The Annual State of Constitutionalism in East Africa 2013

Editor
Thierry B. Murangira
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## Abbreviations

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<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>ACHPR</td>
<td>African Court on Human and People’s Rights</td>
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<td>AG</td>
<td>Attorney General</td>
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<td>AMISOM</td>
<td>African Union Mission in Somalia</td>
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<td>ATPU</td>
<td>Anti-Terrorism Police Unit</td>
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<td>AU</td>
<td>African Union</td>
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<td>BVR</td>
<td>Biometric voter registration</td>
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<td>CAJ</td>
<td>Commission on Administrative Justice</td>
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<td>CBEFs</td>
<td>County Budget and Economic Forums</td>
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<td>CBS</td>
<td>Central Broadcasting Service</td>
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<td>CCK</td>
<td>Communication Commission of Kenya</td>
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<td>CCM</td>
<td>Chama cha Mapinduizi</td>
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<td>CDF</td>
<td>Constituency Development Fund</td>
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<td>CEC</td>
<td>Central Executive Committee</td>
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<td>CHADEMA</td>
<td>Chama cha Demokrasia na Maendeleo</td>
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<tr>
<td>CIC</td>
<td>Commission for Implementation of the Constitution</td>
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<td>CIPEV</td>
<td>Commission of Inquiry in Post-Elections Violence</td>
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<td>CJ</td>
<td>Chief Justice</td>
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<td>CMI</td>
<td>Chieftaincy of Military Intelligence</td>
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<tr>
<td>COMESA</td>
<td>Common Market for Eastern and Southern Africa</td>
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<td>CORD</td>
<td>Coalition for Reforms and Democracy</td>
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<td>CoW</td>
<td>Coalition of the Willing</td>
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<tr>
<td>CRJ</td>
<td>Chief Registrar of the Judiciary</td>
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<td>CRC</td>
<td>Constitutional Review Commission</td>
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<td>CSOs</td>
<td>Civil Society Organisations</td>
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<td>CSRG</td>
<td>Civil Society Reference Group</td>
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<td>CUF</td>
<td>Civic United Front</td>
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<td>DCJ</td>
<td>Deputy Chief Justice</td>
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<td>DP</td>
<td>Democratic Party (Uganda)</td>
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<tr>
<td>EAC</td>
<td>East African Community</td>
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<td>EACC</td>
<td>Ethics and Anti-Corruption Commission</td>
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<td>EACJ</td>
<td>East African Court of Justice</td>
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<td>EALA</td>
<td>East African Legislative Assembly</td>
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<tr>
<td>ECOSOC Rights</td>
<td>Economic, Social and Cultural Rights</td>
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<tr>
<td>Acronym</td>
<td>Description</td>
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<tr>
<td>ELC</td>
<td>Environment and Land Court</td>
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<td>ETS</td>
<td>Election Transmission System</td>
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<td>EVID</td>
<td>Electronic Voter Identification Devices</td>
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<td>FDC</td>
<td>Forum for Democratic Change</td>
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<td>FUF</td>
<td>Freedom and Unity Front</td>
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<td>GNU</td>
<td>Government of National Unity</td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>IICDRC</td>
<td>Interim Independent Constitutional Dispute Resolution Court</td>
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<td>IEBC</td>
<td>Independent Electoral and Boundaries Commission</td>
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<td>IGAD</td>
<td>Inter-governmental Authority on Development</td>
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<td>IGP</td>
<td>Inspector General of Police</td>
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<td>IPOA</td>
<td>Independent Police Oversight Authority</td>
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<td>IPOD</td>
<td>Inter-Party Organisations for Dialogue</td>
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<td>IREC</td>
<td>Independent Review Commission</td>
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<td>ISO</td>
<td>Internal Security Organisation</td>
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<td>JTF</td>
<td>Judiciary Transformation Framework</td>
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<td>JSC</td>
<td>Judicial Service Commission</td>
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<td>JMVB</td>
<td>Judges and Magistrates Vetting Board</td>
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<td>KCCA</td>
<td>Kampala Capital City Authority</td>
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<td>KICA</td>
<td>Kenya Information and Communications Act</td>
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<td>KNCHR</td>
<td>Kenya National Commission on Human Rights</td>
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<td>KNHREC</td>
<td>Kenya National Human Rights and Equality Commission</td>
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<td>LSK</td>
<td>Law Society of Kenya</td>
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<td>MCAs</td>
<td>Members of County Assembly</td>
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<td>MCOs</td>
<td>Mega Constitutional Orientations</td>
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<td>MP</td>
<td>Member of Parliament</td>
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<td>MoU</td>
<td>Memorandum of Understanding</td>
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<td>NA</td>
<td>National Assembly</td>
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<td>NCCR-Mageuzi</td>
<td>National Convention for Construction and Reform-Mageuzi</td>
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<tr>
<td>NEC</td>
<td>National Electoral Commission</td>
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<td>NEC</td>
<td>National Executive Committee (CCM)</td>
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<td>NGEC</td>
<td>National Gender and Equality Commission</td>
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NGOs Non-Governmental Organisations
NRM National Resistance Movement
NRM-O National Resistance Movement-Organisation
NPSC National Police Service Commission
ODM Orange Democratic Movement
OHCHR Office of the United Nations High Commissioner for Human Rights
OPM Office of the Prime Minister
PAC Parliamentary Accounts Committee
PBOs Public Benefits Organisations
PEFA Pentecostal Evangelistic Fellowship of Africa
PEV Post-election Violence
PIC Parliamentary Investments Committee
PNU Party of National Unity
PWDs Persons With Disabilities
SADC Southern African Development Community
SAHRiNGON Southern Africa Human Rights NGO-Network
SRC Salaries and Remuneration Commission
SPLA Sudan People’s Liberation Army
SUPKEM Supreme Council of Kenya Muslims
TA Transition Authority
TEF Tanzania Editors’ Forum
TNA The National Alliance (Kenya)
TPDF Tanzania People’s Defence Force
TRA Tanzania Revenue Authority
TSC Teachers Service Commission
TVZ Television Zanzibar
UDHR Universal Declaration of Human Rights
UK United Kingdom
ULS Uganda Law Society
UN United Nations
UNSC United Nation’s Security Council
UNSG UN Secretary General
UPDF Uganda People’s Defence Force
UPR Universal Periodic Review
URP United Republican Party (Kenya)
URT United Republic of Tanzania
USA United States of America
WAN-IRFA World Association of Newspapers and News Publishers
WGI World Bank Worldwide Governance Indicators
ZACECA Zanzibar Anti-Corruption and Economic Crimes Authority
ZLSC Zanzibar Legal Services Centre
When the East African Community (EAC) countries attained independence in the early sixties a common feature was the adoption of new Constitutions. Though there were Constitutions in place throughout the EAC countries after their independence, except in Burundi where Major Pierre Buyoya, in 1987, suspended Burundi’s Constitution. A Constitution is the fundamental law of a state that lays down the basic principles to be conformed to when organising the government, regulating, distributing, and limiting the functions of the different departments, prescribing the extent and manner of the exercise of sovereign powers, the relationship between the citizens and the State, the duties of the State and citizens, distribution of powers, election and tenure of the elected representatives and qualifications for the same, their fundamental rights and freedoms and the judicial system amongst others.

However, during the period after independence to date there is doubt as to whether citizens and their leaders understand what a Constitution

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really is and what it entails. Furthermore, has constitutionalism really been entrenched in the EAC? The Constitutions that were adopted during independence are or have been replaced with new ones. There would be numerous reasons for promulgating new Constitutions but the reasons seem to be that the States did not implement their Constitutions in letter and spirit with the effect being that the citizens were left at the mercy of the State and the rulers who seemed to have their own vested interests which were opposite to the citizens’.

This edition of the Annual State of Constitutionalism in East Africa addresses the question posed and what the EAC States have done during the year in review i.e., 2013, to entrench constitutionalism. However, the other EAC States have authors who have addressed the same in their well-researched papers on constitutionalism. Interestingly, there are papers on the new Constitution that is being drafted in Tanzania where there is one view from Zanzibar and another from Tanzania mainland.

The paper on Uganda by Phillip Kasaija Apuuli delves into constitutionalism in Uganda and elaborates on what a constitution is, constitutionalism and what constitutionalism entails. The author elaborates on the coming of age of Ugandan politicians due to the fact that they resolve political and legal questions through courts rather than through the barrel of the gun. The paper correlates constitutionalism and the EAC Treaty and addresses the following issues: disagreements between the institutions of Parliament and the Executive; talk of the possibility of a military takeover in Uganda; the fleeing into exile of the former Coordinator of Intelligence Services, General David Sejusa; the closure of media houses; the struggle for the management of Kampala city; enforcing discipline within political parties; the reappointment of the retired Justice Benjamin Odoki as Chief Justice (CJ); public order management; the fight against corruption; relations between the Central Government and Buganda Kingdom and Uganda’s intervention in South Sudan.

The author addresses issues of governance which pitted Parliament against the Executive due to the sudden and mysterious death of the Butaleja District Woman Member of Parliament, Cerina Nebanda, in December 2012. On the issue of disciplining party members who breach the party code, the paper delves into whether they automatically lose
their parliamentary seat after suspension from their parties or not and how the courts have addressed the issue of disciplining party members.

The author also deals with the issue of the battle for the control of Kampala City. The Kampala Capital City Bill sought to create an administration of the capital controlled by the Central Government. Prof. Kasaija addresses the legal framework that created Kampala Capital City Authority (KCCA) i.e, KCCA Act 2010 by which Kampala ceased to be a local government in both status and administrative structure and whether the Act is constitutional or not. The paper shows how the purported impeachment of Lord Mayor Erias Lukwago resulted in the Executive and Judicial arms of Government being at loggerheads. In order to resolve the conflict, they sought the intervention of the courts and the paper considers the effect of the court decisions.

With regard to the General Sejusa saga i.e. claims that security operatives that were involved in Operation Wembley (which was aimed at cracking down on violent crime in the late 1990s) are being mobilised to be used in extrajudicial manner and about the irregular (informal) involvement of several members of [the] first family in the matters of state, economy and security etc., the author addresses how these claims touch on constitutionalism in Uganda and the effect of publishing the same which led to media houses being closed by the government and whether that was is constitutional or not.

On the issue of administration of justice, the author delves into the issue of the CJ, Benjamin Odoki, retiring after attaining the mandatory constitutional retirement age of 70 years and later on being reinstated in the Supreme Court by the President advice of the Attorney General. On public order management, the paper traces how the Act regulating the same was passed without much debate and questions whether the law claws back the freedom of assembly affirmed by Article 29(1) (d) of the 1995 Constitution. With regard to corruption, the paper elaborates how the vice undermines constitutionalism and good governance by subverting public institutions and traces the steps taken by the Government to curb it.

Wambua Kituku’s paper on Kenya addresses constitutionalism by showing how the constitutional framework of Kenya was tested by the
2013 elections, which ushered in a devolved system of government. The author identifies the key contexts that have defined and shaped Kenya’s constitutional development from independence to recent times and the role of ethnicity and elite accommodation in constitutional negotiations and eventual adoption of the Constitution. The author shows how the 2013 elections ended the hybrid presidential system and ushered in a pure presidential system and elaborates how the new system evinces more checks and balances in the exercise of executive power.

With regard to the power of presidential appointments, the author cites *Minister for Internal Security and Provincial Administration v. CREAW and 8 others*, Civil Appeal 218 of 2012 and *the Supreme Court’s Advisory Opinion No 2 of 2012 in the Matter Of The Principle Of Gender Representation In The National Assembly And The Senate (2012) eKLR (FIDA case)* in which the author states the need for a comprehensive and policy framework to address the same. The author also cites a number of decisions that have had the effect of curtailing the abuse of exercise of power with regard to presidential appointments.

The author tackles the International Criminal Court (ICC) Question and the resulting constitutional quagmire whether the candidature and subsequent election of Uhuru Kenyatta and William Ruto (leaders of the Jubilee Coalition) as president and deputy president respectively and the indictments handed to the two constituted valid grounds for their disqualification on grounds of violation of provisions of Chapter 6 of the new constitution on integrity. He also examines the questions that arose over the capacity of Kenyatta and Ruto, once elected, to discharge their constitutional duties while facing charges at the ICC. The author elaborates the approach used in resolving this vexing constitutional question and how the ICC question will have far reaching implications on implementation of the Constitution and reforms generally from a foreign policy perspective.

The paper delves into the changes the new constitution established and the challenges to parliamentarians as they internalise changes reflecting the critical constitutional developments that occurred in respect to the legislature. Further, the author highlights the supremacy wars between Senate and National Assembly by citing *Speaker of the
Senate and Another v. Attorney General and 4 others, Advisory Opinion Reference No. 2 of 2013, and the effect the court decision had with regard to entrenching constitutionalism.

With regard to the nomination to National Assembly and the Senate, the author cites the case The Commission for Implementation of the Constitution v. the AG and Another, Petition No 389 of 2012, and its effect on party discretion in choosing their nominees.

On the matter of Parliamentary oversight versus overreach, the author cites Njaya and 17 others v. AG and 218 others Petition No 137 of 2011, Law Society of Kenya v. The National Assembly and Others, Petition No. 281 of 2013 which addressed the constitutionality of Members of Parliament paying taxes. The author highlights parliamentary overreach with the issue of the tussle between the National Assembly and the Judiciary over summonses issued against members of the Judicial Service Commission (JSC) and its effect on the doctrine of separation of powers.

Regarding the Judiciary and vetting of Judges and Magistrates, the author highlights the issue of the judges found unsuitable to serve in the judiciary who appealed against the decisions of the Judges and Magistrates Vetting Board (JMVB), which prompts questions regarding the level of consultation provided to the vetting process by the Constitution and statutes i.e. on what legal basis did the ousted judicial officers approach the court and what is the impact of a judicial pronouncement that opens the vetting exercise to challenge? The author relies on Republic v. Judges and Magistrates Vetting Board and Ex Parte Hon Lady Joyce Khaminwa, Misc Applications 113 of 2013 and LSK v. Center for Human Rights and Democracy and 13 others, Civil Appeal No. 308 of 2012 to answer the same.

The author highlights the main challenges with regard to facilitation of transfer of functions, ministries, departments and agencies (MDAs) of government. The author illustrates how the Transitional Authority, which is an important independent institution to oversee the problematic transition process, faces challenges and constraints which are highlighted, with claims that the national government is intent on sabotaging devolution, besides accusations by county governors that the
National Government maintains a parallel system of administration, encroaching on their mandate, particularly with regard to public financial management.

The author deals with the challenges relating to public participation and rolling out of devolution, the need and importance for the law regulating the financing of elections in Kenya and how the same attempts at clean politics in Kenya. The author addresses the legislative developments and emerging jurisprudence pertinent to the operationalisation of the Bill of Rights. Also, there are hurdles with the working of the human rights commissions which raise the question whether there could be a wider campaign to whittle down the operational capacities of the commissions and offices.

In order to entrench constitutionalism, the legislative developments with clear impacts on human rights have been elaborated. The jurisprudence on Human Rights has been elaborated, namely: civil and political rights wherein the author cites cases decided in 2013 that entrench constitutional values.

Fred Nkusi, in *Constitutionalism in the East African Community in 2013*, outlines the achievements of the EAC with regard to constitutionalism, adherence to democratic principles and human rights. The paper discusses the achievements of the Community in light of its mandate as spelt out in its legal framework, the nexus between constitutionalism of the EAC and the activities of its organs and institutions. The paper explores notable achievements by the organs and institutions of the EAC and their conformity with the EAC legal framework as well as the challenges, especially with regard to the decisions of the East African Court of Justice (EACJ).

The paper is divided in two parts, with the first discussing the difference between constitutionalism and Constitution, constitutional and democratic achievements in the EAC and related challenges. The second part captures and analyses some of the crucial judgments of the EACJ.

The paper elaborates on the difference between constitutionalism and Constitution and how the signing of the EAC treaty has helped entrench constitutionalism in the EAC by adoption of a number of protocols, laws and policies to ensure the effective realisation of constitutionalism.
The author elaborates how the realisation of constitutionalism is spelt out in the functions of the EACJ and the East African Legislative Assembly (EALA), the constitutional and democratic achievements of the EAC such as the signing of the EAC Monetary Union, extending the jurisdiction of the EACJ to cover trade and investment as well as matters associated with the East African Monetary Union and Human Rights matters, in addition to crimes against humanity, negotiations for admission of South Sudan into the EAC as well as the signing of the EAC Protocol on Peace and Security.

The paper delves into the issue of the chairmanship of the EAC, which is rotational on a yearly basis and the fact that it was to be held by the President of Rwanda but was taken over by the President of Kenya. The author elaborates on the reasons for the same.

The paper has dealt with the issue of deployment of the EAC Observer Mission to monitor the Rwandan Parliamentary elections, whilst in Kenya the Independent Electoral and Boundaries Commission (IEBC) invited the Common Market for Eastern and Southern Africa (COMESA), the EAC and the Inter-governmental Authority for Development (IGAD) who jointly deployed an election observer mission premised on international principles and standards governing the conduct of democratic elections including the African Charter on Democracy, Elections and Governance (2000) and the EAC Principles for Election Observation and Evaluation (2012).

The paper in its second part addresses constitutionalism by a number of cases decided by the EACJ and the effect the cases have on entrenching constitutionalism.

Juliana Masabo addresses the constitutional developments that took place in Tanzania Mainland in 2013 with a view to assessing the state of constitutionalism during this period. She highlights the key events that directly or indirectly shaped constitutionalism during the period of survey and illustrates the constitutional review process which was the key constitutional development in 2013. The author discusses the major developments and key challenges inhibiting the realisation of human rights, good governance and rule of law which together constitute important elements of constitutionalism. The paper highlights key legislations enacted in the year and the judicial pronouncements of relevance to constitutionalism.

The paper gives a detailed analysis of the Draft Constitution, elaborates on the new aspects and concepts introduced such as the Structure of the Union i.e. three Governments; reduction of Union matters and its effect on the autonomy of the respective governments and size of the Union Government, the significant improvements to the Bill of Rights i.e. inclusion of certain fundamental rights to the Bill which are not included in the present Constitution, inclusion of citizenship provisions, whether independent candidates should be allowed to contest elections and the decisions regarding the same.

The paper analyses the proposed changes to the executive wing of Government, the powers of the president in appointment of key public officers, the shape and structure of the Union Government, the establishment of a moderate Parliament, gender parity in highest decision-making bodies, the minimum age for vying to be elected as MP, term limits for MPs, removal of MPs, appointment of the Speaker and Deputy Speaker of the National Assembly, and functions of Parliament.

With regard to the judiciary the paper delves into what is to be the highest judicial organ (the Supreme Court) and its effect in helping to integrate the Tanzanian judiciary with the rest of the EAC Partner States. The paper analyses the various discussions on the suitability of the proposals of the Draft Constitution i.e. Constitutional Fora (Maharaza Ya Katiba) and how political and religious influences presented opinions doctored by their political parties and religious sects. The author analyses the Second Draft Constitution of the United Republic of Tanzania, 2013 whilst giving her own views and analysis of issues relating to respect, promotion and protection of human rights and fundamental freedoms in Tanzania to ensure that they are in tandem with international and regional norms and mechanisms available for enforcement of the rights
Introduction

and redress for wrongs suffered. The paper delves into specific aspects of a select number of human rights, for example the right to life vis-a-vis the death penalty, extrajudicial killings and mob violence. With regard to the death penalty, paper cites a number of judicial decisions which have addressed the issue of constitutionality/unconstitutionality of the death penalty and juxtaposed those with some in another Partner State, Uganda. With regard to the right to life in Tanzania the paper highlights the issue of extrajudicial killings that threaten the right to life and the issue of deaths resulting from mob violence.

The paper examines freedom of religion in Tanzania which is a secular state and highlights the incidences of religious intolerance leading to loss of innocent lives and massive destruction of properties whilst giving the various reasons and justifications for the heinous acts and the effect they have on society.

There is analysis of the various media related laws such as the Newspapers Act, 1976 and the Broadcasting Services Act 1993, the Freedom of Information Bill, 2006 and the Media Service Bill, 2007 and the various penalties/fines imposed on media houses such as the risk of being banned or suspended, the attacks on media personnel and the effect with regard to entrenching media freedom.

The author delves into the issue of freedom of assembly and the excessive use of force during political assemblies, the police powers to stop political assemblies, the reasons for the same and whether this has hampered citizens from enjoying the said right.

The paper also addresses other key legislations during the period in review, for example, the Constitutional Review (Amendment) Act, No. 7 of 2013, the Constitution Review (Amendment No. 2) Act, 2013. There is also an analysis of key judicial decisions such as Tanganyika Law Society, the Legal and Human Rights Centre and Reverend Christopher Mtikila v. the United Republic of Tanzania,1 Zakaria Kamwele and 126 Others v. the Minister of Education and Vocational Training and the Attorney General, Civil Appeal No. 3 of 2012, which touch on constitutional aspects.

1 African Court of Human and People's Rights' Applications 009 and 011/2011 (Judgement delivered on June 14, 2013).
The paper addresses other challenges that touch on constitutional values such as the spiralling land conflict and the anti-poaching activities which elicited claims that the operation infringed on human rights.

Mwinyi Talib Haji in *The State of Constitutionalism in Zanzibar 2013* addresses the ongoing Constitution-making process in Tanzania with special reference to Zanzibar, its significance for the people of the isle and the status they would enjoy in the new constitutional setup. The paper shows how the Union of Tanzania was formed into one republic i.e. joining of Tanganyika and Zanzibar, the challenges faced in the Union such as distribution of power between the Union Government and the Zanzibar Government and solutions to the same.

The author highlights the division in Zanzibar with regard to the best structure of the Union of Tanzania, arguments challenging the inclusion of human rights in the Draft Constitution, the post of the Union presidency and elections of the Union President.

The paper traces the constitutional development of Zanzibar, the establishment of the Zanzibar Anti-corruption Authority (which has led to the eradication of corruption as a major objective), the debates regarding the death penalty in Zanzibar and the United Republic of Tanzania, challenges facing the Children’s Court, women’s empowerment and finally the laws that have been enacted in the review period and how they help entrench constitutionalism.

The papers in Burundi and Rwanda are not included in this volume because the two countries are outside the geographical scope of the funders for this year.
Constitutionalism in the East African Community in 2013

Fred Nkusi*

Introduction
The Treaty on the Establishment of the EAC (hereinafter, ‘the Treaty’) envisages integration among the countries of East Africa to progress from a Customs Union to a Common Market, then a Monetary Union and, ultimately, a Political Federation as enshrined in Article 5 (2). Furthermore, the Council directed the Secretariat in April 2006 to initiate negotiations for the Common Market, to be concluded and become effective in 2010 when the Customs Union takes full effect. In so doing, the Council invoked Article 5(2) and Article 76(1) of the Treaty. The latter Article recognises the free movement of labour, goods, services, capital and the right of establishment as the pillars of

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2 Article 5(2) of the Treaty for the Establishment of the East African Community.

3 Ibid
the Common Market. Since its inception, the East African Community has made numerous achievements in terms of constitutionalism and observance of democratic and human rights principles.

Throughout 2013, the EAC had remarkable achievements covering three interesting areas, namely constitutionalism, adherence to democratic principles and human rights. First, this paper discusses the achievements of the Community in light of its mandate as spelt out in its legal framework. At this juncture, specifically in 2013, the EAC adopted two important protocols: the Protocol on the Establishment of the East African Community Monetary Union and the Protocol on Peace and Security of the EAC.

Additionally, the paper will show the nexus between constitutionalism at the EAC and the activities of its organs and institutions. In particular, it seeks to explore notable achievements by the organs and institutions of the EAC and their conformity with the EAC legal framework. Meetings were held, protocols finalised, laws adopted, and judgments handed down. Although there are remarkable developments, it is important to point out that there were some challenges, especially with regard to the decisions of the EACJ.

One of the notable developments was Kenyan President Uhuru Kenyatta taking the helm of the Community for the next one year (from November 2013 to November 2014), in a typical rotational chairmanship of the bloc, a position previously held by Ugandan President Yoweri Museveni. The United Republic of Tanzania took over from the Republic of Burundi as the Rapporteur.

This work is arranged in two parts with sections under each part. Part I discusses the difference between constitutionalism and Constitution, and also discusses constitutional and democratic achievements in the EAC and related challenges. Part II particularly captures and analyses some of the crucial judgments of the EACJ and, gives a conclusion.

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4 Ibid.
5 See the Communiqué of 15th Ordinary Summit of the Heads of State of the East African Community held at the Speke Resort and Conference centre in Kampala, Uganda on November 30, 2013.
Difference Between Constitutionalism and Constitution

Constitutionalism in its formal sense has been defined as the principle that the exercise of political power shall be bound by rules, which determine the validity of legislative and executive action by prescribing the procedure according to which it must be performed or by delimiting its permissible content. Constitutionalism “becomes a living reality to the extent that these rules curb the arbitrariness of discretion and are in fact observed by the wielders of political power, and to the extent that within the forbidden zones upon which authority may not trespass there is significant room for the enjoyment of individual liberty.”

According to Rosenfeld, constitutionalism is a “three-faceted concept”, as it requires imposing limitations on government powers, adherence to the rule of law, and the protection of human rights. Constitutionalism is the antithesis of arbitrary rule. Its opposite is despotic government, the government of will instead of law. Constitution, on the other hand, refers to a document containing the rules and practices that determine the composition and functions of the organs of central and local governments in a State and regulate the relationship between individuals and the State.

One of the mistakes made by some politicians, and even by some intellectuals, has been to indulge in the confusion between constitutionalism and written constitutions, or between constitutionalism and the constitution-making process.

Besides, some scholars have defined a constitution as a set of norms (rules, principles or values) creating, structuring, and possibly defining the limits of government power or authority. Similarly, constitutionalism is

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7 Ibid.
10 Ibid. p.27-28.
11 Ibid.
regarded as an idea, often associated with the political theories of John Locke and the founders of the American republic, that government can and should be legally limited in its powers, and that its authority or legitimacy depends on its observing these limitations.12

After the independence of many African states, the constitution was seen as evidence within the international community that the state deserved independence and it became an admission card within the club of ‘civilised nations’. Coups d’etat and violent changes of government followed that honeymoon of constitutions in Africa and were characterised by the repeal of the previous constitutions and the adoption of new ones, which were to be repeatedly amended and violated. Unfortunately, this proliferation of constitutions throughout Africa did not usher in a paradise for constitutionalism.

As Schochet has pointed out, “there is closeness between constitutionalism per se and the having of a constitution, a closeness that is behind the easy and frequent slippage from one to other.”13 Nevertheless, the constitution and constitutionalism should be markedly distinguished.

Constitutions may go with constitutionalism and vice versa but the rule is far from absolute as there have been many exceptions. Constitutionalism presupposes the existence of a proper constitution, whether written or unwritten.

**Constitutionalism in the East African Community**

As far as constitutionalism is concerned, the objective of the Community, as spelt out in Article 5, paragraph 1, of the EAC Treaty, “shall be to develop policies and programmes aimed at widening and deepening cooperation among the Partner States in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs for mutual benefit.”14

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Constitutionalism in the East African Community in 2013

Article 5(3), of the articulated Treaty,\(^\text{15}\) stipulates that in pursuit of the objectives as provided for in the Treaty, the Community shall ensure the attainment of sustainable growth and development of the Partner States by promoting a more balanced and harmonious development of the region; the strengthening and consolidation of co-operation in agreed fields that would lead to equitable economic development; the promotion of sustainable utilisation of the natural resources in the region; and the strengthening and consolidation of the long standing political, economic, social, cultural and traditional ties and associations between the peoples. The Treaty goes further to state that the Community will ensure the promotion of peace, security and stability; the enhancement and strengthening of partnerships with the private sector and civil society and mainstreaming of gender in all its endeavours.

The foregoing provision reflects the fundamental basis of the regional integration. The Treaty, which brings together the republics of Kenya, Burundi, Rwanda, the United Republic of Tanzania and the Republic of Uganda, set out a bold vision for their eventual unification. The vision of the EAC is to have a prosperous, competitive, secure and politically united East Africa. As noted in the objectives of the EAC, the Community has adopted a number of protocols, laws and policies to ensure the effective realisation of constitutionalism as reflected in the Community’s stated objectives.

More importantly, the Treaty envisages the fundamental principles of constitutionalism enunciated in Article 6, such as: mutual trust, political will, sovereign equality, peaceful co-existence, good neighbourliness, peaceful settlement of disputes, 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 people’s rights in accordance with the provisions of the African Charter on Human and People’s Rights.\(^\text{16}\)

Currently, in the process of integration, the Community has made strides in terms of adopting protocols of a Customs Union, a

\(^{15}\) Ibid.

\(^{16}\) Ibid.
Common Market and a Monetary Union, plus a Political Federation yet to be adopted. But the effective implementation of these fundamental principles of the Community remains a huge challenge.

The basis of ensuring the realisation of constitutionalism is likewise spelt out in the functions of the EACJ and East African Legislative Assembly (EALA).17 The reason for paying attention to these two organs is that their mandate perfectly matches with the realm of constitutionalism unlike other organs.

It is quite important to recall, as set out in Article 27 of the Treaty, that the Court has jurisdiction over: “disputes on the interpretation and application of the Treaty; disputes between the Community and its employees arising from the terms and conditions of employment or the interpretation and application of the staff rules and regulations; disputes between the Partner States regarding the Treaty if the dispute is submitted to it under a special agreement; disputes arising out of an arbitration clause contained in a contract or agreement which confers such jurisdiction on the Court to which the Community or any of its institutions is a party; disputes arising out of an arbitration clause contained in a commercial contract or agreement in which the parties have conferred jurisdiction on the Court; and, if the jurisdiction may be extended, human rights, at a suitable date to be determined by the Council.”18

The EALA, as a legislative organ similarly established under Article 9 of the Treaty, has, among others, the following mandate: to adopt laws on behalf of the Community; liaise with the National Assemblies of the Partner States on matters relating to the Community; discuss all matters pertaining to the Community and make recommendations to the Council as it may deem necessary for the implementation of the Treaty. The Assembly may also perform any other functions as are conferred upon it by the Treaty.

The activities of the above organs clearly depict that Community is duty-bound to live up to its constitutional mandate.

17 Ibid., Article 9.
The obligation to observe fundamental principles of democracy and human rights by the EAC is further articulated in Article 7, paragraph 2, of the Treaty, where the Partner States undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.

The Community has to ensure that Partner States likewise live up to their obligations. The Treaty provides that:

Partner States shall: plan and direct their policies and resources with a view to creating conditions favourable for the development and achievement of the objectives of the Community and the implementation of the provisions of this Treaty; co-ordinate, through the institutions of the Community, their economic and other policies to the extent necessary to achieve the objectives of the Community; and abstain from any measures likely to jeopardise the achievement of those objectives or the implementation of the provisions of this Treaty.19

In this view, the Treaty stipulates that: “subject to the provisions of this Treaty, the regulations, directives and decisions of the Council taken or given in pursuance of the provisions of this Treaty shall be binding on the Partner States, on all organs and institutions of the Community other than the Summit, the Court and the Assembly within their jurisdictions, and on those to whom they may under this Treaty be addressed.”20

Constitutional and Democratic Achievements of the EAC

Signing of the EAC Monetary Union

One of the most exciting recent achievements was the signing of the Protocol on the Establishment of the East African Community Monetary Union at the EAC Heads of State Summit held in Kampala, Uganda, on November 30, 2013,21 by Heads of State of all five Partner States: Presidents Uhuru Kenyatta of Kenya, Jakaya Kikwete of Tanzania, Yoweri Museveni of Uganda, Pierre Nkurunziza of Burundi

19 Article 8 of the Treaty.
20 Article 16 of the Treaty.
21 See the Communiqué of the 15th Ordinary Summit of the EAC Heads of State, supra note 4, also the Protocol on the Establishment of the East African Community Monetary Union at the EAC Heads of State Summit held at Kampala, Uganda, on November 30, 2013.
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and Paul Kagame of Rwanda. As has been noted, the theme of the 15th Ordinary Summit of EAC Heads of State was “One People, One Destiny: Towards Monetary Union.”

The signing of the Protocol was in line with Article 5(2), and Articles 82 and 151 of the Treaty. Under paragraph 2 of Article 5 of the Treaty, the Partner States undertook to establish among themselves and in accordance with the provisions of the Treaty, a Customs Union, a Common Market, subsequently a Monetary Union and ultimately a Political Federation.

Accordingly, under Article 5(2), and Articles 75 and 76 of the Treaty, the Partner States have established among themselves a Customs Union, in accordance with the provisions of the protocol for the establishment of the EAC Customs Unions and a Common Market in accordance with the provisions of the EAC Common Market Protocol.

The Protocol on the Establishment of the East African Community Monetary Union states the objectives of the Monetary Union as promotion and maintenance of monetary and financial stability aimed at facilitating economic integration to attain sustainable growth and development of the Community.

The same Protocol exhorts the Partner States to cooperate in its implementation. More specifically, the Partner States agree to:

• Harmonise and coordinate their fiscal policies;
• Formulate and implement a single monetary policy and a single exchange rate policy;
• Develop and integrate their financial, payment and settlement systems;
• Adopt common principles and rules for the regulation and prudential supervision of the financial systems;
• Integrate their financial management systems;
• Harmonise their financial accounting and reporting practices;

22 Ibid.
23 Ibid.
24 EAC Treaty, supra note 1.
25 Ibid.
26 See the Protocol on the Establishment of the East African Community Monetary Union.
• Adopt common policies and standards on statistics; and
• Adopt a single currency.

The culmination of the Monetary Union will be the adoption of a single currency across the EAC Partner States. As has been noted, the protocol is expected to become operational in the next 10 years.

As noted in the Communiqué of the 15th Ordinary Summit of the EAC Heads of State, the Summit outlined four institutions designed to implement the Monetary Union: the East African Monetary Institute; the East African Statistics Bureau; the East African Surveillance; Compliance and Enforcement Commission; and the East African Financial Services Commission.27 On this note, the Summit ordered the Council of Ministers to implement the roadmap to single currency as indicated in the Monetary Union Protocol. It is worth noting that this was a big stride towards attainment of the EAC integration plan. The Kenyan President, Uhuru Kenyatta, in his acceptance speech as chair of the Heads of State Summit, said: “The signing of the Monetary Union Protocol is a big step towards attainment of the EAC agenda.” Integration, he said, would maximise and deepen intra-EAC trade. He gave assurance of his government’s support for implementation of EAC policies. He implored those speculating about cracks in the Community to stop spreading rumours of imagined rifts.28

He further said the ratification of the new protocol by all Partner States would be done by July 2014. On the adoption of a single EAC currency, Kenyatta said the move would reduce inflation, attract foreign investors and increase trade between citizens of the EAC Partner States.29

At the same Summit, the EAC Heads of State appointed Dr Emmanuel Ugirashebuja from Rwanda to be judge of the EAC (Appellate Division) to replace Justice Emily Rusera Kayitesi, who resigned. The Summit also appointed Justice Monica Mugenyi from Uganda to be judge of the same court (First Instance Division) to replace Justice Mary Stella Arach Amoko, Deputy Principal Judge who retired. The appointments are in accordance with the Treaty, which stipulates:

28 Ibid.
29 Ibid.
Judges of the Court shall be appointed by the Summit from among persons recommended by the Partner States who are of proven integrity, impartiality and independence and who fulfil the conditions required in their own countries for the holding of such high judicial office, or who are jurists of recognised competence, in their respective Partner States.30

Recommendation for Extending the Jurisdiction of the EACJ

The 15th Ordinary Summit of the EAC Heads of State Summit held at Kampala, Uganda, on November 30, 2013, also approved the Council recommendation to extend the jurisdiction of the Court to cover trade and investment as well as matters associated with the East African Monetary Union and Human Rights, in addition to crimes against humanity. However, the Summit directed the Council of Ministers to consult the African Union on extending the jurisdiction over human rights and crimes against humanity matters. This is not, however, an achievement per se, it was only a recommendation that would subject the Partner States to adopting an additional protocol to extend the court jurisdiction.

As already noted, the EACJ ordinarily hears disputes relating to interpretation and application of the Treaty (including disputes between Partner States). The Court does not have the jurisdiction to hear individual complaints of alleged human rights violations, save those relative to the breach of the Treaty.

The Treaty provides that the Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date. To this end, the Partner States shall conclude a protocol to operationalise the extended jurisdiction.31

At this juncture, however, the EACJ lacks explicit jurisdiction to hear cases concerning human rights violations and crimes against humanity. The failure to extend the jurisdiction in accordance with Article 27 of the Treaty violates the East African’s legitimate expectation that the matter contravenes the principles of good governance provided for in Article 6 of the Treaty.

Although the Council of Ministers recommended the extension of the Court’s jurisdiction and this was approved by the recent

30 Article 24 of the Treaty.
31 Ibid.
Kampala Summit, the Partner States are yet to conclude a protocol to operationalise the extended jurisdiction. Consequently, this step has to be taken.

The East Africa Law Society (EALS) has added its voice to the push to have the extension of the jurisdiction of the EACJ in a bid to effectively arbitrate and dispense justice. Its President, James Mwamu, noted that,

...it is vital to have Treaty for the Establishment of the EAC amended as soon as possible to pave way for the Court to adjudicate on more cases.\footnote{See \textit{Press Release of 25th Extraordinary Meeting of Council of Ministers held in the East African Community Secretariat, Arusha, June 30, 2012.}}

He further said: “Litigation is key and we feel the EACJ is currently limited in terms of its scope and operations. In addition to the human rights issues which interests EALS, the EAC has recently discovered quite some resources including oil and gas and naturally litigation is expected at some point as we advance integration.\footnote{Ibid.} Though it is too early to celebrate the possibly genuine administration of justice by a regional Court, at the same time it cannot be said the Court will fail to live up to hallmarks of independence and impartiality that must characterise any judicial organ.

**Negotiations for Admission of South Sudan into the EAC**


Based on the recommendation of the report by the Verification Committee, the Heads of State Summit in November 2012 directed that the Council of Ministers negotiate the admission of South Sudan, putting into consideration provisions of the Treaty on the criteria of joining the EAC.\footnote{Ibid.}

\footnote{Hereinafter, South Sudan}
As consequence, the Council of Ministers established a High Level Negotiations Team, directed Partner States to nominate three (3) Members to this Team and convened a meeting of the High Level Negotiations Team to start the negotiations with South Sudan.\textsuperscript{38}

On November 6, 2013, a High Level Mission from South Sudan visited the East African Secretariat to have an in-depth exposure on the headquarters, organs and institutions of the Community as well as assess the requirements for joining the Community.\textsuperscript{39}

In that regard, the 15\textsuperscript{th} Ordinary Summit of the EAC Heads of State Summit held at Kampala, Uganda, on November 30, 2013, received the progress on the negotiations for the admission of South Sudan into the EAC and the Summit directed the High Level Negotiations Team to conduct the negotiations and enable the Summit to make a decision on the matter at the 12\textsuperscript{th} Extraordinary Summit in April, 2014.\textsuperscript{40}

In view of the above, a question emerges: does South Sudan meet the criteria of joining the EAC?

The Treaty enumerates the eligibility requirements of joining the EAC, such as acceptance of the Community; geographical proximity to and interdependence between it and the Partner States; adherence to universally acceptable principles of good governance, democracy, the rule of law, observance of human rights and social justice, and so forth.\textsuperscript{41} According to the eligibility requirements, one would say South Sudan meets the criteria for admission into the EAC, especially the criterion of geographical proximity to and interdependence between it and the Partner States, since South Sudan is adjacent to Uganda. Conversely, most of the eligibility requirements are subject to verification. In this regard, a Verification Committee, composed of three (3) experts from each Partner State and three (3) experts from the Secretariat was dispatched to undertake the verification of the Application of South Sudan to join EAC from July 15-31, 2012.

\textsuperscript{38} Ibid.
\textsuperscript{39} Ibid.
\textsuperscript{40} Communiqué of the 15\textsuperscript{th} Ordinary Summit of the EAC Heads of State, supra note 4.
\textsuperscript{41} Article 3(2) and (3) of the Treaty.
The Signing of the EAC Protocol on Peace and Security

On February 15, 2013, the five Partner States of the EAC signed a Peace and Security Protocol aimed at improving security in the region. The signing of this Protocol was held in Dar es Salaam, Tanzania. As underlined in the Protocol, the Partner States shall cooperate in peace and security matters and collaborate with international and regional organisations to promote peace and security in the region.

Specifically, Article 2(3), of the Protocol, enumerates the areas of cooperation: conflict prevention, management and resolution; prevention of genocide; combating terrorism; combating and suppressing piracy; peace support operations; disaster risk reduction, management and crisis response; management of refugees; control of proliferation of illicit small arms and light weapons; combating transnational and cross border crimes, including drug and human trafficking, illegal migration, money laundering, cyber crime and motor vehicle theft; addressing and combating cattle rustling; and Prisons and Correctional Services including exchange of prisoners, detention, custody and rehabilitation of offenders.

The primary objective of the Protocol is to promote peace, security, and stability within the Community and good neighbourliness among the Partner States.

The signing of this Protocol conforms to Article 5, paragraph 3(f), of the Treaty, which sets out “to promote peace, security, and stability to the achievement of the objectives of the community”.

In similar view, Article 124 of the Treaty sets out that peace and security are pre-requisites to social and economic development within the Community and are vital to the achievement of the objectives of the Community. The initiative to adopt measures designed to bring peace and security perfectly matches with the purposes and principles of the UN Charter and the Constitutive Acts of the African Union.

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44 Ibid.

45 Ibid.

46 EAC Treaty Supra note 1.

47 Ibid.
Apparently, this is a remarkable step in achieving security against international crimes, such as genocide, piracy, terrorism and other serious violations of human rights as stipulated in Article 2 of this protocol. However, the signing of the agreement is one thing and the enforcement is another. That said, there is need to put in place mechanisms that will ensure effective cooperation to prevent such crimes.

On August 22, 2013, the EALA adopted a Resolution (EALA/RES/3/12/2013) urging the Summit of Heads of State to give general directions and impetus to measures designed to fight genocide, its ideology, and genocide denial in the EAC.48

The resolution further exhorts that the Summit directs the Council of Ministers to propose an action plan to deal with genocide and genocide denials as well as an action plan for the Community in furtherance of the Community’s obligations under the UN’s responsibility to protect the agenda.49 The resolution condemns in the strongest possible terms, terrorist groups with a genocidal agenda, their supporters and financiers wherever they may be, and also urges the EAC Partner States to develop policies and legal instruments to fight and punish genocide ideology and denial.

In line with this, under Rule 80 of the Rules of Procedure, EALA resolves to select a committee to study and make recommendations to the Assembly on the likely security impact to the Community of the genocide ideology including genocide denial.50

The necessity of such measures conforms to the general spirit of the Convention on the Prevention and Punishment of the Crime of Genocide adopted by the UN General Assembly in 1948.51 Pursuant to this view, Article 124 of the EAC Treaty provides that:

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48 EALA, Resolution (EALA/RES/3/12/2013) of the Assembly urging the Summit to institute mechanisms to stop the perpetration of genocide ideology and denial in the region and to take appropriate action, adopted August 22, 2013.
49 Ibid.
50 Ibid.
51 Article 1 of the Convention states: “The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.”
The Partner States agree that peace and security are pre-requisites to social and economic development within the Community and vital to the achievement of the objectives of the Community. In this regard, the Partner States agree to foster and maintain an atmosphere that is conducive to peace and security through co-operation and consultations on issues pertaining to peace and security of the Partner States with a view to prevention, better management and resolution of disputes and conflicts between them.

The concept of the ‘responsibility to protect’ was endorsed at the UN World Summit in 2005 and a version of the concept incorporated into the World Summit Outcome Document. The Outcome Document, in paragraphs 138 and 139, recognised that the international community through the UN, has a responsibility to use peaceful means to protect populations from genocide and other crimes against humanity. The EAC, as part of the global community, has a bounden duty to fight genocide and serious international crimes.

Arguably, the 2005 World Summit Outcome Document codified some positive developments, but it is recognised that lack of political will is the main obstacle to effective response by the international community in cases of genocide. According to this view, the EAC should ensure that the Partner States put in place appropriate measures, such as, creating a joint regional force with mandate to take offensive action where necessary, but, of course, in a manner that is consistent with the UN Charter and other regional instruments. Additionally, the Partner States should strengthen cooperation by initiating extradition and mutual assistance to deal with suspected criminals without providing them a safe haven. The preceding measures would bolster the commitment to the Peace and Security Protocol.

New Chairmanship of the EAC

Another notable development was Kenyan President, Uhuru Kenyatta taking over the chairmanship of the EAC for the next one year (from November 2013 through November 2014). The chairmanship of the

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52 See Amy Dowell, the international community and Intervention in cases of genocide, Leeds University, see also Report of the International Commission on Intervention and State Sovereignty (ICISS) on the Responsibility to Protect (R2P).

53 Ibid.
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bloc is rotational, the position having previously been held by Ugandan President Yoweri Museveni. The United Republic of Tanzania took over from the Republic of Burundi as the Rapporteur.

However, it has been argued that the election of the Kenyan president to the chairmanship of the bloc was a tactical move, aimed at strengthening his posture in the face of demonising the ICC charges of crimes against humanity allegedly committed by him in the 2007 post-election violence in Kenya. Without mincing words, the EAC’s position was to sabotage the move to bring President Uhuru before the ICC. The position of the EAC does not reflect international obligation incumbent upon Partner States who are signatories to the Rome Statute that established the ICC. The obligation to comply with international treaties and apply them in good faith (Pacta sunt servanda) is well-codified in Article 26 of the Vienna Convention on the Law of Treaties. In spite of the EAC’s negative stance on the ICC, both Uganda and Kenya ratified the Rome Statute. Analysts further noted that it was a well-calculated manoeuvre to shield Kenyatta from the ICC charges.

