CONSENSUS-BUILDING AND POPULAR PARTICIPATION IN CONSTITUTION-MAKING: LESSONS FROM EARLY CONSTITUENT PROCESSES IN TANGANYIKA AND ZANZIBAR

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Abstract

This article seeks to contribute to the on-going debate on the revival of a constituent process that stalled in 2014. In doing so it discusses two constituent processes that led to the adoption of independence constitutions [the Tanganyika (Constitution) Order in Council 1961 and the Constitution of the State of Zanzibar 1963]. The two processes were elitist and exclusionist as they side-lined ordinary citizens and various interest groups. Also, the British sought to impose their own version of a constitutional design. Consequently, the two independence constitutions lacked legitimacy and, therefore, they were replaced and abrogated shortly after their adoption. This indicates that popular participation and consensus-building are crucially important. Thus, in the light of the experience, the article offers a major recommendation in case the stalled process is revived: broad and inclusive participation and consensus-building are necessary if the envisaged constitution has any chance of enjoying legitimacy and longevity.

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1.0. INTRODUCTION

The first consultative constituent process in the United Republic of Tanzania (simply called "Tanzania"), which began in 2011, has stalled. Lack of broad-based political consensus on the Proposed Constitution that the Constituent Assembly adopted in 2014 is greatly responsible for the stalemate. Recently, the three-decade constitutional replacement debate has resurfaced once again. From June 2021, the debate did not only resurge with vigour but also assumed totally different dimensions. Unlike in the past when it was held within boardrooms, closed seminar halls, sporadic public rallies, and the traditional media, it is now being trumpeted through the modern social media. On 23rd December 2021, the Registrar of Political Parties formed a Task Force, which comprised of academics and politicians, who were given the responsibility to collect public views on political matters including political rallies as well as the proper modality of reviving the stalled constituent process.[1] Ultimately, the Task Force submitted reports to the President of the United Republic of Tanzania on 21st October 2022. On 8th March 2023, President Samia Saluhu Hassan announced a meeting with the top leaders of the opposition political parties to discuss the formation of a committee of political parties that will be responsible for the appointment a committee of experts to spearhead the constituent process.[2]

Thus, if this process is resumed as announced by the President, it is important to avoid the mistakes that stalled the process in 2014. The consensus of Tanzanians and various interest groups should therefore be

[1] The Report of the Task Force, 2023, p. (ii).
[2] The President spoke at Women's Day Event organised by CHADEMA in Moshi where she attended as the Guest of Honour.

sought. In this regard, popular participation and consensus-building are essential aspects in any constitution-making process. A constitution that results from the meaningful participation of people and their various groupings is likely to enjoy longevity, legitimacy, obedience, and support; consequently, this may foster political stability, social cohesion and economic prosperity. In contrast, a constitution that emanates from an exclusionist process that side-lines the people and various groups lacks popular legitimacy and, thus, it cannot last.

The major aim of this article is to show the problematic nature of exclusionist constituent processes. In order to achieve this objective, the paper examines the early constituent processes in Tanganyika and Zanzibar. The early "constituent processes" means constitution-making processes that led to the adoption of the *Tanganyika (Constitution) Order-in-Council, 1961* (otherwise called "the Independence Constitution of Tanganyika") and *the Constitution of the State of Zanzibar, 1963* (the Independence Constitution of Zanzibar). These two processes were marred by the problem of the exclusion of the masses and various groups at varying degrees. As a result, their products (the two independence constitutions) were replaced and abrogated immediately after independence. In the last section, the paper proffers the recommendations that if the stalled process is revived, then a wide and inclusive popular participation is crucially necessary for better results.

Popular participation and consensus-building in constitution-making are engrained in two important constitutional principles: popular sovereignty and constituent power. These are prominent principles insofar as constitution-making is concerned. Thus, the article examines the two constituent processes in the light of these principles. Accordingly, it highlights the two principles first and then it proceeds to examine each process starting with the Tanganyika process and then the Zanzibar process.

2.0. POPULAR SOVEREIGNTY AND CONSTITUENT POWER

2.1. Popular Sovereignty

Since the American and French Revolutions in the 18th century, the period which was characterised by robust constitution-making activities, popular sovereignty and constituent power have been the key guiding principles.[3] The principle of popular sovereignty encapsulates a host of ideas, the most elemental one being that sovereignty resides in the people. In other words, people are sovereign. As Wallis points out, it is difficult to define "the people."[4] Sometimes "the people" are spoken of as the entire population of the state in question or people in the collective sense. Nonetheless, for the purpose of the principle of popular sovereignty, the state's population is ordinarily divided into two, namely, the governors (government) and the governed (ordinary citizens). It is the second category that is usually referred to as "the people." Thus, as Malagodi asserts, "the concept of 'the people' indicates 'the governed'."[5] In Kiswahili, this division is also common: *viongozi* (leaders) and *wananchi* (ordinary citizens or the people). This classification of citizens into the governors (government) and the governed (the people) makes sense, especially when considered in view of the oft-cited statement that government draws its authority from the people.[6] If the governors were also to be regarded as part of the people, then it would be permissible to

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[3] Colón-Ríos, J., "Constituent power, primary assemblies, and the imperative mandate," in Landau, D. and Lerner, H., (eds.), *Comparative Constitution Making*, Northampton: Edward Elgar Publishing Limited, 2019, pp. 90 ─116, p. 116.

[4] Wallis, J., "Constitution making and state building," in Landau, D., and Lerner, H., (eds.), *Comparative Constitution Making*, Cheltenham: Edward Elgar Publishing Limited, 2019, pp. 278-301, p. 280.

[5] Malagodi, M., "The Locus of Sovereign Authority in Nepal," in Tushnet, M. and Khosla, M. (eds.), *Unstable Constitutionalism: Law and Politics in South Asia*, New York: CUP, 2015, pp. 49-85, p. 49.

[6] Article 8 (1) (a) of the Constitution of the United Republic of Tanzania, 1977.

argue that government partly draws its authority from itself. This would be against the principle which totally places sovereignty in the people.

Several writers including Eleftheriadis, Gilchrist, Kapur, Labastilla, and Tate have attempted to explicate the principle.[7] They argue that popular sovereignty entails many things including following. First, as mentioned earlier, the principle categorises a state population into the people (the governed) and government (the governors or rulers). Second, 'the people' constitute the highest legal and political authority in a state. In other words, the locus of the state sovereignty is the people, not their government. Third, the power to constitute a constitution and thereby establishing their government belongs to the people. Fourth, on the one hand, 'the people' are the bearer of all state authority; therefore, they delegate part of their authority to government. On the other hand, government derives its authority from the people. In exercising its governmental power, government functions as an agent of the people. It exercises such power in accordance with the extent of the authority granted to it and within the limits of such authority. Fifth, the people can exercise their sovereignty, as pointed out, through delegation to the governmental institutions, indirectly through representation or directly by giving their opinion, making constitutions, voting in elections, plebiscites, referendums, popular initiatives, popular recalls and sometimes participating in popular uprisings or revolutions. Sixth, the existence of government is based on the consent of the people and its major aim is securing the common good or welfare of the people. If the

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[7] Eleftheriadis, P., 'Power and Principle in Constitutional Law," 45(2) *Netherlands Journal of Legal Philosophy*, 2016, pp. 37-56, p. 39; Labastilla, S.C., "Dealing with Mutant Judicial Power: The Supreme Court and its Political Jurisdiction," 84 *Philippine Law Journal*, 2009, pp. 1-2, p. 12; Kapur, A.C., *Principles of Political Science*, New Delhi: S. Chand & Co. Ltd, 1987, p. 184; Gilchrist, R.N., *Principles of Political Science*, Longmans, Bombay: Green & Co., 1921, p. 117; and Tate C.N. (ed.), *Governments of the World: A Global Guide to Citizens' Rights and Responsibilities*, USA: Thomson, 2006, p. 1.

[7] Article 1 Title 3 of the French Constitution, 1791.

government renegades from this major aim, 'the people' retain the right to remove it. Thus, making government accountable to the people.

The American and French constitutional documents were the first to recognise popular sovereignty as a key political and constitutional principle.[8] Contemporarily, the principle has almost attained ubiquity. For instance, all state constitutions in East Africa provide for the principle.[9] The Constitution of the United Republic of Tanzania, 1977 includes three statements that pronounce the doctrine: "(a) sovereignty resides in the people and it is from the people that the Government through this Constitution shall derive all its power and authority; (b) the primary objective of the Government shall be the welfare of the people; (c) the Government shall be accountable to the people."[10] To indicate the importance with which the framers attached to the principle, the constitutions of Uganda and Kenya have stated the principle in their first article.

2.2. Constituent Power

"Constituent power" ("constitution-making power") is a principle which is closely related to popular sovereignty. Its original proponent was a French clergyman and political writer, Emmanuel Joseph Sieyès (also known as Abbé Sieyès) (1748 —1836).[11] Subsequently, a German jurist and political theorist, Carl Schmitt (1888—1985), took up Sieyès' theory of popular constituent power and expanded it.[12] According to Sieyès, the

[8] The Declaration of the American Independence, 1776; the American Bill of Rights, 1776 and the French Constitution, 1791.
[9] Article 1 of Constitutions of Uganda (1995) and Kenya (2010); articles 2 and 7 of constitutions of Rwanda (2003) and Burundi (2018), respectively.
[10] Article 8(1).
[11] Wandan, S., "Nothing out of the Ordinary: Constitution-making as Representative Politics," 22(1) *Constellations,* 2015, pp. 44-58, at pp. 44-45; and Weinrib, J. *Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law*, Cambridge: CUP, 2016.
[12] Schmitt, C., *Constitutional Theory,* London: Duke University Press, 2008, pp. 125-135.

people or the nation forms what he called "the constituent power" (*pouvoir constituant*) and governmental institutions (the legislature, executive and judiciary) are "the constituted powers" (*pouvoir constitué*).[13] He defines "the nation" as a body of associates living under common laws and represented by the same legislative assembly."[14]

There have been several interpretations to the Sieyès' theory on popular constituent power. The main ideas can be summarised in the following four main statements. First, the foundational power or "originary power" as Everett calls it,[15] which means the authority to make a constitution thereby establishing the framework of government, belongs to the people generally. In the words of Negretto, "the right to create and replace constitutions belongs to the people, not to government bodies."[16] To make a constitution in this regard includes, as Weinrib asserts, "the public authority to establish, modify, or repeal constitutional norms."[17] The people may delegate a limited form of constituent power to

[13] Colón-Ríos, J., "The Legitimacy of the Juridical: Constituent Power, Democracy, and the Limits of Constitutional Reform," 48(2) *Osgoode Hall Law Journal,* 2010, pp. 199-245, p. 205; and Sonenscher, M. (ed. & trans.), *Emmanuel Joseph Sieyès: Political Writings: Including the Debate between Sieyès and Tom Paine in 1791*, Indianapolis: Hackett Publishing Company Inc., 2003, p.(xxiv).

