# THE STATE OF CONSTITUTIONALISM IN EAST AFRICA FOR THE YEAR 2005: THE ROLE OF THE EAST AFRICAN COMMUNITY.

**By Dr. Kithure Kindiki**[1]

## 1. INTRODUCTION

One of the most important developments in Africa in recent years has been the revival of the East African Community (EAC), with Kenya, Uganda and Tanzania as its members. Before its collapse, the old EAC was regarded as one of the most successful experiments in regional economic integration on the Continent. Due to ideological differences among and within the three countries, the perceived domination f the Kenyan economy and the Idi Amin-led military coup in Uganda in 1971, this promising experiment in regional economic integration came to a premature and painful end in 1977. [2]

Twenty-two years after the ignominious collapse, the Community appears to have arisen from the ashes of the old.[3] On 1 December 1999, the new EAC was launched in Arusha, Tanzania. This was preceded by eight years of protracted and gradual negotiations that culminated in the signing of the Treaty Establishing the East African Community on 30 November 1999.

This paper explores the status of constitutionalism in the three states of Kenya, Uganda and Tanzania; and the actual and potential role of the EAC in promoting constitutionalism in the region. In so doing, it analyzes the constitutional and political developments in the three states during 2005, and examines the constraints and opportunities for the EAC to enhance constitutionalism in the region.

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[2] Ajulu, R "The New EAC: Linking Sub-regional and Continental Integration Initiatives" in R. Ajulu (ed) *The Making of A Region: Revival of the East African Community* (2005) Midrand: Institute for Global Dialogue p.17.

[3] *Id.*

## 3 THE CONTEXT

### 3.1 The Concept of Constitutionalism

The notion of constitutionalism is today broader than it used to be in the 1960s when De Smith described it in the following words:[4]

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

In its broadest sense, constitutionalism refers to the ethic of complying with constitutional norms. Thus, Ojwang states that having written or unwritten constitutional principles does not always guarantee constitutionalism.[5] Ostensibly, constitutionalism would entail a culture of respecting a country's constitutional normative and institutional frameworks. In this light, constitutionalism encompasses both constitutional and political ethos.

Constitutionalism goes beyond the mere existence of a constitution and governance according to a constitution.[6] It is premised on the assumption that the constitution is a social contract between people and their leaders; defining democratic governance, guarantees individual rights, and empowers the citizenry to use it as a living document that reflects their needs and aspirations in furtherance of their day- to- day life struggles.

Since the end of the Cold War, two developments have wrought broader conceptualizations of constitutionalism. The first one is the emergent world citizenship whose content is to be found in such international human rights instruments as the Universal Declaration of

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4 De Smith, SA "Constitutionalism in the Commonwealth Today" (1962) 4 *Malaya Law Review* 1.

5 Ojwang, JB (1990) *Constitutional Development in Kenya: Institutional Adaptations and Social Change* Nairobi:Acts Press p.2.

6 See Maina, W "Constitutionalism and Democracy" in K. Kibwana *et al* (eds) (1996) *In Search of Freedom and Prosperity: Constitutional Reform in East Africa* Nairobi: Claripress p.1-6.

Human Rights[7], the International Covenant on Civil and Political Rights (ICCPR),[8] and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[9]
The workings international human rights supervisory mechanisms, together with the international criminal tribunals[10] and the International Criminal Court[11] have produced a human rights jurisprudence that no constitutional lawyer can ignore. This jurisprudence is supplementing the old jurisprudence on constitutionalism.

Yet another citizen has been emerging side by side the world citizenship. This is the regional citizenship.[12] The members of the European Union (EU) have adopted federal Constitution that is currently the subject of public debate. The African Union (AU) launched in Durban, South Africa in 2003 is aimed at ripening into some political federation first envisaged under the 1994 Treaty Establishing the African Economic Community.

In East Africa, it has been decided to nurture the EAC until it becomes a political federation consisting the three states of Kenya, Uganda and Tanzania; but also, perhaps, including Rwanda and Burundi. The notion of constitutionalism, understood in the context of universalism and regionalism provides the theoretical underpinning for this paper.

### 3.2 Regionalism and Constitutionalism: The Nexus

The deteriorating economic, social and economic conditions in Africa have generated a lot of Afro-pessimism, with suggestions that Africa is likely to forever remain the backwater of

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7 Adopted and proclaimed as UN General Assembly Resolution 217(III) of 10 December 1948.
8 Adopted and opened for signature, ratification and accession by the UN General Assembly by Resolution 2200 A (XXI) of 16 December 1966; entry into force: 3 March 1976, in accordance with article 49.

9 Adopted and opened for signature, ratification and accession by the UN General Assembly by Resolution 2200 A (XXI) of 16 December 1966; entry into force: 3 January 1976, in accordance with article 27.

10 Notably the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for the Former Yugoslavia (ICTY) as well as the Special Courts for East Timor and for Cambodia.

