CONSTITUTION MAKING PROCESS-TANZANIA CASE STUDY

BRIEF HISTORY

The Constitution of the United Republic of Tanzania was enacted by the Constituent Assembly (CA) April 25, 1977 and promulgated April 26, 1977. Up until the Constitutional Review Process started, the current constitution of 1977 had been subjected to 14 amendments. The last amendment to the 1977 Constitution was in 2005.

For over 35 years, the 1977 Constitution has enabled and guided the United Republic of Tanzania to make considerable milestones and successes politically, economically and socially. It is for a fact that the progress made politically, economically and socially in the country and abroad triggered demands for changing the constitution. The citizens including politicians, activists, development and social partners, academicians, farmers and workers saw the need for changing the constitution. While some had suggested minimal amendments to certain areas in the constitution others saw the 1977 constitution as outdated and a new constitution should be written.

Despite several efforts made by the government of Tanzania to amend the constitution so that it effectively respond to societal concerns and issues, as time went, citizens continued to demand for a new constitution. Some of the issues raised by the people that needed immediate attention was such as the establishment of an Independent Electoral Commission, The structure of the union that responds to present and future needs and realities, the existence of independent candidate, to control and monitor excessive election campaign financing and most of all people wanted the 1977 constitution scrapped since it had too many patches and a new one to be drafted. The people also wanted to have specific and substantive provisions to spell out accountability principles for our leaders and civil servants and to provide constitutionally a procedure of getting public leaders. Moreover the people saw the 1977 constitution being lenient to single party and hence failing to support efficiently the multi-party system of democracy.

THE PROCESS

Tanzania embarked on a Constitutional Review Process in 2011 after the announcement by His Excellency Dr. Prof. Jakaya Kikwete President of the United Republic of Tanzania during his end of the year 2010 public address. This historic announcement was followed by a parliamentary process to enact a regulatory framework, the Constitutional Review Act of 2011 to provide guidance in the process that will lead Tanzanians getting their new Constitution. The CRA 2011 underwent several amendments that were meant to improve it and to broaden participation of key stakeholders and citizens as highlighted bellow;-

Amendments made to the Constitution Review Act, Chapter 83

Constitutional Review Act, Chapter 83 was amended three times since it was enacted and passed by the Parliament of the United Republic of Tanzania. The following are the amendments made to:

First Amendment

The first revision took place in the early stages of implementation of the Constitutional Review Act. These amendments were submitted and approved by the Parliament on 10 February, 2012. At its Eighth meeting the Parliament staged the following amendments:

(a) The President of the United Republic and President of Zanzibar to consult and agree on all the fundamental matters about the Constitutional Review process;

(b) Having the same number of members of the Commission from two sides of the Union;

(c) The appointment of the Chairman, Vice Chairman, Secretary and Deputy Secretary to consider the two sides of the Union; and

(d) Constituent Assembly to have representatives from both sides of the Union, voting in the Constituent Assembly to be two thirds for each side of the Union and a referendum vote to approve the Constitution of the United Republic to be determined by more than 50 percent on each side of the Union.

The Second Amendment

At the session of the National Assembly in September, 2013 amendments made concerned the provisions of the composition of the Constituent Assembly, the order of operations in the Constituent Assembly and dissolution of the Constitutional Review Commission.

Third Amendment

Third Amendment of the Constitution Amendment Act took place on the 13th meeting of the Parliament of the United Republic of Tanzania in November, 2013. The amendments concerned the increase in the number of members from specific categories in the composition of the Constituent Assembly from 166 to 201, the removal of texts which referendum issues and issues of voting in the Constituent Assembly.

CONSTITUTIONAL REVIEW STAGES

The CRA CAP 83 in section 9, 18 and 25 provides the first to the third stage of the review process. The CRA CAP 83, 2013 version has removed sections pertaining to

the fourth stage and those sections have been transferred to the Referendum Act of 2014.

