

Constitution making and constitutional reform in fledgling democracies: An East African appraisal

by

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Introduction

Modern constitutionalism¹ in Africa is an evolutionary process roughly divisible into five historical phases. The first two phases are the pre-colonial era and the era of colonial domination. The next two phases are the immediate post-colonial period and the modern era when the colonies became independent states and began to face the challenges of nationhood. The final phase is the contemporary era focusing on the latest political and constitutional turmoil in Africa as well as recent efforts to promote democracy and constitutional reform. As elsewhere in Africa, constitutionalism in East Africa has received increased attention in the last decade and a half more than ever before. The preoccupation of democratic analysts with elections as the *sin qua non* of democratic transitions is now a thing of the past. Opposition politicians and democratic activists have turned greater attention to constitutions and constitutionalism. This study examines constitutionalism in the three Kenya, Uganda and Tanzania in a view to open up debate on the approaches that the reform processes have adopted.

1. Constitutions

A constitution enjoys a special place in the life of any nation. It is the supreme and fundamental law that sets out the state's basic structure including the exercise of political power and relationship between political entities, between the state and the people.² Constitutions serve numerous functions. Firstly, they enable states to create unifying ideals and objectives Secondly; constitutions afford government stability by ordering its conduct. Thirdly, constitutions provide an avenue for the protection of individual freedom and liberty. Lastly, constitutions provide a source of legitimacy for the regime in place.³

1.1 Creation of unifying ideals and objectives

In addition to limiting the exercise of governmental power, constitutions define the existence of states and outline their sphere of authority. The creation of a new state whether through the overthrow of colonialism, fragmentation of larger states or an amalgamation of smaller ones is invariably accompanied by the enactment of a constitution. Indeed, it can be argued that such states exist only once they have a constitution since without one they lack formal jurisdiction over a particular territory or a governing apparatus that can effectively exercise that jurisdiction.

In addition to laying down a government framework, constitutions typically embody a broader set of political values, ideals and goals embraced by the local populous. They seek to invest their regime with a set of unifying values, a sense of ideological purpose and a vocabulary that can be used in the conduct of politics. In many cases these aims are spelled out explicitly in preambles to constitutional documents, which often function as statements of national ideals. However, in other cases these values and ideological priorities implicit.

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¹ Constitutionalism in a narrow sense refers to the practice of limited government ensured by the existence of a constitution. Thus constitutionalism can in this sense be said to exist when government institutions and political processes are effectively constrained by constitutional rules. More broadly constitutionalism is a set of political values and aspirations that reflect the desire to protect liberty through the establishment of internal and external checks on government power. It is typically expressed in the form of support for constitutional provisions that achieve this goal; for example a codified constitution, a bill of rights, separation of powers, bicameralism and federalism or decentralisation.

² Heywood, A *Politics*, (2002) 292.

³ Heywood, as above at 298.

1.2 Constitutions as a source of stability and a mechanism for protection of individual liberty

In allocating duties, powers and functions amongst the various institutions of government, constitutions act as organisational charts definitional guides or institutional blueprints. In so doing, they introduce a measure of stability, order and predictability to the workings of government. Constitutions also lay down the relationship between state and individual marking out the respective spheres of government authority and personal freedom. They do this largely by defining civil rights and liberties often through the means of a bill of rights.

2. Constitutionalism in East Africa: The pre-colonial period

The concept behind constitutionalism did not arrive with the colonialists. Indeed, traditional African societies had their own system of social and political organisation prior to colonialism.⁴ With the arrival of colonialism, these structures were done away with and a colonial system of government imposed on the Africans. Africa was partitioned by the colonial powers into territorial units at the Berlin Conference of 1884-5 in accordance with their various claims. Colonial boundaries were drawn up without regard to ethnic, linguistic, religious, cultural, economic and demographic or other social bonds in the different regions of Africa. African Kingdoms states and communities were arbitrarily divided unrelated regions and peoples were joined together whilst united peoples were torn apart. The era of colonialism initiated and that of independence consummated a dynamic process of disruption in tribal organisation and tribal life.⁵

Colonial rule was philosophically and organisationally elitist, centralist and absolute leaving no room for either constitutions or representative institutions. The philosophy of the government was expressed in law principally by rules that gave almost unlimited discretion to colonial officials and the absence of formal controls over its exercise.⁶ This fact has often been argued to be the cause of the centralist style of leadership that most post-independent African governments adopted.

