Winnowing Tanzania's Proposed Constitution: The Legitimacy Question

By *Tulia Ackson**

Abstract: *The Proposed Constitution is a product of the Constituent Assembly convened by the President of the United Republic of Tanzania to enact the New Constitution upon which Tanzanians would ultimately vote, on a yes or no basis, in a referendum. The Constituent Assembly was to exercise its powers on the Draft Constitution prepared by the Constitutional Review Commission. There were feelings by some quarters that the Draft Constitution was the final document de facto, in that the Constituent Assembly was to mainly approve it for onward transmission to the citizenry for a vote. Other quarters were of the view that the Constituent Assembly had unlimited powers to enact the New Constitution, considering the Draft Constitution as a mere working document, de jure. In the course of the Constituent Assembly sessions, about 21 per cent of the Delegates walked out, taking the stance of the first group, thereby "delegitimising" the continuance of the sessions. Since 79 per cent remained, the Constituent Assembly sessions continued, culminating into the Proposed Constitution awaiting the referendum. The Constituent Assembly materially altered the Draft Constitution, particularly the Union structure, rejecting the proposed federation structure and maintaining the status quo. The issue is: Was the Constituent Assembly legitimately discharging its duties in the absence of one fifth of the Delegates? Again, was the Constituent Assembly justified to alter the Draft Constitution? In the wake of the impending referendum, this article explores these questions in view of the law governing the mandates and functions of both the Constitutional Review Commission and the Constituent Assembly.*

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A. Introduction

The constitution making process in Tanzania set foot on 31 December 2010 when the President of the United Republic of Tanzania (President) announced that Tanzanians were to get a new constitution.[1] The Parliament of Tanzania, in effect, enacted the Constitutional Re-

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1 *Speech on the New year's eve by His Excellency Hon. Dr. Jakaya Mrisho Kikwete,* delivered on 31 December 2010, pp. 15 – 17.

view Act, 2011, Cap 83 (CRA), which envisages the promulgation of a New Constitution to quench the public outcry for a new constitution, mainly spear-headed by the opposition parties. The demand for a new constitution centered on, among other things, enormous presidential powers, a lack of free and fair national electoral commission, inability to question presidential elections in court, inability of independent candidates to stand for representative seats, and the unsettling structure of the Union between Zanzibar and Tanganyika (now Mainland Tanzania).[2] The CRA established a Constitutional Review Commission (CRC) and a Constituent Assembly (CA), each with their distinct mandates, at different stages, towards making a new constitution, which would require a people's decision through a referendum. In the course of fulfilling their obligations, the two bodies had different mechanisms; the CRC decided on consensus while the CA, as the law envisages, decided on what Brandt, Cottrell, Ghai, and Regan would call "supermajority," two thirds of all members from each of the two parts of the Union, Zanzibar and Mainland Tanzania.[3] This brings us to the question of membership:

CRC had 32 Commissioners, half from each of the parts to the Union while the CA had 628 Delegates. Out of 628 CA Delegates (including the two Attorney Generals from Mainland Tanzania and Zanzibar), 409 were from Mainland Tanzania and 219 from Zanzibar stemming from all Members of the United Republic of Tanzania Parliament (Members of Parliament) accounting 355 (Chama Cha Mapinduzi having 262, opposition 92, and the Attorney General), out of whom 70 hail from Zanzibar;[4] all Members of the House of Representatives of Zanzibar (Members of the House of Representatives) at 82 (48 CCM, 33 Civic United Front, and the Attorney General of Zanzibar); and 201 Delegates (one third, i.e. 67 from Zanzibar and two thirds, i.e. 134 from Mainland Tanzania) appointed by the President from names submitted by Non-Governmental Organisations (NGOs) (20), Faith Based Organisations (FBOs) (20), all fully registered political parties (42), higher learning institutions (20), groups of people with disabilities (20), associations of workers (19), farmers (20), fishermen (10), pastoralists (10), and persons having common interest (20).[5] As it

2 *Constitutional Review Commission*, Commission's Report on the Constitutional Review Process of the Constitution of the United Republic of Tanzania, 2013, pp. 5 – 6; *Ndimara Tegambwage* "New Constitution is not a favour" Tanzanian *Mwanahalisi,* 22 December 2010; *Joster Mwangulumbi*, CCM waits for people's power, Tanzanian *Mwanahalisi,* 06 April 2011; *Mbasha Asenga* "Othman, Makinda: A Cry for a New Constitution in your hands" Tanzanian *Mwanahalisi,* 29 December 2010; and *Privatus Karugendo*, "This is a Nation's Cry" Tanzanian *Raia Mwema*, 13 Feb 2013. (Translation supplied for all titles).

3 Section 26(2) of the CRA; see also *3*, p. 218.

4 The total number of Members of Parliament is 357, however, by the time the Constituent Assembly conducted its businesses, the President had only appointed 8 out of 10 Members of Parliament the that the United Republic of Tanzania Constitution of 1977 allows.

5 Section 22(1)(c), (2A) and (2B) of the CRA and Government Notice No. 443/2013. For a general discussion on the ideal composition of constituent assemblies and experiences from elsewhere see *Brandt, Cottrell, Ghai and Regan*, note 3, and *Kituo cha Katiba*, Report of East African Consultative Theme on the Tanzania Constitutional Review Process Report, Kampala 2013.

were, out of 355 Members of Parliament plus 82 Members of the House of Representatives totalling 437, the ruling party, Chama Cha Mapinduzi (CCM), had 312, which is about 71.4 per cent and the opposition had 125, which is about 28.6 per cent. CCM had the majority on both parts, albeit not two thirds as required by law, thereby pegging reliance on 201 Delegates for balancing the voting "equation."

Evidently, however much the opposition would have tried to "veto" the CA process, the numbers favoured CCM. In the course of the deliberations on the first two chapters chosen out of 17 chapters of the Draft Constitution to start with, Delegates from the main opposition parties and their supporters, branding themselves as a Coalition of People's Constitution (CPC), totalling 130, walked out.[6] The walkout speech cited a campaign by the government against the three government structure proposed by the CRC: discriminatory deliberations identifying people with their places of origin such as Arabs, Indians and those from Pemba (which is one of the Islands of Zanzibar), the government not showing any intentions to have a new constitution though extravagantly spent money on the CRC and renovations of the CA venue, and tiredness of listening to vulgar language.[7]

Immediately after they had all walked out, the CA continued with the deliberations, and eventually, on 2 October 2014, a Proposed Constitution was promulgated, having attained the supermajorities, thus, two thirds of all Delegates from Mainland Tanzania and two thirds of all Delegates from Zanzibar. The Proposed Constitution awaits the referendum, which requires more than 50 per cent yes votes from each of the parts of the Union. It is the continuance of the CA in the absence of some Delegates that is put to question: was the CA legitimate after the walkout? Did the CA have the mandate to change the Draft Constitution prepared by the CRC? The Proposed Constitution being in place, this article looks at its legitimacy in terms of the process and the resultant content.

B. The Concept of Legitimacy

Legitimacy is a broad and complex concept which is, admittedly, largely dependent on time, place and context.[8] Literally, the word legitimacy is derived from the Latin word *legitimare,* which means to make lawful. Irrespectively, particularising legitimacy in the con-

6 The CPC is made up of Chama cha Demokrasia na Maendeleo (CHADEMA), Civic United Front (CUF), National Convention for Construction and Reform – Mageuzi (NCCR–Mageuzi), National League for Democracy (NLD) and other people from among the 201 Delegates.

