

## **Forms and Reforms of Constitution-Making With Reference to Tanzania**

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### **Abstract**

Although the prevalent perception about constitutions in older and stable democracies is that they were concluded by popular majorities, and that they were drawn up democratically, a closer examination reveals that constitutions have almost always been drawn up by minority dominant groups. Consequently the reason for the longevity and survival of constitutions in older democracies has less to do with democratic beginnings than with a belief in the system, a culture of respecting society's primary institutions, and a society's willingness to review its constitution periodically, whether by formal re-enactments or by judicial re-interpretation. But the further we have moved into the modern era, the more important it has become to add other prerequisites for a constitution's survival. Thus, it is now imperative to specify clearly what the relationship between the governing institutions and the people is, as well as the formal power relations that exist among major branches of Government. In addition, in newly-constituted polities whose institutions are usually highly contested by non-ruling groups, it might be important not only to institute a 'good' constitution, but also to be seen to be drawing such a constitution by consultative and inclusive means. In Tanzania, the later versions of the constitution have adequately specified the relationship among the major branches of Government, and between the government and the people, especially after 1984. Also, the constitution-making processes have become consultative over time, involving ordinary people in general, though many critics still see them as not being truly consensual.

### **1. Introduction: Definition and Conceptualisation**

At a basic level, a constitution is understood to be a set of norms, conventions, rules and procedures that has the objective of defining the behaviour of its constituents, whether these are individuals, groups of people, or special decision-making and implementing institutions. In this sense a constitution is a law and has the same function as custom, legislative acts, ordinances, decrees and by-laws. The development of constitutions resembles the development of law

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generally, at least in one important respect: both are dominated by unwritten custom at first, and by written enactment later. In general law, custom has not been completely eliminated, and this is also the case to a small extent with constitutions. However, due to the overriding importance of constitutions, which has generated the necessity to have clear (and therefore written) constitutions in modern times, unwritten constitutions are a rarity. The difference between a constitution and all other laws is that it is regarded as the ultimate man-made regulator and the source of all other laws—the equivalent of a *grundnorm*. Largely because of this perception, a pattern has developed in the fashioning of constitutions, attempting to ensure that all important relationships and behaviour among the constituent parts of a society are spelt out in the constitution, and also that all others, on which usually a firm common agreement has not been struck within society, are left to other laws.

In basic terms, constitutions need not be democratic. Even when reform is introduced, it need not necessarily be democratic, although some level of positive development is assumed. However, the modern period we live in is dominated by a heightened consciousness about democracy, and the ultimate agenda of reform in the political sphere is democracy. In the recent history of states whose political reform consists essentially of moving from the monolithic organisation of society (represented by single-party, military and personal-rule regimes) to a more open plural form, the main rationale of constitutional reform is greater democracy and the strengthening of the democratisation process. For this reason, current debate on constitutional processes and reform tends to be less about whether there is such a covenant or *grundnorm*, and more about whether such constitutionalism is an attempt at guaranteeing democracy.

## **2. Constitution-making practices and theory**

Constitution-making is rule-making, and, therefore, constitutional reform is a rule-change. Two major types of rule-change can be identified. The first is change which is effected dramatically in one go. Such a change is usually profound and it tends to create many new rules. The other change is incremental, coming in a series of "continuous" modifications of old rules and additions of new ones. Correspondingly, there are two basic ways of conceptualising how change comes about: cataclysmically or gradually. Of course to a large extent, it is the nature and totality of circumstances that define whether rule-changes will be effected demonstrably in a single swoop, or they will gradually evolve. Thus, where gradual accretion has not been possible despite the need for it, it is likely that momentous change will occur at some point in time. Usually such occurrence takes place in previously oppressive or continuously retrogressive

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situations, and rule-changes there tend to "burst" out not only dramatically but also violently on account of the accumulated, frustrated need. However, history is not merely made by inanimate circumstances; people, including those who struggle for rule-changes, have a role in shaping it, and it seems reasonable to argue from this standpoint that whether rule-changes (including constitutional reform) will assume one or the other face depends also on the attitude of these actors. There are those who tend to adopt the notion that sudden and demonstratively substantive change is the only legitimate change, and at the extremity of it they are inclined to reject gradual change. The others tend to think that gradualism is the "natural order of things" and to resist momentous change.

