Constitutionalism in East Africa

Progress, Challenges and Prospects in 2002

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Acronyms

ACHPR	African Chapter on Human and Peoples' Rights
ADC	Assistant District Commissioner
CA	Constituent Assembly
CAOs	Chief Administrative Officers
CCM	Chama Cha Mapinduzi
CEDAW	International Convention on the Elimination of all Forms of Discrimination Against Women
CEO	Chief Executive Officers
CJ	Chief Justice
CKRC	Constitution of Kenya Review Commission
CMOs	Chief Military Operations Areas
COMESA	Common Market for Eastern and Southern Africa
CP	Conservative Party
CRSR	Convention Relating to the Status of Refugees
CUF	Civic United Front
DCJ	Deputy Chief Justice
DP	Democratic Party
EAC	East African Community
EACJ	East African Court of Justice
EALA	East African Legislative Assembly
EC	Electoral Commission
ECA	Electoral Commission Act
ECK	Electoral Commission of Kenya
EFA	Education for All
EU	European Union
FCM	Field Court Martial
FDI	Foreign District Investment
FGM	Female Genital Mutilation
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tarrifs and Trade
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Convenant on Economic, Social and Cultural Rights
ICJ	International Commission of Jurists

IGG	Inspector General of Government
IGP	Inspector General of Police
IMF	International Monetary Fund
IPP	Inter-Parties Parliamentary Group
JSC	Judicial Service Commission
KANU	Kenya African National Union
KAP	Kalangala Action Plan
LAC	Legal Aid Committee
LC	Local Council
LEAF	Lawyers' Environmental Action Team
LHRC	Legal and Human Rights Centre
LRA	Lords Resistance Army
LSK	Law Society of Kenya
MP	Member of Parliament
MUCHS	Muhimbili College of Medical Science
NAFCO	National Agriculture and Food Corporation
NARC	National Rainbow Coalition
NBC	National Bank of Commerce
NBC	National Broadcasting Council
NCEC	National Convestion Executive Council
NEC	National Executive Committee
NGOs	Non-Governmental Organisations
NRA	National Resistance Army
NRM	National Resistance Movement
PAC	Public Accounts Committee
PAFO	Parliamentary Advocacy Forum
PCK	People's Commission of Kenya
PEA	Parliamentary Elections Act
PIC	Public Investment Committee
POB	Political Organisations Bill
PPOA	Political Parties and Organisations Act
PPU	Presidential Protection Unit
RDC	Resident District Commissioner
SADC	Southern African Development Community
TAMSA	Tanzania Muslim Students' Association
TAMWA	Tanzania Media Women's Association

TANESCO	Tanzania Electric Company
TAWLA	Tanzania Women Lawyers' Association
TGNP	Tanzania Gender Networking Programme
TLP	Tanzania Labour Party
TRC	Tanzania Railways Corporation
TRIMs	Trade Related Investment Measures
TRIP	Trade Related Aspects of Interlectual Property
TTCL	Tanzania Telephone and Telecommunications Limited
UCB	Ugandan Commercial Bank
UDHR	Universal Declaration of Human Rights
UNO	United Nations Organisation
UPC	Uganda People's Congress
UPDF	Uganda People's Defence Forces
URAFIKI	Friendship Textile Mill
URT	United Republic of Tanzania
UYD	Uganda Young Democrats
WLAC	Women's Legal Aid Centre
WTO	World Trade Organisation
ZEC	Zanzibar Electoral Commission

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Introduction

Frederick W. Jjuuko

The most momentous development in the area of constitutionalism in East Africa in the year 2002, was the end-of-year gift the Kenyan people delivered to East Africans. A tardy and reluctant arrival, the successful presidential elections resulted in the peaceful hand over of power by former President Daniel arap Moi to President Mwai Kibaki, on December 30, 2002. It thus saw the end of the rule of the Kenya African National Union (KANU), in power since Independence in 1963, thereby heralding a new era and inspiring optimism not only in Kenya, but in the whole region and well beyond East Africa. This is one of the numerous constitutional developments that took place in the East African region.

This publication documents and analyses the state of constitutionalism in East Africa for the year 2002. It recounts significant events in the three countries, attempts to put meaning to these events by placing them in their historical context and within the constitutional framework of the given country. This publication also attempts to look to the future as adumbrated by the developments in the year. The other subject of this publication is regional constitutionalism in the form of the East African Community and its institutions. There are therefore, four papers assembled in this compendium – three country papers and one on the East African Community. The four papers share a lot in common, not least, naturally, the subject matter, but also differ in their style and approach to the subject matter.

The Tanzania paper, "Constitutional Developments in Tanzania in 2002", differs from the other three in its approach. Sengondo Mvungi tackles the subject from within a human rights framework. The paper is a comprehensive conspectus of the status of rights in a standard Bill of Rights running the gamut of civil, political, economic, social and cultural rights. The prospects of constitutionalism in Tanzania is also

assessed within a human rights framework. This approach is interesting. It tends to focus concretely on the impact of constitutionalism or the lack of it, on the people, while at the same time the institutional and process aspects of constitutionalism are not omitted. This emphasis may perhaps be attributable to the fact that the Bill of Rights introduced in Tanzania for the first time only in 1984 is regarded seriously, whereas in the other two countries where serious human rights violations have occurred in spite of a Bill of Rights in the respective Constitutions since Independence, a skeptical, if not cynical disposition has developed towards it. The more placid political atmosphere in Tanzania may also be part of the explanation.

On the other hand, the brisk pace at which political events, sometimes with sharp reversals, occurred in Kenya, is reflected clearly in the economy with which Collins Odote treats particular events and in his choice of focus in a deluge of developments. This is evidently in an effort to enable us make sense of such an eventful year, which "So Near and Yet So Far Away: The State of Constitutional Development in Kenya in 2002", does so successfully.

If political events and developments in Uganda often verge on the farcical and the tragic, then there was no better way of capturing their character than in the way Edith Kibalama does in her "Opening up into a cul-de-sac: The State of Constitutionalism in Uganda in 2002". In addition to covering the major constitutional developments of the period, Kibalama reproduces carefully chosen verbatim statements by the President, his Vice, Members of Parliament in House debates, portions of judgments, carefully written backgrounds to court cases and a chilling account of a summary execution. "There! If you do not believe me," Kibalama seems to say, giving authenticity to what may otherwise appear fictitious.

These papers ought to be read as one whole, not simply to gain an entire picture of the state of constitutionalism in the East African region, but also because the papers are complementary. Even where certain aspects in a given country are omitted, as will be shown, one will gain a fair idea about the state of things in that country by reading what happens elsewhere. This, however, does not suggest the complete similarity of conditions in the region. Important differences certainly

do exist and on specific issues, a certain picture emerges about constitutionalism in East Africa from all three papers.

On the judiciary in East Africa; Uganda and Tanzania evince a positive picture and a clear effort to propel democratisation and constitutionalism forward. Uganda's courts made bold rulings on various election petitions. They nullified a number of election results, found the President an electoral offender, pronounced themselves on the travesty of the electoral process and captured in their judgments Uganda's gun culture, which has permeated electoral and other processes that underlie constitutionalism. The judiciary redeemed its reputation from the effects of a somewhat awkward decision which had seemed to jettison the principle of one person one vote. As a result, 2002 was marked by a running Presidential vitriolic and caustic diatribe against the judiciary in Uganda. In sum, President Museveni practically declared war on the judiciary and thus undermined the principle of the separation of powers.

In Tanzania, the judiciary asserted its independence too. The Court of Appeal struck down two laws; namely, Section 111(2) of the Elections Act, 1985, as amended by Act 4 of 2000, providing for the security of costs by election petitioners and Section 4(2) of the Legal Aid Criminal proceedings Act, 1969, on grounds of their unconstitutionality. The executive and the legislature reacted negatively to these decisions. Sadly, for the principle of the separation of powers, Parliament re-enacted the law that had been nullified by the courts.

The image of Kenya's judiciary in 2002, is a portrait of contrast with its counterparts. Not only was it found corrupt and lacking in integrity by amongst others, a Commonwealth team, but it also attempted to undermine the cause of constitutionalism in various ways. It balked at suggested reforms in the institution by the Constitution of Kenya Review Commission (CKRC) and issued an injunction to stop the CKRC from writing a draft constitution. The justices then sought to cite the Chairman and other members of the CKRC for contempt of court, when the CKRC produced the Draft Constitution in spite of the injunction. Judges then filed a suit to have the proposals in the Draft Constitution on the judiciary declared un-constitutional. Thus, the judiciary sought to sit in judgment over their own cause. The Law

Society of Kenya led the protest against the judiciary and organised a boycott of the courts. The Fourth Estate was the other victim of the judiciary in the course of the year. The judiciary invoked the *sub judice* rule to prevent public discussion of matters relating to the suit by the judiciary and also made crippling, astronomical awards in defamation suits against the media.

The media in East Africa suffered some setbacks. In addition to what has just been mentioned about the subject in Kenya, the media in Uganda saw the ransacking and closure of the *Monitor,* a premier, private, daily newspaper in the country, and the banning of popular, live, radio discussions known as *ebimeeza*. The three countries also enacted anti-terrorism laws following the September 11, 2001, New York incident, and yet no such laws had emerged from the terrorist bombing in East Africa four years earlier! It is quite clear that these laws pose a serious danger to both human and media rights.

Uganda's militarism continued to dog the country. The country's newspapers reported stories about security operations by un-gazetted bodies such as the "Kalangala Action Plan" that coerces people into supporting government, and Operation Wembley with its shoot-to-kill policy, epitomises militarised policing. The violent dispersal of peaceful political gatherings of the opposition involving shooting to death, shows yet another facet of Uganda's gun culture. Equally, the report of the Parliamentary Select Committee on elections is an indictment of the degenerating electoral process that is both violent and corrupt. The report draws a picture of militarised elections with staggering statistics of violence and death.

In this regard, Tanzania needs to deal with a proto-militarism which is rearing its head. The Tanzania report cites incidents of prison officers beating up city bus conductors; soldiers invading and stripping civil militia; soldiers invading a police station, ordering the police to release a suspect and taking over the police station. The same soldiers broke into a remand prison, vandalised a police station, beat up civilians and damaged their property. The use of live bullets by the police in a clamp down on peaceful demonstrators resulting in two deaths and several injuries, is reported in the *Mwembechai* killings. The report does not say what happened to the soldiers or to the killer police. But when this is combined with the shocking police violence in the previous year in

Zanzibar, the need arises to take these warning signals seriously. Any signs of militarism need to be nipped in the bud. The 1964 East Africa-wide army mutinies are instructive. Uganda, unlike Kenya and Tanzania, did not dismiss the mutineers and militarism began to take root then.

On human rights, the Tanzania paper is comprehensive. One could easily substitute Uganda or Kenya for Tanzania without any cost in accuracy about the human condition. Much of what is stated has become endemic to East Africa. Thus, mention is made of the dismal situation of human rights associated with the administration of justice: the shortage of judges, the absence of a legal aid scheme; institutional decay: delays due to non-completion of police investigations, suspects on remand not being produced in court, corruption in the judiciary, inadequate accommodation and transportation for magistrates. In the same vein are practices such as child dumping, the growing numbers of street children, the lynching and stripping of suspects as well as stoning to death of suspects through mob justices, police brutality and torture. Other Tanzania aspects that could be extrapolated accurately to the rest of East Africa include: the state of prisons, poor food, poor health services, overcrowding and even actual suffocation. Also striking a responsive chord, are the salary delays of teachers and non-payments because their names are not yet computerised on their register. The case of the Rev. Mtikila in Tanzania, is also quite representative of the political persecution of political opponents in East Africa.

The three countries continued to show extremely contradictory indications in their constitutional and political developments. Thus, while Uganda enacted a law on political parties, it continued to violently suppress political gatherings and that law. In the words of one Member of Parliament, the law was "more like the Suppression of Political Parties Act, than a law positively regulating political parties." The law in question practically legislated political parties out of the countryside and out of the activities that political parties are basically formed to carry out. The specious arguments about the media and telecommunication serving as a substitute for political activity amongst the population are too disingenuous to merit comment. Likewise, the government began to campaign for the removal of the provision of the presidential term limit from the constitution, hardly a year after the

re-election of the President. In the area of elections, while the President disbanded an incompetent and compromised Electoral Commission, its replacement could not be said to enjoy any measure of independence.

In respect of Kenya, elections were held successfully, and a draft report of the CKRC came out. Nevertheless, apart from limited amendments, the electoral law remained the same, and a new constitution still eluded the country.

Equally, the year 2002 saw the implementation of the Peace Accord between Civic United Front (CUF) and Chama Cha Mapinduzi (CCM) and in this sense Tanzania redeemed itself. The report of the Commission of Inquiry required by the Accord, condoned police brutality and the excessive use of force. Likewise, following the amendment of the Constitution, the expansion of the Zanzibar Electoral Commission to make it more representative, was done on a bilateral basis between CUF and CCM and thus excluded other political parties and civil society.

"Constitutional Development in the East African Community in 2002" by Benson Tusasirwe is an appraisal of the performance of the East African Community institutions put in place before the period under consideration. While the Legislative Assembly and the Court of Justice were inaugurated during the year and a few developments occurred, the two institutions were marked by inactivity and inertia.

In other areas the free movement of East Africans was eased, internal tariffs reduced and infrastructure plans formulated. There was, however, indecisiveness in relation to the Customs Union. The involvement of civil society in the East African Community which is emphasised as a basis for more meaningful and lasting co-operation, absent in the earlier Community, showed signs of taking shape. The Chief Executive Officers' (CEO) meeting which called for a business manifesto and formed the East African Business Council was a major milestone in this direction, as was the growth and strengthening of various East Africa-wide civil society organisations. The paper notes the need for uniform laws if East African jurisprudence is to emerge, even though, perhaps, the divergence in the laws in the East African countries may have been overstated.

The prospects for a political federation appeared to be dim in spite of the fact that the Customs Union stage had been achieved. Given the disparity in political culture and Tanzania's hesitancy and reservations towards Kenya, political federation will have to be approached incrementally, especially since constitutionalism and regional co-operation go hand in hand.

Benson Tusasirwe's assessment of the state of constitutionalism dove tails with the conclusions of the three country papers in two ways. First, it clearly emerges that Uganda is the odd man out given its gun culture, intolerance and monolithic political system. This political disparity is significant not only for Uganda, but for the region as a whole. Secondly, and on the note on which this introduction ends, is the palpable and irrepressible optimism expressed in all the four papers about the future of constitutionalism in spite of the visible hurdles in its way. The East African paper hopes that Kenya's transition might have a domino effect on the rest of East Africa. The infectious mood is reflected in the Uganda paper which expresses cautious optimism. The Tanzania paper is bold and optimistic in its conclusion: "The dice has been cast. Tanzania will never revert to authoritarianism again." As for Kenya, the ambivalence in the title not withstanding, the paper clearly states that this is no mere change of guard, not a mere succession, but a transition, a substantive shift in policies and style of governance, paving the way to the rule of law, democracy and a new future.

2

Opening up into a cul-de-sac: The State of Constitutionalism in Uganda in 2002

Edith Kibalama[1]

Introduction

The year 2002 marked yet another year in office for President Yoweri Museveni and the Movement system of government, following the conclusion of the presidential elections in 2001 that restored him to power and the 2000 Referendum that paved the way for the victory of the Movement over the multiparty system of government. It was an outstanding year that saw further restrictions on political party activity in Uganda and witnessed the birth of the Political Parties and Organisations Act (PPOA). It was also a year of increased doubt and questioning of the independence of the judiciary and one that put freedom of expression and media rights in the balance. On the other hand, while the disbanding of the Electoral Commission (EC), and the appointment of new office bearers offered a small ray of hope for the country's electoral future, a lot of skepticism surrounded the impartiality of the national electoral body, since the new office bearers still remained presidential appointees. On the human rights scene, Uganda showed the rest of the world that it remains one of those countries that still upholds the death sentence and continues to use firing squads as a means of achieving justice. "Operation Wembley," a joint military and police operation was established and entrusted with the oversight of internal security amidst the rising number of illegal killings and robberies that had hit Kampala, Uganda's capital city. Along with "Operation Wembley", a court martial was set up, in which civilians were tried by the military. Both "Operation Wembley" and the Military Court martial triggered off many human rights violations. Amidst all this, the 16-year-old war in the north raged on, with more

ferocity and complexity than ever before, in spite of peace deals, monetary awards and ultimata from government, to end the war.

On a more positive note, the Constitutional Review Commission managed to continue with its work, earlier financial constraints that had threatened its mandate notwithstanding. Most importantly, a legal framework for fighting corruption was strengthened through the implementation of the Constitution by enacting the Leadership Code 2002 and the Inspector General of Government (IGG) Act 2002. These two Acts were aimed at making leaders more accountable. They gave the IGG more power in handling abuse of office. Leaders required to be governed by the Leadership Code were expanded to include local council leaders, military personnel and mid-level public servants. Another development in the House was the constitution of a Standing Committee on Equal Opportunities to monitor and promote measures to enhance the equalisation of opportunities for all categories of people. In terms of judicial decisions, the Constitutional Court came up with one of the most outstanding decisions in the electoral history of Uganda, which is expected to greatly impinge on the country's electoral and political future.

The political climate in Uganda: A continuing test for political development

There was continued suppression of political pluralism in Uganda during the year 2002. Attempts by the opposition to hold political rallies were met with considerable government resistance. The only opportunity for the exercise of political pluralism in the name of the Political Parties and Organisations Bill yielded no fruit, when it was passed overwhelmingly in favour of the ruling Movement government, to further stifle the existence and operation of political parties.

Government's suppression of political pluralism under Article 269 of the Constitution

Several attempts by the multipartists to stage political rallies were met with government suppression and in one of the incidents, death. The first of such attempts was one made early in the year by the Conservative Party's Secretary General, Ken Lukyamuzi. A political rally at the

Constitutional Square on January 1, 2002, was interrupted by the Police and Lukyamuzi, together with three of his aides were arrested and detained. They were subsequently charged under Section 110 of the Penal Code, for violating Article 269 of the Constitution, which, it was contended, forbade political party activities.[2] In a subsequent incident, the Uganda People's Congress (UPC), organised a peaceful rally on January 12, 2002, in support of the constitutional right of assembly. The rally was disrupted by a huge deployment of security personnel and ended up in a fiasco, with one person killed by the riot police, over ten injured and several UPC leaders and party activists arrested. In a related incident, the police arrested five students of Makerere University who had joined the UPC rally.[3]

Supporting the rally, the UPC argued that the rally was lawful and constituted the legal gathering of citizens of Uganda under Articles 20 and 29 of the Constitution, and that while Article 269 prohibited the holding of rallies, legally, a constitutional provision can only be enforced through another law. Since there existed no law operationalising Article 269, violating the Article was incapable of creating an offence. In essence, their argument was that under no law could the UPC rally be stopped. [4] Additionally, the UPC argued that Museveni's militarisation of the police was part of the government's strategy to clamp down on the opposition.[5] Government in response argued that the action of the police was justified and lawful. It contended that the policemen who had allegedly shot at the assembly with live bullets had been arrested and held by their superiors in contempt of defying superior orders not to use live ammunition. [6]

The UPC rally attracted a lot of national and international sympathy from political activists and human rights organisations[7] and provoked the party to announce that they would hold another rally in the near future. As if to affirm his high handedness, the President of Uganda in response to the utterances of the UPC, threatened to ban UPC as a political party. This was followed by an open challenge to the President to the effect that he lacked powers to ban the UPC.[8] Nonetheless, the President's statement showed political intolerance of other political parties on his part. And lawful or not, evidently, the force used to quell the UPC rally was by far excessive and unjustified.

The third and last outstanding incident following the UPC rally, came only days later, when, the Conservative Party (CP), once again, but through another of its leaders, planned to hold a consultative rally with its constituents on 26 June, 2002, to discuss the Political Organisations Bill (POB) and the Suppression of Terrorism Bill. Their argument was that they intended to hold a consultative meeting and not a political rally. Although the meeting subsequently took place, it did so under stringent police oversight, that prohibited the use of party slogans and colours and strict caution against turning the meeting into a political rally.

Ultimately, the three incidents showed the government's continuous invoking of Article 269 to undermine the right of assembly and to frustrate political party activity in the country.

Earlier on, prominent members of the Movement, including Hon. Bidandi Ssali and Hon. Eriya Kategaya, had during a National Executive Committee meeting of the Movement held from December 16 -19, 2001, declared that the time was ripe to open up the political space for political party freedom. One of the criticisms raised in the resolutions at the National Executive Committee (NEC), was that the matters relating to the opening up of political space and the issue of presidential succession were not urgent and that the wrong fora such as public functions and the media, had been used to air them. It was therefore, resolved that Movement cadres could only talk about political pluralism if they had to, in proper fora such as a closed Parliamentary Caucus or Cabinet, or whatever other appropriate forum was deemed fit.[9] Subsequently, a 22-member committee of NEC members was appointed to investigate whether there was actually need to open up to political parties and make a report to the President within three months.[10] But considerable doubt was cast as to the objectivity of the findings of the appointed committee, NEC being an arm of the Movement. This state of affairs relegated the remaining hope for Uganda's political liberalisation, to the POB, an impending law that was supposed to operationalise Article 269 of the Constitution.

The Political Parties and Organisations Act 2002: a "climax" for political Pluralism in Uganda

The Political Parties and Organisations Act (PPOA) was passed by Parliament on March 9, 2002, and signed by the President in June 2002, but effectively became law on the date of its publication on July 17, 2002. The Act had hitherto became a subject of anxiety following restrictions on the activities of political parties imposed under Article 269 of the Constitution, but more so, because it had failed the test of the presidential assent, when Uganda's Sixth Parliament had earlier presented it to the President, on February 6, 2001. The Sixth Parliament had gone ahead to pass the Bill to allow political parties to open branches at the district level and presented it to the President for assent in accordance with the law. However, on April 10, 2001, over two months after it had been passed, pursuant to Article 91(3)(b) of the Constitution which mandates him to return a bill to Parliament for reconsideration, the President returned the Bill to the Speaker of Parliament. The President's argument was that political parties should restrict their activities to their national headquarters, until "enough consensus had been generated on the matter."[11] The President's decision was also said to have been in conformity with the decision of the National Executive Committee and the National Conference of the Movement, as well as the earlier Movement caucus decision on the issue.[12] Thus the re-tabling of the Bill in the seventh Parliament was a major source of anxiety and was seen as the only remaining hope for political pluralism in Uganda. The Bill was therefore, critical both to the opposition and to the government. It is not surprising that the Movement Caucus held a number of meetings prior to the debate on the draft.[13]

The preamble to the Act specifically states that, it is to "make provision for regulating the financing and functioning of political parties and organisations, their registration, membership and organisation pursuant to Articles 72 and 73 of the Constitution and for related matters."

Article 269 of the Constitution, states:

"On the commencement of this Constitution and until Parliament makes laws regulating the activities of political organisations in

accordance with Article 73 of this Constitution, political activities may continue except –

a) Opening and operating branch offices;
b) Holding delegates conferences;
c) Holding public rallies;
d) Sponsoring or offering a platform to or in any way campaigning for or against a candidate for any public elections and
e) Carrying on any activities that may interfere with the movement political system for the time being in force."

Article 72 guarantees the right to form political parties and any other political organisation. It further provides that a political party or organisation shall not operate unless it conforms to the principles outlined in the Constitution and is registered. The provision further stipulates that Parliament shall by law, regulate the financing and functioning of political parties.

Article 73 stipulates that during the period when any of the political systems provided for in the Constitution has been adopted, organisations subscribing to other political systems may exist subject to such regulations as Parliament may by law subscribe.

Against this backdrop, in arguing the case for the incumbent Movement Government, the Hon. Minister of Justice and Constitutional Affairs, in her opening remarks on presenting the Bill to the seventh Parliament, stressed the position of the ruling Movement Government by quoting Article 271(3) and 69(1) of the Constitution. To quote, "Contrary to common belief, the Bill was aimed at bringing back full multiparty activities, the Movement system of government which the people of Uganda chose to govern them for the next five years should operate without hindrance from organizations subscribing to other political systems."[14] She added that the new law was to be passed in accordance with Article 73 of the Constitution, and should not in any way hamper the political system chosen by the people through the 2000 Referendum. Additionally, that nothing would prohibit Parliament from adopting some of the provisions of Article 269 of the Constitution under the new Act, provided that some restrictions were necessary to enable the unhampered operation of the Movement system of government. In effect, the inclusion of the prohibitions to political parties as contained in Article 269 under the new law, was deemed

constitutional. Furthermore, that political parties had to operate within the purview of the existing system and doing otherwise would mean having more than one political system in place, which was unconstitutional.[15]

Supplementing the arguments made by the Hon. Minister of Justice and Constitutional Affairs, proponents of the Movement system of government strengthened their case for the restriction of political party activities. First, it was strongly argued that the Bill was not about changing the political system since this had already been done by the Constituent Assembly (CA) in 1994-5, by providing for a referendum in the Constitution, but was aimed at regulating the financing and functioning of political parties and organisations, their registration, membership and organisation under the existing Movement system of government.

Critical therefore, was the need for political parties to distinguish between the operations of political parties under a multiparty and a Movement system of government. Secondly, it was contended that since the Constitution stipulates that power belongs to the people, the people's decision to have a Movement system of government with minimal or no interference from political parties as had been echoed through the Referendum, had to be respected. Thirdly, and perhaps most notable, was the contention that certain political activities of political parties and organisations should be restricted to national level. It was particularly argued that with the exception of national conferences, executive committee meetings, seminars, conferences, and specific district meetings to elect the first members of executive committees, no offices were to be opened below the national level and that all other public meetings were prohibited at national level.[16] National level was defined as the capital city of Uganda, namely Kampala. In the same vein, it was argued that by having branches below national level, the development work of existing committees and implementation of their programmes would be disrupted at the village, parish, sub-county and district levels.[17] In further support of this point, it was argued that by starting their operations at national level before moving to the districts, political parties would be given ample opportunity to put the one third political representation in place and exercise gender sensitivity, both of which had been guaranteed by the Movement

Government. In fact, some contended that affirmative action was only workable under the Movement system of government and that parties needed to grant people what they have enjoyed under the Movement system of government before political parties could be accepted. The proponents of the Movement further contended that a vibrant media with numerous FM stations, one of the highest mobile phone usage in Africa and the good road communication network created by the Movement system of government, had provided a lot of space for divergent political views and ought to be utilised by the political parties, without necessarily going to the district level. In this respect, no need was seen for political parties to go to the grassroots in order for them to be heard or for their activities to be known.[18] The Vice President and MP for Kigulu-South, in the same respect noted that, "You cannot say that everybody who gave Hon. Aggrey Awori a vote actually saw his face. You do not need to go to every village to get people to hear about you or to know what you want to do." [19]

Another point raised was that political parties had in the past been responsible for disrupting the stability of the country and were therefore not good for the country as they would lead to chaos. Still with reference to Uganda's political history, another radical view expressed was that since the Movement system of government was a good system, it should continue in power for as long as it took. In fact an Honourable Member of Parliament boldly stated:

"Let us learn from our history and if we are going to permit parties to operate beyond Kampala, then let it take time. I agree with the Honourable Members of Parliament that since this is a good system of government, we can continue to be in power not just for 60 years, but also for 100 years."[20]

Lastly, the poor internal democracy and governance within the existing political parties, was yet another point advanced in strengthening the case against restricting their activities. It was argued that political parties were divided and confused and would potentially transfer the confusion to the population. In illustrating the point, an Honourable Member of Parliament echoed the supposed position of her constituents thus:

"One, you have two branches of the Democratic Party (DP). You have the DP of Dr. Semwogerere and the DP of Bwengye. They are

asking which one is the DP they are taking there? Go to UPC: you have the UPC in Lusaka and the UPC in Kampala which of the two is the right one? Go to CP: you have the CP of Hon. Lukyamuzi and Hon. Nsambu and the CP of Hon. Mayanja Nkangi, which is which? The people in Luwero are saying, "let the parties sort out their confusion in Kampala before they go down to the districts. We do not want to take this confusion to the districts and confuse our people." [21]

The passing of the PPOA however, did not go unchallenged. The proponents for the opening up of political space in the country, vehemently battled it out with the supporters of the Movement system in Parliament as reflected in their articulations in the Committee on Legal and Parliamentary Affairs and during the general debates.

A number of issues were raised in the Committee on Legal and Parliamentary Affairs. It was among others, recommended that political parties should be given the right to determine their membership and office bearers as opposed to the exclusion of citizens not resident in Uganda and of persons aged above 75 years from holding office in a political organisation. Second, that restrictions on foreign contributions to political parties under clause 17 of the Bill were unrealistic; and third, that the restriction of activities of political organisations to national level contained under clause 21 of the Bill, was inconsistent with Article 73(2) of the Constitution. The Committee contended that political parties and organisations should have been permitted to open co-ordination offices at the district level.[22]

The salient arguments of the proponents of political pluralism in respect of Article 269 were mainly twofold. First, that Article 269 denied political parties the right to associate which had denied them the ability to mobilise their membership or hold delegates' meetings. And yet, an active membership was critical since every political party acts on behalf of its membership. Secondly, that it was impossible for political parties to strengthen their national outlook without having access to the rural areas. Consequently, the political parties deemed themselves "in detention or buried," because most activities that the political parties needed to engage in, had been rendered unconstitutional.[23] On the restriction of political party activities to national level, the proponents of political pluralism strongly argued that this would deny them a national outlook, would disable them from mobilising their membership – the

very essence of a political party, and to hold delegates' meetings. In effect, the inaccessibility to the rural people would stifle the growth and development of political parties. Describing the hopelessness of the situation of political parties, Hon. Cecilia Ogwal, a political party stalwart observed:

"I want people to understand that the moment you say parties must exist," then we should not try to behave as if we are ridiculing the intellectual ability of MPs… Now we are saying, let parties exist, but what is a party? It means I must go to Kotido to get a member; it means I must go to Kisoro to get a member; it means I must go to Kitgum to get a member; I must recruit members in Kampala! How am I going to do it if you are going to tie my legs and my arms and my mouth and I stand in one place?" [24]

Another Honourable Member of Parliament noted as follows, "I want Honourable Members to know that the Bill before them is not the Suppression of Political Parties Bill, it was supposed to be a regulation of political activities."[25]

In addition to the above, it was contended that the restriction of political party activities to the national level without mobilisation at the grassroots, coupled with a limitless time provision against the restriction, effectively amounted to a ban. Besides, the restriction of parties to national level would make it impossible to clean and reform political parties, which have hitherto been branded "bad" and "unclean". Similarly, the restriction would render parties inactive and unable to bring in new members and new leadership. More importantly, that it could not have been the intention of Parliament to have the new law maintain the *status quo* since 1995, of having political parties restricted to the national level.

Glorifying the 2000 Referendum as an outcome of democratic practice by the proponents of the Movement was dismissed as illusory by the pro-multipartists, on the basis that the Political Parties Bill, which aimed at regulating the activities of political parties, should have been brought before the referendum and not after. As a result, sections of the populace including political parties boycotted the Referendum.

The question of political parties interfering with the Movement system of government, once operational at district level, was ruled out of the question, on account of the Movement being possessed of all the mechanisms and organs that would enable the system to operate without hindrance. Relatedly, the dire need to define what constituted "operation at district level," was emphasized, if the levels of restriction were to be clearly determined.[26]

Lastly, on the issue of affirmative action, it was opined that what was critical was not the protection of those that brought affirmative action - in this case the Movement, but rather the principle of affirmative action itself, which had now been embedded in the Constitution. At the end of the debate, a Movement favoured Political Parties Organisations Bill was passed, with all the proposals of the Minister of Justice adopted. The position of the multipartists was defeated and about 50 opposition Members of Parliament including some moderate Movementists walked out of the House in protest, leaving behind the die-hard Movement members, celebrating their victory.

However, as correctly predicted by one Member of Parliament, [27] the PPOA became the subject of legal action. The multipartists petitioned the Constitutional Court contending that the Act was in violation of the right of freedom of association and had effectively introduced a one party state. In July 2002, Paul Semwogerere DP's President, Hon. Winnie Byanyima the MP for Mbarara Municipality and others filed a petition in the Constitutional Court challenging this law. They sought a declaration that Sections 16 and 18 of the Act were unconstitutional and should be declared null and void, and that the PPOA contravened Article 21 of the Constitution, as far as it gave different treatment to different persons on the basis of their political opinion and inclinations. A group led by Dr James Rwanyarare of the UPC, brought another petition on similar grounds. Judicial means therefore became yet another channel of hope devised to try and achieve political pluralism.

Much as the PPOA was aimed at establishing a framework for operationalising political parties and organisations as expounded in its long title, it failed the test and instead manifested cardinal flaws that totally undermined its principle objectives. In the end, the Act fortified the one party Movement system of government by providing

it with an even firmer legal framework. Indeed, to some, the PPOA was like the manifesto or Constitution of the NRM political organisation.

Overall, the restrictions on political party activities were a big blow to political pluralism as manifested mainly through the restriction of party activities to national level under the PPOA. This has been the case despite the existence of a number of constitutionally established institutions and structures aimed at enhancing democracy in Uganda, such as the Uganda Human Rights Commission and the Office of the Ombudsman. Restrictions on political parties activity in Uganda have continuously been the basis for questioning the democratic nature of and constitutionalism under the incumbent Movement Government. And until political space is opened, democracy under the Movement Government will remain largely illusory.

Outstanding Judicial Decisions

Two judicial decisions are given focus in this review, for the year 2002. These are the Constitutional Court decisions on the parliamentary election petitions, Masiko Winfred Komuhangi vs Babihuga J. Winnie, and Musinguzi vs. Amama Mbabazi. Though similar on the face of it, the two decisions are of considerable legal significance albeit for different reasons. Much as both cases set precedent for electoral law and practice in the country, the Masiko Winfred Komuhangi vs. Babihuga J. Winnie was mainly significant for its controversial ruling, which among others put "the one man-one vote right'' principle in contention, and led to a tremendous stir in public debate as to the independence of the judiciary. The latter case of Musinguzi vs Amama Mbabazi, on the other hand, was a vivid display of judicial activism and earnest adherence to justice. To a large extent, the latter case went a long way in salvaging public confidence in the Court of Appeal which had hitherto dwindled after the ruling made in the earlier case of Komuhangi vs Babihuga as exemplified below. Salient features of the High Court judgments in respect of the two cases which offer lessons for electoral law and practice in Uganda, are also highlighted.