7 Constituent Assembly Hansard, 16 April 2014.

8 *Athanasios Moulakis,* Introduction, in: Athanasios Moulakis (ed.), Legitimacy, Berlin/New York 1986, pp. 2, 3 and 6; *Patrick McAuslan* and *John F. McEldowney*, Legitimacy and the Constitution: The Dissonance between Theory and Practice, in: Patrick McAuslan and John F. McEldowney (eds.), Law, Legitimacy and the Constitution, London 1985, p. 2; *Inger-Johanne Sand*, Legitimacy in global and international law: A sociological critique, in: Chris Thornhill and Samantha Ashenden (eds.), Legality and Legitimacy: Normative and Sociological Approaches, Baden-Baden 2010, pp. 147, 148, 150 and 155; and *Nick Turnbull,* Legitimation in terms of questioning: Integrating political rhetoric and the sociology of law, in: Thornhill and Ashenden (eds.), note 8, pp. 323 and 333.

text of law as opposed to political, philosophical or sociological contexts, scholars have variedly defined legitimacy to mean, "accepted as binding," as Moulakis and Guibentif argue that when the society accepts certain rules as binding, then such rules are legitimate and, as Kitromilides notes, the society is then expected to obey the accepted rules.[9] In line with the Latin word, Cranston and Rosen argue that legitimacy may be coined in the word "lawfulness" in that an act or something done in line with the law and the prescribed procedure is legitimate.[10] Relatedly, Cranston and Guibentif consider an act done as legitimate if it is justifiable and rightful, provided that such an act is based on law, linking it to the "lawfulness."[11] Similarly, Rosen adds that apart from lawfulness, legitimacy embraces something done orderly and rightfully in that those bestowed with powers by the rules should not abuse the powers but use it for the 'good' of the society.[12] McAuslan and McEldowney refer to this concept of legitimacy as "correct use of power."[13] In this way legitimacy is understood here to embrace not only lawfulness but also justifiability, orderliness, acceptability and rightfulness.

Legitimacy depends on the opinion of the people and their belief in the rules that govern them which, according to Ciassi, may be lost where expectations are generated but not fulfilled.[14] An important factor of the belief of the people in the rules that govern them and their acceptance of such rules is the people's participation in the making of these rules.[15]

Although legitimacy refers to lawfulness, which in essence reflects on the act or something being done in accordance with the law, thus legality of the said act, the two terms may be distinguished. While legitimacy embraces justification for the law which binds people, legality refers to the question whether an action or something done by the people is allowed or prohibited by the law.[16] This means that a valid law, under the authority of which acts may be committed or done or prohibited, may be illegitimate if such acts are unjust and unacceptable such as laws allowing discrimination of certain groups of people in the society

9 *Moulakis*, note 8, p. 3; *Pierre Guibentif*, Sociology among the third-order observers in legitimisation processes, in: Thornhill and Ashenden (eds.), note 8, pp. 82 – 83; *Paschalis Kitromilides*, Enlightment and Legitimacy, in: *Moulakis*, note 8, p. 60; *Brandt, Cottrell, Ghai,* and *Regan*, note 3, p. 357; *Terrance Sandalow*, Abstract Democracy: A Review of Ackerman's We the People, Const. Comment. 9 (1992), p. 330; and *Sand*, note 8, p. 148.

10 *Maurice Cranston*, From Legitimism to Legitimacy, in: Moulakis (ed.), note 8, pp. 38 and 39; *Frederick Rosen*, Legitimacy: A Utilitarian View, in: Moulakis (ed.), note 8, p. 67; and *Blandine Kriegel*, The legal and sociological construction of norms, in: Thornhill and Ashenden (eds.), note 8, p. 23.

11 *Cranston*, note 10, p. 42 and *Guibentif*, note 9, pp. 82 and 83.

12 *Rosen*, note 10, p. 67.

13 *McAuslan* and *McEldowney*, note 8, p. 2.

14 *Margherita Ciacci*, Legitimacy and the Problems of Governance, in: Moulakis, (ed.) note 8, p. 26; and *McAuslan* and *McEldowney*, note 8, p. 2.

15 *Kitromilides*, note 9, pp. 60 – 66; and *Brandt, Cottrell, Ghai,* and *Regan*, note 3, p. 9.

16 *Peter Weber-Schäfer*, Divide Decent and Sovereign Rule: A Case of Legitimacy?, in: Moulakis (ed.), note 8, p. 89.

on the bases of race and gender.[17] As Weber-Schäfer notes, legality essentially is the "lawfulness of human actions" while legitimacy is the justification and motivation for such acts.[18] In this context, legitimacy is considered as a higher concept than legality in that legitimacy is the justification of the law and its acceptability.[19]

However, despite of the distinction between legality and legitimacy, the two terms, particularly in the legal and constitutional context, are interrelated. Specifying constitutional context, Weber-Shafer notes that legitimacy "seems to be closely connected with the idea of legality…" and Ashenden joins the loop and notes that modern societies consider legitimacy to be based on legality."[20] Thus, legitimacy, apart from its varied definitions and contexts, may be directly linked to legality, particularly in the constitutional context, which this article deals with.

In the context of this article, legitimacy refers to conformity of the process and the resultant content of the Proposed Constitution with the law, particularly the CRA, on the one hand and justifiability of the process and content of the Proposed Constitution, on the other.

C. The Constitutional Review Process

Based on its mandate outlined under section 9 of the CRA, the CRC, among other functions, coordinated and collected public opinions; and examined and analysed the constitutional provisions in terms of their consistency and compatibility with the sovereignty of the people, the political system, democracy, rule of law and good governance.[21] The said functions were guided by national values and ethos upon which the CRC was required to ensure the existence of the United Republic, the Executive, Legislature, Judiciary, the Revolution-

17 For instance in South Africa during apartheid, laws in place were valid laws in as far as they were made following the procedures required but they were not legitimate as they fell short of acceptability and were unjustifiable since they subjected other categories of people in the society to suffering. For more details see *R. Ridd*, Creating Ethnicity in the British Colonial Cape: Coloured and Malay Contrasted, The Societies of Southern Africa in the 19th and 20th Centuries, Collected Seminar Papers No. 48, 20(1994); *T. Cross*, The Afrikaner Takeover: Nationalist Politics and the Colonisation of South Africa's Parastatals, 1948 to 1960, The Societies of Southern Africa in the 19th and 20th Centuries, note 17; *L. Marquard*, The Story of South Africa, London 1966; *M. Evans*, South Africa, London 1987; C. F. J. Muller, (ed.), Five Hundred Years: A history of South Africa, Pretoria 1981; and the Population Registration Act of 1950, Act No. 30 repealed by the Population Registration Act Repeal Act, 1991, Act No. 114 of 1991.

18 *Weber-Schäfer*, note 16, p. 89.

19 For a broader discussion on legitimacy see *McAuslan* and *McEldowney*, note 8; *Moulakis*, note 8; *Thornhill* and *Ashenden,* note 8; *Jutta Brunnée* and *Stephen J. Toope,* Legitimacy and Legality in International Law, New York, 2010; Rüdiger Wolfrum and Volker Röben (eds.), Legitimacy in International Law, Berlin, 2008; Paul Craig and Gráinne de Búrca (eds.), Law, Legitimacy, and European Governance, Oxford, 2004; and Thomas Heberer and Gunter Schubert*,* (eds.), Regime Legitimacy in Contemporary China: Institutional change and stability, London 2009.