In modern state systems, the two major types of rule-change approximate two major paths of constitution-making. In some systems, constitutional reform has by and large stayed gradual. This does not necessarily signify the absence of visible and even violent agitation in constitutional change in those societies: it is merely to acknowledge that such change generally kept coming incrementally even in the midst, and sometimes in spite, of such episodes. An example of this is England, the Scandinavian countries, and three former British dominions—Australia, New Zealand and Canada. England is particularly interesting in this respect because its long history of a gradualist approach to constitutional reform has left it almost anachronistically satisfied with a mix of custom in the form of accepted conventions and a number of separate documents, including the Magna Carta and the Bill of Rights, that have evolved into its so-called unwritten constitution. One can almost sum up this constitutional culture of England, and later Britain, as a laid-back rejection of the perception that constitution-making is nearly a matter of life and death, and must be clearly spelt out as well as written properly in a single document. There is an additional characteristic of this type of rule-change, which is that when formal constitutional change or modification is required after its initial enactment or acceptance, the constitution is extremely flexible and therefore permissive of relatively easy and prompt changes. Thus, changes in British law, including aspects of the constitution, are effected equally by the ordinary legislative procedure requiring the assent of a majority of members of Parliament (Scarman, 1990: 105). It has often been argued that this practice is based on the British attitude that does not regard the constitution as superior to Parliament (Scarman, 1990: 106; Khan and McNiven, 1984: 147-153).

In other situations constitution-making was a stupendous event, the pinnacle of an acrimonious or violent struggle. The first accepted version of the constitution after the struggle often laid down clear principles of behaviour of the constituent parts of society, and carefully defined their roles in governance, and the extent of authority of each one of the institutions of decision-making and implementation.

Once this was accomplished, future constitutional changes were made relatively difficult to achieve. For example, the United States, which fits this category of constitution-making, has two relatively rigid procedures for the amendment of the constitution. One of these allows a proposal for amendment to start in the federal legislature, but then rules that for it to proceed it must be supported by a two-thirds majority in each of its two houses. If the proposal passes that test it must then be ratified by three-quarters of the state legislatures. The other amendment procedure provides that, at the request of two-thirds of the state legislatures, Congress shall call a convention for proposing amendments, which must then be ratified by conventions in three-quarters of the states. Clearly, formal constitutional change here is comparatively rigid. One must note that the federal set-up, which on its own necessitates a relatively laborious and complex process of consultation prior to an amendment, contributes to this relative inflexibility. But it has also been the view of many that the inflexibility stems from an American notion of the supremacy of the constitution over the legislature, which implies that it cannot be amended through normal legislative procedures. An additional explanation for the rigidity in this type of constitution-making may be that, since such constitutions came about after stupendous upheavals, leaders are overly protective of the resultant arrangements considered hard worn.

Many states have tended to adopt the rigid method for formal constitutional changes and modifications, not out of a jealous protection of an important historical legacy as the American case suggests, but because constitutions are now regarded as such grand law-giving edifices that they should be tinkered with only rarely, and in the most compelling of circumstances. In India, amendment to the constitution is effected only after approval by a two-thirds majority of members present and voting in both houses of its bicameral legislature. A similar provision existed in the former USSR. Many of the newly decolonised states, usually with only unicameral legislatures, have similar requirements. In the case of Switzerland, when an amendment to the Swiss constitution is envisaged, the Swiss voters are asked to approve the principle or the text of the proposal, then the assembly formulates the amendment, which is presented for approval by a referendum. As in the American case, this rigidity in the procedure for the amendment of the Swiss Constitution is partly explained by the requirement of consultation in the federal arrangements that characterize Switzerland's constitution. But here, in requiring that an important section of the people or the entire enfranchised electorate ratify a constitutional change, we also have a more overtly responsive and democratic rationale for the rigidity.

The special amendment rules seen above are not the only expressions of the rigidity in the process of changing a constitution. We have seen that in both the

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American and Swiss constitutional settings, the final authority for the approval of a new constitution is a body or bodies outside the regular legislature. In many states this condition is mandatory in passing a new constitution: either a referendum or a constituent assembly is necessary for such a rule-change.

The further we have gone into the twentieth century the more formal and elaborate the constitutions have become, and the greater the pressure on constitutional experts and legislators to make constitutions even more elaborate than the previous versions. There is some use in this if it means that more matters are accepted society-wide and are becoming so important that they have to be enshrined in the higher law—that is, the constitution. However, there is a problem with too formal and elaborate a drafting of the constitution, which is that it tends to paint itself into the corner of the specific time in which it was drafted, or of only a section of society—very quickly becoming outdated or objectionable in many of its provisions, and therefore becoming an endless source of contestation among society's major players. A further consequence of this is that where the procedures for constitutional change are rigid, and the writing of the constitution has been too detailed to allow flexible interpretations between difficult-to-obtain amendments, the constitutions face the danger of being overthrown.

