TOWARDS A NEW CONSTITUTIONAL ORDER: THE STATE OF THE DEBATE IN TANZANIA

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CONTENTS

TOWARDS A NEW CONSTITUTIONAL ORDER: THE STATE OF THE DEBATE IN TANZANIA **3**

I. Introduction **3**

II. The Deeper Relations **4**

III. An Overview of Constitutional Developments: 1961-1995 **5**
A. 1961-1990: The Pinnacalisation of Power 5
B. Summing Up: Constitution-making and Consensus-building: A World Apart 13
C. 1990-1995: Marketisation of Politics 14

IV. Constitution-making and Consensus-building: Problems & Prospects **17**
A. The Purpose 17
B. Constitution-making as Consensus-building: A View from Mlimani 18
C. Constitution-making as a Technical Legal Exercise: The Nyalali Model 20

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I. Introduction

In this paper I highlight some of the important considerations in the debate on making a new constitution for Tanzania. First and foremost, by tracing the history of constitutional development in the country I attempt to derive certain lessons which can then feed into assisting us in determining the path of constitution-making. As a matter fact, it is only such a historical approach that can help us to build a consensus on the need for a new constitution. The issue is not technical and legal. The issue is historical and political. Consensus building is both an intellectual as well as a political task. So while making out a case for constitution-making that will embody national consensus, I hope, I am also assisting in constructing a consensus on the need for a new constitution.

This paper does not go into details. The detailed arguments, references and historical material is to be found in the accompanying supplement to this paper which is a paper I presented recently to the Parliamemtary Committee on Constituitonal and Legal Affairs. This paper should therefore be read together with the supplement.

II. The Deeper Relations

African scholars analysing the constitution have observed an apparent paradox in Africa which Okoth-Ogendo sums up as the paradox of 'constitutions without constitutionalism'. To understand the paradox one has to interrogate the African situation in the light of the liberal theory of constitutionalism which serves as an 'ideal model' or the dominant paradigm (ideology) in the African discourse on constitutionalism.

In the liberal theory the constitution is both a power-map as well as a terrain of constructing political legitimacy. In the former sense the constitutional structure and rules map out the way state power is organised and distributed in, and within the organs of the state. In the latter sense constitution provides the ideology which is partially manifested in what are called constitutional principles and doctrines (separation of power, responsible government etc.). This together is what is meant to be conveyed by the concept of constitutionalism. Whereas constitutional rules enable the exercise of power, constitutionalism provides rationalisation, explanantion and justification of its exercise in relation to society which is presented as a collection of individuals and persons. This is what is called political legitimacy in the language of sociology of politics and consensus building in the language of (probably the less intellectually profound!) political science.

In the liberal political formation as it emerged in Western Europe and North America, constitutional rules and constitutionalism merged in the constitution. Thus, as it is often observed the constitution is not only a fundamental legal but primarily a political document. In other words, the rulers derive both the exercise of power and its legitimation from the constitution. In other words, the making and application of the constitution is not only putting in place a certain institutional and legal structure but the process of constructing consensus i.e. making the political rule and the exercise of power acceptable and respectable. To put it more bluntly, the constitution mobilises consent to the exercise of coercion without provoking counter-coercion.

The paradox in the African situation arises from the fact that the constitution is a power-map without being an embodiment of consensus. The rulers in Africa for

various historical reasons, which I would not go into, sought the legitimation of their rule on terrain and in ideologies other than constitutionalism barring political set-ups where there was unmediated rule of the gun. Yet all of them did have the documents called constitutions. It has been argued that the function and role of these documents was largely symbolic and mostly in the international arena. In the international arena the constitution symbolised state sovereignty giving it international personality and respectability. Indeed, literally, as we know, the independence of the formerly colonised African countries was symbolically embodied in passing and giving of the independence constitution.

In the paper which is being presented as a supplement to this one, I have shown in detail the process of constitutional developments in Tanzania as a power-map on the one hand, and the process of the reproduction of the separation of the constitution from constitutionalism, on the other. There I have shown the need for a new constitutional order and dfferent approaches to constitution-making. In the sections that follow I highlight in a summary form some of the arguments and observations of the supplement paper. For the purposes of this meeting I add in a more practical form and answer some of the possible objections to the proposals which I made some five years ago on one possible path of constitution-making which will integrate the process of consensus-building.

