Paradoxes of Constitution-Making in Tanzania*

by

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I. What are constitutions: cross-examining concepts

We, the East African lawyers, have learnt the meanings of constitution from our British masters who themselves do not have a written constitution. Steeped in positivism, theirs is more of a description rather than a definition, much less a concept. The descriptions, with some or other variation of language, tell us that a constitution is a collection of rules which establishes and regulates or governs the government (Wheare 1966:1) Wade & Bradley (1965, 7th edn.) better it slightly. 'By a constitution is normally meant a document having special legal sanctity which sets out the framework and the principal functions of the organs of government of a State and declares the principles governing the operation of those organs.' (ibid.:1) I will not dwell on definitions; rather my purpose is to explore the concept of constitution and what does it express politically and socially.

I will quickly deal with three concepts.

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* The most reasonable speculation that comes to mind is that the government is giving itself a bargaining chip by transferring the referendum provisions in the

Social contract

Lawyers often define constitution as a contract or a pact between the rulers and the ruled. The genesis of this definition lies in the discourse of the 18th and 19th century bourgeois philosophers grappling with the transition from absolutist rulers, who ideologised their authority as deriving from God, to limited governments responsible to the ruled. As happens so often with legal doctrines, the historical genesis is forgotten with the passage of time and changes, and the concept becomes a logical construct, which, oftentimes, is a legal fiction with no basis in reality. We all know that neither historically nor in practice, rulers and ruled sit to enter into a contract or a social compact, which is then reduced into a document called constitution.

In my view, this concept is outdated and not very useful in understanding the deeper meaning and role of constitutions.

Power-map

In the heyday of entry into multipartism, African intellectuals wrote quite a bit on constitutionalism. Okoth-Ogendo, in one of his writings, defines constitution as a 'power-map' (Okoth-Ogendo 1991: 3 et. seq). He relates constitutions and law generally to power. This is a step forward in the definition of constitution than social contract. It is the configuration of power at a particular time in society that is expressed in a constitution. So it is not the constitution that constitutes power; rather it is power that constitutes or subverts a constitution. So far so good; but one must go further and define the social character of power. Who exercises power, for whom and in whose interest and how does that power relate to the socio-economic forces in civil society. That type of understanding of constitutions requires contextualizing and situating constitutions in the bigger picture of social struggles that characterise class societies.

It is the stretching of power-map beyond political power that gives us the next concept that I want to discuss.

National consensus

The movement from authoritarian civil, and dictatorial military regimes to multipartism in the early 1990s in Africa, threw up some important lessons all of which have not been fully learnt and analyzed. One of the early experiences

starting with Benin was the almost spontaneous convening of national conferences or conventions. It is at these conferences that existing heads of state were replaced, where debates and discussions took place and where eventually the outlines of new constitutions emerged. Not all of these experiences were successful. Nonetheless, they threw up, albeit in a somewhat inchoate manner, a new process of constitution-making which caught the imagination of committed African intellectuals and was developed further theoretically (see generally Kibwana, Peter & Oloka-Onyango eds. 1996)

In this context, a new definition or concept of constitution emerged: constitution as an embodiment of national consensus. Depending on each concrete situation, the process of constitution-making was seen, first, as a process of consensus building between different competing and contesting interests through open national debates, which, secondly, would define the character of the polity that the people wanted, and, third, the process would be fully participatory lending legitimacy and stability to the political order.

In 1990, when the then President of Tanzania Ali Hassan Mwinyi, announced the government's decision to form a commission to look into one-party or multi-party system, this author wrote a long piece arguing for a protracted process of national debate followed by a national conference to crystallise national consensus that would underlie the new constitutional order (Shivji 1990(a) in Shivji 2009: 30-39). The argument was that the relative peaceful situation in the country allowed a process of a protracted national debate, which would take stock of the previous three or so decades. The one-party rule was essentially authoritarian based on an imperial presidency, a one-party polity and two-government union. These formed the three pillars of the 1977 Union constitution. The ruling party CCM (Chama cha Mapinduzi) adamantly refused to entertain the idea. There was no need for either a new constitution or a national conference, they argued.