A good contrast to the detailed type of constitution is the brevity and generality of the Constitution of the United States of America. It is clearly dwarfed by the lengthy and voluminous latter-day constitutions of such states as Canada (1984), Uganda (1995), South Africa (1996), and Tanzania (the 1998 version of 1977). Although, as seen earlier, the US constitution has rigid procedures for formal changes, its generality and brevity permits it to escape a possible demand for its overthrow because the judiciary, in the form of the Supreme Court, can introduce "flexibility" with its subtly changing interpretations of constitutional provisions, as in its landmark decision in *Brown V. Board of Education of Topeka* (Prewitt and Verba, 1975:230).

### **3. History and a constitution's chance for survival and endurance**

It has been argued by many that the nature of the birth of a constitution determines its ability to survive and endure. Lately, the concept of a people's constitution, which vaguely refers to a constitution proposed and ratified by some kind of mass constitutional conference or subjected to a referendum, has re-surfaced, just over two hundred years since Thomas Paine, who had a part in the American Revolution and the French Constitution of 1793, made it famous in his book *Rights of Man*. It has been argued, for example, that most constitutions of African states—and especially former British colonies or possessions—lack

legitimacy, and are highly contested because, despite their facilitation of smooth transitions to new administrations, they did not involve "the people" (Liundi, 1994: 10; Makaramba, 1988). Even where subsequent constitutions have superseded transitional ones, it is argued, there has not been an involvement of "the people", and therefore the constitutions remain aloof, imperial and oppressive. Only when "the people" participate through a national or mass constitutional conference is legitimacy realised. In the background of this thinking there has always been some vague notion that most European constitutions were worked out in popular conventions (Liundi, 1994:8), and that the American constitution was the direct result of one such mass constitutional gathering. To many, this presumed popular approach to constitution-making explains the survival and endurance of the European and American constitutions against the test of time.

There is no doubting the fact that an event's history plays a role, and that its legacy and legend creates or magnifies a value with which many people will identify. Thus the history and legacy of America's Constitutional Convention of 1787 in Philadelphia has produced images of democratic and popular participation in constitution-making that have contributed to the respect with which the resultant American Constitution is treated. Although every constitution is likely to be challenged by any new generation, it is less probable that a constitution *perceived* to have been historically approved by the majority of a previous populace will meet with such abject sectional disapproval as does the Tanzanian and constitutions of similar states, which are *perceived* differently. However, the perceived "popular" beginnings of a constitution are only a small part of the explanation for its survival and endurance. An examination of the process leading to the adoption of the US Constitution may throw some light on the matter.

The convention that worked out the US Constitution was discussed by 55 delegates representing 12 of the 13 states of the American Confederation from May to September 1787. Due to objections by some delegates, only 39 signed the final text of the Constitution. The procedure for the ratification of the new constitution required approval by a simple majority at conventions in two-thirds of the 13 states. There were bitter struggles for and against the constitution, and many issues about which there were struggles, including the lack of adequate constitutional safeguards for fundamental rights. A majority of those who opposed the Constitution were small farmers and craftsmen, while many of those who called for its approval were merchants, shippers, manufacturers, bondholders, land speculators, lawyers and ministers. The constitution was finally approved by all states nearly three years later in 1790, amidst all these bitter differences of opinion. John Adams, a later US President, once wrote that

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the Constitution was "extorted from the grinding necessity of a reluctant people". Evidence of gross dissatisfaction with the Constitution was recorded even immediately after ratification. At the first sitting of Congress in 1789, there were 103 proposals for amendment. Only 10 were eventually ratified, and they are now collectively known as the Bill of rights, but it is interesting to note that the imperfection of the original US Constitution generated so many amendment proposals and resulted in 10 such amendments within the first cycle of the business of Congress.

The US Constitution therefore is historically a minority constitution, not only in its preparation but also in its aspirations, and it had glaring human rights omissions in its beginnings. A similar conclusion can be reached regarding many European constitutions. The notion of a well-worked out social pact that is sometimes associated with them may have some validity, but if these constitutions were social pacts they were worked out by a minority ruling group, and they were largely about apportioning power among themselves, as it is testified by the English Magna Carta of the year 1215, and the Bill of Rights of the year 1689. These were, respectively, about limiting the arbitrary exercise of power by the King against the nobles, and the final abolition of the principle of divine right.

Most of the European constitutions, then, fell short on human rights provisions, and some did not advance in this area for an extremely long period, as in the case of the Swiss Constitution, which did not enfranchise women until 1972.