Stage I: Collecting citizens views and opinion for the New Constitution

Section 9 of the CRA CAP 83 states that “(1) The functions of the Commission shall be to: (a) co-ordinate and collect public opinions; (b) examine and analyse the consistency and compatibility of the constitutional provisions in relation to the sovereignty of the people, political systems, democracy, rule of law and good governance; (c) make recommendations on each term of reference; and (d) prepare and submit a report.

(2) In the implementation of the provisions of subsection (1), the Commission shall adhere to national values and ethos and shall, in that respect safeguard and promote the following matters: (a) the existence of the United Republic; (b) the existence of the Executive, Legislature and the Judiciary; (c) the republican nature of governance; (d) the existence of Revolutionary Government of Zanzibar; (e) national unity, cohesion and peace; (f) periodic democratic elections based on universal suffrage; (g) the promotion and protection of human rights; (h) human dignity, equality before the law and due process of law; and (i) existence of a secular nature of the United Republic that does not inclined to any religion and that respect freedom of worship...”

This section gave the Tanzanian citizens a lifetime opportunity that has never been granted before, to give freely their opinions on what kind of constitution they would like to have. In the beginning people thought that there were “sacred” matters that people were restricted from giving their opinion on, such matters included the existence of the United Republic, structure of the union and so forth.

The truth remained that the CRA CAP 83 gave the people the freedom to air out their view with no restrictions, this is manifested by section 9(3) that clearly stated that “For the purpose of subsection (2), and for any other matter of national importance, the Commission shall afford the people an opportunity to freely express their opinions with a view to further enrich those matters.”

Stage one saw over a million Tanzanians attending the public meetings organized by the Constitutional Review Commission (CRC). The CRC went across Tanzania in every district and respective municipal, council, township and ward-level authorities. Out of a million Tanzanians that attended, over 350,000 of them had the opportunity of presenting their opinions before the CRC. This number has never been reached in terms of public consultation by any other engagement related to constitution making history in Tanzania.

The exercise was very simple and clear, citizens were asked to put forward their views and opinions on what should constitute the New Constitution, emphasis was made that upon giving the views and opinion, supporting reasons was paramount.

Those citizens who were able to give constitutional proposals did so, those who couldn't comprehend constitutional provisions spoke of challenges they were facing in their localities. CRC Commissioners who hosted these public meetings facilitated the citizens who couldn't pin point challenges and put forward provisions to share with the CRC their dreams depicting the kind of Tanzania they would wish to live in, the kind of village they would wish to live, be part of, feel safe, feel happy and that guaranteed their present needs without compromising their future needs.

Stage one also gave political parties, civil society organizations including religious institutions the opportunity to submit their views on the new constitution, an enormous number of submissions was received, analyzed and formed part of the constitutional proposals put forward in the First Draft of the New Constitution.

The outcomes of Stage I was the a report of public opinions on the New Constitution explaining Constitutional issues proposed, history and practice in Tanzania, experience from other parts of the world and reasons supporting each issue in question. It was this report that made it possible for the CRC to come up with the First Draft of the New Constitution. The CRC also made a separate report that looked at Policy, Regulatory and Administrative proposals that citizens were aggrieved with and the intention of the CRC was to inform the government to start responding to the matters while the review process was progressing.

Stage II: Citizens Constitutional Forums

This stage is provided for by section 18 of the CRA CAP 83 that stated the following; - (1) there shall be fora for constitutional review.

(2) The fora for constitutional review shall provide public opinions on the Draft Constitution through meetings organized by the Commission.

(3) The fora for constitutional review shall be formed on ad hoc basis by the Commission based on geographical diversity of the United Republic and shall involve and bring together representatives of various groups of people within the communities.

(4) The fora referred to in subsection (1) and in other provisions of this Act shall exclusively be for the citizens of Tanzania.

(5) For the purpose of this section, before the Commission completes making the report, it shall publish the Draft Constitution in the Gazette, and other local newspapers in order to afford opportunity to the public to further enrich the provisions of the Draft Constitution through discussions in the fora for constitution review.

(6) For the purpose of this section, the Commission may allow organizations, associations or groups of persons to convene meetings in order to afford

opportunity to its members to air their views on the Draft Constitution and forward such views to the Commission.

