

## Constitutional Reform in Tanzania: Developing Process and Preliminary Results

By *Juliana Masabo*\* and *Ulrike Wanitzek*\*\*

**Abstract:** *The United Republic of Tanzania, consisting of the two partners in the Union, Mainland Tanzania (formerly Tanganyika) and Zanzibar, is undertaking comprehensive constitutional reforms. The reform process, once finalised, will replace the current constitution, the Constitution of the United Republic of Tanzania, 1977. The reform process has been carried on since the enactment of the Constitutional Review Act of 2011. Two successive drafts for a new constitution were produced by the Constitutional Review Commission in 2013 followed by a Proposed Constitution which was produced by the Constituent Assembly in 2014. A referendum for validation of the Proposed Constitution has not yet been conducted at the time of writing this article.*

*This article provides an overview of the reform process and its preliminary results. It starts with a brief historical background of constitution-making in Tanzania. The specific stages of the constitutional review process and selected provisions of the Constitution of 1977, the two Draft Constitutions of 2013 and the Proposed Constitution of 2014 are then compared with each other. The comparison includes the suggested structure of the Union between Mainland Tanzania and Zanzibar, national values, general constitutional principles such as the sovereignty of the people, the supremacy of the constitution and the separation of powers, the status of international and regional law, human rights, citizenship and the electoral process. This comparison shows that in some regards the Draft Constitutions and the Proposed Constitution made equally significant proposals for reform. However, some progressive provisions contained in the Draft Constitutions were not retained in the Proposed Constitution. The article discusses these points of contention.*

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## A. Introduction

The United Republic of Tanzania,<sup>1</sup> consisting of the two partners in the Union, Mainland Tanzania (formerly Tanganyika) and Zanzibar, is approaching the end of a constitutional reform process which has been carried on since the coming into force of the Constitutional Review Act in 2011.<sup>2</sup> This Act was the basis for a comprehensive reform of the Constitution of the United Republic of Tanzania of 1977 (Constitution, 1977).<sup>3</sup> Two successive drafts for a new constitution were produced by the Constitutional Review Commission on 3 June 2013 (First Draft Constitution)<sup>4</sup> and 30 December 2013 (Second Draft Constitution).<sup>5</sup> The Constituent Assembly then published a “Proposed Constitution” on 2 October 2014.<sup>6</sup> A referendum on the Proposed Constitution<sup>7</sup> was originally scheduled to take place

- 1 According to the Population Census held in 2012, the population consists of 44,928,923 persons of whom 43,625,354 persons live in Tanzania Mainland and 1,303,569 persons live in Zanzibar; the land area of Tanzania Mainland is 883,600 km<sup>2</sup> and of Zanzibar 2,500 km<sup>2</sup> (total: 886,100 km<sup>2</sup>), *United Republic of Tanzania, National Bureau of Statistics, Ministry of Finance, Tanzania in Figures 2012*, Dar es Salaam, 2013, pp. iii, 7, [http://www.nbs.go.tz/nbs/takwimu/references/Tanzania\\_in\\_figures2012.pdf](http://www.nbs.go.tz/nbs/takwimu/references/Tanzania_in_figures2012.pdf). The national and official language, as well as lingua franca, is Kiswahili, while English is also an official language. Administratively, the country is subdivided into 30 Regions five of which are in Zanzibar, and 169 Districts, *United Republic of Tanzania, Government Portal*, <http://www.tanzania.go.tz/home/pages/68>; *Legal and Human Rights Centre/Zanzibar Legal Services Centre, Tanzania Human Rights Report 2013*, Dar es Salaam, Zanzibar 2014, pp. 11, 305, <http://www.humanrights.or.tz/downloads/tanzania-human-rights-report-2013.pdf>.
- 2 Constitutional Review Act, No. 8 of 2011, in force since 1 December 2011, as amended, Cap. 83 R. E. (Laws of Tanzania. Revised Edition) 2014, [http://www.constitutionnet.org/files/constitutional\\_review\\_act\\_amended\\_up\\_to\\_31\\_dec\\_2013-cap\\_83-latest\\_edition.pdf](http://www.constitutionnet.org/files/constitutional_review_act_amended_up_to_31_dec_2013-cap_83-latest_edition.pdf).
- 3 Constitution of the United Republic of Tanzania, 1977, as amended, Cap. 2 R. E. 2005, [http://www.tanzania.go.tz/egov\\_uploads/documents/Katiba%20ya%20Jamhuri%20ya%20Muungano%20wa%20Tanzania%20\\_English%20Version\\_%202009.pdf](http://www.tanzania.go.tz/egov_uploads/documents/Katiba%20ya%20Jamhuri%20ya%20Muungano%20wa%20Tanzania%20_English%20Version_%202009.pdf); <http://www.wipo.int/edocs/lexdocs/laws/en/tz/tz008en.pdf> (in English); [http://www.zanzibarassembly.go.tz/katiba\\_1.pdf](http://www.zanzibarassembly.go.tz/katiba_1.pdf) and [http://www.zanzibarassembly.go.tz/katiba\\_2.pdf](http://www.zanzibarassembly.go.tz/katiba_2.pdf) (in Kiswahili).
- 4 First Draft Constitution of 3 June 2013: *Rasimu ya Katiba ya Jamhuri ya Muungano wa Tanzania ya Mwaka 2013*, [http://www.tzonline.org/pdf/RASIMU\\_YA\\_KATIBA\\_2013.pdf](http://www.tzonline.org/pdf/RASIMU_YA_KATIBA_2013.pdf) (in Kiswahili). An unofficial English translation of the First Draft Constitution is accessible at [http://www.constitutionnet.org/files/tanzania\\_draft\\_constitution\\_2013-english.pdf](http://www.constitutionnet.org/files/tanzania_draft_constitution_2013-english.pdf).
- 5 Second Draft Constitution of 31 December 2013: *Rasimu ya Katiba ya Jamhuri ya Muungano wa Tanzania*, <http://www.kituoachakatiba.org/sites/default/files/legal-resources/RASIMU%20YA%20KATIBA%20YA%20JAMHURI%20YA%20MUUNGANO%20WA%20TANZANIA.pdf> (in Kiswahili); or [http://www.sheria.go.tz/index.php?option=com\\_docman&task=cat\\_view&Itemid=68&gid=44&orderby=dmdate\\_published](http://www.sheria.go.tz/index.php?option=com_docman&task=cat_view&Itemid=68&gid=44&orderby=dmdate_published) (in Kiswahili). An unofficial English translation of the Second Draft Constitution is in circulation.
- 6 Proposed Constitution of 2 October 2014: *Rasimu ya Katiba Inayopendekezwa*, [http://www.bungemaalum.go.tz/files/publications/attachments/KATIBA\\_INAYOPENDEKEZWA\\_sw.pdf](http://www.bungemaalum.go.tz/files/publications/attachments/KATIBA_INAYOPENDEKEZWA_sw.pdf) (in Kiswahili); or [http://www.sheria.go.tz/index.php?option=com\\_docman&task=cat\\_view&Itemid=68&gid=44&orderby=dmdate\\_published](http://www.sheria.go.tz/index.php?option=com_docman&task=cat_view&Itemid=68&gid=44&orderby=dmdate_published) (in Kiswahili). An unofficial English translation of the Proposed Constitution is in circulation.
- 7 Section 28B of the Constitutional Review Act, 2011, read together with the Referendum Act, No. 11 of 2013, especially Part VI (Sections 35–42).

on 30 April 2015 but was postponed to a later date which was not yet determined at the time of writing this article.

This article provides an overview of the constitutional reform process and its preliminary results. After a brief survey of the historical constitutional background of Tanzania (B.) and the different stages of the constitutional review process since 2011 (C.), selected provisions of the Constitution of 1977, the two Draft Constitutions of 2013 and the Proposed Constitution of 2014 are compared to each other (D.). The comparison includes the suggested structure of the Union between Mainland Tanzania and Zanzibar, national values, general constitutional principles such as the sovereignty of the people, the supremacy of the constitution and the separation of powers, the status of international and regional law, human rights, citizenship and the electoral process. This comparison shows that in some regards the Draft Constitutions and the Proposed Constitution made equally significant proposals for reform. However, in other regards, progressive provisions contained in the Draft Constitutions were not retained in the Proposed Constitution. The article discusses these points of contention.

## B. Brief Overview of Tanzania's Constitutional History

### I. *Before the Union*

#### 1. Tanganyika

From 1 January 1891, the areas which are now Mainland-Tanzania, Burundi and Rwanda came formally under German colonial power as the Crown Colony of German East Africa (Kronkolonie Deutsch-Ostafrika), after the ground had been prepared since 1885 by the German East Africa Company (Deutsch-Ostafrikanische Gesellschaft) with the authorisation of the German Government.<sup>8</sup> When Germany lost its colonial possessions after the First World War,<sup>9</sup> Tanganyika came under British administration<sup>10</sup> and the British colonial government was established under the Tanganyika Order-in-Council, 1920.<sup>11</sup> In 1922, Tan-

8 On the colonial legal history of German East Africa, see *Harald Sippel*, *Arbeit und Recht in Deutsch-Ostafrika (1891-1918)*. Experimentelles Arbeits- und Steuerrecht zur Lösung der kolonialen Arbeiterfrage, Habilitationsschrift, Rechts- und Wirtschaftswissenschaftliche Fakultät, Universität Bayreuth 2005, pp. 27 ff., 45.

9 Under Article 119 of the Peace Treaty of Versailles of 28 June 1919 which entered into force on 10 January 1920, <http://www.documentarchiv.de/wr/vv 01.html>.

10 While Burundi and Rwanda came under Belgian administration.

11 This Order-in-Council was proclaimed on 25 September 1920 and came into force on 28 September 1920. On the colonial legal history of Tanganyika under British rule and on the early period of independence, see *J. S. R. Cole/W. N. Denison*, *Tanganyika. The Development of Its Laws and Constitution*, London 1964; *H. F. Morris/James S. Read*, *Indirect Rule and the Search for Justice. Essays in East African Legal History*, Oxford 1972; *Kenneth Roberts-Wray*, *Commonwealth and Colonial Law*, London 1966.

ganyika became a British Mandate Territory under the League of Nations,<sup>12</sup> and in 1946, it became a Trust Territory under the United Nations.<sup>13</sup>

Tanganyika became independent on 9 December 1961. This was on the formal basis of the (British) Tanganyika Independence Act, 1961 and the Tanganyika (Constitution) Order in Council, 1961, passed by the British colonial government, through which Tanganyika's first constitution, the Independence Constitution, 1961 was enacted.<sup>14</sup> One year later, on 9 December 1962, Tanganyika became a Republic. The Republican Constitution, 1962 was passed by the National Assembly, which was converted into a Constituent Assembly for this purpose.<sup>15</sup>

## 2. Zanzibar

Zanzibar was an Oman-Arab Sultanate from the 17th century and was seat of the Sultan of Muscat (Oman and Zanzibar) from 1832. It became a separate Sultanate in 1861 and came under British colonial rule in 1890 as a British Protectorate.<sup>16</sup> Zanzibar became independent on 10 December 1963, with an Independence Constitution of the same year (Zanzibar Independence Constitution, 1963). Shortly thereafter, on 12 January 1964, the Sultan's government was deposed by a revolution<sup>17</sup> and the People's Republic of Zanzibar was established. The Zanzibar Independence Constitution, 1963 was repealed and replaced by a number of

12 Article 22 of the Covenant of the League of Nations, [http://avalon.law.yale.edu/20th\\_century/leagov.asp](http://avalon.law.yale.edu/20th_century/leagov.asp).

13 Articles 75 ff., 77 in Chapter XII of the Charter of the United Nations; Trusteeship Agreement for the Territory of Tanganyika, approved by the General Assembly of the United Nations on 13 December 1946, [http://untreaty.un.org/unts/1\\_60000/1/7/00000314.pdf](http://untreaty.un.org/unts/1_60000/1/7/00000314.pdf); see *Bernard T. G. Chidzero, Tanganyika and International Trusteeship*, London 1961.

14 See *Cole/Denison*, note 11, pp. 15 ff.

15 *Issa G. Shivji/Hamudi I. Majamba/Robert V. Makaramba/Chris Maina Peter*, *Constitutional and Legal System of Tanzania. A Civics Sourcebook*, Dar es Salaam 2004, p. 48; *Kituo cha Katiba: Eastern Africa Centre for Constitutional Development*, *Review of the Constitutional Process and the Draft Constitution of Tanzania 2013*, p. 16, [http://www.constitutionnet.org/files/report\\_on\\_the\\_tanzania\\_draft\\_constitution\\_jan\\_2014\\_0.pdf](http://www.constitutionnet.org/files/report_on_the_tanzania_draft_constitution_jan_2014_0.pdf).

16 *James S. Read*, *Kenya, Tanzania, Uganda. Bibliographical Introduction to Legal History and Ethnology*, Bruxelles 1968, p. 7.

17 *Chris Maina Peter/Nayla Ahmed Sultan*, *The Constitution, Structure of the State and Constitutional Development in the United Republic of Tanzania and Zanzibar*, in: *Chris Maina Peter/Immi Sikand* (eds.), *Zanzibar: The Development of the Constitution*, Zanzibar, 2011, p. 45 footnote 17 with further references.

Presidential Decrees,<sup>18</sup> especially the Constitutional Decree No. 5 of 1964, passed on 25 February 1964.<sup>19</sup>

## II. *The Union and thereafter*

### 1. Union Constitutions

On 26 April 1964 the Republic of Tanganyika and the People's Republic of Zanzibar united to form the United Republic of Tanganyika and Zanzibar.<sup>20</sup> With regard to the country's constitutional history, this marked the beginning of "the interim period – i.e. from the Union Day to the commencement of the Permanent Constitution in 1977".<sup>21</sup> During this period, in Issa G. Shivji's view, two documents represented the Constitution of the United Republic, i.e. the Union of Tanganyika and Zanzibar Act, 1964<sup>22</sup> and the Interim Constitution. The Republican Constitution of Tanganyika of 1962 was modified to become the Interim Constitution of the United Republic of Tanganyika and Zanzibar, 1964<sup>23</sup> and subsequently the Interim Constitution of the United Republic of Tanzania, 1965 which entered into force on 9 December 1965.<sup>24</sup>

18 See *Peter/ Sultan*, note 17, p. 63; *Romuald Haule*, *Popular Participation in Constitution-Making and Legitimacy of the Constitution: The Experience of Tanzania*, *Journal of African and International Law* 5 (2012), pp. 1, 17; *Mahadhi Juma Maalim*, *The United Republic of Tanzania in the East African Community: Legal Challenges in Integrating Zanzibar*, Dar es Salaam 2014, p. 84.

19 Section 2 of the Constitutional Decree No. 5 of 1964 provided: "The People's Republic of Zanzibar is a Democratic State dedicated to the rule of law. The President as the Head of State, validates legislation by his assent. As an interim measure, legislative power resides in the Revolutionary Council and is exercised on its behalf and in accordance with its laws by the President. The principal executive power is exercised on behalf of the Revolutionary Council and with its advice by the Cabinet of Ministers individually and collectively; the principal judicial power is exercised on behalf of the Revolutionary Council by the Courts, which shall be free to decide issues before them solely in accordance with law and public policy."

