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ABOUT THIS PUBLICATION

This is publication has been prepared by the Legal and Human Rights Centre (LHRC) with the aim of examining the historical background to the reintroduction of multi-party democracy in Tanzania in 1992. It specifically examines the constitutional, legal, institutional and practical issues relating to the reintroduction, implementation and experimentation of multiparty democracy in the country since 1992. The book also discusses the progress made in strengthening and deepening multiparty democracy in Tanzania as well as the inherent opportunities and challenges that surfaced during the implementation and experimentation of multiparty democracy up to 2022, when Tanzania celebrates thirty years of multiparty democracy.

As well as documenting the lessons learnt, challenges and the inherent prospects, each specific Chapter in this book makes both general and specific recommendations geared towards further strengthening and deepening multiparty democratic institutions and culture in Tanzania. The book consists of five (5) Chapters all written by experts in the relevant fields canvassed in the respective Chapters.

It is expected that this book will immensely contribute to the body of knowledge on the implementation and experimentation of multiparty democracy in Tanzania. Focusing on specific issues relating to the equal and effective participation of Tanzanian citizens in the governance of their country's political and public affairs; this book is useful to legal practitioners, jurists, human rights experts and activists, politicians, scholars and students of not only human rights, constitutional law and gender justice; but also social and political science.

CHAPTER ONE:
GENERAL OVERVIEW OF THE REINTRODUCTION OF MULTIPARTY DEMOCRACY IN TANZANIA

By Anna Henga, Dr. Victoria Lihiru, Adv. Jenerali Ulimwengu, and Dr. Julius Clement Mashamba

1.1. Introduction

On 1 July 1992, Tanzania marked the reintroduction of the multiparty political system, which was disbanded in 1965. This means that the year 2022 marked thirty years of the implementation and experimentation of multiparty democracy in Tanzania. By implications, those who were born in 1992 are now thirty years, entering in the next phase of their lives as young adults. It is expected that thirty years from now, these young adults will be entering their age brackets as senior citizens of Tanzania. Therefore, this a good moment to take stock of the progress made in realizing citizens' participation in the governance of their country's political and public affairs in a multiparty democracy in Tanzania. It is an opportune moment to pose and look back in order to look forward on the multiparty democratic lane with the view to further strengthening and deepening multiparty democracy in the country.

As considered in this book, the right of citizens to participate in the governance of their country's political and public affairs in a multiparty democracy is entrenched in both international law and the Constitutions of Tanzania and Zanzibar.[1] This right is realised in light of other fundamental freedoms – the freedoms of association, assembly and expression – and the rights of equality and non-discrimination. These rights and freedoms are collectively referred to as "participation rights" in that they cumulatively guarantee and ensure the realisation the right of every person to participate in the governance of his or her country's political and public affairs.

To realise these participation rights, the State has to discharge certain obligations geared towards the need required of the State to design and implement a range of measures, which include constitutional, policy, and legal measures. They also include the State's obligation to adopt and implement strategic plans of action, programmes, allocate budgets and provide services to its citizens in order to ensure that these participation rights are *equally* and *effectively* realised by

the citizens who are entitled to enjoy them. Together, these measures make up the State's overall plan for the realisation of the right of citizens to participate in the governance of their country's political and public affairs in a multiparty democracy.

It should be noted that since 1992, Tanzania has re-conceptualized and introduced several constitutional and statutory provisions to bring them in line with the international human rights law obligation imposed on the State to ensure its citizens are entitled to participate in the governance of their country's political and public affairs without discrimination on any of listed grounds and/or any practical impediments. Although the Constitutions of Zanzibar and Tanzania have sparingly being amended, the relevant laws have been continually reviewed and amended to respond to the design and implementation challenges constraining the right of citizens to participate in the governance of their country's political and public affairs in a multiparty democracy.

Therefore, this book focuses on the reflection made on the progress, challenges and opportunities available in relation to the realisation of the right of citizens to participate in the governance of their country's political and public affairs in a multiparty democracy in compliance with international and constitutional law. The book reminisces on the constitutional and legal developments that have occurred in post-independent Tanzania regarding the realisation of the right of citizens to participate in the governance of their country's political and public affairs first in a multiparty democracy (*i.e.,* between 1961 and 195), a single-party political system (*i.e.,* between 1965 and 1992) and later in a multiparty democracy (*i.e.,* from 1992 to date).

With a few notable exceptions, the book notes that the failure by Tanzania to adopt a comprehensively new constitution in order to align the entire constitutional design on multiparty democracy as it was recommended by the Nyalali Commission Report,[2] has been responsible for the many challenges that have constrained equal and effective participation of Tanzanian citizens in the governance of their country's political and public affairs. However, the book capitalizes on the lessons learnt in the past and the existing opportunities for proposing more reforms in the two Constitutions, laws and institutional frameworks in order to further strengthen and deepen equal and effective realisation of Tanzanian citizens' right to take part in the governance of their country's political and public affairs in a multiparty democracy.

2 *See* particularly Jamhuri ya Muungano wa Tanzania, *Tume ya Rais ya Mfumo wa Chama Kimoja au Vyama Vingi vya Siasa Tanzania, 1991* (Dar es Salaam: Mchapaji Mkuu wa Serikali, 1992).

1.2. Objective of this Book

The Legal and Human Rights Centre (LHRC) has supported the preparation of this book with the aim of taking stock of the developments that have taken place since Tanzania re-introduced multiparty democracy in 1992. It strives to trace the historical background of multi-party democracy by examining its constitutional and legal introduction, institutional frameworks as well as lessons, opportunities and challenges that emerged during the implementation and experimentation of multi-party democracy up in the country to the year 2022. The book also seeks to document the lessons learnt and opportunities available for further strengthening and deepening multi-party democracy in Tanzania. Through the Chapters in this book, both general and specific recommendations are made towards strengthening and deepening multi-party democratic institutions and culture in Tanzania.

1.3. Methodology

Given the nature of the subjects canvassed in this book, the authors and the editorial team adopted a qualitative methodology through which the relevant international and regional human rights treaties, the Constitutions Tanzania and Zanzibar, the relevant laws and case law were reviewed and analysed as the major sources of "authorities" in the various studies in the respective Chapters in this book. Both members of the editorial team and authors also convened expert consultative sessions (both physically and virtually) where critical reviews of manuscripts were made and recommendations were directed towards the areas needing further improvements. It should be noted that, each Chapter of the book has been written by an expert in the subject(s) canvassed in the relevant Chapter.

1.4. Summary of Findings

This book contains five (5) Chapters. Whereas **Chapter One** presents a general overview of the book, **Chapter Two** traces the political journey through which Tanzania has travelled since it decided to go back to multiparty politics in 1992. To do this, the chapter looks at the historical antecedents, right from the years immediately after Independence and how politics was organised then and for a long time thereafter. It will deal essentially with the ethos of single-party politics as hitherto practised in Tanzania and other countries on the African continent.
The Chapter also examines the country's frame of mind at the beginning of the 1990s and the struggles within the ruling party – *Chama cha Mapinduzi* (CCM)[3] – including the restive relations within the Union. This Chapter also touches on the 1984 "foul air" that caused serious rifts between President Julius Nyerere and his

3 In English, the Kiswahili words: *Chama cha Mapinduzi* (CCM), mean Revolutionary Party.

vice-president and president of Zanzibar, the late Aboud Jumbe Mwinyi, and how this helped to inform the conversations that took place hitherto as Tanzania was considering re-introducing multiparty politics in the early 1990s.

In the main, this narrative attempts to take stock of the various stages of political developments from the time of Independence, passing through the installation of the single-party dispensation; the morphing of the Tanganyika National Union (TANU) (later CCM) into a party-state or state-party; the stifling of people's political spaces; the sudden change of heart to reluctantly 'embrace' multiparty politics; the tightening of one-man rule and the rise of bloody political violence; to the impasse we experience today and the stuttering efforts to move out of the logjam.

It is an account of one who lived through some of the events related here, a fulltime participant in the engagements of the early 1990s and who has had several occasions to comment on some of the vents even as they took place. Whether this fact will tend to diminish the objectivity and credibility of the story remains to be seen; but, at least, a number of the factors that are brought out in this narrative could stand the test of scrutiny from available documents as well as lived experience.

Moreover, this Chapter attempts to explain the difficulty that almost certainly was caused by the sudden volte-face, which was being proposed to the leaders of the ruling party who were now being told to embrace plural politics after a lifetime of being fed on a single-party ideology. A suggestion is being offered that the reluctance and zigzagging in the implementation of multiparty politics was inbuilt in the history and the legacy of a one-party hegemony that was refusing to die.

At the tail-end of the Chapter, this story talks of the need to move out of the impasse and how this could be done. It takes cognisance of some of the efforts deployed by various actors attempting to effect political progress. Not least among these efforts have been some actions taken by President Samia Suluhu Hassan to ease the psychology of the country and restore some semblance of sanity in the hobbled multi-party politics of the country.

On its Part, **Chapter Three** critically examines the constitutional, legal and institutional frameworks for enhancing citizens' participation in multi-party democratic processes thirty years after Tanzania re-introduced multipartyism in 1992. It considers the theoretical framework for citizens' participation in multi-party democratic processes basing on the prevalent international standards

as well as the constitutional and legal basis of citizens' participation in multi-party democratic processes in Tanzania. It also briefly examines the historical background to the law regulating citizens' participation in multi-party democratic processes in Tanzania, by particularly tracing multi-party politics and the law in post-independence Tanzania, especially in the period between 1961-1979. Notably, this period witnessed several constitutional and legal developments in the country, ranging from the formation of the Union between Tanganyika and Zanzibar in 1964, through the adoption of the Interim Constitution in 1965 and the promulgation of presidential decrees that formed the constitutional basis in Zanzibar to the adoption of the Constitution of the United Republic of Tanzania in 1977 (henceforth, 'the Constitution of Tanzania') and that of Zanzibar in 1979. Markedly, this period was also characterised by the sheer lack of Bills of Rights as well as both *de facto* and *de jure* banning of multi-party politics in both Mainland Tanzania and Zanzibar.

In addition, the Chapter considers constitutional and legal developments that took place in 1984 when Zanzibar adopted another Constitution and the Fifth Constitutional Amendment to the Constitution of Tanzania, both of which entrenched Bills of Rights. Moreover, the Chapter examines the constitutional basis of the re-introduction of multi-party politics in Tanzania in 1992 and the legal basis of citizens' participation in multi-party politics since 1992. This is mainly undertaken in the context of citizens' participation in intra-party democratic processes in the multi-party era and the parametres of citizens' participation rights and freedoms. The Chapter also examines international law and constitutional limitations to citizens' participation rights and freedoms.[4]

Furthermore, the Chapter examines the law relating to supervision and regulation of political parties; canvassing the formation and registration of political parties, maintenance of a Political Parties' Register, registration of national leaders of political parties, and maintenance of registers of political party leaders and members. The Chapter also examines the law relating to suspension and cancellation of registration of political parties as well as recourse against the Registrar's decisions relating to registration, suspension and cancellation of political parties. As well as examining the law regulating the privileges of registered political parties, the Chapter also considers the law relating to financing of political parties.

4 *See* particularly Articles 4, and 18(3) and 19(3) of the International Covenant on Civil and Political Rights (ICCPR), *Mukong v. Cameroon*, Communication No 458/1991, Human Rights Committee (Views: 10 August, 1994); Article 27(2) of the African Charter on Human and Peoples' Rights (ACHPR), Articles 30(1), (2) and (5) as well as 31 of the Constitution of Tanzania, and Human Rights Committee, *General Comment No. 37 (2020) on the Right of Peaceful Assembly (Article 21)*, adopted by the Human Rights Committee at its 129th session (29 June–24 July 2020), paras. 36-69. In particularly *DPP v. Daudi Pete*, op. cit (where the Court of Appeal interpreted this provision to the effect that no person shall enjoy his basic rights and freedoms in such a manner as to occasion the infringement or termination of the rights and freedoms of others or the public interest). *See* also *Mariam Mashaka Faustine & Others v. A.G. & Another* (Consolidated Misc. Civil Cause 88 of 2010) [2011] TZHC 2050 (15 December 2011.'

Additionally, the Chapter considers the law regulating citizens' participation in multi-party electoral processes, by particularly examining the Tanzanian electoral system, and citizens' participation in the electoral process in the country. The Chapter also examines the law on corruption and code of conduct in the electoral process as well as dispute resolution relating to citizens' participation in multi-party democratic processes in Tanzania. Finally, the Chapter concludes by making recommendations aiming at contributing to the strengthening and deepening of effective citizens' participation in the multiparty political system in Tanzania.

Moreover, **Chapter Four** critically examines the extent to which have been participating in Parliament since Tanzania re-introduced multi-party democracy in 1992 after three decades of operating under a single-party system. The Chapter notes that; while both men and women played a key role in the attainment of the 1961 independence, fewer women have been winning parliamentary elections both during the single-party system as well as after the reintroduction of multi-party democracy.

The Chapter contends that under the Tanzanian electoral laws there are five ways through which women can access parliamentary positions. Notably, the prominent ways are (*i*) contesting directly in constituencies, (*ii*) being elected as special seat MPs, (iii) through representing the Zanzibar House Representatives, and (*iv*) through presidential nominations. Although these mechanisms have somewhat enabled women to access parliamentary positions, the Chapter argues that, Tanzania celebrates 30 years of multiparty democracy with only 9.8 percent of elected women parliamentarians. The majority of women parliamentarians access the legislative seats through the special seat system, which is supposed to be temporary measure to scale up women participation in Parliament on equal footing with men.

In the main, this Chapter provides legal reasons for why there are fewer women winning parliamentary constituencies three decades after the reintroduction of multi-party democracy in Tanzania Mainland, and offers recommendations for redressing the situation. The Chapter also makes numerous concrete recommendations aimed at contributing to the ways of ensure equal representation of women and men in Parliament.

Finally, **Chapter Five** critically examines the role of Civil Society Organisations

(CSOs) in the process of democratization in Tanzania since multiparty democracy was re-introduced in 1992. Specifically, the Chapter looks at the contribution of CSOs in conceiving and shaping of multiparty democratic processes and historical events associated to these developments. The Chapter also provides how the political and social contexts at a given time have impacted on CSOs and their contribution to the democratization process in Tanzania.

Moreover, the Chapter analyzes struggles carried out by CSOs geared towards the strengthening and deepening of the process of democratization process in the past thirty years. Lastly, the Chapter discusses some of the opportunities available for CSOs in strengthening and deepening the democratization process in Tanzania, thereby projecting what will CSOs look like in the next 30 years (which will be 6 decades after rebirth of the multiparty political system in Tanzania).

In sum, it should be noted that this summary has lightly touched on the complex constitutional, legal, institutional and practical issues and challenges raised in the Chapters that follow. However, readers are encouraged to read the individual Chapters to gain a more nuanced understanding aspects of the experimentation of multiparty democracy in Tanzania thirty years down the road. It should be noted that the recommendations made in each Chapter are work in progress needing further dialogue and consultation amongst the relevant stakeholders with the view to further strengthening and deepening citizens' participation in the governance of the country's political and public affairs in a multiparty democracy.

CHAPTER TWO:
THIRTY YEARS OF UPS AND DOWNS: HOW 'MULTIPARTY' POLITICS KILLED THE DREAM FOR DEMOCRACY

By Jenerali Ulimwengu

2.1. Introduction

This Chapter traces the political journey, which Tanzania has travelled since it decided to go back to multiparty politics in 1992. To do this, the chapter looks at the historical antecedents, right from the years immediately after Independence and how politics was organised then and for a long time thereafter. It will deal essentially with the ethos of single-party politics as hitherto practised in Tanzania and other countries on the African continent.

Next, the Chapter examines the country's frame of mind at the beginning of the 1990s and the struggles within the ruling party – *Chama cha Mapinduzi* (CCM)[5] – including the restive relations within the Union. This Chapter also touches on the 1984 "foul air" that caused serious rifts between President Julius Nyerere and his vice-president and president of Zanzibar, the late Aboud Jumbe Mwinyi, and how this helped to inform the conversations that took place hitherto as Tanzania was considering re-introducing multiparty politics in the early 1990s.

In the main, this narrative attempts to take stock of the various stages of political developments from the time of Independence, passing through the installation of the single-party dispensation; the morphing of the Tanganyika National Union (TANU) (later CCM) into a party-state or state-party; the stifling of people's political spaces; the sudden change of heart to reluctantly 'embrace' multiparty politics; the tightening of one-man rule and the rise of bloody political violence; to the impasse we experience today and the stuttering efforts to move out of the logjam.

It is an account of one who lived through some of the events related here, a fulltime participant in the engagements of the early 1990s and who has had several occasions to comment on some of the vents even as they took place.

Whether this fact will tend to diminish the objectivity and credibility of the story remains to be seen; but, at least, a number of the factors that are brought out in this narrative could stand the test of scrutiny from available documents as well as lived experience.

Moreover, this Chapter attempts to explain the difficulty that almost certainly was caused by the sudden volte-face, which was being proposed to the leaders of the ruling party who were now being told to embrace plural politics after a lifetime of being fed on a single-party ideology. A suggestion is being offered that the reluctance and zigzagging in the implementation of multiparty politics was inbuilt in the history and the legacy of a one-party hegemony that was refusing to die.

At the tail-end of the Chapter, this story talks of the need to move out of the impasse and how this could be done. It takes cognisance of some of the efforts deployed by various actors attempting to effect political progress. Not least among these efforts have been some actions taken by President Samia Suluhu Hassan to ease the psychology of the country and restore some semblance of sanity in the hobbled multi-party politics of the country.

2.2. The One-Party State Enshrined

Although Tanganyika had the seeds of multiparty politics at Independence in 1961 (*see* Chapter Two), the very idea of competitive politics soon came under attack almost immediately after that. There were many calls for a return to a certain idyll of ages long gone when 'Africans would sit together under the big tree and talk and talk until they agree.'[6] Julius Nyerere, the founder president of Tanganyika (and later of Tanzania) could not have emphasised this more. He was quoted saying: 'They talk until they agree'; he said, and, although he went on to say that this was 'a rather clumsy way of conducting affairs, especially in a world impatient for results as this of the twentieth century, t 'is "discussion is one essential factor of any democracy; and the African is an expert at it".[7]
Turning to democracy as known in the Western world, Nyerere attempted to trash the systems obtaining there by showing how fickle their foundations were:

> [...] when they challenge our ability to maintain a democratic form of government, they really have in mind not democracy but the particular

6 Duffy, J. and R.A. Manners (eds.), *Africa Speaks* (Princeton: D. Van Nostrand, 1961).
7 Ibid.

> form it has taken in their own countries, the two-party system and the debate conducted between the Government party and the opposition party within the parliament buildings.[8]

In further elaboration, Nyerere laboured to demonstrate how the two opposed systems of thought differed fundamentally: 'To the Anglo-Saxon, it is no use to tell an Anglo Saxon that when a village of a hundred people have sat and talked together until they agreed where a well should be dug they have practised democracy".[9] With a sense of the ridiculous obvious in his argument, Nyerere goes on to say: "The Anglo-Saxon will want to know whether the talking was properly organized [...] whether there was a well organised group for the motion and an equally organised group against the motion (and whether the same groups will be similarly set apart in future debates, that is to say, unthinkingly)".[10]He will also want "to know whether in the next debate the same group will be 'for' and the same group 'against' the next motion. In other words, he will want to know whether the opposition was organised, and therefore *automatic* or whether it was spontaneous, and therefore *free"*. This *argumentum ad absurdum* serves to illustrate Nyerere's deep seated antipathy toward competitive politics which he managed to implant and nurture in the body politic of Tanzania for a long time.

This was accompanied by the desire to spare all the vital energies for developmental efforts needed to heave the country out of poverty and place in on the path to 'economic development'. The promises made by a would-be developmental state[11] supposed that one could put on hold the need for greater political and civic freedoms in exchange for faster 'economic development'.

This is all too often an illusory promise that produces neither economic development nor political and civic freedoms.

2.3. The Threat from Berlin and Romania

1989 was a politically seismic year around Eastern Europe and its aftershocks sent reverberations around the African continent, which had to take steps to rearrange longstanding political systems that now looked fragile and untenable. It was the year when an old order was crumbing and a new and uncertain one taking its place. The fall of the Berlin Wall marked the end of the

8 Ibid.
9 Ibid.
10 Ibid.
11 Smith, W.E., *We Must Run While They Walk: A Portrait of Africa's Julius Nyerere* (New York: Random House, 1971).

era of the Cold War between East and West: the fall of the mighty Soviet Union and its client States in the East. It was a period of great uncertainty and anxiety among many ruling circles in Africa.

But probably the most frightening event of the succession of events in Eastern Europe was the overthrow, summary trial and execution of Nicolae and Elena Ceausescu, the ruling couple in Romania for quarter a century, an all-powerful family that had inspired Kafkaesque dread among the people of that country.

The despatch with which this fallen couple was disposed of sowed seeds of terror in the hearts of many African rulers who had cultivated close ties with the Romanian couple and other rulers in Eastern Europe over the decades. Many African rulers had come to identify with the regimes in Eastern Europe and tried to erect in their various countries' political structures similar to the ones under the Soviet Union and countries in the Soviet sphere of influence. The writing, so to speak, was on the wall.

On the African continent the events in Romania, East Germany and elsewhere in Eastern Europe were followed with bated breath. Once thought to be invincible, now the communist regimes in Eastern Europe were crumbling like so many packs of cards. The alarm was sounded to herald the new and worrisome realities.

2.4. Julius Nyerere and the Advent of Nyalali

"When you see your friend being shaved..."

Tanzania's retired President, Julius Nyerere, who had retired only four years previously, was quick to point out the importance of these convulsions. He made a number of appeals to African rulers to recognise the upheavals that were rocking Eastern Europe as significant for Africa too. "When you see your neighbour being shaved apply shaving cream to your hair", a Kiswahili saying which suggests that the shaving alluded to is the rough type, crude and painful, needing softening to minimise suffering.

At Nyerere's prodding, the man who had succeeded him in 1985, President Ali Hassan Mwinyi, duly formed a presidential commission to look into the political dispensation in the country and whether it was preferable to continue with the one-party system or to adopt a multi-party order. The commission

was headed by the then Chief Justice, Francis Nyalali; hence the name "Nyalali Commission".

Nyalali traversed the country, meeting clusters of citizens and special interest groups, and when his Commission reported to President Mwinyi,[12] it revealed that of those sampled 20 percent had opted for a multiparty system while 80 percent had opted to continue with the one-party dispensation. However, Nyalali suggested that this statistical representation notwithstanding, it would be wise to adopt multipartyism. It is important to note at this juncture that the Nyalali exercise was not a referendum but rather an informal consultation with the population

The Nyalali report pointed out the similarities existing between African governance systems and those obtaining in Eastern Europe. These systems operated under a single-party dispensation, whose main hallmarks included, *inter alia*, the prohibition of the freedoms to associate, assemble or express political opinions. The single-party order, said the Nyalali report, placed all political activities within the ambit of the State and there was no room for the free organisation of popular opinions in bodies like trade unions, youth or student bodies. In this dispensation, Nyalali pointed out: "there ceased to exist any difference between the ruling party and the government." One might have added here that in places like Mobutu's Zaire, everybody was deemed to be a member of the ruling party, *le Mouvement Populaire de la Revolution* (MPR), even yet unborn babies!

As stated above, it is important to note the similarities between the African governance systems and the systems that were at that particular time being pulled apart in Eastern Europe since 1989. In Eastern Europe, Nyalali reported, the single-party, had become so monopolistic that eventually small cliques of selected individuals held sway over the popular wishes of the people. Economic activities were likewise centralised under a command economy wherein party bureaucrats made all the decisions, leaving no room for competitive economic life.

2.5. Change is Imminent, Unstoppable

The Nyalali Commission report concluded its reflections on the political situation that had caused the collapse of the systems under Soviet hegemony

12 Jamhuri ya Muungano wa Tanzania, *Tume ya Rais ya Mfumo wa Chama Kimoja au Vyama Vingi vya Siasa Tanzania, 1991* (Dar es Salaam: Mchapaji Mkuu wa Serikali, 1992).

thus:

> [...] it is important to emphasise that the effects of the monopoly of the single-party system, both in political as well as economic systems, explain why it was easy for the citizens of these countries to overthrow their governments which had been in power for a period of more than 40years, or even more than 70 years in the case of the Soviet Union.

Turning to the African continent, Nyalali drew parallels between African governance systems and those which had obtained in Eastern Europe, characterised by monolithic single-party, or military, dictatorships with little or no room for contending ideas or alternative views. Permeated by debilitating corruption and incompetence, most African states had descended into one-man dictatorships giving rise to the phenomenon of the infamous African "Big Man" in the image of Mobutu Sesse Seko, Gnassingbe Eyadema, Omar Bongo *et al*.

Invariably, the imposition of single-party rule was explained away as being necessitated by the imperatives of rapid economic development, requiring Africans to pool all their energies together, obviating political bickering. This was coupled with state monopoly over economic resources, production and distribution, always exacerbating corruption, cronyism and gross inefficiencies. In the end, most African countries fell between two stools, being deprived of political freedoms and at the same having nothing to show for it in terms of economic development.

The Nyalali report insisted on the vital point of the frustration of millions of Africans who were becoming more and more disenchanted with their rulers and seeking alternatives to their political and economic straightjackets. The report also pointedly noted that in most of those African countries where military takeovers kept recurring, such as Nigeria and Ghana, a common denominator was the existence of single-party dictatorships.

Contrasting the dire situation described above with the few existing exceptions, , the Nyalali report went on to describe a different type of system operating on the African continent, where a form of political pluralism was practised. The countries cited in the report were Botswana, Mauritius and Senegal, although the report also critiqued some aspects of the operations of multiparty politics in these three countries.

However, all in all, the main thrust of the Nyalali report was to recommend that Tanzania abandon the single-party dispensation and adopt a multiparty political order in its place.

This, then, has to be taken as the principal reason for the recommendations made by Nyalali in favour of abandoning a system that was so similar to a system that had failed so spectacularly in Eastern Europe. There may have been an element of panic in what Nyerere was telling his compatriots, especially those within the ruling party and official circles. The emphasis was on taking care lest what had happened to the Ceaucescus took place here too.

This may have led the ruling party stalwarts to do just what was necessary to appear to be doing the right thing without necessarily embracing the ethos of democratisation wholeheartedly. During the special conference called by Mwinyi to receive the Nyalali report, CCM party delegates were heard to grumble in muted disagreement with Nyerere, who was the main protagonist in support of the Nyalali proposals, rather than the chairman of the party, President Ali Hassan Mwinyi.

Nyerere was pleading with his party faithful, literally beseeching them to accept the altered circumstances of the world and embrace change, rather than wait to be shaved with rough blades, roughed up and swept away by that inevitable whirlwind of change. So, although in the end the conference voted to institute a multiparty system of government, in the eyes of a discerning observer it was clear multipartyism was rammed down the throats of CCM stalwarts.

2.6. Reluctance to Embrace Change

Within the ruling party there were feelings, expressed openly, that the Nyalali report had overstepped its boundaries, that it had been sent to collect people's opinions but was now substituting its own ideas for the views of the people it had consulted. But Nyerere was undeterred. At his urging and prodding, the CCM-only parliament passed a number of legislative amendments to tinker with the Constitution, to cater for the first multi-party elections slated for 1995. Although Nyalali had proposed that certain constitutional measure be taken prior to the structural changes allowing for multiparty politics, there was no attempt to carry out thoroughgoing constitutional reforms to craft a new constitutional order.

Nyalali had proposed the calling of a constitutional conference, the separation from ruling-party structures of police, military and judicial officers and the repossession by the government of all assets held by the ruling party which had been put by the general public in the era of ruling party hegemonism. These proposals had been intended to level the political playing field between CCM and the new parties, but were all ignored in the processes leading to 1995.

Rather, all that was allowed were superficial clausal additions or subtractions grafted onto formulations that had originally been intended to serve single-party arrangements. This did not give the patchwork 1977 Constitution, under which the 1995 elections were held, much coherence. It was essentially a case of old wine in new bottles or, better, a case of square pegs being fitted into round holes, giving rise to multi-facetted incongruences.

The same arrangements that had made sense within the previous one-party elections were retained. For example, the rule that all other election results could be challenged in court except the presidential election results remained intact. Also, the idea of independent candidates in all the elections was rejected out of hand for a variety of reasons that did not seem to answer to logical thinking.

The Nyalali Commission report also warned against the habit of amending the Constitution frequently in the same way that regular laws are amended when a need arises. It noted that:

The constitution is a permanent instrument and when it is written it has to take into consideration all the major exigencies that might occur subsequently This is why in most countries view of major stakeholders and experts are consulted during the process of constitution making [...]. We thus propose that in the preparation of our Constitution there be placed onerous conditions for constitutional amendments, and that at any rate it should be made especially onerous to amend the constitutional clauses guaranteeing human rights (except through referenda).

The Nyalali commission considered the constitutional provisions allowing the president to prorogue parliament as provided in the constitutions of the Union and Zanzibar, proposing instead that the Parliament/ House of Reps be dissolved only “at the end of the tenure set by the constitution or at the fall of government of the ruling party after a vote of no confidence.

Also, Nyalali seriously critiqued the excessive powers wielded by the president, who is Head of State, Head of Government, Commander-in-chief of the Armed Forces, etc. apart from many other responsibilities. The commission pointed out the provision under Article 37 of the Constitution which stipulates that:

In the execution of his duties, the president shall be free and shall not be compelled to accept any advice given by anybody, except where he shall be required by this constitution or any laws requiring him to perform any act in accordance with the advice [...] give to him [...].

Also, the Nyalali Commission observed that, under Article 36(2) of the Constitution, the president has the power to appoint, promote, and remove from their positions (and expel) many officials, ranging from the Chief Justice and judges (whose removal is subject to certain requirements); ministers, Civil Service Commission, Electoral Commission, etc. The Nyalali Commission report noted that:

It is clear from this situation that the powers allowed the president are too vast and in the context of broadening democratic governance, these powers need to be curtailed to be in accordance with the need to divide these powers among the three main branches of government.

Concerning the electoral commission(s), Nyalali proposed that the electoral commission(s), alongside the executive directors of the commissions, be appointed by Parliament to ensure their independence, impartiality and fairness.

These are just a few of the recommendations made by the Nyalali Commission. It further enumerated 40 laws which it singled out as "oppressive laws" needing abrogation or heavy amendment. These concerned such pieces of legislation as gave the powers of arrest and incarceration of persons without trial under the so-called Preventive Detention Act (PDA) of 1962;[13] the Trade Unions Act of 1962 and others, some of which were either amended or removed as a matter of course in the course putting together a legislative cushion allowing for the first multiparty elections in 1995, but some of which remain on the statute books to date.

13 Cap. 490.

As far as the programme of the changes that needed to be instituted before the new dispensation came into force, the Nyalali Commission proposed a measured step-by-step approach, lest a hasty implementation schedule lead the nation into chaos or a sluggish pace which could lead the pro-democracy lobby to despair.

In this spirit, the Nyalali Commission proposed that there be a constituent assembly to consider and adopt a new constitution.[14] This was supposed to be done at the same time as the removal of all legislative provisions providing the pre-eminence of the then-ruling party, CCM, and all other legal provisions curtailing citizens' rights to participate in political activities unless they belonged to the ruling party.

It was also suggested that all laws be repealed, or rectified sensibly, that encroach on basic rights, including all such laws as governed press freedom. Significantly, the Nyalali Commission expressly proposed the reintroduction of the names of Tanganyika and Zanzibar. The commission proposed the formation of a Constitutional Commission which would write the Constitution of The United Republic as well as a constitution each for Tanganyika and for Zanzibar. Nyalali made it clear that the Constituent Assembly should be truly representative of Tanganyika and Zanzibar, and warned against turning the existing National Assembly and the Representative Council for Zanzibar into the constituent assembly, pointing out that: 'these two legislative organs are CCM organs and can thus be biased.'

2.7. Situation After the Nyalali Commission (1995-2005)

The end of the Mwinyi' presidency in 1995 signaled the end of the single party political system, effectively ushering in the reintroduction of multiparty democracy in Tanzania. As considered below, when multipartyism was re-introduced in July 1992, many people were optimistic that true multi-party democracy was in the offing. But the years that followed the first multi-party elections (beginning from 1995) have proved those optimists wrong. As Tanzania celebrated thirty years of multi-party politics in July 2022, still there were many constitutional, legal, institutional and practical issues that were still negatively impacting on the exercise, by the Tanzanian people, of true multiparty democracy.

14 Nyalali Commission Report, op. cit, para. 696.

2.7.1. The Mkapa Years: False Start to Multiparty Politics

As stated above, some recommendations by the Nyalali Commission report were accepted by the government and taken to Parliament to be enacted into law. Many of the recommendations were not accepted by government, so they were ignored.[15] Without doubt, the most significant and central proposals rejected by government were those treating the structure of the Union, which Nyalali sought to fundamentally alter. Its principal plank was the creation of a three-tier government for the Union, with a government for Tanganyika and Zanzibar and a Union federal government, with detailed proposals for how the system would operate at the constituent level (Tanganyika and Zanzibar) as well as at federal (Union) level.

Notably, this proposal was rejected out of hand, because it went straight against the grain of what Julius Nyerere believed in. It should be noted that Nyerere was, all this while, the mastermind behind the Nyalali project. He arduously argued against a federal structure for the Union, a position he maintained a couple of years later when the matter was brought up again by a group of CCM parliamentarians dubbed the G-55.[16]

After the first election was held since the reintroduction of multipartyism in 1995, it became clear that some of the issues addressed by Nyalali Commission report had been left to persist, and in some cases had been exacerbated. For instance, the 1995 general elections had shown serious weaknesses within the CCM ranks, especially in the way the main opposition candidate for the presidency, Augustine Mrema, had effectively challenged CM's candidate, Benjamin Mkapa, who finally won the presidency with a thin majority. This ironically prompted President Mkapa to rush a constitutional amendment[17] through parliament allowing future presidential elections to be decided on the basis of a minority victory, a situation which subsists even now.

This desire of the ruling circles in our country to lower standards for the sake of expediency is a constant reminder that they have not been keen to engage seriously with the vital forces in society to craft a working, vibrant and productive plural politics allowing all the vital forces of the country to contribute to the political, economic and social development of the people. The inclination to hold onto power whatever it costs, we shall see below, is alarmingly recalcitrant and brazen.

15 Tambila points out that: 'Of the 26 specific recommendations made, about 50 % had been partially or fully carried out by December 1992.' *See* Tambila, K.I., "The Transition to Multiparty Democracy in Tanzania: Some History and Missed Opportunities," *Nomos e-Library*; available at https://www.nomos-elibrary.de/10.5771/0506-7286-1995-4-468/the-transition-to-multiparty-democracy-in-tanzania-some-history-and-missed-opportunities-jahrgang-28-1995-heft-4?page=1 (accessed 23 November 2022).

16 *See* particularly Kasaka, N., *Njelu Kasaka: Maisha, Siasa na Hoja ya Tanganyika - G55* (Dar-es-salaam: Greenleaf Associates, 2018).

17 The Thirtieth Constitutional Amendment (2000).

The first governance period following the reintroduction of multiparty politics in 1995 did not show signs of having any intention on the part of government to further the cause of greater democracy. Increasingly, Mkapa showed few or no signs of wanting to deepen or broaden popular engagement, and instead resorted from time to time to strong-arm actions.

Both within the context of the Union and on the Isles, his actions and statements showed Mkapa's impatience with those who had differing views. He openly supported the repressive measures taken by Zanzibar's president, Salmin Amour and extended police and military intervention on the Islands, with devastating consequences. He paid little attention to the demands by opposition parties on both sides of the Union wanting to be allowed to participate in the political life of the country as sanctioned by the Constitution, and watched as the police were being deployed to disrupt political activities of the opposition parties, beating up and injuring political activists on many occasions, without any discernible justification.[18]
At the same time, Mkapa supervised the pillaging of the economy[19] by the way of kneejerk privatisation of state-owned companies[20] such as the national airline and the National Bank of Commerce, given away for a song. He also oversaw the granting of mineral exploitation rights to big multinationals[21] without any obvious interest to the country. Strangely, the Mkapa government even gave tax holidays for betting companies and casinos, unheard of anywhere in the world. Alongside these measures, Mkapa also sanctioned the 'sale' of government dwelling houses, at almost zero value, in one of the more corrupt undertakings of the Mkapa administration, aided by John Magufuli, his Works minister, who as we shall see hereunder, was the man who became the fifth president of Tanzania, illustrating the DNA of corruption running down successive eras of the CCM government.

It is not as if these aberrations were not pointed out to the president and his government even as they took place. It is useful to remember that this was at

18 Ulimwengu, J., "Mkapa: The Man in the Media, Who Loved the Queen's Language," *The East African* newspaper (Nairobi), Wednesday, 5 August 2020; available at https://www.theeastafrican.co.ke/tea/oped/comment/mkapa-the-man-media-who-loved-queen-language--1913450 (accessed 23 November 2022).
19 Speaking at the 8th Mwalimu Julius Nyerere Intellectual Festival held at Dar es Salaam in June 2016, President Mkapa was quoted regretting about the privatisation process thus:

> 'Our preoccupation shouldn't just have been in privatisation, but there should have also been a monitoring instrument. […] We established an instrument to carry out privatisation, but at that time it did not have the mandate […] of monitoring the development of privatized companies. We admit this mistake.'

See Correspondent, "Mkapa Says Privatisation 'Worst Mistake' of his Presidency," *The Guardian* newspaper (Dar es Salaam), 15 June 2016. Available at https://www.ippmedia.com/en/news/mkapa-says-privatisation-worst-mistake-his-presidency (accessed 23 November 2022).
20 For a discussion on how the privatisation process was carried out from a real estate valuation point of view, *see* particularly Waigama, S.M.S., "Privatization Process and Asset Valuation: A Case Study of Tanzania," Ph.D. Thesis in Building and Real Estate Economics, School of Architecture and the Built Environment, Royal Institute of Technology, Stockholm, Sweden, 2008. Available at https://www.diva-portal.org/smash/get/diva2:13398/FULLTEXT01.pdf (accessed 23 November 2022). *See* also Maige, I., *et al., Privatisation, Workers Eclipse? – The Legal and Human Rights Implication of Privatization on Industrial Relations: The Case of Divestiture of the Tanzania Electric Supply Company Limited, TANESCO* (Dar es Salaam: Legal and Human Rights Centre, 2002).
21 *See* particularly Curtis, M. and T. Lissu, *A Golden Opportunity?: How Tanzania is Failing to Benefit From Gold Mining* (2nd Edn.) (Dar es Salaam: CCT, BAKWATA and TEC, October 2008).

a time when there was a vibrant private media environment, a hallmark of the years of Ali Hassan Mwinyi as president, which accompanied the formation of opposition parties for the first time since 1965.
So, under the presidency of Benjamin Mkapa (1995-2005), which was the first presidency in which plural politics was supposed to take root, be nurtured and be allowed to blossom, deliberate measures were taken to hinder such development and to roll back the march of greater political and constitutional freedoms. In effect Mkapa poured cold water on the scant flames that had been lit during the Mwinyi presidency.

In addition to the political parties being given short shrift every time they wanted to do politics, the Mkapa administration also clamped down on popular organisations militating for the opening up of civic spaces. The government was now bent on making sure the civil society organisations that had undergirded plural politics with a non-partisan cushion were either made silent or banned.

In this way, organisations such the *Baraza la Wanawake Tanzania* (BAWATA) – a non- partisan women's organization — was banned and stayed banned even after the whole judicial hierarchy had declared severally that the banning was illegal.[22] Also banned were the non-partisan National Youth Council and *Haki-Elimu*, a civic organisation campaigning for inclusive quality education in the country.

It is important to empathise that these civil society organisations had been in the forefront of the struggle for the liberalisation of the political, economic and civic spaces in Tanzania, making them more responsive to people's *needs*, a far cry from the constraints obtaining under the single-party dispensation.

Thus, it was that from one administration to the next, the political landscape of Tanzania looked so changed that it was hard to understand that these two administrations were led by the same political party, CCM.

2.7.2. The Zanzibar Crisis

The culmination of the reversal of democratisation during Mkapa's reign took place in a bloody showdown on January 27 in 2001 in Unguja and Pemba, when pro-democracy demonstrators from the opposition Civic United Front (CUF) took to the streets to demand greater democracy and to express their

22 In *Baraza la Wanawake Tanzania & Others v. Registrar of Societies & Others*, High Court of Tanzania at Dar es Salaam, Miscellaneous Civil Cause No. 27 of 1997 (Unreported), the High Court found such ban as unconstitutional.

rejection of the election results for Zanzibar the previous year.[23] The police force opened fire, killing an unknown number of civilians, forcing many of the survivors to flee to the Kenyan coast, creating Tanzanian refugees for the first time in history. The government was unrepentant when it was criticised, citing the alleged killing of a police man during the demonstrations organised by CUF.

When President Mkapa was asked by Tim Sebastian of BBC *Hard Talk*[24] about the shootings, his answer was that "only 17 people were killed," as if it was too small a number to be mentioned. The promotions of a number of police officers soon after the massacre did nothing to suggest contrition on the part of the Mkapa government. Neither did the whitewashing job done by a commission of enquiry chosen by Mkapa to investigate the incident and headed by his close friend, Gen. Hashim Mbitta, a CCM stalwart.

President Mkapa was determined not to accept responsibility for what had happened in Zanzibar. The truth is that he had abandoned leadership to a police force, which knew no better than to counter pro-democracy rallies and demos with maximum force, including the firing of live ammunition. Before the demos (and the police shootings), there had been unseemly public arguments between the leadership of CUF and the police force, exchanging accusations and counter-accusations in an atmosphere suggesting matters were coming to a head, but the political leadership failed to intercede. When the eruption happened, all Mkapa wanted was a whitewash and coverup.

2.7.3. An Appreciation of Mkapa

All in all, the Mkapa years were marked by an absence of movement on the democracy agenda, coupled by a weakened ethical disposition and a willingness to embrace grand corruption, despite his good intention of constituting a special presidential commission to look into the corruption scourge in 1996.[25] This was more manifest when it was revealed after his departure from office that he, and the First Lady, had incorporated a private company under the official address of the State House, and had privatised under their own names a state-owned coal-mining company.

It is telling that all these shenanigans started after Mwalimu Julius Nyerere,

23 Legal and Human Rights Center (LHRC) and International Federation for Human Rights (FIDH), Zanzibar: *Wave of Violence – A Fact Finding Report on Police Brutality and Election Mismanagement in Zanzibar* (Dar es Salaam: LHRC and FIDH, Report nº 307, May 2001).
24 The interview is now available at https://www.youtube.com/watch?v=mwehaBjNz8s (accessed 23 November 2022).
25 *See* particularly United Republic of Tanzania, *Report of the Presidential Commission on Corruption* (Dar es Salaam: Government of the United Republic of Tanzania, December 1996) ('The Warioba Commission Report').

the venerated founding president who had assiduously campaigned for Mkapa in 1995 as "Mr. Clean", had died in London in 1998. The main effect of Mkapa's lack of democratic zeal was that what had been intended by the Nyalali Commission's recommendations was not given effect and, gradually, the opening up which had seen great promise in the last years of the Mwinyi administration, died out. The discourse on further democratisation died out and the political and constitutional dispensation was reduced to an empty formalistic routine devoid of any vitality, which made it an easy target for anti-democratic forces, as we shall see later.

On matters of governance, Mkapa appeared to have surrendered his role as national leader to the police and security forces, allowing his police chiefs to conduct noisy arguments with opposition political leaders, such as what happened immediately before the Zanzibar massacre. This is a trend that has now entrenched itself, wherein ruling-party chiefs tend to let the police carry out arguments with the opposition rather than ruling-party leaders answering opposition queries.
It is clear that what had been described in the Nyalali Commission Report about the Police being part of the ruling party and abandoning their role as neutral law-enforcing agents, was still being entrenched and the situation has not been rectified to date.

2.8. The Kikwete Years (2005-2015): Empty Promises, Dashed Hopes

In 2005, the country went through its third general election under the multiparty dispensation that had been re-established in the early 1990s, and the expectation was that the polity had gained valuable experience from the conduct of the 1995 election. The new political parties that had been formed in the 1990s were becoming more articulate and better organised, although some that had shown great promise in the past were undermined by internal bickering and disintegration. The ruling party, CCM, endorsed Jakaya Mrisho Kikwete, who won handsomely amid a lot of enthusiasm among the popular masses.

However, this enthusiasm was not met with the satisfaction expected by the people, and soon signs began to appear that the system was once again resorting to strongarm actions against opposition politicians and other disaffected members of society.

During a strike involving junior medical doctors in 2012, a strike leader, Dr. Steven

Ulimboka, who had been involved in a public argument with the government, was abducted and tortured before being dumped into a suburban wood, apparently left to die. No one claimed responsibility, but the state was not exactly eager to investigate the matter.

All the while calls for a new constitution were being heard, mainly from the opposition, which had gained some strength, winning a considerable number of seats in parliament. Out of the blue, President Kikwete appointed a commission to advise him on how to write a new constitution and placed it under Judge Joseph Sinde Warioba, a respected lawyer and former prime minister.[26]
When the Warioba Commission had completed its report and sent it to a Constituent Assembly, but before completing its task, the commission was disbanded, its members chased out of their hotels and its website shut down. In addition to these indignities, Warioba himself was roughed up in public by a ruling-party thug who was later appointed regional governor for Dar es Salaam.

President Kikwete did not at any time have the courtesy to explain this strange behaviour of his, and the constitution writing exercise, which had expended so much money, has gone begging to this day.

2.9. The Magufuli Years (2015-2021): A Complete Reversal

When he took over as president in 2015, John Pombe Magufuli lost no time in making clear what he stood for in matters relating to democratic governance. It was clear he did not believe that democratic governance was important to Tanzania,[27] preferring instead to prioritizing a "development" agenda, which to him meant the building of roads, bridges, mega dams and railways.

Although by this time opposition parties were taken as a governance fixture of the country, Magufuli forbade their activities, including the holding of rallies or demonstrations. Although this prohibition was merely verbal, the police implemented it as though it were based on a law of parliament. To his credit, Magufuli openly declared that he had no time for political arguments, arguing that elections were over and what remained was working to "bring development".

26 Maingraud-Martinaud, C., "*Katiba Mpya*? Dynamics and Pitfalls of the Constitutional Reform Process in Tanzania", *Mambo!* Vol. XIII No. 1, 2015.
27 *See* generally Congressional Research Service (CRC), *Tanzania: Recent Governance Trends and 2020 Elections: In Brief* (Updated October 26, 2020), available at https://sgp.fas.org/crs/row/R46579.pdf (accessed 23 November 2022); and Bamwenda, E., "The Symptoms of the Shift Towards an Authoritarian State in Tanzania's President John Pombe Magufuli's Rule," *Politeja*, Vol. 56, 2018, pp. 123-150.

Those who dared challenge these strictures were met with violent police responses. Tens of opposition party officials were regularly arrested for nothing more than doing their legally sanctioned political activities, and some were thrown in jail for long periods without trial or had their cases postponed from time to time because they were "still under investigation."

The president exhibited no respect for the independence of the Judiciary, once or twice stating publicly that he would allocate sufficient funds for the Judiciary on condition that the courts would to lock up those he sent there.

During President Magufuli's period of six years, the country witnessed the weakening of the media which had made its mark since the 1990s. He cautioned the media not to think they had "so much freedom," and his officials in the information ministry instrumentalized the president's threats through bans, fines, suspensions and closures of news outlets. Within a short time, media organs became tame and stopped doing any investigative journalism and were soon forced into self-censorship, which invariably kills any meaningful journalism.

The attacks on media were part of a generalised crackdown on civil society organisations and their activities. The political and economic liberalisation of the 1990s had spawned vigorous non-governmental organisations and civil society groups which contributed significantly to the public conversations of the period.

