

# *Remaining in the Shadows*



## Parliament and Accountability in East Africa

Tundu Lissu



*Remaining in the Shadows –*  
**Parliament and Accountability in East Africa**

By Hon. Tundu Lissu

Berlin and Tienen, August 2020



***Remaining in the Shadows-***  
**Parliament and Accountability in East Africa**

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The pictures on the cover page are those of Parliament Buildings of Uganda (left), Kenya (centre) and Tanzania (right).

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I signed the contract very quickly. Over time, however, it dawned upon both KAS and myself that a study of parliaments of three different countries with different historical, social and political contexts, could not be ‘depicted’ exhaustively in a 30 to 40 standard page monograph. As a result, what should have been a monograph eventually morphed into this book.

And so, I must register my gratitude to KAS, especially its Subsahara-Africa Department, for not only making the grant possible but also for hosting me and organizing meetings with German government officials, members of the Bundestag and other stakeholders on the numerous occasions that I visited in Berlin in the course of researching and writing of the book. Special mention is due to Stefan Friedrich, the Head of the Subsahara-Africa Department, Stefanie Brinkel, Stefanie Rothenberger, Mathias Kamp, Tillman Feltes and Miriam Fischer, for their patience, persistence and encouragement which ensured this book sees the light of day.

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Finally, I owe a huge emotional debt to my family, my wife Alicia and children Tino and Eddie. They have never said much, publicly or privately, but one can only imagine the horrors they went through during the past three years, starting with that fateful

Thursday afternoon on 7th September, 2017. Their selfless love, unswerving devotion and unstinting friendship did not only see me through those dark days, it has always been a great source of strength for me.

**Tundu Lissu**

**Tienen, December 2020**

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## **List of Abbreviations**

AIM	African Independence Movement
AMNUT	All Muslim National Union of Tanganyika
ANC	African National Congress
ASP	Afro-Shiraz Party
BBI	Building Bridges Initiative
CCM	Chama Cha Mapinduzi
CHADEMA	Chama Cha Demokrasia na Maendeleo
CKRA	Constitution of Kenya Review Act
CKRC	Constitution of Kenya Review Commission
CoE	Committee of Experts
EBC	Electoral and Boundaries Commission
ECK	Electoral Commission of Kenya
IEBC	Independent Electoral and Boundaries Commission
GEMA	Gikuyu, Embu and Meru Association
KADU	Kenya African Democratic Union
KANU	Kenya African National Union
KASA	Kenya Socialist Alliance
KPU	Kenya People’s Union
KY	Kabaka Yekka
NARC	National Rainbow Coalition
NCC	National Constitutional Conference
NEC	National Electoral Commission
NEP	National Enterprise Party
NRA	National Resistance Army
NRC	National Resistance Council
NRM	National Resistance Movement



NUTA	National Union of Tanganyika Workers
ODM-K	Orange Democratic Movement – Kenya
PCK	People’s Commission of Kenya
PCP	People’s Convention Party
PDP	People’s Democratic Party
PSC	Parliamentary Select Committee
SRB	State Research Bureau
TANU	Tanganyika African National Union
TFL	Tanganyika Federation of Labour
TISS	Tanzania Intelligence and Security Service
UKAWA	Umoja wa Katiba ya Wananchi
UNLF	Ugandan National Liberation Front
UPC	Uganda People’s Congress
UTP	United Tanganyika Party

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## **List of Statutes**

### **TANZANIAN STATUTES**

The Deportation Ordinance, 1921

The Expulsion of Undesirables Ordinance, 1936

The Emergency Powers Order in Council, 1939

The Legislative Council (Elections) (Amendment) Ordinance, 1959

The Legislative Council (Power & Privileges) Ordinance, Chapter 359 of the Laws of Tanganyika

The Constitution of Tanganyika Act, 1961

The Constituent Assembly Act, 1962, No. 66 of 1962

Republican Constitution, 1962

The Republic of Tanganyika (Consequential, Transitional & Temporary Provisions) Act, 1962

The Preventive Detention Act 1962, No. 500 of 1962

The United Republic (Declaration of Name) Act, 1964, Act No. of 1964

The Interim Constitution of Tanzania Act, 1965, Act No. 43 of 1965

The National Assembly (Alteration of the Number of Constituency Members) Act, 1968, Act No. 56 of 1968

The Interim Constitution of Tanzania (Increase in the Number of Regional Commissioners) Act, 1971, Act No. 29 of 1971

The Interim Constitution of Tanzania (Increase in the Number of Regional Commissioners) Act, 1972, Act No. 10 of 1972

The Interim Constitution of Tanzania (Increase in the Number of Regional Commissioners) Act, 1974, Act. No. 3 of 1974

The Interim Constitution of Tanzania (Increase in the Number of Regional Commissioners) Act, 1975, Act No. 10 of 1975

The Constitution of the United Republic of Tanzania, 1977, Chapter 2 of the Revised Edition of the Laws of Tanzania

The Tanzania Intelligence & Security Service Act, 1997

The Land Act, 1999, No. 4 of 1999

The Village Lands Act, 1999, No. 5 of 1999

The Constitutional Review Act, 2011, Chapter 83 of the Revised Edition of the Laws of Tanzania 2012

The Constitutional Review (Amendment) Act, 2013, Act No. 7 of 2013

The Constitutional Review (Amendment) Act, 2013, Act No. 9 of 2013

The Referendum Act, 2013, Act No. 11 of 2013

The Draft Constitution of the United Republic of Tanzania, December 2013

The Proposed Constitution of the United Republic of Tanzania, October 2014

## **UGANDAN STATUTES**

The Legislative Council (Elections) Ordinance, 1957, No. 20 of 1957

The Constitution of the Republic of Uganda, 1966

The Constituent Assembly Act, 1967, Act No. 12 of 1967

The Constitution of the Republic of Uganda, 1967

The Suspension of Political Activities Decree, 1971, Decree No. 14 of 1971

Legal Notice No. 5 of 1986 on Constitutional Modification

Legal Notice No. 1 of 1986

The Uganda Constitutional Commission Statute, 1988, Statute No. 5 of 1988

The Constitution of the Republic of Uganda, 1995

Legal Notice No. 1 of 1999

The Constitution (Amendment) Act, 2000, Act No. 13 of 2000

The Constitution (Amendment) Act, 2005, Act No. 11 of 2005

The Constitution (Amendment) Act, 2005, Act No. 21 of 2005

The Constitution of Uganda (Amendment) Act, 2017

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## **KENYAN STATUTES**

The Constitution of Kenya (Amendment) Act, 1964, No. 28 of 1964

The Constitution of Kenya (Amendment) (No. 2) Act, 1964, No. 38 of 1964

The Constitution of Kenya (Amendment) Act, 1965, Act No. 14 of 1965

The Constitution of Kenya (Amendment) Act, 1966, Act No. 18 of 1966

The Constitution of Kenya (Amendment) Act, 1966, Act No. 16 of 1966

The Constitution of Kenya (Amendment) (No. 2) Act, 1966, Act No. 17 of 1966

The Constitution of Kenya (Amendment) Act, 1966, No. 40 of 1966

The Constitution of Kenya (Amendment) Act, 1967, Act No. 4 of 1967

The Constitution of Kenya (Amendment) Act, 1968, Act No. 16 of 1968

The Constitution of the Republic of Kenya, 1969

The Constitution of Kenya (Amendment) Act, 1982, Act No. 7 of 1982

The Constitution of Kenya (Amendment) Act, 1991, Act No. 10 of 1991

The Constitution of Kenya (Amendment) (No. 2) Act, 1991, Act No. 12 of 1991

The Constitution of Kenya (Amendment) Act, 1997, Act No. 4 of 1997

The Constitution of Kenya Review Act, 1998, Act No. of 1998

The Constitution of Kenya (Amendment) Act, 2000

The Constitution of Kenya Review (Amendment) Act, 2001, Act No. 2 of 2001

The Constitution of Kenya Review (Amendment) Act, 2004

The Constitution of Kenya Review Act, 2008, Act No. 6 of 2008, Chapter 3A of the Revised Laws of Kenya 2008

The Constitution of the Republic of Kenya, 2010

The Constitution of Kenya (Amendment) Bill, 2013, Kenya Gazette Supplement No. 100 (National Assembly Bills, No. 15), 12 July 2013

The Constitution of Kenya (Amendment)(No. 2) Bill, 2013, Kenya Gazette Supplement No. 115 (National Assembly Bills, No. 26), 6 August 2013

The Constitution of Kenya (Amendment) Bill, 2015, Kenya Gazette Supplement No. 3 (National Assembly Bills, No. 1), 9 January 2015

The Constitution of Kenya (Amendment) Bill, 2015, Kenya Gazette Supplement No. 3 (National Assembly Bills, No. 2), 9 January 2015

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Memorandum of Objects and Reasons, The Constitution of Kenya (Amendment) Bill, 2019, Kenya Gazette Supplement No. 108 (National Assembly Bills, No. 53), 4 July 2019

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The Foreign Jurisdiction Act, 1890

The Uganda Order in Council, 1902

The Uganda Order in Council, 1920

The Tanganyika Order in Council, 1920

The Tanganyika (Legislative Council) Order in Council, 1926, Government Notice No. 59 of 1 July 1926

The Tanganyika Independence Act, 1961

The Tanganyika (Constitution) Order in Council, 1961

The Tanganyika Republic Act, 1962

Constitution of Uganda Act, 1962

The Uganda (Independence) Act, 1962

The Uganda (Independence) Order in Council, 1962

The Uganda (Constitution) Order in Council, 1962

The Constitution of Kenya Act, 1963

The Kenya Independence Act, 1963, Chapter 54 of the Laws of Kenya

## **Publisher's Note**

Parliament is at the heart of democracy. Democratic decision-making is unthinkable without an effective function of representation and delegation. Thus, a legislative body, constituted by democratically elected representatives of the people is a key pillar of any democratic system. Tundu Lissu's remarkable study of parliaments in East Africa shares this fundamental conviction but goes on to show that the mere presence of parliaments – stipulated in a constitution and assembled through periodic elections – will say little about the true depth of democratic substance in a given political system. In fact, the case studies of Kenya, Tanzania and Uganda, presented in this study, point out significant weaknesses in the mandates, functions and actual performances of parliaments in all three countries. Much as there are significant differences between these countries, to varying degrees throughout the different phases of their historical journey, a striking common element is clearly brought out by the author: East African parliaments have largely remained in the shadows of an often overwhelmingly powerful and poorly checked executive in the context of one dominant factor, which is presidentialism.

In this book, Tundu Lissu takes us on a historical journey from the early days of Parliamentarism during the time of colonialism to the current state of democracy in East Africa. Lissu has managed to effectively feed his multi-faceted personal background into this study. He writes as a lawyer, politician, researcher, activist, and not least as a passionate defender of liberal democracy. Lissu's appealing writing style, his in-depth knowledge and compelling arguments make for a great read. The story he is telling, the story of Parliaments in East Africa, does not end with the conclusion of his study. It is a continuous story and – from Lissu's perspective as an advocate of Parliamentary democracy – a continuous struggle. His insights into the historical journey provide a strong basis for further assessment and discourse on the current developments in the three countries analysed. In fact, new chapters in the story were already opened before this book could be published. At the time of finalizing the manuscript for this study, in summer 2020, the Tanzanian author was in exile in Belgium. By the time of publication, towards the end of 2020, he is back to the same place. A lot has happened in the meantime though: Tundu Lissu returned from exile to his home country, contested in the Presidential elections, inspired voters with his alternative political agenda, but ultimately had to face the results of an election marred by irregularities, intimidation and violence. Fearing for his life, he once more fled his home country - this time without gunshot wounds, but with a feeling of deep pain in light of the obvious erosion of the foundation of democracy in his home country.

This excellent study is yet another manifestation of the deep connection that Tundu Lissu shares with the Konrad-Adenauer-Stiftung - a connection that is based on a common vision for a better society based on key principles of liberal democracy, rule of law and social market economy.

I want to personally thank Tundu Lissu for the many months of hard work and deep thought that went into this study. I also want to express our gratitude to Dr. Willy Mutunga for his great contribution as intellectual sparring-partner and reviewer of this work. As a lawyer and leading intellectual in East Africa, Dr. Mutunga shares a lot of qualities and ideals with Tundu Lissu – and his own personal story as reform activist, including a remarkable chapter as an outstandingly progressive Chief Justice of the Republic of Kenya, is equally inspiring.

It is my hope that this book will find many readers, that it will stimulate deeper reflection and reinforce passionate debate about the nature of democracy and parliamentarism in East Africa and beyond, and that Tundu Lissu's important message will continue to be heard.

**Dr. Stefan Friedrich**  
**Head of Department for Subsahara-Africa**  
**Konrad-Adenauer-Stiftung**  
**Berlin, December 2020**



## Foreword

### I: Background

*“This study tells the story of East African Parliamentarism in its long journey from British colonialism through post-colonial authoritarianism to the current democratic renaissance and its many varied challenges. That story, still unfolding, is a story of the most acute difficulties; of too few and far between triumphs and too many defeats and disappointments. It is a story of parliaments under near complete control of the colonial Governors and the post-colonial Imperial Presidents. But it is also the story of democratic struggles and triumphs, albeit short-lived, of democratic parliamentarism as in the Independence Parliaments and the current era of multiparty democratic renewal.”* Page 18.

There is also a story of how this book was written which readers will find relegated to a paragraph on page 251 in the following words:

*“At lunchtime on 7 September 2017, unidentified gunmen followed this author from parliament in Tanzania’s legislative capital of Dodoma, to his official residence. Outside his residence, the gunmen opened fire with automatic rifles from a close range, hitting the author multiple times and seriously injuring him. He was rushed to a nearby government hospital for emergency treatment, and later airlifted unconscious out of the country for further specialized treatment. His treatment ended on 2 November 2019.”*

There is information in the public domain that prior to the attack, Honourable Tundu Lissu was subjected to relentless harassment in the form of arrests, imprisonment and constant surveillance by the security and intelligence operatives of his own country. As he continued to defy this continuous and consistent intimidation there followed open calls on social media platforms for his assassination. Known operatives of the ruling party, Chama Cha Mapinduzi (CCM), made these calls. No action was taken against these operatives where incitement to murder is a serious criminal offence under Tanzanian law.

On the day of the attack, the President of Tanzania, His Excellency John Magufuli, made a televised address in which he stated that those opposed to his ‘economic war’ against foreign mining companies ‘did not deserve to survive.’ Though the President did not name names, that statement was directed at Tanzanians, and indeed, Hon. Tundu Lissu so interpreted it, as directed at him because he had publicly and vociferously, in and out of Parliament, opposed President Magufuli’s mining policies. Indeed his harassment, intimidation and imprisonment were as a result of his opposition to these mining policies among others. In Parliament, Hon. Tundu Lissu was the Leader of the Opposition.

Two hours after that televised speech Hon. Tundu Lissu was shot sixteen (16) times outside his official residence, located in a heavily guarded government-housing compound. Unknown to Hon Tundu Lissu, the security team at the housing compound had

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been withdrawn and the unidentified gunmen were able to follow him into his compound unhindered.

Hon. Tundu Lissu was airlifted to Nairobi for emergency treatment at midnight on the day of the attack (07/09/2017). He was hospitalised at Nairobi Hospital for four months where he underwent seventeen operations.

It was while he was in hospital that the former Chief Justice of Tanzania, Hon Mohamed Chande (who was in Nairobi) and I visited him for five minutes in his hospital ward. Since I could not visit him as often as I wanted, his wife, Alicia Lissu (who is an Advocate of the High Court of Tanzania) kept me posted on his recovery progress. She continued to do so when Hon. Tundu Lissu was moved to Belgium for further specialised treatment including another seven operations – now totaling 24 surgeries.

Hon. Tundu Lissu started researching and writing a first draft of the book in December 2019 and submitted it to publishers in May 2020. Against this backdrop, the circumstances under which the book was imagined, thought-out, researched, and then written, can only be described as follows: unparalleled commitment and courage for the protection of human rights and social justice. Hon. Tundu Lissu’s great love for his Motherland, Tanzania; and his unwavering protection of the rule of law against rule by law.<sup>1</sup> The imagination, process and creation of the book was done under great pain as he courageously fought for his life.

On the night of July 26, 2020 Hon. Tundu Lissu left Belgium via Ethiopia for his beloved country, Tanzania. He arrived at the Julius Kambarage International Airport in Dar es Salaam the afternoon of July 27. On August 4, 2020 Hon. Tundu Lissu was elected by his political party, Chama Cha Demokrasia na Maendeleo (CHADEMA) as the party’s presidential candidate in the elections that will take place in October 2020. Hon. Tundu Lissu did not come back home because he was safe. He decided to resist the intimidations, threats, and particularly future threats on his life, to participate in the struggle to lead his country. I can only salute such courage, love for one’s country, and the political commitment to mobilise Tanzanians to imagine yet again, freedom, emancipation and democracy.

## **II: Review**

Hon Tundu Lissu has told his story in this book simply, persuasively and passionately. It is a story told without the inhibiting legalese that all lawyers are infected with. Readers of this book will not put it down the moment they open the first page.

Constitutions have been about political and ideological struggles for the equitable distribution of political power, land and national resources. Engaged in this struggle are

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1 Hon Tundu Lissu’s book is full of examples of colonial and post-colonial rule by law. In the era of transformative constitutions rule by law is present when the Executive and Parliament subvert the Constitution and when both arms disobey court orders. A judiciary that subverts the vision of a Constitution does not stand for its independence also ends up participating in rule by law. The development of jurisprudence that anchors the rule of law is solemn duty of any Judiciary worth its name. Judiciaries in East Africa are, therefore, at a crossroads - they either become appendages of the Executive or they become temples of justice for the working people as envisioned by the Constitutions.

internal and external forces that stand for the monopoly of property, power, profits and societal inequalities on one hand; and those forces that envision a society that is egalitarian and equitable, free, just, peaceful, ecologically safe, non-militaristic, and prosperous on the other. Thus constitutions reflect class interests and their struggles spearheaded by opposing political leaderships.

In between these long-term struggles, Constitutions are also about cease-fires that call for concessions from the former group to the latter. The former forces give these concessions to guarantee their further lease on political life while the latter forces see the concessions as a great political opportunity to use them to build a better society. So, constitution-making itself is part of these struggles where the clarion call is the supremacy of the people, voiced by both contending sides. So are the struggles about the implementation of the promulgated constitution.

In my opinion, in all these struggles in the trajectory of law-making (in the colonial era) the constitution-making, promulgation and implementation (in the sunset of colonial era and in the post-colonial era) political leaderships (be they national or colonial-imperial) play a fundamental part. The ruling classes always face their nemesis, the alternative political leaderships in these struggles. History records these struggles can be violent (where the ruling class that has the monopoly of violence uses it and that violence is resisted) or peaceful where cease-fires happen and birth concessions for the mitigation aimed at the reinforcement of the status quo. History also records the centrality and supremacy of the masses of the people in the ultimate victory for the winning political leadership in these struggles.

Within this conceptual framework we can analyse colonial law-making and post-colonial Constitutions, their amendments, and the history of constitution-making and implementation in East Africa since the 1960s. Do the new transformative constitutions (Kenya and the Warioba Commission's Draft in Tanzania) break (as Hon. Tundu asks) with colonial and post-colonial legacies of dictatorship and authoritarianism? And one could add the continued foreign domination, exploitation, and oppression?

Hon. Tundu Lissu's book has rich historical, economic, political, social and cultural material that enriches such analysis. Hon. Tundu Lissu has brought in his book an impressive literature review of the study it engages in. It is commendable that he prioritises published work by East African public intellectuals, including interesting analyses from doctoral theses and a few foreigners who have researched and taught in East Africa. I find this practice supremely important in the creation and development of knowledge on this area of study in Africa. Unless East Africans unearth studies by their compatriots, critique them, and glorify them, how will public intellectualism in East Africa grow?

It would appear Hon. Tundu Lissu has great faith in liberal democracy with its values of free markets, separation of powers, check and balances, strong political parties, regular elections, strong opposition political parties that are governments in waiting; and overall liberal parliamentary democracy. He has no faith whatsoever in what he calls *presidentialism*, which he sees, as unable to fulfill the promise of democracy in East

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African countries. He brings in an array of public intellectuals in his analyses who support his case. I believe there is evidence across the world that parliamentary democracy does give birth to dictatorships as much as, indeed, *presidentialism*. It seems to me that we should analyse the problems of both systems.

If we critiqued and demystified liberal democracy as the root cause of what appears to be a false dichotomy between *presidentialism* and *parliamentarism*, we would be able to unearth the class interests in both systems. Class analysis of the systems exposes created false dichotomies.

Hon. Tundu Lissu's great faith in liberalism easily fits into debates that have taken place since the collapse of the Soviet Empire in 1989 and the financial meltdown in the West in 2007-8.<sup>2</sup> These debates are reflections of the struggle of the two dominant paradigms since the end of WWII, namely capitalism and socialism. In the West, there was welfare capitalism/social democracy/social markets under the former paradigm to mitigate the harshness of the free market economy. It is in this period that state intervention in the economy was prevalent. The neoliberal stage of capitalism and the end of mitigated free markets can be traced after 1975. After the collapse of the Soviet Empire in 1989, there have been rich discourses on what actually collapsed in that Empire.<sup>3</sup> Similar discussions have taken place after Mao Zedong's China, Cuba and Vietnam. As I understand the quest here has been to highlight the gains made while exposing the weaknesses of the socialist systems.<sup>4</sup>

We now live in a world that is critical of both models given their respective outcomes, strengths and weaknesses. The search for a paradigm/s that can rescue the weaknesses of both systems continue. There seems to be a consensus emerging that for the planet to survive it has to be free, just, egalitarian, equitable, peaceful, non-militaristic, ecologically safe and prosperous. The search for a paradigm(s) that will deliver such a planet is taking place outside the dogmatic intellectual, ideological and political reflections that took place during the Cold War. In my opinion, we have a great opportunity for public intellectuals, think tanks, foundations, political parties, governments, civil societies, women, the youth in the world to take up this challenge and heed the words of Eric Hobsbawm that "Our world risks both explosion and implosion. It must change...if humanity is to have a recognizable future, it cannot be by prolonging the past or the present. If we try to build the third millennium on that basis, we shall fail. And the price of failure, that is to say, the alternative to a changed society, is darkness."<sup>5</sup>

Hon. Tundu Lissu is right in flagging the Kenyan constitution-making path as one other country in East Africa he can emulate. The 2010 Kenya Constitution is a progressive and transformative one with key social democratic ingredients that were borne out the

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2 See Willy Mutunga, *Constitution-Making from the Middle: Civil Society and Transitional Politics in Kenya, 1992-1997*, 2nd Edit; (Nairobi: SUP, 2020), xxxv-xxxix

3 Ibid; xxxv, footnote 16.

4 Eds; Sorace, Francheschini, & Loubere, *Afterlives of Chinese Communism* (Australian National University Press & Verso, 2019).

5 *The Age of Extremes: A History of the World, 1914-1991* (New York: Vintage Books, 1996) 585.

process of people's participation in constitution-making and the resultant product.<sup>6</sup> The 2010 Constitution has provisions that mitigate the status quo. It can further be argued it has provisions that develop a historical, economic, social, cultural, and political basis for struggles for a better Kenyan society.

Constitutions should never be *fetishised*. In the hands of political leaderships that are compradorial, they will reinforce the status quo. In the hands of anti-imperialist and anti-comprador leadership, there can be great hope, in at least having serious discussions on societal commons and public goods both critical to the working people of Kenya. I see that as some kind of subversive mitigation of the status quo.

The supremacy and sovereignty of the Kenyan people in that Constitution is undeniable. The Constitution decree on equitable distribution of political power and resources is commendable. The Constitution, however, has weaknesses borne out of the consensus arrived at by the warring classes. For example, the protection of property, power and profits is still entrenched in Article 40 Constitution.

Issa Shivji is right when he argues as follows:

*Constitutions don't make revolutions. Revolutions make constitutions. No constitution envisages its own death for that is what a revolution entails. But constitutions matter. Some of the finest constitutions have been erected on ugly socio-economic formations wrought with extreme inequalities and inequities. South Africa and Kenya are examples.*<sup>7</sup>

### **III: Alternative Political Leaderships in East Africa**

Hon. Tundu's book has a unique value in the quest for alternative political leaderships in East Africa. Very few politicians in East Africa put pen to paper on their ideological and political visions of their leadership. Hon. Tundu makes it clear he supports a strong parliamentary democracy and transformative constitutions that make sure this happens. Hon. Tundu Lissu is also acutely aware that East Africa is still dominated by foreign interests of the West and East. Indeed, the book is very eloquent on the impact of colonization and imperialism within the contexts of law-making and constitutionalism. The book is published against the backdrop of weak opposition political parties because of presidential authoritarianism that stunts their growth; or as in the case of Kenya, makes the opposition political party an appendage of the dictatorship.

It is also published against the landscape of civil society that is unable to imagine itself as forming an authentic people's opposition and various factions of the ruling elite invariably hold that captive. Throughout the book, there are serious discussions on authentic

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6 See Willy Mutunga, *Transformative Constitutions and Constitutionalism: A New Theory and School of Jurisprudence from the Global South* (mimeo. 2020).

7 Keynote speech titled *Do Constitutions Matter? The Dilemma of a radical lawyer* on the 10th Anniversary of Kenya Constitution Celebrations and the launch of Willy Mutunga, *Constitution-Making from the Middle: Civil Society and Transition Politics in Kenya, 1992-1997* (Nairobi: SUP, 2020) on August 27-2020, on page 1. *I believe one can add that either a progressive implementation of the Constitution or the subversion of it can be a basis for a revolution. And such revolution can be either progressive or regressive.*

opposition and alternative political leaderships that will either give us the change Hon. Tundu Lissu yearns for in the short term with radical or revolutionary leaderships that are keen to build, in both the short and long term, not just democratic but truly inclusive and socially balanced East African societies. It is only these sorts of societies that can reflect the will of the working people of East Africa. I have no doubt these debates will continue as more political parties are registered in the three countries.

The timing of the publication of the book is critical in that it will fuel these current debates. His last sentence in the book is a clarion call for democratic action – “*But the bitter lessons of history should never be forgotten in the quest to construct a more workable democratic order.*”

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**September 2020**

## Summary

This study tells the story of East African Parliamentarism in its long journey from British colonialism through post-colonial authoritarianism to the current democratic renaissance and its many and varied challenges. That story, still unfolding, is a story of the most acute difficulties; of too few and far in between triumphs and too many defeats and disappointments. It is a story of parliaments under the near complete control of the colonial Governors and the post-colonial Imperial Presidents. But it is also the story of democratic struggles and triumphs, albeit short-lived, of democratic parliamentarism as in the Independence Parliaments and the current era of multiparty democratic renewal.

To tell the particular story of East African Parliamentarism is to tell the general story of African Parliamentarism. For as Professor Peter Anyang' Nyong'o, a prominent Kenyan intellectual and political figure, has said of Anglophone Africa:

*“Many African countries inherited the Westminster parliamentary system, but within a year or so of independence they went presidential. They all soon sank into authoritarian regimes of the worst kind, best known for political oppression, shameful denial of human rights, corruption that benefitted few elites and political instability....”*<sup>8</sup>

The story of East African Parliamentarism is one of parliaments and parliamentarians in danger. It is a story, to use Winston Churchill's famous phrase, of 'blood, toil and tears'. And yet the struggle for democratic parliamentarism continues, as it must. For, to paraphrase the poet Alexander Pope, our people's hopes and desires for a democratic dispensation in our countries, have continued to spring eternal in their breasts.

### The Central Question of Democracy

Most of the myriad and seemingly intractable problems and challenges that East African Parliamentarism has faced, and continues to face, are fundamentally constitutional and political in nature. These relate to the nature and character of the East African Parliament from its inception during the colonial period, through the promise of the early years of Uhuru, then the long, dark night of one-party authoritarianism, and on to the current era of multiparty democracy and its uncertainties and apparent reverses.

Throughout this long journey, the fortunes of the East African Parliament have risen or fallen with the rise or fall of democracy writ large in the region. This is as it should be. For the modern parliament is itself a product and a reflection of the triumph of the liberal democratic ideals of democracy and constitutionalism and the political struggles that brought those ideals to fruition. The state of a country's parliament, its authority, power and prestige relative to the other institutions of government and of civil society, is the truest measure of the country's democracy.

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<sup>8</sup> P. Anyang' Nyong'o, *Presidential or Parliamentary Democracy in Kenya? Choices to be Made*, Booktalk Africa, Nairobi, 2019, p. 187

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But even problems that are apparently technical in nature and, therefore, innocuous and uncontroversial, such as insufficient budgetary allocations to parliament, want of technical support and facilities for members, etc. have their roots in political decision-making. Resource allocation through the budgetary process involves choices and priorities which are determined by and through the political processes. These choices and priorities are fundamentally political in nature.

For example, the issue as to whether members of parliament – whose key constitutional function is to supervise the government and hold it to account – should have adequate technical facilities and expert support, as compared to unelected regional or district commissioners appointed by the President, is a political question which reflects the relative power, prestige and influence between the two institutions of government.

A focus on technical, apparently non-controversial aspects of the East African Parliamentarism divorced from their constitutional and political moorings is, therefore, to completely miss the point. Conversely, to understand the constitutional and political problems of the East African State is to understand the challenges and prospects of East African Parliamentarism. Similarly, to make an East African Parliament effective is to make an East African Democracy effective, for one is impossible without the other. Consequently, democracy and constitutionalism remain at the centre of the debate on East African Parliamentarism.

## **Organisation of the Study**

This study traces the development of parliamentarism in the three East African countries Kenya, Tanzania and Uganda. The mere fact that these parliaments have existed since the earliest years of colonial rule – through the long dark years of single party autocracies to the democratic openings of the last three decades – shows that the appeal of representative democracy, epitomised by strong parliaments and accountable governments, remains potent even if its promise is still largely elusive and unfulfilled. The study seeks to throw light on this paradox. It seeks to answer the question as to whether, after the false starts of the early years of independence and the succeeding half a century of presidentialist rule in East Africa, an era of parliamentary democracy may have eventually arrived. After an introduction to the topic, the study is divided into three main parts with each covering a particular country. The final part ties together the major strands of the study into conclusion and recommendations.

## **How Far Have East African Parliaments Come?**

This year, 2020, is the Centenary of the Parliament of Uganda. For in 1920, the British Monarchy enacted the *Uganda Order in Council* which established the Legislative Council for what was then called the Uganda Protectorate. The Legislative Council, the forerunner to the current National Assembly of the Republic of Uganda, held its first session on 23 March 1921. Compared to Uganda, Kenya's Parliament is this year celebrating its 114<sup>th</sup> year, having been established by the enactment of the *East African Protectorate Order in Council* dated 27 October 1906. It first met on 17 August 1907. The last parliament to be



established in East Africa was the Tanganyika<sup>9</sup> Legislative Council, established under the *Tanganyika (Legislative Council) Order in Council* of 19 March 1926.

### **First Phase: The Early 20<sup>th</sup> Century**

The East African Parliament has come a long way from its beginnings in the early twentieth century East Africa. In its long journey, it has passed through several historical phases spanning the entire modern East African history. In its early years which, in Kenya, ran roughly from 1906 to 1920, the Parliament was an unadorned façade to colonial despotism. In Uganda, this period ran roughly from 1920 to just before the end of the Second World War in 1945. In Tanganyika, the period ran from the creation of its Legislative Council in 1926 to just before the end of World War Two, as in Uganda.

We can now deduce the characteristic features of this early period as follows. Firstly, the Parliament was unabashedly white and thoroughly dominated by the colonial government. Even though there was an occasional Indian member, the East African Parliament of this early period was largely composed of white members. It was also totally dominated and controlled by the colonial executive. It was presided over by the colonial Governor, who also appointed all its members. Most of the latter were designated as ‘official members’, that is to say senior officials in the colonial administration. The ‘unofficial members’, largely European merchants and settler planters – and the occasional Indian merchant – were almost invariably a small, if often vocal, minority which did not affect colonial policy to any significant degree.

Secondly, the East African Parliament of this period was characterised by the complete disenfranchisement of the overwhelming majority of the residents of its territories, the colonial natives. The native African populations had no presence nor voice in these early Legislative Councils. The interests, if any, of these natives were represented by white members, invariably Christian missionaries, appointed by the Governor. This is not surprising, for the colonial project was essentially undemocratic characterised by violent conquest, subjugation and despotism, all of which were rationalised by white supremacist ideologies.

Hand in hand with the disenfranchisement of the ‘semi-barbarous multitude’, the East African Parliament of this period was also characterised by complete non-representation and voicelessness of all women, be they black, brown or white. This disenfranchisement of women should not surprise us either, for, even in the metropolitan

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9 ‘Tanganyika’ was the name given by the British administration to what was before known as *Deutsch Ost-Afrika* (German East Africa) after it was placed under the British Mandate by the League of Nations following the conclusion of the Treaty of Versailles on 28 June 1919. Following the ratification of the Treaty on 10 January 1920, the British renamed their new territory ‘Tanganyika’ on 1 February 1920. Following the union between the Republic of Tanganyika and People’s Republic of Zanzibar on 26 April 1964, the United Republic of Tanganyika and Zanzibar was born. On 29 October 1964, the country was renamed the United Republic of Tanzania, or simply ‘Tanzania’, with the passage of the *United Republic (Declaration of Name) Act, 1964*. After the enactment of the **Constitution of the United Republic of Tanzania** on 25 April 1977, the territory formerly known as ‘Tanganyika’ was renamed Tanzania Mainland, while ‘Zanzibar’ became Tanzania Zanzibar or simply Zanzibar. For a brief account of this history, see Tanzania, U.R., **The Report of the Constitutional Review Commission on the Process for the Review of the Constitution of the United Republic of Tanzania**, Constitutional Review Commission, Dar es Salaam, December 2013, Ch. 3.

centres of the Empire women did not secure franchise until after the end of the First World War, following decades of struggle by the suffragette and working-class movements in Europe and North America.

The third characteristic feature of the East African Parliament was its powerlessness *vis a vis* the colonial executive and the imperial government. Apart from the fact that its members were not only overwhelmingly colonial officials handpicked by the Governor, the Legislative Councils wielded no real powers. Their founding statutes made clear that the Legislative Councils were largely advisory bodies. In the language of those statutes, the primary function of these legislative bodies was ‘to advise and give consent’ to the Governor who wielded the real power “*to make laws for the administration of justice, the raising of revenue and generally for the peace, order and good government of the Territory.*”<sup>10</sup>

Even then, and consistent with the primary objectives of the colonial project, the ultimate power lay with the imperial government in London, as the founding statutes typically “... *reserved to His Majesty, His heirs and successors, His and their undoubted right, with the advice of His or their Privy Council, from time to time to make all such laws or Ordinances as may appear to Him or them necessary for the peace, order and good government of the Territory.*”<sup>11</sup> Thus, Bills passed by the Legislative Council required not only the assent of the Governor, but also, ultimately, that of the imperial Secretary of State.

Additionally, the revenue-raising powers of these early colonial legislatures were severely circumscribed, with the founding statutes typically declaring that:

*“No member of the Council may propose any Ordinance, vote or resolution, the object or effect of which is to impose any tax, or to dispose of or charge any part of the public revenue, unless that Ordinance, vote or resolution shall have been proposed by the direction or with the express permission of the Governor.”*<sup>12</sup>

The East African Parliament of this early period was, therefore, thoroughly undemocratic, an appendage of the colonial state *par excellence*. As Professor Kanyeihamba, the Ugandan jurist, has argued, this period was “*dictatorial and despotic, if not in practice, at least in law.*”<sup>13</sup>

10 *Tanganyika (Legislative Council) Order in Council, 1926, art. XIV*

11 *Article XXII of the Tanganyika (Legislative Council) Order in Council, 1926.* The same position obtained in Kenya and Uganda as well. For, as Luis Franceschi and PLO Lumumba have argued in the case of the former, “... *the imperial government ... could disallow any legislation passed by the (Kenya Legislative) Council and retained the power to legislate directly for the colony through Orders in Council or issuance of Royal Instructions.*” See L. Franceschi and PLO Lumumba, *The Constitution of Kenya: A Commentary, 2<sup>nd</sup> Edition*, Strathmore University Press, Nairobi, 2019, p. 29.

12 *Tanganyika (Legislative Council) Order in Council, 1926, art. XXXI*

13 Kanyeihamba, *Constitutional and Political History of Uganda: From 1894 to Present, 2<sup>nd</sup> Edition*, LawAfrica, 2010, p. 10

## **Second Phase: Significant Changes**

In the second phase of their history, roughly between 1919 and 1945 in Kenya and between 1945 and 1960 in Tanganyika and Uganda, significant changes occurred in the East African Parliament. Direct elections, albeit on a limited, racially based franchise, were introduced in Kenya in 1919. The franchise, still limited, was extended to Indians and Arabs in 1924. Native representation started, albeit with appointed members, in 1944. Direct elections for African members were introduced in Kenya and Uganda in 1957 and in Tanganyika in 1958. With direct elections, the composition of the Legislative Councils changed in favour of unofficial members, the latter attaining a majority in Kenya in 1948, in Uganda in 1956 and in Tanganyika by 1960.

By this time, the colonial state had abandoned its policy of maintaining white supremacy in the Legislative Councils towards a policy of multiracialism whose objective was to protect the vital interests of whites, Indians and other non-native residents in a rapidly changing political environment of the late 1950s. By 1960, multiracialism was also abandoned in favour of majority African rule. Women, at first white, members were admitted to the Legislative Councils during this time, with two white women admitted to the Uganda Legislative Council in 1954. Two years later, Mrs. Damali Kisosonkole, the Nnabagereka (First Lady) of the Buganda Kingdom, became the first woman African member of the Legislative Council in East Africa.

## **Third Phase: The Independence Parliaments**

The third historical phase of the East African Parliament, spanning a brief period between 1960 and 1966, saw the brief arrival onto, and the equally quick disappearance from, the historical stage by the Independence Parliaments. The colonial Legislative Councils seamlessly morphed into the independent National Assemblies. It is important to highlight the fundamental characteristics of this period.

The first and most obvious is, of course, the fact that these were Independence Parliaments. They were, therefore, composed of the majority African members. Still, there were some vestiges of multiracialism, with a fixed quota of European and Indian members, in Tanganyika but none in Kenya and Uganda.

Secondly, in sharp break from colonialism, the Independence Parliaments were the supreme organs of power and authority. In the typical Westminster tradition with its cabinet system, the executive – composed of the government led by the Prime Minister and the Governor General or, as in Uganda, the President as the titular head of state – was accountable to the National Assembly. The latter could bring the government down through a vote of no confidence.

Thirdly, whereas the colonial Legislative Councils were uniformly unicameral, Independence Parliaments came with several divergences. Thus, for example, whereas the Tanganyikan and Ugandan National Assemblies were unicameral, the Kenyan National Assembly was bicameral with the House of Representatives and the Senate of the American variety.

The fourth characteristic feature of the Independence Parliaments related to their legislative and constituent powers. In this sense, the Tanganyikan Independence Parliament was more akin to the Westminster Parliament, with fairly unlimited legislative and constituent powers. It could make and unmake laws and change the Constitution without constitutional inhibitions. Owing to their peculiar history, however, both the Kenyan and Ugandan Independence Parliaments had severely inhibited legislative and constituent powers. Uganda started its independent statehood as a federal state, with significant powers reserved to the Federal States, that is to say, to the Kingdoms and their respective legislatures.

The constituent powers of Uganda's first National Assembly were equally circumscribed, through the entrenchment of certain matters that were reserved for the Federal States such as the Kingdoms of Buganda, Bunyoro, Ankole and Toro and the Territory of Busoga. These entrenched provisions could only be changed through a complex amendment procedure requiring special majorities. This, too, was the case with the Kenya Independence Parliament. The latter was bicameral owing to the history of constitution-making which ushered in independence in 1963.

It is also worth noting here that, unlike Tanganyika, Kenya and Uganda Independence Parliaments exercised their legislative and constituent powers in the context of Independence Constitutions which enshrined and entrenched an elaborate Bill of Rights, which inhibited their legislative and constituent powers still further. For these reasons, the two National Assemblies had little in common with the Westminster parliamentary tradition.

There were, however, striking continuities between the colonial and the independence constitutional orders. Firstly, the newly independent countries adopted the old order of colonial laws. The typical provision in the Orders in Council, the legislative vehicles through which imperial Britain delivered independence to her colonies, almost invariably stated:

*"...the operation of existing laws after the commencement of this Order shall not be affected by the repeal of the existing Orders but the existing laws shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them in conformity with this Order."*<sup>14</sup>

'Existing laws' were defined as all Ordinances, laws, rules, regulations, orders and other instruments having the force of law made in pursuance to the existing Orders and having the effect as part of the law of the three countries immediately before the commencement of the Independence Orders in Council. The retention of existing laws had dramatic implications on the post-colonial African constitutional and political

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14 *The Tanganyika (Constitution) Order in Council, 1961*, clause 4(1). See also clause 1(2) of the *Uganda (Independence) Order in Council, 1962*; and Githu Muigai, **Constitutional Amendments and the Constitutional Amendment Process in Kenya (1964-1997): A Study in the Politics of the Constitution**, A Thesis Submitted in Fulfilment of the Requirements of the Degree of Doctor of Philosophy of the Faculty of Law of the University of Nairobi, September 2001, p. 89.

development, which eventually led to the downfall of the democratic experiment which was promised by independence.

Secondly, following the colonial legislative tradition of reserving taxation powers to the executive, the Independence National Assemblies of the three countries were prohibited to pass certain financial measures, "... *unless the bill is introduced or motion is moved by a Minister.*"<sup>15</sup> James McAuslan, the British legal scholar of East African constitutional and political development, would later argue about the restrictions on financial measures that they were intended to ensure that Parliament imposed "*only that taxation which [wa]s in accordance with the wishes of the government.*"<sup>16</sup>

The colonial practice of packing the Legislative Councils through nominated or other indirectly elected members was also continued by the Independence Constitutions of the three countries. In this regard, Tanganyika was in a league of its own. Thus, the Governor General of Tanganyika was given the power to nominate a certain number of members of the National Assembly. Owing to the complexities of their ethnic politics, which were exacerbated by colonial rule, the composition of the Kenya and Uganda Independence Parliaments was even more cumbersome than that of Tanganyika.

For example, Uganda's National Assembly did not have members nominated by the executive. However, it consisted of directly elected members; 'specially elected members'; and, due to the peculiar role it had played throughout the colonial period, Buganda Kingdom was represented by 'the twenty-one members'. The latter were elected by members of the Lukiiko, the Kingdom's Legislative Assembly, instead of by the Buganda voters. So, as Professor Kanyeihamba says, Uganda's Independence Parliament was 'an anomalous body'. It was "*partly elected and partly nominated.... The Lukiiko indirectly elected the Buganda representatives while the rest of the representatives were directly elected by the people.*"<sup>17</sup>

The architecture of Kenya's Independence Parliament was just as complex. The Senate comprised forty-one members representing forty districts and the Nairobi Area,<sup>18</sup> was directly elected.<sup>19</sup> The House of Representatives, on the other hand, was made up of single member constituencies, as well as 'specially elected' members.<sup>20</sup> Whereas the constituency members were directly elected, 'specially elected' members were, like their Ugandan counterparts, elected by the House of Representatives sitting as an electoral college.<sup>21</sup>

Kenya was, however, a halfway house between Westminster centralism of Tanganyika and the federalism of Uganda. Failure to agree a final settlement satisfactory

15 Constitution of Uganda, 1962, art. 57; article 37 of the *Constitution of Tanganyika, 1961*, and article 60(2)(a) of the Constitution of Kenya, 1963

16 James P.W.B. McAuslan, '**The Republican Constitution of Tanganyika**', *International and Comparative Law Quarterly*, Vol. 13, 1964, p. 533

17 Kanyeihamba, op. cit., p. 73

18 Constitution of Kenya, 1963, op. cit., ss. 35 and 36(1)

19 Ibid., s. 36(4)

20 Constitution of Kenya, 1963, op. cit., s. 37

21 Ibid., s. 39(2)

to all sides had led the British Government to impose what “... *the Colonial Office thought was the right policy...*”<sup>22</sup> The ‘right policy’ was a system of regionalism “*that (fell) short of true federalism*”; but involved “*the minimum possible number of regions*” and the least possible expenditure of money, which meant that seven regions were created.

#### Fourth Phase: Authoritarian Presidentialist Polities

The fourth phase of the East African Parliamentarism saw the transformation of the independence constitutional settlements into strong, authoritarian presidentialist polities. In Tanzania, this phase began with the Republican Constitution of 1962 and lasted until the Fifth Amendment of 1984. In Kenya it lasted between the First Amendment of 1964 and the Nineteenth Amendment of 1990. And in Uganda it started with the military coup and the ‘Pidgeon Hole Constitution’ of 1966 until the enactment of Fifth Constitution in 1995.

The nascent parliamentary democracies envisaged under the Independence Constitutions were quickly subverted through apparently constitutionalist means, as in Tanganyika and Kenya, or through a military *putsch* as in Uganda. Within a year of their independence in 1961 and 1963 respectively, Tanganyika and Kenya had become republics, with their Presidents as Heads of State, Chiefs of Government and Commanders in Chief. Uganda waited a little longer, accomplishing the same feat four years after independence in a bloody military coup and the enactment of the ‘Pidgeon Hole Constitution’ in 1966.

The turn to republican presidentialism spelled the end of the East African Parliaments as institutions of power, authority and prestige. In Uganda, the parliament disappeared altogether during the twenty-five years of military and quasi-civilian rule that lasted from January 1971 to 1996. In Tanzania, the period between 1965 and 1985 witnessed what Dr. Mwakyembe has described as ‘the entombment of the National Assembly.’<sup>23</sup> In Kenya, according to Muigai, *Parliament dwindled in significance, becoming merely a rubber stamp for executive orders and decisions.*<sup>24</sup>

The principal method employed in this process of entombment was to pack the parliament with appointed, nominated or other indirectly elected members, thereby diluting its composition and undermining its representative character. The Constitution was extensively used as an instrument in this regard. Thus, for example, between 1968 and 1974, a period of mere six years, the Interim Constitution of Tanzania was amended five times with the sole objective of changing the composition of the National Assembly.<sup>25</sup> Kenya was even more blatant in this regard, with the Independence Constitution being amended twelve times during a five year period from 1964 to 1969.

22 Ibid., p. 125

23 Harrison G. Mwakyembe, ‘The Parliament and the Electoral Process’, Issa G. Shivji (ed.), *The State and the Working People in Tanzania*, CODESRIA, Dakar, 1985, p. 29

24 Loc. cit.

25 The amendments were as follows: *The National Assembly (Alteration of the Number of Constituency Members) Act, 1968, Act No. 56 of 1968; The Interim Constitution of Tanzania (Increase in the Number of Regional Commissioners) Act, 1971, Act No. 29 of 1971; The Interim Constitution of Tanzania (Increase in the Number of Regional Commissioners) Act, 1972, Act No. 10 of 1972; The Interim Constitution of Tanzania (Increase in the Number of Regional Commissioners) Act, 1974, Act No. 3 of 1974, and The Interim Constitution of Tanzania (Increase in the Number of Constituency Members) Act, 1975, Act No. 10 of 1975.*

Cumulatively, these amendments altered the content, structure and philosophy of the Independence Constitutions.<sup>26</sup> The amendments fundamentally re-designed the structure of the post-colonial state and the entire basis of governance. Power and authority were centralised in the all-powerful executive that was nominally accountable to Parliament and not accountable to the Judiciary. The arena of independent political activity outside the ruling party was severely circumscribed, as in Kenya, or abolished altogether as in Tanzania.

These constitutional amendments achieved two things. First, in Kenya they completely destroyed *Majimboism* or regionalism and created a strong unitary state. In Tanzania, they put paid to the democratic promise of the Independence Constitution as they returned the National Assembly to the democratic façade that it was during the colonial period. In Uganda, the same outcome – the destruction of federalism and parliamentary democracy – was achieved not through constitutional amendment but through the barrel of the gun.

Secondly, whether by constitutionalist or military means, the transformations from the Independence Constitutions to Republican Constitutions, “... *distorted the balance of power between the three arms of government by creating an all-powerful executive presidency to which the legislature and the judiciary were subservient.*”<sup>27</sup> Through the amendments, the proportion of appointed or nominated or indirectly elected members rose steadily. By 1984, for example, the number of these members in the Tanzania National Assembly stood at about 54 percent of all members. Thus, as Tambila observed, by 1975, “*the composition of parliament was such that the representative character of that institution was almost lost.*”<sup>28</sup>

The second method used to ‘entomb’ the parliament was its subordination to the sole ruling party. In Tanzania, this was achieved in 1965 when the Interim Constitution declared the country a *de jure* one-party state, thereby transforming the Tanganyika African National Union (TANU) and later Chama Cha Mapinduzi (CCM) into what Msekwa has called a ‘constitutional category.’<sup>29</sup> Though using different means, the same ends were achieved in Kenya and Uganda which, by 1969, had become *de facto* one-party regimes. Soon after, Uganda would become, and for twenty-five years remain, a no party military dictatorship. For its part, Kenya waited until 1982 for it to join the *de jure* one-party bandwagon. The Republican Constitutions also retained the prohibitions of parliament from initiating money bills which had its origins in the colonial Legislative Councils.

The preponderance of unelected or indirectly elected members; the relegation of the National Assembly to a simple committee of the ruling party; making party membership

26 Ibid., p. 146

27 Githu Muigai, **Constitutional Amendments and the Constitutional Amendment Process in Kenya (1964-1997): A Study in the Politics of the Constitution**, A Thesis Submitted in Fulfilment of the Requirements of the Degree of Doctor of Philosophy of the Faculty of Law of the University of Nairobi, September 2001

28 Kapwepwe I. Tambila, ‘The Ups and Downs of the Tanzanian Parliament, 1961-1994’, in R.S. Mukandala, S.S. Mushi and C. Rubagumya (eds.), *People’s Representatives: Theory and Practice of Parliamentary Democracy in Tanzania*, Fountain Publishers, Kampala, 2004, p. 62

29 Ibid., p. 34

a mandatory qualification for election, and its deprivation of the powers of control over policies of the state inflicted a lasting damage to the authority, power and prestige of the East African Parliaments. Thus, as Kjekshus argued, in Tanzania after 1968,

*“Parliament’s position became one where its functions (we)re negligible and ideally restricted to an august replay of consensus themes worked out in the process of Party deliberations of policy measures.”*<sup>30</sup> In Kenya, as Muigai puts it, *“Parliament had become completely subdued by a bloated executive and ... settled to the role of a rubber stamp of party and executive decisions.”*<sup>31</sup>

### **Fifth Phase: Some Modicum of Democracy**

After two decades of the worst forms of authoritarian presidentialism, East Africa began to return to some modicum of democracy in the early 1990s. This is the fifth phase of East African Parliamentarism. In Tanzania, this process started with the Fifth Amendment to the Constitution which was introduced in 1984. It is still ongoing. With the Fifth Amendment, the National Assembly began to regain its power and authority. Its composition and, therefore, democratic character changed and became more representative. For the first time since 1970, directly elected members became a majority.

Party supremacy was also dealt a major blow, as the Constitution now declared that the National Assembly was the principal organ for oversight over and advice to the government and all its agencies. In the same vein, the amended Constitution proclaimed a return to collective ministerial responsibility that was lost under the Republican Constitution in 1962. There were other important changes to the Constitution which loosened the grip of the Imperial Presidency on the body politic. For instance, the Fifth Amendment introduced the principle of presidential term limits which held any future President to a maximum of two five year terms.<sup>32</sup> In a region where presidential term limits have come under severe pressure, this innovation in Africa’s constitutional and political tradition has largely held in Tanzania.

The President’s power of appointment of cabinet ministers was also qualified with the requirement to consult the Prime Minister on such appointments.<sup>33</sup> For the first time, too, the Constitution declared the principle of separation of powers between the Executive, Legislature and the Judiciary.<sup>34</sup> The three arms of the state, which had hitherto been subject to the tutelage of the single party, were now required to exercise their functions in accordance with the Constitution.<sup>35</sup> The Fifth Amendment also made parliamentary proceedings immune, and not liable to be questioned in any court or any other body

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30 H. Kjekshus, ‘Perspectives on the Second Parliament’, The Election Study Committee, University of Dar es Salaam, *Socialism and Participation: Tanzania’s 1970 National Elections*, Tanzania Publishing House, Dar es Salaam, 1974, p. 79

31 Ibid., p. 153

32 Art. 40(2)

33 Art. 55(1)

34 Art. 4(1) and (2)

35 Art. 4(4)



outside the National Assembly.<sup>36</sup> Hand in hand with the introduction of the Bill of Rights, the introduction of the parliamentary free speech attained special significance.

By far the most important reform brought by the Fifth Amendment was the introduction of the Bill of Rights. The High Court was given power to declare statutes void if they offended the provisions of the Bill of Rights. Even though its justiciability was postponed for three years, the Bill of Rights was critical in the preparation for final assault on the one-party system. This came in 1992, when Tanzania officially returned to a multiparty system of government after 27 years of a *de jure* one-party rule. The Eighth Amendment to the Constitution, which brought multiparty politics back in, introduced wide ranging reforms affecting the entire political system, and parliament in particular. The principle of party supremacy was consigned to the dustbin of history.

The composition and power of parliament also saw a sea change. Firstly, for the first time since its inception in 1926, the National Assembly had no appointed members in its ranks. Similarly, there was a drastic reduction in the number of indirectly elected members. Thus, for the October 1995 elections, unelected or indirectly elected members comprised about 9 percent of the total, the lowest in the parliament's history. Further amendments to the Constitution in December 1992 gave the National Assembly powers to impeach the President<sup>37</sup>; as well as to confirm the President's choice of a Prime Minister.<sup>38</sup>

The Eighth Amendment also strengthened the principle of collective ministerial responsibility, by introducing the provisions for a no confidence vote against the Prime Minister.<sup>39</sup> However, the power of a no confidence motion remains largely illusory because it has continued to exempt the President who is not only the Head of State but the Chief of Government with powers to appoint the Prime Minister and all other ministers.

## **Gazing into the Future**

In the years that followed the reintroduction of multiparty politics in Tanzania, the National Assembly continued to grow in power, authority and prestige. This ascendancy went hand in hand with the growth and maturation of the opposition parties. A strengthened National Assembly; better organised opposition; freer press and an active civil society and less inhibitive government policies led to a much better showing for the opposition in the general elections of 2010 and 2015. Because of this strengthening of the opposition in and outside parliament, Tanzanian Parliamentarism has grown significantly. Its effectiveness in holding the government to account has also consistently increased.

The democratisation phase in Tanzania has come under severe stress since the 2015 general elections and the rise to power of President John Pombe Magufuli. With a combination of state-orchestrated coercion and violence and a wide array of legal and extra-legal means, the Magufuli Government has sought to roll back the democratic gains that have been made since the Fifth Amendment in 1984. The fundamental rights of free

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36 Art. 100

37 Art. 46A

38 Art. 51(2)

39 Art. 53A

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expression and association have especially suffered, with the crackdown on the free media and political freedoms of expression and assembly.

Government critics in the media, civil society and political parties have been singled out for persecution with extra-judicial killings, disappearances, torture and legal persecution through trumped up charges in criminal courts being the most preferred weapons. Lawful political activity has been largely prohibited by administrative fiat. Parliament, which had become such an important organ for holding the government accountable, has largely been rendered impotent with violence against and intimidation and bribery of the opposition members.

Once the hallmark of the despotic colonial and post-colonial legal orders, repressive and anti-democratic legislation has become common under the Magufuli regime. Laws targeting lawful political activity, media freedoms and a wide variety of citizens' rights have been enacted during these five years. Authoritarian screws have been tightened around access to justice and public interest litigation. What has emerged then is the despotic legal and extra-legal state of the neo-colonial variety.

Whereas in the earlier phases of this state it was legitimated by various nation-building ideologies which, in the case of Tanzania, played a significant hegemonic role, the new despotism does not have any legitimating ideology other than its mere maintenance in power and political survival. The argument now is that we cannot have democracy or rule of law or human rights simply because the President says so and he has control of the national security apparatus to enforce his will. Now we cannot have free and fair elections because, as President Magufuli himself said, he cannot pay fat salaries to election officers only for them to declare opposition candidates as winners in future elections.

As Tanzania prepares for the general elections slated for October 2020, these developments raise very important short-, medium- and long-term issues on the future of parliamentarism in particular, and democracy generally, in the country. In the short term is the issue whether President Magufuli and his government will allow any meaningful elections at all. That is to say, whether the Electoral Commission (NEC) that is mandated to conduct and supervise elections will allow the main opposition parties to field candidates for the various contested positions on offer during the forthcoming elections.

This is not an academic question, for the President and his government have already proved their utter contempt for the democratic process. The local government elections slated for November 2019 were not held because the election supervisors disqualified almost all the candidates fielded by the opposition parties from running in the countrywide elections. The ostensible reason given for the wholesale disqualifications was that the opposition candidates had improperly filled in their nomination papers. Chama cha Demokrasia na Maendeleo (CHADEMA), the largest opposition party in the country, had 96 percent of its candidates thus disqualified. Candidates from smaller parties were similarly disqualified from running.

Consequently, all CCM candidates were deemed to have won the local elections unopposed. For the first time in Tanzania's entire post-colonial history, the lowest levels of the local government system are manned by unelected CCM officials. Buoyed by this 'success' in stealing the local elections, President Magufuli may be tempted to similarly steal the general elections, where the stakes are much higher and the prizes bigger.

But even without rigging, a substantial win for Magufuli in the October polls will have dramatic short and medium consequences for Tanzania. Parliament will become even more marginalised than it has been these past five years. There already are disturbing portents of the things to come if he and his party are re-elected with bigger mandates than in 2015. There were, for example, very clear signals during the just concluded budget session of the National Assembly that, should that happen, the presidential term limits will be removed to allow Magufuli to remain in power beyond the permissible term of two five year terms, which ends in 2025.

Apart from presidential term limits, a win for Magufuli and CCM will also mean a continuation of the populist economic policies and anti-democratic practices that have brought the country to the brink of socio-economic and political disaster during these past five years. In the long term, the Magufuli presidency marks the end of the presidentialism that has marked Tanzania's post-colonial political and constitutional history. At best, Magufuli will try to take Tanzania back to the discredited authoritarianism of the period from 1962 to 1984. At worst, the country will descend into an unfettered dictatorship that may eventually tear the country apart.

On the other hand, any post-2020 Tanzania that sees Magufuli and his party with diminished power will bring the central question of democracy and of presidentialism squarely back on the political centre stage. The unfinished business of the new constitution-making, which was aborted in 2014, will commence again. This time it will have the added advantage of having gone through the catharsis of the Magufuli presidency. Just as Kenya went through the purgation of the Moi dictatorship in the 1980s and the post-election violence of 2007/08 to emerge with the new democratic Constitution of 2010, so will Tanzania emerge from the Magufuli dictatorship with a democratic new order.

As regards Uganda, the period that followed the restoration of constitutional rule in 1995 has seen the consolidation of the 'hybrid regime', with President Museveni clinging onto power through state-orchestrated violence, political repression, ethnic nepotism and political patronage. Initially proclaimed as one of the 'new breed' of African leaders, he has transformed himself into a 'self-styled life president', to use the phrase coined by the Uganda Constitution Commission. He started by removing presidential term limits in 2005 but, after realising the limits of revising his age downwards, he removed constitutional age limits altogether.<sup>40</sup> Already one of the longest serving presidents on the continent, Museveni is now slated – as a result of these manoeuvres – to rule Uganda for as long as he is alive.

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40 On 20 December 2017, the Ugandan National Assembly passed the **Constitution (Amendment) Act, 2017**, which amended article 102(b) of the Constitution to remove the age limits for presidential candidates. Prior to the Amendment, the Constitution prohibited anyone younger than 35 years of age or older than 75 from serving as President of Uganda.

But at the age of 76, the clock for a post-Museveni transition is already ticking. As in Tanzania, that transition will not only concern the question of who the next occupant of the presidential seat is. It will also concern the issue of the presidency itself. As the post-colonial history of Uganda itself has shown, an Imperial Presidency – whether of a civilian hue, as in Milton Obote; or a military one as in General Idi Amin; or of a ‘hybrid’ variety, as in the current quasi-civilian regime – can only rule Uganda through dictatorial means. Imperial Presidency of the African vintage is, as Wanjala, the Kenyan jurist, wrote in 1993, “... *an executive monarchy whose very features are undemocratic....*”<sup>41</sup>

On the other hand, the brief history of the Independence Constitution with its controversial federalism and parliamentary democracy offers an important lesson in the opposite direction. It was the only system that reflected and respected the multi-national and multi-ethnic reality of that creature of British colonial rule called Uganda. No wonder the only period that Uganda did not experience political turmoil, state-orchestrated violence and dictatorship was between 1962 and 1966, the period of the Independence Constitution. Federalism and parliamentary democracy, the twin pillars of the Independence Constitution, will therefore take centre stage in any discussion of the post-Museveni Uganda.

Kenya is in a league of its own in this phase of democratisation. With the enactment of the new Constitution in 2010, Kenya can be said to have concluded the fifth phase of parliamentarism which, for that country, started in 1990. During this twenty-year period, Kenya travelled through the road of a multiparty parliament still dominated by the Imperial President to the parliament where the President was no longer permitted to appoint members thereof, to the current American-style bicameral parliament where government ministers are totally absent. Executive power has also been extensively decentralised with the creation of strong regional governments which are protected from the machinations of the central government by a system of strong checks and balances entrenched in the Constitution.

Life has not stopped since the enactment of the 2010 Constitution. If anything, the Kenyan people have shown no sign of diminishing their appetite for constitutional amendment. For since 2010, thirteen bills for amendment of the Constitution have been published in the Gazette. These bills have almost invariably been presented through ‘parliamentary initiative’ in terms of article 256 of the Constitution. The bills have been concerned mostly with the consolidation and refinement of the new political and constitutional order brought about by the 2010 Constitution. None has sought to challenge its fundamental pillars. Even the Building Bridges Initiative (BBI), which seeks to recast certain features of the executive and the legislative organs, is intended to smoothen the workings of the new constitutional order, not to remake it.

So far none of these individual member initiatives has succeeded. Even the BBI, which enjoys crucial support of the President and the principal leader of the opposition, has not garnered the unqualified support of all major political forces in the country.

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41 Smokin Wanjala, ‘**Presidentialism, Ethnicity, Militarism and Democracy in Africa: The Kenyan Example**’, in J. Oloka-Onyango, K. Kibwana and C.M. Peter (eds.), *Law and the Struggle for Democracy in East Africa*, Claripress, Nairobi, 1996, p. 88

Nevertheless, these initiatives are proof of two important points. The first is the vitality of the new Kenyan democracy. Never in the history of East African Parliamentarism have there been any such independent legislative initiatives as we have witnessed in Kenya since 2010. Such legislative initiative has always been the preserve of the executive, one more proof of the dominance of the executive in the law-making process.

The second important point is that the failure, thus far, to bear results of these independent legislative initiatives points to the stability and general acceptance of the evolving constitutional order. This is startling, especially when measured against the history of constitution-making since independence. Thus, between 1963 and 2010, there was on average one constitutional amendment per every one year and seven months, with the first ten years witnessing twelve amendments. By comparison, there has not been any single amendment of the new Constitution in the decade since its enactment in 2010.

But even Kenya, with its democratic transformations, is not without potential difficulties in the medium- term and long-term. With regard to the former, the BBI is likely to result in a new realignment of political forces in Kenya, with the *rapprochement* between the two main historical protagonists of Kenyan politics, the Kikuyu around the Kenyatta family and the Luo around the Odinga family. The constitutional tinkering proposed by the BBI is intended to accommodate this realignment. Put simply, any loser of future presidential elections will be guaranteed the vastly improved position of the Leader of the Official Opposition, while the leader of the majority party in Parliament, likely from a different ethnic group from that of the President, will take the lucrative position of the Prime Minister. This horse-trading will likely calm the nerves of the main political players in the short- and medium-term.

In the long-term, however, there is one major issue concerning the political system that remains unresolved: presidentialism or parliamentarism. There is no doubt that the current Kenyan presidency is a far cry to the Imperial Presidency of the period between 1964 and 2010. Its massive constitutional powers have been clipped, while the parliamentary power has been vastly augmented. It also does not enjoy the historical legitimacy associated with the first Independence Government of Mzee Jomo Kenyatta; nor does it have the command of the coercive machinery and administrative apparatus that Moi inherited from Kenyatta.

However, as Professor Anyang' Nyong'o has argued, "*a strong parliamentary democracy cannot co-exist with an executive presidency which suffocates it and always tries to run it out of town.*"<sup>42</sup> There already are bad omens of the presidency instigating a purge of parliamentary leaders thought to be hostile to the BBI; as well as trying to co-opt the main opposition party. This is precisely what the first Independence Government of Jomo Kenyatta and the Kenya African National Union (KANU) did with regard to the Kenya African Democratic Union (KADU). Obviously, so much water has passed under the Kenyan political bridge. But the bitter lessons of history should never be forgotten in the quest to construct a more workable democratic order.

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42 Anyang' Nyong'o, op. cit., p. 168

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## Introduction – The Long Road for Parliamentarism in East Africa

### The Centenary Year

This year, 2020, is the Centenary of the Parliament of Uganda. For in 1920, the British Monarchy enacted the *Uganda Order in Council* which established the Legislative Council for what was then called the Uganda Protectorate. The Legislative Council, the forerunner to the current National Assembly of the Republic of Uganda, held its first session on 23 March 1921. Compared to Uganda, Kenya's Parliament is this year celebrating its 114<sup>th</sup> year, having been established by the enactment of the *East African Protectorate Order in Council* dated 27 October 1906. It first met on 17 August 1907. The last parliament to be established in East Africa was the Tanganyika<sup>43</sup> Legislative Council, established under the *Tanganyika (Legislative Council) Order in Council* of 19 March 1926.

It would appear, therefore, that although the three East African territories came under European colonialism around the same time, i.e. following the conclusion of the Berlin Conference in 1885, their parliamentary history did not necessarily coincide in point of time. There are numerous reasons for this, not least the fact that Tanganyika was originally a German colony that did not come under British control until after the Versailles Peace Treaty of 28 June 1919. By virtue of that Treaty, following her defeat during World War One, Germany lost all of her colonial possessions in Africa and elsewhere. Thus, on 20 July 1920 Tanganyika formally became a British Mandate Territory under the League of Nations trusteeship. It took about five years for the British to organise their administration in Tanganyika, including to establish the colonial legislature.

Kenya, on the other hand, had a head start because from the earliest years of colonial rule, it had a substantial White settler farmer community. The latter had a more powerful voice in the colonial policy-making in Kenya than in the other countries. As Jay E. Hakes argued in his 1970 doctoral dissertation,<sup>44</sup> the Kenyan Legislative Council resulted from complaints from the White settler community during the period of the Protectorate that its wishes were being ignored. "*This small settler population*", Hakes pointed out,

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43 'Tanganyika' was the name given by the British administration to what was before known as *Deutsche Ost-Afrika* (German East Africa) after it was placed under the British Mandate by the League of Nations following the conclusion of the Treaty of Versailles on 28 June 1919. Following the ratification of the Treaty on 10 January 1920, the British renamed their new territory 'Tanganyika' on 1 February 1920. Following the union between the Republic of Tanganyika and People's Republic of Zanzibar on 26 April 1964, the United Republic of Tanganyika and Zanzibar was born. On 29 October 1964, the country was renamed the United Republic of Tanzania, or simply 'Tanzania', with the passage of the *United Republic (Declaration of Name) Act, 1964*. After the enactment of the **Constitution of the United Republic of Tanzania** on 25 April 1977, the territory formerly known as 'Tanganyika' was renamed Tanzania Mainland, while 'Zanzibar' became Tanzania Zanzibar or simply Zanzibar. For a brief account of this history, see Tanzania, U.R., **The Report of the Constitutional Review Commission on the Process for the Review of the Constitution of the United Republic of Tanzania**, Constitutional Review Commission, Dar es Salaam, December 2013, Ch. 3

44 **The Parliamentary Party of the Kenya African National Union: Cleavage and Cohesion in the Ruling Party of a New Nation**, Dissertation Submitted in Partial Fulfilment of the Requirements for the Degree of Doctor of Philosophy in the Department of Political Science in the Graduate School of Arts and Sciences of Duke University, 1970

*“petitioned the Commissioner in Kenya for an advisory council as early as 1902. In such a council they hoped to ventilate grievances concerning their economic relationship with Britain and their status and security in relation to Kenya’s African population.”<sup>45</sup>*

Though the first of the three territories to fall under British imperial control, Uganda did not have a colonial legislature until 1920. This was because, unlike her neighbours, Uganda was governed through a complex system worked out in numerous agreements signed between the British imperial agents and the powerful kingdoms that eventually formed the core of the Uganda Protectorate. Buganda Kingdom was the most powerful of these kingdoms and the British had to navigate the delicate minefield of their relations with the Kingdom, in order to be able to hold the Protectorate together. As Sir Henry Hamilton Johnston, the British Consul-General for the Uganda Protectorate stated:

*“If there is any part of the Uganda Protectorate which could do us any real harm it is ... the Kingdom of Buganda. Here we have something like a million fairly intelligent, slightly civilised negroes of warlike tendencies, and possessing about 10,000 to 12,000 guns. These are the only people for a long time to come who can deal a serious blow to British rule in this direction....”<sup>46</sup>*

## A Democratic Façade

With remarkably few exceptions, and over a long period of its post-colonial history, the East African Parliament was, and remains, a democratic *façade* with which the ugly face of the post-colonial authoritarian state was hidden, albeit unsuccessfully. But this democratic *façade* was not a creature of the nationalist movements that became ruling parties on the morrow of African independence. For the East African Parliament was, like the East African State itself, a creature of British colonialism. It was created as an appendage of the British colonial state in East Africa and, without exception, was a later addition to the institutional paraphernalia of British colonialism in East Africa.

The British colonial state was a violent and despotic instrument of colonialism. It was centralised and undemocratic. Its rule was characterised by what Professor Issa G. Shivji, an eminent legal scholar from Tanzania, has termed ‘a regime of rightless law.’<sup>47</sup> Writing on this subject over fifty years ago, Robert B. Seidman, the American law professor who taught at numerous African universities in the 1960s and early ‘70s, had this to say about the colonial regime in Africa:

*“In East Africa and West, the imperatives of Empire as perceived by the colonial rulers required authoritarian government in order to maintain the control of ‘a few civilised men’ over ‘a multitude of the semi-barbarous.’*

45 Ibid., p. 4

46 Letter to Lord Salisbury, the British Secretary of State, 17 March 1900, quoted in J.T. Mugambwa, **The Evolution of British Legal Authority in Uganda With Special Emphasis on Buganda, 1890-1938**, *Doctoral Thesis Submitted to the Australian National University, January 1986*, p. 133

47 Issa G. Shivji, **State Coercion and Freedom in Tanzania**, Institute of Southern African Studies, Roma, Lesotho, 1990

*In East Africa in addition, the small but insatiable demands of settler enterprises for cheap African labour required the invocation of a whole set of compulsions, applied through state power guided by law.”<sup>48</sup>*

This study tells the story of East African Parliamentarism in its long journey from British colonialism through post-colonial authoritarianism to the current democratic renaissance and its many and varied challenges. That story, still unfolding, is a story of the most acute difficulties; of too few and far in between triumphs and too many defeats and disappointments. It is a story of parliaments under the near complete control of the colonial Governors and the post-colonial Imperial Presidents. But it is also the story of democratic struggles and triumphs, albeit short-lived, of democratic parliamentarism as in the Independence Parliaments and the current era of multiparty democratic renewal.

The story of East African Parliamentarism is one of parliaments and parliamentarians in danger. It is a story of Parliament ordered at gunpoint to pass a new Constitution without even reading and debating it, or of Parliament itself abolished, as in the Uganda of Obote One and Genera Idi Amin respectively. It is a story of parliamentarians assassinated for their political views as in Pio Gama Pinto<sup>49</sup> and ‘JM’ Kariuki<sup>50</sup> in Kenya; or shot multiple times and nearly killed as in my own case. It is a story of parliamentarians arrested and charged with or imprisoned for sedition or treason or detained without charge or trial as in all three countries. It is a story, to use Winston Churchill’s famous phrase, of ‘blood, toil and tears.’ And yet the struggle for democratic parliamentarism continues, as it must. For, to paraphrase the poet Alexander Pope, our people’s hopes and desires for a democratic dispensation in our countries, have continued to spring eternal in their breasts.

To tell the particular story of East African Parliamentarism is to tell the general story of African Parliamentarism. For as Professor Peter Anyang’ Nyong’o, a prominent Kenyan intellectual and political figure, has said of Anglophone Africa:

*“Many African countries inherited the Westminster parliamentary system, but within a year or so of independence they went presidential. They all soon sank into authoritarian regimes of the worst kind, best known for*

48 Robert B. Seidman, ‘The Reception of English Law in Colonial Africa Revised’, *Eastern Africa Law Review*, Vol. 2, 1969, 47-126, p. 78

49 Pio Gama Pinto (31 March 1927 - 24 February 1965) was a Kenyan journalist, trade union leader and member of the country’s Independence Parliament. A well-known socialist agitator and pamphleteer with links to the anti-colonial liberation movements in Portugal’s African colonies of Mozambique, Angola and Guinea Bissau, Pinto was assassinated outside his Nairobi home on 24 February 1965. He was the first Kenyan, and East African, political leader to be assassinated after Independence. Kisilu Mutua, his alleged assassin, who was convicted and spent 35 years in prison for the killing, always insisted on his innocence and, upon his July 2001 release, called for a thorough investigation to identify Pinto’s true killers.

50 Josiah Mwangi Kariuki (21 March 1929 - 2 March 1975) was a Kenyan parliamentarian and junior minister under Mzee Jomo Kenyatta’s government. A political detainee during the Mau Mau Emergency of the 1950s and later President Kenyatta’s private secretary, JM Kariuki became a vociferous critic of the ethnic kleptocracy and corruption that characterised the Kenyatta government. Wildly popular amongst ordinary Kenyans, Kariuki was abducted and murdered by government security agents on 2 March 1975 and his body burnt and left on a roadside outside Nairobi. A Parliamentary Select Committee established to investigate his killing implicated senior police and administrative officers and politicians with the murder. Noone was, however, ever charged or punished with the murder.



*political oppression, shameful denial of human rights, corruption that benefitted few elites and political instability....*<sup>51</sup>

### Legislating for ‘The Semi-Barbarous’

Even though they were established at different times, the East African colonial legislatures had many things in common. Firstly, the Legislative Councils were never meant to be representative organs of the colonial subjects, much less organs for the oversight and accountability of the colonial state. Rather, they were meant to be the legislative instruments of the colonial state over the colonial natives. As Robert B. Seidman, the American law professor, said of the British colonial regime in Africa in a 1969 article:

*“In East Africa and West, the imperatives of Empire as perceived by the colonial rulers required authoritarian government in order to maintain the control of ‘a few civilised men’ over ‘a multitude of the semi-barbarous.’ In East Africa in addition, the small but insatiable demands of settler enterprises for cheap African labour required the invocation of a whole set of compulsions, applied through state power guided by law.”*<sup>52</sup>

The Legislative Councils were largely established in order to legislate for this ‘multitude of semi-barbarous’ natives.

Secondly, because they were imperial impositions over the colonised natives, the East African Legislative Councils were ultimately controlled from the imperial centre in Whitehall, London. To ensure that ultimate power lay with the imperial government in London, an important provision of a typical founding Order in Council invariably “... reserved to His Majesty, His heirs and successors, His and their undoubted right, with the advice of His or their Privy Council, from time to time to make all such laws or Ordinances as may appear to Him or them necessary for the peace, order and good government of the Territory.”<sup>53</sup>

The Legislative Councils were also controlled by the local agents of the imperial government, notably the Governor. Thus, the founding Orders in Council invariably provided that their primary function was to advise and give consent to the Governor “to make laws for the administration of justice, the raising of revenue and generally for the peace, order and good government of the Territory.”<sup>54</sup> Bills passed by the Legislative Council required the assent of the Governor.<sup>55</sup> The latter was kept on a very short leash

51 P. Anyang’ Nyong’o, *Presidential or Parliamentary Democracy in Kenya? Choices to be Made*, Booktalk Africa, Nairobi, 2019, p. 187

52 Robert B. Seidman, ‘**The Reception of English Law in Colonial Africa Revised**’, *Eastern Africa Law Review*, Vol. 2, 1969, 47-126, p. 78

53 Article XXII of the *Tanganyika (Legislative Council) Order in Council, 1926*. The same position obtained in Kenya and Uganda as well. For, as Luis Franceschi and PLO Lumumba have argued in the case of the former, “... the imperial government ... could disallow any legislation passed by the (Kenya Legislative) Council and retained the power to legislate directly for the colony through Orders in Council or issuance of Royal Instructions.” See L. Franceschi and PLO Lumumba, **The Constitution of Kenya: A Commentary, 2<sup>nd</sup> Edition**, Strathmore University Press, Nairobi, 2019, p. 29

54 *Tanganyika (Legislative Council) Order in Council, 1926*, art. XIV

55 *Ibid.*, art. XV

indeed by the imperial government. For, once passed and assented, the Governor was obligated to transmit, ‘at the first available opportunity’, two authenticated copies of any Ordinance to the Secretary of State in London.<sup>56</sup> Moreover, the Secretary of State retained the power to assent to the Bills before they became law.<sup>57</sup>

In democratic theory, the legislature is said to hold the executive accountable through its control of the purse. That is to say, it is parliament that has the ultimate power to raise public revenue by levying taxes on the people. This, too, was the ostensible reason for the establishment of the colonial Legislative Councils. However, their revenue-raising powers were tightly controlled by the colonial state. Almost invariably, the legislatures were expressly prohibited from initiating financial measures, the so-called money bills. Typically, the founding documents declared that:

*“No member of the Council may propose any Ordinance, vote or resolution, the object or effect of which is to impose any tax, or to dispose of or charge any part of the public revenue, unless that Ordinance, vote or resolution shall have been proposed by the direction or with the express permission of the Governor.”<sup>58</sup>*

### **Admitting ‘Men of Substance’**

Finally, the representative character of the Legislative Councils betrayed their colonial and undemocratic nature. In democratic theory, parliaments are said to be organs for the democratic representation of the people. As such, they are supposed to be composed of directly elected members in free and fair elections based on universal adult suffrage. Not so the Legislative Councils. Firstly, they were made up of official and unofficial members, both of which sets were appointed by the Governor. Whereas the official members were invariably senior civil servants of the colonial state, the unofficial members were often immigrant planters or merchants appointed in their personal capacity. With the exception of Kenya, which introduced elections on a limited franchise at the end of the First World War, it was not until the second half of the 1950s that elections to the Legislative Councils in Tanganyika and Uganda were introduced on equally restrictive franchises.

Secondly, the Legislative Councils were not organs for the representation of the colonial natives. The legislatures were instead the preserve of predominantly white men and the occasional Indian merchant or planter. For the greater part of the colonial period, the ‘semi-barbarous’ natives were represented in these august institutions by European, mostly Christian missionary, members. The latter, however, never had any legitimacy with the African natives they ostensibly represented. For example, in a 26 March 1930 letter to *The Times of London*, Jomo Kenyatta, the future Prime Minister and later President of independent Kenya, who was then living in London, demanded the “... *representation of Native interest on the Legislative Council, by native representatives elected by the natives themselves.*”<sup>59</sup>

56 Ibid., art. XX

57 Ibid., art. XVI

58 Ibid., art. XXXI

59 Quoted in Hakes, op. cit., p. 9

Notwithstanding these demands, it was not until 1944 and 1945 that the first African natives were allowed into the East African Legislative Councils as appointed members. By this time, the anti-colonial stirrings by the colonised peoples of Africa and its Caribbean Diaspora were getting more vehement and better organised. Even then, the natives appointed to the Legislative Councils tended to be tribal chiefs put into power and maintained by the colonial state. These handpicked members were hardly the type capable of or interested in challenging the colonial state to which they owed their privileged positions. As Governor Sir John Hall said when he welcomed the first African members to the Uganda Legislative Council, these were

*“... men of substance and authority, of ripe experience and possessed of a developed sense of responsibility which may be expected from those high office in the Native Governments and Administrations.”*<sup>60</sup>

Once admitted into the Legislative Councils, the number and proportion of African members gradually but steadily rose compared to European and Indian members. The proportion of unofficial members also increased significantly. This was, again, the function of the growing anti-colonial agitation by the African nationalist movements. The British colonial state in East Africa was, however, careful not to tip the racial balance of power in the Legislative Councils, always ensuring that the minority European and Indian members had a combined majority in the Legislative Councils; while the majority Africans had a minority of representation.

The British colonial state in East Africa was equally loathe to lose its Legislative Council majorities and always made sure that official members were preponderant over the nominated members. Sir Richard Turnbull, the last British Governor of Tanganyika, explained the rationale for this asymmetrical, racially-determined representation in the following White supremacist and racist terms:

*“The only justification of keeping an official (European) majority in any colony is that we are convinced that we are better judges, for the time being, of the interests of the native population than they are themselves.”*

<sup>61</sup>

## **Losing Imperial Control**

But as the final decade of colonial rule wore on, the winds of nationalist change blew even stronger. Pan-territorial nationalist political parties were formed in Uganda and Tanzania to demand independence from colonial rule. Meanwhile in Kenya, the predominantly Kikuyu, Embu and Meru peasantry – rendered landless by five decades of systematic alienation of their lands in favour of the White settler farmers – exploded into the *Mau Mau* Rebellion in 1952. It would take almost six years and tens of thousands of

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60 G.W. Kanyeihamba, *Constitutional and Political History of Uganda: From 1894 to Present, 2<sup>nd</sup> Edition*, LawAfrica, 2010, p. 18

61 *Ibid.*, p. 14

lives for the *Mau Mau* to be finally crushed in what turned out to be what one writer has called the ‘British Gulag.’<sup>62</sup>

These developments gave huge impetus to constitutional developments in the three countries. Seeing the writing of majority rule on the proverbial wall, the British colonial state moved away from the principle of overt European control of the Legislative Council, to one of multiracialism in which the interests of the minority immigrant communities could hopefully be more effectively protected. This change was seen in the acceptance of the demands for directly elected African members. Thus, after decades of rejecting elections, Sir Andrew Cohen, the Governor of Uganda, broke the news of the sudden change of policy in his 24 April 1956 address to the Legislative Council:

*“I wish to address the Council on the subject of elections, in which you as representatives of the people of Uganda are deeply interested. The Government welcomes this interest and has itself been studying the question of elections for some months. When the Council debated the question last January, there was agreement by honourable members that the aim should be to introduce direct elections to the Legislative Council. But the great majority of members, including a substantial majority on the representative side, voted against binding ourselves to the introduction of direct elections throughout the Protectorate in 1957.... There will be, I believe, general agreement in the House that the objective of our policy must be to introduce direct elections on a common roll for the representative members of the Legislative Council from all parts of the Protectorate.”*<sup>63</sup>

The new policy was effected – albeit on a restricted franchise and in limited areas<sup>64</sup> – in the multiracial elections to the Legislative Council held in Kenya in March 1957. The following year, Tanganyika and Uganda also held multiracial elections for all races. Two years later, responsible government was granted in Tanganyika following elections to the Legislative Council in August 1960. For the first time, both directly elected and African members of the Tanganyika Legislative Council formed a clear majority over the nominated and European and Indian members. The following year, on 9 December 1961, Tanganyika became the first East African country to attain what was known in British constitutional lexicon as ‘self-government.’

### **Birth Pangs of a Nascent Democracy?**

Things were more complicated in Kenya and Uganda. From the very beginning of colonial rule in the latter, Buganda Kingdom had always been treated differently from other Kingdoms and ethnic groups. Buganda Kingdom was never conquered militarily and its relationships with the British colonial state were governed by a series of agreements,

62 Caroline Elkins, *The Britain’s Gulag: The Brutal End of Empire in Kenya*, Jonathan Cape, London, 2005

63 Kanyeihamba, *Constitutional and Political History...*, p. 23

64 The *Mau Mau* heartlands of Kikuyu, Embu and Meru areas of the Central Province which were still under emergency rule, were precluded from participating in the elections. Voters from the three ethnic groups were also required to produce ‘loyalty certificates’ from the colonial officials, an insurmountable task, before they could be allowed to vote.

the most important of which was the Buganda Agreement of 1900. On the basis of these agreements Buganda's territorial integrity was assured, while its institutions of government, presided over by its powerful *Kabakas*,<sup>65</sup> were not only retained but also secured in law. As John T. Mugambwa argues in his 1986 doctoral thesis, although the Uganda Protectorate could be classified as a 'colonial protectorate', the Kingdom of Buganda represented "*the colonial protectorate at its nearest approximation to the protected state....*"<sup>66</sup>

As a result of this preferential treatment and its centuries of history as an independent state, and because of its population size and economic might, the Buganda Kingdom resisted the democratic challenge that animated the nationalist movements in other East African countries and elsewhere. Consequently, in the elections to the Legislative Council of 1961 and 1962, members from Buganda Kingdom were not directly elected by the Buganda voters, but were selected by the *Lukiiko*, Buganda's legislative assembly sitting as an electoral college.

Thus, at independence on 9 October 1962, Uganda's Legislative Council (now renamed 'the National Assembly') was composed of indirectly elected members from Buganda Kingdom, directly elected constituency members from the rest of the country and 'specially elected' members. The latter category were members elected by the National Assembly sitting as an electoral college. Moreover, Uganda became a federal state with the Buganda Kingdom enjoying substantial autonomy. So, as Professor George W. Kanyeihamba – former Attorney General, Supreme Court justice and constitutional scholar – says of Uganda's first Constitution:

*"The Uganda Independence Constitution ... created a hotchpotch form of government which was both federal and unitary. Although allowing for elements of each form, the Constitution was sufficiently vague for it did not demarcate the boundaries of or distinguish between the territories of Uganda."*<sup>67</sup>

Professor Kanyeihamba further elaborates:

*"Uganda consisted of five federal states. Of these, Buganda enjoyed more powers than the other four. Moreover, one of these districts (sic!) was not a kingdom but was described as the Territory of Busoga. In addition, there were ten districts, which were regarded as Unitary. It was not clear whether they were unitary in relation to the central government or to the federal states. Lastly, there was the curious Territory of Mbale, which was in a category of its own. The relationship between the Uganda Government and the Kingdom of Buganda was clearly a federal one. The same could not be said about the other three Kingdoms or the Busoga Territory because the central government had and exercised more powers with regard to their affairs than it did in the case of Buganda."*<sup>68</sup>

65 'Kabaka' is the title of the king of the Kingdom of Buganda in Southern Uganda.

