

CONSTITUTIONALISM IN EAST AFRICA

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Constitutionalism in East Africa: Progress, Challenges and Prospects in 1999

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Progress, Challenges and Prospects in 2007

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Acronyms

ACECCA	Anti-Corruption and Economic Crimes Act
AG	Auditor General
AU	African Union
CBD	Central Business District
CCM	Chama Cha Mapinduzi
CCPR	Covenant on Civil and Political Rights
CHA	Cessation of Hostilities Agreement
CRC	Constitutional Review Commission
CSO(s)	Civil Society Organisation(s)
CUF	Civic United Front
DO	District Officer
DP	Democratic Party
DRC	Democratic Republic of Congo
EAC	East African Community
EACA	East Africa Court of Appeal
EACJ	East African Court of Justice
EACSO	East African Common Services Organisation
EALA	East African Legislative Assembly
EAF	East African Federation
EAPF	East African Polical Federation
ECK	Electoral Commission of Kenya
EMB	Electoral Management Body
FDC	Forum for Democratic Change
FDLR	Forces Democratiques de Liberation du Rwanda
FIFA	Federation for International Football Association
HIV/AIDS	Human Immunodeficiency Virus/Aquired Immune Deficiency Syndrome

ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
IDPC	Internally Displaced People's Camps
IPPG	Inter Parliamentary Parties Group
JKU	Economy Building Brigade [Jeshi la Kujenga Uchumi]
JPSC	Joint Presidential Supervisory Commission
KACC	Kenya Anti-Corruption Commission
KACITA	Kampala City Traders' Association
KANU	Kenya African National Union
KICC	Kenyatta International Conference Centre
KMKM	Anti-smuggling Squad [Kikosi Maalum cha Kuzuia Magendo]
KNCHR	Kenya National Commission on Human Rights
KRA	Kenya Revenue Authority
LHRC	Legal and Human Rights Centre
LP	Labour Party
LRA	Lords Resistance Army
MP	Member of Parliament
NARC	National Rainbow Coalition
NCC	National Consultative Commission
NCHR	National Commission for Human Rights
NGO	Non-Governmental Organisation
NHRI(s)	National Human Rights Institution(s)
ODM	Orange Democratic Movement
PAP	Pan African Parliament
PNU	Party of National Unity
PRA	Peoples' Redemption Army

RBoR	Regional Bill of Rights
RMLF	Roads Maintenance Levy Fund
RPA	Rwanda Patriotic Army
RPF	Rwanda Patriotic Front
SG	Secretary General
SMZ	Zanzibar Government Special Forces [Serikali ya Mapinduzi ya Zanzibar]
UDHR	Universal Declaration of Human Rights
UEC	Uganda Electoral Commission
UHCR	Uganda Human Rights Commission
UNHCHR	United Nations High Commission for Human Rights
UN	United Nations
UPF	Uganda Police Force
ZEC	Zanzibar Electoral Commission
ZFA	Zanzibar Football Association
ZLSC	Zanzibar Legal Service Centre

Introduction

The East African Community (EAC), now encompassing five states after Rwanda and Burundi joined in 2007 expressed a commitment to the rule of law, good governance and respect for human rights under article 6(d) of the East African Treaty of 2000. The article sets out the fundamental principles that shall govern the relationship between members of the Community. Based on this principles, East Africans have committed themselves to enhance constitutionalism in the region in order to improve the manner in which the region is governed. Enhancing constitutionalism and the rule of law is key to achieving Objective 1 under Article 5 of the Treaty which is the attainment of greater economic prosperity of the region, regional security and political stability.

In Chapter One Philip Kasaija examines the role of the EAC in the promotion of the rule of law and constitutionalism in the region in the year 2007. As noted earlier, in 2007 the EAC expanded to include Rwanda and Burundi. In addition, in the same year, the issue of the establishment of the East African Political Federation became an important political concern for the original three Partner States of Kenya, Tanzania and Uganda. The three states engaged in a consultative process in which they, through country-specific commissions, sought to gauge their people's support for the fast tracking of the East African political federation. The consultations resulted in the slowing down of the process as the people of Tanzania categorically objected to the fast tracking of political federation. This should give the region the opportunity to deepen economic integration before the political federation can be realized.

With regard to the promotion of the rule of law and constitutionalism, Philip Kasaija argues that the East African Court of Justice (EACJ) has taken the lead in this area. In the year under review, the court took a bold step by fighting against a member state for having

violated Article 6 (d) of the EAC Treaty, although it never made any binding orders on that state. The Court ordered the Secretary General of the EAC to put in place a framework to monitor what is going on in the five member states of the Community in the areas of the rule of law and constitutionalism.

On the down side, the court failed to fine the governments of partner states who amended the treaty without public consultations and participation. In pronouncing itself, the court noted that the amendments had already come into effect and so there was no need to grant an injunction to halt them. Kasaija argues that if the EAC is meant to be a people-centred institution, then the people must be consulted at every significant stage of the integration process, including the amendment of the treaty. Thus by allowing the amendments to stand, we think, court missed an opportunity to remind the governments that the people are at the centre of the new EAC as per Article 7(1) (a) of the EAC Treaty.

The paper considers that the East African Legislative Assembly (EALA) has not demonstrated capacity to make optimal contribution to enhancing constitutionalism in the region due to; among other reasons, its short period of existence, the economic focus of its legislation, the unclear standing of the assembly and its *legislation viz-a-viz* that of the national assemblies of member states.

In Chapter Two, Isaac Bakayana analyses the state of constitutionalism in Uganda in 2007. His paper argues that Uganda is facing a crisis occasioned by the lack of an independent judiciary that has been continuously under attack. In this respect, he points out certain instances in which the independence of the Judiciary is not upheld by other authorities and particularly the Executive. The courts have been continuously defied by government, law enforcement officers including the Attorney General, all of whom, are taking cue from an overbearing Executive. He further argues that the Amnesty Act of 2000 enacted to deal with the political problem of rebellion seems to exacerbate the problem because of the manner in which it has been enforced which seems to facilitate the denial of the right to be presumed innocent under the constitution.

In 2007 the Judiciary was unable to uphold the rights of accused persons most specially the presumption of innocence. Bakayana points out that in some instances, either due to loopholes in the law or interference of the Executive with the work of the Judiciary, presumption of innocence has been violated by the Ugandan authorities. For instance, the law relating to criminal offences requires that a suspect must be produced in court within 48 hours of their arrest. Where the crime committed is of a capital nature, there is discretion on the part of the police to hold the suspect for up to six months. Bakayana points out specific instances (for example the trial of the alleged Peoples Redemption Army (PRA) in which this discretion was abused by the authorities to detain the PRA suspects for a longer time than is constitutionally allowed.

In 2007, Uganda witnessed a growth in ethnic and racial tensions especially with regard to access to land that culminated in violent protests against government allocation of forest land to investors of Asian descent. The government's response to the Mabira Forest demonstrations, for example, served as a reminder that in the absence of greater vigilance civil liberties are threatened and the government cannot be trusted to promote and respect fundamental rights and freedoms.

On a more positive note, his paper argues that the peace process relating to the conflict in northern Uganda is likely to yield gains for constitutional governance in Uganda if provisions that relate to human rights violations during the war are implemented.

In chapter three, John Ambani Osogo argues that although Kenya has a fairly developed infrastructure for enhancing constitutionalism, the institutions are tested to the limit and most of them are underperforming. This, he says was illustrated by the December 2007 general election and its aftermath. All the institutions involved fell short of meeting acceptable standards in a constitutional state. He argues that the Executive, out of the three traditional institutions of government that are vested with the mandate to foster constitutionalism, is overbearing on the other two institutions – Parliament and the Judiciary. This has had the unfortunate result of eroding the confidence of the

Kenyan institutions. He further argues that other oversight institutions such as the Kenya National Commission on Human Rights (KNCHR), the Electoral Commission of Kenya (ECK) and the Kenya Anti-Corruption Commission (KACC) have a role to play in advancing constitutionalism in Kenya. But they have underperformed and in some instances impeded the growth of constitutionalism in Kenya especially due to institutional weaknesses that have to do with their relationship with the Executive.

In Chapter Four, Prof Sheriff and Ismail Jussa analyse the constitutional development in Zanzibar in 2007. They demonstrate the desire by the people of Zanzibar to continue examining their relationship with mainland Tanzania (Tanganyika). The response of the people of Zanzibar to the *Wangwe Commission* that was established to consult the people on fast tracking the East African Political Federation (EAPF) went further to demonstrate that the people of Zanzibar continue to engage with their relationship with the Tanzanian Union is ambiguous.

The publication of the first Zanzibar Human Rights Report by a Zanzibar-based Non-Governmental Organisation (NGO) may be another sign of the maturation of the political awareness and determination of the people of Zanzibar not to be silenced. Their discussion makes the point that despite these positive developments, Zanzibar is yet to outgrow one-partyism and the suppression of basic rights and freedoms. There have been attempts to muzzle the press by restricting their reporting of the affairs of the House of Representatives. The Zanzibar government has also failed to establish an anti-corruption agency even when there is official acknowledgement that corruption is a big issue in Zanzibar. The purported floundering of the latest Accord between Chama Cha Mapinduzi (CCM) and the Civic United Front (CUF), if it is not reversed quickly, exposes these Islands to another prolonged period of uncertainty and potential breakdown of law and order.

Lastly, in Chapter Five, Felix Ziginshuti of Rwanda discusses various aspects of constitutionalism in the Republic of Rwanda with specific focus on the progress made in the year 2007. The chapter opens

with acknowledging the constitution as the supreme law of Rwanda to which all the other laws are subordinate. It sets out the various fundamental principles which are embedded in the constitution and proceeds to evaluate the application of these principles in light of various practices, events and occurrences both by government in particular and the Rwandan people in general.

The various principles discussed include the fight against genocide ideology, power-sharing, rule of law, democratic government, equality, non-discrimination and the quest for solutions through dialogue and consensus. Some of these issues include the commitment of the government to prosecuting and penalising the perpetrators of the 1994 genocide in the most effective manner possible, the fight against the genocide ideology, protection of human rights and the government's support of, among others, the right to life, right to property, right of defence, right to own property as well as press freedom within appropriate limits.

It concludes that although Rwanda faced various challenges in 2007 its commitment to uphold constitutionalism, has made it a country that is committed to its Constitution. Some of the challenges faced in 2007 are the conclusion of genocide trials that are still pending in both *Gacaca* and ordinary courts. The analysis acknowledges that Rwanda needs to align Rwandan laws with the regional principles observed by the EAC into which Rwanda was admitted in 2007.

The State of Constitutionalism in East Africa: The Role of the East African Community (EAC) – 2007

Philip Kasaija

Introduction

On 19 June 2007, Rwanda and Burundi acceded to the East African Community Treaty, thus expanding the East African integration area to five countries. Subsequently, the two countries became full members of the Community on 1 July 2007. The National Consultative Committees (NCC) on Fast Tracking the East African Federation (*hereinafter* NCCs-EAF) had also finalized their reports. It should be recalled that on 13 October 2006 the presidents of Kenya, Uganda and Tanzania simultaneously launched, in their respective capitals, committees to gather views on Fast Tracking the East African Political Federation (EAPF). The idea of fast tracking the regional integration of East Africa had been arrived at during a meeting of the three heads of state in Nairobi in August 2004. At that meeting, they had reviewed the pace of integration and had come to the conclusion that it was slow. As a result, they agreed to establish a committee “to examine ways and means to expedite and compress the process of integration, so that the ultimate goal of a Political Federation is achieved through a fast track mechanism.”¹

Following the August 2004 heads of state meeting, a committee to gather views on Fast Tracking the EAPF was established and given three months to report its findings to the 6th regular summit of the heads of state.² The Wako Committee (named after its chairman)

1 See Letter of Transmittal, Committee on Fast Tracking East African Federation.

2 The Committee was chaired by Amos Wako, Attorney General of Kenya; Professor

traversed the region gathering views from different stakeholders from September 2004 and presented its report in November 2004. In the end, it concluded that the integration process of the East African region should be expedited. In this regard, it recommended that the political federation of East Africa should be achieved in the year 2013, with the election of a single president for East Africa. After receiving the Wako Committee's recommendations, the heads of state deemed it imperative to carry out further consultations. In this regard, they agreed to establish committees in their respective countries to gather further views on the project. This resulted in the governments of Kenya, Uganda and Tanzania establishing the National Consultative Committees on Fast Tracking (NCCS1–EAPF) chaired by Njuguna Ngunjiri (Kenya), Besweri Akabway (Uganda) and Samuel Mwita Wangwe (Tanzania).

The Treaty of EAC sets out as its fundamental principles among others, 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 peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights.”³ It can be argued that these principles form the basis of constitutionalism under the Treaty regime. This paper aims at reviewing the role played by the EAC (as an institution) in the advancement and achievement of constitutionalism in the region in the year 2007. It seeks to examine the impact of the activities and decisions made by the EAC through its organs and institutions, on the Partner States in light of their respective constitutional developments during the period under review.

Theorising Constitutionalism and Constitutional Development

Constitutionalism is an idea often associated with the political theories of English philosopher John Locke who opined that a government can

Haidan Amani, Vice Chairman (Tanzania); Dr. Ezra Suruma, Secretary (Uganda); and Associate members were: Professor Sam Tulya-Muhika (Uganda), Ms Margaret Chemengich (Kenya) and Mr. Mohamed Fakh Mohamed (Tanzania).

3 Article 6(d)

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; and that a government's authority depends on its observing of these limitations.⁴ 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.⁵ Institutions in constitutional theory offer rules that bind both the persons in authority as well as the organs or bodies that exercise political power.

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.⁶ 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.⁷ While the first principle is an external one, confining state powers in relation to civil society, the second principle is an internal one, 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, are referred to as constitutional development.⁸ In the context of integration, some of the changes originate within the

4 Benson Tumasirwe, "Constitutionalism in East Africa: Progress, Challenges and Prospects in 2003," Cited in John E. Ruhangisa, *The State of Constitutional Development in East Africa: The Role of the EAC-2003*, edited by John E. Ruhangisa: Fountain Publishers, Kampala p 106.

5 *Encyclopaedia Britannica* (vol. 6) (1972), William Berton, Chicago, at 398.

6 Jan-Erik Lane (1996), *Constitutions and Political Theory*, Manchester University Press, Manchester p 19.

7 *Ibid.* p 25.

8 Ruhangisa, *op. cit.* p 106.

respective partner states, while others have to be adopted following the countries membership or commitment to various regional and international organisations, such as the EAC. In the sections that follow, we examine the role of the EAC as an institution in the process of constitutional development in the East African region. But first, we look at a short history of the East African integration.

A Brief History of the East African Integration

According to M. Abir, “since 1895, in the case of Kenya, Uganda and Zanzibar, and since 1919 in the case of Tanganyika territory, politicians and scholars have been toying with the idea of an East African federation.”⁹ As we have noted somewhere else, attempts at integrating the East African region have gone through five states.¹⁰ The first stage was marked by the building of the Uganda Railway. Subsequently, between 1900 up to early 1960s (the second phase), there was the establishment of the East African Common Market, the introduction of a single currency and the establishment of an East African High Commission. According to some writers, this was “the golden age of cooperation” in the region.¹¹

The third phase began in 1961 with the formation of the East African Common Services Organization (EACSO). In this stage, there were calls for the three countries of the region to politically federate. A working committee was even set up to draft the federation constitution, after Mwalimu Julius Nyerere had declared that he was ready to delay the independence of Tanganyika for at least a year so that the countries of the region could become independent at the

9 M. Abir, “Closer Union in East Africa,” *The Journal of African History*, Vol. 10 No. 3, 1969 p. 514. See also David Hamilton, *An East African Federation, The Journal of Modern African Studies*, Vol. 11 No. 3, 1963 at 407 (observing that “the issue of federation has been raised from time to time ever since 1899 when Sir Harry Johnston was instructed to consider the merits of some form of union or amalgamation of the East Africa (Kenya) and Uganda Protectorates and to find a suitable site suitable for a federal capital ...”).

10 Kasaija Phillip Apuuli, “Fast Tracking East Africa Federation: Asking the Difficult Questions,” *The Uganda Living Law Journal*, Vol. 4 No. 2, 2006 p 171.

11 *Ibid.* p 172.

same time – in a federation. This phase ended with the establishment of the EAC in 1967.

From 1967 to 1977, the three countries of the region operated within the EAC which was the fourth attempt at regional integration. The EAC Treaty was anchored on three broad categories: harmonization of economic policy; common institutions and a common market.¹² This attempt at integration collapsed in 1977 for various reasons.¹³ The last attempt (fifth) at integration of the region is the one which is underway, as we write this book. It began in 1984 when the three countries of the region signed the ‘Mediation Agreement for the Division of Assets and Liabilities of the former Community.’ Under the agreement, the parties agreed to explore areas of future cooperation and to work out concrete arrangements for such cooperation.¹⁴ Subsequently, between 1991 and 1999 agreements were reached to revive the defunct EAC. In July 2000, a new EAC was born after the ratification of the new EAC Treaty.

Institutions under the Current EAC and the Promotion of Constitutionalism

The EAC Treaty which according to Ruhangisa can be regarded as the Constitution of the Community¹⁵ establishes a number of institutions. These include: the Summit of the Heads of State and Government; the Council of Ministers; the Coordination Committee of Permanent Secretaries; the EACJ; the EALA; and the Secretariat. These institutions are meant to strengthen ties in the areas of cooperation identified as:

12 Mohabe Nyirabu (a), “Lessons from the East African Community of 1967-1977,” in Ahmed Mohiddin (ed.), (2005), *Deepening Regional Integration of The East African Community*, DPMF Book Series, Addis Ababa p 26.

13 Reasons for the collapse include among others: the economic war waged by Idi Amin resulting into a divergence of currencies; the worsening relations between Uganda and Tanzania due to the latter’s giving political asylum to Milton Obote; the worsening of relations between Uganda and Kenya following the Israeli raid on Entebbe in 1976; the disparity between the three currencies and the divergences in their economic policies. See Kasaija, *op. cit.* p 175. See also O. Oro *et al.*, (1990), *African International Relations*, Longman, London.

14 Article 14.02 EAC Mediation Agreement (1984).

15 Ruhangisa, *op. cit.* p 107.

political, economic, social and cultural fields, research, technology, defence, security and legal affairs.

The Summit, Council of Ministers and the Coordination Committee of Permanent Secretaries has a pre-determined membership. Presidents, ministers in charge of Regional Cooperation and permanent secretaries responsible for regional cooperation automatically make up these institutions. The EACJ, EALA and the Secretariat have periodically been reconstituted. The EACJ and EALA were first inaugurated in 2001.¹⁶ Our focus in this paper to a great extent will be on the work of the institution of the EACJ, which we think has had a profound effect on constitutional development in the region, and to a less extent on the work of EALA, in the period under review.

The East African Court of Justice

The EACJ is an organ of the Community established under Article 9(1) (e) of the EAC Treaty. The Court's role is to "ensure the adherence to the law in the interpretation, application of and compliance with the Treaty."¹⁷ The Court's jurisdiction extends to adjudication of disputes between the EAC and its employees arising from the terms and conditions of service of the latter or the application and interpretation of staff rules, regulations and terms and conditions of the EAC.¹⁸ The Court may also adjudicate on any matter submitted to it on the basis of an arbitration agreement, being either an arbitration clause contained in an agreement or where state parties concerned agree to submit a dispute between them to this court.¹⁹

In the period under review, the jurisdiction of the court was widened. This was in accordance to the Treaty which stated that "the Court shall have such original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable

16 Benson Tumasirwe, "Constitutional Development in East African Community (EAC) in 2002," in Fredrick W. Jjuuko, (ed.), (2005), *Constitutionalism in East Africa: Progress, Challenges and Prospects in 2002*, Fountain Publishers, Kampala p 136.

17 Article 23 of the EAC Treaty.

18 Tumasirwe, *op. cit.* p 139.

19 *Ibid.*

subsequent date.”²⁰ At their 8th Ordinary Summit held in November 2006, the Heads of State took a decision to reconstitute the EACJ by establishing two divisions namely: a Court of First Instance with jurisdiction as per the present Article 23 of the Treaty, and an Appellate Division with appellate powers over the Court of First Instance.²¹ The Council of Ministers in fulfilling its mandate made proposals aimed at amending the Treaty for the purpose of expanding the jurisdiction of the court which were adopted by the Summit at its 4th Extraordinary Meeting in December 2006.²² In March 2007, the amendments came into effect upon the completion of the ratification process. The reconstituted Court became operational on 1 July 2007. In the interim period pending its full establishment, the court will have five judges in each division. Each Partner State has been asked to re-designate one of its current judges of the EACJ to the Appellate Division.²³

According to Ruhangisa, the EACJ has a crucial role to play in conflict resolution and confidence building in the region.²⁴ In playing this role, “it should enhance the observance of and upholding of human rights through good governance and democratic institutions.”²⁵ Irene Ovonji a former member of EALA sees the Court as the “main body to play the role of constitutional development in the region.”²⁶ In the period under review, the Court was seized with a number of issues that touch upon the promotion of good governance and constitutionalism. To these we now turn.

Continued Interference with the Independence of the Judiciary in Uganda: The People’s Redemption Army (PRA) Suspects Case

On 1 March 2007, Ugandan security forces invaded the High Court in Kampala in an attempt to re-arrest suspects who were about to be

20 Article 27(2).

21 EAC Secretariat, Communique of The 5th Extra-ordinary Summit of EAC Heads of State, Kampala, 18 June 2007 p 4.

22 Note that the proposals were a subject of a legal challenge in the EACJ, which challenge was dismissed.

23 *Ibid.*

24 Ruhangisa, *op. cit.* at 108.

25 *Ibid.*

26 Personal Interview with Ovonji in Kampala, 27 November 2007.

granted bail.²⁷ It should be recalled that this was the second time the security forces were doing that, the first time having been 16 November 2005.²⁸ The accused who the security forces sought to re-arrest were suspected rebels belonging to the shadowy People's Redemption Army (PRA). They had been arrested in Eastern Democratic Republic of Congo (DRC) and West Nile in Uganda at various times between 2003 and 2004. The second siege of the High Court led to the judiciary going on strike for the first time since Uganda became independent. The judiciary accused the executive of "gross infringement on its independence."²⁹

In their justification for going on strike the judiciary cited "the repeated violation of the sanctity of the court premises, disobedience of court orders with impunity and the constant threats and attacks on the safety and independence of the judiciary and judicial officers."³⁰ Other grounds that the judiciary cited for going on strike include, "the savage violence exhibited by security personnel within the court premises, the total failure by all organs and agencies of the state to give the courts assistance as required to ensure effectiveness, and the recognition that judicial power is derived from the people, to be exercised by the courts on behalf of the people in conformity with the law, the values, norms and aspiration of the people of Uganda."³¹

The invasion of the courts by security men provoked condemnations from within and outside Uganda. It evoked memories when the government of Idi Amin invaded the courts and dragged the then Chief Justice of Uganda Benedicto Kiwanuka from his chambers and murdered him. According to the Principal Judge, James Ogoola, "the siege constituted a very grave and heinous violation of the twin principles of the rule of law and judicial independence."³² He added,

27 See Monitor Team, "Judges on strike over court siege," *Daily Monitor*, 2 March 2007 p 1.

28 See Solomon Muyita et al., "Armed Men Disrupt Besigye Court Case," *Daily Monitor*, 17 November 2005 at 1; Emmanuel Mulondo et al., "Besigye: Chief Justice Condemns Court Siege," *Daily Monitor*, 18 November 2005 p 1.

29 Monitor Team, "Judges on strike over court siege," *op. cit.*

30 *Ibid.*

31 *Ibid.*

32 *Ibid.*

“it sent a chilling feeling down the spine of the judiciary, and left the legal fraternity and the general public agape with disbelief and wonderment.”³³

Commenting on the incident, Supreme Court Justice George Kanyeihamba noted that “this regrettable episode in the history of Uganda should never have occurred if the actors in the other two arms of government had interpreted their respective roles correctly, and in the spirit of give and take and reconciliation, acted, guided by the doctrine of separation of powers, the rule of law and constitutionalism.”³⁴ He added that the episode, “depict[ed] an Executive that is bent on ignoring what it knows to be the right course both in national and international law and culture but instead embarks on the principle that ‘might is right’ and majoritism is always the answer to every possible social, legal and political problem.”³⁵ He concluded by observing that, “[the Museveni] administration ... is driven by what it perceives as victory through political power regardless of what the constitution, laws or final decisions of the courts or indeed the citizens of Uganda think.”³⁶

Arising from the November 2005 court siege, lawyers of the PRA suspects petitioned the EACJ praying that the court should find Uganda guilty of violating Article 6(d) of the EAC Treaty. The lawyers also accused the Secretary General (SG) of the EAC of failing to ensure that a member state (Uganda) complies with the EAC Treaty. The court in late 2007 pronounced itself on this petition. The Court held that “Uganda had violated the rule of law and the rights of its citizens by allowing its military to repeatedly interfere with the court processes.”³⁷ Whilst the Court did not find evidence against the Secretary General on the ground that he did not know what was happening in Uganda. However, it asked him “to be more pro-active and not sit back.”³⁸ The

33 *Ibid.*

34 G.W. Kanyeihamba, “The Culture of Constitutionalism and The Doctrine of Separation of Powers,” Public Lecture, Makerere University Faculty of Law, 15 March 2007.

35 *Ibid.*

36 *Ibid.*

37 Cited in Solomon Muyita, “Uganda violated rule of law, says EAC Court,” *Daily Monitor*, 26 October 2007 p 3.

38 *Ibid.*

Court directed the SG “to put in place a framework to know what would be happening in the five member states of the community.”³⁹ Unfortunately, the court did not make any orders against Uganda because of the absence of an enabling protocol.

In the promotion of constitutionalism in the region, the EACJ has taken a bold step by holding that a member state violated the rule of law and rights of its citizens. But the failure to make any orders is a step backwards. According to Yona Kanyomozi, a former member of the EALA, the lack of penalties for Article 6(d) violations makes the Treaty hollow.⁴⁰ To him the current EACJ is just engaged in “public rhetoric.”⁴¹ Kanyomozi avers that the operating principles in Article 7(2)⁴² must be translated into legally binding ones and above all the violators of these principles must be sanctioned. In conclusion to this point, we can however observe that notwithstanding the lack of power to make binding declarations regarding issues of the rule of law and constitutionalism, the EACJ has interpreted the Treaty robustly in its jurisprudence.