Under Magufuli, these were under serious attack, courtesy of stringent pieces of legislation which sought to constrict their activities and keep them on a state-controlled leash. A string of laws were enacted adversely affecting journalism,[28] statistical research;[29] online contents,[30] etc.
Amid this clampdown, a new and strange phenomenon emerged around

28 In particular, the 2015 Cybercrimes Act restricts free expression online; the 2015 Statistics Act (through its amendment in June 2019) criminalizes publishing statistics without government approval and blocked the publication and dissemination of independent research; and the 2016 Media Services Act gives government agencies broad power to censor and limit the independence of the media by creating stringent rules for journalists accreditation and creating offenses and oversight powers that are open to abuse by the government. For a comprehensive analysis of the adverse ramifications of these law on free press, *see* Human Rights Watch, *"As Long as I am Quiet, I am Safe": Threats to Independent Media and Civil Society in Tanzania* (Human Rights Watch, October 2019); available at https://www.hrw.org/report/2019/10/28/long-i-am-quiet-i-am-safe/threats-independent-media-and-civil-society-tanzania#_ftn227 (accessed 23 November 2022). Notably, on 28 March 2019, the East African Court of Justice (EACJ) held (in *Media Council of Tanzania, Legal and Human Rights Centre, & Tanzania Human Rights Defenders Coalition v. A.G. of Tanzania*, Reference No. 2 OF 2017) that the Media Services Act violates the East African Community's establishing treaty's rules on good governance. In a judgment on an application filed by three Tanzanian nongovernmental organizations, the Arusha-based EACJ found that multiple sections of Tanzania's 2016 Media Services Act, including those on sedition, criminal defamation, and false news publication, restrict press freedom and freedom of expression, and thereby breach the constitutive treaty of the East African Community, a regional economic bloc of which Tanzania is a member. The EACJ directed Tanzania to "take such measures as are necessary" to bring the law into compliance with the treaty, according to the judgment.

29 *See* the Statistics Act, Cap. 351 R.E. 2019.

30 In 2018, the Electronic and Postal Communications (Online Content) Regulations, 2018, were promulgated under section 103 of the Electronic and Postal Communications Act, subjecting bloggers as well as online TV and radios to excessive licensing fees. In 2020, these Regulations were repealed and replaced by the Electronic and Postal Communications (Online Content) Regulations, 2020, vide the GN. No. 538 of 17 July 2020. *See* Media Council of Tanzania (MCT), *Analysis of The Electronic and Postal Communications (Online Content) Regulations, 2020* (Dar es Salaam: MCT, 2020).

the commercial capital, Dar es Salaam, of bodies washing on the shores of the Indian Ocean wrapped in gunny bags. Nobody tried to explain these frightening occurrences, which fuelled wild rumour mongering and intense fear.

The unexplained disappearance of prominent people, such as political activist Ben Saanane and journalist Azory Gwanda, and the silence observed by police around their disappearances further stoked the fear of people who could not be certain of their own safety.[31] Though a minister in Magufuli's government once intimated publicly that Gwanda had been killed, there is no evidence that the minister has ever been interviewed by police to get details of the alleged killing.

A most egregious event shocked the country when a prominent opposition personality, Tundu Antipas Lissu, was shot several times within the residential compound of Parliament in broad daylight as he was coming home during a lunch break during the parliamentary session. To this day, there does not appear to be any police investigation of the attack. Nor is there any explanation why there is no CCTV footage of the attack. The police seem to have had no interest in the case, frightening though it certainly was.

2.9.1. The Covid-19 Saga

When Covid-19 erupted, the government quickly took matters into its hands, issuing advisories and directions on how to keep safe and limit the spread of the virus. For a time, it looked like Tanzania, alongside our neighbours, had taken the disease in its stride and all would be well. But, from nowhere the whimsical side of the president got the better of him and he dragged the country down a dark path of Corona denialism which resulted in the deaths of people who should not have died so unnecessarily.

Calling on the people to pray and fast as ways to "chase away" the virus,[32] he created a false sense of security which killed many people because they believed him as people usually believe their leaders. Magufuli refused to wear the mask and actually chided any prominent person that did. In this way he encouraged dangerous behaviour which could have been extremely serious had the country experienced what countries like India, for instance, went

31 Congressional Research Service (CRC), *Tanzania: Recent Governance Trends and 2020 Elections: In Brief* op. cit, p. 4.
32 *See* generally Carlitz, R., T. Yamanis, and H. Mollel, "Coping with Denialism: How Street-Level Bureaucrats Adapted and Responded to COVID-19 in Tanzania," *Journal of Health Politics, Policy and Law*, Vol. 46 No. 6, 2021, pp. 989–1017 (https://doi.org/10.1215/03616878-9349128); available at https://read.dukeupress.edu/jhppl/article-abstract/46/6/989/173556/Coping-with-Denialism-How-Street-Level-Bureaucrats?redirectedFrom=fulltext (accessed 23 November 2022).

through. As a result of Magufuli's denialism and his encouragement of dubious grandmother remedies, led to the deaths of numerous people, many of whom were in their productive years. Magufuli himself may have succumbed to the virus he ignored.

The Magufuli years will be remembered as a period when scientists abandoned science and superstition took centre stage in the public domain. For instance, medical doctors, whose responsibility it is to guide the nation in issues pertaining to health, abdicated that responsibility and listened instead to the rantings of politicians.

2.9.2. An Appreciation of the Magufuli Years

The five years and a bit that John Magufuli was president were arguably the most difficult for the democratic project in Tanzania. But it may also be fair to say that these were the years when the true worth of the various forces in contention in the Tanzanian political equation were made clear.
It was unmistakably the era of the often talked about African strong man, with unlimited powers collected around him and who could do anything he wished without worrying about any countervailing power daring to oppose him. Magufuli had succeeded in silencing the opposition as he had promised at the beginning of his presidency. He had cowed Parliament into subservience. He had made the Judiciary seem unable to challenge any of his decisions. He had gagged the media and civil society organisations. He was now a power unto himself.

He was now free to appoint and place people into positions they were not qualified for and gave them power to do what they pleased. For instance, he appointed one person as Chief Secretary, head of the Civil Service and secretary to the Cabinet, although the said appointee had never worked for a day in the Civil Service. He did not respect any legal or constitutional limitations on his powers.

The general elections held in 2020, as well as the civic elections held a year earlier, were a farce. Magufuli worked to make sure that most of the opposition party members vying for the various positions at municipal and parliamentary levels were declared unqualified, citing various obstacles, but also worked to disenfranchise members of his own party with whom he disagreed.

This last point is important for a reason. Magufuli reportedly had plans for the

future. He reportedly intended to mobilise elements in his party who would drum up support for him to amend the country's Constitution to make him seek a third term, and maybe more. To do this, he needed a big enough majority in Parliament. For this to happen, he needed not only to reduce opposition numbers but also to ensure only ruling-party unquestioning supporters were elected.

On the economic front, Magufuli's period was marked by destructive interventionism that destroyed some sections of the economy unnecessarily. For instance, he closed down foreign exchange bureau in certain areas in military-style operations following no known laws or rules. It is not known how much foreign currency was confiscated, because no inventory was taken, and the owners are still yet to get an explanation as to what happened to their money.

A similar fate fell on the cashew-nut farmers, whose 2018 crop was confiscated; but was apparently not commercialised in time, and no explanation was ever given as to what happened to the crop. Cashew nuts have grown to be a major cash crop that has helped to heave thousands of Tanzanians out of poverty, especially in the southern part of the country, a historically marginalised area. Disruption of an economically viable activity is regrettable, to say the least.

Both those who lost their foreign currency and those who lost their cashewnut crop was confiscated suffered huge losses in incomes and livelihoods. It is reported anecdotally that a few suffered shocks and lost life, and now the question has to be how these losses can be compensated.

2.9.3. Judicial Aberration

President Magufuli pushed his officials to devise stratagems apparently designed to raise funds through dubious means. In what was termed "plea-bargaining,"[33] people who had been arrested on charges of money laundering or economic sabotage would be offered the possibility of release if they paid a certain amount of money. In this way several people bought their freedom in cases which were never judicially determined one way or the other. It is not

33 FB Attorneys, "Plea Bargaining System to be Introduced in Tanzania," *Legal Update*, 24 July 2019, available at https://fbattorneys.co.tz/plea-bargaining-system-to-be-introduced-in-tanzania/ (accessed 23 November 2022). Following President Magufuli's public "advice" to the DPP, Parliament made amendments to several criminal laws in Tanzania which, among others, introduced the plea bargain phenomenon into Tanzanian statute books. These were embodied in the Written Laws (Miscellaneous Amendments) Act (No. 4) 2019 (Act No. 11 of 2019) through which numerous amendments were made (*see* particularly Sections 194A, 194B and 194C of the CPA). Later on, the Chief Justice published the Criminal Procedure (Plea Bargaining) Rules 2021 (Rules) under Section 194H of the Criminal Procedure Act, Cap. 20 R.E. 2019 (the CPA), for better carrying out of the provisions of plea bargaining in the Act. Notably, the Rules were published on 5 February, 2021 vide GN. No.180 of 2021.

too clear who the recipient of the sums so acquired by people who acted as state agents was or whether indeed the sums so paid found their way into state coffers.

The judicial system in Tanzania is still very backward and badly needs reform. Offences usually bailable elsewhere remain unbailable and judges and magistrates have almost no option but to grant bail in the most ordinary offences.

In Tanzania, the situation has been a little complicated. For a long time, the state prosecutors have been empowered to successfully oppose any application for bail, which has seriously impeded access to bail. Although judicial personalities have pronounced themselves against this travesty of justice, the practice has endured, which is a serious blemish on the administration of justice in the country.

2.9.4. The Aftermath and the Way Forward

President John Magufuli died in office on 17 March 2021. The cause of his death was never made clear and there was some speculation as to what may have caused his demise. Suffice it to say that there was a great outpouring of grief, a natural response every time a leader dies, especially one who had all the while tried to identify himself with "the downtrodden."

His place was taken over by his vice-president, Samia Suluhu Hassan, his running mate in the 2015 and 2020 general elections. Since taking over, President Samia has shown herself a very different kind of leader than her predecessor, although she has been at pains to stress that she would follow in the footsteps of her predecessor.

President Samia has opened up channels of communication with the opposition parties. She has put in place consultative structures – the presidential task force – to advise her on how to handle political, constitutional and legal issues. She has distanced herself from some of the more unpleasant aspects of the previous ruler. In particular, the task force on political reform submitted its report to the President on 21 October 2022. The task force's report came out with a long list of recommendations, chief amongst which being the need to lift the ban on political rallies ahead of the next General Election in 2025 but with certain conditions to the political players.

All this is encouraging, but it may be early days still for any meaningful judgment on Samia's governance merits and/or demerits. There is much to do. She has to steer the country back onto the rail of democratisation from whence Magufuli had seriously derailed it.

Political parties are rearing to go back into doing politics. They want to be able to organise rallies and demonstrations, which they had been denied under Magufuli. There are scores of citizens who are still facing police charges on cases that rare really political. The foreign exchange traders who lost their money will need to be compensated as will those who lost livelihoods—sometimes even lives—when their cashew crop was confiscated.

The issue with law enforcement that has gone rogue is especially concerning in that the police force has lost much of its professionalism and has been utilised by political actors at all levels of government to harass people for political ends. It is necessary that all efforts possible be deployed to right this wrong, for the police force is a critical element in the preservation and maintenance of peace and should not be allowed to serve political masters.

The police is a very powerful force which needs strict regulating lest it turn rogue or falls under the thumb of ill-intentioned elements within the power structures. If this is allowed to continue unchecked, unscrupulous elements will take it over and use it to gain political control of the country. In such a case, it becomes just another private militia paid, armed and deployed by political agents.

Statements like, "They will be beaten like they are stray dogs" are a brutal verbal manifestation of what the police force is thinking, which is not what they have been given as their responsibility. And yet how can anyone fault the police commissioner who sees protesters as straw dogs differ from a top government officer who is on record saying, "They have to be beaten up, there is no other way... they have to be beaten up, come what may." ?

These are poignant indicators of a harsh reality, and that is that the mentality of the colonial government, which we have not succeeded to eradicate completely. They will surface from time to time each time those in uniform begin to think that their political bosses will condone their violence. It is imperative to put an end to this kind of thinking, prouncements and deeds,

The efforts deployed by President Samia to restore democratic practices must be commended, but the groups she has been engaging will be watching and gauging every step she makes and calibrating their responses to fit how they perceive her intentions. Probably the most important point is that all involved in these processes be imbued with a high spirit of patriotism, an acute ethos of honesty and a rare sense of self- abnegation.

Without these, we will continue making hollow-sounding political declarations which, devoid of true intent, will soon be revealed as yet another set of a conjurer's trick which will not quench the thirst of those who are dying to see true democracy, to the extent that such a possibility exists, thrives in our country.

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CHAPTER THREE:
THIRTY YEARS OF MULTIPARTY DEMOCRACY: CRITICAL EXAMINATION OF THE CONSTITUTIONAL, LEGAL AND INSTITUTIONAL FRAMEWORKS FOR ENHANCING CITIZENS' PARTICIPATION IN MULTI-PARTY DEMOCRATIC PROCESSES IN TANZANIA

By Dr. Julius Clement Mashamba

3.1. Introduction

This Chapter critically examines the constitutional, legal and institutional frameworks for enhancing citizens' participation in multi-party democratic processes thirty years after Tanzania re-introduced multipartyism in 1992. It commences by considering the theoretical framework for citizens' participation in multi-party democratic processes basing on the prevalent international standards as well as the constitutional and legal basis of citizens' participation in multi-party democratic processes in Tanzania. It also briefly examines the historical background to the law regulating citizens' participation in multi-party democratic processes in Tanzania, by particularly tracing multi-party politics and the law in post-independence Tanzania, especially in the period between 1961-1979. Notably, this period witnessed several constitutional and legal developments in the country, ranging from the formation of the Union between Tanganyika and Zanzibar in 1964, through the adoption of the Interim Constitution in 1965 and the promulgation of presidential decrees that formed the constitutional basis in Zanzibar to the adoption of the Constitution of the United Republic of Tanzania in 1977 (henceforth, 'the Constitution of Tanzania') and that of Zanzibar in 1979. Markedly, this period was also characterised by the sheer lack of Bills of Rights as well as both *de facto* and *de jure* banning of multi-party politics in both Mainland Tanzania and Zanzibar.

In addition, the Chapter considers constitutional and legal developments that took place in 1984 when Zanzibar adopted another Constitution and the Fifth Constitutional Amendment to the Constitution of Tanzania, both of which entrenched Bills of Rights. Moreover, the Chapter examines the constitutional basis of the re-introduction of multi-party politics in Tanzania in 1992 and the legal basis of citizens' participation in multi-party politics since 1992. This is mainly undertaken in the context of citizens' participation in intra-party

democratic processes in the multi-party era and the parametres of citizens' participation rights and freedoms. The Chapter also examines international law and constitutional limitations to citizens' participation rights and freedoms.[34]

Furthermore, the Chapter examines the law relating to supervision and regulation of political parties; canvassing the formation and registration of political parties, maintenance of a Political Parties' Register, registration of national leaders of political parties, and maintenance of registers of political party leaders and members. The Chapter also examines the law relating to suspension and cancellation of registration of political parties as well as recourse against the Registrar's decisions relating to registration, suspension and cancellation of political parties. As well as examining the law regulating the privileges of registered political parties, the Chapter also considers the law relating to financing of political parties.

Additionally, the Chapter considers the law regulating citizens' participation in multi-party electoral processes, by particularly examining the Tanzanian electoral system, and citizens' participation in the electoral process in the country. The Chapter also examines the law on corruption and code of conduct in the electoral process as well as dispute resolution relating to citizens' participation in multi-party democratic processes in Tanzania. Finally, the Chapter concludes by making recommendations aiming at contributing to the strengthening and deepening of effective citizens' participation in the multiparty political system in Tanzania.

3.2. Theoretical Framework for Citizens' Participation in Multi-Party Democratic Processes

Recognising the fundamental role of citizens' participation in the governance of their country's political and public affairs, both international human rights law and national constitutions as well as municipal laws have codified four inter-related and inter-dependent "participation rights and freedoms". As considered below, "participation rights and freedoms" encompass the right of every person to participate in the governance of his or her country's political and public affairs as well as freedoms of association, assembly and expression. At the heart of these participation rights, is the guarantee by the State of

34 *See* particularly Articles 4, and 18(3) and 19(3) of the International Covenant on Civil and Political Rights (ICCPR), *Mukong v. Cameroon*, Communication No 458/1991, Human Rights Committee (Views: 10 August, 1994); Article 27(2) of the African Charter on Human and Peoples' Rights (ACHPR), Articles 30(1), (2) and (5) as well as 31 of the Constitution of Tanzania, and Human Rights Committee, *General Comment No. 37 (2020) on the Right of Peaceful Assembly (Article 21)*, adopted by the Human Rights Committee at its 129th session (29 June–24 July 2020), paras. 36-69. In particularly *DPP v. Daudi Pete*, op. cit (where the Court of Appeal interpreted this provision to the effect that no person shall enjoy his basic rights and freedoms in such a manner as to occasion the infringement or termination of the rights and freedoms of others or the public interest). *See* also *Mariam Mashaka Faustine & Others v. A.G. & Another* (Consolidated Misc. Civil Cause 88 of 2010) [2011] TZHC 2050 (15 December 2011.'

equality and non-discrimination rights to all citizens exercising these rights.

3.2.1. International Standards for Enhancing Citizens' Participation in Multi-Party Democratic Processes

An individual's right to take part in the political and public affairs of his or her country is clearly entrenched in various international and regional human rights treaties. In particular, this right is stipulated in Article 21 of the Universal Declaration of Human Rights (UDHR), which provides that:

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right to equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Since the adoption of the not-so-binding UDHR in 1948, the individual's right to take part in the political and public affairs of his or her country has been reaffirmed in various "binding" international human rights, particularly Article 25 of the International Covenant on Civil and Political Rights (ICCPR),[35] Article 7 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),[36] Article 13 of the African Charter on Human and Peoples' Rights (ACHPR)[37] and Article 9 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ('the Maputo Protocol').[38]

In particular, Article 25 of the ICCPR and Article 13 of the ACHPR[39] guarantee to "every citizen" the right and the opportunity, without any of the listed distinctions[40] and without unreasonable restrictions:

i. To take part in the conduct of public affairs (*i.e.,* in the government of his or her country), directly or through freely chosen representatives 'in

35 The ICCPR was adopted and opened for signature, ratification and accession by the United Nations (UN) General Assembly vide resolution 2200A (XXI) of 16 December 1966. It entered into force on 23 March 1976, in accordance with Article 49.
36 The CEDAW was adopted by the UN General Assembly in 1979 vide resolution 34/180. It entered into force on 3 September 1981.
37 The ACHPR was adopted on 28 June 1981 by the Summit of Heads of State and Government of the then Organization of African Unity (OAU) held in Nairobi, Kenya. It entered into force on 21 October 1986.
38 The Maputo Protocol was as adopted on 11 July 2003 by the Assembly of the African Union (AU) at its second summit held in Maputo, Mozambique. On 25 November 2005, having been ratified by the required 15 Partner States of the AU, the Maputo Protocol entered into force.
39 *See* also the African Charter on Democracy, Elections and Governance (ACDEG), which was adopted by the AU Assembly on 30 January 2007 and entered into force on 15 February 2012; and the Declaration on the Principles Governing Democratic Elections in Africa, which was adopted by the Heads of State and Government of the OAU on 8 July 2002.
40 Article 2(1) of the ICCPR obliges States Parties to the present Covenant to undertake to respect and to ensure to all individuals within their territory enjoy the rights recognized in the Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

accordance with the provisions of the law';[41]To vote and to be elected int public office at genuine periodic elections, which are held on the bases of universal and equal suffrage as well as held by secret ballot, guaranteeing the free expression of the will of the electors;

ii. To have the right of equal access to the public service of his or her country; and

iii. To access public property and services in strict equality of all persons before the law.

These provisions were given due weight by the African Commission on Human and Peoples' Rights (henceforth, 'the African Human Rights Commission') in *Legal Resources Foundation v. Zambia,*[42] *Jawara v. The Gambia,*[43] *Purohit & Another v. The Gambia,*[44] and *Lawyers for Human Rights v. Swaziland.*[45] In these cases, the Commission pointed out that, as well as making it clear that citizens should have the right to participate in the government of their country "directly or through freely chosen representatives", the ACHPR also guarantees to every citizen the rights to equality and non-discrimination in the exercise of the participation rights.

As it can be gleaned from the jurisprudence of international and regional courts and tribunals, the participation of citizens in their country's public and political affairs can be exercised in several ways including through political parties as well as independent candidates. In particular, the African Human Rights Commission has held that the participation rights canvassed in this Chapter can be better exercised through, *inter alia*, the free formation and operationalization of political parties in a multiparty political system. For instance, in *Lawyers for Human Rights v. Swaziland*, where a King's Proclamation banned the formation of political parties or any similar structures in Swaziland, the Commission was of the view that:

> Political parties *are one means through which citizens can participate in governance either directly or through elected representatives of their choice*. By prohibiting the formation of political parties, *the King's Proclamation seriously undermines the ability of Swaziland people to participate in the government of their country* and *thus violated article 13 of the Charter*.[46] [Emphasis supplied].

42 Ibid.
43 *Jawara v. Gambia* (Communication No. 147/95, 149/96) [2000] ACHPR 17; (11 May 2000).
46 *Lawyers for Human Rights v. Swaziland*, op. cit, para 63.

In addition, the participation of citizens' in their country's public and political affairs through independent candidates was considered by the African Court on Human and Peoples' Rights (AfCHPR) in *Tanganyika Law Society, Legal and Human Rights & Rev. Christopher Mtikila v. The United Republic of Tanzania*[47] ('*Mtikila v. Tanzania*'). In this case, one of the allegations was the prohibition of independent candidates to contest in elections in Tanzania after the Court of Appeal of Tanzania (the highest court in Tanzania) had refused to declare certain constitutional provisions[48] to be repugnant to the right of an individual to participate in the political and public life of one's country.[49] To this end, the African Court observed that:

> In view of the patently clear terms of Article 13(1) of the Charter, which gives to the citizen the freedom of participating in the governance of her country directly or through representatives, *a requirement that a candidate must belong to a political party before she is enabled to participate in the governance of Tanzania surely derogates from the rights enshrined in Article 13(1) of the Charter*.[50] [Emphasis supplied].

It has also been held that, on the bases of universal and equal suffrage, all citizens in a country should be entitled to vote without discrimination on any of the listed grounds, including mental health status. For instance, in *Purohit & Another v. The Gambia,* it was alleged that, under the Lunatics Detention Act, the respondent State failed to provide conducive environment to enable detainees for mental illness to exercise their civic rights and obligations, including the right to vote. In its submission, the respondent State admitted that persons detained at Campama detention facility for persons with mental illness were not allowed to vote. This was because the respondent State believed that allowing mental health patients to vote would open the country's democratic elections to much controversy as to the mental ability of these patients to make an informed choice as to which candidate to vote for.

Rejecting the respondent State's submissions, the African Human Rights Commission held that the right guaranteed under Article 13(1) of the ACHPR 'is extended to "*every citizen*" and its denial can only be justified by reason of legal incapacity or that the individual is not a citizen of a particular State.'[51]

47 *Tanganyika Law Society, Legal and Human Rights & Rev. Christopher Mtikila v. The United Republic of Tanzania,* Applications No's. 009 and 011/2011 (AfCHPR). *See* also Mashamba, C.J., *Litigating Human Rights in African Institutions: Law Procedures and Practice* (Nairobi: LawAfrica Publishing (K) Ltd., 2017); and Mpandikizi, G.C.L., "Decision of the African Court on Human and Peoples' Rights on *Rev. Christopher Mtikila v. The United Republic of Tanzania* in Protection and Promotion of Human Rights in Africa," *The Tanzania Lawyer,* Vol. 1 No.1, 2013.
48 *See* particularly Articles 39(1)(c) and 67(1)(b) of the Constitution of Tanzania.
49 *A.G. v. Rev. Christopher Mtikila* (Civil Appeal 45 of 2009) [2010] TZCA 3 (07 May 2010).
50 *Mtikila v. Tanzania,* op. cit, para 99.
51 Ibid, para 75.

According to the Commission, legal incapacity 'may not necessarily mean mental incapacity.'[52] The Commission was of the view that: 'Legal incapacity, as a justification for denying the right under Article 13(1) can only come into play by invoking provisions of the law that conform to internationally acceptable norms and standards.'[53] Extending the application of Article 13(1) of the ACHPR to the provision of Article 25 of the ICCPR, the Commission endorsed the clarification provided by the Human Rights Committee in relation to Article 25 to the effect that any conditions applicable to the exercise of Article 25 rights should be based on objective and reasonable criteria established by law.[54]

Therefore, the foregoing provisions guarantee the right of citizens to participate in the governance of the political and public affairs of their respective countries. This kind of citizens' participation is two-fold: it entails both active/direct participation and passive/indirect participation. By active participation, a citizen is entitled to vote and vie for an elective post, say as a legislator or councilor, and take an active participation in the decision- and/or policy-making process. Passive participation of citizens entails people's contribution to the governance process through, for example, paying taxes and contributing ideas to the country's governance machinery. Therefore, people's participation in the governance of political and public affairs in a country is very important for maintaining democracy, good governance, rule of law and the promotion and protection of human rights in any country.[55]

In addition to the guarantee of the right of every individual to participate in the public and political life of his or her country under Article 25 of the ICCPR and Article13 of the ACHPR, women are entitled to the right to participate in the political and decision-making process under Article 7 of the CEDAW and Article 9 of the Maputo Protocol as considered Chapter … of this book. Additionally, States Parties are obliged to ensure increased and effective representation and participation of women at all levels of a country's decision-making processes.[56] States Parties are also obliged to take 'all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations.'[57]
Viewed in the foregoing context, the right to participate in the public affairs is realised by individuals in two ways: (*i*) the right to participate in public service

52 Ibid.
53 Ibid.
54 *See* Human Rights Committee, "General Comment 25(57), adopted by the Committee at its 1510th meeting. UN Doc CCPR/C/21/rev.1/7 (1996), para 4. This General Comment was also recently considered by the African Court on Human and Peoples' Rights in *Mtikila v. Tanzania*, op. cit.
55 Mashamba, C.J., *Judicial Protection of Civil and Political Rights: Cases, Materials and Commentary*, op. cit.
56 Article 9(2) of the Maputo Protocol.
57 Article 8 of the CEDAW.

and access public services, and (*ii*) the right to directly or indirectly participate in political life and leadership. Whereas the former had to do with citizens' participation or employment in in the public service, the latter has to do with citizens' participation in politics whether as directly elected leaders or indirectly through voting leaders into public office. This Chapter, nevertheless, concerns itself with the latter part of the individual's right to participate in the governance of public affairs of his or her country.

It should be noted from the outset that citizens' participation in politics entails that other participatory freedoms such as the freedoms of assembly, association and expression are guaranteed to those participating in the country's politics on the basis of equality and without discrimination on any of the listed grounds. These freedoms are guaranteed in both international law and domestic law. In particular, the rights to freedom of association and peaceful assembly are guaranteed in Articles 21 and 22 of the ICCPR, Article 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD), Article 15 of the Convention on the Rights of the Child (CRC), and Article 21 of the Convention on the Rights of Persons with Disabilities. Moreover, in the African regional context, the right to free association is guaranteed in Article 10 of the ACHPR and Article 8 of the African Charter on the Rights and Welfare of the Child (ACWRC). Article 11 of the ACHPR guarantees the right of every individual to assemble freely with others.

In exercising the foregoing rights and freedoms, both international law and municipal law guarantees the right of every human being to express and disseminate their opinions in accordance with the law.[58] Intrinsically, the right to freedom of expression encompasses the freedom to seek, receive and impart information and ideas of all kinds, 'regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.'[59]

In sum, the foregoing are rights to freedom of association, peaceful assembly and expression may be termed as "participation freedoms" in that they enable all individuals in a given State (without distinction as to race, gender and any other grounds of discrimination) to participate in the political and decision-making processes. This includes ensuring women's participation in the political and decision-making processes. In particular, this obliges States

58 *See* particularly Article 19 of the ICCPR, Article 9 of the ACHPR, Article 7 of the ACRWC, and Article 12 of the CRC
59 Article 19(2) of the ICCPR.

Parties to take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action, enabling national legislation and other measures to ensure, *inter alia*, that 'women are equal partners with men at all levels of development and implementation of State policies and development programmes.'[60] In addition, States Parties are obliged to 'ensure increased and effective representation and participation of women at all levels of decision-making.'[61]

3.2.2. The Constitutional and Legal Basis of Citizens' Participation in Multi-Party Democratic Processes in Tanzania

Like in international human rights law, both the Constitution of Tanzania (1977) Constitution of Zanzibar (1984, as amended in 2010) guarantee both the individuals' right to participate in political and public affairs of one's country as well as the participation freedoms of association, assembly and expression. The two Constitutions also prohibits discrimination and ensure that there is equality in all spheres of life (including in the realisation of these participation rights and freedoms). In particular, Article 21 of the Constitution of Tanzania and Section 21 of the Constitution of Zanzibar both guarantee to "*every citizen*" the right 'to take part in matters pertaining to the governance of the country, either directly or through representatives freely elected by the people, in conformity with the procedures laid down by, or in accordance with, the law.' In addition, every citizen has the right and the freedom 'to participate fully in the process leading to the decision on matters affecting him, his well-being or the nation.'[62]

Under Article 21(1) of the Constitution of Tanzania, this right is realised subject to the provisions of Articles 39(1)(c), 47(4)(c) and 67(1)(b) of the Constitution, which respectively require persons vying for the positions of President and Vice-President of Tanzania as well as Members of Parliament (MPs) to be members of, or being sponsored by, a political party. This requirement also applies to those persons vying to be elected as Councillors in local government authorities (LGAs).[63] As noted above, however, in *Mtikila v. Tanzania*, the AfCHPR found the requirement to oblige candidates to be members of a political party is repugnant to Article 13 of the ACHPR. In addition to obliging candidates to members of political parties, the right to participate in the country's political and public life is also subjected to the laws of the land in connection with

60 Article 9(1)(c) of the Maputo Protocol.
61 Ibid, Article 9(2).
62 Article 21(1) of the Constitution of Tanzania and Section 21(2) of the Constitution of Zanzibar.
63 *See* particularly Section 39(2)(f) of the Local Authorities (Elections) Act (1979), Cap. 292 R.E. 2015.

the conditions for electing and being elected or for appointing and being appointed to take part in matters related to governance of the country.[64]
As well as guaranteeing to "every citizen" of the United Republic of Tanzania the right 'to take part in matters pertaining to the governance of the country', the two Constitutions guarantee the participation freedoms of association and assembly,[65] as well as expression[66] in similar manner as they are protected under the foregoing international human rights treaties. All these participatory rights and freedoms are to be realised by all individuals "in accordance with the law"[67] and without discrimination basing on any of the listed grounds – nationality, tribe, place of origin, political opinion, colour, religion, sex or station in life.[68]

There is a dearth of judicial decisions on the individual's right to take part in matters pertaining to the governance of the country in Tanzania. However, the *Mtikila*'s cases stand out as leading authorities on this subject. Following the 1992 Eighth Constitution Amendment – which required all candidates for presidential, parliamentary and local government elections to be members of and be sponsored by a political party – the late Rev. Christopher Mtikila successfully filed a constitutional case in the High Court of Tanzania.[69] Rev. Mtikila argued that the prohibition on independent candidates conflicted with the spirit and letter of the entire Constitution. On 24 October 1994, the High Court found in favour of Mtikila and declared the impugned provisions[70] unconstitutional,[71] consequent to which the A.G. appealed to the Court of Appeal of Tanzania.[72] It should be noted that, just prior to this judgement, on 16 October 1994, the Government tabled a Bill in Parliament (Act No. 34 of 1994) seeking to expressly prohibit independent candidates. On 2 December 1994, Parliament passed the Bill that, in effect, restored the position prior to the High Court's October judgement and continued the ban on independent candidates.

64 *See* especially the Local Authorities (Elections) Act, ibid; and the National Elections Act (1985), Cap. 343 R.E. 2015.
65 Article 20 of the Constitution of Tanzania and Section 20 of the Zanzibar Constitution.
66 Article 18 of the Constitution of Tanzania and Section 18 of the Zanzibar Constitution.
67 For example, whereas the guarantee of an individual's right to participate in party politics is regulated by the Political Parties Act (1992), Cap. 258 R.E. 2019; the rights to vote or being voted are regulated by the Local Government (Elections) Act, op. cit; the National Elections Act, op. cit; the Election Expenses Act (No. 6 of 2010); and the Zanzibar Election Act (No. 11 of 1984, as amended from time to time). The import of the phrase "in accordance with the law" in relation to the realisation of human rights was given judicial consideration by the High Court of Tanzania in *Africscan Group (T) Ltd. v. Said Msangi*, High Court of Tanzania (Commercial Division) at Dar es Salaam, Commercial Case No. 87 of 2013 (Unreported) thus: '[human rights] must be exercised within the confines of the law so as to avoid further breach of justice.' Notably, this reasoning was adopted with approval by the Court of Appeal of Tanzania in *Golden Globe International Services Ltd. & Another v. Millicom Tanzania N.V. & 4 Others*, Court of Appeal of Tanzania at Dar es Salaam, Civil Application No. 441/01 of 2018 (Unreported); and *Ahmed Teja t/a Almas Autoparts Ltd. v. Commissioner General of Tanzania Revenue Authority*, Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 283 of 2021 (Unreported).
68 Article 13(5) of the Constitution of Tanzania and Section 12(5) of the Zanzibar Constitution.
69 *Rev. Christopher Mtikila v. A.G.* [1995] TLR 31 [*Mtikila v. A.G.* (1993)].
70 The impugned provisions were Articles 21(1), 39 and 67 of the Constitution of Tanzania.
71 *Mtikila v. A.G.* (1993), op. cit (Judge Lugakingira, ordered that: 'for everything I have endeavored to state and notwithstanding the exclusionary elements to that effect in articles 39, 67 and 77 of the Constitution as well as s. 39 of the *Local Authorities (Elections) Act* 1979, I declare and direct that it shall be lawful for independent candidates along with candidates sponsored by political parties, to contest, presidential, parliamentary and local Council elections. This will not apply to the Council elections due in few days.').
72 *A.G. v. Rev. Christopher Mtikila,* Court of Appeal of Tanzania, Civil Appeal No. 3 of 1995 (Unreported).

Subsequently, the A.G. sought to withdraw the pending appeal in the Court of Appeal. Of course, the Court of Appeal had to grant the application for withdrawal; but, speaking through Kisanga, Ag. C.J. (as he then was), the Court of Appeal lamented that:

> We are constrained to have to point out some aspects in the handling of this matter by the appellant which cause great concern. While the ruling was being awaited, the Government on 16/10/94 presented a Bill in Parliament seeking to amend the Constitution so as to deny the existence of that right, thus pre-empting the Court's Ruling should it go against the Government. *This is where things started going wrong. The Government was now adopting parallel causes of action towards the same end by asking Parliament to deal with the matter simultaneously with the High Court. That was totally wrong for reasons which will be apparently present*. [...] Thus, the *government consciously and deliberately drew the judiciary into a direct clash with Parliament by asking the two organs to deal with the same matter simultaneously. Such a state of affairs was both regrettable and most undesirable. It was wholly incompatible with the smooth administration of justice in the country and every effort ought to be made to discourage it*. [...]. In the instant case *had the amendment been initiated and passed after the Court process had come to a finality that in law would have been alright procedurally*, the soundness of the amendment itself, of course, being entirely a different matter. *Then the clash would have been avoided.* Indeed, that would be *in keeping with good governance which today constitutes one of the attributes of a democratic society*.[73] [Emphasis supplied].

Eleven years later, in 2005, Rev. Mtikila launched another judicial challenge against the constitutional prohibition of independent candidates to contest in elections for the President, MPs and Councilors. In *Christopher Mtikila v. Attorney General,*[74] at issue was whether the constitutional amendments made vide Act No. 34 of 1994, amending Articles 21(1), 39 and 67 of the Constitution of Tanzania (which disallowed independent candidates in elections) were unconstitutional. This was the second petition by the same petitioner to challenge, *inter alia*, the same constitutional provisions prohibiting private candidates to vie elective political posts. The petitioners successfully did so in 1993, only to be pre-empted by the constitutional amendments made vide Act No. 34 of 1994.

73 Ibid, p. 3 of the typed judgment.
74 High Court of Tanzania, at Dar es Salaam, Miscellaneous Civil Cause No. 10 of 2005 (Unreported) [*Mtikila v. A.G.* (2005)].

In this landmark decision, the High Court ruled in favour of the petitioner, further remarking that the A.G. erred in introducing constitutional amendments in Parliament, which had the effect of rendering the appeal (Civil Appeal No. 3 of 1995) filed by the A.G. himself in the Court of Appeal nugatory. Emphatically, the High Court warned, just like the Court of Appeal did in 1995, that this move by the A.G. drew the Judiciary into a direct clash with Parliament by asking the two arms of State to deal with the same matter simultaneously.[75]

Aggrieved by this decision, the A.G. successfully appealed to the Court of Appeal, which, in 2010, quashed the High Court's decision on reason that the issue of introducing independent candidates was essentially a political one, which had to be resolved politically by Parliament. Therefore, the Court of Appeal directed Parliament to embark on political consultations for that matter. However, twelve months lapsed without Parliament taking any action; hence, Rev. Mtikila, the Legal and Human Rights (LHRC) and the Tanganyika Law Society (TLS) commenced proceedings in the AfCHPR in 2011.[76] Interpreting Article 13(1) of the ACHPR, the AfCHPR held that a requirement that an individual be first a member of a political party for him or her to be allowed to contest for elective political positions "surely derogates" from the rights enshrined in Article 13(1). Having noted that the prohibition on independent candidates did indeed derogate from Article 13(1), the Court went on to examine whether the prohibition was justifiably restricted under Article 27(2)[77] or Article 29(4)[78] of the ACHPR.

Indeed, the Court recalled the jurisprudence pertaining to a state's restriction of a citizen's rights and when it may be considered proportionate. The Court recalled that the African Human Rights Commission has found that the 'only legitimate reasons for limitations to the rights and freedoms of the African Charter' are found in Article 2 7(2) of the Charter,[79] and that having found that a right is effected through a law of "general application" whether it is proportional by weighing the impact, nature and extent of the limitation against the legitimate state interest serving a particular goal. The legitimate interest must be 'proportionate with and absolutely necessary for the advantages which are

75 Notably, the High Court reiterated Justice Kisanga's remarks made in 1995 against this move: 'As a matter of procedure, we must, at once condemn this act of the Respondent as being contrary to the dictates of good governance, and for which we can do no more than quote the above cited passage from the judgment of the Court of Appeal. We shall leave it at that and now go to the substance of the petition which is before us.'
76 *Mtikila v. Tanzania*, op. cit.
77 In particular, Article 27(2) of the ACHPR provides categorically that: 'The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.'
78 Specifically, Article 27(2) of the ACHPR provides categorically that: 'To preserve and strengthen social and national solidarity, particularly when the latter is threatened.'
79 *See*, for example, *Legal Resources Foundation v. Zambia*, op. cit; *Jawara v. The Gambia*, op. cit; *Purohit & Another v. The Gambia*, op. cit; and *Lawyers for Human Rights v. Swaziland*, op. cit.

to be obtained.'

The Court also looked to cases from the European Court of Human Rights[80] and UN Human Rights Committee's *General Comment No. 25 on Article 25 of the ICCPR* (para. 17), which provides that:

> The right of persons to stand for election should not be limited unreasonably by requiring candidates to be members of parties or of specific parties. If a candidate is required to have a minimum number of supporters for nomination this requirement should be reasonable and not act as a barrier to candidacy. Without prejudice to paragraph (1) of article 5 of the Covenant, political opinion may not be used as a ground to deprive any person of the right to stand for election.

Recognising that limitations to Charter rights and freedoms are only those set out in Article 27(2) of the ACHPPR and that such limitations must take the form of "law of general application" and these must be proportionate to the legitimate aim pursued; the AfCHPR found that, when considering restrictions that are allegedly based on security, morality, common interest and solidarity, there was nothing in Tanzania's arguments to demonstrate that the restrictions on the right to participate freely in the government of the country fell within the permissible restrictions set out in Article 27(2) of the Charter. The Court further found that the prohibition was not proportional to the alleged claim by Tanzania of fostering national unity and solidarity.

In an attempt to justify the legitimacy of the prohibition of independent candidates, Tanzania had invoked the decision of the Inter-American Court of Human Rights (IACHR) in *Castañeda Gutman v. México*.[81] In making its finding, the AfCHPR distinguished the present case from *Castañeda*; insofar as that, in *Castañeda,* the IACHR found that individuals had other options to seek public elective office; in particular, pointing out that, apart from being a member of a political party and being sponsored by that party, prospective candidates in Mexico could also be sponsored by a political party without being a member or that an individual could form a political party as the requirements weren't arduous. However, in *Mtikila v. Tanzania,* the only option available to Tanzanians was membership of a political party and sponsorship.[82]
Citing the African Human Rights Commission's finding in *Amnesty*

80 *See* particularly *Handyside v. United Kingdom,* op. cit, and *Gillow v. United Kingdom,* op. cit.
81 *of Castañeda Gutman v. México*, Inter-American Court of Human Rights, Judgment of 6 August 2008 (Preliminary objections, merits, reparations and costs).
82 The AfCHPR Monitor, "A Watershed Case: *Mtikila and Others v. Tanzania*," available at www.acthprmonitor.org/a-watershed-case-mtikila-and-others-v-tanzania/ (accessed 28 October 2022).

International v. Zambia,[83] the AfCHPR found that, having ratified the ACHPR, Tanzania is under an obligation to enact laws that are in line with the Charter. In addition, the Court held that a person's freedom to choose a candidate of their choice in Tanzania is restricted only to those sponsored by a political party; and, as such, it was the Court's holding that the requirement that to participate in elections a citizen must be a member of a political party is "an unnecessary fetter" that denies citizens direct participation and amount to a violation of Article 13 of the Charter.

In conclusion, the Court found a violation of the right to participate freely in the government of one's country since to participate in Presidential, Parliamentary or Local Government elections in Tanzania, a citizen must belong to a political party. The Court concluded that Tanzanians are, thus, prevented from freely participating in the government of their country directly or through freely chosen representatives.[84]

3.3. Historical Background to the Law Regulating Citizens' Participation in Democratic Processes in Tanzania

Conventionally, a political system (whether a single- or multi- party political system) is determined by constitutional and statutory frameworks. Notably, classical national constitutions are almost invariably founded in some variation on the theory of national sovereignty and national constituent power.[85] In particular, the concepts of national sovereignty and constituent power imply that legitimate public order 'must be established through common processes of popular will formation, and that a political system derives its legitimacy from demonstrable acts of collective self-legislation, by a given people, in a given society, at a given historical moment.'[86] As such, by the conventional theory of constituent power, the legitimacy of a political system is derived from an *ex nihilo* moment of foundation, in which the national will, 'albeit perhaps mediated through representative actors, enunciates the original constitutional norms by which the State as a whole is to be governed, and by which later acts of legislation are pre-determined.'[87] Therefore, it is a national constitution (and the laws flowing therefrom) that determines how a country's political system is to be organised and how people within the given State are to participate in the governance of that country's political and public affairs. As considered

83 *Amnesty International v. Zambia*, Communication No. 212/98, Twelfth Activity Report (1998 – 1999), para. 50.
84 The AfCHPR Monitor, op. cit.
85 Thornhill, C., "Constitutionalism and Populism: National Political Integration and Global Legal Integration," *International Theory*, Vol. 12 Issue 1, March 2020.
86 Ibid.
87 Ibid.

in the sections below, the political systems that have been experimented in Tanzania since independence in 1961 have been founded in the constitution and the relevant laws governing political activities.

3.3.1. Tanzania Union, Multi-Party Politics and the Law in Post-Independence Tanzania

Whereas Tanganyika became independent from the British colonialists on 9 December 1961,[88] Zanzibar became independent from the same colonial masters on 19 December 1963[89] subsequent to which, on 12 January 1964, the Indian Archipelago went through a revolution.[90] On 26 April 1964, Tanganyika united with Zanzibar to form the United Republic of Tanzania. Whereas Zanzibar retained a semi-autonomous government within the Union, the governance affairs of former Tanganyika were embraced in the Union Government under the subsequent constitutions of Tanzania. The Union between Tanganyika and the People's Republic of Zanzibar was formed on 26 April 1964 under Article (i) of the Articles of Union between the Republic of Tanganyika and the People's Republic of Zanzibar.[91]

The Articles of Union[92] were signed on 22 April 1964 between Tanganyika's President Julius Nyerere and Zanzibar's President Sheikh Abeid Amani Karume.[93] In law, this 'was an international agreement between two sovereign States and therefore a treaty under international law attracting to itself the solemnity that goes with international compacts.'[94] This point was strengthened by the Court of Appeal in *Serikali ya Mapinduzi Zanzibar v. Machano Khamis Ali & 17 Others*,[95] where it held categorically that:

88 In fact, the Tanganyika Independence Act (1961) and the Tanganyika (Independence) Order-in-Council (1961) gave powers to the British Queen to grant independence to Tanganyika, which she did on 27 November 1961.

89 African American Registry, "Zanzibar Gains Independence From Britain," Thursday 19 December 1963; available at https://aaregistry.org/story/zanzibar-gains-independence-from-britain/ (accessed 15 November 2022).

90 Burgess, G.T., "The Zanzibar Revolution and Its Aftermath," *African History*, published online on 28 March 2018 (https://doi.org/10.1093/acrefore/9780190277734.013.155); available at https://oxfordre.com/africanhistory/view/10.1093/acrefore/9780190277734.001.0001/acrefore-9780190277734-e-155 (accessed 15 November 2022).

91 Cambridge University, *Tanganyika and Zanzibar: Articles of Union and Implementing Legislation* (*International Legal Materials*) (Vol. 3 No. 4) (Cambridge: Cambridge University Press, July 1964), pp. 763-777.

92 The late Alhaj Aboud Jumbe Mwinyi (the disgraced former President of Zanzibar) referred to the Articles of Union as the "birth certificate" of the Union between Tanganyika and Zanzibar. *See* Shivji, I.G., *Pan-Africanism or Pragmatism? – Lessons of Tanganyika – Zanzibar Union* (Addis Ababa/Dar es Salaam: Organization for Social Science Research in Eastern and Southern Africa (OSSREA)/Mkuki na Nyota Publishers, 2008), pp. 96, and 215-16 (noting that, in law, the status of the Articles of Union 'is that of a constitution because they *constituted* the Union and gave power to the President to amend and modify the pre-existing Constitution of Tanganyika to accommodate the union and extend the laws of Tanganyika to Zanzibar on Union matters.'). *See* also Shivji, I.G., *Tanzania: The Legal Foundations of the Union* (2nd expanded edn.) (Dar es Salaam: Dar es Salaam University Press, 2009). Notably, this position has been accepted in extra-judicial statements by two former Chief Justices of Tanzania, Francis Nyalali and Barnabas Samatta. *See* particularly Nyalali, F.L., "Katiba na Sheria za Nchi" (mimeo); and Samatta, B., "Katiba ya Jamhuri ya Muungano ya 1977", a paper presented to Members of Parliament, Dodoma 21 November 2000, printed in *Mtanzania* newspaper (Dar es Salaam) 24-26 November 2000. This position was also noticed (and partially approved) by the Zanzibar High Court in *S.M.Z v. Machano Khamis Ali & 17 Others*, High Court of Zanzibar at Zanzibar, Criminal Session No. 7 of 1999 (Unreported) and by the High Court of Tanzania in *Mtumwa Said Haji & 49 Others v. A.G.*, High Court of Tanzania at Dar es Salaam, Civil Case No. 2 of 1995 (Unreported)).

93 Jamhuri ya Muungano wa Tanzania, *Ripoti ya Tume Kuhusu Mchakato wa Mabadiliko ya Katiba ya Jamhuri ya Muungano wa Tanzania* (Dar es Salaam: Tume ya Mabadiliko ya Katiba, 2013), p. 62.

94 *See* Shivji, I.G., *Tanzania: The Legal Foundations of the Union* op. cit, p. 1. *See* also Greig, D.W., *International Law* (2nd edn. London: Butterworths, 1976), p. 451; and Jamhuri ya Muungano wa Tanzania, *Ripoti ya Tume Kuhusu Mchakato wa Mabadiliko ya Katiba ya Jamhuri ya Muungano wa Tanzania,* op. cit, p. 62.

