

CONSTITUTIONAL DEVELOPMENT IN KENYA IN 1999

By Kivutha Kibwana

INTRODUCTION

This report traces and evaluates constitutional development in Kenya in 1999. Section One describes the meaning and nature of constitutional development. Section Two presents a historical perspective of constitutional development from 1960 to 1999. The report then proceeds to describe constitutional development in 1999 under several sub-sections, that is, establishing the process for constitutional change; constitutional amendment in 1999; implementation of the constitution; and citizen activism and constitutional development. Section Four discusses the National Convention

Executive Council's (NCEC's) attempt to break the constitutional impasse. The concluding section tackles emerging issues of constitutional development in 1999.

The report reveals that the pre- 1999 consensus reached by citizens in entrenching a people driven process of constitutional review had begun to be reversed in 1999. President Daniel Arap Moi, the ruling Kenya African National Union (KANU) and the co-operating opposition National Development Party (NDP) mounted a vigorous campaign to the effect that constitutional reform was the preserve and responsibility of parliament, not civil society. By December 1999, Moi had secured a political strategy for the amendment of the 1998 review law through a parliamentary select committee headed by NDP leader Raila Odinga. In response, civil society and the reform inclined opposition established the Ufungamano Initiative led by religious leaders with the mandate that it makes and enforces a people's constitution and finds a suitable way of enforcing it. Hence two parallel systems of constitutional review were born in 1999, thereby rendering trouble free constitution making an impossibility.

SECTION ONE: THE MEANING AND NATURE OF CONSTITUTIONAL DEVELOPMENT.

The present initiative by KITUO CHA KATIBA: EAST AFRICAN CENTRE FOR CONSTITUTIONAL DEVELOPMENT to annually review the state of constitutional development

and thus constitutionalism is invaluable for several reasons. Such assessment is likely to reveal existing shortfalls for corrective action. Also corresponding strengths can be highlighted and build upon. The evaluation enables a country to monitor its record of constitutionalism and democratisation thereby creating an opportunity to incrementally strengthen its culture of constitutionalism. If and when many countries annually review their record of constitutionalism, it will become possible to compare and borrow best practices in constitutionalism continent-wide. KITUO's new effort is thus likely to strengthen constitutionalism in East Africa and even Africa.

Constitutional development can be examined from several perspectives. Whenever a country makes a new constitution, one can analyse all the processes and activities which feed into and shape such constitution making. Secondly constitutional development concerns the way in which the citizenry relate to a new or existing constitution. Those activities accompanying the changing or amendment of a constitution similarly provide another aspect of constitutional development. The other key component concerns the implementation of the existing constitution by the executive, judiciary and also the legislature.

A close examination of constitutional development will crucially then shows the extent to which a country's citizens and officials collectively make and embrace constitutional norms. The tendency in Africa however has been to depart from the official elite made constitution. I have elsewhere summarised this trend as follows:

It is clear to me that in any African country at any given time more than one constitution may be in place. The written or textual constitution is also the aspirational constitution. Opposition leaders or elements and the citizens may clamour for the primacy of such constitution. The political incumbency often claims to follow such a constitution - sometimes even to the letter - but that is usually in rhetoric, or at best the leadership selectively abides by certain parts of the written constitution. Where it is obvious that the leadership feels frustrated by certain sections of the constitution and there is pressure or expectation for these to be followed, then amendments are engineered. These formal amendments are undertaken so that the leadership can continue to argue that it is still faithful to the original constitution or a citizens' derived constitution.[i]

This survey on Kenya's constitutional development also examines the extent to which the legal constitution was adhered to in 1999. Finally in our analysis of constitutional development, we must

also examine whether non-state actors conduct their own affairs through their own, as well as official constitutional norms. This is an important area of enquiry because non-state actors that demand the state to act constitutionally and democratically must practice constitutionalism.

SECTION TWO: CONSTITUTIONAL DEVELOPMENT IN HISTORICAL PERSPECTIVE 1960 - 1999

Since this Kenya's 1999 Annual Report on constitutional development is the first in KITUO's series, a summary of constitutional and significant political developments in the period 1960 - 1998 will form a sound basis for the report. Such outline including highlights of 1999 developments is presented below:-

1960, 1962 and 1963: Lancaster House Constitutional Conferences were held in London and Nairobi (1963) to negotiate independence constitution.

1963: May elections were held on the principle of one person, one vote. The Kenya National African Union (KANU) won. On June 1 the country attained internal self-government. On December 12, full independence was granted

1963 – 1968: Secession threat by Kenyan Somalis led to protracted civil war and the promulgation of emergency law until 1992. The North Eastern Province has been run by the government analogously to an occupied territory during war time.

1964: Kenya became a republic and Jomo Kenyatta her president after unification of the hitherto dual executive. KANU and the opposition party Kenya African Democratic Union (KADU) merged to pave way for de facto one partism.

1964 (twice), 1965, 1966 (four times), 1967, 1968 (twice), 1969, 1974 (twice), 1975 (twice), 1977, 1979, 1982, 1984, 1986, 1987, 1988, 1990, 1991 (twice), 1992, 1997, 1999: Various constitutional amendments were effected. The first set (1964- 1988) dismantled multipartism. The second set (1990 to the present) have begun to hesitantly recreate a multiparty democracy.

1965, 1969, 1975, 1990, 1996, Assassinations of Pio Gama Pinto, Tom J. Mboya, J.M. Kariuki, Robert Ouko and Karimi Nduthu respectively

1966: An opposition party the Kenya Peoples' Union (KPU) was formed.

1969: KPU was banned and its leaders detained.

1969, 1974, 1979, 1983, General elections were held

1988, 1992, 1997, 1978 Jomo Kenyatta died, his vice president Daniel Arap Moi succeeded him as president.

1982: A constitutional amendment made Kenya a de jure one party state to forestall the registration of an opposition political party by Jaramogi Oginga Odinga and George Moseti Anyona. In August, there was an attempted military coup d'état which was ruthlessly crushed.

1982 – 1988: Protracted crackdown of MWAKENYA and other political dissidents. These years represent the hay days of the Moi dictatorship.

1990: Saba Saba demonstrations whose central demand was resumption of multipartism were violently broken by the police. Scores of demonstrators were killed. KANU established a Review Committee to collect views from Kenyans on how KANU should be reformed.

1991 – 1993: Politically instigated ethnic clashes left about 1000 Kenyans dead and many thousands more especially from the major ethnic Kikuyu community rendered internal refugees.

1991: Donors withdrew budgetary support aid so as to pressurise for return to multipartism.

1991: Multipartism restored through the repeal of section 2A of the constitution.

1995: On New Year's eve, Moi promised constitutional review would start.

1996: The National Convention Planning Committee (NCPC), the executive arm of pro-democracy forces who had come together to agitate for constitutional change was formed.

1997: The National Convention Assembly and its executive arm the National Convention Executive Council (NCEC) were formed. Between May and July, widespread mass action forced the government to concede to minimum constitutional and legal changes necessary to facilitate freer and fairer elections. The Constitution of Kenya Review Commission Act, 1997 was passed to provide a framework for constitutional change.

1997-1998: Second generation of politically instigated ethnic clashes.

1998: Negotiations between civil society and the political class for the review of the Constitution of Kenya Review Commission Act, 1997 led to an extensive amendment of the Act via the Constitution of Kenya Review Commission (Amendment) Act 1998 (the amended law was now called Constitution of Kenya Review Act, 1997) and the creation of a substantially people driven process of constitution-making was created.

1999: KANU frustrated the establishment of organs for the review of the constitution and therefore the implementation of the review law; KANU and NDP successfully sponsored a parliamentary motion to facilitate the amendment of the Constitution of Kenya Review Act,

1997; NCEC launched Katiba Mpya- Maisha Mapya: A Vision for National Renewal, a document that detailed how Kenya could overcome the existing political stalemate;

The Ufungamano Initiative, a citizen's lobby on constitutional change led by the religious sector was established with the mandate that it should facilitate the making of a constitution for Kenyans by themselves.

SECTION THREE: CONSTITUTIONAL DEVELOPMENTS IN 1999

3.1 Establishing the process of constitutional change.

President Daniel Arap Moi assented to the Constitution of Kenya Review Commission (Amendment) Act, 1998 on 24th December 1998. The law's commencement date was 30th December 1998.

Section 4 (1) of the Constitution of Kenya Review Act, 19973 provided: Within fifteen days of the commencement of this Act, the bodies referred to in sub-section (2) of section 3 shall submit to the Attorney General the names of the persons nominated in accordance with that section for appointment as commissioners. Section 3 (2) established the constitutional commission to consist of:

- The chairperson
- Thirteen persons nominated by the political parties as represented in the Interparties Parliamentary Committee of whom at least two shall be women
- One person nominated by the Kenya Episcopal conference of Bishops
- One person nominated by the Muslim Consultative Council and the Supreme Council of Kenya Muslims
- One person nominated by the Protestant churches in Kenya as represented by:
 - i. National Council of Churches of Kenya
 - ii. The Seventh Day Adventist Church
 - iii. The Church of God
 - iv. The Kenya Indigenous Christian Churches
 - v. The Evangelical Fellowship of Kenya
 - Five persons nominated by women's organisations through the Kenya Women's Political Caucus of whom at least one shall be a woman with disability.
 - Four persons nominated by the civil society through the National Council of Non-governmental Organisations, particular regard being had to the youth, the disabled, professional associations and the pastoralists in Kenya, of whom at least one shall be a person with disability and one a woman.
 - The Attorney General or his representative who shall be an ex officio commissioner.

During the third Safari Park forum held to negotiate the amendment of the initial Constitution of Kenya Review Commission Act, 1997, KANU argued it was not necessary to specify the number of commissioners each parliamentary political party was entitled to nominate since the Inter Parties Parliamentary Committee would settle the issue.

However informally agreement was reached on how the 13 seats reserved for parliamentary political parties would be shared.

When the parliamentary parties eventually sat to dispose of the issue, no agreement was reached. In January, they twice failed to agree and similarly on February 4, 5 and 194. On February 19, KANU even sent 22 representatives (instead of 2) to the meeting, which was coordinating the establishment of the commission. Further meetings convened on March 22 and April 14 did not yield consensus on the selection of political parties nominee commissioners.

The Protestant churches as well as the Kenya Women Political Caucus each ended supplying two sets of commissioners to the Attorney General. The selection of nominee commissioners by the National Council of Non Governmental Organisations was also marred by rigging of the elections when one faction of the electorate colluded with the Ministry of Culture and Social Services to register civil society groups which instantly became eligible voters.

Due to the manipulations described above, the commission was never established and thus the constitutional review process could not start. Although a suit by the bona fide officials of the Women Political Caucus resolved the nomination issue for the Caucus,⁵ other stage-managed stalemates in the nomination process obstructed the establishment of the commission.

Although the Constitution of Kenya Review Commission (Amendment) Act, 1998 was largely viewed by the stakeholders who negotiated it as satisfying the criteria of a peoples’ driven process of constitutional change,⁶ the National Convention Executive Council identified fifty flaws, which rendered the law difficult to implement.⁷ Three broad positions were developed over time in relation to whether the review law as amended by the 1998 Act should be amended further or operationalized as it was. These were:

According to KANU and NDP, the Act had to be amended to give parliament supreme control over the constitutional review process. The non-KANU - NDP political parties and civil society groups which had the right to nominate commissioners wanted the Act to be immediately operationalized. NCEC called for further amendments to the Act to secure a people's constitution making process further although it recognised that the said Act represented the then highest level of national consensus on how the constitution should be changed. After effectively frustrating the establishment of the commission, Moi and KANU resumed the boisterous campaign that the proper forum for constitutional reform was parliament because, according to Moi, the process under the review law would cost colossal sums of money and „Wanjiku“ - a euphemism for the ordinary Kenyan did not know what the constitution entailed and could not therefore participate in its making. A KANU parliamentary caucus meeting in October resolved to seek parliamentary changes to the 1998 review law to exclude civil society involvement in the organs of constitutional review. In November and December, an intensified campaign was undertaken to set in motion the machinery for amending the Constitution of Kenya Review Commission (Amendment) Act, 1998. A parliamentary select committee was established ostensibly with the mandate to break the stalemate on constitutional review. This committee was dominated by both KANU and NDP.⁸ Fifty-four non-NDP opposition MPs led by the Democratic Party (DP) had previously boycotted the proceedings of parliament during the deliberations on the establishment of the parliamentary select committee.

A spirited attempt by Moi to lobby opposition leaders to embrace the route of parliamentary review of the constitution failed before the fait accompli passage of the December 15, National Assembly's resolution establishing a select committee. The Resolution stated:

That while noting that the Constitution of Kenya Review Commission (Amendment) Act 1998 received Presidential Assent on December 24, 1998, with a commencement date of December 30, 1998; cognisant of the fact that the implementation of the Act has been hampered by the disagreement over the nomination of commissioners among some stakeholders, and concerned that the review process is now behind schedule as a result of the impasse; and in order to facilitate consensus building necessary to resolve the stalemate amongst the bodies specified in the First schedule to the Act, the formation of a Review commission and the co-ordination of the constitutional review process, this House resolves to establish a select committee comprising 27

members to review the Constitution of Kenya Review Act according to the wishes of Kenyans and facilitate the formation of the Review Commission.

The non -KANU - NDP MPs, with the exception of three MPs, boycotted the proceedings of the select committee. On December 17, the chairman of the select committee Raila Odinga announced that his committee would meet Kenyans and foreign experts to solicit their opinions on the Review. From the above account it is clear that:

By the end of 1999 a peoples’ driven process of constitution making, which had been agreed on - though imperfect - was about to be dismantled by parliament. However there was no consensus among the MPs on the move.

KANU had appeared to support the Constitution of Kenya Review Commission (Amendment) Act, 1998 since in 1998 it lacked the political strength to oppose or scuttle it. However, KANU’s negotiations at Safari Park were not bona fide. Indeed even at the Safari Park forum, KANU’s position was that only parliament should review the constitution.

- Through the Attorney General’s office and some members of the Safari Park Drafting Committee, KANU ensured that the 1998 law was written sloppily rendering it difficult to implement.
- The manner in which the commissioners were allocated especially among civil society – both secular and religious - created divisions, in that progressive segments of civil society were excluded from the composition of the commission. Opportunistic elements that had played a minor or no role at all in the struggle for the new constitution ended up in the abortive commission. Acrimony was thereby sowed in the civil society.
- The elite has not developed a consensus on the need for and scope of constitutional change.
- KANU supports minor changes while other forces support more basic or fundamental changes aimed at undoing dictatorship or cosmetic multipartism.

If then 1997 was a crucial year in the agitation for constitutional change, 1998 the year of negotiations, 1999 was the year of stalemate; a low point in Kenya’s journey towards democratic renewal.

3.2 Constitutional Amendment in 1999

Towards the end of 1999, curiously a bi-partisan movement to change one aspect of the constitution developed. Initially KANU appeared to resist it only to embrace it in no time. Assisted by a non-governmental organisation called Centre for Governance and Development (CGD), an opposition MP Peter Oloo Aringo introduced a private member's bill whose objective was to amend the constitution so as to enhance the independence of parliament.

The bill sought the establishment of an independent parliamentary service commission.¹⁰ Hitherto parliamentary staff came under the ambit of Public Service Commission. Moi suggested to KANU that his party should defeat Aringo's bill and then table a similar bill six months later. Twenty-five KANU MPs who apparently disagreed with their chairman and president vowed to support Aringo's bill. Subsequently however the government took over the bill which was unanimously passed on November 11.

Although the above bill appeared to be an opposition initiative, KANU did not ultimately object to it for various reasons. These are: Passage of the constitutional amendment by parliament strengthened KANU's argument that only parliament should review the constitution;

KANU wanted parliament to feel it was independent and should assert itself over civil society although KANU-NDP still controlled parliament;

A parliamentary service commission alone could not guarantee the independence of parliament because other factors that promoted its subservience to the executive such as constituency gerrymandering, independence of the electoral commission etc. were not dealt with. NCEC and the civil society generally criticised the lone amendment on the basis that it was undertaken without consultation with the people of Kenya and gave the impression that parliament was only concerned with those amendments which favoured it as an institution.

3.3 Implementation of the Constitution

There are several key questions regarding the constitution's implementation, which have not been hitherto resolved by legislative intervention or judicial interpretation. They were not also resolved in 1999. These are:

According to section 9, if a president holds office for less than 5 years, has he/she served a term? The section provides: 9(1) The president shall hold office for a term of five years beginning from the date on which he is sworn in as president. (2) No person shall be elected to hold office as president for more than two terms.

