

# **Constitutionalism in East Africa**

Progress, Challenges and Prospects in 2003

Editor

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Fountain Publishers

Fountain Publishers Ltd  
P.O. Box 488  
Kampala, Uganda  
Email: fountain@starcom.co.ug  
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Distributed in Europe, North America and Australia by African Books Collective (ABC), Unit 13, Kings Meadow, Ferry Hinksey Road, Oxford OX2 0DP, United Kingdom.  
Tel: 44 (0) 1865-726686, Fax: 44 (0) 1865-793298  
E-mail: abc@africanbookscollective.com  
Website: www.africanbookscollective.com

© Kituo Cha Katiba: East African Centre for Constitutional Development 2005  
First published 2005

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ISBN 9970 02 488 4

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*Cataloguing-in-Publication Data*

Tusasirwe, Benson (ed).  
Constitutionalism in East Africa: Progress, Challenges and Prospects in 2003.  
– Kampala: Fountain Publishers, 2005  
— p. — cm

ISBN 9970 02 488 4

1. Constitutional Law      I. Benson Tusasirwe.      II. Title

342.676

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# Acronyms

ARLPI	Acholi Religious Leaders Peace Initiative
AU	African Union
CCM	Chama cha Mapinduzi
CET	Common External Tariff
CGD	Centre for Governance and Development
CKRC	Constitution of Kenya Review Commission
COMESA	Common Market for Eastern and Southern Africa
CRC	Constitutional Review Commission
CUF	Civic United Front
DC	District Commissioner
DP	Democratic Party
DPP	Director of Public Prosecution
EAC	East African Community
EACJ	East African Court of Justice
EAHRI	East African Human Rights Institute
EALS	East African Law Society
EAMJ	East African Magistrates and Judges Association
ECK	Electoral Commission of Kenya
ECOMOG	Economic Community of West African States Monitoring Group
EEC	European Economic Community
ENEL	L'Energia Elettrica
EPZ	Export Processing Zone
FDI	Foreign Direct Investment
FES	Friedrich Ebert Stiftung
GTZ	Deutsche Gesellschaft fur Technischee Zusammenarbeit
ICCPR	International Convenant on Civil and Political Rights
IGAD	Inter-Governmental Authority on Development
IGG	Inspector General of Government
IMF	International Monetary Fund
IPPG	Inter-Parties Parliamentary Group
JSC	Judicial Service Commission
KANU	Kenya African National Union
KBC	Kenya Broadcasting Corporation

KHRC	Kenya Human Rights Commission
KICC	Kenyatta International Conference Centre
LC	Local Council
LDP	Liberal Democratic Party
LHRC	Legal and Human Rights Centre
LSK	Law Society of Kenya
MoU	Memorandum of Understanding
MPs	Members of Parliament
NAK	National Alliance of Kenya
NARC	National Rainbow Coalition
NC	National Conference
NCA	National Convention Assembly
NCEC	National Convention Executive Council
NCS	National Council of State
NDP	National Development Party
NEC	National Electoral Commission
NEC	National Executive Committee
NEPAD	New Partnership for African Development
NRM	National Resistance Movement
NRM-O	National Resistance Movement - Organisation
OAU	Organisation of African Unity
PAFO	Parliamentary Advocacy Forum
PPOA	Political Parties and Organisations Act
PPT	Presidential Peace Team
PR	Proportionate Representation
PRALP	Popular Resistance Against Life Presidency
PSC	Parliamentary Select Committee
RCs	Regional Commissioner
REDET	Research and Education for Democracy in Tanzania
SADC	Southern African Development Community
SAPs	Structural Adjustment Programmes
TAMWA	Tanzania Media Women Association
TGNP	Tanzania Gender Networking Programme
TI-K	Transparency International – Kenya
UHRC	Uganda Human Rights Commission
UPDF	Uganda Peoples Defence Forces

UPE	Universal Primary Education
URT	United Republic of Tanzania
USA	United States of America
USE	Universal Secondary Education
ZEC	Zanzibar Electoral Commission





# 1

## Introduction

### **Constitutionalism, Governance and Human Rights in East Africa: The Contemporary Score-sheet**

*Benson Tumasirwe*

#### **Where it all began**

When, in 1999, Kituo Cha Katiba undertook to produce annual analyses of constitutional developments that occurred in East Africa, it was very easy for the pessimist to wonder whether there would be developments worth reporting to justify the intended study series. Our imaginary pessimist's reservations would be understandable, considering that for decades the region, like most of sub-Saharan Africa, had been mired in tyranny, state-inspired abuse of human rights and in many cases, a near-total collapse of constitutionalism and the rule of law. What then was there to report and analyse year after year regarding "constitutional developments" in such a region other than a repetitive litany of excesses?

In "the Constitutional Development in East Africa" annual studies have now been published on four occasions. This instant one, the fifth in the series, more than justifies the decision to embark on this project. The present compendium, like its predecessors, contains a country report for each of the three states – Uganda, Kenya and Tanzania, and one focusing on the East African Community (EAC). The common thread that runs through the four reports is the interest which the people of all the three countries continue to exhibit in matters relating to governance and human rights, in short, to constitutionalism. In all three country

reports, one notes an on-going process of the re-examination and the re-adjustment of the existing constitutional order – for better or for worse – a process involving not just state players, but the general populace as well.

### **Developments in 2003**

Laurean Ndumbaro on “the State of Constitutionalism in Tanzania,” presents at great length the deliberations and recommendations of the November, 2003, Constitutional Review Conference, organised by the Research and Education for Democracy in Tanzania (REDET) programme of the Department of Political Science and Public Administration, of the University of Dar es Salaam. The conference discussed and took positions on the amendments to the Constitution of Zanzibar effected the previous year, and then exhaustively went through various constitutional issues affecting the United Republic of Tanzania, which include electoral matters, political parties, the presidency and vice-presidency, the central government’s relationship with local governments, the legislature, and the judiciary. It also addressed human rights. While the conference appears to have been inconclusive on most issues, there is no denying the depth and breadth of its deliberations. The author does, though, not tell us whether the recommendations of the conference carry any weight on the ground.

In “the State of Constitutionalism in Uganda, 2003,” Beatrice Ngonzi examines the on-going process of amending the 1995 Constitution of the Republic of Uganda, detailing the submissions made by the public and (quite unusually), by the Cabinet to the Constitutional Review Commission (CRC). She then addresses the twin issues of “opening up the political space,” by shifting from the so-called no-party or Movement system of government to a multi-party political system on the one hand, and of amending Article 105(2) of the Uganda Constitution, so as to do away with presidential term limits and enable President Museveni seek another term of office, on the other.

Again in Kenya, we find yet another far-reaching discourse on constitutional reform. Gichira Kibara explains the agitation for constitutional reform that began in the wake of the 1997 elections. That the backbone of the National Rainbow Coalition (NARC) was

the agreement to share power and to entrench that power-sharing arrangement in a new constitution which NARC promised to enact shortly after ascending to power. Indeed by the time NARC made these commitments, a Draft Constitution providing for the proposed changes had already been published and had received widespread support. But no sooner was the Kibaki government in office than it began to back-pedal over its pre-election undertaking to champion extensive constitutional review aimed at trimming the power of the executive, through a vertical and horizontal devolution of powers, with the result that by the close of 2003, the anticipated constitutional reforms had got nowhere.

In all three countries, the necessity for some form of constitutional reform is taken as a given, the only question being what aspects need reform and how far these reforms ought to go. It is also evident from at least the Uganda and Kenya reports, that the executive arm of the state is ready to do everything in its power to frustrate any reforms that trim its powers. In the case of Uganda, the Cabinet was so frightened of the trend of proposals for constitutional reform that it took the unusual and arguably irregular step of submitting its own proposals to a commission whose recommendations were to be submitted to and processed by the very same Cabinet! The Cabinet's proposals, if adopted, would be a recipe for autocracy and would in one blow wipe out most of the gains of the last 18 years in the field of good governance, constitutionalism and the respect for human rights.

In Kenya, the Government's approach was a little more sophisticated. The National Alliance of Kenya (NARC) component of reneged on an earlier agreed proposal to create the post of Prime Minister, to whom some of the powers hitherto exercised by the President would be transferred. The result has been a bitter split between NAK and the Liberal Democratic Party (LDP). The NAK faction and the President himself, realising that LDP enjoyed greater support in the National Constitutional Conference at the Bomas of Kenya, resorted to openly undermining the conference, declaring it unrepresentative and incompetent!

What all this shows is that the selfish interests of those in power continues to obstinately stand in the way of progressive constitutionalism.

Each of the reports show, on the one hand, a people determined to reform the existing constitutional order and to put in place a more workable one. On the other hand, one witnesses in each case, an executive equally interested in constitutional amendments, primarily for the purpose of entrenching itself in power.

Inevitably, at some stage one begins to worry whether the East African region is not in danger of getting obsessed with constitutional amendments for its own sake. There seems to be an all-pervasive assumption that the problem with the politics of the region has a lot to do with the provisions of the constitutions of the respective countries. This may not necessarily be the case. If the post-independence history of the region has demonstrated anything, it is that the most elaborate constitutional provisions may not be worth the paper on which they are printed, unless there is a corresponding will to observe and respect them. Thus, the fact that Uganda has gone through endless political unrest while Tanzania has enjoyed uninterrupted stability, does not mean that the latter has the best-crafted constitution while the former has the worst. Since 1991, when the Kenya Constitution was amended to allow multi-party politics, Kenya had on paper a generally more democratic Constitution than Uganda and probably Tanzania. However, on the ground this did not turn Kenya into a democracy. Consequently, in matters of constitutionalism, democracy, the respect for human rights and the rule of law, legal provisions only tell half the story.

Other than constitutional reform, there was also close similarity in the activities of the institutions and organs involved in constitutional and human rights issues. In Tanzania, these included the Zanzibar Electoral Commission, the National Electoral Commission and the Commission on Human Rights and Good Governance. In Uganda, it was the Uganda Human Rights Commission (UHRC) and the Inspectorate General of Government, while in Kenya there was the Goldenberg Commission, the Ringera Committee and the National Commission on Human Rights.

The new government in Kenya was faced with a judiciary that had lost the last vestiges of credibility. Not surprisingly, therefore, the country experienced more radical changes than its neighbours. A Chief Justice was forced to resign. The new one appointed a committee to investigate allegations of widespread corruption in the judiciary, following which scores of judges, magistrates and other judicial officers were suspended.

Gichira Kibara's report expresses satisfaction with the measures instituted by the new government to fight corruption but correctly points out that little has been done to restore judicial independence, the lack of which is as harmful as corruption.

On the other hand, there continued to be remarkable Judicial independence demonstrated in the case of Uganda, as evidenced by the Uganda Constitutional Court's striking down of sections of the Political Parties and Organisation Act (PPOA), sections of which were clearly designed to emasculate the opposition. Indeed, the Court went ahead to declare the ruling Movement a *de facto* one-party state which is unconstitutional. The point is that the court was able to pronounce this kind of judgment without fear of the consequences. As with Kenya, the report on Tanzania calls for a more autonomous judiciary.

On human rights, again one notices considerable commonality, unfortunately in the negative sense. Ngonzi on Uganda highlights the debilitating effects of the rebel insurgency in northern Uganda which during the year, spread to the eastern region of the country resulting in human rights abuses on a massive scale. As a result, the government was forced to recruit paramilitary units to contain the onslaught. The writer then points out the potential problems that could arise in relation to what to do with such units when the insurgency comes to an end. In addition, Uganda, like Kenya, continued to grapple with the suppression of the freedom of association and assembly that has characterised the country over the last 17 years or so.

Having apparently descended to the lowest level possible during the last days of the Moi regime, Kenya the only way left for it to go was up. Gichira Kibara outlines the various positive developments registered in Kenya in the area of human rights, including the opening to the public of the prisons and torture chambers used by the previous regime to deal with its opponents, the passing of anti-torture and other human rights legislation and the re-opening of inquiries into several prominent political murders of the past. The writer, however, also highlights a worrying trend of continued police brutality, extra-judicial killings and the suppression of the freedom of association, expression and assembly. He also voices the now too common disquiet concerning the proposed anti-terror legislation. Of the three countries, Tanzania has always had the least excesses in the area of human rights violations. Thus not

surprisingly, one does not read of extra-judicial killings and other gory details in the report on Tanzania.

Fortunately, in all the three countries, the Human Rights Commissions seem to have taken a firm stand in protecting human rights, though one gets the sense that the operations of these commissions are extremely limited in scope.

From the foregoing, the inescapable conclusion is that the more the three countries try to look different, the more they continue to resemble. Without any deliberate effort to do so, the three have ended up following a more or less similar constitutional road. Likewise, the constitutional and human rights challenges they face are more or less the same.

As usual, Uganda remained the odd man out in one important aspect. While Kenya had just executed a smooth transfer of power and had peacefully rid itself of a tired regime and in Tanzania a smooth political transition is now a matter of course, ridiculous Uganda was in the thick of an extremely involved debate over whether or not there was need for a referendum to determine whether or not to allow multi-party politics. Equally ridiculous was the protracted and sometimes acrimonious debate over whether to amend the Constitution, remove the presidential term limit and thus allow the incumbent to seek another five-year term and probably rule for life. In this respect, constitutional developments in Uganda run the danger of stagnating while the rest of the region forges ahead. While in all other areas the three countries seemed to walk in tandem during the period under review, in these two related areas, Uganda stood alone.

Which brings us to the paper on the East African Community (EAC). Dr. John Eudes Ruhangisa, in his paper on the EAC, concerns himself in the first instance with the general question of constitutionalism, which is also the starting point adopted by the other reports. The bulk of Ruhangisa's paper then deals with the East African Community. The report deals at length with the East African Court of Justice (EACJ), explaining its composition, jurisdiction and its present and future challenges.

The report also deals with the East African Legislative Assembly (EALA), the East African Community Law – especially its potential conflict with the municipal laws of partner states – and the movement

towards a Customs Union and ever closer integration. More importantly, the report deals with the potential problems that could result from the partner states' membership in other regional arrangements such as the Common Market for Eastern and Southern Africa (COMESA), in the case of Uganda and Kenya and the Southern African Development Community (SADC), in the case of Tanzania.

The immediate concern, however, relates to the extent to which the developments within the individual countries help to bring them closer, so as to be able to reap the benefits expected from membership of the East African Community. In particular, the on-going constitutional reforms seem to be concerned with issues of a strictly national character – issues such as whether or not Kenya should have a Prime Minister, whether Uganda's President should be allowed another term in office, or how the Chama Cha Mapinduzi (CCM) and the Civic United Front (CUF) are to co-exist. Consequently, the question of whether enough is being done to ensure that that EAC does not suffer the fate of its predecessor is hardly being addressed. Not surprisingly, the EALA had done very little work, the EACJ registry had not received a single case by the end of the year, the launching of the Customs Union had been postponed several times, while the East African passport remained ineffectual and virtually unknown.

## **Globalisation and the International Context**

The issue of the East African passport brings us to the one aspect that the four reports do not seem to sufficiently address and that is the international context. Analysts have flogged the question of globalisation over and over. Still, it is necessary to examine how globalisation, the US-led war on terror, the global human rights advocacy movement, foreign aid, the change from the Organisation of African Unity (OAU), to the African Union (AU) and the New Partnership for African Development (NEPAD), have impacted on the region.

While East Africans, like their brethren throughout the developing world, have continued to be lectured about how they are part of a global village, they have continued to reap very little in substance from their membership of the said village. The full operationalisation of the World Trade Organisation (WTO) agreement has not opened up

European and American markets to the Third World. Firm subsidies, protective tariffs and other barriers have continued to distort world trade, and there is evidence that the stronger economies of the north are able to violate the rules of world trade with virtual impunity. Consequently by the close of 1993, developing countries which are home to 80 % of the world's population, only handled 0.5 % of the world's trade.

The history of the relationship between the East African countries and the Bretton Woods institutions has amply demonstrated that the assistance by those institutions, if it can be called "assistance," can never trigger sustainable economic growth. Thus, apart from participation in world trade, which we have pointed out is almost non-existent, the one aspect that holds the key to future economic growth and transformation is foreign direct investment (FDI). Substantial and sustained FDI however, may not be forthcoming unless political stability is assured, good legal regimes and responsive corruption-free institutions are put in place. This is why the positive developments in post-Moi Kenya and the efforts in Tanzania to close the sad chapter of the 2001 elections bode well for the region.

On the other hand, the uncertainty in Uganda over the question of succession and the transition to a multi-party democracy did little to inspire confidence in the future. Likewise corruption, bureaucratic waste and incompetence in all three countries continued to frustrate investment.

In regard to the NEPAD initiative in particular, the proposed peer review mechanism is still in its infancy, and it is too early to predict what contribution it will make towards creating an enabling political environment. Besides, the governments of the three countries have not received the initiative with much enthusiasm. Likewise, it is too early to tell to what extent the African Union (AU) is an improvement of the Organisation of African Unity (OAU), especially in as far as the prevention or censure of widespread state-sanctioned abuse of human rights is concerned. The early indicators are that the transformation was one of form and not substance.

It would also have been appropriate to analyse how far the troubles in the Great Lakes Region, the Sudan and the constitutional and political developments in such countries as Zambia, Malawi, Mozambique, Namibia, Cote d'Ivoire Liberia and Nigeria have impacted on the region,



if at all, and what lessons are to be learnt from these, as well as from such countries as Zimbabwe, Sierra Leone and Liberia, where unresolved political and socio-economic issues have had tragic consequences.

## **Human Rights**

The chapter on Uganda discusses such specific issues as the debate over whether to give legal recognition to prostitution, homosexual relationships and striptease entertainment. The question is whether there is really a genuine constituency for the debate on these issues or whether the activists are voicing support for their legalisation as a matter of fashion – as a way of appearing modern. The pressure on the governments of all three countries to allow freer expression, association and assembly has gained momentum. But how much of it is really founded on the aspirations of the ordinary people and how much is a matter of liberal hype championed by the *elite* – again as a fashion? These issues all need to be interrogated.

The above comments, however, should not and do not detract from the importance of this issue of the Kituo Cha Katiba study series. The fact remains that the 2003 reports provide an invaluable analysis of constitutional and human rights developments in each of the three East African countries and the region as a whole. More importantly, the reports demonstrate that the developments in each country are not to be viewed in isolation, but as aspects of a region-wide development.

No doubt, the year 2003 witnessed sufficiently significant events in the area of constitutionalism, governance and human rights to more than justify recording and analysis. The zeal with which the new government in Kenya tackled corruption, abuse of political power and the more blatant violations of human rights was a breath of fresh air in the region. Tanzania firmly put the tragic spectre of the 2001 electoral violence in Zanzibar behind it and worked towards more peaceful elections in the future. In spite of renewed rebel activity, the resulting human suffering, and in spite of the worrying moves to frustrate the expected political transition, at least Ugandans continued to debate the issues with passion and without actually shooting at one another. The EAC continued to work towards setting its institutions on a firm

foundation. All said, therefore, were he to peruse the “Constitutional Development in East Africa, 2003,” study series, our hypothetical doubting Thomas, who in 1999 thought that an annual compendium of constitutional developments in the region would be little more than a catalogue of ills, would be put to shame.

## 2

# **The State of Constitutionalism in Tanzania, 2003**

*Laurean Nlumbaro*

### **Introduction**

The purpose of this chapter is to examine the constitutional and human rights developments that took place in the year 2003. Although revising the Constitution through amendments has been a characteristic of Tanzania's post-independence history, there were no constitutional changes and amendments that were adopted in the year 2003. However, there were some important developments related to constitutional development including the Pemba by-elections, which tested some of the 2002 amendments to the 1984 Constitution of Zanzibar and the effects of these amendments on the national constitutional debates.<sup>1</sup> The other important development was the Tanzania Constitutional Review Conference, which was held in Dar es Salaam from November 3-4, 2003.<sup>2</sup> The Conference drew participants from a variety of social segments including representatives from civil society organisations, the Parliament, members of the diplomatic corps, non-governmental organisations (NGOs), religious leaders, academicians, politicians and common men and women from both rural and urban settings. With regard to developments in human rights, the paper examines the major developments in the performance of the Commission for Human Rights and Good Governance and critical issues emerging from the 2003 Human Rights Report, prepared by the Legal and Human Rights Center. The next section provides a historical overview of constitutional developments in Tanzania. It is followed by a discussion on the state of constitutional and human rights developments in Tanzania.

## **Constitutional Development in Tanzania: A Historical Overview**

Okoth-Ogendo conceives a constitution as a ‘power map’ in which the authority and functions of different organs of the state, namely the executive, legislature and the judiciary, are demarcated, legitimised and regulated.<sup>3</sup> A constitution is the “foundation law” which embodies the values, aspirations and wishes upon which a country is governed. All other laws, by-laws, rules, regulations and policies draw their legitimacy from a constitution.<sup>4</sup> Constitutional development is about building political consensus on the distribution and use of state power. Constitutionalism is a key aspect of constitutional development and it refers to the participatory process of legitimising the use of state power by political consensus. More specifically, constitutionalism is the process by which citizens participate not only in defining and distributing powers among state organs, but also in setting parameters in which those powers can be legitimately exercised.

Students of constitutionalism in Tanzania such as Peter (2000), have argued that historically, constitutional development in Tanzania has been a process of “Constitution-making without constitutionalism.” This is particularly true in the period between 1960-1992, when statist or commandist politics were the *modus operandi* of doing politics in Tanzania.<sup>5</sup> The authoritarian single-party politics and the *Ujamaa* ideology with its welfare policies contributed significantly in creating consensus (forced or voluntary) and mobilising consent. However, in most cases the citizens’ consent was sought at the implementation level, rather than at the policy making level.<sup>6</sup> The processes used in the development of the Constitution in the single-party period were contrary to the liberal theories and doctrines of constitution-making. Under these theories constitutionalism plays an important role in constitution-making, as it contributes to the justification and legitimisation of the exercise of the state power as defined in a country’s constitution. Thus, it is the process of constitutionalism that helps in creating political consensus between rulers and the ruled.

The statist legacy of colonial rule, followed by an authoritarian single-party regime and the *Ujamaa* ideology all worked against constitutionalism, as all are founded on a top down model of constitution-

making. For example, the discussion that led to the adoption of the Independence Constitution, basically involved only the colonial rulers and the nationalist leaders. The general public was never involved. Likewise, the Republican Constitution of 1962, was a product of discussion among nationalist leaders and it reflected more the wishes and aspirations of the nationalist leaders than the general public. The National Assembly whose members were from one party converted itself into a Constitutional Assembly and adopted the Republican Constitution of 1962. Thus, the way the Republican Constitution was adopted and the unrepresentative nature of the Constitutional Assembly signified a continuation of the exclusionary process of constitution-making in Tanzania. In other words, while during the colonial era, law making was an exclusive right of the colonial leadership. In the post independence era, it was the exclusive right of the ruling party leadership.

Similarly, the signing of the Articles of the Union in 1964, between the then People's Republic of Zanzibar and the Republic of Tanganyika, by Presidents Abeid Karume and Mwalimu Julius Nyerere was without public consent.<sup>7</sup> Neither the Tanganyika National Assembly nor the Zanzibar Revolutionary Council was allowed to debate the essence of the Union. They were only required to grant legal status to the Articles of the Union. In other words, the Articles of the Union embodied more the aspirations and wishes of the two Presidents than the general public, as the principle of constitutionalism was not followed.

The establishment of a single party regime in 1965 and the adoption of the *Ujamaa* ideology in 1967, enhanced the trend of excluding citizens from participating in constitutional debates. The logic of single-party politics and the nature of the socialist system have tendencies of centralising power and excluding not only those who are against the dominant ideology but also the "non-vanguard *elite*."<sup>8</sup> Experiences of communist and socialist countries worldwide, which have widely been documented, attest to the above claim. The process that led to the adoption of the 1965 Interim Constitution that proclaimed Tanzania a single-party state was largely without public debate. Likewise, the process that led to the adoption of the Permanent Constitution in 1977, was too short to allow for any meaningful debate among members of the Constituent Assembly.<sup>9</sup> Besides, neither public consultation nor debate was conducted. The National Executive Committee of the party

debated the bill behind closed doors. In this respect, constitution-making became the exclusive right of the party leaders. In other words, like previous constitutional developments, the adoption of the 1977 Constitution was more of a private matter of the party than a public issue.