The Jurisprudence of the EACJ

In the period under review, the EACJ was seized with a number of cases which concerned the interpretation of the Treaty, but also having a bearing on the principles of constitutionalism and the rule of law.⁴³ Among the cases decided include: Application No. 5 of 2007 concerning the matter of Kenya representatives to the EALA; Application No. 8 of 2007 concerning judicial review; and Application No. 944 challenging the amendments to the EAC Treaty made by

³⁹ *Ibid.*

⁴⁰ Personal Interview Kampala, 13 November 2007.

⁴¹ *Ibid.*

⁴² It states: “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.”

⁴³ In accordance with Article 27(1) of the EAC Treaty.

⁴⁴ These amendments concerned among others Article 23 dealing with the Role of the EACJ; Article 24 dealing with the appointment of Judges of the Court; and, Article 26 which deals with the Removal from Office and Temporary Membership of the Court The amendment of these provisions led to the creation of two divisions of the East African Court of Justice i.e. the Court of First Instance and an Appellate Division.

Kenya, Uganda and Tanzania.⁴⁴ We will make comments on these applications later.

In Application No. 5, the Attorney General of Kenya sought the setting aside of the EACJ ruling in Reference No.1 of 2006. In the latter case the EACJ had ruled that the manner in which the Kenyan government had 'elected' its representatives of EALA contravened the EAC Treaty. As a result, the 'elected' members were barred from taking up office at Arusha. In Application 5, the court was asked to set aside its ruling in Reference No. 1 of 2006 because some members of the bench were suspected of having been biased. The Court took the opportunity to expound on the principle of judicial impartiality and the rules relating to recusal of judges. In dismissing the application, the court reminded member states that respect for court decisions is part and parcel of the rule of law, a fundamental objective principle of the Community, which is clearly set out in Article 6 (d) of the EAC Treaty.

Application No. 8, concerned a claim made by a Tanzanian national, Christopher Mtikila with regard to Tanzanian representatives to EALA. The court dismissed the claim with costs, having found that the claimant should have first sought redress in Tanzania's courts before appealing to the EACJ. In this application the court discussed at length the principle of judicial review, which has an import on the rule of law and constitutionalism.

In Application No. 9, the law societies of Kenya, Uganda, Tanganyika, Zanzibar and East Africa sued the Attorneys General of Kenya, Uganda, Tanzania and the Secretary General of the EAC over the amendments which the respondents made to the Treaty. The amendments concerned two issues: the reconstitution of the EACJ by establishing two divisions of Court of First Instance and an Appellate Division; and, a review of the procedure for the removal of Judges from office to include all possible reasons for removal other than those initially provided for in the Treaty.

When the amendments were first announced, the legal fraternity in the region registered deep concern. The legal societies of East Africa petitioned the EACJ to stop their implementation. The applicants contended that the amendments were made in violation of Treaty

provisions. The violation, it was opined offended the spirit of the EAC Treaty which called for 'public consultation' and 'participation' in the making and amending of the supreme law of East African integration.⁴⁵ In the instant case, no public consultations had been done on the amendments.

The court dismissed the application noting that most of the amendments had already been implemented anyway. Nevertheless, the court took the opportunity to expound on the principles of *locus standi*, granting of interlocutory injunctions and public interest litigation. These, we think, will contribute significantly to the principle of *stare decisis* and thus advance the rule of law and constitutionalism.

It must be stated that the amendments themselves were not bad per se. As already noted, the creation of an appellate tier of the EACJ is contemplated by Article 27(2) of the Treaty. Nevertheless, there have been those who have been calling for the establishment of an East African Court of Appeal (EACA).⁴⁶ The EACA would be the supreme court of the region. It would receive appeals from member states on any issue. By creating an appeals chamber for the current EACJ through amending the Treaty, moreover without public consultations and participation, the partner states seem to have 'killed' the EACA idea.

The East African Legislative Assembly

Like the EACJ, the EALA is one of the principal organs of the EAC.⁴⁷ It is composed of 32 directly and indirectly elected members.⁴⁸ Each Partner State elects 9 representatives to the Assembly. The EALA is set to expand with the admission of Burundi and Rwanda in the Community. The EALA is the legislative arm of the Community. The first EALA was inaugurated in 2001 and existed up to 2006. The second EALA was meant to be inaugurated in November 2006 but it ran into problems as a result of a legal challenge that was mounted

45 Article 150 of the EAC Treaty.

46 In an interview with Hon. Kanyomozi (see above), he strongly called for the establishment of the EACA.

47 Article 9(1) (f).

48 Article 48(1) of the EAC Treaty.

against the Assembly members from Kenya.⁴⁹ The result of the delay has meant that the term of the Second Assembly will now run from 5 June 2007 to 4 June 2012.⁵⁰

In the life of the EAC, the EALA, in addition to providing a democratic forum for debate also serves as a watchdog.⁵¹ The Assembly is mandated *inter alia* to: debate and approve the budget of the Community; debate annual reports on the activities of the community prepared by the Council of Ministers; debate the annual audit report prepared by the Audit Commission; debate all matters pertaining to the Community and make recommendations to the Council of Ministers; debate any other reports referred to it by the Council of Ministers; and liaise with the parliaments of the Partner States on matters relating to the Community.⁵² As can be seen, whilst the Assembly is not explicitly mandated to deal with issues of the rule of law and constitutionalism, it could use its mandate of “debating all matters pertaining to the community” to do so.

In the period under review, the second EALA has minimally (if at all) impacted on the areas of the rule of law and constitutionalism in the region. This could partly be explained by the fact that it has been in existence for a short time, as it started its work in July 2007. Time of existence notwithstanding, it must also be noted that the EAC generally and EALA in particular, have been saddled with *inter alia* the problem of sovereignty. Whilst the Treaty clearly states that the Community organs, institutions and laws shall take precedence over similar national ones on matters pertaining to the implementation of the Treaty, partner states sometimes enact new laws without regard to the regional body and its institutions.⁵³ The problem is further compounded by the fact that the EAC does not have a clear mandate

49 For details see *Anyang N'yongo et al v. AG of Kenya et al*, (EAC) Reference Case No. 1 of 2006.

50 EAC Secretariat, COMMUNIQUE OF THE 5TH EXTRA-ORDINARY SUMMIT OF EAC HEADS OF STATE, Kampala, 18 June 2007 p 5.

51 Yasin Olum, *Election of Members of the EALA: The Case of Uganda*, THE UGANDA LIVING LAW JOURNAL, Vol. 4 No. 2, 2006 p 139. For other functions of the EALA see Article 49 of the EAC Treaty.

52 Article 49 of EAC Treaty.

53 Wilbert T. K. Kaahwa, *The State of Harmonisation of Municipal Laws in the East African Community Context*, in Maria Nassali (ed.) (2008), REFORMING JUSTICE IN EAST AFRICA, Fountain Publishers, Kampala p 13-37.

to police enforcement of its decisions by partner states. On the problems facing EALA, Deya has succinctly opined that “it [EALA] has been under-funded and under-staffed. The national governments are content to grant sufficient resources to pay salaries and other emoluments, hold the formal sessions and perhaps for some regional travel, but not sufficient to cover the research, documentation for enabling the legislators to translate their intentions into tangible laws and policies that reap positive and practical benefits for the people of East Africa.”⁵⁴ We think this summarizes the weakness of EALA in the areas of constitutionalism and good governance.

As we write, EALA has just concluded its 4th meeting at Zanzibar. Nevertheless, a look at its legislation agenda for the year 2007-8, one can conclude that it has its hands full. The Assembly will consider the following Bills: the Lake Victoria Transport Bill, 2007; Lake Victoria Basin Commission Bill, 2007; Summit (Delegation of Powers and Functions) Bill, 2007; EAC Customs Management Act (Amendment) Bill, 2007; EAC Appropriations Bill, 2007; EAC Supplementary Appropriations Bill, 2007; East African Science and Technology Commission Bill, 2007; East African Civil Aviation Safety and Oversight Agency Bill, 2007; East African Kiswahili Commission Bill, 2007; and East African Health Research Commission Bill, 2007.⁵⁵ In addition the Assembly might consider in the period a bill to combat counterfeit practices in the region; and a bill to regulate the elections of the members of EALA.⁵⁶

From the list of bills that are to be considered by EALA, one clearly notices the absence of bills relating to issues of constitutional development. This absence can partly be explained by the fact that such issues are considered to be firmly under the ambit of the member states. Even those bills that the Assembly has passed in the past have had little or nothing to do with constitutional development and the

54 Donald Deya, “Constitutionalism and the East African Community in 2004,” in Lawrence Mute (ed.), (2007), *Constitutionalism in East Africa: Progress, Challenges and Prospects in 2004*, Fountain Publishers, Kampala at p 124.

55 EAC Secretariat, *op. cit.* p 6.

56 *Ibid.*

promotion of the rule of law.⁵⁷ There should be regional laws and programmes for the promotion of constitutional development so that comparisons can be made. As of now, every member state is pursuing its own agenda while EALA seems to be un-interested in constitutional development issues.⁵⁸

The EALA is also expected to play a big role in the implementation of the Third EAC Development Strategy (2006-2010), which sets out the strategic goals of the EAC and time-bound targets to be achieved. As the life of this Assembly is slated to end in 2012, it will therefore play a vital role in the establishment of the Political Federation.

The Movement towards a Political Federation

In the EAC Treaty, the Partner States declare that they will undertake to establish among themselves a Customs Union, a Common Market, a Monetary Union, and ultimately a Political Federation.⁵⁹ The purpose of this unique experiment is, as it has been noted, “to strengthen and regulate the industrial, commercial, infrastructural, cultural, social, political and other relations of the Partner States so that there is accelerated, harmonious and balanced development with sustained expansion of economic activities that will be shared equitably.”⁶⁰ Again, as Kamanyi has observed, “whereas Article 5(2) clearly provides for the establishment of political federation, there is no subsequent article that elaborates on the establishment of a

57 For a list of these acts see Deya, *op. cit.* p 122.

58 It should be noted that no member of EALA has ever brought an individual member's bill on constitutional issues for debate. Nevertheless, individual members have been happy to bring bills such as: The Inter-University Council for East Africa Bill, 2004; The East Africa Trade Negotiations Bill; and the East African Community Immunities and Privileges Bill. However, these were subsequently appropriated by the Secretariat. EALA is made up of members representing different political party interests in Member States. One would have expected that those members representing the opposition parties would put constitutional and good governance issues on the EALA agenda, but they have not. It could be that their parties have not given them a green-light to engage in these areas yet.

59 Article 5(2).

60 Judy Kamanyi, Political Federation in East African Progress, Challenges and Prospects for Constitutional Development, *East African Journal of Peace and Human Rights* Vol. 13 No. 1, 2007 at 127.

political federation.”⁶¹ Having realised this *lacunae*, the Partner States in 2004 moved to institute mechanisms to operationalize the political federation.⁶² As we mentioned in the introduction, the heads of state of Kenya, Uganda and Tanzania in 2004 met in Nairobi and decided to fast track the movement towards political federation. They established a committee headed by the Attorney General of Kenya Amos Wako, to study the issue and make recommendations.

The Wako Committee identified two arguments for fast tracking the East Africa Federation, these are: peace, political stability and security; and second, economic integration. The first argument has three strands. First, when societies merge to form one large economic and political entity, issues of tribalism, religious and social – cultural problems tend to disappear—this has proven difficult under each separate country. Secondly, under a Federation, people will identify themselves as East African (Kenyan), East African (Ugandan) or East African (Tanzanian). Reference to tribal associations will be marginalized and will disappear eventually. This is a major pillar for peace, stability and security as the Federation is a solution to any real or potential problem of internal disintegration. Thirdly, that the Federation will remove any possibilities of Partner States fighting each other and as more countries join, such as Rwanda and Burundi, political stability of the region will be further entrenched.

The bane of the second argument is that the desire for economic integration can only be satisfied if there is political will and support. The imperative in this global environment is that for a people to survive there must be an environment that enables them to participate in an accelerated economic development process. Economic development can be made faster within a political federation than when it is done under totally separate governments. The underlying assumption is that effective economic integration buffeted by a political federation is an imperative.

61 *Ibid.* at 128.

62 In accordance with Article 123(6) of the EAC Treaty which states, “The Summit shall initiate a process towards the establishment of a Political Federation of the Partner States by directing the Council to undertake the process.”

Having identified the above two arguments and having studied various options to fast track the Federation, the Wako Committee among other recommendations suggested that the process of fast tracking take the form of overlapped and parallel stages of integration (involving the retention of the timeframe for the Customs Union of five years effective January 1, 2005; overlapping of the four stages of integration to allow the undertaking of parallel activities at each stage to ensure that the basic minimum requirements at each stage of the federation are achieved within five years effective from January 1, 2005. A consolidated and planned approach, in the form of negotiating templates, should be used in order to hasten the process of integration).⁶³ The timetable (roadmap) towards political federation was suggested to be in three phases: a preparatory phase, a transitional phase to a federation, and a consolidation phase leading to a fully-fledged federation with appropriate institutions, including an elected Executive Organ and Legislature and a fully constituted Federal Judiciary.⁶⁴

Following the recommendations of the Wako Committee, the partner states established the NCCs-EAF to study the issue of fast tracking the political federation in the respective countries and then make recommendations. As we write the NCCs-EAF reports are now part of public records. In Uganda, the idea of fast tracking the East African Political Federation by 2013 was supported by 75.21%; in Kenya by 65% and in Tanzania by 20.8%.⁶⁵ Clearly the majority of the Tanzanians were not in favour of fast tracking the federation.⁶⁶

63 EAC, Report of The Committee on Fast Tracking East African Federation, Arusha Tanzania, 2004, para. 320.

64 In terms of time, the Preparatory Phase would run from December 2004 to December 2005; the Transition Phase would run from January 2005 to December 2009; and the Consolidation Phase would run from January 2010 to March 2013.

65 Report of the National Consultative Committee on Fast-Tracking the East African Federation-Uganda, June 2007; Report of the National Consultative Committee on Fast-Tracking the East African Federation-Kenya, June 2007; and Report of the National Committee for Gathering Views on Fast-Tracking the Formation of East African Political Federation-United Republic of Tanzania, June 2007.

66 Report of the National Committee for Gathering Views on Fast-Tracking the Formation of East African Political Federation-United Republic of Tanzania, June 2007 p 4.

Nevertheless, the idea of an East African Political Federation was supported by 69% of Kenyans; 74% of Tanzanians and 77% of Ugandans. As a result of Tanzania's position on fast tracking, the process has been slowed down. The Partner States have realized that there is need to deepen economic integration to underpin the political federation. Negotiations are in advanced stages to sign the Common Market Protocol, which market should come into operation by 2010 and the Monetary Union is expected to be in place by 2012. This is of course in addition to the Customs Union which came into operation in 2005.

During the national consultations on Fast Tracking the Political Federation, a number of issues concerning political governance and constitutionalism were brought to the fore by the public in the three Partner States. The issues raised include among others: disparity in national constitutions and other laws and practices related to governance, corruption and human rights; loss of sovereignty in national decision making and national identity; and clarity on electoral processes at both national and regional levels.⁶⁷ The argument of the people was that these issues should first be ironed out by national governments before they can embark on the political federation of the region. As we write, the three Partner States have decided to concentrate on deepening the economic integration as a prelude to the establishment of the political federation.

The East African Bill of Rights and the Role of the Civil Society

The Treaty of the EAC recognises the importance of the civil society in the integration process, and thus calls on the Partner States to create an enabling environment for it to participate in the EAC activities.⁶⁸ According to Ssali Simba, civil society has several roles to play in the integration process.⁶⁹ First, for any stage of regional integration to

67 Beatrice Kiraso, "Towards the East African Political Federation," October 2007 at http://www.eac.int/news_kiraso_Article_PF.htm (visited on 28 December 2007).

68 Article 217(3)

69 S. K. Simba, "The Role of Civil Society in Regional Integration," paper presented

be successful, it must incorporate full ownership and participation of the people, especially through their institutions of choice. Secondly, Civil Society Organizations (CSOS) have a role in order to ensure that the previous mistakes of the community are not repeated. Lastly, the active participation of civil society in the activities of the community will provide the necessary impetus in the development of the Community.

The civil society has been vocal in advocating for the Partner States of the EAC to stick to the fundamental and operating principles as stated in Articles 6 (d) and 7 (2) of the EAC Treaty. In this regard, the civil society has been pushing the EAC to enact a Regional Bill of Rights (RBoR). It must be mentioned that *Kituo Cha Katiba* has been at the vanguard of this call. The demand for an East African Bill of Rights comes at a time when the jurisdiction of the EACJ has been expanded. The RBoR would complement existing national Bill of Rights and international human rights instruments, including the various United Nations and African Union Protocols and Covenants on Human Rights.⁷⁰ The envisaged RBoR would include provisions for economic, social and cultural rights. In addition, it would provide for issues such as equality before the law; personal liberty; access to information; access to justice; freedom of movement; right to work, reside and own property within the EAC region; sexual reproductive rights; rights of refugees and internally displaced persons, and on the whole, the recognition of the principle that rights are to be limited by law where such limitations are acceptable and ascribed within

at the Induction Workshop for New Members of the East African Legislative Assembly (EALA) and Members of the Pan-African Parliament (PAP), Entebbe, November 2006. See also Mohabe Nyirabu (b), "Democratic Governance and Deepening Political Integration of the East African Community: The Case of Tanzania," in Ahmed Mohiddin (ed.), (2005), *Deepening Regional Integration of The East African Community*, DPMF Book Series, Addis Ababa p 253 (arguing that for successful integration, there is a need to involve the civil society and galvanise and tap people's energy. Integration of policies without the people's active involvement is likely to be unsuccessful).

70 "EAC, EAC Turns Attention to Regional Bill of Rights," Press Release, Arusha, 18 September 2007. On the imperatives of having a RBoR see Donald Deya, *op. cit.*, pp 117-121.

the bounds of a democratic society. The proposal to enact the RBoR was scheduled to be considered by the EAC Council of Ministers in November 2007. The enactment of the Bill will go a long way in enhancing the rule of law and promoting constitutionalism in the region.

Conclusion

We set out to examine the role of the EAC in the promotion of the rule of law and constitutionalism in the region in the year of 2007. We have noted that in 2007 the EAC expanded to include the countries of Rwanda and Burundi. In addition, in the year under examination, the issue of the establishment of the East African Political Federation was firmly put on the agenda of the original three Partner States of Kenya, Tanzania and Uganda, by way of the three carrying out national consultation on the matter. The consultations resulted in the slowing down of the process as the people of Tanzania expressed a strong desire to first deepen the economic integration before the political federation can be instituted.

In addition, in the year under review, the Second EALA was finally constituted. There had been a delay in its constitution because the Kenyan representatives had been illegally 'elected.' The matter was referred to the EACJ which ordered for fresh elections, which were duly conducted resulting in the election of the current members of EALA from Kenya.

In the promotion of the rule of law and constitutionalism, we noted that the EACJ has taken the lead in this area. In the year under review, the court took a bold step by fighting against a member state for having violated Article 6 (d) of the EAC Treaty, although it never made any binding orders on that state. Court ordered the Secretary General of the EAC to put in place a framework to monitor what was going on in the five member states of the Community in the areas of the rule of law and constitutionalism.⁷¹

⁷¹ According to Mike Sebalu a member of EALA from Uganda, no framework has been put in place so far. The possible reason could be that the areas of the rule of law and constitutionalism fall within the sovereignty of Member States. Interview on 7 May 2008 Kampala.

On the down side, Court failed to fine the governments of Partner States who amended the Treaty without public consultations and participation. In pronouncing itself, the Court noted that the amendments had already come into effect and so there was no need to grant an injunction to halt them. If the EAC is meant to be a people-centred institution, then the people must be consulted at every stage of the integration process, including the amendment of the Treaty. By allowing the amendments to stand, we think, the court missed an opportunity to remind the governments that the people are at the centre of the new EAC as per Article 7(1) (a) of the EAC Treaty.

The State of Constitutionalism in Uganda – 2007

Isaac Bakayana

Introduction

In the recent past, the Parliament of Uganda has adopted three amendments to the 1995 Constitution.⁷² Though the amendments were designed to achieve particular objectives, they most importantly demonstrated that the constitution was alive to the various political, economic and social changes within Uganda. The current constitution is a result of the various constitutional pronouncements and the findings and recommendations of the Constitutional Review Commission (CRC) established by Legal Notice 1/2001.⁷³

It is against the above background that an evaluation of the state of constitutionalism in Uganda should be made. Several events were witnessed during 2007 which have a direct bearing on the principles of constitutionalism in the country. During the year, judges went on strike, suspects were granted bail on terms that undermined the principle of presumption of innocence, the freedoms of expression, association and assembly were continuously abused, and the Inspectorate of Government intensified its fight against corruption.

Furthermore during 2007, the Uganda Electoral Commission conducted by-elections, there were attempts by government to lease portions of forestland to investors, and, several positive strides were taken in the ongoing peace process between the Government of Uganda and the Lord's Resistance Army (LRA). It is not my intention to reproduce the above events in this paper, however, these events will

72 Act No. 13 of 2000, Act No. 11 of 2005 and Act No. 21 of 2005.

73 *Paul K. Semogerere, Zachary Olum and Juliet Rainer Kafire v. Attorney General*, Supreme Court Constitutional Appeal No. 1 of 2002.

be used as a basis to analyze the state of constitutionalism in Uganda during 2007.

Notwithstanding article 2 (1) of the Constitution of Uganda, which affirms the supremacy of the Constitution, several acts were witnessed during 2007, which were contrary to the general principles of the constitution and its provisions.

Violation of the Right to a Fair Trial

The Presumption of Innocence

The arrest, detention and trial of suspects in Uganda has been conducted in a manner that contravenes the right to a fair hearing.⁷⁴ This right requires that an accused person is presumed innocent until convicted by a court of competent jurisdiction,⁷⁵ hence the presumption of innocence must be upheld at all times prior to a conviction. This notwithstanding, suspects were treated in such a manner that implied a presumption of guilt.

The above may be attributed to the loopholes within the law and the persistent interference by the Executive with the work of the Judiciary. Although article 23 (4) of the constitution provides that a suspect should be produced before a court of law within 48 hours, the law creates a six months period within which a person charged with a capital offence can “legally” be held in custody even when they are presumed innocent. The discretion under article 23 (6) (a) has not been sufficient to remedy the abuse that has been occasioned to presumably innocent suspects.

The implication therein is that a person can be arrested on a groundless suspicion of committing a capital offence, formally charged before a court and remanded for at least six months within the provisions of the law. Though the law requires that a person be produced before a court within 48 hours, it does not require the court

74 See also Bakayana Isaac, (2006), “From Protection to Violation? Analyzing The Right to a Speedy Trial at The Uganda Human Rights Commission” HURIPEC Working Paper No. 2, Kampala.

75 Articles 28 (3) (a) and 44 of the revised Constitution.

to do more than read the charges to the accused at such a preliminary stage. In addition, it does not require the police or prosecutors to produce some *prima facie* proof to justify his detention. Indeed one may rightly argue that the underlying justification for the period of remand has been to enable police investigate its cases, that is, charge first, investigate later and make a decision on whether or not to prosecute thereafter.

The above legal loopholes were evident during the trial of people alleged to be members of the Peoples Redemption Army (PRA). Although some PRA suspects were arrested in 2002 and others in 2003 and 2004, most of them were detained and only regained their “freedom” when they ‘opted’ to ‘apply’ for amnesty under the Amnesty Act (2000). The manner in which the police handled these suspects seemed to imply their guilt, a position that was further affirmed by President Yoweri Museveni. President Museveni asserted that “*the original mistake...was for the court to release people on bail who were facing very grave criminal charges...*”⁷⁶.

The president’s statement implied that persons accused of committing very grave offences were guilty until otherwise proved; that the burden of proof shifted to accused persons and the onus of proving their innocence lay with the accused persons. In order to avoid the consequent release on bail of the PRA suspects the state brought against them fresh charges of capital offences, which meant another six months on remand!⁷⁷ In effect, though the accused’s trial had failed to take off after 6 months in detention, they could not be released as new charges of capital offences were filed against them and therefore could not be released on bail.

When the above events are considered in light of the right to a fair trial in general and the presumption of innocence in particular, one may infer a radical shift from a presumption of innocence to that of guilt being adopted in the case of persons within political opposition. The arrest, arraignment and detention of a suspect should be conducted in

76 Museveni Yoweri Kaguta “Museveni writes to Chief Justice over High Court siege.” *The Daily Monitor*, 12 March 2007 pp. 4.

77 Museveni Yoweri Kaguta, “Museveni speaks out on High Court scuffle.” *The New Vision*, 6 March 2007 pp. 10.

line with the constitutional provisions that uphold the presumption of innocence.

The Amnesty Act

The role of the Amnesty Act in undermining the right to a fair hearing cannot be underestimated in the case of the PRA suspects. The Act was enacted in 2000 with the objective of granting amnesty and releasing from detention persons captured or associated with rebellion. The law provided for admission of guilt to engaging in rebel activities as a precondition for the release of any applicant. In effect all persons released under that law are guilty of treason or misprision of treason by admission. Although President Museveni has continuously expressed discomfort about the release of PRA suspects on bail arguing that, “there is a strong likelihood that they will go back to engage in PRA activities” (implying that they are guilty and need no trial), he has not held this same reservation for those granted amnesty even when some of them rejoin their former rebel groups.⁷⁸ For instance, former rebels like Sunday Otto and Richard Odongo though released under the Amnesty Act in 2003 rejoined LRA thereafter.⁷⁹

It is important to note that twenty-two PRA suspects were arrested in 2003, detained and “were never charged or tried in any court of law until President Museveni’s main opposition contestant during the 2001 presidential elections, Dr. Besigye, returned in late 2005.”⁸⁰ Though they were detained for at least two years and later granted bail, the PRA suspects were consequently charged with other offences and detained again. It is against this background that some suspects “... in the treason trial chose, on their own free will, to apply to the Amnesty Commission for amnesty, under the Amnesty Act...” and were indeed “...granted amnesty under the law.”⁸¹ Despite their

78 Ibid.

79 Henry Mukasa, Charles Ariko “No amnesty for two LRA defectors,” *The New Vision* December 2007 p 3.

80 Naluwairo, Ronald, (2006), “The Trials and Tribulations of Rtd. Col. Dr. Kiiza Besigye and 22 Others” HUR�PEC Working Paper No.1.

81 Hon. Ruhakana Rugunda “Rugunda explains court siege” *The Daily Monitor* 9 March 2007 pp. 4.

release on bail, which had clearly been undermined by the subsequent charges, it seemed fruitless to further pursue any bail application.