20 *Roberts-Wray*, note 11, p. 765; *Issa G. Shivji*, *Tanzania: The Legal Foundations of the Union in Tanzania's Union and Zanzibar Constitutions*. Professorial Inaugural Lecture, Dar es Salaam 1990, p. 3; Chris Maina Peter/Haroub Othman (eds.), *Zanzibar and the Union Question*, Zanzibar, 2006, p. v; *Maalim*, note 18, pp. 59 ff.

21 *Shivji*, note 20, p. 16.

22 Act No. 22 of 1964 (Cap. 557); it incorporated the "Articles of Union", i.e. the treaty between Tanganyika and Zanzibar, of 22 April 1964 as Schedule, *Shivji*, note 20, p. 3.

23 *Maalim*, note 18, p. 84.

24 *Maalim*, note 18, p. 84; *Haule*, note 18, p. 23. This Constitution continued to lack a Bill of Rights. It provided for a single party system, Article 3 (1) of the Interim Constitution, 1965. The Zanzibar Independence Constitution, 1963 contained a Bill of Rights, see *James S. Read*, *Human Rights in Tanzania*, in: Colin Legum/Geoffrey Mmari (eds.), *Mwalimu. The Influence of Nyerere*. London 1995, pp. 125, 131. The programme of the socialist single party, based on the Arusha Declaration of 1967, was formally anchored in the Constitution in 1975, *Chris Maina Peter*, *Constitution-Making in Tanzania: The Role of Civil Organisations*, in: Kivutha Kibwana/Chris Maina Peter/Nyangabyaki Bazaara, *Constitutionalism in East Africa: Progress, Challenges and Prospects in*

The Union structure provided for a two-government structure, with a Union government, dealing also with Mainland Tanzania matters, and another government for Zanzibar.<sup>25</sup> In 1977, the Interim Constitution, 1965 was replaced by the first permanent Constitution of the United Republic of Tanzania, which entered into force on 26 April 1977. This Constitution was formally adopted by a Constituent Assembly which was identical to the National Assembly.<sup>26</sup> Following criticisms, a Bill of Rights was incorporated into the Constitution in 1984,<sup>27</sup> with effect from 1 March 1988.<sup>28</sup>

As a consequence of both internal and external pressures and following further constitutional debates in the early 1980s,<sup>29</sup> a process of political democratisation and economic liberalisation began in the mid-1980s.<sup>30</sup> The existing socialist planned economy was gradually transformed into a market economy, and in 1992 a multi-party system was introduced into

- 1999, Kampala 2001, p. 23. The single party was originally the Tanganyika African National Union (TANU) and, after TANU's unification with Zanzibar's Afro-Shirazi Party (ASP) on 5 February 1977, the joint single party Chama cha Mapinduzi (CCM), i.e. "party of the revolution".
- 25 Due to this unique structure, Mainland Tanzania has no constitution of its own but shares the constitution of the Union, while Zanzibar has its own constitution; see below, B. II. 2; *Dieter Schröder*, Tanzania, eine Herausforderung an die europäische Verfassungslehre, *Afrika Spectrum* 1969, pp. 31-43; *Yash Ghai*, Tanzania, in: *International Encyclopaedia of Comparative Law*, Vol. 1, Tübingen etc. 1973, T1-T8; *Yash Ghai*, Constitutional Asymmetries: Communal Representation, Federalism, and Cultural Autonomy, in: Andrew Reynolds (ed.), *The Architecture of Democracy. Constitutional Design, Conflict Management, and Democracy*, Oxford 2002, p. 156; *Peter/Sultan*, note 17, p. 45 footnote 18 with further references.
- 26 *Shivji*, note 20, p. 59. According to *Peter* 2001, note 24, p. 25, factually, all decisions were in the hands of the powerful single party, Chama cha Mapinduzi (CCM, see note 24).
- 27 Constitution (Fifth Amendment Act, 1984 (No 15 of 1984); see *Peter* 2001, note 24, at his footnote 29; *Read*, note 24, pp. 125 ff. Until then, the Constitutions of Tanganyika and the Interim Constitutions of the Union had not contained a Bill of Rights (but Zanzibar's very short-lived Independence Constitution, 1962 had had one). Different from other former British colonial territories in Africa which became independent after Tanganyika, such as Uganda (1962), Kenya (1963) and Zanzibar (1963), the Tanzanian Independence Constitution, 1961 was without a Bill of Rights, *Read*, note 24, pp. 128, 129. According to *Read*, "[t]o Nyerere, it would have seemed hypocritical for a colonial power to entrench guarantees of human rights on the eve of decolonisation: colonialism was itself a basic denial of human rights", id. p. 129. See also *Peter*, note 24, pp. 18, 19, 21; *Chris Maina Peter*, The Draft Constitution 2013: A Silent Revolution, *The Guardian of Sunday (Tanzania)*, 9 June, 2013, p. 4.
- 28 Section 5 (2) Constitution (Consequential, Transitional and Temporary Provisions) Act 1984 (No. 16 of 1984).
- 29 *Peter/Sultan*, note 17, pp. 49-57.
- 30 *Benedict T. Mapunda*, Legal Sector Reforms in Tanzania: An Examination of Developments and Status, in: Maria Nassali (ed.), *Reforming Justice in East Africa. A Comparative Review of Legal Sector Processes*, Kampala 2008, pp. 99, 101; *Issa G. Shivji*, Let the People Speak. Tanzania down the Road to Neo-Liberalism, *Dakar*, 2006, pp. 8-12 and 15 ff.

the Constitution.<sup>31</sup> Further constitutional amendments followed until the last amendment of 2005.<sup>32</sup>

## 2. Constitutions of Zanzibar

Under the Union of Tanganyika and Zanzibar Act, 1964, several of the Presidential Decrees of 1964 were seen as the constitutional laws of Zanzibar; Issa G. Shivji therefore identifies these Decrees and the Union Act together as forming the Constitution of Zanzibar up to 1979, when the Zanzibar Constitution of 1979 was adopted.<sup>33</sup> Five years later, Zanzibar adopted the Constitution of 1984 which introduced a catalogue of human rights and entered into force on 12 January 1985.<sup>34</sup> The Constitution was amended several times, with the last amendment in 2010.<sup>35</sup> This amendment led to heated debates with regard to the question of Zanzibar's autonomy.<sup>36</sup>

### C. Process towards Constitutional Reform

When the constitutional reform process began in 2011, the constitutional arrangement was such that the Constitution of the United Republic of Tanzania was not only the constitution of the Union but served at the same time as the constitution of one of the Union partners, i.e. Mainland Tanzania, while the other Union Partner, Zanzibar, had its own constitution. The same applied to the government structure, with one government for the Union and Mainland Tanzania, and another one for Zanzibar.

31 Constitution (Eighth) Amendment Act, 1992 (No. 4 of 1992); Political Parties Act (No. 5 of 1992). For details see *Michael K. B. Wambali*, The Historical Overview of the Constitutional Reforms towards Limited Leadership in Tanzania, Commonwealth Law Bulletin 34 (2008), pp. 287 ff.; *Mwesiga Baregu*, Tanzania's Hesitant and Disjointed Constitutional Reform Process, Conference on Constitution-Making Processes in Southern Africa, Sheraton Hotel [no place indicated], 26-28 July, 2000, pp. 1, 4 ff., 6 ff. on the work of the Nyalali Commission and the Kisanga Committee, <http://www.eldis.org/vfile/upload/1/document/0708/DOC8308.pdf>, via: <http://www.policyforum-tz.org/print/52>. On the latter see also *Wambali*, id., pp. 293 ff.

32 Constitution (Fourteenth) Amendment Act (No. 1 of 2005).

33 *Shivji*, note 20, p. 16; see also *Peter/Sultan*, note 18, pp. 63-65; *Maalim*, note 18, pp. 91 ff.

34 See *Peter/Sultan*, note 17, pp. 65-79 with details. Apart from Zanzibar's (very short-lived) Independence Constitution, 1962, this was the first Bill of Rights in the Constitutions of Zanzibar.

35 10th Zanzibar Constitutional Amendments. See *Sengondo E. A. Mvungi*, 10th Constitutional Amendment of Zanzibar: The Break-Up of the United Republic of Tanzania, in: Chris Maina Peter/Immi Sikand (eds.), Zanzibar: The Development of the Constitution. Zanzibar 2011, pp. 219-234; reprinted in: Elinaza Sendoro/Helen Kijo-Bisimba/Chris Maina Peter/Anna Henga/Rodrick Maro (eds.): Breathing the Constitution. Dar es Salaam 2014, pp. 245-253.

36 *Maalim*, note 18, pp. 95 ff.

### I. *Constitutional Review Act, 2011 and Referendum Act, 2013*

The recent review process of the Constitution of the United Republic of Tanzania of 1977 (as amended) was formally set in motion by the enactment of the Constitutional Review Act, 2011 which forms the legal basis and provides a road map for the promulgation of a new constitution.<sup>37</sup> Part VI of the Constitutional Review Act, 2011 originally contained provisions for validation of the Proposed Constitution through a referendum; this Part was later repealed and replaced by the Referendum Act, 2013.

These two Acts contain detailed provisions for each step of the constitutional review process, these being (i) collection of public opinions and, on this basis, preparation of the First Draft Constitution by the Constitutional Review Commission;<sup>38</sup> (ii) a second round of collection of public opinions through so-called Constitutional Fora and thereafter preparing of the Second Draft Constitution by the Constitutional Review Commission; (iii) preparation of the Proposed Constitution by the Constituent Assembly;<sup>39</sup> and (iv) validation of the Proposed Constitution by the Tanzanian people through a referendum.<sup>40</sup> These four steps of the constitutional reform reflect the strong participatory approach provided for in the reform, with the involvement of the Tanzanian people at every level of the reform process.<sup>41</sup>

37 The Act was amended several times, starting with Amendment Act No. 2 of 2012, followed by Amendment Acts No. 7 of 2013 and No. 9 of 2013. These amendments are incorporated in the latest version of the Act of 31 December 2013, Cap. 83 R. E. 2014, at [http://www.constitutionnet.org/files/constitutional\\_review\\_act\\_amended\\_up\\_to\\_31\\_dec\\_2013-cap\\_83-latest\\_edition.pdf](http://www.constitutionnet.org/files/constitutional_review_act_amended_up_to_31_dec_2013-cap_83-latest_edition.pdf). See *Juliana Masabo*, The State of Constitutionalism in Tanzania Mainland – 2013, in Thiery B. Murangira, Annual State of Constitutionalism in East Africa – 2013, Kampala 2014, pp. 105-152.

38 The Constitutional Review Commission was established under Part III (Sections 5-16) of the Constitutional Review Act, 2011 which provides in detail for the Commission's composition, functions and mandate. The procedure of the Commission is regulated in Part IV (Sections 17-21) of the Act.

39 The Constituent Assembly was established under Part V (Sections 22-30) of the Constitutional Review Act, 2011 which regulates its composition, its mandate and its functions.

40 It has been noted that a referendum "is a recent development in the region", *Kituo cha Katiba: Eastern Africa Centre for Constitutional Development*, note 15, p. 25.

41 This was seen by some authors as overdue, considering the lack of participation by the people in the development of the previous and current constitutions; see for instance *Peter* 2001, note 24, p. 31: "... since independence the people of Tanzania have never been genuinely involved in the constitution-making process". See also *Khoti Chilomba Kamanga*, The Tanzania Draft Constitution of 2013: Panacea or Pandora's Box? The Guardian on Sunday (Tanzania), 16 June, 2013, p. 2. See however *Kituo cha Katiba: Eastern Africa Centre for Constitutional Development*, note 15, pp. 20-22, for some critical comments on the implementation in practice, pp. 23 ff.

## II. Preparation of the Draft Constitutions by the Constitutional Review Commission

### 1. First Draft Constitution

The task of collecting public opinions on the new constitution, examining and analysing the views collected during public hearings and preparing a First Draft Constitution was the primary responsibility of the Constitutional Review Commission.<sup>42</sup> The composition of the Commission was to reflect the Commissioners' "experience relevant to constitutional review or professional qualifications on constitutional matters, law, public administration, economic, finance and social science", the country's "geographical and ... population diversity", as well as "age, gender and representation of various social groups".<sup>43</sup> Subject to this, the Union partners, i.e. Mainland Tanzania and Zanzibar, were to be represented by equal numbers of Commissioners.<sup>44</sup> Personal integrity and Tanzanian citizenship of the Commissioners were among the further requirements.<sup>45</sup> The President was required to invite "fully registered political parties, religious organisations, civil societies, associations, institutions and any other group of persons under whatever name having common interest" to submit suggestions for appointments to him, but he was also free to appoint persons not so suggested.<sup>46</sup> Chairperson, Vice-Chairperson and Commissioners were to be appointed by the President of the United Republic of Tanzania "in consultation and agreement" with the President of Zanzibar.<sup>47</sup> These appointments were made on 6 April 2012. The Commission consisted of the Chairperson, the Vice-Chairperson and 30 Commissioners,<sup>48</sup> 15 from Tanzania Mainland and 15 from Zanzibar.<sup>49</sup>

42 For details of the terms of reference of the Commission, see Section 8 (1), read together with Sections 9 and 17, of the Constitutional Review Act, 2011.

43 Section 6 (3) (a), (b), (c) of the Constitutional Review Act, 2011.

44 Section 6 (2) of the Constitutional Review Act, 2011.

45 Section 6 (4), (5) of the Constitutional Review Act, 2011.

46 Section 6 (6), (7) of the Constitutional Review Act, 2011.

47 Section 6 (1) of the Constitutional Review Act, 2011. See also Section 7 (3) of the Act, 2011.

48 According to Section 7 (1) (c) of the Constitutional Review Act, 2011, the minimum number of members should have been 20, and the maximum 30, in addition to the chairperson and vice-chairperson. Chairperson was Judge Joseph Sindi Warioba, and Vice-Chairperson was Judge Augustino Ramadhani. Assaa A. Rashid served as Secretary and Casmir S. Kyuki as Assistant Secretary to the Commission.

49 Members from Mainland Tanzania were Joseph Butiku, Prof. Mwesiga L. Baregu, Riziki Shahari Mngwali, Dr. Edmund Adrian Sengondo Mvungi, Richard Shadrack Lyimo, John J. Nkolo, Alhaj Said El-Maamry, Jesca Sydney Mkuchu, Prof. Palamagamba J. Kabudi, Humphrey Polepole, Yahya Msulwa, Esther P. Mkwizu, Maria Malingumu Kashonda, Al-Shaymaa J. Kwegyir (MP) and Mwantumu Jasmine Malale. Members from Zanzibar were Dr. Salim Ahmed Salim, Fatma Said Ali, Omar Sheha Mussa, Raya Suleiman Hamad, Awadh Ali Said, Ussi Khamis Haji, Salma Maoulidi, Nassor Khamis Mohamed, Simai Mohamed Said, Mohamed Yusuph Mshamba, Kibibi Mwinyi Hassan, Suleiman Omar Ali, Salama Kombo Ahmed, Abubakar Mohammed Ali and Ally Abdullah Ally Saleh.

