The independent candidate case by the African Court of Human and Peoples' Rights revisited

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Abstract: In June 2011, the Tanganyika Law Society, the Legal and Human Rights Centre and Rev. Christopher Mtikila filed in the African Court on Human and Peoples' Rights applications instituting proceedings against the government of the United Republic of Tanzania claiming that the government had, through certain amendments to its Constitution, violated its citizens' right of freedom of association, the right to participate in public affairs and the right against discrimination by prohibiting independent candidates to contest Presidential, Parliamentary and Local Government elections. In its judgment of 14 June 2013, the Court found that the government violated Articles 2, 3, 10 and 13 (1) of the African Charter on Human and Peoples' Rights. The Court directed the government to take constitutional, legislative and all other necessary measures within a reasonable time to remedy the observed violations. This article revisits this case to understand the reluctance by the government towards independent candidates.

Keywords: independent candidates; constitutionalism; Africa; Tanzania; Mtikila; African Court; human rights; election.

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1 Introduction

Independent candidacy is a right (Wolf, 2014; Amundsen, 2010; EU-EOM, 2015; TEMCO, 2016; Makulilo, 2012). In its 154th session in Paris, the Inter-Parliamentary Council[1] adopted the Declaration on the criteria for free and fair elections. Among other things, the Council stated that everyone has the right to take part in the government of their country and shall have an equal opportunity to become a candidate for election either as an independent candidate or through an organisation for the purpose of competing in an election. The above criterion is clearly stipulated in Article 25(1) of the United Nations International Covenant on Civil and Political Rights (CCPR) 1966 which states that every citizen shall have the right and the opportunity, and without

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unreasonable restrictions to take part in the conduct of public affairs, directly or through freely chosen representatives. What it means here is that restrictions may be allowed only to the extent that they are objective and reasonable. For example, conditions such as age, mental health and citizenship can reasonably prevent individuals from voting or being voted for in public offices. However, it was in 1996 that the United Nations (UN) general comment number 25 on the CCPR made it explicit that political party membership as a qualification for participation in public affairs is unreasonable. Section 17 of the comments provides, "the right of persons to stand for election should not be limited unreasonably by requiring candidates to be members of parties or of specific parties".[2]

Yet, across the world's political systems, independents have had varied impact. Australia is regarded as the home to more non-party independent parliamentarians than any other comparable Western country. Since 1980, for example, an unprecedented 56 independents have served in Australian parliaments. In Pakistan and Russia, independents win as much as 20 to 40% of vote while in the USA they win less than 1% of the national vote in average (Brancati, 2008). In Africa, independent candidates are visible in countries like Zambia, Malawi, and Republic of South Africa.

Unlike in those mentioned countries and contrary to the international instruments in which Tanzania is a part, all contenders for public offices for the presidency, parliamentary and councillors' elections, should be sponsored by a fully registered political party. That means, independent candidates are not allowed in Tanzania. Interestingly, during the brief multiparty system immediately after independence (1961–1965), independent candidacy was practiced. It has to be stated that upon receiving its independence on 9 December 1961, Tanganyika (later the United Republic of Tanzania) was a multiparty democracy. At least four political parties existed by then, namely, the Tanganyika African National Union (TANU), the African National Congress (ANC), the United Tanganyika Party (UTP), and the All Muslim of National Union of Tanganyika (AMNUT). Though it did not spell out the term 'independent candidate', the Tanganyika (Constitution) Order in Council, 1961 as published by the Government Notice No. 415 of 1st December 1961 allowed such a candidate during elections. To be sure, Sections 18 and 19 of the constitution stipulated qualifications and disqualifications for elections at the National Assembly. It provided:

> Subject to the provisions of Section 19 of this Constitution, any person who (a) is a citizen of Tanganyika, (b) has attained the age of twenty one years, and (c) is able to speak, and unless incapacitated by blindness or other physical cause to read the English language with a degree of proficiency to enable him to take an active part in the proceedings of the National Assembly; shall be qualified for election as a member of the National Assembly, and no other person shall be so qualified.

Yet, Section 24 of the Republican Constitution of Tanganyika (Constitutional Act No. 1 of 1962) retained the same requirements for the post of the National Assembly. Furthermore, the constitution introduced qualifications to the new post of the presidency. Section 4(3) read:

> Any citizen of Tanganyika who: (a) is qualified to be registered as a voter for the purposes of elections to the National Assembly, (b) has attained the age of thirty years and, and (c) in the case of elections held on a dissolution of Parliament, is nominated by not less than one thousand persons registered as voters for the purposes of elections to the National Assembly shall be qualified for elections as President.