66 Mugambwa, op. cit., p. 8

67 Kanyeihamba, Constitutional and Political History ..., op. cit., p. 65

68 Ibid., p. 66

As far as Kenya is concerned, its march to independence was equally complicated. So, as the 1950s drew to a close and the country inched towards independence, the short-lived multiracialism championed by the British Secretaries of State Oliver Lyttelton and Alan Lennox-Boyd gave way to the mantra of protection of ethnic and racial minorities from the more powerful groups, particularly the Kikuyu and Luo ethnic groups. At the centre of this campaign was the fear of economic and political domination and, in particular, the loss of historic land rights of the smaller ethnic groups. Organised around the Kenya African National Union (KANU) established in May 1960, the Kikuyu and the Luo had a vision of independent Kenya as a strong centralised, preferably one-party, state.

The medium and smaller tribes such as the Luhya, the Kalenjin, the Maasai and the Mijikenda organised themselves in the Kenya African Democratic Union (KADU). As Robert Maxon argues in his ‘Constitution-Making and the End of Empire’,<sup>69</sup> in the constitutional negotiations that preceded independence in 1963, KADU “*wanted a constitution providing for regional powers and safeguards in respect of tribal lands and spheres of influence.... Such a constitution would provide safeguards particularly against infiltration of regions for settlement purposes by outsiders. There must also be constitutional safeguards against a one party political system and suppression of opposition criticism.*”<sup>70</sup> KADU’s policy came to be known as *Majimboism*, the Swahili for regionalism or federalism.

Needless to say, KANU was vehemently opposed to the KADU policy. In an article published in the *East African Standard* of 9 February 1962, Mzee Jomo Kenyatta, KANU’s undisputed leader, described the policy as ‘a strange new concept’ which had no roots in the country and was allegedly being fostered by ‘self-seekers’ desperately trying to secure their own individual interests, by creating “*pockets of tribal influence by arousing hatred and fear against brother Africans so that they may rule as tin-pot kings in their own little kingdoms.*”<sup>71</sup> Two years earlier, Jaramogi Oginga Odinga, Kenyatta’s deputy as KANU leader and later his Vice President, had told the same newspaper that “*too many parties confuse things.*” When independence came, he had argued, “*there would be no need for an opposition party until later and even then he would only wish to see two parties.*”<sup>72</sup>

The British Government in London and its colonial functionaries in Nairobi found themselves in a quandary. On the one hand, both the Colonial Office in London and the colonial authorities in Nairobi were well aware of KANU’s propensity for authoritarianism, with Governor Renison admitting that the party was ‘avid for power’ and “*... aims to be firmly in the saddle at independence and its scruples in regard to minority rights thereafter are, at best, suspect and more likely non-existent.*”<sup>73</sup> According to Maxon, even the new

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69 Robert M. Maxon, **Kenya’s Independence Constitution: Constitution-Making and the End of Empire**, Fairleigh Dickinson University Press, Plymouth, 2011

70 *Ibid.*, p. 53

71 *Ibid.*, p. 75

72 *East African Standard*, 5 May 1960

73 Maxon, *op. cit.*, p. 64

Secretary of State Reginald Maudling had to confess that “*KADU’s fears are very real and every effort will have to be made in our constitution-making to allay them.*”<sup>74</sup>

On the other hand, however, the British Government worried that regionalism, with its focus on tribal land rights and decentralised power structures, would undermine the colonial land tenure regime and the centralised administrative regime needed to sustain the colonial economic relations spawned by colonialism. Thus senior Government officials such as P.J. Kitcatt at the Colonial Office argued – according to Maxon – that, the *majimbo* plan was likely to “... reproduce some of the worst features of the American constitution, namely its inflexibility.”<sup>75</sup> Kitcatt also noted that the KADU proposals would “require substantial alteration in the machinery and method of government which have already been established in Kenya.”<sup>76</sup>

The British Government also needed to protect the interests of its citizens and companies who had established substantial economic interests in colonial Kenya, while at the same time maintaining cordial relations with the newly independent countries of Africa and Asia. Maxon cites Prime Minister MacMillan as saying that of foremost concern for the British Government was the protection of British settlers and investments in eastern and southern Africa where

*“... people of British stock have made permanent home. We shall wish to protect the rights of these people and the large British investments in the area, so far as we can, while doing as little damage as possible to our relations with the other African and Asian countries.”*<sup>77</sup>

With the constitutional negotiations, conducted in a series of conferences held at the Lancaster House in London between 1960 and 1963, deadlocked on the question of *Majimboism*, the British Government was forced to impose a constitutional settlement. The latter was a compromise of a kind which did not quite leave any of the parties to it completely dissatisfied to the point of rejecting it. Thus, at the Second Lancaster House Conference in 1962, Kenyatta urged the KANU delegates to accept the imposed settlement even if the party did not like it. Fitz de Souza, the KANU legal advisor and later Deputy Speaker of the Independence Parliament tells what happened next:

*“After long debates about what would be the shape of the new country’s Constitution, Kenyatta’s KANU were still holding out for centralized government while Ronald Ngala’s KADU argued for majimbo, a patchwork of more autonomous geographical and tribal regions. It was a stalemate, and no one seemed to know how to end it. Then one day Kenyatta called us to a private meeting. He said it was time to move forward and that we should accept, more or less, whatever terms were being proposed for the constitution. When there were murmurs of disapproval, Kenyatta said not*

74 Ibid., p. 67

75 Ibid., p. 60

76 loc. cit.

77 Ibid., p. 80

*to worry about majimbo or anything else because later on, once he was in power, he would change it all.*<sup>78</sup>

The settlement imposed by the Colonial Office was summarised in a minute dated 30 May 1963, by F.D. Webber, the head of the East African Division at the Colonial Office, as follows:

*“The new Constitution, which is to set the pattern for the independence constitution, is deliberately designed to prevent even a quite powerful government at the centre from having matters all its own way where Regional interests are concerned. There are powerful minority groups in Kenya which provide a much greater ‘balance’ in the political situation that is possible in a number of other African countries. In this lies a real hope for reasonable stability in that country. There are very strong safeguards in the Constitution, which is going to be very difficult to amend against the infringement of property and other rights of the individual, and, because of the voice that Regions will have in the appointment to the Judiciary, it will be difficult again for the Prime Minister of the day to ‘pack’ the judiciary and so interfere with the courts.”*<sup>79</sup>

It was under these conditions that Kenya assumed its independent nationhood on 10 December 1963.

### **Independence Constitutions: Variations on a Theme?**

So, within a period of two years, from 1961 to 1963, all three East African countries had obtained independence. All were parliamentary democracies. This fact has led many academic commentators to describe the nature of the East African polities that emerged at independence as Westminster-type constitutional governments. Writing about Tanzania, for example, Dr Harrison Mwakyembe, an erstwhile academic and current cabinet minister, has argued that the Independence Constitution

*“... introduced into Tanganyika the British system of government known as the ‘Westminster model’, a model of parliamentary or liberal democracy which colonial Britain indiscriminately bequeathed to all of its dependencies on the eve of their independence.”*<sup>80</sup>

Similarly, writing on Kenya’s Independence Constitution of 1963, Luis Franceschi and Professor PLO Lumumba – both of them prominent legal scholars – have argued that *“... the Westminster version is the model of the Independence Constitution.”*<sup>81</sup> The Media Development Association of Kenya and KAS Kenya agree that the Independence Constitution was indeed *“... founded on the principles of parliamentary government based*

78 Fitz de Souza, **Forward to Independence: My Memoirs**, Amazon Fulfilment, Wroclaw, 2019, p. 223

79 Quoted in Maxon, *op. cit.*, p. 175

80 Harrison G. Mwakyembe, ‘The Parliament and the Electoral Process’, Issa G. Shivji (ed.), *The State and the Working People in Tanzania*, CODESRIA, Dakar, 1985, pp. 16-56, 16

81 Luis Franceschi and P.L.O. Lumumba, *The Constitution of Kenya: A Commentary, 2<sup>nd</sup> Edition*, Strathmore University Press, Nairobi, 2019, p. 31



*on the Westminster model and protection of minorities.*<sup>82</sup> For its part, the Independence Constitution of Uganda introduced a cabinet system of government, with the Prime Minister and the Cabinet being collectively and individually accountable to the National Assembly for its advice to the Governor General, soon after the President.<sup>83</sup>

Unlike Kenya and Tanganyika, where the Governors General represented Her Majesty the British Queen, the President of Uganda was to be “... *elected from among the Rulers of the Federal States and the constitutional heads of the Districts by the members of the National Assembly for a term of five years.*”<sup>84</sup> In the exercise his functions, the latter was bound to

*“... act in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet except in cases where is required by this Constitution or any other law to act in accordance with the advice any other person or authority other than the Cabinet.”*<sup>85</sup>

He could be re-elected or elected to the office of Vice President.<sup>86</sup> As in any Westminster system, the President was to be the titular ‘Supreme Head (of State) and Commander in Chief.’<sup>87</sup>

The claims that the East African countries adopted the Westminster constitutional model must be interrogated and validated. While true, these generalisations conceal important nuances and the important role that nationalist struggles played in shaping the independence Constitutions of each particular country. As Mwakyembe himself points out in the case of Tanganyika that its political independence “... *was a product of the people’s protracted struggles against alien rule and denial of democratic rights. It was not ... a result of an orderly and generous abandonment of alien rule by imperialist nations.*”<sup>88</sup> The intensity of the popular struggles determined the scope and content of the Constitution that ensued on the morrow of independence.

Tanganyika was a British Mandate Territory, firstly, under the League of Nations and, later, under the United Nations Trusteeship Council. Under the terms of the Mandate, the British were obliged to administer the Territory in trust for its native inhabitants, in such manner and until such time as the natives were ready for self-government. Tanganyika was also a relatively poor territory which, unlike Kenya or Zimbabwe, did not attract significant White settler communities or large-scale British capital investment.

As a result of these factors, the struggle for Tanganyika’s independence was much less protracted and relatively peaceful. Its Independence Constitution – negotiated over two days in constitutional talks held in Dar es Salaam from 27 to 29 March 1961<sup>89</sup>, and

82 MDA and KAS, *History of Constitution-Making in Kenya*, Nairobi, KAS, 2012, p. 7

83 *Ibid.*, art. 63(1) and (2)

84 *Ibid.*, art. 36(1)

85 *Ibid.*, art. 67(1)

86 *Ibid.*, art. 36(5)

87 *Ibid.*, art. 34(1)

88 Mwakyembe, *op. cit.*, p. 23

89 It was at this meeting that, according to Mwakyembe, ‘... *the colonial government managed to push through the*

chaired by the Secretary of State for Colonies Ian Macleod – reflected this lack of vested economic or political interests on the part of the British colonial state. The principles of prime ministerial and cabinet system, the sovereignty of parliament, loyal opposition, electoral system based on one man one vote, the independence and impartiality of the judiciary, civil service and armed forces, made up the substance of the Independence Constitution.

The practice and procedure of the Independence Parliament closely conformed to that of the British House of Commons. So were laws and regulations relating to its powers, privileges and immunities conformed to those generally applicable to the House of Commons.<sup>90</sup> Likewise, the position of the constitutional monarch as the titular head of state became the model for the post of the Governor General at independence. So was the position of the Prime Minister who wielded real executive power. Just as in Britain, he was the leader of the political party commanding a parliamentary majority. In form and substance, therefore, the Independence Constitution of Tanganyika was very close to the Westminster Constitution.

There were, however, crucial differences with the Westminster system, not least the fact that, unlike Great Britain, Tanganyika had a written Constitution. This means that, unlike the British Parliament, the Parliament of Tanganyika was the creature of, and derived its powers from, a written Constitution. Its powers and authority were, therefore, subject to constitutional limitations imposed by the Constitution; and could be measured up and challenged on the standard of the written Constitution. The notion of ‘parliamentary supremacy or sovereignty’ that Pius Msekwa – the first African Clerk of the Tanganyika Independence Parliament and later the first Speaker of the Tanzanian National Assembly in the multiparty era – refers to in his 1977<sup>91</sup> work was, therefore, non-existent with regard to the Parliament of Tanganyika.

Another crucial difference was that, unlike the Westminster Constitutional model, the Independence Constitution of Tanganyika did not enshrine a Bill of Rights. Indeed, it would take more than two decades for the country to have a justiciable Bill of Rights. As Professor John E. Ruhangisa has noted in his 1998 doctoral thesis,

*“the British made it compulsory for the majority of its (sic!) colonies to include in their Independence Constitutions provisions limiting the powers of the government and introducing an enforceable Bill of Rights which safeguarded human rights and freedoms .... But unlike other British colonies, the Tanganyika Independence Constitution had no Bill of Rights. In most unusual circumstances the nationalist leaders persuaded the British government not to include a Bill of Rights in the Tanganyika Independence Constitution....”*<sup>92</sup>

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Westminster model.’ Mwakymembe, op. cit., p. 22

90 Tanganyika (Constitution) Order in Council, 1961, s. 6(7)

91 Pius Msekwa, *Towards Party Supremacy*, East African Literature Bureau, Dar es Salaam, Kampala & Nairobi, 1977, Introduction and Chapter I

92 John E. Ruhangisa, *Human Rights in Tanzania: The Role of the Judiciary*, Thesis Submitted to the University of London for the Degree of Doctor of Philosophy, Law Department, School of Oriental and African Studies, London,

With regard to Kenya's Independence Constitution, the claim of a Westminster model being indiscriminately bequeathed on hapless nationalist movements is even less convincing. It is true that its Constitution introduced certain features of the Westminster system. It established the position of Prime Minister appointed by the Governor General upon the advice of the Cabinet. It had a 'Central Legislature', soon after the Parliament, comprising the National Assembly and the Queen represented by the Governor General. The National Assembly was bicameral, consisting of the House of Representatives and the Senate. The Prime Minister was accountable to the National Assembly, which could pass a motion of no confidence and bring the government down. It embodied a Bill of Rights which sought to protect minority rights from abuse of power.

However, unlike other Westminster Constitutions, the Independence Constitution of Kenya retained the position of the Governor General with immense legislative and executive powers with respect to foreign affairs, internal security and defence. It also retained the Governor's veto powers over legislation with limited chances of overturning it. And unlike Tanganyika, Kenya's Independence Constitution was a long, detailed and highly complex document that sought to balance the positions of the negotiating parties and maintain the fragile compromise thrashed out at the Lancaster House Conferences.<sup>93</sup> Thus, while they refer to it as 'a Westminster Constitution', Franceschi and Lumumba note that:

*"it embodied an extensive system of regionalism, with the country divided into 7 majimbo, each with its own elected and independent executive and legislative bodies."*<sup>94</sup>

But what made the Independence Constitution of Kenya fundamentally different from the Westminster model was its stringent procedure for its amendment. Firstly, although Parliament was empowered to alter any part of the Constitution, it could only do so with the support on the second and third reading of the votes of three quarters of all the members of either House of the National Assembly.<sup>95</sup> A previously withdrawn bill aiming to amend the Constitution could be reintroduced unaltered to the House only if it had been approved in a referendum with the support of two thirds of the registered voters of Kenya; in which case it could be passed by a simple majority of the members of either House of the National Assembly.<sup>96</sup>

Secondly, if the Bill was for amendment of the 'specially entrenched' provisions of the Constitution, its passage required the support of three quarters of all members of the House of Representatives, and 90 percent of all members of the Senate.<sup>97</sup> The specially entrenched provisions related to the Bill of Rights, rights of the regions, citizenship, elections, the Senate and the Judiciary. Jurisdiction in respect of land, a major issue during

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1998, pp. 46-47

93 MDA and KAS, op. cit., p. 7

94 Franceschi and Lumumba, *ibid.*, p. 31

95 Constitution of Kenya, 1963, section 71(2)

96 *Ibid.*, section 71(3) read together with section 56(1)

97 *Ibid.*, section 71(6)

the Lancaster House negotiations, was divided between the regions (crown lands) and the central government, which took control of public and trust lands.

As far as Uganda's Independence Constitution is concerned, it, too, had little in common with the Westminster constitutional template. Owing to Uganda's complex history and ethnic makeup, its Independence Constitution was, according to Professor P. Godfrey Okoth, the Makerere University historian,

*“a balancing act aimed at satisfying the competing political interests and aspirations of diverse groupings in Uganda.”*<sup>98</sup>

In an attempt to satisfy the diverse vested interests, Professor Okoth observes, the Constitution

*“provided for parts of the country to have a federal relationship with the central government, while the rest of the country was governed on a unitary basis. Within the federal structure, the powers of the four kingdoms ... and the territory of Busoga were not by any means uniform.”*<sup>99</sup>

The distribution of legislative and executive powers reflected the federal character of the polity envisaged under the Independence Constitution. Parliament was given power to make laws for peace, order and good government of Uganda in respect of all matters except in the Federal States.<sup>100</sup> The Lukiiko was given exclusive power to legislate for peace, order and government of the Kingdom of Buganda for matters concerning Buganda which were set out in its Constitution.<sup>101</sup> The distribution of legislative powers between the National Assembly and the Legislature of Buganda, applied in the same terms in the relationship between the National Assembly and the Legislatures of the other four Federal States.<sup>102</sup> Laws passed by Parliament in respect of matters specified under the Buganda Constitution could not come into force

*“... unless the Legislative Assembly of the Kingdom of Buganda has ... signified its consent that the Act of Parliament should have effect.”*<sup>103</sup>

The third important distinction with the Westminster Constitution related the role of the Judiciary in the constitutional scheme of the newly independent states. The existence of written constitutions which enshrined a Bill of Rights, as in Kenya and Uganda, vested the East African judiciaries with special authority as the final interpreters of the Constitution, with power to declare parliamentary enactments null and void. Under the Westminster system, courts do not have this power. Therefore, as Dr Githu Muigai, the Kenyan constitutional scholar and former Attorney General has said,

98 P. Godfrey Okoth, 'The historical Dimensions of Democracy in Uganda: A Review of the Problems and Prospects', in J. Oloka-Onyango et al. (eds.), **Law and the Struggle for Democracy in East Africa**, Claripress, Nairobi, pp. 46-69, p. 50

99 Loc. cit.

100 Constitution of Uganda, art. 73

101 Ibid., art. 74(1)

102 Ibid., art. 75

103 Ibid., art. 74(5)(a)

*“... the post-colonial independence constitutions of the three East African countries were at great variance with the Westminster model....”*<sup>104</sup>

## **The Promise of Independence**

As post-colonial history of Africa was to prove, there was no simultaneity between independence and democracy. Yet this was not so obvious on the morrow of independence. After the long, dark night of colonial despotism, after the nationalist mobilisation and the unprecedented political awakening of the African masses, independence was greeted with justified waves of optimism all across the continent. The optimism was for a democratic future for the continent and the socio-economic transformation of African societies that independence promised. According to the author Ama Biney<sup>105</sup>, that, in fact, was what Dr Kwame Nkrumah, the Prime Minister of Ghana, the first Sub-Saharan African territory to attain independence from European colonial yoke, promised with his clarion call: *‘Seek ye first the political kingdom, and all else shall be added unto thee’!* That optimism was backed by independence constitutions which had enshrined parliamentary governments.

The Independence Parliaments were powerful organs of state power in East Africa. For example, writing about the Independence Parliament of Tanganyika, Msekwa has noted that

*“between Independence in 1961 and 1965, the National Assembly was generally acknowledged to be the supreme institution for policy-making and control....”*<sup>106</sup>

However, that was not a solely Tanganyikan phenomenon. The Kenyan National Assembly was an equally powerful legislative body. It had power to pass a confidence motion and force the resignation or removal of the Prime Minister.<sup>107</sup> It had significant control in the exercise of emergency powers, for no emergency could be declared without a prior resolution of the National Assembly, supported by 65 percent of all of its members.<sup>108</sup> It had power to extend the state of emergency for a period not exceeding two months.<sup>109</sup>

As Dr Smokin Wanjala, the erstwhile law lecturer at Nairobi University and current Supreme Court justice, says the first two years of Kenya’s Independence

*“... witnessed some of the most vigorous and enlightened debates in parliament as well as out of it.... It was an environment that helped cultivate a nascent democracy.”*<sup>110</sup>

104 Githu Muigai, *‘Legal and Constitutional Reforms to Facilitate Multiparty Democracy: The Case of Kenya’*, in Oloka-Onyango, et al., op. cit., pp. 526-544, 526

105 *The Political and Social Thought of Kwame Nkrumah*, Palgrave MacMillan, London, 2011

106 Pius Msekwa, *Towards Party Supremacy*, East African Literature Bureau, Dar es Salaam, Kampala & Nairobi, 1977, p. 1

107 Constitution of Kenya, 1963, op. cit., s. 65(2)(a)

108 Ibid., s. 69(4)

109 Ibid., s. 69(8)

110 Smokin Wanjala, *‘Presidentialism, Ethnicity, Militarism and Democracy in Africa: The Kenyan Example’*, in Oloka-Onyango et al., ibid., pp. 86-100, 91

In Uganda, for its part, the period between independence in 1962 and the constitutional coup of 1966 was described by the Constitutional Commission which drafted the current Constitution as ‘the Era of Good Feeling’ because, the Commission pointed out, “... constitutionalism appeared to work....”<sup>111</sup>

## Republican Constitutions and the End of the Honeymoon

### Tanganyika

The independence constitutional settlements unravelled quickly. In Tanganyika within a month of the attainment of independence, TANU, the ruling party, started a process aimed at transforming the country from the parliamentary democracy it was to a presidentialist Republican polity. A Government White Paper published in late May 1962 alleged that the parliamentary system of government, with the Governor General as Head of State and Prime Minister as Head of Government accountable to Parliament, which had been adopted at independence, had turned the newly independent state into a ‘British monarchy.’<sup>112</sup> Strangely, while denigrating the latter institution, the White Paper proposed the creation of an African presidential monarchy with powers that the British monarchists could only dream about. It invoked the imagery of an all-powerful African chief:

*“The honour and respect accorded a chief or a king or, under a republic, a President, is for us indistinguishable from the power he wields.”*<sup>113</sup>

It was argued further that the institutions of government had to be such as could be understood by the people of Tanganyika. This implied that the parliamentary system – which already had a long history, albeit colonial one, with its many imperfections – was alien to the people of Tanganyika; while the republican presidential system – which had never been tried anywhere in the colonial world – was understood by them!

The White Paper proposed unprecedented subordination of the National Assembly to the Republican President. The proposals were, however, camouflaged with misleading language:

*“The proposal to have an Executive President in no way derogates from the authority or status of Parliament. The moral authority of any Government must ultimately depend upon the consent of the people who are governed. This is the basis of democracy and in practice democracy is best maintained by means of a freely elected parliament having exclusive power to make laws, raise taxes and vote money for public purposes. Even though Parliament remains sovereign, freedom in a democracy cannot*

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111 Republic of Uganda, **The Report of the Uganda Constitutional Commission: Analysis and Recommendations**, Kampala, Ministry of Justice and Constitutional Affairs, 1993, p. 51

112 Quoted from the British House of Commons, *Tanganyika Republic Bill*, House Debate, 6 November 1962, Hansard, Vol. 666, cc905-19, para. 905

113 *Ibid.*, p. 906

*survive without the rule of law.*<sup>114</sup> Thus, it greatly misrepresented its true object, promising that “... Parliament must remain sovereign....”<sup>115</sup>

Following the passage of the White Paper, the National Assembly of Tanganyika passed the *Constituent Assembly Act, 1962*,<sup>116</sup> which empowered the National Assembly to

*“... resolve itself from time to time into and constitute a Constituent Assembly for the enactment of provisions for the establishment of a Republic and the enactment of a Constitution therefor.”*<sup>117</sup> Mwakyembe has perceptively argued that this Act “placed the country in an irreversible process towards concentration of power in the executive and the erosion of people’s democratic rights.”<sup>118</sup>

Thus, on 9 December 1962, the first anniversary of her independence, Tanganyika became a Republic with the coming into force of the Republican Constitution.

The coming into effect of the Republican Constitution marked the beginning of the weakening of parliamentary authority *vis a vis* the party and the executive, as well as a noticeable departure from the Westminster model.<sup>119</sup> There was a tremendous broadening in the power and scope of the government and an increase in the authority of the chief executive under the Republican Constitution at the expense of the legislature. The President became the Head of State and Commander in Chief of the Armed Forces; the executive power of the republic was vested in him and in the exercise of his functions he was to act in his own discretion.

The President was empowered to dissolve parliament, the power which under the Independence Constitution could only be exercised when the National Assembly passed a motion of no confidence in the Prime Minister. The National Assembly was also robbed of the vote of no confidence, its vital weapon to control the actions of the executive. There were no other circumstances than the effluxion of time, or the President’s refusal to assent to a Bill which had been re-tendered, that could bring about a general election.

The President also casts a long shadow over Parliament over and above his dominant influence in the law-making process. He has powers to appoint the Clerk of the National Assembly, its chief executive officer, and can appoint up to ten members of parliament, a reversion to common practice under one-party rule which goes back to the first colonial Legislative Council. The President also determines the salaries and benefits for members of the National Assembly. So, as Dr Mwakyembe says,

*“the assurance given earlier by the government that the proposal to have an executive president would in no way derogate from the authority or*

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114 Ibid., p. 907

115 Ibid., p. 907

116 No. 66 of 1962

117 The Constituent Assembly Act, *ibid.*, s. 2(1)

118 Mwakyembe, *ibid.*, p. 17

119 Mwakyembe, *op. cit.*, p. 28

*status of parliament, stood in contrast to the position which the Republican Parliament found itself in.*"<sup>120</sup>

The relationship between the Cabinet and the President was also qualified to restrict the advisory functions of the Cabinet to “*such matters as may be referred to it under any general or special directions of the President.*”<sup>121</sup> The Republican Constitution also conferred to the President vast punitive powers of detention, deportation and expulsion of persons deemed undesirable by the government. With its passage the presidential shadow now hovered everywhere in the public sphere. He had power to appoint ministers, deputy ministers, permanent secretaries, judges including the chief justice, heads of services commissions, regional and district commissioners, commanders of the army, police, prisons and paramilitary forces, chief executives of parastatals and members of the electoral commission and its chief executive officer.

The presidential reach was not confined to matters of politics and government. It was also to be found in the realm of land and natural resource management and allocation. Because of the saving clauses in the Independence and Republican Constitutions which retained the colonial legal order, all lands, hitherto under control of the Governor, were vested in the President in trust for the people of Tanganyika, later Tanzania, a position reaffirmed by the 1999 Land Laws.<sup>122</sup> Since 2017, all natural resources and wealth of Tanzania have similarly been vested in the President. He is, therefore, the ultimate owner of the land and natural resources and wealth of the country.

The President enjoys complete immunity from prosecution of any kind; and he is largely immune from the civil process. In fact, a law has just been passed a few days before the 11<sup>th</sup> Parliament was dissolved on 19 June 2020, that makes the President effectively immune from civil proceedings from which he enjoys no immunity under the Constitution. He has powers to declare war and emergencies and make peace; and he can also pardon convicted prisoners regardless of their offences and irrespective of their sentences. In short, as Professor Issa G. Shivji, a prominent constitutional scholar, argues,

*“the president is the giver and taker of life, liberty and livelihood. The description of this system of government as ‘presidentialism’ or ‘executive presidency’ has been found wanting. African constitutional scholars have therefore coined a new term to describe it: the Imperial Presidency.”*<sup>123</sup>

## Kenya

As far as Kenya was concerned, the Independence Constitution was even more short-lived. This could not have surprised the parties to the Lancaster House settlements. Like KADU, the British did not trust Kenyatta and his KANU followers to abide by any agreement reached at Lancaster House once in power. As Secretary of State for Colonies Reginald Maudling said in a secret memo dated 19 March 1962, “*KADU and many of*

120 Loc. cit.

121 Loc. cit.

122 *The Land Act, 1999, No. 4 of 1999; and the Village Lands Act, 1999, No. 5 of 1999*

123 I.G. Shivji, *Let the People Speak: Tanzania Down the Road to Neo-Liberalism*, CODESRIA, Dakar, 2006, p. 77



*KANU believe, in my opinion with justification, that Mr. Kenyatta and his followers have no intention of being bound by any undertakings or any constitution if ever they can get power into their hands.*”<sup>124</sup> The main protagonists showed little faith in the Independence Constitution. While KANU was not satisfied with the entrenchment of regionalism in the Constitution, KADU felt that the regional governments were not adequately protected from the vagaries of the central government.<sup>125</sup>

And so, as Maxon notes,

*“the pressure for change in the constitution emerged very quickly. This was hardly surprising. The majimbo constitution provided many significant departures from past practice in colonial Kenya. Numerous functions had to be devolved to the regional assemblies, and this would take time. The rush to hold the election that (new Governor Malcolm) MacDonald and the Kenyan politicians advocated meant that there would be little time to put the new arrangements in place before internal self-government. The greatest difficulties faced in implementation of the new constitution, however, emerged as a result of the fact that the party winning the 1963 elections, KANU, desired to alter the regional constitution in significant ways.”*<sup>126</sup>

Soon after independence, leading government ministers started to undermine the Independence Constitution, with one describing it as ‘unworkable and unfair.’<sup>127</sup> Another opined that the first requirement for its successful implementation was to hire “... *a corps of skilled lawyers and clerks ... to explain to legislators what they were required, permitted or forbidden to do under scores of legally worded clauses.*”<sup>128</sup> Charles Mugane Njonjo, the first Attorney General, explained the reasons for the constitutional amendment that soon followed as follows:

124 Quoted from Maxon, op. cit., p. 100

125 DMA and KAS, op. cit., p. 7

126 Maxon, op. cit., p. 175

127 Tom Mboya, *The East African Standard*, 15 May 1963. Thomas Joseph Odhiambo Mboya was one of the most well-known and articulate leaders of Kenya’s independence movement. A trade unionist, Pan Africanist and political activist, Mboya is rightly considered one of the founding fathers of the Republic of Kenya. He was instrumental in the formation of KANU in 1960 and became its first Secretary General. As KANU’s point-man, he spearheaded the constitutional negotiations at the Lancaster House Conferences between 1960 and 1963. After independence in December 1963, he served as Kenya’s first Minister for Justice and Constitutional Affairs, playing an important role in turning the country into a Republic and a virtually one-party state. He was assassinated in Nairobi, Kenya’s capital, on 5 July 1969.

128 Jaramogi Oginga Odinga, **Not Yet Uhuru**, London, Heinemann, 1967, p. 242. Odinga was the Minister for Home Affairs in the Independence Government and Kenyatta’s first Vice President. A leading proponent of a centralised one-party state for Kenya during the Lancaster House Conferences, in 1966 he and scores of his followers were ousted from KANU, whereupon he formed an opposition Kenya People’s Union (KPU). The party was virtually harassed out of existence and was eventually banned in 1969 and its leaders, including Odinga himself, detained under the draconian public security laws enacted during the Mau Mau Rebellion and retained at independence. He re-emerged in the early 1980s as one of the leading opponents of the one-party authoritarianism that emerged under the Kenyatta and Moi regimes. After the return of multiparty democracy in 1991, he unsuccessfully contested presidential elections in 1992, losing to the incumbent President Moi. He died on 20 January 1994.

*“First of all it militated against effective government at the centre. Secondly, it prevented the coordination of the national efforts at a time when it was most important that development should be planned on a nation-wide basis. Thirdly, the system of regional government was both costly and cumbersome and made heavy demands on the country’s inadequate resources for trained manpower. Fourthly, the independence constitution made provision for a monarchical form of government, a form which is alien to the Kenya people. Amendment of this constitution was therefore imperative.”*<sup>129</sup>

In October 1964, hardly ten months after independence, the First Amendment to the Constitution of Kenya was passed by Parliament.<sup>130</sup> It came into force on 12 December 1964, the first anniversary of independence. Between it and the adoption of the new Constitution in 2010, there would be twenty-eight other constitutional amendments. The First Amendment *“not only established Kenya as a sovereign republic but also weakened the majimbo system.”*<sup>131</sup> Professor Muigai argues that it made

*“far-reaching changes to the structure and content of the Independence Constitution.... It created an American-type executive Presidency and abolished the post of Prime Minister.”*<sup>132</sup>

The newly minted President became the Head of State and Government and the Commander-in-Chief of the armed forces. The prerogatives and privileges that Her Majesty enjoyed in relation to Kenya were transferred to the President. It provided for the first President of the Republic to assume office ‘as if he had been elected’<sup>133</sup>, rather than being voted into office. Uganda would follow suit three years later, following the 1966 coup. There was a similar ‘continuity on offices’ for members of the National Assembly and other holders of public office under the regime of the Independence Constitution.<sup>134</sup>

The First Amendment created a novel procedure for parliamentary elections, whereby all candidates for the election to the House of Representatives were required to declare their support for a presidential candidate, *“... and if he does not so declare, his nomination as a candidate for election to that House shall be void.”*<sup>135</sup> This created another precedent for Uganda’s Republican Constitution of 1967. Typical in Imperial Presidencies, the First Amendment gave the President vast powers to appoint and dismiss public officers. He could appoint the Vice President, Ministers and Assistant Ministers, the Attorney General, chairmen and members of the services commissions.

129 Charles M. Njonjo, ‘Recent Constitutional Changes in Kenya’, *East African Law Journal* (1965), p. 98; quoted in Muigai, *Constitutional Amendments ...*, op. cit. pp. 105-106

130 *The Constitution of Kenya (Amendment) Act, No. 28 of 1964*

131 Franceschi and Lumumba, *The Constitution of Kenya...*, op. cit., p. 34

132 Githu Muigai, **Constitutional Amendments and the Constitutional Amendment Process in Kenya (1964-1997): A Study in the Politics of the Constitution**, *A Thesis Submitted in Fulfilment of the Requirements of the Degree of Doctor of Philosophy of the Faculty of Law of the University of Nairobi*, September 2001, pp. 110-111

133 Act No. 28 of 1964, op. cit., s. 10

134 *Ibid.*, s. 19

135 *Ibid.*, s. 33A(5)(c)

In his capacity as Head of State, he was entitled to address either House of Parliament or both of them sitting jointly.<sup>136</sup> As a member of the House of Representative and Head of the Cabinet, he could participate in the deliberations of that House and could, indeed, vote on any motion or matter therein.<sup>137</sup> Save for voting, as Head of the Cabinet he could attend and take part in the proceedings of the Senate.<sup>138</sup> More importantly, he could summon, prorogue or dissolve the National Assembly; powers that were previously vested in the Governor General.

The First Amendment also removed all except specially entrenched powers from the Regional Assemblies; and deleted most of all non-entrenched provisions. The entire financial arrangements and independent revenue provisions between the central and regional governments were similarly revised.<sup>139</sup> In general, as Professor Muigai concludes, the First Amendment

*“... was intended to achieve and did achieve a significant configuration of the power map in Kenya. In this sense, it was a major victory for the government of the day. It provided KANU with the model of government it had failed to extract from the negotiating table at the Lancaster House. The political impact of the changes was enormous.”*<sup>140</sup>

Franceschi and Lumumba claim that it ‘gave birth’ to the Imperial Presidency in Kenya, “... resulting into a complete centralization of power and authority.”<sup>141</sup>

## **Uganda**

Uganda’s transformation from a parliamentary federal state into an Imperial Presidency was even more dramatic and left a lasting legacy of state orchestrated political violence and lawlessness. Prior to the 1962 elections, Obote’s Uganda People’s Congress (UPC) had formed an electoral alliance with the Kabaka Yekka (KY) party in order to defeat the Democratic Party of Prime Minister Benedicto Kiwanuka. After the elections, UPC and KY formed a coalition government headed by Obote as Prime Minister. A year later, following the amendment of the Independence Constitution, Uganda became a Republic with Kabaka Edward Muteesa II elected by the National Assembly to serve as President.

However, this political marriage of convenience quickly soured in 1964 when Prime Minister Obote supported a referendum to decide the fate of ‘the Lost Counties’, i.e. the Buganda counties of Buyaga and Bugangazi which had been ceded to Buganda from the Bunyoro Kingdom after Kabaka Mwanga helped the British to defeat King Kabalega of the Bunyoro Kitara Kingdom in the late 1890s.<sup>142</sup> Following the referendum, the two

136 Ibid., the new art. 33C(a)

137 Ibid., art. 33C(b)

138 Ibid., art. 33C(c)

139 Muigai, *Constitutional Amendments and the Amendment Process...*, op. cit., p. 113

140 Loc. cit.

141 Franceschi and Lumumba, *The Constitution of Kenya...*, op. cit., p. 34

142 The Kingdom of Bunyoro Kitara was one of the two most powerful kingdoms in pre colonial Uganda. A traditional rival of the Buganda Kingdom, it was defeated and conquered by the British with the help of Buganda in 1898-99.

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counties seceded from Buganda and reverted to Bunyoro. There was widespread rioting in Buganda and the relations between UPC and KY were never smooth after that.

Meanwhile, divisions within the UPC emerged which involved senior members of Obote's Cabinet, who accused him of dictatorial tendencies and fostering tribal rivalries within the party and the army. Obote's leadership of the UPC was becoming tenuous. In the midst of this intra-party feud, a scandal broke out in the National Assembly involving allegations of widespread smuggling of gold, timber and coffee from Eastern Zaire, which implicated the deputy army commander, Col. Idi Amin, Prime Minister Obote, his Defence Minister Felix Onama and former Minister Adoko Nekyon. Calls were made for the suspension of Col. Amin pending the investigation of the allegations; while members of Obote's Cabinet and UPC backbenchers moved a motion for a no confidence vote on the Prime Minister. The motion was passed.<sup>143</sup>

On 22 February 1966, Obote responded by having five of his Cabinet Ministers arrested during a Cabinet meeting and held without trial.<sup>144</sup> He also suspended the Constitution and assumed all executive powers. Two days later, on 26 February 1966, rather than suspend him, Obote appointed Col. Amin as his army commander and, shortly afterwards, promoted him to brigadier general. On 3 March, Obote dismissed the President and Vice President and assumed the powers of the President himself. On 15 April 1966, the Independence Constitution was formally abrogated after now President Obote convened a special session of the National Assembly at which he introduced proposals for a new Constitution, copies of which, he informed the members, were available in their pigeonholes!

During that session, Obote, surrounded by armed troops, outlined the features of the new Constitution that differentiated it from the Independence Constitution and moved the motion for its adoption. The speaker immediately called for a vote. There was no debate, even though members of the National Assembly had not even seen it beforehand, let alone read its contents. Those members who demanded copies before debate could commence were told to collect their copies from their respective pigeonholes after having passed it. As a result, the opposition members walked out along with four members of the government benches. Nonetheless the motion adopting the 1966 Constitution was passed by a wide majority. The 1966 Constitution was thus promulgated without debate or discussion, hence its apt description as 'the pigeonhole Constitution.'<sup>145</sup>

The crisis came to a head one month later when, on 19 May, the Buganda Lukiiko responded to the abrogation of the Independence Constitution, under which Uganda had become an independent federal state, by passing a resolution requesting the Government of Uganda to leave Buganda soil, which included the country's capital city Kampala. Obote

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Omukama (King) Kabalega, its powerful king, was captured and exiled to the Indian Ocean island of Seychelles. Because of its help in defeating Bunyoro, two of the Kingdom's counties were given to Buganda Kingdom, hence 'the Lost Counties.'

143 Republic of Uganda, Report of the Constitution Commission..., op. cit., para. 2.41, p. 51

144 Those arrested were Grace Ibingira, Balakyi Kirya, Mathias Ngobi, George Magezi and Emmanuel Lumu.

145 See Republic of Uganda, **The Report of the Commission of Inquiry into Violations of Human Rights: Findings, Conclusions and Recommendations**, Ministry of Justice and Constitutional Affairs, 1994, p. 87.

seized the opportunity to crush Buganda. On 24 May 1966, under the command of Col. Idi Amin, the Uganda Army staged a bloody assault on the Kabaka's Palace in the royal capital of Mengo, ostensibly to forestall a coup.

Security forces were deployed in Kampala and other areas of Buganda and a state of emergency declared all over the Kingdom. The troops killed thousands of civilians, and there was extensive looting, rape and torture by the soldiers. The Palace was set ablaze, and priceless artefacts and other cultural treasures spanning over six centuries of the Buganda Kingdom were irretrievably lost. The Kabaka fled into exile in Great Britain where he died three years later.

The 'Pigeonhole Constitution' created an executive presidency, vesting the office with fairly extensive powers. The old federal structures were retained as an interim measure, awaiting the enactment of a new Constitution. Like Tanganyika five years earlier, the preparations for the new Republican Constitution started with the enactment of the *Constituent Assembly Act, 1967*.<sup>146</sup> Section 1 of this Act reproduced *verbatim* the provisions of section 2(1) of the Constituent Assembly Act of Tanganyika:

*"The National Assembly may from time to time resolve itself into a Constituent Assembly with full power to enact such provisions for or in connection with the establishment of a new constitution as it thinks fit."*

The stage was now set for the adoption of Uganda's permanent republican Constitution.

On 9 June 1967, the Government of President Obote published its proposals for a new Constitution. Thereafter, an extraordinary debate on the proposals kicked off in the Constituent Assembly on 22 June and concluded with the new Republican Constitution on 8 September 1967. It was the third constitution for Uganda in five years. The preamble to the new Constitution said it all. The members of the Constituent Assembly, on behalf of all the people of Uganda, for themselves and their 'generations yet unborn' had resolved that "*the Government Proposals be adopted....*" They were indeed President Obote's government proposals.

Under the new Republican Constitution Dr Apollo Milton Obote, who had become President in the bloody coup of 15 April 1966, became the President. He did not have to call for, or win, any election. For, taking a leaf from Kenyatta's Kenya three years earlier, the new Constitution declared that "*... the person holding office as President immediately before the commencement of this Constitution shall, on such commencement, be deemed to have been elected as President with effect from 15<sup>th</sup> April, 1966.*"<sup>147</sup> The National Assembly that passed this Constitution also did not have to worry about elections either. Like the

<sup>146</sup> *Act No. 12 of 1967*. The Act was in many ways a *replica* of the Tanganyika *Constituent Assembly Act, 1962*, which paved the way for the adoption of the Republican Constitution of Tanganyika in 1962. Given close ties between Mwalimu Nyerere and Dr. Obote, it may not be farfetched to assume that Obote borrowed a leaf from his close political ally across Uganda's southern border.

<sup>147</sup> *Constitution of the Republic of Uganda, 1967*, Article 26(3)

President, the National Assembly too was “... deemed to have held its first sitting on 15<sup>th</sup> April, 1966”,<sup>148</sup> the day of the military putsch against the Independence Constitution.

Obote’s resolve to abolish the Kingdoms now took on the unequivocal language of constitutional law:

*“The institution of King or Ruler of a Kingdom or Constitutional Head of a District, by whatever name called, existing immediately before the commencement of this Constitution under the law then in force, is hereby abolished.”<sup>149</sup>*

These proud nations, some of which, like Buganda, had been in existence for over six centuries, were now called ‘Districts’, a British colonial term used to refer to non-kingdom areas of North and Eastern Uganda. To add salt to the Buganda injury, the abolition of its Kingdom was made retroactive to 24 May 1966<sup>150</sup>, the day of the military assault on the Kabaka’s Palace in the royal capital of Mengo. The abolition of the kingdoms was shielded from any judicial challenge. Article 118(5) made clear that

*“no action may be instituted in any court of law in respect of any matter or claim by any person under this article or under any provision made by Parliament pursuant thereto.”<sup>151</sup>*

The events of 1966 unleashed a wave of political repression by the state security agencies from which Uganda is yet to recover.<sup>152</sup> Obote’s total reliance on the army after 1966 led directly to his overthrow by now General Idi Amin on 25 January 1971. The terror and violence by the state that had first been perpetrated on the Buganda Kingdom in April and May of 1966 was now extended to the rest of Uganda, a process in which the Oder Commission of Inquiry estimated that over two million Ugandans were killed by the state or those revolting against the state; and another one million were exiled.<sup>153</sup>

However, in political and constitutional terms, the greatest and most enduring legacy of the 1967 Constitution is the presidentialism it created. Whereas the 1962 Constitution had introduced the office of the President as a titular Head of State, the 1967 Constitution transformed the President from the titular Head of State to include the executive Head of Government and Commander in Chief.<sup>154</sup> The President now became the Chief Executive of the State whose power “*shall be exercised by him, either directly or through officers subordinate to him.*”<sup>155</sup> Under the new Constitution, the President was

148 Ibid., art. 62(5)

149 The Constitution of the Republic of Uganda, 1967, art. 118(1)

150 Ibid., art. 118(2)

151 Ibid., art. 118(5)

152 Republic of Uganda, The Report of the Constitution Commission..., op. cit., para. 2.42, p. 51

153 See Republic of Uganda, The Report of the Commission of Inquiry into Violations of Human Rights ..., op. cit., p. 465. Chaired by Supreme Court Justice Oder, the Commission was established in order to investigate widespread human rights abuses beginning with the 1966 coup that made Obote President of Uganda. It published its 720 pages Report in 1994.

154 Ibid., art. 24(1)

155 Ibid., 65(1)

given vast powers to constitute public offices and to appoint public officials of all kinds.<sup>156</sup> He could appoint the Vice President;<sup>157</sup> Ministers and their Deputies;<sup>158</sup> the Attorney General;<sup>159</sup> and the Chairman and members of the Electoral Commission.<sup>160</sup>

The 1967 Constitution also gave the President immense powers of control over the Judiciary. He was empowered to appoint the Chief Justice of the High Court of Uganda,<sup>161</sup> and the puisne judges.<sup>162</sup> Members of the Judicial Service Commission were themselves presidential appointees.<sup>163</sup> Over and above these powers, the power to appoint judicial officers “... to hold or act in offices to which this article applies, include the power to confirm appointments, to exercise disciplinary control over persons holding or acting in such offices and to remove such persons from office shall be vested in the President, acting in accordance with the advice of the Judicial Service Commission.”<sup>164</sup>

The President was also given vast powers to declare the existence of a state of public emergency in Uganda.<sup>165</sup> This power was to be exercised in accordance with the advice of the Cabinet. The state of public emergency could be revoked or extended by a resolution of the National Assembly supported by a simple majority of the members thereof.<sup>166</sup> The declaration of a state of public emergency under this provision allowed for lengthy detention of persons under an order made by the Minister.<sup>167</sup>

As Commander in Chief of the Armed Forces, the President was given wide powers over the control and the deployment of the Armed Forces. He could, for example, determine the operational use of the Armed Forces;<sup>168</sup> and had power to appoint, promote and dismiss members of the Armed Forces.<sup>169</sup> He had power to

*“... give to the Inspector General of Police such directions with respect to the maintaining and securing of public safety and public order as he may consider necessary and the Inspector General shall comply with those directions or cause them to be complied with.”<sup>170</sup>*

The courts were precluded from inquiring into the question whether any, and if so what, directions were given to the Inspector General of Police.<sup>171</sup>

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156 Ibid., art., 66

157 Ibid., art. 32(1)

158 Ibid., art. 33(1)

159 Ibid., art. 35(1)

160 Ibid., art. 47(1)

161 Ibid., art. 84(1)

162 Ibid., art. 84(2)

163 Ibid., art. 90(1)

164 Ibid., art. 91(1)

165 Ibid., art., 21(1)

166 Ibid., art., 21(3) and (4)

167 Ibid., art., 21(5), (6) and (7)

168 Ibid., art. 78(2)(a)

169 Ibid., art. 78(2)(b)

170 Ibid., art. 69(2)

171 Ibid., art. 69(3)

The constitutional provisions relating to the control and deployment of the armed forces were peculiar to Uganda. They were not part of the Republican Constitutions of both Tanganyika and Kenya, which were the first and second respectively in changing their Independence Constitutions. This reliance on the armed forces was the most obvious legacy of the 1966 military coup which propelled Milton Obote to the Presidency. In that sense, it betrayed Obote's political weakness, as reflected in his reliance on the armed forces for political survival. Dean Fred Jjuuko, the Makerere University law professor, has noted that Obote's

*“creeping dictatorship then saw ... the erosion of the (political) parties through crossings and finally the establishment of a de facto one party system. Political parties and other organizations apart from the UPC were banned, and many of those who were perceived to be political enemies of the ruling party were incarcerated in 1969. Civilian dictatorship thus perfected, it came face to face with the reality of the military nightmare in 1971.... The civilian dictatorship had whetted the army's appetite for power as it had resorted to this army in the suppression of its political competitors and of the population at large.”*<sup>172</sup>

### **The Central Question of Democracy**

Most of the myriad and seemingly intractable problems and challenges that East African Parliamentarism has faced, and continues to face, are fundamentally constitutional and political in nature. These relate to the nature and character of the East African Parliament from its inception during the colonial period, through the promise of the early years of Uhuru, then the long, dark night of one-party authoritarianism, and on to the current era of multiparty democracy and its uncertainties and apparent reverses.

Throughout this long journey, the fortunes of the East African Parliament have risen or fallen with the rise or fall of democracy writ large in the region. This is as it should be. For the modern parliament is itself a product and a reflection of the triumph of the liberal democratic ideals of democracy and constitutionalism and the political struggles that brought those ideals to fruition. The state of a country's parliament, its authority, power and prestige relative to the other institutions of government and of civil society, is the truest measure of the country's democracy.

But even problems that are apparently technical in nature and, therefore, innocuous and uncontroversial, such as insufficient budgetary allocations to Parliament, want of technical support and facilities to members, etc. have their roots in political decision-making. Resource allocation through the budgetary process involves choices and priorities which are determined by and through the political processes. These choices and priorities are fundamentally political in nature.

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<sup>172</sup> F.W. Jjuuko, 'Political Parties, NGOs and Civil Society in Uganda', in Oloka-Onyango et al., *Law and the Struggle for Democracy...*, op. cit., pp. 180-198, p. 185



For example, the issue as to whether members of parliament – whose key constitutional function is to supervise the government and hold it to account – should have adequate technical facilities and expert support, as compared to unelected regional or district commissioners appointed by the President, is a political question which reflects the relative power, prestige and influence between the two institutions of government.

A focus on technical, apparently non-controversial aspects of the East African Parliamentarism divorced from their constitutional and political moorings is, therefore, to completely miss the point. Conversely, to understand the constitutional and political problems of the East African State is to understand the challenges and prospects of East African Parliamentarism. Similarly, to make an East African Parliament effective is to make an East African Democracy effective, for one is impossible without the other. Consequently, democracy and constitutionalism remain at the centre of the debate on East African Parliamentarism.

### **Organisation of the Study**

This study traces the development of parliamentarism in the three East African countries. The mere fact that these parliaments have existed since the earliest years of colonial rule; through the long dark years of single party autocracies to the democratic openings of the last three decades shows that the appeal of representative democracy, epitomised by strong parliaments and accountable governments, remains potent even if its promise remains largely elusive and unfulfilled. The study seeks to throw light on this paradox. It seeks to answer the question as to whether, after the false starts of the early independence years and the succeeding half a century of presidentialist rule in East Africa, an era of parliamentary democracy may have eventually arrived.

The study is divided into three main parts with each covering a particular country. Tanzania, previously Tanganyika, was the last of the three countries to have a colonial legislature, but it was the first to attain her independence from Great Britain. Her colonial and post-colonial history was also characterised by greater political and institutional stability compared to her neighbours. Of the three countries, therefore, Tanzania, its presidentialist political and constitutional order notwithstanding, is the one country whose fundamental constitutional pillars show the most striking continuity with the colonial state compared to Kenya or Uganda.<sup>173</sup> This is the subject of Part Three of the study, which is itself divided into six chapters.

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173 In a study on presidential powers it commissioned in 2013, the Constitutional Review Commission drew striking parallels between the vast powers enjoyed by the governors of colonial Tanganyika – “*the Governor ruled as he wished in order to attain colonial objectives*” – and the presidential powers under the Republican Constitution of 1962. Quoting Nyerere’s infamous statement that he had powers under the Constitution and the laws to become a dictator if he wished, the Commission was at pains to justify these dictatorial powers. It argued: “... *Those powers were necessary because Tanzania needed a strong Government in order to be able to function efficiently and to prevent opposition and the various obstacles to nation-building.*” The Commission added that “*Tanzania needed to run while other (countries) were walking in their quest to meet the challenges of nation-building in order to bring development.*” See Tanzania, U.R., **Research on Various Constitutional Issues**, Dar es Salaam, Constitutional Review Commission, December 2013, pp. xiv-xv.

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Part Two deals with Uganda. The second of the three countries to have a colonial parliament in 1920, Uganda was also the second to attain independence from the British imperial rule in 1962. More importantly, however, Uganda's post-colonial history took a dramatic and violent lurch after only four years of independence. By the time it recovered from that episode, nearly three decades of political violence, civilian and military dictatorship and civil war had passed, costing the country millions of lost lives and social and economic dislocation from which it has not recovered fully. Parliament disappeared completely during those years of turmoil, re-emerging with Uganda's Fifth Constitution of 1995. But when it emerged again, that parliament was unrecognisable from its independence antecedents. This story is told in six chapters as well.

Kenya's post-independence history has also been a political and constitutional roller-coaster. Its Independence Constitution, characterised by strong parliamentary democracy and quasi-federalist features, was soon subverted and by the end of the decade had been completely jettisoned to make way for one of the most autocratic presidentialist rules in Africa. Although it did not become a formal one-party state until the start of the third decade of her independence, it had already joined the bandwagon of effective one-party regimes before the first decade was out. The last of the three countries to gain independence from the British, Kenya was the first to return to multiparty democracy in 1991, holding its first multiparty general elections since independence the following year.

After nearly two decades of dramatic multiparty politics punctuated by political strife that brought the country to the brink of civil war, Kenya finally enacted a new Constitution in 2010. With remarkable resemblances to the Independence Constitution, the new constitutional and political order has brought Kenya to almost where it had started its independent path. Although still strongly presidentialist, the new order is nevertheless very different from the presidentialism of the Kenyatta and Moi variety. It is hemmed in on all sides by a strong system of checks and balances and an independent bureaucracy that, on paper at least, is one of the most innovative on the continent. This story is told in five chapters in Part One of the study.

Part Four ties together the major strands of the study into conclusion and recommendations. Here, in broad strokes, the major lessons of East African Parliamentarism are painted and a prognosis for the future is drawn. Given its history, presidentialist rule stands discredited. In Tanzania and Uganda, it can only be maintained under the conditions of dictatorship and state-orchestrated violence. The post-Museveni era, which has already begun, will either see Uganda descend into utter chaos and violence of its first three decades of independence; or take a more democratic, federalist, turn akin but not necessarily similar to its Independence Constitution with its monarchical tendencies.

Even in Tanzania, whose political situation appears more grim after five years of relentless pressure on the democratic institutions, the future is not necessarily a foregone conclusion of dictatorship and retrogression. Like Uganda, the post-Magufuli era will either see the country descend into socio-economic and political chaos of the Zimbabwe type; or will usher in a more democratic political and constitutional order based on a looser

federation with Zanzibar and devolved system of government in the Mainland. All this is told in two chapters of Part Four.

## Part I – Kenya: ‘Constitution We Did Not Want’?

### The Parliamentary Road to Kenya’s Democracy

On 9 March 2018, President Uhuru Muigai Kenyatta and Raila Amolo Odinga, his closest competitor during the controversial 2017 Kenyan General Elections, met to discuss ways of averting a bitter political crisis that was threatening to plunge the country into a civil war. A few months earlier, the Supreme Court of Kenya had, in a landmark judgment, declared the presidential elections held on 8 August, ‘invalid, null and void’, because the Independent Electoral and Boundaries Commission (IEBC) had “... *failed, neglected or refused to conduct the Presidential Election in a manner consistent with the dictates of the Constitution....*”<sup>174</sup> The annulment of election results was the first time in Africa that an opposition judicial challenge against the presidential poll result had been successful.

President Kenyatta won the repeat election ordered by the Supreme Court and held on 26 October 2017, which was also marred by violent clashes between the security forces and the supporters of Mr Odinga, the main challenger, who had boycotted that election citing lack of independence on the part of the IEBC. Now, for the first time since the contested elections, the two bitter rivals shook hands in public. Following ‘The Handshake’, on 31 May 2018, President Uhuru Kenyatta appointed a 16-member team of eminent Kenyans, to collect the views of the people of Kenya on the ways and means of ending what the team, in a remarkable understatement, would later describe as ‘Divisive Elections.’<sup>175</sup>

The team, christened as *The Presidential Task Force on Building Bridges to Unity Advisory*, was tasked with, *inter alia*, evaluating “*the national challenges outlined in the Joint Communique of ‘Building Bridges to a New Kenyan Nation’, and having done so, make practical recommendations and reform proposals that build lasting unity....*”<sup>176</sup> The ensuing process was soon christened as the Building Bridges Initiative, or simply ‘BBI.’ The BBI Task Force toured all 47 counties of Kenya and received submissions from 7,000 Kenyans. The Task Force submitted its Report on 23 October 2019;<sup>177</sup> and on 27 October 2019, the BBI Report was officially unveiled at an impressive ceremony in Nairobi, attended by both President Kenyatta and Mr Odinga and the ‘who is who’ of Kenyan politics and society.

In its long Report, the BBI Task Force dwells extensively on the history of political violence that has bedeviled multiparty elections in the recent Kenyan history. It identifies the culprit for the ‘divisive elections’ with a disarming alacrity: foreign-inspired political

174 See **Raila Amolo Odinga & Another versus Independent Electoral and Boundaries Commission & 2 Others**, *Election Petition No. 1 of 2017* (Supreme Court of Kenya). The judgment of the Supreme Court was delivered by Chief Justice David Maraga on 1 September 2017.

175 See **Establishment of Task Force on Building Bridges to Unity Advisory**, *Gazette Notice No. 5154 of 2018*, published on 31 May 2018.

176 *Ibid.*, cl. 1(a)

177 Republic of Kenya, **Building Bridges to a United Kenya: From a Nation of Blood Ties to a Nation of Ideals, A Report of the Presidential Task Force on Building Bridges to Unity Advisory**, Nairobi, October 2019.

models that are not autochthonous to Kenya. The Task Force does not mince any words in this regard:

*“In our rush to adopt, and even to mimic, foreign models, particularly from the democratic West, we have forged a politics that is a contest of us versus them. And we have chosen our ‘us’ and ‘them’ on an ethnic basis, especially in competing for the Presidency, which is the highest office in Kenyan politics.”*<sup>178</sup>

This dog-eat-dog system of electoral competition has given birth to a ‘lack of inclusivity’, which *“is the leading contributor to divisive and conflict-causing elections.”*<sup>179</sup> And, apparently, the people of Kenya are also aware of this self-evident truth and are sick and tired of it:

*“Kenyans associate the winner-take-all system with divisive elections and want an end to it.”*<sup>180</sup>

Coming from such a high-level bipartisan panel, in a country as politically and ethnically polarised as Kenya, the BBI Task Force Report is sobering indeed. What is even more confounding is the fact these conclusions come less than a decade after the enactment of the new Constitution of the Republic of Kenya, 2010. The new Constitution, was enacted in the wake of the tragic violence that followed the General Elections of December 2007,<sup>181</sup> which eventually saw President Kenyatta and his Vice President William Ruto indicted for crimes against humanity at the International Criminal Court in The Hague.

The new Constitution is breath-taking in its ambitiousness. It has sought to cure, legislatively speaking, all the age-old ills of Kenyan politics and society. It has done this by creating a complex system of checks and balances at every turn in the decision-making process at every level of governance. It has extensively devolved central government powers. It has shackled the President in ways that were unimaginable in post-colonial African constitutional history. It has empowered Parliament and emboldened the Courts to the extent that its Supreme Court has dared to nullify the election of the President who appointed it.

Yet, it seems, even ‘the beautiful tapestry’ of the new Constitution<sup>182</sup> has failed to live up to its promise. In a recent book, Professor Peter Anyang’ Nyong’o, a prominent political scientist, political activist, former Senator and current Governor of Kisumu County, has described it as *“the ‘mongrel’ of a constitution ... a hybrid of presidential*

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178 Building Bridges to a United Kenya..., op. cit., p. 10

179 Loc. cit.

180 Loc. cit.

181 The 2007 General Elections, which had also pitted Mr Odinga against then President Mwai Kibaki, had similarly been marred by widespread ethnic and political violence which resulted in the deaths of possibly thousands of civilians.

182 See Hon. Justice David Maraga, Chief Justice and President of the Supreme Court of Kenya, in his *Foreword* to Luis Franceschi and PLO Lumumba, **The Constitution of Kenya: A Commentary, 2<sup>nd</sup> Edition**, Strathmore University Press, Nairobi, 2019

*and parliamentary systems.*”<sup>183</sup> Senator Anyang’ Nyong’o is not alone in holding that the path to a durable democratic dispensation in Kenya may not lie in this ‘mongrel.’ In his Foreword to the book, Michael Chege, his colleague of many years at the University of Nairobi, has made the case for change, albeit in less colourful terms:

*“There is need to replace the presidential system of government with a parliamentary one because the latter is better suited to an ethnically polarized society like ours.”*<sup>184</sup>

In this first of four Parts, I want to demonstrate that the 2010 Constitution – even in its audacity – is not entirely new to Kenya. Its institutional schema is not substantially dissimilar to its first Independence Constitution of 1963. The social forces and ideologies underpinning the new Constitution are no different from the social forces and political thinking that informed the 1963 Constitution. Those are the centripetal forces of centralised state power represented by presidentialism; and the centrifugal forces of devolved or distributed or federated state power represented by parliamentarism. This has always been the central question of Kenyan politics since independence. As Professors Yash Ghai<sup>185</sup> and Jill Cottrell Ghai have argued in a recent article, *“Kenya’s constitutional history is full of the tension between centralization and distribution of state authority.”*<sup>186</sup>

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183 P. Anyang’ Nyong’o, **Presidential or Parliamentary Democracy in Kenya? Choices to be Made**, Booktalk Africa, Nairobi, 2019, p. 118

184 Ibid., p. 9

185 Yash Pal Ghai is one of the foremost legal scholars and public intellectuals in Kenya and Africa generally. In an academic career spanning more than five decades, Professor Ghai has taught law in universities in Africa, Asia-Pacific and Europe. He was the first East African dean of the Faculty of Law of the University of Dar es Salaam in 1967. In 1999 he was appointed Chairman of the Constitution of Kenya Review Commission (CKRC) and served until 2004.

186 Y.P. Ghai and J.C. Cottrell, **Constitutional Transitions and Territorial Cleavages: The Case of Kenya**, *Occasional Paper Series No. 32*, Forum of Federations, 2019, p. 4

## Chapter One: The New Constitution and its Tensions

First the institutional design. The new Constitution has radically transformed the institutions of governance and their decision-making processes. Its very first provision declares that “*all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.*”<sup>187</sup> Furthermore, that power may be exercised either directly or through the democratically elected representatives of the people.<sup>188</sup> The Constitution sets out the institutional mechanisms for the indirect exercise of that sovereignty by the people, namely Parliament and the Legislative Assemblies in the county governments;<sup>189</sup> the national executive and the executive structures in the county governments,<sup>190</sup> and the Judiciary and independent tribunals.<sup>191</sup> Thus, “*the sovereign power of the people is exercised at the national level and the county level.*”<sup>192</sup>

It is clear, therefore, that the new Constitution has separated powers both horizontally and vertically. Under the vertical separation, power is now distributed between the central and county governments, each having distinct powers and functions. Both levels of government have executive, and legislative powers and functions in their respective spheres of competence. In this regard, Kenya’s system of government has been extensively devolved. That is to say, political power has been transferred from the central government to local government institutions called county governments.

But power has not only been ‘decentralised’ or devolved, it has also been ‘democratised.’ Thus, the county governments are all elected, with executive authority being vested in elected governors and legislative powers in the hands of elected County Assemblies. Rather than being upwardly accountable to the central government, county governments are downwardly accountable to their people. The constitutional dictum, prevalent in previous presidentialist Constitutions, that all executive authority is vested in the President, has been broken with regard to executive authority in county governments.

### Unpresidential Commissions

Even in central government, power has been substantially reorganised and limited. All previous presidentialist Constitutions in Kenya, as indeed elsewhere in East Africa and beyond, created constitutional or statutory commissions to deal with a wide variety of specialised matters. Historically, these commissions were completely dominated by the executive, especially the presidency. They were, as Luis Franceschi and PLO Lumumba have derisively described as “... *one of the many toys that the Kenyan Constitution awarded to the President.*”<sup>193</sup> Not anymore.

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187 The Constitution of the Republic of Kenya, 2010, art. 1(1)

188 Ibid., art. 1(2)

189 Ibid., art. 1(3)(a)

190 Ibid., art. 1(3)(b)

191 Ibid., art. 1(3)(c)

192 Ibid., art. 1(4)

193 Franceschi and Lumumba, *The Constitution of Kenya...*, op. cit., p. 683

The new Constitution has conceived of commissions “... as a fourth arm of government from which efficiency, objectiveness and fairness is expected.”<sup>194</sup> The Constitution has clearly listed and established the commissions and endowed them with unique independence. A total of ten constitutional commissions<sup>195</sup> and two independent offices<sup>196</sup> have been established by the Constitution. One more commission, with the same status and powers as the constitutional commissions, is provided for but not established by the Constitution.<sup>197</sup>

Their functions are described as to protect the sovereignty of the people; secure the observance by state organs of democratic values and principles, and promote constitutionalism.<sup>198</sup> In discharging their functions, the commissions and independent offices may conduct investigations *suo motu* or upon complaints from members of the public.<sup>199</sup> Only three commissions and one independent office have power to issue subpoenas to witnesses to assist with their investigations.<sup>200</sup> The rest do not have such powers. None of them can compel the attendance of witnesses or production of documents or commit offenders for contempt.<sup>201</sup>

The new Constitution requires the commissions and holders of independent offices to owe their allegiance only to the Constitution and the law;<sup>202</sup> and declares them “... independent and not subject to direction or control by any person or authority.”<sup>203</sup> To protect their independence, the new Constitution has provided extensive mechanisms for the recruitment, appointment and approval thereof of chairperson and members of the commissions and independent offices. Thus, the manner of their identification and recommendation for appointment must be prescribed by legislation.<sup>204</sup> They must also be approved by the National Assembly,<sup>205</sup> and only then can they be appointed by the President.<sup>206</sup>

There are other important safeguards to the independence of the commissions and independent offices. For example, the composition of the commissions and independent offices is required, taken as a whole, to “... reflect the regional and ethnic diversity of the

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194 Ibid., p. 684

195 Constitution of the Republic of Kenya, 2010, art. 248(1) and (2). The commissions are the Kenya National Human Rights and Equality Commission; the National Land Commission; the Independent Electoral and Boundaries Commission; the Parliamentary Service Commission, and the Judicial Service Commission. Others are the Commission on Revenue Allocation; the Public Service Commission; the Salaries and Remuneration Commission; the Teachers Service Commission and the National Police Service Commission.

196 The independent offices are the Auditor General and the Controller of Budget. Ibid., art. 248(3)

197 The commission in question is the Ethics and Anti-Corruption Commission, which the Constitution commands Parliament to establish for the purposes of ensuring compliance with, and enforcement of, the leadership and integrity provisions of the Constitution. See Ibid., art. 79.

198 Ibid., art. 249(1)

199 Ibid., art. 252(2)(a)

200 Ibid., art. 252(6). Those that do have powers to summon witnesses are the Human Rights and Equality Commission; the Judicial Service Commission; the National Land Commission and the Auditor General.

201 Franceschi and Lumumba, *The Constitution of Kenya...*, p. 698

202 Ibid., art. 249(2)(a)

203 Ibid., art. 249(2)(b)

204 Ibid., art. 250(2)(a)

205 Ibid., art. 250(2)(b)

206 Ibid., art. 250(2)(c)



*people of Kenya.*<sup>207</sup> There are also provisions for allocation of funds, salaries and other emoluments to secure the independence of the commissions and independent offices and their personnel. The budget of each one of them is required to be a separate vote, so that their finances are not lumped together with the funds for other activities.<sup>208</sup>

The security of tenure for members of the commissions and independent offices is assured. They can only be removed for serious constitutional violation; gross misconduct, and physical or mental incapacity or incompetence.<sup>209</sup> Complaints against members must first be lodged by way of petition to the National Assembly.<sup>210</sup> Once the National Assembly is satisfied with the merit of the complaint, it will refer it to the President who shall appoint an independent tribunal to investigate the complaint expeditiously.<sup>211</sup> Upon completion of the investigation, the tribunal shall report to the President, and make binding recommendations upon him or her. The President must act on the recommendations within thirty days.<sup>212</sup>

In terms of their accountability, the constitutional commissions and independent offices are accountable upwardly to the President and the Parliament; and downwardly to the people. Article 254(1) of the new Constitution obligates the commissions and independent offices to present their annual reports to the President and to Parliament. They may also produce reports on a particular matter upon request by the President or Parliament.<sup>213</sup> Moreover, *“every report required from a commission or holder of an independent office ... shall be published and publicised.”*<sup>214</sup> This way, the Kenyan people get to see what their President and Parliament see with regard to the performance of their public officials.

It is clear, on the basis of this analysis, that the 2010 has made significant inroads on powers and prerogatives of the President with regard to the appointment of public officials and on their removal from public office. Presidential powers have not only been drastically limited, but also their exercise has been substantially democratised. The Kenyan President can no longer use public offices as private largesse to be dished out to political cronies, family members or tribesmen as in years past. Similarly, he can no longer use public office as a stick with which to beat or blackmail public officials to do his bidding.

## **Parliament in Ascendancy**

The new Constitution has also provided for separation of powers and functions between the different arms of government, which also serve as meaningful checks on one another. Here, I focus on the reorganisation of the relationship between the President and Parliament. Historically, the rise of the Imperial Presidency went hand in hand with the eclipse of the authority, power and prestige of Parliament and the Judiciary.

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207 Ibid., art. 250(4)

208 Ibid., art. 249(3)

209 Ibid., art. 251(1)

210 Ibid., art. 251(2)

211 Ibid., art. 251(3), (4) and (5)

212 Ibid., art. 251(6)

213 Ibid., art. 254(2)

214 Ibid., art. 254(3)

In this regard, Smokin Wanjala, the erstwhile law lecturer at the University of Nairobi and current Supreme Court Justice, has explained the rise of the Imperial Presidency in Kenya:

*“From 1966, ... one by one, democratic institutions were dismantled, as the Constitution was amended to enhance executive power in the person of the President. The single party system was institutionalized through de factorization; detention without trial became a legitimate exercise of presidential power. Through detention, the executive made inroads into the freedom and supremacy of parliament by silencing those who constantly criticized government malpractices. The President then deliberately weakened the party machinery and started ruling through the provincial administration.”*<sup>215</sup>

With the new Constitution, the Kenya Parliament has taken the political centre stage again. This Parliament is unlike any other in Kenya’s entire history. Firstly, the President – who is still the Head of State and Government and Commander in Chief – is no longer part of Parliament. For, under the new Constitution, the Parliament of Kenya consists of the National Assembly and the Senate.<sup>216</sup> In their commentary on the new Constitution, Franceschi and Lumumba hint that the bicameral parliament

*“... is similar to the position at independence where parliament consisted of the House of Representatives and the Senate.”*<sup>217</sup>

I shall return to that point in due course.

The National Assembly is the legislative organ of Parliament which represents the people of the constituencies and special interests.<sup>218</sup> The latter are identified in Article 97 of the Constitution as the disabled, youth and workers. The National Assembly is the deliberative body on matters of concern to the people.<sup>219</sup> Its legislative reach is very wide. Any bill, even a bill concerning county government, may originate in the National Assembly.<sup>220</sup> However, money bills may only be introduced in the National Assembly.<sup>221</sup> The National Assembly determines the allocation of revenue between the national and county governments;<sup>222</sup> appropriates funds for expenditure by the national government and organs of the state,<sup>223</sup> and oversees national revenue and expenditure.<sup>224</sup> The power of the purse is firmly in the hands of the National Assembly<sup>225</sup>.

215 S. Wanjala, ‘Presidentialism, Ethnicity, Militarism and Democracy in Africa: The Kenyan Example’, in J. Oloka-Onyango, K. Kibwana and C.M. Peter (eds.), **Law and the Struggle for Democracy in East Africa**, Claripress, Nairobi, 1996, p. 91

216 The Constitution of the Republic of Kenya, 2010, art. 93(1)

217 Franceschi and Lumumba, *The Constitution of Kenya...*, op. cit., p. 387

218 The Constitution of the Republic of Kenya ..., op. cit., art. 95(1)

219 Ibid., art. 95(2)

220 Ibid., art. 109(2) and 109(4)

221 Ibid., art. 109(5)

222 Ibid., art. 95(4)(a)

223 Ibid., art. 95(4)(b)

224 Ibid., art. 95(4)(c)

225 Subject to Article 94(1) of the Constitution: “The legislative authority of the Republic is derived from the people and,

Beyond its legislative powers, the National Assembly also plays major oversight roles. It “*reviews the conduct of the President, Vice President and other state officers and initiates the process of removing them from office.*”<sup>226</sup> Furthermore, the National Assembly has oversight mandates over ‘state organs.’<sup>227</sup> Though not defined by the Constitution, ‘State organs’ have been held by the courts to be constitutional commissions and independent offices.<sup>228</sup> In addition, it approves declarations of war and extensions of states of emergency.<sup>229</sup>

Regarding its impeachment powers, the National Assembly may set the impeachment motion rolling with the support of at least one third of its members.<sup>230</sup> The grounds upon which the President may be impeached are ‘gross violation’ of a provision of the Constitution or any other law,<sup>231</sup> commission of a crime under national or international law,<sup>232</sup> or gross misconduct.<sup>233</sup> A motion supported by two thirds majority of the National Assembly will be referred to the Senate,<sup>234</sup> which will convene to hear the charges against the President, and may appoint a committee to investigate the charges.<sup>235</sup>

Once the senate investigation committee has investigated the matter, it is obligated to report to the Senate within ten days whether the allegations against the President have been substantiated.<sup>236</sup> If it finds the allegations unsubstantiated, no further proceedings shall be continued in respect of the complaint.<sup>237</sup> If, however, the Senate committee finds the complaints substantiated, “*the Senate shall ... vote on the impeachment charges.*”<sup>238</sup> At all times during the proceedings in the Senate the President shall be afforded a fair hearing.<sup>239</sup> The President shall stand removed from office if the Senate vote to uphold the impeachment charges is supported by not less than two thirds of all members of the Senate.<sup>240</sup>

The Senate, on the other hand, “*represents the counties, and serves to protect the interests of the counties and their governments.*”<sup>241</sup> It participates in the legislative process by considering, debating and approving bills concerning counties.<sup>242</sup> It determines the allocation of national revenue among counties and exercises oversight over revenue

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at the national level, is vested in and exercised by Parliament. Article 3 states that “All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.” This qualification is important because Parliament believes it “owns” national resources and can starve other institutions of funds.

226 Ibid., art.95(5)(a)

227 Ibid., art. 95(5)(b)

228 See *Judicial Service Commission vrs. Speaker of the National Assembly & Others (2014) eKLR*

229 The Constitution of the Republic..., op. cit., art. 95(6)

230 Ibid., art. 145(1)

231 Ibid., art. 145(1)(a)

232 Ibid., art. 145(1)(b)

233 Ibid., art. 145(1)(c)

234 Ibid., art. 145(2)(a)

235 Ibid., art. 145(3)

236 Ibid., art. 145(4)

237 Ibid., art. 145(6)(a)

238 Ibid., art. 145(6)(b)

239 Ibid., art. 145(5) and (6)(b)

240 Ibid., art. 145(7)

241 Ibid., art. 96(1)

242 Ibid., art. 96(2)

allocated to county governments.<sup>243</sup> It also participates in the oversight of state officers by considering and determining any National Assembly resolutions to remove the President or Vice President from office.<sup>244</sup>

The 2010 Constitution does not designate which is the superior of the two houses of parliament. This, however, is not a question of academic interest. For, as Franceschi and Lumumba point out, following the March 2013 elections ‘a battle for supremacy’ erupted between Senators and members of the National Assembly over which of the two legislative bodies was the Upper or Lower House. Eventually the dispute found its way to the Supreme Court which, in *The Speaker of the Senate & Another vrs. The Attorney General & Another*,<sup>245</sup> held that whereas the National Assembly plays an important role in how government revenue is allocated, the Senate has a constitutional mandate in such deliberations.

The Supreme Court directed that, rather than rush to the courts of law, both houses should strive to work together and resolve their differences through the mechanisms provided for by the Constitution. This decision notwithstanding, Franceschi and Lumumba have concluded the following regarding the ‘battle for supremacy’:

“... upon close scrutiny of the roles or functions under Articles 95 and 96, the number of members of each of the houses of , and given that the Speaker of the National Assembly chairs sittings of both houses deputized by the Speaker of the Senate; the National Assembly would seem to occupy a higher status compared to the Senate....”<sup>246</sup>

The new Constitution has also significantly altered the representative character of the Parliament. As regards the National Assembly, for instance, the Constitution stipulates that it shall be comprised of 290 directly elected members representing single member constituencies; forty-seven women, each of them directly elected to represent each county as a single member constituency; twelve members nominated by Parliamentary political parties in proportion to their parliamentary strength to represent special interests and the Speaker, who is an *ex officio* member.<sup>247</sup>

This composition is very significant. Firstly, for the first time since independence in 1963, the Kenyan Parliament is devoid of appointed members, that chronic relic of the colonial and post-colonial legislatures. Secondly, the composition bears strong resemblance to the country’s Independence Parliament which also had twelve ‘specially elected’ members, with the then House of Representatives acting as the electoral college. Thirdly, the introduction of the two-chamber Parliament marks a return to the Independence Parliament, which had a 130 member House of Representatives and a forty-one member Senate representing ‘districts.’

243 Ibid., art. 96(3)

244 Ibid., arts. 96(4) and 145(2)-(7)

245 (2013) eKLR

246 Franceschi and Lumumba, *The Constitution of Kenya...*, op. cit., p. 388

247 *The Constitution of the Republic of Kenya...*, op. cit., art. 97(1)

As with the National Assembly under the new Constitution, the old House of Representatives of the Independence Constitution was the more important of the two Houses of Parliament. As Jay E. Hakes noted in his 1970 doctoral dissertation for Duke University, constitutionally,

*“... the House of Representatives was the stronger chamber, since it had the sole authority in financial matters and in votes of no confidence. In practice, it was even stronger; one indication of its superior position being that the Prime Minister, his Ministers and all but one assistant ministers were selected from the House.”*<sup>248</sup>

### **Overcoming the Ghosts of History**

Fourthly, and perhaps most importantly, the Kenyan Parliament has finally laid to rest the Kenyan ghosts of the East African colonial legislative councils regarding the power to initiate money bills. Under article 114(2) of the new Constitution,

*“if, in the opinion of the Speaker of the National Assembly, a motion makes provision for a matter listed in the definition of ‘a money Bill’, the Assembly may proceed only in accordance with the recommendation of the relevant Committee of the Assembly after taking into account the views of the Cabinet Secretary responsible for finance.”*

Franceschi and Lumumba argue – correctly in my view, that these provisions have

*“... curtail(ed) the presidential power on matters dealing with public finance and vest(ed) them on Parliament.”*<sup>249</sup>

Under the 1969 Constitution that was repealed and replaced by the new Constitution, the National Assembly could only consider money bills that were recommended by the President and signified by the minister.<sup>250</sup> This rule, which is traced back to the colonial Legislative Councils, was inherited by the independence constitutions and retained by the authoritarian presidentialist Constitutions following the rise of the Imperial Presidency in the 1960s. Those ghosts remain alive and well in both Tanzania and Uganda.

The new Constitution has laid other ghosts of Kenya’s colonial past to rest, namely the place and the power of the Head of State in the legislative organs and processes. At independence, the Independence Constitution of Kenya provided, as did those of Tanganyika and Uganda, that the Governor General and later the President was the constituent part of the Parliament. Not any more. Moreover, the independence and later republican Constitutions provided for powers of the president to appoint a certain number

248 Jay E. Hakes, *The Parliamentary Party of the Kenya African National Union: Cleavage and Cohesion in the Ruling Party of a New Nation*, Dissertation Submitted in Partial Fulfilment of the Requirements for the Degree of Doctor of Philosophy in the Department of Political Science in the Graduate School of Arts and Sciences of Duke University, 1970, p. 18

249 Franceschi and Lumumba, *The Constitution of Kenya...*, op. cit., p. 425

250 See the Constitution of the Republic of Kenya, 1969, art. 48

of members of parliament; as well as the Clerks of the National Assemblies concerned. This power, too, is gone.<sup>251</sup>

With regard to the power to assent to bills passed by the National Assembly and the Senate, although the President can still withhold his assent, that power is more limited now than it was before the enactment of the new Constitution. The Parliament can override the presidential veto by returning the bill for a second time with a two thirds majority of both houses; in which case the President must assent to it within seven days, failure of which the bill shall be deemed to have been assented to.<sup>252</sup>

In addition, over and above their powers to assent to bills passed by their respective National Assemblies, the presidents were given powers to rule by decree under certain circumstances. And finally, the presidents were empowered to convene, prorogue and dissolve their respective parliaments. The shadow of the Imperial Presidencies hovered everywhere in the legislative bodies and processes in East Africa. With the new Constitution, Kenya superficially appears to have broken away from these colonial and post-colonial authoritarian legacies. But although the imperial presidency has been decentralised and democratised under the Constitution, in practice evidence points the other way. Indeed, the implementation of the Constitution has shown that the Executive is hellbent on clawing back these authoritarian legacies.

In his recent memoirs published last year, Fitz de Souza, the British-trained barrister and KANU's legal advisor during the Lancaster House Conferences who became the first Deputy Speaker of Kenya's Independence Parliament, has said the following of the first President Mzee Jomo Kenyatta:

*“Kenyatta used his position as President to reward or punish those who supported or opposed him. He stopped development projects in areas where he thought the people opposed him. If they wanted the development projects, they had to go and support him.”*<sup>253</sup>

With its newfound powers under the new Constitution, the Kenya Parliament now has the tools to put an end to the nepotism that characterised the Kenyatta and Moi governments.

One of the most potent weapons in the rise of the Imperial Presidency in Kenya, as in Uganda, was the extensive use and abuse of emergency powers. With the explosion of the landless Kikuyu peasantry during the Mau Mau Revolt in 1952, a state of emergency was declared which would lead to the creation of the ‘Britain’s Gulag’ and cost an estimated 100,000 lives, before the Revolt was finally crushed in 1960.<sup>254</sup> The emergency was,

251 Under article 128 of the new Constitution, the Clerks of each House of Parliament are “... appointed by the Parliamentary Service Commission with the approval of the relevant House.” The President plays no part whatsoever in the constitution and the deliberations of the Parliamentary Service.

252 Constitution of the Republic of Kenya..., op. cit., art. 115

253 Fitz de Souza, **Forward to Independence: My Memoirs**, Nairobi, 2019, p. 300

254 To defeat the Mau Mau guerrillas, the British devised an extensive system of forced labour camps which were located all over Kenya where tens of thousands of detainees were forced to provide much-needed labour for the colony's infrastructure projects. The detainees were subjected to extreme forms of torture and abuse. For particularly riveting

however, never really lifted after independence. Rather, the Independence Constitution placed significant limitations on the exercise of emergency powers. Thus, the President was obligated to seek the approval of the House of Representatives within seven days of declaration of state of emergency.

However, with the adoption of the Republican Constitution in 1964, the stringent checks and balances that were built into the Independence Constitution were loosened. Thus, for example, whereas the President was originally required to seek parliamentary approval of his declaration of state of emergency within seven days of the declaration, a 1967 constitutional amendment increased this period to twenty-eight days. And whereas Parliament could extend the emergency powers for up to two months, the amendment now made it possible for Parliament to extend the emergency powers for up to six months.

Parliamentary oversight of emergency powers disappeared as Parliament became totally dominated by the Imperial President. As Martin Shikuku, then the Government Chief Whip and later one of the prominent victims of exercise of those powers<sup>255</sup>, told the National Assembly in 1967:

*“The mandate has been given ... to change the Constitution overnight.... It is not up to us to say that we should not change the Constitution. This is a motion which cannot be accepted by the Government.... It cannot be before this House.... If Kenyatta accepts that the Constitution will stay then it will stay, if not it must go. It will go because he is the man who has the mandate of the people....”*<sup>256</sup>

The new Constitution has now reasserted parliamentary oversight of emergency powers in significant ways. Firstly, whereas the President can still declare a state of emergency when there is a threat of war, invasion, general insurrection, disorder, natural disaster or other public emergency, the declaration must be “... necessary to meet the circumstances for which the emergency is declared.”<sup>257</sup>

Secondly, a declaration of emergency or any legislation passed or action taken pursuant to the declaration must be prospective, and must not be for a period longer than fourteen days unless extended by the National Assembly.<sup>258</sup> Any such extension cannot be for a period longer than two months at a time;<sup>259</sup> and requires the support of not less than two thirds of all members of the National Assembly.<sup>260</sup> Any subsequent extension can only be made with the support of not less than three quarters of all members of the National Assembly.<sup>261</sup>

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accounts of Great Britain’s final bloody decade in Kenya, read David Anderson, **Histories of the Hanged: Britain’s Dirty War in Kenya and the End of Empire**, Weidenfeld & Nicolson, London, 2005; and Caroline Elkins, **The Britain’s Gulag: The Brutal End of Empire in Kenya**, Jonathan Cape, London, 2005.