III. An Overview of Constitutional Developments: 1961-1995

A. 1961-1990: The Pinnacalisation of Power

Since independence in 1961 and up until 1977 when Tanzania adopted its permanent constitution, the country had five new constitutions. These are the Independence Constitution of 1961; the Republican Constitution of 1962; the Interim Constitution of the United Republic of Tanaganyika and Zanzibar of 1964; the Interim Constitution of 1965 and the permanent Constitution of the United Republic of Tanzania of 1977.

The Independence Constitution, 1961 represented the classical end of colonialism and the symbolic transfer of power to the nationalist leadership under the Tanganyika African National Union (TANU). As in many other African Commonwealth countries, the constitution was hatched in the colonial office, constructed on the

Westminister model and handed down as an instrument of independence. The Tanganyikan constitution had one glaring omission, glaring because most other African and non-African independence constitutions had included a bill of rights. Much has been made in later writings about this omission with one obvious oversight. And the oversight is that in omitting a written bill of rights the 1961 Tanganyikan Constitution was closer to the genuine British model in that Britain, as we know, does not have a written bill of rights.

The liberal *Independence Constitution of 1961* which provided for parliamentary supremacy and independence of the judiciary without any American style separation of powers was a superimposition on a basically despotic colonial legal system which remained intact. It did not survive.

The *Republican Constitution of 1962* marked the beginning of the presidential system. The executive president combined in him the powers of the head of state and the head of government. He was the commander in chief of the army and a part of the parliament without whose assent a bill could not become law. He appointed his ministers and chaired the cabinet. The collective and individual responsibility of ministers was effectively shifted from the national assembly to the president. The president was to run the country 'in his own discretion and shall not be obliged to follow advice tendered by any other person' (s.3(3). In short, the Republican Constitution laid the foundation of what has been called the 'imperial presidency'. Later constitutions and numerous amendments did not make any dent into presidential powers. Rather, with the expansion of the public sector and the hegemony of a one-party system the powers of the president were augmented even further. **'Imperial presidency' then can be considered one of the three basic pillars or foundations of the 1977 Constitution.**

The rationalisation and justification of the enormous powers of the president was rooted in what I have called the ideology of developmentalism. It was summed up well by no other than Mwalimu Nyerere in a letter he wrote to the London *Observer* in defense of the executive presidency. He wrote:

> Our constitution differs from the American system in that it ... enables the executive to function without being checked at every turn... Our need is not for brakes to social change... - our lack of trained manpower and capital resources, and even our climate, act too effectively already. We need accelerators powerful enough to overcome the inertia bred of poverty, and the resistances which are inherent in all societies. (quoted in Mwaikusa *ibid.*, 105)

The Republican Constitution supplied the necessary accelerators which with subsequent amendments further accelerated the concentration of power in the Executive.

The modality of adopting the Republican Constitution itself is interesting and needs to be noted. Still within the British administrative tradition, the bill was preceded by a Government White Paper in English which was supposed to be discussed by mainly the Swahili-speaking publc. From extant materials, it appears comments came largely from more educated and technical sections, largely expatriates. There was a heated debate on the proposals in the parliament and severe criticisms from members who later fell out from the grace of TANU.

The constitution was enacted by the existing national assembly which was converted to a constituent assembly by an Act of Parliament with the mandate to enact the constitution. In other words, the parliament gave the national assembly, virtually itself, the power to pass the constitution. The national assembly itself was *de facto* a one-party body in that 71 members elected on independence on alimited suffrage came from TANU, with 70 elected on party ticket and one independent. This tradition of converting a pre-existing national assembly into a constituent assembly for the purpose of enacting a new constitution became ingrained in the constitutional practice of East Africa. Only in 1995, for the first time, the tradition was broken when Uganda under Museveni elected a constituent assembly with a specific mandate to adopt and enact the new constitution. Both the life and mandate of the assembly expired by law as soon the new constitution came into force.

