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EDITORIAL: THE CURRENT STATE OF DEMOCRACY IN SOUTH AFRICA

South African voters went to the polls on 7 May 2014 to vote in national and provincial elections. Despite widespread popular discontent, which manifested inter alia in high incidences of service delivery and other protests, the ruling African National Congress (ANC) retained its electoral dominance: it won just over 62% of the national vote and held onto its majority in eight of South Africa's nine provinces. The election results, nevertheless, showed a drop in the ANC's support levels. They also signalled a realignment of opposition politics with a significant increase in support for the Democratic Alliance and a strong showing by the newly formed Economic Freedom Fighters (EFF).

Against this background, a conference titled "**The End of the Representative State – Democracy at the Crossroads**" was held at Freie Universität Berlin on 11-12 July 2014. About 80 participants from diverse backgrounds attended the conference, which was organized by Henk Botha (Stellenbosch University), Nils Schaks (now Universität Mannheim) and Dominik Steiger (Freie Universität Berlin) and generously supported by the Fritz Thyssen Stiftung, Konrad Adenauer Stiftung, Center for International Cooperation of Freie Universität Berlin, Faculty of Law and Executive Board of Freie Universität Berlin, Ernst-Reuter-Gesellschaft, German-South African Lawyers Association and the publishing houses "Nomos" and "C. H. Beck". The conference approached the challenges facing representative democracy through a comparative lens and was structured in the form of a dialogue between South African and German constitutional scholars. Four lead papers focused on the South African experience, with responses to each of them from a German – and European – perspective, while four lead papers explored the position in Germany, with an equal number of South African responses. These contributions will appear soon in an open-access edited collection to be published by Nomos. In this issue of "Verfassung und Recht in Übersee", three of the South African lead papers are published. These three contributions reflect on the current state of democracy in South Africa, against the background of a series of tensions and difficulties that have characterised South Africa's transition to democracy and that have once again been highlighted in the wake of the 2014 elections.

The national and provincial elections in 2014 introduced a period of heightened contestation and confrontation. Opposition parties became bolder in their **demands for democratic openness**, accountability and responsiveness, and the EFF in particular resorted to tactics that were disruptive of parliamentary procedures where they felt that these demands were obstructed by the ruling party. At the same time, the ANC tightened its resolve to shield the President from criminal prosecution on charges of corruption and from having to pay back some of the money spent on the upgrades to his private homestead in Nkandla. The ensuing tensions resulted in unprecedented scenes, in which police forcefully removed members of Parliament from the parliamentary precinct. Public protests also remained a regular occurrence. The violence accompanying many protests is a concern, as is police

brutality in the face of popular dissent. Attacks on foreigners further attest to the frustrations created by poverty, poor service delivery and general feelings of powerlessness. Crude nationalist notions of belonging appear to provide some compensation for the exclusion of significant sections of the nation from real social and political membership.

These conflicts are indicative of deeper tensions and contradictions. In the first place, the **accountability of democratic representatives to the electorate** is undermined by the closed list system of proportional representation that is used in South Africa, in terms of which voters vote for political parties rather than individual representatives. The power of a political party to discipline members, who do not toe the party line or to demote them on the party list for the next election, also compromises their capacity to exercise independent judgement. The executive's ability to determine the legislative and policy agenda raises further questions over the institutional independence of elected legislatures and the integrity of their processes. What happens to democratic accountability if it is ultimately the ruling party and the executive that call the shots? Doesn't that erode the very basis of democratic legitimacy?

Secondly, it is often claimed that the electoral dominance of the ANC endangers party-political competition and threatens to undermine the independence of democratic institutions. In a dominant party democracy, the ruling party can use its legislative majority to change the rules of political engagement **to stifle dissent and suppress information** that can put it in a bad light. It can also deflect challenges to its power through its control of state resources and through the manipulation of independent state institutions. While the exact extent to which the dominant party democracy thesis sheds light on the challenges facing democracy in South Africa is contested, it does resonate with certain aspects of the South African experience, such as the growing conflation of the state and ruling party, political interference in independent state institutions like the National Directorate of Public Prosecutions and the deployment of ANC cadres to key positions in public institutions.

Thirdly, representative democracy in South Africa coexists with other forms of democratic engagement. These different modes of **political participation** are often mutually supportive. For instance, the Constitutional Court, in two landmark cases in which it held that Parliament is under an enforceable obligation to facilitate public participation in the legislative process, stated that the Constitution envisages a model of democracy which contains representative and participatory strands, through which a dialogue between the people and their representatives is instituted.¹ However, not all democratic engagement occurs in formal spaces which are framed by the state and where members of the public participate at the state's invitation. Popular protests, which have become such a regular feature of public life in South Africa, take place outside of these institutional spaces and stand in a more complex relationship with representative democracy. While it would be wrong to conceive

1 *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC); *Matatiele Municipality v President of the Republic of South Africa* (2) 2007 (1) BCLR 47 (CC).

of these two as wholly distinct spheres which do not overlap, the apparent lack of a direct correlation between the number and intensity of public protests and shifts in electoral support away from the ruling party raises concerns over the link between voters and representatives and the overall legitimacy of the representative system.

These problems are, of course, closely bound up with the specific legal, historical, political and socio-economic contexts framing the post-apartheid legal order. However, that is not to say that the broader, underlying challenges are unique to South Africa. In other jurisdictions, too, it is claimed that **the represented have lost faith in the political classes**, and that representatives **themselves experience growing feelings of powerlessness**. In other democracies, too, doubts are raised over the capacity of the representative system to secure the conditions under which exercises of public power can truly be said to emanate from, and be held in check by, the power of the people. In other systems, too, the idea of civic participation as a remedy to the ills of the representative state has gained ground.

The aim of the 2014 conference was therefore threefold. First of all, it sought to **diagnose the crisis** of the representative system, with reference to i) the institutional and supra-national constraints and pressures to which representative institutions are subject; and ii) a loss of trust in representatives as a result of failures to comply with the democratic demands of openness and transparency. Secondly, it asked whether and how this (perceived) **loss of legitimacy** could be addressed through changes to the representative system, for instance by i) redrawing the boundaries of the electorate to ensure a better fit between those entitled to vote and those subject to state power; and ii) strengthening the position of legislators vis-à-vis the executive and political parties. Thirdly, it asked whether the representative system could be supplemented and reinvigorated through the **importation of elements of participatory and direct democracy**.

Reworked versions of three of the South African papers delivered at the conference are published in this volume. *Wessel le Roux's* essay problematizes the very basis of political rights and of democratic representation in an age characterised by high levels of migration. He uses recent case law in Germany and South Africa which dealt either with the voting rights of non-resident citizens or with the voting rights of foreigners residing inside the borders of the state, as the backdrop for his analysis of two competing understandings of the basis of voting rights. While the traditional understanding grounds political rights in citizenship (understood as nationality), an alternative model bases the right to vote on equal residence or **denizenship**. The former can accommodate voting rights for non-resident citizens but not for resident non-citizens; the latter, by contrast, seeks to integrate migrants into the political community by granting them the right to vote, but excludes expatriate citizens from the electorate. *Le Roux* argues that the traditional model cannot facilitate a democratic response to the challenges of migration. Only the post-nationalist idea of residence-based voting rights can provide the basis for a democratic negotiation of the growing divide between nationality and residence in post-apartheid South Africa.

Jonathan Klaaren's essay examines the long-drawn-out process through which the controversial **Protection of State Information Bill** ("the Bill") was considered. The Bill – or

at least some of the various versions through which it has morphed – is viewed by many as a threat to the transparency that is indispensable to the open and democratic society envisaged by the Constitution. *Klaaren* is interested in what the consideration of and debate over this Bill reveal about the functioning of democratic institutions in South Africa. In this regard, he looks at Parliamentary oversight of the state's security apparatus, the position of political parties and the actual roles played by the two Houses of Parliament in national debate. In addition, he also considers the framing of the issues in public discourse. Criticising the dominant party democracy thesis, he argues instead for a frame of analysis which foregrounds tensions relating to the symbolic roles played by the media and the intelligence services. Finally, he argues for a rethinking of the relationship between transparency and secrecy as a way of providing a more nuanced understanding which is able to move beyond the rigid oppositions that have characterised much of the debate on the Bill.

Richard Calland and *Shameela Seedat*'s essay focuses on Parliament's institutional independence and its role in holding the executive to account. They note that Parliament has for a variety of reasons – related inter alia to the electoral system, the power of political parties to discipline their members and the dominance of the ANC – not been particularly effective in ensuring **government accountability**, but that the proceedings of the National Assembly appear to have been characterised by a renewed vitality since the 2014 elections. They analyse a number of recent events where parliamentary proceedings were characterised by sharp confrontation between the governing party and opposition parties over the latter's attempts to call the government to account, and ask whether and to what extent the EFF's disruptive tactics have reinvigorated Parliament or diminished its integrity.

Together, these contributions paint a picture of a democracy marked by contestation over the identity and bounds of the people, the relationship between the people and their representatives, the position of legislators vis-à-vis political parties and the executive, and the balance to be struck between transparency and countervailing interests such as national security. How these conflicts are to be navigated will have important implications for the post-apartheid constitutional order and for its capacity to respond to the crisis of the representative state.

The conference forms part of a larger and ongoing German-South African collaboration between Stellenbosch University, University of the Western Cape and Freie Universität Berlin on the law relating to democracy. In 2012, a first colloquium on questions of democracy in South Africa and Germany took place in Stellenbosch. A follow-up conference will be held at Stellenbosch University on 26 February 2016. The sessions will focus on the fundamental prerequisites of democracy, such as the people, the public sphere and fundamental rights. The conference will deal with these topics both from a South African and a German perspective. For more information please contact Henk Botha at hbotha@sun.ac.za.

Henk Botha/Nils Schaks/Dominik Steiger (guest editors)
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ABHANDLUNGEN / ARTICLES

Residence, representative democracy and the voting rights of migrant workers in post-apartheid South Africa and post-unification Germany (1990-2015)

By *Wessel le Roux**

Abstract: *Over the past 25 years, migration has surfaced as one of the core features of globalisation to impact on established constitutional democracies from the North (such as Germany) and young constitutional democracies from the South (such as South Africa). Nancy Fraser claims that migration has forced all self-proclaimed democracies into a state of ‘abnormal justice’ by placing the meaning of ‘the people’ or the demos in the representative State into question. The ‘abnormal’ nature of contemporary constitutional jurisprudence is perfectly illustrated by a number of recent voting rights cases in South Africa and Germany. These cases reveal two Constitutional Courts caught up in the transition between two constitutional models of political participation. The old model of citizenship places nationality (naturalisation) and the principle of ‘equal citizenship’ central; the new model of denizenship places residence and the principle of ‘all affected persons’ central. The case law discussed below is marked by tensions, contradictions, unexplained shifts and inversions as the Constitutional Courts of South Africa and Germany struggle in search of a new principled basis to regulate the voting rights of migrants.*

A. Introduction

The members of the Bundestag in Germany and the National Assembly in South Africa are elected to represent ‘the people’ of each Republic.¹ It is no longer clear what this basic tenet of representative democracy entails. Globalisation and migration have placed both

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¹ Basic Law for the Federal Republic of Germany, 1949, article 38(1) read with article 20(2); Constitution of the Republic of South Africa, 1996, section 42(3).

‘the people’ and the modalities of its representation into question.² Nancy Fraser claims that we find ourselves in the midst of an era of ‘abnormal justice’.³ As Sofia Näsström puts it, in this era ‘the people’ has changed from constitutional ‘presupposition’ to constitutional ‘problem’; constitutional law has shifted its focus from ‘rule-making’ to ‘people-making’.⁴

In this context, demands for democratic inclusion and representation are increasingly posed by or on behalf of four distinguishable groups of people: (i) citizens residing inside the borders of the State; (ii) citizens residing outside the borders of the State; (iii) foreigners residing inside the borders of the state; and (iv) foreigners residing outside the borders of the state.

The task of the national legislature was traditionally confined to the first issue. The democratisation of representative democracy has unfolded on the assumption that the national legislature has the duty to equally represent all citizens. This assumption sustained many struggles for equal voting rights during the 20th century (not least the armed struggle in South Africa against apartheid). Given this history, many States have tried to resolve the new democratic claims of the other three categories mentioned above on the basis of the old and established model of equal citizenship.

The paper below explores the success of this strategy by comparing the impact of migration on the voting rights jurisprudence of post-apartheid South Africa and post-unification Germany. Both jurisdictions are marked by a conflict between an old and a new constitutional paradigm for the political integration of migrant workers. The old model continues to allocate voting rights to migrants on the basis of equal citizenship, broadly resulting in voting rights for non-resident citizens (category two claims above) but not for resident non-citizens (category three claims above). The new model seeks to allocate voting rights to migrants on the basis of equal residence or denizenship, broadly resulting in the voting rights of resident foreigners (category three claims) but not for non-resident citizens (category two claims).

After exploring the tension between the two models in South African law (section B) and German law (section C), I argue in conclusion (section D) that the tension between the two models should be resolved at the national level in favour of the new model of denizenship or universal residence based voting rights. This model has the potential to revitalise and enhance the democratic legitimacy of national representative governments by including

2 I restrict my focus here to the right to be represented in the national legislature. I also restrict my focus to the right to direct or actual representation (as opposed to virtual representation). The question of ‘the people’ thus becomes the question of ‘the electorate’ or the right to vote. See *Frank Michelman*, Traces of self-government, Harvard LR 100 (1986), pp. 50-55 (on virtual representation), and *Elizabeth Cohen*, Dilemmas of representation, citizenship, and semi-citizenship, Saint Louis University Law Journal 58 (2014), p. 1047 (on virtual representation as a form of trusteeship).

3 *Nancy Fraser*, Transnationalizing the public sphere, Cambridge, 2014, p. 36. The abnormality stems from the fact that membership of the people itself is contested, not only the rights members owe each other.

4 *Sofia Näsström*, The challenge of the All-Affected Principle, Political Studies 59 (2011), p. 116.

“all affected persons” in the demos. Only the latter principle is able to inspire a transnational democratic response to inter-regional migration (and other challenges of globalisation, such as global capitalism and global climate change) by recognising the political right of non-resident foreigners to be represented when laws and policies are made that directly affect them (category four claims above).⁵

B. The voting rights of migrant workers in post-apartheid South Africa

During the first quarter of a century after apartheid, five national elections took place in South Africa. Not two of those elections applied the same voter eligibility criteria to migrant workers. On the contrary, the history of voting rights in South Africa is characterised by often dramatic and unexpected policy shifts. Here is the story.

1. Celebrating residence: the 1994 elections

After decades of violent struggle for equal political rights in South Africa, the interim Constitution of 1993 contained not one, but two provisions regulating the right to vote. Each provision strangely contained its own set of voter eligibility criteria. On the one hand, section 21(1) of the Bill of Rights stipulated that ‘[e]very citizen shall have the right to vote’, implying that foreign nationals may not be granted the right to vote. Section 6(a)(ii) of the Constitution, on the other hand, provided explicitly that an Act of Parliament may extend the right to vote in national elections to foreign nationals. Read together, the interim Constitution neither mandated nor prohibited the inclusion of foreigner nationals. The matter was entirely left to the discretion of Parliament. Parliament responded by extending the right to vote to two groups of migrant workers: foreigners with permanent resident status in South Africa, and foreign residents without such status but who had entered the Republic before 13 June 1986.⁶ Because the first post-apartheid elections did not include a voter registration process, eligible voters without official South African documents could apply for a temporary voter card and proceed to vote. More than 3.5 million temporary voter's cards were is-

5 This does not mean that non-resident foreigners must be allowed to vote in national elections. Even if the right of non-resident foreigners to be included in the demos is recognised, the modalities of membership and participation still need to be determined. I return to this issue below in Section E. For more detail refer to *David Owen*, *Transnational citizenship and the democratic state: On modes of membership and rights of political participation*, in Satvinder Juss (ed.), *The Ashgate Research Companion to Migration Law, Theory and Policy*, Farnham 2013, p. 689; *Eyal Benvenisti*, *Sovereigns as trustees of humanity: on the accountability of states to foreign stakeholders*, *AJIL* 107 (2013), p. 295; *Robert Goodin*, *Enfranchising all affected interests, and its alternatives*, *Philosophy and Public Affairs* 35 (2007), p. 40; and *Arash Abizadeh*, *Democratic theory and border coercion: No right to unilaterally control your borders*, *Political Theory* 36 (2008), p 37.

6 Section 15 read with section 1 of the Electoral Act 202 of 1993.

sued on this basis. According to standard estimates, this number included 500 000 foreign nationals who voted in the 1994 national and provincial elections.⁷

How should we understand this almost unprecedented embrace of foreigner voting rights immediately after the end of apartheid? One answer is that it was a conscious constitutional decision to rebuild post-apartheid South Africa on the basis of a radically post-nationalist and post-colonial model of representative democracy (in direct reaction to the perverted Christian Nationalism of the former apartheid regime). In terms of this post-nationalist constitutional model, the task of the National Assembly was decidedly not to represent the South African nation, but to represent the resident population of South Africa. By extending full voting rights to foreign residents, the interim Constitution of 1993 separated nation and state and completed the disaggregation of citizenship into denizenship.⁸

There are both pragmatic and principled reasons why this preference for denizenship would have made good sense at the beginning of the 1990s. In a deeply divided society on the verge of a civil war, democracy could hardly have been conceived in nationalist terms (ethno-cultural or civic). Political participation on the basis of ‘constitutional patriotism’ provided the only possibility for the future social and cultural integration (and transformation) of society.⁹ Political participation in a peaceful election on the basis of residence became the precondition for national-building and socio-cultural integration.

Secondly, a truly transformative political rights jurisprudence in post-apartheid South Africa was only possible on the basis of denizenship. Apartheid constitutionalism was a disastrous attempt to solve the problem of equal voting rights through the manipulation of migration and immigration law. The solution was to turn all black South Africans into foreign residents by converting their nationality into that of a number of independent black homelands. (White) South Africa thereby became the ‘host country’ of millions of migrant workers from a number of (black) neighbouring ‘home countries’.¹⁰ This constitutional

7 Susan Booysen and Grant Masterson, Chapter 11: South Africa, in: Denis Kadima and Susan Booysen (eds.), *Compendium of Elections in Southern Africa 1989-2009: 20 Years of Multiparty Democracy*, Johannesburg 2009, p. 405-406.