[14] Sieyès, E.J., *What is the Third Estate*? 1789 cited in Preuss, U.K., "Constitutional Powermaking for the New Polity: Some Deliberations on the Relations Between Constituent Power and the Constitution," in Rosenfeld, M. (ed.), *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives*, Duke University Press: Durham and London, 1994, pp. 143-164, p. 149; and Chryssogonos, K. and Stratilatis, K., "Constituent Power and Democratic Constitution-Making Process in the Global Era," in Filibi, I. et al. (eds), *Democracy (With)out Nations: Old and New Foundations for Political Communities in a Changing World Order*, Bilbao: University of the Basque, 2012, pp. 49-81, p. 51.

[15] Daniel Everett, "Constituent Power: Andreas Kalyvas," on https://www.politicalconcepts.org/constituentpower/Accessed on 2nd December 2018.

[16] Negretto, G.L., "Democratic constitution-making bodies: The perils of a partisan convention," 16, *International Journal of Constitutional Law*, 2018, pp. 254-279, p. 261.

[17] Weinrib, J., *Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law*, Cambridge: CUP, 2016, p. 205.

institutions such as constitutional commissions, constituent assemblies, and legislative organs which may act in the representative character for a limited purpose. Thus, as Loughlin posits, "Constitutionalism rests on the principle that constituent power resides in the people, who delegate a limited authority to government to promote the public good."[18]

Second, constituent power is the power that is higher than constitution and government; thus, ordinarily such power is not provided in the constitutional text. Its absence in the constitutional text does not mean that it does not exist.[19] Third, popular constituent power does not disappear, become absorbed, or spent once a constitution is made. It remains alive and this means that people have the right to change the adopted constitution at any time they deem necessary. Fourth, constituent power is usually exercised without legal constraints. As Schmitt asserts, it is ordinarily in the state of nature.[20] Put it differently, popular constituent power exists in a raw form without legal encumbrances. This character makes the exercise of constituent power revolutionary. However, this idea is not wholly supportable because in the modern world many states use constituent legislation to regulate constitution-making processes.[21]

Text-writers normally draw a distinction between "originary constituent power" and "derivative constituent power."[22] On the one hand, the people exercise the originary constituent power (or "original constituent power") during the constitutional moment or the "new beginnings" of a constitutional order, as Arendt terms it.[23] In simpler terms, a

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[18] Loughlin, M., *The Idea of Public Law*, New York: OUP, 2003, p. 46.
[19] *Njoya and others v. Attorney-General and others* [2004] 1 EA 194.
[20] Schmitt, C., *Constitutional Theory,* London: *Duke* University Press, 2008, pp. 128.
[21] Widner, J. and Contiades, X., "Constitution-writing processes," in Tushnet, M. et al. (eds.), *Routledge Handbook of Constitutional Law*, New York: Routledge, 2013, pp. 57-69, p. 58.
[22] Tushnet, M., "Peasants with pitchforks, and toilers with Twitter: Constitutional revolutions and the constituent power," 13(3), *International Journal of Constitutional Law*, 2015, pp. 639–654, p. 646.
[23] Arendt, H., *On Revolution*, New York: Penguin Books, 1963, p. 158.

constitutional moment (constituent moment) or the new beginnings in this context refer the period when people of a particular state are instituting an entirely new constitutional order or making a new constitution, whether through a reform or revolution.[24] A fundamental characteristic of originary constituent power, according to constitutional theory, is that it is exercised without limits or legal constraints as already noted.[25] Also, it denotes a radical break with the past.[26] In *David Ndii & Others v. Attorney General & Others*[27], the High Court of Kenya, stated that "primary constituent power" (originary or original constituent power) is exercised when the people radically change their constitutional order. Also, the court held that the primary constituent power is activated when four stages are followed: civic education is given; public opinion is collected and collated; a constitutional draft is developed, debated publicly in a constituent assembly and lastly, it is submitted to a poplar referendum.

On the other hand, people's agents, or representatives exercise "derivative constituent power" ("delegated constituent power" or "secondary constituent power").[28] The derivative constituent power is derived from the originary constituent power. Thus, it is common for the

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[24] Baker, K.M., "Constitution," in Kates, G. (ed.), *The French Revolution: Recent Debates and New Controversies*, New York and London: Routledge, 1998, pp. 91-140, p. 116. Also, Kalyvas, A., *Democracy and the Politics of the Extraordinary: Max Weber, Carl Schmitt, and Hannah Arendt*, Cambridge: CUP, 2008, p. 10.

[25] Seitzer, J., "Carl Schmitt's Internal Critique of Liberal Constitutionalism: Verfassungslehre as a Response to the Weimar State Crisis," in Dyzenhaus, D. (ed.), *Law as Politics: Carl Schmitt's Critique of Liberalism*, Durham and London: Duke University Press, 1998, pp. 281-311, p. 294.

[26] Negretto, G. and Couso, J., *Constitution-Building Processes in Latin America*, Stockholm: IDEA, 2018, p. 10.

[27] The High Court of Kenya (at Nairobi), Petition No. E282 of 2020 (unreported).

[28] Tushnet, M., "Peasants with pitchforks, and toilers with Twitter: Constitutional revolutions and the constituent power," in 13(3), *International Journal of Constitutional Law*, 2015, pp. 639–654, p. 646; and Roznai, Y., *Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers*, A PhD thesis, London School of Economics, 2014, p. 59.

people to include a constitutional provision that allows an ordinary legislature, a constituent assembly or another constituent body to amend the adopted constitution in the future. Thus, the power to amend a constitution by parliament is normally derivative or delegative.[29] In other words, it is power that the people have lent to government. It follows that derivative constituent power differs from originary in two fundamental respects. First, while originary constituent power is wide and it is exercised without limitations, derivative constituent power is limited.[30] Parliament, for instance, can amend a constitution only to the extent permitted by the people. Consequently, the High Court categorically stated in *Njoya and others v Attorney-General and others*[31] that Parliament has no power to make a new constitution. Second, whereas originary constituent power is exercised freely -without constitutional or legal restraints, another is governed by constitutional rules.[32] Nevertheless, as shown earlier, this theory does not wholly reflect the truth on the ground because currently constituent processes are organised through constituent legislation, decrees, interim constitutions, and peace agreements.

As Sieyès and Schmitt theorised, constituent power is superior to a constitutional text and government. It is the power that creates a constitution itself; thus, it cannot be provided within a constitutional text. On account of this theory, many constitutional texts do not stipulate constituent power. However, there are constitutional texts that make reference to the constituent power principle. For instance, the preamble to the American Constitution 1787 includes a famous phrase, "We the People," which signifies the authority that made the constitutional text.

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[29] Tushnet, M., "Peasants with pitchforks, and toilers with Twitter: Constitutional revolutions and the constituent power," p. 646.
[30] *Anwar Hossain Chowdhury v. Bangladesh*, 41 DLR 1989 App. Div. 165.
[31] [2004] 1 EA 194.
[32] Roznai, Y., *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers*, Oxford: OUP, 2017, p. 2.

Also, the German Basic Law 1949 mentions the principle in its preamble: "the German people, in the exercise of their constituent power, have adopted this Basic Law." Furthermore, article 368 (5) of the Indian Constitution 1949, which was introduced through amendments in 1976,[33] states: "For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article." The Indian Parliament introduced this provision as a reaction to the 1973 decision of the Indian Supreme Court in *Kesavananda v. State of Kerala*[34] in which the Court held that the Parliament's power to amend the Indian constitution was limited. However, the provision is hugely problematic. As the originary constituent power belongs to the Indian people, "the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article," can only refer to secondary constituent power, which, as of necessity, must be limited.[35] It is opined that the provision is unconstitutional insofar as it suggests that the parliamentary constitutional amendment power is unlimited. It is the originary constituent power of the people that is unlimited.

As already indicated, many constitutional texts do not textualise the principle of constituent power. These include the Constitution of the United Republic of Tanzania 1977 and the Constitution of Zanzibar 1984. Nonetheless, this does not mean constituent power is not a constitutional people. As Schmitt stated, it exists in the state of nature.[36] Two statements are pertinent in this connection. First, as the Kenyan

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[33] The amendment was affected through *the Constitution (the Forty-Second Amendment) Act, 1976*.

[34] [1973] AIR (SC) 1461.

[35] *Kesavananda v. State of Kerala* [1973] AIR (SC) 1461; *Njoya and others v Attorney-General and others* [2004] 1 EA 194; and *Anwar Hossain Chowdhury v. Bangladesh,* 41 DLR 1989 App. Div.165, 25.

[36] Schmitt, C., *Constitutional Theory,* London: Duke University Press, 2008*,* p. 128.

High Court held, "Lack of its express textualisation is not however conclusive of its want of juridical status."[37] Thus, constituent power is a constitutional principle which is not usually provided in a state's constitution. Second, because the constituent power is an attribute of popular sovereignty which is ordinarily textualised in many modern constitutions, then it is not quite proper to contend that constituent power is not expressly textualised.