20 *Ashenden*, Legality, legitimacy, and the circumstances of sociology, in: Thornhill and Ashenden (eds.)*,* note 8, pp. 58 and 59; and *Turnbull,* note 8, p. 333.

21 Section 9(1) of the CRA.

ary Government of Zanzibar and existence of a secular nature of the United Republic; and to respect, safeguard and ensure promotion of the republican nature of governance; national unity, cohesion and peace; periodic democratic elections based on universal suffrage; promotion and protection of human rights; human dignity, equality before the law and due process of law.[22] The CRC was required, irrespective of people's views collected, to observe and ensure that the constitutional provisions would not abrogate these principles.

Mindful of the above limitations, the CRC conducted civic education to the public and collected their views on the content of the envisaged New Constitution.[23] The views collected, a total of 351,664 accounting 323,101 (91.8 per cent) from public rallies and 28,563 (8.2 per cent), collected through other media such as letters and social media, were analysed.[24] The analysis of these opinions, review of previous constitutional committees' reports, constitutional acts, policies and other relevant documents resulted in the First Draft Constitution (FDC).[25] Procedurally, the FDC was subjected to a "second eye" in the second round of public opinion designed to enrich the provisions of the FDC.[26] The second round was mainly conducted in organised groups constituted by CRC as Constitutional *Fora.* Based on the views from the Constitutional *Fora,* the CRC improved the FDC as it deemed fit and produced a Draft Constitution for eventual transmission to the next stage, the CA. As per section 20(3) of the CRA, the CRC Chairman presented the Draft Constitution to the CA.

The 628 Delegates of the CA established under section 20 of the CRA were organised in twelve Committees, each discussing similar issues at the same time.[27] The CA sessions would convene after all Committees completed their discussions and compiled their reports, which would be presented in the plenary as the majority and the minority views.[28] The deliberations started with two chapters, one and six of the Draft Constitution, with a bearing on the Union structure. While the majority views wanted the Draft Constitution to be changed from the proposed federal structure with three governments to the *status quo*, a two-government structure, the minority was of the view that the Draft Constitution provisions on the Union structure should remain unchanged.[29] In the course of the deliberations, it was clear that the political parties, CCM for the majority and CPC for the minority reports, took uncompromising stances and the weaker side, sentient of the "negligible" Dele-

22 Section 9(2) of the CRA; see also *Brandt, Cottrell, Ghai,* and *Regan*, note 3, pp. 60 – 65.

23 *Constitutional Review Commission*, note 3, p. 3.

24 Constitutional Review Commission, *Annexes to the Commission's Report on the Constitutional Review Process of the Constitution of the United Republic of Tanzania,* 2013, p. 207. (Translation supplied).

25 Section 17(4) of the CRA.

26 Section 18 of the CRA.

27 Part VI and reg. 32 of the Constituent Assembly Standing Orders, 2014.

28 Reg. 32(10) of the CA Standing Orders, note 27.

29 Constituent Assembly, Consolidated 12 Committee Reports on Chapters One and Six of the Draft Constitution, April 2014; and CA Hansards, 10 April – 25 April 2014.

gates it had, walked out of the process before voting could start, trusting to have sufficient sympathisers from the public out of the CA to mount pressure for the halting of the CA sessions.[30] The walkout, however, did not deter the CA making the provisions for the New Constitution. The issue is, under the circumstances, was this process legitimate?

Determination of the legitimacy of the continuance of the CA sessions in the absence of the CPC prompted some quarters to approach the court for stoppage of the process. One of the prominent bodies is the Tanganyika Law Society, which petitioned the court in the case of *Tanganyika Law Society v. The Attorney General* for leave to apply for, among other things:

> *... b) A declaratory order that the composition of the Constituent Assembly is irregular and unconstitutional and it vitiates the power and right of Tanzanians in making their own constitution; c) A declaratory order that the Constituent Assembly acted irregularly by amending the standing orders of the Constituent Assembly so that the voting process circumvents the procedure provided for by law, of voting for one provision after another; d) An order of injunction to suspend continuation of the meetings of the Constituent Assembly pending compliance with the proper constitution making process with maximum participation, representation and the wishes of Tanzania...*[31]

Although leave to file the application for the declaratory orders was granted, the main application has been withdrawn as its determination would be inconsequential since the CA has completed its task and the Proposed Constitution is in place. Irrespectively, this case shows how some quarters "delegitimised" the CA process and therefore sought to stop its sessions.

A constitution making process derives its legitimacy primarily from public participation and transparency which ensures inclusiveness and builds a sense of ownership for the people who in turn hold authorship of the constitution as a contract between the government and the people, thereby necessitating acceptance as people accept to be bound by the constitution.[32] The paramountcy of public participation is underscored by the fact that "[p]ublic

30 Joseph Mihangwa, *The CA lacks intelligence and consensus, should be disbanded,* Tanzanian *Raia Mwema*, 3 September 2014; *"Coalition of People's Constitution want CA adjourned now"* Tanzanian *Nipashe,* 11 September 2014.; "*Constituent Assembly re-convened, Coalition of the People's Constitution remains adamant,"* Tanzanian *Nipashe,* 31 July 2014; and Francis Godwin, *"Religious Leaders pointing fingers against the Coalition for the People's Constitution"* accessed on issamichuzi.blogspot.com, 20 April 2014 (translation supplied for all the newspaper articles). See also the case of *Tanganyika Law Society v. The Attorney General,* Misc. Civil Cause No. 31 of 2014, High Court of Tanzania at Dar es Salaam (unreported).

31 *Tanganyika Law Society v. The Attorney General,* note 30, p. 2.

32 For a general discussion on these concepts see *Frank I. Michelman*, Constitutional Legitimation for Political Acts, Modern Law Review 66(2003), pp. 1-15; *Ming-Sung Kuo*, Cutting the Gordian knot of legitimacy theory? An anatomy of Frank Michelman's presentist critique of constitutional authorship, Int J Constitutional Law 7(2009), pp. 683-714; *Frank I. Michelman,* Reply to Ming-

participation often leads to an emphasis on values and morals, the responsibility of the state, and the integrity of officials, while politicians focus on state powers and institutions."[33] Recognising that "[p]ublic participation can seldom be effective without civic education"[34] the CRC dutifully ensured that a Tanzanian people understood the constitution-making process and made valuable contributions. At another level, public participation was to be exercised in form of the CA which comprised politicians, civil society members, religious groups, representatives of higher learning institutions, people with disabilities, workers, farmers, fishermen, pastoralists and other representatives of people with common interest. A Tanzanian people were constituted through these groups to make provisions for the New Constitution, taking the stance of experts of constitutional law and constitution making:

> *The concept of "the people" (or "the public") is more complex than is usually realized. A proper assessment of the impact of popular participation cannot be made if the concept of "the people" is not disaggregated. There is no such thing as "the people." Rather, there are religious groups, ethnic groups, the disabled, women, youth, forest people, pastoralists, "indigenous peoples," farmers, peasants, capitalists and workers, lawyers, doctors, auctioneers, and practicing, failed, or aspiring politicians, each pursuing his or her own agenda. They bring different levels of understanding and skills to the process.*[35]

Even after this, the CRA yet adds another level, a referendum, where a people of Tanzania would exercise their ultimate decision making powers on whether to have a New Constitution or not.[36] The three levels of public participation are "a manifestation of [a people's] 'sovereignty,' to secure legitimacy, and – most importantly – to find out expectations of the ordinary people."[37] With a referendum in the offing, "the final decision rests with the people – the highest form of public participation."[38] And, in the words of the CRC Chairperson, "…constitution making should be inclusive in the sense of involving citizens at all stages of the process on the understanding that as the constitution writing process is inclusive and broad-based, so increases the likelihood of acceptance, integrity and convenient

Sung Kuo, Int J Constitutional Law 7(2009); *Gunter Frankenberg*, Comparing constitutions: Ideas, ideals, and ideology—toward a layered narrative, Int J Constitutional Law 4(2006), pp. 439-459; *Chris Maina Peter*, Constitution-Making in Tanzania: The Role of Civil Organisations, in: Kivutha Kibwana, Chris Maina Peter & Nyangabyaki Bazaara (eds.), Constitutionalism in East Africa. Progress, Challenges and Prospects, Kampala 2001; and *Brandt, Cottrell, Ghai,* and *Regan*, note 3.