Following the rotational basis, Rwanda was next in line to take the helm but President Paul Kagame declined, citing the need to concentrate on internal engagements such as the 20th genocide anniversary, which analysts have termed a limping reason.

In any event, it seems tricky to justify the reason behind the move. However, taking the helm of the bloc is quite political. The rotation of the office of chairperson is expressly contained in the Treaty, which provides that:

The Council shall determine its own procedure including that for convening its meetings, for the conduct of business thereat and at other times, and for the rotation of the office of Chairperson among its members who are Ministers responsible for regional co-operation in the Partner States.

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54 Communiqué of 15th Ordinary Summit of the Heads of State of the EAC, supra note 4.
56 Ibid.
57 Article 15 of the Treaty.
Deployment of the EAC Observer Mission

From September 16 to 18, 2013, the East African Community (EAC) deployed an Observer Mission to Rwanda to monitor the Parliamentary elections. The Observers’ deployment was in response to an invitation from the Government of Rwanda and the National Electoral Commission (NEC), as laid down in Article 205 of Law N° 27/2010 of 19/06/2010 relating to elections, which provides that the NEC allows international observers accredited to monitor the elections.

The Mission’s assessment of the elections is primarily based on the Constitution and the other legislation governing elections in Rwanda. The assessment is also predicated on international principles and standards governing the conduct of democratic elections including the African Charter on democracy, elections and governance (2000) and the EAC principles for election observation and evaluation (2012).

The EAC Observer Mission expressed “general satisfaction in the technical capacity and competence of NEC in managing the electoral process. The Commission was generally well prepared for the poll.” The mission further noted that the Parliamentary elections were conducted peacefully and transparently.

The Mission encourages the sustenance of the institutionalised culture of dialogue by ensuring that it is as inclusive as possible as this remains key for the consolidation of democracy in Rwanda. The fact that Rwanda is the only state in Eastern Africa to have ratified the African Charter on Democracy, Elections and Governance presents optimism on the future of democracy in the country.

The Observer Mission, however, suggested that measures should be taken to amend the restrictive provision in the electoral law to allow flexibility in movement of observers, and encourage domestic

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59 Article 205 of Law N° 27/2010 of 19/06/2010 relating to Elections, provides “Election observers are accredited by National Electoral Commission on request. In observing elections, the observers must abide by this law, other existing national laws and instructions of the National Electoral Commission.”
60 Preliminary Statement of EAC election Observer Mission.
61 Ibid.
62 Ibid.
observation to enhance ownership of the electoral process as well as the outcome thereof, by the citizens.\textsuperscript{63}

On March 5, 2013, COMESA, the EAC, IGAD jointly deployed an election observer mission in response to the invitation by the Independent Electoral and Boundaries Commission (IEBC), Kenya, to monitor the presidential election.\textsuperscript{64} The Mission observed that the campaign process was generally peaceful despite some isolated incidences of violence noted in some areas. The Mission also noted that there is no regulatory mechanism for financing of electoral campaigns.\textsuperscript{65}

The Mission commended the IEBC for their professional conduct and the security agencies for ensuring that overall law and order prevailed throughout the electoral process. Isolated cases of violence did not overshadow the peaceful conduct of the elections.\textsuperscript{66}

However, the Joint Observer Mission recommended, among others, that mechanisms be explored to strengthen the engagement of various stakeholders in their diversity in national integration and cohesion. The Mission also observed that legal reform should be pursued to bestow the Registrar of Political Parties with the powers to conduct political party primaries within adequate timeframes.\textsuperscript{67}

The deployment of the EAC Observer Mission in both Parliamentary and Presidential elections (Rwanda and Kenya), respectively, undoubtedly comports with the meaning of Article 6(d) of the EAC Treaty regarding good governance as well as adherence to the principles of democracy.

\textsuperscript{63} Ibid.
\textsuperscript{65} Ibid.
\textsuperscript{66} Ibid.
\textsuperscript{67} Ibid.
EACJ Decisions

Among A. Anita v. the Attorney General of the Republic of Uganda and the Secretary General of the East African Community and Ors

On November 29, 2013, the EACJ First Instance Division, ordered the Republic of Uganda (1st Respondent) to cause the amendment of Rule 13(1) and (2) of the 2012 Rules of Procedure of election for EALA Members to bring it into conformity with Article 50(1) of the EAC Treaty, prior to the next EALA elections.

Anita A. Among, a resident of Uganda and a member of the Forum for Democratic Change (FDC) – one of the registered Political Parties in Uganda - was the official party candidate who had been nominated to contest in the elections to the EALA in 2012.

The Applicant challenged the legality of the 2012 Rules of Procedure of election for EALA Members, as being inconsistent with the provisions of the EAC Treaty, particularly Articles 23(1), 27(1), 38(1) and 50(1) on the grounds that, in substance, they do not cater for and guarantee representation in the EALA for each of the interest groups mentioned under Article 50(1) of the Treaty.

Another contention of the Applicant, was that the foregoing Rules of Procedure were never gazetted for the benefit of the interest groups envisaged in Article 50(1) of the Treaty in further breach of the Treaty and provisions of the Constitution of the Republic of Uganda. The Applicant contended that the failure to gazette the Rules renders them null and void.

As a consequence, the Applicant asked court to, among others: declare the said Rules of Procedure null and void for contravening Articles 23(1), 27(1), 38(1) and 50(1) of the Treaty and that therefore the nomination and election of the said EALA members be set aside. The Applicant also asked court to order fresh nomination and elections.

The National Assembly of each Partner State is mandated to “elect, not from among its members, nine members of the Assembly, to represent as much as it is feasible, the various political parties

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68 EACJ reference No. 1 of 2020.
69 Ibid.
represented in the National Assembly, shades of opinion, gender and other special interest groups in that Partner States, in accordance with such procedure as the National Assembly of each Partner State may determine”.

The Rules of Procedure of the Parliament of Uganda provide that the election of Members to the EALA representing the various political parties and other interest groups be by consensus by the political parties and other members of Parliament, and where the consensus is not reached, the Speaker puts the matter to vote.

The Court held that Rules of Procedure for the election of members of the EALA cited as the Rules of Procedure of Parliament 2012, particularly Rules 13(1) and (2) are in substance inconsistent with the Treaty and its application, specifically Articles 23(1), 27(1), 38(1) and 50(1). The Court’s position was premised on the well established guiding principles of interpretation contained in the Vienna Convention on the Law of Treaties.

The Court, applying the above principle and based on the facts, noted that Rule 13 of the Rules of Procedure is found strange to both the spirit and the requirements of Article 50 (1) of the Treaty. The Court clarified that:

...in order to conform to the provisions of Article 50(1), the election Rules must enable the establishment of an electoral process that ensures equal opportunity to become a candidate, full participation and competition for specified groupings and at the end of the process, their effective representation in the EALA.

The Court, however, refrained from adjudicating on the Applicant’s request to determine the issue as to whether or not the rules were gazetted and if not, whether the failure to gazette rendered them null and void as it falls outside its jurisdiction as provided for by both Articles 23 and 27 read together with Article 30 of the EAC Treaty. The Treaty prescribes the role and jurisdiction of the EACJ in two distinct but

70 Ibid.

71 Article 31 (1) of the Vienna Convention on the Law of Treaties provides, “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”
closely-linked provisions: Under Article 23(1) the court has the mandate regarding the interpretation and compliance with the Treaty.

Under Article 27 (1) on the other hand, this jurisdiction shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States.

The Treaty also stipulates in Article 30(1) and (3) that: Any person resident in a Partner State can challenge the legality of any act, regulation, decision or action of a Partner State or institution of the Community on the grounds that it is unlawful or infringes the treaty, but the court has no jurisdiction where such act, regulation or action has been reserved under the Treaty to an institution of Partner State.

As noted above, the Treaty is the primary basis of the Court’s jurisdiction over the election of EALA members in any case requiring the interpretation of the Treaty. As noted elsewhere, the Court has the duty to ensure good governance including adherence to the principles of democracy, the rule of law, promotion and protection of human and people’s rights as enshrined in African Charter on Human and People’s Rights and international human rights instruments.

**Abdu Katuntu v. the Government of Uganda and the Secretary General of the East African Community**

On November 25, 2013, the EACJ First Division dismissed a case seeking the declaration by the Court that the Rules of Procedure of the election of members of the EALA adopted by the Parliament of the Republic of Uganda violate the Treaty.

The National Assembly of each Partner State shall elect, not from among its members, nine members of the Assembly, who shall represent as much as it is feasible, the various political parties represented in the National Assembly, shades of opinion, gender and other special interest groups in that Partner States, in accordance with such procedure as the National Assembly of each Partner State may determine.

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72 Article 30 (1) of the Treaty.
73 Article 30 (1) and (3) of the Treaty.
74 See Article 27.
75 EACJ Reference No. 5 of 2012
76 Rule 13, EACJ Reference No. 1 of 2012
The Applicant argued, inter alia, that the said Rules did not guarantee equality in representation to EALA for all the parties in Parliament and as a result the NRM presented six persons to Parliament for election, with the other parties – Democratic Party (DP) and the Uganda People’s Congress (UPC) – both presented one candidate each.

The Court held that the impugned rules for the election of members of EALA that were passed following EACJ order in the Mbidde case (Reference No.5 of 2012) conformed to Article 50(1) of the Treaty. The Court further added that it was satisfied that the Rules were made by following a proper interpretation of the same Article 50 as laid in the Prof. Anyang’ Nyongo case (Application No.04 of 200). The Court further noted that the meaning of Article 50(1) does not require that all six political parties in the Parliament of Uganda be represented in EALA. The Court further asserted that Parliament of Uganda on May 18, 2012 passed the Rules of Procedure for the EALA election. Consequently, the Court concluded that the process and procedure of nomination, campaigns and subsequent election guaranteed the participation of any interested persons and saw no evidence to the contrary.77 However, it is noteworthy that the Court’s decision was short of expressing a consistent knowledge and interpretation of the Rule 13(1) and (2) of the Rules of Procedure for the elections of members of the EALA adopted by the Parliament of Uganda, whereas in the case of Among A. Anita among others the court challenged the lack of conformity of the foregoing Rule 13 to Article 50(1) of the Treaty. On the contrary, the Court ordered the Republic of Uganda to amend Rules of Procedure for EALA Elections to conform to EAC Treaty. It is this author’s view that the Court’s determination specifically on the preceding issue lacked a persuasive reasoning that demonstrates consistency.

On November 22, 2013, the First Instance Division issued its decision holding that the Council of Ministers is responsible for determining the extended jurisdiction of the EACJ, as laid down in Article 27 (2), of the Treaty.78 However, the Court declared that the failure by Council of Ministers/Sectoral Committee on Legal and Judicial Affairs to implement an earlier Judgement which was delivered on June 30, 2011,

77 Ibid.
where the Court had ordered that quick action should be taken by the EAC in order to operationalise the extended jurisdiction of the Court under Article 27 of the Treaty is a breach of Article 38 (3) of the Treaty which states that: “A partner state or the Council shall take, without delay, the measures required to implement a Judgement of the Court.”79

The Court further ordered that,

the Secretary General should take action to expeditiously implement the previous Judgement mentioned above and to pay US$ 52,534.10 as taxed costs to the Applicant. On the prayer that the Secretary General should be cited for the contempt of the Court for failure to implement the earlier Judgement, Court considered the fact that the Secretary General has not flagrantly disrespected the order since he has made an effort to convince the Council to pay the taxed costs to the Applicant and considering the unique circumstances of the case, Court granted the Respondent the opportunity to purge the contempt with respect to the taxed costs and to pay the same within three (3) months from the date of the Judgement.80 In addition, the Court ordered “the Secretary General to pay costs on the 2nd Reference (determined today) because it was a result of the failure by the Partner States to implement the Court’s orders that the said case was filed.81

Appeal by Okotch Mondoh on Kenya Constitution

On November 8, 2013, the Appellate Division of the EACJ dismissed the Appeal by Okotch Mondoh seeking to reverse the decision of the First Instance Division on grounds that the Division in its Judgement did not consider all the facts that were presented before it, on the process used in promulgation of the new Kenya Constitution which took place on August 27, 2010.82

The Court in its ruling noted,

...we are satisfied that in reaching its findings and conclusions in this case, the First Instance Division exercised its discretion judiciously, not capriciously; and fairly, not unreasonably. Accordingly, even if for

79 Ibid.

80 Ibid.

81 Ibid.

82 Appeal by Okotch Mondoh on Kenya Constitution Case seeking to overturn the decision of the First Instance Division on grounds that the Division in its Judgement did not consider all the facts that were presented before it, on the process used in promulgation of the new Kenyan Constitution which took place on August 27, 2010.

argument's sake, those conclusions were wrong, they would not be reviewable by, nor appealable to, this Appellate Division.\textsuperscript{83}

Pursuant to Article 27(1) and 30 of the Treaty, the primary jurisdiction of the EACJ concerns the interpretation and application of the provisions of the Treaty. Indeed, Article 27(2) clearly expresses that the wider appellate jurisdiction for the EACJ over decisions of the municipal courts and tribunals of the partner states, will be determined by the Council of Ministers only at a suitable subsequent date for which the partner states shall operationalise the extended jurisdiction.

The Court further clarified that

the matter before this Court cannot, and must not, be treated as an appeal of the electoral petition which formed the judicial process that took place in the Kenyan courts.

The Appellate Division added that the First Instance Division was right in holding, as it did, that it had no jurisdiction to review the decisions of the Kenyan courts in this matter. Indeed, even the Kenyan High Court declined jurisdiction, and left the matter to the IICDRC, pursuant to Sections 60–60A of the replaced Constitution of Kenya.\textsuperscript{84}

The Appellate Division likewise dismissed the appeal in favour of the Attorney General of the Republic of Kenya and the Secretary General of the EAC and ordered each party to bear its costs.


democratic party (dp) v. the secretary general of the east african community and 3 others\textsuperscript{85}

On November 29, 2013, the First Instance Division of the EACJ dismissed a case against the Secretary General of the EAC and the four Partner States: the Republics of Kenya, Burundi, Uganda, and Rwanda filed by DP, a registered political organisation in the Republic of Uganda, principally alleging that the respondent parties failed to make individual country declarations in acceptance of the competence of the African Court on Human and People’s Rights (ACHPR) in accordance with Articles 5(3) and 34(6) of the Protocol to the African Charter on Human and People’s Rights and the Establishment of an African Court on Human People’s Rights, respectively.

\textsuperscript{83} Ibid.
\textsuperscript{84} Ibid.
\textsuperscript{85} EACJ Reference No. 2 2012.
The contentious issues were that the inaction of the aforesaid Partner States breached the EAC Treaty, specifically Articles 6(d) and 7(2) and hampered access to the ACHPR by litigants from those countries. As a consequence, the Applicant alleged that the EAC Secretary General’s failure to carry out his supervisory role over all the Partner States of the EAC is in violation of the Treaty.

The Court held that it can only “interpret” and “apply” the Treaty under Article 27 and in doing so, adherence to law in the interpretation and application of and compliance with “the Treaty” shall be its guiding principle under Article 23. The Court further noted that it can only inquire into

the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such an Act, regulation, directive, decision or action is unlawful or is in contravention of the principles of the treaty within the meaning of Article 30 of the Treaty.86

As such, the Court responded to the applicant that there is no connection between the alleged failure and/or delay to deposit declarations by named Respondents and the Treaty for establishment of the EAC. The Court further noted that

neither the Secretary General (1st Respondent) nor this Court can compel the Republics of Uganda, Kenya, Rwanda, and Burundi (the 2nd, 3rd, 4th, and 5th Respondents respectively) to do so.

It is my view that the Court’s reasoning was unpersuasive because, as already noted in Articles 6(d) and 7(2) of the Treaty, the court has the duty to ensure that the Partner States comply with their obligations flowing from the African Charter on Human and People’s Rights.

The Court articulated that it can only have jurisdiction over the matters of interpretation and application of the Treaty, but one cannot shy away from saying the Court’s interpretation of the Treaty was utterly bizarre. Interpretation and application of the Treaty is meant to ensure, among others, the observance of human rights well established in regional and international human rights instruments. In addition to the African Charter on Human and People’s Rights, there is the Universal Declaration of Human Rights (UDHR), 1948, and the EAC

86 Ibid.
Partner States have also ratified the International Covenant on Civil and Political Rights (ICCPR). If ever there was an issue at the forefront of the Community, it is the adherence to the fundamental principles of human rights.

However, there are other issues, such as rule of law, good governance, observance of democratic principles, accountability, transparency, social justice, equal opportunities, and gender equality whose realisation hinges on proper application and enforcement of human rights law.

Accordingly, one would contend the Court’s decision that, if the named Respondents voluntarily ratified or acceded to the Protocol to the African Charter on Human and People’s Rights on the Establishment of the ACHPR, there is an obligation incumbent upon them. Let us take a look below:

<table>
<thead>
<tr>
<th>Country</th>
<th>Date of Signature</th>
<th>Date of Ratification</th>
<th>Date of Deposit</th>
</tr>
</thead>
<tbody>
<tr>
<td>2. Kenya</td>
<td>07/07/2003</td>
<td>04/02/2004</td>
<td>18/02/2005</td>
</tr>
<tr>
<td>3. Rwanda</td>
<td>09/06/1998</td>
<td>05/05/2004</td>
<td>18/02/2005</td>
</tr>
<tr>
<td>5. Uganda</td>
<td>01/02/2001</td>
<td>16/02/2001</td>
<td>06/06/2001</td>
</tr>
</tbody>
</table>

The obligation of compliance by the EAC Partner States is spelt out in Article 130 (1) of the Treaty: “The Partner States shall honour their commitments in respect of other multinational and international organisations of which they are members.” A question emerges, what would be the relevance of ratifying without depositing declarations for the compliance?

Such obligation stems from one of the oldest principles of international law “*Pacta sunt servanda*” enshrined in the Vienna Convention on the Law of Treaties which provides that: “*Every treaty in force is binding upon the parties to it and must be performed by them in good faith*. 87

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**East African Centre for Trade Policy and Law v. Secretary General of the East African Community**

The Applicant filed the case contending that the EAC had amended Chapter 8 of the Treaty and in particular, introduced a proviso to Article 27(1) and creating Article 30(3) and had also concluded the Community Union Protocol and the ACE Common Market Protocol. The Applicant argued that those actions had the effect of limiting or ousting the jurisdiction of the Court and by so doing contravened the treaty, by infringing several of its provisions.

The Court, in its judgement dated May 10, 2013, noted that both Article 27(1) (which recognises interpretation of the Treaty that may be conferred on organs of Partner States) and Article 30(3) (which provides that the Court shall have no jurisdiction where an act, regulation, directive, decision or action of Partner States or an institution of the Community is complained of where such act etc is reserved under the Treaty to an institution of a Partner State) breach the provisions of the Treaty conferring jurisdiction to interpret the Treaty on the EACJ.

The Court further noted that the two amendments were not subjected to prior wide consultations and impinge on its supremacy as the Community’s judicial organ. Regarding the second matter the Court, appreciating the Respondent’s defence and submissions, decided that since Protocols are under the Treaty, integral parts of the Treaty it has jurisdiction to interpret the Customs Union Protocol and the Common Market Protocol especially in cases where the dispute resolution mechanism is not satisfactory to any disputants.

In addition, the Court observed that the dispute settlement mechanisms are a common feature of regional integration and multi-lateral trading arrangements and that therefore the dispute settlement mechanisms provided for in Article 24(1) of the Customs Union Protocol and Article 54 of the Common Market Protocol do not exclude, oust or infringe upon the Court’s interpretative jurisdiction and are not in contravention of or in contradiction of the Treaty.\(^{89}\)

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\(^{88}\) Reference No. 9 of 2012

In a similar case below, the Court held a similar stance, but the author would wish, below, to illuminate his contention in reaction to the way the Court expressed its position in two cases with regard to its interpretative jurisdiction.

**East African Law Society v. Secretary General of the East African Community**

On February 14, 2013, the East African Law Society (ELS) had filed a Reference seeking declaratory orders that Article 24(1) of the Protocol on the Establishment of the EAC Customs Union Protocol and Article 54(2) of the Protocol for the Establishment of the EAC Common Market Protocol are inconsistent with Article 27(1) and Article 38(1) and (2) of the Treaty because they purport to have the jurisdiction of the EACJ in matters relative to EAC Regional integration processes.

The EAC Customs Union Protocol provides that the East African Community Committee on Trade Remedies shall entertain any matters relative to: rules of origin provided for under the East African Community Customs Union; anti-dumping measures; subsidies and countervailing measures; safeguard measures; disputes arising from Customs Union; and, any other matter referred to the Committee by the Council.

In accordance with their Constitutions, national laws and administrative procedures and with the provisions of this Protocol, Partner States guarantee that:

“(a) any person whose rights and liberties as recognised by this Protocol have been infringed upon, shall have the right to redress, even where this infringement has been committed by persons acting in their official capacities; and (b) the competent judicial, administrative or legislative authority or any other competent authority, shall rule on the rights of the person who is seeking redress.”

In view of the foregoing, the Court held that it has jurisdiction to interpret disputes arising out of the Customs Union and Common Market Protocol in reference to Article 24 of the Customs Union

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**References**

90 Reference No. 1 of 2011.
91 See Article 24 (1), Protocol on the Establishment of the East African Customs Union.
92 See Article 54 (2), Protocol for the Establishment of the East African Community Common Market.
Protocol and Article 54 of the Common Market Protocol and are not in conflict with the relevant provisions of the EAC Treaty.

Dispute settlement under Article 24 of the Customs Union is quite an unambiguous provision, because it is a mechanism envisaged in the legal framework of the Community. However, the Court’s reasoning under Article 54 of the Common Market Protocol is clearly at odds with Article 27(1) of the Treaty because the national mechanism envisaged would be robbing the jurisdictional authority of the EACJ. Article 27(b) of the Treaty prescribes that a competent judicial, administrative or legislative authority or any other competent authority shall adjudicate on the rights of the person who is seeking redress.

Arguably, this local mechanism set out in Article 54(b) can never signify that it is an integral part of the EAC legal framework as one would concur with the existence of EAC Committee on Trade Remedies as illustrated above. It sounds incomprehensible to think that a national mechanism stipulated in Article 54(b) suggests a subsidiary mechanism to the EACJ. The same cannot be posited, that the EACJ can delegate some of its judicial powers to a national mechanism, nor can it be said that a national mechanism plays a complementary role.

Legally speaking, the EACJ and a national mechanism are mutually exclusive in terms of their statutory framework, jurisdictional authority and status.

**Conclusion**

Throughout 2013, the EAC has registered a number of achievements with regard to constitutionality and adherence to principles of democracy and human rights. The most remarkable development was the signing of two protocols: the Protocol on the Establishment of the EAC Monetary Union and the East African Community Protocol on Peace and Security. These protocols, in addition to others signed in the past years, reflect the general objectives of the EAC. One of the phases of implementing the EAC objectives is to have a single currency across the EAC Partner States, as envisaged in the EAC Treaty and the EAC Monetary Union Protocol.

The signing of a Peace and Security Protocol requires the partner states to cooperate and collaborate with international and regional
organisations to promote peace and security in the region. The protocol particularly points out the areas of cooperation, such as fighting against international crimes as well as non-international crimes.

In 2013, the Community elected the Kenyan President, Uhuru Kenyatta, to the chairmanship of the EAC in a typical rotational chairmanship of the bloc, a position previously held by the Ugandan President. The EAC Summit also appointed a number of the EACJ judges to replace those who stepped down. In addition, the EAC sent its Observer Mission to Kenya and Rwanda to monitor the Presidential election and Parliamentary elections, respectively. This move demonstrates the Community’s role in ensuring good governance and observance of democratic principles across the region.

Furthermore, the EACJ handed down numerous important judgments, which reflects the realm of EAC constitutionalism, including the rule of law, the maintenance of universally accepted standards of human rights. Crucially, this demonstrates the desirable path to living up to constitutional mandate. Much as there are commendable achievements, as already noted, there are few symptoms of misinterpretation and inconsistency in the EACJ’s decisions, regarding the interpretation and the application of the EAC legal framework. However, this stands as the author’s personal analysis.
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International and Regional Legislations
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The Vienna Convention on the Law of Treaties.
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The Protocol on the Establishment of the East African Community Monetary Union.
The Protocol on the Establishment of the East African Customs Union.
Rwanda’s Law No. 27/2010 of 19/06/2010 relating to Elections.

Cases
Among A. Anita v. the Attorney General of the Republic of Uganda and the Secretary General of the East African Community, EACJ Reference No. 1 of 2012.
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Electronic sources
Introduction
In the history of Kenya’s constitutional development, the year 2013 will be considered a watershed in many ways. The first democratic polls under the new constitution were carried out peacefully, thus fully testing the constitutional framework on elections. Secondly, the elections ushered in a new governance dispensation characterised by a *sui generis* devolved system of government. Thirdly, the process of implementing the constitution entered its third year as Kenya marked the 3rd anniversary of promulgation of the new basic law on August 27. The critical and profound events and processes that ensued largely form the basis of scrutiny in this paper.

In this paper, some of the key conceptual issues and trends that underpin Kenya’s constitutional development will be examined. The key constitutional developments will thereafter be identified and their
significance and impact on Kenya’s democratic development and future analysed. Finally, conclusions will be drawn and recommendations pertinent to safeguarding gains made in the implementation of constitution and promotion of constitutionalism will be given. This paper, however, cannot claim to be exhaustive in its coverage of the constitutional events and developments that occurred in 2013 due to limitations in scope and space. The paper also covers some constitutional developments that occurred outside 2013 but, nevertheless, had real impact or significance during the review period.

**Conceptual and Contextual Issues**
There is a growing body of literature that suggests constitutional development occurs as a result of adoption, “elaboration” and amendment of a constitution.\(^93\) This view of constitutional development can be said to be formalistic, in the sense that it attributes development to quantitative changes on the text of the supreme law. Constitutional development is due to various actors including courts, the legislature, the executive, political actors and the people. Courts will give constitutional meaning through their power of constitutional interpretation and restraint of executive actions, while the legislature does the same through power of amendment of the constitution and enactment of statutes to elaborate on the spirit of the law. The executive, as the key implementer of law, will provide constitutional meaning through application of law, operationalising institutional machinery of the constitution and in some cases, exercise of governmental power while testing the limits of constitutional bounds. Political players can affect constitutional development through their interpretation of the basic law in the court of public opinion, thereby mobilising pressure for sustenance or change of the constitution. The people, on the other hand, lend legitimacy to maintenance and change of constitution as the repository of sovereignty. These actors are said to influence or give constitutional meaning though many times in a conflicting way, leading to constitutional development.

Constitutional development can also be evaluated in terms of the aims a constitution actually pursues or achieves, viewed against the aspirations of its framers. This can be referred to as the ‘substantive’ aspect of constitutional development as it focuses on qualitative changes accompanying such developments. Constitutions are invariably drafted to resolve key or core problems afflicting a particular society. The American constitution sought to address the topical issues that prevailed at that time; independence from English monarchy and recognition of individual rights being at the fore. The same can be said of Kenya’s independence constitution that sought to ensure a smooth transition to independence rule and entrenchment of a system of governance underpinned by majority rule and respect for minorities. In the same vein, Kenya’s 2010 Constitution was drafted within a context that was largely set in the Agenda Four of the National Accord that was reached by political actors in a bid to end the calamitous 2008 post-election violence (PEV) and address the underlying issues that led to the same. Agenda Four suggested constitutional, legal and institutional measures to address youth unemployment, poverty, inequality, regional imbalance, consolidation of national unity, tackle impunity and entrench transparency and accountability. In this sense, the constitution was to lay a firm basis for guiding all other proposed reform strategies of Agenda Four by creating institutions and processes for restoration of justice and sustainable peace. The extent to which implementation of the constitution addresses the Agenda Four issues therefore constitutes an important subject of inquiry into Kenya’s constitutional development.

The process of constitutional development is conditioned by political and social institutional contexts that prevail in a particular country. Yash Ghai has identified the following as key contexts that have defined and shaped Kenya’s constitutional development from independence to

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96 Besso op cit.
recent times; popular legitimacy of the constitution and institutions of governance it creates; level of political and constitutional awareness among the population, attitudes of the elite towards law and power, legacy/heritage of a legal system, popular perceptions of constitution as permanent (immutability) and symbolism attached to constitutions (e.g. symbol of nationhood, renewal or rebirth of a nation, etc). In order to understand better the driving forces of constitutional development, it becomes imperative to study the context within which a constitution is being implemented.97

Long term trends underpinning Kenya’s constitutional development can be discerned from past reform initiatives. The incrementalist nature of constitutional reform is perhaps the most preponderant trend that was evinced by the protracted and piecemeal efforts towards adoption of the new constitution.98 The same is also demonstrated in the implementation framework of the constitution (Fifth Schedule to the Constitution), which provides for a five-year period for enactment of laws to give full effect to the document. This trend reflects the imbalance of power between pro- and anti-reform forces in favour of the latter, causing delays, postponements and impediments in the settlement of key issues during process of constitutional reforms. It also mirrors the slow pace of internalisation of change by key actors in the reform process which in turn slows the acceptance of the said change.

The role of ethnicity (ethnic mobilisation) and elite accommodation in constitutional negotiations and eventual adoption of the Constitution as explained by the theory of constitutional consociationalism is also likely to condition the future of constitutional development. This theory is developed from Lijpart’s consociational democracy, which entails the use of elite accommodation to promote stability and governability


of a nation especially in the allocation of power and resources. It is assumed that the elite of the society are willing to abide by the rules of the game and accommodate one other’s interests in order to achieve optimum outcomes with respect to sharing of resources. Constitutional consociationalism on the other hand entails elite accommodation in the design of the rules of the game - in this case, the Constitution being regarded as such rules (Lusztig, 1994). The theory proceeds to assert that such elite accommodation is inevitably undermined by mass input and legitimation of the constitutional product by the citizens. It is therefore plausible to conclude that this theory to a large extent explains the success of constitutional change processes that were devoid of such legitimation (e.g. South Africa, Malawi,) and failures where mass legitimation commonly by way of referendum is required (e.g. Canada, Belgium and recently the European Union (EU). Such legitimation takes away representational monopoly of the elite by creating new constitutional interest groups (referred to as mega constitutional orientations - MCOs) thereby denying the elite traditional tools of elite bargaining (trade-offs, buy-ins etc.). Any bargain reached by the elite that offends the MCO they putatively represent is likely to be rejected at the legitimation stage. Similarly, where the process creates too many MCOs, it invariably raises the threshold for satisfying the competing interests and this makes elite accommodation more difficult if at all, while it also increases the chance of mass rejection at referendum.

Whereas Kenya qualifies as a divided society due to ethnic, class, regional and religious differentiation of its polity, did the adoption of the new constitution appear to have turned constitutional consociationalism on its head? The process did result in the creation of various MCOs in its wake e.g. decentralisation (Majimbo or regionalism v centralisation; presidential v parliamentary system), land (redistribution v status quo), religious (conservative Christians v Muslims over the Islamic (Kadhis) courts question), human rights (conservative Christians v human rights activists over reproductive rights), etc. Thus, the adoption of

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100 Ibid
the Constitution by a large majority (66%) may have either signified a limited compromise (due to false elite accommodation) on the key contentious issues which therefore duped the masses into legitimising the document or that the bargaining process succeeded in bridging the gap of expectations and satisfaction among the critical MCOs. Is the adopted constitution at risk of being unravelled as the elite engage in a new phase of constitutional bargaining over contentious issues through amendments and statutory enactments without the constraints of mass legitimation? Is constitutional consociationalism applicable to constitutional development in the post-legitimation period as the elite seek to elaborate and modify the rules of the game and to what effect/impact? In analysing the 2013 constitutional developments, an attempt shall be made to answer these questions.

**Key Constitutional Developments in 2013**

**Executive**
The 2013 elections brought an end to the hybrid presidential system that was the hallmark of Kenya’s constitutional framework since 1964 and ushered in a pure presidential system modelled largely along the American constitutional heritage. The new President under the new dispensation was not to be an elected Member of Parliament and could only appoint his/her cabinet outside the legislature. The new system also evinced more checks and balances in the exercise of executive power. For instance, the presidential power of appointments was tapered with parliamentary oversight, whereas the new cabinet secretaries were answerable to parliament through the various departmental committees. With the executive presence in parliament curtailed, the business of government was to be championed by either leader of majority or minority, depending on the strength of the ruling party or coalition in parliament. The transition from the old to the new presented interesting constitutional challenges that will be analysed shortly.

The elections also brought to an end the power sharing that had been negotiated under the National Accord which saw President Mwai Kibaki form a coalition government with Prime Minister Raila Odinga. This arrangement (a product of consociational democracy) brought out the best of consociational democracy as the elite accommodation
within the coalition government managed to bring peace, deliver a new constitution and pass through a raft of reforms as outlined in the National Accord. However, the power sharing aspect of the accord was observed more in breach as was evidenced by the persistent quarrels and bickering over the status and authority of the Prime Minister relative to that of the President.

**Exercise of Power of Presidential Appointments**

From the foregoing, the system of checks and balances enmeshing the executive courtesy of the new constitutional dispensation was put under test during the transitional year of 2013 in various ways. Firstly, the power of presidential appointments under the National Accord and its continued relevance under the new dispensation created a constitutional problem that was reviewed by the Court of Appeal in the *Minister for Internal Security and Provincial Administration v. CREAW and 8 others.*

In this matter, the President appointed 47 county commissioners as part of national government’s efforts to rationalise the provincial administration in view of the imminent rolling out of devolved system of government. The then Prime Minister kicked off a storm, claiming that the President had not consulted him over the appointments as required under the National Accord. There were also complaints that the appointments did not meet the constitutional threshold of gender parity. The respondents went to court and succeeded in persuading the High Court to hold the said appointments as illegal. Dissatisfied with the ruling and against the opinion of the AG, the Appellant moved to the Court of Appeal and restated their case.

The appellate court agreed with the appellants that the positions of the County Commissioners were not new but rather, were deployments carried out within the extant Provincial Administration structure and as such, did not merit parliamentary approval. That being the case, the National Accord did not require the President to consult with the Prime Minister when making such deployments. Similarly, the provisions under the new constitution that would have compelled the President to seek parliamentary approval for such appointments remained

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101 Sihanya and Okello, 2010 op cit.
102 Civil Appeal 218 of 2012.
103 Article 81 (b) Constitution of Kenya (2010)
suspended until the 2013 elections. Since these appointments were done under the saved provisions of the old constitution regarding Presidential appointments, they were unfettered by the gender parity rule that governs the suspended provisions of the new constitution. The decision confirms doubts expressed by some at the signing of the National Accord over the lopsidedness and ambiguity of the agreement, which the President and his PNU side of the coalition exploited ruthlessly to diminish the influence of the Prime Minister and his ODM wing of Government. The appellate court’s decision also buttressed the judicial approach to progressive realisation of gender parity that emanated from the Supreme Court's Advisory Opinion No. 2 of 2012 (FIDA case) and this points to the need for a comprehensive and policy framework to address this particular issue.

The second major development related to the constraints over powers of the president to alter or interfere with appointments (dis) approved by the previous Parliament. In the case of *Abdi Yusuf v. AG and 2 others* President Kibaki was barred by the court from resubmitting to Parliament for fresh approval, nominees for the Teachers Service Commission (TSC), who had been rejected by the 10th Parliament. The President had resubmitted a list of nominees that had been rejected by Parliament on grounds of lack of regional balance and meritocracy. In disregard of the Teachers Service Commission Act that required the President, in consultation with the Prime Minister, to submit a fresh list of nominees from among those shortlisted by a recruiting panel, the President resubmitted the rejected list. The learned judge rightly observed the principle of rule of law and legality as enshrined in Article 10 of the Constitution required the President to make such appointments in accordance with statutory enactments. A similar line of thinking was adopted in the case of *Amoni Amfry and another v. Minister for*

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104 See Section 2 (1) (c) of the Sixth Schedule of the Constitution of Kenya (2010) which suspended Articles 129-155 of the new Constitution until the first elections were held.

105 See Section 3 (2) of the Sixth Schedule to the Constitution of Kenya (2010) *ibid.*


107 In The Matter Of The Principle Of Gender Representation In The National Assembly And The Senate(2012) eKLR.

108 Petition No. 8 of 2013.
Lands and others\textsuperscript{109}, where the court directed the President to gazette the names of persons appointed to the National Land Commission, citing lack of statutory discretion on the part of the appointing authority in occasioning any delays. These decisions will undoubtedly act as a sure deterrent to future attempts by a president to abuse exercise of power of appointments with the complicity of Parliament.

**The ICC Question and Constitutional Dilemma**
The third major development related to the candidature and subsequent election of persons of Uhuru Kenyatta and William Ruto (leaders of the Jubilee Coalition) as President and Deputy President respectively. The two had been indicted by the International Criminal Court where they faced crimes against humanity charges relating to the 2008 PEV.\textsuperscript{110} This presented two critical constitutional questions that dominated the pre-and post-election period. First was whether the indictments handed to the two would constitute valid grounds for disqualifications of the candidature on grounds of violation of provisions of Chapter 6 of the new constitution on integrity.

Prior to the elections, a group of civil society groups had filed a suit seeking disbarment of the two over the said ICC indictments. In that matter, ICPC and 5 others v. AG and 4 others,\textsuperscript{111} the court declined to pronounce itself on the substance of the claims by the Applicants and instead threw out the suit on a technicality. The court held that it had no jurisdiction to entertain such a suit and that any suit challenging the validity of nomination of a presidential candidate ought to be filed at the Supreme Court as an election petition pursuant to any rules pertaining thereto. The court also further observed that persons aggrieved by the nomination process still had the opportunity to channel their grievances to the bodies concerned (particularly the Independent Electoral and Boundaries Commission (IEBC), something the parties had failed to do. This decision can be faulted on two grounds: owing to the great public importance attaching to the issues raised by the Applicants, the proper thing for the High Court to do was to refer the same to the Supreme

\textsuperscript{109} Petition No. 6 of 2013.

\textsuperscript{110} The cases are cited as The Prosecutor v. Uhuru Muigai Kenyatta and The Prosecutor v. William Samoi Ruto and Joshua Arap Sang respectively.

\textsuperscript{111} Petition No. 552 of 2012.
Court *sui moto* for determination of the substance of the claims made by the Applicants. Secondly, since the bodies charged with vetting of candidates prior to the election (such as the IEBC and Ethics and Anti-Corruption Commission (EACC) had pronounced the two as validly nominated, it was within the supervisory jurisdiction of the court to entertain the claims by the Applicants and subject such pronouncements to judicial review.

The second question related to the capacity of Kenyatta and Ruto, once elected, to discharge their constitutional duties as President and Deputy President respectively while facing charges at the ICC. In the matter of *National Conservative Forum v. AG*\(^\text{112}\), the Applicants sought to stop the two from attending the Hague trials on grounds that this would violate their oath of office and the Constitution. The court declined to grant to orders, noting the proceedings before The Hague Court were sanctioned by the Rome Statute, which had been domesticated by the International Crimes Act and by virtue of the monoist doctrine espoused by the new constitution.\(^\text{113}\) The court opined that the proper forum to challenge the proceedings therefore was at The Hague Court.

The Jubilee Administration sought a political approach to resolving this vexing constitutional question. Parliament (dominated by the Jubilee Coalition) voted a resolution to repeal the ICC Act amidst a walkout by the opposition. This prompted the ICC to ask the Kenya Government to file submissions regarding the intended repeal of the ICC Act and the impact it may have on Kenya’s future cooperation with the ICC and protection of witnesses in the two ongoing cases. This action appeared to have slowed down attempts by Jubilee legislators to repeal the ICC Act. Thereafter, Kenya Government submitted a request for deferral of the two cases before ICC to the United Nation’s Security Council (UNSC), arguing that the cases were likely to distract the President from attending to security matters (particularly Kenya’s military incursion into Somalia) and hence likely to affect regional stability. The deferral

\(^{112}\) Petition No. 438 of 2013

\(^{113}\) Article 2 (6) of Constitution of Kenya (2010) incorporates ratified treaties and conventions as part of Kenya’s municipal law
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The request gained more impetus following the Westgate terrorist attack in Nairobi in September 2013, which appeared to vindicate the Kenya Government position on security threats posed by the continued absence of the two leaders while attending to their ICC cases. Prior to this, the Government had initiated a high level diplomatic move to lobby African states to pursue collectively for termination of the cases as well as freezing of cases against sitting Presidents until expiry of their terms. This culminated into the holding of an extraordinary session of the African Union (AU), where a tentative resolution barring cooperation with the ICC was passed. The unrelenting campaign against the cases continued at the UNSC, with African delegates intensifying lobbying efforts with countries deemed friendly towards the deferment of the cases. The UNSC, however, dealt the case a fatal blow when the major powers (except China and Russia) declined to vote on the matter, thus technically shooting the same down.

From the UNSC, attention quickly shifted to the conference of parties to the ICC Rome Statute, which was held in November 2013. The African groups supportive of the ICC cases failed in getting the parties to amend the Rome Statute in line with the AU resolutions, but got some respite when a UK-sponsored amendment was enacted, allowing courts to excuse ‘high ranking state officials’ from physical attendance and letting them instead appear before the court via video link or any other appropriate technology.

It is now evident that the ICC question has entirely preoccupied the top echelons of government, with consequences for the internal political arrangements and external relations. Locally, the presidential contest between Kenyatta and Odinga was cast as an ideological battle between nationalists and sympathisers of the West, with the ICC cases providing the fodder. The Uhuru and Ruto Campaign (or simply ‘UhuRuto’ campaign as they were popularly known) presented

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114 On September 21, 2013, a group of gunmen laid siege for three days on Westgate Mall in Westlands, an upmarket area of Nairobi, Kenya killing about 67 people (including foreigners). The Somalia-based Al-shabaab terrorist group later claimed responsibility for the attack, ostensibly in retaliation to Kenya’s military intervention in Somalia.

115 During the informal session, the delegates from veto-wielding nations of France, America and Britain expressed the view that Kenya should engage the ICC more since the court had started demonstrating greater flexibility towards the Kenyan cases instead of seeking deferral or termination of the cases.
themselves as victims of a geopolitical battle between the West and the rising China, in which the ICC was being used to punish Kenya for leaning towards the latter. Raila was painted as a bogeyman of the West, whose candidature was being boosted by the ICC trials. In the period after elections, the ICC question continued to act as a beacon for Kenya’s political divide as evidenced by the divisions that underlay parliamentary debate on the repeal of the Rome Statute. Efforts by the government to introduce laws curtailing activities of Civil Society Organisations (CSOs) are said to be motivated by the desire to punish CSOs for their role in the investigations that led to the ICC cases as explained elsewhere in this article.

During the presidential campaigns, Kenyatta and Ruto were careful to characterise the proceedings before the court as personal challenges. However, upon assuming power, the Government went overboard courting African nations and friendly European countries to support its bid to have the cases halted. Countries that appeared lukewarm to Kenya’s bid (including African countries like Botswana) were isolated and heavily criticised. Relations with the West have remained prickly, leading to accusations against Kenyatta’s administration for apparently snubbing European countries by not giving accreditations for their new envoys.

Within the EAC, a rift pitting Kenya, Uganda and Rwanda on one side and Tanzania and Burundi on the other emerged, ostensibly over the rather slow pace of integration efforts. The former (referred to as coalition of the willing or simply ‘CoW’) accused the latter of obstructing the pace of integration and invoked the principle of variable geometry to initiate bilateral agreements on aspects of fast tracking integration on specific issues such as single visa territory and conclusion of regional infrastructural projects like; single gauge rail and expansion of Mombasa port. The emergence of ‘CoW’ and the enthusiastic role played by Kenya could be linked to the ICC cases. Within the regional

117 This is enshrined in Article 7 (1) (e) of the Treaty Establishing the East African Community, which allows groups within the community to proceed on specific projects at different speeds.
bloc, Uganda and Rwanda have been the loudest critics of the ICC and proponents of termination of cases, whereas Tanzania and Burundi have appeared indifferent to the same. Tensions therefore between leaders in Nairobi and Dar es Salaam, can be attributed to the perceived lack of support by the latter to the ICC quest.

The ICC question will have far reaching implications on implementation of the Constitution and reforms generally from a foreign policy perspective. It will be remembered that the National Accord and its resultant reforms (including enactment of the Constitution) were negotiated and agreed upon with great involvement of the international community (particularly the African Union and western powers). Considerable resources were invested by foreign (Western) countries in the reform project. When the parties in government appeared to deviate from the reform roadmap underpinning the National Accord, the international community weighed in to keep the country on track. However, with the election of Kenyatta and Ruto to the presidency, the international community seems to have lost leverage to push government to pursue reforms, owing to mounting pressure on the ICC to terminate the cases facing the two and efforts to diplomatically isolate Western countries over the issue. Any regression or deviation from constitutional implementation is likely to be met with rather feeble rebukes from the international community.

