

# **Report of East African Consultative Theme on the Tanzania Constitutional Review Process**

Report of Kituo Cha Katiba: Eastern Africa Centre for  
Constitutional Development.

**2013**

# **REVIEW OF THE CONSTITUTIONAL PROCESS AND THE DRAFT CONSTITUTION OF TANZANIA 2013**

## **1.0. ABOUT KITUO CHA KATIBA**

Kituo Cha Katiba: The Eastern Africa Centre for Constitutional Development (KCK) is a regional non-governmental organisation (NGO) established in 1997 to promote constitutionalism, good governance and democratic development in East Africa. KCK's current mission is "To promote a culture of constitutionalism, where the constitution is a living document that reflects the aspirations and needs of women and men in democratic and participatory governance in Eastern Africa". Her vision is, "Constitutionalism that promotes good governance and democratic development in Eastern Africa". KCK's work aims to empower East Africans to hold their governments answerable in order to influence the way they are governed so that there is ultimately a respectful relationship between the leaders and the led.

KCK's current geographical focus is the six countries of the East African Community (EAC) namely Burundi, Kenya, Rwanda, Tanzania mainland, Tanzania Zanzibar<sup>1</sup> and Uganda. The organisation has a regional board drawn from these countries. KCK's secretariat is in Kampala, Uganda.

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<sup>1</sup> Although part of the United Republic of Tanzania, KCK by virtue of her mandate devotes special attention to Zanzibar because it has its own constitution; executive, legislative and judiciary arms and national symbols such as national anthem and flag.

## 1.1 ABOUT THIS INITIATIVE

In line with its goal of providing critical information in order to activate East Africans to make constitutions and laws for constitutional development relevant to their experiences, KCK, with support from the Open Society Initiative for Eastern Africa (OSIEA) constituted a team of experts in constitution making from Kenya and Uganda to provide feedback to the Tanzania constitution making process and the Draft Constitution 2013. The major goal of the initiative is to contribute to the development of an inclusive, just, equitable and durable constitution for the United Republic of Tanzania (URT).

The specific objectives were:

1. To enable a team of experts in constitution- making from East Africa to analyse the constitution making process in Tanzania and to provide critical input to the Draft Constitution of Tanzania 2013, based on best practices and lessons from the region.
2. To provide a forum for members of the Tanzania Constitution Review Commission to dialogue, learn and share best practices and lessons from experts in constitution making from the region.

The specific tasks of the team of experts were to:

1. To critically analyse the process of constitution making in Tanzania, including the inclusivity, credibility and acceptability of the different bodies involved in the process such as the Tanzania Constitution Review Commission and the Constituent Assembly.
2. Assess the extent to which the Draft Constitution embraces:
  - a) constitutional principles such as separation of powers, rule of law, answerability and accountability;
  - b) democratic values including gender sensitivity;
  - c) issues of regional integration including Zanzibar's role in the EAC Integration process.

3. To provide clarifications to provisions and key definitions of terms where necessary.
4. To review the logical flow of the provisions of the Draft Constitution.

## 1.2 The Team

The team comprised the following:

Prof. Frederick Ssempebwa:

(Uganda), a constitutional lawyer and legal practitioner, former member The Uganda Constitutional Commission (The Odoki Commission); former Chair Uganda Constitution Review Commission; former member Committee of Experts (CoE), Kenya.  
(Chair of the Team)

Hon. Miria Matembe:

(Uganda), lawyer and renowned woman activist, former member The Odoki Commission, former minister for Ethics and Integrity Uganda, former Member of Parliament, former Member Pan African Parliament; has consulted widely on gender

and constitution making in Africa.

Mr Bobby Mkangi:

(Kenya), lawyer and independent legal consultant on human and children's rights working in Nairobi, Kenya, former member Committee of Experts (CoE) Kenya.

Prof. Godfrey Muriuki:

(Kenya), Professor of History, University of Nairobi, member of Kituo Cha Katiba's 2010 Fact-finding Mission to Tanzania that examined areas of tension relating to the Union between Tanzania Mainland and Zanzibar, and co-author of the Mission publication: *Shirikisho Ndani ya Shirikisho: Uzoefu wa Muungano wa Tanzania na Mchakato wa Kuiunganisha Afrika Mashariki (Federation within Federation: The Tanzania Union Experience and the East African Integration Process)*.

Prof. Frederick Jjuuko:

(Uganda), Constitutional Lawyer and Professor of Law, Makerere University; former member KCK's 2010 Fact- finding Mission to Tanzania, and co-author to the Mission publication.

### **1.3 Methodology**

The team reviewed relevant literature and laws on the subject. Given that the official Draft Constitution of Tanzania was in Kiswahili, members of the team especially from Uganda relied initially on an unofficial translated version of the Draft Constitution in English; and subsequently on an English draft translated under the auspices of KcK that was reviewed for accuracy by the Tanzania Constitution Review Commission.

The team held several meetings to allocate tasks, and discuss the form of the report, key issues, and recommendations. A joint meeting of the team to review the draft report was held on 20<sup>th</sup> August 2013 in Kampala.

On 9<sup>th</sup> September 2013, the experts held a day long meeting with members of the Tanzania Constitution Review Commission at the Commission's office in Dar es Salaam, Tanzania. Prior to sharing its views on the Draft Constitution as captured in this report, the Commission provided the team of experts with information on its establishment, mandate, methodology used and progress made in the execution of its work. The Commission also provided a projection on what would happen in future.

KcK interacted closely with the Secretariat of the Commission as part of the preparation for the meeting, and to secure relevant information and documentation.

## **2.0. CONSTITUTIONAL REVIEW PROCESSES IN EAST AFRICA**

### **2.1 THE BACKGROUND**

All the Partner States of the East African Community (EAC) have had to overhaul their constitutions; a response to varying degrees of virtual break down of the rule of law, democracy and good governance. At their independence, the States received colonial sponsored written constitutions embodying idealist rules which were hardly practiced under colonialism. The challenges of building nations out of fragile States, plus the struggle for economic development in the context of the impact of the cold war and the neo-colonial economy, drove the States to adopt political and economic policies that paid scant regard to human rights and good governance. In the last two decades, there have been intensified demands for democratic political systems leading to dialogue over the process of constitution making. With the exception of Burundi, widely participatory processes have been the norm, although the design has varied. The process of constitution making in Tanzania can take a leaf from what has taken place in the region even if the only benefit would be to avoid mistakes that have been made.

### **2.2 UGANDA**

Uganda was the first to respond to the quest for democracy. The 1962 Constitution adopted at independence, though colonially sponsored, was negotiated with the representatives of the communities. It tried to provide a basis for a united state and a framework for a nation. It was abrogated without consultation of the people, and another constitution was enacted in

1967. The main objective of the 1967 Constitution was to concentrate power into the executive, mainly the president by dissolving or weakening structures for accountability such as devolution/federation plus other checks and balances on the exercise of power. In 1971, the resultant regime was overthrown in a military coup. What followed was a long period of tyranny by regimes sponsored by armed groups that fought for power until they were subdued by one group, the National Resistance Movement (NRM)/ National Resistance Army (NRA) in 1986. It is this group that established mechanisms for consultation over a new constitution.

### **2.2.1 The Design of Constitution Making in Uganda**

A Constitutional Commission (The Uganda Constitutional Commission) was established by law in 1988. Chaired by a justice of the Supreme Court the Commission consisted of twenty one members appointed by the president in consultation with the minister responsible for Constitutional affairs. The Commission was mandated to:

- stimulate public discussions and awareness of constitutional issues;
- collect views of the people through public meetings and debates, seminars, workshops and any other appropriate forum; and
- formulate proposals for a new constitution.

The objectives of the Uganda review process included the enactment of a Constitution which would:

- a) guarantee the national independence and territorial integrity and sovereignty of Uganda;
- b) establish a free and democratic system of government that would guarantee the fundamental rights and freedoms of the people;
- c) create viable political institutions that would ensure maximum consensus and orderly succession to government.



The Commission carried out its mandate of educating and sensitizing the people plus collection of their views. The views were presented through public gatherings, workshops, seminars, memoranda submitted by individuals and groups, plus newspaper comments. A total of 3,392 memoranda were collected from individuals and groups, 12,377 from Resistance Councils (RCs) 1 (village), 11 (Parish), 111 (Sub County), 1V (County) and V (District) levels; over 12 from Ugandans living abroad, 36 from District Councils; 13 from municipalities; an approximated 25 leading personalities were interviewed and their views recorded; 5,844 essays were collected from the youth; and over 2,763 newspaper articles, comments and proposals were assembled. All these views were analyzed and a report that included a draft Constitution prepared and discussed by a Constituent Assembly which was the other organ of review.

The law had initially provided for a Constituent Assembly comprising the National Resistance Council (NRC) which was then sitting as an interim parliament, together with the National Resistance Army Council (NRAC) which was the top military organ. However, the public objected strongly to this arrangement. Besides having been imperfectly constituted, the NRC had not been elected with the specific objective of constitution making. The NRAC was not a representative body.

After due consideration of the people's views on the issue, the Commission made an interim Report in which it recommended a Constituent Assembly directly elected by the people, in order to ensure legitimacy and acceptability of the Constitution.

The Constituent Assembly consisted of 288 members of whom 214 were directly elected delegates from electoral areas and 78 representatives of different interest groups.

The representatives of interest groups included:-

- a) 39 women representatives
- b) 10 representatives of the army;

- c) 2 representatives from each of what were regarded as the four active political parties.
- d) 2 trade unionists
- e) 1 person with disability
- f) 4 youth representatives
- g) 10 nominees of the President.

The process at Constituent Assembly level was supported by a Commission which:

- Organized elections to the Assembly;
- Conducted civic education for the voters;
- Administered the entire process; and
- Was mandated to conduct referenda on contentious issues, that is, issues which the Assembly would have failed to agree upon.

The Constituent Assembly debated and promulgated the Constitution. The constitution did not make provision for its implementation. As a result some issues such as the envisaged institution on equal opportunities were left pending for a long time.

There were several challenges that the design of the review process raised among which were:-

- a) The perception that members of the Constitutional Commission were not independent because they had been appointed without apparent consultation;
- b) The reliance on the existing regime's administrative structure (Resistance Councils, now Local Councils) for purposes of civic education and collection of views;
- c) Minimal involvement of political parties/groups. Political party activities were in suspension and were not permitted to sponsor candidates to the Constituent Assembly. Elections were on individual basis, and only

four persons directly represented the parties in the Constituent Assembly;

- d) Debates on contentious issues in the Assembly took a sectarian stance regardless of the merit. Examples are the issues of devolution/decentralization versus federalism, and multipartism versus the nonparty/movement organization; and
- e) The multiple representation of the ruling regime by different groups such as presidential nominees and the army, in the Assembly.

### **2.3 KENYA**

Kenya has the most recently completed process of constitutional review in the region. The background to this is not very different from that in the other States. Just like Uganda, as soon as the Kenya leadership took office in 1963, without consulting the people, it embarked on changes to the independence constitution. What followed was a struggle by democratic forces against a series of repressive constitutional changes which can be summed up as:

- Erosion of all elements of popular participation in governance such as devolution/decentralization of powers and functions;
- Suppression of political competition through single party regimes; and
- Erosion of checks and balances including the concentration of executive powers in the presidency, and domination by the executive over other organs of government.

