

TANZANIA'S HESITANT AND DISJOINTED
CONSTITUTIONAL REFORM PROCESS

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Introduction

As this work was getting under way there was a wide spread feeling among the opposition parties in Tanzania that the ruling party was suppressing them particularly in the run up to the coming elections in October, 2000.

In an article in “Majira”, a popular national Daily, on November 23, 1999, it was reported that the ruling party, ‘Chama cha Mapinduzi’ (popularity known by its acronym CCM) had established youth vigilante groups (UVCCM) in every region with the aim of preparing them to confront the youth of the opposition parties in the forthcoming elections in October, 2000. It was further reported that a training camp had been set up in Mbeya (in the south-west) to provide basic military and fitness training for the CCM youth to prepare them to restrain all those who might want to “... spoil the CCM’s victory in the national elections.” “If a CCM member is hit with one stone in the face you must retaliate with two stones. Do not follow what is written in the holy books that you should turn the left cheek when hit on the right check.” The Deputy secretary General of CCM was quoted as saying.

The newspaper report essentially sums up the pervasive feelings among members of the opposition political parties that the ruling party is determined to hold onto power by ruthlessly suppressing the opposition and ensuring its victory in the elections by hooks or by crooks. To this end the opposition parties and leaders believe that CCM has devised mechanisms ranging from election rigging to outright intimidation in order to ensure that the other parties do not record a significant vote in the forthcoming elections. The CCM, according to the opposition, would like to revert to a de-facto single-party political system. At the time of writing this report at least four leaders of opposition parties had either been arrested, convicted or were appearing in courts.

The government has denied any such assault on the opposition. Addressing journalists on December 18th 1999, the Prime Minister stressed the point that where leaders of opposition have been arrested it is because they have contravened the law. He insisted that CCM leaders committing similar offences would face the same treatment.

The ruling party, on its part, denies any such designs and insists that it will indeed ensure that it wins the election but only by fair means. They contend that the opposition parties are their own worst enemies by wasting large amounts of energy in internal bickering, political intrigues and failure to cooperate or to create a coalition or coalitions that can be mobilized to dislodge the ruling party and its incumbents in the elections. It is further argued by CCM that the opposition parties, (most of which have only emerged in the last six years or so) are motivated by material gain rather than political principle or commitment. Many are referred to as ruzuku (subsidy) parties led by rent seeking political elites whose sole goal is to access the public funds intended to assist in election campaigns or promote institutional capacity within these parties, for personal benefit. One influential daily sums up the contemporary picture thus:

When multipartism was ushered in Tanzania in 1995, we hoped that it would be used as a vehicle not only for change but also for enhancement of the principles of democracy and good governance. But when political parties came into offing, most of them were founded as personal parties either for self-aggrandisement or for the money minded, a quick way of earning easy money..... Squabbles within the leadership have become almost the order of the day. (The African, December 21, 1999)

It is against this background that a related study¹ was undertaken with the following underlying concerns:

- ? That newly established political parties have largely remained weak;
- ? That the ruling parties have in some cases become stronger thus further weakening and marginalizing the new parties;
- ? That the political party as the critical institution undergirding pluralist democracy is under threat in the SADC countries in general;
- ? That long-term sustainable democracy is impossible without vibrant political parties with competing policy alternatives.

¹ The state of Political Parties in Tanzania, 1999. Prepared for International IDEA-SADC Conference on Sustainable Democratic Institutions in Southern Africa: International Support & Self-Reliance. Gaborone, May 8-10th, 2000.

These concerns as they relate to Tanzania are a result of the deliberately hesitant transition strategy adopted since 1989. As I pointed out before:

Tanzania has embarked on the controlled transaction path which is marked by intolerance, control and a consuming desire for peace, stability, solidarity etc. – meaning law and order which does not always imply the rule of law. Laws may be flouted by the authorities in the interest of order, i.e. controlled order. The CCM continues to exploit incumbent advantage not only in defining the rules of the game but also in posing as the paragon and custodian of the civic virtues of peace, stability and solidarity. This, wrongly, but deliberately, portrays the opposition as the villains – the opponents of these virtues and purveyors of strife, instability and disunity.²

Background

Tanganyika (now Tanzania mainland) was under British colonial rule until 1961 when it became independent under the Marlborough House constitution agreed between the outcome colonial power and the in-coming political elites. The nationalist struggle for independence featured trade unions and a range of political parties representing diverse interests. At the time of independence the dominant political party was the Tanganyika African national union (TANU) which had been formed in 1954 through the transformation of the Tanganyika African Association (TAA) under the leadership of Julius Nyerere. Never-the-less there were other political parties. Among these were; United Tanganyika Party (UTP) set up to defend settler colonial interests; the African National congress (ANC) – a left-learning splinter from TANU and many other groups based on regions and ethnic groups.