It may be said that the only available options were two, that is; either remaining in detention for an indefinite time or applying for amnesty. Though the amnesty law generally provides incentives to rebels to move out of rebellion without the fear of prosecution, it may be argued that the incentives under the amnesty law are availed in circumstances which clearly undermine the right to a fair trial and particularly the presumption of innocence. These suspects had been in detention without trial from 2003. Their release on bail had been intercepted and rejected without recourse to the appeal process by the military and the judiciary whose role is to dispense justice had effectively been rendered ineffective by the security forces and the army. With the exception of a few “stubborn” PRA suspects, the only available option was clearly applying for amnesty, even when the circumstances were blatantly coercive.

Furthermore, the Amnesty Act has been placed as a strong bargaining legislation to all persons accused of treason and international crimes.⁸² Uganda having ratified the Rome Statute in 2002, the International Criminal Court (ICC) indicted five top commanders of the LRA and indeed issued warrants of arrest against them. In order to compel the LRA to engage in the ongoing peace talks and/or surrender to the government forces, the government on several occasions declared that it would not withdraw its referral of the northern Uganda situation to the ICC. It has further argued that whoever surrenders to it under the Amnesty Act will not be prosecuted.⁸³ In the same light, all persons accused of treason and are in detention have been ‘encouraged’ to apply for amnesty. This encouragement has been done against the backdrop of persistent violation of court orders relating to bail by the authorities and/or preferring further charges to avoid the release of suspects on bail.

82 Felix Osike, Cyprian Musoke “We won’t lift Kony arrest yet – Museveni” *The New Vision*, 21 July 2007 p 1.

83 Henry Mukasa “Defectors receive amnesty” *The New Vision*, 6 December 2007 p 3.

Granting Bail to Suspects at 5 p.m.

The constitutional provisions relating to bail affirm the presumption of innocence of suspects within the criminal justice system. In compliance with the above, judges/ magistrates have the power to grant bail on such terms as they deem fit.⁸⁴ The year 2007 witnessed several instances when bail was granted under circumstances only intended to defeat its purpose. Though the courts granted bail to some suspects, it usually did so at such a time and in such a manner as to render the satisfaction of the set conditions impossible.

In order to sufficiently demonstrate this, it is important to briefly highlight the practice in relation to bail. Once a person has been released on a cash bail, they must deposit the bail money in a designated bank, return the receipts to the court registry and finally complete the bail form. It must be emphasized that if the payment is not made (or cannot be made), the suspect cannot be released and indeed that person has to be handed over to the prison authorities. The practice in relation to perceived opposition members during 2007 was to grant bail between 4 – 5 p.m. Granting bail at that time ensured that the bail money could not be deposited at the bank as banks generally close at 4 p.m. This was done in the case of Democratic Party's Publicist Betty Nambozo, Hon. Betty Anywar, Hon. Hussein Kyanjo, Hon. Elias Lukwago, and Hon. Odongo Otto among others.

The above practice by the police and the courts of law undermined the constitution and the rights of the suspects on the one hand, and the judiciary on the other hand. Article 126 (2) (e) of the constitution of Uganda states as a principle that "substantive justice shall be administered without undue regard to technicalities." Furthermore the Judiciary is obligated to administer justice in accordance with the "values, norms and aspirations of the people". The constitution is a clear depiction of the consensus of all Ugandans pertaining to the release of people on bail. Therefore the police and courts of law should not be seen to use their powers/discretion in way that only defeats a mutually agreed upon position, that is the constitution.⁸⁵

84 Op cit. *DPP v. Rtd. Col. Dr. Kiiza Besigye* (Constitutional Court).

85 For a detailed discussion on a theory of justice see Rawls, John, (1999), *A Theory of Justice* Oxford University Press.

The judges in such circumstances would rather release such persons on their own recognizance or even non-cash bail, which is provided for by law. One can draw two conclusions from the above practice: that police, judges, magistrates have become partisan in the political arena and have indeed taken sides, or that Police, Judges, Magistrates are now willing to “impress” the Executive by prolonging the periods of detention of the various political actors, a situation that has adverse implications for the good governance of the country.

Independence of the Judiciary

Article 128 (2) of the Constitution of Uganda states that “No person or authority shall interfere with the courts or judicial officers in the exercise of their judicial functions.” Although the interference referred to by this provision mainly relates to the more direct method of “directing” the courts, it also relates to other aspects, which may be in the form of under resourcing the judiciary or severe, harsh and unwarranted criticism of Judges’ decisions. Independence of the courts is comparable to the independence accorded to National Human Rights Institutions (NHRIs) guided by the Paris Principles.

The Paris Principles in relation to the NHRIs require that they “freely consider any questions” falling within their jurisdiction on any matter.⁸⁶ The freedom of judicial officers though exercised within the provisions of the law should not be influenced by threats and demonstrations by the public. During the year in review, the judiciary came under persistent attacks, which threatened its independence in executing its tasks.

Verbal attacks of Judicial Decisions

The exercise of the discretion to grant bail by judicial officers is enshrined in the Constitution under article 23 (6) (a). However, the judiciary has persistently and most severely been criticized whenever the discretion is exercised to grant bail. As already alluded to above, article 23 (6) (b) makes provision for mandatory bail for those

⁸⁶ Adopted by United Nations General Assembly Resolution 48/134 of 20 December 1993. Cited at: <http://www.ohchr.org/english/law/parisprinciples.htm> accessed on 20 November 2007.

persons who have been in detention for more than 60 days without trial. President Museveni, in 2007, was quoted as having stated that “*the original mistake was for the court to release people on bail who were facing serious criminal charges.*”⁸⁷ The President was further quoted to have said that the recent tension between the Executive and the Judiciary was due to five factors, “*the first being the erroneous ruling by Justice Edmond Ssempe Lugayizi saying that bail was an automatic constitutional right for even people accused of very serious crimes.*”⁸⁸

This continuous attack of a judicial officer was only meant to intimidate Judges, thereby undermining their independence. It will be recalled that Justice Lugayizi had earlier granted bail to 14 PRA suspects who were consequently re-arrested within the court premises. He thereafter declined to hear Dr. Besigye’s bail application forcing the Principal Judge to handle it.⁸⁹ Later Justice Katutsi who subsequently took over the case also withdrew from hearing the treason case against Besigye. These actions from judicial officers were as a result of intensified criticism against their decisions. The Constitutional Court in ‘*Director of Public Prosecutions v. Col Rtd Dr. Kiiza Besigye*’ noted that a suspect is entitled to a right to apply for bail. Article 23 (6) (a) of the Constitution grants the presiding Judge the discretion to grant or deny bail.⁹⁰ It must be emphasized that though some of the PRA suspects were arrested in March 2003, they were charged much later in November 2005 jointly with Dr. Besigye with treason and misprision of treason.

At the commencement of Kiiza Besigye’s trial on charges of rape, the Principal Judge did grant the accused “interim bail”. However, when the president made reference to persons making “erroneous” judgments, he did not mention any other Judge’s name, but Justice Lugayizi as though to turn him into the focal point of the tension

87 Yoweri Museveni “Museveni speaks out on High Court scuffle” *The New Vision*, 6 March 2007 p. 10.

88 Milton Olupot, Steven Candia “M7 meets lawyers” *The New Vision*, 19 March 2007 p.1.

89 Solomon Muyita, “How govt violated court orders” *The Monitor*, 4 March 2007 p.1.

90 Constitutional Court Constitutional Reference No. 20 of 2005.

between the Executive and Judiciary. This statement further tried to demonstrate that all the happenings at the High Court, that is, the two time High Court is sieged by a questionable armed group, assaulting of lawyers and the continued detention of bailed suspects were a direct result of Justice Lugayizi's "erroneous" ruling. As already demonstrated, however, the Executive and the president in particular, had already reached the conclusion that all PRA suspects were guilty of treason even before they could enter plea on the charges. Though the government could have chosen to exercise its right of appeal against the above-cited rulings, it did not instead, it chose to engage in a verbal attack against the rulings as if to incite the public against the Judiciary.

Failure to implement Court decisions

On the 2nd March 2007, Judges held a crisis meeting and announced " that judicial officers countrywide were laying down their tools with effect from March 5 until the Executive respects and stops infringing on the independence of the Judiciary."⁹¹ Though the High Court had earlier made several orders pertaining to the PRA suspects, most of those orders had been violated with impunity. Dr. Besigye for instance, was granted bail and later re –arrested. Although the Constitutional Court had ruled as illegal the simultaneous trial of the PRA by both the High Court and the General Court Martial, the latter disregarded this ruling, on the 15th March 2006, Justice Kagaba's order releasing the 14 suspects on bail was also ignored. Despite the fact that Judiciary 'insisted' on granting the various orders during 2007, the government chose to defy them further as demonstrated by the table below:

91 Solomon Muyita "How govt violated court orders." *The Sunday Monitor* 4 March 2007 p. 2.

**Table 1: Chronological events leading up to the 2nd March
Judicial strike**

No	Date	Court	Order	Response
1.	12/01/07	Constitutional Court	Immediate release of 14 PRA suspects	3 suspects granted amnesty and the rest jailed further.
2.	17/01/07	High Court	Bail granted again	Suspects jailed pending an interpretation of a court order from the Solicitor General.
3.	19/01/07	General Court Martial	Halts trial pending advice of the Attorney General	-
4.	25/01/07	High Court (Civil Division)	Solicitor General files an application seeking to revoke bail granted in 2005	Matter fixed for hearing on 30/01/07 and defense lawyers walk out of court in protest.
5.	30/01/07	High Court	PRA suspects oppose hearing the Solicitor General's application in the absence of their lawyers.	Suspects remanded until 1/03/07
6.	1/03/07	High Court	Application heard in the presence of all lawyers, adjournment sought by Solicitor General and granted.	PRA suspects released again on bail, process interrupted by the military causing a scuffle within the High Court premises. Suspects further detained.
7.	2/03/07		Judges resolve to strike.	

Source: *The Sunday Monitor*, 4 March 2007 p. 2.

Ignoring court orders by agencies in charge of implementing them has persisted during the court appearances by PRA suspects leading to the inference that they are no longer presumed innocent and since they were “guilty” they must be detained in respect of the offences. It is evident from Table 1 above that government, instead of exercising its right of appeal, chose to ignore orders by both the Constitutional and High Court. Article 129 (1) of the Constitution states that “Judicial power of Uganda shall be exercised by the courts of judicature.”

The courts exercise judicial power in Uganda with the assistance (and not resistance) of all persons and government agencies therefore, it was illegal for the security agencies and the prison service to further detain persons granted bail on numerous occasions. It is interesting to note that both the General Court Martial and the Uganda Prisons Services sought the advice of the Attorney General (a party to the court proceedings) pertaining to lawful court orders before they could abide by them as though to suggest that the Attorney General’s advice would override court decisions. Courts of law and other legally recognized institutions have the monopoly to adjudicate civil, criminal and constitutional matters. The Ministry of Justice and Constitutional Affairs (and the Attorney General) has no constitutional mandate to administer justice at all. The attempt therefore, to subject a court decision to the interpretation of one of the litigants in the proceedings is not only an attack on the independence of the judiciary but is also contemptuous. It is in this respect that the Judges rightly resolved to strike.

During the aforementioned Judges’ strike, legal practitioners too resolved to strike in protest against the above events and particularly about the persistent undermining of the Judiciary by the Executive.⁹² This action by both judges and lawyers implied that all pending cases had to be adjourned, in turn affecting several persons’ freedoms. At the beginning of 2007, Chief Justice Benjamin Odoki announced that courts were faced with a backlog of 82,517 cases; 35,740 of them of

92 Harriet Onyalla, Hillary Nsambu, Apollo Mubiru “Law Society Blasts Chief Justice” *The New Vision* 7 March 2007 p.1. The Judges strike lasted about 1 week whereas the lawyers’ lasted three days. See also Solomon Muyita “Lawyers’ strike gets underway” *The Daily Monitor* 12 March 2007 p 1.

a civil nature while 46,777 were criminal.”⁹³ The above strike further prolonged the various court hearings, suspects had to be detained longer and most of them arrested during that period could not be produced before court within the 48 hour constitutional limitation. Several people therefore, suffered human rights violations as a direct result of the above strikes.

A point worth noting is that during the aforementioned events at the High Court, the government relied upon hitherto unknown personnel to violate court orders arguing that they formed part of the police force. Article 212 of the Constitution states that the Uganda Police Force (UPF) has an obligation to preserve law and order in cooperation with the civilian authorities. This obligation requires the UPF to work together with the courts of law, especially in the implementation of the latter’s orders. Despite the several court orders releasing the aforementioned suspects on bail, the UPF actively participated in the violation of the very orders it is supposed to implement contrary to the constitutional provisions.

Democratic Participation

When the Local Governments Act was enacted in 1997, the main objective was to “ensure good governance, and democratic participation in, and control of, decision making by the people.”⁹⁴ The system was to ensure that all people participated in their governance from the village level up to the national level.⁹⁵ To achieve this, section 46 (1) provided that at the village level the council shall consist of all persons of eighteen years of age or above...”

Although the Act could be commended for creating an all-inclusive system to encourage participation, it did not provide any options for persons who, though qualified, were to be part of the council at the village level. It was in this regard that the Constitutional Court in

93 Hussein Bogere, Angello Izama, Solomon Muyita, “The Cost of Judges’ strike” *The Daily Monitor*, March 10th, 2007 p. 3. See also Justice Law and Order Sector (2003) p 89.

94 Preamble to Local Governments Act Cap 243.

95 Oloka-Onyango, Joe, (2007), “Local Governance and Access to Justice in Post Movement Uganda” (Human Rights and Peace Center).

Rubaramira Ruranga v. Electoral Commission, Attorney General ruled that “section 46 (1) of the Local Governments Act, section 6 (1) of the National Women’s Council Act, Section 6 (1) of the National Youth Council Act and Regulation 12 (1) ...are inconsistent with articles 29 (1) (e) and 1 (4) of the Constitution.”⁹⁶ The Petitioner argued that the aforementioned provisions of the Local Governments Act, National Women’s Act and National Youth Council Act that provide for compulsory recruitment of persons into them violated their “freedom to decide whether or not to join a particular association.”

Declaring the above provisions unconstitutional meant that they were void. The petitioner’s prayers fell short of seeking a declaration that the actual structures set up by the Act are void. Despite the fact that the provisions of the law were declared void, court did not touch the structures created by the law nor did parliament amend the respective laws to reflect the constitutional ruling. Although persons can no longer be conscripted into the Local Council system, these councils remain in place for the interested parties. Which therefore means that “the current local council structures remain in place and continue carrying out their constitutional and statutory duties...”⁹⁷ In most places within the country, local council offices are still visible and are executing several tasks. It is not uncommon for instance, for local councils to issue letters of introduction to persons who desire to open bank accounts, move from one village to another, or seek the assistance of lawyers. Furthermore, local councils in several areas continue inviting persons to participate in the issues pertaining to their villages. The constitutional court ruling in effect nullified the compulsory membership of persons into local councils, women councils or youth councils.

96 Constitutional Petition No. 21 of 2006 p. 22 of the Judgement (Dated 3 April 2007).

97 Ministry of Local Governments Press Statement issued on 19 April 2007. Cited at <http://www.molg.go.ug/news> accessed on 27 August 2007.

Freedom of Assembly and Expression

The government has taken various steps to attract investors into the country. It has provided tax incentives, land and labor to particular foreign investors.⁹⁸ It is under this arrangement to provide incentives that government allocated forestland in Namanve and Butamira to Coca Cola and BIDCO respectively. In 2007, the government attempted to allocate an estimate 7900 hectares of a major forest in Uganda, that is Mabira, to the Mehta Group (a sugar manufacturing company) to increase sugar production from 50,000 tons to 100,000 tons per year. The proposed allocation led to a protest (Peaceful demonstration) by some MPs and the civil society.

During this process however, one person of Asian origin was beaten to death, whereas other people thought to be Asians were beaten and injured. The Hindu temple was smashed and cars were set ablaze among other incidents. Some of the protestors carried placards reading “For one tree cut, five Indians dead” and “Asians should go.”⁹⁹ A total of 34 people including MPs, businesspersons and members of the opposition were thereafter arrested and charged with participating in a riot.¹⁰⁰ This caused further unruly demonstrations. During all these occasions the city center became impassable for non-demonstrating persons and all businesses in the affected areas were closed, Bata shoe shop was looted.¹⁰¹

In response to the above, Kampala Central Division Chairman Godfrey Nyakaana ‘banned’ all demonstrations in the Central Business District (CBD) arguing that “we cannot tolerate losing lives and property because of having demonstrations in the city.”¹⁰² Indeed

98 See Uganda Investment Authority “The incentive regime” www.ugandainvest.com/incentives.htm accessed on 28 August 2007.

99 Gerald Tenywa, Conan Businge and Steven Candia “Asians attacked in Mabira Demo” *The New Vision*, 13 April 2007, pp 1, 2.

100 The Daily Monitor Team, “More chaos” *The Daily Monitor*, 18 April 2007, pp.1. See also Ruhakana Rugunda “Govt responds to Mabira demo” *The New Vision*, 18 April 2007 pp 8.

101 Op cit., Ruhakana Rugunda.

102 Al-Mahdi Senkibirwa, Robert Mwanje “Can Nyakana ban demos in the city center.” *The Daily Monitor*, 26 April 2007, p. 14.

thereafter “police dispersed FDC’s planned party card launch and the DP’s attempt to release the controversial report into the murder of former energy Minister, Andrew Kayiira.”¹⁰³

Article 29 (1) (d) of the constitution states that, “every person shall have the freedom to assemble and to demonstrate together with others peacefully and unarmed...” The right to assemble must be exercised peacefully and with due regard to all other interests. Although the activities of the demonstrators sent a message to the policy makers and consequently led to the interim withdrawal of the forest offer, the violent acts were unconstitutional. The demonstrators ensured that the CBD was impassable and they looted as well as destroyed property. Should demonstrators have “demonstration parks/corridors” that guarantee both their freedoms and those of the non-demonstrating parties?

The Police Act (Cap 303) confers powers upon the police to regulate demonstrations.¹⁰⁴ Section 35 of the Act confers powers upon the minister to designate particular areas in which it would be unlawful to demonstrate. The minister and not any other person has authority to exercise this power. Almost similar requirements are provided for in the United Kingdom. Section 132 of the Serious Organized Crime and Police Act (2005) makes it an offence for any person to organize a demonstration in a designated area (near House of Parliament) without prior approval. The organizers are by law required to give a six days written notice indicating the date, time, suggested place for the demonstration, the organizers’ names and addresses and the proposed duration of the demonstration.¹⁰⁵ The objective of the above provisions are not to deter the proposed demonstrations, indeed the “commissioner must give authorization for the demonstration to which the notice relates.”¹⁰⁶ The authorization may be given with the conditions as the commissioner thinks necessary to prevent public disorder, damage to property, security risk among others.¹⁰⁷

103 Op cit.

104 Sections 32 - 34.

105 Serious Organized Crime and Police Act (2005), Section 133.

106 Op cit., s.134 (2).

107 Op cit., 134 (3).

Though the Ugandan law seeks to provide instances when the minister/police may refuse persons to demonstrate, the law in the United Kingdom guarantees the right to demonstrate by providing a mandatory authorization with or without conditions. These conditions are currently relevant in a world faced with severe terrorist threats. Furthermore, demonstrators in Uganda have particularly opted to always demonstrate within Kampala, a place that is increasingly becoming crowded and suffers from severe and prolonged traffic congestions. This option has its merits of at least attracting public attention thereby alerting all spectators to the “issues” or “problems” the demonstrators are agitating about for the CBD.

Demonstrations within the city inevitably cause unnecessary disturbances to several other non-demonstrating persons thereby disturbing the peace of such persons. Rather than curtail such an important freedom, however, particular areas within the business district should be designated as “demonstration zones” e.g. Clock Tower grounds, Lugogo bypass football fields, Kololo Airstrip, Kibuli Police training school grounds, among others. These places would sufficiently cater for the demonstrations. Processions should be held outside the CBD in such areas as would minimize public disturbances. Furthermore, organizers should be encouraged to demonstrate on Sundays and public holidays.

During the aforementioned protests, a member of the protesting group held a placard that read “For one tree cut, five Indians dead”.¹⁰⁸ Indeed it was after such threats that the Asian Community opted to stay clear of all public places during the above protests. The statements were clearly targeted at any person, Ugandan or not, of Asian origin, and were meant to incite the general public against all persons of Asian origin. The statement had racial connotations and was a clear depiction of intolerance against a particular group of persons in Uganda. The Uganda Human Rights Commission (UHRC) has defined xenophobia to mean “intolerance/hatred of people from different countries, ethnic groups, geographical locations, tribes,

108 Op cit, Gerald Tenywa.

religion...”¹⁰⁹ The Constitution guarantees the right to equal treatment and freedom from discrimination to all persons notwithstanding their “...race, colour, ethnic origin, tribe...”¹¹⁰ The attempt to incite the public against any persons of Asian origin therefore, was and is racist contrary to the national and international human rights regime to which Uganda is bound.

The birth of “Kiboko squad”

“Kiboko” may be translated to mean “whip”. During the demonstrations that followed the Mabira Forest protests, a new ‘security’ organization was unveiled to particularly deal with the demonstrators. The group, largely comprised of youthful male adults, emerged from the Uganda Police Force’s Central Police Station on 17 April 2007 armed with long and thick sticks. In full view of the police, they beat up any person perceived to be engaged in the demonstration.¹¹¹ Despite the public denial of any knowledge pertaining to this squad by the police, the President revealed that “those people are the community who organized themselves in a self defense group against these rioters”, clearly underlining support from the president for “self defense groups”. One may therefore draw conclusions that this “whip squad” was prepared by the police to deal with the demonstrators. The police (one of the most under-funded public bodies) allegedly bought or otherwise acquired sticks, armed the “whip squad” and unleashed it onto the public.

The Constitution of Uganda stipulates in article 212 that the functions of the police include preserving law and order. There is no provision in both the constitution and the Police Act that provides for people “organizing themselves” into self-defense groups under any circumstances. The explanation by the government that they were people who organized themselves cannot be supported by any constitutional provision. Furthermore, the group was not a spontaneous one in response to the demonstrators. It clearly emerged from the police station, was under the direction and control of the

109 UHRC (2004) p 127.

110 Article 21 (2).

111 See picture on cover page of the *Daily Monitor*, 19 April 2007.

police and one could rightly conclude that it was a police attempt to respond to the demonstrators on the streets through the use of force in utter violation of the constitution and the Police Act.

Peace Process in Northern Uganda

Several strides have been taken in a bid to bring the war between government and the LRA in northern Uganda to an end. Since the commencement of the talks, the following agreements have been signed between the parties to the negotiations: The Cessation of Hostilities Agreement (CHA), Agreement on Comprehensive Solutions to the Causes of War and the Agreement on Accountability and Reconciliation.¹¹² These steps are quite important in a multidimensional way.

The LRA has waged war since 1987, leading to massive human rights violations.¹¹³ Though there were various attempts to end the war through forceful means, these efforts were futile. In 2003, for instance, the UHRC reported that between February 2003 and June 2003, there were 297 casualties of the LRA.¹¹⁴ The cost is also immeasurable in respect to health, sanitation, education, poverty among others (the war has affected each and every sphere of the lives of the people living in northern Uganda). By signing the CHA, therefore, both parties agreed to seize the opportunity to achieve peace. Though all persons in northern Uganda are guaranteed their personal liberties by article 23 of the Constitution, their continuous stay in Internally Displaced Peoples Camps (IDPC) has curtailed these liberties. The attempt to reach a comprehensive peace solution would go a long way in ensuring that people enjoy the rights accorded to them by both the constitution and the international covenants to which Uganda is a party.

The peace negotiation process gave attention to the need for accountability. The agreement signed on 29 June 2007 recognized

112 Henry Mukasa, "Stay calm, peace is on the way." *Sunday Vision*, 17 July 2007, p 14 (an interview with Hon. Ruhakana Rugunda, the Chief Government Negotiator with the LRA).

113 UHRC (2004), UHRC (2003).

114 Op. cit., 2003 p 53.

the various human rights violations committed during the 20 years of war. It further recognized the need to "...promote national legal arrangements, consisting of formal and non formal institutions and measures for ensuring justice and reconciliation with respect to the conflict." Article 1 of the Declaration on the Right to Development states that; "The right to development is an alienable right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development..."¹¹⁵

The proclamation of the right to development gave rise to the Human Rights Based Approach to Development. This approach emphasizes the linkage of all processes to human rights observance, participation, accountability and empowerment of the people. This requires that all processes undertaken by both government and non-government actors must comply with all the above salient principles. The Agreement attempted to ensure that it abides by the aforementioned principles. It stated in Paragraph 2.4 that at all stages of the implementation of the agreement, "...the widest possible consultations shall be promoted and undertaken in order to receive the views and concerns of all stakeholders..." it continues that "... consultations shall extend to state institutions, civil society, academia, community leaders, traditional and religious leaders and victims..." The process was meant to ensure that all affected persons participated in the ongoing peace negotiations and their opinions/considerations were taken into account by both parties to the negotiations. It is in this respect that LRA delegation visited parts of Uganda to seek opinions on the on going peace process in Southern Sudan.¹¹⁶

Due to the previous human rights violations, the agreement also made provision for accountability in respect to gross human rights violations. The 20-year-old war in northern Uganda has directly and indirectly led to the violation of political, civil rights, economic,

115 Declaration proclaimed by the United Nations General Assembly Resolution 41/128 on 14 December 1986.

116 Grace Matsiko, "LRA visit brings hope to the north." http://www.monitor.co.ug/artman/publish/inside_politics/LRA_visit_brings_hope_to_the_North.shtml accessed 13 November 2007.

social and cultural rights with the several national, regional and international human rights instruments ratified by Uganda. Indeed the ICC has indicted the five LRA commanders over committing international crimes. The international criminal mechanism is one avenue of ensuring accountability for the crimes committed at least since 2002.¹¹⁷ Accountability in the context of the ICC, however, is likely to hamper the progress of the peace process due to the emphasis it places on prosecuting the perpetrators of international crimes with less emphasis on bringing the war to an end and also reconciling the people in the country.¹¹⁸

Paragraph 2.2 of the agreement states that “The accountability process...shall relate to the period of the conflict. This clause, however, shall not prevent the consideration and analysis of any relevant matter before this period...” The agreement therefore, considered the violations committed during the twenty years and the need to hold accountable all the persons responsible for such acts. It also emphasized other avenues of promoting accountability and reconciliation within the affected communities. It for instance, stated in paragraph 3.1 that “Traditional justice mechanisms, such as *Culo Kwor*, *Mato Oput*, *Kayo Cuk*, *Ailuc* and *Tonu Ci Koka* and others practiced in the communities affected by the conflict shall be promoted...as a central part of the framework for accountability and reconciliation.” The agreement further made provision for accountability through the formal criminal and civil justice measures for persons alleged to have committed serious human rights violations.