95 Court of Appeal of Tanzania at Zanzibar, Criminal Revision in Criminal Application No. 8 of 2000. [Coram: Kisanga, J.A., Ramadhani, J.A.; and Lugakingira, J.A.]. This judgment is also reproduced in Shivji, I.G., "Sovereignty and Statehood in Zanzibar in the Union: Critical Comments on *S.M.Z. v Machano Khamis Ali & 17 Others*," in Peter, C.M. and H. Othman (eds.), *Zanzibar and the Union Question* (Zanzibar: Zanzibar Legal Services Centre Publication Series, Book No. 4, 2006), pp. 188-232. This case is also available at http://www.saflii.org/tz/cases/TZCA/2000/1.html (accessed 22 August 2014). This appeal was of its kind and raised grave constitutional issues for the Court of Appeal of Tanzania to determine. When the matter had been heard and the judgment of the Court of Appeal was being prepared,

> The International Persons called Tanganyika and Zanzibar ceased to exist as from 26th April, 1964 because of the *Articles of Union*. The two States merged to form a new international person called the United Republic of Tanzania. [Therefore] both Tanganyika and Zanzibar, and not Zanzibar alone, surrendered their treaty-making powers to the United Republic of Tanzania.

Therefore, in order to formalize the Union at the international level, on 30 April 1964 the Tanganyika's Ministry of Foreign Affairs notified the then United Nations Secretary General, Mr. U Thant, that the States of Tanganyika and Zanzibar had united. As a result of this union, a single, united State in the form of the "United Republic of Tanganyika and Zanzibar" was formed. This means that when Tanganyika and Zanzibar united in 1964, the new united republic was named as the "United Republic of Tanganyika and Zanzibar".[96] However, on 1 November 1964, this name was rephrased to the "United Republic of Tanzania" vide the United Republic (Declaration of Name) Act (1964).[97] Zanzibar was then called "Tanzania Isles" and Tanganyika was renamed to "Mainland Tanzania". Later on, Zanzibar was to be referred to as "Tanzania Zanzibar".

Suffice to say here that the history of constitutional developments, constitutional and multi-party politics in Tanzania is closely linked to this Union. The first fifty+ years of the Union have been a bitter and turbulent period,[98] at least from a constitutional point of view. This period has been characterised by endless, fierce constitutional politics due to a plethora of reasons, at some point limiting or prohibiting multi-party politics in both parts of the Union.[99]

The period between 1964 and 1977 saw no serious constitutional and legislative activities allowing multi-party politics in the sense that between 1965 and 1977 Tanzania was governed under an Interim Constitution.[100] Similarly, between 1964 and 1979, Zanzibar had no known conventional Constitution, properly so-called. This situation was a result of the decision taken in 1965 to defer the process to constitute a Constituent Assembly to prepare and adopt a Union

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the High Court of Zanzibar discharged the accused persons following a *nolle prosequi* entered by the Principal State Attorney. However, despite this move, the decision of the High Court of Zanzibar to the effect that the offence of treason could be committed against the Revolutionary Government of Zanzibar remained intact. Worried that the decision might be relied upon in future by the High Court, the Court of Appeal was satisfied that that decision was fit for revision so that it could not be allowed to stand. Consequently, the Court of Appeal decided to revise that decision under Section 4(3) of the Appellate Jurisdiction Act (1979), as amended by Act No. 17 of 1993. The main concern before the Court of Appeal in this revision was the constitutional issue: whether or not treason can be committed against the Revolutionary Government of Zanzibar. The Court of Appeal held, *inter alia*, that treason could not be committed against the Revolutionary Government of Zanzibar.

96 Shivji, I.G., *Tanzania: The Legal Foundations of the Union*, op. cit, p. 106 (endnote 4).

97 Act No. 61 of 1964.

98 Jumbe, A., *The Partner-ship: Tanganyika-Zanzibar Union – 30 Turbulent Years* (Dar es Salaam: Amana Publishers, 1994).

99 *See* Jjuuko, F. and G. Muriuki, *Federation within Federation: The Tanzania Union Experience and the East African Integration Process – A Report of the Kituo cha Katiba Fact-Finding Mission to Tanzania* (Kampala: Fountain Publishers, 2010).

100 The Interim Constitution was enacted by Act No. 43 of 1965. It remained in force until 1977 when the process for a new and permanent Constitution finally resulted into the current Constitution of the United Republic of Tanzania in 1977.

Constitution as envisaged under Article (vii)(b) of the Articles of Union. This was justified 10 years later by Mwalimu Nyerere. Speaking on the occasion to mark the 10th anniversary of the Union, Nyerere pointed out that 'at the formation of the Union, the constitutional framework was deliberately flexible so as to allow building of trust on both sides.'[101] According to Mwalimu Nyerere, the decision to unite was political, which entails that the Constitution was there 'to serve the Union not the Union to serve the Constitution.'[102]

To worsen the situation, Karume ignored the Acts of Union with an unprecedented impunity. As Shivji reminisces, while Karume used to 'run Zanzibar as if there had never been any Union', Nyerere had '"manipulated" the law to add to the list of Union matters.'[103] So, both parties seemed to share the blame for the sheer lack of constitutionalism in the first ten years of the existence of the Union. This stance justifies why Tanzania had to be governed by an Interim Constitution for 12 years in contravention of the Articles of Union, which obliged the President of Tanzania (in agreement with the President of Zanzibar) to summon a Constituent Assembly within one year after the formation of the Union. The Constituent Assembly would consider proposals made by a Commission appointed under Article (vii)(a) of the Articles of Union to make such proposals.[104]

So, when Karume was assassinated and Aboud Jumbe came to power in Zanzibar in 1972, Nyerere seized this opportunity to return to the constitutional foundations envisaged in the Articles of Union. In the speech already referred to above, Mwalimu Nyerere pointed out that: 'now all of us must scrupulously observe every article of the Constitution [...].'[105] As considered below, such promise was delivered in 1977 when Tanzania adopted a "permanent" Constitution and in 1979 when Zanzibar adopted its first ever post-Revolution Constitution; and later in 1984 when the two Constitutions introduced justiciable Bills of Rights.

3.3.2. Multi-Party Politics and the Law in Post-Independence Tanzania (1961-1965)

As considered below, Tanzania attained independence in 1961 with an Independence Constitution that prescribed a multi-party political system. This was also the case for Zanzibar's independence in December 1963. However, after the Zanzibar Revolution on 12 January 1964 and the subsequent Union

101 Shivji, I.G., *Pan-Africanism or Pragmatism? – Lessons of Tanganyika – Zanzibar Union*, ibid, p. 152.
102 Ibid.
103 Ibid, pp. 152-3.
104 Article (vii)(b) of the Articles Union.
105 Quoted in Shivji, op. cit, p. 152.

of Tanganyika and Zanzibar on 26 April 1964, the country adopted a *de facto* single party system, which was later *de jure* recognized and entrenched in the Interim Constitution in 1965. It was not until 1992 when Tanzania re-introduced the multiparty political system.

a. Multi-Party Politics and the Law in Post-Independence Tanganyika (1961-1965)

In terms of political system, when Tanganyika got independence in 1961, its Independence Constitution (1961)[106] embraced multi-partyism. However, this Constitution did not contain a Bill of Rights, which normally guarantees basic rights and fundamental freedoms, one which being the individual's right to participate in the governance of one's country's public affairs. The absence of a Bill of Rights in the Independence Constitution, which was framed in the Westminster model, was strange because the British colonial rulers pressed for incorporation of a Bill of Rights in independence constitutions when they were granting independence to their former African colonies.[107] In Tanganyika, the British colonial rulers also pressed for the incorporation of a Bill of Rights in the Independence Constitution in order to protect the interests of their remaining subjects and interests.[108] However, the new African leaders, through the Tanganyika African National Union (TANU), rejected the idea.[109]

This idea was rejected on accounts that: foremost, the new government put great emphasis on economic development, national unity and solidarity,[110] and political stability of the country; and it, thus, wanted a constitution that would not hinder it in these endeavours.[111] Indeed, the TANU Government seemed to be justified, in this regard, because a Bill of Rights, once enshrined in a constitution, is potentially rebellious of authoritarianism, as it tends to limit the autocratic powers of the State to violate human rights. It has been noted that a Bill of Rights 'tells the Executive what it cannot do to its people. It strengthens the Judiciary's position in relation to Parliament and the Presidency.'[112]

Furthermore, the State feared the fact that, as the Judiciary at the time being was mainly staffed by white expatriates, such judicial officials would

106 In fact, the Independence Constitution of Tanganyika (1961) was annexed to the Tanganyika Independence Act (1961) in the form of a schedule. This was the constitution under which Tanganyika became independent on 9 December 1961.
107 This matter is discussed at length in Mashamba, C.J., "Enforcing Social Justice in Tanzania: The Case of Economic and Social Rights", LL.M. Thesis, Open University of Tanzania, 2007.
108 Peter, C.M, "Five Years of Bill of Rights in Tanzania," *East African Law Review,* Vol. 18, No. 2, December 1991, p. 148. *See* also Mashamba, ibid.
109 Ibid, pp. 148-149.
110 Shivji, I.G., "Tanzania: The Dialectics of Maguphilia and Maguphobia," *The Elephant*, 11 June 2021; available at https://www.theelephant.info/long-reads/2021/06/11/tanzania-the-dialectics-of-maguphilia-and-maguphobia/
(accessed 15 November 2022) (pointing out that: 'Nation-building called for national unity.').
111 Mughwai, A., "Forty Years of Struggles for Human Rights in Tanzania: How far have we Travelled?", in Mchome, S.E. (ed.), *Taking Stock of Human Rights Situation in Africa* (Dar es Salaam: Faculty of Law, University of Dar es Salaam, 2002), p. 57.
112 Lobulu, B.R.N., *Citizens' Rights in Tanzania: Selected Essays* (Volume I) (Arusha: S.J. Printers & Stationery), p. 42.

probably take advantage of the presence of a Bill of Rights in the Constitution to frustrate the efforts of the new Government by declaring many of its legislative decisions and actions unconstitutional.[113] Reminiscently, it is in this context that the then Prime Minister, the late Rashid Kawawa, was quoted to have 'characterized a Bill of Rights as a luxury which merely invites conflicts.'[114] In the end, the British colonialists agreed to grant political independence to Tanganyika with a Constitution that had no Bill of Rights, which was, in those days, an exception to the general rule that every British colony had to be given political independence with a Bill of Rights enshrined in its independence constitution.[115]

When Tanganyika enacted the Republican Constitution in 1962[116] to replace the Independence Constitution, the multi-party political system was also sustained. Notably, the Independence Constitution was seen as representing colonial interests rather than Tanganyikans' wishes and interests. After the new Government was installed, it became apparent that Tanganyika needed its *homegrown* Constitution, which resulted in the adoption of the Republican Constitution.[117] Like the Independence Constitution, the Republican Independence did not contain a Bill of Rights, with the same justifications for its absence were deemed applicable at this stage. The powers that be still thought that with the country's priorities to build national unity and solidarity out of more than 120 ethnical groups and the need to stir up significant national economic gains, the Bill of Rights would derail these goals.[118]

The refusal to have the Bill of Rights in the Republican Constitution was later on followed by TANU's decision to adopt a single party system, which was made at a meeting of the TANU National Executive Council that was held on 13 January 1963.[119] The transition towards having a single party political system in Tanganyika took about three years to be rolled out with the ruling party establishing a Special Commission to collect views, not on whether or not to establish the system, but on how the system would work.[120] As it shall be

113 Peter, C.M., *Human Rights in Africa: A Comparative Study of the African Charter on Human and Peoples' Rights and the New Tanzanian Bill of Rights*, (New York – Westport, Connecticut – London: Greenwood Press, 1990), p. 2.
114 Peter, C. M., "Five Years of Bill of Rights in Tanzania," op. cit, p. 149. *See* also Government of Tanganyika, *Parliamentary Debates (Hansards)* Dar es Salaam National Assembly, 3rd Meeting, 1088, 28th June 1962. This contention is true in view of what the Government later did in 1994 after the High Court of Tanzania, in *Rev. Christopher Mtikila v. A.G.* [1993] TLR 31, had declared certain provisions in the Elections Act of 1985 unconstitutional in 1993, the Attorney-General hastily tabled a Bill in Parliament amending Articles 21, 39 and 67 of the Constitution. The constitutional amendment, indeed, restored the provisions that were declared unconstitutional by the High Court despite the fact that the A.G. had lodged an appeal to the Court of Appeal of Tanzania, and without due regard to the Bill of Rights enshrined in the Constitution.
115 Peter, C.M., *Human Rights in Tanzania: Selected Cases and Materials*, (Köln: Rudiger Koppe Verlag, 1997), p. 3.
116 The Republican Constitution became operational on 9 December 1962 having been adopted by the Constituent Assembly on 23 November 1962 together with the Constitutional (Transitional and Consequential Provisions) Act (1962). Notably, on 9 December 1962 when the Republican Constitution was promulgated, Tanganyika was declared a Republic with the President having a three-tier function: Head of State, Head of the Executive and Chief of Defence Forces. This means, in effect, that all the powers that were in the hands of the colonial Governor were moved on to the President of the Republic, who could now appoint members of the Cabinet, senior civil servants (particularly so the Vice-President and Prime Minister), members of the Judiciary, and senior members of the armed forces.
117 The adoption of the Republican Constitution was preceded by Government Paper No. 1 of 1962 on Proposals for a Republican Government.
118 Peter, C.M., *Human Rights in Africa: A Comparative Study of the African Charter on Human and Peoples' Rights and the New Tanzanian Bill of Rights*, op. cit.
119 Jamhuri ya Muungano wa Tanzania, *Ripoti ya Tume Kuhusu Mchakato wa Mabadiliko ya Katiba ya Jamhuri ya Muungano wa Tanzania*, op. cit, p. 35.
120 Ibid, p. 37.

seen later, the adoption of a single party political system in Tanganyika and later Tanzania, haunted the country and was one of the basic features of the subsequent Constitution up until the system was abandoned in 1992.

b. Multi-party Politics and the Law in Post-Revolution Zanzibar (1964-1979)

On its part, Zanzibar obtained "its" independence from the British colonialists on 10 December 1963. However, this kind of independence was opposed by some dissidents, particularly members of the Afro Shirazi Party (ASP), which resulted in the staging of an historical Revolution of Zanzibar barely a month later (*i.e.,* on 12 January 1964).[121] Among other reasons, this revolution sought to uproot foreign domination disguised in the so-called self-rule that was granted by the British colonialists to the Sultan of Zanzibar, who represented Arab interests in the Isles. In fact, the Zanzibar Revolution was not only caused by the immediate accusations that the July 1963 elections were rigged, but also the fact that the African majority (the landless peasants) were struggling to assert their grievance over an Arab minority (the landed aristocracy and political oligarchy) that was considered to exploit and oppress the former.[122]

It should be noted from the outset that the Zanzibar Revolution was a very significant step in the subsequent constitutional and legal developments, multi-partyism, and socio-economic developments in the Isles. Immediately after the revolution took place, it was associated with the ASP and supported by the Umma Party, which was banned and its property confiscated by government of the Sultan of Zanzibar from 4 January 1964.[123] In fact, on 2 January 1964, the Cabinet decided to declare Umma Party unlawful, a declaration that was made under the Societies Decree of August 1963.[124] This draconian law provided that a society or organization (which included a political party), which was considered unwanted for whatever reason that could be fathomed by the powers be, could be indefinitely banned and its property confiscated.

Immediately after the Revolution, these two parties formed the Revolutionary Council, which ruled Zanzibar under the leadership of Abeid Amani Karume as the President and Abdallah Kassim Hanga as the Vice-President.[125] As it is traditional in most revolutions, immediately after the Revolutionary Council

121 Ibid.
122 Jjuuko and Muriuki, op. cit, p. 4.
123 General Notice No. 24 and 25 of 6 January 1964. *See* also Jamhuri ya Muungano wa Tanzania, *Ripoti ya Tume Kuhusu Mchakato wa Mabadiliko ya Katiba ya Jamhuri ya Muungano wa Tanzania,* op. cit, p. 49.
124 Shivji, I.G., *Pan-Africanism or Pragmatism? – Lessons of Tanganyika – Zanzibar Union,* op. cit, p. 43.
125 Jamhuri ya Muungano wa Tanzania, op. cit. The pioneer members of the Zanzibar Revolutionary Council were Abdullahman Mohammed Babu; Hasnu Makame; Aboud Jumbe Mwinyi; Saleh Saadalla; Idrissa Abdul Wakil; Othman Shariff; Abdul-Aziz Twala; Hassan Nassor Moyo; and Field Marshal John Okello. Others were Commissioner of Police, Edington Kisasi; Yusuf Himidi; Seif Bakari; Ramadhani Haji Abdallah A. Natepe; Pili Khamis; Khamis Hemed, Hamid Ameir Ali; Said Idi Bavuai; Said Washoto; Muhammed Abdallah; Abdulla Mfaranyaki; Hafidh Suleiman; Khamis Darwesh Khamis Abdulla Ameir; Mohammed Mfaume Omar; Muhsin bin Ali; Mohammed Juma; and Daud Mahamoud.

was established, the 1963 Constitution was abrogated and replaced by a series Constitutional Decrees.[126] Between 1964 and 1979 these decrees formed the basis of the "constitutional" order in Zanzibar,[127] which means that Zanzibar did not have a written constitution during that period.

The first of such Decrees was the Legislative Powers Law (1964), which recognised the application of laws that were in existence, except the 1963 Zanzibar Constitution. However, this Decree required modification of those laws to suit the situation obtaining in Zanzibar at the time and the changes brought forth by the Revolution. The second was the Existing Laws (1964),[128] which gave powers to the Zanzibar President to "enact" laws; presumably, as a result of the suspension of the Legislative Assembly that came with the Revolution. Although under this Decree the President was required to consult with the Revolutionary Council, in practice, most of the Decrees that were to be subsequently enacted in Zanzibar were made without such consultation.

The third Decree[129] established the High Court of Zanzibar as a 'superior court of record and, save as otherwise provided for by the President, shall have all the powers of such a court.'[130] The High Court was under the Chief Justice. The Chief Justice and the High Court Judges were appointed by the President in consultation with the Revolutionary Council. In practice, the application of this provision saw the President whittling away the judicial system.[131]

On 25 February 1964, four more decrees were promulgated: the Cabinet Decree (1964); the Constitutional Government and the Rule of Law Decree (1964); the Equality, Reconciliation and Unity of Zanzibar People Decree (1964); and the Friendly Relations among States Decree (1964).[132] Notably, the Cabinet Decree (1964) established the positions of President, Vice-President and Ministers; and, although it was promulgated on 25 January 1965, it recognised that these positions started to apply on 12 January 1964, when the revolution took place. This law decreed that the President was the Head of State and Commander-in-Chief of the Armed Forces. It also declared Ministers to be members of the Revolutionary Council and they were appointed by the President.

126 General Notice No. 73 of 25 January 1964. During the reign of Karume (from 1964 up until he died in 1972), Zanzibar was ruled through Decrees as opposed to laws enacted by a conventional legislature.
127 Section 7(2) of the Union of Zanzibar and Tanganyika Law (1964) recognised these "constitutional" decrees as forming the "Constitutional Laws of Zanzibar". However, Shivji argued that this law, which purportedly ratified the Articles of the Union, was not actually passed in Zanzibar. It is annexed in Shivji, op. cit, pp. 273-284.
128 Decree No. 1 of 1964.
129 The High Court Decree (No. 2 of 1964).
130 Ibid, Section 2(3).
131 Shivji, op. cit, p. 60.
132 Decree No. 7 of 1967 (decreeing that Zanzibar would adhere to the legal principles of friendly amongst states, in which case it would honour all treaty obligations it had freely entered into. It also declared that Zanzibar would not commit acts of aggression against another sovereign state in accordance to the UN Charter and it would further the 'special relationship of the peoples of East Africa').

However, in 1970 the Cabinet Decree (1964) was repealed and replaced by the Appointment of Chairmen Decree (1970). Under the 1970 Decree, Ministers were designated as Chairmen and Deputy Ministers as Assistant Chairmen.[133] It also designated the President as the Chairman of the Zanzibar Revolutionary Council. However, the designations "ministers" and "deputy ministers" were revived in 1977 during the reign of the late Alhaj Aboud Jumbe Mwinyi.[134]

Despite the fact that these Decrees had a constitutional bearing, the significant one that had a semblance of constitutional principles as conventionally known was the Constitutional Government and Rule of Law Decree (1964).[135] This three-section Decree provided for separation of powers amongst the arms of the State. It also provided the basis for the promulgation and codification of Constitutional Decrees, which formed the bedrock of the basic law of the People's Republic of Zanzibar. In particular, the unusually long Section 2 categorically provided that:

> The Peoples' Republic of Zanzibar is a Democratic State dedicated to the rule of law. The President as Head of State, validates legislation by his assent. *As an interim measure, legislative power resides in the Revolutionary Council and is exercised on behalf and in accordance with its laws by the President.* The principal executive power is exercised on behalf of the Revolutionary Council and its advice by the Cabinet of Ministers individually and collectively; *the principal judicial power is exercised on behalf of the Revolutionary Council by the Courts*, which shall be free to decide issues before them solely in accordance with [the] law and public policy. [Emphasis supplied].

The fact that the Revolutionary Council became both the Executive and the Legislature made this a strange constitutional order because under the conventional approach, law-making is a reserve of the Legislature. In a representative democracy, an executive body like Cabinet does not hold legislative powers; rather, it implements resolutions of the Legislature and decisions made by the Judiciary. This is what constitutes checks and balance amongst and between the three arms of the State.

In addition, the Constitutional Government and Rule of Law Decree (1964) had provisions requiring the Government to convene a Constituent Assembly by

133 It should be noted that, during this time gender justice was not so popular. The law and its terminologies and designations were not sensitive on gender parity, hence the designation "Chairmen" in this Decree.
134 Jamhuri ya Muungano wa Tanzania, *Ripoti ya Tume Kuhusu Mchakato wa Mabadiliko ya Katiba ya Jamhuri ya Muungano wa Tanzania*, op. cit, p. 51.
135 Presidential Decree No. 5 of 1964.

11 January 1965 for adopting a new Constitution for Zanzibar.[136] A year later, however, this Decree was amended and allowed the President to convene the Constituent Assembly on a date of his choice.[137] Eventually, President Karume did not convene the Constituent Assembly until he was assassinated in 1972. Rather, it was President Alhaj Aboud Jumbe Mwinyi, who, in 979, ensured that a conventional Constitution of the Revolutionary Government of Zanzibar was adopted. It should be noted that during the time of these constitutional Decrees, Zanzibar had adopted a single-party political system.

3.3.3. Single-Party Politics and the Law in Post-Independence Tanzania (1965-1984)

For Tanganyika, the period between 1965 and 1984, and for Zanzibar, the period between 1964 and 1979, were marked by lack of conventional Constitutions. While Tanzania (particularly Tanganyika) was ruled under an Interim Constitution (1965-1977), Zanzibar was ruled under a series of draconian constitutional Decrees that were regarded as forming the foundation of a Zanzibari Constitution. This period was also characterized by a sheer prohibition of multi-party politics and the absence of Bills of Rights in the relevant "Constitutions".

Notably, on 18 March 1965 the Legislature enacted the Constituent Assembly Act (1965)[138] to indefinitely extend the time for the adoption of a Union Constitution. In Section 2 of this unusually short law (consisting of only three sections) it was stated that:

> [The President of the United Republic of Tanzania] *shall not be required to appoint a Commission to make proposals for a Constitution for the United Republic, or to summon a meeting of a Constituent Assembly for the consideration of such proposals and the adoption of such Constitution*, but the President, acting in agreement with the Vice-President who is head of the Executive for Zanzibar shall appoint such Commission and summon such Constituent Assembly *at such times as shall be opportune.* [Emphasis supplied].

Two legal issues associated with this law arise here: that is, it is debatable 'if the union parliament had powers to (a) amend the Articles [of Union], an

136 Section 3 of the Presidential Decree No. 5 of 1964, 'Not later than January 11th, 1965, a Constituent Assembly of the Zanzibar People shall be convened to pass upon these and other basic provisions which, after having received the assent of the Constituent Assembly, shall be the Constitution of Zanzibar.'
137 Section 2 of the Decree to Amend the Constitutional Government and the Rule of Law Decree, 1964 (Decree No. 4 of 1965) provided that: 'Section 3 of the principal Decree is amended by deleting therefrom the words and figures "January 11th, 1965," appearing in the fourth line and substituting therefor the words "a day to be appointed by the President".'
138 Act No. 18 of 1965.

international treaty, unilaterally, and (b) amend the Zanzibar law, which was supposedly passed by the Zanzibar legislature to ratify the treaty.'[139] According to Shivji, a more legally appropriate way to address this anomaly 'would have been for the two heads of the executive, Karume and Nyerere, the latter in his capacity as the head of "Tanganyika", to renegotiate the treaty.'[140] However, given the political situation then prevalent in the country, such course of action 'would have been disastrous, wrecking the Union right there. Politics determined the law, as is always the case.'[141]

So, between 1965 and 1977 Tanzania had to be governed under an Interim Constitution whose legitimacy was questionable. Therefore, it was more than necessary that a permanent union constitution was long overdue by the time this process was initiated in 1977. After drawn out struggles waged by different actors and stakeholders, the "permanent" Constitution of Tanzania was enacted in 1977 and that of Zanzibar in 1979.[142] Similar efforts led to the introduction of Bills of Rights in the two Constitutions in 1984. One of the basic human rights guaranteed in these Bills of Rights is the right of 'every citizen of the United Republic [of Tanzania] to take part in matters pertaining to the governance of the country, either directly or through representatives freely elected by the people, in conformity with the procedures laid down by, or in accordance with, the law.'[143] However, during this period multi-party politics remained prohibited by the relevant Constitutions.

3.3.4. Single-Party Politics After the Bill of Rights was Entrenched in the Constitutions of Tanzania and Zanzibar (1984-1992)

The constitution-making process adopt the current Constitution of Tanzania came barely within two weeks after the merger of TANU and ASP that saw the birth of CCM on 5 February 1977. Unlike the 2011-14 constitutional review and making process, the making of the 1977 Constitution was fraught with a number of anomalies. In particular, this was a highly party-driven constitution-making process, characterised by absolute lack of citizens' participation therein.[144] In fact, the Constituent Assembly (CA) that adopted the 1977 Constitution was not properly constituted, constitutionally and democratically speaking. Members of the CA were same Members of the National Assembly. Notably, the CA debated and adopted the Constitution in less than a day.[145]

139 Shivji, I.G., *Pan-Africanism or Pragmatism? – Lessons of Tanganyika – Zanzibar Union,* op. cit, p. 163.
140 Ibid.
141 Ibid, p. 164.
142 Notably, the 1979 Zanzibar Constitution was repealed and repealed by the Zanzibar Constitution of 1984.
143 Article 21 of the Constitution of Tanzania; and Section 21 of the Zanzibar Constitution.
144 *Cf.* Msekwa, P., *Reflections on the First Decade of Multiparty Politics in Tanzania* (2nd edn.) (Dar es Salaam: Nyambari Nyangwine Publishers, 2014), p. 66 (pointing out that: 'In almost every case in [the] constitution-making exercise, the Government has usually undertaken to involve the people of Tanzania by drafting proposals and presenting them to the general public for discussion and comments, (and giving them ample time to do that) before presenting the relevant legislation to Parliament').
145 Ibid.

As we noted above, the process of making the 1977 Constitution of Tanzania and the 1979 Zanzibari Constitution was highly politicized and involved a very small group of politicians under the then country's sole political party, CCM. One of the major effects of this anomaly was that the end product of the process was the adoption of Constitutions that were fraught with several pitfalls. Some of these pitfalls include the controversial Union question and enlarging the list of Union matters; enormous and unlimited powers of the Union President;[146] flawed electoral management system and process; lack of Bills of Rights,[147] which was later introduced into the Constitution in 1984; and the contentious constitutional amendments that have constantly haunted the 1977 Constitution throughout its lifespan.[148]

3.4. Constitutional Basis of the Re-introduction of Multi-party Politics in Tanzania

The multi-party-political system was re-introduced in Tanzania in 1992 through the Eighth Constitutional Amendment. Like the Fifth Amendment that entrenched the Bill of Rights into the 1977 Constitution, the Eighth Amendment brought about significant constitutional reforms, particularly in respect of the country's political system and governance. In the main, it re-

146 For a detailed academic discussion on this issue, *see* particularly United Republic of Tanzania, *The Report of the Presidential Commission on Single or Multi-party Political System* (Book One) (Dares Salaam: Government Printer, 1991), p. 133; and Wambali, M.K.B., "Constitutional Reform in Tanzania and its Impact on the Integration Process in the East African Region," *The Tanzania Lawyer* Vol. 1 No. 1, 2013, pp. 1-21, pp. 14-17. The Founding and Father of the Nation, Mwalimu Julius Kambarage Nyerere, was quoted quipping that: '*madaraka ya Rais ni makubwa kiasi cha kuweza kumfanya awe dikteta kama angetaka*' (literally translated as: 'presidential powers are so enormous to make a willing president to become a dictator'). *See* also Wambali, M.K.B., "The Constitutional Review Process in Tanzania: Paramount Issues for Consideration" *Zanzibar Yearbook of Law* Vol. 3, 2013, pp. 145-172; and Peter, C.M., "Constitution Making in Tanzania: The Role of the People in the Process", a paper presented at the University of Dar es Salaam, 2000. *See* also United Republic of Tanzania, *The Report of the Presidential Commission of Enquiry into Corruption* (Vol. 1, Chapters I-V) (Dares Salaam: Government Printer, 1996), p. 76; Jamhuri ya Muungano wa Tanzania, *Taarifa ya Kamati ya Watualamu Kuhusu Uchaguzi wa Rais wa Muungano na Masuala Mbalimbali Yanayoambatana Nayo* (Dar es Salaam: Serikali ya Jamhuri ya Muungano wa Tanzania, 1992); and United Republic of Tanzania, *The Report of the Presidential Committee to Coordinate Public Views on the Constitution* (Book One) (Dares Salaam: Government Printer, 1999), p. 77. Recently, another commission appointed by the President, the Constitutional Review Commission (thenceforth, popularly known "the Warioba Commission II"), reiterated this position. In a well-detailed and well-thought study about the presidential powers, the Warioba Commission II went as far as to propose for the need to review the presidential powers with the view to bringing about an effective appointing mechanism in respect of, and accountability amongst, senior public leaders and servants. *See* particularly Jamhuri ya Muungano wa Tanzania, *Taarifa ya Utafiti Kuhusu Madaraka ya Rais wa Jamhuri ya Muungano wa Tanzania* (Taarifa Na. 1) (Dare es Salaam: Tume ya Mabadiliko ya Katiba, Disemba 2013).

147 In the alternative, before the Bill of Rights was enshrined in the Constitution in 1984, the Government put in place two strategies for protection of fundamental human rights and freedoms in Tanzania – (*i*) enumerating a "purported" Bill of Rights in a loose form in the Preamble to the Interim Constitution; and (*ii*) establishment of the Permanent Commission of Enquiry (PCE). However, higher courts of the land later held that a preamble is not an enforceable part of the Constitution. *See* particularly *Hatimali Adamji v. East African Posts & Telecommunications Corporation* [1973] L.R.T. No. 6; and *A.G. v. Lesinoi Ndeinai & 2 Others* [1980] T.L.R. 214. On its part, the PCE had several limitations in relation to protection of fundamental rights and freedoms: (*i*) the PCE lacked institutional autonomy as it had to report all the completed investigations on complaints brought to it to the President, who would decide whether or not to pursue the matter brought to him; (*ii*) the President had powers 'to stop any investigation which the Commission had undertaken at any point in time'; and (*iii*) the President could bar the PCE from accessing any information. All these limitations rendered the PCE's performance ineffective, resulting into subjecting the fundamental rights and freedoms of the individual at the mercy of the executive arm of the State. *See* particularly Peter, C.M., *Human Rights in Tanzania: Selected Cases and Materials*, op. ci; McAuslan, J.P.W.B. and Y.P. Ghai, "Constitutional Innovation and Political Stability in Tanzania: A Preliminary Assessment," *Journal of Modern African Studies*, Vol. 4 No. 4, 1966, p. 474; and Oluyede, P. A., "Redress of Grievances in Tanzania," *Public Law*, 1967, p.567.

148 Between 1977 and 2022, the Constitution of Tanzania has undergone through 14 amendments, half of which were made between 1992 when Tanzania introduced multiparty politics – the 8th Constitutional Amendment – to the 14th Constitutional Amendment in 2005. Some of these constitutional amendments have eroded effective citizens' participation in multiparty democracy. Apart from re-introducing multiparty politics with a compulsory requirement for registration of political parties in Tanzania, the Eighth Constitutional Amendment (1992) increased the number of special seats MPs to 15%. On its part, the Ninth Constitutional Amendment (1992) amended the procedure for presidential elections and introduced procedures for removal from office of the President and Prime Minister. The Tenth Amendment that took place in 1993 extended the mandate and powers of the NEC to also manage and conduct elections for Councillors. In this context, it decreed that the elections for Councillors should take place on the same day as those for MPs and the President. In addition, the Eleventh Amendment (1994) introduced the requirement of a running mate in the presidential elections. The Twelfth Constitutional Amendment (1995) amended the oath of office for the President of Tanzania, President of Zanzibar, Vice-President and Prime Minister to require them to uphold the "sacrosanctity" of the Union as well as imposing obligations for them to do so during their tenure. The Thirtieth Constitutional Amendment (2000) introduced five amendments, more significant amongst them being increasing the number of special seat women MPs from 15% to 20%, simple majority rule for the presidential candidature from the not-less-than 50% rule, and the president's power to appoint ten MPs to Parliament. Lastly, the Fourteenth Constitutional Amendment (2005) increased special seats for women MPs from 20% to 30%; and it also introduced new procedure for nomination of special seats MPs basing on the proportion of votes in constituents a political party obtains in an election (Articles 78 and 81). In addition, the amendment removed claw-back clauses and limitations to certain fundamental freedoms – of speech, religion, belief and conscience.

introduced a multiparty political system that was banned in early 1960s. As considered in Chapter Two of this book, this development largely came as a result of the then wind of change that swept across the entire globe and upon the recommendations by the Nyalali Commission in 1991[149] as well as Mwalimu Nyerere's candid advocacy for the reintroduction of a multiparty political system in Tanzania.[150] Significantly, the Eighth Amendment radically transformed the political landscape in the country, which saw the hitherto party supremacy "dying" a natural death.

There were many other constitutional reforms introduced by the Eighth Amendment that reformed the political principles and practice in Tanzania. Firstly, it introduced increased the number of special seats for women to 15% of all seats in the National Assembly and 5% of all seats in the Zanzibar House of Representatives. This was an affirmative action intended to promote women's participation in the governance of their country's affairs in the context of the UN Convention on the Elimination of all forms of Discrimination against Women (CEDAW) to which Tanzania is a party (as considered in Chapter Four of this book).

Secondly, the Eighth Constitutional Amendment introduced provisions for the registration and regulation of political parties. This entailed a directive on the Legislature to enact a law to provide for procedures on registration, conduct and deregistration of political parties. In light of this directive, Parliament enacted the Political Parties Act in 1992,[151] requiring all political parties, with the exception of CCM,[152] to register under certain conditions. Thirdly, it decreed that the registration and functioning of political parties was a Union matter. Fourthly, it introduced provisions that required persons who aspired to contest for the presidency to be sponsored and nominated by a political party.[153] Fifthly, this constitutional amendment enlarged the mandate and powers of the National Electoral Commission (NEC) in light of the newly re-introduced multiparty political system.

3.5. The Legal Basis of Citizens' Participation in Multi-party Politics Since 1995

149 United Republic of Tanzania, *Tume ya Rais ya Mfumo wa Chama Kimoja au Vyama Vingi vya Siasa Tanzania* (Kitabu cha Kwanza) (Dar es Salaam: Government Printer, 1991a)
150 Tambila, op. cit.
151 Cap. 258 R.E. 2002.
152 Ibid, Section 7(2).
153 *Cf.* in *Mtikila v. Tanzania*, op. cit, the African Human Rights Court held, *inter alia*, that this requirement infringed the right to contest in an election of all persons who do not belong to a political party.

As considered above, the right of citizens' participation in the governance of political and public affairs of the country is guaranteed in both international human rights law and national constitutions. It entails free and equal participation of every interested citizens without discrimination on any of the listed grounds. It also requires that constitutional and legislative frameworks should allow political and ideological pluralism for both persons who belong to political parties and those that do not subscribe to any of the existing political parties' ideologies. As considered in this Chapter, participation rights and freedoms are now guaranteed in the constitution and their exercise regulated by the relevant laws.

3.5.1. Citizens' Realisation of their Participatory Rights and Freedoms

During the multi-party political era, Tanzanian citizens continued to realise their constitutionally-entrenched participatory rights in relation to freedoms of association, assembly, and expression entrenched in the Bill of Rights vide the Fifth Constitutional Amendment in 1984. Apart from guaranteeing citizens' freedom to associate and assemble with others in political parties,[154] the Constitution also guarantees the freedom of expression in relation to communicating and receiving political views.[155] In particular, citizens' participation in democratic processes during the multi-party political era is guaranteed under Article 20(2)-(4). These provisions guarantee the right to freedoms of association and assembly as well as they do regulate the realisation of these rights in terms of setting conditions for registration of a political party[156] and the prohibition of compelling a person to join a political party.[157]

In addition, the Constitution vests power in Parliament to enact a law regulating political parties' activities and conduct.[158] In exercising this power, in 1992, Parliament enacted the Political Parties Act.[159] This law, which entered into force on 1 July 1992, provides for terms, conditions and the procedure for the registration of political parties and for related matters. This law was amended in 2019 to introduce several provisions relating to the management and regulation of political parties and citizens' participation in multi-party politics.[160] In particular, the amending law provides for regulation of civic education and

154 Article 20 of the Constitution.
155 Ibid, Article 18.
156 Ibid, Article 20(2).
157 Ibid, Article 20(4).
158 Ibid, Article 20(3).
159 Cap. 258 R.E. 2002.
160 *See* the Political Parties Act (No. 1 of 2019).

capacity building training;[161] as well as for the power of the Registrar of Political Parties to demand certain information from political parties.[162] It also lays down further conditions for registration of political parties ranging from the contents of constitutions of political parties,[163] the need for political parties to manage their affairs in accordance with laid down conditions,[164] promoting laid down principles,[165] qualifications for leaders[166] and people applying for registration of political parties[167] to the requirements for parties to hold general meetings,[168] making asset declarations by political parties[169] and submitting financial reports to the Registrar and the Controller and Auditor General (CAG).[170]

Furthermore, the 2019 amendments to the Political Parties Act introduced certain restrictions on party members and their participation in political activities.[171] They also introduced the requirements for the maintenance of a Political Parties Register,[172] registration of political parties' national leaders,[173] and maintenance by political parties of registers of their members, leaders and members of party organs at each administrative level.[174] Through these amendments, political parties are prohibited from forming security groups (including recruiting, deploying and/or forming a militia, paramilitary or security group) or usurping the functions of the police force or any government security organ.[175]

The amendments to the Political Parties Act create both civil sanctions and criminal offences to members of political parties who contravene *general* provisions of this law. In particular, the Registrar may suspend a member of a political party who contravenes this law from conducting political activities;[176] and where that member defies this sanction, such member commits an offence.[177] In addition, the law creates further offences and penalties in respect of (*i*) any person who violates this law for which breach there is no specific penalty or sanction in the law, which attracts a fine of not less than three

161 Ibid, Section 5A.
162 Ibid, Section 5B.
163 Ibid, Section 8D, and the First Schedule to this law.
164 Ibid, Section 6A(2). Under this provision, political parties are obliged to manage their affairs in accordance with the Constitutions of Tanzania and Zanzibar as well as their constitutions, thereby upholding principles of democracy and good governance, non-discrimination, gender and social inclusion.
165 Ibid, Section 6A(5). In particular, this provision obliges political parties to promote the Union between Tanganyika and Zanzibar, democracy, good governance, anti-corruption, national ethics and core values, patriotism, secularism, uhuru torch, national peace and tranquility, gender, youth and social inclusion in the –

(a) formulation and implementation of their policies;

(b) nomination of candidates for elections; and

(c) election of their leaders.

166 Ibid, Section 10A.
167 Ibid, Section 6B.
168 Ibid, Section 12B.
169 Ibid, Section 12C.
170 Ibid, Section 18A.
171 Ibid, Section 6C.
172 Ibid, Section 8A.
173 Ibid, Section 8B.
174 Ibid, Section 8C.
175 Ibid, Section 8E.
176 Ibid, Section 21E(1).
177 Ibid, Section 21E(2).

million shillings and not exceeding ten million shillings, or an imprisonment of not less than six months and not exceeding one year; or both;[178] and (*ii*) any political party, for which breach there is no specific penalty in the law, which attracts a fine of not less than ten million shillings and not exceeding fifty million shillings or suspension or deregistration of the respective political party.[179]

However, the 2019 amendments to the Political Parties Act were challenged in the East Court of Justice (EACJ) in *Freeman A. Mbowe & 5 Others v. A.G. of Tanzania*.[180] Firstly, the complainants alleged that Section 3 of the 2019 amending law, which amends Section 5(b) of the Political Parties Act, violates freedoms of association, democracy and rule of law; thus, it is repugnant to Articles 6(d), 7(2) and 8(1)(c) of the Treaty Establishing the East African Community ('the EAC Treaty') by particularly giving the Registrar the power to monitor intra-party elections and nomination processes. According to the complainants, this is unjustifiable and amounts to abuse and violation of intra-party democracy.

Moreover, the complainants alleged that Section 4 (introducing Section 5B) centralizes civic education, training and capacity building into the Registrar, which is unjustifiable and contrary to the freedom of expression and access to information in violation of Articles 6(d), 7(2) and 8(1)(c) of the EAC Treaty. According to the complainants, Section 4 – which introduces Section 5B providing for penalties where a party leader or political party fails to furnish the Registrar with information demanded by him, violates the right to privacy, rule of law and protection of human rights – violates the right to privacy, rule of law and protection of human rights contrary to Articles 6(d), 7(2) and 8(1)(c) of the EAC Treaty.

Furthermore, the complainants alleged that Section 5 – which introduces Part IIA, under Section 6B(a) – is discriminatory by requiring that persons (who apply for registration of a political party must be Tanzanians born of parents, who are also Tanzanians) is in violation of Articles 6(d), 7(2) and 8(1)(c) of the EAC Treaty. Additionally, the complainants alleged that Section 29 (introducing Section 21E), which empowers the Registrar to suspend a member from conducting political activities in violation of the principles of good governance, democracy, rule of law, as well as recognition, promotion and protection of human and

178 Ibid, Section 21D(1).
179 Ibid, Section 21D(2).
180 *Freeman A. Mbowe & 5 Others v. A.G. of Tanzania*, East African Court of Justice, First Instance Division, at Arusha, Consolidated References Nos. 3 & 4 of 2019 ('*Freeman Mbowe v. Tanzania*'). In particular, the impugned provisions of the Political Parties Act (No. 1 of 2019) are Sections 3(5)(b), (e), and (f); 5A(1) – (6); 5B(1) – (4); 6A(5); 6B(a); 8C(2) – (4); 8E(1) – (3); 11A(2) – (5)21D; 21F and 23.

peoples' rights enshrined in the African Charter on Human and Peoples' Rights (ACHPR) in violation of Articles 6(d), 7(2) and 8(1)(c) of the EAC Treaty. Furthermore, the complainant alleged that Section 21D introduces criminal sanction in the Political Parties Act, which is contrary to the principles of good governance, promotion and protection of human and peoples' rights in accordance with the provisions of the ACHPR in violation of Articles 6(d), 7(2) and 8(1)(c) of the EAC Treaty.

As well as raising a point of preliminary object that the EACJ had no jurisdiction to entertain the matter, the Respondent State argued that the impugned amendments to the Political Parties Act were intended 'to promote institutionalism, intra-party democracy, political and financial accountability in conformity with the Constitution of the United Republic of Tanzania, the Treaty and other international human rights instruments' to which Tanzania is a State party.[181] According to the Respondent, the impugned amendments contain 'reasonable restrictions to monitor the conduct of political parties' activities and affairs so as to ensure there is a balance of rights.' Such balance is 'between the right to freedom of association by allowing registration and conduct of political parties and increased alarm on deterioration of intra-party democracy.'[182] According to the Respondent, the impugned provisions of the Political Parties Act are not discriminatory and do not contravene the principles of democracy, good governance and rule of law guaranteed in the EAC Treaty, the ICCPR, the UDHR and the ACHPR.[183]

Therefore, the EACJ was called upon to determine three key issues – (*i*) whether the court had jurisdiction over the matter; (*ii*) whether the impugned provisions of the Political Parties Act constitute a violation of Articles 6(d), 7(2) and 8(1)(c) of the EAC Treaty; and (*iii*) whether the parties were entitled to any remedies. Recognizing the principle that jurisdiction is a fundamental issue that the Court can *suo motu* raise and determine in light of Articles 27(1) and 30(1) of the EAC Treaty;[184] the Court held that it had jurisdiction to entertain and determine the matter.[185]

Relating to the second issue, the EACJ reiterated the three-tier test in considering whether limitations set out by a law in any of the Member States of the EAC are compatible with international human rights norms as enumerated

181 Ibid, para. 20.
182 Ibid, para. 21.
183 Ibid, para. 22.
184 *See* particularly *Angella Amudo v. Secretary General of the East African Community*, EACJ Appeal No. 4 of 2014 ('*Amudo v. EACJ*'); *Alcon International Ltd. v. Standard Chartered Bank of Uganda & 2 Others*, EACJ Appeal No. 3 of 2013 ('*Alcon v. Uganda*'); and *A.G. of Tanzania v. African Network for Animal Welfare*, EACJ Appeal No. 3 of 2011 ('*Tanzania v. ANAW*').
185 *Mbowe v. Tanzania*, op. cit, paras. 29-47.

in *Media Council of Tanzania & Others v. A.G. of Tanzania* ('*MCT v. Tanzania*').[186]
The three-tier test set out in *MCT v. Tanzania* require that:

i. The limitation must be prescribed by law, clear and accessible to citizens; so that they are clear on what is prohibited by the relevant law;
ii. The objective of the law should be pressing and substantial – *i.e.,* it must be important to society; and
iii. Proportionality of the impugned law – *i.e.*, has the State, in seeking to achieve its objectives, chosen an 'appropriate way to do so?'[187]

While the Court found the impugned limitation to be prescribed by law,[188] it wondered:

Are the impugned legal provisions clear as to what is the nature and extent of this limitation on the participation rights of citizens of Tanzania?
Do the impugned provisions have sufficient clarity for the Partner States [to the EAC] to understand what the limitations to the basic rights and fundamental freedoms entail? and
Does the Registrar of Political Parties have powers to implement this law in terms of giving any directions or imposing any requirement arising out of the "monitoring" function?

