

Update

Tanzania constitution review – President announces date for referendum

Following President Jakaya Kikwete's announcement on 4 November 2014 that the referendum for Tanzania's new constitution will be held on 30 April 2015, in this special constitution briefing we consider the constitutional review process including the drivers behind the review, the process to date and the key changes proposed by the current draft constitution.

Brief history of the Tanzania Constitution

The constitutional history of Tanganyika traces its background from the 1961 Independence Constitution. In 1962 Tanganyika adopted the Republican Constitution, which operated from 1962 to 1965. These two were based on the traditional Lancaster style constitutions negotiated at independence by the British upon handover of state powers to newly independent states.

In 1964 Tanzania was born out of the Union between Tanganyika and Zanzibar. In 1965 Tanzania adopted an Interim Constitution while the country awaited the drafting of a new constitution, after it abolished the multi-party political system and adopted a one party state system. The process took longer than intended and thus the Interim Constitution lasted from 1965 to 1977. In 1977 the constitution of Tanzania (**the Current Constitution**) was adopted. The Current Constitution has remained in force to date, with fourteen subsequent amendments.

The recent calls for constitutional change have been prompted by, among other things, the following two factors:

- (a) The need to have a constitution based on the wishes of the people as to how they want to live (participatory constitution)
- (b) To address the problems relating to the Union

Appreciating the need to have a new constitution, President Jakaya Kikwete announced during the 2011 New Year address that he would form the Constitution Review Commission (CRC) to coordinate and supervise the constitution making process in Tanzania.

The CRC

In April 2012 President Kikwete formed the CRC, and appointed the former Attorney General and Prime Minister Joseph Warioba as its Chairman and the former Chief Justice Augustino Ramadhani as its Vice Chairman.

The CRC was expected to complete its task by October 2013 with a goal of having a new constitution by April 2014, at the time when Tanzania would be celebrating its 50th anniversary of the Union.

After gathering the opinions throughout the country as to what should be included in the constitution, on 3 June 2013 the CRC unveiled the first draft of the new constitution (the **First Draft**).

The First Draft

The First Draft which significantly reflected many of the issues people raised with the CRC, made the following notable propositions:

- (i) That the excessive powers held by the President under the Current Constitution be reduced and redistributed to the National Assembly
- (ii) The establishment of a Supreme Court which would, among other things, be vested with the power to hear petitions challenging presidential election results
- (iii) That the United Republic should be a federation with three governments: the new government of Tanganyika, the government of Zanzibar and the federal government
- (iv) That Union matters should be reduced from the current 22 to 7
- (v) That the President should not be a part of the Parliament
- (vi) The introduction of a fully independent speaker and deputy speaker
- (vii) The introduction of a provision allowing independent candidates to contest in all positions, from the grassroots level to presidency

Pursuant to the Constitutional Review Act, of 2011 (the **CRA**), the CRC published the First Draft in the Government Gazette. This aimed to have the First Draft discussed by the people in constitutional fora (*Barazas*). These fora were attended by representatives elected at the Ward level in Tanzania.

Taking into account peoples' views and discussions on the First Draft and views submitted through the institutional fora, the CRC then produced the second draft of the constitution (the **Second Draft**), which was presented to the President and the President of Zanzibar on 30 December 2013. It made some amendments and additions to the First Draft and the number of Articles increased from 240 to 271.

The President then published the Second Draft in the Gazette with a statement that it shall be presented to the Constituent Assembly (**CA**) for enactment of the Proposed Constitution.

The Proposed Constitution

On 18 February 2014 the CA, comprised of the members appointed by the President, was convened and in March 2014 the chairman of the CRC, Joseph Warioba presented the Second Draft to the CA. However, because of heated debates on matters like the structure of the Union, the deliberations took longer than scheduled.

On 8 October 2014 the required majority vote, that is a two-third majority of the total members from Mainland Tanzania as well as Zanzibar, was achieved and the Proposed Constitution was passed by the CA.