In July 2012 the Commission embarked on its first substantive task of collecting people's views through public hearings organised all over the country. About one year after having started, on 3 June 2013, the Commission issued the First Draft of the Constitution which circulated widely throughout the country, by publication in the Government Gazette and in local newspapers, to prepare the public for the second round of collection of public opinions through the Constitutional Fora.<sup>50</sup>

## 2. Second Draft Constitution

The Constitutional Fora were to be established on an *ad hoc* basis in order to gather public opinions on the First Draft Constitution.<sup>51</sup> The Commission was to form the Constitutional Fora on the basis of the geographical diversity of the United Republic and to “involve and bring together representatives of various groups of people within the communities”.<sup>52</sup> The Constitutional Fora were organised at two levels. Firstly, there were 177 Constitutional Fora directly organised and supervised by the Constitutional Review Commission, 164 in Tanzania Mainland and 13 in Zanzibar.<sup>53</sup> Secondly, there were 500 self-supervised or independent Constitutional Fora formed by organisations, institutions and groups of people with common interests, such as higher learning institutions, political parties, pastoral organisations, community-based organisations, non-governmental organisations and professional bodies, including also women's fora and children's fora.<sup>54</sup> The comments collected during these fora informed the preparation of the Second Draft Constitution which was issued by the Constitutional Review Commission on 30 December 2013.

### III. Preparation of the Proposed Constitution by the Constituent Assembly

The preparation of the Proposed Constitution was the responsibility of the Constituent Assembly.<sup>55</sup> The Constituent Assembly had a total of 628 delegates. It was composed of all

50 Section 6 (5) of the Constitutional Review Act, 2011.

51 Section 18 (2), (3) of the Constitutional Review Act, 2011.

52 Sec. 18 (3), (4) of the Constitutional Review Act, 2011.

53 See Section 18 (2) of the Constitutional Review Act, 2011, and *Jamhuri ya Muungano wa Tanzania*, Tume ya Mabadiliko ya Katiba, Mwongozo kuhusu Muundo, Utaratibu wa Kuwapata Wajumbe wa Mabaraza ya Katiba ya Wilaya (Mamlaka za Serikali za Mitaa) na Uendeshaji wake, pp. 3 and 4, [http://matukiodaima.blogspot.de/2013/02/mwongozo-kuhusu-muundo-utaratibu-wa\\_7065.html](http://matukiodaima.blogspot.de/2013/02/mwongozo-kuhusu-muundo-utaratibu-wa_7065.html), indicating that 13,544 men and 5,789 women participated.

54 See Section 18 (2) of the Constitutional Review Act, 2011, and *Jamhuri ya Muungano wa Tanzania*, Tume ya Mabadiliko ya Katiba, Mwongozo kuhusu Mabaraza ya Katiba ya Asasi, Taasisi na Makundi ya Watu Wenye Malengo Yanayofanana, 2013, [http://www.tanzania.go.tz/egov\\_uploads/documents/PDF\\_-\\_MWONGOZO\\_WA\\_ASASI\\_TAASISI\\_NA\\_MAKUNDI\\_YA\\_WATU\\_-\\_FIN\\_AL\\_Sw.Pdf](http://www.tanzania.go.tz/egov_uploads/documents/PDF_-_MWONGOZO_WA_ASASI_TAASISI_NA_MAKUNDI_YA_WATU_-_FIN_AL_Sw.Pdf). Also see *Constitutional Review Commission*, Ripoti ya Tume kuhusu Mchakato wa Mabadiliko ya Katiba ya Jamhuri ya Muungano wa Tanzania, 2013, at p. 101.

55 Established under Section 22 of the Constitutional Review Act, 2011.

the (then) 355<sup>56</sup> Members of the National Assembly of the United Republic of Tanzania, all the (then) 82 Members of the Zanzibar House of Representatives, and an additional 201 delegates who were appointed by the President, in agreement with the President of Zanzibar.<sup>57</sup> 134 of these hailed from Mainland Tanzania and 67 from Zanzibar.<sup>58</sup> These 201 delegates represented various organisations and groups listed in the Constitutional Review Act.<sup>59</sup> The President invited each of these groups to submit four to nine suggestions per group for appointments.<sup>60</sup> When appointing delegates, the President had to consider the “qualifications and experience of the persons nominated” and gender parity.<sup>61</sup> The delegates elected a Chairperson and a Vice-Chairperson from among themselves who had to represent both parts of the Union.<sup>62</sup> With regard to the composition of the Constituent Assembly, consisting to a large extent of Members of Parliament and having a CCM<sup>63</sup> majority both among the Members of Parliament of the United Republic and the Members of the Zanzibar House of Representatives,<sup>64</sup> it was critically argued that constitution-making “is not an ordinary legislative act” but that it deals with the “concerns of the wider community of citizens”; for this reason, the involvement of political leaders motivated by party interests was seen as problematic.<sup>65</sup>

The Constituent Assembly started its work on 18 February 2014. Unlike the preparation of the First and Second Drafts of the Constitution, the preparation of the Proposed Constitu-

56 The Members of the National Assembly, with a total of 355 MPs, included (a) 239 members elected to represent the constituencies, (b) 102 women members (“special seats for women”), (c) five members elected by the Zanzibar House of Representatives from among its members, (d) the Attorney General and (e) eight members appointed by the President (out of the maximum of ten he could have appointed), according to Article 66 (1) (a), (b), (c), (d), (e) of the Constitution, 1977. It was only on 26 March 2015 that the President appointed the remaining two members under Article 66 (1) (e) of the Constitution, 1977 (The Guardian, 27 March 2015, <http://www.ippmedia.com/ftrend/?l=78700>), which led to the grand total of 357 MPs.

57 See Section 22 (1) (a) (b) (c) of the Constitutional Review Act, 2011.

58 According to Section 22 (2) of the Constitutional Review Act, 2011.

59 Section 22 (1) (a), (b), (c) of the Constitutional Review Act, 2011, as amended: 20 persons from non-governmental organisations, 20 from faith-based organisations, 42 from political parties, 20 from higher learning institutions, 20 from groups of persons with disabilities, 19 from trade union organisations, ten from associations representing livestock keepers, ten from fisheries associations, 20 from agricultural associations and 20 from other groups having common interest.

60 Section 22 (2A) of the Constitutional Review Act, 2011.

61 Section 22 (2A) of the Constitutional Review Act, 2011.

62 Section 23 (1), (2) of the Constitutional Review Act, 2011. Samuel Sitta was elected chairperson and Samia Suluhu vice-chairperson.

63 Chama cha Mapinduzi, the majority party.

64 See *Tulia Ackson*, *Winnowing Tanzania’s Proposed Constitution: The Legitimacy Question*, in this issue, p. 372.

65 *Kituo cha Katiba: Eastern Africa Centre for Constitutional Development*, note 15, pp. 27-28; see also *Peter Nyanje*, *Party Interests Threaten Tanzania’s Constitution-Making Process*, *The East African*, 8 March 2014.

tion generated a big controversy regarding the scope of the mandate of the Constituent Assembly, as well as the modality of the proceedings in the Assembly. At the centre of this quagmire was the decision by the Constituent Assembly to materially alter the content of the Second Draft Constitution as presented to it by the Constitutional Review Commission, an act which was deemed to contravene Section 25 of the Constitutional Review Act, 2011 from which the Constituent Assembly drew its mandate.<sup>66</sup>

When there were indications that the Constituent Assembly would overhaul the Second Draft Constitution and remove a number of provisions which had been incorporated by the Constitutional Review Commission on the basis of the people's views collected by the Commission according to its mandate, a group of 130 Delegates left the Constituent Assembly. These were those who formed the Coalition of Defenders of a People's Constitution (UKAWA),<sup>67</sup> mainly from the major opposition parties.<sup>68</sup> The major reason advanced by UKAWA was that "the ruling party using its majority membership was taking the CA in the wrong direction by overhauling the draft Constitution, which was the product of people through the CRC..."<sup>69</sup> UKAWA, through its members, fiercely opposed the move by the Constituent Assembly to replace the Union structure proposed by the Constitutional Review Commission (which the latter regarded as "the key plank of the draft constitution") with a two-government structure as being a move tantamount to an attempt by the ruling party to maintain the status quo.<sup>70</sup> There were also charges by UKAWA "that the draft is promoting segregation instead of enhancing unity" and concerns that the constitutional drafting process "could lead to social unrest" or promote "discrimination on the basis of origin" from Mainland Tanzania and from Zanzibar.<sup>71</sup> The further preparation of the Pro-

66 Section 25 of the Constitutional Review Act, 2011 reads: "Powers of Constituent Assembly. (1) The Constituent Assembly shall have and exercise powers to make provisions for the New Constitution of the United Republic of Tanzania and to make consequential and transitional provisions to the enactment of such constitution and to make such other provisions as the Constituent Assembly may find necessary. (2) The powers of the Constituent Assembly to make provisions for the proposed Constitution shall be exercised by a Draft Constitution tabled by the Chairman of the Commission and passed by the Constituent Assembly."

67 UKAWA: Umoja wa Katiba ya Wananchi.

68 CHADEMA (Chama cha Demokrasia na Maendeleo), CUF (Civic United Front) and NCCR Mageuzi (National Convention for Construction and Reform – Mageuzi), 'mageuzi' meaning reform.

69 *Mwasa Jingi*, Does UKAWA Boycott Make Sense, *The Citizen*, 1 February 2015. CA: Constituent Assembly; CRC: Constitutional Review Commission.

70 *Erick Kabendera*, Tanzania: As Constitutional Reform Stalls, Jakaya Kikwete Risks Losing his Legacy, *The East African*, 2 October 2014, <http://africanarguments.org/2014/10/02/tanzania-as-constitutional-reform-stalls-jakaya-kikwete-risks-losing-his-legacy-by-erick-kabendera>. For a discussion of these claims see below under D. II.; and *Ackson*, note 64, pp. 375, 385.

71 World Bulletin/News Desk, 18 April, 2014, Tanzania Opposition Quits Constitution-Drafting Body, <http://www.worldbulletin.net/servisler/haberYazdir/134093/haber>.

posed Constitution took place in the absence of those 130 delegates.<sup>72</sup> On 2 October 2014, the Constituent Assembly completed its task and submitted the Proposed Constitution to the President.

#### *IV. Validation of the Proposed Constitution through Referendum*

The last component of Tanzania's constitutional reform process, as provided for in the Referendum Act, 2013,<sup>73</sup> is the validation of the Proposed Constitution through a referendum organised, conducted and supervised by the National Electoral Commission in collaboration with the Zanzibar Electoral Commission.<sup>74</sup> Participation in the referendum is open to those registered in the registers of voters established in Mainland Tanzania and in Zanzibar.<sup>75</sup> The Proposed Constitution will be considered approved if it is supported by more than 50 per cent of the votes cast in Mainland Tanzania and more than 50 per cent of the votes cast in Zanzibar.<sup>76</sup>

### **D. Some Key Features of the Constitutional Reform**

#### *I. Scope and Structure of the Constitution*

The two Draft Constitutions and the Proposed Constitution of the United Republic of Tanzania were milestones in Tanzania's constitutional reform process as they introduced new features. Compared to the Constitution, 1977, they are more comprehensive in terms of the scope covered and more voluminous in terms of the number of chapters and articles.<sup>77</sup> While the Constitution, 1977 has ten Chapters with 152 Articles, the First Draft Constitution of June 2013 had 16 Chapters with 240 Articles, the Second Draft Constitution of December 2013 had 17 Chapters with 271 Articles, and the Proposed Constitution of October 2014 has 19 Chapters with 296 Articles. The increase is due firstly to the introduction of new rights, such as citizenship (in the two Drafts and in the Proposed Constitution) and land, natural resources and environment (in the Proposed Constitution), and secondly to the elevation to independent chapters of certain parts or provisions of the Constitution, 1977, such as human rights, elections and public leadership ethics.

72 See *Ackson*, note 64, pp. 376 ff., on the question whether this "walk-out" of a number of delegates led to a "delegitimisation" of the further process and its product.

73 See Section 28B of the Constitutional Review Act, 2011, read together with the Referendum Act, 2013.

74 Section 36 (1) of the Referendum Act, 2013.

75 Section 39 of the Referendum Act, 2013.

76 Section 41 (2) of the Referendum Act, 2013, with the possibility of a repetition of the referendum, Section 41 (3) of the Referendum Act, 2013. See *Kituo cha Katiba: Eastern Africa Centre for Constitutional Development*, note 15, pp. 30 ff., on some problems.

77 Although the increased number of chapters was partly caused by greater differentiation within the existing chapters, some new chapters were also added.

Like the Constitution, 1977, both Draft Constitutions and the Proposed Constitution open with a Preamble. The Constitution, 1977 has two Schedules added at the end; the First and Second Drafts had one Schedule each; and the Proposed Constitution has three Schedules. All these Schedules are small.

The ten substantive chapters of the Constitution, 1977 contain the following titles: (1) The United Republic, Political Parties, the People, and the Policy of Socialism and Self-Reliance; (2) The Executive of the United Republic; (3) The Legislature of the United Republic; (4) The Revolutionary Government of Zanzibar, the Zanzibar Revolutionary Council, and the House of Representatives of Zanzibar; (5) Dispensation of Justice in the United Republic; (6) The Commission for Human Rights and Good Governance, and the Public Leaders' Ethics Secretariat; (7) Provisions Regarding the Finances of the United Republic; (8) Public Authorities; (9) Armed Forces; and (10) Miscellaneous Provisions.

The 16 chapters of the First Draft Constitution covered (1) The Republic of Tanzania; (2) Fundamental Objectives and Directive Principles of State Policy; (3) Leadership Ethics; (4) Human Rights; (5) Citizenship; (6) Structure of the Union; (7) Union Government; (8) Coordination of Partner States; (9) Union Parliament; (10) Judiciary of the Union; (11) Public Service of the Union; (12) Elections; (13) Accountability Institutions; (14) Finances of the Union; (15) Defence and Security of the United Republic; and (16) Miscellaneous Provisions.

The Second Draft Constitution maintained all of these and added one more chapter: (17) General, Transitional and Consequential Provisions. This chapter was specially tailored to facilitate a smooth transition to the proposed new constitutional order. The Second Draft Constitution largely resembled its predecessor, the First Draft Constitution, as most of the proposals made in the First Draft were sustained in the Second Draft, except for a few modifications.

The Proposed Constitution added two more chapters to the 17 chapters of the Second Draft, thus making the total number of 19 chapters. The addition of these chapters, on Land, Natural Resources and Environment (inserted as Chapter Three) and on the Revolutionary Government of Zanzibar (inserted as Chapter Eleven), was necessitated by the return of the Proposed Constitution to the two-government structure, as opposed to the three-government structure provided for in the First and Second Drafts.<sup>78</sup>

In sum, the Proposed Constitution is similar to the two Draft Constitutions in so far as they are all more comprehensive in terms of scope and number of provisions in comparison to the Constitution, 1977. In terms of content, the Proposed Constitution differs significantly from the two Drafts as it identifies itself to a greater extent than the First and Second Drafts with a number of key features of the Constitution, 1977. The first to be discussed here is the structure of the Union.

