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MAMBO!

Katibampya? Dynamics and pitfalls of the constitutional reform process in Tanzania¹

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¹ This paper summarizes the findings of fieldwork that I undertook in Tanzania between March and May 2014 and resumed since October of the same year.

Introduction

Taking his own party by surprise, President Jakaya Kikwete took the opportunity of his 2011 New Year's public address to announce plans to introduce a new Constitution for the United Republic of Tanzania. The Constitution Review Bill was voted early 2011: the scope of the Bill was initially narrow due to the reluctance of the leadership and MPs of the ruling-party CCM (*Chama Cha Mapinduzi* – the party of the revolution). As a result of pressure from civil society organizations as well as the government of Zanzibar, however, this scope was later extended so as to include broader issues concerning the Tanzanian constitutional structure. On 6 April 2012, President Kikwete appointed a Constitutional Review Commission (CRC) led by Joseph Warioba, a former Prime Minister of President Ali Mwinyi who was then serving as a judge on the East African Court of Justice. The commission included retired Chief Justice Augustino Ramadhan as the Vice Chairperson as well as 30 other members – 15 from mainland Tanzania and 15 from Zanzibar. The commission was mostly praised for its diversity of opinion and backgrounds, though some noted the over representation of Muslims among the commissioners as well as the absence of the famous legal scholar Professor Issa Shivji.

The opening of this constitutional review process raised hopes among many Tanzanians. Coinciding with the celebrations of the 50th anniversary of the Union, it was expected to give space to a critical engagement with several core issues of the United Republic such as: the nature of the Union between *Tanzania bara* (mainland Tanzania or former Tanganyika) and Zanzibar; the protection of civil liberties and human rights; and the electoral system. After 8 months and a chaotic process, the Constituent Assembly (CA) finally handed the proposed Constitution to President Kikwete in October 2014.

“Pandora box”. **1. A new constitution for a new Union? The issues at stake.**

The objective of the constitutional review process was to replace the 1977 Constitution which stands “on a tripod: party supremacy, the two-government Union and the ‘imperial presidency’” (Shivji, 2008: 181).

Following the creation of the Union on 26 April 1964, the interim constitution of 1965 officially made Tanzania a one-party State: the Tanganyika African National Union (TANU) and the AfroShirazi Party

(ASP) were the only political parties allowed, respectively on mainland Tanzania and Zanzibar. Yet, in order to guarantee the citizens' capacity to choose their representatives, two candidates selected by the party were to compete for a seat in each constituency, and elections held the “classical functions of leadership recruitment, policy making, and legitimization of the political system” (Bakari & Whitehead, 2013 : 98). In

1977, the making of the Permanent Constitution was a direct consequence of the merging of TANU and ASP into CCM a few months earlier; it ultimately

To be officially adopted, the Proposed Constitution has to be approved by no less than 50% of voters from either side of the Union. Even though the Constitutional Review Act states that the referendum must be held within 84 days of the delivery of the proposed constitution to the President, it was finally scheduled for 30 April 2015 in order to give the National Electoral Commission (NEC) time to update the voters' register. However, both the new Constitution and the organization of the referendum in such a timeframe were opposed by four of the main opposition parties, which united under the banner of *Ukawa (UmojawaKatibayaWananchi*– Coalition of Defenders of People's Constitution). Growing concerns had also been raised among the opposition and civil society that the NEC would not be able to make the necessary preparations to register 24 million potential voters as it was facing severe difficulties using the biometric voter registration (BVR) technology. Mid-March, the media started reporting that the government was considering a postponement of the referendum, a fact that was confirmed on 3 April and applauded by the majority of newspapers and opposition leaders. Until now, no date has been set for the referendum and it is extremely unlikely that it will take place before the October general elections.

This paper aims to shed light on the Constitutional Review Process and to place it within the recent dynamics of the Tanzanian political regime. Amid growing tensions in the context of the upcoming elections, it illustrates the continuous control of CCM over the Tanzanian political sphere. At the same time, its pitfalls constituted an opportunity for the opposition: united under the banner of *Ukawa* and determined to present a united front in October 2015, its supporters now hope that the government, by starting this process, opened their

reinforced the Union by increasing the list of Union matters from 11 to 17; it also strengthened the party's monopoly over all political activities to the detriment of the Parliament, the majority of whose members were nominated.