The UhuRuto Executive: A Return of Consociational Democracy?
As stated elsewhere, Uhuru Kenyatta and William Ruto (also referred to as ‘UhuRuto’) fashioned a pre-election coalition that brought together at its core, the political elite from the Central and Rift Valley regions of Kenya. This coalition was unfathomable a few years before the elections, as the two communities were the key protagonists in the 2007/8 post-election violence. How then could the two leaders afford and manage to bring the two groups together in pursuit of electoral victory? After victory, how would the two leaders shape the executive to improve governability of the country and reflect this delicate balance while at the same time avoiding the pitfalls of the Kibaki-Raila (unwieldy) consociational government?
In a sense, the coalition unified two pre-2010 referendum MCOs, that is, the Rift Valley group that had outrightly opposed the enactment of the Constitution\textsuperscript{118} and the Central Kenya group that had initially expressed reluctance to support the Draft Constitution.\textsuperscript{119} To some extent therefore, these two MCOs at least demonstrated suspicions towards the Draft Constitution and the dispensation it promised. While the proceedings at the ICC brought the two leaders together as their destiny was somewhat tied, it can be also argued that the attitudes of their respective ethno-political elite towards the new constitutional dispensation as reflected in the MCOs they belonged to could also have provided a common denominator. The commitment of the new leaders to implement the constitution is therefore a legitimate concern, given the nature of MCOs they now represent.

When the UhuRuto team carried the day, the duo promised a complete departure from old consociational governance by appointing ministers more from technocrats and eschewing politicians. This arrangement, it was argued, would shield the executive from excessive political interference and allow the technocratic cabinet to discharge its mandate. The duo also promised to have a cabinet that broadly reflected the diversity of the country, rather than the communities that lent support to their electoral victory. The eventual cabinet appointments largely reflected this thinking, with only two politicians picked out of the 18 technocratic cabinet secretaries i.e. Hon. Charity Ngilu and Hon. Najib Balala. Diversity of the cabinet was also commendable, given the limited slots available for appointments. It was also commendable that the bargaining and horse trading over the cabinet positions went on quietly, away from the public purview. The resultant government was lean and showed more coherence than the Kibaki-Raila coalition

\textsuperscript{118} The Rift Valley Group led by William Ruto was not happy with the land provisions contained in the draft law, which were viewed as disentitling the community to historical claims over land in the region.

\textsuperscript{119} This group led by Uhuru Kenyatta was suspected of quietly opposing the new law due to its provisions on devolution as against their preference for a strong unitary State; also See Macharia G., \textit{Will Kenyatta II betray the dreams captured in supreme law of the land?}, The Daily Nation August 26, 2013 edition last accessed from http://mobile.nation.co.ke/blogs/Will-Kenyatta+II+betray+Constitution+dream/-/1949942/1969018/-/format/xhtml/-/l83pfz/-/index.html on May 14, 2014.
government and this may have greatly contributed to the governability of the country under the new executive.

However, the UhuRuto team borrowed from the Kibaki-Raila statecraft, the appointment of a coterie of technical advisors that operated outside the formal civil service establishment. These advisors were better paid and seemed to enjoy more authority than the traditional civil servants. Even though they are said to bring fresh expertise to government, the disparity in terms of service between them and regular civil service is a constant source of discord, which if not checked can affect governability of the State.

**Parliament**
The legislature is one of the State organs fundamentally reformed courtesy of the new Constitution. The new law established a bicameral chamber with a Senate and National Assembly; increased the number of parliamentarians; raised the thresholds for nomination of women and special categories thereby affecting the complexion of the Houses; created a complete separation between the Executive and House as is the case with the presidential system of government, among the key notable changes. The challenges inherent in drastic changes and difficulties confronting parliamentarians as they internalise the said changes reflect the critical constitutional developments that occurred in respect to the legislature.

**Challenges of internalisation of the new presidential system in Parliament**
After the 2013 elections, the ruling Jubilee Coalition secured majorities in both houses of Parliament while the opposition Coalition for Reform and Democracy (CORD) was relegated to the opposition minority party status. Jubilee asserted their authority in both Houses by pushing through their preferred candidates for the position of Speaker to National Assembly and Senate respectively and thereafter election of Chair and Deputy Chairs for departmental committees of Parliament. However, the leadership of the watchdog committees of Parliament (Parliamentary Accounts Committee - PAC and Parliamentary Investments Committee - PIC) became contentious as Jubilee sought to take the chair and deputy chair positions thereof. CORD protested
the move and engineered a boycott of all the departmental committees until Jubilee gave in to demands that leadership of the two watchdog committees should be a preserve of the opposition, in line with Commonwealth parliamentary traditions.\textsuperscript{120} This tradition was, however, put in jeopardy by amendments to Standing Orders that allowed the party with majority in the Houses to take control of all committees including PAC and PIC.\textsuperscript{121} After days of haggling and with the threat of Parliament failing to pass the budget in good time, both sides agreed to let CORD chair PAC and PIC, but Jubilee retained majority in both committees.\textsuperscript{122} To avoid this situation in future, the leadership of both watchdog committees should be a preserve of the largest opposition group in Parliament and this should be secured by a specific amendment to the Standing Orders of both Houses.

Without cabinet ministers sitting in Parliament, championing government business in the National Assembly became the responsibility of the Leader of Majority. He took over the role of moving government sponsored Bills and policy papers, answering to parliamentary queries to the Executive, conveying communication from the Executive to Parliament and representing the interests of the Executive in the powerful House Business Committee. It now appears that the effectiveness of the government in the Houses of Parliament depends on the abilities of the Leader of Majority. The leadership skills of the current holder, Hon. Aden Duale, have increasingly come under scrutiny with the opposition accusing him of being high-handed and lacking capacity to promote bipartisanship. With a clear majority in Parliament, Jubilee certainly enjoys a larger latitude of error and mistakes by the Leader of Majority. This may change in the unlikely event that such majority shrinks through collapse of the Jubilee Coalition (i.e. a coalition between TNA, URP and other small parties). Failure to have a more consensual leader of majority may make the ruling coalition vulnerable to pressure from a strengthened minority party.


\textsuperscript{121} See Standing Order 179 of Standing Orders of the National Assembly (2013 Edition) and Standing Order 180 of Standing Orders of Senate (2013 Edition) respectively.

\textsuperscript{122} Mutai Edwin, “CORD abandons its bid to control two watchdog teams”, \textit{The Business Daily} May 16, 2013, p.1.
Cabinet members no longer appeared in the Chamber of the Houses to answer to questions but rather, could only be summoned to appear before Departmental Committees for the same. This new arrangement was not without initial teething problems. As the frequency of the summonses to appear issued to Cabinet Secretaries grew, President Kenyatta hit out at Parliamentary Committees for constantly summoning his Cabinet hence slowing the government’s bid to deliver services.\(^\text{123}\) This problem was compounded by the fact that the Constitution does not allow the President to appoint deputy cabinet secretaries who could answer to parliamentary summonses on behalf of their bosses.

Without their key leaders, Raila Odinga and Kalonzo Musyoka, CORD appeared disjointed and weak, prompting calls for the return of the two as MPs and lead the opposition from inside. The two, however, declined and opted to lead from outside Parliament. For now, the opposition will continue evincing weakness until strong leadership emerges from within.

**Supremacy Wars Between Senate and National Assembly**

On the afternoon of May 23, 2013, the Member of Parliament for Suba, Hon. John Mbadi rose in the National Assembly and questioned why the Senate was debating the Division of Revenue Bill, 2003, a law that had been debated and previously adopted by the Assembly. This question sparked what came to be (in)famously known as the war of supremacy between the two Houses of Parliament that shook Kenya’s political landscape.

The leader of majority in the National Assembly, Hon. Duale, accused the Senate of usurping the powers of the National Assembly by debating a Bill that was purely within the purview of their legislative powers. The Speaker of the National Assembly, Hon. Justin Muturi, also weighed in on the issue and took the side of his troops, despite himself having initially referred the draft law to the Senate after invoking the relevant articles of the Constitution. The Senate responded by arguing that the House was properly seized of the matter as the Constitution allows them to review bills passed by the National Assembly that touch on the Counties. Eventually, Senate amended the Division of Revenue

Bill by allocating an additional KShs 125 billion to the Counties. The Bill was returned to the National Assembly for passage. However, the National Assembly ignored the amended Bill and instead, adopted the earlier version they had forwarded to the Senate, before dispatching it to the President, who finally assented it to law despite loud protests from Senators and other organisations.

The Senate responded to the situation by filing a suit at the Supreme Court seeking an advisory opinion as to whether or not the House had a role to play in the enactment of the Division of Revenue Bill (now Act). In that suit, Speaker of the Senate and Another v. Attorney General and 4 others, Senate argued that Article 109 gave it legislative competence to debate the said Division of Revenue Bill, it being a Bill concerning the county government and that this was intended to fulfil Senate’s role as the guardian of the devolved system of government. If a dispute between the two Houses arose over the processing of the said Bill, then the same ought to have been referred to the mediation committee as outlined in Article 113 of the Constitution, which was never the case. The National Assembly and the Attorney General differed by arguing that the Bill at stake was not a Bill concerning county governments per se but rather, a law concerning appropriation of funds by the national government, which fell within the expansive legislative mandate of the National Assembly.

The court ruled that the Bill in question was indeed a Bill concerning county governments rather than a money (taxation or spending) Bill as per Article 114(3) of the Constitution and as such, the Senate had a role to play in its enactment. The court, however, declined to declare the enacted Division of Revenue Act unconstitutional, noting that the law had already been implemented but warned it would not hesitate to do so in future. It can be argued that the Court’s failure to declare the Act unconstitutional rendered hollow Senate’s victory and emboldened the National Assembly to continue belittling the former.

Though the Constitution creates a bicameral house, it does not assign to either a superior status. Rather, both Houses have different mandates. The National Assembly, however, seems to have more responsibilities than the Senate, hence is more active and thus perceived

as more powerful. National Assembly MPs still retain control over the Constituency Development Fund (CDF)\textsuperscript{125} and this gives them financial clout and the wherewithal to follow through their electoral promises. This is a privilege not available to Senators, despite the fact that the latter have a wider constituency than National Assembly MPs\textsuperscript{126}.

Unfortunately, the judicial opinion of the Supreme Court did not elicit serious consideration by the National Assembly. The Speaker of the National Assembly derisively referred to the decision as “just an opinion” which the Assembly could very well disregard.\textsuperscript{127} This accentuated the ensuing supremacy war, which occasionally would degenerate into name calling between representatives of the both houses.

Seemingly, this war has weighed on the Senate, forcing the House to at times overreach itself in attempts to stamp its authority. For instance, the Senate initiated a legislative effort towards creation of the County Development Board to oversee county planning, budgeting and implementation, (which Senators are meant to chair with the respective Governor as Secretary) a mirror of the CDF.\textsuperscript{128} This proposal has been criticised for want of constitutionality, as this drags senators away from their oversight roles into the muddle of budget implementation and funds utilisation. Senators have also initiated a law that would water down the prestige of Governors by taking away the right to fly the national flag on their motorcades.\textsuperscript{129} Rather than casting themselves as the guarantors of the devolved system of Government, Senators have come out of this supremacy battle wounded, confused and now consumed in petty rivalries, venting all their anger on the county governments rather than their National Assembly adversaries. Without a strong devolution advocate and champion in the legislature, County

\begin{itemize}
  \item\textsuperscript{125} This is a fund created under Constituencies Development Fund Act of 2003, which allocates 7.5\% of national revenue to implementation of projects in constituencies
  \item\textsuperscript{126} A senator represents an entire county whereas a National Assembly MP represents a constituency which is part of a county.
  \item\textsuperscript{127} Wanzala Ouma, “Speaker snubs court advice on draft laws”, \textit{The Daily Nation}, November 7, 2013, last accessed from http://mobile.nation.co.ke/news/Muturi-snubs-court-advice-on-draft-laws-/-/1950946/2064528/-/format/xhtml/-/j4252kz/-/index.html on May 19, 2014
  \item\textsuperscript{128} Vide The County Governments (Amendment) Bill No. 4 of 2013 adopted by senate on December 4, 2013.
  \item\textsuperscript{129} Vide The National Flag, Emblems and Names (Amendment) Bill No. 2 of 2013 adopted by senate of December 4, 2013.
\end{itemize}
Governments and indeed the devolution process remain vulnerable to a predatory National Assembly unless the Senate refocuses accordingly.

**Nomination of MPs**
Nomination of MPs was a vexed issue under the old Constitution. Prior to the constitutional changes of 1997, the President was empowered by law to nominate 12 MPs of his/her choice. This was, however, changed to allow parliamentary parties to nominate MPs to represent special interests (while observing the principle of gender equality) on the basis of their proportion of seats held in the House. Special interests were not defined in that Constitution and this allowed party leaders to reward loyalists through these appointments. The seats also provided soft landing cushions for politicians (including presidential candidates and their running mates) who failed to clinch parliamentary seats.

The 2010 Constitution, however, retained this provision with regard to nomination of MPs to the National Assembly but attempted to define categories to which special interest belong i.e. youth, persons with disability and workers. With regard to the Senate, parliamentary parties were to nominate 16 women on the basis of the proportion of seats held in the house and 4 members from defined interest groups (i.e. youth and PWDs) appointed under the principle of proportionate representation. The Elections Act of 2011 preserved and espoused the same spirit of reserving for special interest groups, nominated MP seats in both houses.

However, in 2011, the Attorney General published Legal Notice No. 142 of 2011, which permitted the inclusion of the name of a presidential or deputy presidential candidate in party lists for purposes of special representation. This prompted the Commission for Implementation of the Constitution (CIC) to file a suit, *The Commission*

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131 In 1997, the Social Democratic Party nominated Prof Anyang Nyongo, the putative running mate of presidential flag bearer Hon. Charity Ngilu, after he lost his Kisumu Rural seat, whereas after the 2002 elections, Hon. Musalia Mudavadi (Uhuru Kenyatta’s running mate) rejected his nomination to parliament by KANU after surprisingly losing his Sabatia parliamentary seat.
133 The Laws of Kenya (Rectification) Order of 2011 which deleted the word “not” from Section 39(4) of Elections Act No. 24 of 2011.
for Implementation of the Constitution v. the AG and Another\textsuperscript{134}, arguing that the definition of special interests as contained in Article 97 (1) excluded presidential candidates and their deputies and therefore the amendment to the Elections Act was unconstitutional. The High Court dismissed this argument precipitating an appeal. The Court of Appeal agreed with the Appellants and held that the said Article was meant to secure representation of minorities and marginalised groups, in which case presidential and deputy presidential candidates could not possibly have been intended to be representatives of the special interests.\textsuperscript{135} By so ruling, the Court struck an important blow for minorities and marginalised groups by limiting party discretion in the choice of their nominees, which hitherto was a tool for patronage and political insurance against electoral loss for party bigwigs.

**Parliamentary Oversight Versus Overreach**

Parliament is vested with wide ranging oversight responsibility by virtue of representing the will of the people and exercising their sovereignty while also having to play the critical role of protecting the Constitution and promoting democratic governance in Kenya.\textsuperscript{136} The National Assembly has a clear role in oversight of national revenue and expenditure, review of conduct and initiating removal of key state officers and oversight over state organs.\textsuperscript{137} The oversight role of the Senate on the other hand can be gleaned from its constitutional duty to protect the interests of county governments and its participation in oversight of state officers.\textsuperscript{138} It is arguable that the oversight powers of the National Assembly are broader than those of the Senate particularly with regard to state officers and organs operating at the national level. In the discharge of this power, Parliament is empowered to establish committees and call for evidence by way of summoning any person to appear before it.\textsuperscript{139} It is the exercise of its oversight powers that drew accusations against Parliament of overreaching itself in its efforts to

\textsuperscript{134} Petition No. 389 of 2012.

\textsuperscript{135} Civil Appeal No. 351 of 2012.

\textsuperscript{136} Article 94 (2) and (4) of the Constitution of Kenya (2010).

\textsuperscript{137} Article 94(4) and (5) \textit{Ibid}.

\textsuperscript{138} Article 95 (1) and (4) supra.

\textsuperscript{139} Articles 124 and 125 respectively, supra.
oversee other state organs and officers during the year under review as discussed below.

On February 28, 2013, the Salaries and Remuneration Commission (SRC), a constitutional state organ established for the purposes of *inter alia* setting salaries for state officers, published a Legal Notice that set salaries of various categories of state officers including MPs. The said notices set the salaries of MPs down from Kshs 851,000 to Kshs 542,500 per month. Whereas the pronouncement elicited a positive response from the public, there was muted response from politicians as they were busy on the campaign trail. Once Parliament convened after the elections and it became apparent to the new MPs that their salaries were indeed lower than those earned in the previous House, a campaign to have SRC increase their salaries commenced. The situation was further compounded by a ruling in March 2013 by the High Court in the case *Njoya and 17 others v. AG and 218 others* which decreed that Members of Parliament should pay tax on their salary. The ferocious campaign culminated in the passing of a resolution of the House on May 28, 2013, nullifying the legal notices of SRC and effectively restoring the old salary structure. They argued that their salaries were to be determined under the National Assembly Remuneration Act (Cap 5) and Parliamentary Pensions Act (Cap 196), which gave the SRC no mandate to alter the same.

This prompted the Law Society of Kenya (LSK) to file a suit, in which they sought conservatory orders restraining state organs from effecting the contentious parliamentary resolution. They argued that the resolution was meant to undermine the independence of SRC as an independent constitutional commission and thus was unconstitutional. The Court agreed with the Petitioners and granted the conservatory orders pending full hearing. Undaunted by this ruling, the National Assembly pressed on with the demands that SRC set aside the legal notices. Whereas the Senate was more guarded and diplomatic in their efforts on this issue, the National Assembly went about the campaign rather callously and belligerently with threats to disband the SRC. Public anger against Parliament’s campaign was displayed when members of

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140 *See* Legal Notices 2885, 2886 and 2889 published in Kenya Gazette of March 1, 2013
141 Petition No. 137 of 2011.
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Civil society organised a massive protest outside Parliament dubbed “occupy Parliament”. Eventually, the Deputy President brokered a deal between a severely intimidated SRC and a belligerent Parliament which saw the basic salary of MPs retained at Ksh542,500 but allowances and benefits increased culminating in a take-home package of Ksh1 million.

The second instance of parliamentary overreach, can be discerned from the tussle between the National Assembly and the Judiciary over summonses issued against members of the Judicial Service Commission (JSC) over the sacking of the former Chief Registrar of the Judiciary (CRJ), Gladys Shollei. She was among the new senior judiciary officers appointed under the new Constitution. As the CRJ, she was the accounting officer of the Judiciary and therefore in charge of the day-to-day running of the state organ. On August 17, 2013, the JSC resolved to initiate investigations into complaints against the CRJ over financial mismanagement, among other issues. In the meantime, the JSC asked the CRJ to step aside to facilitate the investigations. She, however, went to court and obtained an injunction stopping the process temporarily before the suit was withdrawn. Before that, she appeared before the National Assembly’s Departmental Committee on Justice and Legal Affairs, where she lashed out at three members of the JSC (Lawyer Ahmednassir Abdullahi, Justice Mohammed Warsame and Chief Magistrate Emily Ominde), accusing them of being behind her woes. The Committee issued summons to appear to JSC members in order for them to respond to the accusations. The JSC snubbed the summonses and formally notified Parliament, citing the doctrine of separation of powers and independence of constitutional commissions as the reason therefore.

On September 9, 2013, the JSC formally charged Ms Shollei with 87 allegations of impropriety and misconduct and asked her to respond to the same within a set period. After considering her response, the JSC sacked her on October 18, 2013 for incompetence, gross misconduct,

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144 Ibid.
insubordination and corruption. On the previous day, a little known Mr Rungu Nicholas Mugambi submitted a petition to the National Assembly, seeking the removal of 6 JSC members (Ahmednassir Abdullahi, Samuel Kobia, Emily Ominde, Christine Mange, Florence Mwangangi and Justice Mohammed Warsame), ostensibly for misappropriation of funds linked with accusations made against JSC members by Ms Shollei. The Speaker of the National Assembly placed the petition before the departmental committee for justice and Legal affairs. The committee summoned the six JSC members to appear before it, and as predicted, they snubbed the summons, citing separation of powers. The JSC moved to court and sought to have the proceedings before the committee stopped as they were motivated by malice and hence a breach of privilege bestowed upon that committee. The High Court granted the injunction. The committee nevertheless proceeded with its inquiry and eventually tabled a report, recommending that the President appoint a tribunal to inquire into the conduct of the said commissioners. Parliament, by a majority vote adopted the report, whose recommendation was transmitted to the President. The President suspended the 6 JSC members and appointed a tribunal to investigate the same. However, JSC successfully went to court and obtained an order restoring the JSC members and quashing the President’s move to set up the tribunal pending full trial.

The power of Parliament to summon JSC members before it has been widely viewed as illegal.¹⁴⁶ There are insinuations that the Shollei saga could indeed be a high level political gambit involving shadowy powers seeking to influence the forthcoming succession within the Judiciary should CJ Willy Mutunga attain retirement age within the next two years.¹⁴⁷ Could it be that the same shadowy powers were using parliamentary devices to effect their designs over the control of the Judiciary?

Whereas Article 160 insulates the Judiciary (including the JSC) from interference from other organs or authorities, Article 170 grants the JSC exclusive mandate in disciplining the officers of the Judiciary. One could argue that Article 160 conflicts with Article 95(5) which gives the National Assembly oversight powers of other state organs including

¹⁴⁶ Kuria Gibson, “Parliament has no powers to summon JSC members”, The Standard, August 29, 2013, p.5.

the Judiciary. However, a purposive interpretation of the Constitution underpinned by the principle of harmonisation should result in a finding that secures judicial independence rather than interference. This, however, does not displace the need for judicial accountability, which can still be achieved through the power of removal of judges and members of JSC, supervisory powers of courts over the JSC, reporting obligations of independent commissions (including JSC) to the President and Parliament (as per Article 254), accountability of state organs (including Judiciary) to the Auditor General (Article 226) and legislative power of Parliament to prescribe rules and procedures for disciplining judiciary officers (Article 172). In this case, Parliament resorted to invoking power of removal of judges, but applied a procedure that was tainted by an illegality hence bringing to question the exercise of that power.

It should also be recalled that the summoning powers of Parliament are judicial in nature and should be exercised judiciously, otherwise, Parliament may bring itself within the remit of supervisory powers of the Courts, whenever allegations of abuse of this powers are claimed, as is the case now. It is therefore undoubted that the two cases above represent classical cases of parliamentary overreach, which if abates unchecked, could undermine constitutionalism in Kenya. It is also possible that a rogue Parliament could be vulnerable to capture by shadowy forces seeking to subvert the progressive constitutional development, as may be the case with the Shollei saga.

**Judiciary**

The Judiciary was among the institutions that were earmarked for radical transformation, following the enactment of the new constitution. It is an institution that had been known for lethargy, corruption and incompetence. Not only were new structures established within the Judiciary, such as the Supreme Court, Judiciary Fund, Office of Chief Registrar and National Council for Administration of Justice, among others, but also, leadership change and vetting of judicial officers needed to be carried out as per transitional clauses of the new constitution. The year 2013 marked the second year since the adoption of the Judiciary Transformation Framework (JTF), a roadmap charted by the new-look Judiciary to guide implementation of the vast changes as commanded
by the new constitutional dispensation. The JTF had identified key priorities for a reformed judiciary as: vetting of judges and magistrates; expansion of court infrastructure, recruitment of judicial officers and other staff and entrenchment of culture change.\textsuperscript{148} This section will assess the progress made in entrenching changes within the Judiciary and the various challenges faced.

**Vetting of Judges and Magistrates**

The responsibility for vetting of judges and magistrates is vested with the Judges and Magistrates Vetting Board (JMVB) headed by Sharad Rao, a former prosecutor.\textsuperscript{149} The vetting process was structured to allow for vetting of judges from superior courts in the first phase followed by magistrates in the second phase. By 2013, the JVMB had vetted 53 judges, 44 principal magistrates and 32 other magistrates, while 244 were to be vetted in the remaining second phase.\textsuperscript{150} Due to the complicated nature of the process, the JMVB, through the Government, approached Parliament on two occasions to extend the tenure of the Board to allow for conclusion of the process.

The vetting process, however, is not without controversy. Nearly all the judges who have been found unsuitable to serve have appealed against the decisions of the JMVB, prompting questions regarding the level of insulation provided to the vetting process by the Constitution and statute. Section 23 (2) of the Sixth Schedule to the Constitution states that:

\begin{quote}
A removal or a process leading to the removal of a judge from office … shall not be subject to question in, or by review by any court.
\end{quote}

Under what legal basis therefore, did the ousted judicial officers approach the court and were they bound to succeed in challenging their dismissals in light of the aforesaid provision of the supreme law? What would be the impact of a judicial pronouncement that appears to open the vetting exercise to challenge?


\textsuperscript{149} The JMVB is established pursuant to Section 23 of the Sixth Schedule to the Constitution (2010) and The Vetting of Judges and Magistrates Act of 2011 (and subsequent amendments of 2012 and 2013).

These questions were partially answered in the matter of *Republic v. Judges and Magistrates Vetting Board and Ex Parte Hon Lady Joyce Khaminwa*151. The JMVB had in its determination found the applicant unsuitable to serve as a judge of the High Court due to her medical condition. The Applicant applied for review of the determination, which was considered by the JMVB but the decision was subsequently upheld. She thereafter went to court, seeking judicial review of the decision. The Respondent objected to the case, arguing the Constitution ousted jurisdiction of the court from interfering with the Board’s decision. The court held that it had jurisdiction to be seized of the matter since Section 23 (2) of the Sixth Schedule to the Constitution insulating the JMVB did not specifically oust the supervisory jurisdiction of the High Court as per Article 165 of the Constitution. The same decision was upheld in the case *LSK v. Center for Human Rights and Democracy and 13 others*152. These decisions, though introducing an element of uncertainty in the vetting process, will definitely impel the JMVB to be more cautious in its work and treatment of its subjects. For now, the High Court is still in the process of determining the substantive issues raised by the judges dissatisfied with decision of JMVB and it is likely that the first outcomes of these cases will be out in 2014. The impact of these decisions on the vetting process as a whole shall become clear once the High Court cases are determined, even though the prospect of further appeals all the way to the Supreme Court cannot be discounted.

**Expansion of Courts and Emerging Impacts on Dispensation of Justice**

The new-look Judiciary inherited a dilapidated infrastructure comprising 111 court stations.153 With only 16 high court stations, the judiciary needed to establish 31 more to ensure all counties were covered, whereas 172 additional magistrates courts were required to cover all 285 districts in the country.154 Four new high court stations were opened and two new magistrates’ courts were constructed by the end of 2013, with three more expected in 2014. Decentralisation of the Court of Appeal from Nairobi to Mombasa, Nakuru, Kisumu and Nyeri has brought justice at

151 Misc Applications 113 of 2013.
152 Civil Appeal No. 308 of 2012.
154 Ibid.
this level closer to the regions. The concept of mobile courts was rolled out, targeting marginal areas, road traffic offenders and prisons as well.

In terms of recruitment, the JSC has since 2011 presided over the most ambitious recruitment exercise ever in Kenya’s judiciary. This saw the recruitment of all the seven judges of the Supreme Court, 15 new judges of the Court of Appeal and 26 new judges of the High Court. The Industrial Court was brought under the fold of the Judiciary and 12 judges appointed to head it, whereas 15 judges were appointed to the new Environment and Land Court (ELC). Within the same period, 104 new magistrates were appointed, bringing to 471 the total number of magistrates in the country. Also noteworthy is the recruitment of 20 new Kadhis to administer justice in Muslim courts. As a result of this expansion, there has been a notable improvement in reduction of case load. Pending cases stand at 657,760 down from approximately 750,000 cases in 2010. The court was able to process all 188 election petitions within the stipulated time frame, and this can be attributed to the creation of a division of the High Court for this purpose and to the high level of preparedness of the courts.

Perhaps a few but significant blights to this remarkable progress were the dismissals of senior officers of the judiciary including Gladys Shollei, Justice Nancy Baraza and Justice Joseph Mutava. The country’s first Deputy Chief Justice, Nancy Baraza, was recommended for dismissal after she was found liable by the JSC to be removed as a judge. Initially, Justice Baraza had tried to scuttle attempts by a tribunal appointed by the President to investigate her conduct as recommended by the JSC, but she failed. Before the Tribunal court could sit, she tendered her resignation. She was later replaced by Justice Kaplana Rawal.

Within the period, the JSC also recommended the removal of Justice Joseph Mutava, following public outcry over his decision to halt all criminal proceedings against the architect of the multibillion Goldenberg scandal. The President appointed a tribunal to investigate the conduct of the judge, but this was stopped in its tracks by a court order obtained by the said judge after claiming the JSC breached his

156 Justice Baraza was involved in an altercation with a security guard at an upmarket mall in Nairobi after allegedly refusing to have her hand bag searched as was the security procedure then. It was further alleged that she drew a gun and menacingly threatened the guard.
rights in its inquiry into the matter. It will be remembered that Justice Nancy Baraza and Justice Mutava were among the new judges appointed through the rigorous public vetting process. Their dismissal should therefore raise queries over the efficacy of the vetting processes.

Devolution
One of the hallmarks of Constitution of Kenya (2010) is devolution. Defined as the transfer of power and resources to an autonomous sub-national entity, devolution was introduced in Kenya’s scheme of constitutional governance to address years of central authoritarianism and marginalisation of peripheral regions right from the colonial era to modern Kenya. Devolution is characterised by creation of two levels of government (i.e. national and county) which, though distinct, are interdependent and expected to conduct their mutual relations on the basis of cooperation and consultation. Devolution created mega constitutional orientations ahead of the 2010 referendum, with former PM Raila Odinga and his ODM party viewed as champions of the devolution. On the other hand, the PNU side of government, to which President Kenyatta belonged, was viewed as supporting a strong unitary state with a watered down version of fiscal decentralisation.

The new system of devolution was supposed to come into effect after the first general elections to be held under the new supreme law. To facilitate a smooth and orderly transition to the new system, the government adopted a policy document that identified priority laws and institutions to be put in place for this purpose. Accordingly, five laws were enacted, that is the Transition to Devolved Government Act (2012); the County Government Act (2012), the Inter-governmental Relations Act (2012); the Public Finance Management Act (2012) and Urban Areas and Cities Act (2011). The Transition Authority was established as an independent institutional mechanism for coordinating efforts towards inception of county governments. The transition to devolution came with very high expectations amidst widespread ignorance among the population. In a study done in 2012, less than half of Kenyans understood what devolution was all about and roughly a quarter

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157 Article 6 (2) of Constitution of Kenya (2010).
(24 per cent) had sufficient information on how the devolved system of
government would work, whereas 40 per cent expected devolution to
improve their lives.\textsuperscript{159} This section will look at the transition to devolution
and the key issues and challenges that face the transition process.

**Transition to Devolution**

Prior to the 2013 elections, the President, in consultation with the
Prime Minister (and parliamentary approval) appointed members of
the Transition Authority (TA) with the responsibility of overseeing
devolution with key functions of policy and legal advisory, resource
mobilisation, oversight, capacity building and coordination.\textsuperscript{160} Despite
its slow start due to limited budgetary provisions, slow recruitment of
core staff and delayed acquisition of vital secretariat facilities, the TA
went about its business with a great deal of enthusiasm.

By early 2013, the TA had managed to have in place County
Government Public Financial Management Transition Bills to provide
transition for county treasuries, budget-making process, revenue
raising and expenditure.\textsuperscript{161} To facilitate the envisaged county planning
processes, the TA published county profiles containing comprehensive
development indicators for all the counties. It also published guidelines
for transfer of assets and liabilities as well as human resources audit,
drafted model standing orders for county assemblies and laid framework
for functional analysis and competency assignment by national
government to the new county governments. The TA also seconded
staff from the National Government to counties in anticipation of
the impending transition and initiated a civic education programme
targeting public sector workers.

However, the TA experienced critical challenges.\textsuperscript{162} With regard
to facilitation of transfer of functions, Ministries, Departments and
Agencies (MDAs) of Government provided little or no data as requested

\textsuperscript{159} Society for International Development et al, 2012, the status of governance in Kenya: A baseline

\textsuperscript{160} The membership to the authority comprises a Chairperson, 8 members appointed through a
competitive process, 7 permanent secretaries drawn from ministries with a critical stake/function
in devolution and the Attorney General.

\textsuperscript{161} See Republic of Kenya, 2012, Transition authority, quarterly report (October-December 2012),
Government Printer, Nairobi.

\textsuperscript{162} \textit{Ibid}, pp.27-9.
to enable the costing of functions pending transfer. The MDAs also ignored implementation of transition plans that had been crafted by TA. When county governments were installed, the national government officials began resisting the mandate of TA by refusing to hand over buildings and facilities earmarked for governors and county assemblies. The newly created Ministry of Devolution and Planning effectively took over the functions of the TA. Under the directions of the President, all functions were devolved to the county governments in the absence of a complete framework for the same. The Ministry also took over the capacity building functions of the TA and started issuing policy directions on transition matters.

The newly established Council of Governors took on the embattled TA, calling for its dissolution for “obstructing the devolution process”. In the controversial Miscellaneous Amendment Bill that was published by the Attorney General towards the end of 2013, there was a curious proposal for the establishment of an Inter-governmental Technical Committee to take over the functions of the TA. This, ostensibly, would have marked the death of the TA. The withdrawal of the Miscellaneous Bill due to confusion in Parliament and a spirited opposition to it by CORD gave the TA a new lease on life.

The TA remains an important independent institution to oversee the problematic transition process. However, its challenges and constrained mandate seem to lend credence to claims that some powerful forces within the National Government are still intent on sabotaging devolution. The fact that the TA has powerful civil servants in its top leadership cannot adequately explain the obstacles the Authority has continuously faced. Perhaps with greater support, the TA would have midwifed a smoother transition than has been witnessed in 2013. The impediments to the work of TA also point to an increasingly growing trend where the National Government appears to obstruct the functioning of independent commissions, making them subservient to ministries that are supposed to provide policy guidance and oversight. This will have grave implications for constitutionalism as these independent commissions and offices are supposed to promote constitutionalism and secure observance of state organs to democratic values and

principles. Whittling down their mandate amounts to subversion of their constitutional function and hence sabotaging of constitutional development.

Assumption of Office of Governors and County Assemblies
Whereas the election of governors was largely celebrated as peaceful and orderly, their assumption of office was largely characterised by chaos and confusion. Quite a number of governors lacked official residences and had to begin their operations from rented or makeshift premises. Governors also complained of inheriting empty county coffers and therefore had to start establishing systems from scratch. Dissatisfied with the salaries that had been set by the Salaries and Remuneration Commission (SRC), the majority of Governors and Members of County Assembly (MCAs) began pushing for an increment even before they could settle down for business. The demands eventually snow-balled into a full strike by MCAs which was eventually resolved in late November 2013 after SRC backed down to salary increment demands. This raised concerns that the new county leaders were not any different from their national counterparts in terms of a political culture characterised by pursuit of self-aggrandisement at the expense of the public good.

Tensions Over Inter-governmental Relations
After the swearing-in of Governors and Members of County Assemblies, attention swiftly shifted to the relations between county governments and national government officials based in the counties. Governors expressed apprehension that County Commissioners and other national government officials operating within the counties could hamper their monumental task of delivering services to citizens. They accused the National Government of maintaining a parallel system of administration, which encroached on their mandate, particularly with

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164 See for instance, Gichana Angwenyi, “Nyamira governor-elect in office space headache”, The Star, February 25, May 2013; other governors who experienced similar challenges include the Tharaka Nithi, Makueni, Homa Bay and Kisumu among others.


regard to public financial management. These tensions came after the government appealed a High Court decision which had ruled that the appointment of County Commissioners by President Kibaki was unconstitutional.\textsuperscript{167} Eventually, the case was determined in July 2013 in favour of the Government and this helped ease tensions between Governors and the County Commissioners.

At the national level, Governors through their Council of Governors began a campaign to have the allocation of resources to counties increased from the constitutional lower threshold of 15 per cent of annual national revenue to 45 per cent and transfer of more functions. This quickly escalated into calls for amendment to the constitution that would entail a referendum.\textsuperscript{168} Alarmed by the prospects of the country returning to an electoral contest before the dust raised by the 2013 elections could settle, the Jubilee government sought to appease the governors by holding talks over the contentious issues. Noting that the current allocation to counties had currently stood at 32 per cent of annual national revenue, the Deputy President unsuccessfully pleaded with the governors to call off the referendum threat.\textsuperscript{169} After a protracted wrangling over the issue, the governors shelved the threat after it lost traction as other issues emerged that evidently distracted the country’s attention from the subject.

\textbf{Challenges to Public Participation and Rolling out of Devolution}

The constitution has imposed an obligation on national and county governments to ensure participation of citizens in decision-making processes and development affairs. Specific requirements for citizen participation can be gleaned from provisions in the Constitution and County Government Act relating to planning, budgeting, project planning and implementation, vetting of key officials and passage of legislation. Upon assumption of office, the county governments grappled with this new obligation as governors subjected their

\textsuperscript{167} Minister for Internal Security and Provincial Administration v. CREAW and 8 others, Civil Appeal No. 218 of 2012 supra.

\textsuperscript{168} Even though as per Article 255 (1) of the Constitution (2010) changing the percentage of funds to counties would not require a referendum, Governors threatened to use a popular initiative to effect this change, something that would necessitate a referendum.

appointees to the county executive to public scrutiny. However, the level of participation was uneven in almost all other processes that required it. When county governments published the finance Bills revealing new taxation measures, this was met with public outrage in most counties, signifying failure of the county leadership to engage the public in formulation of these critical proposals. To some extent, this problem can be attributed to the lack of a clear policy framework on public participation. Whereas the Kenya Law Reform Commission has drafted model laws on public participation for county governments, these are yet to be finalised. The Attorney General’s office has initiated a process of developing a national public participation policy, but this remains at the conceptualisation stages.

Participation can be further realised through decentralisation of power and responsibilities from the county to sub-county levels as envisaged by Article 176 (2) of the Constitution. This would entail establishing offices at sub-county, ward and village levels. However, few counties had even appointed Ward Administrators by the end of the year. Without this critical administrative machinery, it is doubtful that counties have the necessary capacity to give effect to the principle of participation. Another avenue for promoting citizen participation is through classification of urban areas within counties and establishment of urban areas boards. The Urban Areas and Cities Act (2012) which is supposed to provide the legal framework for this process was, however, found to be defective in the sense that the formula it has provided for classification of urban areas is unworkable. To this extent therefore, citizen participation in running of urban areas remains suspended. County governments are required to establish County Budget and Economic Forums (CBEFs) as per the Public Finance Management Act (2012). These forums are meant to ensure involvement of stakeholders in budget making and development planning processes. However, by the end of 2013, few county governments had established CBEFs as per the law.

As a key national value, the principle of public participation is critical for promotion of democratic values that would foster constitutionalism. The continued lip service to this principle, through delays in adoption
of authoritative policy and legal frameworks, is something that may jeopardise Kenya’s constitutional development in this area.

**Elections 2013**

The 2013 elections were historic in the sense that they were the first to be held under the new constitution and that they entailed six elections in one, that is, Presidential, Parliamentary (Senate, National Assembly and women representative) and County Assembly. Legislative measures to ensure a sound framework for the management of elections had been put in place well ahead of the elections through the enactment of the Elections Act (2011) and Independent Elections and Boundaries Commission Act (2011), Leadership and Integrity Act (2012). Similarly, the electoral dispute resolution framework was put in place through enactment of the Supreme Court Act (2011) to guide the court’s jurisdiction on hearing and determining presidential petitions. However, the framework on regulation of election campaign financing was not enacted, contrary to transitional provisions set under the Fifth Schedule to the Constitution.¹⁷⁰

Even though the elections were generally peaceful, the outcome of the presidential election was instantly challenged by the eventual loser, Raila Odinga (first petitioner),¹⁷¹ and two civil society activists (second petitioners).¹⁷² Three party activists (third petitioners) also filed a petition seeking exclusion of invalid votes from the Presidential vote tallies and recalculation of the percentages of votes received by each presidential candidate.¹⁷³ The stage was set for the Supreme Court to test the legal framework on resolution of disputes regarding presidential elections - one of the causes of the calamitous post-election violence of 2007/8. This section will look at the presidential election petitions and legislative developments on elections. We contend that an appraisal of parliamentary and county assembly petitions is a more detailed affair that should form the subject of another study.

¹⁷⁰ Article 82 (1) (d) requires Parliament to pass legislation on election which, among other things should provide for regulation of elections and referenda, whereas Article 88 (4) (i) provides for regulation of election financing as part of the regulatory mandate of IEBC. Legislations on election and IEBC were to be enacted within one year.

¹⁷¹ *Raila Odinga v. IEBC and 3 others*, Petition No. 5 of 2013.

¹⁷² *Gladwell Orieno and Zahid Rajan v. IEBC and 3 others*, Petition No. 4 of 2013.

¹⁷³ *Moses Kuria and 2 others v. IEBC and 3 others*, Petition No. 3 of 2013.
Presidential Elections Petitions

The Constitution lays down a procedure for handling presidential election petitions that requires aggrieved parties to file a suit within seven days after proclamation of results; that the Supreme Court must hear the petition within 14 days after filing and; if the said election is declared invalid, a fresh election must be held within 60 days.174 The Supreme Court Act (2011) and Supreme Court (Presidential Election Petition) Rules, 2013 further elaborate the entire trial process entailing the petition hearing. After filing of the petition, the Supreme Court at the pre-trial conference consolidated the 3 petitions and identified the issues for determination as follows:175

- Whether the 3rd and 4th Respondents (Uhuru Kenyatta and William Ruto) were validly elected and declared winners.
- Whether the presidential election was conducted in a free, fair, transparent and credible manner in compliance with the constitution and the law.
- Whether rejected votes ought to be included in determining the final tally of votes in favour of each candidate.

The petitioners contended that the election was marred by irregularities, primarily, failure of technology in registration of voters (through biometric voter registration - BVR - system), identification of voters at the polling stations (through the electronic voter identification devices - EVID) and transmission of votes through the election transmission system (ETS). They argued that the collapse of the ETS resulted in IEBC reverting to the previously discredited manual system which allowed the manipulation of votes to suit the 3rd and 4th respondents. The second key contention was the absence of a transparent, verifiable and accurate register of voters, given the acknowledged existence of various registers and diverse totals of registered voters as announced by the IEBC during various stages of the elections. Lastly, the IEBC had ceded its independence to the Executive when it allowed for the procurement of the electronic systems to be conducted by the government. The first petitioner (Raila Odinga) tendered evidence to show malpractice in 22 randomly sampled polling stations. Attempts to

175 Raila Odinga and 5 others v. IEBC and 3 Others, (Consolidated) Petition No. 5 of 2013 at p.7.
introduce more evidence of this nature through a further affidavit after closure of pleadings were opposed by Respondents.

The third petitioners contended that the 1st and 2nd respondents (IEBC and its chairman respectively) erred in including invalid votes in the determinations of proportions of the tally of votes in favour of each candidate, arguing that such invalid votes were null and void and as such, should not be considered at all. If the court agreed with this contention, the percentages of the overall vote ascribed to each candidate would significantly change therefore, giving the 3rd respondent (Uhuru Kenyatta) a higher percentage than that he had received.

The respondents, on the other hand, argued that the use of electronic technology in the entire process was not mandatory but rather, IEBC had the discretion to deploy such technology. Since no technology was perfect, the failure of Biometric voter registration (BVR), Electronic Voter Identification Devices (EVID) and Election Transmission System (ETS) was mitigated by IEBC’s reversion to the manual register which was accurate, transparent and verifiable. The consistencies evinced in the tallying of votes were not deliberate, malicious and criminally-motivated, but rather, were a result of inevitable clerical errors. They also argued that the petitioners had not provided sufficient evidence to prove their case within the required standard of proof and that the election of the 3rd and 4th respondents should be upheld. The court was cautioned to exercise utmost restraint in its judicial approach, since the dispute at hand was political rather than legal and further, invalidation of a presidential election was a grave matter with extraordinary consequences to the country and fragile reform processes that were underway.

The 1st and 2nd petitioners contested the claims by the 3rd petitioners regarding use of invalid votes by arguing that the Constitution, by requiring calculation of proportions using “all votes cast” was unambiguous in its meaning and therefore this meant that all votes including invalid votes were to be counted.

The court rejected the introduction of additional evidence by the first Petitioner, holding that the time-frame for handling presidential petitions was strict with an overriding principle of ensuring the dispute was closed with total finality. The court invited submissions on the issues, but also on its own motion ordered for re-tallying of votes in
18,000 polling stations and examination of 22 polling stations. After seven days of hearing, the Court retreated to consider the evidence and submissions by all parties, before rendering its decisions.

The decision of the court on the above issues can be summarised as follows:

**Burden of Proof:** The Petitioners bore the burden of proof to demonstrate the conduct of elections was irregular and did not comply with the law. Where this burden has been discharged, the same shifts to the respondents to show that any irregularities so proven by petitioners were not so substantial as to warrant vitiation of the will of the people and hence invalidation of the election. From then on, the burden keeps shifting.

**Standard of proof:** Since an election petition was neither criminal nor civil proceedings, the standards of proof beyond reasonable doubt (for criminal) or on a balance of probabilities (for civil cases) could not be applied strictly. Rather, the standard ought to be somewhere between the two, that is, lower than beyond reasonable doubt but higher on balance of probabilities.

**Judicial approach:** Rather than apply judicial restraint as proffered by the respondents, the court would be guided by fidelity to the terms of the Constitution and of such other law as objectively reflects the intent and purposes of the constitution.\(^{176}\)

**Jurisdiction of the court:** The jurisdiction of the Supreme Court with regards to presidential elections is limited in terms of scope i.e. it only relates to an inquiry into legal, factual and evidentiary questions of the validity and invalidity of a presidential election and that the court can only grant orders specific to the presidential elections.\(^{177}\) Jurisdiction is also limited in time-span i.e. the claims brought before court must be resolved within the 14 day period, with due regard to various time-lines set within the procedure thereof.\(^{178}\)

**The voter register and its adherence to election principles:** There were many irregularities in data and information capture during the registration process, but these were not so substantial as to affect the credibility of the electoral process in that they did not maliciously cause

\(^{176}\) *Ibid* p.84.

