1.0 INTRODUCTION
1.1 Contextual Issues
Tanzania is a sovereign, united republic made of two former independent countries, i.e. the Peoples Republic of Zanzibar which comprises of the islands of Zanzibar and Pemba and the Republic of Tanganyika popularly known as Tanzania Mainland today. Zanzibar has its own government known as the Revolutionary Government with its constitution as well as the Revolutionary Council or House of Representatives that assumes the role of a parliament. In this regard, the Revolutionary Government of Zanzibar has its own electoral commission known as the Zanzibar Electoral Commission (ZEC) while its counterpart in the Mainland is the National Electoral Commission (NEC). Tanzania Mainland does not have its own separate government other than the Union Government. It also uses the Union Constitution and the Union Parliament. In pursuance of democratic principles in governance the Union constitution provide for Zanzibar to be represented in the Union Parliament. The people of Zanzibar (the Zanzibaris) are therefore obliged to participate in electing the Union government’s president and vice president as well as members of the Union Parliament under the management of the National Electoral Commission (NEC).

Due to requirements of the constitution of the Revolutionary government of Zanzibar that have to be met on election of the new government such as holding elections within a certain time frame, the 2005 general election in Zanzibar was held on October 30th, 2005 as originally planned while for the Tanzania Mainland (union government) the election had to be postponed to meet one of the constitutional requirements on elections that demands for postponement of both the campaigns and the election where one of the presidential candidates or running mate of contesting parties die as was the case with the CHADEMA running mate for presidential post who died during the last few days of the election campaigns¹. Given these circumstances, the Zanzibar general election of October 30th involved voting for only those posts specific to the Zanzibar Revolutionary government while the December 14th election also involved the Zanzibaris in electing the President and Vice President for the union government and members of the house for the union parliament. The NEC administered the December 14th election in both the Isles and the Mainland while the election of 30th October was administered solely by ZEC as it only applied to the Isles.

All registered political parties operate in both the Isles and the Mainland as enshrined in the Law on registration of political parties. However, such parties are not forced to take part in any elections contrary to their choice. For the Zanzibar elections, very few parties out of a total of 18 registered parties took part in the October and December 2005 general elections while in Tanzania Mainland the number was higher but even for the latter, some parties took part in the election of members of parliament and/ or the councillors by nominating contestants but not for the presidential elections.

1.2 The electoral system in Tanzania
The system of elections in Tanzania follows the principles of representative democracy under universal suffrage as provided for in both the constitutions of the Zanzibar Revolutionary

¹ In case the running mate dies during the campaigns, the presidential campaigns have to be postponed until a new running mate for the affected party is nominated as was the case during the just ended 2005 elections.
Government and the Union Government. Although the electoral laws have tended to be least debated on during the last five years indicating the relatively high level of acceptance by the populace, a few flaws were noted and reforms were made in the two governments' Constitutions during the last few years to address both the unconstitutional gaps and other concerns brought about by changes pertaining to the system of multiparty democracy and subsequent socio-economic and political reforms. The Thirteen Amendment of the Union Constitution (Act no. 3 of 2000) is of particular interest in this case as it introduced changes relating to the election of the president in terms of required total votes for winning the presidential post, and the proportion of parliamentary seats for women under the quota system popularly known as the Preferential Seats. The Constitution also mentions the mode of getting the Vice President who is the principal assistant to the President and is therefore required to have same qualifications as the president and stands for elections as a running mate of the President (Shivji I.G. 2004). This chapter is a modest attempt to assess the applicability of these constitutional changes within the context of the 2005 electoral processes. It is hoped to contribute to the on-going discussions on constitutional reforms in East Africa.

1.3 Methodological Issues
The choice of the theme for the year 2005’s discussion on Constitutional Development in Tanzania was purposely made to take advantage of the available opportunity of informing the global community on the success story of the Tanzania 2005 national elections that has demonstrated the potential of young democratic states like Tanzania to offering good experiences on electoral processes under multi-party democracy. In the recent past Tanzania has been accused of having unfair and undemocratic elections especially in Zanzibar for the 1995 and 2000 national elections under multi-party context where the ruling party Chama Cha Mapinduzi (CCM) emerged as the winner in both cases and gave the critics room to speculate and even seek for evidence on rigging and corruption. The authors found it opportune to assess the 2005 election process conducted after a decade since the first election under multi party democracy, to determine whether there has been any tangible constitutional developments ever since on matters of elections.

The narration and subsequent analysis of the 2005 national elections provided in this chapter borrowed a lot from the preliminary reports of both informal and formal election monitors such as the Tanzania Election Monitoring Committee (TEMCO) and the National Democratic Institute for International Affairs (NDI), media reports, publications by political parties the government and civil society organisations and personal observations. The discussion combines both the story telling and analysis of the whole election process in line with the ongoing constitutional reforms in Tanzania in the socio-economic and political arena. Unfortunately it was impossible to access final reports at the time of writing this chapter because none was ready yet hence, the failure to provide adequate quantitative data.

1.3.1 Conceptual Issues
(i) Constitutionalism
We couldn’t agree more with Maria Nassali’s quotation from Julius Ihonvbere (2000) on the definition of constitution that puts emphasis on both socio-economic and political arena:

“Constitutionalism is premised on the assumption that the constitution is a social contract between the people and their leaders, that defines democratic governance, guarantees individual rights, and
empowers the citizenry to use it as a living document that reflects their needs and aspirations in furtherance of their day to day life struggles” Shivji (2000) page 117 para 2.

Election processes offer opportunity for people to exercise their constitutional rights that are linked to socio-economic and political empowerment, hence the authors’ inspiration to choose the 2005 election as an entry point for discussing the state of constitutional development in Tanzania, this time around.

(ii) Free and Fair election

Many interpretations are used to describe these two inter-related concepts, which tend to be used as a pair in assessing national elections. The UN criteria include “ensuring a level playing field; the prevention of fraud, corruption and unfair practices or dirty tricks, safeguarding the right to vote and safeguarding of the right to freedom of expression. (Oloka-Onyango (Ed) (2001) page 71 Para 1). The National Electoral Commission’s criteria do not diverge much from the UN criteria as it touches on both the voters and contestants’ needs and rights as highlighted below:

- There has to be a permanent voters’ register
- Polling stations have to be in open and accessible locations
- Procedures for election/voting have to be understood by all voters
- There should be no threats, intimidation or pressure to voters.

For the contestants they have:
- To know their rights on how to be selected by their parties and when
- To be fully informed on all the election processes
- The environment has to be peaceful and secure
- There should be absence of any type/form of discrimination
- They should be represented at appointment, voting and counting of votes
- Administration organs should to be devoid of favouritism
- To have in place an efficient and effective system of reporting on unfairness and on election petitioning over the results.

The discussion that follows will use these criteria in assessing the 2005 national elections process and provide a synopsis on how the application of such criteria contributed to the constitutional development in Tanzania.

2.0 REGISTRATION OF VOTERS

2.1 The basis for Creation of permanent voters’ register

The creation of permanent voters’ register constitutes the first and essential activity in the electoral process. In order to attain integrity of the electoral process, the voters’ register has to be transparent, acceptable, fair and capable of inspiring confidence both to the election administrators and the electorate. If effectively used, the register has the potential for reducing problems and complaints that usually crop up during elections.

The year 2005 general elections in Tanzania witnessed a usage of Permanent Voters Register (PVR) in both the Isles and the Mainland. The registers were legally established as result of constitutional development and subsequent laws as amended in January 2000 (Article 5(3) of the URT 1977 Constitution and Section 12 of the Elections Act No 1 of 1985) and in June 2004
The introduction of PVR was aimed at providing an instrument for guiding free and fair general elections in Tanzania.

2.2 The process of creating the PVR
A number of factors contributed to the establishment of the register. First, creation of the register was one of the agreements made during the second Peace Accord signed between CCM and CUF (Muafaka 11) on October 10th 2001. Second, the PVR came to replace the previous voters’ registration systems which lacked permanency, contained several limitations as they were time and money consuming, lacked transparency and were prone to manipulation by the strong and corrupt political parties. In order to make these changes there was need to review the constitution and the electoral law, hence the passing of an Act in Parliament in time for the process to be initiated.

Due to the dual nature of the political system in Tanzania where the Revolutionary Government of Zanzibar and the Union Government of Tanzania that applies to the Mainland have different constitutions and election laws, two Permanent Voters Registers were created, one for the former part created by the Zanzibar Electoral Commission (ZEC) and the second for the Mainland under the National Electoral Commission (NEC) following the amendment in January 2000 Article 5 (3) of the URT 1977 Constitution and Section 12 of the Elections Act No 1 of 1985. In June 2004 Section 11 A (1) of the Elections Act No 1 of 1985 and Section 15 A (1) of the Local Government Elections Act No 4 of 1979 were amended. For Mainland Tanzania the exercise of creating PVR that started by registering voters commenced on 7th October 2004 and ended on 18th April 2005. The first task performed was the preparation of adequate human resource responsible for managing the voters’ registration exercise. This entailed temporary employment or appointment of registration officials and building their capacity through training. A series of workshops and seminars were organized for their training on their role, responsibilities and functions and other matters related to the registration of voters in their respective regions and districts/constituencies.

The focus was on all legal, administrative, operational and technical aspects of the voters’ registration process. Sections 7 A (1) and 8 (1 and 2) of Acts No 13 of 2004 and No 8 of 195 respectively empowered NEC to appoint Regional Election Coordinators-cum Registration Officers and all City, Municipal, Town and District directors as Assistant Registration Officers. NEC also appointed the senior officers of the City, Municipal, Town and District Directors, including Ward Education Coordinators and Ward Executive Officers for recruitment. Camera Operators were also employed and recruited on issues related to photographing. Preparation of registration materials for the voters’ registration process was another task performed and this was followed by the task of distribution of the materials in time to the registration centres. This task was performed smoothly as vehicles and motorcycles were sufficiently available.

2.3 Mobilizing voters to register in the PVR

Muafaka is a political/peace accord concluded between CCM and the Civil United Front (CUF) (the two most active and rival political parties) on Zanzibar. So far two accords have been signed and the agreements made have largely contributed to the improved political life in Zanzibar.
This was the fourth task that was performed towards creation of the PVR. The process was facilitated through a voter education strategy that was also aimed at empowering the voters politically and making them competent and well informed particularly on the family of rules, regulations and procedures governing elections in the Tanzania political system and hence, more likely to participate confidently, effectively and meaningfully in elections. There is also enough evidence to show the positive correlation between politically literate voter and the rate of participation in elections.³

Voter education was provided by different institutions including NGOs using various strategies including the use of posters, brochures, pamphlets and fliers which were spread in almost all accessible strategic public places included bus stations/stands, health centres, schools, voters’ registration centres, hotels, bars and other places. Radio, television, newspapers, mobile vehicles mounted with public address systems and loud speakers were used as other strategies to mobilize people to register.

Government officials were also responsible for informing people to register in the PVR for the 2005 general election. As for the involvement of political parties, two political parties namely CCM and CUF were more active than the remaining registered political parties that participated in the general election in Tanzania. Civil Society Organizations (CSOs) played very minimal role in performing the task. Out of 75 CSOs specialized in Civic Education, only two actively took part in mobilizing people to register in the PVR the situation contributed by failure of the majority to get funds from donors.⁴ The tendency of over-dependence on donor funding made by the NGOs has several negative impacts including that the NGOs may be partisan or influenced by donors resulting in favouring certain ideologies and political parties which may lead to building disunity among the people in the country. For the future there is a need to extend government support and observing practices of no-partisanship and impartiality in activism of NGOs to disseminate civic education to voters. These were Global Network of Religion for Children (GNRC) and Agenda 2000. Religious Organizations also played their part in informing their followers to register in the PVR. Despite the fact that the organizations legally have the rights to perform such function, the danger of many of them to use such opportunity to serve their interest may arise if there are no effective laws and regulations that could guide them in the whole exercise of education provision to the voters. Although the monitoring of voters’ registration exercise was to be undertaken by the political party agents as directed by NEC, this did not happen due to financial and human resources constraints, lack of strong institutional base and support at the grassroots level.⁵ There was also scepticism by some political parties on the ability, credibility and efficiency of the NEC and ZEC to carry out the process of creating PVRs soon enough for use in the 2005 elections. One of the indicators for such doubts was when ZEC was seen providing a loophole that allowed the local government leaders (shehas) and military personnel to interfere in the process of registration despite the amendments of both the Zanzibar Constitution and Elections Act in 2002 that barred them to do so. In Tanzania Mainland the NEC was not able to promptly address problems of registered voters whose identity cards (voter cards) were lost, defaced or destroyed leading to majority failing to be issued with replacements. Others never reported the loss on time as they were unaware of operating law governing registration process and others encountered high cost problem as they lived far from the

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³ B.A. Bana, Voter Education and Response Paper, University of Dar es Salaam, 2005 p.1
⁴ Ibid p. 5
⁵ C. Mongella ( ) page 19
district headquarters. Most of these failed to vote and hence were unable to exercise their constitutional rights. Also some voters such as University students with problem of changing polling stations because of genuine reasons failed to be attended to on time and hence could not vote. Unfortunately NEC was accused of being inefficient as it failed to address all these problems adequately.

The relatively transparent and democratic processes of PVR creation and voters registration helped to realize a turn up of big number of voters (16,5760,230) for registration in the PVR for the 2005 Mainland general elections and it also reduced complaints that might have arisen from voters’ registers.

3.0 SELECTION/ NOMINATION OF POLITICAL PARTIES OF CONTESTANTS/CANDIDATES
The Union Constitutional development demands general elections in Tanzania to be free, fair and democratically conducted on the one hand, and for the nomination of candidates of political parties involved in the election to follow democratic procedures. Unfortunately for the 2005 general elections majority of political parties did not have candidates’ nomination procedures that could be termed democratic which meant that for majority of these parties nomination models did not even exist and many relied on combination of hand picking and self proclamation model thus being accused of nepotism in some instances.

Very few political parties such as CHADEMA, CUF and CCM demonstrated democratic way of nomination of their presidential candidates but for the MPs a number of parties did not have any noticeable degree of democracy. CHADEMA nominated its presidential candidates for the union presidency via a zonal preferential poll, which was then endorsed by party delegates during a national conference. As for CUF its presidential candidates for both the Union and Zanzibar’s presidency were nominated in a national congress via a secret ballot. Compared to the other parties, CCM displayed most democratic, clear cut and transparent system for candidates’ nomination. For the CCM Union presidential nomination a total of 11 candidates contested. Each candidate had to fulfil 13 qualifications in order to qualify as CCM presidential candidates as set by the National Executive Committee of the party. The 13 point set nomination criteria among others included leadership experience in government and public institutions, cleanliness from corruption and other vices; possession of university degree; commitment and ability to defend the union and the ability to govern.

CCM nomination model is dependent on three decision making organs which are the Central Committee (CC), the National Executive Committee (NEC), and the Party Congress. The actual selection of the candidates began with a submission of aspiring candidates’ names to the party’s secretary general who in turn submitted them to the Central Committee (CC). The CC with a membership of between 25 and 30 did not eliminate any name from the candidacy list of eleven people from which it was supposed to shortlist five best candidates for onward transmission to the NEC comprising of 230 members. In order to get the five best candidates, a thorough assessment

6 Alasiiri Tanzania Newspapers of December 19, 2005 p. 8
7 Election Update 2005 Tanzania a number 1, 26 September 2005 p.
8 Ibid p. 6
of the candidates’ curriculum vitae was made against the criteria set by the party. After short listing the five names, CC then sent the list to the NEC, which further scrutinized the names to come up with only three names by secret ballot. It was then the NEC’s responsibility to send these three names to the Party Congress comprising of close to 1200 delegates to elect by secret ballot the candidate for presidency-ship. This process was praised by many people as being very democratic and the other parties were expected to emulate such a unique process. But even for CCM, it was the first time to have such an elaborate system with so much transparency and so many candidates without any trace of partisanship embedded in it.

4.0 CAMPAIGNS
Campaigns constituted strategies used by political parties to make their contesting candidates and policies (manifestos) known and assessed for their credibility by the voters. In Tanzania Mainland campaigns for the 2005 general election began on the 5th September, 2005 and although they were to end one month thereafter, they were prolonged following the postponement of the election day from October to December 2005 due to the death of the running mate for the presidency candidate for CHADEMA party a few days before ending the campaigns. In Zanzibar campaigns started on the 5th September 2005 and continued until just a day before the elections on 30th October 2005.

The postponement of the Mainland general election was assessed with mixed feelings. On the one hand people saw the postponement as an opportunity for the campaigners to iron out some of the pending issues and address some of the controversial issues raised during the first leg of the campaigns to clear any doubts the electorate might have had on their own suitability as well as their parties’ strengths. However, for the relatively financially weak political parties the extra time attained due to the postponement was seen as a constraint in the sense that they would have no money to continue with the campaigns although they feared that much of the excitement they had already raised among the electorate might subdue by the time the election actually takes place. To some parties like CUF the postponement was also disastrous in that the election results for the Zanzibar election that was held in October were not so encouraging to the extent that it had some psychological effects on the electorate for the Mainland. Besides, the winning of CCM candidate for the Zanzibar Presidency office contrary to expectations of CUF leaders and followers tended to cause anger and inspired some followers to go wild and break the law to the extent that they attacked the media people who happened to be around the CUF head office premises in Dar es Salaam. This incidence which landed the media reporters in hospital and some losing their precious equipment was widely abhorred by the general mass and more so the media people and this to a large extent made the party lose the support it had been enjoying from the media. It is also feared that CUF might have lost some voters who might have associated the chaos with the inability of CUF to contain its followers’ anger whenever it erupts. The response on this allegation by CUF leaders is that they made a very strong statement to condemn that behaviour immediately after that unfortunate event. Yet it remains to be confirmed whether the sad event had negative effects on the winning of CUF contestants or not but the fact remains that CUF got not a single Parliamentary seat from the constituencies in Tanzania Mainland contrary to their expectations.

Although the electoral laws provide equal participation of all political parties in the campaign process, financial constraints faced by most parties limited their involvement in the campaigns for the 2005 general election. Public meetings, door-to-door campaigns and the use of brochures, pictures, posters, T-shirts and khangas were some of the campaigning tools used by political
parties in the electoral campaigns. Each of these tools contributed to the furthering of democracy in Tanzania. Public meetings for instance gave all the parties opportunity to be heard and explain the content of their party election manifestos for those which had any, the people were also given chance to weigh from amongst the manifestos the ones which could adequately meet their expectations before voting. The police force also performed its role to ensure security and hence instilled confidence among the people on its capacity for peace keeping. The use of door-to-door campaign entailed that both political party agencies and contesting candidates were using all available opportunities for face to face engagements to lobby and convince the voters to support them and their parties. However, this approach had the impact of using hospitality ‘takrima’\(^9\) which, is seemingly corruptive as a means by the candidate to convince voters to vote for them and their parties. Except for CCM, CHADEMA, CUF and NCCR-Mageuzi, the rest of the political parties never designed tangible policies (manifestos) that could be used during campaigns to attract voters.

The campaigns were to a large extent peaceful except in few cases where there were some collision between CCM and CUF and ensuing fighting between the supporters of these parties especially in Zanzibar where some people were injured and hospitalized while each party was blaming the other for the scuffles. This year more political parties were involved in the elections in Zanzibar and people were convinced that this would have diffused the long standing misunderstanding between the two relatively strong parties of CCM and CUF but to everybody's surprise, the new parties were just too weak to make any noticeable difference. CCM and CUF have by all standards remained the strongest political parties in Zanzibar and they shadow the political life in Zanzibar with continued misunderstanding between the two at both the level of leadership and membership/supporters. This misunderstanding always culminates at the time of national elections where CCM has always emerged the winner while CUF has always refused to accept the election results and such behaviour has always marred the elections to the extent that some political analysts have unconvincingly labelled the previous Tanzanian national elections under the multi-party system as undemocratic. The situation has sometimes caused political tension thus making the issue a national concern as it affects the security of the people and their socio economic development, the implementation of the government policies and the survival of the Union itself.

Other cases of collision were noted in both Zanzibar and the Mainland regarding the availability of campaigning grounds where accusations of giving favour to CCM were directed to the government and other influential organs mandated to allocate campaigning grounds like football pitches, and other open spaces. There were also instances in the Mainland where CUF followers attacked and injured media people as well as ruining some of their equipment while CUF leaders were accused of not being vocal enough in condemning such mishaps. Some parties due to chaos created by an opposing party’s followers also reported a few cases on cancellation of campaigning meetings. It is hard to tell what would have happened if there was insistence to hold the meeting despite the chaos, yet it was sheer luck in such circumstances that some party followers and the general mass are civilized enough to avoid commotion whenever there is fear for provocation.

\(^9\) Takrima is a token cost paid for hospitality in the form of materials or cash met by the contestant for all those involved in campaigning for her/him at the end of the working day. However, experience has shown that it was very difficult to distinguish takrima from election corruption.
5.0 THE ELECTION DAY PROCESS
5.1 Introduction

The electoral process entails a number of important events/activities beyond the participation of the electorate. It embraces respect of the peoples’ will and building a basis for the rule of law and respect for human rights. The rights involved in the electoral process are derived from three sources, that is, the African Charter on Human and Peoples’ Rights the Banjul Charter) the constitution of Zanzibar State of the United Republic of Tanzania all of which recognize both the individual and group rights and duties towards society. In nutshell, this connotes the building of a culture that embraces democratic principles in a society aiming at attaining peace, security and sustainable development that would benefit all Tanzanians.

For the election process, Tanzania has a number of important benchmarks of democratization including the enactment of Political Parties Act No.5/92 that ushered in the era of multiparty democracy in Tanzania. As a result of this the electoral laws of Tanzania were amended to accommodate this new political process. Indeed, Tanzania is one of the developing countries with numerous political parties. To-date there are a total of 18 registered political parties out of which 16 signed the document containing acceptable code of conduct on elections that was prepared under the guidance of NEC. Of the 18 parties, less than half the number participated in the presidential elections in both Zanzibar and the Mainland while more parties participated in the parliamentary and councillors’ elections for Mainland Tanzania on 14th December 2005 and in the election for members of the Revolutionary Council/House of Representatives of Zanzibar government in October 2005. This implies that several parties lack confidence in contesting for the presidential post either because of lack of qualified candidates or due to financial constraints that lead to inability to launch effective campaigning.