Exclusionary politics were possible at that time partly because of the existence of two dominant ideologies in the world, each struggling to maintain its hegemony. Globally dominant countries were working to influence countries emerging from colonial domination to adopt their ideology. The most dominant experience at that time was that in a country dominated by one of the two ideologies, people inclined to an opposing ideology were in most cases suppressed, harassed, victimised and sometimes killed without any public protest. The enjoyment of human rights was exclusive to the supporters of the ruling regime. Domestically, the existence of a weak opposition in the country created an opportunity for the ruling regime to adopt single-party rule<sup>10</sup> and subordinate all state organs and civil society organisations to the whims of the party. The existence of a relatively strong economy enabled the government to have a relatively strong bargaining position *vis-à-vis* donors. Moreover, donors could not force Tanzania to follow certain policies because at that time they lacked a common stand on almost all issues.<sup>11</sup>

The ailing economy experienced by Tanzania in the 1980s weakened the state's capacity to deliver public goods. Economic hardship experienced by the citizens partly contributed to the decline in the legitimacy of the ruling party in the 1980s,<sup>12</sup> and for the first time the citizens were allowed to debate constitutional matters, namely the powers of the President, the status of the Parliament and the need for the consolidation of the Union. However, the citizens led by the Tanganyika Law Society went beyond the terms of debate set by the government to demand for the inclusion of a Bill of Rights in the Constitution, making the state more democratic. Additionally, there was demand for greater autonomy for Zanzibar. The debate did not last long because the government felt it was getting out of control. Despite the closure of the discourse, the spirit of debate continued as the government went on to adopt the Bill of Rights in the Constitution in 1984, while other people went on to demand constitutional change for the establishment of multi-party politics.

Serious citizens' involvement in constitution-making came with the introduction of multi-party politics in July 1992. The appointment of the Presidential Commission on single-party or multi-party System (popularly known as the Nyalali Commission) which went around the country to seek people's opinion about whether Tanzania should continue with single-party rule or adopt multi-party politics was an important development. The 1990s also saw the emergence of several civil society organisations such as Tanzania Gender Networking Programme (TGNP), Tanzania Media Women Association and the Legal and Human Rights Centre, with advocacy as one of their explicit roles. In addition, civil society organisations, which were working as organs of the party such as trade unions and co-operative unions, began to work independently of the party. These civil society organisations provided the people with autonomous avenues to participate in policy making. Thus, the Nyalali Commission whose report led to the adoption of multi-party politics, the Kisanga Commission, which led to the adoption of the 13<sup>th</sup> Constitutional Amendment of the year 2000 and the registration of autonomous civil organisations with explicit advocacy roles, are good examples of conscious measure taken by government to ensure that citizens participate in constitution-making.<sup>13</sup> The invitation of public opinions on constitutional changes made by the Prime Minister in 2003, which led to the Research and Education for Democracy in Tanzania (REDET) organised National Constitutional Review Conference, in November 2003, is another case in point.

Thus, though the adoption of multi-party politics has ushered in transparency and the participation in constitutional issues, more needs to be done especially in creating information-gathering infrastructure or opinion-gathering machineries. Both the government and the machinery it employs to research, aggregate opinions and draft Bills should continue to involve all stakeholders, including the largest number of people possible when there is an impending ground-breaking enactment.<sup>14</sup> This is partly because most political parties and civil society organisations which are supposed to be vehicles for interest articulation and aggregation, are too weak and too poor, to effectively act as the machinery for articulating and aggregating opinions, challenging Bills and ensuring that the interests and aspirations of those they represent are addressed by the Bills. The creation of machinery or

infrastructure to gather public opinion is also important because of the increase in consciousness about the importance of constitutions and the never-ending need to entrench certain critical principles and power relationships in them. The involvement of citizens in constitution-making is important because constitutions are not static, rather, they have to reflect the people's aspirations and interests which change with time. Therefore, constitutional changes are an acceptable measure of the fact that a constitution needs to stay alive, but changing it too frequently may throw it into disrespect and instability. What perhaps is needed is the construction of critical principles of governance (including the protection of rights) and power relationships (including the separation of powers and checks and balance), in a relatively consensual way. That means a construction which may not necessarily meet the preferences of everybody, but to which everybody can relate.<sup>15</sup>

### **The 2002 Constitution of Zanzibar Amendments and the 2003 Constitutional Debates**

As noted earlier, there were extensive amendments to the 1984 Zanzibar Constitution in 2002. These amendments had some effects on the 2003 constitutional debates as some people were calling for the extension of the *Muafaka* spirit and the Amendments it resulted into, the Union Constitution. The Amendments, which were a product of signing the Peace Accord between the ruling party the Chama Cha Mapinduzi (CCM) and the major opposition party in the Zanzibar the Civic United Front (CUF), in October 2001, were in the form of the 8<sup>th</sup> and 9<sup>th</sup> Amendments. The Peace Accord was propelled by serious tension and animosity between the members and supporters of the two major parties in Zanzibar, stemming from electoral malpractice in both the 1995 and 2000 elections. The amendments were also partly fueled by the failure of the government of Zanzibar to implement the 1999 Commonwealth brokered Peace Accord (popularly known as *Muafaka* 1). The immediate trigger of the 2001 Peace Accord was the January 27, 2001, violent encounter between the police and CUF supporters over the way the 2000 Zanzibar general elections were handled. The confrontation led inter-alia to 23 deaths and substantial destruction of property.



Following the 2002 Amendments to the Zanzibar Constitution, Articles 6 and 7 of the Constitution were repealed and replaced by new ones. The major aim was to ensure that all people were guaranteed their rights as citizens, especially the right to vote. To that effect, a permanent voters' register was supposed to be put in place. The 2003 Pemba by-elections were to be taken as a starting point for the creation of a permanent voters' register. However, the registration forms had too many errors to be used for establishing a permanent voters' register. In this respect, the expectation that data collected in the Pemba by-elections would be used in the establishment of a permanent voters' register for Pemba in 2003 could not be met. The failure to utilise registration data from the Pemba by-elections to establish a permanent voters' register made political parties, especially the CUF, continue to raise the issue in various fora in 2003. In fact, it helped to keep alive the issue of the need for a permanent voters' register, which was among the top constitutional issues in the 2003 constitutional debates. The May 2003, Pemba by-elections, which were reportedly conducted in a free and a fair manner and with no major irregularities, was a positive note to the *Muafaka* related amendments.

Another area covered by the amendments was the composition of the House of Representatives. Following the 8<sup>th</sup> Amendment to the Constitution of Zanzibar, the President of Zanzibar is now obliged to consult with the leader of the opposition in the Zanzibar House of Representatives, in appointing at least two of the ten non-elected Members of the House. Prior to this Amendment, the President was not obliged to consult with the leader of the opposition when making such appointments. This has assured the opposition of at least two appointed legislators. This issue was raised in the REDET organised Constitutional Review Conference. Participants felt that Article 66(1) of the Constitution of the United Republic of Tanzania, which empowers the President to nominate up to ten Members of Parliament, should stipulate clear rules to guide the President in choosing those Members of Parliament. There is no doubt that the 2002 changes to the Zanzibar Constitution influenced this recommendation.

The Judiciary and the High Court of Zanzibar were also affected in the 8<sup>th</sup> Amendment to the Constitution of Zanzibar. High Court Judges must now be appointed by the President on the recommendation of the

Judicial Service Commission. The amendment also limits the term of office of the Chief Justice to ten years, renewable at the pleasure of the President. Furthermore, the amendment widened the membership of the Judicial Service Commission to include the Chief Kadhi, an advocate nominated by the Zanzibar Law Society and a retired High Court or Court of Appeal Judge. Previously, the Commission was only composed of the Chief Justice, the Attorney General, two High Court or Court of Appeal Judges, the Chairman of the Zanzibar Civil Service and any other person appointed by the President.

The Amendment further dealt with the composition of the Zanzibar Electoral Commission. Article 119 now provides that the Chairman of the Electoral Commission shall be appointed by the President; that two members be appointed by the President on the basis of recommendations made by the Leader of Government Business in the Zanzibar House of Representatives; that two members be appointed by the President according to recommendations made by the Leader of Opposition in the Zanzibar House of Representatives, that one member be appointed by the President from among the High Court Judges and finally, that one other member be appointed by the President as he deems fit. The amendment is in line with the CCM/CUF reconciliation agreement that requires the Electoral Commission to be broad-based, free and fair. The appointment of two members of the opposition to the Zanzibar Electoral Commission has helped to bring back the people's trust and confidence in that body. The 2003 Pemba by-elections were the first test to the Zanzibar Electoral Commission (ZEC) following its messing up of the 1995 and 2000 Zanzibar general elections. The reformed ZEC managed to handle the by-elections well and all observers domestic and international, certified the Pemba by-elections as free and fair.<sup>16</sup>

The REDET organised conference also saw the need to reform the structure of the National Electoral Commission (NEC) to widen its professional representation beyond the legal profession. To achieve this, it was proposed that the membership of the Commission should be raised to 12. Participants recommended that the President should select members of the NEC from a list of persons recommended by all stakeholders and that the appointees must be confirmed by Parliament. This would avert the dangers of politically motivated appointments. In

order to give democratic legitimacy to the Commission and to dispel the notion that it owes allegiance to the appointing authority, the conference proposed that members of the Commission should be nominated by political parties for appointment by the President and confirmation by Parliament. It is, however, suggested that appointments to the Commission should not be politicised. Accordingly, it should be prohibited for political parties to nominate their own members.

## **The Constitutional Review Conference**

The REDET organised conference focused on six areas, namely: the presidency; the vice presidency and Prime Minister; Parliament, the National Electoral Commission and elections; union matters; the Judiciary; local government; human rights and good governance.

Participants noted that the Constitution of the United Republic of Tanzania, (Article 39) requires a presidential candidate to belong to a political party. The majority were in support of retaining this requirement in the interests of national unity and representativeness. Some participants feared that external powers could easily hijack the electoral process by sponsoring candidates if the nomination was not tied to party membership and sponsorship.

Concerning the threshold of votes for electing the President, it was argued that the President's acceptability and mandate ought to be demonstrated by a clear majority. It was recommended that Article 41(6), under which a simple majority suffices for a candidate to be elected as President, be amended to require 50% or more of all the votes cast in order to be elected as President, as was the case before the adoption of the 13<sup>th</sup> Amendment to the Constitution.

Related to the above was the issue of presidential election petitions. It was noted that currently the Constitution allows petitions concerning the election of members of the National Assembly but does not provide for petitions against the presidential election results. A majority of participants felt that petitions against the results of a presidential elections should be permitted, even though there was a substantial minority view to the contrary.

The discussion also dealt with presidential powers in respect to appointment of public officers. Most participants felt that the President's powers of appointment were too wide. It was recommended that the

list of presidential posts to which the President is empowered to make appointments should be reviewed and shortened. On the appointment of Regional Commissioners (RCs) and District Commissioners (DCs) by the President, some participants considered the positions to be important for democratic governance and that accordingly, they needed to be held by elected officers. However, the position which ultimately prevailed was that it was still desirable that RCs and DCs remain political appointees and not technocrats, but that the exercise of their powers should be effectively regulated to safeguard against abuse.

On the vice-presidency, participants pointed out a snag in relation to accession to the presidency. The main concern here was that there are no regulations guiding the appointment of a person to succeed the Vice-President, who having been presented to the electorate as a running mate later dies before the presidential term has run out. If another Vice-President is then appointed, he can later become a President if the elected President dies or fails to perform his or her duties. In such a situation, the appointed Vice President becomes a President and he or she appoints another Vice-President. This puts Tanzanians at the risk of being governed by a President and Vice-President who have never been elected at all. The example of Botswana was given as a case where the President resigned and left his post to a Vice-President who was not elected.

The REDET Conference also debated the electoral system and called for the establishment of a hybrid electoral system with 50% of Members of parliament coming from the constituencies and the other 50% entering parliament through partial proportional representation. The adoption of a proportional representation system is desirable because it means that every vote will count and will bring a good balance in the representative character of the Parliament.

Another important suggestion that emerged from the conference concerns the assent to legislative bills. Presently, a bill passed by Parliament cannot become law, even if unanimously passed by the House until it has been assented to by the President. This undermines the separation of powers and was pointed out as yet another manifestation of the excessive powers of the President. It was recommended that if the President refuses to assent to a bill passed by Parliament and returns it to Parliament, the bill should become law

without the need for assent by the President, provided that the Parliament passes the bill by a two-thirds majority.

The Conference also suggested that Article 67(b) of the Constitution should be amended to allow aspirants for election to parliament to stand as private candidates. Consequently, Article 71(c), which provides that a person shall cease to be a Member of Parliament upon ceasing to be a member of a political party, would become redundant. People saw the Article as an undemocratic weapon in the hands of party leaders in order to control party members. Another suggestion was that the provisions of Article 72, which require a public servant who wishes to contest for a parliamentary seat to resign from government service, be repealed. Instead, such a person should be given leave without pay, as was the case before.

With regard to the Union, participants acknowledged the fact that the Union has problems and saw the need to raise the discussion of those problems above party politics. They suggested the need to identify the pros and cons of having one government, two governments and three governments. According to them, this is possible by forming an independent body or entity that will co-ordinate the debates on the Union. This body should be representative of all key stakeholders and should consist of people of integrity and independent minds. Participants also suggested that the Constitution should clearly stipulate the financial contribution to be made by each part of the Union towards the running of the Union Government.

With regard to the Judiciary, participants recommended that it should be an independent branch of the state and not a department subordinated to any ministry of the government, as the case appears to be now, and that it should enjoy both financial and administrative autonomy. Participants also recommended that a formal and permanent Constitutional Court be created to deal with constitutional issues, election petitions and related matters, instead of the present system of assigning Judges to deal with such cases on an *ad hoc* basis.

On local government issues participants noted that the Constitution does not provide clearly for the autonomy, powers and responsibilities of local governments. This is in sharp contrast with the provisions regarding the Central Government, the Cabinet, Parliament and the Presidency. Moreover, the Constitution does not make clear the division

of revenue and control over natural resources between local and central governments. Importantly, the Constitution does not protect local governments from interference by organs of the Central Government nor does it give clear legislative powers to local governments. The power to make delegated legislation is overly controlled by the Central Government. Participants called for amendments that would make clear the powers and responsibilities of local governments, give them greater autonomy and greater legislative powers, which are not subject to undue interference by the Central Government. Additionally, the amendments should make clear the functions and responsibilities of local governments.

It is evident from the above account on Tanzania's 2003 Constitutional Review Conference that the conference generated key proposals which are important and therefore need consideration in future constitutional development efforts in Tanzania. The specific problems and pitfalls in the current Constitution, as well as the corresponding specific suggestions for remedy, also need to be considered. In fact, the conference did a commendable job in terms of identifying weaknesses in the current Constitution and in suggesting how these weaknesses can be rectified. More specifically, the conference showed the state of the current Constitution and areas of contention.

## **Developments in the Area of Human Rights**

This section focuses on human rights issues that emerged during the REDET Constitutional Review Conference held in November 2003. Besides, it deals with major developments in the performance of the Commission for Human Rights and Good Governance, particularly cases that the commission started hearing in 2003. Lastly, the section presents critical human rights issues contained in the Legal and Human Rights Centre 2003, Report on Human Rights.

The REDET Constitutional Review Conference addressed the Bill of Rights, in particular the claw-back clauses in the Constitution. Article 30(2)(a), which permits the legislature to pass laws that interfere with basic rights and freedoms of individuals where and when it believes that the public interest is in jeopardy, was cited as one example of claw-back clauses in the Constitution. Participants expressed the worry

that the term “public interest” may be manipulated to emasculate human rights. It was therefore recommended that the term “public interest” be defined to prevent those in authority from misusing the constitutional provisions to cater for their own interests.

Other claw-back clauses which were pointed out are in Articles 30(4)(c) and 30(5), which relate to powers of the courts. Whereas Article 30(4) gives the courts the power to adjudicate cases, such powers are taken away by the subsequent part (c) of that Article. Article 30(5) states that courts have the duty to advise parliament to amend any offending law. Participants felt this to be in contradiction with the principle of the separation of powers as enshrined in Article 107 of the Constitution and recommended that it should be repealed. Participants further recommended that since courts have been given powers to adjudicate cases, the state authority must not interfere by enacting laws which tend to reverse the decisions of courts.

Though participants commended the procedures prescribed for appointing the Human Rights Commissioners, which they felt to be in line with the requirement of good governance, they were critical of Articles 130(3) and 130(4), which allow the President to intervene in the work of the Commission for Human Rights and Good Governance. Most participants saw this as incompatible with one of the purposes of establishing the Commission, which is to “check” the powers of the executive. The President should not have powers to interfere in the operations of the Commission. Instead, whenever the President is in disagreement with the Commission, the remedy should be for him to refer the matter to the Court of Appeal.

With regard to the performance of the Commission for Human Rights and Good Governance, the year 2003 was also an important year as far as efforts towards the realisation of the objectives of the Commission were concerned. The Commission was created in 2001 as an independent institution that among other things, receives and investigates complaints of human rights violations and institutes proceedings (public hearings) on human rights violations. It was in 2003, that the first public hearings before the Commission began. The Commission summoned the District Commissioner (DC) for Serengeti who had ordered police officers to forcefully evict Nyamuma villagers from their homes in 2001. The summoning of the DC was an important development in the

implementation of Commission's work, because District Commissioners are representatives of the President in their respective areas of jurisdiction and are as such perceived by many people to be virtually immune from judicial proceedings.

The 2003 Human Rights Report commends the Commission for Human Rights and Good Governance for taking proactive measures against human rights abuses in the country in 2003. The issuance of an injunction order on November 24, 2003, against Afrika Mashariki, its Canadian parent company Placer Dome and three officials in Tarime District, is given as an example of such proactive measures. The injunction order was given following a case which was brought before the Commission in 2003, on behalf of 1,260 small-scale miners and other Tarime residents of Nyabigena and Nyabirama areas.<sup>17</sup> This move by the Commission was important because it gave meaning to constitutional and human rights in Tanzania.

Turning to major critical issues emerging from the 2003 Human Rights Report, the report pointed out two proposals that were introduced in the Parliament in 2003 that have impact on human rights, namely, the proposal to remove claw-back clauses in the Constitution of Tanzania and a proposal intended to amend the Political Parties Act of 1992. The proposal to remove claw-back clauses was introduced through the 14<sup>th</sup> Constitutional Amendment Bill of October 10, 2003, following the continuous public outcry against claw-back clauses laid down in the Bill of Rights introduced in 1984, but which came into force in 1988.<sup>18</sup>

The Registrar of Political Parties submitted a proposal intended to amend the Political Parties Act of 1992, to allow for the de-registration of political parties that could not receive three per cent of the popular vote in parliamentary or local government elections. The biggest problem with this proposal was that once a political party was de-registered, it would never again be eligible for re-registration.<sup>19</sup> The proposal clearly undermines the people's democratic right to belong or to support a political party of their choice and is contrary to the multi-party system in place in Tanzania.<sup>20</sup>

The report also notes that the realisation of the right to take part in the governance of the country continued to be restrained in a number of ways. For example, the Tanzania Constitution provides that no person shall run for office except through a political party, (Article 77(1) (3)(a)).



This has continued to act as a stumbling block for people wishing to contest for leadership but are unwilling or unable to join the existing political parties. According to the report, this provision conflicts with another provision of the same Constitution of Tanzania, which states “every citizen of the United Republic is entitled to take part in matters pertaining to the governance of the country.”

The report also addressed itself to the post-October 2000 presidential and parliamentary elections in Zanzibar. According to the 2003 Human Rights Report, the bitter disputes arising from the elections culminated in physical confrontation which on January 27, 2001, resulted in 23 deaths (according to government figures) and possibly more than 300 deaths (according to independent figures). Subsequently, a Presidential Probe Team was set up to report on the killings in accordance with *Muafaka* 2. Although the probe team made its report on the killings to the government, its contents have remained a state secret. Thus, by the end of 2003, armed security persons and other governmental officials who were involved in these killings were not brought to justice and the state of impunity was maintained.<sup>21</sup> Likewise, families of the victims have also not yet received any compensation for the loss of their family members.<sup>22</sup> This puts the principle of equality before the law at cross-roads!

Moreover, in the year 2003, there were incidents of abuse of power and brutality by state officials or agents that contravened the Constitution of Tanzania, as well as the International Covenant on Civil and Political Rights (ICCPR) to which Tanzania is a party. Article 15 of the Tanzania Constitution states that every person has the right to live as a free person and this guarantees the right not to be arbitrarily arrested, imprisoned, confined, detained or deported. Article 9 of the ICCPR provides that no one shall be subjected to arbitrary arrest or detention. Extra judicial killings by law enforcement officials, police brutality in the form of arbitrary arrests, detention, beatings, harassment and intimidation continued to prevail in 2003, and in particular to supporters of opposition political parties.<sup>23</sup> This was a drawback in as far as the implementation of the constitutional principles and observance of international treaty commitments was concerned.

## Conclusion

Although there were no amendments to the Tanzania Constitution in 2003, there were a number of constitutional developments. The Pemba by-elections tested some of the amendments made to the Constitution of Zanzibar a year before. The REDET organised Constitutional Review Conference of November 2003, highlighted many constitutional issues that needed to be addressed. The paper also acknowledges the growing trend in constitution-making since the introduction of multi-partism that shows a shift from a more centralised, closed and exclusionary approach to a more decentralised, transparent, public and participatory approach to constitution-making. The Nyalali Commission, the Kisanga Commission, the invitation by the Prime Minister of interested parties to send their views on the Constitution and other laws to the office of the Attorney General, illustrates a growing acceptance of constitutionalism as a means of developing the Constitution. Compared with the period between 1961-1992, this is a commendable achievement. However, it is one thing to allow and even call for views and quite another to take those views into account. The REDET organised Constitutional Review Conference clearly showed that there are still a number of major weaknesses in the current Constitution and a more transparent decentralised and participatory approach is desirable for effective constitution-making in Tanzania. This is in line with the principles of democracy, good governance the rule of law that Tanzania is aspiring to institutionalise.

Concerning human rights developments, the Commission for Human Rights and Good Governance did a commendable job by taking proactive measures in human rights protection and in so doing, demonstrating that no one is above the law. Generally, therefore, the 2003 Human Rights Report shows that there are some improvements in the area of human rights. Nevertheless, a lot needs to be done to institutionalise human rights values and good governance practice.

## Notes

- <sup>1</sup> The 2002 Constitutional Amendments were part of the implementation of the Peace Accord (popularly known as “*Muafaka 2*”), between the ruling party Chama Cha Mapinduzi (CCM) and the major opposition party in Zanzibar, Civic United Front (CUF).
- <sup>2</sup> The conference was organised by the Research and Education for Democracy in Tanzania

(REDET) Programme of the Department of Political Science and Public Administration of the University of Dar es Salaam.

- <sup>3</sup> Okoth-Ogendo, H.W.O (1991) "Constitutions Without Constitutionalism: Reflections on an African Political Paradox," in Shivji I.G (ed.) *State and Constitutionalism: An African Debate on Democracy, Human Rights and Constitutionalism Series No.1* Southern African Political Economy Series (SAPES) Trust, Harare, Zimbabwe, 1991.
- <sup>4</sup> Peter, C (2001) "Constitution-Making in Tanzania: The Role of Civil Organizations," in Kibwana, K. Peter, C. and Bazaara, N (2001): *Constitutionalism in East Africa: Progress, Challenges and Prospects in 1999*; Kituo cha Katiba: East Africa Centre for Constitutional Development, 2001
- <sup>5</sup> Ndumbaro, L. "Policy Making in Tanzania: A Contested Terrain," in I. Kimambo (ed)
- <sup>6</sup> Ibid.
- <sup>7</sup> Peter, C. op. cit
- <sup>8</sup> Vanguard *elites* are the core group in the socialist/community parties.
- <sup>9</sup> It took only seven days from publishing a bill to the submission of the bill to the Constituent Assembly for discussion and approval.
- <sup>10</sup> All National Assembly members were members of the ruling party.
- <sup>11</sup> Ndumbaro, L. (1998) "Learning and Policy Change in International Organizations: The Case of SIDA," Phd Dissertation, University of Florida.
- <sup>12</sup> Ndumbaro, L. (1998), Op.cit.
- <sup>13</sup> United Republic of Tanzania (URT): The Presidential Commission on Single-party or Multi-party System, 1991, Volume I, Report and Recommendations, Dar es Salaam. United Republic of Tanzania, The Kisanga Committee, 1999, Kamati ya Kuratibu Maoni Kuhusu Katiba, Kitabu cha Kwanza: Maoni ya Wananchi na Ushauri wa Kamati, 1999, Dar es Salaam
- <sup>14</sup> Mukangara, D (2003): "Tanzania Constitutional Review: Issues for Debate," Unpublished paper presented to a Conference on Constitutional Review in Tanzania organised by the Research and Education for Democracy in Tanzania Programme held at the Golden Tulip Hotel, Dar es Salaam, November 3-4, 2003.
- <sup>15</sup> Ibid.
- <sup>16</sup> TEMCO (2004), "The Pemba By-Elections: Report of the Tanzania Election Monitoring Committee," (Forthcoming).
- <sup>17</sup> Ibid.
- <sup>18</sup> Legal and Human Right Centre (LHRC), (2004), Tanzania Human Rights Report 2003, Dar-es -Salaam, LHRC.
- <sup>19</sup> See *Guardian*, August 7, 2003.
- <sup>20</sup> Ibid.
- <sup>21</sup> Ibid.
- <sup>22</sup> Ibid.
- <sup>23</sup> Ibid.