255 He was detained during Jomo Kenyatta’s presidency and released by President Moi in December 1978.

256 Franceschi and Lumumba, *The Constitution of Kenya...*, p. 397

257 *The Constitution of the Republic of Kenya...*, art. 58(1)

258 *Ibid.*, art. 58(2)

259 *Ibid.*, art. 58(3)(b)

260 *Ibid.*, art. 58(4)

261 *Ibid.*, art. 58(4)

Thirdly, and more importantly, emergency powers are now subject to judicial review. Thus,

*“the Supreme Court may decide on the validity of the declaration of a state of emergency; ... any extension of the declaration ... and any legislation enacted or other action taken in consequence of a declaration of a state of emergency.”*<sup>262</sup>

There are further restrictions to the exercise of emergency powers. For example, any legislative measures to limit fundamental rights enshrined in the Bill of Rights must be as strictly required by the emergency;<sup>263</sup> and must be consistent with the country’s obligations under relevant international law.<sup>264</sup> It must also be gazetted before it takes effect.<sup>265</sup>

### A Tamed Presidency?

In his 1974 *magnum opus*, Professor Ben Nwabueze argued that the Imperial Presidency was a very African phenomenon:

*“The Africanness of the Presidency in Africa refers to the fact that it is largely free from such limiting constitutional devices, particularly those of a rigid separation of powers and federalism. It is the universal absence of such restraint mechanisms that is implied in the qualifying word ‘African.’”*<sup>266</sup>

Nevertheless, Professor Nwabueze thought that the Imperial Presidency could be tamed:

*“Doubtless, an executive president who holds and exercises executive power in his discretion and who also controls the process of legislation arouses fear of dictatorship. Nonetheless, the real enemy ... is not the power itself, but insufficient restraint upon power.”*<sup>267</sup>

There is a strain of thought in Kenya which holds that the real accomplishment of the new Constitution lies in the restraint it has placed upon presidential power. Thus, in his critique of the 2010 Constitution, Professor Anyang’ Nyong’o has claimed that the new Constitution has retained *“a presidential system held hostage by an amorphous parliament with unusual powers.”* Furthermore, the learned professor complains, *“we have a House with very restricted work (the Senate) whose members represent a huge portion of the population, and a House with alarmingly ample powers which represents very small units or constituencies (the National Assembly).”*<sup>268</sup>

262 Ibid., art. 58(5)

263 Ibid., art. 58(6)(a)(i)

264 Ibid., art.58(6)(a)(ii)

265 Ibid., art. 58(6)(b)

266 B.O. Nwabueze, **Presidentialism in Commonwealth Africa**, St. Martin’s Press, New York, 1974, p. 435

267 Loc. cit.

268 Anyang’ Nyong’o, *Presidential or Parliamentary Democracy? ...*, op. cit., p. 50



Elsewhere in his polemic, Senator Anyang' Nyong'o argues that "*the major mischief of the Kenyan constitutional system is the preservation of the authoritarian and imperial presidency as the center of executive power where other institutions of governance have been radically democratized.*"<sup>269</sup> Moreover, he adds, "*Kenya's history of political repression, presidential intolerance and authoritarian rule has not been substantially done away with under the present Constitution....*"<sup>270</sup> Franceschi and Lumumba apparently do not support this view. They argue in their Commentary that "*Kenya can now boast of having a purely presidential system of government. This system and the composition of the executive has its origins in the Constitution of the United States.*"<sup>271</sup> The American presidentialism is, as is well known, a very limited presidency, with Congress, the Supreme Court and states power acting as powerful checks on the federal presidential power.

The validity of these seemingly contradictory arguments needs to be assessed by looking at the relevant provisions of the new Constitution.

There is no dispute that the new Constitution has retained the executive presidency and, in that sense, Kenya is still a presidentialist polity. Thus, executive authority is vested in 'the National Executive' comprising the President, the Deputy President and the Cabinet.<sup>272</sup> Article 131(1) retains the position of the President as the Head of State and Government,<sup>273</sup> Commander-in-Chief<sup>274</sup> and Chairman of the National Security Council.<sup>275</sup> He is also "*a symbol of national unity.*"<sup>276</sup> As the Chief Executive, the President "*exercises the executive authority ... with the assistance of the Deputy President and Cabinet Secretaries....*"<sup>277</sup>

In that capacity, the President nominates Cabinet Secretaries, the Attorney General, the Secretary to the Cabinet, Principal Secretaries and Kenya's diplomats abroad.<sup>278</sup> He also chairs Cabinet meetings, directs and coordinates the functions of ministries and government departments and assigns ministerial responsibilities to Cabinet Secretaries.<sup>279</sup> The President may also establish public office;<sup>280</sup> as well as appoint or dismiss any state or public officer whom the Constitution requires or empowers to appoint or dismiss.<sup>281</sup>

As the Head of State, the President graces the State Opening of the newly elected Parliament;<sup>282</sup> addresses a special sitting of Parliament once every year and may address Parliament at any other time.<sup>283</sup> Moreover, once every year, the President must "*submit a report for debate to the National Assembly on the progress made in fulfilling the international*

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269 Ibid., p. 152

270 Ibid., p. 160

271 Franceschi and Lumumba, *The Constitution of Kenya...*, op. cit., p. 457

272 *Constitution of the Republic of Kenya...*, op. cit., art. 130(1)

273 Ibid., art. 131(1)(a)

274 Ibid., art. 131(1)(c)

275 Ibid., art. 131(1)(d)

276 Ibid., art. 131(1)(e)

277 Ibid., art. 131(1)(b)

278 Ibid., art. 132(2)

279 Ibid., art. 132(3)

280 Ibid., art. 132(4)(a)

281 Ibid., art. 132(2)(f)

282 Ibid., art. 132(1)(a)

283 Ibid., art. 132(1)(b)

*obligations of the Republic.*”<sup>284</sup> He must also address the nation, once every year, on all measures taken and the progress achieved in the realization of the national values;<sup>285</sup> and publish in the *Gazette* the details of the measures taken and progress achieved.<sup>286</sup>

As Commander-in-Chief, the President may declare a state of emergency,<sup>287</sup> as well as war.<sup>288</sup> The President also controls the national security establishment not only as the chairman of the National Security Council, but also because he appoints the heads of the ‘National Security Organs’,<sup>289</sup> namely the Chief of the Kenya Defence Forces, the Director General of the National Intelligence Service and the Inspector General of the National Police Service. All other members of the National Security Council are also presidential appointees.<sup>290</sup>

The new Constitution is clear about the appointment of the Inspector General of the National Police Service: he is appointed by the President.<sup>291</sup> Curiously for a Constitution as detailed as this one, it is totally silent about the appointment of the Chief of the Kenya Defence Forces and the Director General of the National Intelligence Service, both of whom are key members of the National Security Council. These two are appointed by the President on the basis of specific statutory enactments, rather than the Constitution.

Franceschi and Lumumba have warned that these ‘deliberate omissions’

*“... may perpetuate the practice of regime maintenance which has contributed to the lack of democracy in the security governance.... For as long as the President retains unregulated powers to appoint these officers, it is arguable that the operations of the Kenya Defence Forces and the National Intelligence Service will be dominated by the imperatives of regime maintenance.”*<sup>292</sup>

This warning is not misplaced. For as Dr Wanjala has observed in relation to the Kenyatta One regime, *“the military’s role was simply to superintend over the degeneration of the democratic system.”*<sup>293</sup> Under the Moi despotism, according to Dr Wanjala, *“the police force became an instrument of terror at the beck and call of the government to silence public opinion.”*<sup>294</sup>

In view of the foregoing analysis, there is no doubt that the Presidency remains a very powerful institution in the Kenyan constitutional scheme. However, this powerful

284 Ibid., art. 132(1)(c)(iii)

285 Ibid., art. 132(1)(c)(i)

286 Ibid., art. 132(1)(c)(ii)

287 Ibid., art. 132(4)(d)

288 Ibid., art. 132(4)(e)

289 Ibid., art. 239(1). The National Security Organs are the Kenya Defence Forces, the National Intelligence Service and the National Police Service.

290 Ibid., art. 240(2). Others are the Deputy President; the Cabinet Secretaries for Defence, Foreign Affairs and Internal Security and the Attorney General

291 Ibid., art. 245(2)(a)

292 Franceschi and Lumumba, *The Constitution of Kenya...*, op. cit., p. 672

293 Wanjala, *Presidentialism, Ethnicity, Militarism and Democracy...*, op. cit., p. 91

294 Ibid., p. 92

presidency is not like any other of the years past. We have already seen the vast new powers that Parliament exercises under the new Constitution. Over and above these parliamentary powers, the presidential powers are hemmed in by all kinds of qualifications and conditionalities<sup>295</sup>.

For example, the President and the other executive officers are required to exercise their executive authority “... *in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit.*”<sup>296</sup> Franceschi and Lumumba contend that this provision is meant “*to remedy the situation where past leaders only served their own agenda and not that of all the Kenyan people.*”<sup>297</sup> That is not all. Under article 130(2) of the new Constitution, the President is required to constitute a national executive which “... *shall reflect the regional and ethnic diversity of the people of Kenya.*”

The latter provision is very important given the post-colonial history of Kenya under its first and second presidents. As Professors Yash Ghai and Jill Cottrell say in their *Occasional Paper*, between Mzee Jomo Kenyatta and Daniel arap Moi, they “*managed to destroy democracy, used excessive violence against their opponents, looted the national treasury, and promoted the fortunes of a few from their ethnic groups, ethnicising politics....*”<sup>298</sup> The two academics are supported by Fitz de Souza, the KANU legal advisor at Lancaster House Conferences and Deputy Speaker of the Independence Parliament.

According to de Souza,

*“Kenyatta was a very strong nationalist but also a tribalist who believed in the greatness of his own people, the Kikuyu.”*<sup>299</sup> He adds: “*Kenyatta had recognized the very strong loyalties that lay beneath the surface of Kenyan politics a long time ago, and in his view, the country had to be ruled by a coalition of tribes under whatever collective party name. He felt that through this process the Kikuyu would dominate, and would say as much in political meetings....*”<sup>300</sup>

Fitz de Souza knows what he is talking about. He was part of the legal team that defended Kenyatta and his fellow Kapenguria Six<sup>301</sup> for their alleged leadership of the Mau Mau Rebellion. He was also KANU’s legal advisor during the Lancaster House constitutional negotiations which paved the way for Kenya’s independence; and, after independence, he served as the Deputy Speaker of the country’s Independence Parliament.

295 Fundamental to these qualifications and conditionalities is Article 129 (1) of the Constitution which provides that the “Executive authority is derived from the people of Kenya and shall be exercised in accordance with this Constitution.”

296 The Constitution of the Republic of Kenya..., op. cit., art. 129(2)

297 Franceschi and Lumumba, *The Constitution of Kenya...*, op. cit., p. 456

298 Ghai and Cottrell-Ghai, *Constitutional Transitions...*, op. cit., p. 5

299 Fitz de Souza, *Forward to Independence: My Memoirs*, Nairobi, 2019, p. 207.

300 *Ibid.*, p. 208

301 The Kapenguria Six – Mzee Jomo Kenyatta, Bildad Kaggia, Kung’u Karumba, Fred Kubai, Paul Ngei and Achieng’ Ouko – were six leading Kenyan nationalists who were arrested in 1952, tried at Kapenguria in Western Kenya and imprisoned for seven years in Northern Kenya.

There are other positive obligations placed on the President by the new Constitution. For example, the President is duty-bound to “*promote and enhance the unity of the nation; promote respect for the diversity of the people and communities of Kenya ... (and) ensure the protection of human rights and fundamental freedoms and the rule of law.*”<sup>302</sup> With regard to these obligations, Franceschi and Lumumba have explained its rationale in the light of the country’s history.

*“In the past, the Constitution was used by the President as a weapon.... The conduct of previous Presidents shows that they saw the Constitution as something that could be easily tampered with in order to achieve their own ends.... It is on the gained lessons and experiences with absolute presidential powers that Article 131 was couched requiring the President to pursue the protection of human rights and the fundamental freedoms and the rule of law.”*<sup>303</sup>

There are more obligations. Thus, the President must submit reports ‘for debate’ in the National Assembly on the progress made in fulfilling the country’s international obligations.<sup>304</sup> These obligations are unprecedented in Kenya’s constitutional and political history.

The President’s powers of appointment of executive officers are equally qualified. His appointment of Cabinet Secretaries, the Attorney General, Secretary to the Cabinet and Principal Secretaries and the country’s diplomatic corps must be approved by the National Assembly.<sup>305</sup> Similarly, whereas he enjoys the prerogative of mercy, that power must be exercised “... *in accordance with the advice of the Advisory Committee....*”<sup>306</sup> According to Franceschi and Lumumba, the power of mercy was introduced in the old Constitution in a 1975 amendment which “... *was passed in a single afternoon when President Kenyatta wanted to pardon Paul Ngei*<sup>307</sup> *after he was found guilty of election fraud and was barred from participating in the elections following conviction....*”<sup>308</sup>

### **Devolution: A Return to Original Values?**

In 1993 Dr. Gibson Kamau Kuria, prominent lawyer and human rights activist, told a conference held in Dar es Salaam that the only way Kenya was going to avoid an impending economic collapse and political disintegration consisted in ‘Returning (it) to its Original Values.’<sup>309</sup> Those values, according to Dr Kuria, were contained in the country’s independence constitution of 1963, whose terms were:

302 The Constitution of the Republic of Kenya ..., art. 131(2)(c), (d) and (e)

303 Franceschi and Lumumba, *The Constitution of Kenya...*, op. cit., p. 459

304 The Constitution of the Republic of Kenya..., art. 132(1)(c)

305 Ibid., art. 132(2)

306 Ibid., art. 133(1)

307 A fellow Kapenguria Six detainee, Paul Joseph Ngei (18 October 1923 – 15 August 2004) held several ministerial positions after Kenya’s independence under both Presidents Jomo Kenyatta and Daniel arap Moi.

308 Franceschi and Lumumba, *The Constitution of Kenya...*, op. cit., p. 465

309 Gibson Kamau Kuria, ‘Returning Kenya to its Original Values’, in J. Oloka-Onyango, et al. (eds.) *Law and the Struggle for Democracy ...*, op. cit., 341-361

*“The government that was to be limited in purpose, and it would be constitutional; different political parties would always operate without inhibitions or obstacles placed in their path by their rival political parties; the judiciary, civil service and the office of the Attorney General would always be independent.”<sup>310</sup> Moreover, “the Bill of Rights would be respected by all political parties always; and a bicameral parliament with no power to alter the Constitution’s basic structure would always exist.”<sup>311</sup>*

There is substantial disagreement about the extent to which the new Constitution marks a return to the principles enshrined in the Independence Constitution. In a minute dated 30 May 1963, which he prepared for his bosses at the British Colonial Office, F.D. Webber, who was the head of the East African Division of the Colonial Office, summarised the rationale for the Constitution agreed at the last Lancaster House Conference in 1963 as follows:

*“The new Constitution, which is to set the pattern for the independence constitution, is deliberately designed to prevent even a quite powerful government at the centre from having matters all its own way where Regional interests are concerned.*

*“There are powerful minority groups in Kenya which provide a much greater ‘balance’ in the political situation than is possible in a number of other African countries. In this lies a real hope for reasonable stability in that country. There are very strong safeguards in the Constitution, which is going to be very difficult to amend against the infringement of property and other rights of the individual, and, because of the voice that Regions will have in the appointment to the Judiciary, it will be difficult again for the Prime Minister of the day to ‘pack’ the judiciary and so interfere with the courts.”<sup>312</sup>*

While they refer to it as ‘a Westminster Constitution’, Franceschi and Lumumba have noted in their exhaustive Commentary that the Independence Constitution “... embodied an extensive system of regionalism, with the country divided into 7 *majimbo*<sup>313</sup>, each with its own elected and independent executive and legislative bodies.”<sup>314</sup> Quoting Ghai and McAuslan in their seminal study of Kenya’s political and constitutional change, they have argued that the Independence Constitution “‘not only provided the organic kernel for equal power sharing, but also became a channel for all tribes (especially minorities) to participate in the process of government.’”<sup>315</sup>

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310 Ibid., p. 349

311 Loc. cit.

312 Ibid., p. 175

313 Kiswahili for provinces, singular ‘jimbo’.

314 Franceschi and Lumumba, *ibid.*, p. 31

315 Op. cit.

I have already examined the powers of the Parliament *vis a vis* the President under the new Constitution. In their Commentary on the new Constitution, Franceschi and Lumumba have observed that “*perhaps the most fundamental break of the 2010 Constitution from the repealed dispensation is the establishment of a devolved government.*”<sup>316</sup> By devolved government it is meant a system of government whereby power is transferred from a superior political power to an inferior authority.

Quoting Donald Rothschild’s *Majimbo Schemes in Kenya and Uganda*,<sup>317</sup> Maxon describes the difference between regionalism and federalism in the following terms: “*Regionalism differs from federalism both in its allocation of powers and in its objectives. Whereas federalism seeks to build a nation by accommodating vigorous constituent parts, regionalism ... involves the devolution of limited powers upon a middle tier of government. Regionalism, therefore, represents a political and institutional compromise between federalism and a unitary system.*”<sup>318</sup> In other words, the devolved government of 2010 is substantially no different from the *Majimbo* government of 1963.

Though akin to a federal system, with its bicameral governance system, a system of government ensuing from the new Constitution is nevertheless not federal. For, as Franceschi and Lumumba argue persuasively, “*a federation is a system in which the relationship between the national and constituent governments, in law and in practice, is not subordinate but coordinate....*”<sup>319</sup> This means that in their respective spheres of authority, the national and regional governments are equal in status. On this definition, the Kenyan system of devolved government is not a federation, as the county governments are subordinate to the national government.

The new Constitution sets out the devolution of power as one of the national values and principles of governance which are binding on all state organs, state officers, public officers and all persons acting in the name of the Constitution.<sup>320</sup> Moreover, revenue raised nationally shall be shared equitably between the national and county governments.<sup>321</sup> To give effect to these values and principles, the territory of Kenya has been divided into forty-seven counties specified in the First Schedule to the new Constitution.<sup>322</sup> The new Constitution commands the national and county governments – described as ‘distinct and interdependent’ – to conduct their mutual affairs “*... on the basis of consultation and cooperation.*”<sup>323</sup>

The objects for which devolved governments are described as to promote democratic and accountable exercise of power; foster national unity by recognising diversity; give powers of self-government to the people; and to recognise the right of communities to

316 *Ibid.*, p. 547

317 D. Rothschild, ‘Majimbo Schemes in Kenya and Uganda’, in Jeffrey Butler and A.A. Castagno (eds.), **Boston University Papers on Africa**, Praeger, New York (1967), 292

318 Maxon, Kenya’s Independence Constitution..., *op. cit.*, p. 18

319 *Loc. cit.*

320 The Constitution of the Republic of Kenya..., *op. cit.*, art. 10(2)(a)

321 *Ibid.*, art. 201(b)(ii)

322 *Ibid.*, art. 6(1)

323 *Ibid.*, art. 6(2)

manage their own affairs. Other objects are to protect and promote the rights and interests of minorities and marginalised communities; to promote socio-economic development through provision of proximate, easily accessible services throughout the country, and to ensure equitable sharing of national and local resources throughout Kenya. Finally, to decentralise the functions and services of state organs as well as to enhance checks and balances and the separation of powers.<sup>324</sup>

To implement devolution, county governments, consisting of county assemblies and county executives have been established for each county.<sup>325</sup> Each county government is required to decentralise its functions and the provision of its services to the extent that is efficient and practicable.<sup>326</sup> The new Constitution also provides for the membership of county assemblies;<sup>327</sup> county executive committees,<sup>328</sup> and urban areas and cities as distinct entities within devolved government systems.<sup>329</sup> It also provides for the powers and functions of county governments,<sup>330</sup> and the transfer of those powers and functions between levels of government.<sup>331</sup>

The new Constitution emphasises the subordinate nature of the county governments *vis a vis* the central government. Thus, for example, the boundaries of a county may be altered by resolutions of both the National Assembly and the Senate, supported by two thirds majorities of all members thereof.<sup>332</sup> It is clear that the central government is the primary source of revenue for the county governments; and in that capacity, it may intervene in the affairs of the county governments and hold the latter to account for the discharge of its functions.<sup>333</sup>

Where there is, as inevitably is the case, a conflict between national and county laws in matters falling under the concurrent jurisdiction of county and the central governments, national legislation prevails over county legislation.<sup>334</sup> And if push comes to shove, the President may suspend a county government in an emergency or war, or ‘in any other exceptional circumstances.’<sup>335</sup> In the latter case, an independent commission of inquiry must first investigate the allegations against the county government and the Senate must authorise the suspension.<sup>336</sup>

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324 *Ibid.*, art. 174

325 *Ibid.*, art. 176(1)

326 *Ibid.*, art.176(2)

327 *Ibid.*, art. 177

328 *Ibid.*, art. 179

329 *Ibid.*, art. 184

330 *Ibid.*, art. 186

331 *Ibid.*, art. 187

332 *Ibid.*, art. 188

333 *Ibid.*, art. 190

334 *Ibid.*, art. 191

335 *Ibid.*, art. 192(1)

336 *Ibid.*, art. 192(2)

## Chapter Two: Devolution or *Majimbo*?

Devolved government is not an innovation brought about by the new Constitution. Rather, as Franceschi and Lumumba observe, Kenya had a similar system of devolved government at independence in 1963.

*“The devolved government ... consisted of the national government and seven regions which were further divided into local authorities. Each region had a regional assembly which elected a regional president among its members. The executive power of the regions lay in the Finance and Establishments Committee. The Independence Constitution had set out a list of areas which regional assemblies had exclusive competence over, and those in which it had concurrent competence with the national assembly. In order to entrench the place of regions, the Constitution provided that regional boundaries be altered by Parliament with the approval of the regional assembly.”*<sup>337</sup>

According to Professors Ghai and Cottrell, *“a combination of factors led the British to institute regionalism in the independence constitution.”*<sup>338</sup> What were these factors that led the creation of a devolved government at independence? What happened after independence which removed devolution from Kenya’s constitutional and political power map? And what factors and reasons that brought devolution back in? These questions are the subject of this part.

Unlike Tanganyika and Uganda, Kenya was a colony and relatively richer and had, consequently, attracted a substantial British settler farmer population and significant British capital investment. In terms of its ethnic demographics, Kenya was closer to Uganda but different from Tanganyika. For, like Uganda, Kenya was dominated by a few large and powerful ethnic groups, in particular, the Kikuyu and the Luo. Like Uganda, Kenya had numerous medium-sized and many smaller ethnic groups.

The Kikuyu had been hit the hardest by the creation of the ‘White Highlands’, i.e. huge tracts of land in the Kikuyu country and the Rift Valley that were alienated from the Kikuyu, the Kalenjin and the Maasai communities, and reserved for White settler farmers in the first two decades of the last century.<sup>339</sup> Millions of landless Kikuyu peasants were consequently pushed into overcrowded native reserves; or lived as squatters in the Rift Valley part of the White Highlands, which were historically Kalenjin or Maasai territories.

The hallmark of colonial rule, in Kenya as everywhere in the colonised world, was the economic exploitation of the natives and their political subjugation and oppression. In settler colonies such as Kenya, economic exploitation and political oppression was most

337 Franceschi and Lumumba, *The Constitution of Kenya...*, op. cit., p. 548

338 Ghai and Cottrell, *Constitutional Transitions...*, op. cit., p. 5

339 For a compelling account of how the British colonial state in Kenya used colonial land laws and institutions to create and secure the White Highlands for the European settlers, see HWO Okoth-Ogendo, **Tenants of the Crown: The Evolution of Agrarian Law and Institutions in Kenya**, *ACTS Legal Studies Series No. 2*, African Centre for Technology Studies, Nairobi, 1991.



acute. As a result, in 1952 the landless Kikuyu peasantry exploded into the *Mau Mau* Revolt which, before it was finally crushed in 1960, would cost tens of thousands of lives. *Mau Mau* would also hasten the ‘End of Empire’ in East Africa. Therefore, as Kenya inched towards independence in the early 1960s, the Land Question, ethnicity and colonial despotism made for a very toxic mix.

The nature of the political system that independent Kenya would adopt came to the fore during the period of intense struggles to make the independence Constitution between 1960 and 1963. These struggles took place in the context of three constitutional conferences held at the Lancaster House in London in January 1960, February 1962 and September 1963. These meetings have come to be known in Kenyan history as Lancaster House I, Lancaster House II and Lancaster House III, respectively.

At all three Conferences, two issues dominated the constitutional negotiations. On the one hand, KANU (Kenya African National Union) which was dominated by the Kikuyu and the Luo – Kenya’s two largest and most powerful ethnic groups – had a vision of independent Kenya as a strong centralised, preferably one-party State. On the other hand, KADU (Kenya African Democratic Union) which brought together medium-sized and smaller tribes, preferred a decentralised, federal system.

In his *magnum opus* on the making of ‘Kenya’s Independence Constitution’<sup>340</sup>, Robert M. Maxon, the eminent historian of this period, has meticulously narrated how, from its formation in May 1960, KANU – that was to lead Kenya into independence and ruled it for nearly forty years afterwards – was founded on the premise of a strong centralised state that would inform the political thinking and practice not only of post-colonial Kenya, but that of post-colonial Africa generally.

Professor Maxon notes that by the time of KANU’s establishment in May 1960, “(*Jaramogi Oginga*) *Odinga* had emerged as the leading advocate in KANU for a single party approach to Kenya’s political problems and constitutional future.”<sup>341</sup> For example, Odinga – Kenya’s first Vice President – had told the *East African Standard* of 5 May 1960 that “*too many parties confuse things.*” When independence came, he argued, “*there would be no need for an opposition party until later and even then he would only wish to see two parties.*” He concluded that “*true democracy would evolve after independence.*”<sup>342</sup>

In a twist of Shakespearean irony, Oginga Odinga would be ‘hoisted in his own petard’ when, in 1969, his Kenya People’s Union (KPU) – established in 1966 following his expulsion from KANU – was banned by President Jomo Kenyatta; its parliamentarians were detained under emergency powers inherited from the British colonial state; and, for all intents and purposes, Kenya turned into a *de facto* one-party state. But that is for later.

KANU’s position and the fact that it was largely dominated by the Kikuyu and the Luo, Kenya’s two largest ethnic groups, frightened the smaller tribes. Thus, hardly

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340 Robert M. Maxon, *Kenya’s Independence Constitution: Constitution-Making and the End of Empire*, Fairleigh Dickinson University Press, Plymouth, UK, 2011

341 *Ibid.*, 34

342 *Loc. cit.*

ten days after the formation of KANU, the leaders of these tribes formed the Kenya African Democratic Union (KADU) at a meeting held in Ngong', outside Nairobi, on 25 May 1960. As Professor Maxon, the eminent historian of this period, has demonstrated in his excellent book, *“the fear of loss of tribal land rights and political and economic domination by the dominant tribes, especially the Kikuyu, in any post-colonial settlement informed the KADU position in the constitutional negotiations between 1960-1962.”*<sup>343</sup>

Thus, during the negotiations between KADU and KANU that followed Lancaster House I and chaired by the colonial Governor, Sir Patrick Renison, KADU *“wanted a constitution providing regional powers and safeguards in respect of tribal lands and spheres of influence.”*<sup>344</sup> This proposal came to be known as *Majimboism* (Kiswahili for regionalism).<sup>345</sup> Such a Constitution would provide safeguards particularly against infiltration of regions for settlement purposes by ‘outsiders.’ There must also be constitutional safeguards against *“a one party political system and suppression of opposition criticism.”*<sup>346</sup>

Professor Maxon argues that the Land Question was not the only issue that preoccupied KADU and its leaders. Another important consideration was the opposition to a one-party rule and support for multipartyism. The party was frightened by what it rightly considered anti-democratic tendencies that KANU, and especially its leadership, was beginning to exhibit. Thus at the Ngong' Meeting, KADU's Founding Fathers issued a joint statement in which they warned: *“The discouragement of free expression now beginning in KANU will have grown to immeasurable heights and the few at the top will not tolerate any opposition to the one party. It will be a dictatorship.”*<sup>347</sup>

One of those Founding Fathers was named Daniel Toroitich arap Moi, Kenya's longest serving President and perhaps its most brutal tyrant. Indeed, it would be Moi who – as KANU Chairman and President of the Republic – would declare Kenya a *de jure* one-party state; and whose exit from power in 2002, would pave the way for the most audacious political and constitutional experiment in the country's modern history: the adoption of the 2010 Constitution.

The day after KADU's formation, Masinde Muliro, another of its Founding Fathers who would remain a prominent opposition political figure in Kenya for the next three decades, told the *East African Standard* of 26 May 1960 that he was opposed to the philosophy *“that one political movement was enough until independence was achieved, when there could more.”* He asserted: *“You will never get democracy by starting on a dictatorial basis. To me democracy is the right of any individual to express his views without getting his head chopped off.”*<sup>348</sup> Therefore, he insisted, there must be constitutional safeguards against *“a one party political system and suppression of opposition criticism.”*<sup>349</sup>

343 Ibid., p. 53.

344 Loc. cit.

345 'Majimbo', singular 'jimbo' is province/s or region/s.

346 Loc. cit.

347 Ibid., p. 37

348 Ibid., p. 36

349 Op. cit.

## Lancaster House and the Shaping of the Post-Colonial State

Federal constitutional proposals were not new to Kenya, for they had been pushed by European right-wing settler political organisations during the 1950s. What was new is that from 1961, federalism, in the shape of *majimboism*, took center-stage in the political discourse of the newly formed African political parties.<sup>350</sup> The earliest published position on the federal system by these parties was published in the *East African Standard* of 11 August, 1961, by one of KADU's 'rare intellectuals', P.J.H. Okondo. In his article, Okondo argued that 'recent experience' had shown that a Westminster type of Constitution could not work in Kenya. The country thus required a Constitution with more clearly defined separation of powers and an effective system of checks and balances, as the Westminster system could easily lead to dictatorship.

To avoid this possibility, Okondo proposed a system that would serve better as a bulwark against authoritarian, dictatorial rule than the establishment of regional governments. He urged the adoption of a Constitution "*proximate to that of the United States of America.*"<sup>351</sup> There should be a two-chamber legislature; a supreme court with a high court and magistrates' courts below; and an executive branch outside the legislature. Okondo felt that these features would "*eliminate the chances of a small clique of men trying to usurp power under the cover of a parliamentary majority of one....*"<sup>352</sup>

KADU justified its federal proposals on the need to insure democratic future for Kenya. Its *Proposals for Regional Governments and a Federal Constitution for Kenya* argued that regionalism was

*"a doctrine developed to make sure that excessive political ambitions of men shall not drag our young country down into the dangerous path of tyranny. This urge to build a bastion of democracy has been forced upon us by the sad turn of political events in Africa generally and, in particular, the ominous happenings in Kenya which augur badly for the survival of the democratic process there. We are motivated by our strong desire to entrench personal liberty, regional harmony, domestic tranquillity and peace for our generation and for posterity...."*

*"We have learned from the mistakes of our neighbours and those who went before us on this road, and especially from recent developments in African countries formerly under British rule and have achieved independence under the Westminster model constitution. We have learned that one man one vote does not necessarily mean freedom. It is sad to record that independence under an undiluted British type of constitution has more often than not (and indeed in most cases has) meant a headlong plunge for those countries from the colonial frying pan into the hell-fire of dictatorship by an individual or despotism of a military junta.... In Kenya*

350 Ibid., pp. 54-55

351 Op. cit.

352 Op. cit.

*today conditions are stage set for the easy emergence of an absolute ruler. We have realized this danger and we will remain awake to it.*"<sup>353</sup>

This was written in September 1961, well before any of the East African countries had obtained their independence from British colonial rule and certainly long before the emergence of the 'Imperial Presidency' that was to blight Africa's political and constitutional landscape for decades to come.

By 'African countries formerly under British rule', KADU had Ghana in mind, which, having attained independence under a Westminster Constitution four years earlier, was rushing headlong into a one-party autocracy under President Kwame Nkrumah. The Colonial Office bureaucrats in London admitted as much. Thus, P.J. Kitcatt, who was a senior official at the Colonial Office, noted in his October 16 analysis of the KADU proposals, that KADU were frightened of Kikuyu domination and dictatorship "*of a Ghana pattern emerging in Kenya after independence.*"<sup>354</sup>

F.D. Webber, who headed the East African Division department at the Colonial Office, returned to this theme in his brief for the Secretary of State for Colonies Reginald Maudling's visit to Kenya in November 1961:

*"KADU's proposals for a form of regional government in Kenya arise basically from the fears of the minority tribes that Kenya will be dominated by the Kikuyu and that a type of authoritarian government, similar to that which has been established in Ghana, may be set up in Kenya.*"<sup>355</sup>

Okondo, the most prominent intellectual progenitor of majimbo for KADU, also told the *East African Standard* of 12 October 1961, that 'repressive measures in Ghana' had provided the examples of dictatorship much like the KADU leaders had imagined..

Mzee Jomo Kenyatta, KANU's undisputed leader was also violently opposed to *majimboism*. On the eve of the Second Lancaster House Conference in February 1962, the KANU leader stated bluntly in an article published in the *East African Standard* of 9 February 1962:

*"In recent weeks a strange new concept which goes by the name of 'regionalism' or 'majimboism' has appeared in our country. This policy does not emanate from genuine political forces among our people. It has no roots in our country. This is very clear. It is being deliberately fostered by certain self-seekers desperately trying to secure their own individual interests.*

*"The real authors and manipulators of this ridiculous attempt to destroy our nation are the European members who trade under the name of the New Kenya Party. The few African supporters of 'regionalism' are either*

353 Ibid., p. 59

354 Ibid., p. 64

355 Ibid., p. 70

*willing dupes or have fully realized that they stand condemned in the eyes of the African people because of their political record in the past. They are now trying to create pockets of tribal influence by arousing hatred and fear against brother Africans so that they may rule as tin-pot kings in their own little kingdoms.*"<sup>356</sup>

The upper reaches of the Colonial Office in London were not enthusiastic about *majimboism* either. The British government worried that regionalism, with its focus on tribal land rights and decentralised power structures, would undermine the colonial land tenure regime and the centralised administrative regime needed to sustain the colonial economic relations spawned by colonialism. W.B. Leslie Monson, the Assistant Undersecretary of State for Colonies, described the idea of an American-type Constitution as 'ludicrous.' The American Constitution was, according to him, "*one of the most cumbrous forms ever thrust upon themselves by human beings.*"<sup>357</sup>

Developing this point further, Kitcatt at the Colonial Office argued that the *majimbo* plan might "*reproduce some of the worst features of the American constitution, namely its inflexibility.*"<sup>358</sup> Kitcatt also noted that the KADU proposals would "*require substantial alteration in the machinery and method of government which have already been established in Kenya.*"<sup>359</sup> Webber of the East Africa Division worried too that the KADU approach would result in what he called "*pure Balkanization and complete loss of confidence in the country.*"<sup>360</sup> The upshot is that the Colonial Office bureaucrats preferred the retention of the authoritarian machinery and the brutal 'method of government' of the colonial state in post-colonial Kenya.

Uppermost in the concerns of the Colonial Office was the likely effect of federalism on the economic backbone of the Colony, i.e. settler agriculture. Leslie Monson, the Assistant Undersecretary of State, stated in his message to Governor Renison of 19 October 1961 that the Colonial Office was

*"even more worried about the effects of KADU's regionalism on the running of the country. The sort of points which struck us as difficult are the interference with the mobility of labour and the effect this would have particularly on agriculture and what seemed to us to be a departure from the policy we have been so patiently building up of treating land as an economic asset. The reservation of land within a region to the people in the region would obviously put a brake to the spread of such a concept. In short, is there in fact a federal structure for Kenya which would encourage rather than hinder its efficient economic development?"*<sup>361</sup>

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356 Ibid., p. 75

357 Ibid., p. 60

358 Op. cit.

359 Op. cit.

360 Op. cit.

361 Ibid., p. 65

The colonial state and its senior civil servants in Nairobi were equally opposed to *majimbo*. As Chief Commissioner Robin Wainwright told Minister Blundell in July 1961: “If you devolve more and more onto local authorities in the African areas at this stage in their development, you are inevitably going to do two things: increase tribalism and reduce efficiency....”<sup>362</sup> And, when asked to consider the feasibility of land titles being transferred to boards representing tribes or regions made up of groups of tribes, the acting commissioner for lands found little justification for such a departure, and “very considerable danger and complications arising out of their implementation.”<sup>363</sup> The permanent secretary in the ministry of local government and land also concluded that placing land transfers under regional control would be most “unwise and present almost insuperable problems.”<sup>364</sup>

### The Truces and the Compromises

Even so, the Colonial Office was forced to concede that the proponents of *majimboism* had made a very strong case. In their preparations for the visit by Governor Renison to London planned for late October 1961, Colonial Office officials admitted that the question

*“whether Kenya should continue to evolve on unitary lines or whether there should a radical departure in the sense contemplated by KADU and, for that matter by many Europeans, is, of course, of fundamental importance. However, Colonial Office was in favour of ‘the unitary concept but qualified by the most effective safeguards that can be thought of, and against thinking in federal terms.’”*<sup>365</sup>

Following his meeting with Governor Renison in October 1961, the new Secretary of State for Colonies Reginald Maudling told Prime Minister Harold MacMillan that

*“KADU’s fears are very real and every effort will have to be made in our constitution-making to allay them. At the same time, we must be careful not to antagonize KANU to such an extent that their extreme wing take over the running or secure their ends through widespread subversion. It seems to the Governor and me that the best way of steering through these difficulties is to promise a constitutional conference but to insist that it be preceded by careful preparations so that when the constitution giving Kenya internal self-government is worked out, it will fully reflect the anxieties of a substantial portion of the population.”*<sup>366</sup>

The colonial state was well aware of KANU’s propensity for authoritarianism, with Governor Renison arguing that the party was ‘avid for power.’ “It aims to be firmly in the saddle at independence and its scruples in regard to minority rights thereafter are,

362 Ibid., p. 122

363 Ibid., p. 65

364 Op. cit.

365 Ibid., p. 66

366 Ibid., p. 67

at best, suspect and more likely non-existent.”<sup>367</sup> However, on the eve of the Lancaster House II Conference, Secretary of State Maudling continued to express his opposition to KADU’s federal proposals. He told his cabinet colleagues on 30 January 1962:

*“Viewed quite objectively, I do not believe that Kenya has the administrative and financial resources to sustain KADU’s system of regionalism. Nor do I believe that, in itself, it has much to offer in the way of protection of the European and Asian communities, which I think we must seek by other means. Therefore, I do not believe that we should give strong backing to the KADU concept, although I think that it would be politic to meet KADU to the extent of getting the general structure of the local government system, including the establishing of bodies higher than district, e.g. at the provincial level, entrenched in the constitution to some extent.”*<sup>368</sup>

The main concern of the Colonial Office and the British government was the protection of British settlers and investments in eastern and southern Africa where, according to Prime Minister MacMillan,

*“... people of British stock have made permanent home.’ MacMillan argued: ‘We shall wish to protect the rights of these people and the large British investments in the area, so far as we can, while doing as little damage as possible to our relations with the other African and Asian countries.”*<sup>369</sup>

To allay the fears of KADU, the British government ministers agreed that *“the essential interest of the African minority centered on the control of land, and our aim must be to achieve agreement on arrangements which are reasonable in themselves and could not under the constitution easily be altered.”*<sup>370</sup>

For the protection of their interests, the Europeans and Asians would have to rely *“on a satisfactory bill of rights backed up by an independent judiciary of good quality both deeply entrenched in the constitution.”*<sup>371</sup> The ministers were of the view that entrenchment should not merely consist of a requirement that the Constitution could not be altered with something like a majority of 75 per cent in the legislature.<sup>372</sup>

The lack of enthusiasm by the Colonial Office on the *majimbo* plan was made clear in a brief titled ‘Regionalism’ prepared for the Conference. While trashing *majimboism* as economically unsound, the brief suggested a system of regionalism *“that falls short of true federalism”*; that will involve *“the minimum possible number of regions”* and the least possible expenditure of money, which meant using the present system of provinces and administrative structure.<sup>373</sup>

367 Ibid., p. 64

368 Ibid., p. 80

369 Op. cit.

370 Ibid., p. 82

371 Op. cit.

372 Op. cit.

373 Ibid., p. 84

As Lancaster House II deadlocked over KADU's insistence on federalism, Kenyatta urged the KANU delegates to agree on a settlement even if the party did not like it: "*We might be forced to accept a constitution we did not want, but once we had the government we would change the constitution.*"<sup>374</sup> Like KADU, the British did not trust Kenyatta and his followers to abide by any agreement reached at Lancaster House once in power. According to Secretary of State Maudling, "*KADU and many of KANU believe, in my opinion with justification, that Mr. Kenyatta and his followers have no intention of being bound by any undertakings or any constitution if ever they can get power into their hands.*"<sup>375</sup>

The outcome of Lancaster House II bore the imprint of heavy British influence. Kenya's political elites had again not been able to reach a broad level of agreement on constitutional advance, and the Secretary of State had to in effect impose his framework on the conference. As its draftsman conceded, the Constitution for independent Kenya was written on the basis of "*what we in the Colonial Office thought was the right policy....*"<sup>376</sup> The framework was not the result of bargaining, compromise and agreement among the parties at the conference. This absence of consensus between KANU and KADU, in spite of the signatures of the participants on the final document, presaged huge difficulties in the finalisation of a constitution for Kenya.<sup>377</sup>

But Lancaster House II was not implemented by KANU which formed the internal self-government following its overwhelming win in the elections of May 1963. The reason, as Maxon points out, is that "*KANU leaders desired centralized control, and they realized that the constitution gave power to the regional assemblies that would have inhibited that design. Thus, there had to be significant alterations to the constitution.*"<sup>378</sup> KADU, for its part, refused to countenance any changes "*save those required to tailor the constitution for independence or to correct technical errors in the document.*"<sup>379</sup>

This deadlock made Lancaster House III – which took place between September and October 1963 – necessary. But after more than three weeks of intense negotiations, KADU and KANU were still far from reaching an agreement acceptable to both. At this stage, the British Government, fearing that the KANU Government would tear up the Independence Constitution if changes were not made to the Lancaster House II Constitution, decided to mollify KANU. After bitter objections from KADU, the British

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374 Ibid., p. 99. This is confirmed by de Souza, KANU's legal advisor at the conference: "*In early 1963 we were back in London.... After long debates about what would be the shape of the new country's Constitution, Kenyatta's KANU were still holding out for centralized government while Ronald Ngala's KADU argued for majimbo, a patchwork of more autonomous geographical and tribal regions. It was a stalemate, and no one seemed to know how to end it. Then one day Kenyatta called us to a private meeting. He said it was time to move forward and that we should accept, more or less, whatever terms were being proposed for the constitution. When there were murmurs of disapproval, Kenyatta said not to worry about majimbo or anything else because later on, once he was in power, he would change it all.*" Ibid., p. 223. See also Professor Macharia Munene, 'Constitutional Development in Kenya: A Historical Perspective', in Yash Vyas, Kivutha Kibwana, Okech Owiti and Smokin Wanjala (eds.), **Law and Development in the Third World**, Nairobi University Press, 1994, 51-63, 56

375 Ibid., p. 100

376 Ibid., p. 125

377 Ibid., p. 111

378 Ibid., p. 220

379 Loc. cit.



Government agreed to demands made by KANU to change certain aspects of the Lancaster II Constitution such as, regional control of the police force and civil service, with KANU accepting the continuation of the safeguards for the regional governments.

Duncan Sandys, who had replaced Sir Reginald Maudling as Secretary of State, explained the decision to impose a deal favourable to KANU as follows:

*“If we get the KANU Government to agree to such amendments now and to undertake publicly to respect the Constitution containing them, that should go a long way toward restraining them tearing up the Constitution and making much more extreme amendments immediately after 12 December (1963, the agreed Independence Day), with all the grave consequences to law and order, unity and friendliness throughout Kenya (to say nothing of its effect on Kenya’s international standing) which would follow from such actions by the Central Government.”*<sup>380</sup>

With Lancaster House III concluded, Kenya now moved full speed towards independence. On 3 December 1963, the British Parliament passed the *Kenya Independence Act* “to make provision for, and in connection with, the attainment by Kenya of fully responsible status within the Commonwealth....”<sup>381</sup> The Act declared that “on and after 12<sup>th</sup> December 1963 (... ‘the appointed day’) Her Majesty’s Government in the United Kingdom shall have no responsibility for the government of Kenya or any part thereof.”<sup>382</sup> The Act also declared the end of legislative authority of the British Parliament over Kenya, transferring that authority to ‘any legislature established for Kenya or any part thereof.’<sup>383</sup> To complement the Independence Act, Her Majesty in Council also enacted the *Kenya (Independence) Order in Council, 1963*, whose Second Schedule contained the first Constitution for the independent state of Kenya.

## **The Independence Constitution**

The Independence Constitution was based on the framework agreement that the British Colonial Office thought was ‘the right policy’ for an independent Kenya at Lancaster House III. It established a parliamentary democracy, with ‘the Central Legislature’, soon after the Parliament, comprising the National Assembly and Her Majesty.<sup>384</sup> The National Assembly was bicameral in the American sense, with a House of Representatives and a Senate.<sup>385</sup> In his 1970 doctoral dissertation for Duke University, Jay E. Hakes referred to the bicameral parliament as major innovation of the Lancaster House II.<sup>386</sup>

380 Ibid., pp. 250-251

381 *Kenya Independence Act, 1963, Chapter 54, preamble.*

382 Ibid., s. 1(1)

383 Ibid., First Schedule

384 Constitution of Kenya, 1963, s. 34(1)

385 Ibid., s. 34(2)

386 Hakes, *The Parliamentary Party of the Kenya...*, op. cit., p.17

The Senate comprised forty-one members representing forty districts and the Nairobi Area, into which Kenya was divided.<sup>387</sup> It was directly elected.<sup>388</sup> Hakes argues in his doctoral dissertation that the Senate was established at the insistence of minority tribes with the support of the Colonial Office of the British Government. According to him, the Colonial Office “*anticipated that the Senate, with one member from each of Kenya’s forty-one districts, would protect minorities, since the Senate, apportioned to favour rural areas, could block non-money bills for up to a year.*”<sup>389</sup> We have already seen how this came about in the course of the Lancaster House constitutional negotiations.

The House of Representatives, on the other hand, was made up of single member constituencies, as well as ‘specially elected’ members.<sup>390</sup> Constituency members were directly elected to represent the 117 constituencies into which Kenya was divided as part of the Lancaster House II constitutional settlement. Once elected, the House of Representatives, the more important of the two chambers, turned itself into an electoral college to choose the ‘specially elected’ members.<sup>391</sup>

The formula for choosing the specially elected members was contained in Article 39(1) of the Independence Constitution:

*“The number of the specially elected members of the House of Representatives shall be the number which results from dividing the number of seats of elected members of that House by ten or, if that result is not a whole number, the whole number next greater than that result.”*

As a result of this formula, the Independence Parliament comprised 117 constituency members and twelve specially elected members. Hakes points out that KANU, the ruling party at independence, used these seats after the 1963 elections to choose twelve ‘specially elected’ members from the opposition strongholds.<sup>392</sup>

The National Assembly was a powerful legislative body. It had power to pass a confidence motion and force the resignation or removal of the Prime Minister.<sup>393</sup> It has to be pointed out that at this time the executive was headed by the Governor General as Head of State and Commander in Chief and the Prime Minister as the Chief of Government. The National Assembly had significant control in the exercise of emergency powers, for no emergency could be declared without a prior resolution of the National Assembly, supported by 65 percent of all its members.<sup>394</sup> It had power to extend the state of emergency for a period not exceeding two months.<sup>395</sup>

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387 Constitution of Kenya, 1963, op. cit., ss. 35 and 36(1)

388 Ibid., s. 36(4)

389 Hakes, *The Parliamentary Party...*, op. cit., p.18

390 Constitution of Kenya, 1963, op. cit., s. 37

391 Ibid., s. 39(2)

392 Hakes, *The Parliamentary Party...*, op. cit., p.18

393 Constitution of Kenya, 1963, op. cit., s. 65(2)(a)

394 Ibid., s. 69(4)

395 Ibid., s. 69(8)

Both the Senate and the House of Representatives were led by Speakers and Deputy Speakers elected by not less than two thirds of the members of the Senate and the House respectively.<sup>396</sup> The two Speakers also served as the respective Chairman and Vice Chairman of the Electoral Commission.<sup>397</sup> In the exercise of its legislative powers, the National Assembly could pass bills which, to become law, had to be assented to by Her Majesty or the Governor General.<sup>398</sup>

Except for money bills, all other bills could originate in either House of Parliament.<sup>399</sup> Only the House of Representatives had power to originate money bills. The Senate could only proceed with a money bill only if it was transmitted to it by the House of Representatives.<sup>400</sup> The latter, for its part, could only proceed with a money bill only upon the recommendation of the Governor General signified by a minister.<sup>401</sup> So, like Tanzania and Uganda whose National Assemblies had no powers to originate money bills, Kenya's Independence Parliament had no power to proceed with money bills without the approval of the executive. The control of the purse was firmly in the hands of the executive.

But what made the Independence Constitution fundamentally different from the Westminster model was its stringent procedure for its amendment. Firstly, although section 71(1) empowered the Parliament to alter any part of the Constitution, it could only do so with the support on the second and third reading of the votes by three quarters of all members of either House of the National Assembly.<sup>402</sup> A previously withdrawn bill could be reintroduced unaltered to the House only if it had been approved in a referendum with the support of two thirds of the registered voters of Kenya; in which case it could be passed by a simple majority of members of either House of the National Assembly.<sup>403</sup>

Secondly, if the Bill was to amend the 'specially entrenched' provisions of the Constitution, its passage required the support of three quarters of all members of the House of Representatives, and 90 percent of all members of the Senate.<sup>404</sup> The specially entrenched provisions related to the Bill of Rights, rights of the regions, citizenship, elections, the Senate and the Judiciary. Jurisdiction in respect of land, a major issue during the Lancaster House negotiations as we have demonstrated, was divided between the regions (crown lands); and the central government, which took control of public and trust lands.

Professor Maxon argues that Lancaster House III did not destroy the *Majimbo* Constitution, as the Independence Constitution is popularly known. With the hindsight of history, however, "*it is clear that the changes made in October 1963 were the beginning of the end of regionalism in independent Kenya.*"<sup>405</sup> Even so, *Majimboism* refused to die. The

396 Ibid., ss. 43-46

397 Ibid., s. 48(1)(a) and (b)

398 Ibid., s. 59(1)

399 Ibid., s. 59(2)

400 Ibid., s. 60(1)(a)

401 Ibid., s. 60(2)(a)

402 Ibid., s. 71(2)

403 Ibid., s. 71(3) read together with s. 56(1)

404 Ibid., section 71(6)

405 Maxon, Kenya's Independence Constitution..., op. cit., p. 267

Independence Constitution lasted for only one year, but the legacy of *majimbo* remained not only a major part of Kenya's constitutional and political history, but made a dramatic return with the constitution-making of the 2000s, culminating in the adoption of the new Constitution in August 2010.

## Chapter Three: Independence and the Rise of Imperial Presidency

In his preface to Professor Anyang' Nyong'o's *Presidential or Parliamentary Democracy in Kenya?*, Professor Michael Chege, the Nairobi University political scientist, notes that “*the immediate post-colonial experience in Africa saw the elimination of the parliamentary government and its replacement with an autocratic ‘presidentialism’...*”<sup>406</sup> This is certainly true of East Africa, and Kenya was no exception. Throughout the Lancaster House negotiations, KANU had been very clear that it wanted a centralised state with, preferably, a one-party system of government. Kenyatta had personally stated that he and his KANU party ‘did not want’ the Independence Constitution, even before Kenya became independent with Kenyatta as the Prime Minister.

Almost immediately after Lancaster House II and the establishment of the internal self-government, Kenyatta and KANU started to undermine the framework agreement. Professor Maxon shows how, within two weeks of internal self-government, KANU ministers, including Prime Minister Mzee Kenyatta, started to look for ways of loosening the constitutional restrictions on emergency powers in order to allow the Government to govern even “*if a substantial number of the Opposition had been detained or imprisoned...*”<sup>407</sup>

Tom Mboya, the Minister for Justice and Legal Affairs, opined in a 12 June 1963 cabinet meeting that it would be impossible to declare a state of emergency in that situation because “*it would be impossible to achieve the required 65 percent.*” He concluded: “*This would be an intolerable situation; it was imperative that the Government should be in a position to govern in a situation of emergency without challenge from the Legislature.*”<sup>408</sup> Given this hostility from the KANU Government, it is no wonder that the Independence Constitution would begin to unravel immediately after independence on 12 December 1963.

*Maxon notes that “the pressure for change in the constitution emerged very quickly. This was hardly surprising. The majimbo constitution provided many significant departures from past practice in colonial Kenya. Numerous functions had to be devolved to the regional assemblies, and this would take time. The rush to hold the election that (new Governor Malcolm) MacDonald and the Kenyan politicians advocated meant that there would be little time to put the new arrangements in place before internal self-government. The greatest difficulties faced in implementation of the new constitution, however, emerged as a result of the fact that the party winning the 1963 elections, KANU, desired to alter the regional constitution in significant ways.”*<sup>409</sup>

406 Anyang' Nyong'o, *Presidential or Parliamentary Democracy...*, op. cit., p. 7

407 Maxon, *Kenya's Independence Constitution...*, op. cit., p. 193

408 Loc. cit.

409 Ibid., p. 175

The KANU government did not take immediate steps to alter the Independence Constitution. Instead, it took six months after independence to make known its intention to enact a republican constitution. Nevertheless, the Government did not keep its promises to implement the Independence Constitution that were made at Lancaster House III. As part of the majimbo plan negotiated at that Conference, the major town of Kitale was supposed to be transferred to the Western Region from the Rift Valley bastion of the White Highlands. The central government which should have effected the transfer as mandated by the Constitution did not do so. It also continued to control the financing of services that were reserved for the regions under the Constitution throughout 1964. Crucially, using emergency powers inherited from the colonial state, it continued to maintain a ban on most KADU public meetings throughout 1964.<sup>410</sup>

In October 1964, hardly ten months after independence, the National Assembly passed the *Constitution of Kenya (Amendment) Act*.<sup>411</sup> It was assented to by Governor General Macdonald on 23 November 1964 and came into force on 12 December 1964, the first anniversary of independence. Literally and figuratively, this was Kenya's First Amendment. Between it and the adoption of the new Constitution in 2010, there would be twenty-eight other amendments. The First Amendment was very significant. According to Franceschi and Lumumba, the Amendment "*not only established Kenya as a sovereign republic but also weakened the majimbo system.*"<sup>412</sup> Professor Githu Muigai, who served as Kenya's Attorney General between 2011 and 2018, argues in his 2001 doctoral thesis that it made "*far-reaching changes to the structure and content of the Independence Constitution.... It created an American-type executive Presidency and abolished the post of Prime Minister.*"<sup>413</sup>

The newly minted President became the Head of State and Government and the Commander-in-Chief of the armed forces. The prerogatives and privileges that Her Majesty enjoyed in relation to Kenya were transferred to the President. Foretelling what would happen in Uganda three years later following the 1966 coup, the First Amendment provided for the President to be the person holding the post of Prime Minister immediately before the coming into force of the amendment.<sup>414</sup> In other words, the first President of the Republic of Kenya was not voted into office, but assumed office 'as if he had been elected'<sup>415</sup> under the new provisions. There was a similar 'continuity on offices' for members of the National Assembly and other holders of public office under the regime of the Independence Constitution.<sup>416</sup>

The First Amendment also created another precedent for Milton Obote's Uganda Republican Constitution of 1967. Under the new article 33A(5)(c) of amended Constitution,

410 Ibid., p. 268

411 Act No. 28 of 1964

412 Franceschi and Lumumba, *The Constitution of Kenya...*, op. cit., p. 34

413 Githu Muigai, **Constitutional Amendments and the Constitutional Amendment Process in Kenya (1964-1997): A Study in the Politics of the Constitution**, *A Thesis Submitted in Fulfilment of the Requirements of the Degree of Doctor of Philosophy of the Faculty of Law of the University of Nairobi*, September 2001, pp. 110-111

414 Act No. 28 of 1964, op. cit., ss. 8 and 9

415 Ibid., s. 10

416 Ibid., s. 19

all candidates for election to the House of Representatives had to declare their support for a presidential candidate, “... *and if he does not so declare, his nomination as a candidate for election to that House shall be void.*” Typical in Imperial Presidencies, the First Amendment gave the President vast powers to appoint and dismiss public officers. He could appoint the Vice President, Ministers and Assistant Ministers, the Attorney General, chairmen and members of the services commissions.

In his capacity as Head of State, he was entitled to address either House of Parliament or both of them sitting jointly.<sup>417</sup> As a member of the House of Representatives and Head of the Cabinet, he could participate in the deliberations of that House and could, indeed, vote on any motion or matter therein.<sup>418</sup> Save for voting, as Head of the Cabinet he could attend and take part in the proceedings of the Senate.<sup>419</sup> More importantly, he could summon, prorogue or dissolve the National Assembly, powers that were previously vested in the Governor General.

The First Amendment also removed all except specially entrenched powers from the Regional Assemblies by amending the First Schedule to the Independence Constitution that defined the legislative and executive powers of the regions. Most of all non-entrenched provisions, particularly the Second Schedule which dealt with matters of concurrent jurisdiction between the central and regional governments over agricultural, veterinary and educational matters were deleted. The entire financial arrangements between the central and regional governments, particularly the taxation powers of the latter were similarly revised, as were independent revenue provisions.<sup>420</sup>

In general, as Professor Muigai concludes, the First Amendment “... *was intended to achieve and did achieve a significant configuration of the power map in Kenya. In this sense, it was a major victory for the government of the day. It provided KANU with the model of government it had failed to extract from the negotiating table at the Lancaster House. The political impact of the changes was enormous.*”<sup>421</sup> Franceschi and Lumumba claim that it ‘gave birth’ to the Imperial Presidency in Kenya, “... *resulting into a complete centralization of power and authority.*”<sup>422</sup>

## **The Collapse of Independence Constitution**

Hardly one month before the First Amendment entered into force, on 10 November 1964 it was declared in Parliament that KADU had been dissolved both as a political party as well as the Official Opposition in Parliament. All of its office bearers in the National Assembly and at all levels of regional and local government joined KANU *en masse*. In his doctoral thesis, Professor Muigai had observed that the death of KADU – that had been

417 Ibid., the new art. 33C(a)

418 Ibid., art. 33C(b)

419 Ibid., art. 33C(c)

420 Muigai, *Constitutional Amendments and the Amendment Process...*, op. cit., p. 113

421 Loc. cit.

422 Franceschi and Lumumba, *The Constitution of Kenya...*, op. cit., p. 34

on the cards since independence a year earlier – gave rise to a significant theme in Kenya’s post-independence politics: “*politics as a zero-sum game with the winner taking it all.*”<sup>423</sup>

Eighteen years later, this finding would be supported by Senator Anyang’ Nyong’o, the erstwhile political science professor: “*The experience with the winner-take-all presidential system has not really been fair or good to Kenyans.*”<sup>424</sup> As we have witnessed, over half a century later the BBI Report would highlight this fact as one of the major shortcomings of the Kenyan political and constitutional culture of the post-independence era.

The demise of KADU also had serious constitutional and political ramifications. For it made the stringent requirements for constitutional amendments academic. The complex procedures for amendments, with especially high majorities required for the amendment of the specially entrenched provisions had been based on the implicit assumption that there would always be an official opposition in parliament.<sup>425</sup> In one fell swoop that intricate structure collapsed like a house of cards.

Writing eight years earlier in 1993, Muigai had captured this phenomenon in the following terms:

*“The constitution assumed that there was, ought to be and would continue to be an opposition party in parliament, which would be consulted in respect of important legislation.... The constitution suffered from glaring omissions and major inadequacies which reveal that the last thing on the minds of the drafters was how to safeguard competitive politics and a multiparty democracy. The whole question of who constituted the opposition and how it was to function in parliament was not deemed a matter of constitutional significance, despite the constitutional assumption of the importance of the opposition in the process. These delicate issues were ... relegated to the imprecise Standing Orders of the national assembly.”*<sup>426</sup>

Within a few weeks of KADU’s dissolution and taking full advantage of it, the Kenya Parliament passed the *Constitution of Kenya (Amendment)(No. 2) Act, 1964*.<sup>427</sup> As its preamble declared, the intent of this quickfire amendment was “... to amend certain specially entrenched provisions of the Constitution....” It achieved this end by vesting the President with the power to appoint the Chief Justice without consulting the regional governments, a key requirement of the Independence Constitution insofar as the Judiciary was concerned.<sup>428</sup>

423 Muigai, *Constitutional Amendments and Amendment Process...*, op. cit., p. 115

424 Anyang’ Nyong’o, *Presidential or Parliamentary Democracy?...*, op. cit., p. 117

425 Ibid., pp. 232-233

426 G. Muigai, ‘Legal and Constitutional Reforms to Facilitate Multi-Party Democracy: The Case of Kenya’, in Oloka-Onyango et al., *Law and the Struggle for Democracy...*, op. cit., pp. 529-530

427 Act No. 38 of 1964. The Act was passed on 1 December 1964, assented to on 11 December and came into force on 12 December 1964, the same day as the First Amendment.

428 Franceschi and Lumumba, *The Constitution of Kenya...*, op. cit., pp. 34-35



The amendment also empowered the President to make judicial appointments without consulting the Judicial Service Commission and to initiate disciplinary proceedings against judges for the purpose of their removal from office. Furthermore, the amendment removed from the regional governments the power to alter regional boundaries and vested it to Parliament. In addition, it repealed all provisions for independent revenue collection by regional governments, making them totally dependent on the central government for grants.<sup>429</sup> As Muigai has argued in his doctoral thesis, the Second Amendment “*confirmed the government’s commitment to destroying the significance of the regions in the political life of the country and to centralization of power in the presidency.*”<sup>430</sup>

By the time the *Constitution of Kenya (Amendment) Act, 1965*,<sup>431</sup> was enacted in early 1965, the stage had been set for the complete abolition of the majimbo system negotiated at Lancaster House II. Franceschi and Lumumba argue that by this amendment, KANU “‘*quenched its fears’ (sic!) by abolishing ‘majimboism’ in total.*”<sup>432</sup> They add: “*This amendment completely did away with the regional structure and replaced these structures with Provinces and Councils.*”<sup>433</sup> By this time, however, regionalism was effectively dead, leading Professor Muigai to describe the amendment as ‘killing a fly with a sledgehammer.’<sup>434</sup>

But provincial councils lasted for only two years. By virtue of the Ninth Amendment,<sup>435</sup> the last vestiges of regionalism were removed. The provincial councils were eliminated; past laws enacted by regional assemblies repealed and all references to the provincial and district boundaries and their alteration deleted from the Constitution. This Amendment, according to Franceschi and Lumumba, “‘... *altered the Independence Constitution, as (regionalism) ... had been the Constitution’s fundamental part.*”<sup>436</sup> By this act, Muigai argues in his doctoral thesis, “*KANU finally had the unitary state that it had always wanted.*”<sup>437</sup>

The Third Amendment also altered the stringent amendment procedures introduced by the Independence Constitution, reducing the special majorities required to amend the entrenched provisions from 75 percent in the House of Representatives and 90 percent in the Senate to sixty-five percent. Ironically, the Government saw these amendments as safeguards against foolhardy amendments. According to Attorney General Charles Mugane Njonjo, the requirement for two thirds support in the National Assembly for a constitutional amendment was “‘... *a sufficient safeguard against ill-considered amendments.*”<sup>438</sup> But, as Muigai has observed, “*abolishing all the entrenched clauses changed the character of the Constitution radically. All parts of the Constitution were to be treated as equal and*

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429 Ibid., p. 35

430 Muigai, *Constitutional Amendments and the Amendment Process...*, op. cit., p. 117

431 Act No. 14 of 1965.

432 Franceschi and Lumumba, *The Constitution of Kenya...*, op. cit., p. 35

433 Loc. cit.

434 Muigai, *Constitutional Amendments and the Amendment Process...*, op. cit., p. 118

435 *Constitution of Kenya (Amendment) Act, 1968, Act No. 16 of 1968*

436 Franceschi and Lumumba, *The Constitution of Kenya...*, op. cit., p. 38

437 Muigai, *Constitutional Amendments and the Amendment Process...*, op. cit., p. 133

438 Franceschi and Lumumba, *The Constitution of Kenya...*, op. cit., p. 35. See also Muigai, *ibid.*, p. 120

were to be subject to the same amendment procedure.”<sup>439</sup> The effect was to render the notion of specially entrenched provisions wholly meaningless.

Similarly amended was the special majorities required for the parliamentary authorisation of declaration of a state of emergency. Whereas the Independence Constitution had strictly circumscribed the exercise of emergency powers by requiring parliamentary authorisation supported by two thirds majority of all members of the National Assembly within seven days of the imposition of emergency, the Third Amendment changed the support required to simple majority and extended the time for obtaining the authorisation from seven to twenty one days.

In addition, the amount of time within which the emergency could last was extended from two to three months.<sup>440</sup> The parliamentary control of emergency powers was removed altogether by the Sixth Amendment,<sup>441</sup> which allowed the President to rule by decree for the period of one month extended by the Third Amendment. In his 1970 doctoral dissertation, Hakes states the following regarding the effect of these amendments on parliamentary control of emergency powers: “*Since Kenya was under a constant state of emergency dating from before independence, these changes represented an important contraction in the power of the parliament to control the government.*”<sup>442</sup>

### Emasculating Parliament

The rise of the Imperial Presidency went hand in hand with the emasculating of the legislative and oversight powers of the National Assembly. The weapons of choice in this war against the parliament were constitutional amendment and the vastly augmented emergency powers of the President. Starting with the Fourth Amendment<sup>443</sup> passed in 1966, a Member of Parliament missing eight consecutive sittings without the speaker’s permission, or who was imprisoned for a term exceeding six months could now lose his parliamentary seat. However, the President could pardon the member concerned in his sole discretion. Muigai has argued that the real reason for this amendment was to give the President more control over parliamentarians and therefore Parliament itself, as these matters could be easily dealt with by the Parliamentary party concerned or by ordinary legislation.<sup>444</sup>

The Fifth Amendment had the most dramatic consequences on the rights of Members of Parliament. The dissolution of KADU and the rise of a *de facto* one-party State in November 1964, had given a semblance of unity within KANU which paved the way for the passage of the first four constitutional amendments. It had however exacerbated the tensions between the right and left wings of KANU that had been simmering since its creation in 1960.

439 Muigai, *ibid.*, p. 120

440 *Ibid.*, p. 121

441 *Constitution of Kenya (Amendment) Act, 1966, Act No. 18 of 1966*

442 Hakes, *The Parliamentary Party...*, op. cit., p. 26

443 *Constitution of Kenya (Amendment) Act, 1966, Act No. 16 of 1966*

444 Muigai, *Constitutional Amendments and the Amendment Process...*, op. cit., p. 123

These tensions boiled over at the Limuru Conference of 12 and 13 March 1966, which was called ostensibly to reorganise the party, but in reality it was called to deal with the ‘radicals’ within the party led by Vice President Oginga Odinga. At the Conference, while Mzee Kenyatta was re-elected the party President, Odinga was not re-elected its Vice President nor were any of his supporters elected to positions of influence within the party.<sup>445</sup> The day after the Conference a number of KANU parliamentarians resigned from KANU and declared that they would form their own political party. One month later, on 14 April 1966, Oginga Odinga and more MPs together with numerous trade unionists followed suit.

As a result of these defections from KANU, Kenya People’s Union (KPU) was born a few days later. Jaramogi Oginga Odinga became its President. The retribution came in swiftly. On 25 April 1966, the KANU Parliamentary Group decided to recall Parliament for the purpose of passing a constitutional amendment to deal with these ‘dissidents.’ The following day, President Kenyatta informed the MPs that they were required to meet in a special session to pass a constitutional amendment requiring the defectors from KANU to seek a fresh mandate from their electors in a by-election.

On 27 April 1966 the Speakers of both the House of Representatives and the Senate announced that the National Assembly would meet on 28 April at the government’s request. On the same day two bills on the same subject of amendment of the Constitution were published in clear violation of the Constitution. It did not matter. For, on 28 April 1966, the *Constitution of Kenya (Amendment)(No. 2) Act*<sup>446</sup> was passed by the National Assembly. It was assented to by the President two days later on 30<sup>th</sup> April and became operative the same day.

The Fifth Amendment was a very brief piece of legislation, containing only three sections. Section 3, its sole substantive provision, amended section 42 of the Constitution by introducing a new section 42A which declared: *“A member of either House of the National Assembly who, having at his election stood with the support of or as a supporter of a political party, either ... resigns from that party at a time when that party is a parliamentary party; or ... having after the dissolution of that party been a member of another parliamentary party, resigns from that other party at a time when that other party is a parliamentary party, shall vacate his seat in that House at the expiration of the session then in being or if Parliament is not session then at the expiration of the session next following, unless in the meantime that party of which he was last a member has ceased to exist as a parliamentary party or he has resigned his seat....”*

The Fifth Amendment was introduced in parliament and went through its three stages of tabling, debate and passage all in one day. The Parliamentary Standing Orders had to be jettisoned for this to happen. Such was the hurry to rush it through parliament that its drafters forgot to add a provision making its operation retrospective. This ‘forgetfulness’ was clarified by the Eighth Amendment passed on 29 March 1967 *“for the removal of doubt*

445 Hakes, *The Parliamentary Party...*, op. cit., pp. 52-55

446 Act No. 17 of 1966

as to the interpretation” of the Fifth Amendment.<sup>447</sup> With passage of the latter, according to Muigai, “*the era of instant constitutional amendments had begun. Legal niceties no longer stood in the way.*”<sup>448</sup> Franceschi and Lumumba describe the enactment of the Fifth Amendment as setting the stage “*for the abuse of the process of law-making.*”<sup>449</sup>

In the by-elections that soon followed the passage of the Fifth Amendment, the newly formed KPU polled some 73,000 votes to KANU’s 36,000 votes, a majority of more than two to one. Yet, the by-elections returned 21 KANU members of the House of Representatives and eight senators, while KPU obtained seven representatives and two senators. As Muigai observes with a note of sadness, “*an electoral minority nonetheless produced a parliamentary majority*”<sup>450</sup> Nevertheless, the rise of KPU, though not depleting KANU’s numerical strength, “*...reinforce(d) the swing within (it) away from the relatively militant, issue-oriented party elected in 1963.*”<sup>451</sup>

A slew of other constitutional amendments followed the passage of the Fifth Amendment which significantly impacted on parliament. The Sixth Amendment which removed parliamentary oversight of emergency powers, for instance, was immediately followed by the detention without trial of dozens of trade unionists and political activists who had joined KPU. As Franceschi and Lumumba note, “*this amendment became a political weapon meant to silence political opposition.*”<sup>452</sup> The Sixth Amendment was soon followed by the Seventh Amendment<sup>453</sup> which abolished the Senate, the sole remaining holdover from the Lancaster House agreements. Conceived as a parliamentary bulwark for the protection of ethnic minorities, the Senate was gone in a flash.

The Seventh Amendment was perhaps the most blatantly undemocratic piece of legislation. It created 41 new constituencies and assigned them, without election, to the senators who would otherwise have lost their parliamentary positions due to the Amendment. This clearly undermined the country’s Constitution and electoral laws. The Amendment also extended the life of the now single chamber National Assembly by two years, from 1968 to 1970. This, too, was in blatant violation of the Constitution and the electoral laws.<sup>454</sup>

The government sought to justify these blatantly undemocratic acts by arguing that new elections would not have made any difference to the KANU government then in power. Attorney General Charles Mugane Njonjo:

*“With so much done, Mr. Speaker, we have no time for elections for the sake of elections. The purpose of democratic institutions is to ensure that the people choose their leaders at reasonable intervals of time peacefully*

447 Constitution of Kenya (Amendment) Act, 1967, No. 4 of 1967

448 Muigai, Constitutional Amendments and the Amending Process..., op. cit., p. 128

449 Franceschi and Lumumba, The Constitution of Kenya..., op. cit., p. 36

450 Muigai, Constitutional Amendments and the Amendment Process..., op. cit., p. 128

451 Hakes, The Parliamentary Party..., op. cit., p. 48

452 Franceschi and Lumumba, The Constitution of Kenya..., op. cit., p. 37

453 Constitution of Kenya (Amendment) Act, 1966, Act No. 40 of 1966

454 Muigai, Constitutional Amendments and the Amendment Process..., op. cit., p. 132

*and freely. Sir, we have had quite a few by-elections including the 'little general election' last year. Those by-elections did not indicate that the people wanted a change of government. The 'little General Election' certainly did not indicate that any alternative government is available. Therefore, Mr. Speaker Sir, it is the view of the President and his government that the new National Assembly should be re-elected when the new national assembly and the new constituencies have been in existence for a reasonable time.'"*<sup>455</sup>

The Seventh Amendment was also significant in other important ways. For example, by abolishing the Senate, Kenya reverted to the unicameral parliament of its immediate colonial past. Similarly, by transforming the formerly elected senators into unelected members of the National Assembly, Kenya harkened back to its colonial past of Legislative Councils packed with the Governor's appointees.

Other amendments which affected the parliament were the Tenth Amendment,<sup>456</sup> which abolished the right of independent candidates to contest elections. Henceforth, every candidate for elective office would have to be nominated and sponsored by a political party. This, according to Muigai, "... elevated the ruling political party to a position of constitutional significance."<sup>457</sup> The Tenth Amendment also removed the requirement for approval of detention without trial under a state of emergency, thereby giving the President the authority to invoke emergency powers without restraint.<sup>458</sup>

Even more significantly for the Kenyan parliament that did not have appointed members from independence in 1963, the Tenth Amendment replaced the twelve specially elected members with twelve members appointed by the President at his sole discretion. Muigai argues that this change was "*obviously intended to give the President extra power to pack the House with his own appointees to counter-balance any dissidents or free thinkers elected by the public.*"<sup>459</sup>

Reviewing this period, Professor Muigai has argued that compared to the period 1964 to 1969, the 1970s were a period of relative political and constitutional calm in Kenya. During that period there were only six constitutional amendments, four of which were made by the Kenyatta Government. Thus, during the Kenyatta reign, between 1964 and 1977, the Constitution was amended sixteen times. Some amendments were fundamental while others were minor. Cumulatively, however, the amendments altered the content, structure and philosophy of the Independence Constitution.<sup>460</sup>

Moreover, the amendments fundamentally re-designed the structure of the post-colonial state and the entire basis of governance. Power and authority were centralised in the all-powerful executive that was nominally accountable to Parliament and not

455 Ibid., pp. 131-132

456 *Constitution of Kenya (Amendment) Act, 1968, Act No. 16 of 1968*

457 Muigai, *Constitutional Amendments and the Amendment Process...*, op. cit., p. 135

458 Ibid., p. 134

459 Loc. cit.

460 Ibid., p. 146

accountable to the Judiciary. The arena of independent political activity outside the ruling party was severely circumscribed.<sup>461</sup>

These constitutional amendments achieved two things. First, they completely destroyed *Majimboism* or regionalism and created a strong unitary state. Second,

*“they distorted the balance of power between the three arms of government by creating an all-powerful executive presidency to which the legislature and the judiciary were subservient.... Parliament dwindled in significance, becoming merely a rubber stamp for executive orders and decisions. The executive determined its calendar and agenda so much so that the president could prorogue or dissolve parliament at any time at his discretion.”*<sup>462</sup>

### Enter the One-Party State

Kenya had already been a *de facto* one-party state from the time of KADU’s dissolution in November 1964 to April 1966 when KPU was formed. But KPU was doomed to fail from the very beginning. It was not allowed to open party branches or to organise public meetings. Civil servants and political operatives faced severe pressure and terrible consequences if they joined KPU. Party leaders and MPs were harassed with detention without trial, arrests and prosecution on trumped up charges.

When Tom Mboya, Oginga Odinga’s political nemesis from his days in KANU and potential successor to Mzee Kenyatta, was assassinated in a Nairobi street in July 1969 and rioting broke out in various parts of Nairobi and in the Luo heartland city of Kisumu (Mboya was an ethnic Luo), the Kenyatta Government found the pretext to ban KPU and detain its leaders and MPs under the greatly enhanced emergency powers. Thereafter, Kenya reverted to its status as a *de facto* one-party state. However, the Government did not amend the Constitution to make the country a *de jure* one-party State.

Nonetheless, the assassination of Tom Mboya and the banning of KPU completed the break-up of the Kikuyu-Luo ethnic alliance that had largely defined the post-independence politics of Kenya. Thus, as Professor Muigai puts it in his doctoral thesis,

*“the more Kenyatta felt politically isolated the more he retreated into the cocoon of ethnicity to the extent of encouraging the formation of the Gikuyu, Embu and Meru Association (GEMA) as a coalition of the communities closest to the Kikuyu ... who had participated in the Mau Mau. GEMA aspired to be an alternative vehicle for political mobilisation since KANU had more or less lost all semblance of being a political party.”*<sup>463</sup>

461 Ibid., p. 147

462 Loc. cit.

463 Ibid., p. 145

### Moi's '*Fuata Nyayo*':<sup>464</sup> In Kenyatta's Footsteps

On 22 August 1978, Mzee Jomo Kenyatta died and was replaced by his Vice President, Daniel arap Moi. The Kenyatta succession politics had been intense and acrimonious, with numerous threats to amend the Constitution to deny Moi the chance to be president. From the outset, Moi was therefore confronted with serious problems of legitimacy which would set the tone for some of the constitutional amendments that followed.<sup>465</sup>

To his advantage, however, by the time he ascended the presidential throne in 1978, "*the ground*", according to Dr Wanjala, "*had been laid for the erection of an absolute dictatorship.*"<sup>466</sup> Moi forcibly disbanded the Gikuyu, Embu and Meru Association (GEMA)<sup>467</sup> and the tribalised system built by the Kenyatta regime with the intent of destroying the Gikuyu economic might, which he saw as a threat to his consolidation of power. He then embarked upon an aggressive programme to resuscitate the ruling party which he would use in the future to consolidate his power.<sup>468</sup> This programme to rebuild KANU would lead to the Nineteenth Amendment to the Constitution of Kenya.

The first serious indication that the state was back to form was the outlaw of all political opposition brought about by the Nineteenth Amendment. Like the banning of KPU in 1969, this was proof that KANU could not countenance opposition, not for the sake of peace and stability as professed, but for the real fear that its political survival would be jeopardised. Soon after followed the attempted coup in 1982 and then a period of extreme political instability. The attempted coup provided the government with an excuse to crack down on every known or suspected freethinker and hundreds were jailed on sedition and other political charges.<sup>469</sup> But what prompted this calamitous decision?

On 20 May 1982, the ubiquitous Oginga Odinga, George Anyona<sup>470</sup> and other dissidents called a press conference in Nairobi, to declare their intention to form an

464 Literally 'follow the footsteps.' After his ascension to power following Mzee Kenyatta's death in 1978, President Daniel arap Moi pledged that he would follow in the political footsteps of the former. In subsequent years '*fuata nyayo*' became President Moi's mantra, which was repeated in every major meeting or public occasion. It also appeared in major urban landmarks such as '*Nyayo Stadium*', a major sports complex in Nairobi, and '*Nyayo House*', a skyscraper also in Nairobi that houses several government departments and which was used as a torture chamber for political dissidents opposed to President Moi in the 1980s.

465 *Ibid.*, p. 149

466 Wanjala, *Presidentialism, Ethnicity, Militarism and Democracy*..., op. cit., p. 91

467 GEMA was an organisation in Kenya which was created in 1971 presumably to advance the social and political interests of the Gikuyu and their smaller ethnic cousins the Embu and the Meru. It was registered on the instructions of the President Mzee Jomo Kenyatta and became one of the most powerful informal power bases of President Kenyatta. In the acrimonious struggles of the Kenyatta succession politics of the 1970s, some members of GEMA close to Kenyatta were charged with treason by the Attorney General Njonjo, an order that was soon countermanded by Kenyatta himself. Following Kenyatta's death and Moi's ascension to the presidency, GEMA was formally banned in 1981.

468 *Loc. cit.*

469 *Ibid.*, p. 171

470 George Anyona (1945 – 4 November 2003) was one of the most fearless and principled leaders of Kenya's post-colonial period. Elected to parliament during the worst periods of repression under both Kenyatta and Moi, Anyona was repeatedly arrested, detained without trial or imprisoned for his opposition to autocratic policies of the two Kenyan presidents. He is rightly considered as one of the fathers of the modern democracy movement in Kenya. He died in a car crash in Nairobi on 4 November 2003.

opposition political party by the name of Kenya Socialist Alliance (KASA). Speaking for the group, Anyona told the press the following according to *The Standard* of 21 May 1982:

*“... The true position is that the formation of a political party in Kenya is a constitutional right.... As far as the Constitution of Kenya is concerned, and there is nothing outside the Constitution, the situation has not changed from what it has always been since Lancaster House in 1960. This means that, according to the Constitution, Kenya is a de jure multi-party state.... They cannot have it both ways. They must therefore be told or reminded, in case they have forgotten, that the system which they support, believe in and practice is multi-party democracy.”*<sup>471</sup>

This declaration sent the political establishment into a panic. Shortly afterwards, Oginga Odinga was expelled from KANU and George Anyona was detained without trial. Then on 8 June 1982, the KANU Governing Council directed the Attorney General to forestall Odinga’s and Anyona’s attempt by preparing a constitutional amendment making Kenya a one-party state.<sup>472</sup> The next day, Vice President Mwai Kibaki – later Moi’s successor as President – successfully moved a motion in Parliament seeking to reduce the time of publication of the amendment bill he had just tabled from 14 to six days. Kibaki explained the rush to table and debate the bill by saying that the proposed amendment stood in the way of more important matters such as the passage of the supplementary budget.

On 15 June 1982, the Bill for the *Constitution of Kenya (Amendment) Act*<sup>473</sup> was passed by the National Assembly. Two days later on 17 June, the Act was assented to by President Moi and it came into force a week later, on 25 June 1982. It would be the most controversial constitutional amendment of Moi’s long reign as the President of Kenya. It introduced a new section 2A to the Constitution which declared very simply that: *“There shall be in Kenya only one political party, the Kenya African National Union.”* Its new section 5(3)(a) provided for only one presidential candidate in future presidential elections *“... who shall be a member of the Kenya African National Union and shall be nominated by that party....”* Similar provisions were made in respect of parliamentary candidates.<sup>474</sup>

According to Professor Muigai, the former Attorney General, the Nineteenth Amendment had two immediate consequences. Firstly, it outlawed all opposition and gave the ruling party KANU a monopoly of political power in the country. From now on, *“... one could not pursue elected office unless he was a member of the ruling party and had received its nomination.”* Conversely, *“... one ceased to hold elected political office if he was suspended or expelled from the ruling party.”*<sup>475</sup> Secondly, the Amendment raised KANU, hitherto merely a political party registered as a ‘society’ under the *Societies Act*, to

471 Quoted in Muigai, *Constitutional Amendments and the Amendment Process...*, op. cit., pp. 151-152

472 See *The Daily Nation* of 9 June 1982. See also Constitution of Kenya Review Commission, **The Final Report of the Constitution of Kenya Review Commission: Final Draft**, Nairobi, 10 February 2005, p. 30

473 *Act No. 7 of 1982*

474 *Ibid.*, s. 5 which introduced a new section 34(d)

475 Muigai, *Constitutional Amendments and the Amendment Process...*, op. cit., p. 151



what Msekwa, the former Speaker of Tanzania Parliament, described as a ‘constitutional category.’<sup>476</sup>

The establishment of a *de jure* one-party state capped a process begun by Mzee Jomo Kenyatta and his KANU party since the earliest days of independence to create a centralised authoritarian state. This is because by the time of the Nineteenth Amendment, Parliament had all but been emasculated by the effect of the previous amendments.

*“Parliament had become completely subdued by a bloated executive and had settled to the role of a rubber stamp of party and executive decisions.”*<sup>477</sup>

Ironically, Oginga Odinga who had been the leading exponent of the one-party system even before independence,<sup>478</sup> became its main victim when his vision was finally realised, informally by Mzee Kenyatta in 1969, and officially by Moi in 1982. Equally ironically, Moi – whose KADU was formed partly to resist KANU’s anti-democratic tendencies – became the person who hammered the last nail into the coffin of multi-party democracy in Kenya. As Professors Ghai and Cottrell observe, *“Kenyatta managed to destroy all political parties except KANU, and Moi changed the Constitution to make a de jure one party state.”*<sup>479</sup>

Dr Kamau Kuria, the human rights lawyer and another prominent victim of the Moi autocracy, has described the effect on democracy of the two periods thus:

*“Multipartyism or constitutional government was abolished in two stages. Between 1964 and June 1982, it was attacked by stealth through constitutional amendment and extra-legal force which weakened democracy. In June 1982, it was abolished by the enactment of section 2A of the constitution which made Kenya a de jure one party state. Whilst the government before August 1978 merely weakened democracy, after 1978 it set out to abolish it altogether.”*<sup>480</sup>

With this emasculation of democracy, KANU

*“... became an arena for political charlatans and dilettantes and the electoral process was rendered completely meaningless through the ‘queue voting’ system, which facilitated massive state-sponsored rigging.... Private and public dissent or criticism was ruthlessly suppressed by detentions and trumped up criminal charges. The police force became an instrument of terror at the beck and call of the government to silence public opinion.”*<sup>481</sup>

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476 Loc. cit.

477 Ibid., p. 153

478 See Maxon, op. cit., p. 34

479 Ghai and Cottrell, *Constitutional Transitions and Territorial Cleavages...*, op. cit., p. 5

480 Kamau Kuria, *Returning Kenya to its Original Values...*, op. cit., p. 355

481 Wanjala, *Presidentialism, Ethnicity, Militarism and Democracy...*, op. cit., p. 92

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Professor Muigai has argued in his doctoral thesis that the Independence Constitution “... *had been based on the fundamental assumption that by transplanting certain basic constitutional values and institutions, it would be possible to secure the practice of constitutionalism in Kenya. This was to prove very difficult in practice.*”<sup>482</sup> The learned professor is unduly harsh. The actual history of the Independent Constitution reviewed here shows the following. One, that it came out of the democratic demands, not of aliens from Europe or Asia, but of minority African communities fearful of being economically dominated and politically marginalised by the bigger and more powerful Kikuyu and Luo ethnic groups.

Two, because it was democratic and it was intended to build constitutionalist checks and balances on the exercise of political power, the Independence Constitution was not allowed to survive and thrive. It was, instead, killed at birth. It did not fail, rather it was not allowed to succeed. Three, all the fears of the protagonists of the Independence Constitution, that a centralised state would lead to loss of tribal lands, economic domination, political marginalisation and dictatorial rule have been fully vindicated by nearly half century of post-independence history of ethnic kleptocracy and political tyranny.

