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Khoti Chilomba Kamanga

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Acronyms

SLDF	Saboat Land Defence Forces
ECK	Electoral Commission of Kenya
KICC	Kenyatta International Conference Centre
ODM	Orange Democratic Movement
KNCHR	Kenya National Commission on Human Rights
CRECO	Constitution and Reform Education Consortium
PNU	Party of National Unity
AU	African Union
ICC	International Criminal Court
PEV	Post-election Violence
KBC	Kenya Broadcasting Corporation
TJRC	Truth, Justice and Reconciliation Commission
EAC	East African Community
SADC	Southern African Development Community
COMESA	Common Market for Eastern and Southern Africa
RECs	Regional Economic Communities
ICTR	International Criminal Tribunal for Rwanda
ID	Identity Document
FTA	Free Trade Area
JCA	Joint Competition Authority
SACU	Southern African Customs Union
EAAACA	East African Association of Anti-Corruption Authorities
EALA	East African Legislative Assembly
LVBC	Lake Victoria Basin Commission
EACJ	East African Court of Justice
EACA	East African Court of Appeal
NRM	National Resistance Movement

CCM	Chama Cha Mapinduzi
KANU	Kenya African National Union
PARMEHUTU	Parti du Mouvement de l'Emancipation Hutu (Party of the Hutu Emancipation Movement)
APROSOMA	Association for the Social Settlement of the Masses -Hutu
MDR	Democratic Republican Movement (*Mouvement Démocratique Republicain)*
MRND	Mouvement Révolutionaire National pour le Dévelopement
CND	National Development Council (*Conseil National du Développement*)
RPF	Rwanda Patriotic Front
CDR	Coalition for the Defence of the Republic
ICCPR	The International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
TANU	Tanganyika African National Union
OAU	Organisation for African Unity
CHRAGG	Commission for Human Rights and Good Governance
DP	Democratic Party
IGG	Inspector-General of Government
AG	Attorney-General
LRA	Lord's Resistance Army
DPP	Director of Public Prosecution
CUF	Civic United Front
CCM	Chama Cha Mapinduzi
NEC	National Executive Committee

LHRC	Legal and Human Rights Centre
ZLSC	Zanzibar Legal Services Centre
ZLS	Zanzibar Law Society
ZAFELA	Zanzibar Female Lawyers
KMKM	Kikosi Maalum cha Kuzuia Magendo (Anti-Smuggling Squad)
JKU	Jeshi la Kujenga Uchumi (Economy Building Brigade)
ICESCR	International Covenant on Economic, Social and Cultural Rights
TPDC	Tanzania Petroleum Development Corporation
ZSTC	Zanzibar State Trading Corporation
GJALOS	Governance, Justice, Law and Order Sector
ICT	Information Communication Technology
IREC	Independent Review Commission
KNA	Kenya National Assembly
USAID	United States Agency for International Development
CIPEV	Commission of Inquiry in Post Election Violence
LRF	Legal Resources Foundation
USE	United States of America
UNESCO	The United Nations Education, Scientific and Cultural Organisation
TAWLA	Tanzania Women Layers Association
TAMWA	Tanzania Media Women Association
WLAC	Women Legal Aid Centre
TLS	Tanzania Law Society
EPA	External Payment Arrears
UK	United Kingdom
US	United States

KCC	Kampala City Council
JSC	Judicial Service Commission
EC	Electoral Commission
ZEC	Zambia Electoral Commission
URT	United Republic of Tanzania
TRA	Tanzania Revenue Authority
UN	United Nations
RPA	Rwanda Patriotic Army
PDI	Islamic Democratic Party
CDD	Christian Democratic Party
PPC	Party for progress and Concord
PSP	Prosperity and Solidarity Party
UPDR	Democratic Union of Rwanda People
PSR	Rwandese Socialist Party
BBC	British Broadcasting Corporation
VOA	Voice of America
TTCL	Tanzania Telecommunication Company Limited
BOT	Bank of Tanzania
EALS	East Africa Law Society
EITI	Extractive Industries Transparency Initiative
MPs	Members of Parliament
UDHR	Universal Declaration of Human Rights
RNHC	Rwandan National Human Rights Commission
EU	European Union
NURC	National Unity Reconciliation Commission
CAO	Chief Administrative Officer
IGP	Inspector General of Police

Introduction

Khoti Chilomba Kamanga

Once again, Kituo cha Katiba (KCK) brings its esteemed readers insights on a wide range of developments in the East African region, of relevance to constitutionalism and human rights, and which in the opinion of this particular series' contributors, left the greatest impression.

In **The State of Constitutional Development in the East African Community** Med Kaggwa starts by recapturing, in broad strokes the highlights in the Community's journey as it headed for its present destination, a Common Market. He informs us that in their decision of April 2008, the Summit gave its approval for negotiations leading to the adoption of a Protocol on a Common Market to commence. The general sense of optimism was however soon overshadowed by seemingly endless disagreements.

As is to be expected, debate has arisen over the issue of free movement of people and the use of national identity cards for purposes of cross-border travel within the region. A related debate is over access to land by non-nationals. At the other extreme, the author quite reasonably questions member states' commitment to the Common Market, given the miserly rates of intra-East African Community (EAC) trade.

Beyond the challenge of unrolling the Common Market, the region continued with its efforts to synchronise its relationship with sister Regional Economic Communities (RECs). Notably, the EAC took part in a summit on a Common Market for Eastern and Southern Africa (COMESA) held in Kampala in October 2008. Multiple membership of RECs entails duplicity of legal obligations and discordant and even contradictory trade relations. Kaggwa also examines a unique problem which arose out of the expansion in

membership, occasioned by the entry of Rwanda and Burundi. It emerges that there are no specific EAC Treaty provisions for dealing with member states who default on their subscriptions.

In the year in question, the East African Court of Justice (EACJ) was reconstituted following a controversial amendment to the EAC Treaty arising from an interim order in the case of *Anyang' Nyong'o & Ten Others* v *The Attorney-General of Kenya & Five Others* (Reference No. 1 of 2006). Such was the controversy that the regional bar association took the lead in challenging the legality of the amendment, before the EACJ in the case of *The East African Law Society et al.* v *The Attorney-General of the Republic of Kenya et al.*, in a judgement that was delivered in September 2008. A continuing challenge, the author rightly observes, is the genuine "representativeness" of the East African Legislative Assembly (EALA), particularly with Article 50 of the EAC Treaty in mind.

As is to be expected, Collins Odhiambo, the author of **Kenya: Haunted By the Ghost of Unresolved Constitutional and Historical Grievances?** begins with the general elections of December 2007 and a series of events in which state organs resorted to disproportionately lethal violence in addressing problems with far deeper underlying causes. Besides the inexplicable delay in announcing poll results, the manner in which the outcome was published – from Kenya Broadcasting Corporation (KBC) studios, rather than from the media centre at Kenyatta International Conference Centre (KICC) also heightened suspicion among political contestants and the public at large. In the author's view, the constitutional and governance problem in Kenya may be clustered around three groups: immediate political crisis; historical legacy; and institutional and structural problem, and the solution lies in the adoption of a properly promulgated, new constitutional order that is people driven.

In the final part, the author chronicles observations and concerns by columnists and other social observers, of whom the vast majority is convinced that the ghosts have hardly been exorcised. In the opinion of one of them, Kenya is still stuck with an imperfect constitution, skewed distribution of the national cake and an electoral commission whose credibility is in tatters.

The contribution by Robert Turyahebwa, titled **The State of Constitutionalism in Rwanda: Documenting Constitutional and Human Rights Developments in the Year 2008**, discusses the various conceptual approaches to understanding constitutionalism. This is followed by a historical overview of constitutionalism arching back to the days of the monarchy and colonialism. Typically, the colonial constitutional regime (especially Belgian) left an indelible footprint on the post-independence architecture, most notably, as regards the distinction the civil law draws, between "natives" and "europeans". The author runs through the series of post-independence constitutions, namely, those of 1962, 1978 and 1991 as a backdrop to appreciating the existing constitution, adopted in 2003. He observes quiet rightly, that the entrenchment of a Bill of Rights in the constitution, is highly important in so far as the protection of human rights is concerned. But serious practical challenges do exist and his biggest concern is the accessibility and effectiveness of remedies by aggrieved persons. He finds, and quite justifiably, parliament's constitutional powers as regards interpretation of the law as anachronistic and an impediment to a robust development of jurisprudence on human rights.

Fahamu Mtulya, in **The Elusive Search for Constitutionalism and Human Rights Protection in Tanzania,** invites us to examine the events of import in one of the EAC's founding partner states. A cursory glance indicates nothing of the seismic proportions witnessed in neighbouring Kenya, but closer inspection reveals otherwise. The Court of Appeal in *Attorney-General* v C*hristopher Mtikila* confirmed

an earlier decision of the High Court, which held that prohibiting persons not affiliated to any political party from contesting in elections, was contrary to the 1977 constitution of the United Republic of Tanzania(URT). Furthermore, the case is that of *Chama cha Walimu Tanzania* V A*ttorney-General,* addressed the constitutional right and basic tenet of natural justice in any democratic society. *Legal and Human Rights Centre (LHRC)* v *Thomas Ole Sabaya et al.* was a test case in many respects, not least for affirming the proactive role of the Commission for Human Rights and Good Governance (CHRAGG), on the one hand, and the practical steps human rights defenders (such as LHRC) are able to take, on the other. In a unique development in Sub-Saharan Africa, the year 2008 also saw a parliamentary probe team investigate the role of government in what has come to be popularly known as the Richmond scandal after the USA-based firm, Richmond Development Company contravened laws and rules of procurement. Ultimately, it led to the resignation of the premier, two cabinet ministers and the dissolution of cabinet. Tanzania's constitutional model of the union between Tanzania Mainland and the isles of Zanzibar (the so-called Union question) continued festering in 2008, following a statement on the floors of the Union Parliament, that "Zanzibar is not a sovereign state". The issue of Zanzibar's sovereignty, the author correctly points out, was addressed earlier, by the highest court of the land, in *SMZ* v *Machano Khamis et al.*

The campaign for the abolition of capital punishment from Tanzania's statute books received a major boost in 2008. The human-rights country map was deeply blemished by killings of albinos. Between March and September a total of 25 albinos were reported to have been put to death, but information on government response is scant, save for the arrest of 173 suspects. The National Human Rights Conference is another high point.

Mtulya isolates the following areas as experiencing the greatest challenges as regards constitutionalism and human rights and hence reference in the paper's title, to the "elusive search": participatory politics; reporting to human-rights monitoring bodies; extra-judicial killings; and constitutional and human-rights education.

Peter Mulira, in **Uganda: Land, Devolution and Transitional Justice Take Central Stage**, like Kaggwa, Turyahebwa and Mtulya before him, exercises his mind over conceptual issues. Of all the developments of import to constitutionalism and human rights, it is the issues of land, governance, freedom of speech and assembly, and transitional justice, which he considers pre-eminent. A Land Bill brought government into confrontation, not only with the powerful Buganda kingdom, but Acholi elders as well and, as is to be expected, threw the gates open for the political opposition to join the fray. And in this (that is, duality of the land tenure system), we see once again the enduring legacy of colonialism and unresolved grievances. The colonial governance model had left Uganda with a "state within a state" in respect of the Buganda kingdom and the rest of the country, a situation perpetuated by the first post-colonial constitution of 1962. Abolished by the 1967 Constitution, kingdoms were restored in 1993, with further complications arising in 1995. Not surprisingly, in 2008 Buganda renewed its demand for a federal status. Almost parallel with this, was the status of Kampala city, which is hosted on territory that historically belongs to Buganda kingdom (a fact openly acknowledged by the 1995 Constitution). The proposed Capital City Bill, 2008 has met undisguised opposition and Mulira captures well the constitutional dimensions of the confrontation.

The creation of a War Crimes Court (within the existing judicial system) was announced in May 2008. But these developments also brought Uganda into controversy with the global criminal justice system. Finally, Mulira draws attention to a number of cases of significance to constitutionalism. These include *Kafero et al* v *The*

Electoral Commission et al; Joseph Tumushabe v *The Attorney-General*, and *Law & Advocacy* v *The Attorney-General*

The author of **The State of Constitutionalism in Zanzibar**, Yahya Khamis Hamad, begins by capturing the essence of constitutionalism - limited government, subjected to the dictates of the law. In his view, the centre piece of constitutional developments in Zanzibar is occupied by negotiations between the ruling party, Chama cha Mapinduzi (CCM) and the opposition, Civic United Front (CUF), in talks that are more commonly referred to as *Muafaka*, or political accords. We learn that whereas the second Muafaka entailed tangible and significant constitutional changes, that can hardly be said of the third round of Muafaka.

We learn further that the emergence of a group (elders) in Pemba, seeking autonomy from Zanzibar, is partly a fallout of the disintegration of Muafaka III. Besides, the political drama of approaching the United Nations (UN) secretary general, the Pemba petition does indeed raise constitutional issues which the petitioners, in their interview with the Yahya Hamad, however, seem reluctant to confront. The elders seem to be aggrieved by Pemba's marginal role in the governance structure and its miserly share of the national cake. They point out the politically (but not necessarily unconstitutional) unacceptable position of finding themselves under the rule of a political party (that is, CCM) which does not enjoy the support of the electorate.

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The State of Constitutional Development in the East African Community, 2008

By Med S.K. Kaggwa

Introduction

In the past, Kenya, Tanzania and Uganda enjoyed a long history of cooperation under successive regional integration arrangements. Attempts at integrating the region started in the latter years of the 19th century. Moves to integrate East Africa were initiated by the British in 1894 with the decision to start the construction of the Uganda Railway[1] (Kasaija, 2004: 24). Subsequently, there was the Customs Union between Kenya and Uganda in 1917, which the then Tanganyika later joined in 1927. Other regional integration arrangements included the East African High Commission (1948-1961); the East African Common Services Organisation (1961-1967); the EAC (1967-1977) and the East African Cooperation (1993-2000).

Following the dissolution of the former EAC in 1977, the member states negotiated this agreement for the Division of Assets and Liabilities, which they signed in 1984. However, as one of the provisions of the Mediation Agreement, the three states agreed to explore areas of future cooperation and to make concrete arrangements for such cooperation.

1 Kasaija P.A. (2004), "Regional Integration: A Political Federation of the East African Countries?" *African Journal of International Affairs*, Vol. 7, Nos. 1 & 2, pp. 21–34.

Subsequent meetings of the three heads of state led to the signing of the Agreement for the Establishment of the Permanent Tripartite Commission for East African Cooperation on 30 November 1993. Full East African cooperation operations started on 14 March 1996, when the secretariat of the Permanent Tripartite Commission was launched at the headquarters of the EAC in Arusha, Tanzania.

Considering the need to consolidate regional cooperation, the East African heads of state, at their second summit in Arusha on 29 April 1997, directed the Permanent Tripartite Commission to start the process of upgrading the agreement establishing the Permanent Tripartite Commission for East African cooperation into a treaty.

The treaty-making process, which involved negotiations among the member states as well as wide participation by the public, was concluded successfully within three years. The treaty for the Establishment of the East African Community was signed in Arusha on 30 November 1999 and entered into force on 7 July 2000 following the conclusion of the process of its ratification and deposit of the instruments of ratification with the Secretary-General by all the three partner states. Upon the entry into force of the treaty, the EAC came into being. The Republic of Rwanda and the Republic of Burundi acceded to the EAC Treaty on 18 June 2007 and became full members of the community with effect from 1 July 2007, thereby increasing the membership of the community to five.

The EAC is the regional intergovernmental organisation which aims at widening and deepening cooperation among the partner states in, among others, political, economic and social fields, for their mutual benefit. To this extent, the EAC countries established a Customs Union in 2005 and are working towards the establishment of a Common Market by 2010, subsequently a Monetary Union by 2012 and ultimately a Political Federation of the East African states. In a number of provisions the EAC Treaty emphasises the obligation of the member states to observe the rule of law, respect

human rights and promote good governance. The organs of the EAC therefore have an important role to play in the realisation of these principles among the EAC member states. The main objective of this paper is to review constitutional developments in the EAC and assess the role of EAC. The chapter identifies and analyses pertinent issues of constitutional debate; and analyses the role of the EAC in these pertinent issues.

Progress in the Integration Efforts of the East African Community

The member states of the EAC, under the Treaty, undertake to strengthen their economic, social, cultural, political, technological and other ties for their fast, balanced and sustainable development by the establishment of an EAC, with an East African Customs Union and a Common Market as transitional stages to and integral parts thereof, subsequently a monetary union and ultimately a political federation. The Customs Union has already been established and is called the East African Customs Union (EACU). The members are now moving towards a Common Market and negotiations are proceeding. Integration of the EAC is, therefore, a process. This section presents an analysis of the developments in the integration efforts of the community and the issues arising from it.

The Common Market

The East African Common Market is an important step in the EAC's integration agenda. It follows and deepens the successes achieved under the East African Customs Union. The Common Market is a step to an ambitious integration agenda which includes the eventual formation of a Monetary Union and a Political Federation. Common Market means that partner states' markets will be integrated into a single market in which there is free movement of capital, labour, goods and services (preamble to the EAC Treaty). It involves the right of establishment of businesses, the right of residence, as well

as the harmonisation of economic, fiscal, and monetary policies to make the market work. In other words, it involves the elimination of obstacles for the free flow of the factors of production.

Under the Treaty, the establishment of a Common Market must be progressive and in accordance with schedules approved by the Council. For this purpose, the partner states must conclude a protocol on a Common Market. In April 2008, the presidents of East African states approved the commencement of negotiations on an East African Common Market that would lead to the conclusion of a protocol on a Common Market.

One of the issues about which controversy persists is Article 6, which deals with free movement of people within the Community. Burundi, Kenya, Rwanda and Uganda propose to retain Article 6 (5) and (6) as the basis for allowing East African citizens to use their national identity documents (IDs) for travel within the Community. This is supported on a number of grounds. First, acquiring national passports is cumbersome and they are not easy to obtain by the majority of citizens. IDs, on the other hand, are easily accessible since all partner states are obliged to issue national identity cards. IDs will, therefore, ease the movement of people within the Community, who have in the past used temporary movement permits, for which they are charged for each crossing, a practice that disencourages illegal crossings. Elevating IDs to travel documents will alleviate this problem. Further, the use of national IDs for travel within the Community will not mean passports will no longer be used; it will only enrich the travel document regime to the benefit of the common man. Those with passports will continue to use them as travel documents.

Tanzania, on the other hand, proposes to retain Article 6 (7) and (8) because IDs are used for identification of nationals but are not recognised as standard travel documents internationally. Moreover, under Article 104 (3) (b) of the Treaty, partner states are required to

maintain common standard travel documents and IDs would not fulfill this requirement. Tanzania also gives its size and porous borders for a reason for refusing to use IDs as a travel documents.

How can these contrasting positions be reconciled? It is true that Article 104 (3) (b) of the Treaty requires partner states to maintain common standard travel documents but this should be read together with other provisions of the Treaty. Article 104 (3) (a) of the Treaty requires partner states to ease border crossing by citizens of the partner states. In the circumstances of the East African states, as noted above, accessing national passports is not easy; few Ugandans possess passports. Furthermore, temporary travel permits, which would have served as an alternative, are issued at a fee. With these limitations, it cannot be said that the partner states have complied with Article 104 (3) (a). They have to do this by introducing travel documents that are accessible to the citizens.

Considering the requirement for maintenance of common, standard travel documents, the Treaty defines a common standard travel document to mean a passport or *any other valid travel document establishing the identity of the holder*, issued by or on behalf of the partner state of which he or she is a citizen and shall also include inter-state passes (emphasis provided). My understanding of this definition is that a standard travel document is not limited to a passport; it can include an ID provided that it is agreed that it may be used as a travel document.

In the light of these arguments, IDs can and should be used as valid travel documents because the objective is not to derogate from the obligations assumed under the Treaty, but to encourage free movement of persons within the Community, a very important element in the Common Market that the member states are struggling to establish. Moreover, the IDs will apply only to movement within the Community.

The introduction of the Common Market will also involve the "right of establishment" and this is governed by Part V (Articles 12-18) of the Draft Protocol. The member states have attained consensus save for a few issues, such as the one governing abolition/non-introduction of restrictions. On the other hand, Burundi, Kenya, Rwanda and Uganda propose to retain subparagraph 4 (d), dealing with access to and use of land and buildings within the context of the "right to establishment". Tanzania, on the other hand, has proposed to delete subparagraph 4(d) because land is not a Common Market issue, and secondly, investors in Tanzania are adequately provided for under the existing investment regime. Tanzania also argues that land is a sensitive issue since most civil conflicts in the region are connected to the unequal distribution of land.

When talking of the right of establishment, it cannot be isolated from access to land because you cannot establish where you have no land. For this reason access to land is a Common Market issue. However, land is a very sensitive issue that needs to be approached with caution. This is evident in Uganda, where any access to land by a person who does not belong to the local tribe of the area is subjected to elaborate scrutiny. Indeed, there are many cases where the indigenous tribes have resisted acquisition of land by people from other areas. Therefore, whereas access to land is an important aspect of a Common Market, caution is necessary. One of the response strategies could be elaborate and sustained public sensitisation campaigns.

Other challenges to the introduction of a Common Market include poor road network, high border-crossing charges, lengthy bureaucratic checks and verification inspections by customs authorities, high taxes and duties, extortion, and restrictions on importation and exportation of goods. It is not surprising therefore that businesses in the EAC region opt to import most of their requirements outside the EAC states. Tanzania's imports from the

non-EAC world account for 75 per cent of its total imports, while the figure for Burundi is 43 per cent. Imports from EAC countries by Kenyan and Tanzanian businesses account for only six and five per cent of their total imports respectively. If the partner states are really interested in the Common Market, they should eliminate these barriers and trade among themselves. Free movement of factors of production will not have an effect unless the output (goods) move within the community.

EAC, SADC and COMESA Relationship

Under Article 130 of the EAC Treaty, partner states reiterate their desire for a wider unity of Africa and the Community is regarded as a step towards achievement of the objectives of the treaty establishing the African Economic Community. For this reason, they undertake to foster cooperative arrangements with other regional and international organisations whose activities have a bearing on the objectives of the Community. The EAC has initiated integration efforts with the COMESA and Southern African Development Community SADC. The first EAC-SADC-COMESA Tripartite Summit was held in Kampala on 22 October 2008 and it embarked on a roadmap to a single Free-Trade Area (FTA) and merger of the regional economic blocs.

In their final communiqué issued at the conclusion of the Tripartite Summit, the heads of state noted that the Summit was held in pursuit of the broader objectives of the African Union (AU) of accelerating the economic integration of the continent, with the aim of achieving economic growth, reducing poverty and attaining sustainable economic development.

The Kampala Tripartite Summit agreed on a programme of harmonisation of trading arrangements amongst the three RECs, free movement of business persons, joint implementation of inter-regional infrastructure programmes as well as institutional arrangements on the basis of which they would foster cooperation.

The summit reviewed the progress on the implementation of joint programmes in trade, customs and economic liberalisation amongst the three RECs. It approved the expeditious establishment of a Free Trade Area (FTA) encompassing the member/partner states of the three RECs, with the ultimate goal of establishing a single Customs Union. It also directed the three RECs to undertake a study incorporating, among other things, the development of the roadmap, within six months, for the establishment of the FTA, which would take into account the principle of variable geometry; the legal and institutional framework to underpin the FTA; and measures to facilitate the movement of business persons across the RECS.

In a major development, the summit also resolved that the three RECs should immediately start working towards a merger into a single REC with the objective of fast tracking the attainment of the African economic community. It directed the Tripartite Task Force to develop a road map for the implementation of this merger for consideration at its next meeting.

In the area of infrastructurual development, the Tripartite Summit launched the Joint Competition Authority (JCA) on Air Transport Liberalisation, which will oversee the full implementation of the Yamoussoukro Decision on Air Transport in the three RECs, commencing January 2009. The JCA comprises seven members; two members each from EAC, COMESA and SADC plus a rotational chairperson.

The Summit also directed the three RECs to effectively coordinate and harmonise, within one year, the regional transport master plans; the regional energy priority investment plans; and the energy master plans of the three RECS. It further directed the three RECs to develop joint financing and implementation mechanisms for infrastructure development within one year.

With regard to the legal and institutional framework, the Summit directed the Council of Ministers of each of the three RECs to, within six months, consider and approve a memorandum

of understanding on interregional cooperation and integration; to ensure that the approved memorandum of understanding is signed by the chairpersons of the three RECs within one month of its approval; and to have established a Tripartite Summit of Heads of State and/or Government which shall sit once every two years.

In the interim, pending the signing of the memorandum of understanding, the Tripartite Summit established a tripartite Council of Ministers which will meet at least once every two years. It also established tripartite sectoral ministerial committees for trade, finance, customs, economic matters, home/internal affairs, infrastructure, legal affair.; A tripartite committee of senior officials and experts which shall meet at least once a year was also established as well as and a tripartite task force of the secretariats of the three RECs, which has to meet at least twice a year.

The EAC-SADC-COMESA Summit is considered historic, because for the first time since the birth of the AU, key building blocks of the African economic community met on how to integrate territories and move towards deepening and widening integration within the overall context of the Abuja Treaty for the establishment of the African economic community.

The economic integration among these RECs will benefit every member of the three blocs. The proposed establishment of a single market among them will indisputably have profound positive effects on the integration in the African continent in terms of the extended market. However, the realisation of this dream will not be easy. At the Summit, the leaders emphasised the need to coordinate and harmonise their commitments to multiple trade arrangements. The EAC has a functioning Customs Union, as does COMESA. Meanwhile, the SADC is preparing to set up a Customs Union in 2010. SADC formally launched its free trade area in August 2008. So the three blocs are at different levels of integration. The coming together of these three blocs would first require them to remove

the tariff barriers and agree on common rules of origin before they expand their economic and trade cooperation and integration.

Multiple membership is also seen as a big hurdle in the process of the economic integration of the three. The EAC is already a Customs Union but shares four members with COMESA and one member with the SADC. Yet Article 130 of the EAC Treaty requires partner states to honour their commitments in respect of other multinational and international organisations of which they are members. Five of SADC members are also members of the Southern African Customs Union (SACU). There are 10 countries in the region which are already members of Customs Unions but all of them are also involved in the negotiations that are aimed at establishing alternative Customs Unions to those they currently belong to.

The integration process will also be hampered unless the three blocs invest heavily to improve the poor infrastructure in most member countries. The current road, railway and port networks found in many African countries were built by the colonialists and are not adequately inter-linked. This is a severe constraint, given the supreme importance of a modern and effective transport network for the free movement of goods and services.

Rwanda and Burundi in the EAC

Rwanda and Burundi were not part of EAC at the launch of the Community in November 2000. Rwanda and Burundi formally joined Kenya, Tanzania and Uganda on 1 July 2007. In a way, this event takes into account a pertinent historical fact, as exemplified by the long-established ties both Rwanda and Burundi have enjoyed with their East African neighbours. For example, ancient Rwandan and Burundi kingdoms conducted intense trade and diplomacy with the Swahili coast and Buganda, and the two kingdoms were later to become part of imperial Germany's East African colony, encompassing present-day Mainland Tanzania. Further, the inclusion

of these countries will lead to greater benefits to all the members of the Community. The large size of the regional body matters a lot in the success of the EAC because it increases the size of the EAC market and makes it more attractive to global investment.

These benefits, however, come with some obligations and challenges, on the side of both the founding and new member states. The expansion of the EAC has not come about without budgetary implications. It pushed the EAC annual budget up by 7.9 per cent. Contributions from partner states have also increased by 10 per cent.

The budget of the EAC is made up of equal contributions by each of the five EAC partner states, as required by Article 132(4) of the Treaty. The idea of equal contribution to the EAC budget by partner states was essentially supposed to underline the equal partnership of the member states in the Community (Francis Ayieko). It would eliminate the tendency of one state having an upper hand in the affairs of the Community on the grounds that it makes greater financial contributions than other member states.

These legal controls notwithstanding, at the Kigali summit, the Burundian President informed his counterparts that his country could only afford to pay US $1m in the 2008 financial year, which constituted only about one third of the subscription. It was agreed that Kenya, Uganda, Tanzania and Rwanda should contribute US $8m towards Burundi's subscription fees. Uganda agreed to contribute US $2.2 million as membership fees for Burundi.

Several key issues emerge from this move. First, and curiously, the EAC Treaty contains no provision about member states assisting a defaulting partner state. Some could argue that the decision to bail out Burundi was in contravention of the Treaty. Unpaid dues should be recorded as an outstanding debt (and if so treated with leniency) or the Community would invoke the powers under Articles 143 and 146 of the Treaty, in which case Burundi would have been

subjected to such action as the Summit may, on the recommendation of the Council, would have determined; or be suspended from the Community.

Further, at a minimum, the national parliament, being an important body in the operations of the Community, should have been consulted before such a decision was taken. Issues of assisting other states are of national concern. The process should, therefore, have been consultative.

Problems like this one would perhaps be solved by the proposals in the Common Market Draft Protocol, if so adopted. Under the Protocol, contributions by member states to the EAC annual budgets will no longer be uniform. The Draft Protocol, in Articles 154-156, proposes that the Community be financed through direct contributions by partner states pegged at 0.5 per cent of the previous year's GDP and a 1.5 per cent charge on customs revenue. This would create room for countries with low GDPs, which would otherwise not afford to fulfill their financial obligations (although this is not an absolute guarantee that they will be able to do so afterwards).

Organs of the EAC and their Role in 2008

The EAC has a number of organs that play significant roles in its development. These include the Summit; the Council; the Coordination Committee; sectoral committees; the EACJ; the EALA; and the Secretariat. These organs and institutions, in the performance of their functions, are required to act within the limits of the powers conferred upon them under Article 9 of the EAC Treaty. This section makes an assessment of the role of these organs in the year 2008.

The Summit

The Summit consists of the heads of state or government of the partner states. The Summit is mandated to give general directions and impetus regarding the development and achievement of the

objectives of the Community; considers the annual progress reports; and reviews the state of peace, security and good governance within the Community and the progress achieved towards the establishment of a political federation of the partner states.

The Summit meets at least once in every year and may hold extraordinary meetings at the request of any of its members. The Summit discusses business submitted to it by the Council of Ministers and any other matter which may have a bearing on the Community. It is empowered to determine its own procedure, including that for convening its meetings, for the conduct of business thereat and at other times (Article 12 of the EAC Treaty).

At the 7th Extraordinary Summit of the heads of state held in Kampala on 22 October 2008, the Summit received a report on the retirement of the judges of the EACJ and the recommended names of those to replace the retiring judges. The Summit appointed Hon. Mr. Justice James Ogoola to the appellate division and Hon. Mr. Justice Benjamin Patrick Kubo to the first instance division. The Summit also considered the proposed EAC anthem and directed the Council to review the three shortlisted songs and make recommendations to the 10th Summit accordingly.

In addition, the Summit received a report from the Council that, pursuant to a directive made by the Summit, the secretariat had embarked on the preparation of a comprehensive roadmap to facilitate the effective integration of the Republics of Rwanda and Burundi into the organisational system of the EAC. The integration was deemed necessary to provide for political visibility of Rwanda and Burundi at the executive level of the EAC management structure.

The Summit endorsed the decision of the Council to split the position of deputy Secretary-General (projects and programmes) into two, namely; deputy Secretary-General (planning and infrastructure) and deputy secretary (productive and social sectors). One of these positions is to be filled by the incumbent deputy Secretary-General

through designation, while the other is to be filled by one of the new partner states through appointment.

It is not disputed that nationals of both Rwanda and Burundi have to feature in the organs of the Community. However, the manner in which this principle was effected raises concern. Creating additional positions comes with considerable financial implications. What would have been more appropriate would have been to redistribute existing posts. In particular, Burundi, which has failed to meet its financial obligations, probably did not deserve the additional administrative positions created.

The Council of Ministers

The Council consists of the ministers responsible for East African Community affairs of each partner state and other ministers of the partner states as each partner state may determine (Article 13 of the EAC Treaty). The Council is the policy organ of the Community; it promotes, monitors and keeps under constant review the implementation of the programmes of the Community; and ensures the proper functioning and development of the Community in accordance with the Treaty. The Council may also request advisory opinions from the EACJ in accordance with the EAC Treaty.

The Council meets twice every year, one meeting of which is held immediately preceding a meeting of the Summit. Extraordinary meetings of the Council may be held at the request of a partner state or the chairperson of the Council (Article 15 of the EAC Treaty). The regulations, directives and decisions of the Council taken or given in pursuance of the provisions of the Treaty are binding on the partner states, on all organs and institutions of the Community other than the Summit, the court and the assembly within their jurisdictions.

Under the terms of Article 6 (d), the Council is required to oversee the implementation of a key objective, with relevance to the

fight against corruption. In particular, adherence to the principles of good governance, including democracy, rule of law, accountability, transparency, social juice, equal opportunities, gender equality as well as recognition and protection of human rights in accordance with the African Charter on Human and People's Rights (ACHPR). Anticorruption is also regarded as an important element of good governance (EAC Secretariat).

Pursuant to this, the 15th Meeting of the Council of Ministers (17 – 18 March 2008), noted that the anticorruption authorities of the partner states had launched the East African Association of Anti-Corruption Authorities (EAAACA) in November 2007. The launching of EAAACA is a landmark achievement within the EAC since it will enable the authorities to join forces to fight corruption and enhance cooperation in preventing and combating corruption in the region.

The initiative is intended to complement the efforts of the partner states in promoting good governance and combating corruption. The regional framework would establish a set of guidelines to promote and strengthen the development of mechanisms and institutions to control corruption and promote good governance, and facilitate harmonisation of policies and national legislation relating to the prevention of corruption in both the public and private sectors. As the Community continues to grow by widening and deepening cooperation, there is need for a regional framework that guides its organs and institution on good governance and anticorruption.

The Council directed the Secretariat to convene consultative meetings of the relevant sectors and discuss with them on the agreeable and comprehensive regional framework on good governance for the EAC. It also directed the secretariat to commence the process of developing a code of ethics and integrity for the Community, its organs and institutions; convene a meeting of the heads of national anticorruption authorities to consider the Draft Protocol on Anti-

Corruption, Ethics and Integrity; and establish a sectoral committee on anticorruption, ethics and integrity to articulate policy and operational issues related to the sector.

The Draft Protocol covers the principles, acts of corruption, prevention measures, confiscation or seizure of proceeds and instruments of crime, establishment of financial intelligence units, extradition, mutual legal assistance and institutional framework. What is to be observed, however, is that most of the principles embedded in the Draft Protocol are contained in the anticorruption legislation of member states, which, however, suffer from limited enforcement due to lack of political will. What therefore needs to be emphasised is greater regional cooperation in respect of enforcement of the laws, accompanied by the necessary political will.

The 16th meeting of the Council of Ministers, held on 16 September 2008, reviewed the status of ratification of various protocols and noted that a number of them had not been ratified. The meeting decided that timely signature of the protocols should be effected and timelines in future be set with respect to ratifications. Partner states were urged to ratify all the outstanding protocols and deposit the instruments of ratification with the Secretary-General by 31 December, 2008.

Article 151 of the Treaty empowers member states to conclude such protocols as may be necessary in each area of cooperation. Each protocol must be subject to signature and ratification by the parties hereto. Failure by a member state to timely ratify a protocol is in contravention of the Treaty which states the obligation in mandatory terms. A possible alternative to addressing the delaying tactics of member states in respect of ratifying Protocols is to make full use of the EALA. As the legislative organ of the Community, the EALA could resort to enacting protocols as "acts" so as to have immediate effect without waiting for ratification from members.

The Council also directed the Secretariat to file a request for an advisory opinion from the EACJ by 31 October, 2008 on the application of the principle of variable geometry. The principle of variable geometry is one of the operational principles of the Community which allows for progression in cooperation among groups within the Community for wider integration schemes in various fields and at different speeds. This provision, read together with the relevant interpretation of the principle in the EAC Treaty, suggests flexibility in the progression of integration activities, projects and programmes; and progression of such activities, projects and programmes in cooperation with some of the partner states, as opposed to all the partner states simultaneously.