The EACJ held that it is 'not by any means evident what the "monitoring" of intra-party elections entails.'[189] Citing with approval *Konate v. Burkina Faso*,[190] the EACJ held that: 'To be considered law, norms have to be drafted with sufficient clarity to enable an individual to adapt his behaviour to the rules and [should be] made accessible to the public.' Therefore, the EACJ held the limitations in Section 5(b) of the Political Parties Act to be repugnant to the first test as

[...] being vague, unclear and imprecise. In application, the political parties would not know what the Registrar can or cannot do, in the exercise of the powers to "monitor" intra-party elections. With such imprecision and lack of clarity, the provision cannot be justified as being consistent with the Partner States' obligations under the [EAC] Treaty.[191]

In relation to Section 5(4), which has been introduced by Section 3 of the 2019 amendments to the Political Parties Act, the EACJ subjected the Registrar's

186 EACJ, Reference No. 2 of 2017 (Judgment dated 28 March 2019) ('*MCT v. Tanzania*').
187 Ibid, para. 56 (pointing out that: 'This is the test of proportionality relative to the objectives or purpose it seeks to achieve.').
188 *See* particularly Section 5(b) of the Political Parties Act (No. 1 of 2019).
189 *Mbowe v. Tanzania*, op. cit, para. 63.
190 AfCHPR, Application No. 004/2013 (2014).
191 *Mbowe v. Tanzania*, op. cit, para. 67.

function to "regulate civic education provided by political parties" to the first test, questioning whether this provision has the requisite precision and clarity. According to the Court, the term to "regulate" civic education 'does not express the parameters within which the Registrar is to exercise the function, and which the political parties and their members should expect.'[192] For example, 'will the Registrar, in "regulating", determine the content and mode of delivery of civic education? Is the determination to be a negotiated or directed process?'[193] As such, the Court found the term to "regulate", in this context, 'is not sufficiently precise for the Registrar to appreciate the parameters of the power, and the political parties to know what to expect. By reason of such imprecision and lack of clarity, Section 5(4) fails the first test of the three-tier tests.'[194]

Considering the provision of Section 5B(2), which was introduced by Section 4 of the 2019 amendments to the Political Parties (concerning the powers of the Registrar to demand information from political parties), the EACJ held the same to meet the first test in that it is clear and precise. According to the Court, this provision is 'precise and clear in stating the function given to the Registrar' in that the Court could be involved in determining the question on application by either party.[195] Additionally, the Court found this provision to have an objective 'that is pressing and substantial, that is important to the society; namely, to facilitate the effective functioning of the Political Parties Act.'[196] The Court also held this provision to meet the third test in the three-tier tests in that the Respondent State 'has chosen a proportionate way to achieve the objective referred to in consideration of the second tier test above.'[197]

The Applicants also challenged the provisions of Section 6A(5), which obliges political parties to promote, *inter alia*, the Union between Tanganyika and Zanzibar in light of Article 20(2) of the Constitution of Tanzania. The EACJ found this provision to be repugnant to the first test in the three-tier tests for lack of precision and clarity. The Court said that this provision is vague, imprecise and lacks clarity for a political party to understand its obligations to promote the Union.[198]

Similarly, the Court dealt with Section 6B(5), which requires that only a person who is a citizen with both parents having Tanzanian citizenship can be allowed to apply for registration of a political party. While finding the provision to be clear

192 Ibid, para. 72.
193 Ibid.
194 Ibid, para. 73.
195 Ibid, para. 88.
196 Ibid, para. 89.
197 Ibid, para. 90.
198 Ibid, paras. 95-96.

as to who qualifies to apply for registration of political party, the EACJ found no legitimate objective, which 'patently excludes and is thus discriminatory of citizens who do not have both parents as citizens. Nor did the Respondents, in its submissions, offer any justification in respect thereof.'[199]

Moreover, the Court determined Section 8E, which prohibits political parties to recruit, deploy or form a militia, paramilitary or security group of any kind or maintain an organization intending to 'usurp the functions of the police force or any government security organ.'[200] Subjecting this provision to the first of the three-tier tests, the EACJ found the phrase "a militia, paramilitary or security group of any kind", to be 'not clear as to what it encompasses. Nor, indeed, [does] the phrase "usurp the functions of the police force or any government security organ".'[201] According to the Court, the introduced provision, read in its entirety, 'falls short of the requisite clarity to inform the political parties, what exactly is prohibited.'[202] This is particularly so 'in a situation where, as the Applicants argue and the Court takes judicial notice, there are other laws that govern and regulate ostensible groups that present an affront or political threat to public order and security.'[203]

As the EACJ noted, while the object of ensuring public order and safety is legitimate and substantial, the impugned provision of Section 8E, to the extent that it is wide and imprecise, would 'be deemed to be a disproportionate manner of meeting the otherwise pressing and substantial objective. It would, in any event, thus, fail the third test.'[204]

Although the Court found the right granted to political parties to form coalitions before or after general elections to be guaranteeing the freedom of association (thus, meeting the first of the three-tier tests)[205] and the second of the three-tier tests,[206] it found the requirement that decisions for forming a coalition can only be made by members during general meetings to be 'a disproportionate way to achieve the said objective' in light of the third of three-tier tests.[207] The Court held that it is not apparent 'why, if the political party's Constitution allows it, such decision cannot be made by another organ of a party, on a delegated basis.'[208] According to the Court, this limitation of the right

199 Ibid, para. 101.
200 Section 8E(1) of the Political Parties (Amendment) Act, No. 1 of 2019.
201 *Freeman A. Mbowe & Others v. A.G. of Tanzania*, op. cit, para. 112.
202 Ibid, para. 113.
203 Ibid.
204 Ibid, para. 114.
205 Ibid, para. 120 (noting that Section 11A of the Political Parties (Amendment) Act is 'clear and precise as to what is required of political parties.').
206 Ibid, para. 121 (noting that the provision of Section 11A regulating the formation of coalitions of political parties is a 'proper and substantive objective that is important to society.').
207 Ibid, para. 122.
208 Ibid.

bestowed on political parties to organize themselves internally in accordance with their constitutions is 'indefensible in a democratic environment.'[209]

Amongst a few provisions that were saved by the Court in this case include Section 23 amending Section 18 (relating to sanctions to be meted out to political parties for mismanagement of subventions granted by the Registrar of Political Parties)[210] and Section 21D (introducing general criminal sanctions for violation of the Political Parties Act).[211] In particular, the EACJ found Section 21D to: (*i*) be legitimate, clear and unambiguous in that has clarity and precision to the political parties as to what is provided for in relation to violators of the law;[212] (*ii*) have a legitimate objective;[213] and (*iii*) be reasonable and proportionate to the objective stated therein.[214]

In the end, the EACJ found Sections 3, 4, 5, 9, 15 and 29 of the Political Parties (Amendment) Act (2019) to be in violation of Articles 6(d), 7(2) and 8(1) of the EACJ Treaty. As such, it directed the Respondent to take measures 'as are necessary, to bring the said Political Parties (Amendment) Act, No. 1 of 2019 into conformity with the Treaty.'[215] However, the respondent State has since then appealed to the Appellate Division of the EACJ, where an appeal is still pending.[216]

3.5.2. Citizens' Participation in Intra-party Democratic Processes in Multi-Party Era

As considered above, the right of citizens to participate in their respective party's democratic processes (including participation in elections, meetings and public rallies) is guaranteed through freedoms of association, assembly and expression which are entrenched in several international human rights treaties to which every human being is entitled as well as under the Constitutions and laws of Tanzania and Zanzibar. It should be noted from the outset, however, that under international human rights law, few human rights are absolute (*e.g.,* the right to life, and the prohibitions on torture,[217] on slavery, on taking people hostages, on abductions[218] and on retroactive criminal laws). Most of the rights are subjected to legitimate limitations, meaning that that States may impose certain limitations on their enjoyment. Like most of the civil and political rights, the foregoing participatory rights and freedoms are limited under international human rights law[219] and by the provisions of Articles 30(1),

219 In particular, under international human rights law, the rights to freedom of expression, freedom of association, and freedom of assembly are subjected to such legitimate limitations as national security or public order, as well as conditions to be met in order for them to be legitimately limited. Notably, the restrictions provided for in the text, such as in Articles 18(3) and 19(3) of the ICCPR, exist and may be relied upon independently of any declaration of a state of emergency. Indeed, even in times of public emergencies as understood in Article 4 of the ICCPR, States may elect to rely upon these restrictions instead of seeking derogations. Notably, human rights courts and treaty bodies have developed a test to establish whether a measure limiting a non-absolute right is legitimate by particularly raising the following questions: (*i*) Is there a legal basis for the measure limiting the right? (*ii*) Does the limitation on the right pursue a legitimate aim (such as respect of the rights or reputations of others, the protection of national security, the maintenance of public order or public health or morals)? (*iii*) If so, is the limitation necessary to achieve the

(2) and (5) as well as 31 of the Constitution of Tanzania.[220]

As the AfCHPR noted in *Mtikila v. Tanzania*, the right of citizens' participation in the governance of their country's political and public affairs can only be restricted in light of the permissible limitations set out in Articles 27(2)[221] and 29(4) of the ACHPR.[222] Elaborating the import of the jurisprudence on restrictions of rights under Article 27(2), the Court was of the view that:

> [The] Jurisprudence regarding the restrictions on the exercise of rights has developed the principle that, *the restrictions must be necessary in a democratic society; they must be reasonably proportionate to the legitimate aim pursued*. Once the complainant has established that there is a *prima facie* violation of a right, *the respondent State may argue that the right has been legitimately restricted by "law", by providing evidence that the restriction serves one of the purposes set out in Article 27(2)* of the Charter.[223] [Emphasis supplied].

The Court referred to *Media Rights Agenda & Others v. Nigeria*[224] and *Gareth Anver Prince v. South Africa,*[225] where the African Human Rights Commission stated that the only legitimate reasons for limitations to the rights and freedoms enshrined the ACHPR are found in Article 27(2) of the Charter. In *Mtikila v. Tanzania*, the Court was of the view that, after assessing whether the restriction is effected through a "law of general application", the Commission 'applies a proportionality test, in terms of which it weighs the impact, nature and extent of the limitation against the legitimate state interest serving a particular goal. The legitimate interest must be "proportionate with and absolutely necessary for the advantages which are to be obtained".'[226]
In fact, the African Human Rights Commission has held the view that restrictions on human and peoples' rights should be an exception to the

legitimate aim, and is the extent of the limitation proportionate in pursuit of the identified legitimate aim? The existence and effectiveness of procedural safeguards will be a key aspect of the assessment whether the limitation of the right is proportionate. (*iv*) Does the restriction respect the principle of equality? Is it non-discriminatory? Measures that limit rights in a discriminatory way will fail the test of proportionality. Therefore, the question of discrimination is generally considered one aspect of the necessity and proportionality test. (*See*, for example, *Mukong v. Cameroon*, Communication No 458/1991, Human Rights Committee (Views: 10 August, 1994). See also *See* Human Rights Committee, *General Comment No. 37 (2020) on the Right of Peaceful Assembly (Article 21)*, adopted by the Human Rights Committee at its 129th session (29 June–24 July 2020), paras. 36-69.

220 International human rights treaties also impose certain limitations to civil and political rights. See, for example, Article 27(2) of the African Charter on Human and Peoples' Rights, which stipulates that:

> '2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.'

For a discussion on limitations of human rights in Africa, *see* particularly Naldi, G.J., "Limitation of Rights Under the African Charter on Human and Peoples' Rights: The Contribution of the African Commission on Human and Peoples' Rights, *South African Journal on Human Rights*, Vol. 17 No. 1, 2001, pp. 109-118 (DOI: 10.10 80/02587203.2001.11827619).

221 Article 27(2) of the ACHPR provides that: 'The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.'

222 Article 29(4) of the ACHPR imposes duties on individuals: 'To preserve and strengthen social and national solidarity, particularly when the latter is threatened; also limits the enjoyment of this right.'

223 *Mtikila v. Tanzania*, op. cit, para 106.1.

224 *Media Rights Agenda & Others v. Nigeria* (Communication No. 224/98) [2000] ACHPR 24; (6 November 2000) [Communications No.'s 105/93, 128/94, 130/94, 152/96 (Consolidated Communications), *Fourteenth Activity Report* (2000-2001) and Communication No 255/2002].

225 *Prince v. South Africa* (2004) AHRLR 105 (ACHPR 2004).

226 *Mtikila v. Tanzania*, op. cit.

norm. For instance, in *Amnesty International & Others v. Sudan,*[227] it held that: 'where it is necessary to restrict rights, the restriction should be as minimal as possible and [it should] not undermine fundamental rights guaranteed under international law [...]. Any restrictions on rights should be the exception.'[228] A similar approach was adopted by the European Court of Human Rights (ECtHR) in *Handyside v. United Kingdom,*[229] where it was held that:

> The Court's supervisory functions oblige it to pay the utmost attention to the principles characterizing a "democratic society". [...] This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed [...] must be proportionate to the legitimate aim pursued.[230]

This approach was restated in *Gillow v. United Kingdom*[231] where the ECtHR held categorically that:

> As to the principles relevant to the assessment of the "necessity" of a given measure "in a democratic society", reference should be interest serving a particular goal. The legitimate interest must be "proportionate with and absolutely necessary for the advantages which are to be obtained".[232]

Domestically, the Court of Appeal of Tanzania has held, in *A.G. v. Dickson Sanga,*[233] that the Constitution 'permits derogation from basic rights in certain circumstances as provided under Article 30 and 31 of the Constitution.' In particular, these constitutional provisions require that the enjoyment of the human rights and freedoms set out in Articles 12-29 of the Constitution should 'not be exercised by a person in a manner that causes interference with or curtailment of the rights and freedoms of other persons or of the public interest.'[234] In addition, Article 30(1) of the Constitution decrees that the rights, freedoms and duties set out in the Bill of Rights do not render unlawful any existing law or prohibit the enactment of any law or the doing of any lawful act in accordance with such law for the purposes of:

i. ensuring that the rights and freedoms of other people or of the interests of the public are not prejudiced by the wrongful exercise of the freedoms and rights of individuals;[235]ensuring the defence, public safety, public peace,

227 (2000) AHRLR 297 (ACHPR 1999).
228 Ibid, para 80. *See* also *Civil Liberties Organization (in respect of Bar Association) v. Nigeria* Communication No. 101/1993 (ACHPR).
229 Application No. 5493/72 (Judgment of 7 December 1976), Series A No. 24.
230 Ibid, at para 49.
231 Application No. 9063/80 (Judgment of 24 November 1986), Series A No. 109.
232 Ibid, para 55.
233 *Attorney General v. Dickson Paulo Sanga* (Civil Appeal 175 of 2020) [2020] TZCA 371 (05 August 2020); [2020] 1 T.L.R 61 [CA].
234 Article 30(1) of the Constitution of Tanzania. This provision was applied in *DPP v. Daudi Pete* [1993] TLR 22.
235 Ibid, Article 30(2)(a).

public morality, public health, rural and urban development planning, the exploitation and utilization of minerals or the increase and development of property of any other interests for the purposes of enhancing the public benefit;[236]

ii. ensuring the execution of a judgment or order of a court given or made in any civil or criminal matter;[237]

iii. protecting the reputation, rights and freedoms of others or the privacy of persons involved in any court proceedings, prohibiting the disclosure of confidential information, or safeguarding the dignity, authority and independence of the courts;[238]

iv. imposing restrictions, supervising and controlling the formation, management and activities of private societies and organizations in the country;[239] or

v. enabling any other thing to be done which promotes, or preserves the national interest in general.[240]

In addition to the foregoing constitutional limitations, the right to freedom of assembly is limited by the Police Force and Auxiliary Services Act,[241] which requires that prior to holding an assembly one has to notify the police officer in charge of the area in which the assembly will be convened not less than forty-eight (48) hours before the scheduled time of the assembly or procession. The prior notification of the intended public assembly and public rallies has to be made to the police officer in charge of the area indicating the purpose in general, specifying time, route and place at which the impending assembly will be held.[242] Although the law allows the organisers of an impending assembly to proceed with the preparations for this event, the police officer in charge of the area may prohibit the assembly not to be held as notified;[243] particularly so, if the assembly 'is likely to cause a breach of the peace or to prejudice public safety or the maintenance of public order or to be used for any unlawful purpose.'[244]

236 Ibid, Article 30(2)(b). *See* particularly *DPP v. Daudi Pete*, op. cit (where the Court of Appeal interpreted this provision to the effect that no person shall enjoy his basic rights and freedoms in such a manner as to occasion the infringement or termination of the rights and freedoms of others or the public interest). Similarly, in *Mariam Mashaka Faustine & Others v. A.G. & Another* (Consolidated Misc. Civil Cause 88 of 2010) [2011] TZHC 2050 (15 December 2011), Juma, J. (as he then was) held that:

> 'We are […] satisfied that in as much as money laundering activities can undermine the integrity and stability of national and international financial institutions and systems, they have destabilizing effect posing national insecurity and threatens the economic security of the whole country. We are therefore of the opinion that section 148(5)(a)(v) of CPA which prohibits an admission to bail to accused persons charged with offence of money laundering is constitutional and in the best interests of defence, public safety, public order within the scope prescribed in paragraph (b) of sub-art. (2) of article 30 of the Constitution of United Republic of Tanzania.'

237 Ibid, Article 30(2)(c).
238 Ibid, Article 30(2)(d).
239 Ibid, Article 30(2)(e).
240 Ibid, Article 30(2)(f). *See* also *Kukutia Ole Pumbun & Another v. A.G. & Another* (1993) TLR 159.
241 Cap. 322 R.E. 2002.
242 Ibid, Section 43(1).
243 Ibid, Section 43(2).
244 Ibid, Section 43(3).

In practice, however, there have been several complaints raised around how members of political parties have been allowed to exercise their freedom of assembly in the forms of public rallies, meetings and demonstrations. In the past six years, there have been complaints that only the ruling party is allowed to freely conduct public rallies, meetings and demonstrations. In fact, it is in record that, in 2016, the government banned all political parties' public rallies, meetings and demonstrations 'outside election periods, sharply curtailing parties' ability to mobilize public support.'[245] Only MPs and Councillors were allowed to conduct public rallies and meetings in their respective constituents.[246] However, since to coming to power on 19 March 2021 following the death of her predecessor (the late Dr. John Pombe Joseph Magufuli) that occurred on 17 March 2021, President Samia Suluhu Hassan has reversed this stance and has taken positive steps to ensure that multiparty politics thrives and political parties are allowed to participate in political activities freely and in accordance with the law.[247] The most remarkable step was her establishment of a presidential task force (chaired by Prof Rwekaza Mukandara) to work and make recommendations on around nine (9) issues relating to multiparty politics, including holding of public rallies, meetings and assemblies.[248] The task force presented its report to the president in October 2022.

In relation to public rallies, meetings and assemblies organised by political parties; the task force made three concrete recommendations to the effect that: (*i*) such public rallies, meetings and assemblies organised by political parties should continue to take place in accordance with the relevant constitutional provisions and the law; (*ii*) such events should continue to be held without any impediments; and (*iii*) the relevant laws[249] should be amended to ensure that public rallies, meetings and assemblies organised by political parties are effectively conducted and organised.[250]

Another limb of complaint in relation to freedom of assembly has been levelled against the police's (ab)use of the discretion to prohibit public assemblies organised by political powers.[251] For example, Kilala complains that:

245 Freedom House, *Freedom in the World 2021 – Tanzania*, available at https://freedomhouse.org/country/tanzania/freedom-world/2021 (accessed 15 November 2022).

246 Jamhuri ya Muungano wa Tanzania, *Ripoti ya Kikosi Kazi cha Mheshimiwa Rais wa Jamhuri ya Muungano wa Tanzania Kilichofanyia Kazi Masuala Yanayohusu Demokrasia ya Vyama Vingi vya Siasa Nchini* (Dodoma: Serikali ya Jamhuri ya Muungano wa Tanzania, Oktoba 2022), pp. 5-6 ['*Ripoti ya Kikosi Kazi*'] (noting that: '*mwaka 2016 Vyama vya Siasa vilizuiwa kufanya mikutano ya hadhara, isipokuwa Wabunge na Madiwani katika majimbo na kata zao.*').

247 *See* particularly President Samia Suluhu Hassan's speech made to the National Assembly in Dodoma on 22 April 2021.

248 Notably, the nine (9) issues on which the Presidential Task Force on Multi-Party Democracy ('the Task Force') was mandated to work and make recommendations on were: (*i*) internal party meeting and public rallies; (*ii*) elections and electoral related processes; (*iii*) political reconciliation process so as to maintain justice, peace, tranquillity and national unity; (*iv*) women's participation in multi-party democracy; (*v*) civic education; (*vi*) corruption and code of conduct during electoral processes; (*vii*) subsidies to political parties; (*viii*) politics and public relations and communication; and (*ix*) the need for a new Constitution.

249 The identified laws are the Political Parties Act; the Police Force and Auxiliary Services Act; and the Political Parties (Code of Conducts) Regulations (GN. No. 954 of 2019).

250 *Ripoti ya Kikosi Kazi,* op. cit, p. 28.

251 *See*, particularly, Commonwealth Human Rights Initiatives, *Policing of Public Assemblies in Tanzania: Analysis of the Legal Framework* (2012); and Kilala, op. cit, pp. 42-51.

> Police always use their [discretion] based on limitations grounds but no demonstrative evidence to validate the reasons. This means the police limits the right concerning the time it chooses, place even decide which route the assembly may pass and the organisers have not the right to take part in this determination. The law tends to be prohibitive rather than regulatory. [...] For example, Police may claim the breach of the peace or public order but there is no justifiable evidence shows the threats of peace or any danger caused, as required under human right standards.[252]

It has been urged that the police in Tanzania need 'to ensure that when they use their discretion to prohibit public assemblies, they are using it objectively, and not arbitrarily.'[253] This is in line with what the Zambian Supreme Court noted in *Mulundika & 7 Others v. People*:[254] the discretion afforded to the Zambian police to prohibit public assemblies has been used unlawfully at times to "muzzle critics and opponents". In this case, the appellants challenged the constitutionality of certain provisions of the Zambian Public Order Act,[255] especially Section 5(4) which required any person to hold a peaceful assembly to obtain a permit and contravention of which is criminalised by Section 7 of the same Act. The challenge related both to the requirement of a permit and the prosecution based on the absence of such permit and it is grounded on the fundamental freedoms and rights guaranteed by Articles 20 and 21 of the Zambian Constitution.[256] A subsidiary challenge related to the exemption of certain offices from the need to obtain a permit which was alleged to be discriminatory contrary to Article 23 of the Zambian Constitution.

The Zambian Supreme Court Found Section 5(4)[257] of the impugned law to be unconstitutional, holding that: 'Quite apart from the possibility of unconstitutionally denying the fundamental rights, the absence of adequate and objective guidelines in subsection 4 leaves it seriously flawed.' Interestingly, the Zambian Supreme Court quoted with approval the holding of the Court of Appeal of Tanzania in *Pumbun & Another v. Attorney General & Another*[258] on

252 Kilala, ibid, pp. 42-3.
253 Commonwealth Human Rights Initiatives, op. cit.
254 *Mulundika & 7 Others v. People* (S.C.Z. Judgment 25 of 1995) [1996] ZMSC 26 (09 December 1996).
255 Public Order Act, Cap.104 (Zambia).
256 In particular, Article 21 of the Zambian Constitution guarantees the freedoms of assembly and association.
257 Section 5(4) of the Zambian Public Order Act provided expressly that:

> '(4) Any person who wishes to convene an assembly, public meeting or to form a procession in any public place shall first make application in that behalf to the regulating officer of the area concerned, and, if such officer is satisfied that such assembly, public meeting or procession is unlikely to cause or lead to a breach of the peace, he shall issue a permit in writing authorising such assembly, public meeting or procession and specifying the name of the person to whom it is issued and such conditions attaching to the holding of such assembly, public meeting or procession as the regulating officer may deem necessary to impose for the preservation of public peace and order.'

Notably, under Section 5(1), a "regulating officer" was any police officer of or above the rank of Sub-Inspector appointed and gazetted by the Inspector General of Police 'to be the regulating officer for the purposes of this section in respect of such area as the Inspector General of Police may, by the same or any other *Gazette* notice, define.'
258 *Kukutia Ole Pumbun & Another v. Attorney General & Another* (1993) 2 L.R.C. 317.

the need for 'adequate guidelines so that the exercise of a discretion by the competent authorities should have the scope indicated and the manner of its exercise set out in the affected law with sufficient clarity.'[259] According to the Zambian Supreme Court, in this case the challenge was not of the act of the regulating officer 'in refusing or neglecting to process a permit for the particular gathering for which the appellants were arrested'; what was challenged was 'the vires of the subsection [(4)] itself, among others, because the power granted to the regulating officer [was] unguided and [allowed] for arbitrary decisions without effective control.'

According to the Court, there may be situations of unconstitutionality 'where it is the official who acts *ultra vires* the constitution when the law itself within constitutional limits. In the instant case it is the pervasive threat inherent in the very existence of the offending subjection which constitutes the danger to the relevant constitutional freedoms.' The Court found that there were 'no adequate guidelines in subsection 4.' Accordingly, all meetings and processions required prior permits and this law was 'routinely contravened when we have for example funeral processions and other gatherings.' In the Court's considered view, the frames of the Zambian Constitution 'could not have contemplated criminalisation of gatherings in this wholesale fashion by some surviving colonial statute.' In addition, the Court found the impugned provision to be 'highly subjective and expressed on negative terms when it speaks of the regulating officer issuing a permit only if "satisfied that such assembly, public meeting or procession is unlikely to cause or lead to a breach of the peace".' Therefore, the Zambian Supreme Court held that:

> The implication is that the permit must be refused unless the regulating officer is able to satisfy himself or herself to the contrary. *It is difficult to imagine a clearer recipe for possible arbitrariness and abuse. The constitutional arrangements for democracy can hardly survive if the free flow of ideas and information can be torpedoed by a misguided regulating officer*. [Emphasis supplied].

Notably, the Zambian Supreme Court, in *Mulundika*, quoted with approval an authoritative reasoning of Supreme Court of Ghana in *Patriotic Party v.*

259 In *Pumbun*, the Court of Appeal held that:

'[…] a law which seeks to limit or derogate from the basic right of the individual on grounds of public interest will be saved by article 30(2) of the Constitution only if it satisfies two essential requirements. First, such a law must be lawful in the sense that it is no arbitrary. It should make adequate safeguards against arbitrary decisions, and provide effective controls against abuse by those in authority when using the law. Secondly, the limitation imposed by such law must not be more than is reasonably necessary to achieve the legitimate object. This is what is also known as the principle of proportionality. The principle requires that such law must not be drafted too widely so as to net everyone including even the untargeted members of society. If the law which infringes a basic right does not meet both requirements such law is not saved by article 30(2) of the constitution, it is null and void. And any law that seeks to limit fundamental rights of the individual must be construed strictly to make sure that it conforms with these requirements otherwise the guaranteed rights under the constitution may easily be rendered meaningless by the use of the derogative or claw back clauses of that very same constitution.'

Inspector-General of Police.[260] In this case, the Supreme Court of Ghana was dealing with a constitutional challenge against a Ghanaian legislation that made it a requirement to obtain a permit prior to holding an assembly. In that case, Hayfron-Benjamin, JSC, opined that:

> [We have that such legislation that] creates a prior restraint on the freedom of the citizen to form or hold meeting or procession and in terms of Article 21(d) also to demonstrate in a public place. *A prior restraint is an injunction prohibiting the freedom of assembly procession or demonstration*, whether such injunction or prohibition is imposed by statute or by order of court [...] the *citizens' freedoms may be restricted by law on the grounds stated in the constitution but they cannot be denied. Any such denial will be unconstitutional and void*.[261] [Emphasis supplied].

According to the Zambian Supreme Court in *Mulundika*, there were no any effective controls on the exercise of the power to grant or refuse a permit under the impugned provision such that the regulating officer was 'not required to give reasons for refusal.' Besides, the Court found that there was 'no procedure provided to act as a safeguard for an aggrieved unsuccessful applicant' that was reasonable, fair and just. According to the Court, fundamental constitutional rights 'should not be denied to a citizen by any law which permits arbitrariness and is couched in wide and broad terms.'

The Court further held that although even in the best of the democratic traditions, some regulation of public gatherings is required of giving directions and imposing conditions, if any, 'for the sake of upholding public order and preserving the peace'; such regulation should be expressly conditioned by safeguards provided by the law to avoid arbitrary refusal of permits to assemble peacefully. As such, the requirement 'of prior permission to gather and to speak, which permission can be denied sometimes for good and at other times for bad cause not contemplated by the constitutional derogation, directly affects the guaranteed freedoms of speech and assembly.' Rejecting the argument on behalf of the State that the impugned subsection cannot be *ultra vires* because there is a possibility of using it strictly for the authorised purposes, the Zambian Supreme Court held that:

> Unfortunately, experience teaches and it is sadly not hypothetical that in this country, the requirement for a permit to gather and speak has

260 *Patriotic Party v. Inspector-General of Police,* Writ No. 4 of 1993 (Unreported), Judgement of the Supreme Court of Ghana).
261 Ibid, pp. 41-42 of the transcript judgement.

been used since 1953 to muzzle critics and opponents as well as alleged troublemakers. It has also been used to deny permission on grounds that had nothing to do with securing public order and safety. For example, there was much litigation in our courts during the recent transition to plural politics engendered by denials of permits on spurious grounds.

Similarly, in *Re Munhumeso & Others,*[262] the Zimbabwean Supreme Court dealt with the constitutionality of Section 6 of Law and Order (Maintenance) Act under which the applicants were charged with organising and holding a public procession for which a permit had not been granted. The applicants, who were members of the Zimbabwe Congress of Trade Unions, had unsuccessfully applied to a regulating officer for a permit which was denied without explanation. They held their procession and the six applicants were arrested. Section 6 was deemed to be *ultra vires* the constitution and invalid. Commenting upon the requirement of a permit, the Zimbabwean Supreme Court found that Section 6 was plainly at variance with the enjoyment of the freedoms of expression and assembly protected under Sections 20 and 21 of the Zimbabwean Constitution. In considering whether such a law was reasonably justifiable in a democratic society, the Court held found the impugned provision was unconstitutional because, when certain features were taken cumulatively, the provision was not reasonably justifiable in a democratic society.

According to the Zimbabwean Supreme Court, the features were: (*i*) the uncontrolled nature of the discretionary power vested in the regulating authority; (*ii*) the fact that the regulating authority was not obliged, when imposing a ban, to take into account whether disorder or breach of the peace could be averted by attaching conditions upon the conduct of the procession such as a relating to time, duration and route; (*iii*) the fact that although the rights to freedom of expression and assembly are primary and the limitations thereon secondary, the impugned Section 6(2) reversed the order, in effect denying such rights unless the public procession was unlikely to cause or lead to a breach of the peace or public disorder; and (*iv*) the criminalisation of a procession held without a permit irrespective of the likelihood or occurrence of any threat to public order.

Although, the provisions of Sections 43-46 of the Police Force and Auxiliary Services Act have been criticised as curtailing the freedoms of assembly and expressly; the High Court has recently upheld these provisions as constitutional.

262 Op. cit.

In a judgement delivered on 18 March 2020[263] in *Francis Muhingira Garatwa & Others v. A.G.*,[264] the High Court determined the constitutionality of Sections 43-46 of the Police Force and Auxiliary Act and Section 11(2), (4), and (5)-(7) of the Political Parties Act. The applicants argued that the impugned provisions infringed on their rights to a fair hearing and to be heard, freedoms of expression, association and assembly as well as the right to participate in the country's public affairs. In the course of the hearing this matter, the court determined two main issues: (*i*) whether the provisions of the Police Force and Auxiliary Services Act and the Political Parties Act were unconstitutional; and (*ii*) whether these provisions should be removed from the statute book without giving the government time to amend.

The Court found, however, that the impugned provisions were constitutional. According to the High Court, Section 43(1) of the Police Force and Auxiliary Services Act 'does not curtail assemblies and processions in public places'; rather, it provides for 'the procedure and time limit within which whoever interested of convening, collecting or organizing any assembly or procession in public places has to comply with.' The Court further held that a careful reading of the decisions of the Court in *Kukutia Ole Pumbun* and *Daudi Pete* in line with the cherished Article 30 of the Constitution of Tanzania, reveals that Section 43(1) 'does not confer arbitrary powers to police officers. It only requires whoever [is] intending to convene, collect, form or organize a procession in a public place to notify the police officer in-charge of that area within 48 hours.' According to the Court, the petitioners 'failed to establish how such provision curtails the right to freedom of expression, association and peaceful assembly.'

Another point that the Court noted is that, under the impugned Section 43(2), a person who submits a notification is at liberty to proceed with the procession unless he receives an order from the concerned police officer restraining such assembly or procession. As such, the Court opined that: 'The point of misuse of powers by a police officer in charge cannot be decided in generality. It has to be looked at on a case to a case basis.' Furthermore, the Court held that the provisions of Section 43(3) 'does away with arbitrary powers of a policer officer' in that a "stop order" for the assembly or procession can be issued only when the concerned police officer is satisfied that: (*i*) the assembly or procession 'is likely to cause a breach of the peace'; (*ii*) the assembly or procession 'is likely to prejudice the public safety'; and (*iii*) the assembly or procession 'is likely to

263 Subsequently, another constitutional petition was lodged in the High Court challenging the constitutionality of the same provisions: *Fortunata Ntwale v. Attorney General* (Misc. Civil Cause No. 13 2019) [2020] TZHC 2503; (17 July 2020). However, on 17 July 2020, this matter was dismissed for being *res judicata*.
264 *Francis Muhingira Garatwa & Others v. Attorney General* (Consolidated Misc. Civil Cause No. 4 of 2018 & Misc. Civil Cause No. 8 of 2018) [2020] TZHC 2861.

cause the maintenance of public order to be used for any unlawful purpose.' Therefore, the Court concluded, in relation to Section 43, that:

> In this case, *the petitioners have not pointed out a specific scenario in which any police officer has arbitrarily denied anyone a right to assembly or procession. The Court cannot issue a buoyant order in vacuum.* The *petitioners' allegation* that Section 43 *is too wide, vague and unclear lacks any justification.* [Emphasis supplied].

In respect of Section 44, the High Court held that this provision 'does not curtail the freedoms enshrined under Articles 13(6) (a), 18, 20(1), 21(2) and 29(2) of the Constitution in that it imposes conditions precedent for the police officer in charge 'to stop or prevent the continuance of assembly or procession.' These conditions are: (*i*) the assembly or procession breaches the peace; (*ii*) the assembly or procession prejudices the public safety; and/or (*iii*) the assembly or procession prejudices the maintenance of peace and order. According to the Court, there is 'nothing illegal with the conditions set out under the provisions of Section 44.' If the police officer in-charge violates the conditions set out under Section 44 'that has to be dealt with on a case to case basis; regard being had to availability of other adequate means of redress.'

Similarly, the High Court found Sections 45 and 46 of the Police Force and Auxiliary Service Act to be constitutional. Whereas Section 45 creates an offence of unlawful assembly or procession against an order for dispersal; Section 46 provides for penalties to any person who neglects or refuses to obey any order given under the provisions of subsection 4 of Section 43 or 44. It was the view of the Court that, if the provisions of Sections 45 and 46 'are to be found unconstitutional, as the petitioners want this Court to hold, it will create on anarchy because persons will be defying lawful order of the police officers in charge and no any criminal charges and penalties will be levelled against them.'

Moreover, the Court found that the impugned provisions of Section 11(2), (4), and (5)-(7) of the Political Parties Act safeguard and control against arbitrary decisions and abuse of power. In principle, Section 11 of the Political Parties Act provides, in what the Court found to be plain, precise and unambiguous wording, for the rights and privilege, and meetings of political parties. In particular, Section 11(2) applies by giving mandatory application and effect of Sections 43, 44, 45 and 46 of the Police Force and Auxiliary Services Act.

On their part, the provisions of Section 11(4) and (7) of the Political Parties Act mandate a police officer in-charge to stop an assembly only if: (*i*) there is a previous notification for the meeting, other function or procession in the same place at the same time; (*ii*) the meeting or procession is intended for unlawful purpose; or (*iii*) the meeting is likely or intended to cause breach of peace or to prejudice the public safety of the area.

According to the High Court, the foregoing are lawful conditions, which provide 'safeguard and control against arbitrary decisions and abuse of power.' The Court opined that a person or political leader has 'the right to complain if a police officer in charge either stops the meeting or procession arbitrarily or abuses the authority when using the provision.' Even if such complains are proved, 'the provision will remain valid and within the purview of the Constitution. It is the act of the police officer in charge which can be declared illegal and therefore challenged.'

Accordingly, in determining the 2nd issue – whether the impugned provisions should be removed from the statute book without giving the government time to amend whether these provisions should be removed from the statute book without giving the government time to amend – the Court held that these provisions 'are constitutional and do not allow violation of human rights. As such, there are no good reasons for expunging the same provisions from the statutes.'

In light of the recommendations made recently by the presidential task force to amend the Police Force and Auxiliary Service Act and the Political Parties Act as well as per the High Court's findings in *Garatwa*, it is expected that these laws will be amended to ensure that the safeguards on the freedom of assembly enunciated in *Mulundika* are also incorporated in Tanzania's laws regulating the exercise of participation rights.

Despite the foregoing limitations, all persons (including women and men) are entitled to the foregoing participation rights and freedoms on equal footing. As such, citizens' participation in internal party meetings and public rallies in Tanzania is constitutionally entrenched, and for that matter, laws relating to the conduct of intra-party political participation of citizens should be framed in light of these constitutional guarantees. Notably, Article 20(3) of the Constitution of Tanzania vests power in Parliament to enact legislation which 'makes provisions for ensuring that political parties operate within the

limits and adhere to the conditions set out in sub article (2) concerning the freedom and the right of persons to associate and assemble.' In exercising this power, in 1992, Parliament enacted the Political Parties Act.[265] In particular, the Political Parties Act (1992) provides for supervision and regulation, formation, registration, and governance of political parties in Tanzania.

3.6. Legal Supervision and Regulation of Political Parties

In order to ensure orderly and organised management and functioning of political parties in Tanzania, the Political Parties Act establishes the Office of the Registrar of Political Parties (ORPP).[266] The ORPP is headed by the Registrar who is assisted by the Deputy Registrar, both of whom are appointed by the President of Tanzania.[267] In general, the Registrar is responsible for the registration of political parties 'in accordance with the provisions of this Act' and performs 'any other functions as conferred by this Act.'[268] In particular, and without prejudice to Section 4(4) of the Political Parties Act, the functions of the ORPP are listed down in Section 4(5) of this law; that is, to:

a. supervise the administration and implementation of this Act;
b. monitor intra-party elections and nomination process;
c. disburse and monitor accountability of Government subvention to political parties which qualify under this Act;
d. provide guidelines and monitor income and expenditures of political parties and accountability of party resources;
e. provide civic education regarding multiparty democracy, laws administered by the Registrar and related matters;
f. regulate civic education provided to political parties;
g. advise the Government on issues related to political parties;
h. facilitate communication between political parties and the Government;
i. undertake research on political parties, multiparty democracy and political parties financing; and
j. undertake any other functions conferred by this Act or any other written law.

In the performance of the foregoing functions, the Registrar is obliged, from time to time, to consult with the Minister, for the time being, responsible for matters relating to political parties.[269] In addition, the Registrar is vested with

265 Cap. 258 R.E. 2019.
266 Section 4 of the Political Parties Act, Cap. 258 R.E. 2019.
267 Ibid, Section 4(2) and (3).
268 Ibid, Section 4(4).
269 Ibid, Section 4(6).

the function to regulate the offering of civic education, capacity building and training,[270] particularly in terms of approving or disapproving the training or capacity building programme.[271] It should be noted, however, that the function "to regulate" civic education has been held by the EACJ, in *Mbowe v. Tanzania*,[272] to be constructed in the manner that makes it imprecise and lacks clarity, rendering this provision to fail to meet the first test of the three-tier test[273] developed in *MCT v. Tanzania*[274] in determining whether or not limitations of rights freedoms brought forth by a law are legitimate, objective and necessary in a democratic society.

Moreover, in exercising his/her supervisory role, the Registrar may also 'suspend or cancel the registration of any political party which has contravened any of the provisions of this Act or which has otherwise ceased to qualify for registration under this Act.'[275] In discharging this function, the Registrar cannot suspend or cancel the registration of any party unless s/he has: (*i*) in writing, informed the party concerned of the contravention or the loss of qualification and of the intention to cancel the registration;[276] (*ii*) received or failed to receive, within the period prescribed by him, any representations from the party concerned;[277] and (iii) submitted to the Minister the intention 'to suspend or cancel the registration of the party together with any representations made by the party.'[278] However, the Registrar cannot cancel registration of a political party 'if the period during which the General Elections would be held does not exceed twelve months.'[279]

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t should be noted that, although the decision of the Registrar on the cancellation of the registration of any political party is final and cannot be the subject of appeal in any court of law,[280] an aggrieved party may resort to judicial review in the High Court to challenge such decision of the Registrar[281] in terms of Article 13(6)(a) of the Constitution of Tanzania, Section 17 and 18 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act,[282] Section 2(3) of the Judicature and Application of Laws Act,[283] and the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees)

270 Ibid, Section 5A.
271 Ibid, Section 5A(2).
272 *Mbowe v. Tanzania*, op. cit.
273 Ibid, para. 73.
274 *MCT v. Tanzania*, op. cit.
275 Section 19(1) of the Political Parties Act.
276 Ibid, Section 19(2)(a).
277 Ibid, Section 19(2)(b).
278 Ibid, Section 19(2)(c).
279 Ibid, Section 19(3).
280 Ibid, Section 20(1).
281 Ibid, Section 20(2).
282 Cap. 310 R.E. 2002.
283 Cap. 358 R.E.2002.

Rules (2014) (henceforth, 'the Judicial Review Rules').[284]Formation of Political Parties.

Before the 8th Constitutional Amendments were introduced in 1992, no person was allowed to form a political part to operate in Tanzania alongside the ruling party, CCM. That was only possible after the introduction of multi-party politics in 1992. Currently, individuals can exercise their right to associate and form a political party as guaranteed in Article 20 of the Constitution of Tanzania. In particular, Sections 6A and 6B of the Political Parties Act provide statutory parametres within which persons wishing to exercise this right can form a political party in Tanzania. Under Section 6A(1), a political party may only be formed if it does not further objectives and purposes which are not contrary to the Constitution of Tanzania, the Constitution of Zanzibar or any other written law in the United Republic of Tanzania.

As such, a political party should be managed by adhering to the two Constitutions, the Political Parties Act, its constitution, principles of democracy and good-governance, non-discrimination, gender and social inclusion.[285] In addition, registered political parties are obliged to promote the Union, the Zanzibar Revolution, democracy, good governance, anti-corruption, national ethics and core values, patriotism, secularism, *uhuru* torch, national peace and tranquillity, gender, youths and social inclusion in the (*i*) formulation and implementation of its policies;[286] (*ii*) nomination of candidates for elections;[287] and (*iii*) election of its leaders.[288]

In terms of qualifications for forming and registering a political part, Section 6B of the Political Parties Act requires that persons will qualify to apply for registration of a political party if:

a. that person is a citizen of the United Republic by birth and both parents of that person are citizens of the United Republic;
b. that person is a person of sound mind;
c. that person is undischarged bankrupt having been declared by the court of competent jurisdiction;
d. that person has attained or is above the age of eighteen years;
e. that person can read and write in Kiswahili or English: and
f. that person is a person who, within five years prior to the date of submission of application has not been convicted or sentenced for commission of an

284 GN No. 324 of 2014.
285 Section Section 6A(2) of the Political Parties Act.
286 Ibid, Section 6A(5)(a).
287 Ibid, Section 6A(5)(b).
288 Ibid, Section 6A(5)(c).

offence of dishonesty, economic crime, corruption, tax evasion or offences relating to gender-based violence.

3.6.1. Registration of Political Parties

With the introduction of multi-party politics in Tanzania in 1992, all political parties[289] must be registered under the law. Notably, in terms of Section 7(2) of the Political Parties Act, the ruling party (CCM) was deemed to have been fully registered as a political party and issued with a certificate of registration in accordance with this Act on the coming into effect of this Act. Under the current political system in Tanzania, the registration of political parties is particularly significant in that every candidate for the Presidency, Member of Parliament, or Councillor must be nominated or sponsored by a political party.[290] This means that because no independent candidates are permitted to stand for elections in respect of these elective positions, for person wanting to participate in the governance of the public affairs in Tanzania, such person must be a member of duly registered political party.

a. Political Parties Register

In order to ensure smooth registration of political parties, the law requires the ORPP to maintain a Political Parties Register in which matters and particulars of political parties are entered.[291] This Register contain information and particulars relating to: (*i*) a register of political parties;[292] (*ii*) a register of national leaders;[293] (*iii*) a register of members of political parties' national organs;[294] and (*iv*) a register of members of board of trustees of political parties.[295]

b. Registration of Political Parties

Currently, the registration of political parties is regulated by the Constitution of Tanzania (1977) and the Political Parties Act (1992) with the administrative details being set out in the Political Parties (Registration) Regulations (1992).[296] In terms of Section 4(4) of the Political Parties Act, the Registrar is responsible for the registration of political parties 'in accordance with the provisions of this Act.' Before a political party is fully registered it has first to obtain provisional registration, which means there are two stages of registration of a political party in Tanzania.[297]

289 Section 3 of the Political Parties Act defines a "political party" as 'any organized group formed for the purpose of forming a government or a local government authority within the United Republic [of Tanzania] through elections or for putting up or supporting candidates to such elections.'
290 Articles 39(1)(a), 47(4)(c), and 67(1)(b) of the Constitution of Tanzania.
291 Section 8A(1) of the Political Parties Act.
292 Ibid, Section 8A(2)(a).
293 Ibid, Section 8A(2)(b).
294 Ibid, Section 8A(2)(c).
295 Ibid, Section 8A(2)(d).
296 Political Parties (Registration) Regulations (G.N. No. 111 of 1992).
297 Section 8(1) of the Political Parties Act.

i. Provisional Registration of Political Parties

It is the law that every political party must first be provisionally registered[298] and issued with a certificate of provisional registration upon fulfilling the conditions prescribed in Section 9.[299] In terms of Section 9(1) of the Political Parties Act, a party qualifies for full registration if, in addition to meeting the terms prescribed by Article 20(2) of the Constitution of Tanzania if: (*i*) its founding members have applied in the prescribed manner; (*ii*) a copy of its constitution has been included; (*iii*) its membership is open to all Tanzanians without discrimination on account of gender, disability, religious belief, race, tribe, ethnic origin, profession or occupation; and (*iv*) the election of its leaders at the general elections is open to both gender.

Where a party meets these conditions, it is issued with a certificate of provisional registration.[300] Such provisional registration is valid for 180 days, during which parties may apply for full registration.[301] It should be noted that, political parties with provisional registration are entitled to hold public political meetings to publicise their parties and recruit members and to the assistance of the security forces in ensuring that these gatherings are held peacefully and orderly, providing that the police officer in charge of the area where a meeting is to be held is informed. Provisionally registered parties are not permitted to put up candidates for election or to campaign for the candidates of other parties.[302]

ii. Full Registration of Political Parties

A party that desires to qualify for full registration must first be provisionally registered.[303] Secondly, it must have obtained signatures from at least two hundred members[304] who are qualified to be registered as voters for the purpose of parliamentary elections from at least half of regions of the United Republic of Tanzania out of which at least two regions are in Tanzania Zanzibar, one region being from Unguja and the other region from Pemba.[305] Thirdly, the concerned party should have submitted to the Registrar, for verification, names of its members.[306]

Fourthly, such party must have submitted to the Registrar particulars in

298 This is also the case in Kenya. *See* particularly Section 6 of the Kenya Political Parties Act (2011).
299 Section 8(2) of the Political Parties Act.
300 Ibid, Section 8(2).
301 Ibid, Section 8(3)-(4).
302 Ibid, Section 11(1).
303 Ibid, Section 10(a).
304 Notably, this requirement was taken from the Nyalali Commission's recommendations. *See* Nyalali Commission Report, op. cit, paras. 451-651.
305 Section 10(b) of the Political Parties Act.
306 Ibid, Section 10(c).

relation to its head office and subhead office on the basis that if the head office is established in Mainland Tanzania, the subhead office should be established in Tanzania Zanzibar[307] and vice versa. Fifthly, it has, through its constitution, restricted its members from having dual party membership.[308] Sixthly, it has submitted the names of the national leadership of the party and such leadership draws its members from both Tanzania Zanzibar and Mainland Tanzania.[309] Seventhly, it has submitted to the Registrar location of its head office within the United Republic of Tanzania and a postal address to which notices and other communications may be sent.[310]

A party that has been fully registered is issued certificate of registration[311] and is obliged to observe and maintain conditions for registration.[312]

iii. Contents of the Constitution of a Political Party

The law requires constitutions of political parties to provide for all matters specified in the First Schedule to the Political Parties Act.[313] According to the First Schedule, the contents of constitutions of political parties are:

a. name of political party, abbreviation (if any), symbol (logo) and description of the party flag;
b. objective and ideology of the political party;
c. qualification and disqualification for membership of the party;
d. admission and cessation of members;
e. rights and duties of members;
f. disciplinary measures against members and leaders;
g. intra-party disputes resolution mechanism;
h. organization and structure of the party;
i. mandate to make and amend party constitution;
j. mandate to make and amend party rules;
k. powers and functions of each party organ and leader;
l. delegations of powers of each party organ and leader;
m. procedure for election of party leaders;
n. mandate and procedure of filling vacant posts;
o. frequency and quorum for meetings;
p. structure for management of the party properties;
q. number, nomination procedure and cessation of members of board of trustees; and
r. dissolution of the party and the disposal of its property.