2.3. Relationship and Significance of the Two Principles

Kalyvas notes that there is a "crucial link between sovereignty and the constituent power of the people."[38] He also speaks of constituent power as a reformulation or replacement of popular sovereignty which has been understood as the highest power of command. As he contends, George Lawson, John Locke, Thomas Paine, Emmanuel Sieyès, and Carl Schmitt have understood sovereignty "not as the ultimate coercive power of command but instead as the power to found, to posit, to constitute, that is, as a constituting power."[39] This, in effect, may translate to: sovereignty of the people means their power to constitute their constitution and the framework of government.[40]

However, many writers still regard constituent power as one aspect of popular sovereignty rather than being the only aspect of sovereignty. Li-ann, for instance, states thus, "The power to make constitutions is an exercise of popular sovereignty in the form of the People's original "constituent power", while "legislative power" refers to the power to

[37] *Njoya and others v. Attorney-General and others* [2004] 1 EA 194 p. 210.
[38] Kalyvas, A., *Democracy and the Politics of the Extraordinary: Max Weber, Carl Schmitt, and Hannah Arendt*, Cambridge: CUP, 2008, p. 93.
[39] Kalyvas, A., "Popular Sovereignty, Democracy, and the Constituent Power", 12(2), *Constellations*, 2005, pp. 223-244, p. 225.
[40] Ibid.

enact legislation."[41] Everett also associates constituent power with popular sovereignty: "constituent power and modern democracy are intrinsically associated from their beginnings in the idiom of popular sovereignty."[42] Additionally, Nwabueze notes that constituent power is "the ultimate mark of a people's sovereignty."[43] The Kenyan High Court essentially adopted this particular statement: "the constituent power is reposed in the people by virtue of their sovereignty and that the hallmark thereof is the power to constitute or reconstitute the framework of government, in other words, make a new constitution."[44]

On the basis of the foregoing discussion, the following can be said of popular sovereignty and constituent power. First, constituent power is one aspect and actually forms part of the principle of the popular sovereignty. Popular sovereignty entails many aspects including constitution-making, voting in elections, referendums and plebiscites popular recalls, etc.[45] Second, the principle of popular sovereignty is wider while constituent power is narrow. Third, as noted, many constitutional texts do not provide for constituent power explicitly; instead, they provide for popular sovereignty which necessarily includes constituent power.

On the basis of the foregoing discussion, the significance of popular sovereignty and constituent power in constitution-making is briefly outlined. Popular sovereignty and constituent power have resulted in several principles regarding constitution-making. First, the ultimate

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[41] Li-ann, T., *A Treatise on Singapore Constitutional Law*, Singapore: Academy Publishing, 2012, p. 225.
[42] Daniel Everett, "Constituent Power: Andreas Kalyvas," on https://www.politicalconcepts.org/constituentpower/- Accessed on 2nd December 2018.
[43] Nwabueze, B.O., *Presidentialism in Commonwealth Africa*, London: L. Hurst and Company, 1974, p. 392.
[44] *Njoya and others v Attorney-General and others* [2004] 1 EA 194 p. 220.
[45] Nwabueze, B.O., *Presidentialism in Commonwealth Africa*, 1974, p. 392.

power in a state (sovereignty) rest with the people and the government draws its power from the people. Second, the power to make a constitution and government belongs to the people, not government. It is a joint power or the power that is shared by the people. Third, because constituent power is shared by all the people, a constituent process should be broad-based, consultative and deliberative as much as possible.[46] Fourth, as the constituent power belongs to the people, constitution-makers and constituent bodies should draw their mandate from the people through special popular elections or other mechanisms based on wide popular consensus.[47] Fifth, a constitutional draft should be ultimately submitted to the people for popular ratification or the eventual approval.[48] Lastly, as the people wield constituent power, the parliamentary amendment power is limited.

3.0. THE INDEPENDENCE CONSTITUTION OF TANGANYIKA, 1961

3.1. The Karimjee Hall Constitutional Conference, 1961

In order to put the Tanganyika Constitutional Conference in perspective, something we need to account for the nature of constitutional conferences generally. Demands of nationalist leaders in India, Pakistan, Ceylon and some Asian colonies, forced the British into organising constituent assemblies which adopted constitutions at decolonisation.[49] As no similar demands existed in Africa and Tanganyika in particular, independence constitutions were negotiated through organised sessions of constitutional negotiations or "constitutional conferences," as they are

[46] Ibid.
[47] Toler, L.U., "First constitutions: American procedural influence," in Landau, D. and Lerner, H. (eds.), *Comparative Constitution Making*, Northampton: Edward Elgar Publishing Limited, 2019, pp. 384-407, p. 384.
[48] Ibid.
[49] Singh, G.N., "The Idea of an Indian Constituent Assembly," 2(3), *The Indian Journal of Political Science*, 1941, pp. 255-272, p. 257.

famously known. By their nature, constitutional conferences were not formal constituent bodies. Instead, they were political meetings or "constitutional talks," intended to provide forums for constitutional negotiations.[50] In such conferences, the British engaged political parties and nationalist leaders in constitutional negotiations. As we shall see later in this paper, such conferences were ordinarily held in London. The modality of constitution-making through constitutional conferences normally excluded ordinary citizens completely. In other words, the conferences were normally exclusionist and elitist in nature because they involved only British politicians, nationalist politicians and bureaucrats. Therefore, the constitutional conferences for Tanganyika and those of Zanzibar, like similar conferences held elsewhere, were of this nature.

Having briefly explicated the nature of constitutional conferences generally, it is opportune to focus on the venue and composition of the Karimjee Hall constitutional conference for Tanganyika. The conference was held for three days, from 27th to 29th March 1961, at Karimjee Hall, in Dar es Salaam.[51] The venue for the Tanganyika Constitutional Conference is one the aspects that distinguished from similar events in East. Thus, constitutional conferences for Kenya, Uganda and Zanzibar were all held in London, in the United Kingdom. The Report of the Tanganyika Constitutional Conference indicates that originally it was arranged that the Conference would be held in London but later it was announced that it would be held in Dar es Salaam.[52] Shivji asserts that

[50] Bakari, M.A., "Constitutional Development of Zanzibar, 1890 - 2005: An Overview," Unpublished paper, p. 6 and ASP, *Afro-Shirazi Party: A Liberation Movement*, (Vol.2), Zanzibar: Printing Press Corporation, 1973, p. 204.

[51] Msekwa, P., "Why Tanganyika's Independence was Granted on 9th December: Revisiting the Country's Political History," in *Daily News* (Tanzania), 22 December 2016. Available on https://www.dailynews.co.tz/news/why-tanganyika-s-independence-was-granted-on-9th-december-revisiting-the-country-s-good-political-history.aspx. Accessed on 21st February 2020.

[52] Report of the Tanganyika Constitutional Conference, 1961, p. 1.

Nyerere desired the Conference to be held in Dar es Salaam.[53] Msekwa supports this explanation but disagrees with any suggestion that Nyerere might have "rejected" to go to London.[54] According to him, in dealing with the British, Nyerere had adopted a cooperative attitude in order to win their confidence.[55]

The report of the Conference categorises participants into four major groups.[56] The first group was the Tanganyika delegation. The Chief Minister and President of TANU, Mwalimu J.K. Nyerere led this delegation.[57] It also included all ministers, other TANU politicians and two legal advisers.[58] The Governor of Tanganyika, Sir Richard Turnbull, and his advisers formed the second group.[59] The third group consisted of the UK delegation. The Secretary of State for the Colonies, Mr. Iain McLeod, led the delegation of officials from the Colonial Office in London and one legal adviser.[60] The last group consisted of the Secretariat, which, of course, was wholly composed of British officials.[61] This group did not participate in the negotiations but played a supportive role in terms of administration.

Two issues may be stated in connection with the composition of the Conference. In the first place, the Conference was elitist. Participation

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[53] Shivji, I.G. et al., (eds.), *Constitutional and Legal System of Tanzania: A Civics Sourcebook*, Dar es Salaam: Mkuki na Nyota Publishers, 2004, p. 48.
[54] Interview with Hon. Pius Msekwa at Nansio, Ukerewe Island, on 23rd February 2019.
[55] Ibid.
[56] Report of the Tanganyika Constitutional Conference, 1961, p. 8.
[57] Ibid.
[58] Ibid.
[59] Ibid.
[60] They included Messrs W.B.L. Monson, P. Rogers, B.E. Rolfe and J.T.A. Howard-Drake and A.R. Rushford (who was a legal advisers). [Report of the Tanganyika Constitutional Conference, 1961, p. 8].
[61] Messrs A.J. Chant (Secretary-General); R.S. Cumming (Secretary); A.H.M. Marshall (Secretary); Mr. F. Steel (Documents officer); and Miss D.F. Kearsley (supervisor of stenographers). [Report of the Tanganyika Constitutional Conference, 1961, p. 8].

was limited to political elites and bureaucrats only; no other groups were included. Neither the British government nor TANU saw the need to consult or include ordinary people and other interest groups. Understandably, it was impossible for all the people in Tanganyika at the time to attend. However, at least people should have elected their representatives in the conference. As already stated, the power to make a state constitution belongs to the people in accordance with principles of popular sovereignty and constituent power. Additionally, it was undemocratic for the British to exclude the people from a constituent process. Participatory democracy calls for popular involvement in important public affairs such as constitution-making. In short, therefore, the exclusion of ordinary people offended these three principles.