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# 3

## **The State of Constitutionalism in Uganda, 2003**

*Beatrice Ngozi*

### **Introduction**

The year 2003 was characterised by several significant events in regards to constitutional and human rights developments in Uganda. The year commenced with the meeting of the National Executive Committee (NEC) and the National Conference (NC) of the Movement at which several far-reaching proposals for constitutional reform were tabled and largely accepted. The year ended with the submission of the report of the Commission of Inquiry into Reform of the Constitution chaired by Prof. Edward Ssempebwa, thereby kicking off another stage in the process of constitutional reform in the country. The year represented a period of significant development in the area of constitutionalism in Uganda. To the ordinary observer, it would appear that significant strides were taken with regard to fostering a culture of constitutionalism and the promotion of respect for human rights; the opening up of political space and charting the road to transition with the opposition; judicial decisions that enhanced constitutionalism and reinforced judicial independence; reconciliatory efforts to end the war in northern Uganda and controversial concerns for constitutionalism and human rights. On closer scrutiny however, proposals to lift the constitutional presidential term limit; Cabinet proposals that would have the effect of weakening the powers of institutions that entrench constitutional governance and tilting the balance of power in favour of the executive; the non-tolerance of opposing views; an open disregard for judicial decisions on the part of the executive; escalating war in the north and the forceful dispersal of opposition public rallies; are developments at variance with progressive constitutionalism.

This chapter critically analyses these developments and identifies the challenges they presented for the advancement of constitutional governance in Uganda.

The chapter is divided into eight sections – the constitutional review process and its implications on constitutionalism; the process of opening up political space; the constitutional issue of lifting the presidential term limit and its implications for democratic participation; an analysis of judicial decisions with significant effects for constitutional law and human rights; the rebel insurgency in northern Uganda and measures to bring it to an end; controversial concerns for constitutionalism and human rights and a conclusion of the study.

## **The Constitutional Review Process**

The 1995 Constitution of the Republic of Uganda has been hailed as containing progressive provisions which advance constitutionalism, democracy and human rights.<sup>1</sup> This is not to say that it is without provisions that are seriously flawed, such as the Article that entrenches the No-Party/Movement system of governance which restricts the operation of political parties.<sup>2</sup> It is limitations of this nature that prompted the creation of the Constitutional Review Commission (CRC), which it was hoped would be resolved by consensus. The CRC was mandated with the task of collecting the views of the people *inter alia* on the system of governance they want; vesting the President with powers to dissolve Parliament when both parties failed to agree on matters of fundamental executive or legislative importance; the system of decentralisation of government and federalism and the functions of the Inspector General of Government *vis-à-vis* existing constitutional bodies.

Cabinet's proposals to the CRC were presented by the Vice-President, Prof. Gilbert Bukenya, after it was deemed inappropriate for the Minister of Justice and Constitutional Affairs to present the same since there was bound to be a conflict of interest, given that she was the appointing authority and the Commission would be presenting its findings to her.<sup>3</sup> It should be noted that these proposals were not entirely authored by the Cabinet, some of them were NEC recommendations that were unanimously endorsed by the NC. Cabinet saw it fit to present its proposals so as to enable the Commission to

harmonise its views with those collected elsewhere. The Chairman of the Commission was happy to receive the Cabinet's proposals and saw no reason why they should be excluded from the process. "I see no legitimate reason why the Cabinet should not give its views on the Constitution. It is proper for the Cabinet to give its views too," he stated.<sup>4</sup> He further stated that since Cabinet was the main user and implementer of the Constitution it was in the best position to propose amendments. The Chairman of the CRC allayed fears concerning adopting the Cabinet's proposals wholesale in total disregard of the whole report and went ahead to state that the Commission would draw attention to the Cabinet proposals that were not in the public interest.<sup>5</sup> Consequent events seemed to confirm these fears: government applied to court for an injunction that prevented the *Monitor* newspaper from publishing a report detailing opposition among the commissioners to the Cabinet proposal of lifting the term limit of the President of Uganda.<sup>6</sup> It is pertinent to note that the Chairperson of the Commission did not deny or confirm the contents of the report, but only apologised for the leakage when appearing before Parliament. The hand-over of the report was a low-key event to which the press was not invited and yet it was a matter of public interest.<sup>7</sup> Two minority reports were issued by the Commission. Attempts were made to down play these views and their significance to the constitutional reform process.<sup>8</sup>

During the course of the year, several proposals for constitutional reform were forwarded to the CRC. Proposals presented by the Cabinet attracted the most attention because of their content and spirit. Among the proposals made were the following:

- The amendment of Article 118, which provides for the censure of Cabinet Ministers by Parliament, upon which the President is enjoined to "take appropriate action." According to Cabinet, in its current form the Article creates the potential for conflict when the President refuses to sack a censured Minister. In its place the Cabinet proposed that the President and not the Parliament, should be vested with the powers to censure errant Ministers.
- Article 113, gives Parliament power to approve ministerial appointments. Cabinet proposed that this provision should be reviewed to read that Parliament can only withhold approval of a presidential nominee on the grounds of past criminal acts and in



cases where the President and Parliament fail to agree, the President should be given powers to dissolve Parliament and that both the Members of Parliament (MPs) and the President should resign.

- Article 91(6)(b), which stipulates that if the President does not assent to a bill passed by Parliament, it automatically becomes law. The alternative suggested by Cabinet reads as follows: “The President and Parliament will legislate together to ensure the President cannot rule by decree or that the Parliament overrides the power of the President as the case may be.”<sup>9</sup>
- That the number of constitutional commissions be reduced because they are numerous and costly in terms of maintenance. Several commissions were suggested for abolition, including the Uganda Human Rights Commission (UHRC), whose functions were to be transferred to the Inspectorate of Government. Interestingly, the powers of the Inspectorate were to be limited to carrying out investigations and leaving the prosecution of criminal offences to the Director of Public Prosecutions (DPP), in cases of corruption and abuse of authority and office.<sup>10</sup> In addition, it was proposed that the Inspector General of Government (IGG) should stop revoking, altering, reversing or otherwise terminating the implementation of any decision made by a ministry or any other government institution and that the Inspectorate should stop giving interdiction orders, suspensions, dismissals or other methods of removal from office of public officers. It was further proposed that the Inspectorate should also be stopped from entertaining any complaints relating to irregularities in tendering processes, including the awards of any tenders under any enactment regulating public procurement.<sup>11</sup>

In the main, the Cabinet proposals were justified on the grounds that the “executive had routinely encountered difficulties, contradictions and inadequacies in implementing the constitutional provisions of the current Constitution. In this regard the proposals assumed significant importance since they were from political practitioners. In addition, the findings collected so far addressed a few limited issues such as land and federalism, thereby necessitating the Cabinet to present its proposals on matters of national importance that had not been previously

addressed.”<sup>12</sup> However, a more critical examination demonstrates that the proposals were in fact a reflection of the past conflicts that the various bodies have had with government or where they have taken a position on an issue which differs from that of government and have refused to give in to the latter’s demands.

The UHRC is charged with the responsibility of the promotion and protection of human rights while the Inspectorate of Government promotes good governance in public offices through the elimination of corruption, abuse of authority and public office. The two bodies perform different functions and merging them will not in any manner whatsoever, enhance their performance. If anything, the proposal would significantly reduce the effectiveness of the performance of their functions. At present, both institutions are facing problems of staffing and insufficient resources. With regard to the Commission, 75% of its budget is funded by donors so the issue of increasing running costs does not arise.<sup>13</sup> It is pertinent to note that these institutions may have stepped on the toes of the executive, hence the move to curb their powers. The Commission has credible evidence that “safe houses” exist in Uganda, where bone-chilling methods of torture are routinely used to extract information from captives.<sup>14</sup> These claims have been backed by international human rights organisations despite denials by the security agencies. In addition, the UHRC has been denied access to military barracks to investigate and monitor human rights concerns. A merger with the Inspectorate of Government will greatly reduce the UHRC’s area of operation and its independence in methods of work, since resources will have to be shared between the two institutions. On its part, the Inspectorate of Government has encountered problems with the enforcement of the Leadership Code which requires public officials to declare their wealth.

It has been argued that the proposal to vest the President with powers to dissolve Parliament is derived from the concept of a social contract, whereby the electorate elects representatives who make decisions on their behalf. These representatives are elected on the basis of policies presented during elections. Therefore, when Parliament and the President fail to agree on these policies, it is legitimate that they should go back to the people on whose authority they act when making decisions. That dissolution will not be a common occurrence, it will happen only when both the President and Parliament have strong

justifications for their respective positions. It has been further argued that critics of this proposal have failed to take note of the fact that dissolution applies to both the President and the Parliament.<sup>15</sup>

Elsewhere, it has been emphasised that this proposal should be analysed in light of the principle of a directly elected President who has secured more than 50% of the votes polled and owes it to the people to implement his/her manifesto. It is against this background that it becomes imperative for a President to dissolve Parliament when there is an impasse. The Cabinet made this proposal for purposes of ensuring that chaos is avoided. If such a mechanism were not in place what would happen when there's an impasse between the two arms of government with no solution in sight? The proposal was therefore made to prevent reverting to military rule. In addition, there is the possibility that the Speaker may refuse to dissolve Parliament, in which case the President should be vested with powers to do so. An alternative method of resolving such conflicts would be by referring the matter to a body such as National Council of State (NCS), which was provided for in Articles 152-155 of the 1992 Draft Constitution of Uganda, but was never adopted in the Constitution itself.<sup>16</sup> The NCS, would after deliberation, advise the President and / or Parliament accordingly. Where both fail to agree after referral of the matter to the NCS, the matter would then be referred to a referendum for resolution. Both arms of government are bound by the decisions of the people and where there is refusal to abide by them, resignation and the dissolution of the President and Parliament respectively, takes place followed by an election.<sup>17</sup>

Key supporters of the proposal have emphasised that the opposition has misconstrued the proposal and that Western democracies such as the United Kingdom, Australia and France have dissolution clauses but are not characterised as dictatorships, so why should a different set of rules apply to Uganda, when it chooses to adopt a similar clause? The proposal was further justified by the need to have a strong presidency, which ensures the accomplishment of election campaign promised, because a weak President (one whose powers are subject to parliamentary approval or limited powers) would be unable to bring about socio-economic change. The Observer, a weekly publication further noted that the National Resistance Movement (NRM) government has fundamentally changed the landscape of governance

in Uganda through ushering in press freedom; the rule of law; empowerment of marginalised groups such as women and the disabled and decentralisation of power.<sup>18</sup> This is in addition to the undisputed fact that the achievements of the NRM have been possible in a system of governance characterised by the absence of a “strong President.”

The context within which the proposals were made assumes significance when one analyses the relationship between President Yoweri Museveni and the Sixth Parliament since 1996. The Cabinet proposals were presented at a point in time when Parliament had on a number of times refused to cave in to pressure from the executive. During such situations the President had been known to summon MPs and persuade them as to why his position on a bill should be endorsed and invariably, the President’s position was then accepted. This was the case with the Political Organisations and Parties Bill, when the Sixth Parliament passed a clause that allowed political parties to open branches at the district level to which the President objected and refused to assent to the Act, only to have the Seventh Parliament pass the bill incorporating the disputed clause.<sup>19</sup>

The proposal stipulating the grounds upon which Parliament may withhold the approval of ministerial appointments was presumably made to prevent the reoccurrence of a past situation where Members of Parliament had objected to the re-appointment of Ministers who had been censured, which approval was later granted.

Concerns were raised about the possibility of Cabinet altering the CRC report before presenting it to Parliament.<sup>20</sup> Government gave reassurances that the report was a public document which was not the first of its kind and that the remotest possibility of such an occurrence was not possible.<sup>21</sup> Ensuring that both Parliament and the Cabinet receive copies of the report simultaneously will go a long way in assuaging such fears. That way Cabinet would be disabled from pushing its interests in total disregard of the whole report.<sup>22</sup> However, it is maintained that when an appointing authority presents its proposals to a body it has created, the question of undue influence and the power that it exercises becomes pertinent.<sup>23</sup> Related to this is the argument that the removal of the term limit of the President was not among the matters on which submissions were raised with the Commission during

its country-wide consultations, and yet it was contained in the proposals presented by the Cabinet. The allegation that Cabinet proposals were in response to a 'leaked' draft report of the Commission which indicated the absence of a submission to lift the president's term limits, put into question the legitimacy of the findings of the CRC on contentious matters.<sup>24</sup> In addition, the fact that Cabinet will receive the final report and prepare a White Paper on the constitutional amendments for presentation to Parliament, increases the possibility of a "modified" report reaching Parliament. In reply to this concern, it has been asserted that it is not out of the norm for government to make presentations to Commissions as it has previously done for several commissions of inquiry.<sup>25</sup> However, the difference in this situation is that the Cabinet is responsible for analysis of the same report, which puts its objectivity into question when discussing the report. Subsequent events regarding the conclusion of the constitutional review process which have been mentioned in the report seem to lend credence to concerns raised about the Cabinet substituting its minority submissions as those of the majority. It is for these reasons that Parliament refrained from making submissions to the Commission to avoid accusations of incorporating its own views as those of the majority.

It is however, contended that the above mentioned concerns are unfounded. The head of the Commission and his deputy are honorable members of the legal profession who were in position to raise objections about the independence of the Commission. The failure to do so implies that this technicality was of no significance to their work. In addition, members of the public had the opportunity to raise similar concerns but failed to do so. It is thus, rather late for them to complain at the last minute when the Commission is winding up its work.

Critics of the proposal to vest the President with powers to dissolve Parliament when both have failed to agree on matters of legislative and executive importance, argued that in a multi-party political system where the President has a majority in Parliament, a rejection of his/her policy is a vote of no confidence. Thus, where he/she has a minority and an impasse is reached, why should minority views take precedence over the majority? Why should one individual have the power to dissolve an institution because it disagrees with her/him on a policy issue? There are alternatives that can be resorted to in such situations, which are

less costly, disruptive and time consuming. For instance, a dialogue can be held or the matter can be referred to adjudication to reach an amicable solution. In addition, it was stated that since this proposal is rooted in sovereignty of the people, then by extension the people should have the right to recall the President when he/she fails to deliver on his/her election campaign promises.<sup>26</sup>

In spite of reassurances that the Cabinet proposals were well-intentioned the fact is that most of them are geared towards increasing executive power, eliminating checks and balances on the use of power and reducing the powers of institutions that perform similar functions. At the end of the day, the proposals are inimical to constitutional democracy whichever way one chooses to examine them, more so considering Uganda's history of tyranny and dictatorship made possible by an omnipotent president. There is need to maintain the balance of power between the executive and the Parliament in order to ensure that the former does not exceed its powers. Parliament being composed of persons with varied political opinions and interests is better placed to ensure the non-abuse of power.

## **Opening up the Political Space**

The issue of opening up political space to accommodate pluralism has been one that has plagued the arena of governance in Uganda since 1986. While political parties have not been banned outright, they have nevertheless been severely restrained in operation, especially with respect to the opening up of branches and sponsoring candidates in elections. Article 269 of the 1995 Constitution maintained the suspension of political party activities and further restrictions were enforced by the Political Parties and Organisations Act (PPOA) 2002. After some agitation over the issue from within and outside the Movement System, the President established a committee led by Dr. Crispus Kiyonga the National Political Commissar, to consider the issue. The committee reviewed the opening of political space and with the exception of Bidandi Ssali in a minority report, recommended that the Movement System continue to be in place. In a surprising departure, President Museveni sided with Bidandi Ssali and declared himself in favour of the opening

up of political space to set free Movementists who were in favour of lifting restrictions on multi-party politics.

The proposal to open up the political space was presented by President Museveni and discussed at a NEC meeting in March 2003. The gathering resolved that “the political space be opened to allow those who feel conscripted into the Movement political system to freely organise and operate as political parties and organisations in accordance with the law.”<sup>27</sup> The proposal was met with stiff resistance and in an attempt to appease those against it, the President further proposed that this should be subject to a referendum.<sup>28</sup> On their part, the opposition were of the view that this was merely a ploy to appease the donor community who believed that it was time to lift the restrictions on political party activities.<sup>29</sup>

What can be made of the President’s stance regarding the opening up of political space, especially given his long-standing opposition to the same? What led to the change of heart? Was it a genuine desire to have a truly pluralistic political system or the realisation that the Movement is no longer tenable as a viable system of governance? Several answers have been given to these questions one of which is that the socio-political circumstances prevailing dictated that the political space should be opened.<sup>30</sup> This view is at variance with events following the pronouncement that the political space was to be opened. The Riot Police disrupted a Democratic Party (DP) celebration of a court victory declaring the Political Parties and Organisations Act unconstitutional.<sup>31</sup> Although it was commendable that President Museveni warned the security agents against harassing the opposition, throughout the year it has been quite clear that such directives have either been ignored or were half-hearted in the first place.<sup>32</sup> Half-hearted measures of this nature can be construed as the lack of political will to ensure a return to a genuine multi-party political system.

The opposition argued that subjecting the proposal to open up the political space to a referendum was uncalled for, as both sides of the divide were now finally in agreement. Members of the NEC rejected this argument and counter argued that the sovereignty of the people is one of the basic tenets of the Movement, and that in order to keep in line with this, a referendum must be held to seek the people’s opinion

on this proposal.<sup>33</sup> It has further been argued that this proposal should be contextualised within Uganda's political history, which has been dominated by the political *elite* and traditionalists who have oppressed the majority. Further, that opponents of the proposal are afraid of participatory democracy hence their opposition to the referendum through which the majority can express their wishes. In addition, Local Council (LC) 1 officials have persistently asked to be excluded from partisan politics because the LC system and a multi-party political system cannot co-exist. It is objections of this nature that have to be addressed and this can only be done by holding a referendum on the issue. Secondly, Article 74 of the Constitution clearly lays down the procedure to be followed when changing a political system, which is through a referendum or elections. Political parties should not rely only on specified Articles of the Constitution that advance their interests. If they choose to advocate for constitutional democracy they should go all the way. Therefore, subjecting the opening up of political space to a referendum is acting within the parameters of the law. When concerns with regard to free and fair elections were raised, it was emphatically stated that all elections held under the Movement system of government have been "very free and fair."<sup>34</sup>

The issue of a level political field requires urgent attention. While the opposition is denied an opportunity to canvass support from the grassroots, Movement leaders are at liberty to traverse the country to contrast. Supporters of the proposal to subject the opening up of political space to a referendum have disputed such claims and counter argue that the President has been holding a series of high-profile meetings to plot the future of the Movement in 2006, under the pretext that these are merely routine meetings expected of a Head of State. Such claims have been dismissed as a smoke screen for canvassing support for the Movement. The observation that these meetings are held with key supporters of the Movement lends credence to their claims.<sup>35</sup>

Well-founded fears have been expressed about political parties perpetuating tribal and religious divisions, as was the case in the past. Thus, it may be necessary to abandon a winner-takes-all voting system and in its place adopt a Proportionate Representation (PR) system, such as that which pertains in the Northern Ireland. Under this system, all political parties are represented in government and a presidential



candidate is required to gain a measure of support from all parts of the country to ensure support for his/her programmes.<sup>36</sup> This type of representation reduces the risk of polarisation along identity lines, because of the possibility that each constituency will have more than one party candidate who may not belong to any identity prevailing in the constituency. Furthermore, PR diminishes parochialism since representatives have to address the different issues of interest to the communities in a constituency, thereby rising above identity divisions. In the long run this encourages the discussion of issues-based politics from a national perspective.<sup>37</sup>

Although there are disadvantages associated with the PR system it should be noted that some of the disadvantages have existed long before its implementation in Uganda so it does not necessarily imply that PR will exacerbate them. For instance, although it produces weak governments due to the absence of a majority party, the resultant coalition governments of national unity could act as a cushion against giving priority to issues that threaten this unity. Secondly, it generates too many political parties, which were many in number even under pluralist regimes where support was sought on identity grounds. On the other hand, PR often does the opposite and may lead to a coalition of parties that have similar agendas.

Alternatively, a “third way” has been advocated for as an alternative to the Movement System of government and the multi-party political system known as the “Multi-party Movement Political System.” This political system combines the key elements of both systems of governance to accommodate supporters of both camps. “The political system being proposed is a hybrid of the good and relevant from the multi-party political system of government and Movement System. It is a give-and-take, win-win, scenario between the Movementists and the Multi-partyists.”<sup>38</sup> The fact that both camps were willing to discuss it further is an indication that the fears associated with a return to multi-party politics can be addressed.

The process of opening up political space was crowned by consultations between a government team and representatives of recognised political groups in the country. The purpose of consultations were to chart a road map to the transition.<sup>39</sup> Considerable skepticism was expressed about the consultations to the effect that, “the whole

issue of talking to parties is to create an illusion of consultations on a direction that is already decided and is being implemented.”<sup>40</sup> It has been further alleged that this is a delaying tactic while the Movement re-organises and prepares itself for the transition. On its part, the opposition gave several conditions to the government before the consultations could begin. These included repealing or amending constitutional and legal provisions which are viewed as obstacles to the restoration of multi-party democracy in Uganda, and giving the opposition adequate time to prepare for the 2006 general elections. The latter was meant to result in the freeing of political parties to canvass support from the grassroots.<sup>41</sup> The opposition went as far as urging Parliament to pass a law defining the mandate for negotiations between the government and other political organisations and set the reporting time and powers for the government team. Having a legal framework for the talks was in the view of the opposition necessary to ensure that the decisions taken were legally binding. The parties came to the realisation that they were too weak and politically vulnerable to act in their individual capacities and therefore decided to have a common negotiator and to meet the government as a single force. In the view of some observers this was commendable given the fact that they had been crippled and were pitted against a political group that has enjoyed the monopoly of the state machinery and the media for the past seventeen years.<sup>42</sup> By the year’s end these concerns had not been addressed and consultations were yet to begin.

The issue of the registration of political parties also came up during the course of the year. Existing political parties were opposed to the requirement of registration since the Constitution acknowledged their existence. However, it was stated that this requirement is based on the need to ensure that these parties become legal entities, which can be sued for any offences committed. That the lack of legal status made it possible for the parties to get away with the atrocities committed in the past, therefore, the registration requirement is meant to address this defect.<sup>43</sup> In spite of these developments members of the Movement set about obtaining the necessary signatures and complying with the other provisions of the PPOA. The National Resistance Movement-Organisation (NRM-O) was duly registered on October 6, 2003 effectively marking a step towards establishing a multi-party political

system. The registration was challenged by the Democratic Party on the grounds that President Museveni had a hand in its formation, contrary to Section 16 of the PPOA, which bars soldiers, police and prison officers, public officers and cultural or traditional leaders from being founding members of a political party. In addition, the law bars such persons from speaking or publishing anything on behalf of, or holding any office in a political party or organisation. The petition alleged that President Museveni was actively involved in the registration process of the NRM-O where by he applied to the Registrar to reserve colours, names and symbols for the NRM-O as Chairman of the Movement. On its part, the promoters of the NRM-O have stated in rebuttal that the said letter was signed by the President as the convener and not as the Chairman of NRM party meetings, thereby remaining within the parameters of the legal requirements. The petition further alleged that Moses Kigongo referred to as the Interim Chairman in the registration application forms falls in the category of a public officer since he draws a salary from the Consolidated Fund.<sup>44</sup> By the end of the year, judgment on the petition was yet to be handed down.

The fact that external and not internal forces brought about the President's change of attitude<sup>45</sup> brings in the possibility of the process being riddled with inconsistencies all geared to ensuring that the Movement remains in control and that its interests are not undermined. This would hardly be surprising since it is alleged that the President has held consultations with former one-party regimes on how they handled the transition process to multi-party politics was advised to ensure that, "the only way a ruling party can successfully manage a transition from single to multi-party politics is by owning the process."<sup>46</sup>

## **Lifting Presidential Term Limit**

The issue of lifting the presidential term limit has taken center-stage in the constitutional debates. Article 105(2) of the Constitution provides that the person elected President shall not hold office for more than two five-year terms. Referred to as the "third term project" the campaign to do away with the presidential term limit was kicked off when the NEC meeting, one of the organs of the National Council (NC) responsible for initiating policies among other duties,<sup>47</sup> passed a

resolution to that effect, and presented it to the NC, the highest decision making organ of the Movement.<sup>48</sup> Various arguments have been advanced for and against the proposal and it is necessary to present a critical analysis of these.