117 Rome Statute of the International Criminal Court (2002).

118 Bakayana Isaac, Enforcing the amnesty act (2000) within the context of the Rome Statute, in *East African Journal of Peace and Human Rights* Vol. 13, No. 2, 2007 at 321.

Xenophobia, Ethnicity and Racism¹¹⁹

In the recent past, tribal clashes in Uganda have sprung from one area to another. Examples include, the Bagungu against the Alur in Bunyoro, the Iteso against the Balaalo in Teso sub-region, the Bagungu against the Balaalo in Bulisa, and the attacks against all persons perceived to be of Asian origin.¹²⁰ The clashes took a tribal or racial tone resulting into members of one tribe or race injuring or killing members of a different tribe or race.¹²¹ The conflicts arose as a result of competition over resources, particularly land. It is estimated that the population of Uganda is growing at an annual rate of 3% per annum.¹²² This means that the population increase is having an impact on the relations over land resulting in inter-tribal clashes. The conflict between the Bagungu and the Balaalo originated from government relocating (with compensation) the latter from a 60 sq km piece of land given to Mukwano Group.¹²³ The Balaalo consequently acquired pieces of land (through sale or leases) from the Bagungu until 31 May 2007 when the area MP, Stephen Birahwa, convened a meeting to demarcate the boundaries between the two groups.¹²⁴

The constitution guarantees the rights to personal liberty and property to all persons in articles 23 and 26 respectively. These provisions do not restrict any tribe to any particular part of the country. The provisions confer unto all Ugandans, the right to acquire property anywhere within Uganda. As demonstrated above, it has increasingly become difficult, especially outside the central region for a member of a different tribe to acquire land in a different area in which he/she has no ancestors. Indeed attempts to settle the Balaalo in Kiboga district within Buganda region met stiff resistance from Mengo (traditional

119 Though there has been frequent use of the term “Balaalo” which I adopt herein, there is no such tribe amongst the tribes referred to by the Constitution, however, it is a term loosely used to refer to cattle keepers.

120 UHRC (2003) p 127.

121 Carol Natukunda “MP Birahwa fanning tribal hatred” *The New Vision*, July 12, 2007 p 9.

122 Poverty Eradication Action Plan (2004/5 –2007/8).

123 Op cit., Carol Natukunda.

124 Ibid.

seat for the Buganda administration). Attempts by the Balaalo to settle in Teso sub-region were also resisted.¹²⁵ Hon. David Mpanga, the Minister in Charge of Research in the Buganda Government said the objection by the Buganda "...is about the non planned and ad hoc migration of the Balaalo. Buganda wants to know: Who are these people? Where do they come from? How many are they? Is Kiboga the best suitable place to take them? What resources are there to support them?" He continued, "...What is going to happen if the herds (of the Balaalo) grow? Won't there be a competition for resources?"¹²⁶

The debate over land also needs to be contextualised within the Land Act (1998) which creates *bonafide* occupants for all persons having occupied a piece of land for 12 years unchallenged by the proprietor.¹²⁷ Buganda has been demanding the return of 9000 square miles of land which during the signing of the 1900 Buganda agreement was taken over by the colonial government from Buganda. The move to settle the Balaalo within Buganda on the contested 9000 square miles therefore, would permanently deprive Buganda of its claim over the aforementioned land. The above has led to increasing tribal tensions, hatred, killing and maiming several people.¹²⁸ The tensions that have developed as a result of scarcity of resources have degenerated into tribal conflict which not only contravene the Constitution but also international treaties to which Uganda is a party.

Racial attacks against persons of Asian Origin

The attack on persons of Asian origin by some demonstrators during the protest against the allocation of part of Mabira Forest brought to the fore some underlying racial tensions between "Ugandans" on the one hand and "Asians" on the other.¹²⁹ As has been demonstrated above, some of the demonstrators carried placards requiring Asians to

125 Buganda is one of the regions within Uganda.

126 Edris Kiggundu "Why Buganda objects to Balaalo in Kiboga" *The Weekly Observer* 12-18 July 2007 p 3.

127 Section 30.

128 John Sserwaniko, Ausi Balyejusa, Al Mahdi Ssenkabirwa, Stephen Kabindi, "Balaalo reject Kiboga" *The Daily Monitor* 10 July 2007 p 1-3.

129 Notwithstanding the fact that these are not only humans but also Ugandan citizens!

go (leave Uganda), or that for every one tree cut some Indians should be killed.¹³⁰

Such statements were a clear demonstration of hostility against the Asian community in Uganda. It is important to note that such hatred may be rooted in what is seen as the increasing leverage of this community in the services sector (hotels), trade (super markets, retail trade), manufacturing sector among others. Indeed, Kampala City Traders' Association (KACITA) has voiced concern over what it views as government's interest in assisting foreign investors (some of these being Asians) with tax incentives, land and in some instances funds while these same incentives are not extended to Ugandan businessmen.¹³¹

KACITA further alleged that most of these Asian investors have, contrary to their earlier intentions ended up in similar trade as other Ugandan businesspersons with a better competitive advantage.¹³² It is against this background that when government announced its proposal to give away part of the natural forest to the sugar manufacturing company, the Mehta Group, run and managed by some individuals of Asian origin, that violent protests against people of Asian origin were sparked off.

The United Nations Convention on the Elimination of All Forms of Racial Discrimination defines racial discrimination to mean "any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." The attack of perceived persons of Asian origin and killing of one person therefore, was a clear racial attack in clear contravention of both the national and international human rights instruments.

130 See p 44.

131 Legally all the said incentives are available to all investors.

132 These allegations have been made by KACITA's spokesperson, Mr. Isa Sekitto, in both the print and electronic media.

Conclusion

The Constitution is a manifestation of the agreement Ugandans have reached in relation to their governance. The standard it creates provides the minimum test of governance within the country. Indeed in the year 2007, one may rightly argue that some constitutional provisions were abided by e.g. those relating to participation (by-elections, accountability (work by the Inspectorate of Government and the various Parliamentary committees) among others. The year 2007, however, witnessed the continued violation of constitutional provisions by government departments and personnel.

The State of Constitutionalism in Kenya – 2007

John Ambani Osogo

Introduction

In December 2007, Kenya held National Assembly and Presidential Elections after five years of what was hailed in December 2002 as the beginning of a new era.¹³³ The National Rainbow Coalition (NARC) was elected overwhelmingly in December 2002 ending forty years of the Kenya African National Union (KANU) rule on a platform of change and zero tolerance to corruption.

The December 2002 general elections were a watershed in Kenya's constitutional history. The elections were important to Kenya in not less than three critical respects. First, they were the first after independence to be held without the direct participation of an incumbent president, President Daniel Moi's constitutional term was coming to an end.¹³⁴ Second, unlike in previous elections, the 2002 electoral process was invariably declared free and fair.¹³⁵ Third, the elections were fought and won on a reform platform by the NARC then led by President Mwai Kibaki. Indeed, there was little doubt that the NARC Government would champion far-reaching reforms given that the party brought together a galaxy of politicians with a record of

133 The violent aftermath of the 2007 elections points, in many ways, to the crisis of constitutionalism in Kenya that spans decades. This paper only assessed the constitutional developments that took place in Kenya in 2007 without going into a detailed history of Kenya's constitutional history that made 2007 the year it turned out to be.

134 President Moi's open support for Uhuru Kenyatta of (KANU), however, meant that retired President Moi played a big role in the elections.

135 See, for instance "When Kenyans Spoke, 2002 General Elections," A report of the Kenya Domestic Observation Programme (K-DOP).

championing human rights, democracy, good governance, economic and environmental reforms.

Thus, Kenyans began the year 2003 genuinely expectant. They expected a new constitutional dispensation upholding the rule of law, human rights, integrity and ethics in governance, sustainable development and a concerted war against corruption amongst other reforms. They expected a change in the way the country is governed. President Kibaki did little to diminish the high hopes. In his inaugural address to the nation, he stated:¹³⁶

You have asked me to lead this nation out of the present wilderness and malaise onto the promised land. And I shall. I shall offer a responsive, transparent and innovative leadership. I am willing to put everything I have got into this job because I regard it as a sacred duty.

The Head of State made further commitments:

I believe that government exists to serve the people and not the people to serve the government. I believe that government exists to chart a common path and create an enabling environment for its citizens and residents to fulfill themselves in life. Government is not supposed to be used to burden the people, it is not supposed to intrude on every aspect of life and it is not supposed to mount roadblocks in every direction we turn to in life. The true purpose of government is to make laws and policies for the general good of the people, maintain law and order, provide social services that can enhance quality of life, defend the country against internal and external aggression and generally ensure that peace and stability prevails.

At the dusk of President Kibaki's first term in 2007, pundits had entered a mostly mixed verdict regarding the performance of his Government.¹³⁷ There was near consensus that certain gains had

136 President Kibaki's Inauguration Speech.

137 See, for instance, "Human Rights in Kenya: The Post Moi Era (2003 - 2007)," Human Rights House Network. (2007); *Kenya's Democratisation: Gains or Losses*, CLARIPRESS

been made although lamentations were registered that the NARC administration had not realized the expectations of the Kenyan people.¹³⁸ Perhaps the most notable shortcoming was the failure by the government to ensure the enactment of a new constitution as had been expected.¹³⁹ Other criticisms leveled against the government include the failure to combat corruption, provide equal opportunities for all ethnic communities as well as the poor living standards for the majority of the people¹⁴⁰. The current investigation assesses Kenya's performance in the realm of 'constitutionalism' for the year 2007.

Conceptual Framework

A traditional function of state constitutions is to distribute power. Constitutions have been written to limit the powers of state, in the process yielding civil and political liberties to the citizenry. Indeed, constitutions spring from a belief in limited government.¹⁴¹ Political philosophers, jurists and other scholars have over the centuries prescribed constitutional structures considered conducive for human freedom, liberty and pursuit of happiness. Montesquieu, for instance, prescribed that:¹⁴²

Political liberty is to be found ... only when there is no abuse of power. But constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go... To prevent this abuse, it is necessary from the nature of things that one power should be a check on another... When the legislative and executive powers are united in the same person or body... there can be no liberty... Again, there is no liberty if the judicial power is

138 Ibid

139 After negotiating a new constitution for a decade plus, the country went to a referendum to ratify a Draft Constitution in November 2005 which was convincingly rejected by the people for various reasons.

140 See List of Questions Submitted by the Kenya Civil Society Coalition on Economic, Social and Cultural Rights to the UN Committee on Economic, Social and Cultural Rights.

141 Bradley A.W. & Ewing K. (eds.), (1993), *Constitutional and Administrative Law*, Longman, p 8.

142 B de Montesquieu *The Spirit of Laws*, Trans Nugent 1949 , p xi, 4.

not separated from the legislative and the executive... There would be an end of everything if the same person or body, whether of the nobles or of the people, were to exercise all the three powers.

Earlier, Locke had observed that¹⁴³

It may be too great a temptation to humane frailty, apt to grasp at power, for the same persons who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their private advantage.

Traditionally therefore, the constitution of a state has had to distribute powers to at least three organs: the Executive, the Legislative, and the Judiciary instituting what has come to be known as the system of checks and balances. More recently, the 'phenomenon' of national human rights institutions' has gained momentum and is fast becoming one more avenue of limiting state power and guaranteeing more liberties and rights to all. Indeed, the United Nations High Commission for Human Rights (UNHCHR) has reckoned that:¹⁴⁴

It has therefore become increasingly apparent that the effective enjoyment of human rights calls for the establishment of national infrastructures for their protection and promotion. Official human rights institutions have been set up by many countries in recent years.

Where these structures are properly erected, there is a chance to secure fundamental freedoms and rights. This constitutional set up where executive power is limited for the sake of human rights and liberties is, arguably, the essence of 'constitutionalism'. De Smith agrees that:¹⁴⁵

143 Locke, John, (1690), *Second Treatise of Civil Government*, p 143.

144 *National Institutions for the Promotion and Protection of Human Rights*, Fact Sheet No.19, para 7.

145 De Smith S.A., (1964), *The New Commonwealth and its Constitutions*, London, Stevens, p 106.

The idea of constitutionalism involves the proposition that the exercise of government power shall be bound by rules, rules prescribing the procedure according to which legislative and executive acts are to be performed and delimiting their 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.

This paper therefore takes constitutionalism to mean a constitution of state whereby legal and political powers, especially of the executive, are limited, there are internal checks and balances and human rights and fundamental liberties are given prominence.

In theory, at least, Kenya's legal and political context boasts of five minimums of a constitutional state. The Constitution disperses state powers to the three conventional organs, namely, the Executive, headed by the President,¹⁴⁶ Parliament, composed of National Assembly and the President,¹⁴⁷ as well as the Judiciary.¹⁴⁸ In addition, the Constitution embodies a Bill of Rights under Chapter V. Furthermore, periodic and regular presidential and parliamentary elections are constitutionally guaranteed. Recently, a national human rights institution, the Kenya National Commission on Human Rights (KNCHR) was established.¹⁴⁹ It is instructive that the Kenya Anti Corruption Commission (KACC)¹⁵⁰ as well as the National Commission on Gender and Development¹⁵¹ have also been legislated to further check state power.

The next section assesses the constitutional developments in the year 2007. Attempts are made to discuss how these developments have

146 Section 23(1) Constitution of Kenya.

147 Section 30.

148 Section 60.

149 The KNCHR is established by The Kenya National Commission on Human Rights Act, 2002.

150 KACC is established by the Anti Corruption and Economic Crimes Act, 2003.

151 The Gender Commission is established by Act No. 13 of 2003.

contributed towards making government more accountable, more responsive to human rights and more respectful for the rule of law.

Constitutionalism 2007: The Unequal Tripartite?

As noted earlier, there are certain developments in the five years of the NARC administration that came to an end in 2007 that contributed to the development of constitutionalism in Kenya. Among these is the establishment of the KNCHR, the KACC and the National Commission on Gender and Development.

Despite these gains, Kenya's governance structure as set out in the current constitution still carries provisions that continue to be the basis of constitutional practice that does not enhance constitutionalism. The legislature for example, lacks the requisite independence and power to successfully check the Executive. The power to commence the sessions of parliament continues to lie with the president and not the Speaker or Members of Parliament.¹⁵² The power to prorogue¹⁵³ as well as dissolve¹⁵⁴ the August House is vested in the president (Executive), a very disempowering scenario because parliament is not able to determine its own calendar.

Although parliament can actually pass a vote of no confidence in the president, such a verdict, if entered, also stands to terminate the life of parliament itself.¹⁵⁵ 'Vote of no confidence' is thus a power that takes away as much as it gives. The net result has been that the Executive has been able to violate even fundamental liberties, in the full view of a disempowered legislature. This leads to a scenario where though in theory parliament can pass a vote of no confidence in government, they are not likely to do so because the law is such that the president would have to dissolve parliament and call a general election. Not many legislatures want to face the electorate before their five years are over.

As for the Judiciary, its independence remains elusive both in law and practice. Indeed, one of the main shortcomings of the current constitution is its failure to expressly assert the independence of the

152 Section 58.

153 Section 59(1).

154 Section 59(2).

155 Section 59(3).

judicial organ of state in the same way it has provided for the other two arms of government. Section 23(1) of the constitution stipulates that the executive authority of the state is vested in the president. Similarly, Section 30 provides that the legislative power is vested in parliament. The absence of a corresponding provision for the Judiciary inevitably means that the institutional independence of the Judiciary has not been properly addressed by constitutional provisions.¹⁵⁶

The credibility of the Judiciary is further weakened by the fact that the government of President Mwai Kibaki has appointed an unprecedented high number of High Court and Court of Appeal judges, which singular appointments cast doubt on the independence of this important organ of state. By December 2004, President Kibaki had appointed up to 29 new judges within a span of two years of his reign in a Judiciary that hardly had a maximum capacity of 60 judges.¹⁵⁷ In 2007 alone, about 10 new judges were appointed. President Kibaki, it follows, has effectively appointed 40 judges in just five years, a very disturbing scenario.

Although the large number of appointments of judicial officers was necessitated by the 'radical surgery' in the Judiciary following a report of the Integrity and Anti Corruption Committee appointed by the Chief Justice, the fact that the president chose to name the new officers under the old regime and procedures has been a cause of worry. Having come to power on a reformist platform, it was widely expected that the Head of State would ensure a review of the constitution to guarantee that the mode of constituting the judicial branch conforms to conventional wisdom. This state of affairs makes the comprehensive review of Kenya's constitution a very urgent national assignment.

The Draft Constitution of Kenya 2004, for instance, which the president was widely expected to implement requires that judicial officers be appointed through a vetting process in which relevant actors participate. There is no evidence that the Head of State consulted other actors in making these appointments. Kenya may have to live with the

156 See Mitullah Winnie, Odhiambo Morris & Ambani Osogo (eds.), (2005), *Kenya's Democratisation: Gains or Losses*, Claripress, Nairobi, p 37.

157 See, Gazette Notices No 3630 and 3631 of 22 May 2003; No 9935 of 10 December 2004; No 9933 and 9934 of 2004.

fact that the tenure of two thirds of the Judiciary was determined by one individual.

In addition, there is a worrying situation in which the ancient Commissioner of Assize Act¹⁵⁸ still has the force of law in Kenya. This legislation provides for a scheme where temporary judges may be appointed by the president. Such judicial officers enjoy no security of tenure and are therefore susceptible to manipulation by the appointing authority.

It is little wonder that following the political and governance impasse caused by the disputed 2007 general elections' results,¹⁵⁹ few had confidence in the Judiciary as a neutral arbiter. When announcing the 2007 presidential results, for example, the Electoral Commission of Kenya (ECK) Chairperson, Mr Samuel Kivuitu advised that the Orange Democratic Movement's (ODM) Party objections were a matter for the courts, a piece of advice that was variously defied. ODM's leader Raila Odinga immediately rejected the court option to resolve the dispute,¹⁶⁰ citing his lack of confidence in the Judiciary. This is why the Crisis Group Africa has recommended that the forthcoming constitution reform should 'include rebalancing power between the three branches of government and address the issue of devolution.'¹⁶¹

Protection of Fundamental Rights and Freedoms

The Bill of Rights (2007)

As stated in the introductory section of this paper, the concept of constitutionalism denotes a constitutional dispensation that delineates specific entitlements as well as liberties for the human person. In Kenya's constitutional context, it is the Bill of Rights that was

158 Chapter 102, Laws of Kenya.

159 The 2007 general elections were marred with irregularities that led to violence and anarchy across the country.

160 'Breaking Kenya's Impasse: Chaos or Courts?' Africa Policy Brief, Africa Policy Institute. P 3.

161 'Kenya in Crisis' Africa Report, 21 February 2008. International Crisis Group. P 26.

envisaged to carry these important provisions. The adequacy of this critical component of the Constitution (and the constitutionalism doctrine) is discussed below.

Kenya has ratified the International Covenant on Civil and Political Rights (ICCPR), which treaty articulates a wide range of first generation rights: The right to self determination; the right not to be discriminated against; the right to equal treatment; the right to life; the right not to be subjected to torture and other cruel and inhuman treatment; the right not to be held in slavery or servitude; the right to liberty and security of person; the right to dignity for persons deprived of freedom; the right to movement; the right to fair trial; the right to freedom of thought, conscience and religion; the right to freedom of expression; the right to peaceful assembly; the right to freedom of association and the rights of minorities.¹⁶² Kenya is also a party to the African Charter on Human and Peoples Rights which provides for similar human rights.

Chapter V of the Constitution protects most of these human rights but fails to provide for nascent entitlements such as women rights, children rights, rights of persons with disabilities, social economic rights as well as other rights belonging to minorities.¹⁶³ Indeed, a commentator has described Kenya's Bill of Rights as falling below the prevailing international threshold noting that:¹⁶⁴

The current constitution is not exactly 'human rights friendly'. Since 1963, Kenya has ratified or acceded to a number of international and regional human rights instruments which have increased the range of human rights standards designed to benefit the people. There are now specific protections of women's rights for example, as well as those of children in international declarations, which are not captured in the post colonial Constitution of Kenya. However, in practice, the Bill, far from reflecting the interests of the ordinary Kenyans, represents the parochial interests of the ruling class.

162 Human Rights in Kenya: opcit fn, 137

163 It is instructive that Parliament has consequently enacted legislations meant to cover for the areas left out in the Bill of Rights. These include, inter alia: Children Act (2001); Persons with Disabilities Act (2003); and the HIV and AIDS Prevention and Control Act (2006).

164 Hansungule, Michelo, "Kenya's Unsteady March Towards the Lane of Constitutionalism," *University of Nairobi Law Journal*, Vol. 1, 2003, p 43.

Another limitation inherent in the Bill of Rights is to be seen in the fact that the definition for discrimination is narrow.¹⁶⁵ The constitution prohibits discrimination only on the grounds of race, tribe, and place of origin, political connection, colour, creed or sex.¹⁶⁶ This stipulation has two notable shortcomings. To begin with, the Bill of Rights permits discrimination, for example, in matters of personal law such as adoption, marriage, divorce, burial and devolution of property on death.¹⁶⁷ Furthermore, the grounds upon which discrimination is prohibited are not exhaustive. These grounds clearly exclude distinctions on the basis of disability, HIV/AIDS status, property *et cetera*. However, legislations such as the Children Act (sec 5), the Persons with Disabilities Act (sec 11), and the National Commission on Gender and Development Act (sec 6(2)(d)) have broadened the scope of definition of discrimination, thus, endeavoring to enhance the course of human rights.

Despite the presence of the Bill of Rights in Kenya's constitutional dispensation, the enjoyment of even civil and political rights is limited by the fact that the constitution is, itself, littered with claw-back clauses which often defeat the very essence of protecting human rights. The Centre for Law and Research International (CLARION) has lamented that:¹⁶⁸

Even though the constitution guaranteed a raft of rights, claw back clauses ensured a rather fluid interpretation of those rights.

Under the pretences of internal limitations as well as the general limitation clauses entailing that rights may be restricted for greater interests, for example, of public safety, security and health, the Executive has tended to limit rather than guarantee human rights. And the Judiciary has not helped matters. It has in the past taken a very retrogressive stand with regard to the interpretation of the constitution, often in the interest of the Executive. In *Republic v*

165 Human Rights in Kenya: opcit, p 7.

166 Section 82(1) and (3).

167 Section 82(4)(b).

168 Op cit, note 19 p 2.

*Elman*¹⁶⁹, for example, the High Court took the position that the constitution is to be taken as any other piece of legislation and should be interpreted in a strict, rigid, legalistic and conservative manner. That position, however, seemed to be reviewed in 2004 when the High Court asserted that:

The constitution is not an Act of Parliament and is not to be interpreted as one. It is the supreme law of the land; it is a living instrument with a soul and consciousness; it embodies certain fundamental values and principles and must be construed broadly, liberally and purposely or teleologically to give effect to those values and principles.

Even as late as 2007, however, the Judiciary had yet to evolve a predictable philosophy to guide in the interpretation of the Bill of Rights, and the realization of rights remains a coincidence rather than a guarantee.¹⁷⁰ This is more so in the prevailing context where the Executive is superior to the other organs of State. A commentator correctly observes:¹⁷¹

That the issue of the proper approach to constitutional interpretation has haunted Kenyan courts for as long as we have been independent... the courts adopted an unprincipled, eclectic, vague, pedantic, inconsistent and conservative approach to constitutional interpretation.

State of Civil and Political Liberties (2007): An Overview

A constitution premised on the constitutionalism doctrine ought to eventually confer, at least, civil and political liberties to the citizenry. But this was not always the case in Kenya during the period under review.

169 [1969] E.A. 357.

170 Human Rights in Kenya: opcit p 6.

171 Thiankolu, Muthomi, *Landmarks from El Mann to the Saitoti ruling; Searching a philosophy of constitutional interpretation in Kenya*, p 7. Cited at www.kenyalaw.org, accessed on 20 May 2007. See, also, Muigai, Githu, (2004), *Political Jurisprudence or Neutral Principles: Another Look at the Problem of Constitutional Interpretation*, East African Law Journal, at 1.

Right to self determination

The right to self determination is part of the menu of human entitlements meant to accrue to all peoples of the world. The Kenya government's understanding of internal self determination includes the decentralization of governance through the local authorities and its elected leaders. Other initiatives aimed at decentralizing power include: the Constituencies Development Fund, the Constituency HIV/AIDS Funds, Constituency Bursary Funds, among others.

The performance of the government in realizing the right to self determination, however, has, at best, been dismal. The government has, for instance, failed to devolve state powers from the Central Government to hinter authorities in the required proportions. Although a number of decentralization schemes have been instituted such as the Local Government Act, the Local Authorities Transfer Fund Act, the Roads Maintenance Levy Fund (RMLF), the Constituency HIV/AIDS Fund, and the Constituencies Development Fund Act, these are fairly weak in formulation and do not fully represent the desired decentralization setup.

Appropriate decentralization should have necessitated a formidable devolution structure with the capacity to cede political power to the devolved units of governance to the extent of ceding both autonomy and income generation powers to such outfits.¹⁷² Both the aforementioned attempted decentralization structures fail to meet this threshold.¹⁷³

Protection of Civil and Political Rights without distinctions of any kind

The government ought to ensure the enjoyment of civil and political rights to all without distinctions of any kind such as race, colour, sex, language, religion or other opinion, national or social origin, property, birth or other status.¹⁷⁴ The current constitution prohibits distinctions on the grounds of race, tribe, and place of origin, political

172 Oyugi, Walter, "Search for an appropriate decentralization design in Kenya: Historical and comparative perspectives in Kindiki," Kithure & Ambani, Osogo, (eds), (2005), *The Anatomy of Bomas: Selected Analyses of The 2004 Draft Constitution of Kenya*, Claripress, Nairobi, at 2005.

173 Odhiambo, Morris, Akivaga, Kichamu, Chweya Ludeki & Mitullah Winnie, (2006), *Gender Dimensions in Management of Decentralized Resources in Kenya*, Claripress, Nairobi, p 3.