The effect of converting a pre-existing legislative body into a constituent assembly is to side-line the role of the people in constitution-making which has been the hallmark of Tanzania's constitution-making as we shall see. But, of equal significance is the

fact that such a legal document cannot easily boast of political legitimacy or of deriving its force of law ultimately from the people. However representative the pre-existing national assembly may be, as a legislative body, it simply does not have the mandate in fact, law or politics to enact a **new constitution**. This should not be confused with the constituent capacity of parliament. The parliament by virtue of the constitution has powers to make laws - this is called its **legislative capacity**. The parliament has also powers, again given by the constitution, to amend the constitution under a special procedure (usually special majorities) stipulated by the constitution. This is its **constituent capacity**. It is now settled that the power of the parliament to amend the constitution while quite wide is still limited in that it cannot alter the **basic structure** of the constitution.

Be that as it may. The next landmark in the constitutional development was the union between Zanzibar and Tanganyika in 1964. I shall not go into the origins of the union. Suffice it to say that the union was constituted by signing of the treaty called the Articles of the Union by the respective heads of state, Mwalimu Nyerere and Sheikh Karume. The Articles were ratified by the respective legislative bodies and became part of municipal law called the Acts of Union. Let me quickly recapitlulate the major features of the acts of Union.

Firstly, as I argued in my book some six years ago, the Acts of Union are a constitutional instrument which is controlling over both the Union and Zanzibar constitutions. This legal position is beginning to be accepted by some members of the higher judiciary and has found its way in a couple of cases pending before our courts. If so, this would have a far-reaching effect on the whole constitutional and union structure.

Secondly, the Acts of Union established the two-government union. Some eleven items were placed under the jurusdition of the union legislature and executive. The remaining matters were all to be under the exclusive jurisdiciton of the Zanzibar government in Zanzibar. As for other part of the union, Tanganyika, the non-union matters were to be administered by the Union government. The union executive was to operate in Zanzibar in relation to union matters through the instrumentality of the

Zanzibar president who by virtue of his position was also the vice-president of the union. These provisions constituted the kernel of the union arrangement which I have called the two-government union. This form of union has survived all constitutional changes and is embedded in the 1977 Constitution.

Thirdly, the Acts provided the procedure for the adoption of the new permanent constitution through the appointment of a constitutional commission followed by a constituent assembly. The spirit behind this undoubtedly was to allow some participation of the people from both sides of the union in the making of the union constitution. In the event, the time of one year which was provided in the original articles was indefinitely extended to an 'oppurtune moment'. Eventually, some 13 years later the constitutional commission and the constituent assembly were formed but in a fashion which almsot completely sidelined the participation of the people as we shall see when we look at the making of the 1977 constitution. The result was, and continues to be that the people in their totality have never had an opportunity to debate fully the desirability, structure and the division of power in the union.

Fourthly, since the formation of the union until the death of one of its architects, Mr Karume, the Acts were respected only in its breach. On the part of the union govenrment under Mwalimu Nyerere the list of union matters was increased from the original 11 to some 21 matters in the present constitution. This was done by amending the union constitution by the union parliament. The legal validity of such a procedure is dubious, to say the least. Whatever be the case, the Karume regime, and to a large extent subsequent Zanzibar governments, have hardly respected the constitutional arrangement. In sum, in some fundamental repects the union in practice did not operate in accordance withe the constitution. Ironically, it was this disregard of the constitution on both sides which kept the union going.

Fifthly, the constitutional changes stipulated in the Acts of the Union were accommodated by modifying the existing Tanganyikan constitution which became the the *Interim Constitution of the United Republic of Tanganyika and Zanzibar, 1964*. This then is the third constitution of Tanzania. The third constitution was passed neither by a constituent assembly nor by the parliament conberting itself into a

constituent assembly. Rather, the existing republican constitution was modified and renamed under a Presidential Decree. The president derived his authority to make these far-reaching changes in the constitution from the Acts of the Union. In effect, therefore, it could be said that the parliament divested itself of its constituent capacity to one of its components, the president!

Finally, if the Republican Constitution laid one of the foundations of the constitution i.e. 'imperial presidency', the 1964 constitution was the source of **the second foundation, the two-government union**. The third pillar was laid by the 1965 interim constitution which we discuss next.