78 See below, D. II.

## II. Structure of the Union – Two or Three Governments?

The First Draft Constitution proposed a federal mode of governance with a three-government structure composed of (1) the Government of the United Republic of Tanzania (the Union government); (2) the Government of Mainland Tanzania; and (3) the Government of Zanzibar.<sup>79</sup> This proposal was sustained in the Second Draft Constitution.<sup>80</sup> This was a departure from the two-government structure as provided for in the Constitution, 1977, a structure which had been in existence since the formation of the Union in 1964.<sup>81</sup>

Within the three-government structure proposed in the First and Second Drafts, the Union government would be responsible exclusively for Union matters, while the government of Mainland Tanzania and that of Zanzibar would each have autonomy over matters falling outside matters listed as Union matters.<sup>82</sup> The legislative, executive and judicial branches of the federal government would operate independently from those of Mainland Tanzania and of Zanzibar because of their different fields of competence, with the exception of the Court of Appeal<sup>83</sup> and the Supreme Court.<sup>84</sup> These courts would serve as highest appellate bodies for both Mainland Tanzania and Zanzibar, while below this level, Mainland Tanzania and Zanzibar would each continue to have their own separate court structure up to High Court level.<sup>85</sup> The Supreme Court would also have original jurisdiction in some cases.<sup>86</sup>

As a consequence of the proposal of a three-government structure, the number of Union matters was substantially reduced, from 22 Union matters under the Constitution, 1977 to seven Union matters under the First and Second Drafts, these being (1) Constitution and Authority of the United Republic, (2) Defence and Security of the United Republic, (3) Citizenship and Migration, (4) Currency and Central Bank, (5) Foreign Affairs, (6) Registration of Political Parties, and (7) Income Tax/Excise Duty as specified in the Schedule to the First and Second Draft Constitution, respectively.<sup>87</sup>

79 Article 57 of the First Draft Constitution.

80 Article 60 of the Second Draft Constitution.

81 See above B. II. 1. In the course of earlier reform discussions, a three-government structure had already been suggested by the Nyalali Commission in 1992 and the Kisanga Committee in 1998, see *Peter* 2013, note 27, p. 2. See also the articles in the African Review, special issue entitled “Fifty Years of the Union between Tanganyika and Zanzibar” (Volume 41 No. 1, 2014), which was published on the occasion of the 50th anniversary of the Union between Tanganyika and Zanzibar in 1964 and was dedicated to the debate on the Union structure.

82 See the Schedule to the First and Second Draft Constitutions.

83 Article 158 of the First Draft Constitution; Article 165 of the Second Draft Constitution.

84 Article 147 of the First Draft Constitution; Articles 154 of the Second Draft Constitution.

85 Articles 143, 146 of the First Draft Constitution; Articles 150, 153 of the Second Draft Constitution.

86 See below at note 116.

87 Article 60, read together with the Schedule, of the First Draft Constitution (with the following specification of (7): income tax, customs duty and excise duty on goods manufactured in Tanza-

The Proposed Constitution defies these proposals by reverting to the two-government structure of the Constitution, 1977, composed of the Union government, which is at the same time responsible for Mainland Tanzania, and the government of Zanzibar,<sup>88</sup> thereby maintaining the status quo. Burying hopes for a new government structure and the ensuing reforms as proposed in the first two Drafts, the Proposed Constitution borrows extensively from the Constitution, 1977. It provides that the Union government should oversee Union matters and matters concerning Mainland Tanzania, while the government of Zanzibar should take charge of all non-Union matters concerning Zanzibar.<sup>89</sup> Each of the two governments should have all three branches of state, that is, the legislative, executive and judicial branches. For purposes of facilitating smooth governance relations, a commission in charge of the coordination of power relations between the two governments is provided for under Chapter Nine of the Proposed Constitution.<sup>90</sup> A commission similar to this was also provided for in the First and Second Drafts.<sup>91</sup>

As a consequence of the return to the two-government structure, the list of Union matters under the Proposed Constitution has been increased to 16 items. The Union matters provided for in the Proposed Constitution are: (1) Constitution and Authority of the United Republic; (2) Foreign Affairs; (3) Defence and Security of the United Republic; (4) Police; (5) Emergency Powers; (6) Citizenship and Migration; (7) Service in the Union Government; (8) Income Tax as specified; (9) Communication; (10) Currency and Central Bank; (11) Higher Education; (12) National Examination Council; (13) Security and Air Transport; (14) Weather Forecast; (15) Supreme Court and Court of Appeal; and (16) Registration of Political Parties.<sup>92</sup> All these Union matters provided for by the Proposed Constitution are also listed as Union matters in the Constitution, 1977.<sup>93</sup> Together with some additional matters,<sup>94</sup> the total is 22 in the case of the Constitution, 1977, as mentioned above. Under the Proposed Constitution, the government of Zanzibar can enter into regional and international relations on non-Union matters, in cooperation with the Union government.<sup>95</sup>

nia); Article 63, read together with the Schedule, of the Second Draft Constitution (with the following specification of (7): excise duty of goods and non-tax revenue accrued from Union matters). *Peter* 2013, note 27, p. 2.

88 Article 73 of the Proposed Constitution.

89 Articles 75 and 76 of the Proposed Constitution.

90 Articles 127 and 128 of the Proposed Constitution.

91 Articles 102-104 of the First Draft Constitution; Articles 109-112 of the Second Draft Constitution.

92 Article 74 (3), read together with Schedule 1, of the Proposed Constitution.

93 Article 4 (3), read together with Schedule 1, of the Constitution, 1977.

94 These include: (8) External borrowing and trade; (13) Industrial licensing and statistics; (15) Mineral oil resources, including crude oil, other categories of oil or products and natural gas; and (18) Research.

95 Article 76 (2) and (3) of the Proposed Constitution; Union matters according to Article 74 (3) and Schedule 1 of the Proposed Constitution. Cf. Article 62 of the First Draft; Article 65 of the Second Draft.

Under the framework of the Constitution, 1977, international affairs are a preserve of the Union government,<sup>96</sup> hence, Zanzibar cannot on its own enter into international relations, although Zanzibar itself claims the capacity to do so.<sup>97</sup>

The structure of the executive and the legislature is also worthy of attention in this context. Under the Constitution, 1977, the cabinet is presided over by the President<sup>98</sup> and otherwise consists of the Vice-President and the Prime Minister of the United Republic, the President of Zanzibar, and the Ministers of the United Republic.<sup>99</sup> The First and Second Drafts followed this pattern with regard to the President and Vice-President but did not include the President of Zanzibar in the cabinet; they also replaced the Prime Minister by the Senior Minister (who basically would have the same functions as the Prime Minister).<sup>100</sup>

The Proposed Constitution provides for three Vice-Presidents.<sup>101</sup> Besides the First Vice-President,<sup>102</sup> the President of Zanzibar is to be the Second Vice-President<sup>103</sup> and the Prime Minister is to be the Third Vice-President.<sup>104</sup> One of the contentious issues in the framework of the Constitution, 1977 was the lack of clarity regarding the status of the President of Zanzibar in the Union hierarchy. The Proposed Constitution tries to resolve this.

As regards the overall size of the cabinet, the original idea of the First and Second Draft Constitutions was to have a lean cabinet with only 15 Ministers.<sup>105</sup> The Constitution, 1977 does not prescribe the number of Ministers. The actual number of Ministers has fluctuated. At present (i.e. in June 2015) there are 30 Ministers. According to the Proposed Constitution, the maximum number of Ministers and Deputy Ministers taken together is 40.<sup>106</sup> Deputy Ministers are not members of the cabinet.<sup>107</sup> If one assumes that the number of Ministers would be about half of this, i.e. 20, the size of the cabinet under the Proposed Constitution could also be called lean, especially as these figures must be seen in the light of the proposed structure of the Union and the number of Union matters under the First and Second Draft Constitutions, the Constitution, 1977 and the Proposed Constitution, respectively.

96 Listed as item 2 in the list of Union matters.

97 *Maalim*, note 18, pp. 67 ff., 74, 75, also discussing the controversial points.

98 Article 54 (2) of the Constitution, 1977.

99 Articles 33, 47, 51, 54 (1) of the Constitution, 1977.

100 Article 92 (1) of the First Draft Constitution; Article 97 (1) of the Second Draft Constitution.

101 Article 99 of the Proposed Constitution. On the possibility of complications arising if there are several vice-presidents, see *John Hatchard/Muna Ndulo/Peter Slinn*, *Comparative Constitutionalism and Good Governance in the Commonwealth. An Eastern and Southern African Perspective*, Cambridge 2004, p. 67.

102 Articles 99 (a), 100-106 of the Proposed Constitution.

103 Articles 99 (b), 107 of the Proposed Constitution.

104 Articles 99 (c), 108, 110-113 of the Proposed Constitution.

105 Article 93 (2) of the First Draft; Article 98 (2) of the Second Draft.

106 Article 115 (2) of the Proposed Constitution.

107 Article 114 (1) of the Proposed Constitution.

The latter point is also relevant with regard to the size of the parliament. While the Constitution, 1977 does not indicate a maximum number of Members of Parliament,<sup>108</sup> and currently has a total of 357<sup>109</sup> MPs, the Second Draft Constitution sought to have a lean parliament with only 75 members which would have been in charge of the Union only.<sup>110</sup> The Proposed Constitution does not provide for a maximum number but allows for a number of MPs between 340 and 390 who would be in charge of the Union and of Mainland Tanzania matters.<sup>111</sup> These varying numbers of MPs are thus the result of the different government structures.

Another feature deserving some attention here is the structure of the judiciary. There are pertinent proposals in terms of both the structure and the actual functioning of the judiciary, with much emphasis on promoting judicial independence. While the highest court under the Constitution, 1977 is the Court of Appeal, the Proposed Constitution, following in this regard the First and Second Drafts,<sup>112</sup> modifies the structure of the judiciary by the introduction of a new Supreme Court<sup>113</sup> serving as the highest judicial organ. It would serve as the final appellate body for appeal matters decided by the Court of Appeal of Tanzania,<sup>114</sup> which in the proposed structure would be the second highest judicial organ in the hierarchy of the courts.<sup>115</sup> Moreover, the Supreme Court would have exclusive and original jurisdiction, *inter alia*, over matters concerning presidential elections, the interpretation and the implementation of the Constitution.<sup>116</sup> Also, the Proposed Constitution endorses the proposal to elevate the Judicial Fund to a constitutional body, a proposal which, if sus-

108 But provides for a special distribution of seats; for the details see Article 66 (1) of the Constitution, 1977.

109 See note 56.

110 70 members elected from the constituencies and five members elected to represent persons with disabilities, Article 113 (2) of the Second Draft Constitution. Article 105 (2) of the First Draft Constitution does not expressly indicate a maximum number.

111 Article 129 (5) of the Proposed Constitution. Besides the MPs directly elected from the constituencies, it would include five MPs representing people with disabilities, and ten MPs appointed by the President, Article 129 (2) of the Proposed Constitution.

112 Article 147 (1) of the First Draft Constitution; Article 154 (1) of the Second Draft Constitution.

113 Led by the Chief Justice and Deputy Chief Justice, Article 171 of the Proposed Constitution. See the discussion in *Damian Z. Lubuva*, The Court Structure and the Need for the Establishment of an Appellate Court above the Court of Appeal, in: Chris Maina Peter/Helen Kijo-Bisimba, Law and Justice in Tanzania. Quarter of a Century of the Court of Appeal, Dar es Salaam, 2005, 99-110, pp. 104-110.

114 Article 173 (1) (b) of the Proposed Constitution; see also Article 156 (1) (d) of the Second Draft Constitution. The Court of Appeal is the appeal court both for Mainland Tanzania and Zanzibar.

115 Article 182 (1) of the Proposed Constitution.

116 Article 173 (1) (a) (i), (ii), (iii) of the Proposed Constitution; see also Article 149 (1) (a), (b) of the First Draft Constitution; Article 156 (1) (a), (b) of the Second Draft Constitution.

tained, holds the potential of safeguarding the economic and financial independence of the judiciary.<sup>117</sup>

### *III. National Values and Fundamental Objectives of State Policy*

Both Draft Constitutions and the Proposed Constitution include a set of national values in their substantive provisions. There are differences, however, in the content of the relevant provisions and the placement of the values.

The Constitution, 1977 mentions the principles of freedom, justice, fraternity and concord in the first paragraph of its Preamble. Article 8 (1) on “The Government and the People” of the Constitution, 1977 mentions democracy and social justice; Article 8 (1) (a): sovereignty of the people; (b) welfare of the people; (c) accountability of the government to the people; (d) participation of the people in government affairs; Article 9: freedom, justice, fraternity, concord, policy of socialism and self-reliance; and Article 9 (a): human dignity and other human rights.

The Preambles of the two Draft Constitutions and of the Proposed Constitution contain in their first paragraph a firm expression of the desire to build a society founded on the principles of human dignity, fraternity, freedom, justice, equality, peace, unity and solidarity.<sup>118</sup> Both Drafts listed two of these also as “National Values” in their Article 5, i.e. human dignity and unity, and added further national values: patriotism, integrity, transparency, accountability and the national language. In Article 10 (1) of the Second Draft on “Fundamental Goals”, justice, fraternity, unity and stability were listed and, in addition, democracy, the rule of law and sustainable development and self-reliance. The following sub-articles provided a mechanism for realisation of the fundamental values.<sup>119</sup> These provisions stated clearly the political, social, economic and cultural objectives of the government as well as the strategies for achieving these objectives.

The Proposed Constitution, while supporting the inclusion of national values in substantive provisions, has made substantial changes in the relevant provisions. The list of national values, as provided for in the two Draft Constitutions, in Article 5, has been changed. While human dignity and the national language<sup>120</sup> have been kept as national values, and complemented by the Union (between Mainland Tanzania and Zanzibar), fraternity, peace and stability as further national values,<sup>121</sup> all the other items which were listed in the two previous drafts as national values have been shifted from Article 5 on “National Values” to Article 6 on “Principle of Good Governance”: patriotism, integrity, (national) unity, trans-

117 Article 207 of the Proposed Constitution; see also Article 183 of the Second Draft Constitution. The Judicial Fund is mainly to cover the administrative and operative costs of the judiciary.

118 Preambles of the First and Second Drafts and of the Proposed Constitution. The Proposed Constitution adds to this list: self-reliance and stability.

119 Article 10 (2), (3) (a), (b), (c), (d) of the Second Draft Constitution.

120 Which appears as “Kiswahili language” in the Proposed Constitution.

121 See Article 5 of the Proposed Constitution.

parency and accountability.<sup>122</sup> On the one hand, the inclusion of these values under the principle of good governance means clear, value-based requirements for leaders' behaviour. On the other hand, it is difficult to comprehend the rationale of placing some of these items under the provision on principle of good governance only. For example, patriotism and integrity should apply to all persons and not only to those in power. Moreover, the question is how such leadership quality can actually be achieved and whether a system of reliable checks and balances is also provided for.

#### *IV. Sovereignty of the People*

The First Draft Constitution was described as a “people-centred Constitution”.<sup>123</sup> Both the First and Second Draft Constitutions contained affirmations of the supremacy of the people, which forms the nucleus of the principle of democracy. The substantive provisions of the two Drafts resonated around the imperative of addressing the needs of the people and the establishment of a democratic order which maximises the people's participation in public affairs. This was unlike the Constitution, 1977, where supremacy of the people is reflected in the Preamble and the Fundamental Objectives and Directive Principles of State Policy only,<sup>124</sup> which are not enforceable. The First and Second Drafts, in addition to stating the doctrine of sovereignty of the people in their Preambles, went ahead to include it in their substantive provisions in Chapter One. In a Part especially dedicated to the power of the people, both Drafts defined what exactly the doctrine of sovereignty of the people entails,<sup>125</sup> i.e. that sovereignty resides in the people, from whom the government derives all its powers, authority and legitimacy.<sup>126</sup> The main objective of the government was described as promoting development and the people's welfare<sup>127</sup> and, in so doing, the government should be responsible and accountable to the people.<sup>128</sup>

The provisions of the First and Second Drafts in Chapter Three on “Leadership Ethics and Integrity” and in Chapter Four on “Human Rights” also strongly supported the doctrine of sovereignty of the people. It was clearly stipulated, for example, that the power assigned to a public officer vested in that officer the responsibility to serve the people, presumably as

122 Further listed there are democracy, rule of law, people's involvement, human rights, and gender equality.

123 *Peter* 2013, note 27, p. 7.