According to section 16(1) offices of Minister of the Government of Kenya shall be established by parliament or, subject to any provisions made by parliament, by the president. Since parliament, has never passed such a law, what is the status of the current ministries? Section 16 (2) provides the president shall, subject to the provisions of any written law, appoint ministers from among the members of the National Assembly. Such enabling law is yet to be passed.

Presumably the law in question could provide that the president can appoint ministers outside the national assembly as well and that the National Assembly could vet the president's ministerial nominations.

The 1997 amendment of this section, which added the language „subject to the provisions of any written law“, is yet to be exploited.

Section 33 (3) provides that nominated MPs „shall be nominated by the parliamentary parties according to the proportion of every parliamentary party in the National Assembly, taking into account the principle of gender equality. „The judiciary is yet to interpret what „taking into account the principle of gender equality“ means.

Section 47 provides for the alteration of the constitution. The courts have not yet interpreted whether this includes de novo constitution making.

According to section 61(2) puisne judges shall be appointed by the president acting in accordance with the advice of the Judicial Service Commission. The judiciary has not yet been moved to determine whether persons appointed as judges without the advice of the Judicial Service Commission are legally appointed.

Section 84 (5) provides:

Parliament (a) may confer upon the High Court such powers in addition to those conferred by this section as may appear to be necessary or desirable for the purpose of enabling that court, more effectively to exercise the jurisdiction conferred upon it by this section; and

(b) Shall make provision –

- i. for rendering of financial assistance to any indigent citizen of Kenya where his right under this chapter (chapter V) has been infringed or with a view to enabling him engage the services of an advocate to prosecute his claim; and
- ii. for ensuring that allegations of infringement of such rights are substantial and the requirement or need for financial or legal aid is real. Parliament is yet to pass a law to implement this constitutional provision. Under section 84 (6) the Chief Justice is empowered to make rules with respect to the practice and procedure of the high court in relation to the vindication of human rights. The Chief Justice has never made such rules.

According to sections 115, 117 and 118, trust land cannot be alienated to those it is not held in trust for unless it is set apart first. Since independence substantial land has been alienated in contravention of the constitution. No court has conclusively interpreted these provisions.

Some areas in which the executive acted in support of the constitution in 1999 are the following:

- In January the minister in charge of agriculture sacked the entire National Irrigation Board after farmers’ riots which had challenged its management
- In March, the Executive pressurised the board of the National Bank of Kenya to take responsibility for massive bad loans and thereby resign. The government had 22.5% shares in the bank and a public parastatal the National Social Security Fund (NSSF) had 37.5% shares in the bank. The government seemed interested in sending a signal that it was protecting public property.
- In April the President finally appointed a Vice President after 14 months of the position being vacant.

- In July the President appointed the so-called Dream Team consisting of technocrats sourced from the private sector and multilateral organisations. Their mandate was to clean the civil service and revive the economy.

In July the President placed a ban on the allocation of land until further notice. This was as a consequence of public protest against illegal allocation of such land and public forests. In September the President reduced the number of ministries from 27 to 15 but retained the 27 ministers, implying that most of the ministries are led by several ministers.

Several cases of constitutional significance were lodged in court. In February the Law Society of Kenya sued the Chief Justice requiring him to establish a tribunal to investigate bribery allegations against high court Judge Richard Kuloba under section 62 of the constitution.¹¹ In February, the president was sued a second time for not appointing a vice president.¹² The suit by the Supreme Council of Kenya Muslims enjoined the Attorney General, whom it accused of failing to advise the President appropriately on the matter. In September, Nairobi Town Clerk Zipporah Wandera was jailed for contempt of court. She had defied a court order of June 25th stopping the Nairobi City Council from preventing Qurdoba Enterprises from distributing petrol in Nairobi. Her activity was viewed, inter alia, as violating constitutionally protected property rights of Qurdoba Enterprises.¹³ In

September a new Chief Justice who had previously been a pro-government prosecutor famous for prosecuting human rights and pro-democracy activists was appointed. The Law Society of Kenya unsuccessfully opposed his elevation.¹⁴ The February cases were never concluded in the plaintiffs' favour.

It is clear from this segment that both the executive and the judiciary have not actively safeguarded the constitution and promoted democratic changes.

3.4 Citizen Activism and Constitutional Development

In the first part of the year, many citizens and their groups were involved in activism, which impacted on constitutional development:

In January, two women were arrested in a demonstration protesting the allocation of the Nakuru Municipality Retail Market to a private developer. Traders demolished a fast food facility erected in the same market.

In January, rice farmers in Kirinyaga and Mwea protested against the manner in which the National Irrigation Board handled their affairs. One farmer was shot dead.

In February students of University of Nairobi rioted over the illegal allocation by government of Karura forest to private individuals.

In March riots broke out in Nyeri and Karatina, Central Province in which citizens were protesting the poor state of roads. Also in Kisumu Jua Kali traders protested the demolition of their kiosks by the municipal council.

In March, inter - denominational prayers were held in Nairobi to protest allocation of Karura forest to private developers.

On March 11, NCEC relaunched a reform movement to agitate for constitutional reform.

In April mourners protesting the killing of the chairman of the Kamae Squatters Resettlement scheme carried his casket to the Chief's camp, blaming his death on the government.

In June, a Budget Day demonstration for an all inclusive process of constitutional change was violently broken outside parliament. PCEA clergyman Rev. Timothy Njoya and NCEC co-convenor Davinder Lamba were injured.

In June, a strike against the Transport Licensing Board rules was staged by the Matatu transport sector. The said rules sought to phase out tout operators and to replace them with city council workers. A rally held to commemorate Saba Saba Day in July called on Kenyans to force Moi out of office.

In July Nairobi City Council workers held a strike to demand salary arrears. On September 21, Catholic bishops demanded a peoples' process of constitutional change. The 15 bishops and 2 priests met the president at State House.

On September 26, the Catholic church launched civic education materials to prepare Kenyans for constitutional review. Archbishop Ndingi Mwanaa Nzeki warned that dictators will not be allowed to derail the process.

On September 30, 23 Catholic bishops warned the country's leadership that civil strife was imminent if the several crises facing the country were not addressed. In their pastoral letter they identified the key problems as corruption, hunger, plunder of public resources, HIV/AIDS, insecurity and collapsed infrastructure.

On October 17, Catholic bishops began another round of protests over the review process with an open mass at the Holy Family Minor Basilica, Nairobi.

On October 21, religious leaders united in condemning KANU's proposal that civil society be excluded from the review process. They demanded that the Attorney General reconvenes the Safari Park Forum so that it could oversee the nomination of commissioners; that the 1998 review law should not be taken back to parliament; and that all the stakeholders named in the Act must participate in constitution-making.

On December 3, religious leaders announced their intention to call a meeting of all stakeholders at Ufungamano House.

On December 15, the Ufungamano Initiative was established with the mandate that it should write a peoples' constitution for Kenya.

In 1999 Kenyans were engaged in various protests and other activities which had constitutional implications. Also the religious fraternity accepted for the first time to lead the constitutional reform process. However, the religious sector may not have been prepared to lead citizens in preparing a new constitution but rather in renegotiations to amend the Constitution of Kenya Review

Commission (Amendment) Act, 1998 to facilitate the onset of bona fide constitutional review. A bigger responsibility than the religious leaders had anticipated was suddenly thrust on them.

SECTION FOUR: NCEC'S ATTEMPT TO BREAK THE CONSTITUTIONAL IMPASSE

In November, NCEC launched an important document, which it hoped would form the basis for national discussion on how to overcome the country's political stalemate.¹⁵ The NCEC's National Rescue Action Plan was predicated, inter alia, on:

“a unified movement of all democratic forces (since) to work for the salvation of the nation rather than for limited political goals, we need a movement of people from all ethnic groups, all religious faiths, all occupations and all democratic political positions working together in solidarity.”¹⁶ The Action Plan¹⁷ consisted of six key steps:

(i) Breaking the current stalemate over constitutional reform through the establishment of a self-governing multisectoral forum which would:

- a) Renegotiate the Constitution of Kenya Review Act, 1997 to fix the flaws in the Act and make the review process workable and democratic
- b) Negotiate the formation of a neutral transition institution to act as a caretaker government during the period of constitutional review
- c) Negotiate a transitional justice mechanism to grant immunity from prosecution persons who may have committed political crimes in the past
- d) Negotiate a package of interim democratic reforms to enable Kenyans participate freely in constitutional review
- e) Play the role of “citizen’s watchdog” throughout the period of constitutional review

(ii) Setting up a caretaker government which is fully representative and competent to govern. Such caretaker government would:

- a) Pass the interim constitutional reforms negotiated by the multi-sectoral forum
- b) Implement the transitional justice programme
- c) Implement the multi-sectoral forum's interim democratic reforms agenda

- d) Implement the multi-sectoral forum's economic recovery programme
- e) Implement and safeguard the constitutional review process negotiated by the multisectoral forum.

(iii) Implementing the interim democratic reforms programme

(iv) Implementing an interim economic and social recovery programme

(v) Creating a new constitution

(vi) Ratifying the new constitution and inaugurating a new democratic order. Although the media sensationalised the NCEC's Action Plan by stating that the NCEC had called for a military government, 18 NCEC's proposals for breaking Kenya's political stalemate in 1999 were perhaps the most well thought out. If implemented, the proposals had the potential of securing Kenya's democratic transition.

SECTION FIVE: CONCLUSION: EMERGING ISSUES IN CONSTITUTIONAL DEVELOPMENT IN 1999

Several important themes or issues emerge from the 1999 survey of constitutional development in Kenya. The government felt it was in a strong position to reverse citizen gains of 1997 and 1998 secured through passage of the Inter Parties Parliamentary Group reforms¹⁹ and the Constitution of Kenya Review Commission (Amendment) Act, 1998. Increasingly government adopted a lukewarm attitude towards the implementation of the IPPG reforms. Further government demonstrated it had no interest in implementing the 1998 law to pave way for bona fide constitutional review. Government sought to replace the negotiated people driven process of constitutional review with a parliamentary driven one captured by KANU. Government in 1999 employed every trick to stall the momentum of constitutional reform. The objective, as had been the case since 1990, was to delay the onset of constitution making, thereby ensuring the continuation of a one party inspired constitution within a multiparty era. 1999 ended on a sad note for constitutional development in Kenya because the government had by the end of the year confined constitutional debate at the level of process, not content. Thus 1999 closed the decade of the 90s by confirming that Kenya's ruling elite had never embraced broad based constitution making. Indeed all along the government had preferred and advocated for constitutional amendments, not overhaul.

The executive also continued to show it lacked fidelity to constitutionalism. A good example was the president's refusal to appoint a vice president when the language of the constitution on the appointment of the vice president is mandatory.

KANU showed clearly that it was no respecter of negotiations because when it suited her, she was ready to reverse the Constitution of Kenya Review Commission (Amendment) Act, 1998 agreed in Bomas and Safari Park negotiations. This characteristic of KANU makes future negotiations problematic since KANU has demonstrated that it will renege on agreements whenever it suits her. However, it was also clear that if KANU is interested for personal gain in any constitutional changes, it will support them. This happened in relation to the constitutional establishment of the parliamentary service commission.

Critically, in 1999, it was also demonstrated that Kenya's citizenry and generally the secular and religious civil society are significantly interested in participating in constitutional and democratic rebirth. The question of constitutional re-engineering is no longer a concern of only the political elite. Even grassroot populations are involved in activism geared at expanding their constitutional gains and getting a foothold in a people driven process of constitution making. At the close of the year, two competing processes of constitution making, a parliamentary driven process, and a people driven process led by the religious sector, were in the process of being established. Moi and KANU had not therefore won a victory over Kenyans on the way the constitution would be written. The stage is set for further contest between the people and the dictatorship in 2000 on who will say the last word on constitution -making. Fortunately history reveals that ultimately the people must triumph.

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1. As amended by the Constitution of Kenya Review Commission (Amendment) Act, 1998, 38:42

2. For information in this section I relied on Kivutha Kibwana (with assistance from Jelvas Musau and Antony Munene) "KENYA" in Christof Heyns (Ed.) Human Rights Law in Africa 1997, The Hague, London, Boston, 1999:180 - 185.

3. As amended by the Constitution of Kenya Review Commission (Amendment) Act, 1998.

4. See the Daily Nation January - December 1999 for all the factual accounts in this segment.
5. Ibid, February 4 at 2.
6. See Generally Kivutha Kibwana, Weaknesses in the Constitution of Kenya Review Act, 1997, Centre for Law and Research International, Mimeo, March 1999.
7. Ibid.
8. See Republic of Kenya, National Assembly Eight Parliament - Fourth Session, Report of the parliamentary Select Committee Reviewing the Constitution of Kenya Review Act, 1997, Nairobi April 2000 at 1 - 2.
9. Ibid at 1.
10. See the Parliamentary Service Commission Bill, 1999.

See also Daily Nation, November 12 at 1.

11. Daily Nation, February 10 at 1.
12. Ibid, February 24 at 1.
13. Ibid, September 29 at 1
14. Ibid, September 14 at 1.
15. See NCEC, Katiba Mpya - Maisha Mapya: A vision for National Renewal, Nairobi., NCEC, 1999 16. Ibid at 17.
17. The rest of this account is closely based on Ibid 17 - 35
18. Daily Nation, November 8 at 1.
19. See The Constitution of Kenya (Amendment) Act, 1997 and the Statute Law (Repeals and Miscellaneous Amendments) Act, 1997 Kenya Gazette Supplement No. 70 (Acts No. 7) at 843 - 913.

**CONSTITUTION-MAKING IN TANZANIA:
THE ROLE OF THE PEOPLE IN THE PROCESS**

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CONSTITUTION-MAKING IN TANZANIA:

THE ROLE OF THE PEOPLE IN THE PROCESS

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CONSTITUTION- MAKING PROCESS IN TANZANIA:

THE ROLE OF CIVIL ORGANISATIONS

No one person has the right to say, “I am the People.” No Tanzanian has the right to say, “I know what is good for Tanzania and others must do it.” All Tanzanians have to make the decisions for Tanzania.

Julius Kambarage Nyerere^[1]

1. Introduction: The Constitution and Constitution-Making

The Constitution of a country is the most important legal document. It is the supreme law on which all other laws are based. At times it is referred to as a social contract between the rulers and the ruled. It is also the consensus amongst the people themselves. The Constitution is therefore more than just a document. It embodies the wishes and aspirations of the country. All the laws, by-laws, rules and regulations derive their legitimacy from the Constitution.

Constitutions take various forms. There are written and unwritten Constitutions. Great Britain for instance, has no written Constitution. It is guided by traditions developed over the years. However, most countries and particularly those in the developing world have written Constitutions. Most of these Constitutions have been developed and shaped by their colonial past. Some were negotiated with the leaving colonial powers. They were or are compromises between the interests of the leaving rulers and the ruled who were taking over power. Yet others are outcomes of protracted independence struggle – mostly armed.

Some of these developing countries have gone beyond the so-called independent Constitution to a more home-grown Constitution. They have nevertheless retained the tradition of the former rulers. For instance, Constitutions of most of the former British colonies will retain the Westminster tradition with clear separation of powers, independence of the judiciary and generally existence of checks and balances. Others have tilted the balance in favour of a strong executive and a very weak judiciary and a rubber-stamping legislature.

This paper examines the role played by the people in the constitution making process in Tanzania. The work begins by examining the struggle for independence and the movement towards the very first constitution of the country – the Independence Constitution of 1961.

Later on we look at the process of constitution making after independence. The focal point is the role of the people in this process. This area covers struggles of over thirty years. We conclude by a prognoses on what the future holds for the people of Tanzania in the constitution making in the country.

II. Struggle for Independence: The Role Played by the People through Civil Organisations

Tanzania was formally under the British as a mandate under the League of Nations and later as a Trustee Territory under the United Nations.^[2] Its independence Constitution was negotiated with the former rulers. In these negotiations the departing British had an upper hand. The nationalists and the people on the other hand, did not have a clear say in the process of framing the coming independence Constitution. One known concession made by the British was to allow the then Tanganyika to become independent with a Constitution that did not contain a Bill of Rights.^[3] That was important as far as the nationalists were concerned as they no longer had a duty to protect the properties of the subjects of the departing rulers.