Variable geometry implies that not every country need take part in every policy but some can cooperate more closely. Greater variable geometry could help in deepening the Community. The countries that aspire to have a "political union" may be able to build a coalition in certain policy areas, and thus revive a sense of forward motion, and make other "slow-moving countries" realise the benefits of a deeper integration.

The Tripartite Summit directed the three RECs to undertake a study on the establishment of the FTA which would take into account the principle of variable geometry. In this context, variable geometry will imply that some members of the EAC will be in position to establish closer ties with SADC and COMESA, without necessarily waiting for all other members to move together.

However, the interpretation accorded to the principle under the Treaty and its application in the EAC is contestable on the basis of the fundamental requirement, under the Treaty, for consensus as a basis for decision making by the Summit of Heads of State and the Council of Ministers.

Variable geometry may also lead to a more complex EAC, by having members at different levels of economic integration. This

may weaken EAC institutions *vis-à-vis* member states' governments. Further, the more some countries are permitted to pick and choose what they wish to do, the greater the risk that others will demand the right to opt out of policies they dislike. This may lead to disintegration of the Community and to the formation of other multiple blocs.

The EAC, therefore, needs to define the set of policies that every member state must take part in. Policies that ensure long-term existence of the Community should never be subjected to the principle of variable geometry. These should include trade, the single market and its four freedoms (of goods, services, capital and people), some environmental rules, some cooperation on borders and policing.

The council also established the EAC Forum of Heads of Electoral Commissions; established a subcommittee of experts and directed the secretariat that a study be commissioned to research on the cost of elections with a view to reducing costs. The study should be conducted by experts from the partner states while borrowing best practices from other African countries. The activities of this body should be incorporated into the EAC programmes and calendar of activities.

The role of this forum would be mainly to initiate development of policies, strategies and programmes that promote the culture of democracy and adherence to the rule of law in East Africa; to harmonise the laws, policies and strategies of national electoral commissions with a view to sharing information, expertise and election materials; and to share and harmonise their electoral calendars and road maps.

Establishment of the Forum followed the discussion of electoral commission chairpersons on the possibility of developing a regional policy on the role of the EAC in promoting democratic principles and practices as well as consolidating democracy and adherence to the rule of law.

Articles 6 and 123 (3) (c) of the Treaty for the Establishment of the EAC provides for development and consolidation of democracy, respect for the rule of law and respect for human rights. The establishment of the EAC Forum of Heads of Electoral Commissions can be regarded as an important step towards the realisation of these important principles. The idea came at a time when Kenya's electoral process is under scrutiny following disputed presidential elections that led to a blood bath that left over 1,000 people dead. In the opinion of some critics, the EAC did not play a positive role to resolve the problem. This would have been an ideal opportunity for the Forum, to intervene.

For the Forum to be effective in its work, a number of factors have to be taken into account. First, Burundi has no permanent electoral commission. It is therefore fundamental that the EAC Forum assists Burundi in establishing an electoral commission.

It would not be necessary for the EAC Forum to conduct elections. The national electoral commissions will continue conducting elections but with the Forum as an umbrella body overseeing the process. If this is the case, then harmonising electoral calendars for member states is an appropriate strategy. Elections in the EAC member countries have often been characterised by corruption, intimidation and all sorts of electoral malpractices. With such a disorganised electoral process, the Forum cannot possibly have a simultaneous and effective presence in all five member states. It becomes sensible therefore, to consider holding elections without an overlap of dates.

Third, the Forum should be granted the mandate to resolve stalemates, as would have happened in the case of the Kenya general election of 2007. Its mandate should move from that of passive "international observers" to a more proactive one. Before a presidential election petition is filed in court, the Forum should have an opportunity to examine the matter and give its position.

In future, member states should consider entrusting the Forum with the task of conducting elections, in some form of partnership with the national electoral commissions. Such a strategy may go a long way in promoting the credibility of elections and results and thus enhance the rule of law, good governance, peace and stability.

At the 19th Extraordinary Meeting of the EAC Council of Ministers held in Zanzibar on 10 November 2008, the partner states agreed to establish "an independent and transparent mechanism for monitoring water release and major abstractions under which the release and abstractions can be measured at all times by representatives of the partner state of the Lake Victoria Basin".

The covenant which the EAC partner states agreed to conclude with due dispatch will require the partner states to develop, implement and be accountable to a legally binding water release policy on Lake Victoria and in its basin. The Council of Ministers directed the Lake Victoria Basin Commission (LVBC) secretariat to finalise the water release and abstraction policy and develop a legal mechanism to ensure compliance with the agreed curve limit; and abstractions from the basin that are equitable and reasonable. The partner states further agreed that the envisaged legal mechanisms shall include dispute resolution procedures as already provided under the Treaty for the EAC.

The 19th Extraordinary Meeting of the Council of Ministers also considered the proposed amendment of the Lake Victoria Bill, 2008 that has been tabled in the EALA. It upheld the decision of the Sectoral Council of Ministers for the Lake Victoria Basin on 23 May 2008, maintaining the institutional framework contained in the Bill which is in harmony with the Treaty for the Establishment of the EAC and the Protocol for the Sustainable Development of the Lake Victoria Basin.

The extraordinary council meeting directed the LVBC secretariat to convene a consultative meeting between the Sectoral Council for the

Lake Victoria Basin and members of EALA committee on agriculture, tourism and natural resources in order for them to exchange views on the divergence of the proposed Amendment Bill.

The Extraordinary Council Meeting (ECM) also considered the East African Community Budget Bill 2008, which had been introduced in the EALA for debate and enactment into law. In a conciliatory move, the Extraordinary Council Meeting recommended to EALA to review the East African Community Budget Bill, 2008 to ensure that it complied with the provisions of the EAC Treaty. The ECM also directed the secretariat to expeditiously convene an inter-organ consultative forum for exchange of views on the different roles and functions of the EAC organs.

The East African Court of Justice

The EACJ is the judicial body of the Community, mandated to ensure adherence to law in the interpretation and application of and compliance with the Treaty. The judges of the Court are appointed by the Summit from among persons recommended by the partner states who are of proven integrity, impartiality and independence and who fulfill the conditions required in their own countries for holding such high judicial office, or who are jurists of recognised competence in their respective partner states.

The provisions on the appointment of judges indicate considerable control of the institution by the heads of state of the Summit. By deciding who to nominate and appoint as judges, the Summit exercises an extension of their national powers. The Summit exercises control over the mode of appointment and in the subsequent composition of the court retains the power to appoint the president and vice president of the Court from among those appointed. The procedure for removal — which can only be affected upon the recommendation of an *ad hoc* tribunal, is likewise vested in the Summit. While the creation of this tribunal is made on the basis

of a complaint over misconduct or inability to perform the functions of office, it is not clear who is to initiate the process leading up to appointment of the tribunal or even how the process is triggered. The lack of clarity coupled with the fact that it is generally the Summit that initiates the process means that the East African heads of state enjoy wide discretion in the removal of judges as well.

The jurisdiction of the Court initially extended to the interpretation and application of the Treaty. The Court also has original, appellate, human rights and other jurisdiction as determined by the council. To this end, partner states are required to conclude a protocol to operationalise the extended jurisdiction. The decisions of the Court on the interpretation and application of the Treaty have precedence over decisions of national courts on a similar matter.

The Draft Protocol to Operationalise the Extended Jurisdiction of the East African Court of Justice seeks to grant the EACJ with appellate jurisdiction. Article 21 of the Draft Protocol grants the EACJ jurisdiction to hear and determine appeals from decisions of commercial courts of partner states. The key question to be determined is how appropriate it is to clothe this court with appellate jurisdiction? In the past, where there was the East African Court of Appeal (EACA), the partner states did not have supreme courts and the EACA served as such. Currently these countries have supreme courts which also handle appeals emanating from commercial courts. From the wording of Article 21, it appears that cases will move directly to the EACJ from the commercial courts by way of appeal. If this is the intended purpose, there are two major consequences. The first one, which is obvious, is that the court, with its resources, will not manage the bulk of cases that will flow in. Second, whereas access to this court may be seen as a way of promoting trade in the Community, it will in the end restrict the rights of the appellants. An appellant from the commercial court to the EACJ will have only one chance to appeal. If she/he loses in the EACJ, that's the end of

the matter. This could only be remedied if the appellate division of the court is functional. On the other hand, a person appealing through the national court system has the benefit of appealing to the Court of Appeal and, if still dissatisfied, to the supreme court (where one exists).

If the above construction is not the intended purpose of the article, in which case, cases from the commercial courts will first go through national appeal processes, it will necessitate the amendment of the Supreme Court Rules of the respective member states, to elaborate on the role of these courts in assisting the EACJ to effectively dispose of the appeal. It will also be necessary to specify the grounds on which such an appeal is preferred, that is, whether on points of law of fact or mixed law and fact.

In either construction, there is a challenge as to the composition of the court. The judges of the EACJ also sit on the national benches. A judge may therefore hear a case in the national court sitting as a national judge. If a party is dissatisfied with the decision of the court, she/he would on lodging of an appeal to the EACJ, be shocked to find the same judge who gave judgment at the national level hearing the case again (in appellate capacity this time. This is contrary to natural justice as there is a likelihood of bias.

The court also serves other functions, including being an industrial court and an arbitrator over matters referred by any court or tribunal of a partner state concerning the interpretation of the Treaty. The court, upon the request of the Summit, the council or a partner state also gives advisory opinions on questions of law arising from the Treaty which affect the Community.

Following the interim order in the case of *Prof. Peter Anyang' Nyong'o & 10 others* v *The Attorney-General of Kenya & 5 others*, the Summit endorsed the recommendation of the Council of Ministers to reconstitute the EACJ by establishing two divisions, a Court of first instance with jurisdiction as per present Article 23 of the Treaty,

and an appellate division with appellate powers over the Court of first instance. This necessitated the amendment of the Treaty. The amendment also sought to limit the court's jurisdiction so as not to apply to "jurisdiction conferred by the Treaty on organs of partner states"; and to deem past decisions of the court and existing judges to be decisions and judges of the first instance division.

The amendments were effected in a process that was irregular which prompted the East Africa Law Society (EALS) and national bar associations of partner states to seek an invalidation of the amendments in the case of *The East African Law Society & Ors.* v *The Attorney-General of the Republic of Kenya & Ors.*, *Reference No. 3 of 2007 [2008] EACJ* (Judgment given on 1 September 2008).

The subject matter of this reference was that the purported declaration of the Summit, contained in the communiqué of 30 November 2006, was not published in an *East African Gazette Notice*, as expressly stipulated by Article 11 of the Treaty, which therefore rendered the decision of no legal effect. That the timelines, as well as the elaborate procedures, for treaty amendment, expressly stipulated in Article 150 of the Treaty, were infringed, and the said amendments therefore have no legal effect. In particular, there was no written proposal from either a partner state or the Council of Ministers as provided in Article 150(2) and (3); the Secretary-General of the Community did not communicate the amendments in writing to the partner states as provided in Article 150(3); the mandatory 90-day period for partner states' comments prescribed under Article 150(4) and (5) was not observed; and there were no written comments from the partner states as stipulated in Article 150(5).

Further, that in purporting to amend the Treaty, while the court was still seized of Treaty (*sic*) Reference Application No. 1 of 2006, the partner states and the secretariat of the Community infringed Articles 8(1) (c) and 38 (2) of the Treaty. As a consequence the entire purported process of Treaty amendment was vitiated and was

of no legal effect since the Summit, Council of Ministers, Office of the Secretary-general and the three partner states' attorneys-general excluded all the other organs of the Community, the partner states governments and more importantly, the people and registered interest groups of East Africa in the irregular and rushed Treaty amendment process. This infringed both the preamble and Articles 1, 5, 6, 7, 8, 9, 11, 38 and 150 of the Treaty.

On the basis of this analysis of Article 150, counsel for the applicant argued that although in the communication to the partner states and in the submission to the Summit the Secretary-General purported to do so in accordance with Article 150(3) and (5) respectively, the submission of the proposed amendments to the Summit before expiry of the prescribed 90 days was an infringement of Article 150(5). He argued further that the undisputed fact that the amendment process from initiation to conclusion took only a few days, is sufficient proof that the consultations envisaged under the Treaty were not carried out, and the Treaty thereby infringed.

Court found that the objective and purpose of Article 150 is to stress that the Treaty, as a contract binding on all partner states, may be amended only if all the partner states agree; and to regulate the procedure for processing the amendments up to conclusion.

Court disagreed with counsel for the applicants, saying that the purpose of prescribing the period of 90 days in Paragraph (4) is to provide for the period that every partner state must spend undertaking unspecified consultations. That in construing Paragraph (5) therefore, it cannot be correct to transform that purpose into one of prescribing a mandatory period for unspecified consultations. The clear core objective and purpose of Paragraph (5), on the other hand, is to direct that the Secretary-General shall submit the proposed amendments with the comments from the partner states, if any, to the Summit. This does not cover the scenario where the partner states take a shorter period to comment. Accordingly, Paragraph (5)

does not expressly or impliedly require the partner states to carry out any consultations, nor does it expressly or impliedly require the Secretary-General to hold the proposed amendments and comments thereon received from partner states until expiration of the 90 days. The correct construction must be that the provision directs the Secretary-General to submit them to the Summit not later than the expiry of that period.

Accordingly, court found that the submission of the proposed amendments to the Summit by the Secretary-General within 5 days after his communication to the partner states was not an infringement of Paragraph (5) of Article 150 of the Treaty specifically.

Court also considered if by reason of failure to carry out wide consultations on the proposals for the amendments, the process constituted an infringement of the Treaty in any other way. Court found that under Article 7, the people's participation in cooperation activities set out in, and envisaged under the Treaty, is ranked high among the operational principles of the Community. That failure to carry out consultation outside the Summit, Council and the secretariat was inconsistent with the Treaty and therefore constituted an infringement of the Treaty within the meaning of Article 30.

Court also found that the amendment process, in the circumstances, was conducted in bad faith. The amendment was designed to suit the circumstances of the two Kenyan judges on the court. That the obligation under Article 38(2) is not to refrain from an act that is detrimental but from one that might be detrimental and the move in the amendment was capable of unduly influencing the pending judgment in Anyang' Nyong'o case (*supra*) and thereby may be detrimental to the just resolution of the dispute.

Since the purported ratification processes for the Treaty amendments employed by the partner states were illegal, unconstitutional and of no legal effect, court recommended that the said amendments be revisited at the earliest opportunity of reviewing the Treaty.

There are a number of lessons to be drawn from this case. First, it illustrates the commitment of the EACJ in ensuring compliance with the Treaty obligations and procedures by partner states. By pronouncing itself on the validity of the amendment process, court demonstrated the existence and operation of a system of checks and balances within Community organs.

However, the court declined to determine the issue of whether the amendments will strengthen the Community. The parties also did not submit on it because it was felt to be immaterial. At this stage, I wish to consider whether the amendments will strengthen or weaken the Community.

Creating the appellate division with appellate powers over the court of first instance is a positive step. It will move to strengthen the institutional structure of the Community. If there is no such appellate division, it would mean that a person dissatisfied with the decision of the court of first instance has no remedy. Of course, errors in interpretation and application of the law by courts occur; these must be addressed at a higher level. What is perplexing is the position that after the creation of the appellate division, past decisions of the court and existing judges were deemed those of the first instance division. This position may give the appellate division retrospective appellate jurisdiction, in which case, decisions prior to its creation may be brought in the form of appeals. There should be a limit on this such that the court will hear cases as they come to the lower court after the establishment of the appellate division.

The amendment seeking to limit the court's jurisdiction so as not to apply to jurisdiction conferred by the Treaty on organs of partner states had two dimensions. First, the court as an organ of the EAC has a duty to ensure that the principles under the Treaty, including good governance and respect for human rights, are adhered to by member states. This necessarily means that where they are neglected, the court should intervene to ensure compliance, by hearing cases from victims in member states.

On the other hand, limiting the jurisdiction of the court can be supported on grounds of practicality. If the jurisdiction of the EACJ is to extend to matters which national courts can handle lawfully, the EACJ would be flooded with cases. If national courts in partner states are already inundated with a huge backlog of cases, then how would the single court handle such claims?

Amidst these difficulties, it is recommended that the EACJ's jurisdiction should extend to matters that involve infringement of the EAC Treaty or disputes over the interpretation of the provisions of the Treaty. Of course this may involve issues of human rights violations, which the applicant may rightly argue it is against the Treaty (because it implores respect of human rights). But this should only come after the adoption of the Protocol to Operationalise the Extended Jurisdiction of the EACJ. Complaints to the EACJ should come after all local remedies have been exhausted.

EACJ and Human Rights

Under the EAC Treaty, the partner states undertake to abide by six fundamental principles, including the "recognition, promotion and protection of human and people's rights in accordance with the provisions of the African Charter on Human and Peoples' Rights" (Article 6(d)). The EACJ is mandated to ensure the adherence to, application of and compliance with the Treaty. On the face of it, this implies that the EACJ has powers to enforce Article 6(d) that relates to human rights. However, the Treaty specifies in what instances and which bodies can make references to the court. These are confined to a partner state, the Secretary-General or any person (both legal and natural) resident in a partner state. Any resident of a partner state may challenge the legality of any act, regulation, directive, decision or action of a partner state or an institution of the community, but only in relation to interpretation of the treaty provisions. In sum, the court has no jurisdiction over infringements that occur or relate

to human or other individual rights of EAC residents that do not necessarily relate to the interpretation of the Treaty.

These provisions illustrate that there was a concern right from the start that the court should not be allowed too much freedom of action to significantly affect the political and legal institutions of partner states, such as the executive or other issues of democratic governance. The limitation of the court's jurisdiction to the interpretation of the Treaty provisions was clearly designed to keep the level of scrutiny over the actions of the individual executives of each country to a minimum, and to limit the extent to which questions could be raised over the extent to which human and people's rights were being observed in individual member states.

However, with time, EAC organs have realised the need for integrated efforts towards human rights protection. The Council of Ministers, in its 15th Meeting, urged National Commissions for Human Rights of Rwanda and the vice ministry of human rights, Burundi, to examine their constitutions in order to have a complete status of all partner states' Bill of Rights. The Summit also urged the national human rights commissions of Kenya, Uganda and Tanzania to review their reports on the Bill of Rights for quality assurance. The Summit also adopted the proposed EAC Plan of Action on Promotion and Protection of Human Rights in East Africa.

In a related development, the Draft Protocol to Operationalise the Extended Jurisdiction of the EACJ seeks to clothe the EACJ with human rights jurisdiction. Article 6 provides that the court shall have original jurisdiction in the disposition of all matters related to human rights referred to it. The jurisdiction of the court extends to all cases and disputes submitted to it concerning the interpretation and application of universal instruments for the promotion and protection of human and peoples' rights (Article 10).

Extending the jurisdiction of the court is a commendable step by the member states towards the realisation of the Treaty principles.

The restriction on exhaustion of local remedies before an application is filed to the court (Article 14 (b)); and the restriction of claims to only those relating to violation of universal instruments for the protection of human rights, are important safeguards against case backlog which could be conveniently disposed of at national level.

However, effective operation of the court within this extended jurisdiction will require some other steps to be taken. These include appointing to the bench a good number of judges with demonstrable competence in the relevant area.

The East African Legislative Assembly

The EALA is the legislative organ of the Community. The Assembly is required to liaise with the national assemblies of the partner states on matters relating to the Community; debate and approve the budget of the Community; consider annual reports on the activities of the Community, annual audit reports of the audit commission and any other reports referred to it by the council; discuss all matters pertaining to the Community and make recommendations to the council as it may deem necessary for the implementation of the Treaty; and make its rules of procedure and those of its committees.

Article 50 provides the procedure for election of members of the Assembly. The national assembly of each partner state must elect, not from among its members, nine members of the assembly, who must represent as much as it is feasible, the various political parties represented in the national assembly, shades of opinion, gender and other special interest groups in that partner state.

Of particular concern is the way in which elections for this body are conducted. EALA members are elected by individual national parliaments. The problem with this is that the five parliaments manipulated the elections in order to secure their interests in the regional body, which essentially produced mainly the National

Resistance Movement (NRM), CCM or the Kenya African National Union (KANU) representatives to the regional assembly. It is obvious that the presumption on which these elections were based was that the interests of the ruling parties in the EAC partner states coincided with those of the people.

In the year 2008, the EALA approved a motion to ensure that all pending cases before the International Criminal Tribunal for Rwanda (ICTR) be transferred to Rwanda when the court's mandate expires in 2010. The ICTR was established by the UN Security Council 14 years ago and the same organ has given the court up to the end of 2009 to finish all trials while appeals should be completed by 2010. The EALA also requested the Council of Ministers to table the motion before the regional heads of state for a common position regarding the transfer of genocide cases from the ICTR to the national jurisdiction in Rwanda, to be adopted.

The regions' abundant natural resources can be harnessed in such a way as to contribute to regional development, prosperity, peace and stability. But exploitation of natural resources is also known to be a source of violent conflict. It is therefore imperative that the EALA and other oversight institutions assume their role in relation to the proper management and exploitation of natural resources.

It is important to note that the draft resolution of the meeting on "Promoting Transparency and Accountability of Revenue from Extractive Industries, held in Arusha, Tanzania, in February, called for the review of extractive industry laws and contracts in the region, improved transparency of contracts and the strengthening of parliamentary capacity to oversee the sector. It also called for all members of the EAC to consider joining the Extractive Industries Transparency Initiative (EITI), an international standard for improving transparency and accountability of revenues from oil, gas and mining.

It is also worth noting that all the EAC member states are signatory to the Nairobi Pact on Stability, Peace, Security and Development of 2006, one of whose ten protocols seeks to combat the illegal exploitation of natural resources.[2]

Conclusion

Economic integration is an indispensable, viable option for developing countries to achieve economic development. This is because it comes with the bigger market of integrated countries, which is attractive to the entire world. Economic development is not, however, the only objective of integration. Promotion of the rule of law, protection of human rights and promoting good governance are all key elements of integration. In the context of the EAC, these form part of the operational principles of the Community. However, the realisation of the benefits associated with economic integration requires concerted effort at all levels in the Community, that is, at national and the Community level. The EAC, through its organs, should take the lead in the integration efforts and encourage the member states to comply with the obligations assumed under the Treaty and its protocols. The discussion above has illustrated that, in the year 2008, the EAC undertook substantial work towards integration and realisation of the principles of the Treaty. The discussion has identified areas that are controversial and need reform. It is hoped that if such recommendations are implemented, the EAC will emerge stronger.

2 For details see www.icglr.org

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2

State of Constitutionalism and Human Rights in Kenya 2008

Collins Odhiambo

Introduction

> *"As hope withers and economies flounder, a new generation of Africans are turning their backs on the continent's old guard political leadership. From Zimbabwe to Uganda, Angola to Kenya, post colonial leaders and pre-independence political parties are falling from grace. Desperately holding onto power by political manipulation and old western bashing slogans of the 1960s, they blame their nations' financial ills on foreign exploitation rather than their own failings-but with a new generation of educated African citizens, such transparent rabble rousing rings increasingly hollow. Economic progress, not political slogan is their concern."*[3]

The quote above captures the hopes and aspirations of the multitudes who believe good governance and politics will realise progress in their lives. This progress will only be possible under a culture of constitutionalism and respect for human rights. Constitutionalism and human rights are related logically. Both have to be present for either to be realised. While respect for human rights is highly dependent on constitutionalism, the latter is dependent on the legitimacy of a particular constitutional dispensation. The measure of legitimacy is rooted in the social contract view of the constitution,

3 Julia Stewart, *Quotable Africa*, September 2004, P. 234, South Africa. Penguin Books.(Quoting Milan Vesely)

which relies heavily on the participation of the governed in naming and granting powers to the governor. This may explain why the delivery of a new constitution has been on the priority lists of all political parties competing for power since 2002.

Accordingly, the state of constitutionalism and human rights in Kenya 2008 cannot be separated from the attempts by the people of Kenya to establish a new constitutional dispensation. For this reason, the election of December 2007 was a way of involving citizens in realizing the new constitutional dispensation. The disagreements and conflict over the handling of the electoral process led to unforgettable post-election violence and accompanying human rights abuses. For purposes of constitutionalism, the issue raised in this paper is why the conflict was never settled in court. This paper provides a brief background to the year 2008; it theorises about judicial settlement of conflicts over elections, and narrates processes and attempts made to establish a new constitutional dispensation. The paper then presents the various human rights indicators in Kenya in 2008.

Background

> *"We must now destroy or abandon all ideologies that tend to divide us. All of us must register a new era of justice, fair dealing and equal opportunities for every part of the country regardless of the tribe… We must guarantee freedom of the press …the protection of liberty over military authority."*[4]

These are familiar sentiments after an orderly election, especially when the aspirations of a nation disturb the mind of a president. When Kenyans voted in 2007 the masses were taking control of their political destiny.[5] However, the outcome of the elections thrust Kenya

4 William V.S Tubman, 6th president of Liberia's inaugural address in Wilson, as Quoted in *Quotable Africa* (Ibid) p. 240

5 Constitution and Reform Education Consotium (CRECO) (2008), Political Thuggery. The State of Kenya Elections 2007Report, Nairobi (Unpublished)

into violence in the early months of 2008. The astonishing scale of the reaction that greeted the announcement of Mwai Kibaki of the Party of National Unity (PNU) winner almost sent Kenya into civil strife. The post- election violence (PEV)[6] is reminiscent of a form of structural violence that had gone unchecked for a longtime but was triggered by a poorly handled election. It is also true that institutional failure diminished greatly the capacity of the state to deal effectively with the violence that erupted and with the total disregard for constitutionalism.[7] Why was the disagreement over election results was never subjected to a judicial process? The constitution of every country sets out the framework and functionality of the government. It sets out the three main organs that are defined in the doctrine of separation of power, namely the executive, the legislature and the judiciary. The functions of these three organs are complementary.[8] Ideally neither of the three controls the other. However, in Kenya, like in many other African countries, this has not been the case. There have been excesses by the executive which have led to the subordination of both parliament and the judiciary. [9]

Constitutionalism

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

6 Amnesty International (2008). State of the World's Human Rights Report, London, Amnesty International Secretariat, p. 177

7 Interview with Paddy Onyango, the Executive Director 4Cs Trust in March 2008.

8 Kanyeihamba, G.W. (1975) *Constitutional Law* and *Government in Uganda*. Nairobi: East Africa Literature Bureau (ELB) Publishers.

9 Kibara, G. (2008) State of Constitutionalism in Kenya 2003. (As accessed through www.google.com)

Therefore, the practice of politics according to a constitution is called constitutionalism. Constitutionalism also refers to a binding with a collection of fundamental rules and principles that restrain a government from exercising arbitrary powers. The process of constitutionalism aims to satisfy the citizens' political needs. It is the abuse of this fundamental political constitutive power that lead to bloodshed in Kenya.

The Judicature[10]

Judicial independence is of paramount consideration as an issue of reform. In Kenya appointments to the judiciary and control of the judicial budget largely remain the absolute discretion of the executive.[11] The role of the court was mentioned above with regard to its failure to resolve disputes. The complementary duties of the arms of the government is illustrated by the case of *Patrick Ouma Onyango and others v the Attorney General*[12] where the court observed that both parliament and the executive have a duty to deliver a new constitution to the people. This paper will consider the role of the judiciary in light of the events of early 2008.

The judiciary is the arm of government charged with resolving disputes that arise between private persons *interse,* or between the private person and the government. Questions about the role and the efficacy of the judiciary arose when the year started. The question raised here is whether judicial settlement is a satisfactory method for managing electoral conflicts. The thesis is as follows: Elections are essentially conflictual, and proper management of elections is key to a peaceful outcome. The proper management of elections in

10 Constitution of Kenya (2001) Revised Edition, Chapter Four.

11 Remarks by Dr Kithure Kindiki on the 29 March 2008 during a symposium at Ufungamano by civil society to reinforce its role in constitution making

12 Misc. Application No. 677 of 2005.

any jurisdiction is established by law and can be contested in law.[13] Since conflicts over elections are often a contestation of the conduct and management of elections, judicial settlement – a constitutional forum for contestation in law is a satisfactory method of managing such conflicts.

In situations of conflict, however, third-party intervention via judicial process is criticised for its tendency to provide a settlement as opposed to a resolution of the conflict. In a competitive situation such as elections, each of the adversaries assumes an "ubiquitous drive to dominate".[14] The pursuit of a judicial settlement over an election would then seem to declare a winner and loser of an election petition just as the election would. it would be contradictory to refuse to accept judicial settlement as a satisfactory method for managing conflicts over elections.

Judicial Settlement of Conflicts over Elections

Judicial settlement comprises that process by which parties require the court to adjudicate their dispute.[15] In respect to elections, the aggrieved party may petition the court on one or all of the following grounds. First, that the electoral commission failed to conduct the election in accordance with the principles laid down in the law of the land. Second, that the respondent committed illegal practices under the electoral law or that the respondent's agents did so with the respondent's knowledge.[16] The courts will then have to determine

13 Interview with Richard Kakeeto, a lawyer and conflict management scholar at the Catholic University of East Africa, March 2008.

14 Groom A.J.R. (1990) "Paradigms in Conflict; the Strategist, the Conflict Researcher and the Peace Researcher" In J. Burton and F. Dukes (eds) *Conflict: Readings in Management and Resolution*. London: Macmillan, p. 89.

15 Mwagiru, M. (2000) *Conflict: Theory, Processes and Institutions of Management.* Nairobi: Watermark Publications. p. 111.

16 Kibalama, E. (2005) Opening up Into a cul-de-sac, the State of Constitutionalism in Uganda in 2002. In F.W. Jjuuko (ed.) *Constitutionalism in East Africa: Progress, Challenges and Prospects in 2002*. Kampala: Fountain

whether the electoral law was actually breached, whether the breach affected the result substantially and whether the respondent was in any way responsible for the breach. The court, on listening to evidence presented before it would determine the matter for or against the petitioner and examine what remedies would be available to the parties.[17]

Accessing the courts for such interventions is not obvious for all situations. The Tanzanian Election Act, 1985, for instance, had a provision requiring the electoral petitioner to deposit Tshs15, 000,000 as security for costs before the petition could be heard.[18] The Court of Appeal of Tanzania declared these provisions unconstitutional in February 2002 but the legislature, in collusion with the executive re-enacted the same provisions in October 2002, in breach of judicial independence.[19] While in Kenya (as opposed to the Tanzanian situation above), the consolidated appeals by the then head of opposition, Mwai Kibaki over losing the 1997 election, were dismissed on a technicality, that is, for failure to serve the incumbent personally.[20]

The question would then be whether courts are actually capable of handling issues raised before them and to settle them satisfactorily. The courts should live to the task of making satisfactory decisions on substantial matters of electoral processes without undue regard to technicalities. The use of technicality to dismiss judicial contest is a loophole that leave the judiciary open to manipulation by the executive, thus compromising judicial independence. It would seem

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Publishers. pp. 20-21.

17 *Ibid*.

18 Section 111(2) of the Tanzanian Elections Act, 1985 as amended by Act No. 4 of 2000.

19 *Julius Ishengoma, Francis Ndyanabo v Attorney General Civil Appeal No. 64 of 2001* (Court of Appeal of Tanzania Unreported) cited by Sengondo Mvungi" Constitutional Development in Tanzania in 2002 in Jjuuko, *op. cit*. p. 80.

20 *Kibaki v Moi Civil Appeal,* No. 172 &173 of 1999 (consolidated).

that if the judiciary maintains its non-representative character, then it has legitimacy.[21] It would then follow that, at the municipal level, judicial settlement ought to be guided by established principles of law. The electoral process governed by the electoral law can be only contested via the courts, which are vested with the interpretative function. This function can only be performed if the judiciary enjoys some level of independence .

Judicial Independence

The Judiciary's performance is always under constant scrutiny. The perceptions around its functions and independence influence the attitudes of parties regarding whether the Judiciary is capable of handling an election disputes. By the year 2002, for instance, Uganda's courts had made bold rulings on various electoral petitions, including declaring that the incumbent president flouted electoral procedures. [22]

Overreliance on political solutions is counterproductive, as this type of solution offers stability but not necessarily peace. We can therefore conclude from the outset that failure by the Kenyan opposition to contest the December 2007 elections in court represents a failure of constitutionalism. This failure placed crucial constitutional issues in the realm of politics. Let us turn to an exploration of the political and legal processes relating to constitutionalism in 2008. The fact that the chief justice himself was expected to swear in the president when it was apparent that there were serious doubts about the outcome of the election in 2008, was a blatant disclosure of the court's impartiality and independence.[23] Save for a few instances when the Court of Appeal overturned the

21 Warner, R. (2005) "Adjudication and Legal Reasoning." In M.P. Golding and W.A. Edmundson, *The Blackwell Guide to the Philosophy of Law and Legal Theory*. Oxford: Blackwell Publishing. p. 259 – 260.

22 Kibalama E, *op. cit.* p. 3.

23 Dr Kithure Kindiki, in an interview conducted in March 2009.

ruling of the High Court over a constitutional reference,[24] the court has remained largely reluctant to make rulings that would upset the executive.

The Legislature[25]

The primary role of the legislature is making laws. Laws are made through acts of parliament and require presidential assent to come into force. The parliament was constituted early in January 2008 amidst skepticism of its ability to properly discharge its function because of the continuing civil strife. Kenneth Marende and Farah Maalim were elected speaker and deputy speaker respectively. The Orange Democratic Movement (ODM) party used its dominance and parliamentary majority to beat the PNU and won both seats. Parliamentary offices had to be constituted in order to avoid a constitutional crisis that would have been precipitated by any delays. Kibaki, in response to concerns raised by the AU chairperson, appointed a committee to lead the post-election crisis talks.[26] ODM also selected a mediation team. This joint team became known as the National Dialogue team, which had the mandate of developing an accord that was to effect a return to normalcy.

The main parties were expected to mobilise their Members of Parliament (MPs) to pass the necessary legislation in parliament. This was not an easy task, as it involved intrigue by interested parties, including civil society groups. The process of crafting the national accord attracted much debate and disagreement. The table below, derived from the parliamentary Hansard of 2008, summarizes the processes that took place at varied dates.

24 *George Mwangi Karuga v Republic* Criminal Appeal 169A of 2006 – (2008) e KLR.

25 Constitution of Kenya (2001) Revised Edition Chapter Three.

26 See *The East Africa Standard* of 19 January 2008. Kibaki's team comprised Kalonzo Musyoka, George Saitoti, Amos Wako, Moses Wetangula, Martha Karua, Amos Kimunya, Uhuru Kenyatta, Ali Mwakwere and Mutula Kilonzo from the PNU coalition.

Table Below Define Moments of Constitutional Development in the Kenya National Assembly (KNA) in 2008

Date	Milestone Realised/ Passed	Implication/Purpose
11 March	House Business Committee formed without an opposition representation for the first time since reintroduction of multiparty politics	Harmonised assembly agenda and thus facilitated development of unity of purpose (consensus), at least technically, and constitutional voting thresholds were met.
18 March	Constitutional (Amendment) Bill 2008KNA No. 1 of 2008	Created and entrenched the position of the prime minister in the constitution.
	The National Accord and Reconciliation Bill KNA No. 2 of 2008	Legislated the Grand Coalition government.
8 July	Political Parties (Registration) Regulations, 2008	Operationalisation of the Political Parties Act.
23 October	The Truth, Justice and Reconciliation Commission (TJRC) Bill KNA No. 10 of 2008	Commission established to investigate and correct violations of human rights and historical injustice and to promote national dialogue and reconciliation.
4 November	Constitution of Kenya Review Bill KNA No. 12 of 2008	Provided legal framework for the review of the constitution of Kenya.
27 November	ECK Judicial Review ruling by the speaker	Reassertion of parliamentary supremacy in making and changing laws without hindrance.
	National Cohesion and Integration Bill KNA No. 9 of 2008	Promotion of ethnic integration and national cohesion.