124 Article 8 (1) of the Constitution, 1977.

125 Articles 6, 7 of the First Draft Constitution; Articles 6, 7 of the Second Draft Constitution.

126 Article 6 (a) of the First Draft Constitution; Article 6 (a) of the Second Draft Constitution. Cf. Article 8 (1) (a) of the Constitution, 1977.

127 Cf. Article 8 (1) (b) of the Constitution, 1977.

128 Article 6 (b), (c) of both the First and Second Draft Constitutions. Cf. Article 8 (1) (c) of the Constitution, 1977.

opposed to the power to rule over them. And therefore state officers should respect the people in the execution of their functions.<sup>129</sup>

Emulating the First and Second Drafts, the Proposed Constitution stipulates the doctrine of supremacy of the people in its substantive provisions. Articles 7 and 8 which provide for this doctrine are similar to the corresponding provisions in the First and Second Drafts.<sup>130</sup> The impression that emerges from these two provisions is that the Constitutional Review Commission and the Constituent Assembly shared a desire to promote the sovereignty of the people over the government. Article 6 on “Good Governance” of the Proposed Constitution can also be regarded as supporting this line, as it lays down how leaders should behave vis-à-vis the people, listing as the central elements people’s involvement, transparency and accountability.<sup>131</sup> On the other hand, the Proposed Constitution contains several provisions that reduce the scope of the doctrine of sovereignty of the people, such as the omission of certain items<sup>132</sup> from the list of national values which were included in the First and Second Drafts and the retention of a powerful presidency.<sup>133</sup>

Another issue is the powers conferred by the two Drafts on the electorate to recall Members of Parliament in the event that the said Members should fail to represent them well. Citizens were given the right to remove their Member of Parliament from office if the Member of Parliament supported policies which were against the interests of the voters or the nation; if they failed to deal adequately with problems their voters were facing; or if they shifted their residence away from the constituency for more than six months without good reason. Further grounds could be specified by an Act of Parliament.<sup>134</sup> This provision has been removed in the Proposed Constitution although it is a current problem that in some of the constituencies Members of Parliament disappear immediately after election and are not seen again until near the end of their term.

129 Article 13 (1) (a) (ii), (b) both of the First and Second Draft Constitutions. Article 28 (1) (a) (ii), (b) of the Proposed Constitution confirms this but omits/reduces specific provisions on leadership ethics which were contained in Articles 15-20/21-22 of the First and Second Draft Constitutions (see Articles 28-29/30-31 of the Proposed Constitution). With regard to a Public Leaders’ Ethics Commission see Articles 188-193 of the First Draft Constitution, Articles 200-207 of the Second Draft Constitution and Articles 228-234 of the Proposed Constitution. For the Ethics Commissioner and the Public Leaders’ Ethics Secretariat under the Constitution, 1977 see Articles 69 (4), 132 of the Constitution, 1977.

130 Articles 6, 7 of the First Draft Constitution; Articles 6, 7 of the Second Draft Constitution.

131 See above under D. III.

132 These are patriotism, integrity, (national) unity, transparency and accountability; see above under D. III.

133 See below under D. IX.

134 Article 124 of the First Draft Constitution; Article 129 of the Second Draft Constitution.

### V. *Supremacy of the Constitution and Entrenchments*

Building on the Constitution, 1977,<sup>135</sup> both the First and Second Drafts made a definite declaration of the supremacy of the Union Constitution over all laws, statutory as well as customary, and over the Constitutions of Zanzibar and the would-be Constitution of Mainland Tanzania.<sup>136</sup> The Proposed Constitution is basically in agreement with this provision. Its declaration of constitutional supremacy<sup>137</sup> almost entirely corresponds to that of the Second Draft.

Apart from asserting the supremacy of the Union Constitution, different strategies to safeguard the Constitution against unwarranted amendments can be identified.

Under the Constitution, 1977, amendments to constitutional provisions require a two-thirds majority in parliament.<sup>138</sup> Amendments in the following areas, however, are qualified by the requirement of a two-thirds majority of all Members of Parliament from Mainland Tanzania and a two-thirds majority of all Members of Parliament from Zanzibar: (1) the existence of the United Republic; (2) the existence of the Office of President of the United Republic; (3) the Authority of the Government of the United Republic; (4) the existence of the Parliament of the United Republic; (5) the Authority of the Government of Zanzibar; (6) the High Court of Zanzibar; (7) the list of Union matters; and (8) the number of Members of Parliament from Zanzibar.<sup>139</sup>

Under the Second Draft Constitution, all constitutional provisions were entrenched by the requirement of a two-thirds majority of all Members of Parliament from Mainland Tanzania and of a two-thirds majority of all Members of Parliament from Zanzibar<sup>140</sup> unless they were among those constitutional provisions which were even further entrenched by denying Parliament the power to change them<sup>141</sup> and requiring a referendum with a two-thirds majority of the citizens of Mainland Tanzania and of Zanzibar.<sup>142</sup> These were matters covered in Chapter One (on the United Republic of Tanzania, i.e. the name of the country, the territorial boundaries, national symbols, language and national values, sovereignty of the people and supremacy of the constitution), Chapter Two (fundamental objectives, directives of government principles and state policy), Chapter Four (containing the Bill of Rights), Article 60 (on the structure of the Union), Article 79 (containing qualifications for election as president), the list of Union matters (according to Article 63, read together with

135 I.e. on Article 64 (5) of the Constitution, 1977.

136 Article 8 of the First Draft Constitution; Article 8 of the Second Draft Constitution.

137 Article 9 of the Proposed Constitution.

138 Article 98 (1) (a) and (b) Constitution, 1977.

139 Article 98 (1) (b), read together with Schedule 2, List 2, of the Constitution, 1977.

140 Article 118 (2) of the Second Draft; see also Article 111 of the First Draft.

141 Article 119 of the Second Draft; comparable provisions are contained in Article 112 of the First Draft.

142 On the problem connected with this provision, see below in this section (D. V.).

Schedule 1), the existence of the United Republic (see Article 1), and the entrenching provision (Article 119) itself.<sup>143</sup>

Unlike both the Constitution, 1977 and the Draft Constitutions, the Proposed Constitution does not provide for a general entrenchment of all constitutional provisions but requires only a simple majority for changes to the constitutional provisions,<sup>144</sup> with the following exceptions: constitutional provisions in relation to (1) Union matters and (2) the list of Union matters which are entrenched by the requirement of a two-thirds majority of all Members of Parliament from Mainland Tanzania and of a two-thirds majority of all Members of Parliament from Zanzibar,<sup>145</sup> constitutional provisions with regard to (1) the structure of the United Republic and (2) the existence of the United Republic, as well as (3) the entrenching provision itself, are entrenched by requiring a referendum with an absolute majority of the citizens of Tanzania Mainland and of Zanzibar in order to change these provisions.<sup>146</sup>

It is beyond the scope of this overview article to undertake a detailed comparative analysis of the scope and mechanisms of entrenchments provided for in the Constitution, 1977, the two Drafts and the Proposed Constitution. Such an analysis would have to look at the following aspects, among others: (i) The list of entrenched provisions in the Proposed Constitution is considerably shorter than the list in the Second Draft, such that the list of matters requiring a referendum in the event of amendment now contains only two substantive items, namely the structure of the Union and the existence of the Union,<sup>147</sup> and the list of matters requiring a two-thirds parliamentary majority also contains two items, i.e. (1) Union matters, and (2) the list of Union matters; the list of Union matters under the Proposed Constitution is considerably longer than that under the Second Draft.<sup>148</sup> (ii) One would also have to compare and analyse the entrenching mechanisms for each entrenched provision, looking at whether a qualified parliamentary majority or a referendum is provided for, and with which kind of majority it is combined in every single case. For instance, the Second Draft required the support of a majority of two thirds of the citizens both from Tanzania Mainland and from Zanzibar for a referendum for amendments to entrenched provisions.<sup>149</sup> One question here is whether a two-thirds majority of the citizens is not too high a requirement for a referendum. Another question is why the Second Draft spoke of two thirds of the citizens rather than two thirds of the votes cast. It is difficult to imagine how two thirds “of the citizens” from Tanzania Mainland and from Zanzibar, as required by the

143 Article 119 of the Second Draft Constitution.

144 Article 134 (1) (a) of the Proposed Constitution.

145 Article 134 (1) (b), read with Schedule 2, of the Proposed Constitution.

146 Article 134 (1) (c), read together with Schedule 3, of the Proposed Constitution.

147 Article 134 (1) (c), read together with Schedule 3, of the Proposed Constitution.

148 16 items in the case of the Proposed Constitution, Article 134 (1) (b), read together with Schedules 2 and 1, of the Proposed Constitution; seven items in the case of the Second Draft Constitution, Article 119 (d), read together with the Schedule, of the Second Draft.

149 Article 119 of the Second Draft.

Second Draft, could be determined for this purpose. (iii) The protection of the Constitution from being exposed to abuse by those in power and from being changed too easily on the basis of mere political interests was clearly a reason for the far-reaching entrenchments of the Second Draft.<sup>150</sup> The other side of the coin, however, is that such far-reaching entrenchments might make it nearly impossible to change the Constitution at all – even for noble reasons, such as an extension or improvement of human rights.<sup>151</sup>

Despite the need for a differentiating analysis before a final assessment is made possible, it is clear that, while the Constitution, 1977 and the Second Draft Constitution had residuary clauses providing for overall entrenchment in the form of a required two-thirds parliamentary majority for the remainder of the constitutional provisions which are not contained in the specific lists mentioned above,<sup>152</sup> in the case of the Proposed Constitution the remainder of provisions can be changed by a simple majority vote by the Members of Parliament.<sup>153</sup> The Constitution is thus treated like an ordinary law. This gives Parliament far-reaching powers to change major parts of the Constitution without a qualified majority or a specific procedure.

#### *VI. International and Regional Law*

The position of international law and regional law within the national legal system has not been accorded the attention it deserves in the ongoing constitutional review process. The relationship between international and regional law on the one hand and national law on the other hand has remained undefined. The questions central to defining this relationship are: (i) Is international/regional law part of the law of the land? (ii) What is the place of international/regional law in the hierarchy of the nation's law? and (iii) How should courts handle conflicts between international/regional law and municipal law?<sup>154</sup>

The Proposed Constitution, like the First and Second Drafts, and similar to the Constitution, 1977, deals with international law in the following way:

- 150 The fear was that the Constitution could be manipulated to serve political interests, for instance that, if the incumbent president is contemplating extending his term of office, he could too easily mobilise his or her peers in parliament to have the constitution changed. The maximum period of office as president is two terms of office of five years each; see Article 40 (1), (2) Constitution, 1977; and equally Article 76 (1), (2) First Draft Constitution; Article 83 (1), (2) Second Draft Constitution; Article 92 (1), (2) Proposed Constitution.
- 151 According to Article 119 (a), read together with Chapter Two, of the Second Draft Constitution, any change affecting constitutional human rights was possible only by referendum.
- 152 Article 98 (1) (a) of the Constitution, 1977 (two-thirds majority of members of parliament); Article 118 (2) of the Second Draft Constitution (two-thirds majority of members of parliament from Tanzania Mainland and two-thirds majority of members of parliament from Zanzibar).
- 153 Article 134 (1) (a) of the Proposed Constitution.
- 154 See *Khoti Chilomba Kamanga*, The Tanzania Draft Constitution of 2013: Panacea or Pandora's Box? The Guardian on Sunday (Tanzania), 16 June 2013, pp. 7-8.

- human dignity and other human rights are preserved and upheld taking into consideration the Tanzanian customs and traditions, the Universal Declaration of Human Rights and international conventions ratified by the United Republic;<sup>155</sup>
- the Parliament has the power to ratify international treaties;<sup>156</sup>
- the Parliament has the power to enact laws where implementation (probably meant: of international treaties) requires legislation.<sup>157</sup>

The First and Second Drafts had further provided that Parliament should have the power to discuss and ratify all contracts concerning natural resources which are managed by the government of the United Republic.<sup>158</sup> This has not been retained by the Proposed Constitution.

The First and Second Drafts had provided that the rights and freedoms contained in international human rights conventions ratified by the United Republic of Tanzania, except for provisions for which it was stated that they were not binding on the United Republic, would be part of the constitutional human rights.<sup>159</sup> In addition, the Second Draft had also included rights and freedoms contained in regional human rights conventions.<sup>160</sup> This monist approach of the two Draft Constitutions<sup>161</sup> was however not followed by the Proposed Constitution.

As regards the relevance of international law in the interpretation of constitutional human rights by the courts and other decision-making bodies, the First and Second Draft Constitutions, and equally the Proposed Constitution, suggested that international law must be considered.<sup>162</sup> In this respect, the two Constitutional Drafts and the Proposed Constitution confirm the long-standing Tanzanian case law jurisprudence<sup>163</sup> which has always held that

155 Articles 8 (2) (a) and 14 (2) (a) of the Proposed Constitution. See Article 9 (a), (f) of the Constitution, 1977; Articles 7 (2) (a) and 11 (3) (b) (i) of the First Draft; Articles 7 (2) (a) and 10 (3) (b) (i) of the Second Draft.

156 Article 131 (3) (g) of the Proposed Constitution. See Article 63 (3) (e) of the Constitution, 1977; Article 107 (2) (g) of the First Draft; Article 115 (2) (g) of the Second Draft.

157 Article 131 (3) (a) of the Proposed Constitution. See Article 63 (3) (d) of the Constitution, 1977; Article 107 (2) (f) of the First Draft; Article 115 (2) (a) of the Second Draft.

158 Article 107 (2) (h) of the First Draft; Article 115 (2) (h) of the Second Draft. See also similar proposals discussed and made by *Issa G. Shivji*, *Debating Constitutional Amendments in Tanzania*, Haki-Elimu Working Papers, Dar es Salaam, n. y., p. 3, [http://hakielimu.org/files/publication/s/document57debating\\_constitutional\\_amendments\\_tz\\_en.pdf](http://hakielimu.org/files/publication/s/document57debating_constitutional_amendments_tz_en.pdf).

159 Article 51 (3) of the First Draft Constitution; Article 53 (3) of the Second Draft Constitution.

160 Article 53 (3) of the Second Draft Constitution.

161 Cf. the Constitution of Kenya of 2010 whose Article 2 (6) reads: “Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”

162 Article 52 (1) (b) of the First Draft Constitution; Article 54 (1) (b) of the Second Draft Constitution; Article 65 (1) (a) of the Proposed Constitution.