33 *Brandt, Cottrell, Ghai,* and *Regan*, note 3, p. 87.

34 *Brandt, Cottrell, Ghai,* and *Regan*, note 3, p. 87.

35 *Brandt, Cottrell, Ghai,* and *Regan*, note 3, p. 84.

36 Section 28B of the CRA and the *Referendum Act,* 2013.

37 *Brandt, Cottrell, Ghai,* and *Regan*, note 3, pp. 25 and 26.

38 *Brandt, Cottrell, Ghai,* and *Regan*, note 3, p. 83.

implementation of the constitution."[39] With all these safeguards, did the walkout delegitimise the CA process? Certainly not:

Firstly, the CRA envisaged voting in the CA and that a decision of what would form part of the New Constitution would be decided by supermajority.[40] As Waldron puts it, "majority-decision respects individuals … by respecting the fact of their differences of opinion about justice and the common good. Majority-decision does not require any one's view to be played down or hushed up because of the *fancied importance of consensus*."[41] The CA Standing Orders of 2014 went further to state that where voting did not produce the supermajority win over a provision, the said provision with its proposed changes, amendments or improvements, would be subjected to a CA Reconciliation Committee after which a provision would be presented for another round of voting, failing which the provision would be considered rejected and would, once all the provisions of the Draft Constitution have been discussed, be brought back for a last consideration.[42] It was, consequently, for the Delegates to persuade each other on the issues in the Draft Constitution or any proposed change.

While it is possible to decide by consensus in relatively small decision making bodies, such as the CRC with 32 members, decision by voting is inevitable with a large group of 628 Delegates.[43] Considering the "egalitarian idea that the people were sovereign and that, consequently, the will of the majority must always prevail," decision by majority, and in case of the CRA supermajority, are not a new phenomenon, most constitution making processes all over the world have embraced this principle.[44] In the authoritative words of the Founding Father of the Nation of Tanzania:

> *... For just as the minority on any question have the right to be heard, so the majority have the right to be obeyed. Once a decision is reached, it must be accepted as the decision of all. And everyone – including those who were in opposition – has to co-operate in carrying out that decision.*[45]

39 "Warioba advises Delegates of the Constituent Assembly", http://mwanahalisiforum.com/threads/1655-WARIOBA-AWAFUNDA-WAJUMBE-BUNGE-LA-KATIBA accessed on 1 May 2015. (Translation supplied). See also *Darien Shanske*, What Would the Delegates Talk About? A Rough Agenda for a Constitutional Convention, Hastings Constitutional Law Quarterly, 37(2010), p. 641.

40 Section 26(2) of the CRA.

41 *Jeremy Waldron*, Law and Disagreement (1999) quoted in *Marco Goldoni*, Two internal critiques of political constitutionalism, Int J Constitutional Law 10:4 (2012), p. 933. (Emphasis supplied).

42 Reg. 36(2), (3), (4), (5), and (6) of the CA Standing Orders, note 27.

43 *Brandt, Cottrell, Ghai, and Regan*, note 3, p. 198.

44 *Roberto Gargarella*, The Constitution of inequality. Constitutionalism in the Americas, 1776 – 1860, Int J Constitutional Law 3:1 (2005), p. 8.

45 *Julius Kambarage Nyerere*, Man and Development, Nairobi, 1974, p. 31. See further *Gargarella*, note 44, p. 7 where it is noted that "majority will was 'inerrante,' unerring," and *Miguel Poiares Maduro*, The importance of being called a constitution: Constitutional authority and the authority of constitutionalism, Int J Constitutional Law 3:2-3 (2005), p. 349.

This would be the position even after the referendum, not all the people would agree to the New Constitution, and vice versa. The New Constitution would be "binding not because people agree or give their consent to [it], but because they have had a fair say in the process that led to [its] adoption…."[46] as was the case in Kenya, through the 2005 referendum Kenyans vetoed the Draft Constitution by 57 per cent while in 2010 the Draft Constitution was successful by securing 67 per cent voting yes.[47] Once the majority of the people make a decision, it has to be respected. Although to aim at consensus building is more ideal in constitution making for the unity of the nation, this does not always work. As Brandt, Cottrell, Ghai, and Regan put it:

> *[t]o require total agreement in every human endeavor is unrealistic …"Consensus" presumably means something other than unanimity… an Africa consensus involves "settling disputes by listening to everyone and taking into account all views. It is a painstaking exercise, which is most rewarding in the end because it produces no losers since all are winners, and promotes legitimacy and acceptable decisions"* ***… In modern politics, however, consensus is often hard to achieve—even in Africa*** *… Consensus may be easier to achieve in small bodies, such as a commission.[48] (Emphasis supplied).*

Now, where consensus may not be achieved and decisions have to be made, they do not turn illegitimate just for lack of consensus, after all, as Sajó notes, "[c]onsensus is a dream (more like a nightmare) in all societies other than that of the angels (and they must be bored for all eternity)."[49] Understandably, in constitution making processes, there may be divisive issues, such as the structure of the Union in the case of Tanzania, and the CA had to make decisions. Although there were calls for a referendum on the issue, it is our considered opinion that it would have been unlawful for lack of an enabling provision in the CRA, not even in the existing United Republic of Tanzania Constitution of 1977.[50] Even then, at times, where there are sensitivities among the public about divisive issues, the public is not called to opine or decide on the same. Kenya and the issue of Kadhi's Courts offer a good example. A sizeable number of Christians objected the inclusion of Kadhi's courts in the Kenya Constitution and promised to veto should the provisions stay intact.[51] However, Kadhi's court was not one of the issues upon which people were asked to decide on before

46 *Goldoni*, note 41, p. 933.

47 *Brandt, Cottrell, Ghai,* and *Regan*, note 3, p. 341 and *Richard Stacey*, Constituent power and Carl Schmitt's theory of constitution in Kenya's constitution-making process, Int J Constitutional Law 9(2011), pp. 597 – 8.

48 *Brandt, Cottrell, Ghai,* and *Regan*, note 3, pp. 197-8 quoting *Benjamin J. Odoki*, The Search for a National Consensus: The Making of the 1995 Uganda Constitution, Kampala 2005..

49 *András Sajó*, The crisis that was not there: Notes on A reply, Int J Constitutional Law 7(2009), p. 518.