2.1 The making of the independence constitutions

It has often been argued that independence constitutions in Africa came to be from a cut and paste process whereby the Westminster model from England was put in place by the departing colonial rulers without regard to local conditions and susceptibilities.⁷ Further, that having been designed abroad, there was a fundamental disparity between the values of the people of Africa and the western values that inspired the drafters of the new constitutions. Whereas there is some truth in this statement, the Public Records Office documentation in England show provides evidence that there

⁴ It is well documented that pre-colonial African society, while not divided into states as defined in the modern west European sense was politically organised. This organisation was highly sophisticated, showing segmentation at various levels such as the family, village and clan, all united by common ethnic, linguistic and religious bonds. For more on this see, Colson, E *Seven Tribes Of Northern Rhodesia* (1957); Gluckman, M *Politics and Ritual in Tribal Society* (1965); Isaak D “Constitutionalism and the post-colonial state in Africa: A rawlsian approach” (1997) 41 *St. Louis University Law Journal* 1301; Nyang, S “The impact of United States constitutionalism in Africa: A Gambian case study” in Kenneth, W *The United States Constitution and constitutionalism in Africa* 77, 80; Makau, M “The Banjul Charter and the African cultural fingerprint: An evaluation of the language duties” (1995) 35 *Vanderbilt Journal of International Law*, 339, 342.

⁵ Ndulo, M, Hatchard, J and Slinn, P *Comparative constitutionalism and good governance in the Commonwealth: An Eastern and Southern African perspective* (2004) 13.

⁶ Makau, M “Putting humpty dumpty back together again: The dilemmas of the post-colonial African state” (1995) 21 *Brooklyn Journal of International Law* 505, 521.

⁷ Nwabueze, B *Constitutionalism in the emergent states* (1973) 23.

was consultation and input of the incumbent governments. In the case of Kenya for example in July 1963, the British government, aware that there were differences of opinion within the ranks of Kenyan politicians on the subject whether Kenya should retain the Queen as head of state after independence, convened a secret tea time meeting between MacDonal, then Governor General, Jomo Kenyatta then Prime Minister and Ronald Ngala an opposition leader.⁸ Ultimately, the two leaders reached a compromise and the way was cleared for Kenya's independence in December 1963. The decisive influence of locally elected nationalist leaders in Kenya on the independence constitution was not only confined to the question of the monarchy. The drafting of the constitution itself was the product of a lengthy consultation exercise involving detailed discussions in 1962-3 in the Kenyan Council of Ministers (which had an elected African Majority). The view that colonial authorities imposed independence constitutions with little or no regard for local conditions and without adequate consultations locally is therefore inaccurate.

However, it has been argued those who helped in the drafting of these constitutions were themselves cultural subjects, having been educated in the ways of the colonialists; they accepted, tactlessly, the values of democracy, free elections, multi-party politics and capitalism of the colonial power without appreciating the values of their own tribal societies. For this reason, that there was an imposition of western values on the African people without regard for their own traditions is a grim reality.

2.2 The next wave of constitution making: The need for constitutional reform

It came as no surprise that many governments that emerged after independence soon became undemocratic, over centralised and authoritarian as their predecessor colonial governments. The imperfections of post-colonial constitutions were in part a reflection of the fact that those who prepared the colonies for independence were themselves not democratic and were largely ignorant of or insensitive to the prevailing social and cultural dynamics of the societies they had colonised. This state of affairs is attributable to a lack of legitimacy of the post-colonial state and its constitution, one party rule phenomenon⁹ and the rise of military rule.¹⁰

Another reason is the manner in which the constitutions were designed. A successful constitution is one that obtains legitimisation by popular will. The socio-economic values incorporated into the independence constitutions had evolved over a long period as western societies went through several phases of social and economic development. It followed that independence constitutions embodying these values were never representative of the African societies that they were meant to govern.¹¹

⁸ Ndulo as note 5 above at 17 citing Correspondence in CO 822/3117 in the United Kingdom Public Records Office. Governor MacDonal wrote almost plaintively to the Secretary of State in a secret despatch of 9 September 1963, 'I shall do my best to persuade Kenyatta that it would be more seemly for them to become a republic unless they intend to remain a monarchy for a number of years but I think it extremely unlikely that I shall have any success.'