The *Interim Constitution of 1965* is the fourth constitution of Tanzania which laid the **third foundation or pillar of the constituitional order, i.e. the one-party state or more correctly the party-state**. Just a year before the union, the President had appointed a commission which was to look into implementing the resolution of the National Executive Commitee of the ruling party, TANU, to introduce a one-party political system. This commission is cited by Mr Msekwa as a fine example of the tradition of the Tanzanian government to let people participate in constitution-making. The reality is far from that fine assertion. The major decision to go one-party was made by the NEC of the party. People did not participate. The commission's terms of reference made very clear that neither the commission nor the people were to question nor to discuss whether to go down the road of one-party; that decision had already been made.

The 1965 constitution estabslihed the country as a one-party state. Zanzibar at the time was already de facto a one party state. So there were then two parties respectively in each part of the union. The making of the 1965 constitution, again, is another example of lack of constitutionalism and participation of the people. This time around the constitution was not even adopted by a constituent assembly, not even one in its reincarnation of the pre-existing national assembly. Instead, the 1965 constitution was enacted as an ordinary Act of Parliament presumably in the constituent capacity of the Parliament. This is equivalent of saying that an amendment of the constitution

repealed the constitution and established a new constituiton in its place. This is nothing less than frankestenian, a creature devouring its own creator!

Subsequent amendments of the 1965 constitution simply consolidated and further concentrated power in the party-state headed by the executive presidency whose incumbent was also the chairman of the party. A 1975 amendment finally declared trhe party to be supreme to which all state organs where accountable. In short the constitutional development represented pinnacalisation of state power in the party-state. **If the constitutional edifice may be graphically represented as a pyramid, then the three corners of its triangular base would be (1) the imperial presidency (2) the two-government union and (3) the party-state with the pinnacle as state power.**

These foundations were further consolidated in the permanent *Constitution of the United Republic of Tanzania, 1977.* As a matter fact, it went beyond consolidating existing trends in that the two parties had now merged to form a single party in the whole of the union, *Chama cha Mapinduzi*. The constitution itself for the first time explicitly recognised the monopoly of politics as vested in CCM by declaring -

> *3.-(1) CHAMA CHA MAPINDUZI (kwa kifupi "C.C.M.") ndicho Chama cha siasa pekee katika Tanzania na ndicho chenye madaraka ya mwisho katika mambo yote kwa mujibu wa Katiba ya Chama.*
>
> *(2) Shughuli zote za kisiasa nchini Tanzania zitaendeshwa ama na Chama chenyewe au chini ya uongozi na usimamizi wa Chama.*
>
> *(3) Shughuli zote za vyombo vyote vya umma katika Jamhuri ya Muungano zataendeshwa chini ya uongozi na usimamizi wa Chama.*
>
> *(4) Masharti yote yaliyomo katika Katiba hii yatatakiwa yatekelezwe kwa kuzingatia wakati wote madaraka ya Chama kama ilivyoelezwa katika ibara ndogo ya (1), ya (2) na (3) ya ibara hii.*

The whole edifice of the 1977 Constitution rests on the three pillars already mentioned. What is even more significant is the way the 1977 constitution wa enacted. Its enactment was preceded by the merger of the two parties, TANU on mainland and ASP in Zanzibar. The merger was discussed by party branches on the two sides. A joint party committee of twenty people worked on the constitution of the new party. It was the same committee which was appointed as a constitutional

commission as required by the Acts of Union. Within a very short time the commission sent its proposals to the National Executive Committee of the party which adopted them in a day in camera. The constituent assembly was appointed on the same day as the commission. It membership was exactly the same as that of the union national assembly. The bill for the new constitution was published seven days before the constituent assembly met to discuss it. The constituent assembly enacted the constitution in three hours. The debate was largely laudatory.

It is clear in all this that the 1977 constitution was not the product of a public debate. There was no participation of the people either in its conception or in its adoption. The provisions of the Acts of Union were followed, at best, only technically; its spirit was completely mutilated. Under the circumstances, one more opportunity was lost to place the constitution on a more consensual foundation.