4 December	Adoption of Independent Review Commission (IREC) Report	Parliament enabled to facilitate implementation of its recommendations.
10 December	Adoption of new parliamentary standing orders	More direct engagement between parliament and the public and within parliament enabled.
	Kenya Communication (Amendment)Bill KNA No. 14 of 2008	To include regulation of Information Communication Technology (ICT) and broadcasting.
11 December	International Crimes Bill	Makes provision for international crimes and domesticates the Rome Statute.
16 December	Constitution of Kenya (Amendment) Bill KNA No. 24 of 2008	Entrenched the review process in the constitution. Introduced an interim electoral body, interim boundaries body and an interim constitutional court to deal solely with issues arising from and during the review process.
	Criminal Procedure Code (Amendment) Bill KNA No. 5 of 2008	Updated the criminal procedures provisions to international standards.
17 December	Appointment of Parliamentary Select Committee on review of the constitution	Effectively commenced and drove the creation and operation of the constitution review institutions and the review itself.

The parliament in Kenya, for the first time ever, rose to the occasion and passed a number of pieces of legislation[27]. Several parliamentary

27 The total number of bills was 16, compared to 11 in 2007. The 2008 bills were; The Constitution of Kenya (Amendment) Bill 2008 introduced by the Attorney-General; The National Accord and Reconciliation Bill 2008; The Accountants Bill 2008; The Proceeds of Crime and Anti Money

committees were formed, which have the capacity to reprimand and compel attendance of its sittings by senior executive personnel. The legislature has managed to assert its authority and has up scaled its mandate as the people's watchdog. While asserting its authority to safeguard peoples' interests parliament passed a vote of no confidence in the minister for finance, refusing to conduct business with him and demanding for his replacement. The parliament also passed legislation disbanding the Electoral Commission of Kenya (ECK).[28] The parliamentary committee, likewise, took the Minister of Agriculture to task over his perceived involvement in a maize scam. The year 2008 showed a robust parliament that executed its duties with zeal.[29] The support parliament received from the United States Agency for International Development (USAID) in terms of facilitating live broadcasts opened parliamentary proceedings to public scrutiny and advanced parliamentary accountability to the electorate.

Review Debate and the Reform Process

When the mediation talks finally ended, parliament immediately embarked on the process of constitutional reform.[30] The Justice Minister tabled the Constitutional Review Bill, which stipulated how the constitutional review would be undertaken in a well

Laundering Bill 2008; The Criminal Procedure Code (Amendment) Bill 2008; The International Crimes Bill 2008; The Supplementary Appropriation Bill 2008; The Sacco Society Bill 2008; The National Cohesion and Integration Bill 2008; The Truth Justice and Reconciliation Bill 2008; The Finance Bill 2008; The Constitution of Kenya Review Bill 2008; The Kenya Communication Amendment Bill 2008; The Biosafety Bill 2008; The Anti Counterfeit Bill 2008; and the Appropriation Bill 2008.

28 Parliamentary Hansard proceedings before 20 December 2008.

29 Interview conducted with Ndolo Asasa on the role of the legislature, October 2008.

30 On 31 July 2008 *Daily Nation* reported that "Mediated talks finally end". It called on the parliament to speed up the adoption of the bills aimed at jumpstarting the review process.

coordinated process that was to involve a committee of experts, parliamentary select committee, the National Assembly and the referendum. However, political parties' interest in reforms within parliament seemed to have declined [31] and the public remained extremely pessimistic of the entire process. As the process of review was going on, the government had set in motion a process for amending the Communication Act; a process that aimed to introduce claw-back provisions on the constitutional right of freedom of expression.[32] The president assured Kenyans that the 10th Parliament was uniquely placed to deliver a new constitution. He said that existing challenges that faced the country would be addressed comprehensively through a new constitutional dispensation. The president noted that the country had taken bold steps towards the achievement of a new constitution and promised to assent to the Constitution of Kenya Review Bill passed by parliament. Before the end of the year, parliament had passed several laws[33] allowing for constitutional amendment and entrenchment of the review process in the constitution. The cabinet later agreed on a roadmap that would lead to the formation of a coalition government, if all went according to the script agreed upon by the two major parties,[34] as outlined in the list below:

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31 *The Standard* of 6 August 2008 reported that "Quorum hitch halts debate on the constitutional review". The constitutional review debate was jolted when only 17 members were present in parliament.

32 *The Standard* of 4 August 2008 reported that The National Civil Society Congress had issued a memorandum to the two principals on constitutional rights of Kenyans to organize around political interests and their freedom to assemble, move, associate, express, petition the government and to hold public officials to account.

33 See table derived from the Hansard 2008.

34 In an article entitled "Kenya's Electoral Revolution" in *The Standard* of 29 November 2008 it was reported that Kibaki and Odinga had pronounced an electoral and constitutional reform roadmap that could culminate in the realisation of an elusive dream.

- Legislating a fixed date for elections
- Adopting a new electoral system
- Compiling a new register of voters
- Creation of an electoral law consolidating all election laws, that is, the enactment of an Electoral Commission Act[35]
- Creation of a permanent observer group
- Creation of Interim Boundaries Review Commission
- Creation of Interim Constitutional Court
- Establishment of an Electoral Dispute Resolution Court
- Enactment of Anti-Hate-Speech Legislation

In fulfilling the recommendation of the Kriegler report, president Kibaki sealed the fate of the ECK as he signed the Constitution of Kenya (Amendment) Bill 2008 into law. The Bill also allowed review of the constitution. ECK would henceforth be disbanded and an interim body formed in its place. This set a platform for ensuring that the roadmap outlined above would be followed without hitches.

Unveiling the Key Steps to a New Constitution

The key steps to a new constitution were unveiled to include the selection of a seven-member team of experts to spearhead the search for a new constitution. The experts would be mandated to identify issues in all available drafts on the constitution which are contentious. The committee would further be expected to solicit written

35 In *People Daily* of 6 December 2008 it was reported that there was anxiety at ECK over the Constitution of Kenya (Amendment) Bill 2008, that the commission would be sent packing once it comes into law. The section of the draft Bill that seeks to repeal Section 41 of the constitution, subsection 14 states; "notwithstanding the provisions of subsection (2) a person who immediately before the commencement of section 41 held or was acting in an office established by section 41 or was a member of staff of ECK shall cease to hold or act in that office at the commencement of this section".

memoranda from the public on the contentious issues, after which the committee would help to resolve these issues by articulating the merits and demerits of these options. The committee was also expected to prepare a draft constitution, including non- contentious issues, and to list the contentious ones so that the parliamentary select committee on constitutional review could deliberate on them. As the year ended, the committee of experts had not been constituted but the stage had been set for the recruitment of the committee members.

The Executive[36]

The Executive is the arm of government that is charged with implementation of government policies and enforcement of the law. The head of the Executive is the president who shares responsibility with the cabinet. The event that followed the signing of the National Accord Act into law expanded the size of the Cabinet and also devolved some of the responsibilities to the newly created Office of the prime minister. The number of new Cabinet ministers in the coalition arrangement moved to forty from the previous thirty. The ministers and their assistants totalled eighty in number. This meant that taxpayers would have to dig deeper into their pockets to sustain a bloated cabinet. The increased size of the cabinet was as the consequence of a political balancing act, especially on the side of the PNU, that failed to give up plum cabinet positions occupied by their members. Both political parties had earlier, during campaigns, favored a lean Cabinet of not more than thirty members.

The National Accord[37] was signed by Kibaki and Odinga. It stated that there would be a Prime Minister with authority to supervise

36 Constitution of Kenya (2001) Revised Edition Chapter Two.

37 See Parliamentary Hansard for 18 March 2008. The parliament set a precedent when it passed, in one sitting, two crucial bills, which transformed the country's political system and cleared the way for the formation of a coalition government. Kibaki also signed the Constitution

and coordinate the execution of affairs of the government; and would be the leader of the largest party in parliament or coalition. The Accord also required each member of the coalition to nominate one person to be appointed deputy prime minister, who could only be removed if the national assembly by a majority vote passed a motion of no confidence . The National Accord was entrenched in the constitution, leading to the formation of a coalition government. The new government would only be dissolved if the 10th Parliament was dissolved, or upon withdrawal of one party from the coalition. Thus it was no longer the executive's prerogative to dissolve the government.

The Coalition Government was sworn in following the entrenchment into law of the National Accord. This set the stage for both constitutional and institutional reforms. The processes that took place in parliament in 2008 redefined the nature of the executive and achieved, at some level, horizontal devolution of the executive powers from the office of the president to the newly created office of the prime minister.

Human Rights Indicators in Kenya in 2008

> *"There are different kinds of justice. Retributive justice is largely Western. The African understanding is far more restorative, not so much to punish as to redress or restore a balance...*[38]*"*

There was no let-up in search for justice by the victims of the post election violence; the people who felt cheated in the election also yearned for justice. By the end of the year, the government had

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of Kenya (Amendment) Bill 2008 and National Accord and Reconciliation Bill 2008, which allowed the president to appoint a prime minister and his two deputies. The Constitution Amendment Bill, which paved way for a coalition government, was passed on March 18.

38 See *The New Yorker (*1996) Recovering from Apartheid, 18 November. p. 90. Tina Rosenberg quotes Desmond Tutu.

failed to bring to justice those who were responsible for human rights abuses. Gender-based violence remained widespread. Health institutions increasingly suffered and government failed to halt unjustified and inhumane forced evictions. Efforts were made to institute reform processes that would recommend reparations for the victims of human rights abuses. Processes were put in place such as commissions of enquiry like Waki's, Kriegler's and Alston's. These three commissions of enquiry made recommendations that would, if acted upon, go a long way to fortify and consolidate the people's fundamental rights and freedoms.

The Right to Life[39]

The report of the Commission of Inquiry into Post-election Violence (CIPEV) is replete with instances of arbitrary and unlawful deprivation of life. Of the 1,133 deaths recorded by the CIPEV, 405 were caused by gun-shot wounds, for which the police was held responsible.40 The real concern about these killings is that while the citizens have a right to be protected by the state, instead the state has failed to execute its obligation of protecting its citizens, which is a total disregard of constitutionalism.41

Security personnel were seldom held responsible for their violence , the *Mungiki* killings[42] in central province and the forced disappearances under the Operation Restore Hope around Mount

39 Constitution of Kenya (2001) Revised Edition, Chapter Five, deals with protection of fundamental rights and freedoms.

40 See International Center for Transitional Justice, *The Kenya Commission of Inquiry into Post Election Violence.* Available at www.icjt.org/static/Africa/Kenya/CIPEV.pdf accesed on 16 March 2009. Other corroborating reports were made by the Kenya National Commission Human Rights (KNCHR), available at www.knchr.org/pidief/overview.pdf accessed on 16 March 2009.

41 There were no reports of official action in the cases of death by mob violence.

42 Mungiki is an outlawed sect suspected of heinous crimes.

Elgon,[43] mounted by the military and police force are examples of the affront to the right to life caused by government agencies. Citizens faced numerous challenges in securing daily livelihoods. Food riots, organised by civil society groups under the slogan *gorgoro,* occurred in most slum areas in Nairobi, with the result that government was compelled to come up with a special arrangement to subsidise the price of maize meal.

The right to decent housing and dignified livelihood deteriorated under the heat of the recession, and poverty increased in most slums in Nairobi. Slum dwellers lived under constant threat of eviction while experiencing extreme deprivation of basic services such water and sanitation. These incidences aggravated insecurity in Kenya.

Freedom of Assembly

Several peaceful demonstrations were dispersed during the year. In January, while the post-election violence was still rife, police wounded six people in the Kibera and Mathare slums of Nairobi while dispersing demonstrators protesting the election results.[44]. In the same period television stations broadcast footage of a police officer in Kisumu fatally shooting two unarmed, peaceful protesters. The officer was subsequently arrested and charged in a criminal court but the case was still pending at end of the year. Organisers had to notify local police in advance of public meetings. According to the law, authorities may prohibit such gatherings only if there are simultaneous meetings scheduled for the same venue or if there is a perceived, specific security threat. This requirement was repeatedly used to disfavour those who hold dissenting views from government.

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43 The government rolled out a programme to resettle people who had been displaced by Saboat Land Defense Force (SLDF) activities, which used excessive force occasioning many deaths. See Alston Report on Impunity in Kenya, United Nations Special Rapporteur on Human Rights, 2008.

44 BBC News (2009) Kenya Police Block Fresh Rally. Available at www.news.bbc.co.uk/2/hi/Africa/7170981.stm – 61k accessed on 6 April.

Mob Violence

Mobs took the law into their hands as a result of losing faith in the Police. The social acceptability of mob violence also explained the incidence of acts of personal vengeance, including settling land disputes. Mobs committed violence against people suspected of witchcraft, particularly in Kisii district in Nyanza and in western provinces. Human rights groups noted public reluctance to report such cases due to fear of retribution. In May, 15 people suspected of practicing witchcraft were burnt to death in Kisii central district.

Conditions in Detention Centers

Conditions in prisons and detention centers continued to be harsh and life threatening. Most prisons, particularly men's prisons, continued to be severely overcrowded, partly due to casebacklog in the judicial system. The Legal Resource Foundation (LRF)[45] released a report which stated that torture in prisons was commonplace and inflicted openly. Of 948 prisoners from 29 prisons interviewed, 83 percent claimed they had been beaten while 59 percent witnessed mistreatment from wardens and other prisoners.

The government failed to put in place a plan to bring to justice those responsible for human rights abuses committed during the post-election violence,[46] or to guarantee reparation. State security officials continued to torture and kill suspects with impunity.[47] Violence against women and girls was widespread. The government did not impose a moratorium on forced eviction.[48] Public health facilities were poorly funded, equipped and maintained.

45 See the LRF report on prison conditions 2008, compiled by Ann Kamau.

46 By the end of 2008 the government had not announced a comprehensive plan of action to guarantee reparation for victims of post-election violence. See Amnesty International Report 2009 on State of Human Rights in Africa.

47 The extrajudicial execution of suspected Mungiki members continued with impunity.

48 The 2006 pledge to release national guidelines on eviction had not been

Conclusion

The democratic gains in Kenya have not reached a point where they are irreversible. Therefore, in Kenya, both perceptive and descriptive constitutionalism remains a pipe dream.Concerted efforts must be made to consolidate the gains already made toward constitutionalism.

Piecemeal reforms and programmes that produce results that are subject to abuse must be abandoned in favour of comprehensive and sustainable reform. Indeed, programmes such as the Governance, Justice, Law and Order Sector (GJLOS) reforms are a waste of time and resources as the framework of their operation clearly remain unsustainable. It is imperative that an all-inclusive participatory process be employed in appointing commissioners to preside over elections, and other public officers. All electoral processes should be fortified in the constitution to stop abuse. The inclusion of the National Accord Act as a constitutional provision is a good way forward. A new constitution for Kenya should be at the fore of all engagement in the coming year, to avert a return to the nearly four months of civil strife in early 2008.

The historical injustices that keep resurfacing at every opportunity during the four successive general elections, since 1992 and the incidental violence supports should be addressed adequately through the Truth Justice and Reconciliation Commission.

True transition is achieved by a total overhaul of the undemocratic structures and institutions of governance through a participatory, democratic and comprehensive constitutional reform process. Thus, reforms must be structural, legislative and institutional, not a mere change of guard, as was the case in Kenya.

Negative and nepotistic ethnicity that advances a culture, where people, groups and communities believe they can only get services

fulfilled by the government.

and resources of their kind is in leadership still persists, and remains a stumbling block to constitutionalism in Kenya. A comprehensive national policy supported by enabling legislation that prohibit tribalism and hate speech should be enacted.

There is mistrust in public institutions because of their lack of independence and transparency. Corruption still bleeds the resources of the government to the last drop, with impunity. This culture must be consciously changed through national civic education targeting the masses whose attitudes towards corruption must be changed.

The dire threat to human rights, the rule of just law, and the further entrenchment of the tradition of impunity are the biggest manifestations of poor constitutionalism in Kenya. The government should come up with a policy that seeks to entrench a human rights culture. The policy and programme should go beyond awareness creation and focus on interventions that enable people to achieve their rights. Such policy should emphasize capacity building and support for grassroot human rights education initiatives. Communities should also be supported through capacity building and with resources to design and deliver a range of innovative community human rights empowerment techniques. The focus should be on follow-up intervention activities geared towards realizing of people's fundamental rights and freedoms as entrenched in the Constitution.

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The State of Constitutionalism in Rwanda: Documenting Constitutional and Human Rights Development of 2008

Robert Turyahebwa

Introduction

Constitutionalism

Constitutionalism is defined differently from constitutional law[49] and a constitution.[50] Constitutionalism has been defined as a political form in which a body of fundamental laws establishes the powers of government and institutionalises important limits for its operation[51].

The term constitutionalism is sometimes identified with human rights, written constitutions, separation of powers and judicial review. All the aforementioned definitions indicate that there is no single accepted definition of constitutionalism. To understand the term

49 Constitutional law is the study of foundational or basic laws of nation states and other political organizations.

50 This is the fundamental law of the state, containing the principles upon which the government is founded and regulating the divisions of the sovereign powers. An example is the 2003 Rwandan Constitution. See also http://www.lectlaw.com/def/c290.htm.

51 Fehrenbacher, D.E. (1989) *Constitutions and Constitutionalism in the Slaveholding in South Africa*. Georgia, University of Georgia Press. p. 1. Accessed at: http://en.wikipedia.org/wiki/Constitutionalism.

constitutionalism better, two approaches have been advanced by scholars, that is, the traditional and the modern, , as elaborated below.

Traditional Approaches: Procedural and Negative Constitutionalism

The traditional approach also referred to as "procedural" or "negative constitutionalism" rests on two main pillars: limited government and individual rights. The traditional approach is based on the notion of limitation of state power by means of law.[52] The focus here is on the extent to which the constitution imposes restrictions on the exercise of state power. Negative constitutionalism is procedural and formal and relates to the normative, normal politics, or politics made in terms of norms and based on the rules of law. Power is proscribed and procedures prescribed.

Proponents of this school define constitutionalism as a doctrine that is prescriptive rather than descriptive, an ideal of how the authority should be exercised not how it is being exercised in practice.

Insofar as it restricts the state in what it can do, constitutionalism tends to create a "minimal state" that is, a state that leaves greater space for individual freedom and activities. The concept of "minimal state" is in itself problematic since what is being limited is not in fact the state, as understood in constitutional and international law, but the government, which is a component of statehood.

Other observers hold that, because of its preoccupation with procedural matters, traditional constitutionalism is unable to respond adequately to contemporary problems of the welfare of society, since it primarily aims at protecting (negative) individual rights and freedoms.

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52 Ihonvbere, J.O.(n.d.) The State, Constitutionalism and Democratization. Available at: http://www.india-seminar.com/2000/490/490%20ihonvbere.htm.

Modern Approaches: Substantive and Positive Constitutionalism

Unlike the traditional conception with its overemphasis on procedure and restraint, modern constitutionalism is said to be more concerned with values. It is in this perspective that some new constitutions claim to be based on a number of core values, which democratic values must be promoted in the interpretation of constitutions in general and of the Bill of Rights in particular. Modern approaches champion substantive and positive constitutionalism. To give effect to democratic values, the state should be more effective and more active and must be given more powers than under negative constitutionalism. Positive or substantive constitutionalism has been called a "rights based" conception.

Historical Background of the Constitution of Rwanda

The historical background of the Rwandan Constitution is examined under different periods that is; during the monarchy, which is the period pre-dates the coming of colonialists; the colonial period; the post colonial period characterised by a string of post-independence constitutions, namely, the 1962, 1978, and 1991 constitutions, the Arusha peace agreements and fundamental laws; and lastly, the present 2003 constitution era.

The Monarchy (The Pre-colonial Period)

During the pre-colonial period, the concept of constitutionalism in Rwanda was marked by extensive powers accorded to the king (*Umwami*). Rwanda was a strong kingdom with a hierarchical society characterised by a high concentration of powers in the hands of the king.[53] Typically, the king's decisions were binding and were transmitted from the top down to chiefs who, in turn, communicated them to the king's subjects.

53 Schabas, W.A. and Imbleau, M. (1997) Introduction to Rwandan Law. Cowansivile (Quebec), Canada, Les Edition Yvon Blais. p. 4.

At the top of the structure therefore was the king, an omnipotent and supreme leader, who exercised all powers over the whole territory and population. The king was very powerful and had sole authority to declare war, and to appoint and dismiss chiefs. He was regarded as representing and deriving his powers from a higher being, and was incapable of wrong doing. and could not be challenged without inviting fatal reprisals.

There is no evidence of any written constitution during the pre-colonial period[54] but there was an elaborate system of rules and procedures. The term law should not, however, be understood in the sense it is used today. The law (*itegeko*) was a solemn act by which the king introduced a new custom or abrogated an old one. This activity took place in a solemn and special ceremony: the people were called to a public place (*ku karubanda*) and the king, surrounded by chiefs, declared publicly the decision he wanted to become law. The chiefs, in turn, had to forward this decision to the population using local authorities. In this way, what would today be termed as legislative, executive, and judicial power, were all vested in the king.

Colonial Period

With the advent of colonialism, a new era of constitutional development was initiated in Rwanda. Fundamental laws were introduced by Germany, and later, Belgium, with little attention to local needs and the "real constitution". The colonial period in Rwanda was basically divided into German and Belgian stages of colonisation.

German Colonisation

At the Berlin Conference of 1 July 1890, German hegemony over major portions of East Africa, including Rwanda and neighboring Burundi, was recognised by a treaty between the United Kingdom

54 *Ibid.,* p. 4.

and Germany. In return, Germany accepted British control of Uganda and a sphere of influence in Zanzibar.[55]

In 1899, a protectorate, known as Ruanda-Urundi, was established under the administration of a governor, Count von Goetzen. Germany did not initially interfere with existing domestic institutions, they ruled Rwanda through indirect rule.[56] The German administration relied on the traditional oligarchy rules to administer Rwandans prior to colonisation. Thus, the general administrative organisation was completed by indigenous chiefs who, due to their power over the population, acted as auxiliaries of the administration. In maintaining the indigenous organisation intact and in basing their system on traditional authorities, the German empire grounded its system on indirect rule. As a consequence, there was a gap between the ordinary people and the colonial authorities. For an ordinary Rwandan, the institutions of the kingdom remained the source of authority and protection.

Belgian Control

Following the defeat of Germany in the First World War, all its colonies were parcelled out to victors.[57] The Versailles Treaty adopted at the Paris Peace Conference in 1919, assigned Ruanda-Urundi to Belgian rule and, on 31 August 1923, Belgium was entrusted with a League of Nations mandate over the territory. The mandate system was created by the Covenant of the League of Nations,[58] to deal with "those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of States which formerly governed them and which are inhabited by people not yet

55 http://www.telphoto.com/Rwanda_History.htm. accessed on 13 January 2009

56 *Ibid*

57 Schabas, W.A. and Imbleau, M. Supra note 53, p. 5.

58 See Article 22 of the Constitution of the League of Nations, which was adopted by the Paris Peace Conference in April 1919.

able to stand by themselves under the strenuous conditions of the modern world".[59] In 1924, the Belgian parliament officially accepted the League of Nations mandate for Rwanda. The following year, an organic law adopted on 21 August 1925 combined the administration of Rwanda and Burundi with that of Belgian Congo.[60]

Article 1 of the law automatically rendered applicable to Rwanda all laws in application in the Belgian Congo that were not incompatible with the goal of the mandate. These laws were adopted by the Belgian parliament and sanctioned as well as promulgated by the Belgian monarchy. Perhaps the most important of them was the law of 18 October 1908, known as the Colonial Charter, and considered by some as the constitution of the Belgian colonies.

Belgian administration was directed by a governor-general, headquartered in Leopoldville, and a deputy governor-general for Ruanda-Urundi, who was based in Usumbura.[61] Laws applicable in the territory were enacted by the Belgian parliament (Lois) or the King of Belgium (*Décrets*) and in emergency situations, by the governor-general (*ordonnances législatives*). Executive power was wielded by the king of Belgium, the Belgian minister of colonies, and by orders issued by the governor and deputy governor, pursuant to delegated power.

Belgium did not impose its own domestic legislation upon Ruanda-Urundi. Instead, it adopted special codes or laws, generally borrowing these from legislation already enacted for the neighbouring Congo. There was no attempt to codify customary law, which continued to have wide application. Furthermore, legislation did not apply equally to everyone. Although criminal law was universal in application, written civil law applied only to

59 Schabas, W.A. and Imbleau, M., Supra note 53, p. 5.
60 *Ibid.*, p. 5.
61 http://www.historyworld.net/wrldhis/PlainTextHistories.asp?historyid=ad24 accessed on 10 December 2008.

people of European origin, whereas customary law continued to apply to native Rwandans.

The Charter of the United Nations, adopted at San Francisco in June 1945, redefined the former mandate of the League as trust territories within the UN trusteeship system.[62]

Among the purposes of the scheme stated in the Charter was "their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned." Supervision of the trust territories was handled by the UN trusteeship scheme, with administration of the two territories again assigned to Belgium.

The decree of 14 July 1952 effected a liberalisation of local government structures and determined the power of indigenous authorities. They included the king of Rwanda and the chiefs of provinces and districts. The decree organised the councils at each administrative level and the national or high council, and a consultative organ at the national level was created. The people appointed the members of the lowest level. Those appointed had to choose from among themselves those who were to sit on the high administrative council. The high administrative council elected the high council of the country from among themselves.

The traditional authorities thus served as a bridge between the colonial authority and the ordinary people. This had the effect of maintaining the well-organised and efficient traditional system and, especially, of securing the traditional authorities direct political power over the population. The local population was thereby forced to learn how to serve the European and the traditional authorities at the same time. Sometimes these authorities had rather contrary political goals. Under such circumstances, only orders and regulations compatible with the goal of the traditional authority were likely to reach the

62 Schabas, W.A. and Imbleau, M., Supra note 53, p. 5.

population. This practice contributed significantly to the creation – in the minds of the Rwandan people - of two different attitudes towards the law.

One attitude regarded the law as a norm by itself. The second regarded the law as understood by the enforcing authority. It is argued, for instance, that whenever an unwanted decision was taken by the colonial administration, the indigenous courts and its notables twisted it by postponing its execution or by modifying it when the colonial administration was not present to oversee its application.

An example of such a situation is the attitude with regards to the death penalty following the interdiction in 1917 by the colonial authority of King Musinga. The interdiction was accepted in theory, but simply ignored in practice, as citizens continued to be subjected to the penalty for a long time.

To sum up this period one could say that, instead of creating a society based on the rule of law and which was favourable to the development of constitutionalism, colonial rule radicalised the Hutu-Tutsi cleavage and empowered the former to exploit and abuse the later. From the late 1940s, the desire for independence shown by the Tutsi elite certainly caused both the Belgians and the church to shift their alliances from the Tutsi to the Hutu. While the Tutsi began to move from Belgian domination, the Hutu elite, for tactical reasons, favoured the continuation of the domination. In the end, unlike most African countries where a single unifying nationalist movement became predominant, Rwanda's independence was one more of repudiation by the majority of their despotic local overlords, than of their harsh but remote European colonial masters.

The Rwandan Post-colonial Constitutions of 1962, 1978 and 1991

The first, but largely ineffective, constitution of Rwanda was known as the Constitution of Gitarama. In the aftermath of the mysterious

death of King Rudahigwa in Bujumbura, a group of elite Hutu, led by one of the few Hutu sub-chiefs, Mbonyumutwa, led the country to bring about a violent end to Tutsi rule in 1959 and to establish the first autonomous government, on 26 October 1960, under the leadership of Gregoire Kayibanda.[63]

That month, Belgium proposed a provisional constitution and agreed to organise local elections, scheduled for January 1961, but this move was blocked by the UN General Assembly, which proposed a national referendum on the future of the monarchy.[64] Belgium agreed to cancel the elections, but Rwanda's new political leaders decided to meet anyway, on the date fixed for the elections, in the town of Gitarama, where they adopted a constitution.

The meeting of all *Bourgoumestres* and *Conseillers communaux* which adopted the constitution was held at Gitarama on 28 January 1961. The main objective of the meeting was to abolish the monarchy and install a republic. This resulting instrument, which was neither published in the *Bulletin Officiel du Ruanda* nor in the *Journal Officiel du Rwanda,* was considered invalid by the monarchists and more significantly by the trusteeship authorities, i.e. Belgium. The Belgian authorities declared that the document had no legal import, having not been officially promulgated in an appropriate manner nor formally endorsed by the Rwandan people. It is worth mentioning that the 1962 Constitution made no reference to the Gitarama Constitution which was presumed to be the first constitution of Rwanda, though it had been rejected by the colonial powers.[65]

Later in 1961, general elections held under the supervision of the UN confirmed the end of the monarchy and established the republic. The UN established a commission on the Rwandan question, which

63 *Ibid*, p. 7.
64 See the General Assembly Resolution No. 1580 XV.
65 Schabas, W.A. and Imbleau, M., *Supra* note 53, p. 7.

met in early 1962 in Addis Ababa. The commission concluded that Rwanda and Burundi should acquire independence separately, and this was affirmed by the Belgian government.[66] Consequently Rwanda, unlike many other African countries that had with their own constitutions at independence, had none at the time of its independence on 1 July 1962. The Constitution of Gitarama that was supposed to replace that of the colonial regime was, in fact, null and void on the day Rwanda gained its independence.

The 1962 Constitution

The Constitution of 24 November 1962 became the first of its type for the Republic of Rwanda.[67] The draft of this constitution was presented by the parliamentarians of the Party of the Hutu Emancipation Movement. Parmehutu and Association for the Social Settlement of the Masses-Hutu. Aprosoma, which were the only accepted political parties of that time. It was inspired by foreign constitutions[68] such as that of France, the Republic of Guinea-Conakry, Senegal, Madagascar and the Haute-Volta (Burkina Faso). It was, however, the constitutions of France and Senegal which most significantly influenced the first Rwandan Constitution. For instance, this Constitution repeated the provisions of the Constitution of Senegal on civil rights literally.[69]

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66 See the General Assembly Resolution No. 1746 XVI.

67 Gasamagera, W. (2007) The Constitution Making Process in Rwanda: Lessons to be Learned, A paper presented to the 7th Global Forum for Reinventing Government, Vienna, Austria, 26-29 June 2007. Available at: http://unpan1.un.org/intradoc/groups/public/documents/un/unpan026620.pdf. Accessed on 20 December 2008.

68 Yachat Ankut, P. (2005) The Role of Constitution-Building Processes in Democratization, Case Study Rwanda, 2005, p. 7, available at: http://www.idea.int/conflict/cbp/upload/CBP-Rwanda.pdf.

69 Schabas, W.A. and Imbleau, M. *Supra* note 53, p. 7.

The 1962 Constitution declared Rwanda a democratic,[70] social and sovereign republic[71] and went on to abolish the monarchy, stipulating that a return to the monarchy was inconceivable.[72]

The Constitution of 1962 has been praised for having embodied a complete list of human rights as defined in the UDHR, including rights that are traditionally considered difficult to implement, such as economic rights.

The 1962 Constitution obliged the Republic of Rwanda to ensure equality of all citizens without any distinction on grounds of race, origin, sex, or religion.[73] It declared the abolition of all caste privileges and of slavery. Many other provisions emphasised equal protection, such as Article 16 which declaredall citizens equal before the law without any distinction based on race, clan, colour, sex or religion. In the section dealing with the family and civil society, the constitution proclaimed equality between men and women, but added that the man is the natural head of the family. Although freedom of religion and expression were recognised, a specific provision of the constitution prohibited communist activities and propaganda.

The 1962 Constitution set up three constitutional organs of government, the president, the national assembly and the judiciary. Even though the Constitution envisaged a pluralist regime, president Kayibanda quickly established a single-party system[74] under the Democratic Republican Movement (*Mouvement Démocratique Republicain*, MDR).[75]

In August 1963, the first general elections since independence were held for local government positions. It was a landslide victory for the PARMEHUTU, which took 139 of 140 communes.

70 Gasamagera, W. *Supra* note67, p. 6.
71 Article 1 of the 1962 Rwandan Constitution.
72 *Ibid.*, Article 2.
73 *Ibid.,* Article 3.
74 Yachat Ankut, P. *Supra* note 68, p. 7.
75 Schabas, W.A. and Imbleau, M., *Supra* note 53, p. 7.

President Kayibanda was elected in 1965 with 98% of all votes, and again in 1969, with more than 99% of the votes cast. All seats in the national assembly were won by Parmehutu, which was the only party presenting candidates.

The adoption of a constitution in 1962 did not bring about any fundamental changes in the relationship between the citizens and political authorities nor in the relationship between the citizens. The 1962 Constitution obliged citizens to familiarise themselves with the law.[76] The question, however remained, how effective this could be in a country where close to 90% of the populace was illiterate? This has been the most challenging obstacle to the realisation of progressive constitutionalism in Rwanda since independence. On the other hand, and despite the overwhelming support given to the constitution, it was argued that, in reality, the new political system simply replaced one set of Tutsi-dominated institutions with a Hutu-dominated one. In other words, there was a reversal of Tutsi hierarchy with a Hutu one, where ethnic identities served as the basis for systematic discrimination against Tutsi in education, the civil service and the armed forces.

The discriminatory regime increased the flight of Tutsi to neighboring countries, from where Tutsi exiles made incursions into Rwanda. Exiled Tutsi became an early example of a new reality leading to instability for the entire Great Lakes Region and beyond. Conflicts that had generated refugees created "warrior refugees" in a dialectical interface between conflict and displacement.

The dissensions that soon surfaced among the ruling Hutu led the regime to strengthen the authority of President Kayibanda as well as the influence of his entourage, most of whom originated from the same region, particularly the Gitarama region.

An amendment to the constitution, voted for on 18 May 1973, allowed the president to be re-elected for an indefinite term. It

76 The 1962 Constitution, *Supra* note 71, Article 15

also abolished the position of vice president, extended the term of deputies of the national assembly, and oriented the Rwandan economy towards the principles of democratic socialism. The ethnic and regional power cleavage became more pronounced, more particularly[77]within the Hutu political establishment, between its key figures from the center (Gitarama) and those from the north and south, who showed great frustration. Increasingly isolated, President Kayibanda could not control the ethnic and regional dissensions. Disagreements within the regime resulted in anarchy, which enabled General Juvenal Habyarimana, minister of defence and army chief of staff, to seize power through a bloodless coup d'état on 5 July 1973, thus ending the reign of the first Republic.[78]

The 1978 Constitution

On 5 July 1973, President Habyarima issued a proclamation, dissolving the National Assembly and transferring its powers to the president, replacing the government by a Committee for Peace and National Unity, dissolving all political parties and suspending several provisions of the 1962 Constitution.[79] Until December 1978, the time of adoption of a new constitution, Rwanda was governed without any constitution. Executive and legislative powers were placed in the hands of the president. Following the trend on the African continent, president Habyarimana instituted, in 1975, a one-party system by the creation of the *Mouvement Révolutionaire National pour le Développement* (MRND), of which every Rwandan was a member *ipso facto*, including newborn babies. Since the party embodied everyone there was no room for political pluralism. Structures of a totalitarian regime were put into place systematically.

77 Schabas, W.A. and Imbleau, M., *Supra* note 53, p. 7
78 Yachat Ankut, P. *Supra* note68, p. 6.
79 Schabas, W.A. and Imbleau, M., *Supra* note 53, p. 8.

The Constitution of 1978 was adopted three years after the creation of MRND and regulated political activities rigidly. It is important to stress that it did not bring about any meaningful change in terms of democracy.[80] A three-member commission appointed by the president submitted a draft based on an MRND draft which, in turn, was essentially based on the Zairean Constitution. The preliminary draft was adopted in October at a joint meeting of the government and the c*omité central* of the MRND. A popular referendum held on 17 December 1978 approved the Constitution by a vote of 89% and, three days later, on 20 December 1978, president Habyarimana proclaimed the new constitution. Elections held on 24 December 1978, pursuant to the new constitution, confirmed Habyarimana, the only candidate, president, by a majority of 99% of votes cast.[81]

The 1978 constitution effected the replacement of the National Assembly by a new legislative body, the national development council (*Conseil National du Développement*, CND). The constitution confirmed that political life was to be organised under the MRND and prohibited all other organised political activity.[82] The constitution stated that the president of the MRND was the only candidate eligible for the presidency of the Republic and that if, during a general election, the president of MRND did not obtain majority votes, he or she would be removed from the presidency of the party.[83] The 1978 Constitution provided for the continuation of customary law, but only to the extent that its rules had not been modified by other legislation or were not contrary to public order and good morals.