Quite independently, when the parallel process of constitution-making in Kenya during the Moi dictatorship was sparked off by a coalition of civil society organisations, the CNC (Coalition for National Convention) arrived at similar conclusions. The main objective of CNC was precisely to work for the convening

of a national convention and at the same time to keep the process independent of the state and firmly rooted in civil society ((Mutunga 1990: Ch.3). With the wisdom of hindsight, many critics, including the founders of CNC themselves, argue that the CNC was naïve in that it did not take into account the configuration of political forces. That may be so. But for radical reformers, the central point behind such proposals and struggles is pedagogical, rather than programmatic. For social radicals, the process of constitution-making is as much a school of social struggles for self-education as any other struggle (like trade union or land occupation) waged by the working people. I submit that seeing constitution-making as a process of consensus building captures this perspective well.

Defining constitution as an embodiment of national consensus has a number of positive characteristics, particularly in our countries and situations:

1) It is not only a definition of constitution but at the same time a guide to the *process* of making a constitution. A process of national debate and national conference to crystallise a consensus must thus precede the making/writing of the constitution.

2) Building consensus requires participation of all major contending forces and interests. Therefore, the process of constitution-making must be a participatory process.

3) Both the participation and debate has an invaluable pedagogical impact on society as a whole as opposed to the constitution-making process that is left to legal experts and politicians. The former are driven by logic and technicalities while the later by getting a slice of power. Both have short time horizons. Experts do not see beyond the life span of a project just as politicians cannot go beyond the next general election.

4) A constitution coming out of such a process is likely to have greater legitimacy and roots in society such that it would be defended by the population and its breach would be easily exposed and understood rather than hidden in the mystified processes of law and litigation.

5) Contending forces and competing interests are brought out in the open, rather than being disguised behind the customary rhetoric of politicians, who invariably claim to represent national interests when in reality they stand for sectional interests.

II. Constitution-making in Tanzania

Currently Tanzania is involved in the process of making a new union constitution. Before I discuss this process let me briefly outline constitution-making in the country.

A. Background

The pre-union Tanganyika has had two constitutions and the post-union Tanzania has had three new constitutions. Zanzibar, the other partner to the union, has had one pre-revolutionary constitution and two post-revolutionary constitutions.

The first constitutions in both Zanzibar (1963) and Tanganyika (1961) were independence constitutions. The 1961 Tanganyika constitution was enacted by the British parliament after negotiations with the Tanganyika African National Union (TANU). The 1963 Zanzibar constitution was enacted by a constituent assembly composed on the formula arrived at in negotiations with the British, which was the colonial power. Both constitutions provided for a constitutional monarchy, in Zanzibar the monarch being the Sultan deriving his ancestry from Oman, and in Tanganyika the Queen was the head of state. Both were based on the Westminster model with the parliament being supreme. The Tanganyika constitution did not have a bill of rights as Nyerere of TANU refused to have a system of checks and balances on the premise that what was needed for a "young nation" like Tanganyika was rapid development rather than checks and balances which would end up being brakes on the process of development (Mwakyembe 1986 in Shivji ed. 1986: 16-57). The Zanzibar constitution did have a bill of rights.

The Republican constitution of Tanganyika (1962) was enacted by the pre-existing National Assembly, which converted itself into a constituent assembly following the Ghana model. This was the second constitution. It ushered in the

Executive presidency, which has been dubbed 'imperial presidency', given the concentration of enormous powers in the president.

The President enacted the third constitution in 1964 following the union between Zanzibar and Tanganyika. The Articles of Union authorized the President to modify the pre-existing Republican constitution of Tanganyika to accommodate the union. Thus was born the third constitution called the Constitution of the United Republic of Tanganyika and Zanzibar, 1964.