The CRC and according to section 18(3) did form a total number of 177 Constitutional Forums plus 2 separate forums for people with disability one in Tanzania Mainland and one in Zanzibar. The constitutional forums organized by CRC brought together over 18,000 people from all villages in rural areas and streets in urban areas in Tanzania Mainland and Zanzibar.

Members of the Constitutional forums organized and coordinated by the CRC were elected at village (rural) and street (urban) levels. The election was organized in such a manner that the people could elect a young person, a woman, an elder person and any other person (could be a person with disability).

Section 18(6) of the CRA CAP 83 provided the establishment of independent forums that were organized by institutions and organizations across the United Republic of Tanzania. According to reports submitted to CRC, institutions and organizations had a reach of over 6 million people whom they gathered views and opinions to improve the First Draft of the New Constitution.

The outcomes of Stage II were the Report of citizen's views and opinions from the CRC and independently organized forums to improve the First Draft of the New Constitution. Another outcome of this stage was the Second Draft of the New Constitution.

Stage III: The Constituent Assembly (CA)

Section 25 of the CRA CAP 83 states that "(1) The Constituent Assembly shall have and exercise powers to make provisions for the New Constitution of the United Republic of Tanzania and to make consequential and transitional provisions to the enactment of such Constitution and to make such other provisions as the Constituent Assembly may find necessary. (2) The powers of the Constituent Assembly to make provisions for the proposed Constitution shall be exercised by a Draft Constitution tabled by the Chairman of the Commission and passed by the Constituent Assembly".

This section gave the Constituent Assembly two major tasks, one, to make provisions for the New Constitution of the United Republic of Tanzania and two, to make consequential and transitional provisions to the enactment of such Constitution. Whenever a Constitution is written those are normally the usual roles.

In the Constitutional Review process this section has also been one of the areas of contention, there are those who believe that the CA's role was to improve the Second Draft without compromising or changing its principles, and considering the nature of the process and the fact that the CA was equally one of people's institutions involved. There are those who believe that the CA had unlimited powers

and not bound by the Second Draft, contenders of this belief particularly used the last sentence of section 25(1) to justify that the CA indeed had the powers of "… making such other provisions as the Constituent Assembly may find necessary". By using this sentence, changing principles of the Second Draft and bringing in new issues irrespective of people's views and opinions collected by the CRC was justified.

The truth remains that, constitutions and all other statutes are written by using principles. Statutory construction is a learnt skill that is guided by principles, similarly the CRA CAP 83 was written not in vacuum of principles. Section 25 of the CRA CAP 83 was also a product of principled construction. The CRA CAP 83 was never constructed in the jungle. After two years of experiential learning I have come to know that section 25 was constructed using "canon of statutory construction and interpretation, the ejusdem generis principle [1] ". In other words it is very wrong to use the text "to make such other provisions as the Constituent Assembly may find necessary" to mean a green light to changing principles of the Draft Constitution. The powers inscribed in the text "to make such other provisions as the Constituent Assembly may find necessary" are only limited to the preceding sentence, which is "to make consequential and transitional provisions to the enactment of such Constitution" and definitely not the very first sentence that talks about "…to make provisions for the New Constitution of the United Republic of Tanzania".

The CA got it all wrong, but that's history now, what transpired in the CA was a manifestation of going into the CA with a divided understanding, coupled by strict part positions with no consensus built or compromises reached.

Composition of the CA

Section 22 of the CRA CAP 83 explains the three types of membership to the Constituent Assembly as being (i) all members of the National Assembly of the United Republic; (ii) all members of the House of Representatives of Zanzibar; and (iii) two hundred and one members appointed by the President in agreement with the President of Zanzibar.

The process of getting the 201 members started with the Government Notice No. 443 of December 13, 2014 that invited the citizens through their different groups and organizations as identified by section 22(1)(c) of the CRA CAP 83 to submit to the President proposed names for CA membership consideration. The President of the Republic and in consultation with the President of Zanzibar appointed the 201 CA members. The appointment of the 201 members was welcomed by mixed reactions to some it was a stride ahead because it was then known who and who will constitute the CA that will make the provisions for the New Constitution. For some it was a stride backward as it looked as if the majority of the CA members were party cadres to the ruling party, this worried people somehow considering

then the mounting difference and positions especially on the contentious issues and that eventually the CA will be polarized.