Two observations can be made from the Independent and Republican constitutions. Firstly, despite the presence of many political parties, party membership was not among the qualifications for the posts of the National Assembly or the presidency. Secondly, the constitutions allowed independent candidates along with party sponsored candidates to participate in elections for the posts of member of the National Assembly and the presidency. This was partly due to the fact that the independence constitution was based on the Westminster principles with relatively many features of democracy. However, the Republican constitution marked the beginning of erosion of democracy for centralising and concentrating power to the executive arm of the government and the ruling party to the extent of making Tanzania of the time a *de facto* one party state (Makulilo, 2008, 2016). Notwithstanding such tendencies, it is imperative to point out that in the 1960 elections, Mr. Herman E. Sarwatt, an active member of TANU vied for the post of member of the National Assembly as an independent candidate in Mbulu constituency. The story went like this. TANU's candidate was unpopular and TANU members in Mbulu demanded for another one. TANU leaders rejected their request by saying that they were tribalist. Interestingly, Mr. Sarwatt won the seat against the TANU nominated candidate. This victory was significant and historical since TANU won all the contested seats except the Mbulu constituency. President Nyerere once remarked *Katika historia yote ya Bunge hili ni mtu mmoja tu aliyemudu kumshinda mjumbe aliyesimamishwa na TANU katika Uchaguzi.*[3] TANU leaders were generally unhappy with this phenomenon. It should be emphasised here that Mr. Sarwatt did not cease to be a member of TANU. In fact during his campaigns he mobilised a lot of people to join TANU.[4]

In dealing with any form of opposition, from both within and without TANU, President Julius Nyerere formed a commission[5] to work out for a one party system. One of the issues addressed was: "Should all candidates for election to the Legislature and local government bodies be members of TANU?" The commission recommended without hesitation that all candidates for election to the National Assembly should be members of TANU since that was an inherent element of the one party state. For the post of presidency, however, the commission recommended that the National Executive Committee of TANU and Afro-Shiraz Party (ASP) should jointly be charged with the duty of nominating a single candidate for the presidency of the United Republic. Following the recommendations made by the commission, on 10th July, 1965 the United Republic became constitutionally a one party state. Article 3(1) of the Interim Constitution of 1965 provided, "there shall be one political party in Tanzania." Section (3) furthered that all political activities in Tanzania, apart from those of the organs of the state of the United Republic of Tanzania and Zanzibar should be conducted by or under the auspices of the party. As it can be seen, the main intention of this article was to completely get rid of any opposition against TANU (Msekwa, 1977). Externally, all political parties and civil societies were disbanded. Internally, political competition for elective posts in the government was attached to party membership (Pinkney, 1997; Hyden, 1999). Nyerere argued that one party system was necessary for unity and development of new nations like Tanzania (TANU Annual Report, 1965). Thus, the impact of one party state was basically the introduction of authoritarian politics where all political activities should only take place through TANU. It was at this juncture where party membership as a qualification by candidates during elections was introduced. Article 27 of the Constitution, for instance, introduced party membership as a qualification for candidates for the National Assembly. For ease of reference it read:

> 27(1) Any citizen of Tanzania who has attained the age of twenty one years and is a member of the Party shall, unless he is disqualified under the following provisions of this section or an Act of Parliament to which this section refers be qualified for election as a constituency member, and no other person shall be so qualified.

Similarly, Article 7(3) of the constitution provided for membership qualification for the presidency. It stated that whenever an election of the President is to be held, "an Electoral Conference of the Party, constituted in accordance with the provisions in that behalf, in the constitution of the Party, shall meet; and such Electoral Conference shall nominate a citizen of Tanzania who has attained the age of thirty years and is a member of the Party, as the sole Presidential Candidate". The nominating authority for the presidential candidate was the Electoral Conference of TANU as defined in Part E Section 3 of the party's constitution appended to the Interim Constitution as a schedule. Section 3(1) stated, "An Electoral Conference shall be held whenever a Presidential election is contemplated". Furthermore, Section 3(4) of the same part provided the function of the Electoral Conference as it held "the sole function of the Electoral Conference shall be to select the name of the candidate for election to the office of President of the United Republic".