The Tanzanian constitutional order was partially liberalized in the early 1990's after the appointed Presidential Commission on multiparty change (also called Nyalali Commission after its chairperson) recommended the adoption of multipartism. However, few Tanzanians supported this change and

the Commission found that 77% of the Tanzanians – 79% of mainlanders and 56% of Zanzibaris – were in favor of the maintenance of the single-party system. Yet, the one-party system was abolished in 1992 and a series of constitutional amendments and laws were adopted ahead of the general elections of 1995, during which the newly formed opposition parties gathered almost 40% of the votes. Still, the transition to multipartism was characterized by a very cautious gradualism: CCM maintained control over institutional changes, leading to a “multiparty monopoly” (*Nyirabu, 2002: 105*) and the perpetuation of a “de facto party-State” (Makulilo, 2008). During the recent constitutional reform process, a first set of demands was formulated regarding the democratization of the Tanzania political order including: a rebalancing of powers between the legislative and the executive branches; the creation of a credible independent and transparent electoral commission; or the authorization to challenge presidential election results in court. The Draft Constitution of the CRC incorporated a number of articles aimed at diminishing the power of Tanzania’s presidency and ruling party. For example, some presidential nominations would have to be vetted by Parliament; independent presidential and parliamentary candidates would be allowed to compete in general elections; the President would no longer have the right to dissolve Parliament in the event that it fails to approve a Bill after it has been vetoed once.

A second set of demands relates to the nature of the Union between *Tanzaniabara* and Zanzibar. This question – and the related issue of the structure of government - has proved a stumbling block in Tanzanian politics since 1964 (Shivji, 2008 : 206). Indeed, the form and legitimacy of the Union, if not its legality, has been questioned since its creation (Bakari&Makulilo, 2014). The Tanzanian constitutional order is currently based on three jurisdictions handled by only two governments: the Union government and the Bunge are in charge of Union matters for the whole Republic (such as foreign affairs and defense, citizenship

and immigration, or the currency) as well as for non-Union matters for mainland Tanzania; the Revolutionary Government of Zanzibar and the House of Representatives are in charge of non-Union matters pertaining to Zanzibar.

2. A process tightly controlled by CCM.

The Draft Constitution of the CRC provoked the uproar within CCM. The ensuing public debate focused almost exclusively on the Union question. Because they had proposed a federal three-government structure, Judge Warioba and the commissioners were violently accused of aiming to destroy the Union. The Constituent Assembly, inaugurated on 18 February 2014, was composed of 630 members, including 357 members of the Union parliament, 82 from the Zanzibar House of Representatives and 201 appointed by the President to represent various segments of society.

Deliberations in the CA were, from the start, a harrowing affair: it used more than 30 days to discuss regulations and standing orders only, and its timeframe had to be extended so it could debate the entire draft. During the 90 days initially planned for the debate, the members managed to discuss the first 6 chapters out of 17, dealing only with the establishment of the new threegovernmentstructure. Mid-April 2014, after a series of incidents, the opposition walked out, arguing that the debate had been hijacked by the ruling-party and claiming that the CA was only going to undo what the Constitutional Review Commission had proposed.

After being suspended in order for parliament to hold the debate on the nation’s budget, the CA resumed on August 5. Despite attempts by the Tanzania Centre for Democracy (TCD) to reconcile positions from the government and the opposition, *Ukawa* members refused to participate in the last weeks of the debate. On October 2, the CA adopted the new Constitution with the constitutional thresholds of two-third majority of members from both

mainland Tanzania and Zanzibar. It was voted in one block, even though legal experts had advocated for each article or section to be adopted separately. A week later, the proposed constitution was handed to President Kikwete and Zanzibar President Ali Mohamed Shein during a ceremony in Dodoma.

The tight control of the constitutional reform process by the ruling-party is nothing new. Shivji notes that none of Tanzanian constitutions since 1961 were elaborated or discussed publicly. If political debates were opened in 1985 (after Nyerere left the presidency) and in 1992 (on the transition to multipartism), their outcome was decided without considering the majority public opinion and by a limited circle of actors. The recent constitutional reform process resembles the elaboration of the Permanent Constitution of 1977 that “turned out to be exclusively a party-driven process embedded in the authoritarian mode of politics” (Shivji, 2008 : 165).