In keeping with the British tradition of treating constitution-making and constitutional changes as if they were an ordinary act of passing laws—that is, within the exclusive domain of legislators and the executive branch, and without the need to appeal to "the people" for approval—Canada has never had even a semblance of a constitutional convention. That state was for a long time guided by the British North American Act of 1867, as amended periodically up to the 1960s. Its constitution now consists of this Act and the Canada Act, which has amended it extensively. Also passed by the British Parliament, the Canada Act was promulgated by the British Monarch in 1982, and it contained the Charter of Rights and Freedoms—the first constitutional bill of rights in Canadian history.

What is interesting is that despite their minority beginnings, and, sometimes, their lack of regard for certain communities or races—the American Constitution was particularly offensive to black people in certain passages—these constitutions are highly respected and have survived. In trying to know why this is the case it is important to have a look at the major ingredients of a constitution.

#### **4. Elements of modern constitutions**

##### ***4.1 The separation of powers and checks and balances***

It is widely acknowledged that the French political writer and philosopher, Montesquieu, has played one of the most important roles in the formulation of modern constitutions. He is most notably associated with the doctrine of the separation of governmental powers, simply known as the separation of powers. Although his writings on the subject were a result of an empirical observation of the working of separation of powers in other countries, especially Britain, which he had visited, he was the first to expound the doctrine of the separation of powers in a systematic way. In his doctrine he observed several important things:

- (a) That governmental power must be divided into three major branches of government—the legislature, the executive, and the judiciary—to safeguard power from tyranny.
- (b) Each branch of government must have a well-defined sphere of operation. The legislature enacts laws, the executive administers or applies the laws, and the judiciary interprets them.
- (c) No member of a branch of government should belong to another branch at the same time.

But, in his scheme, Montesquieu realised that if this separation were absolute it would paralyse the workings of government. And so he provided for a measure of combination of powers, allowing the executive, for example, to encroach on the legislature through the power of rejecting proposed legislation. In the same vein, the legislature encroaches on the judiciary by transforming itself into a tribunal for judging people in high offices, and for mitigating punishment by amnesty (Althusser, 1971: 61 - 107).

The scheme drafted by Montesquieu went beyond the separation of powers he had observed in England and elsewhere. For example, whereas it is true to say that a separation of powers between the emerging parliament and the crown was observable in England, especially after the Pact of 1689, further erosion of monarchical executive power occurred, meaning that parliamentarians became members of the executive as cabinet ministers—an arrangement which has stayed to this day, making many political scientists suggest that Britain has no separation but a fusion of governmental powers (Khan and McNiven, 1984; Scarman, 1990). American leaders, on the other hand enthusiastically embraced Montesquieu's scheme, translating it elaborately in the original version of their constitution as well as in other laws, and basing it on the same principle of separation and combination. The latter concept is better known by a particularly American parlance of 'checks and balances'. In practice, although it was never provided for in the constitution, and despite the fact that Montesquieu had



disparagingly ignored the possible claim of the judiciary to a check of its own vis-à-vis the other branches of government, the Americans even acquiesced in their Supreme Court's assumption of the power of review of enactments in relation to the constitution (Prewitt and Verba, 1975: 222-224). More has been done to the doctrine of separation and combination of powers in USA., including provision for staggered authorities and electoral terms, not confined to the federal level but extending to local levels. Once again the idea is that no fusion of power should subsist in one branch, and that the separation is neither taken to the point of paralysing government nor used to create another form of tyranny through the monopolization of power by any single branch. This power arrangement appears to be one of the sources of respect for the US constitution, and of its longevity (Wilson, 1988; Ladd, 1988). The other, of course, is something mentioned before, namely the ability of the judiciary to make an interpretation in keeping with a changed social context, itself permitted by the brevity and generality of constitutional provisions.

#### *4.2 The protection of basic human rights and fundamental freedoms*

The need to protect basic human rights and fundamental freedoms has been a feature of struggles for better laws or enlightened governance for many centuries. When, in the Magna Carta, English nobles wrested from the King the concession that no one should be punished until a case had been duly made against him/her according to the law, they were seeking a guarantee of human rights, as indeed they were when they finally abolished the so-called divine right of monarchs. By 1791 this guarantee was already either being written into constitutions, as witness the first 10 amendments of the US Constitution, or appended to them, as evidenced by the Declaration of the Rights of Man and the Citizen in the French Revolution. The need to protect human rights was dramatically demonstrated by atrocities against civilians in the times of the 2<sup>nd</sup> World War, thus necessitating the enshrinement of the principles of human rights protection and promotion worldwide in the preamble and articles 1(3), 55(c) and 62 (2) of the United Nations Charter. This was followed by the 1948 Universal Declaration of Human Rights, the two 1966 covenants on human rights, and the regional international instruments on the protection and promotion of human rights and fundamental freedoms, including the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, the 1969 Inter-American Convention on Human Rights, and the 1981 African Charter of Human and Peoples Rights. In addition, there have been numerous international instruments addressing specific human rights. All these show that the need to protect human rights has become universal. All international instruments on human rights have urged states to enshrine them in their constitutions, and the majority of those concluded after 1948 have also attempted to devise mechanisms for enforcement.