Secondly, the Conference was a typically exclusionist political forum. Only TANU participated in the negotiations. At the time, apart from TANU, there were other political parties, including United Tanganyika Party (UTP) and African National Congress (ANC), the latter was registered in 1958.[62] Additionally, the All-Muslim National Union of Tanganyika (AMNUT) was registered in 1959.[63] But all these parties were totally excluded from the Conference.[64] Additionally, Mr. Herman Sarwatt, who won the Mbulu Constituency as an independent candidate in the 1960 election was also not invited.[65] Thia may underscore the proposition that politics is partly the art of crafting one-sided stories and deftly suppressing others. Thus, not much has been written in history about the fact in the years running up to independence the British colonial government favoured TANU over other political parties. Undoubtedly, Nyerere and TANU's policy on the equality of human beings was the magic wand. The British colonial government trusted that

[62] British Information Services, *Tanganyika*, London: Swindon Press, 1961, p. 8.
[63] Ibid.
[64] Report of the Tanganyika Constitutional Conference, 1961, p. 8.
[65] Ibid.

British settlers would be safe under TANU and Nyerere who was a moderate.[66] Such parties as Zuberi Mtemvu's ANC whose policy was "Africa for Africans" and the sectarian AMNUT were excluded.[67]

The exclusion of all interest groups and political parties except TANU make the Tanganyika Conference unique in East Africa because the Kenyan, Ugandan and Zanzibari conferences were all inclusive. It may be argued that since TANU had resoundingly won the 1958/9 and 1960 elections, it had acquired the right and legitimacy to exclusively represent the people of Tanganyika. However, this argument is objectionable on account of at least three reasons. First, TANU's members of LEGCO were elected for the purpose of making ordinary laws. They were not elected for the purpose of exercising constituent power. A constitution should be adopted by a body specifically constituted for that particular purpose or, to use the language of Jameson, "by a body for that purpose specially chosen and commissioned."[68] The UN Human Rights Committee (UNHRC) affirmed this principle in *Marshall v. Canada*[69], when it held in 1986 that participation in a constitutional conference was an exercise of the right to public affairs which, "is the task of representatives of the people, elected for that purpose." Second, as Kalyvas postulates, constitution-making or the exercise of constituent power is "the act of *founding together*, *founding in concert*, or *creating jointly*."[70] In other words, constitution-making entails joint or collective action of

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[66] Smith, W.E., *Nyerere of Tanzania: The First Decade 1961—1971*, Harare: African Publishing Group, 2011, pp. 77-80; Bjerk, P., *Building a Peaceful Nation: Julius Nyerere and the Establishment of Sovereignty in Tanzania, 1960–1964*, New York: University of Rochester Press, 2015, p. 45

[67] Maxon, R.M., *East Africa: An Introductory History*, 2009, p. 233.

[68] Jameson, J.A., *A Treatise on the Principles of American Constitutional Law and Legislation: The Constitutional Convention; its History, Powers, and Modes of Proceeding*, (2nd edn), Chicago: E.B. Myers and Company, 1869, p. 1.

[69] Communication No. 205/1986, U.N. Doc. CCPR/C/43/D/205/1986 at 40 (1991).

[70] Kalyvas, A., "Popular Sovereignty, Democracy, and the Constituent Power," 12(2), *Constellations*, 2005, pp. 223-244, p. 235.

all citizens or "popular authorship," as Gathii calls it.[71] It is a process in which all citizens become legislators. Thus, a constituent process cannot validly be reduced to a one-political-party exclusionist activity. The exclusionist conference, thus, offended the principles of popular sovereignty, constituent power and democracy.

The Conference can be compared to the 1787 American Constitutional Convention. Although 174 years separate the two, they bear striking similarities. One, all of them were informal political forums, which, nevertheless, made important decisions.[72] Two, the participation was not only limited to political elites and bureaucrats, but the debate was also held behind the closed doors. A constituent process should be open to all citizens and all political groups. Apart from the exclusion of other political parties in the Tanganyikan Conference, other groups such women also did not feature except for one British woman who formed part of the Secretariat. On this account, the Conference is comparable to the American Convention which totally excluded women, Blacks and Native Americans.[73] As Tushnet argues, such constitution-making is unacceptable today.[74]

3.2. Deliberated Constitutional Issues

The Conference deliberated administrative and constitutional issues. For instance, it was resolved that 28th December 1961 would be the date of

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[71] Gathii, J.T., "Popular Authorship and Constitution Making: Comparing and Contrasting the DRC and Kenya", 49(4) *William and Mary Law Review*, 2008, pp. 110-1137.
Ibid., pp. 1109-1138.
[72] Hoar, R.S., *Constitutional Conventions: Their Nature, Powers and Limitations*, Boston: Little, Brown and Co., 1917, p. 8.
[73] Amar, A.R., "Women and the Constitution," 18(2), *Harvard Journal of Law and Public Policy*, 1994-5, pp. 465-474, p. 465.
[74] Tushnet, M., "Some Skepticism about Normative Constitutional Advice", 49(4), *William and Mary Law Review*, 2009, pp. 1473-1495, p. 1494.

independence although this date was altered several months following the conference. As for constitutional matters, the Conference made several decisions, the majority of which related to the executive branch of government.[75] First, the Governor and Deputy Governor were to cease from being members of the Council of Ministers, which was renamed "the Cabinet." Second, the title of "Chief Minister," which was created in 1960, was to be changed to "the Prime Minister." The Prime Minister would preside over the Cabinet meetings. Third, the Legislative Council would be renamed "the National Assembly." Fourth, the Governor would act on the advice of the Cabinet. Fifth, the Governor would continue to deal with defence and external affairs until when independence was granted. He would also deal with internal security on advice of the responsible authorities. Sixth, the provisions relating to the prorogation and dissolution of the Legislative Council (later to be renamed "the National Assembly") would be similar to those in *the Nigeria (Constitution) Order in Council, 1960*.

Regarding the legislative branch, the Conference made three related decisions. First, the Governor would exercise the power to assent or reject bills on advice of ministers except regarding matters relating to defence and external affairs. The Governor would exercise such powers on behalf of the Queen. Second, the Queen would have power to disallow any law relating to defence and foreign affairs that "would have a prejudicial effect upon the rights of stockholders of any Tanganyika Government stock."[76] Third, the Governor would retain powers to enact legislation on defence and external affairs.

With regard to the public service, the Conference resolved to establish three commissions for public, judicial, and police services.[77] It also

[75] Report of the Tanganyika Constitutional Conference, 1961, pp. 2-21.
[76] Ibid., p. 3.
[77] Ibid.

decided to abolish the office of Deputy Governor which was responsible for the public service.[78] The British were concerned with the fate of British expatriates who were working in Tanganyika.[79] It was agreed that they would be compensated in case they were removed and that the British Government agreed to pay the funds for that particular purpose.[80] Thus, the Conference just agreed on the above and other matters generally on the basis of which British lawyers would develop a draft constitution.

The Tanganyika Constitutional Conference was uniquely brief. It took just three days (on 27th, 28th, and 29th March 1961). Msekwa states that the first and third days were spent on speeches and thus, according to him, discussion was held for one day only (28th March 1961).[81] The perusal of report actually indicates that there were three speeches on each of the first and third day.[82] In his speech, Nyerere noted that the Conference "must surely be one of the briefest of the many Constitutional Conferences to which you are accustomed."[83] As Msekwa notes, Nyerere tactfully avoided engaging in a protracted debate with the British.[84] Thus, he agreed many of British constitutional proposals because TANU would discard them once the British left.[85] Thus, the British introduced major issues that they wanted except a Bill of Rights,

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[78] Ibid.
[79] Ibid., p. 5.
[80] Ibid., p. 5.
[81] Msekwa, P., "Why Tanganyika's Independence was Granted on 9th December: Revisiting the Country's Political History.,"
[82] Report of the Tanganyika Constitutional Conference, 1961, pp. 9-21.
[83] Text of the Speech of the Chief Minister of Tanganyika at the closing Session of the Tanganyika Constitutional Conference on 29th March 1961 (Annex "H" to the Report of the Tanganyika Constitutional Conference, 1961, p. 18).
[84] Interview with Hon. Pius Msekwa at Nansio, Ukerewe Island, on 23rd February 2019; and Msekwa, "Why Tanganyika's Independence was Granted on 9th December: Revisiting the Country's Political History."
[85] Ibid.

which Nyerere and other TANU politicians objected to its inclusion.[86] This indicated that TANU did not support the constitutional proposals that the British fronted.

3.3. Drafting, Enactment, Salient Features and Legitimacy

In all decolonisation constituent processes in their colonies, protectorates and mandate territories, the British purposely sought to monopolise the drafting aspect. The aim was to retain control over the contents of constitutions in order to protect their vested interests. The introduction of the British prototype parliamentary government or Westminster model or parliamentarianism was the case in point. As Martinez notes, parliamentary government is one with "relatively high degree of fusion of the executive and legislative power."[87] Additionally, the British also wanted to protect their nationals who would remain behind after independence. Thus, British lawyers drafted *the Tanganyika (Constitution) Order in Council, 1961*, as the Independence Constitution was designated.[88] Unlike the Kenyan nationalist leaders who attempted to compete with the British by bringing their own draftsman to a conference, TANU let the British to handle the whole drafting aspect on their own.[89]

By British constitutional practice, Orders-in-Council were a form of delegated or subsidiary legislation that Parliament had delegated its

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[86] Shivji, I.G., "Paradoxes of Constitution-Making in Tanzania," A Paper Presented to the East African Law Society (EALS) Conference in Mombasa, 15-16, Nov. 2013, p. 5.
[87] Martinez, J.S., "Horizontal Structuring," in Michel Rosenfeld and András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford: OUP, 2012, pp. 547-575, p. 556.
[88] Msekwa, p., "Why Tanganyika's Independence was Granted on 9th December: Revisiting the Country's Political History."
[89] Dudziak, M.L., "Working toward Democracy: Thurgood Marshall and the Constitution of Kenya", 56(3), *Duke Law Journal*, 2006, pp. 721-780, p. 745.

making to the monarch.[90] Therefore, the British King or Queen made all Orders-in-Council for various colonies, protectorates and mandates on the advice of the Privy Council.[91] The making of the Tanganyika (Constitution) Order in Council, 1961, followed this procedure. Officials in the Colonial Office in London submitted the draft to the monarch. Thus, Queen Elizabeth signed *the Tanganyika (Constitution) Order in Council, 1961*, on 27th November 1961, in the presence of the Princess Margaret, Countess of Snowdon, and Lord Carrington.[92] Subsequently, on 28th November 1961, the Order was laid before the British Parliament for approval.[93] Additionally, the British Parliament enacted *the Tanganyika Independence Act, 1961*[94] which formally declared the cessation of its power to legislate for Tanganyika.[95] The Independence Constitution became effective immediately before the Independence Day, 9th December 1961.[96]

Furthermore, there are handful fundamental features of the Tanganyika (Constitution) Order in Council 1961 or the Independence Constitution. First, it established a Westminster model of government. In this respect, it typically fused the executive and legislature as the Governor-General had to appoint the Prime Minister and ministers from the National Assembly.[97] Another feature of the system is that the National Assembly was vested with power to pass a vote of no confidence in the Prime

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[90] Sections 8, 9, and 10 of *the Foreign Jurisdiction Act, 1890* and Hendry, I. and Dickson, S., *British Overseas Territories Law*, (2nd edn), Oxford: Hart Publishing, 2018, p. 14; and Banks, M.A., "Privy Council, Cabinet, and Ministry in Britain and Canada: A Story of Confusion," 31(2), *The Canadian Journal of Economics and Political Science*," 1965, pp. 193-205.