8 Seyla Benhabib, *The rights of others: Aliens, Residents and citizens*, Cambridge 2004, p. 171 describes ‘disaggregated citizenship’ both as a reality and normative ideal in the era of globalisation. The end-point of this disaggregation process is denizenship. The post-apartheid Constitutions mandate the disaggregation of citizenship by extending all rights to ‘everyone’ under the territorial jurisdiction of the state. One exception was the right to vote. Under the 1993 Constitution, the disaggregation of voting rights was not mandated (under section 19(1)) but permissible (under section 6). The same position applies arguably under the 1996 Constitution as well. Resistance to disaggregated citizenship or denizenship is not limited to political rights. In *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* [2004] ZACC 11; 2004 (6) SA 505 (CC) Ngcobo J ruled that the right of all residents to social security need not be strictly implemented, but can be limited to citizens only, in order to encourage the naturalisation of foreigner nationals.

9 Jan-Werner Müller, *Constitutional patriotism*, Princeton 2006, pp. 46-90.

10 See the Bantu Homelands Citizenship Act 26 of 1970. Between 1976 and 1981, four homelands (Transkei, Venda, Bophuthatswana, and Ciskei) were declared ‘independent’ and eight million

model (or grand apartheid) rested on the traditional constitutional distinction between citizens and foreign residents, and the equally traditional doctrine that foreign nationals do not have a legitimate claim to political rights in host countries. This controversial constitutional model was officially abandoned in 1986.¹¹ Between 1986 and 1994 South Africans negotiated a relatively peaceful transition to an alternative democratic constitutional model.

Two alternatives to apartheid constitutionalism presented themselves. According to the citizenship model, the problem with grand apartheid was the sharp distinction between black and white citizens. The solution required the recognition and normalisation of equal citizenship. According to the denizenship model, the problem with grand apartheid was the sharp distinction between foreign residents and citizens. The solution to apartheid required the complete disaggregation of citizenship rights, that is, the recognition of political rights as constitutive of the dignity of all residents as participatory subjects of law, as opposed to objects of state power. The deeper logic of apartheid could be transformed only if the nationalist model of equal citizenship was also transformed. Hence the extension of voting rights to all residents in the first post-apartheid elections.

Attractive as this interpretation of the voting rights provisions of the 1993 Constitution and the significance of residence based voting rights might be, a number of South African constitutional scholars tell a different story about the first democratic elections. Jonathan Klaaren and Claire Robinson both insist that the recognition of foreigner voting rights in these elections was no more than a strategic deal between the major negotiating parties.¹² The agreement was simple: keep voter exclusions to a minimum, thereby avoiding potential incidences of election violence and enlarging the support-base of all parties. Pacheka Ncholo suggests (less cynically) that the recognition of foreigner voting rights was simply a pragmatic response to the various unjust nationality regimes which were applicable in South Africa at the end of apartheid.¹³ Far from celebrating an alternative post-apartheid model of denizenship, the granting of voting rights to foreign residents was simply the first

black South Africans lost their South African citizenship. The apartheid framework included not only the homelands, but also the hinterlands of white South Africa (Malawi; Mozambique; Zambia). It was from here that the majority of migrant mine labourers came. The failure to implement a truly transformative model of political rights (read denizenship) means that the apartheid model of hinterlands remains in place.

- 11 *Sampie Terreblanche*, *Lost in transformation: South Africa's search for a new future since 1986*, Johannesburg 2012, pp. 7-16 explains from a slightly different angle why 1986 was the real turning point in South Africa's transformation. As part of a comprehensive new legislative framework, The Matters Concerning Admission to and Residence in the Republic Amendment Act 53 of 1986 came into operation on 13 June 1986. The Act introduced the possibility for black foreigners to acquire South African citizenship through naturalisation.
- 12 *Jonathan Klaaren*, *Contested citizenship in South Africa*, in: Penelope Andrews and Stephen Allman (eds.), *The post-apartheid Constitutions*, Ohio 2001, p. 309; *Claire Robertson*, *Contesting the contest: negotiating the election machinery*, in: Steven Friedman and Doreen Atkinson, *The small miracle: South Africa's negotiated settlement*, Johannesburg 1994, p. 44.
- 13 *Pacheka Ncholo*, *The right to vote*, in: Nico Steytler (ed.), *Free and Fair Elections*, Kenwyn 1994, p 64.

step towards the normalisation of the conventional model of equal citizenship. The strongest support for Ncholo's interpretation is the fact that the post-apartheid experiment with foreigner voting rights did not survive the drafting of the final Constitution of 1996 into the next national elections.

II. Combining residence with nationality: the 1999 elections

South Africa's current Constitution (the so-called final Constitution of 1996) was drafted between the 1994 and 1999 national elections. While the preamble of the Constitution confirmed that 'South Africa belongs to all who live in it', and section 1 declared that 'universal adult suffrage' was a foundational value, and the Bill of Rights again extended disaggregated citizenship rights to 'everyone' within the borders of South Africa, the Constitution did not again make provision for the voting rights of foreign nationals as required by the model of denizenship. On the contrary, the wording of the right to vote in section 19(3) of the Bill of Rights returned to the model of equal citizenship by limiting the right to vote to all adult citizens. The Electoral Act 73 of 1998 dramatically confirmed the new exclusivity ascribed to the right to vote. In sharp contrast with its predecessor, the new Act explicitly prohibited the registration of foreign nationals as voters.¹⁴ The Act nevertheless retained some commitment to residence from the discarded denizenship model. It stipulated that citizens could only be registered as voters if they were ordinarily resident in South Africa, and that registered voters had to vote at their places of ordinary residence.¹⁵

Apart from disenfranchising migrant workers in South Africa, the combination of the ordinary residence and citizenship requirements also had far-reaching consequences for South African migrant workers abroad. The Act effectively divided migrant workers abroad into those who were temporarily abroad with an obligation to return (without permanent residence status abroad), and those with the intention and right to permanently remain abroad (emigrants or expatriates with permanent residence status abroad). Citizens in the first category remained ordinarily resident in South Africa and thus eligible to register and vote. Citizens in the second category had to be deregistered as voters. As a result, migrant workers abroad either lost their right to vote in South Africa, or became constructively disenfranchised (given that the Act did not contain a generally accessible absentee voting rights procedure).

This dramatic restriction of the right to vote reflected the view that citizenship had finally been normalised. It was thus no longer necessary to accommodate special groups of migrants outside the norm (by then exiles had returned home and migrant workers from the hinterlands of South Africa had been naturalised through a series of immigration

¹⁴ Section 8(2)(b) of the Electoral Act, 1998.

¹⁵ Section 8(2)(e) of the Electoral Act, 1998 prescribed that only citizens who were 'ordinarily resident' in South Africa could be registered as voters.

amnesties).¹⁶ The new Electoral Act also reflected a negative policy stance towards migration in general and towards the unprecedented skills drain from South Africa, which tended to reflect racial contours and thus resulted in large, mostly white, South African expatriate communities abroad.

While the disenfranchisement of foreign nationals during the 1999 elections went by unchallenged (another sign of normalisation?), the constitutionality of the ordinary residence requirement and its disenfranchising effect on citizens soon made its way to the Constitutional Court. In *August v Electoral Commission* (the Court's first voting rights case) the South African Constitutional Court (SACC) was faced with the task of establishing whether, and if so why, residence was significant enough to trump citizenship as voter eligibility criteria.¹⁷ The case involved citizens detained in prisons. The Electoral Commission (EC) had simply assumed that prisoners were not ordinarily resident in prison and that prisoners were thus prevented by their personal circumstances from voting in the 1999 election. No steps were taken to register prisoners or to set up polling stations in prisons. Prisoners claimed that this omission violated their right to vote. The Court ruled in favour of the prisoners, but judiciously avoided the broader debate about the constitutional significance of the residence requirement by ruling that prisoners were ordinarily resident in prison, and that the EC therefore had to ensure that all prisoners could register and vote in prison.

The willingness of the Court to manipulate, if not ignore, the 'ordinary residence' requirement in order to avoid the disenfranchisement of prisoners set the tone for many of the Court's subsequent voting rights cases. In *August* the Court explicitly celebrated voting rights as the 'badge' which distinguished dignified citizens (including prisoners) from mere residents.¹⁸ This celebration of the equal dignity of citizens resulted in a very truncated understanding of the constitutional significance (and implied constitutionality) of the ordinary resident requirement in the new Act:

*The purpose of the phrase "ordinarily resident" is to facilitate the electoral process. It will, for example, enable the allocation of voters to voting districts, each with their own polling stations, so that an identified and relatively small number of voters resident in that district during the period of registration and voting will vote in it. [...] This will facilitate easy and accurate identification on voting day and prevent long queues.*¹⁹

16 This conviction was so pervasive that the Constitutional Court boldly ruled that citizens who had by then not yet obtained the apartheid era bar-coded identification book (an ironic sign of normalisation) could justifiably be excluded from participating in the 1999 election, see *New National Party v Government of the Republic of South Africa* [1999] ZACC 5; 1999 (3) SA 191 (CC).

17 *August v Electoral Commission* [1999] ZACC 3; 1999 (3) SA 1 (CC) para 27.

18 *Henk Botha*, The rights of foreigners: dignity, citizenship and the right to have rights, *South African Law Journal* 130 (2013), p. 837.

19 *August v Electoral Commission* [1999] ZACC 3; 1999 (3) SA 1 (CC) para 27.

While a full exploration of the constitutional meaning of residence was not required to decide the *August* case, residence based voting was reduced in the case to a logistical consideration, important enough to exclude certain citizens, but only in order to ensure that elections based exclusively on citizenship were properly administrated. The full effects of this subtle judicial dismantling of denizenship by the Court in its first voting rights case were not immediately felt in the *August* case, but became clear in later voting rights cases, especially those involving the voting rights of absent and non-resident citizens.

III. Contesting residence: the 2003 and 2009 elections

Before the 2004 election, the Electoral Commission requested the government to recognise external voting rights and formalise an absentee voting procedure for the benefit of citizens abroad. As a result of this request, the Electoral Act was amended in 2003 to extend external voting rights to citizens who were unable to vote at their place of residence due to a 'temporary absence' abroad as a result of a holiday, business trip, sports event, or tertiary studies.²⁰ Citizens who were temporarily working overseas were noticeably not included on this list. This omission was not a legislative oversight. The drafting of the list was inspired by the same anti-migration stance that informed the Electoral Act as a whole. During the parliamentary debate on the new provision, migrant workers abroad were repeatedly singled out as unpatriotic and disloyal citizens who did not deserve to be encouraged or rewarded with the right to vote.²¹

This negative stance became the subject of judicial scrutiny shortly before the 2009 elections, when a South African citizen who was working in London as a teacher on a three year contract contested the fact that he had to travel back to his place of ordinary residence in South Africa in order to vote in the election.²² In *Richter v Minister of Home Affairs* the Court ruled that the state had a positive obligation to extend external voting rights to all registered voters abroad, thus taking a far more progressive stance on the issue of external voting rights than the European Court of Human Rights, for example.²³ In the process the Court explicitly discredit any suggestion that citizens living and working abroad had desert-

20 Section 33(1)(e) of the Electoral Act, 1998 (as amended in 2003).

21 For the full debate in the standing committee, see <https://pmg.org.za/committee-meeting/2833/> (accessed 20 February 2015). The drafting history is described and criticised in more detail in *Richter v Minister of Home Affairs* [2009] ZAGPHC 21; [2009] 2 All SA 390 (T), para 11.

22 *Richter v Minister for Home Affairs* [2009] ZACC 3; 2009 (3) SA 615 (CC), para 52. See *Wessel le Roux*, Migration, street democracy and expatriate voting rights, South African Public Law 24 (2009), p. 370 for a fuller discussion and critique of the judgment.

23 Compare the position of the Constitutional Court with that of the European Court of Human Rights which ruled recently in *Sitaropoulos and Giakoumopoulos v Greece* (ECHR case 42202/07), 12 March 2012, para 69, that the right to vote under the European Convention does not include the right to cast an absentee ballot. The same applied, according to the Court, in international and regional human rights law (para 72).

ed their duties of citizenship and could thus be denied their right to vote as part of a policy to discourage migration.²⁴

The *Richter* judgment was widely hailed for its attempt to encourage the ongoing political participation of citizens abroad. In the process of doing so, the Court again failed to appreciate or attach any constitutional weight to the residence requirement in the Act. The Court's failure to do so resulted in confusion about the implications of its order. Without hearing argument on the issue or providing reasons for its judgment, the Court held that registered citizens no longer needed to prove that they were only temporarily absent from (that is, that they are still ordinary resident in) the country, when applying for a special absentee ballot. It was unclear whether this meant that the Court thereby extended external voting rights to expatriate (non-resident) citizens as well. The expatriate voting rights lobby seized the opportunity to argue that it did. In the hope of getting clarity on the issue, a number of opposition parties and expatriate lobby groups decided to directly attack the constitutionality of the ordinary residence requirement. In *AParty v Minister of Home Affairs* the Court was again faced with the task of exploring the constitutional and democratic significance of ordinary residence as a voter eligibility criteria.²⁵ Once again the Court managed to avoid the issue, this time by denying the applicants direct access.

The *Richter* and *AParty* judgments left the ordinary residence requirement in place for the 2009 elections, but with serious doubts whether the requirement served any democratic purpose beyond its role in facilitating the effective administration of national elections (in which case it could hardly continue to justify the exclusion of any citizens on the basis of their migration status). The ongoing failure of the Court to understand and refusal to clarify the constitutional significance of residence as a principle of democratic inclusion (and exclusion), left the principle vulnerable and finally resulted in its abolition shortly before the 2014 national elections.

IV. Dispensing with residence: the 2014 elections

After the *AParty* case, the expatriate voting rights lobby abandoned their litigation campaign and concentrated their attention on the political process. Buoyed by the global trend

24 *Richter*, note 22, para 69: '[W]e now live in a global economy which provides opportunities to South African citizens and citizens from other countries to study and work in countries other than their own. The experience that they gain will enrich our society when they return, and will no doubt enrich, too, a sense of a shared global citizenship. The evidence before us, too, shows that many South African citizens abroad make remittances to family members in South Africa while they are abroad, or save money to buy a house. To the extent that citizens engaged in such pursuits want to take the trouble to participate in elections while abroad, it is an expression both of their continued commitment to our country and their civic-mindedness from which our democracy will benefit'.

25 *AParty v Minister for Home Affairs, Moloko v Minister for Home Affairs* [2009] ZACC 4; 2009 (3) SA 649 (CC).

towards the recognition of expatriate voting rights,²⁶ and by the turn of the African Union towards the African diaspora as a catalyst for Africa's future economic, cultural and political development,²⁷ the lobby called for a complete repeal of the ordinary residence requirement in national elections (some extended the call to provincial elections as well). In December 2013, the government made an about-turn in its attitude towards migrant workers abroad and amended the Electoral Act to allow all expatriate citizens to register as voters and vote in national elections. The amended and current Electoral Act does so by creating an overseas section in the national common voters roll (a tenth province as it were). Any citizen who is not ordinarily resident in South Africa has the right to have his or her name registered in this overseas section of the voters roll,²⁸ and to apply for an absentee vote before each election.²⁹

Under South African nationality law which recognises the *ius sanguinis*,³⁰ the amendment of the residence requirement extended voting rights to second and third generation emigrants purely on the basis of their formal status as South African citizens. In spite of its potential reach, only 6789 expatriates registered as overseas voters during the 2014 general elections (a total of 18 446 special absentee ballots were cast by overseas voters, including those of temporary absent voters).³¹ Nevertheless, the original residence requirement had finally lost its character as a voter eligibility requirement. It was no more than a logistical factor which determined the mode and place of voting.

V. Conclusion

The post-apartheid response to the voting rights of migrant workers is neatly framed by the 1994 and 2014 national elections. In twenty short years, South Africa has moved from a model of denizenship in which voter eligibility was based purely on residence, to a model of citizenship in which voter eligibility is based purely on nationality. What stands out from the brief discussion above is the spectacular manner in which South Africa has embraced the broader global trend towards the granting of voting rights to non-resident citizens, not only by simply neglecting the voting rights of resident non-citizens, but by actively disenfranchising foreign nationals on a large scale. The constitutionality of this dramatic shift has not yet been tested. It remains an open question whether it would be constitutional under the 1996 Constitution to reintroduce foreigner voting rights, or to revoke expatriate voting rights. An answer to these questions would require a proper engagement with the merits

26 Also noted in *Richter*, note 22, para 77.

27 African Union: Agenda 2063, para 68. Available at http://agenda2063.au.int/en/sites/default/files/agenda2063_popular_version_05092014_EN.pdf (last accessed on 10 March 2015).

28 Section 8(3) of the Electoral Act, 1998.

29 Section 33(4) of the Electoral Act, 1998.

30 Section 2(1)(b) of the Citizenship Act of 1995.

31 <http://www.elections.org.za/content/NPEPublicReports/291/Voter%20Turnout/National.pdf>.

of residence as a principle of democratic inclusion. It is precisely such an engagement which is absent from the Constitutional Court's voting rights jurisprudence.

To compensate for this absence and to dispel what Theunis Roux describes as the 'democratic agnosticism' of the South African voting rights jurisprudence,³² I turn in the next section to the migrant voting rights cases of the Federal Constitutional Court of Germany in the period after re-unification. As is the case in South Africa, this jurisprudence is marked by a tension between the model of citizenship and denizenship, or in the terms of the German debate, between *volksdemokratie* and *betroffenheitsdemokratie*, each with its own understanding of the constitutional significance of residence as basis for political participation.

C. The voting rights of migrant workers in post-unification Germany

I. The voting rights of resident foreigners

The German Federal Constitutional Court (FCC) controversially ruled in 1990 that the extension of voting rights to foreign residents at local government level undermined the democratic character of the German state and was thus unconstitutional under the Basic Law.³³ This judgment rested on the claim that the Basic Law implicitly defined 'the people' as the German nation (all German citizens) and not as the general resident population of Germany. Naturalisation was the only available means of securing the democratic congruence between 'the people' (the electorate of formally equal citizens) and the rest of the resident population (those subject to state authority on a standing basis). Under the Basic Law, the political marginalisation of migrant communities had to be addressed by reforming German immigration law, not electoral law.³⁴

This line of reasoning continues to provide the constitutional framework for the political integration of migrant workers 25 years later. The equal citizenship model has been supported by a new generation of constitutional judges,³⁵ constitutional scholars,³⁶ and succes-

32 *Theunis Roux*, *The politics of principle: The first South African Constitutional Court, 1995-2005*, Cambridge 2013, p. 334.

33 BVerfGE 83, 37 [51]; BVerfGE 83, 60 [71].

34 BVerfGE 83, 37 [52].

35 In its *Lisbon* judgment (BVerfGE 123, 267 [para 292]) the FCC confirmed that 'the democratic legitimation of political rule is [...] not assessed according to the number of those affected'. *Patricia Mindus* and *Marco Goldini*, *Between democracy and nationality: Citizenship policies in the Lisbon ruling*, *European Public Law* 18 (2012), pp. 358-364 criticises the Court for its ongoing focus on equal citizenship as opposed to the affected population as basis for democratic legitimacy.