80 Yachat Ankut, P. *Supra* note 68, p. 9.
81 Schabas, W.A. and Imbleau, M. *Supra* note 53, p. 9.
82 Gasamagera, W. *Supra* note 67 p. 5.
83 Yachat Ankut, P. *Supra* note 68, p. 6.

Like that of 1962, the Constitution of 1978 guaranteed most human rights as defined in the UDHR. And yet, ethnic and regional discrimination as well as favouritism continued to characterise the behaviour of those holding the reins of power.

The 1991 Constitution, Arusha Peace Agreement and Fundamental Law

Despite intermittent ceasefires, the civil war launched on 1 October 1990 lasted about four years. In its final three months, the civil war coincided with the period of genocide, which was halted only by the ultimate triumph in July 1994 of the Rwandan Patriotic Army (RPA) over the *genocidaires*.

The first days of the armed struggle provoked a period of political instability which prompted president Habyarimana, on 13November 1990, to announce that political parties would be allowed and that the reference to ethnic origins on identity cards would be eliminated. On 28 December 1990, the National Synthesis Commission published a national political charter and recommended that the president of the Republic undertakes the revision of the constitution, in accordance with Article 9. The Commission issued its report in March 1991 and, later that month, the MDR was recreated as the first opposition party.[84] The changes were formally recognised by the MRND at an extraordinary convention held in April 1991.[85]

On 21April 1991, president Habyarimana submitted the proposed constitution to the National Development Council along with the new legislation governing political parties.[86] The new constitution was adopted by the Council on 30 May 1991 and formally promulgated on 10 June 1991, officially inaugurating a multi-party democracy.[87]

84 *Ibid,* p. 9.
85 Schabas, W.A. and Imbleau, M., *Supra* note 53, p. 9.
86 Yachat Ankut, P. *Supra* note 68, p. 6.
87 Gasamagera, W. *Supra* note 67, p. 4.

The 1991 Constitution was not different from other well-written and soundly conceptualised constitutions. It solemnly recognised not only that Rwanda was a democratic republic with an elected president and legislative assembly, and an independent judiciary, but also provided for separation of powers between the different organs of the government. Executive power was wielded by the president but in collaboration with government, which was made up of the prime minister, cabinet ministers and secretaries of state. The national assembly exercised legislative powers. The constitution also made the president responsible for the appointment (on recommendation of the minister of justice) of judges and endorsement by the Supreme Council of Magistrates (*Conseil Supérieur de la Magistrature*). As was the case with its predecessors, the 1991 constitution also guaranteed a broad range of political, social and economic rights to every citizen.[88]

However, not much changed. Indeed, one may conclude that the adoption of a new constitution had little influence on the way political power was exercised. Instead of being a document of reference, providing supreme guidelines on the exercise of power and serving as a point of departure with respect to human rights, the constitution became an instrument for bolstering state authority and to promote the interests of those in power.

In fact, in a country where the majority of the populace is illiterate and where each new regime designs its own constitution reflecting its own political goals, one may question the *raison d'être* of a written constitution. Indeed, it has not been proved that the period of suspension of the Constitution (1973-1978) was worse than other periods.

What is obvious from an historical over view of constitutional law of Rwanda is that power was understood not by reference to the

88 Articles 12-33 of the 1991 Rwandan constitution.

constitution and institutions created therewith, but by reference to the leaders. This approach brings us to the considerations referred to earlier namely the distinction between the formal Constitution and the real Constitution. The gap between the two has culminated in persistent conflicts in Rwanda.

Arusha Accords

The 1991 constitution was modified substantially by the Arusha Peace Agreement, which proclaimed the official end of the civil war between the Rwandan Patriotic Front (RPF) and government forces. This collection of seven distinct documents was adopted in the course of negotiations between the government of Rwanda and the RPF.[89]

The Arusha Peace Agreement provided for the creation of transitional institutions[90] that led to the broad-based transitional government, including a transitional National Assembly, a substantial reduction in the power of the president, an increase in the power of the prime minister and the entrenchment of the supreme court.[91] The National Development Council disappeared and was replaced by the transitional national assembly. Participation in the transitional institutions of the executive and the legislative branches was distributed among various political parties. The Arusha Peace Agreement provided that the transitional period would last 22 months, and specified that a new constitution was to be adopted following the transitional period.[92] Because of these substantial modifications of political institutions, the Arusha Peace Agreement formally replaced a large number of provisions in the 1991 Constitution.[93] The constitutional amendments were put into effect by Law No. 18/83 of August 1993.

89 Schabas, W.A. and Imbleau, M., *Supra* note 53, p. 9.
90 Gasamagera, W. *Supra* note 67, p. 3.
91 Schabas, W.A. and Imbleau, M., Supra note 53, p. 10.
92 Arusha III, Art 41.
93 Arusha I Art. 3.

Rwanda Patriotic Front Declarations

On July 17, 1994, the RPF issued a declaration in which it reaffirmed its commitment to the Arusha Peace Agreement, to the establishment of the rule of law, the opening up of armed forces to all Rwandans, and to power sharing in the context of a broad-based transitional government.[94] The declaration recognised both the 1991 Constitution and the Arusha Peace Agreement subject to amendments "made necessary by the tragic situation in the country". Political parties that participated in the genocide, specifically the MRND and the Coalition for the Defence of the Republic (CDR), were excluded from the new transitional institutions. [95] The declaration modified the transitional period to five years. It also appointed Pasteur Bizimungu as president of the Republic[96], created the position of vice president of the Republic to be held jointly with a ministerial portfolio, and confirmed, in accordance with the Arusha Peace Agreement that Faustin Twagiramungu would hold the office of prime minister.[97]

The declaration was endorsed in a protocol signed on 24 November 1994 by representatives of eight Rwandan political parties. The protocol also provided for a new distribution of seats in the transitional national assembly, according to political affiliation, essentially replacing the eleven seats that were accorded to those political parties that had perpetrated acts of genocide. Six seats were created for representatives of the armed forces.

In sum, it is self-evident that the mere presence of a constitution elaborately setting out the principles of limited government and establishing a state governed by the rule of law, was insufficient

94 Yachat Ankut, P. *Supra* note 68, p 20.
95 RPF Declaration of 17 July 1994 concerning the establishment of institutions, Article 3
96 *Ibid*, Article 9.
97 *Ibid*, Article 10.

to avoid conflict and genocide. Existing constitutions had neither legitimacy nor were they reflective of acceptable power relations.

In the following section an attempt is made to unravel the underpinning causes of conflicts as well as the role of the constitution in addressing these causes.

Although the first constitution of 24 November 1962 recognised a number of rights, its principal aim was the abolition of the monarchy and the establishment of the republic. This constitution provided for equality of all Rwandese citizens without distinctions as to race, origin, sex or religion.[98] However, there was no reference to ethnicity even though this was the main cause of conflict. Many rights that were in this constitution were however ignored because of the weakness of the mechanisms set up to protect them. The divisions based on regions (north-south), which occurred among Hutus resulted in a coup in 1973.

The 2003 Rwanda Constitution

The Constitution presently in force was adopted in 2003.[99] Its authors were determined to avoid the recurrence of the catastrophes that characterised the entire post-independence period.[100] The Rwandan Constitution of 2003 came at an opportune time and has a comparatively better chance of success if upheld scrupulously. Rwanda's Constitution represents the supreme and fundamental law of theland, and holds the promise of a nation firmly grounded on constitutionalism.

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98 The constitution of 1962, *supra* note71 , Articles 1 and 3.

99 4 June 2003 – Constitution of the Republic of Rwanda (O.G. No. special of 4 June 2003, p119), confirmed by the supreme court in its ruling No. 772/14.06/2003 of 2 June 2003.

100 See the part of fundamental principles of the 2003 Rwandan Constitution Articles 10-33.

The 2003 constitution provides a legal framework for the operation of government, and emphasises the separation of powers.[101] It defines the ultimate resources of legal authority, and provides the foundations of the public law system. It is a source of legitimacy for the state and its activities. It prescribes the political and legal parameters of the individuals' interaction with the state. It establishes the government, the administration and other organs of state, confers power, imposes restrictions on the exercise of that power, indicates which bodies should resolve conflicts and provides procedures and standards for dispute resolution.[102]

In a democratic society, the body established and authorised to adopt the Constitution should be an elected body. In practice, this principle should be tempered with the political and social background of Constitutional practices and other socio-political experiences. A country's social history will also determine the extent to which the constitution goes beyond merely regulating the powers and duties of state agencies, to prescribe rules of personal conduct to be followed by its citizens. Thus, constitution making is a meeting point between the past, the present and the future of a given state. The history of great constitutions of the world attests to this conclusion, and one common feature of such constitutions is the principle that there must be certain limits to governmental power; the nature and extent of the limits differ from place to place and from one period to another.

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101 See Article 60 of the Rwandan Constitution. It stipulates that: The branches of government are the following: the legislature; the executive and the judiciary. The three branches are separate and independent from one another but are all complementary. Their responsibilities, organisation and functioning are defined by this constitution. The state shall ensure that the exercise of legislative, executive and judicial power is vested in people who possess the competence and integrity required to fulfil the respective responsibilities accorded to the three branches.

102 *Ibid.*

Basic Features of the Rwanda Constitution of 2003

Fundamental Human Rights and the Rights and Duties of Individuals

The entrenchment of rights in the constitution is one of the most important steps in the protection of human rights. The Rwanda constitution recognises this hierarchy in Article 200. This recognition of rights in the supreme law of the land is pursuant to the state's international obligations (because one of the steps to be taken by states is to undertake at the domestic level appropriate measures to implement international instruments), on the one hand, and a legal basis for citizens to seek relief when their rights are violated, on the other.

While the majority of citizens hardly have access to the international mechanisms,[103] accessibility is even more critical to disadvantaged groups. The recognition of rights and establishment of their enforcement mechanisms at domestic level are therefore important for their effectiveness.

The 2003 Constitution recognises an impressive range of human rights that include civil and political rights as well as social, economic and cultural rights.[104] The civil and political rights include equality of all citizens, right to life, physical and mental integrity, right to liberty, children's rights and lastly freedom of thought, opinion, and conscience.[105] The socio-economic rights includethe right to private property, private ownership of land, the right to free choice of employment, the right to education, the right to health, the rights to a healthy environment and the right to national culture.[106]

103 The majority of the Rwandan citizens are illiterate although great efforts have been made to prioritise the education sector.

104 Art. 10 (inviolability of human person) of the 2003 Rwandan Constitution.

105 *Ibid.,* Articles 11, 12,15,18,28, and 33.

106 *Ibid.,* Articles 29, 30, 37,40,41,49 and 50.

The 2003 constitution, furthermore, entrenches duly ratified international treaties and agreements. These include the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR). What is important to note is that, once international treaties and agreements are adopted, they have higher status than Rwanda's organic and ordinary laws.[107] Even though this recognition does not include all relevant rights, especially socio-economic rights, the entrenchment of these rights in the constitution is a remarkable step.

It is also important that the constitution, while entrenching the aforementioned rights, also imposes duties on citizens. For instance, citizens have the duty to relate to other persons without discrimination and to maintain relations conductive to safeguarding, promoting and reinforcing mutual respect, solidarity and tolerance.[108] Citizens have the duty to participate, through work, in the development of the country, to safeguard peace, democracy, social justice and equality and to participate in the defence of the motherland.[109] In addition, every citizen has the duty to safeguard and promote the environment. Similarly, the state has the duty to safeguard and promote positive values based on cultural traditions and practices so long as they do not conflict with human rights, public order and good morals. The state also has the duty to preserve the national cultural heritage as well as genocide memorials and sites.[110]

The Domestic Protection of Human Rights Under the Rwandan Constitution

Although human rights are provided for by both international and national legal regimes, their most effective protection possibly takes place at the national level. First of all, it is within the domestic legal

107 *Ibid.,* See Article190.
108 *Ibid.,* Article 46.
109 *Ibid.,* Article 47.
110 *Ibid.,* Article 49.

framework that citizens can find effective remedies. Generally, the constitution, laws, judiciary, policies and other national institutions offer different appropriate remedies to the victims of violation of rights. Secondly, the application of the rule of exhaustion of local remedies by international human rights forums enhances further the role of national institutions responsible for the protection of human rights.[111] Thirdly, even where an applicant has filed a petition with an international human rights body, , the outcome of such a proceeding shall rest ultimately with national authorities. Lastly, and most importantly, is the accessibility of domestic mechanisms of protection.[112]

The domestic protection of rights can be realised through constitutional provisions, national legislation and policies, the judiciary and national institutions. These national mechanisms of protection very often operate at different levels in the national legal system. However, they do co-exist in the same national legal system and complement each other in the protection of human rights.[113]

Rwanda has entrenched a number of rights in her constitution of 2003 and has set up different institutions for their promotion and protection. We need to stress once more that once international instruments have been adopted in accordance with the provisions of law, and published in the Official Gazette, they constitute part of the enforceable laws of the land, in a manner no different from existing organic laws and ordinary laws.[114]

However, although the constitution provides for the judiciary that is guardian of rights and freedom on one hand, the power given to the parliament, on the other hand, is questionable with respect to the

111 See Article 2 of Optional Protocol to the ICCPR, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, UN Doc. A/6316 (1966), 999 U.N.T.S. 302, entered into force 23 March 1976.

112 The Rwandan Constitution *Supra* note 100, Articles 140 and 141.

113 *Ibid*. See Chapter 1 of the Rwandan Constitution, Articles 10-13.

114 *Ibid.* (Article 190).

protection of human rights. The constitution confers inordinately wide powers on parliament while corresponding powers of the judiciary are less generous, as illustrated in the next section.

A Critical Review of the Protection of Fundamental Rights in the 2003 Constitution

The Rwanda Constitution is clear in elaborating commitment to building a state of social welfare and social justice.[115] In a number of respects, the 2003 Constitution advantageously distinguishes itself from its predecessors.[116] This improvement can be found at the level of recognition of rights as well as at the level of institutions involved in the protection of human rights.[117] However, the relationship between the judiciary and the parliament with regard to the interpretation of laws remains problematic, and this has had implications for the protection of human rights.

The 2003 Constitution recognises several rights including contestable socio-economic rights, such as those on compulsory primary education in public schools,[118] property and work. Also under this provision, the state has the duty to take special measures to facilitate the education of disabled people. This right is very important, particularly in the context of Rwanda, considering the number of persons disabled as a result of the war and genocide of 1994.

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115 *Ibid.* (Article 9 Paragraph 5).

116 See the Rwandan Constitutions of 1962, 1878, 1990 and the Arusha Declarations.

117 These include: The National Commission for Human Rights Article 177, National Unity and Reconciliation Commission Article 178, National Commission to Fight Genocide Article 179, Amendment No. 2 of 8 December 2005. The Office of the Ombudsman shall be an independent public institution as elaborated in Article 182 of the Rwandan Constitution.

118 The 2003 Rwandan Constitutions, *supra* note100, Art 40.

While the provisions of the 1991 Constitution with regard to the rights to property did not provide for private ownership of land and other rights related to land, the new Constitution guarantees private ownership of land.[119] The majority of Rwandans are rural, with agricultural activities as their primary source of livelihood. The intervention of a Constitutional provision guaranteeing security of land tenure is therefore pertinent for agricultural subsistence.[120]

Another aspect of improvement with regard to the Constitutional provisions is the insertion of the right and duties of all citizens with regard to health.[121] The right to health is fundamental: without which all other human rights are meaningless. The guarantee of the right to health is particularly important to Rwanda, as one of the African countries worst affected by the HIV/AIDS pandemic. The right to a healthy and satisfactory environment is also guaranteed with an obligation on the state to protect such an environment.[122]

The protection of fundamental rights regarding the welfare of Rwandans can also be deduced from the provisions regarding civil and political rights, such as equality in rights and duties of all Rwandans. The particular attention given to the family by the Constitution is also relevant. The Constitution gives particular attention to the rights of the child. It stipulates that, "Every child is entitled to special measures of protection by his or her family, society and the state that are necessary, depending on the status of the child, under national and international law".[123]

It's important to note that, other rights, such as the right to food, clean water, housing and social security are not mentioned

119 *Ibid*. Article 29.

120 See also the Organic Law No. 08/2005 Of 14/07/2005 Determining the use and Management of Land in Rwanda (O.G. No.18 Of 15/09/2005), Article 11.

121 The 2003 Rwandan Constitution, *supra* note 100 (Article 41).

122 *Ibid.* Article (49).

123 *Ibid.*, See Article 28.

in the Constitution. Even though we have argued earlier that existing Constitutional provisions do not sufficiently guarantee full realisation of rights, their entrenchment in the Constitution represents an important legal step. This is because enforcement of a right not explicitly recognised by the law, is difficult or if not impossible. Therefore, the Constitution's declared commitment to protect fundamental rights, while eschewing explicit recognition of certain fundamental rights (such as to food, shelter and housing), becomes questionable.

Human Rights Enforcement Mechanisms

Although the Constitution sets different rights and obligations, such rights need to be enforced. Institutions play a great role in enforcing the mentioned provisions.

The Judiciary

The provisions of the Constitution with regard to the role of courts in the protection of rights are far from clear. At center stage are two provisions. On the one hand is the role of the judiciary while on the other, is the authentic interpretation of laws. Article 44 provides "the judiciary as a guardian of rights and freedoms of the public ensures respect thereof in accordance with procedures determined by law".

Article 96 provides that "The authentic interpretation of laws shall be done by both Chambers of Parliament acting jointly after the Supreme Court has given an opinion on the matter; each chamber shall decide on the basis of the majority referred to in Article 93 of this Constitution."

The place and the role of the judiciary in the protection of rights become more complicated when these two provisions are read together with Article 145 (5). This article provides that the supreme court has jurisdiction in "hearing petitions on the Constitutionality of laws and decree-law."

The protection of fundamental rights involves the interpretation of laws. It is not clear therefore from the provisions above whether the judiciary has a real power in the protection of these rights without a real power to interpret laws. Moreover, the Constitution does not oblige the parliament to uphold the Supreme Court's opinions, which makes the highest court only a consultative organ! The power of interpretation of laws, including human rights, is given to the parliament. It is submitted that this situation has some implications that do not advance the protection of human rights.

The Constitution confers on parliament the power not only to enact laws, but to interpret them as well.[124] This duality in the functions of parliament, of being judge and a party at the same time, renders the protection of human rights problematic. In a democratic society, the application of the Constitutional principle of separation of powers, by necessity means that each of the three arms of state power shall enjoy certain powers to the exclusion of the others.[125] This is equally relevant in the area of protection of human rights, and especially in respect to the powers of courts of law. The Constitution provides that "the judiciary is guardian of rights and freedom"[126] and that "the judiciary is independent and separate from the legislative and executive branches of government."[127] Given this background, it sounds Constitutionally incongruous to vest in parliament legislative as well as interpretative powers.

The Constitution provides that "judicial decisions are binding on all parties concerned be they public authorities or individuals".[128] Similarly, the supreme court's "decisions are binding on all parties concerned whether such are organs of the state, public officials,

124 The 2003 Rwandan Constitutions, *supra* note 100 Article 62.
125 See the principle of separation of powers under democratic states.
126 The 2003 Rwandan Constitution, *supra* note 100 (Art 44).
127 *Ibid*. Article 140.
128 *Ibid.* Article 140 [4].

civilians, military, judicial officers or private individuals."[129] It is submitted that the decisions or interpretation of laws regarding human rights that bind parliament should not come from the parliament itself.

Another implication of this situation is that individuals seeking remedies find themselves seeking interpretation of laws from the legislature, and not from the organ which is Constitutionally and technically best equipped to do so. The protection of human rights involves technicalities, innovations and actualisations of the jurisprudence by courts. The interpretation of human rights jurisprudence normally evolves in the judiciary, not in the parliament. Therefore giving the power of interpretation of laws to the parliament, does not allow adequate evolution of human rights jurisprudence with regard to the international human rights law standard. In this context, by denying the judiciary the power of interpreting laws, the Constitution makes rights' remedies unavailable and ineffective.

Administrative Mechanisms

National institutions can play an important role in the effective implementation of human rights at the national level. This can be particularly important, depending on the power given to the institution concerned. With regard to human rights issues, the Rwandan structure of national institutions is quite broad and varied. The Constitution provides for special commissions and organs for the promotion and protection of human rights. The National Commission for Human Rights is declared an independent national institution.[130] Its responsibilities include examining the violations of human rights committed by state organs, public officials, organisations and individuals. The Constitution also provides for the

129 *Ibid*. Article 144.

130 The 2003 Rwandan Constitution, *supra* note 100, Article 177.

Office of the Ombudsman,[131] the Gender Monitoring Office,[132] the National Youth Council,[133] and other institutions able to contribute to the protection of fundamental rights.

As mentioned earlier, the role of these institutions and their influence on human rights depends on the power they wield with respect to their protective mandate. The Rwandan National Human Rights Commission (RNHRC) it is obliged to prepare and disseminate annual and other reports as may be necessary on the situation on human rights in Rwanda. Through this power, the Commission together with the parliament plays an important role in protecting public interests.

To sum up, the entrenchment of rights either in the Constitution or in other laws does not automatically translate to enjoyment of such rights. Legal provisions may amount to no more than mere promises. Administrative mechanisms put in place by the Constitution can however, strengthen the protection of human rights. The Constitution, in recognition of the doctrine of separation of powers, empowers the judiciary to be the guardian of all rights. At the same time, the Constitution imposes a limitation on the powers of the judiciary, by giving parliament powers of interpretation of all laws, including those relating to human rights. This is an anomaly, since the parliament, as the organ that makes laws, should not at the same time have the power to interpret such laws. Unless the Constitution is amended to give the judiciary full powers to interpret and enforce Constitutional provisions, human rights will remain pious wishes. This is because, , the legislature is often influenced by partisan politics and is deterred from making impartial decisions, besides the lackof necessary skills to do so. But in the meantime the judiciary should adopt a pragmatic and progressive interpretation in its opinions to parliament, which the later should respect and uphold.

131 *Ibid*. Article 182.
132 *Ibid*. Article 185.
133 *Ibid*. Article 188.

The Rwandan State of Constitutionalism in the Year 2008

In the year 2008, Constitutionalism in Rwanda focussed on the land expropriation, freedom of media, the performance of the judiciary in relation to *Gacaca* Courts and the transfer of cases from ICTR, the abolition of the death penalty, and amendment of the Constitution.

Land Expropriation in 2008

In line with the country's goal of promoting economic growth and development, the land of many people living in urban areas with houses below the required standards was expropriated. Rwanda has a target of turning Kigali city into one of the best cities in the region by the year 2020.[134]

As a result, houses falling below the required standards were demolished and the owners paid and relocated to designated areas outside the city. The exercise aggrieved those who were evicted, on the basis that it infringed their right to own property. In addition, land expropriation worsened the economic status of those who were relocated to areas far from where their source of income was located. It should be noted however, that the owners were compensated and paid value for their land, since at that time land belonged to the government.

In the eastern part of Rwanda, where some government officials and ordinary citizens owned big portions of land, the Rwandan president redistributed the land to poor people in a bid to attain equitable distribution of land. A commission comprising the military, police, and officials from the land ministry was formed by the president to continue with redistribution of land to the poor. Land ownership was limited to 20 hectares. While the redistribution

134 Steffen, A. (2006) Can Rwanda's Vision 2020 National Leapfrogging Plan Succeed?, p. 6. Accessed at: http://www.worldchanging.com/archives/004835.html

won the president praise among the poor there were some claims by those who previously owned vast plots of land, that they had not been compensated. It should be noted that Rwanda was the only country in the East African region in 2008, that published a national land policy report.[135]

Rwandan Parliamentary Elections, 2008

From 15 to 18 September 2008, parliamentary elections were held in Rwanda. The 2008 Rwandan parliamentary elections produced the world's first national legislative chamber with a female majority, after women secured 45 seats, 56.25%.The Rwandan lower chamber of parliament (chamber of deputies) is composed of 80 seats, of whom 53 are elected directly and 27 elected indirectly.

Another element to note is the coalition of political parties during the 2008 parliamentary elections. The ruling RPF assembled a coalition with the small political parties, namely the Islamic Democratic Party (PDI), the Christian Democratic Party (PDC), the Party for Progress and Concord (PPC), the Prosperity and Solidarity Party (PSP), the Democratic Union of the Rwandan People (UPDR) and the Rwandese Socialist Party (PSR).[136]

Aside from the RPF coalition, only two other parties participated in the election; the Social Democratic Party and the Liberal Party. One candidate also participated as an independent candidate.[137] It should be noted that the elections were declared free and fair by observers from the European Union (EU), Commonwealth of Nations, the AU , COMESA, andEALA.[138]

135 Gahigana, I (2008) Rwanda Publishes Land Policy Report. *Rwandan New Times*, 19 January, 2008, p. 1.

136 http://en.wikipedia.org/wiki/Rwandan_parliamentary_election,_2008

137 *Ibid.*

138 *Ibid.*

The Status of Media/ Freedom of the Media in 2008

The general view has been that freedom of the media improved in Rwanda in the year 2008.The year 2008 saw greater growth in the registration of private newspapers[139] and radio stations than at any other point in the country's history. However this positive growth was accompanied by acts of government intimidation in response to alleged breaches of the media code of conduct. For example in July 2008, Furah Mugisha, one of the *Umuseso* editors, was deported to Tanzania on allegations that he was a Tanzanian citizen. Mugisha, who held both a Rwandan passport and identity card, was born in Tanzania, where he subsequently lived as a refugee. In an interview he claimed that his deportation was asa result of a story in the Umuseso about a stalled investigation into the assassination of a leading opposition party leader. Government action was highly criticised as there was ample evidence to confirm that Mugisha was not Tanzanian, but a Rwandan.[140]

Some newspapers that are regarded as critical of government were denied revenue opportunities by government. Umuseso for example, was prohibited from carrying government adverts, nearly leading to the newspaper's collapse. [141] The general view has been that, although the Constitution provides for freedom of speech and of the media "in conditions prescribed by the law"; the government sometimes restricts these rights by enforcing overly broad and strict laws, excluding journalists from government events, and expelling foreign journalists.[142]

139 The Media High Council, a state regulatory body, reported that 57 private newspapers had registered with the government, although only 37 managed to print a single issue.

140 Interview with Kabonero, editor-in-chief of *Umuseso* with the *Voice of America* on 24 June 2008.

141 Charles Kabonero, Rwanda Independent Media Group (RIMEG) director and editor-in-chief of *Umuseso*, said advertising revenue shortfalls forced the company to publish only sporadically.

142 http://www.state.gov/g/drl/rls/hrrpt/2008/af/119019.htm.

In the year 2008 some of the local newspapers were closed. The weekly Kinyarwanda-language newspaper *Umuco* closed after its founder and editor fled the country to avoid persecution. It is believed that Bizumuremyi fled just before police raided his home in the capital, Kigali. As a result, the Media High Council suspended Bizumuremyi's press accreditation and his publication for one year.[143]

Also during the year, the minister in charge of information warned Rwandan journalists working for the British Broadcasting Corporation (BBC) and the Voice of America (VOA) against producing "programmes that destroy Rwanda's social fabric". The minister threatened to suspend the two radios "if they cannot respond positively to government warnings to abandon their non-factual reporting.[144]

Judicial Reform in 2008

Gacaca Courts

In June 2008, the Gacaca law[145] was amended to allow for Gacaca Courts to try category 1 cases. This category of cases comprises approximately 6,900 suspects who were handled by regular courts.[146] The same amendment guaranteed the transfer of about

143 CPJ (Committee to Protect Journalists) *Defending Journalists Worldwide, Attacks on the Press in 2008: Rwanda*; can also be accessed on: http://www.cpj.org/2009/02/attacks-on-the-press-in-2008-rwanda.php.

144 2008 Human Rights Report: Rwanda, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOUR, **2008 Country Reports on Human Rights Practices,** 25 February 2009. p 5, accessed also at:http://www.cpj.org/2009/02/attacks-on-the-press-in-2008-rwanda.php

145 Organic Law No. 16/2004 of 19 June 2004 establishing the organisation, competence and functioning of Gacaca Courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between 1 October 1990 and 31 December 1994 (O.G. special No. 16 of 19 June 2004).

146 *Ibid*. Articles 39-45.

1,200 category I cases relating to genocide that were being heard in regular courts to the Gacaca Courts.[147] By the end of 2008, more than 99 percent of the genocide-related cases dating back to 2002 (when the first Gacaca Courts began operating), had been completed in Gacaca Courts, and less than 10,000 were pending hearing.[148] There were 169,442 gacaca judges (seven per cell-level gacaca court), or "persons of integrity" elected by the community and provided with gacaca law training, serving in 12,103 cell-level Gacaca Courts across the country. There were 1,545 appellate courts that heard appeals from the 3,000 gacaca trial courts.

Unlike in the year 2007, in 2008, no gacaca judges were implicated in the genocide and replaced. Some government officials reportedly unduly influenced gacaca judges during the course of hearings, although there were far fewer such reports than in previous years.[149]

The gacaca court system has been criticized by the international community for failing to conform to international standards. One such criticism has been that government has not authorized Gacaca Courts to consider human rights abuses allegedly committed by the RPF during the 1994 genocide. Consequently, Gacaca Courts are perceived as representing a form of incomplete or one-sided justice and for being biased against those who acted on behalf of the former government.[150] This view is however not shared by all Rwandans living in Rwanda, some of whom view the RPF as liberators who put an end to the genocide.

In June 2008, Government brought charges against four former RPA soldiers for their alleged role in the deaths of 15 civilians in Kabgayi in June 1994. Two of the officers were sentenced to eight years in prison after pleading guilty while two were acquitted.[151]

147 http://www.state.gov/g/drl/rls/hrrpt/2008/af/119019.htm
148 *Ibid.*
149 *Ibid.*
150 *Ibid.*
151 *Ibid.*

Unlike in the year 2007, there were no reports of suicides among genocide survivors in 2008. The government reported that 16 genocide survivors and witnesses were killed in attacks during the year; the genocide survivors' organization,*Ibuka* reported 22 killings of survivors from January through December. Formal or regular courts handled the cases of hundreds of persons accused of participating in the killing, injuring, or threatening of witnesses, survivors, and judges. During the year, police processed 794 cases involving violence against survivors and witnesses, 269 of which were filed in court, and 340 cases of "divisionism" (a poorly defined term commonly used in relation to the offense of sectarianism), 140 of which were filed in court, nearly all before Gacaca Courts. The government also continued to conduct criminal investigations into organized groups that targeted and killed genocide witnesses in certain provinces. Criminal investigations resulted in the prosecution of some persons.[152]

During the year, the National Unity and Reconciliation Commission (NURC)released the results of a survey on the gacaca process and national unity and reconciliation. The overwhelming majority (99 percent of the general population and 92 percent of survivors) expressed the belief that the Gacaca process "is an essential step towards peace and reconciliation in Rwanda," and 98 percent of the general population reported gacaca "a more effective way" to deal with genocide crimes than the formal court system.[153]

In other proceedings, it has been agreed generally that the judiciary was independent and impartial in civil matters. There are mechanisms for citizens to file lawsuits in civil matters, including violations of their Constitutional rights. The Office of the Ombudsman processes claims of judicial wrongdoing on an administrative basis. There

152 http://www.state.gov/g/drl/rls/hrrpt/2008/af/119019.htm
153 *Ibid.*

continued to be problems enforcing domestic court orders.[154] A worthy development to note is the establishment of commercial courts to deal exclusively with commercial matters.

Transfer of Cases from ICTR (Arusha) to Rwanda and its Implications

The UN established the ICTR to prosecute those responsible for the 1994 genocide. [155] The Tribunal aims to assist the process of national reconciliation in Rwanda and the maintenance of peace in the region.

This section reports on the progress of important cases at the ICTR and provides an analysis of the tribunals' effectiveness. Since the term of the tribunal has ended, the key question has been where the suspects should be transferred for final sentencing and trial. Rwanda prefers all suspects to be transferred to Kigali.[156]

While in principle transfer of the accused from ICTR to Rwanda was agreed, not much progress has been achieved.[157] The transfer of ICTR cases has been contentious at different levels: legal, political and social economic.

On 28 May 2008, the Trial Chamber issued its decision,[158] denying the application for referral of the cases of Yussuf Munyakazi[159] to

154 *Ibid.*

155 United Nations Security Council Resolution (955) of 8 November 1994 creating the ICTR for prosecution of persons suspected of having committed atrocities in Rwanda during 1994.

156 Hirondelle News Agency (2008) Rwanda To Refuse Transfer of ICTR Suspects to Anywhere but Kigali. 10 July 2008, p. 1.

157 http://ilreports.blogspot.com/2008/05/ictr-denial-of-request-to-transfer.html

158 The Trial Chamber composed of Judges Inés Mónica Weinberg de Roca, presiding, Lee Muthoga and Robert Fremr was particularly concerned in view of the fact that the High Court hearing the referred case would be composed of a single judge who would be less likely to be able to resist pressures than a panel of three or more judges.

159 Born in 1935 in Kibuye, Munyakazi was a businessman and farmer in

the Republic of Rwanda on two main grounds. First, it was acknowledged that the Republic of Rwanda has abolished the death penalty and therefore precluding its applicability to the referred cases. However, concern was expressed by the Trial Chamber about the sentence of life imprisonment in isolation, which replaced the death penalty under Rwandan law. The Trial Chamber was of the view that certain safeguards listed in the ICTR decision should be put in place to ensure that the penalty of life imprisonment in isolation conforms with international human rights standards.

Secondly, the Trial Chamber expressed serious concern about the right to fair trial of the accused, with specific reference to the independence of the tribunal that would try the case if referred, and the ability of the accused to call witnesses in his defence and the witness protection programme in place. Specifically, the Tribunal was concerned that there were no sufficient guarantees against undue external pressure on the judiciary and that, based on past actions of government, the independence of the judiciary would not be respected.[160] The Trial Chamber also expressed reservations about the fact that the findings of a single Rwandan judge can only be reviewed by the Rwanda supreme court in the case of a miscarriage of justice. Accordingly, the Trial Chamber noted that its concerns regarding the independence of the court would be substantially reduced if the High Court would in such instances be composed of a bench of three or more judges.[161]

Abolition of the Death Penalty in Rwanda

Rwanda abolished the death penalty in 2008.[162] The decision to abolish the death penalty was neither a miracle nor a mere

Cyangugu Province.

160 http://ilreports.blogspot.com/2008/05/ictr-denial-of-request-to-transfer.html

161 *Ibid.*

162 Organic Law No. 31/2007 of 25 July 2007 relating to the abolition of the death penalty.

coincidence. Under the terms of Arusha Peace Agreements[163] the former Government of Rwanda and the RPF agreed without any reservations, to ratify international instruments[164] under which the death penalty is condemned, in particular the Second Optional Protocol[165] to the ICCPR.[166] Another pertinent and related development was the resolution of the African Commission on Human and People's Rights (ACHPR) conference held in November 1999, [167] that expressed concern that some African member states were imposing the death penalty in instances that did not meet international standards. Around about the same time the *Urugwiro* meetings[168] had similar concerns regarding human rights.

Rwandan legislation recognises rights and obligations bestowed on human beings.[169] These rights are of various categories, some are exercised by the individual in his/her relationship with the community, like political rights and social rights; while others are exercised by individuals in their relationships with one another.[170]

The Rwandan Penal Code allows for imprisonment for life, imprisonment for a term, for fines, civil degradation, and confiscation of property and restriction of movement.[171] The available sentences

163 Protocol of Agreement between the Government of Rwanda and the Rwandese Patriotic Front on Miscellaneous Issues and Final Provisions repealed by the 4June 2003 Rwandan Constitution, Article 15.

164 *Ibid.*

165 The 1990 Second Optional Protocol to the ICCPR, aiming to abolish the death penalty.

166 The ICCPR was created by the General Assembly Resolution No. 217A (111) of 23 November, 1966.

167 The Session of the ACHPR held in Kigali, in November 1999.

168 Translated literally as "a meeting", State House initiative on cabinet meetings that discussed a range of national issues.