[91] Ibid.

[92] See the original version of the Tanganyika (Constitution) Order in Council, 1961.

[93] The preamble to the Tanganyika (Constitution) Order in Council, 1961.

[94] (10 & 11 Eliz.2, c.).

[95] Mwakyembe, H.G., *Tanzania's Eighth Constitutional Amendment and its Implications on Constitutionalism, Democracy and the Union Question*, Hamburg: LIT Verlag, 1995, pp. 5 ─6.

[96] The preamble to the Tanganyika (Constitution) Order in Council, 1961.

[97] Section 42 of the Tanganyika (Constitution) Order in Council, 1961.

Minister.[98] Second, another British constitutional feature was the separation of the head of state from the head of government. On the one hand, although no provision explicitly stated so, the British monarch was designated as the head of state but it was the Governor-General that represented her.[99] Because the people of Tanganyika had no right to elect the monarch, it means the Independence Constitution was a monarchical constitution. On the other hand, the Prime Minister was the head of the government although no provision described him or her as such.[100] Also, the Governor-General, who represented the British monarch, was the Commander-in-Chief of Armed Forces.[101] He appointed the Prime Minister, all other ministers, the Chief Justice and puisne judges of the High Court, which was established in the same Constitution.[102] Third, the Constitution established the Cabinet, which was responsible to Parliament that wielded the power to pass a vote of no confidence against the Prime Minister and Cabinet.[103] Fourth, the Constitution also established the High Court as the superior court of record in Tanganyika.

Fifth, the Independence Constitution created the National Assembly composed of two kinds of Members of Parliament (MPs), the elected MPs and nominated ones.[104] The Governor-General, acting on the advice of the Prime Minister, was empowered to nominate not more than ten MPs.[105] Sixth, the Independence Constitution established the Public Service Commission.[106] The Governor-General appointed its members on the advice of the Prime Minister.[107] Seventh, the same Constitution

[98] Section 40 (3), ibid.
[99] Section 11, ibid.
[100] Section 42, ibid.
[101] Section 11, ibid.
[102] Sections 42, 58(1) and 59(1) & (2), ibid.
[103] Sections 40 (1), 42(5) (b), 43(2), and 48(2) (b), ibid.
[104] Section 15, ibid.
[105] Section 16, ibid.
[106] Article 74 (1), ibid.
[107] Article 74 (2), ibid.

also established the Electoral Commission. The Speaker of the National Assembly was the Chairman of the Commission.[108] The Governor-General, on the advice of the Prime Minister, appointed other members of the Commission whose number was neither less than three nor more than five.[109]

It may be stated that the Independence Constitution created a British prototype parliamentary government or a parliamentary constitutional system which is usually termed "Westminster model constitutional system" or "parliamentarianism." The features of such system have already been outlined. For these reasons, *the Tanganyika (Constitution) Order in Council 1961* or *the Independence Constitution*, as usually called, can be described variously as the "monarchical constitution," "parliamentary constitution," or "Westminster model constitution."

The Independence Constitution was not a legitimate Constitutional document. TANU itself, let alone other parties that were excluded from the negotiations, disliked the document. Certainly, its monarchical character and placement of huge powers in the office of the Governor-General were some of its disliked features. As noted, TANU merely avoided a protracted debate with the British. No wonder that after just 38 days following its adoption, that is, on 16th January 1962, TANU announced its intention to discard it, something which became a big shock to the British.[110] As a result, TANU initiated a constituent process through which it adopted *the Constitution of Tanganyika, 1962* (famously known as "the Republican Constitution") on 9th December 1962.

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[108] Section 25 (1) (a), ibid.
[109] Section 25 (1) (b), ibid.
[110] Mwakyembe, H.G., *Tanzania's Eighth Constitutional Amendment and its Implications on Constitutionalism, Democracy and the Union Question*, 1995, p. 12.

4.0. THE INDEPENDENCE CONSTITUTION OF ZANZIBAR, 1963

4.1. The First Lancaster House Constitutional Conference, 1962

The Independence Constitution of Zanzibar was negotiated through constitutional conferences as that of Tanganyika, Kenya and Uganda. But while the Tanganyikan Constitutional Conference was held in Dar es Salaam, similar conferences for Zanzibar, Kenya and Uganda were held at the Lancaster House, in London, Britain.

A rare exception to this common practice was the second Ugandan constitutional conference (Independence Conference), which was held at Marlborough House in London from 12th June to 29th June, 1962.[111] It was the British wish for all such negotiations to be held in London. Maxon and Kanyeihamba provide at least four reasons, which can explain the British's preference for London.[112] First, the British wanted to control the negotiations and London was suited for the realisation of this objective. Second, they sought to insulate the delegates from off-stage pressures. In other words, it was meant to cut them off any pressures from the people at home. Third, British advisors especially academic constitutional lawyers would conveniently attend the conferences held in London than outside Britain. Fourth, as Kanyeihamba asserts, the British wanted to impress native nationalist

[111] Okello, G., "How 1962 London conference paved way for Uganda's independence," in PML Daily, on https://www.pmldaily.com/investigations/special-reports/2019/10/how-1962-london-conference-paved-way-for-ugandas-independence.html. Accessed on 11th March 2023.

[112] Kanyeihamba, G.W., *Constitutional and Political History of Uganda: From 1894 to the Present*, (2nd edn), Kampala: LawAfrica, 2010, pp. 50-55; and Maxon, R.M., *Britain and Kenya's Constitutions, 1950- 1960*, New York: Cambria Press, 2011 (electronic version which does not include page numbers).

leaders about the Westminster model of government, which they wanted to bequeath to their colonies.[113]

The British invited Zanzibar delegations for a constitutional conference or "constitutional talks" in London, which was held from 19th March to 6th April 1962.[114] It coincided with the second Kenyan constitutional conference which had started on 14th February, 1962 at the same Lancaster House but in a separate hall.[115] The two conferences were closed on the same day, 6th April 1962.[116] The Zanzibar conference was typically elitist as the Kenyan, Tanganyikan and Ugandan. As already hinted before, the British preferred this exclusionist constitution-making modality in which only political elites participated in negotiations while side-lining ordinary citizens. This went against the principles of popular sovereignty and constituent power.

In the first Constitutional Conference for Zanzibar, all three major political parties in Zanzibar (ASP, ZNP, and ZPPP) participated. Ali Muhsin Barwan and Mohamed Shamte Hamad led the delegation of the ZNP/ZPPP coalition.[117] From the ASP side, Abeid Amani Karume and Othman Shariff Mussa headed the ASP delegation.[118] On the British side, Reginald Maulding, Secretary of State for the Colonies, led their delegation and actually, chaired the conference.[119] Additionally, the

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[113] Kanyeihamba, G.W., *Constitutional and Political History of Uganda: From 1894 to the Present*, (2nd edn), LawAfrica, Kampala, 2010, pp. 50-55.
[114] Bakari, M.A., "Constitutional Development of Zanzibar, 1890 - 2005: An Overview," Unpublished paper, p. 6. ASP, *Afro-Shirazi Party: A Liberation Movement*, 1973, p. 204.
[115] Kariuki, G.G., *Lancaster Constitutional Negotiation Process and Its Impact on Foreign Relations of Post-Colonial Kenya, 1960-1970*, 2015, A PhD Thesis, University of Nairobi, p. 150.
[116] Ibid., and ASP, *Afro-Shirazi Party: A Liberation Movement*, 1973, p. 204.
[117] Other members of the delegation included Ahmed Abdularahman Baalawy, Juma Aley; and Ibuni Saleh [Juma, A.S., *Zanzibar Hadi Mwaka 2000*, 1997, p. 100].
[118] Other members of the delegation were Aboud Jumbe Mwinyi, Hasnu Makame Mwita and Rustom Sidhwa [ASP, *Afro-Shirazi Party: A Liberation Movement*, 1973, p. 204].
[119] Other participants included Earl Perth, Hung Fraser, Sir George Mooring (British High Commissioner in Zanzibar), Mr. Mackintosh (Assistant to Secretary of State for the

British allowed observers to attend the Conference. Thus, Abdulrahman Mohamed Babu, Abdulrazak Mussa Simai, Hassan Nassor Moyo, and Rajab Saleh attended the conference as observers.[120] Obviously, these observers were neither ordinary citizens nor representatives of economic, social or other interests. They were eminent politicians connected to the same parties, ASP and ZNP-ZPPP Coalition. This composition indicated multiplicity of interests. Thus, while in Tanganyika there were two sides (the British and TANU), the Zanzibar conference entailed a tripartite-interests event in which the interests of the British, ASP and ZNP-ZPPP coalition had be mediated and harmonised. Accordingly, the Zanzibar constitutional negotiations were much more complex than the Tanganyika ones.