36 *Klaus Ferdinand Gärditz*, *Der Bürgerstatus im Lichte von Migration un europäischer Integration*, *VVDStRL* 72 (2013), p 51.

sive CDU/CSU governing coalitions.³⁷ In line with the citizenship model, the requirements for naturalisation were twice relaxed during the past 25 years, first on 1 January 2000 to introduce naturalisation through residence, and most recently on 20 December 2014 to allow for naturalisation with dual nationality. From this perspective, the post-apartheid experiment with denizenship and foreigner voting rights at national level would have been (and remains) constitutionally untenable in Germany. Even so, a closer look at the German constitutional argument *against* the recognition of foreigner voting rights might bring to light what was at stake in that short-lived experiment, and, ironically, provide the impetus for its revival.

The case in Germany for the constitutionality of foreigner voting rights was and remains based on the claim that the principle of democracy requires that ‘all affected persons’ must be included in the demos. At local government level, this meant all permanent residents, regardless of their nationality status. The case thus forced the Court to determine the democratic merits of residence as a principle of political inclusion (and exclusion). As noted above, unlike its South African counterpart, the Court used its two 1990 judgments to explore the meaning of democracy and ‘the people’ in the context of voting rights and explicitly rejected the ‘all affected persons’ principle as basis of democratic inclusion.

In his academic support of the Court at the time, Ernst-Wolfgang Böckenforde presented a scathing attack on the ‘all affected persons’ principle and what he pejoratively called *betroffenheitsdemokratie*.³⁸ Böckenforde argued that the principle could not be translated into operational constitutional law with sufficient precision to enable ‘the people’ to play the legitimating function ascribed to it by the Basic Law. For the people to play its foundational constitutional role, it has to form a closed and bounded unity (an assumption which eventually forced Böckenforde to naturalise the nation as a pre-political cultural, linguistic (if not ethnic) unity).³⁹ Democratic legality required a formal membership rule. Only nationality was able to meet this demand. Nationality is a permanent and formal status; being affected a subjective and temporal state. As a result, the latter inevitably resulted in a demos which shifted from issue to issue, undermined the formal equality between citizens by grading participation according to the degree of affectedness, and left the demos boundless. Böckenforde warned, *reductio ad absurdum*, that the principle implied that non-resident

37 The official policy of the CDU/CSU and its coalition partners remains that the right to vote cannot serve as the precondition or catalyst of the successful political and socio-cultural integration of migrants (as argued by the SPD, DIE LINKE and BÜNDNIS 90/DIE GRÜNEN); voting rights is the consequence of a process of integration or naturalisation. The political debates around the issue of foreigner voting rights cannot be further explored here. Suffice to say that the last three German parliaments all considered, but rejected, legislative proposals enfranchising foreign residents. Most recently, on 12 November 2014, DIE LINKE again tabled a Bill extending voting rights to foreigners (after five years of lawful residence, at all three levels of government). See Bundestag, Drucksache 18/3169, 12 November 2014.

38 *Ernst-Wolfgang Böckenforde*, *Demokratie als Verfassungsprinzip*, in: Josef Isensee and Paul Kirchhof, *Handbuch des Staatsrechts*, Heidelberg 2004, p. 461.

39 *Böckenforde*, note 38, p. 466.

foreigners (in category four above) would gain the right to vote in the Bundestag and so determine Germany's immigration policy.⁴⁰

2. Redefining the 'all affected persons' principle

Democratic theorists have adopted two main strategies in response to Böckenforde's criticism of the 'all affected persons' principle. The first strategy is to refine and reformulate the principle to limit its scope.⁴¹ The second strategy, which I wish to highlight here, has been to combine or supplement the 'all affected persons principle' with other principles of democratic self-government to achieve the same result. Robert Dahl already suggested in 1970 that the wide reach of the 'affected interests' principle needed to be 'curbed' by criteria of competence, size (economy of scale), and political equality in order to arrive at a workable definition of 'the people' as a self-governing constitutional subject.⁴² This approach to the 'all affected persons principle' was taken up again by Brun-Otto Bryde in the 1990s, in order to arrive at a pluralistic principle of democracy.⁴³

Bryde's pluralistic conception of democracy combines competing principles of inclusion in order to secure an optimal degree of democratic self-government. In sharp contrast to the approach of Böckenforde, this approach treats democracy as an aspirational principle and not a legitimacy rule. Bryde nevertheless shares Böckenforde's concern with the boundless nature of the demos associated with the 'all affected persons' principle. Bryde's answer is that not everybody who might possibly be affected needs to be included in the demos, not because it is logically incoherent or absurd to apply the principle so strictly,⁴⁴ but because the criteria of affectedness (the quantity of participants) must be balanced with the criteria of self-government (the quality of the participation). How the optimal balance

40 Robert Goodin, note 5, p. 64 agree that the 'all possibly affected persons principle' means that 'we should give virtually everyone a vote on virtually everything everywhere in the world'. Unlike Böckenforde he regards this transnational effect of the principle as one of its strengths, not weaknesses. Goodin pulls the sting of the *reductio* by conceding that a worldwide franchise for non-resident foreigners is impractical. Other modalities of participation and representation need to be found. Goodin suggests two possibilities: an upwards appeal to a transnational level government and a lateral claim to compensation for decisions that directly affect outsiders (category four claims).

41 Nancy Fraser, note 3, p. 36 (all persons subjected to a regime of governance); Rainer Baubock, Stakeholder citizenship and transnational political participation: A normative evaluation of external voting, Fordham LR 75 (2007), p. 2421 (all persons with a stake in the future of a polity). These reformulations do not affect the principle of universal residence based voting rights.

42 Robert Dahl, *After the revolution? Authority in a good society*, New Haven 1970, p. 66.

43 Brun-Otto Bryde, *Das Demokratieprinzip des Grundgesetzes als Optimierungsaufgabe*, in: Thomas Blanke and Christina Lüttmann, *Demokratie und Grundgesetz*, Baden-Baden 2000, p. 59; Brun-Otto Bryde, *Ausländerwahlrecht und grundgesetzliche Demokratie*, JZ 44 (1989), p. 257.

44 As argued against the principle by Fredrick Whelan, *Prologue: Democratic theory and the boundary problem*, in: James Pennock and John Chapman, (eds.), *Liberal democracy*, New York 1983, p. 22.

and degree of democratic self-government can be achieved is a political judgment. Depending on the context, the optimum level of self-government may lie either beyond the level of the state (in a transnational public sphere) or below the level of the state (in a large city).

Sarah Song recently presented her own version of a pluralistic conception of democracy and the 'all affected persons' principle.⁴⁵ Song insists that the demos must remain bounded to the territorial state for much the same reasons Bryde did earlier. She adds that the quality of self-government requires that the 'all affected persons' principle must be balanced with issues of size, stability, and solidarity.

When these added considerations are accounted for, the restated 'all affected persons' principle can operate effectively as a principle of democratic inclusion *at the national level*. As Bryde reminds us, at lower levels of government the principle far out-performs the principle of citizenship, which cannot explain the democratic gain that is achieved by the constitutional devolution of power in order to ensure optimal democratic governance at local government level. The same applies at higher levels of government above the state, where citizenship is equally incapable of (if not subversive of) achieving optimal levels of democratic governance under conditions of globalisation. In short, when dealing with local issues, the principle of citizenship is over-inclusive; when dealing with global issues, such as migration and climate change, the principle of citizenship is under-inclusive.⁴⁶ I return to this point later.

Limiting our attention for the moment to the national level, Bryde and Song both accept that residence provides the best measure across the range of considerations mentioned above (size, stability and solidarity) for the constitutional operationalization of their reformulated 'all affected persons' principle at local and national levels of government. Once the principle of 'all affected persons' is operationalised through permanent residence, it turns out to do the same work that Böckenforde claimed only nationality could do. In fact, residence better captures the full range of persons directly affected over an electoral period by the legislative authority within a state, without thereby sacrificing the stability and solidarity required of a territorially bounded self-governing demos.⁴⁷

45 Sarah Song, The boundary problem in democratic theory: why the demos should be bounded by the state, *International Theory* 4 (2012), p. 39.

46 Nancy Fraser, *Scales of Justice: Reimagining Political Space in a Globalizing World*, Cambridge 2008, p. 21 describes this exclusionary effect as the 'injustice of misframing'. She claims, p.65, that the injustice can only be overcome if the 'all subjected persons principle' is applied directly to issues such as global migration, without mediation of the principle of citizenship. The upshot is that the political injustice inherent in national migration laws and policies can only be overcome, according to Fraser, p 69, by imagining 'new global democratic institutions'. Böckenforde's *reductio* is resolved by granting foreign nationals voting rights, not in the national legislature, but in a transnational or global legislature.

47 This claim remains contested but cannot be debated in more detail here. I have relied on the work of Jane Jacobs to argue that (urban) residence indeed generates its own form of political solidarity, or what I call 'street democracy'. See *Wessel le Roux*, Planning law, crime control and the spatial dynamics of post-apartheid street democracy, *SA Public Law* 21 (2006), p. 25.

The rehabilitation and operationalisation of the ‘all affected persons principle’ on the basis of residence is today supported by a large and growing number of German constitutional theorists of *betroffenheitsdemokratie*.⁴⁸ The debate among these constitutional theorists is no longer whether democracy implies universal residence based voting rights, or not, but whether voting rights should be limited to permanent,⁴⁹ and lawful,⁵⁰ residents.

All this can be (and has been) conceded by those who claim that foreigner voting rights remain undemocratic and unconstitutional under the German Basic Law. The point is not whether, in principle or theory, all lawful and permanent foreigners have a democratic right to be represented, but whether this model of denizenship is compatible with the definition of ‘the people’ in the Basic Law. The outcome of the debate about this issue is not decisive for the future of denizenship under the post-apartheid constitution. It is nevertheless instructive to briefly look into this aspect of the German response to migration as well.

3. Reinterpreting the Basic Law

At the end of the foreigner voting rights cases of 1990, the Court qualified its own interpretation of article 28(1) of the Basic Law by stating that the judgment does not exclude the possibility of a constitutional amendment to introduce foreigner voting rights as part of Germany’s ongoing political integration into the European Union.⁵¹ The anticipated amendment to the Basic Law took place in 1992 when article 28(1) was amended to recognise the right of resident foreigner to vote (provided they were European citizens). Did this amendment render the earlier judgments obsolete (as the Court itself seemed to suggest)? Could the Basic Law be reinterpreted and further amended to extend voting rights to all foreigners at all levels of government according to the principle of democratic inclusion?

After years of uncertainty about the ongoing authority of the 1990 judgments, the Constitutional Court of Bremen ruled on 31 January 2014 that the interpretation of the Federal Constitutional Court remains operative.⁵² As a result, the Court again declared unconstitutional a new attempt to extend voting rights in the city state of Bremen to foreigners from

48 See *Thomas Groß*, Das demokratische Defizit bei der Grundrechtsverwirklichung der ausländischen Bevölkerung, KJ 3 (2011), p. 303 (residence based voting rights are mandated at the national level by basic human rights norms); *Christian Walter*, Der Bürgerstatus im Lichte von Migration und europäischer Integration, VVDStRL 72 (2013), p. 7 (residence based voting rights are permissible at the national level); *Jürgen Bast*, Denizenship als rechtliche Form der Inklusion in eine Einwanderungsgesellschaft, ZAR 33 (2013), p. 353 (voting rights are permissible at national level).

49 *Ludvig Beckman*, Is residence special? Democracy in the age of migration and human mobility, in: *Ludvig Beckman and Eva Erman*, (eds.), *Territories of citizenship*, London 2012, p.18 (tax law, as opposed to immigration law, should form the basis of residence based voting rights).

50 *Ludvig Beckman*, Irregular migration and democracy: the case for inclusion, *Citizenship Studies* 17 (2013), pp. 48 and 55 (irregular immigrants should be given participatory rights because they are equally subject to or affected by the norms of the legal system).

51 BVerfGE 83, 37 [59].

52 Staatsgerichtshof der Freien Hansestadt Bremen, Urteil vom 31 Januar 2014 (St 1/13).

European member states, and at the level of neighbourhood councils within Bremen to all resident foreigners. The judgment nevertheless contains an important dissenting voice in which all the major arguments in favour of the constitutionality of foreigner voting rights are incorporated. Sacksofsky J ruled that the pre-Maastricht Treaty judgments of 1990 were no longer authoritative, that article 28(1) had to be re-interpreted in light of the 1992 amendment, that the starting point for the re-interpretation was the principle of democracy, and that under the Basic Law this principle meant the following:⁵³

Those who are subject to the authority of the State should have a free and equal say in how this authority is exercised. It follows from the principle of democracy that everybody who is affected by the exercise of state power should participate in constituting this power. The key element in this right of co-determination is participation on the basis of a universal, free and equal right to vote. [...] The claim to free and equal participation in all public authority is moored to the dignity of all human beings.

The majority and minority judgments differ on the question whether German constitutional law has, over the past 25 years, undergone a shift from a nationalistic understanding of democracy and the people (citizenship) to a post-nationalist conception of the people (denizenship), or from a *volksdemokratie* to a *betroffenheitsdemokratie*. However this question is finally resolved, the German foreigner voting rights cases provide the link between residence based voting and democracy that remains unarticulated in the post-apartheid voting rights jurisprudence.

What then about the right of migrant workers abroad or non-resident citizens? If the Basic Law indeed entrenches a nationalist conception of the people, does German law provide further support for the recent recognition of expatriate voting rights in South Africa?

II. The voting rights of non-resident (expatriate) citizens

According to article 12(1) of the Federal Election Law, citizens are only eligible to vote in an election if they had their place of residence or habitual abode in Germany for three months immediately before that election. This surprisingly strict durational residence requirement automatically disenfranchises all Germans living abroad, whether temporarily or permanently. German electoral law thus surprisingly imposes a far stricter residence requirement than ever applied under post-apartheid law. How can this strict residence test be reconciled with the strict nationality test which the Basic Law imposes on voters? What is it about being a resident that trumps being a citizen when it comes to inclusion in ‘the people’?

Since the re-unification of Germany in 1990, the Bundestag has tried on a number of occasions to limit the exclusionary effect of the strict durational residence requirement by inserting an exception in favour of non-resident citizens into article 12(2) of the Act. At the

⁵³ Staatsgerichtshof der Freien Hansestadt Bremen, Urteil vom 31 Januar 2014 (St 1/13), p.24.

time of re-unification, article 12(2) provided that German citizens who lived abroad in Europe could still vote in national elections, provided they had lived in Germany for three months before moving abroad. German citizens who lived outside Europe, could do the same, but had to have lived in Germany for three months within the last 10 years (extended to 25 years in 1998). The Act was again amended shortly before the 2009 election when a uniform prior residence requirement of three months was imposed on all Germans living abroad.

On 4 July 2012, the Court declared the exception in article 12(2) unconstitutional.⁵⁴ The judgement left all non-resident citizens disenfranchised shortly before the 2013 national election. The 2012 judgment followed a long series of cases dating back to 1956 in which the Court repeatedly held that the durational residence requirement (and its exceptions) did not violate the equal right to vote under the Basic Law.⁵⁵ The Court initially explained the constitutionality of the residence requirement as a practical consequence of the post-war division of Germany,⁵⁶ and later as a historical feature of German constitutional law (dating back to 1869).⁵⁷ In its 2012 judgment, the Court added two additional explanations for the residence requirement. In terms of the first, the residence requirement serves to secure the democratic character of German elections or the ‘communicative function’ of voting.⁵⁸ The actual and prior residence requirements test the ‘capacity’ of citizens to participate meaningfully and deliberatively in German politics.⁵⁹ In this sense the residence requirement is similar to the age and mental capacity requirements. In the case of second and third generation emigrants, who can acquire citizenship via the *ius sanguinis*, the ability to contribute meaningfully to public opinion and political debate (which includes elections) can only be cultivated by actually living in Germany.⁶⁰ The purpose of the residence requirement is to distinguish active deliberative citizens from formal and virtual citizens.⁶¹ Thus the Court’s

54 BVerfGE 132, 39. This does not mean that the extension of voting rights to non-resident citizens is unconstitutional in itself. Voting rights for non-resident citizens are neither mandated nor prohibited under the Basic Law.

55 BVerfGE 5, 2; BVerfGE 36, 139; BVerfGE 58, 202.

56 BVerfGE 5, 2 [6].

57 BVerfGE 36, 139 [142] and 58, 202 [205].

58 BVerfGE 132, 39 [50].

59 BVerfGE 132, 39 [52]. Capacity testing is typical of the republican tradition of constitutionalism, see *Jacob Cogan*, The look within: Property, capacity, and suffrage in nineteenth-century America, *Yale LJ* 107 (1997), 473.

60 BVerfGE 132, 39 [54].

61 The Court accepted the view that social media and other communication media do not suffice to cultivate the capacity to participate in expatriate citizens (BVerfGE 132, 39 [53]). Once actual residence is foregrounded in this manner, a potential incoherence in the German response to the voting rights of migrants becomes clear: if a second or third generation emigrant can undergo the necessary acculturation by temporarily living in Germany for three months as a teenager, why is the same not possible for a first generation immigrant who permanently lives in Germany as an adult?

problem with the blanket three months prior residence test. The test did not properly differentiate between those expatriate citizens who had acquired the capacity to contribute meaningfully to public opinion and those who had not. For example, an expatriate citizen who had lived in Germany as a baby would meet the three months prior residence test, but would not thereby have acquired an understanding of German politics.⁶²

The second explanation of the residence test is of direct concern to our discussion. The Court explicitly considered, but eventually held that it was unnecessary to decide,⁶³ whether the residence requirement may also be used to exclude non-resident citizens who are not ‘equally affected by’ or equally ‘subject to German sovereignty’ when compared to citizens who live in Germany.⁶⁴ The ‘all affected persons’ principle resurfaces again. This time it is embraced by the Court itself as a potentially valid and decisive principle of democratic inclusion. While the Court did not explicitly rule that the ‘all affected persons’ principle overrides the ‘equal citizenship’ principle, the Bundestag accepted that it did and explicitly adopted the ‘all affected persons’ principle as voter eligibility criteria when it re-enacted a new residence test before the 2013 national elections. In terms of the current test, unless a non-resident citizen can prove that he or she has direct personal experience of, and is ‘affected by’ the German political process (*‘von ihnen betroffen sind’*), he or she can only vote in a national election if he or she has lived in Germany (i) for an uninterrupted period of three months, (ii) within the past 25 years, (iii) as a teenager or adult (after his or her 14th birthday).⁶⁵

It is worth noting here that Germany’s disqualification of migrant workers abroad was approved by the erstwhile European Commission of Human Rights in *Luksch v Germany*.⁶⁶ The Commission held that the exclusion of non-resident citizens from elections did not violate the right to vote because democracy implied a direct ‘correlation between the right to vote and being directly and equally affected by the acts of the political bodies so elected’. The Commission held that a State need not establish, on an individualised basis, whether a person is ‘directly affected’ by the acts of a particular political body. States are allowed to apply a uniform residence test to establish the correlation between representation and affectedness. The Commission concluded that, as a general rule, a non-resident citizen ‘cannot claim to be affected by the acts of political bodies to the same extent as resident citi-

62 The merits of this attempt to link residence with the deliberative character of democracy falls outside the focus of this essay and must be left for another occasion. On the distinction between statistical and deliberative democracy in the post-apartheid context, see *Democratic Alliance v Masondo* [2002] ZACC 28; 2003 (2) SA 413 (CC).