\(^{177}\) *Ibid* pp.75-76.

\(^{178}\) *Ibid* p.77.
prejudice to any candidate. The voter register comprises various registers and on the whole was transparent, accurate and verifiable.\textsuperscript{179}

**Conduct of elections:** There was no mandatory requirement for use of technology in the conduct of elections. The use of technology has not reached a level of reliability and as such, it cannot be considered a permanent and irreversible foundation of the conduct of the electoral process.\textsuperscript{180} The technology used was not perfect, but the reversion to manual system was lawful.

**Election irregularities:** The evidence tendered by the petitioners and that which emerged from the re-tallying exercise did not disclose any profound irregularity in the management of the electoral process and did not gravely impeach its outcomes.\textsuperscript{181}

**Status of invalid votes:** Using a purposive approach to interpretation of the Constitution, and adopting the position taken in the Court of Appeal of Seychelles in *Popular Democratic Movement v. Electoral Commission Constitutional Case No. 16 of 2011*, invalid votes are null and void and should not be used in computation of tallies for each candidate.\textsuperscript{182} However, the court lacks jurisdiction to re-compute the tallies on the basis of this decision (this is within the purview of IEBC).

**The effect of invalidation of an election (“A Fresh Election?”):** Invalidation of a presidential election cannot trigger an entire fresh election, but would be restricted to fresh presidential election involving candidates who participated in the original election.\textsuperscript{183} However, candidates who did not petition the results are deemed to have either conceded defeat or acquiesced to the results and hence may not participate in the fresh election, unless the petition is filed successfully by a person who was not a candidate. Nominations for the fresh elections would only happen if one of the candidates died as contemplated in Article 138 (1) (b) of the Constitution.

**Order as to costs:** Since the petition involved constitutional issues that are of a public nature, and the proceedings invited the Supreme

\textsuperscript{179} Ibid p.93-4.  
\textsuperscript{180} Ibid pp. 88-9.  
\textsuperscript{181} Ibid p.110.  
\textsuperscript{182} Ibid p.104.  
\textsuperscript{183} Ibid p.106.
Court to exercise a vital jurisdiction at a special historic moment, parties should bear their own costs.\textsuperscript{184}

The decision was important in various ways. First, it settled the uncertainty surrounding the burden and standard of proof, as well as judicial approach in resolution of presidential election contests which various jurisdictions in Africa and beyond hitherto treated differently. Secondly, it anticipated and attempted to resolve with authority, disputes that may be of consequence to the future e.g. the issue of invalid votes, and implications of fresh elections. The court also introduced novel ways of attempting to get to the root of the disputes by ordering in its own motion (\textit{sui moto}) re-tallying of votes. To this extent, the court has ventured into unchartered frontiers for Kenya’s jurisprudence.

However, the decision, like any other judicial determination, cannot be perfect and therefore is liable to criticisms. First, the decision on invalid votes did not take into account the likelihood of voters engineering a protest vote deliberately in order to upset or influence the outcome of an election. A protest vote can be occasioned by voters choosing to mark a ballot paper in a way that invalidates the vote. Given that the Constitution recognises freedom of expression and that a vote has been rightly adjudged by the Supreme Court as a ballot paper that clearly expresses the choice of a voter, then it should follow that the voting process should also be a viable platform for groups that are not satisfied with choices presented to them or for any reason, choose to express their dissatisfaction for the same by not choosing the candidates appearing on the ballot. The Constitution, the Elections Act and its regulations do not specifically outlaw this. In fact, the Constitution takes the permissive view (which was endorsed by the Court) that the IEBC should ensure all eligible to vote actually do vote! It would therefore be unfair and a violation of the same Constitution, if protest votes (in the form of badly marked or unmarked ballots) are excluded from the final tally of proportions of votes received by each candidate for purposes of Article 138 of the Constitution and thereby lose their expressive significance. This ceases to be a fiction, if the election is as close as the 2013 outcome, where the winner crossed the 50% + 1 threshold by a mere 8,300 votes!

\textsuperscript{184} \textit{Ibid} p.111.
In the same vein, where spoilt votes are attributed to ignorance or carelessness by voters, inclusion of invalid votes in the final tally may act as a motivation to the IEBC and political parties to step up voter education campaigns before elections. In the 2010 referendum, the number of spoilt votes was 218,633 or 2% of the voter turnout (almost equivalent to the difference in number of votes garnered between Kibaki and Raila in the disputed 2007 elections) and the same was attributed to voter ignorance. In the 2013 elections, this figure reduced by half to 108,975 or 0.88% (ranking higher than the 4th placed presidential candidate). If this figure rose to 120,000 (an extra 12,000 votes) and was to count in the final tally, it would lower Uhuru Kenyatta’s victory to lower than the 50%+1 vote threshold, thus triggering a re-run. It would therefore be in the interest of all parties if a re-run was avoided on account of reducing the number of spoilt votes by enhancing voter awareness and literacy. Viewed against national values contained in the Constitution, the Supreme Court ought to have reached a different conclusion on this matter, for purposes of furthering good democratic practices such as effective voter education.

Secondly, the decision rightly placed the burden of proof on the petitioner. However, in a situation where the petitioner is not in control of the collection of data for purposes of building and proving his case, the court should demonstrate more flexibility in the time-limits imposed on the petitioner to present his/her evidence to the court and to his/her adversaries. This is more so where one of the Respondents (IEBC in this case) is the proprietor of the information sought and relied upon by the Petitioner to frame and prove his/her case. By the end of 2013, the IEBC had not availed publicly the full tally of the 2013 elections and therefore, it is doubtful if any petitioner for that purpose could have framed a strong case with what was available within 7 days after pronouncement of the results. There is therefore a need to amend provisions relating to the time frame for determination of the presidential petition and as well, the need to impose an obligation on IEBC to avail the full results of an election well before the expiry of the period for lodging a presidential petition.

Thirdly, even though the Court concluded that the process of procurement of BVR, EVID and ETS technologies was tainted by criminal conduct and recommended further investigation into this matter, it is interesting that the judges did not view this as fundamentally eroding the credibility of the electoral process. It is also curious that the court did not pronounce itself on the claims of apparent loss of independence of the IEBC over the procurement of the said technologies.

**Election Campaign Financing Act of 2013**

As stated elsewhere in this paper, the Fifth Schedule to the constitution requires the enactment of a law to regulate the financing of elections in Kenya. This perhaps follows findings of previous studies that showed ‘dirty money’ could have found its way into financing election campaigns with deleterious consequences.186 Similarly, the independence of politicians and parties elected in public leadership positions with financing from shadowy sources was a cause of concern. Even though this law would have served a critical purpose of enhancing the transparency, accountability and credibility of the 2013 elections as commanded by the Constitution, the same could not be enacted in good time, as parliamentarians decried lack of time.187

In 2013, however, the law was introduced in Parliament, debated and adopted within the year. It became operational in early 2014. The law vests the responsibility for enforcing the Act on the IEBC. It requires party candidates, political parties and sides supporting a referendum to establish campaign and expenditure committees with signatories and clear reporting obligations to the IEBC. It defines legitimate sources of campaign funds, outlaws illegitimate sources and requires persons under the ambit of the Act to report on suspected illegal receipts of such funds.

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Those who breach the law face penalties ranging from disqualification from current and future elections as well as penal consequences.

To implement the law, the IEBC is expected to come up with regulations that elaborate further on its obligations as well as procedures for ensuring compliance. Without these regulations, the law may as well remain in limbo. The law also appears to give jurisdiction to the IEBC to entertain questions that may seek to challenge the validity of presidential elections from an election campaign finance perspective. This may conflict with the original and exclusive jurisdiction vested with the Supreme Court by the Constitution and hence the need to clarify on this matter. However, taken in its totality, this law is yet another desirable attempt at cleaning politics in Kenya.

State of Human Rights

One of the remarkable features of the Constitution of Kenya (2010) is an elaborate Bill of Rights that articulates a wider corpus of economic, social and cultural rights than its predecessor. It also provides for a more elaborate machinery for enforcement of rights and liberal standing with respect to human rights-related litigation. To ensure immediate operationalisation of the new rights regime, the Constitution further required the enactment of laws on the establishment of a human rights commission (within a year); media rights (three years); consumer protection, fair administrative action, fair hearing, and rights of detained persons (four years) and; family rights (five years). Some of the human rights cases that were filed immediately after the promulgation of the Constitution were completed and determined in 2013 and therefore laid the basis for emergence of new jurisprudence. This section will analyse the legislative developments as well as emerging jurisprudence pertinent to operationalisation of the Bill of Rights.

Establishment of Human Rights Commission (s)

The new Constitution established the Kenya National Human Rights and Equality Commission (KNHREC) with a fairly broad mandate for the promotion, protection and enforcement of rights in Kenya. Prior
to this, Parliament had by way of ordinary statute established a Kenya National Commission on Human Rights (KNCHR), whose statutory mandate was deemed rather weak as it lacked a clear constitutional status, a malady that KNHREC was set to cure. However, the same law provided for splitting of the KNHREC into two or more commissions ostensibly due to its wide mandate, but the successor commissions would still enjoy constitutional statuses.\textsuperscript{191} Indeed, Parliament enacted into law three successor commissions, i.e. the Kenya National Commission on Human Rights (KNCHR), National Gender and Equality Commission (NGEC) and Commission on Administrative Justice (CAJ) also known as ‘Article 59 Commissions’.\textsuperscript{192}

As a direct consequence of the creation of these new Article 59 Commissions, the law required appointment of new Commissioners to the KNCHR and NGEC as the mandates of those inherited from the predecessor commissions were coming to an end in the 2011-2012 period. Accordingly, advertisements were issued and recruitment processes for the new commissions commenced. After shortlisting and interview of candidates, the recruitment panel recommended those to be selected to the President and Prime Minister for appointment subject to parliamentary scrutiny. However, this was not to be as dissatisfied citizens filed a case stopping the process, on grounds that the persons nominated to the KNCHR did not exhibit regional and ethnic balance.\textsuperscript{193}

While the case dragged in courts, the terms of the sitting commissioners expired so that by the end of 2013, only one commissioner was at the helm of KNCHR. Eventually, the case was thrown out by the High Court, clearing the way for the new President to submit the names for consideration by Parliament.

Curiously though, instead of submitting the pre-existing shortlist, President Kenyatta attempted to initiate a fresh recruitment exercise for the same set of commissioners. At the tail end of the process, a case was filed halting the exercise, on grounds that the President had acted in

\textsuperscript{191} Article 59 (4) supra.

\textsuperscript{192} There were some misgivings over the splitting of KNHREC (which the author is aware of) as this was construed as dilution of its robust mandate.

\textsuperscript{193} CEDMAC and 2 others v. Chairman, the Selection Panel for appointing Chairperson and Commissioners to KNCHR and 4 Others, Petition No.385 of 2012.
excess of his jurisdiction, as a shortlist of recruited candidates already existed. This case was to be determined in 2014.

The delay in appointing commissioners is now widely viewed as one of the various attempts at obstructing or deflating the operations of the KNCHR. It will be remembered that investigations carried out by KNCHR fed into the Commission of Inquiry in Post-Elections Violence (CIPEV) which later formed the basis of the indictment of Kenyans at the ICC. Politicians allied to the President and Deputy President (both indicted by the ICC) have on occasion blamed the KNCHR for the predicament faced by the two leaders. It has therefore not escaped some that the tribulations being experienced at the KNCHR are not accidental and could be a wider campaign to whittle down the operational capacities of independent commissions and offices. Kenya is due for review of its human rights record under the UN-led Universal Periodic Review (UPR) in 2014. The KNCHR is expected to play a big role in preparation of a state report to the UN-Human Rights Council. Without a strong and vibrant KNCHR, the promotion and enforcement of rights will remain under serious jeopardy.

Legislative Developments with Clear Impacts on Human Rights
The following are some of the key legislative actions that were undertaken within the period under review:

**Prevention of Terrorism Act**
This Act was adopted by Parliament in 2012 following years of controversy surrounding its contents and intentions. The Muslim community was particularly alarmed by the view that the law was tailored to curtail rights of Muslims ostensibly under the cover of the global war against terror. Prior to enactment of the law, the fight against terrorism was based on the penal code which was adjudged as insufficient for this purpose. Before the law was enacted, the Police created a counter terrorism squad known as Anti-Terrorism Police Unit (ATPU). The enactment of the law came against a backdrop of

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194 It is instructive to note that all independent commissions and offices have complained of huge cuts to their budgets for FY 2013/4.
escalating threats from Al-Shabaab group that had taken control of vast territory in Somalia, prompting military intervention by the Kenya Defence Forces in late 2012. Thereafter, there ensued a series of terrorist attacks in Nairobi, Mombasa and parts of Northern Kenya that were attributed to the Al-Shabaab. There were also reports that Al-Shabaab was busy recruiting Muslim youth in Nairobi and parts of the coast to join their war in Somalia and perpetrate acts of terror within Nairobi.

The coast province had also witnessed a series of extrajudicial killings targeting Muslim clerics and activists, which were attributed to foreign security agents working in cahoots with their local counterparts (ATPU). In July 2013, Sheikh Aboud Rogo was shot and killed at point-blank range by unknown gunmen about 200 metres from a police station. Shortly thereafter, Mombasa town was engulfed by deadly riots leading to more deaths and destruction of property. Even though a police inquiry was officially opened on the killings, by the end of 2013, no one had been arrested over the matter. In October 2013, Sheik Ibrahim Rogo, a close associate of the slain Sheikh Aboud Rogo was shot under similar circumstances, leading to similar protests at the coast. These killings resulted in heightened tensions between Muslims and Christian communities at the coast, with potential for further radicalisation of the youth.

Terrorism, like any other criminal act, is reprehensible and the State has a responsibility to confront and fight it. The Prevention of Terrorism Act gives the State sufficient legal framework for doing so. It is therefore necessary and important for the ATPU to confine its work to this law and avoid situations where its members are accused of extrajudicial killings. Similarly, past killings attributed to war on terror ought to be investigated and brought to closure in order to avoid the possibilities of further tensions and radicalisation among religious groups.

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Kenya Information and Communications (Amendment Act) of 2013 (Also Known as ‘KICA’) and Media Council Act of 2013

These are some of the laws introduced in Parliament on July 22, 2013 by the Jubilee Government, pursuant to the Fifth Schedule to the Constitution and implementation of Article 34 of the Constitution. The amendment to KICA sought to ensure independent regulation of the media by replacing the Communication Commission of Kenya (CCK) with a new multi-sectoral regulatory apex body. However, stakeholders raised a storm after it emerged that the proposed law had created a government-controlled tribunal and inserted heavy penalties for misconduct by media practitioners. Such a tribunal would effectively water down efforts by the media to enforce self-regulation through the existing Media Council of Kenya.

The Media Council Bill, on the other hand, sought to overhaul the membership to the self-regulatory body. Several efforts were made by stakeholders to have the offensive sections of the law deleted, including holding discussions with legislators and the President. However, the KICA amendment was passed unchanged in October 2013 but the President declined to assent to it. Contrary to wide expectations that the President would ask Parliament to delete the offensive sections, he returned the law to the House with proposals for more stringent penalties for misconduct. Parliament passed both laws on December 5, 2013 which came into force after presidential assent on the eve of Christmas that year. The media practitioners have since challenged the constitutionality of both laws at the High Court and the outcome of the same is expected in 2014 at the earliest.

Prior to this legislative development, Kenya was viewed as having one of the most vibrant media sectors on the continent. The regulation of the media operated on the principle of co-regulation, that is, state regulation complemented by self-regulation. Save for one incident in 2004 when the Standard Media Group’s offices were invaded by suspected state agents, the Kenyan media has largely operated under a free atmosphere. Previous efforts to regulate the media were undertaken in the period 2008-9 after the Commission of Inquiry

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198 Whereafter broadcasting facilities and newspapers were destroyed prior to circulation ostensibly due to a potentially damaging story on the Presidency.
into Post Election Violence (CIPEV) and the Independent Review Commission (IREC) indicted the media for complicity in the chaos that erupted after the 2007 elections. The media has nevertheless continued to speak out against governance malfeasance and is considered perhaps more effective than official opposition with regards to this role. It is perhaps due to this realisation that the political leadership saw it necessary to curtail the freedom of the media through the enactment of the aforesaid laws.

**Public Benefits Organisations (PBO) Act and the Statute Law (Miscellaneous Amendment) Bill of 2013**

The PBO Act was assented to by the President in January 2013, capping years of advocacy for a more progressive legal framework for regulation of civil society organisations in Kenya. The law had initially been introduced to Parliament as a private member's bill sponsored by Hon. Sofia Abdi after successful lobbying efforts by a group of CSOs operating under the banner of Civil Society Reference Group (CSRG). Eventually, government threw its weight behind the Bill and made a series of changes to the law after lengthy consultations with various stakeholders.

In brief, the law sought to re-characterise non-governmental organisations (NGOs) as PBOs in order to emphasise the public spirited nature of these organisations; establish an independent regulatory authority; replace the dysfunctional NGO Council with a Federation of PBOs and PBO Forums for enhancing self-regulation; tighten accountability and reporting obligations of CSOs; provide a framework for PBO advocacy and collaboration with government on development programmes and funding; enhance access to justice mechanism for PBOs and; provide for a more elaborate code of conduct for PBOs. However, the law remains in limbo as the Minister responsible for its implementation has not yet published in the official gazette the effective date.

In October 2013, the Attorney General published the Statute Law (Miscellaneous Amendment) Bill, an omnibus legislation that sought to amend among other statutes, the PBO Act. The essential contents of the proposed amendments were: to unnecessarily bureaucratise the
registration process of the PBOs; alter the independence of the PBO Regulatory Authority by increasing government representation thereto and introducing the President as an appointing authority; diminish independence of the PBO Federation; reduce to 15 per cent of total budget the amount of funds PBOs can receive as external funding and; channel external funding of PBOs through the state-controlled PBO Federation. The proposals were immediately challenged by sections of the CSOs, notably the CSRG. Intense lobbying by CSOs eventually saw the abortion of the amendments after Parliament, in an unprecedented bipartisan spirited effort, stood down the entire Miscellaneous Amendment Bill to allow for more consultations.

The attempts by the government to amend the PBO Act have been construed as part of a wider scheme to curtail freedoms and parallels have been drawn with regards to the same and prior attempts to pass draconian laws targeting the media. CSOs have been equally vocal against excesses of the State and political class. Supporters of the President and his Deputy have blamed human rights NGOs for amassing evidence and ‘bribing’ witnesses to testify against the two at the ICC ‘cases’. It was therefore reasonably expected that a backlash would be inflicted against CSOs if the two leaders came into power. In their Jubilee manifesto, the two leaders pledged to introduce a Charities Act to regulate financing of CSOs and prohibit them from engaging in ‘partisan politics’. When the two came into power, the pledge founds its way into government’s policy blueprints and now the proposed amendments.\footnote{See for instance Government of Kenya (2013) Second Medium Term Plan 2013-2017, Transforming Kenya: Pathway to Devolution, socio-economic development, equity and national unity, accessed www.planning.go.ke last accessed on Feb 12, 2014 from p.114.} Though these attempts appear to have floundered in 2013, it can also be reasonably expected that the same will find their way back to Parliament in 2014 or later.

\textbf{The National Police Service Commission (Amendment) Bill and National Police Service (Amendment) Bill of 2013}

The Bills were introduced in Parliament on July 16, 2013 by the government side with the intention of amending the powers of the National Police Service Commission, with the effect of transferring the power to transfer and discipline police officers from the Commission
to the Inspector General. The second Bill also appeared to diminish the oversight of police by allowing the Inspector General of Police to ignore recommendations of the Independent Police Oversight Authority (IPOA) on disciplining of errant police officers.

The Bills have been criticised as an attempt to claw back on gains made with regard to taming the hitherto unruly police force. Establishment of the National Police Service Commission (NPSC) was a sound measure to effectively bring the police under independent civilian oversight. The effect of the Bills is to recreate an unaccountable police head who is vulnerable to political manipulation. This would severely undermine the human rights situation in the country, since security forces, including the police, have serially been accused of gross human rights violations.

*M matrimonial property Act of 2013*

The law was introduced on July 5, 2013 after years of advocacy on the same. As a key highlight, the law sought to provide legal guidance on the division of matrimonial property after divorce. The law thus established the principle of equality of spouses during and after marriage by creating equal entitlement to the spouses over matrimonial property, with a caveat that each spouse had to demonstrate contribution to the same for the right to accrue. The law has been lauded by women groups and gender equality activists.

*The wildlife Conservation and Management Act of 2013*

The law was also adopted by Parliament after years of relentless campaigns over the need to streamline and update wildlife conservation. Key highlights of the law include: upward revision of penalties for convicted poachers; increased participation of communities in wildlife conservation; better compensation for victims of wildlife attacks on persons and property. This legislative effort was positively received by stakeholders.

*Emerging Jurisprudence on Human Rights*

The period under review saw courts adjudicate disputes on a wide range of human rights, including the hitherto uncharted waters of social, economic and cultural (ECOSOC) rights.
Civil and Political Rights

Expansion of citizenship and the rights appertaining thereto is a key feature of the Constitution. The High Court was called upon in 2013 to make critical decisions over the same. In the case of Gutale v. Another v. AG and Another, the court held that persons unfairly deemed by the government under the old dispensation to be non-citizens can claim citizenship under the new constitution. The courts also extended the right to enforcement of bill of rights to non-citizens, in the case of Ali Wario Guyo v. AG and 3 Others. This means that non-citizens can sue under Article 22 for violations of rights which happen within the country. In respect to refugee law, the High Court found the government’s directive to relocate refugees from urban areas to refugee camps as a threat to fundamental rights and freedoms, in Kituo cha Sheria v. Attorney General (consolidated with Petition No. 115 of 2013).

A landmark decision on freedom of expression and limitations on exercise of fundamental freedoms, the court in Okiya Omtata v. Attorney General and 2 Others held that a limitation on freedom of expression must be justifiable under exclusions provided for under Article 24 of the Constitution. The case arose from a decision by education authorities to ban the staging of a play which was deemed by education authorities to engender hate speech. The Petitioner challenged the ban successfully, arguing that the decision by the authorities to ban the play was not justifiable in an open and democratic society like Kenya’s.

With regard to rights relating to the trial process and custody, the High Court held in John Swaka v. DPP that denial of legal aid to those facing serious charges amounts to abuse of rights. The court, however, declined to stop prosecution against the accused person who was facing robbery with violence charges and instead urged the State to put in place a legal framework on the same. In what appears to be a contradiction of an earlier landmark decision, the High Court, in Jayne

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200 Petition No. 50 of 2011.
201 Petition No. 511 of 2011.
202 Petition No. 19 of 2013.
203 Petition No. 192 of 2013.
204 Petition No. 318 of 2011.
205 Plea by the state that it was in process of enacting a National Legal Aid and Education law and policy mitigated the situation.
Gachoka v. Kenya Commercial Bank,\textsuperscript{206} held that civil procedure rules on committal of judgement debtors to civil jail are not unconstitutional. In Re Zipp{207} Wambui Mathara,\textsuperscript{207} Justice Martha Koome had held that provision of Civil Procedure Act committing a judgement debtor to civil jail for failure to pay decretal sum was in violation of Article 11 of the International Covenant on Civil and Political Rights which Kenya had ratified and hence was part of Kenyan law.\textsuperscript{208} Unless a decision from a superior court is made with regards to this matter, legal uncertainty over this issue will continue. Freedom from unlawful detention was also extended to the dead, when the High Court in Isaac Ngugi v. The Nairobi Hospital and 2 Others\textsuperscript{209} held that hospitals cannot detain cadavers (dead bodies) as a means of debt recovery.

In circumscribing abuse of policing powers, the High Court in ANN v. the Attorney General\textsuperscript{210} held that stripping and searching of persons in public by police officers was unconstitutional and a violation of the right to human dignity. The courts also imposed personal liability to police officers found to have breached rights of accused persons in the decision of Margaret Wairimu Njuguna v. Commissioner of Police and 2 Others\textsuperscript{211}. This decision will hopefully instil fear among rogue police officers, as the State could easily avoid taking liability for violations committed by individual officers. Yet another victory against police torture was registered when the High Court in Alex J. Wangunya v. Attorney General\textsuperscript{212} awarded as compensation a sum of Ksh 2 million for torture at the infamous Nyayo House torture chambers. The court also extended this relief to spouses of detainees when it ruled in Jaoko Oyoo and 5 Others v. AG\textsuperscript{213} and 133 of 2013 that a spouse can be compensated for psychological torture following the husband’s physical torture and death in the Nyayo House torture chambers. However, it should be noted that the effectiveness of compensation as a restorative measure

\textsuperscript{206} Petition No. 51 of 2010.
\textsuperscript{207} Bankruptcy Cause No. 19 of 2010.
\textsuperscript{208} The said Article 11 reads… “no person shall be imprisoned merely on the grounds of failure to meet a contractual obligation”.
\textsuperscript{209} Petition No. 407 of 2012.
\textsuperscript{210} Petition No. 240 of 2012.
\textsuperscript{211} Petition No. 74 of 2012.
\textsuperscript{212} Petition No. 1 of 2010.
\textsuperscript{213} Petition No. 35, 37, 39 and 40 of 2010.
for human rights violation is imperilled by inordinate delays and slow payment process by the State. When successful petitioners attempt to execute the awards, the Government has tendered as an excuse, that there are no adequate resources to compensate successful litigants.\textsuperscript{214}

The courts had occasion to pronounce themselves on matters relating to rights to participation and representation. In \textit{Kituo cha Sheria v. IEBC and 2 Others}\textsuperscript{215} the High Court held that exclusion of prisoners from the voter registration exercise was a violation of fundamental rights. This decision will impact positively on political participation of prisoners and hopefully transform them into a political constituency that is able to champion for causes through the ballot. With regard to nature and substance of right to participation in decision-making processes, the High Court in \textit{COFEK v. Public Service Commission and Another}\textsuperscript{216} held that physical absence of the public during interviews for candidates did not amount to lack of public participation. Where however, the law was categorical that the public must be consulted (physically), public authorities had no option but to give effect to that provision as held by the High Court in \textit{R v. Kenya Forests Service ex parte Clement Kariuki and 2 Others}\textsuperscript{217}. In appointing processes, public authorities were under no obligation to consult each and every stakeholder as held in \textit{R v. Cabinet Secretary responsible for Labour and MSEs and 2 Others}\textsuperscript{218}. As such, for as long as public authorities show they consulted legitimate stakeholders, there is no threshold below which public participation can be adjudged to be insufficient.

Disputes over representation of diversity in appointive processes also found their way into courts. In \textit{Mathew Lempurkel v. Joshua Irungu and 2 Others}\textsuperscript{219} the court held that diversity in making appointments to county offices does not connote a seat for each ethnic group. A similar decision was arrived at in the \textit{CEDMAC} case (supra). In a blow for representation of marginalised groups in legislative bodies, the


\textsuperscript{215} Petition No. 574 of 2012.

\textsuperscript{216} Petition No. 263 of 2013.

\textsuperscript{217} JR Cause No. 285 of 2012.

\textsuperscript{218} (JR) No. 126 of 2013.

\textsuperscript{219} Petition No. 279 of 2013.
High Court in *National Gender and Equality Commission v. IEBC and 5 Others*\textsuperscript{220} injunctioned the IEBC from gazetting nominees of political parties to county assemblies contained in party lists, on grounds that parties had not adhered to requirement for representation of marginalised groups including women.

**ECOSOC Rights**

The scope of principle of progressive realisation of ECOSOC rights was considered by courts resulting in landmark decisions within the period under review. In two cases relating to evictions, *Mitu-Bell Welfare Society v. Attorney General and 2 Others*\textsuperscript{221} and *Satrose Ayuma and 11 Others v. The Registered Trustees of The Kenya Railways Staff Retirement Benefits Scheme and 2 Others*\textsuperscript{222} cited in The Judiciary (2013), the courts held the view that ECOSOC rights were no longer aspirational but had crystallised and therefore the State could no longer shirk responsibility for guaranteeing the right to housing using progressive realisation as an excuse. Rather, the State should take active steps to provide for rights using available resources. The court made a similar observation with regards to realisation of the right to education. In *Michael Mutemi v. Permanent Secretary, Ministry of Education and 2 Others*\textsuperscript{223} the petitioner had sought orders compelling the Government to ensure his child obtained necessary financial provisions including bursary in order to meet school fees for his education. The court held that the Government must ensure realisation of the right to education within available resources by enacting appropriate policies, rather than hanging on to the defence of progressive realisation.

There were a number of decisions touching on labour matters, following the elevation of the Industrial Court to a court having similar status as the High Court.\textsuperscript{224} The Industrial Court, in *Samson Ngonga v. Public Service Commission and 5 Others*\textsuperscript{225} held that it had jurisdiction on

\textsuperscript{220} Petition No. 147 of 2013.
\textsuperscript{221} Petition No. 164 of 2011.
\textsuperscript{222} Petition No. 65 of 2010.
\textsuperscript{223} Petition No. 133 of 2013.
\textsuperscript{224} In *United States International University v. The AG and 2 others*, Petition No. 170 of 2012, it was held that the Industrial Court has same status as the High Court and therefore has jurisdiction to hear and determine an application for enforcement of rights and fundamental freedom.
\textsuperscript{225} Petition No. 459 of 2011.
labour matters relating to police officers and members of Kenya Defence Forces. The Court also held that denial of the police to form a trade union was unconstitutional, in *Nicky Njuguna and 3 others v. Registrar of Trade Union and Another*. These decisions touch on hitherto uncharted waters of security agencies perhaps reflecting the increased boldness of the new Industrial Court following its elevation to a court having similar status as the High Court. The High Court, in *Samuel Momanyi v. AG and Another*, struck out section 45(3) of Employment Act of 2007 as unconstitutional as it apparently denied employees who had worked for less than 13 months, redress for unfair termination. The court deemed the offending section of the Act discriminatory and denying workers the right to fair labour practices.

In a victory for marginalised groups, the industrial court in *Robai Musunzi v. Mohamend Safdar Khan* held that domestic workers were entitled to terminal benefits, just like any other category of workers, notwithstanding the fact that many of them lack written contracts of employment. In a decision that will impact positively on the rights of persons living with HIV and AIDS, the court also held in *CoM v. Standard Group Ltd and Another* that disclosure of a worker’s HIV status without their consent was a violation of the right to privacy. It was also held that pregnancy is not a ground for termination of a contract in *GMV v. Bank of Africa*. This presents a victory for women who have been discriminated against at the work place on this basis.

**Conclusions and Recommendations**

This paper has examined various constitutional events and developments that have occurred or materialised during 2013 (and early 2014). From the magnitude of the events and developments narrated herein, it is evident that 2013 was indeed an eventful year in terms of constitutional developments.

The elaboration of the presidential powers continued in the year, with courts interpreting the Constitution in a manner that curtails...
the exercise of these powers through the judicious application of the principle of legality and national values as enshrined in Article 10 of the Constitution. The emerging jurisprudence on this issue is particularly important in the context of Africa, where imperial and authoritarian presidency has been the norm in many countries. It is also without doubt that the ICC question and the constitutional dilemma it has created, continues to shape the agenda for the executive and by extension, drives the politics of the country, the East African region and beyond.

The country has witnessed peaceful transition from the Kibaki-Raila coalition Government to the youthful Uhuru-Ruto-led Jubilee Coalition Government, with no early signs of factionalism and governability crises that plagued and hobbled the previous Government. However, the Jubilee coalition is reflective of mega constitutional orientations that initially exhibited suspicions to the new constitutional dispensation, a factor that may impact adversely on the commitment of the two leaders to implementation of the supreme law and the reforms envisaged therein.

Whereas accountability for the deleterious 2007/8 post-election violence was part of the National Accord reforms brokered by the international community (AU and Western Powers), it appears that the entire reform agenda has been conflated with perceived interests of Western Powers in respect to Kenya. With Uhuru and Kenyatta succeeding in painting their ICC trials as a failed attempt by Western Powers to block their political ambitions and therefore winning the AU to their side, it is very likely that the West and indeed the African Union has lost leverage in pushing the two leaders to accomplish the National Accord reforms, hence imperilling the full implementation of the constitution. The EAC is now too divided as a result of the ICC dilemma to intervene in Kenya’s problems as well.

The new-look bicameral legislature has taken time to settle under the new constitutional dispensation and internalisation of the changes attendant thereto remains a challenge for parliamentarians. Both Houses are dominated by Jubilee coalition giving the government side a free hand to shape legislative agenda and outcomes, with or without input from a rather disoriented opposition. The legitimacy of laws and policies emanating from the Houses, which are critical for implementation of
the Constitution will depend on the extent to which the ruling coalition bends backwards to accommodate the opposition in a bipartisan spirit. This will also depend on the extent to which both Houses will respect their respective jurisdictional limits and cooperate in pursuing broader agendas, including constitutional implementation. However this spirit has eluded both Houses at most critical times due perhaps to the performance of the ruling coalition’s leadership in Parliament, as well as the supremacy battles crippling both Houses. Refusal by Parliament to abandon parliamentary overreach (rather than oversight) will continue to erode the legitimacy of the Houses and may impact negatively on their ability to advance constitutionalism.

The Judiciary has made remarkable strides in turning itself around from its old bad ways and instilling a new sense of independence, professionalism and accountability. The implementation of the Judiciary Transformation Framework (JTF) has yielded tangible and verifiable changes that could solidify the foundations for long term institutional development. However, these gains remain at risk with uncertainty surrounding the vetting of judges and magistrates as well frequent accusations of corruption and misconduct levelled against high ranking officials. The quarrels between the Judiciary and Parliament as well as disobedience of court orders also imperil attempts by the courts to safeguard rule of law and constitutionalism in the discharge of their mandates.

Devolution has finally arrived and generated so much expectation and hope especially for areas that were indeed marginalised under the hitherto centralised authoritarianism. The transition processes were however characterised by chaos, a reflection of poor performance by the institutions vested with responsibility of midwifing the said transition. The tense inter-governmental relations reinforce long-held suspicions that anti-reform forces within national government are bent on sabotaging devolution. It is also emerging that leaders of devolved governments, (Governors and County Assembly members) are evolving into key risks to the devolution process (the enemy within). The old political culture of self-aggrandisement, coupled with their singular failure to entrench a culture of public participation in governance processes portends serious risk to entrenchment of devolution.
The rather successful 2013 elections have validated Kenya’s constitutional and statutory reforms and framework on management of elections. The decision emanating from the Presidential Election Petition, however, points to the need for more efforts towards strengthening the electoral process especially with regards to integration of new technologies in electoral management. The decision has also generated new jurisprudence that will have great impact not only in Kenya but across the continent. However, criticism levelled against the decision, require more interrogation and discourse to enrich the said jurisprudence. Parliament and the Executive should escalate electoral reforms and put in place the necessary infrastructure to ensure a more credible, effective and efficient electoral process come the next elections.

Through judicial intervention, Kenya has continued aligning its public law and conduct by public authorities with the new human rights regime underpinned by a robust Bill of Rights. However, the Executive continues to undermine the institutional framework for enforcement and protection of rights through the overt and subtle interference with human rights commissions and other independent commissions and offices. This has been evidenced by delays in appointing commissioners (prompting legal actions), reduction of budgetary allocations thereby curtailing their operation and increased/unwarranted parliamentary overreach. There are also clear attempts at reducing or closing out civic space through tightening of the regulatory framework for civil society Organisations. These risks call for citizens to engage their leaders more and demonstrate eternal vigilance against the rolling back of the aforesaid gains. The anticipated appearance of Kenya before the UN Human Rights Council to table its report on human rights status provides the international community an opportunity to push the country to demonstrate more commitment to observance of rights.

Lastly, this paper suggests that the theory of consociational constitutionalism is valid and still applies to Kenya’s constitutional development, particularly in the post-adoption phase of the constitutional reform process. When Governors initiated a campaign for constitutional amendments on devolution (to increase allocations to counties and expand their functions) the prospect of mass legitimation of these proposals through a referendum compelled political leaders to abandon
the project and instead resorted to politics of elite accommodation. A national referendum coming soon after the heated 2013 elections is likely to create new (alignments within existing) mega constitutional orientations, which may crystalise into voting blocs, come 2017/8 elections with unforetold consequences. However, the political elite have freely gone about enacting laws that promote their self-aggrandisement and appear to negate constitutional gains made in the human rights arena owing to the absence of the threat of mass legitimation. However, with the clauses on recall of MPs becoming operational from March 2015, the legislative power of MPs will indirectly become subject to mass legitimation and this may limit elite consensus on such issues in the future.
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National Gender and Equality Commission v. IEBC and 5 others, Petition No. 147 of 2013.

Satrose Ayuma and 11 others v. The Registered Trustees of The Kenya Railways Staff Retirement Benefits Scheme and 2 others, Petition No. 65 of 2010.

Michael Mutemi v. Permanent Secretary, Ministry of Education and 2 others, Petition No. 133 of 2013.


Nicky Njuguna and 3 others v. Registrar of Trade Union and Another, Appeal No. 1 of 2007.

Samuel Momanyi v. AG and Another, Petition No. 134 of 2011.


United States International University v. The AG and 2 others, Petition No. 170 of 2012.
Introduction
This chapter interrogates the constitutional developments which took place in Tanzania Mainland in 2013 with a view to assessing the state of constitutionalism during this period. It highlights the key events that directly or indirectly shaped constitutionalism during the period of survey. The chapter illustrates with keen interest the constitutional review process, which was the key constitutional development in 2013. Also the chapter also discusses the major developments and key challenges inhibiting the realisation of human rights, good governance and rule of law which together constitute important elements of constitutionalism. Key legislations enacted in this year and judicial pronouncements of relevance to constitutionalism are also discussed.

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Towards Katiba Mpya: The Constitutional Review Process Continues
Tanzania is in the process of rewriting her Constitution. The ongoing process seeks to replace the current Constitution of the United Republic of Tanzania promulgated in 1977. The year 2013 marked the third anniversary of this process which was set in motion by the enactment of the Constitutional Review Act, 2011 through which a pathway to the new Constitution was provided. On April 6, 2012, the Constitutional Review Commission (CRC), charged with the mandate of coordinating and collecting public opinions on constitutional review, was established. The commission, constituted 34 members chaired by Judge Joseph Sinde Warioba, (former Attorney General and Prime Minister of the United Republic of Tanzania), was sworn in on April 13, 2012 and officially started its work on May 2, 2012. In July 2012, the CRC embarked on its first substantive task of collecting people's views through public hearing meetings organised all over the country. It took the CRC five months up to the end of December to complete this task.

At the beginning of 2013, the CRC started collecting views from special groups including political parties, Government institutions, religious institutions, non-governmental organisations and groups representing peasants, pastoralists and workers. Serving and retired government leaders also gave their opinions during this process which was concluded at the end of January 2013. The completion of this task gave an opportunity for the second major task: analysing the views collected during public hearing meetings and drafting the Constitution. This work was done in four months from February to June 3, when the First Draft of the Constitution of the United Republic of Tanzania (URT), 2013 was unveiled.

The First Draft of the Constitution of the United Republic of Tanzania, 2013
The unveiling of the First Draft of the Constitution was very exciting as it marked a milestone in the country's Constitution making processes since independence, not only because of its process which saw direct participation by common men and women, but also because of the new

features it introduced. The Draft Constitution was one of a kind and much more comprehensive than the current Constitution of 1977. The Draft Constitution has 240 Articles in total, compared to the current one which has 152 Articles. These are divided into sixteen substantive chapters: the Republic of Tanzania; Sovereignty of the People; Leadership Ethics; the Bill of Rights (Human Rights and Responsibilities); Citizenship; Structure of the Union; Executive (Union Government); Coordination of Partner States and the Union; Legislature; Judiciary; Public Service; Election; Commissions; Finances of the Union; National Security and Defence; and Miscellaneous Provisions. Numerically, the Draft Constitution added six more Chapters to the current Constitution which has only 10 Chapters.232 The Draft Constitution also introduced some pertinent issues not provided for under the current Constitution.

As expected, the Draft Constitution was met by mixed reactions from different sections of the society. In the following section we discuss, albeit briefly, some of the key features of the Draft Constitution.

**Structure of the Union - Three Governments**

One of the innovations brought about by the First Draft Constitution is the new government structure. The Draft Constitution suggested that the URT should follow a federal mode of governance with a three-government structure constituting the Government of the URT (the Union Government), the Government of Tanzania Mainland (Tanganyika) and the Government of Zanzibar.233 This is a departure from the two-government structure which has been in force since the formation of the Union in 1964. According to Article 61 of the Draft Constitution, the Government of Tanzania Mainland and that of Zanzibar shall have autonomy over non-Union matters in their respective territories while the Union Government shall handle the Union matters. In consequence of this innovation, the Draft Constitution proposes reduction of the Union matters from the current 22 to seven (7), namely;

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232 The current Constitution has 10 chapters: the United Republic, Political Parties, the People and the Policy of Socialism and Self-Reliance; Executive; Legislature; the Revolutionary Government of Zanzibar, the Zanzibar Revolutionary Council and the House of Representatives of Zanzibar; Dispensation of Justice (Judiciary); The Commission for Human Rights and Good Governance and the Public Leaders’ Ethics Secretariat; Finances of the United Republic; Public Authorities; Armed Forces; and Miscellaneous Provisions.

the Constitution and the Authority of the URT; Defence and Security of the URT; Citizenship and Immigration; Currency and the Central Bank; Foreign Affairs; Registration of Political Parties; and Customs Duty arising from goods and income arising from Union matters.\textsuperscript{234} The reduction partly addresses long term complaints, particularly from Zanzibar that the increase of Union matters is illegal and also proportionally reduces Zanzibar’s independence.\textsuperscript{235} It should be recalled that the Articles of Union in 1964 (the foundation of the Constitution of the URT of 1977 and the Zanzibar Revolutionary Government of 1984) had 11 Union matters only; the present list is a result of later additions.

The reduction of Union matters means more autonomy for the governments that make up the Union as well as the shrinking of the Union Government. The new structure reinstates the autonomy of the Partner States on 15 matters which formerly used to be under the mandate of the Union Government. The direct effect of this structure is the shrinking of the Union Government. The Draft Constitution proposes a modest Union Government with 15 ministers only.

\textbf{The Bill of Rights}

The new Draft Constitution suggests significant improvements to the Bill of Rights which was incorporated in the country’s constitution for the first time in 1984 and which has since been amended several times. The list of protected rights has been expanded to the fullest with the section covering the Bill of Rights being the largest section of the First Draft Constitution. The Draft Constitution innovatively proposes inclusion of certain fundamental rights which did not have space in the current Constitution such as the right to a nationality,\textsuperscript{236} the rights of accused persons and convicts\textsuperscript{237} and the right to a clean and safe environment.\textsuperscript{238} This section also takes care of the need for protection of the rights of most vulnerable/special groups. It proposes

\textsuperscript{234} See the Schedule to the First Draft Constitution of the United Republic of Tanzania, 2013.
\textsuperscript{236} See Article 37.
\textsuperscript{237} See Article 38.
\textsuperscript{238} See Article 40.
inclusion of the rights of the child, rights of persons living with disabilities, rights of minorities, the rights of women and the rights of elderly persons. In addition, the Draft proposes elevation to the Bill of some of the rights, the right to education in particular, which in the current Constitution is part of the State Objectives and Directive Principles of State Policy and therefore, unenforceable. However, there are some limitations in the Draft Constitution warranting more attention in the future process. One of these is the emulation of the non-absolute protection accorded to the right to life under the current Constitution thereby subjecting the enjoyment of this noble right to the laws. The hopes to have the death penalty abolished in the near future will be diminished significantly if this proposal is sustained in the final process. This is due to the fact that the corresponding provision under the current Constitution has been as a justification for retention of death penalty in the laws of Tanzania. Other limitations observed include the failure to provide the definition of a child and consolidation of two rights into one provision. A good example of this is Article 24 on the right to freedom of association and assembly. These rights are separate and independent from each other, yet they are lumped up together. These limitations notwithstanding, the Bill of Rights in the Draft Constitution is far better than that in the current constitution and reflects the general trend in modern constitutions. In fact, as Prof. Chris Maina Peter remarked on his comments on the Draft Constitution, “[the Bill is a] relatively modern Bill of Rights. To be fair to the Commission, it has gone beyond what most of the civil society Organisations have been demanding to be included in the new Constitution.”

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239 See Article 42.
240 See Article 44.
241 See Article 45.
242 See Article 46.
243 See Article 47.
244 Peter, Op cit.
Citizenship

The Draft Constitution, unlike the current Constitution, proposes inclusion of citizenship provisions in the Constitution, thus according citizenship the deserving treatment by making it part of the highest law of the land. Emulating the spirit of the First Constitution of Tanganyika, the Tanganyika [Constitution] Order in Council, 1961 which had a chapter on citizenship, the CRC dedicated the fifth Chapter (Article 54-56) of the Draft Constitution to citizenship and matters incidental thereto. In this part, the Draft Constitution proposes slight modifications to the categories of citizens by reducing the modes of acquisition of citizenship to two: birth and registration. The first group shall accommodate persons born in Tanzania to a citizen of Tanzania, persons born outside Tanzania but to a citizen of Tanzania and foundlings below the age of seven. Registered citizens will include non-Tanzania children adopted by citizens of Tanzania, long resident migrants and non-citizens spouses. Nothing is explicitly stated as to the rationale for distinguishing the two forms by which citizenship is acquired. What is explicitly clear, however, is that citizens by registration may not exercise the full enjoyment of all the basic rights and fundamental freedoms set out in the Bill of Rights. Imperative also, is the fact that the proposed categories take care of all the modes of acquisition of citizenship prescribed under the Citizenship Act, 1995.