First, this debate illustrated the persistence of a “de facto party-State” (Makulilo, 2008) characterized by the monopolization and suffocation of the public space: for example, ministers were strongly voicing their opinion in the media, often asserting that those in favor of a three-government system were a threat to the Union and almost enemies of the nation. The President himself exacerbated the divisions by strongly promoting the two-government system in his inaugural speech before the Constituent Assembly. Secondly, the dominant party used its capacity to handle institutionally the reform process to control its proceeding and outcome – nomination of a third of CA members, time-frame setting, management of the voting process. Among others, Professor MwesigaBaregu, who was a member of the Constitutional Review Commission stated that “the government [...] used the Constituent Assembly to radically alter the Draft Constitution”².

² The Citizen, “Nyerere Foundation backs Ukawa stance”, 26 January 2015 (accessed on April 27 on <http://www.thecitizen.co.tz/News/national/Nyerere-Foundation-backs-Ukawa-stance/>).

Moreover, irregularities were reported in the vote for the adoption of the Constitution itself: some CA members who claimed to have voted against the Constitution had their names listed as having voted in favor of the Draft; a representative from mainland Tanzania was wrongfully listed as representative from Zanzibar; CA members were also authorized to vote electronically from abroad despite there being no provision for this in the CA standing orders. On October 2, 2014, the draft Constitution was finally adopted by 331 Assembly members from the mainland Tanzania and 147 Zanzibari representatives – one vote more than the required two-thirds quorum on Zanzibar's side.

3. *Ukawa*: a chance for the opposition?

The launch of the constitutional reform process raised many hopes among members of the opposition: the adoption of a new *Katiba* was among their manifesto proposals and they had long endorsed the proposition of a three-government structure. Moreover, many civil society organizations – such as the Legal and Human Rights Center and the Nyerere Foundation, which is now backing *Ukawa* – had already been calling for such reforms and were strongly involved in the process by publishing educational material and participating in the consultation process.

However, their attitude towards the process soon changed. On April 16, about 130 members walked out of the Constituent Assembly – including some

appointed members as well as the MPs from three of the strongest opposition parties – *Chama cha Demokrasiana Maendeleo* (Chadema), the Civic United Front (CUF) and NCCR-Mageuzi. They later united under the banner of *Ukawa* and decided to oppose the Draft Constitution. They also called for the boycott of the referendum and organized several public gatherings to denounce what they considered to be an illegitimate CCM-led top-down

reform. The National League for Democracy (NLD) later joined the coalition. Late October 2014, all parties signed a Memorandum of Understanding (MoU) in which they agreed to campaign against the Proposed Constitution and present a united front for the October 2015 general elections.

The resentment created by CCM's tight control of the constitutional reform process, and especially the refusal to adopt the seemingly popular three-government system, has provided a window of opportunity for the opposition. The creation of *Ukawa* is considered by many to be one of the most striking events to happen in Tanzanian politics since 1992. The opposition has indeed been on an upward trajectory since 2010 – when it reached again its electoral level of 1995 around 40%. The December 2014 local elections were also a success for the opposition parties, which tripled their shares of votes – reaching 24% of the votes nationally.

The opposition is however facing critical external and internal difficulties, encouraging its division and relative absence in Parliament, that are only partially addressed by *Ukawa*.

Institutionally, the First-Past-the-Post System has consistently permitted CCM to win a share of parliamentary seats exceeding its share of votes by around 20 percent. It is not guaranteed that the opposition could win more seats in the National Assembly by mathematically adding their votes: opposition parties have strongholds in different regions (CUF in Zanzibar and the coastal region, Chadema in urban areas and the northern regions) and, until recently, there were few constituencies where they were in direct competition. Moreover, in the 2010 presidential elections, the results of the four parties of *Ukawa* combined places the opposition at 34,9% while CCM gathered 61,2% of the votes. Additionally, the Political Parties Act does not clearly provide for the possibility of coalition candidates and only allows candidates endorsed by one party; if supporters of the other parties will be asked to

support the designated coalition candidate, it will without doubt create confusion among voters.