In 1975, the party became a supreme organ constitutionally (Msekwa, 1977; Makulilo, 2011a). Article 3(3) of the Interim Constitution provided that all activities of the organs of the state of the United Republic of Tanzania should be conducted by or under the auspices of the party. It meant that the parliament, executive, judiciary or any other institution of the state could be summoned by the party. This development came to be described as 'state-party' where the line between the state and the party were blurred (Baregu, 2003; Makulilo, 2008; Brownlee, 2007; Liviga, 2009; Hoffman and Robinson, 2009). It was on 5 February 1977 that TANU and ASP merged to form Chama Cha Mapinduzi (CCM). I should hasten to emphasise that CCM was not a new party but rather a consolidation of TANU/ASP alliance.[6] It is interesting to note that a team of twenty people, ten from each party, i.e., TANU and ASP who designed the constitution culminating to the birth of CCM, was the very same that was entrusted with the role of making the permanent constitution of the United Republic of 1977. What it all means here is that the Tanzania's constitution of 1977 was construed to reflect party supremacy framework. Arguably, it was essentially a party document albeit under the guise of state. The one party state as well as the party supremacy clauses were retained in the permanent constitution as per Articles 3(3) and 10(1) respectively.

In 1984, the permanent constitution was amended to introduce the Bill of Rights. However, membership qualification to be elected for the post of [National Assembly as per Article 67(1)] and [presidency as per Article 39] were upheld. In contrast, Article 20(2) stated that no one should be compelled to be a member of any political party. Furthermore, Article 21(1) provided that: "Every citizen of the United Republic is entitled to take part in matters pertaining to the governance of the country, either directly or through representatives freely elected by the people in conformity with procedures laid down by, or in accordance with, the law". As a general rule, the Bill of Rights was dysfunctional during the one party era. This is because the existence of one party is inimical to freedom of choice and human rights. With the advent of multipartism in 1992, the one party and party supremacy clauses were repealed. Nonetheless, Articles 20 and 21 were retained. For the post of presidency, the amended Article 39 retained paragraph (c) which required a candidate to be a member of and sponsored by a political party.

Likewise Article 67(1)(b) retained the membership qualification for the post of member of National Assembly. From the above backdrop, it can therefore be summed up that independent candidate was a distinctive feature of Tanzania's political system during the multiparty era immediately after independence (1961–1965). At that period, as was shown, one TANU candidate contested as an independent candidate in Mbulu constituency and won the seat against TANU's sponsored candidate. As a reaction to this phenomenon as well as any other forms of opposition against TANU, Mwalimu Nyerere, then the president initiated a move towards the establishment of one party state. It was at that material time that independent candidate was constitutionally abolished. With the introduction of multipartism, independent candidate was disallowed contrary to the provision of the Bill of Rights.

2 The independent candidate case

It was hoped that with the advent of multipartism in 1992, independent candidate would be allowed (URT, 1991). However, it never happened. This was the beginning of the independent candidate question in the era of multipartism. To be sure, in 1992 the National Assembly of the United Republic of Tanzania passed the Eighth Constitutional Amendment Act, No. 4 which entered into force on 1 July 1992. The amendments to Articles 39, 67 and 77 of the Constitution of the United Republic of Tanzania of 1977 as well as Section 39 of the Local Authorities (Elections) Act, 1979 required that any candidate wishing to contest for the posts of Presidential, Parliamentary and Local Government elections must be a member of, and be sponsored by, a political party. These amendments abrogated the provisions of Articles 20 and 21(1) of the Constitution which guarantee person's freedom of association and freedom to participate in public affairs respectively. Therefore the amended law restricted an independent candidate from contesting presidential, parliamentary or local council elections unless he or she was a member of a political party. It is important to note that the struggle for independent candidacy has more effectively been fought in the court of law, both municipal and international courts with competent jurisdiction, than by any other means.

2.1 Municipal courts

In 1993, Reverend Christopher R. Mtikila filed a Constitutional Case in the High Court of the United Republic of Tanzania in *Rev. Christopher Mtikila v. The Attorney General, Civil Case No. 5 of 1993* challenging the Eighth Constitutional Amendments Act referred to above that it conflicted with the Constitution of the United Republic of Tanzania and was therefore null and void. On 24 October 1994, the High Court delivered its judgment in favour of Rev. Mtikila declaring unconstitutional the amendments which were introduced to bar independent candidates. It thus held that the amendments made in Articles 39, 67 and 77 of the Constitution, restricting the right to contest in elections to political party candidates only, are capable of being abused to confine the right of governing to a few and render illusory the emergence of a truly democratic society; notwithstanding those restrictions, it should be lawful for independent candidates to contest elections along with political party candidates. Dissatisfied with this judgment, the government, through the Attorney General, filed an appeal. However, before this appeal was heard, the government withdrew it and sent a Bill to the Parliament to