In 1965 the fourth Constitution of Tanzania was enacted by the parliament as an ordinary Act. It established the one-party system with two parties, the Afro-Shirazi Party in Zanzibar and the Tanganyika African National Union (TANU) in Tanganyika. This constitution was called 'interim'; because the permanent constitution as envisaged by the Articles of Union was not enacted.

Finally, in 1977, after the merger of two parties, the ASP and TANU to form CCM, the permanent constitution of Tanzania called the Constitution of the United Republic of Tanzania, 1977, was enacted by the constituent assembly. The president promulgated the constituent assembly and appointed its members under the authority given to him by the Articles of Union. All the members of the constituent assembly were the members of the existing parliament. For all intents and purposes, therefore, it was the existing national assembly that enacted the 1977 Constitution, which is the reigning constitution today (for the process of constitution-making in Tanzania see generally Shivji ed. 2004, for a legal analysis of the making of the 1977 constitution see Shivji 1990(b))

The first constitution of Zanzibar after the revolution of 1964 was enacted by the Revolutionary Council and approved by the ruling party CCM. It was closely modeled on the 1977 Union constitution. The second constitution was enacted by the House of Representatives in 1984 which is still the reigning constitution in Zanzibar.

One of the important characteristics of the constitution-making process in Tanzania since independence has been that none of the constitutions was enacted by the people either directly through a referendum or indirectly through an elected constituent assembly. Thus the political legitimacy of the constitutions

has been dubious. Furthermore, given the one-party system and an imperial presidency, the constitution has been pretty authoritarian. The first president Mwlaimu Nyerere is reported to have quipped to a BBC reporter that under the constitution he had sufficient powers to be a dictator (quoted in Mwakyembe ibid.: 45). The message of course was that he was not. I have always wondered what would have been the reaction of his people to such a quip. Most likely they would have exclaimed: what a good president we have, not what a bad constitution we have. This is because the constitution did not matter. The polity derived its legitimacy from the egalitarian ideology of the party supported by a charismatic leader. The terrain of political struggles was the party rather than the constitution.

Understandably, the underbelly of the constitution in Tanzania has been the union question. At least since the 1983-84 political turmoil, the union question and the demand by the Zanzibaris for a greater autonomy has refused to go away. In 1983, the then President of Zanzibar Aboud Jumbe, prepared necessary papers to file a case in the Special Constitutional Court provided by the 1977 constitution. His legal advisers took the position that the Articles envisaged a three-government federal structure and not a two-government union. The matter came to a head at the emergency meeting of the National Executive Committee of the party during which Jumbe was left with no alternative but to resign (see generally Shivji 2008).

As already indicated, in 1990, again, there was a call for a new constitution. It went unheeded. This author, for example, suggested an elaborate process of making the new constitution in three stages. There would be a national debate followed by the convening of a national conference of delegates representing major interests in society such as trade unions, peasant associations, commercial an industrial organisations etc. The national conference would outline the main principles of the new constitutional order, which would then be the basis for a committee of experts to draft the constitution. The draft would be submitted to an elected constituent assembly that would discuss its provisions and adopt the constitution. The constitution would then be submitted to a referendum in which people from both sides of the union would approve or reject. A ‘yes’ vote would

give the constitution force of law. Thus, literally, the people would have given themselves a constitution marking a break from the past tradition where constitutions were enacted and 'imposed' from above. It would have given the polity political legitimacy and resolved the union question (see generally Shivji 1990(a) in Shivji 2006).

This proposal was rejected out of hand not only by the ruling party but also by putative opposition parties who were in a hurry to get into power.

The union question has again occupied the centre-stage in the current process, which I discuss in the next section.

B. The current process

The genesis

The call for a new constitution started very early in the 1990s. It came mainly from radicals from the academia, journalists and civil society activists. Later on, as political parties were established in 1992, they took up the issue of a new constitution as part of their political campaigns. Their worry was much more on the impartiality of organs like the electoral commission, which tend to be packed by the appointees of the ruling party. On and off, political parties used the call for a new constitution as their mobilizing tool.