63 Even if it was legitimate to apply the ‘all affected persons’ test to exclude non-resident citizens, the three months prior residence test provided no indication of who were affected and who not.

64 BVerfGE 132, 39 [52]. Even if this objective was legitimate, the three months prior residence test would remain an arbitrary test for voter eligibility (being equally affected by the legislative authority of the Bundestag).

65 Article 12(2) of the Federal Elections Act (as amended by the 21st Amendment Act on 3 May 2013).

66 *Luksch v Germany* [1997] ECHR 198, 21 May 1997 (application 35385/97).

zens'. This line of reasoning was recently confirmed by the European Court of Human Rights in *Shindler v UK*.⁶⁷ The Court confirmed that the right to vote was not violated by an expatriate voter eligibility test which required prior residence in the UK during the past 15 years. As the Court put it, the prior residence requirement was justified as a means to confine the parliamentary franchise of a State to those citizens 'who would [...] be most directly affected by its laws'.⁶⁸

E. Conclusion

The discussion above reveals how two leading democracies, one from the developed and one from the developing world, are caught between two constitutional models of democracy and political representation. The model of citizenship places nationality (naturalisation) and the principle of 'equal citizenship' central; the model of denizenship places residence and the principle of 'all affected persons' central. The case law discussed above is marked by tensions, contradictions, unexplained shifts and inversions as the Constitutional Courts of South Africa and Germany struggle to navigate their way between these models in search of a new principled basis to regulate the voting rights of migrants.

The discussion above focused on the participation of migrant workers in national elections. I argued that at this level the principle of denizenship does an equal, if not better, job than the principle of citizenship as voter eligibility criterion. During the course of the argument the question arose whether the principle of citizenship can also secure political justice in local and global processes of governance. The European extension of voting rights to resident foreigners at local government level provides an answer to the first part of the question. What about the second?

Only the 'all affected persons principle' makes a comprehensive democratic response to migration possible, firstly by integrating migrant workers into the national political process of the representative state as residents, secondly, by inviting transnational democratic contestations of the very distinction between visitors, residents and nationals upon which even this denizenship model of representative democracy would still depend. The political injustice towards resident foreigners cannot be remedied by simply extending voting rights to naturalised citizens, or even denizens, without first finding a democratic answer to the question who should count as lawful residents and illegal foreigners in the first place. Ac-

67 *Shindler v UK* (2013), See also *Hilbe v Lichtenstein* (1999); *Doyle v United Kingdom* (2007); *Sitaropoulos and Giakoumopoulos v Greece* (2012).

68 *Shindler*, note 67, para 118. It should be noted that the European Commission does not share this view. The Commission issued a Recommendation to member states on 29 January 2014 that expatriate citizens should retain the right to vote (C(2014) 391). According to the Commission, the willingness of an expatriate citizens to register as a voter before each election is sufficient to establish the membership link needed to found the right to vote.

According to scholars such as Nancy Fraser,⁶⁹ Robert Goodin⁷⁰ and Arash Azibadeh,⁷¹ this question cannot be answered unilaterally at the national level, without committing the political injustice of excluding foreigners outside the state who are directly affected by the migration laws and policies of the state. As the recent Mediterranean crisis sadly illustrates, the same applies where migration laws and policies are developed at a regional or European level. The principle of equal national or community citizenship is inherently unjust when it comes to the democratic regulation of global migration. This is so because the principle of naturalisation and equal citizenship ‘misframes’ the problem of migration as the last vestige of national sovereignty to be decided by the nation of citizens alone (as opposed to the transnational or cosmopolitan demos of all possibly affected migrants).⁷²

This claim takes us into the contested terrain whether a cosmopolitan demos (humanity as a political category) is conceptually attractive and even possible.⁷³ Even if it is not, about which I do not express any opinion here, the point remains that a politically just or democratic solution to migration, whether at a national or regional level, will have to include foreigners outside the state or the region who are directly affected by border closures and restrictive residence and naturalisation policies (category four claims above). How these foreigners might find political representation within the political decision-making processes of the representative state is a crucial but complex question which I cannot explore in more detail within the space available to me.⁷⁴ The point is simply that the principle of equal citizenship makes it impossible to even raise the participation of foreigners outside the state as a problem of social justice facing the representative state.

It is precisely this (self-imposed) democratic disempowerment which predator states and other governance networks have exploited during the first decades of globalisation. When new social movements try to reassert a right to democratic accountability, they do not do so on the basis of an extension of the principle of national citizenship. They do so in reaction to national citizenship and the representative state, often in the form of a radical anti-institutional participatory political resistance, precisely because the nation state and its representative institutions have become a straightjacket for transformative political ener-

69 Fraser, note 46, p. 25.

70 Goodin, note 5, p. 59.

71 Azibadeh, note 5, p. 37.

72 Fraser, note 46, p. 18.

73 Jacques Derrida, *On Cosmopolitanism and Forgiveness*, London 2001, p. 51.

74 See above footnote 5. For an overview of these options and defence of an administrative law model (as opposed to the constitutional law) model see Eyal Benvenisti, *Sovereigns as trustees of humanity: on the accountability of states to foreign stakeholders*, *American J Int L* 107 (2013), p. 295. See also my comments on Goodin in footnote 40 and Fraser in footnote 46 for other modalities of participation short of equal or weighted voting rights for non-resident foreigners in national legislatures (Böckenforde’s *reductio*).

gies.⁷⁵ The ‘all affected persons’ principle, by contrast, provides a link between the national and transnational phases of the democratic struggle for social justice. In a developing country like South Africa, which is particularly vulnerable to the effects of globalisation and neo-colonialisation,⁷⁶ it is crucial to keep this link alive. The dramatic shift from denizenship to citizenship in South Africa’s voting rights jurisprudence over the past 20 years have, unfortunately, done exactly the opposite.

75 *Chantal Mouffe*, *Agonistics: thinking the world politically*, London 2013, p. 65; *Judith Butler and Athena Athanasiou*, *Dispossession: the performative in the political*, Cambridge 2013, p. 140; *Manuel Castells*, *Networks of outrage and hope: social movements in the internet age*, Cambridge 2012, p. 110.

76 *John Saul and Patrick Bond*, *South Africa: The present as history*, Johannesburg 2014, p. 247 writes that ‘recolonization – not by some individual empire but by the Empire of Global Capital itself – is what now confronts ordinary South Africans’.

The South African ‘Secrecy Act’: Democracy Put to the Test

By Jonathan Klaaren*

Abstract: *The ongoing debate and consideration of the Protection of State Information Bill (often termed the ‘Secrecy’ Bill or Act) has provided a true test for the post-apartheid South African democracy. Using a case study of that legislation’s period of consideration over more than six years, this paper will propose three ways in which the Bill tested democracy in South Africa. The legislation tested South Africa’s structures of representative democracy in showing up the failure of the National Assembly to oversee the intelligence services, in showing the lack of individual accountability for representatives in South Africa’s post-apartheid democracy, and in pointing to the as yet clumsy modes of incorporating elements of the national debate from provincial and local level in the National Council on Provinces (the second legislative chamber which, together with the National Assembly, makes up Parliament). The dominant democracy framework is not as helpful in analysing these developments as an analysis attending to the symbolic politics of transparency between the intelligence services and the media. This article thus explores the complex field within which the politics of the Secrecy Bill has played itself out in South Africa. Finally, the article also goes beyond the metaphor of balancing and argues that transparency and secrecy are not two concepts separate from each other. The insight that transparency and opacity are mutually implicated allows us to understand better how both are supported and nurtured within a constitutional democracy.*

A. Introduction

While it seems that we often live in interesting and testing times, it is easily arguable that the passage of the Protection of State Information Bill (the Secrecy Bill) has provided a true test for the postapartheid South African democracy. There are five goals pursued by this legislation. First, the Bill aims for the repeal and replacement of the existing state information classification law. It therefore provides for the repeal in its entirety of the Protection of Information Act 84 of 1982. A second object of the Bill is to reconcile the necessity for a classification and information security regime with the constitutional principles of transparency and accountability in governance, as well as with individual rights. At one point,

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the Bill declared that it was one of its objects to “harmonise the implementation of this Act with the Promotion of Access to Information Act, 2000”. In its third principal object – the Bill attempts to put into law a government duty of confidentiality that goes beyond the conventionally narrow protection of national security information. In this sense, the Bill was understood as a statutory mirror of Promotion of Access to Information Act (PAIA). Whereas PAIA provided rules for government information disclosure, the Bill would provide rules for non-disclosure of government information, consistent with the PAIA. The fourth and fifth goals of the Bill fall in the category of effecting important policy reforms. With respect to the fourth, as the Explanatory Notes to the 2008 Bill stated: “[t]he aim of the current reforms is to significantly reduce the volume of information classified but at the same time to strengthen the protection of state information that truly requires protection. A comprehensive statutory foundation for the classification and declassification of information is likely to result in a more stable and cost-effective set of policies and a more consistent application of rules and procedures.” Finally and fifthly, the Ministry of Intelligence Services also noted that there was no statutory crime of espionage and only a weak regime of common law criminalization (due in part to constraints placed on such criminalization by courts during the operation of the apartheid regime) and thus included the purpose to provide for an appropriate statutory scheme of criminal offences and penalties. In order to achieve these five goals, the Bill contains 54 sections organized into thirteen chapters.

In its current version, B6H-2010, the legislation has progressed out of Parliament and is awaiting Presidential signature.¹ An indication of its controversial nature is the fact that it is the only one of the forty-one bills introduced into Parliament in 2010 that have not yet been finalized and signed into law. Using a case study of that legislation’s period of consideration over more than six years, this paper will propose three ways in which the Bill tested democracy in South Africa.

The first testing by the Bill of democracy has been at a mostly formal and abstract level. The consideration and eventual passage of the Bill has been in part a battle over the processes of representative democracy. This battle has engaged with a number of institutional stress points in the scheme of the existing Constitution: Parliamentary oversight (particularly of the security sector), the supremacy of the party over both individual members of Parliament (MPs) and even the Presidency, and the relative place and effectiveness of the two houses of the South African Parliament, the National Assembly and the National Council of Provinces in national debate. In each of these stress points, the German comparison can be instructive.

The second testing by the Bill of democracy has been around the content of the contest. The debate over the Secrecy Bill was largely a prospective debate over the likely consequences of the passage of the Bill. The primary set of concerns were that the Bill might be used to aid and abet illegality by covering up corruption, to strengthen the power of the rul-

1 Protection Of State Information Bill , <http://bills.pmg.org.za/bill/282/> (last accessed on 23 June 2014).

ing power to use patronage to entrench its own dominant position in a dominant democracy, and to further increase the power of the security services within the factional battles of the dominant party. Proponents of this line of argument (especially the first two components) include, at least implicitly, Sujit Choudhry² and Samuel Issacharoff³. This debate over the consequences of the Bill for accountability to a certain degree has paralleled the first referenced debate over formal representative democracy in South Africa. The content of this debate could be framed within the balance metaphor – what is the appropriate balance between national security and transparency? Here, it is interesting to explore whether and where South Africa fits within the range of democracies on this score.⁴ The challenge of striking the balance between national security and openness is one that faces nearly all constitutional democracies.⁵

The third testing by the Bill of democracy is interior to the Bill and is implicit in the entangled concepts of transparency and secrecy. Arguably, both concepts encompass elements of trust and control. These concepts are exemplified in the South African jurisdiction by two statutes, neither of which has arguably been implemented even though one has been on the books for over ten years now. The one is the PAIA and the other is of course the Secrecy Bill. It would be possible to operationalize (or frame) the contest of these two concepts expressed in statutory form through an examination of the balance between national security and openness or through an examination of a particular structure such as bureaucracy. However, I wish in this section to take this opportunity to examine the more critical debate between and among these concepts as normative political values.

B. Background and Context

Before we dive into these three testings, let us get a further sense of the Secrecy Bill with some attention to its sociolegal context.

The story of the Bill can perhaps begin with four legal texts – indeed the first of these arguably engendered the following three. The first text is one of the Constitutional Principles placed into the interim Constitution, which South Africa adopted in 1993 and that provided both guidance and constraints on the text of the final Constitution, adopted in 1996. Constitutional Principle IX provided: “Provision shall be made for freedom of information

2 *Sujit Choudhry*, “He Had a Mandate”: The South African Constitutional Court and the African National Congress in a Dominant Party Democracy, SSRN, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1651332&download=yes (last accessed on 23 June 2014).

3 *Samuel Issacharoff*, *The Democratic Risk to Democratic Transitions* (2013), <http://papers.ssrn.com/abstract=2324861> (last accessed on 19 May 2014).

4 *Jonathan E. Klaaren*, *The Promotion of Access to and Protection of National Security Information in South Africa*, Center for the Study of Law and Society Jurisprudence and Social Policy Program (2003), <http://escholarship.org/uc/item/18c3p5kd> (last accessed on 23 June 2014).

5 *Peter Galison et al.*, *What We Have Learned about Limiting Knowledge in a Democracy*, *Social Research* 77 (2010), pp.1013–1048.

so that there can be open and accountable administration at all levels of government.”⁶ The second text is the right of access to information, included as part of the Bill of Rights in the 1996 Constitution. Section 32 of the 1996 Constitution provides: “32. Access to information. (1) Everyone has the right of access to - (a) any information held by the state; and (b) any information that is held by another person and that is required for the exercise or protection of any rights. (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.” The wording of this right actually changed slightly between the interim and the 1996 Constitutions but its substance remained the same.⁷ The third text is a Cabinet policy document approved on 4 December, 1996 as “national information security policy”, the Minimum Information Security Standards (MISS).⁸ The fourth text is the law mandated by subsection 32(2) of 1996 Constitution: South Africa’s access to information law, the PA-IA.⁹

If the story of the Bill began with this opening burst of opening legal texts, the next significant moment was undoubtedly marked by the closing themes of the longrunning sagas of the Truth and Reconciliation Commission and the arms deal. The first is significant since it was the state effort to unearth the past. It failed of course to do this completely yet it had enough successes along the way to achieve a power to defang the retrospective argument against the still existing secrecy legislation, the Protection of Information Act of 1982.¹⁰ Indeed, this apartheid-era national security information legislation to a great extent weathered the storm of openness. At more or less the same time, the arms deal saga (where claims were made of corruption into the large scale post-apartheid purchases of military equipment) showed that the military complex retained great power and particularly retained a power to draw a cloak over its activities. Only now since 2013/2014 has there been a judicial inquiry into these allegations.¹¹ It is perhaps an understatement to observe that it is not yet clear that that this judicial inquiry will get to the bottom of these allegations.

The genesis of the Secrecy Bill may be located soon after 2000. As noted above, one source for the Bill was the growing state acknowledgement of the unconstitutionality of the 1982 secrecy legislation. Running alongside this acknowledgement was a parallel recogni-

6 Constitution of the Republic of South Africa, 1993, Schedules, <http://www.constitutionalcourt.org.za/site/constitution/english-web/interim/schedules.html#sched4> (last accessed on 7 July 2014).

7 *Iain Currie & Jonathan Klaaren*, *The Promotion of Access to Information Act*, Commentary (Cape Town 2002).

8 *Klaaren*, note 4, at 191–194.

9 Promotion of Access to Information Act 2000, http://www.saflii.org/za/legis/consol_act/poatia2000366/ (last accessed on 7 July 2014).

10 *Deborah Posel & Graeme Simpson*, *Commissioning the past: understanding South Africa’s Truth and Reconciliation Commission*, Johannesburg 2002.

11 *Andrew Feinstein, Paul Holden and Hennie van Vuuren*, *Seriti probe’s cautious style risks hiding dirty secrets*, *Open Secrets*, 26 February 2014, <http://opensecrets.org.za/seriti-probes-cautious-style-risks-hiding-dirty-secrets/> (last accessed on 7 May 2014).

tion of the increasing lack of fitness of the MISS. As Sandy Africa has pointed out, “the MISS is a post-1994 initiative, but is based on an administrative instrument inherited from the apartheid era.”¹² Against this background, a commission appointed by the Minister of Intelligence Services appointed in 2001 investigated the need for a classification and declassification framework aligned to the Constitution.¹³ Another significant moment in the initiation of the Bill came from a successor intelligence Minister, focused on aligning the operations of the intelligence services to the Constitution and to executive oversight. Preparations for what became the Secrecy Bill thus began in earnest around 2005.¹⁴ In August 2005, the Minister of Intelligence Services appointed a task team to “look into a range of proposed changes to intelligence legislation”.¹⁵ This initial drafting effort resulted in the first version of a Secrecy Bill being introduced into Parliament in 2008. After several months of Parliamentary exposure, this first version of the Secrecy Bill was then withdrawn.

Yet another intelligence Minister (now titled the Minister of State Security) tabled a significantly redrafted and much more intelligence services oriented Bill in the National Assembly in March 2010.¹⁶ Moving from the National Assembly to the National Council of Provinces to the National Assembly and then to the National Council of Provinces and back to the National Assembly again, the Secrecy Bill was then significantly changed by the consideration of the relevant Parliamentary committees. This change occurred in a drawn-out process with fair degree of public input and debate, albeit filtered often through legal language.¹⁷

The Secrecy Bill was finally passed by Parliament in 2014.¹⁸ The Bill’s legislative passage included a final turn of events where President Zuma sent the Bill back to Parliament for extremely limited revision – essentially fixing a couple of typographical errors -- which

12 *Sandra Elizabeth Africa*, *Well-kept Secrets: The Right of Access to Information and the South African Intelligence Services*, Johannesburg 2009, p. 151.

13 *Id.* at 92.

14 *Id.* at 92–93; *Barry Gilder*, *Songs and Secrets*, Auckland South Africa 2012, p. 412.

