

The practice on the right to freedom of political participation in Tanzania

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Summary

This is a review of the impact of the drastic reforms in 1992 on Tanzania's constitutional and socio-political scene, specifically upon the right to freedom of political participation. Using a historical perspective, the article traces the origins of the present failures and successes in this regard in order to test whether the law meets the requirements of constitutionalism and international standards. It debates the issue as to whether in practice the one-party political system allowed free and unimpeded participation in the public decision making. It is argued that this legacy has not been done away with by the post-1992 reforms. It asks the question as to whether the National Electoral Commission is really independent and free of influence and dictation by the government. The amendments of the relevant constitutional provisions and other laws have added to the establishment of the Commission's de jure independence. Nothing has been done by the government to date, following a report of the Presidential Committee on the Constitution (Kisanga Committee) of 1999, to make the Commission de facto independent, even to a limited extent. Similar questions have been asked relating to other elements of political participation, such as the right to effective participation and the need to hold a constitutional conference leading to a new Constitution and allowing independent candidates in all elections in Tanzania. In this regard the government has not done enough, despite consistent pressure and campaigns from political parties and other civil society institutions. Lastly, the prospects for genuine political reforms are debated, acknowledging only limited success.

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1 Introduction

In 1992, Tanzania experienced unprecedented changes in its constitutional and political discourse, usually referred to in Kiswahili as *Mageuzi*. The country abandoned its dogma of one-party rule and replaced it with a potentially plural multi-party political practice. This paper reviews the impact of the *Mageuzi* reforms on Tanzania's constitutional and socio-political scene, specifically as regards the right to freedom of political participation. The historical perspective employed here is intended to trace the origins of both the present failures and successes in this regard, in order to test whether the law as it is practised today meets the requirements of constitutionalism and international standards.

In current post-modernist development discourse, 'participation' generally means 'the freedom to make meaningful choices between various options [as] the essence of development and [a] precondition for personal well-being ... to ensure the quality, appropriateness and durability of improvements ...'¹ The main problem is the fact that 'development processes are generally far from participatory ... Hence [there is] resistance of traditional top-down development planners towards participation of the poor, the people who are supposed to benefit primarily from foreign interventions.'² Moreover, another problem in the debate is about what form of participation is needed in the whole process of development, that is, as between instrumental participation, which is often applied, and transformative participation, which is seen to be the most desirable in enhancing real participatory development in the future.³ Due to limited space and the need for focus, this paper avoids this discussion, while restricting itself to the subject matter of the law as provided by the Constitution of the United Republic of Tanzania and other related legal instruments and how these have been applied.

2 *Mageuzi* and the right to freedom of political participation

The right to freedom of political participation is usually enjoyed or practised alongside the right to political association. Indeed, these two rights are the key to the enjoyment of all other fundamental human rights because political practice is the condition precedent for any type of mundane life. For example, in the modern human rights discourse under the United Nations (UN) leadership and co-ordination, the right

¹ E Berner & B Phillips 'Participation: Opportunity, burden or ritual?' (2005) 7 *Development Issues* 7.

² K Biekart 'Participation in development studies: Towards mainstreaming' (2005) 7 *Development Issues* 6. See also B Cooke & U Kothari *The new tyranny* (2001).

³ M Buchy 'Let's keep transformative participation on the agenda' (2005) 7 *Development Issues* 10.

to self-determination has come to be seen as the most fundamental of all rights.⁴ However, how can one achieve self-determination without effective political articulation, both at the domestic and international levels? It follows that, in any political jurisdiction, it is necessary and desirable that consensus is reached and maintained, that the unhampered enjoyment and practice of these rights are guaranteed, not only by the printed word of the constitution, but also through overt positive deeds of the governments in power. This is particularly true for governments in the developing world, such as Tanzania. These governments have invariably fallen prey to the temptation of creating extremely powerful ruling regimes, which more often than not tend to manipulate and control the political stage in their countries, for the good of a small section of society. What this paper wishes to emphasise is that this tendency has always worked towards the erosion of a much-needed civil society, respect for human rights and the expansion of democracy, ultimately resulting in less economic development in these countries.⁵

2.1 The law and the right to freedom of political participation

I have discussed in detail elsewhere⁶ the socio-economic factors that led to the fall and disruption of the one-party political system in Tanzania. This discussion is omitted here, partly for economy of space and partly because the area is over-researched.⁷ The right to political participation is provided for in article 21 of the Constitution of the United Republic of Tanzania which, before the Eleventh Constitutional Amendment Act 1994,⁸ had provided thus:

⁴ See generally O Gye-Wado 'A comparative analysis of the institutional framework for the enforcement of human rights in Africa and Western Europe' (1990) 2 *Africa Journal of International and Comparative Law* 187; R Higgins *The development of international law through the political organs of the United Nations* (1963); J Humphreys 'The international law of human rights in the middle twentieth century' in J Bos (ed) *The present state of international law* (1973); S Kaballo 'Human rights and democratisation in Africa' (1995) 43 *Political Studies* 189-203 199-200; H Kanger *Human rights in the UN Declaration* (1984); T Maluwa 'Discourses on democracy and human rights in Africa: Contextualising the relevance of human rights to developing countries' (1997) *African Journal of International and Comparative Law* 9; AH Robertson & JG Merrills *Human rights in the world – An introduction to the study of the international protection of human rights* (1993); IG Shivji *The concept of human rights* (1989); W Tieya 'The third world and international law' in R St J MacDonald & DM Johnson (eds) *The structure and process of international law* (1986).

⁵ See Berner & Phillips (n 1 above) 9.

⁶ See M Wambali 'The historical overview of constitutional reforms towards limited leadership in Tanzania' (2008) 34 *Commonwealth Law Bulletin* 2.

⁷ See eg CM Peter & F Kopsieker (eds) *Political succession in East Africa: In search for a limited leadership* (2006).