169 O.G. Special of 4 June 2003, Rwanda Constitution of June, 2003, Chapter One, Articles 10-51.

170 Augustin, C. (2000) Family Law and Matrimonial Rights. Kigali: UNILAK.. p. 61.

171 Article 3 of the Organic Law No. 31/2007 of 25 July 2007 relating to the

are set out in specific provisions of the code concerning the particular offence or count charged. Usually, the code defines both a minimum and maximum sentence. Within the range set out in the legislation, judges are left with an enormous degree of discretion to determine penalties. Like most legal systems, Rwanda's criminal legislation has little to say about principles to be applied by judges in fixing sentences.

The anti-death-penalty campaign in Rwanda, a government project, was led by the Ministry of Justice (Minijust).[172] This successful project consisted of a campaign to abolish the death penalty through litigation, legislation and public awareness activities. The centerpiece of the campaign was the provision of legal services. In 2004 there was intensive judicial reform that involved training of judicial officials, lawyers and other government officials. Through these workshops and publications, all the judicial sectors were sensitized on the importance of abolition of the death penalty. Finally, the campaign also included lobbying parliament, and research and information dissemination to influence public opinion.[173] It is through these means that Rwanda enacted a law abolishing death penalty in 2008.

Amendment of the Constitution

Amendment of the Constitution may be initiated by either the president of the republic (upon a proposal by cabinet) or by each Chamber of the Parliament upon a resolution passed by a two thirds majority vote by members. The passage of a Constitutional amendment requires a three-quarters majority vote by members of each Chamber of Parliament.[174]

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abolition of the death penalty.

172 Minijust, Ministry of Justice in Rwanda was tasked to study the possibility of abolishing the death penalty in Rwanda.

173 *Ibid*.

174 The 2003 Rwandan Constitution, supra note 100, Article 193.

Aware of anti-democratic practices concerning some controversial amendments, especially with regard to the term of the presidency, the legislature has made more difficult amendment of provisions regarding the presidential term, by providing for this to be done only through a referendum.[175]Furthermore, amending the provisions regulating amendments of such sensitive issues is prohibited.

This notwithstanding, the Constitution has been amended more than three times since 2003. In July 2008, Rwanda's Parliament unanimously voted to amend the Constitution to grant former presidents perpetual immunity from prosecution.[176] The new Constitutional amendment stipulates that a former head of state cannot be prosecuted on charges for which he was not officially put on trial when he was in office. Parliament unanimously introduced a provision that subjects a serving head of state to prosecution during his/her term of office, but protects him/her from liability on completion of the presidential term.. So, any person who may have claims or allegations against the president can only take them to court during the president's term of office. Since the president would not be immune in his own jurisdiction, this article has been challenged by lawyers, who fear that such a provision might weaken the president's immunity within the foreign jurisdiction and might challenge the general principle of diplomatic immunities accorded to serving heads of states in foreign jurisdiction.

Secondly, it is seen as a way of protecting the president because in the African context, there is nobody who will dare to prosecute the serving head of the state. This implies that presidents will never be tried, neither during the term of office nor after.

This provision also has a negative impact on political succession, because an outgoing president might pave way for his or her supporter to avoid a scenario where the opposition might amend

175 *Ibid.*, Article 193 (3).
176 Ibid, Article 115 (3).

the Constitution and prosecute the former president. This clause implies denial of free democracy. Such a clause might create room for complacency by heads of state who may do whatever they want since they would be assured ofnot being prosecuted after their term of office.[177]

On the other hand, it can also encourage a proper democracy because it has been argued that some of the presidents refuse to leave office due to the fear of being prosecuted. Without such fear there is a belief that they will respect their term of office and handover power readily and gracefully. It is also claimed that this provision will encourage a serving head of state to work more conscientiously if he/she is aware of the possibility of prosecution while in office, which will in turn, promote the rule of law and equality of all before the law.

Conclusion

The adoption of a Constitution in Rwanda in 2003 could not have been more fortuitous. It marked the end of the transitional period and, more importantly put an end to the discordant documents which together constitute the fundamental law. Despite its several lacunae, pointed out in this paper, if observed scrupulously, the provisions of the 2003 Rwanda Constitution have the distinct potential of addressing conflicts and establishing a democratic society.

Successive Constitutions of 1962, 1978 or 1991, as amended by the Arusha Agreements, contained many democratic principles, values and human rights provisions. However, these provisions were incapable of obviating recurrent cycles of violence and conflicts, culminating in the genocide of 1994 in which almost a million people were killed. The 2003 Constitution is quite a comprehensive document and if correctly implemented, can contribute substantially

177 Interview with Jean Bosco Gasasira, the editor of the *Umuvugizi Independent Newspaper* on 20 October 2008.

to the improvement of Constitutionalism in Rwanda. Therefore, while searching for durable peace and Constitutionalism, emphasis must be put on mechanisms to encourage both leaders and citizens to respect the Constitution. Leaders must be committed to respect of human rights and the Constitutional principles guiding the exercise of power in democratic society. In short, the state of Constitutionalism in Rwanda improved greatly in the year 2008.

In addition, the notion of democracy within the Rwandan context must be scrutinized carefully. The Constitution has taken into account the unique history of Rwanda, which requires a Constitution which, while guaranteeing the values and principles of democracy, must take into account the rights of minorities, women, children, and other disadvantaged groups.

A comprehensive programme to educate Rwandans on traditional values is critical to building a society that coexists in peace. However, this task should be conducted carefully, as divisionism was taught for years. In Rwanda's post-genocidal state, injuries sustained by survivors as a result of ethnic discrimination are profound and still affect its victims in all aspects of life.

Finally, entrenched, prevalent corruption is likely to frustrate the judiciary's capacity to deliver justice. A corruption-free judiciary, however vital it is, must be accompanied by corresponding strengthening of other arms of the government. The major turning point in the delivery of justice has therefore been the introduction of the Gacaca Courts, to try the thousands of genocide suspects who are languishing in crowded jails across the country. The question however persists: What are the prospects of Constitutionalism in Rwanda? A Constitution makes sense only when fully respected. In the same vein, there can be no democracy without democrats; and Constitutionalism cannot exist when either the leaders or the people fail to respect the Constitution.

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The State of Constitutionalism in Tanzania, 2008

Fahamu Mtulya

Introduction

This paper assesses the state of constitutional and human rights development in Tanzania Mainland during the year 2008. While no specific constitutional amendments took place, there were court decisions, parliamentary debates and court petitions which had direct impact on constitutional developments. In considering human rights developments, most of the issues are drawn from the National Conference on Human Rights held in Dar-es-Salaam, Tanzania. The conference discussed the problems facing different actors involved in the promotion and protection of human rights.

The paper is divided into five main parts. Part one dwells on the concept of constitutionalism and human rights; part two on constitutional developments relating to human rights in Tanzania Mainland before and after independence; part three on constitutionalism and human rights developments for the year 2008; part four on the National Conference on Human Rights and its recommendations; part five on challenges to constitutionalism and human rights development, and finally the conclusion.

The Concept of Constitutionalism and Human Rights

The Concept of Constitutionalism

The definition of constitutionalism is quite controversial.[178] John Ruhangisa thinks that the idea is often associated with the political theories of John Locke, that the government can and should be limited in its powers by a fundamental law, or set of laws, beyond the reach of individual government to amend and that government's authority depends on its observing these limitations.[179] Julius Ihonvbere argues that constitutionalism revolves around the twin issues of individual rights and limited powers of government. According to him, these issues provide room for the rule of law, separation of powers, periodic elections, independence of the judiciary, and right to private property, among other crucial issues.[180] Some writers state that constitutionalism implies that the constitution cannot be suspended, circumvented or disregarded by the political organs of government, and that it can be amended only by procedures appropriate for changing the constitution's character and that gives effect to the will of the people.[181]

Scholars in Tanzania have argued that constitutional development in Tanzania has been a process of "constitution making without constitutionalism".[182] Since independence people in Tanzania

178 Ihonvbere, J. (2000), "Towards a New Constitutionalism in Africa". Centre for Democracy and Development, Occasional Paper Series No. 4, London, p. 2.

179 Ruhangisa, J. (2003), "The State of Constitutional Development in East Africa: The Role of the East African Community" In B. Tusasirwe, Constitutionalism in East Africa: Progress, Challenges and Prospects. Kampala: Kituo cha Katiba, East African Centre for Constitutional Development. p. 5.

180 Ihonvbere, J. (2000) *op. cit* p.2.

181 Louis Henkin as quoted in Ihonvbere, J. (2000) *op. cit p*. 3.

182 Ndumbaro, L. (2003), "The State of Constitutionalism in Tanzania." In Tusasirwe, B. (ed.) *Constitutionalism in East Africa: Progress, Challenges*

have never been genuinely involved by the government in the constitutional-making process. There have only been half-hearted efforts. In most cases citizens' consent was sought at the implementation level rather than at policy-making level.[183] One gets the impression that these attempts are aimed at showing casing Tanzania as a democratic country and that people are involved in their own governance.[184]

The reasons for the shifted constitutional debates, from the public to few individuals, are largely a legacy of colonial rule, authoritarian single party regime, and the adoption of *ujamaa* ideology in 1967.[185] All these worked together against constitutionalism because all are founded on a top-down model of constitutional making. The establishment of the one-party regime is said to have dealt the fatal blow in excluding citizens from participating in constitution-making debates. For instance, the process that led to the adoption of permanent constitution of 1977 was too short to allow for any meaningful debate among members of the constituent assembly. The bill was prepared, discussed and adopted by the constituent assembly in seven days only. It was only the national executive committee

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and Prospects in 2003. Kampala: Kituo cha Katiba, East African Centre for Consitutional Development. p. 12. See also Peter, C. (2001), "*Constitution Making in Tanzania: The Role of Civil Organisations"* In K. Kibwana *et al.* (ed.) (2001) *Constitutionalism in East Africa: Progress, Challenges and Prospects in 1999*, Kampala: Kituo cha Katiba, East Africa Centre for Constitutional Development.

183 Ndumbaro, L. (2003), Policy Making in Tanzania: A Contested Terrain,in Kimaro, I. (2003) ed. Humanities and Social Sciences in East and Central Africa: Theory and Practice, Dar Es Salaam,. Dup Ltd. P. 192.

184 A clear example is the whole White Paper process in 1998. The government prepared issues, and instead of letting the people discuss them, the same government gave its position on all he issues and then asked the people to add any other comments if they felt it was necessary. See Peter's Conclusion in his 2001 work titled Constitution Making in Tanzania: The Role of Civil Organisations (2001).

185 Ndumbaro, L. (2003) *op. cit.* p. 12.

of CCM, the ruling party, that debated the bill, and even that was behind closed doors. Some scholars have therefore argued that the enjoyment of human rights was confined to members of the ruling regime.[186]

The introduction of multiparty politics in the early 1990s marked the beginning of citizens involvement in constitution making. The creation of the Nyalali Commission,[187] whose report led to the adoption of multiparty politics, and the Kisanga Committee,[188] whose report led to the adoption of the 13th amendment of the Constitution in 2000 are good examples of measures taken by the state in Tanzania to ensure citizens participation in constitutional making. What is more important at present is to make citizens aware of their role in constitution making, so that they can contribute to nation building through open and fearless participation. In this way, the principles of rule of law, good governance and protection and promotion of human rights will be adhered to.

The Concept of Human Rights

The concept of human rights is complex and broad.[189] In the most general sense human rights are understood as rights that belong to any individual by virtue of being human, independent of acts of law.[190] It is generally acknowledged that man is born with certain

186 Ndumbaro, L. (2001) *op. cit.* p. 13.

187 United Republic of Tanzania (1991), The Presidential Commission on Single Party or Multi Party System, Volume I, Report and Recommendations, Dar-es-Salaam.

188 United Republic of Tanzania (1999), *Kamati ya Kuratibu Maoni Kuhusu Katiba, Kitabu cha Kwanza*: Maoni ya Wananchi na Ushauri wa Kamati, Dar-es-Salaam.

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190 Piechowiak, B. (2000), *What are Human Rights*? In Raija Hanski and

inalienable rights: freedom to life and liberty, freedom of association, freedom of expression, the right to self-determination and so forth.[191] These rights are universal, that is, they belong to each and every human being, no matter who he or she is.[192]

Although universality of human rights is decisive, defining characteristics of human rights are most often contested by legal philosophers and theorists. It should however, be pointed out that universality is definitely recognised and emphasised by the level of practical discussion of human rights. The Vienna Declaration and Programme of Action (Vienna Declaration) in part provides an answer to the doubt raised through the following unambiguous phrase: Human rights and fundamental freedoms are the birth rights of all human beings and the universal nature of these rights and freedom is beyond question.[193] Again, the Vienna Declaration in its 5th paragraph declares that all human rights are universal, indivisible and interdependent and interrelated, and requires the international community to treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. The Declaration recognises the significance of national and regional particularities and various historical, cultural and religious backgrounds, but declares that it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.[194]

Markku Suksi (eds) *An Introduction to the International Protection of Human Rights*. Turko/Abo: Institute of Human Rights, Abo Academic University. p. 3.

191 Tanganyika Law Society (1995) *op. cit.* p. 2

192 Piechowiak, B. (2000) *op. cit.* p. 5.

193 The Vienna Declaration and Programme of Action, General Assembly of the United Nations, A/CONF.157/23, 12 July 1993, Part I Para 1.

194 See: Paragraph 5 of Part I of the Vienna Declaration

The principles of human rights have been in existence for ages.[195] But it was not until the end of the Second World War[196] that representatives of states comprising the newly established UN developed the Universal Declaration of Human Rights (UDHR).[197] The UN listed human rights and fundamental freedoms as the minimum standards by which governments should treat their citizens.[198] Some scholars argue that the concept of human rights came into existence partially to challenge the positivistic approach of law.[199] Whatever the case may be, human rights are important and their existence is crucial for obliging states to protect and promote individual rights and freedoms, at least, at the minimum.

Constitutional Development in Relation to Human Rights in Tanzania Mainland: Before and After Independence

Before Independence (During the Colonial Period)

During the colonial period, constitutionalism and human rights were not on the agenda. The statist legacy of colonial rule worked against constitutionalism as it was founded on a top-down model of constitution making,[200] for a colonial government to uphold

195 See: Magna Carta of 1215 –The Great Charter of the Liberties of England which was granted by King John in 1215, Remember American War of Independence fought in 1776, French Revolution waged in 1789-95, and the crusades for independence by African nations.

196 The Second World War waged between 1939 and 1945.

197 Adopted by the General Assembly of United Nations Resolution 217(III) of 10 December 1948.

198 English, K. and Stapleton, A. (1995), *The Human Rights Handbook*: A Practical Guide to Monitoring Human Rights. Colchester: Ennifield. p. 23.

199 Zejadro, M. (2000), *Human Dignity and Human Rights.* In Raija Hanski and Markku Suksi (eds) An Introduction to the International Protection of Human Rights. Turko/Abo: Institute of Human Rights, Abo Academic University. p. 15.

200 Ndumbaro, L. (2001) *op. cit.* p. 5. A good is the importation of Order

constitutionalism, fundamental rights and freedom would defeat the very aim of colonialism.[201] Racism and discrimination were accepted as both a way of life and a matter of state policy.[202]

The human rights situation in Africa during this time was backward even by African social science standards.[203] During this time "black skins were said to have no souls".[204] They could be bartered for beads; gunned down like wild animals; packed like sardines; shipped like cattle and harnessed to a plough like horses without any compunction.[205] That was the ideology of domination.[206] It was not until the 1960s, when the US started limiting its dealings with countries that violated human rights.[207] One could ask why the issue of the Bill of Rights came to the fore in the 1960s, was supported

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in Council in 1920, and the discussion that led to the adoption of the independence constitution in 1960. The discussion basically involved only the colonial rulers and the nationalist leaders.

201 Peter, C.M. (1997), *Human Rights in Tanzania*: Selected Cases and Materials. Koln: Rudiger Koper Verlag. p. 2.

202 Ibid.

203 Shivji, I. (1989), The Concept of Human Rights in Africa. Dakar: CODESRIA Book Series. p. vii.

204 *Ibid.* p. 1.

205 Williams, E. (1964), *Capitalism and Slavery*. London: Andre Deutch. See also Walter, R. (1989), *West Africa and the Transatlantic Slave Trade*. Nairobi: East African Publishing House. Quoted in Shivji, I. (1989) *op. cit.* 13 at p. 1.

206 This ideology accompanied the domination and bleeding. See: Shivji, I. (1989) *op. cit.* p. 1. It is also said that in 1900 more than half of the world's people lived under colonial rule, and in no country all citizen had the right to vote. See Human Rights and Human Development: Freedom and Solidarity, http://www.pcpafy.org> accessed on 13 October 2003.

207 For instance, in 1981 the US administration earmarked Zaire and South Africa for sanctions and denial of military aid. It has been argued that the US considered racism and dictatorship to be a threat to its interests in Africa. The sanctions were pursued in order to influence human rights policies, and to give the US access to its interests. See Vance, C. (1985), Human Rights and Foreign Policy. *Georgia Journal of International and Comparative Law Quarterly*, 7, May, pp. 54-81.

by the very powers that had been suppressing it for years.[208] It has been argued that 'it was not because colonialists cared a lot about individual rights and freedoms of the indigenous people, but because they were concerned about the property of their nationals still in the colonies after independence'.[209]

After independence

After independence, hopes that human rights would be respected were high. But it was not long before nationalist governments violated their own laws, misused their own powers, bullied and oppressed the masses and encroached upon human rights.[210] Peter has this to say:

> *'In the struggle for independence things were not better. There was an open struggle between the people on one hand and the new rulers on the other. While the people attempted to consolidate their independence from colonial rule, this was frustrated quite early by their very leaders'.*[211]

The incoming government, right after independence, rejected the guarantee of fundamental rights and freedoms in the form of a Bill of Rights.[212] The nationalists argued that a Bill of Rights would hamper the new government in its endeavour to develop the country, it would be abused to frustrate the government by declaring most of its actions unconstitutional, and it would also invite conflict.[213]

208 At this time constitutional talks were taking place at Lancaster House in London, where the British ensured that a Bill of Rights was entrenched in the constitutions of its former colonies. See: Legal Aid Committee (1985), Essays on Law and Society. Dar-es-Salaam: Faculty of Law, University of Dar es Salaam. p. 12.

209 *Ibid.* p. 13.

210 Warfa, S.O. (1992), Challenges Facing Africa as it Embraces Pluralism. Special Human Rights Report. Published in *Daily Nation,* 16 March 1992.

211 Peter, C.M. (1997) *op. cit.* p. 3.

212 *Ibid.*

213 *Ibid.*

The question of individual rights was raised again in the report of the presidential commission on the establishment of a democratic one-party state in 1965.[214] The suggestion was ignored and the interim constitution of 1965 did not include a Bill of Rights.[215] The 1965 constitution only contained a handful of very general rights provided in its preamble, where the government stated categorically that it believed that the rule of law was best preserved not by formal guarantee in a Bill of Rights.[216] Since individuals had no alternative for claiming their rights, they had to use the preamble to enforce their rights and freedoms.

Alternatives to the Bill of Rights

Preamble to the Constitution

The interim constitution of 1965 contained a preamble which listed constitutional guarantees usually found in a Bill of Rights. But under the common law legal tradition, which is followed by Tanzania and other British colonies, the preamble is not part of the constitution for the purposes of enforcement of rights.[217] Therefore one cannot base his or her case of violation of rights or freedom on this part of the constitution.

Eight years after inclusion of the preamble to the 1965 constitution, Hatimali Adamji[218] based his case on the preamble. Being forced to retire from the East African Posts and Telecommunication Corporation to facilitate Africanisation, Adamji argued that his retirement violated the policy of non-racialism, and amounted to discrimination against him, as a Tanzanian of Asian origin, as provided in the preamble to the constitution. The issue before

214 Legal Aid Committee (1985) *op. cit.* p. 13.
215 Ibid.
216 *Ibid.*
217 *Powel* v *Kempton Park Racecourse Co*. (1899) A.C 143. Also see Peter C.M. (1997) *op. cit.* p. 9.
218 Hatimali Adamji v E.A.P.T Corporation (1973) LRT 6.

court was whether a person could enforce the rights contained in the preamble. Late Justice Biron observed that the preamble to a constitution does not in law constitute part of the constitution and so does not form part of the law of the land.

Seven years after the Adamji's legal battle, Lesinoi Ndeinai filed a case relating to violation of his fundamental rights and relied on the preamble as authority. After a battle in court, Justice Kisanga had this to say:

A preamble is a declaration of our belief in these rights. The rights themselves do not become enacted thereby such that they could be enforced under the constitution… One cannot bring a complaint under the constitution in respect of violation of any of these rights.[219]

It is therefore settled that under the common law legal tradition, a person cannot base his arguments on the preamble.[220] However, in India, one can enforce his rights on the basis of the preamble. In *Kesavanada* v *State of Karala* it is stated that the constitution, including the preamble, must be read as a whole and in case of doubt, the constitution has to be interpreted in line with its basic structure to promote the great objectives stated in the preamble.[221]

Schedules to the Constitution

According to the law, the schedule is part of the constitution and can therefore be used to deal with issues relating to assertion and enforcement of fundamental rights and freedoms.[222] As it happened, the same constitution that could not enforce Lesinoi Ndeinai's right

219 See separate judgment of Justice Kisanga in *Attorney-General* v *Lesinoi Ndeinai* [1980] TLR 214.

220 It has been argued that the decision was not a good one for the future of human rights in Tanzania. The argument was that human rights exist without any provision by law. In England, for instance, there is no written constitution but people can still enforce their rights in court of law.

221 *Kesavanada v State of Karala* AIR 1973 SC 1461.

222 Peter, C.M. (1997) *op. cit.* p. 10.

on the basis of the preamble, had the Tanganyika African National Union (TANU) constitution attached to its schedule. The TANU constitution specified fundamental rights and freedoms. Thabit Ngaka based his case on this part of the constitution. Acting Justice Mfalila held that in Tanzania under Article 3(f) of the TANU constitution, workers including government employees have a right to their wages and that they were not a mere privilege.[223] This recognises that the schedule to the constitution is part of the constitution and can therefore be enforced.

The executive arm of government viewed this ruling as a threat. In 1977, a new constitution[224] which did not contain a Bill of Rights nor had the TANU constitution appended as a schedule, was introduced. This sealed the fate of any form of enforcement of fundamental rights and freedoms in Tanzania.

Introduction of the Bill of Rights

It was not until the Fifth Constitutional Amendment in 1984 that the Bill of Rights was entrenched in the constitution.[225] It has been opined that the Bill of Rights was included in the constitution not out of the state's genuine commitment to protect fundamental rights, but rather as a result of pressure from people and other external forces.[226] Citizens wanted to enjoy the same rights their counterparts in Zanzibar were enjoying. External forces included pressure from other countries in Africa, particularly after the introduction of the

223 See *Thabit Ngaka v Regional Fisheries Officer* [1973] LRT 24.

224 The United Republic of Tanzania constitution, 1997. herein to be referred as the constitution.

225 See the 5th Amendment to the United Republic of Tanzania constitution of 1997 Constitution (Fifth Amendment) Act, 1984 (Act No. 15 of 1984).

226 Mbunda, L.X. (1994), "The Bill of Rights in Tanzania*:* Strategies for Protection and Promotion of Fundamental Rights and Freedoms in a Multi-Party Tanzania". In C. Mtaki and J. Okema (eds) *Constitutional Reforms and Democratic Governance in Tanzania*, Dar-es-Salaam: DUP.

African Charter on Human and Peoples' Rights by the Organisation of African Unity (OAU) in 1981.[227]

After inclusion of the Bill of Rights in the constitution, many people enforced their rights through courts of law. On their part, courts were willing to recognise these rights. For instance, four years after the Bill of Rights was published, Ntiyahela Boneka filed a case concerning his rights to property, that had been violated by Kijiji cha Ujamaa Mutala.[228] In this case, the court held that the law in Tanzania did not sanction seizure of an individual's property in the absence of any enabling written law and without adequate compensation. The same position was applied in the case of Bunzari Mpiguzi, in which court held that Section 24 of the Fourth Constitutional Amendment Act 1984 unequivocally provides that nobody should be deprived of his property contrary to the law and without compensation commensurate to the value of such property, if such deprivation is necessary.[229]

In the legal history of Tanzania, the 1984 constitutional amendment is perhaps the most significant. It laid a foundation for the enforcement of individual rights and freedoms. Government has undertaken further efforts to protect human rights by amending the constitution. For example, in 1992, the government amended the constitution to introduce a multiparty system of government.[230] It also amended the constitution in 2000 to give the judicature final authority over dispensation of justice and adjudication of rights and obligations.[231]

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227 Peter, C.M. (1997) *op. cit.* p. 11.

228 *Ntiyahela Boneka* v *Kijiji Cha Ujamaa Mutala* [1988] TLR 156.

229 *Bunzari Mpiguzi* v *Lumwecha Mashili* [1983] TLR 354.

230 See The 8th Amendment to the United Republic of Tanzania Constitution of 1997- Constitution (Eighth Amendment) Act, 1992 (Act No. 4 of 1992).

231 See Article 107 of the United Republic of Tanzania Constitution of 1997 – Constitution (Thirteenth Amendment) Act, 2000.

Despite these efforts, some claim that there are still serious problems with respect to human rights in Tanzania[232] and some people still question Tanzania's commitment to promoting or protecting the fundamental rights and freedoms of the people.[233] In spite of the existence of provisions relating to the protection and promotion of fundamental rights, significant hindrances to the realisation of rights and freedoms enumerated in the constitution, such as the claw-back clauses also do exist.[234]

Due to these difficulties various NGOs and international organisations lobbied government and other stakeholder for a human rights commission to deal with the abuse of human rights to be established.[235] The establishment of the CHRAGG and the thirteenth amendment to the constitution that declared the judiciary an independent and final organ in the administration of justice, are viewed as key steps in dealing with human rights abuses in the country. The Commission is mandated to protect and promote human rights, and the judiciary in Tanzania is no longer a government department but one of the three pillars of the state.

232 See Tanzania Country Report on Human Rights Practices for 1998 [http://www.state.gov accessed on 10 September 2002].

233 Peter, C.M. (1997) *op. cit. pp.* 762 – 763.

234 Mbunda, L.X. (1994) *op. cit.*

235 Peter, C.M. (2001) The Bill to Enact the Commission for Human Rights and Good Governance Act, 2001: Introduction and Comments. A Presentation at the Seminar on Commission for Human Rights and Good Governance Organised by the Ministry of Justice and Constitutional Affairs held at Sheraton Hotel in Dar Es Salaam on 23 March 2001. p. 5.

Constitutional and Human Rights Development in Tanzania, 2008

Performance by the Judiciary

The Right of a Private Candidate to Contest the Posts of President and Member of Parliament

In the middle of 2008, the Court of Appeal in the case of *Attorney-General v Christopher Mtikila,*[236] confirmed the decision of the High Court of Tanzania, which held that amendments to Articles 39 and 67 of the constitution of the United Republic of Tanzania, 1977 were unconstitutional and contravened the international covenants to which Tanzania is party.[237] The High Court, in its decision, had also declared that it lawful for a private candidate to contest for the post of president and MP along with candidates nominated by political parties. The petitioner in the High Court, Mtikila, was aggrieved by the constitutional amendments of Articles 39 and 67 via Act No. 34 of 1994. Although no constitutional amendment to incorporate the Court of Appeal decision has been made yet by parliament, the effect of the court decision can be interpreted as a fundamental constitutional development, as it goes to the root of the provisions of the constitution.

Other Important Judicial Decisions in the Year 2008

In the year 2008, the judiciary, pursuant to its constitutional duty of interpreting the laws of the land on matters of constitutionalism and human rights, decided many cases. The important cases include *Chama cha Walimu Tanzania* v *Attorney-general;*[238] *Legal and Human*

236 *Attorney-General* v *Christopher Mtikila*, Civil Appeal No. 20 of 2007.

237 *Christopher Mtikila* v *Attorney-General*, Misc. Civil Cause No. 10 of 2005.

238 *Chama Cha Walimu Tanzania* v *Attorney-General*, Civil Application No. 151 of 2008, Court of Appeal of Tanzania.

Rights Centre v *Thomas Ole Sabaya and Four Others;*[239] *Ismal Aden Rage* v *Republic;*[240] *The Bishop, Roman Catholic Church (Musoma)* v *Karume Kibaki,*[241] *Papian Anthony and Two Others* v *Republic;*[242] *and Magige Maswi Mwita and Two Others* v *Republic*.[243]

The Right to be heard

Chama Cha Walimu Tanzania v *Attorney-General*

In the case of Chama cha Walimu, the applicant applied for revision of a High Court decision in favour of the attorney general of the government of Tanzania on grounds that the High Court (labour division) had heard the application and granted the order requested by the attorney-general without affording the applicant an opportunity to present his case by way of counter affidavit. The applicant is a trade union with about 156,923 members employed in the teaching profession nation-wide. Dissatisfied with the way government handled a number of issues concerning their welfare, the trade union a trade dispute with the government in February 2008 and issued a strike notice of sixty days. The government and the applicant held four meetings to settle the dispute by way of negotiations, but did never resolved the impasse. Thereafter, the president declared that teachers were to strike effective 15 October 2008, and the attorney-general, believing that the impending strike was illegal and malicious, instituted

239 *Legal and Human Rights Centre* v *Thomas Ole Sabaya and Four Others*, Miscellaneous Land Application No. 22 of 2005, Court of Appeal, judgment delivered on 24 April 2008 and 2 January 2009.

240 *Ismail Aden Rage* v *Republic*, Criminal Appeal No. 28 of 2005 Court of Appeal, judgment delivered on 19 March 2008.

241 *The Bishop, Roman Catholic Church (Musoma)* v *Karume Kibaki*, Civil Appeal No. 03 of 2007, ruling delivered on 15 August 2008, High Court, Mwanza.

242 *Papian Anthony and Two Others* v *Republic*, Criminal Appeal No.62 of 2007, judgment delivered on 25February 2008, High Court, Mwanza.

243 *Magige Maswi and Two Others v Republic*, Criminal Appeal No. 165 of 2007, judgment delivered on 15 August 2008, High Court, Mwanza.

the application seeking a permanent injunction from the High Court to restrain the president, the union and its members from participating in the planned strike.

The labour court issued a summons for mediation but the mediation did not take place because the parties were represented by officials without the requisite authority to mediate. Their respective advocates appeared, and what was supposed to be an appearance to receive directions turned out to be the hearing of the application. The judge in the High Court held that the applicant had made out a good case in support of the requested orders in the application. The respondents were therefore restrained from participating in the planned strike. Chama cha Walimu was dissatisfied with the irregular way in which the High Court dealt with the matter and challenged its decision in the Court of Appeal. The Court of Appeal stated that the order issued was not interlocutory but determined the application. It went further to state that the respondent in the High Court was unreservedly granted what he was seeking as Chama cha Walimu and its members were equivocally restrained from participating in the planned strike. Apart from its interpretation role, the Court of Appeal also played a very important educational role in the sense that it put on gave an *obiter dictum*. It stated that it is settled law that except under exceptional circumstances, a party to proceedings in the High Court cannot invoke revisional jurisdiction of the Court of Appeal as an alternative to its appellate jurisdiction, unless it is shown that the appellate process had been blocked by judicial process.

Legal and Human Rights Centre v *Thomas Ole Sabaya and Four Others*

The CHRAGG can seek the help of the court to enforce its decisions. This matter started with CHRAGG and was later taken up by the LHRC. The matter concerned 135 people residing in Nyamuma village in Serengeti district in Mara region, who were forcefully evicted and their homesteads and other property set on fire by

the order of the district commissioner of Serengeti. They filed a complaint with CHRAGG against the district commissioner and four others. The commission investigated and gave its recommendations among which was an order that the complainants be resettled in Nyamuma village. However, government never complied with the recommendation.

Thereafter the commission advised the complainants to bring an action and seek appropriate, hence the application by the LHRC on behalf of the 135 people to the land division of the High Court. The application was dismissed in the High Court on grounds that court lacked jurisdiction to entertain the matter. The applicants were dissatisfied with the decision and appealed to the Court of Appeal. In its judgment, the Court of Appeal stated that CHRAGG is not a court within the meaning of the provision of Section 167 of the Land Act which lists down courts which are vested with exclusive jurisdiction to hear and determine land matters. It was explained further that the commission is singularly empowered to investigate violations of human rights involving real property under Article 24 of the constitution, and that Section 2 of the Act which establishes the commission, provides that the Act shall be read together with the constitution. The Court of Appeal also observed, very importantly, that in situations where the commission investigates a complaint and its recommendation is not implemented by the appropriate authority, the commission may seek the help of court to enforce compliance with the decision. The Court of Appeal cemented the position by stating that the High Court erred by stating that the court action for enforcement of the commission's recommendation is not simply execution, but trial. The Court of Appeal finally remitted the case to the High Court before another judge, for consideration on merit.

Tanzania as a state must adhere to democratic and human rights principles

Apart from the decisions in the *Ismail Aden Rage* v *Republic* case brought by the bishop of the Roman Catholic Church, which depicts the misconduct of an advocate as an officer of the court and held that unincorporated company is a person in law; and the *Papian Anthony and Two Others* v *Republic*,, which concerned mistaken identity of the accused, the decision in *Magige Maswi and Two Others v Republic* is of crucial importance as it states the principles of rule of law and human rights. The appellants in the *Magige Maswi* case were convicted of armed robbery by the district court of Mwanza in 2003 and each sentenced to suffer a custodial sentence of thirty years. They lodged an appeal at the High Court. The High Court observed that the proceedings in the district court disclosed that the evidence of the four prosecution witnesses was recorded by one district magistrate and the defence and judgment recorded and written by another. Further that the change of magistrates was madewithout compliance with Section 214 of the Criminal Procedure Act. The High Court, considering the rights of the accused, stated that in a country like Tanzania, where nationals boast of greater compliance with democratic principles, human rights and good governance compared to most of their counterparts on the continent, it is not proper to subject to a retrial, members of the community who were about to complete their seventh year of imprisonment. The High Court also held that the time the appellants spent behind bars was sufficient to quash their convictions and to set the punishment of thirty years imprisonment imposed on them aside.

On the role of the judiciary in interpreting and protecting the principles of human rights and constitutionalism, the judiciary registered both challenges and achievements during 2008. Commemorating Law Day in February 2009, the chief justice of the Republic of Tanzania delivered a speech in which he pointed

a finger to the media; the fourth state organ, for interfering in the independence of the judiciary. He stated that the media sometimes accuse and convict people of corruption, even before they appear before a court of law. He also accused the media of failure to distinguish facts from personal opinion. He referred to the Chama cha Walimu case, where the Court of Appeal remitted the case to High Court for retrial, but the media reported that the court had granted permission for the intended strike to take place. In addition to the usual challenges faced by the judiciary such as budgetary constraints, harassment of judicial personnel, contempt from government, and side-stepping by the executive and parliament, were attributed to interference by the media.[244]

Performance by the Parliament

Parliamentary Powers on Checks and Balances

As part of its role in ensuring the existence of constitutional checks and balances, parliament formed a parliamentary select-committee to investigate allegations of corruption against prime minister, Edward Lowassa and other senior government officials. They were accused of interfering with an energy contract in favour of a US based company, Richmond Development Company, which contravened laws and rules of procurement. A 23 resolution report was delivered by the Committee to parliament, and the findings of the Committee were that some senior government officials were involved in the controversial deal. Prime Minister, Edward Lowassa, and other two ministers were implicated.[245] The resolutions led to the resignation

244 See "Nafasi ya Mahakama Katika Kutekeleza Shughuli za Mamlaka ya Nchi Kulingana na Dhana ya Mgawanyo wa Madaraka", Speech by Chief Justice of Tanzania, Justice Augustino Ramadhani, on Law Day, 2 February 2009.

245 The two ministers are former minister of energy and mineral resources, Ibrahim Msabaha, and former minister of industry, trade and marketing, Nazir Karamagi.

of the premier and the dissolution of cabinet. This resignation is important to constitutionalism and human rights development because, it demonstrated that parliament in Tanzania can play its role of enforcing constitutional checks and balances, especially on the executive branch of government, and secondly, it set a precedent in Africa and Tanzania in particular.