During the struggle for independence and particularly in 1940s and 1950s, there was a very close relationship between the nationalist leaders and their people organised in civil organisations which the colonial regime allowed to exist. It was almost impossible to separate the politicians and these civic groups.^[4]

The peasants in their co-operative movements and the working people in their various trade unions provided the nationalist leaders with a forum through which they could address the public “legally” without having to go through the rigours of getting the required permits for meetings from the authorities. It is on record that even social organisations of the people such as football clubs like *Young Africans Sports Club* popularly known as *Yanga* and Taarab Clubs such as *Egyptian Musical Club* in Dar es Salaam were civil groups which assisted the nationalist movement in its struggle for the independence of the country.

Therefore, the role of the people during the colonial period can not be underestimated. They were very effective in their various organisations. Worth noting, as indicated above, were the co-operative movement and the trade unions. This very amicable and supportive relationship was to change very much at after independence .

III. Independence and Parting of Company Between the Leaders and the Led

At independence the very close relationship between the politicians and the people in their various organisation came gradually to an end. This was due to the differences in perception of what the political independence meant for the people of Tanzania. As for the co-operative movement things were much easier. The top brass in the major co-operative societies were co-opted easily into the new government. In the forefront were the leaders of co-operative societies from Lake Victoria area. Paul Bomani from Victoria Federation in Mwanza, a strong cotton growing zone and George Kahama from Bukoba where there was a strong coffee growing area and there were others. This co-option did not mean freedom to co-operative movement. It is still placed under the tight control of

the government with the Minister responsible for Agriculture keeping an open eye on their operations.^[5]

The problem was the trade unions. There was a sharp division and divergence of views among the leadership. Some wanted to join the new government and get into politics proper. Others wanted to maintain their positions in the trade unions and continue with the struggle for the improvement of the welfare of the working people. Yet others joined the government for a short while and later left. There were serious repercussions to follow for the trade union movement in the country.^[6]

Therefore, people like Michael Kamaliza and Alfred Tandau joined the new Government and were given cabinet posts. Other union leaders like Christopher Kasanga Tumbo joined the government for a short time and then left.^[7] For those who insisted on continuing the trade union tradition of fighting for the rights of workers and their welfare the government was losing patience.^[8] Tanganyika Federation of Labour (TFL) was outlawed and the leadership banished to remote areas of the Country. One of the top leaders of the movement, Victor Mkello was deported to the remote town of Sumbawanga.^[9] TFL was replaced by a State-sponsored and supported National Union of Tanzania Workers (NUTA) which was affiliated to the ruling Party. For many years to follow, the Secretary-General of this “trade union” was always a cabinet minister responsible for labour. That development marked the end of the struggle between the people in their organisations on the one hand, and the government on the other, over the destiny of the country.

Therefore, for most the post-independence period the civil society, through which the people were organised and thus could express themselves was submerged within the ruling party. This was in the form of what were referred to as mass organisations of the ruling party. These were of the youth, the parents, the workers, women and peasants (co-operatives).^[10] As a result of this co-option by the State, these civil groups could not contribute meaningfully to the advancement of the struggle towards a progressive and democratic country. This applies to the contribution in the betterment of the Constitution as the main law of the country governing the relations between people and their government and among themselves.

IV. Major Constitutional Changes in the Country

The major constitutional changes that followed after independence point at one common thing. That is an attempt to by the ruling party and its government to show to the rest of the world that there was democracy in the country and that the people were fully involved in the constitutional process. That is quite understandable as even the most autocratic system does not own up to being autocratic. It would assert that it is democratic. And to be democratic or to be seen to be democratic you have to be seen consulting the people. That is what has been happening in Tanzania. An attempt to indicate that the party and its government were consulting the people – while in fact they were not consulting anybody at all.

To prove our assertion, we look at various ways through which the constitutional process has taken from independence to the present. We examine the way from multi-party to mono-party; consolidation of one-party system to its supremacy and back to multiparty again. We end with an examination of the most recent constitutional amendment – the 13th Amendment of 2000 which followed the controversial *White Paper* debate.

(a) From Multi-party to One-party Democracy

Tanzania, then known as Tanganyika, was a vibrant multi-party democracy at independence. The Independence Constitution of 1961 provided a legal and constitutional framework for that. Apart from the Tanganyika National National Union (TANU) which was dominant there were two other political parties. These were the United Tanganyika Party (UTP) formed in 1958 and backed by the landed section of white settlers in the country to counter the influence of TANU; and the African National Congress (ANC) which was also formed in 1958 by Zuberi Mtemvu after leaving TANU over disagreements over the position to be taken at elections.

After independence other new parties emerged. These include the Peoples Democratic Party (PDP) of Christopher Kasanga Tumbo; the Peoples Convention Party (PCP) led by Samson Mshala; the Nationalist Enterprise Party (NEP) of Hussein Yahaya; All Muslim Nationalist Union of Tanganyika (AMNUT); and later came the African Independence Movement (AIM) which was a merger between PCP and NEP.[\[11\]](#) In this multiparty democracy there was a clear consensus that the Parliament was the supreme organ of the people. This was conceded by the former President of the United Republic of Tanzania, the late Mwalimu Julius K. Nyerere in a speech made on 25th April, 1964 to the National Assembly asking it to ratify the Union between Tanganyika and Zanzibar. In this speech Mwalimu said:

The Parliament is the supreme organ of the people of Tanganyika. No important constitutional issues or important matter concerning state agreement or concerning the laws of this country, can be finally decided by anyone or any group of persons other than this Assembly. All such matters must be brought before this house, and it is entirely at your discretion to approve them or reject them. Today, I am submitting to you for consideration a draft agreement for the Union of Tanganyika and Zanzibar. (emphasis added)[\[12\]](#)

This was to change very soon. First, other political parties had to go in order to pave way for a one political party political system. According to Professor Cranford Pratt, a Canadian Political Scientist and the first Principal of the University College at Dar es Salaam:

In Tanzania the several tiny parties which appeared in 1962 were harassed out of existence, their leadership deported or detained and their rights to register and hold meetings severely restricted.[\[13\]](#)

With other parties out of the way, time was ripe to declare a one-party political system. The argument for this came from the Party President himself. In a speech to the TANU National Conference in 1963 he argued:

Where there is one party, and that party is identified with the nation as a whole, the foundations of democracy are firmer than they can ever be where you have two or more parties, each representing only a section of the community.

What followed was a decision of the Party's National Executive Committee (NEC) to turn Tanganyika into a one party state. This party decision was to be given legal backing two years later vide the Interim Constitution of 1965.

There was no attempt to involve the people in the decision-making. The party had decided for them. Therefore, even when the President of the country formed a Commission on One-Party State he was very clear on their limited mandate:

In order to avoid misunderstanding, I think I should emphasise that it is not the task of this Commission to consider whether Tanganyika should be a one-party state. *The decision has already been taken.* Their task is to say what kind of one party state we should have in the context of our own national ethic and in accordance with the principles I have instructed the Commission to observe.[\[14\]](#) (emphasis added)

The next step was to declare the sole party supreme. Again, the first person to hint at party supremacy was Mwalimu Nyerere. When conveying fraternal greetings to the conference of the Uganda Peoples Congress (UPC) on 7th June, 1968, the President of TANU argued a case for party supremacy very articulately:

For the truth is that it is not the party which is the instrument of the government. It is the government which is the instrument through which the party tries to implement the wishes of the people and serve their interests.[\[15\]](#)

Party supremacy was officially entrenched into the Constitution of the country in 1975.[\[16\]](#)

The party leadership at the same time controlled the government. This gave them control over both ideological and coercive state apparatus. It was the same people making decisions in the party and then overseeing their implementation in the government. Changing hats took place depending on the seat – party president or country president. Already by 1971 the system of checks and balances between the organs of the State had been completely dismantled. The parliament and the judiciary had completely lost the war with the executive. The President was so confident as to tell the British Broadcasting Corporation (BBC) in an interview that “I have powers under the Constitution to be a dictator.”[\[17\]](#)

(b) The Interim Constitution of 1965

The Interim Constitution of the United Republic of Tanzania is taken as the third Constitution – following the Independence and the Republican constitutions of 1961 and 1962 respectively. Its enactment indicates the

new power of the single ruling party and total disregard of constitutional process. No Constituent Assembly was ever convened to pass this Constitution. It was adopted by the parliament in its constituent capacity as if it was amending an existing constitution.

This Constitution recognised the changes brought about by the Union and also adopted most of the proposals made by the One Party Commission. The most significant being the rejection of a Bill of Rights and placing of fundamental rights and freedoms in the preamble. In addition, the Constitution of the ruling party TANU was also made part of the Constitution of the land by being appended as a schedule to this Constitution of the country. It is not clear why it was decided to append the Constitution of one party only – TANU and exclude that of the ASP while in fact the two parties existed simultaneously in the country.

It is worth noting that in the process of bringing this new Constitution into operation the people had been clearly and deliberately by-passed. No attempt was made to involve them. It was party leaders who were busy preparing documents and using the state machinery to see them through the legal processes in order to avoid criticism. Little effort was taken to ensure the legitimacy of the new constitution.

This Constitution was *interim*. According to the Articles of the Union of Zanzibar and Tanganyika of 1964, a new permanent Constitution was supposed to be adopted within *one year* after the commencement of the Union.[\[18\]](#) This time frame was extended almost indefinitely and the Interim Constitution was to last for twelve years until the permanent Constitution was eventually adopted in 1977.[\[19\]](#)

(c). The Permanent Constitution of the United Republic of Tanzania of 1977

On 5th February 1977 the two existing political parties in the country – Tanganyika African National Union (TANU) and Afro Shirazi Party (ASP) merged to form *Chama Cha Mapinduzi* (CCM). This new party was proclaimed at Amani Stadium in Zanzibar. This followed approval by the joint General Congress of TANU and ASP held on 21st January 1977.

What is interesting is the fact that it is the same committee which had been appointed back in October, 1976 to prepare a constitution for a new party which was assigned to prepare the new constitution for the country. On 16th March 1977 the President of the United Republic of Tanzania appointed this 20-person committee headed by the late Thabit Kombo to make proposals for a Constitution for the United Republic.[\[20\]](#)

Strangely, on the same date i.e. 16th March, 1977 the President appointed and summoned the Constituent Assembly to discuss and enact the new Constitution of the United Republic.[\[21\]](#) According to Professor Issa G. Shivji:

The Commission had started working on the Constitution even before it was formally appointed as the Constitution Commission. It submitted its proposals to the National Executive Committee [of the new Party CCM] which adopted them in camera in a one day meeting. These proposal were then published in the form of a Bill and within seven days submitted to the Constituent Assembly.

The Constituent Assembly the new Constitution within three hours.[\[22\]](#) (emphasis added)

Thus in the making of this Constitution there was no consultation or debate. Everything was forced through the throat by the powerful ruling party. Yet this was the permanent Constitution of the country.

(d) The 1983 Constitutional Debate

Notwithstanding the tight grip of the party over the country and curtailing of the various rights and freedoms, the members of the public never gave up their right to contribute to the welfare of their society. Whenever an opportunity is offered or offers itself tended to grab and utilise it to the full.

One such opportunity came with the desire by the ruling party to effect changes to the Constitution of the United Republic of Tanzania of 1977 in 1983. There was a serious debate on the Constitution and the people almost hijacked it and contributed effectively to this debate. The ruling party, being supreme under the Constitution, declared the areas it desired to be changed. These areas were:

1. The Powers of the President;
2. Consolidation of the Authority of the Parliament;
3. Strengthening the Representative Character of the National Assembly;
4. Consolidation of the Union; and
5. Consolidation of the Peoples Power.[\[23\]](#)

The debate began slowly with the people, due to the long suppression under one-party rule, wanting to remain within the dictates of the party. That is, to restrict their views only to the areas indicated by the party as wanting to be looked into. However, as the debate picked tempo, members of the public began making comments on the whole Constitution and indicating the various weaknesses in this supreme document. [\[24\]](#)

Leading in this crusade was the society of advocates and lawyers in the country, the Tanganyika Law Society (TLS). This society has a long and chequered history. Over the years it has evolved from a conservative lawyers' club to force to reckon with in constitutional issues. According to Tambila:

Most NGOs, as part of Tanzanian civil society, kept a very low profile during the years of demobilisation of civil society with the notable exceptions of Tanganyika Law Society, the University of Dar es Salaam Academic Staff Assembly (UDASA) and CHAKIWATA[\[25\]](#). From 1983 the Tanganyika Law Society became very vocal on

issues concerning the Constitution and actually led the debate on democracy in the late 1980s and early 1990s.[\[26\]](#)

Therefore, whenever the issue of the rights of the citizens has been placed on the agenda, the society has been very clear in expressing the views of the majority of its members. For instance, when the President of the United Republic of Tanzania appointed the Commission on One-party State and this commission was going around the country collecting people's views, TLS sent a well considered memorandum to the Commission in which it indicated that it was necessary to have a Bill of Rights in the Constitution of the country if that Constitution is to get respectability from the members of the international community.[\[27\]](#) The recommendation was ignored by the Commission but the point had been made.

The 1983 debate was another opportunity for the Law Society to make its mark on the Constitutional map of the country. As the debate progressed, the society organised a three-day seminar on the Constitution. Among the contributors to this seminar was Wolfgang Dourado, the former Attorney-General of Zanzibar, who wrote a paper on the Union between Tanganyika and Zanzibar and advocating for a three-government system instead of the current two. During the seminar, participants openly argued for introduction of a multi-party democracy in the country and doing away with the one-party system and party supremacy. It was also insisted that time has come for the Bill of Rights to be entrenched into the Constitution of the country. Also, participants argued that those who did not belong to the sole political party should be allowed to form their own political parties or join political parties of their own choice.

The government of the day was not happy with the issues raised in the seminar. While closing it, the then Attorney-General and Minister for Justice Hon. Joseph Warioba indicated clearly that it was important for the lawyers to adhere to the guidance given by the party on the areas which desired changes in the Constitution if they were to be relevant to the country.

This seminar had two opposite results. One positive and the other negative. On the negative side, two of the ideas raised and developed in the course of the seminar were summarily rejected. These were those on the introduction of multi-party political system in the country and re-organisation of the two-government union to a three-government federation. To add salt to injury one of the proponents of these ideas, lawyer Wolfgang Dourado was immediately after the seminar detained under the notorious Preventive Detention Act, 1962. He was to spend over a hundred days in custody. This detention was triggered by what he had said in his paper at the seminar.[\[28\]](#) On the positive side, the seminar opened way for the incorporation of a Bill of Rights into the Constitution of the United Republic of Tanzania of 1977.[\[29\]](#) This is because the lawyers at the seminar were able to articulate and crystallise the wishes of the majority of the people of Tanzania as expressed in various forums in a variety of ways. Interestingly, the question of incorporating a Bill of Rights in the Constitution was outside the purview of the five issues decreed by the ruling party as open for debate.

This was a development that raised the morale of not only the lawyers in the Society, but the members of the public and in the NGO fraternity. It indicated that with a spirited and concerted effort, members of the public could effect change on the Constitution and other areas of public life that affect them in their daily life. The important lesson was that everything had to be fought for inch after inch.

V. The Nyalali Commission on One-party or Multi-party

The events in 1983 did not deter those who wanted change in the Constitution of the country to continue with their agitation. Whenever an opportunity presented itself, it was thoroughly utilised. At the end of the 1980s, the Eastern Block of socialist countries was slowly disintegrating. It began with the Union of Soviet Socialist Republics (USSR) which disintegrated into several republics. Later, the formidable Berlin Wall separating the Federal Republic of Germany (FRG) and German Democratic Republic (GDR) fell and thus leading to the re-integration of Germany into a single country.

These changes are well illustrated by Tambila who says:

External influences included ... the dramatic changes taking place in Eastern Europe and the now defunct Soviet Union, starting with the 1985 accession to power of Mikhail Gorbachev who initiated change and openness under the banner of *perestroika* and *glasnost*. The events included the collapse of the Stalinist regimes in East Germany, Bulgaria and the violent collapse of the communist regime in Rumania; the changes were epitomised by the fall of the Berlin Wall and the ignominious deaths of Nikolae and Yelena Ceaucescu of Rumania.[\[30\]](#)

These and other developments in the world had their effects on democracy and democratisation in Tanzania.

Thus, in 1991 the then second phase President Ali Hassan Mwinyi appointed a commission under the Chairmanship of the then Chief Justice of the United Republic of Tanzania Hon. Mr. Justice Francis Nyalali to collect views of the people on what type of political system they would like. That is whether to remain with the one-party system or to adopt multi-party political system and advise the government accordingly.[\[31\]](#) The Commission was given one year to complete its work.[\[32\]](#)

During the debates introduced by the Commission all over the country, lawyers again in their society took almost a central role. The society under the presidency of advocate Bob Makani organised a very successful conference at the historical Institute of Finance Management Hall. Papers on constitutionalism were presented and at the end of the conference the participants “voted” for a multi-party political system of government.[\[33\]](#) This “voting” was not received well in the ruling party and government with the then Party Secretary-General Rashid Kawawa saying that the lawyers were on their way to mislead the people again.