In Articles 55(4), 55(5) and 56(4) there is an attempt to address the problem of statelessness by extending Tanzanian citizenship to persons who would otherwise be stateless. It proposes extension of Tanzanian citizenship to children below the age of seven years who are found in Tanzania and whose parents are not known (foundlings); non-Tanzanian children adopted by a Tanzanian and children born out of the marriage between a Tanzanian and non-citizen. The Draft Constitution also proposes inculcation of gender parity in transmission of citizenship to a non-citizen spouse, a right which in the past was exclusively reserved for male citizens. Perhaps most innovative is the recognition of the right to a nationality in Article 37. For the first time in the legislative history of our country, a proposal has been forwarded that the right to

245 See Articles 55(4) and (5) and 56 (1) and (2).
246 Ibid., Article 56(2).
citizenship which is regarded by some people as ‘the right to have rights’ be recognised as one of the fundamental rights protected within the Bill of Rights and whose realisation the state has a positive obligation to put in place mechanisms to ensure. A proposal is made that the government should put in place proper mechanisms for issuance of birth certificates, national identification cards and to outlaw any form of discrimination in issuance of travel documents. Correspondingly, in Article 42 of the Draft Constitution, the importance of safeguarding the right of a child to a nationality was underscored.

While this part is commendable, there were worries that it is likely to carry forward the injustice caused by the current and past citizenship legislation which denied citizenship to certain categories of people, particularly those born before independence and those born before the Union Day, thus rendering them stateless. The Draft Constitution also avoids the issue of dual citizenship despite the outcries that it is high time Tanzania allowed dual nationality so as to enable Tanzanians in the diaspora to take up nationality of their host countries and enjoy the ensuing economic opportunities in those countries, without having to renounce their status as Tanzania citizens.

Independent Candidature

The Draft Constitution proposes a departure from the current Constitution and electoral laws by allowing persons vying to be elected as MPs or President to stand in election independent of any political party. Under the current Constitution and electoral laws, affiliation to a political party is a condition sine qua non for anyone wanting to vie for election into public office. Thus, only individuals affiliated to or sponsored by political parties can be elected into public office. Political and human rights activists, led by Rev. Christopher Mtikila have, ever since the early 1990s, fought tirelessly through different political platforms and in courtrooms to have this position nullified and thereby provide room for participation by persons who for different reasons have no affiliation with any political party but want to stand in elections.

It can be recalled that in 1993 Rev. Mtikila instituted a case in the High Court of Tanzania in which he successfully challenged the

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247 See Article 75(g) on the presidency and Article 117(1)(c) on members of parliament.
constitutionality of this provision. His prayers were granted and the respective provision was declared unconstitutional.\textsuperscript{248} The order of the court was short-lived as Parliament immediately amended the Constitution to have the requirement for political nomination entrenched in the Constitution. In 2005, Rev. Mtikila once again challenged this amendment in the High Court which boldly annulled this amendment holding that, in principle it is lawful for private candidates to contest for the posts of President and Member of Parliament along with candidates nominated by political parties.\textsuperscript{249} This decision was nevertheless reversed by the Court of Appeal when it was brought before it by way of appeal, thereby disallowing independent candidates for election to the Local Government, Parliament or Presidency.\textsuperscript{250} The possibility of participation by independent candidates in future elections was buried by this decision which categorised the issue of independent candidate as political and outside the mandate of the judiciary.

The proposals in the Draft Constitution coincided with the judgement delivered on June 14, 2013 by the Arusha-based ACHPR- in the application lodged by the Tanganyika Law Society and the Legal and Human Rights Centre and Rev Mtikila, in which the Court declared that the prohibition of independent candidature violated provisions of the African Charter on Human and People’s Rights, 1981 and therefore directed Tanzania take constitutional, legislative and other necessary measures to remedy this violation. By including a provision allowing independent candidates to participate in the electoral processes, Tanzania will be implementing the order of the ACHPR.\textsuperscript{251}

\textsuperscript{249} Christopher Mtikila v. The Attorney General, High Court of Tanzania at Dar es Salaam, Miscellaneous Civil Cause No. 10 of 2005.
\textsuperscript{250} Attorney General v. Rev. Christopher Mtikila, Civil Appeal No. 45 of 2009 (Unreported).
\textsuperscript{251} Tanganyika Law Society and the Legal and Human Rights Centre and Reverend Christopher Mtikila v. The United Republic of Tanzania, Applications 009 and 011/2011. This case will be discussed in section 5 of this chapter.
The Office of the President

The Draft Constitution proposes several changes to the executive wing of Government. The first of these are the numerous changes introduced under the office of the President to address some of the most contentious issues in relation to the election process and the powers vested in the President. As already noted, the Draft Constitution proposes that independent candidates be allowed to contest for presidency. Moreover, the Draft Constitution proposes substitution of the simple majority vote in presidential election with an absolute majority vote. It suggests that the President should be elected by an absolute majority vote contrary to the current arrangement where the incumbent is elected by a simple majority vote. Under Article 77 (6), a candidate shall be declared elected as president if he/she receives more than half of all the votes cast in the election. If no candidate is elected, a fresh election involving two of the candidates with the largest number of votes has to be held in 60 days. As this is not enough, the Draft Constitution provides an avenue for questioning the validity of presidential election in the Supreme Court (Article 77(7). This is a total departure from the current constitution where a person is elected a president after winning by simple majority votes. And, when a candidate is declared by the Electoral Commission to have been duly elected in accordance with the Constitution, the courts of law have no jurisdiction to inquire into the election of that candidate, even if the said election was marred by multiple irregularities. This position is absurd and least expected in a democratic country.

There are also proposals on reduction of the powers of the President as regards appointment of key public officers by putting in a requirement that persons appointed by the President to head these offices should get the approval of the National Assembly. Among those who will need this approval are ministers and deputy ministers; Registrar of the Judiciary; Registrar of Political Parties; persons appointed to the Commission for Public Service Ethics and the Human Rights Commission. This is also another area where the Draft Constitution innovatively departs from the old position. At present, the President has the authority to appoint persons to hold key Government offices and departments

252 See Article 41(6) and (7) of the Constitution of United Republic of Tanzania, 1977.
including those responsible for formulation of policies and supervision of the implementation of those policies. With all these powers, the president under the current Constitution becomes a very powerful institution. And interestingly, Article 37(1) of the current Constitution provides that

apart from complying with the provisions contained in this Constitution, and the laws of the United Republic in the performance of his duties and functions, the President shall be free and shall not be obliged to take advice given to him by any person, save where he is required by this Constitution or any other law to act in accordance with the advice given to him by any person or authority.’

Cabinet - Small Cabinet and Departure from Westminster Model

The Draft Constitution also has new proposals which would shape the structure of the Union Government in years to come. Corresponding with the envisaged shrinking of the Union matters, a fairly small cabinet with a total of 15 Ministers only has been proposed. This cabinet is quite small compared to the current cabinet which has more than fifty (50) ministers. Another significant change in this area is the departure from the Westminster model of governance, copied from England at independence and which has remained in force since the country gained its political independence. Under this model, Ministers and Deputy Ministers are appointed amongst the MPs. The Draft Constitution proposes that ministers should not be chosen from amongst the MPs. Article 94(2)(a) specifically provides that MPs and Members of the Zanzibar House of Representatives do not qualify to be appointed as Ministers. It also imposes a requirement for approval of these appointments by the Parliament. This proposal emulates corresponding provision in the Constitution of Kenya which disqualifies the Members of Parliament from holding the position of Cabinet Secretary which is an equivalent of that of a Minister in Tanzania. There are also proposals to get rid of office of the Prime Minister which in the current structure is very powerful and acts as a bridging stone between the executive and the legislature.

These include members of Cabinet, Attorney General, Director of Public Prosecution, members of Electoral Commission and their leaders, Judges and Justices of the High Court and Court of Appeal respectively, members of the Commission for Human Rights and Good Governance, Public Leaders, Ethic Secretariat, heads of Tanzania armed forces as well as Regional and District Commissioners. He also appoints 10 MPs pursuant to Article 66(1) (c) of the 1977 Constitution.
Legislature - Fairly Moderate With Equal Representation of Men and Women

The Legislature, its structure and mandate, are covered under chapter nine (9) of the Draft Constitution (Articles 105-142). This is one of the institutions likely to undergo several changes should the proposals put forward by the Draft Constitutions be sustained in the final processes. There are numerous proposals on its structure and composition. The first of these proposals, as provided in Article 105, is an establishment of a moderate Parliament with 75 MPs, much smaller in number compared to the current parliament which has a total of 356 members. These will include: MPs elected directly from constituencies and five MPs appointed by the president to represent persons with disabilities. Under the proposed structure, regions will serve as constituencies in Mainland Tanzania and in Zanzibar, the districts will be designated as constituencies for the purpose of general election.

The First Draft Constitution appreciates the need for gender parity in the highest decision-making bodies. It proposes that, every constituent be represented by two MPs – a man and a woman. The effect of this proposal is to get rid of the special seats for women in the National Assembly. This is an about-turn from the current Constitution which provides for special seats through which political parties with representation in the Parliament select a number of female MPs. These positions, which at present constitute 30 per cent of MPs directly elected from the constituencies, are proportionally allocated to political parties. The allocation of these seats is done in accordance with the performance of political parties during the general election, whereby only the parties with at least 5 per cent of the votes in the general election are entitled to these seats. This arrangement was introduced in an attempt to address insufficient women representation in political spheres and to introduce gender parity in the highest decision-making organs.

The creation of special seats and other efforts which were conducted by the Government together with civil society, contributed immensely to increasing women representation in parliament. The number of

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254 Of these, 239 are elected from constituents, 102 hold special seats for women, 5 are elected by the Zanzibar House of Representatives and 10 are appointed by the President.

255 See Article 105(4).
women MPs increased from 21.5% in the 2000 elections to 30.3% in the 2005 elections and 35% in 2010. In the current parliament there are 125 female MPs, of whom only 20 were elected from constituencies. The good intentions of this arrangement and the achievements that have been recorded so far have not been free from criticism. There is discontent that these seats have diminished the ability of women to contest in constituencies because most of them wait for these special seats which are given as rewards. There have been reports of abuse of these seats due to lack of interparty democracy whereby special seats are given as rewards to women who are on good terms with senior officers in the respective parties, which leaves aside the most able women. Nepotism, corruption and other unethical practices in the selection of holders of these seats have been reported. Many people, including women, have openly criticised the interparty allocation of these seats and have expressed the view that they would rather have them abolished. It is therefore not surprising that the Draft Constitution substitutes these seats with equal representation of men and women.

The Draft Constitution proposes an increase of the minimum age for which a person qualifies to be elected as MP from the current 21 years to 25 years. It also proposed that candidates should have a minimum of secondary education contrary to the current arrangement where one needs only to be literate to be elected as MP (Article 117).

Another innovative proposal is the introduction of term limits for MPs. This is a new thing in Tanzania’s politics as there have never been term limits for persons elected as MPs. Thus, MPs could stay in parliament indefinitely as long as they won their seat during national elections. Consequently, some MPs have served for 30 years or so. Until recently, some MPs treated their respective Constituents as personal property to which no other person had legitimate claim. Thus, even when the incumbents became unable to discharge their responsibilities as MPs due to infirmity or old age, they would find a person to succeed them and present that person to the Constituents for rubber stamping. The Draft tries to get rid of this practice by imposing a time limit for a person to serve as a representative in the National Assembly. According to Article 117(2) (a), a person can only hold this position for three terms of five years each, after which he/she will be disqualified from standing for elections.
Even more interesting is the proposal in Article 124 of the Draft Constitution to give the electorate the mandate to remove their MPs. Amongst the reasons which may warrant voters to exercise this power are supporting policies which are against the interests of the electorate and the nation; failure to present and defend well issues relating to the problems facing the electorate; shifting domicile from the constituency for more than six months without good reasons; failure to attend three consecutive parliamentary sessions without the permission of the Speaker; involvement in business activities which attract conflict of interest; and acting in any other manner which impairs the integrity and faithfulness of the respective MP. This means that the voters will not have to wait for the general election if they want to get rid of their MP. They can do so at any time provided that the grounds enumerated above exist. It is hoped that this proposal, if sustained in the final processes, will force the MPs to be more responsible than before. At present, there is no opportunity for voters to call their MPs to account. Some of the MPs take advantage of this loophole by disappearing from their constituencies immediately after the election with most of them establishing their residence in Dar es Salaam or other towns while making no visits to their constituencies. Consequently, they are alienated from the needs of the people they represent and those of the constituency.

The third significant proposal is in provisions relating to the appointment of the Speaker and Deputy Speaker of the National Assembly. The Draft Constitution boldly proposes that the Speaker and Deputy Speaker of the National Assembly should not be amongst the Members of Parliament. According to Articles 129 (1)(a) and 130(4)(a), a person holding the seat of Speaker or Deputy Speaker of the National Assembly shall cease to hold that seat if elected a Member of Parliament. Undoubtedly, the departure seeks to inculcate a sense of impartiality and address conflict of interest of holders of these offices. Under the current arrangement, the candidates for the position of Speaker and Deputy Speaker are proposed by their respective political parties and endorsed through partisan oriented ballots cast in the National Assembly. The arrangement through which the holders of these seats are elected in office and their affiliation to political parties

256 See Articles 128(2) and 130(2).
has, since the introduction of multiparty democracy, remained one of the controversial areas, with concerns being raised that their pathway to the throne is a threat to the impartiality of these people in conducting the business of the National Assembly.

Apart from the aforementioned proposals, there are no significant proposals on the mandate and functions of Parliament. The functions of Parliament in the Draft Constitution are more or less the same as those enumerated in the current Constitution. There is only one important addition which empowers Parliament to debate and ratify or sign all contracts involving the exploitation of the nation’s natural resources. This is a reversal of the current situation whereby contracts between the Tanzanian government and multilateral companies are mired in secrecy. They are not made available for public scrutiny nor are they subjected to parliamentary oversight. Thus, neither the people nor their elected representatives have the ability to question the specific terms under which the country’s natural resources are exploited.

The Judiciary - Supreme Court as the Highest Judicial Organ

The judicial arm of the state is provided for under the tenth chapter of the Draft Constitution. In this chapter, the Draft Constitution proposes some modifications on the existing structure by creating the Supreme Court as the highest judicial organ in the country. The Supreme Court will be headed by the CJ, who will also be the president of this court. Under the proposed structure, the Court of Appeal of Tanzania, which is the highest judicial organ in the current structure, shall be second to the Supreme Court. Under the proposed structure, the Supreme Court shall have jurisdiction over matters which question the validity of the election of the president of the URT; matters over the interpretation of the constitution as brought to it by the Union Government and the respective governments. It shall also have jurisdiction over appeals originating from the Court of Appeal. This proposal has been hailed as an important development because, first, it provides an avenue for people to challenge the decision of the Court of Appeal, and secondly, it helps the country to join the systems used by other Partner States of the EAC.257

257 Peter, op cit.
Debating the Draft Constitution: Constitutional Fora (Mabaraza Ya Katiba)

The Draft Constitution received mixed reactions from the public. There were discussions from all corners of the country as to the suitability of the proposals of the Draft Constitution. Most of the preliminary discussions were centred on the structure of the Government, with some commentators warning that the three-government structure is a threat to the Union. Issues such as independent candidacy, term limits for MPs, voters’ right to recall their representatives, the Bill of Rights, the office of the Speaker of the National Assembly, the structure of the cabinet and the qualifications of ministers also dominated the discussions.

Formal discussions were held during the meetings of the Constitutional fora. These were ad hoc forums established under part IV of the Constitutional Review Act\textsuperscript{258} and directly supervised by the CRC\textsuperscript{259}. A total of 173 CRC – supervised constitutional fora – 160 in Tanzania mainland and 13 in Zanzibar – were formed at District level.\textsuperscript{260} These had 19,367 members and were constituted by ward Councillors and members elected by their respective wards (Mainland) and Shehia (Zanzibar).\textsuperscript{261} There were also self supervised/independent Constitutional fora formed by organisations, institutions and groups of people with the same interests – such as higher learning institutions, political parties, pastoral organisations, community based organisations, non-governmental organisations, professional boards, women’s forums and children’s forums etc.\textsuperscript{262} These were formed pursuant to the CRC

\begin{footnotesize}
\footnote{258}{Cap 83, Laws (Principal Legislation) of Tanzania.}
\footnote{259}{See Section 18 of Cap 83.}
\footnote{261}{Ibid, see pages 4 and 5.}
\end{footnotesize}
Directives on Formation of Independent *Fora* which provided friendly procedure to allow wider participation by different groups.\(^{263}\)

The meetings of the fora started with much enthusiasm, particularly on the part of independent fora, which were very much determined to interrogate the provisions of the Draft Constitution and beat the deadline set for submission of their views. However, on the part of the CRC the start of the supervised fora was not as smooth. Their formation, which took place in April 2013, barely a month before the First Draft of the Constitution was unveiled, left a lot to be desired as it was marred by serious irregularities ranging from heavy involvement of politicians and political parties, religious influences, corruption, favouritism, discrimination of people with disabilities, gender discrimination and other forms of irregularities.\(^{264}\) The ability of the members of these fora to interrogate the Draft Constitution and make meaningful contribution was highly questioned as it was alleged that the qualified candidates were left out due to these irregularities. As one commentator remarked “[U]nfortunately, the majority of those who have been elected into the fora have no idea what they are supposed to do and even a large number of them have no capacity to undertake the task of interrogating the work of the Commission.”\(^{265}\) Some of the civil society organisations called upon CRC to conduct fresh election in places where grave irregularities were reported, with some threatening to take the CRC to court in the event it failed to conduct fresh elections in these areas. These discontents notwithstanding, the CRC maintained that there was nothing seriously wrong to justify fresh elections.\(^{266}\) The meetings of the fora started as scheduled.

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\(^{263}\) In Section 18 (6), the Commission was given discretion to allow organisations, associations or groups of persons to convene meetings for the purpose of providing their opinion on the Draft Constitution.

\(^{264}\) *Taarifa ya Jukwaa la Katiba Juu ya Uchaguzi waWajumbe wa Mabaraza ya Katiba katika Vijiji, Mitaana Kata ambako Kumeambuwa na Dosari Urudiwe*, April 11, 2013. Also see Sitta Tumma “Nyamagana Walalamikia Uchaguzi Mabaraza ya Kata” *Tanzania Daima*, April 15, 2013. See also Daniel Mwingira, “Mbowe: Haya ni Mabaraza ya Katiba ya CCM”, *Muunanchi*, April 27, 2013. There were also reports that some politicians from various political parties made sure that they planted people from their political parties, publicly conducted campaigns and transported voters to polling stations.

\(^{265}\) Peter, *op cit*.

As expected, the views and concerns raised on issues were quite diverse. Political and religious influences became more apparent, with some of the members of the CRC-supervised fora presenting opinions doctored by their political parties and religious sects. With the exception of fora representing specific groups of people, such as persons with disabilities, whose focus was much centred on issues directly or indirectly impacting on the interest of their respective groups, the discussions in many of these fora focused on the structure of the Union. Concerns were raised by those opposing the three-government structure that such form of Government was against the Articles of the Union which is the legal basis for the Union between Tanganyika and Zanzibar. Hence, the endorsement of three-government structure would pose a threat to the Union.\footnote{Shivji, Issa “Utatanishi na Ukimya katika Rasimu ya Katiba Mpya.” Valedictory Lecture on the occasion of formal retirement from the Mwalimu Julius Nyerere Professorial Chair in Pan-African Studies at the University of Dar es Salaam, on June 21, 2013.} It was also argued on behalf of this group that the expense of running three-governments would be exorbitant given that the cost of running two Governments is already prohibitive. Chama cha Mapinduzi (CCM), being the pioneer of this position, argued that the three-government structure places all the resources into the respective governments, leaving the Union Government with no resources of its own hence making the latter entirely dependent on the goodwill of the respective governments. A point was made that the Union Government will not only be dependent but also alienated from the people because in addition to losing control over resources, it will not be directly responsible over matters which have a direct impact on people’s daily life such as education, health, water, agriculture and infrastructure. Concerns were also raised over the ability of the Government of Zanzibar to meet its financial contribution to the Union Government compared to that of Tanzania Mainland.\footnote{Chama cha Mapinduzi. Ufashaani kuhusu Rasimu ya Katiba ya Jamburi ya Muungano wa Tanzania kwa Wanachama na Viongozi wa CCM, 2013, pp. 11-13.}

Those in support of the three-government structure argued that the Draft Constitution did not introduce a new structure as the Government of Tanzania Mainland (Tanganyika) does exist in the current structure. What the Draft Constitution did was to acknowledge the existence of this government which has over the past 50 years lived
under a concealed identity in what has been dubbed as ‘wearing a coat of the Union Government’. The question of costs and the ability of Zanzibar to meet its fiscal obligation were also dismissed with statistics being given by the Tanzania Revenue Authority (TRA) to substantiate the argument that the running of three Governments will not be as exorbitant. The point was made that the three-structure addresses several discontents and provides solutions for recurrent union related problems, as it grants the respective governments autonomy on matters which were highly contested. The recognition of Tanzania Mainland as a State with equal status with Zanzibar also addresses the outcry by the people of Tanzania Mainland that Zanzibar was enjoying more rights as it has autonomy over many issues and has her Government structure is recognised and acknowledged, which is not the same for Mainland Tanzania.

The issues of independent candidacy, tenure of MPs, the right of voters to recall their representatives and the disqualification of MPs from holding the office of the Speaker and that of ministers, were also dominant, particularly in forums organised by political parties. Some of the political parties and politicians tried to push their agenda though members of the CRC -supervised fora by doctoring the contributions and providing instructions on what was to be said or asked during the fora. This reaction was not least expected because of its impact on political parties and individual MPs. Some of the proposals touched directly and indirectly on the personal, economic, political and social interests of individual MPs. It would have been very naïve to expect political parties and MPs to support these proposals. Other issues which arose include provisions on citizenship, with recommendations being made that the new Constitution should allow dual nationality to enable Tanzanians in the diaspora acquire nationality of their host states without necessarily losing their Tanzanian citizenship. It was also recommended that the Draft Constitution should state clearly the geographical boundaries of the respective governments, and that the office of the Registrar of Political Parties should be independent from the Electoral Commission. There were also proposals that the Draft Constitution should clearly assert its supremacy over the constitutions of the respective states.
The Second Draft of the Constitution of the United Republic of Tanzania, 2013

The Second Draft of the Constitution, together with the report of the Commission was submitted to the President of the Union and that of Zanzibar on the December 30, 2013. At the writing of this chapter, the Draft was waiting to be published in the Government Gazette pursuant to Section 20 (2) of the Constitutional Review Act, Cap. 83.

The Second Draft is slightly longer than the First. It has a total of 271 Articles, an addition of 31 Articles to the First Draft Constitution. The addition of the Articles notwithstanding, the structure has remained almost the same. Only one chapter, chapter 17, on the transitional and consequential provisions, has been added. As regards the contents, the impression from a quick scan of the Second Draft is that there are modest additions and modifications on the chapters, sections and individual articles. For example, the word ‘Mainland Tanzania’ has been substituted with the name Tanganyika, undoubtedly to give recognition to the original name of the territory currently described as Mainland Tanzania. There is also an emphasis on the need of State organs to conduct themselves in a manner that respects, promotes and protects human dignity and rights of the people and to adhere to the principles of democracy, good governance and rule of law (Article 7). Unlike the First, the Second Draft highlights the supremacy of the Constitution (Article 8). It also has comprehensive provisions on protection and better management and utilisation of natural resources so that every citizen can benefit from these resources. Moreover, it introduces the Office of Senior Minister with responsibilities relatively similar to that of the Prime Minister in the current Constitution. The incumbent shall have the responsibility of supervision and execution of the day-to-day functions and affairs of the Government of the United Republic (Article 100). As regards the composition of Parliament, the Second Draft provides the numerical proportion of representation of the respective states in the Parliament. It proposes that 50 out of the 70 MPs directly elected from the constituencies should come from Tanganyika and 20 from Zanzibar (Article 120). It also proposes to restore the current minimum age (21 years) for MPs. Under the new Draft, an MP who willingly leaves his/her political party will lose his/her seat as MP

269 See the Second Draft of the Constitution of the United Republic of Tanzania, 2013, Articles 7(2) (d) and (i); 10 (c ) (ix) and 51(1) and(2).
and another person from that respective party will take over the seat (Article 128). Article 198 establishes the office of the Registrar of political parties, a position which in the First Draft was placed under the Electoral Commission.

It is imperative to note that most of the issues which were dominant in the constitutional fora, such as the three-government structure, the modest legislature and the cabinet and participation of independent candidates in elections have been sustained, notably because the majority of the citizens want it so. According to the Chairman of the CRC, members of the public would prefer to have their mandate over their representatives, including the right of voters to recall their MPs, clearly stated in the Constitution. They were also consistent that ministers should not be MPs, there should be a term limit for MPs and that the Speaker and Deputy Speaker should not be drawn from amongst MPs or senior political party leadership. On the three-government structure, Justice Warioba observed that, it has been sustained because the majority of the people are in support of the three Governments. It is, however, to be seen if these proposals will be sustained in the next two phases of this process, namely; the Constituent Assembly, scheduled to start in February 2014 and the Referendum which is also likely to be conducted in 2014.270

Respect, Promotion and Protection of Human Rights and Fundamental Freedoms

Human rights are inherent to all human beings whatever their nationality, place of residence, sex, national or ethnic origin, colour, religion, language or any other status. They are universal and inalienable, interdependent and indivisible and are as well equal and non-discriminatory.271 Human rights are not established but are normally expressed and guaranteed


by law. International law possesses fundamental sources of human rights such as treaties, customary international law, general principles of law and others. National law as well provides for human rights usually in the Bill of Rights contained in the national constitutions and other law enactments. In Tanzania, as in many other countries, respect, promotion and protection of human rights are important constitutional pillars. The Bill of Rights became part of the Constitution in 1984. Numerous changes have been effected on the Bill of Rights to ensure that it is in tandem with international and regional norms. Mechanisms for enforcement of these rights are also in place to enable those who have suffered human rights violations to get redress for the wrongs they have suffered. Generally, there have been notable developments since the Bill of Rights was incorporated into Tanzania’s Constitution. However, this is not to say that these rights are respected and protected to the fullest. The actual enjoyment of some of these rights has remained a myth. There are numerous violations of these rights by both state and non-state actors. When observing the annual state of constitutionalism in Tanzania one must cast a keen eye on the adherence of these constitutional pillars and in particular, the actual enjoyment of these rights. This report looks at such adherence in specific aspects of a select number of human rights.

The Right to Life: Death Penalty, Extrajudicial Killings and Mob Violence

Article 14 of the Constitution of Tanzania recognises the right to life as one of the fundamental rights and freedoms. It should, however, be noted from the outset that the safeguard accorded to this right, which has been regarded as the most important of all human rights and a foundation for other rights, is not absolute. Its enjoyment and protection is subject to the laws. Interestingly, two consequences arise from this provision. One, no human life can be taken unless the law so provides and it is so ordered by a competent authority, here being the Judiciary. Secondly, human life can be lawfully taken where it is so sanctioned by law.

272 Article 14 of the Constitution provides the right to live and protection of life in accordance with the law. This means if the law sanctions the taking of life then a person’s life will be taken without query.
The claw back clause in this provision has been used to justify the retention in Tanzania’s statute books of the death penalty, a sentence which has been described as the most barbaric, inhuman and brutal mode of punishment. The death penalty is imposed on capital offences: murder and treason. Section 26 of the Penal Code provides for the death penalty as the mandatory sentence for persons convicted of murder, leaving the courts with no choice of an alternative sentence to impose. The only exception is where the convict is a pregnant woman or a minor.273

The execution of this sentence has nonetheless not taken place since 1994. This has placed Tanzania among the defacto abolitionist countries, i.e. countries that retain the death penalty in their statute books but have not executed it in the past ten years.274 The moratorium on execution, which has turned 19 years, has left hundreds of convicts languishing on death row. In 2002 and 2009 President Benjamin Mkapa pardoned 100 and 75 condemned prisoners respectively by commuting their penalties to life imprisonment. However, the numbers of inmates remain significant. As Tanzania was joining other countries in commemorating the World’s Day against Death Penalty in October 10, 2013, it was reported that there were 364 convicts languishing on death row.275 Some of them have been on death row for several years. The confinement conditions and uncertainty of the execution date inflicts mental suffering on the convicts as they are forced to contemplate being executed from the very moment they are sentenced.

The outcry to have this sentence abolished has not yielded much. No attention was attached to the recommendations made by the Nyalali Commission which found death penalty a barbaric and morally insupportable punishment, thereby strongly recommending

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273 Proviso to Section 197 and under Section 26 of the Penal Code, Cap 16 of Laws of Tanzania.
274 Other countries in this list are Algeria, Benin, Brunei, Burkina Faso, Cameroon, Central African Republic, Congo (Republic of), Eritrea, Ghana, Grenada, Kenya, Laos, Liberia, Madagascar, Malawi, Maldives, Mali, Mauritania, Mongolia, Morocco, Myanmar, Nauru, Niger, Papua New Guinea, Russian Federation, Sierra Leone, South Korea, Sri Lanka, Suriname, Swaziland, Tajikistan, Tanzania, Tonga, Tunisia and Zambia.
its abolition.\textsuperscript{276} The second attempt to have this penalty abolished was through the bold decision of Justice Mwalusanya in the High Court case of \textit{R. v. Mbushuu and Dominick Mnyaroje and Another}\textsuperscript{277} in which he declared the death penalty an inherently cruel, inhuman and degrading form of punishment and therefore violative of the Constitution. This declaration was soon rendered ineffective by the Court of Appeal which, despite sharing the position that the death penalty and the mode of execution used in Tanzania is inherently inhuman, cruel, degrading and offends the right to dignity, declined to declare it unconstitutional, holding that the imposition of death penalty is lawful, not arbitrary and hence constitutional as it is saved by Article 30(2).\textsuperscript{278}

In 2003, the Constitutional Court of Uganda was also called upon to determine the constitutionality of the death penalty in \textit{Susan Kigula and 416 others v. the AG}.\textsuperscript{279} While declining to declare the death penalty and its mode of execution as cruel, inhuman, degrading treatment or punishment and therefore unconstitutional, the Court made the following finding: “[T]he framers of the Constitution were aware of the provisions of Articles 24 and later 44 when they enacted Article 22. ......they could not have permitted a death sentence in one article and prohibited it in another. This means that the right to life is a derogation of a fundamental human right which provides an exception to acts of torture, cruel, inhuman and degrading form of punishment prohibited by article 24 (emphasis added).\textsuperscript{280} However unlike Tanzania’s Court of Appeal, the Constitutional Court of Uganda declared that the superimposition of the mandatory death sentence and the delay to carry out the death beyond three years after the sentence was confirmed by the highest appellate court to be unconstitutional.

\textsuperscript{276} See \textit{Tume ya Rais ya Mfumo wa Chama Kimoja au VyamaVingi vya Siasa}, 1991 (Kitabu cha Tatu), Baadhi ya Sheria Zinazohitaji Kufutwa au Kufanyiwa Marekebisho, pp. 25-27.
\textsuperscript{277} \textit{High Court (Dodoma) Criminal Sessions Case No. 44 of 1991 reported in [1994] 2 LRC 335.}
\textsuperscript{278} \textit{Mbushuu and Dominick Mnyaroje and Kalaisangula v. Republic, Court of Appeal of Tanzania (Dar es Salaam) Appeal No. 142 of 1994 Reported in [1995] 1 LRC 216.}
\textsuperscript{279} \textit{Constitutional Petition No. 6 of 2003.}
\textsuperscript{280} \textit{Art. 22 (1) of the Constitution of Uganda prohibits deprivation of life except where the said deprivation is due to the “execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda”. Article 44 prohibits derogation from particular human rights and freedoms viz. freedom from torture and cruel, inhuman or degrading treatment or punishment; freedom from slavery or servitude; the right to fair hearing and the right to an order of habeas corpus.}
Numerous activities and programmes advocating for abolition of the death penalty are conducted nearly every year but the Government has remained reluctant. The Government on its part has consistently maintained that the retention of the death penalty is in the interest of the general public as it has some deterrence effect. Although the deterrence effect of this sentence has been questioned, the Government holds that the death penalty should not be abolished because members of the public want it to continue. While it may be true that there are some people who are in favour of the continued imposition of death penalty, there is yet to be conducted a recent study/survey of public opinion on the appropriateness of the death penalty. The last survey was conducted by the Law Reform Commission in 2008. The report of the Commission, which was submitted to the Government in April 2009, revealed that majority of the people wanted to have this sentence struck from the statute books. On the basis of this, the Commission made a firm recommendation for the abolishment of the death penalty.281 In a small survey conducted by the Legal and Human Rights Centre in which 1,500 people were interviewed, it was reported that 76 per cent of the people interviewed admitted that the death penalty is not a good punishment.282

On October 10, 2008 three organisations - the Legal and Human Rights Centre, Tanganyika Law Society and the Southern Africa Human Rights Ngo-Network (SAHRiNGON) - Tanzania Chapter - instituted a public interest litigation at the High Court of Tanzania seeking the Court’s declaration of the death penalty as unconstitutional. The case is yet to be determined. Hearing on a preliminary objection raised by the Attorney General has commenced. It is expected that the ruling will be issued before the first half of 2014 ends.

There are also some positive developments on the part of Government. On different occasions the Minister for Justice and Constitutional Affairs, Mathias Chikawe and the Attorney General, Judge Frederick Werema, were reportedly making firm positions in support of the abolition of the death penalty. In an interview with an Independent

Television (ITV) presenter on a Monday programme on September 9, 2013 the minister shared the view that: “[A] punishment is meant to reform a criminal. The death penalty does not reform anyone let alone deter crime as those convicted to die do not get time to contemplate.” Commenting on the hopes lying on the constitutional reform process, he averred that he had hoped that the new Constitution would scrap this sentence but to his surprise, the first Draft of the Constitution failed to do so. As for Judge Werema, he was reported at the Regional Conference on the Abolition or Moratorium on Executing of the Death Penalty held in Kigali, from October 13-14, 2011 as saying: “Death penalty is a barbaric punishment, introduced by barbaric colonialists, for barbaric offences.” Although none of these statements warrants abolition of the death penalty, they are a good gesture.

The second major threat to the right to life in Tanzania is extrajudicial killings. Simply understood, these are killings committed by law enforcement organs, with no prior judgement of a well-constituted court of law affording all the judicial guarantees which are regarded as indispensable. Extrajudicial killings have continued to be amongst the most prevalent human rights violations committed by State organs in the country. In 2011, Tanzania was ranked by the UN Human Rights Council in its Universal Periodic Review Report as amongst ten countries with unprecedented record of extrajudicial killings perpetrated by security forces.\footnote{283} There are also claims that extrajudicial killings claimed a total of 246 lives between 2003 and 2012.\footnote{284} A Bi-Annual report issued by the Legal and Human Rights Centre, covering the period from January to June 2013, revealed that 22 lives were reportedly lost as a result of extrajudicial killings. These deaths occurred in the hands of police, militia men \textit{(sungusungu)} and the Tanzania People’s Defence Force \textit{(TPDF)}. Fifteen of these deaths reportedly occurred at the hands of the police officers.\footnote{285} Some of the deaths occurred during the Mtwara Gas turmoil in May which, apart from causing massive destruction


of property, claimed innocent lives. The excessive use of force by members of the TPDF deployed to calm the situation was reported to have caused several deaths and severe injuries to people. Reports on the number of deaths that occurred during this incident differed substantially, with the Police Force insisting that only three people lost their lives through gunshot wounds while human rights groups and Mtwara residents claimed that at least 12 people died.

There was also an increase of deaths resulting from mob violence. A total of 597 deaths resulting from mob violence were reported in the first half of the year. The victims included individuals suspected of committing very minor offences. For instance, on March 5, 2013, a resident of Chunya District in Mbeya was brutally killed on allegations that he stole empty beer cases. A month prior to this incident, a resident of Mbozi District was brutally stabbed and burned to death on allegations that he had stolen a motorcycle. Yet in another incident of its kind, residents of Kanyama, a village in Magu District, Mwanza brutally murdered Mr Clement Mabina, a former CCM Regional Chairman of Mwanza and the councillor of Kisesa Ward, over a land dispute. He was stoned to death by a crowd that had confronted him, accusing him of grabbing their land. On that fateful day, Mr Mabina allegedly shot dead an 11-year-old boy as he tried to control the mob, an act which allegedly enraged the villagers who started throwing stones at him and beating him using any weapon they could find on the scene until he died. What was most troubling about this incident is that the death of Mr Mabina occurred in one of the villages constituting Kisesa Ward, meaning that he was brutally murdered by the very people he represented in decision-making bodies. Many questions were raised as regards the relationship that Mr Mabina had with his people, the booming tensions between the haves and have-nots, efficiency of land conflict management systems, and most importantly, public ethics and adherence to the rule of law.

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by those in power as this death would not have occurred if the law had been left to take its course.

**Freedom of Religion**

Tanzania is a secular state. The right to the freedom to have conscience, or faith, and choice in matters of religion, including the freedom to change one’s religion or faith is guaranteed under the Constitution of Tanzania and so is the right to propagate religion. Thus people are free to propagate the religion of their choice without any interference by State organs. In the community too, people of different religions have over time maintained strong society ties built through marriages and other social and cultural affinities. Members of the two major religions in the country, Islam and Christianity, have a good record of peaceful co-existence and interactions through marriage and other social activities and it is common in Tanzania to have Muslims and Christians in one family.

However, of recent there have been cases of religious intolerance leading to the loss of innocent lives and massive destruction of properties worth millions of shillings. The perpetrators of these crimes have used religion as a shield in justifying their heinous acts, while also instilling fear on the population and threatening peaceful co-existence among citizens of different religions and thereby shaking the foundation of the peace so proudly bespoken. Places of worship have been burnt or bombed or have received threats of such happenings. Religious leaders have been killed in cold blood with others sustaining severe bodily injuries. The rate of interfaith clashes and tugs-of-war between followers of different faiths having devastating consequences has also grown tremendously.

The year 2013 started with the escalation of the conflict over slaughtering of animals for consumption. This started in May 2012, following the detention of Pastor James Moses by the authorities in Singida for slaughtering animals at a funeral of a follower of the Pentecostal Evangelistic Fellowship of Africa (PEFA) without following Muslim *halal* rituals, which have been traditionally followed

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290. See the Preamble to the URT Constitution, 1977, paragraph 3.
in the country.\textsuperscript{292} As a continuation of this conflict, on February 11, 2013, another clash was reported between Muslim youth and a group of Christians who had on the material date slaughtered a cow and two goats to be sold at the local market at Buseresere in Geita. In reaction, a group of Muslim youth attacked the owner of the butchery where the meat was displayed for sale. A priest of the Tanzania Assemblies of God, Pastor Mathayo Kachili, was beheaded and several other persons were reportedly injured during these clashes.\textsuperscript{293}

Several devastating incidents targeting religious leaders and places of worship were reported throughout 2013. On February 17, 2013, Reverend Evarist Mushi, a member of clergy of the Catholic Church, Minara Miwili Parish, Mji Mkongwe, Zanzibar, was shot dead while going to celebrate mass at St. Joseph Cathedral.\textsuperscript{294} His assailants, unidentified young men on a motorbike, blocked him at the entrance of the church while one of them opened fire and shot the priest in the head three times, leading to his instant death. This incident came only two months after the shooting of another Catholic priest, Father Ambrose Mkenda of the Mpendae Roman Catholic Church, Zanzibar, who was shot dead on Christmas day in 2012 as he approached his residence at Tomondo. In both incidents, nothing was stolen during the attack which indicated that it was freedom of religion in Zanzibar which was at stake. Two days following the death of Reverend Mushi, a church in the name of Pool of Siloam at Kiyangakwasheha in Kusini, Unguja was set on fire.

In another deadly incident on May 5, 2013, this time in Tanzania Mainland, a bomb was thrown at a newly built Roman Catholic Church (Saint Joseph Church) in the suburb of Olasiti, Arusha. The bomb exploded amidst a gathering of about 3,000 people who were attending the church’s inaugural ceremony. The Vatican’s ambassador to Tanzania, Archbishop Francis Padilla and the Archbishop of Arusha, Josepah

\textsuperscript{292} Lyimo Karl, “Playing the Devil’s Advocate Halal Food: Government has Moral Duty to Teach, Explain, Rule”, \textit{Business Times}, April 12, 2013.


\textsuperscript{294} “Mauaji ya Padri Zanzibar, JK Ataka Uchunguzi Ufanyike”, \textit{Mwananchi}, February 18, 2013.
Lebullu who were also in attendance survived this attack which claimed three lives. More than sixty people were reportedly injured in this bomb blast. Two months after this incident, Sheikh Said Juma Makamba of Arumeru, Arusha was badly injured when acid was poured on his face by an unidentified person on July 12, 2013. In a more or less similar incident, Reverend Joseph Magamba of the Roman Catholic Church, Machui Parish, Mjini Magharib in Zanzibar had acid poured on his face, chest and forearms on September 13. As this was happening, a Lutheran Church at Segerea and a Baptist Church at Vingunguti, both in Dar es Salaam, and a Listulation Church at Kisosora, Tanga, were reportedly torched in the period between August and October.

There have been notable efforts from religious leaders in collaboration with the Government to address these challenges and bring the perpetrators of these crimes to book. However, so far, only a few suspects have been arrested; the rest remain at large.

**Freedom of Expression**

The right to freedom of expression is an essential component of democracy. It is through this right that members of any society are able to decide who they are, to speak their minds, to obtain the information they require, and most importantly, to cast their vote, shape Government and hold it to account. It is from this context that the safeguards of this right have been enshrined in several international instruments and national constitutions. In Tanzania, this is one of the constitutional rights found under the Bill of Rights. It is provided for under Article 18 of the Constitution. The enjoyment of this freedom, which encompasses the right to seek, receive and disseminate information, goes hand in hand with media freedom, which is also provided for under Article 18(d).

Although the clawback clause limiting the exercise of this right has been scrapped from this provision, other limitations surrounding

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the practical enjoyment of this right such as bureaucracy in obtaining information, poverty, high levels of ignorance and inefficient information systems, particularly in rural areas, have remained in place. Repressive laws inhibiting media freedom also remain in force. Although there has been a constant outcry for media-friendly laws, laws with draconian provisions inhibiting media freedom such as the Newspapers Act, 1976 and the Broadcasting Services Act, 1993, have remained on the statute books. The Freedom of Information Bill, 2006 and the Media Service Bill, 2007 which were expected to provide a solution by eliminating the repressive provisions and putting in place a conducive environment for the free functioning of the media, failed to meet this expectation. They, too, contained draconian provisions threatening media freedom and as a result they could not be accepted by stakeholders. Attempts by the media fraternity to have a progressive Bill tabled before Parliament for enactment have not been fruitful. Unexpectedly, in November 2013, the Government tabled a Bill in which it proposed to increase the fines imposed on media houses found liable for publishing hate speech from the current fine of 150,000 Shillings to 5,000,000 shillings; a mammoth increase by any standards.300

At present, it is an illusion to expect that media freedom can be enjoyed to its fullest. Media persons have to be careful with what they report, else they could be banned or suspended indefinitely as was the case with Mwanahalisi newspaper which was banned indefinitely in 2012 for allegedly publishing seditious stories.301 In 2013, a similar fate befell two newspapers, Mwananchi and Mtanzania whose production and circulation were suspended for 14 and 90 days, respectively. Just like Mwanahalisi, the two newspapers were suspended for allegedly publishing seditious stories likely to provoke incitement and hostility with the intention of influencing the public to lose confidence in state organs and create disharmony.302 Such actions by the Government, as the Media Council of Tanzania observed, are very unfortunate and

300 The Written Laws Miscellaneous Amendment Bill, 2013.
301 Section 25 of the Newspapers Act empowers the Minister responsible for newspapers to prohibit publication of any newspaper if he/she is of the opinion that it is in the public interest or in the interest of peace and good order so to do.
302 Press Release by the Media Council of Tanzania on the Closure of Two major newspapers, issued by Kajubi Mukajanga on September 30, 2013.
undemocratic and have taken the country decades back in its endeavour to build a democratic society which respects freedom of expression and of the media.\textsuperscript{303}

Acts of violence targeting media reporters and news editors were also reported. In January, Issa Ngumba, a news writer for Radio Kwizera Kakonko in Kigoma, was found dead in a forest far from his home. His death came a few days after he reported a story of a farmer who had eaten the facial flesh of his shepherd boy in Muhange Village, Kakonko, Kigoma. Two months after this incident, Absalom Kibanda, Managing Editor of New Habari Corporation and chairperson of the Tanzania Editors’ Forum (TEF), was attacked by unidentified people at his residence at Mbezi-Beach in Dar es Salaam. Mr Kibanda had some of his teeth and nails plucked out and his left eye pierced with a sharp object during this attack, which also caused him multiple and severe injuries on his head.\textsuperscript{304} The assailants of Kibanda, who lost his eye as a result of this attack, are yet to be brought to book.

These events raise doubt as to whether the media is free as Article 18(d) stipulates. One can hardly talk of total media freedom when media-men and women are uncertain of their physical safety and when the print media cannot freely report all the news that gets to their houses without risking closure. While it is true that if the media is left to operate freely without any form of regulation it may put national peace and tranquillity at risk, such regulation should be proportional and should not impair the freedom of media. In fact, it would be more appropriate to make good use of professional regulatory mechanisms that exist so far by ensuring that integrity and professionalism prevail in the day-to-day work of the news reporters and that of their respective media houses.