Not all states have Bills of Rights recognized as one unique set of rules as such, but it is difficult to find a constitution these days without a few rights and freedoms, even if scattered in different sections. The separation and combination of powers seem to be necessary to constitutions for regulating the relationships among the major institutions of state governance themselves, while the protection of human rights regulates the behaviour of these institutions in their relations with the governed people. Some kind of pronouncement on the extent of human rights protection has therefore become an essential feature of modern constitutions. In this sense the problem is not so much the absence of a pronouncement on protection, but the nature of the guarantee—for example whether the human rights appear together, whether they are qualified rights, whether they have a special or elevated status in relation to other provisions of the constitution, whether there is a special prosecutorial body for violations, and whether they are adjudicated in special courts—all of which are perceived to have a bearing on the effectiveness of formal protection.

It seems to us that since the US Constitution was one of very few constitutions that clearly spelt out many of these rights very early on, it contributed greatly to a national culture that respected the constitution. It was further helped along by the self-assertion of the early Supreme Court, which wrested from a reluctant executive the right to be the chief defender of the Constitution, and to review the enactments of Congress. This created a legacy of the independence of the judiciary in the United States, which largely endures despite the fact that it can be highly partisan and ideological in practice at times. The independence and esteem of the judiciary, and through it an increase in the respect for the constitution, was also a result of a liberal and activist "bench", which adjudicated many cases in the 1960s and 70s in favour of civil rights after there had been a long impasse in the enforcement of these, apparently by reason of the constitution itself. We must of course add that the Court was liberal and activist at a time when the social context was ready for it, allowing the other branches of government also to legislate and execute laws in favour of civil rights. A constitution that had been prohibitive became permissive of the enjoyment of human rights.

In Canada, as seen earlier, there was no special entrenchment of human rights protection in the constitution for well over 100 years, and many Canadians argued that they did not need such entrenchment since they clearly enjoyed them anyway (Khan and McNiven, 1984:162-167). When they were finally entrenched in the constitution they had "claw-back" clauses similar to those in East African constitutions that have been condemned by many, including Oloka-Onyango (1995).

What we can say about this brief survey of the importance of a Bill of Rights in constitutions, therefore, is that:

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- (a) Respect for a constitution increases when basic rights and fundamental freedoms are guaranteed in a constitution via a Bill of Rights.
- (b) The enjoyment of these rights nonetheless does not always depend on the explicit promulgation of a Bill of Rights.
- (c) Enforcement in this area depends almost equally on constitutional and legislative provisions, executive will and action, and judge-made law originating from judicial activism.

### *4.3 Other elements of a constitution*

The guarantees of the separation of powers and the protection of basic rights and fundamental freedoms seem to contain most of the important provisions of modern constitutions. Other provisions are details of these fundamental relationships among institutions of governance, and between those institutions and the governed.

Those details are important, of course, since the way the relationship is defined or elaborated upon has consequences for the distribution of power and for governance generally. A discussion of a concrete instance of such constitutional elaboration is taken up shortly in a discussion of the Tanzanian experience with constitution-making. But there are other matters in modern constitutions which merit mention here. Usually these include the place of the civil service, defence and finance, as well as the role of lower levels of government, such as state governments in federal arrangements, provincial administration and local government.

## **5. The Tanzanian experience with constitutional reform**

### *5.1 The constitution-making process historically*

The decolonisation history of Tanzania is well-known to many to have been peaceful, and the immediate events leading to the formal "handing over" of independence in 1961 quite orderly. Both this and the traditionally gradual, nearly uneventful passage of constitutions characteristic of the British, who ruled Tanganyika and Zanzibar, accounted for a similar way in which the first Tanganyikan constitution was brought about in 1961—that is, uneventfully. Similarly, in keeping with the British attitude of regarding constitutional construction and reform as specialised events best left to the elite or to representatives, the 1961 constitution took root without the consultation with a broad mass of the population. Since then there have been four major reorientations of the Second Constitutional Process, or four other constitutions in Tanzania, depending on whether one takes the interpretation of the government or that of its critics respectively. These four constitutional events or constitutions have come about in the following way.