307 Ibid, Section 10(d).
308 Ibid, Section 10(e).
309 Ibid, Section 10(f).
310 Ibid, Section 10(g).
311 Ibid, Section 11(3).
312 Ibid, Section 10B(1).
313 Ibid, Section 8D(1).

Where the Registrar is satisfied that a constitution of a political party is not in compliance with the foregoing requirements, s/he may, by notice in writing, require such party to amend its constitution within six months from the date of notice to ensure compliance.[314] Notably, the said notice 'shall specify areas of non-compliance, nature of the amendment and the reason for such amendment.'[315]

c. Registration of National Leaders of Political Parties

After their respective parties have been provisionally or fully registered under the provisions of Section 7 or 9 of the Political Parties Act (respectively), "national leaders"[316] of such political parties must be required to fill in and submit a special form for national leaders to the Registrar for registration in the register of political parties kept and maintained by the Registrar.[317] Notably, a person who is not registered as a national leader is not allowed to 'engage in any political activities in the name of a political party for which that person purports to be a leader or a member.'[318] It is an offence to engage in such political activities without being registered, which on conviction attracts a fine of not less than five hundred thousand shillings but not exceeding two million shillings or to imprisonment for a term of not less than three months but not exceeding twelve months or to both.[319]

d. Maintenance of Registers of Party Leaders and Members

Every political parties is obliged to maintain updated registers for: (*i*) members of the party;[320] (*ii*) leaders of the party at each party administrative level;[321] and (*iii*) members of party organ at each party administrative level.[322] The Registrar has power, by notice in writing, to require a political party to submit any of registers mentioned herein above, or any particulars relating to such register, within a period stated in the notice.[323] A political party which fails to comply with the foregoing requirements may be suspended in accordance with provisions of the Political Parties Act.[324] If the contravention is occasioned by a leader of political party, such leader will be held to have committed an offence, which, on conviction, attracts a fine of not less than one million shillings and not exceeding three million shillings or to imprisonment for a term of not less

314 Ibid, Section 8D(2).
315 Ibid, Section 8D(3).
316 Under Section 3 of the Political Parties Act, "national leader" means 'a national leader of a political party as prescribed in the constitution of political party.' In particular, Section l0A sets out qualifications for a person to contest for election or nomination as a leader of a political party.
317 Ibid, Section 8B(1).
318 Ibid, Section 8B(2).
319 Ibid, Section 8B(3).
320 Ibid, Section 8C(1)(a).
321 Ibid, Section 8C(1)(b).
322 Ibid, Section 8C(1)(c).
323 Ibid, Section 8C(2).
324 Ibid, Section 8C(3).

than three months but not exceeding six months or to both.[325]

e. Suspension and Cancellation of Registration of Political Parties

The registration of a political parties goes hand in hand with its obligation to observe conditions for registration laid down in the law.[326] Where a political party is in contravention of the conditions of registration, or otherwise such party ceases to qualify as a political party, the Registrar may suspend or cancel its registration.[327] Before the registration of a party is cancelled the Registrar must have first: (*i*) informed, in writing, the party concerned of the contravention or the loss of qualification and of the intention to cancel the registration;[328] (*ii*) received or failed to receive, within the period prescribed by him/her, any representations from the party concerned;[329] and (*iii*) submitted to the Minister responsible for political parties affairs the intention to suspend or cancel the registration of the party together with any representations made by the party.[330]

If the concerned party does not respond within the laid down period, or the Registrar decides to proceed with the cancellation after receiving the response, he must submit the decision with the response, if any, to the responsible Minister. If the Minister agrees, then the registration may be suspended or cancelled, as the case may be. However, the Registrar cannot exercise his powers to cancel the registration of a political party if the period during which the General Elections would be held does not exceed twelve months.[331]

f. Recourse Against the Decision of the Registrar's Decision on Registration

The decision of the Registrar to register or not to register, suspend or cancel the registration of any political party is final and cannot be the subject of appeal in any court of law.[332] However, an aggrieved party may resort to judicial review[333] in the High Court to challenge the propriety, or otherwise, of such decision of the Registrar in terms of Article 13(6)(a) of the Constitution of Tanzania, Section 17 and 18 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act,[334] Section 2(3) of the Judicature and Application of Laws Act,[335] and the Judicial Review Rules.[336]

325 Ibid, Section 8C(4).
326 Ibid, Section 10B(1).
327 Ibid, Section 19(1).
328 Ibid, Section 19(2)(a).
329 Ibid, Section 19(2)(b).
330 Ibid, Section 19(2)(c).
331 Ibid, Section 19(3).
332 Ibid, Section 20(1).
333 Ibid, Section 20(2).
334 Op. cit.
335 Op. cit.
336 Op. cit.

3.6.2. Privileges of Registered Political Parties

After provisional or full registration, political parties enjoy several rights and privileges under the Political Parties Act. In particular, every political party provisionally or fully registered is entitled: (*i*) to hold and address public meetings (subject to Sections 43, 44, 45 and 46 of the Police Force and Auxiliary Services Act and Section 11(2) and (4)-(8) of the Political Parties [337]) in any area in the United Republic of Tanzania after giving notification to the police officer in charge of the area concerned for purposes of publicising itself and soliciting for membership;[338] (*ii*) to hoist its flag;[339] and (*iii*) to the protection and assistance of the security agencies for the purposes of facilitating peaceful and orderly meetings.[340] However, provisional registration does not entitle any political party 'to put up a candidate or to campaign for any candidate' in any election relating to MPs, members of the Zanzibar House of Representatives, the presidency election or LGAs.[341] In addition, two or more political parties fully registered in accordance with the provisions of the law are entitled to form a coalition before or after general election in terms of Section 11A of the Political Parties Act, in which case they must submit to the Registrar an authentic copy of the coalition agreement entered into between or among such parties.[342]

3.6.3. Financing of Political Parties

One of the proposals taken from the Nyalali Commission was to ensure that fully registered parties should be granted subventions for running their routine businesses.[343] Prior to 1996, all political parties were provided with public funding in the form of subvention.[344] However, with the passage of the Political Parties (Amendment) Act in 1996,[345] subventions were restricted only to political parties with representation in Parliament.[346] In 2000, public funding of political parties ceased entirely on the ground that the State could not afford it[347] only to be restored later. Subsequent to the abolition of public funding, a system of funding of political parties (as well as other civil society bodies) through a foreign donor basket fund was implemented, with funds coming from European countries and Canada.[348]

In terms of Section 13(1)(d) of the Political Parties Act (2019), one of the sources

337 Section 11(2) of the Political Parties Act. As considered above, the provisions of Sections 43, 44, 45 and 46 of the Police Force and Auxiliary Services Act and Section 11(2) and (4)-(8) of the Political Parties were held to be constitutional in *Francis Muhingira Garatwa & Others v. A.G.,* op. cit; *cf. Fortunata Ntwale v. A.G.,* op. cit.
338 Ibid, Section 11(1)(a).
339 Ibid, Section 11C.
340 Ibid, Section 11(1)(b).
341 Ibid, proviso to Section 11(1).
342 Ibid, Section 11A(1).
343 Nyalali Commission Report, Vol. I, op. cit, para. 449.
344 *See* Section 13(1)(d) the original text of the Political Parties Act (1992).
345 Act No. 11 of 1996.
346 EISA, "Tanzania: Party Funding and Finances," African Democracy Encyclopaedia Project. Available at https://www.eisa.org/wep/tanparties2.htm (accessed 12 November 2022).
347 EISA, "EISA Election Observer Mission Report: Tanzania Presidential, National Assembly and Local Government Elections," 14 December 2005. Available at https://www.eisa.org/pdf/tzomr2005.pdf (accessed 12 November 2022).
348 Ibid.

of funds of a fully registered political party is subvention from the Government. Under Section 16(1) of this law, the Government is obliged 'to disburse up to not more than two per centum of the annual recurrent budget less the amount payable in defraying the national debt in the grant of subventions to political parties in pursuance of the provisions of this Act.' Conditions for a political party to qualify for government subsidy, which are set out in Section 16(3) of the Political Parties Act, are two-fold: (*i*) an eligible party must be fully registered;[349] and (*ii*) it must have MPs or members of local authorities elected in the previous elections.[350] However, apart from restricting subventions to only parties with MPs, these provisions are not gender responsive in ensuring that the subsidies allocated to qualifying parties assist women in participating in multi-party democracy on equal footing with men.[351]

3.7. Citizens' Participation in Multi-Party Electoral Processes

Conventionally, election is the major route through which citizens can be effectively and equally represented in political decision-making processes. Elections normally are held within definitive electoral systems different countries around the world have established for that purpose.

3.7.1. Overview of an Electoral System

An electoral system is a set of rules governing an election in any given country[352] that defines the integration of elected public officials and the relation between formal political parties in a country, in a State, or in a group of countries. It is usually set out in a constitutional and/or legal framework, which clearly establishes the type of electoral system and the regular scheduling and conduct of elections.[353]

Broadly speaking, an electoral system can further be defined as the regulation of the relation between voting and the elected officials, which renders the electoral system as the way in which votes can be translated into elected representatives. In effect, such regulation results in the enactment of very important legislative decisions.[354] Almost all electoral systems allocate (at least some) legislative seats by territorially-defined constituencies. In addition, the definition of constituency boundaries is crucial in that victory or defeat in an

349 Section 16(3)(a) of the Political Parties Act.
350 Ibid, Section 16(3)(b).
351 Sulley, C.R., "Women in Leadership and Decision Making in Tanzania: A Review of Existing Studies," WiLDAF Tanzania, December 2021, pp. 6, 26.
352 Ware, A., in *International Encyclopedia of the Social & Behavioral Sciences* (2nd Edn.), 2015.
353 ADC and EISA, *Principles for Election Management, Monitoring, and Observation*, 8
354 ACE, "The Legal Framework," available at https://aceproject.org/ace-en/topics/lf/lfb/lfb01 (accessed 11 November 2022).

election depends upon a constituency's voters' characteristics.[355]

Worldwide, electoral systems can be plural in nature, based on proportional representation (PR), or mixed systems.[356] Whereas plurality or majority electoral systems can either be determined on simple majority or first-past-the-post (FPTP) or absolute majority; under the PR systems, all voters deserve representation and that all political groups in society, including women and marginalised, deserve to be represented in legislatures 'in proportion to their strength in the electorate.'[357] In other words, everyone should have the right to fair representation in an election.[358] On its part, FPTP operates within a framework of a winner-takes-all approach,[359] where a candidate with the most votes is elected in the single-member-constituency.[360] Notably, FPTP is the central electoral system in Tanzania.

As noted above, Tanzania has been subscribing to the FPTP electoral system since it attained independence in 1961.[361] In particular, a presidential candidate in respect of presidency of the United Republic of Tanzania 'shall be declared duly elected President only if he has obtained majority of votes.'[362] In relation to election of either MPs or Councillors, in the event that the result of a contested election has been ascertained, the Returning Officer immediately declares to be elected the candidate for whom the majority of valid votes has been cast.[363] This also applies to elections in relation to Chairpersons of *Mitaa*, *Vitongoji* and Village Councils.

3.7.2. Citizens' Participation in the Electoral Process in Tanzania

The guarantee on citizens' participation in the electoral process through voting in Tanzania is laid down in Article 5(1) of the Constitution. According to this provision, persons who have attained eighteen years of age are entitled to voting in regular elections conducted in terms of Articles 39, 41, 66, 76, 77, 78, 79, and 81 of the Constitution of Tanzania. In terms of Article 5(2) and (3) of the Constitution, Parliament has enacted several laws to regulate citizens' participation in the election of the President of the United Republic of Tanzania, Members of Parliament, Councillors and grassroots leaders. While the election of Councillors to District and Urban Councils is governed by the Local Government

355 Johnston, J., in *International Encyclopedia of the Social & Behavioral Sciences*, 2001
356 King, C., "Electoral Systems," (2000), available at http://faculty.georgetown.edu/kingch/Electoral_Systems.htm (accessed 11 November 2022).
357 Fair Vote, "How Proportional Representation Elections Work," available at https://www.fairvote.org/how_proportional_representation_elections_work (accessed 11 November 20220.
358 Ibid.
359 Fraenkel, op. cit.
360 Lihiru, V.M., "The Implications of the Electoral Systems to the Attainment of Gender Equality in East African Parliaments," (2021), available at https://www.un.org/ldc5/sites/www.un.org.ldc5/files/the_implications_of_the_electoral_systems_to_the_attainment_of_gender_equality_in_east_african_parliaments_-_victoria_lihiru.pdf (accessed 11 June 2022).
361 James, J., "The Constitution-making Process in Tanzania," Legal and Human Rights Centre (2013).
362 Article 41(6) of the Constitution of Tanzania.
363 Section 81(1)(a) of the National Election Act (Cap. 343 R.E. 2015); and Section 82(a) of the Local Authorities (Elections) Act, Cap. 292 R.E. 2015.

(Elections) Act[364] and the Local Authorities (Councillors' Elections) Regulations (2020);[365] the election of grassroots leaders in Villages, *Mitaa* and *Vitongoji* are regulated by Guidelines regularly made by the Minister responsible for LGA's in terms of Section 210A of the Local Government (District Authorities) Act.[366] In addition, the election of the President and MPs is governed by the National Elections Act,[367] and the National Elections (Presidential and Parliamentary Elections) Regulations (2020).[368]

In exercising its multi-party-political system, Tanzania ensures that every registered political party has the right to sponsor one candidate for Presidential, Parliamentary, Council and grassroots elections. In the context of Tanzania's FPTP system, a candidate who wins majority votes is declared elected as such.

As considered in Chapter Four, Tanzania retains a system where women are assigned a specific quota in all these elections through special seats.[369] In particular, representation for women special seats in LGA's and in Parliament is *not less than one third* of the all-elected Councillors and MPs in each Council and Parliament, respectively. The special seats are apportioned according to seats each political party, has won in the council. Notably, after the latest general elections in 2020, currently men and women representation in the National Assembly constitute 62.6% and 37.4% respectively of the total number of 388 seats.[370] Women Councillors also constitute only 34% of seats in all LGA Councils in Mainland Tanzania.[371] Notably, the global women representation in local governments' political leadership was 36% in 2020.[372]

3.7.3. Corruption and Code of Conduct in the Electoral Process

Given the competitive nature of multi-party elections, corruption has found its roots in such elections since Tanzania conducted its first multi-party election in 1994. In the elections that were held during the single party era, there were less corrupt practices, with the main electoral concern being lack of free competition as the only political party (CCM) participated alone in the electoral processes.[373] But with the advent of competitive multi-party electioneering,

364 Cap. 292 R.E. 2015.
365 Local Authorities (Councillors' Elections) Regulations (2020), G.N. No. 401 published on 5/6/2020.
366 The latest version of such Guidelines are set out in *Kanuni za Uchaguzi wa Viongozi wa Serikali za Mitaa za Mwaka 2019*.
367 Cap. 343 R.E. 2015.
368 National Elections (Presidential and Parliamentary Elections) Regulations (2020), G.N. NO. 402 published on 5/6/2020.
369 *See* particularly Articles 66(1)(b), 78(1), and (3)-(4) and 81 of the Constitution; Section 86A of the National Elections Act; and Section 86A(1) of the Local Government (Elections) Act. *See* also Regulation 70 of the the National Elections (Presidential and Parliamentary Elections) Regulations (2020); and Regulation 61(1) of the Local Authorities (Councillors' Elections) Regulations (2020).
370 *EISA African Democracy Encyclopaedia Project* (1985-2020).
371 Commonwealth Local Government Forum (CLGF), "The Governments System in Tanzania,"- *Country Profile 2017–18.* Available at http://www.clgf.org.uk/default/assets/File/Country_profiles/Tanzania.pdf (accessed 9 November 2022).
372 Berevoescu, I. and J. Ballington, *Women's Representation in Local Government: A Global Analysis* (Working Paper) (New York: UN Women, December 2021), p. 7.
373 Babeiya, Babeiya, E., "Electoral Corruption and the Politics of Elections Financing in Tanzania," *Journal of Politics and Law*, Vol. 4 No. 2, September 2011, pp. 91-103, p. 91.

corrupt practices have crept into the Tanzanian electoral process necessitating the adoption of several anti-corruption laws and code of conduct in the electoral process.

a. General Overview

Although there were several shortcomings in the colossal single-party politics, then CCM strictly adhered to ethical conducts during elections and candidates 'at all levels had limited or no opportunities to get involved into corrupt practices.'[374] The respect for ethics was a result of the leadership of the country's first president, the late Mwalimu Julius Nyerere, who was very outspoken against corruption. In its endeavour to fight corruption, in 1966, the first phase Government, established the Permanent Commission of Enquiry (PCE) to check the abuse of office by government officials and agencies. In addition, in 1967, the Leadership Code was adopted in the context of the *Ujamaa na Kujitegemea* policy, effectively prohibiting leaders from engaging in corruption and having extra sources of income other than their regular salaries.[375]

Furthermore, in 1971, the Prevention of Corruption Act was enacted, *inter alia*, establishing the Anti-Corruption Squad in 1975, which was later transformed in the Prevention of Corruption Bureau (PCB). In 1983, Parliament enacted the Economic Sabotage (Special Provision) Act to deal with the so-called "economic saboteurs" (popularly known then in Kiswahili as "*wahujumu uchumi*") and this came as a response to illicit trade following the early 1980s country's economic crisis.[376] In 1984, the Economic Sabotage Act was replaced by the Economic and Organized Crimes Control Act.[377] It should be noted that all these anti-corruption actions were organized along with the "*ujamaa*" ideology, which stressed on the need for all people in Tanzania to uphold honesty, equality and the hardworking spirit, especially amongst political leaders and public technocrats.[378] In that regard,

> In order to ensure uniform conducts, the [ruling] party was in full command of the electoral processes and individuals had no open chance of using corruption to climb the political ladder. For instance, during the campaign period candidates were not allowed to conduct their own campaigns individually as this was to be monitored by the party. The party also set the campaign timetable and even prescribed the boundaries of what the

374 Ibid.
375 Barulo, E.K., "Controlling Corruption in Tanzania: The Role of Prevention of Corruption Bureau," M.A Dissertation, University of Dar es Salaam, 2006.
376 Babeiya, op. cit.
377 Act No.13 of 1984.
378 Babeiya, op. cit.

candidates were to say in the campaign's meetings. Candidates were also required to use the same transport facilities, a situation which implied that they were to attend campaign meetings on the same day at the same venues. As a result, all candidates were given equal publicity, transport and other facilities. Election meetings, at which both candidates spoke, were arranged by the district executive committee of TANU and chaired by a local party leader in which there were also party's supervisory committees from the constituencies to ensure fair play.[379]

As noted above, however, since the country reintroduced liberal politics in 1992, there has been a major shift of electoral conducts as some of the issues that were not common during the election period during the single-party politics era, such as corrupt practices, are now ubiquitous. This development necessitated the adoption of concerted efforts to tackle corruption in Tanzania, particularly during the third and fourth phase governments – *e.g.*, the formation of the Presidential Commission of Enquiry against Corruption in 1996 and the establishment of the Prevention of Corruption Bureau (PCB), which later became the Prevention and Combating of Corruption Bureau (PCCB).[380] In 1995, Tanzania enacted the Public Leaders Ethics Act[381] to provide for political and public leaders' ethics. In 2010, Tanzania enacted the Election Expenses Act[382] to regulate the financing of election expenses and criminalise corrupt practices arising out of abuse of election expenses.

Tanzania has also ratified several international and regional treaties against corruption, namely: the United Nation Convention Against Corruption (UNCAC),[383] the African Union Convention Against Corruption (AUCAC),[384] the SADC Protocol Against Corruption (SPAC),[385] and the East Africa Protocol Against Corruption (EAPAC). In addition to ratifying international and regional anti-corruption treaties and enacting anti-corruption laws, since 1999, Tanzania has adopted several National Anti-Corruption Strategy and Action Plans (NACSAP's).

It should be noted that, one of the darkest sides of the electoral laws in multi-party Tanzania was the introduction of Sections 119 (2) and (3) and 130 (b) and (c) into the National Election Act, which, in effect, blessed corruption in the name of 'traditional hospitality' (popularly known in Kiswahili as "*takrima*").

379 Ibid.
380 The PCCB is established under Section 5 of the Prevention and Combating of Corruption Act (No. 11 of 2007).
381 Cap. 398 R.E. 2002.
382 (Act No. 6 of 2010) Cap. 278 R.E. 2010.
383 The United Nation Convention Against Corruption (UNCAC) was adopted by UN General Assembly resolution 58/4 of 31 October 2003.
384 The African Union Convention Against Corruption (AUCAC) was adopted by the AU General Assembly on 1 July 2003 and entered into force on 5 August 2006.
385 The SADC Protocol Against Corruption (SPAC) was signed on 14 August 2001.

However, *takrima* was outlawed by the High Court of Tanzania on 25 April 2006 in *Legal and Human Rights Centre (LHRC), Lawyers' Environmental Action Team (LEAT) & National Organization for Legal Assistance (NOLA) v. A.G.*[386] for being discriminatory of candidates between those who were capable of favourably treating voters and those who could not.[387] Now, Section114(1)(2) of the National Elections Act and Section 106(1)(2) of the Local Government (Elections) Act prohibit corrupt practices in elections along with the Election Expenses Act.

Nonetheless, there have been very limited efforts to fight corruption in elections. Much of the focus in addressing corruption has been devoted to the public sector and 'only political rhetorics are surrounding the issue of corruption in elections in which government and ruling party officials are begrudgingly promising to tackle the scourge.'[388] As noted above, unlike during the single party era, Tanzania is currently suffering from many incidents of corruption in elections as they have been witnessed in all multiparty elections held since 1994 when the first multiparty local government elections were held through a by-election in the Temeke Constituency. This is despite the fact that Tanzania has put in place several legislative and administrative measures to specifically address the problem of corrupt practices in elections in the country since the reintroduction of multiparty politics.[389]

b. The Concept of Corruption

Corruption has been conceptualised differently by various experts and scholars who look at it from different angles. Whereas some experts and scholars view corruption as an unfair behaviour that connotes bribery, extortion, embezzlement, favouritism, nepotism and patronage;[390] some conceive corruption as the behaviour, which deviates from the formal duties of public officials because of private pecuniary or status gains, or which violates rules against the exercise of certain types of private interests regarding influence.[391]

There are mainly two broad categories of corruption: petty and grand corruption.[392] Whereas the former is said to involve officials of middle or low levels and that it is a strategy for survival where no one gets rich out of it; the latter involves higher echelons of government and public institutions involving

386 *Legal and Human Rights Centre (LHRC) & Others v. Attorney General* (2) (Massati, J.) (Misc. Civil Case 77 of 2006) [2006] TZHC 2 (24 April 2006)
387 *See* particularly Mashamba, J.C., "*Takrima* in Court: The Implications of the High Court Ruling in *Legal and Human Rights Centre & Others v. Attorney-General* on Free and Fair Elections in Tanzania," *Tanzania Lawyer*, Vol. I No. 2, July 2007.
388 Babeiya, op. cit, p. 92.
389 *Ripoti ya Kikosi cha Rais*, op. cit, pp. 125-141.
390 Alatas, S.H., *Corruption: Its Nature, Causes and Functions* (Aldershot Avebury, 1990).
391 Nye, J., "Corruption and Political Development: A Cost-Benefit Analysis," *American Political Science Review,* Vol. 61, 1967).
392 Sohail. S.A., "The Role of Civil Service Reform in Combating Corruption," Issues Papa, WBI, Washington, 1999.

high level public officials who seek self-enrichment.[393] Furthermore, there are other various types of corruption namely: institutional or organisational, political, classical, neo-colonialist, technical, sensualist and retaliatory, giving bribes, transitive, extortive, defensive, nepotism, autogenic, and supportive corruption.[394] Suffice to say that, whatever its form or nature, corruption is a criminal offence under the laws of Tanzania.

c. Conceptualising an Ethical Code of Conduct in Elections

The term "ethics" has been defined in various literature. According to dictionary definition, ethics is a discipline regulating human behaviours and conducts, dealing with what is good and bad and with moral duties and obligations. It is a set of moral principles, as well as a system of moral values. It also entails principles of conduct governing an individual or a group, providing a guiding philosophy, a consciousness of moral importance.[395]

In the electoral process, "ethics" means a catalogue of ethical principles and values that are set out in a Code of Conduct, which applies to all those who participate in the electoral process – voters, candidates, party leaders and members, election management bodies (EMBs) and their employees or agents, etc. Under the law, the Code must be upheld by all actors who participate in the electoral process, failure to do which constitutes a breach of the Code resulting in a misconduct punishable in accordance with the law. Conventionally, a Code of Conduct can be viewed as a tool which contributes to *freedom* and *fairness*; to *effective choice*; to a *representative* and *credible process*; to *transparency* and *accountability*; to *inclusive practices*; to *reducing adversarial relationships*; and to the *emergence* and *consolidation of a democratic political culture*.[396]

d. The Current Situation Relating to Corruption and Code of Conduct During the Electoral Process

As noted above, in effectively responding to the corrupt and unethical challenges attributed to competitive electoral practices brought about by multi-party democracy, Tanzania has adopted several measures to prevent and combat corrupt practice and unethical conducts during elections. These measures are considered below.

i. Taming Corrupt Practices During the Electoral Process

393 Babeiya, op. cit, p. 92.
394 Kiapi, *Law and Politics of Corruption in East Africa* (Dar es Salaam: Dar es salaam University College, 1968); and Shaidi L.P., "The Problems of Corruption in Tanzania," M.A Dissertation, University of Dar es salaam, 1975.
395 Merriam Webster Dictionary, available at https://www.merriam-webster.com/ /dictionary/ethic (accessed 9 November 2022).
396 Goodwin-Gill, G.S., *Codes of Conduct for Elections* (A Study Prepared for the Inter-Parliamentary Union) (Geneva: Inter-Parliamentary Union, 1998), p. 3.

As well as invoking general penal and anti-corruption laws,[397] the National Elections Act[398] and the Local Authorities (Elections) Act[399] contain several provisions outlawing corrupt practices in the electoral process ranging from penalisation of corrupt inducement of candidate to withdraw from election,[400] penalty for bribery and treating,[401] to disqualification of candidates as a result of being convicted for corrupt and illegal practices.[402] These laws also outlaw acts of bribery, treating and undue influence in relation to members and officers of the NEC[403] as well as they penalise persons who are found guilty of certain corrupt and illegal practices relating to elections.[404] Furthermore, both the National Elections Act and the Local Authorities (Elections) Act provide that persons who have been convicted of offences of corrupt or illegal practices in relation to elections should be removed from the Permanent National Voters' Register for the United Republic of Tanzania.[405]

In addition, Tanzania has enacted the Election Expenses Act[406] to tame, *inter alia*, corrupt practices during elections by particularly controlling election expenses.[407] This has been a direct response to the reality that has set in since 1995 when Tanzania held its first multiparty general elections following the reintroduction of plural politics in the country in 1992, whereby there have been many incidents of corruption.[408] According to its long title, the Election Expenses Act strives to make provisions for the funding of nomination process, election campaigns and elections 'with a view to controlling the use of funds and prohibited practices in the nomination process, election campaigns and elections; to make provisions for allocation, management and accountability of funds and to provide for consequential and related matters.'

As well as requiring the disclosure of funds before election campaigns,[409] during election campaigns[410] and the receipt of election expenses;[411] the Election

397 *See* particularly the Prevention and Combating of Corruption Act, Cap. 329 R.E. 2019; the Economic and Organized Crimes Control Act, Cap. 200 R.E. 2019; and the Penal Code, Cap. 16 R.E. 2002.
398 Cap. 343 R.E. 2015.
399 Cap. 292 R.E. 2015.
400 Section 91B of the National Elections Act; and Section 88 of the Local Authorities (Elections) Act.
401 Section 94 of the National Elections Act.
402 Ibid, Section 96.
403 Ibid, Section 100; and Section 93 of the Local Authorities (Elections) Act.
404 Section 102 of the National Elections Act; and Section 100 of the Local Authorities (Elections) Act.
405 Section 107 of the National Elections Act; and Section 106 of the Local Authorities (Elections) Act.
406 According to Section 4 of the Election Expenses Act, the Registrar of Political Parties is responsible for supervision and administration of election expenses under this law.
407 In terms of Section 7(1) of the Election Expenses Act, the term "election expenses" means 'all funds expended or expenses incurred in respect of the conduct and management of nomination process, election campaign and election by a political party, candidate or Government and include-

(a) in relation to nomination process, all expenses incurred by a political party during the nomination process;

(b) in relation to nomination of a candidate under the National Elections Act or all expenses or expenditure incurred by a political party for facilitating its candidate for nomination;

(c) in relation to election campaigns, all expenses or expenditure incurred by a political party or candidate for the purpose of election campaigns; and

(d) in relation to an election, all expenses incurred by the Government, political parties and candidates.'

408 Babeiya, op. cit, p. 92.
409 Section 9 of the Election Expenses Act.
410 Ibid, Section 15.
411 Ibid, Section 16.

Expenses Act lists down unfair election conducts[412] and prohibits certain practices prior to the nomination process.[413] It also provides for disqualification of any candidate who, by himself, his agent or by his political party which 'commits an act amounting to a prohibited practice as stipulated.'[414] Once found in violation of this proscription, the concerned candidate or political party will, herself/himself or itself, be liable for disqualification from participation in the nomination process or election.[415] Moreover, this law creates two types of offences: general offences committed under this law[416] and those committed in relation to the powers of the Registrar of Political Parties.[417]

ii. Enforcing the Code of Conduct During the Electoral Process

In the Declaration on Criteria for Free and Fair Elections adopted unanimously in March 1994 in Paris, France; the Inter-Parliamentary Council urged States to take the necessary policy and institutional steps to ensure the progressive achievement and consolidation of democratic goals. Taking practical experience into account, it recommended that States should 'Encourage parties, candidates and the media to accept and adopt a Code of Conduct to govern the election campaign and the polling period.'[418] In principle, Codes of Conduct in the election process contributes to fairness and to the appearance of fairness in the administration of an election.

Both in principle and practice, Codes of Conduct not only supplement rules, but can also provide what has been called in another context: 'light touch regulatory styles that do not stress commands.'[419] The provisions of any Code will necessarily depend upon the particular political and social contexts, and on the needs that must be met, in a given country. In general, however, a Code's content will be determined by reference to whether 'it furthers an acceptable result in terms of the criteria for free and fair elections.'[420]

In discharging the foregoing obligation, Tanzania has adopted the Political Parties (Code of Conducts) Regulations in 2019,[421] whose broad objective is 'to ensure that political parties and their supporters behave well, so as to practise mature politics and maintain peace and harmony in political activities.'[422] In

412 Ibid, Section 21.
413 Ibid, Section 25.
414 Ibid, Section 24(2).
415 Ibid.
416 Ibid, Section 26.
417 Ibid, Section 27.
418 Declaration on Criteria for Free and Fair Elections, Inter-Parliamentary Council, 154th session, Paris, 26 March 1994, 4(2); text in Goodwin-Gill, G. S., *Free and Fair Elections: International Law and Practice* (Geneva: Inter-Parliamentary Union, 1994), p. x.
419 Baldwin. R., *Rules and Government* (Oxford: Clarendon Press, 1995), p. 159.
420 Goodwin-Gill, G.S., *Codes of Conduct for Elections*, op. cit, p. 3.
421 GN. No. 954 of 2019. Under Regulation 16, these Regulations repealed and replaced the Political Parties Code of Conduct Regulations entitled "*Kanuni za Maadili ya Vyama vya Siasa za Mwaka 2007*".
422 Ibid, Regulation 4.

particular, the Code obliges every political party to adhere to tenets as set out in Regulation 5, which includes general avoidance of discriminatory acts.[423] The Code also imposes responsibilities on political parties towards the society, obliging each of them to:-

i. conduct political activities in a lawful and ethical manner;[424]
ii. not to engage in corrupt practices;[425]
iii. present views in a lawfully, moral and ethical manner;[426] *and*
iv. be patriotic and uphold national ethics, customs, morals, peace, harmony, tranquillity and national unity.[427]

One of the gender-sensitive provisions of the Code is framed in Regulation 8(c), which imposes responsibility on political party, while engaging in political activities, to 'avoid a conduct, speech or any other act or statement which may lead to hatred, discrimination on the basis of religion, tribe, *gender*, colour, ethnicity or any other form of discrimination.'

In order to ensure compliance with the Code, the Political Parties Ethics Committee is established[428] to, *inter alia*, hear complaints submitted on violation of this Code.[429] Under Regulation 13(1), the Political Parties Ethics Committee may issue a variety of penalties to violators of the Code,[430] ranging from warning or reprimanding the offender; ordering the offender or violator to amend or correct the violation; ordering the offender or violator to apologise in public through a widely spread news media; or announcing in public through a widely spread news media the name of the offender or violator, explaining the violation and warn him or her not to repeat the violation. Where the offender or violator (*i*) continues to violate the Code of conducts after being punished; (*ii*) refuses to adhere to the penalty; or (*iii*) violates this Code in a manner that results to severe consequences, she or he may be further punished in accordance with the Political Parties Act.[431]

iii. Gender Irresponsive Practices and Electoral Corruption in Multi-Party Elections

Despite the enactment of the foregoing laws and the adoption of the Code

423 Ibid, Regulation 5(h).
424 Ibid, Regulation 6(a).
425 Ibid, Regulation 6(b).
426 Ibid, Regulation 6(c).
427 Ibid, Regulation 6(d).
428 Ibid, Regulation 10(1).
429 Ibid, Regulations 11(a), 12 and 13.
430 For instance, during the election campaigns for the 2020 general election, the Committee suspended opposition candidate Tundu Lissu's presidential campaigns on 2 October 2020 as a punishment for alleged ethics violations following remarks he made while on the campaign trail. *See* Kiruga, M., "Tanzania: Candidate Tundu Lissu is Suspended Just Ahead of Polls," *The Africa Report*, 5 October 2020; available at https://www.theafricareport.com/44469/tanzania-candidate-tundu-lissu-is-suspended-just-ahead-of-polls/ (accessed 30 November 2022).
431 Regulation 13(12)(a)-(c) of the Political Parties (Code of Conducts) Regulations.

of Conduct striving to tame corrupt practices and unethical conducts during elections, women continue to suffer a number of abuses and gender violence revolving around corrupt practices and unethical conducts. This is attributable to a number of factors, the most fundamental being gender irresponsiveness of these laws and the Code of Conduct. In addition, existing intra-party institutional set-up for elections allows for gender-based violence towards female candidates,[432] which amount to unethical practices. A 2016 TGNP Report on *Women in Leadership Stakeholders Workshop* recommended to the NEC to look into intra-party selection procedures for women's special seats which entertain sextortion[433] against the candidates.[434]

It was, for instance, revealed in the report that, amongst the challenges that female candidates encountered during the 2015 elections in the Eastern Zone, was sextortion whereby female candidates were demanded sex by party leaders and their drivers.[435] In another study on sextortion, corruption and gender-based violence, some prominent party leaders, who were interviewed, acknowledged that their respective political parties had problems of sexual corruption in relation to selection of female candidates for special seats.[436] With selection processes being centralized in male-dominated central/national committees of the political parties, which normally have the final say on the selection outcome, the likelihood of sextortion increases.[437]
Furthermore, studies have indicated that electoral campaigns are the other avenues where gender discrimination is manifested.[438] This is especially through the use of abusive language that mostly affect women, despite the fact that the Code of Conduct prohibits such unethical conduct.[439] Although several laws prohibit harmful practices such as the use of abusive language and corrupt practices, practical implementation of such prohibitions have become challenging.[440] Women have become victims of such unethical and harmful practices in all elections over the years as monitoring mechanisms to redress such practices are still weak, if they do exist.[441]

iv. Recommendations of the Presidential Task Force Relating to Curbing Corruption and Code of Conduct in the Electoral Process

432 Sulley, 2021, op. cit, p. 8.
433 According to the online *Cambridge Dictionary*, "sextortion" is 'the practice of forcing someone to do something, particularly to perform sexual acts, by threatening to publish naked pictures of them or sexual information about them.' Available at https://dictionary.cambridge.org/dictionary/english/sextortion (accessed 30 November 2022).
434 Tanzania Gender Networking Programme (TGNP), *Report on Women in Leadership Stakeholders Workshop* (Dar es Salaam: TGNP, 2016), p. 51
435 Ibid, p. 26.
436 Elden, A., *et al., Sextortion: Corruption and Gender-Based Violence: The Expert Group for Aid Studies* (EBA Report) (Stockholm: EBA Sweden, 2020), p. 64
437 Sulley, 2020, op. cit.
438 Sulley, 2021, op. cit, p. 15.
439 *See*, for example, Regulations 5(c) and (f); 6(c) and (d); and 8(a), (c) and (f) of the Political Parties (Code of Conducts) Regulations in 2019.
440 Sulley, 2021, op. cit.
441 Ibid.

In its recent report submitted to the President in October 2022, the Presidential Task Force on Multi-party Democracy noted several challenges relating to the proliferation of corrupt practices and unethical conducts in the electoral process in Tanzania. It made several recommendations aimed at curbing such vices in the electoral process, including the need to reform the Political Parties Act in order to:

i. *compel political parties' constitutions to have provisions that will allow political parties to remove from the election process any candidate who has been found to engage in corrupt practices;*
ii. *vest powers in the Registrar to prescribe a procedure through which he/she may be able to monitor intra-party elections to address corrupt practices and unethical conducts; and*
iii. *oblige political parties to adopt Codes of Conduct in order to curb intra-party corrupt practices and unethical conducts (such Codes of Conduct should also contain procedures for dealing with offenders and the sanctions that should be imposed upon such offenders, including warning, reprimand, penalties, fines, suspension and expulsion from the party).*[442]

The Task Force also recommended for the amendment of the Election Expenses Act in order to: (*i*) sanction a concerned candidate who fails to submit his or her election expenses, instead of punishing the party from which such candidate belongs; and (*ii*) make all acts and practices prohibited by this law to be criminal offences.[443] In addition, the Task Force proposed for the amendment of the relevant election laws in order to ensure that candidates who are found to engage in corrupt practices are prohibited from contesting in any election for a consecutive period of ten years.[444]

3.8. Dispute Resolution Relating to Citizens' Participation in Multi-Party Democratic Processes

Dispute resolution is a precondition for any political system to thrive in relation to giving space to citizens to effectively participate in the governance of the public affairs of their country. It ensures that disputes arising out of political processes in a democratic society are dealt with in an orderly and organized manner in the realm of the country's constitution and the law. Usually, political dispute resolution is two-pronged: intra-party and inter-party dispute resolution. Whereas intra-party dispute resolution is normally conducted through out-of-court negotiation, mediation and reconciliation; inter-party

442 *Ripoti ya Kikosi Kazi cha Rais*, op. cit, p. 139.
443 Ibid.
444 Ibid, p. 140.

dispute resolution is usually conducted through conventional court litigation.

3.8.1. Political Reconciliation Process for Maintaining Justice, Peace, Tranquillity and National Unity

Reconciliation is one of the most favoured methods of alternative dispute resolution (ADR) in situations where the parties to a dispute will need to sustain their relationship after the dispute is resolved. As considered below, reconciliation is the best way of resolving disputes in Tanzania's political setting, whether they are intra-party or inter-party. This is so because, in so far as the internal processes of party politics are riddled with all shades of scheming that often entrench bitterness, alienation, distrust, decamping and character assassination;[445] a more appropriate mechanism of resolution of political disputes is desirable, than resorting to court litigation that normally escalates such disputes.

a. The Concept and Scope of Reconciliation

Reconciliation (or *reconciliatio* in Latin) means "*a re-establishing, reinstatement, restoration, renewal,* or *reconciling*" of disputing parties' relationship or situation or positions. In dispute resolution, reconciliation is a process as well as an outcome. Ordinarily, disputing parties refer their dispute to a third, neutral party (*i.e.*, the conciliator or reconciliator) who assists them to amicably resolve their difference. It is set into motion from the beginning of a dispute resolution process and as an integral part of it. In reconciliation, participants are encouraged to listen to and to try to appreciate each other's narrative and to engage in a process of "negotiating identity."[446] It is a process whereby parties to a dispute learn to live together in the post-dispute environment.

Reconciliation presupposes dispute resolution; in that it entails the development of working trust; the transformation of the relationship towards a partnership based on reciprocity and mutual responsiveness; an agreement that addresses both parties' basic needs. That way, reconciliation goes beyond conflict resolution in representing a change in each party's identity. Reconciliation goes beyond dispute resolution as 'it moves past the level of pragmatic partnership' and 'enables the parties to internalize the new relationship, integrating it into their own identities.'[447] New attitudes toward the other can thus develop, 'not just alongside of the old attitudes, but in place of the old attitudes. As the

445 Obi, N.N., "Resolving Political Party Disputes through Alternative Dispute Resolution," *Journal of Political Science and Leadership Research*, Vol. 4 No. 4, 2018, pp. 28-41, at p. 29 (ISSN 2504-8821). Available at www.iiardpub.org (accessed 12 November 2022).
446 Kelman, H.C., "Conflict Resolution and Reconciliation: A Social-Psychological Perspective on Ending Violent Conflict Between Identity Groups," Landscapes of Violence, Vol. 1 No. 1, 2010 (Article 5). DOI: 10.7275/R5H12ZX0 Available at: https://scholarworks.umass.edu/lov/vol1/iss1/5 (accessed 9 November 2022).
447 Ibid.

new attitudes become integrated into the group's own identity, they gradually replace the old attitudes. Working trust can gradually turn into personal trust. This does not foreclose the possibility that old fears and suspicions will re-emerge, but the relationship is less vulnerable to situational changes.'[448]

Reconciliation is, therefore, a process of making two people or groups friendly again after they have argued seriously or fought and kept apart from each other.[449] It is concerned with the creation and/or restoration of "right relationships" between two individuals, a community or an entire society. Both in principle and practice, reconciliation involves more than just dispute resolution (*i.e.,* it is more than reaching a win-win outcome oy other such deal), it entails that, to be reconciled, the two disputing parties have to reach something akin to closure and mutual satisfaction on whatever it was that divided them or caused the dispute. As such, reconciliation is an appropriate dispute resolution mechanism for disputes in situations where the disputing parties will still need to co-exist or depend on each other even after the dispute is resolved – *e.g.,* in labour, succession, parentage, and matrimonial relationships.

Much as reconciliation is concerned with the creation and/or restoration of "right relationships" between two disputing individuals, a community or an entire society; it is an appropriate dispute resolution mechanism for disputes in situations where the disputing parties will still need to co-exist or depend on each other even after the dispute is resolved. Viewed in this sense, the conception and scope of reconciliation deals with three specific situations:

i. *In an overall sense, reconciliation promotes an encounter between the open expression of the painful past, on the one hand, and the search for the articulation of long-term, interdependent future, on the other hand;*[450]
ii. *Reconciliation provides a place for truth and mercy to meet, where concerns for exposing what has happened and for letting go in favour of renewed relationship are validated and embraced;*[451] *and*
iii. *Reconciliation recognizes the need to give time and place to both justice and peace, where redressing the wrong is held together with the envisioning of a common, connected future.*[452]

The scope and situations in which reconciliation is more appropriately

448 Ibid.
449 Hauss, C., "What is Reconciliation?" Beyond Intractability, 10 May 2021. Available at https://www.beyondintractability.org/essay/reconciliation (accessed 9 November 2022).
450 Lederach, J.P., Building Peace: Sustainable Reconciliation in Divided Societies (New York: United States Institute of Peace Press, 1997), p. 31.
451 Ibid.
452 Ibid.

applicable – *i.e.,* in disputes revolving around, include: (*i*) matrimonial relations; (*ii*) child parentage, custody and access; (*iii*) tribal conflicts; (*iii*) labour relations; (*iv*) land disputes; (*v*) political disputes; (*vi*) consumer complaints; and (*vii*) communal conflicts.

Forming the crux of major forms of ADR, reconciliation is a *consensual*, *voluntary*, *flexible*, *confidential*, and *interest-based* process through which the parties seek to reach an amicable dispute settlement with the assistance of the (re)conciliator, who acts as a neutral third party. Reconciliation is a voluntary proceeding because parties involved are free to agree and attempt to resolve their dispute through reconciliation. The process is flexible, allowing parties 'to define the time, structure and content of the reconciliation proceedings.'[453] In principle, reconciliation proceedings are interest-based in that the conciliator 'will when proposing a settlement, not only take into account the parties' legal positions, but also their; commercial, financial and/or personal interests.'[454]

Unlike the mediator, who just facilitates the mediation process, the reconciliator has to suggest an effective way of resolving the dispute between the parties.[455] This means that, after hearing the parties to the dispute, the reconciliator recommends a settlement proposal to the parties.[456] Following a settlement, or, if no settlement can be reached, the reconciliator closes the reconciliation proceedings and will have to notify the court that referred the matter to reconciliation and the parties accordingly.[457] Notably, the purpose of reconciliation proceedings is to reach an amicable, swift and cost-efficient settlement of a dispute.[458]

Like any process of dispute resolution, reconciliation has both advantages and disadvantages. It has the following advantages:

i. *It is flexible;*
ii. *It requires expertise in a particular area of the dispute;*
iii. *It is less costly compared to other forms of ADR;*
iv. *It allows the parties to approach the court if one is not satisfied with the proceedings.*
v. *It conserves the relationship between the disputants.*

453 https://www.dispute-resolution-hamburg.com/conciliation/what-is-conciliation/ (accessed 12 November 2022).
454 Ibid.
455 Chattopadhyay, A., "Meaning and Scope of Conciliation," 13 September 2019. Available at https://www.legalbites.in/meaning-and-scope-of-conciliation/ (accessed 12 November 2022).
456 International Capital Market Association, "Conciliation and Arbitration Proceedings." Available at https://www.icmagroup.org/News/ (accessed 12 November 2022).
457 Order VIIIC Rule 39 of the CPC.
458 International Capital Market Association, "Conciliation and Arbitration Proceedings." Available at https://www.icmagroup.org/News/ (accessed 12 November 2022).

Apart from having advantages, reconciliation has the following disadvantages:

i. *The process is not binding upon the parties to the dispute, unless there is a law giving it a binding force of law;*
ii. *There is no avenue for appeal; and*
iii. *The parties may not achieve a settlement to their conflict by coercion like litigation does.*

The legal basis of reconciliation (as a formal method of ADR in Tanzania) is Article 107A(2)(d) of the Constitution of Tanzania, which provides that:

(2) In delivering decisions in matters of civil and criminal matters in accordance with the laws, the court ***shall*** observe the following principles, that is to say –
(a) *Not applicable*.
(b) *Not applicable.*
(c) *Not applicable.*
(d) to ***promote*** and ***enhance dispute resolution*** among persons involved in the disputes.
(e) *Not applicable.* (Emphasis supplied).

The legal basis of (re)conciliation is Order VIIIC rule 24 of the Civil Procedure Code (CPC),[459] which provides that:
Subject to the provisions of any written law, the court *shall* refer *every* civil action for negotiation, *conciliation*, mediation or arbitration or similar alternative procedure, *before proceeding for trial*. (Emphasis supplied).

The requirement for an agreement to resolve a dispute through reconciliation is elaborated in Order VIIIC rule 36 of the CPC. Whereas rule 37 of Order VIIIC of the CPC sets out the duration of reconciliation (*i.e.*, not exceed a period of thirty days from the date the trial court referred the matter to reconciliation), rule 38 deals with closure of reconciliation. Rule 39 obliges the parties to as remit the settlement agreement to the trial court immediately or within fort-eight hours after the conclusion of reconciliation. Although the CPC does not set out elaborate procedural rules to govern the reconciliation process, Rule 36(1) of Order VIIIC requires parties to reconciliation over any matter referred by the court to reconciliation 'in accordance with the applicable law and the agreement of the parties to the negotiate or conciliate and arrive at a settlement.'