legislate in anticipation of the decision of the Court. Therefore on 16 October 1994, the Government tabled a Bill in Parliament (Eleventh Constitutional Amendment Act No. 34 of 1994) seeking to nullify the right of independent candidates to contest Presidential, Parliamentary and Local Government elections. On 2 December 1994, the National Assembly passed the Bill whose effect was to restore the Constitutional position before the *Civil Case No. 5 of 1993* by amending Article 21 (1) of the Constitution of the United Republic of Tanzania. This Bill finally became a law after it was assented by the President on 17 January 1995. The law therefore rendered the High Court's judgment in the *Civil Case No. 5 of 1993* ineffectual.

In 2005, Rev. Mtikila instituted another case in the High Court namely *Christopher Mtikila v. the Attorney General, Miscellaneous Civil Cause No. 10 of 2005*. Here Rev. Christopher Mtikila petitioned for a declaration that the amendment to Articles 39 and 67 of the Constitution of the United Republic of Tanzania as introduced by amendments contained in Act No. 34 of 1994 were unconstitutional. He also petitioned for a declaration that he had a constitutional right under Article 2(1) of the Constitution of the United Republic of Tanzania to contest the post of the president of the United Republic of Tanzania and/or the seat of a member of parliament of the United Republic of Tanzania as an independent candidate. In short, the contention between the parties in this petition was whether the amendment to the Constitution introduced by Act No. 34 of 1994 was constitutional. After long submissions from both parties, on 5 May 2006, the Court observed that Act No. 34 of 1994 which amended Article 21(1) so as to cross refer it to Articles 5, 39, and 67 which introduced into the Constitution, restrictions on participation of public affairs and the running of the government to party members only was an infringement on fundamental rights and that the restriction was unnecessary and unreasonable and so did not meet the test of proportionality. It therefore declared that the said amendments to Articles 21(1), 39(1)(c), and 67(10)(b) were unconstitutional. The Court went further to declare that, in principle, it should be lawful for independent candidates to contest the posts of President, Member of Parliament and Councillor along with candidates nominated by political parties. However, in contrast to the *Civil Case No. 5 of 1993*, in the *Civil Cause No. 10 of 2005* the Court ordered the government to put in place a legislative mechanism that would regulate the activities of independent candidates. This order had a deadline of the 31st October 2010, the date of the General Election.

As was the case with the *Civil Case No. 5 of 1993*, the government immediately appealed against the decision of the High Court to the Court of Appeal of Tanzania known as the *Honourable Attorney General v. Reverend Chistopher Mtikila Civil Appeal No. 45 of 2009*. As the Court of Appeal of Tanzania is the supreme court of the country, *Civil Appeal No. 45 of 2009* attracted more attention from academics, politicians, lawyers and members of the general public. In contrast to the ordinary sitting of the Court of Appeal of three judges, in this case the Court of Appeal sat as the full bench of seven justices of appeal. Moreover, the Court invited four *amicus curiae* namely Mr. Othman Masoud, the Director of Public Prosecutions, Zanzibar; Prof. Palamagamba Kabudi; Prof. Jwan Mwaikusa and the Chairman of the National Electoral Commission, who was represented by the Director of Elections, Mr. Rajabu Kiravu. In its Judgement of 17 June 2010 the Court of Appeal laid down the principle that "*a court cannot declare an article of the Constitution to be unconstitutional except where the article has not been enacted in accordance with the procedure under Art 98(1)(a) and (b)*". This meant that the High Court's judgement was reversed and hence independent candidate was not allowed. The

Court held that the issue of independent candidates is political and not legal and has to be resolved by the Parliament. However it went further to say:

> We give a word of advice to both the Attorney General and our Parliament: The United Nations Human Rights Committee, in paragraph 21 of its General Comment No. 25, of July 12, 1996, said as follows on Article 25 of the International Covenant on Civil and Political Rights, very similarly worded as Art 23 of the American Convention and our Art 21: The right of persons to stand for election should not be limited unreasonably by requiring candidates to be members of parties or of specific parties. Tanzania is known for our good record on human rights and particularly our militancy for the right to self determination and hence our involvement in the liberation struggle. We should seriously ponder that comment from a Committee of the United Nations, that is, the whole world.