163 See especially *Transport Equipment Ltd. and Reginald John Nolan v. Devram P. Valambia*, Court of Appeal of Tanzania at Dar es Salaam, Civil Application No. 19 of 1993 (unreported). For further discussion and references, see for instance *Juliana Masabo*, *The Protection of the Rights of Migrant Workers in Tanzania*, PhD thesis submitted to the University of Cape Town, 2012, p. 62; *B. C. Murungu*, *The Place of International Law in Human Rights Litigation in Tan-*

international law should be considered in the interpretation of the provisions of the constitutional chapter on Human Rights.

The Proposed Constitution provides that the foreign policy of the United Republic shall be pursued so as to promote regional and international cooperation and to adhere to international and regional agreements.<sup>164</sup> There are no provisions which are more specific on the status of laws adopted by regional economic communities and which provide for a transfer of sovereign powers to the regional community in either of the two Drafts or in the Proposed Constitution. Despite the important legal developments taking place in regional economic communities of which Tanzania is a member, the East African Community and the Southern African Development Community in particular, the Constitutional Review Commission and the Constituent Assembly saw no need to include articulate provisions on the position of the law of these regional communities in Tanzania's legal system.<sup>165</sup>

### VII. Human Rights

The two Draft Constitutions proposed substantial improvements to the Bill of Rights, as compared with the Constitution, 1977; and the Proposed Constitution has maintained and

zania, in: M. Killander (ed.), *International Law and Domestic Human Rights Litigation in Africa*, Pretoria 2010, pp. 57-69; *Ulrike Wanitzek*, *Women's and Children's Rights in Africa: A Case Study of International Human Rights and Family Law in Tanzanian Courts*, *Recht in Afrika – Law in Africa – Droit en Afrique* 11 (2008) 1, pp. 43-44; *Khoti Chilomba Kamanga*, *International Human Rights Law as Reflected in Tanzania's Treaty and Court Practice*, in: W. Binchy and C. Finnegan (eds.), *Human Rights, Constitutionalism and the Judiciary: Tanzanian and Irish Perspectives*, Dublin 2006, pp. 53-70; *Chris Maina Peter*, *Incorporation of International Conventions in Tanzania*, *International Law Review* 1997, pp. 172-173; *Palamagamba John Kabudi*, *The Judiciary and Human Rights in Tanzania: Domestic Application of International Human Rights Norms*, *Verfassung und Recht in Übersee* 24 (1991) 3, p. 277.

164 Article 22 (1) (a), (e) of the Proposed Constitution. See Article 12 (1) (a), (e) of the First Draft; Article 12 (1) (a), (e) of the Second Draft.

165 But successful regional economic integration requires the accommodation of community law in the national laws of the member states; see *Richard Frimpong Oppong*, *Legal Aspects of Economic Integration in Africa*, Cambridge 2011, pp. 209-210, with examples of European Union Member States, including Article 23 of the German Basic Law (Grundgesetz), and with the example of Article 3 of the Proposed New Constitution of Kenya of 2005 which was rejected in a referendum in 2005. Article 23 (1) of the German Basic Law provides specifically that “[w]ith a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. ...”. And the rejected Article 3 of the Proposed New Constitution of Kenya of 2005 read: “The laws of Kenya comprise this Constitution and each of the following laws to the extent that it is consistent with this Constitution: ... (f) the laws of the East African Community; and (g) customary international law, and international agreements, applicable to Kenya.” Instead, the Constitution of Kenya of 2010 now contains the provision contained in its Article 2 (6); see note above.

extended them. A progressive and up-to-date Bill of Rights was one of the key features for which the First Draft Constitution was applauded. Commenting immediately after the release of the First Draft Constitution, Chris Maina Peter observed that the Bill of Rights in the First Draft Constitution was “a relatively modern Bill of Rights. To be fair to the Commission, it has gone beyond what most of the civil society organisations have been demanding to be included in the new Constitution”.<sup>166</sup> Indeed, the Bill of Rights, as incorporated in the First Draft and maintained in the Second Draft and, with some modifications, in the Proposed Constitution, has been extended to the fullest by introducing some rights which were alien to the Bill of Rights under the Constitution, 1977, such as the right to recognition of one’s citizenship,<sup>167</sup> the rights of accused persons and convicts,<sup>168</sup> the right to a clean and safe environment,<sup>169</sup> and the rights of vulnerable and special groups, such as women,<sup>170</sup> children,<sup>171</sup> elderly persons,<sup>172</sup> persons living with disabilities,<sup>173</sup> and minorities.<sup>174</sup> In addition, the Proposed Constitution, like the two Drafts, proposes elevation of the right to education from State Objectives and Directive Principles of State Policy under the Constitution, 1977<sup>175</sup> to a right that is legally enforceable if denied.<sup>176</sup> The provision concerning the right to freedom of religion contained in the Constitution, 1977<sup>177</sup> has also been expanded in both the First and Second Drafts and in the Proposed Constitution.<sup>178</sup> The Pro-

166 Peter 2013, note 27, p. 5.

167 Article 37 First Draft; Article 28 Second Draft; Article 69 Proposed Constitution; see below at note 192.

168 Article 38 First Draft; Article 39 Second Draft; Article 48 Proposed Constitution.

169 Article 40 First Draft; Article 41 Second Draft; Article 50 Proposed Constitution. See *Lawyers’ Environment Action Team (LEAT)/Policy Forum*, Environmental Rights, Protection and Management in Tanzania. Justification for their Inclusion in the Would-Be New Constitution, Dar es Salaam 2012, <http://www.policyforum-tz.org/files/EnvironmentalRights.pdf>; *Hamudi Ismail Majamba*, Environmental Protection within the Framework of the East African Community: Lessons for Constitutional Reform in Tanzania, in: Johannes Döveling/Kennedy Gastorn/Ulrike Wanitzek (eds.), *Constitutional Reform Processes and Integration in East Africa*, Dar es Salaam 2013, 137-153.

170 Article 46 First Draft; Article 47 Second Draft; Article 57 Proposed Constitution.

171 Article 42 First Draft; Article 43 Second Draft; Article 53 Proposed Constitution.

172 Article 47 First Draft; Article 48 Second Draft; Article 58 Proposed Constitution.

173 Article 44 First Draft; Article 45 Second Draft; Article 55 Proposed Constitution.

174 Article 45 First Draft; Article 46 Second Draft; Article 56 Proposed Constitution.

175 Article 11 (2) of the Constitution, 1977.

176 Article 52 of the Proposed Constitution; see Article 41 of the First Draft Constitution; Article 42 of the Second Draft Constitution.

177 Article 19 of the Constitution, 1977.

178 Article 31 of the First Draft Constitution; Article 32 of the Second Draft Constitution; Article 41 of the Proposed Constitution. The introduction of Kadhi Courts in Mainland Tanzania (Kadhi Courts are in existence in Zanzibar) was a controversial issue during the constitutional review; see: Mahamaka ya Kadhi Yazikwa, Mtanzania, 30 September 2014, <http://www.tanzaniatoday.co.tz/news/mahakama-ya-kadhi-yazikwa>; Pinda Aiokoa Mahakama ya Kadhi, Mwananchi,

posed Constitution, apart from modifying some of the rights mentioned above, adds further rights, such as the right to health and to clean and safe water,<sup>179</sup> the rights of prisoners<sup>180</sup> and the rights of peasants, livestock holders, fishermen and miners.<sup>181</sup>

The Proposed Constitution sets certain new parameters within which the limitation of rights can be imposed.<sup>182</sup> A limitation of rights, if imposed, must be transparent and democratic and should be based on respect for human dignity, equality and freedom, taking into account factors such as the nature of the right or fundamental freedom; the importance and purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; the requirement that if less restrictive means to achieve a similar purpose are available, they should be preferred; and the importance of preserving national security.<sup>183</sup>

The Proposed Constitution retains the claw-back clause on the right to life contained in the Constitution, 1977,<sup>184</sup> and subjects this right to the law.<sup>185</sup> This limitation has been used to justify continued reliance on the death penalty for people convicted of capital of-

30 September, 2014, <http://mobile.mwananchi.co.tz/Habari/Pinda-aiokoa-Mahakama-ya-Kadhi/-/1597580/2469628/-/format/xhtml/-/15t4vqj/-/index.html>. Kadhi Courts were not incorporated into the Draft Constitutions and the Proposed Constitution. A Bill of the Written Laws (Miscellaneous Amendments) (No. 2) Act, 2014, Bills Supplement No. 9 of 31 October 2014, mentions Kadhi Courts within the Islamic Law (Restatement) Act, Cap. 375. However, the Islamic Law (Restatement) Act itself has never formally entered into force. The Bill providing for the introduction of Kadhi Courts was shelved as it had caused much uproar, see: Proposal for Kadhi Courts Set to Spark Fierce Debate, *The Citizen*, 27 January 2015, <http://www.thecitizen.co.tz/News/national/Proposal-for-Kadhi-courts-set-to-spark-fierce-debate/-/1840392/2603414/-/128s5bez/-/index.html>; Mtikila Sues Govt over 'Kadhi Court', <http://www.pesatimes.co.tz/news/governance/mtikila-sues-govt-over--kadhi-court/-/tanzania>.

179 Article 51 of the Proposed Constitution.

180 Article 48 (2) of the Proposed Constitution.

181 Article 46 of the Proposed Constitution.

182 Not contained in Article 30 of the Constitution, 1977, but in the two Drafts, see note 183.

183 Article 66 of the Proposed Constitution; cf. Article 53 of the First Draft Constitution, which is similar to Article 55 of the Second Draft Constitution. The question arises whether a limitation of rights requires a formal Act. Article 67 of the Proposed Constitution speaks only of an Act to "oversee the use and implementation of the rights, freedoms and duties".

184 Article 14 of the Constitution, 1977; Article 33 of the Proposed Constitution; similarly Article 23 of the First Draft Constitution; Article 24 of the Second Draft Constitution.

185 Within the boundaries set by the law.

fences.<sup>186</sup> Although the last execution was carried out in 1994,<sup>187</sup> a number of persons are still on death row.<sup>188</sup> It would have been desirable to take the constitutional review process as an opportunity to abolish the death penalty. A report by the Legal and Human Rights Centre indicates that “public opinion regarding the death penalty remains divided”, referring to a report by the Law Reform Commission according to which the majority view of the people favours retention of the death penalty,<sup>189</sup> and to another report according to which the majority does not approve of it.<sup>190</sup>

### VIII. Citizenship

First of all, it is notable that, unlike the Constitution, 1977, both the two Draft Constitutions and the Proposed Constitution provide for a right to recognition of one’s citizenship.<sup>191</sup> Bonaventure I. Rutinwa observed (with regard to the First Draft Constitution) that, although the marginal note formulates “right to citizenship”, the provision as such “does not, strictly, protect the right to citizenship. It simply protects the right to *recognition* of citizenship.”<sup>192</sup>

- 186 The death penalty is provided for in the case of murder (Sections 26, 196, 197 of the Penal Code, Cap. 16) and treason (Sections 39, 40 of the Penal Code, Cap. 16), see *Leonard P. Shaidi*, The Death Penalty in Tanzania: Law and Practice, n. p. n. y., [http://www.biicl.org/files/2213\\_shaidi\\_death\\_penalty\\_tanzania.pdf](http://www.biicl.org/files/2213_shaidi_death_penalty_tanzania.pdf); *Legal and Human Rights Centre/Zanzibar Legal Services Centre*, note 1, pp. 16-17. In *Republic v. Mbushuu @ Dominic Mnyaroje and Kalai Sangula*, High Court of Tanzania at Dodoma, Criminal Sessions Case No. 44 of 1991, reported in [1994] TLR 146, the High Court had held the death penalty unconstitutional; but it was declared constitutional by the Court of Appeal in *Mbushuu @ Dominic Mnyaroje and Another v. Republic*, Court of Appeal of Tanzania at Dar es Salaam, Criminal Appeal No. 142 of 1994, reported in [1995] TLR 97; critically *Hatchard/Ndulo/Slinn*, note 101, p. 180. See also *Helen Kijo-Bisimba/Chris Maina Peter*, Justice and Rule of Law in Tanzania. Selected Judgements and Writings of Justice James L. Mwalusanya and Commentaries, Dar es Salaam, 2005, pp. 37-39.
- 187 Tanzania is therefore characterised as “de facto abolitionist”, *Legal and Human Rights Centre/Zanzibar Legal Services Centre*, note 1, p. 17.
- 188 *Legal and Human Rights Centre*, Tanzania Human Rights Report 2008: Progress through Human Rights, 2009, [http://www.humanrights.or.tz/downloads/tanzania\\_human\\_rights\\_report\\_2008.pdf](http://www.humanrights.or.tz/downloads/tanzania_human_rights_report_2008.pdf); see also *Cornell University Law School*, Death Penalty Worldwide, Tanzania, 2014, <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Tanzania#f10-5>; and *Legal and Human Rights Centre/Zanzibar Legal Services Centre*, note 1, p. 17.
- 189 *Law Reform Commission of Tanzania*, Draft Discussion Paper on the Review of Capital Punishment, Corporal Punishment and Long Term Sentences in Tanzania, 2008, p. 40, as referred to in *Legal and Human Rights Centre*, note 188.
- 190 *Cornell University Law School*, note 188.
- 191 Article 37 of the First Draft; Article 38 of the Second Draft; Article 69 of the Proposed Constitution.
- 192 *Bonaventure Rutinwa*, Citizenship and Related Rights: Implications of the Proposed New Constitutional Dispensation in Tanzania, in: T. L. Maliyamkono/H. Mason/B. Rutinwa (eds.), A 100 Academics Search for Katiba Bora Tanzania, Dar es Salaam, Tema Publishers for Eastern and Southern African Universities Research Programme (ESAURP), 2014, p. 121.