Chief among the architects of this proposal, aside from the President, was Prof. Semakula Kiwanuka who supported the lifting of the constitutional term limit for the President. He and other proponents argued that Uganda should adopt the Westminster system of governance that is characterised by the absence of term limits. He emphasised that “the President is highly respected and people should not be ashamed of associating with him.”<sup>49</sup> He argued further that presidential term limits are undemocratic in the sense that they prevent the development of durable, democratic institutions and principles such as the right of the people to choose, in this case, leaders who may have served for more than their stipulated term of office.<sup>50</sup> The proposal was further justified on the ground that it was an unnecessary legal technicality, which served no purpose since a sitting President could be removed through periodic elections.

Those arguing for lifting of term limits are convinced that progressive government policies started by President Museveni are dependent on him for their implementation. It is therefore, necessary to give him another term in office to ensure continuity of the same. In the words of Frank Tumwebaze, “Another reason to support open presidency is the fact that some policies require long-term leadership to ensure their success over a long period. For example, the Universal Primary Education (UPE), which also gives prospects for Universal Secondary Education (USE). If these are policies on the basis of which the people voted for Museveni in previous elections and they have total confidence and trust that he will deliver, why deny the voters the chance of this continuous development?”<sup>51</sup> Related to this is the argument that an open presidency “creates the prospect of future tenure, which gives the presidency leverage to get things done. Without this, presidential terms suffer the lame duck effect, making a President less and less able to promote his legislative agenda.”<sup>52</sup>

It is further contended that limited presidential terms reduce voter choice since the citizenry are denied the opportunity to vote for a candidate of their choice, it is consequently difficult to ensure the full

participation of the citizenry in their own affairs when voter choice is limited. Related to this is the argument that such limits create a weak executive, thereby tilting the balance of power in favour of the legislature.

In addition, it has been stated that with the opening of political space the opposition should be principally concerned with how to win the next general elections. Instead, they are focusing on how to prevent Museveni from seeking another term of office. The reality is that the two issues are inter-related. The “third term project” has significant implications for the active participation of political parties. They face an up-hill task were Museveni to stand for another term of office since all efforts will be made to ensure that he wins the election. This brings in the issue of whether or not there is a level playing field. If not, the alleged opening up of political space remains a mere gimmick designed to give legitimacy to the self-perpetuation of the Museveni regimes.

However, it has been asserted that since this is a constitutional amendment that requires voting by secret ballot it will be very difficult for the government to force MPs, including those loyal to the regime, into voting for government positions.<sup>53</sup> It has been argued that it is for this same reason that government may put the lifting of the third term to a referendum where it can exercise control over the process to achieve the desired results, instead of relying on the uncertainty associated with secret voting in Parliament. Observers of this debate argue that the Rules and Procedures of Parliament can be amended to require open voting.<sup>54</sup> The Movement leaders have had the notoriety of amending laws to suit their interests and it will only be a matter of time before they do so in this case. Will the Members of Parliament re-assert their independence when voting on this contentious matter? Only time will tell.<sup>55</sup>

Opponents of the lifting of the Presidential term limit urged that this would set a bad precedent for future leaders who may amend laws to suit selfish and narrow interests.<sup>56</sup> This leads to disrespect of the law due to its vulnerability to manipulation and would undermine the rule of law which is one of the accepted cornerstones of a functioning democracy.

They also asserted that allowing the President a third term of office will deny Ugandans the freedom to determine the destiny of their

country.<sup>57</sup> This is because such a move will be accompanied by measures to reduce the powers of institutions that hold the executive accountable for its actions, in addition to acting as a check on the abuse of power.

There is need to contextualise the lifting of the third term to understand better those opposed to it. Uganda's political history has been characterised by the violent hand-over of power. This has been followed by the concentration of power in the executive, which has resulted in the establishment of a dictatorial regime. It is against this background that the opponents of the third term raise legitimate concerns about the dangers of reverting to situations that pertained in the past. These views were echoed by the Odoki Commission which drafted the 1995 Constitution of the Republic of Uganda. The Commission observed, "We have also reflected the view almost unanimously advocated for by the people that the tenure of office of the President should be constitutionally limited to put to an end to the phenomenon of self-styled life Presidents. We have recommended a limit of two terms of five years each for any President."<sup>58</sup>

What is the President's stand on these arguments about term limits? Right from the start, President Museveni has not explicitly stated that he is against the lifting of the presidential term limit. Rather, he has argued that it is a matter which can be debated upon as a principle. He has further argued that any lifting of the presidential term limit should not be geared to give him another term nor should it be hinged on his personality.<sup>59</sup> In the same breath, he recommended that the term limit issue be the subject of review<sup>60</sup> while also advising people to concentrate on coming up with a "vision" for Uganda. The President also threatened to stand for another term since those who are agitating for his retirement were not pegging their opposition on alternative visions for Uganda.<sup>61</sup>

Related events, such as the dropping of Ministers who were opposed to amending the provision on the presidential term limit in Cabinet reshuffles, have been largely interpreted as being related to their opposition to the amendment of the presidential term limit.<sup>62</sup>

Some Aides to the President also attacked leaders of the Catholic Church (including Cardinal Emmanuel Wamala) who openly opposed the lifting of the presidential term limit.<sup>63</sup> They were prominent throughout the year in making the case for the Cabinet proposal and in

many respects were considered to be speaking on behalf of the President.

Two pressure groups were noted for their organised countrywide campaigns against the third term. These were the Popular Resistance Against Life Presidency (PRALP) and the Parliamentary Advocacy Forum (PAFO). The former is a pressure group formed in October 2003, to campaign against a possible third term for President Museveni. The group has attempted to hold public rallies to sensitise the population against the removal of the presidential term limit from the Constitution, only to be forcefully dispersed by security agents because they had not sought the necessary permission as required by law. Such show of force would be unnecessary if pro-third term activism allegedly originated from the districts.

PAFO on the other hand, is a pressure group composed of MPs and has been aggressively campaigning against lifting of the constitutional presidential two-term limit. One of its activities was to hold a conference to discuss the attempts to amend the Constitution. It has however, been dismissed as being mainly composed of people who are disgruntled with the Movement and of allying with political parties who were the cause of political turmoil in Uganda's political past.

It is interesting to note that the Movement adherents pick and choose aspects of the Western democratic system that suit their interests. Whereas they were vocal in their criticism of such democracies which they asserted were imposed on Uganda and failed to take into account the prevailing socio-economic circumstances, in addition to being unsuitable for a pre-industrial society that has no middle class, they have at the same time justified proposals to lift the presidential term limit on the need for Uganda to adopt such systems of governance. Countries that have no presidential term limits are characterised by the presence of active political parties, which act as a check on life presidency. This is possible through two mechanisms: the party in power may elect a new party leader or another party may win an election. This is not the case in Uganda where the political space has just been declared "opened." If the Movement chooses to adopt the Western type of democracy then it should go all the way instead of selecting parts of the system that best suits it.

Reports by external observers and national monitoring organisations on the 2001 presidential and parliamentary elections concluded that they were a far cry from being free and fair since they were marred by intimidation of the opposition, tampering with the electoral register, deployment of military personnel during the elections and the monopoly of the media and public resources by the incumbent. This therefore, begs the question: since free and fair elections cannot be held how else can an incumbent be removed from power?

There is no need to labour the point that President Museveni has not been solely responsible for implementing government policies. It for is this same reason that he has ministers, ministries, advisers and district personnel to assist him in the implementation of such policies. It may also be counter argued that if strong institutions manned by qualified and competent personnel are established, then they are well placed to ensure the continuity of government policies. However, the reverse is true which explains why they have been unable to carry out their functions effectively.

Persons who attended the National Conference of the Movement, held at Kyankwanzi have questioned the manner in which the proposal was made and put forward. It is believed that it was engineered by a few individuals including the incumbent (a claim repeatedly denied by President Museveni)<sup>64</sup> and the claim that it had its roots in the districts, does not hold water.<sup>65</sup>

Results of a nationwide opinion poll survey showed that a significant majority of the public are not in favor of the President standing for a third term.<sup>66</sup> Pro-third term activists have dismissed the results as being unrepresentative of the true picture on the ground since they are receiving a different message from their wider consultations. However, if the poll results are a true reflection of public opinion on the third term, then it begs the question: for whom do the pro-third term advocates speak for when they state that it encourages full participation of citizens?

The contention that NEC's proposal with regard to removing the presidential two-term limit will be subject to a parliamentary vote should put to rest fears that it will easily sail through. The clause in the constitution that sets the two-term limit can be amended provided it has the support of two-thirds of all MPs and not necessarily those who are present. This number may not be difficult to obtain since the Seventh



Parliament has been noted for its tendency to fail to stand firm on decisions that are contrary to those of the Executive. There is no assurance that it will behave any differently when debating the proposal for an unlimited presidential tenure.<sup>67</sup>

However, it has been urged that when one considers events related to the third term it becomes very clear that the “President’s vision of governance is a vision that puts a stop to the deepening of democracy in favour of less democracy.”<sup>68</sup> That this was contained in memoranda from the districts is questionable given the fact that when the same district officials rejected the opening up political space he managed to persuade them to change their minds.<sup>69</sup> In addition, Museveni’s current term expires in 2006 and he has recommended that there should be no constitutional amendment to give a President a third term until at least after 20 years, which also applies to him.<sup>70</sup>

It is quite clear that although the lifting of the presidential term limit only emerged in the early part of the year, it was destined to dominate political discourse in Uganda. This is because it has brought together different shades of political opinion and threatened to divide the Movement down the middle. The culmination of developments on this issue came with regard to the on-going CRC where the same proposal was presented by the Cabinet.

## **Judicial Decisions with Significant Effects for Human Rights Development**

Three decisions of the Constitutional Court in 2003 have been selected for review. They have significant implications for constitutional and human rights developments in three main aspects: the right to associate in view of the proposal to open up the political space; the right to a fair trial *vis-à-vis* Field Court Martials and the right to religious freedom in secular institutions.

In the case of *Dr. Paul K. Ssemwogerere, Hon. Kassiano Wadri Ezati, Hon. Sebuliba Mutumba, Hon. Winnie Byanyima, Mr. Sam Njuba, Hon. Okumu Ronald Regan v. Attorney General*,<sup>71</sup> the petitioners challenged the constitutionality of the Political Parties and Organisations Act 2002, and in particular Sections 18 and 19 which they claimed unduly affected their constitutionally guaranteed freedom

to assemble and associate under Article 29(1) (d) and (e) of the Constitution respectively. The purpose of the PPOA was 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 related matters. Article 72 guarantees the right to form political parties and any other political organisation, but these have to conform to the principles laid down in the Constitution. The same article mandates Parliament by law to regulate their financing and functioning. The extent of these regulations is prescribed by Article 73. Under Article 73(1), during the period when the Movement Political System is in force, organisations subscribing to other political systems not chosen under Article 69, could only operate in accordance with the regulations made under Article 73(2), which regulations *would not exceed what is necessary for enabling the political system to operate* (emphasis added). The Act was therefore made to regulate the functions and operations of a multi-party political system and any other democratic and representative political system during the period that the Movement system is in operation. Those sections provide as follows:

Section 18(1) “Notwithstanding anything in this Act, during the period when the Movement political system is in force, political activities may continue except that no political party or organisation shall:

- (a) sponsor or offer a platform to or in any way campaign for or against a candidate in any presidential or parliamentary election or any other election organised by the Electoral Commission;
  - (b) use any symbol, slogan, colour or name identifying any political party or organisation for the purpose of campaigning for or against any candidate in any election referred to in paragraph (a);
  - (c) open offices below the national level;
  - (d) hold public meetings, except for national conferences, executive committee meetings, seminars and conferences held at the national level and the meetings for purposes of forming a political party and one meeting in each district to elect members to the national conference for the purpose of electing its first members of the executive committee.”
- (2) “A political party or organisation shall not hold more than one national conference in a year.”

Section 19 “Subject to clause (2) of Article 73 of the Constitution, during the period when the Movement Political System is in force and until another is adopted in accordance with the Constitution, no organisation subscribing to any other political system shall carry on any activity that may interfere with the operation of the Movement political system.”

The agreed issues for determination by the Court were:

- (i) Whether or not Sections 18 and 19 of the Act imposed unjustifiable restrictions or limitations on the activities of political parties and organisations;
- (ii) Whether or not Sections 18 and 19 of the Act rendered political parties and organisations non functional and inoperative.
- (iii) Whether Sections 18 and 19 of the Act were inconsistent with Article 75 of the Constitution and established a one-party state namely the Movement.
- (iv) Whether or not Sections 18 and 19 of the Act are inconsistent with Articles 20, 29(1) (a), (b), (d) and (e) and 2 (a)43 (1) and (2) (c), 71, 73(2) and 286 of the Constitution.

The Court delivered a unanimous judgment in favour of the petitioners and declared that the impugned provisions imposed unjustified restrictions or limitations on the activities of political parties and organisations, rendering them non functional and inoperative, and that they also established a one-party state and infringed the fundamental rights and freedoms to assemble and associate with others. The offending sections of the Act were thus declared null and void.

The Court noted that when faced with matters of constitutional interpretation an account should be taken of the background against which such interpretation was made to ensure that its spirit is effectuated and in particular its provisions concerning fundamental human rights and freedoms. With regard to Uganda, it was noted that the 1995 Constitution was made against a violent and turbulent political history and its spirit was to prevent a reversion to the past by vesting all power in the people who should ultimately decide on how they should be governed. However, since society is not static, interpretation of a Constitution should in addition take into account the context that exists at the time of interpretation and not when it was promulgated, so as to be relevant and reflect the growth of the society it seeks to regulate.

Lady Justice Mpagi-Bahigeine stated, “Courts have to breathe life into the Constitution bearing in mind that it is not a lifeless museum piece nor is it frozen but is organic and grows.” When applied to the prevailing circumstances in Uganda this means that although political parties in the past were associated with and perpetuated identity divisions thereby taking center stage in contributing to the violent and turbulent political history, people do change and therefore political parties can be reformed and offer constructive criticism to the government, and advance alternatives in all spheres of development. In addition, it was observed that there have been tribal and political divisions leading to the loss of life during the NRM regime, thereby putting to rest the notion that divisiveness of the people is restricted to political parties. This decision depicts the progressive attitude adopted by the Court with regard to political developments: it gives a human face and voice to the Constitution by ensuring that the interpretation of its Articles reflect prevailing circumstances so as to remain relevant.

Also worth noting, is the liberal and generous approach taken by the Court with regard to entrenched rights and fundamental freedoms, because the Court has previously held back on elaborating on the rights in the instrument and in many instances was reluctant to decide cases against the state. A number of its decisions have maintained the *status quo* in the face of obvious unconstitutional legislation or actions.<sup>72</sup> The Court noted that such rights must be given a “generous and purposive construction, should not be diluted or whittled down and derogations therefrom must be given a narrow and strict construction.”<sup>73</sup> It was noted that the main objective of the Constitution was to promote a free and democratic society, which should be the yardstick of the decisions of the Court when interpreting it. In this regard, political parties are one of the essential ingredients of a free and democratic society and therefore their existence and operation are of paramount importance to ensuring the promotion and establishment of a democratic society. The Sections in the Act in point permit the existence of political parties but they may as well have been totally banned since they are prohibited from carrying out their activities.

The stand taken by the Court on the Sections of the Act that were challenged, illustrated a considerable degree of judicial independence, as the Judges vehemently refused to be persuaded by the state’s

justifications for the restrictions placed on political party activities. The Court stated that where fundamental rights and freedoms are alleged to have been violated the petitioners have to show that there is a *prima facie* case that the impugned law impinges on their political rights and freedoms. The nature of evidence required to establish such a *prima facie* case depends on the manner in which the fundamental rights are said to be affected by the challenged legislation. After establishing a *prima facie* case, the burden then shifts to the respondent to show justification for the challenged law. The duty of the Court is then to ascertain whether the objective of the limitations seeks to promote or responds to substantial concerns in a free and democratic society. The petitioners adduced evidence to illustrate that these restrictions infringed upon their rights of association and assembly. Political parties are not allowed to open branches, hold public rallies or seminars below the national level except only once a year for the purposes of electing delegates to their National Delegates Conference to constitute their National Executive Committees. The respondents justified the restrictions on grounds of the sovereignty of the people, avoidance of partisan politics, the principle of individual merit, local governance and unity. These reasons were discounted as being merely speculative. The Court used the test of a free and democratic society which was defined as one “where people have a say in the governance of their affairs and there is observance of fundamental human rights and freedoms,” and came to the conclusion that it was not the intention of the 1995 Constitution to ban parties.<sup>74</sup> In addition, it was noted that the membership of political parties is one of the avenues through which the right to associate and assemble are realised.

The Court further held that the effect of the controversial Sections was to establish a one-party state contrary to Article 75, which prohibits the same. The state put the case that the Movement was not a party or an organisation but rather a system. This argument was dismissed by the Court as the splitting of hairs. It was noted that the Movement has all the attributes of a political party. To wit it has the symbol of a bus, intends to acquire property and set up its headquarters, vies for power and sponsors candidates openly to stand for elections.<sup>75</sup> A circular from the Chairman of the National Conference of the Movement to all members of the National Conference provided ample proof to support

the petitioners' case. It read thus, "In constituencies where the Movement is under threat by multi-parties and there is more than one aspirant standing on the Movement platform, we should aim at ensuring that the Movement wins. This should be done in the following ways:

- The Movement organs, the Local Council structures, the youth structures and women structures that are friendly with the Movement from the village, parish, sub-county and county levels in that constituency should make every effort to dissuade some aspirants from standing so that one Movement candidate is left;
- Where such efforts of the local leadership have failed, the Movement leadership at the centre through a committee I have set up should try to urge locally identified aspirants to stand down in the interest of the Movement;
- Where (a) and (b) fail, then the structures mentioned in (a) above should meet and by vote select one of the candidates who then should be urged to stand and should be supported politically."

Preventing political parties from carrying out similar activities leaves the Movement as the only "bull in the kraal," thereby creating a one-party state. In the same vein, it was further held that the essence of political parties is to mobilise people in order to influence and promote political agendas and capture political power in order to govern at every level.<sup>76</sup> Denying political parties access to the people at the grassroots and limiting their operation to the national level incapacitates them. It is not enough for the parties to exist, they must be able to carry out the activities for which they were created. This was to counter the argument by the state that the Act does not ban parties and that the restrictions have been put in place to reform them. It is incomprehensible how political parties are expected to undergo reformation if they are inoperative. The Court concluded by stating that it is only through active political participation that an assessment can be made on the progress made with regard to reformation.

This decision assumes great importance in a country where political party activities are restricted and the courts were one of the alternatives available to the opposition to challenge unconstitutional measures taken by the government in power to restrain their activities.

In the case of the *Uganda Law Society v. Attorney General*,<sup>77</sup> the petitioners challenged the constitutionality of the National Resistance

Army Statute 1992, (hereinafter referred to as the Statute), in so far as it permits the Field Court Martial to pass the death sentence without the confirmation of the Supreme Court, which is the highest appellate in Uganda. Two soldiers had been sentenced to death and executed by the firing squad under circumstances that denied them their right to a fair trial. The petitioners applied for an injunction stopping the operation of Section 92(1)(a) of the National Resistance Army Statute under which the executions were carried out.

The Court held that although the Field Court Martial was a court of competent jurisdiction as envisaged by Article 22(1) of the Constitution, the special nature of the Field Court Martial makes it exempt from normal court structures. It is a special court that is set up to maintain law and order and military discipline in the field of operation. Subjecting it to the appeal process therefore would delay the administration of justice in situations that warrant expedience.

With regard to the death penalty it was held that the objective intended to be achieved may warrant the death sentence. In this case, it was necessary in a field of operation as a method of instilling discipline in the men and women at the front line. It was also observed that the petitioners had failed to rebut the necessity of the death sentence in a field of operation. In the result their application was refused.

The procedure followed in a field court martial has negative implications for the right to a fair trial. Its composition (the Field Commander of the operation is the Chairman and eight other members are appointed in writing by the deploying authority before departure) presents problems of impartiality which makes it prudent to subject its sentences to an appellate court that is impartial. If the offence committed by the service man or woman is disobedience of lawful orders (of the Field Commander) resulting in loss or death, then it is a situation of a judge judging his own case. In addition, because the chief objective is to administer instant justice there is a risk of failing to give the accused persons ample time to prepare their defence.

In another case of *Dimanche Sharon, Moreika Gilphine and Nansereko Luck v Makerere University*,<sup>78</sup> the petitioners alleged that the university's regulation and policy of requiring students to attend classes and sit for examinations on the Sabbath day, infringed their

right to practice their Seventh Day Adventist Christian faith and consequently their right to education as provided for in Articles 20, 29(1)(c), 37 and 30 respectively, of the Constitution. A cardinal tenet of their faith was that believers could not engage in any form of work on the Sabbath day, which is a blessed and sacred day to their faith. The court unanimously dismissed the petition.

The court noted that when interpreting the constitutionality of a piece of legislation, its effect and object should be taken into consideration. With regard to the instant case, it was observed that the University and Other Tertiary Institutions Act 2001, under which the respondent's policies and regulations are made is "to provide for the establishment of the National Council for Higher Education, its function and administration and to streamline the establishment, administration and standards of universities and other institutions of higher education in Uganda and to provide for other related matters." By adopting the policy of running university programmes seven days a week, the respondent had done so on account of an increase in the number of students enrolled at the institution. It was thus able to fulfil to a large measure the *raison d'être* of its existence. In addition, it was observed that the petitioners had several options availed to them by the University that took into account their religious beliefs. These were changing courses, applying to re-sit exams and attending lectures missed on a different day with different students. Re-scheduling classes and exams to cater for the religious beliefs of the petitioners would be viewed as discriminatory to other students who profess different faiths. A delicate balance had to be maintained, hence the policy of running its programmes seven days a week. Related to this was Article 7 of the Constitution, which prohibits the adoption of a state religion. Therefore, the respondent being a secular institution was not circumscribed by the variety of religious beliefs obtaining among its student population. With regard to the right to religious freedom the Constitution provides that they have to be practiced "in a manner consistent with this Constitution" and "in community with others." This invariably means that this freedom is subject to other laws and in practicing one's religious beliefs the rights of others must not be prejudiced.

The case raised pertinent issues of balancing the rights of an interest group with those of the wider public. It was also instructive in



demonstrating that religious freedom is not an absolute fundamental human right.

## **Rebel Insurgency in Northern Uganda**

By the end of 2003, there was no end in sight to the war in northern Uganda. If anything, the rebels managed to infiltrate further south, entering the districts of Soroti, Lira, Katakwi and Kaberamaido. The brutality that was meted out to innocent civilians is a harrowing tale. Suffice it to say that the civilian population of these districts has undergone untold suffering.

A militia group known as the Arrow Group was set up to rout the rebels in what used to be Teso. Allied to the Uganda Peoples' Defence Forces (UPDF) in the operation against Joseph Kony's Lords Resistance Army (LRA) rebels in Teso, their role was restricted to protecting civilians and not pursuing rebels. Concerns were nevertheless raised about the lack of clear guidelines and laws to ensure their smooth operation.<sup>79</sup> A number of questions were raised: What happens to the Arrow Group after it is disbanded? Is there an opportunity for the Arrow Group to be recruited into the regular forces or to get alternative forms of employment for those who have no plans to become professional soldiers? Will they be persuaded to lay down their arms? The President emphasised that the militia group was under the tight control of the government and was fully accountable to it. Therefore, when the Teso Region was rid of the rebels government would be in position to demobilise them.<sup>80</sup>

The Arrow Group have to a limited extent been successful in fighting the rebels. They move in small groups and are willing to pursue them to their hide-outs. Their presence has brought a semblance of peace to Teso.<sup>81</sup> However, concerns in relation to their activities and disbandment are legitimate and should be addressed.