11 Established through the Rome Statute of the International criminal Court (ICC) adopted on 17th July 1998; entered into force on 1 July 2002.

12 See Kuria GK "Building Constitutionalism: Defining the Jurists Province and Tasks – How to Mobilise a Consticuency of Citizens" in T. Ojienda (ed) (2003) *Constitution Making and Democracy in Kenya: Building Constitutionalism* Law Society of Kenya: Nairobi p. 24 at 25.

the global economy.[13] Nassali notes that the African crises is no longer defined in technical and economic terms but as problems of human rights, social and political impasse, the total suffocation, fragmentation and encapsulation of civil society, containment of democratic civil pressure and the depolitization of civil society, all which have frustrated growth, peace, stability and development.[14]

The erosion of security and stability in Africa is one of the major causes of continuing crises and acts as a major impediment to the creation of sound economies and the establishment of an effective system of intra and inter-African cooperation. This cooperation, particularly the intra-African type has led to Africa-wide and regional cooperation within the continent, particularly in the area of economic cooperation. But while the process of regional integration is inextricably linked to the quest for economic development, it is emerging that economic prosperity cannot be achieved in a state of constitutional crises and without addressing the root causes of underdevelopment.

Linking the two concepts, a commentator had the following to say about the future role of regionalism in enhancing constitutionalism:[15]

> The next millennium is likely to be one of greater regional and other forms of international cooperation than have been witnessed [before]. The last two decades have witnessed the revival of regional cooperation including [the Common Market for Eastern and Southern Africa] (COMESA), and the EAC. In Africa, regional cooperation is perceived to be capable of facilitating rapid economic progress and to offer hope of an end to ethnic strive as the citizens identify themselves with larger entities than with their own races or tribes.

With the imperatives of contemporary globalization, it has increasingly become clear that regionalism must address issues of development, the environment, political stability, human rights and governance. The EAC Treaty acknowledges this linkage between regional economic integration and constitutionalism. It provides as one of the core objectives of the Community, 'the promotion of peace, security and stability within, and good neighbourliness

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[13] Nassali, M "The East African Community and the Struggle for Constitutionalism: Challenges and prospects" Kampala: Kituo Cha Katiba p. 1.

[14] *Id.*

[15] Speech of GK Kuria, Chairman Law Society of Kenya, on occasions of the Annual Dinner held on Saturday 20 March 1999, Hotel Intercontinental, Nairobi.

among, the partner states'.[16] Among the fundamental principles of the Community is 'good governance, including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality as well as the recognition, promotion and protection of human and peoples' rights'[17]

## 4. RELEVANT DEVELOPMENTS IN THE PARTNER STATES OF THE EAST AFRICAN COMMUNITY (EAC) DURING 2005

### a. The Republic of Kenya

A dominating theme in public and media debate in Kenya during 2005 was the Proposed New Constitution. The constitutional reform process in Kenya, however, is much older – having began around 1990. It has been argued that Kenya's is easily one of the longest constitutional reform processes in world history.

This longevity has been explained variously. However, one of the more enduring arguments is that good constitutions are never written in peacetime. Writes Brazier:[18]

> Constitutions have, of course, been granted or adopted for many different reasons. New constitutions have marked stages in a progression towards self-government (as in most British colonies before independence); they have established a system of government in a newly independent state (as in the United States of America in 1787), or in a reconstituted state (such as Malasyia in 1963 of Tanzania in 1964); they have marked a major change in the system of government (as in Spain in 1978); they have been adopted in order to rebuild the machinery of government following defeat in war (as with the Federal Republic of Germany in 1949); and they have declared a new beginning after a revolution, or after a collapse of a regime (as in France as in 1791 and in 1958).

Brazier is not alone in supporting the view that writing of new constitutions is not feasible during the stable condition of functional statehood. Wade and Bradely have similarly stated:

> In the modern world, the making of a constitution normally follows some fundamental political event – the conferment of independence on a colony; a successful revolution; the creation of a new state by the union of states which were formally independent of each other; a major reconstruction of a country's institutions following a world war

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16 Article 5 of the EAC Treaty.

17 Article 6(d), EAC Treaty.

18 Brazier, R (1991) *Constitutional Reform: Reshaping the British Political System* Oxford: Clarendon Press p.1.

Small wonder then that Kenya's Constitutional reform process floundered, in a manner of speaking, during 2005. After many months of re-negotiations of the content of the Draft Constitution of Kenya produced by the National Constitutional Conference at the Bomas of Kenya, Nairobi (the '*Bomas* Draft') on 15 March 2004, a breakthrough was claimed to have been achieved following the conclusion of a retreat at the South-Western town of Naivasha by members of the Parliamentary Select Committee on Constitution in January 2005.