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In 1962 Tanganyika severed its last sovereignty ties with Britain. The British Crown, through its representative, the Governor of Tanganyika, ceased to be the Head of State. This brought about the Republican Constitution, which was enacted by the existing Parliament after its National Assembly had met and converted itself into a constituent assembly. The second occasion was when Tanganyika formed a union with Zanzibar. Following the ratification of the treaty (known as Articles of Union) by the Tanganyika and Zanzibar legislatures through instruments known as Acts of Union, the immediate constitutional arrangement put in place was to regard the constitution of Tanzania as being constituted by the Tanganyikan constitution and the Articles of Union. Article VII of the articles of Union had directed that the President of the United Republic, in agreement with the Vice President, would appoint a commission to draft a constitution and, within a year, call a constituent assembly of representatives of Tanganyika and Zanzibar to adopt the constitution. This requirement was modified by the Parliament through Act No. 18/65, which now directed that such a constitutional process be effected at "an opportune time".

In 1965 the Parliament amended the constitution to accommodate and implement the Articles of Union and to legalise the one party-system, which had been proposed by a commission of the governing party, TANU. The constitution was further amended in 1975 by an Act of Parliament to legalize the notion of the doctrine of the supremacy of the party over all state organs.

Finally, in 1977, the long-delayed implementation of the Articles of Union requirement for a permanent constitution of the United Republic of Tanzania took place. The constitutional process involved a constitutional commission appointed by the President; the National Executive Committee of the Party, to which the proposals were initially presented; the Cabinet, which prepared and discussed the necessary bill; and the Constituent Assembly, which deliberated on and passed the bill.

None of these constitutions or constitutional events came about through significant agitation. Neither were the broad masses of the population involved in the shaping of the constitution (Shivji, 1991; Nassoro, 1995), with a minor exception for the 1965 one-party system amendment, which was preceded by a country-wide canvassing of opinion by a presidential commission, not on whether the system should be adopted, but on how it could best be implemented without the loss of the democratic ideal.

The first extensive involvement of the broad masses of the population in constitutional reform was in 1991-1992, when a commission appointed by the President and headed by the Chief Justice (otherwise known as the Nyalali

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Commission) canvassed opinion. The Commission's mandate was to investigate whether Tanzania should have a one-party or a multi-party system, and to explore other issues related to these arrangements. Opinion was gathered through a variety of methods, including public meetings, individual and institutional submissions, and direct academic research. Through its recommendations the multi-party system was adopted, and the 1977 constitution was amended accordingly.

### *5.2 The 1977 Constitution (as amended)*

Since 1977 there have been numerous changes to the provisions of the Constitution. The majority of these changes came after the introduction of the multiparty system of political organization in 1992. The changes translate into 13 constitutional amendments, with the Eighth Amendment, which is the multi-party legislation, bringing about most of the changes. In the main, the first five amendments of the multi-party era streamline the extent of the authority of the highest executives—the President, the Vice-President and the Prime Minister—in relation to the other branches of government, and in response to the new situation of the absence of monopoly and supremacy of the ruling party, CCM. These multi-party changes, which were enacted by the single-party parliament before the multi-party one came into being with the 1995 General Elections, clearly demonstrate a reduction of the power of the executive vis-a-vis other branches, and in relation to the people generally (see Appendix 1). The constitution is here below briefly examined in relation to whether it contains the basic elements of a democratic constitution.

#### *5.1.1 Separation of powers*

The constitution exemplifies a standard separation of powers, and the minimum combination, that has come to be expected in all modern written constitutions (Fimbo, 1995). Even the previous constitution, the 1965 Interim Constitution, exhibited these features, but the current one has defined them more clearly.

Usually, however, despite a good constitutional arrangement of the separation and combination at a general level, details of the division of power may favour one branch so much as to render the powers fused or unbalanced, often in favour of the executive. For example, state officials appointed by the President alone, which is sometimes not clearly expressed in a constitution, may be so many as to tilt this balance. Or there may be too many vague legislative delegations of the role of rule-making to the executive as to make it the dominant rule-maker, thus eclipsing the legislature in authority. Quite often these are fine details in constitutions, and they can be points of unending debates and contestations,

raising the question of the appropriate balance between the need for a greater dispersal of power, and those of stability and effectiveness of the government. This has happened in the Tanzanian constitution too. Although the multiparty amendments greatly reduced the power of the executive, especially in relation to the previous era, the Thirteenth Amendment appears to restore some of these powers, most notably in the authority of the President to appoint ten people to the National Assembly, thereby altering the constituency-based composition of the House.