After his election to the second term, President Kikwete took up the issue of a new constitution, partly perhaps to take the wind out of the sail of political opposition and partly to carve out a legacy, as he would be leaving presidency in 2015. Whatever the case, the issue of a new constitution itself does raise some fundamental questions like the direction of the country, the long standing grievance of Zanzibaris against the structure of the union, the social-economic conditions of the large majority, the exploitation of natural resources including minerals and gas, the deteriorating living conditions of the people and most important of all, the general perception of the class polarization in society and the fragmentation of the social fabric. These are not the kind of issues that can be addressed, let alone be resolved, without a deep and protracted national debate. Hence, when the president announced his intention to initiate a process of making a new constitution, there was an intense, albeit short lived debate on the nature of the process and its objective.

The University of Dar es Salaam held a major symposium. Two currents emerged. A small minority argued that:

(1) the process ought not to be hurried;

(2) the process itself of making a constitution was equally, if not more, important than the outcome;

(3) the issue at hand was of getting a legitimate constitution rather than just a good constitution in technical terms;

(4) there should be a protracted national debate on what kind of country Tanzanians want;

(5) the process should be extra-parliamentary and fully participatory; and

(6) there was a need to build a national consensus before writing the constitution.

The other current, mainly political parties and NGO activists, favoured a parliamentary process with a specific time frame so that the next general election (2015) is held under a new constitution. Opposition political parties tended to interpret consensus and participation as *their* involvement rather than the involvement of the people as a whole. In any event, the government sent a bill to parliament providing for a process of constitutional review and eventually coming up with a new constitution to be launched in April 2014, thus coinciding with fifty years of the Union.

As was expected, once the bill was sent to parliament, it became a highly contentious issue as political parties within parliament turned it into a partisan tug of war. The ruling party, through its government, obviously wanted to retain control over the process while opposition parties had to find their niche on issues that they believed would strike a chord with their constituencies and enhance their prospect of winning the next election.

Outside parliament, both the existing human rights and other NGOs, or rather FFUNGOS (foreign funded NGOs), joined the constitutional debate from the standpoint of their own sectional interests: gender, land, disabled, youth, women, media, etc. New NGOs, among which the most vocal being *Jukwaa la*

Katiba, sprung up. Seminars, workshops, symposia, training sessions etc. multiplied as project funds had to be spent and visibility to be expanded. A few of these activities provided fora for serious reflections, many tended to be repetitive NGO-speak – human rights, good governance, independent electoral commissions, etc. Very few engaged in the bigger picture analyzing the real life-conditions of the large majority or the domination of the polity and economy by imperialism. Hardly any offered alternative platforms to address the concerns of the working people. I do not know of any which developed alternative constitutional arrangements, which would address issues of transforming the social-economic order. Any attempt to introduce such discussion was shot down on the ground that it was 'theoretical', not feasible and would not be easily acceptable by the powers-that-be. (Least of all, I guess, by the funders!) As is wont, NGO paradigm is goal- rather than process-oriented with little conceptualization and much less understanding of history generally, and history of social struggles, particularly. For NGOs, the time horizon begins and ends with a project as with mainstream politicians the time is bounded by five-year election cycles.

After much tussle, the Constitutional Review Act (Cap. 83) was passed in 2011. A constitutional review commission was eventually formed. The Act itself went through several amendments, twice in 2012 and twice in 2013. As I write this, the latest amendment has yet to be published. For the purposes of this paper, I will not dwell in details or legal problems of the Review law; rather my focus will be on the process of constitution-making as conceived by the Act and the positions taken by political forces in relation to the process.

Organs and process under the Constitutional Review Act

The Review Act provides for three main organs and two stages of consultation. The organs are:

- Constitutional Commission;
- Constituent Assembly; and
- Referendum

The *Commission* is composed of 32 members, 16 from Tanzania Mainland, 16 from Zanzibar, including the Chairman who is from the Mainland and the Vice-Chairman who is from Zanzibar. The President in agreement with the President of Zanzibar appointed all members. The President invited fully registered political parties, faith based organisations, NGOs and other civil society groups to submit nominations from which he picked the membership.