⁸ See sec 4 of Act 34 of 1994. Sub-sec (1) thereof was amended following a judicial ruling that we will deal with in detail in this paper. For purposes of clarity of argument and understanding of the constitutional developments involved, we proceed here to discuss the replaced provision.

- (1) Every citizen of the United Republic is entitled to take part in the government of the country, either directly or through freely chosen representatives, in accordance with the procedure provided or under the law.
- (2) Every citizen is entitled and shall be free to participate in full in the making of decisions on matters which affect him, his livelihood or the nation.

The scope of this section was delineated in the High Court of Tanzania case of *Rev Christopher Mtikila v The Attorney-General*.⁹ The High Court, presided over by the late Hon Mr Justice K Lugakingira, held as follows:

A citizen's right to participate in the government of his country implies three considerations: the right to the franchise, meaning the right to elect representatives; the right to represent, meaning the right to be elected to the law-making bodies; and the right to be chosen to political office.

In addition article 21(2) provides for the right to be consulted. Every citizen has the right to demand the government's effective consultation of them, before making important decisions seriously affecting their welfare. Moreover, the provision of the right to political participation was a significant feature of the Tanzanian Bill of Rights. It distinguished it from, for example, that of neighbouring Kenya, or even that of India.¹⁰ Even then, the right to participate in political affairs may be inferred from other constitutional provisions in such constitutions. Its inclusion in the Tanzanian Bill of Rights was evidence of the influence of the international legal regime thereto.¹¹ Actually, article 20(1) of the Constitution was, before its amendment in 1994,¹² *in pari materia* with article 13(1) of the African Charter on Human and Peoples' Rights (African Charter).

Besides that, article 25(a) of the International Covenant on Civil and Political Rights (CCPR) contains a provision akin to the former version of article 21(1) of the Tanzanian Constitution. However, CCPR is more elaborate on the right to political participation in its article 25(b), which is not found in the other legal instruments mentioned above. The right includes, *inter alia*, the right 'to vote and be elected at genuine periodic elections which shall be held by secret ballot, guaranteeing the free expression of the will of the electors'. Therefore, in the absence of such express provision in the Tanzanian Bill of Rights, the above foreign and

⁹ [1995] TLR 31 (*Mtikila* case).

¹⁰ Neither the Kenyan Bill of Rights (ch 5 of the Constitution of Kenya) nor that of India (ch 3 of the Constitution of India) provides for the right to political participation.

¹¹ The influence of international human rights standards in the Constitution of the United Republic of Tanzania can also be seen in other areas, especially arts 9(a) and (f), which refer to the relevance of the provisions of the Universal Declaration of Human Rights, 1948, to the Fundamental Objectives and Principles of State Policy, which invariably guide the interpretation of the Bill of Rights and the Constitution as a whole.

¹² n 8 above.

international provisions can be invoked by the courts in the country to develop an interpretation as to the parameters of the right to political participation.

Finally, we come to article 21(2) reproduced above. It is worth noting at this juncture that one does not find a provision analogous thereto in the international legal instruments mentioned above or in other related legal documents. Indeed, it was an innovation of the Tanzanian Constitution, reflecting the Guidelines of the then ruling political party, CCM.¹³ But it must still be borne in mind that the Bill of Rights in the Constitution of Tanzania is crafted in such a way that it imitates the International Bill of Rights. Whether the one-party political system allowed free and unimpeded participation in the public decision making in practice is the subject of the discussion in the next section.

2.2 The right to political participation in practice

If anything, by its very nature, the one-party political system was itself a negation of all aspects of the enjoyment of the right to political participation. Take, for example, the right to take part in the government, either directly or through freely chosen representatives (article 21(1)). This was marred by the election law itself. The issue is whether the *Mageuzi* process from 1992 onwards has changed substantially for the better the right to political participation in expanding the right. This issue is examined in the next subsection of this paper.

2.2.1 The right to stand for public office

Prior to the coming into effect of the Eighth Constitutional Amendment Act 20 of 1992, article 39(1) of the Constitution of the United Republic of Tanzania had categorically provided that the contestant for the position of President must be 'a member of the party who fulfils all membership obligations prescribed by the party Constitution'. Moreover, article 67(1) of the same Constitution had provided for qualifications for members of the National Assembly along the same lines.

One cannot doubt the importance of the above requirement in a one-party scenario. Similarly, one has to appreciate the logic that such requirement cannot have any substance in a multi-party situation. But that was not to be the case with the ruling party, CCM, and its government, which still insist to date on the requirement of party membership for any person wishing to contest all elective offices at the local government, parliamentary and presidential levels, even after having discarded the one-party political system. Thus, by virtue of sec-

¹³ See the CCM *Guidelines* (1982).

tion 13 of the Eighth Constitutional Amendment Act 1992, article 39 of the Constitution was amended to read as follows:¹⁴

- (1) No person shall be entitled to hold the office of the President of United Republic unless he:
 - (a) is a citizen by birth of the United Republic by virtue of the citizenship law;
 - (b) has attained the age of forty years;
 - (c) is a member and is a contestant sponsored by a political party; and
 - (d) is otherwise qualified for election as a member of the National Assembly or of the House of Representatives.¹⁵

Similarly, provisions were made in the same law in respect of contestants for membership to the National Assembly (section 19). It was indeed no secret that the above provisions followed the ruling party's directives as had been confirmed by the government.¹⁶ Thus, in defending his party's position while dismissing any rationale for the introduction of independent candidates, the then Prime Minister, John Samuel Malecela, scornfully declared that 'if one holds opinions and beliefs which are acceptable to the people but are different from those shared by the present political parties, one has the option of forming one's own political party'.¹⁷

However, such eloquent justification, which seemed to have been well received by the House, did not get the same approval from the High Court of Tanzania. The constitutional validity of the same provisions was questioned in *Rev Christopher Mtikila v The Attorney-General*.¹⁸ In this case it was held that article 39 was constitutionally valid in terms of the requirements of article 98(2) of the Constitution. It was emphasised by the Court that this did not mean that these were free from difficulties.¹⁹ The Court pointed out that article 21(1) was very broad in its wording as it addressed itself to 'every citizen'. Thus, according to the judge:²⁰

It could have easily been said 'every member of a political party', but it did not, and this could not have been without cause. It will be recalled indeed, that the provision existed in its present terms ever since the one-party era. At that time all political activity had to be conducted under the auspices and

¹⁴ Now replaced by sec 5 of the 9th Constitutional Amendment Act 1992, which amended art 39 to add to the citizenship requirement, citizenship by naturalisation, subject to the concerned contestant satisfying the condition of having prior to standing for such elective office, been resident in the United Republic for 15 years or more.