Here the judgment by the Court of Appeal entered into an endless debate when the Court stated "thus the issue of independent candidates is political and not legal" (p.48). What did the Court mean by the words 'political' and 'legal'? What are the demarcations between 'political' and 'legal' in the issue under discussion? Are there no overlaps? If laws are made through the political processes in the executives and legislatures, could the output law be free from politics? Arguably, to attempt a distinction between 'political' and 'legal' in the context of a legislative process so as to fix politics in 'containers' as their Lordships attempted is misleading (Makulilo, 2012). It has to be noted that the so called 'word of advice' was actually the ruling by the African Court of Human and Peoples' Rights.

2.2 African Court of Human and Peoples' Rights

On 2 June 2011 and 10 June 2011, respectively, the 1st Applicants (the Tanganyika Law Society and the Legal and Human Rights Centre) and the 2nd Applicant Rev. Christopher Mtikila filed in the Registry of the African Court on Human and Peoples' Rights applications instituting proceedings against the Respondent (the United Republic of Tanzania) claiming that the Respondent had, through certain amendments to its Constitution, violated its citizens' right of freedom of association, the right to participate in public/governmental affairs and the right against discrimination by prohibiting independent candidates to contest Presidential, Parliamentary and Local Government elections. The Applicants also alleged that the Respondent violated the rule of law by initiating a constitutional review process to settle an issue pending before the courts of Tanzania. The two applications being similar were consolidated.

In its judgment of 14 June 2013, the Court unanimously found that the Respondent violated Articles 10 and 13 (1) of the African Charter on Human and Peoples' Rights; and by majority of seven to two that the Respondent violated Articles 2 and 3 of the Charter. The Court directed the Respondent to take constitutional, legislative and all other necessary measures within a reasonable time to remedy the violations found by the Court and to inform the Court of measures taken. It would seem that the decision by the African Court on Human and Peoples' Rights was foreseen by the Court of Appeal of Tanzania through its word of 'advice' to both the Attorney General and the Parliament of the United Republic of Tanzania. That is to respect the international law and human rights treaties. Therefore, the application presented a test case to evaluate the trajectory of the African Court towards the jurisprudence of other international and regional human rights

organs on similar issues. What is interesting to note is the fact that the Court of Appeal of Tanzania declined to exercise its constitutional mandate (Makulilo, 2011b). Yet, the ruling has been instrumental in informing the ongoing constitution making process in Tanzania. Both the first and second draft constitutions have included the issue of independent candidate.[7] Again, the case has set precedent in the course of promoting and defending human rights in Africa.

3 Opposition to independent candidates

The need for introducing independent candidacy in Tanzania has been opposed by the ruling party and its government since the inception of multiparty system in 1992 (Makulilo, 2012; Mateng'e, 2012; TEMCO, 2016; EU-OEM, 2015). While addressing workers in Mbeya region, to mark the Workers' Day, on May 1, 1995, the first president of the United Republic of Tanzania, Mwalimu Julius K. Nyerere wandered why CCM and its government are afraid of independent candidates. He retaliated that if one is allowed to vote, why should one be compelled to be a member of a political party to get elected. To be sure, Nyerere posited "It is very illogical to argue that moving to a multi-party system is to make the country more democratic, and at the same time there are laws restricting the citizens' right to contest for an elective office to membership of a political party – or disallowing them to stand against their party's official candidate" [Nyerere, (1995), p.11]. During the 3 February 2004 Parliamentary session, Amani W.A. Kabourou asked why is the government reluctant in introducing independent candidates to contest as candidates in national and local elections.[8]

During the recent constitution making process which commenced in 2012 the issue resurfaced. Opposition parties and many civil society organisations demanded for this to be included in the proposed constitution. Indeed, it was finally included in the Proposed Constitution of 2014. Article 216 focuses entirely on the conditions to be attached to independent candidacy once the Parliament enacts a specific law to that effect. These conditions include such as the limit of time for one to cease party membership before becoming an independent candidate; that a person not to join any political party once he or she is elected as an independent candidate; to provide for sources of funding his or her electoral campaigns; to provide for an outline and criteria on how such an independent candidate will appoint his or national leaders; to have an electoral manifesto; to put conditions against any policies whose effect is to divide the nation and any other conditions which the Parliament will deem them relevant. Although the specific law has not yet been in place, it would appear, based on the Proposed Constitution, that the law will be restrictive in nature. This section discusses fears by the ruling party and its government on introducing the independent candidate.