50 CA Hansards, 10 April – 25 April 2014.

51 *Brandt, Cottrell, Ghai,* and *Regan*, note 3, p. 203.

a final constitution was drafted as it was not listed as one of the contentious issues which included, among others, the "relationship between the executive and the legislature, questions of devolution of power and federalism," to mention a few.[52]

It is clear therefore, that not all contentious issues causing deadlock may be resolved by consensus. Some require a referendum, where the voting may not provide answers, like not having the required supermajority, as was the case when Uganda was making its 1995 Constitution on whether or not multi-partism could be included in the Constitution, and in Kenya for the 2005 constitution making process where a decision was required on whether to have a presidential or parliamentary constitution.[53] Other issues may be resolved by what Brandt, Cottrell, Ghai, and Regan call a sunset clause, where a time frame may be indicated for the determination of a contentious issue, or in other cases, postponing the resolution of the issue, as Uganda did when it needed a plebiscite on whether or not to adopt multi-partism.[54] All these options of resolving deadlocks must be provided for by the law governing the constitutional making process, as was the case in Uganda and Kenya. Limitedly, contentions have necessitated a voice of the people where the CA failed to resolve, such as in Maldives on whether the constitution should provide for a presidential or a parliamentary system and in Greece and Italy on the question of Monarchy leadership.[55] Notably, since legitimacy "refers to the acceptance by the people generally of a system of government and rules" and, as noted earlier, is dependent on people's opinion and belief, the impending referendum would be the ultimate indicator of the people's attitude towards the Proposed Constitution, notwithstanding that the plebiscite would be on all the provisions embroiled in a "yes" or "no" vote and not disaggregating contentious matters such as the structure of the Union.[56]

Thus, the fact that the CA voted when making the provisions of the Proposed Constitution and achieved the required supermajorities from both parts of the Union, it is submitted that the CA process was lawful and valid as the non-participation of the CPC did not affect the attainment of the supermajorities. Voting was equally legitimate since those CA Delegates who voted, apart from being more than three quarters, 79 per cent of all the Delegates, were adequate representatives of all the Delegates as each of the groups listed earlier on to have representation in the CA had their members among the Delegates who remained, hence the high number and attainment of the supermajorities.

Secondly, walkouts are a common phenomenon in decision-making bodies, more so for constitution-making bodies where there are contentions which different parties believe to be fundamental. Walkouts are a sign of dissatisfaction for whatever is taking place that the

52 Section 23 of the Constitution of Kenya Review Act, 2008, Cap 3A and *Stacey*, note 47, pp. 607 and 614.

53 *Brandt, Cottrell, Ghai,* and *Regan*, note 3, p. 204.

54 *Brandt, Cottrell, Ghai,* and *Regan*, note 3, pp. 205 – 7.

55 *Brandt, Cottrell, Ghai,* and *Regan*, note 3, pp. 204.

56 *Brandt, Cottrell, Ghai,* and *Regan*, note 3, p. 357. See also *Sandalow*, note 9, p. 330 where it is indicated that "… Constitution's legitimacy depends on popular consent…".

party walking out protests against, or at times, walkouts are meant to create a deadlock so that the other party against whom a protest is directed can be forced to negotiate. Protestation, however, does not in itself vitiate the legitimacy of the decisions made by those remaining behind except where continuance or decisions made are against the law or where, as was the case in Egypt, Nepal, Russia and Israel, the walkout significantly affects the quorum or leaves only one group of people, rendering continuance illegal.[57] In South Africa, for instance, the 1996 Constitution was made in the absence of the Pan Africanist Congress (PAC) party, which walked out of the Convention for a Democratic South Africa proceedings protesting of the closeness that existed between the African National Congress (ANC) and the Government in the negotiations process.[58]

There are gains however in some walkouts, like the remaining party accepting to negotiate, particularly where the walkout creates a deadlock as exemplified by a situation in Egypt. In Egypt, Islamists under the Muslim Brotherhood of Freedom and Justice Party and the Salafi Al-Nour Party, controlling about 70 per cent of the Parliament, were accused by the small and secular parties of dominating the Constituent Assembly and thwarting the efforts of all other parties in the revolution struggles.[59] However, after the deadlock was resolved, the influence was still looming as Ottaway noted, "[n]o matter how much parties [haggled], the Muslim Brothers and the Salafis, who control 70 per cent of the parliament, [were] bound to influence a constitution written by an elected body."[60] Considering the composition of the CA in Tanzania, out of 18 political parties with permanent registration and having Delegates in the CA, it was only four political parties that walked out with a few other Delegates, totalling 130.

57 "Liberals walk out of the Egypt assembly selection," Aljazeera, 24 Mar 2012, available at http://www.aljazeera.com/news/middleeast/2012/03/20123241726742763.html accessed on 4 April 2015; *Marina Ottaway*, Egypt: Death of the Constituent Assembly? 13 June 2012, available at http://carnegieendowment.org/2012/06/13/egypt-death-of-constituent-assembly accessed on 17 April 2015; "Wave of Walkouts leaves Constituent Assembly in Islamists' hands," available at http://www.egyptindependent.com/news/wave-walkouts-leaves-constituent-assembly-islamists-hands accessed on 19 April 2015; *Russian Government*, Constituent Assembly, available at http://www.britannica.com/EBchecked/topic/134156/Constituent-Assembly, accessed on 17 April 2015; *Russian Government*, The Constituent Assembly, available at http://alphahistory.com/russianrevolution/constituent-assembly/ accessed on 17 April 2015; *Vladimir Lenin*, The Proletarian Revolution and the Renegade Kautsky: The Constituent Assembly and the Soviet Republic, available at https://www.marxists.org/archive/lenin/works/1918/prrk/soviet_republic.htm accessed on 18 April 2015; and Daniel J. Elazar (ed.), Constitutionalism: the Israel and American experience, Jerusalem Center for Public Affairs, 1990; and *Brandt, Cottrell, Ghai,* and *Regan*, note 3, pp. 18, 194, 201 and 234.

58 *Padraig O'Malley*, Constitutional Making with reference to CODESA, Namibia and Zimbabwe, available at https://www.nelsonmandela.org/omalley/index.php/site/q/03lv 02039/04lv 02046/05lv 02047/06lv 02049/07lv 02056.htm, accessed on 17 April 2015 and *D. M. Davis*, Constitutional borrowing: The influence of legal culture and local history in the reconstitution of comparative influence: The South African experience, Int J Constitutional Law 1(2003).

59 *"Liberals walk out of the Egypt assembly selection,"* note 57; and *Marina Ottaway*, note 57.

60 *Marina Ottaway*, note 57.

Distinct from the Timor-Leste Constituent Assembly which was dominated by the Fretilin without broader participation by other groups, in Tanzania Delegates from 14 political parties, including CCM, majority of Delegates from NGOs, FBOs, higher learning institutions, groups of people with disabilities, workers, farmers, fishermen, pastoralists, and other persons having common interest remained, a total of 498 Delegates.[61] As indicated earlier on, while a constitution making process should strive at consensus building, when consensus is quixotic, voting may be the only option. The walkout therefore, it is submitted, did not delegitimise the CA proceedings, if anything, the CA, even in the absence of the CRC, was legally a people, representing different categories of people in the country thereby legitimising its functions. Thus, the fact that about four fifths of the Delegates remained, representative of all categories of people in the society, public participation was guaranteed, thereby ensuring justifiability of the CA process making the absence of one fifth of Delegates negligible and incapable of delegitimising the CA process.