As happened in Tanganyika, the most serious problem about this composition of the conference is that the people of Zanzibar had not elected these participants. It was the British who invited them to the conference. It was assumed that politicians connected with political parties had the automatic right or mandate to represent the people. This was not right. As the power to make a constitution belonged to the people, the mandate to participate in a constituent conference should have been directly or indirectly obtained from the people.

Another challenge was that the British limited the participation to political parties and political elites only. As pointed out earlier, constitution-making is a joint enterprise of all citizens and their groupings, whether political, economic or social. Accordingly, the participation in a constituent process should be as broader as possible. The exclusion of other interests from the conference was not only

Colonies), M.L. Wood, P.A.P. Robertson, P.N. Dalton, G.C. Laurence, and A.L. Pennington.

[120] Juma, A.S., *Zanzibar Hadi Mwaka 2000*, 2007, p. 100.

undemocratic but also went against the principles of popular sovereignty and constituent power.

It can therefore be stated that. The first Zanzibar Constitutional Conference was exclusionist; thus, it violated the principles of popular sovereignty and constituent power. Nonetheless, it was, to some extent, better when compared to the Tanganyikan one in terms of its inclusiveness and democratic participation. This conclusion emanates from two aspects. First, while only one political party (TANU) participated in the Tanganyikan negotiations, as noted earlier, all Zanzibar political parties were involved in the negotiations. This was positive and indicated double standards on the part of the British. Second, while observers were invited to Zanzibar constitutional negotiations, the British invited no one else other than the TANU delegates to the Tanganyikan constitutional conference.

Having discussed the composition of the conference, we turn to examine issues that the conference deliberated. As was common in all such conferences, the Zanzibar conference had two major agenda items: independence and constitution-making. There was no consensus on the date of independence. Both sides, ASP and the coalition, wanted independence but differed on the manner of arriving at such stage. While the coalition wanted independence immediately, ASP wanted an election based on universal adult suffrage to be held first before the British left.[121] Another issue that featured prominently in the conference was the Sultanate. The British wanted the assurance of the protection of the Sultanate, especially the Al-Busaidi dynasty, their ally that had ruled Zanzibar and Oman since the 17th century.[122] Similarly, the ZNP/ZPP coalition supported the maintenance of monarchical constitutional

[121] Mrina, B.F. and Mattoke, W.T., *Mapambano ya Ukombozi Zanzibar*, 1980, p. 83.
[122] Ibid.

system in Zanzibar.[123] In sharp contrast, ASP considered the Sultanate as colonialism which needed to be abolished.[124] Furthermore, the Conference also discussed the fate of the Kenya coastal strip (*mwambao*), which, at the time, was constitutionally part of Zanzibar; the Executive Council to be re-designated "the Council of Ministers;" changing the title of a "chief minister" to "prime minister," and the increase in ministerial and assistant ministerial posts.[125] Moreover, the conference agreed on the inclusion of a Bill of Rights in the constitution when internal self-government and independence constitutions came into force.[126] This was in accordance with the Blood Commission's recommendation. Moreover, the conference discussed and agreed to establish public, judicial and police service commissions.[127] However, all this was a tentative work because, as already indicated, no agreement was reached on the dates of internal self-government and full sovereignty.

4.2. The Second Lancaster House Constitutional Conference, 1963

The second constitutional conference for Zanzibar was held at the same venue as the first one from 20th to 24th September, 1963.[128] The conference is also referred to as "the Independence Conference" as, for instance, the 1957 and 1962 Lancaster House conferences for Nigeria

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123 Ibid.

124 ASP, *Afro-Shirazi Party: A Liberation Movement*, 1973, p. 191.

125 Special Reporter, "Zanzibar Talks," in *Reporter: East Africa's Newsmagazine*, 28th April 1962. Brennan, J.R., "Lowering the Sultan's Flag: Sovereignty and Decolonization in Coastal Kenya," 50(4), *Comparative Studies in Society and History*, 2008, pp. 831–861, p. 857.

126 Special Reporter, "Zanzibar Talks," in *Reporter: East Africa's Newsmagazine*, 28th April 1962.

127 Ibid.

128 Juma, A.S., *Zanzibar Hadi Mwaka 2000*, 1997, p. 118. The opening of the second conference at Lancaster House in London can be viewed on https://www.youtube.com/watch?v=3CuAaLbxDSg. Unfortunately, the video is mute.

and Jamaica respectively were called.[129] This nomenclature, as Utuk opines, was attributed to the fact that the Nigerian conference did not discuss constitutional matters but steps towards independence.[130] However, this reasoning misses a crucial point: sovereignty (independence) is an important constitutional issue. Nonetheless, a constitutional debate took centre stage at the second conference for Zanzibar. On this basis, it befits here to refer it "a constitutional conference" as Juma does.[131] Once again, when Zanzibar delegations arrived in London, the Kenyan third constitutional conference, which had started on 15th September, 1963, was going on in the same Lancaster House.[132] Certainly, the simultaneity of the two conferences was not a fortuitous event for two major reasons. First, it provided the British, Kenyan and Zanzibar delegations with an opportunity to discuss and sort out the Kenyan coastal strip issue.[133] Second, the British aimed at granting independence to the two territories in 1963, so that they could conveniently form the East African Federation.[134] According to Brown, Nyerere and Obote had requested the British to grant Kenya and Zanzibar independence at the same time so that they could participate in the negotiations for the formation of the East African Federation as sovereign states.[135] The British agreed and as they wholeheartedly supported Nyerere's initiatives towards federating the East African states

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[129] Utuk, E.I., *Britain's Colonial Administrations and Developments, 1861-1960: An Analysis of Britain's Colonial Administrations and Developments in Nigeria*, 1975, A thesis, Portland State University, p. 58 and Mapuri, O.M., *Zanzibar: The 1964 Revolution: Achievements and Prospects*, 1996, p. 33; and The Report of the Jamaica Independence Conference, 1962.

[130] Utuk, E.I., *Britain's Colonial Administrations and Developments, 1861-1960: An Analysis of Britain's Colonial Administrations and Developments in Nigeria*, 1975, p. 58.

[131] Juma, A.S., *Zanzibar Hadi Mwaka 2000*, 1997, p. 118.

[132] Kariuki, G.G., *Lancaster Constitutional Negotiation Process and Its Impact on Foreign Relations of Post-Colonial Kenya, 1960-1970*, 2015, p. 218.

[133] Lofchie, M.F., *Zanzibar: Background to Revolution*, Princeton: Princeton University Press, 1965, p. 216.

[134] Ibid., p. 72.

[135] Brown, B., *A Guide to the Constitutional Development of Kenya*, Kenya Institute of Administration, Unpublished Mimeo, 1965, p. 21.

in the early 1960s.[136] However, according to Singh, this was a mistaken approach as the formation of the Federation could have easily achieved before its members attained sovereignty but not thereafter.[137] Since then, as Singh prophesied, the objective of federating East African states has been elusive.

The Zanzibar party delegations in the second conference were almost the same as the first conference except for two slight variations. First, Abdulla Kassim Hanga replaced Rustom Sidhwa in the ASP team.[138] Second, *Umma* Party became the fourth party in the conference.[139] Before this Conference, Babu and a group of committed Marxists had left ZNP and formed *Umma* Party. The common version of the cause of the departure has been "ideological differences."[140] However, the major reason was that the Americans and British considered Babu a dangerous communist.[141] The British had threatened to discontinue their support of ZNP/ZPPP coalition unless its leadership got rid of Babu.[142] Moreover, when Babu left ZNP, Ali Muhsin Baruan, a leader of ZNP, reported to the American ambassador in Zanzibar that all concerns about Communist influence in the party had completely gone.[143]

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136 Report of the Select Committee on East African Federation, 1974, pp. 12-18, and Report of the Committee on Fast Tracking East African Federation, 2004, p. 15.
137 Singh, C., "The Republican Constitution of Kenya: Historical Background and Analysis," 14(3), *The International and Comparative Law Quarterly*, 1965, pp. 878-949, p. 898.
138 ASP, *Afro-Shirazi Party: A Liberation Movement*, 1973, p. 235.
139 Juma, A.S., *Zanzibar Hadi Mwaka 2000*, 1997, p. 118.
140 Mosare, J., "Background to the Revolution in Zanzibar," pp. 214-238, p. 231.
141 Wilson, A., *The Threat of Liberation: Imperialism and Revolution in Zanzibar*, London: Pluto Press, 2013, p. 39.
142 Ibid.
143 Petterson, D., *Revolution in Zanzibar: An American's Cold War Tale*, Boulder (Colorado): Westview, 2002, p. 30.

The British attempted to prevent Babu from attending the conference by withdrawing his passport.[144] Consequently, Babu paddled a canoe all the way to the mainland where he obtained a Tanganyika passport and flew to London. He surprised the British by his unexpected appearing at the Lancaster House, and actually participated in the negotiations.[145] Similarly, the British had also prevented Mr. Koinange wa Mbiyu, one of the *Mau Mau* organisers, from attending the first Lancaster House Constitutional Conference for Kenya in 1960.[146] British attempts to prevent Babu from attending the Conference was undemocratic and unconstitutional, to say the least. A constituent process is a popular deliberative event which should be open to all citizens. Although it was impractical for all Zanzibaris to attend the Conference, Babu was a leader of one of the political parties to which the British had exclusively granted and attributed the right to participation in the negotiations. Thus, he had the right to attend the conference as other leaders of political parties.