The Commission is charged with educating the public in the workings of the Commission and gathering and coordinating their opinions on the 'new constitution'. The Commission is also responsible for constituting fora to discuss the first draft of the Constitution written by the Commission following its analysis of the opinions given by the public. The Commission has already accomplished the two tasks and is now involved in preparing the second draft of the Constitution, which it is required to finish by 15th December 2013. In terms of the Act, the second draft of the Constitution, together with a comprehensive report, will be submitted to the Union President and the President of Zanzibar.

The Commission was thus conceived as a kind of unelected "representative" body, representing different interests, rather than a body of experts. Since there was no prior debate or a national consensus as to the kind of constitutional order desired by the people in their collective capacity, it was left to the Commission to determine the vision, direction and the structure of the new constitution. The Commission presumably believed that it could do so after gathering and receiving opinions from the people at large and the more articulate and vocal organised civil society and political elites.

In a society divided into competing and conflicting interests, as expected, *people* had different expectations of the constitution. Working people expected betterment of their life-conditions – better and accessible education, health, water, sanitation and nutrition; participation in the control and disposal of their land and natural resources; decent jobs and humane treatment. The section of the political class in power (divided and fragmented as it is) wanted only the tinkering of the constitution to get legitimacy and continue to be in power. The section of the political class in opposition wanted the constitution to facilitate and expedite their entry into power. They used the call for a new constitution as

a mobilizing device, presenting it as a panacea for all ills for all time. The intelligentsia in academic institutions and the NGO sector wanted the new constitution to deliver democracy, as they understood it, that is, rooted in liberal values of the market-place - individual human rights, pluralism, political competition, good governance, etc. The business class wanted freedom to exploit and accumulate and legal protection against competition from foreign businesses. Small disparate groups of nationalist radicals, a remnant from the Nyerere era, wanted the constitution to reclaim national pride and respect. Theirs was a voice in the wilderness. The dominant voice was undoubtedly that of the neo-liberal compradorial class combining the political, intellectual and business elites.

The first stage of consultation is before the Commission prepares the first draft. Members of the Commission did this by organising trips to various parts of the country. At this juncture, in absence of a report of the Commission and an analysis, it is difficult to make an assessment of the process. Nonetheless, as could have been expected, in their submissions ordinary people talked about their daily problems arising from their real life conditions rather than address what the learned would consider constitutional issues. Often, participants repeated what they had been taught by their parties to say. Both these irritated members of the Commission, the former because the speakers failed to relate their contribution to constitution and the latter because the Commission insisted that they wanted people's *own* opinions and not the opinion of their parties. In Zanzibar, the response was more focused, albeit polarized. Zanzibaris concentrated on the structure of the union. This translated into the number of governments, two or three. A significant number also demanded '*muungano wa mkataba'* (treaty based union) which, in effect, means breaking the union. All in all, the expectations of the Commission and the expectations of the people were poles apart.

In its wisdom, the Commission took the view that the majority wanted a three-government federal structure. In view of this conclusion, the Commission drafted a federal constitution taking a minimalist position, that is, only six matters as falling within the federal list among which the most important being foreign

affairs, army and security and immigration while the rest would be left to the respective partner governments, that is, the Tanganyika and Zanzibari governments. The draft has elaborate provisions on human rights, directive principles and some kind of an ethical code for leaders. However, these are not federal matters and therefore respective constitutions of the partner states need not follow them. In short, in my view, the structure suggested is that of a very weak central government in terms of power but with proliferate institutions. The structure is closer to a confederation than a federation. It is unlikely to last for long, as I have analyzed elsewhere (Shivji 2013).