**Freedom of Assembly: Excessive Use of Force During Political Assembly**

The year 2013 saw considerable political movements organised by the ruling party and the opposition parties as well. On the part of CCM, the major assembly was the around-the-country meetings with

\textsuperscript{303} Ibid.

their members aimed at strengthening the party, which started in the late second half of the year. Chama cha Demokrasia na Maendeleo (CHADEMA) has had a very busy year going around the country in an operation called ‘movement for change’. They have called their members to assemble and demonstrate a considerable number of times and for various reasons including to discuss the Draft Constitution. Such assemblies are sanctioned by Section 11 of the Political Parties Act, 1992 which allows political parties to organise assemblies anywhere in the United Republic for the purposes of publicising themselves and attracting membership. This provision is commendable as it gives effect to the right to free and peaceful assembly, which is enshrined under Article 20 of the Constitution alongside the right to freedom of association which encompasses the right to form or join associations or organisations formed for the purposes of preserving or furthering one’s interests or any other interests.

The law requires political parties to give notice to the Officer in Charge at Police in the area where the said assembly is to take place. In the past, political parties and other people organising assemblies were required to obtain a permit from the District Commissioner, a requirement which was declared by Justice Lugakingira, in Rev. Christopher Mtikila v. Attorney General to be unconstitutional for its infringement of the constitutional right to peacefully assembly.

It is, however, lawful under the current framework for an officer in charge of police or any police officer above the rank of inspector or any magistrate, to stop or prevent the holding of any assembly or procession, if in the opinion of that officer, the holding of such assembly or procession is imminently likely to cause a breach of peace, or to prejudice public safety or the maintenance of public order. This position, notwithstanding its good intentions, has on some occasions been used in a manner which impairs the ability of people to hold peaceful assemblies. The limitations are most often in terms of short

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305 Section 40 of the Police Force Ordinance, 1953 and Section 11 (1) of the Political Parties Act, 1992.
notice, issued by police officers to suspend assemblies and meetings planned and brought to the notice of police well in advance. In most of these incidents, police officers cite the existence of imminent security threats as a ground for suspension while also employing excessive use of force in the event the orders suspending the meetings or the assemblies are disobeyed.

Excessive use of force by police has of recent become a norm particularly concerning meetings and rallies organised by CHADEMA such as the one in Arusha on January 5, 2011, in Msamvu, Morogoro, August 27, 2012 and in Mufindi, Iringa September 2, 2012. In 2013, the most devastating incident was the deadly bomb blast at Kaloleni playground in Arusha on June 14. This happened as CHADEMA was concluding its campaigns ahead of the ward by-election in Elerai, Kimandolu, Kaloleni and Themi wards scheduled for June 15. Two people died on site, two others later and many others were injured. However, no one is sure of the identity of the bomber to date. A month later, police officers allegedly accidentally fired a tear gas canister that nearly hit Ubungo MP, John Mnyika at a CHADEMA rally held at Sahara grounds, Mabibo, in Dar es Salaam as they tried to disperse CHADEMA members attending the rally which was reportedly declared illegal by police officers at the last minute. In all these incidents, issues related to the credibility of the police force in protecting the citizens and their independence from political influences were put to question.

Key Legislations

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

The Constitutional Review (Amendment) Act, 2013 was enacted during the 12th Meeting of the National Assembly in September 2013. The Act amended certain provisions of the Constitutional Review Act, 2011 (Cap 83). This was the second amendment to this Act. The first amendment was passed on February 10, 2012 under the Constitutional

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Review (Amendment Act), 2012. Among other things, the 2013 amendment sought to underline the procedure for appointment of the Members of the Constituent Assembly other than Members of the National Assembly of the United Republic and members of the House of Representatives of Zanzibar and to provide for dissolution of the Constitutional Review Commission.

It can be recalled that part five of Cap 83, which Act No. 6 amends, proposes establishment of the Constituent Assembly whose mandate is to make provisions of the New Constitution and to make consequential and transitional provisions for the enactment of the said Constitution. The Constituent Assembly was to be constituted by Members of the National Assembly of the United Republic and those of the House of Representatives of Zanzibar and 166 members appointed by the President from non-governmental organisations, faith-based organisations, registered political parties, institutions of higher learning, groups of people with special needs, workers’ associations, associations representing farmers, pastoralists and other groups of persons with common interests. The qualifications and procedure for appointment of the 166 members were not provided for under the Act, a mischief which the amendment sought to cure.

According to this Act, the said groups have to nominate their candidates and submit a list of not less than nine names from which the President shall appoint three persons as members of the Assembly. The Act requires that the list so submitted should indicate the age, gender, experience, qualifications and place of abode of candidates so as to guide the President in his appointment. The Act also provides that the President of the Republic of Tanzania and that of Zanzibar should both agree on the appointment of the 166 members (Section 4(a)). In Section 11 of the Act which amended section 37 of Cap. 83, the Act endorses the dissolution of the Constitutional Commission shortly after submission of the Draft Constitution to the Constituent Assembly.

The passage of this Act during the ninth session of the 12th meeting of the National Assembly on September 6, 2013 was the most

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309 It was amended by Act no 2 of 2012.
310 Cap. 83, section 22 (1).
311 Section 4 (c).
controversial and ugliest event in 2013 and in the country’s law-making history so far, as it was preceded by a tug-of-war between members of the ruling party, CCM and those from the three main opposition parties, CHADEMA, Civic United Front (CUF) and NCCR Mageuzi. This culminated in a walkout by the opposition parties and physical confrontations involving some MPs of these parties and Parliamentary security officials. These events followed an unsuccessful attempt by the opposition parties to have the Bill withdrawn on the grounds that there were no adequate consultations with stakeholders in Zanzibar. Also, the opposition differed with the Government on a number of issues. For instance, they did not agree with the proposal that the President should be an appointing authority for the 166 members of Constituent Assembly. They also suggested an increase of the number of members of the Constituent Assembly, other than those who are already Members of Parliament or the House of Representatives so that the Assembly maintains a national image rather than a partisan character. It was also their plea that the CRC should not be dissolved immediately after the submission of the Draft Constitution so as to give it time to monitor the implementations of the agreed recommendations.

The Bill was debated and passed by legislators from the ruling CCM in the absence of the opposition. As expected, the debate was largely partisan with CCM MPs practically agreeing with all the proposals. Consequently, the Bill was passed without any meaningful input from the legislators. Almost all the contentious clauses, including those which were alleged to have been unlawfully sneaked into the Bill, were passed with literally no modification. The passing of the Bill ignited cries from the opposition parties, academics, the civil society and the general public pleading with the President that he should not sign the Bill. The three opposition parties joined forces by forming an alliance to campaign against the Bill. A tripartite statement was signed by the national chairperson of the three opposition parties in which they clarified the resentment expressed by opposition legislators which culminated in the walkout in Dodoma. They also threatened to conduct public rallies all over the country to clarify their resentments with a view to getting public support.312 Rallies in protest of the Bill were conducted

in Zanzibar and Dar es Salaam. As part of their strategy, they declared October 10, 2013 as a civil disobedience day. This plan did not, however, materialise as it was suspended indefinitely on October 9 to give room for discussion with the President, who had prior to this date invited the leaders of these parties for a talk on October 15, 2013. It was this talk which culminated in further amendments to the Act.

The Constitution Review (Amendment No. 2) Act, 2013
The Constitution Review (Amendment No. 2) Act, 2013 was basically passed to give a legal face to what was agreed on during the talk between the President and the opposition. To catch up with time, the Bill for the enactment of this Act was tabled under a certificate of urgency during the 13th meeting of the National Assembly which started on October 29, 2013 in Dodoma, only a month after the enactment of the Constitution Review (Amendment) Act, 2013. The Bill addressed itself to the two contentious issues, viz: the composition of the Constituent Assembly and the position of the CRC after submission of its report. Unlike its predecessor, this Act increased the numbers of members of the Constituent Assembly elected by the President from 166 to 201, an addition of 35 to the old list. These, according to the Act, were to be drawn from NGOs (20), faith-based organisations (20), fully registered political parties (42), higher learning institutions (20), people with special needs (20), trade unions (19), associations of livestock keepers (10), fisheries associations (10), agricultural associations (20) and 20 others from any other groups of people. This time again, MPs from the opposition, mainly CHADEMA, unsuccessfully pushed for inclusion of members of the CRC in the Constitutional Assembly.

Key Judicial Decisions

*Tanganyika Law Society, the Legal and Human Rights Centre and Reverend Christopher Mtikila v. The United Republic of Tanzania*

This case has its origin in the Political Parties Act, 1992 and the amendments effected to Articles 39, 67 and 77 by the Eighth Constitutional Amendment Act, 1992 through which the requirement

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313 African Court of Human and People’s Rights Applications 009 and 011/2011 (Judgement delivered on June 14, 2013).
of political affiliation for persons vying for Presidential, Parliamentary and Local Government elections was introduced. These provisions literally barred independent candidates from contesting for Presidential, Parliamentary and Local Government elections. The constitutionality of these provisions was successfully challenged by Rev. Mtikila in the High Court of Tanzania in Rev Christopher Mtikila v. The Attorney General the Judgement of which was delivered on October 24, 1994. In this judgement, the High Court, presided over by Justice Lugankinkingira held that: ‘......it shall be lawful for independent candidates, along with candidates sponsored by political parties, to contest for presidential, Parliamentary and local council elections.’

In December 1994, the National Assembly passed the eleventh amendments to the Constitution negating the decision of the High Court which allowed independent candidates to contest. In contest to these amendments in 2005, Rev. Mtikila instituted a fresh petition in the High Court challenging the new amendments. This time again, the Court held in his favour in a judgement delivered on May 5, 2006. Aggrieved by the decision of the High Court, the Government lodged an appeal with the Court of Appeal of Tanzania, a decision which triggered the application to the African Court on Human and People's Rights. The judgement of the Court, which raised serious criticisms, observed that the issue of independent candidacy is political and not legal and therefore should be left to Parliament which has the preserve over the mandate of amending Constitutional provisions as opposed to the courts, which do not have such jurisdiction. The court further observed that, interrogation of this issue by the courts would amount to a direct violation of the principle of separation of powers. It was this decision which ignited the application to the African court.

In their prayers, the applicants requested the court to question the validity of the eleventh amendments to the Constitution through which the bar for independent candidature was entrenched in the Constitution;

314 Civil Case No. 5 of 1993 (“Civil Case No. 5 of 1993”).
317 Ibid.
and to make a declaration that Tanzania is in violation of Articles 2, 3(2), 10 and 13(1) of the African Charter on Human and People's Rights and Articles 3 and 25 of the International Covenant on Civil and Political Rights (ICCPR). The court was requested to order Tanzania to put in place the necessary constitutional, legislative and other measures to guarantee the rights provided for under Articles 2 and 13(1) of the African Charter and Articles 3 and 25 of the ICCPR.

Several arguments were raised from both parties. On the part of the applicants it was contended that the Judgement of the Tanzanian Court of Appeal Articles 39, 47, 67 and 77 of the Constitution of the United Republic of Tanzania 1977, and the Local Authorities (Election) Act No. 7 of 2002, which collectively require political sponsorship for Presidential, Parliamentary and Local Government election candidates is discriminatory and violates the right to freedom of association and the right to participate in public or government affairs in one’s country. The government on its part argued that the prohibition of independent candidates is not discriminatory as it is not targeted at any particular individuals but applies equally to all Tanzanians. The government further argued that the prohibition is a way of avoiding absolute and uncontrolled liberty, which would lead to anarchy and disorder. It also contended that the prohibition is necessary for good governance and unity and that it is necessary for national security, defence, public order, public peace and morality.

Having considered different submissions made by the parties, and precedents from different domestic, regional and international judicial bodies, the court found Tanzania to be in violation of the Articles 2, 3(2), 10 and 13(1) of the Charter. The court held that the requirement that only persons affiliated or sponsored by political parties should participate in Presidential, Parliamentary or Local Government elections prevents Tanzanians from freely participating in the Government of their Country directly or through freely chosen representatives, and therefore violates article 13(1) of the Charter which provides inter alia that: “Every citizen shall have the right to participate freely in the
Government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.”

The court observed that:

In view of the patently clear terms of Article 13(1) of the Charter, which gives to the citizen the option of participating in the governance of her country directly or through representatives, a requirement that a candidate must belong to a political party before she is enabled to participate in the governance of Tanzania surely derogates from the rights enshrined in Article 13 (1) of the Charter. [emphasis added]

Dismissing the argument raised on the behalf of the government that the enjoyment of the right to political participation as provided for under Article 13 is not absolute for it must be in accordance with national laws, the Court held that while it is true that this Article is not absolute, the limitations imposed by national legislation or regulations may not negate the clearly expressed provisions of the Charter. In other words, they should not nullify the very rights and liberties they are to regulate. Rather, the limitations so imposed by a Member State on the enjoyment of the rights provided under the Charter should be in accordance with Article 27(2) of the Charter, that is, they should be aimed at protecting the rights of others, collective security, morality and common interest. Also, the limitations so imposed should be of “law of general application” and “must be proportionate to the legitimate aim pursued”.

The Court cited with approval the United Nation’s Human Rights Committee’s General Comment No. 25 on the right to participate in public affairs, voting rights and the right of equal access to public service as provided for under Article 25 of the ICCPR which in paragraph 17 it states inter alia that:

The right of persons to stand for election should not be limited unreasonably by requiring candidates to be members of parties or of specific parties. If a candidate is required to have a minimum number of supporters for nomination this requirement should be reasonable and not act as a barrier to candidacy. Without prejudice to paragraph (1) of Article 5 of the Covenant, political opinion may not be used as a ground to deprive any person of the right to stand for election.
The Court further held that, the requirement that individuals belong to
and be sponsored by a political party in seeking election in the Presidential,
Parliamentary and Local Government election was in violation of
Article 10 of the Charter as it compelled persons wishing to participate
in these elections to join or form an association before seeking these
elective positions. Moreover, the court held that Tanzania’s amendment
seeking to preclude independent candidates from being elected into
these offices violated the country’s obligations under Article 2 (non-
discrimination) and Article 3(2) (equal protection), which recognise that
each individual is entitled to the freedoms and equal protection without
distinction of any kind, including political affiliation. Consequently, the
Court directed Tanzania to take constitutional, legislative and all other
necessary measures to remedy the violations.

This decision was received with excitement by many, given that for
many years the outcry to have independent candidates allowed to stand
in elections was suppressed by the authorities, including the country’s
highest judicial organ. The timing of the decision was equally an
important factor as it coincided with the First Draft of the Constitution
which also recommended that independent candidacy should be
allowed. The decision, therefore, provides another ground to sustain
the provision on independent candidacy in the Draft Constitution.
Generally, the decision has attracted much attention from within
Tanzania and in other countries in the continent and beyond due to
the precedent it establishes regarding the exercise of political and civil
rights in Tanzania as well as in other countries in Africa and also for
being the first substantive decision to be issued by the African Court of
Human Rights since its establishment in 1998.

This was an appeal originating from the High Court’s decision in
Zakaria Kamwela and 126 Others v. The Minister for Education and Vocational
Training and Another in which the petitioners, all students belonging to
a Christian religious sect known as Jehovah’s Witnesses, requested the
court to interrogate the validity of a circular issued on July 6, 1998,
by the Ministry of Education and Vocational Training, which allegedly
violated the right to freedom of religion by obliging the Appellants
(primary and secondary school students) to sing the National Anthem,
contrary to their trained religious conscience. Some of these students were expelled from school and others were subjected to disciplinary measures in their schools because they refused to sing the national anthem which according to them has words that contradict their religious conscience. The petition to the High Court was filed following failure to have the expelled students reinstated in their respective schools. In their unsuccessful petition to the High Court, the petitioners sought several reliefs including a declaration that the Circular contravened their right to freedom of religion under Article 19(1) of the Constitution. The majority judgement found no infringement while the dissenting opinion of Judge Shangwa opined that forcing the appellants to sing the National Anthem contrary to their religious beliefs was an infringement of Article 19(1).

The Court of Appeal raised two pertinent issues. In the first issue, it interrogated whether the Appellants were prima facie entitled to the enjoyment and guarantee of the right to freedom of religion enshrined in Article 19(1) of the Constitution. In the second issue, the court interrogated the two important things: the validity of the Circular at issue, Waraka wa Elimu Na. 4 wa Mwaka 1998 titled: “Nyimbo zinazojenga Hisia za Kitaif” which was issued by the Commissioner pursuant to Section 60 of the Education Act, (Act No. 25 of 1978); and whether the said circular infringed the Appellants’ right to freedom of religion under Article 19(1).

It was not in dispute that the Appellants were faithful Jehovah’s Witnesses and that their refusal to sing the National Anthem was based on the fact that it was against their Bible trained Conscience. The main question was whether in their refusal to sing the National Anthem they were protected under Article 19(1) of the Constitution. In answering this question the Court used the test of sincerity rather than validity of belief. The Court observed the Appellants’ sincerity and conscientiousness in that they were prepared to suffer illiteracy and others to forfeit their primary education compulsory under Section 35(1) of the National Education Act (Cap 358 R.E. 2002) rather than yield to the compulsion of singing the National Anthem against their
genuine and conscientiously held religious conviction. The Court observed that the Appellants were more than entitled to seek refuge under Article 19(1) and to enjoy the right to freedom of conscience and religion guaranteed under this Article.

In answering the second issue, the Court significantly noted that under Section 60 of the Education Act, the minister may make laws to prescribe the conditions of expulsion or exclusion from schools of pupils on the grounds of age, discipline or health and to provide for and control the administration of corporal punishment in schools. He can also delegate these powers to the Commissioner, but in the present case, there was no evidence that the Minister lawfully delegated these powers to the Commissioner. In the absence of such evidence, the Court declared that the Circular did not have the binding force of law, and consequently, it could not have been the legal basis for the imposition of any disciplinary action against the appellants nor could it by any measure override the Appellant’s entitlement to the right to freedom of religion guaranteed under Article 19(1). The Court concluded that the Circular was invalid and interfered with and violated their right to freedom of religion.

Apart from asserting the importance of protection of freedom of religion, this Judgement reinforces the need of public authorities to whom legislative powers are conferred to observe and comply strictly with the rules governing delegation of legislative powers to executive authorities.

**Other Relevant Developments**

**The Booming Land Conflicts**

Tanzania has over the years experienced conflicts related to the ownership and utilisation of land. New aspects of the conflicts have emerged following the changes taking place in the country and the globe at large. They add up to the old land conflicts between the Government on one hand and citizens whose land was converted into ranches and farms owned by state corporations in the late 1960s, as well as conflicts between holders of granted right of occupancy and the local
communities holding land under customary laws, or what is known as the deemed right of occupancy which is regarded as inferior to granted right of occupancy. There are now more actors and different forms of these conflicts, some of them being a result of economic liberation policies which have seen an influx of investors grabbing land for commercial farming, ranching and mining activities. Allocation of such land has brought about serious tensions between the local communities and the respective investors for either lack of adequate consultation or forceful eviction of communities without compensation. The absence of a proper land use plan with fair allocation of farming and grazing land has also contributed immensely to these conflicts, particularly those involving farmers and pastoralists.

Multiple cases of such conflicts and their ensuing negative effects including loss of life and destruction of property worth millions are reported in several parts of the country. In 2013, the prominent land use conflict between farmers and pastoralists in Mvomero District in Morogoro occupied the headlines of newspapers. The fights between these two groups on September 15, left one person dead and three seriously injured. Also on November 6, six people were killed during these confrontations with many more sustaining severe injuries. Conflicts between the local population and investors, both internal and foreign, due to proliferation of huge pieces of land for investment purposes while locals are left landless, have also increased recently. There are complaints that huge pieces of land which were appropriated with little or no consultation with the local community lie idle while the locals from whom this land was taken have no land for their subsistence farming. One of the major complaints is that most of the land so appropriated has not been developed and the local communities are not allowed any access to the said land. There are also tensions around mining areas, contributed among others by, contamination of air and water sources by mining companies and violent acts by employees of these companies against the local communities.

**Anti-poaching Operation (Operesheni Tokomeza)**

On October 4, 2013 the Government launched an anti-poaching operation in the name of *Operesheni Tokomeza*, in an attempt to address
The challenges posed by poaching activities which have increased at an alarming rate in the national parks, game reserves and conserved areas. The operation came as Tanzania was reported to be among the largest sources of ivory illicitly transported and sold to black markets in China and other places, hence it was necessary to rescue the elephants whose numbers have drastically decreased. *Operesheni Tokomeza* sought to curb poaching activities within and outside game areas and national parks, to identify poachers, apprehend them and bring them in the course of justice, breaking all poaching networks as well as confiscating all properties of poachers obtained through poaching activities.\(^{318}\) The operation recorded significant success. Within a month of its launch, 952 suspects were arrested in connection with poaching and illegal ivory trade in different parts of the country. It was also reported that the operation had during the same period saved 104 elephant tusks, expounded 13 military fire arms, 18 ordinary guns and 1,458 rounds of ammunition. This was, undoubtedly, a great achievement.

However, while this success was reported, there were alarms over grave violation of human rights in the form of murder, torture, severe beating, rape and sexual abuse, committed by security forces deployed into the operation. These transcended into a special investigation by the Parliamentary Committee on Natural Resources and Environment and the suspension of the operation pending the investigation by the Parliamentary Committee. The report of this committee and its ensuing consequences touched directly on constitutional principles, thus warranting an examination by this work. First, the report exposed grave human rights violations committed by security forces. It was reported that some of the suspected poachers were brutally beaten, gang raped and others forced to have sex with members of their families. Corruption was also reported to have been rampant, whereby suspected poachers were forced to pay large amounts of money to the security officers to avoid arrest. Those who failed to pay such amounts were seriously tortured, with some sustaining death as a result of severe bodily injuries.

\(^{318}\) See, *Taaarifa Ya Kamati Ya Kudumu ya Bunge ya Ardhi, Maliasili Na Mazingira Kuhusu Tathmini ya Matattizo Yaliyotokana na Operesheni Tokomeza* (Report of Parliamentary Standing Committee on Land, Natural Resources and Environment on assessment of issues/problems emanating from the implementation of *Operesheni Tokomeza*) pp. 8-9.
Many were shocked at how the implementation of this operation, which was launched in good faith and for a good cause earning support and applause from many people, went haywire, drawing the wrath of the very people who had commended its establishment. One commentator noted that the implementation of *Operesheni Tokomeza* was carried out so despicably that it is hard to believe that the implementers knew what they were supposed to do or if they did, whether they were sons and daughters of this land, born by mothers and fathers of this country. Of interest to this study, is the extent to which the security forces are oriented on the principles of human rights, rule of law, good governance and natural justice and the need to respect these principles in their day-to-day activities.

The revelation of the committee led to another important constitutional principle as ministers in charge of the ministries directly responsible for this operation: the Ministry for Natural Resources and Tourism (Ambassador Hamis S. Kagasheki); Home Affairs (Dr Emmanuel Nchimbi); Defence (Shamsi Vuai Nahodha) and Livestock and Fisheries Development (David Mathayo David) were called on to take responsibility for the misconduct of the officers under their respective ministries. This was another test on the constitutional principle of ministerial responsibility which has become a nightmare not only in Tanzania but in other African countries as well. This is because ministers find every reason to dismiss calls for their resignation, even where the grounds for resignation are so obvious that they do not require constitutional experts to determine whether or not they form formidable grounds to justify individual or collective responsibility on the part of the minister. As expected, out of the four ministers, only one, Ambassador Hamis Kagasheki, resigned. The other three had to have their appointment annulled by the President. This was one of the rare times where the MPs performed their supervisory role quite seriously. All of them joined forces by putting aside their political differences in the defence of the rights of the citizens they represent. Both the resignation and annulment of their appointment would not have been possible in the absence of unity amongst the MPs.

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Conclusion
The discussion leads to a conclusion that there were notable constitutional developments in Tanzania in the year 2013. The Constitutional Review Process went smoothly. The First Draft of the Constitution and its revised version (the Second Draft) were all issued in 2013. There were also notable legislative and judicial pronouncements which positively impacted on the country’s constitutional development. Nevertheless, there were major challenges, particularly on the protection of human rights and adherence to principles of good governance and rule of law by the state organs. These are in addition to the booming conflicts over land and natural resource which places the country at a risk of serious internal conflicts over resources if not addressed in a timely and efficient manner. All of these appeal for immediate attention. The Constitutional review process partly provides an avenue to deal with some of these issues. In the meantime, the Government and other stakeholders should take every necessary step to address some of these challenges for the wellbeing of the country and that of the people.
References

Cases
Christopher Mtikila v. The Attorney General, High Court of Tanzania at Dar es Salaam, Miscellaneous Civil Cause No. 10 of 2005.
Zakaria Kamwele and 126 Others v. The Minister of Education and Vocational Training and the Attorney General, Civil Appeal No. 3 of 2012.

Books


Introduction
Writing in the issue of August 3-9, 2013 of *The East African* newspaper, columnist Joachim Buwembo posited that ‘… the legal age is finally dawning in Uganda too. Ugandans no longer pick up guns to fight over top jobs. They now trust in the law’. Buwembo was prompted to make this observation following the inundation of Courts in Uganda (especially the Constitutional Court) with a number of cases requiring the court’s intervention. From the number of cases referred to the Constitutional Court in 2013, one can say that the Ugandan political class has come of age by referring political and legal questions to the law

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courts. It would suffice to say that in the days past, political questions were settled through armed conflict, if they were settled at all.

In addition to the national constitutional legal regime, the Partner States of the EAC, of which Uganda is a member, are also required to adhere to the provisions of the EAC Treaty. Apropos constitutional development, the Treaty sets out as its fundamental principles, inter alia, the promotion of “good governance including, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality as well as the recognition, promotion and protection of human and people’s rights in accordance with the African Charter on Human and People’s Rights”. Thus, it can be argued that these principles form the basis of constitutionalism under the EAC Treaty regime.

2013, saw a number of issues touching on the governance of Uganda. This chapter aims at reviewing these issues within the overall constitutional governance of East Africa. It seeks to examine some of the activities and decisions made by the Uganda Government through its organs and institutions that impact on the constitutional development of the country in the year 2013. In this regard, the chapter identifies the following issues as meriting special attention: disagreements between the institutions of Parliament and the Executive; talk of the possibility of a military takeover in Uganda; the fleeing into exile of the former Coordinator of Intelligence Services, General David Sejusa; the closure of media houses; the struggle for the management of Kampala City; enforcing discipline within political parties; the reappointment of the retired Justice Benjamin Odoki as Chief Justice; public order management; fighting corruption; relations between the Central Government and Buganda Kingdom; and Uganda’s intervention in South Sudan.

Conceptual Context
Constitutionalism is an idea often associated with the political theories of English philosopher John Locke, who opined that a government can and should be limited in its powers by a fundamental law or set of laws, beyond the reach of an individual government to amend them

321 Article 6(d).
and that a government’s authority depends on its observing these limitations. Constitutionalism means that political authority is to be exercised according to the law; that state and civic institutions, executive and legislative powers, have their source in a Constitution which is to be obeyed and not departed from at the whim of the government of the day; in short government of law and not of men. Elsewhere, constitutionalism has also been taken to mean a set of principles in the governance of a polity: effective restraints upon the powers of those who govern, the guarantee of individual fundamental rights (ranging from freedom of speech and expression to the right to privacy), the existence of an independent judiciary to enforce these rights, genuine periodic elections by universal suffrage and the enshrinement of the rule of law as reflected in the absence of arbitrariness and the equality of all before the law. In application, constitutionalism penetrates the civic culture and collective consciousness of rulers and the ruled alike. It supposes a democratic approach, an attitude of ‘give and take’ in public affairs, readiness to accept the limitation of power, a sense of accountability and readiness to do justice.

There are three central components of constitutionalism: the observance of human rights, separation of powers in government and restrictions that derive from international law and its obligations on the state. The two ideas that form the core of constitutionalism are: the limitation of the state versus society in form of respect for a set of human rights covering not only civic rights but also economic and cultural rights and the implementation of separation of powers within the state. While the first principle is an external one i.e., confining state

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powers in relation to civil society, the second principle is an internal one i.e., making sure that no state body, organ or person can prevail within the state.

Through Constitutions, Governments express their commitment to creating an enabling environment for the effective participation in the affairs of nations by the people. Changes within the government or policies that have a bearing on the rules as contained in the Constitution for better or worse, [is what is termed as] constitutional development.\footnote{Ruhangisa J.E., \textit{The State of Constitutionalism}, p. 106.} In 2013, Uganda was not short of constitutional issues. In the sections that follow, these issues are discussed in detail.

\textbf{Governance Issues}

\textbf{Parliament Versus Executive}

The year 2013 began with two arms of government – parliament and executive – in locked horns. This was as a result of the sudden death of the Butaleja District Woman Member of Parliament, Cerina Nebanda, in December 2012. A section of Members of Parliament wanted the institution of Parliament recalled to debate the death of the MP. In the aftermath of the death, some Members of Parliament suspected foul play and wanted the institution of Parliament to conduct an independent inquiry, which the government refused. This led to a standoff between the Executive and Parliament. Some Members of Parliament, supported by the family of the late MP who wanted an independent inquiry, were arrested. A petition was drafted seeking to recall Parliament from recess to debate \textit{inter alia} the issue of the arrest of the MPs. Article 95(5) of the 1995 Constitution of Uganda states that “Notwithstanding any other provision of this Article, at least one-third of all members of Parliament, may in writing signed by them, request a meeting of Parliament; and the Speaker shall summon Parliament to meet within 21 days after receipt of the request.” In accordance with this provision, a section of Members of Parliament started collecting signatures for Parliament’s recall. At least 125 Members of Parliament were needed to recall the House. When the petitioners finally handed their petition to the Speaker, 126 Members of Parliament had signed to recall the House.\footnote{Mugerwa Yasin and Nalugo Mercy, \textit{Showdown looms as MPs hand in petition to recall Parliament}, \textit{Daily Monitor}, January 8, 2013, p. 4.}
Before the petition was submitted to her office, President Yoweri Museveni held a meeting with the Speaker of Parliament, Rebecca Kadaga, and demanded that the petition be blocked.\textsuperscript{330} He argued that the Police should be allowed to investigate the death of Nebanda, and swore that Parliament would be recalled “over his dead body”.\textsuperscript{331} He told those behind the petition that should they defy him and proceed they should be ready for “severe repercussions” and that they should not say he did not warn them. Speculation is rife as to why the President did not want Parliament to meet. But it is believed he feared Parliament could use the opportunity to pass a vote of no confidence in his government.

Having heard Museveni’s warning, a section of Members of Parliament started arguing that the recall of Parliament was not necessary.\textsuperscript{332} They saw the petition as trying to create a crisis in the doctrine of the separation of powers. Others who had signed the petition decided to withdraw their signatures.\textsuperscript{333} In the event, ten Members of Parliament wrote to the Speaker withdrawing their signatures.\textsuperscript{334} The withdrawal of the signatures by these members meant that the petitioners did not have the required number under the Constitution to recall the House. In the end, the petition failed to materialise.

The failure of the recall of Parliament was in no doubt as a result of the executive branch of government exerting pressure on some Members of Parliament. In the end, the often-touted independence of Parliament was thrown in doubt.

\textsuperscript{331} \textit{Ibid}, p. 4.
\textsuperscript{333} Mulondo Moses and Namutebi Joyce, “MPs withdraw from recall petition”, \textit{New Vision}, January 9, 2013, pp. 1 and 3.
\textsuperscript{334} These were named as: Lyndah Timbigamba (Kyenjojo), Edward Sempala Mbuga (Nakaseke South), Beatrice Barumba Rusaniya (Kiruhura), Onyango Kakoba (Buikwe North), Godfrey Lubega (Kasanda North), Sarah Nakawunde (Mpiigi), Fred Ebil (Kole), John Mulimba (Samia-Bugwe) and Yahaya Gudoi (Bunghokho North). Some members like Ebil alleged that his signature had been forged, while others like Timbigamba said that her name had been put on the list of the petitioners without her consent.
Return of Military Rule?
While addressing a Committee of Parliament in January 2013, the Minister of Defence, Crispus Kiyonga, posited that, “if the military feels the country is in the hands of wrong politicians, some officers may be forced to intervene in the name of refocusing the country’s future”. This was interpreted to mean that the minister was not ruling out the possibility of a military coup d’etat in Uganda. Subsequently, while addressing a retreat of the ruling National Resistance Movement-Organisation (NRM-O) party members, President Yoweri Museveni echoed Kiyonga’s views. He is reported to have warned the members that if the confusion in Parliament persisted, the military would not allow it. The then Chief of Defence Forces, General Aronda Nyakairima, also weighed in to observe that the army would not allow bad politics to send Uganda back into turmoil. Other elements of the political class also weighed in in support or against the possibility of a military coup in Uganda. Senior Army Officer and Presidential Advisor, Brigadier Kasirye Gwanga, denounced talk of a possible military takeover and argued that the problems of the 21st Century need brains and not guns and bullets. The Minister of Justice and Constitutional Affairs, Kahinda Otafiire, observed that the duty of the army is to defend the country’s territorial integrity and the Constitution and not to hijack power. But a senior NRM ideologue and former Third Deputy Prime Minister, Kirunda Kivejinja, argued that the coup d’etat talk was real.

Talk of the return of the military reminded people of the years gone by. The resulting public uproar caused State House to issue a public

337 *Mwanguhy Charles and Kasasira Risdel, “Aronda says army takeover possible”, Daily Monitor, January 24, 2013, p.6. General Aronda specifically said: “We are going about our business … Stand warned. Stand advised. Should you not change course, other things will be brought into play. Let no one return to the past. We have seen enough, almost 25 years of turmoil.”
statement stating that the President had been ‘misquoted’.\textsuperscript{341} Parliament’s Committee on Defence and Internal Affairs summoned Kiyonga and Nyakairima to explain their comments.\textsuperscript{342} Brenda Nabukenya, the Women Member of Parliament for Luwero District, sued Nyakairima with three counts of treason including contriving a plot, by force of arms to overthrow the Government of Uganda as by law established, contrary to section 23(1) c of the Penal Code Act.\textsuperscript{343} Nabukenya’s court case was eventually thrown out of the Nakawa Magistrates Court on technicalities.

In the end, talk of a military takeover fizzled out, although the spectre of the return of military rule continues to bubble under the surface. This is in view of the fact that talk is rife that Museveni is preparing his son, Brigadier-General Muhoozi Kainerugaba, to succeed him. Nevertheless, the return of military rule would be a serious setback to the constitutional gains that the country has recorded since the enactment of the 1995 Constitution.

**Enforcing Discipline within Political Parties - The Case of the ‘NRM Rebels’**

In 2005, the people of Uganda voted in a referendum to return to a multi-party political dispensation. It should be recalled that when the NRM government came to power in 1986, the operations of political parties were suspended to allow the country heal from its political wounds. The re-instatement of multiparty politics in Uganda came with its own challenges including how the members of the political party should behave within and outside the party. The issue of the NRM rebels was a carry over from the year 2012. At the end of November 2012, the Government/NRM Chief Whip, Justine Kasule Lumumba,

\textsuperscript{341} Njoroge John, “Museveni was misquoted on army take-over talk, State House explains’, \textit{Daily Monitor}, January 30, 2013, p. 4. Lindah Nabusayi, Deputy Press Secretary to the President was quoted as saying: “Excitement and hopefully not anxiety has been generated by sections of the media that was deliberately fed with misleading information that President warned of a military take-over, without putting this statement into the context… Unless those twisting the President’s caution have an agenda, there is no way the son of Kaguta can undo the over 50 years of his struggle to restore this country to sanity and the transformation we are experiencing now.”


wrote to the NRM Secretary General, Amama Mbabazi, forwarding the names of NRM Members of Parliament whom she wanted disciplined for breaching the party’s code of conduct. The targeted members were named as: Mohammed Nsereko (Kampala Central), Vincent Kyamadidi (Rwamara), Barnabas Tinkasimire (Buyaga West), Wilfred Niwagaba (Ndorwa East) and Theodore Ssekikubo (Lwemiyaga). Specifically, the named MPs were generally accused of criticising the party chairman, President Museveni, and taking independent positions in Parliament. The accused MPs argued that what they were being accused of forms part of their legislative role and that their utterances in the House, which are believed to have precipitated the call to order, were privileged and as such protected in law.

When the NRM party Disciplinary Committee summoned the legislators to defend themselves, they declined to attend. In fact, they petitioned the High Court objecting to the disciplinary process and sought a temporary injunction to halt the proceedings of the committee. In its preliminary ruling, the High Court ordered the NRM ‘rebel’ MPs to appear before the party’s national disciplinary committee and give their side of the story. Even in the face of the ruling, the MPs, save for Vincent Kyamadidi, refused to appear before the disciplinary

345 Other charges levelled against specific MPs included: for Nsereko, appearing on several radio talk shows where he allegedly denounced President Museveni and vowed to fight his re-election in 2016; Niwagaba was accused of being a member of a Parliamentary Forum on Oil whose work continues to oppose the party position on oil issues. All ’rebel’ MPs are collectively accused of engaging in formation of cliques/factions and intrigue within the NRM party contrary to Rule 4 (a) of the NRM code of conduct.
committee. In the absence of the accused, the disciplinary committee reached a decision to expel the errant MPs, which was communicated to the highest decision-making organ of the party, the Central Executive Committee (CEC). The CEC thereafter met and decided to adopt the recommendations of the disciplinary committee. The MPs: Nserekoo, Niwagaba, Tinkasimire and Ssekikubo were expelled while Kyamadidi was handed a three-month suspension from the party.\footnote{New Vision, April 15, 2013. See story “NRM throws out rebel MPs” at \url{http://www.newvision.co.ug/news/641657-nrm-throws-out-rebel-mps.html}. Accessed August 20, 2013.} Opinion was divided on the effect of the expelled MPs retaining their seats in Parliament. The NRM Secretary General, Amama Mbabazi, wrote to the Speaker of Parliament seeking to have the parliamentary seats of the members declared vacant.\footnote{Namutebi Joyce and Kiwuuwa Paul, “Rebel MPs must quit Parliament-NRM”, New Vision, April 16, 2013, pp. 1 and 3.} He argued that “Parliament has no room for anonymity … if anyone loses his party sponsorship they (sic) definitely lose their seats in Parliament.”\footnote{Naturinda Sheila, “Expelled NRM MPs to retain their seats”, Daily Monitor, April 16, 2013, pp. 1 and 4.} On the other hand, Hellen Kaweesa, the Spokesperson of Parliament, was of the opinion that “there is no enabling law that compels [Parliament] to expel the MPs expelled from their political parties.”\footnote{Ibid, p. 4.} In the end it was left to the Speaker of Parliament to rule on the matter.

In her landmark ruling delivered on May 2, 2013, the Speaker, citing from the 1995 Uganda Constitution, legal precedents in Uganda and elsewhere in the world declared that the expelled MPs could retain their seats.\footnote{Daily Monitor, May 3, 2013, p. 4. See story “How Kadaga decided MPs’ fate”.} Thereafter, the NRM party, through its Chairman and Secretary General together with two members, petitioned the Constitutional Court impugning the Speaker’s ruling.

The expulsion of MPs with dissenting views from the ruling party set a precedent. The rules governing the operation of the multiparty form of governance are developing in Uganda. The issue of party discipline continues to afflict all the political parties in Uganda. In fact, opposition parties like the Forum for Democratic Change (FDC) welcomed the expulsion of the MPs from the ruling party because it has also been
having problems with enforcing party discipline among its members.\textsuperscript{353} In the Eighth Parliament, two FDC Members of Parliament, Beti Kamya and Alex Onzima, broke ranks with the party on a number of issues and were denounced by the party, although they retained their seats in Parliament.

On September 6, 2013, the Constitutional Court, whilst granting a mandatory injunction, requested by the NRM party lawyers that the expelled MPs should be removed from Parliament, ruled by a majority of 4 to 1 that the expelled MPs should be barred from attending any parliamentary proceedings pending the final conclusion of the case. The court granted a mandatory injunction and ordered the Speaker of Parliament to temporarily restrain the respondents [expelled MPs] from entering Parliament.\textsuperscript{354} However, in a dissenting opinion, Justice Remmy Kasule argued that his colleagues' decision was contrary to the established norms of justice. He opined that “the approach being adopted by the court has the danger of undermining the court's judicial duty to resolve all the issues before it impartially, that is, without being or appearing to be favouring or pre-judging the issues in favour of or to the prejudice of any of the parties, before the court gives its final Judgement”.\textsuperscript{355} The expelled MPs appealed against the ruling in the Supreme Court. On September 11, 2013, the Supreme Court, in a 6 to 1 ruling, ordered for the temporary stay of the orders of the Constitutional Court (barring the expelled MPs from accessing parliament) until it pronounced itself on the MPs application for a stay of execution.\textsuperscript{356} Subsequently, on October 10, 2013, again in a 6 to 1 ruling, the Supreme Court stayed the interim orders of the Constitutional Court to bar the ‘expelled’ MPs from Parliament until their intended appeal in the same court is heard.

\textsuperscript{353} Lule Jeff Andrew and Aber Cynthia, “FDC backs expulsion of indisciplined MPs”, \textit{New Vision}, April 16, 2013, p. 3.
\textsuperscript{354} Kasozi Ephraim, “Expelled NRM legislators petition Supreme Court”, \textit{Sunday Monitor}, September 8, 2013, p. 4.
\textsuperscript{355} \textit{Ibid}.
and determined. The Constitutional Court decided that the expelled MPs were no longer Members of Parliament. In turn, the expelled MPs appealed the decision in the Supreme Court.

The decision of the Supreme Court in this case is eagerly awaited not only by the expelled MPs but also the political parties. Most, if not all, the political parties in Uganda have suffered from lack of internal democracy leading to their splintering into different factions. In the instant case, the expelled MPs were elected by universal adult suffrage in constituencies. If, having expressed dissenting views from those of their parties, they are expelled, this does not augur well for democratic governance of the political parties and the country at large. The variant of this argument is that if persons elected on a particular platform turn around to oppose the positions of the party whose tickets they were elected on, this will result in anarchy in the political parties, which is inimical to good governance and constitutionalism in the country.

The Battle for the Control of Kampala City

In 2008, the government introduced the [Kampala] Capital City Bill seeking to create an administration of the capital controlled by the central government. The origins of the Bill can be found in an amendment to the constitution which decided inter alia to provide parliament with the powers to enact an enabling law for the creation of a governing and administrative body for Kampala Capital City. When it was first introduced, the Bill caused considerable emotional debate, especially from the opposition. It should be remembered that Kampala has always been an opposition stronghold. The Kampala Capital City Act 2010 was passed amidst acrimony in Parliament between the government and members of the opposition. The Act reduces the Lord Mayor’s role to a largely ceremonial political head of the capital and transfers the pragmatic stewardship of Kampala into the hands of an Executive Director appointed by the President. The current Lord Mayor, Erias

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358 Constitution (Amendment) Act No. 2 of 2005.

Lukwago, was elected through universal adult suffrage in February 2011 and the Executive Director, Jennifer Musisi, was appointed by the President in April 2011. Since assuming office, Lukwago and Musisi have been clashing over the management of the city.

In the context of a constitutionalism debate, the issue of the management of Kampala City should be examined from the point of the legal framework that created Kampala Capital City Authority (KCCA). Under the KCCA Act, 2010, Kampala ceased to be a local government in both status and administrative structure with a single vote, single accounting officer and a management team. Whilst the Act provides for an Authority comprising elected politicians (the Lord Mayor and Councillors) as the policy making body, the management team (led by the Executive Director) is appointed by the President on the advice of the Public Service Commission.

Since taking office, the Lord Mayor and the Executive Director have been working at cross-purposes. Because he is popularly elected, the Lord Mayor has argued that he should be the face of the capital city, which is contested by the Executive Director. The Councillors have also become divided between the camps of the Lord Mayor and the Executive Director. Arising out of this situation, a section of the Councillors (17 of them) petitioned the Minister in charge of Kampala seeking removal of the Lord Mayor. In their May 15, 2013 petition, the Councillors raised pertinent issues such as abuse of office,

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360 S 5 Kampala Capital City Act, 2010.
361 S 17 Kampala Capital City Act, 2010.
362 Section 12(1) of the KCCA Act 2010 states that the Lord Mayor may be removed from office by the Authority by resolution supported by not less than two-thirds majority of all the members of the Authority on any of the following grounds- (a) abuse of office; (b) incompetence; (c) misconduct or misbehaviour; … (e) failure to convene two consecutive meetings of the Authority without reasonable cause… Section 12(3) of KCCA 2010 states that purposes of removing the Lord Mayor… a petition in writing signed by no less than one-third of all the members of the Authority shall be submitted to the Minister- (a) stating that the members intend to pass a resolution of the Authority to remove the Lord Mayor… (b) setting out the particulars of the charge supported by the necessary documents, where applicable, on which the conduct of the Lord Mayor… be investigated for the purposes of his or her removal. Section 12(5) states the Minister shall evaluate the petition in consultation with the Attorney General and if satisfied that there are sufficient grounds for doing so, shall, within 21 days after receipt of the petition, constitute a Tribunal consisting of a Judge of the High Court or a person qualified to be appointed a judge of the High Court, as chairperson and two other persons all of whom shall be appointed by the Minister in consultation with the Chief Justice, to investigate the allegations.
incompetence and misconduct as grounds to cause the impeachment of the Lord Mayor. The specific allegations against the Lord Mayor included: engaging in acts of public incitement against payment of city dues; engaging in divisive and inciting acts under the guise of monitoring KCCA programmes; failing to convene ordinary authority meetings to transact business of the Authority; misuse of information to misinform the public, propagating lies against the officers and the institution of the KCCA; and using abusive language during the Authority meetings and in the media where he referred to the Authority members as being narrow minded.