15 *Gilder*, note 14, p. 408.

16 Protection Of Information Bill [B6-2010], Parliamentary Monitoring Group, <http://www.pmg.org.za/node/21973> (last accessed on 7 July 2014).

17 *Pierre De Vos*, *Bizos & Kerfoot: LRC submission on Secrecy Bill – Constitutionally Speaking*, 22 February 2012, <http://constitutionallyspeaking.co.za/bizos-kerfoot-lrc-submission-on-secrecy-bill/> (last accessed on 13 October 2015); DA: Statement by Dene Smuts, DA Shadow Minister of Justice and Constitutional Development, welcomes improvements to Secrecy Bill but constitutional problems remain, *Polity.org.za*, 23 March 2013, <http://www.polity.org.za/article/da-statement-by-dene-smuts-da-shadow-minister-of-justice-and-constitutional-development-welcomes-improvements-to-secrecy-bill-but-constitutional-problems-remain-13032013-2013-03-13> (last accessed on 24 April 2013); Secrecy Bill fears unfounded – Dloomo, *Polity.org.za*, 16 October 2013, <http://www.polity.org.za/article/secrecy-bill-fears-unfounded-dloomo-2013-10-16> (last accessed on 26 November 2013).

18 Protection Of Information Bill [B6G-2010], Parliamentary Monitoring Group, <http://www.pmg.org.za/bill/20131015-protection-information-bill-b6g-2010> (last accessed on 7 July 2014).

the Parliament did. As mentioned above, the current state of affairs is thus the Bill passed by Parliament is waiting for Presidential assent. Without a doubt, this piece of legislation is heading for the Constitutional Court.¹⁹ The top advocates are already lined up.

C. First Testing

The first testing the Secrecy Bill provides is with respect to the operation of representative democracy in South Africa. I would argue that there are three stress points of South African representative democracy that the consideration of the Bill has highlighted.

The first stress point is the limited degree of effective oversight by Parliament over the security sector. The 1996 Constitution put into place a complex Parliamentary structure for overseeing the security services. But the implementation of this system never really took hold.²⁰ The 2010 and 2011-2012 annual reports of the intelligence inspector-general were released only in the dying days of the Fourth Parliament in March 2014, showing that not even the basic annual reports were completed and submitted to Parliament.²¹ Thus, the only degree of somewhat effective oversight when the line in respect of political intelligence was overstepped amidst the battle among various ANC factions came from the Minister of Intelligence Services and the judiciary, rather than through Parliament.²²

To see the relative place of transparency, we may go to the conceptual arguments for Parliamentary oversight in the first place. In a standard delegation understanding, through statutes Parliament delineates broad policy for the country but then also delegates to the intelligence services the implementation of that policy. In terms of being able to exercise control over its agent, transparency may be presumed to assist Parliament, providing greater information that Parliament may use to hold the intelligence services to account for and thus limit the degree of deviations the agent takes from the policy. Thus, transparency assists in ensuring the intelligence services are accountable to Parliament. Indeed, to some extent, the Minister at the time used the forum provided by Parliament in 2008 to publicly articulate an initial policy on classification of information and then allowed for that policy to be refined through public debate. This is particularly shown by the Minister's tabling in front of Parliament a document largely supportive of the potential for a public interest defence to a criminal charge of disclosing state secrets – a key demand made by civil society

19 ConCourt action will be secrecy Bill activists' last resort, *The M&G Online*, 28 November 2012, <http://mg.co.za/article/2012-11-28-00-info-bill-will-go-to-concourt-say-experts/> (last accessed on 23 April 2013).

20 *Laurie Nathan*, *Intelligence bound: the South African constitution and intelligence services*, *International Affairs* 86 (2010), pp. 195–210.

21 *Why is no one watching the watchmen?*, *The M&G Online*, 14 March 2014, <http://mg.co.za/article/2014-03-13-why-is-no-one-watching-the-watchmen/> (last accessed on 8 July 2014).

22 Gilder, note 14.

in relation to the Secrecy Bill.²³ The tabling of this document was a significant concession to the tone of the public debate. Still, the initiation of policy development is worth noting – even here it is the Minister using the legislative forum rather than the Parliamentary committee driving the events.

A second stress point is around the lack of individual accountability of members of Parliament. Party accountability figures in the Secrecy Bill story in several ways and does so against the background of a majority party, the ANC, being understood as dominant. In perhaps the most dramatic way, party accountability underlies the withdrawal of the 2008 version of the Secrecy Bill in 2008 after several months' consideration. This withdrawal occurred simply because the Minister's principal, President Thabo Mbeki, resigned under pressure after losing the support of the ANC at this point.²⁴

In another way, party accountability was highlighted in a key vote on the Secrecy Bill. An ANC stalwart and one other MP did the exceptional and abstained from a Parliamentary vote without party permission, thus avoiding voting in favour of the Secrecy Bill in a key vote in November 2011.²⁵ This is the only time such public flouting of ANC party discipline has happened. By the final vote on the Secrecy Bill, the stalwart MP was voting reluctantly in favour, citing the certainty of a Constitutional Court review of the legislation.²⁶ This plays into a key theme of critique of the current South African democracy – the call for electoral reform to address the lack of individual accountability for MPs.²⁷

A third stress point is around the institution of the National Council of Provinces, the second house of Parliament. Most of the debates over the Secrecy Bills introduced in both 2008 and 2010 was led by and focused around National Assembly structures including the ad hoc committee. The Constitution does, however, give the National Council of Provinces a role in national debates – though not in oversight. This is true for national legislation not affecting the provinces as well as under different legislative procedures for national legislation affecting the provinces. Indeed, a legal point relating to the correctness of the proce-

23 *Iain Currie & Jonathan Klaaren*, Evaluating the Information Bills: A Briefing Paper on the Protection of Information Bill (2011), http://www.nelsonmandela.org/images/uploads/Info_bills_evaluation_final.pdf (last accessed on 8 July 2014).

24 *Frank Chikane*, Eight Days in September: The Removal of Thabo Mbeki, Johannesburg 2012; *Jonathan Klaaren & Theunis Roux*, The Nicholson Judgment: An Exercise in Law and Politics, *Journal of African Law* 54 (2010), pp. 143–155.

25 *Gaye Davis and Shanti Aboobaker*, Turok facing censure over secrecy bill snub, IOL.co.za, 24 November 2011, <http://www.iol.co.za/the-star/turok-facing-censure-over-secrecy-bill-snob-1.1185506#.U7v44fvNyBp> (last accessed on 8 July 2014).

26 *Sarah Evans*, Secrecy Bill: Ben Turok won't defy ANC this time, The M&G Online, 25 April 2013, <http://mg.co.za/article/2013-04-25-secrecy-bill-turok-wont-defy-anc-orders-this-time/> (last accessed on 8 July 2014).

27 Report of the Electoral Task Team, Cape Town 2003, <http://db3sqepoi5n3s.cloudfront.net/files/docs/Van-Zyl-Slabbert-Commission-on-Electoral-Reform-Report-2003.pdf> (last accessed on 8 July 2014); "Electoral system needs overhaul" - Politics | IOL News | IOL.co.za, <http://www.iol.co.za/news/politics/electoral-system-needs-overhaul-1.1413064#.U7v6afvNyBo> (last visited 8 July 2014).

dures followed may be crucial to the next step in the journal of the Secrecy Bill. If the National Council of Provinces did not follow the correct procedures in considering the Bill, the Constitutional Court in its inevitable case may well send it back to Parliament. Indeed, the objection that the Bill treads onto exclusive provincial competence was by early 2013 the “main constitutional objection” of the official opposition, the Democratic Alliance.²⁸ Perhaps most extraordinarily however was the utilization of the National Council of Provinces as a mechanism to hold a series of public hearings on the Secrecy Bill at key point in its Parliamentary passage in early 2012.²⁹ Framed as a genuine exercise in participatory democracy, these hearings done with the authority of the National Council of Provinces appeared to be largely a rushed inconclusive symbolic exercise.³⁰ They may nonetheless be a harbinger of province-level participatory politics to come.

A brief comparison with German parallels

In understanding further two of these three stress points, a brief comparative look to the German constitutional position is helpful. With respect to the National Council of Provinces and the Bundesrat, beyond acknowledging the clear institutional debt of the South African body on the German one and the structural similarity, a valuable comparative study would require greater space.³¹

With respect to Parliamentary oversight of the intelligence services, Parliamentary scrutiny of federal intelligence activities in Germany is enshrined in constitutional law by Article 45d of the Basic Law. This is a relatively recent development, being put into the Basic Law largely as a codification of existing law in 2009. It is a multiparty body with the members elected upon criteria of particular trustworthiness.³² The formal situation in South Africa is not so different. The specific institutions set up by the Constitution include the Office of the Inspector General. The appointment of the Inspector General of Intelligence is done through the Intelligence Services Oversight Act.³³ The Office of the Inspector-Gener-

28 DA, note 17.

29 *Andisiwe Makinana*, NCOP won't rush through secrecy Bill hearings, *The M&G Online*, 20 January 2012, <http://mg.co.za/article/2012-01-20-ncop-wont-rush-through-secrecy-bill-hearings/> (last accessed on 8 July 2014).

30 “Amandla”, “viva” banned at secrecy bill hearings, *City Press*, <http://www.citypress.co.za/news/a-mandla-viva-banned-at-secrecy-bill-hearings-20120214/> (last accessed on 8 July 2014); War of words erupts at secrecy bill hearings, *City Press*, <http://www.citypress.co.za/news/war-of-words-erupt-at-secrecy-bill-hearings-20120217/> (last accessed on 8 July 2014).

31 *Christina Murray*, NCOP: Stepchild of the Bundesrat, in: Bundesrat (ed.), *50 Jahre Herrenchieser Verfassungskonvent, Zur Struktur des deutschen Föderalismus*. Tagungsband zum wissenschaftlichen Symposium vom 19. bis 21. August 1998 im Kloster Seon, Nördlingen 1999.

32 *Id.* at 218.

33 Intelligence Services Oversight Act 40 of 1994, sec. 7, <http://www.ssa.gov.za/Portals/0/SSA%20docs/Legislation/Intelligence%20Services%20Oversight%20Act%2040%20of%201994.pdf> (last accessed on 5 May 2015).

al has a certain degree of independence, with “line or functional accountability to parliament and an administrative accountability towards the Minister for Intelligence Services.”³⁴ The Constitution mandates establishment of a body to carry out civilian oversight of the intelligence services, providing for “civilian monitoring of the activities of [the intelligence] services by an inspector appointed by the President, as head of the national executive, and approved by a resolution adopted by the National Assembly with a supporting vote of at least two thirds of its members.”³⁵ In addition to the civilian oversight body, the Constitution requires legislation setting up a multiparty parliamentary committee for oversight of intelligence services as part of the security services of South Africa.³⁶ The implementation of these structures has not been complete, with reports to Parliament, for instance, often overdue.

With respect to the lack of accountability of individual members of Parliament, it is important to recognize the positive and significant role granted to political parties in the German Basic Law. From 1949, Germany regarded parties as a positive contribution to and a vehicle for democraticization. Instead of being a hindrance, parties were an enhancement of self-government and the formation of the political will. This was a departure from the constitutional tradition in places like the United States, where parties were not an explicit part of the constitution.³⁷ Indeed, parties have become a defining concept for the notion of democracy. As has been observed, “key democratic principles such as political participation, representation, pluralism and competition have come to be defined increasingly, if not almost exclusively, in terms of party.”³⁸ The German role for parties thus goes beyond the role of the parties in electoral participation. In so doing and doing so through constitutional means, Germany has effectively made the parties into constitutional or public entities.³⁹

South Africa’s take-up of the Germany model of party democracy is decidedly partial. As one observer has noted for South Africa: “There are no significant constitutional provisions or legislation dealing with political parties.”⁴⁰ There is of course some regulation of political parties. The law regarding party registration is contained in the Electoral Commission Act and the Electoral Act. Both of these statutes are enforced through the Independent

34 *Imtiaz Fazel*, Who shall guard the guards? Civilian operational oversight and the Inspector General of Intelligence, in: Lauren Hutton (ed.), *To Spy or Not to Spy? Intelligence and Democracy in South Africa*, ISS Monograph 157 (2009), p. 35; accessible at: <http://www.issafrica.org/uploads/Mono157Full.pdf>.

35 Constitution of the Republic of South Africa, 1996, sec. 210 (b), <http://www.constitutionalcourt.org.za/site/theconstitution/english-2013.pdf> (last accessed on 27 November 2013).

36 Constitution of the Republic of South Africa, 1996, sec. 199(8).

37 *Mark Tushnet*, *The Constitution of the United States of America: A Contextual Analysis*, Portland 2009.

38 *Ingrid Van Biezen*, Constitutionalizing Party Democracy: The Constitutive Codification of Political Parties in Post-war Europe, *British Journal of Political Science* 42 (2012), pp. 187–212.

39 *Id.* at 196.

40 *Iain Currie & Johan De Waal*, *The Bill of Rights Handbook*, Cape Town 2005, p. 422.

Electoral Commission, a body itself with constitutional standing.⁴¹ The closest the Constitution comes to the German philosophy is in a section titled "Other Matters" under a heading of "Funding for political parties". Here, the Constitution provides for state funding of political parties "to enhance multi-party democracy".⁴² This has been given effect to with the Public Funding of Represented Political Parties Act 103 of 1997. There have also been similar laws enacted in at least six provinces.⁴³ Once one moves away from the funding question, however, there is much less explicit parallels and much less significant regulation. The party funding provisions are implemented.

D. Second Testing

The second theme of testing is the content of the debate. In a significant development, both proponents and opponents conducted the debate over the Secrecy Bill in presentist/futurist rather than historical-regarding terms. That is, the Bill's stance on transparency and secrecy and their appropriate interaction was not evaluated in terms of the substantive light that such a balance would reveal about the specific actions taken in the past, and specifically under the apartheid regime. Implicitly, the need for light into South Africa's past was regarded as having been addressed and sufficiently addressed by the TRC process. This orientation towards the present and the future made the Secrecy Bill more into a metric or proxy for South Africa's democracy – and a herald of its possible future -- than might have otherwise been the case.

What were the terms of the debate? The primary set of concerns were that the legislation might be used to aid and abet by covering up corruption, to strengthen the power of the ruling power to use patronage to entrench its own dominant position in a dominant democracy, to weaken the role of the media in South Africa's democracy, and to further increase the power of the security services within the factional battles of the dominant party.⁴⁴ While the first two of these concerns are championed by an analysis of South Africa as a dominant party democracy, the concerns over the weakening of the media and the strengthening of the intelligence services more directly engage the values of transparency and secrecy. Indeed, it would not be too far-fetched to characterize the contest over the Bill as a proxy war conducted by the media (in particular the print media) and the security services over their centrality and symbolic power within the South African democracy.

41 Constitution of the Republic of South Africa, 1996, 190–191, <http://www.constitutionalcourt.org.za/site/theconstitution/english-2013.pdf> (last accessed on 27 November 2013).

42 *Id.* at 236.

43 ANC seeks more party funding, City Press, 27 July 2014, <http://www.citypress.co.za/politics/anc-seeks-party-funding/> (last accessed on 28 July 2014).

44 Guide: Why the Secrecy Bill still fails the Freedom Test, Right2Know Campaign, 28 November 2012, <http://www.r2k.org.za/2012/11/28/guide-why-secrecy-bill-fails/> (last accessed on 8 July, 2014).

Transparency and the dominant democracy analysis as applied to South Africa

To begin with the concerns about corruption and ruling party dominance, Choudhry and Issacharoff have in separate analyses articulated deep concern regarding the so-called dominant place of the ANC within South Africa's polity, the tension between that dominance and the spirit of the Constitution, and the potential for entrenchment or extension of the ANC's dominant position through unconstitutional means. Specific mechanisms identified by Choudhry and Issacharoff in their critiques include the mechanism of cadre deployment on the one hand and the undermining of the independence of the state institutions supporting constitutional democracy such as the Public Protector and the Human Rights Commissions (called Chapter 9 institutions in South Africa) and the judiciary on the other hand.

Interestingly enough, Choudhry mentions transparency only once in his analysis, as part of characterizing the dynamics of politics in a dominant party democracy. For Choudhry, dominant party democracy "has the effect of pulling politics into the party, and into processes that lie outside constitutionally created institutions of liberal democracy, and which need not comply with the same norms of transparency and participation. The relative importance of Parliament, and through it, electoral democracy, declines."⁴⁵ Similarly, Issacharoff also mentions transparency in setting out the pathologies of unconstitutional incumbent power: "The greater the scale of government enterprise the more it rewards those who can master its byways in a process that is non-transparent to the public and that resists either monitoring or accountability."⁴⁶

As shown by these examples, transparency figures largely by its absence in the dominant democracy analysis. Where mentioned, it serves only by contrast to point out the evils of a dominant party democracy. This is quite interesting in these two pieces that advocate a robust pro-democracy jurisprudence from the Constitutional Court. Openness does not figure as a strand in an argument from first principles.

At least one sustained South African analysis partaking of the dominant democracy analysis engages with the specifics of secrecy and transparency in South Africa.⁴⁷ Dale McKinley identifies an intensification in autocratic power since the ascension to control of the state of the Zuma ANC faction in 2007-2008. He delineates a three-pronged secrecy-power matrix. The first side is a "conscious, politically and materially driven closing down of the constitutionally-enshrined right of access to information under the Zuma-led ANC/state ... The second side is the militarisation and centralisation of power within the coercive forces of the state alongside the massive and largely de-regulated growth of the private security industry. ... The third side of the matrix is the law, past, and pending. ... What better way to buttress those walls of secrecy around the physical representations of state and private (capitalist) power than to dust off and actively employ [the National Key Points Act

⁴⁵ Choudhry, note 2, p. 35.

⁴⁶ Issacharoff, note 3, p. 17.

⁴⁷ Gilbert Khadiagala et al. (eds.), *New South African Review* 4 (2014), pp.150–166.

