On the 1984 Zanzibar Constitution

That the 1984 Zanzibar Constitution is clearly an improvement over the 1979 constitution. The improvement is in the areas pertaining to Bill of Rights, election of the President of Zanzibar, civil and political rights, and powers of the three branches of government.

Observed that that there are power inequalities between the Zanzibar and Union Government; that there is a over concentration of powers in the Executive branch; and that currently the Political Parties Act is not observed as required. It is therefore pertinent to call for further constitutional changes with a view to making the Zanzibar Constitution more responsive to the needs and aspirations of the people.

On Centre-local issues in the Process of Governance

That institutions of local governance are tightly controlled by the Central government through various provisions, e.g., the Local Government (Finance) Act, 1982. That similar acts were passed by the state-party to consolidate itself and its stranglehold on government and society. There is, therefore, the need to review the centre-local relationship with a view to increasing not only the powers and autonomy of local authorities but also redefine their role, ensure local participation and enhance democracy at the grassroots level.

These observations and recommendations were tabled at the Second State of Politics Conference and were adopted as part and parcel of the resolutions. The State of Politics Conference was held on July 4th — 6th, 1994 at the Kilimanjaro Hotel, Dar es Salaam.

The seven papers form the main part of this issue. In addition to these, there are two more articles by Dr. Athuman Liviga and Dr. Mohabe Nyirabu, both of which are closely related to the chosen theme of the Tanzanian Constitution and the current political changes in the country.

THE PROCESS OF CONSTITUTION MAKING IN TANZANIA

By

Hamid Nassoro

INTRODUCTION

The debate on the form and content of Tanzania constitution has been on the agenda throughout the three decades of independence, and it seems that the importance and the urgency of the debate tend to increase with time. Up to mid 1980's the pressure for changes in the constitution was largely internal in that the effect of the inadequacies and shortcomings of the constitutional form and content was largely felt by the main actors in the political game — the executives. thus the change from the Independence Constitution of Tanganyika[1] to the Republican Constitution of 1962 was not only based on the need to sever links with the former colonial masters but also to create the kind of framework within which the regime in power would realise itself.[2] One of the basic intentions was for those in power to strengthen their positions. This was achieved by the establishment of executive presidency and the corresponding emasculation of the Parliament. Likewise, the 1965 constitutional changes[3] were largely a response to internal change in circumstances: the Revolution in Zanzibar and the consequent union between the Revolutionary Government and the Republic of Tanganyika. Similarly internal factors accounted for the enactment of the Constitution of the United Republic of Tanzania 1977 (hereinafter referred to as the 1977); for instance, the merger of the sole political parties Afro Shirazi Party (A.S.P.) and Tanganyika African National Union (TANU).

From then onwards, the influence of external factors on the form and content of constitutional changes has become more noticeable.

The grip of multilateral financial institutions on the economies of developing countries and the dependence on foreign aid has not only killed whatever little political initiative the leaders and politicians of these countries had on the control of their destinies, but it has also made these countries more vulnerable to external pressure. Foreign aid in terms of grants, soft loans and so on have always come with conditions reflecting overseas development policies of the "donor" countries. Generally these conditions required the recipient countries:

(a) to promote open, market friendly and competitive economies through liberalisation of economies and foreign exchange, structural adjustment programmes and so on;

(b) to democratize their political systems and improve their human rights records; and

(c) to strive and attain good government.[4]

In order to fulfil these conditions, developing countries have had to undergo some sweeping changes in their political and socio-economic systems which invariably entailed constitutional changes — for example, the entrenchment of the Bill of Rights in the constitutions which is necessary for the protection of private property which in turn, is the cornerstone of market economy; the inclusion of provisions permitting multiparty politics which were done away with soon after independence by most developing countries, particularly in Africa; and so on. More recently, the desire to attract foreign capital has become a driving force in bringing about changes in policies and laws in the developing countries. It is in this context that external pressure has become a significant factor in the current constitutional changes in many African countries.