459 Cap. 33 R.E. 2022.

b. Modes of Resolving Disputes through Reconciliation

There are mainly two modes of settling disputes through reconciliation in Tanzania:

Court-annexed reconciliation, and

Out-of-court reconciliation.

i. Court-Annexed Reconciliation

Court-annexed reconciliation is *consensually* and *voluntarily* conducted in the course of a civil litigation process in accordance with the provisions of Order VIIIC rules 24, and 36-39 of the CPC. It is court-annexed in the sense that there should first be filed in court a civil case before it takes place. Procedurally, court-annexed reconciliation commences immediately after pleadings are concluded and the court has determined all preliminary matters, including determination of preliminary objections (if any).

ii. Out-of-Court Reconciliation

Out-of-court reconciliation is *voluntarily* and *consensually* conducted in relation to disputes that that are not pending before a court of law or *quasi-judicial* tribunal or body.

c. Types of Resolving Disputes through Reconciliation

There are two types of settlement of disputes through (re)conciliation: individual and collective.

i. Individual (Re)Conciliation

This a way of finding an alternative way to resolve a dispute which may occur in a society or an organization. Individual reconciliation may be done between disputing parties through a conciliator. In individual reconciliation, parties' resort to a conciliator in order to bring down the tensions and establish communications between them. The conciliator assists the parties in interpreting the issues and all the facts with a view to reaching an amicable settlement.

ii. Collective (Re)Conciliation

This takes place where there is a dispute between a group of persons against one or more persons. It is typical in political dispute resolution where a political party may be pitted in a dispute against a group of party members. Therefore, reconciliator will be engaged to help both parties to try to come to an agreement and settle the dispute. Collective conciliation is held by a neutral

person (a "(re)conciliator"), who is impartial. The role of the (re)conciliator is to help both parties find a solution that everyone agrees to.

3.8.2. Intra-Party Dispute Resolution Mechanisms in the Multiparty Political System in Tanzania

It is universally accepted that any dynamic society, such as political parties, is susceptible to disputes. It is generally accepted that 'intractable conflicts between political actors are omnipresent, changing characters or venue from time to time.'[460] In effect, these conflicts have proven 'to be costly to some political parties because when the raging political fires have burnt out, nothing resembling the previous political structure remains standing. Some parties have gone into oblivion while others have fared relatively well. Not a single party has been left untouched by these conflicts.'[461] Therefore, what is important, therefore, is putting in place appropriate legislative mechanisms for amicable resolution of political disputes.

a. Types and Sources of Political Disputes

Universally, political disputes are either intra-party or inter-party. Whereas intra-party disputes are those disputes that occur within a given political party, inter-party disputes are those conflicts that involve more than one political party. Most of the intra-party political disputes have been around party's leadership, [462]which have been the most common and 'can be found right from the outset of multi-partyism in the early 1990s.'[463] Other intra-party conflicts involve elected officials from a political party, in particular members of parliament in that there have been 'many instances of a group of MPs or a single MP bitterly disagreeing with their party's leadership leading to their expulsion from the party, which, if not challenged lead to them losing their parliamentary seats.'[464] In most cases, these disputes are fuelled by such factors as lack of ideology, absence of internal democracy, incumbency factor, goal incompatibility, godfatherism and politics of self-interest.[465] Other sources of intra-party disputes, including favouritism (particularly though promoting one's kith and kin); unequal sharing of resources (leader's constituency gets a lion's share); lack of regular meetings; and centralized authority – power concentrated at the top.[466]

460 Mwakibete, E., "Party Politics: The Oddity of Strength and Conflicts," The Citizen newspaper (Dar es Salaam), Sunday 22 May 2022. Available at https://www.thecitizen.co.tz/tanzania/oped/ party-politics-the-oddity-of-strength-and-conflicts-3823542 (accessed 11 November 2022).
461 Ibid.
462 Shaba, R., *State of Politics in Tanzania* (Dar es Salaam: Konrad-Adenauer-Stiftung, July 2007). Available at ttps://www.kas.de/c/document_library/get_file?uuid=5255a2d1-92dd-75e9-92ce-0bc85a47f08c&groupId=252038 (accessed 12 November 2022).
463 Mwakibete, op. cit.
464 Ibid.
465 Obi, op. cit, p. 30.
466 *See*, for instance, Shale, V. and K. Matlosa, *Managing Intra-Party and Inter-Party Conflicts in Lesotho: Training Manual* (Johannesburg: Electoral Institute for Sustainable Democracy in Africa (EISA), 2008), p. 13.

Furthermore, the opaque nature of internal party processes 'has been another reason to explain these conflicts,' whereby 'a few individuals make decisions about party affairs and the rest of members are merely informed of such decisions.'[467] Since the multi-party political era set in in Tanzania in 1992, most political parties have not been able to cultivate a culture of being 'fair to their own members, which is precisely the reason why from time to time, those who have led accusations against other members leading to their expulsion, have found themselves in the same situation down the line.'[468]

On their party, inter-party conflicts are often around common issues touching on inter-party relations such as elections. Because elections are a competitive in nature, they normally tend to cause intense inter-party conflicts as parties tend to compete for space for their campaigns in an election. Because of lack of clear rules on inter-party dispute resolution (including inter-party electoral conflict management systems), inter-party conflicts tend to escalate to being destructive in the end. Usually, inter-party disputes revolve around unequal access to media; the ruling party's use of state resources for campaigns; parties' use of ethnicity or other social factors as divisive force; character assassination; and constitutional changes (party's changing of national constitution without proper consultations and procedures to suit its goals, thus threatening democracy).

b. Resolution of Political Disputes in Tanzania

As considered above, reconciliation has been codified in our civil procedural law as one of the ADR mechanisms for resolving civil disputes in Tanzania with the law recognizing accredited reconciliators, among others, to preside over dispute resolution through reconciliation. Currently, a reconciliator is required to be accredited if he or she is to practice ADR in Tanzania on a fee. Section 64B(1) of the CPC, requires the Minister to 'establish and maintain a system of accreditation for reconciliators, negotiators, mediators and arbitrators and keep a register of accredited persons who may be involved in facilitation of reconciliations, negotiations, mediations and arbitrations.' As such, no person is allowed to practice for fee as, *inter alia*, a reconciliator, unless such a person is accredited in accordance with the law.[469] Under the law, it is 'an offence to practice for a fee as a reconciliator, negotiator, mediator, arbitrator or any other category of a dispute resolution practitioner without being accredited.'[470]

467 Mwakibete, op. cit.
468 Ibid.
469 Section 64B(2) of the CPC.
470 Ibid, Section 64B(3).

The procedure for accreditation of reconciliators as well as other ADR practitioners is provided for in the Accreditation of Mediators (Reconciliation, Negotiation, Mediation and Arbitration (Accreditation of Practitioners) Regulations (2021).[471] The process of accreditation of reconciliators begins by the applicant submitting an application form to the Registrar of Reconciliators, Negotiators, Mediators and Arbitrators. After processing the application form, and upon satisfying himself that the form and its annexures are in order, the Registrar refers the application to the Accreditation Panel, which may or may not accredit the applicant.

However, ADR is not *clearly* and *expressly* entrenched in the political setting in that the law regulating the operationalisation of political parties – *i.e.,* the Political Parties Act – does not have express provisions for out-of-court dispute settlement through reconciliation, apart from a requirement set out in item (g) in the First Schedule to this law demanding political parties' constitutions to contain intra-party dispute resolution.[472] Apart from not expressly detailing the out-of-court disputes mechanisms in relation to intra-party disputes, the law does not have any provisions for the out-of-court settlement of inter-party disputes.[473]

This has necessitated most intra-party-political disputes to be referred to court for settlement,[474] instead of resorting to accredited reconciliators who could assist the disputing parties to reconcile their differences out-of-court. Most political parties have conventionally been resolving intra-party disputes through "ordinary" party organs such as the Ethics Committees,[475] Central Committees, National Executive Committees and General Meetings.[476] However, these organs are not presided over by professional or accredited reconciliators as the law requires. As a result, the outcomes of these party organs have been a subject of court litigation. It would appropriate for every political party to have a separate mechanism for resolving intra-party disputes through accredited reconciliators in order for the reconciliation process to yield the desired expectations of maintaining justice, peace, tranquillity and

471 GN. No.147 of 2021.
472 Section 8D(1) of the Political Parties Act requires a constitution of a political party to provide for matters specified in the First Schedule thereto, one of which is a stipulation on intra-party dispute resolution mechanism.
473 *See* generally, *Ripoti ya Kikosi Kazi cha Rais*, op. cit.
474 *See*, for example, *Hon. Zitto Zuberi Kabwe v. The Board of Trustees, Chama cha Demokrasia na Maendeleo & Another,* High Court of Tanzania at Dar es Salaam, Civil Case No.270 of 2013 (unreported); *Peter Michael Malebo & Others v. The Registered Trustees of The Civil United Front (CUF - Chama Cha Wananchi) & Others,* High Court of Tanzania at Dar es Salaam, Misc. Civil Application No. 80 of 2017 (unreported); *Peter Michael Malebo & Others v. The Registered Trustees of The Civil United Front (CUF - Chama Cha Wananchi) & Others* (Civil Application 343 of 2018) [2018] TZCA 352 (20 December 2018); *CUF - Chama Cha Wananchi v. Registrar of Political Parties & Another* (Misc. Civil Application 80 of 2017) [2018] TZHC 104 (29 May 2018); *Mgeni Jadi Kadika v. The Registered Trustees of the Civic United Front (CUF - Chama Cha Wananchi) & 3 Others* (Civil Case 54 of 2019) [2020] TZHC 1458 (10 July 2020); and *Halima James Mdee & 18 Others v. The Board of Trustees, Chama cha Demokrasia na Maendeleo (CHADEMA) & 2 Others*, High Court of Tanzania at Dar es Salaam, Misc. Civil Application No. 16 of 2022. On 16 May 2022 (pending). *See* also Magai, J. and A. Masoud, "Tanzania: Hamad Rashid Goes to Court Over Expulsion," *The Citizen* newspaper (Dar es Salaam), 10 January 2012, available at https://allafrica.com/stories/201201120011.html (accessed 12 November 2022).
475 *See*, for example, *Mgeni Jadi Kadika,* ibid.
476 *See*, for example, *Halima James Mdee & 18 Others,* op. cit; and *Hon. Zitto Zuberi Kabwe,* op. cit.

national unity.

Apart from lack of effective intra-party dispute resolution mechanisms, there are no inter-party dispute resolution mechanisms in place. This has resulted in many political disputes being unresolved. At times, the lack of inter-party dispute resolution has resulted into serious unresolved disputes in Tanzania since multi-party politics were ushered in in 1992.[477] In the absence of an inter-party out-of-court dispute resolution mechanism, disputing parties are left with only one option when disagreements, conflicts and violence between political parties occur – *i.e.*, the tendency is for disputants to seek redress in court through the process of litigation. However, contrary to court litigation, ADR (particularly reconciliation) is an effective toolbox for the management of political disputes in in Tanzania order meet the desired expectations of maintaining justice, peace, tranquillity and national unity. It should be noted that resorting to court to resolve political disputes through litigation is a more disadvantageous option than resorting to reconciliation in that:

The mentality that the court holds the key to the management of party disputes has not only challenged the optimal functionality of political parties but threaten the democratic and governance processes generally. The process of litigation has unwittingly provided the framework for protracted and sustained party disputes leaving in its trail weak political parties without internal cohesion, damaged interpersonal relationships, financially drained litigants, suspicion and distrust. The true winner in the process of litigation is always the attorney, whose primary evidence of victory is the judgement delivered and his professional fee. The disputant who got judgement loses relationship.[478]

Both in principle and practice, reconciliation saves time, it is less costful and more flexible than court proceedings which are quite often technically and procedurally complex, take long time and are more costful. In addition, reconciliation involves experts in a particular area of the dispute who work together with disputants to reach an amicable solution as opposed to the court litigation process where the presiding officer (a judge or magistrate) imposes a binding judgment that is founded in merit than the need to address the root causes of the dispute and how parties will sustain their relationship after the dispute. As such, unlike court litigation, reconciliation is more advantageous in the resolution of political disputes in that it strives to restore and conserve the

477 *Ripoti ya Kikosi Kazi cha Rais*, op. cit, pp. 142-154.
478 Obi, op. cit, p. 29.

relationship between the disputants.

3.8.3. Constitutional Litigation

As noted above, the Political Parties Act does not contain express provisions for dispute resolution in relation to political disputes. However, there is a requirement set out in item (g) in the First Schedule to this law demanding political parties' constitutions to contain intra-party dispute resolution.[479] This *lacunae* in the law has resulted in many aggrieved persons involved in political disputes to refer their disputes to court through either conventional constitutional or judicial review litigation. In particular, constitutional litigation may pursued be through the enforcement of the Bill of Rights (Articles 12-29) of the Constitution;[480] or the enforcement of provisions of the Constitution in terms of Article 108(2) of the Constitution.

a. Resolving Political Disputes Through the Bill of Rights

In case a political dispute is lodged in the High Court on the basis of violation of any of the rights, freedoms or duties guaranteed in the Bill of Rights; a party is required to lodge its case under the BRADEA and its 2914 Rules.[481] It should be noted that before the enactment of the BDRADEA in 1994, cases for the enforcement of the Bill of Rights were litigated under the traditional civil procedure – *i.e.,* a single High Court Judge could entertain and determine the matter under the ordinary rules of civil procedure and evidence. As the Court of Appeal held in *DPP v. Daudi Pete*,[482] in the absence of formal rules of procedure governing the litigation of cases for the enforcement of the Bill of Rights, the High Court would maintain its tradition of undertaking civil litigation. Notably, this was a more simple and accessible procedure for enforcement of the Bill of Rights than the one that was brought about by the BRADEA in 1994.

So, in the absence of a procedural law for enforcing the Bill of Rights, in 1991, Section 17(2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance[483] was amended to introduce some procedural requirement relating to the enforcement of the Bill of Rights.[484] Indeed, there was no complex procedure on how the Court would proceed to hear and determine

479 Section 8D(1) of the Political Parties Act requires a constitution of a political party to provide for matters specified in the First Schedule thereto, one of which is a stipulation on intra-party dispute resolution mechanism.
480 *See* particularly Article 30(3) of the Constitution; and the Basic Rights and Duties Enforcement Act, Cap. 3 R.E. 2019 ('the BRADEA').
481 Basic Rights and Duties Enforcement (Practice and Procedure) Rules, 2014 (GN. No. 304 of 2014).
482 *DPP* v. *Daudi Pete* [1993] TLR 22.
483 Cap. 310 of the Revised Laws of Tanzania. This amendment was effected vide Act No. 27 of 1991.
484 In particular, this amendment introduced Section 17A to the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance, which provided that:

> '17A .-(2) In any proceedings involving the interpretation of the Constitution with regard to the basic freedoms, rights and duties specified in Part III of Chapter I of the Constitution, *no hearing shall be commenced or continued unless the Attorney-General or his representative designated by him for that purpose is summoned to appear as a party to those proceedings*; save that if the Attorney-General or his designated representative does not appear before the Court on the date specified in the summons, the court may direct that the hearing be commenced or continued, as the case may be, *ex-parte*.' [Emphasis supplied].

cases revolving the violation of the Bill of Rights. The law only required the AG to be made party to such proceedings.[485]

As contemplated in Article 30(4) of the Constitution, the enactment of the BRADEA strives to make provision for rules of procedure and practice for the enforcement of the justiciable fundamental rights and freedoms in the Constitution of Tanzania.[486] Under Sections 1(2) and 3, this Act covers only claims and causes of action founded on the provisions of Articles 12 to 29 of the Constitution in relation to the basic rights, duties and fundamental freedoms in both Zanzibar and Mainland Tanzania.[487] It also vests the High Court of Tanzania with original jurisdiction in cases relating to fundamental rights and freedoms.[488]

However, the Act did not bring about clear rules of procedure and practice in the High Court pertaining to cases of violation of the Bill of Rights. Indeed, without doubt, before the BRADEA was enacted, the retired Judge Mwalusanya predicted that,

> The new rules of procedure (for enforcing human rights in the High Court) to be enacted (might) *be more restrictive, contrary to the intention of the Constitution which provides in Article 30(4)(c)* that the new rules of procedure must ensure more efficient exercise of the powers of the High Court in the protection and enforcement of the basic human rights.[489] (Emphasis supplied).

To Judge Mwalusanya, this law would 'be a blessing in disguise, as the ordinary rules of civil procedure (hitherto) used by the courts (were then) quite sufficient if liberally used.'[490] Before the enactment of this law, the High Court used its inherent powers to determine human rights petitions, which at times the High Court used its powers to raise constitutional issues *suo motu*,[491] which was not received well by most government officials, thus the enactment of the controversial Basic Rights and Duties Enforcement Act in 1994.[492]

485 Early cases that were litigated under this less complex procedure for enforcing the Bill of Rights include *Chumchua s/o Marwa v. Officer-in-Charge of Musoma Prison & A.G. High Court of Tanzania at* Mwanza, Misc. Criminal Cause No. 2 of 1988 (unreported). *See* also *National Housing Corporation v. Tanzania Shoe Company and Others* [1995] TLR 251 (CA), and *Lausa Alfan Salum and Others v. Minister for Lands and Housing and Urban Development and National Housing Corporation* [1994] TLR 237, in cases the constitutionality of G.N. No. 41 of 1992 was challenged.

486 *A.G. v. Rev. Christopher Mtikila*, Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 20/2007 (unreported) (Ruling of the Court rendered by Justice Rutakangwa on 9 May 2008) (pointing out that: 'from the general scheme of Ac, the legislature intended the Act to be self-sufficient in relation to the form of procedure for the conduct of all suits instituted under it.').

487 Section 1(2) of the BRADEA.

488 Ibid, Section 4.

489 Mwalusanya, J.L., "The Bill of Rights and the Protection of Human Rights: Tanzania's Court Experience," reproduced in Peter, C.M. and H. Kijo-Bisimba, *Justice and Rule of Law in Tanzania: Selected Judgments and Writings of Justice James L. Mwalusanya and Commentaries* (Dar es Salaam: Legal and Human Rights Centre, 2005), pp. 634-635. This paper was earlier presented at the International Conference on the Bill of Rights jointly organized by the Legal Resources Foundation, Zimrights, and the Catholic Commission for Justice and Peace, all of which based in Zimbabwe and held at Victoria Falls, Zimbabwe, between 10th and 14th December 1994.

490 Ibid, p. 634.

491 Mwalusanya, J. (as he then was) did so in a number of cases, of particular significance being in *Chumchua Marwa* and *Butambala,* op. cit.

492 Peter, C.M., *Human Rights in Tanzania: Selected Cases and Materials,* op. cit, p. 760.

Consequently, the absence of clear, accessible and user-friendly rules of procedure for enforcing the Bill of Rights resulted in a number of challenges, which necessitated the promulgation of the Basic Rights and Duties Enforcement (Practice and Procedure) Rules, 2014 ('the BRADEA Rules) by the Chief Justice in 2014. Such challenges included lack of a clear expression on the document initiating a constitutional petition for vindicating any of the basic rights and freedoms guaranteed in Articles 12-29 of the Constitution. There was a confusion that was brought about by the provisions of Section 5 of the BRADEA, which names two documents as initiating a constitutional action: *petition* and *originating summon*. In particular, this section provides that:

> *An application to the High Court in pursuance of section 4*[493] shall be made by *petition* to be filed in the appropriate Registry of the High Court *by originating summons*. (Emphasis supplied).

Whereas in most cases the practice was to initiate such proceedings by way of a document bearing the title of "originating summons", supported by a Statement; in some situations, such proceedings were commenced by a title bearing the title of "petition." Interestingly, the Court of Appeal, in *Registrar of Societies and 2 Others v. Baraza la Wanawake Tanzania (BAWATA)*,[494] held that proceedings for obtaining redress of violation of basic rights guaranteed under the Bill of Rights in the Constitution may be initiated by way of either a petition or originating summons. In particular, the Court held that: 'the two procedures of petition and originating summons provided under section 5 of the Act are to be used as alternative processes for commencing proceedings of human rights violations. A complainant may move the High Court by filing either a petition or originating summons.'

The decision in *BAWATA* was followed in many cases, including *Federation of Mines Association of Tanzania & 2 Others v. African Gem Resources (AFGEM) & 7 Others.*[495] In this case, an objection that the petition was incompetent as it was not accompanied by an origination summons was overruled on the basis of the decision made by the Court of Appeal in the case of *BAWATA*.
Although it agreed with this proposition, in *Mselem Ali Mselem & 21 Others v. A.G.*,[496] the High Court held that the said confusion was rectified by the CJ

493 Section 4 of the BRADEA recites the provisions of Article 30(3) of the Constitution in the following regards:

> '4. If any person alleges that any of the provisions of sections 12 to 29 of the Constitution has been, is being or is likely to be contravened in relation to him, he may, without prejudice to any other action with respect to the same matter.'

494 Court of Appeal of Tanzania, Civil Appeal No. 82 of 1992 (unreported).
495 [2003] TLR 294.
496 Misc. Civil Cause No. 25 of 2017) [2018] TZHC 111; (17 August 2018).

upon promulgation of the Basic Rights and Duties Enforcement (Rules and Procedure) Rules, 2014 ('the BRADEA Rules'). According to the High Court,

> [...] despite the interpretation of Section 5 of Cap. 3 made by the Court of Appeal of Tanzania in the case of *BAWATA* as quoted hereinabove and followed by this court in the case of *Federation of Mines Association of Tanzania* cited in the submission of the counsel for the petitioners and other cases but as rightly argued by the learned State Attorney on 29th day of August, 2014 his Lordship the Honourable Chief Justice of Tanzania while acting under the powers conferred to him by section 15 of Cap 3 promulgated the Rules of procedure to be applied with a view to advancing and realizing the basic rights and duties contained in the Constitution.

The High Court referred to Rule 4 of the BRADEA Rules, which provides that any petition filed for the purpose of vindicating the Bill of Rights should be by way of originating summons. According to the High Court, the wordings of this Rule together with that of Section 5 of the BRDAE do direct 'the application of this nature to be made by way of originating summons and not by petition.'[497] Accordingly, it held that:

> [...] the Rules promulgated by his Lordship the Honourable Chief Justice *cleared the confusion which the counsel for the petitioners have alluded to in relation to section 5 of Cap 3 in relation to the appropriate procedure to be followed when a person wishes to apply for redress against violation of basic rights enshrined under Part III of the Constitution*. The provision states clearly that *the application shall be made by way of originating summons*. To accept the submission by the counsel for the petitioners that *a complainant of violation of basic rights and duties enshrined in the Constitution can apply for redress either by petition or originating summons is to my view prone to creating more confusion as the complainant will not know which appropriate procedure between the two should be used when seeking redress arising from violation of the basic rights and duties provided under the Constitution*. [Emphasis supplied].

Therefore, it is now settled that, as provided under Rule 4 of the BRADEA Rules, the Originating Summons[498] 'is a proper and correct procedure to deal with questions of law' in relation to the enforcement of rights and freedoms guaranteed in the Bill of Rights,[499] including participation rights enumerated above.

497 Notably, in their submission against a preliminary objection raised by the respondent to the effect that the matter was defective for bearing the title: "petition", counsel for the petitioners argued that Rule 4 of the BRADEA Rules was in conflict with Section 5 of the BRADEA.

498 In *Mwalagaya v. Bandali* [1976 - 1985] 1 EA 339, it was stated at pp. 319 - 320: 'Originating summons procedure is primarily designed to deal with questions of law or discretion arising upon facts substantially not in dispute, and indeed, where there is any choice in the matter, it is wrong to bring proceedings by originating summons if it is known that the facts are disputed.'

499 *Mselem Ali Mselem & 21 Others v. A.G.*, op. cit, p. 11 of the typed Ruling.

In general, the BRADEA Rules are progressive[500] in the sense that they provide clear rules of procedure and practice on the enforcement of the Bill of Rights, distinct from rules applicable in other civil proceedings.[501] In particular, the Rules provide for essential steps to be undertaken in the human rights proceedings before the High Court as well as they progressively vest powers in a District Court or a Court of Resident Magistrate to receive and process cases of violation of human rights referred to them by a Primary Court for the purpose of referring them to the High Court for determination of human rights violations.[502]

However, one admissibility condition introduced through the 2020 amendments made to the BRADEA[503] is set out in Section 4(2), which makes it mandatory that an application, other than one made by the Commission for Human Rights and Good Governance (CHRAGG), under Section 4(1) 'shall not be admitted by the High Court unless it is *accompanied by an affidavit stating the extent to which the contravention of the provisions of Articles 12 to 29 of the Constitution has affected such person personally*.' This provision has done away with the broadening of the scope of *locus standi* to include interested and third parties, who prior to this provision, could bring a petition in the High Court for the enforcement of the Bill of Rights without necessarily exhibiting person harm caused by the impugned violation.[504]

It should be noted the provision of Section 4(2) of the BRADEA was recently challenged in *Onesmo Olengurumwa v. A.G*.[505] In this case, the petitioner strongly believed that this provision attempts, through the backdoor, to amend the Constitution of Tanzania, particularly Article 26(2) and/or imposes into the Constitution *locus standi* requirements that were not considered by the framers of the Constitution. However, the High Court (Mlyambina, J.) rejected this contention, opining that: 'The enactment of Section 4(2) of the BRADEA (*supra*) is saved with Article 30(1) and 30(2) (a) and (b) of the Constitution (*supra*) which does not render unlawful any existing law or prohibit the enactment of any law on account of public interest.'

500 For a discussion of these Rules, see particularly Mashamba, C.J., "The Law and Procedure on Litigation of Human Rights in Tanzania: An Appraisal of the New Rules of Procedure," LST Law Review, Vol. 1, Issue 1, January – June 2016 (pp. 36-60).
501 It should be noted that, under Rule 19, the Rules give the Court room to apply the procedure and practice applicable in the High Court in civil cases where there is a *lacunae* in the rules concerning a certain matter facing the Court in human rights proceedings before it.
502 Rule 2(3) of the Rules provides that the Rules do not limit or affect the inherent powers of the Court 'to make necessary orders for the ends of justice or to prevent abuse of the process of the Court.'
503 *See* the Written Laws (Miscellaneous Amendments) (No. 3) Act (No. 6 of 2020).
504 This principle was enunciated by the High Court for the first time in *Mtikila v. A.G.* (1993) and was subsequently applied by both the High Court and Court of Appeal in a number of cases before the 2020 amendments to the BDRADEA introduced the requirement for the petitioner to exhibit, in an affidavit, the extent to which the complained breach has affected that petitioner personally.
505 Onesmo Olengurumwa v. A.G. (Misc. Civil Cause 9 of 2021) [2022] TZHC 1 (15 February 2022).

In upholding the constitutionality of Section 4 (2) of the BRADEA, the Court held that requirement to exhibit the extent of personal harm will serve the following purposes: firstly, it will 'safeguard [the] Court to entertain litigation not on a false hypothesis of public interests but private interests brought in the umbrella of public interests.' Secondly, it will 'bar many Petitioners with the *mala fide* intention who are likely to file Petitions on public litigation basis which are not real public interests.' According to the Court, it is 'not easy for the civil court to establish a *mala fide* intention of the parties unless there is an affidavit in support of such Petition.' Thirdly, the attachment of an affidavit to the petition 'helps to avoid multiplicity of cases which are not based on public interests.' As a result, it will 'help the court to evade huge unnecessary backlog of cases.'

Fourthly, the attachment of an affidavit to a petition 'is a compliance of the law since the Constitutional Court is guided by [the] BRADEA Procedural Rules to deal with cases fairly, within reasonable time and at a proportionate cost.' Fifthly, a filtration of public litigation cases by way of affidavit attachment to the petition 'will avoid hindrance to speedy disposal of other matters as the Court will have time to deal with other real cases.' Sixthly, 'it serves resources of the court and of the parties.' According to the High Court, it follows, therefore, that the impugned provisions of the BRADEA 'are rationally connected to their objective and not based on unfair or irrational considerations.'

In conclusion, since the advent of multi-party-political system in Tanzania in 1992, most of the political disputes have been referred to the High Court on the basis of violation of the Bill of Rights, beginning with *Rev. Christopher Mtikila v. A.G.*[506] in 1993 to the most recent cases.[507] However, resorting to court for resolving political disputes is not an appropriate dispute resolution of such kinds of disputes as it escalates further disputes amongst disputants; and, as such, it compromises the continuous harmonious relationship between such parties. As the Presidential Task Force on Democracy has recently proposed, resorting to court to resolve political disputes should be the last resort, mainly after reconciliation has failed.[508]

b. Resolving Political Disputes Through Constitutional Litigation

Apart from litigating political disputes through the Bill of Rights, some parties

506 *Rev. Christopher Mtikila v. A.G.,* High Court of Tanzania at Dodoma, Civil Case No. 5 of 1993 (Unreported).
507 *See*, for example, *Julius I.F. Ndyanabo v. A.G.* (2002) AHRLR 243 (TzCA 2002) *Mtikila v. A.G.* (Misc. Civil Cause 10 of 2005) [2006] TZHC 5 (05 May 2006); *Legal and Human Rights Centre (LHRC) & Others v. A.G.* (1) (Misc. Civil Case 77 of 2005) [2006] TZHC 1 (24 April 2006); *A.G. v. Rev. Christopher Mtikila* (Civil Appeal 45 of 2009) [2010] TZCA 3 (07 May 2010); *Paul Revocatus Kaunda v. Speaker of National Assembly & Others* (Misc. Civil Cause No.10 of 2020) [2020] TZHC 2897; (03 June 2020); and *Zitto Zuberi Kabwe v. the President of the United Republic of Tanzania & Others* (Misc. Civil Cause 1 of 2020) [2020] TZHC 72 (18 March 2020).
508 *Ripoti ya Kikosi Kazi cha Rais*, op. cit, p. 153.

involved in political disputes have, of late, innovatively been invoking Article 108(2) of the Constitution and Section 2(3) of the Judicature and Application of Laws Act[509] (JALA). In *Tito Elia Magoti & Another v. National Electoral Commission & 3 Others*,[510] for example, the petitioners sought, *inter alia*, orders to compel the respondents to: (*i*) table the National Elections Act in Parliament for amendment; and (*ii*) promulgate specific Regulations providing for polling stations and procedure for regulating casting of votes by prisoners in general elections. In this case, Judge Luvanda held that Article 108(2) of the Constitution clothes the High Court 'with inherent and unlimited jurisdiction to hear any matter, constitution petition being inclusive.'[511] The Court also held that Section 2(1) and (3) of the JALA also vests jurisdiction in the High Court to entertain various cases, including constitutional petitions. According to the High Court, when entertaining such constitutional petitions, a single Judge of the High Court 'has jurisdiction and powers to adjudicate over matters filed under Article 108(2) of the Constitution and Section 2(3) of the Judicature and Application of Laws Act.'[512]

Similarly, in *Paul E.K. Kisabo v. A.G.,*[513] it was held that Article 108(2) vests inherent jurisdiction in the High Court to determine any disputes relating to matters not prescribed in the Constitution or any other written law.[514] Such matters include political disputes. In James *Francis Mbatia v. Job Yustino Ndugai & Others,*[515] the Petitioner invoked the provisions of Articles 26(2) and 108(2) of the Constitution of Tanzania and Section 2(3) of the JALA in pursuit of several declaratory orders, including orders to the effect that the 1st Respondent's Notice of Resignation from the seat of Speaker of the National Assembly was invalid, unconstitutional, null and void; and, the resignation in pursuance of the said Notice of Resignation was invalid and ineffective for contravening the provisions of Article 149(1)(c) and (2) of the Constitution.

Dismissing a preliminary objection that the court had no jurisdiction to entertain this matter, a three-panel Bench of the High Court held that:

> [...] we have considered that the petitioner is not challenging contravention of Articles 12 to 29 of the Constitution and that the petition was not made under the provisions of Cap. 3 [*i.e.,* the BRADEA]. We are of the considered view that *the petition being brought under Articles 26(2) and 108(2) of the*

509 Judicature and Application of Laws Act, Cap. 358 R.E. 2019.
510 Tito Elia Magoti & Another v. National Electoral Commission & 3 Others (Misc. Civil Cause 3 of 2022) [2022] TZHC 10074 (10 June 2022).
511 Ibid, p. 4 of the typed judgment.
512 Ibid, p. 9.
513 Paul E.K. Kisabo v. A.G., High Court of Tanzania at Dar es Salaam, Misc. Cause No. 09 of 2022 (Unreported).
514 See also Odero Charles Odero v. DPP & Another, High Court of Tanzania at Dar es Salaam, Misc. Civil Cause No. 20 of 2021 (Unreported).
515 Francis Mbatia v. Job Yustino Ndugai & Others (Misc. Civil Cause 2 of 2022) [2022] TZHC 15 (28 January 2022).

> *Constitution and Section 2(3) of [the JALA], is properly before this court*. For purposes of emphasis, we are of the settled position that [the BRADEA] is inapplicable to the matter before us. [Emphasis supplied].

Therefore, with the introduction of strict admissibility conditions in enforcing the Bill of Rights through Section 4(2) of the BRADEA, some litigants have, of late, have been resorting to resolving political disputes through constitutional litigation in terms of Article 108(2) of the Constitution and Section 2(3) of the JALA.

3.8.4. Resolving Political Disputes Through Judicial Review Litigation

In the absence of intra-party dispute resolution mechanisms in both the law and political parties' constitutions, many political disputes have been resolved through judicial review litigation[516] in the High Court in terms of Article 13(6)(a) of the Constitution of Tanzania, Sections 17 and 18 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act,[517] Section 2(3) of the JALA,[518] and the Judicial Review Rules.[519] Unlike constitutional litigation, judicial review litigation is a process by which courts exercise a supervisory power over decisions, acts or omissions by public bodies (including political parties and the Registrar[520]) in the field of public law.[521] According to Rule 3 of the Judicial Review Rules, judicial review means 'an application for prerogative orders of *mandamus* or prohibition or *certiorari*.'

Usually, such decisions, acts or omissions by public bodies should have been made *ultra vires*, irrationally, illegally or with impropriety for judicial review to be invoked. As the Kyando, J. (as he then was) held in *Juma Yusuph v. Minister for Home Affairs*,[522] judicial review can only lie where a public body: (*i*) exceeds its powers (*i.e.,* it acts *ultra vires*), (*ii*) decides or acts without having powers to so to act, (*iii*) omits to act while it has a statutory duty to act, or (*iv*) abuses its statutory powers. Where any of these grounds are proved, the High Court has power to quash such action, decision or omission and declare it to be legally invalid; or in case of omission, the Court may compel the concerned public body to act in accordance with the law.

Therefore, in judicial review proceedings, the court issues an order that has any

516 Ibid, Section 20(2).
517 Op. cit.
518 Op. cit.
519 Op. cit.
520 *See*, for example, Section 20(2) of the Political Parties Act.
521 *R. v. Panel on Takeover and Mergers, ex parte Datafin* [1987] Q.B. 815, at p. 833E.
522 *Juma Yusuph v. Minister for Home Affairs* [1990] TLR 80.

of the three legal remedies: (*i*) quashing (*i.e., certiorari*), (*ii*) prohibiting, or (*iii*) compelling (*i.e., mandamus*), the performance of a particular act committed or a decision taken by a lower court/tribunal, a public body or a governmental officer,[523] usually striving at correcting or rectifying a prior action, decision or failure to act or decide.[524] This means that the decision or act complained of must have been taken or made by a public body established by a statute or otherwise exercising a public function.[525] In a number of cases, courts have held that a privately established body may be amenable to judicial review if it discharges public functions or it functionally operates as an integral part of a governmental framework, while those affected by its functions have no choice but to submit to its jurisdiction.[526]

Of late, several disputes pitting political parties and their disgruntled members have been resolved through judicial review. These cases include: *Hon. Zitto Zuberi Kabwe v. The Board of Trustees, Chama cha Demokrasia na Maendeleo & Another*;[527] *Peter Michael Malebo & Others v. The Registered Trustees of The Civil United Front (CUF - Chama Cha Wananchi) & Others*;[528] *Peter Michael Malebo & Others v. The Registered Trustees of The Civil United Front (CUF - Chama Cha Wananchi) & Others*;[529] *CUF - Chama Cha Wananchi v. Registrar of Political Parties & Another*;[530] *Mgeni Jadi Kadika v. The Registered Trustees of the Civic United Front (CUF - Chama Cha Wananchi) & 3 Others*;[531] and the pending case: *Halima James Mdee & 18 Others v. The Board of Trustees, Chama cha Demokrasia na Maendeleo (CHADEMA) & 2 Others*.[532]

3.8.5. Resolving Political Disputes in Regional and International Tribunals

In further vindicating their rights arising out of political disputes, some Tanzanian litigants have referred cases to sub-regional, regional and international courts and tribunals. The basis of referring cases to such international and regional fora is that Tanzania is a State Party to a number of international and regional human rights treaties,[533] which usually establish treaty bodies

523 *Felix Mselle v. Minister for Labour and Youths & 3 Others* [2002] T.L.R. 437.
524 *R v. Panel of Takeovers and Mergers, ex-parte Datafin*, op. cit. *See* also *Halsbury's Laws of England* (3rd Edn. Vol. 11, p. 54); and *R. v. Metropolitan Police Commissioner, ex parte Parker* (1953) 2 ALL ER 717, at p. 719.
525 *R. v. Panel of Takeovers and Mergers, ex-parte Datafin*, ibid.
526 Ibid. *See* also *Francis Kwilabya Stola v. Tanganyika Law Society & A.G.*, High Court of Tanzania at Dar es Salaam, Misc. Civil Application No. 12 of 2007 (Unreported).
527 Op. cit.
528 Op. cit.
529 Op. cit.
530 Op. cit.
531 Op. cit.
532 Op. cit.
533 Under the African Human Rights System, Tanzania has signed and ratified four human rights-related core treaties: the ACHPR (09/03/1984), the ACRWC (16/03/2003), the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (10/01/1975), and the African Union Convention on the Protection and Assistance to Displaced Persons in Africa. It has also ratified three human rights-related Protocols: the African Court's Protocol (07/02/2006), the Maputo Protocol (03/03/2007), and the Protocol on the Statute of the African Court of Justice and Human Rights. In addition, Tanzania has ratified several UN human rights treaties: the CEDAW (20 August 1985), the CRC (10 June 1990), and the CRPD (10 November 2009). It also accessed to several UN human rights treaties: the CERD (27 October 1972), the ICCPR (11 June 1976), and the ICESCR (11 June 1976).

for monitoring the implementation of treaty provisions. These treaty bodies also do have judicial or quasi-judicial powers to entertain and determine cases over violations of rights and freedoms guaranteed in the treaties under which they are established. In addition, Tanzania is a Partner State to the East African Community (EAC), whose founding treaty establishes the East African Court of Justice (EACJ).[534]

Whereas the referral of cases to the three African Human Rights Organs[535] and the nine UN treaty bodies is not automatic, accessing the EACJ is direct. For an individual wishing to refer a complaint to the former international and regional human rights bodies, he or she must meet, *inter alia*, the following admissibility conditions: it must be submitted within reasonable time and after exhaustion of local remedies[536] that are judicial in nature,[537] as well as it should not have been dealt with by or pending before other AU or UN tribunal or court.[538] It should be noted, however, where the available remedies are ineffective, insufficient or extra-ordinary to provide adequate redress to the complained violation, an individual may directly access such international human rights tribunals without necessarily exhausting local remedies.[539]
By the time Tanzania withdrew its declaration allowing individuals and NGOs to directly access the African Court on Human and Peoples' Rights (AfCHPR) in 2019,[540] it has been "sued" heavily before this continental Court more than before any other treaty bodies. Some commentators[541] have attributed this trend to the decision to withdraw the Article 34(6) Declaration, which was made by Tanzania on 14 November 2019.[542] The withdrawal became effective a year later, meaning that beginning from 20 November 2020,[543] Tanzanian individuals and NGOs are no longer able to *directly* access the Court basing

534 *See* particularly Articles 9 and 23 of Treaty Establishing the East African Community ('the EAC Treaty').
535 The three African Human Rights Organs are the AfCHPR, the African Commission on Human and Peoples' Rights and the ACERWC.
536 In *Urban Mkandawire v. Malawi* (AfCHPR, Application No. 3 of 2011) [2018] 1; (21 June 2013), para. 37, the AfCHPR held categorically that:

> 'It […] remains the duty of this Court to enforce the provisions of the Protocol and of the Charter. The Court is enjoined to ensure that *an application meets, amongst others, the requirements for admissibility* which are stipulated in the Protocol and the Charter. […]. *The requirement of exhaustion of local remedies is fundamental in the inter-action between State Parties to both the Protocol and the Charter, and their national courts, on the one hand, and this Court, on the other hand. State Parties ratify the Protocol on the understanding that local remedies would first be exhausted before recourse to this Court*; the making of the declaration in terms of Article 34 (6) of the Protocol is also on this understanding.' [Emphasis supplied].

537 *See* in particular *Mtikila v. Tanzania*, op. cit, para. 82. 3, where the AfCHPR held that: "The term local remedies is understood in human rights jurisprudence to refer primarily to *judicial remedies* as these *are the most effective means of redressing human rights violations*.' [Emphasis supplied]. *See* also *Mkandawire v. Malawi*, op. cit, paras. 38-40; and *Mariblanca Staff Wilson and Oscar E. Ceville v. Panama*, Case 12.303. Report No. 89/03, Inter-Am. C.H.R., OEA/Ser.UV/11.118 Doc. 70 rev. 2 at 531 (2003), paras.35 and 36.
538 *See*, for example, Article 56 of the African Charter on Human and Peoples' Rights; and Article 6(2) of African Court's Protocol.
539 *See* particularly *Actions Pour la Protection des Droits de l'Homme (APDH) v. Ivory Coast* (merits) (2016) 1 AfCLR 668; *Beneficiaries of the Late Norbert Zongo & Others v. Burkina Faso* (preliminary objections) (2013) 1 AfCLR 197; *Frank David Omary & Others v. Tanzania* (admissibility) (2014) 1 AfCLR 358; *Peter Joseph Chacha v. Tanzania* (admissibility) (2014) 1 AfCLR 398; *Wilfred Onyango Nganyi & Others v. Tanzania* (merits) (2016) 1 AfCLR 507; and *Alex Thomas v. Tanzania* (merits) (2015) 1 AfCLR 465.
540 Article 34(6) of African Court's Protocol.
541 See, for example, Greenfield, N., et al., "What Comes After Withdrawing from the African Court of Human and Peoples' Rights? Filling the Gaps to Bring Human Rights-based Claims Against Tanzania," International Law Blog, 1 June 2020. Available at https://internationallaw.blog/2020/06/01/what-comes-after-withdrawing-the-african-court-of-human-and-peoples-rights-filling-the-gaps-to-bring-human-rights-based-claims-against-tanzania/. (accessed 30 November 2022) (arguing that: 'Tanzania's move appears to be a politically motivated attempt to silence human rights NGOs in the region. The State's withdrawal followed in the wake of a string of decisions by the African Court against Tanzania.').
542 The Notice of Withdrawal, which was signed by the Minister for foreign affairs on 14 November 2021, was transmitted by the Permanent Mission of the United Republic of Tanzania to the African Union Commission (AUC) on 21 November 2021. The AUC circulated the Notice to AU Member States on 26 November 2019. The Notice of Withdrawal is available online at https://www.african-court.org/wpafc/wp-content/uploads/2020/10/Withdrawal-Tanzania_E.pdf (accessed 21 November 2021).
543 Greenfield, *et al.*, op. cit.

their claims on violations of the ACHPR.

Since the first case was filed in the AfCHPR against Tanzania in 2011,[544] a total of 156 cases had been filed in the same court against Tanzania by the time of Tanzania's withdrawal of the declaration. While 53 cases were finalized by 6 September 2021, 103 were still pending determination by the Court.[545] Amongst the finalised cases, in 28 cases, Tanzania was held liable for violations of human rights and in only 15 Tanzania was not held liable for violations of human rights.[546] Out of 28 cases in which Tanzania was held liable for violations of human rights, 3 cases were decided on merits but judgments on reparations were still pending determination by 1 July 2022; and 25 cases were decided on both merits and reparations.[547] The Court's status report on the implementation of these judgments does not present a good story, as illustrated in **Table 3.1** below:

Table 3.1: Status of Implementation of Decisions of the African Court on Human and Peoples' Rights

Type of Relief	No. of cases	No. of Decisions Implemented	No. of Decisions Not Implemented	State Implementation Reports Submitted to the AfCHPR
Violation	28	0	28	4[548]
Reparation	25	0	25	0
No violation	15	0	15	0

Source: AfCHPR, "Report on the Implementation of Judgments of the Court in Matters Filed Against the United Republic of Tanzania," 6 September 2021.

544 *Tanganyika Law Society & Legal and Human Rights Centre v. Tanzania*, AfCHPR, Application No. 009/2011, which was later consolidated with *Rev. Christopher Mtikila v. Tanzania*, AfCHPR, Application No. 011/2011.

545 African Court on Human and Peoples' Rights, "Report on the Implementation of Judgments of the Court in Matters Filed Against the United Republic of Tanzania," 6 September 2021.

546 These cases are: Thobias Mango & Another v. Tanzania, AfCHPR, Application No. 005/2015 (judgment dated 11 May 2018); Anudo Ochieng Anudo v. Tanzania, AfCHPR, Application No. 012/2015 (judgment dated 22 March 2018); and Mgosi Mwita Makungu v. Tanzania, AfCHPR, Application No. 006/2016 (judgment dated 7 December 2018).

547 Ibid.

548 In Tanganyika Law Society and the Legal and Human Rights Centre and Rev. Christopher R. Mtikila v. Tanzania, AfCHPR, Consolidated Applications 009 and 011/2011 (Judgment of 14 June 2013 on the Merits and 13 June 2014 on Reparations), the respondent State filed 3 Reports in this regard on 17 April 2015, 18 January 2016 and on 3 January 2017. The respondent State indicated that the implementation of the Court's judgment was contingent on the outcome of a referendum on the proposed Constitution and that the proposed Constitution had made provision for independent candidates in the Local, Parliamentary and Presidential elections. On 3 January 2017, the respondent State informed the Court that the referendum was still pending. In Alex Thomas v. Tanzania, AfCHPR, Application 005/2013 (Judgment of 20 November 2015 on Merits and 4 July 2019 on Reparations), the respondent State maintained in its report that the order to take all necessary measures within a reasonable time to remedy the violations found, specifically precluding the reopening of the defence case and the retrial of the Applicant was un-implementable; and, subsequently, the respondent State applied for an interpretation of the Judgment. This interpretation was given by the Court on 28 September 2017. However, the Respondent State has not filed a follow up report to indicate the measures it has taken after the Judgment on interpretation. On reparations, the Respondent State has not filed any report on the implementation of the reparations judgment despite its time to do so having elapsed on 5 January 2020. Similarly, in Wilfred Onyango Nganyi & 9 Others v. Tanzania, AfCHPR, Application 006/2013 (Judgment of 18 March 2016 on Merits and 4 July 2019 on Reparations), the respondent State has filed reports on the implementation of the judgment on Merits indicating that stakeholders were informed regarding the legal aid provisions of the law and their obligation to inform suspects/accused persons of the provision of legal aid. The Legal Aid Act was gazetted in March 2017. The respondent State reported that, by the time the Court ordered it to provide legal aid to the Applicants for the pending proceedings against them in the domestic court, the High Court had already concluded their appeals (in Criminal Appeal Nos. 47 and 48 of 2014). The Judgment was delivered on 10 December 2015, where the High Court dismissed the Applicants' appeals. On reparations, the respondent State has not filed any report on the implementation of the reparations judgment despite its time to do so having elapsed on 5 January 2020. Finally, in Mohamed Abubakari v. Tanzania, AfCHPR, Application 007/2013 (Judgment of 6 June 2016 on Merits and 4 July 2019 on Reparations), the respondent State reported that stakeholders of the criminal justice system were informed of the provisions of the law with regard to legal aid and their obligation to inform suspects/accused persons of the provision of legal aid. The Respondent State also reported that the Legal Aid Act 2017 was passed. That the Act regulates and coordinates the provisions of legal aid services to indigent persons, recognises paralegals, repeals the Legal Aid Criminal Proceedings Act and provides for related matters. It also sought interpretation on the remedy of the violations which was provided by the court on 28 September 2017. The Respondent state did not file a follow up report to that. On reparations, the Respondent State has not filed any report on the implementation of the judgment despite its time to do so having elapsed on 5 July 2020.