The retreat, initially dismissed by some MPs as 'a waste of time' apparently successfully discussed the so-called 'contentious clauses of the *Bomas* Draft, and even produced a draft Bill empowering Parliament to amend the *Bomas* Draft by two-thirds majority affirmative decision.[19] In spite of this, the then Minister in charge of Justice and Constitutional Affairs the Hon. Kiraitu Murungi refused to published the Bill with recommended changes to the contentious clauses.[20] In the same manner, President Mwai Kibaki also discredited a Bill that some commentators believed would have easily paved the way for the enactment of a new constitution for Kenya.[21]

On 22 July 2005, amid street protests in Nairobi,[22] the Parliament of Kenya approved amendments to the *Bomas Draft*, after an acrimonious debate that led to the walk-out of MPs allied to the Liberal Democratic Party (LDP) and KANU. 102 votes for and 61 against carried the amendment motion. Known as the 'Kilifi Draft'. These amendments had been prepared by MPs allied to the National Alliance Party of Kenya (NAK) wing of the ruling National Rainbow Coalition (NARC) in a hotel in the coastal town of Kilifi, in early July 2005.

The Kilifi draft drastically reduced the powers of the Prime Minister as crafted under the *Bomas* Draft. Following the Parliamentary vote, the amended draft Constitution was subjected to a referendum on 21 November 2005. The figures released by the Electoral

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[19] These related to the sharing of Executive powers between the President and the Prime Minister; , the Legislature and the Bill of Rights among other issues.

[20] See, "Kiraitu Spoils Consensus party" in *News and Views on Africa from Africa,* available at www.newsfromafrica.com (accessed on 14 January 2006).

[21] *Id.*

[22] Protestors were against Parliament having a role in altering in any way the *Bomas Draft* as adopted by the National Constitutional Conference on 15 March 2004.

Commission of Kenya (ECK), which supervised the referendum, showed the "No" vote won with 3.5 million vote, against 2.5 million votes for "yes". In a terse, emotional live television broadcast President Mwai Kibaki conceded defeat of the government in the referendum.[23] On 23 November 2005, in an unprecedented move the President sacked all Ministers, except the Vice President and the Attorney General. [24] He reconstituted his Government two weeks later, excluding all the 7 Ministers allied to the LDP Wing of NARC, who had actively campaigned against the constitutional draft.[25]

A number of developments during the constitutional reform clamour in 2005 can be said to have relevance to a culture of constitutionalism in Kenya. They are mainly setbacks:

1) The role of Parliament in re-discussing a constitutional draft that had been adopted by the National Constitutional Conference is by all means against the tenets of constitutionalism, by which Parliament exists to endorse, and not to obliterate, the will of the people. In this light, it should be noted that the National Constitutional Conference that met at *Bomas* consisted of 3 people from each Districts, representatives of interest groups (women, trade unions, professional activities etc) as well as all MPs. In reaction to demonstrations that took place in Nairobi to oppose what MPs had done to the *Bomas* Draft, the police used unnecessary force on unarmed demonstrators.

*2)* During the referendum campaigns, the Kenya National Commission on Human Rights established that many Cabinet Ministers on both the 'yes' and 'no' teams were misusing government resources, transports etc to carry out campaigns, contrary to the law. Despite public outcry, the practice continued unabated, and no action was taken, until the end of the referendum campaigns.

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23 See *Kenyan Leader Accepts Defeat* BBC Online, 22 November 2005, available at <www.news.bbc.co.uk> (accessed on 2nd January 2006).

24 See Miring'uh E "Kibaki Sacks his Entire Cabinet" *The Standard, 24 November 2005*.

25 See the Headlines of the *Daily Nation* and *The Standard* on 7th December 2005, available online at <www.nationmedia.com/archives> and <www.eastandard.net/archives> respectively.

3) Politicians including the President breached the code of conduct on electoral related campaigns.

4) The authority of courts of law was occasionally ridiculed. On one occasion, the High Court had issued an injunction against issuance of title deeds by government on forestland to squatters. The political opposition had moved to court, arguing that the issuance of title deeds was being done for political expediency, notwithstanding its possible adverse environmental ramifications. Despite the court order, no lesser government official than the President went ahead to issue the title deeds. On several other instances, Cabinet Ministers publicly defied court orders.

On a positive note though, it was gratifying to see an incumbent government conceding poll results that were against their favour.

In the wake of the rejection of the Draft Constitution in November 2005, one question that lingered towards the close of the year was whether Kenya is, after all, in need for constitutional reform. We find an affirmative response more tempting; for at least two reasons. Firstly, the current 42-year-old constitution was not adopted by plebiscite. Neither was it a product of popular participation. It was at best an imposition unto the people of Kenya by not only the former colonial masters but also the then emerging African elite. It is ridiculous that east Africa's independence was facilitated by subsidiary deliberations in the House of Commons and finally midwifed by the *East Africa Independence Ordinance*. Kenya's current constitution is in many respects the document appended to this legislation. Such a constitution is unlikely to reflect the aspirations of the people of Kenya today.