These were effected through constitutional changes spanning over decades of suppression of dissent, accompanied by personalization of power by the presidents.

In the wake of strong resistance by the civil society movement to tyranny, the leadership in the late nineties eventually agreed to a dialogue on popular constitutional review. The official design of participation was first through a Constitution of Kenya Review Commission (CKRC) consisting of twenty seven (27) members. It was a merger of an organ set up by law (Constitution of Kenya Review Act, 1998); one which had been formed by a people driven process (The Ufungamano initiative); and one sponsored by government through a Parliamentary Select Committee. The Commission was therefore representative of various constituencies including the top leadership, political parties, civil society, and religious groups. Among other functions the Commission was mandated:

- a) to conduct and facilitate civic education in order to stimulate public discussion and awareness on constitutional issues;
- b) to collect and collate the views of the people on proposals to alter the constitution and on the basis thereof, to draft a Bill to alter the constitution; and
- c) to carry out or to cause to be carried out research concerning the constitution making including comparative studies of the constitutional systems (Constitution of Kenya Review Act 2000 S. 17).

The objects of the constitutional review exercise were spelt out by the Act. Besides evolving a constitution that would guarantee peace and national unity, democracy, a system of accountability based on separation of powers plus checks and balances, popular participation in governance, the new Constitution had to have provisions that:-

- a) ensured the provision of basic needs of all Kenyans through the establishment of an equitable framework for economic growth and equitable access to national resources;
- b) promoted respect for ethnic and regional diversity and communal rights plus the right to cultural identity; and
- c) promoted and facilitated regional and international cooperation to ensure economic development, peace and stability, and to support democracy and human rights. (Constitution of Kenya Review Act 2000 Section 3).

That the process was to be participatory and all inclusive was emphasized by the law. The Commission and the other organs of review had to be accountable to the people and ensure that the review process accommodated the diversity of the people of Kenya including socio-economic status, race, ethnicity, gender, faith, age, occupation, learning, persons with disabilities and the disadvantaged. In particular it had to be ensured that the process:

- a) provided the people with an opportunity to actively, freely and meaningfully participate in generating and debating proposals to alter the Constitution;
- b) was conducted in an open manner; and
- c) was guided by respect for human rights, gender equity and democracy.

The Commission collected views and presented a report together with a draft Constitution in 2002. Under the law, the draft was to be debated and adopted by another organ of review which was National Constitutional Conference (NCC).

The NCC consisted of:

- a) All members of the Constitution of Kenya Review Commission who were ex-officio members;
- b) All members of the National Assembly;
- c) Three representatives of each district (at least one of whom had to be a woman) elected by the respective County Council;
- d) One representative from each political party that was registered at the time the Review Act commenced; and
- e) Representatives of religious organizations, professional bodies, women's organizations, trade unions and non-governmental organizations and such other interest groups to be determined by the Commission, provided that the membership under this category had not to exceed twenty five (25) per cent of the total membership of the NCC.

The NCC consisted of 629 delegates inclusive of the Commission members.

Voting at NCC was by consensus or failure of which, by simple majority. But in respect of a proposal for inclusion in the Constitution, a two-thirds majority of all members was required. Contentious issues not supported by a two-thirds majority but at the same time, not opposed by one-third or more of the members, could be submitted to a referendum for a popular decision.

The Conference debated and adopted a constitution which eventually came to be known as the BOMAS draft, reflecting the name of the Conference Centre which was the venue for the Conference. Because of functional disagreements over the provisions defining political structures and the powers of the executive, the BOMAS draft did not go beyond parliament where it ought to have been enacted and promulgated. There were also legal developments which had made further progress on the BOMAS draft impossible as planned. The judiciary in *Dr Timothy M. Nyoja & Ors. V. Attorney General & Ors. (2004) AHRLR 157 (KeHC 2004)* had ruled that it was the people in referendum to approve a draft Constitution but not Parliament. After several informal initiatives to draft a compromise out of the BOMAS draft, the Government made its own draft (The Proposed Constitution of Kenya 2005, popularly known as the Wako Draft) and submitted it to a referendum in November 2005, where it was rejected.

After the referendum, President Kibaki in February 2006 appointed a 15 member Committee of Eminent Persons chaired by Ambassador Bethuel Kiplagat, to undertake an evaluation of the constitutional review process and provide a road map for its conclusion. Amongst its tasks was to collect views of Kenyans on the weaknesses, strengths, successes or failures of the constitutional review process and make proposals on the way forward; identify obstacles past or present that stood in the way of achieving a successful conclusion of the review process; consult local, regional and international experts on the foregoing issues and in particular

on how to establish an effective legal framework for the completion of the review process, and submit a report of their findings to the President by May 30, 2006. Amongst its recommendations was an inclusive process that reconciles all ethno-religious and political groups in Kenya; a constitution making process entrenched in law; an institutional framework including a Constituent Assembly, a committee of experts and a referendum. The Committee's roadmap had six stages: reconciliation and healing; discussion and agreement; enactment of legislative framework; implementation of identified options, drafting of a constitution; and a referendum.

After the post-election violence of 2007, initiatives to write a constitution were revived under a new time bound design anchored in the Constitution of Kenya Review Act 2008. The design took into account and built upon what had already been accomplished by way of consultation. Issues that had been agreed were not to be re-opened. An eleven member Committee of Experts (COE) (six Kenyan, and three foreign and two ex-officio – Attorney General and CEO/Secretary of COE) was constituted through a competitive process to review the results of all previous initiatives, particularly the BOMAS and the WAKO drafts, and come out with a harmonized draft constitution. The draft was published and the public invited for comments. The Committee carried out extensive public sensitization over the draft. In addition, civil society groups were specifically consulted and facilitated to carry out sensitization and debates.

On the basis of the views emanating from the public, the Committee of Experts prepared a proposed Constitution of Kenya. It was reviewed by a Parliamentary Select Committee (PSC) as required by law. The PSC made proposals some of which, the Committee accepted and incorporated in the final draft which was approved by the Kenyans in a referendum in 2010.

Some of challenges raised by the Kenya design are:-

- a) over-politicization of the process as reflected in the composition of the CKRC and the constant attempts by the Government to influence the process;
- b) direct involvement of politicians at the vital phases of the NCC/BOMAS and at promulgation;
- c) ambivalence over the design for formal popular consensus, as between a “National Conference” and a Constituent Assembly;
- d) having an unduly large conference (NCC) in which most members were unable to contribute effectively and where most were just delegates of, and, representing only, interests of their constituencies.
- e) Initial skepticism and non acceptability of the Committee of Experts due to constitution making ‘fatigue’ and prior non successes.
- f) A 2005 referendum whose focus derailed from the key constitutional questions to other issues such as gay rights, ethnicity, abortion etc. The referendum was adversarial in approach and polarized the nation. This was similarly observed during the 2010 referendum.
- g) Influence of western powers such as the United States of America, Britain and Germany in the constitution review process.

## **2.4 TANZANIA**

Just as in the other Partner States of the EAC, Tanzania was bequeathed a constitution that was the result of minimal consultation. In 1962 a year after independence, the Government altered the constitution by abrogating the Westminster Parliamentary System in favor of a presidential system with a strong executive (presidency). The changes were made exclusively at parliamentary level with no public participation. The next constitutional changes were in 1965 after the Tanganyika African National Union (TANU); the ruling party had decided that Tanzania becomes a one party state. A Presidential Commission was set up to make proposals as to what type of one party state constitution should be adopted. On the basis of the Commission’s recommendations, the Interim Constitution of Tanzania



1965 was adopted. Besides introducing a one party system, it gave constitutional status to the Union between Tanganyika and Zanzibar.

The Permanent Constitution of Tanzania was enacted in 1977. Just as was the case over the Interim Constitution, there was virtually no popular participation in constitution making.

Due to increasing demand for a comprehensive constitutional review process, the Government appointed the Nyalali Commission to consult the people and advise mainly on the continued viability of the one party system. Although the people of Tanzania by an 80% majority recommended for the continuation of the one party system, as a result of the Commission's recommendation, an amendment deleted the one party system out of the constitution, and, introduced other provisions that were not the result of the Commission's findings. Certain issues remained outstanding such as the problems relating to the Union (*Kero za Muungano*), and while the Commission had recommended a three government system, it was not adopted.

There were further amendments to the Constitution which can be referred to as minimal reforms that lamely attempted to address the popular demand for a comprehensive review.

## **2.5 RWANDA**

Rwanda's history is characterized by years of ethno-based violence immediately after independence up to the mid 1990s. In the period of turmoil, unilateral changes were instituted resulting in the abolition of the monarchy, concentration of power in the executive, introduction of a one party system, plus the suppression of dissent and minority interests. The suppression of the minority degenerated into genocide until the minority led rebels seized power in 1994. Through various power sharing Peace Accords, the rebels incorporated other political groups in a new Rwanda

Patriotic Front (RPF) regime. One of the power sharing Agreements had provided that a new constitution would be enacted by 2003.

The design of constitutional review was through a Constitutional Commission mandated to:

- sensitize the people about the constitution;
- prepare a draft constitution;
- organize a referendum on the draft that would have to be endorsed by parliament; and
- harmonize all laws with the new constitution.

The people were invited to give their views, although there is doubt as to whether they freely discussed substantive issues. There was more focus on national unity, with extra concern over ethnic hegemony over power, and, avoidance of genocide.

The challenges arising out of Rwanda's design are to be appreciated in the historical context of ethnic divisions.

As a result:

- Consultation concentrated on issues of national unity and prevention of ethnic violence plus equitable sharing of power;
- There was lack of a conducive environment for free discussion since political groups had been condemned as contributors to ethnic divisions and genocide.

## **2.6 BURUNDI**

The current Burundi constitution is a result of a post conflict reconciliation process, based on the Arusha Peace Agreement of 2000. To date Burundi has not engaged in a comprehensive consultative constitution making process.

**2.7** A scant background to Rwanda's and Burundi's constitution making experiences was outlined. This is because the two countries, unlike the traditional EAC countries of Kenya, Uganda and Tanzania that shared a common history of British control and legal system, were part of Franco-phone Africa, and thus have a different history.

### **3.0 THE LESSONS FROM CONSTITUTION MAKING PROCESSES IN THE REGION**

The background review of constitution making in the region brings out some lessons as to what may be regarded as important factors towards an acceptable constitutional review process. Some are:

- a) An environment of free discussion and debate. The people, political actors, civil society and the media should be free and be facilitated to reach the public through sensitization and dissemination of information.
- b) The process should be anchored in law, in terms of design, objectives, timelines, organs of review etc
- c) The design of constitution making should be inclusive and participatory. It should accommodate all diversities taking due account of gender.
- d) The process should be transparent. For example, meetings by the organs of review to consult the people should be accessible to all the people.
- e) Consensus should be the guiding principle.