Subsequently, upon receiving the petition, the Minister in Charge of Kampala in June 2013 established a tribunal to investigate the Lord Mayor. The three-person tribunal headed by High Court Judge, Catherine Bamugemereire, was sworn into office by the Principal Judge, Yorokamu Bamwine, on June 10, 2013. Some people, though, have blamed the law that established KCCA for causing the friction between the top leaders of the city. For example, first, it has been pointed out that after providing for so many powers of the Authority in one section, the law rushes to assert that such powers shall only be exercised with approval of the minister responsible for Kampala. Secondly, even though the Lord Mayor is elected by universal adult suffrage, the law by implication seeks to reduce him or her to an employee of the Authority. Thirdly, the law fails – in even one sentence – to describe the Authority as the legislative arm of the city with full legislative powers.

But possibly the law has turned out to be the way it is because of the way it was passed in Parliament. The Bill seems to have been rushed through Parliament without much scrutiny. According to one Member of Parliament, who was present in Parliament when the KCCA Act 2010 was passed, “by the time the [Kampala Capital City] Bill was passed, it was passed,

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Parliament was almost empty [as MPs] were preparing for elections. It was passed a few hours to the nomination of candidates. In the end, the legal framework has been declared as leaving a lot to be desired.

**Lukwago’s Impeachment and Interim Injunction**

On November 14, 2013, the tribunal handed over to the Minister in charge of Kampala, Frank Tumwebaze, its 211-page report *inter alia* finding the Lord Mayor guilty of abuse of office, incompetence and misconduct/misbehavior warranting his removal. On November 25, 2013, Minister Tumwebaze convened a KCCA meeting at which Mayor Lukwago was impeached. Twenty-nine councilors voted in favour of impeaching while 3 were against. Earlier on, Councillors representing the four professional bodies to KCCA had been elected ensuring the Authority’s composition was complete. Just before the impeachment proceedings commenced, Lukwago, who had petitioned the High Court challenging the findings of the Tribunal, secured an injunction stopping the process. The interim order “restrained the Minister in charge of Kampala, his agents and or servants and all persons under his authority, the Councillors of KCCA from convening and proceeding with a meeting at Kampala Capital City Authority to deliberate on the report of the Tribunal and vote for the removal of the Applicant from the office of Lord Mayor of Kampala pursuant to a petition of Councillors until the final determination of miscellaneous application 445 of 2013”. However, Minister Tumwebaze (the Minister in Charge of Kampala) just ignored the court order. Justice Yasin Nyanzi, who issued the injunction (through High

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366 Semogerere, “City Authority law recipe for conflict”.
367 See *The Republic of Uganda, Report of the KCC Tribunal (2013)* constituted to Investigate allegations against the Lord Mayor of Kampala Capital City Authority pursuant to a Petition of Councillors of the Kampala Capital City Authority, Kampala, June-November 2013, p. 23. The report can also be found in full at http://www.scribd.com/doc/184175543/Report-of-the-KCCA-Tribunal.
370 Ibid.
Court Assistant Registrar Fred Waninda) later affirmed that he indeed had stayed the impeachment proceedings. Lukwago’s lawyer, while attempting to serve the injunction on the minister and KCCA, was arrested and beaten by police, as was one councillor who wanted to serve the minister. Since then, Lukwago has been barred from accessing his office or his benefits. The Attorney General meanwhile affirmed that the impeachment of Lukwago was legal and should thus stand. This is in total disregard to what the High Court ordered. A standoff has thus ensued between the office of the Attorney General and the High Court, whereupon the former has sought to have Justice Nyanzi recuse himself from the case alleging bias. In his ruling on the matter, the judge lashed out at the Attorney General as being an “embarrassment as the Head of the Bar” and “engulfed in group legal darkness”. The Attorney General appealed the Judge’s ruling in the Constitutional Court, which was yet to decide the matter at the time of writing this paper. Meanwhile,


377 Ibid.
an attempt by a section of opposition Members of Parliament to censure Minister Tumwebaze for his role in the Lukwago impeachment saga failed to materialise.378

The purported impeachment of Lord Mayor Lukwago resulted in the executive and judiciary arms of governmentlocking horns. Whilst all the parties to the saga have sought the intervention of the courts, in some instances the decisions of courts have been ignored by the executive. For the maintenance of the rule of law in the country, court decisions must be respected within the context of Article 128 of the 1995 Constitution, which affirms the independence of the Judiciary. Moreover, the 1995 Constitution establishes the right of anybody (including government agencies) aggrieved by any decision of the court to appeal to the appropriate court.379 The non-compliance with the decisions can only result in anarchy in the country.

The General Sejusa Saga
On April 29, 2013, General David Sejusa, a Senior Presidential Advisor and the Coordinator of Intelligence Services penned a letter to the Director General of the Internal Security Organisation (ISO) demanding that investigations be carried out on a number of issues including: claims that former Wembley380 operatives are being mobilised to be used in extrajudicial manner and that a certain group was trying to stage-manage rebel recruitment to frame innocent people. The General raised concerns into “the so-called project of the first son [Brigadier Muhoozi Kainerugaba] being fast-trucked (sic) outside the law to hold serious positions many of which he may not be qualified by the set standard operating procedures (sops) like experience in command, seniority or aptitude etc; … the informal involvement of General Caleb Akandwanaho aka Salim Saleh in the many affairs of state [when] he is formally retired; … the irregular (informal) involvement of several members of [the] first family in the matters of state, economy and security, and the disruption this is causing, and in other instances

379 Article 50(3).
380 Operation Wembley was a joint security effort launched in June 2002 to fight violent crimes in the country. It comprised personnel from the intelligence services, the police and the army.
actually interfering with important fundamental strategic programmes like causing professionalisation of the army, streamlining command, infighting and abuse… in the Office of the Prime Minister (OPM), Gavi etc. Just before the publication of the letter, General Sejusa travelled to the United Kingdom (UK) where he has since declared war on the Government of Uganda. In a radio and television interview with the British Broadcasting Corporation (BBC) on June 18, 2013, General Sejusa accused President Museveni “of seeking a life presidency… a political monarchy”. He intimated that “the governance system in Uganda had become decadent and perverse… as President Museveni is now being worshipped like God”. He concluded by saying that “this is the point of saying: Enough is enough”.

The Government, through its various actors, has since been denouncing General Sejusa. Whilst Ofwono Opondo, the Government spokesman accused the General of being a “coward”, Paddy Ankunda, the Army spokesman, stated that the General was being investigated for possible “civil criminality” by the Chieftaincy of Military Intelligence (CMI) over suspicions of breaking military law. On a number of occasions, General Sejusa has indicated that he is going to return to Uganda but on the appointed day he fails to appear. The army has since contemplated charging the General with offences including desertion and failure to protect classified documents.

In October 2013, the Speaker of Parliament requested the Parliamentary Committee on Rules and Privileges to investigate the continued absence of Sejusa from Parliament. This was after he had written to the Speaker requesting that his leave of absence be extended. Having failed to appear before the Committee to explain his continued absence, the Committee recommended that the General be kicked out of Parliament. In December 2013, General Sejusa launched a political

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383 Ibid.

384 Ibid.

385 Ibid.

386 Ibid.

party called Freedom and Unity Front (FUF) in London. Sejusa was eventually replaced in Parliament.

Whilst so far, General Sejusa’s flight into exile has not had any serious constitutional fall-out, the incident has the potential to destabilise the country. Tensions have been exacerbated by the government becoming more intolerant to civil liberties. In the aftermath of the Daily Monitor newspaper publishing the Sejusa letter, the government closed down two radio stations and two newspapers.

The NRM government prides itself on having introduced press freedom in Uganda. Article 29(1) (b) of the constitution affirms the right of everyone to freedom of speech and expression which includes freedom of the press and other media. The only limitation placed on this right is if it prejudices the fundamental or other human rights and freedoms of others or the public interest in accordance with Article 43(1). The closure of the media houses in this case clearly violated the Constitution as the government did not show how the publication of Sejusa’s letter prejudiced the rights or freedoms of others or the public interest. Moreover, the issues that Sejusa raised in his letter such as President Museveni propping up his son to succeed him as president, had been in the public domain for sometime.

The Closing of Media Houses
On May 20, 2013, police closed down the Monitor Publications Limited and Red Pepper Publications; and KFM and Dembe FM radio stations, a closure that lasted eleven days. The closure of media houses was meant to help the police conduct a search for documents associated with the story quoting a letter from General Sejusa. It should be noted that the closure of the media houses was preceded by the police obtaining a search warrant from the Magistrates court. The police demanded that the Daily Monitor newspaper hand over the Sejusa letter and name its sources, which the paper declined to do. Monitor Publications went to


court and obtained an order cancelling the police search warrant, but the Police did not heed the new order. Instead, the force invoked the provisions of Section 27 of the Police Act, which empowers Police to conduct searches without a search warrant. The publication was also accused of violating the Official Secrets Act. Meanwhile, the Monitor Publications Limited had started negotiations with the government.

The closure of the media houses was protested at home by political parties and civil society groups, and condemned abroad. Ugandan political parties under their umbrella organisation – Inter-Party Organisation for Dialogue (IPOD) – urged the government “to immediately and unconditionally reopen the closed media houses”. In a letter, Jacob Matthew, President of the World Association of Newspapers and News Publishers (WAN-IRFA) and Erik Bjerager, President of World Editors’ Forum, inter alia, urged President Museveni “to take all possible steps to ensure that... Uganda fully respects its international obligations to freedom of expression”.

In the end, the closure of media houses ended after the media houses made certain undertakings. Specifically, the Monitor Publications highly regretted the story that led to the closure of the Daily Monitor newspaper and KFM and Dembe radio stations. It undertook that the Daily Monitor newspaper would only publish or air stories which are properly sourced, verified and factual. It also undertook that the reporting in the Daily Monitor newspaper would always be objective, fair and balanced. It undertook to be sensitive to and not publish or air stories that could generate tensions, ethnic hatred, cause insecurity or disturb law and order; it acknowledged that there had been violations of their editorial policy by their reporters and editors in Uganda and thus undertook to ensure that both the letter and the spirit of the policy are respected; and undertook to tighten its internal editorial and gatekeeping processes, to ensure that stories that impact especially on national security are subjected to the most rigorous scrutiny and verification process before they run; it further


392 See Ibid.
undertook to seek regular interface with the Government to ensure that the undertakings made would be respected and implemented; and it undertook to ensure that the Monitor Publications Ltd would observe and comply with the laws of Uganda, in particular to co-operate with the Police on the ongoing investigations.

The implications of the closed media houses making certain undertakings before re-opening had the effect of impacting on the freedom of speech and thought, which is a violation of the provisions of the 1995 Constitution as indicated above.

**Administration of Justice**

Twenty-eight new judges of the High Court, the Court of Appeal/Constitutional Court and the Supreme Court were appointed in May 2013.393 The Chief Justice (CJ), Benjamin Odoki, retired after attaining the mandatory constitutional retirement age of 70 years in March 2013. However, subsequently he was first recalled to the bench as a judge and then re-appointed as CJ by the President on the advice of the Attorney General. A number of challenges against the re-appointment were raised including a constitutional petition which sought a declaration that the re-appointment was unconstitutional. Article 144(1) (a) of the Constitution states that “A judicial officer … shall vacate his or her office - in the case of the CJ… on attaining the age of seventy years; …” Article 142(1) states “The CJ… shall be appointed by the President acting on the advice of the Judicial Service Commission (JSC) and with the approval of Parliament”. The JSC, having known in advance that the CJ was going to retire, started searching for a new one. In its advice to the President, the JSC recommended the appointment of Supreme Court Justice Bert Katureebe as the substantive CJ.394 However, the Attorney General, Peter Nyombi, advised the President to re-appoint retired Justice Odoki as CJ.395 Nyombi argued that since retired Justice Odoki had been re-appointed to the Judiciary as an Acting Justice of


the Supreme Court, he could be re-appointed as the CJ. He based his argument on Article 143(1) (a) of the Constitution which states “A person shall be qualified for appointment as Chief Justice, if he or she has served as a justice of the Supreme Court of Uganda…” and Article 253 (1) which states that “where any person has vacated an office established by this Constitution, that person may, if qualified, again be re-appointed or elected to hold that office in accordance with the provisions of this Constitution.” It is upon this advice that the President disregarded the JSC’s advice and sought to re-appoint Justice Odoki.

Attorney General Nyombi’s legal advice to the President has been contested. The Chairman of the JSC, Justice Ogoola, argued that, “despite the law allowing the re-appointment of a retired Judge/Justice, nowhere does it provide for the recall of a retired CJ. Temporary vacancies in the office of the Chief Justice are automatically filled by the Deputy Chief Justice but in case it is a permanent vacancy, it is filled by a substantive appointment, implying that he/she is to be appointed by the President acting on the advice of the JSC and approved by Parliament.” Justice Ogoola finally observed in a letter to the President that “it is readily evident, from the… summary of the law, the Commission’s reservations (on the reappointment of Justice Odoki as the CJ), are grounded in the letter and spirit of the fundamental provisions of the Constitution. For the Commission to advise otherwise would be to advise an illegality and to transgress the solemn oath which the Commissioners took to uphold, protect and defend the Constitution.”

Justice Odoki’s appointment was yet to be vetted by Parliament at the time of writing this paper. Nevertheless, his re-appointment has been condemned by various civil society groups, academics, the Uganda Law Society (ULS) and the political opposition. In fact, the Western Region Youth Member of Parliament, Gerald Karuhanga, has petitioned the Constitutional Court to declare the re-appointment as unconstitutional. In his petition, Karuhanga also argues that it is against the spirit of constitutionalism for the president to direct the JSC

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396 Ibid.
397 Ibid.
398 Ibid.
on the names of the persons to be appointed as judicial officers.\(^{400}\) The petition was yet to be heard at the time of writing this paper.

The failure to appoint a substantive Chief Justice has affected the administration of justice in the country. The position of CJ is a constitutional office and the person occupying the office is the head of the Judiciary and is responsible for the administration and supervision of all courts in Uganda.\(^{401}\) The failure by the President to appoint a substantive CJ is simply unconstitutional. The problem is compounded by the fact that the country does not also have a substantive Deputy Chief Justice (DCJ) who should act as CJ.

**Attorney General’s Woes**

Partly, due to the advice the AG proffered to the President on the re-appointment of a retired CJ, Attorney General Nyombi has come under fire from a section of the Uganda Law Society. On August 16, 2013, a total of 30 lawyers petitioned the ULS seeking the suspension of Nyombi from the legal fraternity. The group accused Nyombi of “exhibiting irresponsible behaviour while executing his duties, which [has] subjected many Ugandans and in particular the legal fraternity to undue embarrassment.”\(^{402}\) They added that, “he [Nyombi] has executed his duties without regard to the Constitution.”\(^{403}\)

When ULS members met at their extraordinary assembly on August 29, 2013, they resolved to *inter alia*: suspend Nyombi from the society until further notice, issue him with a certificate of incompetence and refer him to the Law Council for disciplinary action.\(^{404}\) On his part, Nyombi insisted that there was nothing wrong with his legal advice to the President, including the one on re-appointing retired Justice Odoki as CJ. He observed that the lawyers were making “stupid allegations … intended to embarrass him…”\(^{405}\) Justice Odoki also weighed in on the controversies surrounding his re-appointment, and declared that “he is

\(^{400}\) Ibid.

\(^{401}\) Article 133(1) (a), 1995 Constitution.

\(^{402}\) Ibid. Nyombi was also accused of *inter alia* misleading the President in his appointment of General Aronda Nyakairima as Minister of Internal Affairs without the General first resigning from the army.

\(^{403}\) Ibid.

\(^{404}\) Ibid.

\(^{405}\) Ibid.
ready to serve until [he] runs out of energy.”406 The country is holding its breath to see if the re-appointment will be accepted in Parliament.

The re-appointment of Odoki as CJ put the three arms of government (Executive, Judiciary and Legislature) at loggerheads. Whilst the Legislature refused to vet the appointment of Odoki, the Executive insisted that he is qualified to be re-appointed. With the Executive and Legislature wrangling, the Judiciary has continued to suffer due to the absence of its head. This does not promote constitutionalism and good governance in the country.

Public Order Management

Article 29(1) (d) of the Constitution states that “every person shall have the right to… freedom to assemble and to demonstrate together with others peacefully and unarmed, and to petition…” On August 6, 2013, Parliament passed the Public Order Management Bill 2011 (hereinafter The Bill). As was observed, “few pieces of legislation have evoked as much rancor on the floor of Parliament and heated public debates outside the House as the Bill.”407 The manner in which the Bill was passed into law left a bitter taste in many people’s mouths, especially opposition Members of Parliament. It is reported that the Deputy Speaker, Jacob Oulanyah, “rammed the Bill through the House and suspended whoever tried to stand in his way.”408 It took only less than two minutes for the Bill to be passed into the Public Order Management Act 2013.409

This law, originally drafted in 2009, seeks to inter alia provide for the regulation of public meetings, the duties and responsibilities of the police, the organisers and participants in relation to public meetings, to prescribe measures for safeguarding public order without compromising the principles of democracy, freedom of association and freedom of speech.410 The Act in particular seeks to provide for the regulation of public meetings; to provide for the duties and responsibilities of the police,

406 Mukisa Farahani, “I’ll serve until I run out of energy”, Sunday Monitor, September 1, 2013, p. 3.
409 Ibid, p. 4.
organisers and participants in relation to public meetings; to prescribe measures for safeguarding public order; and for related matters.411

Whilst the Government has come out to defend the contents of this law,412 opposition activists, academia, human rights activists and civil society have condemned not only the contents of this legislation but also the manner in which it was passed in Parliament.413 It has been argued that the law seeks to reintroduce through the backdoor Section 32(2) of the Police Act (Cap 303 Laws of Uganda)414 which was declared unconstitutional in 2008. In the case of Muwanga Kirungi v. Attorney General,415 it was held by the Constitutional Court that “powers given to the IGP [by section 32(2) of the Police Act] to prohibit the convening of an assembly or procession [was] an unjustified limitation on the enjoyment of [a] fundamental right”. Thus the section was repealed. Whilst Civil Society Organisations (CSOs) have threatened to petition the Constitutional Court to challenge the law,416 the Office of the United Nations High Commissioner for Human Rights (OHCHR) has urged the government to repeal it.417 One of Uganda’s representatives to the EALA, Mukasa Mbidde, announced that the law would be challenged in

411 Long title to the Public Order Management Act 2014.
414 The section stated as follows: … if it comes to the knowledge of the Inspector General that it is intended to convene any assembly or form any procession on any public road or street or at any place or public resort, and the inspector general has reasonable grounds for believing that the assembly or procession is likely to cause a breach of the peace, the inspector general may, by notice to the person responsible for convening the assembly or forming the procession, prohibit the convening of the assembly or forming the procession.
415 Constitutional Petition No. 9 of 2005.
He alleged that the law *inter alia* breaches several provisions of the EAC Treaty and the Vienna Convention on the Law of Treaties 1969.

On October 2, 2013, President Museveni assented to the Bill and thus it became law. In December 2013, civil society activists petitioned the Constitutional Court challenging some Sections of the Act. In their petition, the activists, who included retired Bishop Zac Niringiye and Butambala County Member of Parliament, Muwanga Kivumbi, challenge the authorisation procedure that grants the police broad discretion to refuse peaceful assemblies. They allege that the law bars them from enjoying their rights to assembly. The Constitutional Court is yet to fix a date for the hearing of the case.

The law relating to public order management, in my opinion, was motivated by the activities of the political opposition whom the government has accused of inciting violence during their public rallies. Nevertheless, the law claws back the freedom of assembly which is affirmed by Article 29(1) (d) of the Constitution. The law also reintroduces Section 32(2) of the Police Act which was declared unconstitutional. Clearly, this law cannot be demonstrably justified in a free and democratic society.

**Relations Between Buganda Kingdom and the Central Government**

Ahead of the celebrations to mark Kabaka Ronald Mwenda Mutebi II’s 20th coronation anniversary, President Museveni and the Mengo government signed a Memorandum of Understanding (MoU) under which the central government undertook to return more of Buganda Kingdom properties. The properties to be returned include the Kingdom’s official estates for the *masaza* (counties), *magombolola* (subcounties) and properties of chiefs amongst others. The assets were

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420 Kabaka Mutebi is king of Buganda, the largest and most populous kingdom in Uganda.
taken over by the central government after the abrogation of the 1962 Constitution in 1966, which had the effect of all abolishing kingdoms and traditional leaders in Uganda. Under the Traditional Rulers (Restitution of Assets and Properties) Statute 1993, by which the restoration of the traditional leaders in Uganda was done in 1993, Buganda Kingdom’s assets and properties comprising, among others, the former parliament building (The Bulange), the royal palace (The Lubiri at Mengo), the residence of the Katikkiro (The Butikkiro), the Kabaka’s official 350 square miles of land, and several other buildings that used to be under the kingdom’s possession were returned to the kingdom by the central government. However, a number of other properties remained in the hands of the latter, which now form the subject of the MoU. In addition, the Kingdom has been demanding arrears accumulated by the Central Government for renting un-returned Kingdom properties to the tune of Uganda Shs20 billion.\footnote{Of this the central government has recently paid Shs2 billion. See Al-Mahdi Ssenkabirwa, \textit{Government pays shs2 billion to Buganda}, \textit{Daily Monitor}, August 22, 2013 at http://www.monitor.co.ug/News/National/Government+pays+Shs2+billion+to+Buganda/-/688334/1963588/-/j7ruu/-/index.html. Accessed August 25, 2013.}

Generally, the MoU is considered part of President Museveni’s efforts to reconcile with the Buganda Kingdom following years of bad blood. It should be remembered that in 2009, the central government blocked the Kabaka from visiting Kayunga, part of Buganda Kingdom, resulting in the Buganda riots in which a number of people were killed. Following the riots, the central government closed some radio stations including Central Broadcasting Service (CBS) belonging to the kingdom. So, the MoU is seen as a reconciliation gesture on the part of President Museveni.

Nevertheless, details of the MoU, which have subsequently been published in the press, indicate that the kingdom may have been short-changed yet again.\footnote{See Kakaire Sulaiman, “Holes cited in Buganda MoU: Banyala and Baruuli will keep their assets”, \textit{The Observer}, August 16-18, 2013, p. 1 and 4.} First, whereas Katikkiro Peter Mayiga stated that the central government will be returning to Buganda land that formerly served as headquarters for the Kingdom’s counties and sub-counties as well as land hosting markets, the MoU indicates that the properties will be verified first before being transferred or compensation paid for
them. Secondly, whereas the initial impression that was created after signing of the MoU was that the central government would recognise the Kabaka as the cultural head of all Buganda, the document indicates that the central government undertook to ensure that the Kabaka enjoys his freedom of movement in any and all parts of Uganda provided he respects the rights of other cultural institutions or leaders as enshrined in the Constitution and the Institution of Traditional or Cultural Leaders Act 2011.

It should be remembered that other cultural institutions have been created within Buganda Kingdom. Whilst in Nakasongola there is the Buruuli Chiefdom, in Kayunga there is the Obukama bwa Bunyala. These institutions, with the encouragement of the central government, have demanded that Buganda Kingdom recognises them as separate entities. Thus, if the Kabaka is to visit these areas he first has to seek permission from their cultural heads. Buganda Kingdom has vehemently contested the argument that these are not parts of Buganda Kingdom. Nevertheless, the Baruuli and Banyala have expressed their discomfort with the MoU, threatening to resist if it impinges on their cultural rights.

Also, the legal basis of the MoU has been doubted by some. According to some legal scholars like Oloka Onyango, it would be difficult for Buganda Kingdom to enforce it because “it (MoU) is not a legally effective undertaking like an agreement or contract”.423 Within Buganda establishment, former Katikkiro Dan Muliika, is of the view that the failure to involve Parliament and other parties in the process and the absence of an enabling law to support the process makes the MoU illegal. On its part, the Kingdom contends that the MoU was concluded in accordance with Article 246 of the Constitution and the Traditional Rulers (Restitution of Assets and Properties) Act 1993.424 With the payment of rent arrears alluded to above to the Kingdom, the central government seems to have started implementing the MoU.

Relations between the central government and Buganda Kingdom have sometimes boiled over into open conflict as happened in 2009 when street riots broke out after the Kabaka was stopped from visiting Kayunga. Thus, the conclusion of the MoU should be welcomed as

423 Ibid. p. 4.
424 Ibid.
a positive sign that instead of the two entities engaging in conflict, they have decided to engage with each other peacefully. This can only portend well for the good governance of the country.

**Fighting Corruption**

Corruption in Uganda is widespread and seen as one of the greatest obstacles to the country’s economic development as well as to the provision of quality public services. In fact, the government has acknowledged that corruption is one of the main challenges facing the country.\(^{425}\) Transparency International’s 2013 Global Corruption Perceptions Index ranked Uganda among the 17 most corrupt countries in the world, with a score of 61%.\(^{426}\) The country has also consistently scored poorly in the World Bank Worldwide Governance Indicators (WGI). For example, in 2011, it scored 19.9 on control of corruption, on a scale from 0 to 100 and it has shown no improvements across the years.\(^{427}\)

The prosecution of persons in the Office of the Prime Minister (OPM) accused of mismanaging funds meant for the victims of the northern Uganda conflict, which started in the year 2012, reached a climax in 2013 with the conviction by the Anti-Corruption Court of Geoffrey Kazinda, the former Principal Assistant in the OPM.\(^{428}\) Kazinda was charged with a total of 30 counts, namely abuse of office, one of making a document without authority, 26 of forgery and two of unlawful possession of government stores, all contrary to the Anti-Corruption Act 2009 and Penal Code Act. In his Judgement, delivered on June 19, 2013, Judge David Wangutusi found Kazinda guilty as charged.

Subsequently, in his sentencing Judgement, Judge Wangutusi observed that the offence of abuse of office has been committed in the country with impunity, and thus sentenced Kazinda to a five-year prison

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\(^{427}\) Anti-Corruption Resource Centre, *U4 Expert Answer*.

\(^{428}\) See Uganda v. Geoffrey Kazinda, *High Court of Uganda [Anti-Corruption Division, HCT-00-SC-0138-2012]*.
term. He also sentenced Kazinda to two years on each of the counts of forgery; five years for making a document without authority and two years on each count of unlawful possession of government stores, the terms to be served concurrently.\footnote{Ibid.} Kazinda appealed against his conviction. Nevertheless, the sentence handed down to Kazinda drew mixed reactions among the public with some arguing that he had gotten a “lenient sentence”.\footnote{Afunadula Badru, “Fury as Kazinda gets “lenient” sentence”, Chimpreports.com, June 26, 2013 at www.chimpreports.com/index.php/news/10971...fury-as-kazinda-gets-“lenient”-sentence. html (accessed September 7, 2013); Alex Masereka, “Northern leaders express anger over ‘light’ Kazinda sentence”, \textit{Red Pepper}, June 27, 2013 at www.redpepper.co.ug/northern-leaders-express-anger-over-light-kazinda-sentence.html. Accessed September 7, 2013, (describing Kazinda’s sentence as ‘an insult’ to the people of northern Uganda).} The corruption at the OPM was complemented with that in other government offices including the Ministry of Public Service where money meant for pension of former government employees was misappropriated by civil servants. The trials of these and other persons who were involved in the corruption scam in the OPM are ongoing.

The World Bank estimates that Uganda loses Shs500 billion through corruption per year.\footnote{The World Bank, 2005, \textit{The World Development Report}, Washington DC. This figure is cited in \textit{The Uganda Country-Self Assessment Report and Programme of Action}, Nov. 2007, p. 242. Cited in “Joint Evaluation Support to Civil Society Engagement in Policy Dialogue’ Uganda Country Report, p. 31.} This money should have gone to provide vital social and economic services for the people. Corruption undermines constitutionalism and good governance through the subversion of public institutions. Thus the fight against corruption should be intensified so that the people get the services they deserve.

\textbf{Suspension of the Anti-corruption Court}

The Anti-Corruption Court was established in 2008 under Article 138 of the constitution to deal with corruption cases. In February 2013, lawyer Davis Wesley Tusingwire filed an application in the Constitutional Court challenging the inclusion of Magistrates in the Anti-Corruption Court, which is a Division of the High Court. In July 2013, the Constitutional Court suspended the operations of the court pending
the final determination of Tusingwire’s application.432 The Court, however, held that its decision would not have any effect on already decided cases and that only the continuing cases should be stayed until the petition is disposed of.433 In a 4 to 1 ruling delivered in December 2013, the Constitutional Court held that the Anti-Corruption Division was established in accordance with the Constitution and all relevant laws.434

The Constitutional Court ruling furthers the fight against corruption and thus should be applauded. If the court had ruled otherwise, it would have sent negative signals to the institution that have been established to fight the vice. Ugandan’s have been demanding accountability and good governance from public institutions. The ruling only affirms this demand.

Anti-Pornography and Anti-Homosexual Acts and Debate in Parliament
The year 2013 saw the passing in Parliament of the Anti-Pornography Act and Anti-Homosexual Act. The latter that has raised concern domestically and internationally, whereas the former has also raised concerns among civil society activists especially women groups. I deal with the two laws in turn.

The Anti-Pornography Act435 seeks to “define and create the offence of pornography; to provide for the prohibition of pornography; to establish the Pornography Control Committee and prescribe its functions; and for other related matters.” When introducing the Bill in Parliament, the Minister of State for Ethics and Integrity, Father Simon Lokodo, argued that, “pornography has become … an insidious

433 Ibid.
social problem in the country”\(^\text{436}\). However, some MPs argued that the legislation violated the rights of people especially the right to privacy,\(^\text{437}\) and also that the Bill’s definition of pornography was too broad as it went against Uganda’s tradition of being tolerant to cultural diversity.\(^\text{438}\)

The Bill was passed into law and became the Anti Pornography Act 2014. The Act defines pornography as, any representation through publication, exhibition, cinematography, indecent show, information technology or by whatever means, of a person engaged in real or stimulated explicit sexual activities or any representation of the sexual parts for primarily sexual excitement.\(^\text{439}\)

The Act provides for the creation of a Pornography Committee to implement it. Before passing of the Bill, women groups had been up in arms because they thought that it intended to prevent them from wearing mini-skirts. The passing of this law was welcomed by different religious denominations, especially the Pentecostal ones, who have been urging the President to assent to it.\(^\text{440}\)

The Anti-Homosexuality Bill 2009 (a private members bill), was first introduced in Parliament by the Ndorwa West MP, David Bahati, in October 2009 amidst support from religious groups and denunciation from newspapers such as *The Observer*.\(^\text{441}\) Nevertheless, after its

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\(^{437}\) Article 12 of The Universal Declaration of Human Rights (1948) states “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.” See also Mercy Nalugo, “Anti-Pornography Bill questioned”, *Daily Monitor*, October 3, 2013 at [http://www.monitor.co.ug/News/National/Anti-Pornography-Bill-questioned/-/688334/2016476/-/ccglig/-/index.html](http://www.monitor.co.ug/News/National/Anti-Pornography-Bill-questioned/-/688334/2016476/-/ccglig/-/index.html). Accessed February 10, 2014 (reporting that the Foundations for Human Rights Initiative (FHRI) had observed that the Bill has serious human rights implications since it restricts the enjoyment of rights like freedom of expression, right to information, right to take part in cultural life, right to privacy and the right to own property as enshrined in the Constitution).

\(^{438}\) Mugerwa and Wesonga, “MPs pass Bill”.

\(^{439}\) Section 2, Anti Pornography Act 2014.


introduction, Uganda came under pressure from especially Western countries, like Canada, United Kingdom (UK) and United States of America (USA), to shelve the passing of the law because it violated the rights of sexual minorities. President Obama described it as “odious”.442 Some countries even went ahead to cut-off aid to Uganda because of the Bill.443 Demonstrations were also held in different parts of the world against the enactment.444 In 2010, after receiving a telephone call from then American Secretary of State, Hillary Clinton, calling on him to stop harassing the gay community in Uganda, President Museveni told the Members of Parliament “to go slow on the [Bill]”.445 Before the Christmas of 2012, the Speaker of Parliament, Rebecca Kadaga, had promised a “Christmas gift” of the passing of the Anti-Homosexuality Bill into law.446 The initial draft of the Bill contained a provision for the offence of “aggravated homosexuality”, attracting a death sentence upon conviction. As a result of the uproar caused by inter alia, this provision, debate on the Bill in Parliament was put in abeyance amidst government calls for more consultations.

The Bill was quietly re-introduced in Parliament in December 2013, with the new draft providing for life imprisonment for those convicted of aggravated homosexual acts. According to reports, the government was ambushed by the re-introduction of the Bill in Parliament.447 It is reported that the Prime Minister, Amama Mbabazi, who is also the leader of government business in Parliament, “stormed the House moments before the Bill was passed, protesting without much effect.”448

448 Ibid.
The Prime Minister observed that the government was still consulting on some clauses, and complained that the House didn’t have the number of MPs required to pass the law\(^{449}\). However, all this fell on deaf ears as the law was passed.

The passing of the Bill was “regretted” by Catherine Ashton, the High Representative of the European Union for Foreign and Security Policy and Vice President of the European Commission.\(^{450}\) President Museveni was initially reluctant to assent to the Bill for it to become law. In defence of his stance, he argued that, “the MPs did not consult me [on the Bill].” As a result, he stated that he would study the Bill and if he found some clauses not right, would send it back to Parliament.\(^{451}\) The President’s stance was termed as attempting to buy time as a result of donor pressure,\(^{452}\) which may well be correct. Prime Minister David Cameron of UK has clearly stated that African countries that receive British aid should respect gay rights.\(^{453}\) Eventually, the President signed the Bill into law.

The enactment of the two pieces of legislation elicited strong reactions among sections of the populace with some arguing that they are a claw-back to the freedoms enshrined in the 1995 Constitution. The passing of the Anti-Pornography Act in December 2013, led to the harassment of women by sections of the public who accused them of dressing indecently. It is my considered opinion that the legislations (Anti-Pornography and Anti-Homosexuality Acts) \textit{inter alia} violate the rights of women,\(^{454}\) offend prohibitions against discrimination\(^{455}\) and respect for human dignity and protection from inhuman treatment.\(^{456}\) The legal challenge against the laws by sections of the civil society after the laws were passed is, in my opinion, the correct course of action,

\(^{449}\) Ibid.

\(^{450}\) Ibid.

\(^{451}\) Monitor Team, “Anti-gays bill was rushed”.


\(^{453}\) Monitor Team, “Anti-gays Bill was rushed”.

\(^{454}\) Article 33.

\(^{455}\) Article 21(2).

\(^{456}\) Article 24.
and with most certainty, I think the Constitutional Court will eventually declare the laws unconstitutional.

**Uganda’s Intervention in South Sudan**

In the night of December 15, 2013, fighting broke out between factions of the Sudan People’s Liberation Army (SPLA) in Juba, the capital city of the Republic of South Sudan (hereinafter, South Sudan). The fighting pitted forces loyal to President Salva Kiir against those loyal to former Vice President Riek Machar. Five days after, Uganda sent its troops to South Sudan whilst advancing a number of reasons for the intervention including that: it had been invited by the legitimate government of South Sudan to ensure order; to evacuate its citizens caught up in the fighting; it had been requested by the UN Secretary General (UN SG) to intervene and that the regional organisation, IGAD-had sanctioned the intervention.\(^\text{457}\) However, as the conflict escalated and spread to other towns like Bor and Bentiu, the Ugandan troops started fighting on the side of forces loyal to President Kiir. Uganda’s intervention in South Sudan has raised a number of questions, particularly whether it conforms to the Constitution and international law.

Under the 1995 Constitution, Parliament is mandated to make laws for the deployment of the UPDF outside the country.\(^\text{458}\) To operationalise this provision, the UPDF Act, 2005 provides for the deployment of troops outside Uganda.\(^\text{459}\) However, the law only provides for deployment of troops outside Uganda for purposes of peacekeeping

\(^\text{457}\) Uganda government Spokesman, Ofwono Opondo, proffered the following explanation for the intervention inter alia stating that: Under Section 39 of UPDF Act, 2005, the President can deploy soldiers outside the country through consultation with the Speaker of Parliament. This was done pending an opportunity when parliament convenes to be briefed and perhaps endorse. The President indeed sent a small, but robust, contingent of UPDF troops at the request of the legitimate government of RSS under President Salva Kiir on December 16, 2013, which is allowed under the UN charter and Protocol, if a friendly country asks for assistance; Uganda is a member of IGAD. It is IGAD currently chaired by Ethiopia that is leading all initiatives in full consultations with AU and UNSC; and the UN Secretary General, Ban Ki Moon has said publically that he requested President Museveni to help in RSS political crisis, depending on the situation on the ground. The bloodletting that was seen in the first two days, made it clear there was a real possibility of RSS descending into real ethnic cleansing, genocide and failed state. See Reproduced in Athiaan Majak Malou, “Understanding Museveni’s intervention in South Sudan”, Sudan Tribune, January 12, 2014 at http://www.sudantribune.com/spip.php?article49541. Accessed February 15, 2014.

\(^\text{458}\) Article 210 (d).

\(^\text{459}\) Article 39.
and peace enforcement. Deployment of troops for purposes of peacekeeping must be done with the approval of parliament. The peacekeeping contemplated by the law is that ultimately authorised by the UN as required by the UN Charter. When Uganda’s troops were being deployed in Somalia to participate in the African Union Mission in Somalia (AMISOM), an operation authorised by the UN, Parliament gave its approval. The intervention in South Sudan was undertaken when Parliament was in recess. But the law provides that where the President deploys troops... when Parliament is in recess, the speaker shall immediately summon Parliament to an Emergency Session to sit within twenty-one days after the deployment, for purposes of ratifying the deployment.

Indeed before the lapse of the twenty-one days, the President wrote to the Speaker requesting the recall of Parliament to discuss the deployment. The speaker convened parliament on January 14, 2014, which discussed and ratified the deployment. Nevertheless, questions remain on the intervention. The fact that the UPDF has been fighting in South Sudan has cast doubt on the real intentions of the deployment. The United States among other countries, has called for the withdrawal of the UPDF from South Sudan, a call, which the Uganda government
first ignored, but it has now announced a phased withdrawal of the UPDF beginning April 2014.

Conclusion
The year 2013 may as well, so far, go down as the year of litigation in Uganda. Many more people ran to the courts to have their issues settled between themselves, and between themselves and state institutions. This resort to the courts points to the fact that the rule of law is alive and kicking in Uganda. Nevertheless, the year began with the President threatening that the military could return in the management of public affairs. When put to task to explain the statement, government officials explained that the President’s statement had been taken out of context. Nevertheless, as the year progressed, high profile defections from the military into exile, notably that of General Sejusa occurred, causing anxiety in the polity. Other notable events that have had consequences on the constitutional governance of the country include: the challenge of managing multiparty politics in the country; the application of the doctrine of separation of powers and the fight against corruption.

On the doctrine of separation of powers, the Speaker of Parliament boldly defended the institution of Parliament in the face of pressure from the Executive, which was demanding that members expelled by the parties on whose platform they stood, automatically cease being MPs. The Speaker’s position seems to be the correct one.

The fight against corruption registered modest gains with the conviction notably of Kazinda being recorded. Nevertheless, a lot more needs to be done, as the vice is still rampant in the country.

In the final analysis, all the issues elucidated on above (especially threats of a military takeover and public officials ignoring court decisions for instance in the case of the Lord Mayor’s impeachment) indicate that Uganda future as a constitutional polity is far from guaranteed.


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Introduction
The ongoing Constitution-making process in Tanzania has again occupied a special place in the mind of the people of Zanzibar in 2013. The process has now reached the crucial stage as the Constitutional Review Commission\(^{469}\) went round the country collecting people’s opinions on the best Constitution for the United Republic of Tanzania, replace the current Constitution of 1977. The CRC gave its Second Draft on December 30, 2013.

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\(^{469}\) Established under the Constitutional Review Act, Chapter 83 of the Laws (Principal Legislation) Revised Edition of 2014. This Edition of the Constitutional Review Act, Cap 83, incorporates all amendments made up to the and including December 31, 2013 and is printed under the authority of Section 4 of the Laws Revision Act, Cap. 4.
The Second Draft of the Constitution of the United Republic of Tanzania was a culmination process of the First Draft of the Constitution which was given on June 3, 2013. The talk of the town here is about the Constitution as if there is nothing serious in terms of social, economic and cultural development. One may raise a question as to whether the people of Zanzibar are politicians by nature.

There are reasons that led Zanzibaris to treat the Constitution making process in Tanzania with special attention. The first reason is that the process will determine the fate and the status of Zanzibar itself in the Union setup. The second reason is that the people decided to think of the type of new contradictions to emerge in the Constitution of Zanzibar, 1984 as a result of the new Union Constitution if it passes as in the draft form.

The Union of Tanzania was formed on April 26, 1964 after the then President of the Republic of Tanganyika, Mwalimu Julius Kambarage Nyerere and the then President of the People’s Republic of Zanzibar, Sheikh Abeid Amani Karume, signed an agreement called the Articles of the Union uniting their respective countries in one Sovereign Republic. Unlike other Unions in some African countries that have failed either for political or economic reasons, the Union of Tanzania stands as a unique example.

This does not mean that there have been no problems or complaints from Zanzibar or Tanzania about the Union. This unique experiment in African Unity faces serious administrative and constitutional challenges.

In the first place, the Union as concluded by most, lacked a legal basis right from the very beginning, while the Articles signed by Karume were not ratified. The Union therefore exists de facto, but not as a matter of law.

At one point, the Attorney General of Zanzibar, Honourable Othman Masoud Othman, publicly declared that the three Government system in Tanzania was the only solution in sight to the Union.

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472 For three governments he means the Revolutionary Government of Zanzibar, the Government of Tanganyika, and the Federation of the United Republic of Tanzania.
problems. His statement was received with mixed reactions and some cadres of the ruling party voiced opposition to the statement and put pressure on the Chief Executive of the Revolutionary Government of Zanzibar to remove him from power, apparently for failing to serve the interests of the ruling party. However, the Chief Executive kept quiet.

The position of the Attorney General of Zanzibar on the three-government system in Tanzania was echoed by the Second Draft of the Union Constitution. Giving the Executive Summary of the Report of the Tanzania Constitution Review Commission on December 30, 2013, the Commission’s chairman, retired judge Joseph Warioba, also spoke on the three-government tier as a solution to the Union problems.

Judge Warioba said that all the Zanzibaris who aired their opinion to the Review Commission had spoken on the Union issue and 34 per cent of them recommended the two-government systems, 60 per cent recommended the Contract Union (Confederation) and 0.1 per cent, which is equivalent to 25 people only, recommended the one Government system in Tanzania. This justifies the aforementioned fact that the Constitution-making process in Tanzania has occupied a special place in the mind of the Zanzibaris.

That notwithstanding, Zanzibaris seem to be sharply divided over the three issues with regard to the best structure of the Union of Tanzania. There is a group of Zanzibaris living in Tanzania Mainland who keep saying that the Union must stay and the two Governments should continue in Tanzania. The main reason for this group’s position seems to be the personal economic wealth they acquired in Tanzania Mainland. This group is strongly backed by the position of the ruling CCM—that the two Governments should stay and the Union snags should be solved. The party (CCM) believes that the three Governments may lead to the break-up the Union of 50 years.

473 The Attorney General of Zanzibar, Honourable Othman Masoud Othman, made this statement when he was addressing a workshop organised by the Union of Zanzibar Students of Universities and Institutions of Higher Learning at the Salama Hall, Bwawani Hotel on August 19, 2013.

474 The manifesto of the ruling party (CCM) insists on having two Governments; the Revolutionary Government of Zanzibar and the Government of United Republic of Tanzania as it is currently practiced.

A second group of Zanzibaris are determined to save Zanzibar from a co-option into a larger Tanganyika. The main interest of this group is the survival of Zanzibar in the Union arrangement. The last group of Zanzibaris supports the one-Government system as the solution to getting rid of the Union snags.

**The Union Structure**

The Union structure is one of the serious problems in the current system of the Union of Tanzania. The most controversial issue is the distribution of power between the Union Government and the Zanzibar Government. The draft constitution seems to have tried to solve this problem. The matters falling under the Union sphere had been reduced to seven from eleven. The proposed union matters are:

- Constitution and the Sovereignty of the United Republic of Tanzania;
- Defence and Security of the United Republic of Tanzania;
- Citizenship and Immigration;
- Currency and the Central Bank;
- Foreign Affairs;
- Registration of Political Parties; and
- Taxes on commodities and revenue on matters relating to the Union.

Notwithstanding the reduction of Union matters, some people had complained that the reduction of Union matters in number is not a substantial issue. What is needed is the distribution of powers. It seems the Second Draft Constitution still subjugates Zanzibar in the Union context. In addition, there have been complaints that there are more Union matters that have not been listed in the Second Draft. For example, the proposed Supreme Court of Tanzania and the Court of Appeal of the United Republic of Tanzania are the courts falling under the Union sphere but have not been enrolled in the Schedule of the Union matters.

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476 See the Schedule of the Union Matters in the Second Draft Constitution, 2013.
478 *Ibid*. 
The Second Draft Constitution will be moved in the Constituent Assembly that is expected to begin on February 18, 2014. The composition of the Constituent Assembly will draw members from both parts of the United Republic of Tanzania. According to the Constitutional Review Act, the decision of the union issues shall be made by the two-third majority of each side of the Union. If it fails to score a two-thirds majority of both sides, the Draft Constitution will not be endorsed.