THE DUAL CHARACTER OF CONSTITUTIONS:

The significance of constitutional changes arises from its dual character. In the first place a constitution is a formal statement of political legitimacy and sovereignty of a state. In other words the constitution is constitutive of the state and state organs and gives legitimacy to various policies adopted by that particular state. According to Okoth Ogendo "... the idea that the constitution is 'a means to

demonstrate the sovereignty of the state' appears quite strong throughout Africa. In that sense, therefore, the constitutive value of some form of a constitution remains pre-eminent." In the second place the constitution is a basic law of the state from which all other laws are derived. In this sense the constitution is supreme:

> The supremacy of the constitution demands that the court should hold void any exercise of power which does not comply with the prescribed manner and form or which is otherwise not in accordance with the constitution from which the power derives.[6]

The constitution therefore is not only supposed to create organs of the state, but also provide for their composition, jurisdiction and boundaries within which they are supposed to operate.[7] In other words the constitution also operates as a restraint to the government powers. These two characteristics distinguish the constitution from all other laws. "Constitutions have been clothed with all kinds of sanctimony and sacredness, being politico-legal arrangements given by people unto themselves in the he exercise of their unlimited sovereignty."[8] It follows, therefore, that even the mode of creation/enactment of the constitution or constitutional provisions ought to be different from that of enacting ordinary laws: The constitution, as a fundamental law is supposed to be an original and direct act of the people[9] — it is supposed to be an expression of the will of the people and it is from this that it derives its supremacy over all other laws and the organs created therefrom[10]. The question is how and to what extent "the people" participate in the enactment of the constitution.

PEOPLE'S PARTICIPATION:

Commenting on the 1977 constitution, Mwalusanya, J. observed that any constitution derives its legitimacy and existence from the people, and that the genesis of the constitution should be the people for the constitution should represent the wishes and aspirations of the people generally. He went on to say that:

> But the 1977 is not a peoples constitution. At no point was it referred to the people. It was drafted by a Party Committee; endorsed by NEC of the

Party; enacted by the Constituent Assembly whose members were appointed by the President. The membership of the Constituent Assembly coincided with that of the National Assembly. Only 101 out of 212 members (i.e. less than half were directly elected constituency backbenchers[11].

In fact one could go further and say that throughout the constitution-making history of Tanzania the people have always been sidelined. Starting with the Independence Constitution, its enactment was preceded by a Constitutional Conference presided by the United Kingdom Secretary of State for Colonies one Mr. Ian Macleod. The conference was attended by leaders of the nationalist political parties who were not elected for that purpose by the people of Tanganyika. And even then, the conference was merely a formality; there was no serious discussion as the form and content of the constitution — this was both to the British Government which already had the Westminister Model Constitution. The purpose of the conference was only to advise the Secretary of state on:

(i) The arrangement necessary for the attainment of self government by Tanganyika.

(ii) Steps which had to be taken to prepare the way for independence and the termination of the Trustee Agreements.

(iii) How to chart out the programme for the attainment of self government, and to devise the most effective way of achieving that goal.[12]

Thus, the Independence Constitution was merely a document from colonial office and could not by any stretch of imagination be called a people's constitution. Likewise, there was no debate nor adequate consultation of the people in 1962 when the government decided to sever the links with the colonial masters and enact an autonomous constitution. As noted earlier, the Constitutional changes embodied in the 1962 Republican Constitution were aimed at strengthening the position of the executive over and above the content of severing links with the colonial masters.[13] Of course, it was the Tanganyika National Assembly which on the 15th February 1962 invited the Government to draft such amendments to the constitution as would enable Tanganyika to become a Republic within the

Commonwealth — and the Government obliged[14]. In fact, the Government went beyond their mandate and created an extremely powerful executive presidency while at the same time considerably reducing the power and status of the parliament. Furthermore, a curious precedent was established in this process of constitutional change; the presumption that these in the leadership position knew precisely what the people wanted — and whatever they wanted or said was exactly what the people wanted. This arrogance continues to date. From 1962 Republican Constitution, there has always been a provision in the Constitution which has made it possible to sidestep the people whenever constitutional changes were contemplated and implemented. In the Republican Constitution this provision was embodied in Articles 35(1) which provided:

Parliament may alter any of the provisions of this Constitution, but a Bill for an Act to alter any provisions of this Constitution or any of the provisions of the laws set out in the schedule to this Constitution shall not be passed by the National Assembly unless it is supported by the votes of not less than two thirds of all members of the Assembly at not less than two of its stages in the Assembly.

The term "alter" as used in the provision was interpreted by sub-article 2 to include amendment, modification, re-enactment with or without amendment, or suspension or repeal of any provision. This meant that the Parliament had quite wide powers to tamper with the Constitution without the need to ask for the mandate from the people. Similar provisions were re-enacted in subsequent constitutions: Article 51 of the Interim Constitution of 1965 and Article 98 of the 1977 Constitution of the United Republic.[15]

The main criticism against using this mode of effecting changes in the constitution stems from the fact that normally the legislature usually has the political self preservation as the primary goal thus the possibility of enacting and incorporating in the Constitution provisions in their interest (which may not necessarily be the interest of other interested groups within the society) is always very real. Furthermore, the sanctity of the constitutional document partly rests on *inter alia*, its rigidity and difference with other legislative Acts. Therefore, if it can be amended almost at will by the legislature, then that sanctity is lost.