- f) Taking cognizance of the unarticulated driving forces behind constitutional changes since they inform the designing and planning of the constitution review process as well as influence the outcome.
- g) No interest groups, particularly politicians in leadership should be allowed to dominate the process.
- h) The process should have due regard to democracy, should be accountable, and respect the human rights of participants.
- i) While constitution review teams may initially be met with skepticism, they eventually earn the people's confidence by maintaining institutional and functional integrity.

#### **4.0 THE TANZANIA PROCESS**

The design of the Tanzania process is enacted under The Constitutional Review Act 8 of 2011 under which the Constitutional Review Commission was appointed. A Commission to consult the people is regarded as an important step in a participatory process of constitution making. We understand that although the law authorized the President to appoint the members, he consulted widely before he did so. That the Commission consists of equal representation of Zanzibar and the Mainland has further bolstered its image as an inclusive and independent organ. It has also served to underscore the point that the constitution is being negotiated by both parts of the Union from a position of sovereign equality.

The mandate of the Commission is to:

- a) Coordinate and collect public opinions;
- b) Examine and analyze the consistency and compatibility of the constitutional provisions in relation to the sovereignty of the people, political systems, democracy, rule of law and good governance; and

c) Prepare and submit a report.

The law in Section 9(2) sets out the parameters within which the design of review must operate. These include safeguarding:

- a) the existence of the United Republic;
- b) the existence of the Revolutionary Government of Zanzibar;
- c) the Republican nature of governance; and
- d) national unity, cohesion and peace.

These are in addition to the making of proposals for democratic principles of governance, protection of human rights and the existence of the secular nature of the United Republic.

The Commission was required to conduct awareness programmes to consult and to examine and analyze divergent opinions. Consultation was to be done through public meetings in townships, wards, and villages. The process is therefore designed to be participatory.

The Commission informed us that during the first five months of its establishment it went round the country to collect views from the people about the new constitution. The Commission divided itself into 8 teams which visited all the districts in the country. A minimum of three public meetings were held in each district, making a total of 1773 meetings conducted in the entire country. A total of 1,400,000 people attended the public meetings conducted by the Commission and of these 60,000 people provided their views. Those who were unable to present their views during the public meetings had the opportunity to do so by filling in a special form provided by the Commission ( A copy of the Form is attached as an Appendix). The Forms were provided by the Commission at meetings where people were requested to write their views. The views were collected at specific centres at Ward level on the Mainland and at Shehia level in Zanzibar in every Local Government Authority. The Form required personal details such as name, age, gender, profession, residence, educational level; other information such as one's province, district, village, station at which the views were presented and space for

one's views on the new constitution. A total of 300,000 people gave their views between July and December 2012.

Beginning January 2013, the Commission met with key institutional stakeholders who included the 19 political parties; leaders of the major religious denominations namely Christian, Muslim and Hindu; and a cross section of civil society organisations which were classified into 42 clusters. In addition, 42 of the country's major leaders, both in service and retired, including former presidents and prime ministers, were interviewed by the Commission.

The Commission was also privileged to have had its capacity built through discussions held with various international experts.

In February 2013, the Commission began analyzing the views collected and within a period of 4 months came up with the first Draft Constitution, which was launched on 3<sup>rd</sup> June 2013.

The Draft Constitution was subsequently discussed by the people in constitutional fora (Barazas). Each district elected a constitutional fora which totalled 174. The fora were attended by representatives elected at Ward level. Each Ward had 5 representatives including the Ward Council. The Commission divided itself into 14 teams which went to each constitutional fora for a period of at least 3 days, moving from district to district. The three days at the fora were devoted to an introduction and overview of the Draft Constitution; group work; and a plenary session at which people gave their views and held discussion about the Draft Constitution.

Views were also submitted to the Commission through institutional fora. Organisations or institutions that wished to form a Council were allowed to submit applications to the Commission and which upon approval, submitted their views. A total of 500 institutions and organizations applied to form councils and were approved. However a total number of 614 submissions were received by the Commission.

The Commission will analyse the views from the fora and revise its first Draft Constitution. The Commission will also prepare a report. Both the report and the revised Draft Constitution will be submitted to the President, who will within a month, cause them to be published in the Gazette and call the Constituent Assembly. The Commission will present the Draft Constitution to the Constituent Assembly. The Commission was hopeful that it would execute its mandate in time and deliver a new constitution by the end of the year.

#### **4.1 COMMENTS ON THE PROCESS**

Although the law did not specifically mention the education role on substantive constitutional issues, the Commission took the wise decision to undertake the sensitization.

The Team noted some misgivings from the public about the process. For example, some people accused the Commission of posing leading questions. The team also noted that the Form for submitting views from the public did not allow for anonymity as contributors were required to give very detailed personal information which could have prohibited free expression of views. We were not able to conduct interviews with the people but inferred from information from the Commission that the Form used by the Commission was otherwise open ended.

Two institutionalized forms of consultation were provided for . The first is consultation through peoples' fora (Barazas) Under the Review Act; *Fora* for constitutional review have been a medium for providing opinions on the Draft Constitution. The Review Act authorized the Commission to form *Fora* on an ad hoc basis, taking into account the geographical diversity of Tanzania and the need to involve people of diverse interests and groups in the communities.

The *Barazas* have therefore been very important organs of constitution making. However, for the purpose of inclusivity and acceptability, the

formation of *Barazas* ought to have been democratic and transparent. **We understand that the process of forming the Barazas on the Mainland was not satisfactory. This is because, according to different interest groups, members were screened by Ward Development Committees (WDCs) which are dominated by one political party, Chama Cha Mapinduzi (CCM). If this is true, it may lead to a perception that the views from Barazas are unduly influenced by the dominant party which is a challenge to the acceptability of the result. Democratic and transparent** participation of the people in forming *Fora* would have enhanced the acceptability of the process and added value to it. For purposes of inclusivity, public gatherings should extend to as much geographical and thematic coverage as resources can allow. Although, gatherings are more focused if key players, such as political and religious leaders, elders and civil society attend, the meetings should be freely accessible to the people of the locality. This is to ensure a participatory process whose results can be owned by the people.

The Kenya process had an equivalent mechanism which consisted of the Constituency Constitutional Forums. The geographical location of the Forums was the constituency. Forum Committees were established in the 210 constituencies then duly demarcated. They were the focus point for organizing debates, and collections of views from the members of the public (Review Act 2000 S.20). The advantage of this arrangement was that every part of Kenya was reached.

Just as in Kenya, Uganda's process did not have an institutionalized mechanism for discussing the Draft Constitution generated by the Commission, save for the Constituent Assembly. The local government structures from the District to the Parish were the focal point for sensitization as well as collection of views. Written memoranda were collected from all levels. But, every person or organization was free to forward views to the Commission directly or through the media. Tanzania's design is, therefore unique, in that foras have the Draft to comment upon which makes transparency an important component of the process.



Tanzania should remember that the remaining stages require full commitment, generosity and sincerity as experience in other jurisdictions show that constitutions are brokered through negotiations that achieve consensus and in the least compromises.

The second form of institutionalized consultation has been through the activities of individuals and civil society. Any person or organization wishing to conduct awareness programmes on constitutional review must register under the relevant laws and must disclose sources of his/their funds. Failure to do so constitutes an offence punishable by a fine of not less than TzShs.5, 000,000/= and not exceeding TzShs.15, 000,000/= or imprisonment for a term of not less than three years.

The objective of the above provisions appears to be avoidance of foreign interference or influence in what should appropriately be a home grown process. It is doubtful however, whether the objective can be achieved by placing strict fetters on the freedom of individuals and civil society to fully participate in, and influence the review process. The parameters for the debate are defined by law. It is therefore possible to detect and prevent the pushing of anti-people agenda. **The process would have been more facilitative if the legal requirement had stopped at notifying authorities of the planned events and refrained from criminalizing activities which creates fear, and a hindrance to free participation. It is hoped that the Commission as was the case with the COE in Kenya, designed the tools used during the awareness creation campaign to avoid distortion of the intended message/information.**

#### **4.1.1 The Constitutional Assembly**

The design for finally adopting a constitution is of critical importance to its legitimacy. From the background, it has been shown that the ideal design is for a representative body to debate a draft and promulgate the constitution. A referendum is a recent development in the region.

The Review Act has provided for a Constituent Assembly which will comprise:

- a) All members of the National Assembly of the United Republic of Tanzania
- b) All members of the House of Representative of Zanzibar
- c) One hundred and sixty six members drawn from:
  - i) Non-Governmental Organizations;
  - ii) Faith based organizations;
  - iii) All fully registered political parties;
  - iv) Institutions of higher learning;
  - v) Groups of people with specific needs;
  - vi) Workers Associations;
  - vii) An Association representing farmers;
  - viii) An Association representing pastoralists;
  - ix) Any other group having a common interest.

It may be noted that the original version of the Act did not provide mechanisms for election/selection of the members of the Assembly of the above categories and the numbers to represent each group. A subsequent amendment has clarified that these will be appointed by the President. **The ideal is for the President to consult the interest groups and select from their lists of nominees. This is to enhance the participatory nature of the process.** According to the amendment, each of the interest groups will forward not more than nine names of persons from which the President will select three delegates. The other check on the President's discretion is that he must consider the qualifications and experience of the nominees as well as the gender factor.

It is not clear from Section 26 (2) whether every decision at the Assembly must be supported by a two-third majority of the total members from Zanzibar as well as Tanganyika, or whether it is only the entire draft that must be approved by such majorities. If it is the former, it might be difficult for decisions to be made. **It is not clear why consensus from each side**

**is not a guiding principle with a vote reserved for contentious matters where consensus fails. The amendment on the procedure of decision making introduced by the Constitutional Review (Amendment) Act 2013 does not address this issue satisfactorily.**

Several other challenges arise out of the legal provision for the Constituent Assembly. First is the question as to whether both parts of the Union should be equally represented as has been demanded by some pressure groups mainly from Zanzibar. From the standpoint of sovereign partners proposing a federal union, the demand would be justified. At the very least, there ought to be equity of representation. Indications are that by virtue of the Mainlanders' majorities in the Union Parliament, Zanzibar will be under represented in the Constituent Assembly. The Union Parliament has a membership of 357, a minority of whom are from Zanzibar while the Zanzibar House of Representatives is 81 strong.

The second challenge arises from the involvement of members of the current legislatures. There are fundamental objections to the involvement of politicians sitting in the current parliaments.

- i) Just as was argued against the proposed Constituent Assembly for Uganda, members of parliament are people's representatives but they were not elected with the specific mandate of bringing about a new basic structure of governance. Making a constitution is not an ordinary legislative act. A constitution "deals with many issues which are the concerns of the wider community of citizens including, the vision of the country, honest and effective administration, protection of the individual and communal rights, social justice and fairness, the rights of the disabled, safe custody of the environment and the welfare of future generations". (Y Ghai) These are matters that should be decided upon by a broad cross-section of the country. Experience has shown that sitting political leaders' interest in constitution making is usually blinkered, concentrating on

mechanisms for access to power and the prospects of securing that access.