Thirdly, by virtue of section 26(1) of the CRA, which mandates the CA to make its own Standing Orders, the CA Standing Orders of 2014 were promulgated for the conduct of the CA business, particularly the making of the provisions of the New Constitution. Regulation 87(1) of the CA Standing Orders of 2014 envisaged amendment of the Standing Orders and it states, in part, that the "CA may amend these Standing Orders by a Resolution presented in the CA by the Chairperson of the CA Committee on Standing Orders and Rights of the CA." Such amendments could be initiated by any Delegate.[62] On account of the said regulation, the CA regularly changed the CA Standing Orders of 2014 depending on the needs and circumstances arising in the course of performing its functions. Linked to the concerns raised by the petitioner in the case of *Tanganyika Law Society v. The Attorney General* quoted earlier, central to our legitimacy discussion is the amendment of the CA Standing Orders of 2014 regarding voting which initially required members to vote at the end of the plenary discussions for the specific chapters under consideration. Regulations 36 and 38 as amended are such that the voting for each provision would only be done once all the provisions have been discussed, re-drafted, amended, changed or improved, as the case may be.

Administratively, the amendment would simplify the voting process in that a Delegate would have a sense of the entire document and decide which of the provisions to support and which ones not to. Conversely, on the legal side, section 25(1) of the CRA, which envisages the CA to make provisions for the New Constitution and section 26(2), which provides that decisions on the provisions have to be voted by two-thirds were not breached just by the fact that all the provisions of the New Constitution were voted on completion of the draft provisions for the Proposed Constitution since, as indicated above, the supermajorities were attained through the majority of the Delegates who remained. Although analysis of the voting procedure is out of the scope of this article, it is submitted that the CA was procedu-

61 See *Brandt, Cottrell, Ghai,* and *Regan*, note 3, pp. 347 and 348 for details on the Timor-Leste Constituent Assembly.

62 Reg. 87(2) of the CA Standing Orders, note 27.

rally correct in law to amend the CA Standing Orders of 2014. Henceforth, the declaratory order prayed, among others, by the petitioner in the case of *Tanganyika Law Society v. The Attorney General* that "the Constituent Assembly acted irregularly by amending the standing orders of the Constituent Assembly so that the voting process circumvents the procedure provided for by law, of voting for one provision after another" is, in our opinion, erroneous.[63] The CA Delegates, on account of the said Orders, and in accordance with the requirements of the CRA, voted precisely for each provision either by ticking on the ballot paper in favour of or against each of the enumerated provisions for those who voted by secret ballot, and for those who opted for open voting, by publicly stating the provisions they supported or rejected.[64] Considering the participation of the majority of Delegates who represented all the groups in the Tanzanian society in amending the CA Standing Orders of 2014, it is submitted that the amendments were procedurally and legally done in tandem with the provisions of the CRA and the CA Standing Orders of 2014 thereby ensuring not only their lawfulness but also justifiability.

Essentially, the fact that voting for the provisions of the Proposed Constitution took place and that the votes of Delegates reached the supermajorities from both parts of the Union; the fact that the walkout involved 21 per cent of the Delegates, leaving the CA with 79 per cent of all the Delegates; and the fact that the CA Standing Orders of 2014 were amended in accordance with its provisions, it is submitted that the process of the CA which culminated in the Proposed Constitution was legitimate. This, as indicated above, is grounded in the public participation and transparency, which was guaranteed throughout the process and that the Delegates who remained comprised representatives from all groups which were represented in the CA.

Now, having looked at the legitimacy of the process, what of the resultant content? We now turn to the content of the Proposed Constitution.

D. The Proposed Constitution: Legitimacy of Content

The CA was constituted to "have and exercise powers to make provisions for the New Constitution of the United Republic of Tanzania and to make consequential and transitional provisions to the enactment of such Constitution and to make such other provisions as the Constituent Assembly may find necessary."[65] Accordingly, the CA had powers to make the New Constitution. However, those powers were to be "exercised by a Draft Constitution

63 *Tanganyika Law Society v. The Attorney General,* note 30, p. 2.

64 Reg. 38(1), (2), (3), and (7) of the CA Standing Orders, note 27 and CA Hansards, 29 September to 2 October 2014. See also *Brandt, Cottrell, Ghai,* and *Regan*, note 3, p. 199 where it is noted that "[i]t is unrealistic to expect political parties to agree to secret voting if they are determined to exercise control.".

65 Section 25(1) of the CRA.

tabled by the Chairman of the Commission and passed by the Constituent Assembly."[66] This means that the provisions of the New Constitution would be made by the CA but the CA would make such provisions through the suggested provisions of the Draft Constitution "as the basis for its deliberations."[67] As Brandt, Cottrell, Ghai, and Regan put it:

> *At some stage … a draft already prepared by a particular process may then be presented to another body.* ***There are basically two ways for that draft to be considered****: either it is* ***to be presumed to be the final constitution unless it is changed****, or it is* ***to be viewed as a proposal only****.*[68] *(Emphasis supplied).*

Evidently, the CRA envisaged that the Draft Constitution prepared by the CRC would be a "proposal only" until "made" by the CA as opposed to being the "final constitution" until "changed" by the CA. This interpretation is also supported by the decision of the Court in the case of *Saed Kubenea v. The Attorney General* where the mandate of the CA was put to question, the Court noted:

> *"… the role of the Commission was to collect people's views and prepare the Draft Constitution, and that of the Constituent Assembly is to write and pass the Proposed Constitution, which will be presented to the citizens of Tanzania who will have the last say (through a referendum) on whether to enact it as the new Constitution of the United Republic… it is clear that the proper interpretation of the provisions of section 25 (1), is that the Constituent Assembly has powers to write and pass the New Constitution of the United Republic …*[69]

This, it is submitted, is in consonance with the wording of section 26(2) of the CRA, which states:

> ***The provisions of the proposed Constitution shall require passing by the Constituent Assembly on the basis of support of two third majority*** *of the total number of the members hailing from Mainland Tanzania and two third majority of the total number of members hailing from Tanzania Zanzibar. (Emphasis supplied).*

The fact that the CRA requires the supermajority of votes of Delegates from each part of the Union for passing the provisions of the Proposed Constitution indicates that, even where the specific provision suggested by the CRC was accepted by the CA, it still required supermajority votes to make its way into the Proposed Constitution. This was also the case in Kenya with the 2005 constitution making process where a draft constitution required

66 Section 25(2) of the CRA. See also *Saed Kubenea v. The Attorney General,* Misc. Civil Application No. 29 of 2014, High Court of Tanzania at Dar es Salaam (arising from Misc. Civil Cause No. 28 of 2014), (unreported), p. 10 where the High Court was called upon to give the correct interpretation of section 25 of the CRA.

67 *Saed Kubenea v. The Attorney General,* note 66, p. 10.

68 *Brandt, Cottrell, Ghai,* and *Regan*, note 3, p. 198.

69 *Saed Kubenea v. The Attorney General,* note 66, pp. 11 – 12, 13 – 14.

two-thirds votes of all the members to be adopted.[70] A different approach was adopted in Uganda where changes to the draft constitution prepared by the commission could only be effected if a two-third vote from the members was secured.[71] The Ugandan approach was adopted in Kenya in the 2010 constitution making process, which required 65 per cent of votes for any change to the Draft Constitution prepared by the Committee of Experts.[72] As such, except for the national values and ethos, the mandate of the CA to make the provisions of the New Constitution was boundless and, perhaps, too wide considering the composition of the CA, which was overly filled with politicians who had already pre-determined views in line with their party policies and manifestos. As noted by the CRC Chairperson on 13 February 2014, before the CA even started its sessions: "Chama cha Mapinduzi (CCM) wants to push the agenda of maintaining the Two Government Structure while opposition parties want the CRC's proposal of Three Government Structure respected."[73] Thus, the political divide was already established between the ruling party CCM and some of the opposition parties, particularly those which later formed the CPC consisting of four out of 17 opposition parties, namely, CHADEMA, CUF, NCCR-Mageuzi and NLD.