Four, the enactment of the new Constitution, after 46 years of Imperial Presidency and authoritarian rule, is a living proof not only of the resilience of the ideals and values of the Independence Constitution, but also of its deep roots in Kenyan constitutional and political soil. Looked at from this perspective, the new Constitution is a clear vindication and ideological triumph of the politics advocated by P.J.H. Okondo, the intellectual progenitor of *Majimboism*, and the other KADU founders and a repudiation of the triumvirate of Jomo Kenyatta, Oginga Odinga and Tom Mboya and their authoritarian visions.

By Moi becoming President, the character of KANU changed forever. Initially the augurs were good as Moi released dozens of detainees from prison and clamped down on the excesses of the Kenyatta regime. By 1982 it was quite clear, however, that the tremendous goodwill that the majority of Kenyans manifested towards KANU as a party and Moi as President was waning. The government nonetheless did nothing to improve its governance. Moi had literally stepped into Kenyatta’s shoes as a paramount chief to whom homage was to be paid by all and the imperial presidency to which all laws and institutions were subordinate.<sup>483</sup>

Between 1982 and 1989 the imperial presidency reached its apogee. Every conceivable autonomous centre of democratic expression was either co-opted into KANU or the wider system or banned altogether. From university staff associations to trade unions none was spared. The presidency assumed even greater significance than ever before. The ideology of order was elevated to the level of a creed. The president by way of directives began to run virtually every single aspect of national life from where children should learn new or old maths to whether trucks hauling goods would run during the day or during

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482 Muigai, *Constitutional Amendments and the Amendment Process...*, op. cit., p. 146

483 *Ibid.*, p. 170

the night. Increasingly the contention that the president was above the law was heard and believed.<sup>484</sup>

Paul Muite, the future President of the Law Society of Kenya and prominent opposition activist and legislator when democracy returned in 1992, said the following about the Moi presidency in an interview with the *Finance* magazine of 16 to 31 October 1991:

*“During Moi’s presidency the office (of the President) has been expanded and extended far beyond anything either the Founding Fathers, or the original 1963 Constitution, would have envisaged. Today, the Presidency looms above everything else, having assumed power and control over all other branches of government”.*

*“The office of the president is a monolithic system, a government within a government that overshadows virtually all. It controls the entire civil service, the provincial administration, the public corporations, the police, the armed forces, the National Youth Service, the Immigration, all appointments to boards and senior positions in all public institutions, elections, (you) name it”.*

*“As the situation pertains today, positions in the public service which were previously tenured under an independent Public Service Commission are held at the pleasure of the President. Hiring and firing of civil servants have become exercises in loyalty contests. The traditional insulation of the public service, which was intended to ensure an independent, efficient and disciplined institution, has been subverted into an extension of executive authority – a highly partisan system serving the political interests of the President.”<sup>485</sup>*

The need to build a more efficient patron-client machine would appear to have caused the one major blunder that was later to generate an intense momentum for change. 1988 was an election year. Consequently, KANU enacted rules for the nomination of parliamentary candidates which provided for queue voting<sup>486</sup> during the nomination process. The rules provided that a candidate receiving 70 percent of the queue votes from KANU members would be deemed to have been elected as Member of Parliament.

The rules were clearly unconstitutional as they disenfranchised millions of Kenyans who were not KANU members. They were implemented all the same during the 1988 general elections. As even the government was to later admit openly, the 1988 elections were widely rigged and interfered with by government operatives to ensure favoured candidates were returned. Professor Muigai says the following of the parliament that ensued from these elections:

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484 Loc. cit.

485 Ibid., pp. 155-156

486 Under this system, voters who preferred a particular candidate would queue behind the photograph of that candidate at the polling station. The candidate with the most people queuing behind his picture was thus declared the winner.

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*“The Sixth Parliament was, not surprisingly, an assortment of politicians whose only thought was how to remain in parliament and to appease whoever had rigged them into office. No other group could have been more opportunistic and sycophantic than this lot of people. Increasingly what was left of parliamentary dignity was eroded. Parliament became in a real sense a rubber stamp, which spent all its time denouncing dissidents, understood as any critic of the government. Little wonder that the abuse of constitutional process at this time assumed an entirely new zeal.”<sup>487</sup>*

## Chapter Four: Democracy Makes a Come-Back

The decade of the 1980s was when democratic institutions failed, respect for human rights disappeared and a culture of political tolerance subverted. The arena of political participation disappeared as the state became more authoritarian and politically menacing. The imperial presidency as the fountain of all power and authority had become so overwhelming that for a time, all other institutions were cowed into subservience. Yet this state of affairs could not be sustained for long. The intensification of domestic opposition and international pressure by, particularly Western countries now freed by the end of the Cold War, led to the Twenty-Seventh Amendment and a return to multi-party democracy.

In December of 1991, the National Assembly passed two constitutional amendments in quick succession. *The Constitution of Kenya (Amendment) Act, 1991*,<sup>488</sup> and the *Constitution of Kenya (Amendment)(No. 2), 1991*,<sup>489</sup> were a day apart but they were given presidential assent on the same day, 17 December, and entered into force on the same day 20 December 1991. Both were very brief. The latter, the Twenty-Seventh Amendment, was, however, the most significant. Its section 2 declared simply: “*The Constitution is amended by repealing section 2A.*”

The Amendment also removed the restrictions imposed by the Nineteenth Amendment on presidential and parliamentary candidates from other political parties contesting elections. However, to stem the feared tide of defections of the MPs from KANU to join the newly formed opposition parties, it reintroduced the provisions of the Fifth Amendment of 1966, which had prohibited the practice of crossing the floor by making it a ground for an automatic loss of a parliamentary seat.

Professor Muigai has called the Twenty-Seventh Amendment “... a major watershed in the country’s ... swing to back to the dictates of constitutionalism and the rule of law.”<sup>490</sup> Franceschi and Lumumba have described it as “... the most significant amendment in Kenya’s democratic history.”<sup>491</sup> The high praise is deserved, for the Amendment restored multi-party democracy that had been abolished by the violence of Mzee Kenyatta’s emergency powers in 1969, and by Moi’s constitutional fiat in 1982.

The Twenty-Seventh Amendment sounded the death knell of the Imperial Presidency in Kenya. The ruling party since independence in 1963, KANU’s stranglehold on political power began to slip. Thus, for example, in the first two multiparty elections after reintroduction of multiparty politics, President Moi won the presidential elections even though he had a minority of the total presidential vote.<sup>492</sup> In between these two elections, the Constitution was amended in 1997 to further consolidate the democratic gains made through the Twenty-Seventh Amendment. Thus, *the Constitution of Kenya*

488 *Act No. 10 of 1991*

489 *Act No. 12 of 1991*

490 Muigai, *Constitutional Amendments and the Amendment Process...*, op. cit., p. 167

491 Franceschi and Lumumba, *The Constitution of Kenya...*, op. cit., p. 42

492 Anyang’ Nyong’o, *Presidential or Parliamentary Democracy...*, op. cit., pp. 22-24

(Amendment) Act, 1997,<sup>493</sup> removed the power of the president to appoint a certain number of members of the National Assembly. That power was now vested in the Parliamentary parties in proportion to their performance in the previous parliamentary election.

### Towards a New Constitution

But by far the most important development to come out of the reintroduction of multi-party politics was the commencement of the process towards the making of the new Constitution. The Twenty-Eighth Amendment, brought about by the parliamentary parties to undercut the popular process that was gathering pace outside the official channels, was the first outcome of that process. Parliament enacted the *Constitution of Kenya Review Act, 1998*,<sup>494</sup> to create a legal framework for the making of a new Constitution. This was the first CKRA and it provided for the appointment by the President of a commission that will collect people's views, prepare a report and draft a bill for the new Constitution to be submitted to Parliament for enactment.

However, popular demands for a new constitution continued unabated, with civil society organisations and religious institutions supporting what was known as the 'Ufungamano (Solidarity) Initiative.' This initiative established what was called the People's Commission of Kenya (PCK) which was chaired by the lawyer Dr Oki Ooko Ombaka and consisted of nineteen other members drawn from a cross-section of the Kenyan civil society.

Meanwhile the government and Parliamentary parties started a separate process under the Parliamentary Select Committee (PSC). This latter process produced the first amendment to the first CKRA in 2000.<sup>495</sup> On the basis of this amendment, on 10 November 2000, President Moi appointed a fifteen-member Constitution of Kenya Review Commission (CKRC), chaired by Professor Yash Pal Ghai, a widely respected legal scholar. The Attorney General S. Amos Wako and Arthur Owiro, the Commission's Secretary, were *ex officio* members.

The existence of the two processes side by side was clear evidence of "*a serious fracture in the political landscape. The Commission was perceived as an instrument of the ruling political party and the Ufungamano Initiative as that of those in opposition to it.*"<sup>496</sup> Consequently, Professor Ghai embarked on a personal initiative to broker an agreement to merge the two processes and create a unified process. Professor Ghai's high standing<sup>497</sup> among the wide cross-section of the Kenyan stakeholders resulted in an agreement to bring the PCK and the CKRC processes together in a revamped CKRC in December 2000.

493 *Act No. 4 of 1997*

494 *Act No. of 1998*

495 *Constitution of Kenya (Amendment) Act, 2000, Act No. of 2000.*

496 See CKRC, **The Final Report of the Constitution of Kenya Review Commission: Final Draft**, 10 February 2005, p. 5

497 As part of his distinguished resume, Professor Ghai served as the first East African Dean of the Faculty of Law of the University of East Africa, Dar es Salaam, in the late 1960s. He has also written extensively on the problems of law, politics and state in Africa and elsewhere in the developing world.

The merger between the PCK and the CKRC processes was codified in May 2001 with the enactment of the second amendment to the CKRA.<sup>498</sup> As result, ten members of the PCK and two nominees of the Parliamentary Select Committee on the Review of the Constitution (PSC) were admitted into the revamped CKRC.<sup>499</sup> The new Commission, now with twenty-seven members, went around the whole country between December 2001 and July 2002 to collate people's views and concerns about the new Constitution. It submitted its Report and draft Constitution, popularly known as the Ghai Draft, on 19 September 2002

The Ghai Draft was intended to be presented to the National Constitutional Conference (NCC), planned for 28 October 2002 at the Bomas of Kenya<sup>500</sup> in Nairobi. However, on 25 October President Moi dissolved the National Assembly and after two days the Electoral and Boundaries Commission (EBC) announced the actual date for the General Elections on 27 December 2002. Since members of the National Assembly were delegates to the NCC, the planned Conference was cancelled until after the election and the convening of the new parliament. The 2002 general elections were historic as, with President Moi constitutionally barred from running as candidate, KANU was finally voted out of office, after being in power for 39 continuous years. Emilio Mwai Kibaki of the new National Rainbow Coalition (NARC) was elected the third President of Kenya.

With the NARC Government in power, the NCC finally took off at the Bomas of Kenya on 28 April 2003. It brought together a total of 629 delegates from a cross-section of Kenyan politics and society.<sup>501</sup> Its composition<sup>502</sup> had been painstakingly negotiated and was stipulated by the CKRA.<sup>503</sup> Although the new CKRC had originally planned for the Conference to be held in one continuous session, it was ultimately held in three sessions over a period of ten months due to a number of intervening factors. The three sessions have gone down in history as Bomas I (held between 28 April and 6 June 2003); Bomas II (17 to 25 August and 6 to 26 September 2003), and Bomas III which was held between 12 January and 23 March 2004.

### **The Bomas Report and Draft Constitution**

In terms of section 27(1)(b) of the new CKRA, on 15 March 2004, the Draft Constitution of Kenya Bill 2004, the so-called Bomas Draft, was adopted by the National Constitution Conference. The adoption of the Draft Constitution set the stage for the

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498 *Constitution of Kenya Review (Amendment) Act, 2001, Act No. 2 of 2001.*

499 CKRC, The Final Report..., op. cit., pp. 3-8

500 The Bomas of Kenya is a cultural and tourist hotspot in Nairobi. Opened in 1971 as part of the Kenya Tourism Development Board, it boasts the largest auditorium in Africa and has hosted some of the major political events in Kenya's modern history.

501 CKRC, The Final Report..., op. cit., p. 377. See also Appendix IV for the list of the delegates Conference, *ibid.*, p. 568

502 The NCC was composed of 29 members of CKRC who were *ex officio* members; all 222 members of the National Assembly; three members from each of the 69 districts and Nairobi, one of whom was a woman and at least one of them was a councillor from the respective county council; one member from each of the registered political parties not being a member of parliament or a councillor; and 126 members representing religious organisations, professional bodies, women's organisations, trade unions and non-governmental organisations.

503 This composition was provided for by section 27(2) of the *Constitution of Kenya Review Act, 1998, Act No. 6 of 1998* as amended by *Act No. 5 of 2000* and *Act No. 2 of 2001.*

NCC to adjourn *sine die* one week later, on 23 March 2004. Thereafter, the Commission was required to submit the Final Report and Draft Constitution Bill for publication and later submission to the National Assembly. This process was, however, stymied by legal challenges against certain aspects of the constitution-making process.<sup>504</sup> To break the impasse, an amendment to the *Constitution of Kenya Review Act* was passed on 2 December 2004.

On 10 February 2005, at its 95<sup>th</sup> Plenary Meeting, the new CKRC approved for release the Final Draft of its *Final Report of the Constitution of Kenya Review Commission*. As expected in a report of this nature, the Final Report was a wide-ranging examination of Kenya's political and constitutional history; and of the fears, hopes and aspirations of the Kenyan people. It was also candid in its diagnosis of the political and constitutional problems of the country since independence.

The Final Report acknowledged that even though the Independence Constitution was never formally repealed and replaced, the effect of repeated amendments of its core provisions was such that a new Constitution was created. With regard to this point, the Commission argued:

*“In its values and orientation, the current Constitution is different from the Independence Constitution, despite legal continuity. The Independence Constitution was the product of intense negotiations among various Kenyan political parties and the British Government. The result was that the Independence Constitution reflected the interests of the different negotiating parties and the manner in which these interests were balanced and harmonized.”*<sup>505</sup>

The CKRC found that, after four decades of presidentialism, the majority of the people of Kenya were no longer in favour of the Imperial Presidency.

*“With regard to the system of government, majority of people recommended that the Constitution should ensure that the organs of government are totally independent of one another; and adopt a parliamentary system of government with a Prime Minister as the Head of Government and a largely ceremonial President be the Head of State. The President would play the role of an ‘Elder of State’ as a symbol of national unity and identity.”*<sup>506</sup>

Equally, after decades of rampant abuse of power by Kenyan Presidents, the people of Kenya were tired of impunity and wanted an end to it. *“With regard to the President, the majority of people asserted that the President should not be above the law; their concerns were that it should be possible to prosecute him or her while in office.”*<sup>507</sup> CKRC also found there was general consensus that the powers of the President should

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504 Ibid., pp. 472-473

505 Ibid., p. 21

506 Ibid., para. 13.4.4(a)

507 Ibid., para. 13.4.4(b)(i)



be significantly curtailed. In its extensive Commentary on this point,<sup>508</sup> the Commission observed that what the people wanted was ‘very different’ from the divisions and power structures under the existing Constitution.

The essence of the people’s views was that Kenya should revert to the parliamentary system that was the hallmark of the Independence Constitution but adapted to current and future circumstances. The CKRC stated:

*“The parliamentary system, which is recommended, provides for collective leadership and better accountability. It, however, implies greater separation of powers than is usual in parliamentary systems by the rule that Ministers may not be members of the National Assembly. This recommendation takes into account the fact that a large majority of Kenyans have expressed a preference for some form of parliamentary system.”*<sup>509</sup>

The Commission rejected the Imperial Presidency that has been the hallmark of Kenya’s post-independence history:

*“A purely presidential system, in which all power is vested in the President, is unlikely to assist in overcoming the culture of authoritarianism. That office would continue to be the focus of elections, the lynchpin of party organization and the fount of all power. Given Kenya’s history, an over-powerful presidency would retard the effective separation of powers and a system of checks and balances or a better distribution of power. It would also continue to foster ethnic politics, for each ethnic group would want a member of its own community to occupy that office. It would promote fears of ‘ethnicisation’ as well as personalization of state power. A partisan presidency would undermine the role of national unity.”*<sup>510</sup>

The CKRC was nevertheless hesitant to recommend a purely parliamentary system, arguing that it may not serve Kenya’s interests. *“It would shift most of the powers to the Prime Minister and lessen people’s control of the choice of government leaders. The stability often associated with the presidential system may be hard to secure, given the intrigues of parliamentary politics and the possibility of motions of no confidence.”*<sup>511</sup> However, the danger of political instability may be obviated by a well-functioning political party system which, the CKRC argued, *“is critical to the success of a parliamentary system.”*<sup>512</sup>

On balance, the Commission concluded, *“a parliamentary system, with the Cabinet as the principal decision-making body, allows collective decision-making and the accommodation of diverse interests, including multi-ethnic interests. It is, therefore,*

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508 Ibid., para. 13.4.5

509 Loc. cit.

510 Loc. cit.

511 Loc. cit.

512 Loc. cit.

*more inclusive and participatory than a presidential system. It would also be a more accountable system, since the retention of power by the Government would depend on its ability to retain the National Assembly's support.*"<sup>513</sup> It cautioned, however, that it had to be a modified form of parliamentary system if it was to be able to achieve the principles of government outlined above. *"The aims of the modifications would be a more balanced executive with internal checks; to establish a collective form of government to facilitate coalition-building across ethnic lines. It would cut across geographical areas and provide a basis for effective as well as accountable government through greater separation of powers."*<sup>514</sup>

### A 'Mongrel' Constitution...?

But having thus endorsed the parliamentary system, the Commission recommended a modified form of presidential system, falsely calling it a modified parliamentary system. Incredibly, it recommended a directly elected President and Vice President who would not only be the Head of State and Commander in Chief of the armed forces. The Commission did not use the term 'Commander in Chief.' However, who else could chair the National Security/Defence Council; have power to declare war or states of emergency, or protect national sovereignty and territorial integrity apart from a commander-in-chief? It also proposed the usual powers of assent to bills before they become law; power to appoint judges; and to ratify treaties negotiated by the Government and approved by parliament.<sup>515</sup>

At the same time, the Commission recommended a Cabinet system of government in the usual Westminster tradition, who is the Head of the Government and leader of the largest parliamentary party. The Prime Minister would be assisted by two Deputy Prime Ministers appointed by the President; and other ministers also appointed by the President as nominated by the Prime Minister and confirmed by parliament. The President would, with parliament's approval, also appoint the Attorney General; and, on recommendation by the Public Service Commission, the Director of Public Prosecutions.<sup>516</sup>

The proposed system would have been worse than 'the mongrel Constitution' that was eventually adopted in 2010. It would have created two potentially competing power centres within the executive, for instance a partisan (the Commission recommended that the President be sponsored by a political party or an independent!) plebiscitarian President<sup>517</sup> with control of the instruments of violence; and a Prime Minister with a parliamentary majority but who may not have total control over his own ministers or the bureaucracy.

As Professor Anyang' Nyong'o has said in his interesting polemic, *"a strong parliamentary democracy cannot co-exist with an executive presidency which suffocates it*

513 Loc. cit.

514 Loc. cit.

515 Ibid., para. 13.4.6(a) and (b)

516 Ibid., para. 13.4.6(c)

517 The notion of a 'plebiscitarian presidency' is argued with great force in an insightful book by Bruce Ackerman, **The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy**, Belknap Press of Harvard University Press, Cambridge, Mass., and London, England, 2005.

and always tries to run it out of town.”<sup>518</sup> Under the system that the CKRC recommended, in a country where political ethnicity has played such a subversive role such as Kenya, the potential for conflict of the type that plunged Uganda into decades of turmoil and bloodshed could not be overestimated.

In his book, Professor Anyang’ Nyong’o argues that one of the key planks of the Bomas Draft was “*a parliamentary system of national government of the Westminster type where an all-powerful executive president was done away with and a Prime Minister, answerable to Parliament became the chief of the executive. This ... is the democratic change that the popular forces wanted.*”<sup>519</sup> An otherwise fine scholar and intrepid political activist, Professor Anyang’ Nyong’o misstates the facts on this point. The Bomas Draft did not recommend a parliamentary system of government. At the very least, it recommended a retention of presidentialism modified by some elements of the parliamentary system.

Here is why. Chapter Twelve of the Bomas Draft provided for the ‘Executive.’ In a provision titled ‘Structure of the National Executive’, the Draft Constitution declared that: “*The executive authority of the Republic at the level of national government is vested in the President, Vice President, the Prime Ministers and Ministers, all of whom ... shall work in harmony for the good of Kenya and the progress of the people of Kenya.*”<sup>520</sup> The Bomas Draft went further than a mere declaration. Consistent with the recommendation of the CKRC in the Final Report, the National Constitutional Conference proposed the position of the President who “*... is the Head of State, Commander in Chief of the Kenya Defence Forces and the Chairperson the National Security Council....*”<sup>521</sup>

And for a country whose presidents have been a little more than tribal patriarchs for their ethnic groups, the Bomas Draft envisaged a president who “*... is a symbol of national unity, and has the responsibility to promote and enhance the unity of the nation ... promote and respect the diversity of the people and the communities of Kenya....*”<sup>522</sup> It is true that the Bomas Draft prohibited the President from holding any other public office, “*or any elected or appointed office within a political party.*”<sup>523</sup>

In a country and in a region in which Imperial Presidents exercised total control of the levers of power in both the state and the often-sole ruling party, this prohibition may seem like a big deal. However, even during the darkest days of one-party regimes, real power did not lie with control of the sole ruling party, but with the control of the institutions of the state. Moreover, the ruling party did not act as a counterbalance to the state; on the contrary it served to complement the power of the state. The fact that, as the Bomas Draft proposed, a candidate for election as President could be nominated by a

518 Anyang’ Nyong’o, *Presidential or Parliamentary Democracy...*, op. cit., p. 168

519 Anyang’ Nyong’o, *Presidential or Parliamentary Democracy...*, op. cit., p. 29

520 See NCC, *Draft Constitution of Kenya 2004*, clause 151. This is the draft that was circulated to the NCC delegates on 23 March 2004 when the Conference was adjourned *sine die*.

521 *Ibid.*, cl. 152(2)(a)

522 *Ibid.*, cl. 152(2)(b)

523 *Ibid.*, cl. 152(4)

registered political party<sup>524</sup> meant that the prohibition against holding office in a political party was intended to pacify opponents of an Imperial Presidency.

In his capacity as the Head of State, the Bomas Draft proposed that the President be empowered to appoint and dismiss members of the Cabinet including the Prime Minister; Deputy Prime Ministers; Ministers and deputy Ministers; judges of the superior courts and any other public officer who the Constitution directed should be appointed by the President.<sup>525</sup> The Draft Constitution also proposed that the President be empowered, with parliament's prior approval, to sign binding international treaties<sup>526</sup> declare states of emergency and war,<sup>527</sup> and establish commissions of inquiry.<sup>528</sup>

The President had numerous other powers under the Bomas Draft. For example, with the consent of the National Assembly, he could appoint members of the country's diplomatic corps; receive credentials of foreign diplomatic and consular representatives; exercise the prerogative of mercy,<sup>529</sup> and confer honours.<sup>530</sup> He could, in liaison with the Prime Minister, ensure that Kenya's treaty obligations were honoured and that courts, constitutional commissions and state officers secure their impartiality, independence, dignity, accessibility and effectiveness.<sup>531</sup>

The Bomas Draft also proposed a presidency with strikingly novel legislative powers, beyond the usual powers to assent to bills passed by Parliament. Thus, the President had power to initiate legislation and "... refer it to the Cabinet with a request that the Cabinet approve its submission to the National Assembly as a Government Bill."<sup>532</sup> The Bomas Draft Constitution remained silent on what would happen if the Cabinet declined the President's request. The President was also required to ensure that "... the Prime Minister assigns responsibility for the implementation and administration of every Act of Parliament."<sup>533</sup> The significant question of what would happen if the Prime Minister did not do as required went unanswered.

But that was not all. The Bomas Draft proposed a ministerial system akin to the Westminster system, with a Prime Minister appointed by the President from a majority party in parliament or a coalition thereof.<sup>534</sup> Unlike the Westminster system, however, the Bomas Draft proposed that the President be empowered to propose that the National Assembly dismiss the Prime Minister.<sup>535</sup> If a simple majority of the members of the National Assembly agreed with the President's proposal, then the Prime Minister would be removed

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524 Ibid., cl. 157(1)(b)(i)

525 Ibid., cl. 153(2)

526 Ibid., cl. 153(3)

527 Ibid., cl. 153(4)

528 Ibid., cl. 153(5)

529 Ibid., cl. 166

530 Ibid., cl. 153(7)

531 Ibid., cl. 153(8)

532 Ibid., cl. 154(1)

533 Ibid., cl. 154(3)(b)

534 Ibid., cl. 173(1)

535 Ibid., cl. 176(1)

from office.<sup>536</sup> The President could also dismiss the Prime Minister if the latter did not step down within seven days of losing a vote of no confidence in the National Assembly.<sup>537</sup>

The Bomas Draft also empowered the President to appoint, upon nomination by the Prime Minister and subject to approval of the Senate, members of the Cabinet and Deputy Ministers;<sup>538</sup> and, on the recommendation of the Prime Minister, the Cabinet Secretary.<sup>539</sup> The President had power to remove the ministers and their deputies from office if they lost a motion of no confidence;<sup>540</sup> or dismiss the Cabinet and the deputy ministers on the recommendation of the Prime Minister.<sup>541</sup>

I have argued that rather than a modified parliamentary system, the Bomas Draft in fact proposed a modified Imperial Presidency. The question that must be answered then is, what was the nature of the modifications, if any? Firstly, the introduction of a Cabinet system with a Prime Minister as Head of Government was an important innovation. For as I have shown exhaustively, the principal feature of the Imperial Presidency not just in Kenya but in East Africa was the President as not only the Head of State and Commander-in-Chief but also the Chief Executive of the Government. The second modification to the presidential system was the extensive requirements for parliamentary approval of the exercise of the wide presidential powers. Thirdly, the Bomas Draft instituted further controls on the presidency, in particular, the power to remove the President from office for incapacity.<sup>542</sup>

### **The Stalemate and its Bloody Aftermath**

Franceschi and Lumumba have called the system proposed by the CKRC and the NCC as a ‘hybrid’ system and contend that, as originally conceived, “... *it would have created an expensive and inordinate bureaucracy in the Kenyan context.*”<sup>543</sup> The National Rainbow Coalition Government and the Parliamentary parties revolted against the proposals set forth in the Bomas Draft. Instead, the Parliamentary Select Committee met in the coastal town of Kilifi and drafted an alternative to it. This rear-guard action produced what became known as the Kilifi or the Wako Draft, after Amos Wako, the former Attorney General alleged to have been the brains behind it.

The Kilifi Draft was, according to Professor Anyang’ Nyong’o, ‘a democratic mirage.’ Whereas in the Bomas Draft, the position of an executive Prime Minister of the Westminster type was envisaged; in the Kilifi Draft, although the position was retained, it was watered down to be a mere appointee of the President, performing the duties of the Leader of Government in the House.<sup>544</sup> But that was not the end of it. Parliament in the

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536 Ibid., cl. 176(2)

537 Ibid., cl. 176(6)

538 Ibid., cl. 177(1)

539 Ibid., cl. 178(1)

540 Ibid., cl. 177(5)

541 Ibid., cl. 177(6)

542 Ibid., cl. 163

543 Franceschi and Lumumba, *The Constitution of Kenya...*, op. cit., p. 457

544 Anyang’ Nyong’o, *Presidential or Parliamentary Democracy...*, op. cit., pp. 29-30

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Bomas Draft was bicameral, consisting of the National Assembly and the Senate, while the Kilifi Draft dropped the Senate.

Furthermore, while the Bomas Draft envisaged a four-tier system of devolved government; in the Kilifi Draft what appeared as a devolved system of government, simply retained the old system of Provincial Administration created by the colonial state and reconstituted in the late 1960s under the Kenyatta I government. Consequently, Professor Anyang' Nyong'o asserts, "*the Kilifi Draft essentially brought back the authoritarian Provincial Administration with a few titles changed here and there.*"<sup>545</sup>

On 21 November 2005, 'A Proposed New Constitution of Kenya 2005', the so-called Kilifi or Wako Draft, was submitted to a referendum and soundly rejected by the majority of Kenyans. The bickering within the NARC Government and amongst the Parliamentary parties led the constitution-making process to near collapse. This stalemate continued into the fateful 27 December 2007 general elections which pitted the incumbent President Kibaki against his principal challenger Raila Odinga. Early results tallied indicated that Odinga held a strong lead over President Kibaki. This prompted Odinga to declare himself the winner and urge Kibaki to concede defeat.

However, 30 December, three days into the vote count, the Electoral Commission of Kenya declared Kibaki the winner, placing him ahead of Odinga by over 232,000 votes. He was promptly sworn-in late in the evening of the same day. Odinga accused the ECK and government of fraud, a verdict widely shared by international observers and later confirmed by ECK's own Chairman Samuel Kivuitu. Within minutes of the Commission's declaration of Kibaki as victor, ethnic rioting and violence, primarily targeting the Gikuyu, broke out across the country. It was higher in areas like the Nairobi slums, Nyanza Province, the Rift Valley and the Coast, where opposition against Kibaki and NARC was particularly strong.

As ethnic violence spiralled out of control and the death toll mounted, the international community, led by the African Union through its Chairman President John Kufuor of Ghana, intervened and urged a negotiated settlement of the deepest political crisis since Kenya's independence in 1963. The UN Secretary General Ban Ki-moon also weighed in after the UN Security Council call for a negotiated settlement of the crisis. Soon afterwards, an international mediation team known as the Panel of Eminent African Personalities, led by the former UN Secretary General the late Dr Kofi Annan, was appointed to mediate between the parties.

Following weeks of intense negotiations, on 28 February 2008, an agreement was signed between President Kibaki and Mr Odinga. Under the agreement, the two parties accepted a power-sharing deal in which Odinga became the Prime Minister; with other cabinet portfolios being shared out between PNU (the Party of National Unity – Kibaki's NARC had formed an electoral coalition with Kalonzo Musyoka's Orange Democratic Movement – Kenya (ODM-K) and Odinga's ODM. By the time the peace accords were signed, between 800 and 1,500 people had been killed and between 180,000 and 600,000

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<sup>545</sup> Ibid., p. 30

were internally displaced. This bloodshed would lead to the indictment of President Uhuru Kenyatta and his Deputy President William Ruto for crimes against humanity in the International Criminal Court in The Hague.

### **The National Accords and New Constitution**

The post-election violence of December 2007 and January 2008 was a chastening experience for Kenya. The accords ending the internecine bloodshed were codified with the enactment of the *National Accord and Reconciliation Act, 2008*;<sup>546</sup> and relevant amendments of the Constitution.<sup>547</sup> The constitution-making process also resumed, with the enactment of the *Constitution of Kenya Review Act, 2008*.<sup>548</sup> The Act entered into force on 22 December 2008. Its preamble declared its intent as being “... to facilitate the completion of the review of the Constitution of Kenya....”

Whereas the constitutional review process that produced the Bomas Draft was broad-based and controlled by the popular democratic forces of the Kenyan society, the process which emanated from the post-election violence mediation was an elite consensus dominated by the Parliamentary parties and the Government. This is clear from a close reading of the new Constitution of Kenya Review Act. The new CKRA obligated the National Assembly to establish, in accordance with its standing orders, “*a select committee to be known as the Parliamentary Select Committee on the Review of the Constitution ... consisting of twenty-seven members, to assist the National Assembly in the discharge of its functions under this Act.*”<sup>549</sup> The composition of the Parliamentary Select Committee was to be ‘regional and gender’ balanced.<sup>550</sup>

The new CKRA also established a committee known as the Committee of Experts (CoE) comprising nine persons nominated by the National Assembly and appointed by the President.<sup>551</sup> Three of the experts were to be non-Kenyans nominated from a list of five names submitted to the Parliamentary Select Committee by the Panel of Eminent African Personalities;<sup>552</sup> and the remaining six were Kenyan experts nominated by the National Assembly.<sup>553</sup> The difference between the CKRC, which had produced the Bomas Draft, and the CoE could not be clearer. More than half of the members of the former were independent academics, religious leaders or representatives of civil society organisations.

The CoE produced the Harmonized Draft Constitution which was published on 17 November 2009 and submitted for public scrutiny for a period of thirty days. The CoE proposed a Hybrid system of government with the President as the Head of State and a Prime Minister as the Head of Government. The CoE also proposed a bicameral parliament made up of the National Assembly and the Senate.

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546 *Act No. 4 of 2008*

547 *Act No. 10 of 2008*

548 *Act No. 6 of 2009, Chapter 3A of the Revised Laws of Kenya, 2009.*

549 *Ibid.*, s. 7(1)

550 *Ibid.*, s. 7(2)

551 *Ibid.*, s. 8(1) and (4)

552 *Ibid.*, s. 8(4)(a)

553 *Ibid.*, s. 8(4)(b)

Following the thirty days period of review, on 8 January 2010, the CoE submitted its Report and the Harmonized Draft Constitution to the National Assembly.<sup>554</sup> In its Report, the CoE admitted that the people of Kenya remained “... *deeply divided over the nature of the executive.... Public views are divided between those who prefer a Presidential, or a Parliamentary or Hybrid Executive system of government. They express widespread concern that the structure of the executive in the Draft is ambiguous and would be unworkable because it could lead to frequent tensions between the President and the Prime Minister, especially if they come from different parties.*”<sup>555</sup>

Despite the ‘widespread concern’, the CoE stuck to its proposals for the Hybrid system, arguing that there was a general preference for ‘collective executive’, that is to say, a system that would accommodate the President as Head of State and a Prime Minister as Head of Government. The Committee rationalised its decision thus:

*“The executive is defined more clearly, with the authority of the State President in decision-making delineated, and the holding of regular consultations between the State President and the Prime Minister elaborated. While the Prime Minister runs government, the President has a supervisory role that is evident in the stated requirement that the Prime Minister reports to the President.”*<sup>556</sup>

The Parliamentary Select Committee was not satisfied by this position. It reviewed the Harmonized Draft and, on 2 February 2010, returned a document called a ‘Review Harmonized Draft’ to the CoE. In this document, the position of the Prime Minister was deleted altogether. As CoE would later acknowledge in its Final Report, “... *the PSC had reached consensus on a presidential system of government for Kenya.*”<sup>557</sup> This consensus was clear cut, for “... *PSC’s explicit request was that the constitution should follow the American model....*”<sup>558</sup> On 28 February 2010, this ‘explicit request’ and other adjustments made to the PSC document were submitted as the *Report on the Proposed Constitution of Kenya* to the National Assembly for deliberation.

After a spirited debate, on 2 April 2010, the National Assembly unanimously passed the Proposed Constitution without amendment, setting the stage for a referendum held on 4 August in which an overwhelming majority voted in favour of the historic document. Finally, after more than four decades, a new Constitution was promulgated by President Kibaki at an impressive ceremony held at Uhuru Park, central Nairobi, on 27 August 2010. In view of the long and difficult journey that the country had traversed, the adoption of the new Constitution was, as the CoE stated in its Final Report, “... *an historic achievement of the Kenyan people as a whole.*”<sup>559</sup>

554 See Committee of Experts on Constitutional Review, **The Report of the Committee of Experts on Constitutional Review Issued on the Submission of the Review Harmonized Draft Constitution to the Parliamentary Select Committee on Constitutional Review**, Nairobi, 8 January 2010.

555 *Ibid.*, p. 10

556 *Ibid.*, p. 11

557 Committee of Experts on Constitutional Review, **Final Report of the Committee of Experts on Constitutional Review**, Nairobi, 11 October 2010, p. 14

558 *Loc. cit.*

559 *Ibid.*, p. 13



## Chapter Five: Constitutional Developments since 2010

Life has not stopped since the enactment of the 2010 Constitution. If anything the Kenyan people have shown no sign of diminishing their appetite for constitutional amendment. Since 2010, thirteen bills for amendment of the Constitution have been published in the Gazette. These bills have almost invariably been presented through ‘parliamentary initiative’ in terms of Article 256 of the Constitution. So far none of these individual member initiatives has succeeded. Nevertheless, they are proof of the vitality of the Kenyan democracy, as well as the stability of the evolving constitutional order. This is important especially when measured against the fact that there was on average one constitutional amendment per every one and seven months in the period from independence to 2010 when the new Constitution was promulgated.

Most, if not all, of the amendment proposals have been intended at implementation of the fundamental tenets of the 2010 Constitution. None has sought to challenge its fundamental pillars. Even the BBI process, which seeks to recast certain features of the executive and the legislative organs are intended to smoothen the workings of the new constitutional order, not to remake it.

On 12 July 2013, Samuel Chepkong’*a* introduced an amendment to the Constitution intended to remove members of parliament and county assemblies as well as judges and magistrates from the designation of ‘state officers’ in order to give effect to the doctrine of separation of powers.<sup>560</sup> Only three weeks later, on 6 August 2013, Lati Lelelit introduced an amendment Bill whose intent was to remove the Equalisation Fund from the purview of the Central Government and into the constituencies.<sup>561</sup>

On 9 January 2015 David Ouma Ochieng’ moved a Bill to amend the Constitution to change the date of the general elections from the second Tuesday of August in every fifth year to the third Monday of December in every fifth year.<sup>562</sup> On the same day, George Kaluma introduced a Bill for the amendment of the Constitution intended to prohibit the courts from interfering with matters pending in Parliament.<sup>563</sup> Six months later on 24 July 2015, House Majority Leader Aden Duale introduced a Bill to amend the Constitution to ensure that the composition of both Houses of the Kenyan Parliament conform to the two thirds gender principle of the Constitution.<sup>564</sup>

On 2 December 2015 House Majority Leader Aden Duale moved a Bill to amend the Constitution intended to amend Articles 97 and 98 of the Constitution with regard to

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560 The Constitution of Kenya (Amendment) Bill, 2013, Kenya Gazette Supplement No. 100 (National Assembly Bills, No. 15, 12 July 2013)

561 The Constitution of Kenya (Amendment)(No. 2) Bill, 2013, Kenya Gazette Supplement No. 115 (National Assembly Bills, No. 26, 6 August 2013)

562 The Constitution of Kenya (Amendment) Bill, 2015, Kenya Gazette Supplement No. 3 (National Assembly Bills, No. 1, 9 January 2015)

563 The Constitution of Kenya (Amendment) Bill, 2015, Kenya Gazette Supplement No. 3 (National Assembly Bills, No. 2, 9 January 2015)

564 The Constitution of Kenya (Amendment)(No. 4) Bill, 2015, Kenya Gazette Supplement No. 112 (National Assembly Bills, No. 38, 9 January 2015)

gender parity in parliamentary representation.<sup>565</sup> As its Statement of Objects and Reasons declared, the Bill sought “... to give effect to the two thirds gender principle through the creation of special seats that will ensure that the gender principle is realized in Parliament over a period of twenty years from the next general election.”

On 24 March 2016, the *Constitution of Kenya (Amendment) Bill, 2016*, was published by Mithika Linturi.<sup>566</sup> The proposed amendment sought to extend the presidential immunity from prosecution to the Vice President. Two months later, another proposal to amend the Constitution was published in the Gazette.<sup>567</sup> Moved by Samuel Chepkong’ a, the Bill sought to create mechanisms for ‘seamless determination of election petitions.’ On 11 January 2017, the *Constitution of Kenya (Amendment) Bill, 2017*, was published by Boniface Otsiula.<sup>568</sup> Its intent was to create three special Funds for the development of electoral constituencies; for affirmative action, and to facilitate parliamentary oversight.

On 12 February 2018 the *Constitution of Kenya (Amendment) Bill, 2018* was published in the Gazette.<sup>569</sup> Presented by the Leader of the Majority Party Aden Duale, the Bill was intended to amend Articles 97 and 98 of the Constitution with regard to gender parity in parliamentary representation. As its Statement of Objects and Reasons declared, the Bill sought “... to give effect to the two thirds gender principle through the creation of special seats that will ensure that the gender principle is realized in Parliament over a period of twenty years from the next general election.”

On 22 February 2018 the *Constitution of Kenya (Amendment) Bill, 2018*, presented by Chris Wamalwa, was published in the Gazette.<sup>570</sup> The Bill sought to change the date of the general elections from the second Tuesday of August in every fifth year to the third Monday of December in every fifth year. The reasons stated were that holding general elections in August was disruptive of the final examination calendar for public schools, especially if there is a run-off or repeat elections. It is also disruptive of concurrent reading of the annual budget by the member countries of the East African Community, as well as affecting the vital tourism industry whose high season is during the Northern summer months of June through September. As the Statement of Objects and Reasons, the proposed change would have reflected “*the unique circumstances and traditions of Kenya.*”

On 10 December 2018 Senator Aaron Cheruiyot published a Senate Bill for amendment of the Constitution in order to remove Nairobi from the county government

565 The Constitution of Kenya (Amendment)(No. 6) Bill, 2015, Kenya Gazette Supplement No. 190A (National Assembly Bills, No. 64A, 2 December 2015)

566 The Constitution of Kenya (Amendment) Bill, 2016, Kenya Gazette Supplement No. 35 (National Assembly Bills, No. 6, 24 March 2016)

567 The Constitution of Kenya (Amendment) Bill, 2016, Kenya Gazette Supplement No. 79 (National Assembly Bills, No. 17, 2 June 2016)

568 The Constitution of Kenya (Amendment) Bill, 2017, Kenya Gazette Supplement No. 3 (National Assembly Bills, No. 3, 11 January 2017)

569 The Constitution of Kenya (Amendment) Bill, 2018, Kenya Gazette Supplement No. 10 (National Assembly Bills, No. 4, 12 February 2018)

570 The Constitution of Kenya (Amendment No. 2) Bill, 2018, Kenya Gazette Supplement No. 13 (National Assembly Bills, No. 5, 22 February 2018)

system and to have the city managed by the Central Government like in some countries of the world.<sup>571</sup>

The latest of these parliamentary initiatives was submitted by Gladys B. Shollei on 4 July 2019. It seeks to amend the Constitution “... *in order to ensure that the number of members of Parliament reflects the requirements of article 27(8) that not more than two thirds of members of elective or appointive bodies shall be of the same gender.*”<sup>572</sup> It is also intended to ensure the constitutional requirement for the representation of persons with disabilities under Article 54(2) is effected by making sure that at least five percent of the members of Parliament are persons representing the disability communities.

### **Déjà-vu: Parliamentarism or Presidentialism?**

No sooner had the ink dried on the new Constitution than new questions and fresh doubts started to emerge regarding its efficacy. The circle of political violence, especially in the hotly contested presidential elections of 2012 and 2017, continued even after the adoption of the new Constitution. With it, or perhaps because of it, the political and constitutional debate has continued to rage on the best constitutional model for Kenya. As in previous times, this debate pits the advocates of a parliamentary system modified to suit pluralistic realities of Kenya; and those who seek to maintain a retouched presidentialist *status quo*.

Professor Anyang’ Nyong’o has been the standard bearer of those who argue, as he does that the one major mistake that was made in creating the current Constitution was “*to preserve a presidential system of government and only create structures around it meant to keep it in check.*” “*This experiment*”, according to him, “*has failed....*”<sup>573</sup> The cure for Kenya’s political ills is, in Professor Anyang’ Nyong’o’s view, the adoption of a parliamentary form of government. He argues:

*“In parliamentary systems, political parties and pluralist interest groups tend to play more central roles in the electoral process. Contested, inconclusive, violent and even permanently unstable political dispensations tend to follow after elections in presidential democracies, whether authoritarian or benevolent.”*<sup>574</sup>

Professor Anyang’ Nyong’o believes that presidentialism is inherently “*antithetical to democratic politics.*” “*Conversely*”, he asserts, “*parliamentarism has historically been proven to be the home of democracy.*”<sup>575</sup> And while regular elections are used to elect governments in both systems, “*... parliamentary systems have better records of conducting free and fair elections than presidential ones. Electoral violence*

571 The Constitution of Kenya (Amendment) Bill, 2018, Kenya Gazette Supplement No. 152 (Senate Bills, No. 40, 10 December 2018)

572 Memorandum of Objects and Reasons, The Constitution of Kenya (Amendment) Bill, 2019, Kenya Gazette Supplement No. 108 (National Assembly Bills No. 53), 4 July 2019

573 Anyang’ Nyong’o, *Presidential or Parliamentary Democracy...*, op. cit., p. 182

574 Anyang’ Nyong’o, *Presidential or Parliamentary Democracy...*, op. cit., p. 34

575 Loc. cit.

*is more frequent under presidential regimes than parliamentary regimes.*<sup>576</sup> Drawing on Kenya's own history of multiparty elections, Professor Anyang' Nyong'o claims that "... first multiparty elections, 'the self-government elections' of May 1963, marked the one and only 'free and fair' election to be held in Kenya from 1963 to 2002."<sup>577</sup> Elaborating, the learned professor bluntly argues that "there has never been a single presidential election in Kenya's history where the majority of Kenyans have come out without being politically, morally or physically injured, except the 2002 General Election."

Even though it has become widespread, particularly in the Third World, "the presidential system is the only survival in the contemporary world of constitutional monarchies once prevalent throughout medieval Europe."<sup>578</sup> And like the absolute monarchies on which they are modelled, African and Third World

*"presidential systems of government tend to limit political participation, close down political and social avenues of being held accountable, use public resources in a profligate manner, and employ violence and repression in case of public criticism or disapproval of what the government does. Whatever development is achieved is easily undermined by the tensions in society contesting the fairness in the share and distribution of development resources."*<sup>579</sup>

Professor Anyang' Nyong'o is not a lone voice in Kenya. Professor Michael Chege, his colleague of many years at the University of Nairobi, has similarly pronounced himself in favour of a parliamentary system of government. Professor Chege readily admits that a parliamentary system of government is no panacea to Kenya's many political ills,

*"... but it is far better suited to our politics than the highly divisive majoritarian-based presidentialism. Kenya's violent electoral conflicts every five years are ever about the presidential poll, and seldom or ever about elective positions further down the political hierarchy.... Under a parliamentary system, Kenyans would vote for parties, or coalition of parties, the party with the majority in the legislature getting the first shot in forming the government."*<sup>580</sup>

Yash Pal Ghai, the prominent jurist and former Chairman of the Constitution of Kenya Review Commission and very much the father of the new Constitution, has differed with Anyang' Nyong'o's belief that a few changes to the Constitution, particularly in moving towards a parliamentary system would do the trick of building national unity and cohesion. To Professor Ghai, Anyang' Nyong'o's assertion that "a parliamentary system of governance, amenable to consensus democracy, coupled with devolution, is perhaps

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576 Ibid., p. 11

577 Ibid., p. 18

578 Ibid., p. 34

579 Ibid., p. 35

580 Ibid., p. 9

our best option at the moment' is not necessarily correct."<sup>581</sup> But even he admits that a parliamentary system is more suitable for a multi-ethnic society like Kenya.

*"One of the virtues of the parliamentary system is its continuing affiliation with democratic practice. Politics are not only about power and wealth sharing, but establishing a vibrant, parliamentary democracy in which the role of the opposition is to keep the government on its toes, to scrutinise its policies and finances, put searching questions to it on the policies and conduct of the government, and offering policy alternatives."*<sup>582</sup>

Presidential politics never builds political parties; rather they destroy them. Presidentialism transforms political parties into state parties of Tanzania's Chama cha Mapinduzi (CCM) variety by encouraging sycophancy, personality cults and by making them dependent on the state - rather than members – for resources and for winning elections. Thus, for example, former President Benjamin Mkapa of Tanzania has had to admit, in his recent memoirs, that he authorised the looting of hundreds of billions of shillings from Tanzania's Central Bank to help his party CCM win the 2005 General Elections.<sup>583</sup>

### **Beyond East Africa: A Comparative Review**

Beyond Kenya and East Africa and into the continent as whole, history has also discredited presidentialism. Many African countries inherited the Westminster parliamentary system, but within a year or so of independence they went presidential. They all soon sank into authoritarian regimes of the worst kind, best known for political oppression, shameful denial of human rights, corruption that benefitted few elites, and political instability.<sup>584</sup>

But it is not only in Africa where presidentialism has proved a bane in national politics. Writing about presidentialism in Latin America, Professor Carlos Santiago Nino of the University of Buenos Aires in Argentina, has argued that the strengthening of the workings of democracy against corporative powers requires the broadening of direct popular participation in decision-making and control of governmental action, perfecting the mechanisms of representation and strengthening political parties, which are themselves internally democratic and open, disciplined and ideologically defined.<sup>585</sup>

According to Professor Santiago, however, *"strong democracy is functionally incompatible with extreme forms of presidentialism typical of Latin American constitutions, and that when presidentialism is not accompanied by limited or conditioned forms of democracy, tensions are generated that often lead to the breakdown of the institutional system."*<sup>586</sup> Presidentialist regimes have several problems that have led to the collapse of

581 Yash Pal Ghai, *Ethnicity and the Kenyan System of Governance*, 2016

582 Ibid.

583 Benjamin William Mkapa, *My Life, My Purpose: A Tanzanian President Remembers*, Mkuki na Nyota Publishers, Dar es Salaam, 2019, pp. 206-207

584 Anyang' Nyong'o, *Presidential or Parliamentary Democracy...*, op. cit., p. 187

585 Carlos Santiago Nino, 'Transition to Democracy, Corporatism and Presidentialism with Special Reference to Latin America', in Greenberg et al., op. cit., pp. 46-64, 51

586 Ibid., p. 54

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many presidentialist regimes outside the United States. These include executive-legislative confrontations, paralysis of the assembly, weakness of the party system and the politics of the court.

For the presidential system to work smoothly it has a tendency to require political parties to be weak. One, parties are difficult to organise and perpetuate in a cohesive way, as they must try to form coalitions prior to the elections in order to have any chance of forming a majority; whereas in a parliamentary system, parties can go to elections supporting well-defined programmes and try to form coalitions in parliament itself after the elections.

Two, lack of party discipline, which may be a necessary condition for the success of a presidentialist regime, whereas if party discipline were enforced, the capacity of government to govern would be severely impaired whenever the president belonged to one party and the opposition had a congressional majority. This is especially the case in the US.

Three, the effect of electoral defeat in presidential systems also weakens political parties. Many of the non-political functions that parties perform in a parliamentary system cannot be carried out in a presidentialist one because parties are not tied to a more or less stable representation in parliament, but are affected by the fate of their presidential candidates; when they lose, there are few incentives to remain faithful to the party.<sup>587</sup>

One of the limitations of a presidential system of government appears to be voter apathy. Despite its longstanding history and the apparent commitment of Americans to representative democracy, there is notably less voter turnout in the US than in virtually all parliamentary democracies. The presidential system works as a zero-sum game in which all that one party loses, the other gains. The parties are trapped in a dynamics of confrontation in pursuit of the presidency, an indivisible position that for a fixed and usually long period of time, controls an enormous amount of power, including that of filling innumerable public positions. This dynamic pits each party against the others in a savage competition for power which may even lead to heavy bloodshed, as it has happened in all East African countries.

The presidential system divides the expression of popular sovereignty between the president and parliament, each of which has a sort of a veto power over the other. When different political parties control parliament and the presidency, the parties' dynamics of confrontation is mirrored in the relation between the powers of the state, leading to fights and stalemates. Even where the parties are not seriously antagonistic, the presidential system makes it very difficult for them to collaborate in the same government, as is sometimes required in a national crisis. If the main parties support the same candidate the working of the system is affected as there is no real opposition and no prospect for a genuine alternative.<sup>588</sup>

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587 *Ibid.*, p. 56

588 *Ibid.*, p. 58

If, on the other hand, the president who represents one party invites others to collaborate in his cabinet, the vote of the people who favoured one against the others seems somehow neutralised. *“The confrontation between the parties often leads to the political exhaustion of the president’s credibility and popularity long before the expiry of his term.... The rigidity of the term of the government in the presidential system means the crisis cannot be vented through an escape valve.”*<sup>589</sup> The president reaches a point at which, though he still has an enormous set of formal powers, he has lost credibility, popularity and parliamentary support.

The only way to replace him is through voluntary resignation or impeachment. Impeachments are all but impossible to carry out; they require an accusation of impeachable misconduct and a qualified majority, which implies the support of the president’s party, not usually willing to commit suicide. The president himself is not generally inclined to resign; he feels that he has a mandate for the whole term and does not want to become a historical failure.<sup>590</sup> Professor Santiago concludes that the presidentialist system, especially in Latin America, has been

*“... an obstacle to the consolidation of democratic institutions.”*  
*Consequently, “the transition to democracy would be greatly facilitated by constitutional reforms that incorporate parliamentary mechanisms.”*<sup>591</sup>

The post-WWII constitutional reconstruction of Western Europe also offers important insights on the enduring power of parliamentary democracy as opposed to presidentialism. The late Nevil Johnson<sup>592</sup> has written thus about the Western European political reconstruction:

*“Throughout Western Europe those involved in post-war constitutional reconstruction favoured a parliamentary form of government. They designed the new or restored constitutions to confer full legislative authority on an elected assembly (co-existing in most cases with an upper chamber with more limited powers) responsible for installing and sustaining the political executive or government. This structure made the government responsible to parliament, which could withdraw its confidence and thus force the government’s resignation....*

*“However, none of the parliamentary regimes that emerged in post-war Western Europe fully embodied the British principle of parliamentary sovereignty. Most countries’ parliaments co-exist in various relationships with other institutions in a manner that qualifies their authority. The formal provisions of the written constitutions of all states limit the rights of the elected parliamentary bodies. Such conditions point to a more complex pattern of institutionalized checks and balances than was*

589 Ibid., p. 59

590 Loc. cit.

591 Ibid., p. 60

592 Formerly Professorial Fellow at Nuffield College, University of Oxford, the United Kingdom.

*usually associated with the classical parliamentary government of the Westminster type.*

*“The mode of operation of a parliamentary government depends decisively on the configuration of parties and the manner in which they behave. It is a characteristic feature of Western Europe that political parties have grown stronger. They have become an indispensable means of representation, they are brokers and mediators in the resolution of conflicts of interests in the society and they are the organizations in and through which most individuals pursue a career in politics or public affairs.”<sup>593</sup>*

Professor Johnson argues that it is only in France where the parliamentary system has proved unsuccessful after the Fourth Republic, established in 1946, was replaced by the Fifth Republic in 1958. There political parties were unable to coalesce into workable coalitions common in other Western European countries. This resulted in high degree of executive instability which became a major handicap in the effort to resolve the difficult problems of decolonisation, especially in Algeria where there was a substantial French settler population and the native population had risen up in an armed rebellion.<sup>594</sup>

The Constitution of the Fifth Republic led to a strengthening of executive in the shape of an elected executive president. Along with this there occurred a severe reduction in the authority and power of Parliament. It limited substantially the legislative competence of the National Assembly, instead conferring on the Executive wide scope for the use of administrative decrees. It deprived deputies of the possibility of proposing increased expenditure. It imposed severe restrictions on the National Assembly’s scope for proposing motions of no confidence in the government.<sup>595</sup>

Equally significant was the decision to delink parliamentary mandate from ministerial service, which paved the way for a high proportion of ministers to come to office from the public service. Johnson observes that

*“to an extent without parallel in Western Europe, the constitution of the Fifth Republic has thus weakened parliamentary government, hand in hand with strengthening of the bureaucracy.” He concludes, however, that even “though it has had widespread support at home, the Fifth Republic has found relatively few admirers and no imitators in Western Europe.”<sup>596</sup>*

The experience of European countries that suffered decades of military dictatorship such as Portugal and Spain is equally instructive. Jordi Sole Tura, an eminent Spanish jurist and formerly professor of constitutional law at the University of Barcelona has written of

593 Nevil Johnson, ‘Constitutionalism in Europe Since 1945: Reconstruction and Reappraisal’, in D. Greenberg, S.N. Katz, M.B. Oliviero and S.C. Wheatley (eds.), **Constitutionalism and Democracy: Transitions in the Contemporary World**, Oxford University Press, New York/Oxford, 1993, pp. 31, 33

594 *Ibid.*, p. 38

595 *Loc. cit.*

596 *Ibid.*, p. 39



the democratisation processes in the Iberian Peninsula following the end of the Salazarist and Franco dictatorships in Portugal and Spain respectively.

Of the former, Professor Sole Tura writes that under its 1986 Constitution, Portugal has become a semi-presidential system of government, or one which can be described as a mixed presidential and parliamentary system. The president of the Republic is directly elected by voters; has no executive powers, though he has limited veto powers over legislation and can dismiss the government and dissolve parliament. The system works as a parliamentary government with a unicameral parliament directly elected under a proportional system.<sup>597</sup>

As for Spain, Professor Sole Tura notes that the country is a ‘parliamentary monarchy’ in which the King reigns but does not rule. He has no veto power, cannot dissolve parliament or dismiss the government; and although he is the nominal commander in chief, he cannot deploy the armed forces. The structures and implementation of the parliamentary system are similar to those of other parliamentary democracies, with a specific regulation of parliament’s control of the government in the constructive sense of Germany. Spain has also embedded a federal-like system with 17 autonomous regions.<sup>598</sup>

Perhaps the most telling example of the folly of presidentialism is that of interwar Germany. The presidentialist Weimar Republic, which arose from the defeat in the First World War and the consequent Revolution which ended the Empire of the Hohenzollerns, failed. In its ruins, there arose the Third Reich which plunged Germany into dictatorship and the rest of the world into the Second World War. The post-war Germany that emerged from the ruins of the War is a parliamentary democracy with the President as a titular Head of State and the Chancellor the Head of Government and leader of the majority party in parliament. In the seven decades since its emergence, this parliamentary democracy has not only survived the post-war division of Germany and its reunification following the collapse of the Berlin Wall, it has made Germany the most socially prosperous, economically dynamic and politically stable country in Europe.

### **Building Bridges or ‘Hybridisation’?**

After the wide-ranging tour of the political and constitutional landscape of Kenya and its evolution since independence, we can now return where we started this study, that is to say, the ongoing debate around the Building Bridges Initiative. One thing that stands out immediately is the lack of originality that informs many of its proposals. Take the example of the proposals on the presidency, for example.

The BBI Report proposes that the President shall be elected through universal suffrage, as he has been since the First Amendment to the Independence Constitution in 1964. Similarly, as was the case when the Twenty Seventh Amendment reintroduced multiparty politics in 1991, for a candidate to be declared the winner of the presidential

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597 Jordi Sole Tura, ‘Iberian Case Study: The Constitutionalism of Democratization’, in Greenberg et al., *op. cit.*, pp. 287-299, 296

598 *Ibid.*, p. 297

election, “*he or she must win 50%+1 of the presidential votes and at least 25% of the votes cast in each of the more than half of the counties, as is now the case.*” The President will remain the Head of State and Government, Commander in Chief, and be ‘the central symbol of national unity.’ He will chair the Cabinet that comprises the Deputy President, Prime Minister and Cabinet Ministers.’ This too has been the case since the rise of the Imperial Presidency in 1964.

The BBI Task Force recommends the creation of the position of Prime Minister to be appointed by the President from amongst elected members of parliament from the majority party, or a member who appears to have support of the majority of members. The Task Force claims that the creation of this position is “*crucial in strengthening inclusivity and accountability ... (as well as to) ensure that the work of government is better overseen in the National Assembly.*” The Prime Minister shall be confirmed by the National Assembly; and may be dismissed by the President or by the National Assembly through a motion of no confidence.

The Prime Minister shall have the authority over the control, supervision and execution of the day to day functions and affairs of the government. He will be the Leader of the Government Business in the National Assembly and may chair Cabinet sub-committee meetings ‘on the President’s tasking.’ The post does not carry a salary. On the Cabinet, the Task Force proposes to tweak the current American-inspired system to enable the President to appoint Cabinet Ministers from amongst members of parliament as well as technocrats. The latter shall be *ex officio* members of parliament, upon approval of the National Assembly. The Ministers will be appointed by the President in consultation with the Prime Minister and shall be called ‘Ministers’ rather than the current ‘Cabinet Secretaries.’

Although the Task Force touts these proposals as ‘homegrown’ and not a ‘mimicry’ of foreign, particularly Western models, the claims are hard to support. Firstly, there is nothing Western about the Imperial Presidency that emerged in Kenya from 1964 onwards. Rather, as amply demonstrated, KANU and the British colonial state forcefully rejected KADU’s *majimbo* constitutional proposals during the Lancaster House negotiations of 1960-1962, precisely because the proposals were inspired by the American federal model. On the contrary, the model that was adopted at independence was neither Westminster nor American federalist. It was an autochthonous system that captured the ethnic realities of Kenya as it emerged from decades of colonialism.

Similarly, the Imperial Presidency that the KANU Government embraced soon after independence was not Western; rather it was and it remains a post-independence African political and constitutional phenomenon. The immediate model for its Kenyan variant was the 1962 Republican Constitution of Tanganyika which, in turn, was modelled on Ghana’s Republican Constitution of 1960. Even though they smack of the absolute monarchies of 18<sup>th</sup> century Europe, these republican constitutions have no equivalents in the Western constitutional tradition.

Secondly, rather than dismantle the Imperial Presidency, widely recognised as the bane of Kenya's and Africa's post-colonial politics and governance, the Task Force's proposals will actually rehabilitate and reinforce it. Although it correctly describes the Executive Presidency as the ultimate prize in Kenya's winner-takes-all elections it deems 'divisive and conflict-causing', the Task Force proposals will make it even more lucrative and hence even more competitive and divisive. For example, prior to 2010, ministers were always appointed from amongst members of parliament. By appointing the Prime Minister and other ministers from amongst members of parliament, as BBI proposes, the President will have the ministerial carrot which all Kenyan and African presidents have dangled before parliamentarians, thereby weakening parliamentary powers of oversight and control.

Thirdly, the proposals for the creation of the post of Prime Minister are a non-starter. For a start, the Prime Minister envisaged in the proposals is not the Prime Minister who was proposed, and rejected, by both the Bomas Draft and the Committee of Experts' Harmonized Draft Constitution. In the two drafts, the Prime Minister was to be the Head of Government. Here he is merely *primus inter pares* amongst the numerous other ministerial appointees of the President, who serve at the pleasure of the latter.

Moreover, the proposals are an unabashed 'mimicry' of Tanzania's authoritarian constitutional tradition. And if Tanzania's own constitutional and political history is any guide, a Prime Minister who is one more appointee of the President, and does not head the Government he purports to lead in parliament, will add nothing of value in the stated quest to strengthen accountability and parliamentary oversight, much less inclusivity. If anything, it will increase the aura of the President as the constitutional Leviathan before whom all must bow and supplicate.

Perhaps the most innovative proposal that is likely to institutionalise and strengthen parliamentary democracy relates to the position of the parliamentary opposition. The current Constitution provides for 'Party Leaders', described as "*a leader of the majority party and a leader of the minority party.*"<sup>599</sup> The former is "... *the leader in the National Assembly of the largest party or coalition of parties*"<sup>600</sup>; while the latter "... *shall be a person who is the leader in the National Assembly of the second largest party or coalition of parties.*"<sup>601</sup> Beyond providing for 'the order of precedence' to be observed in the National Assembly, there are no provisions that stipulate the rights and privileges of the official opposition.

The Task Force proposes to fill this *lacuna*. It recommends, in this regard, that the runner up of the presidential election should become an *ex officio* member of parliament and the Leader of the Official Opposition, if his or her party is not represented in the Government; or of a coalition of parliamentary parties not represented in the Government. To make the parliamentary opposition more effective, the Task Force proposes that "*the Leader of the Official Opposition shall be enabled (in order) to have a Shadow Cabinet to challenge the Government position in parliament.*"

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599 Article 108(1)

600 Article 108(2)

601 Article 108(3)

These are important recommendations. As Professor Muigai, the constitutional scholar and Kenya's Attorney General until his February 2018 resignation, told a conference held in Dar es Salaam in 1993, Kenya's Independence Constitution "*suffered from glaring omissions and major inadequacies which reveal that the last thing on the minds of the drafters was how to safeguard competitive politics and a multiparty democracy.*"<sup>602</sup> According to Professor Muigai, "*the whole question of who constituted the opposition and how it was to function in parliament was not deemed a matter of constitutional significance, despite the constitutional assumption of the importance of the opposition in the process. These delicate issues were relegated to the standing orders of the parliament.*"<sup>603</sup> If implemented, these recommendations will redress this long-running sore of Kenya's body politic.

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602 Muigai, 'Legal and Constitutional Reforms...', op. cit., p. 529

603 Ibid., p. 530

## **Part II – Uganda: ‘End of the Road for Federation’? Federalism, Parliamentarism and Presidentialism in Uganda’s Long March to Democracy**

Uganda has experienced a more unique and turbulent history than any other East African country. Although placed under colonial rule like all the rest, Uganda is unique in that its advanced pre-colonial centralised states and their institutions were not destroyed by colonialism. Instead, they were bent to the service of the overarching needs of British imperial rule. It is unique in that Buganda Kingdom, its most important and most powerful component, was ruled based on agreements signed with its British overlords, which were administered faithfully by all accounts. It is also unique in the sense that, unlike many other British colonial possessions in Africa, Uganda started its independent statehood as a federal, as opposed to a unitary, state.

Uganda’s post-colonial history is equally unique in East Africa. It remains the only country to have never had a peaceful transfer of power in Anglophone Africa. It shares, with a few other countries, the unflattering distinction of having been ruled by one of the blood-thirstiest dictators in the continent. Its post-colonial history is distinguished by political strife and state lawlessness that killed millions, drove many more into foreign exile and left an entire generation traumatised. And now, with one or two exceptions, Uganda holds the continental record for one of the longest serving rulers in Africa.

Yet, at independence, Uganda held one of the brightest prospects for the future. As the historic centre of learning in Eastern Africa – the University College Makerere, a constituent college of the University of London, was located here – Uganda boasted one of the best educated elites on the continent. Its economy was also one of the best performing. In other words, its reputation as ‘the Pearl of Africa’ was not undeserved.

Yet, within a few years of independence, all hell broke loose. A constitutional government was violently overthrown by the army on the orders of a civilian political leader. A civilian dictatorship, followed a few years later by a military one, threw Uganda into an orgy of bloodletting which, at its end twenty years later, had killed over two million people, sent a million more into exile and caused untold suffering to its entire population. This is the story of its constitutional development with a particular focus on its Parliamentary democracy.

The focus on Parliament is deliberate. Though perhaps not equal in status with the colonial Executive and its Judiciary, Parliament was one of the most important institutions of the colonial state, both in Uganda and elsewhere in Africa. At independence in 1962 Uganda, like her neighbours to the south and east, became a parliamentary democracy, with Parliament the most important institution of government.

Yet, a few years after independence, that parliamentary democracy was violently overthrown and replaced with a civilian Imperial Presidency. The latter did not survive long, for hardly five years later it was similarly overthrown in a military coup, which

threw Uganda into an orgy of dictatorship and blood-letting that took over three decades and millions of lives. After that long, dark night of political violence and dictatorship, democracy – and with it – multiparty parliamentary politics returned to Uganda following a referendum in 2005.

There is another, related, reason for the focus on parliamentarism. After decades of presidentialism and its poor record all across Africa, if not the world, there is growing interest in parliamentary democracy as a system of government best suited to the needs and realities of multi-ethnic and pluralistic societies. Three quotations, based on experiences from East Africa, Europe, and Latin America, illustrate this point.

The first is from Peter Anyang' Nyong'o, previously a political science professor at the University of Nairobi and currently Governor of Kisumu County in Kenya. In a preface to his recent book on this subject, Professor Anyang' Nyong'o argues:

*“By its very nature ... presidentialism is antithetical to democratic politics. Conversely, parliamentarism has historically been proven to be the home of democracy. Parliamentary systems have better records of conducting free and fair elections than presidential ones. Electoral violence is more frequent under presidential regimes than parliamentary regimes.”*<sup>604</sup>

The second is a lengthy quotation from the late Nevil Johnson, formerly Nuffield Reader in the Comparative Study of Institutions and Professorial Fellow at Nuffield College, University of Oxford, in the United Kingdom. It relates to Post-World War Two Western European political reconstruction.

*“Throughout Western Europe those involved in post-war constitutional reconstruction favoured a Parliamentary form of government. They designed the new or restored constitutions to confer full legislative authority on an elected assembly (co-existing in most cases with an upper chamber with more limited powers) responsible for installing and sustaining the political executive or government. This structure made the government responsible to Parliament, which could withdraw its confidence and thus force the government's resignation....*

*“However, none of the parliamentary regimes that emerged in post-war Western Europe fully embodied the British principle of parliamentary sovereignty. Most countries' parliaments co-exist in various relationships with other institutions in a manner that qualifies their authority. The formal provisions of the written constitutions of all states limit the rights of the elected parliamentary bodies. Such conditions point to a more complex pattern of institutionalized checks and balances than was usually associated with the classical parliamentary government of the Westminster type.*

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604 Peter Anyang' Nyong'o, **Presidential or Parliamentary Democracy in Kenya? Choices to be Made**, Booktalk Africa, Nairobi, 2019, p. 11

*“The mode of operation of a parliamentary government depends decisively on the configuration of parties and the manner in which they behave. It is a characteristic feature of Western Europe that political parties have grown stronger. They have become an indispensable means of representation, they are brokers and mediators in the resolution of conflicts of interests in the society and they are the organizations in and through which most individuals pursue a career in politics or public affairs.”<sup>605</sup>*

The last quotation is from the late Fred W. Riggs, political scientist and pioneer theoretician in administrative model building and Emeritus Professor at the University of Hawaii. In a seminar paper published in 1988 comparing the performance of presidentialist and parliamentary systems of government, Professor Riggs argued:

*“One starting point for analysis might be in the proposition that some 33 Third World countries (but none in the First or Second) have adopted presidentialist constitutions. Almost universally, these polities have endured disruptive catastrophes usually in the form of one or more coups d’etat, whereby conspiratorial groups of military officers seize power, suspend the constitution, displace elected officials, impose martial law and promote authoritarian rule. By contrast, almost two thirds of the Third World countries that have adopted parliamentary constitutions, usually based on British or French models have maintained their regimes and avoided the disruptions typical of all American-type systems.”<sup>606</sup>*

So, parliamentary democracy is firmly back on the political agenda, in Uganda as in East Africa and elsewhere in Africa and beyond.

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605 Nevil Johnson, ‘Constitutionalism in Europe Since 1945: Reconstruction and Reappraisal’, in D. Greenberg, S.N. Katz, M.B. Oliviero and S.C. Wheatley (eds.), **Constitutionalism and Democracy: Transitions in the Contemporary World**, Oxford University Press, New York/Oxford, 1993, pp. 31, 33

606 Fred W. Riggs, ‘The Survival of Presidentialism in America: Para-Constitutional Practices’, **9 International Political Science Review** 247, 249 (1988)

## Chapter One: In the beginning there was Buganda...

In his interesting book, *Constitutional and Political History of Uganda*, Professor George W. Kanyeihamba, an eminent Ugandan constitutional scholar and jurist, has stated – quoting Morris and Read in their *British Commonwealth Series* – that “*like many other African countries, Uganda as a territorial unit is the creation of the colonial period. Its external boundaries were determined first by international agreements and then by administrative convenience and at almost no point do they fall into an ethnic pattern.*”<sup>607</sup> This is true, but only partly so. Uganda was not merely a creation of the Anglo-German Agreement of 1890, it was also created out of the agreements between the agents of the British imperial state and the leaders of, at least initially, sovereign states, in particular the Kingdom of Buganda.

As a result of these agreements, Buganda – and later Ankole and Toro Kingdoms and eventually the whole of what would become Uganda – became a ‘Protectorate’ rather than a colony. Unlike colonies, protectorates were not militarily conquered. They became colonial possessions by agreement, not by conquest. And because of this, they were governed much differently from other colonies. The institutions of government were not only preserved in Protectorates, the latter were also granted considerable autonomy to manage their own internal affairs.

To the British imperial authorities in London, this was common sense economics. As Lord Salisbury, the Prime Minister, said in 1890 when the Sultanate of Zanzibar became a British Protectorate:

*“The condition of a protected dependency is more acceptable to the half-civilized races, and more suitable for them than direct dominion. It is cheaper, simpler, less wounding to their self-esteem, gives them more career (opportunities) as public officials, and spares them of unnecessary contact with white men.”*<sup>608</sup>

Shorn of its white supremacist language, Salisbury’s argument was simple. No one wants to be under the rule of aliens because human beings, whether ‘half-civilised’ natives or ‘civilised’ white men, have their self-esteem to preserve and protect. This self-esteem is wounded if the natives come into direct contact with their ‘civilising’ white men, breeding hostility and rebellion. Governing the colonial subjects directly also requires many white men and more resources and is therefore expensive.

The process by which Uganda became a formal state was to have significant consequences for the future of the country, which still reverberates to this day. This process started with the Berlin West African Conference of November 1884 to February 1885. We need to remember that the period during which the British gained control of Uganda

607 **The British Commonwealth, Series No. 13, 1966**, p. 13, quoted in George W. Kanyeihamba, **Constitutional and Political history of Uganda: From 1894 to the Present, 2<sup>nd</sup> Edition**, LawAfrica, Kampala, 2010, p. 3

608 Andrew Roberts, *Salisbury: Victorian Titan*, Phoenix, 1999, p. 529



is known to history as ‘The Scramble’, because a number of European powers were competing to acquire colonial possessions in Africa and the Pacific.

These powers deployed a range of ‘legal tools’ agreed upon during that Conference, to accomplish their imperial designs. The legal tools included entering bilateral treaties with African rulers; recognising each other’s spheres of influence; declaring protectorates; granting charters to private commercial companies and outright annexation.<sup>609</sup>

In the late 19th century, British imperial policymakers were caught in a dilemma regarding Africa and the Pacific. On the one hand, they were unwilling to annex territories in these areas either because they did not want Britain to assume the administrative responsibility associated with annexation, or they did not want the indigenous peoples of these regions to become British subjects. That would have entitled them to the legal rights and privileges inherent to this status.

On the other hand, although Britain already had many colonies around the globe, the British could not afford to let other European powers, notably the French or the Germans, colonise the whole of the African continent and the Pacific. John T. Mugambwa, the foremost student of the agreements that created Uganda, has said in his 1986 doctoral thesis that the legal device of the protectorate was used as a halfway house solution to the problem. Quoting Henry Jenkyns,<sup>610</sup> Mugambwa defines a British protectorate as

*“a country which is not within the British dominions, but as regards its foreign relations is under the exclusive control of the King, so that its government cannot hold direct communication with a foreign power, nor a foreign power with that government.”*<sup>611</sup>

According to Mugambwa, a protectorate differed from a colony in that it was a foreign territory, and its inhabitants were foreigners. British protectorates were further classified into two groups, namely protected states, and colonial protectorates.

*“The protected states were distinguished from protectorates on the ground that in the former case, by treaty, the external and some of the internal sovereignty of the state was ceded to the British Crown, whereas in the latter case, even though in some cases the protectorate status may have originated from an agreement with the tribal chiefs, these agreements ‘are not considered as treaties in international law’; neither have the treaties any validity in the constitutional law of the empire.”*<sup>612</sup>

The British were unwilling, for financial reasons, to assume administrative responsibility for Uganda. Therefore, they granted a royal charter to the Imperial British East African Company to operate within the sphere that had been allocated to Britain under

609 John Tamukedde Mugambwa, **The Evolution of British Legal Authority in Uganda With Special Emphasis on Buganda, 1890-1938**, Doctoral Thesis Submitted to the Australian National University, January 1986, p. 1

610 **British Rule and Jurisdiction Beyond the Seas**, London, 1902:1, 165

611 Mugambwa, *The Evolution of British Legal Authority...*, op. cit., p. 6

612 *Ibid.*, p. 7

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the *Anglo-German Treaty Relating to Africa and Heligoland*, signed on 1 July 1890. That treaty demarcated the borders between the area that constitutes modern day Tanganyika, which was declared a German sphere of influence. It also delimited the area that makes up modern day Kenya and Uganda, which was declared the British sphere of influence.

The object of granting a royal charter to IBEA Co. was for the company to set up a government, at its own expense, to control the region in return for the expected economic gain. Its presence would reinforce Britain's claim over the sphere against all potential claimants, at no cost to the Crown.<sup>613</sup> But even as its ministers prevaricated over the true importance of a sphere of influence during the House of Commons debates, the British government was aware that it did not confer any legal rights to the claimant.

On 1 March 1892 during the House of Commons debate on the East African sphere of influence, Parliament heard the following exposition from Sir William Harcourt, formerly professor of international law at Cambridge University and then a Liberal Party member:

*“A sphere of influence confers no rights, no authority over the people, ... or authority over the land of any kind.... Every act of force you commit against a native within a sphere is an unlawful assault; every acre of land you take is robbery; every native you kill is murder, because you have no right and authority over these men, ... except such as in any particular spot may have been given to you by Treaty with any particular Chief.”*<sup>614</sup>

Professor Harcourt's views were shared by Hall in his book *Foreign Jurisdiction of the British Crown*. Considered an authority on British colonial policy, Hall had written that in a sphere of influence “no jurisdiction is assumed, no internal or external sovereign power is taken out of the hands of the native tribal chiefs; no definite responsibility consequently is incurred.”<sup>615</sup> This interpretation was convenient for the British Government. There was no need for the parliament and the British public to worry over the British Empire's endless expansion. The Crown had no responsibility over the sphere except where it chose to by express agreement with the local ruler.

This position was reflected in the *Africa Order in Council, 1889*, the basic law for exercising British jurisdiction in any part of Africa where it was applied. Article 5 of the Order in Council declared the whole of the East African sphere of influence a local jurisdiction. By its charter, IBEA Co. was not given permission to assume sovereign powers over any territory in East Africa. Its Article 2 made clear that the authority granted to the company was to acquire any power by treaty or agreement with the local rulers “and to hold, use, enjoy and exercise the same, for the purposes of the Company ... subject to the charter.” It was not given any sovereign power for the simple reason that the British Government had no sovereign power to give over the areas where it had no jurisdiction.

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613 Ibid., p. 26

614 Ibid., p. 27

615 Hall, *Foreign Jurisdiction of the Crown*, London, p. 228; quoted in Mugambwa, *The Evolution of British Legal Authority* .... op. cit., p.28

However, the Crown retained in the charter significant powers to steer the Company in the direction it wanted. For example, the Company was precluded from exercising any treaty rights or grants until the Secretary of State had signified his approval of the treaty. Moreover, the Company could not assign or lease any rights without the government's consent. And if all else failed, the charter could be revoked.<sup>616</sup>

With the Anglo-German treaty signed and sealed, IBEA Co. now dispatched Captain Frederick Lugard to Buganda Kingdom to parley with Kabaka Mwanga over a treaty for his protection by the British. It was not an easy task, for as Lugard would note years later:

*“Every clause is discussed in all its bearings sometimes for days, words are altered, and the foresight and determination which the natives show in forecasting the bearing on the future of every regulation is as keen almost as would be that of Europeans....”*<sup>617</sup>

After a week of intense and close to violent negotiations, on Boxing Day 1890 Kabaka Mwanga and his chiefs agreed to sign the treaty. Captain Lugard signed for IBEA Co. Under the Buganda Agreement, 1890, IBEA Co. offered to protect Buganda and to introduce an administrative system *“to secure peace, prosperity and commerce, and to promote civilization.”* The Kabaka accepted the Company's protection and undertook not to enter into any agreement with any European of whatever nationality or allow Europeans to settle in his country except through and with the consent of the Company's resident officer.

Under Article 3(a) of the Agreement, all matters and questions regarding Europeans were to be the sole responsibility of the Company's resident officer who would act as an 'arbitrator' and whose decision, subject to appeal to senior officers of the Company, was to be final. No mention was made of jurisdiction over the Baganda and other non-Europeans. However, the Company's resident officer was given wide general powers to intervene in the Kabaka's administration. For example, under Article 2(ff), the Kabaka had to seek the resident officer's consent before declaring war and *“in all serious affairs and matters connected with the state.”*

By the time the Buganda Agreement was approved by the Secretary of State, which was over a year later, Captain Lugard had been actively enforcing its terms. Moreover, by the time of its approval, Captain Lugard and the Kabaka had already signed a fresh treaty which superseded any other previously 'whatsoever and with whomsoever concluded.' This second treaty, submitted to the Foreign Office in October 1892, was never approved by the Secretary of State. Nor were the other treaties he had signed with the Kings of Ankole, Toro and the lesser chiefs of eastern and northern Uganda.

By this time, however, the Company was no longer buoyant, having exhausted its finances and resources in the military campaigns and on huge transportation costs from

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616 Ibid., p. 30

617 Ibid., p. 32

the coast. The British Government being unwilling to extend any financial lifeline, IBEA Co. wound up its affairs in Buganda and much of East Africa.<sup>618</sup> This resulted in an intense campaign in Great Britain for the Government to take over the treaty responsibilities left behind by the Company. This pressure led the Secretary of State to commission Sir Gerald Portal, the Commissioner of Zanzibar, and the East African sphere, to investigate the situation and report his findings to the Cabinet for its decision. Portal was specifically told to investigate and report on the practical effect to British reputation, were the Government not to adopt the Company's treaties.<sup>619</sup>

Predictably Portal, who favoured the retention of Uganda, reported that whatever the legalities of the treaties between the Company and the Crown, "... *the impression conveyed to the different native chiefs and peoples in this region ... when they signed treaties and received in return the Company's flag and promise of protection was that they were thereby placing themselves under the protection of the Government of Great Britain. Even among the more intelligent people of Uganda the same belief obtained....*"<sup>620</sup> Portal called for a practical solution to the problem of the treaties. He cautioned the Government that failure to assume the Company's treaty obligations was bound to tarnish the British reputation (which he claimed was held in higher esteem than that of other Europeans), and ruin Britain's commercial prospects in the region. Eventually the Government decided to enter into fresh treaties with the chiefs throughout the British sphere of influence.<sup>621</sup>

However, unlike the treaty that Portal entered with Kabaka Mwanga, in the treaties signed with all other chiefs, no protection was promised or any responsibility assumed. The treaties were essentially of 'friendship' which, however, required the chiefs not to cede any territory or enter into any treaty or agreement with any European without the British Government's consent. The content of the treaties was compatible with the British policy of retaining control over their sphere of influence, by excluding other Powers, but without taking over the administration of the territory.<sup>622</sup>

On 1 April 1893, Sir Gerald Portal lowered the IBEA Co. flag and hoisted the Union Jack. According to Bishop A.B. Tucker, the Church Missionary Society cleric who witnessed the event, for those present "*the administration of Her Britannic Majesty's Government became an accomplished fact.... The British Government had come to stay.*" Two months later, Portal signed another treaty with Kabaka Mwanga which, as he told the Secretary of State, was "*made with the object of insuring and defining the position and authority of Her Majesty's Government Representative in the country until the final decision and further instructions of Her Majesty's Government on the whole question can be conveyed to him.*"

In other words, the treaty was an interim arrangement providing the British Representative with legal cover for asserting his authority in Uganda. Portal's treaty

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618 Ibid., pp. 33-34

619 Ibid., p. 35

620 Ibid., pp. 35-36

621 Ibid., p. 36

622 Loc. cit.

was drafted carefully. Its terms were described as ‘conditions’, which Kabaka Mwanga promised to fulfil in order to secure British ‘protection, assistance and guidance’ in governing his country. The treaty was immediately binding upon both parties except that, whereas Mwanga was bound to renew it or enter into another with similar terms if so requested by the British Government, the latter’s obligations were only to remain until such time as the Secretary of State instructed otherwise.

Kabaka Mwanga could not escape the treaty, but the Crown exercised discretion to continue or cancel it. Under the treaty, the British Government acquired extensive authority and power in Uganda. Under Article 5, the British Representative was granted an exclusive mandate to administer justice in all cases and matters concerning Europeans and persons not born within Buganda, or in cases where such persons were involved ‘so far as ... the Kabaka was concerned.’ By this provision, the Kabaka deprived himself of any jurisdiction over foreigners in his Kingdom, or in any cases in which they were involved.

The British Government Representative’s judicial powers were extended to cases involving the Baganda. Under Article 6, he was empowered, ‘in his absolute discretion’, to act as ‘a Supreme Court of Appeal’ in all civil cases. In criminal cases, he was given the power to intervene ‘in public interest and for the sake of justice’ as he saw fit. Apart from the judicial powers, Portal’s treaty with Mwanga vested the British Government with far-reaching powers to intervene in Buganda’s affairs. Under Article 10, the British Representative had to concur in all serious matters affecting Buganda, such as declaration of war, appointment of chiefs, revenue collection and expenditure, as well as any division of the territory based on religion or politics. In addition, Buganda’s foreign affairs were unreservedly surrendered to the Crown.

Moreover, Mwanga acknowledged that all international agreements to which Britain was a party (then or in future), would bind Buganda and all its dependencies to the extent determined by the British Government. The treaty’s overall impact was to make Buganda a ‘provisional’ British Protectorate before the Government confirmed or renounced its status.

In his report to the British Government, Portal recommended the declaration of Buganda as a British Protectorate. This recommendation was enthusiastically supported by Secretary of State Roseberry, with the entire British government not far behind. Thus, on 18 June 1894, the *London Gazette* published the following announcement:

*“Under and by virtue of the agreement concluded on the 29 May, 1893, between the late Sir G. Portal and Mwanga, the King of [B]Uganda, the country of that ruler is placed under the Protectorate of Her Majesty the Queen.”*

This treaty specifically limited the Protectorate to Buganda only. Two months later, on 27 August 1894, acting Commissioner signed a fresh treaty with Mwanga which was a replica of the Portal treaty it replaced. The Buganda Protectorate was, therefore, established on the basis of the treaty with Kabaka Mwanga. This factor gave legitimacy

to the treaty which was to dominate the relationship between Buganda and the British Government for decades to come.

With Buganda Kingdom sorted out, the British Government proceeded to conclude agreements with neighbouring countries such as the Kingdom of Toro (3 March 1894); the Kavirondo (18 April 1894), and the Ankole Kingdom (29 August 1894). Unlike the Buganda Agreement, however, these latter agreements did not confer the kingdoms with the coveted *status* of British protectorates. For what was uppermost in the British Government concerns was to maintain them as spheres of its influence. In doing so, it precluded all other European Powers from the Nile Basin, while at the same time not assuming any sovereign responsibilities over them, thereby keeping costs of their administration to a minimum.