Prof. Ghai was the overall chairperson of the BOMAS process in Kenya. According to him almost half of the Members of Parliament barely ever entered the National Conference. Those who participated showed interest in only the structure of government, the election system, and devolution. The politicians had a common stand in all matters that affected their interests, thereby scuttling some proposals for accountability, the determination of parliamentary salaries, and the right of the electorate to recall their member of parliament.

- ii) This leads to the second objection to involving members of parliament in the Constituent Assembly. A number of proposals in the Draft have an impact on their interest. These include, the limitation on eligibility to stand for election, and the possibility of being recalled by the electorate, and the fact that they will not be able to serve as ministers in the proposed presidential system. A free Constituent Assembly could propose more. This cannot be expected of the Assembly as proposed because it will be dominated by the affected group.

**It would add value to the process if the law is reviewed** to provide for a directly elected Constituent Assembly with provision for the representation of special interest groups being the “youth” and the people with disability. There are lessons to be learned from the Kenyan and Ugandan experience namely:

- A large and unwieldy Assembly as proposed does not serve the purpose.
- Where an existing electoral body carries question marks, the alternative is an interim/special commission to organize the

elections (Could the Review Commission itself perform this task?)

- to the Constituent Assembly and the referendum if any .
  
- The formal role of promulgating the constitution after the Referendum (without debate) could be reserved for the parliaments. As a result, by law, current members of parliament should be disabled from standing for elections for the Constituent Assembly. Experience in Uganda shows that members of parliament who won elections to the Constituent Assembly had their political interests in the forefront in some cases, disregarding the merits. An example is the decision to have the presidential and the parliamentary elections on different days in the face of overwhelming advantages of same day elections.
  
- Decisions should be by consensus except where a matter becomes contentious, whereupon special majorities voting could be adopted.

#### **4.1.2 Referendum**

The final proposed stage of public participation is through a referendum. The Act provides for a referendum to be conducted by the sitting Electoral Commission of the Union, and, of Zanzibar. The Constitution has to be approved by a “yes” or “no” vote. The vote shall be carried by absolute majority in both Zanzibar and in Tanganyika with the possibility of a re-run. The Electoral Commission shall, and the political parties and civil societies may provide civic education and advocacy on the proposed constitution during a period that will be fixed by the Commission. It does not appear that the provisions are permissive of two parties to the question with the possibility of generating campaigns for or against. This should be explicitly provided for.

A referendum on a proposed constitution has several problems. The first applies to referenda generally, in that they hardly decide the question posed. Experience has shown that canvassing referenda takes on other issues, usually the credibility of the government at the time of the vote. This has been the case in referenda on abortion in Ireland and the referenda on various European Community issues in Europe. Nearer home in Kenya, the referendum on the Proposed New Constitution (WAKO Draft) was just slightly more focused. It was focused in the sense that a section of the opponents prepared to campaign against the Draft on its demerits compared to the achievements made at BOMAS. They criticized the provisions that strengthened the presidency, weakened checks and balances, and brought in a system of devolution that denied power to the people. They were supported by those whose objection was based on the legitimacy of the process after the popular process had been abrogated.

Eventually the campaign degenerated into political battles amongst the dominant political groupings and not the merits of the Draft. The alliances for and against clearly reflected the contests at the previous election of 2002; a preparation for the next electoral contest. Even the vote was a reflection of the ethno-based support of the contestants. The achievements were a loss of credibility by the government and a sharper division of Kenya along ethnic lines; the precursor to the post election violence of 2007.

Another problem is that a constitution has a multiplicity of issues. It is a compromise and not a tight Agreement. A consensus that is the result of a widely consultative and participatory process on multiple issues should not be rejected by a "No" vote, nor can a "Yes" indicate the majority's acceptance of each and every provision in the constitution.

On the other hand is the proposition that a referendum is the ultimate exercise of sovereignty. Over the Constitution a referendum would signify acceptance and ownership, the foundation upon which constitutionalism

can be built. But the participatory nature of the review design and an elected Constituent Assembly can ensure this without the necessity of a resort to a vote.

If Tanzania insists on a referendum, it may proceed with it well knowing the challenges involved. For emphasis, it is worth restating that the law has not clearly provided for opposing parties to the referendum question. Democracy demands that those who will be unhappy with the draft are free to campaign for a “no” and they should be facilitated to do so.

A referendum should be held on only such issues that the Assembly fails to agree upon even by special majorities.

### **4.1.3 The Union**

#### **4.1.3.1 Brief history of the Union – Articles of Union and why Union in 1964**

The United Republic of Tanganyika and Zanzibar was formed on 26th April 1964 as a result of an agreement between the two leaders- Julius Nyerere and Abeid Karume respectively. The United Republic of Tanganyika and Zanzibar eventually became the United Republic of Tanzania (URT) on 29th October 1964. The Union brought together two separate and independent states of Tanganyika and Zanzibar- Tanganyika having gained independence in December 1961 and Zanzibar on 10 December 1963. The Union also came 100 days after the 12 January 1964 Zanzibar revolution in which Africans revolted against the Arab dominated government that saw the Afro Shirazi party (ASP) under the leadership of Abeid Karume take over power.

#### **4.1.3.2 Why Union in 1964?**

Though portrayed as a step towards pan Africanism and particularly East African Federation, the Union was more fundamentally a result of the cold war. Following the 1964 Zanzibar Revolution, there was a fear within the region that the volatility in Zanzibar could spread to Tanganyika and

indeed the whole region. It is also further argued that the chaotic state in which Zanzibar was after the Revolution forced Karume into the Union as a means of securing Nyerere's assistance and protection, both for Karume as a individual and for Zanzibar. In the event, pressure was brought to bear by Britain and the USA for President Nyerere to rescue the situation by Tanganyika absorbing Zanzibar.

#### **4.1.3.3The actual/perceived challenges**

Overall, Union matters entail a lot of conceptual, legal, constitutional, political and operational complexities.

- a) The formation of the Union was associated with haste, secrecy and lack of consultation with the people. The Articles of Union are shrouded in secrecy and suspicion as they are not known by the majority of leaders including parliament and the population. It is also not certain that the original copy is available. Even worse, is the accusation that discussion of the Articles of Union was taboo till Mkapa's presidency.
- b) The legality of the Union has been continuously questioned. Although the Articles of Union constitute the legal basis of the Union, and should have been ratified by both Tanganyika and Zanzibar, no evidence points to ratification by Zanzibar. Their legality solely relies on the ratification by the mainland government and its subsequent appearance in the mainland gazette. Thus the Union exists *de facto* and was a political agreement between the two leaders.
- c) Even if ratification and therefore legality of the Articles of Union was to be assumed, they have been consistently breached:
  - For example:  
The Interim Constitution (Art 3) was to last for only one year and make way for a permanent constitution. This was never done. Instead, a Bill tabled in the Union Parliament extended the interim period indefinitely.



One concern is also the constitutionality and legality of the increase of Union matters, as well as the acceptability and political consequence of the increase.

The list of Union matters is said to have been unilaterally expanded from the original 11 provided in the Articles of Union to 22 in 1990 and allegedly 32 if listed individually rather than 22. It is argued the Articles of Union did not provide for such expansion; and that it was illegal since Zanzibar was not consulted. The majority of Zanzibaris irrespective of political persuasion deem the expansion as intended to undermine Zanzibar's autonomy and legitimacy. On the other hand, some expansions were said to have been done at the initiative of Zanzibar e.g. higher education.

- d) The current structure of the Union raises a number of issues. The structure consists of two governments- the Union government and the Zanzibar government; but three exclusive jurisdictions since there is no provision for a government for Tanganyika.
- i) The first concern is that Union and non -Union matters are lumped together.
  - This has created a number of problems, which raises issues of conflict of interest in their management. Some ministries merge portfolios of both Union and non-Union matters as is the case with broadcasting and telecommunications.
  - Another issue is the appointment of a Zanzibari as minister to a ministry dealing with Union matters.
  - A single transaction may entail both a Union and non Union mandate which makes it difficult to practically isolate. For example, the process of arrest, prosecution and adjudication - arrest and investigation is a matter of internal affairs and is a Union matter; prosecution and adjudication are non-Union functions; while imprisonment is a Union matter.

- ii) There is no distinct budgetary allocation for the Union government and Tanzania Mainland. Non- Union matters for the mainland are treated as Union matters and are managed as such in terms of sources of revenue, budgeting etc which causes confusion.
- iii) There are definitional issues regarding what a Union matter is. For example if the item is harbors, does this refer to the business or regulation of harbors? Also in practice, items have been considered Union matters as a result of implementing Union matters. For example, if immigration is listed as a Union matter, visa fees imposed would be Union revenue.
- iv) The fusion has undermined Zanzibar/Tanganyika's identity. From the Zanzibar perspective, the fusion cost Zanzibar her sovereignty since it cannot transact, negotiate or treat regionally or internationally. Conversely, those on the Mainland argue that the two government structure is at the expense of the mainland, that Zanzibar never lost its statehood, government, president, while mainland did. Further that there are Zanzibar ministers in the Union government but no mainlanders in the Zanzibar government and similarly that there are members of parliament from Zanzibar in the Union Parliament but no mainlanders in the Zanzibar House of Representatives.
- v) The Union structure has been managed as a purely political system than a constitutional one. While issues of the Union and its structure could be resolved through the one party system, the structures and law were not amended to suit the post 1992 multiparty system. For example the political instability in Zanzibar was attributed to the Union structure under which CCM had to rule both sides of the Union as the structure could hardly accommodate 'discordant' governments.

- vi) Zanzibar's minority seats in the Union Parliament means laws are passed against the wishes of Zanzibar.
  
- vii) There are administrative issues relating to the relationship between Union ministries and Zanzibar ministries. Ministries that deal with Union issues have no offices in Zanzibar, which denies people in Zanzibar access to them. A counter argument is Zanzibar's rejection of some Union institutions when they go to there. i.e. The Revenue Authority and Communications Commission.
  
- e) Resources, Finances, and Economy
  - i) Foreign aid is solicited and received in the name of the United Republic, of which Zanzibar receives little or none in respect to non-Union matters. In the reverse, mainlanders contend that Zanzibar does not contribute to the Union.
  - ii) The sharing formula of revenues of 4.5% for Zanzibar is considered inadequate.
  - iii) Zanzibar argues that is not allowed to exploit and be in control of the little resources they have.
  - iv) There have been complaints of double taxation of goods of Zanzibaris, in both Zanzibar and the mainland.
  - v) There are complaints that the Union government bears all costs of collecting revenue in Zanzibar (by the Tanzania Revenue Authority) yet TRA remits all revenues collected to Zanzibar; that Zanzibar maintains its own foreign currency account in its own People's Bank rather than with the Central Bank, the result of which Zanzibar does not contribute to costs of the Union; and that Zanzibar benefits from foreign loans without contributing to their repayment.
  
  - vi) Mainlanders also complained of lack of reciprocity on the part of Zanzibar- That although the Union provides a market for Zanzibar goods and that Zanzibaris mainly from Pemba own land and invest in businesses on the mainland; mainlanders cannot easily own land in Zanzibar.