⁹ Owing to the ethnic character of political parties at the time one party rule was regarded as viable and a desirable option.

¹⁰ D Issak as note 2 above at 1305. Following independence there were more than 21 military coups in Africa namely, Algeria, Burundi, Congo-Brazzaville, Democratic Republic of Congo (formerly Zaire), Central African Republic, Dahomey, Ethiopia, Gabon, Gambia, Lesotho, Liberia, Libya, Mali, Niger, Nigeria, Senegal, Sierra Leone, Somalia, Sudan, Togo, Uganda, Burkina Faso (formerly Upper Volta) and Zanzibar.

¹¹ Nwabueze as note 7 above at 25 and 27.

The position as prevailed at the time was captured explicitly in 1991 by the Report of the Presidential Commission on Single Party or Multiparty System in Tanzania prepared by the Nyalali Commission.

- One party rule had largely undermined the participation of citizens in governance.
- Ruling parties had transformed themselves from political parties to state parties monopolising all politics.
- Various civil organisations, non-governmental organisations and other pressure groups had fallen under the hegemonic control of the party.
- Repressive colonial laws had not only been retained but also expanded.
- The bill of rights had been significantly undermined by the presence of numerous claw back clauses.
- The judiciary had often been interfered with and had its right to act independently infringed upon.
- The division of power between the executive, judiciary and legislature had been lopsidedly weighted in favour of the executive especially the office of the president.
- Absolute power of the state party meant it had overshadowed the legislature.
- The constitution was full of very serious shortcomings, contradictions and inconsistencies.¹²

Tanzania was the exception to this dismal state of affairs, with the implementation of Julius Nyerere's concept of African society, based on what he called "*ujamaa*", meaning family-hood in Swahili. This was a genuine attempt to encourage grassroots participation by the masses in their political and economic advancement.¹³ Not only did Nyerere refuse to allow the development of a personality cult, common practice among many other African leaders, but also he was one of the few leaders of Africa who willingly stepped down from office. He also instituted constitutional reforms limiting presidential tenure to two terms.¹⁴ In 1990, the one party state was abolished, and the new constitution of Tanzania of 1990 provides for multiparty elections and contains a comprehensive bill of rights.

Thus independence constitutions failed to work not so much because of a failure by Africans to learn the lesson of parliamentary government, rather the lesson of authoritarian colonial rule was taught and learnt all too well. The result of all this was unprecedented economic decline and mismanagement resulting in unimaginable poverty and a growing economic divide between the urban and rural areas. However the end of the cold war, the Harare Commonwealth Declaration¹⁵ influence and pressure from the international donors all played a key part in bringing about constitutional changes in 1990s that were unmatched since the granting of independence.

3. The process of constitutional reform

Constitutional reform must come from the integration of ideas of the major stakeholders in a country including the government, political parties both within and without parliament, organs of civil society and individual citizens.¹⁶ It follows that the process is one in which the government

¹² Nyalali Commission, 'Report of the Presidential Commission on Single Party or Multiparty system in Tanzania', Dar es Salaam: Government Printers, 1991.

¹³ Motala, *Z. Constitutional options for a democratic South Africa* (1994) 145.

¹⁴ Motala at 151

¹⁵ In 1991, the Commonwealth Heads of Government pledged to work with renewed vigour concentrating on *inter alia* democracy, democratic processes and institutions reflecting national circumstances, rule of law and independence of the judiciary, just and honest government. For the context and significance of the Declaration see Duxbury, A "Rejuvenating the Commonwealth: The human rights remedy" (1997) 46 *International and Comparative Law Quarterly* 344.