Both Draft Constitutions and the Proposed Constitution contain a chapter on citizenship,<sup>193</sup> enumerating the modes of acquisition of citizenship, loss of citizenship and other matters pertaining to citizenship.<sup>194</sup> The provisions largely correspond to the Tanzania Citizenship Act, 1995<sup>195</sup> with modifications, particularly with regard to the categories of citizens proposed by reducing the modes of acquisition of citizenship from three (birth, descent, naturalisation) under the Tanzania Citizenship Act<sup>196</sup> to two (birth and registration) under the two Drafts and the Proposed Constitution.<sup>197</sup>

Citizens by birth are to be persons born in Tanzania if at the time of their birth at least one parent is or was a citizen of Tanzania, persons born outside Tanzania if at least one parent is a citizen of Tanzania,<sup>198</sup> and foundlings below the age of seven who have been found in Tanzania and whose parents are unknown.<sup>199</sup> Citizenship by registration can be applied for by migrants who are resident in Tanzania and are observant of the law and by spouses of Tanzanian citizens after seven years of marriage if they are resident in Tanzania and are observant of the law; a child adopted by a Tanzanian citizen can also acquire citizenship by registration.<sup>200</sup> It is remarkable that both Draft Constitutions and the Proposed Constitution provide for gender parity in the transmission of citizenship to a non-citizen (whether a spouse or a child), the right to which under the current regime is exclusively reserved for male citizens.<sup>201</sup> Of interest is also the development with regard to dual citizen-

- 193 Chapter Five of the First Draft Constitution; Chapter Five of the Second Draft Constitution; Chapter Six of the Proposed Constitution. *Bonaventure Rutinwa*, Constitutionalising Citizenship in Tanzania: Lessons from Other East African Jurisdictions, in: Johannes Döveling/Kennedy Gastorn/Ulrike Wanitzek (eds.), *Constitutional Reform Processes and Integration in East Africa*, Dar es Salaam 2013, p. 118, notes that the Constitution, 1961 had contained a chapter on citizenship which however „mysteriously disappeared in subsequent editions of the Constitution“.
- 194 Chapter Five of the First Draft Constitution (Articles 54-56); Chapter Five of the Second Draft Constitution (Articles 56-59); and Chapter Six of the Proposed Constitution (Articles 68-72).
- 195 Cap. 357 R. E. 2002.
- 196 Sections 5, 6, 8-12 of the Tanzania Citizenship Act, Cap. 357 R. E. 2002.
- 197 Article 54 (2) of the First Draft Constitution; Article 56 (2) of the Second Draft Constitution; Article 68 (2) of the Proposed Constitution. It is therefore imperative that the proposed categories take care of all the modes of acquisition of citizenship prescribed under the Citizenship Act.
- 198 This would replace citizenship by descent with its disadvantages, *Rutinwa*, note 192, p. 123; the disadvantages are explained in *Rutinwa*, note 193, pp. 120-121. However, in *Rutinwa*'s view the new provision goes too far, *Rutinwa*, note 192, pp. 123-124 (with a comparison with the Kenyan and Ugandan provisions).
- 199 Article 55 (1), (2) and (4) of the First Draft Constitution; Article 57 (1), (2) and (4) of the Second Draft Constitution; Article 70 (1), (2) and (4) of the Proposed Constitution. On foundlings see *Rutinwa*, note 192, pp. 124-125.
- 200 Article 71 (1), (2) and (5) of the Proposed Constitution; Article 58 (1), (2) and (5) of the Second Draft; Article 56 of the First Draft. This replaces citizenship by naturalisation under Section 9 (1) of the Citizenship Act, 1995, *Rutinwa*, note 192, p. 125.
- 201 The Tanzania Citizenship Act, 1995 (Cap. 357 R. E. 2002) which restricts this right exclusively to male citizens will have to abide with the Constitution. Section 11 of the Act reads: “Naturalization of women married to citizens of the United Republic (1) Subject to the provisions of sub-

ship. While neither the two Drafts nor the Proposed Constitution allow dual citizenship, the Second Draft and the Proposed Constitution contain provisions to take care of persons of Tanzanian descent who were once citizens of Tanzania but lost this citizenship because they acquired the citizenship of another country,<sup>202</sup> by proposing enactment of a law that would bestow a special status on this category of people.<sup>203</sup>

### *IX. Separation of Powers*<sup>204</sup>

The Constitution, 1977, although it enshrines the doctrine of separation of powers in its provisions,<sup>205</sup> does not put in place any mechanism for ensuring strict adherence to the tenets of this doctrine. It establishes the three branches of the state, the legislative, executive and judicial branches, and outlines the mandate and functions of each of these branches.<sup>206</sup> However, the remainder of the provisions of the Constitution, 1977 do not entrench this position further by ensuring that the separation of powers so envisaged also entails separation of functions as well as separation of personnel. There is, therefore, no strict separation of powers in terms of the functions of each branch of the state and the personnel vested with state powers.

section (2) and of section 6, a woman who is married to a citizen of the United Republic shall at any time during the life-time of the husband be entitled, upon making an application in the prescribed form, to be naturalized as a citizen of the United Republic. (2) A woman who has, previous to her marriage to a citizen of the United Republic, renounced, or been deprived of, her status as a citizen of the United Republic in accordance with the law for the time being in force shall not be entitled to be naturalized under subsection (1), but may be naturalized with approval of the Minister.”.

202 Article 59 of the Second Draft Constitution; Article 72 of the Proposed Constitution.

203 For comparative purposes an example from Ethiopia is provided here: In Ethiopia, a proclamation issued by the government of Ethiopia in 2002 allows foreign nationals of Ethiopian origin (other than those who have forfeited Ethiopian nationality and acquired Eritrean nationality) to obtain special identity cards that entitle the holders to enjoy rights and privileges not enjoyed by other foreigners, such as visa-free entry, residence, and employment, the right to own immovable property in Ethiopia, and the right to access public services.

204 See already *Ibrahim Hamisi Juma*, Public Order Laws in Changing Political Landscape: The Role of the Executive, the Legislature and the Judiciary, in: Chris Maina Peter/Ibrahim Hamisi Juma (eds.), *Fundamental Rights and Freedoms in Tanzania*, Dar es Salaam, 1998, pp. 83-100.

205 Indirectly, in Article 4 of the Constitution, 1977; see *Issa G. Shivji*, *Debating Constitutional Amendments in Tanzania*, Haki-Elimu Working Papers, Dar es Salaam, n. y., p. 1, [http://hakielimu.org/files/publications/document57debating\\_constitutional\\_amendments\\_tz\\_en.pdf](http://hakielimu.org/files/publications/document57debating_constitutional_amendments_tz_en.pdf), where he compared the (Union) Constitution, 1977 with the Zanzibar Constitution, 1984, as amended, in this regard, and quoted Article 5 (A) (3) of the latter as a good example of a clear separation of powers.

206 Article 4 of the Constitution, 1977.

### 1. Simultaneous Membership in the Executive and Legislative

A point of relevance is the membership in parliament of members of the executive. Under the Constitution, 1977, the Prime Minister, Cabinet Ministers and Deputy Ministers must be Members of Parliament to qualify for their government offices: the President appoints them from among Members of Parliament.<sup>207</sup> Although in line with the Westminster model where the whole cabinet is part of the legislature,<sup>208</sup> this system has been criticised in Tanzania since the early 1980s.<sup>209</sup> Instead, it was proposed that Ministers should not be Members of Parliament.<sup>210</sup> As simultaneous membership of the executive and legislature was seen as a violation of the principle of separation of powers, the First and Second Draft Constitutions wanted the three branches of government<sup>211</sup> to be redesigned in respect of their relations with one another. It was proposed by both Drafts that the Cabinet Ministers and their Deputies should not at the same time be Members of Parliament. The two Drafts therefore provided that a person serving as a Member of the Parliament of the United Republic, of the (would-be) Parliament of Mainland Tanzania or of the Zanzibar House of Representatives would be disqualified from being appointed as a Minister or Deputy Minister.<sup>212</sup>

The Proposed Constitution, however, does not follow this proposal. It returns to the position of the Constitution, 1977, that the Prime Minister,<sup>213</sup> Ministers and Deputy Ministers<sup>214</sup> all have to be appointed from amongst the Members of Parliament, and Regional Commissioners may be appointed from amongst the Members of Parliament.<sup>215</sup>

207 Articles 51 (2) and 55 (4) of the Constitution, 1977. Regional Commissioners can be Members of Parliament but need not be so. This can be concluded from Article 61 of the Constitution, 1977 as it does not exclude membership in parliament. On the functions of the Regional Commissioners, being part of the central government to carry out executive functions at regional level, see *Shivji*, note 205, p. 2. There are actually a few instances where Regional Commissioners also serve as full Members of Parliament: Engineer Stella Manyanya is both, a Member of Parliament and the Regional Commissioner for Rukwa; also, Dr. Christine Ishengoma serves as a Member of Parliament (special seats for women) and Regional Commissioner for Iringa.

208 *Shivji*, note 205, p. 2.

209 *Shivji*, note 205, p. 2.

210 Thus “[d]eparting from the old Westminster arrangement copied from [the United Kingdom]”, *Peter* 2013, note 27, p. 4. See also *Issa G. Shivji* who suggests to ask: “Why should the ministers, who are part of the Executive, be Members of Parliament?”, rather than asking why they should not, *Shivji*, note 205, p. 2.

211 Articles 57 (2) and 58 (1) of the First Draft Constitution which correspond with Articles 60 (2) and 61 (1) of the Second Draft Constitution.

212 Article 94 (2) (a) of the First Draft Constitution and Article 101 (2) (a) of the Second Draft. Obviously the First and Second Drafts did not contain any provisions on Regional Commissioners as those would be covered by the constitutions of Mainland Tanzania and Zanzibar, respectively.

213 Article 110 (2) of the Proposed Constitution.

214 Article 116 (1) (d) of the Proposed Constitution.

215 As Article 123 of the Proposed Constitution does not exclude this membership.

Looking at other constitutions in the region, Hatchard, Ndulo and Slinn observed in 2004 that “[u]nder the new multi-party constitutions of the 1990s, the model of a Cabinet consisting of the President, Vice-President and Ministers appointed by the President from members of the legislature remains commonplace”.<sup>216</sup> Uganda may serve as an example<sup>217</sup> and Kenya (since its Constitution of 2010), Burundi and Rwanda as counter-examples.<sup>218</sup> While the First and Second Drafts followed the Kenyan, Burundian and Rwandan models, the Proposed Constitution returned to the pattern of the Constitution, 1977 and the Ugandan model.

## 2. Parliamentary Approval of Presidential Appointments

Another key proposal made in both Drafts had the goal of substantially reducing the powers of the President (as part of the executive) vis-à-vis the other branches of the state. For example, there was a requirement in both Drafts that key presidential appointments should have parliamentary approval.<sup>219</sup> While under the Constitution, 1977, the requirement of parliamentary approval applies to the post of Prime Minister only,<sup>220</sup> the First and Second Draft Constitutions required parliamentary approval for appointments with regard to a number of offices, such as the Senior Minister,<sup>221</sup> Ministers and Deputy Ministers,<sup>222</sup> Chief Justice and Deputy Chief Justice,<sup>223</sup> the Attorney General,<sup>224</sup> Chief Secretary<sup>225</sup> and Chief Au-

216 *Hatchard/Ndulo/Slinn*, note 101, p. 68. According to Thomas Fleiner and Cheryl Saunders, it is typical of common law countries that ministers are required to be Members of Parliament, while it is typical of civil law countries that they are not, although there are variations, *Thomas Fleiner/Cheryl Saunders*, *Constitutions Embedded in Different Legal Systems*, in: Mark Tushnet/Thomas Fleiner/Cheryl Saunders (eds.), *Routledge Handbook of Constitutional Law*, London, New York 2015, p. 25.

217 Article 113 (1) of the Constitution of Uganda, 1995 (as amended up to 2005).

218 Article 152 (3) of the Constitution of Kenya, 2010; Articles 104-105 of the Constitution of Burundi of 2005; Article 68 (2) of the Constitution of Rwanda of 2003.

219 See *Hatchard/Ndulo/Slinn*, note 101, p. 73, on the importance of parliamentary approval for certain important appointments, and generally of an “independent transparent appointment system for public servants”; and p. 72 on the role of public service commissions. See also *Shivji*, note 205, p. 4.

220 Article 51 (2) of the Constitution, 1977.

221 Article 99 of the Second Draft, referring to the Senior Minister (Waziri Mwandamizi). The impression is that the Constitutional Review Commission tried to replace the Prime Minister (Waziri Mkuu) with the Senior Minister (Waziri Mwandamizi), while still referring to the Prime Minister (Waziri Mkuu) in Article 262 (1) of the Second Draft with the provision that he would stay in office only until the general election in 2015.

222 Article 98 (1) of the Second Draft.

223 Articles 158 (1) and 159 (1) of the Second Draft.

224 Article 104 (1) of the Second Draft.

225 Article 105 (1) of the Second Draft. For the functions of the Chief Secretary, see Article 105 (2)-(5) of the Second Draft.

ditor-General.<sup>226</sup> Moreover, appointment of chairpersons and vice-chairpersons of a number of constitutional bodies, such as the Electoral Commission,<sup>227</sup> the Leadership Ethics and Accountability Commission<sup>228</sup> and the Human Rights Commission,<sup>229</sup> also required parliamentary approval in the two Drafts.

In contrast to this, the Proposed Constitution returns to the position of the Constitution, 1977 and endows the President with powers to appoint any civil servants without requiring parliamentary approval<sup>230</sup> except for the appointment of the Prime Minister.<sup>231</sup> These far-reaching powers of the President under the Proposed Constitution reflect the continued concentration of power in this office.<sup>232</sup>

In theory, one may raise the question whether the requirement of parliamentary approval for the appointment of Ministers is not a violation of the principle of separation of powers as the legislature would be given power to interfere in functions of the executive. However, in practice this requirement is considered as an instrument in the system of checks and balances needed because of the powerful position of the President.<sup>233</sup> This is confirmed if one looks at the Constitutions of some of the neighbouring countries. Both the Ugandan and the Kenyan Constitutions require parliamentary approval for the appointment of Ministers.<sup>234</sup> Yet, the Proposed Constitution does not follow this example.<sup>235</sup>

226 Article 215 (1) of the Second Draft.

227 Article 191 (5) of the Second Draft. In this case also the appointment of ordinary members of the Electoral Commission required parliamentary approval.

228 Article 200 (4) of the Second Draft.

229 Article 209 (5) of the Second Draft.

230 Article 82 of the Proposed Constitution.

231 Article 110 (2) of the Proposed Constitution. Also, contrary to the proposals of the First Draft (Article 71) and the Second Draft (Article 74), under the Proposed Constitution the President is not obliged to take advice given to him unless so provided for by the Constitution; Article 83 of the Proposed Constitution. For instance, Article 95 (3) of the Proposed Constitution: National Advisory Committee to advise the President on the prerogative of mercy. Emulating the provision of Article 45 of the Constitution, 1977, Article 95 of the Proposed Constitution gives the President wide prerogative powers; he/she can change any sentence or pardon any person convicted by a court of any offence.

232 On the position under the Constitution, 1977, see *Wambali*, note 31, p. 278.

233 See the reflections on the imperial character of presidency in a number of African states by *H. W. O. Okoth-Ogendo*, *Constitutions without Constitutionalism: Reflections on an African Political Paradox*, in: Issa G. Shivji (ed.), *State and Constitutionalism: An African Debate on Democracy*, Harare 1991, pp. 13-14.

234 Uganda: Article 113 (1) of the Constitution; Kenya: Article 152 (2) of the Constitution.

235 Likewise, the Constitution of Burundi (Articles 87-94) and the Constitution of Rwanda (Article 116) do not contain this requirement.