174 Article 2(1), ICCPR.

connection, colour, creed or sex.¹⁷⁵ As noted above, this constitutional standard is below the prevailing international threshold. Furthermore, distinctions in Kenya are even sanctioned constitutionally. A clear case of discrimination in Kenya's legal system is to be found in section 91 of the constitution which allows Kenyan husbands to confer citizenship unto their alien wives while the same is not permissible for Kenya women marrying foreign husbands. This discriminative position stands even as late as December 2007.

Right to Freedom of Expression/Media

States are obligated to guarantee free flow of information in whatever medium, be it oral, print or any other form of art.¹⁷⁶ Human rights standards, however, permit that in certain instances, this right may be limited, for instance, to protect the reputation of others. Such restrictions should not, however, negate the very essence of the freedom.

During the year under review, the right to access public information continued to be near impossible to achieve. The overbearing legislative framework of the Official Secrets Act¹⁷⁷ jealously guards against divulging of information in the custody of the State to otherwise worthy recipients of such information. This is not withstanding the fact that this condition of secrecy has in the past, been conducive to the perpetration of corruption and other economic crimes.

Moreover, the Government still demonstrated propensity to limit the freedom of expression. On 30 December 2007, for instance, amidst protests against flawed presidential elections, the government muzzled press freedom, directing that no live broadcasts could be aired by any media house. According to an observer report:¹⁷⁸

On the announcement of the final results for the presidential election on 30 December 2007 at the Kenyatta International Conference Center (KICC), journalists were ejected from

175 Section 82(1) and (3).

176 General Comment No. 10: Freedom of expression (Art 19). Human Rights Committee, Para 2.

177 Cap 187, Laws of Kenya.

178 Doubts about the Credibility of the Presidential Results Hamper Kenya's Democratic Progress. Preliminary Statement of the European Union Observation Mission, 1 January 2008, Nairobi.

the building. Immediately following the announcement, a directive from the Internal Security Minister ordered broadcasters to suspend all live broadcasts, seriously infringing the right of the media to report without undue state interference.

Another form of violation in this regard was the biased coverage by the public broadcaster, Kenya Broadcasting Corporation, during the electioneering year. It has been noted that:¹⁷⁹

A number of monitored media outlets failed to provide equitable coverage for candidates and parties. The Kenya Broadcasting Corporation, in particular, failed to fulfill even its minimal legal obligations as a public service broadcaster set out in the Kenya Broadcasting Corporation Act, its coverage demonstrating a high degree of bias in favour of the Party of National Unity (PNU) coalition.

On the legislation front, during the reporting period, two important Bills were introduced in parliament seeking to regulate certain aspects of the freedom of expression. These are the Freedom of Information Bill and the Media Bill. The Statistics Act, legislated in late 2006, also stood to have enormous implications during the period under review.

Freedom of Information Bill, 2007

The Freedom of Information Bill, 2007, seeks to enable members of the public to access information in possession by government authorities. It also seeks to put in place structures and processes to promote proactive publication and dissemination of such information. The preamble to this Bill, most importantly, alludes to international human rights standards such as common article 19 of the Universal Declaration of Human Rights (UDHR) and the (ICCPR). This forward-looking preamble could anchor the legislation on high moral ground, if enacted.

The Bill provides for the right of every person to access information held by government authorities and also that held by private authorities

179 Ibid.

but which may impact on the realization of rights.¹⁸⁰ Although the right is not absolute, the limitations placed on it are only the most essential ones, which are clearly spelt out in the Bill.¹⁸¹ A further positive aspect of the proposed law is that it provides for proactive disclosure of certain information by all government institutions.¹⁸² The Bill further provides for the employment of information officers to assist in the realization of the right. There is, however, apparent lack of commitment by the government to enact this law, owing to the fact that the Bill has rarely been substantively discussed since 15 May 2005 when it went through the first reading. Attempts by CSOS, especially the International Commission of Jurists – Kenya Section, to have this Bill enacted into law during the year under review bore little fruit.

The Media Act, 2007

This new legislation, among other things, establishes the Media Council of Kenya; establishes the Media Advisory Board, provides for the conduct and discipline of the media; and facilitates self regulation of the media.

The law had initially been passed with a provision entailing that journalists could in certain instances be compelled to name the sources of their information. The Bill was passed by the Legislature in August 2007, but was not assented to by the president due to pressure from journalists, media owners as well as civil society organizations. Indeed, the proposed legislation would have violated fundamental rights of journalists, for instance, the right not to name the sources of their information.

Statistics Act, 2006

Although enacted in 2006, the Statistics Act stood to impact strongly on the right to freedom of expression in 2007 and even later. On a positive note, the Statistics Act¹⁸³ provides for the establishment of the Kenya National Bureau of Statistics, for the collection, compilation and dissemination of statistics, and for the coordination of the

180 Section 4.

181 Section 5.

182 Section 6.

183 Kenya Gazette Supplement No. 61 (Acts No 4), Nairobi, 1 September 2006.

national statistical system, amongst other items.¹⁸⁴ Sections 18 (1) and (2) of the Act stipulate that any agency other than the Bureau wishing to conduct a census or survey at national or local level has to seek the approval of the Board by submitting its plans to the Board three months prior to the intended survey. The Board has powers, under the Act, to approve or disapprove such plans. The Act further provides for the conduct of Housing and Population Census every ten years¹⁸⁵ as well the maintenance of a comprehensive and reliable national socio-economic database.¹⁸⁶ This law is important because statistics of this nature are critical not only for development planning, but also human rights analysis.

On a negative note, however, this law could violate freedom of information in two cardinal ways. First, both the conductors and users of surveys may be hindered to disseminate or receive information within the required time since such statistics have, under this law, to be approved by the Board. Second, the Act may be instrumental in curtailing the freedom of information since the Board retains the power to approve or disapprove a survey. This is done without any clear benchmarks regarding the application and approval process, thus, leaving room for the officer concerned to act with impunity.¹⁸⁷ The legislation violates human rights in that surveys in most cases need to be disseminated hastily to meet their objectives. Media houses, for instance, conduct quick and needed opinion polls, which may be threatened by the mandatory three-month rule. The required three months notice may either serve to delay otherwise very urgent statistics or make it stale by the time of dissemination.

Moreover, section 20 of this legislation violates the doctrine of human rights in that it authorizes certain officers of the Board to enter any premises without a warrant. There is no requirement that such a step be first sanctioned by another office acting judicially. It is thus meant that this law gives certain government officers unlimited power to enter ones premises, private abode, privacy (the inner sanctum) at will so long

184 Aringo, O., "Legislating against free access to information," Centre for Law and Research International (CLARION). A paper presented during a NASCON/CLARION workshop at Panafric Hotel, 12 October 2006. P 2.

185 Section 4(2)(d).

186 Section 4(2)(e).

187 Aringo, opcit p 2.

as such persons can justify such entry to be for the purposes of collection of information under the Act. It follows that the Statistics Act is a most offensive Act ever enacted by the government of President Kibaki, and flies in the face of democratic values.

Right to Freedoms of Assembly and Association

The related rights of peaceful assembly¹⁸⁸ and association¹⁸⁹ continued to suffer violations in 2007. On 21 September 2007, for example, Hon William Ruto and Hon Omingo Magara were violently prevented by armed youth allied to the then Cabinet Minister, Hon Simeon Nyachae, from attending a fundraising meeting in Hon Magara's own constituency.¹⁹⁰ Police and provincial administrators looked on as armed youth attacked the two legislators. No action has been taken and there is little evidence such a measure is planned to be taken. Ironically, on 25 September 2007, five university students were charged in court for demonstrating against this brutal attack.

The State of Autochthonous Oversight Bodies

The doctrine of constitutionalism anticipates the establishment of autonomous oversight bodies to not only put government to check but also manage core government functions such as elections, human rights promotion and protection, anti-corruption, among others. In Kenya, the constitutional and legal order establishes a number of institutions, for instance, an Electoral Management Body (EMB), the ECK, a National Human Rights Institution, the KNCHR, the KACC, the National Commission on Gender and Development, among others. The first three are particularly pertinent to the constitutionalism discourse hereunder.

The Electoral Commission of Kenya

The constitution envisages the ECK¹⁹¹ charged with the registration of voters and maintenance of voter registers; direction and supervision

188 Article 21 ICCPR; See, section 80 of the Constitution.

189 Article 22 ICCPR; See, section 80 of the Constitution.

190 See, "Orange team ejected from Nyachae rally," *Saturday Nation*, 22 September 2007.

191 Section 41 and 42A.

of elections; promotion of free and fair elections; and the promotion of voter education. The ECK is required to be under the charge of the chairperson, vice chairperson and between four and twenty one other commissioners, all appointed by the President. It is recognized universally that EMBs ought to have independence and autonomy, and must act with impartiality. Independence is often enhanced by consultative hiring of the members (commissioners) as well as their security of tenure. Financial security is equally critical. To be an impartial arbiter of elections, members of the EMBs are required to act with neutrality in matters considered political. These ideals are expected of the ECK.

A major constraint experienced by the ECK has been its perceived lack of independence and autonomy owing to the fact that its commissioners are now appointed single-handedly by the president, himself, a participant in elections. In 2007 alone, for example, the president appointed 19 new commissioners to the ECK, a move that was seen as compromising the elections in which he himself was a party. In so doing, the President violated an earlier agreement, the Inter Parliamentary Parties Group (IPPG) principles, and tradition where political parties, according to their parliamentary strength, nominated commissioners to the EMB. Lack of consultations in the appointment of commissioners undermined the confidence of election stakeholders and led to a majority of commissioners being inexperienced.¹⁹² This perceived lack of independence could have contributed to the perception that the 2007 presidential elections were irregular and hence the unprecedented violence experienced soon after the election results were announced. Indeed, the elections possibly 'were marred by a lack of transparency in the processing and tallying of presidential results, which raised concerns about the accuracy of the final result of this election'.¹⁹³

The ECK itself has on many occasions complained that it lacks sufficient resources to carry out its mandates such as voter education

192 Doubts about the Credibility of the Presidential Results Hamper Kenya's Democratic Progress, *opcit.*

193 *Ibid.*

as well as continuous voter registration.¹⁹⁴ The EMB even lacks sufficient capacity to punish political parties and candidates that take part in electoral violence. In this regard, the Institute of Education in Democracy has proposed that:

The ECK should have sufficient statutory powers to investigate, arrest and prosecute party officials, candidates and voters who incite violence or disrupt campaign rallies of other candidates ...

In addition, there have been attempts to place the ECK at the whim of the Executive by suggesting that it be under the umbrella of the Ministry of Justice and Constitutional Affairs,¹⁹⁵ an attempt that has been vigorously resisted. With the advantage of hindsight, suggestions for reform have been advanced, the keys to which is:¹⁹⁶

To strengthen the ECK's budgetary and administrative independence, including detailed, apolitical procedures for appointment of its commissioners and to empower the judiciary to become a credible arbitrator of electoral disputes, including by reforming the process for appointing judges.

Without these reforms, free and fair elections may continue to be impossible in Kenya's context.

Kenya National Commission on Human Rights

Another important oversight body with potential to enhance constitutionalism in Kenya is the KNCHR. The Kenya National Commission on Human Rights Act, 2002, establishes the KNCHR as an independent institution not 'subject to the direction or control of any other person or authority', a clear mark of autonomy and independence. In 2003, the Law Society of Kenya lauded the establishment of the KNCHR stating that for the first time; 'there is in place a permanent statutory institution specifically for the purposes of

194 See, the ECK 2002 General Elections Report.

195 See, Presidential Circular No. 1/2003.

196 'Kenya in Crisis' Africa Report, opcit p 27.

championing human rights'.¹⁹⁷ Indeed, under the enabling legislation, the KNCHR is charged with the following responsibilities:

- Investigating complaints of human rights violations;
- Visiting prisons and places of detention or related facilities;
- Informing and educating the public on human rights;
- Recommending to parliament effective measures to promote human rights;
- Implementing programmes aimed at inculcating civic awareness and responsibilities in the citizens;
- Ensuring government's compliance with international human rights obligations; and
- Investigating complaints of human rights violations.

To be able to fulfill this mandate, the law makers entrusted the human rights bastion with tremendous powers. These include: the power to issue summons or orders requiring the attendance of any person before it or the production of any document relevant to its investigations;¹⁹⁸ the power to question any person with respect to any subject matter under investigation¹⁹⁹ as well as the power to require the disclosure by any person of any information within such person's knowledge relevant to any investigation.²⁰⁰ Moreover, the law gives this citadel of human rights the power to enforce the findings of its investigations. The KNCHR can, for instance, recommend prosecution of human rights violators on its own, commence proceedings to enforce the Bill of Rights²⁰¹ order lawful compensation or payment to victims of human rights violations²⁰² and the power to send quarterly human rights reports to the president.²⁰³

Since its inception, the KNCHR has taken its mandate in stride, visiting detention facilities, investigating complaints of human rights,

197 See, Human Rights Report, 2003, Law Society of Kenya.

198 Section 19(1)(a).

199 Section 19(1)(b).

200 Section 19(1)(c).

201 Section 25(c).

202 Section 19(2)(b).

203 Section 25(f).

persuading the government to accede to international human rights instruments, partnering with non governmental institutions to promote human rights education, getting involved in anti corruption campaigns, *et cetera*.

In 2007, however, as in preceding years, the independence of the human rights institution continued to be questioned due to lack of financial independence. The KNCHR receives its annual funding through the Ministry of Justice and Constitutional Affairs and this has had the tendency to limit its autonomy. Its activities have had to tally with the budget approved by the Executive hence tampering with its independence. The challenges faced by this noble institution have been thus stated:²⁰⁴

The Commission has faced a number of challenges, including inadequate human and financial resources, limited support from government departments and the concern that human rights are not a major priority for the Government as a whole (including the President).

Moreover, officials of the national human rights institution have continued to face harassment by the Executive through its agencies, hence tampering with the realization of human rights. Non-governmental organizations have, for example, accused the government of using the KACC and Kenya Revenue Authority (KRA) to intimidate its critics. A case in point is where the chairperson of the KNCHR was summoned by the KACC for an investigation into allegations of abuse of office, considered by human rights defenders as amounting to fabrications.²⁰⁵ It is illustrative that Maina Kiai and other commissioners have recently been subjects of threats by illegal militia groups for taking positions perceived to be unfriendly to the government.

Functionally, also, this bastion of human rights continues to face criticism. Although the KNCHR has established a human rights tribunal for instance, as envisioned by the enabling Act, the tribunal has not been properly seized to check executive excesses. The KNCHR has also shied

204 Human Rights in Kenya, *opcit*, p 82.

205 Amnesty International Report 2007, p 158.

away from ordinary human rights tasks such as instituting actions to reinforce human rights, further casting doubt on its ability to protect human rights and check the Executive.

Kenya Anti Corruption Commission

A potential check on Executive power is the KACC which is established pursuant to the Anti Corruption and Economic Crimes Act (ACECA)²⁰⁶ as a body corporate capable of suing and being sued in its own name.²⁰⁷ The Act generously establishes KACC giving it 'all the powers necessary or expedient for the performance of its functions'.²⁰⁸ KACC was envisioned to perform the following main functions:²⁰⁹

- To investigate any matter which raises suspicion either of conduct constituting corruption or economic crime²¹⁰ or conduct liable to allow, encourage or cause conduct constituting corruption or economic crime;²¹¹
- To investigate personal conduct that is conducive for corruption;²¹²
- To assist any law enforcement agency of Kenya in the investigation of corruption or economic crime;²¹³
- At the request of any person, to advise any person on the ways of eliminating corrupt practices;²¹⁴
- To examine the practices and procedures of public bodies in order to facilitate the discovery of corrupt practices and to secure the revision of methods of work or procedures that may be conducive to corrupt practices;²¹⁵

206 Section 6(1).

207 Section 6(3).

208 Section 6(2).

209 Section 7(1).

210 Section 7(1)(a)(i).

211 Section 7(1)(a)(ii).

212 Section 7(b).

213 Section 7(c).

214 Section 7(d).

215 Section 7(e).

- To advise public heads on how to exercise power in a manner that is a hindrance to corruption;²¹⁶
- To educate the public on the dangers of corruption and economic crimes as well as foster public support in combating corruption and economic crimes;²¹⁷
- To investigate the extent of liability for the loss of any public property with a view to instituting proceedings to recover such property;²¹⁸

These mandates have been attempted with varying degrees of success.²¹⁹ There is little doubt that since inception, KACC has taken its mandate in stride.²²⁰ Each quarterly report published, pursuant to section 36 of the ACECA, shows that, indeed, KACC has been a beehive of activity.²²¹

Concerns have been raised, however, that KACC lacks the capacity to prosecute, especially senior Government officials - the 'big fish'. In the process, it has failed in its anticipated task of being a formidable check on especially the Executive function. In fact, save for the most exceptional circumstances, KACC's quarterly reports continue to indicate a growing tendency of the institution to investigate only the most junior public officers not necessarily at the heart of the Executive. KACC's constant casualties are employees of Nairobi City Council, traffic policemen, police officers below the rank of inspector, administrative officers below the rank of District Officer (DO) and other public officers of low ranks.²²²

There are doubts as to whether KACC has been an effective check on the government, especially on the anti corruption front. Such aspersions find credence in the fact, for instance, that it failed

216 Section 7(f).

217 Section 7(g).

218 Section 7(h).

219 See, Kenya State of Corruption Report, Centre for Law and Research International, 2006.

220 Ibid.

221 Ibid.

222 See, the Kenya Anti Corruption Commission's quarterly reports published through www.kacc.go.ke. Also, Kenya State of Corruption Report, opcit

to prosecute and tame certain politicians who were keen on using public vehicles and resources during the 2007 general elections. Of the 2007 General Elections, the Kenya Human Rights Commission has documented that:²²³

Reports indicated the misappropriation of publicly owned resources and also the presence of public officers at campaign events. There were 30 such incidences in Eastern province.

This position is corroborated by the European Union Election Observation Mission which observed that ‘use of state resources was reported for campaign purposes by some incumbents and the state owned media’s coverage was biased’. There is little evidence that KACC will rise to the occasion and prosecute those implicated in these scandals. Failure to prosecute key Cabinet Ministers implicated in, particularly Anglo-Leasing, corruption further vindicates the doubts on the efficacy of KACC as an oversight body.

In Lieu of a Conclusion

Although Kenya has attempted to establish structures usually found in constitutional states such as the Judiciary, Legislature and other oversight bodies, the state is yet to attain the constitutionalism threshold. Human rights are still violated, the Executive has overbearing authority over the other institutions and the oversight mechanisms are still fairly weak. The year under review, 2007 only served to accentuate the major weaknesses is in the emerging dispensation, and the general elections particularly tested state institutions. There is need for an overhaul of the constitution to entrench the Bill of Rights protecting all human rights, establishment of autonomous and effective oversight institutions as well as the subjection of the Executive to checks and balances.

223 Violating the Vote: A Report of the 2007 General Elections, 27 February 2008.

One Step Forward, Two Steps Backwards: The State of Constitutionalism in Zanzibar – 2007

Abdul Sheriff and Ismail Jussa

Introduction

This paper examines the constitutional development of Zanzibar in the year 2007 concentrating on those issues that touch on major constitutional, legal and human rights affairs. The major issues that dominated the year included the formal launching of the long awaited fresh dialogue between the ruling Chama Cha Mapinduzi (CCM) party and the Civic United Front (CUF) that were aimed at finding a lasting solution to the simmering political crisis between the two antagonistic parties; the debate over the status of Zanzibar as a semi-autonomous state in the EAC and the region's envisaged political federation and the never ending issue of the Union between Zanzibar and Tanganyika.

Other constitutional development issues in the year included the question whether the death penalty should be abolished; the controversial enactment of a new rights, privileges and immunities of the Members of House of Representatives Act, 2007 especially with regard to the provisions that are seen as undermining freedom of information in the Islands; the publication of the first-ever local human rights report on Zanzibar; the report of the Zanzibar Electoral Commission (ZEC), on its activities during its five-year tenure (2002 – 2007); and finally the malady of corruption in the justice system.

The Fresh Dialogue between CCM and CUF

In his inauguration speech to the Parliament of the United Republic of Tanzania on 30 December 2005, President Jakaya Kikwete spoke

of what he termed as a 'political divide' in Zanzibar, and asked for support from political leaders of the two wrangling parties for his endeavour to realize a lasting solution to the uneasy political situation in the islands.²²⁴ After one year of 'informal contacts' between some of the top leaders and officials of CCM and CUF, the much awaited dialogue was officially launched on 17 January 2007 in Zanzibar. Initially smaller CCM and CUF delegations met to agree on the agenda and the *modus operandi*, and then formal talks were launched on 1 February 2007 in Dodoma before moving to Bagamoyo.

Five items of the agenda were agreed. These were:

1. The General Elections of 30 October 2005 in Zanzibar, and their consequences;
2. Equality and fairness in conducting political activities in Zanzibar;
3. Issues of governance in the Revolutionary Government of Zanzibar;
4. Means and ways of promoting reconciliation, and the conduct of free and fair elections; and,
5. Methods and programmes of implementation of the issues that will be agreed upon in the talks.

The talks were reported to be proceeding smoothly during the earlier stages, with both the CCM and CUF Secretaries General assuring their members and the public at large in April 2007 that it would not take long before the outcome would be announced.²²⁵ Among other issues, the package in the draft agreement²²⁶ contained the following items:

224 For an interesting comparative analysis of the Kenya – Zanzibar electoral crisis, see 'Panacea to post-election skirmishes', *The Sunday Standard* (Nairobi), 6 January 2008, p. 27.

225 'CCM, CUF talks slated to end soon', *The African* (Dar es Salaam), 7 April 2007, p. 1; 'Matokeo ya Muafaka Zanzibar kutangazwa mwezi huu' [Outcome of the Zanzibar Accord to be announced this month], *Mwananchi* (Dar es Salaam), 7 April 2007, p. 1.

226 'NEC-CCM yaubariki mwafaka' [NEC-CCM endorses the Accord], *Mwananchi*, 17 May 2007, p. 1.

1. Further reform of the ZEC, including its Secretariat, to strengthen its competence and its independence in law and in practice, to be able to conduct elections that are free, fair and credible;
2. Complete verification of the Permanent Voters' Register that was established in 2004/5, which will involve photographic images, fingerprints and signatures to ensure that all those who do not qualify or have been registered more than once are removed from the register, and those who were either denied their constitutional right to be registered or who have attained the age of voting have their names entered in the voter register;
3. Complete review of the recruitment laws and regulations as well as codes of conduct governing the defence and security forces to ensure that they are non-partisan and refrain from indulging in politics;
4. Defence and security forces to stop interfering with the election campaigns of political parties;
5. Political parties to abstain from advocating the use of violence, threats and/or intimidation in pursuance of their political objectives;
6. Political parties and the government of the day to ensure that a conducive atmosphere exists for the conduct of free political activity within the law;
7. Review of the residence requirement for a person to be eligible to register as a voter;
8. Reform of the publicly owned media to ensure equitable coverage for all political parties in the country;
9. Provision of assistance to victims of the 26-27 January 2001 violence when more than forty (40) people were killed by the police, and more than 2,000 sought refuge in neighbouring Kenya;
10. Corrective measures to be taken to provide redress to victims of human rights violations and destruction of property;

11. Establishment of a Fund for Reconciliation and Reconstruction;
12. Measures to be taken to rectify imbalances between Unguja and Pemba in the composition of the Revolutionary Government of Zanzibar and its institutions, and in the allocation of budget resources for development purposes.

But such positive news was short-lived. In May 2007, the two parties started trading accusations and counter accusations, blaming each other for undermining the spirit of the talks.²²⁷ The saga began with a visit to Pemba by the Secretary General of CCM, Yussuf Makamba, who was quoted by the local print and broadcast media as ruling out a re-run of the Zanzibar general elections or a possible power-sharing arrangement between his party and CUF, and referring to those who alleged that there were imbalances between Unguja and Pemba as ‘mad people’.²²⁸ CUF protested against those remarks, and its rank and file urged their leadership to withdraw from the talks, accusing CCM of taking their party for a ride in a well calculated tactic.²²⁹ CCM on its part denied having any hidden agenda in the talks, and accused CUF of exerting undue pressure to force its demands.²³⁰

By the end of July 2007, it was an open secret that things were not normal, and in fact the bi-partisan talks were stalled for all intents and purposes. On 7 August 2007, the Chairman of CUF, Prof. Ibrahim

227 ‘CCM, CUF Muafaka on verge of collapse’, *Sunday Citizen* (Dar es Salaam), 20 May 2007, p. 1.

228 ‘Makamba: Uchaguzi Zanzibar hadi 2010’ [Makamba: No Elections in Zanzibar until 2010], *Uhuru* (Dar es Salaam), 23 May 2007, p. 1; ‘Makamba aigeuka CUF’ [Makamba turns against CUF], *Tanzania Daima*, 24 May 2007, p. 1; ‘CCM lacks political will – CUF’, *The African*, 10 June 2007, p. 1.

229 ‘Makamba kavuruga mambo Z’bar – CUF’ [Makamba has spoiled the matter in Z’bar – CUF], *Tanzania Daima* (Dar es Salaam), 12 June 2007, p. 1; ‘We are sticking to Muafaka talks – CUF’, *Sunday Citizen* (Dar es Salaam), 17 June 2007, p. 1; ‘CUF Council supports Muafaka’, *Sunday News* (Dar es Salaam), 17 June 2007, p. 1; ‘Chama cha CUF chamlaani Makamba’ [CUF condemns Makamba], *Mwananchi* (Dar es Salaam), 17 June 2007, p. 1

230 ‘CCM refutes ditching Muafaka’, *Daily News* (Dar es Salaam), 8 August 2007, p. 1; ‘Makamba: CUF haisemi kweli kuhusu mwafaka’ [Makamba: CUF is not telling the truth about the Accord], *Uhuru* (Dar es Salaam), 8 August 2007, p. 1; ‘CCM, CUF warushana’ [CCM, CUF blame each other], *Tanzania Daima*, 8 August 2007, p. 1.

Lipumba, held a press conference in Dar es Salaam, declaring that the two parties had reached a deadlock, while the 'agreed timeframe for the conclusion of the talks', which was said to be 15 August, 2007, was only one week away.²³¹ He called upon the international community to intervene to rescue the talks. Finally, the saga was brought to an end through a public statement by President Jakaya Kikwete on 14 August, 2007, in which he urged CUF to go back to the negotiating table, promising his personal supervision of the process to ensure its successful conclusion.²³² CUF heeded the president's call, and on 18 August, 2007, its Secretary General, Seif Sharif Hamad, announced that the party had agreed in principle to continue with the negotiations, provided that a timeframe for their conclusion is agreed by the two parties, and that the president will keep to his word to personally supervise them.²³³

The rest of the year witnessed the two parties quietly continuing with the negotiations with reports²³⁴ suggesting that they were in their final round and that a deal in the form of a memorandum of understanding will be made public anytime in January 2008. Though the deadline has again passed, no deal has been announced by the two parties yet.