Parliamentary Debate on Whether Zanzibar is a Sovereign State

From June to August 2008 parliament was engaged in debating whether Zanzibar is a sovereign state. This constitutional problem started when the prime minister of the United Republic of Tanzania, Mr Mizengo K. Pinda, was quoted to have said that Zanzibar is not a sovereign state. This statement prompted MPs from Zanzibar to seek clarification on the subject, and Zanzibar's deputy chief minister, Mr Ali J. Shamhuna, issued a statement reaffirming Zanzibar as a sovereign state. This debate led to an intervention by president Kikwete, who delivered a speech in parliament, in an attempt to settle the issue. In *SMZ* v *Machamo Khamis and 17 others*[246] one of the issues before court was whether Zanzibar is a state and whether therefore treason could be legally committed against the revolutionary government. The Court of Appeal of Tanzania settled the issue by holding that Zanzibar is not a sovereign state.[247] The court reasoned that the international persons called Tanganyika and Zanzibar ceased to exist on 26 April 1964 because of the Articles of Union. The court stated that when the two states merged, it formed

246 Criminal Application No. 8 of 2000 (Unreported), p. 7 judgement delivered on 21 November 2000.

247 See *SMZ* v *Machamo Khamis and 18 Others,* Criminal Session Case No. 7 of 1999 (Unreported). The case originated as a criminal case, only to later involve the issue of constitutionality. It centred on whether treason can be committed against the Revolutionary Government of Zanzibar..

a new international person called the United Republic of Tanzania. The court illustrated that "The United Republic of Tanzania is the treaty –making power and this was illustrated by the abortive attempt of Zanzibar to join the Organisation of Islamic Conference."[248]

The problem of Zanzibar's sovereignty and the validity of the Articles of the Union has been the basis of political debate and academic discourse ever since the birth of the Union,.[249] The government in Tanzania instead of trying to settle the continuing debate by resorting to sustainable measures, such as public consultation and involvement, and adoption of the new constitution, which will incorporate and address all issues, it has resorted to constitutional amendments and political settlement.[250] Taking stock of the political gains since independence, the rapid changes that have taken place since the re-introduction of multiparty democracy in Tanzania in 1992, and the continuing debate and discussions on the subject, there is a need to revisit the constitution so that it considers Tanzania's contemporary constitutional problems.

Legislation enacted in the Year 2008

During the year, parliament performed its basic constitutional role of debating and passing legislation. Contrary to previous years, parliament did fairlywell. It passed a total of 20 pieces of legislation, namely the National Prosecution Services Act, the HIV/AIDS (Prevention and Control) Act, the Tourism Act, the Petroleum Supply Act, the Financial Leasing Act, the Anti-Trafficking of Persons Act, the The United Nations Education, Scientific and Cultural Organisation (UNESCO) National Commission Act,

248 *Ibid.* p. 7

249 Shivji, I.G. (1990), Tanzania: *The Foundation of the Union*. Dar es Salaam, p. 34. Jumbe, A. (1994). *The Partnership: Tanganyika Zanzibar Union - 30 Turbulent Years*. Dar-es-Salaam: Amana Publishers.

250 Makaramba, R. (2001), The State of Constitutional Development in Tanzania, Dar es Salaam: E &D Limited. p. 6.

the Social Security (Regulatory Authority) Act, the Financial Loss(Miscellaneous Amendment) Act, the Electricity Act, the Public Audit Act, the Appropriation Act, the Finance Act, the National Assembly (Administration) Act, the Contractors Registration Amendment Act, the Unit Titles Act, the Mortgage Finance (Special Provision) Act, the Hides, Skins and Leather Trade Act, the Animal Welfare Act, the Workers Compensation Act, and the Mental Health Act. Most of these Acts have implications for constitutionalism or human rights, however this paper devotes special attention to the HIV/AIDS legislation.

The Enactment of HIV/AIDS Legislation

In Tanzanian constitution does not specifically provide for protection against discrimination on the basis of health status, although the same constitution recognises the principles of equality of all human beings, equality before the law, and the rights to health and life. Human rights activists and NGOs[251] have been lobbying government to amend the constitution to include a provision to specifically prohibit discrimination based on health status, in order to protect people who are discriminated or offended based on this ground particularly those living with HIV/AIDS. It was deemed unnecessary to amend the mother law to include health status, on the basis that HIV/AIDS is a health condition, and like other epidemics, is not permanent. Therefore, it was argued that precedent should not be set for amending the constitution whenever a new epidemic erupts. Tanzania has several pieces of legislation providing for health matters,

251 See The Tanzania Women Lawyers' Association (TAWLA), Tanzania Media Women Association (TAMWA) and Women Legal Aid Centre (WLAC), Read Rwebangira, M.K. and Tungaraza, M.B. (2003), Review Assessment of Laws Affecting HIV/AIDS in Tanzania, A Summary Booklet. See also: USAID Tanzania Adopts HIV Law, Health Policy Initiative, August 2008 Issue, Human Rights Stakeholders Report.

but most of them were enacted before the HIV/AIDS pandemic, and therefore do not specifically provide for HIV/AIDS matters. However, laws that were enacted since the HIV/AIDS epidemic erupted deliberately create an environment that supports HIV/AIDS prevention, treatment, care, and control of the disease.

As the discussion on the amendment of the constitution proceeded, two views emerged: whether there should be an omnibus law or an amendment of existing laws to address various HIV/AIDS issues. Those who favoured enactment of a single, comprehensive legislation argued that it is more practical and easier for legal practitioners and the general public to refer to a single law, and that drafting various statutes is cumbersome and involves a longer drafting period and legislative process. On the other hand, those who favoured amendment of the various existing HIV/AIDS laws argued that HIV/AIDS is a health condition, which like other epidemicsand is not permanent. Therefore a precedent should not be set for enactment of comprehensive laws whenever a new epidemic erupts.

After considering all views and arguments, in February 2008 parliament unanimously passed a single comprehensive legislation, known as the HIV and AIDS (Prevention and Control) Act,[252] which provides for prevention, treatment, care, support and control of HIV and AIDS. The Act protects the rights of people living with HIV/AIDS, and defines the roles and responsibilities of different sectors in addressing HIV/AIDS. The Bill moved through parliament swiftly because it addressed sensitive issues. It had its first reading in November 2007 and was passed unanimously at its second reading in February 2008. This is testament of existing political will on the part of the government to protect and promote the rights of the people living with HIV/AIDS. It should be noted however, that having legislation is one thing and implementing it is another. The

252 The HIV and AIDS (Prevention and Control) Act, No. 2 of 2008.

government must take steps to disseminate the legislation, train law implementers, and raise public awareness on the rights guaranteed by the legislation, among other matters.

Petition to the High Court to Abolish the Death Penalty

On 11 October 2008, human rights NGOs petitioned the High Court, seeking an order to have the death penalty declared unconstitutional.CSOs including Tanganyika Law Society (TLS) and theLHRC, argued that the death penalty was unconstitutional, cruel, inhuman and degrading and filed Miscellaneous Civil Application No. 67 of 2008. The issue of the death penalty was also in dispute 13 years ago, in the case of *Mbushuu* v *Republic,*[253] where the High Court convicted the accused of the offence of murder but sentenced each of them to life imprisonment instead of mandatory death penalty, on grounds that the death penalty was unconstitutional. The High Court held that "the two petitioners have managed to prove on a balance of probabilities that the death penalty is cruel, inhuman and degrading punishment and also offends the right to dignity of man in the process of execution of the sentence".[254] The Court of Appeal agreed with this holding,[255] but stated that "we find that though death penalty as provided in by section 197 of the Penal Code offends article 13 (6) (a) and (e) of the constitution, it is not arbitrary, hence a lawful law, and it is reasonably necessary and it is thus saved by article 30 (2)".[256]

The justices of appeal concluded that the death penalty is constitutional. They went further and provided guidance to the effect that "we may observe here that we are aware of the drive to abolish death penalty worldwide, but that has to be done by deliberate moves

253 See *Mbushuu alias Dominic Mnyaroje and Another* v *Republic* (1995) T.L.R
254 *Ibid*. p. 104.
255 *Ibid*. p.112.
256 *Ibid*. p.117.

to influence the public opinion in a more enlightened direction". They added that "for the present, even international instruments still provide for death penalty".[257] This advice was taken by the government of Tanzania, which is now in the process of considering the views and opinions of ordinary people.[258] However, recently the minister of justice and constitutional affairs in Tanzania, Mathias Chikawe, is quoted to have said that the proposal to abolish the death penalty had come at the wrong time because of the continuing killing of people with albinism.[259] Despite that view, NGOs believe that the government is slow in deciding on the matter, and have petitioned the High Court to abolish the death penalty. Whether NGOs will succeed in their cause or not, the point to note is that there is a constitutional and human rights petition that was brought to the attention of court in the year 2008 with regard to constitutionality of death penalty and it is the first time the court is specifically requested to abolish the death penalty, and the first time the Bar Association of Tanzania has taken a constitutional and human rights cause to court.

On the other hand, the government was in a constitutional petition to the High Court of Tanzania in Dar-es-Salaam, challenged by human rights activists and persons with albinism, for its inaction regarding the protection of the right to life and dignity of persons with albinism.[260] If successful, the petition will set an important

257 *Ibid*. pp. 117-118.

258 See Tanzania Government Mulls Over Abolishing Death Penalty, An Interview Between Mary Nagu, then minister of justice and constitutional affairs in Tanzania, and Peter Clottey of the Voice of America (VOA) on 30 April 2007, cited at http://ww.voanews.com/english/archieve/2007-04/2007-04-30-voa2.cfm, accessed on 13 November 2008.

259 See The Guardian (2008), Tanzania: Abolishing Death Penalty amid Albino Killings Unrealistic. 25 November 2008.

260 Legal and Human Rights Centre, the chairperson, Tanzania Albino Society, and the chairperson, The Tanzania Federation for Disabled People Organisation v The Attorney-general, Miscellaneous Civil Cause No. 15 of 2009.

precedent which will link the right to health, which is not in the Bill of Rights, with the right to life and dignity. It is also the first case which clearly advocates for the rights of persons with disability.

Freedom of the Media and Harassment of Journalists

The constitution of Tanzania provides for freedom of opinion and expression of the ideas,[261] but does not expressly provide for freedom of media. In any case, freedom of the media can be covered within the ambit of freedom of expression. Under the current administration of present president Jakaya Kikwete, freedom of the media has increased because of support from the president. In general, several newspapers, radio and television stations have been registered and the number of journalists has increased. Because of the extent of freedom of expression, the media has been able to expose corrupt senior government officials more forthrightly. This was not welcomed by some government officials, and has led to government officials subjecting the media to restrictions, including the enforcement of media law and a code of ethics.[262] The government has fined and suspended some newspapers, as well as sometimes harassed and intimidated some journalists and editors by placing defamation charges against them. In other instances journalists have received anonymous death threats, warning them against reporting on graft in public institutions.

In October 2008, the minister for information, culture and sports banned *Mwana Halisi* newspaper for three months, alleging that the newspaper had repeatedly published seditious stories, specifically that senior government officials and political leaders of the ruling party were plotting to unseat the president of the URT. The minister stated that the suspension was designed to send a strong signal to other media houses which had intentions of violating ethical reporting

261 Article 18 (a) of the constitution.

262 See: The News Papers Act (Cap. 229 R.E 299).

under the guise of exercising their right to freedom of expression. Consequently, journalists took to the streets of Dar-es-Salaam to protest the ban, sealed their mouths with tape, and using placards denounced the state's disrespect of media freedom. It was the first time in Tanzania's history that journalists and editors marched against the government, accusing it of stifling media freedom. The police arrested, detained and interrogated, for several hours, the managing editor of MwanaHalisi news paper and the author of the story. On the other hand, some senior government officials threatened to file libel suits against the newspaper. Prior to this incident, the newspaper's editors had been harassed because of their investigative stories. In January 2008, two editors of the newspaper were attacked and beaten at their offices by three assailants, and had acid poured acid on their faces. These attacks were followed by police searches of the offices of the newspaper and home of one of the editors.

There were other incidents that occurred during 2008. In February 2008, police arrested, detained and questioned two online editors of *Jumbo Forum* without any official charges being placed against them. The police confiscated their equipment, including computers, and closed their website for five days. The police claimed that the editors were arrested on suspicion of criminal activity, but the editors contended that their discussion forum had played a major role in exposing a questionable energy contract involving the former prime minister and an American energy firm. Tanzania as a state has for long been hailed for its respect for human rights, including media freedom, but the current trend indicates that the cherished freedom declared by the president is under threat. Freedom of expression is not a prerogative of government but is provided for in the constitution and the African Charter of Human and People's Rights, and therefore the government and its agencies must desist from infringing media freedom.

Corruption by Government Officials

Corruption is not a new phenomenon, but is currently on everybody's lips because of its alarming proportions. While addressing the colonial legislative council in May 1960, the first president of Tanzania, the late Julius K. Nyerere, stated corruption must be treated ruthlessly because it is a greater enemy of the welfare of the people in peacetime than war is. To him, corruption should be treated in the same way as treason. On 12 October 1965, when addressing the newly elected national assembly of the URT, Nyerere reiterated that corruption perverts justice, and if allowed to spread, could destroy the nation. He advised members of the house and government not only to resist corruption, but to also conduct themselves in an exemplary manner that showed that that they were not corrupt.

The struggle has since been difficult, in spite of government's efforts to eradicate corruption , including enactment of specific anticorruption legislation[263] and establishing a specialised agency to fight it, namely the Prevention and Combating of Corruption Bureau. Despite improvements in the past decades, corruption has remained a pervasive problem in government. The year 2008 is tainted by several corruption scandals involving senior government officials, especially in the mining, land, energy and investment sectors.[264] Some 'big fish' have been caught and charged before courts of law, a new trend that has emerged compared to previously when only the small not "big fish" were arrested and taken to court.

The above notwithstanding, government has been slow to act on some of the issues that require immediate attention, thus giving the accused a chance to get away. For instance, the government was aware of the External Payment Arrears (EPA) scandal and knew that the

263 The Prevention and Combating Corruption Act, Act, No. 7 of 2007.

264 For instance, the Richmond Power Generation Company contract, the Bank of Tanzania External Payments Arrears, Bank of Tanzania Twin Towers contract, fraudulent sale of government owned Kiwira Coal Mine and Tan-Power Resources Limited.

former governor of the Bank of Tanzania could provide the necessary evidence to help have the culprits involved in the scandal arrested, but government only started to work on it after the governor passed away. The government ordered those involved in the EPA scandal to pay back the money in return for their freedom from prosecution. This was seen as a failure on the part of the state, because culprits involved in petit corruption have either been taken to court or prisoned without being given the option to return what they stole in order for them to regain their liberty. This poses a challenge to equality and adherence of the principles of the rule of law in the fight against corruption in Tanzania. To fight against corruption, a clear statement is needed both in words and deeds from a clean government official. The government needs to take a clear stance on the fight against corruption and to clean its own house first. In the year 2008, some ministers who were accused of being involved in corruption were asked to resign, and have resigned, not necessarily because they were directly involved in the scandals, but for the sake of good governance.

Killing of Persons with Albinism

The UDHR,[265] which sets the minimum standards upon which states should treat their citizens, and states that every human being has the right to life.[266] The two covenants passed in 1966[267] affirmed the importance of the right to life[268] while the ACHPR recognises the same position.[269] Tanzania is a state party to all these international

265 Universal Declaration of Human Rights, General Assembly Resolution 217 (III) of 10 December 1948.

266 Article 3 of the UDHR.

267 See ICCPR and the ICESCR, General Assembly Resolution 2200 of 16 December 1966.

268 Read Article 6 to 27 of ICCPR and Article 6 to 15 of the ICESCR.

269 OAU Doc. CAB/LEG/167/3 rev.5 I.L.M 58 (1982) Adopted on 27 June 1981, and came into force on 21 October 1986.

instruments[270] and has taken appropriate measures to ensure enjoyment of the right to life by incorporating it in its constitution.[271] In implementing this right, the constitution criminalises homicide in its various forms and provides for punishment of people who commit such offences.[272] Despite these initiatives, some people continue to act contrary to the constitution and statutory law by killing other human beings.[273]

The year 2008 was a tragic year for persons with albinism in Tanzania. Their lives were threatened because their body organs, particularly genitals, limbs, breasts, fingers and tongues were sought by people involved in mining and fishing activities in the Lake Victoria Zone, especially in the Mwanza, Shinyanga and Mara regions.[274] It is claimed that persons with albinism possess mystical powers that can make a person fabulously rich within a short time. The problem became so serious that, in May 2008, an albino body was exhumed at night by unidentified people in search of these organs. The official record shows that, from March 2008 to September 2008, 25 persons with albinism[275] had been murdered and their body parts sold to witchdoctors, but leaders in the albino

270 Tanzania became party to ICCPR and ICESCR in 1976 and ACHPR in 1984.

271 See Article 12 of the constitution.

272 Read Sections 150, 151, 152, 195, 196, 199 and 219 of the Penal Code (Cap. 16 R.E. 2002), Section 50 of the Pharmaceutical and Poisons Act (Cap. 219 R.E. 2002).

273 Mchome, S.E. (2008), The Challenges of Extra Judicial Killings and Witchcraft in Tanzania. Discussion Paper Presented during National Human Rights Conference as Part of the Activities to Commemorate the 60th Anniversary of the UDHR 1948, Held at Blue Pearl Hotel, 28 October 2008, p. 1.

274 See Superstitious Albino Killing in Tanzania Must Stop, cited in http://www.groundreport.com, accessed on 12 May 2008. Also see Mchome S.E. (2008) *op. cit.* pp. 1, 14.

275 European Parliament Resolution 4 of September 2008 on the killing of albinos in Tanzania.

community believe the number was over 60.[276] These killings not only violate the right to life, and interfere with freedom of movement but also constitute elements of torture (mostly psychological), and discrimination..

The government in Tanzania has taken some measures to end this tragedy, but it needs to change its strategy. President Jakaya Kikwete, during his monthly television address to the nation in April 2008, condemned the killings and described them shameful and distressing to the nation. The president called upon citizens, local government authorities, and police to work together to end the killings. On his part, the vice president, Dr Ali Mohamed Shein, while addressing the audience on the occasion of the National Albino Day in Dar-es-Salaam, on 14 May 2008, described the ongoing killing of people with albinism disgraceful to the nation and urged citizens to collectively fight against the depraved and greed-related ritual killings. Following these calls, up to September 2008, citizens and authorities arrested 173 suspects in connection with the killing of albinos, but the wave of killing still continued by the end of 2008.

Since the albino killings are rooted in cultural backgrounds and belief systems that still reign in some parts of the country, an holistic approach to the problem through enforcement of the law, is necessary. To root it out and enforce sustainable measures, there is need for awareness and education, to avert the superstitious beliefs, and to bring the stigmatisation and end discrimination against albinos to an end. There is also need to involve all the state's law-enforcement machinery, namely, intelligence, police, and prosecutors.

In June 2008, prosecutors filed five cases in the High Court of Tanzania in Shinyanga, one of the regions worst affected by killings of

276 See The Horror of a Rapidly Growing Industry in the Sale of Albino Body Parts, cited at http://www.underthesamesun.com/home.php, accessed on 21 December 2008.

people with albinism.[277] The director of public prosecutions(DPP), Eliezer Feleshi, is quoted to have said that another five cases would be filled in Tabora, three in Mwanza and two in Kagera.[278] This serves as fulfilment of the promise that president Kikwete made to Tanzanians namely that the killers would be brought to book. Although some cases werefiled and trials for some commenced in August 2008, the trials were suspended until further notice due to lack of funds. It is necessary for the government in Tanzania to commit sufficient resources for the trials to send a clear message to albino killers of governments commitment to end the killings, which will ultimately protect the vulnerable members of the albino community. .

National Human Rights Conference in Tanzania

The Conference

A two-day National Human Rights Conference was held in Dar-es-Salaam on 27-28 October 2008. The conference was organised by CHRAGG with technical and financial assistance from the UN country team. Participants at the conference were drawn from the public and private sector, international institutions, academia, and the diplomatic community in the country. CHRAGG is statutory body established under Article 129 (1) of the Constitution[279] and it became operational after the enactment of the establishing Act[280]. CHRAGG is mandated toamong others, protect and promote human rights.

The conference was aimed at providing an overview of programmes, mechanisms and initiatives established by the government of Tanzania for the promotion and protection of human rights; discuss challenges faced in realising human rights

277 See *Daily News*, Monday, 8 June 2008.

278 Clarke D. (n.d.) Tanzania Opens Cases Against Suspect Albino Killers, cited at http://www.reuters.com/article, accessed 13 July 2009.

279 The Constitution of the URT (Cap. 2 R. E 2002).

280 The CHRAGG Act (Cap. 391 R. E. 2002).

in Tanzania from the perspective of different actors involved in the promotion and protection of human rights; to discuss thematic issues of particular concern for realising human rights in Tanzania; and to take into account Tanzania's experience in interacting and collaborating with the international human rights mechanisms, particularly the treaty body reporting system.

Recommendations of the Conference

During the conference, participants from government ministries, national human rights institutions, and CSOs discussed and identified challenges as well as measures to redress the human rights situation in Tanzania and made a range of recommendations on various matters. However for purposes of this paper, only recommendations which have direct impact on developments during 2008 are discussed.

Participation of Marginalised and Disadvantaged Groups in Legal and Policy Making

During the conference, participants raised concerns relating to the need to consult marginalised and disadvantaged groups in matters that affect them. The government was therefore, asked to recognise the essential principles of human rights, which are based on participation and inclusion, equality and non-discrimination, accountability and transparency, indivisibility and independence. It is generally accepted that equality and inclusiveness are core human rights issues, that they are recognised by the constitution[281] which need to be promoted among citizens. In view of this, the government was called upon to protect the human rights of all citizens, including those of marginalised and disadvantaged groups, and to therefore make the country's legal and policy direction participatory and inclusive of all citizens.

281 Article 13 of the constitution.

The Process of Developing a National Plan of Action

The Ministry of Justice and Constitutional Affairs, in collaboration with CHRAGG, were requested to initiate a process of developing a national plan of action for implementation of the recommendations of the Conference and those made by the Treaty bodies in relation to the human rights situation. In order to implement it effectively and efficiently, the UN Office of the High Commissioner for Human Rights should be requested to assist with implementation of the national plan of action. The aim of the national plan of action is to map out a holistic approach to human rights instead of concentrating on specific issues sporadically, such as the illegal killings of people with albinism.

Proper and Sustainable Human Rights Education

The other recommendation was to request the government to ensure that there is proper and sustainable human rights education, conducted in a format appropriate for all, including in braille and other modes of communication for people with disabilities, and to take steps to ensure the continuity and sustainability of such education. The need to ensure public education, particularly among children, to prevent them from believing in witchcraft, among other societal and mystical vices, was one of the considerations. With regard to successful incorporation of human rights education into the education system, the government was urged to take action to address simultaneously different pillars of the system, from the level of policies, legislation, and plans of action, curricula, training policies and so forth. The said actions should address policy implementation, targeting the learning environment so that education is participatory and democratic.

Reporting to International Treaty Bodies

The government was requested to submit timely and regular reports to international treaty bodies, particularly reports relating to human rights. It was recommended that there should be established an inter-ministerial committee to facilitate the collection of comprehensive data and a central data base to record violations of human rights. Government was also urged to ensure that disaggregated data, inter alia by sex, age, minority group, socio-economic background and geographic location, are systematically collected and analysed, as such data provides essential tools for policy formulation.

Prioritisation of Corruption Cases

With regard to the existence of many corruption cases pending before courts, the government was requested to give them priority because corruption is a heinous crime and a gross violation of human rights in the country.

Protection of the Right to Life

During the conference, the government was requested to combat violation of the right to life especially with regard to extra judicial killings; improvement of the criminal justice system; giving local government the power to deal with local problems (including suppression of crime, maintenance of peace and good order); improving and enhancing the capacity of the Police Force; and formulating guidelines on how witchcraft cases should be prosecuted. Since most Tanzanians are either uneducated or have little knowledge on human rights, government was called upon to ensure that more efforts are dedicated to enlightening Tanzanians about the problem of violation of fundamental right to life by providing them with human rights education, as this was seen as the best way to solve or reduce the vice.

Challenges to Constitutionalism and Human Rights Development

Participation and Consultation of Citizens in Constitutional Making

From the outset of this paper, it has been the author's view that, historically, constitutional development in Tanzania has been a process of constitution making without constitutionalism. This is deduced from the fact that static politics does not involve citizens at the policy-making level, but usually at implementation level. This is contrary to liberal theories and doctrines of constitution making. Yet constitutionalism is very important and plays an important role in constitutional making. Although, after the introduction of multiparty democracy, citizens were involved in constitution making, more needs to be done to include as many citizens as possible.

Reporting Obligations to International Bodies

Tanzania has ratified several international and regional instruments on matters of constitutionalism and human rights, but has been lagging behind in submitting human rights reports to appropriate committees to demonstrate the progress attained.[282] For instance, Tanzania ratified the African Charter on Human and Peoples' Rights in 1986; however apart from its initial report to the African Charter on Human and Peoples' Rights Committee in July 1991, it never submitted further reports until May 2008, when it submitted the consolidated second to tenth periodic report.[283] Tanzania on the other hand, submitted the fourth periodic report to the Human

282 See The Guardian (2008), Tanzania Yet to Submit Eight Human Rights Reports to African Charter. 11 March 2008.

283 See The Second to Tenth Consolidated Periodic Report Submitted by the United Republic of Tanzania Under the African Charter on Human and Peoples' Rights, 43rd Ordinary Session of the African Commission on Human and Peoples' Rights, 7th – 22nd May 2008, Ezulwini, Kingdom of Swaziland.

Rights Committee[284] in 2005.The Committee on Elimination of All Forms of Discrimination Against Women considered the fourth, fifth and sixth periodic reports on 11 July 2008;[285] the Convention on the Rights of the Child second periodic report was submitted in 2004 and was considered by the committee on 19 May 2006.[286] The Committee on Elimination of Racial Discrimination considered the eighth to sixteenth combined periodic reports on 17 August 2005[287], and in its concluding observations requested Tanzania to submit additional information within one year[288] as well as recommended that Tanzania submits its seventeenth periodic report jointly with its eighteenth report on 26 November 2007,[289] although the joint periodic report has to date not been submitted.[290]

Despite ranking high in peace and stability, Tanzania's failure to submit reports in time is a big challenge. The human rights reports are intended to ensure and improve the human rights situation in the country, and are not aimed at humiliating the state with regards to its human rights situation.

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284 The Human Rights Committee (HRC) is the body of independent experts that monitors implementation of the ICCPR by its state parties.

285 See Combined Fourth, Fifth and Sixth Periodic Report, United Republic of Tanzania, CEDAW/C/SR/845 and 846. Also CEDAW/C/TZA/Q/6 and CEDAW/C/TZA/Q/6/Add.1.

286 See Committee on the Rights of the Child, Forty-second Session, 15 May - June 2006, CRC/C/TZA/Q/2/Add.1 and Forty-second Session, 19 May 2006, CRC/C/SR.1136, and Forty-ninth Session, 29 September 2008, CRC/C/SR.1363.

287 The Report was submitted in 2004. See The CERD Committee, CERD/C/452/Add.7 at its 1713th and 1714th meetings, CERD/C/SR.1713 and 1714, held on 9 and 10 of August 2005, and at its 1725th meeting held on 17 August 2005, CERD/C/SR.1725.

288 See Concluding Observation Number 26 of 17 August 2005.

289 See: Concluding Recommendation Number 27 of 17 August 2005.

290 See Follow-up: State Reporting, Action by Treaty Body, CERD/A/62/18(2007).

Extrajudicial Killings and Killings Associated with Witchcraft

Killings of innocent people in total disregard of either the judicial system or human dignity continued in the year in question. Two relevant aspects of extra-judicial killings are worth mention, mob killing and killing in the name of tribal fighting. Reports have shown that mob killing was responsible for the lives of 1,170 people from the year 2000 to September 2008.[291] Police reports indicate that about 1,961 cases of witchcraft and 3,678 witchcraft-related deaths were reported between 2000 and September 2008. This is an average of 409 deaths per year, which by all standards is an alarming rate.[292] More recently, albinos have been targeted for their body parts, under the belief that these organs when used in witchcraft result in success in business enterprises. In response, the state has introduced various policies and laws,[293] as well as prosecuted suspects. These strategies are likely to yield results, but the challenges remain enormous.[294]

Constitutional and Human Rights Education

The UDHR and many other international human rights instruments oblige states to provide human rights education.[295] One of the purposes of requiring states to provide human rights education is

291 Mchome, S.E. (2008) *op, cit.* p. 4.

292 *Ibid*. p. 12.

293 United Republic of Tanzania, *Sera ya Taifa ya Wazee*, September 2003, Witchcraft Act (Cap. 18 R.E. 2002).

294 In late 2008 the Ministry of Home Affairs stated that the government is taking serious measures to protect albinos. However, the general fear is that while people with albinism are being targeted today, who knows what minority group will be the target tomorrow. The argument is that the albino question can, with some sustained effort by all actors, be eliminate, but the witchcraft question will not be solved as easily. There is a need for dedicated efforts to enlighten parts of society, to persuade them that problems can be solved by science and technology, and not by witchcraft. This cannot be done by the police and courts of law.

295 See Article 26 (1) – (3) and 8th Preambular Paragraph of the of the UDHR. Also ICCPR, ICESCR, CEDAW, CRC, and CERD.

to create awareness among the people. In this way, effective and efficient adherence to human rights preservation, promotion and protection activities would be facilitated. Human rights education can foster knowledge, skills, values, attitudes, behaviour and responsive actions. Save for law candidates, as stated earlier in Tanzania, specific curricula on constitutional and human rights at all levels of education, namely primary schools, secondary schools, tertiary institutions and university are lacking. Considering the importance of the subjects, the government should consider incorporation of constitutional and human rights curricula from primary to university level for all candidates. The government initiated the implementation of the first phase of the World Programme on Human Rights Education in Tanzania in April 2008. However, the successful incorporation of education should address simultaneously different pillars of the system, from the level of policies, laws and plans of action. The education should be participatory and democratic and should address the educational and professional development needs of school personnel, such as teachers, head masters, inspectors. It is also important to raise public awareness and produce user-friendly Kiswahili publications.

Conclusion

This paper endeavoured to evaluate the constitutional and human rights developments that occurred in Tanzania mainland in the year 2008. There were no specific constitutional amendments, but there were some events that directly impacted on constitutional development. The conference on human rights identified various human-rights matters that require attention. Generally it can be stated that there were improvements in constitutionalism in the year 2008, but some problems regarding recognition of constitutional and human rights issues still remain. However, by any standard, Tanzania has, since independence, made positive efforts towards constitutionalism and human rights development.

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5

Constitutional Development in Uganda

Peter Mulira

Introduction

By constitutionalism we mean the theory of conducting politics according to the constitution of a country. In this sense, a country's constitution is a document which sets out the framework and composition of the government or the overall composition of the polity. Such a constitution may be written as in the US, or unwritten as is the case with the UK. Apart from creating, organizing and distributing government powers, the constitution also ensures that governmental power is exercised legitimately.[296] This in turn means that a constitution places restraints on governmental power and provides a standard of legitimacy for assessing its actions.

An essential element of constitutionalism is the requirement that right conduct consists of following the rules, especially in countries where the constitution is declared to be the supreme law of the land; however the idea of constitutionalism cannot disregard the forces of social change lest it becomes static. As a result of this reality, constitutionalism has faced many challenges throughout history, its major test being how to make constitutional limitations effective against rulers. Two approaches have been employed to solve this problem. The first is the doctrine of the rule of law under

296 Winfred, H.H., Hatbison, H. and Belz, H . (1991) *The American Constitution: Its Origins and Development*: New Delhi, McGraw-Hill. Publishing Co. Ltd,

which judges test the legitimacy of government action against the standard of higher or fundamental law. The second is to so structure and balance institutions of government in such a way that power is thereby limited. In short, constitutionalism means the rule of law.

Origin of the Rule of Law

The rule of law traces its history to ancient Rome and medieval England. To Roman jurists, the law of nature provided a standard according to which laws enacted by government could be tested.[297] But Roman constitutionalism did not evolve means for holding the government accountable under natural law. This was left to be developed in medieval England, where royal power was subjected to restraint when courts started protecting individual rights attaching to feudal landownership against royal abuse. As a result of this protection, the king was placed under the law.

In England the constitution has never been reduced to a written document but has grown organically from an assemblage of statutes, beliefs and institutional practice. Under this system the ability to limit government power in England came from three sources namely, common law guarantees of private rights and individual liberty (jurisdiction) enforced by courts against government (guberculums); balanced institutional arrangements according to the theory of mixed government; and fundamental law.[298]

By the eighteenth century the idea of fundamental or higher law had lost its intellectual force. Instead the doctrine of legislative or parliamentary supremacy had set in. This doctrine rested on the argument that parliament's enactments were part of the constitution and as such no limits could be placed on parliament's power.[299] This doctrine did not find favour with American theorists, who argued that if parliament was sovereign then the constitution was not a

297 *Ibid.*
298 *Ibid.*
299 *Ibid.*

constitution at all but this has not prevented the English idea of parliamentary supremacy to persist.

The USA was the first country to adopt a written constitution in 1784, and this gave rise to the doctrine of constitutionalism based on the supremacy of the constitution.[300] The development of constitutionalism in Uganda has been marked by an attempt to make both the English and American doctrines of constitutionalism work side by side without the benefit of the intellectual background which informed the older systems. Although the country has moved away from the federal system which was embodied in the independence constitution of 1962, the current constitution, which was promulgated in 1995, combines features of English and American constitutionalism.

With this background we turn now to the constitutional issues which emerged in the year 2008.

Land: The Unsettled Issues

Towards the end of 2007 news leaked that the government was planning to introduce in parliament a new land bill to provide security for occupants on registered land.[301] The draft bill, which had not been published officially, found its way in the hands of the opposition leadership, which organised a rally at which the bill was attacked as a ploy by the ruling NRM government to dispossess people of their land. Although opposition to the bill was initially centred in the central region where private ownership of land is prevalent, resistance spread to other areas. The MP for Dokolo in northern Uganda, Felix Okot Ogong, even tried to block the tabling of the bill, but was overruled by the speaker.[302]

300 *Ibid*.
301 The Land Amendment Bill 2008
302 "The Land Bill will Leave Many Poor People Landless", *The New Vision*, 12 March 2008.

The Acholi Parliamentary Group, representing an area where communal ownership of land is practiced, issued a statement which read, "We have realised that government wants land so badly. Today it is fighting Buganda tomorrow it may be us."[303] When religious leaders of different denominations had joined the fray, the prime minister, Apolo Nsibambi, met with them and appealed to them to educate their congregations on the proposed changes. As justification for the changes, the prime minister pointed out that more than 50,000 people had been evicted from their land in the past two years in nine districts alone, which forced the government to act.[304] In its main thrust, the bill tried to address a unique problem which arose during thirty years of instability in the country, as a result of which many people left their traditional homes to seek refuge in areas free of war and insurgency. This resulted in widespread illegal settlements on registered land, by people who unilaterally allocated land to themselves. With the return of stability, land has increased in value, creating demand, which lead to eviction of unauthorised tenants.

While the intentions of government are noble, it has been pointed out in numerous articles in the media that many of its provisions are unconstitutional because it tends to protect lawful and bona fide occupants outside the time frame which was set by the constitution. This argument is based on the wording of Article 237(8) of the constitution which provides that "Upon the coming into force of this constitution and until parliament enacts an appropriate law under clause (9) of this article, the lawful or bona fide occupants of mailo land, freehold or leasehold land shall enjoy security of occupancy on the land."[305]

303 "Acholi MPs Back Mengo", *The New Vision*, 9 January 2008.

304 "Nsibambi Meets Bishops Over Land", *The New Vision*, 24 January 2008.