Since its adoption the 1977 constitution underwent many amendments. Probably the most important amendment was the Fifth Constitutional Amendment. It was in more than one respect an exception to the rule. First, the amendment was initiated by the NEC of CCM making proposals for the amendment. This ran against the usual practice where the NEC made decisions and asked the government to implement them. Secondly, the party invited a public debate on its proposals and assigned one year for the purpose. Again, the practice hitherto had been to confine debates, if at all, to party members and organs. Thirdly, although the original proposals did not contain any suggestion for a bill of rights, one was included partly as a result of public demand.

In the event, the debate itself was the only one of its kind in the constitutional history of Tanzania. Its scope was expanded beyond the expectations of the party. It came to a head in the case of the union question in terms of increasingly strong calls of greater autonomy for Zanzibar. The party felt so threatened by this that the debate was cut short by announcing the pollution of ‘political atmospehere’ and forcing the then Zanzibari leadership to resign. Curiously, the accusation against Mr Jumbe who was then the president of Zanzibar was that he had been involved in preparing papers to open a case for the interpretation of the Articles of the Union before the constitutional

court provided in the 1977 Constitution. Be that as it may. Suffice to reiterate that the 1983-84 constitutional debate was a fine example of public participation in constitution-making.

B. Summing Up: Constitution-making and Consensus-building: A World Apart

The thirty year experience of constitution-making since independence may be summed up as follows:

First, the constitution in Tanzania as elsewhere in Africa has represented a power map in its strict sense. It has not been a terrain of mobilising consent of the ruled. As a power map the adoption of some five new constitutions and numerous amendments (with one exception proving the rule) has represented pinnacalisation of state power in the executive arm of the party-state thus leading to the establishment of an authoritarian state.

Second, the process of constitution-making has been devoid of serious and genuine participation of the people. The rulers did not seek legitimacy on the terrain of constitution or constitutionalism and therefore did not see or feel the need to solicit people's participation in this process. Political legitimacy was constructed on the plane of the ideologies of developmentalism. In the case of Tanzania this took the form of the ideology of Ujamaa. It is at this level, rather than at the level of constitution, that consensus was constructed. Hence non-participation of the people in constitution-making was of no great political significance. Yet the Tanzanian political system boasted of stability and even legitimacy compared to many other African countries. I have argued elsewhere that this was the result of the hegemonic role that Ujamaa played. [This is well analysed by Mwalimu himself in a rarely quoted, or understood, speech; see appendix to the supplement paper.] In other words, it is not only that the rulers cared little about legitimating their rule through the constitution; it is also true that the constitution mattered for little in the consciousness and perceptions of the ruled. In this regard I am fond of citing an anecdote which illustrates the point.

Mwalimu has been quoted to quip to a BBC interviewer that 'The constitution gives me enough powers to be a dictator'. The message of that was of course that in spite of those powers he was not a dictator. Which message in my view was not inaccurate. By no stretch of imagination Mwalimu could be described as a dictator. He was a geneuinely popular and legitimate leader. Yet his legitimacy did not lay in the constitution. At the same time, I have little doubt, that if the mass of the people were asked to spontaneously react to that quip they would have probably exclaimed: 'What a good leader we have!', **not** 'What a bad constitution we have!' Neither the ruler nor the ruled felt embarrased by a constitution that gave the president enough powers to be a dictator but both took credit in the fact that the ruler wa not a dictator ... in spite of the constitution.

Third, the 1983-84 constitutional debate which I have described as an exception to the rule itself proves the rule that the constitution was not a means or a terrain of consensus building. By the time of the debate the hegemonic ideology had undergone severe stress. The 1979 Uganda war and the subsequent economic crisis had begun to tell on the legitimacy of the government. The campaign against economic sabotage under the then Prime Minister was almost a last-ditch effort under Ujamaa to salvage government legitimacy. Thus by the time of the debate there was already the beginning of loss of an hegemonic ideology. Since then the ideological vacuum has become even more apparent. Multi-partyism and liberalisation itself may be considered a response to the crisis of political legitimacy i.e. absence of a legitimising ideology. Can constitutionalism constructed in its liberal form of multi-partyism, good governance, etc. fill this vacuum? Piecemeal constitutional changes heralded by the introduction of multi-partyism have not, I would submit, answered the question; rather they have raised more questions on the validity of the existing constitutional order.