Several opportunities for peace talks have been offered to Kony but he has either failed to take them up, or has reneged on his promises for a cease-fire.<sup>82</sup> Coalitions of both the Acholi Religious Leaders Peace Initiative (ARLPI) and the government's Presidential Peace Team (PPT) have been formed to facilitate the peace process. Dates have been set for the talks but the rebel leaders have failed to turn up. What

then has made it impossible for the talks to set off? For starters, the venue is not conducive for peaceful negotiations. The talks have been taking place at the scene of battle with both sides having a strong military presence.<sup>83</sup> In addition, the government decides on the venue and this is bound to raise suspicions. True to form, government troops have surrounded the venue with the result that the rebels understandably failed to turn up. But then on the other hand, the rebels have demonstrated that they cannot be trusted. They have been known to kill civilians during a cease-fire and even to jeopardise peace emissaries. These events make it imperative that a neutral venue should be chosen in agreement with both sides. Offers for such a venue have been made but no action has been taken. A leaf could be borrowed from the current peace talks between the Burundi government and various rebel groups whose venue is in Arusha.<sup>84</sup> If the two sides to the Ugandan conflict are unwilling to meet outside Uganda then a peace-keeping force similar to Economic Community of West African States Monitoring Group (ECOMOG)<sup>85</sup> should be deployed while the negotiations are taking place, to ensure that the process is not abused by either side breaching the terms of the cease-fire. The issue of a neutral mediator also needs to be addressed. This would ensure that the interests of both sides are addressed as practically and as objectively as possible.<sup>86</sup>

The limited period of the cease-fire has been highly criticised with some critics implying that this symbolises the lack of political will to bring the war to an end.<sup>87</sup> Bearing in mind that the war has lasted 16 years it is practically impossible to hope that meaningful talks can be held and resolutions agreed upon in five days. The talks are a continuing process and allotting them a limited period indicates the unwillingness to compromise, an attitude that serves to embolden rebels with no political agenda like Joseph Kony. Museveni as Chairman of the Great Lakes Regional Peace Initiative on Burundi should emulate the principles adopted in handling the troubles in that country when dealing with the war in northern Uganda. He, more than anyone else, should be aware of how to negotiate for peace with rebel groups and how delicate and precarious the process is. Any mishandling by either side can lead to a stall and a renewal of the insurgency. In addition, as Chairman of the Inter-Governmental Authority on Development (IGAD), he has pledged

to work for peace in the region and there is no better place to begin than at home.<sup>88</sup>

Does the recruitment of militia groups imply that the UPDF has failed to defeat the rebels? In addition to the militia groups there is the need to conduct investigations as why the UPDF is failing to rid the areas of rebel activity and why the rebels have managed to infiltrate the country further. It has been denied that the existence of these groups is due to failure by the UPDF to contain the insurgency.<sup>89</sup> That these are reserve forces which may be called upon to expand the capacity of the national defence. In addition, it was stressed that there is no distinction between the regular forces and the people since the government in 1991 opted for a small standing army that would be the nucleus of a vast national defence force comprised of militia groups.<sup>90</sup> In other words, the UPDF lacks the necessary numbers to fight off the rebels and not the ability to do so. Militia groups were created due to the need to reduce the expenditure on the army because of pressure from the donors.<sup>91</sup>

By the year's end rebel infiltrations further south had been curbed with the combined efforts of the militia groups and the UPDF which was not the case for northern Uganda where the LRA continues its senseless butchering of innocent civilians.

## **Specific Constitutional and Human Rights Concerns**

Over the course of the year, a number of controversial issues cropped up. These relate to the outcry over striptease shows commonly known as *ebimansulo*, advocacy on gay rights and the call for the legalisation of prostitution. Arguments for and against the recognition and regulation of these practices have been justified on the basis of non-discrimination of sexual orientation, the right to exercise control over one's sexuality and moral, cultural, religious grounds respectively.

### **Prostitution: To Legalize or Not!**

The legalisation of prostitution gained prominence when sex workers decried the manner in which they were being mistreated by security agents when they were arrested, in addition to the flimsy grounds on which this was effected. It further became an issue when they received

support from Members of Parliament, writers and columnists in the print media. Sections 137 and 139 of the Penal Code Act Cap. 120, (Laws of Uganda 2002), define and criminalise prostitution respectively. Sex workers petitioned Parliament to repeal Section 162 (now Section 167) of the Penal Code Act which provides for the offence of being idle and disorderly. As a result of this provision, many sex workers against whom it would be impossible to sustain the more specific charges of prostitution have been arrested. The sex workers further stated that the provision discriminates against them since it restricts punishment to them (who are mainly women) and not to the persons to whom they provide services to, who are predominantly men. Some members of the House were in agreement with the sex workers while others opted for the moral high ground and pointed out the need to protect the moral and social fabric of society. The regulatory legal machinery should provide for free and regular medical check-ups, HIV/AIDS awareness and sex education. In addition, licenses may be issued to prostitutes for purposes of monitoring the payment of taxes. However, there is the possibility of abuse of this mechanism by law enforcement officers. Ideally, therefore, there should be total freedom to engage in commercial sex without having to acquire a license. The chief objective of the regulatory regime should not be to eliminate the industry. Women have the right to engage in any form of economic activity and for some commercial sex may be resorted to supplement their other sources of income. The objective should be to provide them with a safe environment within which to conduct their trade.<sup>92</sup>

Those against the legalisation have argued that sex workers do not make a conscious choice to engage in the trade but are forced by circumstances such as poverty, sexual abuse, child abuse, educational deprivation and war among many other reasons to engage in the practice. Therefore, the right approach one should adopt is to address the factors that force women to engage in commercial sex. According to this view, prostitution amounts to sexual violence and the oppression of women.<sup>93</sup> Related to this, is the view that legalisation of the sex industry reduces the achievements Ugandan women have made with regard to uplifting the status of women since the legalisation of prostitution lowers it.<sup>94</sup> Having the freedom to use their bodies as they so wish exposes women to exploitation.

It has been argued in the alternative that the exploitation of women is not restricted to the sex industry but extends to all economic activities that are dominated by women. Therefore, economic exploitation should be addressed across the entire economic sector and should not be limited to the sex industry. The economic exploitation of women is indicative of an economic crisis, which has been partly fuelled by the International Monetary Fund (IMF) economic policies and Structural Adjustment Programmes (SAPs).<sup>95</sup> Others have argued that sex workers are in a better bargaining position in comparison to fellow women engaged in other economic activities. For instance, female domestic helpers are under-paid, work long hours, lack private space and are sometimes sexually abused by the members of the households they work in.<sup>96</sup> Sex workers on the other hand, have flexible working hours, could be earning more than domestic workers and have greater freedom of choice with regard to sexual partners. For those who argue that commercial sex is not lucrative, this applies across the board as well to other economic activities, which are regulated by the market forces of demand and supply. It was further argued that sexuality is one of the formidable tools used in patriarchal societies to keep women in subordinate positions.<sup>97</sup> The intention is to restrict women to the domestic arena where they are less visible, their work not given monetary value and where they are subject to exploitation. This explains why the penal provisions that criminalise prostitution punish the sex workers (who are usually women) and not those who pay for their services (who are usually men).

It has been argued that women should have control over their sexuality and one way of achieving this is to decide how they use their bodies. Related to this, is the argument that prostitution is an economic activity and therefore sex workers have a right to engage in the same. It has been further argued that sex work should be a regulated industry to ensure that the trade is carried out in restricted areas and that this would place them in a better bargaining position.

The fact that ex-prostitutes are willing to take on other forms of employment is testimony to the fact that some of them may have had no choice but to engage in the industry. The Eden Ministries in Mbale, a Christian voluntary organisation has taken the role of wooing prostitutes

off the street and now has 2,000 members, many of whom are ex-prostitutes.<sup>98</sup> There is a strong case for the decriminalisation of prostitution. It is one of the oldest professions and we are yet to see an end to it. The alternative is to regulate it and restrict it to zoned-off areas. Measures can also be taken to ensure that under-aged girls do not engage in the trade. At the same time, law enforcement officers must not abuse their powers and ultimately the rights of sex workers.

## **Ebimansulo**

*Ebimansulo* are erotic striptease dances usually performed by young girls who in most cases are illiterate, in bars and at night. In 2003, *Ebimansulo* took Kampala by storm and caused a public uproar with many people arguing that *Ebimansulo* were destroying the social and moral fabric of society. To some this is foreign culture which must not be allowed to take root and all efforts must be made to nip it in the bud. On the other hand, it has been argued that these dances are no different from the cultural dances that are performed by women who are in various states of nudity. Calls have been made to ban them and the authorities have heeded these calls.<sup>99</sup> Arrests have been made but these have been limited to the dancers and not the organisers of the shows which to some is a futile exercise since the dancers are replaceable. The organisers are well positioned to evade the law enforcers. Some of them have gone as far as paying them to ensure that they are not raided. These dances raise several issues that require urgent attention: the age of the girls, their level of education and the factors that make them join the *bimansulo*. For those who argue that these are adult shows, held at night and in secluded places, it should be noted that the nude dancers are paid a paltry shs 2,000 (equivalent to \$1) per night, while the owners rake in high profits. This is a clear case of economic exploitation of probably under-aged, vulnerable girls that should be addressed. This exploitation is not restricted *ebimansulo* but is part and parcel of the wider problem of the exploitation of child labour and should be addressed.

## **Homosexuality**

Homosexuality is not a new phenomenon in Uganda, the only difference being that for the first time the possibility of legal recognition is being discussed in public and gay men and women have actively come out to advocate for the same.<sup>100</sup> The gay community in Uganda has openly come out to demand the same rights as heterosexuals and an end to the discrimination to which they are subjected. From the recent trend of events it is clear that the gay community faces an uphill task in gaining acceptance in society. That the Anglican Church of Uganda severed ties with the United States of America's Diocese of New Hampshire following the consecration of an openly gay bishop, serves as an illustration of the disdain with which the practice is considered in Uganda.<sup>101</sup>

The law does not operate in a vacuum and does to an extent reflect societal values which at present do not condone homosexuality. This raises the issue of whether the right to sexual orientation is an absolute human right or whether societal values take precedence. It has been argued that sexual orientation is a basic human right and part of one's identity. For those who argue that homosexuality is un-African, history has proved otherwise.<sup>102</sup> Furthermore, some scholars have argued that because homosexuality threatens gender hierarchical relationships in patriarchal societies that are based on the male in a dominant position and a female in a subordinate one, legal recognition of homosexuality may spill over to lesbianism thereby upsetting the power relations between men and women.

Legal recognition of homosexuality is a controversial issue. Those arguing for it have their work cut out for them. The fact that it threatens to destroy the foundations upon which patriarchal societies derive their sustenance pits them against formidable opponents.

## **Conclusion**

Significant constitutional and human rights developments took place in the year 2003. These developments have the potential to present new opportunities for the entrenchment of constitutional democracy in Uganda. The constitutional review process was an avenue through

which constitutional reforms would address restrictions on political participation and thereby expand democratic participation. These reforms would guide the process of opening up the political space and stipulate measures that would be adopted to ensure genuine opening up of the political space. Judicial decisions that reinforced the need to lift restrictions on political parties were made which reflected political developments. New or once taboo human rights concerns with regard to sexuality were being publicly discussed. Although there was resistance to changing the *status quo* with regard to the criminalisation of homosexuality, commercial sex and striptease dances, the reality is that the bubble would soon burst. One way or the other, these constitutional and human rights issues have to be addressed and a compromise position agreed upon.

Despite these seemingly positive constitutional developments, the year under review was simultaneously characterised by developments that were detrimental to constitutional democracy. Chief among these was the proposal to lift the presidential two-term limit which was viewed as an attempt by the incumbent President to become a life President. The process of opening up the political space was characterised by the absence of measures that would ensure the effective participation of political parties in the 2006 general elections. This demonstrated the lack of commitment by the government to ensure a genuine return to multi-party democracy. The constitutional review process was at risk of being manipulated by the Cabinet which presented proposals that had the possibility of taking precedence over submissions collected from the people countrywide. This trend of events was worsened by the fact that the proposals were geared towards increasing presidential powers and reducing those of institutions that would otherwise act as a check on the abuse of presidential powers. The end to the LRA rebel insurgency in the northern part of the country was nowhere in sight. Attempts to broker a peace deal fell through and the element of trust which is crucial to the process was absent from both the government and the rebels.

The year 2003 promised to be a watershed for constitutional democracy in Uganda. The situation could go either way depending on whether the positive and negative developments are allowed to flourish



or are checked. The end result could be the strengthening of constitutional democracy in Uganda or retrogression to dictatorship.

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- <sup>21</sup> Interview with Fr. Waliggo.
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- <sup>26</sup> Interview with Dr. Joe Oloka-Onyango.
- <sup>27</sup> Felix Osike and Grace Matsiko, "NEC okays third term," *The Sunday Vision*, March 30, 2003.
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- <sup>29</sup> Alex Atuhaire, Mercy Nalugo and Richard Kavuma, "Opposition, MPs snub Museveni over parties," the *Monitor*, March 28, 2003.
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- <sup>73</sup> Page 10 of Justice Mpagi-Bahigeine's judgment.
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# 4

## The State of Constitutionalism in Kenya, 2003

*Gichira Kibara*

### **Background**

In December 2002, Kenyans voted a new regime into power, ending almost four decades of Kenya African National Union (KANU) rule. This was all the more important because it coincided with the exit of President Daniel Arap Moi who had ruled the country for almost a quarter of a century. Like most of the former British colonies, Kenya on attaining independence in 1963, inherited a fairly progressive, liberal, democratic Constitution from the departing colonialists. The Constitution had elaborate checks on executive power. It largely devolved and decentralised power and was difficult to amend. The Independence Constitution provided for an independent judiciary and a comprehensive Bill of Rights, guaranteeing and protecting almost all internationally recognised civil and political rights. It established a parliamentary system of government with the Prime Minister as head of government and the Governor General as the head of state. A multi-party democracy akin to the Westminster model was created where parties would nominate candidates for election to political office and independent candidates were permitted.

Almost immediately after independence the ruling party began to dismantle the elaborate checks placed on executive power. This was done by first and foremost, undermining the political opposition and ultimately forcing the official opposition party to fold up and join the government to create a *de facto* one-party state. In tandem with the decimation of political opposition, was the enactment, repeal and/or amendment of several provisions of the Constitution all calculated to confer more powers on the executive, particularly the presidency, and to remove the effective powers of the judiciary and Parliament to hold

the executive in check. In the period 1964-1990, thirty amendments were made to the Constitution, (Omolo, 2002: 13-25; Gatheru and Shaw, 1998: 3), the net effect of which has been a serious mutilation of the Constitution and a legitimisation of dictatorship. The fundamental underlying values and principles of the Independence Constitution have been lost as a result of these amendments, (Kuria, 1997:33-48). Indeed, contrary to the a constitutional state underpinned by the primacy of the law envisaged by Kenya's founding fathers, what emerged is a highly personalised system run on the whims of the executive, particularly the President (Ghai, 1992: 3-15).

Civil society was also not spared. In many cases, civil society organisations and operatives were co-opted into the programmes, operations and apparatus of the state and effectively neutered. Those that could not be co-opted were either intimidated into silence (through the use of detention without trial, sedition laws, denial of licenses/permits, etc.) or de-registered altogether. The cumulative effect of which has been the negation of constitutionalism in the country. By the beginning of the 1980s virtually all non-state actors had been neutralised and could not hold the state to account.

The ruling party in 1982, enacted a constitutional provision, Section 2A, to turn the *de facto* one-party state into a *de jure* one-party state. This move was precipitated by the attempt by political actors who had been marginalised from the political arena by KANU to form and register an opposition party. The outlawing of political parties brought home to political actors, the academia and civil society at large the reality that the ruling *elite* did not value constitutionalism and the rule of law. It was, indeed, followed by massive human rights violations throughout the 1980s and early 1990s. Corruption became institutionalised as the President and his party sought to retain their stranglehold on power through the patronage of the various political actors and communities. Resistance to the single-party state and what came to be regarded as the struggle for the second liberation, was inevitable. But it was essentially a struggle for multi-party politics and was based on the false notion that pluralism would naturally lead to democracy and constitutionalism. (Masime and Kibara, 2003:18).

Inevitably, the challenge to authoritarian rule, spearheaded by the academia, religious organisations and the Bar (the Law Society of Kenya), was met with the full force of the authoritarian state. Arbitrary arrests, detention without trial, torture, and disappearances characterized the government's crack down on dissidents. The ruling party however, gave in to concerted pressure from internal dissent within the ruling party, those who had been sidelined from political activity, donors and international financial institutions and civil society advocacy. It repealed Section 2A, in 1991, paving the way for multi-party politics.

## **Restoration of Pluralism**

Following the agitation for democracy that characterised the late 1980s, the last decade of the twentieth century was a decade of change from single-party dictatorship to a nascent multi-party democracy. Some of the key changes were:

- The relaxation of state surveillance on government critics and political opponents, thereby allowing greater enjoyment of civil rights and liberties;
- The restriction of the tenure of the President to two five-year terms;
- The removal of the responsibility for elections from the executive (provincial administration) to the newly constituted Electoral Commission of Kenya (ECK);
- The restoration of security of tenure for High Court and Court of Appeal judges. (Schmidt and Kibara, 2002: 14).

All these changes were made by a reluctant KANU under overwhelming local and international pressure to democratise. Most of the changes were made in order to convince the newly formed political parties to participate in the elections due to be held in December 1992. In the euphoria that followed the reintroduction of multi-partyism, the newly formed political parties were too eager to participate in elections to soberly assess their chances of removing an entrenched autocratic ruling party that had been in power for more than 30 years. (Schmidt and Kibara, 2002: 12-14).



## **Agitation for Constitutional Reform**

After the December 1992 multi-party elections in which the ruling party triumphed against popular expectations, the agitation for democratisation continued. The opposition parties now sobered up by defeat in the elections, realised that without an overhaul of the constitutional foundations of the authoritarian state they could not remove KANU from power. Civil society also realised that democracy was more than multi-partyism. All genuine pro-reform agents thenceforth engaged in a concerted advocacy for a comprehensive constitutional review. The opposition and civil society teamed up to form the National Convention Assembly (NCA), whose executive organ was the National Convention Executive Council (NCEC), (Mutunga, 1999: 111-146). The NCEC galvanised pro-reform forces and took the agitation for reforms to a new level through mass action that ultimately forced the government to relent and enact some constitutional and statutory reforms, to appease the pro-reform forces and facilitate a peaceful general election in 1997. The reforms popularly known as the Inter-Parties Parliamentary Group (IPPG) reforms, were generally geared towards creating a level playing field for all the parties participating in the 1997 general elections. Some of the significant changes were:-

- The requirement that political parties get licenses from the provincial administration (Office of the President) before holding public meetings was removed.
- The Kenya Broadcasting Corporation (KBC), which controls public-owned media was required by the law to give equal treatment to the ruling party and the opposition during the official campaign period. It had hitherto only given favourable coverage to the ruling party, wholly ignoring or giving unfavourable coverage to the opposition. Only KBC is licensed to broadcast nationally for both radio and television.
- Administration officers were barred from participating in partisan politics.
- The Police force was barred from discriminating against people on the basis of political beliefs.

- The presidential prerogative of nominating 12 Members of Parliament was removed; henceforth, parliamentary parties would share the seats on a *pro rata* basis.
- The parliamentary opposition parties were allowed to nominate 10 Commissioners to the Electoral Commission of Kenya. Unfortunately no law was enacted to operationalise this arrangement.
- An Act of Parliament was passed providing for the setting up of a commission to comprehensively review the Constitution after the 1997 elections. (Masime and Kibara, 2001: 29-31). Immediately after the IPPG reforms, Parliament was dissolved and elections took place.

### **Civil Society or Parliamentary led Reforms?**

After the 1997 elections, agitation for constitutional reform continued and talks between the government, the opposition and civil society on the structure and representation in the Commission to facilitate the review of the Constitution were held at Bomas of Kenya and Safari Park. Differences emerged between the ruling party (and its partners) and the opposition/civil society and the negotiations were eventually abandoned. Consequently, the religious leaders summoned the stakeholders and a forum, the *Ufungamano* Initiative, was born. Almost simultaneously, the ruling party and its partners formed a Parliamentary Select Committee (The Raila Committee) to seek views from the public and spearhead the formation of a commission to review the Constitution. At issue was whether Kenyans were to surrender their constituent power to an elected body of their representatives (Parliament). While the ruling party, KANU, and its allies pressed for a parliamentary review process, the *Ufungamano* Initiative pushed for a people driven, all-inclusive and participatory process. Ultimately, the two review commissions were merged through the efforts of Professor Yash Pal Ghai who was chairing the Parliamentary Commission. The Act governing the review process, the Constitution of Kenya Review Act 2001, is the product of the resulting compromise. It constitutes a negotiated neutral framework to facilitate an all-inclusive and participatory review exercise.

## **Opposition Unity**

Parallel to the constitutional review agenda, opposition political parties were since 1992 engaged in discussions on how to unite and field a single candidate against President Moi. But the power ambitions of individual party leaders and the tribal nature of Kenyan politics, made opposition unity a tall order. Shortly after the 1997 elections, the ruling party and the National Development Party (NDP), the second largest opposition party, entered into a “co-operation” eventually merging on March 18, 2003 to form a New KANU. The opposition parties, sensing certain defeat by the New KANU, had in the meantime held several meetings dubbed “breakfast meetings,” eventually forming the National Alliance (Party) of Kenya (NAK), a coalition of 13 parties and two pressure groups. The KANU-NDP merger however, broke down a month to the 2002 elections, when President Moi imposed a political novice as KANU’s torchbearer in the December 2002 presidential elections. Moi had hoped to perpetuate himself through a puppet presidency. He created five powerful political positions (four Vice-Presidents and a Secretary-General) at the top of the KANU hierarchy to accommodate the main ethnic groups. His calculations were that this tribal balancing would satisfy the KANU leaders. He was wrong. The top leaders walked out on him and formed a rival political grouping, the Rainbow Alliance, which subsequently took over a moribund party the Liberal Democratic Party (LDP), which joined NAK to form the super opposition alliance the National Rainbow Coalition (NARC) that handed Moi a humiliating defeat on December 27, 2002.

The biggest challenge for NARC in 2003 was the constitutional reform process as it ascended to power on the platform of change. The NARC manifesto was replete with reform proposals. (Manifesto for the National Rainbow Coalition, 2002). Most importantly, the Coalition promised voters it would facilitate the enactment of a new Constitution within six months after ascending to power. Its national leaders even signed an agreement with religious leaders to this effect. By the time of making the commitment, the Constitution of Kenya Review Commission (CKRC) had already released a draft that was hailed as an excellent proposal for reform. The draft proposed to create a powerful executive Prime Minister and a largely ceremonial President.

It also proposed to create two posts of Deputy Prime Minister and a Vice-President. On the basis of these proposed government structures, the key players the various political parties, were able to agree on how to share power once they won the elections. Consequently opposition unity which had been elusive over the previous ten years, was achieved resulting in the opposition victory.

The unity was founded on the understanding that power would be shared on an equal basis between the two main components of NARC – NAK and LDP. Under the pact, NAK was to get the presidency while the LDP was to get the premiership. The cabinet posts were to be shared equally. A summit of the senior leaders from the component parties was formed to ensure the pre-election pledges, which were documented in a Memorandum of Understanding (MoU) between NAK and LDP, were implemented. The MoU was founded on the enactment of a new Constitution that would create a new power structure that divides executive authority between the Prime Minister and the President. There was therefore a clear understanding within NARC that the completion of the review process was an immediate priority in order to stabilise the coalition. That NARC came together on the basis of an MoU based on a new Draft Constitution and won on a change platform raised a lot of expectation of increased constitutionalism in the governance of the country. It is against this background that we are evaluating the status of constitutionalism in Kenya in 2003.

## **The Essence of Constitutionalism**

Kenya is in the midst of writing a new Constitution through what has been referred to as a “people-driven process,” powerfully symbolised by the 629 member National Constitutional Conference at the Bomas of Kenya, in Nairobi. The country is not alone in seeking a constitutional solution to the governance, democracy and human rights problems that have dogged it since independence. Ghai notes that many constitutions are under review in many places due to changing power considerations, new demands on the state, the need for effective forms of participation and accountability, and the recognition of new and old identities, (Mutunga, 1999: xii).

Constitutions are essentially meant to regulate or limit state power. A constitution is however, more than just a set of rules or laws regulating society and the government. "It is ...an expression of the general will of a nation (the sum total of) its history, fears, concerns, aspirations, vision, and indeed, the soul of that nation," (Commonwealth, 1999: 2). Unfortunately, constitutions in Africa have for long been seen merely as legislation that legitimise executive action and establish the supremacy of the state over society. This emphasis on legal constitutionality or juridical constitutionality has undermined the essence of constitutionalism. Applying this warped notion of constitutionalism, many African states have used constitutions to legitimise authoritarian rule, (Commonwealth, 1999: 2-3). As we have seen above, the Kenyan Constitution has been amended so extensively that it no longer reflects the values and principles on which it was founded, (Kuria, 1997:33-48; Centre for Governance and Development, 2002: 4-5). It is, therefore, critical that we study the concept of constitutionalism before proceeding to assess the state of constitutionalism in Kenya.

According to De Smith (1964: 106):

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

Constitutionalism is therefore, the practice of politics in accordance with the constitution – a collection of written or unwritten fundamental rules and principles that restrain the government and other political actors from exercising arbitrary power. The constitution gears the exercise of political power toward the satisfaction of the citizens' socio-political and economic needs. Although well nigh all modern states have written constitutions, not all governments can be said to be constitutional. The following are some of the key elements of constitutional government, (The New Encyclopaedia Britannica, 1997: 691-693):

### **Procedural Stability**

Certain fundamental procedures must not be subject to frequent or arbitrary change. Citizens must know the basic rules according to which politics are conducted. Stable procedures of government provide citizens with adequate knowledge of the probable consequences of their actions.

### **Accountability**

Those who govern are regularly accountable to at least a portion of the governed. In a constitutional democracy, all persons in government owe this accountability to the electorate. Accountability can be enforced through a great variety of regular procedures, including elections, systems of promotion and discipline, fiscal accounting, recall and referenda.