Another important benchmark is the increase of special seats for women MPs from the previous 15% to between 20% and 30% of the constituency seats. There is yet another very prominent and important landmark for the election process that marked the 2005 elections and this is the establishment of the Permanent Voters’ Books one for Zanzibar and the second one for Tanzania Mainland.

It would do no justice if we bypass the issue of the two peace Accords (Muafaka I & II) signed in June 1999 and October 2001 respectively whose impact has led to dramatic changes not only in terms of the behaviour of the two involved political parties i.e. CCM and CUF but also in terms of the work of the Zanzibar & (Mainland) National Electoral commissions, especially in ensuring that the agreements made including membership to the Zanzibar Electoral Commission (that had to include CUF representatives) and allowing all the parties to operate freely before and during elections as well as for the mass media to treat all parties without discrimination. There is a general feeling among those who initiated and signed the Accords that much development has been realized ever since, as demonstrated by the following quotation:

“Frankly speaking since the signing of the Agreement Zanzibar has benefited with the Accord as to a large extent there is development in both: democratic freedom and the Human Rights respect...”
Maalim Seif Sharif Hamad (undated) pg.14.

It is against this political background that the election processes of 2005 will be discussed.
5.0 ELECTION DAY PROCESS

5.1 Introduction

The election process in a multi-party system especially in African countries has always tended to be delicate and sensitive. This emanates from the little experience these countries have on present-day multi-party elections coupled with poverty and high rate of legal illiteracy as well as low level of civic education among the voters. This necessitates careful preparations for the election process not only in terms of legal/constitutional environment resources, so as to make the election free and fair. As noted from the previous sections of this chapter and as a general practice, preparations for the election-day started long before the day itself. Such preparations included voters’ and administrators’ education (on election matters); registration of voter which went hand in hand with creation of permanent voters’ book(s); having elections monitors prepared identification of polling stations.

5.2 Election administration

5.2.1 Credibility of Electoral Commissions

It is undeniable that Parliamentarians and councillors are elected representatives of the citizens. But it is also true that going through the election process can be tough and rough sometimes because of the high competition and many temptations including corruption. Hence, as one politician once said there are a number of issues to be considered the main one being how the members of parliament earned office. This is where the issue of corruption comes in. There are certain parties for instances including CCM which had legalized the use of takrima which has been interpreted by some people as a form of corruption. There is also the issue of whether the results announced by the National Electoral Commission were free from doctoring and this raises the concern on the credibility of the commission itself in the eyes of the electorate and the citizenry in general. Such credibility also extends to the ability of the commission to control the election officers in the districts, constituencies, wards and polling stations.

The following quotation tells it all as to the danger for both the elected leaders and the constituents where a leader enters office through corruption.

“... a political leader who does not earn the political office through the confidence he enjoys in the electorate by electing him to office in a free and fair election that political leader will never serve his people sincerely. If one knows that he can be a Member of Parliament (or even) the president for that matter), through the manipulation of the electoral process... or through corrupt practices such a parliamentarian will not respect his constituents, and so he will not represent their interests. Such a Parliamentarian will be driven to safeguard his personal interest and so be amenable to the wishes of the Executive” Maalim Seif Sharif Hamad (undated).

5.2.2 Logistical preparations

It is the role of election commissions to make all the logistics including preparation of timetable for voting; preparation of voting materials/resources; selection and training of polling centers/stations’ administrators and their assistants; identification and training of regional, district and polling stations’ returning officers; identification and selection of voters /political parties agents for each polling station; production of a guide for the voters and administrators on voting process/procedures; posting voters’ names and numbers on the notice boards at poling stations and educating the general mass on voting procedures through mass media. What remained to be
done on the election day was reduced to the minimum. Voters were to be reminded on the following: to check their names on the notice boards at the poling stations, to bring their registration cards for identification before casting their votes and to be at the stations on time. On their part, the election commissions were to ensure a peaceful environment at all poling stations and that the actual voting, the counting of votes and announcing of results are done in a transparent and peaceful manner.

(i) Distribution of Materials
Preparations for the two voting days (one for Zanzibar and the second one for the Mainland) were relatively better compared to the last national election. Due to the death of the running mate for the CHADEMA Party presidential candidate during the last few days before the elections, the elections for Zanzibar were held earlier to meet some constitutional requirements pertaining to Zanzibar. This split made the logistics easier especially in terms of distribution of human resource and voting materials. The latter including ballot boxes, indelible ink, pens, stamps and various forms were distributed on time and available in abundance even in remote polling stations except in few cases in Zanzibar where about of the TEMCO observed stations had inadequate voting materials. While in some materials especially the ballot papers and presidential results declaration forms were either delayed inadequate or missing in about 10.6% of the TEMCO observed polling stations. However, the party agents derived the forms after this long delay due to pressure. For the mainland, probably due to experience learnt from the Zanzibar elections no missing, inadequacy or delay of materials was experienced in the polling stations.

(ii) Display of list of voters
In both the Isles and the mainland constituencies, names of voters were displayed but unlike the latter where the display was made two weeks before the election day, in the Isles the list was displayed on the voting day or late on the previous day thus giving little room for voters to verify their names before voting. For the mainland the displaying of voters’ names was transparent and timely thus voters were able to verify their names long before the voting day and report to the relevant authority where their names were missing. The disturbances found in Zanzibar on verification of names were therefore very much minimized and voting went on very fast where voters had managed to see their names on the list before hand. The process of names was important because missing names on the list indicated omission of such names in the voters’ registration book and hence denial of voting rights. There were few complaints on missing names for both Zanzibar and the mainland but for most complaints especially for the mainland it was due to both panic and carelessness in searching for the names especially for the voters who never bothered to verify their names prior to the Election Day. Very few genuine cases were witnessed and to a large extent the ZEC and NEC in collaboration with the polling officers who assisted voters to check their names on the list managed to act promptly and allowed the affected people to vote. In Zanzibar, TEMCO observers note that 59.1% of the stations they observed showed that the list displayed was satisfactory while for the remaining stations the lists had problems although most of these were eventually addressed positively voters turned in big numbers and those who are illiterate were given freedom to choose their assistants from the pool of eligible voters while the secrecy of voters’ ballot was highly respected. The opening of polling stations was done at 7.00a.m and closing was at 4.00p.m. Although some voters reported to the stations as early as 4.00a.m, it was uncalled for because the voting process including checking of voters’ names in the voters’ books against their voters’ identity cards were orderly and efficient.
5.3 Role of Party Agents
The electoral law provides for presence of party agents for all the participating political parties in all polling stations as part of the monitoring process. These are poll watchers representing political parties and their contestants. They all understood their role after having been educated on what is expected from them and they remained actively engaged in monitoring the voting process and counting stages. Their presence was even more felt during the counting stage at the polling stations to ensure absence of rigging of results by corrupt parties. There are allegations that some agents were unfamiliar with their roles but it is un-doubtful whether this was not by design given the training sessions prepared for them by the ZEC and NEC before the Election Day. But even if this was the case, the blame should equally be shared by their representing parties that were also obliged to treat the issue of selection of their agents with almost care and seriousness. There are some unconfirmed accusations that some agents were bribed to allow for rigging but this is very unlikely given the vigorous screening process during the counting of votes that was very transparent. Posting party agents to each polling station has some costs. The agents were to be paid an allowance by the parties they were representing and this involved finance. Most of the relatively young political parties could not afford to have agents in every station. While some decided to share agents so as to minimize costs, others had to do without agents in some stations. The parties that were able to place agents in every polling station were CCM, CUF and CHADEMA and these are the same parties that got majority of votes and hence majority of representatives in the union Parliament and the Revolutionary Council of Zanzibar. Absence of government subsidy for the young political parties compounded the problem of financial constraint for the young parties.

5.4 Security Issue and the use of force
There is a general assumption among many critiques of national governments that every state organ entrusted with powers finds ways of abusing such powers; i.e. it fails to act in accordance with the law. Two such organs that were involved in the election process are the police force including the Field Force Unit (FFU) and the Tanzania Peoples Defence Forces (TPDF). The latter was used by Zanzibar Electoral Commission (ZEC) to carry voting materials to and from polling stations while the former was expected to deal with breach of peace likely to happen during and after the casting of votes. The work of security personnel who were deposited in every polling station was made easy this time unlike the last national elections of 2000 due to three main factors:

1. Most voters were enthusiastic, patient and disciplined and hence, the voting process was carried out in an orderly manner with men and women having separate queues, thus making their ballot casting fast and smooth as reported by observers from both the Tanzania Election Monitoring Committee (TEMCO) and the National Democratic Institute (NDI). For the Zanzibar elections for instance, TEMCO placed a total of 300 observers who noted that 83.3% of the polling stations they observed had no indication of breach of peace despite the high turn out of voters. This shows that the voters were seriously observing all the election procedures as guided by the NEC and ZEC and that the education given to voters was adequate.

2. The high degree of competence demonstrated by most ZEC and NEC officials/administrators including district returning officers as well as polling stations’ officials and their assistants in managing the voting process. Both formal and informal election monitors made this observation. For Zanzibar for instance, unlike the situation in the 2000 elections where ZEC was considered weak and pro CCM, much improvements were made this time.
to the extent that about 90% of TEMCO observers who also took part in the monitoring of the previous election said they were satisfied by the competency shown by ZEC officials.

3. Re-dedication by CCM, CUF and the two governments to peaceful democratic politics especially in Zanzibar after the signing of the second Peace Accord (Muafaka II) as an attempt to end hostile politics in Zanzibar in October 2001. The impact of the Accord was felt even before the voting day, e.g in terms of reorganizing membership of the ZEC to include representatives of CUF.

Police Officers were found in all polling stations in Zanzibar and in some in the Mainland, and although some voters considered their presence to be intimidating, the officers assisted in providing voters with directions to their appropriate polling stations; location of voters names in the voter registers and in ensuring that women with babies, the sick, the old and the disabled are given priority by allowing them to vote without standing in long queues.

Unlike Tanzania Mainland where very few uniformed police were found at polling stations however, in Zanzibar the stations were characterized by heavy presence of security forced including KMKM, Prisons Officers, Field Force Police and Volunteers despite the fact that very few political parties took part in the elections in Zanzibar.

Unfortunately for Zanzibar, there were some few incidences of violence outside the polling stations in both Unguja and Pemba islands the major cause being allegations that CUF supporters and agents had identified some non residence people who were not registered to vote at those stations and had to be barred from voting. The alleged non-residents on defending themselves claimed that CUF followers were actually victimizing the former because of political differences. It should be noted here that in Zanzibar, these two parties are the strongest with majority of followers who for some reasons are always at loggerheads in the political arena. It is only after the signing of the two ‘Peace Accords’ in June 1999 and October 2001 that there is some degree of political tolerance between them today.

Other causes include illegal assembly, demands for posting of results and provocative acts towards security forces by supporters of opposition parties. It was reported that in addressing the erupted violence, the security forces used excessive force including tear gas and even water cannons in some cases to disperse crowds of people that were blocking the road access to the polling stations.

5.5 Counting votes and announcement of results.

The sensitivity of the counting of votes cannot be over emphasized as it is usually intrigued by possibilities of rigging especially where the officers in charge and other involved stakeholders are corrupt. The counting is critical because it is the last but one stage before knowing the winners and losers. During the counting every stakeholder waits with curiosity, anxiety and hopes for winning while everybody knows that there has to be losers in the end although nobody wants to be the loser after having incurred so many expenses during the campaign process.

For both Zanzibar and Mainland, the counting of votes commenced after closing the polling stations at 4.00p.m although on average most stations started counting between 5.00 and 6.00p.m. The counting went on with relative smoothness as noted by the party agents, the domestic and international observers, the voters themselves and many other stakeholders as reported by the
media and also from our personal experience. The counting was transparent and carefully done with close checking and counter checking of votes by party agents who were to be held answerable by their parties in case of inefficiency in counting that would jeopardize the winning position of their parties. The result forms were signed by each party agent to demonstrate their total agreement with the results as witnesses. In Zanzibar counting was even repeated where there was a disagreement between the election officers and the party agents. TEMCO informs that there were complaints about counting in 9.1% of the stations it managed to observe while repeating of counting was made once in 12.9% of such stations, twice in 6.8% of same stations and thrice in 9.1% of same stations. Disagreement was also noted over what was considered to be spoilt votes in 4.5% of the TEMCO observed stations. Overall, for Zanzibar complaints were made in 6.1% of stations observed by TEMCO before the final results were declared. This shows that incidences of irregularities were very few making the election process to be largely free and fair in the eyes of both the winning and losing parties and the general mass.

For Tanzania Mainland, reports from both the media and TEMCO inform on the reigning peace and security in both voting and counting of votes where the election officials demonstrated a high degree of responsibility neutrality and efficiency. The results were counted in a transparent manner with party agents witnessing every step while the election monitors were able to see every stage and the results were signed and displayed as expected.

5.6 Role of Civil Society Organizations (NGOs)
Since the introduction of multiparty democracy in Tanzania there has been a tradition for the NGOs to prepare NGOs election manifestos to be shared by all political parties during the election process. The manifestos highlight critical areas to be considered by political parties in their party election manifestos and campaigning tools. NGOs manifestos are also supposed to empower the electorate for active participation in the election process by way of consolidating their demands on what the new leadership should do to meet peoples needs/interests.

For the 2005 election, the NGOs’ manifesto is contained in a publication carrying the title “Tanzania Tunayoitaka” (The Tanzania we want) where several issues of almost importance to the development of the Tanzanians are raised. Among such issues is the concern that NGOs are being marginalized on political issues and more so in the on-going democratic processes pertaining to the national electoral system. It should be underscored at this juncture that the electoral system does not allow for anyone to contest for leadership outside the party structure while the fact cannot be denied that only a small number of the electorate belongs to political parties. This connotes that a large number of the electorate is denied the constitutional right of contesting for leadership. This section of the people falls under the precinct (ambit) of civil society organizations.

The 2005 election manifesto aimed at reviving the spirit of nationhood, seeing that concerted efforts are made to completely eradicate poverty, to allow each Tanzanian to live with dignity, efforts to democratize all processes good governance and quality leadership. Lastly, the manifesto aimed at seeing that leaders are answerable to the electorate within the context of political objectives.

The NGOs prepared the manifesto from the understanding that by doing so they were using their constitutional rights as citizens who care for the development of their nation and who are obliged not only to inform their leaders on what the people need and expect from the leadership but also remind the leadership and electorate the basic principles to be followed in leading the people and
in the election process including the protection of national interest and peoples’ interest through making and developing policies that are pro-poor and pro-development.

The manifesto that was prepared in a participatory manner by a total of 175 NGOs from all walks of life (Agenda participation 2000, 2005 pg. 31 – 34).

The manifesto highlighted basic concerns/challenges to be addressed by the new government during the next 5 years in the areas of economic development and economic rights, good governance and democratic processes, social rights and security pertaining to education, health, communication and networking, peace and security and gender equality and equity. In total, 12 demands were made in relation to the 2005 election process. A synopsis of the demands is provided below (translated from the Swahili version):

1. Leadership to be answerable / accountable to the electorate.
2. Leadership that cherishes tolerance, democratic discussions and debates, consultative processes and progressive politics.
3. Leadership that has a clear vision for the nation that is shared by the general mass and that has the potential for participatory community development that will enthusiastically motivates people to participate in elections and in development processes after the elections.
4. Revolutionary thinking and innovative strategies that would ensure congruence of implementation process and results thereof.
5. Development of a New leadership culture that insists on leading by showing good examples in serving the people and being answerable/accountable first to the electorate and second to the party through which leaders attained their positions’.
6. The election process to be transparent, free, fair and peaceful.
7. The electorate to use the manifesto as a yard stick for assessing the campaign agenda of contestants and their political parties as well as a tool for measuring performance of the ruling political party during next 5 years.
8. Sources of funds for political parties to be transparent to the electorate
9. The electorate to have the right to remove from office non-performing leaders.
10. Counting of votes to be transparent and done at polling stations.
11. Participatory and democratic governance to reign at all levels (page 27 & 28 of Agenda 2000, 2005).

6.0 THE GENDER ASPECT
6.1 Introduction
The 2005 general elections were the first to be held after the adoption of the National Strategy for Growth and Poverty Reduction (NSGPR) for the Mainland and the Zanzibar Poverty Reduction Plan for the Isles. The two national strategies share the component of good governance as one of the three major clusters with clearly stated political will on ensuring sustained democratization and human rights and increased government’s accountability to the citizenry. The two strategies emphasize the need to take equity issues on board for realization of fast and equitable growth that focuses on reducing inequalities. The emphasis is further made on creating structures and systems of governance that are representative and accountable and where human rights are respected.

Operationalization of this cluster’s goal has a lot to do with the electoral system and more so the gender dimension. While there is commitment to improve the capacity of all representative bodies
The strategy popularly known as MKUKUTA has three clusters namely, Growth and Reduction of Income Poverty; Improvement of Quality Life and Social Well-being and Good Governance.
of democracy expected in such matters. This observation therefore requires further analysis as it highlights a challenge worth pursuing.

ii. Registration in the PVR
The gender disparity in the electoral system is often noted in the number of voters who are obliged to register first before voting. This scenario was also noted during last year’s creation of the Permanent Voters Register. Out of the total number of people who registered in Mainland Tanzania for instance, women were the majority according to unconfirmed data. As for Zanzibar, women were also the majority as noted on the election day. It was also personally observed during the registration process that women were more responsive to the national call for registration of voters and long queues of women were seen as the women patiently waited for their turn to engage in the voters’ registration process. The high turn out of women in the registration stage is verified by the big number of women who actually took part in the voting. This scenario is not surprising given the fact that compared to men, women tend to appear in bigger numbers when it comes to participation at social events or gatherings including those for political motives although they are hardly heard or listened to.

iii. Nomination of candidates
One of the roles of political parties in the electoral process is the choosing/nominating of candidates to compete with counterparts from other parties for the contested posts/positions. With regard to gender representation both the SADC member states and the Government of Tanzania had made a commitment (agreement) that by 2010 the target of ensuring that women hold 30% of political posts and other decision making posts need to have been met. The Union Constitution as well as that of the Revolutionary Government of Zanzibar also requires equal representation of men and women in political and decision-making positions. However, as usual, it is easily said than done especially where top national leadership posts applies as was the case in the 2005 general elections where, only 1 (i.e CHADEMA) out of the 10 political parties which contested for presidential election in Mainland Tanzania had a woman presidential candidate and 4 political parties had women presidential running mates. But even for the party that had a female running mate, the woman was nominated only after the death of the first nominee hence it was like an after thought to have a woman running mate. Nonetheless, there were high expectations from their parties that having these women nominees would be very much appealing to the electorate especially women who form the majority in the electorate and that having women nominees is a genuine gesture for gender mainstreaming and hence the potential for winning of more votes from the electorate although the election results proved contrary to this.

iv. Election Campaigns
The gender dimension of the campaigning process is assessed with mixed opinions. On the one hand, there are arguments that the general campaigns were unnecessarily very expensive this time around compared to past elections. While the blame is squarely put on corruption especially under the takrima practice, it is also true that the cost of transport and other requirements have gone up compared to the last election. There has also been a cut-throat competition between the equally qualified contestants from an increased number of participating political parties and this competition was reflected in the pattern of use of resources for campaigning as noted in preceding sections of this chapter. Besides, the electorate is more politically literate this time given the intensive civic education provided by many stakeholders including the civil society organisations. There is also an observation that the MPs from the last parliament had a good amount of money
given as end of term gratuity and therefore, those who had the intention of returning to office had added advantage of having enough financial resources for the campaigns.

The above state of affairs had much influence on the gendered pattern of the campaign process and coupled with the fact that a large number of women are economically disempowered, most of them would surely think twice before using the meagre resources they have for the campaigning exercise. Indeed, we are aware that some men were motivated to use their salaries for the campaigning but there would be very few women with similar opportunity. Men are also used to mobilizing contributions for campaigning from their friends or colleagues as they normally do when they have social functions but women are less successful in this area due to both their economic powerlessness and less chances for socializing as dictated by patriarchy. In any case, women's wages are usually lower than men's and even where women earn as much as men, decisions on how to use family cash incomes tend to be a male domain. But even where they have the decision-making powers over the use of resources, women tend to invest in areas with direct benefit to the whole family rather than in selfish and personal gains. In any case married women are less exposed to chances of spending their incomes on political affairs. Incidentally, women are also less active in engaging in corruption because most, if not all, value their dignity more than political fame. They also fear breaking the law and abhor going to jail for whatever reason probably because of their high level of legal illiteracy and inability to hire advocates.

Most of the women contestants faced a lot of problems related to financial constraints as noted from the lamentation aired by the media where some were even forced by circumstances to walk for many hours to reach the electorate because of inadequate resources. On the part of men, very few aired their lamenting although some, especially from the relatively new political parties that have no access to government subsidy also faced the same financial limitation. To some extent men found different tactics for addressing the financial limitation. Some for instance carefully targeted the electorate that was seemingly more responsive to their party election 'manifesto' and hence reduced the physical coverage while others used less expensive election tactics. There were also cases where the male nominees spent more party resources than their female running mates although they both were expected to enjoy the campaigning resources. This differential way of expressing grievances and distributing resources also indicates a gender difference in the electoral system. A few gendered challenges pertaining to campaigns have been raised here and this calls for more studies and analysis before the next general elections are held so as to find ways of improving the electoral system.

v. Election –day and Election results

The election -day is a test case for determining the level of exercising of the constitutional rights of voting and being voted in office. It also informs on individual party's level of success of their campaigns. This entails the turn up of voters and the carefulness and level of efficiency demonstrated by the election administrators. As was the case in the registration of voters, the actual turn up for voting was higher for women that men. It is too early to provide precise quantitative data on this issue due to failure to access final monitoring reports from both the two Electoral Commissions and the independent monitors on grounds that they are still being prepared, suffice it to use the qualitative data. It is a truism that as is the case in many general elections, women are less provocative than men and where the breach of law is found, more men than women tend to be involved. This applies to the 2005 general elections for both Zanzibar and Tanzania Mainland where in the few cases where these instances were witnessed most of those
who were either injured or rounded off by the police were men. Even for those who lamented that they were not able to exercise their voting rights due to the missing of their names in the PVR, more male than female voices were heard. This may mean that women have closely followed up the guidelines provided by the Electoral Commissions including careful checking of their names ahead of the election -day although we can not completely rule out some elements of victimizing some men for political reasons. All in all, women were very active in exercising their voting right as electors.