Yet, when the time came to make decisions on the recommendations of the Nyalali Commission, the government adopted the multi-party political system.^[34] This is what the Tanganyika Law Society had been advocating for over the years. A hard struggle had to be waged for the government to give in to this demand.^[35]

VI. The White Paper: The Work of the Kisanga Committee

For a long time, the members of the public have been critical of the way the ruling party and its government have been handling changes in the Constitution of the country. Since its adoption in 1977, there has been over thirteen amendments touching on various issues. Lawyers and pro-democracy movement in the country have been calling these amendments patches (*viraka*) which have not managed to bring about any serious changes. They have maintained and consolidated the *status quo*. This has led to agitation over time for a formulation of a new Constitution. This is a Constitution which will take into account the interests of all stakeholders in the country. That is, people of all works of life – peasants, workers, students, religious groups, professionals etc. These interest groups can only be brought together in a National Conference in which they can jointly write a completely new social contract to govern the relationship among themselves and their relationship with their government.^[36]

Instead of addressing the issues being raised, the ruling party has remained adamant. It has argued and continues to argue that the current Constitution is both legal and legitimate and therefore the question of writing of a new Constitution does not arise.

In order to reduce the mounting pressure, in 1998 the government came up with the bright idea of floating a *White Paper*^[37] on the constitutional change. The White Paper is basically a British method of trying to know the views of the public on a particular issue of national importance. The system of White Paper goes hand in hand with what is called a Green Paper. In the Green Paper the government of the day raises issues which it desires the public to discuss and then releases these issues to the public. On receipt of the reactions from the public, the government then adds its own views to those of the people and then comes out with a White Paper. Therefore, essentially a White Paper contains both the summarised views of the public and those of the government. In Tanzania, as usual, the government is fond of copying things half way. Its version of a White Paper was strange. It contained both issues and the views of the government on those issues. The public was expected to add if they have “any other view.” This was technically pre-emptying debate on these issues.

A Committee of 16 members was appointed led by a respectable member of the legal fraternity Hon. Mr. Justice Robert Kisanga of the Court of Appeal of Tanzania. The Committee visited all districts of the country and presented its huge report, which is in four volumes covering over 800 pages to the President of the United Republic of Tanzania.

As the report was being presented, the government made it categorically clear that it will disregard the recommendations of the Committee where they are in conflict with the views of the “people.” This was a strange position because in the past there are precedents of the same government, where there has been good reasons, adopting views of past commissions “against” those of the “people.”

The government kept its work, in an unprecedented fashion, after reading the report for a month and without releasing it to the public, the President decided to blast the Kisanga Committee for going beyond its mandate by making recommendations which were not in conformity with the views of the people [read here views of the government]. On his side, the Chairman of the Committee informed the press that he would not enter into a debate with the President and that the President was entitled to his own views and could pick whatever he found useful in the report. With this the whole momentum built through the work of the Committee was lost. That meant that another opportunity to meaningfully better the Constitution of the country was lost.

Parallel to the Kisanga Committee Tanganyika Law Society initiated its own programme of seeking people’s views on the Constitution. It held public meetings in various parts of the country and people were able to give their views on what they wanted to see in their Constitution. The work of the society was completely ignored by the government. No comment was made of this valuable task and the legislation that followed including the 13th Amendment to the Constitution never referred to the work of TLS.

VII. The 13th Amendment to the Constitution of April, 2000

True to its word, the government prepared the 13th Amendment to the Constitution of the United Republic of Tanzania^[38] on the basis of its own views as indicated in the White paper. The amendment has in fact taken the country back instead of advancing its democratic tradition. A lot of ground gained in the struggle for change for the better has been lost through this amendment. Illustration of these changes will drive the point home.

Firstly, before this amendment for a person to be declared president of the United Republic, such a person needed more than 50% of votes in the presidential elections. Now, this has been done away with. A candidate for the office of the President needs only to win by *simple majority* to be declared President.^[39] It is alleged that this amendment was meant to avoid presidential elections re-runs, which are said to be expensive. However, at what cost? The president is a symbol of the country and hence should indicate a pan-territorial acceptability. This is no longer necessary. It thus means that a single tribe or merger of related ethnic groups

can "sponsor" a presidential candidate and succeed. The same could be said for a religion. One of the major religions can identify a presidential candidate and "work" for his or her success in the elections. A President by *simple majority* is a liability rather than a blessing and this is a negative development in the democratic process in the country.

Secondly, before this amendment, all Members of Parliament save for the Attorney General, women in the special seats and those representing the Zanzibar House of Representatives, all other members of the House were elected from the constituencies. The President did not have power to nominate anybody to Parliament. The 13th Amendment changes this and takes us back to the one-party era in which the Parliament was dominated by those who had entered the House through the back door i.e. through nomination or holding certain constitutional offices such as Regional Commissioners etc. This Amendment now allows the President to nominate up to *ten Members of Parliament*.^[40] As a justification, we are told that this is meant to give the President opportunity to appoint some "experts" to parliament. These are "experts" who are good but shy away from active competitive politics of elections.

One may wish to note that the Parliament is a representative body. All citizens cannot sit together to make laws and other rules to regulate their affairs. They have delegated this duty to their representatives in Parliament. Therefore, one goes to Parliament to *represent* and not to exercise a certain expertise. Therefore, the legitimacy of being in Parliament is derived from this task of representing others. Experts can always be called to assist the Parliament to clarify complicated issues. However, they need not belong to the Parliament, as they represent nobody. If the President is interested in experts, he can always hire them as permanent secretaries, presidential advisers etc. These will be normal bureaucrats doing their duties to the nation. Therefore, the argument of filling the Parliament with "experts" who enter the house by the back door has little logic. The net result is to give the executive arm of the government more weight so as to enable it to push unpopular decisions in Parliament with ease. This was the case in the one-party parliament which had a majority of nominated members. Therefore, to revert back to nominations is definitely retrogressive.

One positive element in the 13th Amendment is the increase of the number of the special seats for women. The number of MPs in this category will increase from the current 15% to 20% plus depending on the declaration by the National Electoral Commission from time to time after obtaining the consent of the President.^[41] This is a welcome development given the small number of female MPs in the current Parliament.

VIII. Conclusions and Observations

From what has been covered above, it is obvious that the people of Tanzania have never been genuinely involved by the government in the constitution-making process since independence. There have been half-hearted efforts involve the people in this process. However, these have not been genuine. These are attempts

aimed at showing the rest of the world that this is a democratic country and people are involved in their own governance. However, when one looks deeper into these efforts it is easy to discover their hollowness. A clear example is the whole White Paper process. Here, the government prepared issues, which in its opinion were important for the country. Instead of letting the people discuss them, the same government gave a position on all of them and then asked the people to add any other comments if they felt it was necessary. And this was termed a consultation and involvement of the people in the constitutional process.

IX. Selected Bibliography

- CHIDZERO, Bernard T.G., *Tanganyika and International Trusteeship*, London: Oxford University Press, 1961.
- COLE, J.S.R. and DENISON, W.N., *Tanganyika: The Development of Its Laws and Constitution*, London: Stevens & Sons, 1964.
- COULSON, Andrew (ed.), *African Socialism in Practice: The Tanzanian Experience*, Nottingham: Spokesman, 1979.
- COULSON, Andrew, *Tanzania: A Political Economy*, Oxford: Clarendon Press, 1982.
- CRANENBURGH, Oda van, *The Widening Gyre: The Tanzania One-Party State and Policy Towards Rural Co-operatives*, Delft, The Netherlands: Eburon Publishers, 1990.
- FIMBO, G. Mgongo, *Constitution Making and Courts in Tanzania*, Dar es Salaam: Faculty of Law, 1992.
- FORTMANN, Louise, *Peasants, Officials and Participation in Rural Tanzania: Experience with Villagisation and Decentralisation*, Ithaca, New York: Rural Development Committee of the Centre for International Studies of the Cornell University, 1980.
- FREYHOLD, Michaela von, *Ujamaa Villages in Tanzania: Analysis of a Social Experiment*, London/ Ibadan and Nairobi: Heinemann Educational Books Ltd, 1979.
- Friedland, William H., *VUTA KAMBA: The Development of Trade Unions in Tanganyika*, Stanford, California: Stanford University and Hoover Institution Press, 1969.
- GOVERNMENT OF THE UNITED REPUBLIC OF TANZANIA, *Report of the Presidential Commission on the Establishment of a Democratic One Party State*, Dar es Salaam: Government Printer, Dar es Salaam, 1968.
- GOVERNMENT OF THE UNITED REPUBLIC OF TANZANIA, *The Report and Recommendations of the Presidential Commission on Single Party or Multiparty System in Tanzania, 1991 on the Democratic System in Tanzania*, Dar es Salaam: Dar es Salaam University Press, 1992.
- HAVNEVIK, Kjell J., *Tanzania: The Limits to Development from Above*, Uppsala: The Scandinavian Institute of African Studies and Dar es Salaam: Mkuki na Nyota Publishers, 1993.
- HOPKINS, Raymond F., *Political Roles in a New State: Tanzania's First Decade*, New Haven and London: Yale University Press, 1971.
- HYDEN, Goran, *Beyond Ujamaa in Tanzania: Underdevelopment and an Uncaptured Peasantry*, Berkeley and Los Angeles: University of California Press, 1980.
- KIBWANA, Kivutha, Chris Maina Peter and Joseph Oloka-Onyango (eds.), *In Search of Freedom and Prosperity: Constitutional Reform in East Africa*, Nairobi: Claripress, 1966.
- LEGUM, Colin and Geoffrey Mmari (eds.), *MWALIMU: The Influence of Nyerere*, London/ Dar es Salaam/ Trenton: James Currey/ Mkuki na Nyota and Africa World Press, 1995.
- LISTOWEL, Judith, *Making of Tanganyika*, Chatto and Windus, London 1965.
- MAPOLU, Henry (ed.), *Workers and Management*, Dar es Salaam: Tanzania Publishing House, 1976.
- MAPOLU, Henry and Issa G. Shivji, *Vuguvugu la Wafanyakazi Nchini Tanzania*, Kampala: East Africa URM Contact Group, 1984.
- Martin, Robert, *Personal Freedom in Tanzania: A Study of Socialist State Administration*, Nairobi: Oxford University Press, 1976.
- MIHYO, Paschal B., *Industrial Conflict and Change in Tanzania*, Dar es Salaam: Tanzania Publishing House, 1983.

- MOHIDDIN, Ahmed, *African Socialism in Two Countries*, London and Totowa, New Jersey: Croom Helm and Barnes & Noble Books, 1981.
- MSEKWA, Pius, *The Transition to Multiparty Democracy*, Dar es Salaam: Tema Publishers Company Ltd and Tanzania Publishing House, 1995.
- Msekwa, Pius, *Towards Party Supremacy*, Arusha: Eastern Africa Publications Ltd, 1977.
- MTAKI, Cornel K. and Michael Okema (eds.), *Constitutional Reforms and Democratic Governance in Tanzania*, Dar es Salaam: Friedrich Naumann Stiftung, 1994.
- MUKURASI, L., *Post Abolished: One Woman's Struggle for Employment Rights in Tanzania*, London: The Women's Press, 1991.
- MVUNGI, Sengondo E.A., *Constitutionalism and the Status of the Legislature in a One Party System: The Case of Tanzania*, LL.M Thesis, University of Hamburg, Federal Republic of Germany, 1991.
- MVUNGI, Sengondo E.A., *Impact of Party Supremacy Doctrine on the Democratic Process of Government in Tanzania: A Constitutional and Administrative Law Perspective*, LL.M Dissertation, Faculty of Law, University of Dar es Salaam, 1986.
- MWANSASU, Bismarck and Cranford Pratt (eds.), *Towards Socialism in Tanzania*, Dar es Salaam: Tanzania Publishing House, 1979.
- NYALALI, Francis L., *Aspects of Industrial Conflict: A Case Study of Trade Disputes in Tanzania 1967-1973*, Nairobi: East Africa Literature Bureau, 1975.
- NYERERE, Julius K., *Freedom and Development*, Dar es Salaam: Oxford University Press, 1967.
- NYERERE, Julius K., *Freedom and Socialism*, Dar es Salaam: Oxford University Press, 1968.
- NYERERE, Julius K., *Freedom and Unity*, Dar es Salaam: Oxford University Press, 1966.
- OKEMA, Michael and Jwani T. Mwaikusa (eds.), *Constitutions and Opposition in Africa*, Dar es Salaam: Friedrich Ebert Stiftung, 1992.
- OLOKA-ONYANGO, Joseph; Kivutha Kibwana and Chris Maina Peter (eds.), *The Law and the Struggle for Democracy in East Africa*, Nairobi: Claripress, 1996.
- O'NEILL, Norman and Kemal Mustafa (eds.), *Capitalism, Socialism and the Development Crisis in Tanzania*, Aldershot, Avebury: Gower Publishing Company, 1990.
- PETER, Chris Maina, *Human Rights in Tanzania: Selected Cases and Materials*, Cologne: Rudiger Koppe Verlag, 1997.
- PRATT, Cranford, *The Critical Phase in Tanzania 1945-1968: Nyerere and the Emergence of a Socialist Strategy*, Cambridge: Cambridge University Press, 1976.
- RESNICK, Idrian N., *The Long Transition: Building Socialism in Tanzania*, New York and London: Monthly Review Press, 1981.
- SEATON, Earl E. and Kirilo Japhet, *The Meru Land Case*, Nairobi: East African Publishing House, 1967.
- SHIVJI, Issa G. (ed.), *The State and the Working People in Tanzania*, London: CODESRIA, 1985.
- Shivji, Issa G., *Law, State and the Working Class in Tanzania*, London: James Currey, 1986.
- SWANTZ, Marja L., *Women in Development: A Creative Role Denied? The Case of Tanzania*, London: Hurst, 1985.
- VUORELA, Ulla, *The Women's Question and the Modes of Human Reproduction: An Analysis of a Tanzanian Village*, Helsinki: The Finish Society for Development Studies and Finish Anthropological Society, 1987.

Articles

- BIENEFELD, M.A., "Trade Unions, the Labour Process, and the Tanzanian State," Volume 17 No. 4 *Journal of Modern African Studies*, 1979, p. 553.
- BIENEN, Henry, "The Ruling Party in the African One-Party State: TANU in Tanzania," Volume 5, 1967. *Journal of Commonwealth Political Studies*, 1967, p. 214.