Politicians are generally not much trusted in Tanzania as there is "cynicism and suspicion about the motivations of politicians and political parties; they are seen as serving their own narrow, partisan interests."[74] Irrespective of the distrust, politicians are 'necessary evils' and understandably, attempts to exclude them from constitution-making processes have been unsuccessful. [75]

The indispensable fact of non-exclusivity of politicians was even more worrisome to the considerable number of Delegates from CCM who accounted for 71.4 per cent of the 437 Delegates as Members of Parliament and Members of the House of Representatives leaving the 28.6 per cent for the entire opposition. In essence, for the requirement of supermajority two-thirds votes from each of the Union parts, out of 409 Delegates from Mainland Tanzania, having 262 Delegates from Parliament alone, CCM only needed 12 Delegates to attain the two-thirds set at 274 Delegates voting in support, which they would not miss out of 134 Delegates from the 201 Delegates appointed by the President from Mainland Tanzania since some appointees were directly appointed from CCM (as part of 42 Delegates from fully registered political parties). The challenge would only have been in re-

70 *Brandt, Cottrell, Ghai,* and *Regan*, note 3, p. 198.

71 *Brandt, Cottrell, Ghai,* and *Regan*, note 3, p. 198.

72 *Brandt, Cottrell, Ghai,* and *Regan*, note 3, pp. 198 and 341. See also the cases of *Saed Kubenea v. The Attorney General,* note 66, and *Saed Kubenea v. The Attorney General,* Misc. Civil Cause No. 28 of 2014, High Court of Tanzania at Dar es Salaam (unreported) both of which sought the interpretation of the court on the powers of the CA in view of section 25 of the CRA.

73 "*Warioba Awafunda Wajumbe, Bunge la Katiba*", http://mwanahalisiforum.com/threads/1655-WARIOBA-AWAFUNDA-WAJUMBE-BUNGE-LA-KATIBA accessed on 1 May 2015 (translation supplied). See also *Saed Kubenea v. The Attorney General,* note 72.

74 *Brandt, Cottrell, Ghai,* and *Regan*, note 3, p. 87.

75 *Brandt, Cottrell, Ghai,* and *Regan*, note 3, p. 85.

spect of Zanzibar where out of 219 Delegates CCM had only 48 from the House of Representatives, 44 Delegates out of 70 Members of Parliament from Zanzibar, totaling 92, while the supermajority required 146 Delegates, thereby falling short of 54 Delegates and reliance being on the 67 out of 201 Delegates appointed by the President from Zanzibar. Evidently, the CPC, whichever position they were to take, was destined to fail, unless CCM was convinced and so rendered support for the supermajority vote requirement. Predictably, a compromise between CCM ideals and CPC stand on the Draft Constitution proved unattainable.

Now, since both CCM and CPC, as earlier indicated, had their "pre-conceived contents" of the New Constitution, and that the CPC walked out of the CA sessions and in their absence, the CA "made" provisions for the New Constitution, predominantly diverting from the CRC Draft Constitution, is the Proposed Constitution legitimate? Again, as was the case with the CA procedure, the answer is in the affirmative:

Primarily, the CA had, by virtue of sections 25(1) and 26(2) of the CRA, powers to make provisions for the New Constitution. Such powers were exercisable irrespective of the walkout by some Delegates provided that the provisions were made and supported by the supermajority votes from each of the parts of the Union. Contrary to the limited functions of the CRC, which produced the Draft Constitution for consideration by the CA, the CA's powers were unlimited in terms of dealing with the provisions of the Draft Constitution except for the national values and ethos as noted by the Court in the case of *Saed Kubenea v. The Attorney General:*

> *... section 25 does not expressly provide for any limitations in the exercise of the powers of the Constituent Assembly... "the power to make provisions for the New Constitution" is vested in the Constituent Assembly and not the Commission. The law has not given such powers to the Commission, or any "powers" for that matter… Instead, the Commission's role is limited to preparing a report, with the Draft Constitution as one of the documents to be annexed to that report.* ***It would not be correct****, in our respectful view,* ***for one to construe the Draft Constitution****, a product of the Commission while exercising its "functions" to "prepare and submit a report", to mean that* ***that product would be binding on the Constituent Assembly in which the law vests "powers" to "make provisions for the new Constitution". It is also erroneous to say that the Constituent Assembly****, which by its composition is more representative than the Commission,* ***would be bound by the Commission's Draft Constitution****, unless there are express provisions to that effect.*[76] *(Emphasis supplied)*

Further, knowing its mandate properly, of an advisory body, CRC has consistently, and rightly so, maintained the statement "CRC recommends/proposes" in all its Reports.[77] Had the CRC the mandate to finally make decisions, it would not be recommending to the CA, it would perhaps be directing or informing the CA. Recommendations were therefore made to

76 *Saed Kubenea v. The Attorney General,* note 66, pp. 13 – 14.

77 Constitutional Review Commission, note 2.

the CA for a decision on behalf of the people of Tanzania, before a plebiscite. As such, the changes, amendments, improvements made to the Draft Constitution by the CA in the course of exercising its powers of making provisions for the New Constitution were lawful irrespective of the walkout, provided the supermajority votes supported the change, amendment or improvement, as the case would be. Among the many changes made by the CA to the provisions of the Draft Constitution, the most pronounced ones include the structure of the Union, powers of recall for the electorate, leadership ethics, national values, and that ministers should not be Members of Parliament. Of all the altered provisions, the most prominent one is the structure of the Union, to which we now turn to illustrate legitimacy of content of the Proposed Constitution.

The CRC reports that out of 351,664 opinions collected by the CRC from the public, 47,820, which is about 14 per cent, commented on the Union structure.[78] Out of these 47,820, only 7.7 per cent wanted a unitary state, followed by 25.3 per cent who wanted a confederation or treaty-based union, 29.8 per cent for a two-government structure and 37.2 per cent who wanted a three-government structure, a federation.[79] Desegregating this data, in Zanzibar, 60.2 per cent wanted a confederation, 34.6 per cent wanted a two government structure, 5.0 per cent a federation while 0.2 per cent was equally shared between those preferring a unitary state and those for four governments. On the other hand, in Mainland Tanzania people wanted mainly a three-government structure by 61.3 per cent, a two government structure at 24.3 per cent, one government structure had 13.4 per cent supporters, 1.0 per cent for a confederation and 0.1 per cent for other forms of union structures.[80] As such,

78 Constitutional Review Commission, Statistics for Collection of Citizens' Opinions on the Constitutional Review Process of the Constitution of the United Republic of Tanzania*,* 2013, pp. 9, 57, 66 – 70.

79 Issa Shivji, *Dhana na Maana ya Bunge Maalum la Katiba,* available at http://www.checheafrika.org/dhana-na-maana-ya-bunge-maalum-la-katiba-2/ 19 February 2014, accessed on 1 May 2015. See also Constitutional Review Commission, note 78, pp. 66 – 70. The terms "unitary state" denotes a single government structure in which Zanzibar would not have its own government while currently has its own, thus having only the union government; "two government structure" is the *status quo*, where the Union Government takes charge of both Union and Mainland Tanzania matters and Zanzibar has its own Government for non-union matters, thus having two governments in the United Republic of Tanzania; "three government structure" refers to a federal structure contained in the Draft Constitution whereby there would be a union government (a federal government) while Mainland Tanzania and Zanzibar would each have their own governments, thus having three governments, two for the respective federating countries and one federal government (federation); "four government structure" denotes having a union government and Mainland Tanzania, Unguja and Pemba each having their own governments (Unguja and Pemba are the two Islands making up Zanzibar); and "confederation" denotes a weak union structure with no sovereign government since sovereignty remains with countries entering into this form of association and in the Tanzanian context, proponents of this kind of union consider it to be time bound at the expiry of which the union comes to an end. For more details on these concepts see the Constitutional Review Commission, Research on the issues related to the Union of Tanganyika and Zanzibar, 2013.