Business in the Constituent Assembly

Here I will put my opinion straight away, that the conduct of the CA and particularly the CA leadership deliberately ignored all calls for consensus building. The CA started divided and no effort was made to bridge the division, it seemed from early days of the CA that majority of the members in the CA were never independent and carried with them unquestionable party positions.

As the CA session progressed, it was quite evident that polarization was anticipated, the practice of “tyranny of the majority [2] ” in almost all discussions in the CA made the CA deliberations quite subjective. It reached a time in the CA session, members could use such abusive language that was meant to demean ones dignity, that fueled racism and inappropriate ways of addressing one another in the CA, yet the CA leadership allowed all that to continue.

The pick of the CA was the discussion on how voting will be conducted, and that for the first time people outside the CA failed to understand the rationale for strict positions from the majority members (mainly from ruling party- CCM) who wanted open ballot against secret ballot and the minority members (mainly from the major opposition parties and some of the 201 members) who wanted secret ballot against open ballot. The now two major camps in the CA, one led by the ruling party (CCM) and labeled themselves as “Tanzania Kwanza” meaning putting national interest first. The opposing camp was led by major opposition parties namely Chadema, CUF and NCCR-Mageuzi who labeled themselves as “UKAWA” an acronym of “Umoja wa Katiba ya Wananchi” meaning a coalition advocating for a people centred constitution.

One thing I remember for sure was some meetings I held with Members of Parliament from the ruling party way before the CA who were in support of the Second Draft who made me aware of the unknown, they then said “if the CA decisions will be based on a secret ballot the Warioba Draft will be supported with the majority but not otherwise”.

It was very clear and anticipated that the very clear polarized CA with subjective discussions and serious lacking leadership would soon collapse, and that is exactly what happened. After failing to bridge the gap between the two camps, failing to build consensus, failing to reach compromises and failing to provide leadership in the CA, finally Mid-April over 200 UKAWA members boycotted the CA. Immediately after UKAWA walked out of the House, it was expected the Vice Chair to call for an emergency consensus meeting to resolve the matter but contrary to that assumption she asked the CA secretaries to crosscheck if the quorum was complete, and the session continued. This could tell you that the political will to

produce a constitution based on consensus building at the level of CA leadership was highly questionable.

Despite all the CA odds including very questionable voting procedure to pass provisions, the CA leadership continued all the way until they produced the Proposed Constitution having in the house members from the ruling party (CCM) and some members of 201.

The outcomes of Stage III were the Proposed Constitution.

Stage IV: Referendum and the process leading to the Referendum Vote

Stage IV is guided by the Referendum Act of 2014; in this area I would explain processes, initiatives to broker consensus, their outcomes and how it shapes the referendum vote.

So far we have witnessed several initiatives to broker consensus, the Registrar of Political Parties started and his efforts stalled. Then it was the religious leaders, these ones were kindly asked to “stay out” until when matters were out of hand then they would be asked to intervene.

The last initiative was the Tanzania Centre for Democracy engagement with the President, here some strides were made and an agreement was reached. Some of the land mark agreement was (a) that no more time shall be allotted to CA despite their plea to the government after October 4, 2014, (b) that the referendum vote to be conducted after the 2015 general election; this was due to the fact that time was becoming a challenge, (c) that the general election will be conducted using the 1977 Constitution, which will have to undergo “minimum amendments” to include the following elements (i) Contesting the Presidential results in court (ii) 50 percent plus qualification for Presidential results (iii) Establishing Independent Electoral Commission, and (iv) the introduction of independent candidates. The TCD engagement with President were sealed and read out by TCD Chair Hon. John Cheyo.

To the surprise of many these milestone have been dishonored ceremoniously. What it means is, we are going to the Referendum vote with the current highly disputed (especially by opposition parties) National Electoral Commission (NEC), we are going to the referendum vote while the NEC had already warned that they will be able to complete the voter’s register improvement by May 2015, yet the Referendum date has already been set on April 30, 2015.