However, despite their active participation as electors, they still lag behind in holding political office. In Zanzibar for instance, they represent only 10.5% of the total number of candidates in the House of Representatives, while for the Union Parliament they hold less than 40% of the total seats although for the special seats this time the women managed to get 75 MPs through this route out of a total of 232 MPs. The party with majority female MPs through the quota system is CCM which had 58 members followed by CUF with 11 members while CHADEMA has 6 members. The contribution of the quota system in addressing the gender concerns in politics in Tanzania is substantial, the political scene especially in the legislature is slowly being gender balanced, yet the situation is not all that rosy. The expectations that the women who have had chance to enter the legislature through the quota system would venture into the constituencies and compete with men while giving opportunity for the new comers to enter through the preferential seats has not been met. It is true that the special seats entrance does empower women and mould them for more challenging opportunities. But the open-endedness regarding the terms one should serve through this route leaves the same characters to enter the legislature for as long as there are supporters to vote them in. This is limiting the openings to new -comers who may be equally good but have high regard to those who are already in and hence shy away from contesting. There are already some arguments that while it is true that the quota system for parliamentary seats empower and increase women’s awareness and experience in power relations, the constitutions of both the Government and political parties should make constitutional amendments to limit the terms to say two so as to create space for new comers and hence expand the list of women who are politically empowered. All in all, the fact still remains that a greater number of women representatives enter the parliament/House of Representatives through the quota system leading to a very strong assumption that in the absence of the system, the number of women representatives at the legislature would be very negligible. This implies that more concerted efforts need to be made especially in Zanzibar to realize both the constitutional rights and the SADC 30% target of women representation in decision-making positions by 2010 as agreed upon by African leaders.

There are also some observations that much as women form the majority of the electorate, female nominees/contestants do not necessarily get the highest number of votes. A number of reasons have been expressed including the high level of political awareness that inform women that they should not vote for women just because of their sex but because they are better candidates. Indeed, this demonstrates a high degree of political maturity and gender sensitivity among women voters. Yet, there are also possibilities that women have voted in weaker male candidates and left out strong and able female candidates because of other reasons such as the takrima which many people have had difficulty trying to distinguish it from election corruption.
7.0 CONCLUSION
The process of constitutional development in Tanzania during the year 2005 has been bombarded by a lot of challenges that draw their legitimacy from both the socio-economic reforms and the democratic initiatives targeting the political arena as stimulated by the multi-party system introduced as far back as 1992. Much as multipartism has lived for a decade now, and has actually influenced the last two general elections, the 2005 general elections were blessed by a bigger number of participating political parties to the extent that the competition over political office was made so strong that even the relatively old and strong parties had to be extra careful in making their nominations for the would be contestants. The same factor had actually challenged the participating political parties more innovative in carrying out their campaigns all geared towards winning as many voters as possible.

Undoubtedly, the then ruling party CCM that vehemently defended its position and actually won with overwhelming majority and other experienced parties had more reason for being extra careful in all their preparations for the election including drawing well thought through election manifestos while the newly emerging parties had reason for seeking recourse, given the tough competition amidst the undeniable financial constraints facing them. Each party played its role amicably in all the election processes and those who won have reason to celebrate while failure to others also provides yet important challenges on constitutional development that cannot be allowed to pass unnoticed.

The main lessons learned during the 2005 general elections are very important for constitutional development in Tanzania and not just because there were some elements of violation of constitutional rights. There are a number of issues emanating from these elections that are worth mentioning here. The issue of takrima for instance, though constitutionally allowed has been found to be pro-men and more so the well off, as well as being used to lure voters to vote for the takrima givers. This has had gender biases and hence contrary to the constitution. There are already some discussions towards making it unconstitutional and it has to be done soon to spare the constitution from further abuse. The other issue left for the constitution to grapple with is the long pricking issue of private candidacy. There have been some attempts to challenge this constitutional omission and the conclusion is yet to be reached. There are mixed opinions on this issue. On the one hand, some people consider it as a constitutional right where one do not have to belong to a political party before contesting for political office while on the other hand others find it prudent for one to belong to at least a social organization but not necessarily a political party as a pre-requisite for entering into contesting for high political office. The debate continues and a big challenge remains for Tanzanians to find ways of dealing with this issue. The gender issues discussed above also need to be addressed and to be able to do this there is need to ensure that the electoral commissions are also empowered to more adequately articulate all the gender issues inherent in the electoral system before drawing some guidelines and strategies on how best to mainstream gender in the system.

It is consoling that the 2005 general elections tried as much as possible to honour the Peace Accord (Muafaka) made between the two big and often at loggerheads CCM and CUF. There were also agreements signed by a larger number of political parties on the desired conduct for the general elections that were adequately honoured and at this juncture we would like to suggest that the two Electoral Commissions did a good job worth congratulating but the two organs should not be complacent because they are still left with more challenges to address to make the general
elections that will follow more gender friendly and democratic. Much appreciation together with a big challenge also goes to all other stakeholders including the civil society organizations that played a remarkable role in providing civic education and in the election monitoring which were very instrumental in making the election process and hence the constitutional development during the year 2005 quite successful and the lessons emanating there-from worth emulating.
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THE STATE OF CONSTITUTIONAL DEVELOPMENT OF ZANZIBAR IN THE YEAR 2005: AN OVERVIEW.

By Mohammed A. Bakari

Introduction

More than four decades have elapsed since Zanzibar became independent and about the same time since the 1964 revolution and the subsequent merger of Zanzibar with Tanzania mainland to form the United Republic of Tanzania. Yet, Zanzibar still experiences a constitutional crisis with a lot of resemblance with the pre-independence constitutional struggles. The fundamental questions of governance, form of government, electoral system, representation as well as the status of Zanzibar within the Union arrangement have been constant themes in the constitutional debates before and after the introduction of multipartism in 1992.

The history of constitutional development in Zanzibar after independence has been shaped by both endogenous and exogenous developments. These developments have been a response to both internal political dynamics within Zanzibar itself as well as external dynamics within the Union arrangements whereby Zanzibar as a semi-autonomous political entity is under the hegemonic protection of Tanzania Mainland. This feature of post-independence constitutional development in Zanzibar seems to have many parallels with pre-independence constitutional developments whereby Zanzibar as a British protectorate was under the colonial administration in constitutional designing processes towards independence. Perhaps the only striking difference is that whereas the British colonial administrators detached themselves to some degree from the competing political forces in Zanzibar, the Union Government is an integral part of the broad ruling coalition of the United Republic of Tanzania.

Constitutional development of any country is a reflection of the society itself in terms of its social structure, history and cultural heritage, and above all, power struggles. That is to say the spirit of constitutional making and constitutional development may be based on social pact (social consensus) or imposition by the elites (single faction or multiple factions). In situations where a country becomes independent through a constitutional
means of free and fair elections, the general trend was to have constitutions based on elite consensus. On the contrary, in situations where a country became independent through a non-constitutional means, the victorious elite faction would often single-handedly dominate the constitutional making process. The history of constitutional development in Zanzibar displays both features. Prior to independence, there were some initiatives aimed at establishing a minimum and basic consensus on the drafting of the independence constitution. These initiatives were administered and supervised by the protecting power, the British colonial authorities. Thus, the Zanzibar independence constitution of 1963 was an outcome of a negotiation process between the elites of different factions in Zanzibar and therefore it could be said that the constitution that was designed in spite of its deficiencies had some minimum consensus at least that of the political elites of different political factions. This chapter seeks to document the history of constitutional developments in Zanzibar with a view to situate the current political crisis of Zanzibar within a constitutional perspective.

**Historical Background**

The history of Zanzibar’s constitutional development goes a long way back to the early period of British domination in Zanzibar. On 14th June, 1890, Zanzibar was declared a British Protectorate. Immediately after that a British Representative was appointed as the First Minister to the Zanzibar Sultan where he took charge of Posts, Labour Office, Customs, Harbors, Treasury and Police. The powers of the Sultan himself were curtailed, and he could not remove or transfer British officials at will, His own annual salary was set by the British authorities. Later, on July 1913, Zanzibar was removed from the Foreign Office and placed under the Colonial office (Hollingsworth, 1953).

Within this framework, the Protectorate Council was established in 1914. This was an advisory body to the Sultan, with the Sultan himself the President and the British Resident as the Vice President. The Attorney General, the Chief Secretary and the Financial Secretary were ex-officio members of the council while there were four unofficio members nominated by the Sultan; two Arabs and one each from of the Indian and European races (Blood, 1960:57). With these initiatives, the Sultan was put in the
background and Britain was in firm control of the show. The thinking that a “protectorate” was different from “a colony” in the eyes of the colonial power became an academic question (Hailey, 1957:305).

Thereafter, the Legislative and Executive Councils were formed in Zanzibar in 1926 by Zanzibar Order in Council, His Majesty King in Council, i.e., Privy Council. The formation of these two bodies put the administration of the Zanzibar Government to the hands of the British Resident, and required that no decree be enacted by the Sultan without the advice and consent of the Legislative Council (Ayany, 1970:15). In the same year a constitutional change was made requiring the British Resident to receive his instructions from the Secretary of State for the colonies in London and not from the Sultan (Crofton, 1953:76). According to Crofton, these changes were intended to safeguard the islands “complete autonomy and independence”, but in actual fact they greatly curtailed the powers of Sultan and made him a prisoner in his own regime.

The notion found in some of the contemporary literature on Zanzibar, that during the British colonial period in the islands, there existed a dual state, one Arab and the other British, tends to misread the whole situation pertaining to the islands at the time. With the 1926 Order in Council and the decrees enacted thereafter the Sultan’s state was dismantled, and Britain imposed its own colonial state. By the 1930 it was obvious that no traits of the Sultan’s state remained (Othman and Shaidi, 1981:187).

The Sultan led the Executive Council, which consisted mainly of the senior British Administrators. The British Resident led the Legislative Council which was also made mainly of Europeans, Arabs and Indians nominated by the Sultan, but with practically no African. Even when by Decree No. 14 of 1942, an announcement was made on the enlargement of this body, which was basically a “rubber stamping body”, no African representation was envisaged. It was only in 1946, when it was resolved that one place in the Legislative Council be reserved for African representation (Blood, 1960:57). In an apparently deliberate effort to sustain chaos and misunderstanding among the Africans, the Sultan appointed a Shirazi, Sheikh Ameir Tajo to represent the Africans, at the very
time when the some administrators treated Shirazi as Asians (Mhina and Matoke, 1980:51-52).

The next constitutional development came in 1957 following the Coutts Constitutional Commission that proposed 12 unofficial members for the Legislative Council. The major innovation in the 1957 constitutional changes was the election of the half of the twelve unofficial members through the Common Roll system. This was not only a novelty in Zanzibar but it was also a “revolutionary” step in East Africa. The changes envisaged in the constitutional announcement of 1957 placed Zanzibar along the path to self-rule and independence (Othman and Shaidi, 1981:192).

In April 1960, the British Government appointed another constitutional Commissioner, Sir Hillary Blood, who was called upon to propose further constitutional developments.

The commissioner’s recommendations can be summarized as follows:-

(i) The Sultan of Zanzibar should remain a constitutional monarch and he should stay completely outside politics, his salary becoming a statutory charge instead of being voted annually in the estimates, whereby it was a subject of annual discussion.

(ii) The legislature should have its own speaker and 29 members, 21 of whom should be elected.

(iii) There should be a cabinet under a Chief Minister with seven Ministers, three ex-officio (The Civil Secretary, the Finance Secretary and the Attorney General) and four appointees of the Sultan from the party winning the election.

(iv) There should be an official opposition whose leader should be entitled to Government salary.

These recommendations were adopted with minor alterations, most particularly in the number of ex-officio seats in the legislature and they formed the basis for the subsequent elections. The government had also earlier extended the franchise to women; lowered the minimum voting age from 25 to 21, lowered the property requirement; and lowered the voter eligibility age for illiterate from 40 to 30 years (Zanzibar Government, 1961:4-5).
Long before the Blood Report was published, the Government had announced that the second general election would be held in January, 1961. All three contesting parties (ASP, ZNP and ZPPP) involved themselves in vigorous and, at times, dirty campaigns. The government at this point, increased the number of seats to be contested through the ballot to 22 from the 21 recommended by the Blood Commission. The extra seat was allocated to the Stone Town Area. The A.S.P. was not happy with the decision to increase seats. This was seen as a move clearly designed to favor the affluent residents of the Stone Town, most of whom were ZNP supporters. The elections were eventually held in January, 1961 and ASP emerged a narrow winner with 10 seats over 9 seats of ZNP and only 3 seats of ZPPP. With these results, the ZPPP was in quite enviable position, with each of the other parties soliciting it as a potential coalition partner. But the ZPPP itself became divided, with one of its members, joining ASP and the other two allying with the ZNP. Thus a stalemate ensued, and a new election had to be called.

There was criticism at the time over the way British authorities handled the election. The ASP not only had the majority of seats, but also the votes too (Zanzibar Protectorate, 1961). The A.S.P. felt that the British Resident should have called on its leader to form a government. The Government would have had the necessary working majority since the three ex-officio members (the Chief Secretary, the Financial Secretary and the Attorney General) sitting in the legislative Council were always supposed to vote with the government. But the argument made by the British authorities at the time was that a party had to have a working majority of its own without depending on the ex-officio members. As a result, new elections were planned for June, 1961, and the Chief Secretary acted as Chief Minister for six months, with a coalition government consisting of all political parties.

Before the new elections were held, a new constituency was created in Mtambile Pemba, the idea being to prevent another stalemate. But the addition of the new constituency in Pemba where the ASP had not enjoyed great support worked against the ASP’s favor (Middleton and Campbell, 1965:57). These elections held on 1st June 1961 were marred by bloody riots which started with minor skirmishes and disturbances at polling stations, spread to the country side and continued for the whole week, resulting in 68 deaths and
381 people injured, while over 1000 were arrested and many buildings were damaged (Commission of Inquiry, 1961). In this election, in spite of the fewer votes (that is a combined total of 44,092 against ASP’s 45,172), the ZNP/ZPPP alliance won the elections by securing a total of 13 seats compared to 10 of the ASP.

Thereafter, came the time for constitutional conference which was held in London from 19th March and 6th April 1962. Earlier before the conference, the independence issue was a matter of serious discussion in the Legislative Council from August 1961 to early 1962. There were frequent consultations between the political parties, trying to figure out how and when full independence should be granted. This conference was attended by all the political parties in the Legislative Council with the Colonial Secretary as chairman. The ZNP/ZPPP alliance demanded an immediate full internal self government to be followed shortly afterwards by full independence, without holding any further elections. The ASP also proposed that independence be granted the same year but, after fresh, free and fair elections. It also demanded reduction of minimum voting age to 18 and, an increase of elected members from 25 to 31. However, both sides reaffirmed their loyalty to the Sultan and the Throne and their desire that the dynasty should continue. They also agreed on the removal of means and literacy condition in elections.

The British Government proposed that the three parties join to form a coalition government. The ZNP/ZPPP alliance agreed and offered 3 out of 9 ministerial posts to the ASP and a veto power in the deliberations of the cabinet. The ASP rejected this offer insisting that a fresh round of elections was necessary (Mapuri, 1996:35). The constitutional conference therefore, ended in a dead-lock.

After the failure of the 1962 constitutional conference to produce a solution regarding Zanzibar’s independence, the British Government appointed Sir Robert Arundell to study the problems regarding electoral constituencies in Zanzibar. In his report, released in October, 1962, he recommended that Zanzibar should be divided into 31 constituencies, coinciding with an earlier ASP proposal.
In April 1963, the British Minister of state for the Colonies, Sir Ian Macleod announced that Zanzibar would be granted internal self government on 24 June, 1963 and general elections would be held in July the same year. Relations between the parties were becoming even more strained at this time (Middleton and Campbell, 1965:61).

Once again, the ASP with the majority, and this time a very clear majority of votes ended up with fewer seats, indicating discrepancy in the demarcation of constituencies. In the elections the ZNP/ZPPP alliance won 18 seats and the ASP 13 while the ZNP had a fall in the percentage of votes cast from 35% in 1961 to 29.8%. In 1963 the ASP increased its share of votes from 49.9% in 1961 to 54.3% in 1963. The ZPPP made an increase from 13.7% in 1961 to 15.9% in 1963. Following elections which determined the future government of an independent Zanzibar the last constitutional conference was convened in London at Lancaster House in September, 1963 on Independence constitution.

As expected, the conference was attended by both the government and opposition sides. It was agreed that Zanzibar should become fully independent on 10 December, 1963. During the proceedings under the chairmanship of the British Secretary of State for the Colonies, a number of constitutional changes were made. The debates were very hot and where differences could not be reconciled amicably the Secretary of State undertook to arbitrate and his decisions were adopted. One of the most significant changes was that the sultan would be declared the Head of State of Zanzibar (British Government, 1963:3). Also Bill of Rights had a chapter in the Independent Constitution.

The Independence Constitution which was the first comprehensive constitutional document for Zanzibar had eleven chapters. However, this document survived and functioned for only a month. Thus, on 10 December, 1963 the British Government declared the Independence of Zanzibar and handed sovereignty to the Sultan and the ZNP formed a coalition government with ZPPP.

ASP was seriously dissatisfied with the way the British government handled the independence issue of Zanzibar. It felt that its justice was denied by the British Government as Mapuri puts it that “the efforts towards true independence for the African
majority by constitutional means came to an unsatisfactory end. The British colonialists left behind a political mess and a complete failure to deliver justice of which they surely could be proud. “Alternative routes had to be sought by the victimized African majority” (Mapuri, 1996:38). Hence, in additional to other factors, the failure to amicably handle the independence and constitutional issues led to the January 12th 1964 revolution that not only overthrew the ZNP/ZPPP coalition government, but immediately also abolished the monarchy.

**The 1964 Revolution and its Aftermath**

Immediately after the 1964 Revolution, the Revolutionary Government abrogated the Independence Constitution of 1963. However, the government realized the necessity of having a constitutional basis for its actions. Perhaps that is why one of the first actions taken by the Revolutionary Council was the passing of a Constitutional Decree providing for constitutional government and the rule of law. The Decree spelt out the division of powers in the new Government and declared an intention of codifying Constitutional Decree’s which were to form the basis of the new constitution (Othman and Shaidi, 1981:195).

On division of powers, Section 2 of the Decree provides:

*The People’s Republic of Zanzibar is a democratic state dedicated to the rule of law. The President as Head of State validates legislation by his assent. As an interim measure, legislative power resides in the Revolutionary council and is exercised on its behalf and in accordance with its laws by the President. The principal executive power is exercised on behalf of the Revolutionary Council and with its advice by the cabinet of Ministers individually and collectively; the principal judicial power is exercised on behalf of the Revolutionary Council by the Courts, which shall be free to decide issues before them solely in accordance with law and public policy.*

It is quite obvious from this section that Zanzibar fell into the hands of one man rule and an authoritarian regime as asserted by Othman and Shaidi that, “it is clear from this section that in actual practice, legislative power was vested in an individual who was to
exercise it “on behalf of the Revolutionary Council” Judicial power was to be exercised by courts also “on behalf of the Revolutionary Council” The orthodox doctrine of division of power was not strictly adhered to since the Revolutionary Council was “every thing and every where” (Othman and Shaidi, 1981:196). At the same time the President of Zanzibar became the chairman of the Revolutionary Council. Prior to this Decree No. 5 the High Court Decree No. 2 of 1964 was passed to establish the High Court of Zanzibar which was given judicial power to work on behalf of the Revolutionary Council.

However, these absolute powers vested to the Revolutionary Council of enacting Constitutional Decrees; performing executive functions and exercising judicial power were taken as only interim measures to cope with the environment of the time. This intention was stipulated clearly in section 3 of the Decree No. 5, which provided that:

\[ ... Not later than January, 11^{th}, 1965 a Constituent Assembly of the Zanzibar People shall be convened to pass upon these and other basic provisions which after having received the assent of the Constituent Assembly, shall be the Constitution of Zanzibar. \]

This shows that the new Government gave itself a period of one year which is very reasonable according to the circumstances, to prepare and then to adopt a new Zanzibar Constitution. Surprisingly, the interim period of one year elapsed and the originally expressed desire never materialized. Instead, section 3 was amended one year later 1965 by removing the words and figures “January 11^{th} 1965” and substituting for them the words “a day to be appointed by the President”. After this amendment, electing a Constituent Assembly became a forgotten issue in Zanzibar, The Government clearly indicated that was not a priority issue and the first President of the Afro-Shirazi Party publicly admitted that he had no plan for elections in the isles (Othman and Shaidi, 1981:197).