The Marlborough House Constitution was silent on the position and role of the opposition in general and political parties in particular. Thus within one year of independence the TANU government had extinguished the political powers of traditional rulers and by 1965 it had banned the other political parties and established a constitutional one-party state. To be sure, some of these parties had disintegrated from internal decay but the fact remains that the immediate post-colonial constitutional and political order there was not conducive to competitive policies.

Thus TANU proceeded to impose its monopoly on political power but not without resistance arising trade unions, co-operatives, students etc, throughout the period to the early 1990s when multi-partism was re-instated.

Pressures for political change in Tanzania began to emerge in earnest in the late 1980s. These pressures evolved against a background of largely failed structural adjustment programs which had been put in place in the early 1980s. These programs which were supposedly intended to spearhead economic recovery on the whole had quite the opposite effects-they intensified economic difficulties precipitating popular discontent. This discontent created a crisis of political legitimacy of the state giving rise to demands for which ultimately translated itself into demands for a more open and competitive political system. The reformers' argument was at least in part, that economic liberalization had to be accompanied by political liberalization in order to stimulate sustained economic recovery. This argument was mainly embraced by those who had lost out in structural adjustment.

It should be noted that the government and the ruling party (CCM) strongly resisted these demands and it was not until the late ex-president Nyerere intervened that the ruling party acceded to these demands albeit hesitantly. It is in this context that a Presidential Commission was set up in 1990 with essentially one term of reference – “To enquire whether the majority of Tanzania’s preferred the continuation of a single-party system or the establishment of a multiparty system.” The commission was chaired by Chief Justice Francis Nyalali and eventually became popularly known as the Nyalali Commission.

Although many in the opposition groups were skeptical about its composition, term(s) of reference and its very political legitimacy, the commission approached its task with such seriousness and integrity that its report earned popular acceptance. This acceptance arose mainly from the depth of analysis, the scope of the issues covered and the range of recommendations it made. The major recommendation made by the Nyalali Commission was that Tanzania should abandon the single-party system and

² Baregu, M. *The Dynamics of Political Change and the Restructuring of Governance in Tanzania in REDET, Reflections on the Transition to Democracy in Tanzania*. Dar-es-Salaam, Dar-es-Salaam University Press, 1995.

adopt a multiparty system in spite of the fact that many of those who made verbal or written submissions (80%) preferred the continuation of a single-party system. Three arguments were made to support this apparently anti-majoritarian recommendation. One argument was that many of those who expressed a preference for a single party insisted on major reforms. The second argument was that the 20 per cent who preferred a multiparty system were a substantial minority whose discontent could negatively affect a democratic political system. The third argument was that given the grip of single party dominance the 80 percent majority could partly be explained by Plato's allegory of the cave since all Tanzanians below the age of 40 had known no other political system. This was encapsulated in the popular contention that "if one CMM has brought us such misery, many CCMs will finish us off." CCM had become the very embodiment and expression of the idea of a political party. This perception viewed political parties negatively or at least cynically.

The Nyalali Commission went further than just recommending the adoption of a multiparty system. It also prescribed the necessary conditions under which the system could be established and consolidated. Among these conditions are:

- ? Creation of a conducive environment for free participation in politics through the repeal of 40 pieces of repressive legislation;
- ? Establishment of a body to oversee the transition with a clear transition time-table;
- ? Appointment of a Constitutional Commission to draft a new constitution with considerably reduced presidential powers;
- ? To conduct a free and open public debate on a new constitution and eventually subject it to a popular referendum;
- ? To set up a major public education program on multi-partism and democracy;
- ? De-linking the CCM from public institutions such as the armed forces and the civil service;

It is important to note that there was no public or parliamentary discussion of the Nyalali report. Instead the CCM took it up at its February 1992 delegates conference and approved it without discussion. Even more important is the fact that the party conference passed a resolution removing the single party clause in its own

constitution giving way to the Political Parties Act, 1992 which was subsequently passed by parliament in May 1992. Among the many conditions recommended by the Nyalali Commission, only the removal of the party from public institutions was adopted. The rest were ignored and there was no attempt to explain why. Thus right from the beginning it would seem that the ruling party was less than fully committed to meaningful and fundamental change. Thus the period since 1992 has been marked by:

- a) A CCM controlled rather than a negotiated transition in which all parties participate in determining the path, pace, process and players (4 PS) in the transition;
- b) Extreme uncertainty with regard to the rules and procedures resulting in entrapment of opposition parties;
- c) Lack of a clear and unwavering commitment to the promotion and institutionalisation of multi-partism as a desired political system;
- d) A consuming preoccupation with political stability and emphasis of law and order;
- e) Restrictive rules and regulations designed to control political parties rather than to nurture them;
- f) Systematic harassment of opposition parties and their leaders with the Preventative Detention Act (1962) in particular, hanging over their heads like the proverbial sword of Damocles.