In Masiko Winfred Komuhangi (appellant) versus Babihuga J. Winnie (respondent[28]), a unanimous decision of the Court of Appeal

sitting as the Constitutional Court on November 4, 2002, the judgment of the High Court in favour of the respondent Winnie Babihuga was over-turned and the appellant reinstated as the elected Woman Member of Parliament, for the District of Rukungiri.

The background to the appeal was that on June 21, 2001, parliamentary elections for District Women Members of Parliament were held throughout Uganda. Winnie Masiko was declared winner of the Woman MP seat for Rukungiri District after polling 12, 655 votes against Winnie Babihuga's 5,670, and the former took up the seat in Parliament. Aggrieved by the results of the election, Babihuga filed a petition in the High Court of Mbabara challenging the validity of Masiko's election. The Electoral Commission and Returning Officer, Rukungiri, were joined as second and third respondents, respectively. The High Court ruled in favour of Babihuga and set aside the election of Matsiko, whose parliamentary seat was declared vacant. Babihuga was a strong supporter and campaigner for Dr. Kizza Besigye, the most outstanding contestant of the incumbent President during the 2001 presidential elections. Moreover, Rukungiri District, which the two women contested the parliamentary seat for, happened to be the home district of Dr. Kizza Besigye.

In the High Court, the two main grounds for contesting the election were: first, that the Electoral Commission and the Returning Officer had failed to conduct the election in accordance with the principles laid down in the Constitution and the Parliamentary Elections Act No.8 of 2001. Secondly, that during the election, the respondent had committed illegal practices and offences under the Parliamentary Elections Act, and that her agents with her knowledge, consent or approval committed numerous offences under the same Act. Numerous grounds were raised by the appellant in the Constitutional Court challenging the High Court decision and orders.

The main issues that guided the Constitutional Court in reaching its decision were whether during the election of the Woman Member of Parliament for Rukungiri District held on 21st June 2001, there was non-compliance with the provisions and principles of the Parliamentary Elections Act No.8 of 2001; if so, whether the non- compliance with the provisions and principles of the aforesaid law affected the result of the election in a substantial manner; whether any illegal practice or

election offence, under the Parliamentary Elections Act was committed in relation with the election by the appellant personally or with her knowledge, consent or approval and, finally, what remedies were available to the parties.

The Constitutional Court allowed the appeal, set aside the judgement of the High Court and reinstated the appellant as the elected Woman Member of Parliament for Rukungiri mainly on two grounds: first, that there was no evidence of non-compliance with the provisions of the Parliamentary Elections Act relating to the elections and it was not possible to assess with certainty that the non-compliance affected the result in a substantial manner as provided under Section 62(1)(a) of the Article. Secondly, on the available evidence, the respondent failed on the balance of probabilities to adduce sufficient evidence to prove that illegal practices or the electoral offences complained of, were committed by the appellant personally or by any other person with her knowledge, consent or approval.

The Constitutional Court acknowledged that the burden of proof in election cases under the Parliamentary Elections Act was the balance of probabilities. Two tests – namely the qualitative, which applies to the whole electoral process and the quantitative, that applies to numbers, were found instructive in determining and assessing the magnitude and effect of electoral irregularities in a given election. It was also acknowledged that determining the most appropriate test applicable depended on the particular facts of a given case.

In reaching its decision, the Court of Appeal dismissed the method used by the trial Judge as speculative and unacceptable because it was not based on evidence. The Hon. Deputy Chief Justice (DCJ) stated, "Random sampling is too speculative. It is not the appropriate approach even if it had been properly applied because the law as already seen casts a duty on a party to any litigation to prove facts. It must be emphasised that in courts of law issues in controversy between parties are decided on the basis of evidence before them." Furthermore, it was observed that by the Trial Court scrutinising for irregularities and malpractices of only 50 out of 119 ballot boxes from the whole constituency, the respondent failed to discharge the duty cast on her to prove the allegations on a balance of probabilities. It was thus argued that the opening and examining of the 50 boxes could not be used as a

yard stick out of a total of 119 boxes, and therefore that no cogent evidence existed to show that the irregularities /manipulation or non-compliance was so grave as to amount to a substantial effect on the results of the election.

Agreeing with the High Court, the Court of Appeal argued that there was considerable manipulation of the voters' register through alterations and erasures that were suspect, but found that the register of voters for the Woman Member of Parliament for Rukungiri was not a nullity only because it was hand written and manipulated. In the same vein, the Court of Appeal could not declare the election void *ab initio*. However, the Court argued that there was no yardstick to support the finding that the result of the election was affected in a substantial manner as required by law. It was the Court's contention that although some types of manipulation or malpractices incapable of being quantified existed, those capable of quantification such as the total number of votes which could have been illegally cast and the number of voters who could have voted more than once, should have been computed so as to find the right measure to guide the court in assessing the magnitude of the irregularity claimed. Additionally, while the Constitutional Court was in agreement that there was a lot of evidence of electoral offences committed by election officers, some of which were outrageous and totally unacceptable, it found no evidence to show that the conduct complained of was committed with the knowledge, consent or approval of the appellant.

An analysis of the decision of the Trial Judge and the Court of Appeal is important at this point. It is important to note that the major point of divergence between the decision of the Trial Judge and that of the Court of Appeal was the yardstick applicable in determining the extent to which electoral irregularities and manipulations were said to have affected the result of an election in a substantial manner, which indeed is a core ingredient in setting aside a parliamentary election. While the two courts were largely in agreement that there had been gross irregularities and manipulations that had marred the elections, the Court of Appeal disagreed that these had affected the elections in a substantial manner so as to have had the election set aside. Interestingly, although the Court of Appeal recognised that finding an

appropriate yardstick using the qualitative method was indeed a dilemma, it failed as an appellant court to set out the yardstick with specificity, which being an appellant court, it should have done to guide future decisions.

Most controversial of the Court of Appeal rulings was perhaps the one in respect to the "one person, one vote," decision. The issue before court was whether the trial Judge erred in law in finding that the principle of "one person, one vote", applied to the Woman Member of Parliament for district elections as it did to any other local or national elections held in Uganda. In other words, whether a member of an Electoral College for the election of a Woman Member of Parliament was entitled to vote more than once on the offices held in the Electoral College. One of the arguments before court was that a member of the Electoral College could cast as many votes as the posts he or she held on various committees constituting the Electoral College and that such voting was by posts or offices held in a representative capacity. On the flipside and in line with the holding of the trial Judge, was the argument that members of the Electoral College were entitled to one vote only. While the Court of Appeal in delivering its ruling, agreed with the trial Judge's finding that Section 28 of the Local Governments Act prohibits a person from sitting on more than one council and that resignation from a smaller office in case of election to one with a wider jurisdiction applied only to Local Councils and not to the Women's Councils, the Court of Appeal went on to hold that Section 28 strictly dealt with Local Councils and local governments but not with Women's Councils, which are established under a different statute. Additionally, that a person voting under Section 11, did so in a representative capacity in accordance with the office he or she held. Consequently, that voting more than once was legal and permissible in so far as it relates to women councillors who hold office both under the Local Governments Act and under the Women's Councils Statute. In short, the Court of Appeal sanctioned voting twice for women councillors by virtue of holding office under both the Local Governments Act and the Women Councils Statute.

The above ruling raises serious controversy in electoral law and practice in Uganda and puts to question the electoral principle of "one person, one vote". Much as the Court of Appeal and in particular her

Lordship the DCJ interpreted the law "in its absurdity" as she claimed, and blamed it on the legislature, the ruling begs the question as to why the Court failed to fall back on internationally recognised rules of electoral practice and the court's discretion in invoking judicial activism. In view of this ruling, the Court of Appeal's decision was drowned in criticism, which cast doubt on the independence of the judiciary vis a vis the executive and the incumbent regime. Whether the ruling derived from the lacuna in the Constitution of Uganda, which paradoxically is silent about the "one person one-vote" principle is unclear. Unfortunately, neither the International Bill of Human Rights[29] nor the International Covenant on Civil and Political Rights (ICCPR),[30] provide an answer to this question. Like the Ugandan Constitution, the two international instruments only spell out the right to vote in broad terms, with no specific reference to the "one-person-one-vote" principle. Nevertheless, the Constitutional Court in justifying "the one person one vote" principle could with foresight have made reference to the International Standards of Elections, which clarify the position of the ICCPR, and state that "an electoral system in a state party must be compatible with the rights protected by Article 25 of the Covenant and that the principle of one person, one vote, must apply and within the framework of each state's electoral system, the vote of one elector should be equal to the vote of another." [31]

In the second parliamentary election case of Amama Mbabazi (appellant 1) and Electoral Commission (appellant 2) versus Musinguzi Garuga James (respondent),[32] the first appellant and the respondent had contested for the parliamentary seat for Kinkizi West Constituency in the parliamentary general elections held nationwide on 26 June, 2001. The first appellant was declared winner in that constituency with 25,433 votes against the respondent's 12, 977 votes. The respondent petitioned the High Court to nullify the result alleging that the two appellants and/or their agents committed acts or omissions that constituted non-compliance with the provisions and principles of the Parliamentary Elections Act and the Election Commission Act, as well as the Constitution of Uganda. He also alleged the commission of illegal practices or offences under the Parliamentary Elections Act during the electoral process. The respondent alleged that the second appellant failed to ensure that the entire electoral process was conducted under

conditions of freedom and fairness. Specifically, that several Uganda People's Defense Forces (UPDF), Presidential Protection Unit (PPU), government officials comprising the Resident District Commissioner (RDC), Assistant District Commissioner (ADC), sub-county Internal Security officers and Local Council Executives, had interfered with the electoral process through torture, arrest, harassment, intimidation, confiscation of property and the beating of the respondents' supporters during the campaigns and on the polling date, with the aim of preventing them from supporting the respondent; that there was massive rigging of votes through ballot box stuffing, multiple voting and pre-ticking of ballot papers for voters and the manipulation of voters' rolls; and that no updated voters' register existed for the constituency, whereby votes were cast in the names of deceased voters or those who had migrated from the constituency. Furthermore, that voting by secret ballot was compromised and that the respondent was denied representation at polling stations during the period of voting, counting of votes and ascertaining the results of the poll. Other allegations were that the second appellant failed to control the use and distribution of electoral materials to eligible voters, resulting in multiple voting and ballot stuffing; that the second appellant failed to ensure that adequate security was provided for the respondent's campaign meetings; that the appellants, their agents, servants and or supporters denied the respondent unhindered freedom of expression and access to information throughout the campaign period; and finally that the second appellant failed to stop the first appellant and his agents from using sectarian campaign against the respondent during the campaign.

The trial Judge ruled that there was non-compliance with the provisions and principles of the Parliamentary Elections Act and the Constitution of Uganda; that there was commission of malpractices or offences under the Parliamentary Elections Act (PEA) by the first appellant personally and with his knowledge and consent; and that the non-compliance affected the result of the election in a substantial manner. He set aside the first appellants election and hence the appeal.

The Court of appeal upheld the trial Judge's decision and dismissed the appeal with costs in favour of the respondent on several grounds. First, the Court of appeal confirmed that the second appellant had failed to take steps to ensure conditions necessary for the conduct of free and

fair elections in Kinkizi West Constituency, when violence was unleashed on the respondent's supporters by the army and other security agencies to intimidate and stop them from voting for the respondent and instead vote for the first appellant. That armed soldiers of the UPDF were positioned at polling stations to continue with their intimidation since the campaign period and prevent voters from voting for the respondent and instead vote for the first appellant. Furthermore, that public officers, the state machinery and the public institution of the presidency portrayed the respondent as an enemy of the state and as unqualified to be a Member of Parliament in the ruling Movement Government while actively campaigning for the first appellant and decampaigning the respondent. The Court of appeal was also in agreement with the decision of the Trial Judge that scores of incidents of violence, which could have been prevented, had been reported to the police across the constituency.

Secondly, that by the president campaigning for the first appellant as a Movement person, he contravened Section 24(1) of the PEA and Article 70(1)(d) of the Constitution, which stipulates the Movement's principle of inclusiveness and individual merit as a basis for election to political office. It was argued that much as the President as the Chairman of the Movement was free to campaign for one candidate against another, he could only portray the good qualities of that candidate, but not on the basis of his candidate belonging to the Movement.

Another important ruling of the Constitutional Court was that the manning of roadblocks near polling stations by UPDF was illegal since the UPDF have no role under the law in the electoral process. Fourth, upholding the decision of the Trial Judge, the Court of Appeal held that there was non-compliance as the Electoral Commission, failed to ensure that the elections were conducted under conditions of freedom and fairness. In determining whether there was failure to conduct the elections in accordance with the principles laid down in the Parliamentary Elections Act (PEA) and the Electoral Commission Act (ECA), the Court of Appeal in affirmation referred to the case of Kizza Besigye's Museveni Yoweri Kaguta and Anor [33], which though related to presidential elections was found equally applicable to

parliamentary elections. In that case Benjamin Odoki the Chief Justice (CJ) opined:

> "To ensure that elections are free and fair, there should be sufficient time given for all stages of elections, nominations, campaigns, voting and counting of votes. Candidates should not be deprived of their rights to stand for elections and the citizens to vote for candidates of their choice through unfair manipulation of the process by electoral officials. There must be a leveling of the ground so that the incumbent or government ministers and officials do not have an unfair advantage. The entire election process should have an atmosphere free of intimidation, bribery, violence, coercion or anything intended to subvert the will of the people. The election procedure should guarantee the secrecy of the ballot, the accuracy of counting and the announcement of results in a timely manner. Election law and guidelines for those participating in elections should be made and published in good time. Fairness and transparency must be adhered to in all stages of the electoral process. Those who commit electoral offences or otherwise subvert the electoral process should be subjected to severe sanctions. The Electoral Commission must consider and determine electoral disputes speedily and fairly."

The words of the CJ guided the Court of Appeal and were held to contain the basic principles which underlie the electoral process. In addition to the above principles, the Court of Appeal added the principle of individual merit contained in Article 70(1)(d).

The Court of Appeal defined the degree of non-compliance that justifies the annulling of the result of an election as: "Something substantial. Something calculated really to affect the result of the election." Although the Court of Appeal acknowledged that each case had to be decided on its own peculiar facts, in agreement with the trial Judge, it adopted the qualitative test of determining the degree of non-compliance and what amounts to a substantial effect on the result of an election. The court observed that there was overwhelming evidence to prove widespread violence, intimidation and sectarian campaigning against the respondent and his supporters, and of persistent violence against the respondent's agents and supporters up to election day, which provided room for voting malpractices, that affected the result of the election in a substantial manner such as to warrant its nullification. It

went on to observe that there were generalised and widespread aspects of malpractice that constituted non-compliance during the elections, which included voting malpractices at polling stations; co-coordinated intimidating campaigns and violence against the respondent and his supporters throughout the constituency; illegal road blocks manned by the UPDF; arrests and removal of the respondents agents from polling stations and that the intense and widespread intimidation played a key role in the low turn up on voting day.

A comparison of the two cases provides a number of lessons. While the violence and intimidation that ensued in Kinkizi-West Constituency was rather unprecedented in electoral violence in Uganda compared to other areas, a comparison of the two Court of Appeal decisions clearly demonstrates a more comprehensive reference and appreciation of case law and more substantive arguments in the Amama Mbabazi case, compared to the Babihuga vs Masiko case. Consequently, the Mbabazi decision offers more guidance and carries a more weighty legal decision.

Interestingly, but equally significant, was the fact that two judges with similar jurisdiction made contrary judgments on a similar matter at trial level, in the two cases. Of outstanding significance was the decision of Justice Egonda Ntende in the Amama Mbabazi case, which for the first time in the history of parliamentary elections, if not in the history of Uganda, found the President of Uganda guilty of an electoral offence. While there were accusations in both cases that the President had campaigned for candidates of his choice, Hon. Justice Kibuuka in the Masiko case did not find the President guilty of an electoral offence. With reference to the President's campaigning for Masiko, His Lordship Justice Kibuuka held that " The meeting which the President held at Riverside Hotel was a political meeting. As both Head of State and Government and as the Chairperson of the Movement, the President, in my view was entitled to make the political pronouncements which were attributed to him since particularly, it was a campaign period…." In contrast, Justice Egonda Ntende citing Sections 24 of the PEA in the Mbabazi case held that:

> It is not in dispute that the President at least addressed one rally in Kinkizi-West constituency, during the campaigns, that was attended by the petitioner. What he said at the rally is not in dispute. He canvassed voters to vote for his two children who had not strayed from the Movement and that included respondent number one (Mbabazi). In so doing, the President, in my view campaigned (for respondent number one) on a sectarian ground namely that the respondent number one subscribes to the Movement school of thought or system to which he assigned the petitioner not to belong. Once a candidate is promoted as the Movement candidate, it runs foul not only of section 24(1) of the PEA, but also Article 70(d) of the Constitution… The President by identifying Mbabazi as a Movement candidate and Musinguzi as the enemy of the Movement, was being sectarian and divisive and intended to divide citizens into those who belong to the Movement and those outside the Movement. And this is contrary to the Movement's principle of individual merit.

Apart from guiding future electoral practice and enriching legal jurisprudence, the courts in Uganda have provided an important alternative for realizing democracy and constitutionalism. Indeed it was on the basis of the finding of the Court, that the inefficiency of the Electoral Commission and a major decision to dismiss Commissioners was made, as exemplified below.

Electoral violence and the role of the Electoral Commission in recent elections in Uganda

Electoral violence and Recent Developments in Uganda

Recent elections in Uganda have been characterised by electoral violence and gross flaws and malpractices, which have continuously put the independence and competence of the Electoral Commission in question. Electoral fraud, intimidation, violence and most recently, killings have characterised elections in Uganda. Both the executive and the army have occupied centre stage, not only as instigators of violence but also as campaign agents for candidates supported by the incumbent government in both the parliamentary and presidential elections. In addition, security agencies and ungazetted organisations,

such as the "Kalangala Action Plan" (KAP), have continuously been accused of meting out violence against the general populace in order to coerce them into supporting candidates of the ruling government.

A number of incidents are instructive. In an isolated incident, a Member of Parliament made an official complaint and disclosure in Parliament of having been arrested and threatened with being drowned in the Kabaka's Lake on the eve of the mayoral elections, allegedly by security operatives, who were allegedly acting on the instructions of the President.[34] During the 2002 elections, two Ministers were accused of direct involvement in election malpractices. One minister is alleged to have ordered one of her guards to shoot into a crowd of people which resulted in the death of a Local Council leader, and another of having been found in possession of ballot boxes and ballot papers in her car.[35] Two other Members of Parliament were also charged with murder committed during electioneering.[36] Other people have implicated President Museveni of having been responsible for fueling electoral violence in the country, since it began during the presidential race between him and Dr. Kizza Besigye.

The above allegations of rampant election malpractice have been confirmed in recent judicial decisions.[37] Hon. Justice Musoke Kibuuka in his judgement nullifying the election of MP Winnie Masiko, ruled: "Almost everything that can go wrong in an election went wrong in the Rukungiri election."[38] Similarly, the Uganda Human Rights Commission in a bid to eliminate electoral fraud, called upon the UPDF to stop voting in the secrecy of their military barracks and begin voting together with the civilians in the open. It also called for the withdrawal of the army from the electoral process in order to reduce unnecessary tension and leave it to the police, who are constitutionally mandated to do the job.[39]

As a positive measure in addressing the issue of increased electoral violence, a Parliamentary Select Committee was set up to probe the degenerating electoral process. In a typical example of distrust between the legislature and the executive, attempts by the executive to have a judicial inquiry were rejected by Parliament, not as an impugning on the honesty of the bench, but to circumvent the occurrence of previous commissions of inquiry, whose results had been merely shelved by the executive. The legislature also believed, and rightly so, that being among

the instigators of election violence, the executive could easily use the judiciary to control the investigation.

The Select Committee's terms of reference were to investigate the causes of electoral violence, the mismanagement of the electoral process, the misconduct of public officials during elections, the staffing and structures of the Electoral Commission, the role of the armed forces and other security forces, financial impropriety, inadequate civic and voter education and the role of the executive, the Movement Secretariat and Members of Parliament.[40]

More revealingly, the report of the Select Committee affirmed earlier reports of election violence in Uganda and noted that it had become "more widespread, fatal, destructive and threatening to the democratisation process."[41] The report further disclosed that election violence rose by 512% during the 2001 presidential elections and by 380% for parliamentary elections compared to the 1996 elections. In addition, that 742 cases of violence were reported to the police during the Presidential elections, while 474 cases were reported to the police during the 2001 parliamentary elections. Seventeen people were reported to have lost their lives as a result of electoral violence during 2001-2002.[42] The Select Committee came up with a number of recommendations. It called for an end to the role of the army and security agencies during elections and for the police to be strengthened in order to handle elections. Secondly, that the EC should be disbanded. In particular, that the Chairman and Secretary of EC should be sacked for failure to manage the electoral process in accordance with the Constitution, and that the entire EC staff should be overhauled since they had allegedly been recruited on the basis of nepotism and sexual favoritism. Another ground underlined was that the newly appointed Secretary to the Commission had been appointed contrary to the Public Service regulations and lacked experience in electoral matters. The Committee also recommended the removal of Chief Administrative Officers (CAOs) as returning officers since they are public servants and instead proposed having ordinary citizens recruited. Lastly, government was urged to set aside monies for electoral petitions in order to overcome the prohibitive petition costs.

Given that the Committee had its genesis in the legislature, its report was met with considerable criticism from the executive arm of

government for not being comprehensive and lacking in content. The other criticisms were that the report gave credence to an earlier one made by the IGG, already under implementation,[43] and did not highlight any violence instigated by the opposition and generally hinged on insufficient evidence. To some Movement sycophants, "The report was just another phase of a political war waged by some MPs or people outside Parliament against the executive as was the case in the Sixth Parliament."[44]

Despite its importance, the report was never debated upon during the year. A motion to present the report was made on September 10, 2002, [45] and in December 2002, but the debate was shelved by the Speaker of Parliament on the basis that it mentioned a number of cases, which were then *subjudice*. Criticisms aside, it is noteworthy that the report affirmed and gave credence to earlier reports of electoral violence and malpractices and made broad recommendations for action, some of which came to fruition.

The Role of the Electoral Commission

Under Article 61(a) of the Constitution, the Electoral Commission has the mandate of ensuring that regular, free and fair elections are held; to organize, conduct and supervise elections and referenda in accordance with the Constitution; to demarcate constituencies in accordance with the provisions of the Constitution; to ascertain, publish and declare in writing under its seal the results of the elections and referenda; to compile, maintain, revise and update the voters' register; to hear and determine election complaints arising before and during polling; to formulate and implement civic educational programmes relating to elections and to perform such other functions as may be prescribed by Parliament by law.

It is due to the failure of the EC to fulfil its constitutional mandate resulting from incompetence, mismanagement, conflict of interest and corruption that most of the chaos of the electoral processes in the country was attributed.[46] As a result, there was a general outcry by the public, the legislature and sections of the executive about the role of the EC. Major among the accusations against the EC was the failure to compile an updated photo register to take off for presidential elections, ghost voters on the voter's register, ghost workers at the EC,

messy Local Council (LC) elections and sex scandals within the EC. Despite having purchased a US$ 7 million photographic voter machine, there were no proper voters' register and the recruitment of the Secretary to the EC was contrary to the public service regulations.[47] Aside from the above, the EC was also accused of causing government the loss of 2 billion Uganda shillings in a dubious award for the printing of ballot papers, in breach of the procurement guidelines laid down by the Central Tender Board and the IGG.[48] Exacerbated by the Supreme Court's ruling that confirmed the EC Chairperson's incompetence and the IGG's recommendation to sack him, the President, retired the Chairman of the EC together with five Commissioners in public interest, for incompetence in accordance with Article 60 of the Constitution, on July 31, 2002.[49]

The President appointed a new Electoral Commission on November 5, 2002, and Parliament approved it on November 11, 2002. The sacking of the Electoral Commission and the appointment of a new one raised the issue of whether the new one was capable of bringing about any substantive changes in the denigrated electoral situation in the country, and in particular, whether indeed it was capable of working independent of the executive in steering the electoral process in the country.

Although the EC is not subject to the direction or control of any person or authority in the performance of its functions,[50] the fact that the President appoints its members largely vitiates its autonomy. As a matter of fact, it is evident that unless the members of the EC ceased to be presidential appointees,[51] a change in the management of the electoral body does not make it more autonomous. In other words, no substantial decline in the levels of electoral malpractice can easily accrue so long as the instigators of the violence (namely the executive), which remained the appointing authority with respect to the EC, and the army, continued to interfere with elections and electoral administration in the country.

The Independence of the Judiciary and the Electoral process in Uganda

With the exception of the obviously ludicrous dictatorships in Uganda, incidents where the executive has influenced both the judiciary and the legislature are not new in the history of Uganda. There have been

situations in which the judiciary has been largely ineffective in relation to the executive particularly through government officials ignoring court orders,[52] as well as instances when the Parliament has been forced to enact laws incompatible with democracy.[53]

The post 1986 judiciary in Uganda faced one of the most preposterous attacks by the President after the 2001 elections. The President accused the judiciary of having failed to implement the electoral laws, which he claimed had led to rampant violence, intimidation and malpractice. He went on to accuse the judiciary of being biased and anti-Movement. He expressed a lack of confidence in their judgments made in respect to election matters. At the same meeting, the President disclosed his plans to appoint a commission of inquiry, composed mainly of foreign judges to inquire into corruption and unprofessional practices in the judiciary.

The statements of the President were most revealing in this regard. He was quoted as having stated that: "These biased state officials, the judges and magistrates are anti-NRM. Some of their decisions are amazing. They excel in showing their unprofessional behaviour during elections… They should know that there is some other authority. The judiciary needs to be transformed just like what's happening to the police following the appointment of Maj. Gen. Katumba Wamala… A situation where we have DP, UPC judges, and it is known! I would not persecute my own people because of a decision of these judges. We need to fight a new war (against judges)."[54] And that he could not rely on court's judgement to take action against Richard Nduhuura, Minister of State for Industry who was found to have voted twice.

The President's remarks represented the first of a series of public denunciations of the judiciary as an incompetent and corrupt institution and opened public debate on the matter in the media. The fact that the said Nduhuura remains a Minister in the incumbent government to date despite court having confirmed that he had voted twice, gives credence to the President's statement. Not only did the President's remarks depict an apparent lack of respect for the judiciary, they were a tacit revelation of the lack of respect for the principle of separation of powers and connoted an absolute President, possessed of unquestionable powers.

The President's remarks led to criticism of the President and opened up a debate by various sections of the public, mainly in defence of the judiciary. Being appointees of the Judicial Service Commission (JSC), it was argued that judges had no distinct political affiliation and neither belonged to UPC nor DP.[55] Similarly, the President's proposal for a commission of inquiry into the conduct of judges was challenged in view of the constitutionally-mandated role of the Judicial Service Commission, which clearly is to "receive and process people's recommendations and complaints concerning the judiciary and the administration of justice and to generally act as a link between the people and the judiciary; and advise government on improving the administration of justice." [56] The independence of the JSC in exercising its functions, without the direction or control of any person or authority was also reiterated.

Fostering Legislative Independence

Unlike the Sixth Parliament that was dynamic, rigorous and a challenge to the executive, the Seventh Parliament, has by far been "toothless," so to say. It has been constantly bulldozed and intimidated by the executive including the President. Glaring examples of the feebleness of the Seventh Parliament was the sale of the Uganda Commercial Bank (UCB), which the Seventh Parliament had stopped in October, but which decision was reversed by Bank of Uganda with strong backing from the President. The feebleness of the Seventh Parliament, is attributed to the existence of a Movement-dominated Parliament, reinforced by a Movement Caucus, coupled with a poorly organised minority opposition in the house. Nonetheless, it carried out its constitutional duty of making laws albeit with less vigour than its predecessor. In a bid to enhance legislative independence, some members of the Seventh Parliament formed the Parliamentary Advocacy Forum (PAFO).

Laws passed by the House

In accordance with its constitutional mandate, of making laws on any matter for the peace, order, development and good governance of the country, Parliament debated and passed a number of important laws during the year 2002.[57] A Standing Committee on Equal Opportunity

was constituted in accordance with Article 40 of the Constitution on August 15, 2002. Its function is to monitor and promote measures designed to enhance the equalisation of opportunities and improvement in the quality of life and status of all people including marginalized groups, on the basis of gender, age, disability and any other reasons created by history, custom or tradition.[58] This is a right step, however, the establishment of an Equal Opportunities Commission remains pending.

The passing of a new Leadership Code 2002 [59] and the IGG Act 2002, was yet another positive development in an effort to control the rampant corruption and abuse of office. The Leadership Code was enacted under Article 231(1), of the Constitution, which mandates Parliament to establish a Leadership Code of Conduct for persons holding certain offices. The Act provides for a minimum standard of behaviour and conduct for leaders; requires leaders to declare their incomes, assets, and liabilities and puts in place an effective mechanism to provide for other related matters. The Act which was aimed at reinforcing an earlier one, requires a wider category of public officials to declare their wealth and introduces tougher sanctions for those who refuse to comply, including losing their jobs and the confiscation of any property acquired as a result of the abuse of office.

A leader was required within three months after it took effect, and thereafter every 2 years during the month of December, to submit a Statement of Declaration to the IGG, declaring his or her income, assets and liabilities; the names, income, assets and liabilities of his or her spouse, children and/or dependents. The Declaration is a public document that can be accessed by the public upon application. Failure to do so, can lead to dismissal, vacation of office or payment of a fine of not less than Ug shs 1,000,000. Additionally, the law expands the brackets of leaders to include among others, certain categories of political leaders such as those working at the Movement Secretariat and leaders of political organisations as well as leaders of local government at the district level, for the first time.[60] Furthermore, the IGG has the same power and rights as the High Court to hear evidence, to compel witnesses to appear, swear, and be examined, as well as to produce important documents and enforce orders. The IGG can also inspect the bank accounts of leaders. The IGG has already invoked the new law by ordering some Members of Parliament notably Hon. Caleb

Akandwanaho and Hon. Cecilia Ogwal to vacate their parliamentary seats after failing to comply with the November 2002 deadline and subsequent extension to December 2002.[61] The law met enormous criticism on several grounds. It was criticized for infringing on the constitutional right to privacy, when it came to making one's property a public affair; it was also criticised for infringing on the right to property when it came to individual ownership of property by spouses which by law had to be declared by leaders. It was also argued that the public declaration of property exposed leaders to potential criminals; the truthfulness of a declaration made by a leader was also doubtable especially given inadequate enforcement and monitoring mechanisms by the IGG's department. Lastly, but in the same vein, the IGG's department was criticised for lacking the human and logistical capacity to effectively monitor the expanded categories of leaders included under the new Act.[62] Overall, the Act was criticized for having potential difficulties in implementation. Despite the weaknesses of the new law, it is hoped that the Act will in practice enhance the powers of the IGG to curb corruption, amidst factors such as inadequate funding personnel and the lack of autonomy from the executive, given that the office holder is appointed by the President, which fact has greatly hampered the work of the IGG's office in the past.

The IGG Act 2002, on the other hand, was made under the provisions of Article 232(1), of the Constitution. This new law regulates the procedure for the making of complaints by members of the public and ensures accessibility to the services of the IGG by the general public. In order to improve the efficiency of the office of the IGG under Article 232 of the Constitution, the new law also decentralises the functions of the IGG to other persons and authorities at district and lower government levels.

A National Planning Authority Bill was also passed by Parliament in accordance with Article 125 of the Constitution. Parliament is, however, still faced with the challenge of making a number of important laws. Notable are the laws regulating the Uganda People's Defence Forces (UPDF), providing for its organs and structures; recruitment, appointment, promotion, discipline, removal and ensuring representative recruitment from every district; the terms and conditions of service of its members; and the deployment of troops outside Uganda

in accordance with Article 210 of the Constitution. An attempt to implement Articles 208, 209 and 210 of the Constitution, through the NRA Amendment Bill which among others provides for the management of the army into three structures namely, land, marine and air force, was found inadequate by Parliament and rejected. It, for instance, fell short of provisions relating to the professionalisation of the army; neither did it provide for mechanisms for ensuring civil - military relations nor for the modalities of deployment. An Act relating to the operations of the UPDF is critical to the streamlining of unprofessional promotions within the army and to take care of deployment. The recent unregulated deployment of the UPDF in the Democratic Republic of Congo, being a case in point.

In addition to the establishment of an Equal Opportunities Commission, other provisions of the Constitution yet to be put into operation include provisions of the law relating to access to information under Article 41; the enforcement of rights and freedoms under Article 50 (4); promotion of public awareness of the Constitution through a national civic education programme; inheritance laws under Article 31(2); protection of the rights of persons with disabilities under Article 35 (2); economic rights under Article 40 and the procedure for recalling a Member of Parliament under Article 84(6). Other constitutional provisions relate to the benefits for retired presidents under article 106(2); the laws relating to the state of emergency under Article 110(7); the enactment of a law to enable the participation of people in the administration of justice by courts under Article 127, the management of public finances under Chapter Nine and the right of citizens to demand a referendum under Article 255.

The Birth of PAFO

The Parliamentary Advocacy Forum (PAFO) was formed in April 2002, specifically to provide a platform where research can be done on various legislative issues in order to accordingly inform Members of Parliament, who often lack comprehensive information and knowledge about issues that are tabled, resulting in most decisions being taken by the executive and the ruling party.[63] The formation of PAFO was also necessitated by the absence of an effective pressure group that can agitate for wider issues such as, the democratic future of the country within a Parliament

that could fight to uphold its independence, particularly in view of the fact that the existent associations in Parliament had failed to push for a common stand. The Movement caucus pushes the agenda of the ruling Movement government and acts as a rubber stamp to government policy. The Young Parliamentary Association (YPA), that worked tirelessly during the Sixth Parliament to keep the executive on its toes, is said to have lost its vibrancy and had resigned itself to merely organising seminars.[64]

Although the establishment and objectives of PAFO were a step towards the enhancement of legislative independence, apart from educating the house about upcoming Bills, legislative procedure and perhaps playing a potential role in facilitating the linkage between the East Africa Legislative Assembly (EALA) and the national legislature, it is doubtful whether bodies of its nature can effectively influence Bills brought before Parliament, given that the Movement dominated the House throughout the period under review. Predictably, PAFO was stillborn. Perhaps partly due to its composition, which was mainly Members of Parliament from the opposition, but also due to its goals. PAFO was not well received by the government and had no impact on the landscape of the legislative process, one of the major goals it set out to achieve.