80 Constitutional Review Commission, note, 78, p. 67.

in Zanzibar the majority of the people who gave views on the Union structure wanted a confederation, by 60.2, while in Mainland Tanzania people preferred a federation by 61.3.

Flowing from these statistics, and considering the special dispensation of Zanzibar in the Union structure, it would be injudicious to say a three-government structure was the preference of people while it was people from Mainland Tanzania who preferred the federation by 61.3 and only five per cent from Zanzibar. Likewise, the CRC could not have proposed that a confederation was the people's choice while it is primarily in Zanzibar where people wanted it by 60.2 while in Mainland Tanzania it is only 1.0 per cent. If anything, the statistics from both parts of the Union support the two government structure, having 34.6 per cent in Zanzibar and 24.3 from Mainland Tanzania, than the two extremes of 61.3 per cent for a federation and 60.2 per cent for a confederation in Mainland Tanzania and Zanzibar respectively. Although this is not intended to dispute the wisdom of the CRC on proposing three government structure to the CA, it only shows that had the CRC wanted, it could equally have come up with different advice, such that the two government structure is widely accepted in both parts of the Union, though each of the parts have their own preferences.[81] Or, another alternative would have been to take "judicial notice" of the 86 per cent of the people who did not find anything wrong with the existing Union structure. The CRC, in its unquestionable astuteness, chose one of the options, thus, the federal structure. Likewise, given a chance, other people would have preferred a different option, even different from those alternatives above. Hence, a decision making body empowered by law and a people, the CA, to change the proposals in the Draft Constitution, wisely, was justifiable, as cemented by the Court in the case of *Saed Kubenea v. The Attorney General:*

> *... we are not convinced that the Constituent Assembly is bound to follow any of the provisions in the Draft Constitution — be they basic or not ... the contention that there are certain basic structures in the Draft Constitution that the Assembly is simply not empowered to change is not supported by the Act. Indeed, our reading of section 25 (1) and (2), together with section 9 (2), supports the position ... that the powers of the Constituent Assembly to alter the Draft Constitution are limited only by the national values and ethos laid down in section 9 (2) of the Act.*[82]

The legitimacy of the content of the Proposed Constitution is even concreted in the case of *Saed Kubenea v. The Attorney General* where the Court rightly noted: "… if the Assembly decides to depart from the Draft Constitution, alter or amend it, so long as it does not go against the national values and ethos, it is doing so within its legal mandate."[83] Thus, a Tanzania people constituted by the CA had a choice either to accept the proposal made by the CRC or decide otherwise. The changes made to the Draft Constitution, as exemplified by the changes made to the CRC's proposed federal structure by retaining the *status quo,* a two

81 Constitutional Review Commission, note 24, p. 249.

82 *Saed Kubenea v. The Attorney General,* note 66, p. 12.

83 *Saed Kubenea v. The Attorney General,* note 66, p. 17.

government structure, are lawful and justifiable as the CRC proposed to CA for the later to decide by supermajority. The CRC could, as indicated by the varied interpretation options which could have been adopted on the government structure, have come up with a different proposal, thereby justifying not only in law but also in fact, the different interpretation of statistics adopted by the CA which lead to maintenance of the current government structure.

Consequently, considering its powers under the CRA and the CA Standing Orders of 2014, and the CA's legitimacy derived from the participation of the public through their representatives who remained as part of the 79 per cent, it follows that the content of the Proposed Constitution awaiting the referendum is legitimate, *de jure* and *de facto,* irrespective of the political wrangles between the ruling party and the opposition on the status of the Proposed Constitution. As one should note, law is above politics: "politics is regarded not only as something apart from law, but as inferior to law. Law aims at justice, while politics looks only to expediency. The former is neutral and objective, the latter the uncontrolled child of competing interests and ideologies."[84] Thus, the people "in whom lies the sovereign, will then decide whether to accept it or not," for political legitimacy, which as Herzog notes, "is in the eye of the beholder."[85]

E. As We Wait for the Referendum

The constitution making process in Tanzania has gone through a number of phases: enactment of the CRA in 2011, appointment of the CRC Members in 2012, submission of CRC's Report annexed with the Draft Constitution to the President of the United Republic of Tanzania and the President of Zanzibar in December 2013, the constitution of the CA in February 2014 and finally the submission of the Proposed Constitution to the two Presidents in October 2014. The Proposed Constitution is awaiting a decision by the Tanzanian people, on whether they want to enact a New Constitution or not, by an imminent referendum.

These phases, particularly from the CA phase, have received a lot of attention from people from all walks of life. The object of criticism have been: its composition, its mandate and the attendant procedures adopted in exercising its mandate. Some questions regarding these matters exercised even the High Court of Tanzania. These challenges, though perplexing, were to continue, arising from the "disputed" procedures and trends, until the resultant "disputed" Proposed Constitution. Although the Court has given its interpretation of the mandate of the CA, and some quarters have tried to give their opinion of the powers of the CA, there are still quarters that consider the CRC's Draft Constitution as "the new constitution" and that whatever it contained was the ultimate decision made by a Tanzanian

84 *Goldoni*, note 41, p. 929.

85 *Saed Kubenea v. The Attorney General,* note 66, p. 12 and *Chrisella Herzog*, Political Legitimacy and International Law in Crimea: Pushing The U.S. and Russia apart, available at http://www.diplomaticourier.com/news/topics/politics/2187-political-legitimacy-and-international-law-in-crimea-pushing-the-u-s-and-russia-apart, accessed on 12 May 2015. See also *Yasuo Hasebe*, Constitutional Borrowing and political theory, Int J Constitutional Law 1(2003), p. 228, respectively.

people. The article has only attempted to give what it considers a correct account of the powers of the CA and the attendant procedure, thereby arguing for the unrivalled legitimacy of the Proposed Constitution, both procedurally and materially, considering that "[l]egitimacy … is … an insuperably and irreducibly decentralised, personal judgement."[86]

It is submitted that the Proposed Constitution is *de jure* properly before a Tanzanian people waiting for their ultimate decision to accept or reject the CA's lawful product. The New Constitution will be made by the Tanzanian people when they decide, again, by majority vote which "accords to citizens a fair method of decision making."[87] And,

> *lest somebody wonder why, the supremacy of the Constitution…is not explicable only on the basis that the Constitution is the supreme law, the grundnorm… the Constitution is not supreme because it says so: its supremacy is a tribute to its having been made by a higher power, a power higher than the Constitution itself or any of its creatures. The Constitution is supreme because it is made by they in whom the constituent power is reposed, the people themselves.*[88]

The article could not be concluded, since a Tanzanian people is waiting for the D-day…

86 *Frank I. Michelman*, A Reply to Baker and Balkin, Tulsa Law Review. 39(2004), p. 661.

87 *Goldoni*, note 41, p. 933.

88 *Njoya & Others v. Attorney General & Others*, [2004] LLR 4788 (HCK), at 15.