- HOPKINS, Raymond F., "The Role of the M.P. in Tanzania," Volume 64 No. 3 American Political Science Review, 1970, p. 754.
- Kapinga, Wilbert B.L., "State Control of the Working Class Through Labour Legislation," in SHIVJI, Issa G. (ed.), *The State and the Working People in Tanzania*, London: CODESRIA, 1985, p. 87.
- KJEKSHUS, Helge, "Parliament in a One-Party State - The Bunge of Tanzania, 1965-70," Volume 12 No. 1 Journal of Modern African Studies, 1974, p. 19.
- MWALUSANYA, James L., "Conditions for Functioning of a Democratic Constitution," in MTAKI, Cornel K. and Michael Okema (eds.), *Constitutional Reforms and Governance in Tanzania*, Dar es Salaam: Friedrich Naumann Stiftung, 1994, p.
- MWAPACHU, Juma Volter, "Operation Planned Villages in Rural Tanzania: A Revolutionary Strategy for Development," in COULSON, Andrew (ed.), *African Socialism in Practice: The Tanzanian Experience*, Nottingham: Spokesman, 1979, p. 114.
- PETER, Chris Maina, "Determining the Pace of Change: The Law on Pluralism in Tanzania," in OLOKA-ONYANGO, Joseph et al (eds.), *Law and the Struggle for Democracy in East Africa*, Nairobi: Claripress, 1996, p. 511.
- RABL, Kurt, "Constitutional Development and the Law of the United Republic of Tanzania: An Outline," Volume 16 Jahrbuch des Öffentlichen Rechts der Gegenwart, 1967, p. 567.
- Seaton, Earl E. and Joseph S. Warioba, "The Constitution of Tanzania: An Overview," Volumes 11-14 Eastern Africa Law Review, 1978-1981 p. 35.
- Shivji, Issa G., "The Role of Law and Ujamaa in the Ideological Formation of Tanzania," Volume 4 Social & Legal Studies, 1995, p.
- Shivji, Issa G., "The State of the Constitution and the Constitution of the State in Tanzania" Volumes 11-14 Eastern Africa Law Review, 1978-81, p. 1.
- SHIVJI, Issa G., "Problems of Constitution-Making as Consensus-Building: The Tanzanian Experience," in SICHONE, Owen (ed.), *The State and Constitutionalism*, Harare: Sapes Books, 1998, p. 23.
- SRIVASTAVA, B.P., *The Constitution of the United Republic of Tanzania 1977 - Some Salient Features - Some Riddles*, Dar es Salaam: Dar es Salaam University Press, 1983. (See also Volumes 11-14 Eastern Africa Law Review, 1978-1981, p. 73.
- TAMBILA, Kapepwa I., "The Transition to Multiparty Democracy in Tanzania: Some History and Missed Opportunities," Volume 28 No. 4 *Verfassung und Recht in Übersee*, 1995, p. 468.
- TENGA, Nakazael and Chris Maina Peter, "The Right to Organise as Mother of All Rights: The Experience of Women Organisation in Tanzania," Volume 34 No. 1 Journal of Modern African Studies, March, 1996, p. 143.
- TORDOFF, William and Ali A. Mazrui, "The Left and the Super-Left in Tanzania, Volume 10 No. 3 Journal of Modern African Studies, 1972, p. 427.
- TORDOFF, William, "Parliament in Tanzania," Volume 3 Journal of Commonwealth Political Studies, 1965, p. 85.
- TRIPP, Aili Mari, "Local Organisations, Participation, and the State in Urban Tanzania," in HYDEN, Goran and Michael Bratton (eds.), *Governance and Politics in Africa*, Boulder & London: Lynne Rienner Publishers, 1992, p. 221.
- WELCH, Claude E., Jr., "The Right of Association in Ghana and Tanzania," Volume 16 No. 4 Journal of Modern African Studies, 1978, p.
- WESTERLUND, David, "Freedom of Religion under Socialist Rule in Tanzania - 1961-1977," Volume 24 No. 1 Journal of Church and State, 1982, p. 87.
- Williams, David V., "State Coercion Against Peasant Farmers: The Tanzania Case," Volume 20 Journal of Legal Pluralism, 1982, p. 95.

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- [1] See NYERERE, Julius K., *Freedom and Development*, Dar es Salaam: Oxford University Press, 1973, p. 70.
- [2] See CHIDZERO, Bernard T.G., *Tanganyika and International Trusteeship*, London: Oxford University Press, 1961.
- [3] See READ, James s., "Bills of Rights in the Third World: Some Commonwealth Experiences," Volume 6 *Verfassung und Recht in Ubersee*, 1973, p. 21; and MARTIN, Robert, *Personal Freedom and the Law in Tanzania: A Study of Socialist State Administration*, Nairobi: Oxford University Press, 1974, p. 38.
- [4] See FRIEDLAND, William H., *VUTA KAMBA: The Development of the Trade Unions in Tanganyika*, Stanford, California: Stanford University and Hoover Institution Press, 1969.
- [5] See NAALI, Shamshad, "State Control over Co-operative Societies and Agricultural Marketing Boards," in SHIVJI, Issa G. (ed.), *The State and the Working People in Tanzania*, London: CODESRIA, 1985, p. 132.
- [6] See Kapinga, Wilbert B.L., "State Control of the Working Class Through Labour Legislation," in SHIVJI, Issa G. (ed.), *The State and the Working People in Tanzania*, London: CODESRIA, 1985, p. 87.
- [7] Kasanga Tumbo was appointed Tanzanian High Commission to the Court of St. James (Britain) and resigned after a short time.
- [8] See PRATI, Cranford, *The Critical Phase in Tanzania 1945-1968: Nyerere and the Emergence of a Socialist Strategy*, Nairobi: Oxford University Press, 1978, p. 123.
- [9] This was done under the Deportation Ordinance, 1921 (Chapter 38 of the Revised Laws of Tanzania).
- [10] See SAID, Mohamed, "Has the Present Tanzania Labour Movement Abdicated a Political Role?" Volume 2 Nos. 8 and 9 *Change*, August September, 1994, p. 50
- [11] See MLIMUKA, A.K. and KABUDI, P.J., "The State and the Party," in SHIVJI, I.G. (ed.), *The State and the Working People in Tanzania*, Dakar, Senegal: CODESRIA Book Series, 1985, p. 57 at 62.
- [12] See MSEKWA, Pius, *Towards Party Supremacy*, Arusha: Eastern Africa Publications Limited, 1977, p. 22.
- [13] See PRATI, Cranford, *The Critical Phase in Tanzania 1945-1966: Nyerere and the Emergence of Socialist Strategy*, Cambridge: Cambridge University Press, 1974, p. 187.
- [14] See GOVERNMENT OF THE UNITED REPUBLIC OF TANZANIA, *Report of the Presidential Commission on the Establishment of a Democratic One-Party State*, Dar es Salaam: Government Printer, 1968, p. 2 paragraph 8.
- [15] See NYERERE, Julius K., "The Party Must Speak for the People." In NYERERE, Julius K., *Freedom and Development*, Dar es Salaam: Oxford University Press, 1973, p. 30 at pp. 32-33.
- [16] This was done through Act No. 8 of 1975 which declared that "All political activities in Tanzania shall be conducted by or under the auspices of the Party."
- [17] He is quoted in HOPKINS, Raymond F., *Political Roles in a New State: Tanzania's First Decade*, New Haven and London: Yale University Press, 1971, p. 26.
- [18] See Article 7 of the Articles of the Union. The Articles of the Union and other relevant documents on the Constitution are reproduced in Volume 3 of the Report of the Kisanga White Paper Committee.
- [19] This extension was done vide the Constituent Assembly Act, 1965 (Act No. 18 of 1965).

- [20] Other members of this Committee were Pius Msekwa, Asia Amour, Kanali Seif Bakari, Nicodemus Banduka, Hamisi Hemed, Jackson Kaaya, Rajabu Kheri, Peter Kisumo, Basheikh Mikidai, Beatrice Mhango, Hassan Nassor Moyo, Hamdan Muhidin, Daudi Mwakawago, Ngombale Mwiru, Ali Mzee, Abdallah Natepe, Juma Salum, Lawi Sijaona, na Peter Siyovelwa. See Government Notice No. 38 of 25th March, 1977.
- [21] See Government Notice No. 39 of 25th March, 1977.
- [22] See SHIVJI, Issa G., "Problems of Constitution-making as a consensus-building: The Tanzanian Experience," in SICHONE, Owen (ed.), *The State and Constitutionalism*, Harare: Sapes Books, 1998, p. 23 at p. 31.
- [23] See CHAMA CHA MAPINDUZI, *1983 NEC Proposals for Changes in the Constitution of the United Republic and the Constitution of the Revolutionary Government of Zanzibar*, Dodoma: C.C.M. Department of Propaganda and Mass Mobilisation, 1983.
- [24] PETER, Chris Maina, *Human Rights in Tanzania: Selected Cases and Materials*, Cologne: Rudiger Koppe Verlag, 1997.
- [25] This is the *Chama cha Kitaaluma cha Waalimu Tanzania* – an independent professional teachers' organisation.
- [26] See TAMBILA, Kapepwa I., "The Transition to Multi-Party Democracy in Tanzania: From One State Party to Many State Parties," op. cit. at p. 41.
- [27] The views of Tanganyika Law Society were recorded in the Commission's report. See GOVERNMENT OF THE UNITED REPUBLIC OF TANZANIA, Report of the Presidential Commission on the Establishment of a Democratic One Party State, Dar es Salaam: Government Printer, Dar es Salaam, 1968.
- [28] Interestingly, after years in wilderness and notwithstanding his critical stance, lawyer Wolfgang Dourado is currently a Puisne Judge of the High Court of Zanzibar.
- [29] This was done through the Constitution (Fifth) (Amendment) Act, 1984 (Act No. 15 of 1984). On this see LUGAKINGIRA, K.S.K., "Personal Liberty and Judicial Attitude: The Tanzanian Case," Volume 17 *Eastern Africa Law Review*, 1990, p. 107; and PETER, Chris Maina, "Five Years of Bill of Rights in Tanzania: Drawing a Balance Sheet," Volume 18 *Eastern Africa Law Review*, 1991, p. 147.
- [30] See TAMBILA, Kapepwa I., "The Transition to Multi-Party Democracy in Tanzania: From One State Party to Many State Parties," op. cit.
- [31] See "Team on Political Debate Formed," *Sunday News* (Tanzania), 24th February, 1991, p. 1. Also relevant are the following works: TAMBILA, Kapepwa I., "The Transition to Multiparty Democracy in Tanzania: Some History and Missed Opportunities," Volume 28 No. 4 *Verfassung und Recht in Übersee*, 1995, p. 468; and PETER, Chris Maina, "Determining the Pace of Change: The Law on Pluralism in Tanzania," in OLOKA-ONYANGO, Joseph et al (eds.), *Law and the Struggle for Democracy in East Africa*, Nairobi: Claripress, 1996, p. 511.
- [32] See "One Year for Multi-Party Fact Finding," *Daily News* (Tanzania), 28th February, 1991, p. 1.
- [33] The conference is well covered in SHIVJI, Issa G., "Problems of Constitution-Making as Consensus-Building: The Tanzanian Experience," in SICHONE, Owen (ed.), *The State and Constitutionalism*, Harare: Sapes Books, 1998, p. 23 at p. 36.
- [34] The multi-party political system was adopted vide the Constitution (Eighth) (Amendment) Act, 1992 (Act No. 4 of 1992). This constitutional amendment was supplemented by the Political Parties Act, 1992 (Act No. 5 of 1992).
- [35] See KIMWAGA, John, "Tortuous Road to Multi-Partyism," in *Family Mirror* (Tanzania) First Issue December, 1992. Also reproduced in KIBWANA, Kivutha; Chris Maina Peter; and Joseph Oloka-Onyango (eds.), *In Search of Freedom and Prosperity: Constitutional Reform in East Africa*, Nairobi: Claripress, 1996, p. 55.

[36] See the editorial entitled “National Conference Needed Now,” in *Family Mirror* (Tanzania), First Issue December, 1993; and JUMA, Ibrahim H., “Constitution-Making in Tanzania: The Case for a National Conference,” in OLOKA-ONYANGO, Joseph; Kivutha Kibwana and Chris Maina Peter (eds.), *The Law and the Struggle for Democracy in East Africa*, Nairobi: Claripress, 1996, p. 393.

[37] The White Paper was Government Notice No. 1 of 1998.

[38] The 13th Amendment to the Constitution of the United Republic of Tanzania was effected through Act No. 3 of 2000 entitled *Sheria za Mabadiliko ya Kumi na Tatu Katika Katiba ya Nchi*.

[39] See Section 8 of Act No. 3 of 2000.

[40] See Section 11 of Act No. 3 of 2000.

Mixed Results in Uganda’s Constitutional Development: An Assessment of the Year 1999

By

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The 1995 Constitution represents a fairly radical reconstitution of the organs of the state. Certainly Uganda has not had a constitution that has attempted to effect radical change in the organs of the state and their relationship with the people. There are many things [in the constitution] that point in a new direction... In spite of the radical changes, [however,] there are severe limitations in the rights of association, in political expression and opposition. [1]

Introduction

Both supporters and critics of the 1995 constitution are united in agreement that despite the shortcomings, the 1995 constitution was a radical departure from all previous constitutions.[2] It is different in as far as it was crafted through a protracted process that involved a significant number of Ugandans and also in as far as it contains new innovations that do not appear in previous constitutions.[3] Against this background one would expect the 1995 constitution to be a durable foundation for constitutionalism in Uganda. However, the question remains: will the 1995 constitution work where the previous ones failed? After all the African constitutional experience reveal that elites have been manipulating constitutions to entrench themselves in power.[4] In addition, and as Mahmood Mamdani argues, „the terrain of constitutionalism has never been and cannot be an uncontested one.“[5] Whether or not a given constitution can become a basis for constitutionalism is not predetermined. Therefore, we are bound to ask the question as to whether or not the culture of constitutionalism is growing in Uganda as a result of the 1995 constitution.[6]

The objective of this paper is to examine constitutional issues that emerged in the year 1999 and make a critical analysis as to whether or not there is a discernable march towards constitutionalism. The paper is divided into 3 parts. Section one provides the historical context within which the new constitution was crafted. Section two highlights issues that emerged in the

year 1999 to show flaws or progress in the process of constitutionalism. Section three concludes the paper.

1.0 A Violent History of Political Change and Necessity of a New Constitution

The 1962 constitutional framework within which Uganda regained independence proved to be undurable. Within a space of less than five years, it was replaced by the 1966 interim constitution that in turn gave way to the 1967 constitution. The 1967 constitution was also thrown out by the military after the coup of 1971. Thereafter, the period 1971-1986 was characterized by unbridled dictatorship. In order to appreciate the implication of this trend to constitutionalism, we need to examine the manner in which constitutional amendments were introduced, the kinds of powers that were affected, the implications of the changed powers to the operation of state structures and how these affected civil and political liberties.

The 1962 independence constitution was based on a compromise of various political interests. The Uganda People's Congress (UPC) party allied itself with Kabaka Yekka (KY) in order to win state power from the Democratic Party (DP). Yet the interests that had coalesced under those two parties were opposed to each other. KY was a party of monarchists whose ultimate interest was to lead Buganda out of the Ugandan framework. In contrast, the UPC, a party of peasants, workers, some traders and intellectuals was avowedly nationalist. In the event that the Buganda monarchists could not secure a separate existence from Uganda, they successfully entrenched a federal arrangement for Buganda in the 1962 constitution. Under this arrangement Buganda retained powers over the local police, primary education, local forests, etc. In addition, they successfully blocked the advance of democratization in local government. Members of parliament were to be elected indirectly.

When Uganda regained independence, executive powers were vested in the office of the Prime Minister, who happened to be the UPC's Milton Obote. When later the posts of President and Vice president were introduced, Kabaka Mutesa became the first President and the Kyabazinga of Busoga the Vice President. However, the posts of President and Vice President were more or less ceremonial with most of the executive powers in the hands of the Prime Minister.

From about 1964, differences between the Buganda monarchy and the UPC began seeping to the surface. The touchstone was the issue of referendum provided for in the 1962 Independence Constitution, namely that the problem of the „lost counties“ would be resolved two years after independence by way of a referendum. The „lost counties“ were areas that formally belonged to Bunyoro-Kitara kingdom but which were given to Buganda as a reward to Buganda chiefs for assisting the British colonial masters in subduing Bunyoro-Kitara. When two years passed, the Prime Minister Milton Obote was determined to follow through this constitutional provision, i.e. holding a referendum in which the inhabitants of the „lost counties“ would vote either to remain in Buganda, become independent of both Buganda and Bunyoro or return to Bunyoro. Kabaka Mutesa was determined to ensure that Buganda did not lose the „lost counties.“ One of the things he did to achieve this objectives was to try to rig the referendum by settling ex-service men in the lost counties. Mutesa was trying to increase on the numbers of people who would elect that the „lost counties“ remain in Buganda.

The second thing he did was to shoot down 9 Banyoro peasants gathered in a market place as a show of his power and might. The stage was now set for real armed confrontation that culminated in the battle at Mengo between central government troops and the palace guards. The unrest that followed in Buganda was clamped down with military might and an emergency declared over Buganda until 1971.

Before the military confrontation, the UPC introduced the 1966 interim constitution. The manner of its introduction and the amendments there in were extremely controversial. First, the 1966 interim constitution was introduced without any discussion. It was merely, and as Abu Mayanja remarked during a parliamentary session, „brought in – I know that the new constitution was dropped in our pigeonholes, we read it after we left parliament and after we had been sworn in“.[7] The significance of this method of introducing a new constitution is that many people could not respect it; it could not become a basis of constitutionalism.

Secondly, it is very clear that the executive was usurping the powers of parliament. For example, during the debate on the „The Administrations (Kingdom) Bill, 1966, it was discovered that not only were the powers of the local administration being transferred to the District Commissioners but also government was trying to usurp powers to make laws from parliaments. Section 24 of the Administrations (Western Kingdoms and Busoga) Act had empowered government to make laws, subject to the constitution, a) in respect to any matter for which it is required or permitted to make laws, b) public security and c) functions it is required or permitted to carry out. Abu Mayanja quipped

Now this obviously escaped us during the previous time, but here we have an opportunity to correct it, because it is preposterous, Mr. Speaker, for us to speak of Government making laws...In other words, Section 24 is conferring power to make laws upon Government that is to say upon the Ruler and his Council of Ministers, whereas according to the constitution, and indeed according to common sense, the power to make laws should be vested in the Legislature...