The violation of human rights: A general note

An examination is made of two major incidents deemed to have been at the core of human rights violations and state inspired violence during the period under review. These are the tragic murder of Father O'Toole and the state initiated "Operation Wembley." The murder of Fr. O'Toole brought to the fore, fundamental legal issues relating to respect for the constitutional right to a fair hearing and trial and the question of the death penalty. It also raised questions about Uganda's place in the global campaign to end the death penalty. Equally noteworthy, is the whole question of access to justice by soldiers under the existing legal framework that governs the army. Inevitably, the issue of the constitutionality of the legal framework relating to the army becomes a fundamental issue for discussion. However, the murder of Fr. O'Toole cannot be discussed in isolation of the Karamoja disarmament process, to which it was closely linked. Another development "Operation

Wembley" - is also reviewed. "Operation Wembley" was established at the initiation of government to combat robbery, murder and other serious crimes that had engulfed the capital city of Kampala and the nation, generally - but its *modus operandi* had far reaching implications on the right to life, unlawful detention, the independence of the judiciary and other criminal justice institutions legally mandated to deal with crime in the country.

The Karamoja Disarmament Process

"A threat to a cow is a threat to the whole community."[66] This is the belief that underlies the Karimajong culture of cattle rustling in north-eastern Uganda. Article 26(1) of the Constitution of Uganda provides for the right to own property individually or in association with others. It also guarantees protection of one's property. Article 34 guarantees the right to culture for all Ugandans. However, the exercise of the above rights is subject to respect for the rights and freedoms of others in public interest. The cultural practice of cattle rustling exercised by the Karimojong has led to tremendous loss of life and property, hence violating the right to life, property and security under the constitution. In an attempt to stop the practice, government undertook a disarmament exercise at the end of 2001, the first phase of which the UPDF were deployed in Karamoja to sensitise and mobilise the Karimojong to appreciate peaceful disarmament. The second phase involved developing local capacity in Karamoja for the people to be able to take over from the army once it withdrew. Thus, there was a voluntary phase from December 2001 to February 2002 and a forceful phase from February 16, 2002 to date, under which guns were supposed to be forcefully taken away from the Karimajong.[67]

In order to entice the Karimajong to peacefully handover the guns, they were promised and eventually given ox-ploughs, maize and oxen.[68] The kraal leaders who were to help in the process were given corrugated iron sheets to roof houses. The disarmament process was however, viewed with a great deal of suspicion among the Karimojong. Some Karimojong felt that government should have bought guns from them since they had also acquired them at a fee, which proposal the President rejected on the grounds that it would encourage thuggery and illicit gun trafficking.[69] The Ikarachuna - young Karimajong men behind the

cattle rustling culture, feared that the Pokot from Kenya and the Turkana from Sudan would steal their hard earned wealth with ease. [70] As a result, some of the Pokot - Karamojong fled to Kenya in hundreds to hide their guns with their Kenyan cousins.[71]

As part of the forceful disarmament process, the President had promised punitive measures against those who declined to hand over their guns. The Commander of the UPDF Division responsible for the exercise, Col. Sula Semakula was quoted as stating: "The UPDF would carry out operations in homesteads of people suspected to have guns..." Dogs would be used to sniff out buried guns while helicopters would flush out armed Karimojong who try to hide in mountains and caves."[72] Unfortunately, during the beginning of the forceful disarmament, characterised by the deployment of the UPDF troops and the massive recruitment of Karimojong Local Defence Units (LDU) in all eight counties, armed to check any aggression amongst the Karamojong, a number of human rights violations including the loss of life and rape among others were reported.[73] To ensure the respect of human rights, the Uganda Human Rights Commission (UHRC), undertook a disarmament sensitisation programme in Karamoja, under which they monitored the human rights situation during the exercise. For the same purpose, the UHRC in conjunction with the Danida Human Rights Democratisation Programme and the UPDF, established Civil Military Operations Centers (CMOCs) in Karamoja. However, the success of both the CMOCs and the disarmament process are yet to be ascertained.

Fr. O'Toole is alleged to have been compiling a report on the various human rights violations by senior army officers of the UPDF in respect of the disarmament process, shortly before his murder. He is said to have witnessed the torture of locals by the UPDF and was allegedly beaten by a junior army officer shortly before his murder.[74]

The Murder Of Father O'Toole & Others: A Test of the Constitutional Right to a Fair Hearing and Trial , and the Right to Life

In the Constitution of the Republic of Uganda Article 22(1) provides for the protection of the right to life. It states that "No person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal

offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court."

The right to a fair hearing is also stipulated under Article 28 of the Constitution. It provides that in the determination of the civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law. Furthermore, that every person charged with a criminal offence is presumed innocent till proven guilty, or until that person has pleaded guilty; is given adequate time and facilities for the preparation of his or her defence and in cases of any offences that carry a death sentence or imprisonment for life; is entitled to legal representation at the expense of the state. According to Article 44, the right to a fair hearing is one of the rights whose enjoyment cannot be derogated.

On March 21, 2002, Fr. Declan O'Toole, an Irish missionary, was murdered along with his two aides, by men wearing military apparel, at an illegal roadblock in Kotido, in north-eastern Uganda. The nearby military detach is reported to have quickly called a parade to establish if any of the troops were missing, whereupon two soldiers were found missing. It was further reported that the two suspects were unable to offer a satisfactory explanation as to their absence when confronted with the evidence of an eyewitness who had given a description fitting their profiles. Following these developments, the two men are reported to have confessed to the shooting. Two days later, on March 24, 2002, the two soldiers were executed.[75] A Field Court Martial (FCM), sat and within about two hours tried the two soldiers, found them guilty and sentenced them to death by firing squad. A point to note is that long before the trial and execution of the two men, the overall Commander of the Third Division of the UPDF was quoted in the press as saying that whoever was responsible would be executed,[76] which in effect amounted to a presumption of guilt, before their trial. The two men were charged under Section 183 and 184 of the Penal Code and Section 68 of the National Resistance Army Statute.[77] The other important point to note is that the accused are said to have withdrawn their confessions at the trial, which raised the possibility of their having been coerced into confessing.[78] In view of the above circumstances, a lot of suspicion and distrust surrounded the hasty trial

and subsequent execution of the two army suspects mainly on two grounds. Firstly, shortly before his murder, Fr. O'Toole was said to have been compiling a report on gun trafficking in Karamoja involving some senior army officers. He had also strongly criticised the army's human rights abuses in respect of the disarmament process. Secondly, prior to his murder, the priest had been assaulted by soldiers and had reported the matter to the Irish Embassy in Kampala. It was on his return to Kotido that he was murdered.[79]

The murder of Fr. O'Toole and his companions met with public condemnation, as did the hasty trial and execution of the suspected murderers. The Mill Hill Fathers to which O'Toole belonged and the Irish Government condemned both the expeditious execution of the two soldiers and the murder of the missionary. [80] Many local human rights NGOs, the Uganda Law Society,[81] the Uganda Human Rights Commission, religious institutions,[82] foreign missions and the EU issued strong statements of condemnation. They were later joined by political parties, in particular, the UPC. As a matter of fact, to some members of the public, the executions were a reminder of the Idi Amin days, when executions were not out of the ordinary. An eyewitness description of the expeditious execution of the two soldiers paints the gruesome picture as thus:

> The two soldiers arrived guarded by many soldiers in a green army Toyota Hilux pick up truck where they lay handcuffed. They were hurled onto the ground, then picked up and shoved towards two trees that stood approximately five metres apart. The soldiers, dressed in neat, new army uniforms proceeded to tie them to the Neem trees against which they would be shot. …. A few minutes after the men were tied to the trees, a group of camouflaged soldiers arrived. They moved in single file and lay behind us waiting for orders to shoot. A soldier picked a rag and blind-folded the two men. A crowd of about 600 women, men and children went into a deathly silence as soldiers lying down in two groups of four started shooting after a whistle went… They sprayed the men with bullets from head to toe. Blood spewed from their bodies. After some twenty seconds of gunfire, a whistle went again, signaling the executioners to stop. A doctor wearing plain clothes and white surgical gloves advanced towards the two bodies. The doctor felt around Abdalla

> Omedia's neck and walked over to the Captain, whispered something to him…. The Captain reached for his pistol, moved towards the tree to which Abdallah Omedia was tied and shot him in the head. His body was stilled. Thereafter, soldiers rushed to the scene to untie the bodies and using ropes clamped to the lifeless legs, dragged them to their waiting graves. …….[83]

Following strong condemnation of the execution, Government was forced to take the debate to Parliament and made a statement defending the Court Martial and its expeditious nature. One of government's main arguments was that the execution of the two soldiers was in accordance with the provisions of the Army Statute applicable during periods of war and was therefore lawful. Government said that the FCM had been legally constituted following the direction of the Army Commander before the deployment of the forces and that, furthermore, Karamoja was and still is a special operations zone which created extenuating circumstances for the establishment of a FCM. Justifying the handling of the matter by the FCM, it was argued that given that the matter required tight disciplinary action, it was imperative to use the FCM for the expeditious trial of capital offences, for justice to be seen to be done. Additionally, that there was no legal or other reason to delay the carrying out of the sentence. Government undertook to provide a copy of the trial proceedings and to conduct a fully-fledged investigation into the murder of the priest.[84] In a subsequent turn of events, however, government rejected the EU's call for a full probe into the Kotido executions, unless new evidence implicating army officers other than the two that were executed, appeared.[85]

A number of arguments were advanced challenging the speedy execution of the two men. The main argument was that soldiers were not an exception to the constitutional provisions, which requires cases involving murder or life imprisonment to be confirmed by the highest ordinary appellate court. In other words, that Section 77 of the NRA Statute, that establishes the Field Court Martial, through which the executions of the two men was effected, had to be read and interpreted in light of Article 22 of the Constitution of the Republic of Uganda. The Article states that "No person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the law of

Uganda and the conviction and sentence have been confirmed by the highest appellate court." Article 132 of the Constitution makes the Supreme Court the final court of appeal[86] and makes all other courts bound by the decisions of the Supreme Court on questions of law.[87]

The fairness of the trial, the competence of the jurisdiction of the court and the fact of the conviction and sentence having not been confirmed by the highest appellate court – the Supreme Court, were at the core of the contention. Under Section 77 of the Army Statute, a nine member FCM is required to operate in circumstances where it is impracticable for the offender to be tried by a Unit Disciplinary or Division Court Martial. In this regard, it was strongly contended that Karamoja by description did not meet the criteria of an area within the confines of Section 77, because the Section envisaged an area where there is contact with an enemy on a frontline.[88] Furthermore, Section 78 of the same statute prohibits any person who participated in the investigations of the case against the accused, from sitting on the Court Martial. In the case of the two soldiers, the question arose as to whether indeed there were such impracticable circumstances that justified the FCM to try the case and the partiality of the FCM Chairman who was the Division Commander, accuser, investigator, prosecutor and executor in the same case. Moreover, the Division Commander is reported to have condemned the two soldiers long before their trial.

Another argument was that since the NRA Statute was enacted after the 1995 Constitution, according to the rules of statutory interpretation, the statute had to conform to the provisions of the Constitution. In this respect, the Army Statute is not only vividly inconsistent with the Constitution of Uganda, but the court structure as established under the statute discloses fundamental problems relating to access to justice for soldiers in Uganda. The existing court structure under the NRA Statute is outside the framework of ordinary courts of law but falls within the executive arm of Government. The Division Court and the General Court Martial have unlimited jurisdiction both original and appellate and the Court Martials Appeals Court hears and determines appeals from the General Court Martial. Consequently, appeals from military courts do not lie with ordinary appellate courts. It is clear from the above, that the manner in which the trial and execution of the two suspects of the murder of Fr. O'Toole were handled, was in

contravention of the outlined constitutional tenets of the right to a fair hearing and trial and, of the right to life. The incident also shows Uganda's total lack of international support in upholding the death penalty.

Operation Wembley

Mid- 2002 witnessed a spate of armed robberies and the killings of several people in the city of Kampala and its suburbs. Initially a joint force of security personnel comprising of the police supported by the military intelligence and a special force came together to address the situation by pursuing the renegades, at first creating a sense of hope and security for the people. Subsequently, the task of keeping law and order was relegated to the army under an operation code named "Operation Wembley." Operation Wembley was given powers of arrest and detention and instantly undertook arrests, detentions and shot suspected robbers and "criminals" on the spot. Subsequent to the establishment of Operation Wembley, a Court Martial was specially set up to handle the cases that arose. It was argued that the Court Martial and not ordinary courts had been empowered to handle the cases, on the allegation that ordinary courts would release the suspects on bail as had been their practice.

Operation Wembley raised several serious legal and institutional issues. "Operation Wembley" eroded the cardinal principle of presumption of innocence until proven guilty in criminal matters, and was illegal and unconstitutional. The "shoot to kill" *modus operandi* of Wembley meant that many innocent people could be killed in the process. It was also argued that political opponents of government had been unlawfully arrested and detained for more than the constitutionally mandated 48 hours, tortured and denied access to their relatives. Overall, "Operation Wembley" was said to undermine the confidence of existing legal and judicial institutions such as the police and the courts of law. The "Operation Wembley" for example usurped the powers of the police by taking over the arrest of civilians. Coupled with this, it was being run by ungazetted security organs and personnel without any stipulated conditions of punishment in case the need arose. [89] Due to its lack of competence and qualified personnel, the Court Martial was equated to a kangaroo court. In fact, its chairperson

Lt. Gen. Elly Tumwine was described as a "non lawyer but a fine artist and legislator"[90]

In spite of the numerous condemnations of "Operation Wembley" and that of the Court Martial especially from legal and judicial circles as to their legality, both the operation and the court martial continued to enjoy the support of the state and the full backing of the President, their operations expanded nation-wide. Government argued that "Operation Wembley" had reinstated public confidence in the security organs, which had hitherto been lost. Justifying the long hours of detention, government argued that since "Operation Wembley" was dealing with a new form of terrorism, investigations unavoidably took much longer.[91] Furthermore, that since the suspects used weapons which were the preserve of soldiers, they were categorised as soldiers and in this case qualified to appear before military and not ordinary courts. [92]

Although perceived as positive and a success by some members of the public, for having reduced crime and illegal killings, the "Operation Wembley" was in fact illegal and unconstitutional. It instigated state-inspired violence and was a potential tool for government to repress political opponents. Instead of militarising law enforcement the Wembley style, there is need for government to strengthen the capacity of gazetted law enforcement institutions of government especially, the police, to handle crime. Similarly, ordinary courts of law should be respected and allowed to handle the cases they are authorised to handle according to the law. In this way, illegal arrests, detentions, prosecutions and excessive violation of human rights would be minimised and public confidence restored in law enforcement and judicial institutions.

Freedom of expression/the status of media rights

Threats to media rights, freedom of expression and freedom of the press are not new in the history of Uganda. In fact, post 1986 Uganda has seen a number of sedition cases brought by the state against journalists particularly of non- government newspapers. Recent efforts to strengthen the freedom of expression and media rights such as the establishment of the Media Law Reform Committee and the measures it had taken in this direction were vitiated by two main events in 2002,

namely, the closure of the *Monitor* newspaper and the ban on the "Ebimeeza" or public radio talk shows. The anti-terrorism law passed in May 2002, was another threat to the work of journalists.

The Media Law Reform Committee

Established in 2001,[93] the Media Law Reform Committee was mandated to among other things: make proposals for an appropriate legislative framework for augmenting democratic freedoms, professionalisation and growth of the media in Uganda and secondly, to devise an appropriate institutional framework for regulating the media including the resolution of media disputes. In 2002, the Committee made elaborate proposals to the Directorate of Information for the repeal of all repressive media provisions of the Penal Code such as laws on sedition, defamation, and the publication of false news e.t.c. In addition, it proposed a consolidation of the two main laws governing the media industry namely, the Journalist and Press Statute 1995 and the Electronic Media Statute 1996. More significantly, however, the Committee proposed the establishment of an independent non-statutory Media Council, in place of the existing statutory one, to regulate the media industry and handle media related disputes respectively. Hitherto, the statutory Media Council was not functional for a number of reasons. Firstly, it was subject to undue ministerial control; secondly it was supposed to be state funded from the Consolidated Fund, which funding was not forth coming. Lastly, being a statutory body, it failed to attract international recognition and external funding. Consequently, a non-statutory Media Committee autonomous of government control was a more viable option for overseeing the vibrant media industry.

The *Monitor* Newspaper saga

On October 10, 2002, freedom of the press suffered yet another blow. At 6.30 pm, the offices of the *Monitor* newspaper were cordoned off by the police, and other security agencies, who searched, took official and private documents, computers and confiscated the personal phones of employees. The search continued for seven hours and the subsequent siege of the offices lasted for a week. The incident was attributed to a story that run the same day in the *Monitor* newspaper to the effect

that a UPDF helicopter had crashed while fighting rebel insurgency in northern Uganda, as a result of having been hit probably by rebels of the Lords Resistance Army (LRA). The article offended government, which claimed that the story was false and that its publication would cause fear and anxiety among members of the public. "The reporter who wrote the article was charged with reporting false news and information prejudicial to national security" and the Managing Director and News Editor were charged with "publishing false news."[94]

Government's reaction to the article led to considerable public concern. Not only was it considered high handed under the circumstances, since no opportunity was given to the paper to explain, retract or respond in whatever manner, but it was also a stark reminder of the typical reaction of a monolithic and autocratic regime, out to destroy the independence of the media.

The closure of the *Monitor* was unique, not because it had never occurred in Ugandan media history, but because it was the first time a paper had been closed in post 1986 Uganda. It, therefore, raised serious questions regarding the role of the media in contemporary Uganda. Apart from informing, educating and entertaining, the media plays a key role as a watch dog over government. In Uganda, this has increasingly been the case, especially in the absence of an active opposition. On the other hand, the media has to tread the delicate balance of offering objective and balanced reporting on a diversity of ideas, thus adhering to professional codes of ethics and standards. Contravention of these ethics and non-adherence to set standards is a potential area of conflict between the media, individuals, various institutions and the state, and a potential area of oppression of media rights and freedom of expression by the state.

Most importantly, freedom of expression is one of the core essentials to democracy. A functional democracy necessitates access to different viewpoints in order to make informed choices. Accessibility to information promotes accountability in various spheres including political and economic spheres, and the enjoyment of various rights. Thus freedom of the media as defined in the Universal Declaration of Human Rights for example, entails freedom to seek, receive and impart information and ideas, [95] and is in this regard, the entitlement of every person. Consequently, the public, like those who work in the media, are

entitled not only to seek information and ideas through the media but also to receive information and ideas through it.[96] It is thus a right enjoyable both by the media and the public. In instances of censorship or constraint of this right, the public is equally as affected, as the people who work in the media.

The Constitution of Uganda provides for freedom of speech and expression, which includes the freedom of the press and other media.[97] It also grants a right of access to information for every citizen.[98] Article 43 puts a limit on the enjoyment of fundamental human rights in as much as they should not prejudice the fundamental and other human rights of others or of the public interest. "Public interest," as defined under the Constitution does not permit the enjoyment of rights and freedoms beyond what is "demonstrably justifiable in a free and democratic society." The key issue is the extent to which this right can be limited.

To a large extent, this right is traditionally civil /political. With the commercialisation of the media industry, however, the right has attained an economic interpretation especially assigned to it by governments. And in some instances, governments have advanced the economic cause to the detriment of the civil/political dimension. The *Monitor* incident is instructive in this respect.

While the public argued that there was an infringement of the civil/political dimension of the right to freedom of expression and a denial of access to balanced reporting about the conflict in northern Uganda, Government on the other hand shifted the debate to an economic one. Often times, governments resort to the economic interpretation in order to dilute the civil/political argument, and thereby force media houses to comply and adhere to the whims of governments. In the case of the *Monitor,* government asked the newspaper to rethink its economic interests. Negotiations to re-open the paper were not conducted with the editors of the paper, but rather with the investor/owners of the business - the Aga Khan group of companies. Consequently, suppression of the civil/political right of freedom of expression was compromised over and above the economic interests of the investor owners of the newspaper. In order to safeguard its commercial interests, the newspaper was forced to apologise to Government, on top of the institution of criminal action against its top officials and News Editor.

On the whole, the paper has since been intimidated and has slid into a state of self censorship that has limited public access to information about the northern Uganda conflict among other issues, which has in turn led to lop sided reporting from the Government owned newspaper, the *New Vision***.** Since the event, the paper may be forced to rethink its commercial interests before printing any "sensitive" articles.

The ban on the "Ebimeeza"

The liberalization of the electronic media in Uganda led to the sprouting of FM radio stations and to more freedom of speech and expression for the people of Uganda. Following this process, commercial programming dominated FM radio airspace, as well as politically oriented talk shows, call-ins and live broadcasts. People made direct contributions to contemporary issues in studio and outdoor broadcasting programme. These public, live talk shows attracted large audiences and were locally baptized *ebimeeza*, literary meaning "the tables". The *ebimeeza* were both popular with the elite who had then programmes in English and the ordinary people, who enjoyed freer expression in vernacular. In other words, *ebimeeza* became the medium for popular participation in the discussion of public affairs and the accessibility to information for the ordinary citizen. They became a major vehicle for serious debate on a variety of issues.

In December 2002, the National Broadcasting Council (NBC) banned *ebimeeza*. The ban was contained in a letter from the BC Secretary to all the three radio stations that broadcast the shows live. The ban was premised on the fact that the programmes allegedly contravened Section 3 of the Electronic Media Statute which limits broadcasters to their registered venues, namely their broadcasting houses but not outdoors or in bars. The letter was backed by the Minister of State for Information's earlier briefing that government would crack down on the *ebimeeza*. Subsequently, a few of the broadcasting houses challenged the ban arguing that it was not backed by any legal provisions and on that basis continued broadcasting the programmes. Eventually the imposed ban did not succeed. Instead, the Minister began cautioning the media houses on the need to control the use of abusive language against the person of the President, hence making the apparent reason

for the initial ban political rather than merely a restriction of programmes to registered venues.

These two developments drew important lessons for the country. Press and media freedom, were threatened. It revealed that the Museveni regime like previous ones in Uganda, was capable of suppressing press and media freedom, which henceforth left media rights in limbo.

The Anti-Terrorism Act 2002

In May 2002, government passed tough anti-terrorism laws.[99] It employed a broad definition of terrorism as the " The use of violence or threat of violence with intent to promote or achieve political, religious, economic and cultural or social ends in an unlawful manner." The law carries a mandatory death sentence for those found to be terrorists. Much as the new definition of terrorism has been seen as appropriate in curbing "terrorist acts" such as the planting of bombs in public places as had been common in Uganda, and an improvement of the "inadequately narrow," Penal Code definition,[100] it has on the other hand been found to be too wide, to the extent that it could be used by the executive as a repressive tool against its political opponents.[101] It was also argued that the definition should have been limited to the use of violence or the threat of violence to promote or achieve political ends. Inclusion of religious, cultural and economic ends was considered incongruous. Furthermore and perhaps more important, in the context of media rights, the law was seen as a possible threat to the work of journalists who publish material considered likely to promote terrorism, because any information could easily be interpreted as likely to promote terrorism. In this way, the law directly threatens media rights and freedom.

Succession to the Presidency

Talk about succession to the presidency in Uganda and hints about a possible third term for him started in the year 2002. With time, it became an issue of public concern and debate. The Constitution of Uganda clearly stipulates that the President shall hold tenure for two terms, which are set to expire in the year 2006.

The call to open up the debate on the President's succession first came from a few outstanding politicians including insider-historical and Movement founder members, who publicly called for clear steps to be outlined as to how the case should be handled to ensure a peaceful transition.[102] However, contrasting views came from a section of the public including women from Rakai and Mukono Districts,[103] and some Government Ministers,[104] who made public requests for the President to stand for a third term. Mayanja Nkangi, prominent veteran politician in his views presented to the Constitutional Review Commission, voiced such a proposal.[105] Nkangi was quoted as having stated that: "If the electorate choose, a President should be allowed to remain in office for as long as he or she wishes." He added, "The two-year limit should be removed to enable the country to benefit from visionary leadership… Once you have provided a free election, someone should offer himself as many times as possible."[106]

On his part, at the beginning the President generally dismissed the debate on presidential succession as inconsequential. He is for instance quoted as having stated that the discussion was not as pertinent as outstanding issues such as poverty alleviation, the modernisation of agriculture and so on. With time however, certain statements made by the President began to cause public concern. Among these were statements of self-praise of his exceptional military might and skill. He was, for example, quoted as having said that freedom fighters do not easily handover power and that the transit from the Movement system of government will be gradual after a calm and disciplined discussion.[107]

Equating himself to Zimbabwe's Mugabe, President Museveni added: "Don't play around with freedom fighters, you see Zimbabwe's Robert Mugabe? Freedom fighters already have *entandikwa.* (Start-up capital) liberation armies are not like these mercenary ones, which earn salaries. We fought and can still fight."

On another occasion, the President is said to have expressed little doubt about using force in bringing to bear a quick and summary end to any sort of political uprising as was done in the cases of China and Madagascar. These particular remarks echoed those made by President Muammar Gadafi of Libya, during President Museveni's swearing ceremony the previous year, to the effect that revolutionaries like

President Museveni should not be subject to elections and were not compelled to hand over power. [108]

The President's remarks signalled a transition that would not be characterised by a peaceful handover, but one that would necessarily involve resistance or even violence. Given that the President has in fact ruled the country for the last 16 years, when the Constitution stipulated 10 years since he came into power, apart from contravening the Constitution, another term in office is likely to cause a political crisis – there have been fears that a third term may lead to war in the country. Assuming a third term, as President, would undoubtedly confirm President Museveni's dictatorial tendencies and greed for power, it would also definitely erode the remaining confidence in him as one of the new breed of democratic African leaders, as perceived by some nationals and the international community.

The impact of regional politics: The case of the Kenyan elections

The 2002 Kenyan presidential election marked a new era for multipartism in the region. After the opposition forces in Kenya united and successfully ousted the 40-year rule of the KANU Party, the viability of multipartsim as a political system within the region was re-invigorated. The developments in Kenya, to a great extent gave hope to multipartism in Uganda, which was then at the cross roads, given that it had been deliberately dismissed by the incumbent Movement Government as a dying political system of governance. Consequently, the victory of the National Rainbow Coalition (NARC), in Kenya set a challenge for the incumbent government in Uganda, which can no longer dismiss multipartism as nonsensical, unpopular and alien to Africa, as was previously the case. Indeed, the Kenya experience opened national politics and the issue of presidential successions in East Africa, to the fore of public debate. These issues ceased being the preserve of a few national politicians but became regional matters touching neighbouring countries.

The direct contribution of the Uganda Young Democrats (UYD), through the training of polling agents in Kenya to ensure a fair electoral process[109] and sharing political lessons from Uganda with their

counterparts, during the recent Kenya electoral and democratisation process, was yet another lesson in the development of regional politics and was quite instructive. The UYD example offers an important precedent for East Africa as a whole especially Uganda, whose elections are around the corner. This can be a new method of sharing the best electoral practices and building stronger political alliances across national borders in the future, but also goes along way in fostering regional integration. The UYD example further reaffirms what has already been mentioned above, that future elections in East Africa may cease to be national issues and become regional ones

Another lesson from the Kenyan experience is the growing need to revisit the critical role civil society should play in the democratisation process. In the case of Uganda, civil society has largely shied away from criticising the Movement Government and has been supportive of its many wrong doings. Civil society in Tanzania is equally as docile as that of Uganda. Yet civil society in Kenya was instrumental in the success of NARC. While the Kenya example brings to the fore the need for Kenyan civil society to re-organise itself and assume its traditional role of "watch dog" to government, it is typical of what underlies civil society in the democratisation process. Consequently, civil society in Uganda and Tanzania need to be strengthened to overtly and pragmatically embrace this role.

Conclusion

Underlying the contemporary political problem of Uganda is the challenge of power sharing, which to a large extent is connected with the scourge of militarism. In the case of Uganda, dictatorship or the lack of power sharing is manifest in the one party political system - the Movement, which has restricted the operation of political parties in the country and most recently, in the impending issue of a third term for the President, with a high possibility of a non-peaceful handover of power. Along with these, and arising out of dictatorship, is the usurpation of powers by the executive of the other arms of government - the legislature and the judiciary. There has been continuous interference in the work of the legislature by the executive not only during the year 2002, but over the years. This has been accentuated by

the Movement-dominated parliament, which provides a leeway for the executive to manipulate Parliament and ensure that all Bills before Parliament are passed in favour of the Movement. Likewise, the judiciary which hitherto appeared the "safer" of the two, has recently fallen victim to direct attacks from the President over its alleged "partiality and inefficiency." However, all the above tendencies of dictatorship, including the concentration of power in one person and usurpation of the power of the legislature and judiciary by the executive are located in the highly militarised state and leadership of the country. Militarism has greatly contributed to dictatorship in Uganda and is the *raison d'etre* for the military being seen by the executive as having a stake in every aspect of government - from law enforcement and the administration of justice, to gross interference with elections and involvement in war at the national and regional level.

The road to democratisation in the country requires that political parties in Uganda be given the leeway to operate at full capacity. A strong opposition would augur the existence of a more independent legislature capable of serving the interests of the people better. Needless to say however, political parties on their part still have an uphill task of streamlining their internal democracies, for them to be able to compete and indeed to have the moral authority to critique the government they always criticise as undemocratic and to win the confidence of the people that they stand for and the democracy they advocate for. Otherwise, as has been observed, the majority of political parties in Africa, as is the case for Uganda, "do not speak out for the masses, for they are urban based and run by the middle class or discredited politicians who still marginalise women and rural folks."[110] Similarly, it is imperative that both the Movement and the political parties acknowledge each other's strengths and draw on them in order to enhance good governance in the country.

Notes

1 Ms. Edith Kibalama is a Programme Officer at Kituo Cha Katiba – East African Centre for Constitutional Development.

2 See "Police arrest MP Lukyamuzi," The *Monitor*, January 2, 2002.

3 See "One dead, over 10 injured as Police crush UPC Rally," The *Monitor*, January 13, 2002; See also "MUK Students throw stones; locked in Campus," The Monitor; "Death as UPC stages Demo, Police foil rally; Rwanyarare , Kawempe DPC arrested," The *New Vision*, January 13, 2002.

[4] See "UPC Vs. Movement: when a 10 year political war ended in a Kla Road Killing Field: Museveni sells Movement not to UPC but to violence – Dr. Jean Barya and MP Ben Wacha weigh the implications." "UPC looks to spruce up image - Barya," See The *Monitor*, January 16, 2002.

[5] "Katumba taking Military orders?" The *Monitor*, January 16, 2002.

[6] The Inspector General of Police ordered for the arrest of the Police Officers in Charge of the operation on the pretext of having acted unlawfully. See "Death as UPC stages Demo, Police foil rally"– Rwanyarare, Kawempe DPC arrested, op cit. See also "Katumba explains killing at UPC rally," The *New Vision*, January 14,2002.

[7] See "DP backs UPC," The *Monitor*, January 14, 2002 and "Amnesty issues alert on Uganda after bloody rally," The *Monitor*, January 14, 2002.

[8] "Museveni can't ban UPC, Law Society," The *Monitor*, January 18, 2002.

[9``] "Kyankwanzi '01, Gulu '64: The More Uganda Changes, the more it stays the same," The *Monitor*, January 23, 2002. See also " "Why parties 'good,''bad' Movementists are at war," The *Monitor*, January 12, 2002.

[10] "NEC meeting," The *Monitor*, January 2, 2002.

[11] "Museveni rejects Political Bill 2001,"*The New Vision*, April 19, 2001

[12] "Movement MPs to discuss Political Bill 2001," *The New Vision*, April 21, 2001

[13] "From a Rosy Start, House is haunted at the end," *The New Vision*, December 30, 2002

[14] Parliament of Uganda; Parliamentary Debates *(Hansard*), Official Report, Ist Session – Second Meeting; Issue No. 6; 3 April 2002-16 May 2002, p.2045-6.

[15] Ibid.

[16] See Political Parties & Organisation Articles 18, 2002, S. 18(1) (c), (d) and S.10. (7) (8).

[17] Parliamentary *Hansards*, op cit, p.2,106, Statement by Hon. Crispus Kiyonga, MP Bukonjo, West Kasese and National Political Commissar, Movement Secretariat.

[18] Ibid, p.2064.

[19] Ibid, p.2109.

[20] Ibid, at p. 2,098, Statement by Hon. Henry Obbo, MP West Budama-North, Tororo.

[21] Ibid, p. 2,076, Statement by Prof. Victoria Mwaka, Woman Representative, Luweero.

[22] Ibid, p.2,047.

[23] Haroub Othman & Maria Nassali, *Towards Political Liberalisation in Uganda, A Report of the Uganda Fact Finding Mission*, Fountain Publishers, Kampala, 2002, p. 45.

[24] Parliamentary *Hansard*, op cit, p.2093, statement by MP Lira Municipality.

[25] Ibid, p.2,175, statement by Hon. Kawanga.

[26] Ibid. p. 2,087, Statement by Hon.Ekulo Epak.

[27] Ibid, p.2065, Hon. Katuntu MP. Bugweri County Iganga, told the House that it needed to interpret Article 73(2) not only politically but legally , otherwise, it faced the danger of being challenged in court.

[28] Court of Appeal Ruling: Election Petition Appeal No. 9 of 2002, arising out of the Judgment of the High Court of Mbarara Election Petition No.4.

[29] See The International Covenant on Civil & Political Rights , GA. Res. 2200 A (XX1) of 16 December 1966. Art. 21(1) states, *"Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. Art. 21(3)* states, *"The will of the people shall be the basis of the authority of government , this will shall be expressed in periodic and genuine and equal suffrage and shall be held by secret ballot or by equivalent free voting procedures"*.

[30] See Article 25 of the Declaration of Human Rights 1948, GA. Res. 217 A (111) of 10th December, 1948. It states:"*Every citizen shall have a right and the opportunity to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of*

the will of the people."

31 See Standard 21 of the *International Standards of Elections; UNCommittee on Human Rights ,General Comment 25*, "The Right to Participate in Public Affairs, Voting Rights and the Right to Equal Access to Public Service,"1,510th meeting, 57th session12 July, 1996.

32 Election Petition Appeal No.12 of 2002; An Appeal from the Judgement and Orders of the High Court of Uganda (Egonda-Ntende) sitting at Mbarara, dated 17 May 2002 in Election Petition No. HCT- 05-CV-EPA-0003 of 2001) at Mbarara Registry.

33 Supreme Court Election Petition No.1 of 2001.

34 Hon. Latif Sebagala claimed to be the victim of the violence. See "Museveni blamed for poll violence," The *Monitor* April 12, 2002

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36 These two were Hon. Vincent Nyanzi (Busujju) and Hon. Edward Kamana Wesonga (Bubulo-West). See "MPS whose elections have been nullified," The *Monitor,* April 11, 2002.