¹⁵ Author's translation of the original *Kiswahili* version.

¹⁶ Hansard (1992), *Majadiliano ya Bunge – Taarifa Rasmi: Mkutano wa Saba – 28 Aprili – 8 Mei 1992*, Part I, Dar es Salaam: Bunge Press – Government Printer 130.

¹⁷ Hansard (n 16 above) 130-1.

¹⁸ n 9 above.

¹⁹ n 9 above, 21-25.

²⁰ n 9 above, 41.

control of the *Chama Cha Mapinduzi* and it could have been argued that this left no room for independent candidates.

The judge did not see any justification for extending the above restriction to the multi-party context. Indeed, he found the requirement to be contradictory of the contents of article 20(4) which, for its part, outlaws compulsory recruitment to membership of associations. According to him, ‘while participation through a political party is a procedure, the exercise of the right of participation through a political party *only* is not a procedure but an issue of substance’.²¹ Therefore, the Court ultimately held it to be lawful for independent candidates, along with candidates sponsored by political parties, to contest presidential, parliamentary and civic elections.²²

The government’s reaction to the above judgment expressed its disrespect for and represented a breach of the independence of the judiciary. Not long thereafter, the Attorney-General’s chambers withdrew their notice of appeal against the decision to the Court of Appeal of Tanzania. They went on to table before the following session of the National Assembly constitutional amendments which effectively provided for just the opposite of the Court’s decision mentioned above.

Thus, by virtue of section 4 of the Eleventh Constitutional Amendment Act 34 of 1994, article 21 was drastically amended to subject the right to freedom of political participation to the then repugnant articles 39 and 67. At the same time it inserted therein even more stringent limitation clauses. The current article 21(1) reads as follows:²³

Without prejudice to the provisions of articles 5, 39 and 67 of the Constitution and the laws of the land relating to the provisions for electing or being elected, or appointing or being appointed to take part in the government of this country, every citizen of the United Republic is entitled to take part in the government of this country either directly or through freely chosen representatives, in accordance with the procedure provided by or under the law.

Simply stated, what had been achieved was the compromising of fundamental rights as had appeared in the original version of the Bill of Rights, with the other ordinary provisions of the Constitution and laws inconsistent with the former. The desire of the government to legislatively overrule the court as regards the validity of independent candidates in elections was further expressed when, by means of section 8 of the same Amendment Act of 1994, a new sub-article was added to article 39 of the Constitution, providing thus:

- (2) Without interfering with the right and freedom of a person to hold his own opinions, to believe in the religion of his own choice, to co-operate with others in public activities in accordance with the laws

²¹ n 9 above, 42.

²² Borrowing support from Lord Diplock’s *dictum* to that effect in *Attorney-General of The Gambia v Jobe* [1984] AC 689; [1984] 3 WLR 174; [1985] LRC (Const) 556.

²³ Author’s English translation of the original *Kiswahili* version.

of the land, no person shall be qualified to be elected to the office of President of the United Republic if he is not a member and contestant sponsored by a political party.

The same was done in respect of article 67 relating to contestants for membership to the National Assembly.²⁴ This indeed was a mockery of the rule of law, inhibiting the government's determination not to loosen the grip they had always maintained over the conduct of political activities in the country. The issue is whether the mere observance and correct exercise of the legislative powers in the National Assembly to amend the provisions of the Constitution under article 98 thereof may legitimate the curtailment of the substance and content of the Bill of Rights; particularly where this does not only change the letter of the concerned provisions, but also erodes the ethic of fundamental rights as was done by the Eleventh Constitutional Amendment Act of 1994.

Surprisingly, even the retired President and architect of this regime, the late *Mwalimu Julius Kambarage Nyerere*, could not remain silent over this constitutional blunder by the government, then led by his immediate successor, Alhaj Alli Hassan Mwinyi. He publicly condemned the government for this move, describing the amendments as a severe circumscription of the 'irksome provision in the Bill of Rights on the basis of which the ban [on private candidates] was ruled unconstitutional by the High Court'.²⁵

This criticism of the government from the founder of the system of governance actually sought to be defended by the amendment is sufficient reason to vitiate any political legitimacy that might have existed when the government decided to misuse its legislative authority in the way demonstrated above. What can be added, though, is to call upon the courts to cherish the responsibility of guarding against such encroachments upon their constitutional mandate to interpret and apply the law in context. They should respond to the late Nyerere's concern by making sure that there is an end to such assaults. This is what is meant by judicial activism. Indeed, the High Court of Tanzania has responded to this call in a recent judgment of 5 May 2006 in the case of *Christopher Mtikila v The Attorney-General*.²⁶ In this case, the full bench of the High Court of Tanzania (Manento J (as he then was), Massati and Mihayo JJ) took the opportunity to openly launch a vicious attack on the powers of parliament to make and amend laws, while emphasising that such powers are not limitless, relying heavily

²⁴ Sec 13 of Act 34 of 1994, mentioned above, amended sub-art (2) of art 67 by adding thereto a new clause (e), providing thus: 'Without interfering with the right and freedom of a person to hold his own opinions, to believe in the religion of his own choice, to co-operate with others and to participate in the public activities in accordance with the laws of the land, if such person is not a member and contestant sponsored by a political party.'