Subsequent events revealed that the legislature lost its power to the executive.

During the same period it became obvious that the executive diminished the power of the judiciary. This fact is revealed in the court cases that were brought against the government as a result of the political events that involved the arrest of five ministers and members of the Lukiiko who had declared that the central government remove its capital from Kampala.

To begin with the case of the five ex-ministers, the Obote government had arrested and deported them to Karamoja. One of the ex-ministers, Ibingira, applied for writ of habeas corpus to the high court arguing that under the 1962 Constitution, it was unconstitutional for government to deport its own citizens. When the Court ordered the release of the ministers, the Obote government transported them to Buganda, where government held emergency powers, released them and rearrested them under the emergency regulations. The Obote government also forced parliament to pass a Deportation (Validation) Act. This Act, which started operating retroactively from July 27 1966, sought to indemnify Government from all penalties and liabilities arising out of deportation orders that had been served to the five ex-ministers. In response, Ibingira challenged the validity of the Deportation (Validity) Act as being unconstitutional. The Judges of the High Court agreed that the act was unconstitutional including the 1966, interim constitution.

However, the Attorney General Godfrey Binaisa challenged the judges arguing that their decisions was a contradiction in terms because they had been sworn in as Judges under the 1966 Interim Constitution; how could they turn around and allege that the 1966 constitution was not valid? Ibingira appealed to the East African High Court which simply upheld the government side!

The powers of the judiciary vis-à-vis the executive were put to further test in respect to the arrest of Mr. Matovu who was before the crisis a county chief and a member of the Lukiiko (the Buganda Local parliament). After the battle for Mengo was over, Mr. Matovu and others were arrested because they had participated in the controversial resolution of the Buganda Lukiiko to the effect that the central Government should remove its capital from Buganda soil (Kampala). The bid to get Matovu released led to issues of whether or not the 1966 Interim constitution was legitimate or not. Buganda chiefs filed a civil suit no. 206 of 1966 seeking the High Court of Uganda to declare that the assumption of all powers by Prime Minister Obote was a violation of the 1962 constitution and that Kabaka Mutesa was still the President. The High Court, however, appears to have been intimidated to declare that the interim constitution was invalid.

The trend towards concentrating power in the executive and whittling down the importance of the legislature and the judiciary was further revealed in the proposals that the executive introduced and were later to become the 1967 constitution. First, the President was put beyond legal scrutiny. Article 24 (3) of the 1967 constitution states that the President „shall not be liable to any proceedings whatsoever in any court“.[8] Whereas the 1962 constitution shielded the Director of Public prosecutions from control of the executive and political manipulation, the 1967 constitution squarely put the DPP under the control of the Attorney General. In addition, the executive could appoint and dismiss public servants including cabinet members without checks from other organs.

A.A. Nekyon argued persuasively,

Turning to civil liberties, our rights could be suspended summarily under the proposals and there was no recourse to the courts to find out why they had been suspended. This was the biggest indication of autocracy. The members were giving the President power to appoint everybody, dismiss everybody, nominate one third of the parliament and detain them in the bargain...The concentration of powers in one person was not justified. Some

of the powers given to the President were excessive. There should be a balance between the office of the President and the Judiciary, and the system of Parliament.[9]

In effect the bill of rights was also transformed; restrictions were put on the enjoyment of those rights.[10]

The 1971 coup that overthrew the UPC government came to seal what was already an established fact: the predominance of the executive power. The coup makers did not lose time; they abolished rights to organize in political parties and the parliament. Hence, the power of making laws was taken over by the executive; the President was to make laws by decree. The judiciary was cowed into silence. Not only was the chief justice, Ben Kiwanuka killed but also the everyday operation of the judiciary was interfered with. As Oloka Onyango has argued, this trend

meant that the constitution was no longer “supreme law”; that it could be altered without reference to parliament, and finally that Parliament lost its law-making powers to the head of State - now empowered to rule by Presidential decree. In effect this made the President not only the “supreme law” of the land, but also the sole law-maker. [11]

It took a foreign Army, the Tanzanian Defence Force, to oust Amin from power in 1979. Although, the overthrow of Amin by a combined force of exiles and the Tanzanian army was called liberation from violence and dictatorship subsequent events demonstrate the opposite. Even the supposedly civilian Obote II government, a government that ascended to power through a ballot box abused the rights of its citizens and many innocent people were subjected to extra-judicial killings.

In summary, prior to the commencement of the process that culminated in the promulgation of the new constitution in 1995, it is clear that politicians have been recrafting constitutions to buttress themselves in power. Given that the amendments were not based on popular discussion and compromise, many Ugandans have not respected pre-1995 constitutions with disastrous consequences for the culture of constitutionalism. Political change has been extremely violent and unconstitutional. In a situation where the Executive was not subjected to checks and balance, the relationship between state organs and the people was that of dictatorship and disrespect of human rights. The people of Uganda have lost close relatives because of state inspired violence

or injustice because of police and armed forces that are used by those in power to crush dissent. It was with relief that NRM, on ascending to power tried to curb state inspired violence and reintroduce of some semblance of rule of law, although it curtailed the right of people to organize in political parties. Most important was the NRM's decision to make a new constitution. A new constitution would be based on the assumption that it is respected by all and change has to be constitutional and peaceful. One way of ensuring that it was respected was to ensure that it was widely discussed and free from manipulations. It is to this process we now turn to test these assumptions.

2.1 Constitutional Commission and the Constituency Assembly

The process of making a new constitution began in 1988 with the appointment of a Constitutional Commission, which produced a draft constitution, and the election of a constituency Assembly in 1994, which debated the draft constitution and produced a new constitution that was promulgated in 1995.[12]

The appointment of the people to constitute the commission was very controversial and probably may have affected the kind of constitution that emerged. Critics have argued that the biggest drawback was that the members of the constitution were handpicked and many were deemed to sympathetic to the NRM. Organised political interests such as political parties were not invited to send their own chosen representatives. Questions have been raised on the manner in which the Constitutional Commission went about „educating“ people. It has been argued that the kind of questions the Commission posed and the debates were designed in such a way as to favour the NRM as against the multi-partists. Most controversial is the Constitutional Commission's suggestion that political party activities be frozen until some future date. In short the Constitutional Commission created a framework for the Constituent Assembly to proscribe freedom of assembly and association.

The decision to elect a Constituency Assembly was no doubt a movement forward in the history of constitutional making. Although the 1967 Constitution was a product of debate and discussion, the problem was that it was passed by a parliament whose prescribed time had long

expired. Parliament was operating unconstitutionally. In addition, the choice of a protracted and time-consuming process was also new and commendable, for this approach was the only way to generate the much needed consensus that would make the new constitution to be respected and obeyed by all.[13] For that commentators have argued that truly it was serious attempt to make constitutionalism a reality.

However, there are flaws in the manner in which the CA was constituted. Those individuals who came through the electoral process were elected on „individual“ merit rather than on the basis of organizational support. This means that they could be influenced to support wrong motions with the promise of state patronage. Indeed many of the delegates debated issues in the CA with a political calculation of accessing state patronage or being elected as parliamentarians in the post-CA elections. This was particularly so because the law did not forbid CA delegates from standing for parliamentary elections after the CA.

It has also been argued that NRM supporters who were out not to debate but to support the NRM line whether it was right or wrong dominated the CA. There are instances when useful motions moved by known multi-partists were not supported because a multi-partist had moved them.[14] In the process, the CA went ahead to recommend that the NRM „system“ continue for another five years, with political party activities proscribed and that a decision as to whether or not the NRM should be replaced by a multiparty system would be decided by a referendum. The controversial article 269 banning political activities remains one of the clauses in the 1995 constitution that contradicts the otherwise excellent bills of rights section and dilutes the protracted, time consuming and sometimes painful efforts put in the constitutional making process. No doubt, this article is one of the biggest drawbacks to the growth of constitutionalism in Uganda.

It should be noted that the constitution contains new innovations. First, the language is gender-sensitive. Secondly, there are elaborate provisions to advance rights of women, the disabled and children. In addition, the constitution provides for the rights to organize for categories of workers such as medical workers, a right that had been denied by previous constitutions. What then is the progress after promulgation of the constitution? Is there progress towards durable

constitutionalism? In the following section we highlight those issues that emerged in 1999 and assess whether or not a culture of constitutionalism is growing.

2.0 Constitutional Issues in 1999 2.1 Armed Insurgence in Northern and Western Uganda

One of the assumptions behind the making of the 1995 Constitution was that this would usher in an era of peace and peaceful resolution of conflict. Peace is an important ingredient for constitutionalism. However, even with the new constitution the resort to armed methods to address political issues still prevails. The Lord's Resistance Army (LRA) has continued to maraud the north for close to a decade and the Allied Democratic Force (ADF) has destabilized the western region.

One aspect of the armed insurgence in northern and western Uganda is the involvement of neighboring countries in arming and supporting the insurgents. In the year under review Sudan continued to provide armed support to the LRA and ADF. The success of foreign forces in destabilizing Uganda may partly be related to the fact that there is a missing link in Uganda's democratization process. Disenchanted people resort to foreign support to force the system to respond to their needs.[15] But most important, the culture of constitutionalism can only grow if Uganda has peaceful relations with her neighbours and internally the democratic process accommodates people of diverse opinions.

During the year 1999, there was an attempt to use peaceful means to end the conflict in northern and western Uganda. An Amnesty Bill was passed in December 1999 to establish a „legal framework within which the government can implement its policy of reconciliation and facilitate its efforts to eliminate rebel elements in some parts of the country.“[16] Since it was passed in December 1999, its practical achievements can only be realised in the year 2000, a year out of scope of this study. However, the point here is that the deepening of a culture of constitutionalism requires that Ugandans develop a culture of democracy and also nurture peaceful relations with her neighbours. Yet the persistence of armed insurgence is testimony of the fact that there are still gaps in the constitutionalism culture and the democratisation process. Some observers are inclined to think that the 1995 constitution has not provided an acceptable legal way to express dissent. As a result people have been resorting to arms in order to express

their dissatisfaction with the NRM government. The ban on political party activity has closed avenues for those who do not believe in the movement government. Article 269 of the 1995 constitution prohibits political parties from

- a) opening and operating branches,
- b) holding delegates conferences,
- c) holding public rallies,
- d) sponsoring or offering platform to or in any way campaigning for or against a candidate for any public elections,
- e) carrying on any activities that may interfere with the movement political system for the time being in force.[17]

This article contradicts the fundamental rights – the right to associate and the right to dissent. Article 29 clause (e) states that every person shall have the right to „freedom of association, which shall include the freedom to form and join associations or unions, including trade unions and political and other civic organisations“ (emphasis added).[18] Second, those who believe in multi-parties have tried to defy the provisions of article 269. In the past, elections under the movement system have been aligned along party interests and multi-partyists have continued to meet and politick sometimes in disguised form. It is not a surprise that activities of the Foundation for African Development (FAD) are always a target of the state. FAD is generally believed to be a cloak behind which Democratic Party hides although it is registered as an NGO. In 1999, state officials broke up two seminars organised by FAD. One seminar for civic education in Moyo was prevented from taking place in January 1999. The seminar was

broken up for political reasons. A local FAD organizer informed the organization “s officials that the district council chairperson had described the FAD seminar as a multiparty meeting intended to cause disruption in the district, and that the meeting should be prevented from taking place.[19]

In another incident in Mpigi, an official of FAD was harassed in April 1999. Once again it was believed that the seminar was a multiparty function.[20] What is interesting to note is the fact that the state in some instances uses extra-constitutional or extra-legal actions against political parties. Seminars, for example, are not part of the list of activities prohibited by Article 269.

Even more important for the culture of constitutionalism, are the accusations of the Movement system of being „undemocratic, corrupt and opportunistic“. Col. Kiiza Besigye, wrote a statement that was widely publicised in the media. Kiiza Besigye was accused of having used a wrong forum for airing his grievances.[21] However, Kiiza Besigye’s criticism point to the fact that unless the NRM can itself practice democracy within itself, its moral claim that political parties are up to no good will remain hollow.

2.2 Uganda’s Involvement in the Congo

Another thorny constitutional issue in 1999 was the continued presence of Ugandan troops in the Congo. In a speech to Parliament in 1998, President Yoweri Kaguta Museveni argued that

Our involvement in Congo (indirectly last year and a bit more directly this year) is mainly, because of the threats to our security that emanate from there in the form of NALU in the past and, more recently, ADF...Therefore, Mr. Speaker, may I restate our position. We are in Congo primarily for our own security.[22]

Although, it is perfectly in order for a country to ensure its security interests, the constitutional snag is that the President (executive) did not seek the approval of Parliament as stipulated in the Ugandan constitution. According to Article 210 (d) parliament shall make laws regulating the Uganda People’s Defence Forces, and in particular for the „deployment of troops outside Uganda.“[23] The continued presence of the army in Congo remains a very controversial aspect as far as constitutionalism is concerned.

2.3 The Functioning of State Organs

The Parliament

Censure of A Minister

Parliament improved its performance by censuring the Minister for Finance in charge of Planning and Investment, Sam Kuteesa. One hundred and sixteen members of parliament signed a petition of censure. A motion was moved citing

Kutesa “s ministerial portfolio and being a chairman of the Entebbe cargo handling firm, ENHAS, as constituting a conflict of interest, contrary to the leadership code of conduct. Kutesa was also accused of causing financial loss to Uganda Airlines by allowing

ENHAS to buy the national carrier 's shares in the cargo firm below market value and also writing off as a bad debt US \$ 400,000.[24]

Members of parliament numbering 152 voted to censure the minister who was dropped in the subsequent cabinet reshuffle. Kutesa was the second minister after Jim Muhwezi who was censured in 1998. Shortly after, parliament sought to censure the Vice President, Specioza Wandira Kazibwe and the two ministers of state in Agriculture, Lawrence Kezimbira Miyingo and Kibirige Ssebunnya. It was believed that the shs. 3.4 billion meant for the construction of valley dams in Masaka, Mbarara and Luwero districts was utilised inappropriately.[25] To save the Vice President, the President dropped her from the Ministry of Agriculture. We need to note here that parliament played a positive role here by acting as a check on the executive arm of government. This has enhanced the culture of constitutionalism.

2.4 The Relationship between the Executive and Parliament

Despite these positive developments in the functioning of parliament, it still remained overshadowed by the executive. Mention has already been made regarding how the executive deployed troops in Congo without recourse to Parliament. In addition, there are more instances in which the executive tried to bulldoze parliament to pass legislation, particularly that legislation aimed at attracting foreign investors or when the executive is under pressure from foreign donors.

One of the issues around which the Executive and Parliament clashed was the legislation to liberalise the production of electricity. Up until then, production and distribution of electricity was monopolised by the Uganda Electricity Board. To allow other private investors to enter the business of producing electricity and its distribution required a new law. The Executive wanted parliament to expeditiously pass a law liberalizing the production of electricity so that foreign investors could embark on construction of dams at Bujagali and Karuma falls. However, the environmental consequences related to dam construction at these sites had not been assessed and therefore parliament was arguing that such an assessment be made first, much to the displeasure of the Executive. During a World Bank sponsored workshop held in Kampala, President Museveni accused MPs of delaying the process. He argued that this could cause a “political crisis”. [26]

These days I am very disgruntled, I am tired and sick of wiseacres, everybody is an authority and they do not listen to my advice. There is a lot of wastage of time...Parliament is another confusion. Traditionally, I have been having bureaucrats but now there are MPs and sometimes the World Bank comes from the other side. How many wars shall I fight?...World Bank told me Uganda was in danger of too much electricity. We have struck a compromise with Mr. Adams that we can have a dam at Bujagali and then Karuma afterwards, but still I have a problem with parliament.[27]

In response to this attack by the Executive, members of parliament met and passed a resolution that parliamentarians „have no intention, have never had intentions and will never have an intention to cause a crisis“.[28] Major Okwiri Rabwoni (Youth MP Western) argued that the youth „look on with trepidation when the process of democratisation and constitutionalism is about to be halted“. Elly Karuhanga speaking on behalf of parliamentary committees argued that it was the Executive and not Parliament that was to blame.[29] The most important thing about this exchange between the Executive and Parliament is that it sensitised the public about the self-assertion of the parliament vis-vis the Executive. In a sense this exchange could have enhanced the culture of constitutionalism. This is readily discernable in the letters that appeared in the media. For example Peter Nyanzi wrote

Parliament has shown that even a poor and needy country like Uganda reserves the right to study investment proposals, take them through a sifting process and negotiate for what is best for its people and on the best terms possible. However long it takes, however good the investment projects are, even in a poor country, they should be in line with established regulations and prescribed procedure. It is amazing and ironical that even in the light of the hastily made shoddy deals with companies like Midroc, West Mont, and Tahar Fourati’s Africa Continental Hotels, the Government is now criticizing parliament for „delaying “ to approve the AES power deal.[30]

It would appear that although the Executive is able to assert itself, it also has to contend with parliament and outside forces. In this case we are not only referring to the World Bank and IMF, and other donor conditionalities but also forces of globalisation in general. As the President indicated, sometimes he is under pressure to create enabling environment for foreign investors. This pressure on the Executive forces it to compel parliament to pass certain legislations. This outside pressure from donors or investors can be detrimental to the maintenance of adequate checks and balances between the Executive and Parliament and, therefore, the culture of constitutionalism. It should be recalled that in the history of constitutions, the first casualty of the internal conflicts or outside pressure is parliament. For a country that is still developing, the

danger of the Executive capturing the role of parliament is ever present and can only be averted when there are organised political forces in the country committed to the culture of constitutionalism.