37 See judicial decisions: Kizza Besigye vs. Museveni; Winne Babihuga vs, Winnie Masiko; Amama Mbabazi Vs. James Musinguzi. See also, "Parliament wins round one in elections fouling debate" *The Monitor*, February 25, 2002, and "Probe Army, Minister over Polls – MP", The *Monitor*, February 20, 2002.

38 See Winne Babihuga vs. Winnie Masiko case.

39 "UHRC wants UPDF votes cast in open," The *Monitor*, March 08, 2002.

40 "Winnie on poll violence probe," The *Monitor*, February 27, 2002.

41 See "Poll violence up, democracy questioned,"*The New Vision*, September 25, 2002.

42 Ibid.

43 See "Report on election violence is biased," *The New Vision*, September 27, 2002

44 Ibid.

45 "Review of achievements of the 7th Parliament in 2002,"*The New Vision*, December 20, 2002

46 See "Kasujja Commission corrupt – Matembe", The *New Vision*, January 12, 2002; "DP attacks EC's Kasujja, UHRC," The *Monitor* January 5, 2002; "Explain poll mess, government tells Kasujja," The *Monitor* January 7, 2002; " Poll probe want Kasujja sacked," The *Monitor*, May 25; 2002; "IGG wants Kasujja sacked", The *Monitor*, July, 17, 2002; "No cash for EC until Kasujja is out-MPs", The *Monitor* July, 18, 2002; "I wont resign Kasujja vows", The *Monitor*, July 25, 2002.

47 "Kasujja's Commission corrupt-Matembe," Ibid.

48 "Poll Violence up, democracy questioned," *The New Vision*, September 25, 2002

49 See "Kasujja fired," The Monitor, August 1, 2002.Article 60. (8), of the Constitution states that a member of the Commission may be removed from office by the President only for among other grounds, inability to perform the functions of his or her office arising out of physical or mental incapacity; misbehaviour or misconduct; or incompetence.

50 See Art 62 of the Constitution of Uganda

51 Article 60. (1) of the Constitution of Uganda provides that there shall be an Electoral Commission which shall consist of a Chairperson, a Deputy Chairperson and five other members appointed by the President with the approval of Parliament.

52 See Stanley Oonyu V. AG H.C Misc . Case No. 113 of 1988 cited in Tindifa Sam, *Constitutionalism & Development*, in *In Search for Freedom & Prosperity : Constitutional Reform in East Africa*, (ed) Kivutha-Kibwana, Chris Maina Peter & J. Oloka-Onyango, Claripress Ltd, 1996, p.133. The Judge expressed how hopelessly the judiciary had been treated by the executive and castigated the behaviour of government officials in ignoring court orders which reflects badly on courts and on the law courts apply.

53 See Kivutha, Maina Peter et al Ibid, where parliament had to enact the Public Order & Security Act and gave the President power to detain a person without trial, once a person

was in the opinion of the President a threat to public security.

54 "Judiciary anti-Movement – Museveni," The *Monitor*, April 24, 2002.

55 See "Respect Judges Museveni told", The *Monitor*, July 25, 2002.

56 Article 147 (1) d & e, of the Constitution.

57 Article 70 (1), of the Constitution of the Republic of Uganda.

58 See "Laws passed by the 7th Parliament in 2002,",*The New Vision*, December 20, 2002.

59 The Act was passed by Parliament on April 24, 2002 and came into force in July 2002.

60 Other categories include Chairperson and Vice chairperson of the National Conference under the Movement political system; members of the National Executive of any political party or organisation; Regional District Commissioners, their assistants and deputies e.t.c.

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62 "Is the Leadership Code Bill practical?"*New Vision*, March 13, 2002.

63 See "100 MPs form pressure body," The *New Vision*, March 28, 2002.

64 "PAFO and the search for an assertive House," The *Monitor*, April 3, 2002. See also, "Face up to the executive, Sabiiti urges fellow MPS", The *Monitor*, April 3, 2002

65 See " From rosy start, House is haunted at the end of 2002", The *Monitor*, December 30, 2002. It was reported that the President came out and criticised PAFO and prophesised its doom.

66 " Hundreds of Pokot from Amudat have gone to Kenya to hide their guns with their relatives: Will the Karimojong be safe?", The *New Vision*, January 3, 2002

67 See Website: www.karamojadata.org/disarmament.htm

68 "Kjong gun deadline pushed to February;" The *New Vision*, January 2002

69 " Hundreds of Pokot from Amudat have gone to Kenya to hide their guns with their relatives: Will the Karimojong be safe?", op cit .

70 Ibid.

71 Ibid

72 Ibid.

73 Ibid. See also " UPDF to probe Kotido killing," The *New Vision*, March 12, 2002, and " UPDF suspects for trial," The *New Vision*, March 19, 2002, where the army spokesman was quoted in the press as having confirmed some human rights violations by the UPDF, during the exercise and confirmed their arrest. He was also quoted as stating that the soldiers would be prosecuted. The UPDF is said to have killed three people and raped a pregnant woman who as a result miscarried her baby.

74" UPDF to Probe Kotido killings," Ibid. See also " O'Toole criticised UPDF", The *New Vision*, March 28, 2002.

75 "UPDF executes Priest Killers," The *New Vision*, March 26, 2002.

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77 No. 3 of 1992.

78 See "Kotido ghosts come to haunt Parliament," The *Monitor*, April 11, 2002.

79 See "O'Toole criticed UPDF," The *New Vision*, March 28, 2002; "Irish government condemns executions", The New Vision, March 28, 2002

80 See "Missionaries protest swift execution," The *New Vision*, March 27, 2002 and " Irish Govt condemns executions," Ibid.

81 " Lawyers protest UPDF execution," The *New Vision*, March 28, 2002.

82 See "Press Release upon the death of Fr. Declan O'Toole and Companions by the Bishop of Kotido," The *Monitor*, January 18, 2002.

83 "I went to cheer, but left with a sour taste: Eyewitness account of the Kotido executions," The *Monitor*, April 9, 2002.

84 See "Mbabazi defends Execution," The *New Vision*, March 28, 2002.

85 "UDPF rejects EU call for probe into Kotido executions," The *Monitor*, April 4, 2002.

86 Article 132 (1), of the Constitution of Uganda.
87 Article 132 (4), of the Constitution of Uganda.
88 "Court Martials are not parallel to civil courts," The *Monitor*, April 11, 2002
89 See "Operation Wembley on Trial," The *New Vision*, September 4, 2002.
90 See "Operation Wembley slammed," The *New Vision* Newspaper, September 12, 2002.
91 "Operation Wembley on Trial," op cit
92 Ibid.
93 The Committee began its work in October 2001. The information was derived from an interview with Mr. Peter Edopu, Lawyer working with the Uganda Law Reform Commission and who represented the Commission on the Committee.
94 See *"How the Monitor reopened,"* The *Monitor*, October 10, 2003; *"Monitor Reporter finally charged, bailed,"* Ibid, *"Public Reacts to Monitor closure"*, Ibid; *From seven hour search to seven – day closure*, Ibid; *"Reflections on Dark Oct.10,"* Ibid.
95 Article 19, Universal Declaration of Human Rights.
96 *Constitutional Law and Freedom of the Media*, Frederick W. Jjuuko, unpublished.
97 Article 29(1) of the Constitution of the Republic of Uganda
98 Ibid, Article 41.
99 The Act was passed on May 20, 2002 by Parliament.
100 "The Suppression of the Terrorism Bill vis a vis other laws and their practicability," A Paper presented by Florence Nakachwa, lecturer at Law Development Centre, at the Workshop on the "Suppression of the Terrorism Bill," organised by the Law Society in conjunction with the Konrad Adenauer Foundation, December 14, 2001, at Hotel African , Kampala.
101 "MPs pass law on terror," The *New Vision*, March 21, 2002.
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103 The MP proposed that the President remain in power after the mandated term limit to accomplish his vision. Ref. "Cadres" want Museveni, The *New Vision*, November 29th 2002, and Mukono backs 3rd M7 Term, The *New Vision* December 29th 2002.
104 The Minister for the Presidency Prof. Gilbert Bukenya argued that Ugandans have the powers to change the Constitution, "Now we wrote our own book. Can't we change it. "Ref Constitution can change to allow Museveni third term," The *New Vision* Dec 23rd, 2002. Also see The *New Vision* Dec 14th 2002, "Sebunya wants 3rd Term for Museveni." The Minister was overt in starting that "It is only during President Museveni's regime that I have been able to make some money if Museveni relinquishes power, how will I survive."
105 See " Remove presidential terms – Nkangi,"The *New Vision*, September 13, 2002.
106 Ibid.
107 See "Movement shall not hand over power easily – Museveni", The *Monitor*, March 15, 2002.
108 Ibid.
109 See "Government warns DP Youth over Kenya elections," The Monitor, December 2002.
110 See *Multiparty Democracy & Political Change: Constraints to Democratization in Africa*, (ed) John Makum Mbaku & Julius O. Ihonvebere, 1998, Ipswish Book Co, Suffolk.

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3

Constitutional Development in Tanzania in 2002

Sengondo Mvungi

Introduction

The United Republic of Tanzania is a union of the Republic of Tanganyika and the People's Republic of Zanzibar. They were two formerly independent states. The Republic of Tanganyika was a German colony between 1884 and 1918 and became a colony of the United Kingdom of Great Britain as a mandated territory under the League of Nations up to 1945. After World War II, Tanganyika became a trusteeship territory under the United Nations. It remained under Great Britain until 1962, when she became an independent sovereign republic.

From 1832, Zanzibar was a colony of the Sultanate of Oman. In 1878, the Sultan of Zanzibar signed a protection treaty with Great Britain and in 1914, Zanzibar became a virtual colony of Great Britain with the Sultan acting as its local ruler. In October 1963, Zanzibar became a sovereign Arab Sultanate. African Zanzibaris overthrew the Sultan on January 12, 1964 in a revolution that ended Arab colonialism. Zanzibar moved into a union with Tanganyika on April 26, 1964 to secure the revolution.

Tanzania is neither a federation nor a unitary state. The treaty establishing the Union (known as Articles of the Union) gave Zanzibar a separate executive, legislature and judiciary in respect of non-union matters in and for Zanzibar. Tanganyika's non-union matters were put under the jurisdiction of the union. This gave the new state a quasi-federal Constitution that is a source of controversy to date. The new state was governed as a one-party state without a constitutionally guaranteed Bill of Rights.

In 1984, both the Zanzibar Constitution and the Constitution of the United Republic of Tanzania were amended to include a Bill of Rights. The Union Bill of Rights was made unjusticiable for a three-year transitional period during which the union government was supposed to amend or repeal all laws contrary to the Bill of Rights. In practice, this did not happen. In July 1992, following a constitutional debate and recommendations by the Presidential Commission on Multiparty Democracy led by Chief Justice Francis Nyalali, the union Constitution was amended to abolish the one-party state and put in place a multiparty state. Tanzania conducted its first multiparty elections in October 1995 without taking measures to level the playing field for new political parties.

The structure, composition and procedures for the appointment of members of the Electoral Commission remained the monopoly of the ruling Chama cha Mapinduzi (CCM) party. This party retained the resources it had accumulated under one-party rule. In elections reminiscent of David and Goliath, the nascent opposition won 38 per cent of the presidential vote and 20 per cent of seats in the union Parliament. Thus Tanzania saw the opposition take seats in Parliament for the first time since the nation was founded.

The presidency was contested by four candidates: Benjamin Mkapa for CCM; Augustine Mrema for National Convention for Construction and Reform (NCCR); John Mageuzi Cheyo for UDP; and Professor Ibrahim Lipumba for the Civic United Front (CUF). Mkapa emerged the winner with 61.8 per cent of the vote – a win attributed to the influence of the first President and late father of the nation Mwalimu Julius Nyerere and rigging conducted by state security agencies.

Prior to the union's general elections, Zanzibar held its Presidential and House of Representative elections whose results were controversial. Salmin Amour, the CCM presidential candidate for Zanzibar was elected with 50.5 per cent of the vote in an election which the opposition CUF alleged was rigged. CUF refused to accept the election results and boycotted the House of Representatives. The dispute continued for three and half years and was only resolved in mid 1999 when the mediation initiative of the Commonwealth's Secretary General bore fruit in the form of a peace accord known as Muafaka I.

Five years later, in the October 2000 elections, similar rigging took place. The election results showed the opposition winning five per cent of seats in the Union Parliament. In Zanzibar, the peace accord broke and CUF again mounted a standoff. This led to the January 26-27, 2001, demonstrations in Zanzibar and Pemba. Again mediation was conducted, this time by local organisations, and a second peace accord known as Muafaka II was concluded between CCM and CUF on October 10, 2001.

The Constitutional Structure of the State in Tanzania

The Articles of the Union (1964) and the Constitution of the United Republic of Tanzania, 1977, establish three jurisdictional areas, namely: two separate and concurrent jurisdictions for matters regarding Zanzibar and Tanganyika respectively; and the union jurisdiction for matters regarding the United Republic of Tanzania. Non-union matters regarding Zanzibar are in the hands of a separate legislature and executive in Zanzibar. No similar structure is provided for non-union matters regarding Tanganyika. Instead, these have been placed in the hands of the Government of the United Republic of Tanzania. This makes Tanzania a quasi-federation. In effect, there are three separate jurisdictions, with two governments to handle them.

The judiciary in Tanzania is reflective of this quasi-federalism. Zanzibar has separate subordinate courts and a High Court with concurrent jurisdiction to that of the subordinate courts and a High Court of Tanzania. The Court of Appeal of Tanzania has jurisdiction to hear appeals from both High Courts. Thus the judiciary is a quasi-union matter. The judiciary in Zanzibar is divided into two parts, namely the ordinary magistrate's courts and the Kadhis' courts. The former includes the local, district and resident magistrates' courts. The High Court is both an appellate court and a court of first instance depending on the subject matter and it's pecuniary value. The High Court has final jurisdiction to hear appeals from the Kadhis' courts.

In every other respect, Tanzania has unitary characteristics. The union administers 26 regions and more than 120 districts. Every district is further divided into wards and villages. Local Government structures end at the district level.

The Tanzanian Economy

Tanzania is an agricultural country dependent upon the export of coffee, cotton, sisal, tea and other non-traditional export produce for its foreign exchange earnings. The agricultural sector provides 85 per cent of the employment. Drops in producer prices over the years have reduced real incomes for the rural population, to the extent that over 75 per cent of the rural population live below the poverty line and 40 per cent live in absolute poverty.

Structural adjustment policies introduced in the late 1980s led to the privatisation of the public sector and opened up the country to foreign investments. The expectations were that this would yield results in the form of economic growth, increased employment and increased incomes. The contrary has been the case. Privatisation of government-owned enterprises to foreign investors has left local entrepreneurs with empty hands. Retrenchment in both the public and private sectors has thrown thousands of workers onto the streets without the means to earn a livelihood. The tax burden, aggravated by foreign debt, continues to weigh heavily on the shoulders of ordinary Tanzanians, whose tax payments are not matched with corresponding powers to hold the government accountable for taxpayers' basic needs.

More Tanzanians are therefore poorer now than they were two decades ago. The job market is shrinking as the laying-off of workers in privatised companies continues without efforts being mounted to create new jobs elsewhere. The assumption that laid-off workers will integrate themselves into the rural economy is neither here nor there since they are ill-prepared to fit into the rural economy. Most workers are urban dwellers without rural connections. In any event, the rural economy has collapsed due to falls in commodity prices and the poor supply of inputs and infrastructure necessary for a modern agricultural sector.

The mining sector is also recording negative returns. A poor legal and policy framework has resulted in foreigners grabbing lucrative mining concessions at the expense of local people, for which the government is only paid a three per cent royalty fee, excluding tax. In addition, the lack of monitoring capacity in order to stem smuggling has made Tanzania a haven for outlaws.

The Lawyers' Environmental Action Team (LEAT) has reported gross violations of human rights in mining areas in Shinyanga and Mwanza. These include uncompensated acquisition of land from locals and burying local miners alive during mine closures undertaken to clear locals away from land given to foreign mining companies. In Arusha's Mererani area, where the semi precious stone Tanzanite is mined, small miners have been forcefully removed from mining concessions under a South African Mining Company : (AFGEM). A court case filed by small miners is still *sub-judice* in the High Court. Problems in the mining sector indicate failure by the government to act as a custodian of the people of Tanzania in exercising sovereignity over their natural resources. This has stunned and angered many Tanzanians and created a wave of anti-foreign investment sentiment. The effect of these economic policies has been stagnation and deterioration of the economy. Absolute poverty is growing and productivity, income and life expectancy levels are falling. For example, the average life expectancy level has reduced to 45 years. The situation of economic, social and cultural rights is becoming critical.

Tanzania's Cultural and Social Life

The cultural and social life of a country depends on its political and economic systems. Tanzania boasts that peace and tranquillity are hallmarks of its political culture. For a country occupying 630 square kilometres and composed of 123 different ethnic groups, each speaking its own language and with a distinct culture, peace and tranquillity are not empty boasts. There is religious diversity as well, with Christianity, Islam, Buddhism, native African religions and atheism being practised. Tanzanians owe this peace and tranquillity to the late President Nyerere, who constructed a coherent nation-state. The common language Kiswahili, has also helped knit people lacking ethnic linkages together.

The Constitutional Guarantee of Human Rights in Tanzania

Tanzania did not have a Bill of Rights in its Constitution at independence. It introduced a Bill of Rights in 1984, two years after the African Charter on Human and Peoples' Rights (ACHPR) was adopted by African Heads of State and Government in Nairobi, Kenya. Independence negotiations in the early 1960s excluded a Bill of Rights.[1]

The English Dominion Act, 1961, that is frequently wrongly cited as the independence Constitution of Tanganyika did not contain a Bill of Rights.[2] Similarly, the Republican Constitution that is the independence Constitution of Tanganyika did not contain a Bill of Rights.[3] There was apprehension by nationalist leaders of the time that the colonial judges who then manned the judiciary would use the Bill of Rights to frustrate the government's efforts to bring economic development to the people. Nyerere feared that a judiciary composed of European judges would pose a threat to development.

Nyerere's refusal to include a Bill of Rights in the Constitution both at independence and during the making of the Republican Constitution in 1962 has been subject to criticism.[4] Nyerere's reasons were not sufficient to deny a Bill of Rights. Critics will not absolve Nyerere for ruling as the British had done. The new state inherited authoritarian laws that Nyerere made no effort to change. As in other newly independent African countries, nationalists anchored governance upon authoritarian foundations.[5]

However, in 1984, a Bill of Rights was introduced into the Union Constitution by way of a constitutional amendment modelled on the ACHPR.[6] This was as a result of public demand from civil society, including the Tanganyika Law Society. Nyerere conceded to public pressure because it was clear that a Bill of Rights would be needed to protect individual freedoms in the post-Nyerere period. For Nyerere had already ensured his government avoided human rights violations without having human rights legislated. When, for example, violations surfaced, as they did in 1975 with the Shinyanga/Mwanza killings of innocent citizens by state agencies on allegations of witchcraft, Nyerere's personal intervention pacified the survivors. Nyerere's governance derogated from human rights in several respects, but subsequently to his era, constitutional powers seemed a better guarantee against bad governance.

The 1984 Bill of Rights

Tanzania introduced a Bill of Rights into its Constitution through the Fifth Constitutional Amendment Act, 1984. The guaranteed rights were not justiciable immediately. Their justiciability was put off for three years during which the government was supposed to amend or repeal

laws that contravened the Bill of Rights. The law that suspended justiciability of the Bill of Rights was the Constitution Consequential, Transitional and Temporary Provisions Act, 1984.

The Bill of Rights was tailored upon the Universal Declaration of Human Rights (UDHR) while incorporating 'duties' from the ACHPR. Important provisions include the right to equality (Articles 12-13), the right to life (Articles 14-17), the right to freedom of expression (Articles 18-21) and the right to work (Articles 22-24). The Bill of Rights, however, also contains claw-back clauses that take away the guaranteed rights. Such clauses include phrases such as "… in accordance with law" (Articles 14 -15(2) (a), "… without prejudice to the relevant laws of the land," (Articles 18(1) and 19(2) and "… subject to the laws of the land," (Article 20(1). These claw-back clauses depart from the substance of rights guaranteed by the UDHR. They erode, water-down or restrict the substance of the rights guaranteed.

Fortunately, the Tanzanian courts have shown vigilance in making sure that claw-back clauses do not prevail. In Pumbun vs Attorney General (1993),[7] the Tanzanian Court of Appeal held that claw-back clauses must be strictly construed "otherwise the guaranteed rights under the Constitution may be rendered meaningless by the use of such derogative or claw-back clauses of the very Constitution."

Human rights can also be understood in the context of international commitments the state has bound itself to respect. Tanzania has not ratified certain international human rights instruments and these unratified instruments constitute derogation from the international human rights regime.

Ratified International Human Rights Instruments

Tanzania has signed and ratified international human rights instruments including the following:

- the UDHR, 1948;
- the International Covenant on Civil and Political Rights (ICCPR), 1966;
- the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966;
- the International Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), 1979;

- the Convention Relating to the Status of Refugees (CRSR), 1951;
- the International Convention against Apartheid in Sports, 1985;
- the African Chapter on Human and Peoples' Rights (ACHPR), 1981;
- the International Convention on the Rights of the Child (ICRC), 1989;
- the Rome Statute establishing the International Criminal Court (ICC), 1999.

Unratified International Human Rights Instruments

Tanzania has not signed and ratified the following major international human rights instruments:

- the International Convention against Torture and other Cruel, Inhuman or Degrading treatment or Punishment;
- the Optional Protocol to the ICCPR;
- the Optional Protocol to the ICESC.

The backlog in the process of signing, ratification and incorporation of international human rights instruments is not a result of state policy but a consequence of ineptness. This conclusion is supported by the fact that none of the unsigned or unratified instruments constitute a challenge to state policy.

Introduction of Multipartism

In 1992, a Presidential Commission was established to study the possibility of establishing a multiparty system headed by Chief Justice Francis Nyalali. The Commission recommended the introduction of a multiparty system and the overhaul of the legal system by, *inter alia*, scrapping 40 laws in the statute books that violated human rights.[8] The government acted on the first proposal and introduced a multiparty system. It abolished the one-party political system fearing that the democratic movement then in the minority (according to the commission's findings), might ultimately become a majority and overthrow the ruling party.

The government was, however, slow to change the laws to conform to human rights standards. Few of the 40 laws have been repealed. In fact, more such laws have been enacted since the submission of the Commission's report. The Law Review Commission studied the 40

laws and unfortunately proposed their retention on the grounds that they were still relevant and needed. Additional laws were passed to satisfy the growing need for a more repressive state as globalisation impacts on the economy. In less than ten years, the government has privatised the entire public sector. Four-hundred and fifty public companies have been sold, some at give-away prices. Over 200,000 workers employed by these companies have been laid-off with minimal terminal benefits.

Enforcement Procedures

The Bill of Rights provided for in the Constitution of the United Republic of Tanzania, 1977, and the Constitution of the Revolutionary Government of Zanzibar, 1984, are enforceable through constitutional petitions to the High Court of the United Republic of Tanzania and the High Court of Zanzibar respectively. Article 26(2), of the union Constitution provides for the right of every person, in accordance with procedures provided by the law, to take legal action to ensure the protection of the Constitution and the laws of the land. This Article thus vests *locus-standi* in constitutional litigation in Tanzania. Eligibility to this right is universally given in that it is not restricted to citizens alone.

Article 30(3), gives every person whose rights have been or are likely to be infringed upon by any person anywhere in Tanzania, the right to institute proceedings in the High Court. Article 30(4), grants upon the High Court jurisdiction to hear and determine any matter brought before it relating to the violation of rights provided for in the Constitution. Parliament is vested with powers under Article 30(4)(a), (b) and (c), to enact laws providing for and regulating procedures for instituting and hearing petitions under the Bill of Rights. The Constitution of Zanzibar contains provisions that are *mutatis mutandis in pari materia* with the provisions in the Union Constitution.

The procedure for presenting a constitutional petition under the Union Constitution is further regulated by the Basic Rights and Duties (Enforcement) Act, 1994, which provides that the manner of instituting proceedings for the enforcement of basic rights shall be by way of a petition accompanied by an originating summons. The matter must first be mentioned before a single judge who shall determine whether

the petition is frivolous or not. If not, then the matter is placed before a panel of three judges who shall hear and determine the matter.

This long procedure has made human rights litigation in Tanzania a nightmare. It makes it difficult for individuals to defend their rights. It is clear that the provision laying down the condition of initiation of court action by way of a petition accompanied by an originating summons is duplex. Both a petition and an originating summons are instruments that can be used to move a court to act upon a matter brought before it. Since they are both modes of instituting civil action, only one of them should be used, not both.[9] The procedure of placing the petition before one judge for a preliminary hearing and only then committing it to a hearing by a panel of three judges is similarly a delaying tactic. Tanzania has few High Court judges. It is therefore difficult to appoint a panel of three judges. There would be nothing wrong with a human rights matter being heard by only one judge. Taking into account chronic delays in hearing and determining cases in Tanzania, this provision is unrealistic.

Developments in 2002

Civil and Political Rights

This report now turns to human rights issues that occupied Tanzania in 2002. In accordance with the ICCPR, 1966, civil and political rights include rights such as the right to self-determination, life, freedom from torture or cruel, inhuman or degrading treatment or punishment, liberty and security of person and to have the inherent dignity of the human being recognised. Other rights include the right to freedom of movement, equality before the law, presumption of innocence, freedom from unlawful or arbitrary interference with one's privacy, freedom of thought, conscience and religion, freedom of expression, peaceful assembly, freedom of association and minority rights. Many of these rights are incorporated in the Union Constitution. Only few of these rights require reporting on in 2002, as narrated below.

The Right to Participate in the Government of One's Country

Political Crisis in Zanzibar

Ever since the October 1995 elections, Zanzibar has been in a political crisis. The elections saw Salmin Amour of CCM become President of Zanzibar amidst protests by the opposition, led by the main opposition party in Zanzibar, the CUF. The CUF alleged that CCM rigged the elections and stole victory from its candidate, Seif Sharrif Hamad. The protests degenerated into a conflict between the ruling CCM and the CUF. After the unrest, the two parties began negotiations under the Commonwealth Secretariat's mediation. Their discussions culminated in the signing of a peace accord on June 9, 1999, now known as Muafaka I. The peace accord outlined measures to resolve the conflict. The peace accord was not, however, respected.[10] The two parties thus entered into the elections of October 2000 in a politically tense environment, similar to or worse than that of 1995. The elections brought the CCM candidate, Amani Karume, to power. The CUF did not recognise the results because it claimed that CCM had rigged the elections again. There were allegations of mismanagement of voter registration and campaigns. International observers witnessed police interference in the campaigns, voting and in the counting of votes.[11]

The CUF therefore demanded a nullification of the results and fresh elections under an independent Electoral Commission. These demands fell upon deaf ears and as a result the CUF organised the January 27, 2001 demonstrations that ended in a bloodbath. Scores of people were killed by the police and hundreds others injured. Many fled to Mombasa, Kenya as refugees. Following calls for the peaceful resolution of the conflict mounted by civil society, the two parties once again sat to find a solution to the crisis. Their discussions resulted in a second peace accord, signed on October 10, 2001 referred to as Muafaka II. It outlined what needed to be done to end the conflict, including the reform of the Electoral Commission, reform of the Constitution and electoral laws, the formation of an independent inquiry into the January 26-27, 2001 crisis and the reform of law enforcement agencies. The peace accord included a schedule of implementation.

According to this schedule, 2002 was concerned with implementation of the peace accord. Most of the steps to be taken were the responsibility of the government. In the course of the year, the government implemented a number of decisions reached in the peace accord. These included: having the Zanzibari Constitution provide for restructuring of the Zanzibar Electoral Commission (ZEC) to include two members from the CUF; the formation of a presidential commission to inquire into the causes and impact of the police killings; and the provision of amnesty to the CUF's, Hamad, who had been dismissed from the public service. Hamad was the former Chief Minister of Zanzibar and a member of CCM. He was dismissed for allegedly acting against the Union. He lost his position and membership in CCM and was incarcerated – a human rights violation. Under the terms of Muafaka II, Hamad regained his pension and emoluments as former Chief Minister. Meanwhile, the commission of inquiry into the January 26-27, 2001 police killings was appointed and submitted its report to the Union President. The report was made public in November 2002. Sadly, it justified police violence and does not condemn the excessive use of force by the police, and it sets out neither the right to accountability nor the right to compensation of survivors.

The appointment of two members of the CUF into the ZEC was accepted by both parties, although it left out other parties. This may create tension among parties not involved in Muafaka I and II. The politics of exclusion led to the political crisis and the half measures that included the CUF but omitted other parties created a vicious circle. The fact is that the peace and tranquillity of Zanzibar is not only a CCM/CUF affair but the concern of all Tanzanians.

The peace accord also provided for the formation of a Presidential Commission to oversee the implementation of the peace accord. This Commission was appointed and is in business. However, other matters remain to be implemented and the government seems to be in no hurry to meet the deadlines. This may also create tension. One must strike when the iron is hot. In political and legal terms, the CUF came out of Muafaka II empty-handed. This, compounded with the failure to adhere to the schedule for implementation, may make recalcitrant elements rock the boat again even though the government has blamed the lack of funds for the delay. However, the negotiations that led to Muafaka

II were long and costly to the taxpayer. It makes no sense for government to say that it has no funds for the implementation of the peace accord so late in the day.

It is true, however, that some difficulties emerged during the process of implementation of Muafaka II. For example, Muafaka II included a provision requiring the President to appoint two opposition members onto the seven-person ZEC on the advice of the head of the opposition in Parliament. But, other than CCM, no party had members in the House of Representatives. The CUF had lost its 17 members as a result of boycotting three consecutive sessions of the House. A new amendment to the Constitution of Zanzibar had to be made to enable the President to appoint such members on the advice of political parties where no official opposition exists.

That notwithstanding, this report notes a lack of seriousness on the part of CCM and its two governments. By December 2002, the following had been implemented in accordance with Muafaka II:

- the ZEC was restructured with the appointment of two members from the CUF;
- a permanent voters' register was established;
- the Constitution and electoral laws of Zanzibar were reviewed;
- the CUF was involved in governance;
- a commission of inquiry into the events of January 26-27, 2001 was established;
- refugees who had fled to Mombasa, Kenya were re-called.

The following are yet to be implemented:

- reform of the judiciary and other law enforcement organs;
- provision of civic education to Zanzibaris;
- formation of a coalition government between CCM and the CUF;
- compensation of survivors of the January 26-27, 2001 police killings;
- establishment of a secretariat for ZEC;
- review of union laws relating to the peace accord;
- establishment of the public service media.

Thus 2002 was the year of partial implementation of Muafaka II. The peace accord created a more positive political climate in Zanzibar. Harassment, unjustified detentions, unjustified killings,arson, discrimination on political grounds and so on were absent in 2002.

This report notes, however, that despite its achievements, Muafaka II left out many issues at the heart of the political crisis. The question about the legitimacy of the revolution requires a broader context than that provided by CCM and the CUF. And, as mentioned above, like Muafaka I, Muafaka II excluded other opposition parties thus reducing the political crisis to a CUF/CCM affair. The narrow benefits accrued by the CUF in Muafaka II resulted from this narrow participation. Negotiating with CCM required broader participation than the CUF could offer. Reform of the ZEC, the judiciary, electoral laws, the Constitution, the Political Parties Act and the public service media required broader participation and a national consensus that could not be achieved by meetings behind closed doors.

The right to take part in governance is a fundamental right that can not be abridged. The behaviour of both the CUF and CCM suggests that, as far as Zanzibar is concerned, any conflict requires agreement between them and no one else. This has attracted criticism from citizens who are not members of these two parties and other parties in Zanzibar. Thus, instead of increasing democracy, Muafaka I and II have sent the signal that the CUF is being coopted into CCM. This signal is highlighted by the fact that the government paid the CUF to enable it to hold its Annual General Meeting.

The Right to Political Association

In 2002, two new parties, namely the Democratic Party (DP) and Chama cha Demokrasia Makini (CDM) were registered by the Registrar of Political Parties. The application for registration of DP had been rejected on several occasions before for non-compliance with legal requirements. The DP is headed by Christopher Mtikila, who has emerged as a "one-man-show" in Tanzanian politics. In 1992, when multipartyism was introduced, Mtikila emerged as a political activist against the government. He filed several court actions to promote human rights. In one of his most famous actions, Mtikila moved the High Court of Tanzania to declare that a candidate not belonging to any political party can contest for the presidency. However, soon after this decision, the Parliament amended the Constitution to defeat the spirit of the High Court decision and the right to participate in governance. Mtikila thus could not benefit from the High Court's decision

to contest for the presidency in the 1995 elections. In the 2000 elections, Mtikila was in jail after a court convicted him of uttering seditious words when the registration of his party was in progress. Not long after his party was registered, Mtikila was arrested for allegedly uttering words abusive to President Mkapa and Nyerere. A few days after he was released on bail, Mtikila was re-arrested and charged with utterances he had made in 1999 against Nyerere.

Right to a Fair Trial

The right to a fair trial is provided for under Article 13 of the Union Constitution. For this right to be realised, the trial body must be impartial and knowledgeable. A person whose right is at stake must be given adequate opportunity to be heard. This implies the rights to equal treatment before the law; free access to ordinary courts of the land; be presumed innocent until proved otherwise by the courts of law; legal representation; be heard fully by an impartial court and to a speedy trial.

The Right to Equality Before the Law

This right has not been established by law. Although Article 13 (1) of the Union Constitution provides for this right, laws like the Government Proceedings Act, 1967, gives the state and its agencies special rights and treatment. One still has to give three months notice to the Attorney-General before instituting a matter against the state or any public body.

The Right to Free Access to the Courts

This is another dead provision of the Union Constitution. Article 13 (1), goes further to declare that every person has the right to be protected by the law and to get equal justice without discrimination. This provision thus implies the right to free access to the courts. But the Union Constitution vests jurisdiction to hear rights matters in the High Court.[12] The year 2002 passed without an increase in High Court registries. There are only eleven High Court registries in the country. Furthermore, not all existing High Court registries have sufficient judges. With the exception of Dar es Salaam, Mwanza, Arusha, Tanga and Tabora, no High Court registry in mainland Tanzania has more than two permanent judges.

This report has already pointed out that the Basic Rights and Duties Enforcement Act, 1994, provides that rights cases have to be heard by a bench of three High Court judges.[13] This means that such cases must wait until judges are transferred from one High Court registry to another to constitute a full bench. This situation, coupled with the shortage of funds for judges' travel, is bad news for human rights litigation. The results are that many people who would have otherwise instituted proceedings in court opt not to.