### **Representation**

Those in office must conduct themselves as representatives of their constituents. To represent means to be present on behalf of someone else who is absent.

### **Protection of Human Rights**

Protecting the individual members of the political community against interference in their personal spheres of genuine wishes and interest. It is the self that each person presumably wishes to have safeguarded. Constitutionalism has stressed different rights at different times, and the content of such rights has undergone significant changes.

### **Division of Power**

The basic objective of protecting the individual member of the political community is reinforced and institutionally safeguarded by the division of political power, both functionally and spatially. Such division may therefore be considered as an objective of a constitution. Typically, the "separation of powers" serves as the functional division while federalism serves as the spatial. Both require a constitution for their effective operation. They operate as restraints on governments' power. In this perspective then a constitutional government is one in which effective restraints divide political power, or, to put it negatively, prevent the concentration of such power. Constitutionalism, by dividing power between, for example, local and central government and between the

legislature, executive and judiciary ensures the presence of restraint and “checks and balances” in the political system. Citizens are thus able to influence policy by resort to any of several branches of government.

### **Openness and Disclosure**

Democracy rests upon popular participation in government, constitutionalism upon disclosure and openness about the affairs of government. In this sense constitutionalism is a prerequisite of successful democracy, since the people cannot participate rationally in government unless they are adequately informed of its workings.

### **Constitutionality**

Written constitutions normally provide the standard by which the legitimacy of governmental action is judged. Constitutionality is conformity with the constitution.

### **Constitutional Change**

As the saying goes the only constant thing in life is change itself. Political dynamics change and constitutions, in order to remain relevant, must follow suit.

It is against these universal parameters that we undertake an evaluation of the state of constitutionalism in Kenya in the year 2003.

## **Constitutional and Human Rights Developments in 2003**

There is general consensus that constitutionalism in Kenya is seriously undermined by the current Constitution which has no effective checks on executive authority. However, the coming into power of a reformist government that promised to overthrow the existing defective Constitution signaled that certain gains would be made. This section highlights the gains made as well as the losses suffered in the endeavour to institutionalise constitutionalism in Kenya in the year 2003.

## **Accountability**

### **Setting up of the Goldenberg Commission**

A commission to investigate the siphoning of billions of shillings from the Central Bank in the early 1990s was set early in the year. It has the mandate to recommend for prosecution persons involved in the scandal and recover the public funds lost in the scam. (Daily Nation, February 25, 2003). The corruption scheme involved the payment by the Central Bank of billions of shillings to a private company as export compensation for the export of non-existent gold. President Moi sanctioned it and his sons, senior ministers and treasury officials were directly involved.

### **Anti-corruption Campaign in the Judiciary**

The Kenyan judiciary was notorious for corruption during the KANU regime. This vice was tacitly encouraged by the regime in order to reduce the judiciary's moral authority and capacity to check the executive's excesses. A discredited and corrupt judiciary is always useful to autocrats as it lacks the moral authority and public confidence to confront the executive. The judiciary was therefore, a major obstacle to the protection and respect for human rights. The government had pledged to "perform radical surgery" on the judiciary immediately it was elected. In February, civil society commenced a campaign to pressurise the government to live up to its pledge by sacking the Chief Justice who was implicated in both corruption and human rights abuses. He had been a notorious prosecutor in the 1980s who would present torture victims to court at night and with the connivance of corrupt magistrates have them jailed on trumped-up charges. After a number of street demonstrations, petitions and press statements, the President appointed a tribunal to investigate the Chief Justice and suspended him from office. The Chief Justice resigned paving the way for the appointment of a respected Judge to the position. The new Chief Justice subsequently appointed a committee made up of respected judges and magistrates to conduct investigations into allegations of corruption in the judiciary. The Committee went round the country listening to public complaints and gathering evidence of corruption in the judiciary and presented a report to the Chief Justice that recommended fuller



investigation and disciplinary action against 23 Judges, 18 in the High Court and five in the Court of Appeal. The President subsequently appointed tribunals to investigate them and suspended them as provided for in the Constitution. He also appointed acting judges to take up their work. Most of the judges opted to retire rather than face the tribunals. (Daily Nation, October 15, 2002).

### **Repossession of Misappropriated Government Property**

The government made efforts to repossess public properties and assets that had been illegally or irregularly converted to private ownership. It started by forcefully taking over the Kenyatta International Conference Centre (KICC), which was constructed using public funds but was given to KANU by Moi as a gift to be used as the party headquarters. It also repossessed government houses that had been corruptly sold off at throwaway prices. (Daily Nation, January 14, 2003). A commission was set up to investigate irregular land allocations and recommend actions to be taken to tackle the problem of “land grabbing” (Daily Nation, July 1, 2003).

### **Setting up of a Department of Ethics and Governance.**

The government’s commitment to the fight corruption was affirmed by the creation of a department of Ethics and Governance in the President’s Office to deal specifically with the fight against corruption and advise the President in the clean-up campaign. It is headed by John Githongo, the immediate former Executive Director of Transparency International (Kenyan Chapter) (TI-K). (Daily Nation, January 16, 2003). TI-K has gained prominence through its anti-corruption work, particularly the publication of an annual bribery index assessing the magnitude of bribery in the public sector.

### **Cleaning up of the Public Service**

Senior public officers who had been implicated in grand corruption were forced to resign through public pressure. This included the Governor of the Central Bank of Kenya, the Commissioner-General of the Kenya Revenue Authority, the Permanent Secretary in Ministry of Health and several parastatal heads, (Saturday Nation, April 12, 2003; Daily Nation, March 4, 2003; Daily Nation, March 5, 2003). Public servants who

were doing business with the government thereby occasioning conflict of interest were also made to resign or cease contracting with the government, (Daily Nation, January 31, 2003). All supplies officers in the government were also dismissed in an effort to break the chain of procurement related corruption, (Daily Nation, May 28, 2003).

### **Enactment of Anti-corruption Legislation**

The government enacted elaborate anti-corruption and good governance legislation. The Acts of Parliament forming the framework are the Anti-Corruption and Economic Crimes Act, the Public Officers Ethics Act 2003, (Daily Nation, April 17, 2003) and the Public Audit Act 2003, (Daily Nation, December 3, 2003). The government also published the Procurement and Disposal Bill and the Privatisation Bill. The Public Officers Ethics Act and the Anti-Corruption and Economic Crimes Act will particularly go a long way in fostering transparency and accountability in the public service. The former requires public servants to declare their wealth and assets and how they acquired them, (Daily Nation, July 3, 2003). Indeed, all public officers from the President to the humble cleaner have since declared their wealth and filed the declarations with their respective employment agencies, (Daily Nation, September 30, 2003). The declarations are however, not open to public or media scrutiny, (Daily Nation, August 15, 2003). They can only be accessed by law enforcement agents or by order of the High Court. The Act also provides for the establishment and enforcement of codes of conduct for the various departments of the public service. It will definitely discourage civil servants from dipping their hands into the public till and using their offices for personal gain.

The Anti-Corruption and Economic Crimes Act establishes and defines the powers of anti-corruption agencies. It establishes an Anti-Corruption Commission (and an advisory board), which it requires to work very closely with Comptroller, Auditor-General and the Director of Criminal Investigation Department. The Act broadly defines corruption and its enforcement will go along way in reducing corruption in the public sector.

Indeed, a survey of the magnitude of bribery in the country by Transparency International-Kenya revealed a significant reduction in the vice. Not only did the percentage of encounters in which bribes

were demanded or offered decline from 65 % recorded in 2002, to 40 % in 2003, but the cost of bribery, as measured by the average expenditure reported declined from Kshs. 3, 905 in 2002, to Kshs.1,261. According to TI-Kenya “this reduction reflects reduced bribery activity, that is to say, people are paying fewer bribes, than before as opposed to smaller bribes,” (Transparency International-Kenya, 2004:5). There were also significant reductions in the corruption index scores among government ministries and departments compared to the previous year, (Ibid: 5-16).

There was however, evidence that abuse of public resources continued despite the legislations and the government’s professed determination to eradicate corruption and abuse of office. Government officials including ministers campaigned for the ruling party candidates in parliamentary by-elections using state resources, (October 15, 2002; Daily Nation, April 13, 2003). Faced with a public outcry, they however claimed to have paid for the use of police helicopters, (Daily Nation, April 17, 2003). Government vehicles also continued to be misused for private benefit, (Daily Nation, December 3, 2003).

### **Task Force to Probe the Role of *Harambee***

A task force was set up by the Minister for Justice and Constitutional Affairs to probe the role of *harambee* (self-help/charity fundraising especially by politicians) in facilitating or fuelling corruption, (Daily Nation, June 11, 2003). *Harambee* has been quite instrumental in the pooling of resources by local communities to complement government development efforts. Indeed, *harambee* has allowed local communities to construct schools, health facilities and other social amenities thereby contributing to the improvement of economic, social and cultural rights. The *harambee* spirit has however, been subverted and *harambee* initiatives have in the last two decades, been veritable vehicles of corruption and flagrant voter bribery by power hungry politicians, (see TI-K and Friedrich Ebert Stiftung (FES), 2001: Passim; TI-K and FES, 2003; Passim).

## **Representation**

In the 2002 elections women made substantial gains. The current Parliament has the highest number of elected and nominated women ever. NARC has also given powerful cabinet positions to women: For the first time there are three women full Cabinet Ministers, in the Ministries of Health, Water and Office of the Vice President. There are also four women Assistant Ministers in the important ministries of Education, Environment and Natural Resources, Local Government, and Tourism, (Saturday Nation, January 4, 2003). Previously, women were mostly made assistant Ministers in the Ministry of Culture and Social Services. There had been only one female full Cabinet Minister, previously. She was of course the Minister for Social Services and Sports!

Like was the case with the last (Eighth) Parliament, Members of Parliament have tended to put their interests before those of the electorate. Soon after being sworn-in they awarded themselves huge increases in their allowances despite public outcry that they were already being overpaid, (Daily Nation, March 5, 2003; Daily Nation, February 21, 2003; Daily Nation, March 27, 2003; Daily Nation, March 5, 2003). They also made the Minister for Finance to provide for their car loans and salary increments in the national budget by threatening to frustrate the government's governance and legislative reforms and to block the anti-corruption legislation, (Daily Nation, March 28, 2003).

Despite the hefty allowances and benefits to Members of Parliament, they continued in the now established tradition of barely attending Parliament and spending most of their time on their private businesses, (Daily Nation, March 27, 2003). Ministers also failed to answer questions and there were constant complaints by backbenchers, (Daily Nation, April 3, 2003; Daily Nation, March 21, 2003).

## **Protection of Human Rights**

### **Human rights and civil liberties**

The government to its credit, took several measures to remedy the wrongs of the past and to create infrastructure for the enforcement of human rights. Some of the significant measures were:

### **Establishment of a National Commission on Human Rights**

In mid 2002, the KANU government had bowed to international pressure to establish an independent human rights commission to act as the national watchdog for human rights issues. It had however, failed to operationalise the Act by gazetting it and constituting the commission. An autonomous Human Rights Commission has now been appointed with the majority of its members being leading human rights activists. A former director of the Kenya Human Rights Commission (KHRC) the premier human rights NGO in Kenya, who at one time also worked for Amnesty International, chairs it, (Daily Nation, July 3, 2003). Its mandate includes investigating cases of human rights violations and advising the government on the way forward.

### **Setting up a Task Force to Explore the Possibilities of Establishing a Truth and Reconciliation Commission**

The Minister for Justice and Constitutional Affairs established a task force early in the year that went around the country soliciting views on whether a truth, justice and reconciliation commission should be set up to investigate the gross human rights violations of the post-independence period. The Commission was also empowered to advise on the mandate and powers of such a commission. The Commission has already reported back recommending the establishment of a commission with the mandate to collect evidence of the violations, recommend prosecutions and award compensation to victims, (Daily Nation, June 11, 2003b; Daily Nation, July 7, 2003).

### **Opening up the Nyayo Torture Chambers**

The government has opened to public access the notorious Nyayo House chambers, where the special branch detained, tortured and killed hundreds of pro-democracy advocates in the 1980s. It has also degazetted the cells, declared the chambers a “national monument of shame” and vowed never to repeat the human rights abuses perpetrated by the previous regimes, (Daily Nation, March 4, 2003; Saturday Nation, March 29, 2003). Many of those who were tortured in the chambers visited them and publicly narrated the horrors they suffered. Some of them are now prominent members of the current government including a Cabinet Minister, Members of Parliament and members of the new Human Rights Commission.

### **Opening Up the Prisons**

Prisons in Kenya have always been tightly controlled in terms of public or media access. This has allowed the perpetration of gross human rights to thrive under secrecy. The government has now allowed the media and human rights organisations to visit prisons, carry out investigations and even undertake human rights work in the prisons. Prisoners have also been given better living conditions including access to television and reading materials, which were hitherto prohibited. Measures to reduce crowding in prisons have also been encouraged, including extra-mural punishment (community work) for petty offenders, (Daily Nation, February 27, 2003; Daily Nation, February 13, 2003; Daily Nation, July 10, 2003).

### **Anti-Torture Legislation**

Legislation has also been passed to outlaw the admission in court of confessions obtained by police officers. This used to encourage police officers to torture suspects in order to obtain confessions to back up trumped up charges. Confessions can only be made in court or before a magistrate now.

### **Ending Impunity**

The government also re-opened the murder inquiries of the late Minister for Foreign Affairs, Dr. Robert Ouko and the late Catholic priest, Father John Kaiser. In both murders, prominent politicians including government ministers were implicated and the public was of the general view that powerful people were involved, thereby making it impossible for justice to be done in the two matters. An inquest was opened into the death of Father Kaiser while a Parliamentary Select Committee was appointed to inquire into the death of Dr. Ouko, (Daily Nation, March 27, 2003; Daily Nation, April 3, 2003).

### **Social, Economic and Cultural Rights**

The government also made several attempts to address the socio-economic rights of the poor. It introduced universal free primary education, rehabilitated some street children by recruiting them into the national youth service and developed plans for a national health and housing scheme to benefit the poor, (Saturday Nation, January 4, 2003; Daily

Nation, January 8, 2003; Daily Nation, April 1, 2003; Saturday Nation, January 25, 2003; Sunday Nation, February 23, 2003).

### **Enactment of Pro-Human Rights Legislation**

During the year, many important Acts of Parliament were passed to enhance the enjoyment of human rights.

While the new government's commitment to the respect for human rights cannot be denied, human rights abuses occurred in 2003. These include extra-judicial killings, torture and police harassment. Civil liberties are still fairly restricted. Despite the many efforts by the government to address past human rights violations, the government itself was involved or abetted the violation of human rights. The following incidents are significant.

### **Police Brutality and Extra-Judicial Police Killings**

Despite the fact that Kenya has ratified the Universal Declaration of Human Rights, police brutality has not reduced in any significant manner: Torture and extra-judicial killings characterised their handling of criminal suspects (KHRC, 2003a: 13-20; KHRC, 2003b: 13-19; EHRI and EALS, 2003: 12; Law Society of Kenya (LSK), 2003:20-25). The police continued to injure and kill unarmed citizens at the slightest provocation, (Daily Nation, March 6, 2003; Daily Nation, July 1, 2003; Daily Nation, January 8, 2003). The police killed more than 100 people during the year according to Amnesty International, Daily Nation, June 3, 2003).

### **Freedom of Association**

The police also frequently dispersed peaceful processions and brutalised the participants. The treatment of workers demonstrating against inhuman working conditions in the Export Processing Zone (EPZ) was particularly appalling, (Daily Nation, February 27, 2004; Daily Nation, April 13, 2003). At one time, the police prevented the son of the former President who is a Member of Parliament from addressing his constituents in a scene reminiscent of the Moi regime when MPs were denied access to their constituents, (Daily Nation, July 11, 2003; Daily Nation, July 12, 2003).

### **Freedom of Expression**

There were many cases of the violation of the freedom of expression. The most blatant was the government attack on the East African Standard journalists when the paper published what they claimed to be a confession of one of the killers of the late university don Dr. Crispin Odhiambo Mbai. The journalists were arrested and held incommunicado for sometime (EHRI and EALS, 2003: 13). While one journalist was eventually released, the other was charged with what many saw as a punitive and fabricated charge of stealing a video cassette worth five hundred shilling, (Daily Nation, September 30, 2003; Daily Nation, October 2, 2003; Daily Nation, October 3, 2003). The government also clamped down on the informal media derisively referred to as the “gutter press.” It did so using legislation that had been passed by KANU in its sunset days, although the new government officials had at that time strongly opposed it and had promised to repeal it when they took power, (Daily Nation, April 8, 2003).

### **Threats to Fundamental Rights Posed by the Anti-Terrorism Bill**

The government published an Anti-Terrorism Bill that proposes to derogate substantially from the fundamental rights guaranteed in the Constitution (LSK, 2003: 8-9; EHRI and EALS, 2003: 10-11). There was public outcry against the proposed legislation but the government seemed adamant to push the bill through, (Daily Nation, July 4, 2003; Sunday Nation, June 29, 2003).

## **Separation of Powers, Checks and Balances**

### **Creation of the Ministry of Justice and Constitutional Affairs**

The creation of the Ministry of Justice and Constitutional Affairs raised some controversy as to the propriety of placing independent constitutional institutions under its mandate. The Judiciary, the Electoral Commission and the Attorney General’s office were all placed under the Ministry. Many lawyers questioned the rationale and constitutional validity of the arrangement. The government defended its action by arguing that accountability required that all constitutional institutions effectively answer for their actions to the democratically elected government of the day, and that accountability required clear ministerial



responsibility both in the Cabinet and in Parliament. It said that both the ECK and the Judiciary were not represented in either the Cabinet or the Judiciary, which created a gap in accountability. The government also argued that there was no interference in the operations of the institutions as the Ministry's role was limited to policy co-ordination, (Daily Nation, August 5, 2003).

### **Parliamentary Oversight**

Parliament flexed its muscle in its role of oversight over executive decisions by severally summoning and questioning Ministers over their actions and utterances. It was particularly keen on issues of corruption. A number of Ministers were questioned over their attempts to influence the awarding of tenders by the Kenya Ports Authority while another was grilled over his frequent and unprocedural dismissal of local authority staff, (Saturday Nation, July 19, 2003; Daily Nation, September 1, 2003; Daily Nation, November 13, 2003). Parliament also questioned the practice of approving ministerial appropriations en-masse without debate, the "guillotine procedure" (Daily Nation, November 3, 2003).

### **Judicial Independence**

Although the NARC government has done a lot in reforming the Judiciary as discussed above, this has been limited to the purging of corrupt and inefficient Judges, Magistrates and court officials. Nothing has been done to restore the institutional and administrative autonomy of the Judiciary as an institution, the lack of which perhaps more than the integrity of judicial officials, contributed to the rot in the sector. The government is yet to come up with a transparent and efficient mechanism for appointing Judges. The President has absolute discretionary powers in the appointment of judicial officers. He appoints the Chief Justice without reference to any authority or established guidelines. He also appoints all Judges of the High Court and Court of Appeal from nominees of the Judicial Service Commission (JSC), which consists of his appointees: the Attorney General, the Chief Justice and the Chair of the Public Service Commission. It is the Judicial Service Commission which appoints the Registrar of the High Court, who has a lot of administrative powers over the administration of justice. The President

is mandated to appoint a tribunal to “advise” him on whether to remove a Judge or not. Although the Government, for the first time, sought the input of the Law Society of Kenya in the nomination of the recent appointees to the Bench, it largely ignored the latter’s recommendations. The list forwarded by LSK, however, left a lot to be desired, and showed quite clearly that the Bar Association lacked the capacity to undertake such an exercise. The Judiciary was therefore, hardly in a position to stand up to the Executive and to restrain it from abusing human and civil rights as documented above.

## **Openness and Disclosure**

The government made many attempts to involve non-state actors in the development of policy. Various ministries involved the private sector and civil society in the development of their strategic plans and policy documents, (Saturday Nation, February 8, 2003). An unfortunate drawback was the Speaker’s order outlawing the discussion of pending legislation outside Parliament, (Daily Nation, March 14, 2003). A practice has developed where civil society discusses Bills pending before Parliament with stakeholders and also lobbies Members of Parliament. The Speaker’s order undermines this healthy democratic practice.

## **Constitutionalism/Rule of Law**

The government appears committed to the rule of law. Impunity is generally on the decline. But there is still the perception that the government is not ready to deal with some senior people in the NARC establishment. Some Ministers have been accused of corruption but the government has not acted on these accusations and has, instead, come to their defence. A number of executive actions also gave rise to questions about the commitment to the rule of law and constitutionalism. These included:

### **i) Repossession of Kenyatta International Conference Centre (KICC)**

Though the action of repossessing this historic building was laudable, the process of repossession was questionable. The government invoked the authority of what it referred to as an “Executive Order” to give

itself authority to use strong-arm tactics. That KANU had been given a title deed by the Commissioner of Lands acting on the instructions of the President called for a more legally and constitutionally valid process. KANU filed a suit challenging the repossession and the matter is still pending in court, (Daily Nation, January 1, 2003; Daily Nation, February 13, 2003a; Daily Nation, February 20, 2003; Daily Nation, January 9, 2003).

## **ii) Attempts to undermine political parties**

Factional fights between NAK and LDP irked the President so much that he declared the parties making up NARC obsolete. (Daily Nation, December 30, 2003).

## **Constitutional Change**

Most Kenyans agree that the socio-economic and political problems afflicting the country are rooted in the existing defective Constitution. In fact, the fight for a new Constitution has been on for slightly over a decade. This is why Kenyans overwhelmingly voted for NARC. Yet upon the Coalition ascending to power, signs that the MoU on the basis of which the constituent parties came together, is unlikely to hold have begun to appear. The President does not seem to have much regard for the Summit and did not consult it when constituting his Cabinet. LDP soon started grumbling that it had been short-changed in the appointments to the Cabinet. The LDP also complained that the President was neither consulting nor convening the Summit. NAK on the other hand, maintained that Kenyans directly elected the President under the current Constitution and there was no room for a collegiate presidency or for the President to be advised by informal party structures such as the Summit. Further signs that the MoU would not hold included the fact that constitutional reform did not seem to be a priority for the new government. The President did not mention the reform in his inaugural speech. Parliament also did not place it on its priority list, claiming that it had to first pass the anti-corruption legislations that the donor community demanded, before they could release financial aid.

After considerable delay, the National Constitutional Conference which had been adjourned after Parliament was dissolved in October 2002, was re-convened and it immediately became clear that the coalition

partners were no longer in agreement on the sharing of power, as proposed in the Constitution of Kenya Review Commission Draft Constitutional Bill. While the LDP faction of NARC substantially supported, the Draft, the NAK was unhappy with many of its provisions. The latter is contesting a number of clauses including the creation of an executive Prime Minister; the abolition of the Provincial Administration; the devolution of power to the regions and the establishment of an Upper House of Parliament. The tensions between NAK and LDP over the constitutional reform process were also exacerbated by the removal of Raila Odinga from the chairmanship of the Parliamentary Select Committee (PSC) on the Constitution, which oversees the review process on behalf of Parliament. Raila's Cabinet colleague Kiraitu Murungi, mobilised MPs to vote against him, there by resulting in his defeat by Safina, a minority fringe opposition party lead by MP, Paul Muite.

Apart from the disagreement on the substance of the Draft, there are also disagreements on the process of review. Key NAK members have questioned the legitimacy of the conference on several grounds including the composition of the delegates. They argue that the delegates are unrepresentative of the Kenyan population given that three delegates, regardless of population, represent each district. This has resulted in a situation where a district with a population of 15,000 people is represented by the same number of people as that with a population of over 100,000 people. The extreme case of Nairobi with 3,000,000 people being represented by three delegates, just like Ijara with 15,000 people is often quoted. It is argued that with this lopsided representation, views from some parts of the country will be given undue weight in the Conference, thereby disadvantaging some regions or communities. Supporters of NAK maintain that basing representation on districts, many of which had been created by Moi for political advantage, with no recourse to a boundary commission, is patently unfair. They argue that the composition of the delegate was meant to give the KANU areas undue advantage and that given the fact that the delegates had not been changed after elections, NAK was bound to be disadvantaged. The LDP being substantially composed of breakaway KANU politicians and former members of NDP who had been incorporated into KANU,

is largely seen as a possible beneficiary of the unfair composition of the delegates. NAK also questions the fact that the adoption of the Constitution does not require a mandatory referendum. Under the Review Act, only specific, unresolved, issues may be referred to referendum, upon the vote of two-thirds of the delegates present and voting. The absence of a mandatory referendum, NAK posits, negates popular participation. Further arguments by NAK supporters against the review process included the fact that the review process was not entrenched in the current Constitution and may be torpedoed by a court declaring it unconstitutional. The MP for Nakuru Town, Mirugi Kariuki, a key NAK supporter moved motions both in the Conference and in Parliament to have the current Constitution amended to recognise and secure the review process. Both motions were unsuccessful.