²⁵ JK Nyerere *Our leadership and the destiny of Tanzania* (1995) 9.

²⁶ Miscellaneous Civil Cause 10 of 2005, Dar es Salaam Main Registry [2006] TZHC 5 (Saflii).

on Shivji, among others, who had this to say on the same point in a 2003 publication:²⁷

The power to amend the Constitution is also limited. While it is true that parliament in constituent capacity ... can amend any provision of the Constitution, it cannot do so in a manner that would alter the basic structure or essential features of the Constitution.

Then the Court went on to decide conclusively, in the same terms as those of the late Lugakingira J (as he then was) in the 1993 *Mtikila* case,²⁸ that it shall be lawful for private candidates to contest the posts of President and Member of Parliament along with candidates nominated by political parties. However, unlike in the former case, in this matter the judges went on to say thus:²⁹

Cognisant of the fact that the vacuum might give birth to chaos and political pandemonium, we shall proceed to order that the respondent, in the true spirit of the original article 21(1) and guided by the Fundamental Objectives and Principles of State Policy contained in Part II of the Constitution, between now and the next general elections, *to put in place a legislative mechanism that will regulate the activities of private candidates, so as to let the will of the people prevail as to whether or not such candidates are suitable.*

Certainly it is clear that the judges have gone far beyond the recommendations of the Kisanga Committee of 1999, which had advised the government to allow private candidates only during parliamentary and civic elections, and not in presidential elections,³⁰ as we shall see shortly. However, it can be stated that in the current Tanzanian constitutional discourse, there still exists a tug of war between the government's position against the desirability of independent candidates to contest in elections, on the one hand, and that of the judiciary and other progressive stake-holders, consistently urging the government to allow independent candidates in all elections, on the other hand.

Suffice it to say at this juncture that, although the government has not yet openly supported the *Mtikila* judgment, it seems unlikely that it is going to directly oppose it, particularly in view of the recent constitutional amendment of 2005, which fortified its respect and adherence to the principle of the independence of the judiciary.³¹ Nevertheless, before we deal with the recommendations of the Kisanga Committee

²⁷ IG Shivji 'Constitutional limits of parliamentary powers' (2003) *The Tanzania Lawyer* 39.

²⁸ n 9 above.

²⁹ My emphasis.

³⁰ See the 7th Proposal in the *Report of the Presidential Committee for the Collection of Views on the Constitution*, Book One on 'The views of the people and the Committee's advice thereon' Dar es Salaam: Ministry of Justice and Constitutional Affairs (1999).

³¹ See art 107A of the Constitution of the United Republic of Tanzania, 1977 (as re-enacted by sec 16 of the Fourteenth Constitutional Amendment Act 2005).

on the same issue, let us discuss the specific aspects of freedom of political participation, beginning with the right to effective representation.

2.3 The right to effective representation

The right to effective representation is discussed with reference to the issue as to whether the legal reforms made during the *Mageuzi* period have really reflected a departure in total from the former system under the one-party rule. Focus is directed to the changes effected in the electoral system.

Together with the Eighth Constitutional Amendment Act of 1992, amendments were also made to the Elections Act 1 of 1985.³² The most significant thereof was the repeal of the former section 4A of the Act, which had provided for the membership of the National Electoral Commission established by the Constitution,³³ by replacing it with a new section 4.

This was the re-enactment *in pari materia* of sub-article (1) of article 74 of the Constitution of the United Republic of Tanzania. The former law had provided for the Commission's Chairperson to be a judge of the Court of Appeal only. Moreover, the new law did not provide for the membership of a judge from the High Court of Zanzibar, but instead it created the position of Vice-Chairperson. In order to guarantee the representation of each side of the United Republic in the topmost positions of the Commission, article 74(2) of the Constitution of Tanzania, as amended, provides for the appointment of a Vice-Chairperson in the manner that if the Chairperson came from one party, the Vice-Chairperson would have to be appointed from another.

It is worth noting the number of amendments article 74 of the Constitution has endured over a period of a decade from the *Mageuzi* of 1992. By virtue of section 2 of the Tenth Constitutional Amendment Act 7 of 1993, article 74 was amended to give power to the National Electoral Commission to supervise civic elections at the district, town, municipal and city levels. Furthermore, article 74 was again amended by means of section 4 of the Thirteenth Constitutional Amendment Act 3 of 2000. The National Voters' Register was established, and section 14 of the Amending Act included in the membership of the Commission, among others, the 'Vice-Chairman who shall be a person who holds or in the past held or is qualified to hold the position of judge of the High Court or Court of Appeal'. Also, the same section was made to provide for the guarantee of the independence of the National Electoral Commission. Lastly, section 14 of the Fourteenth Amendment Act 2005 amended article 74 by again providing that the membership of the Commission must include 'the Chairman who shall be a person

³² See Elections (Amendment) Act 6 of 1992.

³³ See art 74 of the Constitution of the United Republic of Tanzania as amended by Act 4 of 1992.

holding the position of judge of the High Court or Court of Appeal or a person qualified to be appointed to the position of judge of the High Court or Court of Appeal'. Undoubtedly, these multiple amendments are a result of the ongoing and yet unresolved controversy and demands of the campaigners in the opposition camp of the Tanzanian political area. Their aim is a fully independent National Electoral Commission, which I deal with briefly in the next section, after having examined a few other constitutional changes.

Alongside these constitutional amendments in the electoral system, the amended Elections Act 1985 was made to provide for the Director of Elections as the Chief Executive Officer of the National Electoral Commission.³⁴ Thus, coming to the question whether these changes have improved effective representation, it is important that we critically analyse whether the whole process is capable, under the new constitutional set-up, of guaranteeing free and fair elections. Therefore, an evaluation of the independence of the National Electoral Commission cannot be avoided.