Secondly, and despite the above, the current constitution on Kenya has been amended roughly 40 times in 40 years. Each of those amendments has ostensibly moved the country away from democratic ideals. In the groundbreaking case of *Rev Timothy Njoya & 6 others* Ringera J, as he then was, lamented this irking position thus:

> Since independence in 1963, there have been thirty-eight (38) amendments to the constitution. The most significant ones involved a change from Dominion to Republican status, abolition of regionalism, change from a parliamentary to a presidential system of executive governance, abolition

> of a bicameral legislature, alteration of the entrenched majorities required for constitutional amendments, abolition of security of tenure for judges and other constitutional office holders (now restored), and the making of the country into a one party state (now reversed). And in 1969 by Act No. 5, Parliament consolidated all the previous amendments and reproduced the constitution in a revised form. The effect of all those amendments was to substantially alter the constitution. Some of them could not be described as anything other than an alteration of the basic structure or features of the Constitution … … All I can say in that respect is that, fortunately or unfortunately, the changes were not challenged in the courts and so they are now part of our constitution.

The NARC Government's self-declared fight against corruption remained in the spotlight during 2005. Although the Report on Illegal and/or Irregular Land Allocations in Kenya (the *Ndung'u* Report was presented to the President, it was not released to the public, notwithstanding assurances by both the President and the Lands and Housing Minister that the report would be made public. The Report resulted from a Commission of Inquiry appointed by the President in 2004 to identify all illegally or irregularly acquired land in Kenya and recommend what action is to be taken in respect thereof. Reportedly, the *Ndung'u* Report has identified over 200 000 pieces of illegal or irregular land acquisitions, now in the hands of political and business bigwigs associated with the current and past regimes in Kenya. Using the market rates, moneys raised from repossession of such land (Kenya Shillings 170 billion or US $ 2.1 billion) would be able to tarmac 8 200 kilometers or road; or would be adequate to keep 7.2 million children through eight years of free primary schooling!!

The *Goldenberg* Judicial Commission of Inquiry wound up its sittings in November 2005. The financial and political events that developed in the Republic of Kenya in the 1990s and came to be known as the Goldenberg Affair were the brainchild of a Kenyan citizen named Kamlesh Pattni. In his 30s and without substantial schooling, Pattni conceived a financial scheme which was to facilitate the stealing from the national coffers in Kenya of substantial amounts of money—running into millions of dollars. After almost three years of public hearings, the Commission retreated at the close of 2005 in order to compile its report. In the meantime, political pressure to make Government investigate the Anglo Leasing financial scandal intensified.

### b. The Republic of Uganda

Uganda's constitution was adopted in 1995. Its article 69 provides for two political systems for the country, namely, the movement, no-political party system, and the multiparty system. Under the same provision, the people of Uganda 'shall have the right to choose and adopt a political system of their choice through free and fair elections and referenda'. The provision builds on article 4 that gives the right to people to express their will and consent as to how they should be governed.

On 13 April 2005, Hon. Adolf Mwesige, Minister of State for Justice and Constitutional Affairs of Uganda tabled a notice for a resolution of Parliament to hold a referendum to change the political system. When the motion was put to vote in Parliament on 21 April 2005, the government lost. Only 142 out of the required 147 of the MPs supported the motion; 17 MPs opposed it and 1 abstained.

Nevertheless, at the insistence of the President, the matter was returned to Parliament and this time round, the referendum was chosen as the method for deciding the future political system for Uganda. The remarks of President Yoweri Museveni on this occasion are instructive:[26]

> If Parliament does to pass the referendum [motion], I will use another *Kasonsekele* (trick) to bring it here (to the people). I will not accept to make mistakes. It is you to decide on the issue of the referendum not Parliament alone. I cannot allow to be trapped because if anything goes wrong in future you will blame me. Those who do not know Uganda's issues think it is Parliament to decide on the referendum but I do not agree with them. The power is not with Parliament, not the President, not the Chairman, but with the people.

Two days on (on April 27), the notice of rescinding the Parliamentary decision was issued. After a heated debate, Parliament on 3 May 2005 overturned its earlier decision to oppose the referendum motion on the country's political system. When put to vote, 189 MPs

[26] Cited in the *Daily Monitor* on Thursday 25 April 2005.

supported the motion, 24 opposed it and none abstained. Clearly the events surrounding the Parliamentary vote on the referendum bespeak of Executive interferences in Parliamentary affairs, and this is inimical to constitutionalism and the doctrine of separation of powers.

Then came an interesting court case. In *Okello & 6 others v Attorney general and the Electoral Commission of Uganda,* the petitioners claimed that the holding of the referendum would be unconstitutional, on the basis that the Movement system is a guised political party and an "illegal fiction", and as a result, there would be no basis for changing form a non-existent system. They clamed that the constitutional court in *Paul Ssemwogerere & 5 others v AG* had declared the movement and its organs a political party.