It was this draft of over 250 articles that was taken to fora for discussion and opinion. Expectedly, ordinary citizens could hardly comment on the technically drafted provisions. Hence discussions revolved around the issue of the structure of the union – two or three governments. In some places, Commissioners were irritated if speakers favoured two governments and opposed three governments on the ground that they were supposed to suggest improvements to the structure suggested by the Commission and not suggest an alternative structure. Some Commissioners turned themselves into campaigners for the draft. Just as the first stage of consultation which had no basis for the people to debate on could not arrive at any consensus, so the second stage of consultation, which had a technical basis in the form of a draft constitution, did not solicit any broad understanding and national consensus. To say the least, the consultation exercise could not be described as genuinely democratic. The participation of the people was perfunctory even as it was elaborately organised.

In my opinion, the Commission fell between two stools. It was not a suitable body for crystallizing a national consensus, nor was it conceptualized as such. Not could it act fully as a technical committee of experts. It had, on the one hand, to address different interests of its members and, on the other, do a technical job of drafting based on compromises. (Those who disagreed with the majority could not possibly have a minority *draft* constitution.)

Next we look at the second organ, the constituent assembly.

In terms of the Constitutional Review Act, the Constituent Assembly will be composed of –

- All members of the National Assembly of the Union (357)
- All members of the House of Representatives (81)
- Other 201 members appointed by the President from among persons nominated by the following civil society organisations as follows: -
    - NGOs (20)
    - Faith based organisations (20)
    - Fully registered parties (42)
    - Higher learning institutions (20)
    - Groups of people with special needs (20)
    - Trade Union organisations (19)
    - Association representing livestock keepers (10)
    - Fisheries associations (10)
    - Agricultural associations (20); and
    - Other groups of people having common interest (20).

This composition of the Constituent Assembly clearly represents the intention of the powers-that-be to get a constitution which they want. First, the proposed constituent assembly is not an elected body. Although, members of parliament and the House of Representatives are elected, they are elected under the present constitution and have no mandate to adopt a new constitution. Secondly, political parties dominate both legislatures, that is the union parliament and Zanzibar House, since independent candidates are not allowed. The result is that CCM would constitute more than half the total membership. If we make a reasonable assumption that at least half of the 201 appointed by the President in agreement with the President of Zanzibar are CCM or CCM-inclined, CCM would constitute some 70 per cent of the Constituent Assembly. The Constituent Assembly would thus be a party body delivering a party constitution unless of course CCM splits. Whatever be the case, in principle, it is simply not correct to have a constitution, which is supposed to belong to the people, being made by a party body.

It is even more ironical that some 200 members should come from the so-called civil society organisations when these CSOs represent nobody except their own members and activists. It is even more absurd that members coming from NGOs, faith based organisations and high learning institutions should be almost equal in number to those coming from the working people - workers, peasants, pastoralists and fisher men and women. This is the reflection of the extent of NGOisation of our politics. NGOisation of "representative democracy" and marginalization of traditional class based organisations (such as trade unions) is the new form of donor driven neo-liberal politics. NGOs in fact demanded representation in their own right and did not feel embarrassed that they should substitute themselves for elected delegates of the people based on universal suffrage which is what ought to have been an elementary democratic demand.

The referendum to validate the constitution passed by the constituent assembly is the last stage before the constitution gets force of law. In the first version of the Review Act, the approval of the constitution required a simple majority of the votes cast from both sides of the union. Should the voter turnout be low, this would mean that a minority of the population could pass the new constitution.

In the latest amendment of the Review Act, the provisions on the referendum have been deleted on the grounds that the referendum would be taken care of by the proposed Referendum Act to be enacted in the future sitting of the parliament. The proposed bill for a referendum has been already drafted and published. It seeks to introduce referendum as a way of making decisions on issues deemed to be important by the President. It is a generic law providing for referenda. On the face of it, the bill is very problematic and far-reaching in its implications

First, how do you make a law that is contingent on the passing of a future law? What will happen to the whole process of constitution-making should the proposed referendum Act, for whatever reason, is not enacted or cannot be enacted? Secondly, the referendum bill itself raises significant issues. What is the purpose of introducing an Act on generic referendum when this has not been the tradition of decision-making in the country or the region? In any case, if the intention were to introduce referenda as a method of decision-making, the most

rational thing would have been to include it in the proposed new constitution. Why was this not done and instead propose a separate Act? What is the hurry? Why bring such a fundamental change at the eleventh hour on the eve of adopting a new constitution? And finally, as it stands, the proposed bill could be unconstitutional. It purports to apply to both parts of the union when referendum is not a union matter.