Outside Buganda, the Protectorate was extended first to Busoga to the east of Buganda and across the all-important route to the coast. The British Government representative and his officials negotiated with Kabaka Mwanga to make Busoga part of the Protectorate. On 18 June 1895, the imperial government in London took unilateral action, and declared all territories lying between the Protectorate and the coast, and the areas from River Juba in the north to the border with the German sphere of influence in the south, under the protection of the Crown.

The declaration was prompted by the British Government decision to construct the Uganda railway from the coast to the shores of Lake Victoria. It was made without any reference to any treaty or agreement with the local rulers of the areas concerned. Quite clearly, at this point in time, the British Government did not consider the consent of the local rulers as being necessary before declaring their territories part of the British Protectorate.

Next in line to be incorporated into the Buganda Protectorate were Ankole, Toro and Koki Kingdoms. Here, the Protectorate officials asked for and obtained permission to initiate negotiations with the kings of the three territories. However, before the negotiations could be concluded and treaties signed, the *London Gazette* of 3 July 1896 published a proclamation to the effect that:

*“Bunyoro, together with that part of the British sphere of influence lying to the west of Buganda and Bunyoro which has hitherto not been included in Uganda Protectorate, is placed within the limits of that Protectorate, which includes, also, [B]Usoga and the other territories to the east under the administration of Her Majesty’s Commissioner and Consul-General for the Protectorate.”*

Here, too, there was no mention of any agreements or treaties with the local rulers. Thus, Bunyoro, Ankole and Toro Kingdoms were incorporated into the Protectorate by imperial fiat, as opposed to by treaty or agreement as had been the case with Buganda. There remained the areas to the north and north-eastern corner of the Buganda Protectorate. Some of these areas were incorporated into the Protectorate by another array of treaty-

making induced by military campaigns; but eventually all of them were integrated into the Protectorate by the *Uganda Order in Council, 1902*, which was promulgated on 11 August 1902.

Buganda Kingdom was, therefore, the only territory in East Africa to have come under British ‘protection’ through a treaty. But it was not exactly a ‘protected state’ since the treaties entered with the British agents were not recognised under international law. Nonetheless, relations between the Kingdom and the British colonial state were governed by the agreement.<sup>623</sup> This raised constitutional and political questions, which were to shape the history of not only the Uganda Protectorate during the colonial period, but also the post-colonial history of Uganda deep into independence.

It is significant that although the Uganda Protectorate and other black African British protectorates and the Solomon Islands have often been classified as ‘colonial protectorates’, Mugambwa argues that the Kingdom of Buganda and Northern Nigeria represented “*the colonial protectorate at its nearest approximation to the protected state...*”<sup>624</sup>

Although Bunyoro-Kitara and Buganda Kingdoms were the two most important and powerful states in the 19<sup>th</sup> century Great Lakes Region, it was Buganda, the less powerful of the two, that came to dominate Ugandan politics and society both during the colonial period and after independence. Buganda was the nucleus around which the Protectorate of Uganda was built. It was declared a British Protectorate in 1894, and gradually all other territories were incorporated into this ‘Uganda Protectorate.’<sup>625</sup>

Secondly, apart from Bunyoro-Kitara, Buganda Kingdom had a highly organised political structure that was unique in East and Central Africa. Thirdly, numerically the Baganda were (and continue to be) the largest ethnic community in the region. Fourthly, because of their earlier contacts with the Europeans, the Baganda were introduced to Western education and culture much earlier than other groups. Finally, unlike other ethnic groups, Buganda’s relations with Great Britain were governed by treaty and the Buganda Agreement of 1894, which were respected by both parties to the letter.<sup>626</sup>

Bunyoro-Kitara, the most powerful of the Great Lakes Region’s Kingdoms, resisted British incursions into their country. As a result, the British formed a military alliance with Buganda Kingdom, defeated Bunyoro-Kitara on the battlefield and exiled its king, Mukama Kabalega, to the Islands of Seychelles on the Indian Ocean. Hence, unlike Buganda, Ankole and Toro Kingdoms which became part of the Uganda Protectorate by treaty, Bunyoro-Kitara was the only Kingdom that the British maintained was theirs by military conquest.

It was not until 1933 that the Bunyoro Kitara entered into an agreement with the British colonial state. But by this time, it had already long been conquered and the

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623 Ibid., p. 2

624 Ibid., pp. 7-8

625 Ibid., p. 11

626 Loc. cit.

agreement did not have the same significance, legally or politically, as the original treaties. Bunyoro-Kitara did not only lose its sovereignty to the British, but it also lost substantial territory to Buganda Kingdom, giving rise to what came to be known as the ‘Lost Counties’ Question. This was to sully Ugandan politics throughout the colonial period and well into independence.<sup>627</sup>

The Ankole and Toro Kingdoms were much smaller and less powerful than Bunyoro-Kitara and Buganda. In fact, Buganda Kingdom treated them as her tributary states until, under pressure from the British, she renounced her alleged rights under the Buganda Agreement of 1900.<sup>628</sup> The two smaller kingdoms together with Bunyoro-Kitara and Busoga (which was not a Kingdom but consisted of independent chieftaincies) were incorporated into the Uganda Protectorate in July 1896. There was no prior treaty in which any of them accepted British protection, but agreements similar to Buganda Kingdom’s were signed by Ankole and Toro Kingdoms in 1900 and 1901 respectively. These agreements laid down relationships between the Protectorate Government and the Kingdoms for many years to come.

The territories to the north and east of the Nile, which constitute modern day Northern and North-eastern Uganda, were brought under the Uganda Protectorate through a series of British military expeditions to the region. Treaties with the local chiefs and the *Anglo-French Agreement of 1899*, under which France acknowledged the British claim over the entire Nile River Valley. These territories were eventually incorporated into the *Uganda Protectorate by the Uganda Order in Council, 1902*.<sup>629</sup>

### **The Buganda Agreement and the Birth of Uganda**

On 10 March 1900, at the royal capital of Mengo in Buganda Kingdom, an agreement was signed between the Kabaka, Chiefs and People of Buganda, and Sir Henry Hamilton Johnston, Her Majesty’s Special Commissioner, Commander in Chief and Consul-General for the Uganda Protectorate and adjoining territories, “*respecting the boundaries and administration of the Uganda Protectorate.*” The agreement was variously called the Uganda Agreement or Buganda Agreement. It was a landmark in Britain’s relationship with the Buganda Kingdom. It has, consequently, been described as Buganda’s ‘Magna Carta’, ‘Buganda’s Constitution’, ‘Buganda’s Charter of Rights’, etc.<sup>630</sup>

In his book *Buganda and British Overrule*, Anthony Low has argued that of all treaties signed by Britain with native authorities during the colonial era, “*few ... have been of such consequence as ... (this) Agreement, few have been so detailed, few have attained such importance in the relationship with the colonial people; few too have so enjoyed their approbation or become so embedded in their folklore.*”<sup>631</sup> Apart from this Agreement,

627 Ibid., pp. 14-15

628 Ibid., p. 15

629 Ibid., pp. 15-16

630 The Uganda Constitution Commission which was established in 1989 refers to the Agreement as “*the Magna Carta for ... the Buganda ruling groups.*” See Republic of Uganda, the Report of Uganda Constitution Commission: Recommendations and Analysis, Ministry of Justice and Constitutional Affairs, Kampala, 1993, para. 2.15, p. 46

631 Quoted in Mugambwa, *The Evolution of British Legal Authority ...*, op. cit., p. 133.



Johnston also signed similar Agreements with Toro on 26 June 1900; and with Ankole on 7 August 1901.

Not unlike the Buganda Agreement of 1892, the negotiations between the British representative and the Baganda chiefs were complex and long drawn out. Even though they had been witnesses to the full power of the British military might inside and outside their Kingdom, and despite threats by Johnston, the Buganda chiefs who parleyed with him bargained hard. Johnston, for his part, was aware that Buganda was no pushover, even in military terms where the British had few competitors even in Europe.

Thus, a week after the Agreement was signed, he wrote to Lord Salisbury, the Secretary of State:

*“If there is any part of the Uganda Protectorate which could do us any real harm it is ... the Kingdom of Buganda. Here we have something like a million fairly intelligent, slightly civilised negroes of warlike tendencies, and possessing about 10,000 to 12,000 guns. These are the only people for a long time to come who can deal a serious blow to British rule in this direction....”*<sup>632</sup> The Agreement was concluded with this understanding.

The Buganda Agreement was so comprehensive that it covered all aspects of government and Buganda’s relationship with the Protectorate Government. It encompassed three important areas, namely land, taxation, and administration. Unsurprisingly, the Land Question was the most controversial aspect of the Agreement. Here, the Kabaka, his chiefs and the Baganda landed gentry were granted, as private estates, large tracts of land running in square miles according to sizes prescribed in Article 15 of the Agreement. These allocations would give rise to the ‘Mailo’ feudal land tenure system, which has bedevilled Uganda’s land tenure system for generations since. It is called ‘mailo’ because the land grants were measured in square miles.

The remainder of the land, apart from private estates granted to Europeans and to Christian missionaries, and all forests became Crown land. Shortly afterwards, Johnston would tell Secretary of State Salisbury that the Crown’s share of the Buganda lands was approximately 10,500 square miles, which he estimated to be one half of the total area of Buganda Kingdom.

With regard to taxation, the Protectorate Government had enjoyed taxation powers over goods entering or leaving Buganda Kingdom since concluding the first Buganda Agreement in 1892. However, these taxes had always been collected in the name and to the account of the Kabaka. And it was on his account that it had to be expended. Under the new Agreement, these existing powers were retained but with significant modifications. Article 4 declared in this regard:

*“The revenue of the Kingdom of Buganda, collected by the Uganda administration, shall be merged in the general revenue of the Uganda Protectorate as will that of the other provinces of the Protectorate.”*

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632 Ibid., p. 133

Thus, the revenue of Buganda was to be made indistinguishable from the revenue from the rest of the Protectorate. Moreover, there was no mention of taxes being collected or expended in the name or to the account of the Kabaka.

Moreover, new taxes were introduced, namely hut and gun taxes; the proceeds of which were to be “... handed over intact to Her Majesty’s Representative in Uganda as the contribution of the Uganda Province towards the general revenue of the Protectorate.”<sup>633</sup> These taxes were intended “... to contribute to a reasonable extent towards the general cost of the maintenance of the Uganda Protectorate....”<sup>634</sup> The new Agreement also stipulated that the Baganda were liable to pay the same ‘exterior taxation’ as all other territories of the Protectorate. However, save for hut and gun taxes, the Baganda were exempted from any further ‘interior taxation’, “... without the agreement of the Kabaka who, in this matter, shall be guided by the majority of votes in his Native Council.”<sup>635</sup> In other words, the Protectorate Government had limited power to tax the Baganda.

With respect to administration, the Buganda Agreement was also foundational for the future constitutional and political problems of the country. By its Article 3, for instance, the Kingdom of Buganda was to be a province equal in rank with any other province into which the Protectorate might be divided. This provision was quite significant since, due to the 1894 Agreement, Buganda had always been treated differently from the rest of the Protectorate.

Johnston’s objective in incorporating this provision in the Agreement was to try and prevent the administration of Buganda from being different to that of other parts of the Protectorate, or the future of a combined Uganda and the East Africa Protectorate which was then under consideration. However, this equality of rank amongst the provinces was not real. Firstly, as we have seen, the Agreement itself made the Baganda exempt from ‘interior taxation’ other than the hut and gun taxes. This express exemption was not availed to other territories.

Secondly, since Buganda was already guaranteed certain rights not available to all other territories in the Protectorate, and which could not be overridden by any Protectorate legislation, it could not be said to be equal in rank with the others. This was made clear by Article 5 of the new Agreement: “*The laws made for the general governance of the Uganda Protectorate by Her Majesty’s Government will be applicable to the Kingdom of Buganda except in so far as they may in any particular conflict with the terms of this Agreement will constitute a special exception in regard to the Kingdom of Buganda.*”

To assist him in the governance of Buganda, the Agreement allowed the Kabaka power “*to appoint three native officers of State, with the sanction and approval of Her Majesty’s Representative in Uganda (without whose sanction the appointment shall not be valid).*”<sup>636</sup> The said ‘officers of State’ were stipulated as a Prime Minister, otherwise

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633 Agreement Between Sir H.H. Johnston and the Kabaka, Chiefs and the People of (B)Uganda, Respecting the Boundaries and Administration of Uganda Protectorate, Signed at Mengo, March 10, 1900, art. 12

634 Ibid., art. 12

635 Ibid., art. 12

636 Ibid., art. 10

known as the ‘Katikiro’; a Chief Justice or ‘Omulamuzi’; and a Treasurer or Controller of the Kabaka’s revenues.<sup>637</sup> The Katikiro was to be President of the Lukiiko, with the native Minister of Justice the Vice President and in his absence, the Treasurer was to preside over the meetings of the Lukiiko.<sup>638</sup> The latter served as the Parliament of the Buganda Kingdom.

The Lukiiko itself consisted of these ministers as *ex officio* members; and twenty county chiefs representing the counties in the Kingdom, who were *ex officio* members as well. In addition, the Kabaka was entitled to appoint, ‘during his pleasure’, three ‘notables’ from each county to be members of the Lukiiko.<sup>639</sup> The Kabaka’s powers over the Lukiiko were vast and were checked only by the Protectorate Representative. He could, for instance, “... at any time deprive any individual of the right to sit on the Native Council, but in such a case shall intimate his intention to Her Majesty’s Representative in Uganda, and receive his assent thereto before dismissing the member.”<sup>640</sup>

The Lukiiko had power to discuss all matters concerning the native administration of Buganda, and to forward to the Kabaka resolutions voted by a majority of its members regarding measures to be adopted by the Buganda administration.<sup>641</sup> The Kabaka was bound to consult with Her Majesty’s Representative before implementing any such resolutions and “shall ... explicitly follow the advice of Her Majesty’s Representative.”<sup>642</sup>

As for administration of justice, the Agreement provided for the Kabaka courts which had unlimited jurisdiction over the Baganda. Part of Article 8 of the Agreement stipulated as follows:

*“The Kabaka of Buganda shall exercise direct rule over the natives of Buganda, to whom he shall administer justice through the Lukiiko or Native Council, and through others of his officers in the manner approved by Her Majesty’s Government.”*

The Lukiiko or a Committee thereof was to be the Court of Appeal for decisions of the courts of first instance held by county chiefs. It was required to refer certain appeals relating to property or in respect of sentences of imprisonment for a term of more than five years or capital punishment directly to the Kabaka whose decision, when countersigned by Her Majesty’s Representative, was final.<sup>643</sup>

There were, however, significant *caveats* to these judicial powers. Firstly, the jurisdiction of the Kabaka courts did “... not extend to any person not a native of the Buganda Province.”<sup>644</sup> Secondly, “the Kabaka’s Courts shall be entitled to try natives for capital crimes, but no death sentence may be carried out by the Kabaka or his Courts

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637 Loc. cit.

638 Ibid., art. 10

639 Ibid., art. 11

640 Ibid., art. 10

641 Ibid., art. 11

642 Ibid., art. 11

643 Ibid., art. 11

644 Ibid., art. 6

*without the sanction of Her Majesty's Representative in Uganda.*"<sup>645</sup> Moreover, "there will be a right of appeal from the Native Courts to the principal Court of Justice established by Her Majesty in the Kingdom of Buganda as regards all sentences which inflict a term of more than five year's imprisonment or a fine of over £100."<sup>646</sup>

Similarly, "in the case of any other sentences imposed by the Kabaka's Courts which may seem to Her Majesty's Government disproportioned or inconsistent with humane principles, Her Majesty's Representative in Uganda shall have the right of remonstrance with the Kabaka, who shall, at the request of the said Representative, subject such sentence to reconsideration."<sup>647</sup>

The Agreement provided for the position of the Kabaka, with Article 6 stating that the British Government would continue to recognise him as the Native Ruler of the Province of Buganda 'under Her Majesty's protection and overrule', "so long as the Kabaka, chiefs and the people of Buganda shall conform to the laws and regulations instituted for their governance by Her Majesty's Government, and shall cooperate loyally with it in the organization and administration of Buganda...."

The Kabaka was to bear the honorific title of 'His Highness the Kabaka of Buganda'; which Johnston strongly urged Secretary of State Salisbury to approve because, in his view, the Kabaka of Buganda was of no lesser importance than the Sultan of Zanzibar who carried the same title; even though he ruled over a much smaller territory and had fewer people.<sup>648</sup> He was also "entitled to a salute of nine guns on ceremonial occasions when such salutes are customary."<sup>649</sup>

But even while Johnston was negotiating the Buganda Agreement with its rulers, the British Government was already planning the enactment of a new Order in Council for Uganda Protectorate. This would extend the Crown's authority over all aspects of government in the Protectorate. Gray, its draftsman, was clear that the new Order in Council would "... give legal expression to the fact that the general administration of the Protectorate is in the hands of His Majesty."<sup>650</sup>

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645 Ibid., art. 6

646 Ibid., art. 6

647 Ibid., art. 6

648 Mugambwa, *The Evolution of British legal Authority ...*, op. cit., p.144

649 Agreement Between Sir HH Johnston ..., op. cit., art. 6

650 Ibid., p. 151

## Chapter Two: The Uganda Order In Council 1902

*The Uganda Order in Council of 1902* provided for a complete system of government with executive, legislative and judicial powers.<sup>651</sup> Article 18 established His Majesty's High Court of Uganda which was granted full jurisdiction, civil and criminal, over all matters and persons in Uganda.<sup>652</sup> By this time, the Crown had assumed plenary powers in the Protectorate. The Commissioner had unlimited executive and legislative powers, while the High Court had unlimited jurisdiction over all persons and matters in Uganda. Although the Buganda Agreement (and those of Toro and Ankole respectively) imposed certain restrictions on the Crown's powers in Buganda, the Order in Council did not expressly incorporate them.<sup>653</sup>

The Order in Council also made provisions for administering the protectorate and designating a Commissioner who was vested with the powers of government of Uganda, assisted by a Deputy Commissioner and other officers. He was vested with the prerogative of mercy, which he could exercise in the name of the Crown.

The Commissioner was vested with legislative powers. He could "... *make Ordinances for the administration of justice, the raising of revenue, and generally for the peace, order and good government of all persons in Uganda.*"<sup>654</sup> He could order that laws of the United Kingdom, India or any other colony be generally applied to Uganda, subject to any exceptions and modifications as he deemed fit. In the exercise of his legislative powers, the Commissioner was to be subject only to the general or special instructions of the Secretary of State. He was required to respect existing native laws and customs, but only insofar as they were not repugnant to the British notions of justice or morality.

Besides the laws made or authorised by the Commissioner, laws enshrined in the First Schedule to the *Foreign Jurisdiction Act, 1890*, were made applicable to Uganda as if it 'were a colony or possession.' The application of these laws was subject to the Uganda Order in Council and to the exceptions, adaptations and modifications as described in the Order in Council. The Commissioner was granted with powers to establish subordinate courts and courts of special jurisdiction, and to appoint, discipline and dismiss public officers, magistrates and judges other than those of the High Court of Uganda, registrars and all manner of judicial and administrative officers.

The Order in Council also gave the Commissioner punitive powers to remove and deport from Uganda persons he considered undesirable or dangerous to the peace, order, and good government of Uganda. Until 1920, Uganda was therefore virtually ruled by the orders of one man: Commissioner. He was the head of the Protectorate, the chief executive officer and its lawmaker. With the exception of His Majesty's High Court of Uganda and its judges, the Commissioner controlled all other courts and their personnel. Professor

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651 Ibid., p. 152

652 Ibid., p. 156

653 Ibid., p. 157

654 The Uganda Order in Council, 1902, art. 12

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George W. Kanyeihamba, the prominent Ugandan jurist, has argued: “*The period between 1902 and 1920 may be described as dictatorial and despotic, if not in practice, at least in law.*”<sup>655</sup>

### **Birth of the Legislative Council**

In 1920, a new *Uganda Order in Council*, consolidating all previous Orders in Council, was promulgated. The new Order in Council made provisions for the establishment of both executive and legislative councils. The Commissioner was re-designated Governor. Members of the two councils were designated by His Majesty, through the Secretary of State, rather than appointed by the Governor. Apart from powers to suspend them, which, however, was subject to confirmation by the Secretary of State, the Governor had no powers over the persons who were to assist him in governing Uganda. Instead, they were to hold office at the pleasure of His Majesty, through the Secretary of State, the appointing authority.<sup>656</sup>

The membership and functions of the Executive Council were not provided for in the Order in Council. They were, instead, set out in the Royal Instructions of 1921 made under the Order in Council. The Executive Council was to consist of the Chief Secretary, the Attorney General, the Financial Secretary, Director of Medical Services, Director of Agriculture, and the Resident of Buganda. In addition, the Governor could appoint persons within or outside the public service as members of the Executive Council. The former were styled as ‘official’ members while the latter were to be called ‘unofficial’ members of the Executive Council.

The Order in Council also established a legislative body known as the Legislative Council whose constitution and procedures were, like the Executive Council, set out in the Royal Instructions of 1921. It was empowered to make laws and regulations for the administration of justice, law and order and good government of Uganda. The laws so made were subject to assent of the Governor, whose assent could be withheld.

The Legislative Council was to consist of the Governor and such other persons, not being less than two at any time, as His Majesty directed by way of Royal Instructions. The first Legislative Council was very small, and it was all-European. It consisted of the Governor as President and four official and two unofficial members. It was not until 1926 that it got its first Indian member, Chunibhai Jethabhai Amin, who was appointed by the Governor as an unofficial member. The second Indian to be appointed to the body entered the Legislative Council in 1933. The two were appointed in their personal capacity.

Demands for native African representation in the Legislative Council started to appear formally in the early 1940s. Thus, during the 1944 legislative debates, Mr Fraser, an unofficial member tabled a private member’s motion in which he said *inter alia*:

“... Consideration should be given to African representation on this Council, either by an African member, or by a person other than a

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655 Kanyeihamba, *Constitutional and Political History...*, op. cit., p. 10

656 *Ibid.*, p. 11

*Government official who can voice the African's view point in an unbiased manner and without fear of incurring Government's displeasure. The four Unofficial Members of this Council are drawn from a similar walk of life and though they may be conscientious advisers to Government on matters of finance and general development problems, they are not conversant with specialised subjects such as education, medical and African welfare which are to form a large part of Government activities in the future.*"<sup>657</sup>

Mr Fraser's motion was seconded by two other unofficial members but was defeated on the Council vote after the Governor opposed it on the grounds that it raised 'constitutional issues' whose time had not yet come.

However, in less than a year, the British Government's attitude towards African representation in the colonial Legislative Assemblies changed. With the Second World War drawing to a victorious close, there were dramatic political developments. In Great Britain, the first Labour Government, that of Clement Attlee, came to power. The Labour Party was more sympathetic to the cause of the colonial peoples than the Tories were. Likewise, in the colonial world there were nationalist stirrings which could no longer be suppressed now that the War had ended.

A year before, in 1944, a multinational Pan African organisation called Pan African Federation had been established in Manchester, UK, whose aim was, inter alia, "*to demand self-determination and independence of African peoples, and other subject races from the domination of powers claiming sovereignty and trusteeship over them.*" From East Africa, the Kikuyu Central Association, led by Mzee Jomo Kenyatta of Kenya, was one of the founding members of the Federation. Then, with the dust of the War still settling, the Fifth Pan African Congress was held, again in Manchester, between 15 and 21 October 1945. Significantly, the Congress was attended by 26 African delegates, including future African nationalist leaders such as Kwame Nkrumah of Ghana, Mzee Kenyatta, Obafemi Awolowo of Nigeria and Hastings Kamuzu Banda of Malawi. Equally importantly, the Congress called for an end to European colonialism in Africa and elsewhere.

In their African colonial possessions, official attitudes held by the colonial governments also began to change. On 18 June 1945, the newly appointed Governor of Uganda, Sir John Hawthorn Hall, made the following statement from the Chair of the Legislative Council:

*"I hope also that before long we shall be able to welcome to our deliberations as colleagues representatives of the African race so that they may be associated more closely with the business of Government and the framing of measures which so intimately affect their lives and the future of their country."*<sup>658</sup>

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657 Quoted from Kanyehimba, *Constitutional and Political History ...*, op. cit., p. 17

658 *Ibid.*, p. 18

Governor Hall's statement indicated a complete reversal of British policy on African representation.

On 23 October 1945, barely two days after concluding the Pan African Congress in Manchester, Governor Hall announced that the Secretary of State had approved his proposal to appoint three African members to the Legislative Council. The Governor declared:

*"The principle that this Protectorate should be administered primarily for the benefit of its African population no one nowadays seriously challenges.... Africans should have an effective voice and should take an effective part."*<sup>659</sup>

But the African voice came with heavy qualifications. Firstly, the African representatives were to be drawn from the native ruling elite that owed their power and positions to the Protectorate Government. In the words of Governor Hall, these were to be *"men of substance and authority, of ripe experience and possessed of a developed sense of responsibility which may be expected from those high offices in the Native Governments and Administrations."*<sup>660</sup> As a result, only Katikiros (Prime Ministers) of the Kingdoms of Buganda, Bunyoro, Toro and Ankole; and the Secretaries General of Busoga, Bugisu, Bukedi and Teso would qualify for membership to the Legislative Council.

Secondly, the African voice did not include the North and Northwest of the Protectorate. These areas were still inhabited by 'the semi-barbarous multitude', who did not qualify for a seat in the civilised centers of power such as the Legislative Council. Governor Hall again:

*"It will not have escaped the notice of the Honourable Members that the system of nomination which I first described will leave the Nilotic districts in the North without direct representation. Their tribal and administration organizations have not yet in all their districts advanced to the stage requiring the creation of centralised native executives and thus of appointments similar to the Secretaries General but they are already developing."*<sup>661</sup>

The third qualification to African representation to the Legislative Council reflected the central role played by Buganda Kingdom in the creation of the Uganda Protectorate, and its most favoured nation status in the British colonial scheme in Uganda. Governor Hall declared that the three new members of the Legislative Council would be drawn from Buganda, Western and Eastern Provinces only. The Western Province, comprising Bunyoro, Toro and Ankole Kingdoms, was to be represented by the *Katikiros* of the three Kingdoms in rotation. The Eastern Province made up of Busoga, Bugisu, Bukedi and

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659 Ibid., p. 18

660 Ibid., p. 18

661 Quoted in Kanyehamba, Constitutional and Political History ..., op. cit., p. 19



Iteso, was to be represented by the Secretaries General of those areas, also in rotation. Only Buganda Kingdom would have a permanent representation in the Legislative Council.

On 4 December 1945, three new members of the Legislative Council of the Protectorate of Uganda took their seats.<sup>662</sup> By March 1948, the number of African representatives in the Legislative Council had increased to four, and by 1950 it was eight. However, they were in the minority as the non-African members were also correspondingly raised to six official members and four to European and Indians, respectively.

In 1952, a new Governor, Sir Andrew Cohen, replaced Sir John Hall. The new Governor immediately set about changing the composition of the Legislative Council in favour of increased African representation. He soon announced that representation outside Buganda would be based on districts rather than provinces. This took the number of African representatives to 27 members. To avoid the Government being defeated by unofficial members during voting, Governor Cohen introduced a new category of nominated members called crossbench members. These were free to discuss and debate any matter according to their conscience, but they were obliged to support Government policy when it came to voting.

Hence, by 1954 the Legislative Council consisted of the Governor, nine *ex officio* members, eleven cross benchers and 27 representative members. Thus, with the four European representatives generally supporting the Government, the latter had a majority of two. For the first time since its creation, the Legislative Council had fifty per cent of African representation. For the first time too, it welcomed its first two women members, both of them Europeans. With the introduction of a ministerial system of government in 1956, five Africans were made Ministers; while the representation of the people was also raised to 61 members, including the first Ugandan woman, a Mrs. Kisosonkole.<sup>663</sup>

By the second half of the decade of the 1950s, with the winds of nationalist change beginning to blow hard, demands started to emerge inside and outside of the Legislative Council for direct elections. For example, on 24 April 1956, Governor Cohen addressed the Legislative Council on the subject of elections as follows:

*“I wish to address the Council on the subject of elections, in which you as representatives of the people of Uganda are deeply interested. The Government welcomes this interest and has itself been studying the question of elections for some months. When the Council debated the question last January, there was agreement by honourable members that the aim should be to introduce direct elections to the Legislative Council.*

*“But the great majority of members, including a substantial majority on the representative side, voted against binding ourselves to the introduction of direction elections throughout the Protectorate in 1957.... There will*

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662 These were Michael Ernest Kawalya Kagwa, the Katikiro of Buganda; Petero Nyangabyaki, the Katikiro of Bunyoro and Yekonia Zirabamuzale, the Secretary General of Busoga.

663 By the sheerest of coincidences, Mrs. Damali Kisosonkole happened to be the wife of Kabaka Edward Muteesa II, the King of Buganda!

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*be, I believe, general agreement in the House that the objective of our policy must be to introduce direct elections on a common roll for the representative members of the Legislative Council from all parts of the Protectorate.”*<sup>664</sup>

Buganda Kingdom and its landed oligarchy, which had received special treatment since the earliest days of colonialism, felt threatened by these plans. While it did not oppose the principle of elections as such, Buganda preferred indirect elections using its Lukiiko as an electoral college, rather than direct elections using a common roll. Through indirect elections, the Baganda's vested interests would be better placed to control the outcome in Buganda and thereby protect its interests. But other Provinces, less powerful than Buganda, preferred direct elections.

Eventually, a compromise was agreed upon which allowed direct elections to be held in all parts of the country except Buganda. Therefore, on 16 October 1957, the Legislative Council passed the *Legislative Council (Elections) Ordinance*,<sup>665</sup> to prepare for the first direct elections in the history of the Uganda Protectorate. One year later, on 20 October 1958, the first direct elections were held for 10 seats to the Legislative Council. The new Legislative Council resulting from this election comprised all members of the Executive Council; three civil servants (the Administrative Secretary, the Solicitor General and the Treasury Secretary); three Parliamentary Secretaries, and 15 Government backbenchers consisting of ten Africans, three Europeans and two Indians.

On the representative side were twelve elected African members representing various parts of Uganda. Of these, the Ankole member, whose District Council became the electoral college, and the Bugisu member, whose District Council refused to participate in the elections, were nominated instead of being directly elected. Buganda, which should have had five members but whose Lukiiko had called for a boycott of the elections, was unrepresented. There was also no representative for Karamoja. Apart from these, there were six European and six Indian nominated members. Thus, the Government side had 32 members as opposed to 25 representative members. This Legislative Council also contained five nominated women members.

### **The Wild Committee Report**

As the momentum for independence gathered pace, on 4 February 1959, newly appointed Governor, Sir Frederick Crawford, formed a Constitutional Committee on Self-Government. The Committee was chaired by John V. Wild and has gone down in history as the Wild Committee. Its terms of reference were brief and succinct:

*“To consider and to recommend to the Governor the form of direct elections on a common roll for representative members of the Legislative Council to be introduced in 1961, the number of representative seats to be filled under the above system, their allocation among the different areas*

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664 Kanyeihamba, *Constitutional and Political History...*, p. 23

665 No. 20 of 1957

*of the Protectorate and the method of ensuring that there will be adequate representation on the Legislative Council for non-Africans.”*

On 5 December 1959, the Wild Committee sent its report to Governor Crawford. In it, the Committee recommended that direct elections should be conducted in all parts of the Protectorate, and no option should be offered for indirect elections. It also recommended that all members of the Legislative Council should be elected on a common roll. Governor Crawford accepted the recommendations of the Wild Committee report in principle and announced that direct elections would be held in Uganda in 1961.

The Governor explained the Government position thus:

*“If direct elections on a common roll were introduced in 1961, this will be a positive step forward towards self-government.... Self-government cannot be a reality in any country unless it has men and women who can effectively run its political institutions, its civil service, its local government bodies, its professions and its economic life.... Equally essential is the building up of a strong Central Government.... We respect your desire to move forward towards self-government. At the same time we ask you to remember the part the Government is playing. To help you move forward is the first and most important Government policy.”<sup>666</sup>*

Nevertheless, while affirming the principle of direct elections on a common roll, the colonial government had to contend with Buganda Kingdom whose wishes, as the 1958 elections had clearly shown,<sup>667</sup> could not be ignored. Governor Crawford’s solution to the Buganda conundrum was, thus, to give her the option of either direct or indirect election for her members to the Legislative Council. Professor Kanyeihamba has decried this preferential treatment which, he claims, “... was designed to encourage tribalism rather than nationalism.”<sup>668</sup>

According to the learned professor, with a few exceptions,

*“local governments and administrations were built around the tribe as the most important unit. Inevitably, local administrators owed loyalty to the tribe first and state second. The notion of nationhood of Uganda was not well known until after independence. Certain regions, notably kingdoms, were treated and encouraged to feel as nations within a nation. Buganda had the privilege of being treated more or less as an equal of the imperial power, more so than any other region, and no attempt was made to bring it to the belief that it formed part and parcel of the Protectorate. This state of affairs was, in fact, subsequently entrenched in the 1962 Constitution which not only created the kingdoms federal and semi-federal states in*

<sup>666</sup> Quoted in Kanyeihamba, *Constitutional and Political History ...*, op. cit., p. 24

<sup>667</sup> As a result of the active opposition of the Buganda Government and its Lukiiko, only a mere 3% percent of the Buganda electorate had participated in the 1958 elections to the Legislative Council. As a result, Buganda, the largest and most powerful province in Uganda, was not represented in the Legislative Council that was convened on 4 December 1958.

<sup>668</sup> *Ibid.*, p. 24

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*relation to the Central Government, but also devoted more space to local government than any other matter found in the Constitution.”<sup>669</sup>*

But, as Professor Kanyeihamba himself says in the very first sentence of his otherwise interesting book, “*until 1894 the sovereign state we now know as Uganda was ... unknown even though its constituent parts predated it, having been in existence long before it was made a state.*”<sup>670</sup> Even the name ‘Uganda’ is, Professor Kanyeihamba acknowledges, ‘of recent origin’<sup>671</sup>, being derived from the Buganda Kingdom, the powerful kingdom on the western and northern shores of Lake Victoria with which the British concluded a series of agreements from 1890 onwards.

Elsewhere in his book, Kanyeihamba has correctly observed that, “*like many other African countries, Uganda as a territorial unit is the creation of the colonial period.*”<sup>672</sup> On the other hand, at the time of the creation of this ‘territorial unit’, Buganda Kingdom had, by all accounts, been in existence for over half a millennium. How was this ‘colonial creation’ supposed to be taken as a ‘nation’ by the very nations and peoples it had violently conquered and subjugated, is not explained.

Uganda is indeed a state with internationally recognised borders and a government with all attributes of statehood. But it could never be a nation. It is a multinational state, in other words, a state comprising diverse nationalities and ethnic groups. The attempts to make a ‘nation’ out of this artificial creation are the cause of so much bloodletting and human suffering in Uganda since independence.

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669 Ibid., pp. 24-25

670 Ibid., p. 1

671 Ibid., pp. 1-2

672 Ibid., p. 3

## Chapter Three: The Still-Birth of Federal Uganda

In 1961, the British Government hosted a constitutional conference at the Lancaster House in London, to discuss the move towards self-government and eventual independence for Uganda. The conference brought together representatives of political parties, which had been forming since the early 1950s: the four kingdoms, the non-kingdom districts, and the British government itself. After weeks of complex negotiations and horse-trading, a deal was finally struck by all delegates, except Bunyoro Kingdom and the Democratic Party. The latter had walked out in protest over the issue of the ‘Lost Counties’; while the Democratic Party refused to accept the settlement on account of indirect elections for the Buganda members to the National Assembly.

Under the Lancaster House settlement, according to Kanyeihamba, “*Buganda got her federal status, the other three kingdoms and Busoga got a semi-federal status and the rest were to be unitary in relation to the Central Government.*”<sup>673</sup> On 1 March 1962, the London Agreement reached at the Lancaster House Conference was ratified in the new Uganda Constitution, which came into effect that same day. While external affairs, defence and internal security were to remain the responsibility of the Governor, all other responsibilities were delegated to a cabinet of ministers drawn exclusively from the National Assembly and to whom they were directly accountable. Former Chief Minister Benedicto Kiwanuka of the Democratic Party became Uganda’s first Prime Minister.<sup>674</sup>

### Constitution of Uganda, 1962

On 1 August 1962, the British Parliament passed the *Uganda Independence Act, 1962*, “... to make provision for, and in connection with, the attainment by Uganda of fully responsible status within the Commonwealth.”<sup>675</sup> The most important provision of the Act was its symbolic declaration that “*on the ninth day of October, nineteen hundred and sixty-two ... the territories which at the passing of this Act are comprised in the Uganda Protectorate ... shall together form part of Her Majesty’s dominions under the name of Uganda; and as from the appointed day Her Majesty’s Government in the United Kingdom shall have no responsibility for the government of Uganda or any part thereof.*”<sup>676</sup> The British Parliament also washed its hands off the legislative affairs of Uganda.<sup>677</sup>

The Order in Council came into force immediately before 9 October 1962.<sup>678</sup> The Order in Council established the *Constitution of Uganda, 1962*, and provided for it to come into effect on 9 October 1962, which became Uganda’s Independence Day.<sup>679</sup> It revoked substantial parts of the *Uganda Order in Council, 1902*; the whole of the *Uganda (Constitution) Order in Council, 1962*, and the *Uganda (Constitution)(Amendment) Order*

673 Ibid., p. 54

674 Ibid., pp. 54-55

675 Uganda (Independence) Act, 1962, preamble.

676 Ibid., s. 1(1)

677 Ibid., s. 1(2)

678 **Uganda (Independence) Order in Council, 1962**, cl. 1(2)

679 Ibid., proviso to cl. 1(2)

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in Council, 1962.<sup>680</sup> However, it retained existing laws in the same terms as the *Tanganyika (Constitution) Order in Council* the year before.<sup>681</sup>

The Constitution was part of the *Uganda (Constitution) Order on Council* as a schedule thereof. Designating itself as ‘the supreme law of Uganda’,<sup>682</sup> the Constitution declared Uganda a federal state consisting of Federal States, Districts and the Territory of Mbale.<sup>683</sup> The Federal States were the Kingdoms of Buganda, Bunyoro, Ankole, Toro and the Territory of Busoga,<sup>684</sup> while the Districts were Acholi, Bugisu, Bukedi, Karamoja, Kigezi, Lango, Madi, Sebei, Teso and West Nile.<sup>685</sup> These were all territories that had belonged to the Uganda Protectorate by virtue of the Agreements stretching back to the Buganda Agreement of 1890.<sup>686</sup> The Constitution also provided, in schedules thereof, for the Constitutions of the Kingdoms and the Territory of Busoga. These constitutions were to have effect in the respective Kingdoms and the Territory of Busoga.

The federal character of the Uganda State was deeply entrenched in the Constitution. Parliament could amend any provision of the Constitution and the *Uganda Independence Act, 1962*, insofar as it formed part of the laws of Uganda. However, it was precluded from changing or amending the Schedules to the Constitution, i.e. it could not change the constitutions of the four Kingdoms and the Territory of Busoga.<sup>687</sup> Moreover, the constituent power of the Parliament could only be exercised with a special majority. Thus, Article 5(2) stipulated that an amendment to the Constitution “... shall not be passed in the National Assembly unless it has been supported on second and third readings by the votes of two thirds of all members of the Assembly.”<sup>688</sup>

Power to change the boundaries of the Federal States, Districts, and the Territory of Mbale was similarly circumscribed. Thus, any alteration of these territories by any transfer of the area thereof required not only the support of the special majority in the National Assembly set forth above; it also required the support of two thirds of members of the Legislative Assembly or Council of the State or District from which it was being transferred, and of the State or District to which it would be transferred.<sup>689</sup>

In keeping with its historic place in the formation and administration of the Uganda Protectorate, the Kingdom of Buganda was specially provided for. Thus, any constitutional amendment to alter the boundaries of Buganda, its Constitution or the constituent powers of its Legislative Assembly “... shall not come into operation in the Kingdom of Buganda unless the Legislative Assembly of Buganda has by resolution passed by not less than

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680 Ibid., cl. 2

681 Ibid., cl. 4(1)

682 Constitution of Uganda, 1962, art. 1

683 Ibid., art. 2(1)

684 Ibid., art. 2(2)

685 Ibid., art. 2(3)

686 Ibid., art. 3

687 Ibid., art. 5(1)

688 Ibid., art. 5(2)

689 Ibid., art. 5(3)

*two thirds of all its members, signified its consent that the Act of Parliament should have effect.*"<sup>690</sup>

Other matters that were similarly protected from amendment by the National Assembly were the Bill of Rights; the election of elected members of the National Assembly; the extent of the authority of the Central Government and the Federal States and the delegation of that authority; the administration of services in the Federal States and the police force and its control. Similarly protected were the Kabaka's prerogative of mercy; certain matters relating to the judiciary; payments to Buganda; existing powers and land matters pertaining to Buganda. Equally shielded from the constituent powers of the National Assembly were matters pertaining to precedence and privileges of the rulers and members of the Buganda Legislative Assembly, as well as the towns and local government councils of Buganda.

The other four Federal States were similarly protected.<sup>691</sup> The Legislature of the Kingdom of Buganda was given power to amend the Constitution of Buganda, provided the amendments had the support of no less than two thirds of members thereof.<sup>692</sup> However, if the amendment had the effect of abridging the Bill of Rights entrenched in the Constitution, then it could only be effective if it obtained the consent, signified by proclamation published in the *Gazette*, of the President.<sup>693</sup> Through skilful horse-trading between the Uganda People's Congress of Dr Apollo Milton Obote and the royalist Kabaka Yekka, the Kabaka of Buganda, Sir Edward Muteesa, became the first President of Uganda.

These constituent powers were extended to the other four Federal State Legislatures, with similar requirements as to special majorities.<sup>694</sup> However, unlike Buganda, if the amendments passed by the latter Legislatures had the effect of abridging any of the provisions of the Bill of Rights, they "... *shall come into operation unless the National Assembly, by resolution passed by not less than two thirds of all its members, has signified its consent that the law should come into effect.*"<sup>695</sup>

In other words, it was much easier for the Buganda Legislative Assembly to change Buganda's Constitution than it was for the other Federal States' Legislative Assemblies to change theirs. The former required the consent of only one person, its King; while the latter needed the consent of no less than 61 persons, the National Assembly being composed of 91 members<sup>696</sup>, many of whom were not necessarily natives or residents of the Federal State concerned.

The independence Constitution of Uganda provided for Parliament consisting of the President and the National Assembly. Unlike Kenya and Tanganyika, where the Governors General represented Her Majesty the British Queen, the President and the Vice

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690 Ibid., art. 5(4)

691 Ibid., art. 5(5)

692 Ibid., art. 6(1)(a)

693 Ibid., art. 6(1)(b)

694 Ibid., art. 6(2)(a)

695 Ibid., art. 6(2)(b)

696 Ibid., art. 38(1)

President of Uganda was to be “... elected from among the Rulers of the Federal States and the constitutional heads of the Districts by the members of the National Assembly for a term of five years.”<sup>697</sup> He could be re-elected or elected to the office of Vice President.<sup>698</sup>

The President was to be ‘the Supreme Head and Commander in Chief’<sup>699</sup>; and was entitled to significant perks commensurate with his office. He was, for example, to “... take precedence over all persons in Uganda and shall not be liable to any proceedings whatsoever in any court.”<sup>700</sup> He was also exempt from any “direct personal taxation and no property held by him in his personal capacity shall be compulsorily acquired or compulsorily taken possession of.”<sup>701</sup> This provision, and that of clause 23 of the Independence Order in Council,<sup>702</sup> were intended to protect the hundreds of squares miles of *mailo* land that the Kabaka and the Baganda landed oligarchy had acquired under the Buganda Agreement of 1900.<sup>703</sup>

The President enjoyed significant powers. For instance, in terms of Article 61(1), all executive authority in Uganda was vested in him. He could appoint the chairman and members of the Electoral Commission, or remove them from office, in accordance with the advice of the Prime Minister.<sup>704</sup> Unprecedented for the independence constitutions of Anglophone Africa, the Prime Minister was bound to consult the Leader of the Opposition before tendering advice to the President in relation to the appointment or removal from office of a member of the Commission.<sup>705</sup>

The President was also empowered to appoint the Attorney General, again acting in accordance with the advice of the Prime Minister.<sup>706</sup> Furthermore, he had power to prorogue the Parliament at any time;<sup>707</sup> as well to dissolve it upon the advice of the Prime Minister.<sup>708</sup> He also had power to appoint the Prime Minister from amongst members of the political party with the largest number of members in the National Assembly;<sup>709</sup> and other Ministers with the advice of the Prime Minister.<sup>710</sup> The Prime Minister was to be the Head of the Government.

The Independence Constitution introduced a cabinet system of government, with the Prime Minister and the Cabinet being collectively and individually accountable to the

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697 Ibid., art. 36(1)

698 Ibid., art. 36(5)

699 Ibid., art. 34(1)

700 Ibid., art. 34(2)

701 Ibid., art. 34(3)

702 That provision stated: “*The continuance of the system of mailo land tenure system in force in the Kingdom of Buganda immediately before the commencement of this Order shall not be affected by the reason only that the Buganda Agreement 1961 ceased to have effect as from 9<sup>th</sup> October 1962.*”

703 Under Article 15 of the Agreement, for instance, the Kabaka personally received some 350 square miles of ‘plantations and other private property.’

704 Constitution of Uganda..., op. cit., arts. 45(1) and (4)

705 Ibid., art. 45(5)

706 Ibid., art. 64(1)

707 Ibid., art. 60(1)

708 Ibid., art. 60(2)

709 Ibid., art. 62(1) and (3)

710 Ibid., art. 62(2)



National Assembly for its advice to the President.<sup>711</sup> In the exercise of his functions, the latter was bound to “... *act in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet except in cases where is required by this Constitution or any other law to act in accordance with the advice any other person or authority other than the Cabinet.*”<sup>712</sup>

## The Independence Parliament

The Independence Constitution had extensive and complex provisions relating to parliament, particularly its representative arm, the National Assembly. Uganda was to be a parliamentary democracy. Let’s start with its composition. The Independence Constitution stipulated that the National Assembly was to consist of 82 directly elected members;<sup>713</sup> and “*such a number of specially elected members not exceeding nine, as Parliament may prescribe.*”<sup>714</sup> The Attorney General, too, was an *ex officio* member; as was the Speaker, if elected from outside the National Assembly.<sup>715</sup>

‘Specially elected members’ were members who were elected to the National Assembly by the members of the National Assembly.<sup>716</sup> Like Tanganyika which entered her independent nationhood with a National Assembly consisting of ten appointed members, Uganda also started her independence with a National Assembly whose representative character was rather dubious. In both cases, the continuity with colonialism in this regard was remarkable.

But the Ugandan Parliament inherited another, characteristically Ugandan, feature of British colonial rule: the special status of Buganda Kingdom. Under the Independence Constitution, of the 82 directly elected members of the National Assembly, 21 were to represent constituencies in the Buganda Kingdom, exclusive of Kampala which had three members of its own.<sup>717</sup> The Constitution referred to these Buganda members as ‘the 21 members’!

But it did not end here; it went further. The Legislative Assembly of the Kingdom of Buganda was given power to decide, by resolution passed two weeks before the nomination of candidates for a general election, that ‘the 21 members’ would be elected by members of the Legislative Assembly of Kingdom, instead of by the Buganda voters. The Buganda Legislative Council, in its capacity as an electoral college, consisted of 68 directly elected members; Ministers of the Kabaka Government not exceeding six and members appointed by the Kabaka, also not exceeding six.<sup>718</sup>

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711 Ibid., art. 63(1) and (2)

712 Ibid., art. 67(1)

713 Ibid., art. 38(1)(a)

714 Ibid., art. 38(1)(b)

715 Ibid., art. 38(2)

716 Ibid., art. 47

717 Ibid., art. 43(1)

718 Ibid., provisos (a) and (b) to Article 43(3)

During the March 1961 elections to the Lukiiko, the Buganda Legislative Assembly, used this power to dramatic effect. The royalist Kabaka Yekka party won an overwhelming victory at the said elections. What happened next is told by Professor Kanyeihamba thus:

*“The elected Lukiiko then then opted for indirect elections to the National Assembly, thus ensuring that only Kabaka Yekka supporters would represent Buganda in the Legislative Council.”*<sup>719</sup>

So, as Uganda inched towards independence, her National Assembly became what Professor Kanyeihamba has called ‘an anomalous body.’ In his words:

*“It was partly elected and partly nominated.... The Lukiiko indirectly elected the Buganda representatives while the rest of the representatives were directly elected by the people.”*<sup>720</sup> *I will return to these complaints later.*

In exercise of its legislative functions, the National Assembly was empowered to pass bills, which could only become law if assented to by the President. The Constitution did not specify whether the President had power to block any bill by withholding his assent and the consequences thereof. It is, however, safe to assume that the President did not have this power on the basis of the Westminster parliamentary tradition where Her Majesty must assent to any bills passed by the House of Commons. And, following the colonial legislative tradition of reserving taxation powers to the executive, the National Assembly was prohibited from passing certain financial measures, “... *unless the bill is introduced or motion is moved by a Minister.*”<sup>721</sup>

The distribution of legislative and executive powers under the constitution also reflected the federal character of the polity envisaged under the Independence Constitution. Parliament was given power to make laws for peace, order and good government of Uganda in respect of all matters except in the Federal States.<sup>722</sup> The Lukiiko was granted exclusive power to legislate for peace, order and government of the Kingdom of Buganda for matters concerning Buganda, which were set out in Part I of the Buganda Constitution.<sup>723</sup>

For its part, Parliament was conferred with the exclusive power to legislate for peace, order and good government of the Buganda Kingdom for matters concerning Buganda, which were set forth in Part II of the Buganda Constitution.<sup>724</sup> In all other matters, both Parliament and the Lukiiko had concurrent jurisdiction to legislate for peace, order and good government thereof.<sup>725</sup>

719 Kanyeihamba, *Constitutional and Political History...*, op. cit., p. 58

720 Ibid., p. 73

721 Constitution of Uganda, op. cit., art. 57

722 Ibid., art. 73

723 Ibid., art. 74(1)

724 Ibid., art. 74(2)

725 Ibid., art. 74(3)

Laws passed by Parliament in respect of matters specified under the Buganda Constitution could not come into force “... unless the Legislative Assembly of the Kingdom of Buganda has, by resolution, signified its consent that the Act of Parliament should have effect.”<sup>726</sup> This restriction applied to laws respecting changes to the *Buganda Courts Ordinance*; changing the *Public Lands Ordinance* in so far as it applied to Buganda; changing the *mailo* land tenure system existing in Buganda; or any provision concerning the local government in Buganda.<sup>727</sup>

The distribution of legislative powers between the National Assembly and the Legislature of Buganda, applied in the same terms in the relationship between the National Assembly and the Legislatures of the other four Federal States.<sup>728</sup> Moreover, the National Assembly could delegate some of its legislative powers in respect of those Federal States in general or for a specific period of time.<sup>729</sup> In case of inconsistency between any law made by the legislature of a Federal State and any law validly made by the National Assembly, the latter law prevailed and the former was declared void to the extent that it was inconsistent.<sup>730</sup>

### The ‘Pigeonhole’ Constitution and Presidentialism

Prior to the 1962 elections, Obote’s UPC had formed an electoral alliance with the Kabaka Yekka party in order to defeat the Democratic Party of Prime Minister Benedicto Kiwanuka. After the elections, UPC and KY formed a coalition government headed by Obote as Prime Minister. A year later, following the amendment of the Independence Constitution, Uganda became a Republic and Obote nominated Kabaka Edward Muteesa II to serve as President. He was therefore overwhelmingly elected by the National Assembly.

Apollo Nsibambi, a Muganda political science professor, leading monarchist intellectual and former Prime Minister under the President Museveni, has written that out of this alliance Prime Minister Obote

*“... acquired double political legitimacy. The traditional rulers provided a bridge between the old values and the new and thus the ordinary people were spared the psychological problems of alienation.... The alliance between the traditional and national leaders (also) enabled Obote to obtain electoral votes and to form a national government, and ... ensured that governance was based on (mutual) bargain and tolerance. This created stability in the country making it possible to carry out development activities.”*<sup>731</sup>

726 Ibid., art. 74(5)(a)

727 Ibid., art. 74(5)(b)

728 Ibid., art. 75

729 Ibid., art. 75(3)

730 Ibid., art. 75(4)

731 Apollo Nsibambi, ‘The Role and Place of Culture and Decentralization in Uganda’s Struggle for Pluralism’, in Oloka-Onyango et al., *Law and the Struggle for Democracy...*, op. cit., pp. 362-371, pp. 367-368

However, this political marriage of convenience quickly soured in 1964 when Prime Minister Obote supported a referendum to decide the fate of ‘the Lost Counties’, i.e. the Buganda counties of Buyaga and Bugangazi. The latter had been ceded to Buganda from the Bunyoro Kingdom after Kabaka Mwanga helped the British to defeat King Kabalega of the Bunyoro Kitara Kingdom in the 1890s. Following the referendum, the two counties seceded from Buganda and reverted to Bunyoro. The relations between UPC and KY were never smooth after that.

Fearing loss of political support in Buganda, from that time on Obote ordered the security forces to react with maximum force to any perceived sign of opposition in Buganda. The new policy was dramatically demonstrated when, on 10 November 1964, following a minor scuffle on the outskirts of Kampala, riot police went on a rampage killing six innocent people, including two school children. Although a judicial inquest concluded that the victims had been killed in a deliberate, violent and unprovoked attack by riot police, and the government condemned the killings, the officer in charge of the operation was promoted and transferred away from Kampala.

Meanwhile, divisions within the UPC emerged which involved senior members of Obote’s Cabinet, who accused him of dictatorial tendencies and fostering tribal rivalries within the party and the army. Obote’s leadership of the UPC was becoming tenuous. In the midst of this intra-party feud, a scandal broke out in the National Assembly. On 4 February 1966, Daudi Ochieng’, a KY member introduced a bill in the National Assembly demanding the formation of a commission of inquiry to investigate allegations of widespread smuggling of gold, timber and coffee from Eastern Zaire (now the Democratic Republic of the Congo), which involved the deputy army commander, Col. Idi Amin.

Prime Minister Obote, his Defence Minister Felix Onama, and former Minister Adoko Nekyon were also implicated in these allegations. Ochieng’, the parliamentarian, called for suspension of Col. Amin pending the investigation of the allegations. Some members of Obote’s Cabinet and UPC backbenchers moved a motion for a confidence vote on the Prime Minister introduced by KY’s Ochieng’. The motion was passed.<sup>732</sup>

Obote’s response came swiftly. On 22 February 1966, he had five of his Cabinet Ministers arrested during a Cabinet meeting and held without trial.<sup>733</sup> He also suspended the Constitution and assumed all executive powers. Two days later, on 26 February 1966, rather than suspend him, Obote appointed Col. Amin as his army commander and, shortly afterwards, promoted him to brigadier general. On 3 March, Obote dismissed the President and Vice President and assumed the powers of the President himself.

On 15 April 1966, the Independence Constitution was formally abrogated after now President Obote convened a special session of the National Assembly at which he introduced proposals for a new constitution; copies of which, he informed the members, were available in their pigeonholes! During that session, Obote, surrounded by armed troops, outlined the features of the new constitution that differentiated it from the Independence

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732 Republic of Uganda, Report of the Constitution Commission..., op. cit., para. 2.41, p. 51

733 Those arrested were Grace Ibingira, Balakyi Kirya, Mathias Ngobi, George Magezi and Emmanuel Lumu.

Constitution and moved the motion for its adoption. The speaker immediately called for a vote.

There was no debate, even though members had not even seen it beforehand, let alone read its contents. Those members who demanded copies of the proposed constitution before debate could commence were told to collect their copies from their respective pigeonholes after having passed it. As a result, the opposition members walked out along with four members of the government benches. Nonetheless, the motion adopting the 1966 was passed by a vote of 55 to four.

The 1966 Constitution was thus promulgated without debate or discussion, hence its apt description as ‘the pigeonhole constitution.’ According to the Commission of Inquiry that investigated human rights abuses committed by the Ugandan State since independence,

*“... the 1966 Constitution was put in the pigeonholes of the Members of Parliament and they were asked to approve it even before reading it, and they did.... They enacted and promulgated a Constitution whose contents they did not even know.”*<sup>734</sup>

The crisis came to a head one month later when, on 19 May, the Buganda Lukiiko responded to the abrogation of the Independence Constitution under which Uganda had become an independent federal state, by passing a resolution requesting the Government of Uganda to leave Buganda soil, which included the country’s capital city Kampala. Obote seized the opportunity to crush Buganda. On 24 May 1966, under the command of Col. Idi Amin, the Uganda Army staged a bloody attack on the Kabaka’s Palace in the royal capital of Mengo, ostensibly to forestall a coup.

Security forces were deployed in Kampala and other areas of Buganda and a state of emergency declared all over the Kingdom. The troops killed thousands of civilians, and there was extensive looting, rape and torture by the soldiers. The Palace was set ablaze, and priceless artefacts and other cultural treasures spanning over six centuries of the Buganda Kingdom were irretrievably lost. The Kabaka fled into exile in Great Britain where he died three years later of alcohol poisoning two days after his 45<sup>th</sup> birthday.

The Constitution created an executive presidency, vesting the office with fairly extensive powers. The old federal structures were retained as an interim measure, awaiting the enactment of a new constitution. The preparations for the new Constitution started with the enactment of the *Constituent Assembly Act, 1967*.<sup>735</sup> Section 1 of this Act reproduced *verbatim* the provisions of section 2(1) of the Constituent Assembly Act of Tanganyika, which had been passed only four years earlier:

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734 See Republic of Uganda, **The Report of the Commission of Inquiry into Violations of Human Rights: Findings, Conclusions and Recommendations**, Ministry of Justice and Constitutional Affairs, 1994, p. 87.

735 Act No. 12 of 1967. The Act was in many ways a replica of the Tanganyika *Constituent Assembly Act, 1962*, which paved the way for the adoption of the Republican Constitution of Tanganyika in 1962. Given close ties between Mwalimu Nyerere and Dr. Obote, it may not be farfetched to assume that Obote borrowed a leaf from his close political ally across Uganda’s southern border.

*“The National Assembly may from time to time resolve itself into a Constituent Assembly with full power to enact such provisions for or in connection with the establishment of a new constitution as it thinks fit.”*

The stage was now set for the adoption of Uganda’s permanent republican Constitution.

## Chapter Four: 1967 Constitution and 'The Creeping Dictatorship'

On 9 June 1967, the Government of President Obote published its proposals for a new constitution. Debate on the proposals kicked off in the Constituent Assembly on 22 June and continued for over one month before being adjourned on 27 July. On 4 August, the Government announced that it would make amendments to its proposals to take account of the views raised during the parliamentary debate. These amendments were published on 29 August, and the Constituent Assembly was reconvened on 6 September to consider the proposals section by section. The Government proposals, as modified by its own amendments only, were accepted and the new constitution was adopted on 8 September 1967.

In his book, Professor Kanyeihamba takes great pains to prove that the new Constitution was enacted in conditions of relative freedom. He argues that even though Buganda was still under a state of emergency; and the people 'quite legitimately' feared that the Government would use its emergency powers against any opponents or critics of its constitutional proposals, "... *nobody was arrested for expressing his or her fears or for vehemently criticising the proposals afterwards.*"<sup>736</sup> Moreover, according to him, "*the freedom with which the proposals were discussed reflected the apparent calm and security that prevailed in the country. It also showed that the expressed fears of a one-man rule and dictatorship were, at that juncture, groundless.... Critics of the Government of the day conceded that freedom of speech in Uganda still existed after the events of 1967*"(!)<sup>737</sup>

Professor Kanyeihamba is trying to rewrite the history of these events. As he himself conceded in the same book, the debate in the Constituent Assembly took place against the background of unprecedented circumstances. The issue of kingdoms generally, and Buganda Kingdom in particular, had already been decided by the cannon only a few months earlier. Hundreds, possibly thousands, had been killed in the process. The entirety of Buganda Kingdom, including the nation's capital, was under a state of emergency, with severe restrictions placed on personal freedoms. There was a vicious crackdown on the opposition, with prominent political figures, including several Ministers in Obote's own Cabinet, in detention without trial. To argue, even after more than 40 years, that 'freedom of speech' existed under such conditions is to whitewash the history of one of Uganda's darkest chapters.

As it stands, this extant record belies Professor Kanyeihamba's rosy account of the proceedings in the Constituent Assembly. This record shows that inside the Debating Chamber members felt insecure. Government members, especially, had been threatened with 'severe' consequences should they speak or vote against the government proposals. For instance, M.A. Okelo (Democratic Party, West Nile and Madi), read a letter to members of the government benches signed by the Government Chief Whip which stated in part:

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736 Kanyeihamba, *Constitutional and Political History...*, op. cit., p. 100

737 *Ibid.*, p. 101

*“... Members absenting themselves from the House without permission would be causing subversion, and no member should oppose or vote against the proposals. As far as I am concerned, opposition has been dealt with at the parliamentary group meeting, and members who oppose the proposals will be liable to be dealt with severely.” Mr Okelo concluded by saying: We can now see what sort of Parliament we have got.”<sup>738</sup>*

*Mr Okelo’s words were echoed by A.A. Latim, the Official Opposition Leader: “We on this side of the House are few, but in spite of that we shall do our best and we shall speak without fear.... We have said that the Buganda emergency should be lifted. We have said that the representatives of the people should be free to speak to the masses of the people they represent. But all this has not been given to us. People are in fear. The people cannot express their views freely. A Member of Parliament has been quoted as saying he feared giving an opinion about the new proposals. If he can say that, how many more people outside can say it? This House is fearing to tell the truth. If a Member of Parliament is frightened to comment, how many people in the country are afraid to express their views?”<sup>739</sup>*

Even members of the government benches did not feel the conditions were conducive to free debate. Akbar Adoko Nekyon (UPC, Lango South-East), was Uganda’s first Minister of Information and Culture at independence in 1962; where he is credited with founding the Uganda Television Service (now Uganda Broadcasting Corporation). He later served as Minister of Economic Planning, where he was credited with formulating Uganda’s first five-year economic plan in 1964. He also had the distinction of being President Obote’s first cousin.

Nevertheless, with Obote beginning to show authoritarian tendencies, the two cousins had a falling out, and Adoko Nekyon was removed from Obote’s Cabinet. With the National Assembly being asked not only to legitimise Obote’s power grab after the 1966 coup, but also being blackmailed to confer wide powers to him, Adoko Nekyon, now a UPC backbencher, rose to the occasion. Firstly, he addressed the pressure being placed on government members to support the proposals:

*“Party considerations are one reason why the proposals are difficult to debate. The members should be speaking as representatives of their constituents. If this was the case, they would see what was the right thing to include and what would please some people. If the proposals are being debated on a party basis, there is only need for two members to speak: one from each party. There cannot be 82 members speaking on party matters....*

*“I think we should speak as if there were no government now, no parliament now, no president now, and no judiciary now, because the Constitution is*

<sup>738</sup> *Uganda Argus*, 1 July 1967

<sup>739</sup> *Uganda Argus*, 24 June 1967



*meant not only for today's government but for tomorrow's government and the government after that. Another reason why the proposals are difficult to debate is that it appears that certain members of the House are under the impression now that they are in real danger of being attacked by the security forces at any time because of their views. The sense of fear should be removed if the Constitution is going to be a good guide for the country in the future.*"<sup>740</sup>

Mr Adoko Nekyon was not the only government MP to protest the level of intimidation directed at members who did not support the government proposals. Dr F.G. Sembeguya (UPC, Specially Elected) "*criticised Government MPs whose 'insulting and threatening' interjections during the past week's debates in the Constituent Assembly suggested that, already having prior knowledge of the proposals, they were intent on seeing that they are bulldozed through the Assembly.*"<sup>741</sup> The members' fears were proven true in dramatic fashion by President Obote himself on 12 July 1967.

Cuthbert Joseph Obwangor (UPC, Teso) had been a member of the Legislative Council of the Uganda Protectorate representing the Teso District Council for ten years prior to independence in 1962. Following independence, he became the member of the National Assembly for the same constituency, which he served until 1969 when he was detained on President Obote's orders. A political maverick who had started his political career in Kenya in the late 1940s, he was a founding member of the UPC in 1960 and its treasurer between 1960 and 1967. He also held several ministerial portfolios in Dr Obote's Cabinet since independence.<sup>742</sup> His solid UPC credentials notwithstanding, Mr Obwangor felt compelled to speak out against the vast powers proposed for the President under the government proposals.

On 8 July 1967, Mr Obwangor, then Minister for Commerce and Industry, rose to speak in what would turn out to be the speech of his political life. His first target was the concentration of powers being proposed for the President under the government proposals. He said:

*"I love the present President. He knows me thoroughly and I know him intimately. He is not a machine, but even in machines there are limitations. In my opinion it is unfair to impose all the powers of the State on him. The essential factor in a modern state is the balance of power. It would be ridiculous if the Constituent Assembly vested all the powers in one man.*"<sup>743</sup>

Mr Obwangor then directed his wrath towards proposals for the president to nominate members of the National Assembly, whom he described as 'political failures.' As the *Uganda Argus* quoted him:

<sup>740</sup> *Uganda Argus*, 30 June 1967

<sup>741</sup> *Daily Nation*, 4 July 1967

<sup>742</sup> Minister of Internal Affairs (1962-1964); Minister of Justice and Constitutional Affairs (1964-1966); Minister of Housing and Labour (1966-1966); and Minister of Commerce and Industry (1966-1969).

<sup>743</sup> *Uganda Argus*, 8 July 1967

*“If someone fails at the vote, let him not poke his nose in this noble House, (he) said amid cheers from both sides of the House.”<sup>744</sup>*

Mr Obwangor then turned his attention to the problem of selective enforcement of the Constitution. He argued:

*“To say the Constitution must be the supreme law is good, but it is not sufficient. Nobody, apart from the President (sic!), should be exempt from the provisions of the Constitution. Everybody, including Ministers and officials must obey it. I want to be given the right as a citizen of Uganda to arrest a Minister who does not obey the law.”<sup>745</sup>*

With UPC members of the Constituent Assembly complaining that they were being pressured to support their party, Mr Obwangor rose again three days later to speak on the matter. As members of the Constituent Assembly, he argued, the members were not party representatives:

*“As a Constituent Assembly, we represent not political parties but the nation as a whole. When the Constitution is enacted, it would be by the Constituent Assembly as a whole.”<sup>746</sup>*

President Obote had had enough of this breach of Cabinet discipline. The following day, 12 July, Obote read a lengthy letter to the Constituent Assembly dismissing Mr Obwangor as Cabinet Minister:

*“I do not consider that the view that has been expressed in the Constituent Assembly that members should consider the constitutional proposals as individuals representing constituencies is valid or correct. The Constituent Assembly provides for a Minister responsible for the Government proposals. This, in my view, does not mean that the Government – having worked out the proposals – one Minister should then be selected to be responsible while others take up the position of tearing up what are supposed to be proposals worked out by the Government as a whole.*

*“I find that if that was to be the position, we should have provided in the Constituent Assembly Act that every member had to speak as an individual and to bring such proposals as he thought fit on his own. In doing so we should have provided for the method of bringing together the different points of view. As matters stand, however, it is the Government that has made proposals before the Constituent Assembly and it is the Government that is responsible to consider each and every view expressed by non-Government members. The Ministers’ place in proposing which parts of the proposals should be amended is certainly, in my view, not the Constituent Assembly but the Cabinet Room.”<sup>747</sup>*

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744 Loc. cit.

745 Loc. cit.

746 *Uganda Argus*, 11 July 1967

747 *Uganda Argus*, 12 July 1967

And so Mr Cuthbert Obwangor lost his ministerial position due to exercising what he mistakenly thought was his freedom of speech as a member of the Constituent Assembly. Over two years later, on 19 December 1969, Obwangor and several other prominent politicians were arrested following an assassination attempt on President Obote. Even though the assassination was allegedly organised by Baganda civilians, Obwangor, an Itesot, was detained without trial at the Luzira Maximum Security Prison until his release, along with other political prisoners, a week after President Obote was overthrown in a coup led by his former army chief, General Idi Amin.

Even under these fearful conditions, however, debates in the Constituent Assembly were anything but restrained. Members, from both the opposition and the government benches, debated the constitutional proposals with the typical Ugandan panache. As Mr. Okelo of the Democratic Party defiantly told the Constituent Assembly,

*“we in the opposition have not been afraid to speak our minds and would never be afraid to speak, even in the face of threats. We would sooner die. We will continue to defend this principle against all comers. The ship of freedom is being torpedoed, and Ugandans are waiting to see what we, their elected representatives, are going to do to save it.”*<sup>748</sup>

Inevitably, the one issue that dominated the debate inside and outside the Constituent Assembly, concerned the fate of the Kingdoms. In the Constituent Assembly, President Obote himself led the debate on this issue, which had defined Ugandan history and politics since the earliest days of colonialism. He led from the front, his style uncompromising. On the second day of debate, President Obote defiantly declared:

*“This is the end of the road of the Federation, and the beginning of a unitary system of government.”*<sup>749</sup> He reminded Ugandans that they had “... been traveling along a narrow and twisty road.” He promised them that “this road is the best road”; and implored “every citizen (to) support the building of it.”<sup>750</sup>

President Obote was supported by W.W. Kalema, his Minister for Commerce and Industry, who called on the Baganda to place their loyalty in Uganda and not in their tribe.

*“We are all the same people”, he intoned. “In the new proposals there is no such thing as northern region or east or Buganda or western region. These proposals are trying to build a strong Uganda and a strong government so that progress can be made. I hope the time will come when we would go back to the old African tradition of leadership, when the leaders sat together and discussed problems, and not across a room to oppose one another.”*<sup>751</sup>

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748 *Uganda Argus*, 1 July 1967

749 *Uganda Argus*, 23 June 1967

750 Loc. cit.

751 *Uganda Argus*, 29 June 1967

These arguments were a tough sell for many members of the Constituent Assembly, including those of the UPC. Eridadi Medadi Kasyiire Mulira (UPC, Mengo North), whose constituency was part of the Buganda royalist heartland, was a leading constitutional thinker of Uganda Protectorate of the 1950s. Since the 1940s, Mulira had unsuccessfully advocated the democratisation of the Buganda Monarchy. As a result of his pro-Buganda activism, he was one of the many Baganda intellectuals deported to various parts of Northern Uganda,<sup>752</sup> when Kabaka Mutesa himself was deported to Great Britain in 1952.

Now, with the Buganda Monarchy in mortal danger, Mulira rose to speak. Adopting the language of the old colonial founding statutes, he argued:

*“In the Kingdoms there had been a ready-made system for providing for peace, order and good government – the three things that African governments have found difficult to obtain. The chiefs are accepted by the people as the representatives of the King. What is needed is not to reject kings, but to rechannel the loyalty to them to wider issues of nation-building.”*<sup>753</sup>

Mr Mulira made his position clear the following day:

*“I would like to support the Constitution because there are so many things I agree with. I cannot, however, sign a death warrant for kingship, because it would be tantamount to writing one’s own obituary.”*<sup>754</sup>

Mr Mulira was not alone in defending the kingdoms. Dripping with sarcasm, Mr Okelo, the Democratic Party representative from the non-monarchist West Nile and Madi, inquired:

*“The proposal to rid the country of kingship and privileged classes seems interesting and tempting. But how do we propose to do it without introducing a ‘super kingship’ by creating a privileged class? If Members of Parliament have their homes guarded and are always accompanied by the army when on tour, is that not a privilege?”*<sup>755</sup>

Abubakar Kakyama Mayanja, the brilliant Makerere and Cambridge-educated barrister and later Attorney General and Deputy Prime Minister in the early years of President Yoweri Museveni’s government, had been the first Secretary General of the Uganda National Congress; the country’s first political party established on 6 March 1952 by Ignatius Musaazi. An anti-colonial fighter and Pan Africanist from his student days at both Makerere and Cambridge, in 1961 Abu Mayanja – as he was affectionately known – was appointed Minister of Education in the Buganda Government upon returning from his studies abroad.

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752 See Fredrick Derek Ssekindi, *A Critical Analysis of the Legal Construction of the Presidency in the Post-1995 Uganda*, Doctoral Thesis, Brunel University, London, May 2015, fn. 73, p. 34

753 *Uganda Argus*, 30 June 1967

754 *Uganda Argus*, 1 July 1967

755 Loc. cit.

Later that year, he participated in the Lancaster House Conference which paved the way for Uganda's independence in October 1962. He is credited with making the Buganda Constitution part of the Independence Constitution, and was charged with overseeing its implementation in Buganda. In the elections that preceded independence, he had been elected the Kyagwe North-East MP for Obote's UPC. Now, as the Independence Constitution he negotiated lay in tatters, and his beloved Buganda a smouldering ruin, Abu Mayanja took up the defence of federalism once more.

With the elegance of the constitutional lawyer that he was, Abu Mayanja attacked the 'national unity' argument at the heart of the assault on the kingdoms:

*"There are those who think that in order to achieve true national unity, there should be only one loyalty to the State or the Republic of Uganda. There are others who conceive of loyalty in a series of spreading out circles. I believe that in achieving true national unity, loyalty should not be exclusive of all other loyalties. What the government is trying to do is to unite different entities which existed before Uganda was invented. Therefore, those who pretend that all Ugandans are the same and that the tribes do not exist are unrealistic.*

*"Therefore, the devised Constitution should take into account all the peculiar circumstances of the country's situation. I pray that the members in making the Constitution should not do so at the expense of losing our peculiar geniuses. I deny we have the mandate to abolish the kings for the reason (that) we pledged ourselves to safeguarding the kings and hereditary rulers. That is how we were elected."*<sup>756</sup>

Like Obwangor, Abu Mayanja also became a political prisoner under President Obote's regime. In October 1968, following his critique of the 1967 Constitution in a popular magazine, Abu Mayanja was arrested and charged with sedition. He was acquitted of the charges but immediately rearrested in court under emergency detention powers, which President Obote had acquired under that Constitution. He was adopted as a prisoner of conscience by Amnesty International but remained in detention without trial at the Luzira Maximum Security Prison until 1970 when he was released.

The proposals for an Imperial Presidency also attracted considerable interest and some of the most prophetic contributions from members of the Constituent Assembly. Dr. J. Luyimbazi-Zake, the Acting Attorney General and later Ambassador to the United States, kicked off the debate on the government proposals for vast presidential powers. He argued:

*"We want to pin down the responsibility. Now the President is the final authority. If things are going to go wrong, we know it is him. If a minister forgets to do something, the President cannot turn around and say 'I was*

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756 Uganda Argus, 6-7 July 1967

*advised' or 'I was not advised.' Either the man resigns or he takes the rap for it.*"<sup>757</sup>

But not all members bought this argument. Adoko Nekyon, Obote's cousin and a UPC member, took the lead in attacking these proposals.

*"Turning to civil liberties", he argued, "our rights could be suspended summarily and there is no recourse to the courts to find out why they have been suspended. This is the biggest indication of autocracy. The members are giving the President power to appoint everybody, dismiss everybody, nominate members of the Parliament and detain them in the bargain...."*

*"The proposals provide for an autocracy or an African type democracy. Which prevails will depend on the person who holds the office of President. The concentration of powers in one person is not completely justified. Some of the powers given to the President are excessive. There should be a balance of power between the office of the President, the judiciary and the system of Parliament."*<sup>758</sup>

Abu Mayanja, the constitutional lawyer, joined the attack, challenging the argument that the powers being proposed were necessary because Uganda was a poor country that needed a strong president for rapid socio-economic development. He argued:

*"We are not here to govern this country like savages. We are not going to reject the standards which have been accepted by the rest of the civilized world. We are part and parcel of the civilized community. We are not going to justify autocracy and the granting of dangerous powers on the grounds that Uganda is backward and cannot have a civilized government."*<sup>759</sup>

Summing up the effect of these proposals, Abu Mayanja observed:

*"The keynote of the proposals is the concentration of all powers of government – legislative, executive, administrative and judicial – into the central government institutions and the subjection of those institutions to the control of one man – the President. The result is the creation – not of a republic, but of a one-man dictatorship."*<sup>760</sup>

The power, role and composition of the Parliament became one of the major battlegrounds during the Constituent Assembly debate. Here, too, President Obote set the tone. On 23 June, the second day of the Constituent Assembly debate, the President took the floor:

*"I do not mind people saying it is a good thing to have a parliamentary democracy, or even a great thing. But there is no point in pretending*

757 *Uganda Argus*, 24 June 1967

758 *Uganda Argus*, 30 June 1967

759 *Uganda Argus*, 7 July 1967

760 Quoted in Ssekindi, *A Critical Analysis ...*, op. cit., pp. 68-69

*Uganda is at a stage where full parliamentary democracy could obtain, because there are certain matters that come with it which are lacking in Uganda.*

*“These things have become effective in certain states in the world after many years of trial and error, and many upheavals. But they did not just come like that. Uganda must be prepared to go through years of trial and error in order to get them. Many countries of the world are in various transitional stages. It cannot be achieved by wishful thinking.”<sup>761</sup>*

President Obote did not see any irony in the fact that his constitutional proposals seemed to be moving Uganda, already a functioning parliamentary federal state, in a direction opposite to the transitional stages that other parliamentary democracies had taken in their development. President Obote was supported by Felix Onama, his Minister of Defence, who opined – without elaborating - that *“a parliamentary system of democracy must be a guided system.”<sup>762</sup>*

Unlike Kenya and Tanzania which had adopted presidentialist constitutional systems a few years earlier, Uganda’s constitutional proposals did not provide for the president to be directly elected. Instead, according to Kanyeihamba,

*“every political party that would have taken part in a general election was supposed to nominate one of its members as a presidential candidate. Every candidate wishing to become an elected member of the National Assembly would have to declare his support for one of the presidential candidates at the time of nomination otherwise ... his or her nomination would have been void. After the general election, the presidential candidate nominated by the party which emerged with the greatest numerical strength of elected members consisting of not less than 40% of all the elected members of the National Assembly would become President.”<sup>763</sup>*

This novel procedure was clearly intended to enable President Obote, who had used the army to destroy the powerful Buganda Kingdom, to avoid facing the electorate, particularly in the kingdoms he was abolishing. Felix Onama, the Defence Minister, hinted as much:

*“On the basis of theory alone, there is no reason why the President should not be directly elected. It is easy to say that political parties can put up presidential candidates and elections can be conducted on a party basis. But it is not difficult to conceive of a situation where there can be five different parties all derived from tribal considerations. Where there is a one party system, or where the tribal considerations are not strong, as in Kenya or Tanzania, then it is possible to have a directly elected President.*

<sup>761</sup> *Uganda Argus*, 23 June 1967

<sup>762</sup> *Uganda Argus*, 26 June 1967

<sup>763</sup> Kanyeihamba, *Constitutional and Political History...*, op. cit., p. 102. See also art. 26(1) of the Constitution of the Republic of Uganda, 1967.

*The first thing to do in Uganda is to try and create a situation which would enable the people to elect future presidents on purely national considerations.*<sup>764</sup>

Nevertheless, the proposal became the subject of intense debate in the Constituent Assembly. Felix Onama, the Defence Minister, explained it thus:

*“The Cabinet has decided to reject a proposal that the President should be elected by the people of the country directly. The proposed method of electing the President, where members state their choice when they are nominated as a parliamentary candidate, with the person who has the majority of votes being elected, is the best way. If the President was directly elected, the supremacy of Parliament would be challenged.”*<sup>765</sup>

In other words, this procedure for electing the executive president was intended to secure parliamentary supremacy!

Not all members of the Constituent Assembly were taken in by this disingenuous argument. Following the constitutional coup the year earlier, everyone knew that President Obote was in charge, and members of the Constituent Assembly were merely doing the President’s bidding. As Mr G.O.B. Oda (DP, West Nile & Madi West) confessed:

*“I am not in the House as a representative of the people. I was elected by the President on April 15 last year, as was every other member of the House. Since May 6 of this year, the mandate of every elected member of the House has expired.”*<sup>766</sup>

The moral was, they were here not because they had any mandate to be here. Rather, they were here because President Obote wanted them to be here!

Therefore, whether President Obote was directly elected or not did not really matter. Vincent Rwamwaro, the Deputy Foreign Minister, put the matter without any adornments when he said:

*“Democracy does not work anywhere. Some people confuse democracy with general elections. If Uganda decides not to have a general election for a generation it is up to it.”*<sup>767</sup>

Perhaps with Soviet satellites in Eastern Europe in mind, Mr Rwamwaro added that “... in many European countries there have been no elections or real elections for years.”<sup>768</sup> In other words, elections were not such a big deal.

There were also major skirmishes on the proposals to allow the President to nominate up to 27 members of the National Assembly. Here, P. Munyagwa-Nsibirwa,

764 *Uganda Argus*, 27 June 1967

765 *Uganda Argus*, 27 June 1967

766 *Uganda Argus*, 28 June 1967

767 *Uganda Argus*, 15 July 1967

768 Loc. cit.



the Deputy Minister for Information, Culture and Tourism, had argued that there were strong reasons why the decision was taken to confer those powers on the President. *“He is allowed to nominate up to 27 members because of stability. We do not want a Government with a majority of ... one as recently happened in one of the West African countries.”*<sup>769</sup>

This argument did not find bipartisan sympathy. Mr Latim, the Leader of the Official Opposition, rejected the proposals arguing that

*“the system of presidential elections could bring into that office a person who is not a true representative of the people. As that same person is empowered to nominate up to 27 Members of Parliament, that means that key ministries could also go to some of those nominated persons who are not true representatives of the people. The country could then end up being ruled by those people who are not representatives of the people.”*<sup>770</sup>

For his part, H.M. Luande, an Independent member representing Kampala East, argued that the proposals were the antithesis of democratic principle of accountability. He stated:

*“It is not democracy for the President to nominate 30 members of the House. It would be better for him to nominate all the Members of Parliament so that the country would clearly know that it is a dictatorship. If a man is nominated he is bound to become a ‘yes man.’ This is a clear step back to the dark days.”*<sup>771</sup>

Adoko Nekyon, the UPC legislator, also disagreed with the proposals. Reacting to suggestions that the nominated members would not necessarily be the President’s stooges, he shot back:

*“As far as the people nominated by the President are concerned, some people have said that they would not be stooges, but what else can they be?”*

His fear was that nominated members would undermine the integrity of the National Assembly as a representative organ of the people. In his view, the nominated members

*“... would be the remnants of the politicians who have failed at the polls. If the purpose of bringing these 27 people was to bring stability to the country, then it is better to find some other way. There are only a limited number of people available who can maintain the dignity of the House.”*<sup>772</sup>

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769 *Uganda Argus*, 27 July 1967

770 *Uganda Argus*, 27 June 1967

771 *Uganda Argus*, 29 June 1967

772 *Uganda Argus*, 30 June 1967

Opposition to the proposals for nominated members was so strong and bipartisan that the Government was forced to drop them when it presented the amended proposals for adoption on 6 September 1967.

There were also heated debates on the issue of granting powers of detention without trial to the President. Lakidi, the Public Service Minister, set the tone for the debate on this proposal:

*“I had suggested in 1963 that if people attempted to cause trouble in the country a detention act should be passed to deal with them. Today I am very happy that the Government has seen it fit to bring about my dream. I am happy that it is now going to be not only my idea but the idea of the entire nation. I hope that all members will support it. It has not been introduced lightly by the Government, but only after a lot of thought. If we had in the 1962 Constitution a section about a detention act in it I am sure Sir Edward Mutesa would still be here today. I embrace this article (on detention) as mine, because I was the first person to come out (sic!) with it.”*<sup>773</sup>

The battle was soon joined by, mostly UPC, backbenchers, with none of them in favour of the proposal. The first to take up the Government gauntlet was Eridadi Mulira, the constitutionalist from Buganda. His warning was stark:

*“When the Detention Act comes into being, it will not pick and choose, one does not know who will come first. It is like death, and you don’t want to play with death.”*<sup>774</sup>

Mulira was joined by Adoko Nekyon, the ever-present member from Lango. He spoke at length about the dangers of introducing detention without trial:

*“Preventive detention is a double-edged sword. It prevents a crime which is feared if it is used properly. But it can also create the commission of that offence if it is wrongly used. If a man is detained because he is trying to subvert the country, it is only proper that he should be brought to trial. But if he is going to be kept indefinitely then I think that what Uganda is trying to prevent would instead be caused by other people who may think they might be detained as well.*

Adoko Nekyon warned:

*“Preventive detention, unless used correctly, will spread discontent. To detain one person means to detain six, because his friends and family will become discontented. To go on detaining more and more people will mean a spread to the point where preventive detention will no longer be effective because one has detained three million out of seven and a half*

<sup>773</sup> Uganda Argus, 15 July 1967

<sup>774</sup> Uganda Argus, 30 June 1967

*(million) already. At that point, the Constitution will be changed by force. This is nature's provision for human rights, human nature. I believe that the President and the police are being given power to eliminate serious political opponents systematically, and I do not think this is the answer even if power is wanted.*"<sup>775</sup>

Abu Mayanja, the freedom fighter, recalled the detentions during the nationalist struggles for independence:

*"...As a veteran nationalist, one of the most serious indictments against the colonialists was the deprivation of some of the fundamental rights and freedoms of the individual. But still there were some rights which the colonialists guaranteed, and it is disappointing that even those rights and freedoms which were enjoyed during colonial times are going to be taken away by the present proposals. This move is a shame."*<sup>776</sup>

J.W. Kiwanuka (UPC, Mubende North), another legislator from the Buganda heartland, added his voice to the chorus against presidential detention powers:

*"What a shame that Members of Parliament should be asked by our President to give him powers to detain us and, after he has done so, to give him powers not to be taken to a court of law."*<sup>777</sup>

Such was the opposition from the UPC legislators that President Obote himself was forced to admit, during his speech to close the debate, that *"detention is bad. It is very bad. There is nobody in the Government who does not think that it is very bad."*<sup>778</sup> Nevertheless, invoking the name of the people of Uganda, he stuck to his guns:

*"... There is a significant responsibility to construct a platform or foundation for the millions of people in Uganda."*<sup>779</sup>

There were lighter moments, too, as when B. Byanyima (Democratic Party, Ankole North-East) quipped that it was *"unfair to ask a person who comes from the part of the country where there are no kings whether kingships should be retained."*<sup>780</sup> To which, Abbas K. Balinda (UPC, Ankole South-East) and a fellow Munyankole retorted two days later:

*"I disagree with those who suggest that members who come from areas where there are no kings should not discuss kingships. All members are entitled to discuss any national issues and to vote over them."*<sup>781</sup> Another member, a Cabinet Minister, added: *"To have a king as President has not*

775 Uganda Argus, 30 June 1967

776 Uganda Argus, 6 July 1967

777 Uganda Argus, 14 July 1967

778 Uganda Argus, 7 September 1967

779 Loc. cit.

780 Uganda Argus, 12 July 1967

781 Uganda Argus, 14 July 1967

*proved satisfactory in the past. With kingships there are double loyalties. This is what we don't want. We don't want two masters when we have only one destiny.*"<sup>782</sup>

Equally amusing were members' exchanges regarding the official language. It started with the Acting Attorney General Luyimbazi-Zake who said that according to the proposals,

*"the country's official language would be English. I hope that members will not spend unnecessary time over this matter by asking when there should be a switch to Swahili. To those, I would say why not change over to Gujarati because Swahili is no nearer to us than Gujarati."*<sup>783</sup>

Acting Attorney General Luyimbazi-Zake spoke too soon. On 7 August 1973, two years after the Obote Government was overthrown, General Idi Amin passed a decree declaring Kiswahili the national language of Uganda.<sup>784</sup> Now it occupies the pride of place in the Constitution as one of Uganda's two national languages.<sup>785</sup>

And so, on 8 September 1967, Uganda got her third constitution in five years. The preamble to the new Constitution said it all. The members of the Constituent Assembly, on behalf of all the people of Uganda, for themselves and their 'generations yet unborn' had resolved that "*the Government Proposals be adopted...*" They were indeed President Obote's government proposals. No wonder, then, that Dr Apollo Milton Obote, who had become President in the bloody coup of 15 April 1966, became the President under the new Constitution.