The powers given to the Parliament to alter the Constitution are rather wide — particularly if one bears in mind that the Tanzania Parliament up to this moment is *de facto* a one party parliament. The extent to which the Parliament can alter the Constitution is still not certain. The wording of Article 98 (2) gives an impression that the Parliament can change the whole constitution piece meal — provided of course, it abides by the requirements depending on the category to which the subject matter belongs.[16] Some commentators have argued that the power to alter the constitution does not include the power to enact a new constitution nor the changing of its basic structure.

> Should it become desirable to enact a new constitution or changing the basic structure of the constitution, a fresh mandate from the people will be necessary [17].

Closely related to this mode of altering the Constitution is the fact that the Parliament can resolve itself into a Constituent Assembly for the purposes of enacting a Constitution without the necessity of seeking prior mandate from the people. This has attracted severe, but deserved criticism by prominent constitutional lawyers:

> .... the process by which the existing legislative assembly without prior popular mandate resolves itself into a Constituent Assembly for the purpose of enacting a Constitution is not a genuine reflection of popular will. The reason is that the existing legislative mandate is limited to law making according to the existing constitution.[18]

The immediate consequence of lack of popular participation in the creation of a constitution is the lack of political legitimacy of the constitution. Of course, the fact that the constitution has been enacted pursuant to the provisions of an existing constitution will give it legal legitimacy, but this is not enough if the constitution is to have one of its most important characteristics namely political legitimacy — that it is a social pact by the people themselves. The question then is how should the people participate in the process of making the constitution.

MODES OF POPULAR PARTICIPATION IN THE PROCESS OF MAKING A CONSTITUTION

The Nyalali Commission[19] recommended, among other things that the constitution of the United Republic should be changed — by not only tinkering with the offensive provisions, but actually effecting an overhaul of the Constitution itself. The Commission went on to provide for the procedure to be adopted in creating such a constitution. It recommended the enactment of an Act to oversee the transition to multi-partyism, repeal of provisions inimical to the establishment of multi-partyism, and those which blatantly violate the Bill of Rights; establishment of the Constitutional Commission which would have been changed with the duty to prepare a draft of the new constitution which would later be subjected to a referendum — followed by presidential and parliamentary elections. These proposals would have entailed a clean breakaway from the provisions practice of constitutional changes. The refusal was to be expected because accepting that procedure would have meant relinquishing the initiative which the ruling party and its government have always had in constitutional changes. Furthermore, the present Government is exceptionally wary of a referendum. One reason for this morbid fear is the inability to control the outcome of such an exercise — if the open debate preceding the 5th Constitutional amendments is anything to go by, there is always the possibility that during the referendum more fundamental issues might arise outside the limited agenda envisaged by the Government or the outcome may not be palatable to those in power. But still if the people are to effectively participate by making the constitution, a referendum on the draft constitution is almost inevitable.

Commenting on the Zanzibar Constitution Mvungi observed that:

> The usual procedure for ensuring that a people make its own constitution is to subject the constitutional draft to public debate after which it is either adopted by a constituent assembly of deputies elected by the people for that purpose or endorsed by a referendum.[20]

Professor Fimbo is also in favour of a referendum. He argues that the new constitution should be enacted by a referendum because it is only in that way that it can derive its authority directly from the people and that there are several Afri-

can countries which have successfully adopted this mode of constitution making.[21] At a theoretical level, Professor Fimbo argues that even the referendum cannot effect a clean break with the existing constitution — because even the referendum itself would have to be provided for and based on an Act of Parliament under the existing constitution.

An example of an African country which carried out a referendum in line with the suggestion of Professor Fimbo is that of Seychelles. After amending the existing constitution to permit the registration of political parties, a law was enacted for the creation of a nationally elected commission to draft the new constitution. This Constitutional Commission was elected in universal sufferange with all political parties participating. After the Commission had prepared a draft, the same was subjected to a referendum to approve the draft. It was only after the approval of the Constitution by referendum that Presidential and Parliamentary elections were held.[22] Another example much more closer to home is that of Uganda. In May 1993 the National Resistance Council passed an Act for electing delegates to the Constituent Assembly. Any Ugandan who has attained the age of majority and is of sound mind can stand for election as a delegate to the assembly. Some interest groups such as Women, Disabled, Youths, Resistance Councils and the army have been guaranteed representation. The main task of the Constituent Assembly is to scrutinise the constitutional draft prepared by the Constitutional Commission. The Assembly is required to enact the constitution within 4 months of its first meeting after which it dies an automatic statutory death. Decisions of the Assembly require a minimum of 2/3 majority and if this is not attained then the draft constitution is subjected to the referendum. The rationale for adopting this procedure is the desire to attain a national consensus — the objective is to get a constitution which will reflect the will of the people.[23] Two things stand out in these models: The first one is that the participation of the people is quite evident and it is not solely based on the existing political parties platform. In the case of the Ugandan model the composition of the Constitutional Assembly is most likely to reflect a broad spectrum of interests to be represented. The second thing is that there is an obvious attempt to avoid the conversion of the existing Parliament into a Constituent Assembly which, as noted earlier, cannot achieve the desired goal of actual participation of the people in enacting their constitution.