A major constitutional development expected to come out from the talks was a power-sharing scheme between CCM and CUF, which would entail a major amendment of the Constitution of Zanzibar. There had been speculation that such an arrangement would make it obligatory for any winning party to incorporate other political parties that will meet certain constitutional and legal requirements in the formation of a government of national unity. This would mean

231 'CUF calls for international mediators in Zanzibar impasse', *The Citizen*, 8 August 2007 p.1.

232 'Taarifa ya Rais Kikwete kuhusu Mazungumzo ya Muafaka kati ya CUF na CCM' [President Kikwete's Statement about the Talks on the Accord between CUF and CCM], *Tanzania Daima* (Dar es Salaam), 15 August 2007, p. 3.

233 'CUF: We take JK's word on Muafaka', *Sunday News* (Dar es Salaam), 19 August 2007, p. 1; 'Mwafaka Talks: Kikwete faces strict conditions from CUF', *The African on Sunday* (Dar es Salaam), 19 August 2007, p. 1.

234 'CUF optimistic on Muafaka', *Sunday News* (Dar es Salaam), 18 November 2007, p. 1.

a departure from the current winner-takes-all system to that of an inclusive one in the formation of a government.

There seems to have been some confusion about the power-sharing scheme, with some mistakenly referring to it as a coalition government, while others calling it a government of national unity. The former entails a situation where, in a parliamentary system, no single party wins a clear majority to warrant it to form a government on its own, and hence is obliged to look for partners to form a coalition. The latter refers to a case where, even with a clear-cut winner of the elections capable of forming a government on its own, internal or external circumstances, such as political polarisation, war, or transition to democracy, oblige it to incorporate all other segments of the society into the government in a 'grand coalition'.

A requirement for an all-inclusive government for Zanzibar had formed part of the *Muafaka* (Accord) of 2001²³⁵ under which the winning party was to provide the President, while the runner up, having won at least 30% of the popular vote, was to provide the Chief Minister, and cabinet posts were to be shared proportionately. The Accord called for dialogue on the matter to be completed in 2003 following the by-elections in 17 Pemba constituencies, and a mechanism to be put in place for it to take off in the post-2005 elections period.²³⁶ Lack of political will and a third controversial election however, prevented the implementation of the arrangement. It is not clear whether it will be implemented this time round.

235 *Muafaka wa Kisiasa baina ya Chama Cha Mapinduzi (CCM) na Chama Cha Wananchi (CUF) wa Kumaliza Mgogoro wa Kisiasa Zanzibar, 2001* [Political Accord between Chama Cha Mapinduzi (CCM) and the Civic United Front (CUF) on Ending the Political Crisis in Zanzibar, 2001], Clause 5.

236 *Tume ya Rais ya Pamoja ya Usimamizi (2004), Mustakbali wa Siasa na Demokrasia Zanzibar: Hoja ya Serikali ya Pamoja*, [Joint Presidential Supervisory Commission (2004), *The Future of Politics and Democracy in Zanzibar: A Case for a Joint Government*] (unpublished)

Many analysts and commentators²³⁷ have put forward the view that a power-sharing agreement is the only way out of the present political quagmire in Zanzibar. It is seen as a win-win situation to ensure all citizens of Zanzibar equally enjoy their constitutional right to participate in the governance of their country, and will also put an end to 'life and death' approach to politics and electioneering.

Among the issues that will require constitutional amendments for such an arrangement to work are those provisions that relate to succession, formation of the cabinet (Revolutionary Council in the case of Zanzibar), the structure of the House of Representatives (which is adversarial in its present structure), and the inclusion of new provisions to cover areas such as a threshold for the incorporation of a party into the government, a formula for the distribution of positions in government, dispute resolution mechanism, and drawing up of a political programme that will guide government policy.

The draft memorandum of understanding agreed between the CCM and CUF by January 2008²³⁸, that was supposed to be endorsed by the two parties' decision-making bodies, put the basic framework of the power sharing arrangement in the following terms:

1. Any political party that attains 5% or more of the presidential vote will qualify to be included in the government.
2. Cabinet portfolios will be proportionately distributed between political parties in accordance with the percentage of presidential votes they attain.
3. Election manifesto of the majority party will provide the basis of government policy, but a minimum programme will be

237 'Serikali ya mseto ni ufumbuzi Zanzibar' [Coalition government is the solution for Zanzibar], *Habari Leo* (Dar es Salaam), 9 August 2007, p. 1. 'Zanzibar needs coalition government – US envoy', *The Guardian* (Dar es Salaam), 10 August 2007, p. 1; Balozi Karume ataka Serikali ya Umoja wa Kitaifa Zanzibar' [Ambassador Karume wants a Government of National Unity in Zanzibar], *Mwananchi* (Dar es Salaam), 28 January 2008, p. 1.

238 Rasimu ya Makubaliano kati ya Chama Cha Mapinduzi (CCM) na Chama Cha Wananchi (CUF) katika Kuupatia Ufumbuzi wa Kudumu Mpasuko wa Kisiasa Zanzibar [The Draft Agreement between *Chama Cha Mapinduzi* (CCM) and the Civic United Front (CUF) to find a Lasting Solution to the Political Divide in Zanzibar] p. 9 – 13.

- drawn up by all participating parties that will cover important areas of governance.
4. There will be an executive president assisted by two Vice-Presidents; the office of the Chief Minister was to be abolished.
 5. The leading candidate in the presidential election will be the President, who will be the Executive President.
 6. The first runner-up in the presidential election will be the First Vice-President, and he will be the principal assistant and adviser to the President. He will also be consulted by the President in the formation of the cabinet.
 7. The second Vice-President will be appointed by the President from his own party in the House of Representatives, and he will be the leader of government business in the House. He will automatically assume the presidency if the president becomes incapacitated.
 8. There will be a Reconciliation Council made up of two representatives from each participating party which shall have powers to hear any complaint from either the president or the First Vice-President, or both, on the conduct of government business, and adjudicate accordingly. The decision of the Reconciliation Council will be binding and final.

Another important aspect of such an arrangement is how it will affect the Union Constitution which still (erroneously) incorporates sections and provisions governing the structure and administration of the Zanzibar government over purely Zanzibari affairs that are non-Union matters.²³⁹

Besides the power-sharing scheme, implementation of many of the items listed as forming part of the Accord to be announced require either enactment of new legislation or amendment of the existing

239 Shivji, I. G. (1990) *Tanzania: the Legal Foundations of the Union*, Dar es Salaam; Dar es Salaam University Press, 1990, p. 80. See also Shivji, I.G. (2006) 'Sovereignty and Statehood in Zanzibar in the Union', in C. M. Peter and H. Othman, (2006) *Zanzibar and the Union Question*, Zanzibar: Zanzibar Legal Services Centre Publication Series, No. 4, pp. 184-5.

ones to give effect to the desired changes that aim at strengthening the democratic dispensation in the Islands. With only a partial success of the Joint Presidential Supervisory Commission (JPSC), a statutory body established to supervise the implementation of the *Muafaka* Accord of 2001,²⁴⁰ it remains to be seen how a different body will be structured to differentiate itself from that record of performance, and earn the confidence and respect of the electorate in terms of its capability to ensure full, or at least satisfactory implementation of the new Accord. This is crucial if Zanzibar is to avoid another chaotic election come 2010.²⁴¹

The Debate on Fast-Tracking the East African Federation and the Status of Zanzibar

As was the case in other East African countries, the year 2007 saw the government soliciting the views of Tanzanians on fast-tracking the East African Federation. It was Tanzania's idea, endorsed by Kenya and Uganda, to seek opinion on whether citizens of the three countries backed the political leaders' decision to speed up the formation of a regional super-state from the earlier target of 2013, by moving it forward to 2010. The roadmap contained in a protocol signed by the three Heads of State provided for a gradual formation of the Federation in five stages:

2005 – Customs Union

2007 – Common Market

2008 – Common Passport (for international traveling)

2009 – Monetary Union (Single Currency)

2013 – Formation of the East African Federation involving direct election of the President and Parliament of the Federation

In fact, it is believed by many that the Tanzanian government was not ready for the Federation, and knowing full well Tanzanians' lukewarm

²⁴⁰ The Joint Presidential Supervisory Commission Act of 2001.

²⁴¹ Unfortunately, as of April, 2008, the Accord appeared to be floundering once again as the CCM National Executive Committee has refused to endorse the agreement, although it was accepted by CUF. This will have to be covered in next year's report.

approach to the whole concept, it was politically convenient to use the public to drive to a desired conclusion. But the debate that ensued, while giving the authorities what they wanted in putting the brakes on fast-tracking the East African Political Federation, re-opened the debate in Zanzibar on the issue of interpretation of the Articles of Union and the Union Constitution. The Presidential Commission, also known as the Wangwe Commission, that was formed to collect the peoples' views, met a hostile audience everywhere it went in Zanzibar. Its response was to pack and leave the islands after only two days of the initial round of meetings.

Zanzibaris, who had gathered to give their opinion, ignored the whole issue of fast-tracking, and instead used the occasion to demand explanation on the status of Zanzibar in the current EAC and in the envisaged Federation. Questions raised included the status of the President of Zanzibar in the regional Heads of States Summit; the representation of Zanzibar in areas that are non-Union matters; how the Customs Union will protect Zanzibar's economy, which depends heavily on the transit trade, and is already depressed due to harmonised tariffs with Tanzania Mainland; Zanzibar's status in Union institutions that were created using capital that came partly from Zanzibar's dividends paid from the defunct East African Currency Board and EAC; and Zanzibar's representation in the regional institutions, such as the EALA.

The biggest constitutional issue, however, remained that of interpretation of the Articles of Union on the jurisdiction of the Union government over non-Union matters when it comes to representing Zanzibar as part of the Union in international bodies.²⁴² The issue becomes more relevant when one considers the fact that only four areas covered by the EAC Treaty fall under the Union's ambit. They are:

242 Anil Kija 'Union Anniversary and East African Federation', *This Day*, 26 April 2007, pp. 16 – 17. See also Ani Jozeni, 'How the Union impinges on EA Federation fast tracking', *The Guardian* (Dar es Salaam), 26 April 2007, (Special Supplement: Union of Tanganyika and Zanzibar), p. 4.

- Monetary and Financial Co-operation;
- Free Movement of Persons, Labour Services, Right of Establishment and Residence;
- Relations with other Regional and International Organisations and Development Partners;
- Cooperation in Political Matters.

The remaining 13 out of the 17 areas covered by the Treaty for the establishment of the EAC, which will later be transferred to the Federation, are non-Union matters.²⁴³ These include:

1. Cooperation in Trade Liberalisation and Development;
2. Cooperation in Investment and Industrial Development;
3. Cooperation in Standardisation, Quality Assurance, Meteorology and Testing;
4. Cooperation in Infrastructure and Services;
5. Cooperation in the Development of Human Resources, Science and Technology;
6. Agriculture and Food Security;
7. Cooperation in Environment and Natural Resources Management;
8. Cooperation in Tourism and Wildlife Management;
9. Health, Social and Cultural Activities;
10. Enhancing the Role of Women in Socio-Economic Development;
11. Legal and Judicial Affairs;
12. The Private Sector and the Civil Society;
13. Cooperation in other Fields.

All these matters fall squarely under the jurisdiction of the Zanzibar government in accordance with Article 102 (1) of the Union Constitution which provides, in its official Kiswahili version, that:

²⁴³ Chapter 12 to Chapter 27 of the Treaty for the Establishment of the East African Community (1999).

Kutakuwa na Serikali ya Zanzibar itakayojulikana kama “Serikali ya Mapinduzi ya Zanzibar” ambayo itakuwa na mamlaka katika Zanzibar juu ya mambo yote yasiyo mambo ya Muungano kwa mujibu wa masharti ya Katiba hii. [There shall be a government for Zanzibar which shall be known as “The Revolutionary Government of Zanzibar” which shall have exclusive authority over Zanzibar in all matters other than the Union matters in accordance with the provisions of this Constitution. (unofficial translation).]

The said constitutional provision correctly translates Article (iii) (a) of the Articles of Union that provides for “a separate legislature and executive in and for Zanzibar from time to time constituted in accordance with the existing law of Zanzibar and having exclusive authority within Zanzibar for matters other than those reserved to the Parliament and Executive of the United Republic.”

A question that was raised repeatedly by the people of Zanzibar during the Wangwe Commission public hearings was one that related to the fact that the Union government had assumed powers that are exclusively under the jurisdiction of the Zanzibar government. Zanzibar has its own ministries dealing with finance and economic planning, investment, trade and tourism, employment and labour, education, health, communications and transport, water, construction, energy and lands, information, culture and sports, and constitutional affairs and good governance. These matters are administered by the Zanzibar government through these ministries, which therefore are the only competent organs to represent Zanzibar’s interests if they are to be administered by a pan-territorial body such as the Community or the envisaged Federation.²⁴⁴ This was the premise that Zanzibaris used to campaign openly for their country to be admitted either as an independent or at least as an associate member of the Community or Federation.

Given the importance which Zanzibaris across the political divide attach to any matter that touches on their autonomy and identity, it

244 Bilal, Said Gharib (2007) ‘Nafasi ya Zanzibar katika Jumuiya ya Afrika Mashariki’, Position of Zanzibar in the East African Community, a paper presented to a Training Workshop on The Constitution Law and Development in Zanzibar (30 – 31 May, 2007) organised by the Zanzibar Legal Service Centre (ZLSC), at p. 3.

was not surprising that one of the features of the debate was a rare common position by political adversaries in the islands. The opposition CUF Secretary General and former Chief Minister, Seif Sharif Hamad, in his written submission to the Wangwe Commission,²⁴⁵ rejected outright any fast-tracking of the Federation, citing major issues that each country needed to address before embarking on the ambitious programme to create a super-state; and in the case of Tanzania, underlining the importance of resolving the Union problems between Zanzibar and Tanganyika and the political impasse between CCM and CUF. As soon as the Wangwe Commission announced the results of their work, in which it was reported that three quarters of Tanzanians opposed fast-tracking,²⁴⁶ President Amani Karume of Zanzibar cautioned that any further integration of the East African countries must take into consideration public opinion in individual countries.²⁴⁷

While the final outcome of the exercise was a rejection of fast-tracking, something that the authorities might be happy with because it at least postpones the debate over complaints from the islands with regard to their representation in international bodies when it comes to non-Union affairs, the concerns and queries raised by Zanzibaris will still beleaguer future development of regional integration. It remains a challenge for the three East African governments to look into the possibility of making a special arrangement for accommodating Zanzibar within the institutional and legal framework of the Community and of the Federation, if such a project is to be successful. Perhaps there is

245 Hamad, Seif Sharif (2007) 'Maoni juu ya Kuharakisha Uundwaji wa Shirikisho la Afrika Mashariki' [Views on Fast-tracking the Formation of the East African Federation] presented to the Wangwe Commission in Zanzibar. (unpublished).

246 'Ripoti ya Tume ya Wangwe: Wananchi robo tatu hawataki Shirikisho' [Report of the Wangwe Commission: Three Quarters of the Citizens do not want Federation], *Tanzania Daima* (Dar es Salaam), 14 July 2007, p 1; 'Watanania walikataa Shirikisho Afrika Mashariki' [Tanzanians rejected East African Federation], *Mwananchi* (Dar es Salaam), 14 July 2007, p. 1. For initial reaction to the debate, see 'Tanzanians say No to EA Federation', *Sunday Citizen* (Dar es Salaam), 15 April 2007, p 1; 'Referendum to decide EA Federation – Wangwe', *Sunday Citizen* (Dar es Salaam), 22 April 2007, p 1.

247 'Karume naye awashukia madikteta Afrika Mashariki' [Karume also condemns dictators in East Africa], *Tanzania Daima* (Dar es Salaam), 15 March 2007, p 3.

a need to consult the special arrangement that Finland has in relation to Aaland Island, and Denmark to Faroe Islands and Greenland, when it comes to membership of international organisations such as the European Union.

The Union between Zanzibar and Tanganyika

Controversies continued to surround the administration of the Union between Zanzibar and Tanganyika in 2007.²⁴⁸ During the commemoration of the Union Day on 26 April, and the budget session in Parliament, the Union government, through its Minister of State in the Vice President's Office (Union Affairs), Dr. Hussein Mwinyi, announced what he termed as successes in resolving a number of obstacles that haunt the smooth functioning of the Union. He announced that consensus had been reached between the Union and Zanzibar governments on a number of issues, including the hiring of a consultant to advise the two governments on the sharing of revenue emanating from the potential discovery of petroleum and natural gas,²⁴⁹ amendment of the law that establishes the Human Rights and Good Governance Commission so as to recognise the Zanzibar Minister responsible for Good Governance, and hence allow the Commission to start operating in Zanzibar,²⁵⁰ and an agreement over a formulae for sharing revenue accruing from deep sea fishing to pave the way for a single licensing authority for the whole of the United Republic.²⁵¹

248 'Miaka 43 ya Tanzania: Muungano kidonda' [Forty Three Years of Tanzania: Festering Union], *Tanzania Daima*, 26 April 2007, p 1; 'Mzimu OIC wafufuka' [The OIC ghost rises again], *Tanzania Daima*, 1 December 2007 p 1; Nizar Visram, 'Kuvurugwa kwa Hati ya Muungano ndicho chanzo cha kero za Muungano' [Breaching of the Articles of Union is the source of the problems of the Union], *Mwananchi*, 26 April 2007, p. 12; 'Seif Sharif: Kilichofanyika ni kiini macho Zanzibar' [Seif Sharif: What was done was to blindfold Zanzibar], *Mwananchi*, 26 April 26 2007, p 13.

249 'Lowassa, Nahodha waja na suluhu kero za Muungano' [Lowassa, Nahodha come with solutions of the Union problems], *Mtanzania*, 27 April 2007, p. 1; 'Ugunduzi wa Petroli: Muungano majaribuni' [Discovery of oil: A test for the Union], *Tanzania Daima* (Dar es Salaam), 5 July 2007, p 1.

250 'Kero za Muungano zaendelea kufanyiwa kazi – Dk. Mwinyi' [Union problems being attended to – Dr. Mwinyi], *Zanzibar Leo Jumapili*, 22 April 2007, p 1; 'Dk. Mwinyi: Mafanikio ya Muungano ni makubwa' [Dr. Mwinyi: The successes of the Union are major], *Uhuru*, 26 April 2007, p 12.

251 'Mainland, Islands squabble over revenues from EU fishing deal', *The East African*

On the other hand, the Official Opposition, led by CUF both in the Union Parliament and in the Zanzibar House of Representatives, objected to the method of closed door sessions between the Union Prime Minister and Zanzibar Chief Minister, or setting up of numerous committees²⁵² in dealing with the Union problems, and instead called for a more participatory approach involving the wider citizenry.²⁵³

(Nairobi), 8-14 October 2007, p 1.

- 252 'No need for commission on Union matters – Opposition', *The African* (Dar es Salaam), 5 July 2007, p. 1. Altogether nineteen Committees or Commissions have been set up to examine Union problems. Twelve of them are from Zanzibar which include *Kamati ya Baraza la Mapinduzi (Kamati ya Amina) ya 1992* [Committee of the Revolutionary Council (Amina Committee) of 1992]; *Kamati ya Rais ya Kupambana na Kasoro za Muungano (Kamati ya Shambhuna) ya 1997* [Presidential Committee to deal with the shortcomings of the Union (Shambhuna Committee) of 1997]; *Kamati ya Rais Kuchambua Ripoti ya Jaji Kisanga (Kamati ya Salim Juma Othman)* [Presidential Committee to analyse the Report of Justice Kisanga (Committee of Salim Juma Othman)]; *Kamati ya Kuandaa Mapendekezo ya Serikali ya Mapinduzi ya Zanzibar juu ya Kero za Muungano (Kamati ya Ramia) ya 2000* [Committee to prepare the Recommendations of the Revolutionary Government of Zanzibar on the Union Problems (Ramia Committee) of 2000]; *Kamati ya Baraza la Mapinduzi juu ya Sera ya Mambo ya Nje* [Committee of the Revolutionary Council on Foreign Policy]; *Kamati ya Rais ya Wataalamu juu ya Kero za Muungano ya 2001* [Presidential Committee of Experts on the Union Problems of 2001]; *Kamati ya Baraza la Mapinduzi ya Jumuiya ya Afrika Mashariki* [Committee of the Revolutionary Council on the East African Community]; *Kamati ya Mafuta* [Committee on Oil]; *Kamati ya Madeni baina ya Serikali ya Mapinduzi ya Zanzibar na Serikali ya Muungano wa Tanzania* [Committee on Debts between the Revolutionary Government of Zanzibar and the Government of the United Republic of Tanzania]; *Kamati ya Suala la Exclusive Economic Zone (EEZ)* [Committee on the Question of Exclusive Economic Zone (EEZ)]; *Kamati ya Masuala ya Fedha na Benki Kuu* [Committee on Fiscal Matters and the Central Bank]; *Kamati ya Rais ya Masuala ya Simu (1996–1999)* [Presidential Committee on Telecommunication matters (1996-1999)]. In addition, seven Committees have been formed by the Union government, and these are *Kamati ya Mtei* [Mtei Committee]; *Tume ya Nyalali* [Nyalali Commission]; *Kamati ya Shellukindo* [Shellukindo Committee]; *Kamati ya Bomani* [Bomani Committee]; *Kamati ya Shellukindo 2 ya kuandaa Muafaka juu ya Mambo ya Muungano baina ya SMZ na SMT* [Shellukindo Committee 2 to reach an accord on Union Matters between the Revolutionary Government of Zanzibar and the Government of the United Republic of Tanzania]; *Kamati ya "Harmonization"* ["Harmonization" Committee]; *Kamati ya Masuala ya Simu (Kamati ya Kusila)* [Committee on the Telecommunication Matters (Kusila Committee)].
- 253 'Long way to go to resolve Union problems', *The Citizen* (Dar es Salaam), 11 July 2007, p. 14 – 15.

The opposition further highlighted the more serious problems that needed attention, including the complaint from the people of Tanzania Mainland that Zanzibaris are over-represented in Union institutions, such as the Parliament, and enjoy undeserved privileges of holding positions even in non-Union institutions. From the Zanzibar side, complaints revolve around issues like unfair fiscal and monetary arrangements that kill Zanzibar's economy which is island-based. Such matters include harmonisation of tariffs between the Mainland and Zanzibar with complete disregard of the vulnerability of Zanzibar's economy which depends heavily on the transit trade; double taxation of goods entering Tanzania Mainland from the Islands; inclusion of petroleum and natural gas into Union matters while other minerals such as gold, diamond and tanzanite found on the Mainland are not Union matters; a continuing blocking of Zanzibar Football Association from joining Federation for International Football Association (FIFA), since sports is not a Union matter; and many others.

Above all, the opposition argued that the biggest problem of the Union emanates from the continuing breach of the Articles of Union between the Republic of Tanganyika and the People's Republic of Zanzibar which is the *grundnorm* of the Union. The removal of the President of Zanzibar as an automatic Vice President of the United Republic is one such serious breach, denying the Head of the Executive of Zanzibar (being the only person enjoying full mandate of his people), to directly represent his country's interests in the Union government. The opposition further called for the renegotiation of the Articles of Union to pave the way for a review of the structure of the Union from the current two-governments system to a full-fledged federation with three governments, one for Zanzibar and one for Tanganyika to cater for non-Union matters, and a third Union government to deal with Union affairs throughout the United Republic.

Another interesting development with regard to the Union debate was the exercise of powers by Union institutions over Zanzibar which they do not have constitutionally. The leader of the official opposition in the Union Parliament, Hamad Rashid Mohammed, took to task the Union government over a 1965 piece of legislation,

the Exchange Control Act²⁵⁴ that was passed by the Union Parliament and contained a provision that repealed a Zanzibar law (the Exchange Control Decree). The Union Parliament has no jurisdiction to repeal Zanzibar laws.

These complaints were repeated by citizens from both sides of the channel during debates organised by the print and electronic media when the nation was marking 43 years of the Union. The government, however, still seems not to be prepared to go into uncharted waters by agreeing to a review of the Articles of Union and writing of a new constitution that will address these serious problems. Not surprisingly then that a group of 10 Zanzibaris attempted to settle the matter through the courts.

Rashid Salim Adiy and nine others filed a suit²⁵⁵ at the High Court of Zanzibar demanding that the Union be declared null and void and a restoration of Zanzibar's sovereignty. This move followed an earlier suit filed in 2005 by the same group praying to the court to instruct the Attorney General of Zanzibar to produce the original copy of the Articles of Union with signatures of President Julius Nyerere of Tanganyika and President Abeid Karume of Zanzibar. The High Court of Zanzibar ruled that despite the failure of the Attorney General's chambers to produce the original copy of the Articles of Union, the Union cannot be declared null and void.

One of President Jakaya Kikwete's pledges in his speech to Parliament on 30 December 2005 was to engage in a more constructive and serious effort to address the Union problems. He might have re-launched the Prime Minister – Chief Minister joint meetings to discuss such problems, but evidence on the ground suggests that, through almost half his term, his government is still far behind in settling the issue.

254 Exchange Control Ordinance (Amendment) Act, No. 22 of 1965.

255 Rashid Salum Adiy & 9 Others vs. Attorney General of the Revolutionary Government Zanzibar & 4 Others (No. 20 of 2006), High Court of Zanzibar (unreported)

The Protection of Fundamental Rights and Freedoms

The Controversial Enactment of the new Rights, Privileges and Immunities of the Members of House of Representatives Act, 2007

The April 2007 session of the House of Representatives attracted a lot of attention when the Zanzibar government tabled a bill to repeal the Rights, Privileges and Immunities of the Members of House of Representatives Act, 1990, and to enact new legislation to the same effect.²⁵⁶ Concerns were raised by the media in Zanzibar and Tanzania Mainland, human rights organisations and the opposition legislators with regard to the proposed new law, especially provisions that are seen as undermining freedom of information in the Islands.

Section 28 (d) when read together with section 10 of the Bill bars journalists from entering the House premises without prior approval of, and issuance of a permit by the Speaker, and makes it an offence liable to a fine of up to Shs. 50,000 and imprisonment of not less than a month and up to six months, for any person who will be found in the said premises without the Speaker's authorisation.