305 Ugandan Constitution 1995 Article 237(8).

The argument which has been advanced is that on true interpretation of Article 237(8), lawful or bona fide occupants of land only enjoyed constitutional protection from eviction up to the time of passing of the Land Act, 1997. According to this argument, after the passing of the Act both the lawful or bona fide occupants became subject to the ordinary laws of the land which provide sufficient protection to both the owners and occupants.[306] As will be seen, these arguments, although valid in themselves, fail to address two crucial issues.

The deputy attorney-general responded to most of the arguments against the bill in a letter to the prime minister, which was published in full in the government-owned newspaper, *The New Vision*.[307] The chairperson of the Uganda Law Reform Commission also joined the debate on the side of government. In a learned opinion the chairperson argued that "No landowner owns and uses his land in total exclusion of the government or other individuals. It would be in order to provide criminal sanctions provided the principles of appropriateness and overall desire to maintain amicable relations are satisfied."[308] But these views were contradicted in another legal opinion which subsequently appeared in the media.[309]

While the public debate was going on, reports of evictions continued to be reported in the media which suggested a nationwide problem.[310] From Kabale, western Uganda, it was reported that 400 families in Makanga division were involved in a bitter fight with the municipal council, which wanted to develop the land. Although the families had no titles, they described themselves as landlords or legal owners and threatened to sue the council. Under the local

306 The Land Act 1997.
307 "The State Responds to Buganda on Land Bill", *The New Vision*, 27 March 2008.
308 "Legal Expert Okays Land Bill", *The New Vision*, 27 March 2008.
309 "Define Tenant", *The New Vision,* 13 February 2008.
310 "Hoima Evict Balalo", *The New Vision*, 29 July 2008.

terminology occupants of land without title deeds are known as *"bibanja"* holders which is similar to the English tenants at will. These are the people the Land Bill seeks to give some security of tenure but as the Kabale incident illustrates, there is a need to strike a balance between the need to protect bibanja-holders and development.[311]

Although the government tried to stem opposition to the bill by making some amendments to it, the ploy did not succeed.[312] The debate also widened the rift between the central government and the kingdom of Buganda, a rift which had been simmering for some time when the president wrote to the *Kabaka* (king) of Buganda regarding the bill.[313] The matter was further aggravated by disclosure by government that the land formerly known as Buganda's public land which was expropriated when the kingdoms were abolished in 1967 and which Buganda now wants returned to it, did not measure 9,000 square miles as is commonly assumed but was only 5,949 square miles.[314] The year 2008 ended without the end of this legal and constitutional saga in sight.

Governance: The Trials and Tribulations of Decentralisation

One of the cardinal innovations of the 1995 Uganda Constitution was the introduction of the system of decentralization of government services based on districts. Unfortunately this has had the unintended result of localizing personnel at district level, which means that less-developed districts find it difficult to hire appropriately qualified personnel. There was little surprise therefore when the state minister for health blamed decentralisation for poor delivery of health services

311 "State House Probes Kabale Land Row", *The New Vision*, 30 July 2008.
312 "Mengo Rejects Land Bill Charges", *The New Vision,* 14 July 2008.
313 "Mengo Replies to Museveni's Letter to the Kabaka", *Daily Monitor*, 2 January 2008.
314 "9,000 Square Miles False – Museveni", *The New Vision*, 4 March 2008.

in the country. The minister lamented that, "it is unfortunate that decentralization has almost led to tribalism within the health sector. When I go to Arua I find nurses and doctors mostly from that area, in the east it is the same case and in Kampala the hospitals are mostly manned by people from this region. This trend affected adversely areas where there are few qualified persons."[315]

The minister's complaint coincided with an outcry against the high cost of running district administrations and rampant corruption by officials. According to a report by the Inspector-General of Government (IGG), 16.9% of the complaints recorded between July and December 2007 were against local government officials.[316] In January 2008 the IGG queried the Chief Administrative Officer (CAO) of Mukono district over payment of an extra Shs.180,000,000 in councillors' emoluments. Districts are by law mandated to use only 20% of the local revenue collections for payments of emoluments but it was reported that Mukono district had spent 50% of its revenue on councillors' emoluments.[317] This problem was found in most of the districts.

Apart from widespread corruption, the system of financing the districts also came under scrutiny. Under the constitution, districts derive their income from taxes and conditional, unconditional and equalisation grants from the central government.[318] With poverty biting in almost all the districts, little is realised from local taxation. Some small districts, like Abim, collected a paltry Shs. 10,000,000. The situation was worsened by government's decision to scrap graduated taxes.[319] To compensate for this loss, government

315 Decentralisation Blamed for Poor Service Delivery", *Daily Monitor*, 29 October 2008.

316 "Districts, Police top IGG's Complaints List", *The New Vision*, 17 June 2008.

317 "Mukono Councillors Overpay Themselves Shs 180 m", *The New Vision*, 17 January 2008.

318 Ugandan Constitution 1995 Articles 191-193.

319 "Arua District Budget Falls by 18%", *The New Vision,* 17 June 2008.

introduced in the 2007/08 budget two new taxes namely Local Services Tax and Local Hotels and Lodgings Tax, but by the end of the year, these taxes had not become fully operational. In addition to these problems, political wrangles threatened the development of many local authorities.[320]

Freedom of Speech and Assembly

The year under review witnessed a number of police actions against certain politicians, which opposition political parties saw as a restraint on freedom of speech.[321] In many cases the police, on its part, were provoked by opposition members who apparently sought to test the level of tolerance in the country, as illustrated by the action of the opposition MP for Kampala Central. He declared that he would hold two political rallies without seeking permission from the Inspector-General of Police (IGP) as was required by law, in order to express his views against government's proposals to take over the administration of Kampala city.[322]

In another development the IGP refused to apologise to the Democratic Party (DP) after officers ransacked the DP office and caused damage. Through the mediation of a senior citizen, Joash Mayanja-Nkangi, a former minister of finance, the police agreed to and repaired the offices, prompting the IGP to express hope that a new chapter had been opened in the relationship between the police and DP, where the parties would exist harmoniously with the police.[323]

The power of the police to control public rallies was considered in the Constitutional Court case of *Muwonge-Kivumbi* v *The Attorney General*.[324] Section 32(2) of the Police Act provides that "If it comes

320 "Politics is Undermining Development in Masaka", *Daily Monitor,* 2 January 2008.
321 "MPs Kamya, Lukwago Charged", *The New Vision*, 12 February 2008.
322 "Lukwago Defiant on Land Rally", *The New Vision*, 18 January 2008.
323 "Police Repair DP Office", *The New Vision*, 2 July 2008.
324 Constitutional Court Petition No. 9 of 2005

to the attention of the Inspector General of Police that it is intended to convene any assembly or form any procession on any public road or street or at any place of public resort and the Inspector General has reasonable grounds for believing that the assembly or procession is likely to cause a breach of the peace the Inspector General may by notice in writing to the person responsible for the convening of the assembly or procession, prohibit the convening of the assembly or forming of the procession." The Court held that this provision is inconsistent with Articles 20(1) and (2) of the Constitution which provide that fundamental rights of an individual are inherent and not granted by the state. The Court also held that Section 32(1) of the Police Act contravened Article 29(1)(d) of the Constitution which guarantees every person's freedom to assemble and to demonstrate together with others.

In her judgment, the deputy chief justice laid down the principle that "A right to freedom of assembly and to demonstrate with others is a fundamental right guaranteed in Article 29(1) of the Constitution. As long as there is no contravention of Article 43 of the constitution, and the rights are exercised within the confines of the law, there would be no justification for invoking the powers under Section 32(2) of the Constitution." Article 43 of the Constitution sets out limitations on fundamental and other human rights and freedoms.

Kivumbi's case followed a refusal by the police commander in Masaka township to allow an organization calling itself "Popular Resistance Against Life Presidency" from holding an open-air rally. Unfortunately for the police, the power of the IGP under the Act only extends to regulation of assemblies and rallies on public roads or streets or at places of public resort and consequently the police could not prevent a rally being held in another place. The police was however, adamant and insisted that it would continue to require seven days notice from those intending to hold a rally. The decision

was subject to different interpretations. The DP which was not a party to the suit interpreted the decision to mean that the police had no power to regulate assemblies and gave notice that in future it would not seek police permission to hold its rallies. However another opinion expressed in an article held that the Court did not wipe out the regulatory powers of the police to control the conduct of rallies.[325]

The Inspector General of Government and the Fight Against Corruption

Ugandans expressed their satisfaction with the work and the determination of the IGG in fighting corruption during the year under review. A number of corrupt officials, especially in the local government sector, were brought to book.[326] However, the good work of the IGG in fighting corruption and enforcing the Leadership Code was marred by incessant arguments with other arms of government. There was a high profile tussle in the media with the minister of local government over eviction of occupants of dilapidated Kampala City Council (KCC) houses the ministry wanted to be demolished to make way for a modern satellite town.[327] This raised the issue of whether the IGG had power to investigate and reverse a decision of a member of the cabinet especially in the face of a constitutional provision which makes ministers accountable to the president for the administration of their respective ministries.[328] The country is waiting to see how the president will resolve this issue, since the matter is now in his hands.

325 Court did not Wipe Regulatory Role of Police", *The New Vision*, 4 July 2008

326 " A high-profile case involving former minister of health and two deputies of alleged embezzlement of Global Fund money is still in court. "Court Dismisses Muhwezi Appeal", *The New Vision*, 18 March 2008.

327 "IGG Otafiire Clash Over Naguru Estate", *The New Vision*, 18 June 2008.

328 "Naguru Project to Proceed – Otafiire", *The New Vision*, 1 July 2008.

The IGG also became entangled in a public controversy with a judge of the High Court.[329] The judge in question was hearing the case of three former ministers who were charged with corruption. The prosecution was being conducted by the IGG's office.[330] At one stage of the hearing, the judge made a ruling which did not please the IGG, who wrote to the principal judge, complaining that "the matter was irregularly brought before Court. But to my surprise the Judge allowed the irregularity to continue."[331]

The Principal Judge ended this particular controversy when he wrote back reprimanding the IGG politely for her course of action and pointing out that "I trust in future, for all similar complaints, if any, the orthodox procedure will be followed."[332] Unfortunately the judge, who also responded in a letter which was published in the media, excused himself from the case, thus giving the impression that he was succumbing to the IGG's pressure.[333] This went down badly with members of the legal fraternity, who felt that the IGG's action represented unacceptable interference in the work of the judiciary.

Another confrontation involved parliament. It started with a refusal by the IGG to appear in person before a parliamentary committee to defend her office's budget and instead sent her deputy[334] and all MPs saw this as a slight to their authority and refused to pass the budget until the IGG appeared before them.[335]

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329 "Justice Opio-Aweri's Procedure Unknown" *The New Vision*, 14 December 2007.

330 The IGG has powers to prosecute cases of corruption Articles 230(1) of the Ugandan constitution.

331 "IGG Protests against High Court judge", *The New Vision,* 12 December 2007.

332 "IGG Erred in Judgement", *The New Vision*, 12 February 2008.

333 "IGG, Judges Clash Over Muhwezi", *The New Vision*, 21 December 2008.

334 "IGG, Not Answerable to Parliament", *The New Vision*, 24 July 2008

335 "IGG, Refuses to Appear Before MPs", *The New Vision*, 14 August 2007

After a number of public exchanges the budget was passed - but without the IGG appearing before the committee.

There is apparently a need to define the constitutional position of the IGG.[336] The Constitutional Court has interpreted the independence of the inspectorate of government referred to in Article 227 of the constitution to mean that the office of the IGG is a legal entity which stands apart from all other departments of government.[337] This has led to the inspectorate taking up public prosecutions, which are normally the preserve of the Director of Public Prosecutions (DPP),[338] as well as conducting civil cases on its own behalf instead of the Attorney- General (AG) who is the chief legal advisor to government in civil matters.[339]

The problem created by the above Constitutional Court decision, which attributed an independent legal personality to the IGG is that the inspectorate of government does not have a budgetary provision for the role it assumed. This raises the question as to how the inspectorate will meet the costs when ordered against it in civil trials. Usually, it is the AG who is given this capacity to meet such liabilities on behalf of the government. But the AG cannot be expected to do so in cases the office of the AG did not conduct.

Government's Control of Kampala

Government introduced the Capital City Bill, which seeks to create an administration of the capital city controlled by central government, abandoning the old system under which Kampala was administered as a district. The bill caused considerable emotional debate, especially from the opposition.[340] In order to understand the

336 "IGG's Powers Not Understood", *The New Vision*, 27 March 2008
337 Constitutional Court Petition No. 18 of 2006
338 Constitution of Uganda, 1995, Article 120
339 *Ibid*, Article 119
340 "Opposition Members Reject Kampala Take Over", *The New Vision*, 2 January 2008.

constitutional issues raised in the debates we must examine the legal framework under which the city is presently managed. The Local Government Act, 1997 equates the city council to an administrative district. Section 5(a) of the Act provides that "A city shall exercise all functions and powers conferred upon a District Council within its area of jurisdiction".[341]

A number of issues have arisen from the provision which equates the city council to a district. For example, under the Town and Country Planning Act, 1964, the law responsible for physical planning, the responsibility to declare an area a planning area lies with the town and country planning board and the minister responsible for physical planning, and not with the district.[342] This has led to administrative logjams and confusion in the area of planning since it means that the city falls under two line ministries namely the ministry of local government for administrative purposes and the ministry of lands, housing and urban development for planning. There are no known official arrangements for coordinating the work of the two.

Related to this problem, under the Local Government Act, 1997, there is no provision for dealing with planning schemes although Article 190 of the constitution provides that "District Councils shall prepare comprehensive and integrated development plans incorporating the plans of lower level local governments for submission to the National Planning Authority". While this system of planning may suffice for a rural district it is hardly appropriate for a modern metropolis. Another unsatisfactory area is the system of financing for city council operations which is based on the same formula as that of districts, although by its very nature the city has demands which do not apply to districts.

341 Local Government Act 1997

342 Sections 81 and 83 of the Local Government Act, Cap 243..

In order to remove these anomalies and implement the provisions of the constitution, which vests the administration of the city in the government and requires parliament to make a law for its administration and development, the media reported towards the end of 2007, that cabinet had voted unanimously to adopt a Bill that would enable government to take over management of the city.[343]

As soon as news of government's intentions became public, the bill met with intense opposition. Among the proposed changes was that the president was empowered to appoint the mayor from elected councillors instead of the mayor being elected through adult suffrage.[344] The bill also proposes to extend the boundaries of the city to a radius of around 30 kilometers, which attracted opposition from private landowners who feared that this would lead to expropriation of their land by government. The bill is yet to come before parliament.

The Armed Conflict in Northern Uganda

The conflict in northern Uganda continued to occupy centre stage of political debate following the peace talks, which started in Juba between representatives of the government of Uganda and the rebel group of the Lord's Resistance Army (LRA). Ugandans were excited when it was announced that the peace talks, which were held in Juba under the chairmanship of the vice-president of Southern Sudan, had made a breakthrough after an agreement was reached on five major points on the agenda, which opened the way for the signing of the final peace agreement by the leader of the rebel group, first, and by president Yoweri Museveni four days later.[345]

343 "Citizens Want the Path of Amnesty in Exchange for Peace", *The New Vision*, 1 March 2008.

344 Tumwesigye, J. (2004), Tackling the Problem of Corruption in the Judiciary. Unpublished Paper Presented at the Seventh Biennial Conference of International Women Judges. 11 May 2004.

345 "The Judiciary Under Attack", http//www.icj.org/img/uganda

Chances for peace were dashed when the leader of the rebel group, Joseph Kony, announced that he would not sign the peace deal until the warrants of arrest which had been issued by the International Criminal Court (ICC) against him and four of his commanders were withdrawn.[346] Indeed representatives of the rebel group visited the Hague, where the ICC is situated, to try to push for the idea of leaving matters concerning the rebellion to be decided in Uganda. This idea was not welcomed by the ICC prosecutor, although the ICC wrote to the Ugandan government to explore the implications for a local trial of the rebels.[347]

The war in the north has adversely affected the region. One local NGO executive director has stated that "We have lost, I think, a generation in the north because people have grown up in violence, seeing nothing but violence. They don't know what peace means."[348]

Developments in the Judiciary

In a National Integrity Survey commissioned by the IGG in 1998, the judiciary was ranked as the second most corrupt institution in the country.[349] The survey found that 63% of the 18,412 households surveyed reported paying bribes to the police and 50% paid bribes to courts. According to the survey, corruption is more prevalent at the magisterial level. In another survey commissioned in 2003, incidents of corruption in the judiciary dropped from 50% to 29%.

From January 2003 to May 2004, the IGG handled over fifty complaints concerning alleged corruption in the judiciary. Most of the corruption cases occurred among junior staff, the police and

346 "Kony Crosses into Central African Republic", *Daily Monitor,*16 March 2008.

347 "ICC writes to Uganda over Kony", *The New Vision,* 18 March 2008.

348 "Citizens Want the Path of Amnesty in Exchange for Peace", *The New Vision*, 1 March 2008.

349 Tumwesigye, J. (2004), op.cit.

the magistrates' courts. Cases of corruption among judges were less common. Most cases involved state attorneys and private lawyers. In some cases state attorneys were accused of receiving bribes to withdraw cases or to conduct poor prosecutions while private lawyers were accused of offering bribes to judicial staff to ensure favourable outcomes for their clients. There were also cases of disappearing files which pointed to junior staff.[350]

Cases of corruption in the judiciary should not be considered in isolation. The Judiciary is confronted with deficiencies that ultimately hamper due process. Delays in the disposal of cases, for example, results from a lack of resources and the limited number of judges.[351] In cases where members of the judiciary are suspected of corruption complaints against them can be lodged with the inspector of courts, the Judicial Service Commission (JSC) or the IGG under the Leadership Code.[352] There is also an internal integrity committee headed by a judge of the Supreme Court which was set up in 2000 to strengthen ethics among officers of the judiciary.[353]

But these measures do not seem to have halted the incidence of corruption, for the judiciary and the police were once again named in 2008 the most corrupt institutions in the country, forcing one columnist to remark that corruption was the biggest threat to Uganda. In response to a public outcry against this scourge, not only in the judiciary but countrywide, an anticorruption court has been set up as a division of the High Court, which will have two judges, two grade one magistrates and a registrar. The court will handle cases involving corruption, causing financial loss, laundering, bank forgeries and theft.

350 "The Judiciary Under Attack",supra note 345

351 "Justice Ogoola on Decongesting of Prisons", http//www/judicature.go.ug/index

352 "The Judiciary Under Attack", supra 345

353 *Joseph Tumushabe* v *The Attorney-General*. Constitutional Petitions No. 6 of 2004.

In a related development, the Principal Judge, James Ogoola, called for decongestion of prisons and asserted that this was the responsibility of the judiciary and groups like the police, prosecutions and defense lawyers. "Our adversarial system allows prosecutors and defense lawyers to throw missiles at each other in Court as they look for the best weaponry, mainly from the defense."[354] This leads to delayed justice, which in criminal cases results in congestion of prisons. To address this problem the principal judge disclosed that the High Court has resorted to shorter criminal sessions and consideration is being given to the idea of introducing the system of plea-bargaining.

Some of the Constitutional Cases Decided in 2008

Right to Form Political Parties

The Supreme Court delivered a judgment in the case of *Kafero & Anor* v *The Electoral Commission & Others*[355] which is bound to enhance the powers of the Electoral Commission (EC) to reject or register a name chosen for a new political party. Under the relevant law, the EC acts as the registrar of political parties, having replaced the registrar general in this role.[356] The matters before the court in this particular case started when the registrar general was still responsible for registration of new parties. Paul Kafero and his friend applied to register a new political party under the name of *Kabaka Yekka* (or "The King Only"). On seeking advice, the registrar general refused to register the name since it was so closely identified with the traditional ruler of the kingdom of Buganda.

Kafero pursued the matter with the EC after it took over from the registrar general. The Commission also refused to issue a

354 "Justice Ogoola on Decongestion of prisons " *supra note 351*

355 *Kafero & Anor* v *The Electoral Commission & Others*. Constitutional Petition No. 22 of 2006.

356 The Electoral Commission Act, Cap. 140.

certificate of registration whereupon Kafero filed the constitutional case complaining that such refusal contravened Articles 72(1) of the constitution, which provides for freedom of association, and 29(1) that guarantees the right to form political parties.

In its judgment, the court quoted with approval a statement by Manyindo DCJ, as he then was, in the case of General Tinyefunza vs Attorney General[357] that in cases which concern human rights "the court may decline relief if the grant of the same instead of advancing or fostering the cause of justice would perpetuate injustice or where the court feels that it would not be just and proper, for example if the matter has been overtaken by events". The court also referred to the provisions of Article 43(1), which provide a general limitation in the enjoyment of rights and freedoms where to do so will prejudice the rights of others. In the court's view to register Kabaka Yeka would arouse excitement of ethnic origin or tribe among people belonging to other tribes. Accordingly Kafero lost the case.

The General Court Martial

Prior to the presidential elections of 2006, the general court martial invited controversy after it conducted prosecution of cases which appeared to be politically motivated. Eventually the court became entangled in legal tussles regarding the issue of bail for accused persons before it. The issue of bail also raised the wider question as to whether the court was a subordinate court within the meaning of the constitution. When the matter came up before the constitutional court in the case of *Joseph Tumushabe* v *The Attorney-General,*[358] the court held that the general court martial was a subordinate court and that detainees were entitled to be released on bail by the court martial upon completing 120 days in custody.

357 Constitutional Petition No 1 of 1996
358 Supra Note 356

Article 129 of the constitution provides that the judicial power of Uganda shall be exercised by the Courts of Judicature which shall consist of:

- the Supreme Court of Uganda
- the Court of Appeal of Uganda
- the High Court of Uganda
- such subordinate courts as parliament may by law establish

Under Article 129(3), parliament is given power to make provision for the jurisdiction and procedure of the courts. Tumushabe's case, in the end, turned on the interpretation of this provision. The Court found that there was no limitation to parliament's discretion to vest in subordinate court's jurisdiction over some matters and on the basis of this provision, the court reasoned that since parliament had provided that appeals against decisions of the general court martial, like those of the High Court, lie to the Court of Appeal, it followed that the General Court Martial was both a subordinate court within the meaning of Article 129(3)(d) and was lower than the High Court in the appellate hierarchy of courts. The decision of the Constitutional Court was accordingly upheld.

Bail

Tumushabe's case also put to rest controversy which has often surrounded the issue of bail since the coming into force of the 1995 constitution. The general view among criminal lawyers used to be that the granting of bail was an automatic right of accused persons. However the court held that, in the case of a person accused of a criminal offence, applying for release on bail pending trial, the court has to consider whether such release is likely to prejudice the pending trial and in that connection the court has discretion to grant or reject the application. However where an accused person applying for bail has been on remand in custody before trial or committal for trial, as

the case may be, for 120 or 360 days respectively, the court has no discretion except in regard to reasonable conditions. In this case it was held that the accused person was entitled to release forthwith.

Discrimination

The constitutional court continued to advance equal rights for women in the case of *Law & Advocacy* v *Attorney-General*.[359] The complaint was that Section 154 of the Penal Code tended to discriminate against women. Subsection 1 of the code provides that a man who has sexual intercourse with any married woman who is not his wife commits adultery and is liable to imprisonment for a term not exceeding twelve months or to fine not exceeding two hundred shillings. Subsection 2, on the other hand makes it an offence of adultery for any married woman who has sexual intercourse with any man not being her husband. In other words a man who has sexual intercourse with an unmarried woman does not commit an offence whereas in the case of a woman to commit adultery, she must be married and must have had sexual intercourse with a married man.

The petitioners saw the distinction as discriminatory against women and the court agreed. The court found that Section 154 of the Penal Code is inconsistent with :

- Articles 20(1) and (2), which make fundamental rights to be inherent and require all agencies of government to respect them.
- Article 24, which provides that no person shall be subjected to degrading treatment.

At the same time some sections of the Succession Act were found to be inconsistent with Article 21(10) of the constitution which

359 *Law & Advocacy* v *The Attorney-General*. Constitutional Petitions No. 13/05 and 05/06 (2007).

provides for equality of all persons before the law, and Article 31, which provides for equal rights in marriage.

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Law & Advocacy v *The attorney-General*, Constitutional Petitions Nos. 13 /05 /& 05 /06 [2007].

6

The State of Constitutionalism in Zanzibar 2008

Yahya K. Hamad

Introduction

It cannot be denied that the term constitutionalism is descriptive of a complicated concept, deeply embedded in historical experience, which subjects the officials who exercise governmental powers to the limitations of a higher law. Constitutionalism proclaims the desirability of the rule of law as opposed to rule by the arbitrary judgment or mere fiat of a public official. Within the literature that deals with modern public law and the foundations of statecraft, the central element of the concept of constitutionalism is that in political society government officials are not free to do as they please, in any manner they choose; but are bound to observe both the limitations on power and the procedures which are set out in the supreme constitutional law of the community. It may therefore be said that the touchstone of constitutionalism is the concept of limited government under a higher law.[360]

360 Whatever particular form of government a constitution delineates, however, it serves as the keystone of the arch of constitutionalism, except in those countries whose written constitutions are mere shams. Constitutionalism as a theory and in practice stands for the principle that there are in a properly governed state, limitations upon those who exercise the powers of government, and that these limitations are spelled out in a body of higher law which is enforceable in a variety of ways, political and judicial. See Wiener, P.P. (1973), Dictionary of the History of Ideals: Study of Selected Pivotal Ideas. Volume 1. New York, charles Scribner's Sons pp. 485, 491-92. For further reading see Okoth-Ogendo, H.W.O (1991)

Much has already been written regarding the constitution of Zanzibar of 1984,[361] and it is not the purpose of this paper to review what has already been written, but rather to reflect what took place in 2008 as far as constitutionalism is concerned. Although revising the constitution through amendments has been a characteristic of Zanzibar's post independence and revolution history, in 2008, the constitution remained intact - it was not amended. That 2008 did not witness further constitutional recrafting in Zanzibar, however, there were some constitutional developments, including the third *Muafaka,*[362] statehood of Zanzibar, and administration in Pemba. The other important issues that are discussed include the right to natural resources, corruption, abuse of power and equality before the law.

Reflections on the Third Muafaka: A Frog's Kiss

Before discussing the third Muafaka, it is important to recall the highlights of the second Muafaka.

The second Muafaka introduced significant changes in the governmental framework. The second Muafaka was implemented to a greater extent than the first Muafaka. Soon after the second Muafaka was signed, a joint commission was established to supervise the implementation of the accord, followed by an enabling legislation by the house of representatives and two successive amendments to the Zanzibari constitution, through the 8th and 9th constitutional amendments. By the end of 2003, nearly 80% of the requirements of the second Muafaka had been implemented.[363] The implementation

361 See East African Human Rights Reports, 2004.

362 President Jakaya Mrisho Kikwete established this idea in his inauguration speech to the parliament of the United Republic of Tanzania on 30 December 2005.

363 Mwakyembe, H. (2003), *Maendeleo ya Siasa Zanzibar na Matumaini kwa Chaguzi Zijazo*. Paper Presented at a workshop on national leaders of political parties in Tanga, 2-3 December, Organised by the Bunge Foundation for Democracy, 2003.

was characterised by the establishment of the office of DPP, an appointment that was informed by the need to separate the government and the ruling party from the DPP's office, and to bring about a more expeditious and fair administration of the criminal justice system. The second Muafaka also stimulated a spirit of good neighbourliness amongst Zanzibaris. It underscored the fact that competitive politics does not necessitate hatred amongst competitors. It can be observed that, in the second Muafaka, the politicisation of the civil service was reduced, as was the victimisation of officials who were considered to be insufficiently loyal to the ruling Zanzibar Revolutionary Council.

It has been observed that, even if the second Muafaka been implemented fully, it would still not offer durable solutions to Zanzibar's political conflicts nor build sustainable peace.[364] This is because the Muafaka essentially confined itself to election issues, neglecting broader issues such as the status of the Union, governance, the rule of law, education, including civic education, and socio-economic development.

The third round of the accord between the CUF, and the ruling party, CCM, began on 17 January 2007 in Zanzibar after more than one year of informal consultations between the advisors and assistants of president Jakaya Kikwete and some CUF officials. These informal consultations were initiated immediately after the Zanzibar general elections of October 2005.

CUF believed that the third round of the accord between CUF and CCM will come into force as soon as President Kikwete assumes CCM party chairmanship. However on granting the president CCM party chairmanship in June 2006, it was deemed necessary to give the new chairman another six months to consolidate his position

364 See the Institute for Security Studies, The Zanzibar Conflict: A Search for Durable Solution, by Gaudens P. Mpangala. Monograph No. 128, December 2006.

before tough decisions could be made and implemented. Come December 2006, it became open to the public that the two parties would be involved in a three- months long dialogue.

In April 2007, the secretaries general of CCM and CUF agreed to conclude the talks by 15 August 2007. Concerned by the slow progress, CUF appealed for international intervention to save the talks, which prompted president Kikwete to issue a statement on 14 August 2007, promising to monitor and guide the process personally to ensure its successful conclusion.

In late August 2007, CCM asked for patience from CUF to allow the CCM national congress and party elections scheduled for November 2007to pass before entering the final stage of the talks. CUF granted all the CCM's requests as a gesture of trust and confidence. Finally, all pending items on the agenda were discussed and concluded in the last meeting between the two parties.[365]

The two teams agreed to submit the package to their parties' respective decision-making bodies for approval and subsequent signing at a date to be agreed upon.

CUF conducted their National Governing Council session which approved the package and aimed to resolve thepolitical standoff permanently in Zanzibar, on 17 March 2008 in Zanzibar.[366] However, the CCM's NEC meeting in Butiama torpedoed the agreement and proposed the idea of holding a referendum "to let the people of Zanzibar decide on the new political dispensation", an idea CUF rejected.

It is undeniable that, from the above explanation, a tug-of-war ensued and it is important to understand the root causes of the

365 The last meeting involving these parties was held in Bagamoyo on 25-29 February 2008.

366 On the same day, CUF announced to its members and people of Tanzania in general the results of the meeting of its National Council. This announcement was made at a rally held at Democracy Grounds, Kibandamaiti, Zanzibar.

standoff.[367] It would also seem that the parties lacked a shared understanding of the *modus operandi* of the negotiation process. CCM believed that the agreed procedure was for each team to make regular progress reports to their respective national party organs, and to seek approval for whatever consensus may have been reached during the negotiations. Any modifications made by the party organs would then be conveyed to the other team for consideration and to obtain their agreement.[368]

On the contrary, CUF believed that the reason for sending the issue to the national organs of the parties was only to seek approval for the understanding reached. The report was expected to be the final progress report, after the two teams had agreed on all items of their agenda.

As if that was not enough, CCM accused CUF of announcing publicly that a final agreement had been reached, before the CCM NEC meeting was held to receive the progress report from the CCM team. The argument was that premature announcement of the results was contrary to the agreed procedure, according to which any public statement would have been made jointly by the two secretaries-general only after both parties had received and endorsed their respective teams' reports.

Upon receipt of its team's report and pursuant to the agreed practice, CCM made certain procedural modifications to the team's proposals, but accepted without any change the core proposal of power sharing. Having done that, and in view of the implied major changes to the Constitution of Zanzibar which would have emerged, Zanzibar CCM believed that, the stakeholders (Zanzibaris) should be directly involved in the decision-making process of this

367 See "CCM, CUF Muafaka on Verge of Collapse", *Sunday Citizen* (Dar-es-Salaam), 20 May 2007, p. 1.

368 Msekwa,P. (2008), "The new Zanzibar 'Muafaka': Reflections on the CCM-NEC Butiama Decision", *Daily News,* 7 April 2008.

matter. In preparation for its implementation, CCM informed the people of the possible major constitutional change, and that this would be done through a referendum. CCM further suggested (which was challenged by CUF), that the proposal for the new constitutional dispensation to be approved by the people of Zanzibar through a referendum should be referred back by the CCM and CUF negotiating teams, for their agreement to this fundamental amendment, in as far as it related to the procedure required in arriving at the final decision.

To substantiate their arguments, CCM argued that in order to have a proper understanding of Zanzibar's persistent political problem, it is important and necessary to understand Zanzibar's political history, and in particular its electoral history- a a history that has been characterised by tensions arising from disputed elections, always followed by severe civil disturbances, right from the very first pre-independence general elections of 1957.

This state of affairs has been caused by the underlying division of the Zanzibar society on account of its different cultural traditions and different perceptions of their heritage, as reflected in the political parties,[369] a phenomenon that has also vitiated multiparty politics in many other jurisdictions. This situation is worse where different groups overlap geographically but are separated socially and economicallyas is the case in Zanzibar. That is why the outcome of Zanzibar elections has, in most cases, been determined by the structure of Zanzibari society, rather than by the contention of policies and programmes. So, for CCM, any attempt at conflict resolution in Zanzibar must be focussed on this particular set of circumstances.

In its most recent public statement, CUF called for international mediation to achieve a new Zanzibari accord between itself and

369 See Shivji, I.G. (2008), *Pan Africanism or Pragmatism? Lessons of Tanganyika-Zanzibar Union*. Dar-es-Salaam: Mkuki and Publishers. pp.18-27.

CCM. But CCM argued that CUF's statement appears to have ignored, the sad experience of the first accord, which was crafted under the mediation of the then Commonwealth Secretary-General, Emeka Anyaoku. CCM strongly emphasised that the failure of the first accord to produce a harmonious political life in Zanzibar resulted in substantial measure from having been created through foreign mediation. On the other hand, the comparative success of the second accord resulted in no small measure from having been hammered out by the very people who had the responsibility to implement it. This consideration is in fact the justification for CCM's decision to include a referendum in the process of constructing the new accord. It was therefore deemed absolutely essential that the accord which is being negotiated should meet with widespread public support from the stakeholders in Zanzibar. Furthermore, in consideration of the fact that the second accord was criticised on the grounds that it excluded all the other political parties from the decision-making process; and that this exclusion did not in line with the Zanzibari Constitution,[370] which confirms the right of every Zanzibari to participate fully in matters that affect him or her, or which concern the nation, CCM agreed that a referendum in Zanzibar was the best option for involving Zanzibaris of all political shades and opinions in this crucial decision-making process leading to the new accord. CCM stressed that, the need for compliance with the Zanzibar Constitution with a proposal for a referendum had been misunderstood, with allegations being made that it was a "delaying tactic" on the part of CCM. CCM reiterated that the referendum proposal was based on the basic consideration, namely respect for the principle of peoples' participation in decision making moreover in such a major constitutional amendment process.

CCM went on to assert that an effective Zanzibar Accord must be coherent with the constitution and other laws of Zanzibar. The

370 See Articles 21(1) and (2) of the Zanzibar Constitution 1984.

current Zanzibari Constitution (like the Union constitution and many other constitutions of Commonwealth member countries) is based on the principle of "winner takes all". That is to say, the political party which wins elections, even if it by only one vote, forms the government, to the exclusion of all other parties. That is why, in order to implement the new understanding of power sharing, the Zanzibari constitution must be amended to accommodate this new structure.

Again, CCM believed that the basic objective of the proposed agreement is to make provision for a new structure of governance that will eliminate the recurring incidents of post election violence in Zanzibar. The next general election is due in 2010, and the ideal requirement would have been to have the agreement ready and signed before the 2010 general election, so as to ensure that the outcome of the elections does not produce the same frustrating social disturbances.

The power-sharing scheme will however have to contend with one other problem. Following the 2005 general elections, CUF issued a formal statement to the effect that it did not recognise president Amani Karume as the undisputed winner of the elections. Plausibly, if this non-recognition is not withdrawn, it may complicate a power-sharing arrangement. This perhaps warrants a detailed discussion of what the proposed power sharing structure between the two parties.

It is envisioned that after the general election, under the proposed power sharing structure, results would be declared, and both the winner and losers will jointly form the government of Zanzibar, in accordance with the following formula: first of all, the president of Zanzibar will come from the winning party. There will be two deputy presidents; the first deputy president will come from the party with the second largest number of votes (the second winner)

and he or she will be the principal assistant to the president. The second deputy president will come from the winning party, that is to say, the same party as that of the president, and he or she will be the coordinator of ministers and leader of government business in the house of representatives. In other words, the second deputy president will replace the current position of chief minister. Thirdly, cabinet ministers will be appointed from both the winning party and the losing parties in proportion to their respective strengths in the house of representatives.