The following are the key issues that can be extracted from the Proposed Constitution as compared to the Current Constitution and the Second Draft:

(a) The Structure of the Union

The current structure of the Union is made up of two governments: the Union government that has authority for Union matters and non-Union matters concerning Tanzania Mainland and the revolutionary government of Zanzibar that has authority for all non-Union matters concerning Zanzibar, has been retained. This is in contrast to a three-tier government which was proposed in the Second Draft. Under this arrangement, as currently, there shall be two presidents: the President of the United Republic and the President of Zanzibar. Again this is contrary to the Second Draft that proposed three presidents: the President of the United Republic, the President of Tanganyika and the President of Zanzibar. However, contrary to the position under the Current Constitution, the Proposed Constitution proposes three vice presidents: the first Vice-President, the second Vice-President who is the President of Zanzibar and the third Vice-President who is the Prime Minister.

(b) Powers of the President

With a view to reducing the significant powers of the President under the Current Constitution, the Second Draft proposed various checks to the president's powers. For example it was proposed in the Second Draft that the President should observe the provisions concerning confirmation of his appointments by the Parliament and the advice given to him by the Government authorities and the Judiciary on appointments of persons to various leadership positions. However, these provisions have not been included in the Proposed Constitution. Therefore, it can be argued that to some extent the President still enjoys a considerable amount of power under the Current Constitution.

(c) Union Matters

Under the Proposed Constitution, the Union matters have been reduced from the current 22 to 14 matters, removing the following matters: emergency powers; external borrowing and trade; harbours, matters relating to air transport, posts and telecommunications; all matters concerning coinage and currency for the purposes of legal tender (including notes), banks (industrial saving banks) and all banking business; foreign exchange and exchange control; mineral oil resources, including crude oil other categories of oil or products and natural gas; research; and statistics. This is contrary to the Second Draft that proposed only 7 Union matters. Additionally, the Proposed Constitution establishes the Commission for Union Matters which

shall, amongst other things, be responsible for ensuring coordination and cooperation in fulfilling the provisions of the Constitution, policies, laws, plans and strategies between the Union government and the revolutionary government of Zanzibar.

(d) The Parliament

As in the Current Constitution, the Proposed Constitution maintains that the Parliament is made up of the National Assembly (**NA**) and the President. This is contrary to the Second Draft that proposed that the President should not be a part of the Parliament. Additionally, it was proposed in the Second Draft that the Attorney General and the Speaker should not be Members of the Parliament (**MPs**). This is not the position under the Proposed Constitution which, although it allows for an independent speaker, he may also be an MP. The Proposed Constitution limits the number of MPs to 360. Further, contrary to the Second Draft that proposed a maximum of three terms for MPs, the Proposed Constitution does not set any limit. Furthermore, the Second Draft proposed that a person to contest for a parliamentary seat should have attained at least a secondary level of education whereas the Proposed Constitution maintains the current position that a person qualifies to be an MP if among other things he is able to read and write in English and Kiswahili.

(e) Independent Electoral Commission

As proposed in the Second Draft, the Proposed Constitution establishes an Independent Electoral Commission which shall be responsible for overseeing and coordinating electoral processes and issues concerning political parties. This does not exist under the Current Constitution.

(f) The structure of the Judiciary

While the Proposed Constitution maintains the Supreme Court and the Court of Appeal as was proposed in the Second Draft, it has also maintained the High Court of the United Republic as in the Current Constitution. This is contrary to the proposition of the Second Draft that there should be the High Court of Mainland Tanzania and a separate High Court of Zanzibar.

The Referendum

Now that the Proposed Constitution is in place, the next stage is the conduct of a referendum to validate the provisions of the Proposed Constitution. According to the CRA, the referendum process must be conducted in accordance with the Referendum Act of 2013 which provides that the referendum shall be determined by a majority of the valid votes cast in the referendum. It further provides that if the votes cast "YES" on a referendum question are not more than fifty percent of the total valid votes cast either in Mainland Tanzania or Tanzania Zanzibar, the poll shall be repeated within sixty days of the declaration of the results.

However the timing for the referendum has provoked further debate. In September 2014 in a meeting between President Kikwete and members of Tanzania Centre for Democracy, it was agreed that, whatever the outcome of the CA's work, the constitution making process would be suspended to pave the way for election preparations for this year and next year. However, on 4 November 2014 President Kikwete announced that the referendum will be held on 30 April 2015.

Further information

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