102 of 1980]. This apartheid dinosaur gives the minister of police the power to declare any place a 'national key point' if it is considered vital to 'national security'. Once a site is declared, a range of strict anti-disclosure provisions which criminalise any person disclosing 'any information' in 'any manner whatsoever' about security measures of a national key points comes into effect as does the curtailment of the right of assembly in or near any key point.⁴⁸ While McKinley references a close cousin to the secrecy legislation the Secrecy Bill is designed to replace rather than the Secrecy Bill itself, the outlines of his analysis are clear. This analysis is clearly as much a polemic as it is empirical— yet it adds helpful evidence to this discussion. In addition to detailing an uptick in the relative power of the Zuma/securocrat network in the South African polity in 2007-2008, a development coinciding with and indeed causing the withdrawal of the first version of the Secrecy Bill in 2008, McKinley makes explicit what is implicit in the dominant democracy analysis – that there is a “symbiotic relationship between secrecy and power”.⁴⁹

What is not examined in this line of argument may be as significant as what is examined, if not more so. There are a number of lines of credible research that argue that transparency does not deliver its promised effects and may even have unintended consequences.⁵⁰ For instance, one recent study found the counter-intuitive effect of greater transparency increasing corruption, through its effect of lessening support for anti-corruption initiatives by demonstrating that corruption is indeed rife, everyone is doing it, and sending the message that it is not worth trying to counter the corruption.⁵¹ Further, there is little comparative evidence that greater transparency would lead to greater opposition party competitiveness and reduce whatever degree of electoral dominance is enjoyed by the majority party. One might look to the American jurisdiction where, both before and perhaps even more so after the key Supreme Court case of *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), a high degree of transparency about what funding flows from private corporations to political parties co-exists comfortably with a high degree of influence by those corporations in politics, arguably strengthening rather than weakening party structures as those corporations seek to reduce agency and transactions costs by working with the two established American political parties. The relevance for South African politics is that what some term the “unconstitutional” practice of funding of political parties (including but not limited to the ANC) by provincial governments may well exist side by side with legislative accountability and transparency.⁵²

48 *Id.* at 160–161.

49 *Id.* at 151.

50 *Clare Birchall*, *Transparency, Interrupted Secrets of the Left*, *Theory, Culture & Society* 28 (2011), p. 64.

51 *Monika Bauhr & Marcia Grimes*, *Indignation or Resignation: The Implications of Transparency for Societal Accountability, Governance* 27 (2014), pp. 291–320.

52 *Khadiagala et al.* (eds.), note 47, p. 159.

Leaving transparency aside for a moment, the dominant party democracy as applied to South Africa is also worth critically examining on its own terms.⁵³ There is of course the relatively simplistic rejoinder that the ANC has become dominant through the vote of the majority of the citizens of the country in terms of free and fair elections – itself presumably the purest and strongest rejoinder within the discourse of representative democracy. Beyond this, one might argue that the ANC is simply not in as dominant a position as this argument would have it. What a difference the steadfast and principled engagement of the current Public Protector (a South African Chapter 9 institution) and a shaky 2014 ANC electoral victory make. A number of recent developments – the small but steady erosion of support from the ANC, the evident vitality of at least some of the Chapter 9 institutions and the policy trend against cadre deployment -- undercut the concerns articulated by Choudhry and Issacharoff and the specific mechanisms they discerned operating.

The relative place of the media and the intelligence services in postapartheid South African democracy

We turn now to a consideration of the direct politics of transparency and openness, picking up on the concerns that the Secrecy Bill entrenches the power of the intelligence services and that it impedes the democratic role of the media. Here, we may examine the place and the relative place of the media and the intelligence services in the South African constitutional democracy. As implied above in relation to the lack of oversight exercised by Parliament over the intelligence services, insufficient attention has been paid to the place of the intelligence services in post-apartheid South Africa. Most of the relevant academic literature is concerned with the specifics of structuring the security sector. And much of this literature is concerned to argue within a framework of increasing the efficacy and efficiency of the sector – in particular the fight against crime (and indeed corruption). Insufficient research and analysis has been directed to the role that the intelligence services have played and play within the ANC and within South Africa's politics. This is unfortunate since the current of politics runs strong between the intelligence services and the ruling party. As the former coordinator of the national intelligence bureaucracy has observed: "Perhaps it is an unavoidable force of nature in a young democracy such as ours – a democracy attained through a struggle that engendered the twin emotions of passionate enmity and commitment – that the turbulence and cross currents that surged through the liberation-movement-turned-ruling-party should breach the harbour wall between party and government and break, in particular, against the ramparts of the intelligence community."⁵⁴

53 Jonathan Klaaren, *Dominant Democracy in South Africa? A response to Choudry*, *Constitutional Court Review* 2 (2009), pp.87–96.

54 Gilder, note 14, p. 413.

There has perhaps also not been sufficient attention paid to the place of the media in South Africa's democracy.⁵⁵ This is of concern since it should be acknowledged that the role played by the media is not a simple one of reinforcing the virtues of representative democracy through the multiplier effect of transparency. There is of course that aspect and the media is quite skilled at noting the significance of their place in a representative democracy. However, the role of the media goes beyond an enabler of transparency understood as greater quantitative flow of information.

The place of the media also includes its own role as a powerful social institution and, in what is perhaps a further distinct role, a reservoir of symbolism, of signs and conceptual understandings. For instance, Michael McCann's *Rights at Work* articulates the often quite powerful influence that the media may play with respect to litigation campaigns for social and economic rights, such as the equal pay movement in the United States in the 1970s.⁵⁶ Even where the specific objective of a particular campaign was not achieved, over time the conceptual understanding of what constitutes equal pay was transformed, leading to significant reductions in the pay received by women and minorities, (if not still not fully equal pay). The media creates, disseminates, and stores cultural images and stories that exert their own power over time, even long after the event that generated them. South African analyses which could be considered in this vein include Jackie Dugard's study of the Phiri community's struggle for water as well as to some extent Belinda Bozzoli's *Theatres of Struggle and the End of Apartheid*.⁵⁷ It may well be that the campaign against the Secrecy Bill will be best analysed within this framework.

In a fashion similar to the intelligence services, the media had its own institutional interests to protect during the consideration of the Secrecy Bill. Those interests include the media's profitable and politically powerful role filtering and shaping the news and opinion of a well-resourced segment of South African society. In this respect, what is of particular interest is the contest that the media and the intelligence services engaged in with respect to the Bill.

An episode arguably illustrating a number of the above points occurred with respect to the perceived overlap between the Secrecy Bill and an initiative of the ANC to blunt the power of the media, the media tribunal initiative. As a policy proposition, this initiative can be sourced to a resolution taken at the ANC's conference in Polokwane, the same one where Zuma ousted Mbeki. This initiative, while not succeeding in its initial terms, nonetheless did result in a significant change in the self-regulatory structure of the print media, following a non-judicial commission of inquiry chaired by former Chief Justice Pius

55 *Sean Henry Jacobs*, *Public sphere, power and democratic politics: media and policy debates in post-apartheid South Africa*, London 2004.

56 *Michael W. McCann*, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*, Chicago 1994.

57 *Belinda Bozzoli*, *Theatres of Struggle and the End of Apartheid*, Ohio 2004; *Jackie Dugard*, *Rights, Regulation and Resistance: The Phiri Water Campaign*, *South African Journal on Human Rights* 24 (2008), p. 593.

Langa.⁵⁸ Most but not all media observers felt that the changes suggested by Langa were appropriate and served to bolster good journalistic ethics.

Of interest here is the degree to which the media repeatedly conflated the Secrecy Bill and the media tribunal initiative. The joining of the two policy initiatives and in many cases their conflation served to fan the flames of the conspiracy view of the ANC, of it exercising dominant party power arbitrarily. For instance, the noted author Andre Brink wrote in an opinion piece published in the *New York Times*:

“South Africa faces its starkest challenge yet in the form of two pieces of anti-press legislation that would make even the most authoritarian government proud. One, cynically named the Protection of Information bill, would give the government excessively broad powers to classify information in the ‘national interest’; the other, which would create a media appeals tribunal” to regulate the printed and electronic press, is written in language chillingly reminiscent of that used by the apartheid regime to defend censorship in the 70s.”⁵⁹

The conflation of these two initiatives drew the ire of observers including the Nelson Mandela Foundation, which noted that “[c]ontrary to popular belief, the [Secrecy] Bill is not an offshoot of the ANC’s Polokwane resolutions on the media and does not contain provisions for a media tribunal.”⁶⁰ As an example of the conflation, the Nelson Mandela Foundation noted a cartoon by a well-known South African political cartoonist. The cartoon shows a distant figure wearing a banner “Press Freedom” menaced by two rifle-bearing assassins, one wearing a jacket saying “Protection of Information Bill” and the other “Media Tribunal”.⁶¹ This conflation served the interests of the media, wrapping the protection of its own interests in the opposition to the Secrecy Bill.

In the institutional politics of the media and the intelligence services, the interplay of transparency and opacity are directly implicated. Indeed, the two institutions are nearly polar opposites—the spy as the epitome of the secret and the journalist understood as the apostle of transparency. There is a collective dimension here as well: the set of organisations in the media field will wish to push out the bounds of transparency, at least symbolically, and push up against the limits of secrecy. The media was thus for instance particularly vociferous in the debate around the Secrecy Bill with respect to the provisions in vari-

58 *Glenda Daniels*, Media tribunal rejected, but major press reforms mooted, *The M&G Online*, 26 April 2012, <http://mg.co.za/article/2012-04-26-major-press-reforms-mooted/> (last accessed on 10 July 2014).

59 *André Brink*, Silence in South Africa, *The New York Times*, 11 September 2010, <http://www.nytimes.com/2010/09/12/opinion/12brink.html> (last accessed on 10 July 2014).

60 *Iain Currie and Jonathan Klaaren*, Evaluating the Information Bills: A Briefing Paper on the Protection of Information Bill, University of the Witwatersrand, Johannesburg, 17 June 2011, http://www.nelsonmandela.org/images/uploads/Info_bills_evaluation_final.pdf (last accessed on 8 July 2014).

61 ANC’s new policy towards the media, Cartoon, *Sunday Times*, 1 August 2010, accessible at <https://zapiro.org/cartoons/100801st> (last accessed on 20 October 2015).

ous drafts that call for a duty of returning secrets that have found their way outside the protection of the state to the security agencies and criminalizes mere possession of such secrets.⁶² These provisions touch on a core media concept and received much attention. Nonetheless, as already demonstrated above, this is not to say that the spies always push secrecy and the journalists always push transparency. Rather both institutions play both values.

The balance between national security and transparency

As a final point in relation to the contest over the content of the Secrecy Bill, consider the balance struck between national security and transparency/openness. This metaphor is the usual framing metaphor for discussions of this policy in constitutional democracies. While the metaphor could have been employed to demarcate the symbolic boundary between the media and the intelligence services, it was not prevalent in the debate over the Secrecy Bill. Perhaps this reflected the still-developing and relatively inchoate nature of South African democratic politics. In any case, most provisions of the version of the Bill finally enacted by the Parliament arguably fall within the zone of tolerance in terms of the balance metaphor. As mentioned above, the official opposition's main constitutional objection at this point in time relates to a procedural and not a substantive constitutional violation.⁶³ The clause attempting to harmonize between the bureaucratic procedures of the Secrecy Bill and the procedures of the PAIA (discussed more fully below) was an explicit attempt to balance secrecy and transparency. Indeed, the call for the public interest defence can itself be interpreted as a call for balance, since it was commonly understood to include a proportionality element within this doctrinal device. However several of the clauses of the Bill that were dropped along the way were clearly outside the zone of tolerance (and were nearly certainly unconstitutional). One particular example was a clause which would have allowed the security agencies themselves to classify information and various subject matters but provided no objective criteria whatsoever by which this would be done.

According to the dominant democracy analysis, there is a symbiotic relationship between secrecy and power. There are reasons to question the potency of that simple under-

62 Clause 15 of the B version of the 2010 Bill provided: Report and return of classified records. 15. A person who is in possession of a classified record knowing that such record has been unlawfully communicated, delivered or made available other than in the manner and for the purposes contemplated in this Act, except where such possession is for any purpose and in any manner authorised by law, must report such possession and return such record to a member of the South African Police Service or the Agency to be dealt with in the prescribed manner." Clause 44 then provided: "Failure to report possession of classified information. 44. Any person who fails to comply with section 15 is guilty of an offence and liable to a fine or imprisonment for a period not exceeding five years".

63 One of the provisions that caused the most controversy among the South African public would be judged relatively tame by Western developed nations – the penalties of up to 25 years for espionage.

standing, just as there are reasons to question and demand proof for the positive democratic effects of transparency. As noted below, it is important to problematize the relationship between transparency and trust: “Transparency certainly destroys secrecy: but it may not limit the deception and deliberate misinformation that undermine relations of trust. If we want to restore trust we need to reduce deception and lies rather than secrecy. Some sorts of secrecy indeed support deception, others do not. Transparency and openness may not be the unconditional goods that they are fashionably supposed to be. By the same token, secrecy and lack of transparency may not be the enemies of trust.” In any case, a different kind of analysis of democracy, of the symbolic politics of transparency between the intelligence services and the media, has revealed a more complex field within which the politics of the Secrecy Bill has played itself out.

E. Third Testing

The third testing of democracy in South Africa is interior to the Bill itself and may be tracked by the entanglement of the transparency and opacity.

In my view, this cultural contest may, with only a small degree of loss of accuracy, be neatly represented by two statutes, transparency being associated with the PAIA and opacity with the Secrecy Bill. The initial drafting effort within the Ministry of Intelligence Services drew in several lawyers or legal academics with human rights background (including this paper’s author). One doctrinal achievement in which this drafting team took pride at that point in the legislative process was a mechanism -- section 28 -- which operated to harmonize the freedom of information implementation procedures of the PAIA with the classification regime of the Secrecy Bill. This was done through granting authority to directors general (the executive but not political heads of the South African departments of the public administration) to strike the balance between the right to access to information and its limits. The criteria for this exercise in substantive balancing to be used by these bureaucrats in the actual implementation of this section were never very clear but were to be drawn from both statutes.

This harmonization clause itself shows how the two concepts of transparency and opacity are intertwined with each other. This can be shown from the point of view of either of the statutes. From the point of view of PAIA, the right of access to information is justifiably limited by a number of policy reasons – confidentiality, national security, privacy etc. The balance is struck already within the structure and operation of the PAIA. From the point of view of the Secrecy Bill, the need for secrecy is abridged by a number of demands of justification according to specific criteria (such as the need to pass certain tests of necessity in order to retain a classification for more than a five year period) and by the entrenchment of transparency as to the reasoning of those safeguards. The balance is struck already within the structure and operation of the Secrecy Bill. Beyond the metaphor of balancing, I wish to suggest that transparency and secrecy are not two concepts separate from each other. The

insight that transparency and opacity are mutually implicated allows us to understand better how both are supported and nurtured within a constitutional democracy.

Some work in the field of cultural studies has deepened this line of analysis, focusing it directly on the power of secrecy as well as transparency.⁶⁴ Claire Birchall's argument examines the value of transparency from the point of view of the Left. Given the near-universal adulation given to transparency, it makes sense, she says, to examine and at least discover what politics, if any, this global diffusion of transparency precludes. This leads Birchall to cite work by Onora O'Neill problematizing the relationship between transparency and trust: "Transparency certainly destroys secrecy: but it may not limit the deception and deliberate misinformation that undermine relations of trust. If we want to restore trust we need to reduce deception and lies rather than secrecy. Some sorts of secrecy indeed support deception, others do not. Transparency and openness may not be the unconditional goods that they are fashionably supposed to be. By the same token, secrecy and lack of transparency may not be the enemies of trust."⁶⁵ After examining two fields where transparency does not reign supreme, Birchall concludes: "In both psychoanalysis and poetry we can see that it is not just that secrecy is productive, but that it is constitutive. A violence is performed in current discourse, therefore, when transparency is advocated as an alternative to secrecy or as a method by which secrets will be eradicated. Secrecy is always already at work in transparency."⁶⁶ Birchall then offers a way to "recuperate" secrecy and develop its laudable constitutive qualities, thinking through the notion of secrecy as a commons.⁶⁷

To further develop this line of analysis within the South Africa post-apartheid context, we may be able to use the metaphor of entanglement. For Sarah Nuttall, entanglement is "a condition of being twisted together or entwined, involved with; it speaks of an intimacy going, even if it was resisted, or ignored or uninvited."⁶⁸ Drawn by its use in human relationships, Nuttall has used it to explore a number of topics, including the secrets and lies that white South African have told themselves growing up under apartheid.⁶⁹ She writes further: "Entanglement offers, for me, a rubric in terms of which we can begin to meet the challenge of the 'after apartheid'. ... It enables a complex temporality of past, present, and future; one which points away from a time of resistance towards a more ambivalent moment in which the time of potential, both latent and actively surfacing in South Africa, exists in complex tandem with new kinds of closure and opposition. It also signals a move away

64 *Birchall*, note 50.

65 *Id.* at 66.

66 *Id.* at 71.

67 *Id.* at 72–77.

68 *Sarah Nuttall*, *Entanglement: literary and cultural reflections on post apartheid*, Johannesburg 2009, p.1.

69 *Id.* at 58–82.

from an apartheid optic and temporal lens towards one which reifies neither the past nor the exceptionality of South African life.”⁷⁰

F. Conclusion

A prominent opposition party MP claimed that the Secrecy Bill was “South Africa’s first real exercise of democracy”.⁷¹ Was it? Or was it a herald of things to come? Either democracy or its demise? This article has suggested above that the Secrecy Bill did test South Africa’s structures of representative democracy in three particular ways – in showing up the failure of the National Assembly to oversee the intelligence services, in showing the lack of individual accountability for representatives, and in pointing to the as yet clumsy modes of incorporating elements of the national debate from provincial and local levels of the National Council of Provinces.

These three stress points do not add up to a conclusive argument that representative democracy has reached its end in South Africa. But they do add force to the notion that we should consider closely forms of democracy – such as participatory democracy and direct democracy – that are less concerned with the legitimacy often claimed from the moment of electoral blessing by a state’s citizens and more concerned with the issues of compliance on an everyday timescale – with citizens’ interaction with the bureaucracies and agencies of the state.⁷² This is not a startling new insight. For one scholar closely identified with the drafting of South Africa’s interim Constitution, it was the importance of moving beyond the austerity of snapshot democracy to a more fulsome vision of responsive democracy – a vision identified as ambiguous and analysed with respect to participation and accountability.⁷³

Was the genesis and continuing consideration of the Secrecy Bill an episode that should be understood as a fight against the dominant role of the ANC in South Africa’s democracy? Or in the truest form of deliberative democracy, was the movement against the Bill an instance whereby the results of national discourse in civil society was transmitted by some set of mechanisms and struggles to elected officials in Parliament who then responded appropriately?⁷⁴ Perhaps neither. Indeed, the dominant democracy analysis is wanting in several respects – that the ANC is simply not so dominant, that the focus on electoral domi-

⁷⁰ *Id.* at 11.

⁷¹ Secrecy bill fight “SA”’s first real exercise of democracy, City Press, 28 September 2013, <http://www.citypress.co.za/politics/secrecy-bill-fight-sas-first-real-exercise-democracy/> (last accessed on 8 July 2014).