Thereafter, there will be conducted a referendum to validate the Draft Constitution. Similarly, the two third majority is necessary otherwise the Draft Constitution will lack people’s legitimacy and will be rejected.

Human Rights
The human rights aspect in the Second Draft Constitution of the United Republic of Tanzania is another controversial area. There is an argument challenging the inclusion of human rights in the Draft Constitution. Many Zanzibaris do not find it acceptable for human rights be included in the Union Constitution on grounds that human rights are not part of the Union matters. Instead, human rights should be in the Constitution of the proposed Tanganyika and the Constitution of Zanzibar, 1984.

Irrespective of the argument on human rights, the basic rights enrolled in the Draft Constitution include new rights such as the right of the child, the right of the youths, the right of people with disabilities, the right of minority in the society, the right of women and the right of elders.

The Union Presidency
The post of the Union presidency was well addressed in accordance to the complaints raised by the Zanzibaris. The Second Draft of the Constitution does not propose the rotational system of the Union Presidency. Zanzibaris want a provision in the new constitution
stipulating that the Union presidency should rotate between Zanzibar and Tanzania Mainland.

Many Zanzibaris argue that since the Union of the then Tanganyika and Zanzibar was formed on April 26, 1964, the post of the Union Presidency was once held by retired President Ali Hassan Mwinyi from Zanzibar. Since then, the Mainlanders have held the post and the trend shows that this will continue to be the system.

The Elections of the Union President
The Second Draft Constitution has also not addressed the issue of votes to be scored by the Union presidential candidate. The Draft\footnote{Ibid, Article 80 (6).} says that the Union presidential candidate shall be elected as President if he/she gets more than 50 per cent of the total valid votes.

This position has been disputed by the Zanzibaris who demand that there should be a provision in the Second Draft Constitution saying that the Union presidential candidate shall be declared the elected president of the post if he/she scores a certain percentage of the total valid votes from Zanzibar. This position will give political legitimacy to the Union President and shall compel the union presidential candidate to feel that Zanzibar is partner of the Union.

The current position shows that the union presidential candidate can be elected to the post of the union president without getting a single vote from Zanzibar. This suggests that union presidential candidate does not have to concentrate much on the votes from Zanzibar, bearing in mind that the number of eligible voters from Zanzibar stands at about of 550,000 against the number of eligible voters of Tanzania mainland that stands at more than 20 million voters. This is a crucial point and may raise a hot debate in the Constituent Assembly.

Constitutional Development of Zanzibar
thought that the Constitution of Zanzibar would not be subjected to criticisms and amendments in the near future. However, the process of amending was only starting.

In other words, this proves the fact that constitutional reform in Zanzibar is essentially a journey and not a destination.

The call for the amendment of the Constitution of Zanzibar, 1984 is being heard in all corners in both Unguja and Pemba. To begin with, the amendments of the Constitution of Zanzibar are necessary to tune to the new Constitution of the United Republic of Tanzania. There are a number of constitutional issues recommended in the Second Draft of the Union Constitution that would automatically call for a review of the Constitution of Zanzibar. These include the structure of the Union Governments, the Judiciary, Legislature and the number of Union matters.

In addition, it appears that Zanzibaris may take advantage of the Constitution-making process to develop the new Union Constitution to amend a number of issues that are necessary for the strengthening of the operations of the Government of National Unity (GNU), the Zanzibar Electoral Commission and country’s development as a whole.

One senior retired Government official and First Secretary to the Revolutionary Council, Mr Salim Rashid, was quoted in a local newspaper as saying that what was done in 2010 in the amendment of the Constitution of Zanzibar is not enough. In this regard, he is of the view that the Constitution of Zanzibar should be overhauled to get a new one.

He added that:

We need to review our situation in the last 50 years under the Executive Presidency, the Revolutionary Council and structure of the Government and sentiments from the people. We need a new Constitution which has social contract in it. Social contract will give people their rights in economic and social development. Social contract in the Constitution should promise minimum living standards and all other social services including health services and education. We need social contract which spells out civic rights and other political issues which are found in many Constitutions like ours. Many countries have no social contracts in their Constitutions because they have strong entrenched laws which have become common practice. We don’t have such laws.
All in all, there was no single amendment that was carried out in the Constitution of Zanzibar, 1984; neither through the Zanzibar House of Representatives nor through the decision of the Courts of Law.

The Constitution of Zanzibar, 1984 is the third constitution of Zanzibar. Zanzibar had its first Constitution in 1963. It was, however, a short-lived document which was abrogated after the January 12, 1964 Revolution that toppled the Sultanate regime. The most interesting aspect of the pre-revolution Constitution is that it had a Bill of Rights. Zanzibar did not have a Constitution from 1964 to 1979. It was, instead, governed through presidential decrees.

The Second Zanzibar Constitution was of 1979 that established the House of Representatives that replaced the Revolutionary Council. This was a positive development and the Isles Legislature had all the legislative power in relation to all matters not falling under the sphere of the Union.

The Establishment of the Zanzibar Anti-Corruption Authority

The Constitution of Zanzibar, 1984 (as amended from time to time) provides the framework of governance within which political governance and associated principles of transparency and accountability are given prominence. To give effect to these principles, Section 10 of the Constitution of Zanzibar, 1984 spells out the political objectives of the country which include total eradication of corruption and abuse of power. The Zanzibar Government had not only created an institutional framework for fighting corruption under the Zanzibar Anti-Corruption and Economic Crimes Act, it had also amended or enacted a slew of

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493 Article 10 (b) of the Constitution of Zanzibar of 1984.
other laws to strengthen public accountability and financial probity.\textsuperscript{495} Furthermore, Zanzibar is part of the implementation of the United Nations Convention Against Corruption of 2003, the African Union Convention on Preventing and Combating of Corruption of 2003, the SADC Protocol Against Corruption of 2001 and a number of other similar treaties to which Tanzania is a signatory.\textsuperscript{496}

The overarching framework for combating corruption is articulated in a series of policy documents comprising Zanzibar’s Vision 2020; the MKUZA II and the Zanzibar Investment Policy. The Zanzibar Vision 2020 envisions attacking “corruption at its roots”\textsuperscript{497} and mobilising “public participation in the war against corruption”.\textsuperscript{498} This vision is then articulated in terms of strategic option in the MKUZA II. MKUZA II notes that “transparency and accountability mechanisms within Government ministries, civil society organisations and the private sector still leave much to be desired”\textsuperscript{499} and that “corruption

\textsuperscript{495} Though some of the historical pieces of legislation have now been repealed or replaced by subsequent legislation, these laws have covered such matters as criminal fraud, money laundering, public procurement, public financial control and audit, smuggling of goods, the trafficking in narcotics and the recruitment and deployment of public service employees. The provisions of law with a partial bearing on corruption include the Constitution of Zanzibar of 1984 (as amended in 2010); the Penal Decree (Cap. 13) of 1964 (now repealed); the Prevention of Corruption Decree No. 4 of 1975 (now repealed); the Prevention of Corruption (Amendment) Decree of 1979; (now repealed); the Control of Smuggling of Essential Commodities and Restricted Goods Act of 1986; the Zanzibar Fair Trading and Consumer Protection Act of 1995; the ‘Kikosi Maalumu cha Kuzuia Magendo’ Act No. 1 of 2003; the Establishment of the Office of Controller and Auditor-General Act No. 11 of 2003; the Commission for Human Rights and Good Governance (Extension) Act No. 12 of 2003; the Drugs and Prevention of Illicit Traffic Drugs Act of No. 9 2009; the Penal Act No. 6 of 2004; the Public Procurement and Disposal of Public Assets Act No. 4 of 2005; the Anti-Money Laundering and Proceeds of Crime Act No. 10 of 2009 and the Public Service Act of 2011.

\textsuperscript{496} Corruption is defined broadly and includes all the crimes covered in Part V of the Anti-Corruption and Economic Crimes Act. These offences include bribing agent of the ZACECA; secret inducement for advice; deceiving principal; failure to disclose conflict of interest; improper benefits to trustees for appointment; bid rigging; misappropriation of property and revenue; misappropriation of assets; tax evasion; smuggling; hoarding; anti-trust and syndication; wrongful use of official information; money laundering; drug trafficking; counterfeiting goods and currency; scheme intended to unlawfully manipulate exchange rate; abuse of office; transfer of proceeds of corruption; corruption in election; bribery of foreign official; sexual favours and abetment. For more details see Sections 36 to 59 of the Zanzibar Anti-Corruption and Economic Crimes Act of 2012.

\textsuperscript{497} Zanzibar Vision 2020, at 40.

\textsuperscript{498} Ibid.

\textsuperscript{499} Ibid.
practices are manifested in the provision of public services”. From this diagnosis, the MKUZA proposes a number of measures to stamp out the scourge of corruption and includes the enactment of anti-corruption legislation, public ethics legislation and the establishment of Anti-Corruption Authority.\(^{500}\)

Thus, in order to give effect for the enacted Zanzibar Anti-Corruption and Economic Crimes Act,\(^{501}\) the establishment of the authority is very crucial. Following this, the Zanzibar Anti-Corruption and Economic Crimes Authority (ZACECA) was institutionalised in 2013. The functions of the authority are stated under Section 13(1) and other provisions\(^{502}\) of the Zanzibar Anti-Corruption and Economic Crimes Act of 2012. Generally, the functions of this authority can be grouped into four categories, namely investigation, advice, assessment and public awareness on corruption and economic crimes issues;

- Investigation of the complaints concerning corruption practices, breach of ethics or economic crimes against any public or private body.\(^{503}\)

\(^{500}\) A war against corruption and abuse of public office in Zanzibar traces its roots from colonial days and after independence and revolution in 1963 and 1964 respectively. The Government of Zanzibar tried to use both administrative and legal measures to plug certain loopholes or forms of corruption and abuse of public office. In 1964, the State passed the Existing Laws Decree No. 1 of 1964 which was deemed to have come into operation on the January 12, 1964 (Revolution Day). Section 2 of this law stated that, the laws in force immediately before the January 11, 1964 continue to be enforceable. Therefore, the colonial laws applicable during the time including the Penal Decree (which contained some offences against corruption and misuse of public office), were inherited by the independent Zanzibar. In 1975, Zanzibar passed the first specific law on prevention of corruption known as the Prevention of Corruption Decree No. 4 of 1975. Section 6(1) of this law created an offence of corruption. It stated that: "any person who by himself, or by or in conjunction with any other person, corruptly solicits, accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person, any advantage as an inducement to, or reward for, or otherwise or attempts on account of, any agent (whether or not such agent is the same person as such first mentioned person) doing, or forbearing to do, or having done or forborne to do, anything in relation to his work or business, shall be guilty of an offence". For more details see the Legal Supplement (Part 1) to the Zanzibar Gazette Extraordinary, Vol. LXXIII, No. 4344 of March 2, 1964.

\(^{501}\) Act No. 1 of 2012.

\(^{502}\) For instance, Section 18(1) of the Zanzibar Anti-Corruption and Economic Crimes Act of 2012 oblige the ZACECA to promote policies, laws, programs, skills and public awareness in all aspects of anti-corruption activities and economic crimes.

\(^{503}\) Section 13(1)(a)(b)(c) and (i) of the Zanzibar Anti-Corruption and Economic Crimes Act of 2012.
• Advising any public or private entity on corruption occurrence issues and assisting any law enforcement agency of the Government in investigation of the corruption or economic crimes offences.\(^{504}\)

• Examination (assessment) of the practices and procedures of public or private bodies in order to facilitate discovery of corruption practices and secure mechanisms of reversing the situation.\(^{505}\)

• Educating the public on the dangers of corruption and economic crimes, fostering public support in combating corruption and economic crime.\(^{506}\)

Generally, these functions are consistent with functions granted to other anti-corruption bodies in the continent. But in themselves these are not enough to eliminate corruption in society. The effectiveness of anti-corruption measures depends on the performance of other institutions. So to have a coherent, integrated approach that specifies the roles and responsibilities of other bodies with anti-corruption mandate is essential to the success of the anti-corruption authority.

The relationship between the Zanzibar Anti-Corruption and Economic Crimes Authority and the Directorate of Public Prosecution needs special observation. It can be observed that the Departments of Public Prosecution and Anti-Corruption Commissions in Sub-Saharan Africa often have a difficult relationship.\(^{507}\) For example, in Malawi and Kenya, there were tensions leading to dysfunction between the better-paid investigators (many of whom are policemen) at the anti-corruption commissions and the poorly paid prosecutors at the Directorate of Public Prosecution (many of whom are lawyers).\(^{508}\)

In worst cases, anti-corruption agencies accuse prosecutors of undermining their work and prosecutors charge anti-corruption commissions of shoddy investigations that cannot support prosecution.\(^{509}\) This problem is acute in countries such as Kenya, Uganda, and Ghana, where the anti-corruption commissions report directly to Parliament.\(^{510}\)

\(^{504}\) Section 13(1)(d)(e) and (g) of the Zanzibar Anti-Corruption and Economic Crimes Act of 2012.

\(^{505}\) Section 13(1)(f) of the Zanzibar Anti-Corruption and Economic Crimes Act of 2012.

\(^{506}\) Section 13(1)(h) of the Zanzibar Anti-Corruption and Economic Crimes Act of 2012.

\(^{507}\) Maina, Wachira, and Kipobota, Clarence, (2012), Baseline Assessment of Anti-Corruption Activities in Zanzibar, the Revolutionary Government of Zanzibar, at 44.

\(^{508}\) Ibid.

\(^{509}\) Ibid.

\(^{510}\) Ibid.
The challenge for Zanzibar is to learn from these experiences. In particular, it will be critical to ensure that the terms and conditions of service for the employees of the Anti-Corruption Authority are comparable to those of the employees of the Director of Public Prosecution in order to avoid interagency conflicts and envy.\footnote{Ibid.}

There are other challenges which need to be addressed particularly with the establishment of ZACECA. At the outset let us observe the security of tenure for the Director General of this office. To secure the independence of the ZACECA, the Director General has security of tenure and may not be removed from office except for reasons and procedures laid down for the removal of a High Court Judge.\footnote{See the provisions of Section 5 of the Zanzibar Anti-Corruption and Economic Crimes Act of 2012 and Section 95 of the Constitution of Zanzibar, 1984.} But comparative experience suggests that tenure provisions are not as important as appointment processes in ensuring independence and autonomy of a public body. If the wrong persons are appointed, security of tenure provisions are of no use. In fact, in some cases security of tenure is dangerous if it is granted to staff that are not professionally independent and honest.

Another issue is about staff supervision and control. To effectively carry out its functions, ZACECA has been given power to hire independent consultants or investigators in addition to its regular staff. However, employment terms and conditions must comply with the provisions of the relevant laws. In order to secure the operational autonomy of the ZACECA, its staff, though public service employees, are its direct supervision and authority and may not be transferred or seconded to other agencies without the consent of the Director General.\footnote{Ibid, Section 8(3).} But there is the still the question of what happens to staff seconded to the Authority from other agencies and Government departments. Even if such staff are under the authority, their contracts are still with the seconding Ministry and agency and this poses problems of concurrent accountability.

In terms of investigatory powers, the Act stipulates that the Director General, or any other person authorised by him to conduct investigations
has the same powers, privileges and immunities as a police officer.\textsuperscript{514} This includes powers of entry, search and seizure. Officers of the authority are immune from personal liability for any actions done under the Act so long as such acts are done in good faith in the discharge of their functions under the law.\textsuperscript{515} This is consistent with best practice but there is still the question of who has priority when the Police and the Authority concurrently investigate a matter that falls within their overlapping mandates. The law anticipates some conflicts and provides for the intervention of the DPP when conflicts arise. However, this still leaves the question of who has priority between the police and ZACECA unresolved.

Based on the funds of the Authority, under the law, the authority has its own vote appropriated by the House of Representatives. Other sources of funds include grants, donation and other funds received from eligible sources.\textsuperscript{516} However, funds of the Authority are neither ring-fenced nor determinate. This means that what funds the Authority gets any particular year will depend on the ceilings set by Treasury and the actual vote made by the House of Representatives. This means that there is a real risk of the authority being both underfunded and uncertain about its budget year on year.

Generally, it can be concluded that good institutions are a necessary but not sufficient condition for eliminating corruption. The key success ingredient is the commitment of the political leadership, especially the Office of the President.

Though many African countries have anti-corruption agencies, many of these have been rather tame and ineffectual, especially in dealing with high-level corruption. Few high level prosecutions have taken place in Kenya. In Sierra Leone, not a single Minister or senior official had been sent to prison before foreign judges were hired. There is a need for the Anti-Corruption Authority to be present throughout Zanzibar where one of the deputy directors of the Authority should be based in Pemba and that the Authority should have offices in all regions of Zanzibar. This is due to the fact that in some cases, the problems of

\begin{footnotesize}
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\item \textsuperscript{514} Ibid, Section 19(2).
\item \textsuperscript{515} Ibid, Section 80.
\item \textsuperscript{516} Ibid, Section 9.
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corruption, misuse of resources, and abuse of power are more intense at the local than at the national level. The risks are compounded in an environment of weak public sector capacity. To this end, rolling out and strengthening anti-corruption operations at the local levels is critically important but this requires a clear, coherent strategy. The said strategy should spell out clear arrangements for creating robust and accountable local level mechanisms for addressing corruption.

Again, budget unpredictability in terms of amount and timing is a key source of weaknesses for many Anti-Corruption Commissions and Agencies in Africa. This problem is sometimes compounded by conflicting or shifting donor and Government funding cycles. Based on this reality, it is imperative that the Government of Zanzibar earmarks core funds for the Anti-Corruption Authority. Donors would then fund specific mandates of the Authority rather than provide core funding. The overall budget of the Anti-Corruption Authority should be integrated with Government funding for the other complementary institutions involved in anti-corruption activities.

**Twists and Turns on the Abolition of Death Penalty**
The continued existence of the death penalty in many countries of the world is highly contentious. The global trend towards worldwide abolition of the death penalty has accelerated over the past two decades. Progress towards abolition at the end of the Second World War was at first slow but sharply increased from the early 1990s

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onwards.\textsuperscript{519} When the UN was founded in 1945, only eight States had abolished the death penalty for all crimes.\textsuperscript{520} Twenty years later, in 1965, twenty-five countries had abolished the death penalty, eleven of them for all crimes and fourteen for ordinary crimes in peacetime.\textsuperscript{521} According to the UN, as of February 2013 some 150 UN Member States have abolished the death penalty in law or no longer execute.\textsuperscript{522} This continuing trend towards abolition is positive but it must not be forgotten that there are billions still in countries which retain capital punishment and thousands of prisoners continue to be executed every year or remain under sentence of death.

In Africa, abolition of the death penalty is a goal promoted by the African Commission on Human and People’s Rights, a body tasked with the protection and promotion of human rights and people’s rights in Africa, as well as interpretation of the African Charter for Human and People’s Rights.\textsuperscript{523} In 2011, the African Union Commission Chairperson, Mr Jean Ping of Gabon, and the Chairperson of the African Commission’s Working Group on the Death Penalty in Africa, Ms. Zainabou Sylvie Kayitesi of Rwanda, publicly stated that the death penalty violated the African Charter.\textsuperscript{524}

In Tanzania, which Zanzibar is part of, the death penalty is imposed on capital offences such as murder, treason, entering Zanzibar with intent to organise a counter revolution, instigating invasion and child destruction.\textsuperscript{525} Zanzibar, being a part of Tanzania, has for many years abolished the death penalty in practice but continues to retain it in its laws.\textsuperscript{526} There are many reasons given by different disciplines on the need to retain the death penalty in our laws where most of these reasons are based on the deterrence factor and the demand of the society.

\textsuperscript{520} Ibid.
\textsuperscript{521} Ibid.
\textsuperscript{522} Ibid.
\textsuperscript{524} Ibid, also see International Criminal Tribunal for Rwanda: Prosecutor v. Munyakazi, international legal materials, Vol. 48, No. 1, 2009, at 165.
\textsuperscript{525} Section 26 of the Penal Act, 2004 (Act No. 6 of 2004).
\textsuperscript{526} Ibid.
to continue with it. But it must be known that at the national level, Tanzania is a signatory of the UDHR and to the ICCPR. However, the ratification of the international instruments is not enough and there is a need for Tanzania to re-think the death penalty.

For a long time, the Revolutionary Government of Zanzibar made no statement regarding the possibility of inclusion of the prohibition of the death penalty in the Constitution. Due to this position, the Zanzibar President, Dr Ali Mohamed Shein took a step to describe death penalty as “a very difficult issue” because it concerns “all the people and is attached to some people’s ideologies and religions”.

He told the East African Judges and Magistrates meeting held in Zanzibar in 2013 that as per the Constitution and the Universal Human Rights, the right to life is for all without discrimination. However, the President did not respond to the issue of him and President Jakaya Kikwete not signing for the execution of prisoners on death row. The death penalty took centre stage at the meeting after being brought to light by Zanzibar’s Chief Justice, Omar Othman Makungu, who advised the Constitutional Review Commission to re-examine the death penalty and its execution. Zanzibar’s Chief Justice argues that both presidents of Tanzania and Zanzibar have been reluctant to authorise death sentences passed by various judges, effectively preventing the execution of the convicted.

On the issue of many presidents in the world being reluctant to sign for the execution of prisoners or death row, there are many reasons

528 Ibid.
530 Ibid.
531 Ibid.
532 Ibid.
533 Ibid. It is on record that the last execution in Zanzibar was carried out before the Revolution of the January 12, 1964. This means Zanzibar has been observing de facto moratorium for almost 50 decades. A number of convicted persons had since 1964 been sentenced to death by the High Court of Zanzibar and are languishing in jail for the execution of the death penalty. For more details see Hassan, Ali A., The Death Penalty in Zanzibar, a Paper Presented to Mark the Abolition of the Death Penalty Day held at the Zanzibar Legal Services Centre, Zanzibar, on October 10, 2012.
given. The risk of executing innocent people is recognised by political leaders when making the decision to abolish the death penalty. For example, Bill Richardson, the former Governor of US state of New Mexico argued that:

In a society which values individual life and liberty above all else, where justice and not vengeance is the singular guiding principle of our system of criminal law, the potential for wrongful conviction and, God forbid, execution of an innocent person stands as anathema to our every sensibilities as human beings.\(^\text{534}\)

Upon recognising this stand, Section 59 of the Constitution of Zanzibar, 1984 gives power to the President of Zanzibar to change the death penalty awarded by the Court where the section provides that the president may:

- Pardon any person convicted of any offence and may grant such pardon unconditionally or on conditions;
- Grant temporary or permanent suspension of execution of any sentence handed down by any court in respect of any person for any offence committed by that person;
- Change any sentence handed down to any person in respect of any offence and make it less than what is originally was;
- Absolutely or partially pardon any person sentenced in respect of any offence, or in the case of decree for confiscation decided upon by the Government against that person.

Though the Constitution of Zanzibar, 1984 gives mandate to the President of Zanzibar to make changes on the death penalty awarded by the competent Court, there is a need to find the best mechanism which will help to abolish death penalty permanently in Zanzibar.\(^\text{535}\) It could be argued that the best path to abolish the death penalty is by amending the Constitution, mostly on the right to life, and then subsequently


\(^{535}\) This will also maintain the position of Section 13 of the Constitution of Zanzibar which guarantees the right to live to all persons.
amend the penal code and other laws.\textsuperscript{536} This will be materialised if various actors including Government officials, the courts, the media, professional organisations, religious bodies and non-governmental organisations (NGOs) play their role in that process. However, the starting point should focus on enabling national institutions and civil society to engage in free and informed debate about the death penalty, and seeking the advice of relevant organisations including national human rights institutions, professional organisations, religious bodies and national and international non-governmental organisations.

The Establishment of Children’s Court and Its Challenges

The United Republic of Tanzania ratified the United Nations Charter on the Rights of the Child in 1991; the African Charter on the Rights and Welfare of the Child in 2003; the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography in 2003 and the Optional Protocol on the Involvement of Children in Armed Conflict in 2004. Upon knowing the importance of ensuring the rights of the children, the Zanzibar Revolutionary Government as the executive body responsible for introducing legislation decided to enact the specific and comprehensive law\textsuperscript{537} so as to give full force to the provisions of the UN Convention on the Rights of the Child and other international treaties.

However, the demand to establish the Children’s Court in Zanzibar as enshrined in the Children Act\textsuperscript{538} took about two years before it materialised. It is observed that ratification of international instruments is only a beginning; it is a signal of a commitment to the recognition of children’s rights, which requires implementation in practice.\textsuperscript{539}

Thus the Government of Zanzibar via High Court of Zanzibar with the support from Sweden, the Save the Children and the Zanzibar Legal Services Centre (ZLSC) on February 5, 2013 launched a Children’s

\textsuperscript{536} In 1971, the UN General Assembly affirmed, in Resolution 2857 (XXVI), that to guarantee the right to life in the Universal Declaration of Human Rights “the main objective to be persuaded is that of progressive restricting the number of offences for which capital punishment may be imposed, with a view to the desirability of abolishing this punishment in all countries”.

\textsuperscript{537} The Children Act, 2011 (Act No. 6 of 2011).

\textsuperscript{538} \textit{Ibid.}, Section 18.

\textsuperscript{539} In fact, unimplemented domestic and international law create false expectations and do children more harm than good. Inherent in this argument is the view that rights without resources are meaningless. For more details see Shannon G., 2005. Child Law. Dublin: Thomson Round Hall, p.2.
Court. This is a big step forward in helping children and other vulnerable witnesses who are required to testify in court in cases of child abuse. The court is the first of its kind on Zanzibar and symbolises an intensification of the work for children’s rights and is expected to strengthen the implementation and enforcement of the Children Act No. 6 of 2011.

A national study on violence against children undertaken in Zanzibar showed that children of all ages are under the risk of violence, abuse and exploitation at home, at school and in the communities.\textsuperscript{540} Based on the findings of the study, the Government of Zanzibar, together with its partners, decided to increase the efforts to end the violence.\textsuperscript{541} In addition to the Children’s Court, a number of actions have been taken, such as the establishment of a child protection unit in the Department of Social Welfare, the development of national child protection policies and guidelines, the establishment of One Stop Centres at different hospitals, children and gender desks in police stations, and the development and implementation of legislation to better promote and protect the rights and interests of children in Zanzibar.\textsuperscript{542}

It is hoped that with the establishment of the Children’s Court, the process to bring justice will be shorter, which will increase the trust of the community in the justice system and break the silence around cases of violence against children. Despite this comprehensive system put in place, there are some weaknesses which need to be addressed. For example, very few cases of violence against children have actually been prosecuted. One of the reasons is, the lack of evidence as children are intimidated when witnessing in front of the presumed perpetrator or other people.\textsuperscript{543}

Based on the above study which reveals that in Zanzibar children in all ages are under the risk of violence, abuse and exploitation at home, at school and in the communities, it was presumed that additional Children’s Courts in other regions of Zanzibar might have been established so as to deal with the problems facing the children.

\textsuperscript{541} Ibid.
\textsuperscript{542} Ibid.
\textsuperscript{543} Ibid.
However, this is not the case as for the time being there is only one Children’s Court which is located at Vuga, Zanzibar. This causes many cases from other regions to be filed at Vuga. Though someone may argue that with the nature of Unguja Island this might not cause any disturbance, in a real sense this situation has jeopardised the system of implementing justice. This is due to the fact that many cases filed before the Children’s Court fail to be heard because of poor attendance of the witnesses.

The poor attendance of the witnesses can be justified particularly by observing the low economic status of many Zanzibaris living in the rural areas. It is extremely difficult for them to afford the bus fares to the Children’s Court at Vuga. Again, this problem has caused delays in propagating justice in Zanzibar. To further add to this problem, questions may be asked as to the administration of rights of the children in Pemba Island. It is the demand of the law for the Children’s Court to be established in every region in Zanzibar. There is no clear cut answer for this failure but lack of infrastructures might be the reason behind it. Nevertheless, this should not be taken as an excuse as the demand to ensure the implementation of children’s rights in Zanzibar is something that cannot be ignored.

Failure to establish approved schools and rehabilitation centres can be viewed to be another encumbrance facing the Children’s Court in Zanzibar. Though the Government has established the Children’s Court, it fails to fulfill the requirements of the Child Act which insists on the need to have approved schools and rehabilitation centres. To a great extent, this has hampered the expected effectiveness of the administration of children’s rights before the Children’s Court.

Many questions might be asked as to the system of punishments which is applied by the Children’s Court in Zanzibar. The answer to these questions is in negative form. The lack of good mechanisms to discipline child offenders has not only caused the system to be ineffective but also substantiated the argument that the Children’s Act favours the

545 Ibid.
546 Section 18 of the Children Act, 2011 (Act No. 6 of 2011).
offending child rather than the victim. For example, in the case of rape whereby all parties are under age.

Even in a case where the offending child is found guilty, failure to put him or her in an approved school or rehabilitation centre causes the offending child to return to the community and he or she may even come face to face with the victim. This is not a proper practice as it increases the psychological stigma that the victims of many offences including rape might suffer.547

Stripping of Party Membership of Mr Mansour Yussuf Himid

The movement for the current constitutional review process which is occurring in Tanzania gives rise to many arguments where the majority of Zanzibaris air their views on the need to expand Zanzibar’s autonomy. At the outset this movement was made free for everyone to comment according to his or her understanding. Among the issues that emerged in this discussion is the existence of three Governments. This issue has involved many politicians, among them Mr Mansour Yussuf Himid, the former Minister for Agriculture and Natural Resources and the

547 The first and foremost objective of the Children’s Court is to curb lawlessness. This requires careful sifting out of the few hardened teenage criminals, the seasoned young outlaws in need of discipline. These hoodlums must be identified by careful staff work based on publicly known criteria, and where they meet the criteria and waiver is authorised, they should be tried by courts of general criminal jurisdiction. Such criteria should include unusually vicious acts, unusual sophistication of purpose and plan, hardened mental attitudes and repeated offenses. There is a school of thought that all sixteen and seventeen-year-olds who come athwart of the law should be tossed into the slot designed for criminals - to be booked, fingerprinted, mugged and presented to grand juries. This school operates under the slogan, “lower the age limits for Juvenile Courts”. The premise of these out-criers is that such a purse-net seining operation would dispose of the young hoodlums. And so it would, but it would be an operation so wasteful as to be scandalous. The great majority of this age group are far from being criminals or, indeed hardened in any respect. It would be worse than vicious, it would be stupid, to treat all erring teenagers as though they were criminals, to stamp their names on the criminal record books, to brand them with a charge and a number as indelibly as if with a branding iron, to throw them into prolonged association with case-hardened criminals to learn the ways and the philosophies of outlaws, to destroy or ignore their potentialities for good citizenship. We treat our wildlife better than that. You are not allowed to kill all the fish in the river to get a few carp, or to poison a whole feeding area to destroy a few hawks. It is hard to imagine a civilised proposal to label as criminals young people who are not criminals. But that is precisely the realistic result of the ‘lower-the-age-limit’ proposal. The sane treatment of the young hoodlums is to sift them out from among the juvenile delinquents, and then treat them as the criminals they are. For more details see Shears, Curtis C., 1962. “Legal Problems Peculiar to Children’s Courts”, American Bar Association Journal, 48, (8), p.720.
former member of the House of Representatives for Kiembe Samaki Constituency, who was highly involved. Himid’s stand to demand three Governments was seen as an act of going against the policy and manifesto of Chama Cha Mapinduzi (CCM).

This led to some leaflets being circulated in Zanzibar demanding that Himid step down for saying that the two Governments system was outdated. The leaflets charged that the statement by the Minister violated CCM policy and manifesto which the Minister had participated in approving as a member of the party’s National Executive Committee. According to the leaflets, CCM members expressed surprise at the minister’s stance pushing for a three-Government system when speaking in the Zanzibar House of Representatives session. The leaflets read in part:

You are a NEC member and a member of a special National Executive Committee for Zanzibar, a member of NEC leading the Economy and Finance department. Why didn’t you raise all those concerns during the party’s meetings?548

Following these allegations, Mr Vuai Ali Vuai, CCM Deputy Secretary General for Zanzibar, revealed that he had started receiving complaints from CCM members in Isles when he was in Dodoma in relation to the statement by Minister Himid defending the three Governments system.549 He, however, said that CCM believed in the two Governments system which was proper for the Union between Tanganyika and Zanzibar and that was why the structure was included in the party’s policy and its election manifesto.550

To put the allegations into effect, in October 2012, the Zanzibar President, Dr Ali Mohammed Shein, dropped Mr Himid from the cabinet, replacing him with Ms. Shawana Buheti Hassan as the Minister without portfolio.551 It was argued that Mr Himid’s stand over the Union was the factor behind his clash with the authorities. Mr Himid, who was also serving as a member of the House of Representatives for Kiembe

549 Ibid.
550 Ibid.
Samaki, issued public statements indicating that he was in favour of more autonomy for Zanzibar.

On August 25, 2013, the CCM National Executive Committee (NEC) stripped Mr. Himid of his party membership for acting against the party ethics. Announcing the decision, CCM Ideology and Publicity Secretary Nape Nnauye argued that NEC endorsed the decision by Zanzibar’s NEC for West District basing on three accounts:  

- First, he was accused of failing to oversee objectives of CCM as well as failing to fulfill his obligation as a CCM member.
- Second, Mr Himid was also accused of failing to live like a CCM member by violating the ruling party ethics.
- Third, he was accused of acting against the CCM 2010-2015 manifesto under which he campaigned in the 2010 General Election.

It was further indicated by Mr Nnauye that the decision was final and Mr Himid would not appeal anywhere in the party machinery. Again, this decision means that Mr Himid has also lost all the leadership posts that he had been holding in the party, including his membership in the Zanzibar House of Representatives. The loss of representative role in the House of Representatives has been made in connection with the Zanzibar Constitution, 1984 where it is provided that whenever a member decides to leave his or her political party, his or her membership in the House will automatically come to an end.

The stripping of party membership which results in the cessation of Mr Himid’s membership in the House leaves many questions pertaining to the application of the Constitution of Zanzibar 1984, and the position of the voters. While it is mandatory for a person who wants to be a member of the House of Representative to gain the majority of voters in a particular constituent, there is no such need whenever it comes for his cessation as the act of stripping his party membership is enough to take him out of the House.

This sounds unclear as the law fails to consider the role and position of the voters who participated fully in the process of electing him as their

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553 Ibid.
554 Section 71 (1) (g) of the Constitution of Zanzibar, 1984.
representative. From this trend, the revisiting of laws is indispensable in order to balance the demand of political parties while at the same time taking care not to jeopardise the voters who played a pivotal role in the election process.

**Women Empowerment**

To bridge the gap between men and women as well as strengthening women's position in decision-making bodies, Zanzibar in the past few years amended its Constitution to increase the women members in the House of Representatives. Section 67(1) of the Constitution of Zanzibar of 1984 says:

> There shall be female members of the House of Representatives thirty per cent (30%) in number of elected members in electoral constituencies who are Zanzibaris and appointed by political parties in the House of Representatives.

In addition, Section 67 (2) of the same Constitution says:

> Every political party winning more than ten (10) per cent of the constituencial seats in the House of Representatives shall recommend the names of women considering the provisions of proportionality seats between the parties winning the election in the constituencies and get seats in the House of Representatives, and send names and their qualifications to the Chairman of the Zanzibar Electoral Commission.

Ideally, the right to take part in decision-making is constitutional right. The Constitution of Zanzibar 1984 has provided the right regardless of gender. Section 21 (1) provides:

> Every Zanzibari shall have the right to take part in the conduct of the government of the country, either directly or indirectly through freely chosen representatives.

It has been observed that women’s participation in the decision-making process still remains low.\(^{555}\) The low participation of women is mainly attributed to lack of education, cultural and historical factors, including the religious beliefs and lack of exposure.\(^{556}\) Participation of women is obtained through election after contesting in the general elections;

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\(^{556}\) Ibid.
political posts after appointment by the President and election or nomination for special seat of women in parliament or House of Representatives. However, despite many chances being established for women’s participation, their number is still not satisfactory.

Currently there are two women holding the post of District Commissioner in Zanzibar out of 10 existing Districts while, no woman was appointed as Regional Commissioner in five regions of Zanzibar. It is worth noting that both District and Regional Commissioners are presidential posts constitutionally. At the Ministerial levels, it has been found that until December 2013, there were only three female Ministers out of 20 Ministers and five Deputy Ministers from eight. The imbalance also exists for the remaining posts like Principal Secretary and Directors in the Ministries. There are 50 elected members of the House of Representatives of whom 47 are males and three are females while the total number in the House is 82, out of whom only 26 are female.

Generally, a large number of women do not hold key posts in the Revolutionary Government of Zanzibar. In addition, most women work as clerks and not as technocrats. Women’s participation in decision-making in Zanzibar is far from 50-50 proposed by International Treaties. Therefore, more campaigns are needed to streamline women’s participation in Zanzibar.

The move to bolster women’s participation is a plausible one. It will encourage women, one of the vulnerable groups, to wake up from a slumber and stand and fight for their rights and development in different ways. However, Zanzibar should further contemplate boosting the female members of the House of Representatives to 50 per cent (50%) in number. The suggested increase will put the number of women at par with their male counterparts. On their side, women should reciprocate the increase of their number in the Legislature by being aggressive and speaking out their minds on matters regarding their interests as a way of economic, social and political emancipation. In the view of this author,

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557 Section 61 (2) of the Constitution of Zanzibar, 1984.

women should try to claim a special percentage in the appointment of cabinet ministers. This will give a push to their efforts to stand side by side with men.

**Laws Enacted in Zanzibar, 2013**

It is a well-known fact that the development of any society needs the flexibility and adaptability of law. This encourages the civilised society to consider the essence of enacting different laws which will cover the areas concerned. Thus, in 2013 many laws have been enacted by the House of Representatives in Zanzibar. Among the laws enacted during this year, the establishment of the Attorney General’s Chambers (Discharge of Duties) Act and the Zanzibar Broadcasting Corporation Act requires special observation.

The Zanzibar Broadcasting Corporation Act was passed by the House of Representatives on January 23, 2013 and assented to by the President on August 19, 2013. This Act merges together the Television Zanzibar (TVZ) and the Radio Zanzibar (Sauti ya Tanzania, Zanzibar) with the aim of strengthening information mechanisms in Zanzibar. The establishment of this Act goes hand in hand with the Constitution of Zanzibar, 1984 which guarantees the right to be informed. The establishment of the Zanzibar Broadcasting Corporation is stipulated under Section 3 of Zanzibar Broadcasting Corporation Act and the objectives of this Corporation have been mentioned under Section 5 of the same Act. Thus, the objectives of the Corporation shall be:

- To provide information, education and entertainment to the public;
- To provide radio, television broadcasting and other related services and programmes that contribute to social, economic, political and cultural development, with emphasis on national unity in cultural diversity;
- To run the corporation into business and commercial activities;
- To reflect the public vision regarding the objective, composition and overall management of the broadcasting services; and

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560 The Zanzibar Broadcasting Corporation, 2013 (Act No. 4 of 2013).
561 Ibid.
• To provide electronic media and consultancy services that educate and guide the public.

As regards the functions of the Corporation, Section 6 of the Zanzibar Broadcasting Corporation Act\textsuperscript{562} specifies different functions, among them to:

• Establish a sustainable system of gathering, analysing, storing and disseminating information to the public;
• Produce quality local programming and to adapt foreign programmes to suit the needs of the society of Zanzibar;
• Establish systems of accountability and enhance profitability in running public broadcasting services;
• Maintain responsible editorial independence and set national broadcasting standards through exemplary performance;
• Protect public interest in rendering broadcasting services;
• Provide accurate, timely and reliable reporting of events and presentation of programmes; and
• Conduct research and develop programmes in pursuit of its general objectives which it may operate both within the Corporation and in collaboration with relevant institutions.

The establishment of the Attorney General’s Chambers (Discharge of Duties) Act\textsuperscript{563} is another development which needs special attention. Though the office of Attorney General’s Chambers was there before the introduction of this law, the introduction of this law emphasises the importance of this institution in Zanzibar. This has been done after realising the position of the Attorney General as stipulated in the Zanzibar Constitution\textsuperscript{564}. The functions of the Chambers have been mentioned under section 14 of the Attorney General’s Chambers (Discharge of Duties) Act they include:

• To facilitate the execution of the functions and powers vested in the Attorney General as provided in the Constitution and other relevant laws;

\textsuperscript{562} Ibid.

\textsuperscript{563} Act No. 6 which was passed by the House of Representatives on April 8, and assented by the President on August 16, 2013. Section 4(2) of the said Act emphasises that the Chambers shall be an independent and autonomous government agency in the Zanzibar public services.

\textsuperscript{564} Section 56 of the Constitution of Zanzibar, 1984.
To represent the Government and other public service institutions in civil litigation, arbitration and other proceedings of civil nature;

To develop and keep under review policy and practices relating to legislative drafting and drafting of non-legislative documents;

Subject to relevant laws and regulations, to prepare and administer all procedures for preparation of Bills, regulations and other statutory instruments and cause the same to be published in the Official Gazette;

To prepare and improve legislative drafting manuals to be used as guidelines to develop any legislation, rules and regulations;

To provide legal advice to the Government on any legal matter, in particular matters of a civil nature including commercial and international matters;

To provide legal advice to the Government and public institutions in the negotiation and drafting of commercial contracts and other non-commercial agreements on behalf of the Government;

To regulate provision of legal service to the Government and other public service institutions;

Coordinating reporting obligations to international human rights treaty bodies to which the United Republic of Tanzania is a member or on any matter which member states are required to report;

To collect, keep and disseminate records to public service institutions, International and Regional Conventions to which the United Republic of Tanzania is a member or signatory;

To conduct research on legal matters and recommend to the Government on the amendment of policy, law or powers of executives of relevant institutions;

To conduct trainings on any aspect of law;

To provide any other service not inconsistent with the functions of the Chambers for the purpose of improving administration of justice whether free of charge or otherwise.

The Attorney General’s Chambers (Discharge of Duties) Act gives powers to the Attorney General whereby his opinion on any legal issue is considered to be the legal position of the Government. This has been stipulated under Section 20 of the Act where it is mentioned that:
The legal advice of the Attorney General given pursuant to the provisions of this Act shall remain the legal position of the Government on the matter unless the President directs otherwise or it is otherwise revised by a court of competent jurisdiction.\textsuperscript{565}

It can be observed that the cooperation between the office of Attorney General’s Chambers and the office of the Director of Public Prosecutions is indispensable as both stand as the independent and autonomous Government agencies dealing with the matters of civil and criminal nature respectively. Upon realising this, the Attorney General’s Chambers (Discharge of Duties) Act gives mandate to these two offices to enter into arrangements for cooperation for the purpose of improving their respective institutional, operational and human resource capacity.\textsuperscript{566} In doing so, the two institutions may make rotation arrangement of their professional staff, develop common career and skills development programs and conduct or engage in any other program or arrangement.\textsuperscript{567}

Other laws enacted in Zanzibar during 2013 include:

- The Appropriate Act No. 11 of 2013 passed by the House of Representatives on August 5 and assented to by the President on August 20, 2013.
- The Establishment of Zanzibar Commercial Court Act No. 9 of 2013 passed by the House of Representatives on April 11 and assented to by the President on August 16, 2013.
- Written Laws (Miscellaneous Amendment) Act No. 8 of 2013 passed by the House of Representatives on April 8 and assented by the President on August 16, 2013.
- The Establish and Manage the Zanzibar Utilities Regulatory Authority Act No. 7, passed by the House of Representatives on April 8 and assented by the President on August 19, 2013.
- The Zanzibar Ports Corporation (Amendment) Act No. 5 passed by the House of Representatives on April 8 and assented by the President on August 16, 2013.

\textsuperscript{565} Section 20 of the Attorney General’s Chambers (Discharge of Duties) Act No. 6 of 2013.
\textsuperscript{566} Ibid, Section 29.
\textsuperscript{567} Ibid.
• An Act to Amend the Zanzibar Maritime Transport Act No. 5 of 2006 passed by the House of Representatives on January 18 and assented to by the President on April 18, 2013.

• An Act to Amend the Political Parties (Grant of Subvention) Act No. 1 of 2013 passed by the House of Representatives on January 16 and assented by the President on April 19, 2013.

• Zanzibar Shipping Corporation Act No. 3 passed by the House of Representatives on January 22, 2013 and assented to by the President on August 19, 2013.

• The Finance (Public Revenue Management) Act No. 10 of 2013 passed by the House of Representatives on June 20 and assented to by the President on July 5, 2013.

• An Act to Amend the Roads Decree Cap 134 passed by the House of Representatives on September, 2013 and waiting for the President’s assent.

• An Act to Establish the Zanzibar Youth Council, Act No. 15 of 2013, waiting for President’s assent.

**Conclusion**

It is argued that State remains important in the global age. Thus, constitutionalism may provide the formal institutional components that allow the State to perform its functions on the higher end of the development process in the best manner so as to aggregate societal interests. Therefore, the process of constitutionalism is an intricate web of lived experience and human interaction which is very dynamic and provides the institutional reliability and accountability upon which sustained development depends. These assumptions reflect the reality here in Zanzibar where the on-going Constitution-making process in Tanzania has occupied a special place in the mind of the people of Zanzibar. This is due to the fact that the process will determine the fate and the status of Zanzibar itself in the Union set up. Though it is a long way till the results of referendum come out, it is worth waiting for the people of Zanzibar, particularly for them to ascertain their true status.
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