Considering the diminishing time, unless we postpone the general election 2015, we won’t be able fulfill any proposals put forward by the President and TCD together.

Section 35 of the Referendum Act explains about the validation of the Proposed Constitution and the outcomes of the Stage IV.

If the Proposed Constitution gets a YES vote at the referendum by over 50% of all votes cast in Tanganyika and Zanzibar then we shall have our new Constitution. If the Proposed Constitution gets a NO vote at the referendum by over 50% of all votes cast in Tanganyika and Zanzibar then several things shall take place (i) another date for repeating the referendum shall be set within 60 days (ii) more sensitization shall conducted on the referendum and (iii) where circumstances all give the president enough time to reconvene the Constituent Assembly to consider people's views and opinions. If we get another NO vote in the second round of the referendum then the 1977 Constitution shall remain in force.

BRIEF ANALYSIS BETWEEN THE SECOND DRAFT AND THE PROPOSED CONSTITUTION: LOOKING AT KEY AND CONTENTIOUS ISSUES

The Proposed Constitution has serious limitations and has trashed critical views and opinions as set forth by the citizens themselves as follows: -

1. Powers of President

Citizens suggested considerable powers of the President in particular powers to appoint officers could be reduced by establishing constitutional bodies to advise the President before he makes the appointments. People suggested that key Presidential appointments should be endorsed by the parliament. The proposed constitution has deleted these proposals and has reinstated President Powers as per 1977 Constitution. This is a setback to exercising Sovereignty of people

2. Separation of Powers

Citizens suggested greater autonomy for Parliament and more power to the Parliament to advise and hold the government accountable. This proposal goes in parallel with separating government and Parliament, which is not the case now. Warioba draft gave the parliament more oversight authority over the government and it stated where a poorly developed budget or a bad bill of the government is brought to the house and rejected for improvement grounds on several occasions, the President would not be able to dissolve Parliament. The people aired their views that the Ministers should not be appointed from and among members of parliament. They suggested strongly that Members of Parliament had one exclusive role to represent the people and not otherwise and wanted the President to be free to appoint people (ministers) whom can best assist the President to discharge government roles in a professional manner.

3. Right to Recall MPs

Warioba draft gave voters the powers to recall their MPs with a vote of no confidence in them at any time (Recall Powers) if they go against the interests of the citizens in the constituency concerned. People wondered if MPship is indeed a

surety, how can’t it be possible to immediately remove a non performing MP and be bound to wait until five years.

4. Reliable sources of Revenue

The existence of sources of the union government revenue is paramount and after having reduced union matters from 22 to 7, this recommendation was echoed even by government institutions that gave opinions to the first draft. Warioba went ahead to suggest only excise duty should be a union tax and proposed new sources of income for the union that were sufficient and reliable to run the Union Government with its Union Matters. The proposed Constitution has reinstated the same sources of revenue as per 1977 Constitution. In so doing we have returned to the main challenge facing the union that has never been resolved since 1984. If you take three taxes, customs duty, excise duty and income tax from Zanzibar that is suicidal to Zanzibar economy and will serious affect its capacity to run its non union matters mainly those related to social and economic development, this equally applies to Tanganyika.

5. Union Structure

For years we have not been able to answer the riddle of what kind of the union structure our Republic has. This has remained a paradox to many who engage in this discussion, including Mw. J.K Nyerere. Warioba draft set forth and the first time that our union structure bears a Sovereign Federal Republic with three jurisdictions and each having an executive, legislature and judiciary. The Proposed Constitution has maintained the 1977 Constitution controversial structure.

6. Reducing the size of government

Citizens expressed distaste with the size of government which amounts to extensive use of taxpayers' money. They suggested transformative restructuring and establishing a stable, efficient and small union government. Warioba draft stated number of ministers not exceeding 15; the Proposed Constitution says ministers should not exceed 40, this Proposed Constitution proposal is impossible since the structure of the union entails a union government that handles also non union matters of Tanganyika, this would need a much bigger cabinet and contrary to people’s views.