The court dismissed the application stating that despite the repugnancy of holding a referendum on human rights and fundamental freedoms, the one-party system (read the movement) was now so entrenched that it must be changed through a referendum. The court ruled that there were cheaper methods of changing the prevailing political system, but that this decision was within the discretion conferred on Parliament by the Constitution and it was, therefore, not for the court to tell Parliament how to exercise its discretion on the matter. Also, it was ruled that since the Electoral Commission was only implementing a constitutional requirement and the impugned sections of the *Referendum and other Provisions Act, 2005,* their operations did not in any way infringe any provision in the constitution.

The opposition parties, in particular the group of 6 (G6), comprising the more established parties boycotted the referendum. These parties are: Conservative Party (CP), Democratic Party (DP), Uganda Peoples' Congress (UPC), Free Movement (FM), Justice Forum (JEEMA) and Forum for Democratic Change (FDC). In boycotting the referendum, the parties gave the reason that freedom of association is an inherent human rights under articles 20 and 29(1)(e) of the Uganda Constitution -and therefore, the question as to whether it (the freedom) should lawfully exist in Ugandan law cannot be subjected to a vote.[27]

Thus, the participation of the opposition parties in the referendum was limited to their scathing criticism of the whole exercise. This was done mainly in urban areas where they

[27] *Id.*

used the public media to express their opposition to the process which they saw as a façade for the government to gain ground for its newly registered party, the NRM – O.

On 28th January 2005, Uganda held the referendum for the purpose of changing the political system. The referendum posed to the Ugandan voters was: 'Do you agree to open up the political space to allow those willing to join other political parties/organizations to do so to compete for political power?' The options presented to voters were *Yes* (symbolized by a tree) or *No* (symbolized by a House). The Yes vote emerged overwhelmingly victorious in all the 56 Districts of the country, garnering 92.5% of the vote. The *No* vote got 7.5% of the vote. However, voter turnout was low, at 47% of the registered 8.5 million voters.[28]

The July 2005 referendum was the third in Uganda. The first was held in 1964 over the disputed so-called 'lost counties' while the second referendum was held in 2000 regarding the change of the political system. Compared to the 2000 referendum on the same issue, the 2005 referendum was less contentious as both the government and opposition groups shared the view that a return to multiparty politics was desirable.

On 29 June 2005, the Parliament of Uganda voted overwhelmingly to approve a change in the country's constitution, allowing a new term for President Museveni.[29] Before the Parliamentary vote on the controversial issue, demonstrators clashed with riot police on the streets of the capital city, Kampala. The police lobbed teargas canisters and used water canons to disperse hundreds of demonstrators.[30]

The arrest and arraignment in both the regular and military courts of Colonel Kizza Besigye, President of the Forum for Democratic Change (FDC) on charges of rape and treason respectively in November 2005 remained in the headlines of East African daily newspapers for a couple of weeks. Besigye was to be charged later with new charges of terrorism and

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[28] *Id.*

[29] *The New Vision* Friday 25th November 2005 p. 1<www.newvision.co.ug>(accessed on 17 January 2006).

[30] *Id.*

unlawful possession of firearms. [31] This happened against the backdrop of claims that top generals of the Uganda Peoples' Defence Forces (UPDF) had stepped up pressure to persuade Besigye to plead guilty of the charges facing him so that he could obtain presidential pardon. [32]

The Government of Uganda also appeared keen to prevent Colonel Besigye from registering as a Presidential candidate. On 7 December 2005, the Attorney General and Minister for Constitutional Affairs of Uganda Khiddu Makubuya wrote to the Electoral Commission Chairman stating that there was no provision in law allowing candidates in a presidential election to be presented by proxies.[33]

Towards the close of 2005 some political commentators were categorical that the erstwhile much-acclaimed Ugandan democracy is now on a slippery slope with the rights of free speech and political opposition being suppressed and the government sending commandos to the High Court to prevent the release of Besigye on bail.[34] Ugandans are preparing for an election in March 2006, against a backdrop of constitutional and political developments that bespeak the decay of the much-acclaimed Ugandan constitutionalism built painfully over a 20-year period. Ironically, the very person associated with building it – Yoweri Kaguta Museveni – is the same one at the centre of its erosion.

### c. The United Republic of Tanzania

The main constitutional and political development in Tanzania in 2005 was the general election held in the mainland and the Union Island of Zanzibar. Chama cha Mapinduzi's (CCM's) Jakaya Mrisho Kikwete's overwhelming victory in the Union's elections has left opposition political parties stunned and accusing government of stifling multi-party politics

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[31] *Catholic World News;* available at <www.cwnews.com/index.cfm> (accessed on 17 January 2006.

[32] *The East African,* 5-11 December 2005, p. 4. ("Now Top Army Men Offer Besigye a Deal").

[33] *The East African* 12-18 December 2005, p.4 ("New Move to Block Besigye from Filing Papers").