¹⁶ Motala, as note 13 above.

should neither control nor unduly influence nor should it be a mere formality. It involves the making of complex bargain between the various stakeholders with often fiercely contested political tradeoffs.¹⁷ Further the process must be transparent i.e. it must be undertaken in full view of the country and the international community. This is crucial for establishing an ethos of constitutionalism, a recognition by the people that it is a constitution upon which they were consulted and which they endorse, that it contains provisions from which they derive demonstrable benefits that are worth defending and that it encourages in both the governed and governors alike a habit of compliance and respect for its provisions.¹⁸

3.1 The politics of constitutional reform

Politics is a highly controversial term. It is usually associated with trouble, disruption, violence, deceit and manipulation. As to its meaning, there is the lack of agreement on this even amongst respected authorities. It has been defined in different ways as the exercise of power, exercise of authority the making of collective decisions, allocation of scarce resources, practice of deception and manipulation and so on. The virtue of its definition as advanced in this paper, is sufficiently broad to encompass most if not all of the competing definitions. Politics is the activity through which people make preserve and amend general rules under which they live.¹⁹ Given that a constitution creates the rules under which a people live, constitutional reform is necessarily a political matter. It is often stated that the constitutional reform process ought not be politicised. This statement is in my view inherently contradictory. Constitutional reform of itself is a political matter and it would be a grave error to consider constitutional reform as a purely legal affair. Consequently, that constitutional reform will always involve mudslinging by politicians is inevitable.

3.2 Constitutional reform in Kenya; 1992-2005

Kenya has had a troubled constitutional history. As alluded to earlier, the independence constitution of 1963 was negotiated between the Kenyan nationalist political leadership and the departing colonial power, but was still seen as being imposed upon the larger faction of the organized in the Kenya African National Union (KANU) under the leadership of Jomo Kenyatta. At independence, Kenya was under a constitution that established a federal (*majimbo*) framework with an executive prime minister and the British monarch as head of state. However, only one year in force the federalist constitution was replaced with the current one introducing a unitary state with President as head of state. Though the constitutional debate in Kenya goes back to the challenges of negotiating an independence constitution under the auspices of the departing British imperialists, this paper will focus on the period between 1992-2005.

While the repeal of Section 2A of the constitution in 1991 allowed for the legal existence of opposition parties, it left in place a matrix of laws (many of which were holdovers from the colonial period, especially the emergency era), which undermined liberal principles necessary for a functional multi-party system. These laws included restrictions on free assembly, sedition laws, and party registration mechanisms controlled by the executive.²⁰ The constitutional reform debate can be said to have started in earnest in 1994 with the publication of the Model Constitution by the Citizens' Coalition for Constitutional Change (4Cs), which took the mantle of pressing for constitutional change following the problematic transition elections of 1992.²¹ Apart from for the repeal of Section 2A and the 1997 Inter-Parliamentary Parties Group Constitutional Reform (IPPG) reforms, all of the

¹⁷ Heywood, as note 2 above.

¹⁸ Heywood as note 2 above.

¹⁹ Heywood as note 2 above.

²⁰ Institute of Education in Democracy, *Election Handbook* (Nairobi, Kenya: IED, 1997).

²¹ Barkan, J "Kenya: Lessons from a flawed election," (1993) 4 *Journal of Democracy* p. 85-99.

amendments to the constitution restricted the liberties of individuals and groups, while enhancing the power of the executive at the expense of parliament.²² As such, broad-based constitutional reform became the key goal of most 'progressive' organizations. The momentum started by the 4Cs and related groups gained ground in 1997 when the National Convention Assembly (NCA) and its executive arm, the National Convention Executive Committee (NCEC) began to mobilize for comprehensive constitutional changes before the 1997 elections. With the support of opposition political parties, the NCEC threatened to derail the 1997 elections with mass demonstrations and enlisted politicians to a boycott under the battle cry "no reforms, no elections." As a result, the government was forced to accede to a set of minimum reforms – the so-called IPPG reforms that allowed elections to take place with most opposition leaders taking part.²³ This agreement included constitutionally entrenching the multi-party system and omnibus legislation repealing most of the repressive laws and administrative regulations. The most significant reform plank was the passage of legislation enabling a comprehensive review of the constitution after the elections. However, even before the formal review was to start, the process proposed in the Constitution of Kenya Review Act²⁴ became highly contentious and consumed much of the energy in the political arena after the elections of December 1997 in which the ruling party KANU retained power. By late 1998, this process had been derailed and in the next two years, a protracted battle ensued to decide the process of constitutional reform. This battle would go on until the end of then President Daniel Toroitich Moi's regime and the inception of Mwai Kibaki's government that drew up the following agenda as a plan to mop up the existing political impasse.