C. 1990-1995: Marketisation of Politics

The Nyalali Commission's recommendation to go multi-party was a foregone conclusion. This was the only recommendation which was accepted by the government. The CCM government adopted the method of piecemeal amendments to the constitution to introduce the multi-party political system. Thus between 1992 and 1995 there were some four constitutional amendments each one of which was

accompanied by crisis and introduction of even more contradictions and internal inconsistency in the constitutional structure. This was to be expected.

We have seen that the 1977 constitutional order was constructed on three pillars - imperial presidency, two-government union and the party-state. The concentration of power under this sstructure operationalised the system and the ideology of Ujamaa rationalised, justified and legitimised it thus giving the political system its "proverbial" stability and tranquility ("*amani na utulivu*"). With the party-state dismantled and the Ujamma idoelogy all but knocked out by liberalisaiton (the Zanzibar Resolution), the constitutional edifice lost its major pillars. The patch work that has been done in the amendments can hardly sustain it. To cite just two examples.

Once there was the multi-party system it created two possibilities which, for obvious reasons, were not within the contemplation of the 1977 constitution. One, the possibility of different parties winning elections in the two parts of the union. CUF's strength in Zanzibar paused such a possibility which was immediately perceived as a threat to CCM hegemony. "How could Shariff Hamad be permitted to be the union Vice-President?"! On the other hand, any proposal to delink the union vice-presidency from Zanzibar presidency was resented by the Zanzibari CCM leadership as slighting and belittling of their leader. The issue of vice-president was postponed twice as a result of these tensions. A committee (Bomani Committee) was hurriedly appointed and hastily recommended a rather ill-conceived device of running-mate based on the American system. Ill-conceived because the two-government union was predicated on the president of Zanzibar in his capacity as vice-president of the union executing union functions on behalf of the executive of the union in Zanzibar. Once that link was broken, besides hurting the feelings of the incumbent president, the structure could not easily be operationalised.

Meanwhile, the union question assumed new dimensions with the OIC affair and the G55 resolution. Both of these created political crisis and brought the continuing durability of the 1977 constitution into question. Yet CCM did not want to address the constitutional issue. The question of vice-president was apparently resolved by including the president of Zanzibar in the union cabinet. This was like adding salt to

the wound so far as “feelings” are concerned but a total anachronism in so far as the constitutional structure is concerned. What is the role of this “member” in the cabinet? Is he collectively or individually responsible to the union parliament? to the union presidency? This is one side of the story. The other side is: Is he supposed to implement the decisions of the union cabinet in Zanzibar? as what? And many other issues could be hypothesised. In any case, the amendment compounds the original problem it set to resolve. What happens if you have the president of another political party elected as the president of Zanzibar? He would become member of the union cabinet all of whose membership including the president of the union are from another (not his) party. Could such cabinet really function?

The other scenario is where you have the presidency and national assembly going to different parties. Clearly the situation would be unworkable. Again such a possibility clearly existed in the last general election. The fact that it was not realised does not reduce the utter hopelessness of the existing constitutional structure.

It is clear that once you have a multi-party system or marketisation of politics, the unity of the state cannot be maintained either by what is perceived as a parochial party ideology (Ujamaa, which in any case has been battered to disappearance!) or a constitutional structure where power is concentrated in one organ (imperial presidency) to the exclusion of others. **What is needed is a new constitutional order based on a reconstructed constitutionalism which would crystallise a national consensus and entrench it in the constitution thereby providing necessary unity to the state and political stability to the system.** The 1977 constitution clearly fails on all these counts as I have clearly shown in my historical analysis. The debate on a new constitutional order and modalities of acheving this is not therefore a fancy of some misguided academics or intellectuals but an urgent **national** necessity.

IV. Constitution-making and Consensus-building: Problems & Prospects

A. The Purpose

The foregoing sections clearly establish the need for a new constitutional order. The need of the new constitution arises not so much in terms of whether or not the existing constitutional rules are well drafted and workable or not workable and therefore should be amended where they are deficient. It is not the deficiency of rules which is at stake. It is the whole constitutional order in terms of constructing national consensus which is in question. If so, the central issue is one of constitution-making . And in looking at different modalities of constitution-making, I would suggest, the criteria are neither technical or those to do with good craftsmanship. Rather the criteria are primarily political i.e. what modality or process will make the ultimate product acceptable and respectable and therefore perceived as binding on all - the rulers, the ruled and those aspiring to rule. What we need are not some neutral rules which willy nilly we have to obey on threat of punishment but rules to which we are all morally committed and therefore politically prepared to observe. It is in this context and with these criteria in mind, I submit, that we should debate the various proposals of making a new constitution.