2.4 The independence of the National Electoral Commission

Right from the beginning of *Mageuzi* in 1992, there has invariably been voiced — mainly from academic circles and the parties in the opposition — reservations about the independence of the present National Electoral Commission. Indeed, it was part of the recommendations of the Nyalali Commission that³⁵

[c]hairmen of electoral commissions together with the ordinary members thereof should be appointed by the National Assembly/House of Representatives as applicable, but not from the members of the Houses. The Directors of Elections, who shall also be secretaries of the electoral commissions, should also be appointed by the National Assembly/House of Representatives on the recommendations of the respective civil service commissions. It is also advised that electoral commissions should be independent organs in the conduct of their business without the involvement of the offices of the National Assembly/House of Representatives.

The above recommendations have so far been implemented partly by the government in that, at least at the level of law, the independence requirement in the National Electoral Commission's conduct is fulfilled. It is provided in the new article 74(7) that:

For the purposes of the best performance of its functions set out in this article, the electoral commission shall be an independent department and

³⁴ The position was established by sec 6 of the Elections Act 1985, as amended by sec 7 of the Elections (Amendment) Act 1992. The other amendments to the Act are not relevant to the discussion here.

³⁵ Nyalali Commission Report (1991), *Tume ya rais ya mfumo wa chama kimoja au vyama vingi ya siasa Tanzania: Taarifa ya mapendekezo ya tume kuhusu mfumo wa siasa nchini Tanzania, Kitabu cha Kwanza*, (Dar es Salaam: President's Office, United Republic of Tanzania) 141 para 593. Author's English translation of the original *Kiswahili* version.

it shall reach its decisions regarding the implementation of its official duties by way of meetings, and its chief executive shall be the Director of Elections who shall be appointed to work in accordance with the provisions of the law made by Parliament.

Moreover, it is expressly stipulated in the same article (article 74(11)) that, in the due exercise of its authority under the provisions of the Constitution, the National Electoral Commission shall not be bound to follow any order, directive or instruction of any person, government department or any political party's opinion. Also, with the same strong words it is further stipulated that the decision or action of the National Electoral Commission, done in accordance with the provisions of the Constitution, cannot be questioned or investigated by any court of law (article 74(12)). This is indeed independence of an extreme order.

Apparently, it is for the purposes of underscoring the importance of the Commission's independence that a specific category of persons are excluded by the Constitution from eligibility for membership. These include Ministers and Deputy-Ministers, other persons so restricted by the law, members of the National Assembly, local government councilors or similar persons and people in the leadership of political parties (article 74(3)). Moreover, within the membership of the Commission are included for the positions of Chairperson and Vice-Chairperson, persons who are or were formerly judges of the High Court or Court of Appeal of Tanzania or persons who qualify to hold those positions or status of advocate of the High Court (article 74(1)). This is a class of persons who, by virtue of their office or profession, are expected to be independent of government control.

Yet, it is the way the Commission's membership is constituted that is the main subject of controversy in Tanzania. Opponents of the present ruling party invariably question the capacity of members of the Commission when they continue to be appointed by the President at his sole discretion in total disregard of the above-quoted recommendation of the Nyalali Commission. Whether that is true is not at issue here. Indeed, as retired Mr Justice Mwalusanya once put it, the National Electoral Commission should be 'independent beyond reproach like Caesar's wife, so that justice is not only done but seen to be done, as the maxim goes'.³⁶

Thus, opposition parties have ever since 1995 condemned as unfair all general elections (which they lost) conducted and supervised by the present National Electoral Commission. They have always alleged that the Commission cannot be free, fair and independent of government control when it is financially dependent on the latter, and that the interests of the opposition are not represented within its membership. Nevertheless, the members of the opposition have over time been

³⁶ JL Mwalusanya 'Conditions for the functioning of a democratic constitution' in CK Mtaki & M Okema (eds) *Constitutional reform and democratic governance in Tanzania* (1994) 27-28.

inconsistent on this issue. At the beginning of the practice of multi-party politics in early 1993, they tended to put the creation of a truly independent Commission as a condition precedent to their taking part in the October 1995 general elections.³⁷ Indeed, they even attempted some judicial solutions to this. In *Mabere Nyaicho Marando and Another v The Attorney-General*,³⁸ for example, the plaintiffs challenged the political legitimacy of the National Electoral Commission. Apart from the arguments mentioned above, they underscored the political affiliation of the members of the Commission because of the way they had so far been appointed. However, the court found it as a point of fact that the witnesses had failed to show how the Commission had, by reason of its composition, negatively influenced elections which it supervised.³⁹ Apart from this, the court also dismissed the plaintiffs' arguments that, by using the CCM government's employees as officers of the Commission, it was the CCM that had been controlling and supervising the elections in which it was also a contestant, against the rules of natural justice. The presiding judge, Mr Justice JM Mackanja, was not convinced that the above reasons alone vitiated the Commission's independence.⁴⁰ The court advised the plaintiffs either to include their reservations on the Commission's independence in their election manifestoes or to look for lawful means of pressuring the government to institute procedures for the amendment of the Constitution.

It is not exactly clear which of the two alternatives the opposition parties preferred, but when the political wind blew in their direction with the defection of some prominent members of the ruling party (CCM) to some of them,⁴¹ they decided to contest the 1995 general elections under the Commission. However, after the election results revealed their imminent defeat following a relatively successful campaign period, the same parties were back at the Commission's door. But this time it was in a joint action in the High Court of Tanzania accusing the latter of its responsibility in the partnership of the ruling party (CCM), for generally rigging the 1995 elections. They thus prayed that the results be nullified and, instead, a transitional government led by the Chief Justice be installed. Also, that the CCM and their presidential

³⁷ As above.

³⁸ High Court Civil Case 168 of 1993, Dar es Salaam Registry (unreported) (*Marando case*).

³⁹ As above.

⁴⁰ Relying on the interpretation of a similar situation by the European Court of Human Rights in the case of *Campbell and Fell v United Kingdom* 7 EHRR 165.