While Mr. Reginald Maulding chaired the first conference, his successor, Mr Duncan Sandys, chaired the second conference.[147] The Conference debated various matters including the independence date, the fate of the sultanate and constitutional design. As TANU did, ASP adopted a passive role in the second conference stance.[148] The idea was to agree and let the British go, so that they could compete with ZNP-ZPPP on their own.[149] This softened stance has had at least two effects. First, it would affect the legitimacy of the eventual document. Second, it shortened the debate. Thus, while the first conference took a whopping

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144 Smith, W.E., *Nyerere of Tanzania: The First Decade 1961—1971*, Harare: African Publishing Group, 2011, p. 93.
145 Ibid., p. 93.
146 Dudziak, M.L., "Working toward Democracy: Thurgood Marshall and the Constitution of Kenya", 56(3), *Duke Law Journal*, 2006, pp. 721-780, p. 745.
147 Special Reporter, "Zanzibar Talks," in *Reporter: East Africa's Newsmagazine*, 28th Sept. 1963, p. 13.
148 Mrina, B.F. and Mattoke, W.T., *Mapambano ya Ukombozi Zanzibar*, 1980, pp. 90.
149 Ibid.

17 days and ended without consensus, the second one was concluded in just four days. The second conference resolved that Zanzibar would be independent on 10th December 1963.[150] Another issue that the conference discussed at length was the fate the Sultanate or monarchical constitutional system.[151]

In the end, the conference arrived at several constitutional resolutions (called "the London resolutions"), which is briefly outlined here.[152] First, the Sultan would be a hereditary constitutional monarch with powers to appoint his successor, a regent, and prime minister from the political party that enjoyed the majority in the National Assembly.[153] Additionally, the Sultan would enjoy the prerogative to make laws "independently of the National Assembly."[154] Second, the conference proposed provisions on the citizenship which had the effect of modifying the Nationality Decree, 1952.[155] Third, in order to protect individual freedoms, emergency powers were to be exercised only during war and serious public disturbances.[156] Moreover, the National Assembly would ratify a declaration on the state of emergency and individuals affected by it would have right to legally contest it.[157] Fourth, there would be a unicameral legislature.[158] Fifth, it was agreed to establish four commissions, namely, the Electoral Constituencies Commission, the Public Service Commission, the Judicial Service Commission, and the Police Service

[150] Special Reporter, "Zanzibar Talks," in *Reporter: East Africa's Newsmagazine*, 28th Sept. 1963, p. 14.
[151] Ibid., p. 13.
[152] Ibid
[153] Special Reporter, "Zanzibar Talks," in *Reporter: East Africa's Newsmagazine*, 28th September 1963, p. 13.
[154] Ibid.
[155] Ibid.
[156] Ibid.
[157] Ibid.
[158] Ibid.

Commission.[159] Sixth, the High Court was to be established and that parties could appeal against its decisions to the Court of Appeal of Eastern Africa.[160] Seventh, Zanzibar would be a member of the Commonwealth.[161] Eighth, the legislature would have the power to amend the constitution but some provisions would be entrenched.[162] Lastly, it was resolved that a special constituent assembly in Zanzibar would enact a constitution on the basis of the above-listed London resolutions.[163]

4.3. A Constituent Assembly

As indicated above, one of the resolutions of the second conference was the convocation of a special constituent assembly that would enact a constitution. The convocation of a constituent assembly gave the Zanzibar constituent process a unique feature. It was unique because, as noted earlier, the British rarely preferred this constitution-making modality. They applied it in their few Asian colonies such as in India and Pakistan because the natives demanded it.[164] By the time the second Zanzibar conference was held, independent Ghana and Tanganyika had already held constituent assemblies in 1960 and 1962, respectively. On

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[159] Ibid., p. 14.
[160] Ibid., p. 14.
[161] Ibid., p. 13.
[162] Ibid., p. 14. Interestingly, according to the resolution, the entrenched provisions would "only be alterable by a Bill passed by the National Assembly in two successive sessions, there having been dissolution of parliament between those two sessions." [Special Reporter, "Zanzibar Talks," in *Reporter: East Africa's Newsmagazine*, 28th September 1963, p. 14].
[163] Special Reporter, "Zanzibar Talks," in *Reporter: East Africa's Newsmagazine*, p. 13.
[164] Jha, S., "Rights versus Representation: Defending Minority Interests in the Constituent Assembly", in 38 (16), *Economic and Political Weekly*, 2003, pp. 1579-1583 and Chiriyankandath, J., "Creating a secular state in a religious country': The debate in the Indian constituent assembly," 38(2), *Commonwealth & Comparative Politics*, 2008, pp. 1 ─24.

account of these precedents, ASP demanded a constituent assembly.[165] Undoubtedly, this demand was a complication for the British who sought to control the process for the purpose of protecting their vested interests. Consequently, one of the London Resolutions was that the assembly would not deviate from consensus arrived in London. This was meant to secure British interests. For instance, they always wanted their colonies, protectorates and mandates to adopt the British-styled parliamentary government known as "the Westminster model." Thus, the Assembly would not adopt another form of government. Also, in the case of Zanzibar, they wanted to protect the sultanate and Albusaidi dynasty, which they had kept longstanding close ties in Oman since 1750, before one family member moved to Zanzibar in 1832.[166]

A brief theoretical reflection is salutary. A constituent assembly, according to Brandt et al., "refers to a body representing the people that is vested solely (or mainly) with "constituent power."[167] In other words, it is a representative institution whose main function is to exercise one of the important powers in a state, the power to make a constitution. In the 17th century, an English politician, Sir Henry Vane, partly described a constituent assembly as "a general, or convention of faithful, honest, and discerning men, chosen for that purpose by free consent of the whole body of adherents to this cause in the several parts of the nations."[168] Furthermore, according to Partlett, a constituent assembly

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[165] Interview with Mr. Hassan Nassor Moyo through a phone conversation on 8th April 2020.

[166] Bhacker, M.R., "Family Strife and Foreign Intervention: Causes in the Separation of Zanzibar from Oman: A Reappraisal," 54(2), *Bulletin of the School of Oriental and African Studies*, 1991, pp. 269-280; Francis Owtram, "A Close Relationship: Britain and Oman Since 1750," *Qatar Digital Library*, on https://www.qdl.qa/en/close-relationship-britain-and-oman-1750. Accessed on 8th March 2023.

[167] Brandt, M., et al., *Constitution-making and Reform: Options for the Process*, USA: Interpeace, 2011, p. 233.

[168] Cited in Srinivasan, N., "The Theory of the Constituent Assembly," 1(4), *The Indian Journal of Political Science*, 1940, pp. 376-392, p. 378.

debate entails "elite deliberation" on a constitutional draft.[169] Its members are supposed to be more enlightened on constitutional and political matters than average citizens.

The Constituent Assembly of Zanzibar (simply called "the Assembly") began its sessions in mid-November 1963.[170] Like the 1962 Constituent Assembly of Tanganyika, the Zanzibar Assembly was formed by a conversion method.[171] The National Assembly converted itself to a Constituent Assembly.[172] In other words, members of the National Assembly became members of the Constituent Assembly. The Assembly discussed a constitutional draft that British lawyers had developed.[173] Both the coalition and ASP did not demand participation in the drafting process as the Kenyan nationalist leaders did. As happened in Tanganyika, British lawyers did everything on their own. In the Assembly, the Prime Minister, Mr Mohamed Shamte Hamad presented the draft.[174] After Shamte's speech, the leader of the opposition, Abeid Amani Karume, gave a brief speech.[175] The powers of the Assembly were circumscribed. According to one of the London resolutions, the Assembly had no power to depart from what was agreed in London.[176] Thus, the discussion was to be confined within the framework of the London resolutions.

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[169] Partlett, W., "Restoration Constitution-Making," 9(4), *Vienna Journal on International Constitutional Law*, 2015, pp. 514-547, p. 514.
[170] Interview with Mr. Hassan Nassor Moyo through a phone conversation on 8th April 2020.
[171] Ibid.
[172] Ibid.
[173] Ibid.
[174] Special Reporter, "Zanzibar: Constitution Debate," in *Reporter: East Africa's Newsmagazine*, 30th November 1963, p. 12.
[175] Ibid.
[176] Ibid., p. 13.

Two issues provoked a heated debate in the Assembly. The first one was the provision which proposed that appeals from the High Court of Zanzibar would lie to the Court of Appeal of the prospective East Africa Federation. The opposition (ASP) wanted the relevant provision to read that appeals would lie to "the Court of Appeal for time being established under the Constitution of the East African Common Services organisation and its successors."[177] ASP supported the initiative for East African Federation and thus the word "successors" would serve a future political development.[178] For its part, the coalition government objected to the inclusion of the word "successors" in the provision.[179] The coalition government was not passionate about the federation idea, and it actually failed to send a representative in a meeting which was held in Nairobi on 5th June 1963.[180] In the end, the coalition held sway as the word was excluded from the draft.[181] Another contentious issue was the amendment modality. In the second conference, the opposition had pressed for many entrenched constitutional provisions.[182] Briefly explained, constitutional entrenchment entails provisions which are purposely designed to make constitutional amendment practically difficult.[183] In contrast with the opposition stance, the Government thought that over-entrenchment would make the constitution excessively

[177] Ibid., p. 12.
[178] Ibid.
[179] Ibid.
[180] Report of the Select Committee on East African Federation, 1974, p. 17; and Mwakikagile, G., *Restructuring the East African State and Quest for Regional Integration: New Approaches*, Dar es Salaam: New Africa Press, 2014, p. 143.
[181] Section 96 of the Constitution of the State of Zanzibar, 1963.
[182] Special Reporter, "Zanzibar: Constitution Debate," in *Reporter: East Africa's Newsmagazine*, 30th November 1963, p. 12.
[183] McLean, I. and Peterson, S., "Transitional constitutionalism in the United Kingdom," *Cambridge Journal of International and Comparative Law*, 2014, pp. 1113- 1135, p. 1113; Schmitt, C., *Constitutional Theory*, 2008, p. 71; and Albert, R., "Constitutional Handcuffs," 1, *Intergenerational Justice Review*, 2017, pp. 18-30, p. 19.

rigid.[184] Ultimately, the Assembly passed *the Constitution of the State of Zanzibar* on 27th November, 1963.[185] It was published in the official Gazette on 5th December 1963 and became effective on the Independence Day, 10th December, 1963.[186] In short, while the British Parliament adopted *the Tanganyika (Constitution) Order in Council, 1961*, the Constituent Assembly of Zanzibar adopted *the Constitution of the State of Zanzibar, 1963*.