- 1) Conducting of civic education to prepare the people for the review through Constituency Constitutional Forums;
- 2) Touring the country and listening to people directly and through organizations and groups;
- 3) Preparation of the Commission's report and a Draft Constitutional Bill;
- 4) Publication and dissemination of the Commission's report and the Draft Constitutional Bill;
- 5) Organising a National Constitutional Conference in accordance with section 27(1)(1) of the Constitution of Kenya Review Act;
- 6) Organisation of a referendum;
- 7) Submission of a final constitutional draft to the Attorney General for final "technical revision" for submission for popular approval through a referendum.

The process started and progressed well until the fifth point on the agenda, which came to be known as is known as the Bomas named after the place where the 1st draft constitution was produced. The Bomas I conference lasted from April to June 2003, Bomas II from August until September 2003 and Bomas III, which finalized the "*Bomas draft constitutional Bill*", lasted from January until March 2004. Around 630 representatives from locally elected bodies, members of selected non-

²² Ndegwa, S "The incomplete transition: The constitutional and electoral context in Kenya," (April 1998) 45 *Africa Today (Special Issue)* p. 193-212.

²³ Ndegwa, as above.

²⁴ According to the Constitution of Kenya Review Act 1997, A Constitution of Kenya Review Commission consisting of 29 commissioners was to be appointed by the president from a list of 45 submitted by various stakeholders. This commission would collect and collate the views of Kenyans by traveling across the country holding public hearings. The act delineated three stages for the establishment of the commission but made no mention of how it would actually work.

governmental organizations and all members of parliament attended the Bomas conferences. The last phase of Bomas III, was marred by deep controversies, and the final adoption of the draft was boycotted by MPs opposed to the governmental model that the majority of the conference participants preferred. The main conflict revolved around so-called “contentious issues” that Bomas III was unable to resolve, and remained key controversies in the subsequent referendum campaign. The two major issues of disagreement were:

- The system of government namely, the choice between, on the one hand, a parliamentary system with separation between a president as head of state with significantly reduced powers and an executive prime minister as head of government, supported by a majority in parliament, versus a presidential system with a strong executive president (and a weak prime minister appointed by the President).
- The devolution of power to lower tiers of government. The Bomas draft suggested five tiers of government, including a strong regional political level.

These issues gravely hampered the Bomas III conference and the draft constitutional Bill adopted by the conference in March 2004 threatened to bring the constitutional process to a halt. In order to bring the issue out of the deadlock, Parliament on 30 June 2004 reconstituted the Parliamentary Select Committee on Review of the Constitution of Kenya. This Committee met in Naivasha from 4-5 November in 2004 under the chairmanship of Member of Parliament, William Ruto to resolve the contentious issues and negotiate a compromise between the supporters of the Bomas Draft and those opposed to it. The negotiated Naivasha Accord stated that the executive authority should; “*repose in the president, the prime minister and the Cabinet*”²⁵. Although the President would appoint the prime minister, the latter should be appointed from the party or coalition of parties with majority support in parliament. In addition to the national level, it suggested to introduce a county level of government, but retained the district level under the current constitution.

The Naivasha Accord was subsequently reconsidered by a new Parliamentary Select Committee appointed on 5 May 2005 with a new chairman (Simeon Nyachae) and new terms of reference. The Committee met at a retreat in Kilifi on 15–17 July 2005. The Kilifi Report basically recommended that the Bomas Draft be revised in accordance with the Naivasha Accord. Yet, the Kilifi Report went further by suggesting a reduction of the powers of the prime minister in favour of the president, and omitted a clause in the Naivasha Accord, which limited the number of ministers to not more than twenty-five.²⁶ The Bomas Draft along with the Naivasha Accord and the Kilifi report were then submitted to Parliament for debate and adoption on 20–21 July 2005. The Kilifi Report was adopted after a heated debate where after the Attorney General, Amos Wako, would prepare a Constitution of Kenya Bill. Nevertheless, when the Attorney General produced the Bill (which came to be known as the Wako Draft), the Bomas Draft and the revisions recommended by the Naivasha Accord and the Kilifi Report were tilted in favour of the latter. The Wako Draft was, as you would have thought, supported by the President Mwai Kibaki and it became the Bill commonly referred to as the Wako Bill or the proposed new constitution which was voted upon in the referendum.