As illustrated in **Table 3.1** above, only one decision of the AfCHPR has been partially implemented by Tanzania as ordered. In particular, in *Nguza Viking & Johnson Nguza v. Tanzania*,[549] the applicants were released on 9 December 2017 through a presidential pardon.[550] Nonetheless, their other reliefs, including reparations, remain unimplemented to date.[551] Some circles in Tanzania have raised issues with the AfCHPR's own problem with regard to the nature of the reliefs it has been granting against Tanzania, with the most problematic being an order of release from imprisonment of most of the applicants. It has been argued that the AfCHPR, being not an appellate court against national judiciaries,[552] has no jurisdiction to grant an order releasing a prisoner who has been lawfully being tries, convicted and sentenced in accordance to the national penal law.

From the records available with the African Commission on Human and Peoples' Rights, there is only one decision that has been rendered against Tanzania: *Women's Legal Aid Centre (on behalf of Sophia Moto) v. Tanzania*.[553] In this communication, Tanzania was held in violation of Article 7(1)(a) of the ACHPR. Moreover, only one communication has filed against Tanzania before the African Committee of Experts on the Rights and Welfare of the Child (ACERWC): *Legal and Human Rights Centre & Centre for Reproductive Rights (on behalf of Tanzanian girls) v. Tanzania*.[554] In this case, Tanzania was found to have violated a number of rights guaranteed under the ACRWC, including the right of impregnated school girls to return back to school after delivery.[555] However, these decisions have not been implemented as of today.[556]
In relation to UN treaty bodies, there are seems to be only three communications filed against Tanzania: one with the CEDAW Committee[557] and two with the CRPD Committee.[558] In all communications, decisions were rendered against Tanzania. In reference to these communications, Tanzania has implemented only a few aspects of the Committees' recommendations.[559]

549 AfCHPR, Application No. 006/2015 (Judgment of 23 March 2018 on Merits, and 8 May 2020 on Reparations).
550 "Nguza Viking Walks out of Prison," The Citizen newspaper (Dar es Salaam), 17 December 2017. Available at https://www.thecitizen.co.tz/tanzania/news/ guza-viking-walks-out-of-prison-2616244 (accessed 29 November 2021).
551 After finding Tanzania to have violated Articles 1 and 7(1)(c) of the Charter, the Court ordered the respondent State to (i) pay the first Applicant the sum of TShs. 20,000,000/- and the second Applicant the sum of TShs. 5,000,000/- (para. 68); (ii) publish the Judgment within three (3) months of its notification, on the official websites of the Judiciary and the Ministry of Constitutional and Legal Affairs (para. 69); and, (iii) ensure that the Judgment remains accessible for at least one (1) year after the date of such publication (para. 69).
552 *See*, for example, *Mkandawire v. Malawi*, op. cit.
553 African Commission on Human and Peoples' Rights, Communication No. 243/01 (decision adopted at the 36th Ordinary Session of the African Commission on Human and Peoples' Rights held from 23 November to 7 December 2004).
554 ACERWC, Communication No. 0012/Com/001/2019 (filed on 17 June 2019).
555 In particular, Article 11(6) of the ACRWC obliges States parties thereto to take 'all appropriate measures to ensure that children who become pregnant before completing their education shall have the opportunity to continue with their education on the basis of their individual ability.'
556 Natalie Greenfield, et al., op. cit (noting that: 'Tanzania does not appear to have enforced the one decision on the merits that the Commission decided against Tanzania.').
557 E.S. & S.C. v. Tanzania, CEDAW/C/60/D/48/2013, decision adopted on CEDAW/C/60/D/48/2013 (property rights relating to inheritance).
558 Y v. Tanzania, CRPD/023/2014, decision rendered on 31 Aug 2018; and X v. Tanzania, CRPD/C/18/D/22/2014 (all on discrimination, and cruel, inhuman or degrading treatment or punishment).
559 Natalie Greenfield, *et al.*, op. cit.

On its part, the East African Court of Justice (EACJ)[560] has "derivative" jurisdiction[561] to hear human rights in terms of Article 27(2) of the EAC Treaty. It should be noted that, one of the fundamental principles of the EAC Treaty is upholding the respect for the rule of law and the promotion and protection of human and peoples' rights in accordance with the provisions of the ACHPR.[562] The EAC Treaty also imposes an obligation on member States to 'abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights'.[563]

Apart from having jurisdiction to interpret and apply the EAC Treaty,[564] the EACJ has derivative human rights jurisdiction founded in Article 27(2) of the Treaty. In principle, this provision empowers the Council of Ministers to conclude a Protocol for the purpose of extending the competence of the Court to include, *inter alia,* jurisdiction over human rights matters.[565] However, until now, the Council has not executed such a Protocol, a situation which has been termed as ambiguous by some scholars.[566] But Viljoen does not agree with this assertion. According to Viljoen, the reference to human rights and the ACHPR in the EAC Treaty means that 'current (EAC) law does not foreclose individual referrals on the basis of human rights.'[567] Supporting this position, the EACJ seized the opportunity provided by *James Katabazi & 21 Others v. Secretary General of the East African Community & A.G. of Uganda*[568] to assert what can best be described as 'a derivative human rights competence under the EAC Treaty.'[569]

Basing on the facts of the case, while conceding that Article 27 of the EAC Treaty did not give it a human rights competence, the Court held that even though it would 'not assume jurisdiction on human rights disputes', it also would 'not abdicate from exercising its jurisdiction of interpretation under Article 27(1) merely because the Reference includes allegations of human

560 The EACJ is the judicial organ of the East African Community (EAC) established under Articles 9 and 23 of the EAC Treaty with the primary responsibility to ensure the adherence to law in the interpretation and application of, and compliance with, the EAC Treaty (Article 23 of the EAC Treaty). In accordance with Article 9(1)(e) of the EAC Treaty, the EACJ has two divisions: the First Instance Division and an Appellate Division.
561 Ebobrah, S.T., "Litigating Human Rights Before Sub-Regional Courts in Africa: Prospects and Challenges" *RADIC* (17: 2009), p. 82.
562 Article 6(d) of the EAC Treaty.
563 Ibid, Article 7(2).
564 Article 27(1) of the EAC Treaty. *See* also *Rashid Salim Adiy & 39,999 Others v. A.G. of Zanzibar & 2 Others,* EACJ Reference No. 9 of 2016, paras. 16, and 18.
565 Ibid, Article 27(2).
566 The purported ambiguity seems to be based on the provisions of Article 27(2) of EAC Treaty, which gives the Council of Ministers discretionary powers to conclude a Protocol for the purpose of extending the competence of the Court to include other original and appellate jurisdiction, including jurisdiction over human rights matters. As of now, there is no Protocol that has been concluded by the Council extending the jurisdiction of the Court to entertain cases involving violations of human rights. On the strength of these provisions, Tom Ojienda argues that: 'the Court has no jurisdiction where infringements that occur relate, for example, to the human or other individual rights of the residents.' *See* Ojienda, T.O., "The East African Court of Justice in the Re-established East Africa Community: Institutional Structure and Function in the Integration Process" *East African Journal of Peace & Human Rights*, Vol. 11, 2005, pp. 220–240, p. 228.
567 Viljoen, F., *International Human Rights Law in Africa* (Oxford: Oxford University Press 2007), p. 505.
568 Reference No. 1 of 2007, Judgment of the EACJ delivered on 1 November 2007 available at www.chr.upac.za/about/news_2008/EACJ (accessed 24 November 2021).
569 Ebobrah, op. cit, p. 82.

rights violation.'[570] This can particularly be founded in the Court's use of the word *may* in the following text:

> It is very clear that Jurisdiction with respect to Human Rights requires a determination of the Council and a conclusion of a protocol to that effect. Both of those steps have not been taken. It follows, therefore, that this Court *may* not adjudicate on disputes concerning violation of Human Rights *per se*. [Emphasis supplied].

"Interpreting" and "applying" Articles 6(d), 7(2) and 8(1)(c) of the EAC Treaty, the EACJ arrived at a finding that 'there was a violation of the principle of the rule of law and consequently a contravention of the EAC Treaty.'[571]

Therefore, this decision has opened the door to human rights litigation before the EACJ 'if it can be shown that the conduct violating the rights in question also amount to a violation of the EAC Treaty[which] limits of the powers conferred by the Treaty.'[572]This implies that the EACJ has derivative jurisdiction to determine human rights cases, provided that the claims for violations of human rights are to be premised around violation of the principles of the rule of law inherent in the Treaty Establishing the East African Community.

On the basis of this position, the EACJ has received a couple of human rights cases, including those from instituted against Tanzania. For example, by banning the publication of the *Mseto* newspaper for three years in 2016,[573] Tanzania was held in violation of press freedom, which constitutes a violation of Tanzania's obligation under the EAC Treaty to uphold and protect the principles of democracy, rule of law, accountability, transparency and good governance as specified under Articles 6(d) and 7(2) of the Treaty.[574] Having so found, the First Instance Division of the EACJ ordered the Minister responsible for information 'to annul the order forthwith and allow the Applicant to resume publication of *Mseto*.'[575] However, the respondent State's attempt to appeal against this decision to the Appellate Division of EACJ was strike out on 2 June 2020.[576] The decision of the First Instance Division of the EACJ has not yet been enforced.

570 *James Katabazi*, op. cit. p. 16.
571 Ebobrah, op. cit (noting that: 'Although a positivist approach would lead to the argument that the decision amounts to excessive judicial activism that may be read as judicial re-writing of the EAC Treaty, this decision provides the platform for future litigation of human rights before the Court, subject to proper wording of the claim and innovative advocacy on the part of the lawyers. By focusing on whether the conduct of the respondent state was a violation of the principle of the rule of law, instead of embarking on a direct determination whether the human rights of the applicants have been violated, the Court cleverly avoided the effects of Article 9(4) of the Treaty which requires that organs of the EAC would function and act within the limits of the powers conferred by the Treaty.'). (Emphasis supplied].
572 Ibid, p. 83.
573 The order banning the newspaper was issued by the Minister for Information, Culture, Arts and Sports vide *Government Gazette* No. 242 of 10th August 2016.
574 Managing Editor, Mseto & Another v. A.G. of Tanzania, EACJ (First Instance Division), Reference No. 7/2016.
575 Ibid, para. 74(c).
576 Managing Editor, Mseto & Another v. A.G. of Tanzania, EACJ (Appellate Division), Consolidated Applications Nos. 3 & 4/2019 (in an intended appeal).

Again, in *Media Council of Tanzania & 2 Others v. A.G. of Tanzania*[577] the First Instance Division of the ACJ found Sections 7(3)(a), (b), (e), (t), (g), (h), (i), and (j); 19, 20 and 21; 35, 36-40; 50, 52-54; and 58-59 of the Media Services Act (2016)[578] to have violated Articles, 6(d) and 7(2) of the Treaty for the Establishment of the East African Community.[579] Therefore, the EACJ directed Tanzania to take 'such measures as are necessary, to bring the Media Services Act, into compliance with the Treaty for the Establishment of the East African Community.'[580] The respondent State's attempt to appeal against this decision failed after its Notice of Appeal filed on 11 April 2019 was to strike out on 9 June 2020.[581] However, since the decision was rendered on 28 March 2019, these measures have not been implemented. Another case in which Tanzania was held to have violated participation rights through the 2019 amendments to the Political parties Act is *Mbowe v. Tanzania* (considered above). However, the respondent State has appealed to the Appellate Division of the EACJ, which is pending at the time of writing.

3.9. Conclusion

The constitutional reintroduction multi-party political system in Tanzania in 1992 ushered in a façade of democratic participation in the governance of the country's political and public affairs for people of different ideologies. The past thirty years of multi-partyism in Tanzania has witnessed an increase in people's participation in the governance of their country's political affairs through direct or indirect participation in political or public life. However, the road to an effective participation of citizens in multi-party democracy has not been without challenges. Although the Nyalali Commission report proposed a number of constitutional, legal and institutional reforms; only patchy reforms were undertaken henceforth. As it has been noted by scholars, by December 1992, about 50% (26 specific recommendations) made by the Nyalali Commission report had been partially or fully carried out by December 1992.[582]

Amongst the unimplemented recommendations, five specific recommendations were left out although they were very crucial in the short-term in ensuring effective people's participation in the multiparty democratic processes. These included, firstly, carrying out a campaign or programme to educate or inform the people about the principles of multi-party democracy.

577 EACJ (First Instance Division), Reference No. 2/2017.
578 Act No. 120 of 2016.
579 *Media Council of Tanzania*, op. cit, para. F.(a).
580 Ibid, para. F.(b).
581 Media Council of Tanzania & 2 Others v. A.G. of Tanzania, EACJ (Appellate Division), Application No. 5/2019.
582 Tambila, op. cit.

Secondly, the Nyalali Commission report proposed the introduction of teaching in schools of subjects on the Constitution of Tanzania and on human rights; thirdly, the Commission recommended for the enhancement of academic freedom; fourthly, the enhancement of the free flow of information and encouragement of the growth of a free press; and, fifthly, the abolition or amendment of identified 40 oppressive laws.[583]

One of the consequences of this omission is that the multiparty political system in Tanzania was not founded on a concrete foundation that would enhance an all-inclusive participation of citizens in the governance of public affairs of their country. For instance, apart from the AfCHPR holding that independent candidates should be allowed to participate in elections in June 2013, Tanzania has not amended the Constitution to that effect. Again, there are still issues with the independence of NEC, non-attainment of a 50:50 representation of women and men in Parliament (*see* Chapter Four) and LGAs' Councils, and freedom of assembly in relation to political rallies. Some of these issues were also recently dealt with the Presidential Task Force on Multi-party Democracy, which has made around 98 recommendations aimed at further strengthening and deepening multiparty democracy in Tanzania.[584]
Therefore, it is recommended that, in order to further strengthen and deepen multiparty democracy in Tanzania, it is high time that the country resuscitates the constitutional review and making process that was envisaged by the Nyalali Commission Report and given further impetus by President Kikwete's constitutional review and making process that took place between 2011 and 2014. It is also recommended that the country should implement recommendations made in a recent report submitted to the President of Tanzania by the Presidential Task Force,[585] which include undertaking comprehensive legal and institutional reforms in various aspects concerning the realisation of participation rights in the country. In addition, it is recommended that Tanzania should fully implement decisions of domestic, regional and international courts concerning the realisation of participation rights in the country.

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CHAPTER FOUR:
WHY TANZANIA CELEBRATES 30 YEARS OF MULTIPARTY DEMOCRACY WITH ONLY 9.8 PERCENT OF ELECTED WOMEN PARLIAMENTARIANS? A LEGAL EXPLANATION

By Dr. Victoria Lihiru

Abstract

Tanzania re-introduced multi-party democracy in 1992 after three decades of operating under a single-party system. While both men and women played a key role in the attainment of the 1961 independence, fewer women have been winning parliamentary elections both during the single-party system as well as after the reintroduction of multi-party democracy. The Tanzanian electoral laws provide for five ways to access parliamentary positions, with prominent ones being through contesting directly in constituencies, special seat systems, and presidential nominations. These mechanisms have somewhat enabled women to access parliamentary positions. Nevertheless, Tanzania celebrates 30 years of multiparty democracy with 9.8 percent of elected women parliamentarians. The majority of women parliamentarians access the legislative seats through the special seat system. This chapter provides legal reasons for why there are fewer women winning constituencies three decades after the reintroduction of multi-party democracy in Tanzania Mainland, and offers recommendations for redressing the situation.

4.1. Introduction and Methodology

Tanzania became a *de facto* single-party political system right after the 1961 independence and *de jure* in 1965.[586] Tanzanian women have struggled to access elected parliamentary positions both under the single-party system as well as after transitioning to multi-party democracy in 1992. Both men and women played a critical role in obtaining the 1961 independence.[587] However, it took up to two decades for the first woman to win a constituency in 1985, with the number increasing to two in 1990.[588] After three decades of the existence of a single-party system, the strong influence of the first President of URT, *Mwalimu* Julius Kambarage Nyerere, and the Second President of URT Ali Hassan Mwinyi[589] led to the re-introduction of multiparty democracy

589 President Samia's letter to Tanzanians on 30 years of multi-party democracy, July 01, 2022 — updated on July 04, 2022, available at https://www.thecitizen.co.tz/tanzania/oped/president-samia-s-letter-to-tanzanians-on-30-years-of-multi-party-democracy-3866168, accessed on 4th August 2022.

in Tanzania in 1992 through the Eighth Constitutional Amendment. This is notwithstanding that 80 percent of Tanzanians opined for the country to remain under a single-party system through the 1991 report of the Judge Francis Nyalali Commission.[590]

The transition to multiparty democracy brought some changes to how women participated in elections and won constituencies. The first election under multiparty democracy in 1995, quadrupled the number of women winning constituencies with 8 women (3.4 percent) winning the parliamentary seats.[591] The number kept on increasing, albeit at a snail's pace. Twelve women (5.3%) won constituencies in 2000, seventeen (7.3%) in 2005, twenty-one (8.7%) in 2010, and 25 (9.4 percent) in 2015. The recent election, the 2020 general election, happened as Tanzania was about to celebrate its 59th independence anniversary. In this election women made up less than ten percent of the directly elected parliamentarians,[592] winning 26 out of 264 seats (9.8 percent).[593]

Realizing women's challenges in winning constituencies, the government adopted the Special Seats System (SSS) as one of its selected forms of Quotas/Temporary Special Measures (TSM). The introduction of SSS in 1985, reserved 10 percent of parliamentary seats for women. The SSS percentage was increased to 15, 20, 30, and later to 40 percent in 1995, 2000, 2005, and 2010 respectively.[594] With the introduction of SSS, the number of women in Parliament, including those directly elected from constituencies, increased to 16.73, 21.5, and 30.3 percent after the 1995, 2000, and 2005 general elections, respectively. The number increased to 35.85 then to 37.2 percent after the 2010 and 2015 elections. After the 2020 general elections, the number of women in parliament currently stands at 36.9 percent.[595]

In 2022, Tanzania celebrates 30 years of multi-party democracy and 61 years of independence. However, the number of women elected from constituencies remains unsatisfactory. While the Parliament is composed of 36.9 percent of women in the National Assembly, only 26 women (9.8) are elected from a total of 264 constituencies.[596] 113 women got into the Parliament through the SSS

590 President Ali Hassan Mwinyi formed a presidential commission to look into whether Tanzania should continue with the one-party system or to adopt a multi-party system. The commission was headed by the then Chief Justice, Francis Nyalali. Nyalali met with people across the country, and reported that 20 percent of those consulted opted for a multi-party system while 80 percent opted to continue with the one-party system. However, Nyalali suggested for the adoption of multipartyism. Jamhuri ya Muungano wa Tanzania, *Tume ya Rais ya Mfumo wa Chama Kimoja au Vyama Vingi vya Siasa Tanzania, 1991* (Dar es Salaam: Mchapaji Mkuu wa Serikali, 1992).

591 Lihiru, V. (2019), "Participatory Constitutional Reforms vs. Realization of Equal Representation of Men and Women in the Parliaments: A Study of Kenya, Rwanda and Tanzania," Ph.D. Thesis, University of Cape Town; available at http://hdl.handle. net/11427/31508 (accessed 10 June 2022).

592 There have been two by-elections in Muhambwe and Buhigwe in Kigoma Region in Mainland Tanzania and one by-election in Zanzibar that have taken place since the 2020 general election. In Mainland Tanzania, in the by-election that took place on 16 May 2021 a woman (Frolence Samizi) won in Muhambwe constituency.

593 Lihiru, V. (2021), "The 2020 CHADEMA Special Seats Dispute in Tanzania: Does the National Electoral Commission Comply with the Law?", available at https://www.eisa.org/pdf/JAE20.2Lihiru.pdf (accessed 5 September 2022).

594 National Election Commission (2020), *Report on the 2020 Presidential, Parliamentary and Councillors' Elections* (Dodoma: NEC) ISBN 978-9976-9957-4-9.

595 Inter-Parliamentary Union (IPU), "Women in National Parliaments," available at https://data.ipu.org/women-ranking?month=9&year=2022 (accessed 10 November 2022).

596 Ibid.

window, five are nominated by the president, and two represent the Zanzibar House of Representatives.

The lower number of elected women parliamentarians raises concerns and makes the commemoration of 30 years of multiparty democracy a critical juncture to reflect on how electoral laws and those governing the management of political parties in Tanzania enable or hinder women to compete and win parliamentary seats. This Chapter, therefore, leverages a doctrinal legal research method[597] and compares national laws with international law principles to determine the strengths and weaknesses of Tanzanian laws in guaranteeing women's political rights. With the recognition that the history and trends in Zanzibar are quite distinct, this Chapter is focused primarily on Mainland Tanzania rather than the entire United Republic of Tanzania.

4.2. Theoretical Framework: The International, Regional, and Sub-region Legal Standards for Women's Participation in Elections

There are several critical arguments for advancing the equal representation of men and women positions of power. The justice and equity argument appreciates that women account for half the population[598] and thus have the right to be represented in decision-making processes. There is also a democracy argument that views the equal representation of women and men as key in enhancing democratization of governance in the emerging, transitional and as well as in consolidated democracies. The interest and experience argument views women's experiences and interests as different and unique from those of men and need to be represented in policy-making processes so they can offer policy solutions that speak to their challenges. In addition, the critical mass argument sees that women are able push and influence for policy positions when they achieve certain levels of representation. Finally, the symbolic argument perceives that women are attracted to political life if they have role models in the arena.[599]

In light of these arguments, its noteworthy that the slow progression of women's access to the elected parliamentary positions in Tanzania happens against the backdrop of the country's strong commitment to the international, regional, and subregional conventions and treaties which call states parties to

597 The doctrinal research method focuses on what the law is (*de lege lata*) as opposed to what the law ought to be (*de lege ferenda*), in undertaking the analysis of the legal doctrine and how it has been developed and applied. Chui WH & McConville M (eds) *Research Methods for Law* (2010) Edinburgh University Press 2010.
598 United Nations, "Gender Ratio in the World," UN (World Population Prospects 2019), 26 Aug 2021. Available at ttps://statisticstimes.com/demographics/world-sex-ratio.php, accessed 20 October 2022.
599 United Nations, "Equal Participation of Women and Men in Decision-Making Processes, with Particular Emphasis on Political Participation and Leadership," Expert Group Meeting organized by the United Nations Department of Economic and Social Affairs (DESA), Division for the Advancement of Women (DAW), held in Addis Ababa, Ethiopia, 24 to 27 October 2005, para. 28. Available at https://www.un.org/womenwatch/daw/egm/eql-men/index.html, accessed 25 October 2022.

take deliberate efforts to achieve the equal representation of men and women in decision-making spaces.

Prior to transitioning to multiparty democracy, Tanzania had and is still committed to the 1945 United Nations Charter (UN Charter),[600] the 1948 Universal Declaration of Human Rights (UDHR),[601] the 1966 International Covenant on Civil and Political Rights (ICCPR),[602] and the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[603] Regional-wise, Tanzania had and still has obligations under the 1981 African Charter on Human and People's Rights.

As the country transitioned to a multiparty system, it continued to commit to more international, regional, and sub-regional conventions such as the Beijing Declaration and Platform for Action of 1995,[604] the 2003 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ('the Maputo Protocol'),[605] the 2008 Southern African Development Community (SADC) Protocol on Gender and Development, and the 1999 Treaty to the Establishment of the East African Community.[606] The Conventions signed and ratified during the single-party era and after the country transitioned to multiparty systems contain the agreed standards for the promotion of women's right to take part in elections and decision-making processes, structures.

Specifically, the UN Charter, a constitutive treaty of the United Nations, recognizes '*equal rights between men and women and reaffirms respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion*."[607] Also, it requires member states to "*place no restrictions on the eligibility of men and women to participate in any capacity*."[608] The instrument that has been accepted all over the world as an International Customary Law,[609] the Universal Declaration of Human Rights

600 United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, available at: https://www.refworld.org/docid/3ae6b3930.html (accessed 18 November 2022).
601 UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: https://www.refworld.org/docid/3ae6b3712c.html (accessed 18 November 2022).
602 UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: https://www.refworld.org/docid/3ae6b3aa0.html (accessed 18 November 2022).
603 UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, available at: https://www.refworld.org/docid/3ae6b3970.html (accessed 18 November 2022).
604 Beijing Declaration and Platform for Action, Fourth World Conference on Women, 15 September 1995, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995).
605 African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003, available at: https://www.refworld.org/docid/3f4b139d4.html (accessed 18 November 2022).
606 The East African Community Treaty was signed on November 30, 1999 in Arusha, Tanzania between five countries, including Burundi, Kenya, Rwanda, Uganda and The United Republic of Tanzania. The accord established the East African Community whereby all participating nations agreed to establish more cooperative commercial and political relations for their cumulative 133 million citizens. The treaty went into effect on 7 July 2000, and being amended on 14 December 2006 and 20 August 2007.
607 Articles 1 and Article 55 (c) of the UN Charter.
608 Ibid, Article 8.
609 It refers to international obligations arising from established state practice, as opposed to obligations arising from formal written international treaties. According to Article 38(1)(b) of the ICJ Statute, customary international law is one of the sources of international law. Customary international law can be established by showing (1) state practice and (2) opinio juris. Put another way, "customary international law" results from a general and consistent practice of states that they follow from a sense of legal obligation. Accessed from http://www.law.cornell.edu/wex/customary_international_law on 15 February 2013.

(UDHR)[610] guarantees "*everyone the right to take part in the government of his country, directly or through freely chosen representatives.*"[611]

Owing to the non-binding nature of the UDHR, in 1966, the international community passed the International Covenant on Civil and Political Rights (ICCPR),[612] with Tanzania ratifying the ICCPR in 1976. The Convention prohibits distinction based on race, color, and sex[613] and further recognizes the right and the opportunity, of everyone *(a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.*"[614]

On women-specific conventions, before transitioning to multiparty democracy, Tanzania ratified the *International Bill of Rights for Women* in 1985, namely, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The Convention requires States Parties to take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, to ensure that women, on equal terms with men, have the right:

a. *To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies, and*
b. *To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government [...].*[615]

On the African continent, before transitioning to multi-party democracy, Tanzania had already ratified the African Charter on Human and People's Rights (ACHPR) in 1984.[616] Similar to the global human-rights-based international conventions, the African Charter enshrines the underpinning principles of non-discrimination and equality before the law.[617] It also guarantees *"every citizen the right to participate freely in the government of his country, either*

610 This is a declaration adopted by the United Nations General Assembly on 10 December 1948 at Palais de Chaillot, Paris. The Declaration arose directly from the experience of the Second World War and represents the first global expression of rights to which all human beings are inherently entitled.
611 Article 21 of UDHR.
612 It also passed the International Covenant on Economic, Social, and Cultural Rights (ICESCR). Notably. The UDHR together with the ICCPR and the ICESCR form what is referred to as the International Bill of Human Rights
613 Articles 2 and 3of the ICCPR
614 Article 25 of the ICCPR.
615 Article 7 of CEDAW.
616 Concluding Observations and Recommendations - Tanzania: 2nd to 10th Periodic Report, 1992-2006, available at https://www.achpr.org/sessions/concludingobservation?id=73#:~:text=The%20United%20Republic%20of%20Tanzania%20(Tanzania)%20is%20a%20State%20Party,same%20on%2018%20February%201984, accessed on 10th October 2022.

On 27 June 1981, at its 18th General Assembly Meeting in Nairobi, Kenya, the Heads of State and Government of the OAU adopted the African Charter on Human and Peoples' Rights.
617 Article 2 and 3 of the ACHPR.

directly or through freely chosen representatives."[618]

In addition to the ACHPR, Tanzania is also part of the Maputo Protocol, having ratified it in 2007. The preamble to the Protocol recalls that: "*women's rights have been recognized and guaranteed in all international human rights instruments as inalienable, interdependent and indivisible human rights*." It requires state Parties to take specific positive actions to promote the equal participation of women in the political life of their countries, ensuring that:

a. *Women do participate in all elections without any discrimination.*
b. *Women are represented equally at all levels with men in all electoral and candidate lists.*
c. *Women are partners with men at all levels of development and implementation of state policy.*[619]

Furthermore, Tanzania is fully committed to respecting the Beijing Declaration and Platform for Action of 1995.[620] The Declaration contains two strategic objectives in women's participation in political leadership and decision-making positions, namely: (*i*) to ensure women's equal access to and full participation in power structures and decision-making; and (*ii*) to increase women's capacity to participate in decision-making and leadership. In order to ensure effective implementation of the first strategic objective, the Beijing Platform for Action recommended various measures, including the need to: -

a. *Integrate women into elective positions in political parties.*
b. *Promote and protect women's political rights; and*
c. *Reconcile work and family responsibilities for both men and women.*

The Declaration also, calls on governments to take measures to ensure "*women's equal access to, and full participation in, power structure and decision-making by creating a gender balance in government and administration; interacting women into political parties; increasing women capacity to participate in decision making and leadership and increasing women's participation in electoral process and political activities.*"[621]

Notably, the Declaration also requires countries to *"review the impact of electoral systems on the political representation of women and consider reforming those systems by adopting the electoral systems that encourage*

618 Article 13 of the ACHPR.
619 Article 10 of the Maputo Protocol.
620 Soon after the Beijing Conference, the Government developed and adopted an Action plan within the National Sub-Programmme for Women and Gender Advancement.
621 Tanzania Gender networking (TGNP), "Research Findings on Gender and Elections in SADC Region," SADC Electoral Support Network, final draft, 2005, p. 16.

political parties to integrate women in elective and non-elective public positions in the same proportion and level as men."[622]

Moreover, the Southern African Development Community (SADC) Protocol on Gender and Development[623] consolidates and creates synergies between various commitments on gender equality[624] into one comprehensive regional instrument that enhances the capacity to plan, implement and monitor the SADC Gender agenda. The Declaration called for 50:50 male and female representation by 2015, in the public and private sectors including the use of affirmative action measures.[625] It requires States Parties to ensure women and men participate in decision-making positions[626] and adopt specific legislative measures and other strategies to enable women to have equal opportunities with men to participate in all electoral processes.[627]

Finally, the Treaty to the Establishment of East African Community (EAC),[628] *inter alia,* calls upon the Partner States to take appropriate legislative and other measures to: -[629] *Promote the empowerment and effective integration and participation of women at all levels of socio-economic development especially in decision-making; Abolish legislation and discourage customs that are discriminatory against women; Promote effective education awareness programmes aimed at changing negative attitudes towards women; Take such other measures that shall eliminate prejudices against women and promote the equality of the female gender with that of the male gender in every respect*. In 2018, the EAC adopted the East African Community Gender Policy whose aims include to promote women's participation in political and decision-making process at all levels.[630]Overall, the international and regional legal frameworks call upon member states to take deliberate measures including changing their policies, laws, and practices to embrace the principles of gender equality and non-discrimination as well as guarantee equal enjoyment of civic and political rights between men and women. State parties are also called to take efforts to realize 50:50 men and women

622 Strategic Object G1 of the BPFA.
623 The SADC Protocol on Gender and Development looks into integration and main streaming of gender issues into the SADC Programme of Action and Community Building initiatives which is important to the sustainable development of the SADC region. It aims to provide for the empowerment of women, to eliminate discrimination and achieve gender equality by encouraging and harmonising the development and implementation of gender responsive legislation, policies and programmes and projects. It was signed in the year 2008.
624 It harmonizes the various international, continental and regional gender equality instruments that SADC Member States have subscribed to such as the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), Beijing Declaration and its Platform of Action, The Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa, and the Sustainable Development Goals (SDGs) amongst others. l
625 Ibid, Article 12 (1)
626 12 (2) of the SADC Protocol on Gender and Development.
627 Ibid, Article 13.
628 The treaty for the Establishment of the East African Community was signed on 30 November 1999 in Arusha, Tanzania by the first three Partner States: Kenya, Tanzania and Uganda (currently, four other countries have joined the EAC: Burundi, DRC, Rwanda and South Sudan). The accord established the East African Community whereby all participating nations agreed to establish more cooperative commercial and political relations for their cumulative 133 million citizens. The treaty went into effect on July 7, 2000 and being amended on 14th December, 2006 and 20th August, 2007.
629 Article 121 of the EAC Treaty.
630 Objective 4(5)(c). The Protocol was revised in 2016 to align it to the Post-2015 Sustainable Development Goals and Targets, the African Union Agenda 2063, and the Beijing Plus 20 Review Report. Tanzania is also one of the countries that has signed the Agreement Amending the SADC Protocol on Gender and Development.

representation in decision-making spaces, adopt temporary special measures, review the electoral system and ensure men and women participate equally in elections. Therefore, through the signing and subsequent ratification of the international, regional, and sub-regional conventions, Tanzania is committed to ensure both men and women have the right to "vote in all elections", "to be eligible for election", and "to hold public office and exercise all public functions."

4.3. Women Participation in Parliamentary Elections During Single-Party System

Despite the commitments under the international and regional conventions, the laws governing access to parliamentary seats during the single-party system, namely the 1977 Constitution of United Republic of Tanzania[631] and the National Elections Act[632] contained no deliberate measures to address the historical challenges that faced women's access to electoral decision-making positions as required under international law. Consequently, only two women won the parliamentary elections in the 30 years that the single-party system existed in Tanzania.[633]

Notably, during the single-party political system women were confined to exercise their political rights through the *Umoja wa Wanawake Tanzania* (UWT),[634] a women wing of *Chama cha Mapinduzi* (CCM).[635] As the only political party during the single-party hegemony, CCM took minimum efforts to ensure women stand and win elections through competitive constituencies. The quota system that was adopted by CCM saw a token number of women, youth, representative from the army and workers association getting into the parliament as national members of parliament, ostensibly representing the national interest.[636] The majority of women remained as mobilizers, fundraisers, and organizers. In the same vein, those who held different political ideologies apart from that preached by CCM and that of UWT could not have alternative platforms to exercise their political rights. This is because all political activities were placed within the State and its machineries, CCM, and its respective party wings. Free organisation and association in bodies like trade unions, youth, women or student outside CCM structures were limited.[637]

631 Cap. 2 R.E. 2002.
632 Cap. 258 R.E. 2015.
633 Killian, B. (1996), "A Policy of Parliamentary 'Special Seats' for Women in Tanzania: Its Effectiveness," op. cit.
634 Loosely translated as the Union of Tanzanian Women.
635 Loosely translated as Revolutionary Party.
636 Ruth Meena, "The Politics of Quotas in Tanzania," available in International Institute for Democracy and Electoral Assistance, 2004, The Implementation of Quotas: African Experiences Quota Report Series, available at https://www.idea.int/sites/default/files/publications/implementation-of-quotas-african-experiences.pdf, accessed on 5th September 2022.
637 Jamhuri ya Muungano wa Tanzania, *Tume ya Rais ya Mfumo wa Chama Kimoja au Vyama Vingi vya Siasa Tanzania, 1991* (Dar es Salaarn: Mchapaji Mkuu wa Serikali, 1992).

Consequently, the culmination of the single-party scheme left the country with the majority of women population being politically inactive,[638] which in turn affected how women participated and influenced the transition to multiparty democracy.[639] Accordingly, the laws that governed the transition to multiparty democracy covered to a limited extent how women could move from being mobilizers and fundraisers to meaningful actors in the building of multiparty politics.

4.4. Women Participation in Parliamentary Elections During Transition to Multi-Party System

In 1992, when Tanzania transitioned to multiparty democracy, amendments were made in the 1977 Constitution of the United Republic of Tanzania, and the Elections Act to allow political plurality. Also, the Political Parties Act[640] was enacted in 1992 to provide guidance on the formation and management of political parties. Neither the Constitution, the National Elections Act, nor the Political Parties Act contained any specific directives to guide the newly formed political parties on the inclusion of women as members, as leaders of the political parties, and as candidates. This sprung from an inability of the country to undertake a comprehensive constitutional and legal review prior to allowing for multiparty politics as proposed by the Nyalali Commission report.

Consequently, by the first multiparty elections, fewer women were members and or leaders of the political parties.[641] By 1994 only 21.6 percent of women were members of the eight registered political parties. Also, by 1994, key positions including the position of National Party chairman, Vice Chairman Secretary General, Deputy Secretary General, and Treasurer in the political parties were held by men. Further, only a few women were nominated to vie for parliamentary seats by the political parties. In the first multiparty elections in 1995, women made up 4.43 percent of the nominated candidates for parliamentary elections, with the number increasing to 8.12 percent in 2000.[642]

The excise of political rights continued to be limited within the political parties' women wings, mostly under UWT, with the newly formed political parties facing operational challenges. CSOs advancing women's rights contrary to the wishes of the government also faced challenges, with organisations such

638 Shayo, R. (2005), *Women Participation in Party Politics during the Multiparty Era in Africa: The Case of Tanzania* (ISBN: 1-920095-14-4 ISSN: 1811-7449 © EISA, 2005); available at https://media.africaportal.org/documents/OP34.pdf (accessed 17 September 2022).
639 Ibid.
640 Act No. 5 of 1992.
641 Shayo, op. cit.
642 Makulilo, A.B (2009). '"Whose affirmative action is affirmative?" lessons from Tanzania.' CEU Political Science Journal.http://www.thefreelibrary.com/%22Whose+affirmative+action+is+affirmative%3F%22+lessons+from+Tanzania-a0220135952. Accessed 29th August 2022.

as the *Baraza la Wanawake Tanzania (*BAWATA),[643] a non- partisan women's organization, banned and remained banned even after the court declared that the banning was illegal.[644]

4.5. Legal Challenges Facing Women's Access to Parliamentary Positions 30 Years After the Reintroduction of Multiparty Democracy

In 2022, 30 years after the reintroduction of multi-party politics in Tanzania, the 1977 Constitution, the National Election Act, and the Political Parties Act still govern access to parliamentary positions in Tanzania. Three decades of multipartyism have seen these laws being amended, as well as new laws such as the 2010 Election Expenses Act, coming into being to regulate the utilization of finances in the elections.

In general, these laws establish five ways through which women can access parliamentary seats; namely; directly vying in a constituency; through a special seat system; presidential appointment, representing the Zanzibar House of Representatives; and by virtue of one's position,[645] with the first three being the prominent ones. When weighted against the principles of international law discussed under part 3.2.0 of this Chapter, these legal mechanisms have to some extent facilitated women to access the parliament, however, notable gaps exist as discussed below.

4.5.1. Legal Challenges Hindering Women to Vie in the Constituencies

In line with Article 25 of the ICCPR and Article 7 of CEDAW, the Constitution of United Republic of Tanzania and the National Elections Act allow both men and women to stand for elections.[646] While a person needs to be 18 years of age to vote in an election,[647] a candidate for parliamentary seat needs to be 21 years of age.[648] Likewise, one needs to be affiliated with and obtain the sponsorship of a political party to be able to vie for any electoral position.[649]

Both the age criteria and the requirement for political affiliation as stipulated in Tanzania's electoral laws limits how the citizens including women contest for parliamentary seats. International standards require any person of age to be able to vie to an electoral position as guaranteed under Article 25 of ICCPR.

643 Loosely translated as The Women Council of Tanzania.
644 In *Baraza la Wanawake Tanzania & Others v. Registrar of Societies & Others*, High Court of Tanzania at Dar es Salaam, Miscellaneous Civil Cause No. 27 of 1997 (Unreported), the High Court found such ban as unconstitutional.
645 The President and the Attorney are part of the parliament by virtue of their positions.
646 Article 21(1) of the 1977 Constitution of United Republic of Tanzania.
647 Article 5(1) of the Constitution of United Republic of Tanzania.
648 Article 67(1)(a) of the 1977 Constitution of United Republic of Tanzania.
649 Articles 39, 47 and 67 of the 1977 Constitution of United Republic of Tanzania.

The United Nations Committee on Human Rights suggest that while it may be reasonable to require a higher age for election or appointment to particular offices than for exercising the right to vote, any restrictions on the right to stand for election, such as minimum age, must be justifiable on objective and reasonable criteria.[650] The 21 years age criteria in Tanzania's law, makes young people including young women wait for three more years after they have been eligible to vote to exercise their right to vie for a parliamentary seat. Dropping the eligible age for candidacy can lead to increased diversity and alternatives for voters. It also allows the representation of young people, their perspectives and experiences on policy issues.[651]

With regard to the criterion on political affiliation, international law requires countries to allow citizens to take part in political processes beyond political affiliation.[652] Article 25 of the ICCPR requires every citizen to have the right and the opportunity, without any of the distinctions mentioned and without unreasonable restrictions to take part in the conduct of public affairs, to vote and to be elected at genuine periodic elections. The United Nations Committee on Human Rights on General Comment 25 clarified in 1996 that persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation.[653] Many countries have allowed the independent/private candidates,[654] including Tanzania's neighbors such as Uganda, Kenya, and Rwanda.[655] Tanzania has however not allowed independent candidates, thus, anyone who desires to contest for electoral positions including parliamentary seat has to be a member and obtain an endorsement from a political party. In 2013 the African Court on Human and People's Rights ordered Tanzania to take efforts to allow independent candidates,[656] but the country is yet to comply. Independent candidates provide an alternative entry point to the political space for people, including women, to still exercise their right to contest for electoral positions outside the walls of political parties and their respective ideologies. [657]

Another legal challenge that has consistently limited women's ability to

650 UN Committee on Human Rights, General Comment 25, "The Right to Participate in Public Affairs, Voting Rights and the Right to Equal Access to Public Service," 1510th meeting (fifty-seventh session) (12 July 1996), available at https://www.osce.org/files/f/documents/4/a/19154.pdf, accessed on 1st December 2022.
651 Not Too Young To Run, "Facts and Figures: What Do the Numbers Tell Us?" Not Too Young To Run, available at http://www.nottooyoungtorun.org/facts/, accessed on 10th August 2022.
652 *See*, for example, *Tanganyika Law Society, Legal and Human Rights & Rev. Christopher Mtikila v. Tanzania*, AfCHPR, Consolidated Applications Nos. 009/0211 & 011/2011, Judgment of 14 June 2013 ('*Mtikila v. Tanzania*').
653 UN Committee on Human Rights, General Comment 25, "The Right to Participate in Public Affairs, Voting Rights and the Right to Equal Access to Public Service," 1510th meeting (fifty-seventh session) (12 July 1996), available at https://www.osce.org/files/f/documents/4/a/19154.pdf, accessed on 1st December 2022.
654 Makulilo, A., "The Independent Candidate Case by the African Court of Human and Peoples' Rights Revisited," *International Journal of Human Rights and Constitutional Studies (IJHRCS)*, Vol. 5, No. 2, 2017.
655 For example, Article 75 (1) of the 2003 Constitution of Rwanda (as amended in 2015) allow independent candidate.
656 *Mtikila v. Tanzania*, op. cit.
657 Makulilo, A., The Independent Candidate Case by the African Court of Human and Peoples' Rights Revisited," op. cit.

contest for the parliamentary electoral system is the applicable electoral system in Tanzania. Since the 1961 independence, the First-Past-the-Post (FPTP) electoral system has been the prominent electoral system used for electing leaders from national to lower levels. [658] Under this system, a country is divided into small constituencies, with political parties required to place one candidate per constituency.[659] The candidates for a particular constituency contest against each other, and voters are allowed to only for only one candidate. Eventually, one candidate with the most votes wins.[660] It has been extensively argued that an electoral system that requires a political party to field one candidate, allows a voter to vote for just one candidate, and takes a candidate with the most votes as a winner, does not favor the participation of vulnerable groups, including that of women, in an election.[661] FPTP has been proven to influence political parties to prefer male candidates, affects political parties' voter mobilization efforts as well as the voter turnout. Cultural beliefs and the traditional societal positioning of men and women influence political parties to nominate candidates who are deemed to be capable of attracting votes from diverse groups of voters. The long-entrenched belief that women are private and domestic beings make political parties view women as risky and incompetent candidates, and thus prefer male candidates. The FPTP also affects voters' choices. Cultural and traditional orientations coupled with a historical disentrancement of women, make votes view women as incapable leaders, hence prefer to vote for men.

It is well documented that the political parties and voter bias against women candidates can be arrested through other electoral systems such Proportional Representation electoral system particularly those operating under a closed-party list and have embedded the Zebra System.[662] Women are three to four times more capable of winning elections under the Proportional-Representation electoral system than under FPTP. It is with this realization, that the Beijing Declaration and Platform for Action of 1995[663] calls on governments to take measures to "review the impact of electoral systems on the political representation of women and consider reforming those systems by adopting the electoral systems that encourage political parties to integrate women in elective and non-elective public positions in the same proportion and level as

658 Sections 35F (8) and 80(1) of the National Elections Act, Cap 343, R:E 2002).
659 Skorge, Ø.S. (2021), "Mobilizing the Underrepresented: Electoral Systems and Gender Inequality in Political Participation," *American Journal of Political Science* (https://doi.org/10.1111/ajps.12654)
660 King, C. (2000), "Electoral Systems," available at http://faculty.georgetown.edu/kingch/Electoral_Systems.htm (accessed 13 June 2022).
661 Skorge, Ø.S. (2021), "Mobilizing the Underrepresented: Electoral Systems and Gender Inequality in Political Participation," *American Journal of Political Science* (https://doi.org/10.1111/ajps.12654)
662 International Institute for Democracy and Electoral Assistance. 2021. "Women's Political Participation Africa Barometer." ISBN: 978-91-7671-397-6. Available at https://www.idea.int/sites/default/files/publications/womens-political-participation-africa-barometer-2021.pdf. Accessed on 10th August 2022.
663 Beijing Declaration and Platform for Action, Fourth World Conference on Women, 15 September 1995, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995). Soon after the Beijing Conference, the government developed and adopted an Action plan within the National Sub-Programmme for Women and Gender Advancement.

men."[664] Despite the strong commitment to the implementation of the Beijing Declaration, Tanzania is yet to review its electoral system and continues to use FPTP as its main electoral system. Hence, a small number of women have been aspiring to be elected for parliamentary seats, with a few getting nominated by their political parties.

Table 4.1 Percentage of Women Nominated for Parliamentary Elections Since 1995

S/N	Year	Number of Women Nominated for Parliamentary Elections	Number of Women Nominated for Parliamentary Elections
1	2020	23.3	76.7
2	2015	19.2	80.8
3	2010	18.4	81.4
4	2005	12.7	87.3
5	2000	8.12	91.88
6	1995	4.4	95.6

Source: National Election Commission Elections Reports.

Consequently, fewer women have won parliamentary elections since the first multi-party elections in 1995 which witnessed eight women winning parliamentary seats directly from constituencies. After 30 years of multiparty democracy the number of women winning constituencies has increased to 26. Although the number of women winning constituencies has increased threefold within the 30 years of multipartyism, the number of women winning parliamentary elections is still low and stands below 10 percent.

Table 4.2: Trend of Elected Female MPs in the National Assembly

S/N	Years	Number of women who won the elections in the constituencies	Total percentage of women in the parliament
1	1995	8	3.4 %
2	2000	12	5.3 %
3	2005	17	7.3 %
4	2010	21	8.3 %
5	2015	25	9.4 %
6	2020	26	9.8%

Source: National Election Commission Elections Reports.

664 Strategic Object G1 of the BPFA.

The bias caused by the FPTP electoral system against women aspirants, nominees, and candidates in Tanzania, is escalated by the fact that the Constitution, election laws, and political parties' laws do not provide for candidates' gender quotas. Nominating female or male candidates for parliamentary positions is entirely the discretion of political parties. Although Political Parties Amendment Act, 2019 requires political parties to adhere to the principles of gender and social inclusion in selection of candidates, the Act does not establish any specific thresholds to ensure political parties meet a particular percentage of women candidates in nomination of candidates.[665] Also, the Act does not establish any incentives and penalties to trigger political parties' compliance to the gender and social inclusion principles. The Act further carries ineffective monitoring mechanisms thus rendering compliance by political parties and enforcement by the Registrar of Political Parties impossible.

Another legal challenge facing women's access to parliamentary seats through competing in constituencies is funding. In 2010, Tanzania passed the Elections Expenses Act. The Act controls the use of money in elections. The Act however does not contain specific measures for addressing women's unique financial challenges to participating in an electoral process. Further, the Act contains unregulated exceptions with loose enforcement mechanisms allowing candidates and political parties to get away with election omissions. This affects the electoral playing field and in turn, affects how women participate in an election.