The delay in the establishment of the Constituent Assembly provided room for the President to continue to exercise his absolute powers of issuing Constitutional Decrees,
appointing members of Revolutionary Council and to carry out other executive functions. Among the Decrees which were enacted include the High Court Decree No. 2 of 1964 which established the High Court of Zanzibar, Cabinet Decree; Afro Shirazi Party Decree which marked the beginning of party supremacy, and the Confiscation of Immovable Property Decree No. 8 of 1964 which legalized confiscation without compensation. Section 2(1) the Confiscation of Immovable Property Decree No. 8 of 1964 provides:

*Whenever it appears to the President that it is in the national interest of the Republic to acquire any property and that the acquisition of such property without the payment of compensation would not cause undue hardship to the owner thereof, the President may by order confiscate such property.*

There are no provisions for compensation, the only criterion was whether such confiscation would cause undue hardship to the owner or not. If no undue hardship was caused thereby then such immovable property would be liable for confiscation. Unfortunately again the Decree did not define requisites which would determine whether confiscation would cause undue hardship or not. Under this decree a number of immovable properties such as plantations and buildings formerly owned by people who were believed to be supporters of overthrown Government were confiscated without compensation. These properties then were redistributed to landless people, most of them A.S.P. members and quite a substantial portion of the confiscated properties was distributed to the highly placed ASP leaders.

Another Decree enacted during this period was the People’s Courts Decree of 1970. The provisions of the Decree provided that the Chairman of the Revolutionary Council was to appoint the Chairman of the Court at area or district levels and two other members of the court. However, the Decree did not provide any qualifications required for the appointment of the Chairman or members of the Courts. Thus, it is not surprising to note that most of the Chairmen and members of the People’s Courts for their whole tenure were illiterate.
Further, it should be noted again that in criminal matters, District People’s Courts had jurisdiction over all cases except murder, manslaughter, attempted murder and treason. In the same chain of judicial system at the top there was the Supreme Council Decree of 1970 which established the Supreme Council as on Appellate Court against decisions of the High Court in the cases of murder, attempted murder, manslaughter and treason. Also, the Council had been given responsibility to deal with any matter of public interest referred to it by the President of Zanzibar. It is quite striking that there was no qualification requirements prescribed for appointment into the Council.

Generally, from 1964 to 1979, when the first post-revolution constitution was adopted the state of constitutionalism and human rights in Zanzibar were in recession and stagnation. Legislative, executive and judicial powers in Zanzibar were concentrated and fused in only one body which is the Revolutionary Council. Besides, those powers within the Revolutionary Council were in effect excessively exercised by a single person who was the President, Chairman of the Revolutionary Council and Chairman of the ruling party.

As earlier mentioned the orthodox doctrine of separation of powers and checks and balances was not adhered to. The only existing political party, A.S.P. became supreme and was only political organization allowed to exist in Zanzibar. No elections were held at all levels and the President alone was vested with discrentional powers to appoint members of the cabinet and Revolutionary Council. It is interesting to note that before the adoption of the new Constitution of 1979, no woman was appointed as member of Revolutionary Council, and hence no woman member of the cabinet. Human rights and rule of law were not subjects of discussion in Zanzibar. There were gross violations of human rights but there were no avenues through which citizens could air their grievances. Detentions without trial for long periods of time and mysterious disappearance of scores of people who were believed or suspected to be opponents of the regime was the order of the day.

On 26th April 1964, the People’s Republic of Zanzibar and the Republic of Tanganyika announced that they had merged to form the “United Republic of Tanganyika and Zanzibar” (Act No. 22 of 1964). In December of the same year by an Act of the Union
Parliament, a new name for the United Republic was adopted, i.e., Tanzania (Act No. 61 of 1964). Immediately after the ratification of the “Articles of Union, the Constitution of Tanganyika was adopted as the Interim Constitution of the United Republic, which was supposed to last for one year until a new constitution had been adopted by the Constituent Assembly. The Interim Constitution of Tanzania, however, in effect, became a permanent document as it lasted for 13 years. The Interim Constitution was repealed and replaced in 1977 by the Constitution of Tanzania (1977) which was adopted by the Union Parliament which converted itself as a Constituent Assembly.

In spite of the Union, Zanzibar still retained a certain degree of autonomy. Apart from matters that were specifically reserved for the Parliament and Executive of the United Republic of Tanzania, the President of Zanzibar was expected to have absolute powers on non-Union matters. In practice, however, these powers have been highly questionable in the light of the extension of the list of Union matters (especially after 1977) such that even those hitherto regarded as non-Union matters are now directly or indirectly affected by the Union authorities.

**The Zanzibar Constitution of 1979**

The first post-revolution Constitution of Zanzibar was enacted in 1979. This Constitution can rightly be called a “child” of the Union Constitution. It was modeled after the Union Constitution providing the same format and organization of government. It incorporated the principle of separation of powers between the three branches of government, the executive, legislature and judiciary. It also endorsed all provisions in the Union Constitution relating to Zanzibar, making only modest modifications where appropriate. The draftsman of the Zanzibar Constitution must have drafted it with a clear desire to avoid any contradictions or inconsistencies with the Union Constitution (Othman and Shaidi, 1981:208).

Another salient feature of the 1979 Zanzibar Constitution was that it provided for the first time since the 1964 revolution a presidential election in Zanzibar. The Constitution altered the procedure of electing the President of Zanzibar which was laid down by the
1977 Union Constitution. According to the 1977 Union Constitution a special committee of the Central Committee of CCM was to select a candidate for the Zanzibar Presidency. Then the name was to be confirmed by the National Executive Committee of CCM. After such confirmation the name would be forwarded to the Revolutionary Council of Zanzibar” which shall have power to accept or reject the candidate selected”. Under the 1979 Zanzibar Constitution, the special committee had to submit not less than two names to the National Executive Committee, which made the final selection of only one candidate. Instead of the name of the selected candidate being submitted to the Revolutionary Council it was now sent to the electorate.

Besides, section 22 of the Zanzibar Constitution of 1979 established the “House of Representatives” as the sole law making organ on all matters other than Union matters. Legislative power which was previously exercised by the Revolutionary Council shifted to the House of Representatives by the Zanzibar Constitution of 1979. The creation of the House of Representatives fundamentally eroded the powers of the Revolutionary Council which was an excessively conservative body.

To be sure, such constitutional developments: the introduction of the presidential election and establishment of the House of Representatives were very instrumental towards the building of a democratic society in Zanzibar. Although the majority of members of the House were not directly elected democratically from the constituencies, they were in a better position to discharge the House functions of oversight and representation than the Revolutionary Council, which was basically a governing oligarchy.

The judicial system was left almost the same by the Zanzibar Constitution of 1979. The constitution made only modest changes to the system leaving the People’s Courts, High Court which had concurrent jurisdictions with the Tanzania High Court on Union matters and the Supreme Council which had appellate jurisdiction. The Supreme Council, like the Peoples Courts was composed of people who were not lawyers. Advocates were barred at all levels of judicial proceedings in Zanzibar. Thus, it is not surprisingly also to note that the Bill of Rights was not included in the 1979 Constitution.
Further, the new Constitution retained the Revolutionary Council. However, it was stripped most of its original powers. Under the constitution the main function left to the Revolutionary Council was only to advise the Chairman of the Council on all governmental matters other than Union matters. Its legislative functions were now assumed by the House of Representatives and it no longer had direct control over judicial matters. Also, it lost its power of electing the Zanzibar President. Admittedly, the adoption of the Zanzibar Constitution of 1979 was a significant step forward in the constitutional development of Zanzibar, but still Zanzibar had a long way to go.

The 1984 Zanzibar Constitution

The current Constitution was adopted in 1984 soon after a pollution of the political atmosphere in Zanzibar which led to the resignation of the second post revolution President of Zanzibar Sheikh Aboud Jumbe from both State and party positions. The 1984 Constitution differs in a number of aspects with 1979 Constitution. This constitution has a bill of Rights which entrenches the basic human rights and guarantees the right to elect and be elected. It also, defines who a Zanzibari is, limits presidential terms of office to only two terms, repeals Supreme Council and extends the jurisdiction of the Union Court of Appeal to Zanzibar. It also, stipulates State directives and makes a House of Representatives that consists mostly of elected members. Further, it is the Zanzibar Constitution of 1984 which established the Special Departments (brigades) of the Revolutionary Government of Zanzibar.

It is apparent that most of these new inputs in the 1984 Constitution are very progressive and congruent with the ongoing democratization process in Zanzibar but the quest for Constitutional government is not just for beauty of it on paper. It requires readiness and political will of all stakeholders especially those who are at the helm of government. A constitutional document provides a framework within which governance is organized, but a constitutional order presupposes the willingness to implement and apply all provisions of the Constitution and other legal instruments. To that end, effective and appropriate control mechanisms have to be in place to control the abuse of power of authorities. As a general assessment, it is quite obvious that Zanzibar still lacks these important
ingredients (Zanzibar Democracy Report 2004/5). The Zanzibar Constitution, for example, imposes democratic requirements that ordain that the Government engages with citizens when making the decisions that effect their lives. Section 9 of Constitution states that power to govern emanates from the people. Seen broadly, the Constitution provides for a right to participate in the legislative and policy making processes that goes well beyond the right to vote in periodic elections. Not only must citizens be given the opportunity to speak on issues that affect them; there is also the onus on the legislatures and the executive to take their views seriously. Yet, this has not been the case and the citizens have often been made mere recipients of the government policies (The East Africa Democracy Report 2004/5:62).

The CCM-CUF political accord has spurred the Zanzibar Government to send to the House of Representatives the 8TH Constitutional amendment which affects many changes to the Constitution. The changes spell out more clearly the division of power between three organs of the government. Section 5A of the Constitution in intent directs at virtual separation of powers. The Election Commission has been re-organized to include two members from the opposition camp. Also, the number of special seats for women was increased to 30% of direct elected members.

The 8th amendment provides for positive reforms in the judicial system of Zanzibar in order to secure its independence and integrity. At least now the Judicial Service Commission has been established more independently and one member elected by the President from a recommendation of the Zanzibar Law Society as stipulated in section 102 of the constitution. Similarly, the 8th constitutional amendment entrenches for the first time in Zanzibar the Office of Director of Public Prosecution to civilianize the public prosecution.

However, the constitution remains with a number negative elements, Section 63 makes the President of Zanzibar to be part of the Legislature, while the constitution itself in intent directs at separation of powers. This seems to be against the principles of constitutionalism. The constitution of Zanzibar in section 5A provides that Zanzibar shall follow the system of distribution of powers between three authorities; executive
authority, legislative authority and the judiciary. Even though the powers and limitations on each of the three branches of government have been set out, the presidency’s powers have always been out of proportion to those of the other branches. The House of Representatives has no real control over the executive; it may be dissolved by the President at any time under conditions specified in section 91(2).

Again, under section 66 of the Constitution, the President has the power to nominate 10 members to the House and under section 64(d) 5 Regional Commissioners are members of the House. This makes a total of 15 direct appointed members by the President, with the Attorney General making them sixteen. The number is too big and in a really democratic society which firmly believes on the principle of separation of powers and checks and balances, this practice cannot be tolerated. Thus, there is no genuine the President to appoint 10 members to the House, and Regional Commissioners should remain as Regional Commissioners representing the President in their respective regions.

Another controversial issue in the constitution can be found in chapter 10, section 121 which established the Special Departments. There are underlying constitutional questions whether in fact the President of Zanzibar has power to establish these Special Departments. Under article 147 of the Constitution of United Republic of Tanzania of 1977 only the Union Government can establish armed forces of any kind. The Court of Appeal of Tanzania has, albeit in passing already hinted that there are constitutional dilemmas posed by Special Departments established by the President of Zanzibar in purported exercise of powers under article 121 of the Zanzibar Constitution. In sharp relief, the question here is; can the Zanzibar Government establish its own ”armed forces” by whatever name they are called?

A key ingredient of the constitutional government is an independent and impartial judicial system. In Zanzibar the judicial system is established under Chapter Six of the Zanzibar Constitution, among the weakness of the current system is the political influence that is exerted by the executive in the whole process of the appointment of Judges. According to section 94 of the Constitution of Zanzibar, the President appoints the Chief Justice of Zanzibar and Judges of the High Court of Zanzibar on the advice of
the Judicial Services Commission. It should be noted, however, that majority members of the Commission which is established by section 102 of the Constitution of Zanzibar are direct appointees of the President. Likewise, the Chief Justice who is the Chairman, the Attorney General who is the Deputy Chairman and the Chairman of the Civil Service Commission, who are all presidential appointees in their respective offices, are members of the Judicial Service Commission. In addition, the President can appoint any other person he “thinks fit” to be a member of the Commission and this is not restricted to qualifications. This is according to the section 102(1) (h) of the Constitution. Thus, clearly reflecting on the political influence in the system, there are no legally stipulated criteria set for the President to adopt when appointing members of the Commission. This is against the rule of law principles. Therefore, precedents of the Zanzibar Judiciary are not inspiring. The judiciary has been suffering from serious credibility questions, especially when political issues are involved.

The 26 and 27 January, 2001 events offer a good illustration on how political influence affect the credibility of the judicial system. The CUF supporters and other citizens were arrested and seriously beaten up by the Police. The 27\textsuperscript{th} January, 2001 was not a working day but because of the large number of suspects who could not be accommodated in the Police cells, the courts at Mwanakwerekwe were ordered to be on duty by the Chief Justice, presumably at the request of the state security organs. As it was not enough, even though all the alleged offences were bailable, all suspects were denied bail even in the face of the over-crowding. One magistrate stated that they had been instructed not to grant bail (Zanzibar Democracy Report, 2004/5:67).

Another setback in the judiciary took place in 2004 when the Government refused to execute a decision of the High Court of Zanzibar. A demolition order was issued in the case of Abdalla Ahmed and Yamu Ahmed vs Khatib Abdalla Makame and 2 others. The order was against the interest of some important persons including former head of intelligence in Zanzibar and a former Regional Commissioner. The police did not execute the court order on pretext that the site was guarded by people armed with machetes.
The Status of Human Rights

Zanzibar has passed through different phases of human rights developments in the post-revolution era. Generally, however, the history of human rights in Zanzibar has been punctuated by gross violations. After the 1964 revolution until the late 1970s, human rights as a concept was not in the government vocabulary and as a practice was not a matter of concern for almost every act and incident of human rights abuse was viewed by the authorities as justified in the spirit of safeguarding the revolution. The first years of the revolution under President Abeid Karume were evidently the worst in the post-independence history of Zanzibar. Under the second President, Aboud Jumbe, gross abuses of human rights continued but the human rights situation remarkably improved particularly in his later years.

The 1984 Constitution included a Bill of Rights which stipulated basic rights and freedoms of citizens. Besides, in 2004, the House of Representative passed an Act to Provide for the Extension of Jurisdiction of the Human Rights and Good Governance Commission (HRGGC).\(^1\) Obviously, it is a step towards promoting and protecting human rights. However, promotion and protection of human rights can never be measured by only looking on how good the scripts are in the Constitution and Acts. But rather it requires a real commitment in the application and implementation by stakeholders particularly the Government itself and its institutions. In the case of Zanzibar, there have been remarkable improvements on the legal scripts, but the application of the same leaves a lot to be desired.

The state of human rights in Zanzibar has suffered a number of setbacks since 1984 when the Bill of Rights was introduced. A number of rights of citizens are clearly stipulated from section 10 to 25 of the constitution. In practice, however, almost all the rights are given to the citizens by the right hand and then taken away by the left hand through a number of claw back and derogation clauses. Consequently, the citizens are denied their

\(^1\) In May, 2005 the extension of jurisdiction was approved in Zanzibar following the amendment to the mainland human rights and good governance law. It was agreed that the Zanzibar Minister for Good Governance would be allowed to present any findings of human rights violations to the Zanzibar House of Representatives rather than to the Union Parliament and that the Mainland Minister for Good Governance would consult with his Zanzibar counterpart before making any regulations that would affect Zanzibar.
basic rights. There is no equality before law especially where political issues are involved; freedom of association and expression is not guaranteed as provided by section 18 of the constitution. Citizens are not treated equally. Public offices arbitrarily used to discriminate some category of citizens who are believed to be opposition supporters most of whom are of Pemba origin (Bakari, 2001:136-140). Thus, in practice, there is no freedom of association either, for if a person associates himself with opposition parties, that is taken as a ground to deny him some of his citizen’s rights including, for example, public employment.

Since the introduction of multiparty politics in Zanzibar in 1992, the record of human rights which had noticeably improved between the late 1970s and 1980s drastically deteriorated. Violation of human rights in Zanzibar may be observed on a daily basis – e.g., the way people are discriminated against on political grounds in various aspects of public life, including public employment and the way state organs deal with political opponents. What is evident, however, is that there is a clear pattern of human rights abuse associated with elections. As the election time approaches, starting with the registration of voters, during the campaigns, voting and in the aftermath of the elections, the state of human rights drastically deteriorates. This has been the case with all the three multiparty general elections since 1995.

Whereas the pattern of human rights abuse is evident in every general election, the events of January 26/27, 2001 mark the climax of human rights abuse in Zanzibar. Unarmed demonstrators and other victims who did not even participate in the demonstrations were shot by the government security forces. According to the Presidential Commission of Inquiry 37 people, including one policeman were killed, and according to CUF sources, more than 45 people were shot dead. Besides, dozens of people sustained serious injuries and some remain to date totally incapacitated. Again, intimidation and harassment of innocent people continued several days after the demonstrations. Properties were looted by the government security forces and scores of people were reportedly raped and more than 2300 people fled to the neighbouring country, Kenya as political asylum seekers (Amnesty International Report, 2002; CUF, 2003).
The backdrop against these events was that both the Union and Zanzibar governments seemed to have prepared themselves well in advance for the violent crackdown of the opposition. In mid-January, 2001 an estimated 500 Tanzanian government police and army reinforcements with armored vehicles and artillery were sent to Zanzibar, adding to the forces that had already been deployed there since the elections. In addition to the security and defense forces of the Union government, the Zanzibar government also deployed its own quasi military units (vikosi). These units include the Army for the Building of the Economy (Jeshi la Kujenga Uchumi, [JKU]), the Coastal Guard – the Anti-smuggling Naval Unit (Kikosi Maalum cha Kuzuia Magendo, [KMKM]), as well as the ruling party militia (mgambo). The massive deployment of the defense and security forces on the islands during the elections and later reinforcements went abreast with the government’s strong statements of scaring the would-be demonstrators. Top government officials issued public statements warning that force would be used: “The government has prepared itself in every way to confront whatever occurs…any provocation will be met with all due forces of the state”, said Tanzanian Prime Minister Frederick Sumaye (Nipashe, January 26, 2001). A similar statement was also given by the late Dr. Omar Ali Juma, the Tanzanian vice-president at the time. The assessment of the chronological events leading to the January 26/27 events therefore suggests that events were not an accident but rather a systematic preparation on the part of both politicians and members of the defense and security forces.

The pattern of excessive human rights abuse particularly during election times repeated itself during the 2005 general elections in Zanzibar. There were several violent events of human rights violations, including an event in Mkoani Pemba where a student was shot dead allegedly by a member of the Zanzibar paramilitary unit in December 2004 during the time of voter registration. By the end of 2005, there were no reports of progress in investigating the killing.

Intimidation and arbitrary beatings and arrest of people on political grounds have been a regular practice in Zanzibar especially during election periods since 1995. A number of
cases are reported where people are humiliated, opposition supporters are also tortured and refused registration while others are attacked in queues with iron bars and machetes (Atunga 2005:3). The Right to vote is a constitutional right to all citizens. Therefore, denial of registration in the Permanent Voter Register to a significant number of prospective voters on flimsy grounds which effectively sealed their fate regarding eligibility to participate in the electoral process is not only against the constitution but also neglecting of internationally recognized democratic right to vote for all citizens.

As regards the conduct of the coercive organs of the state it is worth to mention the role of the Special Departments of Revolutionary Government of Zanzibar which are established under section 121 of the Constitution. However, their actual conduct violates the same section which restricts them from participating in any political activities other than voting during election. The Departments are usually used arbitrarily contrary to the aim of their existence which includes assisting other state organs in eliminating crime and other undesirable activities. As stipulated earlier, these special Departments are established under the Constitution of Zanzibar of 1984, their activities which include “search and arrest, possession and use of firearms clearly violate the rights of Zanzibaris because only the Union Parliament has powers to establish armed forces under Article 147 of the Constitution of the United Republic of Tanzania.

The 2005 election offers a good illustration. During the whole process of elections, the Special Departments in collaboration with other security forces and pro-CCM militia, nicknamed Janjaweed (after the pro-government militia in Darfur, Sudan) which regarded itself as a party’s youth wing harassed people, burnt and looted homes, beat people and committed many acts of violence. A number of organizations which engaged in fact finding in Zanzibar to assess 2005 electoral process reported these acts.

Of all the acts of violence committed by coercive organs of the state and paramilitary units of the Zanzibar government during the 2005 general elections, the worst ones were those committed in Piki, Wete (both on the night of 31st October and the 1st of November) and at Konde on the 1st of November. Residents in these areas were severely beaten by the police or by forces under police command. These incidents occurred after a
member of paramilitary units was abducted and killed at Piki. Many people found their houses looted after they returned from hiding. In Wete, a person was shot dead and he died on the spot. About 16 CUF members from Konde were detained. In Piki, where the situation was tenser, the harassment lasted for several days before the Tanzania Peoples Defense Forces (TPDF) took control of the situation.

In the area of freedom of information and expression the Zanzibar government is still too restrictive. The public media still work under close scrutiny and control of the state. It is the government which decides what information should be disseminated to the citizens. State interference in the news media is of such extent that some government officials exercise significant editorial control before news can be released. Before 2005 General Election, when the islands prepared to go into elections, the media, especially, Television Zanzibar, and Radio Zanzibar were openly promoting the ruling party even before the electoral Commission officially launched the campaign. The only private paper, based in Zanzibar, Dira and which was critical of the government of the day that was in existence had been banned in 2004 and by the end of the year the ban was still on.  