⁷² *Edward L. Rubin*, *Beyond Camelot: Rethinking Politics and Law for the Modern State*, Princeton 2005, p. 141.

⁷³ *Etienne Mureinik*, *Reconsidering Review: Participation and Accountability*, *Acta Juridica* 35 (1993).

⁷⁴ *Rubin*, note 72, pp. 159–160; *Jürgen Habermas*, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Cambridge, MA 1998, pp. 354–359.

nance misses the everyday sphere where citizens live with the South African state, and that dominant democracy analysis does not provide a nuanced account of the place and role of secrecy and transparency in the South African democracy. This article hopes to have offered some steps towards such a more nuanced account, using the case of the Secrecy Bill to outline the symbolic politics of transparency and secrecy between the intelligence services and the media.

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Institutional Renaissance or Populist Fandango? The Impact of the Economic Freedom Fighters on South Africa's Parliament

By *Richard Calland* and *Shameela Seedat**

Abstract: *Twenty one years into its democratic life, modern South Africa faces a number of 'growing pains'. While the ruling African National Congress (ANC) has decisively won five national elections in a row since 1994, never falling below 62% of the national vote, fears that dominant party syndrome will diminish the independence, and undermine the constitutional mandate, of key institutions such as parliament are balanced by the increasingly combative tone and character of opposition parties, especially the new kid on the block, the Economic Freedom Fighters (EFF) that are led by 'firebrand' former ANC Youth League leader Julius Malema. The sudden emergence of a more competitive form of multi-party politics following the May 2014 national election has injected new life into the National Assembly. By examining four episodes of political and procedural contestation that have animated the 2014-19 parliament, this paper seeks to respond to two questions: One, has the newfound parliamentary vigour that has accompanied the belligerent character of the EFF's strategy and tactics enabled parliament to better perform its constitutional mandate in terms of holding the executive to the account? And, second, does the EFF's impact on parliament represent an institutional renaissance after a decade or more of increasing lethargy and mounting irrelevance to the public discourse, or simply and merely a populist fandango? In turn, there are potentially profound implications for the future of South Africa's representative and participatory democratic modality.*

Introduction: A Parliament Re-born?

On 12 February 2015, scholars, practitioners and activists who care about democratic South Africa looked on in shock and horror as the annual State of the Nation Address was disrupted by twenty-four red-overalled 'economic freedom fighters' (EFF). After considerable

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commotion, during which the cellphone signal was jammed by the government, thus preventing journalists and MPs from communicating with the outside world, the 25 EFF MPs were violently removed by police-officers masquerading as parliamentary security officials. The received wisdom of the assembled parliamentary press gallery and commentariat was that it was a 'sad day for South Africa's democracy'. Or was it? Was it not a sign that renewed vigour was entering the democratic process and that ugly and uncomfortable though it might be, real political participation and contestation was being injected into a representative institution that had atrophied over the past decade? In the face of President Jacob Zuma's stubborn refusal to accept accountability for unlawful public expenditure on his private homestead, Nkandla – and his hiding behind institutional weaknesses and the advantage of a dominant majority party – was not militant EFF leader Julius Malema's demand that he 'pay back the money' a powerful, if crude, expression of participatory democracy? Or was it simply an opposition representative employing muscular tactics to advance his political strategy?

Having for many years succumbed to what appears to be one-party dominance¹ and – often in related fashion – institutional lethargy, South Africa's parliament has recently entered a new, more dynamic and arguably more relevant period. Ever since the country's last national election in May 2014 parliament has regained a position of centrality within the political playing field. The Economic Freedom Fighters, a group of mostly ex-ANC Youth members who, on a militant populist ticket, competed in national elections for the first time, secured 6.35% of the national vote – a reasonably good return, given that the party was less than a year old on election day. Thus, the EFF acquired 25 seats in the National Assembly, becoming the third largest political party after the ruling ANC and the main opposition party, the Democratic Alliance (DA). Since the election, media coverage of parliament has soared as result of repeated disruption and the bold use of procedural challenges by EFF MPs. The promise of dramatic commotion as result of the EFF's actions in parliament has kept South Africans glued to parliamentary television and news – not since the days of Nelson Mandela has the National Assembly so vividly caught the public's attention. The element of public spectacle derives much of its impetus from the cult of personality around both President Zuma and EFF leader Julius Malema. While this obvious manifestation of 'personality politics' might well in large part be driving the newfound interest in parliament, there are several events since the last election that are deserving of analytical scrutiny and academic inquiry.

1 For an assessment of where South Africa's democratic trajectory sits within the traditional 'weak' versus 'strong' dominant party theory spectrum, see: *Roger Southall*. The Dominant Party Debate in South Africa. *Africa Spectrum* 39 (2005), pp. 61-82. For a more nuanced consideration of the some of the major factors of the dominant party tendencies of the ANC that impact on constitutional institutions and principles, see: *Sujit Choudhry*, "'He had a mandate': The South African Constitutional Court and the African National Congress in a Dominant Party Democracy". *Constitutional Court Review* 2 (2009), pp. 1-86.

Three events deserve special consideration and are the subject of this article: first, the Presidential Question Time sessions which took place on 21 August 2014 and 11 March 2015; second, the debate on the Ad Hoc Committee's Report on Nkandla which took place on 13 November 2014; and, lastly, the State of the Nation Address of 12 February 2015. We examine these events with the aim of gaining a clearer understanding of the extent to which parliament may now be able to better serve its constitutional mandate as a result of the aggressive parliamentary strategy and tactics of the EFF, in contradistinction to the strong trend of the past 10-15 years in which parliament's constitutional authority has been significantly curtailed as a result of one-party dominance, especially in relation to parliamentary oversight of the executive. This, we hope, will shed new light on the health of South Africa's participatory and representative democracy as it enters this new phase in its democratic evolution, by asking questions such as: Is parliament being hijacked by new (populist) political forces or is it - and by implication "we", the people - genuinely becoming more robust and politically relevant? Has a militant populist named Malema breathed new life into what appeared to be a failing representative democracy where constitutional and parliamentary rules had extensively succumbed to the needs of the governing party? Or are the EFF's antics (and the way they have since been mimicked by the DA) a further morbid symptom of institutional decline rather than a vibrant and welcome challenge to the persistent degradation of parliament as an institution by the ANC's leadership?

Conceptual Framing and Constitutional Context

Section 1 of the South Africa Constitution provides for a system of "Universal adult suffrage, a national common voters roll, regular elections and a *multi-party system of democratic government*, to ensure accountability, responsiveness and openness." (our emphasis). South Africa's Constitution-makers designed a system to govern South Africa's post-1994 democratic politics with the following core features. First, an electoral system that must 'result, in general, in proportional representation' (section 46 of the Constitution). South Africa has chosen the simplest form of the proportional representation system, in which the electorate vote for a party from an open list of parties and every vote counts, with no threshold (in a 400 seat National Assembly, just 0.25% of the vote – around 50,000 voters in the last election – are required to win representation of at least one seat in the national legislature).

Second, a system in which the seat in parliament is essentially 'owned' not by the elected representative but by the party upon whose list he or she appeared at election time² - meaning that if, as has happened on more than one occasion, an MP is disciplined and has

2 The relevant amendment dealing with loss of membership is inserted by item 13 of Annexure A to Schedule 6 of the Constitution. The insertion is as follows: "*Additional ground for loss of membership of legislatures* 23A. (1) A person loses membership of a legislature to which this Schedule applies if that person ceases to be a member of the party which nominated that person as a member of the legislature.

his or her membership of the party revoked, then he or she will automatically lose his or her seat in parliament. Naturally, this gives the management and leadership of the political party – especially the whippers in parliament itself – a large amount of power and makes holding the line and maintaining discipline within the parliamentary party a relatively easy task. Thus, this feature of the political and parliamentary landscape is a consequence of the constitutional design, which has been exaggerated by the fact that electorally the ANC has enjoyed a series of five substantial victories in the national elections that have taken place since (and including) 1994, which further weakens the hand of the backbench MP.

Against this backdrop, it is worth asking: what does the South African public expect of its parliament? The Afrobarometer opinion polling provides some useful guidance in this respect³:

- 55% agreed or strongly agreed with the statement that: ‘Parliament should ensure that the President explains to it on a regular basis how his government spends taxpayers’ money’.
- 63% agree or strongly agreed with the statement that: ‘Parliament should ensure that the President explains to it on a regular basis how his government spends taxpayers’ money’.
- 95% of those polled had never contacted an MP during the past year, compared with 87% who had never contacted a political party
- 70% agreed or strongly agreed with the statement that: ‘Many political parties are needed to make sure that South Africans have real choices in who governs them’.

So, this evidence tends to suggest that the broader population recognizes the importance of political parties, but wants parliament to be effective in holding the executive to account – something that, increasingly, it has been feeble in doing:

In a Westminster system, parliaments are always at a disadvantage when compared with the Executive arm of government, which has by comparison all the resources and people, and all the political weight...it is very hard for back bench MPs in such a system to stand up to their seniors – those who holding positions in the cabinet – especially when the electoral system compounds the problem by giving the political bosses – which would by definition include those cabinet ministers as part of the leadership of the party – even more power.

The National Executive Committee (NEC) of the ANC is elected. But when it meets, those cabinet ministers who were not elected onto the ruling party’s chief decision-making body attend as observers. They may lack power and influence within the ANC – Finance Minister Pravin Gordhan, for example, was not an elected member of the NEC for the first three years of his time at National Treasury; he was only elected onto the NEC at the December 2012 Mangaung National Conference of the ANC – but they are still a part of the leadership of the party.

3 Afrobarometer 2013: http://www.afrobarometer.org/files/documents/summary_results/saf_r5_sor2.pdf.

So when a backbench ANC MP wants to stand up to a cabinet minister, it requires particular courage. And courage tends to come with experience. So, the younger you are, the newer you are to parliament, the less likely that you will have the courage and the means to do so.

Beyond the weekly ANC caucus meeting that is held on a Thursday morning, the ANC members of a particular committee meet as a “study group”, often prior to the committee’s meeting on an issue or a bill and is sometimes attended by the Minister and, sometimes by the Director-General (DG), “which is absolutely wrong” in the view of [Opposition DA MP David] Maynier. In the case of the secrecy bill, the R2K’s point is that at key moments [ANC MPs] Burgess and Landers were getting their instructions directly from the executive. As Judith February explains: “Burgess and Landers were both weak and completely pliable. They abrogated their responsibilities as members of parliament completely”.

The minister is an MP and a member of the ANC caucus. What appears to happen, particularly if dealing with legislation, however, is that the DG will brief the ANC study group on what amendments are acceptable and which are not. “It subverts the legislative process completely”, as Maynier puts it.⁴

To what extent are these weaknesses due to flaws in the constitutional design – and the wisdom of the constitution-makers – as opposed to the political culture and outcomes of post-1994 South Africa? In the UDM case⁵ the constitutional design was considered by the Constitutional Court in the context of controversial ‘floor-crossing’ legislation that ostensibly gave individual MPs more power to dissent and even leave their party without losing their seat in parliament, but which in practice tended to play into the hands of the ruling party:

The first contention was that the amendments undermine the basic structure of the Constitution and for that reason are not sanctioned by any of the provisions of section 74. The second was that the amendments are inconsistent with the founding values of the Constitution set out in section 1, which can only be amended in accordance with the provisions of section 74(1). The third was that the amendments are inconsistent with the voters’ rights vested in citizens by section 19(3) of the Bill of Rights, which can only be amended in accordance with the provisions of section 74(2)... There is a tension between the expectation of voters and the conduct of members elected to represent them. Once elected, members of the legislature are free to take decisions, and are not ordinarily liable to be recalled by voters if the decisions taken are contrary to commitments made during the election campaign....It is often said

4 Richard Calland, *The Zuma Years: South Africa’s Changing Face of Power*, Cape town, 2013, p. 149.

5 *United Democratic Movement v President of the Republic of South Africa and Others* (African Christian Democratic Party and Others Intervening ; Institute for Democracy in South Africa and Another as Amici Curiae) (No 2) (CCT23/02) [2002] ZACC 21.

that the freedom of elected representatives to take decisions contrary to the will of the party to which they belong is an essential element of democracy. Indeed, such an argument was addressed to this Court at the time of the certification proceedings where objection was taken to the transitional anti-defection provision included in Schedule 6 to the Constitution. It was contended that submitting legislators to the authority of their parties was inimical to

“accountable, responsive, open, representative and democratic government; that universally accepted rights and freedoms, such as freedom of expression, freedom of association, the freedom to make political choices and the right to stand for public office and, if elected, to hold office, are undermined; and that the anti-defection clause militates against the principles of ‘representative government’, ‘appropriate checks and balances to ensure accountability, responsiveness and openness’ and ‘democratic representation’.”

This Court rejected that submission holding:

“Under a list system of proportional representation, it is parties that the electorate votes for, and parties which must be accountable to the electorate. A party which abandons its manifesto in a way not accepted by the electorate would probably lose at the next election. In such a system an anti-defection clause is not inappropriate to ensure that the will of the electorate is honoured. An individual member remains free to follow the dictates of personal conscience. This is not inconsistent with democracy.”⁶

In essence, the Constitutional Court was affirming the central role that political parties play in the South African constitutional and political order. An “individual member remains free to follow the dictates of personal conscience” in theory. But not (or at least very rarely) in practice, prompting another question: does this profound constraint on individual independence mean the ‘end of the representative state?’ In South Africa, individual MPs are constitutionally as well as politically contained. Internationally, parliaments are structurally weak and increasingly unable to respond to the most pressing challenges of the age, due to the complexity, scale and transnational character of issues such as climate change and energy policy, arm-dealing and security, and natural resource management. When confronted by ‘wicked’ problems – of macro-economic policy making (the shift from RDP to GEAR in the mid-1990s) or systemic corruption (the failure of the Standing Committee on Public Accounts [SCOPA] to cope with the arms deal scandal at the turn of the century), South Africa’s parliament has found itself to be no exception to this international trend.

Is there a ‘solution’ to this institutional conundrum? After all, on the face of it South Africa’s parliament has done in constitutional and procedural terms much of what could be asked of it: it gives its parliamentary committees power and authority that many parliaments traditionally lack; and it requires of its law-making processes that the public are

6 UDM, *ibid.*

properly involved: South Africa's constitution enshrines the principles of 'participatory democracy' and requires that, for example, national and provincial legislative processes "facilitate public involvement". Section 59(1) of the Constitution reads:

The National Assembly must

- a) Facilitate public involvement in the legislative and other processes of the Assembly and its committees; and
- b) Conduct its business in an open manner, and hold its sittings, and those of its committees, in public...

There is a similar provision for parliament's second house – the National Council of Provinces (NCOP)⁷. South Africa's Constitutional Court has been asked to rule on these provisions on several occasions, as challenges have been brought against the proceedings of the National Assembly and/or NCOP. In the leading case of *Doctors for Life International v Speaker of the National Assembly and Others* [2006]⁸, Justice Ngcobo writing for the majority held (at paragraph 90 of the judgment) that:

The right to political participation is a fundamental human right, which is set out in a number of international and regional human rights instruments. In most of these instruments, the right consists of at least two elements: a general right to take part in the conduct of public affairs; and a more specific right to vote and/or to be elected. Thus article 25 of the International Covenant on Civil and Political Rights ("ICCPR") provides:

"Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- 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".⁹*

Significantly, the ICCPR guarantees not only the "right" but also the "opportunity" to take part in the conduct of public affairs.¹⁰ This imposes an obligation on states to

7 Section 72 of the Final Constitution. Section 118 contains a similar provision in relation to the nine Provincial Legislatures.

8 *Doctors for Life International v Speaker of National Assembly and others* CCT 12/05 [2006] ZACC 11.

9 See *Jonas Ebbesson*, "The Notion of Public Participation in International Environmental Law" *Yearbook of International Environmental Law* 51 (1997), pp. 70-2.

10 International Covenant on Civil and Political Rights (ICCPR), adopted 16 December 1966 (entered into force 23 March 1976). South Africa signed this instrument on 3 October 1994 and ratified it on 10 December 1998. Article 25 of the ICCPR was based in part on article 21 of the Universal Declaration of Human Rights, adopted 10 December 1948, which provides:

"(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives."

*take positive steps to ensure that their citizens have an opportunity to exercise their right to political participation.*¹¹

The majority went on to hold that the NCOP had failed to satisfy its constitutional duty to facilitate public involvement in its law-making process. With typical aplomb, Sachs J. added his own distinctive voice to the majority judgement (at paras 227-228):

Public involvement in our country has ancient origins and continues to be a strongly creative characteristic of our democracy. We have developed a rich culture of imbizo, lekgotla, bosberaad, and indaba. Hardly a day goes by without the holding of consultations and public participation involving all 'stakeholders', 'role-players' and 'interested parties', whether in the public sector or the private sphere. The principle of consultation and involvement has become a distinctive part of our national ethos.¹² It is this ethos that informs a well-defined normative constitutional structure in terms of which the present matter falls to be decided. This constitutional matrix makes it clear that although regular elections and a multi-party system of democratic government are fundamental to our constitutional democracy, they are not exhaustive of it. Their constitutional objective is explicitly declared at a foundational level to be to ensure accountability, responsiveness and openness.¹³ The express articulation of this triad of principles would be redundant if it was simply to be subsumed into notions of electoral democracy. Clearly it is intended to add something fundamental to such notions.

So, constitutionally at least, South Africa's parliament brings together traditional conceptions of representative democracy with more modern notions of participatory democracy. But in doing so, the design modality has inevitably to contend with the political impulses that derive from electoral outcomes and the political culture of both the institutions and the political parties that are contesting power. It is against this backdrop that we now turn to consider four potentially seminal, or paradigm-shifting, events that have shaped the institutional culture and practice, as well as the 'zeitgeist' of the new, 2014-2019, South African parliament, prompting both deep concern and optimism in equal measure.

11 ICCPR, *ibid*, article 25.

12 See *Manfred Nowak*, U.N. Covenant on Civil and Political Rights: *CCPR*, Kehl 1993, p. 439.

13 See *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC), Sachs J at para 625.

A new era of Political Contestation: Four Episodes

Presidential Question Time Sessions on 21 August 2014 and 11 March 2015

Question Time in the National Assembly is a critical mechanism for holding the executive to account. Questions may be put forward for oral or written reply to the President, Deputy President and Ministers on various matters for which they hold responsibility. The President is required to answer a minimum of six questions per term¹⁴. While in theory Question Time is a powerful democratic tool, which directly provides a bridge between the people's representatives and more powerful political structures, specifically in the executive arm of government, there is a strong perception that it has not operated at all effectively to date. The Independent Panel Assessment of parliament¹⁵ observed in 2009 that the manner in which Question Time is conducted has direct bearing on the integrity and eminence of parliament vis-a-vis the executive¹⁶. Shortcomings identified within the process include the executive regularly giving vague or inadequate answers which do not address the substance of the question posed, the use of questions from opposition parties solely to embarrass Ministers rather than to obtain information; and the ruling party posing questions which amount to praise singing rather than being informative or substantive in nature¹⁷.