In summary, the parliamentary debate of the constitutional draft after Bomas did not resolve the contentious issues on system of government and devolution of power. In response to the Wako Bill, published in August, two national referendum committees were organized; the Banana representing the yes side, and the Orange representing the no side. The “No” side secured a resounding victory with per cent of the votes cast, whereas the “Yes” side garnered 43 per cent.

²⁵ Andreasen, B and Tostenten, A *Of oranges and bananas: The 2005 Kenya referendum on the constitution* CMI Working Paper 13.

²⁶ Andreasen and Tostenten as above.

The Banana camp conceded defeat at an early stage and pledged to work with the opposing camp towards reconciliation and the healing of wounds inflicted during the heated campaign. For its part, the victorious Orange camp drew attention to the fact that the people had made its verdict but immediately extended a conciliatory hand to the Banana side. It was apparent that both sides were keen on putting the matter to rest, at least for the time being, and work for a new constitutional consensus. These are the events that have marked the present impasse on constitutional reform in Kenya.

3.3 Constitutional reform in Uganda; 1994-2005

Similar to Kenya, the Constitution of Uganda suffered early setbacks under the independent government. When Uganda gained its independence from Britain in 1962, it had a federal constitution that framed a republic balancing several ethnic and sectarian interests, including the traditional monarchies.²⁷ However, in 1966 the government then under the leadership of President Milton Obote unilaterally changed the constitution and installed a new one the following year, abolishing the Buganda monarchy and extending the life of parliament without elections.²⁸ In 1971 the government of Obote was overthrown by the military led by Idi Amin Dada an event which was initially seen as a necessary halt to the steep decline into authoritarianism under Obote's rule. However, Amin's reign was the beginning of 15 years of gargantuan plundering of state resources.²⁹ Therefore, National Resistance Movement (NRM) came into power in January 1986, Ugandans welcomed then with all arms having seen the worst of Amin's government and several successor regimes.

The NRM came to power advancing a *Ten Point Programme* to help get Uganda out of the mess the previous Government had plunged it in.³⁰ Among its priorities was the democratisation of Ugandan public life with a great emphasis on participatory democracy rather than the institutionalisation of democracy in polyarchic terms. Since then, Uganda has tried to re-write its constitution using both the more constrained Constitutional Commission and the more participatory Constituent Assembly. The Constitutional Commission was set up in 1989 headed by a high court judge and composed of academics and lawyers, worked for three years to collect and collate views. Subsequently, a Constituent Assembly was directly elected in March 1994 to craft a new constitution.

Thus, unlike Kenya, the process itself remained relatively uncontroversial, although the nature of the resulting democracy especially whether multi-party or no-party as the NRM preferred, became the most critical debate. Under the 1995 constitution the NRM established the no-party system in which competitive elections were held but parties were not allowed to operate and candidates not allowed to campaign on the basis of their party affiliation. Instead, all were considered members of the movement which was entrenched in the constitution, whose Article 70 pronounced it "broad-based, inclusive, and non-partisan."³¹ In the year 2000 a referendum approved the continuation of the movement system as the fundamental system organising state power in Uganda. Ugandans seemed to support the system less for its adherence to its ideology of inclusiveness and more as approval of the NRM government's achievements; turning a desolate, brutalised population and a defunct economy into a relatively peaceful country with the highest economic growth rates of the sub-region.

²⁷ Jorgensen, J Uganda: A Modern History (1981) p22; Nabudere, D Imperialism and Revolution in Uganda (1980) 12.

²⁸ Berg-Schlosser, D and Siegler, R Political *Stability and Development* (1990) 37; Kasozi, A *The Social Origins of Violence in Uganda, 1964-1985* (McGill-Queens University Press, 1994).

²⁹ Kasozi, as above.

³⁰ Museveni, Y *What is Africa's Problem?* (2000) 17.

³¹ Constitution of the Republic of Uganda (1995).

The constitutional amendment process was ignited again in 2004 with the government White Paper presenting its views on the recommendations of the Constitutional Review Commission. Thereafter, a Constitutional Amendment Bill 2005 was presented, which was termed an omnibus bill due to the large number and various forms of amendments in the same bill. Interventions from MPs, civil society, and a court challenge, led the government to withdraw the bill from Parliament and reintroduced it as two separate bills, namely, Constitutional Amendment Bill No. 2 and No. 3, 2005. The Constitutional Amendment Bill No. 2 mainly consisted of articles dealing with regional governments while the Constitutional Amendment Bill No. 3 included the transitional provisions. However, the cabinet decided that the question of reintroduction of multiparty politics should be put to a popular referendum. In April a resolution to hold a referendum for change of the political system was tabled in Parliament. The referendum bill was passed in May of 2005 and a referendum held in June of 2005 in which multiparty politics was approved. This referendum was however different from the one of 2000. Compared to that of 2000 over the same issue, the 2005 referendum was less contentious as both the opposition groups and the government shared the view that a return to multiparty politics was desirable.