On the other hand, the creation of *Ukawa* contributes to the institutionalization of opposition parties, which have been characterized since 1992 by divisions and splits, weak ideological content and patronage-based affiliations (Whitehead, 2000). However, the coalition faces difficulties that could undermine its ability to maintain a significant degree of internal cohesion; some conflicts have emerged at the local level where partisan cleavages can be fierce and parties have been competing for the support of voters opposing CCM in the past. Moreover, not all opposition parties are members of *Ukawa*. Notably, the newly formed party ACT (Alliance for Change and Transparency), which decided to stay out of the coalition, has recently been joined by the popular Kigoma North MP Zitto Kabwe, who became its leader after being expelled from Chadema.

4. The Proposed Constitution: changes in continuity.

If the reform process had raised hope, many have expressed disappointment at the Proposed Constitution and felt that few of the major issues have actually been addressed.

In its draft, the Constitutional Review Commission had advocated for a federal Republic with three jurisdictions (each having an executive, legislature and judiciary), the reduction of Union matters from 22 to 7 and a smaller Union parliament. Its chairperson Judge Warioba publicly defended this position arguing that it was in line with popular opinion both in mainland Tanzania and Zanzibar. He advocated that it would also solve long lasting conflicts over equal representation, budget allocation or control over natural resources. Under the pressure of CCM, which is strongly attached to Julius Nyerere's legacy of a two-tier government, the CA refused the proposal and kept the same structure as in the 1977 Constitution. Union matters

have however been reduced to 14, removing emergency powers, post and telecommunications, mineral oil resources, external borrowing and trade among others. If no change has been made regarding the controversial issue of taxes and customs, the government of Zanzibar has been given the mandate to borrow money to finance activities under its authority (Article 254.1 of the Proposed Constitution).

Regarding the issue of democratization, few changes have been made to disband the monopoly of the ruling party and the “imperial presidency”: contrary to the CRC’s draft, the Proposed Constitution has reinstated the power of the President to fill critical positions without endorsement by the *Bunge* as per the 1977 Constitution. The Warioba commission had also proposed to set a limit of 3 terms for members of the Union Parliament, but the Constituent Assembly rejected this proposal and removed term limit. Moreover, the Draft imposed restrictions to the Parliament to not change some constitutional provisions without a referendum (including Directive Principles of State Policy and Bill of Rights); this limitation has been deleted in the proposed Constitution, except on the structure of the Union and the existence of the United Republic. Some provisions of the Draft Constitution were however maintained in the Proposed Constitution, such as the authorization of independent candidates and the independence of the National Electoral Commission (Article 217.1). It maintained the creation of a Supreme Court (Article 171) that both the High Court of Tanzania and that of Zanzibar would be subservient to.

If the Proposed Constitution does not make many major changes to the structure of government, it interestingly includes justiciable social and economic rights, as well as specific provisions for various groups including women, youth, disabled people, the elderly, minorities or farmers. For example, it guarantees women “equal citizenship rights” such as the same rights on land as men (article 22.2), the ability to bestow citizenship to their children (article 71.4) as well as equal employment rights and maternity leave (article 57.d). Moreover, it explicitly defines children as those under 18, taking a clear stand against child marriage (article 53.3). The Proposed Constitution also guarantees equal representation between the sexes in parliament (article 129.4) while only 36% of MPs are currently women. Other fundamental rights are enshrined in Chapter V: article 56.c provides for minorities the right “to be given land where they traditionally live and source or produce food” and additional protections are made for the right to privacy (article 37), to a clean and safe environment (article 50), to health and potable water (article 51) and to education (articles 52).

Conclusion:

While acknowledging the new rights that would be enshrined in the new Constitution if it were finally to be adopted (which is highly unlikely in the coming months), many observers have come to the conclusion that the constitutional reform process has been conducted in vain. The proposed Constitution addresses few - if any - of the core challenges of the Tanzanian political regime. The failure of both the government and the National Electoral Commission to organize the referendum in a timely fashion has also raised concerns about the latter’s ability to organize free and fair elections next October as well as the former’s acceptance of a transparent and competitive process.

Critical observers have also raised concerns about a recent deterioration of the human rights situation in the country and serious attacks on freedoms such as: the banning of the regional weekly newspaper *The East African*; the threat by the Minister for Home Affairs to deregister Faith-Based Organization too involved in politics; the harassment of opposition leaders; as well as the debates on Cybercrime Act and the Statistics Bill. If the adoption of the new Constitution was at first a critical objective for President Kikwete and seen as a signature achievement by the current regime, it seems now that CCM is entirely focused on winning the 2015 general elections – at a cost that it is for now difficult to measure (27 April 2015).

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