Obote did not have to call for, or win, any election. Article 26(3) of the new Constitution took care of that, declaring that "*... the person holding office as President immediately before the commencement of this Constitution shall, on such commencement, be deemed to have been elected as President with effect from 15<sup>th</sup> April, 1966.*" The National Assembly that passed this Constitution also did not have to worry about elections, either. Like President, the National Assembly too was "*... deemed to have held its first sitting on 15<sup>th</sup> April, 1966*",<sup>786</sup> the day of the military putsch against the Independence Constitution.

President Obote had declared in the Constituent Assembly that enacting the new Constitution would spell the end for kingdoms. Obote's resolve now took on the unequivocal language of constitutional law: "*The institution of King or Ruler of a Kingdom or Constitutional Head of a District, by whatever name called, existing immediately before the commencement of this Constitution under the law then in force, is hereby abolished.*"<sup>787</sup> These proud nations, some of which, like Buganda, had been in existence for over six

782 F.Y. Lakidi (Minister for Public Service and Cabinet Affairs) as reported in the *Uganda Argus* of 15 July 1967.

783 *Uganda Argus*, 24 June 1967

784 For the history and politics of Kiswahili in Uganda and East Africa generally, see Ali A. Mazrui and Al'Amin M. Mazrui, *Swahili, State and Society: The Political Economy of an African Language*, East African Educational Publishers, Nairobi, 1995, p. 74

785 See *Constitution of the Republic of Uganda, 1995*, art. 6(1)

786 *Ibid.*, art. 62(5)

787 *The Constitution of the Republic of Uganda, 1967*, art. 118(1)

centuries, were now called ‘Districts’, a British colonial term used to refer to non-kingdom areas of North and Eastern Uganda. Thus, the Kingdoms of Ankole, Toro and Bunyoro were turned into Districts, namely Ankole, Toro and Bunyoro; while Buganda was divided into four Districts, namely East Mengo, Masaka, Mubende and West Mengo.<sup>788</sup>

To add salt to the Buganda injury, the abolition of its Kingdom was made retroactive to 24 May 1966<sup>789</sup>, the day of the military assault on the Kabaka’s Palace in the royal capital of Mengo. The abolition of the kingdoms was shielded from any judicial challenge. Article 118(5) made clear that “*no action may be instituted in any court of law in respect of any matter or claim by any person under this Article or under any provision made by Parliament pursuant thereto.*”<sup>790</sup>

The abolition of kingdoms went hand in hand with the abrogation of royal titles, privileges, and prerogatives of the royal families from the various kingdoms. Thus, the new Constitution stated, “*no citizen of Uganda shall enjoy any special privilege, status or title by virtue of his birth, descent or heredity.*”<sup>791</sup> Similarly, “*no law whatsoever shall confer any special privilege, status or title upon any citizen of Uganda on the ground of his birth, descent or heredity.*”<sup>792</sup>

### **The Rise of Imperial Presidency**

The events of 1966 unleashed a wave of political repression by state security agencies from which Uganda is yet to recover.<sup>793</sup> Obote’s total reliance on the army after 1966 led directly to his overthrow by now General Idi Amin on 25 January 1971. The terror and violence by the state that had first been perpetrated on the Buganda Kingdom in April and May of 1966 was now extended to the rest of Uganda, a process in which the Oder Commission of Inquiry estimated that over two million Ugandans were killed by the state or those revolting against the state; and another one million were exiled.<sup>794</sup>

However, in political and constitutional terms, the 1967 Constitution’s greatest and most enduring legacy is the presidentialism it created. In this regard, President Obote and the current President Yoweri Museveni and the several presidents in between, including Dictator Idi Amin share many similar traits. It is imperative, therefore, to examine the 1967 Constitution in some more detail. Whereas the 1962 Constitution had introduced the office of the President as a titular Head of State, the 1967 Constitution transformed the President from the titular Head of State to include Head of Government and Commander in Chief.<sup>795</sup>

Whereas previously the executive authority was vested in the President but was exercised ‘upon advice’ of the Prime Minister, the President now became the Chief Executive of the State whose power “*shall be exercised by him, either directly or through*

788 See *Constitution of Uganda, 1967*, arts. 115(2) and 118(1).

789 *Ibid.*, art. 118(2)

790 *Ibid.*, art. 118(5)

791 *Ibid.*, art. 8(3)

792 *Ibid.*, art. 8(4)

793 Republic of Uganda, *The Report of the Constitution Commission...*, op. cit., para. 2.42, p. 51

794 See Republic of Uganda, *The Report of the Commission of Inquiry into Violations of Human Rights ...*, op. cit., p. 465

795 *Ibid.*, art. 24(1)

*officers subordinate to him.*<sup>796</sup> Under the new Constitution, the President was given vast powers to constitute public offices and to appoint public officials of all kinds.<sup>797</sup> He could appoint the Vice President;<sup>798</sup> Ministers and their Deputies;<sup>799</sup> the Attorney General;<sup>800</sup> and the Chairman and members of the Electoral Commission.<sup>801</sup>

The 1967 Constitution gave the President immense powers of control over the Judiciary. He was empowered to appoint the Chief Justice of the High Court of Uganda;<sup>802</sup> and, with the advice of the Judicial Service Commission, the puisne judges.<sup>803</sup> Members of the Judicial Service Commission were themselves presidential appointees.<sup>804</sup> Over and above these powers, the power to appoint judicial officers

*“... to hold or act in offices to which this article applies, include the power to confirm appointments, to exercise disciplinary control over persons holding or acting in such offices and to remove such persons from office shall be vested in the President, acting in accordance with the advice of the Judicial Service Commission.”<sup>805</sup>*

The President was also granted vast powers to declare, by proclamation published in *Gazette*, the existence of a state of public emergency in Uganda or any part thereof.<sup>806</sup> This power was to be exercised according to the advice of the Cabinet. A resolution of the National Assembly supported by a simple majority of the members thereof could revoke or extend the state of public emergency.<sup>807</sup> The declaration of a state of public emergency under this provision allowed for lengthy detention of persons under an order made by the Minister.<sup>808</sup>

As Commander in Chief of the Armed Forces, the President was given wide powers over the control and the deployment of the Armed Forces. He could, for example, determine the operational use of the Armed Forces;<sup>809</sup> and had power to appoint, promote and dismiss members of the Armed Forces.<sup>810</sup> He had power to “... give to the Inspector General of Police such directions with respect to the maintaining and securing of public safety and public order as he may consider necessary and the Inspector General shall comply with those directions or cause them to be complied with.”<sup>811</sup> The courts were

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796 *Ibid.*, 65(1)

797 *Ibid.*, art., 66

798 *Ibid.*, art. 32(1)

799 *Ibid.*, art. 33(1)

800 *Ibid.*, art. 35(1)

801 *Ibid.*, art. 47(1)

802 *Ibid.*, art. 84(1)

803 *Ibid.*, art. 84(2)

804 *Ibid.*, art. 90(1)

805 *Ibid.*, art. 91(1)

806 *Ibid.*, art., 21(1)

807 *Ibid.*, art., 21(3) and (4)

808 *Ibid.*, art., 21(5), (6) and (7)

809 *Ibid.*, art. 78(2)(a)

810 *Ibid.*, art. 78(2)(b)

811 *Ibid.*, art. 69(2)

precluded from inquiring into the question whether any, and if so what, directions were given to the Inspector General of Police.<sup>812</sup>

The constitutional provisions relating to the control and deployment of the armed forces were peculiar to Uganda as they were not part of the Republican constitutions of both Tanganyika and Kenya, which had ushered in Imperial Presidencies in those countries a few years earlier. This, perhaps, was the most obvious legacy of the 1966 military coup which propelled Milton Obote to the Presidency. In that sense, it betrayed Obote's political weakness, as reflected in his reliance on the armed forces for political survival.

Admittedly, the 1967 Constitution stipulated that in the performance of any functions conferred upon him, or in the exercise of any rights, prerogatives or privileges vested in him by this Constitution, *"the President shall act in accordance with this Constitution or any such other law."*<sup>813</sup> With the Constitution granting him such vast powers over matters of life or death, the President did not need to be reminded that he was bound to respect the Constitution and the laws. He could literally do as he wished and still be within the remit of the Constitution.

Apollo Nsibambi, the Makerere University political science professor and former Prime Minister, has written of the aftermath of the events of 1966 and 1967:

*"From 1966 onwards, the deadly politics of 'winner-take-all' dominated the Ugandan political scene. As a consequence, political stability began to elude Uganda.... Subsequent events demonstrated that Obote's abrogation of the constitution and abolition of traditional leaders deprived him of political legitimacy. Henceforth, he depended on the army to rule Uganda until he was overthrown by a semi-literate army Commander, which aggravated Uganda's problems."*<sup>814</sup>

Professor Nsibambi is not alone in holding this view. Dean Fred W. Jjuuko, the Makerere University law professor, has noted that Obote's

*"creeping dictatorship then saw ... the erosion of the (political) parties through crossings and finally the establishment of a de facto one party system. Political parties and other organizations apart from the UPC were banned, and many of those who were perceived to be political enemies of the ruling party were incarcerated in 1969. Civilian dictatorship thus perfected, it came face to face with the reality of the military nightmare in 1971.... The civilian dictatorship had whetted the army's appetite for power as it had resorted to this army in the suppression of its political competitors and of the population at large."*<sup>815</sup>

812 Ibid., art. 69(3)

813 Ibid., art. 65(2)

814 Apollo Nsibambi, 'The Role and Place of Culture and Decentralization in Uganda's Struggle for Pluralism', in Oloka-Onyango et al., *Law and the Struggle for Democracy...*, op. cit., p. 368

815 F.W. Jjuuko, 'Political Parties, NGOs and Civil Society in Uganda', in Oloka-Onyango et al., *Law and the Struggle for Democracy...*, op. cit., pp. 180-198, p. 185

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## Emasculating Parliament

More significantly for the purposes of this study, the 1967 Constitution fundamentally reorganised the relationship between the Executive and the Legislature in ways which undermined and diminished the parliamentary power. Firstly, borrowing the language of the colonial agreements with the Kabakas of Buganda, the new, ostensibly republican, Constitution declared that “*the President shall take precedence over all persons in Uganda and shall not be liable to any proceedings whatsoever in any court.*”<sup>816</sup> Similarly, and directly emulating the Kabaka he had just violently overthrown, the President was made “*... exempt from any direct personal taxation.*”<sup>817</sup> These provisions placed the President effectively above the law, and created a constitutional cover for unprecedented impunity.

Secondly, the new Constitution retained the President as a constituent part of the Parliament.<sup>818</sup> This constitutional relic from medieval Europe, which has featured in every Anglophone independence constitution, was introduced in Uganda by the Independence Constitution of 1962. Under the conditions of Imperial Presidency, however, this otherwise harmless colonial relic took on significant constitutional importance. For it meant that the President overshadowed every aspect of public life and every institution of the state, executive, judicial and legislative.

Thirdly, the President was granted the usual power of assenting to bills passed by the National Assembly;<sup>819</sup> with the common disclaimer that “*a bill shall not become law until it has been duly passed and assented to in accordance with this Constitution.*”<sup>820</sup> The new Constitution also preserved the colonial tradition under which the National Assembly was excluded from debating any bill or motion with respect to financial measures unless the bill was introduced or the motion moved by the Minister.<sup>821</sup>

Two crucial matters, which bear witness to the new relationship between the President and the National Assembly, can be distinguished from these provisions. Firstly, like the Independence Constitution, the 1967 Constitution was silent on the power of the National Assembly to override the President’s refusal to assent to bills passed by the House. However, the constitutional and political context separating the two Constitutions had undergone radical change.

In the former case, the President was a largely ceremonial head of state whose assent to bills passed by the House was a mere formality. In the latter case, the President was an executive head of state with overwhelming power of control over the various levers of state power. Moreover, only one year earlier, the new President had dramatically shown what he was capable of doing with those levers of state power. Under these changed circumstances, therefore, silence regarding the withholding of presidential assent was

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816 The Constitution of the Republic of Uganda, 1967, op. cit., art. 24(3)

817 Ibid., art. 24(4)

818 Ibid., art. 39

819 Ibid., art. 58(1) and (2)

820 Ibid., art. 58(3)

821 Ibid., art. 59



ominous. It meant that the National Assembly had no way of overriding the President's legislative intransigence.

Secondly, the President was given enormous legislative powers in his own right. Although Article 63 of the new Constitution gave the National Assembly 'the sole power' to make laws for peace, order and good government of Uganda with respect to any matter; the President, too, could make laws. These were referred to as 'Ordinances.' This was possible when Parliament was not sitting, and whenever the President was advised by the Cabinet that there were exceptional circumstances rendering it necessary for him to take immediate action.<sup>822</sup> The President could also legislate when Parliament was dissolved or, following a general election, if there was no party with a clear parliamentary majority to be able to elect a president and form a government.<sup>823</sup>

The ordinances promulgated by the President had the same force and effect as acts of parliament;<sup>824</sup> but were required to be tabled in parliament in its next sitting.<sup>825</sup> Alternatively, they expired after six weeks of parliament's sitting,<sup>826</sup> or were repealed by the President or by Parliament.<sup>827</sup> These conditions may appear at first sight as sufficient checks against possible abuse of the President's legislative powers.

However, it must be borne in mind that the parliamentary calendar was effectively controlled by the President. Over and above these legislative powers, the President was mandated to summon the Parliament to sit. As the new Constitution made clear, "*each session of Parliament shall be held at such place within Uganda and shall commence at such time as the President may appoint.*"<sup>828</sup> It must also be borne in mind that the President had power to prorogue or dissolve the Parliament at any time.<sup>829</sup>

Over and above these legislative powers, the President was given power to "... *make treaties, conventions, agreements or other arrangements between Uganda and any other country or ... any international organization or body in respect of any matter.*"<sup>830</sup> The treaties were to be on such terms as approved by the Cabinet and were subject to ratification by the Cabinet.<sup>831</sup> The only treaties that were subject to parliamentary control and oversight were those relating to armistice, neutrality or peace.<sup>832</sup> These required ratification by the National Assembly through a resolution. These provisions ceded control to the Executive, without parliamentary oversight, over major areas of foreign and domestic policy, as international treaties, conventions and agreements cover a large swathe of public policy.

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822 Ibid., art. 64(1)

823 Ibid., art. 64(2)

824 Ibid., art. 64(3)

825 Ibid., art. 64(3)(a)

826 Ibid., art. 64(3)(b)

827 Ibid., art. 64(3)(c)

828 Ibid., art. 61(1)

829 Ibid., art. 62(1) and (2)

830 Ibid., art., 76(1)

831 Ibid., art., 76(2)

832 Ibid., art., 76(3)

## Any Silver Linings?

There were positive elements in the 1967 Constitution which, had the political and constitutional context been different, would have founded a more democratic dispensation in Uganda. Firstly, in spite of the tremendous push from the Obote regime, Uganda's National Assembly successfully resisted the dilution of its representative character by rejecting government proposals to allow the President to nominate members of the National Assembly. Hence, Uganda maintained its post-colonial distinction in East Africa of not having nominated members in its Parliament. Its composition remained as it was in the Independence Constitution.<sup>833</sup>

Secondly, unlike her neighbours to the east and south, Uganda's presidentialism was not the classical presidentialism that developed everywhere in post-colonial Africa. Rather, it was a parliamentary presidentialism of the variety that post-apartheid South Africa was to adopt over a quarter century later. In the South African constitutional system, as Professor Peter Anyang' Nyong'o, the Kenyan political scientist, observes, the president

*“exists in name but, in reality, acts like a prime minister....”*<sup>834</sup>

The reason for this is that even though the President of Uganda was the Head of State, Chief of Government and Commander in Chief in the classical presidential system, the 1967 Constitution provided for the Cabinet system of government that is typical of a parliamentary system. Firstly, the President was not directly elected by the people; rather he was deemed elected on the basis of the party having a majority in a parliamentary election. In effect, he was elected by the National Assembly, like a Prime Minister in any other parliamentary democracy.

Secondly, as in any parliamentary democracy, the Ugandan President was liable to be removed from office by a confidence vote. The 1967 Constitution made clear that

*“whenever a resolution is passed by the National Assembly in accordance with the provisions of this Article as a vote of no confidence in the Government, the President shall resign from the office of President.”*<sup>835</sup>

Thirdly, the Constitution provided for collective ministerial accountability to parliament. In this regard, the Ugandan President was, unlike his Tanzanian counterpart, a member of the Cabinet. For article 37(1) of the new Constitution set out the composition of the Cabinet to include *“the President, Vice President and such other Ministers as may be appointed to the Cabinet by the President.”* This Cabinet was mandated to formulate and implement the policy of the Government of Uganda, *“and in the performance of this function the Cabinet shall be collectively responsible to Parliament.”*<sup>836</sup>

The third positive aspect of the 1967 Constitution was its provision of right to

833 Ibid., art., 40(1)

834 Peter Anyang' Nyong'o, **Presidential or Parliamentary Democracy in Kenya? Choices to be Made**, Booktalk Africa, Nairobi, 2019, p. 182

835 Constitution of the Republic of Uganda, op. cit., art. 30(1)

836 Ibid., art. 37(2)

challenge the results of a presidential election. Thus, the Constitution declared in this regard that

*“... the High Court shall have jurisdiction to hear and determine whether the President was validly elected.”*<sup>837</sup>

The determination of the High Court on the presidential election petition was to be final and conclusive.<sup>838</sup> In a continent where presidential elections are commonly immune from judicial scrutiny, these provisions were revolutionary and way ahead of their time. They would be retained in the fifth Constitution of the Republic of Uganda enacted in 1995. Significantly, Kenya followed suit 15 years later when it enacted its current Constitution in August 2010.

There were other features of the 1967 Constitution which, compared to comparative provisions in Kenya and Tanzania, were quite progressive. For instance, the Constitution did not allow much in terms of discretionary powers of the President. Thus, it declared,

*“in the performance of any function conferred upon him or in exercise of rights, prerogatives or privileges vested in him by this Constitution or any other law, the President shall act in accordance with the provisions of this Constitution or any such other law.”*<sup>839</sup>

Compare these provisions with the provisions of Article 37(1) of the Tanzanian Constitution which declares that

*“... the President shall be free and shall not be obliged to take advice given to him by any person, save where he is required by this Constitution or any other law to act in accordance with the advice to him by any person or authority.”*

The new Constitution also entrenched some of its provisions. Thus, whereas Parliament could change any provision of the Constitution,<sup>840</sup> the provisions of Parts I, II and III were entrenched and required a two thirds majority of all members of the National Assembly to amend.<sup>841</sup> The entrenched Parts provided for the Republic of Uganda and its borders; constitution and method of alteration thereof; citizenship, and the protection of fundamental rights and freedoms.

Similarly entrenched were provisions relating to the confidence vote; removal of the President for incapacity; ; Constituencies; the mode of exercising legislative powers; Districts and boundaries thereof; the High Court of Uganda, appointment of its judges and their tenure of office, and the Judicial Service Commission. A bill passed by the National Assembly to amend these provisions could not be assented to by the President “... unless

837 Ibid., art. 27(1)

838 Ibid., art. 27(3)

839 Ibid., art. 65(2)

840 Ibid., art. 3(1)

841 Ibid., art. 3(2)

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*that bill is accompanied by the certificate of the speaker ... certifying that the bill has been supported in the National Assembly as required by this article....*”<sup>842</sup>

The rationale behind the entrenchment of certain provisions of a constitution is that the provisions so entrenched are considered so important to the wellbeing of the society and the safety of the state that they should not be altered by the normal procedures of majoritarian rule in parliament. However, as experience of Uganda itself has demonstrated over the years, the entrenchment of the provisions of a constitution does not necessarily protect it against social or political forces bent on changing or abrogating it. As the ubiquitous Abu Mayanja had told the Constituent Assembly on 8 July 1967,

*“... democratic government ... cannot be created by writing a Constitution. (For) ultimately, democracy does not reside in the Constitution, but in the hearts and minds of the people.”*<sup>843</sup>

All that entrenchment does is to indicate matters that the makers of the Constitution consider so important that their alteration should not be undertaken lightly. To quote the indefatigable Abu Mayanja again:

*“We should not change our Constitutions in the way some men change their shirts. The Constitution should be a document of great sanctity. We should respect it and we should abide by it.”*<sup>844</sup>

Equally progressive for its time were the provisions relating to power to declare war. With regard to this particular issue, the wording of Article 77 of the 1967 Constitution left no doubt that even though the President was the Commander in Chief of the Armed Forces, the power to declare and conduct war resided not with him, but with the National Assembly. The Constitution declared:

*“The National Assembly may, by resolution, authorize the President to declare that a state of war exists between Uganda and any other country.”*<sup>845</sup> Moreover, *“the National Assembly may by resolution revoke a declaration of a state of war made under the provisions of this Article.”*<sup>846</sup>

In other words, the National Assembly was to be constitutionally firmly in control in matters of war and peace.

It is clear, based on this analysis, that presidential powers under the 1967 Constitution were, unlike in Kenya and Tanzania, limited in significant ways. However, as Dr Smokin Wanjala, the erstwhile law lecturer at the University of Nairobi and current Supreme Court justice has argued, drawing on the experience of his native Kenya:

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842 Ibid., art., 3(4)

843 *Uganda Argus*, 8 July 1967

844 *Uganda Argus*, 6 July 1967

845 Ibid., art., 77(1)

846 Ibid., art., 77(2)

*“The recent experience in some African countries ... shows that even a limited presidency can politically, socially and legally manipulate the constitution so as to transform itself into a dictatorship which can subjugate a nation into so many years of traumatic experiences.”<sup>847</sup>*

This conclusion fits perfectly with the Ugandan presidency under the 1967 Constitution like a glove.

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847 Smokin Wanjala, ‘Presidentialism, Ethnicity, Militarism and Democracy in Africa: The Kenyan Example’, in Oloka-Onyango et al., *Law and the Struggle for Democracy...*, op. cit., p. 96

## Chapter Five: Obote’s Heirs and their Inheritance

Like the violent methods he used to become President, the Constitution imposed by President Obote in 1967 was, unsurprisingly, carried over by the Amin Dictatorship. Dean Jjuuko again:

*“The military dictatorship of the 1970s simply made absolute what the ruling party before it had done in half-measures and only to rival political organizations. Where the UPC had used the penal law to proscribe political organizations and incarceration of opponents to suppress the opposition and the population at large, Amin’s regime not only abducted and killed but also made law that was supposed to smother all political murmurs. That law – the Suspension of Political Activities Decree, 1971<sup>848</sup> – in the finality of its provisions best describes the fate of the political parties and other political organizations formed or yet to be formed.”<sup>849</sup>*

To be true, General Idi Amin and his military dictatorship did not abrogate Milton Obote’s 1967 Constitution. Rather, by *Legal Notice No. 1 of 1971*, he merely suspended Articles 1, 3, 63 and Chapters IV and V of the Constitution. The Notice, issued in the name of the President of Uganda, ‘His Excellency Field Marshal Idi Amin Dada’, commanded:

*“... The said Constitution shall be modified by ordinances issued by the President and all legislative and executive powers of Uganda are vested in the President.”*

All other provisions of the Constitution were left largely intact, subject only to the overriding powers of the President. Thus, as we have shown, Article 1 had declared the Constitution to be ‘the supreme law of Uganda.’ Its suspension meant that the Constitution was no longer the supreme law of the land, and its provisions could now be overridden by military edicts of Field Marshal Amin.

Article 3 had provided for the alteration of the Constitution by Parliament in its constituent capacity. Its suspension meant that the military junta could now change the Constitution by decree. Article 63 related to Parliament’s ‘sole’ power to make laws for Uganda. Those powers were now taken over by the Field Marshal. Chapters IV and V had provided for the Executive and Parliament of Uganda. With the coup, the President became both the Executive and the Legislature of Uganda.

Apart from the Legal Notice, the most draconian piece of legislation to emanate from the Amin regime was the *Suspension of Political Activities Decree*. With military precision, section 1 of the Decree unequivocally declared:

*“No person shall manage, take part in, collect subscriptions for, raise for or otherwise encourage the management of any political party; or*

848 Decree No. 14 of 1971

849 Jjuuko, *Political Parties, NGOs...*, op. cit., pp. 185-186

*organize or take part in any public meeting or procession organized for propagating or imparting political ideas or information.”* The sweeping prohibition also covered the formation of new parties: *“As from the date of the commencement of this Decree, no person shall form or manage, take part in or assist in the formation or management of any new political party.”*<sup>850</sup>

The mere mention of the name of a political party was criminalised: *“No person shall, for the purpose of propagating or imparting political ideas in furtherance of the aims of any political party, display in a public place or advertise in any form whatever, signs, symbols, flags, insignia or emblems of any political party; or whether by spoken words, or in writing or in any other form whatsoever, utter in a public meeting or at a public place any political slogan, name of any political party; or wear in any public place or at a public meeting any uniform signifying his association with a political party.”*<sup>851</sup>

Section 4 of the Decree empowered any authorised officer to enter any house, building or place in which he had reason to believe that a public meeting was being held for the propagation of political ideas or information. It also provided for the arrest of persons and seizure of property found in such a place. This provision provided the legal basis for the operatives of the State Research Bureau (SRB), Idi Amin’s dreaded secret police to abduct, disappear and murder thousands of political opponents, real or imagined, during the eight years of the Amin dictatorship.

This state of affairs continued for eight long years of the Amin dictatorship. Following his invasion of Tanzanian territory in August 1978, the Tanzania People’s Defence Forces and the armed groups of exiled Ugandans under the auspices of the Ugandan National Liberation Front (UNLF) chased the Amin Government out of power on 11 April 1979. Upon coming to power the UNLF promulgated *Legal Notice No. 1 of 1979*, the same legal device that Dictator Idi Amin had used eight years earlier.

Like Idi Amin, the UNLF regime suspended Parts IV and V of the 1967 Constitution which provided for elections to, and the legislative powers of, the National Assembly. Instead, the UNLF created a National Consultative Council which was to serve as Uganda’s legislature until the general elections of December 1980, which brought Milton Obote back into power for the second time. Chief Justice Benjamin Odoki would later summarise the continuity between the Amin dictatorship and the UNLF administration as follows in the famous case of *Andrew Lutakome Kayiira vrs. Edward Rugumayo & 2 Others*:<sup>852</sup>

*“Yusufu Lule made a proclamation under Legal Notice No. 1 of 1979 published on 8<sup>th</sup> May 1979 but deemed to have come into force on the 11<sup>th</sup> April 1979. The proclamation suspended Chapters IV and V of the*

850 Ibid., s. 2

851 Ibid., s. 3

852 Uganda Constitutional Court Constitutional Case No. 1 of 1979, p. 34

*Constitution which provisions dealt with the executive and the legislature. All titles, privileges, prerogatives, powers and functions and exemptions that were formerly enjoyed or exercised by the former President of the Republic of Uganda under the Constitution were vested in the new President.*

*“There was to be a Cabinet of Ministers appointed by the President to advise him in the exercise of his executive functions. All legislative powers referred to in the Constitution were vested in the National Consultative Council... until such time as a Legislative Assembly was elected.... Subject to the above provisions of the Proclamation, the operation of the Constitution and the existing laws was not to be affected by the Proclamation except that such laws were to be construed with such modifications, qualifications and adaptations as are necessary to bring them into conformity with the Proclamation.*

*“This Proclamation revoked Decree No. 1 of 1971 by Idi Amin on his assumption of power. The overthrow of Idi Amin’s regime by the UNLF and forces of its allies amounted in law to a revolution. A revolution in law is the nullification of the legal order and its replacement by a new order in an illegitimate way.”<sup>853</sup> The UNLF government also issued Legal Notice No. 5 of 1980 on Constitution Modification which provided that “where any conflict arises between the provisions of this Proclamation and the provisions of the Constitution of Uganda or any other written law, the provisions of this Proclamation shall prevail.”<sup>854</sup>*

Whereas the Obote and Amin regimes had the Uganda Army behind their thrones, the UNLF had the Tanzanian army behind its throne. As Professor Kanyeihamba, an eyewitness and chronicler of this period points out,

*“any meaningful understanding of the Uganda situation under the UNLF must take into account the then Tanzania’s military and foreign policies towards Uganda. The UNLF was a little more than a puppet government of Tanzania and any acts or omissions it may have been responsible for, the Tanzanian government must bear part of the blame, for they were in charge. As the events at Mwanza clearly illustrate, when (UNLF and Uganda President Yusuf) Lule and his associates appeared to deviate from the wishes of the Tanzanian government, and follow an independent line, their removal from office became inevitable.”<sup>855</sup>*

From the fall of the Amin dictatorship in 1979 to January 1986 when current President Yoweri Museveni assumed state power, the 1967 Constitution – as modified by *Legal Notices Nos. 1 and 5 of 1979 and 1980* respectively – continued to be the supreme

853 Quoted in Ssekindi, *A Critical Analysis* ..., op. cit., pp. 70-71

854 Legal Notice No. 5 of 1980, para. 16.3

855 Kanyeihamba, *The Constitutional and Political History* ..., op. cit., pp. 150-151



law of Uganda. Upon his takeover of power, President Museveni issued *Legal Notice No. 1 of 1986*, which repealed and replaced the Legal Notices promulgated by the UNLF regime. The superiority of this latest Legal Notice over the 1967 Constitution was upheld by the Constitutional Court of Uganda in the 1993 case of *Rwanyarare & 2 Others vrs. Attorney General*.<sup>856</sup>

The Decree suspended Article 1 and 3, parts of Chapter IV, V and Article 63 of the 1967 Constitution. Section 3.1 of the Decree vested all executive powers in President Museveni, while section 3.3 vested legislative powers in the President and the National Resistance Council comprising the National Resistance Movement and its military wing, the National Resistance Army. Section 4.1 outlawed all political activity outside the NRM/NRA. This state of affairs continued until 1995, when the 1967 Constitution was repealed and replaced by the current *Constitution of the Republic of Uganda, 1995*.

Therefore, the 1967 Constitution runs like a red thread through the bloodiest chapter in Uganda's history, linking all administrations from Obote I to Yoweri Museveni. But how could a constitution founded on such an unconstitutional act as a bloody military coup be adopted by military dictators and civilian leaders alike? The answer to this is suggested by the nature of the presidential system of government that came with the 1966 coup and was confirmed by the 1967 Constitution. As Ben Nwabueze, the preeminent scholar of the African Presidentialism, wrote in his 1974 magnum opus,

*“Presidentialism in Commonwealth Africa, with the opportunities for total mobilization of the nation and the greatly enhanced authority which they confer to the president, are particularly favourable to the growth of dictatorship.”*<sup>857</sup>

### **The 1995 Constitution and Museveni's 'Hybrid Regime'**

*The Constitution of the Republic of Uganda, 1995*, was passed by the Constituent Assembly on 22 September 1995 and enacted on 8 October 1995. The enactment of the Constitution brought an end to nine years of rule by President Museveni and NRM as an interim government. It also marked the fulfilment of the NRM government's promise to return Uganda to constitutional rule by enacting a new constitution.

For as one of its publications had stated in 1990:

*“As part of laying the groundwork for returning Uganda to democratic government, the Interim Administration shall see to it that a new constitution based on the popular will is drafted and promulgated by a Constituent Assembly elected by the people themselves. The present constitution (1967) was drafted by Obote to answer the needs of establishing a despotic state. It contains many provisions that are anti-*

<sup>856</sup> Constitutional Court Miscellaneous Civil Application No. 85 of 1993

<sup>857</sup> Ben O. Nwabueze, *Presidentialism in Commonwealth Africa*, St. Martin's Press, New York, 1974, p. 435. See also F.D. Ssekindi, *A Critical Analysis ...*, op. cit., pp. 72-79

*democratic, and returning the country to democratic rule under such a constitution would lead to a quick demise of democracy once more.*<sup>858</sup>

The constitution-making process had started two years earlier. On 21 December 1988, nearly three years into its assumption of power, the NRC enacted the *Uganda Constitutional Commission Statute, 1988*,<sup>859</sup> to provide for a procedure for enactment of the new Constitution. This Statute provided for the establishment of a Constitutional Commission composed of a Chairman, Vice Chairman and eleven other members and Secretary, all of whom were to be appointed by the President in consultation with the Minister. The Director of Legal Affairs and Chief Political Commissioner of NRM were to be *ex officio* members.

Following the enactment of the Statute, a 20-member Constitution Commission was appointed and sworn in by President Yoweri Museveni on 4 March 1989. It was chaired by Justice Ben Josses Odoki, with Makerere University political science professor Dan Mudoola as Vice Chairman. There is wide consensus that there was no consultation in the process leading up to the establishment of the Commission. It is also widely accepted that all except two of its members were well-known NRM cadres who were later appointed to senior positions in the government after the adoption of the 1995 Constitution. The Commission's Chairman, Justice Odoki, for instance, became the Chief Justice of Uganda.

The manner of the Constitution Commission's appointment and composition means that the constitution-making process was marred by controversy from the word go. Its critics claimed that the selection of its members as provided for by statute and as effected by the President was designed to give the NRM advantages during the constitution-making process. As the UPC protested in a letter to the Minister of Justice and Constitutional Affairs:

*"The current process of constitution-making has been shrouded in political bad faith. The selection of the members of the Constitution Committee was done without regard to alternative political views of the people of Uganda. Most of the Commissioners are avid sympathisers of the NRM and have made the process of making a national constitution look like ideas are gathered for making an NRM constitution."*<sup>860</sup>

Throughout the period when the Constitution Commission was active and even after, there was a general ban on the activities of all political parties, except the NRM which did not consider itself as a political party. Debate outside the auspices of the Commission was also prohibited. This meant that during the constitution-making process, it was impossible for Ugandans to engage in political debates on the new constitution that did not conform to NRM views. The constitution-making environment was detrimental to freedom of expression and freedom of association and assembly.<sup>861</sup>

858 NRM Secretariat, *Mission to Freedom: Uganda Resistance News 1981-1985*, NRM Publications, 1990, pp. 20-21

859 Statute No. 5 of 1988

860 Quoted in FD Ssekindi, *A Critical Analysis of Legal Construction ...*, op. cit., p. 101

861 Ibid.

The Constitutional Commission received over 25,000 submissions from Resistance Councils, essay competition entries, newspaper s, individual memoranda and seminars.<sup>862</sup> The Resistance Councils, which accounted for about half of the submissions, were elected local government bodies initially established as rebel support structures in areas under NRM control during the civil war of the early 1980s that brought President Museveni to power. These bodies were therefore affiliated to NRM. As Ssekindi notes in his doctoral thesis, “*this created a serious problem (for the Commission) of relying on submissions that toed the NRM political line.*”<sup>863</sup>

On 31 December 1992, the Constitutional Commission published its final report and a draft constitution. The Commission reported that the majority of Ugandans preferred a directly elected Constituent Assembly to enact the new Constitution. This would give the Constitution greater legitimacy with the people of Uganda. Although the Constitutional Commission claimed that its draft constitution was based on the views of the people of Uganda, “*... it was accused of ducking contentious constitutional issues ... on the federation question, the restoration of political parties which were banned when the NRM seized power and the political system most suited to Uganda.*”<sup>864</sup>

The constitution-making process was dismissed by some commentators as a new politics of ‘king-making’:

*“The Commission made use of its own analysis of Uganda’s problems, an analysis which was however, influenced by people’s views.... It also exercised its judgement in determining the best way to give form and effect to the consensus of the majority view. Hence, it cannot claim to have based its draft on the popular views.”*<sup>865</sup>

The Commission reported that the majority of Ugandans wanted a continuation of the executive presidency with a directly elected President. However, the Commission noted, the people also wanted a clear separation of powers and a president subjected to the law. Moreover, there was consensus that presidential powers of appointment for public officials, exercise of prerogative of mercy and deployment of the armed forces should be subjected to meaningful checks.

Similarly, there was a general consensus that Parliament should be strong and effective so that it could provide sufficient checks and balance to the president and safeguard the people’s interests. The Commission admitted that the majority of Ugandans were against granting immunity against criminal prosecution of the President as had been the case since the Independence Constitution.

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862 Republic of Uganda, **The Report of the Constitution Commission: Analysis and Recommendations**, Ministry of Justice and Constitutional Affairs, Kampala, 1993, para. 1.54, p. 36

863 Ibid., p. 104

864 Ibid., p. 105

865 Martin Doornbos and Frederick Mwesigye, ‘The New Politics of King-Making’, in Holger Hansen and Michael Twaddle (eds.), **From Chaos to Order: The Politics of Constitution-Making in Uganda**, Fountain Publishers, Kampala (1995), 68, 73

However, the Commission rejected that majority view. Instead, it sought to preserve what it called ‘the dignity of the office of the president’ by proposing that the president should not be subject to any judicial proceedings whatsoever during his tenure. The Commission rationalised its proposal thus:

*“It would be absurd if the president who takes precedence over all people in the country is liable to court proceedings. However, the President who has committed serious mistakes could be removed either by a vote of no confidence or impeachment by Parliament. He could be taken to court when he is no longer president.”<sup>866</sup> The immunity against prosecution would be confirmed by the Constitutional Court of Uganda a decade later in the landmark case *Brig. Gen. Henry Tumukunde vrs. Attorney General & Another*.<sup>867</sup>*

Subsequently, the Commission recommended that the President may be impeached on the grounds of abuse of office; or wilful violation of the presidential oath of allegiance and office or any other provision of the Constitution; misconduct or misbehaviour that brings or is likely to bring the office of the President into contempt or ridicule or disrepute; or which is prejudicial or detrimental to the economy or the security of the state.

The Commission acknowledged that the vast majority of the people preferred a limitation on presidential terms to prevent a president from being re-elected indefinitely. As result, the Commission proposed in its draft constitution that the president should serve a maximum of two five-year terms. As for separation of powers, the Commission proposed that the president should not be a member of Parliament. In his doctoral thesis, Ssekindi mistakenly calls this recommendation – part of the country’s constitution since independence – “... an innovation in Uganda’s constitutional history.”<sup>868</sup>

With regard to the political system for Uganda, the Odoki Commission recommended a no-party system, essentially an entrenchment of the NRM regime into the Constitution. Later a referendum held in June 2000 allegedly supported this system with 91 percent of the total votes. However, in another referendum held five years later, some 95 percent of the electorate opted to return Uganda to a multiparty system. By this time, however, the NRM regime was deeply entrenched in power.

Ssekindi’s ringing verdict on the Odoki Commission’s report is condemnatory:

*“The Commission laid the foundations for establishing an uncircumscribed presidency in the 1995 Constitution and for the NRM’s transition from an interim government to a permanent holder of political power. This was achieved by imbedding in the draft Constitution a presidential model that disregards the aspirations of the people of Uganda, and which does not embody the tenets of constitutionalism. In sum, the Constitution*

866 See Republic of Uganda, **The Report of the Uganda Constitution Commission: Analysis and Recommendations**, Ministry of Justice and Constitutional Affairs, Kampala, 1992, p. 330

867 Petition No. 6 [2005] UGCC 1

868 Ssekindi, *A Critical Analysis of the Legal Construction...*, op. cit., p. 110

*Commission's contribution towards restraining the presidency was best negligible. Its role cannot be described as a sincere attempt to transform the institution that was unlimited before 1995 into that which is subjected to the mandate of the people and that is subordinated to the constitution.*"<sup>869</sup>

Following the submission of the Commission's report, a Constituent Assembly was elected. With regard to the design and the workings of the Constituent Assembly, the NRA – the military wing of the NRM – was allocated more delegates to the Constituent Assembly than all of the old political parties combined. President Museveni, the Commander in Chief of the NRA, was also given power to appoint more delegates of his own as well.

Aili Mari Tripp, an American political scientist, contends that although the number of the delegates to the Constituent Assembly who were institutionally beholden to the NRM did not form a majority, they represented a major block of NRM supporters who could be relied upon to adopt a pro-NRM position.<sup>870</sup> Critics estimate that of 284 delegates to the Constituent Assembly, 220 were supporters of the NRM politics. In reality, 198 delegates had participated in the NRM armed struggle or had served in the NRM government.

Summing up the constitution-making process, Aili Mari Tripp argues:

*"At no time was Uganda's constitution-making process a neutral or open process, free of manipulation; the entire exercise was part of a broader political agenda of those in power who sought to use the new constitution to remain in power at all costs. Though the level of popular engagement was unprecedented, that engagement had little impact on the substance of the constitution and may have lent unwarranted legitimacy to the more undemocratic aspects of the process and the resulting Constitution, giving the Movement (NRM) more time to entrench itself in power."*<sup>871</sup>

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869 Ibid., pp. 115-116

870 Aili Mari Tripp, 'The Politics of Constitution-Making in Uganda', in Laurel Miller (ed.), **Framing the State in Times of Transition: Case Studies in Constitution-Making**, US Institute for Peace, 2010, 158, 162

871 Tripp, *The Politics of Constitution-Making ...*, op. cit., p. 172

## Chapter Six: The Emperor Unclothed: The Constitution and the Presidency

On 8 October 1995, the new Constitution of the Republic of Uganda 1995 was promulgated. Like the Independence and 1967 Constitutions before it, the 1995 entrenches some of its provisions. Articles 259 to 263 provide for the procedure for amending various provisions of the Constitution.<sup>872</sup> All amendments require an Act of Parliament.<sup>873</sup> Some require approval by the District Councils.<sup>874</sup> Parliament is authorised<sup>875</sup> to change the most fundamental provisions including, but not limited to the sovereignty of the people as the source of power,<sup>876</sup> the supremacy of the Constitution,<sup>877</sup> the provisions relating to the prohibition of derogation from certain fundamental rights and freedoms,<sup>878</sup> presidential term limits<sup>879</sup> and the political system.<sup>880</sup> A referendum is required to change the political system,<sup>881</sup> as well as to remove the presidential limit.<sup>882</sup>

In light of Uganda's catastrophic experience at the hands of powerful heads of state, there is no reason why the country could not return to the system it had immediately after independence when executive powers were shared between the presidency and parliament. At the time when the Constitution was debated in the Constituent Assembly, Goran Hyden, a Swedish political science professor and prominent Africanist told a conference convened in Sweden to discuss the development prospects for Uganda that African countries had opted for strong presidential systems after independence because a strong presidency was seen as a guarantee to national unity and a symbol of national unity.<sup>883</sup>

But it is precisely these presidential systems that are responsible for the parlous state that Africa has found itself in decades after independence in the 1960s. The argument for strong government or national unity as a justification for the Imperial Presidency has not stood the test of time. As Professor Anyang' Nyong'o has argued,

*“our history has discredited presidentialism. Many African countries inherited the Westminster parliamentary system, but within a year or so of independence they went presidential. They all soon sank into authoritarian regimes of the worst kind, best known for political oppression, shameful denial of human rights, corruption that benefitted few elites and political instability....”*<sup>884</sup>

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872 Constitution of the Republic of Uganda, 1995, op. cit., art. 3(3)

873 Ibid., art. 259(2)

874 Ibid., art. 261

875 Ibid., art. 260

876 Ibid., art. 1(1)

877 Ibid., art.3(3)

878 Ibid., art. 44

879 Ibid., art. 105

880 Ibid., art. 74(1)

881 Ibid., art. 260(1)(d)

882 Ibid., art. 26(1)(f)

883 Goran Hyden, 'Political Representation, Stability and Development', Developing Uganda Conference, LyngbyLand Brugsskole, 2-5 June 1994.

884 Anyang' Nyong'o, Presidential or Parliamentary Democracy?, op. cit., p. 187

Ssekindi believes that an executive presidency is not necessarily objectionable; “the problem”, he argues, “is the bestowal of such enormous powers on the presidency that it slides into autocracy.”<sup>885</sup> Ben Nwabueze, the Nigerian intellectual, had propounded the same argument over 40 years earlier when he wrote in 1974:

*“Doubtless, an executive president who holds and exercises executive power in his discretion and who also controls the process of legislation arouses fear of dictatorship. Nonetheless, the real enemy ... is not the power itself, but insufficient restraint upon power. Presidentialism in Commonwealth Africa, with opportunities for total mobilization of the nation and the greatly enhanced authority which they confer to the president, are particularly favourable to the growth of dictatorship.”<sup>886</sup>*

These arguments have been challenged by other writers more rooted in the experience of African presidentialism decades since the publication of Professor Nwabueze’s *magnum opus*. In 1993, a Kenyan jurist wrote that

*“the African presidency is an executive monarchy whose very features are undemocratic.... The phenomenon of presidentialism is a great hindrance to the ‘second liberation of Africa.... In its current form, the presidency cannot survive a comprehensive democratization process.”<sup>887</sup>*

That was almost two decades before the introduction of the 2010 Constitution, the most ambitious yet in trying to ‘tame’ the presidency.

In 2019, nine years later, Anyang’ Nyong’o, the Kenyan intellectual-cum-politician, argued about the Kenyan experience:

*“The presidency is the only survival in the contemporary world of constitutional monarchies once prevalent throughout medieval Europe.... Presidential systems of government tend to limit political participation, close down political and social avenues of being held accountable, use public resources in a profligate manner, and employ violence and repression in case of public criticism or disapproval of what the government does. Whatever development is achieved is easily undermined by the tensions in society contesting the fairness in the share and distribution of development resources.”<sup>888</sup>*

The first attempt to ‘tame’ the Imperial Presidency under the 1995 Constitution was, according to Ssekindi, the introduction of direct elections for the President. However, Ssekindi warns,

885 Ssekindi, *A Critical Analysis of the Legal Construction...*, op. cit., p. 172

886 Nwabueze, *Presidentialism in Commonwealth Africa*, op. cit., p. 435

887 Wanjala, *Presidentialism, Ethnicity, Militarism...*, op. cit., p. 88

888 Anyang’ Nyong’o, *Presidential or Parliamentary Democracy...*, op. cit., pp. 34-35

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*“there is ... a danger that direct elections for the presidency may encourage the belief that the mandate afforded to the president by the people permits the president to exercise constitutional roles without limits.”<sup>889</sup>*

This, indeed, is what happened in Tanzania after the election of President Magufuli in 2015.

Soon after his election, President Magufuli imposed an illegal ban on political rallies and public meetings across the country by political parties or their leaders. Elected officials such as Members of Parliament and Ward Councillors were confined to holding meetings within their respective constituencies. The only exception to this unlawful ban was the President himself; he has argued that since having been elected by a countrywide vote, he has the mandate to hold political rallies anywhere in the country.

Ssekindi argues that this danger can be overcome by constitutional safeguards against the abuse of presidential authority, and the leadership style of the President. Starting with impeachment, now enshrined in the 1995 Constitution,<sup>890</sup> the Constitution Commission had argued that the impeachment proposals it recommended sufficed to remove the President who commits serious offences from office. That was the basis for its rejection of waiver of immunity against any prosecution of the president in the courts of law.

That the current Constitution allows judicial proceedings challenging the results of a presidential election has also been undone by the immunity from legal proceedings that the President enjoys. The impotence of presidential election petitions was cruelly exposed in the judgement of *Rtd. Col. Dr Kiiza Besigye vrs. The Electoral Commission & Yoweri Kaguta Museveni*.<sup>891</sup> In that judgement, Dr Besigye, an opposition presidential candidate challenged the 2006 election of President Museveni, alleging widespread illegalities on the part of the President personally and his agents with his knowledge, consent or approval. However, the challenge collapsed, *inter alia*, because the President could not be summoned to explain his actions in court.

The President has retained all the powers to appoint and dismiss top civil servants that were the hallmark of the 1967 Constitution. Thus, he can appoint all judges and justices of the High Court, the Constitution Court, and the Supreme Court. He can also appoint the Attorney General; the Director of Public Prosecutions; the Inspector General of Government; the Inspector General of Police, and the Commissioner General of Prisons. Other presidential appointees include all Ministers and their Deputies; Chairmen and members of all constitutional and statutory commissions and their chief executive officers; and the Auditor General.

The effect of these vast powers has been dramatic. Ssekindi points to a 2014 survey which testified that of the 826 highest civil service jobs, 397 were held by President

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889 Ssekindi, *A Critical Analysis of the Legal Construction...*, op. cit., p. 173

890 Constitution of the Republic of Uganda, 1995, op. cit., art. 107

891 Election Petition No. 1 [2006] UGSC 24



Museveni's tribesmen and women, while another 397 were held – not by the President's tribesmen and women – but by NRM loyalists. This nepotism has "... *created a public service that is beholden to President Museveni and his NRM but has constitutional and statutory duties of delivering services to all political persuasion, including managing political contestation between the President and his political competitors.*"<sup>892</sup>

The only limit to the presidential powers of appointment are the 'ineffectual' constitutional constraints mandating the president to appoint certain persons 'upon approval' of Parliament; or 'on the advice' of constitutional bodies such as the Judicial Service Commission. As Ssekindi argues,

*"In practice, attempts to deter the misuse of the presidency's powers of appointment have not been able to guarantee non-partisan appointments, (as) Parliament has endorsed most presidential appointments."<sup>893</sup> Furthermore, "The designation of the president established by the 1995 Constitution makes it practically impossible to meaningfully limit the powers of the presidency. This is because all instruments of power and organs of the state are entrusted and subservient to the presidency, which is due to a Constitution that entrenches authoritarian government through legal means."<sup>894</sup>*

Since its adoption, it has been amended four times.<sup>895</sup> The second of those amendments, which commenced on 30 September 2005, amended Article 105(2) of the Constitution to remove presidential terms limits, thereby allowing President Museveni an unlimited tenure. When proposing what eventually became Article 105(2), the Odoki Commission had stated the following:

*"We have also reflected the view almost unanimously advocated for by the people that the tenure of office of the President should be constitutionally limited to put to an end to the phenomenon of self-styled life presidents. We have recommended a limit of two terms of five years each for any President."<sup>896</sup>*

The Fourth Amendment,<sup>897</sup> passed on 20 December 2017, amended Article 102(b) of the Constitution to remove the age limits for presidential candidates. Prior to the Amendment, the Constitution prohibited anyone younger than 35 years of age or older than 75 from serving as President of Uganda. Therefore, as Ssekindi puts it in his doctoral

892 Ssekindi, *A Critical Analysis of the Legal Construction...*, op. cit., p. 197

893 Ibid., p. 198

894 Ibid., p. 249

895 See the *Constitution (Amendment) Act, 2000, No. 13 of 2000*, which commenced on 1 September 2000; the *Constitution (Amendment) Act, 2005, No. 11 of 2005*, which commenced on 30 September 2005; and *Constitution (Amendment) Act, 2005, No. 21 of 2005*, which took effect on 30 December 2005.

896 Quoted from Ssekindi, *ibid.*, p. 250

897 The *Constitution (Amendment) Act, 2017*. The Amendment was given presidential assent by President Museveni and became law on 27 December 2017.

thesis, the 2005 (and 2017) amendments “... created unlimited terms for the office of the President ... thus creating the possibility of a president-for-life.”<sup>898</sup>

The NRM did not act differently from the governments before it in that by coming to power through violence and unconstitutional means, they managed to establish a fundamental law whose provisions they dictated, to legitimise their exercise of state power and entrench their rule. Ssekindi has argued that this was President Museveni’s objective all along. Quoting Justice Akinola Aguda, Ssekindi has asserted that

*“most governments that are founded upon wielding the gun, or upon palpable illegality ... can hardly be expected to have much regard for legality and the rule of law.... Most principles of legality and the rule of law are ridden rough-shod as if they do not exist or as if they are obstacles to be crushed.”*<sup>899</sup>

The removal of the constitutional term and age limits means that objective has now been met:

*“.... The framers of the 1995 Constitution achieved their aim of creating an unlimited presidency, a president for life and a consolidated regime.”*<sup>900</sup>  
*“The presidential authority since the 1995 Constitution has remained almost the same as it was before 1995. Indeed, the powers and privileges of the head of state are almost as they were exercised and enjoyed by the kings of Buganda and since the creation of the Uganda Protectorate in 1894, so has the ineptness of the various constitutional bodies to provide sufficient checks and balances on the head of state. The design of the presidency under the 1995 Constitution also emerged out of efforts to design a fundamental law which would provide President Museveni and his NRM government permanent ownership of power.”*<sup>901</sup>

## **Perverting Parliament?**

How has Uganda’s Parliament fared under the 1995 Constitution? Given its history since the Protectorate days, and especially after independence in 1962, this is an important question. Chapter Six of the 1995 Constitution is wholly dedicated to ‘The Legislature.’ Article 77 establishes the Parliament of Uganda composed of directly elected members representing constituencies; women members representing every District of Uganda; representatives of the army, youth, workers, persons with disability and other groups as may be determined by Parliament, and the Vice President and Ministers if they are not already elected members.<sup>902</sup> The last category of members serve in *ex officio* capacity.

898 Ssekindi, A Critical Analysis of the Legal Construction..., op. cit., p. 260

899 Ibid., p. 157

900 Ibid., pp. 249-250

901 Ibid., p. 252

902 Constitution of the Republic of Uganda, 1995, art. 78(1)

With regard to their election, directly elected members are to be elected by universal suffrage;<sup>903</sup> while women members and those representing the special interest groups are to be elected by a procedure prescribed by Parliament.<sup>904</sup> In 2005, Parliament enacted the Parliamentary Elections Act, 2005, whose section 8(4)(a) mandates that “... *district women representatives ... shall be elected by secret ballot (and) ... by universal adult suffrage.*” With the creation of 23 new districts in 2017 and 2019, Uganda is currently divided into 134 districts and the capital city of Kampala. Ten of the new districts are yet to have parliamentary representation because elections thereof have not yet been held.

According to the website of the Ugandan Parliament, there are currently 124 district women Members of Parliament representing 124 districts. There are, on the other hand, 296 constituency members; ten members representing the Uganda People’s Defence Forces and 15 members representing the youth, workers and disabled.<sup>905</sup> There are also twelve *ex officio* members. Thus, out of the 457 seats in the current Parliament, 25 members (about eight per cent of the total members) are not elected, in the language of the Constitution, “... *on the basis of universal adult suffrage and by a secret ballot.*”<sup>906</sup>

These procedures make Uganda to have the lowest proportion of indirectly or unelected Members of Parliament of the three East African countries. Moreover, unlike her neighbour to the south, Uganda’s women members are directly elected in a secret ballot and by universal adult suffrage. That makes the Ugandan Parliament with the best representative character of the legislatures among the three countries.

Beyond its composition, the 1995 Constitution gave Parliament the exclusive “*power to make laws on any matter for peace, order, development and good governance of Uganda.*”<sup>907</sup> In an all too familiar story of the African Imperial Presidencies, the Clerk to Parliament, its chief executive officer is an appointee of the President.<sup>908</sup> Similarly, the prohibition on Parliament debating or passing financial measures not tabled or moved by the Government, a hallmark of the East African parliaments since colonial times, has also been retained under the 1995 Constitution.<sup>909</sup>

The Parliament is empowered to remove the President under a complicated procedure set out in the Constitution.<sup>910</sup> Nonetheless Ssekindi has argued that:

*“This measure has ... not been sufficient to curb the actions of the President against the abuse of the Constitution. The fact is that despite several attempts to impeach the President for acts which amount to flouting the provisions of the Constitution ... have failed to garner support because of the majority his party holds in Parliament.”*<sup>911</sup>

903 Ibid., art. 78(3)

904 Ibid., art. 78(4)

905 See section 8(2) of the Parliamentary Elections Act, 2005

906 Constitution of the Republic of Uganda ..., op. cit., art. 78(3)

907 Ibid., art. 79(1)

908 Ibid., art. 87

909 Ibid., art. 93

910 Ibid., art. 107

911 Ssekindi, A Critical Analysis of the Legal Construction..., op. cit., pp. 175-176

Parliament is also empowered to approve the President's appointment of a Vice President;<sup>912</sup> Cabinet Ministers and the size of the Cabinet;<sup>913</sup> other Ministers and their number<sup>914</sup>, several other senior public officers. The executive's power to borrow money is limited too as Parliament now has to give prior approval of the borrowing.<sup>915</sup>

However, in an unprecedented departure from both the Independence and the 1967 Constitutions, Parliament cannot pass a motion of no confidence against the government. Instead, Parliament can pass a 'vote of censure' against individual ministers.<sup>916</sup> The motion of censure, which must be supported by not less one third of all members,<sup>917</sup> must first be presented to the President, who in turn must give a copy thereof to the minister concerned<sup>918</sup> before it is debated in Parliament. The motion cannot be debated until thirty days after it was first presented to the President.<sup>919</sup>

And even after all this lengthy procedure has been complied with and the motion is successfully passed, unless the minister concerned resigns from office, the President shall take appropriate, but unspecified, action.<sup>920</sup> The intent of these provisions is clear. It is to give an appearance of democratic accountability to Parliament while retaining real power within the presidency. To quote Ssekindi in his doctoral thesis,

*"like the previous fundamental laws, the 1995 Constitution is another fundamental law authored under the leadership of a head of state and government with the aims of granting them unlimited powers in order to perpetuate their incumbency."*<sup>921</sup>

In a twentieth year 'Report Card' for the implementation of the 1995 Constitution, Dr. Donald Rukare has said that in contrast to the Constitution of 1967, the current Constitution contains a range of powers shared between the President, Parliament and other constitutional bodies. However, as Tripp, the American political scientist, has noted, the regime that has issued from the 1995 is a 'hybrid regime', i.e. a regime "... in which leaders adopt the trappings of democracy yet pervert democracy, sometimes through patronage and largesse, at other times through violence and repression, and all for the purpose of staying in power. These hybrid regimes ... are partly democratic, partly authoritarian."<sup>922</sup>

The constitutional bodies that Dr Rukare claims share powers with the President, are themselves under the complete control of the President. In the case of constitutional commissions, for instance, he appoints all their chairmen and women, members and chief

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912 Ibid., art. 108(2)

913 Ibid., art., 113(1) and (2)

914 Ibid., art., 114(1) and (3)

915 Ibid., art. 159

916 Ibid., art. 118(1)

917 Ibid., art. 118(3)

918 Ibid., art. 118(4)

919 Ibid., art. 118(5)

920 Ibid., art. 118(2)

921 Ssekindi, A Critical Analysis of the Legal Construction..., op. cit., pp. 86-87

922 AM Tripp, **Museveni's Uganda: Paradoxes of Power in a Hybrid Regime**, Lynne Rienner Publishers, Boulder, Colorado, quoted in Rukare, Constitutional Implementation ..., op. cit., p. 89

executive officers. Similarly, in the case of the Cabinet, he also appoints all of its members. As Ssekindi argues in his doctoral thesis,

*“there was no real attempt by the framers of the 1995 Constitution to rethink and limit the power of the presidency, despite a history of self-grants of unlimited state power and its misuse. Like fundamental laws before it, the 1995 Constitution may be perceived as another law, this time authored under the leadership of President Museveni and his NRM government for their sustenance in power.”*<sup>923</sup>

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923 Ssekindi, *A Critical Analysis of the Legal Construction...*, op. cit., p. 161

## Part III – Tanzania: Déjà-Vu? Parliamentary Democracy and the Challenge of Imperial Presidency in Tanzania

### Chapter One: The Poisoned Chalice of Colonialism

Tanganyika was a German colony from 1890 to 1916 when it was occupied by the Royal Navy and the British Indian infantry during the First World War. With Imperial Germany and her Central Power partners losing the War, the Entente and Associated Powers met in Paris in 1919 and 1920 to set the peace terms for the defeated Central Powers. The resulting Versailles Peace Treaty, signed in Versailles on 28 June 1919, was the most important of the peace treaties that brought the War to an end. It was also important for German colonial possessions in African and elsewhere.

By the Treaty of Versailles, Germany lost not only big portions of her European territory and substantial population, it was also stripped of her colonial possessions in Africa and elsewhere.<sup>924</sup> These colonies were converted into the League of Nations Mandates and henceforth put under the control of the victorious Allied Powers.<sup>925</sup> Of her African possessions, German East Africa (modern day Tanganyika) was transferred to Great Britain, while Rwanda and Burundi were allocated to Belgium.<sup>926</sup> Tanganyika was, therefore, administered by the United Kingdom as an occupying power until 20 July 1920, when the British administration was formalised by Tanganyika becoming a League of Nations mandate under British control.

Article 22 of the *Covenant of the League of Nations*, formed as part of the Treaty of Versailles, declared the terms of such transfer of sovereignty:

*“To those colonies and territories which, as a consequence of the late war, have ceased to be under the sovereignty of the States which formerly governed them, and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.*

*“The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who, by reason of their resources, their experience, or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.”*

924 By article 119 of the **Treaty of Peace between the Allied and Associated Powers and Germany**, Germany renounced sovereignty over former colonies in Africa, Asia, Australasia and the Pacific.

925 **The Covenant of the League of Nations**, art. 22. The Covenant and the League of Nations it established were also part of the Treaty of Peace.

926 Other possessions such as Togoland and German Kamerun (modern day Cameroon) went to France; while South Africa obtained German South-West Africa (modern day Namibia) and Portugal was granted the Kionga Triangle, a strip of German East Africa in northern Mozambique.

The part of the Covenant that applied to Tanganyika stated: “*Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic, and the liquor traffic, and the prevention of the establishment of fortifications or military or naval bases and of military training of the natives for other than police purposes and the defence of the territory, and will also secure equal opportunities for the trade and commerce of other Members of the League.*”

The Mandatory Power was enjoined to account for its ‘tutelage’ of the people of Tanganyika: “*In every case of mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge.*”<sup>927</sup> The League of Nations mandate was, therefore, a legal instrument in the nature both of a treaty and a constitution which contained the internationally agreed upon terms for administering former German colonial territories on behalf of the League of Nations.

### **Constituting Tanganyika**

The British acted with speed to discharge their responsibilities as a Mandatory Power over Tanganyika. The Treaty of Peace was ratified on 10 January 1920. Six months later, on 22 July 1920, His Majesty the King promulgated the *Tanganyika Order in Council, 1920*. This was the first Constitution of Tanganyika. Under the Order in Council, His Majesty was given the power to “... *appoint a fit person to administer the Government of the territory under the designation of Governor and Commander in Chief...*”<sup>928</sup> The Governor so appointed was “... *authorized, empowered and commanded to do and execute all things that belong to his said office, according to the tenour of any Orders in Council relating to the territory, and of such commissions as may issued to him ... and according to such instructions as may from time to time be given to him ... or by Order in Council or by His Majesty through one of His Majesty’s Principal Secretaries of State, or to such laws as are now or shall hereafter be in force in the territory.*”<sup>929</sup>

The Order in Council also established an Executive Council consisting “*of such persons as His Majesty may direct by instructions ... and all such persons shall hold their places in the said Council during His Majesty’s pleasure.*”<sup>930</sup> This, then is the genesis of the ubiquitous powers of appointment that post-colonial presidents would enjoy following independence in the early 1960s.

The Governor was given powers to define the boundaries of the territories of Tanganyika and to “... *divide those territories into provinces or districts in such manner and with such subdivisions as may be convenient for purposes of administration describing*

927 The Covenant of the League of Nations..., loc. cit.

928 Tanganyika Order in Council, 1920, art. 4(1)

929 Ibid., art. 4(2)

930 Ibid., art. 6

*the boundaries thereof and assigning names thereto.*<sup>931</sup> Again this is the genesis of the modern presidential power to divide the country into regions and districts.<sup>932</sup> He also had powers to determine disputes over boundaries of the territory as a whole, or of any of its divisions and subdivisions, and his decision in that regard “... *shall be conclusive on the question, and judicial notice shall be taken thereof.*”<sup>933</sup>

By article 8 of the Order in Council, all rights to all public lands and to mines and minerals were vested in the Governor, to be disposed of on such terms and conditions as he deemed fit in accordance with the provisions of any Ordinance that may be enacted for that purpose. The Secretary of State, or the Governor with permission of the former, was given power to appoint public officers for the administration of Tanganyika.<sup>934</sup> The Governor’s powers over the public officers so appointed were, however, limited to suspension ‘upon sufficient cause.’<sup>935</sup>

The Governor enjoyed substantial legislative powers as well. He could make any such Ordinances “*for the administration of justice, the raising of revenue and generally for the peace, order and good government of all persons in the territory.*”<sup>936</sup> These powers were only subject to any Royal Instructions<sup>937</sup> or directives issued by the Secretary of State;<sup>938</sup> and were to respect native laws and customs, “*except so far as the same may be opposed to justice and morality.*”<sup>939</sup> The Governor was enjoined to transmit two authenticated copies of the Ordinances to the Secretary of State,<sup>940</sup> who was empowered to disallow any such Ordinances in whole or in part.<sup>941</sup>

The ultimate law-making powers were reserved to the imperial government in London:

*“There shall be reserved to His Majesty, his heirs and successors, his and their undoubted right, with the advice of his or their Privy Council, from time to time to make all such Laws or Ordinances as may appear to him or them necessary for the peace, order and good government of the Territory.”*<sup>942</sup>

His Majesty, his heirs and successors in Council could also at any time revoke, vary, alter or amend the Order in Council.<sup>943</sup>

931 Ibid., art. 7(1)

932 See, for instance, article 2(2) of the Constitution of the United Republic of Tanzania, 1977.

933 Tanganyika Order in Council..., op. cit., art. 7(2)

934 Ibid., art. 9

935 Ibid., art. 10

936 Ibid., art. 13(1)

937 Ibid., art. 13(2)

938 Ibid., art. 13(3)

939 Ibid., art. 13(4)

940 Ibid., art. 13(10)

941 Ibid., art. 13(6)

942 Ibid., art. 39

943 Ibid., art. 38



The Order in Council also established the Courts of Justice, with Her Majesty's High Court of Tanganyika being established as the Court of Record.<sup>944</sup> The Governor was empowered to appoint judges of the High Court in accordance with the instructions in that behalf from Her Majesty through the Secretary of State.<sup>945</sup> The judges were to hold office during His Majesty's pleasure.<sup>946</sup> The Order in Council also created a Special Tribunal to deal with all disputes arising before the commencement of the Order in Council;<sup>947</sup> and empowered the Governor to appoint its judges.<sup>948</sup> All other judicial officers were to be appointed by the Secretary of State or, with his permission, by the Governor.<sup>949</sup>

The Governor was given power to confirm capital sentences passed by the High Court:

*"When any person has been sentenced to death, the High Court shall transmit to the Governor a copy of the evidence, and the sentence shall not be carried into effect until confirmed by him."*<sup>950</sup>

He was also granted immunity from any prosecution, civil or criminal,<sup>951</sup> save for proceedings against the Governor in his official capacity where it is sought to establish the liability of the Government of territory.<sup>952</sup>

The Governor was given immense punitive powers. He could, for instance, order that any sentence of imprisonment passed by any court of law against a convicted offender be served outside the Territory in some other place in His Majesty's Dominions outside the United Kingdom, where the Government whereof consents to the offender being sent thither.<sup>953</sup> He could also order the deportation from Tanganyika to any place of his choosing, of any person who, upon evidence on oath to his satisfaction, was conducting himself so as to be dangerous to peace and good order in the Territory, or was endeavouring to excite enmity between the people of the Territory and His Majesty, or was intriguing against His Majesty's power and authority in the Territory.<sup>954</sup> The Governor's order of deportation was not appealable in any court of law.<sup>955</sup>

Persons ordered to be removed or deported from the Territory were subject to detention, where necessary, in custody or in prison until a fit opportunity for his removal or deportation occurred.<sup>956</sup> As we shall later see, these vast punitive powers and prerogatives were to be even more expanded under the Imperial Presidency after independence. But we should not get ahead of our story yet.

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944 Ibid., art. 17(1)

945 Ibid., art. 19(2)

946 Ibid., art. 19(2)

947 Ibid., art. 21(1) and (2)

948 Ibid., art. 21(1)

949 Ibid., art. 23

950 Ibid., art. 25

951 Ibid., art. 28(1)

952 Ibid., art. 28(2)

953 Ibid., art. 32

954 Ibid., art. 33(1)

955 Ibid., art. 33(3)

956 Ibid., art. 34(1)

With demand for legislation for what colonial administrators considered the ‘multitude of semi-barbarous’ natives growing, on 19 March 1926 the British colonial state enacted the *Tanganyika (Legislative Council) Order in Council, 1926*.<sup>957</sup> The Order in Council established the Legislative Council of Tanganyika which was, and is considered, the first parliament of Tanganyika. Its primary function was to advise and consent to the Governor “*to make laws for the administration of justice, the raising of revenue and generally for the peace, order and good government of the Territory.*”<sup>958</sup> This provision was crucial, for it showed that the power to legislate for ‘the multitude of the semi-barbarous’ remained in the hands of the Governor. The Legislative Council was to be merely advisory; the law giver was the Governor.

In a piece of British legal sophistry, Bills passed by the Legislative Council required the assent of the Governor<sup>959</sup>, or of the Secretary of State in London for them to become law.<sup>960</sup> Once passed and assented, the Governor was obligated to transmit, ‘at the first available opportunity’, two authenticated copies of any Ordinance to the Secretary of State.<sup>961</sup> The latter had power to disallow any Ordinance passed by the Governor with the advice and consent of the Legislative Council.<sup>962</sup>

Any member of the Legislative Council could present any member’s bills. However, the power to raise revenue was firmly in the hands of the colonial state. Article XXXI of the Order in Council declared in no uncertain terms:

*“No member of the Council may propose any Ordinance, vote or resolution, the object or effect of which is to impose any tax, or to dispose of or charge any part of the public revenue, unless that Ordinance, vote or resolution shall have been proposed by the direction or with the express permission of the Governor.”*<sup>963</sup>

Nearly forty years later, James McAuslan, a British legal scholar, would argue about the restrictions on the Republican Parliament to impose similar financial measures under the Republican Constitution of 1962, that these restrictions were intended to ensure that Parliament imposed “*only that taxation which [wa]s in accordance with the wishes of the government.*”<sup>964</sup> On this evidence, however, it seems that Mwalimu Nyerere drew his inspiration directly from the British imperial state, rather than from Ghana’s Kwame Nkrumah from whom he borrowed the Imperial Presidency and the Preventive Detention Act.

To ensure that ultimate power lay with the imperial government in London, article XXII of the Order in Council

957 The Order in Council came into force on 1 July 1926, vide *Government Notice No. 59 of 1926*.

958 *Tanganyika (Legislative Council) Order in Council, 1926*, art. XIV

959 *Ibid.*, art. XV

960 *Ibid.*, art. XVI

961 *Ibid.*, art. XX

962 *Ibid.*, art. XXI

963 See also art. XXXVIII, *op. cit.*

964 James P.W.B. McAuslan, ‘**The Republican Constitution of Tanganyika**’, *International and Comparative Law Quarterly*, Vol. 13, 1964, p. 533

“... reserved to His Majesty, His heirs and successors, His and their undoubted right, with the advice of His or their Privy Council, from time to time to make all such laws or Ordinances as may appear to Him or them necessary for the peace, order and good government of the Territory.”

With regard to its composition, the Legislative Council was, at first, a preserve of Europeans and Asians only. There were ‘official members’, i.e. senior officials of the colonial government; and ‘unofficial members’, mostly European and Asian planters or merchants who represented the non-governmental economic interests. The ‘semi-barbarous’ African natives were represented by a European, almost invariably a missionary.<sup>965</sup> It was only much later, in the changed circumstances of the post-World War Two period, that natives were allowed into the Legislative Council.

The first Africans to be appointed to the Legislative Council were two colonial chiefs appointed as non-official members on 24 November 1945. By this time, the number of members had reached 30, with the Governor as President, 15 official members and 14 unofficial members.<sup>966</sup> The number of African members was increased to four in 1948, with the appointment of another colonial chief and a schoolteacher.

In 1957 the *Legislative Council (Elections) Ordinance, 1957*, was enacted, paving the way for the first elections to the Legislative Council in 1958. The composition of the Legislative Council was similarly changed, but only slightly. There was now the Speaker; seven *ex-officio* members; not more than 27 nominated members; 30 elected members divided equally between Europeans, Asians and Africans; and not more than three nominated members representing special interests. With the exception of the elected members, all other members were appointed by the Governor.

The European and Asian members, whether *ex officio*, nominated or elected, outnumbered the African members by a factor of five to one. Sir Richard Turnbull, the last British Governor of Tanganyika, explained the rationale for this state of affairs in white supremacist and racist terms that were very much part of the ideological repertoire of European colonialism in Africa and elsewhere:

“*The only justification of keeping an official (European) majority in any colony is that we are convinced that we are better judges, for the time being, of the interests of the native population than they are themselves.*”

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With Tanganyika independence imminent, the colonial government formed the Ramage Committee in 1959 to recommend further changes to the Legislative Council. The Committee recommended the removal of racial quotas for representation to the Legislative

965 Kapwepwe I. Tambila, ‘The Ups and Downs of the Tanzanian Parliament, 1961-1994’, in R.S. Mukandala, S.S. Mushi and C. Rubagumya (eds.), *People’s Representatives: Theory and Practice of Parliamentary Democracy in Tanzania*, Fountain Publishers, Kampala, 2004, p. 46

966 See the **Tanganyika (Legislative Council)(Amendment) Order in Council, 1945**, cl. II

967 Quoted George W. Kanyeihamba, **Constitutional and Political History of Uganda: From 1894 to Present, 2<sup>nd</sup> Edition**, LawAfrica, Dar es Salaam, Kampala & Nairobi, 2010, p. 14

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Council. This was only partly granted for, in the elections to the Legislative Council held on 30 August 1960, there were 71 directly elected members of whom, there were 51 Africans, eleven Asians and ten Europeans.<sup>968</sup> There were also ten nominated members, for a total of 81 members.

So, even though they constituted more than 99 percent of the total inhabitants of Tanganyika, the African natives never had a majority of members in the Legislative Council until 1960, the last year of the British colonialism in Tanganyika. One month later, the British granted responsible government to Tanganyika, with Mwalimu Nyerere as Chief Minister. This was followed by constitutional talks in Dar es Salaam, chaired by the Colonial Secretary Ian Macleod from 27-29 March 1961.

Therefore, as the late Kapwepwe I. Tambila, the University of Dar es Salaam historian, has argued, “... *up to 1960, the only live lesson the people of Tanganyika ... had obtained in running a ‘democratic’ government system was one of an undemocratic, racial, paternalistic and unrepresentative Legislative Council.*”<sup>969</sup> As will become obvious in due course, this is one of many colonial lessons that post-colonial Tanzania has learned very well.

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968 Loc. cit.

969 Tambila, *ibid.*, p. 47

## Chapter Two: Independence and Its Inheritances

On 22 November 1961, the British House of Commons passed the *Tanganyika Independence Act, 1961*, by which the British Parliament abrogated its previous rights to legislate for Tanganyika. Section 1 of the Independence Act declared that on ‘the appointed day’, i.e. 9 December 1961, Tanganyika “... shall become part of Her Majesty’s dominions under the name of Tanganyika and as from that day Her Majesty’s government in the United Kingdom shall have no responsibility for the government of Tanganyika.” By paragraphs 2 and 3 of the First Schedule to the Act, all legislative powers for Tanganyika, including the power to make laws with extraterritorial operation, were vested in the legislature of Tanganyika.

However, the Act imposed upon the new legislature, now renamed the National Assembly, a requirement not to repeal, amend or modify the ‘constitutional provisions’, “otherwise than in such manner as may be provided for in those provisions.” The ‘constitutional provisions’ were defined as the Independence Act itself, and any Order in Council which repealed any Orders in Council before the appointed day and any law enacted by the legislature of Tanganyika after the appointed day. This limitation on the constituent power of the Tanganyika Parliament was meant to protect the prior enactments of the British Parliament relating to the government of Tanganyika. This was a key departure from the Westminster model, as in the British constitutional conventions Parliament is not only supreme but also sovereign in its legislative powers.

To complement the Independence Act, on 27 November 1961, the *Tanganyika (Constitution) Order in Council, 1961*, was enacted by the Queen Mother on behalf of Her Majesty Queen Elizabeth II. The Order in Council came into operation immediately before 9 December 1961; which also became the commencement date for the Independence Constitution of Tanganyika, which was annexed as the Second Schedule thereto.<sup>970</sup> Tanganyika’s Independence Day, a major national holiday to this day, was, therefore, stipulated by an Act of the British Parliament and by Her Majesty’s Order in Council, rather than by the nationalist movement that became the government at independence.

Aggrey K.L.J. Mlimuka and Palamagamba J.A.M. Kabudi, previously legal scholars at the University of Dar es Salaam, have noted that

*“when Tanganyika became independent on 9 December 1961, the constitutional ‘attire’ it adopted was essentially that of Westminster. The Tanganyika (Constitution) Order in Council, 1961, assented to by the Queen two weeks before independence proclaimed Tanganyika to be a multiparty parliamentary democracy. The Governor General represented the Queen locally and, like in Britain, he was part of the Parliament, the other part being the National Assembly. The government, headed by a Prime Minister from the majority party TANU, was responsible to Parliament.”*<sup>971</sup>

970 *Tanganyika (Constitution) Order in Council, 1961*, s. 3

971 Aggrey K.L.J. Mlimuka and Palamagamba J.A.M. Kabudi, ‘The State and the Party’, in Shivji (ed.), *The State and the*

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In view of what had transpired in the period up to independence and what happened soon after; and in the light of the more than half a century of Tanzania's post-independence parliamentary history, it is necessary to examine the Independence Order in Council itself and the Independence Constitution annexed to it in some detail. Doing that, some striking continuities pre- and post-independence are immediately observable.

The first significant continuity with the colonial period that is immediately noticeable is that it made no provisions whatsoever about political parties or political systems as such. Indeed, there is no mention of the term 'political party' in the entire enactment. The claim that the Order in Council "*proclaimed Tanganyika to be a multiparty parliamentary democracy*" is, therefore, factually incorrect.

That, however, is not to say that newly independent Tanganyika was not a multiparty state. It indeed was such a multiparty state, but not by virtue of the Independence Constitution. Tanganyika was a multiparty state in fact (there already were several political parties in existence); and by virtue of the customs and usages of the British constitutional conventions. Several more parties were to be established soon after the Order in Council came into effect.

All of these parties, TANU included, were registered as 'societies' under the *Societies Ordinance, 1954*, which regulated all manner of voluntary civil society organisations. The phenomenon of legislation pertaining to political parties as such is a post-Cold War phenomenon in East Africa. It came with the wave of the democratic upheavals that followed the Fall of the Soviet Empire and the end of single party regimes in the continent.

By itself the non-declaration of Tanganyika as a democratic multiparty state; or the absence of the provisions relating to political parties was not surprising or fatal. Kenya's Independence Constitution of 1963 also did not declare Kenya a multiparty state, nor provide for political parties. Unlike Tanganyika, however, Kenya's Constitution had a robust Bill of Rights which provided a comprehensive 'protection of fundamental rights and freedoms of the individual.'<sup>972</sup> The independence Constitution of Tanganyika, on the other hand, did not contain any such Bill of Rights. This absence of constitutional protection for human rights is one of most striking continuities with the colonial state that requires detailed explanation.

## Resisting Fundamental Rights

As a general rule the British Colonial Office tended to insist on the entrenchment of the Bill of Rights in the independence constitutions of their former colonial possessions. This practice of the British government appears to have led Harrison G. Mwakyembe, then of the Faculty of Law at the University of Dar es Salaam, and currently a government minister, to claim that

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Working People..., op. cit., pp. 58

972 That was the title of Part II of the Constitution of Kenya, 1963.

*“in drafting the Tanganyika Independence Constitution, the Colonial Office in London made sure it had entrenched clauses which guaranteed some rights, liberties and security of the minorities and their property.”*<sup>973</sup>

As it is now widely acknowledged, in both academic literature and policy discourse, one of the most significant departures from the Westminster model in Tanganyika’s Independence Constitution was its omission of a justiciable Bill of Rights. Mwalimu Nyerere and his nationalist movement, TANU, successfully resisted the inclusion of the Bill of Rights during the Dar es Salaam constitutional talks with Secretary of State Macleod. As John E. Ruhangisa has exhaustively argued in his 1998 doctoral thesis to the University of London,

*“in most unusual circumstances the nationalist leaders persuaded the British government not to include a Bill of Rights in the Tanganyika Independence Constitution....”*<sup>974</sup>

Ruhangisa gives two reasons for this resistance to entrench a Bill of Rights in the Independence Constitution. Firstly, the TANU leaders feared that a Bill of Rights would have hindered the new government’s ‘dynamic plans for economic development’ whose implementation needed revolutionary changes in the social structure.

Secondly, that the judiciary was still staffed by expatriates – mainly whites engaged by the former colonial government. It was feared that these white judges would likely take advantage of the Bill of Rights, should it be enshrined in the Constitution, to frustrate the new government by declaring many of its actions illegal. This would have invited conflicts between the executive and the judiciary, which the leaders of the newly independent state were not going to entertain.<sup>975</sup>

And so, the Bill of Rights was consigned to the preamble to the Independence Constitution, an act which would have dramatic and far reaching consequences in the future.

### **Retaining ‘Rightless’ Law**

By far the most important continuity with the departing colonialism was the retention of the existing colonial legal order. In this regard, section 4(1) of the Independence Order in Council declared that the operation of ‘existing laws’ after the commencement day was not affected by the repeal of the Orders in Council enacted between 1926 and 1961.<sup>976</sup> Rather, the existing laws were to continue to operate “... *with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them in conformity with this Order.*”<sup>977</sup>

973 Op. cit., p. 23

974 *Human Rights in Tanzania: The Role of the Judiciary*, Thesis Submitted to the University of London for the Degree of Doctor of Philosophy, Law Department, School of Oriental and African Studies, London, 1998,

975 Ibid., p. 47

976 See Tanganyika (Constitution) Order in Council, op. cit., s. 1.

977 Ibid., s. 4(1)

To that end, the Governor General was given wide discretionary powers to make “... *such amendments to any existing law as may appear to him to be necessary or expedient for bringing that law into conformity with the provisions of this Order...*”<sup>978</sup> Those discretionary powers were, however, to be exercised within six months of the commencement day.<sup>979</sup> Section 4(5) defined ‘existing laws’ as

*“... all Ordinances, laws, rules, regulations, orders and other instruments having the force of law made ... in pursuance to the existing Orders and having the effect as part of the law of Tanganyika ... immediately before the commencement of this Order.”*

The retention of existing laws and its implications on the post-colonial African constitutional and political development has been widely acknowledged. Thus, in a wide-ranging *tour de force* on the African political paradox of ‘constitutions without constitutionalism’, the late Hastings Okoth-Ogendo – an eminent Kenyan intellectual – wrote the following in 1993:

*“The political paradox of post-colonial Africa lies in the simultaneous existence of what appears as a clear commitment by African political elites to the idea of the Constitution and an equally emphatic rejection of the ... liberal democratic notion of constitutionalism....”*<sup>980</sup>

Professor Okoth-Ogendo explains that Africa got into this quandary due to the bureaucratic and coercive nature of the legal order it inherited at independence and perpetuated after that independence. Under this bureaucratic and coercive legal order, little distinction was drawn between the administration of public policy that required state coercion; and economic relations, i.e. employment contracts, cash crop farming, etc., that are normally reserved for private choice. In both spheres, control and coercion, rather than management and persuasion, were the hallmarks of the colonial legal order.

The Independence Order in Council that ushered in the independence of Tanganyika preserved that coercive legal order intact as the foundation of administration in the post-colonial state. With it came the heavy baggage of colonial jurisprudence that had been developed by the colonial administrative and judicial apparatus responsible for the enforcement of the colonial legal order. To make matters worse, Tanganyika, unlike Kenya and Uganda – whose immediate post-colonial constitutional orders displayed a remarkable distrust of any centralised power – not only did not have a Bill of Rights, it also retained almost intact the centralised and despotic political and administrative structures left behind by the departing colonial power.<sup>981</sup>

978 Ibid., s. 4(2)

979 The Governor General was enjoined by section 4(2) to make any such changes “*by order made at any time before the ninth day of June, 1962.*”

980 H.W.O. Okoth-Ogendo, ‘Constitutions Without Constitutionalism: Reflections on an African Political Paradox’, in D. Greenberg, S.N. Katz, M.B. Oliviero and S.C. Wheatley (eds.), *Constitutionalism and Democracy: Transitions in the Contemporary World*, Oxford University Press, New York, 1993, pp. 65-82

981 Githu Muigai, the Nairobi University law professor and Attorney General of Kenya during the most critical period in the making of its current Constitution, would reach the same conclusion in a 1996 essay on constitutional evolution of post-colonial Kenya: “*Independence did not affect the continuity of the colonial legal order. Indeed, other than*



## National Assembly or ‘Legco’ Rebaptised?

The Independence Order in Council also made clear that the Legislative Council elected in the 1960 elections was to continue to exist during ‘the interim period’, under the new name of the National Assembly. By section 6(1), ‘the interim period’ was defined as “... *the period beginning with the commencement of this Order and ending with the first dissolution of Parliament....*” This was to be subject to article 40(6) of the Independence Constitution which provided for extension of the life of Parliament in times of war. Read together with article 40(5) of the Independence Constitution, the interim period was in effect four years from Independence Day.