[34] See, for instance, Onyango, Joe Oloka "Ugandan Democracy on a Slippery Slope" in *The East African* 12-18 December 2005, p.5.

in the country. Analysts observe that while it was not in doubt that Kikwete would win, it is the margin of victory that surprised many – a 81% sweep of the approximately 7 million votes cast in an election described by local and foreign observers as free and fair.

Kikwete garnered 6 659 304 votes, while his closest rival, Ibrahim Lipumba of the Civic United Front (CUF) received 468 948 votes. The CCM also retained its overwhelming majority in Parliament, with 206 out of 232 seats. Kikwete, 55, took over from Benjamin William Mkapa, who handed over in a successful ceremony on 30 December 2005 after serving the maximum two terms in office. Voter turnout was 72% of all the 11.3 million registered voters. The successful handover of power augurs for the rule of law and constitutionalism in Tanzania.

However, at least two presidential election losers – Ibrahim Lipumba of CUF who finished a distant second to Kikwete with 11.66% of the votes and Freeman Mbowe of the CHADEMA Party who garnered 5.9% of the votes- accused CCM of vote rigging. They accused Tanzania's National Electoral Commission (NEC) of bias in favour of CCM, echoing the complaints of others who said electoral fraud was the only way to explain the massive CCM win but could offer no proof of the allegation.[35]

Zanzibar Island, part of the United Republic of Tanzania, was rocked with election-related violence during the year. There were concerns of voter disenfranchisement during the voter registration period. Voters were allegedly turned away at registration centers on flimsy grounds.[36] The controversial role played by the institution of *Shehas* had a negative impact on voter registration. The *Sheha* is a representative of the central government at the community level. The Regional Commissioner, with the advice of the District Commissioner, appoints the *Sheha*.

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[35] "Tanzanian President urges unity after landslide victory" AFP, 20 December 2005, available online at www.us.rd.yahoo.com/dailynews/afp/brand (accessed 16 January 2006).

[36] See *Report of the East African Law Society to Zanzibar* 16-20 May 2005; accessible online at <www.ealawsociety.org> (accessed on 17 January 2006).

Under the legislative framework for Zanzibar, the *Sheha* assists the voter registration assistant at the registration point, to identify the *bona fide* residents of the locality for purposes of voter registration. The *Sheha* was supposed to have pre-registered all eligible voters in his domain (the *Shehia*). Although the registration ought to have been done in a register, this was usually done without record due to the assumption that the *Sheha* knows everyone in the locality.

A study by the East African Law Society on the Zanzibar election registration in May 2005 concluded that using their powers, *Shehas* ended up "denying their own spouses, parents, relatives, neighbours and colleagues they had worked with, from registering as voters".[37] During the October elections in Zanzibar, there were televised instances of police brutality against opposition supporters. Amani Abeid Karume was controversially re-elected and sworn in amid protests by opposition parties on the validity of the election.[38]

## 5.THE ROLE OF THE EAC IN ENHANCING CONSTITUTIONALISM IN PARTNER STATES

### 5.1 The Normative And Institutional Scheme

Among the objectives of the EAC is the promotion of good governance, including adherence to the principles of democracy, the rule of law, accountability, transparency, and social justice, equal opportunities and gender equality.[39] In order to achieve its objectives, the EAC member states are enjoined to adopt and implement common foreign and security policies. These include developing and consolidating democracy and respect for human rights and fundamental freedoms.[40]

Further, the EAC partner states pledge pursuant to article 123 of the Treaty establishing the Community, to foster cooperation aimed at enhancing the rule of law, democracy and

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[37] *Id.*
[38] *Id.*
[39] See article 5, Treaty Establishing the East African Treaty.

[40] Article 6 and 123(1), Treaty establishing the East African Community.

human rights. This pledge has been aptly captured in the EAC Second Development Strategy, 2001 – 2005.

The East African Court of Justice (EACJ), established under the EAC Treaty was intended to have jurisdiction relating to the interpretation of the EAC Treaty as well as to exercise human rights jurisdiction. Unfortunately, the human rights jurisdiction was deferred to a date to be determined by the Council of Ministers.[41] Once this jurisdiction is activated, the jurisprudence of the Court on human rights, constitutionalism etc is likely to be visible.

Despite the ambulatory declaration of norms such as good governance, the rule of law and democracy in the EAC Treaty, coupled with establishment of institutions like the Court of Justice and the Legislative Assembly, a cursory examination of the Community's Development Strategy does not reveal a prioritization of these values, or of constitutionalism. Economic development dominates the document.

**5.2 The Role of the EAC**

A review of the activities of the EAC during 2005 reveal that the Community paid little or not attention to constitutionalism and its corollary principles of the rule of law, democracy and human rights. No bill on any of the above topics was tabled before the East African Legislative Assembly; neither did the EAC Council of Ministers or the Summit (of Heads of State) pronounce themselves on any such matters. Instead, a lot of attention was given to the Protocol on the Establishment of the East African Customs Union and development programs.[42]

Although much of its activities during 2005 took place under the rubric of "a people centred approach" to regional integration, there is no evidence that the people centredness was informed by common constitutional paradigms. However, the decision by the Summit

[41] Article 27(2) of the Treaty Establishing the East African Community.