The Right of Presumption of Innocence

The Penal Code, Cap 16, of the Laws and the Criminal Procedure Act, still retains non-bailable offences. Although Article 13(6)(b), of the Union Constitution provides that no person shall be treated as a criminal until declared guilty by a competent court, denial of bail in offences like sedition, treason, murder and robbery with violence, flies in the face of this provision.

The Right to Legal Representation

This right is not provided for in the Union Constitution although accused persons are allowed to be represented by legal counsel of their choice. The Legal Aid Jurisdiction of Courts Ordinance, 1962, provided for the Chief Justice to give dock briefs to practising advocates to represent accused persons charged with murder or treason. There is, however, no legal aid scheme.

The Right to be Heard

This right is provided for in Article 13(6) of the Union Constitution. It includes observance of the rules of natural justice in the hearing of cases and the right of appeal. However, the right of appeal is theoretical because the Court of Appeal is composed of only a maximum of seven justices of appeal. The mortality rate outstrips the rate of appointment of new justices to fill the vacant positions. In 2002, the Court of Appeal was composed of only six justices of appeal.

The Right to a Speedy Trial

This right is non-existent. Many cases filed remain pending for years due to the shortage of judicial personnel or the non-completion of investigations by the police. The local courts that handle the bulk of

administration of justice are manned by untrained personnel. Most magistrates at this level are Form Four leavers with a Certificate in Law. District Courts are manned by resident magistrates who hold a Bachelor of Laws degree. But some District Court magistrates have only a Law Diploma that is lower than their jurisdictional requirements. Furthermore, the government has not secured magistrates to fill all vacancies. As a result, the shortage of magistrates continued in 2002, despite attempts to fill some positions. According to the Chief Justice, there are only 640 magistrates in Tanzania, while the required number is 1,105,[14] the gap being 465 or 41.9 per cent. The shortage of judicial officers has led to delays in justice. And, as the maxim goes, "justice delayed is justice denied."

Delays are also occasioned by the non-completion of investigations by the police. There was no improvement in investigations in 2002. Reasons commonly advanced by the prosecution include the lack of transport and personnel. In some cases, suspects under police custody are not taken to court on the dates fixed for the hearing. Consequently, they end up being denied bail. On April 20, 2002, suspects remanded in Segerea Remand Prison went on hunger strike in protest against delays in their cases.[15]

Denial of Justice through Corruption

The working conditions of judicial officers are appalling. Their salaries are too low to meet the cost of living and the court facilities are dilapidated or absent. The government has done little to ensure that magistrates get decent accommodation, transport, meals and other requirements of a decent life. The result is devastating, as the judiciary is riddled with corruption. Efforts to investigate and net corrupt judges and magistrates so as not to tarnish the entire judiciary have not borne fruit. The question of corruption in the judiciary has been reduced to allegations and suspicions. This has undermined the judiciary and reduced the work done by honest judicial officers to ashes. As the saying goes, a hungry and needy person cannot be a just person. To expect a hungry person to be a fighter for justice is to expect too much from such a person.[16] Although other factors engender corruption, insufficient personal emoluments cannot be ignored.

Independence of the Judiciary

In 2002, the judiciary demonstrated its resolve to be independent. Two constitutional decisions of the Court of Appeal given in a span of nineteen days portray this. On February 14, 2002, the Court of Appeal, in the case of Julius Ishengoma, Francis Ndyanabo vs Attorney General,[17] invalidated Section 111(2) of the Elections Act, 1985, as amended by Act Number 4 of 2000.

The court held that the Tanzania shillings 5,000,000 deposit imposed by this provision upon elections petitioners as security for costs was excessive and unreasonable. The court declared that the provision denied petitioners of their right to free access to justice. This decision was hailed by the public as a landmark decision. But some government officials did not like it. The Speaker of Parliament, for instance, reacted against the decision, arguing that the court had "usurped" the power of the legislature. He said that the legislature's competence to make or unmake laws is not limited by anybody and anything except by legislators' common sense and wisdom.[18] The Speaker clearly forgot the Constitution is the fundamental law to which all other laws must conform. It is the duty of the courts to interpret laws too, so that they are consistent with the Constitution.

The reactions by some Members of Parliament and the executive notwithstanding, the Court of Appeal went forward a week later to declare another Act unconstitutional. By its decision of March 5, 2002, the court struck out Section 4(2) of the Legal Aid (Criminal Proceedings) Act, 1969, for setting inadequate payments to advocates attending to dock briefs by court assignments. This was in the case of Judge in Charge of the High Court of Tanzania, at Arusha vs N I N Munuo Ng'uni.[19]

The executive has not taken these decisions kindly. In its October session, the government tabled a Bill re-enacting the same provision in the Elections Act that the Court of Appeal had knocked out in Ndyanabo's case. The provision is similar in substance to the provision the court had declared unconstitutional on February 14, 2002. This is contrary to the principle of independence of the judiciary. The government should respect judicial decisions, including those it dislikes.

The Right to Life

Article 14 of the Union Constitution provides for the right to life and protection from society. The right to life is not absolute as it is subject to provisions of other laws.

The Death Penalty

The Penal Code provides for the death penalty.[20] Attempts by the High Court to declare this provision unconstitutional in the case of R vs Mushi Dominic[21] were overruled by the Court of Appeal that held that the death penalty is not unconstitutional because it is saved by the provisions of Article 30 of the Union Constitution.

Although the High Court and the Court of Appeal continued in 2002 to sentence capital offenders to death by hanging, it is reported that, in 2002, no death sentence was executed. Between 1995 and 2002, President Mkapa commuted to life imprisonment 100 death sentences imposed on murder convicts.

The problem has been the lack of education and sensitisation on the need to abolish the death penalty. The public is still inclined more towards retributive sentences than towards alternative measures aimed at correction. Convicts on death row live in perpetual fear and psychological torture.

Child Dumping

Incidents of child dumping continued to feature in the media in 2002. Child dumping is an indicator of falling standards of living. Increasing poverty has meant that many Tanzanians cannot make ends meet. The government has not instituted social security programmes for pregnant mothers intended to secure their welfare during and after pregnancy. The time has come for the government to establish such programmes. This would curb child dumping.

Most children who are dumped are born out of wedlock. There is a direct link between the economic deprivation of unwed mothers and child dumping. Since neither fathers nor the government is statutorily bound to ensure the child's welfare, unwed mothers find the burden of the child's upkeep too heavy to bare. Yet, the Affiliation Ordinance has not been amended since its enactment in 1953. This law requires fathers of children born out of wedlock to pay for the maintenance and

education of such children. The rate fixed by the law is not more than Tanzania shillings 100 per month. This makes a total of Tanzania shillings 1, 200 per year (US$0.10 per month or US$1.2 per year). This rigidity defeats the purpose for which the law was enacted. Its continued life in the statute books is a mockery of the rights of the child.

The Commission on the Change of Laws Relating to Children, which the Law Reform Commission appointed in 1986, submitted its report eight years ago and recommended the amendment of this law. It is not clear why the government has not amended it to accommodate the changing economic circumstances.

The Mwembechai Killings

Two people were shot dead at Mwembechai in Dar es Salaam following a police clampdown on peaceful demonstrators. The allegedly Muslim demonstrators were protesting alleged government interference with their right to freedom of worship. The police used live bullets against them, killing two and injuring several others. The use of live ammunition against peaceful demonstrators was a human rights violation. Later, it turned out that some demonstrators were Christians, a fact that lent credence to the view that religion was used to express deeper social unrest whose roots are found in deepening poverty.

The State's Failure to Maintain Law and Order

In 2002, there were numerous media reports of deaths resulting from robbery. These reports are a clear indication that the Police Force is failing to contain crime. The result is so-called "mob justice," arising from the lack of public confidence in the ability of the police to deal with suspects. This is an abuse of the rule of law by the public, who take the law into their own hands.

The police force is badly equipped, trained and remunerated. Civil society and Parliament have raised concern regarding the equipping, training and remuneration of the police force. For these weaknesses contribute to increased corruption in the police force. This situation worsened in 2002, prompting some legislators to propose that the police force should be disbanded.

The response to this suggestion by the Inspector General of Police (IGP), Omar Mahita, was bitter. Although he admitted the failure of

the police to deal with crime, he attributed this failure to lack of funds and facilities. The IGP called on Parliament to allocate more financial resources to the police instead of allocating money to itself. An exchange of words ensued which enabled the public to participate in a debate that revealed that much remains to be done to secure the rule of law.

Presumption of Innocence

In accordance with Article 15(1) and (2), of the Union Constitution, every person has the right to freedom and liberty and is presumed innocent until pronounced guilty by a competent court of law. The police and prisons departments can only execute punishment imposed by the courts. They cannot make judgement by themselves and punish suspects. However, in 2002, there were many cases reported where the police allegedly took the law into their own hands. These cases included the beating of suspects and the use of excessive force during arrest, investigation and custody.

Human Rights Violations by the State

In mid-2002, it was reported that prison officers beat up city bus conductors in Dar es Salaam for wearing uniforms similar to those worn by prisons officers. This was condemned by the public. A similar incident took place on September 8, 2002, when soldiers from Mgulani National Service invaded Kariakoo and forcibly undressed the civil militia of Ilala Municipality for wearing uniforms that resembled those worn by soldiers and left the militia in their underpants!

On October 1, 2002, the media reported that members of the Tanzania People's Defence Forces had invaded Kunduchi Police Station on the night of September 28, 2002, to liberate from police custody a soldier who had allegedly been caught in *flagrante delicto* with somebody else's wife.[22] The soldiers allegedly ordered the police officer on duty to release the imprisoned soldier. The register of detainees showed that no such soldier was incarcerated in police custody. The soldiers, having discovered the futility of their mission, threatened to beat up the policemen who then ran away leaving the military in control of the police station. The soldiers then broke into the remand prison where suspects are kept. When they could not see

the detained soldier, they shifted their anger to lamps in the police station and civilians living near the police station. According to the media, several residents were beaten up and property in the surroundings, including some cars, were damaged. **Majira** identified two cars with registration numbers TZL 7733 and TZM 6853 as some of the damaged property.

On October 29, 2002, about twenty soldiers from the same camp attacked a bar owned by Willy Lemma and beat him and his customers. They also damaged a television set in the bar. According to **Majira**, the soldiers had been angered by reports that implicated them in adultery and fornication.

Treatment of Suspects and "Mob Justice"

It is reported that, in 2002, the police harassed and tortured suspects and in other instances, used excessive force resulting in deaths. There were also reports of "mob justice," by the public. On March 4, 2002, an unidentified person was stoned to death by a mob because he was allegedly involved in breaking into a shop at Mbagala Kimbangulile in Dar es Salaam.[23] On March 24, 2002, Rajab Seleman (20), was marched naked in Kikwajuni in Zanzibar before being beaten to death by a mob because he was allegedly a thief. People who knew him had tried to stop the mob by informing it that he was mentally incapacitated.[24] On May 1, 2002, William Inyasi and Roisi Mzee were stoned to death on suspicion that they had taken part in theft.[25] On May 9, 2002, Daniel Theodore (22), was beaten to death on allegations of arson.[26] On July 22, 2002, it was reported that an unknown person was burnt to death by a mob for allegedly attempting to steal.[27] Other mob justice victims include three persons killed in Iringa and Shija Julius killed in Mbezi, Dar es Salaam, on suspicion of having stolen four sacks of coffee.[28]

The failure of law enforcement and the judiciary to administer justice to the satisfaction of the public is the main cause of "mob justice." Insecurity resulting from the inefficient handling of crime creates desperation among members of the public. The belief is that killing suspected criminals can lead to reduced crime. The fact is that police investigations are inefficient and slow. In many cases, evidence is lost and suspects with means buy their freedom not only from the

police, but also from the courts. Such suspects become more dangerous to the public than before their arraignment. The public feels safer killing them rather than allowing them to come back and cause more damage by executing revenge.

The government is to blame for its failure to promote human rights education. Lack of civic education means that the majority of people are unaware of the law. This is why some believe that they are not committing a crime by partaking in "mob justice."

The Prevention of Terrorism Act

On November 5, 2002, Parliament passed the Prevention of Terrorism Act, 2002. This was in reaction to acts of terrorism globally, including the bombing of the New York World Trade Centre in the United States on September 11, 2001. The objectives of the Act are to prevent both domestic and international terrorism. The Prevention of Terrorism Act abrogates human rights guaranteed by the Union Constitution such as the right of presumption of innocence. Section 12(2) of the Act, for example, empowers the Minister for Home Affairs to declare any person "he considers appropriate" a suspect of international terrorism.

Pursuant to provisions of Section 12(5), the Minister may also make regulations to, among other things, seize the properties of any person or group of persons believed to be a terrorist or terrorists. The Act does not say whether or not, after being declared a suspected terrorist, the suspect is to be taken to court for trial. The Act does not define who a terrorist is supposed to be, but only enumerates acts that amount to terrorism. It subjects a suspect's rights to the discretion of the Minister.

The Act further provides for the exemption of security officers from any liability arising from investigations into terrorism, even if such investigations cause the death of a person. This provision contravenes the rights to life and the presumption of innocence. The Act not only gives the police powers of arrest without a warrant, of any person who has committed or whom the police has reasonable grounds of suspecting to have committed or to be committing an offence, but it also grants the police powers to intercept communications, violating the right to privacy.[29]

Treatment of Prisoners

The state of prisons, detention camps and remand prisons is bad due to overcrowding, poor food and inadequate health services. This contravenes provisions of Article 13(6)(e) of the Union Constitution, which prohibits torture or cruel, inhumane and degrading punishment or treatment. The government has not made the allocation of funds to improve correctional services offered by the Tanzania Prisons Service a priority.

On September 18, 2002, **Majira** reported that in Tarime Prison in Mara region, prisoners and detainees were walking naked for lack of clothes. Those who had no clothes were not allowed to go out of the prison. Those who were dressed were seen in torn clothes that exposed their genitals. It was reported that a similar situation prevailed in other prisons in Mara region, including Kyabakari. The Prisons Department made no comment.

In the Rujewa incident, 17 remanded suspects at Mbarali police station in Mbeya died of suffocation on November 17, 2002, as a result of overcrowding.[30] The 17 dead remand prisoners were among 112 detained in a room capable of accommodating only 30 persons. The government reacted by firing a few low-level government officials. No senior government official, such as the Minister for Home Affairs, took responsibility for the incident and no further action was taken to ensure that the remand prisons' conditions were improved.

Allegations of Torture

Jafari Bahati alleged that Magomeni police officers once made police dogs bite his legs and hips while in prison. Bahati, a former officer of the Tanzania Peoples Defence Forces, said the police would place newspapers around his genitals and then set them on fire. "I was burning, but what could I do? For after they had done so, they kicked me and then went out."[31] Another suspect, Hamisi, told the media he used to receive beatings on every part of his body. The two men had been charged with murder. It took twelve years before their case was heard. They were acquitted. The Government reacted with a statement finally from Aden Mwamunyange, the Commissioner of the Police, stating that the police force was shocked by the report and that investigations would follow.[32]

Beating suspects in police custody seems to be a common practice in police stations. On October 27, 2002, *Mwananchi* reported that Renatus Vedastus had been beaten by the police while in custody at Kirumba police station. The beating was so serious that Vedastus had to be admitted to Bugando Hospital's intensive care unit. He had been arrested on suspicion of involvement in robbery. Another person, Makena Chacha, was reported to have been beaten to death while in police custody at the same police station.[33] Two detainees, Jafari Bahati and Said Hamis, imprisoned for 12 years but eventually found innocent, showed **Majira** bodily injuries to support their allegations of torture.

There is no doubt that prison conditions are far from satisfactory, but two issues come out clearly, namely, the lack of the prisons officers' awareness of human rights and the meagre resources allocated to the Prisons Department. Both require prompt government intervention through the provision of human rights training for law enforcement officers and the making of budgetary allocations to ease congestion in the prisons. Subjecting prisoners to congestion is inhumane and a breach of their human rights. Inhumane prison conditions have been confirmed by some of the 14 members of the Tanzania Labour Party (TLP) incarcerated in Keko and Segerea remand prisons in January 2002, who reportedly equated prisons with hell.[34] Taslima, an advocate for the accused, was quoted as saying that, "prison authorities had reached a point where they deny our clients water which is a basic daily need."[35] Although the Prisons Department has consistently denied these allegations, a statement from such a distinguished advocate cannot be doubted.

The Right of Freedom of Assembly

The Bill of Rights omits the right of freedom of assembly. Opposition parties are agitating for the inclusion of this right in the Bill of Rights. However, under constitutional law, the failure to guarantee a right does not entitle the Government to violate that right. Rights are fundamental and inalienable. Their enjoyment does not depend on their being provided for in a constitutional text.

In 2002, the government violated the right to freedom of assembly. It banned public meetings, especially those organised by the opposition parties. On January 21, 2002, some CUF members assembled at

Buguruni Kwa Mnyamani, Ilala in Dar es Salaam, to express their dissatisfaction with the local government election results. The police reacted by disbanding them using tear gas and guns. Five persons were arrested.

On October 19, 2002, the police suppressed an open meeting organised by theTanzania Labour Party (TLP) in Arusha, to be addressed by Mrema, the Chairperson of TLP. The police claimed it did so due to the lack of security and an official visit of the Prime Minister to Arusha, yet TLP had alerted the police about the meeting four days earlier.[36] The same type of treatment befell Hamad, the Secretary General of the CUF, who was restrained by the police from convening a public rally at Mtende village in Zanzibar, on the grounds that it would disrupt law and order.[37]

The Right to Freedom of Demonstration

The right to freedom of demonstration is also not guaranteed by the Union Constitution. The government restricts this right by insisting that those who want to assemble or demonstrate must first get permission from the police. The law, however, provides that notice of a demonstration or assembly must be made to the police 48 hours in advance. This provision does not vest the police with powers to grant or deny permission for demonstrations or assemblies. It is intended to enable the police to provide security for demonstrators or those assembled. The police is only empowered to stop a demonstration or assembly if it believes that the activity will breach the peace or create problems for another group exercising the same right in the same area at the same time.

However, in 2002, the police took advantage of this provision to ban a special prayer, "*hitma*," organised by a Muslim group at Mwembechai in Dar es Salaam, on February 13, to commemorate the Mwembechai fracas of 1998. The demonstration took place despite the police ban and fighting broke out between the police and the demonstrators. Police confirmed two deaths and 53 arrests. Those who died were P.C. Said (26), force number 2080, a policeman and Musa Mtunguja (25), a carpenter. Among the 53 arrested were two Muslim clerics, Sheikhs Ponda and Kunducha.

On April 10, 2002, police in Dar es Salaam banned another demonstration organised by an unnamed Islamic organisation scheduled to take place on April 12, 2002, after Friday prayers. The demonstration was aimed at pressurising for the release of Sheikhs Kunducha and Ponda. The police also banned a demonstration by the Organisation of Drivers and Daladala Bus Conductors in Dar es Salaam that was to be held in April 2002. The spokesman for the organisation said in a public statement on April 23, 2002, that members of his organisation would demonstrate to protest against free bus boarding by the police. In June, Muslims in Dar es Salaam notified the police of their intention to demonstrate on July 4, 2002, in protest against ill treatment by the state. The demonstration was banned and many of those who decided to demonstrate regardless were arrested.

Other demonstrations reported to have been banned by the police include that of Dar es Salaam's Secondary School Muslim students who wanted to protest against alleged violations of their "religious rights" by Education Authorities in September 2002, that of TLP in January 2002 and that of Dar es Salaam vendors (*Wamachinga*) on February 14, 2002.[38]

The Right to Freedom of Religion

Article 19 of the Union Constitution provides for freedom of religion. This right is generally speaking, respected by the government, subject to measures which are in its opinion, necessary for the maintenance of law and order. In May 2002, it was reported that some Muslim students of Minaki Secondary School in Kisarawe, demonstrated to protest the use of students' public utensils for the consumption of pork. The demonstration was suppressed by the Field Force Unit of the police and some students were arrested and held in police custody for a day.

The School Board ordered that some students who had organised the demonstration be discontinued and others be suspended.[39] The Tanzanian Muslim Students' Association (TAMSA), accused the school administration and the Ministry of Education of not respecting those whose religions do not allow the eating of pork.

In a similar event, some Christian students of Sokoine University were suspended for refusing to sit for an examination on the day which, in accordance with their beliefs, it is prohibited to work. The students

blamed the university administration for not respecting their day of worship.

Economic, Social and Cultural Rights

According to the ICESCR, 1966, an individual is entitled to enjoy individually or as a group, economic, social and cultural rights. These rights include the rights to self determination, work, favourable conditions of work, fair remuneration, social security and to form trade unions of one's choice. They also include the rights to found a family, an adequate standard of living for oneself and one's family, physical and mental health, education, to take part in cultural life and enjoy the benefits of scientific progress.

Tanzania ratified the ICESCR in 1976, but placed reservations on the rights to work, education and health.[40]

The Right to Education

The ICESCR provides for the right to education and requires member states to provide compulsory free education for all to empower individuals to lead lives as law-abiding members of society. The state must ensure the content of the syllabus is adequate to equip educated individuals to earn a decent living. Article 11 of the Union Constitution recognises the right to education but does not impose upon the government any specific duty to comply with this right. The right to education is contained in Chapter Two of the Union Constitution, which consists of directive state policies.[41]

The Education Act, 1978, provides for seven years of compulsory Primary school education. The government has attempted to provide free and compulsory education at the Primary school level. Illiteracy levels at independence in 1962 were at 90 per cent. This has dropped to below 20 per cent.[42] However, the government has failed to maintain Universal Primary School attendance and the quality of education given has fallen. In 1986, the government introduced a World Bank cost-sharing policy at all levels of education. Parents were required to contribute to the education of their children although it was apparent that they did not have the income to do so. The effect was a fall in the registration of pupils at both the primary and secondary school levels. This led to a drop in literacy levels and the number of children in

higher institutions of learning. By 2001, primary school enrolment was at 57 per cent as compared to 83 per cent in 1986. About 47 per cent of primary school age children are not being enrolled because their parents can no longer afford it.[43]

This prompted the government to abolish cost-sharing at the Primary School level. The government has instituted a programme known as Education for All (EFA) whose objective is to enrol all primary school age children every year. It is expected that the rate of primary school enrolment will increase from 57 per cent in 2001, to 70 per cent in 2003. The number of the children in primary schools was expected to increase from 78 per cent in 2001 to 85 per cent in 2002. Although this is a donor-driven programme, it has succeeded in enrolling more than 1,500,000 primary school age children in 2002.[44] To address the increase in the number of students, the government employed an additional 7,000 teachers in 2002.

The ICESCR also provides that secondary school education shall be made available and accessible to all, depending on the means available to a member state. The government's cost-sharing policy is operational at Secondary schools and higher institutions of education. The government has introduced an educational loan scheme accessible on the basis of citizenship and educational performance. It is apparent, however, that the loans are only given to students attending state universities. Those attending private universities are not eligible. This is discriminatory against those who are citizens and meritorious but cannot be absorbed into state universities.

Tanzania has only two state universities – the University of Dar es Salaam and Sokoine University of Agriculture. There are now more than eight universities in all. The government has failed to increase its education budget to cope with the increasing numbers of students seeking higher education. The state universities do not have the capacity to enrol all eligible candidates. It has, therefore, been suggested that the government allow s eligible students attending private universities to benefit from the loans.

The learning environment is not improving. Recent research on primary school enrolment revealed that the number of primary school age children has been increasing at a higher rate than vacancies available. In 2002, for example, about 214 students expected to be

enrolled at Bwawani Primary School in Karatu, Arusha could not be enrolled for lack of classrooms.[45]

There is also need to balance enrolment with the number of teaching staff and spending on capital development by constructing new buildings and installing modern learning facilities for science and technology. The salaries and emoluments of teaching staff at all levels must be reviewed to make teaching a profession worth practising.

The Right to Work

The right to work is enumerated in the ICESCR. This right includes the enjoyment of favourable conditions of work and fair remuneration. The Union Constitution recognises this right under Article 11(1), but does not recognise it as a justiciable right. In 2002, Tanzania witnessed a shrinkage of the job market due to privatisation. A total of 13 public corporations were divested in 2002, together with 130 non-core assets. This brought the number of privatised public corporations to 259 and that of non-core assets to 210.[46]

The retrenchment of workers occurred without planning for their re-deployment. Although the government policy has been to finance retrenchment from the central government, the poor retrenchment packages and delays in effecting pay-offs led to labour unrest. Workers in the Tanzania Electric Company (TANESCO), the Tanzania Railways Corporation (TRC), the Friendship Textile Mills (URAFIKI), the Tanzania Telephone and Telecommunications Limited (TTCL) and the National Bank of Commerce (NBC) all went on strike due to their lack of involvement in planning for retrenchment and their management's refusal to offer fair retrenchment packages.

While the job market has continued to shrink, labour laws have remained stagnant. The government has not effected the amendments of labour laws to provide for flexible wage growth and employment benefits to meet the cost of living. Wages are below the poverty line as a result of which productivity has declined while corruption levels have risen. Workers in most privatised public enterprises have complained that the government has restructured the economy without restructuring the labour force.

Workers were kept in the dark about the privatisation of their enterprises until deals with new investors were struck. This caused

insecurity among the workers about the protection of their rights under new management. Workers were presented with *faits accomplis* and had to either accept the new terms or lose their jobs. This resulted in sentiments against foreign investment. The tendency to sell lucrative public corporations to investors from one country, South Africa, has also thrown mud on the privatisation exercise.

The control of the state on income distribution has remained hegemonic. Minimum wages have remained low; although they were raised from US$46 a month to US$50 effective from July 2002, the minimum expenditure of the basic needs of an individual worker is above US$250 per month. The government has also been an unreliable employer by failing to pay salaries and allowances on time. Government servants have complained about such delays. For instance, about 400 Secondary School teachers employed in January 2002 had received no salaries as of November 5, 2002, purportedly because their names were not yet computerised on the schools register.[47]

The failure to pay living wages and to respect payment schedules has made government servants prone to corruption. "*Bongoland*" culture, slang for the ingenuity to fend for oneself, has taken root. This has meant the collapse of ethics and accountability and the prevalence of dishonesty and corruption in order to make ends meet. This undermines good governance and economic development and the government is to blame.

The Right to Health

The healthcare system has collapsed. Under socialism, the government had curative and preventive healthcare policies that ensured the health of the majority. Preventive policies included public awareness campaigns to make people aware of the necessity of living in healthy and clean environments and of taking measures to prevent diseases. Every citizen was entitled to healthcare and could walk into a dispensary close to his or her residence for treatment. A network of rural dispensaries and health centres manned by government medical officers meant that primary healthcare was available to all. District and regional hospitals undertook the role of both referral and first instance units. Five national referral hospitals were put in place to take care of complicated cases. Of the five, Muhimbili Medical Centre in Dar es

Salaam, is also a teaching hospital that is part of the University of Dar es Salaam's Muhimbili College of Medical Sciences (MUCHS).

The failure of the government to allocate sufficient financial resources to the healthcare system has meant that dispensaries and health centres have been closed or left empty without doctors or medicines. District and regional hospitals also fell into neglect with deteriorating infrastructure and insufficient, competent, medical personnel. The introduction of cost-sharing for healthcare left much to be desired as medicines are sold at high and unaffordable prices.

Although the government continues to offer free healthcare for diseases such as tuberculosis and cholera, these do not affect the majority. Sometimes, the elderly have been required to pay for healthcare despite provisions in the health policy entitling them to free medical services. It was, for instance, reported in the media that some elderly people in Tabora were denied healthcare for failing to pay.[48]

The government also banned the use of chloroquine, the first drug of prescription for malaria treatment for many years. The reason for this decision was that it has increasingly proven incapable of fighting malaria. The government introduced sulfadoxine pyrimethamine (SP) in its place. This decision was not well taken as chloroquine was affordable and effective with some patients. The government admits that chloroquine is able to cure about 48 per cent of patients.[49] SP is not available in many rural areas and is unaffordable where it is.

In 2002, it was reported that, in several areas, girls and women were being subjected to the partial or total removal of their clitorises. This practice, known as female genital mutilation (FGM) damages the physical and mental health of girls and women and has no medical justification. FGM is practised in Kilimanjaro, Arusha, Manyara, Dodoma, Mara, Singida, Iringa, Mtwara and Morogoro regions. In Dodoma, for example, 12,613 out of 16,789 (75 per cent) women who went for delivery between 1998 and 2000 were found to be mutilated. This was noted by the Fortunata Makavu, Group Secretary of Women Wake Up Group on March 4, 2002, when briefing journalists on FGM.[50]

The Right to a Decent Standard of Living

The Union Constitution does not clearly guarantee the right to a decent standard of living. The closest guarantee of this right is found in Article

14, which provides for the right to life and to obtain protection of one's life in accordance with the law, the clawback clause "in accordance with the law" notwithstanding. It is unclear whether this provision imposes upon the state the obligation to ensure that every citizen lives a decent life. This is an anomaly in a formerly socialist country.

It is now evident that Tanzania's shift to capitalism has been a nightmare for the majority. The state took no steps to empower people with the tools of capitalist entrepreneurship. The consequence has been predatory capitalism that has left the majority in poverty. Living standards have sunk to unacceptable levels. In urban areas, less than half of the inhabitants earn a daily income of $0.30. The absence of a social welfare policy means that no attempts are being made to create an accountable capitalist economy. Life in the rural areas is fraught with malnutrition and disease. The rural electrification and trunk roads programmes have collapsed. Villages are starved of alternative energy sources and are inaccessible by road. Thus tree-cutting for fuel continues without replanting. In both urban and rural areas, superstition provides the hope for a better tomorrow. In Shinyanga and Mwanza, witch-hunting is a problem and many elderly women have been tortured and killed on suspicion of being witches.

The gap between rural and urban areas is increasing resulting in the explosion of migrant labour to urban areas. The majority of the unemployed are young people. This has led to peddling, begging and crime.

Although it is not the duty of the state to grant economic, social and cultural rights, the ICESCR requires state parties to take steps, "to the maximum of available resources," to facilitate enjoyment of these rights.[51]

Sovereignty over Natural Resources

In 2002, Tanzania implemented further economic reforms aimed at replacing socialism with capitalism. The reforms were referred to as, "market economic policies," to pacify the masses who had been made to believe that capitalism is evil and cruel and that their economic salvation lay in the socialism that had created a large public sector and a fledgling cooperative movement.

The new policies were geared at securing, in the shortest possible time, as much foreign investment as possible. They were also aimed at privatising the public sector. Under the new policies, citizens have played a minor role as assets divested to them are of negligible value. Going by the PSRC's own admission, the method used to divest public enterprises to Tanzanians was through outright sale, share sale and management buy-outs.[52] This meant that nationals needed ready capital to buy into divestitures, which is not the case with foreign investors. Foreign investors used bank guarantees, and paid little through bank financing. Sometimes, foreign investors sold part of the rolling stock or non-core assets initially bought at knock-down prices to raise capital.

In the divestiture of the NBC, for instance, $12 million of the $15 million sale price was used to re-capitalise the bank without the foreign investor paying anything else in respect of the 70 per cent shares it now holds in the bank. The divestiture agreement entitled the foreign investor an equal share of the difference in exchange value of the sale price when converted to the local currency. The divested bank was paid an additional 15 million Tanzania shilling, as inter-agency payments from the National Micro Finance Bank that had been established from less profitable assets of the divested bank.

Complaints have been made against underpricing parastatals and selling them to foreigners in the privatisation process. Tanzanian taxpayers created the parastatals and the privatisation process should enable them to take over and re-structure the parastatals with foreigners only being invited to make new investments.

In addition, Tanzanians have expressed concern about foreigners being allowed to exploit the country's natural resources without controls in the mining, forestry and conservation sectors. Foreigners have been given concessions to exploit these resources under terms unfavourable to the country. Little revenue is being collected from these sectors because the three per cent royalties being paid to the government is very low.

In Bulyanhulu and Geita in Shinyanga, thousands of citizens have been chased/removed from their land to give way for gold mining by foreign companies including Barrick Gold from Canada, Kahama Gold Mining, Golden Pride and Ashanti Gold mines. In Mererani in Arusha, a South African mining company, AFGEM has taken over the mining

of the semi-precious gemstone, Tanzanite, at the expense of local miners and mining companies. In Hannang district, the Barbaig pastoralists have been struggling to wrest their land from the parastatal, Natural Agricultural and Food Corporation (NAFCO). This parastatal has been targeted for sale while the pastoralists are prosecuting two court cases against it – Yoke Gwaku and six others vs NAFCO and others and Ako Gembul and ten others vs NAFCO and others.[53]

The pillage of Tanzania's natural resources is similar to that of the Democratic Republic of the Congo's (DRC) and other African countries. The World Bank has overseen this pillage without comment, raising questions about its alliance with transnational corporations in respect of underdeveloped countries. The World Bank cannot continue to preach poverty reduction while enabling the bleeding of economies of underdeveloped countries.

Rights of Vulnerable Groups

Economic, social and cultural rights include ensuring the protection and promotion of the rights of vulnerable groups. These are categories of people in insecure positions *vis à vis* other categories of people. Children, women, people with disabilities and refugees comprise some of these categories. Children are considered vulnerable because of their mental and physical immaturity, women are considered vulnerable in light of historical patriarchal oppression and people with disabilities are considered vulnerable because of their mental or physical incapacity. Refugees are considered vulnerable because they have been forced to migrate. Tanzania's record in 2002 in respect of these categories is as follows:

Children's Rights

In 1986, the Law Reform Commission of Tanzania appointed an eight person Child Law Reform Working Group to review laws relating to children. The Commission found that the laws relating to children had weaknesses requiring amendments. In April 1994, the Working Group, chaired by Dr. R. W. Tenga, submitted its report, pointing out laws that ought to be amended. Since then, however, no legislative reform has occurred. NGOs have undertaken campaigns aimed at making the government change the laws, including the Affiliation Ordinance, Chapter 278, of the Laws of Tanzania.

The Ordinance lays down a complicated procedure to be followed in establishing the paternity of a child born out of wedlock and lays down an inflexible formula for money to be paid by the father for his child's maintenance. According to this law, the child is entitled to a monthly sum of money not exceeding Tanzania shillings 100, an amount that does not even cover a stick of chewing gum. This amount, set in 1949, when the Ordinance was enacted, has remained unchanged despite changes in the economy. The law thus places the burden of maintenance on the mother. Many mothers who give birth out of wedlock remain unmarried and those who are poor cannot cover their own living expenses let alone those of their children.