All in all, there have been a wide range of undemocratic practices and many acts of human rights violations which defy the doctrine of constitutionalism and rule of law in Zanzibar. In part, due to the fact that Zanzibar is not a sovereign a state these practices have not attracted an adequate international concern. Zanzibar remains an island of within the United Republic of Tanzania where citizens have been suffering from gross violations of human rights and the trend of violation keeps accelerating during election times. This state of affairs in effect deny citizens their political right to change their government. The events of 2005 demonstrated for the third time (1995, 2000, 2005) that although the Zanzibar constitution provides citizens with the right to change their government through a peaceful and democratic process, this right is not respected in

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2 Its managing director, Ali Nabwa was deprived his citizenship in 2004 apparently for publishing articles critical of the government. In August the Zanzibar Immigration Department notified Nabwa that since he was “not a Tanzanian citizen”, and was persona non grata in Zanzibar, he should pay 400 US dollars for a temporary residence permit or 600 US dollars for a permanent residence permit. Nabwa defied the notice arguing that he Union Ministry of Home Affairs had the final say regarding his citizenship status.
Zanzibar by both the Zanzibar and the Union governments. The persistence of legal constraints, ineffective and partial election management bodies (ZEC and NEC), and political violence committed by the state in collaboration with the ruling do not allow a peaceful transfer of power in Zanzibar.

**Conclusion and Recommendations**

The Zanzibar society has been grappling with the constitutional question from the colonial days to date. The achievements on the whole however have not been impressive. The basic constitutional issues have not yet been resolved. Some positive developments have certainly been recorded particularly from 1979 but the progress has been generally very slow. In a situation where more than 50 per cent of the citizens are contesting the legitimacy of the regime in power, and in a situation where a peaceful transfer of power through a free and fair election is not possible, evidently there is a constitutional crisis.

Although there have been some changes here and there in response to various pressures from within and outside the country, the changes that have so far been effected are not fundamentally aimed at establishing a new constitutional order which enjoys broad legitimacy of citizens. These changes in a way could be viewed as a survival strategy of the ruling oligarchy in Zanzibar which claims to derive its legitimacy from the 1964 revolution in the wake of rising international concern for democratization, respect of human rights and good governance.

The ruling oligarchy in Zanzibar backed by unwavering support and protection of the Union Government is still resistant to genuine constitutional changes aimed at establishing a new constitutional order which guarantees government accountability, rule of law and respect of human rights as well as democratic principles including election processes. Thus, even the seemingly positive constitutional and legal instruments that have been enacted rarely provide positive results due to lack of political will to implement them. In order to establish a consensual and sustainable constitutional order and justice the following recommendations could be useful:
First and foremost, what is required is political will from all stakeholders especially, the government in power. The issues of constitutionalism and governance have to be viewed not simply as processes and strategies of power struggles between competing political forces, but have to be viewed as issues of national interest with a bearing on political stability, government accountability and economic development. With this understanding, constitutionalism could be pursued abreast with institutional crafting aimed at eliminating resistance on the part of political actors both those in authority and those outside the government.

Secondly, the existing constitution of 1984 was adopted at a time when Zanzibar and the whole Tanzania was under one party system. As a result of the recommendations of the Nyalali Commission, only necessary amendments were made to both the Union and Zanzibar Constitutions in 1992 to suit the needs of the time in making the whole of Tanzania to be a multiparty state. What was required then and still required now is to adopt a genuine multiparty constitution for both the Union and Zanzibar governments. In that case, therefore, the adoption of a new constitution should follow proper international standards and procedures of constitution designing and adoption in order to avoid previous mistakes. As a societal consensus, a constitution is adopted by Constituent Assembly after having seriously taken on into account inputs from various stakeholders. Apart from the procedures, core values of the society should be entrenched in the new constitution. Given the centrality of these values, it must be provided in the constitution that only through a referendum, can the values can be changed. These core values may include; terms of Office of President, who is a Zanzibari, Bill of Rights, security of tenure of High Court Judges and demarcation of powers between three organs of government.

Thirdly, the constitution should not allow the idea of President being part of a legislature. This idea is unhealthy for democratic development. It undermines the concept of separation of powers and it confirms the assertion of academics that in Africa there has developed an imperial presidency. Relatedly, the constitution should also curtail powers of the President to appoint 10 members of the House of Representatives and restricts the Regional Commissioners from being members of the House of Representatives in order to make the House a more independent institution and able to work more effectively in
upholding accountability of the Government. The original intention of giving power to the President to appoint members of legislature was to allow the President to appoint to the House people with no interest in partisan politics, professional, retired civil servants, priests and Imams and others respected members in society so that they could help the House. The idea had never been to increase the majority of a ruling party in the House. In recent years the practice diverges from the original intention, the President appoints people who lost in the elections or to increase the majority of his party in the House.

By way of conclusion, we would like to underscore the fact that Zanzibar is a politically polarized society for a long time. Any constitutional designing has to take into account the fact that the political history of Zanzibar has been characterized by political hatred between the two main political groups and that these groups are almost equally in numerical terms. Any attempt to exclude one group from the political process is likely to have detrimental outcomes to the society as a whole. Confidence building measures and power-sharing between the two main political camps do not seem to have a contending alternative during this period of democratic transition in Zanzibar after many years of abuse of power and lack of trust among the people. In this regard, constitutionalism and rule of law need to be facilitated by the creation of a Truth and Reconciliation Commission that could help heal the wounds inflicted upon the people for a long time and establish trust among the people for the wellbeing of their community.
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THE STATE OF CONSTITUTIONAL DEVELOPMENT IN UGANDA FOR THE YEAR 2005.

By: Dr. Asiimwe B. Godfrey & Muhozi Christopher

Introduction
Uganda formulated and promulgated a new constitution in 1995, hence 2005 marked a decade of its operation. The year 2005 was a landmark of challenges in the constitutional development of Uganda, including the amendments of the very new constitution. But how are we to conceptualise constitutionalism? Constitutionalism could be delimited to checking government, for instance, the scope of its authority and mechanism of exercising power through established and written laws. Positively, constitutionalism conduces to individual or group space, liberty and rights like free expression, association, equality and due process of the law, thus interlacing with democracy (see Katz, 2000). This paper will adopt the broader approach of state – society relations, drawing from the social contract perspective. How then did the Ugandan state interface with society and how did this translate in terms of constitutionalism during the year of 2005? In this paper, we present trends and factors during the year as they related to constitutionalism in its state-society entirety. The year showed some constitutional progress that largely arose out of struggles, but also continued contestations and even retrogression. Pressure yielded progress that culminated into opening of the political space by returning a multi-party political system and there was some improvement in human rights and press freedom. Main contestations revolved around removal of the Presidential Term Limits; the persistent Northern War and the unpredictable transition. Retrogression was seen in the controversial imprisonment of opposition leaders, climaxing in the military siege of the High Court.

Conceptualizing Constitutionalism
This paper’s broader perspective to constitutionalism will enable an understanding of the totality of exercising and checking of power vis à vis the primacy of “the people’s”/civil society’s interests, sovereignty, rights and aspirations. Government cannot be self-limiting, hence its contract and subsequent relations with the people. Tandon enlightens on Constitutionalism as: “…an arrangement by which power is organised within a state so that its exercise is accountable to a set of
laws beyond the reproach of those who exercise these powers” (Tandon, 1994:225). Democracy and good governance through mechanisms like separation of powers and checks and balances underpin constitutionalism. Constitutionalism is also a convention rather than documented laws and limitations *per se* ( Dicey, 1948). It embodies human worth and dignity, a value that necessitates people’s right to political participation, in turn for government limitations in respect of popular will. The value of constitutionalism is to help society to reach some higher goal ( Katz, 2000). Our working definition of constitutionalism, therefore, transcends legalistic confines.

With regard to constitutionalism, democracy and human rights, the year was mixed with political contention and struggles between the National Resistance Movement (NRM) government and opposition groups; many local and International Civil Society Organisations and the Donor Community. Internally, the culture of constitutionalism varied between groups and residence. While the war-torn Northern and Eastern regions were more inclined towards the opposition, the South and Western regions tended to be quiet or supportive of government, but could also be unpredictable. This was because the South and West were the major socio-political power bases of the NRM regime. Some of these areas bore the brunt of past regime repression, thus appreciated the peace ushered in by the NRM and feared the possibility of reverting to turmoil as President Museveni’s successor could fail to tame the army. Additionally, the South and West were the amphitheatres of NRM’s celebrated economic growth activities. However, urban centres, notably Kampala City, continued to show more organisational tendencies against the state compared to rural areas. The class structure and character; residential pattern; exposure; infrastructure and information flows have always made urban centres constitutionally more conscious and organised than the largely scattered peasant rural populations. Although many élites were critical of government, they remained fragmented, enabling NRM’s clientalism and co-option strategies to continued making inroads into the different élite groups and organisations. Generally, when pitted against an increasingly hardening regime, Ugandan civil society remained fragmented and vulnerable to manipulation and repression, thus weak with regard to the culture of constitutionalism. Vulnerable civil society was resonated into weakness in civil institutions of governance, especially with regard to the smooth transfer of power.

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The Constitution and the Amendments

For Uganda, making a new constitution in 1995 was not from a tabula rasa, but emanated from a deeply rooted consciousness of a turbulent political past. There was a general desire to entrench specific parameters and mechanism for government’s *modus operandi* and documented limitations. This was against the backdrop of vivid and daunting past experiences, which rose from the state’s unlimited and costly abuse of powers (see Bazaara, 2001: 41-45; Nassali, 2004). The essence of the new constitution was, therefore, not the legal document *qua* document, but the enshrined people’s consciousness to restrain the executive that had since the abrogation of the independence constitution, exercised arbitrary power that was often facilitated by repressive militarism. Accordingly, the new constitution was buttressed a strong Bill of Rights and entrenched mechanisms for their enforcement. Furthermore, the new constitution reflected the need for popular representation, aspirations and an overriding will of “the people”. Short of these, the new constitution would remain an abstraction with at best, documentary value. Its preamble succinctly reflected the tumultuous past as its point of departure, and the major task of the Constitutional Commission was to “create viable political institutions that will ensure maximum consensus and orderly secession of government” (see Odoki, 2005: Chap.8). However, to what extent was the new constitution a guarantee for a stable and fruitful framework for state-society relations during the specific year of 2005? Was there adherence to constitutionalism both in its textual formalism and broader dynamics that reflected people’s realities, fears, rights and aspirations?

The new constitution had two major issues of contention, namely restriction of association through political parties and Mengo’s persistent demand for a federal (*federo*) system of governance. Pressure from internal and external multi-party advocates, coupled with Mengo’s insistence on *federo* forced government to establish a Constitutional Commission to review some issues that were deemed contentious and unresolved. In the course of its consultations, cabinet itself submitted proposals that were canalised into the 2005 Omnibus Bill. First, it is noteworthy that both the Cabinet proposals and the issue of an appointing authority to present proposals raised concern about conflict of interests and the very independence of the Constitutional Review Commission (see Ngozi, 2003: 31-38). Secondly, NRM’s National Executive Committee (NEC) reached out on Article 105 (2) of the Constitution that restricted the president’s tenure to two five-year terms and
The Constitution Review Commission presented two reports, a major and a minority report, which pointed to earlier public suspicions of divisions among the Commissioners. The subsequent 2005 government introduced Omnibus Bill, clumping together up to 120 articles of the new Constitution for amendment. This was notwithstanding the different modes of amending the various articles as stipulated in the constitution. Once passed, the omnibus bill would have enabled a wholesale passing of the articles, including those like the removal of the presidential term limits, which had raised contention to higher proportions. Mongo’s long-time demand for a federer system had been circumvented through a replacement proposing a regional tier system, which die-hard Mongo federalists considered inferior. Of national contention was the newly proposed controversial amendment of Article 105 (2) lifting constitutionally enshrined presidential term limits. Another major article was the re-introduction of a multi-party system. Some members of Parliament challenged the Omnibus Bill, with some like Miria Matembe, Ben Wacha and Abdu Katuntu taking it up to the Constitutional Court. Consequently, government formally withdrew the Bill on 7th April 2005 before the Court passed a verdict. However, government insisted on having a referendum on changing the political system, leading to the passing of the referendum law in May. The government setback was the rejection of its proposal to grant more powers to the president to dissolve parliament in case of a stalemate (see The New Vision, February 4th, 2005). Although on some occasions the Seventh parliament could challenge and even reject government positions, it was not considered as strong vis à vis the executive as the Sixth parliament demonstrated. The executive and Movement caucus exhibited mobilisation finesse that enabled passing major amendments without much ado. Government’s mobilisation skills were seen when Parliament
acceptance to change its own voting procedures by discarding the secret ballot system. The skills climaxed in yielding the contentious lifting of presidential term limits. How, therefore, were institutions like parliament formidable to check the executive? A case analysis of the most contentious bills will suffice.

The Presidential Term Limit
The Constitution (Amendment) Bill 2005 intended to repeal Article 105 (2) that imposed a two five-year terms presidential limit was the most controversial amendment of Uganda’s young constitution. The third term amendment was characterised by heated debates (including on-line website Discussions), protests, despondency and a deep sense of betrayal. Conversely, there was great relief and jubilation from advocates of a third term (kisanja), which was seen to pave the way for President Yoweri Museveni’s continued “progressive and visionary leadership”. The opponents considered Museveni, the very architect of the new constitution and celebrated fighter of past dictatorship, as an off-screen manipulator bent on changing the constitutional terms limitation for leeway to ad infinitum rule. But the proponents of lifting the presidential terms espoused the concept of a constitution as a “living tree” that grows and adapts to contemporary circumstances, rather than impose a “dead hand” strict textual limitations derived from the by-gone past. It was considered retrogressive to simply adhere to constitutional rigidities that did not express the dynamics and wishes of the "living". Advocates argued that people should have the power to retain or change a leader, provided there were regular free and fair elections.

President Museveni pointed out that Ugandans were going for a flexible constitution on the question of term limits and that Ugandans should be left to decide who leads them without interference from outside. He reiterated that: “The issues of who leads Uganda is up to the people in regular elections” (see The Daily Monitor 4th July 2005). Proponents further argued that the Movement under the stewardship of Museveni had a vision and mission of accomplishing the establishment of the rule of law, constitutionalism, transformation of Uganda and unity in East Africa (see Sunday Vision, February 6, 2005). Bunya west MP William Kiwapama, for instance, said that his people saw in president Museveni a redeemer, hence the need to waive the restrictive term limits. Opponents like Betty Among (MP Apac women) retorted that MPs needed to transcend
the simplistic reasoning of their rural constituents and contemplate why term limits were enshrined in the constitution (The New Vision, February 10, 2005:5).

Uganda’s presidency had ever since the 1966/67 Buganda Crisis displayed totalitarianism, misuse and abuse of unlimited power. Consequently, consensus emerged for a universally elected president, with reduced or limited powers and an explicit two-term restriction (Odoki, 2005:173). There was anxiety about “unlimited rule” still vivid in the Amin era concept of “Life President”. After a two-day workshop on the Constitution Amendment Bill, 2005, a consortium of about 90 local NGOs opposed lifting of the presidential term limits. One of their leaders noted thus: "It is to ignore the lives lost and persons displaced through misrule….Power that is unchecked is fatal" (Masiga, 7 March, 2005). The former American Ambassador to Uganda pointed out that:

Many observers see Museveni’s efforts to amend the constitution as a re-run of a common problem that afflicted many African leaders – an unwillingness to follow Constitutional norms and give up power…. Charismatic and affable, Museveni is regarded as one of the most influential leaders in Africa. However, his thirst for power and quest for a controversial third presidential term may return Uganda to its dictatorial past (Carson Johnnie, Boston Globe, 1 May, 2005).

Change of fundamental constitutional safeguards before they were even applied, required overwhelming affirmation from a people as they were deeply entrenched in their cross-generational body-politic. Otherwise, periodic constitutional changes pointed to arbitrary political expediency for short-term interests, thus sowing seeds of future contestation.

Parliamentary debate on constitutional amendment was preceded by amendment in rules of procedure that substituted secret with open voting, which some believed was intended to manipulate and intimidate MPs to tow the NRM line (Sunday Vision, January 9th, 2005:7). This was followed by allegations of bribery which presumably compromised MPs and weakened Parliament as an independent institution. It was reported that over 200 MPs were each given a 5 million “facilitation” allowance. The “facilitation” was, however, given outside the premises of parliament and to only those MPs who supported government position. Colonel Kahinda Otafiire was quoted as having said: “…yes, I received the money, I drunk some of it because it was facilitation, I also bough some … for home and used the rest to fuel my car to my constituency” (The Monitor, January 11, 2005). Apart from weakness through alleged bribery, there were views that the government took
advantage of special interest groups who owed their position in Parliament to NRM. Army and women representatives were particularly singled out as often voting for government positions. MP Ken Lukyamuzi pinpointed women MPs as always supporting Museveni (*The New Vision*, January 24, 2005). Some women NGOs were reported to have expressed support for the third term project, with Kampala women MP Margaret Zziwa announced that: “without Museveni, we women cannot exist” (*The New Vision*, February 1, 2005). However, the support of women cannot be generalised as some women in Museveni’s own home district of Mbarara were reported to have advised him to respect the constitution and step-down (*The New Vision*, January 24, 2005).

The Third-Term controversy led a sizable number of legislators to form a Parliamentary anti-third term pressure group PAFO. This was followed by the widening of cracks within the inner circle NRM leadership. Prominent long-term (“historical”) NRM leaders, notably Augustine Ruzindana, Eriya Kategaya and Jabel Bidandi Ssali either resigned or were purged through “Baleke Bagende” (good riddance) reshuffles, and new movement enthusiasts increasingly took the centre stage. PAFO’s endeavours to internally mobilise against the “third term” were stifled by intimidation and repression. Nonetheless, some MPs presented the government white paper to their electorate, and some Districts like Nebbi were reported to have rejected the removal of presidential terms (*The New Vision*, January 5, 2005:7).

On 23 March, opposition groups organised a protest against the Third Term Bill, appealing to donor countries to exert pressure on the NRM government, which was accused of attempting to establish a “dictatorial presidential monarchy”. Foreign criticism mounted and Ugandans in the Diaspora organised conferences and demonstrations against lifting presidential term limits. Such were the conferences in London, Sweden (27 August, 2005) and North America (see *The Daily Monitor* 27th September 2005). The US warned that: “Democratisation could suffer a setback if the NRM succeeds in removing presidential term limits from the constitution” (US State Department, Report, 2004/2005). The U.S. Ambassador to Uganda, Jimmy Kolker reportedly pointed out that President Bush had advised President Museveni about the Third Term and need for a peaceful political transition in Uganda. While appearing on Andrew Mwenda live talk show on 93.3 KFM on Thursday 7th July 2005, the US Ambassador was quoted as having said: “I was at the meeting and I am comforted in what I say that peaceful transition is important to term limits because I know what
my president believes and I know what he said”. The Ambassador added that he had offered his own advice to the president whenever asked, ending that: “I don’t broadcast that advice over the radio. But I agree that Africa’s problem is leaders hanging on to power” (The Daily Monitor, 12th July 2005). The Ambassador’s comments were vehemently opposed by Prime Minister Apolo Nsibambi (The New Vision, July 13th 2005). The Commonwealth Secretary General Don Mckinnon, equally pointed to the respect the Commonwealth accorded to term limits (see The New Vision, February 19, 2005). It was further reported that Uganda’s Third Term project was threatening East African unity and prospects of a political federation. Countries with more stable systems like Tanzania were getting apprehensive over Uganda’s move to amend its constitution and abolish presidential term limits (The Daily Monitor, 6th July 2005).

The Federo Issue and the Regional Tier Bill
One of the important constitutional issues handled by the parliament and government during 2005 was a regional government system. This issue has been long standing as Buganda continued to demand for federalism. As Nassali argued: “The ‘Buganda question’ essentially the return to federalism system of government has remained an unresolved issue with incessant pressure from Buganda to return to its position of pre-eminence in the country enjoyed until 1966” (Nassali, 2004:210). Ever since the restoration of the monarchy in Buganda in 1993, the Mengo establishment relentlessly demanded for the restoration of full powers to the Kabaka and his government. Such powers existed under a federal arrangement which the colonial government had granted giving Buganda a “special status”, partly as a reward to Mengo’s collaboration. On failure to regain federalism, The Federo Advocacy Movement expressed their feelings thus: “Federalism is the nature of the Ugandan society. The earlier we realized this fundamental fact, the sooner we shall take our destiny in our own hands. It is unity in diversity in a real sense” [Lugemwa, Federo Advocacy, posted on http://fedsnet.blogspot.com].

The Odoki Commission that collected views on the constitution was faced with demands for federo in all the parts of Buganda³. However, Odoki points out that because of the association of the

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³Mengo operates strong institutions that instil and ensure unity to the extent that some Baganda who dared to deviate from the norm were castigated. During independence time, Mengo’s apparatus was effectively applied to stop universal suffrage in Buganda in favour of Kabaka Yyeka Parliamentary appointees. Some prominent Baganda nationalists like DP leader Benedicto Kiwanuka were repudiated as bakopi (commoners) for daring to oppose Mengo’s position. During
federal system (*federo*) with traditionalism, the members of the Constituent Assembly were biased and eventually the idea did not get room in the new constitution (Odoki: 2005:203). This left Mengo disgruntled and the issue remained contentious. When the Sempebwa Commission was set up to review the 1995 constitution, Mengo’s demand for *federo* was rejuvenated. In its Omnibus Bill, government presented a Regional Tier system as an alternative to *federo* (Government of Uganda: Hansard, 15.02.05). The issue, which was debated in parliament under the Constitution Amendment Bill 2005, was finally passed on August 18 2005. It read as follows:

> [A]nd to amend the constitution to provide for Kampala as the capital city of Uganda, to provide for the districts of Uganda, to provide that subject to the existence of regional government, the system of local government in Uganda shall be based on a district as a unit; to provide for the creation of regional government as the highest political authority with political, legislative, executive, administrative and cultural functions in the region; and to provide for the composition and functions of the regional government; to provide for regional assemblies for each regional government; to replace the fifth schedule to provide for details to regional government; to amend Article 189 to recognize the functions and services of regional governments; and to provide for related matters (Constitution (Amendment No. 2) Bill 2005).