[42] *East African Community Report: Activities of the EAC for the Period 2004/2005* (on file).

directing the Council to establish National Consultative Committees to take on board peoples' views on the integration process is commendable.

According to research carried out by Maria Nassali,[43] the problems facing the EAC especially with regard to the process of enhancing democracy, the rule of law and constitutionalism in general can be traced to the establishment of the Community which was largely a top-down process involving the governments of the region, with the grassroots communities barely informed, educated or consulted about the process. To her, the language and body of the Community remains bureaucratic and elitist. Only the urban-based and the educated have been marginally involved. There are no comprehensive and well-funded institutions in place to generate and package information for dissemination to the grassroots. The masses of women, peasants, workers and the youth have not been brought on board the process. The argument that could be made here is that you cannot create an institution meant to further democracy, the rule of law, human rights and constitutionalism without embracing these ideals from the onset, by adopting a process for establishing the institution that is consistent with the ideals in question.

The above notwithstanding, a possible future role of the EAC cannot be completely ruled out. As the region moves towards a political federation in 2013, the most attractive reason for political and economic integration is need to combat negative ethnicity that has over the years killed constitutionalism, especially in Kenya and Uganda. The politics of ethnicity have wasted human resources through brain drain and frustrated careers; as well as natural resources through plunder. Thanks to negative ethnicity, development has been and skewed and lopsided.

There has been imbalance in equitable distribution. Power politics have meant the victors' "turn to eat" State resources at the expense of the losers. Political competition among ethnic communities has been turned into personal vendetta by the ruling class, culminating in

[43] Nassali, M *The East African Community and the Struggle for Constitutionalism: Challenges and Prospects*, Kituo Cha Katiba, Makerere University, Faculty of Law, available online at <www.kituochakatiba.co.ug/EAC2000.htm> (accessed on 16 January 2006).

punishment of whole communities for decades. A federated East Africa will inject into the region the much-needed nationalism more associated with Tanzania.

With strong laws that discourage corruption, nepotism and cronyism, the fight against parochial politics will have started in earnest. For instance, an East African President from Tanzania with two vice Presidents from Kenya and Uganda would find it difficult or even useless to punish the Langi from Northern Uganda or the Kalenjin of Kenya's rift Valley and so forth.

One can also talk of the expected future role of the EAC institutions in constitutionalism and incidental matters. Apart from the EACJ which would be important in developing regional jurisprudence in human rights etc, the role of the East African Legislative Assembly (EALA) will remain crucial.[44]

In order to comprehend the role that EALA can play in institutionalizing constitutionalism in East Africa, it is important to understand the role of Parliaments generally. The legislative role of Parliament is perhaps the most commonly understood of the many roles of national and international legislatures today. But Parliaments also have the task of checking the possible excesses of the executive. This is the oversight role of Parliament, and it is a particularly important role for ensuring the accountability and transparency of the executive arm of government. It will be seen shortly in this section, that the oversight role of EALA is proving extremely elusive.

Parliaments are also important institutions for political representation. While the complexity of modern societies make it difficult to have everyone represent their interest directly to the governing authority, Parliaments, through elected leaders, play the representational role. In this regard, Parliament provides a forum for the aggregation of diverse interests, and the processing and conversion of those interests into policy decisions.

[44] See a more elaborate discussion in Wanyande, P "The Role of the East African Legislative Assembly" in Ajulu R (ed) *supra* note 1, p. 63 ff.

Regarding the role of Parliament as a forum for discussion, it is arguable that an important role that the EALA can play would be the promotion and deepening of the values of constitutionalism, the rule of law and democracy, pursuant to the objectives of the EAC Treaty. This should include the promotion of accountability and transparency in the conduct of regional issues. EALA should ensure that the process of further integration of the EAC is done in as democratic a manner as possible. The public in the member states, and various interests must find expression in EALA.

But for EALA to be effective, it must enjoy a strong sense of legitimacy and popular support among its constituents. It should not be assumed, however, that EALA is a legitimate institution. According to Wanyande, EALA's legitimacy can be assessed on three aspects: the method of its coming into being, the mode of operation, and its performance.[45]

Take the issue of mode of election of MPs, for instance. In many cases, the nomination of potential EALA MPs, especially in Kenya, was not democratically done. This is best understood in the context of the controversy surrounding the election of some of the MPs. Not only were there claims that gender considerations were not taken on board, but there were also the claims that individuals imposed candidates on parties. MPs of Kenya and Tanzania are currently elected indirectly by the national parliaments from a list submitted by political parties. Uganda, which by 2005 did not have a political party system, elects its MPs directly form the population. This method of election is bound to create a cadre of regional MPs who owe their loyalties to the parties/politicians who elected/appointed them.