⁴¹ A typical example was the defection from the CCM to the NCCR-Mageuzi party of the populist former Deputy-Prime Minister and Minister of Home Affairs, Augustin Lyatonga Mrema, after having been demoted in December 1994 by President Ali Hassan Mwinyi for lack of discipline and a breach of the principle of collective responsibility in the National Assembly, to a mere Minister of Labour and Social Welfare, thereby raising the political fortunes of the NCCR-Mageuzi party to unprecedented heights.

contestant, Benjamin William Mkapa, be banned from political activity for a period of five years for their part in the election irregularities.⁴²

These accusations were strongly denied by the Commission, both in court and outside, emphasising its constitutional mandate and independence from any influence.⁴³ It is now part of history the fact that the court ultimately dismissed the claims of the petitioners. The same is true (as I stated above) of the fact that, since 1992, article 74 of the Constitution, which provided for the establishment, duties and composition of the Commission, has been amended four times and yet none of those amendments have changed the position that the members of the Commission are appointed by the President in his exclusive discretion, notwithstanding the recommendation of the Nyalali Commission to the contrary. This is political arrogance consistently expressed by the ruling party and its government in power, whose basis has been seen by one scholar in the following way:⁴⁴

[t]he arrogance of the ruling party in Tanzania to resist genuine political reforms was in part attributed to the presence of the father of the nation who could employ his charisma to rescue the country under crisis as he did in 1993 when he successfully aborted the restructuring of the Union into a clear federal structure of three governments.

In the same vein it has also been observed, correctly, that of the seven recommendations of the Nyalali Commission, only one was implemented, ie the formation of political parties.⁴⁵ Yet, it is also a fact that the political parties in the opposition in Tanzania actively participated in the following general elections in the years 2000 and 2005 under the same constitutional set-up, and indeed it is no secret that they were heavily defeated by the ruling party (CCM). However, this is aside from the argument I wish to present here, that the inconsistency in the position of opposition parties in this regard only unveils their opportunistic approach to politics, which is prejudicial to the whole democratic process. This weakens their case against the Commission. But, on the other hand, the Commission in their defence can only establish *de jure* independence, undoubtedly leaving unanswered the question as to

⁴² IPS News 'Tanzania politics: Opposition takes election battle to court', report by Paul Chitowa & Anaclet Rwegayura, Dar es Salaam, 1 November 1995.

⁴³ Refer to the Official Statement of the National Electoral Commission in (Radio Tanzania Dar es Salaam) (1995), broadcast on 8 November 1995.

⁴⁴ M Bakari 'Single party to multi-partism in Tanzania: Reality, challenges and lessons' in Peter & Kopsieker (n 7 above) 55 60.

⁴⁵ Other recommendations of the Nyalali Commission were the restructuring of the Union into a truly federal structure of three governments; the formation of a constitutional commission which would draft a constitution to be presented to the public for discussion and approval; repealing and amending laws that restrict freedom of association — about 40 laws were singled out for the exercise; the provision of civic education; the establishment of three independent electoral commissions, one for the union government, one for the mainland and one for Zanzibar; and a mixed electoral system — PR using the additional member system, etc. See Peter & Kopsieker (n 7 above) 61.

whether it commands the trust of all the voters, irrespective of their political affiliations. The issue is whether the Commission is *de facto* independent beyond reproach. Indeed, to this extent, neither the Commission itself nor the government can convincingly justify the failure to comply with the recommendations of the Nyalali Commission as to an appointing authority. This engenders the mistrust of the general public, as illustrated above.

Such mistrust has recently been demonstrated in the Kenyan December 2007 presidential election, where the opposition, led by the contender closest in terms of the declared results to the already sworn-in President Mwai Kibaki, Raila Odinga of the Orange Democratic Movement (ODM), strongly stressed that the election results were rigged by the Kenya Electoral Commission, because of the fact that its members were close friends of the President who had appointed them thereto on that basis.⁴⁶

This kind of tug-of-war between the government and the general public's opinion invariably invites the claim by a substantial part of the population that maybe this could justify the holding of a constitutional conference, followed by a referendum as a solution of last resort. It is worth at this juncture to turn our attention to the issue of whether it is now opportune for Tanzania to hold a constitutional conference.

2.5 The constitutional conference controversy

It is on account of the concerns set out in the foregoing section that there has been a cry for a constitutional conference as a minimum condition for the functioning of a democratic constitution. It has been argued that, without it, there can be no crystallisation of a national consensus necessary for enjoining, within the Constitution to result therefrom, of some political legitimacy.⁴⁷ These have always been the demands of at least three political parties in the Tanzanian opposition,⁴⁸ who have contended that each person and group of people needed to be satisfied that their interests were guarded by their Constitution.⁴⁹

Undoubtedly, the demand for a constitutional conference or even a referendum enforces the requirements of article 21(2) of the Constitu-

⁴⁶ Refer to Mr Raila Odinga's statement in a telephone interview during a TVT *Tuambie* Programme on 3 January 2008, Dar es Salaam: Tanzania Broadcasting Corporation. Ultimately the conflict, which left over 1 000 people dead and many more injured and displaced, ended with the formation of a coalition government under which Mr Odinga, holding the newly-created position of Prime Minister, shares some executive powers with President Mwai Kibaki.

⁴⁷ SEA Mvungi 'Democratic constitution making and the transition to multi-party democracy in Tanzania' in GM Fimbo & SEA Mvungi (eds) *Constitutional reforms for democratisation in Tanzania* (1993) 23.

⁴⁸ CHADEMA, NCCR-Mageuzi and NLD.

⁴⁹ See the Recommendations of the Seminar on the Constitutional Reforms for Democratisation in Tanzania' held in the British Council Conference Hall, Dar es Salaam, 27-28 November 1992, reproduced in Fimbo & Mvungi (n 47 above).

tion regarding the right of all citizens to be consulted in respect of decisions on matters which affect them. It had not been part of the political culture of the one-party regime in Tanzania to opt for referenda whenever there was a need to consult the people at instances of making major decisions.