2.5 Drawbacks in the Parliament

Although parliament carried out a lot of anti-corruption activities there remain a number of weaknesses. Earlier analysis of the strengths and weaknesses of parliament after the constitution was promulgated were identified as follows:

a) Although it had asserted independence from the executive by, for example, censuring Ministers Kirunda Kevejinja, Jim Muhwezi and Sam Kuteesa over corruption and conflict of interest, it has failed to exert its influence on issues of deployment of troops and fiscal matters. Indeed, the executive continues to dole out patronage to favorites through cabinet posts. Is it surprising that parliament approved the expansion of cabinet? Recognising the dangers involved MP for Amuria County, Onapito Ekolomoit, introduced a motion intended to enhance the separation of powers in the organs of state power. His motion targeted article 113 of the 1995 constitution. This article provides that „cabinet members shall be appointed by the President with the approval of parliament from among members of parliament or persons qualified to be elected members of parliament“.[31] The suggested amendment is that once a parliamentarian is appointed cabinet minister, that individual is automatically dropped from parliament. According to Mugisha Muntu, if passed, the bill would „advance democratic practice, improve efficiency in government, enhance transparency and undermine opportunism and intrigue“.[32]

The reduction of the numbers of cabinet posts and the privatisation of public enterprises has reduced the resources at the disposal of the Executive to dispense patronage. However this has not improved significantly the operation of the parliament. The Executive can still take initiative aimed to co-opting a particular vocal individual. As Oloka Onyango argued:

The Legislature remains trapped by the one phenomenon that has dogged movement politics from the outset, the factor of “individual” merit. Given this factor, it is questionable that parliament (as a group) can do little more than nibble at the edifice of state power and control. Since each member is in the house as an individual, they are so easily divided on the basis of individual interest and concerns. Of particular concern is the pavlovian dangling of cabinet posts in order to secure compliance on an issue in

which the executive has staked out a particular interest. This explains why parliament as a body can demand the resignation of a single individual (even if he /she is a powerful one like Muhwezi) and not demand that the whole government resigns. [33]

Given the massive dependence of Uganda on foreign funds, the sovereignty of the country is compromised. To a considerable extent the legislature has not been at the forefront to debate what kind of economic policies to adopt or rejected. As is well known IMF/World Bank sponsored programmes are conditionalities for Uganda's continued access to foreign loans and grants. Quite often the donors through the Executive have had their way, thereby transforming the legislature from a supreme organ in the land into a mere rubber stamp of policies dictated from abroad. A case in point is the budgeting process. It is well known that donors overshadow the entire process. Before a budget is passed on to parliament it has to be reviewed by donors, including the financial institutions of the IMF and IBRD. Constitutionalism culture here is undermined because parliament, which is supposed to debate a budget, is reduced to a rubber stamp.

One of the crucial issues is in regard to parliament's own rules of procedure. Does parliament respect constitutional rules when conducting business? The litmus test for parliament's credibility was when it passed the Referendum and other Provisions Act, 1999 allegedly without the requisite quorum.[34] Speaker, Francis Ayume claimed that there was a quorum not on the basis of the physical count of the people in the house but on the basis of members who had signed in the register. This became extremely controversial. In September 1999, Ssemwogerere and Zachary Olum, petitioned the constitutional court. They prayed the court to declare the Referendum and Other Provisions Act null and void. They argued that the Act was not valid for two reasons. First, it was enacted without a quorum in the parliament. Second, that it was enacted after the expiry of the date stipulated in the constitution. The petition was thrown out on the basis of the technical argument that the petitioners could not use in evidence parliamentary records without the permission of the Speaker, among other things. There are two constitutional issues here. First, is the problem of not respecting the constitutional provisions, i.e., enacting the Act after the date stipulated in the constitution had long passed. The second, is the operation of the parliament without a quorum. Article 88 of the 1995 Constitution stipulates that „the quorum of Parliament shall be one-third of all members of parliament“. Article 89 (1) stipulates that „except as otherwise prescribed by this constitution or any law consistent with this Constitution, any

question proposed for decision of Parliament shall be determined by a majority of votes of the members present and voting".[35] Since the Act was passed without a quorum consisting of physically present members, then one can argue that the Referendum act was passed unconstitutionally. Given that some of the parliamentarians boycotted the proceedings this undermines the progress towards constitutionalism.

The constitution empowers parliament to enact a number of laws within a given time frame. Article 41 (1) of the constitution provides that „every citizen has a right of access to information in the possession of the State or any other organ or agency of State except where the release of the information is likely to prejudice the security or sovereignty of the State or interference with the right to the privacy of any other person. Clause 2 provides that „Parliament shall make laws prescribing the classes of information referred to in clause (1) of this article and the procedure for obtaining access to that information.

The constitution further provides in article 32 (1) „Notwithstanding anything in this constitution, the State shall take affirmative action in favour of groups marginalized on the basis of gender, age, disability or any other reason created by history, tradition or custom, or the purpose of redressing imbalances which exist against them. Clause 2 provides that „Parliament shall make relevant laws, including laws for the establishment of an equal opportunities commission, for the purpose of giving full effect to clause (1) of this article.

In article 270 „parliament was required to make „laws relating to the registration of political parties and organisations“. Under article 125, Parliament is supposed to establish a National Planning Authority and prescribe its functions and functions. Article 244 provides that Parliament shall make laws regarding the exploitation of minerals, the sharing of royalties arising from mineral exploitation, etc. None of these laws were enacted by the end of 1999.

The failure of parliament to carry out such constitutional mandates in itself undermines the progress made so far in the direction of constitutionalism.

2.6 The Judiciary and the Executive

The relationship between the judiciary and the Executive remained strained in the year under review. In the history of Uganda, there has been little independence of the judiciary from the Executive. According to Article 126, among the principles that guide the courts of law is that „justice shall not be delayed“. Under article 128 (1), the courts are supposed to be „independent and shall not be subject to the control or direction of any person or authority“. Clause (2) stipulates that „no person or authority shall interfere with the courts or judicial officers in the exercise of their judicial functions“.[36] In practice court cases are delayed and courts are rarely independent of the executive.

One of the mechanisms used by the executive to erode the judiciary’s independence from the Executive, is the latter’s control over finances and general decisions regarding the welfare of the officers in the judiciary. As Justice J.H. Ntagoba noted

Even if we took the expression “interfere” by its direct meaning we are not short of those individuals or authorities that interfere with our magistrates in the exercise of judicial functions. Cases of Resident District Commissioners (RDCs) threatening to punish Magistrates for the decisions they make in their judicial capacities abound. How about the political leaders who are often heard threatening to hold demonstrations about matters pending therein? But the worst instances are the press speculations and discussions of matters pending in courts! So much for direct interferences. The indirect interferences are more grave and inhibitive. Take a case in which the tools of trade e.g. transport accommodation, books and a living wage. To deny them such tools is the the greatest of all interferences because without them, they cannot discharge their judicial functions. [37]

As can be notice from this extract, organs that interfere with the judiciary are part of the executive arm of government. The executive arm of the state again makes the decisions concerning the payment and facilitation of the judiciary. This means that if the executive is displeased with rulings of courts on certain items, it could starve it of funds.

2.7 SAPs and the Judiciary

The most damaging aspect of the current epoch is the failure of the judiciary to fulfill their constitutional obligations because of donor conditionalities. As part of the IMF and World Bank cost cutting measures, government spending was severely curtailed and recruitment into the state departments frozen. The effect was that the judiciary could not render the necessary services and to fulfil its constitutional obligations. Again Justice Ntabgoba notes that

For several years now, the High Court has had to operate under capacity because of the so-called embargo on recruitment. It is disheartening that those who are supposed to recruit for the judiciary have always made ridiculous justifications that the embargo on recruitment includes embargo on replacement. Consequently, the judicial staff has been so depleted that it is no longer possible to operate. How can a judge, for instance, do his or her work without a secretary, without a court clerk or interpreter and without a driver? A number of Judges do not have these support staff members and yet blames for delays in trials have become a litany, not only on the lips of members of the litigating public, but also of those who have denied the judiciary the necessary employees to do the work! If I may specifically give figures with reference to the High Court and the Magistrates' courts, the High Court which is supposed to have 30 Judges can now make do with 17 Judges. The 12 or 13 judges cannot be recruited to make the full complement, thanks to the embargo on recruitment and replacement...We are told that it is a conditionality of our donors that a recruitment and replacement embargo be clamped even on the government institutions rendering essential services like the administration of justice. Yet in the same breath we are told that it is a conditionality of the donors that the courts remove backlog in trials and that they must decongest the prisons by trying inmates on remand. Surely, either the donors or those in government charged with enabling and facilitating the Judiciary or both are not serious.[38]

This speech was made in 1996. However, a study carried out in 1999 notes that the problem still persists:

Uganda has about 350 judges and magistrates, 50 of them (14 per cent) women. This is far from what is needed. At chief magistrate level, for example, there are only 18 magistrates in service, as opposed to the established 29. At the grade one magistrate level half of the posts are vacant. The backlog of cases is thus massive. High court judges are hitherto to be found in only six upcountry stations and prison inmates on remand have had to wait for three years for this court to sit. Others have spent up to seven years in prison without being tried... [39]

In this situation, it is not difficult to see that the constitutional provision that the people should have speedy hearing is undermined.[40]

2.8 Workers' Rights to Form/Join Trade Unions

The judiciary is not the only area where fulfillment of constitutional provisions is diminished. There are other areas of the constitution that cannot be implemented simply because of the structural adjustment programmes. Such an area is the workers right to belong to a trade union. The current economic situation characterised, as it is, by privatisation of public enterprises has had negative effects on the provision that workers have a right to form trade unions. As noted above, article 29 (e) states that every person has a right to join associations or unions, „including trade unions and political and other civic organisations“. It is apparent that in some industries such as privatised hotels the employers have been preventing workers from joining or forming trade unions contrary to the constitution. The employees have no mechanism to enforce their rights because trade unions have been severely weakened by the very Structural Adjustment policies.[41] Employers have been renegeing on their agreement to pay adequate compensation to laid off workers. And governments, right from early independence days, have been violating some of the constitutional guarantees of workers“ rights simply because they have sought to attract foreign investors. For example, the right to strike is always violated by governments in one way or the other.

2.9 The 1998 Land Act

Yet another matter that puts question marks on the process of constitutionalism is to do with the implementation of the 1998 Land Act, and more particularly on the issue of land tribunals. Article 243 (1) of the 1995 Constitution states that Parliament shall by law provide for the establishment of land tribunals. Clause (2) reads “the jurisdiction of a land tribunal shall include–

- (a) the determination of disputes relating to the grant, lease, repossession, transfer or acquisition of land by individuals, the Uganda Land Commission or other authority with responsibility relating to land and
- (b) The determination of disputes relating to the amount of compensation to be paid for land acquired.

This constitutional requirement is also reflected in an elaborate form in the 1998 Land Act.[42] In fact some provisions in section 77 of the 1998 Land Act are lifted word for word from the

Constitution. In the year under review the land tribunals had not been put in place. This means that not only were the constitutional provisions not implemented but also justice was denied to people because the magistrates' courts have been divested of their jurisdiction over land disputes. The people are effectively denied their constitutional right to „a fair, speedy“ hearing. The unresolved land conflicts also have an adverse effect on production especially in rural areas.

Related to this is the provision on a Land Fund intended to give loans to tenants by occupancy to acquire registrable interests and government acquisition of registered land to enable tenants gain registrable interests. An investigation in the matter revealed that the fund could not be set up because of lack of funds and serious doubt was cast on the workability of the Land Fund even with availability of the money.[43]

2.10 Leadership Code of conduct

Yet another 1999 constitutional issue meriting our attention is the leadership code of conduct. Article 233 of the 1995 constitution, provides for the Leadership Code of Conduct which shall „require specified officers to declare their incomes assets and liabilities from time to time and how they acquired or incurred them“. Article 234 provides that the Inspectorate of Government or such other authority will enforce the Leadership Code of Conduct as parliament may by law prescribe“.[44] The implementation of this constitutional provision has been difficult. During his address to Resident District Commissioners, at the International Conference Centre, the Inspector of Government, Mr. Jotham Tumwesigye, reported that 87 percent of the district leaders had refused to declare their assets contrary to the constitution.

Only 205 out of 1,659 district chairpersons and councilors had declared their assets since taking office. He also said only two out of 205 town clerks and treasurers and 605 district heads of department had declared assets.[45]

Part of the problem was that the Inspectorate had not been given sufficient powers by the parliament to deal with those who do not adhere to the Leadership Code of Conduct. But the other is the conflict of interest that pervades parliament in this matter. Parliamentarians would not certainly legislate a law to catch them. The problem of conflict of interest is also pronounced

in the structures of decentralization. Many councilors are involved in procuring tenders for the supply of essential items to the districts, contrary to the principle of conflict of interest.[46]

2.11 The Human Rights Commission

Noticeable in the year under review is the work of the Uganda Human Rights Commission (UHRC). Among other things UHRC is mandated to investigate, on its own initiative or on a complaint made by any person or group of persons against the violation of any human right; to visit jails, prisons, and places of detention or related facilities with a view to assessing and inspecting conditions of inmates and make recommendations; to establish a continuing programme of research, education and information to enhance respect of human rights; etc.[47] The UHRC is reported to have handled almost two thousand complaints, relating mainly deprivation of rights to property, violations of the right to fair hearing, employment rights and the right to pensions. UHRC has also carried out educational campaigns, seminars and training programmes. Its role in contributing to the rule of law and constitutionalism was summed up by the Monitor editorial

It is a sign of the complexities and possibilities in Uganda that the UHRC takes its job more seriously than many other supposedly independent human rights organisations. It has also exhibited more moral courage than some of the foreign missions which fund some of its activities, and otherwise have more leverage vis-a-vis the government than the UHRC does. For example, no Ugandan human rights organisation takes a position on such broad issues like UHRC does; speaking out on Congo, the Referendum, the right of parties to organise, press freedom and many more...For once, here is a government funded body which is worth the tax-payers' money. The best thing those who care for human rights can do it to give the UHRC every possible support, and we hope it will live up to its expectations.[48]

2.12 Judicial Commission of Inquiry into the Police Force

The year also saw the appointment of the Judicial Commission of Inquiry into the Police force (JCIP).[49] The JCIP, headed by Lady Justice Julia Sebutinde, was mandated to investigate allegations of corruption in the police force.[50] The facts revealed in the public hearings shocked the nation as regards the extent of corruption in the police force, abuse of human rights by police personnel. However, it is one thing to have a commission of inquiry and another to implement far-reaching reforms so that even those who are supposed to administer the law uphold the rule of law and the constitution.

3.0 Conclusions

1999 has been a year of mixed results as far as the culture of constitutionalism is concerned. On the positive note, there were strides in the operation of the parliament especially in taming the Executive that has for the greater part of post-independence period dominated the functioning of the state machinery. We have also, and amazingly too, witnessed a state organ – the Uganda Human Rights Commission, play such a useful role in buttressing some of the fundamental freedoms and rights embedded in the constitution. In addition, the year saw the appointment of the Judicial Commission of Inquiry into the Police Force. At least this was a gesture to show that government was willing to tame some of the state organs that were meting out onto the populace the kind of state inspired terror that characterised pre-NRM periods.