### *5.2.2 Bill of Rights*

An amendment in 1984 enshrined the Bill of Rights, referred to as Basic Rights and Duties, in the 1977 Constitution. The Bill is the kind that has become standard in the latter half of the 20<sup>th</sup> century, and takes largely after the Universal Declaration of Human Rights of 1948. It covers articles 12-32 of the constitution, but substantive protection provisions are 12-24, a total of 13 articles. Four articles (25-28) address duties of the citizen. There are derogations from the "full protection" of the rights in most of the protection articles, and then there are derogations of a general nature that are clearly addressed as such in articles 29-32.

Most constitutional guarantees of the protection of human rights elsewhere also have derogations written in. In many of the constitutions the derogations are expressly stated as such in two or three articles, mostly relating to the need to protect the rights of the larger society against too-zealous a pursuit of individual liberties; and relating to the legitimacy of a legally-instituted curtailment of freedom in times of emergencies and war.

But there may also be other curtailments built within the provisions themselves, "claw back" clauses that give a right with one hand and virtually withdraw it with the other. In East Africa, Uganda's 1995 constitution provides a Bill of Rights with the least of these derogating qualifications, while Kenya's has the most. Tanzania's derogating qualifications in the 1984 Bill of Rights has provisions that are potentially the most vulnerable to arbitrary departure from the protection of human rights, in so far as its limiting language mostly refers vaguely to the necessity of reading the rights in relation to any other laws enacted by the legislature, some of which are extremely limiting laws indeed (JMT, 1992b; REDET, 1998b).

### *5.2.3 General comment*

It has been said before, that although at a general level a constitution could guarantee the separation of powers and even a Bill of Rights, the language and tenor of provisions, or the attendant details, may water down the separation and

balance, as well as compromise the protection of rights. We have seen that the Tanzanian constitution also suffers from this problem, although there have been reviews of it in the past, which were in the direction of positive remedies. In addition, perfectly written constitutions in these areas are themselves necessary but not sufficient conditions for such protection. Others have already documented the denial of human rights in practice in Tanzania that fits this comment (Mushi, 1997; Kilimwiko, 1998; US Department of State, 1998).

## **6. Conclusion**

We have seen that constitutions can be popular and endure the test of time even if they started out as minority constitutions. We have also suggested that the nature of the constitution (whether it fulfils the essential requirements) may contribute to its popularity, especially among the politically conscious. We have, in addition, argued that constitutions can neither be perfectly consensual, nor carry all the details of power relationships. The mode of constitution-making does not matter very much in the production of a good constitution. Only the nature of the constitution matters. However, although the "lower" masses of the populace are still not discussing this, a significant section of the "knowing elite" wishes to have constitution-making in a particular way, namely a national constitutional conference (*mkutano wa katiba*). These are not necessarily in the majority, but they can make governance extremely difficult for the ruling party if their proposal, so dear to them, is not heeded. They are part of the dominant class, of course, and they feel that they have been excluded. It is their turn to influence the new dispensation. They want in. Symbolically, if they do not get their way on a matter so "close to their hearts", they will feel that they have not had their liberation yet. For reasons of effective and consensual governance, it may therefore be prudent for the ruling party to "give in" on this point.

Recently, a presidential commission canvassing opinions on certain issues and proposals on constitutional reform in the form of a White Paper tabled its report, and the government adopted some of its recommendations on new amendments to the constitution, which it passed quickly on account of its large majority in the legislature (JMT, 1988). In this way the government has in a sense been responsive to the 'quiet' Tanzanian agitation for a constitutional review. By presenting the White Paper, the government appears firm in its belief that consulting ordinary people in a constitutional review is important, while it is at the same time reluctant to break with the traditional and routine legislative approval of constitutional changes.

To the extent that the only party that has ruled Tanzania since independence is by far the largest party in the legislature, decisions on constitutional changes are

likely to be dominated by that party. This in turn may lead others to perceive constitution-making in Tanzania as falling short of a truly consensual process. But it is also clear that the process still has some opening for various societal influences until, during, and beyond the next constitutional amendment or enactment.