Most recently a committee “To coordinate views on the Constitution” was appointed by the President under Appeals Court judge, R H Kisanga. Consistent with the peace-meal approach to constitution making in Tanzania this committee was to sound out public views on 19 issues raised in Government Paper, No. 1 of 1968 (popularly known as the white paper). These issues include among others: the structure of the Union; powers of the executive; absolute majority (of cast vote) requirement for winning president; challenging presidential election results; independent candidacy; proportional representation; Presidential nomination of members of parliament; separation of powers; the 40 laws condemned by the Nyalali Commission; human rights and the entrenchment of socialism and self-reliance as national ideologies.

In the 'white paper' the government had already taken positions on each of the issues. For example, on the Union the government favoured the present system of two governments; on the powers of the president the government did not see any need to curtail them, etc. The Kisanga Report differed with the views of the executive government on such issues as the Union; an independent electoral commission; independent candidates; executive powers; repressive laws; challenges of presidential results. The report is the subject of political controversy in the country. It is interesting to note the following however:

- ? That the terms of reference and issues addressed by the Committee were highly selective and determined solely by the incumbent government and party;
- ? There was no attempt to link the Kisanga Committee with the Nyalali Commission even where the former could have complemented the latter on such questions as of the Union;
- ? No issues were raised concerning the building of an environment conducive to the promotion of multi-party democracy such as revisiting the Political Parties Act;
- ? Initial reactions by the president to the committee's recommendations opposed to the government positions were hostile;
- ? Only a further selected number of issues have been tabled as amendments in parliament. They tellingly include; empowering the president to nominate ten members of parliament; dropping the absolute majority requirement for the winning presidential candidate and forbidding the challenge of presidential election results.

The Amendments to the Constitution

The Kisanga Committee addressed its task quite seriously although it must have been aware of the fate of the Nyalali Commission's recommendations before it. Perhaps for this reason, the Kisanga Committee made no reference to the Nyalali Recommendations. Instead, the committee proceeded as if no other recommendations had been made on some of the critical issues to be addressed by the committee.

Below we present a summary of the issues covered by the committee. It should be pointed out however, that before the committee was appointed the government

produced Government Paper No. 1 of 1998³ which set out its position on the key questions.

³ Waraka wa Serikali Na 1Wa 1998. Maoni ya Serikali Kuhusu Mabadiliko Katika Katiba ya Nchi, Dar-es-Salaam, Government Printer, 1998.

Constitution Review Process by Issue Areas and Key Players

<u>Player</u>	<u>Nyalali '91</u>	<u>Government '92</u>	<u>White Paper '98</u>	<u>Kisanga '99</u>	<u>TLS '99</u>	<u>Thirteenth Amendment</u>	
1	New Constitution	Constitutional Commission & Referendum	No	No	No	New	None
2	Structure of Union	3 Govts. Federation & Dissenting View (?½)	2 Govts. Union	2 Govts. Union	3 Govts. Union	Federal Republic	None
3	Referendum on Union	Through New Constitution	No	No	No	Through New Constitution	None
4	Executive Power	Reduce/Impeachment	No	No	Reduce	Reduce	Reduce Power of Appointment Nomination of 10 MPs
5	Judiciary	Enhance Independence	No	No	Enhance Independence	Enhance Independence	Independence increased
6	Emergency Powers	Reduce	No	No	Reduce	Limit	None
7	Preventative Detention	Repeal Immediately	No	No	Repeal	Repeal	None
8	Presidential Absolute Majority	Yes	No	No	Yes	Yes	Simple Majority
9	Challenge of Presidential Results	Yes	No	No	No	Yes	None
10	Independent Candidates	Yes	No	No	No (President) Yes (Parliament)	Yes	No
11	Presidential Nominations (MPs)	No	No	Yes	Yes	None	10 MPs
12	Special Seats (Women)	NA	NA	No	Conditional	?	Increased from 15-20% (Presidential discretion)
13	Right of Recall	NA	NA	No	No	Entrench	None
14	By Elections	NA	NA	Over 12 months	No	?	Yes 25-30% Presidential
15	By Nominations (Women)	NA	NA	Party List	Party List	?	Yes
16	Election Commission	Independent	Presidential	Presidential	Presidential Appointment/ Parliamentary Confirmation	Independent	Voters' Register Chair/Vice Judges
17	Cabinet Appointment	NA	Presidential	No	No	Federal	None
18	Coalition Government	NA	NA	No	No	Federal	None
19	Public Servants in Politics	NA	NA	No	No	Federal	None
20	Regional & District Commissioners (Appointment)	NA	NA	No	No	Federal	None
21	Socialism & Self Reliance	Revise	Continue	Continue	Continue	Remove	NA
22	Human Rights	Entrench in Constitution	No	No		Entrench	Commission on Human Rights and Good Governance