Section 32 (1) of the Bill makes it an offence liable to a fine of up to Shs. 300,000 and imprisonment of up to three years for any person who, among other things, publishes, without prior permission of the House, any report of the business of the House or of its committees, if such business is not public; publishes without prior permission of the House any document or report that has been prepared for submission to the House, if such document or report has not yet been tabled in

256 Mswada wa Sheria ya kufuta Sheria ya Baraza la Wawakilishi (Kinga, Uwezo na Fursa) Nam. 3 ya 1990 na kutunga Sheria mpya kuhusu Kinga, Uwezo na Fursa za Wajumbe wa Baraza la Wawakilishi katika kutekeleza Majukumu yao na mambo mengine yanayohusiana nayo, *Gazeti Rasmi la Serikali ya Mapinduzi ya Zanzibar*, Sehemu ya CXV Nam. 6197, 16 Machi, 2007, p. 24.

[A Bill for an Act to Repeal The House of Representatives (Immunities, Rights and Privileges) Act No. 3 of 1990 and to enact a new Legislation on Immunities, Rights and Privileges of the members of the House of Representatives in Execution of their Responsibilities and other relevant matters. Official Gazette of the Revolutionary Government of Zanzibar, Section CXV No.6197, 16 March, 2007, p. 24.

the House; and also publishes any scandal that relates to behaviour or conduct of a member of the House of Representatives.

These two provisions are unconstitutional, since they contravene Article 18 of the Constitution of Zanzibar which guarantees the right to freedom of information and speech.

Despite objections by journalists²⁵⁷ and attempts by the opposition legislators to seek their removal, the bill was passed into legislation. It remains to be seen whether journalists' associations or human rights organisations will challenge the provisions of this law through the courts, a culture that is seriously lacking in Zanzibar.

The Death Penalty

Zanzibar, as part of the United Republic of Tanzania, found itself engaged in a debate on whether the death penalty should be abolished following the decision to seek public opinion over the matter by the Union government. The general view among those consulted was to retain the death penalty. Religious leaders overwhelmingly upheld the view, citing holy books as a justification for maintaining 'a divine form of punishment'²⁵⁸ for big offences.

However, State Attorney working in the Attorney General's Chambers, Ali Hassan, came out openly to denounce the punishment as 'inhuman, cruel and degrading.'²⁵⁹ While there seems to be a Union government's desire to abolish the death penalty, with its former Foreign Minister and now United Nations (UN) Deputy Secretary General, Dr. Asha Rose-Migiro, taking the campaign to international heights, in Zanzibar it seems to lack popular support. Fear of antagonising the predominant conservative elements of the society will continue to suppress the campaign to do away with this inhuman form of punishment.

257 Editorial comment: 'Wanted: Clear discussion on Islands House privileges bill', *This Day* (Dar es Salaam), 2 April 2007, p 1.

258 'Zanzibar state lawyer against death penalty', *The Guardian* (Dar es Salaam), 22 October 2007, p 1.

259 'Mwanasheria wa SMZ apinga adhabu ya kifo' [State Attorney opposes death penalty], *Nipashe* (Dar es Salaam), 22 October 2007, p 1.

The release of the Report of the Zanzibar Electoral Commission

In November 2007, marking the end of the term for the serving Commissioners, the ZEC published a report of its activities during the previous five years. To the surprise of many, the report admitted that ZEC had no control over the supervision and organisation of the elections, with the Zanzibar Special Forces interfering in their work and even hijacking the electoral process. ZEC also complained of the interference by government authorities, notably the *Shehas* (village headmen), in the registration of voters. It admitted its lack of control over the *Shehas* who are supposed to be ZEC agents by law during the elections, but they would only take instructions from the Regional and District Commissioners.

The Commission further complained about interference by some political parties in the registration of voters who were not qualified to vote, especially those under the age of 18. It stated that it resisted attempts by the donor community to get certain measures implemented, although it does not state that these included verification of the Permanent Electoral Registers.²⁶⁰ With the appointment of a new ZEC in January 2008, it remains to be seen how it would tackle such interference by the local authorities which undermines its very independence and compromises the conduct of free and fair elections. This has the consequence of disenfranchising the people of Zanzibar and is a violation of their right to have a government of their choice and to participate in the public life of their nation.

Other Human Rights Issues

2007 was a historic year in the area of human rights in the islands following the publication of the first ever annual human rights report by a locally-based organisation. The Zanzibar Legal Service Centre

260 *Tume ya Uchaguzi ya Zanzibar (2007) Ripoti ya Shughuli za Tume ya Uchaguzi ya Zanzibar kwa kipindi cha Miaka Mitano kuanzia tarehe 3 Oktoba 2002 hadi tarehe 2 Oktoba 2007*, Zanzibar [Zanzibar Electoral Commission (2007), A Report of the Activities of the Zanzibar Electoral Commission for the period of Five Years starting 3 October 2002 and ending on 2 October 2007, Zanzibar], pp 40–41.

(ZLSC) commissioned, authored and published *Zanzibar Human Rights Report 2006* jointly with *Tanzania Human Rights Report 2006* of the Legal and Human Rights Centre (LHRC) based in Dar es Salaam.²⁶¹

The report highlights serious human rights violations which sometimes go unreported. With regard to civil and political rights, the report covers areas such as right to life, extra-judicial killings, mob violence, freedom of expression, freedom of the press, of association and of assembly, the right to participate in governance, and equality before the law. Under economic and social rights, cases covered include those that violate labour rights, right to own property, to health, education, and the right of accessibility to health services for people living with HIV/AIDS. The report also provides a comprehensive analysis of the rights of vulnerable groups, such as persons with disabilities, children, women and the elderly. It also has separate chapters covering corruption, collective rights (including social inequality, right to development and right to a clean environment), and Zanzibar Special Forces.

Human rights activists and citizens at large welcomed and lauded the publication of this report, calling it a step in the right direction in the history of human rights development in Zanzibar. The authorities, on the other hand, criticised the report as being biased and lacking information from the government side. ZLSC responded by citing lack of cooperation from state officials.

Of particular interest, two serious cases were mentioned in the report. The first one is with regard to the right to participate in governance guaranteed under Article 21 (2) of the Constitution of Zanzibar. The report states:

The crisis of governance in Zanzibar emanates not only from the fact that a section of the population questions the legitimacy of the government in power, but from the fact also

261 Zanzibar Legal Services Centre (2007) *Zanzibar Human Rights Report 2006*, published jointly in Legal and Human Rights Centre (2007), *Tanzania Human Rights Report 2006* (With a Zanzibar Chapter). See also 'Uvunjaji haki za binadamu wakithiri Zanzibar' [Human Rights Violations Increase in Zanzibar], *Familia* (Dar es Salaam), 7-13 March 2007, p 1.

that the government practices politics of exclusion ... people who are perceived to be sympathetic to opposition parties or originate from Pemba are rarely given senior government posts. There are also claims that Zanzibaris of Arab, Indian and Comorian origins are not recruited into the Zanzibar Government Special Forces (SMZ) Special Departments.²⁶²

The second issue is that of regular and persistent violations of human rights by the Special Departments. The report cites specific cases of extra-judicial killings committed by members of these forces, notably the Anti-Smuggling Squad (KMKM) and the Economy Building Brigade (JKU),²⁶³ and goes on to explain the gravity of the situation and the uncontrolled behaviour of the forces in general:

Serious accusations have recently been levelled against these five special departments. They include allegations of indiscriminate beatings of innocent people, especially before and after the elections.

It is very common nowadays to see members of KMKM, which is charged with a duty to curb smuggling, doing police work such as arresting people, searching people and places and even regulating traffic on the roads. The same applies to members of the Fire Brigade, JKU and Volunteer Forces. As these forces are not trained to carry out police work, such as mob control and definitely not trained on human rights, it is very common for members of these forces to act in violation of basic human rights.²⁶⁴

What is worse is the air of impunity the Zanzibar Special Forces have. When its officers were summoned by the Tanzania Human Rights and Good Governance Commission to discuss the rising number of complaints filed against the forces, they refused to appear.²⁶⁵

262 The names Special Departments and Special Forces are used interchangeably to refer to the Zanzibar government-owned security forces. Zanzibar Legal Services Centre 2007:166.

263 Zanzibar Legal Services Centre (2007), *Op. cit.*, at pp 160-161.

264 *Op. cit.*, at p 190.

265 'Tume ya Jaji Kisanga yaahidi mambo safi visiwani Zenji' [Justice Kisanga

Corruption

Although the Zanzibar government generally shies away from discussing the issue of corruption, the end of 2007 witnessed a bold move by the Principal Secretary in the Ministry of Constitutional Affairs and Good Governance, Mr. Mahadhi Juma Mahadhi. He conceded that corruption was rampant in public offices, and that it has led to denial of justice to many citizens.²⁶⁶ The statement, however, did not go further to suggest actions that the government intends to take to curb the menace. It is known for example that a White Paper was prepared for the establishment of an Anti-Corruption Authority and a Leadership Ethics Code in Zanzibar, but the Zanzibar Cabinet refused to endorse it.²⁶⁷ The opposition has criticised this move by the Cabinet saying that the bill would impact negatively on their corrupt activities and malpractices.²⁶⁸ There has been no mention ever since of any effort to revive the initiative to have an anti-corruption legislation for Zanzibar.

Conclusion

The year ended on a slightly more optimistic note albeit with considerable uncertainty as to whether, this time, the Third Accord will be fully implemented, unlike the previous ones which ended with tragic consequences. In case the Zanzibar experience of the killings of 2001 were not instructive enough, it was hoped that the turmoil that accompanied the elections in Kenya at the end of the year, would teach Zanzibar authorities an important lesson about the consequences of another botched electoral process. Rather belatedly, the ZEC was forced to confess its shortcomings which were similar to those of its

Commission promises good things in Zanzibar], *Alasiri* (Dar es Salaam), 31 August, 2007.

266 'Rushwa imewashinda viongozi SMZ' [Corruption has defeated Zanzibar government leaders], *Tanzania Daima* (Dar es Salaam), 16 December 2007, p 1.

267 Zanzibar government also refused to endorse the Union Anti-Corruption legislation in April 2007 on the ground that it is not a Union matter. See 'Zanzibar waikataa Sheria ya Rushwa' [Zanzibar rejects Anti-Corruption Legislation], *Tanzania Daima*, 18 April 2007, p 1.

268 *The Guardian* (Dar es Salaam), 2 January 2007, p 3.

counterpart in neighbouring Kenya. Whether this means that the newly appointed ZEC will fare any better, is anybody's guess.

At the same time, the saga of the attempt to fast-track the East African Federation showed that the people of Zanzibar were not prepared to be taken down another garden path into yet another grandiose project without their consent. They were able to broaden the debate, and revive old issues by questioning even the Tanzanian Union itself. The publication of the first Zanzibar Human Rights Report by a Zanzibar-based NGO may be another sign of the maturation of the political awareness and determination of the people of Zanzibar not to be silenced by old fears.

The fact, however, is that we are not yet out of the woods as regards one-party mentality and suppression of basic rights when the ruling authorities can still get away with it. The successful attempt to muzzle the press in reporting what it deems fit with respect to the affairs of the House of Representatives, is a glaring case in point. Another is the failure to establish an Anti-Corruption Authority and a Leadership Code, even after a respected senior official of the Zanzibar Government had conceded that corruption leads to denial of justice.

The purported floundering of the latest Accord, if it is not reversed quickly, exposes these Islands to another prolonged period of uncertainty and potential breakdown of law and order. It is to be hoped that the contradictory behaviour of the ruling authorities will warn the populace that it was too soon to let down their guard in the struggle for democracy and the rule of law.

The State of Constitutionalism in Rwanda – 2007

Felix Zigirinshuti

Introduction

Having been promulgated in 2003²⁶⁹, the Rwandan Constitution is now four years old. It is noteworthy that Rwanda's law comprises of written laws with the constitution being the supreme law of the land. All other laws, including international agreements, are subordinate to the constitution. Rwanda is committed to the promotion and enforcement of constitutionalism, as evidenced by six core constitutional principles namely:

- a) The fight against genocide ideology;
- b) Power sharing;
- c) Rule of law;
- d) Democratic government;
- e) Equality and non-discrimination; and,
- f) The constant quest for solutions through dialogue and consensus.²⁷⁰

In 2007, a lot was achieved in terms of enforcing the above fundamental principles especially by the government.

This paper will focus on constitutionalism in Rwanda during 2007, within the meaning attributed to it by Stanford that “the government can and should be legally limited in its powers and that its authority depends on its observing these limitations.”²⁷¹ The paper

269 Constitution of the Republic of Rwanda, OFFICIAL GAZETTE special, 4 June 2003 p 119.

270 Article 9 of the Rwandan Constitution.

271 Constitutionalism, First published 10 January 2001; substantive revision 20

assesses the progress that has been made in trying cases related to the 1994 genocide through the *Gacaca* and the ordinary courts. In addition, the paper discusses measures that have been taken to prevent a recurrence of genocide in Rwanda.

In 2007, political parties in Rwanda gained more freedom as demonstrated by the fact that they were able to establish representative units in local areas. The paper also examines the observance of the rule of law and human rights in 2007, with specific focus on media freedom in Rwanda. Lastly, the paper devotes attention to decisions delivered through various dispute resolution mechanisms, including court decisions as well as to other forms of mediation such as dialogue and consensus that may have in one way or another, impacted on constitutionalism in Rwanda in 2007.

Advancing the Cause of Justice: Gacaca Trials and The Fight against Genocide Ideology

Gacaca courts are specialised courts established within the Rwanda legal system. They are based on the traditional system of conflict resolution. The establishment of the *Gacaca* courts was a recommendation by Rwandans during the consultative meeting organised by the President from May 1998 to March 1999. The *Gacaca* courts were introduced after the genocide, mainly to speed up genocide trials, assist in eradicating the culture of impunity, strengthen reconciliation and unity among Rwandans and to improve the capacity of the Rwandan society to solve its own problems. In other words, through *Gacaca* courts, Rwandans hoped to restore peace and unity among Rwandans that would propel the country's development.

By way of background, more than a million Rwandans died and more than three million people fled to neighbouring countries during the 1994 Rwanda genocide. In addition, the catastrophe

February, 2007, cited at <http://plato.stanford.edu/entries/constitutionalism>, accessed on 19 August, 2007; see also C.M. Zoethout & P.J. Boon, "Defining constitutionalism and democracy: an introduction", in Zoethout (ed.), *Constitutionalism in Africa, A Quest for Autochthonous*, Gouda Quit, Sanders Institute, 1996, p 1.

resulted in a big number of orphans and widows. All the country's key sectors, including the judiciary, economy, health and education, were destroyed. There arose disunity among Rwandans and the image of the country was tarnished. Although there was no law punishing genocide in 1994, after the genocide, about 120, 000 people were arrested for commission of crimes of genocide.

It was not until 30 August 1996 that an organic law establishing the organisation and prosecution of offences constituting the crime of genocide or other crimes against humanity was passed. This organic law established specialised chambers for genocide crimes in the civil and military courts, provided procedures for confessions; guilty pleas for genocide suspects and the categorisation of genocide defendants.²⁷²

The conventional court system, however, did not meet the people's expectations because after approximately five years, only 6,000 out of the 120, 000 detainees had been tried. At this pace, it would take more than a century to try all the detainees. Furthermore, the suspects who were still in the community and in exile could not be arrested due to lack of space in the existing prisons and prosecution facilities. The solution was to look for another alternative. As a result, the *Gacaca* Court System was introduced taking its origin from the Rwandan culture where people used to sit together in *Gacaca* (grassland) and solve disputes.

In 2003, a law defining the guiding principles of *Gacaca* courts was enacted,²⁷³ providing for the participation of the whole population in the proceedings. It also provided for confession, guilty plea, repentance and apology procedures for genocide suspects. The jurisdiction of *Gacaca* courts was to collect all information about genocide crimes, categorise all suspects and conduct trials of the second and third category.²⁷⁴ The ordinary courts addressed first category cases. In

272 Summary report of the year 2007, National Service for *Gacaca* Courts.

273 Law 33bis/2003 of 06/09/2003 repressing the crime of genocide, crimes against humanity and war crimes (as amended to date), Official Gazette 21, 1 November 2003.

274 Suspects of genocide crimes are classified into three categories: The First Category consists of the planners, organizers, instigators, supervisors and those who

total, 9013 *Gacaca* courts at cell level and 1545 *Gacaca* courts of appeal at sector of district level²⁷⁵ were created.²⁷⁶

Initially, the establishment of the *Gacaca* courts attracted considerable criticism from, among others, Rwandan refugees as well as foreign countries who did not understand the functioning and importance of the courts. It was found necessary by the government to take into account strategic measures to enable *Gacaca* courts to perform their duties with transparency and within the shortest time possible compared to ordinary courts. Collection of information was speeded up mostly in the early 2006 and was concluded in May 2006. This collection of information was the responsibility of *Gacaca* courts at the cell level assisted by the general assembly attended by at least 100 persons.²⁷⁷

***Gacaca* Courts committed to wind up trials by 2007**

The *Gacaca* courts were committed to wind up genocide-related trials before the end of the year 2007. In order to accomplish this goal, the workplan for 2007 was based on the case files that had been gathered in the year 2006, in which 814,564 files had been investigated. These files were classified into three major categories being (a) the First category which consisted of 77,269 suspects representing 9.4 % of the total number of suspects implicated in crimes of genocide; (b) Second category which consisted of 432,557 suspects representing 51.8 % of the total number of suspects implicated in crimes of genocide; and (c) Third Category which consisted of 308,738 suspects representing

committed acts of rape and torture and their accomplices. The Second Category consists of the persons accused of having killed or injured with an intention to kill. The Third Category consists of persons who committed crimes against property.

275 The Republic of Rwanda is divided into the following administrative entities: 1° Provinces and the City of Kigali; 2° Districts; 3° Sectors; 4° Cells; 5° Villages (art. 2 of Organic Law n° 29/2005 of 23/12/2005 determining the administrative entities of the Republic of Rwanda, Official Gazette Special Number, December 23, 2005).

276 National Service for *Gacaca* Courts, Documentation Department.

277 Ibid.

38.8 % of the total number of suspects implicated in crimes of genocide.²⁷⁸

According to the Executive Secretary of the National Service for *Gacaca* courts²⁷⁹ D. Mukantaganzwa, the process of speeding up trials faced several challenges and therefore a big number of suspects could not be accorded a speedy trial within a minimum period leading to increased criticism. Some major suspects from the southern region began to flee to Burundi.²⁸⁰ This was a great challenge to the government of Rwanda for which a solution had to be found quickly. It was on this basis that the government of Rwanda strategically took measures to finalise all the judgements by the year 2007. The first strategy was to increase the number of *Gacaca* courts at the cell and district level with the intent of speeding up the process. The second strategy was to solve the transportation problem for the detainees from all across the country to the sites where the crimes were committed. The government also established transit sites where the suspects would temporarily be kept or hosted during the trial process.

Additionally, the big number of suspects appeared to constitute another major challenge to the government. They were too many to be accommodated within the limited space of existing prisons. Considering that only 15% of the 432,557 Second Category suspects would be set free and approximately 300,000 would be sentenced to imprisonment, there was need for more prisons. To reduce the number of detainees, the government of Rwanda established a community service system (*Travaux d'intérêt général-TIG*)²⁸¹ for those who voluntarily confessed and repented.

The last challenge emerged from the testimony and plea of guilty procedure, which while useful in revealing all facts and acts,

278 Ibid.

279 Interview with D. Mukantaganzwa, the Executive Secretary of the National Service for *Gacaca* Courts, conducted on 30 January 2008.

280 P. Bakomere, "Mu karere ka Rusizi abagera kuri 50 bahunze *Gacaca Gacaca*", *Umuseso*, 20-26, July 2007, p 11.

281 For those sentenced to prison, if they pleaded guilty and repented, half of the sentence is to be converted into community service (TIG) consisting in using them for some works of public good while staying in their ordinary homes instead of keeping them firmly jailed.

it disclosed a number of suspects that were not identified during the year 2006. Going by the progress made in 2006, the *Gacaca* courts were committed to winding up genocide trials during the year 2007 but were outnumbered by the suspects, thus forcing a few *Gacaca* courts to continue to try cases well into the early months of 2008. By the end of 2007, there were a total of 1,127,706 suspects, of which 1,059,298 (93.9%) had been tried while 68,408 (6.1%) cases were still pending before *Gacaca* Courts.²⁸²

Though the bulk of the cases in 2007 were tried through *Gacaca* courts, few cases of the first category were prosecuted before ordinary courts. Of these cases, media attention was drawn to the *Munyakazi* case. General Munyakazi was a member of the Rwandan Patriotic Army, reintegrated from the defeated army. *Gacaca* Courts in the city of Kigali categorized him under the first category and by virtue of his rank, had to be tried before the Military High Court.²⁸³ In its ruling of 27 April 2007, the court sentenced him to life imprisonment and he was stripped of his military ranks and was also denied some basic human rights on the ground that during the genocide in 1994, he supervised killings while serving as the Commanding Officer in the city of Kigali.²⁸⁴ An appeal was lodged in the Supreme Court and is still awaiting determination.

D. Mukantaganzwa strongly commends the work of *Gacaca* courts because their goal of finishing trials by 2007 was nearly achieved. The courts not only solved the numerous problems that genocide trials faced before their establishment but also served in saving time without regular adjournment of cases as is the case in ordinary courts. In addition, the *Gacaca* trial process reduced opportunities for corruption in comparison to the trials in ordinary courts. Under the *Gacaca* system citizens are able to identify corrupt individuals.

282 National Service for *Gacaca* Courts, Documentation Department.

283 Art. 138, par. 2 of Organic Law 07/2004 empowers military courts to try Military personnel accused of the crime of genocide and crimes against humanity committed in Rwanda between 1 October 1990 and 31 December 1994, which place them in the first category irrespective of their ranks (Organic Law n° 07/2004 of 25/04/2004 determining the organisation, functioning and jurisdiction of courts as amended to date, Official Gazette n° 14, 15 July 2004).

284 *Maj. Gen. Munyakazi vs. Military Prosecution*, Military High Court, Genocide Case RPA/GEN 0001/07/HCM of 27/04/2007.

Nevertheless, Mukantaganzwa pointed out that some work remains to be done in the year 2008, including among other things the termination of trials before *Gacaca* courts and trials of the first category before ordinary courts. As regards the latter category, the government strategy is to leave ordinary courts with the competence to try top planners of genocide which form only 8% of the total number of the suspects detained cases of rape and others crimes of that category to *Gacaca* Courts. The government also intended to terminate all genocide cases by the end of 2008.

In 2007 there was an unexpected and abrupt increase in the number of suspects who were supposed to appear before courts thus delaying further completion of genocide related trials. The trial process was also characterized by the violation of the rights of witnesses and victims including harassment such as destruction of their property, injuries and killing. The responsible security organs adequately responded to the challenges and dealt with the threats firmly.

Overall, despite the fact that the *Gacaca* courts were not able to complete genocide related trials by the end and if the planned period, the primary objective of solving justice problems related to the genocide were achieved. The process of unification of Rwandans is now deeper, on a firmer footing and is advancing successfully.²⁸⁵ *Gacaca* courts have benefited the country in several ways. First, Rwandans were able to reveal the truth about what happened from the perpetrators, witnesses and victims. Second, *Gacaca* courts have helped in reducing the levels of animosity among the Rwandan people. They have also contributed to deconstructing the genocide ideology among the youth while simultaneously providing a lesson to whoever still harbors such thinking.²⁸⁶

The International Criminal Tribunal for Rwanda challenged

The International Criminal Tribunal for Rwanda (ICTR) based in Arusha is expected to close its work at the end of 2008 and it is believed that some cases will not have been tried. Meanwhile, the Rwanda Government is working on transferring the suspects to

285 Op.cit. note 279.

286 Ibid.

Rwanda.²⁸⁷ The only problem left will be the suspects still at large in so many countries all around the world making it necessary for Rwanda to work in collaboration with the international community to have them arrested and brought to Rwanda for trial.

Although the ICTR was criticised for having tried very few cases compared to the big number of suspects, its role, according to D. Mukantaganzwa should not be understated because the existence of the Arusha court signifies the recognition of Rwanda genocide. Taking this into consideration, judgments in terms of quantities mean nothing vis-à-vis the sentencing of top organisers of genocide like Kambanda and Bagosora.²⁸⁸ The existence of ICTR provides international recognition and confirmation that there was genocide of Tutsis in Rwanda. It is also significant that the court tried the criminals who planned the genocide, a point that underscores its central role.

The National Commission for the fight against genocide

In 2007, there was an outcry from so many people that genocide ideology was being spread across the country, more particularly in some secondary schools. The situation prompted parliament to create an ad hoc commission comprising of deputies and members of the lower chamber, to inquire about the extent of the spread of the ideology. In a report of the ad hoc commission it was revealed that some schools were propagating aspects of genocide ideology through teachers and pupils.²⁸⁹

Following that parliamentary inquiry, the Minister of Education together with the Minister of State appeared before the lower chamber of parliament to explain the reasons as to why they had been unable to address and contain the problem.²⁹⁰ The Rwandan Constitution under article 128 provides for oral questions which empowers the

287 Law 11/2007 of 16/03/2007 concerning transfer of cases of the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from other States, Official Gazette special, 19 March 2007.

288 Op.cit. note 11.

289 E. Mwesigye & J. Kimanuka. "Three teachers accused of spreading genocide ideology", *The New Times* 9 June 2007, at 4.

290 J. Buyinza, "MPs grill education ministers", *The New Times*, 19 December 2007, at 1-2.

chamber of deputies to hear and quiz any government Minister for failure to address a given problem.

Moreover, the inquiry persuaded the government to rethink the role of the National Commission for the fight against genocide which was set up by law in 2007,²⁹¹ but which was not yet working effectively. The Commission is a national, independent and permanent institution, having the mission of putting in place a permanent framework for the exchange of ideas on genocide, its consequences and the strategies for its prevention and eradication. It is also responsible for initiating the creation of a national research and documentation centre on genocide; advocating for the cause of genocide survivors both within the country and abroad; planning and coordinating all activities aimed at commemorating the 1994 genocide; elaborating and putting in place strategies that are meant for fighting genocide and its ideology and for fighting revisionism, negationism and trivialization. In addition, it is supposed to seek for assistance for genocide survivors and pursue advocacy on the issue of compensation; rehabilitation and putting in place strategies to resolve problems that were a consequence of the genocide such as trauma and other related illnesses; and cooperating with other national or international organs with a similar mission.²⁹²

The Commission, which shall submit its activity report each year to parliament, has also been mandated to devise recommendations to stop the propagation of genocide ideology and to offer more protection to survivors of genocide.