The first and perhaps the most commonly advanced reason is that of preserving unity, peace and security. The respondent (the United Republic of Tanzania) during hearing before the African Court held that "the prohibition of independent candidates is a way of avoiding absolute and uncontrolled liberty, which would lead to anarchy and disorder; the prohibition is necessary for good governance and unity…The prohibition on independent candidates for positions of government leadership is necessary for national security, defence, public order, public peace and morality". Similar position was long held in the High Court of Tanzania in 1993 by the State Attorney when submitted that: "the prohibition to individual contestants in the general and local government elections is one

way to achieve representative democracy. The constitution primarily aims at establishing and safeguarding a representative democracy, which is the policy our country follows…a policy that intends to safeguard peace, order, security and tranquillity". This position was retaliated by Mohammed Seif Khatib, then Minister in the Prime Minister's Office during the 3 February 2004 Parliamentary session when responding to the question by Amani W. A. Kabourou on the reasons as to why the government is reluctant in introducing independent candidates to contest as candidates in national and local elections. He maintained that the system would lead into divisions and disorder along religion, ethnicity, race, gender and regionalism.[9]

Msekwa seems to agree with this line of thinking when he equates independent candidacy to individualism or selfishness, which according to him has no role to play in advancing the socio-economic and political interests of the people usually pursued by political parties (Msekwa, 1995). This argument is rather weak since it fails to show in a concrete way how independent candidacy would lead into disorder. As indicated elsewhere in this article, independent candidacy is not something new in democracies worldwide and Tanzania in particular. In the 1960 pre-independence elections in Tanganyika, Mr. Sarwatt contested as an independent candidate and won. There were no any sign of breaching peace and order in the country. It is against that backdrop that Mateng'e (2012) posited that there has not been any empirical evidence that associates independent candidates in elections with threats to 'peace, order, security and tranquillity' at least in Tanzania. Under the current multiparty system, the ruling party and its government still behave in a single-party fashion. In 1994, for example, the judgment of independent candidate was circumvented by the ruling party and its government by enacting a law that rendered the High Court's ruling ineffective. This was contrary to the principles of democracy and good governance. Mateng'e acknowledges this fact when stating "Given the current composition of the parliament predominantly tilting in favour of the ruling party and the fact that it was the very institution that unanimously approved the proscription of independent candidacy, changes against that effect are very unlikely". I have to add that in case the independent candidate issue is going to be part of the Tanzania's electoral system, it will be restrictive in nature.

The second explanation is that it would reduce women's support to CCM. As I argued elsewhere, CCM relies on women who constitute the majority population and voters in Tanzania (Makulilo, 2011b). This observation is further strengthened by the Research and Education for Democracy in Tanzania (REDET) opinion poll which indicated that about 52.2% of women respondents compared to 47.8 men would vote for CCM's presidential candidate in the October, 2010 general elections (REDET, 2010). Thus, CCM and its government have already proven that women are very strong and if left to mobilise freely it is likely that they will be a formidable force to the status quo. In an attempt to found autonomous women based organisation countrywide, the University of Dar es Salaam organised a four-day national conference in July 1994 on the position of women in a multiparty system. The conference was attended by representatives from all over Tanzania, as well as top government officials and leaders of political parties. One of the outcome of this conference was the formation of Women's Council of Tanzania (Baraza la Wanawake Tanzania – BAWATA) to address women specific issues. This was because the meeting resolved that in addressing women problems there is no need of any ideology and hence women were ready to bury their differences.

Thus on 16 May 1995 BAWATA was registered in accordance with Cap 337 of the 1954 Societies Ordinances. Article 4 of its constitution outlined the following objectives:

to liberate women from all forms of gender exploitation, oppression, discrimination and degradation and to condemn the same; to work as an institution or a forum on behalf of women and through which they would be able to initiate and further their targets and interests in all aspects of social life; to unite all women without regard to their religious, colour, age, creed, status, levels of education or authority, political parties, ideology or any other thing so as to strengthen their efforts in the struggle for protecting their rights and equality; to mobilise all women for purposes of giving them leadership whereby they would effectively be participating in the bringing about economic and social development; to educate women on their basic rights and duties in the society; to maintain women's respect; to foster women's participation and implementing of various national projects; to make a follow-up on law reforms, particularly in the area affecting women activities (BAWATA, 1995).