This law was passed by parliament based on the agreement that was reached between the government of Uganda and the Mengo government. All the measures therein were reportedly agreed upon by the *Katikiro* (Prime Minister) of Buganda and the Minister of Defence Amama Mbabazi on behalf of the government. However, Mengo did not agree to the terms contained in the law, for instance, the idea of an elected *Katikiro*; financing of the Regional government and the administration of land in the region. Meanwhile, 46 other districts expressed support for the regional tier, which left Mengo the only discontented party (*The Daily Monitor*, 09th December, 2005).

*federo* debates, prominent nationalists from Buganda, for instance, Bidandi Ssali and the late Col. Selwanga Lwanga often conflicted with Mengo over *federo*. Buganda’s leader of the royals, Omulangira Besweri Mulondo was himself disowned for his “betrayal” of the *federo* project. The contention about the type of federalism *cum federo* that was persistently demanded by the Mengo establishment on behalf of Buganda Kingdom was that it raised suspicion in other parts of Uganda. The Colonial government had granted a Federal system against the backdrop of a “special Status” for Buganda. Opinions outside Buganda considered *federo* as a strategy to create a state within a state, whose interests were in the past on a collision course with the central government and not necessarily representative of all sections of Buganda’s society.
The Referendum

The referendum law was passed in May despite resistance from the Opposition in Parliament. The G6, an alliance of 6 major opposition parties comprising Forum for Democratic Change (FDC), Democratic Party (DP), Conservative Party (CP), Justice Forum, The Free Movement (TFM) and Uganda Peoples’ Congress (UPC) and some Civil Society Organisations opposed the referendum, arguing that it infringed on the inalienable right of association which could not be subjected to a vote. Consequently, the G6 vowed to boycott the referendum (New Vision, 6th May 2005). They maintained that owing to its irrelevance, it was not justifiable to spend an estimated $13m (£7.4m) on the referendum, as this was a waste of meagre resources (see Masiga, HURINET, June 17, 2005). Accordingly, the G6 sought an injunction against the plebiscite in the Supreme Court. UPC’s Hajji Badru Wegulo, John Livingstone Okello, FDC’s Sam Njuba, Betty Kamya, DP’s Issa Kikungwe, CP’s Ken Lukyamuzi and The Free Movement’s Dr. John Jean Barya were represented by Peter Walubiri, Moses Ojakol and Elias Lukwago. The petitioners asked the constitutional court to block the July 28th referendum on change of political system saying it is worthless, illegal, unconstitutional, too expensive and violated peoples’ basic rights and freedom (see The New Vision, June 21, 2005).

The G6 continued to exert internal pressure and lobbied donors to freeze aid, which they considered as a prop to the NRM regime. However, there were accusations of government infiltration of major political parties with the intention of undermining their cohesion. Government was also accused of promoting the formation of unknown surrogate quasi-opposition parties with which it negotiated to legitimise its strategies. Such NRM “satellites” were often at variance with the common opposition stand, for instance, with 30 of them reported to have registered to participate in the controversial referendum. Suffice it to note, however, that the major opposition parties were themselves riddled with serious internal divisions and wrangles that eroded their credibility. Mr. Eriyasi Sseguja, the president of one of the newly formed parties, the National Peoples Party (NPP) insisted that old parties should not demonise all new parties as Museveni’s creations, and pledged that his party was ready to enter a coalition with the G6 if they stopped doubting their integrity (The New Vision 9th August 2005).
Government insisted that a national referendum had to be organised to decide whether to retain a no party system or revert to multi-party politics. Supporters of the referendum maintained that it was imperative to consult “the people”, who alone had the prerogative of deciding how they had to be governed. On 12 July 2005, President Museveni himself launched a “Yes” campaign in favour of the return to multi-party politics, presumably to get rid of un-committed elements that were sabotaging Movement advancement. The chief executive’s “Yes” campaign; absence of a competing campaign; poor voter civic education, opposition boycott and general apathy led to a low voter turn-up of about 47%, of who 92.5% supported restoration of multi-party politics. This made the July 2005 referendum a formalistic foregone conclusion. The opposition FDC even claimed that actual turn-up was lower and that the Electoral Commission had inflated the voter’s turn up and the ballots cast to make their results look credible (The Daily Monitor, 16 August 2005)

Overall, the transitional arrangements were contentious, with the government being accused of lack of will and a levelled ground for all the stakeholders. The British High Commission was particularly unsatisfied with the transitional arrangements, prompting Mr. Nikesh Mehta (the Second Secretary on Political Issues at the British Embassy in Kampala) to issue a statement withholding up to £5m ($10m) of funding to Uganda. This was followed by a warning to cut more aid by the Organization for Economic Cooperation and Development (OECD), which comprised most of Uganda’s top donors. In response, government warned foreign diplomats accredited to Uganda to stop making public statements about the country’s transition process. This pointed to the beginning of a strain in the hitherto rosy relationship between the donors and the NRM government.

**Political Parties**

The National Resistance Movement waged a 5 year protracted guerrilla war after the controversial 1980 elections that ushered in a simulacrum of phoney palti-party politics. The UPC-dominated politics were characterised by political repression and instability, which was exacerbated by the guerrilla war. A multi-party system had operated from independence in 1962 to the establishment of a UPC one party rule after 1967, and thereafter lapsed into abeyance during the Idi Amin dictatorship. However, Uganda’s dominant parties emerged on sectarian foundations; with DP overwhelmingly Catholic in leadership and membership; while UPC was protestant and Mengo’s Kabaka Yyeka (KY) purportedly representing the Baganda as an ethnic entity. These sectional
tendencies had fuelled divisions, to which the NRM harped as the cause for past misrule, hence the need to shelve parties and “move together”. Accordingly, political parties were constitutionally prohibited from operating beyond their National Headquarters, and were barred from either mobilising members or even holding delegates’ conferences. Many people had suffered excessive repression and appreciated the need for unity. However, some sections of the society considered the movement system synonymous to one-party rule that lacked established mechanisms of checks and balances, thus at best transient. Internal debate ensued and grew with external recognition and support, underlining the inalienable right to association versus the movement opponents who pointed to sectarian inclinations and the attendant chaos (see Kituo Chakatiba, 2002: Section 5.4 & 5.5).

The eventual opening of political space was, therefore, a protracted process whose landmark was the November 2004 Constitutional Court ruling against some sections of the Political Parties and Organisations Act (PPOA). The Court pinpointed the unconstitutional infringement of some PPOA sections on fundamental civil and political rights, for instance, freedom of association and assembly. A combination of external Donor and internal opposition pressure forced President Museveni to re-consider opening-up political space. Meanwhile, new political parties emerged on the scene, for instance, Forum for Integrity in Leadership (FIL), the National Convention for Democracy (NCD), the Uganda Economic Party (UEP), the Liberation Democratic Transparency (LDT), the National Progressive Movement (NPM) and the National Peoples Party (NPP). The Forum for Democratic Change (FDC), a merger of the Parliamentary anti-third term group (PAFO) and Dr. Kiiza Besigye’s Reform Agenda that contested the 2001 presidential elections, was the most prominent of the new parties, to the extent of eclipsing the two traditional parties, namely DP and UPC.

Although traditional parties remained sceptical of the new parties as creations of the Movement government, they considered FDC as credible and trusted party, and forged common working relationship with it under the G6 framework. The G6 considered and explored possibilities of fielding joint presidential and parliamentary candidates against the incumbent Movement. However, the traditional parties continued to be internally disorganised and were failing to follow their own constitutions. Long-serving party leaders were seen as equally infected with the African Leadership
malaise of wanting to stay-in power, which generated internal wrangles in the UPC (see *The Daily Monitor*, 15th June 2005; *The Daily Monitor*, 19th June 2005), in the DP (see *The New Vision*, January 12, 2005:1; *The Daily Monitor*, 20th May 2005; *The New Vision* 29th August 2005) and the CP.

The establishment of grassroots networks and infrastructure was not smooth for parties like the FDC. In Gulu, the FDC accused the Movement youth league that on 6th August 2005, they vandalised their office situated on Nheru Road (*The New Vision*, August 9th 2005). In Masindi, a landlady padlocked the building that FDC had secured for its offices on the eve of launching the Party. FDC accused local NRM officials in Hoima and Masindi of sabotage. Although in Kamwenge the launch was a success, the FDC chairman cited intimidation of supporters in the District thus: “People fear to register with the party because LC (Local Council) chiefs threaten to beat them up” (*The New Vision*, 27th June 2005). It was reported that FDC offices in Kisoro were vandalised by suspected security officials, prompting State Minister for Information and government spokesman, Dr. James Nsaba Buturo, to call upon government officials to stop harassing FDC (*The New Vision*, 18th July 2005).

**The Northern Insurgency**

Underlying the new constitution was the presumption that political conflicts would be resolved constitutionally. The persistent preponderance of the military factor on the political scene pointed to continued weakness of constitutionalism; civil institutions of governance and democratisation, notably the smooth transfer and exercise of power. By the beginning of 2005, the NRM government had militarily “managed” most insurgencies in Western and Eastern Uganda. However, some constitutional and political issues remained sites of struggle. Worst of all, Joseph Kony’s Lord’s Resistance Army (LRA) remained politically and militarily thorny, particularly in Pader, Gulu, Kitgum and Lira Districts of Northern Uganda. The endemic war and its dire consequences were a challenge to government’s abilities in its constitutional social contract to defend, if not to politically end the conflict or at least provide for its people’s entitlements, rights and basic necessities. Despair eroded the legitimacy of government among the affected areas, prompting 50 International Aid Agencies to appeal to the United Nations to protect the civilians in Northern Uganda. The Deputy Director of Save the Children Fund in Uganda succinctly stated thus: “The UN Security Council
must take firm action and challenge the Ugandan government to protect its own people. If the
government cannot do this, then the Security Council must agree to a resolution which commits the
international community to protect the millions suffering in sub-Saharan Africa’s longest-running
war” (Reinstein John, IRINnews.org, 11 November, 2005).

The government pursued a three-pronged strategy of amnesty, peace talks and military defeat of the
rebels. Despite government’s assurances and claims of military successes, especially after launching
“Operation Iron Fist”, the 19 years old insurgency continued to mint-out havoc and devastate
people’s livelihoods. Militarily, it is noteworthy that the Uganda People’s Defence Forces’ (UPDF)
performance was generally commendable given the meagre resources, strenuous circumstances and
combat fatigue. This was in tandem with the army’s constitutional duty of defending the population.
As a result, many civilians were rescued; actual combat declined as many rebels were killed,
surrendered or fled to Sudan and the Democratic Republic of Congo. However, risk of kidnap
remained high and between January and July 2005, an estimated 1,168 people almost half of who
were children, were abducted by the LRA (IRINnews.org, 11 November, 2005). Girl Children were
particularly in danger as they were wanted by rebels as sex slaves (also see Amnesty International,
35(07), August 2005). The vulnerability and abuse of children was ruinous to society’s future and
hopes, and at variance with the provisions of the African Charter on the Rights and Welfare of the
(ICC) issued arrest warrants for the five elusive rebel leaders, namely, Kony Joseph, Otti Vicent,
Okot Odhiambo, Ongwen Dominic and Lukwiya Raska, to be tried for atrocities against humanity
and war crimes committed in Uganda since July 1st, 2002. However, the ICC arrest threats upset
the peace initiatives and eroded confidence in the amnesty, negotiations and a political solution,
leading to an increase in rebel attacks particularly targeting international personnel.

Response to government’s amnesty was slow while peace-talks were characterised by deep mistrust
and intermittent hostilities leading to collapse of talks in February 2005. The endemic war
prompted opinions that some elements among the top actors were benefiting from the conflict,
hence lacked the will to end the insurgency (See Mamdani, The New Vision, December 5th,
2005:10). If these opinions were credible, then the government’s failures would be at variance with
the principles and objectives which were enshrined in Chapter four of the Constitution. There was a
hopeless feeling of being neglected, as the Northern people harped on the insecurity while the rest of the country continuously praised the unprecedented security ushered in by the NRM. This led to some beliefs that the NRM government intended to depict insecurity as a local problem because the Acholi were “rebellious” and that was why it was largely left to the concern of Non-Governmental Organisations (NGOs) and international workers. One respondent claimed that it was for President Museveni’s veiled negative perception of the Acholi that he hardly appointed a full cabinet Minister from the mid-north to enhance direct political relations with government. “For Museveni, the best solution is to conquer and his pleasure is for opponents to always succumb. How many full Ministers are in Ankole whose problems are not fundamental” (Okello, 20th December, 2005). In the same vein, a Human Rights Watch report noted thus: “While the war continues, the displaced people of northern Uganda remain isolated, ignored and unprotected, vulnerable to abuses by both rebel and army forces” (Human Rights Watch, September, 2005:2).

The government established Internally Displaced Camps (IDCs) in which to protect civilians from the rebels. However, there were some cases of laxity in the protection of the camps leading to occasional attacks and continued insecurity. Mamdani, for instance, reveals that he once visited a camp of roughly 15,000 internees who were “protected” by only 15 armed soldiers and periodically raided by LRA (Mamdani, The New Vision, December 5th 2005). President Museveni’s Media advisor, John Nagenda hastened to dismiss Mamdani’s revelations as devoid of truth (Nagenda, The New Vision, December 10th 2005). Apart from continued insecurity, long stay in IDCs under appalling conditions due to scarcity of necessities, compounded despair and destitution, as a people’s corpus livelihood of traditional organisation, economic and social fabric and ethos was disrupted (see Finnstrom, 2005, a&b). The District Chairman of Kitgum described the situation in an IDC thus: “We are as desperate as the people of Darfur, we lack food, health services and education facilities in the camp. For example, we have only one doctor for every 50,000 people…” (Ojwee Nahaman, IRINnews.org, 11 November, 2005). Hunger, congestion and perceived government’s failure to provide proper frontline services, particularly health care, had horrific consequences estimated at 1,000 excess civilian deaths per week, with curable malaria as the leading killer (See Ministry of Health, Report, July 2005:ii and Table 1). These were aggravated by rape and abuse by some undisciplined elements within the UPDF. An estimated 12% of the Northern population was HIV positive, twice the national average (see Lough and Denholm,
A Catholic Missionary in Kitgum enlightened on the despair in the IDCs as follows:

Life in the camps is such a miserable experience. The quality of life is zero. Now we are receiving reports from Pabbo camp of three suicides a week. Suicide was extremely rare among the Acholi people. Now when people start taking their lives, then they have lost hope (Rodriguez, Carlos, IRINnews.org, 11 November, 2005).

The Uganda Government, however, strongly denied the incriminating findings of Human Rights Organisations, accusing them of degenerating into propaganda mouthpieces for the opposition during the run-up to the 2006 elections (see UG, Press Statement, Minister of Defence, 23 September, 2005). Nonetheless, American based Human Rights Watch in particular stood by its findings (see Human Rights Watch, September 30, 2005).

**Human Rights**

In their wide consultations, the Constitutional Commission tells us that one of the issues on which people were largely unanimous was the need to protect and promote human rights (Odoki, 2005:173). The previous year of 2004 was characterised by reports of violations of human rights in un-gazetted places of detention (Safe Houses), which were operated by state security agencies. There were reports of torture and arbitrary arrests of political opponents and suspects of an alleged rebel group, the People’s Redemption Army (PRA) (See Human Rights Watch, Report, April 2004; Amnesty International Report, 2005). In addition to the Army, agencies that were reported to be in the lead of violating human rights included The Chieftaincy of Military Intelligence (CMI); Internal Security Organisation (ISO); District Security Organisations (DISO); Joint Anti-Terrorism Task Force (JAT); Violent Crime Crack Unit (VCCU) and the Police’s Criminal Investigation Department (CID). JAT’s Kololo based “Safe House” was singled out as one of the most notorious torture chambers. For Ugandans, mention of torture chambers ruptures the healing wounds that had for decades been inflicted by pre-NRM dictatorships.

The Human Rights Watch reported continuation of abuses that *inter alia*, included beating with electric cables, tying hands and feet behind the victim (*kandoya*), piling detainees in underground halls, inflicting injury to genitals and denying suspects medical care. It was reported that common criminals and political opponents, particularly of FDC’s alleged PRA rebels were the major victims
of torture (See Human Rights Watch, May 2005). In some cases, suspects could be maimed or even died of torture. Such was, for instance, Waga Kizza of Kalagala village in Kayunga who was arrested on charges as simple as defaulting payment of graduated tax and died after torture by local police and security agencies (see *The Monitor*, January 31, 2005).

There was persistent pressure through local and international exposure leading to some improvement or possibly concealment of abuses during the second half of 2005. The “sensitive” thus classified as “confidential” findings by Parliamentary Commissions added to the Uganda Human Rights Commission (UHRC) vigilance to pressurise government. In one case, for instance, the UHRC ordered the Attorney General to pay U Sh. 40million as compensation to Mr. Idris Kasekende who was illegally detained for 125 days and tortured by the police to the extent that he occasionally discharges purse (see *The Monitor*, January 21, 2005).

**Arrest of Opposition Political Leaders**

During the year 2005, there were continued arrests and delayed trials of people associated with the opposition on allegations of being connected to the rebels of the People’s Redemption Army (PRA). The most high profile arrest was of Rtd. Col. Dr. Kiiza Besigye, leader of the major opposition party, FDC. While Besigye’s arrest generated pressure and was considered a political boomerang that forced the government to yield to his release, his politically unknown co-accused “rebels” remained in custody and were denied their bail.

In April 2005, two Members of Parliament of the opposition FDC, namely, Okumu Reagan (Aswa County) and Ocula Michael (Kilik County) were arrested for allegedly murdering Alfred Bongomin, a Local Council 3 Chairman of Pabbo, Gulu District way back on February 12th 2002. The army had earlier intimidated the two MPs when they visited Pader District in Northern Uganda. Their lawyer Peter Walubiri, opposition colleagues and leading Human Rights activists maintained that the charges were politically motivated (*The Daily Monitor*, April 21st 2005; Human Rights Watch, April 27, 2005)⁴. Prominent opposition leaders complained of harassment, including allegations of tapping their phones; constant surveillance by security agents; plans to use

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⁴ The two MPs won the case in January 2006, and at the time of writing this paper, government was contemplating appealing against the acquittal.
housemaids to poison them and drivers to plant incriminating seditious materials in their vehicles in order to arrest them (see The Daily Monitor, 25th July 2005).

Some top army officers who showed tendencies of opposing lifting of presidential term limits were also threatened. Prominent of these was Army MP Brigadier Henry Tumukunde, who was forced to resign from Parliament; incarcerated and charged with "spreading harmful propaganda" by the General Court Martial. Tumukunde had openly criticised the president on radio and questioned the third-term project contrary to army regulations against involvement in politics. This ban against the army’s involvement in politics contradicted the rationale of having them represented and voting in parliament. Nonetheless, it was also pointed out that whereas some other senior army officers like Major Roland Kakoza Mutale and Brigadier Kasiryegwanga had been openly involved in politics in favour of the president, they were neither prosecuted nor reprimanded. In an interview, Col. (Rtd) Dr. Kiiza Besigye, leader of FDC, underlined double standards in the application of Army policies and regulations thus: "…policies and regulations apply only as long as they favour the president/C-in-C and his henchmen" (Mutaizibwa, The Monitor on line, 20 June, 2005; Cummins Scott, June 22, 2005). G6 leaders demanded that government speeds up inquiry into reportedly over 1000 political detainees in the country jails (The New Vision May 6th 2005).

The return of Col. (Rtd.) Dr. Kiiza Besigye on 26 October 2005 won Parliamentary commendation of NRM as a politically mature government that exercised principled reconciliation (see The Daily Monitor, 26 October, 2006). The issue of reconciliation rose to prominence following the death of UPC leader and former Uganda president Dr. Apollo Milton Obote in October 2005. Besigye was a perceived major opposition challenger of President Y. Museveni, and his return generated excitement among FDC supporters, with many regaining confidence and interest in registering to vote at the last minute.

Besigye was later arrested by the military police at Busega near Kampala on 14th November, 2005 as he returned from his countrywide “greet the people” tour. The arrest of Besigye drew internal and external protests. Internally, the arrest sparked-off public riots of significant magnitude in Kampala, which spread up-country especially in the Northern-Uganda Town of Arua and Besigye’s birth place of Rukungiri. The turmoil prompted the police and army to deploy heavily and use tear-
gas to quell the riots, especially in Kampala (see *The Daily Monitor* and *The New Vision*, November 15, 2005). The riots were devastating and led to colossal costs, particularly to the business community. On the other hand, the manner in which the riots were suppressed showed the capacity, power and resolute determination of government over any civil society anti-state action, which raised concern on government’s willingness to peacefully hand over power. These internal protests were of particular significance in the history of state–society relations with regard to constitutionalism. Sometimes civil society in Uganda was portrayed as a passive victim of the state, with changes only brought about by external pressure. However, when contradictions mature, civil society in Uganda counter-opposes, including the rural populations who are often organised by the élite middle classes. With the arrest of Besigye, Kampala and some other urban centres showed constitutional consciousness and organisational potential by braving to riot against the state until they were overwhelmed by repression. Externally, the African Parliament called for an immediate and unconditional release of Besigye, and there were more cuts in the budgetary Aid to Uganda by donors. The Netherlands, for instance, withheld 13 billion in budgetary support to Uganda and on 20\textsuperscript{th} December, Britain further cut Shs 64 billion in Aid.

Besigye and 22 others were committed to the High Court accused of treason, because of their alleged connection with the PRA rebel group and concealment of treason. Additionally, Besigye was individually charged with raping (Ms) Kyakuwa Joanita way back in 1997. The rape victim had ever-since been under the custody of state house, which raised suspicion about the interest of the presidency in the case. The arrest at the height of the campaigns was largely seen as politically motivated, intended to block Besigye from competing with Museveni for the presidency. Although the Electoral Commission ruled that Besigye was eligible for nomination while in prison, on 7\textsuperscript{th} December 2005, the Attorney General Dr. Kiddu Makubuye, issued a directive to the Electoral Commission against the nomination of Besigye (see *The Daily Monitor*, December 10, 2005:3). Owing to the absence of a legal bar, the government rescinded its stay on the nomination of Besigye, and he was nominated in custody.