As pointed out earlier, a constituent assembly offers the advantage of enlightened deliberation and reflection. In the 1962 Constituent Assembly only TANU dictated things as other political parties were excluded. Conversely, all political parties in Zanzibar participated in the Assembly. This political inclusivity was positive and democratic. For this reason, the Zanzibar constituent process was more democratic than a similar process in Tanganyika. The convocation of the Assembly expanded participation and deliberation on the constitutional proposals. Members of Parliament (MPs) who did not go to London were availed an opportunity to debate constitutional proposals which were set out in the draft. Nonetheless, the Assembly was beset with the following challenges. First, as noted, the modality of forming the Assembly was one of conversion. MPs became delegates of the Assembly without being popularly elected for that purpose. This was unconstitutional since MPs, individually or collectively, have no power to exercise constituent power unless they obtain that specific mandate from the people. Parliament has no power to make a constitution and this equally applies to its members.[187] Thus, this composition went against the principles of popular sovereignty and constituent power. Second, the Assembly was

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[184] Special Reporter, "Zanzibar: Constitution Debate," in *Reporter: East Africa's Newsmagazine*, 30th November 1963, p. 12.
[185] The Constitution of the State of Zanzibar, 1963.
[186] Ibid.
[187] *Kessevananda v. State of Kerala* [1973] AIR (SC) 1461 and *Njoya and Others v. Attorney-General and Others* [2004] 1 EA 194.

not free to discuss or change the draft outside the framework of the London Resolutions. It was a bird with clipped wings, to be a little explicit. As noted, the British were responsible for this condition for the purpose of safeguarding their vested interests. This was undemocratic and made the whole exercise of convoking the Assembly futile.

4.4. Salient Features

The Constitution of the State of Zanzibar, 1963 (or "the Independence Constitution of Zanzibar" as is famously known) was not only uniquely made but also a distinctive document in East Africa at the time. First, unlike the Tanganyika's Independence Constitution, it contained an exhaustive Bill of Rights.[188] Second, it attempted to deal with the challenge of institutional partisanship in a multi-party democracy. For instance, the Speaker of the National Assembly was appointed outside the Assembly.[189] This appointment modality was aimed at ensuring impartiality in managing a multi-party legislature. Third, like similar independence constitutions of Tanganyika, Kenya and Uganda, it maintained parliamentarianism or a parliamentary government. Two hallmarks of parliamentarianism in the Constitution may be pointed out. One, it typically fused the executive and legislature. The Sultan had to appoint the Prime Minister, all ministers and assistant ministers from the National Assembly.[190] Two, the National Assembly wielded the power to dismiss the Prime Minister by passing a vote of no confidence in him or her.[191] This is another classic feature of parliamentarianism.

Fourth, it provided one of the most extensive and strict entrenchment mechanisms. Only the Independence Constitution of Kenya (the

[188] Chapter II of the Constitution of the State of Zanzibar, 1963.
[189] Section 44 (1), ibid.
[190] Sections 72(1), 72(3) and 76 (1), ibid.
[191] Section 73(1) (a), ibid.

Constitution of Kenya, 1963) came close but it could match the Constitution of the State of Zanzibar in terms of entrenchment. For the sake of brevity, one example would suffice. A Bill to amend an entrenched provision had to be supported by the supermajority (two-thirds) in the National Assembly first.[192] If it passed that rigorous test, it would not be immediately submitted to the Sultan for assent.[193] Instead, it would be kept in a shelf until the National Assembly that passed it was dissolved, a parliamentary election conducted and the National Assembly constituted.[194] If the spirit of change still existed, the Bill would have to be tabled before reconstituted National Assembly and subjected to fresh debate and voting.[195] If it was supported by the supermajority once again, then it would be submitted to the Sultan for assent.[196] Thus, the entire Bill of Rights; all provisions regarding the citizenship, the sultanate, financial matters, and public service (except a few provisions) were entrenched.[197] In addition, the amendment clause itself and other 30 provisions, most of which related to Parliament, were entrenched as well.[198]

Sixth, it declared Zanzibar a monarchy. This was one of its notable undemocratic characters. In this regard, the Sultan was the head of state who wielded extensive executive powers such as declaring the state of emergency; appointing the Prime Minister, all ministers and assistant ministers, the Speaker of the National Assembly, the Chief Justice and puisne judges of the High Court.[199] Additionally, the Sultan was part of Parliament, a replica of the British constitutional system.[200] Moreover,

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[192] Section 58(2) (i), ibid.
[193] Ibid.
[194] Ibid.
[195] Ibid.
[196] Ibid.
[197] Section 58(1) read together with 4th schedule to ibid.
[198] 4th schedule to ibid.
[199] Sections 44(1), 70(1), 71(2) (a), 72(1), 76(1) and 93, ibid.
[200] Section 39 of the Constitution of the State of Zanzibar, 1963.

the Constitution conferred him the right to nominate one male member of his family a successor to the throne in case of his death or abdication as well as the power to appoint a regent.[201] Monarchism is an inherently undemocratic system. The ruled have no right to install or remove their government. Normally, they would be left with two atrocious options: either to obey or resort to a violent upheaval. Democracy is based on the idea of equality of all citizens. As noted earlier, the principle of popular sovereignty is partly based on the idea that a constitution and government must be based on the consent of the governed.[202]

Therefore, the foregoing discussion indicates that the Constitution of the State of Zanzibar 1963, just like the Tanganyika (Constitution) Order in Council 1961, can be described variously as the "monarchical constitution," "parliamentary constitution," or "Westminster model constitution." This is so because it established a parliamentary government in the mould of the British Westminster model. The government was partly monarchical because it established the office of the Sultan as the head of state who exercised substantial powers. The Zanzibari people had no constitutionally recognised right to elect or remove the Sultan from office.

5.0. SUMMARY AND CONCLUDING REMARKS

The main focus of this paper is constitution-making during the decolonisation period in the early 1960s. The paper began by highlighting the immediate pre-independence political and constitutional developments that led to a constituent process. The paper employed the principles of popular sovereignty and constituent power as theoretical tools or framework against which constituent processes at decolonisation

[201] Sections 32, 33 and 34, ibid.
[202] Locke, J., *Concerning Civil Government, Second Essay: An Essay Concerning the True Original Extent and End of Civil Government*, USA: Pennsylvania State University, 1690, p. 75.

were examined. In short, popular sovereignty is a principle with wide connotations. In the context of constitution-making, it means that in making a constitution people should be consulted. Its ancillary principle, constituent power, holds that the power to constitute (or make) a constitution belongs to the people, not their government. Differently explained, while government is vested with legislative, executive and judicial power, the people hold constituent power (the mandate to make a constitution and government). These two closely-related principles are connected with the principle of democracy which demands participation of the people in decision-making on major public affairs such as constitution-making.

As noted, in Tanganyika, apart from the exclusion of the people, only one political party (TANU) participated in constitutional negotiations. The British deliberately excluded other political parties from the negotiations. Additionally, they shut out all social and economic groups such as trade unions which formed a formidable political force in Tanganyika at the time. These exclusions were undemocratic and, more seriously, violative of the principles of popular sovereignty and constituent power. Furthermore, the Zanzibar constituent process was more inclusive and democratic because all political parties fully participated in the London negotiations and the constituent assembly deliberation. However, as it occurred in Tanganyika, economic and social interests were side-lined. The participation was also limited to political interests. This was undemocratic and went against the principles of popular sovereignty and constituent power.

As mentioned, the Zanzibar constituent process included a constituent assembly. This was praiseworthy because the Assembly provided a forum for further democratic deliberation. However, the Assembly was not democratically constituted as the people of Zanzibar were not afforded the opportunity to elect their representatives to the Assembly. Instead,

the ordinary National Assembly converted itself to a Constituent Assembly. This undemocratic formation of the Assembly was inspired by the 1962 Constituent Assembly of Tanganyika, which was also undemocratically formed. Because people hold constituent power, they must have a say or at least consulted in choosing their representatives to the constituent assembly.

Therefore, constitution-making in Tanganyika and Zanzibar at decolonisation was, to a large extent, undemocratic and violated the principles of popular sovereignty and constituent power. There were many challenges as pointed out but the exclusion of the people was the most serious one. The British created bad precedents which nationalist leaders subsequently replicated. Consequently, all constituent processes in the 1960s and 1970s excluded the people. Moreover, in the constituent process, which began in 2011 and stalled in 2014, people participated but powerholders showed their usual reluctance to respect popular opinion. The impetus to exclude other interests from the process was also manifest. Owing to these and other reasons, no broad-based political consensus was coalesced and, consequently, the process stalled.

As public debate to revive the stalled process rages on, it is important for political leaders and ordinary citizens alike to bear in mind the valuable lessons that can be learned from early constituent processes in Tanganyika and Zanzibar. First, in order to produce a legitimate and enduring constitutional text, people need to participate in the process by expressing their opinion or making key decisions whenever possible. It is also important for the people to approve a constitutional draft in a free and fair referendum. Second, it is essential that all political, social and economic groups that wish to participate in the process to be allowed to do so. Third, one political group or another group should not impose its version of a constitutional text on other groups and the population at large. Although complete unanimity is practically unachievable, broad-

based consensus must be sought. An imposed constitutional text would not last. For instance, as already demonstrated, the British imposed their own constitutional design on the nationalist leaders. This action seriously dented the legitimacy of two constitutional texts. Consequently, just after 38 days of its adoption, TANU announced its intention to replace it and actually did so after a year. In Zanzibar, the Independence Constitution was abrogated through a *coup d'état* or revolution after 33 days following its adoption. Therefore, the envisaged constituent process should target consensus-building for the ultimate adoption of a legitimate and durable constitutional text that will ensure long-term social cohesion, political stability and economic prosperity.