In the light of these criteria, there are broadly only two modalities suggested so far which can be seriously evaluated and discussed. One involves a four stage process which begins with a National Convention and ends with a referendum. The other involves a two-stage process which begins with a constitutional commission and ends with a constituent assembly. Many other suggestions which have been made since revolve around these two and are some or other form of variation or confusion of these two. The third possible approach of either amending the existing constitution or adoption of a new one by the existing parliament (even if converted into a constituent assembly) which is what the CCM position seems to be clearly does not fit the criteria set out here. In any case, I have already shown its serious drawbacks in the course of this paper and therefore will not consider it further.

B. Constitution-making as Consensus-building: A View from *Mlimani*

The four stage model was put forward by the author of this article in January 1991 just before the appointment of the Nyalali Commssion. This view involved a protracted process of public debate at all stages and therefore assumed a freer legal atmosphere. I had therfore suggested that as a pre-condition various laws on the statute books restricting freedom of expression and freedom of assembly etc. should be repealed. The Nyalali commission made a similar recommendation enlisting some forty laws. Although many of these laws still remain on the statute books and a few have been amended (not always satsifactorily) there is now generally a freer atmosphere of assembly and expression, at least in one part of the union.

The **first stage** involved the convening of a **National Convention**. This is conceived essentially as a political process of meeting and collective stock-taking with a view to crystallise a broad consensus on the general principles which should guide and form the basis of the new political and constitutional order. The body will be composed of delegates from political parties, voluntary associations, student, youth and women groups, professional and business people, religious leaders and even prominent individuals. The idea is to have a representative sample of different interests and views in society, not representative in terms of numbers. The function of this body is to arrive at broad principles that should guide the structure of the new constitution not to draft one.

Since then the term national conference or constitutional conference has been used which is a slightly narrower formulation than mine. Some people have even confused this process as a legal one of adopting a constitution and therefore has to be validated by the passing of some enabling legislation. In my opinion, this is not necessary. I conceive National Convention as purely extra-legal political process brought into motion by a political agreement and a political commitment to be bound by its outcome.

Once the principles are crystallised they become a guide for a panel or a **constitutional commission** to draft a constitution. This would be the **second stage**. That would be the work of experts but based on the brief coming from the

Convention. Maybe even the commission could be elected by the convention. The draft constitution will then be submitted for a public debate. As a matter of fact the debate would have already begun with the Convention.

Meanwhile, a **constituent assembly** would be elected. This of course would require some enabling legislation providing for election and powers of the constituent assembly. The delegates to the constituent assembly should be elected on non-party basis purely on universal suffrage coming from both parts of the union. Their mandate would be simply to deliberate on the draft and **adopt** it. This would be the **third stage**. The constituent assembly would not have power to **enact** (i.e. give it force of law to) the constitution.

The **fourth stage** would be the **referendum.** The constitution adopted by the assembly would be submitted to the people for their vote. A certain per centage of 'yes' vote from both parts of the union would signify acceptance. As soon as this vote is done the constitution would be considered to have been enacted, that is given force of law. in the literal sense therefore the constitution would have derived its **force of law from the people.** In this sense the constitution would have both legal validity and political legitimacy ultimetely traceable to the people. Also in our constitutional history we would have made a revolutionary break with the past - with the colonial/authoritarian anscestry of the existing constitutional-order.

I know of many criticisms against these proposals, mostly of the technical and practical kind. Firstly, it is too long a process, maybe two or so years. To achieve what we want this probably is not that long. Maybe there could have been urgency before the general elections but I believe that urgency does not exist any longer. Secondly, as usual, there is the constraint of resources. I believe these can be mobilised even from internal resources if we are really committed to do it. Thirdly, it involves almost three general voting, one to the constituent assembly, another referendum and the third one a general election under the new constitution. The last one will have to be there in any case in the year 2000. The referendum is not quite a general election. I believe this again may not be such a great burden if the process is staggered over the next 3-4 years.