The LDP on the other hand fully and enthusiastically supported the review process. It countered the NAK arguments by first of all, noting that however defective the Constitution making process was, it was too late to abandon it. Kenyans had invested too much both in time and resources to just throw away the process and start afresh. On the composition of delegates, LDP argued that despite the uneven representation, the views of all Kenyans had been collected by the CKRC and it was up to NAK sympathisers to persuade the Conference on issues dear to them. Although the delegates had initially been sympathetic to KANU, the LDP supporters argue they were not necessarily so after the 2002 elections. Regarding the political districts, they countered that all districts are political and that NAK was only looking for excuses not to finalise the review because it feared losing power.

Needless to say, the factional differences between the ruling coalition partners have seriously affected the Conference. Both factions have effectively mobilised delegates at the Conference, the results of which are serious differences within civil society and district delegates. The factional wars have seriously undermined the mood of the Conference. Tension, suspicion, anxiety and fear pervade the Conference as delegates try to second guess the political *elite* and remain politically correct.

Apart from the mood of the Conference being undermined by the political infighting within the ruling coalition, the government has also gone out of its way to undermine the public confidence in the review process. Utterances by senior government Ministers to the effect that the forum is illegitimate, illegal and incompetent have over time, tended to erode public confidence in the constitution review process.

Nevertheless, the Conference has made considerable progress. The first plenary received the report from the CKRC and engaged in general debate over the entire Draft. The Conference then broke into committees to discuss in detail the specific chapters of the Draft assigned to them. There were a total of 13 committees, each to deliberate on specific chapter(s), and make recommendations on how they could be improved and if satisfied with them, recommend their adoption. The committees undertook substantial work but were disrupted when Parliament was recalled to enact the Financial Bill. Although the Conference was to resume in November 2003, the government was clearly reluctant to have it resume. Arguing that the legislative agenda of Parliament was more urgent, it unilaterally adjourned the re-opening date of the Conference, without recourse to the Conference organs which have statutory powers to determine its calendar. This resulted in a serious confrontation between the CKRC Chairman, Prof. Yash Pal Ghai and the government. Ghai personally led some delegates in protest to the Conference venue. The Minister for Constitutional Affairs reacted by accusing him of incompetence and calling for his resignation. A clear split within the NARC ranks emerged with NAK supporters clearly condemning Ghai's protest as their LDP counterparts praised his efforts. A delegate and Committee Convenor, Kiriro Ngugi filed a suit in court challenging the Parliamentary Select Committee's power to adjourn the Conference. The court had not given any ruling by the time that the Conference resumed in January 2004, (Daily Nation, March 6, 2003; Daily Nation, May 2, 2003; Daily Nation, September 16, 2003; Daily Nation, November 5, 2003; Daily Nation, November 18, 2003).

## **Conclusion and Recommendations**

The year 2003 was a significant milestone in Kenya's path toward constitutionalism. The December 2002 elections ushered in a government that confessed commitment to constitutionalism and took several measures to restore the values and principles associated with constitutional government. The government made efforts to enhance the enjoyment of human rights by enacting human rights legislation; setting up a National Human Rights Commission; exploring the possibilities of addressing past human rights violations and commencing processes aimed at ending impunity. Bold measures to address corruption which has seriously undermined the rule of law, were also taken by the new government. These included the enactment of anti-corruption legislation, the setting up of an independent anti-corruption authority, a purge in the judiciary targeting corrupt Judges and Magistrates and the removal of senior government officials implicated in grand corruption. Most of the people interviewed were of the view that there was considerable improvement in the observance of the rule of law and the respect for and enjoyment of human rights. Some actions by the government however, raised questions regarding the depth of its commitment to human rights and the rule of law. The failure to take action against NARC supporters implicated in corruption, the harassment of the media and the continued police brutality were particularly worrying. The process adopted to repossess the Kenyatta International Conference Centre (KICC) building from the former ruling party and the purge in the judiciary, also raised questions as to the government's commitment to the rule of law and its respect for the Constitution. In both of these incidents, the government seemed inclined toward a populist approach and ignored constitutional guaranteed rights and limitations placed on its authority.

The NARC government was elected on the understanding that it would facilitate the enactment of a new Constitution within six months of taking office. Kenyans generally agreed that democratic governance was not possible under the existing Constitution. Unfortunately, the government appeared to backpedal on its commitment to facilitate constitutional review. There was evidence that the government was no longer comfortable with many of the proposed constitutional reforms

including the abolition of the provincial administration the creation of a two chamber Parliament, the devolution of power and more importantly, the creation of the post of an Executive Prime Minister. The reluctance to review the Constitution was clearly linked to the factional conflict that developed within the ruling coalition shortly after the elections. The NAK faction coalescing around the President fears that if the reforms are instituted, it would lose power to the LDP faction that revolves around the Minister for Public Works and Housing, Raila Odinga. The LDP on the other hand is determined to have the reforms realised as it sees them as their only hope of gaining power after its pre-election power-sharing pact with NAK was ignored. These factional conflicts have inevitably found their way into the National Constitutional Conference with each faction seeking provisions in the Constitution that favour its designs on power. The factions actively seek the support of the other delegates at the Conference. This has effectively turned the Conference delegates into either pro or anti-NAK and LDP factions, rather than representatives of the interests they were initially nominated to represent or champions of the public interest. The NAK faction fearing that most delegates are pro-LDP has gradually turned against the Conference arguing that it is unrepresentative and incompetent. It has called for the dissolution of the Conference and the development of the Constitution by a panel of experts. Most delegates see these proposals as an attempt to scuttle the Conference in order to maintain the *status quo*, which favours NAK.

The conflict within the ruling party is a clear and imminent danger to the constitutional review process. It has nurtured suspicions in the Conference and made dialogue, compromise and consensus building, the ingredients of constitution-making, almost impossible to achieve. Most people interviewed were of the view that although the Conference is capable of producing a good Constitution, the possibility of the Constitution being enacted by Parliament in that form and becoming a durable Constitution, were minimal. They also felt that the government had failed to provide the necessary leadership to expedite the completion of the review process. This is unfortunate because the National Constitutional Conference at the Bomas of Kenya brought together a rich diversity of national interests and was a microcosm of the Kenyan



nation. It was therefore, capable of providing a clear picture of the vision, fears, desires, aspirations and hopes of all Kenyans. The Conference has also assembled an amazing array of skills, knowledge, and human experiences providing a good reservoir of talent, necessary for the crafting of an excellent Constitution. The conflicts within NARC have unfortunately misdirected the potential of Bomas Conference to the unfruitful pursuit of parochial interests and issues. The delegates now seem unable to resist vested political interests. The process also clearly lacks the confidence of those in the mainstream government. It is however, important to note that the review process continues to enjoy considerable public interest and confidence which has made it difficult to scuttle.

The new government instituted many reforms that clearly point to its desire to enhance constitutionalism in Kenya. The reforms were however not far-reaching enough to substantially alter the nature of governance, because they were based on a defective constitutional foundation. Under the current Constitution, the executive enjoys so much power that only those reforms that do not threaten its hold on society can see the light of day. Unfortunately, it is reforms that substantially shift power from the executive and re-establish the checks and balances between it and the other organs of government that are urgently needed. These reforms can only be made through a new Constitution that provides for the devolution of power both vertically and horizontally. A new Constitution would institutionalise and consolidate the efforts made over the year on issues of human rights, the rule of law and the fight against corruption. All pro-reforms stakeholders should therefore focus their energies on completing the constitutional reform successfully. If successfully completed, the new Constitution should be able to provide a stable and effective framework for political competition and power-sharing and pave the way for the resolution of factional conflicts in the ruling coalition.

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# 5

## **The State of Constitutional Development in East Africa: The Role Of The East African Community (EAC) – 2003**

*John E. Ruhangisa*

And whereas the said countries, while being aware that they have reached different stages of industrial development and resolved to reduce existing industrial imbalances, are resolved and determined to foster and encourage the accelerated and sustained industrial development of all of the said countries. ....

Treaty establishing the old East African Community (EAC) in 1967<sup>1</sup>

### **Introduction**

The East African Community, is a regional organisation, which resulted out of the desire of the people of East Africa to realise their long time shared interest in fast and balanced regional development through cooperation. The East African Community therefore, is not and cannot claim sovereignty but Kenya, Uganda and Tanzania the contracting parties to the Treaty for the establishment of the East African Community, are sovereign states and therefore guided by their respective Constitutions in running the affairs of their governments.

In executing its mandate, the East African Community is governed by the Treaty in the same way that the partner states are governed by their respective Constitutions. Inevitably, the East African Community while executing its mandate and attempting to achieve its objectives, plays an effective role in shaping and influencing constitutional developments in the three partner states. This paper attempts to examine the role played so far by the implementation of the Treaty in giving shape to various policies and constitutional developments in East Africa.

In analysing the role of the EAC towards constitutional development in the region, due regard is paid to the work and activities of various organs and institutions of the Community during the year 2003. In order to have better understanding of the subject under discussion, this work starts with a critical analysis of the concept of constitutionalism and proceeds to make an appraisal of the implementation of the Treaty before making conclusions.

## **The Concept of Constitutionalism**

Constitutionalism is an idea often associated with the political theories of John Locke, that a government can and should be limited in its powers by a “fundamental” law or set of laws, beyond the reach of an individual government to amend them and that a government’s authority depends on its observing these limitations.<sup>2</sup> The fundamental law that is being referred to here is the Constitution, which consists of a set of rules or norms creating, structuring and defining the limits of a government’s power or authority.

It has been common practice in most countries’ constitutions for obvious reasons, to find clearly defined state structures,<sup>3</sup> provision for the separation of powers and an entrenched Bill of Rights with certain derogations. In the simplest terms therefore, adherence to the requirements of the provisions of such a constitution is what can be regarded as constitutionalism. Through constitutions, governments express their commitment to creating an enabling environment for the effective participation in the affairs of nations by the people. This is the case because the promotion and protection of a culture of constitutionalism is vital to the democratisation process in any country.

It should be noted that constitutions like other laws, evolve to adapt to changing circumstances and political beliefs. Changes within the government or policies that have a bearing on the rules as contained in the Constitution for better or worse, are considered to be constitutional developments. Some of these changes have their origins from within the respective countries of East Africa, while others have to be adopted following the countries’ membership or commitment to various international or regional organisations, such as the East African Community. This paper seeks to examine the impact of the activities

and decisions made by the East African Community through its organs and institutions on the partner states in light of their respective constitutional developments.

## **The Treaty for the Establishment of the East African Community**

The Treaty for the establishment of the East African Community can be rightly regarded as the “Constitution” of the Community, in that it consists of among other things, a set of rules creating the structure and defining the limits of power of various organs<sup>4</sup> of the Community and outlining the areas of cooperation. These organs and institutions are meant to strengthen ties in the areas of cooperation identified so far, namely: political; economic; social and cultural fields; research; technology; defence; security and legal and judicial affairs. It is hoped that the framework provided for under the Treaty will foster regional peace and security, while providing an appropriate response to economic development and competitiveness in the light of globalisation and transnational corporations.

In order to realise the objectives of the Community the Treaty directs the partner states to observe fundamental principles such as good governance, which includes adherence to the principles of democracy; the rule of law; accountability; transparency; social justice; equal opportunity; gender equality, and the recognition, promotion and protection of human rights, in accordance with the provisions of the African Charter on Human and Peoples Rights.<sup>5</sup> All these are elements of constitutionalism, which the partner states and the organs of the Community are to be adhered to while attempting to achieve the objectives of the Community.

While the Summit is the top-most organ of the Community charged with the issuance of general directions for the development and achievement of the objectives of the Community,<sup>6</sup> the Council of Ministers is the policy organ of the Community responsible for the constant review of the implementation of the programmes of the Community and ensuring the proper functioning and development of the Community.<sup>7</sup> Whereas the Summit and the Council are the key decision-making organs, the Secretariat is the executive organ of the

Community charged with initiating recommendations and the implementation, planning and monitoring of programmes among other things.<sup>8</sup>

## **Implementation of the Treaty**

All organs and institutions of the Community are supposed to implement the Treaty in its respective areas. It is during the implementation of the Treaty that the activities and decisions of these organs impact on the constitutional development in East Africa, the subject under discussion in this paper.

### **Establishment and Operationalisation of the East African Court of Justice**

The East African Court of Justice (EACJ), is an organ of the Community established under Article 9 of the Treaty. It is composed of six Judges appointed by the Summit, two from each partner state, selected from people of proven integrity, impartiality and independence, who fulfil the conditions required in their own countries for the holding of such high judicial office, or from jurists of recognised competence in the partner states.<sup>9</sup> This requirement governing the appointment of two Judges from each partner states is bound to cause some problems, for it proceeds from the presumption that the membership of the Community shall remain constituted of only three countries (Kenya, Uganda and Tanzania). Will the Treaty be amended to increase the number of Judges from six to eight or ten once the Community membership expands to include Rwanda and Burundi? How often shall the Treaty be amended if the system of appointing two Judges from each partner state is maintained while the Community membership is open beyond the three founder states?<sup>10</sup>

Being a judicial body, the Court's responsibility is to determine disputes arising from the Treaty and to ensure adherence to the law in the interpretation, application of and compliance with the Treaty.<sup>11</sup>

The EACJ has a crucial role to play in conflict resolution and confidence building in the region. Its said role should enhance the observance and upholding of human rights through good governance and democratic institutions. Issues perceived as sensitive at the national

level might be better dealt with at the regional level where they might be less sensitive.

The Treaty is structured along the principle of the separation of powers of the executive, legislature and the judicial arm of the Community. However, some articles of the same Treaty contradict this principle as can be illustrated by the following example. One of the potential “customers” of the Court as recognised by the Treaty is the Secretary General who is also head of the Secretariat. The Secretary General can sue and can also be sued before the Court of Justice.<sup>12</sup> This means that at a certain time, the Court may be required to decide on matters involving the Secretary General either as a claimant or as a respondent. At the same time, the Secretary General is the Accounting Officer of the Community,<sup>13</sup> whose organs include the Court of Justice. The Accounting Officer is expected to authorise the payments and expenditure of the Court as well. This kind of relationship potentially threatens the independence of the Court. Justice even if done, might not be seen to be done, when the Court decides on a matter involving the Secretary General.<sup>14</sup> The independence of the judiciary has to go hand in hand with financial autonomy.

### **Composition and Operation of the Court**

Following its inauguration by the Summit and the swearing in of the Judges and the Registrar on November 30, 2001, the East African Court of Justice became operational. The operations of the Court during the transition period are *ad hoc*.<sup>15</sup> This means that the Judges are not required to reside permanently in Arusha where the temporary seat<sup>16</sup> of the Court is located, but only convene to conduct the business of the Court as and when the need to arises,<sup>17</sup> until such time as the Council of Ministers determines that the Court can be fully operational. This seemingly economical and logical move was strategically designed to take care of the transitional period when the business of the Court would be relatively less and therefore not warranting the full time services of the Judges.

However, the *ad hoc* operation of the Court has its own implications for example, on the issue of the competence of EACJ Judges when presiding over proceedings in their respective national courts. Objections may be raised against such EACJ Judges presiding over matters in

their respective national court for the lack of jurisdiction. Consequently, this may lead to the nullification of the proceedings. Article 43 of the Treaty provides that:

A Judge of the Court shall neither hold any political office or *any office in the service of a partner state* or the Community nor engage in any trade, vocation or profession that is likely to interfere or create a conflict of interest to his or her position.<sup>18</sup> (Emphasis added)

Arguably, the Treaty seems to take care of this eventuality by providing for the transitional provision to the effect that “until such time as the Council (of Ministers) determines that the Court is fully operational, a Judge appointed under Article 24 of the Treaty shall serve on *ad hoc* basis.”<sup>19</sup> Since the Council of Ministers has not determined that the Court is fully operational, the Judges can legally preside over matters in their respective national courts. However, this saving provision does not remove the existing conflict between Articles 43 and 140 of the Treaty, for it does not even make any reference to Article 43 and both Articles are framed in such a way that they present conflicting mandatory requirements.

### **The *Ad hoc* Nature of the Court and its Implications**

The *ad hoc* operations of the EACJ Judges place the Judges in a somewhat difficult situation with regard to whether they should pledge their allegiance to their respective governments and to the East African Community, when the need arises, as required by their Oaths of Allegiance. The aspect of accountability on the part of the Judges is another matter of great concern since the national governments and the East African Community are independent of one another, as far as the appointments and functions of the EACJ Judges is concerned. To illustrate this argument is the event in Kenya, where on October 15, 2003, Judges were massively suspended on allegations of corruption and misconduct and a tribunal constituted to investigate them and finally present its recommendations to His Excellency, President Mwai Kibaki for action. The President took that action under the guidance of the Kenyan Constitution,<sup>20</sup> which allows him to do so. Two of the EACJ Judges from Kenya were affected by the said suspension as far as sitting in the Kenyan courts was concerned. However, since the

appointment of the EACJ Judges is governed by the Treaty which also provides for separate disciplinary procedure leading to removal and temporary membership of the EACJ, the suspension of Judges in Kenya could not automatically apply to the EACJ Judges from Kenya being suspended from the EACJ or affect their services to the East African Community. The Treaty provides that:

1. *The President of the Court or other Judge shall not be removed from office except by the Summit for misconduct or for inability to perform the functions of his or her office due to infirmity of mind or body.*
2. *Notwithstanding the provisions of paragraph 1 of this Article a Judge of the Court shall only be removed from office if the question of his or her removal from office has been referred to an ad hoc independent tribunal appointed for this purpose by the Summit and the tribunal has recommended that the Judge be removed from office for misconduct or inability to perform the functions of his or her office.<sup>21</sup> (emphasis added)*

In any case, if any disciplinary proceedings against them were to be conducted, the mandatory provisions of Article 26 would have to be followed. If the said two Judges from Kenya were full time Judges of the EACJ and therefore not being part of the Kenyan Judicial system as dictated by the requirement of the Treaty under Article 43, the otherwise, unfortunate situation or “dilemma,”<sup>22</sup> as the media preferred to call it, regarding their services in the EACJ during their suspension in Kenya would have been avoided. It is also important to note that the tone in which the newspapers initially reported the incident amounted to more or less a conviction by the media before the trial itself had taken place and would seriously undermine their stature and dignity, were they to preside over a matter before the EACJ, before disciplinary proceedings in Kenya were concluded in their favour.

The East African Court of Justice has to date not received a single case in its registry. There could be several reasons for this, one of them being the human tendency to “wait and see,” whenever new institutions are established. Probably the major reason could be that when the Court was established, the partner states had not yet agreed upon potential

areas that may generate disputes such as the Customs Union and the Common Market. It is expected that after the conclusion, signing and coming into operation of the protocol on the Customs Union the Court will be busy. We cannot also rule out the lack of publicity of the Court and its activities as another factor. This fact became evident during the Court's visit to the three capitals of Kampala, Nairobi and Dar es Salaam, during which most of the stakeholders<sup>23</sup> expressed complete ignorance of the Court, its activities and jurisdiction. The lack of business so far experienced by the Court could also be positively interpreted to mean that the integration process and the operations of the East African Community have started smoothly, without people seeing the need to take each other to Court. The Court has used this period to formulate its rules of procedure and arbitration which are simple and user-friendly.

### **Jurisdiction of the East African Court of Justice**

As stated earlier, the East African Court of Justice is mainly charged with the administration of justice only on matters arising out of the Treaty. This limited jurisdiction makes the Court look more of a political court as it is confined only to the interpretation and application of the Treaty.<sup>24</sup> In some cases, the EACJ appears to have concurrent jurisdiction with national courts and this is a potential breeding ground for conflicting decisions over the same matter in the regions, thereby not only causing confusion to the members of the legal profession, but also subjecting the East African legal institutions to disrepute. Although the Treaty encourages the national courts to refer to the EACJ for preliminary rulings on a matters related to the interpretation or application of the provisions of the Treaty or the validity of regulations, directives, decisions or actions of the Community, it does not make it mandatory for the national courts to do so. The national court can only refer such matters to the EACJ if it considers that a ruling by the EACJ on a question is necessary to enable it to give judgment on matters that are before national courts. It is therefore, the discretion of the national court to decide whether or not there is need to refer a matter to the EACJ. The foregoing underscores the fact that only cooperation between national courts and the East African Court of Justice can ensure that the Treaty and other Community laws are interpreted and



applied uniformly throughout the Community. It is therefore expected that where an issue arises in a national court calling for a preliminary ruling by the EACJ, the national court will stay the proceedings and refer the issue to the EACJ for determination. When the EACJ has delivered its preliminary ruling on the issue, the national court will resume the stayed proceedings and in deciding the case, apply the interpretation of the law provided by the EACJ. The judgment or ruling of the Court would also guide other courts throughout the Community faced with identical or related problems.

The mere fact that decisions of the EACJ on the interpretation and application of the Treaty have precedence over decisions of national courts on a similar matter,<sup>25</sup> does not in itself remove the possibility of there being conflicting decisions by the two courts on the same matter. The two courts are independent of each other and the decision of one court is not binding on the other. At most, the provision recognises this possibility and attempts to suggest that in case of such conflicting decisions by the two courts on the interpretation and application of the Treaty, the decision of the EACJ shall have precedence over the decisions of national courts. It can be argued that in such a situation, national courts are by necessary implication, required to refer such matters to the EACJ in order to avoid such uncalled for conflicts. However, the litigants still have the discretion to choose whether to file their suits in their national courts or in the EACJ regardless of the said consequences.

### **Widening the Jurisdiction of the Court**

It is envisaged that in future the EACJ shall have appellate, human rights and other jurisdiction as will be determined by the Council of Ministers at a suitable date.<sup>26</sup> There is no time frame set within which the Court can start exercising human rights and appellate jurisdiction. The Treaty leaves it to the Council of Ministers to determine a “suitable” date for the Court to exercise the said extended jurisdiction. While the Court’s current jurisdiction appears to be wider than that previously enjoyed by the East African Court of Appeal, it is obvious that the EACJ lacks the ideal jurisdiction on appeals and human rights. A considerable number of people particularly the members of the legal profession<sup>27</sup> and the business community<sup>28</sup> have persistently demanded

for the operationalisation of the Court's appellate and human rights jurisdiction.

It is the argument of the proponents of this view that the Court which is wanted most is the East African Court of Appeal, which will take appeals from apex national courts since national courts have been to a large extent basing their decisions on political considerations to please the appointing authorities.<sup>29</sup> Since the EACJ is constituted by Judges from the three partner states, it is expected to make decisions which are not partisan or politically engineered.

Arguably such demands are common and could be taken lightly especially when they are made by advocates and litigants who naturally would like to increase the chances of winning the cases they lose if the same could be re-tried by another superior court. However, this is not a demand by the advocates and business community only. Members of the East African bench, albeit for different reasons, have also realised the need for having an apex appellate court in East Africa and have joined the Bar to demand for it. This position was clearly and best expressed by the Acting Chairman of the East African Magistrates and Judges Association (EAMJ) during the association's annual meeting in January, 2004, when he said:

We in the EAMJA believe that in order to fulfil the objectives of the Community, especially those under Article 126(c) of the Treaty which include, *inter alia* "... the harmonisation of legal learning and the standardisation of judgments of courts within the Community," the formation of the East African Court of Appeal is a necessary and an overdue step. We need a court of the highest resort in East Africa whose decisions bind all our national courts. The world trend now is to use international norms and standards to interpret national laws. Suspicion of the court, mainly by our politicians, is unfounded. I think there is mere lack of political will on their part. And further delay in establishing the East African Court of Appeal will just leave us behind while other regions forge ahead.<sup>30</sup>

One would have expected the bench especially that of the apex national courts, out of jealousy of its own jurisdiction, to be the last to support this crusade, in that the finality of its respective decisions would be threatened or taken away by the EACJ, once it started exercising

appellate and human rights jurisdiction. However, this has not been the case. Instead the bench has now started leading from the front in the demand for the establishment of the East African Court of Appeal. These are positive steps aiming at developing the judiciaries in the region and consequently calling for the amendment of the Constitutions of the three partner states to accommodate those demands.