There have also been a few unsuccessful attempts to use the courts to force the government to concede to the holding of a constitutional conference. For example, in the *Marando* case cited above, the High Court of Tanzania held that a constitutional conference was a remedy which could be sought and obtained through parliament.⁵⁰ Indeed, the same position was repeated by the 1993 *Mtikila* case, it being categorically stated that, while the court conceded unequivocally that every citizen is entitled to participate in making decisions on matters affecting their country, the only mode of participation available is the election of representatives to the National Assembly.

Thus, it seems that the present position on this issue represents a vicious cycle. It begins with mistrust of the National Electoral Commission by the members of the opposition parties whose demands for a constitutional conference to resolve the issue of the making of a politically legitimate constitution have been turned down by the courts of law, the latter directing the former to the ballot box, which again is under the control and supervision of the National Electoral Commission complained of in the first place. In the next section I will consider the prospects for reform, beginning with a brief discussion of the recommendations of the Kisanga Committee of 1999 in this regard.

3 Prospects for genuine political reforms towards true political succession

This section attempts to inquire into the possibility of identifying ways of effecting genuine political reform in Tanzania, taking the right to freedom of political participation as a working example. I begin by examining the recommendations of the Kisanga Committee which addressed a number of constitutional problems requiring redress.

3.1 The Kisanga Committee's recommendations on the right to freedom of political participation

Following many debates in public seminars, conferences and workshops (mostly involving educated people in urban areas) on the need for a new constitution, the government issued Government Circular 1 of 1998 (White Paper), listing 19 proposals for discussion by the general public throughout the country, including the rural areas. For these purposes, in July 1998, the then President of the United Republic of

⁵⁰ Also in *Mwalimu Paul John Mhozya v Attorney-General (No 2)* 1996 TLR 229 (HC).

Tanzania, Hon Benjamin William Mkapa (retired), appointed a Committee for the Collection of Views on the Constitution (popularly known as the Kisanga Committee) chaired by Hon Justice of Appeal Robert H Kisanga.⁵¹ After having concluded their mission, which took them 11 months to accomplish, and following a long survey, which took them to 25 regions of Tanzania Mainland and Zanzibar, the Committee submitted their report to the President on 20 August 1999.

It was the Seventh Proposal of the White Paper which dealt with the issue of independent candidates in elections, the government having posed the question as to whether there was a need for allowing independent candidates during presidential, parliamentary and civic elections, without their being members or nominated by political parties.⁵² The advice of the Committee, as I have already stated above, was as follows: firstly, that independent candidates should not be allowed in presidential elections; secondly, that independent candidates should be allowed only in parliamentary and civic elections at all levels; thirdly, that proper laws and regulations to oversee the above should be enacted. The government did not adopt these recommendations.

However, it suffices to say at this juncture that, by advising the government in the way that it did, the Kisanga Committee did not give fair treatment to this issue. Here was a clear conflict between the position of the government and that of the judiciary, initiated by the blatant disrespect of the revered principle of the independence of the judiciary. The Committee, chaired by a senior judge and with much wealth of expertise, should have acted in favour of the judicial opinion in this regard for the sake of guaranteeing the spirit of constitutionalism forming the bedrock of Tanzania's constitutional practice. No wonder that the High Court has vindicated itself by coming back to allow independent candidates against the will of the government and parliament, over a decade after the 2006 judgment in the *Mtikila* case mentioned above. Indeed, this is what is expected of a fearless, independent and open-handed judiciary in a developing country like Tanzania, where ruling regimes tend to control and monopolise political arenas through constitutional amendments eroding the fundamental cornerstones of constitutionalism, civil society and wider democracy.

As to the appointment of its members and therefore the independence of the National Electoral Commission, the issue came indirectly in the White Paper's Sixth Proposal, wherein the Committee advised

⁵¹ The other members were Mr Salim Juma Othman as Vice-Chairperson, the late Mr Siegfried KB Lushagara as Secretary, Mr Wilson Mukama, Mrs Moza Himid Mbaye, Mrs Dr Asha-Rose Migiro, Mr Issa Machano, Mrs Mary Chipungahelo, Mr Ali Abdallah Suleiman, Dr Maximillian Mmuya, Mrs Salma Masoud Ebrahim, Mr Yahya B Msulwa, Dr Said Ghalib Bilal, Dr John Magoti, Mr Hassan Said Mzee and Mr Mohamed Balla.

⁵² See the Kisanga Committee Report (KCR) (1999), *Report of the Presidential Committee for the Collection of Views on the Constitution*, Book One on 'The views of the people and the Committee's advice thereon' Dar es Salaam: Ministry of Justice and Constitutional Affairs, Government Printer.

the government twofold: firstly, that the appointment of the Electoral Commission should be more constitutionally transparent than it is the case now, so that it may be seen to be free and legitimately acceptable to the people; secondly, that the Electoral Commission should be strengthened to enable it to perform its duties effectively. In its Eleventh Proposal, the White Paper proposed at length that the structure and appointment of the members of the National Electoral Commission do not take into account representation of political parties and that the Commission is appointed by the President who may happen to be the leader of the ruling party. On that basis, in performing their duties, members of the Commission may be bound to favour the ruling party in repayment of the privilege of having been so appointed thereto. Supporters of this opinion suggest that there must be established in the appointment procedure representation of all political parties, or that the names of prospective members of the Commission should first be scrutinised or vetted by an independent organ before the President makes the final appointments.

The Committee advised government that the President should be appointing the members of the Commission in consultation with the National Assembly under the following procedure: first, that the President should prepare a list of names of persons he intends to appoint as members of the National Electoral Commission, which he should present to the National Assembly to be debated upon by the House. Thereafter the names should be returned to the President with recommendations as to who should be appointed to the Commission's membership. Lastly, the Committee was not in favour of the involvement or participation of political parties in the appointment of members of the Electoral Commission, in order to safeguard the Commission's independence against inter-political party wrangles and politicking. The Kisanga Committee did not have in its terms of reference anything relating to the need for holding a constitutional conference and referendum on this aspect.