National Security and the Security of the People

Negative Forces No longer a serious threat

With the experience of genocide and its aftermath in Rwanda, security and the rights of people especially the right to life, are of paramount importance. According to J. Rutaremara, the army spokesman; save for the activities of the negative forces (usually known as Forces

291 *Law 09/2007 on the attributions, organization and functioning of the National Commission for the fight against genocide*, OFFICIAL GAZETTE special, 19 March 2007.

292 Art. 4 of Law 09/2007 cited above.

Democratiques de Liberation du Rwanda (Democratic Forces for the Liberation of Rwanda) – the residue of the *interahamwe*) [FDLR], operating in the neighbouring DRC, Rwanda's internal security is stable. After the Rwandan government forces pulled out of the DRC, however, the *interahamwe* question in the east of the DRC, is now the responsibility of the UN.²⁹³ Nonetheless, the Rwandan government continues to keep a watchful eye over events in the area while simultaneously pursuing the path of dialogue to resolve the problems between the different parties that are involved in the situation in the DRC.²⁹⁴

The army spokesman reiterated that the negative forces are no longer a serious threat given that the Rwandan army is ready to face any threat that may come from FDLR. Furthermore, among the major achievements of the year 2007 in this respect was the approval of a regional non-aggression pact by the lower chamber of Parliament (the Pact on Security, Stability, and Development in the Great Lakes region, signed in Nairobi, Kenya on 15 December 2006) that binds countries in the Great Lakes region against posing security threats to their neighbours.²⁹⁵ This pact developed from a call by African countries and was transformed into a treaty signed in Abuja, Nigeria on 31 January 2005.²⁹⁶ It was immediately followed up by a plan of action to disarm FDLR in Congo.²⁹⁷

293 The United Nations sent peacekeepers to the Eastern region of DRC, under the acronym of MONUC, to help DRC in reestablishing peace in the KIVU region.

294 Interview with J. Rutaremara, army spokesman, conducted on 17 July 2007.

295 Law 47/2007 of 11/09/2007 authorising the ratification of the pact on security, stability, and development in the great lakes region, signed in Nairobi, Kenya on 15 December 2006, Official Gazette n° 21, 1 November 2007; see also J. Buyinza, "Lawmakers approve regional non-aggression pact", *The New Times*, 28 June 2007 at 3.

296 Law 48/2007 of 11/09/2007 authorising ratification of the African Union non-aggression and common defence pact, adopted in Abuja, Nigeria on 31 January 2005, Official Gazette n° 21, 1 November 2007.

297 J. Munyaneza, "Rwanda, Congo agree to FDLR disarmament plan", *The New Times*, 12 November 2007 at 1-2.

Subordination of military to civilian authority

The army spokesman stated that the Constitution governs the relationships between civilians and the army. Article 1 of the Rwandan Constitution states that the Rwandan State is an independent, sovereign, democratic, social and secular Republic and that the principle governing the Republic is “government of the people, by the people and for the people”. This means that Rwanda is a country which is governed and run along the principles of democracy, based on the wider ideals of the entire society, not those of the army. In other words, the military should be subordinate to civilian authority. That is, Rwanda will be governed by a civilian authority with the help of the military in matters concerning the security and sovereignty of the nation.²⁹⁸

The Protection of Human Rights and Fundamental Freedoms

Protection of human rights is one of the cornerstones of constitutionalism. In Rwanda this role is mainly played by the National Commission for Human Rights (NCHR) in collaboration with other stakeholders.

The Role of the NCHR

Under the Rwandan Constitution, the ‘NCHR’ is responsible for ensuring observance of human rights.²⁹⁹ The president³⁰⁰ of the commission in an interview indicated that in 2007 there were a few threats to human rights in Rwanda. The central achievements of 2007 in the context of human rights protection at the international level

298 Op.cit. note 294.

299 The National Commission for Human Rights is a constitutional commission, empowered under the provisions of article 177 to not only examine the violations of human rights committed on Rwandan territory by State organs, public officials using their duties as cover, by organizations and by individuals but also to carry out investigations of human rights abuses in Rwanda and filing complaints in respect thereof with the competent courts.

300 Interview with Zayinabu Kayitesi, Executive Secretary of the National Commission for Human Rights, conducted on 6 February 2008.

centered on the ratification of the international conventions relating to the fight against torture and inhumane treatment, the abolition of death penalty, the fight against women's discrimination, the treaty on anti-doping in sport, the fight against weapons of mass destruction, and the fight against child trafficking through inter-country adoption.³⁰¹

In spite of press reports questioning the relevance of the annual reports of the commission, the president of the commission stressed that overall, Rwanda is a country that observes the rule of law³⁰² and one that has interest in the protection of the rights of vulnerable groups and those that have been historically marginalized. Although this interest is not adequately grounded in the social, economic and political empowerment strategy of the country.³⁰³

The Supervisory Role of the Ombudsman

In Rwanda there is a new influential office, the Ombudsman's Office, which is an independent institution which makes it possible for citizens to petition and obtain redress from government in cases of maladministration. It acts as a link between citizens and institutions, both public and private. Its mandate includes:

- (i) The prevention and fight against injustice, corruption and other related offences in public and private administration;
- (ii) The receipt and examination of complaints from individuals and independent associations against the acts of public officials or organs, and private institutions.³⁰⁴

According to A. Nzindukiyimana, through investigations and complaints conducted during the year 2007, Rwanda is evolving as a country governed on the basis of the rule of law and respect for the rights of individuals. The mandate of the Ombudsman limits the abuse of powers by government. The Ombudsman is considerably

301 See also Summary report of the year 2007, National Commission for Human Rights.

302 C. Kabonero, "Ni ryari raporo za Zayinabu na Kamagaju zizagira akamaro?", *Umuseso*, 13-19 July 2007 at 6.

303 For example, women are given a constitutional chance to have a 30% minimum representation in Parliament (Art. 76 & 82 of the Rwandan Constitution).

304 Art. 182 of Rwandan Constitution.

accessible because citizens are capable of reaching envoys sent by the Ombudsman to the different districts in the country. In addition the office of the Ombudsman set up toll free telephone numbers to ease public accessibility to the office on matters of human rights. The office will be able to work more effectively if well resourced.³⁰⁵

Women and Children's Rights

Like other citizens aged 16 years and above, there was a census of street children to enable them obtain identity cards.³⁰⁶ Usually, street children have no specific address. The Secretary General in the Ministry of Local Administration confirmed that a street child like everyone else, who has attained the age of 16 has the right to an identity card. This demonstrates a commitment to respect rights of vulnerable children and also a sign of commitment by the government of Rwanda to execute the provisions of article 16 of the Constitution which provides that all human beings are equal before the law and are entitled to equal protection under the law.³⁰⁷

In relation to female sex-workers, the Rwandan State in trying to get them off the streets and has initiated an anti-prostitute campaign. According to *The New Times*, one of the measures that may be used, besides dissuasion that failed to operate,³⁰⁸ is to look for alternative solutions such as arresting men who are used by the sex-workers.³⁰⁹ The Executive Secretary of Haguruka ASBL is of the opinion that criminal sanctions are not enough to force sex-workers off the streets but rather counselling strategies combined with skills enhancement would help them earn a livelihood elsewhere.³¹⁰

305 Interview with A. Nzindukiyimana, Deputy Ombudsman, conducted on 26 July 2007.

306 C. Manzi, "Abana bo mu mihanda ntibibagiranye", *Izuba*, 18-20 September 2007 at 2.

307 Article 16 of the Rwandan Constitution.

308 The Criminal Law, under the provisions of article 363-373, penalizes prostitution, but this law did not ever dissuade prostitutes to continue their job.

309 M. Mazimpaka, "Will prostitution disappear with legislation", *The New Times*, 29 June 2007 p 13.

310 Interview with Christine Tuyisenge, Executive Secretary of Haguruka asbl (an association for defense and protection of women and children's rights), conducted on 11 February 2008.

Economic Rights: The Case of Land Ownership

Another serious threat to human rights exists in the category of economic rights of citizens. While the Rwandan policy has been decentralisation, press reports indicate that much of the administrative and economic powers still remain centralised thereby continuing the concentration of economic wealth and corruption at the centre.

In addition to press reports disclosing that some high government officials have monopolised authority over plots of lands in some districts, others disclosing that about 4 billion francs were unaccounted for in the last two years.³¹¹ It is obvious that the distribution of wealth, in some instances remains in the hands of those who are in charge of its distribution. For instance, evidence relating to land distribution patterns in the Eastern Province indicates that some of the leaders own big plots of land while ordinary farmers own considerably less.³¹²

On the basis of the findings and proposals of the commission that was instituted to handle the problem, the issue attracted the intervention of the Rwandan President Paul Kagame who promised that he would expeditiously solve the problem himself. The Joint Commission which includes military, police and officials from the Land Ministry has stepped up efforts to address any land wrangles especially in the Eastern Province and has among other solutions, proposed equitable redistribution of the land.³¹³

As a measure of fighting corruption, the Office of the Auditor General (AG) which is in charge of supervising use of government's wealth prepares and submits a report to Parliament every year.³¹⁴ According to the Legal adviser of the Chamber of Deputies, Parliament exercises its oversight role by receiving oral and written

311 C. Kabonero, "Ni ryari raporo za Zayinabu na Kamagaju zizagira akamaro?", *Umuseso*, 13-19 July 2007 p 6.

312 C. Kabonero, "RDF generals, ministers grab land at expenses of peasants", *Newsline*, 18-24 July 2007 p 1 & 6-7.

313 E. Musoni, "Military, police team probe land ownership", *The New Times*, 28 June 2007, p 3.

314 Art. 184 Constitution provides that "... the Office of the Auditor General for State Finances shall submit each year to each Chamber of Parliament, prior to the commencement of the session devoted to the examination of the budget of the following year, a complete report on the balance sheet of the State budget of the previous year..."

submissions as well as other methods provided for under article 128 of the constitution. Again, the AG is of the opinion that in addition to punitive measures such as prosecution of suspects, other measures such as massive civic education to prevent acts of corruption and obligating state officials to perform their duties should also be used.³¹⁵ The President of the Political Commission of the lower chamber of Parliament is also of the opinion that every state official should strive for transparency and accountability to make every individual vigilant and fiscally responsible.³¹⁶

Equality before the Law: Top officials compelled to face justice

Corruption is not only about money, but sometimes influence peddling by top officials and in whatever format, it amounts to abuse of office. One of the cases that the press reported during 2007 was the case of Generals S. Kanyemera and F. Rusagara, who were charged with trying to assist a big personality in the business arena, A. Rwigara, to escape justice by not appearing in court. Rwigara had been prosecuted for negligence which had caused the death of workers on his building which was under construction. This begs the question; should there be anyone who should not be subjected to court's jurisdiction? The answer is found in the Constitution, which provides for equality of all citizens before the law.³¹⁷

Turning back to the case, the focus should not only be to ensure that all perpetrators of crime are prosecuted but that an opportunity to defend themselves in the right manner is availed. Not only should suspects enjoy the right to appear before the court within the stipulated time in order to reduce the amount of time it takes to try and determine cases, – Justice delayed is justice denied. Another characteristic of the law is the right to bail which the prosecution

315 Interview with B. Bashoga, Legal Advisor of the Chamber of Deputies, conducted on 24 July 2007.

316 Interview with B. Kanzayire & D. Mukabalisa, respectively President and Vice President of the Political Commission, Chamber of Deputies, conducted on 24 July 2007.

317 Article 16 of the Rwandan Constitution.

was asked to grant the two accused while awaiting trial.³¹⁸ Bail is a new procedural requirement provided for under article 101 of the Criminal Procedure Code,³¹⁹ which states that “in all offences, an accused person or his or her counsel can at any time apply for bail to the public prosecutor charged with the preparation of the case or to a Judge or Magistrate depending on the stage of investigation.” The case of the two generals ended up in the Military Court, which quashed the allegations against the two for lack of evidence.³²⁰

Abolition of the Death Penalty

The death penalty provided one of the major challenges that faced the Rwandan government in terms of striking the balance between punishment and forgiveness. Any post-transition government is obliged to make decisions that may sometimes go against the ordinary structural constructions of law and state, including the penal system. Among the important decisions made in 2007 in the human rights arena was the abolition of the death penalty. This is the most valuable contribution of the Rwandan government towards respect for the right to life. Of course the decision stems, not only from an international legal requirement, but mostly from a political analysis. According to J. Mutsinzi, political life itself regulates or makes functional the legal rules political facts justify amendments of legal rules.³²¹

The year 2007 begun with discussions about the abolition of the death penalty and a draft law was sent to parliament for adoption. Parliament voted for the abolition of the death penalty and a new law was gazetted on 25 July 2007.³²² By implication, the 1,365 convicts sentenced to death between 1998 and 2006 have a chance to survive death which was automatically commuted into life imprisonment

318 F. Kimenyi & G. Agaba, “Generals Kaka, Rusagara get bail”, *The New Times*, 18 August 2007, p 1.

319 Law 13/2004 of 17/5/2004 relating to the Code of Criminal Procedure (as amended up to date), Official Gazette special, 30 July 2004.

320 Military Prosecution v Brig. Gen. S. Kanyemera & Brig. Gen. F. Rusagara, Military Court, Criminal case RP 0172/07/TM, 17 August 2007.

321 Interview with J. Mutsinzi, Judge of Supreme Court, conducted on 11 July 2007.

322 Organic Law 31/2007 of 25 July 2007 relating to the abolition of death penalty, Official Gazette special number, 25 July 2007.

with or without special provisions. This decision consolidates the Rwandan government's will to abide by international law which requires the abolition of the death penalty. It also heightens the chances of transferring genocide suspects prosecuted by the ICTR or foreign countries which have not abolished the death penalty.³²³

Freedom of the Press in Rwanda

The Rwandan Constitution under article 34, provides that “freedom of the press and freedom of information are recognized and guaranteed by the State.” The same article, however, sets the limits of the exercise of such freedom by stating that “freedom of speech and freedom of information shall not prejudice public order and good morals, the right of every citizen to honour, good reputation and the privacy of personal and family life.” Freedom of the press and information “is also guaranteed so long as it does not prejudice the protection of the youth and minors.”

In Rwanda, the challenge has been to find a balance between freedom of the press and public policy. On the one hand, we have to acknowledge that the press not only provides the public with a wide range of information on the other in most cases it condemns and denounces the violation of human rights and corruption within public and private institutions and bad governance. A vivid example is a story in which the media made public diselogue of maladministration in a private bank, the Bank of Commerce, Development and Industry (BCDI) which collapsed under the weight of bad corporate governance hurting its customers and other stakeholders. Thanks to the media, the police was able to bring legal proceedings against the manager of the bank.³²⁴ While the case is still pending in court, the bank was unable to continue operating and sold out to ECOBANK.

On the other hand, in many African countries including Rwanda, cases of violation of press freedom have been recorded. Many journalists are prosecuted for defamation, others are locked up, and newspapers

323 F. Mutesi, “Death row: Over 1300 survive gallows”, *The New Times*, 27 August 2007, p 3.

324 *Prosecution v Kalisa* case is still pending before the High Court of the Republic.

suspended, banned³²⁵ or censored. A well known example in Rwanda is the “*Umuseso Newspaper*” case which, due to its publications, was branded by the government ‘a vehicle of public disorder’. This newspaper had to suspend its publications for a while. The vital lesson for both journalists and government officials to learn is to question not just public policy but also press law and ethics. If the government of Rwanda wants a balance between freedom of the press and public order in general, combined with the protection of the right to privacy needed by the citizens, then threatening public policy or private rights should be sanctioned.

According to P. Mulama, if the rule is that the media needs much more freedom to exercise its duties, it is important to consider the fact that the press may be a threat to the civil and political liberties of citizens that may lead to defamation which is prohibited under Rwandan law. This means that freedom goes hand in hand with legal restrictions, and censorship or penalization becomes less applicable whenever journalists are well trained in the field of journalism and when media ethics are well rooted. This is not yet the case for the Rwandan press.³²⁶ By and large, the way media performs depends on the level of training and consciousness and the ethics that the journalist himself or herself has with regard to security matters and public policy.

The media is therefore generally free to publish what it likes but may be sued for doing so, particularly for defamation.³²⁷ Defamation means to attack through the press the good reputation of somebody. Three principles underlie this definition: the statement alleged to be defamatory must be published, it may expose the claimant to hatred or ridicule, and it may cause the claimant to be shunned or avoided.³²⁸ In Rwanda, cases of defamation have become common with members

325 For example, the contentious problem in relation to media law was the suspension of the *Weekly Post* Newspaper by the Ministry of Information.

326 Interview with P. Mulama, the Executive Secretary of the High Council of the Press, conducted on 7 February 2008.

327 Art. 84, par. 1 of Law 18/2002 of 11/05/2002 governing the press, Official Gazette, 13/2002 1 July 2002.

328 P. Carey (1996), *Media Law*, London, Sweet & Maxwell p 36.

of the public bringing cases against journalists who wrongly defame or expose the public, ordinary people and authorities to disrespect. It is in this regard that the director of publications of the *Umuseso* newspaper has been brought before court to answer defamation charges the first trial of a journalist from *Umuseso* who was prosecuted for defaming a state authority in *Kabonero versus Hon. D. Polisi*, a Member of Parliament in the Chamber of Deputies. Kabonero was given a suspended prison sentence of one year and was required to pay damages equivalent to one million Rwandan francs (almost 2000 US dollars).³²⁹ In 2007, the same journalist was again sued for defaming a Rwandan tycoon named Rujugiro. The latter case is still pending before court.

The government needs to walk a tight rope in order to avoid a situation where defamation cases result in the gagging of the press.

Political Parties' Grass-roots Elections

With regard to multiparty democracy as a way or a means to power sharing, media attention was mainly directed to two political parties; the Rwandan Patriotic Front (RPF) as the ruling political party, and the Liberal Party (PL) because of its overall conflicts relating to the election of its organisational structure.

There was no direct action for power sharing witnessed in 2007, but one cannot fail to talk about the preparations for the parliamentary elections scheduled for 2008. As part of the preparations, all political parties had in 2007 started searching for representatives at all levels beginning from the local level in the sectors of districts to the highest administrative level of the party. This followed a recently enacted law,³³⁰ which for the first time since 1994, granted all legal political parties' freedom to conduct their affairs down to the grass roots level,

329 *Polisi v Kabonero*, High Court of Kigali, Defamation case RPAA 0001/05/HC/Kigali, 02/08/2006.

330 Organic Law 19/2007 of 04/05/2007 modifying and complementing Organic Law 16/2003 of 27/06/2003 governing political organizations and politicians, Official Gazette 11 bis, 1 June 2007 gives a right to the leadership organs of political organizations to also have offices at the level of all the country's administrative entities in the country.

including election of their representatives down to local level. RPF as a powerful party, was the first to undertake this action by putting up structures or levels in the whole country starting with the sector of the district level.³³¹

Other political parties followed suit, but the party which attracted most media attention was the PL. After initiating the grassroots level structures, PL's administrative committee experienced conflicts arising from power/leadership sharing. After a long fight through sanctions and dialogue³³², the situation was finally settled.³³³

The Rule of Law and the Independence of the Judiciary

Three principle aspects attracted the attention of lawyers and the press, with regard to the judicial process during 2007. First, were the constitutional petitions about non-conformity to it by people in public offices, second was the granting of presidential clemency to former Rwandan president P. Bizimungu, and third, was Rwanda's integration into the EAC.

Constitutional Petitions for Non Conformity

As a cardinal rule, the constitution is the highest law of the land and any decision based on provisions of other laws that may be inconsistent with any provision of the constitution is null and void to the extent of that inconsistency.

In E. Mbonimpaye's case, there was an appeal to the Supreme Court against the decision of the High Court of Kigali on the grounds of non-conformity with the provisions of the constitution. The case was in regard to adultery committed by a husband and desertion of the nuclear family. The Court of Higher Instance, and the High Court, with reference to the Criminal Code under the provisions of

331 C. Kabonero, "Fear and ignorance define RPF elections", *Umuseso*, 18-24 July 2007 p 8.

332 The Rwandan Constitution sets the principle of dialogue and consensus as the preferable way of solving conflicts (art. 9 of the Constitution).

333 J. Sesonga, "Ibibazo by'ishyaka PL bikomeje gushakirwa umuti", *Imvaho Nshya*, 30 July 2007 at 6.

articles 393-396 (in relation to punishing adultery) and article 380 (in relation to punishing desertion of family),³³⁴ sentenced the accused person to a term of six months imprisonment.

The lawyer representing E. Mbonimpaye stated that the sentence was contrary to the constitution, since the case in its substance was of a civil nature and not a criminal one, and for that reason, the decision of the High Court contravened article 18 of the constitution which states that “no one shall be subjected to prosecution, arrest, detention or punishment on account of any act or omission which did not constitute a crime under the law in force at the time it was committed.” The appeal was rejected, not on the basis of non-conformity with the constitution, but on grounds that the procedure adopted in lodging the appeal was wrong.³³⁵ The substance of the case is that laws that are inconsistent with the constitution should be revised to conform to it. Accordingly, it would be prudent to revise the criminal code to reconcile its provisions with those of the constitution regarding private matters that may arise under criminal law.

Another constitutional petition was in relation to the repeal of article 121, paragraph. 2 of the Criminal Procedure Code,³³⁶ on the ground that it contravened article 121, paragraph. 2 of the constitution which states: “Where the court finds out that the prosecution is not willing to prosecute such persons it may summon them to appear before the court and be tried.” The Supreme Court repealed the provision on the grounds that it contravened articles 160-161 of the constitution which gave the sole powers of prosecution to the National Prosecution Service as well as those of equitable decision, which required checks and balances of powers between the Judiciary, the Executive and the Legislature as provided for under the provisions of article 60 and other provisions relating to the separation and complementarity of the three powers.³³⁷

334 *Decree Law 21/77 relating to Criminal Code*, Official Gazette 13 bis, 1978 p 1.

335 *E. Mbonimpaye, Supreme Court, Constitutional Petition RS/Inconst.10001/06/CS*, May 10, 2007.

336 *Law 13/2004 of 17/5/2004 relating to the Code of Criminal Procedure*, Official Gazette special, 30 July 2004.

337 *A. Mutebwa, Supreme Court, Constitutional Petition RS/Inconst/Pén.0001/07/*

Presidential Pardon of Former President Pasteur Bizimungu

P. Bizimungu (Ex-President of the Republic), who in 2006 was sentenced to a term of fifteen years in prison by the Supreme Court got presidential pardon on 6 April, 2007.³³⁸ According to the Supreme Court ruling, the reasons that led to such a big sentence were the dissemination of a divisive ideology and instituting a criminal organization disguised as a political party. The Supreme Court relying on the provisions of articles 166, 281 and 282 of the Criminal Code sentenced him to a term of fifteen years imprisonment.³³⁹ It is however important to analyze the pardon granted to Mr. Bizimungu.

Legally speaking, the decision of the President to pardon is constitutional and is based on article 111 of the constitution which gives the Head of State power to exercise the prerogative of mercy.³⁴⁰ The other reason that may have prompted the presidential pardon may have been Mr. Bizimungu's appeal for forgiveness.

The important lesson that can be drawn from this pardon is not so much its grounds, though important, but the political will to change the country's history. Historically in Rwanda, before a succeeding king or president was sworn in, it was a rule to directly or indirectly cause the death of the former king or president. By granting the former president pardon, the old rule has now been changed. Well organized political education and great vigilance or wisdom of the former and current leaders at different levels, however, is still required to change societal attitudes to enable the citizens appreciate this new change. What remains to be determined is whether P. Bizimungu falls within the ambit of article 87 of the constitution, which provides that "... former Heads of State become members of the Senate upon their request to the Supreme Court but must have honorably completed

CS, 11 January 2008.

338 C. Kabonero, "Bizimungu: Ni imbabazi, igitsure cyangwa ni umugambi wa politiki?", *Umuseso*, 19-26 April 2007, at 12.

339 *P. Bizimungu v Prosecution*, Supreme Court, Criminal case n° RPA 0158/05/CS, 17 February 2006.

340 Article 111, par. 1 of the Constitution of Rwanda states: "The President of the Republic has authority to exercise the prerogative of mercy in accordance with the procedure determined by law and after consulting the Supreme Court on the matter".

their terms or voluntarily resigned from office”. In our understanding, there is room for him to become a senator, upon his request.

International Relations: Rwanda and Burundi join the East African Community

The year 2007 was characterized by another big stride in regional co-operation when Rwanda³⁴¹ and Burundi were accepted into the EAC on 18 June 2007.³⁴² This calls for a modification of the laws of Rwanda starting with the constitution to comply with the requirements of the EAC. Such compliance requires revision of laws and of the judicial system to adapt to the EAC rules and regulations, particularly so since Rwanda like other Partner States would be required to have members in EALA and judges in the EACJ.

Conclusion

In concluding this chapter it is important to note that the paper provides an analysis of the most crucial challenges that Rwanda faced regarding implementation of the provisions of the constitution. In general this portrayed Rwanda as a country governed by the rule of law. We have explained the different problems that characterized the year 2007 in safeguarding the constitution.

Top on the list of these challenges is the big problem concerning finalising genocide cases through *Gacaca* Courts. There has been considerable progress in processing and clearing genocide cases but more still needs to be done. Another important issue concerns respecting the constitutional rights and freedoms of people. The media profiled a big problem of land grabbing by highly placed officials. Although a commission was appointed to come up with strategies of equitably sharing the land in the Eastern province, the problem had not been solved by the end of the year.

341 Law 29/2007 of 27/06/2007 authorising the Treaty of accession of the Republic of Rwanda to the East African Community, signed in Kampala, in Uganda, on 18 June 2007, Official Gazette special, 28 June 2007.

342 C. Kazooba, “Finally Rwanda, Burundi become full EAC members”, *The New Times*, 18 June 2007, pp 1-2.

Furthermore, the paper addresses the conflict between two important constitutional principles; freedom of expression and public policy. It was stressed that the government still has a long way to go in terms of training journalists to respect the needs of maintaining public order and people's privacy instead of being heavy handed in dealing with the journalists, thus risking an encroachment on the freedom of expression. Lastly, since Rwanda has joined the EAC, it is imperative that she starts studying ways of amending her different laws so as to make them compliant with those of the EAC. This should be a key step to be taken in the year 2008.

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