7. Intergovernmental Relations and Coordination

Warioba draft focused on ensuring good relations, communication and coordination of all three governments under the authority and leadership of the Federal Government through the Intergovernmental Relations and Coordination Commission. Constituent Assembly failed to understand the logic of this proposal and the Proposed Constitution has completely derailed from Warioba proposal of the "Commission Intergovernmental Relations and Coordination" to the "Affairs of

the Union Coordination Commission". Affairs of the Union are exclusive jurisdiction of the Union Government and not otherwise.

8. Reducing the size of Parliament

Citizens spoke also of the size of the Parliament of the United Republic and the costs associated with it, and echoed the need for small and efficient parliament. Warioba said the number of MPs should not exceed 75, Constituent Assembly through the Proposed Constitution have proposed the Union Parliament should not have more than 390 MPs.

9. Term Limit for members of parliament

People were talking about parliamentary positions dominated by certain people for years and recommended there should be a term limit to bring about broad representation and participation. Warioba draft set forth term limit to the Union Parliament to maximum 3 terms of 5 years each and amounting to 15 years in total. The Constituent Assembly and the Proposed Constitution have trashed this proposal and removed term limit, now you can be MP for life if elected.

10. National Core Values, a basis for a national value system

People suggested the existence of national values (core values) in the Constitution; these values should include dignity, patriotism, integrity, unity, transparency, accountability and national language. According to Warioba Draft Tanzanian citizens were obliged to respect these values. The Proposed Constitution has removed this National core values.

11. Integrity and Code of Ethics for Leaders

Citizens spoke seriously of morality decay to public servants, and called on matters of integrity and code of ethics for public servants to be enshrined in the constitution so that they (citizens) can use the same to make leaders accountable. The Proposed Constitution proposes that integrity and code of ethics for leaders such as separating business undertakings and political office in order to avoid a conflict of interest to be deleted in the Constitution and be limited to the Act of parliament.

12. Entrenched Provision

Warioba Draft imposed restrictions to the Parliament to not change some of the specific provisions of the Constitution (Article 119) unless it has been approved by the people themselves via a referendum. Such provisions include, Directive Principles of State Policy, Bill of Rights, and unfortunately the CRC forgot to put a Chapter 3 on Integrity and Ethics. The Proposed Constitution has managed to delete all other specific provisions except the structure of the union and existence of the United Republic. This is a serious setback to accountability and sovereignty of the people.

CONCLUSION

The Constitutional Review process was a blessing to our country, considering over 50 years of Nation Building finally an opportunity came to transform our structures and systems to make them stronger than before and structure them in the manner that will see our land counting another 50, 100 years before a new overhaul, this time around having people of our land at the centre of the transformation.

The Constitutional Review Process has enlightened many of us, many of our people; we have become aware of our country and our respective civic life. We have uncovered the truth that it is only Tanzanians themselves first shall effect changes that will eventually unleash milk and honey to this generation and generations to come. It takes courage, it takes hope, it takes determination, it takes boldness, and it takes self denial to be part of change makers, change makers who are effecting changes that will be in the best interest or our people today and in the future.

We can still improve the Proposed Constitution, and for sure there is no shame if the Proposed Constitution gets a NO vote, for it will be a lesson learnt that when the people decide nobody will be against them. It can happen during this referendum vote and if it won't this is a fire that has been started, and it will forever burn until justice for and to our people has been restored. Be blessed and pass on this message of hope for our land.

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[1] This doctrine is useful when a statute has explicitly set forth a series of terms to which the statute applies, and you are trying to determine whether the statute also applies to other people, things or situations not explicitly mentioned in the statute. According to this doctrine of statutory construction "general words [that] follow specific words in a [statute] are construed to embrace only objects similar in nature to those objects enumerate by the preceding specific words." (Georgetown University Law Centre 2006)

[2] The phrase "tyranny of the majority", used in discussing systems of democracy and majority rule, involves the scenario in which decisions made by a majority place its interests above those of an individual or minority group, constituting active oppression comparable to that of tyrants and despots.