As may be noted, these proposals represent a major shift from the present constitutional provisions of "winner takes all" and the main reason why CCM felt that such a major change to the constitution of Zanzibar requires an endorsement by the people of Zanzibar by way of a referendum. In the considered opinion of the CCM, involving the stakeholders directly in making such an important constitutional decision is a perfectly reasonable proposal, which enhances democracy inZanzibar. But, is the constitutional change necessary to accommodate the power-sharing deal inspired by the accord? The subsequent discussion attempts to provides answers to this.

After observing the arguments of CCM highlighted above, it is important to scrutinise the arguments and position of CUF following CCM's failure to follow the agreed agenda. First of all, CUF deemed CCM's stance as clear evidence that CCM lacked genuine commitment and good will to resolve the political crisis in Zanzibar when it entered the negotiation . To CUF, the sole purpose of CCM in participating in the talks was to mislead Tanzanians and the international community, and by so doing believed that they could politically control CUF by dangling a carrot through strategic engagement, while prolonging the talks until election time without tackling the issue. The CUF general secretary said that "it is now abundantly clear that CCM has no interest of the nation and has

no wish to see that national unity and lasting peace is achieved in Zanzibar, which is an integral part of the United Republic".[371]

Futhermore, CUF argued that CCM's stance came as surprise given that members of the CCM negotiating team constantly told their CUF counterparts that they were in constant touch with their Central Committee and NEC, and that they were communicating with President Jakaya Kikwete and Amani Karume throughout the negotiations, from whom they were getting guidance and directives. CUF also quoted latest statement by CCM that refuted media stories to the effect that president Karume was not a stumbling block to the accord as well as emphasised that at every step the leaders were kept fully informed and consulted. At this stage, the accord was expected to mark the beginning of new era in Zanzibar politics that are explained in accepting togetherness concept of life based on give and take sentiments amongst themselves, and not to start a new round of unfruitful negotiation.

Again, CUF criticised CCM for coming up with the proposal of a referendum, and argued that by raising such points CUF believed that CCM was downgrading an important issue that required a high level of seriousness, since it concerned the future of Tanzania. CUF further asserted that during the whole period of 14 months of the negotiations, that involved 21 sittings, members of the CCM negotiation team never raised the issue of a referendum. Even more disappointing for CUF was that, the recommendation for a referendum was not raised by members of NEC but was part of the report tabled by the CCM negotiation committee to the Central Committee and NEC. CUF argued that it was thus obvious that the "plot" was hatched well in advance, in what is considered to be a tactic to "win a march" over CUF. By CCM, presenting an entirely

371 Statement issued by CUF general secretary at Buguruni, Dar-es-Salaam on 1 April 2008 following a statement by the NEC of CCM regarding the negotiations of political stalemate in Zanzibar.

new proposal, different from what had been agreed, was considered by CUF an act of scuttling and sabotaging the negotiation process, which is in the interest of Tanzania and its people. In any case, CUF stressed that if CCM's proposal was sincerely aimed at involving the people, as they claimed, why did the CCM negotiation committee not put it on the table during the negotiations, instead of smuggling it through the back door?

Of equal concern to CUF was who would conduct the referendum and under what circumstances? The reason for this question was the reality that both CCM and CUF had agreed that the Zanzibar Electoral Commission (ZEC) and the permanent voters' register had basic shortcomings which needed to be rectified.

The CUF expressed its disappointed with Jakaya Kikwete as head of state and chairperson of CCM. CUF observed that the NEC's refusal to accept the agreement reached by the negotiation teams of CCM and CUF, demonstrated that president Jakaya Kikwete was either insincere and untrustworthy right from the beginning when he claimed that he was grieved by the impasse, or that he is a weak leader who had failed to control the party that he is supposed to lead. CUF further questioned the decisions taken by the president's own CCM party at a sitting he chaired, that failed to illustrate that he was implementing the advice he had gave others in 2003, since the decisions reached by NEC represented the "stalling and procrastination" which, as the president had previously claimed cannot help in resolving the conflict.

CUF also sharply criticised president Jakaya Kikwete for having succeeded in bringing to the table president Mwai Kibaki and Hon. Raila Odinga of Kenya and in bringing about reconciliation in that country, but for failing to do the same in his own country by reconciling CCM with CUF. Similarly, CUF criticised president Jakaya Kikwete for priding in the fact that Tanzanian troops had led an African Union contingent in a military operation on the island

of Anjouan, Comoro, but for his failure to lead a political operation for restoration of democracy in Zanzibar Island.

Necessity of Constitutional Change to Enable Power-Sharing

The provisions of the Constitution of Zanzibar 1984 throw sufficient light on whether constitutional change is necessary to accommodate the power-sharing deal inspired under the accord.. First, Article 43 of the Zanzibar Constitution provides for the Revolutionary Council of Zanzibar as the executive arm of the country. It specifically provides that, "There shall be a Revolutionary Council which shall comprise of the President, Chief Minister, Ministers together with other members as the President shall deem fit"[372]. Aside t from the president who assumes office through a general election[373], other members of the Revolutionary Council are appointed by the president.

The Constitution is silent about which political camp(s) the chief minister and the other ministers are supposed to appointed from. The only provision relating to the appointment of ministers is Article 42(2) of the Constitution which states that, "The President shall appoint ministers from amongst members of the House of Representatives on consultation with the Chief Minister…" There is still no party line requirement for one to become a minister.

Furthermore, Chapter two of the constitution contains the fundamental objectives and directive principles and policies of the Revolutionary Government of Zanzibar. The relatively long chapter running from Article 8 to 10A of the constitution, provides for principles fundamental for a democratic society. Article 8 makes 'peace' one of the most fundamental objectives in the exercise of duties and responsibilities of the Revolutionary Government of Zanzibar. However, most relevant for this discussion is Article

372 See: Article 43(1) of the Constitution of Zanzibar 1984, 2006 edition.

373 Article 27 of the Constitution of Zanzibar 1984 provides on the election of the President.

9(3) which provides that, "The structure of the Revolutionary Government of Zanzibar or any of its organs and the discharge of its functions shall be so effected as to take into account the need to promote national unity in the country and the overall goal of attaining democracy". One might therefore wonder what more is needed under the constitution of Zanzibar to enable power-sharing if so desired amongst the major political parties in the country. In essence, under the circumstances, no special research is required to enable one conclude that what missing to take the reconciliation process in Zanzibar forward is the political will.

What if People Vote Against the Accord?

If a referendum is conducted in Zanzibar on the political accord (Muafaka) between CCM and CUF, aimed at restoring durable harmony in the Isles, what will happen if the majority of the people reject the accord?

In other words, since majority-decisions consciously or unconsciously stand out as the best for governance, would rejection of the accord by Zanzibaris in a referendum favour proponents of the referendum ?.

These are among the many questions most level-headed people have been asking themselves.[374] Both CCM and CUF leaders have participated in three accords - the first in 1999, followed by another in 2001 and the current one – none of which have shown or produced the desired results awaited by millions of poor Tanzanians who wish for harmony in the islands and a peaceful atmosphere that would promote economic and agriculturaldevelopment. But such a situation has been hard to achieve, as it has always been frustrated by powerful people who refuse to recognise the dire need for peace in Zanzibar.

374 Ndaki, W, "What Next if Zanzibaris Vote Against 'Muafaka?", *The Guardian*, 24 April 2008.

But despite the gloom caused by the stalemate, which politicians in Tanzania have shown reluctance to solve, the onus to solve the current deteriorating situation lies with the president of the URT, Jakaya Kikwete, who, on assuming power immediately expressed his commitment to finding an acceptable solution to the problems of Zanzibar. If he still harbours the same intention, the president should not allow egoists to gain the upper hand. Indeed, being the leader of about 40 million people, it should be within his power to prevail over anybody, including his political comrades, so that he is chronicled in the books of history as the first president of the Union to find a just and lasting solution to the Zanzibar problem.

CCM and CUF have been deliberating on a harmonious Zanzibar politics, with considerations of the wellbeing of its people at the centre being the key beneficiaries and thus making it necessary to take the matter to the people for a referendum. But if the people vote against the "Muafaka," would it mean the two parties returning to the negotiating table and restart the unending political negotiations which have, for about 10 years, baffled and confused Tanzanians?

Where does the Third-Round Accord now Stand?

The ruling CCM still believes that a referendum is necessary to effect the required constitutional change. While the referendum decision is yet to be negotiated by the two political parties, CCM has repeatedly assured Tanzanians and the world over that the matter will again be brought to the table, discussed, and concluded peacefully.

On the other hand, CUF has declared its unwillingness to deceive the people of Tanzania by continuing to cooperate with CCM. For CUF, politics is not mere propaganda, but involves sincere and frank service to the people who bring leaders to power. CUF declares that it shall not return to the negotiation table on CCM's terms. Instead CUF calls upon CCM to respect the agreement reached by the negotiation teams of both parties. CUF argues that if CCM, as it

claims, has really "accepted in principle" the agreement submitted to it, then it should approve, sign and implement it with immediate effect. To that end, CUF has called upon the friends of Tanzania and the international community to take stern and immediate steps to intervene, so that the agreement reached by both parties is signed without further delay.

An independent argument maybe made that since Tanzania has so far failed to resolve this long-standing crisis, the time is now ripe for the international community to intervene and appoint a prominent international arbiter to ensure that the agreement reaches its logical conclusion and the political crisis in Zanzibar is brought to an end, for the sake of just and lasting peace in the isles.

From Futility of a Political Accord to a Claim for Independent Leadership for Pemba

We have explained the ways in which the implementation of Zanzibar political accords has brought forth likes and dislikes of the two sides to the accords-CCM and CUF. Of essence is whether a referendum in Zanzibar should decide on the establishment of a coalition government between CCM and CUF.

Of particular interest at this point is the discussion on the status and implementation of the accord, which has culminated in a call by Pemba elders, for independent leadership or administration for Pemba although it is part of Zanzibar.

Petition by Pemba Elders to the UN Secretary-General[375]

Following the failure of political accords to settle differences between CCM and CUF, a group of Pemba elders petitioned the UN Secretary-General to establish an independent administration

375 It should be noted that, to avoid bias, the explanations made in this part are in the very language context of the 'Wapemba Petition'. See the petition itself.

for Pemba[376]. The petition document itself is proof that the political atmosphere in Zanzibar (Unguja and Pemba) is still confrontational. According to the document, the motivation for the petition is the lack of recognition of Wapemba within Zanzibar's government system and the unmet basic and infrastructural needs such as roads, water, electricity, health, and other social facilities. It is these factors, combined with perceived imbalances in the distribution of economic, political and social resources between Unguja and Pemba, that led to this development.

The petition covers an historic account of the claims between Unguja and Pemba, and the humiliations the Wapemba have suffered at the hands of the Revolutionary Government of Zanzibar since 1964. The petitioners explained that the basic reason behind the perceived humiliation is because the people of northern and southern Unguja, the wapemba, did not directly take part in the glorious revolution of Zanzibar of 1964.

The Wapemba elders' petition to the UN Secretary-General indicated that the coming into force of a multiparty system vide the Political Parties Act 1992 worsened the situation. While the Wapemba hoped that the new world order, which emphasises democracy and human rights, would bring them some relief from the political humiliations they were suffering, but the democratisation process in Zanzibar failed. The petitioners argue that although the first multiparty elections of in 1995, were seriously mismanaged, the ruling CCM did not secure a single seat in Pemba. As a result, Wapemba were beaten, ill-treated, detained, women were raped and degraded. This state of affairs resulted in the first political accord in 1999, led by the Commonwealth.The petition also exposed matters associated with other elections, in Zanzibar, the circumstances under which the Pemba killings of 26 and 27 January left many people humiliated, women raped, property stolen, houses demolished and

376 The relevant petition document dated 2 May 2008.

other atrocities committed. It also explains the manner in which the October 2001 political accord was attained, and its failure to deliver the desired results to Zanzibaris. Other complaints listed in the petition include:

- The glaring economic imbalances between Unguja and Pemba
- Neglect of Pemba by poverty-reduction projects
- Rejection and disregard of Wapemba by the government's administrative structure, such that:.

  Out of 13 ministers, only one is from Pemba;

  Out of 6 junior ministers only one is from Pemba;

  Out of 13 principal secretaries only two are from Pemba;

  Out of 14 deputy principal secretaries none is from Pemba;

  Out of 74 directors only 10 are from Pemba;

  Out of 5 regional commissioners only one is from Pemba;

  Out of 10 district commissioners only three are from Pemba;

  Out of 13 chairpersons of various boards of government parastatals, only two are from Pemba.
- The petition clearly indicates that on 6 September 2008, leaflets directing Wapemba to go back to Pemba were scattered throughout Zanzibar town. According to the leaflets, Wapemba were given a grace period of one month, failing which they should suffer the consequences. That the government was silent in spite of this development.
- That in government circles, disciplinary action is based more on ethnic grounds rather than on the gravity of the offence committed. Mpemba can always expect harsher penalties than Muunguja. The "fake employees" saga in government ministries is a telling and vivid example.

- Wapemba also complained about abuses of human rights, damage to their property, dismissals and demotion from the employment as well as denial of scholarships to students. According to the petition, the above examples exhibit the political hatred against Wapemba.

Furthermore, the petition claimed that, since the introduction of the multiparty system, Zanzibar has never been stable, and the CCM regime has forced itself into power. They had expressed hope that the dialogue between CCM and CUF would bring hope for implementation of the accords that would bring freedom, fairness and political stability to Zanzibar, but instead, CCM has continued playing tricks by suggesting a referendum to involve the people in decision making on the matter. According to the petition, the referendum is an extreme measure that should be avoided because it is beyond conjecture. It claims that the referendum on the reform process will only serve the interests of the executive. It will also be a sham, just like previous elections in which people will be manipulated. The petition also states that the referendum as a kind of initiative for reform will invariably be diverted to secure the interests of those in power.

The petition blames for the impasse between CCM and CUF on president Jakaya Kikwete. It is contended that on 31 December 2005, president Kikwete made a firm promise before the Tanzanian parliament that he would solve the Zanzibar problem as soon as possible and once and for all, but has failed. And that having resolved the same kind of controversy in Kenya and Comoro, the conclusion can only be that president Kikwete lacks the political will to solve the Zanzibar question. It is also assumed that the president's wish is to see Pemba (though part of his country) and his people being humiliated. And that if CCM and the CCM led governments do not want a government of national unity in and for the benefit of Zanzibaris, and insist that the current government is not for Wapemba because

they did not take part in the glorious revolution, this will exclude a considerable section of Tanzanian citizens- the Wapemba, from participating in the governance of their country. It is the problems Wapemba are facing and the failure by both the Union and Zanzibar governments to solve themthat led to the Wapemba elders writing to the UN . The petitioner's target or hope was for an intervention in the matter by the UN Secretary-General, so as to ensure that the people of Pemba continue "living on their land which has been ordained to them by God long time ago", to quote the petition.

In their submission, the petitioners averred that this situation needs immediate attention because the people of Pemba are not free, which they doubt was what God intended them to be. That the Wapemba have been patient for a long time, and were now fed up. The petition proclaimed the UN principles of self determination, universal respect for and observance of human rights and fundamental freedom for all, without distinction as to race, sex, language or religion; respect within the country's political, social, cultural, educational and economic treatments; and protection against abuse; all of which the Wapemba do not enjoy in their own country.

The petition was signed by twelve persons namely Mr Hamad Ali Mussa (secretary to the petitioning elders), Ms Fatma Abdalla Hamad, Mr Gharib Omar Gharib, Ms Hidaya Khamis Haji, Moh'd Khamis Ali, Mr Salim Mohammed Abeid, Mr Hassan Yussuf Hassan, Mr Ahmed Marshed Khamis, Mr Mwalim Bakar Ali, Ms Maryam Hamad Bakar, Mr Nassor Abdalla Rajab and Ms Jirani Ali Hamad. These signatories represent people from four districts of Pemba, with each district represented by three signatories. The petition also states that there is an independent list of 10,000 Wapemba (the list was neither attached to the petition nor shown to the researcher) who have signed in support of the petitioners, and that the petition was therefore representative of the entire population of Pemba.

Interview with Secretary to the Petitioning Elders

Ordinary Zanzibari who believe that Zanzibar can only exist as an administratively inseparable Unguja and Pemba, were surprised when an identified group of people petitioned for independent political administration for Pemba. Equally agitated, the author developed a keen interest to learn more about the Wapemba petition issue from the secretary of the petitioners' team, Hamad Ali Mussa.[377]. Mr Mussa made it clear that the fruitless Zanzibari political accords have caused Wapemba enormous disappointment in the current administration of Zanzibar. Further, successive elections in Zanzibar have left no doubt that Wapemba are not in favour of Unguja-based CCM leadership, which has proved to be not only unsupportivebut openly antagonistic to Wapemba. Referring to the last general elections, Mussa argued that although CCM had lost all seats in Pemba at every level, Wapemba continued to be unjustifiably subjected to Unguja-based CCM rule. Mussa further contends that CCM agents, backed by armed forces, enforce their direct rule rather than leadership over Wapemba. In this context, a coalition government is advanced as fundamental to finding a solution to the political issues in Zanzibar. Unfortunately, all "prospects" and "pretences" of a coalition government have been wiped out by CCM's "winner takes all" theory. It is against this backdrop that Wapemba are seeking political and administrative independence from Waunguja.

On what Wapemba expect from the United Nations in reaction to the petition, no firm answer was given by Mussa. on his part,the British high commissioner, Mr Philip Parham cautioned foreigners against meddling in the political affairs of Zanzibar. Addressing a media conference on 19 May 2009, the British envoy expressed

377 Mr Mussa was known to the author before the petition but was mentioned in the petition as the Secretary of the petitioners . The two met on 28th September 2008.

confidence that Tanzania is a politically mature country capable of solving its own internal problems.[378]

Was the Wapemba Petition Misconceived?

One of the salient features of the public discussions on Wapemba's secession move is the demand to secede from the URT. Several key public officials have expressed this viewpoint. *Daily News* reported that Hon Mohammed Seif Khatib the minister in the vice-president's office for Union affairs, stated that some Pemba residents had approached the UN, requesting it to initiate a process that would lead to a declaration of the island as an independent republic.[379] He described the petition as "absurd and unfortunate", and urged the people to ignore all those with such misguided sentiments.[380] In a separate development, the Tanzanian inspector-general of police, Said Mwema, said at a media conference in Dar-es-Salaam, that scores of Wapemba had made a rare petition before the UN for the isle to secede from the Union and to become "an independent republic".[381] In contrast, Mussa explained that the political nature of the matter may have led to misperceptions, but that nothing in the petition indicated that the petitioners intended to secede from the URT and to become an independent republic.

Is Wapemba's Petition Treasonous?

Arguments advanced at different public discussion and fora relating to Wapemba secession petition raise the question of whether the petition is treasonous?

Among those who claimed that the Wapemba petition amounts to treason was the inspector-general of police, Said Mwema, who stated that hatching a secessionist plot clearly amounted to treason "because

378 *Daily News* (Tanzania), Issue No. 9553 of 21 May 2008, p. 1.
379 *Daily News* (Tanzania), Issue No. 9548 of 14 May 2008, p. 1.
380 *Ibid.*
381 *Daily News* (Tanzania), Issue No. 1469 of 17 May 2008, p. 1.

it would be seeking to break a national government structure formed according to the country's constitution".[382]

To have a balanced discussion of whether the petition amounts to treason, it is important to analyse the way in which the Wapemba petition came up, and how it has been subsequently handled. Even the petitioners themselves clearly indicated in the petition that they came up with the idea of administrative secession of Zanzibar following their dissatisfaction with the Muafaka or "*Miafaka*" results. It was a way in which the Wapemba expressed a kind of frustration that stood in the way of their aspiration of having a joint leadership: but that if the joint country leadership is impossible, secession could be the answer.

Initially law enforcers seemed to believe that the Wapemba petition is punishable by law because it is treasonable. A number of people suspects and those involved were arrested,[383] only to be released on police bail without any indication that they will be charged with any criminal offence, not even that of showing seditious intention, which is punishable under Section 55 of the Penal Code, Cap. 16 of the revised laws of Tanzania. This demonstrates that the Wapemba petition is in fact not treasonable. The matter had also clarified as not treasonable by the LHRC and reported in *The Guardian.*[384] The LHRC engagement officer, Leonard Elias, told journalists in thatthe 12 elders arrested in Pemba for allegedly demanding autonomy for Pemba could not be charged with treason because they were simply expressing their views.

State and Statehood of Zanzibar

One of the controversial constitutional issues that arose in 2008 is the question of the sovereignty and the statehood of Zanzibar. This followeda statement of the prime minister of the URT in parliament,

382 *Daily News* (Tanzania), Issue No. 4202 of 17 May 2008.
383 *Daily News*, Issue No. 4202, op cit.
384 *The Guardian* Issue No. 4202 dated 17 May 2008, p. 2.

to the effect that Zanzibar is not a "state".[385] In investigating this question, reference was made to the constitutions of the URT 1977 and that of Zanzibar of1984 as well as to other relevant materials.

This question of the statehood of Zanzibar was raised for the first time in the case of Machano *Khamis Ali and 7 others* v *SMZ*.[386] To understand the Zanzibari position we should first consider the basic law i.e. the articles of Union which are the basis of the Union between Tanzania mainland and Zanzibar. Since the Articles of Union at no point mention that the constitution of the URT is above that of Zanzibar , the claim by the prime minister of the URT that Zanzibar is not a state in the light of Article 1 of the constitution of the URT which provides the notion that Tanzania is one state and is a sovereign united republic does not carry any weight. While acknowledging that Article 2 of the constitution of the URT provides for the territory of the United Republic to include Zanzibar, cognisance is not given to the fact that Zanzibar has its own Constitution which is equally recognized under the constitution of the URT, calling for the need for both to be interpreted harmoniously.[387]

This contention is supported by Article 5 of the Articles of Union which provides that the existing laws of Tanganyika and Zanzibar shall remain in force in their respective territories. The question now is whether the non-existence of the Tanganyika constitution amounts to the non-existence of the government, the state of Tanganyika and the existence of the state of Zanzibar and its government? Article 3 of the Articles of Union gives Zanzibar the power to have separate legislation and executive functions for matters other than those reserved for the parliament and executive of the United Republic.

385 The argument was based on three articles of the constitution, Article 1 and 2 of the Constitution of the URT 1977 and Article 1 of the Zanzibar Constitution of 1984.

386 (1999) Criminal Case No. 7 (unreported)

387 Hamad, S. (2008), *Khatma ya Zanzibar na Mustakbal wa Muungano*. Paper Presented at a Seminar at Bwawani Hotel, Zanzibar.

This has been clearly illustrated under Article 5 of the 1977 constitution of the URT . Thus the constitution of the URT deals with two jurisdictions, one for the United Republic and one for Tanganyika, while the Zanzibari Constitution deals with only one jurisdiction. Two jurisdictions, plus one jurisdiction in a separate constitution make three jurisdictions. This means that if you have two oranges in a basket and one orange in another basket then you have a total of three and not two oranges.[388]

When we talk about the stand point of the Zanzibar Constitution on the question of the statehood of Zanzibar, it should be noted that the constitution of Zanzibar is made by the people of Zanzibar through the Revolutionary Council and does not derive its legal authority or political legitimacy from the Union constitution. This is stated very explicitly in the preamble of the Zanzibar Constitution.

It can be therefore argued that Zanzibar is a state because its Constitution constitutes the state of Zanzibar whose sovereignty is limited in the international sphere. But as President Kikwete stated, for domestic affairs Zanzibar is a state, but when it comes to international affairs, Tanzania is a state; therefore Zanzibar is not a state under international law.[389] President Kikwete emphasised that under the terms and conditions of the Articles of Union of 1964, Zanzibar is a state within the URT. From this perspective out of the United Republic, Zanzibar and Tanzania Mainland are recognised as the United Republic of Tanzania on matters concerning citizenship and participation in the UN and other regional associations and diplomatic relations.

388 Abubakar, K. (2006), The Union and the Zanzibar Constitution. In C.M. Peter and H. Othman, Zanzibar and the Union Question. Zanzibar: Legal Service Center Publication Series. p. 18.

389 President Jakaya Kikwete's speech when he postponed the national assembly at Dodoma on 21 August 2008.

The Zanzibar's chief minister, Shamsi Vuai Nahodha, when in a session of the House of Representatives in Zanzibar, argued that under international law, Zanzibar as a certain geographical area (position) is a state with its own defined territory, government and people who are living within that defined territory.[390] Thus it is correct to state that Zanzibar is a state, but a state without nationality, because it is an integral part of the nation of the URT.

The statehood of Zanzibar can also be established in the Zanzibari constitution where terms such as "Nchi", "Wananchi" and a "Zanzibari" are used. Taken in the context of the Union, the term "Nchi" and "Zanzibari" denotes the political society or the Zanzibari state. The term "Wananchi" connotes the people of Zanzibar in a collective sense as the civil society of Zanzibar,while a Zanzibari refers to the individual member of this "civil society", one who owes loyalty and allegiance to the state of Zanzibar, from which he has right to demand protection of his or her person integrity and welfare.

Again, the constitution of Zanzibar constitutes state powers which are the sum of executive, legislature and judicial powers. This proposition is also supported by the Union constitution. This constitution enshrines that all state authority in the United Republic shall be exercised and controlled by two organs vested with judicial powers and two organs with legislative and supervisory power. While this constitution reveals that the organs vested with executive power shall be the government of the United Republic and the revolutionary government of Zanzibar, the organs vested with judicial power shall be the judiciary of the United Republic and the judiciary of Zanzibar and the organs vested with legislative supervisory powers over public affairs shall be the parliament of the United Republic and the House of Representatives of Zanzibar respectively.[391] We can formulate the following equation: Union government + Union

390 Refer to the Official Report of Parliament, Hansard p. 10.

391 Article 4 (1 & 2) of the Union constitution of the Republic of Tanzania, 1977.

judiciary + Union parliament = state of the United Republic, and revolutionary government of Zanzibar + Zanzibar judiciary + House of representatives of Zanzibar = state of Zanzibar.

It can also be argued that, for the state to stand as a real state it must have a head of state. From this argument we can see that the Zanzibar constitution depicts the existence of president of Zanzibar as the head of this state.[392]

In conclusion it can be said that one cannot accept the existence of Zanzibar and then deny its statehood. This would be unethical because both constitutions recognise the presence of the Zanzibar and its independent executive, legislative, and judicial organs. So Zanzibar remained a state even after entering the Union with Tanganyika. That is why Zanzibar's constitution maintains that statehood despite the existence of a Court of Appeal decision that Zanzibar lacks a statehood[393].

Technically the Court of Appeal decision in the famous case of *Machano Khamis Ali and 7 Others* v *SMZ*[394] which declared that Zanzibar is not a state and thus that the offence of treason cannot be committed in Zanzibar; and also that the provisions of the Zanzibar Constitution do not provide that Zanzibar is a state, has been a subject of various criticisms on a number of legal defects, and can therefore not be fully relied on. One such criticism was that the decision was made after the government had already entered a n*olle proseque* on the charge against the accused and the accused were set free. On that basis, one can query the decision of the Court of Appeal on the ground that it was an illegality in the absence of a charge when the accused had already been set free. Again, the decision of the judges of the Court of Appeal was oblivious of the Constitution

392 Article 26(1) of the Zanzibar constitution, 1984.

393 See: decision in the case of Machano Khamis Ali and 7 Others V SMZ;Supra Note 247.

394 *Ibid*.

of Zanzibar, which was in essence tantamount to misinterpreting the Zanzibari constitution.

All in all, from these arguments it can be concluded that Zanzibar is sovereign and a state, albeit with limited exercise of its sovereignty to the extent that the jurisdictions of its executive and legislature are confined within non union matters but with a judiciary with unlimited jurisdiction within Zanzibar, epitomized by the High Court.

Equality before the Law – Access to Justice

Section 12 of the Zanzibari Constitution 1984 and Article 14 of the ICCPR emphasise that all persons are equal before the law and are entitled to equal opportunities and protection of the law. These two sections mean that all human beings in society should be treated and enjoy rights equally according to domestic laws and policy.

Access to justice can be described as active participation coupled with affective utilization of affordable and available resources in the course of approaching and obtaining justice for all. The concept of access to justice can only be meaningful when individuals have knowledge and understanding of their rights, access to legal advice and representation, accompanied by fair and accelerated trials. Unfortunately this is not the case for many Zanzibaris.[395]

Economic hardships, lack of awareness by individuals about legal advice and judicial corruption are some of the factors that affected access to justice in Zanzibar during the year 2008. Increased corruption in Zanzibari courts denied the poor access to justice. Judges, magistrates, court clerks, typists and even court messengers were accused of corrupt practices.[396] Lack of legal awareness and legal representation in the courts of laws remains a big problem in Zanzibar, especially for the poor. In 2008, the number of advocates enrolled in 2008 to practice in the High Court and its subordinate

395 Tanzania Human Rights Report (2007) at p. 23

396 Ibid, p. 187.

courts, excluding the primary courts and Kadhis' courts, was very low. Moreover, there are various challenges which have remained unresolved, even with an increase in the number of lawyers registered.

The first challenge has always been the fact that there is only one advocate who resides in Pemba.[397] The main reason why Zanzibari advocates prefer to practice in Unguja is the poor economic conditions of people of Pemba, which affects their affordability of legal services.[398]

Three legal organisations in Zanzibar i.e. Zanzibar Law Society (ZLS), Zanzibar Female Lawyers (ZAFELA) and Zanzibar Legal Services Centre (ZLSC), for the first time, celebrated legal Aid Day in 2008,[399] at which all Zanzibaris requiring legal assistance were invited to participate and receive services free of charge.

The system of using paralegals[400] was established by ZLSC in October 2007; The number has grown to 53 paralegals in all constituencies of Zanzibar and four from Zanzibar's special departments i.e. the Anti-smuggling Squad (*Kikosi Maalum cha Kuzuia Magendo* [KMKM]), the Economy Building Brigade (J*eshi la Kujenga Uchumi* [JKU]) etc.

Paralegals were introduced in Zanzibar mainly to address justice–related problems at individual and community levels. The fact that legal representation is not permitted in Kadhis' courts is another challenge facing parties whose disputes fall under the jurisdiction

397 The only enrolled advocate residing in Pemba was employed by the ZLSC, consequently he only works on selected cases.

398 One of the senior private advocate's statements when he was interviewed by the writer concerning legal presentation of people in Pemba.

399 13 December was Legal Aid Day, and was celebrated in Zanzibar for the first time and for the third time on the Mainland.

400 Paralegal is a person, usually with special training, but who does not have a law degree, and who works under the supervision of a lawyer. They are also sometimes called legal assistants.

of these courts because many people often fail to properly present their cases before these courts.[401]

Right to Natural Resources

The islands of Zanzibar have access to various marine resources. However the issue of marine resources exploitation in Zanzibar is shrouded in controversy emanating from the union between Zanzibar and Tanganyika. According to the original Articles of Union of 1964, maritime was not a union matter but became one in the preceding years. Since then, anyone interested in investing in marine exploitation in Zanzibar was required to obtain a license from the Union government. Consequently, Article 1(2) of the ICESCR which provides that "All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence," is being contravened.

The question of oil deposits in Zanzibar has very recently changed from dream to hope. A few years ago, oil was part of the political agenda with the political opposition saying that there was a huge deposit of oil while government dened it. The question of oil has reached the Zanzibari House of Representatives for discussion, and the main question is the equitable and fair distribution of the proceeds between each party of the Union after the oil has been drilled.

401 One of the women interviewed by the author claimed that she was divorced with 8 children, most of them school- going ; with the eldest in form two and youngest aged 13 months. Her ex- husband did not provide care and maintenance for the children. While the woman stated that she is ignorant about legal matters, she believes the decision made by the Khadi court for her to collect 30,000 Tanzania shillings from her former husband monthly for maintenance of the children, was unfair since she had no one to present her in court.

During the discussion in the house of representatives, some MPs openly stated that oil exploitation in Zanzibar was not a union matter while the Union government insisted that the question of oil exploitation and drilling in any part of URT is a Union matter. The issue heated up, as Zanzibaris questioned why coal, diamond and other natural resources found in Tanzania mainland were not considered Union matters but only oil and gas were. Some MPs went on to question whether gas is a Union matter, as extraction at Songosongo site in Tanzania mainland had started almost eight years ago but Zanzibar was yet to receive a single coin from the proceeds; they ask why it took so long, how much was produced and what Zanzibar's share of the proceeds of the gas were. Questions were also being raised about staff composition of Tanzania Petroleum Development Corporation (TPDC)[402] which has no specific posts for Zanzibaris as opposed to Union institutions such as Tanzania Telecommunication Company Limited (TTCL), Bank of Tanzania (BOT) and Tanzania Revenue Authority (TRA) where specific posts for Zanzibaris exist.

The TPDC which, from the outset, seems not to be a Union corporation, is in charge of oil exploitations in Tanzania. It is also employs experts who do the exploitation and divide the proceeds from oil between Zanzibar and Tanzania Mainland.

Zanzibaris feel that the act of making petroleum exploitation and drilling a Union matter contravenes Article 1(2) of the ICESCR.

Corruption and Abuse of Power

Corruption and abuse of power go hand in hand. Zanzibar is part of Tanzania, but unlike Tanzania Mainland, Zanzibar did very little

402 This Corporation was established on 30 May 1969 under the Public Corporation Act No. 17 of 1969 and again, Order No. 140 of 1969 prompted by the need for a Government agency to oversee the petroleum exploration activities of AGIP Africa, which was given a license covering the whole coastal area from Mtwara to Tanga.

in 2008 to fight corruption and abuse of power. Perhaps this is mainly because of lack of a specific anticorruption legislation and institution in Zanzibar, such as the equivalent of Tanzania Mainland's TAKUKURU (Taasisi ya Kuzuia na Kupambana na Rushwa).

In 2008, there were a number of activities by senior government officials which, indicated the existence of corrupt practices, but for which no action was taken against any of the officials concerned because of lack of relevant legislation. The best example of this is the sale or lease of many government buildings such as ZSTC, and Forodhani Orphanage Center, where records show that proper procedures were flouted because no tender or advertisements were posted.

It was quite clear that corruption was practiced in the administration of justice, especially with respect to the question of bail in subordinate court. One respondent claimed that if someone does not pay for bail, he/she is remanded or given bail on very harsh and severe conditions.[403] In order to win public confidence of its citizensthe government of Zanzibar has to adopt the Tanzania Mainland approach, including enacting specific laws on corruption.

The question of abuse of power occurred in many areas but the best example is what happened in Pemba at midnight on 12 May 2008, when security officers in collaboration with police officers in various districts of Pemba arrested 11 people and incarcerated them for a number of days, then released them without charging them.[404]

In summary, a lot more has to be done by the Zanzibari government to combat corruption

403 Interview with the person charged with a traffic offence at Chake Chake Pemba on 16 July 2008.

404 Interview with Gharib Omar, one of the people arrested on 8 December 2008 at Wete, Pemba.)

Conclusion

It is evident that in the year 2008, constitutionalism in Zanzibar did not develop as vigorously as people expected, especially after they witnessed the success of the second Muafaka. A scrutiny of the whole situation reveals that the problem is not mainly legal since Zanzibar has plenty of laws and more legislation is passed every year. The problem is more of lack of commitment among the leaders of political parties, especially government, who have failed to observe, uphold and enforce the law. The best way to heal the problem is to introduce a power-sharing agreement. This will be a win-win situation to ensure that all citizens of Zanzibar have equal enjoyment of their constitutional right to participate in the governance of their country. This will put an end to the "life and death" approach to political life and electioneering.

To rule without a firm legal foundation law is to invite unfairness, arbitrariness and dictatorship. Such a state of affairs is likely to breed civil strife, for people would easily devise and resort to their own means of protecting themselves against such state arbitrariness and unfairness. With commitment and the political will, however, this can be avoided.

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