The year 2002 witnessed increased acts of child dumping and a growth in the number of destitute, homeless so-called 'street children.' Children who escape dumping suffer from low standards of care even when the economic situation of their fathers is better relative to their mothers.

The growth of the number of street children goes hand in hand with juvenile delinquency. Tanzania has few child reform homes and many children and young people have thus found themselves being treated as adults by the law. The definition of a 'child' under the Children and Young Persons Ordinance, Cap 13, excludes persons of between sixteen and eighteen years. Section 22(1) of the Ordinance excludes children of below twelve years from the punishment of imprisonment. However, this Ordinance denies young people the option of being released on bail when charged with an offence involving punishment of seven years imprisonment.

Sections 15(2) and (3), and Sections 131(2)(c) and 131(3), of the Penal Code read together with Sections 4 and 5 of the Evidence Act, 1967, makes it possible for a child under twelve years to suffer not just imprisonment but life imprisonment if he or she commits the offence of rape. This is as a result of the new Sexual Offences Special Provisions Act, 1998, that took away some privileges previously given to children by the Children and Young Persons Ordinance. The adult justice system allows bail to be granted in respect of some offences involving life imprisonment, for example arson under Section 319, of the Penal Code.[54] It is not reasonable for more stringent penalties to be imposed on children than on adults committing similar offences.

Section 13(2) of the Law of Marriage Act, 1971, allows the marriage of a female person of fourteen years. Yet, under Section 130(e) of the Penal Code, such a person has not attained the capacity to consent to sexual intercourse, let alone to understand the implications of marriage. A further contradiction is found in Section 138(6) of the Penal Code, which recognises the marriage of a female person of any age.

The insensitivity of the law on children's rights and the slowness of the government in effecting much-needed changes to the law creates the impression that children's rights are not high on the agenda of government.

One requirement to ensure the dignity of a child on trial is by giving that child a separate trial and custody separate from that of an adult. In Tanzania, with the exception of Ilala district that has a separate facility for the juvenile court at Kisutu in Dar es Salaam, other juvenile courts use District Court facilities. This is contrary to Section 3 of the Children and Young Persons Ordinance. Courts are expected to comply with the minimum standards by holding children court's sessions in a different building or room from those used by adults.[55] But researchers have observed that police officers and magistrates mix children with adults.[56] Magistrates in Tanzania have also complained about the lack of specialised training in children's rights.[57] There are no indications that the government will train its judicial officers on children's rights and laws in the near future.

This potentially contributes to the bad sentencing practice of using custodial sentences for children instead of sending convicted children to reformatory schools to be rehabilitated and educated. That said, there is only one such school in Tanzania, which caters for boys only – the Ilambo Approved School in Mbeya. The number of children that can be accommodated in this school is smaller than the number of convicted children. And there is a need for such a school for girls.

Similarly, the lack of remand homes has meant that children are kept either in police stations or in ordinary remand with adults. Research conducted by the Legal and Human Rights Centre revealed that there are only five remand homes in Tanzania and children therefore sometimes stay in police custody for more than seven days before they are taken to court and released on bail.[58]

Children's labour rights are also frequently violated. Although the law prohibits the employment of children below twelve years, employers continued to employ such children in hazardous conditions.[59] A number of children are not attending school because they are engaged in household and other economic activities. Officially, the number of children between 5 and 14 years not attending school in 2002, was 4.1 million of 10.2 million.[60]

Children are employed under bad working conditions. They are not supplied with protective equipment like gloves, shoes or boots. They are, therefore, exposed to hazards like snakebites that make them sick. Conditions of child labour are worse in mines and quarries such as in Chunya, Mbeya, Mererani Mines in Arusha and Kunduchi Quarry in Dar es Salaam. In Dar es Salaam, children are employed in panel beating, welding, manufacturing of articles such as metal sheets, woodworks, fish preparation, mongering, washing, selling foodstuffs and peddling merchandise. They suffer from low pay, overwork, harassment and abuse. Most children in employment are orphans, abandoned or homeless. 60 per cent are boys and 40 per cent are girls.

Finally, in connection with child labour, incidents of sexual abuse were disclosed in 2002. The media revealed cases of child prostitution. *Uwazi* reported, on August 27-September 2, 2002, that Bi Catherine alias 'Mama Nisa,' 'owned' girls in a house in Mikocheni in Dar es Salaam. The girls were apparently recruited from Arusha, Kilimanjaro and Tanga. They provide sexual services to men for prices ranging from Tanzania shillings 50,000 to Tanzania shillings 200,000 depending on whether they are below sixteen years of age or not, whether they are virgins or not and whether they permit intercourse with or without condoms. Young boys also work as prostitutes, offering services to men as well as women.

Women's Rights

Tanzania ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979, in 1985. Article 13 of the Constitution prohibits all forms of discrimination, including gender-based discrimination, by virtue of the 13th Constitutional Amendment. However, Tanzania continues to be patriarchal and its political and economic systems do not guarantee women's rights.

Participation in its political and economic affairs is more open to men than it is to women.

Recently, steps to address this situation, to empower women and ensure their equality with men have been taken by providing for affirmative action in education, politics, culture and economics.

The Constitution provides that women shall be allocated at least 20 to 25 per cent of all seats, depending on the number of seats won by the respective political parties in parliamentary elections. This number is additional to seats won by female contestants in constituency elections. Out of 47 members of Cabinet in the United Republic of Tanzania, four Ministers and five Deputy Ministers are women. In Zanzibar, of 20 cabinet Ministers, one Minister and one Deputy Minister are women. In the Court of Appeal of seven Justices, one is a woman.

Women have played an increasingly significant role in national affairs. Women's NGOs have joined forces with the Parliamentary Women's Group to lobby Parliament to adopt women-friendly legislation. Such legislation includes the 13th Constitutional Amendment which prohibits discrimination on any ground including gender, and the Village Land Act; and the Land Act that contain provisions recognising a woman's right to own land. The Land Act establishes the Village Council as a dispute settlement mechanism. The Council is composed of seven people, of whom three must be women. An Act to provide for procedures in the settlement of land disputes under the Land Court Dispute Settlement Act was also enacted in 2002.

In 2002, the Tanzanian media carried stories indicating an increase in rape cases. This is disturbing because, in 1998, the government enacted the Sexual Offences Special Provisions Act, 1998, which amended criminal laws by introducing severe sentences for those convicted of sexual offences.

Rights of People with Disabilities

The Constitution does not directly provide for the protection of people with disabilities. Article 11 recognises the right of people with disabilities to special treatment in respect of the rights to work, education and social welfare. This provision, however, falls within the directive principles and it is thus not enforceable through the courts. It

is a recognition of the moral duty of the state to strive towards that right.

However, some laws specifically provide for the right of the people with disabilities to get special treatment. The Employment of the Disabled Act, 1982, requires employers to offer employment to people with disabilities. Furthermore, the Employment of the Disabled Regulations made under the Act require every corporation or institution employing more than 50 persons to employ at least two per cent people with disabilities.[61] Section 16 of the Act excludes people with disabilities from being retrenched. Section 17 makes it a criminal offence to deny employment on the grounds of disability.

The Disabled Care and Maintenance Act 1982, requires local government to provide special training for people with disabilities. It establishes an Advisory Council to advise the Minister responsible about the rights of people with disabilities. It further establishes a care and maintenance fund for people with disabilities. However, local government has not shown any enthusiasm in allocating funds for this purpose.

Public awareness of the rights of people with disabilities is low. This is reflected in the failure to provide facilities for people with disabilities in public transport, public buildings and other public services. No law has been enacted to compel contractors and owners of buildings and facilities providing services to the public to introduce facilities that are friendly to people with disabilities. Thus, although there is no overt discrimination against persons with physical disabilities, their access is restricted with respect to education, employment and other public services by default.

Prospects for the Evolving Human Rights Regime

Globalisation and Human Rights

Humanity is faced with new challenges. The concept of democracy has been shattered by globalisation. States are categorised as being 'democratic' not because their leadership and institutions arise from the will of the people, but because they are compliant with the interests and needs of dominant states.

Global governance is in the hands of inter governmental institutions like the United Nations, including the International Monetary Fund (IMF) and the World Bank. They comprise an 'international oligarchy' overseeing an elite form of neo-liberalism that does not care for state sovereignty, popular participation or substantive democratic governance.

Any measures to democratise, popularise or empower the state derive from this. Such measures are categorised as civilised or uncivilised, defensive or terrorist, human and democratic or against human rights and undemocratic depending on the side of the fence it is done. Globalisation has not globalised human rights.

Many states have adopted Bills of Human Rights half heartedly without any intention of matching what is on paper with practice. Tanzania, wittingly or unwittingly, may fall into such a category. It has ratified many, although not all, international human rights conventions. It has not, however, lived up to its human rights obligations under these conventions.

In 2002, as a result of public pressure, Tanzania established a national human rights commission. It converted its toothless Presidential Commission of Inquiry into a Commission on Human Rights and Good Governance in March 2002.

The Commission on Human Rights and Good Governance

The Commission on Human Rights and Good Governance was established by Article 129 of the Constitution introduced by the 13th Constitutional Amendment in 2000. The Commission was appointed in March 2002. The Commission has the duty of promoting human rights, receiving complaints on human rights violations, investigating human rights violations, instituting proceedings on human rights violations, investigating the conduct of officials and institutions, advising the government on human rights and good governance and taking steps to promote mediation among officials or institutions.[62]

The Commission is not independent as it is bound to receive directions and orders from the President.[63] It has no powers to investigate the conduct of the President and the Head of the Executive in Zanzibar.[64] It is empowered to summon all other officers complained of and can, if it finds it appropriate, prosecute such officers in the High

Court. In effect, the Commission is the investigator, a quasi-judicial tribunal for hearing purposes and a prosecutor. Such concentration of powers in one body is negative as far as good governance is concerned.

On March 14, 2002, the President appointed seven Commissioners. Six Commissioners were sworn in on March 15, 2002 but the seventh Commissioner did not take up the appointment. On August 28, 2002, the President appointed the seventh Commissioner who was sworn in on August 30, 2002. The Commission's first Chairperson is Justice Robert Kisanga, a Justice of the Court of Appeal who served as a Commissioner with the African Commission on Human and People's Rights.

The Commission has been travelling across the country to publicise itself and has admitted its first case filed by the Legal and Human Rights Centre (LHRC), for and on behalf of residents of Serengeti who alleged that officials burnt down their houses and killed residents in the mid 1990s.

On October 5, 2002, the Commission met with NGOs in Dar es Salaam to discuss the manner the Commission will cooperate with NGOs to promote human rights. The Commission acknowledged the role of human rights NGOs. The meeting resolved that the Commission would cooperate with the NGOs in providing human rights education and promoting human rights. The Commission will also use NGOs to to carry out research.

Human Rights NGOs

There is a need to have as many human rights NGOs as possible. In a country emerging from authoritarian, one-party rule, human rights values need careful, concerted and vigilant husbandry to germinate, grow and mature into a human rights culture.

Leading human rights NGOs include the Legal and Human Rights Centre (LHRC), the Women's Legal Aid Centre (WLAC), the Tanzania Women Lawyers'Association (TAWLA), the Tanzanian Gender Networking Programme (TGNP), the Legal Aid Committee of the Faculty of Law, University of Dar es Salaam, (LAC), the Tanzania Media Women's Association (TAMWA) and the Lawyers Environmental Action Team (LEAT).

In 2002, the government demonstrated cooperation with human rights NGOs. It allowed its officers, including police officers, prisons' officers, ward executive officers, magistrates and councillors, to be given human rights training. In many instances, it sent its top officials to attend or to preside over the opening and closing sessions of these workshops. In addition, the LHRC prepared a manual for the training of police officers while the LAC cooperated with Prisons Services in introducing human rights into Prison Services Orders and in conducting human rights training for prisons' services officers.

Persecution of LEAT

The LEAT is one of the leading human rights NGOs dealing with environmental matters. In 2002, friction arose between the government and LEAT as a result of allegations of human rights violations by the government in the gold mining areas of Shinyanga region. LEAT purported to have carried out research in Bulyanhulu Gold Mine in Shinyanga that revealed that the government had buried 52 miners alive and killed 11 others during actions to evict locals from the mining area that had been granted to foreign mining companies. The government reacted not only by denying the allegations but by ransacking the LEAT's offices, seizing documents and video cassettes and arresting two of LEAT's lawyers, namely Rugemeleza Nshalla and Tundu Lissu in April 2002.

Nshalla and Lissu have been persistently harassed for their pursuit of justice for small scale miners evicted in 1996 to make way for Barrick Gold's Bulyanhulu gold concession. A criminal case was instituted at the Kisutu Resident Magistrate Court in which the LEAT, together with Augustine Mrema, have been charged with sedition. Lissu was detained by the police on December 23, 2002, in Dar es Salaam and held for over 24 hours in an underground jail known as 'The Hole.' There was no probable cause and no warrant for his arrest. The LEAT's lawyers were restrained by a magistrate's order from travel to Bulyanhulu and from commenting on events there.

Uniform NGO Law

Until now, the legal framework for the establishment of NGOs was found in three pieces of legislation – the Societies Ordinance, the

Trustees Incorporation Ordinance and the Companies Ordinance. NGOs registered under the Societies Ordinance face two problems, namely, the lack of corporate personality and the danger of being arbitrarily de-registered by the Minister of Home Affairs.

In 2002, the government enacted a uniform NGO law, the NGOs Act, 2002. Some provisions of the Act fly in the face of constitutionally guaranteed rights like the freedoms of association, expression and assembly. In contrast to the NGO Policy, 2001, the preparation of the Act was not based on consultations with stakeholders and thus their interests were not taken care of. Good governance entails that citizens are consulted with respect to decisions affecting their lives. Democratic constitutionalism imposes a duty upon the state to empower people to participate in legislative action so that laws arise from the people's will.

The NGOs Act is restrictive, unreasonable and lacks checks and balances. It creates cumbersome registration procedures through the NGO Board established under the NGO Act. The Act does, however, limit the power to de-register NGOs established under the NGO Act by requiring that NGOs about to be de-registered be given the opportunity to be heard.

Concluding remarks

It is clear from the facts narrated in this report that there is an emerging human rights regime in Tanzania. This report has sought to expose both the successes and failures with respect to the promotion and protection of human rights in Tanzania. But the dice has been cast. Tanzania will never revert to authoritarianism again. Hope for a better tomorrow, in which the government will not violate human rights, must continue to occupy the hearts of every citizen.

People must have the courage to cry foul when their human rights are violated. The use of excessive force in suppressing the Mwembechai demonstration, the unjustified beatings of innocent citizens by the state reported this year, as well as the harassment of human rights defenders in the LEAT case, indicate the dangers of acquiscing to human rights violations.

The study of the growth of a human rights culture in Tanzania reveals the growing sense of impunity among officials. Few in government believe in accountability for human rights. No one has resigned when grave human rights violations occurred under his or her leadership. This is a bad leadership style that must be eradicated.

Notes

1 Chris Maina Peter, "Human Rights in Africa," New York: Greenwood Press,1990, p. 2.

2 This was to abrogate the United Nations Organisation (UNO) Trusteeship Agreement between the UNO and United Kingdom to give Britain constitutional powers to grant Independence to Tanganyika. This Act made Tanganyika a de jure colonial possession of Britain. It gave Tanganyika limited independence within the Commonwealth, while vesting her sovereignty in the British Crown.

3 See: Proposals of the Tanganyika Government for a Republic, Government paper No. 1 of 1962.

4 See: Chris Maina Peter, "Human Rights in Africa," Op. cit., p. 2; Robert Martin, "Personal Freedom and the Law in Tanzania," Nairobi: Oxford University Press, 1979, p. 40.

5 Kabudi, P.J., *The State of Human Rights in Tanzania: The Challenges in the Twenty First Century*, in Sifuni E. Mchome (ed) "Taking Stock of Human Rights in Tanzania," Dar es Salaam: Faculty of Law, University of Dar es Salaam, 2002, at p. 110 See also: Reyntjens, F, "Authoritarianism in Francophone Africa: From Colonial to Post Colonial State," Third World Legal Studies, 1988, p.59.

6 Fifth Constitutional Amendment Act, 1984 (Act no.5 of 1984).

7 Per Kisanga, J.A. [1993] 2l LRC 317 at 323.

8 Nyalali Commission Report, Vol. 1: Government Printer, Dar es Salaam, 1992, p. 7.

9 See: Supreme Court Practice, Vol 1 (1993) [Sweet & Maxwell] Order 5 rule I at p. 28.

10 See: "Zanzibar: Democracy on Shaky Foundations," XIX, April 2000.

11 See: "Zanzibar Eve of Violence: A Fact Finding Report on Police Brutality and Election Mismanagement, prepared by the Legal and Human Rights Centre and the International Federation for Human Rights," May, 2001, Report 207. P. 13.

12 Article 30 (3) of the Constitution of URT, 1977.

13 The Basic Rights and Duties Enforcement Act, 1994, section 10(1).

14 *The Speech of the Chief Justice of Tanzania His Lordship Barnabas, Samatta at the Graduation Ceremony of The Institute of Judicial Administration (AJA), Lushoto, early November this Year. (See also Mwananchi, 10th November, 2002, p.3.)*

15 *Mwananchi*, May 8th 2002.

16 Chris Maina Peter, "Judicial Activism in Tanzania", University of Dar es Salaam, 2000 (Mimeo).

17 Civil Appeal No. 64 of 2001 (Court of Appeal of Tanzania Unreported).

18 Msekwa, P., on February 27th and 28th 2002.

19 Civil Appeal no. 5 of 1998 (Court of Appeal of Tanzania Unreported).

20 Section 197 of cap 16.

21 *Criminal Session Case No 14 of 1991.*

22 Majira 1st, October 2002.

23 Daily News 5th day of March 2002.

24 Daily News 29th day of March 2002.

25 *Majira* 2nd May the 2002.

26 *Majira* 10th day of May 2002.

27 *Daily News* 23rd day of July 2002.
28 *Nipashe*, 29th July 2002 & 17th August, 2002.
29 See Part V section 31 of the Prevention of Terrorism Act, 2002.
30 Legal and Human Rights Centre (LHRC), the leading human rights NGO in Tanzania sent an investigation team to Rujewa in November 2002 which found out that the reports on the deaths of remand prisoners were true.
31 *Majira* 6th September 2002.
32 *Majira* 9th September, 2002.
33 *Mwananchi* 7th November 2002
34 LHRC Human Rights Report, 2002
35 *Mwananchi* 20th October 2002.
36 *Mwananchi* 20th October 2002.
37 *Mwananchi* 2nd November 2002.
38 LHRC Human Rights Report , 2002.
39 *Mwananchi* 4th May 2002.
40 Constitution of the United Republic of Tanzania, 1977 Article 25.
41 Michael Wambali, "Democracy and Human Rights in Tanzania Mainland", PhD Thesis, University of Warwick, 1997.
42 NECTA, 1986.
43 The Minister of Education Hon Joseph Mungai quoted by *Majira 5th September, 2002.*
44 This was stated by President Benjamin Mkapa while opening the 8th Conference of the Ministers of Education of Africa on December 3 2002, at Nipashe 4th December 2002.
45 *Majira* 28th February 2002.
46 "Privatisation in Tanzania", Annual Review 2001/2002, October 2002.
47 This was disclosed by the Deputy Secretary of the Teachers Association of Tanzania (CWT) as quoted by *Mwananchi* 6th November 2002.
48 *Daily News* 13th March 2002.
49 *Daily News* 13th March 2002.
50 *Daily News* 5th March 2002.
51 Article 2(1)
52 See "Privatisation in Tanzania", Annual Review 2001/2002, of October 2002, at p.8.
53 Civil Case no. 12 of 1989 (High Court at Arusha).
54 See section 148(5) (a), of the Criminal Procedure Act, 1985.
55 See section 3 of the Children and Young Persons Ordinance, Chapter 13, of the laws of Tanzania.
56 See ENVIROCARE, Report of Research on the Children in Conflict with the Law in Tanga, Kilimanjaro, Moshi, Arusha, Iringa and Mbeya Regions, October, 2000, p. 39.
57 Ibid.
58 LHRC: Tanzania Human rights Report, 2002 at p. 36.
59 See "Employment Ordinance", cap 366, The United Nations Convention on the Right of the Child, 1989, the ILO Convention No. 138 of 1973 on the minimum age for admission to employment.
60 Elisa Lwakatare, Director of Child Labour Unit in the Ministry of Labour, Youth Development and Sports Report to " Child Labour Forum," at Karimjee Hall in Dar es Salaam on 23rd June, 2002.
61 GN 463 of 1985
62 Article 130 (1) of the Constitution of URT.
63 Ibid Article 130 (2).
64 Ibid Article 130 (6).

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So Near Yet so far Away: The State of Constitutional Development in Kenya in 2002

Collins Odote

> I am very willing to concede that constitutionalism is practiced in a country where the government is genuinely accountable to an entity or organ distinct from itself, where elections are held on a wide franchise at frequent intervals, where political groups are free to organise and to campaign in between as well as immediately before elections, with a view to presenting themselves as an alternative government, and where there are effective legal guarantees of basic civil liberties enforced by an independent judiciary. I am not easily persuaded to identify constitutionalism in a country where any of these conditions is lacking.[1]

Introduction

Constitutionalism refers to the circumstances and levels of constitutional democracy in a country. The existence of a constitution which reflects the aspirations of the populace is one thing, the other and equally important is the extent of conformity with the constitution by all persons and by all organs of government, that is the judiciary, executive and legislature. Kenya has had a constitution since it gained independence in 1963. Although the Constitution has undergone several amendments since then and not all with sincere intentions or positive consequences,[2] Kenya has always been under constitutional rule. The critical point and the focus of this report is the extent to which in implementation, the Constitution has been followed in national affairs. The report will assess the extent to which during 2002 Kenya conducted its affairs in accordance with the Constitution and also efforts to improve the constitutional dispensation in the country. In essence the report will

seek to answer the question as to what the state of constitutionalism was in the country in the past year.

To arrive at an assessment as to what the state of constitutionalism was in the country, two levels of analysis will have to be done. First, a critical appraisal of the legal and institutional framework under which the Constitution exists and operates will be looked at and secondly, the events that occurred during the year which affected either the form of the rules and institutions or their operations. Specifically, we will assess the performance of the executive, judiciary and the legislature and their impact on constitutional development during the year 2002.

Events Impacting on Constitutionalism in Kenya

The year 2002 was a momentous one in Kenya's history. Three critical reasons account for this statement. First the country made progress in its constitutional review process. After several years of agitations and false starts, the review process achieved a milestone by the production of a draft report and a Draft Constitution for debate by the Kenyan public. The second reason for the momentousness of the year was the fact that after more than 20 years, the country held transition elections[3] in which the incumbent was not contesting. The said elections marked the end of an era popularly referred to as "Nyayoism." Third, the end of the year also witnessed the results of the country's general elections being held in a general peaceful, free and fair manner and the results leading to the consignment of a party that had ruled the country since independence, the Kenya African National Union (KANU), to the opposition after losing the elections. Even making the occasion more momentous was the peaceful manner in which President Daniel arap Moi handed over power to his successor, President Mwai Kibaki, setting an example to the rest of Africa on matured democracy and redeeming the image of Africa in the eyes of the west, as a lost continent only famous for conflicts.

The Constitutional Review Process

The one event that occupied the minds of Kenyans during the course of the year was the process of reviewing the country's constitution led by the Constitution of Kenya Review Commission (CKRC). The long

and winding road to constitutional review can be traced to the year 1990 and the clamour for multiparty democracy.

CKRC, the body that is responsible for mid-wifing the constitutional reform gains that the country attempted to make last year is a creation of The Constitution of Kenya Review Commission Amendment Act. The first version of this Act was passed in 1997 before the elections of that year. After the elections, following the meetings at Bomas of Kenya and Safari Park Hotel, a stalemate arose in the review process with Parliament through a Select Committee on Constitutional Review establishing the Constitution of Kenya Review Commission in 2000, but excluding from its membership representatives of civil society and the opposition. This commission was headed by Professor Yash Pal Ghai. The civil society and opposition under the leadership of religious communities, also established a parallel process to review the country's Constitution and formed the People's Commission of Kenya (PCK), to lead this process. However, following negotiations led by Professor Ghai, the two groups merged in 2001. The Review Act was subsequently amended to increase the membership of the commission to 27 to accommodate commissioners from the Ufungamano Group as the PCK was popularly referred to.

This expanded Commission is the one that was responsible for collecting views from the public and producing the Draft Constitution and Report of the Commission. The reports and the Bill were released in September 2002. The Bill comprehensively addressed many of the concerns of Kenyans and was a radical departure from the current Constitution.

The production of the Draft Constitution by the CKRC did not come easily. Several hurdles had to be overcome by the CKRC before producing the draft[4]. There were attempts throughout the year to frustrate the work of the Commission. These efforts continued even after the release of the Draft Constitution with the ruling party dismissing the draft as foreign and unworkable and consequently the President scuttling the National Constitutional Conference when it was set to begin the task of debating the Draft Constitution.

Continued Executive Emasculation of the Constitution

The Kenyan executive has since independence continued to tilt the balance of power between it and the other two institutions. The executive has over time emasculated the powers of the judiciary and the legislature. For the judiciary, this has occurred through, *inter alia*, the level of control that the executive and the presidency has continued to wield over the appointments of Judges and the covert control over decision-making powers of the Judges. The concept of separation of powers and checks and balances that is enshrined in the country's Constitution has, by and large, remained a mirage.

Parliament, despite the establishment of the Parliamentary Service Commission in attempts to assert the independence of Parliament, continued to be controlled in several ways by the executive. Two events in the year 2002 that illustrate the continued control of Parliament by the executive are the budget-making process and the dissolution of Parliament. The Constitution gives Parliament three distinct roles to perform. These are lawmaking, representation and oversight. In discharge of its functions of oversight, parliament annually debates and approves the government budget as prepared by the executive. In spite of this enormous responsibility the first time that MPs come across the financial estimates is around the same time that the budget speech is read. Even though the budget is technical in nature, MPs are expected immediately after the speech has been read, to embark on the process of debating the speech.

During the year 2002, Mr. Peter Oloo Aringo the Vice-Chairman of the Parliamentary Service Commission and MP for Alego Usonga, brought into the house a motion seeking leave to introduce a Bill for the establishment of a Parliamentary Budget Office. The Motion was defeated. Arguments advanced in opposition to the motion were that budget making was a function of the executive and the establishment of a Parliamentary Budget Office would go against the rule of the separation of powers. This argument was advanced by KANU Ministers.

In constitutional theory and practice, nothing could be farther from the truth. The fact that the Constitution empowers Parliament to debate the budget and supervise government spending pre-supposes that they are expected to make informed contributions on the financial estimates

and the budget speech and also that they are expected to understand the issues surrounding budget making. The reality is that since the issues require expertise, MPs cannot be expected, as is the case now to fully grasp all the issues surrounding the budgetary process. It is this *lacuna* that the motion by Honourable Aringo seeking the establishment of a Parliamentary Budget Office sought to fill by establishing an office to provide MPs with technical expertise to analyse the budget and have meaningful control over the budgetary process. The motion only sought to strengthen the role of Parliament. It's only aim was to make Parliament perform its functions better and thus promote and not negate the concept of the separation of powers. The defeat of the motion was, therefore a great setback.

The reports of the Auditor and Controller General are replete with cases of financial mismanagement. The Public Accounts Committee (PAC) and the Public Investment Committee (PIC) have also continuously documented cases of financial mismanagement and abuse. However, despite these abuses, Parliament continuously approves more funds through the budget for institutions that have been involved in financial scandals. Firstly, the work of PAC and PIC are like a postmortem, they only point out who looted but are too late to stop this looting from taking place. By having a Parliamentary Budget Office, Parliament would have been able to have control of the budget process at the right time. Secondly, Kenya could only have been following in the footsteps of Uganda that already has such provisions.

The control of Parliament by the executive was also evident in the manner the President determined the calendar of Parliament. In October 2002, President Moi dissolved Parliament despite the fact that the calendar of Parliament still had some unfinished business, including a Bill to make provision for the retirement package of former presidents starting with President Moi, and also despite the beginning of the National Constitutional Conference, which required the continued existence of the eighth parliament. Further, this was done notwithstanding the fact that several MPs had expressed the desire that Parliament's life continues.

One might want to argue that the President in dissolving Parliament only acted in accordance with his powers under the Constitution, but the truth is that there is no greater threat to constitutional development

than a formalistic application of a constitutional rule. Furthermore, the existence of the provision giving the President power is also a constitutional hindrance to the separation of powers. This is especially so when the President uses his power in circumstances that show that it is done for sinister motives.

Consensus exists that the President dissolved Parliament to serve two interests. First, it was done so as to scuttle the Constitutional Review Process. President Moi had continually expressed his disinterest, nay strong opposition to the Review Process, even to the extent of refusing to present his views to the CKRC even after a date had been set for him to give his views. It therefore came as no surprise when he dissolved Parliament at the same time that the National Constitutional Conference was set to commence deliberations on the Draft Constitution. He even purported to dissolve the CKRC and derogatively stated that this was done so that the review process could continue after the elections with a Kenyan Chairperson, thus imputing, that Professor Ghai was not a citizen of Kenya.

The executive's blow to constitutional development did not end with the scuttling of the review process. The President did in November 2002, appoint Mr. Wycliffe Musalia Mudavadi as the country's Vice-President in circumstances that legal experts considered to be contrary to the Constitution. The Law Society of Kenya led the objections to the appointment. To discuss this act one needs to look at the treatment of the institution of the vice-presidency during the past five years.

In 1997, following the second multi-party elections since repeal of Section of 2A of the Constitution, President Moi formed his Cabinet but left the post of the Vice-President vacant for $1^{1}/_{2}$ years. Legal arguments raged as to whether the act of the President was constitutional or not. It was posited against the President that the Constitution describes a Cabinet as consisting of Ministers and the Vice-President and to have no Vice-President is akin to not having a Cabinet for no Cabinet is complete in the absence of a Vice-President. Despite these concerns the President left the position vacant. Part of the problems arose from the way the position had been used as an electoral tool, with different persons and by extension communities being promised by President Moi appointment to the vice-presidency if they supported KANU and himself in the 1997 general elections. Faced with the

delicate issue of how to reconcile these interests the President, contrary the constitution, seemed to have chosen the easy way out and left the post vacant. When he eventually appointed a Vice-President, 14 months later, he did it so fast, at a roadside meeting and only after warning Kenyans that he did not ascribe much importance to the appointment. He then proceeded to reappoint Vice-President George Saitoti while warning that the appointment would not increase the amounts of food available in the kitchen of Kenyans.

This constitutional circus was repeated in 2002. In August 2002 following a series of disagreements and revolt within the ruling KANU party, President Moi sacked Vice-President Saitoti for allying himself with the rebel faction within KANU. Just as after the 1997 elections when he was dropped from the post, no replacement was made. This the President did despite the extremely volatile situation in his party then and should anything have happened to the President then a constitutional crisis could have arisen. The Constitution of Kenya provides that in any situation where the President dies, is incapacitated or is otherwise unable to discharge the functions of his office as President, the Vice-President would take over in an acting capacity or in the absence of this, the Cabinet would sit and elect one from its midst to assume the position of the President in an acting capacity. With the serious division among the Cabinet due to the succession of President Moi, it is not far fetched to imagine the impossibility of the Cabinet agreeing as to who could be the Acting President. The President by his act therefore, exposed the country to a constitutional crisis and clearly acted contrary to the letter and spirit of the Constitution and in disregard of the welfare of Kenyans.

By and large the executive arm of government did not do much towards the development of constitutionalism during the year 2002. On the contrary its acts, tended to contradict and dilute the Constitution.

The Constitutional Challenges of the 2002 elections

The last general elections were the third since the return of multiparty democracy in Kenya. The previous two elections had been held in an environment that was mainly seen to be unfair, constitutionally flawed and tilted in favour of the ruling KANU party. The International Commission of Jurists in a report had stated of the 1992 elections that:

> Unfortunately the 1992 elections were grossly distorted and clearly failed to pass the freedom and fairness test. The structural environment, which was still largely based on the one-party system, along with the numerous restrictions operating in favour of the ruling party, made the elections farcical.[5]

The period preceding the 1992 elections despite being one of transition from single-party state to multiparty democracy was not accompanied by the requisite constitutional changes to entrench multiparty democracy. Apart from the repeal of Section 2A of the Constitution, no comprehensive review of the Constitution was undertaken.

Due to the experiences of the 1992 elections, there was a lot of pressure for constitutional reform before the 1997 elections. The agitations were led by the civil society commencing with the initiative of the Law Society of Kenya, the International Commission of Jurists and the Citizen Coalition for Constitutional Change drafting a model Constitution in 1994.[6] A few months to the elections, when it seemed evident that Kenya was headed for rough times and possible chaos, Parliament brokered a series of minimum reforms, referred to as the Inter-Parties Parliamentary Group (IPPG) reforms. These reforms aimed at dealing with some of the legal and constitutional hindrances to the conduct of free and fair elections. However the reforms were not far-reaching and only dealt with few defects in the constitutional framework. Secondly, the reforms were brokered so as to take the political initiative away from the National Convention Executive Council (NCEC) which had mobilised citizens in a series of mass action demonstrations to demand for a new Constitutiton before the elections.

The Institute for Education in Democracy, the National Council of Churches of Kenya and the Catholic Justice and Peace Commission who monitored the 1997 general elections concluded that: "Kenyans still have faith in the power of the ballot despite various basic flaws that continue to debilitate the electoral process."

A number of factors militated against a conducive environment for free and fair elections. These included a disproportionate allocation of parliamentary constituencies and civic wards, a regime of electoral law that does not ensure competitive politics, the absence of an effective and efficient electoral body which is independent and impartial, a

worrisome lack of national, democratic, culture, a constitutional framework that does not support basic democratic principles and values, and a system of public administration still based on colonial and authoritarian percepts inimical to democratisation."[7]

The results of the 1997 elections confirmed the wide-perception that nothing short of comprehensive reforms of the rules governing the electoral process would guarantee free and fair elections in Kenya. The results thus provided a fertile ground for renewed agitation for constitutional reforms.

It is against this background that the 2002 general elections need to be looked at. Although Kenyans had expressed reservations about the constitutional and legal framework for holding elections in 1992 and 1997, there was hope that the 2002 general elections would be held under a new constitutional dispensation. The CKRC was expected to have finalised the process of reviewing the country's constitution.