- f) Although partners in the Union should be expected to participate equitably in decision making and involvement in Union matters generally, no structure exists to discuss Union problems.
- i) The Union Cabinet makes the decisions. Yet, the minority number of Zanzibaris in the Union Cabinet cannot influence decision making and arguably, the Union Cabinet often passes policies that disfavor Zanzibar.
  - ii) Whenever Union matters have been raised, government has referred them to committee or commissions which have not solved them (a total of 45 commissions have been established since the inception of the Union; on average, one every year!).
  - iii) The Constitutional Court an ad hoc court, established to handle issues relating to the Union has never been invoked.
  - iv) While the Committee of the Vice president, a joint ministerial committee of standing nature set up to deal with Union issues, and chaired by the Union vice president has registered some successes, it lacks legal or constitutional backing. It is merely advisory and relies on the good will of the Union government to have its decisions implemented.
  - v) Skepticism also surrounds the ability of the Joint Finance Commission to handle its mandate namely determining Union revenue, exploring all sources of Union revenue and examining its collection; determining a formula for sharing of revenue. Apart from having taken 40 years to be established, its report on revenue sharing submitted to both governments in 2006, had by 2010 only been discussed by the Zanzibar government and not the Union government.

- g) Representation of Zanzibar at the EAC
- i) The dissolution of the defunct EAC saw to the expansion of the Union issues from the original 11 issues, and provided a springboard for the absorption of Zanzibar's autonomy, since all the matters formerly run by the EAC became Union matters.
  - ii) Currently, foreign affairs is a Union matter. Thus in international relationships, the United Republic is the recognized entity. As such, Zanzibar lacks the capacity to negotiate and treat internationally including sub-regionally with the rest of the partners in the EAC.
  - iii) Zanzibar is aggrieved by the fact that it did not get its share of the assets of the East African Currency Board. When the Board was dissolved in 1966, every country was paid its share but Zanzibar's share was given to Tanzania. These funds believed to constitute 12% of the capital of the Tanzania Central Bank, were used to launch the Central Bank. The issue is also linked to Zanzibar's desire for a separate currency.
  - iv) Zanzibaris feel that they are not effectively represented at the EAC. The major area of inequity with regard to Zanzibar's participation in EAC affairs stems from inadequacy of internal consultation procedures; unfamiliarity of the Union Government with the Zanzibar situation and its needs; and the small presence of Zanzibaris in the Union government, which has led to Zanzibar having no voice.
  - v) In addition to the Union government lacking mandate to deal with non-Union matters within the EAC, the bigger problem is that the majority of the issues dealt by the EAC are non-Union matters, whose jurisdiction lies with Zanzibar.
  - vi) Consultations between the Zanzibar government and the Union government on EAC matters prior to EAC meetings are ad hoc and

poorly conducted, with reported gaps in information flow between the relevant ministries and the Zanzibar government. Sometimes Zanzibar government officials are unable to attend EAC meetings due to lack of funds. But even when they attend, they have no power to make representations directly to the EAC since it is the United Republic which represents the country. This is the case despite having some Zanzibaris as members of EALA.

## **5.0 COMMENTS ON THE PROVISIONS IN THE DRAFT CONSTITUTION**

The comments below are not exhaustive of each and every provision in the Draft Constitution but are based on an assessment of the extent to which the Draft Constitution embraces:

- a) constitutional principles such as separation of powers, rule of law, answerability and accountability;
- b) democratic values including gender sensitivity;
- c) issues of regional integration including Zanzibar's role in the EAC Integration process.

### **5.1 UNION**

- a) **It is apparent that the Draft Constitution makes a conscious effort to address the above problems affecting the Union (Kero za Mungaano).** It is also a positive development that the Draft Constitution provides for a federal structure with three governments with generally a clear demarcation of functions than before.
- b) Nevertheless there are still issues that either require further explanation or need to be provided for:

### 5.1.1 Nature of Union

i) The review process is premised on the existence of the Union (Section 9(2) (a)) of CRA and should the Draft Constitution fail, the Constitution of 1977 and therefore the Union in its current form shall remain in force. The Union is therefore a given.

#### ii) Tanganyika

Though for the first time the Government of the Mainland is provided for, the name Tanganyika is omitted and it is referred to as Tanzania Mainland although its counterpart is not either called 'Zanzibar Tanzania' or 'island of Tanzania'. This is in spite of allusions to Tanganyika in the preamble and elsewhere. The Draft should expressly refer to Tanganyika and Zanzibar as they existed in 1964.

In **Article 2**, in defining the territory of the United Republic, the Draft seems to regard the Mainland as assumed, basic, without the need to specifically mention it; but Zanzibar has to be mentioned as 'included'. This appears to undermine the principle of sovereign equality embedded in a federation. There is need to attend to the sensibilities of Zanzibar in this respect.

#### iii) Articles of Union

The Articles of Union of 1964 seem to be carried forward by **Art 1 (1)**. These perhaps now need to be superseded by the Constitution – otherwise then the approach to the new Federation should be fully by way of an international treaty just like the Articles of Union were.

#### iv) Revolutionary Government of Zanzibar; House of Representatives

The State government for Zanzibar is given this specific form, freezing it in a particular stage of history yet the same Draft does not refer to the existing Constitution of Zanzibar but rather one that

will be made, **Art 57(3)**. Reference to these institutions should be generic. How the institutions should be referred to in specific terms will depend on the constitutions of the Partners.

**v) State Constitutions**

Several matters in the Draft Constitution are dependent on the state constitutions. For example under **Article 60 and 56** local government is a non- Union matter yet under **Article 105(3)** every region on the Mainland and every district in Zanzibar shall be a constituency. Suppose the new state constitutions increase these – what will happen to the size and proportionality in the composition of parliament? What if Zanzibar changed its name and has it in its constitution? What will the people be approving in the referendum if the constitutions of the partners are absent?

It is not sufficient as **Art 56** states, that State Governments shall derive their authority from democratic elections. Moreover, under **Art 109** the three Constitutions seem to be co-equal. There is no express nullification of partner constitutions for inconsistency with the Federal Constitution.

**It may be appropriate to have the constitutions of the partner states made, in order for them to become schedules to the new Constitution, or at least to provide for a clear framework on how and when and under whose supervision they should be made. The Zanzibar Constitution has to be modified in accordance with the federal constitution. Alternatively, the Union constitution could provide for a minimum content for the other constitutions. An example is the constitution of South Africa which provides for the parameters within which the constitutions of the Provinces must fall. Provincial legislatures were empowered to make constitutions for the Provinces. Under section 143(1) “A provincial constitution or amendment**



**must not be inconsistent with this constitution, but may provide for:**

- Provincial legislative or executive structures and procedures that differ from those provided in this chapter; or**
- The institution, role, authority and status of a traditional monarch where applicable.”**

**Under sub-section (2) of the section, a provincial constitution must comply with the national values enshrined in the constitution as well as the provisions of chapter 3 which deal with cooperative governance amongst the various levels of government. The constitution deals with possible conflicts by providing that a provincial constitution may not confer on the province any power or function that falls outside the area of its competence. However, the South African constitution is unique in that the chapter on provinces sets out legislative and executive structures that can apply without a need for a province to enact its own constitution. Kenya’s County governments are governed under the constitution. But, because Counties have legislative powers, the constitution provides for possible conflict of laws.**

**In our view the Draft suggests a confederation arrangement. In a federation, the Federal Constitution must be declared supreme without any qualification. Partner State constitutions should conform to the Federal Constitution.**

### **5.1.2 Union and Non- Union matters**

- a) The Draft Constitution attempts to make a clear demarcation between the functions of the Federal and State Governments. The list of Union matters is a relatively limited one, conceding the control of such things like land and natural resources to State Governments. This must be a welcome move at least to Zanzibar that was especially sensitive to the**

expansive nature of Union matters such as land and oil. **To enhance the clarity of demarcation of functions, Union matters should be stated in functional terms like was done in respect of Item 6 of the schedule (Registration of Political Parties).**

b) Nevertheless there are some issues which could be considered for review:

i) **Article 62** confers competency on Partner States to establish relations or cooperation with regional / international Community or organizations (in respect of Non- Union matters) (and this may be in cooperation with the Federal Government). **Art. 214** confers power on State Governments to raise external loans.

**There is need to clarify if this confers some external sovereignty on these States in view of the fact that the schedule includes foreign relations in the Union matters.**

ii) **Article 107** requires parliament to deliberate and ratify all agreements concerning resources and natural resources which are under the oversight of the Federal Government. **How would this arise under the division of functions?** Resources and natural resources are not listed as Union matters. Will this apply to what is envisaged under **Article 59(3)**? **Art 59 (3)** grants the Government of the United Republic in agreement with the Partners powers to discharge any function under the authority of the Partners.

**The Article brings about ambiguity as to which natural resources will be under the oversight of the federal government.**

iii) **On academic qualifications**

Many offices require a degree recognized by the **accreditation authority of the United Republic**. But education, now, including higher education is a non-Union matter which infers that each Partner may have its own accreditation system and standards may therefore differ.

Indeed, under **Art. 17**, the National Assembly is supposed to enact a law on curricula for ethics and citizenship and constitution in schools and colleges. Furthermore, there may not be a Federal Accreditation Authority as such.

- iv) Under **Article 112**, the Union and Union matters are entrenched provisions requiring a referendum to amend the Constitution in respect of them.

If it is envisaged that the Union may be brought to an end through a democratic process- a referendum- then **Art 186** should not outlaw a party that advocates for the breakup of the Union e. t. c.

### **5.1.3 Equalization and Proportionality**

The Draft Constitution appears to variously apply the principles of equality and proportionality with regard to state organs, certain offices and the public service.

- a) **Article 61** provides for the equality of the federal states. Equalization is applied to Ministers and Deputies (**Art 93**); President/Vice President (**Art 87**), Speaker/Deputy Speaker, Chief Justice and Deputy Chief Justice.

It is not clear whether Parliament is equalized (Mainland has 25 regions while Zanzibar has 10 districts).

**Equal representation in parliament can only be achieved in another legislative organ such as Senate. Senate usually consists of elected members which might not be attractive on account of the costs. An alternative could be a “National States Council “comprising of a few equal numbers of delegates elected by the State Assemblies. The Council would deliberate on Union matters**

**as they impact on the States including approving the sharing of revenues amongst the two levels of government. The Council could also be the liaison point for the proposed Commission on governments 'relations. The alternative of granting veto powers to Zanzibar on some issues could give rise to acrimony.**

- b) The principal of proportionality is expressly stated or implied in respect of the secretariat of parliament; the quorum of justices of the Supreme Court when hearing certain matters (**Art 149**), Justices of Appeal (**Art 158**), Judicial Service Commission (**Art 173(3)(b)**), Public Service and leadership in the United Republic, independent Electoral Commission and the Bank of the United Republic.

**The issue of equality is a matter that the Mainlanders are likely to be sensitive about while Zanzibar is likely to be sensitive about proportionality. Thus what proportionality means and the factors to be taken into account to reflect proportionality need to be reconciled and clearly stated. For example is proportionality based on population? These factors could be highlighted in the definition section.**

**The constitution should address itself to a situation where proportionality cannot be fulfilled.**

- c) There is no express provision in balancing the positions of Chair and Vice Chair in respect of the Independent Electoral Commission. With respect to the members of the Independent Electoral Commission, the principle applied is proportionality rather than equality.