**Judiciary and separation of powers**

Through wide consultations, the Constitutional Commission noted consensus on people’s desire for a constitutionally protected independent judiciary as a guardian of basic human rights and
constitutionalism. Consensus also emerged on the need for constitutional entrenchment of the principle of separation of powers and mechanisms of checks and balances with regard to the judiciary, executive and legislative arms of government (Odoki, 2005:174). To what extent did the judiciary function as an independent institution during 2005?

As the year 2005 came to a close, the judiciary grappled with challenges of handling high profile “criminal” cum political cases, which ranged from treason to murder and rape. Before Besigye’s return from exile, President Museveni wrote a confidential circular to cabinet drawing its attention to outstanding criminal cases against him. However, some sections of the public perceived the circular as imputing criminality thus a prima facie evidence of the president’s interest in having Besigye imprisoned. This was aggravated by the take-over of the case by the Military General Court Martial (GCM), notwithstanding that the case was already before the High Court. It was believed that as a civilian, Besigye was within the jurisdiction of the High Court, and a parallel trial in a Military Court bordered on double jeopardy. Insistence on trying Besigye in the GCM was seen as intended to serve the purpose of circumventing civil courts that could by law grant him bail, which would enable him to challenge Museveni for the presidency. Besigye’s legal team challenged the legality of the GCM and its concurrent trial and managed to obtain an injunction, pending the ruling of the Constitutional Court (The New Vision, 3 December, 2005).

Museveni’s fervent defence of the GCM to handle the case tended to give credence to speculations of his interference in the process of this specific case (See The New Vision, November 30, 2005). In one incidence, Besigye was intercepted en route to the High Court and forcefully taken to the GCM at Makindye for a parallel trial. During the trial, the GCM Chairman, General Elly Tumwine, sentenced Besigye’s defense lawyers to military detention for contempt of his Military Court and ordered the mainly western diplomats out of it. Tumwine was reported to have shouted at His Excellency, Ambassador Stig Barling, the head of the diplomats thus: “Tell that diplomat to go out ….Please save yourself. And besides, this court is not under international affairs, so please go out” (The New Vision, 25th November, 2005). Meanwhile, President Museveni continued to castigate and warn diplomats for what the government saw as their continued meddling into Uganda’s internal affairs.
On 16th November 2005, there was what was described as an infamous siege of the High Court by black dressed armed men ("Black Mambas") from a reportedly special Urban Hit Squad unit of the Military Intelligence. It was reported that as 14 suspected PRA rebels were being granted bail by Justice Edmond Ssempa Lugayizi who pronounced it as their constitutional right, the “Black Mambas” took positions and tried to force their way into court cells, allegedly to wrest the suspects back into detention. This was considered the jeopardy of the sanctity of the judiciary by state security functionaries, which drew international and local condemnation. Chief Justice Benjamin Odoki and the Inspector General of Government (IGG) condemned the act (The Daily Monitor, November 17th. and 18th., 2005:1; The New Vision, November 17th. and 18th. 2005). The Principle Judge, Justice James Ogoola unequivocally described that Wednesday November 16, 2005 as “a day of infamy” and the incident as “naked rape, defilement, desecration and a horrendous onslaught” on the Judiciary. The event stunned some people that they equated it to the Amin era kidnap of Chief Justice Benedict Kiwanuka from his chambers in 1972, and forced Justice Lugayizi to withdraw from handling Besigye’s treason case (The New Vision and The Daily Monitor, November 19, 2005). The Uganda Law Society protested and condemned the military interference in the independence of the judiciary and demanded the resignation of the Attorney General, albeit in vein (The Daily Monitor, 29 November, 2005).

Not surprisingly, the Uganda army (UPDF) spokesperson, Major Felix Kulayigye justified the widely bewildering and condemned act as follows: “The UPDF had a legitimate and legal right to re-arrest them and have them answer the charges under the UPDF Act” (The Daily Monitor, November 17th. and 18th., 2005:1; The New Vision, November 17th. and 18th. 2005). Although Besigye was later granted bail by the High Court Principle Judge James Ogoola, he was forcefully taken back to prison under the orders of the junior GCM (The Daily Monitor and The New Vision, November 30, 2005). The year ended with an allegation by FDC leaders of bribery of top Judges for the sake of denying Besigye bail so as to eliminate him from the presidential race (The New Vision, 31 December, 2005).

The Police and Security Agencies
During the Constitutional Commission consultations, consensus emerged about the need for a professional police force to be largely responsible for internal security, and that intelligence
agencies should be regulated by law and accountable for their actions. A general view was also noted that the army should be under civilian control; had to defend and protect the constitution and democratic institutions and that its main responsibility should be to defend the sovereignty and territorial integrity of Uganda (Odoki, 2005: 174-175). During 2005, Kalangala Action Plan (KAP), a pro Museveni youth militia group under Major Roland Kakoza Mutale, remained a controversial state security agency. KAP gained notoriety for its intimidation and repression of the opposition during the 2001 presidential elections, and continued to be a potential threat to smooth political transition.

After the Justice Julia Ssebutinde report that unveiled rampant corruption in the police, a new Inspector General, Major General Katumba Wamala was transferred from the Army to head the police force. Despite meagre resources, Katumba Wamala improved the tainted image and poor performance of the police force. However, during 2005, the task and image of the police were complicated by the interface between the state’s political interests versus civil society opposition. While rioting, civil society often lost control of some elements who either took opportunity to loot or vented their anger through destruction of property, thus justifying police intervention. Nonetheless, the police was in most cases seen as an instrument of protecting government interests by suppressing the opposition.

After their siege of the High Court, some members of the Military Police Hit Squad Unit (“Black Mambas”) were later pictured dressed in police uniform (The Daily Monitor, November 25, 2005). This seemed to confirm allegations that state security agencies sometimes disguised as regular police to give a touch of legitimacy to their operations. Some members of the public, especially from the opposition, were increasingly uneasy about what they considered the militarization of the police for what they considered as political motives. In October 2005, the President made military promotions and reshuffle, in which he appointed Major General Kale Kayihura to head the police force. The continued appointment of soldiers to head the police raised concern among opposition Members of Parliament. The MPs also expressed fears that the military reshuffle was sectarian and loyalty biased, which was Museveni’s strategy to enhance “personalization” of the army in preparation for the transitional period (see The Daily Monitor, 26th. October, 2005). In this regard, the MP for workers pointed out that those who were promoted were the “usual suspects”. He
continued thus: “But if top positions are taken by people from the same village, there is a question mark” (ibid). Meanwhile, the capacity of the police to “handle” civil disobedience was bolstered by the importation of RG-12 armoured vehicles, presumably for use during the transitional period (*The New Vision*, 3 December, 2005).

**Freedom of the Press and Speech**

The year 2005 witnessed relative improvement in the freedom of the press, amidst threats of closing some media outlet “for endangering regional security” and reporting lies against government. The improvement was against a backdrop of a struggle, the watershed of which was the February 2004 Supreme Court Judgement, which ruled the offence of “publication of false news” as void and unconstitutional. Ever since 1997, a number of journalists had been constrained, charged and prosecuted for this offence contrary to Section 50 of the Penal Code Act. Although the Supreme Court annulled the offence, in August 2005, government arrested and charged journalist Andrew Mwenda and suspended the licence of KFM Radio under the version of “seditious news”. It was alleged that while on his talk show, Mwenda portrayed Uganda Government as having led to the death of Southern Sudan leader and Sudan Vice President Dr. John Garang through its carelessness.

With the pressure and agitation that followed the arrest of FDC leader Dr. Besigye, government slumped a ban on public rallies, demonstrations, assemblies, seminars, talk shows and media debates related to his trial (see *The New Vision*, November 23, 2005:1-2). While government maintained that the measure was taken in the interest of social order and the security of people and their property, many people saw it as gagging the public, thus an infringement on their freedom of speech. On November 18, over 20 police and state intelligence officials searched the Daily Monitor Offices, which were suspected of being the source of posters soliciting for contributions to the Dr. Besigye Human Rights Fund. Government maintained that such fundraisings were illegal. Meanwhile, government officials sustained threats on the press and media, particularly *The Daily Monitor*, which was construed to be anti establishment. Accordingly, Luzira Prison Officials were reportedly censoring newspapers sent to Besigye, especially *The Daily Monitor*. This was tantamount to denying him the right to information despite his status as a political party leader (*The Daily Monitor*, 23rd November, 2005:3). Based on the above trend, intellectual freedom could follow suite.
Conclusion
For many Ugandans, the year 2005 ended in political suspense and fear of the unpredictable transitional period. The constitutional amendment process, particularly regarding the removal of the unapplied presidential term limits was to many, a chilling awakening into the endemic capricious realities of Uganda’s politics. Many Ugandans simply hope that peace will prevail during the transitional period and especially after the February elections. The population hope that if the elections will be free and fair, they will be able to choose leaders that will bring meaningful change in their lives. As the year progressed, there were cases of unaccountable leadership and corruption; a human rights record with continued reports of abuse; shattered livelihoods of the people of Northern Uganda; a not so free press; a harassed opposition, a manipulated constitutional amendment process and interference in the judicial system. Exposure, coupled with internal and external pressures were instrumental in bringing about positive changes in governance during 2005. On the whole, meaningful constitutionalism was a chimera, as civil institutions of the state remained weak and civil society continued to be vulnerable to state manipulations and repression.
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THE STATE OF CONSTITUTIONALISM IN EAST AFRICA FOR THE YEAR 2005: THE ROLE OF THE EAST AFRICAN COMMUNITY.

By Dr. Kithure Kindiki

1. INTRODUCTION

One of the most important developments in Africa in recent years has been the revival of the East African Community (EAC), with Kenya, Uganda and Tanzania as its members. Before its collapse, the old EAC was regarded as one of the most successful experiments in regional economic integration on the Continent. Due to ideological differences among and within the three countries, the perceived domination of the Kenyan economy and the Idi Amin-led military coup in Uganda in 1971, this promising experiment in regional economic integration came to a premature and painful end in 1977. 2

Twenty-two years after the ignominious collapse, the Community appears to have arisen from the ashes of the old.3 On 1 December 1999, the new EAC was launched in Arusha, Tanzania. This was preceded by eight years of protracted and gradual negotiations that culminated in the signing of the Treaty Establishing the East African Community on 30 November 1999.

This paper explores the status of constitutionalism in the three states of Kenya, Uganda and Tanzania; and the actual and potential role of the EAC in promoting constitutionalism in the region. In so doing, it analyzes the constitutional and political developments in the three states during 2005, and examines the constraints and opportunities for the EAC to enhance constitutionalism in the region.

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3 Id.
3 THE CONTEXT

3.1 The Concept of Constitutionalism

The notion of constitutionalism is today broader than it used to be in the 1960s when De Smith described it in the following words:⁴

… Constitutionalism is practiced in a country where the government is genuinely accountable to an entity or organ distinct from itself; where elections are freely held on a wide franchise at frequent intervals; where political groups are free to organize and to campaign in between as well as immediately before elections with a view to presenting themselves as an alternative government; and where there are effective legal guarantees of basic civil liberties enforced by an independent judiciary; and I am not easily persuaded to identify constitutionalism in a country where any of these conditions is lacking.

In its broadest sense, constitutionalism refers to the ethic of complying with constitutional norms. Thus, Ojwang states that having written or unwritten constitutional principles does not always guarantee constitutionalism.⁵ Ostensibly, constitutionalism would entail a culture of respecting a country’s constitutional normative and institutional frameworks. In this light, constitutionalism encompasses both constitutional and political ethos.

Constitutionalism goes beyond the mere existence of a constitution and governance according to a constitution.⁶ It is premised on the assumption that the constitution is a social contract between people and their leaders; defining democratic governance, guarantees individual rights, and empowers the citizenry to use it as a living document that reflects their needs and aspirations in furtherance of their day-to-day life struggles.

Since the end of the Cold War, two developments have wrought broader conceptualizations of constitutionalism. The first one is the emergent world citizenship whose content is to be found in such international human rights instruments as the Universal Declaration of

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Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The workings international human rights supervisory mechanisms, together with the international criminal tribunals and the International Criminal Court have produced a human rights jurisprudence that no constitutional lawyer can ignore. This jurisprudence is supplementing the old jurisprudence on constitutionalism.

Yet another citizen has been emerging side by side the world citizenship. This is the regional citizenship. The members of the European Union (EU) have adopted federal Constitution that is currently the subject of public debate. The African Union (AU) launched in Durban, South Africa in 2003 is aimed at ripening into some political federation first envisaged under the 1994 Treaty Establishing the African Economic Community.

In East Africa, it has been decided to nurture the EAC until it becomes a political federation consisting the three states of Kenya, Uganda and Tanzania; but also, perhaps, including Rwanda and Burundi. The notion of constitutionalism, understood in the context of universalism and regionalism provides the theoretical underpinning for this paper.

3.2 Regionalism and Constitutionalism: The Nexus

The deteriorating economic, social and economic conditions in Africa have generated a lot of Afro-pessimism, with suggestions that Africa is likely to forever remain the backwater of

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7 Adopted and proclaimed as UN General Assembly Resolution 217(III) of 10 December 1948.
8 Adopted and opened for signature, ratification and accession by the UN General Assembly by Resolution 2200A (XXI) of 16 December 1966; entry into force: 3 March 1976, in accordance with article 49.
9 Adopted and opened for signature, ratification and accession by the UN General Assembly by Resolution 2200A (XXI) of 16 December 1966; entry into force: 3 January 1976, in accordance with article 27.
10 Notably the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for the Former Yugoslavia (ICTY) as well as the Special Courts for East Timor and for Cambodia.
the global economy. Nassali notes that the African crises is no longer defined in technical and economic terms but as problems of human rights, social and political impasse, the total suffocation, fragmentation and encapsulation of civil society, containment of democratic civil pressure and the depolitization of civil society, all which have frustrated growth, peace, stability and development.

The erosion of security and stability in Africa is one of the major causes of continuing crises and acts as a major impediment to the creation of sound economies and the establishment of an effective system of intra and inter-African cooperation. This cooperation, particularly the intra-African type has led to Africa-wide and regional cooperation within the continent, particularly in the area of economic cooperation. But while the process of regional integration is inextricably linked to the quest for economic development, it is emerging that economic prosperity cannot be achieved in a state of constitutional crises and without addressing the root causes of underdevelopment.

Linking the two concepts, a commentator had the following to say about the future role of regionalism in enhancing constitutionalism:

The next millennium is likely to be one of greater regional and other forms of international cooperation than have been witnessed before. The last two decades have witnessed the revival of regional cooperation including [the Common Market for Eastern and Southern Africa] (COMESA), and the EAC. In Africa, regional cooperation is perceived to be capable of facilitating rapid economic progress and to offer hope of an end to ethnic strife as the citizens identify themselves with larger entities than with their own races or tribes.

With the imperatives of contemporary globalization, it has increasingly become clear that regionalism must address issues of development, the environment, political stability, human rights and governance. The EAC Treaty acknowledges this linkage between regional economic integration and constitutionalism. It provides as one of the core objectives of the Community, ‘the promotion of peace, security and stability within, and good neighbourliness

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14 Id.

15 Speech of GK Kuria, Chairman Law Society of Kenya, on occasions of the Annual Dinner held on Saturday 20 March 1999, Hotel Intercontinental, Nairobi.
among, the partner states. Among the fundamental principles of the Community is ‘good governance, including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality as well as the recognition, promotion and protection of human and peoples’ rights’.

4. RELEVANT DEVELOPMENTS IN THE PARTNER STATES OF THE EAST AFRICAN COMMUNITY (EAC) DURING 2005

a. The Republic of Kenya

A dominating theme in public and media debate in Kenya during 2005 was the Proposed New Constitution. The constitutional reform process in Kenya, however, is much older – having began around 1990. It has been argued that Kenya’s is easily one of the longest constitutional reform processes in world history.

This longevity has been explained variously. However, one of the more enduring arguments is that good constitutions are never written in peacetime. Writes Brazier:

Constitutions have, of course, been granted or adopted for many different reasons. New constitutions have marked stages in a progression towards self-government (as in most British colonies before independence); they have established a system of government in a newly independent state (as in the United States of America in 1787), or in a reconstituted state (such as Malaysia in 1963 or Tanzania in 1964); they have marked a major change in the system of government (as in Spain in 1978); they have been adopted in order to rebuild the machinery of government following defeat in war (as with the Federal Republic of Germany in 1949); and they have declared a new beginning after a revolution, or after a collapse of a regime (as in France as in 1791 and in 1958).

Brazier is not alone in supporting the view that writing of new constitutions is not feasible during the stable condition of functional statehood. Wade and Bradely have similarly stated:

In the modern world, the making of a constitution normally follows some fundamental political event – the conferment of independence on a colony; a successful revolution; the creation of a new state by the union of states which were formally independent of each other; a major reconstruction of a country’s institutions following a world war.

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16 Article 5 of the EAC Treaty.
17 Article 6(d), EAC Treaty.
Small wonder then that Kenya’s Constitutional reform process floundered, in a manner of speaking, during 2005. After many months of re-negotiations of the content of the Draft Constitution of Kenya produced by the National Constitutional Conference at the Bomas of Kenya, Nairobi (the ‘Bomas Draft’) on 15 March 2004, a breakthrough was claimed to have been achieved following the conclusion of a retreat at the South-Western town of Naivasha by members of the Parliamentary Select Committee on Constitution in January 2005.

The retreat, initially dismissed by some MPs as ‘a waste of time’ apparently successfully discussed the so-called ‘contentious clauses of the Bomas Draft, and even produced a draft Bill empowering Parliament to amend the Bomas Draft by two-thirds majority affirmative decision. In spite of this, the then Minister in charge of Justice and Constitutional Affairs, the Hon. Kiraitu Murungi refused to published the Bill with recommended changes to the contentious clauses. In the same manner, President Mwai Kibaki also discredited a Bill that some commentators believed would have easily paved the way for the enactment of a new constitution for Kenya.

On 22 July 2005, amid street protests in Nairobi, the Parliament of Kenya approved amendments to the Bomas Draft, after an acrimonious debate that led to the walk-out of MPs allied to the Liberal Democratic Party (LDP) and KANU. 102 votes for and 61 against carried the amendment motion. Known as the ‘Kilifi Draft’. These amendments had been prepared by MPs allied to the National Alliance Party of Kenya (NAK) wing of the ruling National Rainbow Coalition (NARC) in a hotel in the coastal town of Kilifi, in early July 2005.

The Kilifi draft drastically reduced the powers of the Prime Minister as crafted under the Bomas Draft. Following the Parliamentary vote, the amended draft Constitution was subjected to a referendum on 21 November 2005. The figures released by the Electoral

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19 These related to the sharing of Executive powers between the President and the Prime Minister, the Legislature and the Bill of Rights among other issues.
21 Id.
22 Protestors were against Parliament having a role in altering in any way the Bomas Draft as adopted by the National Constitutional Conference on 15 March 2004.
Commission of Kenya (ECK), which supervised the referendum, showed the “No” vote won with 3.5 million vote, against 2.5 million votes for “yes”. In a terse, emotional live television broadcast President Mwai Kibaki conceded defeat of the government in the referendum. On 23 November 2005, in an unprecedented move the President sacked all Ministers, except the Vice President and the Attorney General. He reconstituted his Government two weeks later, excluding all the 7 Ministers allied to the LDP Wing of NARC, who had actively campaigned against the constitutional draft.

A number of developments during the constitutional reform clamour in 2005 can be said to have relevance to a culture of constitutionalism in Kenya. They are mainly setbacks:

1) The role of Parliament in re-discussing a constitutional draft that had been adopted by the National Constitutional Conference is by all means against the tenets of constitutionalism, by which Parliament exists to endorse, and not to obliterate, the will of the people. In this light, it should be noted that the National Constitutional Conference that met at Bomas consisted of 3 people from each Districts, representatives of interest groups (women, trade unions, professional activities etc) as well as all MPs. In reaction to demonstrations that took place in Nairobi to oppose what MPs had done to the Bomas Draft, the police used unnecessary force on unarmed demonstrators.

2) During the referendum campaigns, the Kenya National Commission on Human Rights established that many Cabinet Ministers on both the ‘yes’ and ‘no’ teams were misusing government resources, transports etc to carry out campaigns, contrary to the law. Despite public outcry, the practice continued unabated, and no action was taken, until the end of the referendum campaigns.

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3) Politicians including the President breached the code of conduct on electoral related campaigns.

4) The authority of courts of law was occasionally ridiculed. On one occasion, the High Court had issued an injunction against issuance of title deeds by government on forestland to squatters. The political opposition had moved to court, arguing that the issuance of title deeds was being done for political expediency, notwithstanding its possible adverse environmental ramifications. Despite the court order, no lesser government official than the President went ahead to issue the title deeds. On several other instances, Cabinet Ministers publicly defied court orders.

On a positive note though, it was gratifying to see an incumbent government conceding poll results that were against their favour.

In the wake of the rejection of the Draft Constitution in November 2005, one question that lingered towards the close of the year was whether Kenya is, after all, in need for constitutional reform. We find an affirmative response more tempting, for at least two reasons. Firstly, the current 42-year-old constitution was not adopted by plebiscite. Neither was it a product of popular participation. It was at best an imposition unto the people of Kenya by not only the former colonial masters but also the then emerging African elite. It is ridiculous that east Africa’s independence was facilitated by subsidiary deliberations in the House of Commons and finally midwifed by the *East Africa Independence Ordinance*. Kenya’s current constitution is in many respects the document appended to this legislation. Such a constitution is unlikely to reflect the aspirations of the people of Kenya today.