Kenyans were also united not only on the necessity of conducting the 2002 general elections under a new constitutional framework, but also on the contents of the new framework. As early as April 11, 2002, at a forum convened by the Centre for Governance and Development in conjunction with other civil society organisations and attended by representatives of the Electoral Commission of Kenya (ECK), civil society organisations, political parties and the religious sector, the participants analysed the presentations made by various groups to the CKRC on the electoral framework and agreed on the contents of the reforms necessary for free and fair elections.[8]

Although the CKRC eventually produced a Draft Constitution and addressed the flaws in the rules governing elections, the same draft was not debated and adopted before the elections. The consequence was that the constitutional framework that governed the elections in 1997 was essentially the one that was applied in 2002. However, several events occurred in 2002, which attempted to address the constitutional and legal flaws in the rules governing elections in Kenya.

First, one of the serious shortcomings in the electoral process has been the registration of voters. The Electoral Commission of Kenya has always conducted this task periodically. The timing has been such that the registration of voters became associated with impending elections. Due to it's poor management and periodic nature, many

eligible persons had their constitutional right to vote denied due to disenfranchisement through the voter registration process.[9] To redress these shortcomings, Parliament in June 2002 passed a miscellaneous amendment Act, which amended the National Assembly and Presidential Elections Act[10] so as to provide for continuous voter registration. Although this was not put into operation in time for the 2002 general elections in terms of the constitutional and legal framework, it was a milestone, as future elections would not be hindered by the same problem of short registration period and the consequent disenfranchisement of potential voters.

Further in September 2002, the national assembly approved the Presidential and Parliamentary Elections Amendment Regulations 2002, as made by ECK. These regulations sought to redress problems associated with polling. It sought to seal the loopholes that existed for rigging elections during polling.[11] The greatest changes introduced by the amendments were; first, the rule that one could mark ballot papers by use of any mark and not just a tick. Second, and most important was the introduction of a new rule requiring that votes be counted at polling stations and not at one central place in a constituency. This rule sought to address the perennial complaint of rigging during the transportation of ballot papers and boxes from the polling stations to the counting halls.

The changes that occurred in the electoral laws while not accompanied by fundamental constitutional changes led to the improvement in the conduct and management of the 2002 elections. Firstly, ECK conducted the voter-registration exercise in a manner that was generally satisfactory.[12] The greatest shortcoming of the registration exercise was the names of dead people on the voters' list and the fact that the names of several potential voters were missing from the final register, thus reducing the accuracy of the register.

Second, the elections themselves were conducted in a generally professional manner by the ECK, which having learnt from its shortcomings in the previous two elections strove to ensure that the same mistakes were not repeated. There was also a general level of calmness during the voting and counting processes and the announcement of the election results. Both local and international observers gave the ECK a clean bill of health in the manner it conducted

the elections. The European Union election observation mission for instance, in its final report noted that the 2002 general elections were by and large free and fair.[13] It only pointed out a few critical areas that needed to be addressed.

First, the law as it exists now does not give ECK power to regulate nominations by political parties. This is one area in which a lot of rigging took place during the last elections. The law needs to be changed to deal with this crucial aspect of the electoral period.

The other problem was due to the boundaries of constituencies. Gerrymandering has been a perennial complaint in Kenya. The Constitution of Kenya (1998 Revised Edition) provides in Section 42 that Kenya shall be divided into a minimum of 188 and a maximum of 210 constituencies until Parliament prescribes otherwise by amending the same Constitution. Kenya presently has 210 constituencies. The Constitution goes on to provide the criteria for constituency delimitation/delineation in these terms:

(3) All constituencies shall contain as nearly equal numbers of inhabitants as appears to the Commission to be reasonably practicable, but the Commission may depart from this principle to the extent that it considers expedient in order to take account of –

(a) The density of population and in particular the need to ensure adequate representation of urban and sparsely populated rural areas;

(b) Population trends;

(c) the means of communication;

(d) geographical features;

(e) community of interest and

(f) the boundaries of existing administrative areas, …

The plain meaning of the words given emphasis above leave no doubt that the drafters intended to apply the principle that all people should have as equal a vote as possible: one person, one vote. This is the primary basis, which in legal terms could be referred to as the rule. In order to set a standard of reasonableness the drafters then provided certain criteria in respect of which the Electoral Commission, as the body charged with demarcating/delineating constituencies, could depart from the rule, which in legal terms could be referred to as the exceptions. Those are the ones in paragraphs (a) to (f) of Section 42(3). Available

data shows that they have been applied but quite unreasonably. In 1997, the largest constituency (Embakasi) had 113,848 registered voters while the smallest (Ijara) had 7,445. This type of disparity meant that 1 vote in Ijara was equivalent to 15 votes in Embakasi. Put differently, for every person a candidate in Ijara had to solicit a vote from, another candidate in Embakasi had to convince at least 15! This should not be the case – because legislators represent people, not trees or acres of land. The constituency sizes, when seen against the backdrop of their regional distribution, cannot escape the accusation of witting or unwitting gerrymandering. It is a situation that needs to be corrected if the benefits of electoral system reform are to be satisfactorily realised.

What the drafters of the Constitution intended was merely to provide some latitude for the constituency delimiter to use good sense and avoid situations where a constituency straddled two districts, or to allow the creation of constituency boundaries based on physical features such as rivers or roads, and so on. What we have ended up with is a denigration of the rule: the exceptions became the rule. There is need to revert to the situation the drafters of the Constitution intended, which was to allow for some minimal deviations to take into account the criteria enumerated in Section 42(3).

The disparities in Constituency sizes led John Michuki the MP for Kangema to file a case in the High Court[14] . The court ruled that the boundaries of the constituencies as determined by the Electoral Commission of Kenya are not in accordance with the principles set forth in the Constitution. The High Court ordered the ECK to address this issue. The ECK did not however, address the issue before the 2002 elections. This ruling by the court is laudable for stating the correct interpretation of the constitutional provision on boundaries delimitation. However, its non-application meant that the disadvantages of gerrymandering had an effect on the 2002 elections.

The Politics of Transition[15]

The last general elections were not just important because they were the first multiparty elections that were seen as free and fair in Kenya's independence history, but also because these elections marked the exit of President Daniel arap Moi, who had ruled Kenya for 24 years.

In the months preceding the general elections Kenyans were greatly preoccupied with debate on the impending transition in the country. The debate centered around the uncertainty with which the government was handling the transition. Firstly, there was a lot of skepticism as to whether President Daniel arap Moi who was constitutionally barred from seeking another term as President would step down and relinquish power in accordance with the Constitution which limited the presidential term to a maximum of two five year terms. Although the President continuously reassured the public that he would step down and hand over power in accordance with the Constitution and that he had no intention to cling on to power unconstitutionally, events within his party and his public conduct including his failure to put in place mechanisms to identify his successor within the party early enough, coupled with lack of transition arrangements did not help to assuage the fears of the public.

The fact that the country held peaceful elections that ushered in a new President, President Mwai Kibaki and further that he was sworn in at a peaceful ceremony on 30th December 2002 in which outgoing President Daniel arap Moi peacefully handed over power to him, did a lot to consolidate democratic gains in the country. Kenya, through the peaceful manner in which power was handed over from one President to another set an example to the rest of the world on the importance of respect for the rule of law and governance according to constitutional democracy.

President Kibaki in his inauguration speech captured the national mood when he pointed out that the country was yearning for change and governance according to the rule of law. President Moi did not manage the transition very well. Within his own party, KANU, he strongly expressed preference for Uhuru Kenyatta the son of Kenya's founding President, Mzee Jomo Kenyatta, to be his successor and ignored dissent within his party to have Uhuru nominated as the party's presidential candidate. This act led to serious dissent within his party that resulted in the split of the party with the rebellious faction popularly known as the Rainbow Alliance merging with the mainstream opposition to form the National Rainbow Coalition, which eventually won the ensuing general elections. The President's actions also contributed to the loss of the elections for his party.

The country's Constitution, as the last transition showed, does not comprehensively deal with the issue of transition. The procedure to be followed in handing over power from one regime to another is not comprehensively dealt with. Section 7 of the Constitution provides that one elected as President shall assume office as soon as he is declared to be elected, while Section 8 provides that that person shall before entering office, take and subscribe to the oath of allegiance.

A few weeks to the elections, the opposition called upon the President and the Attorney General to form a transition committee to handle the issue due to the silence of the Constitution. The Attorney General however, took the position that the constitutional provisions on the transition were adequate and that he as government legal advisor, the Chief Justice and the Head of the Public Service were in a committee dealing with the issue and the rest was just an administrative issue. Later events however, showed that this committee never dealt with the matter adequately and last minute arrangements were only made when it became evident that the ruling party had lost the elections. The swearing in ceremony of President Mwai Kibaki also bore this out, as it was both a security and diplomatic scare and disaster. The country went through the transition process without adequate preparation and only on a lot of good luck and God's grace to save the day.

The transition period, however, offered useful lessons for the country and the rest of Africa. The one lesson that requires to be underscored is the importance of constitutional management of a transition process. A country's constitution needs to address the issue of transition adequately.

The transition also offers the country an opportunity to put in place systems that guarantee democracy, the respect for human rights and the rule of law. Kenya has a unique opportunity to end endemic corruption, finalise the review of its Constitution and chart the path towards economic revival and growth.

The Judiciary and Constitutional Reform

The judiciary as one of the three arms of Government is charged with the task of ensuring the respect for and the protection of the constitution. Courts are expected to ensure that the supremacy of the Constitution is respected. Despite its important role, the judiciary in Kenya has failed

to live up to its respected status. Although this bad face of the judiciary reached a crescendo in 2002, the genesis is much further in history. In 1998, a committee formed by Zachaeus Chesoni the Chief Justice, produced a report titled : "Report of the Committee on the Administration of Justice." The committee, chaired by Court of Appeal Judge, Richard Otieno Kwach, did not mince words on the state of the judiciary in Kenya. It stated categorically that:

> The Kenyan judiciary has experienced in the recent past, lengthy case delays and backlogs, limited access by the population, laxity in security, lack of adequate accommodation, allegations of corrupt practices, cumbersome laws and procedures, recruitment and promotional procedures and general lack of training, weak or non-existence of sanctions for unethical behaviour and inequitable budget. As a result of the foregoing the judiciary is able only to a limited extent, to meet the demands and expectations of the private sector and the public at large.[16]

Justice Kwach also reinforced this view when he wrote separately that:

> The judiciary in Kenya is at the crossroads. Its authority has been so denuded over the years that to the majority of Kenyans, it is no longer seen as a lion on the throne, but just as a mouse squeaking under the chair of the executive. As judges we violently resent this label but deep down some of us know it is true. When faced with claims against the government we sometimes behave like a river by taking the course of least resistance. We wait for that wonder drug of judicial cowardice. No *locus standi*.[17]

If one thought that these were the most damning writings on the judiciary or that after the report of the Committee on the Administration of Justice appointed by the then Chief Justice and that reforms would take place to restore confidence of the public in the judiciary, one needed only to wait for the year 2002.

During the efforts by the CKRC to elicit views of the public on the reform of the Constitution, the public perception of the judiciary as a corrupt and inefficient institution under the control of the executive was the most prevalent submission. At the conclusion of the collation of views from the public the CKRC stated in its report that:

> The judiciary rivals politicians and the police for the most criticised sector of Kenyan public society today. For ordinary Kenyans the issue of delay, expense and corruption are the most worrying. For lawyers, there is concern about competence and lack of independence from government.[18]

This view was corroborated by two other reports in the same year. An expert group invited by the government in early 2002, to advise the Government on corruption reported that their interviews revealed consensus in Kenya that the judiciary lacked integrity and was corrupt. Secondly in the middle of 2002, a panel of distinguished Judges from other Commonwealth countries invited by the CKRC and ICJ on a fact-finding mission did state in its report that while many of Kenya's Judges continue to fulfill their judicial office faithful to their judicial oath, public confidence in the independence and impartiality of the judiciary has virtually collapsed.

Following the release of the Draft Constitution and the report of the CKRC, in which the Review Commission made far-reaching proposals on reforming the judiciary, the judiciary got embroiled in a legal tussle with the CKRC which battle was the reaction of the judiciary to the proposals for its reform. The Law Society of Kenya led a public protest against this attitude of the judiciary and for the first time in the country's independence history, lawyers engaged in a boycott of the courts to express disgust at the judiciary's attempts to scuttle the review process.

The judiciary's efforts in scuttling the review process became evident when the High Court, following an application by two Lawyers, T. K'opere and Thoronjo against the Constitution of Kenya Review Commission,[19] issued an injunction restraining the CKRC from writing a Draft Constitution ostensibly because a "draft" obtained by those two lawyers indicated recommendations had been made to sack all judges of the High Court and the Court of Appeal.

The CKRC, however, in spite of this order proceeded and produced a Draft Constitution and its report where it proposed radical reforms in the judiciary. Following the release of these proposals the two lawyers applied for Professor Ghai and the Commissioners to be cited for contempt. The judiciary, through Justice Juma, a High Court Judge,

and Justice Ole Keiwua, a judge of the Court of Appeal, filed a suit[20] seeking orders whose import was to scuttle the review process, arguing that the proposals by the CKRC were unconstitutional.

The act of the judiciary in filing the suit and sitting in judgment over the two cases caused serious legal arguments in the country. The Law Society of Kenya (LSK) called a meeting of its members where there was consensus that the act of the judges was a violation of the rules of natural justice and a violation of the duty of the judiciary under the Constitution. The CKRC, by virtue of the Review Act, had a mandate to make changes to all facets of Kenya's life and governance including the judiciary. The arguments of the judiciary that the proposals by the CKRC were unconstitutional were therefore legally flawed. The proposals by the CKRC would of necessity interfere with existing constitutional arrangements once adopted. In any case, the procedure for dealing with the proposals was through the national conference and not a court order to prevent the whole review process from proceeding. This act and subsequent orders by the judiciary in this case were events that greatly undermined constitutional development in Kenya in 2002. The judiciary in essence failed in its responsibility.

This failure is not only evident in the negative position towards the review process and efforts to scuttle the same because of its proposals on the reform of the judiciary but also because of the judgments emanating from the courts. One area in which the court judgments showed judicial anarchy is the area of freedom of expression.

Freedom of Expression and Judicial anarchy

The price a country pays for institutional integrity and constitutional longevity is eternal vigilance, which is carried out by its monitoring and oversight institutions. In constitutional terms, the judiciary is the foremost of these oversight institutions.[21] In the performance of this function the judiciary should ensure the protection, promotion and preservation of human rights.

In the scheme of human rights in Kenya as guaranteed by Chapter V of the Constitution, freedom of expression is one of the cardinal rights. The Law Society of Kenya in its annual report for the year 2002, justifies focusing the report exclusively on freedom of expression in the following terms:

> First, it is argued that the most important characteristic feature of human beings is the freedom of will and a capacity for self -directed action. These include the capacity for independent decision-making and action, without coercion. Freedom of expression enhances personal autonomy by providing an avenue for the expression of thought and conscience. It also safeguards one's autonomy by providing a range of values and ideas from which one chooses in formulating one's world view without interference from any governmental authority.
>
> The second justification for the right to freedom of expression is largely associated with John Stuart Mill, the eminent 19th century British legal theorist, first enunciated in his book "On Liberty." Mill argues that the freedom of expression should be allowed on purely utilitirarian grounds, since there is no one who is infallible or who has a monopoly of truth. Indeed he doubts that there could be such a thing, as absolute freedom of expression to be allowed on any issue, as it is unlikely to lead society to the truest position on any issue. This, in effect, amounts to the promotion of a culture of tolerance of diverse opinions.
>
> The third justification is that "freedom of expression is absolutely necessary if democracy is to thrive. In order to fully participate in the discussion of issues affecting them, people need uninhibited access to information and to a wide range of ideas and opinions.[22]

Freedom of expression as guaranteed in the Constitution is not absolute. It is limited in three main ways. Firstly, it is like all other freedoms subject to the rights and freedoms of others. Secondly, it is limited to the extent of public interest. Thirdly, it is qualified by particular laws that seek to protect the rights and freedoms of others and that are protective of the public interest. One such law is the law of defamation, principally contained in the Defamation Act[23] .

The law of defamation exists to guard against people's reputation being injured by the utterances and speech of others. Anyone who publishes articles or utters words injurious of the reputation of another is liable to be sued for defamation. In deciding defamation cases, the judiciary is expected to balance two competing interests, one of the right of the public to free speech and information, against that of the private interest to reputation.[24]

In the recent past, however, the judiciary tilted the scales in favour of private interest to reputation to the extent of making the law of defamation superior to the constitutional freedom of expression.

The opening salvo in the judicial anarchy was fired by then Commissioner of Assize, now judge, Justice Visram, in the case of *Nicholas K. Biwott vs Clay Limited and three others.*[25] In this case the court awarded Mr. Biwott Kenya shillings 40 million as awards for defamation. The case has subsequently gained notoriety in the country not for its legal reasoning, for it has been faulted both on its interpretation of the law and application of facts, but because of the manner in which the judiciary has religiously followed it in subsequent cases and used it to award very high sums in damages for defamation.

Briefly the case was brought by Nicholas Biwott, then a Cabinet Minister against two British companies, Clays Limited , Little Brown Company Limited and also Dr. Ian West and Chestern Stern for defamation. The defamation arose out of a book, *Dr Ian West's Casebook*. The book alleged that Biwott had participated in the murder of Dr. Robert Ouko, who at the time of his death was the Minister for Foreign Affairs in Kenya and thus Mr. Biwott's Cabinet colleague. Biwott also sued two Kenyan companies, Bookpoint Limited and Chandermohan Bahal Bookshop for distributing the offending book in Kenya.

These cases were consolidated by the Judge for purposes of hearing. The two Kenyan companies conceded liability in an out of court settlement and each agreed to pay Kenya shillings 5 million. Against the other defendants Justice Visram awarded a total of Kenya shillings 30 million the highest award for an unliquidated claim in Kenya's history.

The Biwott judgement has been faulted for several reasons

The award of Kenya shillings 30 million, included Kenya shillings 15 million in punitive damages. Punitive damages are awarded in instances when a defendant after the initial defamation behaves in a remorseless or high-handed manner, which tends to compound the original defamation or when a defendant recklessly publishes defamatory matter for financial gain. In this instance, evidence was led that the defendants haughtily refused to submit to the jurisdiction of the court

and stated in the press that the matters complained about were true and not defamatory.

The press reports were allegedly made by Dr. West and reported by Paul Redfern, the *Daily Nation* newspapers reporter in England. However, during the case, Redfern never testified. Only Mr. Wangethi Mwangi, the *Daily Nation's* Editorial Director testified stating in his evidence that Dr. West had uttered the words, that the words complained about were true. This evidence clearly offended the rules of evidence.

The courts award was also highly excessive compared to previous awards in Kenya. Its impact has been the emasculation of the press through the use of libel laws. This coupled with the passage of the Miscellaneous Amendment Bill that *inter alia* tightened the laws under which the press operates made the year a dark one for press freedom.

Despite being a precedent setting, the judgment was a disaster as far as freedom of expression was concerned. Surprisingly, the judgment did not even once mention Section 79 of the Constitution dealing with freedom of expression. Later events seem to suggest that this was like the silence of Sir Thomas Moore, that "silence that speaks."

This massive award has been used as a guide in assessing libel awards in subsequent decisions in libel cases by the High Court. Lawyer Patrick Machira has been awarded Kenya shillings 20 million against the *Nation* newspaper, Waruhiu Muite, Kenya shillings 10 million against the *Kenya Times* and Biwott Kenya shillings 20 Million against the *People Newspaper* and Wilson Kalya and another Kenya shillings 16 million against the *Standard Newspaper*.

In the above cases the Judges have not reviewed the place of the public interest in these matters. This was especially so in the Biwott cases where the public had a great interest in getting information about the circumstances surrounding the death of Robert Ouko.

Mr. Biwott, also in the course of the year under review, benefited from another favourable decision of the High Court in relation to the allegations published in a report of a Commission of Inquiry into Tribal Clashes (popularly known as the Akiwumi Report). The Commission, which had been established in 1998 to inquire into the causes of the clashes that rocked the country intermittently since 1991, prepared and submitted its report to the President in which it made adverse findings

against Mr. Biwott. Biwott sued the Attorney General and succeeded in having a court order striking out his name from the report. Although the Attorney General was not a party to the offending findings, he was sued on the grounds that he had to take responsibility for the report of the Commission as the custodian of public interest. This judgment definitely offended not just the Constitution but also the law. By requiring the Attorney General to expunge the name of Biwott from the report and on the nebulous ground that he is the custodian of public interest, the court offended the provisions of the Constitution, especially Section 26(8) which explicitly provides that the Attorney General is not subject to the direction or control of any person or authority in the discharge of his duties and responsibilities. Furthermore, even if the Attorney General expunged the name from the records this cannot stop him from proceeding with investigations against Mr. Biwott.

Second, it was alarming that the case proceeded and a decision was arrived at without the judges who made the offending findings being enjoined to the suit, thereby violating the principles of the rules of natural justice against condemning persons without giving them a hearing. This coupled with the speed with which the matter was concluded and the fact that the judiciary through their Chief Justice saw it fit to convene a bench of three Judges as opposed to the normal one Judge exposed the manner in which the judiciary dealt a death blow to its constitutional duty.

The judiciary's emasculation of freedom of expression is indicative of the attitude of the judiciary in the protection of human rights. In the two cases related to the review of the Constitution mentioned above, the judiciary even attempted to take away the fundamental rights of Kenyans to discuss the reports even though the constitution guarantees all freedom of expression. Justice Hayanga is reported as having remarked during the hearing of the case by the two judges that "this court will not sit and see its authority being violated. The case is *subjudice* and cannot be the subject of public comment, ridicule, praise and approval."

The judiciary through its decisions in the past year and its action of suing to derail the review process and stop the CKRC from proposing changes to it seriously undermined constitutional development in

Kenya. The judiciary has had a chequered history. It has been an effective tool used by the executive arm to attain its political goals. [26] Mr. Ahmednassir Abdullahi, the present Chairman of the Law Society of Kenya, is on record as having stated that the greatest challenge to the judiciary is incompetence and corruption. On his election as chairman of the LSK in March 2003, he pointed out that nothing short of the sacking of at least 70 percent of the judiciary would do. He had earlier written that:

> Since the country is in the process of drafting a new constitution, we suggest that the present judiciary should be overhauled. The judiciary personifies our bad past. Nothing short of complete overhaul of the judiciary is needed.[27]

Constitutional Development: The Road Ahead

The end of the year 2002 was both good and bad. The bad news was that once again Kenyans ended the year without a new constitution. Despite years of agitation the "birth pangs" of a new constitution that Kenyans had started experiencing in the course of the year ended up being a false alarm. The situation was exacerbated by the fact that the CKRC led by Professor Ghai produced a draft that whetted the appetite of Kenyans. At last they saw an opportunity to break with the past of a defective constitution. Analysing the Draft Constitution for its gender content, Professor Maria Nzomo and Dr. Kameri Mbote made a statement that reflected the feeling of most Kenyans. They concluded that:

> Kenyan women have a lot to celebrate as we move to a new constitutional dispensation. The Draft Constitution represents major gains towards gender equality and equity and in essence delivers on many points that have been at the heart of the pro-women movement in Kenya from the 1980s. The statement by the Secretary of CKRC that the Constitution is a political, economic and social 'cape of good hope' is accurate in describing the Draft.[28]

Unfortunately the Cape of Good Hope remained only a hope for Kenyans as the year ended. Thus although the CKRC contributed a lot to the development of a constitutional interest in the citizenry through

their task of collecting views and producing a remarkable draft, its work was frustrated by a recalcitrant executive and an "executive-minded" judiciary.

Despite this gloomy picture Kenyans ended the year on a positive note. So much so that at the end of the year and the start of 2003, Kenyans were described as the most optimistic people on earth. This optimism was justified. Following several years of constitutional dictatorship, Kenyans elected a new Government on 29th December 2002. In elections widely seen as fair and free, President Mwai Kibaki and his opposition alliance,[28] the National Rainbow Coalition won the elections and formed a Government. Kenyans are optimistic not just for the win but because the win provides an opportunity for them to break away from the past and chart the path to a new future, one in which the rule of law and constitutional democracy are the guiding beacons of government. Their optimism is that the year 2003 will be the one that starts them towards that ideal. As to whether they will be rewarded for their optimism, only time can tell.

Notes

1 SA De Smith, Quoted by (Constitutionalism In The Commonwealth Today), (1962), 4 Malaya Law Review.

2 For a discussion of constitutional amendments in Kenya, see G. Muigai, (*Constitutional Amendments and the Constitutional Amendment Process in Kenya (1964-1997): A Study in the Politics of The Constitution,)* PHD Thesis, University of Nairobi, June 2000.

3 The use of the term " transition elections" does not mean that the elections by themselves constituted the transition. Elections are only but one element of transition politics. For the transition to be complete much more needs to be done by the regime of President Kibaki to ensure that substantive political and socio-economic benefits accrue to the citizens.

4 See S. Scmidt and G. Kibara, *Kenya on the Path Towards Democracy? An Interim Evaluation* Konrad Adeneur Foundation Occasssional Papers No 6, 2002 p.64-66

5 ICJ, *Kenya Elections, 1997: Free And Fair?* 1997, p. 8.

6 The efforts of civil society in constitution making are documented in Willy Mutunga, *Constitution Making From The Middle*, SAREAT/MIWENGO, Nairobi, 1999.

7 IED/CJPC/NCCK, *Report on the 1997 General Elections in Kenya 29-3o December 1997*, Nairobi, 1998, p. 113.

8 See CGD Elections Bulletin, "Consensus on Reforms for Free and Fair Elections" Issue 2/02, may 2002.

9 For a brief discussion of the Historical overview of the voter registration see IED, *Registration of Voters in 2002: An audit*, p. 7-9.

10 Chapter 7, *Laws of Kenya*

11 See a discussion on the regulations in CGD Bills digest, "Sealing the Loopholes for Rigging", Nov. 2002, Transparency International (Kenya*), Dealing With Electoral Malpractice: Your Anti-Rigging Guide*, December 2002.

[12] This was the verdict arrived at by IED in its audit of the 2002 voter register See IED, *Voter Registration Exercise in 2002: An Audit.*

[13] European Union Election Observation Mission, *Kenya General elections 27 December 2002, Final Report*, 2003.

[14] High Court Of Kenya at Nairobi, Miscellaneous application No. 975 of 2001.

[15] This title is borrowed from L.M. Mute et al *Building an Open Society: The Politics of Transition in Kenya***,** Claripress**,** Nairobi, 2002**.** It should be noted that transition differs from succession. In a transition there is substantive shift from the policies and governance style of a previous regime to a new and better dispensation while succession refers to the mere change of guard at the top without any corresponding policy change. This paper will use the term transition as a more accurate description of what happened in Kenya.

[16] Republic of Kenya, *Report of the Committee on the Administration of Justice*, 1998, 1

[17] Kwach R.O. "The Judiciary in Kenya: Structure, Procedure and Accessibility (Unpublished Paper), 1998, p.1

[18] CKRC, *The People's Choice: The Report of the Constitution of Kenya Review Commission; Short Version*, issued by CKRC at Mombasa on 18/9/02 p.52.

[19] HCC Application 110 of 2002.

[20] Misc Cause 110 of 2002.

[21] Institute of Economic Affairs and Society of International Development, *Kenya at Crossroads: Scenarios for our Future.*

[22] Law Society of Kenya, "Freedom of expression in Kenya: A review of the Recent past," December 2002. (Unpublished) p. 1-2,

[23] Chapter 36, *Laws of Kenya.*

[24] This balance is discussed in the case of *Francis Lotodo vs The star & Magayu Magayu* HCCC No. 883 of 1998 (Unreported).

[25] HCCC No. 1068 of 1997, consolidated with KNK Biwott Vs Dr Ian West & another HCCC No. 1068 of 1999.

[26] Advocate Correspondent, *Judicial Reform in Kenya in Light of the Current Constitutional Review Process: Some Reflections.Advocate*, Second Quarter, 2002, p.19.

[27] A.M. Abdullahi, "The Judiciary in Kenya: who should Reform it?" *Advocate* 2nd Quarter, 2002.

[28] M. Nzomo and P. Mbote "Gender Issues in the Draft Bill of The Constitution of Kenya: An Analysis" unpublished paper prepared for CKRC 2002 p.4.

[29] On the process of alliance formation in Kenya in 2002 see Willy Mutunga, " The unfolding Political Alliances and Their Implications for Kenya's Transition," in L.M. Mute *Building an Open Society: The Politics of Transition in Kenya, 2002***,** Claripress, Nairobi, p. 65-97.

5

Constitutional Development in the East African Community (EAC) in 2002

Benson Tusasirwe[1]

The East African Community (EAC) aims at widening and deepening cooperation between the Partner States for their mutual benefit. This should be reached among others, through the establishment of a customs union as the entry point of the Community, a common market subsequently, a monetary union and ultimately, a political federation.[2]

Introduction

On November 30, 1993, the Heads of State of Uganda, Kenya and Tanzania took a decisive step. Through the Agreement for the Establishment of a Permanent Tripartite Commission for Cooperation between the United Republic of Tanzania, the Republic of Kenya and the Republic of Uganda, they established the Tripartite Commission, mandated to coordinate the movement towards East African cooperation. A year later, on November 26, 1994, provision was made for a secretariat for the Tripartite Commission.[3] With an institution in place with the mandate to work towards East African cooperation, the idea of reviving the East African Community (EAC), which had collapsed in 1977, moved from the realm of fantasy and nostalgia and those who dreamt of the "good old days" of the EAC could now do something about their dreams and work towards their realisation.

In 1997, the Commission came up with a four-year East African Cooperation Development Strategy for 1997-2000. By this time, debate had been generated on the possibility of closer cooperation. Accordingly, the Heads of State mandated the Commission to commence negotiations for the purpose of upgrading the Agreement

into a Treaty. On November 30, 1999, the Treaty for the Establishment of the EAC [4] was signed. It was ratified by the Partner States without much delay and on July 7, 2000, it entered into force. On January 15, 2001, the EAC was formally re-launched.[5]

The following year was devoted to operationalising the Treaty, by putting in place the institutions spelt out in the Treaty. This study shall analyse the operations of these institutions in 2002.

Implementation of the Treaty was embarked upon in an orderly fashion. An Indicative Programme of Action was adopted by the Council of Ministers at an extraordinary meeting on November 19, 1997. The thrust of the Programme is the domestication of the Treaty, the establishment of the EAC's institutions and the implementation of the EAC's Development Strategy. This is supposed to culminate, in the establishment of a political federation in the long run.[6] In the short term, however, the Treaty limits itself to the formation of a customs union and common market.[7]

The Treaty sets out a framework for cooperation in a wide range of areas – economic, political and administrative. The (2nd) EAC Development Strategy, which was drawn up for 2001-2005, sets out a blue print for the implementation of the goals of the EAC, especially the central goal of regional integration.

In its preamble, the Treaty captures the determination of the peoples of East Africa, "to strengthen their economic, social, cultural, political, technological and other ties for fast, balanced and sustainable development, by the establishment of an East African Community, with an East African Customs Union and a Common Market as transitional stages to, and integral parts thereof, subsequently a Monetary Union and ultimately a Political Federation"[8] In other words, the EAC is asserted as a starting point. Its Development Strategy is to provide the road map to higher stages. The four phases of this progress – from a customs union to a political federation – are expected to be distinct but overlapping.[9] The 2001-2005 Development Strategy concerns itself with the first two phases: the Customs Union; and the Common Market. The Development Strategy is founded on six considerations:

- Lessons and experiences gained during the 1997-2000 Development Strategy;
- Provisions of the Treaty;
- Views of stakeholders;
- The need to continue with on going activities;
- The imperatives of globalisation;
- The need to avoid controversy.[10]

On the basis of these, the Development Strategy lays out specific prescriptions for cooperation. This paper is concerned with an examination of the extent to which these prescriptions were achieved by the end of 2002.

The objects for which the EAC was re-established are set out in Article 5 of the Treaty. They include, among others:

- The strengthening and consolidation of the long standing political, economic, social, cultural and traditional ties and associations between the peoples of the Partner States so as to promote a people-centred mutual development of these ties and associations;
- The promotion of peace, security and stability within, and good neighbourliness among the Partner States;
- The enhancement and strengthening of partnerships with the private sector and civil society in order to achieve sustainable socio-economic and political development;[11]

These are noble objectives. Three years down the road, it is pertinent to analyse the measures being pursued in line with these objects.

Of particular concern is the role the EAC has played, if any, in the prevailing political, legal (constitutional) and human rights situations in the Partner States and, conversely, the effect political and constitutional developments within the individual Partner States have had on the targets, operations and prospects of the EAC.

The Treaty sets out "fundamental" and "operational" principles of the EAC. The former include:

"Good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality as well as the recognition, promotion and protection of human and peoples' rights in accordance with the African Charter on Human and Peoples Rights."[12]

The latter reiterates this commitment where it states:

"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."[13]

These are constitutional principles recognised by and binding on the three East African States, even without the EAC treaty, by virtue of the provisions of each partner state's own constitutions as well as their commitment to various international instruments to which they are party. Whether these principles were applied and/or observed by the Partner States during the period under review and how this affected or was affected by the EAC, is also the subject of this paper.

The Community Institutions in 2002

The Treaty establishes the following institutions:

- The Summit of Heads of State or Government;[14]
- The Council of Ministers;[15]
- The Coordination Committee of Permanent Secretaries;[16]
- The East African Court of Justice (EACJ);[17]
- The East African Legislative Assembly (EALA),[18] and
- The Secretariat.[19]

The first three each have pre-determined membership. Sitting Presidents, Ministers in charge of regional cooperation and Permanent Secretaries responsible for regional cooperation in each Partner State automatically make up these institutions. The last three, however, had to be specifically constituted. The first to be constituted was the Secretariat when, in April 2001, the Secretary General and his Deputies were appointed by the Heads of State during their second Summit.[20] Other members of staff of the Secretariat were appointed in due course. Later in the year, the Justices of the EACJ were appointed by the respective Heads of State, while the 27 EALA members were elected by their respective legislatures of the three Partner States. On November 29, 2001, the Assembly elected a Speaker.

The EACJ and EALA were inaugurated on November 30, 2001.[21] At the onset of 2002, therefore, the institutions were set to go, each implementing its own mandate.

The East African Legislative Assembly (EALA)

As part of its members' orientation and familiarisation with its constituency, the EALA resolved to hold its initial sittings in all the Partner States in rotation, in conjunction with seminars and tours in each country.

In accordance with this resolution, the Assembly held its first sitting in the Chamber of the Parliament of Uganda from January 21-25, 2002. During that session, the Assembly debated and passed three resolutions, namely:

- A resolution by which the Assembly committed itself to implementing the objectives of the process of integration;
- A resolution to apply for membership of the Commonwealth Parliamentary Association (CPA); and
- A resolution to establish seven standing committees.