All these positive developments, however, continue to be dogged by certain drawbacks such as the overwhelming dependence of Uganda on foreign funds, the economic policies dictated by IMF and World Bank which in the final analysis undermine the otherwise useful provisions within the constitution. These include the quick subjection of individuals to a fair hearing, the right of workers to belong to a union, the establishment of tribunals crucial to peaceful resolution of conflicts over land, etc. The culture of constitutionalism was further dealt a blow by the continued-armed conflicts in northern and Western Uganda and by the Karamojong's sporadic fighting in northeastern Uganda. This in itself could be an expression of a sense of frustration and more particularly the contradiction within the constitution, which on one the hand provides for freedom to associate, and on the other removes it by banning political party activities. Those who do not want to belong to the movement seem to be denied the right to dissent or to organize.

In general 1999 was a year in which positive developments occurred and building on the very tremendous contribution by the NRM to end state inspired violence. However, it will be too much to expect the NRM to be a watchdog for the upholding of the Ugandan constitution and promoting the culture of constitutionalism. There are other things that need to be in place for this to happen such as a vibrant civil society and media. Constitutionalism has to be struggle for. Preceded by the armed struggle of the NRA/NRM the little achieved so far need to be consolidated in this epoch through mechanisms that allow peaceful dissent and assembly.

4.0 Bibliography

Address by H.E. the President to Parliament 15th September, 1998 (mimeo). Adoko, Akena, „The Constitution of the Republic of Uganda,” Transition Vol 7 No. 33 October/November, 1967.

Ali Picho, „The 1967 Republican Constitution of Uganda,” Transition Vol. 7, No 34 December/January, 1968.

Bazaara, Nyangabyaki, „Contemporary Civil Society and the Democratisation Process in Uganda: A Preliminary Exploration, Centre for Basic Research Working Paper No. 54, Kampala: Centre for Basic Research, April 2000.

“Cheers for the Uganda Human Rights Commission,” The Monitor, March 11, 2000.

Hammargen, Henrik; Muhereza, Frank; Ottosson, Ase; Senkumba, John, „Peace, democracy and Human Rights in Uganda: A String of Fragile Pearls,” Stockholm: Swedish International Development Agency, December 1999.

Hansen, Holger Bernt, „A Long Journey Towards a New Constitution: The Ugandan Experiment in Constitution Making, Copenhagen: Centre for African Studies Working Paper No. 1992/1, 1992.

Human Rights Watch, Hostile to Democracy: The Movement System and Political repression in Uganda, New York: Human Rights Watch, August 1999.

Henry Ochieng, „Parliament in Recess,” The Monitor, December 20, 1999.

‘Judicial Commission of Inquiry into Corruption in the Police Force (Amendment) (No. 2) Notice 1999, The Uganda Gazette No. 59 Vol. XCII November 19, 1999.

Juuko, Sylvia, President Sick of MPs, Bad Officials,” The Monitor, October 27, 1999.

Kajabago-Ka-Rusoke, „Museveni and the Parliament, Who is inefficient? Sunday Vision, October 31, 1999. Kakande, John and Namutebi, Joyce, „Amnesty Bill Passed,” The New Vision, December 8, 1999.

Kakande, John and Osike, Felix, „Mps Hit Back at Museveni,” The New Vision October 29, 1999.

Kasfir, Nelson, „The 1967 Uganda Constituent Assembly Debate”, Transition, Vol. 7, No. 33 October/November, 1967.

Lino Steve, „The Uganda Constitution”, Transition Vol. 7, No 34 December/January, 1968.

Mahmood Mamdani, „Social Movements and Constitutionalism in the African Context“ in Issa G. Shivji, *State and Constitutionalism: An African Debate on Democracy*, Harare: SAPES Books, 1991.

Mugisa, Anne A., „87%LC5s Refuse to Declare Assets,“ *The New Vision* November 18, 1999

Mwesige, Peter G., „Parliament: A House of Scandal, ‘ *The New Vision*, December 29, 1999

Mwesige, Peter G., „Valley Dams Report Calls For CID Probe, ‘ *The New Vision*, November 2, 1999. ‘

Namutebi, Joyce, „Land Fund Can“t Work, ‘ *The New Vision* September 14, 1999.

Nyanzi, Peter, „Delay on AES was for the Good of all, ‘ *The New Vision*, December 10, 1999.

Odur-Oaper, „A Reply“, *Transition* Vol. 7, No 34 December/January, 1968.

Odongo, Onyango, *Why Uganda Independence Constitution Failed*, Gulu: Lapare General Agency, 1993.

Okoth-Ogendo, H. W. O., „Constitutions Without Constitutionalism: Reflections on an African Political Paradox“ in Issa G. Shivji (ed.), *State and Constitutionalism: An African Debate on Democracy*, Harare: SAPES Books, 1997

Oloka Onyango, Joe: „Judicial Power and Constitutionalism in Uganda“, Kampala: Center for Basic Research Working paper No. 30, 1993.

Oloka-Onyango, Joseph, „Taming the Executive: The History of and Challenges to Uganda“s Constitution-Making“ in Joseph Oloka Onyango, Kivutha Kibwana and Chris Maina Peter (eds.) *Law and the Struggle for Democracy in East Africa*, Nairobi: Claripress 1996.

Oloka-Onyango, J., „Governance, State Structures and Constitutionalism in Contemporary Uganda, “*CBR Working Paper No. 52*, Kampala: CBR Publications December 1998.

Opolot, Samson James, Kintu-Nyago, Crispin,, *Lessons of Constitutional Making in Uganda*, CBR Workshop report No. 10, Kampala: Centre for Basic Research, January 2000.

Osike, Felix, „Did Karim Give Bakiza 100M/- Bribe?“ *The New Vision* April 28, 1999.

Regan, Anthony J., „Constitutional Reform and the Politics of the Constitution in Uganda: A Path to Constitutionalism?“ in P. Langseth, J. Katorobo, E. Brett and J. Munene (eds.), *Uganda: Landmarks in Rebuilding a Nation*, Kampala: Fountain Publishers, 1995.

„Report on the International Conference on Constitutionalism in Africa: New Challenges, New Opportunities,“ Kampala: Faculty of Law, February 2000.

Rossiter, Clinton, *The Federalist Papers*, New York: Mentor, 1999.

The Referendum and Other Provisions Act, 1999¹, *The Uganda Gazette*, Vol. XCII No. 34, July 3, 1999

The Republic of Uganda, *The Constitution of the Republic of Uganda*, Kampala: Government of Uganda, 1995.

The Republic of Uganda, *The Constitution of the Republic of Uganda*, Entebbe: Government Printer, 1967.

The Republic of Uganda, „The Land Act, 1998²“,

The Uganda Gazette Vol. XCI, No. 41, July 2, 1998. *The Uganda Gazette* No. 19 Vol. XCII, April 23, 1999.

Tukahebwa, Geoffrey B.,

*The Role of District Councils in Decentralisation*³ in Apolo Nsibambi (ed.), *Decentralisation and Civil Society: The Quest for Good Governance*, Kampala: Fountain Publishers, 1998

Uganda Parliamentary Debates (Hansard) second Series Vol. 63, First Session 1966-1967, Entebbe: Government Printer, p. 574.

Uganda was Dragged into the Congo Crisis,⁴ *The New Vision* April 19, 1999.

[1] Interview with Joe Oloka Onyango, Dean, Faculty of Law, Makerere University, March 10, 2000.

[2] The Republic of Uganda, *Constitution of the Republic of Uganda*, Entebbe: Government Printer, 1995.

[3] Holger Bernt Hansen has argued that the entire process behind the 1995 constitution „may be characterised as an unusual and pioneering approach in the history of constitution-making, a bold experiment, but it goes without saying that it is very time consuming...Holger Bernt Hansen, „A Long Journey Towards a New Constitution: The Ugandan Experiment in Constitution Making, Copenhagen: Centre for African Studies Working Paper No. 1992/1, 1992. Anthony J. Regan argues that „the NRM Government in Uganda has undertaken potentially the most far reaching constitutional reform exercise attempted in any African country in the post colonial era. Its significance is not just in the details of the innovative reform process and institutional arrangements, actual and proposed, but also in the fact of the serious attempt to make constitutionalism a reality in Uganda.“ See Anthony J. Regan, „Constitutional Reform and the Politics of the Constitution in Uganda: A Path to Constitutionalism?“ in P. Langseth, J. Katorobo, E. Brett and J. Munene (eds.), *Uganda: Landmarks in Rebuilding a Nation*, Kampala: Fountain Publishers, 1995.

[4] Okoth Ogendo argues „political developments in Africa since Ghana’s independence in 1957, have demonstrated again and again, however, that not only have constitutions „failed“ to regulate the exercise of power, but – which is more devastating – they have not become as basic as the analytical traditional scholars thought they would be.“ See H. W. O. Okoth-Ogendo, „Constitutions Without Constitutionalism: Reflections on an African Political Paradox“ in Issa G. Shivji (ed.), *State and Constitutionalism: An African Debate on Democracy*, Harare: SAPES Books, 1997, p.4. Even the most revered American constitution was not respected in the beginning. “The

American Constitution was drafted by 55 delegates and was officially adopted on March 4, 1789. Not all the delegates were pleased with the results. Some left before the signing ceremony. Three of those remaining refused to sign". Batoroogwa E.K., „New onstitution Still has Big Test," The New Vision October 3, 1995. See also Clinton Rossiter, *The Federalist Papers*, New York: Mentor, 1999

[5] Mahmood Mamdani, „Social Movements and Constitutionalism in the African Context" in Issa G. Shivji, *State and Constitutionalism: An African Debate on Democracy*, Harare: SAPES Books, 1991, p. 239.

[6] Prof. A. Nsibambi defines constitutionalism as the „valuing and putting in practice democratically agreed rules of the game in deciding who gets what, how, when and for how long". See „Report on the International Conference on Constitutionalism in Africa: New Challenges, New Opportunities," Kampala: Faculty of Law, February 2000.

[7] See Uganda Parliamentary Debates (Hansard) second Series Vol. 63, First Session 1966-1967, Entebbe: Government Printer, p. 574.

[8] The Republic of Uganda, *The Constitution of the Republic of Uganda*, Entebbe: Government Printer, 1967, p. 25.

[9] Nelson Kasfir, „The 1967 Uganda Constituent Assembly Debate", *Transition*, Vol. 7, No. 33 October/November, 1967.

[10] For an elaborate analysis of the relationship between the executive and the judiciary, see Joe Oloka Onyango: „Judicial Power and Constitutionalism in Uganda", Kampala: Center for Basic Research Working paper No. 30, 1993.

[11] Oloka Onyango, 1993, *ibid*, p. 30.

[12] Joseph Oloka-Onyango, „Taming the Executive: The History of and Challenges to Uganda"s Constitution-Making" in Joseph Oloka Onyango, Kivutha Kibwana and Chris Maina Peter (eds.) *Law and the Struggle for Democracy in East Africa*, Nairobi: Claripress 1996.

[13] David Watt, Rachel Flanary and Robin Theobald, „Democratisation or the Democratisation of Corruption?"

[14] See J. Oloka Onyango, „Governance, State Structures and Constitutionalism in Contemporary Uganda," Kampala: CBR working Paper No. 52, 1998.

[15] There are other reasons why neighbouring countries have been destabilizing Uganda. These range from their attempt to solve their domestic problems by presenting Uganda as a scapegoat (e.g. pre-1992 Kenya) to desire to control resources in Uganda.

[16] John Kakande and Joyce Namutebi, „Amnesty Bill Passed," *The New Vision*, December 8, 1999. [17] The Republic of Uganda, *Constitution of the Republic of Uganda*, Entebbe: Government Printer, 1995, pp. 166-167.

[18] *Ibid*. (The Republic of Uganda, *Constitution of the Republic of Uganda*, Entebbe: Government Printer, 1995) pp. 28-29.

[19] Human Rights Watch, *Hostile to Democracy: The Movement System and Political repression in Uganda*, New York: Human Rights Watch, August 1999, p 85.

[20] Human Rights Watch, *ibid.*, p 85-86.

[21] Henry Ochieng, „Parliament in Recess," *The Monitor*, December 20, 1999.

[22] Address by H.E. the President to Parliament 15th September, 1998 (mimeo). See also speech by Amama Mbabazi at the United Nations. „Uganda was Dragged into the Congo Crisis," *The New Vision* April 19, 1999.

- [23] The Republic of Uganda, *The Constitution of the Republic of Uganda*, Kampala: Government of Uganda, 1995, p. 135.
- [24] Peter G. Mwesige, „Parliament: A House of Scandal,“ *The New Vision*, December 29, 1999.
- [25] Peter G. Mwesige, „Valley Dams Report Calls For CID Probe,“ *The New Vision*, November 2, 1999.
- [26] Sylvia Juuko, *President Sick of MPs, Bad Officials,“ The Monitor*, October 27, 1999.
- [27] Sylvia Juuko, *ibid.*
- [28] John Kakande and Felix Osike, „Mps Hit Back at Museveni,“ *The New Vision* October 29, 1999.
- [29] Henry Ochieng, „Angry MPS Tell Museveni off,“ **The Monitor** October 29, 1999.
- [30] Peter Nyanzi, „Delay on AES was for the Good of all,“ *The New Vision*, December 10, 1999. See also Kajabago-Ka-Rusoke, „Museveni and the Parliament, Who is inefficient? *Sunday Vision*, October 31, 1999.
- [31] Republic of Uganda, *Constitution of the Republic of Uganda*, 1995, p. 75.
- [32] Henry Ochieng, „Motion to Stop MPS being Minister Sails,“ *The Monitor*, December 10, 1999.
- [33] J. Oloka Onyango, „Governance, State Structures and Constitutionalism in Contemporary Uganda,“ CBR Working Paper No. 52, Kampala: CBR Publications December 1998, p.29.
- [34] „The Referendum and Other Provisions Act, 1999“ , *The Uganda Gazette*, Vol. XCII No. 34, July 3, 1999.
- [35] The Republic of Uganda, *The Constitution of the Republic of Uganda*, Kampala: Government of Uganda, 1995, p.56.
- [36] *ibid.* (ft 26) p. 83.
- [37] Samson James Opolot and Crispin Kintu Nyago, *Lessons of Constitutional Making in Uganda*, CBR Workshop report No. 10, Kampala: Centre for Basic Research, January 2000.
- [38] Samson James Opolot and Crispin Kintu Nyago, *ibid.*, pp38-39.
- [39] Henrik Hammargren, Frank Muhereza, Ase Ottosson, John Senkumba, „Peace, democracy and Human Rights in Uganda: A String of Fragile Pearls, Stockholm: Swedish International Development Agency, December 1999, p.30.
- [40] See article 28. *The Republic of Uganda, The Constitution of the Republic of Uganda*, Kampala: Government of Uganda, 1995, p.26.
- [41] See Nyangabyaki Bazaara, „Contemporary Civil Society and the Democratisation Process in Uganda: A Preliminary Exploration, Centre for Basic Research Working Paper No. 54, Kampala: Centre for Basic Research, April 2000.
- [42] The Republic of Uganda, „The Land Act, 1998“ , *The Uganda Gazette* Vol. XCI, No. 41, July 2, 1998.
- [43] Joyce Namutebi, „Land Fund Can“ t Work,“ *The New Vision* September 14, 1999.
- [44] The Republic of Uganda, *Constitution of the Republic of Uganda*, 1995, *op. cit.*, pp. 144-145.
- [45] Anne A. Mugisa, „87%LC5s Refuse to Declare Assets,“ *The New Vision* November 18, 1999.

[46] Tukahebwa notes that „in practice LGTB [Local Government Tender Board] have tended to epitomise the financial management problems that have come along with decentralisation. Numerous press reports as well as the reports of the Auditor General, and the Inspector General of Government (IGG) have pointed out how tendering procedures were flouted resulting in inflated prices, awarding contracts to councilors themselves and even supply of „air”“ . See Geoffrey B. Tukahebwa, „The Role of District Councils in Decentralisation“ in Apolo Nsibambi (ed.), Decentralisation and Civil Society: The Quest for Good Governance, Kampala: Fountain Publishers, 1998, p.19.

[47] see articles 51 and 52 of the 1995 Constitution, pp36-37.

[48] „Cheers for the Uganda Human Rights Commission,” The Monitor, March 11, 2000.

[49] The Uganda Gazette No. 19 Vol. XCII, April 23, 1999. See also „Judicial Commission of Inquiry into Corruption in the Police Force (Amendment) (No. 2) Notice 1999, The Uganda Gazette No. 59 Vol. XCII November 19, 1999.

[50] Felix Osike, „Did Karim Give Bakiza 100M/- Bribe?” The New Vision April 28, 1999.