Secondly, and despite the above, the current constitution on Kenya has been amended roughly 40 times in 40 years. Each of those amendments has ostensibly moved the country away from democratic ideals. In the groundbreaking case of *Rev Timothy Njaya & 6 others* Ringera J, as he then was, lamented this irking position thus:

> Since independence in 1963, there have been thirty-eight (38) amendments to the constitution. The most significant ones involved a change from Dominion to Republican status, abolition of regionalism, change from a parliamentary to a presidential system of executive governance, abolition
of a bicameral legislature, alteration of the entrenched majorities required for constitutional amendments, abolition of security of tenure for judges and other constitutional office holders (now restored), and the making of the country into a one party state (now reversed). And in 1969 by Act No. 5, Parliament consolidated all the previous amendments and reproduced the constitution in a revised form. The effect of all those amendments was to substantially alter the constitution. Some of them could not be described as anything other than an alteration of the basic structure or features of the Constitution … … All I can say in that respect is that, fortunately or unfortunately, the changes were not challenged in the courts and so they are now part of our constitution.

The NARC Government’s self-declared fight against corruption remained in the spotlight during 2005. Although the Report on Illegal and/or Irregular Land Allocations in Kenya (the Ndung’u Report was presented to the President, it was not released to the public, notwithstanding assurances by both the President and the Lands and Housing Minister that the report would be made public. The Report resulted from a Commission of Inquiry appointed by the President in 2004 to identify all illegally or irregularly acquired land in Kenya and recommend what action is to be taken in respect thereof. Reportedly, the Ndung’u Report has identified over 200 000 pieces of illegal or irregular land acquisitions, now in the hands of political and business bigwigs associated with the current and past regimes in Kenya. Using the market rates, moneys raised from repossession of such land (Kenya Shillings 170 billion or US $ 2.1 billion) would be able to tarmac 8 200 kilometers or road; or would be adequate to keep 7.2 million children through eight years of free primary schooling!!

The Goldenberg Judicial Commission of Inquiry wound up its sittings in November 2005. The financial and political events that developed in the Republic of Kenya in the 1990s and came to be known as the Goldenberg Affair were the brainchild of a Kenyan citizen named Kamlesh Pattni. In his 30s and without substantial schooling, Pattni conceived a financial scheme which was to facilitate the stealing from the national coffers in Kenya of substantial amounts of money—running into millions of dollars. After almost three years of public hearings, the Commission retreated at the close of 2005 in order to compile its report. In the meantime, political pressure to make Government investigate the Anglo Leasing financial scandal intensified.
b. The Republic of Uganda

Uganda’s constitution was adopted in 1995. Its article 69 provides for two political systems for the country, namely, the movement, no-political party system, and the multiparty system. Under the same provision, the people of Uganda ‘shall have the right to choose and adopt a political system of their choice through free and fair elections and referenda’. The provision builds on article 4 that gives the right to people to express their will and consent as to how they should be governed.

On 13 April 2005, Hon. Adolf Mwesige, Minister of State for Justice and Constitutional Affairs of Uganda tabled a notice for a resolution of Parliament to hold a referendum to change the political system. When the motion was put to vote in Parliament on 21 April 2005, the government lost. Only 142 out of the required 147 of the MPs supported the motion; 17 MPs opposed it and 1 abstained.

Nevertheless, at the insistence of the President, the matter was returned to Parliament and this time round, the referendum was chosen as the method for deciding the future political system for Uganda. The remarks of President Yoweri Museveni on this occasion are instructive:26

> If Parliament does to pass the referendum [motion], I will use another Kasoomekele (trick) to bring it here (to the people). I will not accept to make mistakes. It is you to decide on the issue of the referendum not Parliament alone. I cannot allow to be trapped because if anything goes wrong in future you will blame me. Those who do not know Uganda’s issues think it is Parliament to decide on the referendum but I do not agree with them. The power is not with Parliament, not the President, not the Chairman, but with the people.

Two days on (on April 27), the notice of rescinding the Parliamentary decision was issued. After a heated debate, Parliament on 3 May 2005 overturned its earlier decision to oppose the referendum motion on the country’s political system. When put to vote, 189 MPs

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supported the motion, 24 opposed it and none abstained. Clearly the events surrounding the Parliamentary vote on the referendum bespeak of Executive interferences in Parliamentary affairs, and this is inimical to constitutionalism and the doctrine of separation of powers.

Then came an interesting court case. In Okello & 6 others v Attorney general and the Electoral Commission of Uganda, the petitioners claimed that the holding of the referendum would be unconstitutional, on the basis that the Movement system is a guised political party and an “illegal fiction”, and as a result, there would be no basis for changing form a non-existent system. They claimed that the constitutional court in Paul Ssemwogerere & 5 others v AG had declared the movement and its organs a political party.

The court dismissed the application stating that despite the repugnancy of holding a referendum on human rights and fundamental freedoms, the one-party system (read the movement) was now so entrenched that it must be changed through a referendum. The court ruled that there were cheaper methods of changing the prevailing political system, but that this decision was within the discretion conferred on Parliament by the Constitution and it was, therefore, not for the court to tell Parliament how to exercise its discretion on the matter. Also, it was ruled that since the Electoral Commission was only implementing a constitutional requirement and the impugned sections of the Referendum and other Provisions Act, 2005, their operations did not in any way infringe any provision in the constitution.

The opposition parties, in particular the group of 6 (G6), comprising the more established parties boycotted the referendum. These parties are: Conservative Party (CP), Democratic Party (DP), Uganda Peoples’ Congress (UPC), Free Movement (FM), Justice Forum (JEEMA) and Forum for Democratic Change (FDC). In boycotting the referendum, the parties gave the reason that freedom of association is an inherent human rights under articles 20 and 29(1)(e) of the Uganda Constitution - and therefore, the question as to whether it (the freedom) should lawfully exist in Ugandan law cannot be subjected to a vote.27

Thus, the participation of the opposition parties in the referendum was limited to their scathing criticism of the whole exercise. This was done mainly in urban areas where they

27 Id.
used the public media to express their opposition to the process which they saw as a façade for the government to gain ground for its newly registered party, the NRM – O.

On 28th January 2005, Uganda held the referendum for the purpose of changing the political system. The referendum posed to the Ugandan voters was: ‘Do you agree to open up the political space to allow those willing to join other political parties/organizations to do so to compete for political power?’ The options presented to voters were Yes (symbolized by a tree) or No (symbolized by a House). The Yes vote emerged overwhelmingly victorious in all the 56 Districts of the country, garnering 92.5% of the vote. The No vote got 7.5% of the vote. However, voter turnout was low, at 47% of the registered 8.5 million voters.  

The July 2005 referendum was the third in Uganda. The first was held in 1964 over the disputed so-called ‘lost counties’ while the second referendum was held in 2000 regarding the change of the political system. Compared to the 2000 referendum on the same issue, the 2005 referendum was less contentious as both the government and opposition groups shared the view that a return to multiparty politics was desirable.

On 29 June 2005, the Parliament of Uganda voted overwhelmingly to approve a change in the country’s constitution, allowing a new term for President Museveni. Before the Parliamentary vote on the controversial issue, demonstrators clashed with riot police on the streets of the capital city, Kampala. The police lobbed teargas canisters and used water canons to disperse hundreds of demonstrators. 

The arrest and arraignment in both the regular and military courts of Colonel Kizza Besigye, President of the Forum for Democratic Change (FDC) on charges of rape and treason respectively in November 2005 remained in the headlines of East African daily newspapers for a couple of weeks. Besigye was to be charged later with new charges of terrorism and

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28 Id.
30 Id.
unlawful possession of firearms.\(^{31}\) This happened against the backdrop of claims that top generals of the Uganda Peoples’ Defence Forces (UPDF) had stepped up pressure to persuade Besigye to plead guilty of the charges facing him so that he could obtain presidential pardon.\(^{32}\)

The Government of Uganda also appeared keen to prevent Colonel Besigye from registering as a Presidential candidate. On 7 December 2005, the Attorney General and Minister for Constitutional Affairs of Uganda Khiddu Makubuya wrote to the Electoral Commission Chairman stating that there was no provision in law allowing candidates in a presidential election to be presented by proxies.\(^{33}\)

Towards the close of 2005 some political commentators were categorical that the erstwhile much-acclaimed Ugandan democracy is now on a slippery slope with the rights of free speech and political opposition being suppressed and the government sending commandos to the High Court to prevent the release of Besigye on bail.\(^{34}\) Ugandans are preparing for an election in March 2006, against a backdrop of constitutional and political developments that bespeak the decay of the much-acclaimed Ugandan constitutionalism built painfully over a 20-year period. Ironically, the very person associated with building it – Yoweri Kaguta Museveni – is the same one at the centre of its erosion.

c. The United Republic of Tanzania

The main constitutional and political development in Tanzania in 2005 was the general election held in the mainland and the Union Island of Zanzibar. Chama cha Mapinduzi’s (CCM’s) Jakaya Mrisho Kikwete’s overwhelming victory in the Union’s elections has left opposition political parties stunned and accusing government of stifling multi-party politics

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32 The East African, 5-11 December 2005, p. 4. (“Now Top Army Men Offer Besigye a Deal”).

33 The East African 12-18 December 2005, p.4 (“New Move to Block Besigye from Filing Papers”).

in the country. Analysts observe that while it was not in doubt that Kikwete would win, it is the margin of victory that surprised many – a 81% sweep of the approximately 7 million votes cast in an election described by local and foreign observers as free and fair.

Kikwete garnered 6 659 304 votes, while his closest rival, Ibrahim Lipumba of the Civic United Front (CUF) received 468 948 votes. The CCM also retained its overwhelming majority in Parliament, with 206 out of 232 seats. Kikwete, 55, took over from Benjamin William Mkapa, who handed over in a successful ceremony on 30 December 2005 after serving the maximum two terms in office. Voter turnout was 72% of all the 11.3 million registered voters. The successful handover of power augurs for the rule of law and constitutionalism in Tanzania.

However, at least two presidential election losers – Ibrahim Lipumba of CUF who finished a distant second to Kikwete with 11.66% of the votes and Freeman Mbowe of the CHADEMA Party who garnered 5.9% of the votes- accused CCM of vote rigging. They accused Tanzania’s National Electoral Commission (NEC) of bias in favour of CCM, echoing the complaints of others who said electoral fraud was the only way to explain the massive CCM win but could offer no proof of the allegation.35

Zanzibar Island, part of the United Republic of Tanzania, was rocked with election-related violence during the year. There were concerns of voter disenfranchisement during the voter registration period. Voters were allegedly turned away at registration centers on flimsy grounds.36 The controversial role played by the institution of Shehas had a negative impact on voter registration. The Sheba is a representative of the central government at the community level. The Regional Commissioner, with the advice of the District Commissioner, appoints the Sheba.


Under the legislative framework for Zanzibar, the Sheba assists the voter registration assistant at the registration point, to identify the bona fide residents of the locality for purposes of voter registration. The Sheba was supposed to have pre-registered all eligible voters in his domain (the Shebia). Although the registration ought to have been done in a register, this was usually done without record due to the assumption that the Sheba knows everyone in the locality.

A study by the East African Law Society on the Zanzibar election registration in May 2005 concluded that using their powers, Shebas ended up “denying their own spouses, parents, relatives, neighbours and colleagues they had worked with, from registering as voters”.37

During the October elections in Zanzibar, there were televised instances of police brutality against opposition supporters. Amani Abeid Karume was controversially re-elected and sworn in amid protests by opposition parties on the validity of the election.38

5. THE ROLE OF THE EAC IN ENHANCING CONSTITUTIONALISM IN PARTNER STATES

5.1 The Normative And Institutional Scheme

Among the objectives of the EAC is the promotion of good governance, including adherence to the principles of democracy, the rule of law, accountability, transparency, and social justice, equal opportunities and gender equality.39 In order to achieve its objectives, the EAC member states are enjoined to adopt and implement common foreign and security policies. These include developing and consolidating democracy and respect for human rights and fundamental freedoms.40

Further, the EAC partner states pledge pursuant to article 123 of the Treaty establishing the Community, to foster cooperation aimed at enhancing the rule of law, democracy and

37 Id.
38 Id.
39 See article 5, Treaty Establishing the East African Treaty.
40 Article 6 and 123(1), Treaty establishing the East African Community.
human rights. This pledge has been aptly captured in the EAC Second Development Strategy, 2001 – 2005.

The East African Court of Justice (EACJ), established under the EAC Treaty was intended to have jurisdiction relating to the interpretation of the EAC Treaty as well as to exercise human rights jurisdiction. Unfortunately, the human rights jurisdiction was deferred to a date to be determined by the Council of Ministers. Once this jurisdiction is activated, the jurisprudence of the Court on human rights, constitutionalism etc is likely to be visible.

Despite the ambulatory declaration of norms such as good governance, the rule of law and democracy in the EAC Treaty, coupled with establishment of institutions like the Court of Justice and the Legislative Assembly, a cursory examination of the Community’s Development Strategy does not reveal a prioritization of these values, or of constitutionalism. Economic development dominates the document.

5.2 The Role of the EAC

A review of the activities of the EAC during 2005 reveal that the Community paid little or not attention to constitutionalism and its corollary principles of the rule of law, democracy and human rights. No bill on any of the above topics was tabled before the East African Legislative Assembly; neither did the EAC Council of Ministers or the Summit (of Heads of State) pronounce themselves on any such matters. Instead, a lot of attention was given to the Protocol on the Establishment of the East African Customs Union and development programs.

Although much of its activities during 2005 took place under the rubric of “a people centred approach” to regional integration, there is no evidence that the people centredness was informed by common constitutional paradigms. However, the decision by the Summit

41 Article 27(2) of the Treaty Establishing the East African Community.

directing the Council to establish National Consultative Committees to take on board peoples’ views on the integration process is commendable.

According to research carried out by Maria Nassali, the problems facing the EAC especially with regard to the process of enhancing democracy, the rule of law and constitutionalism in general can be traced to the establishment of the Community which was largely a top-down process involving the governments of the region, with the grassroots communities barely informed, educated or consulted about the process. To her, the language and body of the Community remains bureaucratic and elitist. Only the urban-based and the educated have been marginally involved. There are no comprehensive and well-funded institutions in place to generate and package information for dissemination to the grassroots. The masses of women, peasants, workers and the youth have not been brought on board the process. The argument that could be made here is that you cannot create an institution meant to further democracy, the rule of law, human rights and constitutionalism without embracing these ideals from the onset, by adopting a process for establishing the institution that is consistent with the ideals in question.

The above notwithstanding, a possible future role of the EAC cannot be completely ruled out. As the region moves towards a political federation in 2013, the most attractive reason for political and economic integration is need to combat negative ethnicity that has over the years killed constitutionalism, especially in Kenya and Uganda. The politics of ethnicity have wasted human resources through brain drain and frustrated careers; as well as natural resources through plunder. Thanks to negative ethnicity, development has been and skewed and lopsided.

There has been imbalance in equitable distribution. Power politics have meant the victors’ “turn to eat” State resources at the expense of the losers. Political competition among ethnic communities has been turned into personal vendetta by the ruling class, culminating in

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punishment of whole communities for decades. A federated East Africa will inject into the region the much-needed nationalism more associated with Tanzania.

With strong laws that discourage corruption, nepotism and cronyism, the fight against parochial politics will have started in earnest. For instance, an East African President from Tanzania with two vice Presidents from Kenya and Uganda would find it difficult or even useless to punish the Langi from Northern Uganda or the Kalenjin of Kenya’s rift Valley and so forth.

One can also talk of the expected future role of the EAC institutions in constitutionalism and incidental matters. Apart from the EACJ which would be important in developing regional jurisprudence in human rights etc, the role of the East African Legislative Assembly (EALA) will remain crucial.⁴⁴

In order to comprehend the role that EALA can play in institutionalizing constitutionalism in East Africa, it is important to understand the role of Parliaments generally. The legislative role of Parliament is perhaps the most commonly understood of the many roles of national and international legislatures today. But Parliaments also have the task of checking the possible excesses of the executive. This is the oversight role of Parliament, and it is a particularly important role for ensuring the accountability and transparency of the executive arm of government. It will be seen shortly in this section, that the oversight role of EALA is proving extremely elusive.

Parliaments are also important institutions for political representation. While the complexity of modern societies make it difficult to have everyone represent their interest directly to the governing authority, Parliaments, through elected leaders, play the representational role. In this regard, Parliament provides a forum for the aggregation of diverse interests, and the processing and conversion of those interests into policy decisions.

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⁴⁴ See a more elaborate discussion in Wanyande, P “The Role of the East African Legislative Assembly” in Ajulu R (ed) supra note 1, p. 63 ff.
Regarding the role of Parliament as a forum for discussion, it is arguable that an important role that the EALA can play would be the promotion and deepening of the values of constitutionalism, the rule of law and democracy, pursuant to the objectives of the EAC Treaty. This should include the promotion of accountability and transparency in the conduct of regional issues. EALA should ensure that the process of further integration of the EAC is done in as democratic a manner as possible. The public in the member states, and various interests must find expression in EALA.

But for EALA to be effective, it must enjoy a strong sense of legitimacy and popular support among its constituents. It should not be assumed, however, that EALA is a legitimate institution. According to Wanyande, EALA’s legitimacy can be assessed on three aspects: the method of its coming into being, the mode of operation, and its performance.\textsuperscript{45}

Take the issue of mode of election of MPs, for instance. In many cases, the nomination of potential EALA MPs, especially in Kenya, was not democratically done. This is best understood in the context of the controversy surrounding the election of some of the MPs. Not only were there claims that gender considerations were not taken on board, but there were also the claims that individuals imposed candidates on parties. MPs of Kenya and Tanzania are currently elected indirectly by the national parliaments from a list submitted by political parties. Uganda, which by 2005 did not have a political party system, elects its MPs directly form the population. This method of election is bound to create a cadre of regional MPs who owe their loyalties to the parties/politicians who elected/appointed them.

Despite any shortcomings, EALA can play an important role of showcasing democracy to the partner states by:

- Legislating on aspects of good governance, democracy, accountability, the rule of law and constitutionalism.

\textsuperscript{45} Id.
- Providing a forum for consultation on matters of common interest to the member states which cannot be effectively handled by national parliaments.

- Enhancing a sense of common identity among the East African citizenry.

6. THE CONTRANITS AND OPPORTUNITIES FOR EAC TO IMPACT ON CONSTITUIONALISM IN THE REGION

6.1 The Constraints

Nassali in her study found out that the top-down process of setting up the EAC may, perhaps, have led to the disillusionment of the populations of the East African region with their governments. The realities of the poor as they grapple with abject poverty, lack of basic amenities as well as the increasing gap between the masses and governments may negate efforts aimed at unifying the region under common ideals. They may view presence of the EAC as more government. If the relationship between the state and the people is characterized by hostility, why should people accept an additional layer of suppression without benefit?

A possible role of the EAC or its institutions in constitutionalism will be further constrained by the lack of knowledge on the part of the citizenry, of the benefits of collective East African psyche. EAC, especially the EALA MPs must sensitize the public about what regional integration brings to them in terms of benefits. A socialization programme to this end is vital. One of the reasons why many integration efforts fail is that the regional public is not usually sufficiently informed about the initiatives. Knowledge seems to the preserve of political and economic elites in the member countries. This has been one of the failings of NEPAD, for instance. While it is gratifying to note that EALA MPs during 2005 stepped up their sensitization tours in the three member states, more needs to be done. The sensitization should go beyond seminars, as they seem to be elitist. There is need to have public meetings at the grassroots level.
To be able to influence constitutionalism in the region, the EAC institutions need to improve on their legitimacy, by opening up possibilities of the best sons and daughters from the region to serve in the institutions, and by using legitimate operational methods. For instance, unless the election procedures for EALA MPs and judges of the EACJ are revised with a view to make them more participatory and open to competition, the EAC will be seen more as a closed club where political and other elites place their relatives and cronies who have been unable to succeed in careers in their home countries. The African Union (AU) and its progenitor, the Organization of African Unity (OAU) have suffered legitimacy/credibility problems for similar reasons. Adopting participatory, people-centred operational methods can also enhance legitimacy of EAC institutions. The institutions must, as far as is possible, develop operational modes that aggregates and articulates the varied societal interests representative of the east African citizenry.

6.2 The Opportunities

A number of steps could be taken by the EAC to instill a culture of constitutionalism in the region.

- The EAC should create public confidence in and respect for its institutions so that they become legitimate in the eyes of the partner states and their peoples. For regional cooperation and integration to be successful, it must be founded on an agreed minimum political framework embodying democratic freedoms.

- In each of the partner states, there is need to accept a greater sense of pluralism in order to guarantee equal and meaningful participation in public affairs and accountability of the governors to the governed.

- The strengthening of the EAC must go hand in hand with the correction of past injustices and human rights violations that have taken place in each of the member states. In this connection the establishment of truth, justice and reconciliation commissions especially in Kenya and Uganda becomes important. The role of the EAC in encouraging mechanisms for addressing past injustices will endear the
Community to the masses in the region, creating the much-needed institutional legitimacy.

- There is need to emphasize in EAC’s programs, activities and strategies, on the linkages between economic integration, on the one hand, and constitutionalism, on the other. A viable political framework is the lynch pin for economic development. Thus, governments must see regionalism as a veritable weapon in the fight to restructure their economies and political systems.

- The EAC should mediate the tensions and disputes between citizens, civil society and the state as a prerequisite for peace and sustainable economic growth in the region. The Community must overcome its impotency as witnessed in the recent electoral violence in Uganda and Zanzibar, whereby the Community remained a hapless bystander.

- There is need to activate the human rights jurisdiction of the East African Court of Justice. This way, the Court’s future jurisprudence on human rights, democracy and good governance issues will feed the culture of constitutionalism in East Africa. The recent effort to address this matter through the May 2005 Protocol additional to the EAC Treaty will undoubtedly go a long way in strengthening EAC’s role in constitutionalism within the region.

7 CONCLUSION

2005 was a year of mixed fortunes for constitutionalism and the rule of law in east Africa. The role of the EAC in these issues remained conspicuously absent. Although there is potential for the EAC to influence the embrace of constitutional ethos in the East African region (due to its normative and institutional structures), a lot needs to be done to endear the community to the citizenry; to enhance the Community’s legitimacy in the eyes of East Africans. Only then can the Community assume its roles of creating a regional psyche based on the values of constitutionalism and its corollaries – democracy, good governance,
accountability and human rights – well captured as fundamental objects and principles of the EAC.