The seven standing committees were subsequently constituted.[22] Thereafter, the Assembly held a seminar where the EAC trade regime, the World Trade Organisation (WTO) obligations, management and utilisation of common resources, especially Lake Victoria and its basin, peace, security and human rights, among others, were discussed.[23] From April 14 to May 4, 2002, the Assembly's standing committees met in Tanzania. The mandate of each committee was discussed and priorities for each committee spelt out. The Assembly also received presentations on the activities of the EAC Sectoral Committee.[24] The Assembly held three sittings in Arusha from May 2-4, 2002. At these sittings, a $5,249,301 budget for the EAC for the 2002/2003 fiscal year was presented, debated and approved.[25]

From May to June 2002, the Assembly met in Nairobi, Kenya. It received, debated and adopted the first reports of most of the standing committees and dealt with questions of regional integration, procedures and privileges of the Assembly and appointment of EAC staff.[26]

While in Kenya, the Assembly's female members held a seminar on gender mainstreaming jointly with parliamentary representatives of the Partner States.[27] The Assembly met again in November for its 6th session, which was devoted to an address by retiring President Daniel arap Moi of Kenya.

It follows, therefore, that throughout its first year of existence, not a single Bill was introduced before the House. The EALA legislators

have pointed out that it was the duty of the Council of Ministers to initiate and submit Bills to the Assembly in accordance with Article 14.[28] This is so, but it is not the whole truth. Whereas the bulk of Bills are expected to emanate from that source, members are also empowered to seize the initiative. The Treaty provides that "subject to the rules of procedure of the Assembly, any member may propose any motion or introduce any Bill in the Assembly."[29]

If it is true that members were eager to do their job but were let down by a lack of Bills, there is no reason why they did not initiate any of the Bills necessary for implementation of the Treaty. As is characteristic of many African legislatures, the EALA spent the bulk of its time receiving presidents and other dignitaries, touring business premises, holding seminars and giving speeches about East African unity. A case in point, the bulk of the 4th session was spent debating how members and strangers in the gallery were to dress, whether or not the Speaker should don a wig and whether the wig should have long ears, short ones or no ears at all!

But one cannot be too harsh on the Assembly. One cannot expect a new institution to commence its work without glitches. It is a different case where an institution has been in existence, with facilities, finances, technical staff and other resources in place. Indeed, members have since come up with private Bills.[30] It has been pointed out that the attempt to propose private Bills is hampered by the lack of a draftsperson at the service of the Assembly.[31]

It also has to be conceded that the work of the Assembly is not limited to the passing of Bills. Its other roles include overseeing other institutions of the EAC, in particular, the Council of Ministers. The Assembly may require the Chairperson of the Council of Ministers to appear before it and answer questions put to him/her by the members. Such questions can include inquiries into the progress made in implementing the Treaty. The Assembly can also receive and debate Annual Reports on the activities of the EAC. Unfortunately, during 2002, no such report was introduced before the Assembly and this cannot be blamed on the latter.[32] It is to be hoped that having found its feet by the close of the year, the Assembly will more effectively tackle its responsibilities in the coming years.

The East African Court of Justice (EACJ)

If not much can be said about activities of the Assembly, even less can be said about the EACJ. The Court is intended to ensure adherence with the law in the interpretation, the application of, and compliance with the Treaty. Thus, its initial jurisdiction is limited to interpretation of the Treaty[33] and adjudication in disputes between the EAC and its employees, arising from the terms and conditions of service of the latter or the application and interpretation of staff rules, regulations and terms and conditions of service of the EAC.[34] The Court may also adjudicate on any matter submitted to it on the basis of an arbitration agreement, being either an arbitration clause contained in an agreement or where state parties concerned agree to submit a dispute between them to the Court.[35]

This initial jurisdiction is exercised where, through reference by a competent person, the Court is called upon:

- To adjudicate on whether a Partner State or an institution of the EAC has infringed the provisions of the Treaty;
- To determine whether or not any Act, regulation, directive, decision or action of a Partner State or an institution of the EAC is ultra vires or contravenes the Treaty;
- To give an advisory opinion regarding any question of law arising from the Treaty which affects the EAC.[36]

An advisory opinion under the foregoing provision may be given at the request of a Partner State, the Secretary General, or any resident of a Partner State.[37] In November 2002, the Court took a major step in preparing itself for business. It enacted its Rules of Procedure and Arbitration Rules.[38] The provisions of the two sets of rules are standard. But, with these, intending litigants and the Court are equipped with directions on how to proceed.

The Treaty envisages future extension of the jurisdiction of the EACJ to such other original, appellate, human rights and other jurisdiction as will be determined by the Council of Ministers at a subsequent date and operationalised through a protocol.[39] To date, no such extension of jurisdiction has been effected or initiated.

The important thing to note is that by the close of 2002, not a single reference had been made to the Court and, accordingly, the Court had not sat. This is a waste, considering that staff of the Court are being

paid for no work. Fortunately, the Justices of the Court are also judges and justices in their respective countries and only claim emoluments for work done for the EAC.

An active EACJ, especially one seized with human rights jurisdiction would serve a vital purpose. One would expect such a court to be less prone to the interference and manipulation of governments than the national courts. It would be more impartial. But survivors of human rights violations must know of the Court's existence in order to turn to it. This knowledge cannot be gained when the Court is non-operational.

The Court could also play a useful role in the arbitration of international disputes, commercial and otherwise. But as long as its existence is not publicised, directly or through good works, disputes will not be referred to it.

The Secretariat and the Council of Ministers

These two institutions are the engines of the EAC. The Secretariat is the executive of the EAC,[40] comprised of the Secretary General, his/her deputies, counsel to the EAC and other officers the Council of Ministers may deem necessary.[41] The mandate of the Secretariat is broad.[42] An ineffective Secretariat would render the running of EAC business impossible.

The Council of Ministers is the policy institution of the EAC[43] and is the institution to which the Secretariat answers. It is empowered to translate the goals of the EAC and indeed, of the peoples of East Africa, into achievable Programmes of Action and in liaison with the Secretariat and the Partner States, to see to the implementation of these Programmes of Action.

As 2002 unfolded and the two organs set about implementing the Treaty and the Development Strategy, it became clear that both in terms of legal framework and of resource allocation, these two institutions were not equipped to handle the ambitious mandate they had been given. In terms of personnel, office space, finances and other resources, the Secretariat was thin on the ground. And, because it is the Secretariat that fends for other institutions, such as the Assembly, the hardships it operates under affect these other institutions. Hence complaints about financial constraints were rife. Not only was the initial budget

inadequate, but what was budgeted for did not always materialise on time or at all. As of May 2002, Uganda was in arrears amounting to $300,000, on top of its obligation to make a contribution to the 2002/2003 budget. Not far off was Tanzania in arrears of $14,593 and Kenya with arrears of $813,898.[44] Even if the Partner States had paid their dues, it would still have been difficult for the Secretariat to realise its mandate on a mere five million dollars. Constitutions and other legal instruments mean little unless facilities for their implementation are put in place. Thus, Dr Harrison Mwakyembe was spot on when he described the $5.2 million budget for the 2002/3 fiscal year as, "inadequate and insensitive to the broad expectations of the people of East Africa."[45] Other constraints included the lack of personnel skilled in regional as opposed to national matters and inadequate infrastructure such as office space, computers, library and research facilities.[46] In spite of these constraints, the policy and executive organs of the EAC were able to keep it in operation. East Africans, however, care for more than survival. Specific targets were set out, initially in the Indicative Programme of Action and later in the Treaty and the Development Strategy. The test of whether or not the institutions of the EAC are doing a good job lies in whether or not they are making headway in implementing the objectives and goals of the EAC and in this way, addressing the aspirations of the peoples of East Africa. It is to that question that we now turn.

Implementation of the Development Strategy

In the Treaty, Partner States pledge to work towards cooperation in trade, investment and industrial development, fiscal and monetary policies, infrastructure and services, human resources, science and technology, migration and residence, agriculture and food security, environmental and natural resource management, tourism and wildlife, health and cultural activities, political matters and legal and judicial affairs.

It was understood that co-operation in economic and related matters comes first and will lay the foundation for political union, culminating in a political federation.[47] Co-operation in the economic sphere is to start with the harmonisation of macro-economic policies, followed by the

establishment of a customs union and then a common market. Macro-economic cooperation is to be achieved through:

- Cooperation in monetary and fiscal policies by maintaining convertibility of the currencies of the three Partner States as the basis for a single currency in future;
- Harmonisation of exchange rate policies and interest rate policies; and
- Working towards convergence of economic parameters (uniformity of rates of inflation, growth rates, fiscal deficits, foreign currency reserves and so on).[48]

The Customs Union will then be established by putting in place three practical measures:

- Removal of non-tariff barriers;
- Elimination of internal tariffs;
- Establishment of a common external tariff.[49]

The Treaty provides that a Customs Union Protocol will be concluded within four years of signing the Treaty.[50] While a Customs Union draft Protocol was duly prepared and disseminated in the course of the year, an inconclusive debate then raged about its provisions relating to external tariffs, especially on whether these should be set at 20 per cent or 25 per cent.[51] Consequently, the Protocol has not been concluded.

There is also the problem that while Kenya and Uganda are members of the Common Market for Eastern and Southern Africa (COMESA), Tanzania is a member of the Southern African Development Community (SADC). So external tariffs are difficult to harmonise.[52] Positively, however, in accordance with the principle of asymmetry, Tanzania and Uganda have reduced tariffs on imports from Kenya by 80 per cent while Kenya has reduced tariffs on imports from the other two countries by 90 per cent, the aim being to eventually eliminate the tariffs altogether.[53] Nevertheless, there is still too much talk and too little action on this matter.

The indecisiveness with which the question of the Customs Union has been approached is the clearest demonstration of the kind of political fickleness and lack of leadership that led to the collapse of the old EAC in 1977. Pettiness still reigns supreme. This sends an unmistakable signal that what went wrong then can still go wrong now.

The Customs Union troubles aside, modest progress has been made on other aspects of the Development Strategy. With respect to the free movement of persons, an East African passport and temporary passes were introduced. Interstate travel passes were also reintroduced.[54] At airports and border crossings, special immigration counters for East Africans were introduced. But, by the end of the year, these counters were not operational and East Africans had to queue up with everybody else.[55] With respect to infrastructure, an East African Power Master Plan, an East Africa Road Network[56] and the Lake Victoria Development Programme[57] were formulated. But they were still in their initial stages at the end of the year. So too, was the project to harmonise judicial training syllabi and activities. Fruition is yet ahead.[58]

The Private Sector and Civil Society

The revival of East African cooperation brought with it, and was accelerated by, the growth of private sector and civil society players. The Treaty anticipated an active role for the private sector and civil society in the life of the EAC.[59] The business community embraced the idea of the EAC and possibility of larger markets for obvious reasons. Indeed, the business community had all along defied politicians and operated from an East African perspective. So it was not surprising when, on November 3, 2002, East Africa's leading Chief Executive Officers (CEOs) held the first ever East African Business Summit where they called for a "business manifesto" to transform the economies of the region. They proposed concrete measures for this transformation.[60] The result has been the formation of the East African Business Council.

Other initiatives, some of which began earlier, continued to grow in strength and influence during the period under review. These include the formation and/or strengthening of organisations such as the East African Trade Union Council, the East African Magistrates and Judges' Association, the East African Youth Council, the East African Tourism Council,[61] the East Africa Law Society, the Joint Research Council for East Africa, and Kituo Cha Katiba, the East African Centre for Constitutional Development.

Participation by civil society and the people generally, was lacking in past efforts at integration. Experience has shown that, without such

participation, the EAC cannot hope to stand the test of time. Political slogans, however colourful, do not build integration – people do. Besides, civil society is well placed to challenge attempts by political actors to hijack the EAC and its institutions for use in their own selfish or short-term ends. The involvement of the private sector and civil society, therefore, is to be encouraged.[62]

Towards an East African Jurisprudence?

Whatever its shortcomings – and these were many – the old EAC had its silver lining. Other than joint infrastructure (railways and harbours, the postal system, the Development Bank, the University and so on), its most outstanding feature in the initial years was the Court of Appeal for East Africa as the final appellate court for the three countries. That Court made some of the best decisions this region has ever had.[63] Because of its regional stature, it was difficult for governments of the Partner States to manipulate or otherwise interfere with it. It was for this reason, that Milton Obote abolished appeals on questions of interpreting the Constitution from Ugandan Courts to this Court, for fear of constitutional cases challenging his actions being submitted to it. Tanzania also abolished appeals to this Court in treason cases following a successful appeal in a sensitive treason case in 1971.[64]

The new Court, the EACJ, is different from the Court of Appeal for East Africa. The latter was an appellate court, hearing appeals against decisions of municipal courts and so applying municipal laws. To each of the three countries, it was more of a municipal court. The new Court has original jurisdiction and only entertains limited matters as already pointed out. There has been clamour, especially within the East African legal fraternity, for the revival of the East African Court of Appeal.

Some, however, have cautioned against its revival in its original form whereby it was handicapped by having to recognise and respect municipal jurisprudence.[65] Indeed, it would now be difficult to revive the old Court without far-reaching changes. Kenya and Tanzania have one appellate court above the High Court while Uganda has two. Secondly, while the laws of the three countries were initially close, having all been borrowed from the British, each country has since moved

in its own direction. The level of respect for the rule of law in the three countries now varies. Finally, while all the present Partner States apply common law, applications for membership by Rwanda and Burundi have been pending for some time.[66] If these countries, that apply civil law, were to join the EAC, a common appellate court would be a difficult proposition.

Perhaps, therefore, the best option is to work towards an East African Court of Human Rights for it is in that area that uniform standards and fundamental principles are recognised. Moreover, it is in this area that municipal courts tend to be compromised. At present, the Partner States lack a homogenous body of laws. The EACJ, which could have helped to harmonise jurisprudence, has limited jurisdiction. The need to create EAC jurisprudence thus remains to be addressed.

Local courts, however, seem to be realising the desirability of embracing the EAC spirit in their work. In a recent decision,[67] Justice James Ogoola of the Uganda Commercial Court was faced with an application by Uganda defendants for the security for costs against Kenya residents with assets in that country, on the ground that the fact of the plaintiff's foreign residence was, *prima facie*, grounds for ordering such security. The judge declined to order security for costs, stating that in exercising his discretion to order payment of security for costs, he was entitled to take into account the fact that the plaintiff was resident within the EAC. The judge stated:

> The ancient and venerable principle of *Ebrard vs Gassier (1885)28 ChD 232* must yield to the realities of today. In East Africa, as was the case with the United Kingdom, there can no longer be an automatic and inflexible presumption for the courts to order payment of security for costs with regard to a plaintiff who is a resident of the East African Community, I am prepared to disregard the fact of the plaintiff's residence as a factor in the consideration of whether or not to order payment of security for costs.

The learned judge's sentiments cannot be faulted. The problem is that the rules relating to the execution of judgements of courts of the respective Partner States have not yet been harmonised. The law on security for costs was born out of the need to protect defendants from losses arising from expenses defending suits in circumstances where

an order (for costs) against the plaintiff is unenforceable either because the plaintiff is impecunious or neither him/her nor his/her assets can be accessed for attachment. So, until the three countries provide for automatic execution of judgements of courts of one Partner State in another, Justice Ogoola's decision has come before its time.

Globalisation and the World Trade Organisation (WTO)

Words like "globalisation" and phrases like "the global village" are now fashionable. For East Africans, globalisation and its implications, especially those that are negative, is more than abstract. Globalisation may be understood as a process that entails transformation of socio-economic relations and transactions across borders, generating networks of activity, interactions and power. According to one academic, globalisation involves:

- Expansion of social, political and economic activities across political frontiers, regions and continents;
- Intensification of inter-connectivity and the flow of trade, investment, finance, people and cultural practices across national, regional and international borders;
- Change in the production system.[68]

To date, the greatest institutional expression of globalisation is the World Trade Organisation (WTO), which purports to lay down a multilateral framework for regulating world trade. It is a successor to and a refined version of the General Agreement on Tariffs and Trade (GATT), which was formed in 1947, to contain the trade wars of the 1930s. But, together with the International Monetary Fund (IMF) and the World Bank, it is a convenient institution for the United States-led capitalist west to dominate the global economy, with considerable success.

By the 1980s, principles that had been agreed upon in the earlier rounds of multilateral trade talks[69] had been overtaken by events. Consequently, the Uruguay Round of talks (1986-94) widened the subject matter and geographical scope of the agenda. The Uruguay Round culminated in the Marrakesh Agreement Establishing the WTO in 1995.

The three East African states are signatories to, have ratified and are bound by the WTO Agreement. The WTO Agreement covers a wide range of matters including agriculture, sanitation, textile and clothing, technical barriers to trade, Trade Related Investment Measures (TRIMs), the Agreement on Anti-Dumping Practices, the Agreement on Trade Related Aspects of Intellectual Property (TRIP), and the General Agreement on Trade in Services (GATS).

Over time, it has emerged that under-developed countries got a raw deal in the WTO arrangement. The requirement to "open up" has left African markets exposed to developed countries' competition. Due to our under-development and fragmentation, we cannot respond in kind, by participating in European and American markets. It is now estimated that high tariffs, anti-dumping regulations and technical barriers in these markets cost sub-Saharan Africa $20 billion annually.[70] Consequently, African countries advocate for a "development round" of talks, to address the specific concerns of underdeveloped countries. They also demand increase in Foreign Direct Investment (FDI), technical assistance, technological transfers, revision of patent laws, especially with respect to biological processes and so on. These demands will not be met as gifts from above. They must be earned, in two ways. First, by strengthening their negotiating hand, African states will be able to insist on favourable terms. Second, by creating viable economic units and markets, they will automatically attract some benefits as a matter of course. That is where regional institutions like the EAC come in.

When the three states negotiate with a single voice, they become harder to ignore. East Africa, with a single market of 80 million consumers, is a more serious proposition for any investor than any of the three separate markets of 25-30 million consumers each. By jointly developing infrastructure, the three states can turn the sub-region into a viable investment destination. The benefits of unity under prevailing global conditions cannot be over-emphasised.

The framers of the Treaty were mindful of this. Both the preamble and the general spirit of the agreement reflect this. In recent days, those in charge of the affairs of the EAC have moved further. During the Kampala Summit of April 2002, the Heads of State resolved and directed that in matters pertaining to WTO and Africa, Caribbean and

Pacific (ACP) / European Union (EU) arrangements, the EAC Partner States should negotiate as a bloc.[71] On September 13 2002, the Council of Ministers established a team of experts to advise how bloc negotiations could be done.[72] The experts met from October 23-25, 2002, to lay substantive strategies for bloc negotiations.[73] Hopefully, therefore, the foundation has been laid for giving East Africa a united and strong voice in world trade. However, these moves will not achieve much unless there is closer union. You cannot negotiate as a bloc unless you are really one. What, then, is being done to turn East Africa into a single entity?

Political Federation

The framers of the Treaty and Development Strategy planned to move systematically to a customs union, common market, monetary union and political federation, as distinct though overlapping phases. Given that the Customs Union stage has been reached with bickering over tariffs, it is difficult to envisage agreement on a federal constitution for East Africa.

Federation entails the surrender of some powers by federating units to the centre and vice versa. Where a federation is constructed of already sovereign entities, it requires them to surrender some of their sovereignty. Traditionally, a federal government takes over defence, foreign policy, fiscal and monetary policy, some legislative authority and final appellate court jurisdiction.[74]

The Partner States have demonstrated hesitancy around ceding these powers. There is nothing to suggest that their leadership has converted. It is difficult to envisage their leadership accepting an East African federal arrangement.[75] There is an even more serious problem – disparity in political culture and practice within the three countries. While Kenya and Tanzania have for years had an increasingly vibrant multiparty system, Uganda has clung to the Movement system of government, which some view as a thinly disguised one-party system. Recent moves towards ending monolithic politics have been slow, half-hearted and driven by donor and other pressures. They have not been borne out of the need to harmonise the politics of the three countries with a view to eventual federation.

Tanzania, too, has been problematic. It seems uncomfortable with Kenya's relative prosperity and assumed economic might. Thus, Tanzania has done the most to prevent agreement on tariffs, the removal of non-tariff barriers and the establishment of a customs union. In the East African Law Society, the Tanganyika Law Society (one of the four corporate members) has been reluctant to accept proposals for cross-border legal practice.

Nevertheless, towards the end of 2002, there have been moves towards federation without going through the four stages in the order referred to above.[76] Federation will have to be approached in small doses through further opening up for the free movement of persons, the establishment of regional institutions (both state and private sector), deepening cooperation in legal and judicial affairs including harmonisation of legal training, practice regulations and judicial codes and meetings of political leaders (including legislators) to eventually eradicate mutual suspicion.

The end of year changes on the political scene in Kenya, culminating in the loss of power by the Kenya African National Union (KANU) for the first time since independence, were an encouraging phenomenon. Uganda was left as the only county in the EAC where power has not changed hands smoothly. This, it is hoped, will encourage those in power in Uganda to accept changes. The Ugandan government may be persuaded to allow a pluralist dispensation and thus pave the way for the harmonisation of political culture and practice in the EAC.

Constitutionalism and Human Rights

To what extent has the EAC been a champion of the rule of law, democracy, constitutionalism and the protection, promotion and observance of respect for human rights? The collapse of the old EAC was partly brought about by the capture of power by Idi Amin in Uganda and the resultant suspension of democratic governance, constitutionalism and human rights. When President Julius Nyerere of Tanzania refused to sit in a meeting with Amin from the outset, it became impossible to convene a summit (then called the East African Authority).[77] Shortly afterwards Uganda and Tanzania went to war in 1972. Relations between Uganda and Tanzania and later, with Kenya, got worse. In 1977, the old EAC collapsed.[78]

The lesson to learn is that in a political atmosphere of insecurity, the breakdown of the rule of law, the suspension of democracy and widespread abuse of human rights, meaningful regional integration is impossible. This is why the question of reviving the EAC only arose after relative sanity returned to Uganda. Tyrants make lousy neighbours and worse bedfellows. For the Development Strategy of the current EAC to succeed, Partner States must, of necessity, individually work towards democracy. They must respect their Constitutions and the human rights of their people. For who would want his/her country to federate with a neighbouring state run by a butcher?

The drafters of the Treaty were mindful of this. As already pointed out, the Treaty lays down good governance including adherence to the principles of democracy, the rule of law as well as the recognition, promotion and protection of human rights as some of its fundamental and operational principles.[79] The Treaty also provides that the EACJ may, at a future date, through a protocol for this purpose, be clothed with jurisdiction in human rights. Hence, the Partner States are bound to respect these ideals in their day to day conduct. On the ground, however, each of the Partner States has gone on with politics as before.

In Uganda, the ruling Movement government continues to deny those who disagree with it the freedom to express themselves, assemble and associate. Meetings of opposition groups are routinely and often violently dispersed. The electoral process has been discredited while the government remains insensitive to public complaints about excesses of those in power, abuse of authority, corruption and nepotism. During the period under review, Uganda continued to be the odd one out, clinging to a monolithic political order and even toying with the idea of suspending constitutional provisions which lay down the term limit for the presidency, in effect paving the way for a life presidency.[80]

In Kenya, following the December 2002 general elections, there was peaceful transfer of power from KANU to the National Rainbow Coalition (NARC), led by current President Mwai Kibaki. The country seemed to have embraced democracy and was brimming with optimism. If the venture into democratic governance works, it is hoped that this will have a domino effect, spreading democracy to the rest of the EAC. At present, the spirit of regional co-operation appears to be championed by Kenya.

Tanzania has enjoyed almost uninterrupted relative peace since independence and has always had some form of general elections, even in the one-party era. It has also had the least overt human rights violations and has enjoyed a semblance of constitutionalism. The spate of violence that occurred in Zanzibar during the last elections does not appear to portend a breakdown in overall peace and stability. All indications are that not much will change. Although President Mkapa is serving his last term under the prevailing constitutional order, there is every sign to show that his government will not tinker with the Constitution to perpetuate itself in power. The calls for suspension of presidential term limits in that country have been muted and have apparently been rejected by the President.[81]

There seems to be a symbiotic relationship between the state of constitutionalism, the rule of law, democracy and the observance of human rights in each country on the one hand and the likelihood of closer and deeper regional cooperation on the other. The faster the three countries harmonise their politics, the easier it will be to co-operate and, eventually, federate.

Conclusion

After a long history, the movement towards closer co-operation found practical expression in East African Cooperation in 1993 and the more permanent EAC was launched in 2001. In the year under review, the EAC made some strides towards consolidation. Institutions of the EAC commenced their work and some made progress. The EAC however, continued to be dogged by challenges. Ordinary people remained detached. The private sector and civil society remained left out of the EAC's day-to-day business, in spite of lessons derived from the collapse of the old EAC in 1977, which demonstrated the futility of treating regional cooperation as the exclusive business of politicians and bureaucrats.

The long and medium term agenda of the EAC, enshrined in the Treaty and the Development Strategy is noble, but it has not got off the ground. Those in charge of implementation of the agenda pay lip service to the EAC's goals while allowing petty differences to prevent the realisation of these goals. This places the EAC at the risk of ending

up as another African talk shop. In the meantime, the global state of affairs is so hostile that unless Uganda, Kenya and Tanzania negotiate as one bloc, they stand no chance. The EAC remains an important organisation, with a vital role to play in the socio-economic, political and constitutional life of the sub-region. The Treaty – the Constitution of the EAC – is a good document. Documents, however, do not mean much if they cannot be implemented or if their implementation is slow, haphazard and half-hearted. That is the lesson to be learnt from the EAC in 2002.

Notes

1 Benson Tusasirwe is an advocate and an Assistant Lecturer in the Faculty of Law at Makerere University in Kampala, Uganda

2 Amanya, Mushega (2000) "Forward," *Freeing Cross Board Trade of Agricultural Products*, EAC Studies, Study II. Mushega is the current Secretary General of the EAC.

3 The 1st Protocol to the Agreement for the Establishment of a Permanent Tripartite Commission was signed in Kampala on November 26, 1994. However, the Secretariat it provided for was not set up until March 1996. For an analysis of the revival of the EAC, see Kamanga, Khoti (2001) "Some Constitutional Dimensions for East African Cooperation," *Constitutionalism in East Africa, 2001* and 2002 *Perspectives on Regional Integration and Cooperation in East Africa*.

4 Hereinafter called the Treaty.

5 Mburu, Chris (2002) "EAC Gives Customs Union Priority," The *East African*, December 9-15, 2002, page 4 and also the preface to the Treaty.

6 See *Annual Report July 2000-June 2001*, pages 5-20.

7 Article 2(2) of the Treaty.

8 See preamble to the Treaty and Article 2(2).

9 (2002) *East African Customs Union: information and implications*.

10 (2001) *The East African Community Development Strategy*, page 21.

11 Article 5(g) of the Treaty.

12 Article 6(d) of the Treaty.

13 Article 7(2)3 of the Treaty.

14 Articles 10-12 of the Treaty.

15 Articles 13-16 of the Treaty.

16 Articles 17-19 of the Treaty.

17 Articles 23-47 of the Treaty

18 Articles 48-65 of the Treaty.

19 Articles 66-73 of the Treaty.

20 *Annual Report July 2000-June 2001*, page 4. See also *Hansard* for the 1st Assembly, 8th Session, 4th Meeting, May 22, 2003, page 23.

21 *Annual Report July 2001-June 2002*, page 14.

22 The Committees are on: accounts; agriculture, tourism and national resources; general purposes, House business; legal, rules and privileges; regional affairs and conflict resolution; and trade, communication and investment.

23 *Annual Report July 2001-June 2002*, op cit, pages 4-5. See also Kaiza, David (2002) "EA Assembly Maiden Sitting in Kampala," The *East African*, January 21-7, 2002 and Kaiza, David (2002) "Nostalgic Debut for EA Assembly in Kampala," The *East African*, January 28-February 3, 2002.

[24] Sectoral Committees are specialised organs of the EAC, established by the Council of Ministers on the advice of the Coordination Committee, under Article 20 of the Treaty.

[25] *Annual Report July 2001-June 2002*, op cit, page 6.

[26] Ibid, page 7.

[27] Ibid, page 7.

[28] Ogalo, Daniel Wandera (2003) "The East African Legislative Assembly in Perspective," The *East African Lawyer*, Issue 4, page 12. Ogalo is a member of the EALA representing Uganda.

[29] Article 59(1) of the Treaty

[30] For example, the Community Emblems Bill was introduced during the 8th session, debated and passed. See *Hansard*, 1st Assembly, 8th Session, February 19, 2003, pages 1-43.

[31] Ogalo, op cit, page 13.

[32] Ibid.

[33] Articles 23 and 27(1) of the Treaty.

[34] Article 31 of the Treaty.

[35] Article 32 of the Treaty.

[36] See Mulenga, J N (2003) "Linkages Between the EACJ and the National Courts," The *East African Lawyer*, Issue 5, October 2003, page 25.

[37] Justice Ole Keiua, President of the Court, has suggested that an advisory opinion may be given at the request of the Summit, the Council of Ministers or a Partner State. See Ole Keiua (2003) "Focus on the East African Court of Justice," The *East African Lawyer*, Issue 4, August 2003, page 14. This position does not appear to be correct, because, under Article 29, the Council can only ask the Secretary General to make a reference, while the Summit is not mentioned at all. There is no provision for a reference directly by either organ.

[38] Under Article 42, the Treaty empowers the Court to make its own Rules of Procedure and Arbitration Rules.

[39] Art 27(2) of the Treaty

[40] Article 66(1) of the Treaty.

[41] Article 66(2) of the Treaty.

[42] Article 71(1)(a)-(b) of the Treaty.

[43] Article 14 (1) and (3) of the Treaty.

[44] The *East African*, May 6-12, 2002, page 14. See also Ambassador Mchumo, Ali Said (2003) "The East African Community," The *East African Lawyer*, Issue 4, August 2003, page 11.

[45] The *East African*, May 6 -12, 2002, page 14.

[46] (2003) *Brief Report on the Role, Structure and Activities of the East African Legislative Assembly*, Arusha: EALA. See also Kaahwa, Wilber (2003) "The Secretariat of the East African Community," The *East African Lawyer*, Issue 4.

[47] (2000) *Perspectives on Regional Integration and Co-operation in East Africa*, pages 89-90.

[48] (2001) *The East African Community Development Strategy 2001-5*, page 23.

[49] Article 28 of the first *Customs Union Draft Protocol*.

[50] Art 75 (7) of the Treaty

[51] *Hansard*, 1st Assembly, 8th Session, page 11.

[52] The Chairperson of Council of Ministers, James Wapakhabulo pointed this out when answering members' questions during the 8th Session of the EALA. See *Hansard*, 1st Assembly, 8th Session, February 14, 2003, page 11.

[53] (2002) *The East African Customs Union: information and implications*, pages 2-3. See also (2003) *EAC News*, Issue II, April 2002, page 5, and (1993) *Proceedings of the Seminar on Customs Union, Competition Law and Policy*, March 1993.

54 Mchumo, op cit, page 8. Ambassador Mchumo is the current Deputy Secretary General (Administrative and Finance) of the EAC.
55 See address by Wapakhabulo in *Hansard*, 8th Session, op cit, page 14.
56 Mchumo, op cit. See also *Annual Report July 2000-June 2001*, page 13.
57 (2002) *Investment and Development Opportunities in the Lake Victoria Basin.* See also (2003) *EAC News*, Issue 11 and *The East African*, December 23-29, 2002, page 23.
58 Mchumo, op cit.
59 Article 5(g) and Chapter 25 (Articles 127-129) of the Treaty.
60 The *East African*, November 4-10, 2002, page 1.
61 Mchumo, op cit, page 9.
62 For a fuller analysis of the nature and importance of civil society, see Oloka -Onyango, J and Barya, John Jean (1997) "Civil Society and the Political Economy of Foreign Aid in Uganda," *Democratization*, Vol 4 No 2; Tusasirwe (2000) "Constitutional Developments in Uganda During the Year 2000," *Constitutionalism in East Africa 2000*; Nyangabyaki, Bazaara (2000) *Contemporary Civil Society and the Democratisation Process in Uganda: a preliminary exploration*, Working Paper No 54.
63 Justice Odoki, B J, (2001) "The East African Court of Appeal: its revival and relevance," *Uganda Law Focus*, December 2001, page 1.
64 The case of *Mattaka vs Republic* (1971) EA 495.
65 See, for example, Ssempebwa, Fredrick (1998) "The Draft Treaty for the Establishment of the East African Community: is cooperation for development?" (unpublished paper), page 16.
66 See The *East African* April 15-21, 2002, page 15.
67 *Deepak Shah & Others vs Manurama Limited. & Others* 2002 (unreported).
68 Kihwelo, P F (2003) "The World Trade Organisation (WTO): for whose benefit?" (unpublished), pages 2-3.
69 Namely, the Geneva Round (1947), the Annecy Round (1949), the Torguay Round (1951), the 2nd Geneva Round (1956), the Dillon Round (1960-1), the Kennedy Round (1964-7) and the Tokyo Round (1973-9).
70 Kihwelo, op cit.
71 *EAC News*, op cit, page 2.
72 Ibid.
73 Ibid.
74 See for example the *Constitution of the United States of America*. Article 1 – vests all legislative powers in Congress. Article 2 that vests executive power in the President, while Article 3, vests judicial power in the Supreme Court and courts "inferior" thereto. Then the 10th Amendment (1791), stipulated that all matters not specifically conferred on the federal government were thereby reserved to the federating states respectively, or to the people.
75 Okumu-Wengi, Richard (1998) "Legal Implications of the Draft Treaty for the Establishment of the East African Community: an overview," in Walubiri, Peter Mukidi (Ed) (1998) *Uganda: constitutionalism at crossroads*, page 344.
76 See proceedings of the EALA during the 8th Session, especially the approach adopted by James Wapakhabulo, Chairman of the Council of Ministers.
77 See *The Treaty for East African Cooperation*, 1967, Article 3(1), 46, 47 and 48.
78 See (2002), *Perspectives on Regional Integration and Cooperation in East Africa*, op cit, pages 87-98; Kamanga, op cit and the Preamble to the Treaty.
79 Articles 6 and 7 of the Treaty.
80 For a fuller analysis of the current political impasse in Uganda, see Tusasirwe, Benson (2003) "Political Succession in Uganda: threats and opportunities," (unpublished).
81 Justice Warioba, J.S (2003) "Political Succession in East Africa," (unpublished), page 4.

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