On the other hand, Tanzanian political parties obtain subventions/subsidies from the political parties. Although the Political Parties (Amendments) Act gives the Registrar of Political Parties a mandate to disburse and monitor accountability of government subventions and issues guidelines pertaining to political parties' income, expenditure, and accountability,[666] the Political Parties Amendment Act does not contain a specific language on how subvention to political parties can be used to, *inter alia,* advance the participation of women and other vulnerable groups in the political parties. In other jurisdictions such as Kenya, political parties are legal required to utilize the funds from the Political Parties Fund on among other things, advancing the participation of vulnerable groups in the political processes.[667] Similarly, huge election deposits are unaffordable to most women. The electoral law requires a deposit

665 Section 6A (5) of the Political Parties Amendment Act, 2019.
666 Section 3 (c) and (d) of the Political Parties Amendment Act.
667 Section 23 of the Kenyan Political Parties Act, 2011.

of up to one million Tanzanian shillings for a presidential candidate and five hundred thousand Tanzanian shillings for a member of parliament. Tanzania could learn from the Kenyan example, where the Independent Electoral and Boundaries Commission (IEBC) allows women and other vulnerable groups to pay half a price of the standard nomination fee.[668]

Violence against women also puts many women out of elections. The National Elections Act and the Code of Ethics provide for smaller punishments for those committing violence against women during elections. In a study conducted after the 2015 general elections,[669] 69 percent of women electoral candidates reported having experienced abusive language, 17 percent reported physical attacks, and 13 percent reported receiving demands for sexual favors.[670] In the same study, over half of the women voters interviewed during the post-election period (53 percent) said that they did not vote due to various factors, including being afraid of the violence that was often geared toward them. In the 2020 general election, there were reports of acts of violence against female candidates, involving male candidates calling female candidates names, and using sexist rhetoric to belittle them. For instance, in Mara Region, a campaign manager labelled a female candidate a 'prostitute' while appealing for people to vote for a male candidate.[671] In Rukwa Region, a CCM parliamentary candidate reportedly urged people during a political rally not to vote for a female candidate because 'she would not be able to represent them while on her period.'[672] Despite the Electoral Code of Conduct of 2020 prohibiting use of abusive language, harassment, threat or language inciting violence or discrimination on the basis of gender, disability, color, or body structure in the election campaigns,[673] more is desired to be done to improve the legal framework to tackle gender-based violence in elections and in politics in general.

4.5.2. Legal Challenges Associated with Accessing Parliament via Special Seats System

The Special Seat System (SSS)[674] as a form of Temporary Special Measures, has been a preferred pipeline through which a majority of women law-makers

668 IEBC to slash nomination fees for women, special groups by half, available at https://www.the-star.co.ke/news/2022-03-23-iebc-to-slash-nomination-fees-for-women-special-groups-by-half/, accessed on 6th November 2022.
669 Tanzania Women Cross-Party Platform. 2015. Violence against women in elections, Evidence From 2015 Tanzania General Elections Tanzania General election.
670 Ibid.
671 Lihiru, V., "Chronicles of Women Participation in the 2020 General Elections in Tanzania," 3 December 2020; available at http://www.udadisi.org/2020/12/chronicles-of-women-participation-in.html?m=1 (accessed 2 October 2022).
672 Ibid.
673 Legal and Human Rights Center, "Human Rights Protection and the Threat Posed by Covid19 in Tanzania 2020," available at https://www.humanrights.or.tz/assets/attachments/1617953964.pdf (accessed 20 November 2022).
674 Articles 66 1(b) and 78 (1)) of the 1977 Constitution of United Republic of Tanzania.

have been accessing the parliament. The system has been somewhat effective, albeit with a number of critical shortcomings. Since, its introduction in 1985, the SSS has played a key role in causing a mindset shift and perception of the role of women in the community. The SSS provides an entry point for women in politics and avails a strong foundation for women to climb the political career. Moving from the SSS, women have been able to vie and win constituencies include in patriarchal communities such as Mara region. They have become Speakers of the National Assembly, deputy ministers, and ministers. In 2015, Samia Suluhu Hassan, a woman who started as a special seat parliamentarian became the Vice-President and later became President of the United Republic of Tanzania in 2021.[675] The SSS is also credited for contributing to the legislation of gender-sensitive laws, especially around the areas of land ownership, labor, education, and sexual offense, just to name a few.[676] The seats have also produced many female political role models for young women to aspire to and consider politics as a career. Notably, 30 years of multiparty democracy has witnessed the SSS complimenting the low number of women winning constituencies and have led to an increase in the number of women in the National Assembly. If it was not for SSS, in 2020, and as the country celebrates 30 years of multiparty democracy, women could just account for 9.8 per cent of parliament. Combining the number of elected women parliamentarians and those from special seats, Tanzania commemorates 30 years of multi-party democracy with 36.9 percent of women in the parliament.

Table 4.3: Trend of the Elected and Special Seats Parliamentarians 1995-2022

Year	Women who won in constituencies	Women Special Seats	Total Number of Parliamentarians	Total Percentage of Women in the Parliament
2020	26	113	393	39.9
2015	25	113	393	37.2
2010	26	102	357	35.85
2005	17	75	307	30.03
2000	12	48	279	21.51
1995	8	37	269	16.73

Source: The Parliament of Tanzania and Reports from National Electoral Commission.

675 In 2000, Samia Suluhu Hassan was elected as a member of the Zanzibar House of Representative for special seat and appointed as Minister. In 2005 she was re-elected and appointed as a Minister in another portfolio. In 2010, she competent for a parliamentary seat and won in Makunduchi constituency. She became the Minister of State for Union Matters. In 2014 Samia was elected the Vice Chairperson of the Constitutional Assembly tasked with drafting the country's new constitution. In July 2015, she was nominated as Presidential running mate as the late Dr. John Magufuli who was the Presidential candidate of the fifth phase. She became the first female Vice-President in 2015 and became the first President of United Republic of Tanzania in March 2021, following the untimely demise of the Late President John Magufuli.

676 The 1998 Sexual Offences (Special Provision) Act, (SOSPA), the 1999 Land Act and the 1999 Village Land Act are the few examples.

Conversely, SSS has also negatively affected how women vie for constituencies. There are reports of political parties discouraging women to vie in constituencies with a promise that they will be included in the SSS list.[677] Voters are also discouraged to vote for women who stand in constituencies with such women named as 'greedy' for vying for a constituency while there are special seats for them. The National Election Commission has not created the procedure for political parties to nominate women for special seats as required by the 1977 Constitution of the United Republic of Tanzania.[678] Owing to the lack of guidance from the NEC, women under special seats do not have electability status, are not voted for directly by the citizens, are not representing any geographical area, are representing the party interest instead of women's interest, and are accountable to their political parties instead of the women whose interests they are camouflaged to represent. Women MPs under special seats are also facing serious marginalization as they are not entitled to constituency funds and are not eligible to be nominated for the prime minister's position as only elected MPs qualify.[679] While women's special seats are required to be temporary in nature, and the seats are required to be stepping stones for preparing women to transition to competitive seats, the women's special seats serve with no term limits. One woman can serve under special seats for decades, thus hindering other women from gaining political experience through the special seats system. While women are not a homogeneous group, there are no guidelines on the qualifications or characteristics of the women who should hold special seats. For example, it is not known how the proportion of women from different age groups, disabilities, rural/urban set up, and other diversities should be taken into consideration when political parties are nominating women for special seats.

Moreover, while there are special seats for women, there are no special seats for youth and persons with disabilities. How different groups of women are considered for special seats remains a discretion of individual political parties, not a legal requirement. The shortcomings for operating special seats in Tanzania are against the requirement of Article 4 of the Convention on Elimination of All Forms of Discrimination against Women (CEDAW), 1979, which requires the Temporary Special Measures not to accelerate de facto equality between men and women; not to maintain unequal or separate standards; and to be temporary in nature. The incompatibility between SSS practice in Tanzania

677 Lihiru, Victoria. 2019. "Participatory Constitutional Reforms vs. Realization of Equal Representation of Men and Women in the Parliaments: A study of Kenya, Rwanda and Tanzania." Ph.D Thesis. University of Cape Town. http://hdl.handle. net/11427/31508.
678 Article 81 of the 1977 Constitution of United Republic of Tanzania.
679 Article 51 (2) of the 1977 Constitution of United Republic of Tanzania provides that as soon as possible, and in any case within fourteen days after assuming office, the President shall appoint a Member of Parliament elected from a constituency of a political party that has a majority of members in the National Assembly or, if no political party has a majority, who appears to have the support of the majority of the Members of Parliament, to be Prime Minister of the United Republic, and he shall not assume office until his appointment is first confirmed by a resolution of the National Assembly supported by a majority vote of the Members.

and the international law standards has led to a number of conflicts including the current conflict pertaining to the nomination of 19 women special seats from the main opposition party, *Chama cha Demokrasia na Maendeleo.*[680]

4.5.3. Legal Challenges Associated with Presidential Appointment

Women also got into the parliament through Presidential Appointments, the constitution provides power to the President to select ten members of Parliament, five men and five women.[681] The women who have assumed the legislative roles through presidential appointments, have been able to vie and win constituencies, become deputy speakers and hold positions of deputy ministers and full ministers. The presidential appointments to the parliament however, only considers men and women, and is silent on young women and/or women with disabilities. Although there are records of Presidents appointing young people and persons with disabilities for these positions, it remains at the discretion of the President and not the legal requirement.

4.6. Recommendations and Conclusion

As the country embarks on the fourth decade under multiparty politics, meaningful and effective participation of women will be obtained through pursuing a number of interventions. In her letter to Tanzanians on 30 years of multi-party democracy, the President of United Republic of Tanzania promised to undertake key reforms in the electoral laws among her "4Rs" agenda (Reconciliation, Resilience, Reforms, and Rebuilding of the nation).

> [...] my administration will initiate reforms in areas of politics, economy, and in the electoral laws [...]. Reforms in electoral laws will create a level playing field in our politics and give the electorate an opportunity to elect the leaders they want.

It is timely, that the envisaged electoral laws reforms should consider, among other things, creating conducive electoral systems and friendly electoral laws to make the elections and political landscape work for women as well as other vulnerable groups. For the electoral system and the respective electoral laws to work for women, the recommendations below are pegged into three possible scenarios.

680 After being expelled from CHADEMA membership, the 19 women filed a judicial review case in the High Court challenging the legality of this action, which was still pending at the time of publication of this work. *See* particularly *Halima James Mdee & 18 Others v. The Board of Trustees, Chama cha Demokrasia na Maendeleo (CHADEMA) & 2 Others*, High Court of Tanzania at Dar es Salaam, Misc. Civil Application No. 16 of 2022. On 16 May 2022 (pending). Also see, Lihiru, Victoria. 2021. "The 2020 CHADEMA Special Seats Dispute in Tanzania, Does the National Electoral Commission Comply with the Law?" Available at https://www.eisa.org/pdf/JAE20.2Lihiru.pdf, accessed on 5th September 2020.

681 Article 66 of the Constitution of the United Republic of Tanzania.

4.6.1. Willingness to Overhaul the Electoral System, Retire from Special Seats System

The best bet for making the envisaged electoral law reforms work for vulnerable groups, would be to transition from First-Past-the-Post to Equality Based Proportional Representation electoral system. Studies show that women and other vulnerable groups are three to four times likely to vie and be elected under Proportional Representation Electoral System. The adopted PR electoral system should be accompanied with the zebra system, to ensure equal representation and the probability of winning by both men and women in the political parties' lists.

4.6.2. Willingness to Modify the FPTP electoral system and Retire Special Seats System

In case FPTP electoral system is maintained and continues to apply in the country as suggested by the Presidential Taskforce on Multiparty Democracy,[682] alterations need to be done. Diverging from the recommendation of the Presidential Taskforce on Multiparty Democracy on the need to maintain the FPTP electoral system as it is, it is my view that, if the country is reluctant to transition to PR electoral system, the FPTP electoral system as applicable in Tanzania need to be upgraded to an equality-based FPTP electoral system for it to work for women and other marginalized groups. This proposal includes a plan where there will be two elected representatives (a male and a female) in each constituency, ward, street, village and hamlet. With this plan, during elections, political parties will be required to place two candidates in each level (a male and a female). When voting for a particular political party, voters would be deemed to have automatically elect female and male candidates from such a political party. In order to avoid doubling of the current number of MPS, councilors and chairpersons, there is a need to change the current constituencies configuration (turn districts and councils into constituencies), and consider combining two wards, streets, villages and hamlets into one. These alterations into the current FPTP and an upgrade to equality-based FPTP will automatically yield equal numbers of men and women in all elected positions and bring to an end the special seats system in the country.

4.6.3. Unwillingness to Change FPTP and Special Seats System

In case the FPTP electoral system and the special seats system continue to

682 President Samia Suluhu formed a Presidential Task Force on Multiparty Democracy to look into the democracy issues in the country. The Taskforce has come up with the recommendations and presented them before the President on 21st October 2022.

apply as suggested in the Presidential Taskforce on Multiparty Democracy, a number of measures have to be been taken to ensure the implementation of special seats is in line with the international law standards for the system to yield effective outcomes.[683] In my previous work,[684] I provided recommendations (some of them have been incorporated in the Presidential Taskforce on Multiparty Democracy report) on how special seats can be repositioned in line with the international law guidance for its original objective to be attained. I have remarked previously that:

> Three decades and half since the introduction of special seats system in Tanzania calls for the system to be nationally evaluated to determine progress, challenges, and what is needed to enable the seats to yield the desired results. The evaluation should also look at the suitability of the name special seats and change it to a less stereotyping name. The international standards require countries to adhere to the terminology "temporary special measures" to avoid confusion, live up to the expected objectives and results, and to keep actors alert on the temporary nature of the measure. Further, the evaluation should look on the suitability of NEC to manage women special seats. The international standards require that the responsibility for designing, implementing, monitoring, evaluating, and enforcing any form of temporary special measures is to be vested in the national institutions, such as women's ministries or presidential offices. NEC's massive and complex responsibility to manage the elections has unfortunately not availed it with adequate time and interest to effectively manage the women special seats system. Thirty-seven years since its establishment, NEC has not developed uniform guidelines for implementation of special seats by political parties against the requirement of Article 81 of the Constitution, nor has it undertaken comprehensive review of the seats to track progress, challenges, and necessary realignment. A framework for implementation of special seats system should be created. The framework should encompass common guidelines for selection of women special seats by political parties in line with Article 81 of the 1977 Constitution requirements. The common guidelines should provide guidance on uniform per centage of women special seats from national to local government levels, term-limits for serving under special seats, diversity of women selected for special seats,

683 Article 4 of Convention on the Elimination of All Forms of Discrimination against Women, 1979. And General recommendation No. 25 on article 4 paragraph 1 of the Convention on the Elimination of All Forms of Discrimination against Women on Temporary Special Measures *http://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20(English).pdf* accessed on 2nd December 2022.

684 Lihiru, V, "The 2020 CHADEMA Special Seats Dispute in Tanzania, Does the National Electoral Commission Comply with the Law?" 2021 Available at https://www.eisa.org/pdf/JAE20.2Lihiru.pdf, accessed on 5th September 2022.

geographical locations women special seats will represent, citizens involvement in voting for the women special seats, and the country's long-term plans to level the political playfield for both men and women to equally participate and win elections. The framework must as well portray linkages and relationship between the special seats system and the country's long-term plans to level the political playfield to eventually enable women to contest and win elections. The long-term plans should include reforming the constitution, laws governing political parties and electoral laws to allow independent candidates as per the directive from the African Court on Human and Peoples Rights; adoption of equality-based FPTP and/or transitioning from FPTP electoral system to Equality-Based PR electoral system.[685]

Finally, Tanzania should take deliberate efforts to develop a comprehensive legal framework around curbing gender-based violence in elections and in politics. Tanzania should as well allow independent candidates, and reduce age for candidacy for all electoral positions to 18 years old. Also, there is a need to reduce the presidential appointing powers and ensure any appointing powers that the president will remain with are guided by a legally stipulated gender and social inclusion threshold to ensure both men and women are appointed in such positions.

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CHAPTER FIVE:
THIRTY YEARS OF MULTIPARTY DEMOCRACY: THE CONTRIBUTION OF CIVIL SOCIETY ORGANIZATIONS TO THE DEMOCRATIZATION PROCESS IN TANZANIA

By Anna Henga

5.1. Introduction

This Chapter highlights the role of Civil Society Organisations (CSOs) in the process of democratization in Tanzania since multiparty democracy was re-introduced in 1992. Specifically, the Chapter looks at the contribution of CSOs in conceiving and shaping of multiparty democratic processes and historical events associated to these developments. The Chapter also provides how the political and social contexts at a given time have impacted on CSOs and their contribution to the democratization process in Tanzania.

Moreover, the Chapter analyzes struggles carried out by CSOs geared towards the strengthening and deepening of the process of democratization process in the past thirty years. Lastly, the Chapter discusses some of the opportunities available for CSOs in strengthening and deepening the democratization process in Tanzania, thereby projecting what will CSOs look like in the next 30 years (which will be 6 decades after rebirth of the multiparty political system in Tanzania).

5.2. History of Civil Society in Tanzania

CSO started operating in Tanzania during pre-colonial era, but became visible in the modern sense of CSOs during the colonial period. Siri Lange, *et al*., note that the colonial period saw the emergence of a number of social movements and organisations that are akin to contemporary CSOs, particularly in the forms of Islam and Christianity.[686] During the colonial period CSOs also were expressed in forms of sports-clubs and dance societies such as the *beni* dance societies, which were popular from around 1890 to 1930, providing not only recreation, but also mutual aid for their members and training in organisational skills.[687] When these societies became very popular and influential, the colonial authorities barred African civil servants from joining these societies and suspected them of being a cover for political activity 'as they developed a well-

organised network with branches in all the major towns.'[688]

Other forms of CSOs during the colonial era included ethnic associations that were formed by urban migrants to provide social services like burial assistance and loans, as well as occupational associations like the African Commercial Association (traders) and the African Association (clerks, teachers and civil servants), which were far more central.[689] Out these ethnic and occupational associations were born more vibrant social associations such as the African Association, which was formed in Dar es Salaam in 1929, and during the 1930s, regional branches were established in other parts of the country. It was later transformed, in 1954, to the Tanganyika African Nationalist Union (TANU) under the leadership of Mwalimu Nyerere to agitate for political independence. It has been noted that TANU's subsequent success in mobilizing the natives to gain Tanganyika's independence in 1961 was due to its collaboration with existing social, cooperative and labour associations such as the Tanganyika Federation of Labour (TFL).[690]

It should be noted from the outset that; civil societies always exist because of people you cannot distinguish between civil society and people. They are not creatures of governments but people themselves. During the pre-colonial era, CSOs were mainly for community coming together socializing, etc. During the colonial era, CSOs were there for mobilizing themselves against colonialists where most of them formed political parties, which became one of the first political parties to engage and to fight against colonialism. This political activism amongst early CSOs created enmity with colonial authorities, resulting in the banning of African civil servants from joining these societies. However, these societies developed a well-organized network with branches in all the major towns in the country, which catapulted the country to independence in 1961.[691]

After independence, Tanzania adopted a single-party political system until 1992 when it re-introduced multipartyism. The banning of multi-party politics went together with a frown against CSOs, unless if they operated under the auspices of the sole ruling party. The banning of civil societies was ironic enough because they 'had enabled TANU to come to power' in 1961.[692] Subsequently, the leading civil societies such as labour and cooperative unions were made part of the ruling party. As a result, in 1980s, there were few CSOs operating in Tanzania, most of which were formed on professional basis. For instance,

688 Ibid.
689 Ibid.
690 Ibid.
691 Ibid.
692 Ibid, p. 5.

notable CSOs in existence then were the Tanganyika Law Society (TLS), *Chama cha Uzazi na Malezi* (UMATI), Tanzania Women Lawyers Association (TAWLA), Tanzania Farmers Association (TFA), to name a few.

As considered in Chapters Two and Three, the wave of change that swept across the world in late 1980s resulted in the move towards political and economic liberalization. As well as resulting into political pluralism and economic liberalization, the new wave necessitated the need for enhancing civic space and allowing CSOs to operate freely. Notably, after protracted negotiation, trade unions and cooperatives were 'detached from CCM and were now legally free to set up their own constitutions and elect their own leaders.'[693] Subsequently, many people resorted to forming, and working with, CSOs. In addition, one of positive results brought about by the Fifth Amendments to the Constitution of Tanzania in 1984 (*i.e.,* the introduction of the Bill of Rights) was the exercise by many citizens of the freedoms of association, assembly and expression that were now constitutionally guaranteed.[694] It is at this time when many organizations advocating for human rights, such as the Legal and Human Rights Centre (LHRC),[695] were established and became operational.

5.3. The Role of CSOs in Vindicating Participatory Rights in Courts

As well as promoting various human rights for which they were established to advocate, these organizations were very vocal in furthering the right of citizens to participate the governance of their country's public affairs. For instance, in 1997, when the government banned the famous *Baraza la Wanawake Tanzania* (BAWATA), the then popular women's grassroots NGOs successfully went to the High Court to vindicate its freedom of association, among others.[696] In 2005, when the National Elections Act was amended to allow "treating" (*takrima*) voters in elections, three NGOs (led by the LHRC) successfully went to the High Court to challenge the constitutionality of the said provisions.[697]

In 2010, when the Court of Appeal failed to provide adequate to redress (*i.e.,* allowing independent candidates in elections), two CSOs teamed up with the late Rev. Mtikila to file the first ever case against Tanzania in the African Court on Human and Peoples' Rights (AfCHPR) in 2011.[698] In 2013, when the then

693 Ibid, p. 6.
694 *See* particularly Articles 18 and 20 of the Constitution of Tanzania.
695 Legal Empowerment Network, "Legal and Human Rights Centre (Tanzania)," Namati; available at https://namati.org/network/organization/legal-and-human-rights-centre-tanzania/ (accessed 5 December 2022).
696 In *Baraza la Wanawake Tanzania & Others v. The Registrar of Societies & Others*, High Court of Tanzania at Dar es Salaam, Miscellaneous Civil Cause Not 27 of 1997 (Unreported) ('*BAWATA v. Registrar of Societies*'), the High Court held the ban of BAWATA to be unconstitutional.
697 In *Legal and Human Rights Centre, Lawyers Environmental Act Team & National organization for Legal Assistance v. A.G.,* High Court of Tanzania at Dar es Salaam, Miscellaneous Civil Cause No. 77 of 2005 (Unreported), the High Court found the takrima provisions to be unconstitutional for being discriminatory against candidates who could not have the financial capacity to "treat" (provide *takrima*) to voters in an election.
698 In *Tanganyika Law Society, Legal and Human Rights & Rev. Christopher Mtikila v The United Republic of Tanzania* Applications No's. 009 and 011/2011

Prime Minister Hon. Mizengo Pinda ordered the Police to beat people who caused public disorder,[699] the LHRC went to court to challenge that chance statement made in Parliament by the head of government business in that august house.[700] In fact, almost in all these cases CSOs have won and the cause that they have been advocating for has been ingrained in the country's jurisprudence relating to people's right to participate in the governance of the public affairs of their country.

5.4. The Role of CSOs in Advocating for a Robust Constitution

As considered in Chapters Two and Three, the constitutional history of Tanzania reveals that since 1965 Tanzania has not undertaken a people-driven constitutional review and making process. As a result, both the 1965 Interim Constitution and the 1977 Constitution have failed to incorporate all human rights and freedoms. This has sparked off constant and continuous struggles for the need to re-write the country's constitution, especially so after Tanzania re-introduced multi-party-political system. One of the arguments for re-writing the country's Constitution is that people needs to be effectively involved in the constitution-making process because it is their right to do so.[701] At the centre-stage of this clamour for a more robust Constitution are several initiatives driven by CSOs, some of which are highlighted below.

5.4.1. The Citizen Coalition of the New Constitution (CCNC)

In late 1990s, the then Feminists Activists Network (FEMACT), which was a network of more than 50 civil society organisations advocating for women's rights, came up with a democratization idea. The start of the idea was a need to have a new people-centred constitution. So, the LHRC was tasked to take the lead in forming what came to be known as the Citizens' Coalition on New Constitution (CCNC).[702] The CCNC was one of its kind, a very powerful network which was conducting public awareness-raising conferences known as *Bahari* (meaning, Ocean). So, there were three phases of these campaigns – *i.e.*, *Bahari One, Bahari Two* and *Bahari Three*.

(AfCHPR), the AfCHPR held that, by denying independent candidate the opportunity to contest in elections, Tanzania was in violation of, *inter alia,* Article 13 of the African Charter on Human and Peoples' Rights.

699 While addressing a Prime Minister's Q&A session in the National Assembly in Dodoma on 20 June 2013, the Prime Minister stated that:

> *'ukifanya fujo umeambiwa usifanye hiki ukaamua kukaidi utapigwa tu [...] nami nasema muwapige tu kwa sababu hamna namna nyingine kwa maana tumechoka.'*

Literally translated, this statement is to the effect that:

> 'If you cause disturbance, having been told not to do this, if you decide to be obstinate, you only have to be beaten up [...] and I am saying you should keep on beating them because we are tired with them.'

700 *Legal & Human Rights Center & Another v. Hon. Mizengo Pinda & Another* (Misc. Civil Cause 24 of 2013) [2014] TZHC 1 (06 June 2014).

701 Makulilo, A. and V. Lihiru, "Constitution-Making Process in Tanzania (2011-2014): A New Era for Women Political Participation?" *Huria Journal*, Vol 27 No. 2, September 2020, pp. 1-29 (pointing out that: 'Globally, [people's] participation in the constitution-making process is emerging as a legal right.').

702 Legal and Human Rights Centre, *Annual Report 2003* (Dar es Salaam: Legal and Human Rights Centre, 2003), pp. 11-13.

5.4.2. The *Katiba Mpya ni Jawabu* Campaign

During the celebrations of the 2010 Human Rights Day, the event's slogan was: *Katiba Mpya ni Jawabu,* meaning a new Constitution is a solution. This came after the 2010 General Election, which was the first election to be observed by civil societies and independent of public institutions like universities. This slogan resulted into a campaign for a robust Constitution following President Jakaya Kikwete's public announcement in 2011 new year eve to the effect that Tanzania will embark on a new constitution-making process henceforth. One month later the President announced the start of the new constitution. Therefore, this Campaign aimed at bringing the CSO voice into the new constitution-making process.

5.4.3. The *Warioba Draft* and the Big Bang Constitutional Campaign

As noted in Chapters Two and Three, in 2011, Tanzania embarked on the constitutional review process with a view to making a new constitution. When the new constitution process started in 2011, many CSOs formed various constitutional reform fora and contributed to the writing of the first draft of the Constitution popularly known as *Warioba draft*. The second draft of the new Constitution by Warioba was also informed by contributions made by CSOs especially, the Legal and Human Rights Centre, which carried out a campaign called the *Big Bang Constitutional Campaign*.[703] The campaign was specifically for creating awareness to the public on the second draft Constitution. Through this Campaign the LHRC reached out to every Ward in Tanzania campaigning for the draft Constitution.

In particular, the materials used in this campaign were demystified copies of the second draft Constitution, Brochures, flash discs, CDs in a very innovative way. Meetings were held under the trees, so they were cost-efficient and ensured participation of villagers without fear or feeling of being excluded.

In effect, the Campaign was very successful. One might wonder why? It empowered more civic awareness onto Tanzanians on the need, *inter alia,* for a robust constitution in the country. This factor, among others, led to a slight increase of voters in the 2015 General Election compared to the previous one. Moreover, the 2015 election was very competitive due to that process.

5.4.4. The *Wanawake na Katiba* Campaign

703 Peter, C.M., *et al*., "The Struggle for Human Rights in Tanzania: 20 Years of LHRC," available at www.humanrights.or.tz (accessed 3 December, 2022).

During the same period, a strong feminist movement was formed and coordinated by the Women Fund Tanzania (WFT) to mobilise women around the constitution-making process in order to ensure that the contemplated new Constitution would engender gender parity. Efforts under this Campaign were targeting at making sure that issues relating to female inclusion in the governance of the country's affairs is adhered to.

5.4.5. The Baraza la Wanawake Tanzania (BAWATA)

Baraza la Wanawake tanzania (BAWATA) was a political union of women who were very strong in the socio-political spheres. Although the idea to form BAWATA, as a non-partisan women's organisation in Tanzania, was hatched some time in 1991; it took shape at a *National Conference on Women and Multiparty Politics in Tanzania* that was held on 24-27 July 1994, which was convened by Prof. Anna Kajumulo Tibaijuka and several other women academicians at the University of Dar es Salaam.[704] The conference was convened upon a request by the then Chairperson of *Umoja wa Wanawake wa Tanzania* (UWT),[705] the late Sofia Kawawa.[706]

It was at this conference, attended by about 400 women from across the country, where it was resolved that a non-partisan national women's organisation should be formed. In essence, BAWATA was formed 'to unite women of all economic, social, and political backgrounds and to ensure gender equity in a multiparty, democratic Tanzania. In particular, with the advent of political pluralism, it was felt that women might lose rights without an organ to voice their common concerns and problems.'[707]

Thenceforth, an interim 10-person committee was elected under the chair of Prof. Tibaijuka. At this conference a draft constitution was approved; with more mandates given to the interim committee to finalise drafting the constitution which would provide, amongst other things, for a suitable structure of the organisation, to get the organisation registered and to convene a general meeting to elect permanent office bearers. Between 19 January and 15 February 1995, the committee gathered views from the regions regarding the structure of the proposed organisation, which was followed with a symposium held at the British Council in Dar es Salaam on 18th February 1995. This symposium was attended by 79 women, who included those who attended the conference

704 See particularly Mashamba, J.C., "Judicial Protection of the Freedom of Association in Tanzania: The BAWATA Case," *Justice Review*, Vol. 8 No. 1, 2009. This article is reproduced in Mashamba, J.C., *Judicial Protection of Civil and Political Rights in Tanzania* (Nairobi: LawAfrica Publishing (K) Ltd., 2016), pp. 409-435.
705 Tanzania Women Association. This was one of the five party affiliates under the ruling *Chama cha Mapinduzi*, CCM.
706 The request was made vide her letter dated 22 September 1993.
707 Nshala, R., "The Freedom of Association in Tanzania: Implications for Civil Society and Sustainable Development," Dar es Salaam: Lawyers' Environmental Action Team, 1997 (available at http://www.leat.or.tz/publications/freedom.of.assoc (accessed 9 November 2022).

held at the University of Dar es Salaam in 1994. At this meeting, the different views were analysed and a structure, which involved establishment of branches starting from the grassroots (*i.e.,* villages) was approved and included in the draft constitution, which was duly adopted.

Thereafter, BAWATA was duly registered on 16 May 1995. After being regarded by the powers that be at that time to be a political threat,[708] BAWATA was deregistered in 1996, consequent to which it filed a case against the decision.[709] BAWATA had to litigate for more than 12 years (*i.e.,* 1997-2009) before they won the case.[710] In early 2009, the High Court [Manento, JK, Kalegeya and Mlay, JJ.] ruled that the decision to deregister the BAWATA National Women Council) was null and void. In particular, the Court was more than persuaded that 'the deregistration of BAWATA was accompanied by numerous flaws constituting a glaring unlawfulness.'[711]

5.4.6. The Tanzania Women Cross-Party Platform

The Tanzania Women Cross-Party Platform (TWCP), popularly known in Kiswahili as *Ulingo*,[712] was for all women parliamentarians. It was officially founded in 2010. It included members from women wings of all political parties (the ruling party and the opposition parties alike). During the Constitution Review process in 2011-2014, *Ulingo* members had their own manifesto to advocate for 50:50 representation of male and female. *Ulingo* contributed very well to the Constitutional Process with other Civil Society. The result was a 50:50 proposal of men and women representation that was included in the 'Warioba Draft Constitution' in its second draft.

Moreover, the *Ulingo* came up with a slogan '*Rafiki wa Mwanamke ni Mwanamke'* literally meaning 'a woman is another woman's friend'. This was to encourage more women to vote for women and also to discourage the gender stereotype that it is believed that women hate each other.
One of the first chairperson was Honourable Anna Abdallah, who was a prominent woman politician in Tanzania for more than 30 years.

708 Detractors argued that BAWATA was being run as a political party or an affiliation of a political party; it had abdicated the objectives for which it was established; and that it was supporting opposition political parties. *See* particularly Mashamba, J.C., "Judicial Protection of the Freedom of Association in Tanzania: The BAWATA Case," op. cit, p. 411.
709 *BAWATA v. Registrar of Societies,* op. cit.
710 *See* particularly Mashamba, J.C., "Judicial Protection of the Freedom of Association in Tanzania: The BAWATA Case," op. cit.
711 *BAWATA v. Registrar of Societies,* op. cit, p. 41 of the typed Ruling of the Court.
712 Tanzania Women Cross-Party Platform having a significant impact on the constitutional review - Demo Finland (accessed on 3rd December, 2022)

5.4.7. The Tanzania Centre For Democracy

The Tanzania Centre for Democracy (TCD)[713] is a non-religious, non -partisan and not - for - profit non-governmental and membership organization founded by Political Parties with MPs. It was founded on 5th July 2005, and registered under the Societies Act in 2006. Current members are Chama cha Mapinduzi (CCM), Chama cha Demokrasia na Maendeleo (CHADEMA), the Civic United Front (CUF), National Convention for Construction and Reform (NCCR – *Mageuzi*), and Alliance for Change and Transparency (ACT – *Wazalendo*). Political parties with no MPs in Parliament are associate members who participate in TCD governance organs by being represented as a block by one political party on a six-month rotational basis.

Notably, political parties with parliamentary representation established the Centre to serve as cross-party platform for parliamentary parties to cooperate in building and strengthening a culture for multiparty democracy through dialogue, consultation, strategizing and implement an agenda for democratic development.

After every general election, the TCD usually convene her members for consensus, rebuilding and reconciliation. During its conventions usually the TCD has a theme around "healing the wounds after election" to support candidates who might have lost the election to be calm and maintain peace in the country.

5.4.8. The Research and Education for Democracy (REDET)

Research and Education for Democracy (REDET) is an independent organization established by the University of Dar es Salaam to conduct research on democracy. The entity also hosts the Tanzania Election Monitoring Committee (TEMCO). The TEMCO is a local election observation group which is citizen-based, non-partisan, impartial and autonomous. It consists of 162 member organizations, including the civil society, faith based, trade unions, academia, and business groups. Being established by a state-operated University of Dar es Salaam, there have been differing perceptions that TEMCO might lack independence when it comes to her election observation findings.

This doubt led to CSOs to form their own Observer Group, which they perceived more independent. This was the Tanzania Civil Society Consortium on Election Observation (TACCEO). Later on, in 2020, TEMCO and TACCEO joined forces to form another coalition called Coalition on Election Monitoring in Tanzania

713 Tanzania Centre for Democracy, available at www.tcd.or.tz (accessed 3 December 2022).

(CEMOT) which has been observed domestic elections jointly. The relationship of this latest entity was never smooth due to the nature and trust between TACCEO and TEMCO; so, in 2015 each entity observed election independent of each other. However, in 2020 the TACCEO was denied accreditation by the NEC, so they did not observe.[714]

5.4.9. The Tanzania Civil Society Consortium on Election Observation (TACCEO)

The Tanzania Civil Society Consortium on Election Observation (TACCEO) is an independent, nonpartisan citizens' election observation coalition established in 2010. By 2020, TACCEO had grown to include 26 national CSOs in Tanzania [according to members' Memorandum of Understanding (MoU)]. Up to 2020 the Consortium was hosted by the LHRC. The main objective of this Coalition was to unveil electoral and democratization potentials, which need further improvement through election observation and monitoring.

Furthermore, the Coalition sought to establish a model for which a better and useful election observation and monitoring could be conducted not only in Tanzania, but also in other parts of the world. At the end of the electoral cycle, TACCEO used to issue a comprehensive analytical report upon completion of the election observation. The report was being well documented and disseminated as a tool to inform future planning and advocate for reform of laws, policies and practices that govern civil and political rights in general but specifically electoral processes in Tanzania.

TACCEO was initially established to observe the 2010 general elections, but members extended its duration, focus and mandate to also encompass provision of election-related civic education. Notably, the Coalition successfully observed a number of elections, including the 2010 general election, the 2014 local government election, the 2015 general election, the 2019 local government election and several other by-elections.

TACCEO was one of the strongest CSOs consortium for observing elections in Tanzania. However, in 2020, before the general election, the LHRC (which served as the Secretariat of the Consortium) received a letter from the authorities to stop hosting it due to two reasons: one, the Coalition had activities in Zanzibar while issues related to NGO's are not Union Matter. Another reason was that the

714 Visit https://udsm.ac.tz (accessed 3 December, 2022).

TACCEO had already started election observation without being accredited. Later on, all TACCEO members, the Secretariat and anyone associated with either TACCEO or the secretariat (LHRC) were denied accreditation to observe elections. As such, members did not observe rather they continued with human rights observance during election and not '*traditional observation'* in polling stations.

5.4.10. USHIRIKI Tanzania

USHIRIKI Tanzania[715] is a civil society coalition with 23 organisations established in 2019 to champion for democracy and citizens' rights in Tanzania through capacity building, research, advocacy, media engagement, and inclusive democratic governance. The pioneers of *USHIRIKI Tanzania* were the National Democratic Institute (NDI) a US-based international non-governmental organization.

USHIRIKI Tanzania had been supported by coalition members for the 2020 election in, firstly, assessing women, youth and persons with disabilities' experiences, challenges and lessons in their participation as candidates and as voters; and, secondly, advocating on inclusive electoral policies for women, youth and persons with disabilities based on civic election experiences.

5.5. The Role of International NGOs

In the 2015 general elections, the USAID supported the Women's Leadership and Political Participation Project implemented by the UN Fund for Women to increase female participation in political parties and electoral processes. Through this initiative, over 1,200 women, youths, and people with disabilities were trained on civic leadership, 713 of whom ran for office and 72 were nominated as candidates in 2015.[716]

Moreover, in the 2020 Tanzania's general election, the Electoral Institute in Southern Africa (EISA)[717] deployed 14 international observers across the country. In their report, they observed that the political environment in Tanzania during the 2020 general election was less tolerant than the previous elections, which included limitation of political campaigns and limited freedom of expression among many other findings.[718] EISA was bold to issue a statement which gave

715 USHIRIKI | Tanzania Youth Coalition - Non-government Organization - Dar es Salaam, Tanzania, available at https://tzyc.org (accessed 3 December 2022).
716 Visit ttps://www.usaid.gov/tanzania/our-work/gender-equality-and-women's-empowerment (accessed 3 December 2022).
717 The Electoral Institute for Sustainable Democracy in Africa (EISA) is a non-governmental organisation (NGO) that has evolved from an election-focused NGO working in the Southern Africa sub-region, into a more diversified organisation working on broader governance issues throughout the African continent
718 EISA, "EISA Preliminary Statement Tanzania 2020 General Elections," 30 October 2020, *The Elephant*, available at https://www.theelephant.info/documents/eisa-preliminary-statement-tanzania-2020-general-elections/
(accessed 3 December 2022).

a true reflection of what transpired amid hostile political space by then.

5.6. The Role of Grassroots Organisations

The national CSOs have made impact on empowering grassroots organisations to demand accountability at the grassroots level. This can be revealed through the introduction and later legal recognition of paralegals[719] and community-based organisations (CBOs), which have played a very big role in democratization, rule of law, respect for human rights and good governance in Tanzania. For instance, *Sheria na Haki za Binadamu Tanzania* (SHEHABITA) in Tarime had trained members all Ward Tribunals[720] on laws relating to governance in 2007. This led to mainstreaming gender in the composition of Ward Tribunals with representation of women being attained in accordance with the law.[721]

5.7. Challenges which have been facing Civil Society organizations

The journey concerning the contribution and participation of CSOs in the democratization process in Tanzania has never been easy. Indeed, it has been noted that: 'The relationship between the Tanzanian government and the local NGOs has not always been a compatible one.'[722] There have been ups and downs all the time, some of which this part of this Chapter will highlight.

Foremost, for a long time now, most of the active and vibrant CSOs have been labelled as agents of the opposition political parties or of the 'West' because they usually challenge or are critical of the *status quo*, some times in the same tone as opposition parties would do. It has been observed time and again that, most of the time human rights violations are perpetrated by the Government or its agencies or third parties in what are commonly referred to as *vertical* and *horizontal* violations of human rights.[723] Whereas vertical violation of human rights is attributed to direct action or omission of the State and its agencies; horizontal violation is attributed to actions of third parties where the State is held complicity for failing to prevent such third parties violative actions. In

719 After operating as voluntary legal aid providers since 1980s, paralegals were finally recognized by the law in 2017. *See* particularly Sections 3, 19, and 20 of the Legal Aid Act (No. 1 of 2017), Cap. 21 R.E. 2017.
720 Ward Tribunals are established under Section 3 of the Ward Tribunals Act, Cap. 206 R.E. 2002.
721 The jurisdiction of the Ward Tribunals over land matters which is now limited to mediation and that has all along been the primary function of the ward tribunals. Notably, power of the Ward Tribunals to hear and decide land disputes was removed through amendment made to the Land Disputes Courts Act by the Written Laws (Miscellaneous Amendments) Act (No.5 of 2021). Generally, under Section 11 of the Land Disputes Courts Act, Cap. 216 R.E. 2022, the composition of the Ward Tribunal is not less than four nor more than eight members, three of whom must be women. All members of the Tribunals are elected by Ward Development Committee (WDC) under section 4 of the Ward Tribunals Act. In all matters of mediation, the Ward Tribunal should consist of three members at least one of whom shall be a woman (Section 14(1) of the Land Disputes Courts Act).
722 Lange, S., *et al*., op. cit, p. 1.
723 *See* particularly Lane, L., "The Horizontal Effect of International Human Rights Law in Practice: A Comparative Analysis of the General Comments and Jurisprudence of Selected United Nations Human Rights Treaty Monitoring Bodies," *European Journal of Comparative Law and Governance*, published online on 22 Mar 2018; available at https://brill.com/view/journals/ejcl/5/1/article-p5_5.xml?language=en&ebody=full%20html-copy1 (accessed 6 December 2022); and Corrin, J., "From Horizontal and Vertical to Lateral: Extending the Effect of Human Rights in Post-Colonial Legal Systems of the South Pacific," *The International and Comparative Law Quarterly*, Vol. 58 No. 1, January 2009, pp. 31-71

vertical violations of human rights, usually the State (through its agencies and organs – such as the police, judges, prosecutors, government officials, and etc.) engages in direct human rights violations.[724] Because the core business of CSOs advocating for human rights is to, *inter alia,* urge the Government to uphold human rights principles, in doing so, they are regarded straying beyond their mandate in which case the Government of the day perceives such CSOs as agents of the opposition political parties.

This has led to constant suffering of some CSOs. For instance, the LHRC's staff have, in several occasions, being arrested and remanded in custody (*e.g.,* the case of election observers at Mbezi during the 2015 general election that was followed by the confiscation of LHRC's equipment; the arrest of Tito Magoti in 2019 who was charged of committing offences under the Cybercrimes Act). Another example is in 2020 when the LHRC was denied observation accreditation and was stopped from coordinating TACCEO activities or else it would be deregistered.

Another challenge faced by CSOs in the democratization process in tanzania was the freezing of bank accounts of some CSOs immediately before the 2020 general elections. One of the organisations that particularly suffered from this move was the Human Rights Defenders Coalition (THRDC).

5.8. Civil Society and Democracy Now!

Despite facing the foregoing challenges, CSOs are still doing a very commendable job in providing civic education, training aspirants especially women and youths, observing elections, among other many things. For instance, *TWAWEZA East Africa*, the LHRC and the TCD have drafted two model laws on democracy: namely the Political Parties Bill and the Elections Bill. These two proposed laws were presented to the Presidential Taskforce on Democracy, which considered almost 7 percent of the CSOs' recommendations.[725]

5.9. Civil Society in the next 30 years

Having travelled through and survived the challenging thirty years in the period of multiparty democracy, it is expected that thirty years to come resilient CSOs will be stronger to bring about changes on the governance of the country's political and public affairs. As considered in this Chapter, for the past 30 years

724 Visit https://www.humanrightscareers.com/issues/what-are-human-rights-violations (accessed on 3 December 2022).
725 See particularly Jamhuri ya Muungano wa Tanzania, *Ripoti ya Kikosi Kazi cha Mheshimiwa Rais wa Jamhuri ya Muungano wa Tanzania Kilichofanyia Kazi Masuala Yanayohusu Demokrasia ya Vyama Vingi vya Siasa Nchini* (Dodoma: Serikali ya Jamhuri ya Muungano wa Tanzania, Oktoba 2022).

CSOs have done a commendable job on shaping democracy of Tanzania despite the said challenges. These results if multiplied by two, Tanzania will be a safer place to live.

However, there remains one main challenge (if it will not be addressed) that will continue to adversely affect the work of the Non-Governmental Organisations (NGOs). The challenge is the prevalence of the NGOs Act's condition on registering for only 10 years![726] It is our fear that, if this condition is not removed from the statute books, some NGOs will not be re-registered again after 10 years. This is one of the biggest threats to Tanzanian NGO's.

5.10. Conclusion

From the foregoing brief analysis, one cannot talk of multiparty democracy without factoring in the contribution of CSOs in not only the transition to multi-party democracy in early 1990s, but also in stirring up people's participation in all multiparty democratic processes since Tanzania re-introduced the multiparty political system in 1992. CSOs try, as much as possible, to build social capital, trust, and shared values, which are transferred into the political sphere and have helped to hold society together, facilitating an understanding of the interconnectedness of society and interests within it.

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726 *See* the Non-Governmental Organizations Act, 2002 (as amended in 2019/2020).

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Official Report

Jamhuri ya Muungano wa Tanzania, *Ripoti ya Kikosi Kazi cha Mheshimiwa Rais wa Jamhuri ya Muungano wa Tanzania Kilichofanyia Kazi Masuala Yanayohusu Demokrasia ya Vyama Vingi vya Siasa Nchini* (Dodoma: Serikali ya Jamhuri ya Muungano wa Tanzania, Oktoba 2022).

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Anna Henga is a Certified Board member, Tanzanian lawyer and an advocate of the High Court of Tanzania. She heads LHRC, the iconic human rights organization in Tanzania. In 2019, the United States awarded her the International Women of Courage Award in recognition of her efforts on women and children rights in Tanzania.

Anna has been designing and managing various programs to enhance the protection and promotion of women's rights in Tanzania. In June 2019, she initiated the ongoing program 'Female Students Mentorship Programme' to empower young girls in schools and universities on their rights. In 2011, She worked to contexualize MAPUTO Protocal, 2003 for the content of the protocal to be available to most Tanzaniania.

She has also worked as coordinator of Tanzania Anti-FGM Coalition and successfully engaged the Muslims community under the Muslim Council of Tanzania to refute the existed myth that Muslims supports FGM. She has worked on the empowerment of women on land rights particularly in influencing the composition of women in Land tribunals. She also contributed to an increase in women's participation in elections through empowerment on political rights. In 2010, she trained women political aspirants in Tanzania under the UNIFEM (now UN Women).

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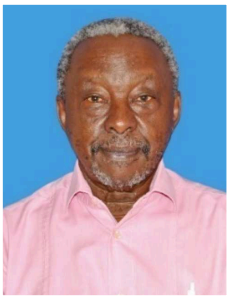

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He has written hundreds of articles in the East African (magazine based in Nairobi), New African and Deutsche Welle on issues of Governance and Human Rights, and published books. He has moderated high level policy and strategic forums organized by the United Nations, African Union Commission, and International and National Organization. And served as a member of various public and private boards. He is currently serving as a rector for the Emerging Public Interest Litigation Advocates Training Programme for East African Countries, targeting young East African advocates from Kenya, Uganda and Tanzania pursuing Public Interest Litigation courses of action in domestic or sub-regional law courts.

Jenerali Ulimwengu served as Member of Parliament of Tanzania for five years in the period leading to multiparty elections in 1995 in Tanzania. He was one of the parliamentarians who laid down the constitutional dispensation allowing for competitive politics. In 1994, concerned with the behaviour of many public officials, he introduced in the House a motion seeking the enactment of a law obliging all public officials to publicly declare their material wealth, with a view to curbing rampant corruption. The motion was adopted, and the law enacted. Between 1974-1985, Jenerali Ulimwengu served as deputy secretary general of the Pan-African Youth Movement, headquartered in Algiers, Algeria. This was an OAU affiliated NGO whose role was to mobilise the youth of Africa and help foster a sense of Pan-Africanism, as well as making them pool their efforts toward liberation support.

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