Of all the recommendations of the Committee discussed above relating to the National Electoral Commission's independence, only one can be said to have been implemented, that is, in relation to the strengthening of the National Electoral Commission. This was demonstrated, as I stated above, by the vast amendments article 74 of the Constitution has endured, particularly the redefinition of the qualifications for membership and the powers and responsibilities thereof, the creation of a permanent voters' register and the unequivocal restatement of the Commission's independence. But again, as I indicated earlier on, all of those amendments have added at best to the establishment of the Commission's *de jure* independence. Nothing has been done by the government to date, following the report of the Kisanga Committee in 1999, to make the Commission *de facto* independent, even to a limited extent, as had been advised by the Committee. The need for making the appointment procedure more transparent by involving the National

Assembly at some point in the procedure, in order to make it free and legitimately acceptable to all the people as was advised by the Committee, has not been addressed at all. This means that, about a decade after the publication of the Kisanga Committee report, members of the National Electoral Commission in Tanzania are still appointed by the President at his sole discretion. One wonders as to what is so special about the appointment of the National Electoral Commission. Indeed, this does invite the suspicion that the ruling regime must have an interest in retaining the current procedure, at least as an amulet of last resort, to guarantee its future political gains, probably in the style that has recently been adopted by the Mwai Kibaki regime in neighbouring Kenya. If that is by any chance true, it is indeed detrimental of the future interests of this country in terms of her much cherished national peace, security and tranquility.

Coming to the answer to the question as to whether there are any prospects for future reform, I will begin the discussion with Bakari's arrogance theory outlined above.⁵³ Bakari has found the basis for the Tanzanian ruling party (CCM) and its government's open desire to resist meaningful reform in the country in the popularity gained from its former charismatic leader, the late *Mwalimu* Julius Kambarage Nyerere. One could add to the theory that such popularity was not buried with Nyerere, as was demonstrated by the huge victory (80%) in the last general elections in 2005, of his political apprentice, the current President of Tanzania, Mr Jakaya Mrisho Kikwete. That, however, is irrelevant to the main argument here, because what is at stake in the present constitutional discourse in Tanzania is how and when to promote the development of pro-democratic governance, commensurate to the general will of all people beyond party affiliations, for the ultimate interest of this country. Having a government in a country that consistently defies and ignores the opinions on important matters related to political practice and general governance of a country is counterproductive to the national interests stated in the foregoing paragraph. In modern constitutionalism, a government which does not listen to the voices of its people from all walks of life is autocratic, however popular it might be.⁵⁴ As Berner and Phillips say, 'a[n] autocratic style of leadership based on patronage reinforces the prevailing inequality of the existing social structure'.⁵⁵ At worst, this creates some breeding ground for future disruption of the country's peace, security and tranquility, as happened in Kenya recently. Therefore, in order to achieve meaningful constitutional reforms, we must devise methods which transcend the governmental limitations and which have visions going beyond the ideological ambit of political parties, that is, the

⁵³ Bakari (n 44 above) 55 60.

⁵⁴ KC Wheare *Modern constitutions* (1966); DD Basu *Comparative constitutional law* (1984); BO Nwabueze *Constitutionalism in emergent states* (1973).

⁵⁵ Berner & Phillips (n 1 above) 9.

capturing of state authority. One such example is the mass-oriented discussions of the Constitution recently inaugurated by the Faculty of Law of the University of Dar es Salaam,⁵⁶ although the same movement is still at its infancy stage and has not yet really taken off. These are expected to involve all people at all levels of society, in order to enable them to know the main ideas comprised in the Constitution for making them decide for themselves what is wanting to justify major constitutional debates, including the holding of a constitutional conference free of government interference.

This is a programme of action that resists the use of law by the state to deny rights and shrink the arena of democracy, and instead argues for law to be used to expand them.⁵⁷ What is necessary is the identification of the immediate problem of the people, which is the ridding of society of any form of authoritarianism and political repression. Therefore, appropriate demands on the basis of the available rights may be put forward to form what Shivji refers to as a new democratic struggle.⁵⁸

4 Conclusion

This paper appraises the impact of the *Mageuzi* reforms on Tanzania's constitutional and socio-political scene with regard to the right to freedom of political participation during the past decade or so, while weighing its failures and successes by using international standards. It was insisted right from the beginning that, together with its sister right to freedom of political association, the right to freedom of political participation is a key to the enjoyment of all other fundamental human rights. Thus, while employing a historical perspective, the paper started with an examination of the contents of the right to freedom of political participation as provided by the Constitution of the United Republic of Tanzania. It then went on to trace the practice of this right from 1992 after the institution of *Mageuzi* to date.

The lack of political participation has thus been identified as the main problem to be resolved in the government's reluctance to effect meaningful constitutional reforms, even where its reaction conflicted with judicial opinion. The key areas noted in this regard were constitutional provisions which prohibited independent candidates in elections and the failure of these to guarantee the *de facto* independence of the National Electoral Commission.

⁵⁶ GM Fimbo *Tuijadili Katiba: Katiba Ya Jamhuri Ya Muungano Wa Tanzania* (2007).

⁵⁷ See, generally, A Seidman & R Seidman *State and law in the developing process: Problem solving and institutional change in the third world* (1994).

⁵⁸ IG Shivji 'The politics of liberalisation in Tanzania: Notes on the crisis of ideological hegemony' in H Campbell & H Stein (eds) *Tanzania and the IMF – The dynamics of liberalisation* (1992).

The main argument to be underscored here is that the existence of a government in a developing country such as Tanzania, which consistently defies and ignores opinions on important matters related to political practice and general governance of a country, restricts the promotion and development of pro-democratic governance, which corresponds with the general will of all the people. Indeed, it invites the elements of autocratic rule which can lead to the collapse of popular institutions which guarantee the country's peace, security and tranquility.