Clause 2 of Part III of the Independence Order in Council reserved eleven seats to candidates who were Asians and ten seats to Europeans. In other words, the racial quota in the allocation of parliamentary seats, made under the *Legislative Council (Elections) (Amendment) Ordinance, 1959*, was to continue during the interim period.<sup>982</sup> The National Assembly was to be composed of ten members nominated by the Governor General acting in accordance with advice given by the Prime Minister<sup>983</sup>; and 71 elected members.<sup>984</sup> The latter provision, which would have increased African representation in the National Assembly beyond the racial quotas of 1960, was not to be effective during the interim period.<sup>985</sup>

The words ‘until Parliament otherwise provides’ in articles 15(b) and 17(1) suggest that the existence and number of the nominated members, as well as the number of directly elected members, was intended to be a temporary phenomena, as Parliament had power to make any changes thereof. This argument is strengthened by the stipulation that the nominated members were to hold their seats “*at the pleasure of the Governor General, acting in accordance with the advice given by the Prime Minister.*”

However, the practice of packing the National Assembly with nominated and other unelected or indirectly elected members – which diluted and undermined its representative character, thereby impairing its oversight effectiveness – was not only perfected under

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*the cosmetic renaming of the statutes from ‘ordinances’ to ‘acts’, the entire corpus of colonial law was adopted at independence as part of the law of the new nation. The colonial legal order, the handmaiden of the colonial state, was dominated by a labyrinthine bureaucracy and a highly coercive administrative machinery. Colonial law reflected the authoritarian character of the colonial state and its autonomy from the people it governed. The colonial state was an edifice of unaccountable and largely discretionary power; which was nonetheless supported and reinforced by law.*

*“The imposition of what was essentially a liberal democratic constitution over an authoritarian public law system is one of the most significant themes in Kenya’s, and East Africa’s, constitutional and political history. The corpus of repressive laws ... had been used in one form or another by the colonial regime to repress African nationalism and generally to subjugate and humiliate the colonized people. The laws were as undemocratic as they were repressive. The judiciary was partisan against African nationalism and in favour of the colonial rulers. The wholesale importation of this corpus of law into the post-colonial constitutional and political order meant that the new government was armed with a formidable weapon that could, and as history now shows did, endanger the very survival of the nascent competitive politics and multiparty democracy then in formation.”* See Muigai, G., ‘Legal and Constitutional Reforms to Facilitate Multiparty Democracy: The Case of Kenya’, J. Oloka-Onyango, K. Kibwana and C.M. Peter (eds.), *Law and the Struggle for Democracy in East Africa*, ClariPress, Nairobi, 1996, pp. 526-544, 530-531

982 Ibid., First Schedule, Part III, Clause 3

983 Ibid., Second Schedule, art. 16

984 Ibid., art. 17(1)

985 Ibid., First Schedule, Part I of the Order in Council

the one-party rule, it has become an almost permanent but contentious feature of the Constitution of the United Republic of Tanzania to this day.

Unless sooner dissolved, the National Assembly was to continue for a period of four years from the date of its first sitting.<sup>986</sup> Like the colonial Legislative Council before it, the National Assembly was precluded from passing any money bills save with the recommendation of the Governor General signified by a minister.<sup>987</sup> This was another major continuity with colonialism. And as I intend to show later, it has remained a sore point and a major weakness of the Tanzanian Parliament to this day.

### **Promise of Independence**

The Independence Constitution of Tanganyika survived for only one year before it was repealed and replaced by the *Republican Constitution, 1962*. The Parliament of Tanganyika it brought into being, lasted a little longer before being turned into the Parliament of the United Republic of Tanzania, following the Union between the Republic of Tanganyika and the People's Republic of Zanzibar on 26 April 1964. Those four short years, however, have left a deep mark in the history of modern Tanzania.

Writing in 1977, Pius Msekwa, the first African Clerk of the National Assembly after independence, and later Speaker of the multiparty parliament when Tanzania returned to multiparty system in 1992, says the following with regard to the Independence Parliament:

*“Between Independence in 1961 and 1965, the National Assembly was generally acknowledged to be the supreme institution for policy-making and control....”*<sup>988</sup>

Msekwa notes that it “... was by all accounts, an institution of high status which was entrusted with decision-making and control functions. It was held in high esteem by members of the general public.”<sup>989</sup> He further observes: “... Even in the government's view ... the National Assembly was regarded as the more important organ when it came to decision-making on major issues....”<sup>990</sup>

Coming from someone who, as its Clerk, observed the National Assembly in action on a daily basis, that is very high praise indeed.

Msekwa is not the only observer to have noted the power, prestige and influence that the Independence National Assembly wielded. Writing on the ‘ups and downs’ of Tanzania's Parliament during its first three decades, Professor Tambila has argued that

986 Ibid., Second Schedule, art. 40(5)

987 Ibid., Second Schedule, art. 37

988 Pius Msekwa, *Towards Party Supremacy*, East African Literature Bureau, Dar es Salaam, Kampala & Nairobi, 1977, p. 1

989 Ibid., p. 15

990 Ibid., p. 16

even though the Independence Parliament started without a ‘loyal opposition’, TANU having swept all but one of the seats during the elections of 30 August 1960,

*“the independence constitution allowed members of parliament a lot of freedom to criticise the government on many issues, continuing the tradition begun in the pre-independence Legislative Council.... Members spoke freely, challenged the government and elicited answers, which were weighed. Indeed, observers of the early independence years’ political scene have noted that both the ruling party and the executive acknowledged the supremacy of parliament in spirit and in action as the ‘constitutionally ... central institution of government.’”*<sup>91</sup>

The democratic promise of the Independent Parliament was not a solely Tanganyikan phenomenon. Writing about Kenya’s Independence Parliament, Smokin Wanjala, an erstwhile law lecturer at Nairobi University and current Supreme Court justice, has argued:

*“Kenya attained independence in 1963 on the basis of a Westminster Constitution but in one year, Kenyatta had transformed the position of prime minister into an executive president. However, between 1964 and 1966 Kenya’s executive president was a constitutional president in the mould of the Western liberal democratic tradition. His powers were fairly limited by the inbuilt checks and balances. It is no surprise that this period witnessed some of the most vigorous and enlightened debates in parliament as well as out of it; and assertive judicial decisions. It was an environment that helped cultivate a nascent democracy.”*<sup>92</sup>

Given these auspicious beginnings, Mwakyembe is correct in arguing that what was expected of the Tanganyika nationalist leaders

*“was to build a sound democratic tradition in the country upon attainment of independence, a tradition which could not ... be evolved under the oppressive colonial rule. It was a matter of fact and a mandatory duty on the part of the TANU government, for democracy has always been a sine qua non for any healthy economic and political development.”*<sup>93</sup>

For reasons that we explain herein, the promise of democratic transformation soon turned into the nightmare of post-colonial authoritarianism.

91 Tambila, *ibid.*, pp. 50-51

92 Smokin Wanjala, ‘**Presidentialism, Ethnicity, Militarism and Democracy in Africa: The Kenyan Example**’, in Oloka-Onyango et al., *ibid.*, pp. 86-100, 90-91

93 Mwakyembe, *op. cit.*, p. 24

## Chapter Three: End of The Honeymoon

There was no spontaneity between the attainment of independence and the consolidation of democracy in East Africa. In Tanganyika, the independence euphoria ended very quickly. As Msekwa, the participant in, and chronicler of, these transformations says, within one month of independence, the National Executive Committee of TANU at its conference of 16-21 January 1962 made a decision to make the newly independent country a republic ‘as soon as possible.’ Three months later, the TANU Annual Conference, held between 17 April and 2 May 1962, noted the preparations for republican Constitution and election of the first President then underway and recommended that he should be an executive president. A month later, the National Assembly passed a resolution inviting the government “to draft such amendments to the Constitution as may be necessary to provide that Tanganyika becomes a republic within the Commonwealth as soon as possible.”<sup>994</sup>

On 31 May 1962, the Government published the *Proposals of the Tanganyika Government for a Republic* White Paper. The latter was debated and passed by the National Assembly on 28 June 1962. Excepting the Republican Constitution, the foundations of which it laid, the White Paper is probably the most important state paper in Tanzania’s post-colonial history. As I intend to show here, its ethos and proposals remain the foundational pillars of the Tanzania state. It is, therefore, important to recapitulate its key arguments and proposals.

In his seminal paper, Professor Okoth-Ogendo had noted that African Independence Constitutions were subverted by, *inter alia*, “demonizing them as a liability.”<sup>995</sup> True to fashion, the White Paper started to make the case for a Republic by falsely claiming that the Independence Constitution had made Tanganyika a monarchy:

*“On 9<sup>th</sup> December, 1961, we became – suddenly – a monarchy.... This direction association of Tanganyika and the British monarchy was something quite new; for, until 9<sup>th</sup> December, their association with Tanganyika was only indirect.... So long as the mandate and trusteeship system continued, Tanganyika was not part of Her Majesty’s dominion, and the relationship between the people of Tanganyika and the Crown was an indirect relationship depending on the position of the Monarch as Head of State in the country charged with the duty of administering the Territory. For Tanganyika, therefore, the British Monarchy has always been a foreign institution.”*<sup>996</sup>

A foreign institution it may indeed have been, but the British Monarchy in Tanganyika did not start with Independence in 1961. It started with the *Tanganyika Order in Council, 1920*, the Territory’s first Constitution, which had made Tanganyika part of His Majesty’s possession under the mandate of the League of Nations, following Imperial

994 Msekwa, *ibid.*, p. 17

995 Okoth-Ogendo, *op. cit.*, p. 68

996 Quoted from the British House of Commons, *Tanganyika Republic Bill*, House Debate, 6 November 1962, Hansard, Vol. 666, cc905-19, para. 905

Germany's defeat in the First World War and the consequent loss of its colonial territories in Africa and elsewhere.

But having thus 'demonised' the Independence Constitution, the White Paper confessed that, actually, the problem was not the monarchy, British or otherwise, but who was to be the Monarch:

*"Our proposal to become a republic does not, however, imply any disrespect to the person of the Queen nor is it based purely on the fact that the British Monarchy is a foreign institution."*<sup>997</sup>

Rather, the crux of the problem was the position of the Governor General who, as a formal head of state, had substantial powers under the Independence Constitution.

Thus in discussing the relative merits of an executive president it proposed as opposed to the Governor General who was the Head of State under the Independence Constitution, the White Paper invoked the image of an all-powerful African chief:

*"The honour and respect accorded a chief or a king or, under a republic, a President, is for us indistinguishable from the power he wields."*<sup>998</sup>

In other words, what the White Paper was proposing was not the elimination of a monarchy as such, but a substitution of its new republican form for a traditional hereditary monarchy.

The White Paper proposed unprecedented subordination of the National Assembly to the Republican President. While preparing to deliver the fatal blow, it camouflaged that blow with velvety and misleading language:

*"The proposal to have an Executive President in no way derogates from the authority or status of Parliament. The moral authority of any Government must ultimately depend upon the consent of the people who are governed. This is the basis of democracy and in practice democracy is best maintained by means of a freely elected parliament having exclusive power to make laws, raise taxes and vote money for public purposes. Even though Parliament remains sovereign, freedom in a democracy cannot survive without the rule of law."*<sup>999</sup>

Furthermore:

*"In drafting the proposals for a republican constitution the Government has attempted to give effect to four basic principles:*

- i. As far as possible our institutions of government must be such as can be understood by the people;*

997 Ibid., para. 906

998 Ibid., p. 906

999 Ibid., p. 907

- ii. *The executive must have the necessary powers to carry out the functions of a modern state;*
- iii. *Parliament must remain sovereign; and*
- iv. *The rule of law must be preserved.*<sup>1000</sup>

The White Paper greatly misrepresented its true object, the emasculation of the Parliament, offering, instead, empty platitudes:

*“In considering the proper relationship between an Executive President and the National Assembly, the Government’s overriding concern has been to devise workable arrangements which maintain, unimpaired, the sovereignty of Parliament. It is, therefore, proposed to confer on the President any power to legislate otherwise than by, or under, the authority of an Act of Parliament.”*<sup>1001</sup>

By introducing these proposals to the National Assembly, Prime Minister Rashid Kawawa falsely waxed lyrical about Parliament as *“the voice of the Nation and the fountain of authority which must remain sovereign....”*<sup>1002</sup> In fact the National Assembly was about to be dealt a massive blow in its power, authority and prestige from which it is yet to recover. Furthermore, Premier Kawawa suggested,

*“if the proposals contained in this White Paper are approved by the National Assembly at this sitting, ... legislative provision will be made at this sitting of the Assembly for the President-Designate of the Republic of Tanganyika, and on December 9<sup>th</sup>, 1962, Tanganyika will become a Republic within the Commonwealth.”*<sup>1003</sup>

Following the passage of the White Paper, on 25 September 1962 the National Assembly passed the *Constituent Assembly Act, 1962*.<sup>1004</sup> It was assented to by the Governor General on 4 October 1962. Mwakyembe has argued that this Act *“placed the country in an irreversible process towards concentration of power in the executive and the erosion of people’s democratic rights.”*<sup>1005</sup> Yet it was a very short piece of legislation. The Act empowered the National Assembly to *“... resolve itself from time to time into and constitute a Constituent Assembly for the enactment of provisions for the establishment of a Republic and the enactment of a Constitution therefor.”*<sup>1006</sup>

The Constituent Assembly thus constituted could make provisions consequential on and supplemental to the establishment of the Republic and the new Constitution.<sup>1007</sup> These provisions would not be ordinary enactments that require assent to become law.

1000 Ibid., p. 907

1001 Loc. cit.

1002 Tambila, op. cit., p. 51

1003 Msekwa, op. cit., p. 19; Tambila, loc. cit.

1004 No. 66 of 1962

1005 Mwakyembe, ibid., p. 17

1006 The Constituent Assembly Act, ibid., s. 2(1)

1007 Ibid., s. 2(2)

They were to be constituent acts requiring no assent. “.... *Any Bill passed by the Constituent Assembly in accordance with the provisions of this Act shall become law notwithstanding that the Governor General has not assented thereto on behalf of Her Majesty....*”<sup>1008</sup> These constituent powers of the National Assembly were to cease upon coming into effect of the new Republican Constitution.<sup>1009</sup>

### **The Bane of Imperial Presidency**

On 9 December 1962, Tanganyika became a Republic when the Republican Constitution came into force. The coming into effect of the Republican Constitution marked the beginning of the weakening of parliamentary authority *vis a vis* the party and the executive as well as a noticeable departure from the Westminster model.<sup>1010</sup> Indeed, as Mwakyembe says, “*the assurance given earlier by the government that the proposal to have an executive president would in no way derogate from the authority or status of parliament, stood in contrast to the position which the Republican Parliament found itself in.*”<sup>1011</sup>

There was a tremendous broadening in the power and scope of the government and an increase in the authority of the chief executive under the Republican Constitution at the expense of the legislature. The President became the Head of State and Commander in Chief of the Armed Forces; the executive power of the republic was vested in him and (unless otherwise provided by law), in the exercise of his functions he was to act in his own discretion, without being bound to follow the advice tendered by any person. He was thus not bound by the British constitutional convention inhibiting the chief executive from acting otherwise than in accordance with ministerial advice.<sup>1012</sup>

The President was empowered to dissolve parliament, the power which under the Independence Constitution was vested in the Governor General and could only be exercised when the National Assembly passed a motion of no confidence in the government and the Prime Minister did not resign within three days. To inject further impotence into the National Assembly, the Republican Constitution robbed it of its vital weapon to control the actions of the executive, i.e. the vote of no confidence.

There were no other circumstances than the effluxion of time, or the President’s refusal to assent to a Bill which had been re-tendered, that could bring about a general election. After all, there was no mention in the Constitution of collective ministerial responsibility which had been made an express part of the Independence Constitution, a *lacuna* which left the National Assembly without any effective remedy against the government as a whole for decisions which it did not approve.<sup>1013</sup> The relationship between the Cabinet and the Head of State was also qualified to inject further authority into one man. The Republican Constitution restricted the advisory functions of the Cabinet to

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1008 Ibid., 2(3)

1009 Ibid., s. 6

1010 Mwakyembe, op. cit., p. 28

1011 Loc. cit.

1012 Loc. cit.

1013 Loc. cit.

*“such matters as may be referred to it under any general or special directions of the President.”*<sup>1014</sup>

On the same day the Republican Constitution came into force, the Constituent Assembly also enacted the *Republic of Tanganyika (Consequential, Transitional and Temporary Provisions) Act, 1962*.<sup>1015</sup> Enacted under the Constituent Assembly Act, the former enactment conferred to the President the vast punitive powers under a variety of laws, colonial and post-colonial such as detention powers under the *Preventive Detention Act, 1962*; the *Deportation Ordinance, 1921* and the *Expulsion of Undesirables Ordinance*; as well as the *Emergency Powers Order in Council, 1939* which had provided the colonial Governors with emergency powers.<sup>1016</sup>

Tellingly, the provisions of this Act were to prevail over the new Republican Constitution. As its section 3 stipulated, *“the provisions of this Act shall have effect notwithstanding anything contained in the Republican Constitution.”* This is significant. During the parliamentary debate over the White Paper, several members had warned that the enormous powers being proposed for the President could easily be abused and that the sovereignty of the Parliament was at stake. Mwalimu Nyerere, then a TANU backbencher but soon to become TANU’s presidential candidate and eventually the first President of the Republic of Tanganyika, defended the proposed powers arguing that the ‘National Ethic’ was the only *“safeguard of a people’s rights, people’s freedoms and those things which they value.”*

Without explaining what the President needed those powers for, if the national ethic was a sufficient safeguard against abuse of the presidential powers, Mwalimu Nyerere argued:

*“What we must continue to do all the time is to build an ethic of this nation, which makes the Head of State, whoever he is, to say, ‘I have the power to do this under the Constitution, but I cannot do it, it is un-Tanganyikan.’ Or for the people of Tanganyika, if they have made a mistake and elected an insane individual as their Head of State, who has the power under the constitution to do X, Y and Z if he tried to do it, the people of Tanganyika would say, ‘we won’t have it from anybody, President or President squared, we won’t have it. I believe, Sir, that is the way we ought to look at this constitution.”*<sup>1017</sup>

Members of the National Assembly had also questioned the absence of a Bill of Rights in the Government proposals. To this, Mwalimu Nyerere retorted with his now famous statement about the need to be wary of ‘constitutional straitjackets.’:

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1014 Loc. cit.

1015 No. 500 of 1962

1016 This was made under, 1962, The Act also came into effect 9 December 1962, the same day as the new Republican Constitution.

1017 Quoted from Tambila, *ibid.*, p. 55



*“We refuse to adopt the institutions of other countries even where they have served those countries well because it is our conditions that have to be served by our institutions. We refuse to put ourselves in a straitjacket of constitutional devices – even of our own making. The constitution of Tanganyika must serve the people of Tanganyika. We do not intend that the people of Tanganyika should serve the constitution.”<sup>1018</sup>*

As it turned out, Mwalimu Nyerere was not averse to borrowing liberally from the ‘constitutional devices’ from other countries as long as it was politically expedient to do so. Thus, for example, his model of the Republican Constitution and the Imperial Presidency it spawned; together with the Preventive Detention Act to complement the vast punitive powers he amassed under the new constitutional dispensation were heavily influenced by Kwame Nkrumah’s Ghana. He also borrowed from the despised British colonialists the Acts of Union between England and Scotland, as his model for the Union between the Republic of Tanganyika and the People’s Republic of Zanzibar, which led to the creation of the United Republic of Tanzania in 1964!<sup>1019</sup>

With the passage of the Republican Constitution, the presidential shadow has hovered and continues to hover everywhere, in public as well as in private spheres. He appoints ministers, deputy ministers, permanent secretaries, judges including the chief justice, heads of services commissions, regional and district commissioners, commanders of the army, police, prisons and paramilitary forces, chief executives of parastatals and members of the electoral commission and its chief executive officer.

Since that time to this day, the President has also cast and continues to cast a long shadow over Parliament, over and above his dominant influence in the law-making process. He appoints the Clerk of the National Assembly, its chief executive officer, and, since the 13<sup>th</sup> Amendment in 2000, appoints ten members of parliament, a reversion to common practice under one-party rule but which, as we have seen, goes back to the first colonial Legislative Council. Since 2008, under the *National Assembly (Administration) Act, 2008*, the President determines the salaries and benefits for members, including medical benefits, as this author’s own personal experience proves.

The presidential reach is not confined to matters of politics and government. It is also to be found in the realm of land and natural resource management and allocation. Because of the saving clauses in the Independence and Republican Constitutions which retained the colonial legal order, all lands, hitherto under control of the Governor, were vested in the President in trust for the people of Tanganyika, later Tanzania. This position was reaffirmed by the Land Laws enacted in 1999.<sup>1020</sup> Now, since 2017, all natural resources

<sup>1018</sup> Quoted from Okoth-Ogendo, *ibid.*, p. 68

<sup>1019</sup> See generally I.G. Shivji, *Pan-Africanism or Pragmatism? Lessons of Tanganyika – Zanzibar Union*, OSSREA, Addis Ababa, and Mkuki na Nyota Publishers, Dar es Salaam, 2008; I.G. Shivji, *Tanzania: The Legal Foundations of Union, 2<sup>nd</sup> Expanded Edition*, Dar es Salaam University Press, Dar es Salaam, 2009.

<sup>1020</sup> See ss. 1(1)(a) and 4(1) of the Land Act, 1999, Act. No. 4 of 1999; and s. 3(1)(b) of the Village Lands Act, 1999, Act No. 5 of 1999.

and wealth are similarly vested in the President.<sup>1021</sup> He is, therefore, the ultimate owner of the land and all natural resources and wealth of the country.

The President enjoys complete immunity from prosecution of any kind; and he is largely immune from the civil process. In short, as Shivji argues,

*“the president is the giver and taker of life, liberty and livelihood. The description of this system of government as ‘presidentialism’ or ‘executive presidency’ has been found wanting. African constitutional scholars have therefore coined a new term to describe it: the Imperial Presidency.”*<sup>1022</sup>

### Monopartyism and Parliament

According to Mwakymbe, the 1962 constitutional changes *“did not only heap wide powers on the President, but also initiated, albeit indirectly, a movement towards party supremacy and consequently the entombment of the National Assembly.”*<sup>1023</sup> The idea of a one-party state in Tanganyika had been in the minds of TANU leaders right from the time of independence.<sup>1024</sup> In early 1962, soon after independence, then Prime Minister Nyerere made a lengthy public statement urging the importance of a one-party democracy in order to enable the young nation to consolidate its unity for the development of the country.

He said:

*“New nations like Tanganyika get their independence after a sustained struggle against colonialism. This is a nationalist struggle which unites all the people in the country and does not leave room for differences; and the nationalist movements, after achieving independence, form the independent governments of their countries.”*

*“But immediately after its formation, the new government is faced with a major task of the economic development of the country and the general uplifting of the standard of living of all the people, through the elimination of poverty, ignorance and disease. In order for this objective to be successfully accomplished there is as much need for unity as was required during the struggle for independence. Similarly, therefore, there is no room for differences.”*<sup>1025</sup>

On 16 January 1963, the Annual General Conference of TANU passed a resolution that it was desirable to change the system of government in Tanganyika to a one-party democracy and authorised the President to set up a commission to consider and recommend

1021 For example, section 5(2) of the Natural Wealth and Resources (Permanent Sovereignty) Act, 2017, Act No. 5 of 2017, declares that **“the natural wealth and resources shall be held in trust by the President on behalf of the People of the United Republic.”**

1022 I.G. Shivji, *Let the People Speak: Tanzania Down the Road to Neo-Liberalism*, CODESRIA, Dakar, 2006, p.77

1023 Mwakymbe, *ibid.*, 29

1024 Msekwa, *op. cit.*, p. 19

1025 Quoted in Msekwa, *ibid.*, p. 20

appropriate procedures to give effect to this new concept of one-party system. In its meeting held between 10 and 14 February 1963, the NEC of TANU endorsed the resolution and directed the government to give statutory effect to the one-party system of government.

On 28 January 1964, the Presidential Commission on the Establishment of a Democratic One-Party State was appointed by President Nyerere. Its express remit was “to consider what changes were necessary in the Constitution of Tanganyika and the Constitution of TANU, as well as in the practices of government, in order to bring into effect a democratic one party state.”<sup>1026</sup> Mwalimu Nyerere made it abundantly clear that the Commission’s task was not to advise whether or not Tanganyika should become a one-party state. “That decision has already been made by the Party. The task of the Commission is merely to make recommendations on the form, structure and procedures of the one party state which will be established.”<sup>1027</sup>

### **The One-Party Constitution**

The Presidential Commission on the Establishment of a Democratic One-Party State had been established slightly over two weeks after the creation of the People’s Republic of Zanzibar following a Revolution that took place on 12 January 1964. The Revolution was led by the Afro-Shiraz Party (ASP) of Sheikh Abeid Amani Karume. Within a hundred days of the Revolution, the People’s Republic of Zanzibar and the Republic of Tanganyika signed Articles of Union uniting the two countries to form the United Republic of Tanganyika and Zanzibar, later Tanzania. As a result of the Union, additional members from Zanzibar were appointed to the Presidential Commission.<sup>1028</sup>

On 22 March 1965, the Presidential Commission submitted its report to President Nyerere. Slightly over one month later, the President submitted the report to the joint session of the NEC of TANU and ASP, held between 3-5 May 1965. The report was given final approval by the extraordinary meeting of the TANU Annual Conference (attended by delegates from ASP) on 1 and 2 June 1965. Only then was the Bill for enactment of the one-party Constitution – known officially as the *Interim Constitution of Tanzania Act, 1965*<sup>1029</sup> – presented to the National Assembly under a certificate of urgency.

The Interim Constitution Act was passed by the National Assembly on 5 July 1965, and was assented to by President Nyerere on 8 July 1965, on which date Tanzania became a *de jure* one-party state.<sup>1030</sup> Its preamble declared that the Interim Constitution was enacted by ‘the Parliament of the United Republic of Tanzania.’ This means it was enacted as an ordinary Act of Parliament, by an ordinary National Assembly sitting in its ordinary legislative capacity. It therefore required presidential assent for it to become effective. There was not even a pretence that it had been enacted by the Constituent Assembly, which is a sovereign act requiring no assent.

<sup>1026</sup>Tanzania, *The Report of the Presidential on the Establishment of a Democratic One Party State in Tanzania*, Government Printers, Dar es Salaam, 1965, para. 8

<sup>1027</sup>Loc. cit. Msekwa, *ibid.*, p. 21

<sup>1028</sup>See Tanzania, *The Report of the Constitutional Review Commission...*, op. cit., p. 37

<sup>1029</sup>*Act No. 43 of 1965*

<sup>1030</sup>Msekwa, *ibid.*, p. 40, inaccurately states the date as 10 July 1965.

The Interim Constitution Act had far-reaching consequences to the Tanzanian Parliamentarism and its politics and society. Firstly, it formally declared Tanzania as one-party state. Article 3(1) simply stated that “*there shall be one political party in Tanzania*”; which, until the union between TANU and ASP, shall be TANU in Tanganyika and ASP in Zanzibar.<sup>1031</sup> Article 3(4) made the Constitution of TANU an integral part of the State Constitution, by appending it as the First Schedule to the Interim Constitution. That is how the sole political party was transformed into what Msekwa has called a ‘constitutional category’<sup>1032</sup>, and what other commentators have described as a ‘state-party.’

Secondly, the Interim Constitution Act retained the basic parameters of the Imperial Presidency ensuing from the Republican Constitution. For example, it retained the President as the constituent part of the Parliament.<sup>1033</sup> It also retained the power of the President to, ‘at any time’ dissolve the Parliament.<sup>1034</sup> He also had power to decide such mundane matters as the places for the sittings of the National Assembly.<sup>1035</sup> Equally significantly, the Interim Constitution Act retained the prohibition on the National Assembly enacting money Bills without the recommendation of the President, signified by a Minister, that was first imposed by the 1926 Order in Council.

Thirdly, and equally significantly, the Interim Constitution Act consigned the Bill of Rights, presented in soaring language, to the preamble where it had languished since the enactment of the Independence Constitution by the departing British colonial state in 1960. The people of Tanzania still had a long way to go before they could meaningfully enjoy fundamental rights.

While maintaining the basic parameters of presidential power, the Interim Constitution Act reinforced and consolidated that power in ways that undermined an already weakened parliamentary power. This was particularly so in the makeup of the National Assembly. We have already seen that, under the Republican Constitution, the President had inherited the prerogative of the Governor General to appoint up to ten members of the National Assembly.

Under the Interim Constitution Act, this prerogative was vastly expanded. Thus, under the new dispensation, the National Assembly was composed of 107 directly elected constituency members; 15 members elected by the National Assembly; 20 regional commissioners (17 from Tanganyika and 3 from Zanzibar) appointed by the President; 32 members appointed by the President from amongst members of the Revolutionary Council of Zanzibar; 20 members appointed by the President from persons ordinarily resident in Zanzibar, and 10 other members appointed by the President in his discretion.<sup>1036</sup>

So, in terms of its composition, the first Union Parliament totalling some 214 members had 82 (or about 38 percent) of its members as presidential appointees. 8 percent

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1031 The Interim Constitution of Tanzania Act, 1965, art. 3(2)

1032 Ibid., p. 34

1033 Interim Constitution Act, ibid., art. 23

1034 Ibid., art. 40(2)

1035 Ibid., art. 41(1)

1036 Ibid., art. 24(1)

of its other members were indirectly elected. Thus, in total, the National Assembly had 97 (or about 45 percent) of its members either appointed by the President, or indirectly elected by itself! The situation would get even worse during the next decade.

Msekwa cites the Interim Constitution Act as the beginning of the shift towards the party supremacy and the marginalisation of the National Assembly. He is incorrect. The marginalisation of the National Assembly had actually started in early 1962, but it was confirmed by the Union. More importantly, the Union was not in any way a triumph of the party over parliament; it was rather a victory of the Imperial Presidency over parliamentary democracy.

The Union was decided between Presidents Nyerere and Sheikh Abeid Amani Karume on 22 April 1964 at their meeting in Zanzibar at which the Articles of Union were signed. However, in order to be effective, the Articles required ratification by the respective legislatures of the two countries, i.e. the Parliament of Tanganyika and the Revolutionary Council of Zanzibar. Msekwa notes that the Union was not discussed by TANU's NEC 'at any stage', but tries to downplay the significance of this omission, arguing that there was "*no necessity to refer the matter to the NEC because the general principle of the desirability of Tanganyika's union with other states in Africa has always been the declared policy of the Party.*"<sup>1037</sup>

But as Shivji has argued in his seminal study of the Union,<sup>1038</sup> Mwalimu Nyerere was a pragmatist who often ignored legality or party policy when political exigencies demanded that. The Union with Zanzibar is a perfect example of this aspect of Mwalimu's political personality. Even though he paid lip service to Parliament as 'the supreme organ of the people of Tanganyika,' by summoning the National Assembly to ratify the Articles of Union under a certificate of urgency, he in fact cynically undermined the power and authority of that 'supreme organ', reducing it to the role of a rubber stamp.

By its own terms, the Interim Constitution Act was no triumph of party supremacy either. Even though it declared the country a one-party state, it did not make the party so declared supreme over all other organs of the state. On the contrary, its article 3(3) made it clear that

*"all political activity in Tanzania, other than that of the organs of state of the United Republic, organs of the Executive and Legislature for Zanzibar, or such local government authorities as may be established by or under a law of the appropriate legislative authority, shall be conducted by or under the auspices of the Party."*

That is to say, both the Executive and the Legislature as well as local government authorities were not obligated to conduct their functions under the auspices of the Party. As we shall see, this issue was to take on huge significance in the struggle for supremacy between the Party and the National Assembly in the years to come. All the same, it is

<sup>1037</sup> Ibid., pp. 22-23

<sup>1038</sup> Shivji, Pan-Africanism or Pragmatism, *ibid.*

indubitable that with the enactment of the Interim Constitution Act, power, authority and concomitant prestige swung decisively to the sole political party and, especially, its National Executive Committee. Thus, by 1967 Henry Bienen could write that “*the NEC has become a more important organ than it was before 1965: its scope and powers have increased, and it has begun to function in governmental capacities.*”<sup>1039</sup>

### Subduing the Opposition

The creation of a one-party system was justified on the argument that Tanganyika was in any case a *de facto* one-party state, as there was not much political opposition. Under the circumstances, it was asserted, to keep up the pretence of multiparty system tended to restrict the freedom of debate in the parliament, since the rules of procedure in multiparty parliaments discouraged members from criticising the government formed by their party. It was argued that the one-party system would free the debates in parliament. It was also argued that the one-party system would encourage rapid social and economic transformation of the country owing to the unity of purpose engendered by that system. This had been Mwalimu Nyerere’s argument from the earliest years of independence.

Before Tanganyika was declared a one-party state, there were many political parties, most of whom were formed after 1962. There was the People’s Democratic Party (PDP) formed by the trade unionist Christopher Kassanga Tumbo; the People’s Convention Party (PCP) formed in Mwanza by Samson Mshala; the National Enterprise Party (NEP) of Hussein Yahaya; the African Independence Movement (AIM) which resulted from the merger between PCP and NEP, and the All Muslim National Union of Tanganyika (AMNUT). And of course there was the United Tanganyika Party (UTP), formed in 1957; and the African National Congress (ANC), a breakaway from TANU, formed in 1958.

These parties were small and weak; and none had parliamentary representation, TANU having swept the August 1960 polls. But small and weak as they were, they did not die a natural death. R. Cranford Pratt, the Canadian political science professor and the first chancellor of the University of Dar es Salaam, has written that, in the movement towards party supremacy, “*the several tiny parties were harassed out of existence, their leaders deported or detained and their right to register and hold meetings severely restricted.*”<sup>1040</sup>

The fact that the opposition political parties were small and weak does not mean that there was no opposition to TANU. Shivji, the preeminent scholar of the working-class movement during this period<sup>1041</sup>, argues that the argument that there was no viable opposition to TANU is historically untenable. As he tells it,

*“the strongest opposition that TANU ... ever faced ... was between 1961 and 1964.... The opposition came not from the political parties but from the trade union movement. Therefore, the first to be forcefully suppressed*

1039 H. Bienen, *Tanzania: Party Transformation and Economic Development*, Princeton University Press, Princeton, 1967, p. 198

1040 R.C. Pratt, *The Critical Phase in Tanzania, 1945-1968*, Cambridge University Press, London, 1976, p. 187

1041 See, for instance, his *magnum opus*, *Law, State and Working Class in Tanzania, 1920-1964*, Heinemann, London, 1986.

*in the march towards a single party were the autonomous trade unions, not the political parties.*

*“The turning point in the history of parties (and the fall of democracy) is, therefore, not 1965 (when the one party state constitution was adopted) but 1964 when (the Tanganyika Federation of Labour) was banned; over 200 trade unionists detained without trial, and the (National Union of Tanganyika Workers - NUTA) Act rushed through parliament in a matter of hours under the certificate of urgency.”<sup>1042</sup>*

The Act legally abolished TFL, replacing it with NUTA. A Presidential Commission formed nearly three decades later would note the difference between TFL and NUTA as being that, unlike the latter, the former “... *in spite of various measures taken to control it, was still an autonomous trade union.*”<sup>1043</sup>

Shivji condemns the decision to establish a *de jure* one-party state as “... *one of the most undemocratic decisions in our political history.*”<sup>1044</sup> For their part, Mlimuka and Kabudi have concluded that:

*“... The party (TANU) was incompetent to make such a decision, for not all Tanganyikans were members of TANU. A few appointed people therefore could not purport to decide the destiny of the majority. The party’s decision on the establishment of a one party state ought to have been subjected to a referendum so that all the people could have participated.”<sup>1045</sup>*

## Packing the Parliament

The creation of the one-party state had dramatic and far-reaching consequences to Tanzanian Parliamentarism. The first obvious change was, as we have seen, with regard to its composition and, consequently, its representative character. We have seen that from its creation in 1926 through to independence, the Tanganyika Parliament was hardly representative; being dominated as it was by nominated and other unelected or indirectly elected members.

It was only following the 1958 elections that the Legislative Council got its first elected members, even though they were determined by strict racial quotas and were elected on the basis of a limited franchise. Even at this late stage, however, there was still a preponderance of unelected members over the elected ones. As Tanganyika moved closer to independence in 1961, the composition of the Legislative Council changed in favour of elected members, even if racial quotas and nominated members still ensured that over a third of the members had very dubious representative credentials.

<sup>1042</sup> Shivji, *Let the People Speak*, *ibid.*, p. 19

<sup>1043</sup> Tanzania, *The Presidential Commission of Inquiry into Party Systems, Vol. I*, Government Printers, Dar es Salaam, 1991, p. 27, quoted in Shivji, *Let the People Speak*, *ibid.*, p. 20

<sup>1044</sup> Shivji, *Let the People Speak*, *ibid.*, p. 18

<sup>1045</sup> Mlimuka and Kabudi, *ibid.*, pp. 62-63

The Republican Constitution retained not only the ‘interim period’ of the National Assembly which was stipulated in the Independence Constitution; it also retained its composition. That is to say, the Independence Parliament with 81 members, 21 of whom represented Asians and Europeans, and 10 were nominated, was to remain in office during the interim period, which was to run for a period not later than 11 October 1964. After the expiry of the interim period, the Republican Constitution stipulated that the National Assembly was to comprise of 107 elected members, and not more than 10 nominated members.

With the introduction of the one-party system in the Interim Constitution and the electoral laws that were introduced around the same time, parliament was now reorganised in ways which revealed its subordinate status to the executive and betrayed its growing impotence. The first to suffer was, as we have shown, the representative character of the National Assembly.

The composition of the National Assembly stipulated in the Independence Constitution, i.e. 107 constituency members and 10 nominated members, was never put into practice as the Independence Parliament dovetailed into the first Union Parliament brought about by the Interim Constitution. Furthermore, no presidential or parliamentary elections were ever conducted under the Republican Constitution. As a result of these factors, the Independence Parliament – with 38 percent of members elected on racial quotas and/or nominated – was transformed into the first Union Parliament with over 45 percent of its members indirectly elected and/or nominated. The situation would get worse as the first decade of independence came to an end.

On 1 October 1968, the National Assembly passed the *National Assembly (Alteration of the Number of Constituency Members) Act, 1968*.<sup>1046</sup> The Act was assented to on 10 October 1968. Enacted under the authority of section 24(3) of the Interim Constitution, it was to be read as one with the Constitution.<sup>1047</sup> By section 2, the number of constituency members was raised from 107 stipulated in section 24(1)(a) of the Interim Constitution to 120. But that was only a small bump on the road to packing the National Assembly with unelected members. For as Mwakyembe and Tambila have shown, by 1970, the National Assembly boasted of 120 unelected or indirectly elected members out of a total of 220 members.<sup>1048</sup>

In 1971, parliament passed the *Interim Constitution of Tanzania (Increase in the Number of Regional Commissioners) Act*,<sup>1049</sup> which increased the number of Regional Commissioners in Tanzania Mainland from 17 to 18. The enactment of this Act added one more presidential appointee to the list of appointed members of the National Assembly. A year later, two more Regional Commissioners, this time from Zanzibar, were similarly added to the number of members of the National Assembly.<sup>1050</sup> There was yet more increase

1046 *Act No. 56 of 1968*

1047 *Ibid.*, ss. 1 and 3

1048 Mwakyembe, *op. cit.*, pp. 38, 41

1049 *Act No. 29 of 1971*

1050 See the *Interim Constitution of Tanzania (Increase in the Number of Regional Commissioners) Act, 1972, Act No. 10 of 1972*.



in 1974 with the passage of the *Interim Constitution of Tanzania (Increase in the Number of Regional Commissioners) Act*,<sup>1051</sup> which raised the number of Regional Commissioners from Tanzania Mainland to 20.

The proportion of unelected or indirectly elected members would grow even more with the 1974 amendments to the Interim Constitution.<sup>1052</sup> As a result of the amendments, the number of directly elected members was reduced from 120 to 88. The number was soon raised to 96, with the passage of the *Interim Constitution of Tanzania (Increase in the Number of Constituency Members) Act, 1975*.<sup>1053</sup> At the same time, the number of indirectly elected members was raised from 20 to 35. Together with nominated and national members, the number of unelected and indirectly elected members reached 122 out of a total of 218 members. As Tambila observes, by 1975, “*the composition of parliament was such that the representative character of that institution was almost lost.*”<sup>1054</sup>

By this time, enough damage had been done to the institution of parliament that it was now safe to declare openly who the master was in the pecking order of the institutions of the Tanzanian state. As Msekwa notes,

“*as a direct result of th[e] widespread acknowledgement and recognition of the de facto supremacy of the Party, the National Executive Committee felt that a stage had now been reached whereby this supremacy should be given legal recognition.*”<sup>1055</sup> Thus, on 3 June 1975 the National Assembly passed the *Interim Constitution of Tanzania (Amendment) Act*.<sup>1056</sup>

Assented to by President Nyerere on 11 June 1975, the amendment put to rest any lingering doubts that the Party was in charge of all other organs of state. Its section 3 amended section 3(3) of the Interim Constitution Act, which enshrined the one-party system, and added a new subsection (4). The new section 3(3) declared: “*All political activity in Tanzania shall be conducted by or under the auspices of the Party.*” The new subsection (4) pronounced the supremacy of the Party over all other organs of state: “*The functions of all the organs of State of the United Republic shall be performed under the auspices of the Party.*”

But that was not the end of the matter. With the adoption of the *Constitution of the United Republic of Tanzania, 1977*, following the merger of TANU and ASP to form the Chama cha Mapinduzi (CCM), parliament was even more diluted with unelected or indirectly elected members. The new Constitution – ‘the nadir of parliamentary decline’, as Tambila describes it – institutionalised the minority status of the directly elected members of the National Assembly, who by this time numbered 111 out of a total of 239.<sup>1057</sup>

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1051 *The Interim Constitution of Tanzania (Increase in the Number of Regional Commissioners) Act, 1974, Act. No. 3 of 1974*

1052 *The Interim Constitution (Amendment) Act, 1974, Act No. 4 of 1974*

1053 Act No. 10 of 1975

1054 Tambila, op. cit., p. 62

1055 Msekwa, ibid., p. 70

1056 Act No. 8 of 1975

1057 Ibid., p. 63

*“This meant that a minority of the members were real representatives of the people.”*<sup>1058</sup>

The 1977 Constitution now proudly entrenched party supremacy. Its article 3 retained the language of party supremacy of the 1975 Amendment:

*“All activities of the organs of the State of the United Republic shall be conducted under the auspices of the Party.” It also declared CCM to be the sole political party which was also supreme; and provided that “all political activities shall be conducted by or under the auspices of CCM.”*<sup>1059</sup>

The subordination of parliament to the party was confirmed by article 54(1) which made parliament a special committee of CCM. Drawing deep from the colonial template created over half a century earlier, the new Constitution also prohibited the National Assembly from dealing with any money bills, or motions or amendments thereto “... except if the President has proposed that the matter be dealt with by the National Assembly and the proposal has been submitted to the National Assembly by a Minister.”<sup>1060</sup> This prohibition did not apply to bills, motions or amendments thereto “moved by a Minister or a Deputy Minister.”<sup>1061</sup> The Constitution could not be clearer about who was in charge than this.

The preponderance of unelected or indirectly elected members in the House; the relegation of the National Assembly to a simple committee of the ruling party; making party membership a mandatory qualification for election to the National Assembly, and its deprivation of powers of control over policies of the state inflicted a lasting damage to the authority, power and prestige of the Tanzania Parliament. The dramatic changes were immediately noticed by all critical observers of the Tanzanian political scene.

Thus Helge Kjekshus, the Norwegian political scientist who taught at the University of Dar es Salaam, argued that after 1968,

*“Parliament’s position became one where its functions are negligible and ideally restricted to an august replay of consensus themes worked out in the process of Party deliberations of policy measures. Parliament’s present position in legislation and as a control instrument is strictly circumscribed by the Party, and Parliament’s original role in the political system would seem to be in doubt.”*<sup>1062</sup>

Later, examining the effect of the introduction of the one-party system, Kjekshus would conclude that under the post-1965 parliament, “disagreements were muffled,

1058 Loc. cit.

1059 The Constitution of the United Republic of Tanzania, 1977, art. 3(3)

1060 Ibid., art. 99(1)

1061 Ibid., art. 99(3)

1062 H. Kjekshus, ‘Perspectives on the Second Parliament’, The Election Study Committee, University of Dar es Salaam, *Socialism and Participation: Tanzania’s 1970 National Elections*, Tanzania Publishing House, Dar es Salaam, 1974, p.

*criticism softened and the parliament arena was made open for compromise and accommodation.*"<sup>1063</sup> To Shivji, "... *the national assembly became an empty shell with little power and even less a forum for public debate, scrutiny and criticism.*"<sup>1064</sup>

The changes were also not lost on the new masters of Tanzanian politics. Government ministers started to declare openly inside Parliament – as a Mr. Wambura, Assistant Minister in the 2<sup>nd</sup> Vice President's Office, did in October 1968 – that "... *it is beyond any doubt that this Parliament belongs to TANU.*"<sup>1065</sup> As if to prove the point, that same month, seven vocal MPs were expelled from TANU for what was described as their "*very clear opposition to the Party and its policies.*"<sup>1066</sup> They automatically lost their parliamentary seats for, by then, party membership had become the key requirement for election to Parliament.

By the 1980s, the President was declaring openly that, in fact, parliament did not really count for much. In a New Year Message to the nation broadcast on Radio Tanzania, President Nyerere announced new tax measures in the following words: "*You will already have heard of the new taxes which come into force tomorrow, the first of January, 1983. These tax measures will be debated in parliament in its next sitting, but in the meantime they have to be paid by everyone.*"<sup>1067</sup> Parliament had indeed become 'a toothless bulldog.'<sup>1068</sup>

*So, as Tambila has put, "Parliament had no more constitutional control over legislation. It hadn't even indirect control over the actions of the executive as had been the case at independence. It became a rubber stamp of party and executive decisions."*<sup>1069</sup>

Even under the grim conditions of one-party rule, these grim developments did not go unchallenged. Rather, to their everlasting credit, several members of the National Assembly fought valiantly, if unsuccessfully, to protect the honour, authority and power of the Parliament. They thereby saved the National Assembly from eternal shame of having capitulated to the rampant Imperial Presidency without a fight.

### **'Stirrings in the National Assembly'**

Opposition to the Imperial Presidency emerged almost immediately with the publication of the White Paper on the proposals for a republic. Significantly, for purposes of this study, this opposition came from within the National Assembly. Tambila has shown how members challenged the Government over the vast powers being proposed for the President that Mwalimu Nyerere, who was bound to become the first President, had to plead with them:

1063 H. Kjekshus, 'Parliament in a One-Party State: The Bunge of Tanzania, 1965-70', *Journal of Modern African Studies*, Vol. 12, 1974, p. 28; quoted in Mwakyembe, op. cit., p. 44

1064 Shivji, Let the People Speak, *ibid.*, p. 19

1065 Quoted in Msekwa, op. cit., p. 47

1066 Loc. cit.

1067 Quoted in Tambila, op. cit., 64; Mwakyembe, op. cit., p. 45

1068 Mwakyembe, *ibid.*, p. 46

1069 Tambila, loc. cit.

*“We have got to have a little amount of faith, although I know that some Members have been questioning this idea of faith. But, Sir, democracy is a declaration of faith in human nature, the very thing we are struggling to safeguard here, the very idea of democracy is a declaration of faith in mankind. And every enemy of democracy is some person who somewhere has no faith in human beings. He doubts. He thinks he is right, but other human beings are not all right. He will be perfectly alright.”*<sup>1070</sup>

Ultimately, as the late Jwani Mwaikusa has argued in his 1995 doctoral thesis, parliament accepted the new Constitution because members knew that the first President was going to be Nyerere. *“It was his personality which alleviated fears of likely misuse of powers by the President.”*<sup>1071</sup> This is supported by Msekwa who, as the Clerk of the National Assembly and later TANU’s Executive Secretary, was in a good position to know:

*“By far the most important factor all along has been the person of the Chairman of the NEC, President Nyerere. There is no doubt that TANU as a whole derives its strength from President Nyerere’s personal popularity and from his historical role as the ... Baba wa Taifa. His ideas have therefore been the most important factor in determining the role and status of the NEC.”*<sup>1072</sup>

The opposition against the Imperial Presidency did not end with the adoption of the Republican Constitution and, after 1965, the Interim Constitution and one-party state. More importantly, that opposition continued to be articulated from the floor of the National Assembly. Between 1967 and 1968, there were serious ‘stirrings’<sup>1073</sup> in the National Assembly. According to Msekwa, with the NEC of TANU becoming increasingly powerful, during the Budget Session of June/July, 1967, a question by Mr. P.J. Ndobho (Musoma North) appeared on the Order Paper, in which he called on the Government to unequivocally clarify which was supreme between the Party and Parliament.<sup>1074</sup>

When the Government demurred to give a straight answer, it reappeared in the next Budget Session through Mr. Michael Chogga (Iringa South) when debating the *Interim Constitution of Tanzania (Amendment) Bill*. Mr. Chogga proposed that the amendment should provide for the National Assembly to be ‘constitutionally the adviser of the President.’ The intent, he argued, was to make it obligatory for the President to act only on the advice of the National Assembly which was ‘supreme.’<sup>1075</sup>

1070 Tambila, *ibid.*, p. 56

1071 J.T. Mwaikusa, *Towards Responsible Democratic Government, Thesis Submitted to the University of London for the Degree of Doctor of Philosophy*, Law Department, School of Oriental and African Studies, London, 1995, p. 92, quoted in Tambila, *ibid.*, p. 55

1072 Msekwa, *op. cit.*, p. 61

1073 H.U.E. Thoden van Velzen and J.J. Sterkenburg, ‘Stirrings in the Tanzanian National Assembly’, in L. Cliffe and John S. Saul (eds.), *Socialism in Tanzania: An Interdisciplinary Reader, Vol. 1: Politics*, East African Publishing House, Nairobi, 1972, pp. 248-253

1074 Msekwa, *ibid.*, p. 40

1075 *Ibid.*, p. 41

*Mr. Chogga went much further, arguing: “Any matter which may be initially considered by any other organ, such as TANU or the Cabinet, should ultimately be submitted to the National Assembly for final approval or other action. That is the right kind of democracy for Tanzania and I don’t accept any other arrangement as being democratic.”*<sup>1076</sup>

He also proposed other amendments which struck at the core of the Imperial Presidency. He proposed, for instance, that the National Assembly should have a large majority of elected members.

Summarising the dangers of a Parliament dominated by nominated members, he argued:

*“If a person nominates another, the nominee is and must follow and agree with the one who nominated him.”*<sup>1077</sup>

He was not done yet. More specifically, Mr. Chogga proposed the following changes to the Interim Constitution:

- Three quarters of the president’s powers should be vested in parliament;
- There should be two or more parties;
- There should be two candidates in presidential elections;
- There should be elections in Zanzibar;
- ASP chairpersons should not have judicial powers in Zanzibar; and
- Between parliament and TANU, it was parliament which was supreme.<sup>1078</sup>

Mr. Chogga’s position drew the support of several other members. This was an unprecedented challenge to the Imperial President and to one-party rule. No member had previously raised these fundamental questions so boldly; no one else would raise them again for the next decade and a half. When he rose to respond to these arguments, Prime Minister and Second Vice President, Rashid Kawawa, stressed that in his understanding, TANU and ASP were supreme. *“These are the institutions which are leading the country. It is these institutions which initiate and decide on this country’s policies. This Assembly and the Revolutionary Council in Zanzibar merely assist the Government in implementing the policies of these two parties.”*<sup>1079</sup> He went on to demand that any member who opposed the policies of the Parties should resign immediately.<sup>1080</sup>

Two weeks after this showdown in the National Assembly, the NEC of TANU met in Tanga and expelled Mr. Chogga and eight other rebel members from the party “for

1076 Mwakyembe, op. cit., p. 41; Msekwa, op. cit., pp. 40-49; Tambila, op. cit., pp. 60-62

1077 Mwakyembe, ibid., p. 43; Tambila, loc. cit.

1078 Tambila, ibid., pp. 60-61

1079 Msekwa, ibid., p. 41

1080 Msekwa, ibid., p. 41; Tambila, ibid., p. 60

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*having grossly violated the party creed in both their attitude and actions, and for showing a very clear opposition to the Party and its policies.*"<sup>1081</sup> The expelled parliamentarians also lost their seats in the National Assembly as, by now, party membership had become a mandatory requirement for election or nomination to the National Assembly.

This event was a major turning point in the parliamentary and political history of Tanzania. As Msekwa, by this time TANU's Executive Secretary, argues, "... *the supremacy of the Party was clearly asserted.... The Party demonstrated its absolute control over the political elite.*"<sup>1082</sup> In Kjekshus' verdict, the expulsions "*confirmed the party as the sole policy maker and indicated parliament's subordinate and technical role as a legislature.*"<sup>1083</sup> To Tambila, these 'stirrings' "... *demonstrated that parliament was no longer the sovereign and revered institution as was the case in 1962.*"<sup>1084</sup> For Mwakymbe, the parliament came to resemble "*a toothless bulldog.*"<sup>1085</sup> It would take another 15 years for this 'empty shell' to begin to recover from these repeated blows to its authority, power and prestige.

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1081 Msekwa, *ibid.*, p. 48.

1082 *Loc. cit.*

1083 Kjekshus, *Perspectives on the Second Parliament, ibid.*, p. 78

1084 Tambila, *op. cit.*

1085 Mwakymbe, *op. cit.*, 46

## Chapter Four: The Democratic Recovery

The decade of the 1970s saw the consolidation of the Imperial Presidency and further ‘entombment’ of the National Assembly. TANU and ASP in Zanzibar merged to form CCM in February 1977. One month later, the first permanent Constitution, the Constitution of the United Republic of Tanzania was enacted. It formalised Party Supremacy and further consolidated the Imperial Presidency. By the late 1970s, following the Uganda War, however, Tanzania entered into a period of deep economic crisis. The crisis manifested itself in widespread shortages of essential consumer commodities.

In the midst of the crisis, government and parastatal functionaries together with businessmen took advantage and engaged in hoarding and racketeering of the essential commodities and all sorts of corruption. Cracks began to appear in the Imperial Presidency. In 1982, an attempted military coup came close to succeeding. To shore up its support amongst the Tanzanian masses, the government passed the *Economic and Organized Crimes (Control) Act, 1984*, perhaps one of the most draconian pieces of legislation to issue from the Tanzanian Parliament. Hundreds, possibly more, people, mostly private businessmen, were rounded up and detained and later punished by tribunals under procedures that departed significantly from the usual judicial safeguards of due process.

Soon political demands started to appear. The Zanzibaris, led by their President, Aboud Jumbe, demanded a review of the 1964 Union which gave birth to the United Republic, arguing that the Articles of Union had envisaged a federal structure of the Union. Mwalimu Nyerere and his party would not oblige. Instead, the NEC of the party issued proposals to consolidate the Union and invited a popular debate for the first time. The debate that unfolded was unprecedented in the country’s history. Between February and September 1983, over 9,335 proposals from all over the country were received by the Party in its Dodoma headquarters.<sup>1086</sup> Many proposed sweeping changes to the country’s Constitution.

There were demands for democratisation. In Zanzibar there were calls for greater autonomy, with some even demanding secession. In Tanzania Mainland people demanded the separation of the state and civil society, the right to form autonomous organisations and the entrenchment of the Bill of Rights in the Constitution. There were even demands for an end to the one-party system on the grounds that that system served no purpose than stifling political opposition.<sup>1087</sup>

As far as parliament is concerned, Mwakyembe has noted that the debate was dominated by the demands “... for the restoration of parliament’s authority as the supreme organ of power and control over the policies of the state.”<sup>1088</sup> It was argued that a truly representative parliament must have a big majority of elected members.<sup>1089</sup> None of these popular demands had been sanctioned by the NEC in its proposals. Fearing loss of control

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1086 Mwakyembe, op. cit., p. 48; Tambila, op. cit., p.65

1087 Mwakyembe, op. cit., 48; Tambila, op. cit., pp. 65-67 ; Shivji, Let the People Speak, op. cit., pp. 6-8

1088 Mwakyembe, op. cit., p. 48

1089 Loc. cit.

and political instability, the Party declared ‘the pollution of political air’ in Zanzibar, the debate was soon called off, President Aboud Jumbe forced out of power and a number of prominent critics of the Union, mostly Zanzibaris, detained without trial.<sup>1090</sup>

But things would never be the same again. Popular demands for change had been too widespread to be ignored or swept under the carpet. As a result of this debate, the Eighth Amendment to the Constitution was enacted in October 1984. Mwakyembe spoke too soon when, shortly after the Bill for the Amendment was introduced, he dismissed it as ‘of little consequence.’<sup>1091</sup> He would indeed write his doctoral thesis to the University of Hamburg on the ‘... Eighth Constitutional Amendment and its Implications on Constitutionalism, Democracy and the Union Question’!<sup>1092</sup> There are dozens of other such endeavours.

### Inconsequential Amendments?

The Eighth Amendment provided a major opportunity for challenging the excesses of the state, especially in the field of parliamentary democracy and human rights. For the first time since the Republican Constitution of 1962, the twin towers of the authoritarian state in Tanzania – Imperial Presidency and Party Supremacy – came under major attack and started to crumble. Thus, the Eighth Amendment paved the way for the final assault on the one-party system and the consequent reforms of the 1990s and beyond.

According to Tambila, parliament began to regain its supremacy as the organ of state representing all the people, their rights and interests with the Eighth Amendment. In terms of composition, for instance, the National Assembly became more representative: directly elected members increased from the 111 of 1977 to 169. Indirectly elected members decreased from 72 to 35 and presidential appointees fell from 56 to 40. Those indirectly elected were 15 women members, 15 members representing mass organisations affiliated to the Party and five members elected by the Zanzibar House of Representatives.<sup>1093</sup> For a House that had a majority of unelected or indirectly elected members since 1970, this was a huge change indeed!

Party supremacy was also dealt a major blow. Under the new article 63(2), the Constitution declared that:

*“The National Assembly shall be the principal organ of the United Republic which shall, on behalf of the people, supervise and advise the government of the United Republic and all its agencies in the exercise of their functions in accordance with this constitution.”*

In the same vein, article 53(2) proclaimed a return to collective ministerial responsibility that was lost under the Republican Constitution:

1090 Shivji, *Let the People Speak*, loc. cit.

1091 Mwakyembe, op. cit., p. 49

1092 See Harrison G. Mwakyembe, **Tanzania’s Eighth Constitutional Amendment and its Implications on Constitutionalism, Democracy and the Union Question**, Lit Verlag, Munster, 1997

1093 Tambila, op. cit., p. 66



*“The Ministers, led by the Prime Minister, shall be collectively responsible to the National Assembly for the discharge of the functions of the Government of the United Republic.”*

The collective ministerial responsibility had serious limitations, however. Firstly, since the Republican Constitution of 1962, the President is not only the Head of State and Commander in Chief; he is also the Head of Government. Unlike the head of government in a parliamentary democracy, however, the President in a presidentialist system such as Tanzania’s chairs the Cabinet but he is not a member thereof.<sup>1094</sup> He is moreover not bound by any advice of the Cabinet.<sup>1095</sup> Ultimately, therefore, the real centre of power in the Government does not lie with the Prime Minister and the Cabinet who are responsible to the National Assembly, but with the President who is not. Under such circumstances, collective ministerial responsibility was a mere charade.

Secondly, because the Prime Minister and other members of the Cabinet are appointed by the President and they all serve at his pleasure, they are also responsible, if not more so, to the President.<sup>1096</sup> Indeed, since they all serve at the pleasure of the President, the Prime Minister and other members of the Cabinet gravitate more towards doing the President’s bidding than they do to the National Assembly, which can only remove him after a very cumbersome procedure. Thirdly, although the Cabinet became collectively responsible to the National Assembly, the Eighth Amendment did not go so far enough as to provide for a no confidence vote. This means that, in practical terms, it was not possible to hold the ministers accountable in any meaningful way. That would have to wait a few more years for reintroduction of the multiparty system.

There were other important changes to the Constitution which loosened the grip of the executive presidency on body politic. For instance, the Eighth Amendment introduced the principle of presidential term limits which held any future President to a maximum of two five year terms.<sup>1097</sup> In a region where term limits have come under severe pressure, this innovation in Africa’s constitutional and political tradition has largely held in Tanzania.

The President’s power of appointment of cabinet ministers was also qualified somewhat with the requirement to consult the Prime Minister on such appointments.<sup>1098</sup> For the first time too, the Constitution declared the principle of separation of powers between the Executive, Legislature and the Judiciary.<sup>1099</sup> The three arms of the state, which had hitherto been subject to the tutelage of the single party, were now required to exercise their functions in accordance with the Constitution.<sup>1100</sup>

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1094 The Constitution names the Vice President, Prime Minister, Zanzibar President, all Ministers and the Attorney General (*ex officio*) as members of the Cabinet. See article 54(1) and (4).

1095 Article 37(1)

1096 Article 53(1) declares in fact that “*the Prime Minister shall be accountable to the President for the exercise of his authority.*”

1097 Art. 40(2)

1098 Art. 55(1)

1099 Art. 4(1) and (2)

1100 Art. 4(4)

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Given the traumatic experience of the October 1968 expulsion of rebel members due to their parliamentary opposition to party supremacy and the Imperial Presidency, the Eighth Amendment made parliamentary proceedings immune, and not liable to be questioned in any court or any other body outside the National Assembly.<sup>1101</sup> Following the enactment of these provisions in the Constitution, four years later, Parliament enacted the Parliamentary Immunities, Powers and Privileges Act, 1988, to give effect to the new power and authority of the National Assembly. Section 3 of the Act declared:

*“There shall be freedom of speech and debate in the Assembly and such freedom of speech and debate shall not be liable to be questioned in any court or place outside the Assembly.”*

This was not a first in our parliamentary history. For the colonial state had enacted the *Legislative Council (Powers and Privileges) Ordinance*<sup>1102</sup> since the 1950s. What was the first was that the new law was enacted on the strength of not only the Bill of Rights but also on the basis of specific protections of freedom of speech and debate in the National Assembly. These constitutional foundations gave the new law special significance.

But by far the most important reform brought by the Fifth Amendment was the introduction of the Bill of Rights into the body of the Constitution, from the wilderness of the preamble where it had languished since the Independence Constitution in 1961. Even though its justiciability was postponed for three years, the Bill of Rights was critical in the preparation for final assault on the one-party system that would take place a few years later. Under article 30(5), the High Court was given power to declare statutes void if they offended the provisions of the Bill of Rights. As a result of these changes, the late 1980s and ‘90s witnessed intense human rights litigation in the High Court and the Court of Appeal of Tanzania.

### **The Era of Reforms (1989-2015) – Return to Multiparties**

On 9 November 1989, the Berlin Wall fell in the then German Democratic Republic. The fall of the Wall was a culmination of a series of revolutions in the former Soviet satellites of Poland, Hungary, Czechoslovakia, etc. These revolutions would conclude with the disintegration of the Soviet Union itself on 26 December 1991. These developments in the Soviet system started a chain reaction which soon engulfed Africa, as one authoritarian one-party state after another succumbed to domestic and international pressure and introduced political changes in the form of a return to multiparty political system.

In Tanzania, President Ali Hassan Mwinyi, Mwalimu Nyerere’s successor, established a Presidential Commission, chaired by then former Chief Justice Francis Nyalali, to coordinate people’s views on the political future of the country. The Commission issued its report in February 1991. In a wide ranging report, the Commission recommended the

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1101 Art. 100

1102 Chapter 359 of Laws

re-introduction of the multiparty system in Tanzania.<sup>1103</sup> And in 1992 Tanzania officially returned to multiparty system of government after 27 years of a *de jure* one-party rule.

The Ninth Amendment to the Constitution, which brought multiparty politics back in, introduced wide ranging reforms affecting the entire political system, and parliament in particular. The principle of party supremacy was consigned to the dustbin of history, at least in theory. That is to say, all the provisions which had openly enshrined party supremacy and one-party system were done away with. Thus, in place of the old article 3 which had enshrined party supremacy, the new article 3(1) declared, as it still does today:

*“Tanzania is a democratic, secular and socialist state which adheres to multiparty democracy.”*

The composition and power of parliament also saw a sea change. Firstly, for the first since its inception in 1926, the National Assembly, had no appointed members in its ranks. Similarly, there was a drastic reduction in the number of indirectly elected members. Thus, for the October 1995 elections, there were 220 elected members; 5 indirectly elected members representing the Zanzibar House of Representatives; and 15 indirectly elected members representing women, and the Attorney General who remained as an *ex officio* member. So, out of 241 members, unelected or indirectly elected members comprised about 9 percent of the total, the lowest in the Parliament’s history.

Further amendments to the Constitution in December 1992 gave the National Assembly powers to impeach the President<sup>1104</sup>; as well as to confirm the President’s choice of a Prime Minister.<sup>1105</sup> Even though the procedure for impeachment is so cumbersome as to make impeachment practically impossible, these provisions further chipped away at the aura of invincibility the Imperial Presidency had attained since 1962. The Ninth Amendment also clarified the principle of collective ministerial responsibility, by introducing the provisions for a motion of no confidence against the Prime Minister.<sup>1106</sup>

The grounds for passing a motion of no confidence were stipulated as failure to discharge his functions as Prime Minister under article 52 and breach of the leadership ethics code.<sup>1107</sup> The motion could only pass if it is supported by a simple majority of the members present and voting.<sup>1108</sup> If passed successfully, the Speaker of the National Assembly is required to send the relevant resolution within two days and the Prime Minister would be required to resign immediately.<sup>1109</sup> His resignation would lead to the resignation of the entire Cabinet.<sup>1110</sup>

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1103 See U.R. Tanzania, *The Report of the Presidential Commission of Inquiry into Party Systems, Vols. 1, 2 and 3*, Government Printer, Dar es Salaam.

1104 Art. 46A

1105 Art. 51(2)

1106 Art. 53A

1107 Art. 53A(2)

1108 Art. 53A(5)

1109 Art. 53A(6)

1110 Art. 57(2)(e)

The National Assembly would use these new powers to force Prime Minister Edward Lowassa to resign rather than be sacked because of the Richmond Scandal in February 2008. However, the power of a no confidence motion remains largely illusory because it has continued to exempt the President who, even though he's not a member of the Cabinet<sup>1111</sup>, he nevertheless attends and chairs cabinet meetings<sup>1112</sup>, over and above his powers of appointment of ministers.

In the years that followed the reintroduction of multiparty politics in Tanzania, the National Assembly continued to grow in size, strength and prestige. This ascendancy went hand in hand with the growth and maturation of the opposition parties. For example, in the first multiparty parliament of 1995-2000 (the Seventh Parliament), opposition had a combined total of 55 members out of a total 269 members, or about 20 percent of the total.

Due to the implosion of the NCCR-Mageuzi party, which was the largest opposition party in Tanganyika, in the second multiparty parliament (the Eighth Parliament) of 2000-2005, the number of opposition members tumbled to 36 or about 13 percent of the total number of 268 members. The opposition remained static in the Ninth Parliament of 2005-2010, with a combined total of 43 members out of a total of 324 members, roughly 13 percent of the total.

However, the extra-parliamentary opposition grew rapidly during this period. This growth was brought about by two related factors. Firstly, the Ninth Parliament was a 'Bunge Live' parliament, that is to say, for the first time in the country's history, parliamentary proceedings were broadcasted live on national television. This generated public interest in parliamentary debates to unprecedented levels.

Members of parliament, particularly of the opposition, took advantage of the massive public interest and relative freedom of speech and debate that was encouraged in no small measure by the Speaker, the late Samuel J. Sitta, to unearth corruption scandals and abuse of power involving senior figures in the government of President Jakaya Kikwete. It was during this period that the National Assembly was able to force the resignation of Prime Minister Lowassa due to the infamous Richmond Scandal in February 2008.

The live broadcasts, and the performance of the National Assembly generally, and of the opposition members in particular, led to a much better showing in the general elections of 2010. This time, the combined total for the opposition accounted for 88 members out of a total of 350 members, or 25 percent of the total. Significantly, it was during the Tenth Parliament (2010-2015) that the locus of opposition politics in Tanzania moved from Zanzibar to Tanzania Mainland, with CHADEMA becoming the largest opposition in the country.

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1111 Article 54(1) lists the members of the Cabinet as the Vice President, Prime Minister, the President of Zanzibar and all Ministers.

1112 Art. 54(2)

The Tenth Parliament was also a Bunge Live parliament, and it generated even greater public interest with the performance of, particularly, the opposition members.<sup>1113</sup> As a result, during the 2015 general election, the combined opposition (this time in a coalition called UKAWA) garnered a total of 115 members in a parliament of 368 members. This was slightly over 31 percent of the total members.

The improving performance was also a result of the increased number of reserved seats for women, which jumped from 37 in the Seventh Parliament to over 110 in the Eleventh. The Constitution stipulates that reserved seats for women members shall not be less than one third of all other members.<sup>1114</sup> The reserved seats are allocated on a proportional system based on the performance of parties in the parliamentary elections. A party that obtains not less than five percent of the total parliamentary votes cast becomes entitled to allocation of the reserved seats.<sup>1115</sup>

Under this arrangement, the number of reserved seats for opposition has consistently grown, hand in hand with its improved performance in the general elections. Thus, in the Seventh Parliament, opposition parties garnered about 3 million votes out of a total of 6.8 million, or about 41 percent of the total. This gave the combined opposition nine reserved seat members out of a total of 37. In the Eighth Parliament, the proportion of the opposition parliamentary votes dropped to 2.5 million votes out of about 7.1 million votes, or about 35 percent of the total. As a consequence, the number of opposition reserved seats also dropped to seven, out of a total of 48 reserved seats, or about 15 percent of the total.

By the time of the 2005 general elections, however, the opposition was on the rise again, with 3.2 million votes out of a total of 10.8 million votes, or roughly 30 percent of the total. This tally gave the opposition 17 reserved seats out of a total of 75 reserved seats, or about 23 percent of the total. This rising curve continued into the 2010 general elections when the opposition scored 3.3 million votes out of a roughly 8 million total. This was about 40 percent of the total votes, which gave the opposition 35 reserved seats out of a total of 102 seats, or about 34 percent of the total number of reserved seats.

By the 2015 general elections, the opposition share of the total parliamentary votes had risen to 6.5 million votes out of about 14.5 million total, or 45 percent of the total parliamentary votes. This tally gave the opposition 46 reserved seats out of a total of 110 seats, or 42 percent of the total number of reserved seats. There is a noticeable discrepancy between the percentages of the total parliamentary votes for the opposition and its share of reserved seats. This variation is explained by the fact that most of the participating opposition parties did not reach the five percent threshold to be allocated reserved seats. Their combined votes were, therefore, not counted in the allocation of the reserved seats.

The most important point to take from these numbers is that, even with votes that go to waste because of not meeting the 5 percent requirement, the share of the opposition

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1113 The author was a member of the Tenth Parliament having won the Singida Mashariki (East) Constituency in the October 2010.

1114 Art. 66(1)(b)

1115 Art. 78(1)

parliamentary votes has consistently risen, as has its share of the reserved seats for women. Because of this strengthening of the opposition in and outside parliament, Tanzanian Parliamentarism has grown significantly. Its effectiveness in holding the government to account has also consistently increased. At least that was the story until the 2015 general elections and the rise to power of President John Pombe Magufuli.

## Chapter Five: The New Constitution-Making

Tanzanians have for decades demanded a new, democratic Constitution to replace the old authoritarian Constitution enacted in 1977. What is more, they have always demanded that the new Constitution should be a product of national consensus, facilitated by a more participatory, democratic constitution-making process. They have yearned for a Constitution which is, in the words of former Chief Justice Ismail Mohamed of South Africa, “*a mirror reflecting the national soul; the identification of the ideals and aspirations of a nation; the articulation of the values binding its people and disciplining the government.*”<sup>1116</sup> The hope has always been that a new democratic Constitution, enacted through a democratic, inclusive process, will enable our country to break from a tradition of imposed Constitutions that came with the British colonial state in the early 1920s.

These demands and yearnings have been echoed in government-commissioned reports and processes. The Nyalali Commission was the first to warn that the introduction of the multiparty system by itself was no guarantee for democracy. It observed:

*“It is clear that political competition consequent upon permitting multi-parties will enhance democracy and accountability of government and of elected leaders in the country. Even so, it is important to realise that having multi-parties alone is not a sufficient safeguard against the culture of authoritarianism, irresponsibility and malfeasance which have thrived over many years of monopoly of politics under the one party rule. The introduction of multi-parties should go hand in hand with greater freedom and autonomy for people’s organizations to enable them to defend their members’ interests. This is the only way to build a sustainable democracy.”*<sup>1117</sup>

*Elsewhere in its three volumes, the Commission was insistent: “Once again the Commission deems it prudent to reiterate that the question of democracy is not resolved simply by having many parties; the issue of democracy is not simply the question of more than one party or election of members of parliament! History has shown that a country can have many parties and still be authoritarian! The question of democracy is really the question of how the people are participating in the running of the country; it is the question of the democratic management of political parties and other people’s organizations; it is the question of the freedom with which the people are asserting themselves. All these issues relate to the expansion of the arena of democracy which is a permanent issue.”*<sup>1118</sup>

1116 Quoted in ‘Speech by the Minister for Justice and Constitutional Affairs, Hon. Celina O. Kombani (MP), at the Brief Ceremony to hand over the Offices of the Constitutional Review Commission’, 2 May 2012, in **Annexures to the Report of the Constitutional Review Commission, Annexure No. 8**, Government Printer, Dar es Salaam, p. 92.

1117 U.R. Tanzania, **Presidential Commission of Inquiry, Vol. 1**, op. cit., p. 51, para. 182; quoted in Shivji, *Let the People Speak*, op. cit., pp. 20-21

1118 *Ibid.*, p. 104, para. 417; quoted in Shivji, *loc. cit.*

The Nyalali Commission recommended two approaches to constitution-making. Firstly, it proposed interim measures intended to usher in the multiparty system. This included cleansing the legal order of all undemocratic and authoritarian laws, many of which, as we have seen, were retained from the colonial state at independence. The Commission identified forty such statutes.

The second approach was to establish a presidential commission to draft the three Constitutions – the Commission had proposed a fully-fledged federal system with both Tanzania Mainland and Zanzibar having their own autonomous governments and one Union government – which, once completed, would be presented to the people for debate. The drafts will thereafter be submitted to an elected Constituent Assembly for adoption; before being subjected to a referendum for enactment. The Commission rejected turning the existing National Assembly into a Constituent Assembly, a practice that started with the Tanganyika Independence Act and the 1960 Order in Council.

The Commission reasoned that the National Assembly, by then still a one-party parliament, was too partisan to be entrusted with the responsibility of making the Constitution for the whole country. It feared that the Constitution so brought about would lack the political legitimacy necessary for its survival. As the Commission explained, “*the Constitution of a country must be accepted by all its people who are the source of all authority in the country. It is from them that the government of the day, by means of a constitution, derives its authority, power and legitimacy to rule.*”<sup>1119</sup>

### **Warioba Commission Report**

Rather than taking the approach recommended by the Nyalali Commission, successive governments have always adopted the approach introduced by the colonial state as it departed from Tanganyika at independence. That is to say, turning the existing National Assembly into a constituent assembly for the purpose of making a new Constitution or amending an existing one. Thus, since 1992, the current Constitution has been amended six times, with all amendments being made by the National Assembly turning itself into a Constituent Assembly.

That was until 31 December 2010 when, during his New Year Message, President Jakaya Kikwete announced that his government was embarking on an unprecedented project to enact a new Constitution for the country. As he explained, after half a century of independence, the time had come for Tanzania to chart a new constitutional future which would serve the country for the next half a century.<sup>1120</sup>

This was a historic moment. As President Kikwete himself would later put it, this time the constitution-making process would be different:

*“This is not the first time for our country to write a new constitution, but it is the first time to have a specific legislation for the purpose, as well as*

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1119 Ibid., p. 93

1120 See ‘New Year Message by President of the United Republic of Tanzania, Dr Jakaya Mrisho Kikwete, to Tanzanians, 31 December 2010’, in Annexures to the Report ..., Annexure No. 1, *ibid.*, p. 16.



*a Constituent Assembly and a referendum. We have made constitutional changes in the past, but we did not have a specific law for that purpose; we have had constituent assemblies but they were unlike this one, and all previous changes did not end with a referendum.*"<sup>1121</sup>

It was a historic moment in terms of the popular participation in the constitution-making process which was unprecedented in the country's entire history. According to the Constitutional Review Commission which was appointed to, *inter alia*, coordinate the process, collect people's views and prepare a draft Constitution, some 1,365,337 people in the United Republic – 1,067,198 from Tanzania Mainland and 298,139 from Zanzibar – participated in meetings organised by the Commission. Of this number, 64,737 made oral submissions; 253,486 submitted written memoranda and 4,778 made both oral and written submissions.<sup>1122</sup>

But President Kikwete's vision suffered from several crippling disabilities. Firstly, it did not have the buy-in, and therefore the political support, of his party as well as the state establishment. Making a new Constitution had never been part of the CCM party program or its election manifesto during the 2010 General Elections. By contrast, the need for a new Constitution had always been an opposition and civil society demand, one which CCM and its governments had consistently opposed. The President's change of direction was, therefore, seen by many within CCM and the establishment as making unwarranted concessions to the opposition.

The second problem was a general distrust of the President's real intentions especially by the opposition. While generally welcoming President Kikwete's object of giving the country a new Constitution, the opposition parties were sceptical about his intentions. The scepticism grew when the Government presented its Bill for the enactment of the Constitutional Review Act in early 2011.

### **The Flawed Roadmap**

The Bill for the Constitutional Review Act, eventually enacted after acrimonious debates in and out of the National Assembly<sup>1123</sup>, made it clear to the opposition that the Government was intent on controlling the constitution-making process in ways which would have predetermined its outcome. The Act was passed on 1 December 2011 but, due to deep and widespread opposition to its provisions, it was amended hardly two months later, on 20 February 2012.<sup>1124</sup> It would be amended two more times<sup>1125</sup> and a completely

1121 'Speech by President of the United Republic of Tanzania, Dr. Jakaya M. Kikwete, at the Swearing in Ceremony for Members and Executive Officers of the Constitutional Review Commission', State House, Dar es Salaam, 13 April 2012, in Annexures to the Report ..., Annexure No. 4, *ibid.*, p. 57.

1122 'Statistics on Attendances in Meetings to Collect People's Views', in Annexures to the Report ..., Annexure No. 16, *ibid.*, p. 205

1123 Chapter 83 of the Revised Edition of the Laws of Tanzania, 2012

1124 *Constitutional Review (Amendment) Act, 2012, Act No. 2 of 2012.*

1125 See the *Constitutional Review (Amendment) Act, 2013, No. 7 of 2013*; and the *Constitutional Review (Amendment) Act, 2013, No. 9 of 2013.*

new legislation<sup>1126</sup> would be enacted to provide for a referendum to give the proposed Constitution the force of law.

The Act not only brought the pervasive influence of the Imperial Presidency into sharp relief; it also showed its limitations. As regards the former, the Act empowered the President to establish the Constitutional Review Commission<sup>1127</sup>; to appoint its Chairman, Vice Chairman and members<sup>1128</sup>, as well as its Secretary and Deputy Secretary.<sup>1129</sup> It also empowered the President to appoint members of the Constituent Assembly<sup>1130</sup>; to receive the report of the Commission<sup>1131</sup> and to direct its submission to the Constituent Assembly<sup>1132</sup>; to convene the Constituent Assembly<sup>1133</sup>, and to recall it for the purpose of amending the proposed Constitution.<sup>1134</sup> He even had powers to administer the oaths of office for the Clerk of the Constituent Assembly and the Deputy Clerk.<sup>1135</sup>

There were, however, important qualifications to the presidential power, which betrayed its limitations in the age of multiparty politics in Tanzania. One, because of the serious challenge on the Union brought about by the dramatic growth of Zanzibari nationalism<sup>1136</sup>, the Act provided important safeguards for Zanzibari interests. Thus, for instance, whereas the President had power to appoint the Commission's Chairman, Vice Chairman and members, he could only do so in consultation with the President of Zanzibar.<sup>1137</sup> In addition, the Act required that the members of the Commission had to be appointed equally from both Tanzania Mainland and Zanzibar.<sup>1138</sup>

Similarly, the secretariat of the Commission was to be headed by the Secretary and Deputy Secretary, both appointed by the President, but 'upon agreement with the President of Zanzibar', and on the condition that if the Chairman of the Commission came from one part of the Union, the Secretary shall come from the other.<sup>1139</sup> Other members of the secretariat were to be appointed by the Minister responsible for constitutional affairs in the Union Government, but 'in consultation with' his counterpart from the Revolutionary Government of Zanzibar.<sup>1140</sup>

The safeguards to Zanzibari interests also related to the submission of the report and its presentation to the Constituent Assembly. Thus, upon completion, the report of

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1126 *The Referendum Act, 2013, No. 11 of 2013*

1127 *Ibid.*, s. 5

1128 *Ibid.*, s. 6(1)

1129 *Ibid.*, s. 13(2)

1130 *Ibid.*, s. 22(3)

1131 *Ibid.*, s. 20(1)

1132 *Ibid.*, s. 20(3)

1133 *Ibid.*, s. 22(4)

1134 *Ibid.*, s. 28(2)

1135 *Ibid.*, 2. 24(5)

1136 In August 2010, Zanzibar enacted a major overhaul of its 1984 Constitution, introducing a Government of National Unity to resolve a political crisis that had gripped the Islands since the introduction of multiparty politics in 1992.

The 2010 amendments also redefined the relationship with the Union Government in such ways that made clear that Zanzibaris wanted full independence.

1137 *The Constitutional Review Act, op. cit.*, s. 6(1)

1138 *Ibid.*, s. 6(2)

1139 *Ibid.*, s. 13(2)

1140 *Ibid.*, s. 13(5)

the Commission was to be submitted to the President of the United Republic and the President of Zanzibar.<sup>1141</sup> Likewise, upon receiving it, the President was enjoined, upon ‘consultation and agreement’ with the President of Zanzibar, to direct the Chairman of the Commission to present the report to the Constituent Assembly.<sup>1142</sup> Furthermore, the President was given the power to convene the Constituent Assembly ‘in agreement with’ the President of Zanzibar.<sup>1143</sup>

There were three more crucial safeguards to the Zanzibari interests. These were, firstly, that the Constituent Assembly was to be composed of not less than one third of its members from Zanzibar.<sup>1144</sup> Secondly, the leadership of the Constituent Assembly was to mirror the principle relating to the leadership of the Commission, i.e. if the Chairman of the Constituent Assembly came from one part of the Union, then the Clerk of the Assembly had to come from the other part. Thirdly, the decisions of the Constituent Assembly regarding the proposed Constitution required the affirmative votes of two thirds majority of all members from both Tanzania Mainland and Zanzibar.<sup>1145</sup>

Zanzibari interests were also protected with regard to the proposed referendum, with the Act providing for the latter to be conducted under the *Referendum Act, 2013*, passed on 6 December 2013.<sup>1146</sup> Similarly, the referendum question was to be framed by the NEC in collaboration with the ZEC.<sup>1147</sup> And, lastly, for the new Constitution to become effective, it required passage in the referendum with the support of more than half of all the voters from both Tanzania Mainland and Zanzibar.<sup>1148</sup>

These safeguards were of crucial importance, because they guaranteed that Zanzibari interests, long ignored in processes of this nature, would be protected both in the inner workings of the Commission, but also in the outcome of its work. Thus, as a result of these safeguards, it came to pass that the Chairman of the Commission came from Tanzania Mainland, while its Secretary came from Zanzibar. Likewise, the Chairman of the Constituent Assembly was a Mainlander, while the Clerk came from Zanzibar.

The second qualification of the powers of the Imperial Presidency came in the form of the composition of the Commission, as well as of the Constituent Assembly. With regard to the former, the Government had essentially proposed the maintenance of *status quo*, with the President, in consultation with the Zanzibar President, being able to appoint all members of the Commission as they wished. However, due to opposition inside the National Assembly and outside, the Government was forced to agree to a broadening of the representation in the Commission.

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1141 *Ibid.*, s. 20(1)

1142 *Ibid.*, s. 20(3)

1143 *Ibid.*, s. 22(4)

1144 *Ibid.*, s. 22(2)

1145 *Ibid.*, s. 26(2)

1146 *Act No. 10 of 2013*. The Act was assented to by President Jakaya Kikwete on 30 December 2013.

1147 *Ibid.*, s. 4(3)

1148 *Constitutional Review Act*, op. cit., s. 36(1) and (2)

The concession came in the form of section 6(6) of the Act: For the purposes of appointment of members of the Commission,

“... the President shall invite fully registered political parties, religious organizations, civil society associations and institutions and any other group of persons under whatever name having common interest to submit to the President names of persons for appointment as members....”

This provision did not preclude the President from appointing persons outside the lists submitted by these interest groups.<sup>1149</sup>

But as it turned out, it would have been foolhardy for the President to ignore the lists submitted, especially by the opposition parties, as that would have deprived the Commission of any legitimacy in the eyes of the general public. Ultimately, therefore, the Commission appointed was not the same as all previous commissions in terms of its composition and, crucially, in terms of its work and eventual outcome. To a large extent, its composition reflected the diversity of political and social opinion in the country.

As for the composition of the Constituent Assembly, the situation was much more complicated. Here, too, the Government had proposed the maintenance of *status quo*, with the existing legislatures, i.e. the National Assembly and the Zanzibar House of Representatives, being combined and jointly transformed into the Constituent Assembly. Fearing domination of the Constituent Assembly by CCM, the opposition had, on the other hand, proposed the broadening of its representation, by the inclusion of representatives of other organised sectors of the civil society.