Seen from its objectives, BAWATA could be a stepping stone for women to liberate themselves and address their issues as opposed to those by parties. In July 1995, BAWATA designed a comprehensive manual to educate women voters for the October 1995 general elections and identify their agenda for the benefit of potential candidates. Similarly, the document aimed at supporting those candidates who would address issues affecting women such as land ownership, health care, water, education, inheritance to mention some. BAWATA therefore presented its views on the qualities needed by any presidential candidate.[10] Tenga and Peter argue that "Given that the ruling party had been used for so long years to having all women in Tanzania under its control, the emergence of a strong and independent organisation was not universally welcomed. Indeed, its leaders felt obliged to reduce their level of political engagement in the run-up to the elections, following threats from the CCM, and several 'warnings' by the President of the United Republic" [Tenga and Peter, (1996), p.162]. After its mobilisation activities of the 1995 elections, the government flung a barrage of accusations at BAWATA, among others, that it was run more-less like a political party, and that it did not submit its annual accounts to the relevant authorities. The government finally de-registered it on 30 June 1997.

On behalf of BAWATA, Prof. Issa Shivji (an advocate) filed a case against government's action for deregistering BAWATA, arguing that it was unconstitutional and violated Articles 13(6)(a), 18, and 20 of the URT Constitution providing for the right of fair hearing, expression, and association and assembly, respectively. The petition also alleged that the government of Tanzania is in violation of international human rights instruments, including the International Convention on Civil and Political Rights (ICCPR), the African Charter on Human Rights, and the Convention on Elimination of All Forms of Discrimination Against Women (Rugemeleza, 1997).

In April, 2009, the High Court of Tanzania ruled in favour of BAWATA and also challenged sections in the Societies Act which go against the Constitution by giving too wide discretionary powers to the President to abolish any civil society organisation, and called upon legal amendments within one year of the ruling. If women organise well outside the party structure they would be able to make a difference (Makulilo, 2009). By now, Tanzania has strong, institutionalised feminist organisations such as Tanzania Media Women's Association (TAMWA), Tanzania Gender Networking Programme (TGNP), Tanzania Women Lawyers Association (TAWLA) which are able to provide sufficient force to mobilise women to vote for the candidates that will articulate their agenda. Experience has shown that it is difficult for women to reform the parties to serve their interests. It is for this reason political parties have limited women through the

nomination processes to contest for constituency seats. The Tanzania Monitoring Election Committee reaffirms that "given the community view of women as hopeless leaders, and women not being in positions of power within their political parties, the internal elections conducted within the parties are mostly in favour of men. For instance, in Songea urban constituency women aspirants wishing to be nominated were harassed and abusive language was used against them" [TEMCO, (2001), p.145].

There is no even a single party which has deliberately initiated efforts to set the affirmative action by adopting quotas to promote women. Meena (2001) would argue that in the male dominated multiparty system, membership in political parties is insufficient in the process of redefining political culture to empower women. Women should organise themselves for action and challenge the primacy of male power and corresponding biases in political processes. The fact that CCM and its government did not welcome BAWATA as well as the court ruling in favour of an independent candidate suggests strongly that it is not in the interest of CCM to see women organise autonomously outside the party structure (Tripp, 1994; Makulilo, 2009). Independent candidate would be one of the entry point through which women could organise outside the party structure and therefore to push and control their agenda in formal decision making bodies (Makulilo, 2009).

Third, it would undermine CCM's party discipline and powers both within and without the party by facilitating party crossovers. This is so due to the fact that seats would belong to individuals and not parties. Unless a claw-back clause is attached to restrict those who are elected through their respective parties not to crossover, individual members of parliament would have been able to join and rejoin other parties at possible lowest cost. Concomitantly, this would have relatively widened space for free debate and discussions in the parliament something which is harmful to CCM. In dealing with this CCM ensured a mechanism is put in place. The Proposed Constitution of 2014 puts two parallel conditions: firstly, 'there will be a limit of time for one to cease party membership before becoming an independent candidate' and secondly 'no person is allowed to join any political party once he or she is elected as an independent'.

CCM has in memory the story of Mr. Serwatt during pre-independence elections as well as several defections after the introduction of multiparty system. For example, in 1995 CCM rejected to nominate Dr. Wilbroad Slaa for the Karatu constituency. Dr. Slaa immediately joined Chama Cha Demokrasia na Maendeleo (CHADEMA) where he was elected as the member of parliament for consecutive three terms before he vied for the post of the presidency in the October, 2010 general elections. Similarly, Mr. Seif Sharif Hamad who was expelled from CCM in 1985 joined the Civic United Front (CUF) and has since then challenged fiercely CCM in Zanzibar. The most recent defections were those by two former Prime Ministers of the United Republic of Tanzania to join the main opposition party CHADEMA during the 2015 general elections. Mr. Edward Lowassa became the Presidential candidate for CHADEMA and he fiercely challenged the ruling party to the extent that its popular votes were reduced to about 57%. He is still feared by the ruling party even after the 2015 general elections.