### 3. Presidential Assent to Legislation

Another example of the powers of the President in the context of the separation of powers is that the legislative function is shared between the parliament and the executive as the President, being the head of the executive, has to assent to legislation.<sup>236</sup> If the President ultimately refuses, he/she has to dissolve the parliament.<sup>237</sup> This is another case of interference with democratic principles, especially the separation of powers, even though it is not uncommon.<sup>238</sup> It was maintained both in the Drafts and in the Proposed Constitution.<sup>239</sup>

The discussion of the three items above leads to the conclusion that the Proposed Constitution does not provide for reform in the area of separation of powers. The provisions of the Proposed Constitution regarding the separation of powers are similar to the corresponding provisions in the Constitution, 1977 in that, while it declares recognition of the principle of separation of powers,<sup>240</sup> the provisions discussed above have the effect of maintaining the strong power of the executive, and especially a powerful President, which the First and Second Drafts sought to change.<sup>241</sup>

The strong role of presidents in many African democracies is well known.<sup>242</sup> As Hatchard, Ndulo and Slinn note, “[a]t independence, most [Eastern and Southern African] states made an attempt to blend Westminster-style Cabinet government with an American version of presidential power.”<sup>243</sup> In Tanzania, the strong position of the President as part of the executive was achieved, among other factors, by abolishing the separation between

236 Article 97 (1) Constitution, 1977; Article 137 (1) Proposed Constitution.

237 Article 137 (5) of the Proposed Constitution; see Article 97 (4) of the Constitution, 1977. *Hatchard/Ndulo/Slinn*, note 101, p. 76 give examples of other countries (Uganda and South Africa) which “strengthen the positions of parliamentarians” by providing solutions other than the dissolution of parliament. Josaphat L. Kanywanyi provides evidence that delays in presidential assent are actually a significant problem in Tanzania, see *Josaphat Laurean Kanywanyi, Open-Ended Features in Constitutionalism and Cultural Attitudes in East Africa: Basis for Prevalence of Corruption, Poor Public Servant Responsibility, Accountability and Public Services Delivery?*, in Johannes Döveling/Kennedy Gastorn/Ulrike Wanitzek, *Constitutional Reform Processes and Integration in East Africa*, Dar es Salaam, 2013, 9-48, pp. 21, 39 ff. See also *Shivji*, note 205, p. 2.

238 *Hatchard/Ndulo/Slinn*, note 101, p. 76.

239 Article 114 of the First Draft; Article 122 of the Second Draft; Article 137 of the Proposed Constitution.

240 Article 74 (3) of the Proposed Constitution.

241 Cf. *Kanywanyi*, note 237, pp. 21, 39, on the roots of the “tendency to authoritarianism” which “foster attitudes and do create conditions that may explain the unabated major open-ended features of constitutionalism and prevalence of corruption, poor public servant responsibility, accountability and public services delivery”.

242 *Hector Fix-Fierro/Pedro Salazar-Ugarde*, *Presidentialism*, in: Michel Rosenfeld/András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford 2012, p. 637.

243 *Hatchard/Ndulo/Slinn*, note 101, p. 58.

head of state and head of government, thereby deviating from the Westminster model.<sup>244</sup> This led to “the *colonial* version of the Westminster (British) system”.<sup>245</sup> Josaphat L. Kanywanyi speaks of the often “virtually unlimited powers granted to executive presidents”.<sup>246</sup> This includes some of the examples presented above, such as appointment to important offices and assent to legislation.<sup>247</sup>

The doctrine of separation of powers does not necessarily mean separation in the strictest sense.<sup>248</sup> But a mutual limitation of powers in the sense of checks and balances is indispensable. The Proposed Constitution misses the chance to balance the power relations between the executive and the legislative branches in a more satisfactory way.

### X. Electoral Process

Reform of the electoral process and establishment of an independent electoral commission were also among the key topics behind the constitutional reform because the position under the Constitution, 1977 is highly controversial.<sup>249</sup> It is therefore not surprising that the two Drafts and the Proposed Constitution attempt to address this concern by proposing various reforms to the electoral processes in a bid to enhance fair elections.<sup>250</sup>

#### 1. Establishment of an Independent Electoral Commission

Both the two Drafts and the Proposed Constitution are in agreement in respect of the need to enhance independence in the administration of elections by establishing an “Independent

244 Jürgen Herzog, *Geschichte Tansanias. Vom Beginn des 19. Jahrhunderts bis zur Gegenwart*, Berlin 1986, p. 181.

245 Shivji, note 205, p. 2; Shivji/Majamba/Makaramba/Peter, note 15, pp. 47-48.

246 Kanywanyi, note 237, p. 24.

247 Id., p. 21.

248 Jenny S. Martinez, *Horizontal Structuring*, in: Michel Rosenfeld/Andrés Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford 2012, p. 540, observes degrees of separation of powers (“horizontal structuring”) “from constitutional systems with strong separation of powers (eg the United States) to those with greater fusion of powers (eg the United Kingdom), with many falling somewhere in the middle”.

249 See *Gamaliel Mgongo Fimbo*, *The National Electoral Commission of Tanzania in Support of Constitutional Democracy: A Comment*, in: Johannes Döveling/Kennedy Gastorn/Ulrike Wanitzek (eds.), *Constitutional Reform Processes and Integration in East Africa*, Dar es Salaam 2013, pp. 105-115; and *Damian Z. Lubuva*, *The Independence of the National Electoral Commission of Tanzania as an Oversight Constitutional Organ*, in: Johannes Döveling/Kennedy Gastorn/Ulrike Wanitzek (eds.), *Constitutional Reform Processes and Integration in East Africa*, Dar es Salaam 2013, pp. 89-103.

250 Chapter Twelve of the First Draft Constitution (Articles 180 ff.); Chapter Twelve of the Second Draft Constitution (Articles 189 ff.); Chapter Fourteen of the Proposed Constitution (Articles 215 ff.).

Electoral Commission”.<sup>251</sup> The Commission is to be composed of nine members, including a chairperson and deputy chairperson<sup>252</sup> who must be persons who have served as judges of the Supreme Court, Court of Appeal or High Court for at least five years.<sup>253</sup> The Commission members are to be appointed by the President on recommendation of the Nominating Committee. The members of the Nominating Committee are to include the Chief Justice of the United Republic as chairperson; the Chief Justice of Zanzibar as deputy chairperson; the Speaker of the Union Parliament, the Speaker of the Zanzibar House of Representatives, the Senior or Principal Judge,<sup>254</sup> and the Chairperson of the Commission of Public Leadership Ethics and Accountability.<sup>255</sup> This is a departure from the contentious position of the Constitution, 1977 under which the power to appoint the members of the Commission, including the chairperson and deputy chairperson, resides exclusively in the President of the United Republic.<sup>256</sup> However, some of the members of the Nominating Committee are to be appointed by the President,<sup>257</sup> insofar the question arises whether the introduction of the Nominating Committee makes a significant difference with regard to the independence of the Electoral Commission because some of its members are presidential appointees. But nevertheless it is different from the current practice. The President is confined to appointing persons from the recommended list and not otherwise and, secondly, all the three state organs are also represented in the process which is a measure of checks and balances. The mandate of the Independent Electoral Commission is similar to the mandate of the Electoral Commission under the Constitution, 1977.<sup>258</sup>

251 Article 181 of the First Draft Constitution; Article 190 of the Second Draft Constitution; Article 217 of the Proposed Constitution. Article 74 of the Constitution, 1977 provides for an “Electoral Commission”.

252 Article 217 (2) of the Proposed Constitution.

253 Article 217 (5) (b) of the Proposed Constitution. Under the Constitution, 1977 and the National Elections Act, 1985 (Cap. 343 R. E. 2002), “the Commission comprises seven Commissioners including the Chairman and Vice Chairman who shall be persons who have been or qualify to be Justices of Appeal or Judges of the High Court”, *Lubuwa*, note 249, pp. 91-92.

254 Article 218 (1) (e) of the Proposed Constitution.

255 Article 218 (1) of the Proposed Constitution. In Article 191 (1) of the Second Draft Constitution, the Speaker of the Parliament of Tanganyika and the Chief Justice of Tanganyika were also listed which was due to the three-government structure suggested in the Second Draft; see above D. II.

256 Article 74 (1) of the Constitution, 1977. The suggestion had been made that appointment by an independent commission should be required, i.e. not only recommendation by a nomination committee, *University of Dar es Salaam School of Law*, Proposals Submitted to the Constitutional Review Commission of Tanzania: Executive Summary, in: Johannes Döveling/Kennedy Gastorn/Ulrike Wanitzek (eds.), *Constitutional Reform Processes and Integration in East Africa*, Dar es Salaam 2013, p. 200.

257 For example, the Senior or Principal Judge is appointed by the President upon suggestion by and after consultation with the Judicial Service Commission, Article 194 (6), (7) of the Proposed Constitution.

258 Article 74 (6) of the Constitution, 1977. This is to supervise and co-ordinate the registration of voters in the United Republic; to supervise and co-ordinate the conduct of parliamentary and presidential elections (the president is elected by the people too, Article 87 (1) of the Proposed

## 2. Presidential Election

The second major proposed reform concerning the electoral process is the presidential election, an area which was equally contested, particularly with regard to the total number of votes which the presidential candidate must obtain, and with regard to the contestation of the results of the presidential election. While the Constitution, 1977 requires only a simple majority,<sup>259</sup> the two Drafts and the Proposed Constitution are in agreement that the candidate must obtain the absolute majority.<sup>260</sup> On the contesting of presidential election results, the Constitution, 1977 provides: “When a candidate is declared by the Electoral Commission to have been duly elected in accordance with this Article, then no court of law shall have any jurisdiction to inquire into the election of that candidate.”<sup>261</sup> By contrast, the two Drafts and the Proposed Constitution all provide for the possibility to challenge the results of presidential elections in court.<sup>262</sup> These proposals mark a reversal of the position under the Constitution, 1977 where not only is the President elected by simple majority, but also once a presidential candidate is declared to have won the election, the courts of law cannot inquire into the election of that candidate even if the said election was marred by multiple irregularities.

## 3. Independent Candidates

The third important reform regards independent candidates. Unlike the Constitution, 1977 and electoral laws under which affiliation to a political party is the only ticket to electoral posts,<sup>263</sup> under the First and Second Drafts and the Proposed Constitution persons can exercise their right to contest general elections and be elected without having to rely on a political party.<sup>264</sup> This position follows the decision of the African Court on Human and Peoples’ Rights in *Tanganyika Law Society and the Legal and Human Rights Centre and Reverend*

Constitution); to review and declare the boundaries of constituencies in the United Republic for the purposes of parliamentary elections; to supervise and coordinate the referendum; and to announce the results of the elections and of the referendum, Article 220 (1) (c), (a), (d), (b), (e) of the Proposed Constitution.

259 Article 41 (6) of the Constitution, 1977.

260 Article 77 (6) of the First Draft; Article 80 (6) of the Second Draft; and Article 89 (6) of the Proposed Constitution.

261 Article 41 (7) of the Constitution, 1977.

262 Article 78 of the First Draft (Supreme Court); Article 81 of the Second Draft (Supreme Court); and Article 90 of the Proposed Constitution (High Court).

263 Article 39 (1) (c) of the Constitution, 1977 provides that a person “shall not be entitled to be elected to hold the office of President of the United Republic save only if ... he is a member of, and a candidate nominated by, a political party”.

264 See, among other provisions, Articles 88 (1) (f), 140 (1) (c) of the Proposed Constitution; Articles 79 (1) (f), 125 (1) (c) of the Second Draft Constitution; Articles 75 (g), 117 (1) (c) of the First Draft Constitution. Cf. for Kenya Articles 99 (1) (c), 137 (1) (c) of the Constitution of Kenya, 2010.

*Christopher R. Mtikila v. The United Republic of Tanzania*,<sup>265</sup> which directed Tanzania to amend its laws so as to allow independent candidates to take part in elections.

#### 4. Representation of Women in Parliament

The fourth major reform is on representation and participation of women in senior decision-making bodies, the parliament in particular. The two Drafts and the Proposed Constitution all propose that there should be an equal number of female and male Members of Parliament.<sup>266</sup> This would mark an end to the system of proportional representation of women in parliament, popularly known as “special seats for women” which are allocated to political parties on the basis of proportion of representation.<sup>267</sup> The First and Second Draft Constitutions were very articulate on the way to achieve the desired gender parity in parliament. They proposed that each constituency must have two representatives, meaning that there should be a male and a female representative for each constituency.<sup>268</sup> However, the Proposed Constitution, while maintaining the requirement of equal representation for men and women in parliament,<sup>269</sup> does not give any specific indication of ways to achieve this end.

#### 5. By-Elections

The fifth and last major point of reform touches upon the conduct of by-elections in the event that a parliamentary seat falls vacant before the expiry of the parliamentary period. Unlike the Constitution, 1977 under which by-elections are conducted each time a constituency seat falls vacant for reasons other than expiration of term,<sup>270</sup> the First and Second Draft Constitutions proposed that a by-election should only be conducted if a constituency seat that has fallen vacant was previously occupied by an independent candidate. As for seats occupied by Members of Parliament affiliated to political parties, the First and Second Draft Constitutions provided that a by-election was unnecessary. They proposed that the constituency seat that falls vacant should be filled by a person from the list of candidates submitted during the general election by the political party that won that election.<sup>271</sup> This

265 *Tanganyika Law Society and The Legal and Human Rights Centre and Reverend Christopher R. Mtikila v. The United Republic of Tanzania*, African Court on Human and Peoples’ Rights at Arusha, Applications 009 and 011/2011, Decision of 14 June 2013.

266 Article 105 (4) of the First Draft Constitution; Article 113 (3) of the Second Draft Constitution; and Article 129 (4) of the Proposed Constitution.

267 Articles 66 (1) (b), 78 (1) of the Constitution, 1977; see *Rose Shayo*, Gender Issues in the Context of Constitutionalism and the Constitution in Tanzania, in: Joseph Oloka-Onyango/Chris Maina Peter (eds.), *Constitutionalism and Transition. African and Eastern European Perspectives*, Kampala, 2014, pp. 166 ff.

268 Article 105 (4) of the First Draft; Article 113 (3) of the Second Draft.

269 Article 129 (4) of the Proposed Constitution.

270 Article 76 (2) of the Constitution, 1977.

271 Article 116 (4) of the First Draft Constitution and Article 124 (4) of Second Draft Constitution.

proposal takes account of popular views which protest against the high costs of conducting by-elections every time a parliamentary seat falls vacant before the expiry of the parliamentary period. However, the Proposed Constitution does not support this proposal but rules, like the Constitution, 1977, that there should be a by-election every time a seat falls vacant outside of general elections.<sup>272</sup>

## E. Conclusions

The constitutional review process is indeed an important development in Tanzania's history. The two Draft Constitutions of June and December 2013 and the Proposed Constitution of October 2014 are milestones in Tanzania's constitutional reform process. They are more comprehensive in terms of the scope covered and more voluminous in terms of the number of chapters and articles compared to the existing Constitution, 1977. More importantly, their preparation was guided by views collected by means of wide consultations and popular participation. They have all attempted, at different levels, to respond to the demands of the reform by introducing new features not included in the Constitution, 1977 or by modifying existing features. For instance, the Bill of Rights incorporated in all three documents is comprehensive and more progressive than the one in the Constitution, 1977. The Draft Constitutions and the Proposed Constitution are all in agreement with regard to modification of the electoral process, through, among other things, establishment of an independent electoral monitoring body, improving the representation of women in parliament, allowing independent candidates to take part in national elections, requiring an absolute majority vote for presidential elections and subjecting presidential electoral results to judicial inquiry.

Further comparison of the content of these three documents, however, leads to the conclusion that the First and Second Drafts were more progressive than the Proposed Constitution in several respects. They had firm statements and elaborate provisions on the sovereignty of the people, national values and fundamental objectives of state policy. They both sought to introduce a new form of governance, transforming the two-government structure of the Union into a federal mode of union with three governments, the Union government and the governments of Mainland Tanzania and Zanzibar. They also proposed significant improvements regarding the principle of separation of powers and regulating the power relations between the parliament and the executive, particularly with regard to ending simultaneous membership in the executive and the legislature, and requiring parliamentary approval of key presidential appointments. The Proposed Constitution on the other hand rejects these proposals and keeps to the existing structure with little modification.

272 Article 139 (2) of the Proposed Constitution.