#### 5.1.4 Managing the Union

a) **Resident Ministers (Art.64)**

The objective of Article 64 as well as chapter 8 appears to be the bringing about of cooperative governance amongst the levels of government. However the proposed institution of Resident Ministers detracts from a genuine federal arrangement and is more in character with an intergovernmental arrangement, without giving up sovereignty.

b) **The Commission for Government Relations and Procedure Chapter 8**

Similar arrangements aimed at cooperative government have been employed before but were not effective, and were hardly implemented. The proposed innovation is the legislative provision for the Commission. Nevertheless, the proposal is unlikely to be effective unless it is separated from the office of the Vice President.

**The Commission needs to be divorced from the Vice President's office. It should be an independent Commission of government functionaries or technocrats than politicians in order for it to effectively undertake its mandate.**

c) **Article 104(1)(e) and (2)** refer to reconciliation and settlement of disputes between the Federal Government and State Governments and interstate disputes on non-union matters and provides for an appeal to the Supreme Court.

It is not clear whether such disputes include ordinary commercial or other legal disputes- in which case the jurisdiction of ordinary courts would be ousted and the Supreme Court would be a court of first and last instance on the issue. This applies to **Article 149(1) (c)**.

d) **Allocation of Resources**

The Draft Constitution Art 214 (4) (c) and Schedule on Union matters specifies the source of revenue for the Union Government but not that

of the Partner Government. If it is assumed that the Partners shall have power to raise revenue from non-Union sources, that could lead to a free run and chaos in revenue matters. The Partner's proposed functions are very expansive and can only be performed with guaranteed sources of revenue without endangering national, regional, and international policies, plus equity of tax burdens. There is a need to define the parameters within which the revenue generating powers of the Partners can be exercised. The Draft should also provide for mechanisms for sharing the revenue collected at Union level.

**A constitutional formula for sharing revenue should be considered because some of the money at the centre will be from both parts of the Union. Besides the current 4.5% ratio has been considered inadequate.**

**An organ responsible for revenue allocation is also an option that can be considered. In Kenya (Art 215 of the Constitution, a Commission to take care of revenue allocation between the national and county governments was provided for as well as an equalization fund(Article 204).**

#### **e) The Cost of Federation**

##### **Three Governments**

Besides the Partner Governments, inevitable devolution from Partner governments to lower levels will imply increased expenditure. This is especially so if the Partner constitutions replicate what is at the centre in terms of portfolio. This may mean an increased tax burden for the people. There shall be a need to cost the proposed federation as structures and procedures of governments are conceived.

## 5.2 CAPITAL AND SEAT OF FEDERAL GOVERNMENT

The draft eschews the matter of the Capital and Seat of the Federal Government – although elsewhere (**Art. 64**) a reference is made to the ‘seat of the Federal Government’. The assumption is that the capital should be federal territory as is the case of Abuja and Washington DC. Provisions for the law applicable in the territory should be made.

## 5.3 CITIZENSHIP

**Chapter V** provides for citizenship by birth and by registration.

a) However certain other issues require consideration:

i) No dual citizenship. It is not explicitly stated but this is implied by 56 (4). This may be problematic with increasing globalization and practice in the EAC region. **There is need for dual citizenship to be included in the Draft Constitution. In order to take care of fears of divided loyalty in case of dual citizenship, certain sensitive offices such as the presidency may be ring fenced for single citizenship. In Kenya, dual citizenship excluded the defence forces and state officers (Article 78).**

ii) There are matters that are not sufficiently clear about citizenship.

- **Article 56** stipulates that citizenship by registration will be based on residence qualifications based on state laws. So is citizenship by registration a Union or non- union factor or both?

**As earlier** stated the equalization and proportionality principle is based on catering for people from partner states. It is not clear what this means; is it a reference to residence

or being born in that state, is it domicile and is it left to the partner states or the Union to determine?

- Both **Article 28(1)** on freedom of movement and freedom to live in any part of the United Republic and **Article 37** the right to birth certificates, national identification and travel documents do not provide sufficient guidance on this. It is a matter that Zanzibar has been sensitive about in the past. It is also a matter in the past that has been contentious in respect of elections in Zanzibar. On the other hand, Zanzibar's requirement of a residence permit would also be contentious for mainlanders and is likely to invite retaliation. **The need to have all three constitutions at the same time is re-emphasized for purposes of clarifying issues of citizenship.**

iii) Number of offices restricted to citizens by birth and at least one of whose parents is a citizen by birth. These include President, Vice President, Minister, Deputy Minister, Attorney General, chairman, deputy chairman and members of Independent Electoral Commission. While this may be justified in the case of the president and his vice, extension to other offices tends to be discriminative.

iv) **No citizenship by naturalization:**

Given the nature of our borders and to a great extent the artificiality of the colonial state as well as uneven development brought about by colonial policies, political and other instabilities, in most countries there are groups of people who migrated to work or seek refugee who are not citizens by birth and may not have registered. The Draft Constitution can render such group of people and their next generations stateless. **A cutoff date could be an option.**



- v) Article 56 (2) needs clarity on the qualifications of marriage for instance the period, so as to prevent abuse of the facility through ‘marriages of convenience’.

## **5.4 DEMOCRATIC PRINCIPLES**

### **5.4.1 Human Rights**

With respect to the provisions for human rights, our observations are as follows:

- a) **Drafting limitations against specific rights as they are declared (eg. Articles 27, 28, and 30) gives the impression of denying those very rights that have been declared. We say so well recognizing that some rights are not absolute, and, may have to be limited. However, it is neater drafting if there are no claw back clauses against each provision that spells out a right. Instead, the rights should be left as declared but a general/yardstick clause guiding limitations is provided. This is what Article 53(1) of the Draft has sought to do. Our observations on this Article are twofold. First, it is not neat drafting to retain the limitations on individual rights when Article 53(1) applies to all rights generally. Secondly, and this we must concede may be due to inaccurate translation of the Article from Swahili to the English version which we have read, the Article is not very clear on the tests of the validity of a limitation. By our version, we find some vagueness in the tests under sub-clauses (e) and (f) of the Article. We find the formulation based on limitations justifiable in a free and democratic as elaborated particularly by Article 24 of the Kenya Constitution attractive. (Uganda Constitution (Art 43 (c), South African Constitution – Art. 36).**
  
- b) **We also propose for inclusion a clause prohibiting limitations of some rights (the right to a fair hearing, freedom from torture,**

**slavery, or servitude and other degrading treatment) which by their very nature must not be limited.**

- c) **The provision on access to information should include an obligation on government to provide and release information in order to promote open government (Art. 62 of Zimbabwe's Constitution, Article 32 of South Africa's Constitution, Article 35 of Kenya's Constitution and Article 41 of Uganda's constitution).**
- d) **Rights of women: should include the right, not only to participate in politics and governance, but also the right to be protected from marginalization and oppression.** The right to equal treatment in employment is very important. We propose that Article 46 (1) includes a clause to read: every woman has the right to...(d) be paid equal salary as a man for similar work/kupata ujira sawa na mwanamme katika kazi zilizo sawa. (Uganda Constitution - Art. 40 – (1) Parliament shall enact laws – (b) to ensure equal payment for equal work without discrimination;...', Art. 65 (6) of Zimbabwe Constitution – 'Women and men have a right to equal remuneration for similar work.')
- e) **In African communities, the family as the fundamental unit of society is an important institution provided for in the constitutions. Provision is usually made for the right of, and rights in, marriage, plus the recognition of the particular positive customs and cultures relating to the family. Much as we would want the inclusion of family rights, it may well be that they were considered but left out for good reasons.**
- f) **A child, a youth, an elderly and disability should be defined. (See for example Article 260 of Kenya's Constitution)**
- g) **Economic, social –cultural rights are absent. Rights such as to health, food, shelter ; and the right to administrative justice are included in international instruments such as the African Charter on Human**

and People's Rights to which Tanzania is a party. It is a positive development that these rights are to be indirectly incorporated in the Constitution by Article 51. This, in our view cannot be the reason why they were omitted from the Draft. It is possible that they were left out deliberately due to peculiar circumstances of Tanzania and the difficulties of implementation. It is our view however, that these rights form the core of the people's aspirations and their expectations from government. They ought to be seriously considered for inclusion and, not merely by incorporation through international instruments, so that implementation and enforcement is clear. The issues of balancing priorities against capacity could be provided for as was done for Kenya (Art. 20(5)).

- h) Art 38 (1) (e) does not adequately secure protection to the accused. It gives the authorities wide discretion as to when the accused may be taken to court. It is very common for the authorities to plead lack of capacity to carry out timely investigations in addition to other challenges, in order to delay committal of accused persons. In our view the provision should be time bound. (Kenya – Art. 49 - within 24 hours, SA – Art. 35 – within 48 hours, Zimbabwe – Art. 50 - 'not later than 48 hours', Uganda Art. 23).
- i) It may well be that there are circumstances peculiar to Tanzania that have led to the proposal in Art 39 (3) that prohibits a citizen from being extradited without his/her consent. In the absence of such circumstances, our view is that the proposal goes counter to Tanzania's obligations under different international treaties and arrangements. A national Constitution should avoid the conflict.
- j) We propose the inclusion of a general clause similar to Art 45 of the Uganda Constitution, which covers other human rights not specifically declared by the Constitution.

- k) In elaborating ‘equality before the law’ (Art. 24 (7)) the draft narrows the scope to ‘due process’ aspects only and does not appreciate the wider ambit of rule of law. It is recommended that the outlined paragraphs should be taken to the relevant provisions either on fair hearing or rights of accused persons.

#### **5.4.2 Democratic Values and Gender Issues**

- a) The provision for gender parity at parliamentary level and representation on the basis of partners to the Union is a welcome development for participation and inclusiveness.
- b) Our observations however are as follows:
- i) The democratic value of inclusiveness requires involvement of all interest groups which have been historically marginalized such as women, persons with disability, youth, ethnic and other minorities, or marginalized communities.
  - ii) We note that Part Two of Chapter One emphasizes the principle of national unity, the dignity of the people and protection of their rights, and the fact that development is to be planned proportionately and collectively. There are also elements of participatory democracy in the Fundamental Objectives. Further, the chapter on Human Rights is very positive on participation where:
    - it guarantees the right of the youth to participate fully “in the political, economic, social, and cultural field (Art. 43);
    - it obliges State authorities to develop processes by which people with disabilities shall participate in representative positions (Art. 44);
    - it equally obliges the State to facilitate the participation of minority groups in leadership (Art. 45) and

- it obliges relevant authorities to facilitate through law, the right of women to participate without discrimination, in elections and decision making (Art. 46)

It is obvious that the actualization of these rights and freedoms is postponed, and is left to the decision of the majority who have little interest in them. Experience from elsewhere shows that in such circumstances, implementation has been slow if at all. **The Draft should have explicit provisions to ensure participation of the above interest groups in governance, (as has been done in respect of the representation in parliament of women and people with disability) at every level, noting their inability to participate on equal footing with the rest of the people.**

- iii) The issue of equality is only addressed in terms of Partner States of the Union and only at first and second positions such as President and Vice President, Chief Justice and Deputy, Chairmen of Commissions and their deputies, but does not extend to other members of the constitutional bodies. Even here no specific mention of gender is made. **The principle of gender parity should extend to all levels of participation and it should be clearly pronounced in the Directive Principles of Government Duties and National Policies.**

**iv) Article 5: Language is not a national value.**

#### **5.4.3 Separation of Powers and Independence of the Judiciary**

- a) The Draft makes very positive proposals such as:
  - i) The establishment of the three organs of the state with distinctive powers and responsibilities.
  - ii) Appointment of ministers and deputy ministers from outside

parliament which strengthens the principle of separation of powers.