The above summary of the constitution making process between 1991 and 2000 in Tanzania basically suggests a pattern which is essentially disjointed without being

incremental in the sense that the process does not cumulatively lead to the resolution of some of the contentions issues. Also to be noted are the following:

- (a) The multiplicity of actors and initiatives which do not necessarily build upon each other;
- (b) A consistent failure by the government to adopt and implement recommendations which may not be politically favourable to the status quo;
- (c) A consistent pattern of differences between commissions or committees, the Tanganyika Law Society (TLS) and the government emerges on certain key issues. These include questions of
 - i) Structure of the Union – Nyalali Commission and Kisanga Committee recommend a federal structure but the government has consistently opted for the status quo;
 - ii) Executive Powers – The Commission, Committee and TLS recommend reduction of executive powers in favour of the other two arms of government but the parliament enhanced them in the 13th Amendments;
 - iii) New Constitution – The Commission and TLS recommend a new federal constitution, public discussion and constituent assembly but the 13th Amendment rejects. (In the Nyalali Commission 9 out of 23 members filed a dissenting report.);
 - iv) Judiciary – The Independence of the Judiciary is considerably enhanced in the 13th Amendment in agreement with the Commission, Committee and TLS;
 - v) Preventative Detention – The Commission, Committee and TLS recommend repeal but the White Paper and 13th Amendment reject this;
 - vi) Presidential Absolute Majority – Both the Commission, the Committee and the present Constitution Advocate this but 13th Amendment repeals it. Presidential elections also remain unchallenged;
 - vii) Independent Candidates – The Commission favours independents while the Committee recommends independents only for parliamentarians. The White Paper and Amendment reject independents altogether;
 - viii) Presidential Nominations – Nyalali rejects presidential parliamentary nominations, the White Paper proposes them and the Committee endorses. The Amendment provides us presidential nominations;

- ix) Special Seats (Women) – The Commission did not address the issue while the committee endorses it conditionally. The 13th Amendment raises the women’s quota from 15 to 25-30% - the point in the range to be decided by the President.

There are many other points of difference between the recommendations made by the presidential commission, the presidential committee and the government’s policy choices as reflected in the adopted amendments. One interesting point is that the Commission and the Committee were headed by the Chief Justice and a Judge of the Court of Appeal, respectively. In both cases, although the Commission and Committee were not ‘judicial’ in a formal sense, they made significant statements about the fundamental law which the government chose to ignore to the embarrassment of both the Justices. The Government’s consistent disagreement with the Commission, Committee and the TLS (call the legal initiatives) is also a matter for concern.

Conclusion - General Trends in Politics

As we pointed out earlier state-civil society relations are rather tense as is indicated by the following trends:

- a) The government’s consistent failure to articulate a clear national vision for the future. Ujamaa vision has not found a successor yet it persists in the national constitution;
- b) Civil society remains very weak particularly with the collapse of cooperatives, trade unions and the weakness of political parties;
- c) A gradual drift towards authoritarianism with the government confining itself to law and order rather than social welfare functions;
- d) Growing intolerance of dissent. It cannot be accidental that the last few months leaders of Chadema TPP, NCCR-M, TLP have been arrested and variously detained;
- e) Increasing political volatility in the wake of the death of Nyerere and therefore, his disappearance as a stabilizing element within the CCM and the country as a whole. CCM is progressively becoming paranoid;

- f) The international community, which formally promoted multi-partisan, seems to be experiencing some democracy fatigue and is now more ‘realist’ and in favour of peace and stability.

1. **What is to be Done?**

“The source of future conflicts in this country is not religion or ethnicity but democracy.” (Opposition, MP)

Those were the words of one of my interviewees. The single most important problem in Tanzania today is the lack of a clear and demonstrated commitment to democratization. This is reflected in the hesitant and disjointed constitutional reform process. In our view, the building of democracy after years of authoritarian rule is not simply a matter of passing an act of parliament. It involves more work if democracy is to be nurtured and ultimately consolidated. The following needs to be done in Tanzania:

- a) The Nyalali recommendations which were ignored opportunistically by the CCM government need to be revisited in order for the country to embark upon a more comprehensive, fundamental and inclusive constitution making process;
- b) The Political Parties Act needs to be re-examined so that it is oriented towards the promotion rather than the restriction of political parties;
- c) The electoral system has to be overhauled to embrace elements of proportional and constituency based representation;
- d) Political party funding should be based on clear and stable principles including the proportionality of popular votes rather than seats;
- e) The Office of the Registrar of Political Parties should not be conceived as the Controller of Political Parties but as the Promoter of Political Parties;
- f) The system of Local Government should be re-examined with a view of creating a federal government with their provincial governments and assemblies in order to bring politics closer to the people. This could be the ultimate solution of the Union problem.

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