Fourth, it would allow alliance formation which is strictly prohibited by the Political Parties Act. No. 5 of 1992. This means that an individual could freely make alliance with another party sponsored candidate. In the October, 2010 general elections, Mr. Ahmad Rashid of the CUF wanted to be a vice-president to CHADEMA's presidential candidate, Dr. Wilbroad Slaa, but that was not possible since he was supposed to cease to be a CUF member, something which he didn't want.[11] In the 2015 general elections, Juma Haji Dunni from the CUF had to cease his membership and join CHADEMA so as to qualify

to be the running-mate to the Presidential candidate to CHADEMA. In order to deal with this threat, CCM ensured that a clause is put in place in the Proposed Constitution of 2014 to limit movements of candidates from political party to an independent candidate and vice versa. It is in the interest of CCM to see that opposition political parties do not forge alliance to outcompete it. The Political Parties Act No. 5 of 1992 is very clear that alliances are only allowed if existing political parties dissolve completely and a new one is registered after fulfilling all registration conditions which are very stringent.

4 Conclusions

The ruling party and its government are determined not to allow an independent candidate at any cost. If it happens that independents are allowed, the strategy is to make sure that they are made to be ineffective. Following the experience of Mr. Sarwatt, independent candidacy was abolished in 1965. With the advent of multipartism, it was also not allowed. In 1994 the CCM's parliament deliberately enacted a provision to curtail independent candidate and jeopardise the rule of law when it made the Court's judgment in the case of *Mtikila 1* ineffective. The failure by the Court of Appeal to boldly adjudicate on the independent candidate question gives CCM and its government discretion to introduce independent candidate. However, experience has shown that the Tanzania's parliament which is a CCM's dominated chamber is unwilling to welcome independent candidate. Notwithstanding, the judgement by the African Court was instrumental in pushing the ruling party and its government to include Article 216 in the Proposed Constitution of 2014 to address the issue of independent candidacy. The conditions which have been attached to the independent candidacy are so stringent to assure independents are effective in the Tanzania's polity.

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Notes

1 On 26 March 1994 the Inter-Parliamentary Council, at its 154th session in Paris unanimously adopted the Declaration on Criteria for Free and Fair Elections. Out of Union's 129 Member Parliaments, 112 were presented at the conference when this Declaration was adopted. The declaration reaffirms the Universal Declaration of Human Rights of 1948 and the International Covenant on Civil and Political Rights of 1966 [online] http://www.ipu.org/cnl-e/154-free.htm (accessed 30 September 2016).

2 The General Comment was adopted in its 57th Session on 7 December 1996. See the General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25) of the United Nations International Covenant on Civil and Political Rights.

3 Literally translated as "In the history of this House, it is only one person who managed to outcompete a TANU sponsored candidate in elections". See Hotuba ya Rais, Mwalimu Julius K. Nyerere katika Bunge, Kuhusu Siasa ya Serikali, 8 Juni 1965.

4 It was admitted so by Mr. Sarwatt himself during the parliamentary sessions. See the Parliament of Tanzania, Proceedings of the National Assembly, Seventeenth Meeting, First Sitting 8 June 1965, (Hansard).

5 United Republic of Tanzania, Report of the Presidential Commission on the Establishment of a Democratic One Party State 1965. Dar es Salaam: Government Printer.

6 CCM Constitution 1977; see also CCM Manifesto 2005.

7 See Articles 75(g) and 117(1)(c) of the First Constitution Draft June, 2013 and Articles 79(1)(f) and 125 (1)(c) of the Second Constitution Draft December, 2013; see also Mhina, Amos and Makulilo, Alexander B. (2013) Consultancy on the Review of Various Aspects on Electoral Systems and the Electoral Commission in Tanzania to the United Republic of Tanzania, Constitutional Review Commission.

8 See the Parliament of Tanzania, Proceedings of the National Assembly, Eighteenth Meeting, First Sitting 3 February 2004, (Hansard).

9 See the Parliament of Tanzania, Proceedings of the National Assembly, Eighteenth Meeting, First Sitting 3 February 2004, (Hansard).

10 Elimu ya Uraia Kwa Wanawake Wapiga Kura na Agenda ya Wanawake Katika Uchaguzi Mkuu wa 1995, Dar es Salaam, July 1995.

11 "Dk. Slaa awataka Duni, Hamad Rashid wa CUF" [online] http://www.mzalendo.net/habari/dk-slaa-awataka-duni-hamad-rashid-wa-cuf (accessed 1 October, 2016).