- iii) Depoliticisation of the office of the Attorney General and a Speaker and deputy Speaker who shall not members of parliament strengthens parliament.
- iv) Limit to the term of members on the constitutional bodies helps to enhance the principle of separation of powers. It reduces interference from the Executive.

#### **5.4.3.1 The Presidency**

a) The proposals on the positive side include:

- i) The fact that the powers of the President are clearly delineated;
- ii) Though those powers are extensive powers, checks and balances are provided in several ways such as:

- Subjecting the powers of the president to appoint political and other high ranking officials together with judges, to other constitutional bodies and parliament.
- General provision obliging the president to take advice.
- Provisions for consultation and approval e.g. in declaration of war and state of emergency (81 and 82) and exercise of prerogative of mercy, confirmation of cabinet appointments by parliament (93(1)), nomination of top civil service posts by Secretariat to Public Service (99 (1)) appointment to judicial office from names submitted by JSC subject to approval by parliament (Cap 10 Part II) etc.

- Proposals for institutions of democracy and good governance e.g. Independent Electoral Commission appointed by an Independent Appointments Committee (181, 182), Commission for Leadership and Accountability Ethics (Cap 13 Part I); Commission for Human Rights.
- iii) The President shall not be able to hold the State at ransom with regard to assent to Bills (114(6))
- b) We however propose the following areas as worthy of re consideration:
- i) The President is not obliged to take advice “**which is inconsistent with the provisions of this constitution or which does not promote or preserve the interests of the United Republic or the majority of citizens**” (71 (2)). This discretion is far too wide, can be abused, and can wipe out all existing checks and balances. It may be noted that the provision does not place an obligation on the President to refer the matter to another organ or institution such as the court for resolution.
  - ii) A Vice President who assumes the presidency on account of the inability of the President who had been an independent candidate, to discharge the functions of his office, consults the National Defense and Security Council in the appointment of Vice President- 72 (1)(6) (b). **The new President should instead seek parliament’s approval.**
  - iii) While it must be admitted that impeaching the President is a very serious matter which should not be taken lightly, the proposed provision for it makes it virtually impossible to impeach the president. It requires 75% of Members of Parliament to support a motion to appoint a Commission of Inquiry and also for a resolution to find the president guilty (84(6) and 84(12)). The threshold for causing an inquiry should be lowered.

- iv) It is proposed in Art.72(1) that the Cabinet is the institution to move the Chief Justice to constitute a Medical Board to certify that the President by reason of physical or mental infirmity is unable to discharge the functions of his office. In our view this **should be a resolution by an absolute majority of parliament not by cabinet. Parliament is a more likely organ to decide impartially rather than the Cabinet whose members are likely to hesitate revealing the state of affairs let alone initiate the process of removing the president.**
- v) Some presidential appointments such as of the justices of the Court of Appeal, judges of the Supreme Court and High Court are not subject to parliamentary approval. (151, 152, 153, 162 (1), 163). It is not clear whether the omission is deliberate, and, if so, **why. In our view such constitutional appointments should be subject to parliamentary approval.**
- vi) **It is proposed that persons may be appointed to judicial office when they do not fully qualify (153 (3), 162 (4)). The president is given powers to dispense with constitutional requirements** of the qualifications regarding working experience. This is dangerous for it can be abused for political; or other reasons. Once constitutional parameters are set, they must be adhered to.
- vii) There appears no good reason why the President should have unchecked powers to appoint members of parliament to represent people with disabilities. It is only fair that this constituency should be involved through a mechanism by which they can nominate, or, select their representatives.
- viii) **General Observation**
- **All the presidential appointments should be made upon**



recommendation by respective constitutional bodies and approved by parliament. Parliament should have powers to either approve or reject any presidential appointment with reasons. This will enhance the democratic principle of participation of the people in their governance through their elected representatives.

- Representation through presidential appointments should be avoided. Other ways of electing people's representatives should be used. Representatives of people with disabilities can be elected by the National Association of People with Disabilities, if it exists in the country, or through some other representative mechanism that can be established by law. This is more democratic and it gives the representatives a constituency to be accountable to, as opposed to the president who will have appointed them.

#### **5.4.3.2 Parliament**

- a) We note the positive provisions proposed:
  - i) Limitations on terms and Member of Parliament can serve to three (117 (2) (a))
  - ii) The right of the electorate to recall a member of Parliament ( 124)
  - iii) A leaner parliament (every region in Tanganyika and every district Zanzibar is a constituency (105(3))
  - iv) Equal representation of men and women in parliament (105(4))
  - v) Independents will stand unlike in the past.
  - vi) Representation of persons with disability (105 (2) (b))
  - vii) Accountability of Members of Parliament (123)
  
- b) However several other issues need to be considered:
  - i) Article 108(1) and 108 (2) with regard to powers of parliament - the provisions are vague and seem to undermine the power of parliament. What happens when parliament's advice is ignored by

government? The Draft should be clear as to what steps Parliament may take to hold the government accountable.

- ii) In our view, Article 109 does not have the effect of declaring the supremacy of the Union constitution.
  
- iii) The proposal in 115(2) appears to undermine the power of parliament. It is proposed that the government's budget proposals shall be deemed to be approved regardless of the reservations of parliament after a second reconsideration. Rather than merely overriding the decision of Parliament, the Draft should provide mechanisms for conflict resolution. Some constitutions (Kenya, South Africa) provide for Mediation Committees consisting of equal members from the National Assembly and Senate (National States Council if acceptable) to resolve disputes over Bills including financial Bills.
  
- iv) Article 116 (4) & (5) disenfranchises the electorate. There appears no good reason why a vacancy in parliament should be filled by a party from a party list, most particularly in a system that will not operate proportional representation. The team was informed by the Commission that this proposal was the result of an overwhelming recommendation garnered from the people that bye-elections should be avoided because they are expensive. However, the proposed solution stands to endanger elective democracy. It does not accommodate the possibility of independent candidates, or, members of new parties who would have wished to contest the bye-election. Unless the option of proportional representation is made, it is not appropriate to allow parties to fill vacant seats without the involvement of the electorate. There is also a contradiction between Article 116 (2) & (5) with regard to when a bye election can be held. This needs to be reconciled.

- v) We see vagueness and subjectiveness in the qualification of parliamentary candidates stated by Article 117 (1) (d) which could be abused. “Honest”, “does not despise or discriminate”, are very subjective expressions. This though may be an incorrect observation arising from inaccurate translation from Swahili.
- vi) Whereas the electorate should not be unduly deprived of representation on account of inability of their Member of Parliament due to continued sickness, the proposed Article 122 (1) (d) which provides for dismissal from the National Assembly for failure to attend for six consecutive months due to physical injury/infirmity is harsh on the Member of Parliament. One should not be penalized for being sick. What if a woman is bed ridden due to pregnancy or any complication related to child birth or somebody has had a serious accident that needs some lengthy treatment. Six months is too short for somebody to lose a seat. The inability of a Member of Parliament to further represent the people within such a short time should be subjected to expert medical determination.
- vii) It is not clear why it is proposed that the absence from the National Assembly for just three consecutive meetings without permission of the Speaker should lead to loss of a seat. This absence does not appear substantial enough for one to lose a seat as provided by the proposed Article 124 (1) (d). **The period should be reconsidered and extended to at least two weeks subject to due process before expulsion.**
- viii) The proposal to empower the electorate to recall their representative from Parliament is a positive development. However, the right of recall should be based on precise and sound grounds whose implications amount to depriving the people of effective representation. The grounds should not at the same time transgress on the rights of the Member of Parliament. The reasons for recall of a Member of Parliament under 124 (1) (e) are vague and can be

abused. Being a Member of Parliament should not prevent a person from engaging in their personal pursuits either for business, or for pleasure.

- ix) Similarly, the proposed ground under Article 124 (1) (g) being 'any other criminal offence' is too broad. A Member of Parliament could be penalized for minor previous convictions such as traffic offences that are not of a serious nature. The usual formulation is to restrict the ground to **offences involving moral turpitude.**
  
- x) We note that the Draft does not provide a constitutional guideline as to the procedure of recall of a Member of Parliament. Presumably, in the interests of flexibility this has been left to Parliament to legislate. It is unlikely that Members of Parliament will deal with the issue that impact negatively on their tenure. If they do, as experience from elsewhere has shown, they may provide for procedural thresholds so high that it is impossible for the people to exercise the right of recall. Some minimal guidelines inclusive of the number of constituents who may petition for recall, where the petition should be lodged, (Independent Electoral Commission) and the mechanism for due process should be considered for inclusion.
  
- xi) It does not portend well for separation of powers for the President to summon parliament at will as Article -137 (3) proposes. The **President should channel a request to the Speaker if he wants to address the National Assembly.**
  
- xii) It is appreciated that parliament should transact national business only when a substantial number of members are present. However a quorum of 50% of all members of parliament for all deliberations is unrealistic [Article 139 (1)]. Such a high requirement should be restricted to a vote on Bills and other serious resolutions. For other business, the quorum of one-third of members is, in our view, more realistic.

xiii) How can a Speaker vote when not Member of Parliament? 139(3).  
This is ill advised instead the motion should be lost.

xiv) Article 142 carries an inbuilt threat to freedom of debate in parliament. A Member of Parliament should be free to say what the member wants to say. The Speaker or any other member can demand for substantiation in case the truth of an assertion is challenged.

xv) Good governance requires that Parliament is accessible to the people, and that the people are able to participate and influence its business. To this extent, the Draft proposes in Article 6(d) that “the people shall participate in the affairs of the Government in accordance with the conditions stipulated in this Constitution.” Hence, a provision should be included obligating Parliament to conduct its business in an open manner, with all its sittings, and those of its committees being accessible to the public unless there are compelling reasons to sit in camera. Every citizen should have a right to petition Parliament on matters of public interest.