Despite any shortcomings, EALA can play an important role of showcasing democracy to the partner states by:

- Legislating on aspects of good governance, democracy, accountability, the rule of law and constitutionalism.

[45] *Id.*

- Providing a forum for consultation on mattes of common interest to the member states which cannot be effectively handled by national parliaments.

- Enhancing a sense of common identity among the East African citizenry.

## 6. THE CONTRANITS AND OPPORTUNITIES FOR EAC TO IMPACT ON CONSTITUIONALISM IN THE REGION

### 6.1 The Constraints

Nassali in her study found out that the top-down process of setting up the EAC may, perhaps, have led to the disillusionment of the populations of the East African region with their governments. The realities of the poor as they grapple with abject poverty, lack of basic amenities as well as the increasing gap between the masses and governments may negate efforts aimed at unifying the region under common ideals. They may view presence of the EAC as more government. If the relationship between the state and the people is characterized by hostility, why should people accept an additional layer of suppression without benefit?

A possible role of the EAC or its institutions in constitutionalism will be further constrained by the lack of knowledge on the part of the citizenry, of the benefits of collective East African psyche. EAC, especially the EALA MPs must sensitize the public about what regional integration brings to them in terms of benefits. A socialization programme to this end is vital. One of the reasons why many integration efforts fail is that the regional public is not usually sufficiently informed about the initiatives. Knowledge seems to the preserve of political and economic elites in the member countries. This has been one of the failings of NEPAD, for instance. While it is gratifying to note that EALA MPs during 2005 stepped up their sensitization tours in the three member states, more needs to be done. The sensitization should go beyond seminars, as they seem to be elitist. There is need to have public meetings at the grassroots level.

To be able to influence constitutionalism in the region, the EAC institutions need to improve on their legitimacy, by opening up possibilities of the best sons and daughters from the region to serve in the institutions, and by using legitimate operational methods. For instance, unless the election procedures for EALA MPs and judges of the EACJ are revised with a view to make them more participatory and open to competition, the EAC will be seen more as a closed club where political and other elites place their relatives and cronies who have been unable to succeed in careers in their home countries. The African Union (AU) and its progenitor, the Organization of African Unity (OAU) have suffered legitimacy/credibility problems for similar reasons. Adopting participatory, people-centred operational methods can also enhance legitimacy of EAC institutions. The institutions must, as far as is possible, develop operational modes that aggregates and articulates the varied societal interests representative of the east African citizenry.

**6.2 The Opportunities**

A number of steps could be taken by the EAC to instill a culture of constitutionalism in he region.

- The EAC should create public confidence in and respect for its institutions so that they become legitimate in the eyes of the partner states and their peoples. For regional cooperation and integration to be successful, it must be founded on an agreed minimum political framework embodying democratic freedoms.

- In each of the partner states, there is need to accept a greater sense of pluralism in order to guarantee equal and meaningful participation in public affairs and accountability of the governors to the governed.

- The strengthening of the EAC must go hand in hand with the correction of past injustices and human rights violations that have taken place in each of the member states. In this connection the establishment of truth, justice and reconciliation commissions especially in Kenya and Uganda becomes important. The role of the EAC in encouraging mechanisms for addressing past injustices will endear the

Community to the masses in the region, creating the much-needed institutional legitimacy.

- There is need to emphasize in EAC's programs, activities and strategies, on the linkages between economic integration, on the one hand, and constitutionalism, on the other. A viable political framework is the lynch pin for economic development. Thus, governments must see regionalism as a veritable weapon in the fight to restructure their economies and political systems.

- The EAC should mediate the tensions and disputes between citizens, civil society and the state as a prerequisite for peace and sustainable economic growth in the region. The Community must overcome its impotency as witnessed in the recent electoral violence in Uganda and Zanzibar, whereby the Community remained a hapless bystander.

- There is need to activate the human rights jurisdiction of the East African Court of Justice. This way, the Court's future jurisprudence on human rights, democracy and good governance issues will feed the culture of constitutionalism in East Africa. The recent effort to address this matter through the May 2005 Protocol additional to the EAC Treaty will undoubtedly go a long way in strengthening EAC's role in constitutionalism within the region.

## 7 CONCLUSION

2005 was a year of mixed fortunes for constitutionalism and the rule of law in east Africa. The role of the EAC in these issues remained conspicuously absent. Although there is potential for the EAC to influence the embrace of constitutional ethos in the East African region (due to its normative and institutional structures), a lot needs to be done to endear the community to the citizenry; to enhance the Community's legitimacy in the eyes of East Africans. Only then can the Community assume its roles of creating a regional psyche based on the values of constitutionalism and its corollaries – democracy, good governance,

accountability and human rights – well captured as fundamental objects and principles of the EAC.