Finally, as usual, there is the criticism of the method of refrendum that, ‘yes’ or ‘no’ is not really suitable for a complex instrument like a constitution. This criticism may be generally valid but does not hold for the proposal put forward here. It must be remembered that in my proposal the referendum comes right at the end after a protracted period of public debate and closer consideration by the constituent assembly In which case, hopefully, people would be largely aware of what they are voting for.

The process suggested here fully takes account of our history and in particular the need to place the union on a more legitimate and acceptable basis. In fact, some such process is necessary even technically if one is to overcome the hurdle of having to trace the validity of the union always to the Articles. If a union constitution is derived in the fashion suggested here the Articles of the Union would have been superceded. The validity of the union would be derived from the people of both parts.

I now briefly look at the Nyalali recommendations.

C. Constitution-making as a Technical Legal Exercise: The Nyalali Model

The Nyalali recommendations were based more on technical considerations rather than on the need to construct a new national consensus. This is a little surprising in the light of their commendable analysis of the rise of monopoly of politics and the party-state which borrowed heavily from the ideas developed at the University. The two stage they recommended involved appointment of a constitutional commission to draft the constitution and three constituent assemblies to enact three constitutions one each for the federal state and its two components. This is because they recommended three government federal struture. They also recommeded that certain provisions of the constitution like those on huma rights should not be subject to amendment without a referendum.

There are a number of problems with the Nyalali recommendations notwithstanding that they are well-intentioned. Firstly, what is the basis of assuming that the people want three governments? Clearly that is an issue which requires wide debate and a

consensus. What structure should the union assume itself is an issue which ought not be decided a priori. The existing criticism is that the two-government union was the brainchild of Nyerere and Karume and that the people did not participate in it. By the same token, it could be argued that the three-government union would be the brainchild of the Nyalali commission, people did not participate in it.

Secondly, the constitutional commission is to be appointed by the president which means the incumbent from one paricular party. This itself damages the legitimacy of the whole process ab intio, right from the beginning. Indeed, some one ought to have reminded the Commission that that was precisely the criticism against their own commission and made one prominent leader of the opposition decline the offer to sit on it.

Thirdly, it is difficult to understand why the Commission recommends one constitutional commission and three constituent assemblies. In a federal structure you cannot possibly have the constitutions of the states placed on par with the federal constitution which would be the case if there were three independent constituent assemblies. The federal constitution has to prevail over state constitutions in case of conflict in which case the state constitutions have to derive their authority from the federal one. The federal constitution could, for example, provide that the state constitutions will be enacted by state assemblies.

Finally, the Nyalali Commission did not consider the need to make a constitutional break with the past. They do not show awareness of this issue either on the union question or on the question of the authoritarian state both of which, as I have shown here, are derived from our particular constitutional history. Neither the union question nor democratic governance can be legitimised because the number of government is changed from two to three and human rights are entrenched without the people themselves having participated in arriving at these decisions. In short, the commissioners seem to have substituted themselves in the place of the people! For similar reasons it is a bit anachronistic for the commission to recommend entrenchment of certain provisions by a referendum when the constitution itself was not enacted by means of a referendum in the first place.

In spite of some of these shortcomings, the Nyalali proposals remain a valid alternative starting point for a debate on the new constitutional order. One basic idea is unmistakeable in the report and that is the need for a new constitution. That is where the debate stands and that is the first consensus that has to be constructed - that we need a new constitutional order. And, secondly, a constitutional order which will command respect throughout the nation and in both parts of the union. That is the second consensus. And the third consensus we have to strive for is the modality of arriving at the new constitutional order. It would, in my opinion, be putting the cart before the horse, to start discussing and differing on what should and should not go into the new constitution. I have therefore resisted the temptation - which admittedly is always great with elites like us - to tell the people as to what type of a constitution would be good for them. One always has views on this, of course, but I believe they have to wait the right occasion.

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SUPPLEMENT TO THE PAPER

TOWARDS A NEW CONSTITUTIONAL ORDER: THE STATE OF THE DEBATE IN TANZANIA

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Problems of Constitution-Making As Consensus-Building in Tanzania

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