The lesson to be drawn from these models is that it is possible to enact a constitution with full participation of the people. Attempts to merely tinkle with

the provisions may be legally unassailable but will not result in a national consensus necessary for the stability of the state. Furthermore there is no need to fear the real views of the people on whatever issue — However sensitive it may be.

NOTES

1. Second Schedule to the Tanganyika Order in Council 1961, S.L. No. 2274.

2. The Republican Constitution of Tanganyika 1962.

3. These changes led to the enactment of the Interim Constitution of Tanzania 1965 which came into effect on 4th July, 1965.

4. Adrian Leftwhich: "Government, the State and the Politics of Development" Journal of Development and Change Vol. 25 No. 2, 1994

5. H.W.O. Okoth Ogendo "Constitutions Without Constitutionalism: Reflections on an African Political Paradox" In Issa G. Shivji; State and Constitutionalism: An African Debate on Democracy, Sapes books, p.6.

6. B.O. Mwabueze; Constitutionalism in the Emergent States, Hurst & Co. London 1973, p. 7.

7. "The Constitution of a country is commonly understood, is the fundamental law — a kind of higher law, which describes the main structure of the constitutional system of the country. It creates the principle organs of government, namely, Executive Legislature and Judiciary, describes their powers and the limitations subject to which each organ will exercise them."

   B.P. Srivastave "The Constitution of the United Republic of Tanzania 1977: Some salient features — some riddles" UDSM mimeo, p.1.

8. Issa Shivji; "The Legal Foundations of the Union in Tanzania's Union and Zanzibar Constitution" UDSM, mimeo, p. 47

9. B. O. Mwabueze, op. cit. p. 5

10. "Government is a creation of the Constitution. It is the constitution that creates the organ of the government, clothes them with their powers, and in so doing delimits the scope within which they are to operate. A Government operating under a written constitution must act in accordance therewith: any exercise of power outside the constitution or which is unauthorised by it is invalid. The constitution operates therefore with a supreme authority." B. O. Mwabueze, ibid, p. 7.

11. James Mwalusanya J. "Conditions for Functioning of a Democratic Constitution" mimeo. p. 7.

12. Commonwealth Survey Vo. 7. (1961) p. 7.

13. McAustan, P. noted in his article "The Republican Constitution of Tanganyika" International and Comparative Law Quarterly Vol. 13, p. 502 that after independence there was considerable dissatisfaction with the Independence Constitution, within the top ranks in TANU which directly contributed to the changes which took place in 1962.

14. Tanganyika Parliament Debates; National Assembly (Hansard) 5th June - 3rd July, 1962, Government Printer, Dar es Salaam, p. 1084.

15. Article 98 of the 1977 Constitution differentiates between these provisions which merely need two thirds majority and those which require two thirds majority of all Members hailing from Mainland and the thirds of all Members of Parliament hailing from Zanzibar. See Article 98 (1) (a) and (b).

16. Article 98(1) read together with 2nd Schedule to the 1977 Constitution.

17. Ibrahim Juma: "Constitution-making in Tanzania: A Case for a Constitutional Conference" — A paper presented at the First Regional Conference on Law, Politics and Multi-party Democracy in East Africa - 1993, pp. 14-15.

18. Prof. Fimbo: Constitution-Making for Multi-Party Democracy, Chapter 6, p. 8.

19. Presidential Commission on One Party or Multi-Party System in Tanzania — usually known as the Nyalali COmmission.

20. S.E.A. Mvungi; "Recent Constitutional Developments in Zanzibar: Some problems and Prospects" A paper presented on the 25th Anniversary of Zanzibar Revolution. 4th—6th January 1989.

21. Prof. Fimbo, op. cit. p. 9. He cites examples of Benin, Togo and Ghana.

22. See analysis of John Hatchard in "Re-establishing Multi-Party State: Some Constitutional Lessons from Seychelles," Modern African Studies, Vol. 13. No. 4 p. 602.

23. See "Family Mirrow" 2nd issue. Feb. 1994, p. 4.