Eventually, a compromise was struck in which there were to be 201 more members of the Constituent Assembly, drawn from a wide range of social sectors.<sup>1150</sup> Fatally, these additional members were to be appointed by the President from lists submitted by the groups concerned.<sup>1151</sup> President Kikwete used these powers to pack the Constituent Assembly by appointing overwhelming numbers of CCM loyalists from this category of members of the Constituent Assembly. Such was the situation that of the 615 members of the Constituent Assembly, the opposition estimated that there were about 480 CCM loyalists and sympathisers.

As a roadmap for constitution-making, the Constitutional Review Act was deeply flawed. While it sought to chart a new course for constitution-making in Tanzania, as evidenced by the broadly democratic provisions that highlighted inclusiveness and participatory processes; it was held hostage by powerful forces that did not want any change to the *status quo*. These powerful forces ensured that ultimate power in the constitution-making process lay with the Imperial Presidency. This ultimate power eventually torpedoed the constitution-making process, and plunged Tanzania into the worst period of political repression in the country's history. But first the Commission's Report.

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1149 Ibid., s. 6(7)

1150 Ibid., s. 22(1)(c)

1151 Ibid., s. 22(2A)

## The Draft Constitution

The Warioba Commission, as it has come to be known because of its Chairman, former Prime Minister and Attorney General Joseph Sinde Warioba, is perhaps the most influential presidential commission in Tanzania's history, both in terms of the way it worked as well as in the political weight of its report. The latter, including a draft Constitution<sup>1152</sup>, is perhaps one of the most important state documents of the multiparty era in Tanzania. Here I will only analyse the Draft Constitution in so far it relates to the subject at hand.

## On Presidential Powers

The Warioba Report made far reaching recommendations intended to contain and democratise the Imperial Presidency. Admittedly, the Draft Constitution retained the Executive Presidency as the depository of the executive authority in the United Republic as well as most of the powers and prerogatives the President has enjoyed since the enactment of the Republican Constitution in 1962. Thus, the President remains the Head of State, Chief of Government and Commander in Chief.<sup>1153</sup> However, the Draft Constitution introduced important checks and limitations on the exercise of those powers. For example, it prohibited the transfer to the President of any powers specifically vested by law to any other person or authority.<sup>1154</sup>

Similarly, the Draft Constitution retained the presidential power to establish and disestablish public offices, and to appoint principal officers to those offices.<sup>1155</sup> However, the power was significantly qualified by the requirement for parliamentary confirmation; and the obligation to consider the advice given by governmental, legislative and judicial authorities in that behalf.<sup>1156</sup> Presidential appointments that were made subject to confirmation by the National Assembly included the Chief Cabinet Secretary and Head of the Civil Service.<sup>1157</sup>

Other presidential appointments subject to parliamentary confirmation were the Chief Justice and President of the Supreme Court and his Deputy<sup>1158</sup>; the Chief Administrator of the Judiciary<sup>1159</sup>; the Chairman, members and the Secretary to the Civil Service Commission<sup>1160</sup>; the Chairman, Vice Chairman and members of the Independent Electoral Commission<sup>1161</sup>, as well as the Director of Elections<sup>1162</sup>; and the Registrar of Political Parties.<sup>1163</sup>

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1152 In terms of section 19(1)(d) and (2), the Commission was enjoined to produce a report containing a Draft Constitution which was to be annexed thereto.

1153 *The Draft Constitution of the United Republic of Tanzania*, December 2013, Government Printer, Dar es Salaam, cl. 71

1154 *Ibid.*, cl. 70(4)(a)

1155 *Ibid.*, cl. 73

1156 *Ibid.*, cl. 73(3)

1157 *Ibid.*, cl. 105(1)

1158 *Ibid.*, cls. 158(1) and 159(1)

1159 *Ibid.*, cl. 178(1)

1160 *Ibid.*, cls. 186(1) and 187(1)

1161 *Ibid.*, cl. 190(3)

1162 *Ibid.*, cl. 195(1)

1163 *Ibid.*, cl. 198(1)

Others were the Chairman and Vice Chairman of the Leadership Ethics and Accountability Commission<sup>1164</sup>; the Chairman and Vice Chairman of the Human Rights Commission<sup>1165</sup>; and the Controller and Auditor General.<sup>1166</sup> The power to appoint, promote, discipline or terminate all other officers in the public services were to be exercised by the respective services commissions.<sup>1167</sup>

In stark departure from the tradition that started with the Republican Constitution in 1962 which exempted the President from any obligation to follow advice, the Draft Constitution boldly declared:

*“... The President shall have a duty to consider and follow the advice given by state authority, and where he disagrees with the advice given, he shall be required to give reasons to the Cabinet for not accepting the advice given.”<sup>1168</sup>*

The President was also precluded from accepting advice that is contrary to the Constitution or any existing law.<sup>1169</sup>

The Draft Constitution also addressed ‘the spectre of a minority President’ that was introduced to the current Constitution by the Thirteenth Amendment in 2000. It declared:

*“A candidate shall be declared to be elected president if he obtains more than fifty percent of the all valid votes cast in a presidential election.”<sup>1170</sup>*

If no candidate obtained that number of votes, there was to be a rerun of the election between the first two candidates.<sup>1171</sup> The Draft Constitution also proposed that the results of a presidential election should be liable to by a petition to the Supreme Court.<sup>1172</sup> The Supreme Court could void the results of the election, in which case there was to be a new election within sixty days from the date of the judgment of the Supreme Court.<sup>1173</sup>

The Draft Constitution also retained the two five year term limits to presidential tenure in substantially the same manner as the current Constitution.<sup>1174</sup> Powers to declare war<sup>1175</sup>; state of emergency<sup>1176</sup>; the prerogative of mercy<sup>1177</sup>, and immunity against criminal

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1164 Ibid., cl. 200(4)

1165 Ibid., cl. 208(4)

1166 Ibid., cl. 215(1)

1167 Ibid., cl. 73(4)

1168 Ibid., cl. 74(1)

1169 Ibid., cl. 74(2)

1170 Ibid., cl. 80(6)

1171 Ibid., cl. 80(7)

1172 Ibid., cl. 81(1)

1173 Ibid., cl. 81(5)

1174 Ibid., cl. 83

1175 Ibid., cl. 84

1176 Ibid., cl. 85

1177 Ibid., cl. 86

prosecution and other judicial process<sup>1178</sup>, were retained in substantially similar terms to the current Constitution, or with minor adjustments. As were impeachment procedures.<sup>1179</sup>

With regard to the Cabinet, the current system is essentially retained. However, there is one proposal that raises eyebrows. Clause 97(4) makes the Cabinet the principal organ to advise the President in the exercise of his powers. Subclause (5) precludes any inquiry by Bunge or the Courts relating to any advice that may have been given by the Cabinet. Considering the obligation to follow advice that is imposed on the President under the Draft Constitution<sup>1180</sup>; and considering that ‘major violation’ of the Constitution<sup>1181</sup> is one of the grounds for impeachment, this ouster clause may render nugatory any provisions intended to ensure the President conforms to the Constitution at all times.

Another significant departure from the current system is the proposal that ministers and their deputies should not be members of parliament, save that they may appear in parliament for specific purpose or for the purpose of making clarification on a matter being debated by parliament.<sup>1182</sup>

### **On Parliamentary Powers**

The Draft Constitution proposed fundamental changes to the composition, structure and powers of the Union Parliament. Firstly, the size of the Union Parliament was significantly reduced, essentially because of the federal three government system that the Draft Constitution proposed. Thus, the Union Parliament was to consist of seventy directly elected members, fifty of whom were to come from Tanganyika (the Commission having proposed the creation of separate Government for Tanganyika) and twenty from Zanzibar.<sup>1183</sup> Of this number, half of them were to be women.<sup>1184</sup>

Old habits die hard, as the English adage goes. This is especially true with regard to power to appoint members of the National Assembly which, as we have shown, has blighted the representative character of Tanzania’s legislature since colonial times. Thus, sitting incongruously with the democratic proposals of the Draft Constitution was the proposal that five members of the National Assembly were to be appointed by the President from amongst persons with disabilities, taking into representation of the partner states and gender equity.<sup>1185</sup>

The second fundamental change proposed by the Draft Constitution related to individual and collective ministerial responsibility to parliament. This principle, which defines the Westminster system and all other parliamentary democracies, was conspicuously absent from the Draft Constitution. However, the reason for the absence is neither sinister nor hard to find or justify. The structure proposed closely resembled

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1178 Ibid., cl. 87

1179 Ibid., cl. 88

1180 Ibid., cl. 74(1)

1181 Ibid., cl. 88(2)(a)

1182 Ibid., cl. 103(1)

1183 Ibid., cl. 113(2)(a)

1184 Ibid., cl. 113(3)

1185 Ibid., cl. 113(2)(b)

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the American constitutional tradition where ministers, though subject to parliamentary oversight, are not part of the parliament.<sup>1186</sup>

Echoing the American constitutional culture, Ministers and their Deputies were subject to parliamentary confirmation<sup>1187</sup>; as was the Principal Minister.<sup>1188</sup> Ministers could only attend parliamentary sessions or address the National Assembly upon invitation or permission of the National Assembly.<sup>1189</sup>

Given these paradigmatic changes, it is unclear as to how parliament may hold the government to account where it is not satisfied by any action taken by the government to implement any advice given by the parliament, as proposed by the Draft Constitution.<sup>1190</sup> This paucity of detail is compounded by the proposal to prohibit parliament from giving directives of an executive nature to the government or civil servants.<sup>1191</sup>

The third aspect of the Draft proposals which is significant relates to the constituent powers of the parliament. Here two matters stand out. Firstly, any amendment to the Constitution requires a special majority of two thirds of all members from both Tanganyika and Zanzibar.<sup>1192</sup> Secondly, the Constitution introduces the principle of entrenched provisions which can only be amended if they are supported by two thirds majority of voters of each of the partner states in a referendum.<sup>1193</sup>

The provisions that are entrenched are the United Republic of Tanzania; Fundamental Objectives and Directive Principles of State Policy and Fundamental Human Rights and Responsibilities of Citizens and state authority. Other entrenched provisions are the structure of the Union; qualification for election of the President; the list of the Union Matters; the existence of the United Republic and the requirement for referendum itself.

Perhaps the strangest and most concerning of the proposals relating to the powers of the Union Parliament relates to its revenue raising powers. Clause 121(1) retains in almost similar language the monopoly of the President and the government to raise revenue by imposing taxes. As we have seen, these restrictions are traced directly from the country's odious colonial past. The retention of this colonial relic in constitutional proposals that are otherwise thoroughly democratic is strange, to say the least.

There are further changes in the law-making process that are a welcome break from the tradition of Imperial Presidency. Firstly, the presidential veto over legislation can now be overridden by a two thirds majority of the parliamentary vote without the threat of dissolution of the parliament.<sup>1194</sup> Secondly, the government's stranglehold on the budget

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1186 *Ibid.*, cl. 101(2)(a)

1187 *Ibid.*, cl. 98(1)

1188 *Ibid.*, cl. 99(1)

1189 *Ibid.*, cl. 103(1), (2) and (5)

1190 *Ibid.*, cl. 116(1)

1191 *Ibid.*, cl. 116(2)

1192 *Ibid.*, cl. 118(2)

1193 *Ibid.*, cl. 119

1194 *Ibid.*, cl. 122(6)



process is now broken. In the event the government does not heed parliament's directives in respect of the budget for the second time, the proposals as varied shall be deemed to have been passed by the National Assembly.<sup>1195</sup>

### Showdown in the Constituent Assembly

On 3 June 2013, the Warioba Commission presented an interim report to the President. The interim report contained the first draft of the Constitution which, in terms of the Constitutional Review Act<sup>1196</sup>, was to be submitted to 'constitutional *fora*' for further debate and comment. The '*fora*' were ad hoc "... open and free public meetings, assemblies, gatherings or discussions organized by the Commission for purposes of collection of public opinions on the Draft Constitution."<sup>1197</sup>

As later events were to prove, the constitutional *fora* were neither open nor free. On the contrary, their participants were carefully selected<sup>1198</sup>, and their processes and procedures tightly controlled<sup>1199</sup> in ways which ensured their outcome did not deviate from the Commission's findings and recommendations. Indeed, when they deviated, their deliberations were simply ignored by the Commission, with Chairman Warioba telling a press conference on 26 September 2013, that the Commission would consider only the 'weight' of the arguments presented at the constitutional *fora*, rather than the number of the contributors.<sup>1200</sup>

The interim report, especially its first draft Constitution, was a bombshell. While it was widely hailed by opposition parties and the autonomous civil society organisations, it was greeted with venomous hostility by CCM and the Government. President Jakaya Kikwete had to calm some seriously frayed nerves on the day the interim draft report was presented to him:

*"I request you to remain patient and calm in debating the recommendations of the Commission contained in the interim draft constitution.... As we have heard and we shall read, ...some of the recommendations of the Commission, if accepted will change the shape of our country, especially our Union and the way we run some of our important affairs.*

*"I will repeat, as you have heard and as we shall read in the interim draft, some of the recommendations of the Commission, if accepted, will change the shape of our country, especially the structure of our Union and the*

1195 Ibid., cl. 123(2)

1196 Constitutional Review Act, op. cit., s. 18

1197 Ibid., s. 3

1198 See the 'List of Members of the District Constitutional *Fora*', Annexure No. 25 to the Annexures to the Report..., *ibid.*, p.275

1199 See 'Guidelines on the Structure and Procedures for the Appointment of Members of the District Constitutional *Fora*' (Annexure No. 24), and 'the Guidelines for the Constitutional *Fora* for Civil Society Organisations and Institutions and Groups of Like-Minded Persons' (Annexure No. 26), in Annexures to the Report..., *ibid.*, pp. 274-276.

1200 Whereas the Commission Chairman Judge Warioba repeatedly castigated 'political parties' for interfering with the deliberations of the constitutional *fora*, opposition parties complained in parliament that the *fora* had been hijacked by CCM with the help of the Commission! For Judge Warioba's complaints see Annexures 19A, B, C and 33 to the Annexures to the Report, *ibid.*, pp. 216-231, 357

*way we run some of our important affairs. Some of us may be shocked or get angry or excited. I ask you not to be like that, not to get angry with the Constitutional Commission or blame it. [W]e gave it the task of collecting people's views and making recommendations, they have done their duty, now it is our responsibility to come up with arguments, if any, to improve the recommendations.*"<sup>1201</sup>

Following the submission of the interim report, CCM and the Government went to task trying to change it. Its first line of attack was to use the constitutional *fora*, which had been packed with CCM loyalists in all levels of the local government structures that it has dominated for decades. The Commission had rejected the opposition demands that delegates to the constitutional *fora* should be freely and directly elected by all adult voters.

Instead, it adopted a system whereby delegates to all *fora* conducted in Zanzibar were directly elected; while those who participated in the *fora* conducted in Mainland Tanzania were local leaders and functionaries who had been elected during the 2009 local government elections. Needless to say, these elections had nothing to do with the constitution-making process.<sup>1202</sup> The hope was that these *fora* would overwhelmingly vote for the CCM positions, which they did, and sway the Warioba Commission to change the basic features of the interim report.

The tactic of relying on the district constitutional *fora* to change the Commission report did not work. By this time, the interim report – and with it its authors – had become so popular in the country that the Commission could not have changed it without completely discrediting itself and the entire constitution-making process. So, for once, the Commission refused to bend to the Government and CCM demands. Whereupon CCM and the Government brought out its remaining trump cards and weapons of last resort: the Imperial President and its overwhelming numbers in the Constituent Assembly.

Unlike the National Assembly which must be opened by the President after every general election, the Constitutional Review Act did not provide for a state opening of the Constituent Assembly. Instead, once the Draft Constitution was submitted to him and his Zanzibari counterpart<sup>1203</sup>, the President was obligated, within thirty days, to publish it in the *Gazette* and in local newspapers with a statement that it was to be presented to the Constituent Assembly for enactment.<sup>1204</sup> Thereafter, upon consultation and agreement with the President of Zanzibar, he was enjoined to direct the Chairman to present the Draft Constitution to the Constituent Assembly.<sup>1205</sup> He also had power to convene the Constituent Assembly by proclamation published in the *Gazette*, specifying the date thereof.<sup>1206</sup>

1201 'Speech by President of the United Republic of Tanzania, Dr. Jakaya M. Kikwete, in the Press Conference to Unveil the Interim Draft Constitution', Karimjee Hall, Dar es Salaam, 3 June 2013, in Annexures to the Report ..., Annexure No. 21, *ibid.*, pp. 236-237. Kikwete's speech was read on behalf by the Vice President, Dr. Mohamed Gharib Bilal.

1202 See footnote no. 243

1203 Constitutional Review Act, *op. cit.*, s. 20(1)

1204 *Ibid.*, s. 20(2)

1205 *Ibid.*, s. 20(3)

1206 *Ibid.*, s. 22(4)

Using its overwhelming majorities in the Constituent Assembly, CCM forced through changes to the Standing Orders of the Constituent Assembly to provide for the state opening of the Constituent Assembly by the President on 21 March 2014. They also almost succeeded in preventing the Chairman of the Commission from making a presentation of the Draft Constitution to the Constituent Assembly. Such was the hostility of the CCM delegates to Judge Warioba and his Commissioners that he was only allowed to make his presentation, for a mere thirty minutes, after the opposition delegates threatened a walkout if he was not allowed to.<sup>1207</sup>

President Kikwete's opening speech, a point by point denunciation of the Draft Constitution, set the tone for all CCM delegates and their surrogates to reject it; and personally attack and vilify the Commission and especially its Chairman, a respected former Prime Minister, Attorney General and a jurist of international renown. With the debates in the Constituent Assembly degenerating into an abusive slanging match between the CCM delegates who wanted to completely undo the work of the Commission, and the opposition delegates who insisted on its preservation, on 16 April 2014, all UKAWA delegates walked out of the Constituent Assembly, leaving CCM and its surrogates to completely rewrite the Draft Constitution and pass a proposed Constitution eerily similar to the current Constitution. That is the subject of the next part.

### **The Proposed Constitution**

On 2 October 2014, the remaining members of the Constituent Assembly overwhelmingly passed the reworked Draft Constitution (now called 'the Proposed Constitution'). The Proposed Constitution was a complete rejection of two years of constitution-making which had raised hopes that Tanzania was finally shedding its colonial and post-colonial political and constitutional legacies. It was a reaffirmation of constitutional and political *status quo par excellence*.

Firstly, with minor exceptions, the Proposed Constitution retains the essential features of the Imperial Presidency as it has evolved since the Republican Constitution. The President continues to be the Head of State, Chief of Government and Commander in Chief.<sup>1208</sup> He is, in the words of clause 80(2), "*the symbol and image of the United republic and her people*"<sup>1209</sup>; and "*a symbol of unity, independence of the state and its authority*."<sup>1210</sup> As such, the President shall exercise all other powers and functions not set out in the Proposed Constitution, which by their nature are exercised by the Head of State, Chief of Government and Commander in Chief.<sup>1211</sup>

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<sup>1207</sup> While the Chairman of the Commission, who was legally mandated to present the Draft Constitution to the Constituent Assembly was allowed half an hour to do so, President Kikwete – who had no right to appear before the Constituent Assembly – was not given any limitation of time to make his opening speech. Amos Wako, the former Kenyan Attorney General, who should never have been into the Constituent Assembly in the first place, was given two hours to make a presentation about the Kenyan experience!

<sup>1208</sup> The Proposed Constitution, October 2014, Government Printer, Dar es Salaam, cl. 80(2)

<sup>1209</sup> Ibid., cl. 80(2)(a)

<sup>1210</sup> Ibid., cl. 80(2)(b)

<sup>1211</sup> Ibid., cl. 81(2)

Also retained in similar language as in the current Constitution are the presidential powers to establish and disestablish public office<sup>1212</sup>; to appoint and terminate public officials<sup>1213</sup>, and to act in his absolute discretion without being bound by the advice of any person or authority.<sup>1214</sup> The two five year terms of office introduced by the 1984 amendments are also retained<sup>1215</sup> – as are powers to declare war<sup>1216</sup> and states of emergency<sup>1217</sup>; prerogative of mercy<sup>1218</sup>; immunity from criminal prosecution<sup>1219</sup>, and impeachment by the National Assembly under the same cumbersome procedure.<sup>1220</sup>

The President continues to appoint the Prime Minister in exactly the same manner as now<sup>1221</sup>; with the latter continuing to be leader of the government business in parliament as is currently the case.<sup>1222</sup> The Prime Minister and the other ministers continue to be collectively accountable to the National Assembly<sup>1223</sup>, which may pass a motion of no confidence against the Prime Minister.<sup>1224</sup> The President also continues to appoint other public officers such as the Attorney General and his Deputy<sup>1225</sup>; the Director of Public Prosecution<sup>1226</sup>; the Chief Cabinet Secretary<sup>1227</sup>; Regional Commissioners<sup>1228</sup>; all judges and justices of the superior courts and the chief registrar and administrator thereof.<sup>1229</sup>

The President is also the appointing authority for the chairmen, vice chairmen and members of all service commissions created by the Proposed Constitution. These commissions are the Judicial Service Commission<sup>1230</sup>; Civil Service Commission and its Secretary<sup>1231</sup>; Independent Electoral Commission<sup>1232</sup>; the Director of Elections<sup>1233</sup>; the Registrar of Political Parties and his Deputy<sup>1234</sup>; Public Leaders Ethics Commission<sup>1235</sup>; Commission for Human Rights and Good Governance<sup>1236</sup>; the Controller and Auditor

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1212 Ibid., cl. 82(1)

1213 Ibid., cl. 82(3)

1214 Ibid., cl. 83

1215 Ibid., cl. 92(1) and (2)

1216 Ibid., cl. 93(1)

1217 Ibid., cl. 94(1)

1218 Ibid., cl. 95(1)

1219 Ibid., cl. 96(1)

1220 Ibid., cl. 97(1)

1221 Ibid., cl. 110

1222 Ibid., cl. 111(2)

1223 Ibid., cl. 112

1224 Ibid., cl. 113(1)

1225 Ibid., cls. 118(1) and 119(1)

1226 Ibid., cl. 120(1)

1227 Ibid., cl. 121(1)

1228 Ibid., cl. 123(2)

1229 Ibid., cls. 175(1), 176(1), 177(1), 186(1), 187(1), 188(1), 194, 200(1) and 202(1)

1230 Ibid., cl. 204(1)

1231 Ibid., cls. 210(1) and 211(1)

1232 Ibid., cl. 217(2)

1233 Ibid., cl. 222(1)

1234 Ibid., cls. 225(1) and 226(1)

1235 Ibid., cl. 228(2)

1236 Ibid., 235(2)

General<sup>1237</sup>; the Joint Finance Commission<sup>1238</sup>; and the chiefs of the armed services and intelligence.<sup>1239</sup>

The Proposed Constitution also retained the National Assembly in substantially the same form it has been in the multiparty era: overshadowed by the Imperial Presidency. We will start with its composition. We know that the parliament has always had suspect representative character because of the presence of unelected or indirectly elected members. The Proposed Constitution continued this legacy of British colonialism. Firstly, continuing with a British constitutional tradition that is traced back to the late Middle Ages, the President remains a constituent part of the Parliament.<sup>1240</sup>

Secondly, continuing with the colonial constitutional tradition that is traced to the 1926 Order in Council, the Proposed Constitution continues with the practice of executive dominance of the National Assembly through the presidential power to appoint a certain number of the members thereof. Thus, whereas under the current Constitution the President can appoint up to ten members, under the Proposed Constitution he can appointed up to sixteen members, comprising of the ten members he can appoint in his absolute discretion<sup>1241</sup>, five that are to be appointed from amongst people with disabilities<sup>1242</sup> and the Attorney General.<sup>1243</sup>

The rest of the members of the National Assembly, ranging between 324 and 374<sup>1244</sup>, shall be directly elected by the people.<sup>1245</sup> Therefore, the proportion of unelected members is between 4 percent and 5 percent of the total number of members of the National Assembly. Their numbers may seem small, but their political significance is not. They serve as a reminder that the President, and therefore the executive, has greater influence in the legislature that is over and above his otherwise vast powers and influence in the legislative process. Compared to the first Multiparty Parliament of 1995-2000 which had no appointed members, this proposal was a significant step backwards in Tanzania's constitution-making.

Thirdly, there were other proposals which portended an even bigger retrogression to the single party attitudes of the late 1960s and 1970s. For, clause 132(1) of the Proposed Constitution gave power to the National Assembly to hold the government accountable if it was not satisfied by the government action on its advice. However, that otherwise laudable provision was immediately watered down by a *caveat*: “*The National Assembly shall not take any administrative steps which, by tradition, are the preserve of government.*”<sup>1246</sup>

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1237 Ibid., cl. 243(1)

1238 Ibid., cl. 252(1)

1239 Ibid., cls. 270(1), 273(1) and 276(1)

1240 Ibid., cl. 129(1)

1241 Ibid., cl. 129(2)(c)

1242 Ibid., cl. 129(2)(b)

1243 Ibid., cl. 129(2)(e)

1244 Clause 129(5) stipulates that the total number of elected and appointed members shall not be less than 340 and not more than 390 members.

1245 Ibid., cl. 129(3)

1246 Ibid., cl. 132(2)

Apart from the marginal note indicating ‘limitations on the exercise of the National Assembly powers’, no explanation was given to clarify what these ‘administrative steps’ are that the National Assembly is prohibited from taking.

This limitation on the oversight powers of the National Assembly was all the more significant because the latter has never had any administrative powers of any sort throughout its history. One is left to conjecture that may be what was intended here was a curb on the growing assertiveness of the National Assembly during the Ninth and Tenth Parliaments, which had led to resignations of numerous cabinet ministers and other senior government officials, including a Prime Minister.

Fourthly, the Proposed Constitution reinforced the presidential, therefore executive, dominance over the National Assembly in the law-making process, and in the day to day running of the National Assembly. One, it retained the principle that the National Assembly cannot initiate or debate money bills without the President’s express authorisation.<sup>1247</sup> Two, it continued with the provisions requiring presidential assent to bills, which – if withheld – can only be overridden at the risk of dissolution of the parliament.<sup>1248</sup> That was also the case with the passage of the government budget.<sup>1249</sup> Three, it retained the presidential powers of appointment of the Clerk of the National Assembly, the latter’s chief executive officer.<sup>1250</sup>

In view of this unabashed and significant maintenance of the *status quo*, one is entitled to ask if there is even any value in discussing the Proposed Constitution, given the fact that it was not even submitted to people of Tanzania for enactment through a referendum? In my judgment there is such value. Firstly, it is not entirely correct to assert that the Proposed Constitution did not change anything. Even though it largely maintained the *status quo*, it did propose certain changes to the system, some welcome and others troubling. I start with the welcome proposals for change.

Perhaps the most welcome change put forward by the Proposed Constitution relates to full gender equality in the composition of the National Assembly. The current doctrine on gender equity, introduced by the Multiparty Constitution of 1992, is the reserved seats – ‘Special Seats’ in legal and common jargon – for women. They constitute a full one third of all other members of the National Assembly under the current Constitution. These members are selected on the basis of the proportion of the total parliamentary votes of each party, provided it does not fall below five percent.

The provision of reserved seats for women was intended to give women the confidence and the means to participate in the political life of the country. It has failed in that endeavour. For example, even after twenty years of reserving seats for women, out of the 264 directly elected members during the 2015 General Elections, only sixteen (a mere six percent) were women. That is to say, out of the 133 members who make the total

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1247 Ibid., cl. 136(1)

1248 Ibid., cl. 137(1) and (6)

1249 Ibid., cl. 138(2)

1250 Ibid., cl. 151(1) and (2)

number of women members in the National Assembly, only twelve percent of them were directly elected by voters.

Instead of building confidence for women, there has arisen a special caste of women members who owe their presence in the National Assembly – and therefore political loyalty – to their party bosses, almost invariably men, rather than to voters, because it is the party bosses who determine the lists of candidates for the reserved seats and the order of preference that is used to decide who becomes a member and who does not in accordance with the party's allocation of the seats after the general election.

Rather than empowering them, Special Seats have become a way of emphasising the subordinate status of the women members. For instance, they cannot be appointed to the position of Prime Minister because the Constitution stipulates that only a directly elected member can be appointed to that prestigious position. This is demeaning not only to the many women concerned, but also to anyone who cares about redressing the historical and socio-cultural injustices caused by centuries of patriarchal systems.

The Proposed Constitution sought to put an end to this demeaning system. Taking its cue from the Draft Constitution submitted by the Warioba Commission, the Proposed Constitution declared that the category of directly elected members “... *shall consider equality of representation between men and women members.*”<sup>1251</sup> A year earlier, when the Commission published its interim report which contained this proposal, Chairman Warioba had explained its import thus: “*Each constituency shall have two members, one a woman and another a man.*”<sup>1252</sup> More importantly, both were to be directly elected.<sup>1253</sup>

Another welcome recommendation of the Proposed Constitution related to the limitations on the constituent powers of the National Assembly, by introducing a referendum in the amendment of certain entrenched provisions of the constitution. To put this recommendation in perspective, since the Independence Constitution the National Assembly has enjoyed and exercised almost unlimited constituent powers to amend or completely change the Constitution of the day. Needless to say, the constituent powers were widely abused to entrench an undemocratic and authoritarian constitutional and political order.

Taking its cue from the Draft Constitution<sup>1254</sup>, the Proposed Constitution recommended an important change, by bringing the people directly into the constitution-making process. Thus, it proposed that an amendment of any of the matters set out in the Third Schedule thereto, required not only the affirmative vote of the majority of the members of the Constituent Assembly, but also an affirmative vote of the majority of

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1251 Ibid., cl. 129(4)

1252 ‘Speech by the Chairman of the Constitutional Review Commission, in the Press Conference to Unveil the Interim Draft Constitution’, Karimjee Hall, Dar es Salaam, 3 June 2013, in Annexures to the Report ..., Annexure No. 22, *ibid.*, pp. 238-255, p. 246

1253 Proposed Constitution, *op. cit.*, cl. 129(3)

1254 Interim Draft Constitution, *op. cit.*, cl. 119

voters of both Tanganyika and Zanzibar in a referendum organised and supervised by the Independent Electoral Commission.<sup>1255</sup>

The Proposed Constitution also accepted the principle of independent members of the National Assembly. It declared:

*“... Any person shall be qualified for election or appointment as a member if ... he is a member sponsored by a political party or he is an independent candidate.”<sup>1256</sup>*

This was important given the longstanding opposition of CCM to non-party members holding elective offices in all levels of the country’s governance system. It is also important because it had the potential of loosening party stranglehold on members and the consequent strengthening of the guarantees for freedom of speech and debate in the National Assembly. This has been rendered difficult because members fear to lose their party membership and the automatic loss of parliamentary seats, if they speak out or vote against their party’s position.

This otherwise progressive proposal was, however, watered down and almost cancelled by two interconnected provisions of the Proposed Constitution relating to loss of qualification for a member. The first is that a member who voluntarily resigns membership of, or is dismissed from, his political party automatically loses his parliamentary seat.<sup>1257</sup> The second is that an independent member will also lose his seat if he joins any political party.<sup>1258</sup>

The two provisions were ill-thought out. They are clearly intended to discourage members from changing their allegiances once elected, rather than encouraging more freedom of speech in parliamentary debates. In other words, they contradict the very basis for having independent members, i.e. lifting the threat of disciplinary action against members who breach their party discipline by speaking or voting their consciences and against the positions of their parties. The best alternative would have been to adopt a procedure common in many countries where a member who loses their party sponsorship becomes an independent member rather than losing his seat and prompting a costly by-election.

Equally ill-thought out was the proposal that a member who fails to attend one session of the National Assembly without the speaker’s permission will lose their seat. Currently, the Constitution stipulates that a member who fails to attend three consecutive sessions of the National Assembly without the speaker’s permission loses his parliamentary seat. To illustrate the dangers of this provision, in the past one year alone, two opposition members from the largest opposition party, CHADEMA, have been dramatically stripped of their parliamentary seats on precisely the same ground as the one recommended by the

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<sup>1255</sup> Proposed Constitution, op. cit., cl. 134(1)(c). To be true, this was a watered down version of the Draft Constitution which had proposed a two thirds support of voters in a referendum.

<sup>1256</sup> Ibid., cl. 140(1)(c)

<sup>1257</sup> Ibid., cl. 143(1)(g)

<sup>1258</sup> Ibid., cl. 143(1)(h)



Proposed Constitution. One of them is this author who was at the time undergoing medical treatment in Belgium. following the assassination attempt of September 2017.

At lunchtime on 7 September 2017, unidentified gunmen followed this author from parliament in Tanzania's legislative capital of Dodoma, to his official residence. Outside his residence, the gunmen opened fire with automatic rifles from close range, hitting the author multiple times and seriously injuring him. He was rushed to a nearby government hospital for emergency treatment, and later airlifted unconscious out of the country for further specialised treatment. His treatment officially ended on 2 November 2019.

In the meantime, the National Assembly not only refused to pay for his statutory medical benefits, but on 29 June 2019, he was stripped of his parliamentary seat on the ground that he had, *inter alia*, not attended three consecutive sessions of the National Assembly without the Speaker's permission. It did not matter that he was attacked while attending parliament and that he was removed from the country with the speaker's knowledge and acquiescence and the whole world – including the speaker himself – knew he was abroad recovering from his terrible injuries.

A few months earlier, another opposition member from the same party as the author was stripped of his seat on similar grounds. This time, the absence was occasioned by the hospitalisation of the member's spouse. Given these precedents, this proposal is, and has in fact been proved to be, amenable to serious abuse.

There were other welcome proposals which will inform the debate on democratic elections for many years to come. The Draft Constitution had proposed a major overhaul of Tanzania's electoral management and supervision system. It had proposed the establishment of an Independent Electoral Commission appointed by the President upon recommendation of the Appointments Committee.<sup>1259</sup> The latter consisted of the Chief Justice of the United Republic as Chairman; the Speaker of the National Assembly of the United Republic as Vice Chairman; Speaker of the Zanzibar House of Representatives; Speaker of the Parliament of Tanganyika; the Chief Justice of Tanganyika; the Chief Justice of Zanzibar and the Chairman of the Leadership Ethics and Accountability Commission.<sup>1260</sup>

The Appointments Committee was enjoined to receive and consider the names of applicants for appointment to the Independent Electoral Commission.<sup>1261</sup> It could also receive recommendations in that regard from civil society organisations and other non-governmental entities.<sup>1262</sup> Thereafter, the Committee was obligated to shortlist the names of the applicants considered fit and qualified for appointment as Chairman, Vice Chairman and members of the Independent Electoral Commission and recommend the same to the President for appointment.<sup>1263</sup> Upon appointment, the President was enjoined to present the appointees to the National Assembly for confirmation.<sup>1264</sup>

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1259 Draft Constitution, op. cit., cl. 190(1) and (2)

1260 Ibid., cl. 191(1)

1261 Ibid., cl. 191(3)

1262 Ibid., cl. 191(6)

1263 Ibid., cl. 191(4)

1264 Ibid., cls. 190(3) and 191(5)

These recommendations of the Warioba Commission offered a major departure from an electoral system that has long been dominated by the long shadow of the Imperial Presidency. It was a pleasant surprise that, with the exception of confirmation by the National Assembly, they were largely accepted and adopted by the Constituent Assembly<sup>1265</sup>, even after the opposition delegates had walked out. Any future debate on the reform of the electoral system will, out of necessity, have these provisions as a starting point. That, alone, is a major achievement of the Warioba Commission and of the aborted constitution-making process it was a central part of.

### The Coup de Grace

On 8 October 2014, the Chairman of the Constituent Assembly, the late Samwel J. Sitta, presented the Proposed Constitution to President Kikwete in an elaborate ceremony in Dodoma. The presentation was right on the time prescribed by law.<sup>1266</sup> Once presented to him, the President was enjoined, ‘upon consultation and agreement’ with the President of Zanzibar and within seven days, to publish the Proposed Constitution in the *Gazette* and in local newspapers.<sup>1267</sup> Thereafter, the process of validating the Proposed Constitution in a referendum organised under the Referendum Act, 2013, was to follow.<sup>1268</sup>

As its preamble declared, the Referendum Act was specifically intended “... to provide legal and institutional framework for the conduct of referendum with a view to making decision by the people on the proposed Constitution....” Towards this end, the Act made elaborate provisions for powers and functions of the Commission in relation to the conduct of the referendum,<sup>1269</sup> referendum committees;<sup>1270</sup> voting procedure;<sup>1271</sup> and general provisions relating to declaration of results, campaign expenses, challenges against the results of the referendum, etc.<sup>1272</sup>

But all these elaborate provisions and the entire constitution-making process, which had taken three costly years in monetary and political terms, depended on one person to kickstart the referendum process: the President of the United Republic, ‘in consultation with’ the President of Zanzibar. The marginal note to section 4 of the Act conveyed the importance of this one person. It simply stated: ‘power to initiate a referendum.’ The section said the rest:

*“The President, in consultation with the President of Zanzibar shall, within fourteen days from the date of receiving the proposed Constitution, by order published in the Gazette, direct the Commission to conduct a referendum on the proposed Constitution.”*<sup>1273</sup>

1265 See Proposed Constitution, op. cit., cls. 217(1), (2) and 218(1), (3), (4), (5).

1266 Section 28A(1) of the Constitutional Review Act provided for the Proposed Constitution to be submitted to the President within seven days of it being passed by the Constituent Assembly.

1267 Ibid., s. 28A(2)

1268 Ibid., s. 28B

1269 The Referendum Act, op. cit., Part II

1270 Ibid., Part III

1271 Ibid., Part IV

1272 Ibid., Part V

1273 Ibid., s. 4(1)

In the order for referendum, in a form prescribed by the Schedule to the Act, the President was required to specify the proposed Constitution to be determined in the referendum; the time for the conduct of campaigns for the referendum; and the period within which the referendum was to be held.<sup>1274</sup> Once the order for the referendum was given, the next steps were to be undertaken within very strict timelines. Thus, for example, the Commission was enjoined, within seven days of the publication of the proposed Constitution, to frame and publish in the Gazette the question to be determined in the referendum.<sup>1275</sup>

Similarly, the Commission was required, within fourteen days after the publication of the referendum question in the Gazette, to specify the period for sensitisation and public awareness on the referendum; the day on which the referendum was to be held; and the polling time.<sup>1276</sup> Thereafter, every returning officer for the referendum was enjoined, within twenty one days of publication of the Commission's notice, to notify all voters in his constituency about the procedure for the conduct of the referendum.<sup>1277</sup>

As for civic education on the proposed Constitution, the Act provided for a period of sixty days from the publication of the proposed Constitution for the Commission to conduct civic education campaigns on the proposed Constitution.<sup>1278</sup> Apart from the Commission, civil society organisations could also conduct civic education with the Commission's leave, for a period of sixty days prior to the voting date.<sup>1279</sup> As for campaigns for and against the referendum question, a period of thirty days was provided for that purpose,<sup>1280</sup> whose period was to end a day before polling day.<sup>1281</sup>

These elaborate provisions came to nought. And the reason was simple, as it was telling: the Imperial Presidency. President Jakaya Kikwete did not exercise his 'power to initiate the referendum.' We can never tell whether or not he consulted the President of Zanzibar on the matter. Neither he nor his Zanzibari counterpart said anything one way or the other. All we know is he never published the Proposed Constitution in the *Gazette* within the fourteen days required by the Act, or at all.

So, President Kikwete did not direct the Commission to conduct any referendum. He did not specify the Proposed Constitution which was to be put on the referendum; nor specify the time for the campaigns for or against the Proposed Constitution. Above all, President Kikwete and his government never gave any reason, despite repeated demands in and out of Parliament, for this blatant and costly disregard for the people of Tanzania and for the one thing that would have defined his legacy for generations to come. He simply let the strict demands of the Referendum Act, and consequently the constitution-making process, lapse through sheer inaction.

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1274 Ibid., s. 4(2)

1275 Ibid., s. 4(3)

1276 Ibid., s. 5(1)

1277 Ibid., s. 5(2)

1278 Ibid., s. 5(3)

1279 Ibid., s. 5(4)

1280 Ibid., s. 16(1)

1281 Ibid., s. 16(3)

As a result, Tanzanians went to the General Elections in October 2015 under the authoritarian constitutional and political order founded on the Republican Constitution of 1962; elaborated under the *ancien regime* of the one-party Constitutions, and almost completely discredited by the time of those general elections. After the said general elections, that constitutional and political order could only be maintained by dictatorial methods characterised by the deployment of the instruments of state violence on a wide scale. That is the subject of the next chapter.

## Chapter Six: *Déjà-Vu* or Democratic Retreat?

The General Elections of October 2015 were perhaps the most consequential in Tanzania's multiparty history. For the first time, the opposition went into the general elections in a loose coalition called UKAWA (Umoja wa Katiba ya Wananchi – a People's Constitution Coalition) which had been born during the aborted constitution-making process of 2011-2014. Against UKAWA was a bitterly divided CCM, the ruling party, which had aborted the constitution-making process after a costly three-year exercise. The CCM nomination process was bitterly acrimonious, which led to the defection to CHADEMA and UKAWA, of the most influential of the CCM candidates, former Prime Minister Edward Lowassa.

In bitterly contested general elections, John Magufuli, the CCM candidate, obtained about 58 percent of the total presidential votes. The rest went to the UKAWA candidate Lowassa. In the parliamentary tussle, as we have seen, CCM got 55 percent of the total parliamentary votes, with UKAWA obtaining 45 percent. As against all of his predecessors, therefore, President Magufuli obtained the lowest tally of the presidential vote; as did his parliamentary candidates.

The opposition, on the other hand, emerged even stronger than ever before. It won more constituency and reserved seats than at any other period since reintroduction of multiparty politics in 1995. Its share of the presidential and parliamentary votes also increased more than at any other period in history; and so was its share of the state subvention, an important source of regular and assured income for political parties in Tanzania. Significantly, the opposition captured not only the top prizes in parliamentary and local government elections – control of four of the five major cities – it also made substantial inroads into traditional CCM territories. Clearly, CCM was in deep trouble. Desperate times call for desperate measures. Something drastic needed to be done.

Bernadeta Killian, a political science professor at the University of Dar es Salaam, had argued, in a 2006 publication, that the new rules that introduced multiparty politics in Tanzania “... were intended to liberalise the political system without necessarily democratising it.”<sup>1282</sup> Professor Killian said that the whole transition process was a result of a careful strategy by the ruling party to introduce plural politics without losing the grip on power. The constitution-making process and the general election that followed soon after loosened that grip on power significantly.

Although the National Assembly had become very powerful now, it still stood facing a President who was still extremely powerful. He retained his full powers over the civil service: he could still create and abolish offices and he could still hire and fire civil servants down to the lowest levels. He could still act without listening to anyone's advice. Above all, as Commander in Chief, he retained his grip on the military forces and the intelligence and security apparatus. This was very important.

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1282B. Killian, 'Comparing Performances: The 1990-1995 Single-Party Parliament and the 1995-2000 Multi-Party Parliament', in Mukandala et al., op. cit., p. 192

During the one-party rule, Tanzania had some of the most politicised armed forces on the continent. The armed forces as a whole constituted a special party ‘region’ which, unlike the administrative regions, had no geographical boundaries. The chief of the defence forces was the CCM chairman of that region, and each commander of its constituent units was chairman thereof. All members of the armed forces, including those who passed through the then compulsory national service program before going for higher studies or employment in the civil service or the government owned parastatals, were compelled to become CCM members.

After the reintroduction of the multiparty system in 1992, there was a conscious effort to delink the armed forces from the political influence of the ruling party. Similarly, with the enactment of the *Tanzania Intelligence and Security Service Act, 1997*, the extensive use of the intelligence and security apparatus as a secret political police in the mould of the Romanian Securitate or the East German Stasi was curbed. The TISS Act imposed legal prohibitions against the surveillance on political opponents of the government by the Service. It also deprived the security and intelligence functionaries of police powers. They could not lawfully arrest or detain any person for alleged breaches of the law.

With his election in 2015, President Magufuli brought back the intelligence and security apparatus into the front and centre of partisan politics. Without recourse to legislative changes to clothe their activities with a semblance of legality, the President has simply unleashed the intelligence and security apparatus in a war against the political opposition. Much of the extra-judicial killings, abductions and disappearances and torture of government critics in secret locations have all been blamed on the intelligence and security functionaries. Bombings of lawyers offices;<sup>1283</sup> abductions and detentions of prominent businesspeople; and the assassination attempt against the author on 7 September 2017, have all been linked to the activities of this new menace to the Tanzanian democracy.

Soon after his election, President Magufuli declared that he did not wish to see any opposition party in existence by the year 2020. He soon imposed an illegal ban on political activity by all political parties except his own. So, since the October 2015 elections, not a single party except CCM has been able to hold a single political rally or demonstration, all of which are provided for by the country’s laws. Even members of parliament belonging to opposition parties have been prevented from public meetings with their own constituents, with police bosses citing unspecified threats of a breach of the peace from unspecified ‘intelligence reports’. Even internal party meetings that are not regulated by law have been subject to police raids, beatings and arrests of opposition leaders and activists.

Life has been equally tough inside the National Assembly. Sensing that ‘Bunge Live’ and freedom of speech and debate inside Parliament had benefited the opposition

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1283 On the night of Friday 25<sup>th</sup> August 2017, the law offices of IMMA Advocates, the Dar es Salaam-based law firm, were bombed and damaged by unidentified people who claimed to be police officers chasing a thief who had allegedly entered the firm’s compound. The bombers arrested the private security guards, tied their hands and gagged them with duct tape before placing explosive devices in the building. At that time, Ms. Fatma Karume, one of IMMA’s senior partners, was representing the author in one of the numerous criminal cases opened against him between 2016 and 2017. Ms. Karume would be elected President of the Tanganyika Law Society, Mainland Tanzania’s bar association, succeeding the author who had held the position between March 2017 and 7 September 2017, when he was shot and seriously wounded in a failed assassination attempt.

during the Kikwete years, President Magufuli unleashed a particularly vicious attack on the National Assembly that is reminiscent of the darkest years of single party rule. The first session of the Eleventh Parliament saw Bunge Live being yanked off the air, allegedly to cut costs. That was followed soon after by a fifty percent reduction in the sittings of parliamentary standing committees and by steep cuts in committee budgets.

But by far the biggest threat to the National Assembly as a whole and to the opposition members in particular, has been a dramatic erosion of the freedom of speech and debate inside the Chamber. This threat emanates from outside the National Assembly but has been carried out by the Speaker, Deputy Speaker and other presiding officers of the National Assembly. It has come in a variety of forms and wearing different guises.

Firstly, using his wide powers to enforce the parliamentary standing orders, the Speaker has re-interpreted the rules of debate in such a way that there has been unprecedented censorship of the opposition members' speeches in the Debating Chamber. Thus, for example, it has now become a common rule, that is zealously enforced, to require the written speeches of the Shadow Cabinet members to be submitted to the Office of the Clerk of the National Assembly one day before they are formally tabled on the parliamentary floor.

Once tabled in that manner, the speeches are then given to government ministers who then mark out whole portions for redaction on grounds of violation of this or that standing order. That way, portions of speeches the government does not want aired are quietly censored without ministers and government back-benchers having to raise points of order which they have to justify on the debating floor. This undemocratic practice began during the final days of the Tenth Parliament under Speaker Anna Makinda; but it is during the Eleventh Parliament under Speaker Job Ndugai that it has been taken to a whole new level.

The second method used to kill freedom of speech and debate has been the widespread abuse of the Speaker's disciplinary powers to punish or intimidate opposition members. Under the parliamentary standing orders, a variety of penalties has been prescribed for infractions of the standing orders. Thus, a member who makes an untrue or false statement on the floor and fails or refuses to withdraw or retract it faces a penalty of suspension from the National Assembly for one session, i.e. one day. That is for the first offence. If it is a second offence, the member is liable for suspension for a period of five sessions; and if it is for a third offence or more, he can be suspended for a period of ten days, or be given any other penalty.

The democratisation phase in Tanzania has also come under severe stress outside the political parties and beyond the walls of Parliament. With a combination of state-orchestrated coercion and violence and a wide array of legal and extra-legal means, the Magufuli Government has sought to roll back the democratic gains that have been made since the Fifth Amendment in 1984. The fundamental rights of free expression and association have especially suffered, with the crackdown on free media and political freedoms of expression and assembly.

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Government critics in the media and civil society have been singled out for persecution with extra-judicial killings, disappearances, torture and legal persecution through trumped up charges in criminal courts being the most preferred weapons. Once the hallmark of the despotic colonial and post-colonial legal orders, repressive and anti-democratic legislation has become common under the Magufuli regime. Laws targeting lawful political activity, media freedoms and a wide variety of citizens' rights have been enacted during these five years. Authoritarian screws have been tightened around access to justice and public interest litigation. What has emerged is a despotic legal and extra-legal state reminiscent of the immediate post-colonial period.

Whereas in the earlier phases of this state it was legitimated by various nation-building ideologies which, in the case of Tanzania, played a significant hegemonic role, the new despotism does not have any legitimating ideology other than its mere maintenance in power and political survival. The argument now is that we cannot have democracy or rule of law or human rights simply because the President says so and he has control of the national security apparatus to enforce his will. Now we cannot have free and fair elections because, as President Magufuli himself said, he cannot pay fat salaries to election officers only for them to declare opposition candidates as winners in future elections.

### **General Elections 2020**

In October 2020, Tanzania goes to the polls again in the first General Elections of the Magufuli presidency. As expected, President Magufuli has just (11 August 2020) been nominated by CCM to defend his presidential seat. He will likely face off against his main challengers from CHADEMA<sup>1284</sup> and ACT-Wazalendo, Tanzania's two main opposition parties. In spite of the unprecedented violence and repression unleashed against it by the Magufuli administration, the political opposition is still alive and well. Indeed it may have grown stronger, if the intense competition for nomination for presidential, parliamentary and civic races evident in the primaries being held all over the country is any indication.

However, as the country prepares for these general elections, the political developments since 2015 raise very important short-, medium- and long-term issues on the future of parliamentarism in particular, and democracy generally, in the country. In the short-term, the question is whether President Magufuli and his government will allow any meaningful elections at all. That is to say, whether the Electoral Commission (NEC) that is mandated to conduct and supervise elections will allow the main opposition parties to field candidates for the various contested positions on offer during the forthcoming elections.

This is not an academic question, for the President and his government have already proved their utter contempt for the democratic process. The local government elections slated for November 2019 were not held because the election supervisors disqualified almost all candidates fielded by the opposition parties from running in the countrywide elections. The ostensible reason given for the wholesale disqualifications was that the opposition candidates had improperly filled in their nomination papers. CHADEMA, the

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<sup>1284</sup>This author is one of an unprecedented eleven party members who are vying for nomination by CHADEMA in the presidential election.



largest opposition party in the country, had 96 percent of its candidates thus disqualified. Candidates from smaller parties were similarly disqualified from running.

Consequently, all CCM candidates were deemed to have won the local elections unopposed. For the first time in Tanzania's entire post-colonial history, the lowest levels of the local government system are manned by unelected CCM officials. Buoyed by this 'success' in stealing the local elections, President Magufuli may be tempted to similarly steal the general elections, where the stakes are much higher and the prizes bigger.

But even without rigging, a substantial win for Magufuli in the October polls will have dramatic short- and medium-term consequences for Tanzania. Parliament will become even more marginalised than it has been these past five years. There already are disturbing portents of the things to come if he and his party are re-elected with bigger mandates than in 2015. There were, for example, very clear signals during the recently concluded budget session of the National Assembly that, should it happen, the presidential term limits will be removed to allow Magufuli to remain in power beyond the permissible term of two five year terms, which ends in 2025.

Similar calls were made, this time by former President Ali Hassan Mwinyi, in the recently concluded CCM national congress that nominated President Magufuli to defend his presidential seat. Should he win the presidency again, the calls for constitutional amendment to remove term limits will grow louder and almost irresistible. The urge to return the country to single party rule, in fact if not in law, will be great. As I have said, the President's barely concealed contempt for democracy has been eminently displayed during the five years of his first term. It will almost certainly become worse should he be re-elected with an increased mandate.

Apart from presidential term limits and threats on democracy, a win for Magufuli and CCM will also mean a continuation of the populist economic policies and anti-democratic practices that have brought the country to the brink of socio-economic and political disaster during these past five years. In the long-term, the Magufuli presidency marks the end of the presidentialism that has marked Tanzania's post-colonial political and constitutional history. At best, Magufuli will try to take Tanzania back to the discredited authoritarianism of the period from 1962 to 1984. At worst, the country will descend into an unfettered dictatorship that may eventually tear the country apart.

On the other hand, any post-2020 Tanzania that sees Magufuli and his party with diminished power will bring the central question of democracy and of presidentialism squarely back on the political centre stage. The unfinished business of the new constitution-making which was aborted in 2014 will commence again. This time it will have the added advantage of having gone through the catharsis of the Magufuli presidency. Just as Kenya went through the purgation of the Moi dictatorship in the 1980s and the post-election violence of 2007/08 to emerge with the new democratic Constitution of 2010, so will Tanzania emerge from the Magufuli dictatorship with a democratic new order.

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## Conclusion – How far have Our Parliaments Come?

The East African Parliament has come a long way from its beginnings in the early twentieth century East Africa. In its long journey, it has passed through several historical phases spanning the entire history of modern East Africa. In its early years which, in Kenya, ran roughly from 1905 to 1920, the Parliament was an unadorned façade to colonial despotism. In Uganda, this period ran roughly from 1920 to just before the end of the Second World War in 1945. In Tanganyika, the period ran from the creation of its Legislative Council in 1926 to just before the end of World War Two, as in Uganda.

We can now deduce the characteristic features of this early period as follows. Firstly, the Parliament was unabashedly white and thoroughly dominated by the colonial government. Even though there was an occasional Indian member, the East African Parliament of this early period was largely composed of white members. It was also totally dominated and controlled by the colonial executive. It was presided over by the colonial Governor, who also appointed all its members. Most of the latter were designated as ‘official members’, that is to say senior officials in the colonial administration. The ‘unofficial members’, largely European merchants and settler planters – and the occasional Indian merchant – were almost invariably a small, if often vocal, minority which did not affect colonial policy to any significant degree.

Secondly, the East African Parliament of this period was characterised by the complete disenfranchisement of the overwhelming majority of the residents of its territories, the colonial natives. The native African populations had no presence nor voice in these early Legislative Councils. The interests, if any, of these natives were represented by white members, invariably Christian missionaries, appointed by the Governor. This is not surprising, for the colonial project was essentially undemocratic and characterised by violent conquest, subjugation and despotism, all of which were rationalised by white supremacist ideologies.

Hand in hand with the disenfranchisement of the ‘semi-barbarous multitude’, the East African Parliament of this period was also characterised by complete non-representation and voicelessness of all women, be they black, brown, or white. This disenfranchisement of women should not surprise us either, for, even in the metropolitan centres of the Empire women did not secure franchise until after the end of the First World War, following decades of struggle by the suffragette and working-class movements in Europe and North America.

The third characteristic feature of the East African Parliament was its powerlessness *vis a vis* the colonial executive and the imperial government. Apart from the fact that its members were not only overwhelmingly colonial officials handpicked by the Governor, the Legislative Councils wielded no real powers. Their founding statutes made clear that the Legislative Councils were largely advisory bodies. In the language of those statutes, the primary function of these legislative bodies was ‘to advise and give consent’ to the Governor who wielded the real power “*to make laws for the administration of justice,*

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*the raising of revenue and generally for the peace, order and good government of the Territory.”*

Even then, and consistent with the primary objectives of the colonial project, the ultimate power lay with the imperial government in London, as the founding statutes typically

*“... reserved to His Majesty, His heirs and successors, His and their undoubted right, with the advice of His or their Privy Council, from time to time to make all such laws or Ordinances as may appear to Him or them necessary for the peace, order and good government of the Territory.”*

Thus, Bills passed by the Legislative Council required not only the assent of the Governor, but also, ultimately, that of the imperial Secretary of State.

Thirdly, the revenue-raising powers of these early colonial legislatures were severely circumscribed, with the founding statutes typically declaring that:

*“No member of the Council may propose any Ordinance, vote or resolution, the object or effect of which is to impose any tax, or to dispose of or charge any part of the public revenue, unless that Ordinance, vote or resolution shall have been proposed by the direction or with the express permission of the Governor.”*

The East African Parliament of this early period was, therefore, thoroughly undemocratic, an appendage of the colonial state *par excellence*. As Professor Kanyeihamba, the Ugandan jurist, has argued, this period was *“dictatorial and despotic, if not in practice, at least in law.”*<sup>1285</sup>

In the second phase of their history, roughly between 1919 and 1945 in Kenya and between 1945 and 1960 in Tanganyika and Uganda, significant changes occurred in the East African Parliament. Direct elections, albeit on a limited, racially based franchise, were introduced in Kenya in 1919. The franchise, still limited, was extended to Indians and Arabs in 1924. Native representation started, albeit with appointed members, in 1944. Direct elections for African members were introduced in Kenya and Uganda in 1957 and in Tanganyika in 1958. With direct elections, the composition of the Legislative Councils changed in favour of unofficial members, the latter attaining a majority in Kenya in 1948, in Uganda in 1956 and in Tanganyika by 1960.

By this time, the colonial state had abandoned its policy of maintaining white supremacy in the Legislative Councils towards a policy of multiracialism whose objective was to protect the vital interests of whites, Indians and other non-native residents in a rapidly changing political environment of the late 1950s. By 1960, multiracialism was also abandoned in favour of majority African rule. Women, at first white, members were admitted to the Legislative Councils during this time, with two white women admitted to the Uganda Legislative Council in 1954. Two years later, Mrs. Damali Kisosonkole,

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<sup>1285</sup> Kanyeihamba, *Constitutional and Political History...*, op. cit., p. 10

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the Nnabagereka (First Lady) of the Buganda Kingdom, became the first woman African member of the Legislative Council in East Africa.

The third historical phase of the East African Parliament, spanning a brief period between 1960 and 1966, saw the brief arrival onto, and the equally quick disappearance from, the historical stage by the Independence Parliaments. The colonial Legislative Councils seamlessly morphed into the independent National Assemblies. It is important to highlight the fundamental characteristics of this period. The first and most obvious is, of course, the fact that these were Independence Parliaments. They were, therefore, composed of the majority African members. Still, there were some vestiges of multiracialism, with a fixed quota of European and Indian members, in Tanganyika but none in Kenya and Uganda.

Secondly, in a sharp break from colonialism, the Independence Parliaments were the supreme organs of power and authority. In the typical Westminster tradition with its cabinet system, the executive – composed of the government led by the Prime Minister and the Governor General or, as in Uganda, the President as the titular head of state – was accountable to the National Assembly. The latter could bring the government down through a confidence vote. There were other sharp breaks. Thirdly, whereas the colonial Legislative Councils were uniformly unicameral, Independence Parliaments came with several divergences. Thus, for example, whereas the Tanganyikan and Ugandan National Assemblies were unicameral, the Kenyan National Assembly was bicameral with the House of Representatives and the Senate of the American variety.

The fourth characteristic feature of the Independence Parliaments related to their legislative and constituent powers. In this sense, the Tanganyika Independence Parliament was more akin to the Westminster Parliament, with fairly unlimited legislative and constituent powers. It could make and unmake laws and change the Constitution without constitutional inhibitions. Owing to their peculiar history, however, both the Kenyan and Ugandan Independence Parliaments had severely inhibited legislative and constituent powers. Uganda started its independent statehood as a federal state, with significant powers reserved to the Federal States, that is to say, to the Kingdoms and their respective legislatures.

The constituent powers of Uganda's first National Assembly were equally circumscribed, through the entrenchment of certain matters that were reserved for the Federal States such as the Kingdoms of Buganda, Bunyoro, Ankole and Toro and the Territory of Busoga. These entrenched provisions could only be changed through a complex amendment procedure requiring special majorities. This, too, was the case with the Kenya Independence Parliament. The latter was, as we have seen, bicameral owing to the history of constitution-making which ushered in independence in 1963.

It is also worth noting here that, unlike Tanganyika, Kenya and Uganda Independence Parliaments exercised their legislative and constituent powers in the context of Independence Constitutions which enshrined and entrenched an elaborate Bill of Rights, which inhibited their legislative and constituent powers still further. For these reasons,

the two National Assemblies had little in common with the Westminster parliamentary tradition.

There were, however, striking continuities between the colonial and the independence constitutional orders. Firstly, the newly independent countries adopted the old order of colonial laws. The typical provision in the Order in Councils, the legislative vehicles through which imperial Britain delivered independence to her colonies, almost invariably stated:

*“...the operation of existing laws after the commencement of this Order shall not be affected by the repeal of the existing Orders but the existing laws shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them in conformity with this Order.”*<sup>1286</sup>

‘Existing laws’ were defined as all Ordinances, laws, rules, regulations, orders and other instruments having the force of law made in pursuance to the existing Orders and having effect as part of the law of the three countries immediately before the commencement of the Independence Orders in Council. The retention of existing laws had dramatic implications on the post-colonial African constitutional and political development, which eventually led to the downfall of the democratic experiment which was promised by independence.

Secondly, following the colonial legislative tradition of reserving taxation powers to the executive, the Independence National Assemblies of the three countries were prohibited to pass certain financial measures, “... *unless the bill is introduced or motion is moved by a Minister.*”<sup>1287</sup> James McAuslan, the British legal scholar of East African constitutional and political development, would later argue about the restrictions on financial measures that they were intended to ensure that Parliament imposed “*only that taxation which [wa]s in accordance with the wishes of the government.*”<sup>1288</sup>

The colonial practice of packing the Legislative Councils through nominated or other indirectly elected members was also continued by the Independence Constitutions of the three countries. In this regard, Tanganyika was in a league of its own. Thus, the Governor General of Tanganyika was given the power to nominate a certain number of members of the National Assembly. Owing to the complexities of their ethnic politics, which were exacerbated by colonial rule, the composition of the Independence Parliaments in Kenya and Uganda was even more cumbersome than that of Tanganyika.

<sup>1286</sup> *The Tanganyika (Constitution) Order in Council, 1961*, clause 4(1). See also clause 1(2) of the *Uganda (Independence) Order in Council, 1962*; and Githu Muigai, **Constitutional Amendments and the Constitutional Amendment Process in Kenya (1964-1997): A Study in the Politics of the Constitution**, *A Thesis Submitted in Fulfilment of the Requirements of the Degree of Doctor of Philosophy of the Faculty of Law of the University of Nairobi*, September 2001, p., 89.

<sup>1287</sup> Constitution of Uganda, op. cit., art. 57; article 37 of the *Constitution of Tanganyika, 1961*, and article 60(2)(a) of the Constitution of Kenya, 1963

<sup>1288</sup> James P.W.B. McAuslan, ‘**The Republican Constitution of Tanganyika**’, *International and Comparative Law Quarterly*, Vol. 13, 1964, p. 533

For example, Uganda's National Assembly did not have members nominated by the executive. However, it consisted of directly elected members; 'specially elected members'; and, due to the peculiar role it had played throughout the colonial period, Buganda Kingdom was represented by 'the twenty-one members'. The latter were elected by members of the Lukiiko, the Kingdom's Legislative Assembly, instead of by the Buganda voters. So, as Professor Kanyeihamba says, Uganda's Independence Parliament was 'an anomalous body.' It was "*partly elected and partly nominated.... The Lukiiko indirectly elected the Buganda representatives while the rest of the representatives were directly elected by the people.*"<sup>1289</sup>

The architecture of Kenya's Independence Parliament was just as complex. The Senate comprised forty-one members representing forty districts and the Nairobi Area,<sup>1290</sup> was directly elected.<sup>1291</sup> The House of Representatives, on the other hand, was made up of single member constituencies, as well as 'specially elected' members.<sup>1292</sup> Whereas the constituency members were directly elected, 'specially elected' members were, like their Ugandan counterparts, elected by the House of Representatives sitting as an electoral college.<sup>1293</sup>

Kenya was, however, a halfway house between Westminster centralism of Tanganyika and the federalism of Uganda. Failure to agree a final settlement satisfactory to all sides had led the British Government to impose what "*... the Colonial Office thought was the right policy....*"<sup>1294</sup> The 'right policy' was a system of regionalism "*that (fell) short of true federalism*"; but involved "*the minimum possible number of regions*" and the least possible expenditure of money, which meant that seven regions were created.

The fourth phase of East African Parliamentarism saw the transformation of the independence constitutional settlements into strong, authoritarian presidentialist polities. In Tanzania, this phase began with the Republican Constitution of 1962 and lasted until the Fifth Amendment of 1984. In Kenya, it lasted between the First Amendment of 1964 and the Nineteenth Amendment of 1990. And in Uganda, it started with the military coup and the 'Pidgeon Hole Constitution' of 1966 until the enactment of Fifth Constitution in 1995.

The nascent parliamentary democracies envisaged under the Independence Constitutions were quickly subverted through apparently constitutionalist means, as in Tanganyika and Kenya, or through a military *putsch* as in Uganda. Within a year of their independence in 1961 and 1963 respectively, Tanganyika and Kenya had become republics, with their Presidents as Heads of State, Chiefs of Government and Commanders in Chief. Uganda waited a little longer, accomplishing the same feat four years after independence in a bloody military coup and the enactment of the 'Pidgeon Hole Constitution' in 1966.

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1289 Kanyeihamba, op. cit., p. 73

1290 Constitution of Kenya, 1963, op. cit., ss. 35 and 36(1)

1291 Ibid., s. 36(4)

1292 Constitution of Kenya, 1963, op. cit., s. 37

1293 Ibid., s. 39(2)

1294 Ibid., p. 125

The turn to republican presidentialism spelled the end of the East African Parliaments as institutions of power, authority and prestige. In Uganda, the parliament disappeared altogether during the twenty-five years of military and quasi-civilian rule that lasted from January 1971 to 1996. In Tanzania, the period between 1965 and 1985 witnessed what Dr. Mwakyembe has described as ‘the entombment of the National Assembly.’<sup>1295</sup> In Kenya, according to Muigai,

*Parliament dwindled in significance, becoming merely a rubber stamp for executive orders and decisions.*<sup>1296</sup>

The principal method employed in this process of entombment was to pack the parliament with appointed, nominated or other indirectly elected members, thereby diluting its composition and undermining its representative character. The Constitution was extensively used as an instrument in this regard. Thus, for example, between 1968 and 1974, a period of mere six years, the Interim Constitution of Tanzania was amended five times with the sole objective of changing the composition of the National Assembly.<sup>1297</sup> Kenya was even more blatant in this regard, with the Independence Constitution being amended twelve times during a five year period from 1964 to 1969.

Cumulatively, these amendments altered the content, structure and philosophy of the Independence Constitutions.<sup>1298</sup> The amendments fundamentally re-designed the structure of the post-colonial state and the entire basis of governance. Power and authority were centralised in the all-powerful executive that was nominally accountable to Parliament and not accountable to the Judiciary. The arena of independent political activity outside the ruling party was severely circumscribed, as in Kenya, or abolished altogether as in Tanzania.

These constitutional amendments achieved two things. First, in Kenya they completely destroyed *Majimboism* or regionalism and created a strong unitary state. In Tanzania they put paid to the democratic promise of the Independence Constitution as they returned the National Assembly to the democratic façade that it was during the colonial period. In Uganda, the same outcome – the destruction of federalism and parliamentary democracy – was achieved not through constitutional amendment but through the barrel of the gun.

Secondly, whether by constitutionalist or military means, the transformations from the Independence Constitutions to Republican Constitutions, “... *distorted the balance of power between the three arms of government by creating an all-powerful executive*

<sup>1295</sup>Mwakyembe, op. cit., p. 29

<sup>1296</sup>Loc. cit.

<sup>1297</sup>The amendments were as follows: *The National Assembly (Alteration of the Number of Constituency Members) Act, 1968, Act No. 56 of 1968; The Interim Constitution of Tanzania (Increase in the Number of Regional Commissioners) Act, 1971, Act No. 29 of 1971; The Interim Constitution of Tanzania (Increase in the Number of Regional Commissioners) Act, 1972, Act No. 10 of 1972; The Interim Constitution of Tanzania (Increase in the Number of Regional Commissioners) Act, 1974, Act. No. 3 of 1974, and The Interim Constitution of Tanzania (Increase in the Number of Constituency Members) Act, 1975, Act No. 10 of 1975.*

<sup>1298</sup>Ibid., p. 146

*presidency to which the legislature and the judiciary were subservient.*<sup>1299</sup> Through the amendments, the proportion of appointed or nominated or indirectly elected members rose steadily. By 1984, for example, the number of these members in the Tanzania National Assembly stood at about 54 percent of all members. Thus, as Tambila observed, by 1975,

*“the composition of parliament was such that the representative character of that institution was almost lost.”*<sup>1300</sup>

The second method used to ‘entomb’ the parliament was its subordination to the sole ruling party. In Tanzania this was achieved in 1965 when the Interim Constitution declared the country a *de jure* one-party state, thereby transforming TANU and later CCM into what Msekwa has called a ‘constitutional category.’<sup>1301</sup> Though using different means, the same ends were achieved in Kenya and Uganda which, by 1969, had become *de facto* one-party regimes. Soon after, Uganda would become, and for twenty-five years remain, a no party military dictatorship. For its part, Kenya waited until 1982 for it to join the *de jure* one-party bandwagon. The Republican Constitutions also retained the prohibitions of parliament from initiating money bills which had its origins in the colonial Legislative Councils.

The preponderance of unelected or indirectly elected members; the relegation of the National Assembly to a simple committee of the ruling party; making party membership a mandatory qualification for election, and its deprivation of the powers of control over policies of the state inflicted a lasting damage to the authority, power and prestige of the East African Parliaments. Thus, as Kjekshus argued, in Tanzania after 1968,

*“Parliament’s position became one where its functions (we)re negligible and ideally restricted to an august replay of consensus themes worked out in the process of Party deliberations of policy measures.”*<sup>1302</sup> In Kenya, as Muigai puts it, *“Parliament had become completely subdued by a bloated executive and ... settled to the role of a rubber stamp of party and executive decisions.”*<sup>1303</sup>

After two decades of the worst forms of authoritarian presidentialism, East Africa began to return to some modicum of democracy in the early 1990s. This is the fifth phase of East African Parliamentarism. In Tanzania, this process started with the Fifth Amendment to the Constitution which was introduced in 1984. It is still ongoing. With the Fifth Amendment, the National Assembly began to regain its power and authority. Its composition and, therefore, democratic character changed and became more representative. For the first time since 1970, directly elected members became a majority.

1299 Muigai, op. cit

1300 Tambila, op. cit., p. 62

1301 Ibid., p. 34

1302 H. Kjekshus, ‘Perspectives on the Second Parliament’, The Election Study Committee, University of Dar es Salaam, *Socialism and Participation: Tanzania’s 1970 National Elections*, Tanzania Publishing House, Dar es Salaam, 1974, p.

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1303 Ibid., p. 153



Party supremacy was also dealt a major blow, as the Constitution now declared that the National Assembly was the principal organ for oversight over and advice to the government and all its agencies. In the same vein, the amended Constitution proclaimed a return to collective ministerial responsibility that was lost under the Republican Constitution in 1962. There were other important changes to the Constitution which loosened the grip of the Imperial Presidency on body politic. For instance, the Fifth Amendment introduced the principle of presidential term limits which held any future President to a maximum two five year terms.<sup>1304</sup> In a region where presidential term limits have come under severe pressure, this innovation in Africa's constitutional and political tradition has largely held in Tanzania.

The President's power of appointment of cabinet ministers was also qualified with the requirement to consult the Prime Minister on such appointments.<sup>1305</sup> For the first time too, the Constitution declared the principle of separation of powers between the Executive, Legislature and the Judiciary.<sup>1306</sup> The three arms of the state, which had hitherto been subject to the tutelage of the single party, were now required to exercise their functions in accordance with the constitution.<sup>1307</sup> The Fifth Amendment also made parliamentary proceedings immune, and not liable to be questioned in any court or any other body outside the National Assembly.<sup>1308</sup> Hand in hand with the introduction of the Bill of Rights, the introduction of the parliamentary free speech attained special significance.

By far the most important reform brought by the Fifth Amendment was the introduction of the Bill of Rights. The High Court was given power to declare statutes void if they offended the provisions of the Bill of Rights. Even though its justiciability was postponed for three years, the Bill of Rights was critical in the preparation for final assault on the one-party system. This came in 1992, when Tanzania officially returned to multiparty system of government after 27 years of a *de jure* one-party rule. The Eighth Amendment to the Constitution, which brought multiparty politics back in, introduced wide-ranging reforms affecting the entire political system, and parliament in particular. The principle of party supremacy was consigned to the dustbin of history.

The composition and power of parliament also saw a sea change. Firstly, for the first time since its inception in 1926, the National Assembly had no appointed members in its ranks. Similarly, there was a drastic reduction in the number of indirectly elected members. Thus, for the October 1995 elections, unelected or indirectly elected members comprised about 9 percent of the total, the lowest in the parliament's history. Further amendments to the Constitution in December 1992 gave the National Assembly powers to impeach the President<sup>1309</sup>; as well as to confirm the President's choice of a Prime Minister.<sup>1310</sup>

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1304 Art. 40(2)

1305 Art. 55(1)

1306 Art. 4(1) and (2)

1307 Art. 4(4)

1308 Art. 100

1309 Art. 46A

1310 Art. 51(2)

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The Eighth Amendment also strengthened the principle of collective ministerial responsibility, by introducing the provisions for a vote of no confidence against the Prime Minister.<sup>1311</sup> However, the power of a no confidence motion remains largely illusory because it has continued to exempt the President who is not only the Head of State but the Chief of Government with powers to appoint the Prime Minister and all other ministers.

### **Gazing into the Future**

In the years that followed the reintroduction of multiparty politics in Tanzania, the National Assembly continued to grow in power, authority and prestige. This ascendancy went hand in hand with the growth and maturation of the opposition parties. A strengthened National Assembly; better organised opposition; freer press and an active civil society as well as less inhibitive government policies led to a much better showing for the opposition in the general elections of 2010 and 2015. Because of this strengthening of the opposition in and outside parliament, Tanzanian Parliamentarism has grown significantly. Its effectiveness in holding the government to account has also consistently increased.

The democratisation phase in Tanzania has come under severe stress since the 2015 general elections and the rise to power of President John Pombe Magufuli. With a combination of state-orchestrated coercion and violence and a wide array of legal and extra-legal means, the Magufuli Government has sought to roll back the democratic gains that have been made since the Fifth Amendment in 1984. The fundamental rights of free expression and association have especially suffered, with the crackdown on the free media and political freedoms of expression and assembly.

Government critics in the media, civil society and political parties have been singled out for persecution with extra-judicial killings, disappearances, torture and legal persecution through trumped up charges in criminal courts being the most preferred weapons. Lawful political activity has been largely prohibited by administrative fiat. Parliament, which had become such an important organ for holding the government accountable, has largely been rendered impotent with violence, intimidation and bribery of the opposition members.

Once the hallmark of the despotic colonial and post-colonial legal orders, repressive and anti-democratic legislation has become common under the Magufuli regime. Laws targeting lawful political activity, media freedoms and a wide variety of citizens rights have been enacted during these five years. Authoritarian screws have been tightened around access to justice and public interest litigation. What has emerged is the despotic legal and extra-legal state of the neo-colonial variety.

Whereas in the earlier phases of this state it was legitimated by various nation-building ideologies which, in the case of Tanzania, played a significant hegemonic role, the new despotism does not have any legitimating ideology other than its mere maintenance in power and political survival. The argument now is that we cannot have democracy or rule of law or human rights simply because the President says so, and he has control of the

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1311 Art. 53A

national security apparatus to enforce his will. Now we cannot have free and fair elections because, as President Magufuli himself said, he cannot pay fat salaries to election officers only for them to declare opposition candidates as winners in future elections.

As Tanzania prepares for the general elections slated for October 2020, these developments raise very important short-, medium- and long-term issues on the future of parliamentarism in particular, and democracy generally, in the country. In the short-term, the question is whether President Magufuli and his government will allow any meaningful elections at all. That is to say, whether the Electoral Commission (NEC) that is mandated to conduct and supervise elections will allow the main opposition parties to field candidates for the various contested positions on offer during forthcoming elections.

This is not an academic question, for the President and his government have already proved their utter contempt for the democratic process. The local government elections slated for November 2019 were not held because election supervisors disqualified almost all the candidates fielded by the opposition parties from running in the countrywide elections. The ostensible reason given for the wholesale disqualifications was that the opposition candidates had improperly filled in their nomination papers. CHADEMA, the largest opposition party in the country, had 96 percent of its candidates thus disqualified. Candidates from smaller parties were similarly disqualified from running.

Consequently, all CCM candidates were deemed to have won the local elections unopposed. For the first time in Tanzania's entire post-colonial history, the lowest levels of the local government system are manned by unelected CCM officials. Buoyed by this 'success' in stealing the local elections, President Magufuli may be tempted to similarly steal the general elections, where the stakes are much higher and the prizes bigger.

But even without rigging, a substantial win for Magufuli in the October polls will have dramatic short- and medium-term consequences for Tanzania. Parliament will become even more marginalised than it has been these past five years. There already are disturbing portents of the things to come if he and his party are re-elected with bigger mandates than in 2015. There were, for example, very clear signals during the recently concluded budget session of the National Assembly that, should it happen, the presidential term limits will be removed to allow Magufuli to remain in power beyond the permissible term of two five year terms, which ends in 2025.

Apart from presidential term limits, a win for Magufuli and CCM will also mean a continuation of the populist economic policies and anti-democratic practices that have brought the country to the brink of socio-economic and political disaster during these past five years. In the long-term, the Magufuli presidency marks the end of the presidentialism that has marked Tanzania's post-colonial political and constitutional history. At best, Magufuli will try to take Tanzania back to the discredited authoritarianism of the period from 1962 to 1984. At worst, the country will descend into an unfettered dictatorship that may eventually tear the country apart.

On the other hand, any post-2020 Tanzania that sees Magufuli and his party with diminished power will bring the central question of democracy and of presidentialism squarely back on the political centre stage. The unfinished business of the new constitution-making which was aborted in 2014 will commence again. This time, it will have the added advantage of having gone through the catharsis of the Magufuli presidency. Just as Kenya went through the purgation of the Moi dictatorship in the 1980s and the post-election violence of 2007/08 to emerge with the new democratic Constitution of 2010, so will Tanzania emerge from the Magufuli dictatorship with a democratic new order.

As regards Uganda, the period that followed the restoration of constitutional rule in 1995 has seen the consolidation of the ‘hybrid regime’, with President Museveni clinging onto power through state-orchestrated violence, political repression, ethnic nepotism and political patronage. Initially proclaimed as one of the ‘new breed’ of African leaders, he has transformed himself into a ‘self-styled life president’, to use the phrase coined by the Uganda Constitution Commission. He started by removing presidential term limits in 2005 but, after realising the limits of revising his age downwards, he removed constitutional age limits altogether.<sup>1312</sup> Already one of the longest serving Presidents in the continent, Museveni is now slated – as a result of these manoeuvres – to rule Uganda for as long as he is alive.

But at the age of 76, the clock for a post-Museveni transition is already ticking. As in Tanzania, that transition will not only concern the question of who the next occupant of the presidential seat is. It will also concern the issue of the presidency itself. As the post-colonial history of Uganda itself has shown, an Imperial Presidency – whether of a civilian hue, as in Milton Obote; or a military one as in General Idi Amin; or of a ‘hybrid’ variety, as in the current quasi-civilian regime – can only rule Uganda through dictatorial means. Imperial Presidency of the African vintage is, as Wanjala, the Kenyan jurist, wrote in 1993, “... *an executive monarchy whose very features are undemocratic*....”<sup>1313</sup>

On the other hand, the brief history of the Independence Constitution with its controversial federalism and parliamentary democracy offers an important lesson in the opposite direction. It was the only system that reflected and respected the multi-national and multi-ethnic reality of that creature of British colonial rule called Uganda. No wonder the only period that Uganda did not experience political turmoil, state-orchestrated violence and dictatorship was between 1962 and 1966, the period of the Independence Constitution. Federalism and parliamentary democracy, the twin pillars of the Independence Constitution, will therefore take centre stage in any discussion of the post-Museveni Uganda.

Kenya is in a league of its own in this phase of democratisation. With the enactment of the new Constitution in 2010, Kenya can be said to have concluded the fifth phase of parliamentarism which, for that country, started in 1990. During this twenty-year period, Kenya travelled through the road of a multiparty parliament still dominated by the

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<sup>1312</sup> On 20 December 2017, the Ugandan National Assembly passed the **Constitution (Amendment) Act, 2017**, which amended article 102(b) of the Constitution to remove the age limits for presidential candidates. Prior to the Amendment, the Constitution prohibited anyone younger than 35 years of age or older than 75 from serving as President of Uganda.

<sup>1313</sup> Wanjala, *op. cit.*, p. 88

Imperial President to a parliament where the President was no longer permitted to appoint members thereof, to the current American-style bicameral parliament where government ministers are totally absent. Executive power has also been extensively decentralised with the creation of strong regional governments which are protected from the machinations of the central government by a system of strong checks and balances entrenched in the Constitution.

Life has not stopped since the enactment of the 2010 Constitution. If anything, the Kenyan people have shown no sign of diminishing their appetite for constitutional amendment. For since 2010, thirteen bills for amendment of the Constitution have been published in the Gazette. These bills have almost invariably been presented through ‘parliamentary initiative’ in terms of article 256 of the Constitution. The bills have been concerned mostly with the consolidation and refinement of the new political and constitutional order brought about by the 2010 Constitution. None has sought to challenge its fundamental pillars. Even the Building Bridges Initiative, which seeks to recast certain features of the executive and legislative organs, is intended to smoothen the workings of the new constitutional order, not to remake it.

So far none of these individual member initiatives has succeeded. Even the BBI, which enjoys the crucial support of the President and the principal leader of the opposition, has not garnered the unqualified support of all major political forces in the country. Nevertheless, these initiatives are proof of two important points. The first is the vitality of the new Kenyan democracy. Never in the history of East African Parliamentarism has there been any such independent legislative initiative as we have witnessed in Kenya since 2010. Such legislative initiative has always been the preserve of the executive, one more proof of the dominance of the executive in the law-making process.

The second important point is that the failure, thus far, to bear results of these independent legislative initiatives points to the stability and general acceptance of the evolving constitutional order. This is startling, especially when measured against the history of constitution-making since independence. Thus, between 1963 and 2010, there was on average one constitutional amendment per every year one and seven months, with the first ten years witnessing twelve amendments. By comparison, there has not been any single amendment of the new Constitution in the decade since its enactment in 2010.

But even Kenya, with its democratic transformations, is not without potential difficulties in the medium- and long-term. With regard to the former, the BBI is likely to result in a new realignment of political forces in Kenya, with the *rapprochement* between the two main historical protagonists of Kenyan politics, the Kikuyu around the Kenyatta family and the Luo around the Odinga family. The Constitutional tinkering proposed by the BBI is intended to accommodate this realignment. Put simply, any loser of future presidential elections will be guaranteed the vastly improved position of the Leader of the Official Opposition, while the leader of the majority party in parliament, likely from a different ethnic group from that of the President, will take the lucrative position of the

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Prime Minister. This horse-trading will likely calm the nerves of the main political players in the short- and medium-term.

In the long-term, however, there is one major issue concerning the political system that remains unresolved: presidentialism or parliamentarism. There is no doubt that the current Kenyan presidency is a far cry to the Imperial Presidency of the period between 1964 and 2010. Its massive constitutional powers have been clipped, while the parliamentary power has been vastly augmented. It also does not enjoy the historical legitimacy associated with the first Independence Government of Mzee Jomo Kenyatta; nor does it have the command of the coercive machinery and administrative apparatus that Moi inherited from Kenyatta.

However, as Professor Anyang' Nyong'o has argued, "*a strong parliamentary democracy cannot co-exist with an executive presidency which suffocates it and always tries to run it out of town.*"<sup>1314</sup> There already are bad omens of the presidency instigating a purge of parliamentary leaders thought to be hostile to the BBI; as well as trying to co-opt the main opposition party. As we have seen, this is precisely what the first Independence Government of Jomo Kenyatta and KANU did with regard to KADU. Obviously, so much water has passed under the Kenyan political bridge. But the bitter lessons of history should never be forgotten in the quest to construct a more workable democratic order.

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<sup>1314</sup>Anyang' Nyong'o, *Presidential or Parliamentary Democracy...*, op. cit., p. 168

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In this book Tundu Lissu, one of the sharpest and loudest political voices in today's Tanzania, traces the evolution of parliaments in the East African countries of Tanzania, Kenya and Uganda. From their origins in the British colonial period, he argues, East African parliaments have – with fleeting exceptions - been in the shadow of the all pervasive executive power, personified by the colonial governors and the post-colonial executive presidents. With the tenuous exception of Kenya, they remain in the shadow of the Imperial Presidency. And as long as that remains the case, he asserts, democracy, accountability, rule of law and all of the attributes of a liberal democratic order remain imperiled.



The book is a ringing indictment of the presidentialist system of government in existence for nearly six decades. Drawing extensively from literature on the subject, and from the political and constitutional history of the three countries, Mr. Lissu makes a powerful case for a return – on a higher democratic plane – to the democratic ideals of the Independence Constitutions of the three states. That brief period was characterized by powerful parliaments, accountable governments and peaceful, free and fair elections. It was, as a Uganda Constitutional Commission would later describe it, ‘the Era of Good Feeling’ because a liberal democratic constitutional order appeared to be working.

Given the entrenchment of that system and the powerful vested interests it has created and serves, the book will most certainly spark stormy political and academic debate. If it does so, it will have served its purpose and justified the time and the expense of its writing.

Tundu Antiphias Lissu was born in rural Singida, Central Tanzania on 20 January, 1968. He trained as a lawyer at the Faculty of Law of the University of Dar es Salaam, where he graduated with honours in 1994. He later attended the School of Law of the University of Warwick in the English West Midlands, graduating with distinction in 1996. A practicing lawyer, Mr. Lissu has previously served as President of the Tanganyika Law Society, Tanzania Mainland's national bar association.

A militant political activist throughout his adult life, he was an opposition member of the Tanzanian National Assembly between 2010 and 2019. He is also the national Vice Chairman of CHADEMA, the main opposition party in Tanzania, and was its presidential candidate in the 2020 general elections. He lives with his wife in the Flemish town of Tienen, Belgium.