It is not clear if there is an ulterior political motive behind the proposed Act. If so, the politics cannot be innocuous.

The referendum bill introduces a huge x-factor in the process of making the new constitution, yet surprisingly, it has gone unnoticed by any of the actors active on the constitutional scene, including vocal NGOs, FFUNGOS and opposition parties.[·]

III. By way of a conclusion

Summing up, I venture to make the following broad propositions, which can hopefully guide us in the processes of constitution-making in our region.

1. New constitutions come about in varied historical circumstances as a result of social struggles and political balance of forces at a particular juncture. Changes of governments, whether through war and violence or negotiations, give rise to new constitutions. In East Africa, our first independence constitutions were symbols of regaining of sovereignty after the colonial rule. The shape and content of the constitution depends ultimately on the dominating class or classes, though, depending on the strength of dominated class at that particular juncture, some of the concerns and demands of the latter may also find a place in the constitution.

[·] The most reasonable speculation that comes to mind is that the government is giving itself a bargaining chip by transferring the referendum provisions in the process of validation of the constitution to the generic referendum Act, which gives enormous powers to the President to appeal to the people over the heads of elected representatives (including of his own party). If the parliament wants the referendum to ultimately validate the constitution, they must pass the proposed referendum bill. If they don't, the constituent assembly, which is dominated by CCM, will have the final say. Either way, the CCM government wins. On the other hand, it may be that the President wants to retain ultimate say should the constituent assembly arrive at an awkward decision not to his liking.

In sum, there is no textbook or a blue print prescription as to when to make a new constitution or what a typical constitution contains. There is no ideal type as far as constitutions are concerned. Constitutions are historical products and reflection of political configuration of social forces. For instance, the US constitution, which is presented as an example of great democracy, is one of the shortest constitutions, under ten articles. 55 rich white men closeted in a room, among whom were slave and plantation owners, made it. On the other hand, the Constitution of India, which is presented as the biggest democracy, is one of the longest, over 300 articles. It was made by a constituent assembly whose 200 members were elected from provincial legislatures acting as electoral colleges. The constituent assembly was declared to be a sovereign body without limitations. It drafted the constitution over three years (Singh 1994: A-21 et seq).

2. We have inherited the definition and conceptualization of constitution from our British masters. These were based on their own history of social struggles. The doctrine of social contract often used to define constitution as a social contract or social pact between rulers and ruled emerged during the transition from absolutist monarchies to limited governments. The mainstream of our intellectuals, in particular lawyers and political scientists, take these definitions without interrogating them.

3. In the 1990s, when there was a wave of democratization in Africa, some West African movements (for example, in Benin) gave birth to very innovative concepts like the national conference as a vehicle for building national consensus to underlie new constitutions. This remained in its infancy as the democratic movement from below was quickly hijacked by neo-liberal elites backed by western donors. The democracy discourse was channeled into the safe alleyway of maintaining the status quo. Multipartism and politics as a market place of competing elites became dominant. Bourgeois liberal values informed the framing of constitutions, regardless of the fact that such constitutional order was being erected on

a highly monopolized economy controlled by compradorial classes backed by imperialism.

The emergence of NGOs and FFUNGOS in turn reinforced the liberal discourse with their rights ideology, good governance, constitutionalism, accountability, transparency etc. when none of this applied to the economic sphere dominated by the corporatocracy, which is least transparent or accountable to the public. It is accountable only to its voracious greed for accumulation.