**xvi) In order to ensure efficiency and effective functioning and proper administration of parliament as an independent institution, there is need for the establishment of a Parliamentary Service Commission. This has become an important aspect of the principle of separation of powers in modern times because it frees parliament to conduct its business properly when insulated from the dominance of the Executive.**

**xvii) The Speaker and deputy speaker should be elected from amongst persons qualified to be Members of Parliament as is the case in Kenya but not from amongst Members of Parliament.**

### **5.4.3.3 The Independence of the Judiciary**

- a) The following positive provisions are noted:
  - i) A federal court structure of the Supreme Court and Court of Appeal (143)
  - ii) Declaration of independence of the judiciary (145 and 157)
  - iii) The fact that Union matters are to be decided upon by the Supreme Court.
  - iv) Appointments to high judicial office are to be through nomination by an independent institution, the proposed Judicial Service Commission.
- b) Nevertheless the following are areas that could be considered for further review:
  - i) The Draft is not clear as to how the courts of the Partners shall relate to federal courts. It is not clear whether there will be a possibility of appeal from the lowest courts through to the High Courts, of the Partners, and then to the Supreme Court (146 (2)). This is a matter that, in our view, needs clarification. In our opinion, with appropriate limitations to exclude appeals that have no substantial issue of law to be adjudicated, the people should have a right of appeal up to the Supreme Court.
  - ii) In our view the Constitution should separate the procedure of removal from office of a Justice of the Supreme Court on grounds of illness from that of removal for disciplinary reasons. The procedure of removal on account of illness should be based, not on a recommendation of a Commission of inquiry as proposed by Article 157 (4) but on a determination by a medical board.

- iii) On the composition of the Judicial Service Commission as proposed by Article 172 (1) it is a matter of contention as to whether the Chief Justice should be the Chairperson. One point of view emphasizes the disciplinary function of the Commission in which the Judiciary which the Chief Justice heads is a frequent complainant. It is then argued that in order to avoid conflict of interest and promote transparency and accountability within the judiciary, the Chief Justice should not chair the Commission. **Another view is that the role of the Commission is much wider encompassing the efficient administration of justice, appointments and the welfare of judicial officers. This would require the Chief Justice as head of the Judiciary to chair the Commission. In our opinion, the Judiciary could be represented at the Commission so as to dispense with the presence of the Chief Justice. For purposes of complete transparency and impartiality, the Commission should be chaired by a retired Judge.**
- iv) We note that Deans of Faculties of Law are to be represented at the Judicial Service Commission. (172(1) (g)). For transparency and democracy, the accredited Law Faculties should elect their representatives.
- v) Art 151 (3) provides that for one to have attained the age of 45 years or more to qualify to be the Chief Justice. **There is no need to state the age of the Chief Justice, the other stipulated qualifications should suffice.**
- vi) In further fortifying the independence of the Judiciary a provision for financial autonomy should be considered. For example in Kenya, a Judiciary Fund is established and the Judiciary provides its own budgetary estimates directly to Parliament through its Chief Registrar (Kenya's Art. 173).

## 5.5 ELECTIONS

- a) The positive proposals discernable are:
- i) Election of president by absolute majority;
  - ii) Independents can stand for presidency;
  - iii) Possibility of electoral challenges in court; and
  - iv) Vice-President a running mate.
- b) We however note the following drawbacks:
- i) The electoral challenges against the validity of presidential elections should not be limited to presidential candidates but should be open to all people who feel aggrieved as obtains in Kenya and Uganda.
  - ii) The Draft does not provide for a requirement that a presidential candidate secures a majority all over the Union, particularly both parts of the Union. Zanzibar with a small population may feel that they have no effective role in electing a president. **The formula of 50% plus one from both parts of the Union should be considered.**
  - iii) It is not clear as to what court challenges to parliamentary elections are to be filed. According to Article 125 of the Draft, these are matters for the Supreme Court. But then Article 185 refers to a different court. Further, if the proposal is to refer parliamentary election disputes to the Supreme Court that would deprive the disputants of any right of appeal. The apparent contradiction between 125 (1) (b) and 185 needs to be clarified.

## 5.6 INSTITUTIONS OF DEMOCRACY AND GOOD GOVERNANCE

These are the Independent Electoral Commission, The Commission for Leadership and Accountability Ethics, The Commission for Human Rights; and The Controller and Auditor General.



a) The following positive proposal is noted:

All the positions except members of the Commission of Human Rights require to be approved by parliament: 181 (3), 188 (3); 194, 200 (2). In our opinion even the **Members of the Commission for Human Rights need to be approved by parliament. As earlier proposed with regard to openness over parliamentary business, the vetting process should be open to the public and the public should be allowed to make submissions regarding the appointees for all appointments.**

b) The following two areas could be considered for further review:

i) The requirement of long service in **government** for offices of Chair/Vice Chair of the institutions of democracy and governance is state centric, and narrows the pool of talent and experience. Yet, increasingly and for the future, the state is ceasing to be the biggest employer and many citizens who may have the relevant experience and competence can be found in civil society and the private sector. We are referring to The Independent Electoral Commission– (Justice of the High Court or Supreme Court 181 (4) (b); Commission for Leadership and Accountability- ( the Chair and Vice President are proposed to be civil servants who have worked for not less than 10 years 188 (4) (c)); Commission for Human Rights ( 194 (4) (c) – Chair and Vice are proposed to be persons who have worked as a public servants for not less than 10 years) ; Controller and Auditor General : Art 201 (b) (c) –( proposed to have worked as a public servant for more than 15 years; and must have 15 years experience in auditing the accounts of the United Republic). In the particular case of the Auditor General, the experience is limited to the United Republic, yet there could be deserving persons who have gathered experience from the two Partners. **The long service in government in order to qualify for the above positions needs to be reconsidered.**

- ii) We note that no reports to Parliament are required of the institutions. **For purposes of accountability, the above Commissions should submit periodic reports to parliament.**

### 5.6.1 Independent Electoral Commission

- a) It is a positive development that there shall be a nomination committee for appointment of members of the Commission.
- b) However the following issues raise concern:
  - i) It is not clear why the Draft proposes to exclude from membership a person holding an administrative post with an NGO five years prior to nomination (181 (6) (c)). Many NGOs exist which have no connection with elections or even with politics. In fact if such disqualification is to be maintained, it should target persons whose impartiality could be brought into focus, such as officials of political parties, rather than NGOs.
  - ii) By Article 181 (4) (b) both the chair and deputy chair are required to be persons who have held a position as a Justice of the High Court or Supreme Court and must have held it for a period of not less than 5 years. This is, in our view, restrictive and tends to deny the Commission the diversity of skills it may require notwithstanding the rationale which is that the nature of the work of the Commission benefits from the qualifications and experience gathered from dispensing justice.
  - iii) Although this may not be considered to be of major consequence, the Constitution should explicitly declare the independence of the Commission; and
  - iv) Just as in the case of the other Commissions, there should be provision for resources for its operations.

**As earlier proposed for all the institutions of Democracy and Good Governance, the Commission should submit a report to parliament after every national election.**

#### **5.6.2 The Commission for Ethics of Leadership and Accountability**

- a) We note the positive proposals which:
  - i) In Article. 192 declares the independence of the Commission; and.
  - ii) In Article 193 whereby government is obliged to provide for adequate funds and human resources to execute the Commission's functions.

#### **5.6.3 The Commission for Human Rights**

- a) Similar positive aspects are observed in respect of this Commission, and of The Controller and Auditor General as noted below:
  - i) Art. 198 - grants the Commission independence.
  - ii) Art. 199 - government obligation to provide for adequate funds and human resources to execute its functions.

#### **5.6.4 The Controller and Auditor General**

- i) Art. 204 - grants protection to the Controller and Auditor General against removal.
- ii) Art. 205 - government obligation to provide for adequate funds and human resources to execute its functions.

### **6.0 CONCLUSION**

#### **6.1 IMPLEMENTATION OF THE CONSTITUTION**

Article 9(3) makes provision for measures to popularize the new constitution. This breeds constitutionalism and is similarly provided for in Ghana's current dispensation and Zimbabwe's new Constitution. See also Article 4 of the Uganda Constitution. It is however recommended that the element of 'educating' the public be added beyond 'distributing' as

currently provided; so as to target those out of formal educational institutions who are not netted by the inclusion in educational curricula.

Although the Commission seems to demur on the basis that their mandate envisaged no post draft constitution role, such provisions for transition would in no way contradict the extent of the mandate of the Commission. It is important that a framework – institutional and programmatic for implementation of the new order is considered for inclusion in the constitution. If this is left entirely to the discretion of the authorities under the new Constitution, there may be inertia and delay in the implementation, which may also be haphazard, and could be subjected to priorities which were never contemplated thereby delaying the new order. Implementation of a new order is a gigantic task. Numerous laws have to be enacted. The most immediate will be laws to transit to new government structures; the executive, the legislature and the judiciary. Timelines have to be set for those including the enactment and implementation of the constitutions for the Partners. We have in mind the process that was enacted by the Kenya Constitution (See Kenya's Commission for the Implementation of the Constitution (S. 5 of Sixth Schedule).

The Commission seemed to demur to this suggestion on account that its mandate ends with the completion of the Draft Constitution and its presentation to the Constituent Assembly. This difficulty would be obviated by the inclusion in the Draft Constitution of a chapter on the implementation of the new constitutional order and any other transitional provisions.

## **6.2 FLOW OF THE CONSTITUTION**

There are a variety of drafting techniques. We shall not make detailed observations on the style of drafting which is entirely at the option of the draftsman. However, some repetitions and details could be avoided. For a better logical flow, re-arranging of some of the chapters could be considered. Chapter 6 should be transferred to come directly after Chapter

One or be made Part Three of Chapter One so that all matters concerning the Federation and the structure of the United Republic are exhausted in one logical sweep. Similarly Commissions that apply to a specific chapter should be contained within that chapter.

### **6.3 COMMENDATION**

We take this opportunity to commend the Constitutional Review Commission for receiving the team and for the informative brief on the constitution making process so far, and for active and open engagement with us on a whole range of issues relating to the constitution making process.

The Team also commends the Commission for having worked with exceptional dispatch towards developing a constitution for Tanzania. We very much hope that the people of Tanzania will adopt the Draft Constitution. It contains very positive proposals a few of which need only clarification and supplementing, and represents a genuine attempt at addressing outstanding issues contained in the current constitutional order. We are also grateful for the opportunity accorded to us to make an input from a regional perspective by sharing constitution making experiences especially from Kenya and Uganda.

Fom Nam./Form  
Number

**JAMHURI YA MUUNGANO WA TANZANIA/UNITED REPUBLIC OF TANZANIA**  
**TUME YA MABADILIKO YA KATIBA/COMMISSION FOR THE REVIEW OF THE CONSTITUTION**  
**MAONI YA WANANCHI KUHUSU MABADILIKO YA KATIBA/PUBLIC VIEWS ON THE REVIEW OF**  
**THE CONSTITUTION**

Mkoa/Province: \_\_\_\_\_  
\_\_\_\_\_

Wilaya/District:

Kituo cha Maoni/Views Station or Station for Views \_\_\_\_ Kijiji/Shehia –  
Village/Shehia \_\_\_\_\_

Tarehe/Date: \_\_\_\_\_

Jina/Name: \_\_\_\_\_

Umri/Age: \_\_\_\_\_

Jinsi/Gender: \_\_\_\_\_

Kazi/Profession: \_\_\_\_\_

Anapoishi/Residence: \_\_\_\_\_

Elimu/Education: \_\_\_\_\_

<b>MAONI/VIEWS</b>

Jina la Mwandishi/Name of Author\_\_\_\_\_

Sahihi/Signature\_\_\_\_\_