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### **APPENDIX I:**

#### **Tanzanian Constitutional Changes in the Multiparty Era: A Synopsis**

<b>Name of Parliamentary Act</b>	<b>Constitutional Change Made/Remarks</b>
Act No.4 of 1992	The words in Art. 3(1)-(3) were changed to expunge the monopoly of CCM and accommodate multipartism, but the clause "Tanzania is a socialist country" was retained
Act No.4 of 1992	The phrasing in Art.37 (3) on the decision to remove the President from office by reason of infirmity was changed. It repealed the authority of the National Executive Committee of "The Party", elevated the Speaker to the role of a participant in this determination and transferred the ultimate authority to the Chief Justice. A new procedure for selecting the Vice-President after the President loses office before term was spelled out: He/she is to be appointed by the new President after consultation with the party of the outgoing president and by the endorsement of at least 50% of members of the National Assembly.
Act No.4 of 1992, 13 of 1994 and 34 of 1994	The list of qualifications of presidential candidates was expanded to include citizenship by birth and party membership.
Act No.4 of 1992	There was a change in Art. 44 (2): The Party's role in approving a declaration of war by the president was scrapped.
Act No.4 of 1992	Changed Art. 63 (2e), removing the obligation of the National Assembly to report to the Party as one of its duties.
Acts No.4 of 1992 and 12 of 1995	Made changes to the composition of members of the National Assembly in Art. 66 (1b), significantly the provision of special women seats, at first fixed at 15, then 15%, and now not less than 20% of all other MPs.
Acts No.4 of 1992, 34 of 1994 and 12 of 1995	Introduced changes in the qualifications for parliamentary candidature. First of all they removed the need to be a member of CCM and to be socialistic as per the party leadership code of 1967 (previous Art. 67 (1b), (1c), and (2i-2m). Secondly they partly responded to the Nyalali Commission's concern with the 40 oppressive laws and removed detention and repatriation or banishment as disabilities for candidature. But then they introduced the party membership requirement that bars independent candidates in Art. 67 (2e).
Act No.4 of 1992	Made it clear in Art. 72 that employment for senior civil servants ceases when they become candidates for political office. Previously they only went on leave without pay.
Act No.20 of 1992	Affirmed the immunity of the President in criminal proceedings while in office. He/she is not immune, and has never been, from civil proceedings while in office. He/she was totally immune from criminal and civil proceedings when out of office for acts previously done in his/her capacity as President, but now there is an exception to this: He/she has no such immunity if found guilty by impeachment: Art. 46 (3).

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Act No.20 of 1992	Introduced impeachment. The numbers of legislators required to approve the starting of the process of impeachment is quite low (20%), and a "convicted" President loses all his/her benefits! This is in Art.46A.
Act No.20 of 1992	Made changes to Art. 52(2) by requiring the President to appoint the Prime Minister from the largest parliamentary party or, failing that, to choose the person most likely to be supported by the majority of MPs. The PM's appointment has to be endorsed by the National Assembly by a simple majority of votes. This act also introduced for the first time the procedure of a "Vote of No Confidence in the PM". Numbers required for starting the process are the same as those for the impeachment of the President (i.e. 20%), but the PM has at least a safety cushion of six months from the date of appointment, which the President does not have, before a Vote of No Confidence can be raised against him/her.
Act No.20 of 1992	Made it clear for the first time, in Art 63 (2e), that one of the functions of the National Assembly was to ratify non-self-executing treaties (Art. 63 (2e)). This had not been written in previously.
Act No.20 of 1992	Was significant in Art. 90 in that for the first time it spelled out clearly the conditions that permit the president to dissolve the Parliament (previously he/she could do so any time).
Act No.7 of 1993	Was significant in changing the leadership of the National Electoral Commission (NEC) from the Speaker to a judge of the High Court and in giving it the authority to conduct Local Government Elections. Also, for the first time the functions of the NEC were expressly stated, among them, quite significantly, constituency demarcation (Art. 74). Demarcation decisions now require the endorsement of President - previously the prerogative of the National Executive Committee of "The Party" [Art.75 (1) and (2)]. It is also significant in these changes that leaders of political parties are prohibited by the constitution from becoming members of the NEC. (There are opinions that favour the idea of a NEC composed of party leaders.)
Act No.34 of 1994	This act introduced changes regarding the office of the Vice President, covering Arts. 47-50. There were two significant new aspects. First, the VP takes oath before the Chief Justice and not the President as it was previously. Secondly the VP is now subject to impeachment by the National Assembly (if endorsed by the President).
Act No.12 of 1995	Top officers in the executive branch – the Union President and Vice-President, the Zanzibar President, and the Prime Minister - have a duty to defend the Union, and have to take an oath in this respect. This provision, Art. 46B, is newly introduced and makes it difficult for such officers to publicly air misgivings about the Union.
Act No.3 of 2000	Affecting about 18 provisions, this amendment, among others, shortens the list of presidential appointees, thus further reducing presidential power, but at the same time authorizes the President to nominate up to ten members of Parliament, thereby increasing his/her say in the legislature.