4. Born in the neo-liberal era and based on liberal values, we had such new constitutions like the South African, the Ugandan and, more recently, the Kenyan. Each one of these is a fine piece of document crafted in the best traditions of liberal values. Yet, they are an edifice erected on extremely unequal, poor and ethnically fragmented societies. South Africa since 1994 is one of the most unequal societies in the world with a Gini index of 63.1. This is more than the Gini index of the US (45), which is considered among the 39 most unequal societies in the world. Uganda's Gini index is 44.3 and Kenya's 47.7. Tanzania, with a less liberal constitution of 1977, has a Gini index of 37.6 (2007). So, technically good liberal constitutions do not mean that they serve the needs of the large majority of working people who wallow in poverty and inhumanity.

5. As part of the NGOisation of the political discourse in our countries, states and representative institutions have been demonized, as corrupt etc. while civil society and private sectors have been romanticized (for a critique of NGOs see Shivji 2007 and Warah 2008). Donor funding is channeled into the NGO sector to continue propagating the good governance and human rights (including despicable humanitarian interventions like in Libya) discourse while undermining traditionally representative institutions like the parliament and the traditional class-based organisations like the trade unions, peasant associations and cooperatives.

   This NGOisation of our polity has been taken to absurd lengths in the current discussions on the composition of the constituent assembly in

Tanzania. Instead of arguing and fighting for a fully elected constituent assembly based on universal suffrage, which should have been the elementary democratic demand in the new dispensation, the NGO sector and opposition parties quickly settled for a greater "representation" of the civil society sector and political parties. Ultimately, that is what the government and the ruling party conceded by increasing the number of members from civil society to 201 from the original 166. Of course, the government kept control by ensuring that the president will remain the appointing authority.

6. From our review of constitution-making in Tanzania, we have seen that in the making of all the five new constitutions, people have not been involved. In that regard the constitutions, including the existing constitution of 1977, lack political legitimacy. This is not to say that the political regime under Nyerere did not have legitimacy. It did but constitutions during the Nyerere period did not matter. The regime derived its legitimacy from the ideology of the party and its charismatic, popular leader. It is only with the entry into multipartism that the constitution became important and hence the call for a new constitution to put political legitimacy on a different foundation.

7. The initial call for a new constitution by a minority of intellectuals beginning in the early 1990s was much more radical. They argued that the opportunity to change the party system should be taken to have a national debate that would take stock of the past and carve out a new future for the country with full involvement and participation of the people. The ruling party was not prepared for this. Subsequently, opposition parties took up the issue, on and off, but more as a mobilizing device. And then various NGOs followed suit.

8. Subsequently, the current process was launched which we have analyzed in this paper. The process, so far, has proved to be far more contentious and fractious than expected and has the danger of marginalizing the large majority of the working people and delivering an elite-based constitution with a plethora of liberal values and a long catalogue of rights and ethical

principles. In practice, elaborate formulation of human rights and ethical principles do not mean much so long as the socio-economic system is based on very divisive neo-liberal precepts. This is the lesson to be learnt from the South African, Ugandan and Kenyan constitutions. In our situation, a good constitution is that which is not only technically good but has involved the participation of the people and, therefore, one, it is politically legitimate and, two, it addresses fundamental problems of the real life-situation of the working people.

9. In the case of Tanzania, the greater danger with the first draft of the constitution is that it provides for a very weak federal government which nevertheless is top-heavy with institutions which would mean a heavy financial burden on the taxpayer, and much more so for Zanzibaris, which he/she can ill afford. In the circumstances, there is a likelihood that the 50-year-old union could break with far-reaching consequences to the country and the region.

10. Constitutions do matter. But those of us who want a real transformation of our societies in the interest, and from the standpoint, of working people, have to devise alternative and more innovative processes of making constitutions. Only thus can we engage in real politics, the politics of the *walalahoi* as opposed to the politics of *walalaheri.*[·]

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[·] In the new KiSwahili vocabulary developed in Tanzania in recent years, *walalahoi* means working people, *walalahai* means middle class or the petty bourgeoisie and *walalaheri* means the upper class or the bourgeoisie.

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