3.4 Constitutional reform in Tanzania; 1995-2005

The United Republic of Tanzania is one of the very few successful constitutional unions attempted in post-independence Africa. Moreover all this happened when most other countries faced political disintegration. Comprising of mainland Tanganyika, which gained its independence in 1961, and the Zanzibar isles of Unguja and Pemba, the United Republic of Tanzania came into existence in 1964. The mainland, given its size and leadership in the relationship has always been the dominant partner although the islands have had a degree of independence. Like the case with Kenya, Tanzania moved to a single-party state very early as a result of the supremacy of Tanzania African National Union's resounding electoral success at independence.³²

Calls for multiparty politics intensified towards the 1990s. Consequently, the then Chama Cha Mapinduzi (CCM) government appointed the Nyalali Commission³³ to review the political system and recommend whether to move to a multi-party system. Multipartyism was introduced in 1994 following constitutional changes and the first democratic elections were held the following year. After elections, the debate on constitutional reform took a new urgency. Three issues have featured consistently in the Tanzanian reform debate: presidential power, a change in election procedures, and the relations between the mainland and Zanzibar. The argument with regard to presidential power has remained overwhelmingly powerful relative to other branches of government. States of emergency can be declared without the approval of the parliament, while key appointments to positions in the cabinet, the prime minister, and chief justice, are also not subject to the approval of parliament. These methods of selection have been argued to be susceptible to abuse. Reformists have continually pressed for the addition of parliamentary vetting for cabinet appointments, as well as approval for the declaration of states of emergency. As regards, election procedures, proposed election reform focuses on Zanzibar and Tanzania more generally (since there are national elections inclusive of Zanzibar and the mainland along with separate elections in Zanzibar). Specifically, reformists have emphasized the need for more independent electoral commissions, more transparent voter registration processes, and the legalization of independent candidates. On the Union, The reformists propose a more federalist style of government in which Zanzibar and the mainland would each resemble states falling under the ultimate control of the Tanzanian government as opposed to the present arrangement whereby a president is elected for the Union, and a president is elected for Zanzibar.

³² Baregu, M "The Dynamics of Political Change and the Restructuring of Governance in Tanzania" in Kajiage, F *Reflections on the Transition to Democracy in Tanzania* (1995).

³³ See note 12 above.

The Zanzibar president, who also serves as Vice President of the Union, is responsible for matters that solely pertain to the semi-autonomous islands of Uguja and Pemba that comprise Zanzibar, whereas the Union president has jurisdiction over matters germane to the mainland and the Union.

5. Conclusion

From the analysis above three issues are particularly notable on constitution making and constitutional reform in East Africa. The first issue relates to the focus on how political power is apportioned, while the second is an emphasis on how individuals relate to state power. The third is a debate over the process by which new constitutions are formulated. The question of apportionment of state power, especially with regard to decentralising power, is one pushed most often by politicians especially those in the opposition or those in minority ethnic or regional groups. As a result, in the first phase of constitutionalism comprising of the independence stage, federalism and the role of traditional authorities featured as part of the constitutional debate. The second issue is normally articulated by civil society actors (mostly human rights organisations). They ordinarily advocate for a constitutional discourse that affords greater protection for individual rights and liberties. The third issue is the most pronounced in that it revolves around the process through which constitutional reform is secured. Constitutional reform processes tend to be protracted where the regime in power considers that a reform of the constitution would result in diminished state power under a new constitution. Therefore, the practice of the incumbent is to seek to control the reform process by restricting the agenda or regulating the pace of change in order to shield itself against inauspicious change. All things considered, the thrust for constitutional reforms in all three East African countries has increased over the last decade. It is anticipated that new constitutions will lay a fair ground for political contest and advance the position that those who govern do so at the behest of an empowered citizenry.