The East African Court of Justice has also the jurisdiction to hear and determine any matter arising from an arbitration clause contained in a contract or agreement which confers such jurisdiction to which the Community or any of its institutions is a party, or arising from an arbitration clause contained in a commercial contract or agreement in which the parties have conferred jurisdiction on the Court.<sup>31</sup> It is somehow unusual for the Court to wear two different hats in the process of settlement of disputes, first as an ordinary court of law and then later as the arbitrator. This raises the fundamental question of how a court of law can be reduced to an arbitral tribunal. The two institutions are different in many respects, they follow different procedures and the consequences of their decisions are different. Arguably the eminence of the Court itself would be at stake if its decisions as an arbitral tribunal were challenged on the grounds of misconduct on the part of the arbitrator and the High Court of a partner state overturns its decision. Even in terms of performance, it has been argued that the arbitral function of the Court may be tenable now that the Court has no cases to attend to but when it becomes busy, this could be fertile ground for breeding inefficiency and the delay of justice as far as the hearing of ordinary suits is concerned.<sup>32</sup>

The Treaty makes the EACJ accessible to a wide range of its stakeholders instead of limiting its accessibility to only partner states. Partner states, the Secretary General and individuals may access the EACJ and this is a very welcome development. Accessibility of the Court has also been supplemented by the Court's deliberate attempt to make simple rules of procedure "that are devoid of legal jargon and complicated procedures."<sup>33</sup>

## **Establishment and Operationalisation of the East African Legislative Assembly**

The East African Legislative Assembly was inaugurated on November 30, 2001, the same day the Court was inaugurated. It has formulated its rules of procedure to guide the house in the execution of its mandate. During the period under consideration the East African Legislative Assembly (EALA) performed one of its functions by enacting a number of laws including:

- (a) The Community Emblems Act 2003;
- (b) The East African Legislative Assembly Powers and Privileges Act 2003;
- (c) The East African Community Appropriation Act 2003;
- (d) The Laws of the Community (Interpretation) Act 2003;

It is the responsibility of the EALA to legislate for the Community<sup>34</sup> on matters which relate to the functions of the Community. To a certain extent this requirement potentially limits the powers of the Legislative Assemblies of the partner states to enact domestic legislation on matters that relate to the functions of the Community, especially when such legislation may be in conflict with the laws passed by the EALA. Presumably the laws of the Community as enacted by the EALA are binding on the partner states. The Treaty is silent about the role of national Legislative Assemblies and whether they can competently question the laws of the EALA or not. This introduces the idea of domestication of Community laws by national Legislative Assemblies, a common practice governing application and enforceability of international laws or instruments by partner states.

The Treaty after being signed by the East African Community Heads of State was formally domesticated by the Legislative Assemblies of Kenya, Uganda and Tanzania to give a binding effect on the partner states and to enable the states to express their respective readiness to carry out the obligations involved and make it enforceable in their national courts. The same procedure would be expected to be followed by national legislatures in order to give effect to the application of Community laws in the partner states. If all Community laws were to be ratified or domesticated first by the national legislatures before they

become effective in a particular partner state, then there would be a wide range of problems. It may give room to a particular partner state to conveniently select some provisions to apply and to leave out others which they think would not be in the interests of the partner state, as it is usually done with all international instruments. This would cause disparity thereby defeating the whole purpose of having Community laws if their application would be subjected to selective application depending on the choice of the national legislatures.

### **The Legal Value of Community Law**

The European Court of Justice has on several occasions, inferred the obligation for national courts to give full application to Community law within their sphere of competence and to protect the rights conferred on individuals by Community law, by leaving unapplied any provision of national law which may be contrary to the Community law, whether that provision was enacted before or after the provision of the Community law came into force.

If the people of East Africa want to build a Community which pursues its objectives on the basis of new and autonomous laws which prevail over the laws of the partner states and are uniform in all the states, national legislatures ought to be required to amend their past legislations which related to the functions of the Community and/or conflict with current legislations of the EALA on the same subject. This could potentially raise issues like which of the two legislative bodies is superior to the other, taking into account the concept of parliamentary supremacy. Naturally, the national legislatures of the partner states would like to consider themselves superior in that they elect the members of the EALA.<sup>35</sup> Probably a precedent from the European Union can shed some light on the question under discussion. It was in *Costa v. Ente Nazionale per l'Energia Elettrica (ENEL)*,<sup>36</sup> where the doctrine of supremacy of Community law in relation to national law was established. In this case, an Italian court asked the Court of Justice whether the Italian law nationalising the electric power industry was compatible with certain European Economic Community (EEC) Treaty provisions. The Court introduced the doctrine of supremacy of Community law, based on the specific legal character of the Community legal order which is required to be applied uniformly in all member states.

### **East African Laws and National Legislatures**

Even though mindful of the fact that national legislatures are the EALA members' constituencies, the EALA would like to be seen as making laws naturally binding on the partner states. It appears the Treaty envisaged this situation and attempted to make a provision for the relations between the EALA and the Parliaments of the partner states.<sup>37</sup> However, going by the content and spirit of the said provision of the Treaty, the problem is left intact, for the Clerk of the Assembly is merely required to make the national Parliaments of the partner states informed of the activities of the EALA. This is a provision which calls upon the two legislatures to simply cooperate and exchange information.

After the EAC Customs Union has been put in place, competition in trade among the business people of East Africa will be an inevitable consequence. In anticipation of this situation the EAC Competition Policy was formulated and translated into a bill to be debated and finally enacted by the EALA during its session in May, 2004. The enactment of the EAC Competition Law will have a big effect on the already existing domestic laws relating to fair trade and competition. The national legislatures may be called upon to amend existing national laws governing trade and fair competition in trade.

### **Establishment of the Customs Union**

The signing of the Protocol on the Establishment of Customs Union ushers in a new era in the history of East Africa. It will be a major achievement for the Community that will effectively consolidate the integration process. The East African Community Customs Union is considered the main entry point towards regional integration with the view to realising accelerated development and building the capacity to compete effectively in the world economy.<sup>38</sup> The objectives of the Customs Union include:

- (a) Further liberalisation of intra-regional trade in goods on the basis of mutually beneficial trade arrangements among the partner states;
- (b) Promotion of efficiency in production within the Community;
- (c) Enhancement of domestic, cross border and foreign investment in the Community; and
- (d) Promotion of economic development and diversification in industrialisation in the Community.<sup>39</sup>

The Treaty also provides that stages of the integration process would be phased starting with the Customs Union, the Common Market, the Monetary Union and finally the Political Federation.<sup>40</sup> Due to the sensitivity of the matter and the importance that the partner states attached to the Customs Union, the Council of Ministers set up a High Level Task Force<sup>41</sup> to expedite the negotiations, which commenced in January, 2000. Since the Customs Union was a main entry point to the integration system and also likely to be the cause of loss of revenue accruing out of the importation of goods by partner states, the composition of the High Level Task Force had to reflect that weight.

### **Classification of Goods in the Region**

In June 2003, after about four years of negotiations, goods were classified and categorised within a three-band structure for the EAC-Common External Tariff (CET), as 0% for raw materials, 10% for intermediate goods and 25% for finished products.<sup>42</sup> The signing of the EAC Protocol on Customs Union by the three Heads of State of Kenya, Uganda and Tanzania was scheduled for November 30, 2003, four years after the signing of the Treaty,<sup>43</sup> but was postponed and rescheduled to February 16, 2004. After the finalisation of some administrative and financial issues and the implications that go with it, the EAC Protocol on the Customs Union is expected to become operational on July 1, 2004. Partner states are required within a period of five years following the coming into force of the Protocol, to reduce the maximum Common External Tariff rate from 25% to 20%,<sup>44</sup> and to harmonise excise duties and other indirect taxes relating to trade.

### **The Customs Union and Sovereignty**

The Customs Union in effect touches an important aspect of state sovereignty. Partner states by joining the EAC Customs Union, surrender a certain degree of their sovereignty as far as the determination of import duty rates is concerned. This is illustrated by the fact that after the Customs Union has become operational, partner states cannot enact legislation or apply administrative measures that directly or indirectly discriminate against the same or like products of other partner states.<sup>45</sup> This means that the power of the partner states legislatures to legislate on the subject will be limited and this may call

for the amendment of the partner states' Constitutions as far as the power to legislate is concerned, so as to bring them to conformity with the Treaty.

The components of the Customs Union among other things include: common external tariffs, the elimination of internal tariffs and the elimination of non-tariff barriers on the goods originating from partner states and so on<sup>46</sup> It appears that there will not be a fully fledged Customs Union until five years after signing the relevant Protocol as a transitional period of five years is envisaged to give the partner states enough time to completely eliminate internal tariffs.<sup>47</sup> During this period, goods to and from the Republic of Uganda and the United Republic of Tanzania shall be duty free and goods from the Republic of Uganda and the United Republic of Tanzania into the Republic of Kenya shall be duty free. However, some goods from the Republic of Kenya into the Republic of Uganda and the United Republic of Tanzania shall be categorised as eligible for immediate duty free treatment and others as eligible for gradual tariff reduction.

This is a move specifically aimed at boosting and giving chance to the less developed Tanzanian and Ugandan industries to catch up with the relatively more developed Kenyan industries. Undoubtedly this is indeed a significant concession by the Republic of Kenya for the sake of regional cooperation taking into consideration the different levels of economic development of the three partner states. It is along the same line that the elimination of internal tariffs will be implemented under the principle of asymmetry where the less developed partner state will be permitted to reduce internal tariffs gradually over a transitional period.

### **Co-ordinating the Customs Union**

The integration of the three customs administrations into one will definitely require a separate coordinating body within the Secretariat, to oversee matters of the Customs Union in the Community and to guide and advise partner states. Other functions including the collection of revenue and other aspects of compilation of trade statistics and information technology, would continue to be handled by the respective revenue authorities of the partner states. The Secretariat therefore will handle policy matters while the respective relevant national authorities will handle implementation issues.<sup>48</sup> The Council of Ministers which



was given the mandate outlined above approved establishment of the Directorate of Customs and Trade at the Secretariat' within the East African Community set up to be headed by the Director General of Customs and Trade.<sup>49</sup>

### **The Community and Partner States Membership into Other Regional Initiatives**

It should be noted that Kenya and Uganda are members of the Common Market for Eastern and Southern Africa (COMESA) and the Intergovernmental Authority on Development (IGAD) while Tanzania is a member of the Southern African Development Community (SADC). Both COMESA and SADC are regional organisations which have the ambition of adverting their integration process into a Customs Union. COMESA is actually heading towards the final stages of establishing the Customs Union among its member states by December 2004. This introduces us to one important question of whether a country can belong to more than one customs regime. This writer's immediate reaction to this question is that "it is not possible for an EAC partner state to belong to more than one Customs Union."<sup>50</sup> It was against this background that EAC had to maintain "a fast track position in these processes until the merger of the three Customs Unions is eventually achieved, pursuant to the ultimate objective of achieving the African Economic Community."

<sup>51</sup> COMESA member states formulated an arrangement called COMESA rules of origin. The COMESA rules of origin arrangement gave preference and zero rating to products produced within COMESA meaning that goods imported by a member state from another member state should be given preferential treatment. In other words, goods imported by Uganda from Kenya would be given preferential treatment by Uganda if they competed with goods imported from Tanzania. This could cause problems and Uganda could be challenged for contravening the Treaty by applying discriminative administrative measures to goods from Tanzania.<sup>52</sup>

The outcome of the Customs Union includes loss of revenue of partner states because of their different levels of economic development thereby causing injury to the economy. In anticipation of such injuries to the economies of the partner states, the Treaty has allowed partner states suffering such serious injury as a result of becoming members of

the EAC Customs Union, to take unspecified safeguards after informing the Council and the partner states for decision thereon.<sup>53</sup> It is hoped that before the Heads of State append their signatures on the Protocol establishing the Customs Union, partner states will have started providing for measures to address imbalances among them and obstacles to trade which may arise from the establishment of the Customs Union and Common Market. Factors such as administrative and bureaucratic inefficiency, poor infrastructure and communication are obstacles to the growth of trade.<sup>54</sup> It is therefore, imperative to have in place East African standards harmonised from national standards to ensure that the products in East Africa are of the same standard and that there is no unilateral imposition of standards with a view to protecting local industries.

### **Harmonisation/Approximation of Municipal Laws in the EAC Context**

The Treaty recognises the importance of harmonising or approximating municipal laws in the region in order to promote the objectives of the Community as the integration process gains momentum. This recognition is clearly reflected in the provisions of the Treaty whereby the partner states are required “through their appropriate national institutions, to take all necessary steps to harmonise all their national laws appertaining to the Community.”<sup>55</sup> Harmonisation and approximation of laws are ways of law reforms at least to start with, as we move towards political federation. Complete harmonisation of some laws may be difficult and approximation may be a compromise good enough for the purpose.

A Task Force on approximation of municipal laws was formed by the Council from the Sectoral Committee on Legal and Judicial Affairs to oversee this important exercise. A number of partner states laws relating to cross-border legal practice; companies; bankruptcy; insolvency; refugees; immigration; movement of professional services; patents; copyright; trade marks and service marks; trade and licensing; property and title; contracts; industrial licensing and business name registration; have so far been reviewed and recommendations made for approximation.<sup>56</sup> Indeed the exercise to harmonise and or approximate laws of the partner states may not be an easy one for it

involves a number of state organs and institutions which depend on each other. It is now up to the partner states to take up the recommendations for the harmonisation or approximation of their respective national laws.

## **Facilitation of Free Movement of Persons in the Region**

While the four phases of the EAC integration process (Customs Union, Common Market, Monetary Union and Political Federation) are distinct, they are intertwined with overlapping processes. Arguably this is a positive aspect of the Treaty implementation process. Some features of the activities which should come up in the second, third, or fourth phase of the integration process are already fairly advanced even before the signing of the Protocol for the establishment of Customs Union. These relate particularly to the movement of persons, immigration and labour/employment, which are the major elements of the Common Market.

The opening up of Customs Union as the main entry point to regional integration introduces the idea of a Common Market, which is the second step in the integration process. A Common market goes hand in hand with the free movement of people, goods and the right of establishment. The introduction of the East African passport and the issuance of inter-state passes, are steps towards the realisation of that important step in the integration process. However, the East African passport presently being issued by the immigration departments of each partner state is not internationally recognised and can only be used within the East African region of Kenya, Uganda and Tanzania. The inauguration of the East African passport was followed by efforts to internationalise it so that the bearer while travelling abroad can use it.

The process of internationalising the East African passport are underway and it was decided by the Council of Ministers that this should be accomplished by January, 2005. However, the use of this passport in East Africa has been a subject of criticism as the bearer has to go through all immigration procedures at the borders just like anybody else thus being of no tangible advantage to the bearer. Also very few people know about its existence and the authority that is charged with its issuance.

Whereas a single immigration departure/entry card has been designed and adopted by the partner states, the process to implement the proposed harmonised classification and procedures for the issuance of entry/work permits is ongoing.<sup>57</sup> Negotiations on the Draft Protocol on the movement of persons, labour, services, the right of establishment and residence, are expected to commence after the signing of the Protocol for the Establishment of a Customs Union. The studies on the harmonisation of labour laws and employment are approaching their final stages. Partner states will definitely go back to their respective drawing boards to harmonise their laws and remove all hindrances so as to enable the people of East Africa move and establish themselves anywhere in Kenya, Uganda, and Tanzania as citizens of East Africa.

## **Conclusion**

The year 2003 has been a year that focussed on the finalisation of the negotiations on the establishment of the East African Community Customs Union so that the Heads of State could sign the respective Protocol on November 30, 2003. Unfortunately this target could not be met since there were still a number of outstanding issues to be sorted out so the signing was postponed to a later date before the end of the first quarter of 2004. However, the attempt to conclude negotiations on the establishment of a Customs Union went side by side with other planned activities of the Community whose impact on constitutional development in East Africa has been the subject of this paper.

The East African Community has in mind a political federation as its ultimate goal. This means that partner states are aware that the end result of their co-operation is to surrender at least part of their countries' sovereignty to the federal political set up. In discharging their respective mandates therefore, the organs of the Community should not lose sight of this fact, which in effect seriously impacts on the partner states' constitutional development as they try to harmonise their respective policies and laws. One is encouraged by the system that governs the decision-making processes in the Community where after popular participation through countries' delegations, the consensus of all partner states is required instead of the ordinary practice whereby the decision is authentic as long as it has the support of the majority. The fact is that

decision-making is not about winning but co-operating. This is indeed another key element of constitutionalism<sup>58</sup> signifying that the success and sustainability of regional integration and development depends largely up on popular participation.

In this paper, we have attempted to highlight some areas in the Treaty whose implementation if not carefully effected, may contradict the culture of constitutionalism in East Africa. This presentation has also attempted to point out various constitutional issues arising from the activities of the organs of the Community as they attempt to implement the Treaty. Due regard has also been paid to the effects of Customs Union in East Africa and how it impacts on the constitutional development in the region. Indeed the establishment of the EAC Customs Union may not be meaningful if the people of East Africa are not sensitised enough to be able to practice it and its relevant laws, so as to reap the fruits that it brings. Publicity programmes therefore have to be carried out all over the region. Indeed, these and many others not mentioned in this work, constitute a domain of challenges facing the East African Community. The Community recognises the need to face them with determination and resolve in order to build a strong and viable East African single market and investment area.

## Notes

- <sup>1</sup> Preamble to the Treaty establishing the old East African Community in 1967. See *East African Community, Laws of the Community: The Treaty for East African Co-operation*, Nairobi: East African Community Printer, 1970; and Nabudere, Dani Wadada, "The Role of Tanzania in Regional Integration in East Africa – Old and New Patterns," in Mushi Samuel S. and K. Mathews (eds.), *Foreign Policy of Tanzania 1961 – 1981: A Reader*, Dar es Salaam: Tanzania Publishing House, 1981, p. 123 at p. 142.
- <sup>2</sup> This idea of course, introduces a number of questions of interest such as: how can a government be legally limited if law is a creature of government? How can a government be self-limiting? and so on. For the sake of coherence, this paper does not attempt to dwell on these issues as they may not be relevant to the subject under discussion.
- <sup>3</sup> The executive (to implement the laws), legislature (whose main function is to enact laws) and the judiciary (adjudicator of disputes using laws).
- <sup>4</sup> The established organs of the Community under Article 9(1) of the Treaty for the Establishment of the East African Community are: the Summit, the Council, the Coordination Committee, Sectoral Committees, the East African Court of Justice, the East African Legislative Assembly, the Secretariat and other organs as may be established by the Summit.
- <sup>5</sup> Article 6(d), of the Treaty.
- <sup>6</sup> Article 11 of the Treaty.
- <sup>7</sup> Article 14(1), and (2), of the Treaty.

- <sup>8</sup> Article 71 of the Treaty.
- <sup>9</sup> Article 24(1), of the Treaty.
- <sup>10</sup> For a discussion on similar problems potentially facing the East African Legislative Assembly see Khoti Kamanga, "Some Constitutional Dimensions of East African Cooperation," in Joe Oloka-Onyango (Ed), "Constitutional Development in East Africa for Year 2001," Dar es Salaam: E & D Limited, 2003, pp. 136-137.
- <sup>11</sup> Article 23 of the Treaty.
- <sup>12</sup> See Articles 4, 29 and 31 of the Treaty.
- <sup>13</sup> See Article 67(3)(b) of the Treaty.
- <sup>14</sup> If for example, the Court has to decide on a dispute between the Community (represented by the Secretary General) and employees of the Community arising out of the terms and conditions of employment.
- <sup>15</sup> See Article 140(4) of the Treaty.
- <sup>16</sup> The present seat of the Court is regarded as temporary because the Summit of EAC Head of States is yet to determine the seat of the Court as per Article 47 of the Treaty.
- <sup>17</sup> This includes carrying out activities such as holding administrative meetings, hearing and determining cases.
- <sup>18</sup> Article 43 (2) of the Treaty.
- <sup>19</sup> Article 140 (4) of the Treaty.
- <sup>20</sup> See Article 63 of The Constitution of Kenya, (Revised Edition, (1998), 1992), Government Printer, Nairobi.
- <sup>21</sup> Article 26 of the Treaty.
- <sup>22</sup> See for example, Kwayera, J. and Kariuki J., "'Shamed' Judges a Dilemma for EA Court," the *East African*, October 20-26, 2003. See also Deya, D., "How EACJ Can Protect its Image," the *East African*, Octobe 20-26, 2003.
- <sup>23</sup> It was interesting to note that members of the legal profession including the Judges and practicing Advocates in the partner states were also ignorant of the EACJ and its activities.
- <sup>24</sup> See Article 27(1) of the Treaty.
- <sup>25</sup> See Article 33(2) of the Treaty.
- <sup>26</sup> Article 27(2) of the Treaty for the Establishment of the East African Community.
- <sup>27</sup> This was a popular demand by the lawyers during the East African Law Society Annual General Meeting which was held in Dar es Salaam in February, 2003.
- <sup>28</sup> This was a common demand during the EACJ Judges' tour of Kampala, Nairobi and Dar es Salaam when the Judges met the business community of East Africa in March, August and October, 2003.
- <sup>29</sup> This view also emerged during the East African Law Society Annual General Meeting which was held in Dar es Salaam in February, 2003.
- <sup>30</sup> Welcome address by Hon. Mr. Justice Lawrence Mchome, Acting Chairman of the Third East African Magistrates and Judges Association Annual General Meeting and Conference, held at the Golden Tulip Hotel on January 20-25, 2004, Dar es Salaam, Tanzania, p. 3.
- <sup>31</sup> Article 32 of the Treaty for the Establishment of the East African Community.
- <sup>32</sup> The Law Faculty lecturers of the University of Dar es Salaam expressed this view during the Court tour of Dar es Salaam in October 2003.
- <sup>33</sup> See Bossa, S.B., "The East African Community, the Protection of Women's Rights and Gender Equality," A paper presented to the East African Programme on the Equal Status and Human Rights of Women August 12-23, 2003, Nairobi, p. 10.
- <sup>34</sup> See Article 49(1) of the Treaty.
- <sup>35</sup> See Article 50(1) of the Treaty.
- <sup>36</sup> Case 6/64 (1964) C.M.L.R. 425; (1964) ECR 585.

- <sup>37</sup> See Article 65 of the Treaty.
- <sup>38</sup> See The East African Community, "The East African Community Development Strategy 2001-2005," EAC Secretariat, Arusha, 2001, p.1.
- <sup>39</sup> Article 3 of the Draft Protocol on the Establishment of the East African Customs Union, Revised Draft No. 5, EAC Secretariat, Arusha, February 15, 2004, (Ref EAC/Customs Protocol/D5A).
- <sup>40</sup> Article 5(2) of the Treaty.
- <sup>41</sup> The Task Force comprised of senior government officials from the relevant Ministries responsible for trade, industry investment, finance and regional co-operation. Other members were drawn from the Private Sector including manufacturers organisations. The partner states had the prerogative of composing their delegations.
- <sup>42</sup> See Article 12(1) of the Draft Protocol on the establishment of the East African Customs Union, Revised Draft No. 5, EAC Secretariat, Arusha, February 15, 2004, (Ref EAC/Customs Protocol/D5A).
- <sup>43</sup> The Treaty under Article 75(7) sets the time frame within which the Protocol on Customs Union should be signed four years after the signing of the Treaty. The Heads of State signed the Treaty on November 30, 1999.
- <sup>44</sup> See Article 12(2) of the Draft Protocol on the establishment of the East African Customs Union, Revised Draft No. 5, EAC Secretariat, Arusha, February 15, 2004, (Ref EAC/Customs Protocol/D5A).
- <sup>45</sup> Article 75(6) of the Treaty.
- <sup>46</sup> See Article 75 of the Treaty.
- <sup>47</sup> See Article 11 of the Draft Protocol on the establishment of the East African Customs Union, Revised Draft No. 5, EAC Secretariat, Arusha, February 15, 2004, (Ref EAC/Customs Protocol/D5A).
- <sup>48</sup> See Sixth Meeting of the Council of Ministers November 24-29, 2003, Report of the Council (Ref: EAC/CM6/2003) p. 19.
- <sup>49</sup> See Sixth Meeting of the Council of Ministers November 24-29, 2003, Report of the Council (Ref: EAC/CM6/2003) p. 20.
- <sup>50</sup> See Muthaura, Francis K., "The Process for the EAC Regional Integration," Dialogue on the Regional Integration in East Africa, Proceedings of an EAC Seminar in Arusha, EAC Secretariat and GTZ, Arusha, 2002, p. 61.
- <sup>51</sup> See Muthaura, Francis K., "The Process for the EAC Regional Integration," Dialogue on the Regional Integration in East Africa, Proceedings of an EAC Seminar in Arusha, EAC Secretariat and GTZ, Arusha, 2002, p. 61.
- <sup>52</sup> See Article 75(6) of the Treaty.
- <sup>53</sup> Article 78 of the Treaty.
- <sup>54</sup> Such obstacles and many others of the like are popularly known as non-tariff barriers.
- <sup>55</sup> Article 126(b) of the Treaty.
- <sup>56</sup> See the Sixth Meeting of the Council of Ministers November 24-29, 2003, Report of the Council. (Ref: EAC/CM6/2003) p. 23.
- <sup>57</sup> See the Sixth Meeting of the Council of Ministers November 24-29, 2003, Report of the Council, (Ref: EAC/CM6/2003) p. 18.
- <sup>58</sup> This system does not apply in the East African Court of Justice or the East African Legislative Assembly where decisions are made on the basis of the majority.

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