Question Time on 21 August 2014 heralded a dramatic shift in South Africa's parliamentary culture. Parliamentary Rules dictate that, following the ANC victory in the April 2014 election, President Zuma should have appeared for questions in the House at least once per term, which meant three appearances between April and December 2014. However, it turned out that Zuma appeared for questions only once during this period – on 21 August – and that this session ended in high drama and pandemonium, one that may be described as being practically “a declaration of future disruption” by the EFF. This move has had major significance for the tone and workings of parliament since. On the day in question, EFF leader Julius Malema asked Zuma whether he would comply with the Public Protector's findings and recommendations on controversial improvements that had been made at taxpayers' expense on his private homestead in Nkandla, KwaZulu-Natal¹⁸. The Public Protector had found that Zuma acted in breach of constitutional obligations by exposing himself to a conflict of interest and in failing to comply with the Code of ethics for

14 The Deputy President answers four questions during ordinary question time, generally once every two weeks, and Ministers divide into three clusters for the purposes of questions, with a cluster answering questions each week according to a system of rotation. See Parliament of the Republic of South Africa ‘Report of the Independent Panel Assessment of Parliament’ (2009) 50 available at http://www.gov.za/sites/www.gov.za/files/panel_assess_parl.pdf (last accessed on 8 June 2015).

15 Report of the Independent Panel Assessment of Parliament, note 14.

16 Ibid.

17 See Parliamentary Press Gallery Association submission referred to in Report of the Independent Panel Assessment of Parliament, note 14, p. 51.

18 The Public Protector is appointed under the Constitutional to strengthen constitutional democracy by probing improper conduct and maladministration in state affairs.

members of the executive¹⁹. Several of the features built with public funds at Zuma's residence – such as a large indoor swimming pool - did not qualify as the “security upgrades” they had been represented as, and the Public Protector determined Zuma recompense the State for the unlawful public expenditure.

Faced with Malema's question, Zuma replied that his responses to all reports concerning the security upgrades to his private residence had been submitted to the speaker on 14 August 2014²⁰. Viewing this as evasive of a proper response, Malema and EFF MPs rose from the floor and began to chant “Pay Back the Money”. The Speaker of parliament, controversial ANC MP Baleka Mbete, deemed this behaviour as disruptive to the proceedings of the National Assembly, and, for the first time in the history of South Africa's parliament, called in members of the riot police, who proceeded to remove Malema and other EFF MPs from the House. In doing so, Mbete relied on legislative powers accorded to her in terms of the Powers and Privileges of Parliament and Provincial Legislatures Act, 2004²¹. EFF members were subsequently suspended for 30 days from parliament without remuneration by its Powers and Privileges Committee, an action that was later challenged and found to be unlawful by the High Court²².

Such unprecedented pandemonium in parliament – the first time in history that a South African President was confronted so robustly by opposition parties in parliament - marked a clear departure from the past. While adversarial behaviour during parliamentary sessions had not been uncommon since 1994, the tenor on 21 August 2014 was much more chaotic and heavy-handed on all sides than witnessed before. The day's events arguably set the tone for all of the EFF's subsequent engagements with parliament, at least as far as President Jacob Zuma was concerned. The EFF adopted a new position that was militant and uncompromising: either Zuma should own up to wrongdoing around Nkandla (and hence resign), or the EFF would continue to engage in the ‘politics of parliamentary disruption’.

The EFF's question to Zuma and accompanying chant “Pay Back the Money” - however disruptive to the proceedings of the National Assembly – deserves consideration in itself. With great popular appeal and in easily understandable terms, Malema demanded from Zuma not only what the Office of the Public Protector, acting on her constitutional duty, had called for but also what the electorate should rightfully demand of South Africa's democratic architecture. In line with the opinion poll findings outlined above, arguable the

19 Section 96(1) and (2).

20 ‘Proceedings of the National Assembly’ (2014) 22 available at http://www.parliament.gov.za/live/content.php?Category_ID=119&DocumentStart=10 (last accessed on 8 June 2015).

21 Section 11.

22 *Economic Freedom Fighters and Others v Speaker of the National Assembly and Others* [2014] ZAWCHC 204 where the court interdicted the Speaker of the National Assembly and anyone acting under their authority from giving effect or enforcing the decision taken by the National Assembly to suspend the EFF members from the National Assembly without remuneration.

EFF was simply amplifying the public's wish that the executive, and the President specifically, be held to account. Zuma was already appearing in parliament under a cloud of allegations: of corruption, unaccountability, the undermining of both parliament and the Office of the Public Protector, his involvement in the "Guptagate" saga, the death of thirteen South African soldiers who allegedly protected business interests linked to the Zuma family in the Central African Republic, and his still-unanswered questions around the arms deal. The Nkandla findings provided Malema with a direct instrument with which to target the country's leader.

South Africa's Constitution articulates "accountability" as one of the founding values of the democratic state and "parliamentary oversight" as a key way of ensuring that government directs the resources of the state in the promotion of the public good rather than for its own narrow interests²³. South Africa's parliamentary website emphasizes that the genuine test of democracy is "the extent to which Parliament can ensure that government remains answerable to the people"²⁴. Parliament therefore has the duty to "detect and prevent abuse of power and illegal or unconstitutional conduct by the national executive; [to] protect the rights and liberties of citizens and hold the Government answerable for how tax money is spent; and [to] make Government operations more transparent in order to increase public trust in the Government"²⁵. The Constitutional Court in *Oriani-Ambrosini MP v Sisulu, MP Speaker of the National Assembly*²⁶ (2012) observed that parliament's oversight responsibility is "a collective responsibility of both the majority and minority parties and their individual members to deliberate critically and seriously on legislative proposals and other matters of national importance"²⁷.

However, in practice the ANC's substantial majority in parliament rendered it unlikely that the National Assembly would ever seriously question the President about potentially problematic conduct. The EFF and other minority parties' use of Question Time on 21 August 2014 is a prime example of how parliamentary processes can be used to demand greater accountability from the highest office bearer in the land. Yet an analysis of the events on this day cannot begin and end with this proposition alone - the fact remains that an important and time-limited parliamentary process entirely collapsed. Parliament itself was as result rendered dysfunctional by a minority political party (with just 6% of the seats in the National Assembly) that saw fit to disrupt it. During the course of the altercation the Speaker of the National Assembly – someone filling a position that demands impartiality – was accused of favouritism and of failing to uphold her parliamentary duties. Ultimately, parliament – an institution which ideally sets an example for the rest of the country as a body that manages diverse positions by means of negotiation and persuasion - became

23 Sections 1 and 55 respectively of the Constitution of the Republic of South Africa, 1996.

24 http://www.parliament.gov.za/live/content.php?Category_ID=20 (last accessed on 8 June 2015).

25 Ibid.

26 *Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly* 2012 (6) SA 588 (CC).

27 *Oriani-Ambrosini*, note 26, p. 22.

tinged by violence. Given that violence in various forms is one of the major problems facing South Africa, such a perception becomes even more problematic.

Disruptive behaviour can also undermine representative democracy as it can progressively - or even in a single instance - undermine the functioning of parliament as a central national institution. One can reasonably posit that "We, the people" will not be served by our representatives - as is demanded by the classic democratic theory of "government for the people by the people" - if parliament is prevented from carrying out its business at any given time. The EFF's disruptions arguably weaken parliament's reputation as a space of dignity and order, one that hosts respectful proceedings and conducts serious business - and in principle this can have wide-reaching negative effects on democracy itself. While it has been argued that the EFF's "street tactics" are but a making-visible of the hard realities of concealed existing power politics, they may also serve to undermine the very instruments which aim, at least in principle, to limit both concealment and the abuse of power.

Several other weaknesses in the operation of parliament, ones which directly reflect its limited ability to pursue its constitutional oversight mandate, came to the fore during the Question Time debacle. These tend to support the perception that parliament's constitutional role has been in jeopardy because of the extent to which ANC dominates politics in South Africa. The first relates to the role and conduct of the Speaker of the National Assembly. Failure of confidence in the Speaker (as result of the events of 21 August 2014) was expressed by the EFF in its affidavit to the High Court when it challenged its suspension from the National Assembly:

"It is thus mandatory for the President to attend Parliament, at least once per term. The reason for the President's attendance in Parliament is to respond to questions asked by members of Parliament, which include members of the opposition political parties such as the EFF. The President cannot decide on his own whether or not he wants to come to Parliament. Also, the President cannot decide which questions he will answer. He is required by law to attend Parliament and answer the questions put to him when he is in Parliament. Further, the answers given by the President when he has been called to Parliament to account must be meaningful. The Speaker, as the leader of the National Assembly, is constitutionally obliged to ensure that the answers given by the President are meaningful. If the President fails to provide meaningful answers in Parliament to the questions put to him, the fundamental purpose of calling the President to account in the National Assembly is defeated. It was therefore incumbent on the Speaker to require the President to explain when he intended complying with the clear findings of the Public Protector since I had raised the matter pertinently. The Speaker failed to request the President to answer my question directly. In asking the question, which I did, I was not only representing the view of the EFF; I was also raising an important issue in the public interest and in relation to the mandate of an important institution of our constitutional order, namely, the role of the Public Protector. If the reports of the Public Protector are ignored, as seems

to have happened in this instance, without any rational grounds and without judicial sanction, the essence of a vital constitutional organ will be eroded. The essence of my question was to request the President to provide an explanation of the steps that he intended taking in order to give effect to the clear and unambiguous findings and recommendations of the Public Protector. This question also spoke to the issue of signal importance about the President's respect for constitutional institutions."²⁸

Speaker Baleka Mbete's reputation has been heavily compromised as result of her conduct during Question Time (and also during further parliamentary events discussed later in this paper). It is a given that the Speaker must be non-partisan and even-handed. Mbete – and the ANC by its deployment of her – have however drastically failed to respect such a basic principle. While the Speaker of the National Assembly has always been drawn from the majority party, this in itself does not compromise his or her position as Speaker - previous speakers have clearly demonstrated that one can place parliamentary business (and fairness) at the centre of one's use of authority notwithstanding a long-held fidelity to the ANC. Mbete, as chairperson of the ruling party, however falls into a different category – the conflict of interest involved here is insurmountable and even if she in an objective sense she is acting impartially, the perception of partiality will linger.

A second weakness in the practical operation of the National Assembly – namely its lack of assertiveness – is emphatically demonstrated by its failure in 2014 to call the President to answer questions at Question Time on four occasions, as expressly required. One of parliament's primary vehicles for holding the executive to account and for obtaining information on pressing issues of national importance fell away. No matter how ineffectual Question Time might be in practice, it remains one of the tools that animate the idea of representative democracy. This failure of implementation occurred despite insistence from minority parties that parliamentary rules should be upheld. Following the direct confrontation with President Zuma on 21 August over Nkandla, and the collapse in the proceedings, opposition parties attempted to compel Zuma to appear before the National Assembly to answer questions. However, they were unsuccessful and Zuma did not appear for the remainder of 2014. This angered opposition parties – and in November 2014 the opposition moved for a Motion of No Confidence in the President ²⁹.

Zuma finally appeared for Question Time on 11 March 2015. Opposition parties continued with their campaign to get Zuma to answer questions on Nkandla. At the start of the session, these parties requested that questions posed to him last August - when the session broke down - should now be addressed. Speaker Mbete ruled that Zuma could not be asked questions from last year's session and that should these be posed anew then they would be answered in written form. When the DA asked why Zuma had failed to appear last year, he

²⁸ See EFF founding affidavit in *EFF v Speaker*, note 22.

²⁹ See 'DA goes to court to ensure motion of no confidence is heard' available at <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71639?oid=341112&sn=Detail&pid=71639> (last accessed on 8 June 2015).

denied that he had ever 'dodged' questions, stating that he had never been asked to come to parliament³⁰. This appeared to contradict the impression created by the Speaker that she had been consulting with the Presidency to arrange a date but that no agreement had been reached³¹. These conflicting accounts have to date not been reconciled.

From a positive perspective, the fact that questions around the nature and occurrence of Question Time have been brought into sharp focus and are now on the agenda of minority parties in a more vocal and vigorous way than before may simultaneously suggest positive signs for the relevance of parliament and, therefore, the state of representative democracy. One positive result seems to be that Zuma has now publicly committed himself to appearing five times a year. While minority parties, the ANC, the Speaker and the President do not seem to agree on the details of how Question Time fell away in 2014, this impasse has led to not only political parties but also parliament and the executive taking greater interest in how Question Time comes about in practice – and, implicitly, what level of responsibility the President owes to parliament. The EFF and other minority parties maintain that the National Assembly must set a date and time when the President must appear, and that the President's primary commitment is to parliament. The ANC on the other hand maintains that a date needs to be negotiated with the President via the Speaker, since he may be engaged with international travel or important state matters and cannot reliably be expected to appear at the times when the National Assembly sees fit³². It appears that the appropriate process is still the subject of debate within parliament, but what is clear is that there is much greater pressure on parliament's Programming Committee to take decisive steps than before. Overall, it can be argued that any fresh parliamentary debate on the nature and occurrence of Question Time itself is beneficial for parliament in the long-term.

The Ad Hoc Parliamentary Committee on Nkandla

As noted, the issue upon which Malema and the EFF have attached their vigorous parliamentary tactics is that of Nkandla, and specifically the President's response to the Public Protector's reports and the remedial action that she has proposed, which includes paying back some of the money spent unlawfully on the upgrades to the President's private residence. At its heart, this is an issue about the strength or otherwise of the Public Protector, a Constitutional body, in relation to the ruling party and, in turn, parliament's willingness or ability to ensure that Zuma and the ANC respect the Public Protector. Indeed, it is worth noting that when President Zuma finally responded to the question from Malema on 11 March, his answer was revealing: "The public protector made recommendations. And rec-

30 See <https://pmg.org.za/hansard/20502/> (last accessed on 19 October 2015) and 'Zuma: I have never dodged questions' available at <http://ewn.co.za/2015/03/11/Zuma-Ive-never-dodged-questions> (last accessed on 8 June 2015).

31 'Mbete or Zuma "is telling lies"' available at <http://www.bdlive.co.za/national/politics/2015/03/13/mbete-or-zuma-is-telling-lies?service=print> (last accessed on 8 June 2015).

32 Ibid.

ommendations are recommendations. [They a]re not verdicts. Recommendations are recommendations. Subject to be taken or not taken, if they are recommendations. It is only a judge verdict that you have got either to go to prison or pay the money. If there is a recommendation that recommendation has to be subjected to those that the public protector reports to.³³ Zuma's attitude derives from his reading – or, rather, deliberate misreading – of the decision of the High Court in *DA v SABC*³⁴, an important judgment to which we return below.

By means of a resolution of the National Assembly on 19 August 2014, parliament had established an Ad Hoc Committee to consider the 'Report of the President regarding the security upgrades at his private residence'.³⁵ The ANC and minority parties (DA, EFF, Congress of the People, Inkhata Freedom Party and Freedom Front) were all represented on the Committee in accordance with South Africa's multi-party committee system, one whereby party political representation is proportional to the number of seats a party has in parliament. From very early on in the life of the Committee, stark disagreements emerged between members of the ANC and those of opposition parties, particularly with regard to the appropriate process to be followed. Differences arose over whether witnesses should be called before the Committee to answer questions and provide information or not, over the weight accorded to various source materials³⁶ that the Committee was considering and over whether legal advice could be solicited in order to shed further light on the status of the Public Protector's report or not.³⁷

One of the central areas of dissension – the status of the Public Protector's findings and remedial actions³⁸ – deserves further consideration not only because of the sensitive nature of Chapter Nine institutions but also because the legislature itself has a special duty to uphold the dignity and integrity of these institutions. Opposition parties maintained that the “remedial action” proposed by the Public Protector³⁹ is binding and enforceable on all or-

33 <http://panmacmillan.bookslive.co.za/blog/2015/03/12/mr-president-we-have-a-problem-julius-malema-again-asks-zuma-to-pay-back-the-money/> (last accessed on March 12th 2015).

34 *Democratic Alliance v South African Broadcast Corporation Limited and Others* 2015(1) SA 551 (WCC).

35 This report was tabled into the National Assembly on 14 August 2014.

36 Inter-Ministerial Security Cluster Task Team Report, the Joint Standing Committee on Intelligence Report, the Special Investigating Unit Report and the Public Protector's Reports.

37 Even before such disagreements on methodology, parties had disagreed about the election of the chairperson. The constitutionality of the committee was also contested by COPE, who decided as early as 25 September not to participate in its work. See 'Report of the Ad Hoc Committee to consider Report by the President regarding the security upgrades at the Nkandla private residence of the President' (2014) 2953 available at <http://www.parliament.gov.za/content/ATC.pdf> (last accessed on 8 June 2015).

38 Report of ad hoc committee, note 35, p. 2954.

39 See Public Protector, *Secure in Comfort* report on the investigation into allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the department of public works at and in respect of the private residence of President Jacob Zuma at

gans of state and persons and that the report of the Public Protector superseded all other reports on the Nkandla issue that were placed before the Committee.⁴⁰ The ANC maintained, to the contrary, that the Protector's remedies were neither binding nor enforceable and that the President's own formal report should be the main focus of attention. They argued that the Protector's Report should be relegated to one of four source documents and that it should not be given any more attention than the three other documents consulted.⁴¹

On 26 September 2014, when the Committee failed to reach consensus on the procedure to be followed, opposition party MPs withdrew their support and all walked out of the Committee, having delivered impassioned speeches on the fundamental constitutional precepts of accountability and oversight at stake. The Ad Hoc Committee was now composed exclusively of ANC members and continued according to its desired procedure: it would consider the President's reports and the source documents in its possession but would not open an inquiry, review any reports or call any witnesses, nor invite legal opinion on the status of the Public Protector's remedial acts and recommendations.⁴²

In the Committee's report, drafted by ANC members in the ensuing weeks, a portion of the High Court judgment in the DA v SABC matter was referenced as providing appropriate clarity on the status of the findings and recommendations of the Public Protector⁴³. Schippers J. found that the "powers and functions of the Public Protector are not adjudicative" and that the "findings of the Public Protector are not binding on persons or organs of state"⁴⁴ – the holding of the court that President Zuma had latched onto in his reply to Malema on 11 March (referred to above). Contrary to the view of the Public Protector, the Ad Hoc Committee finally concluded that there was no rational basis to conclude that President Zuma benefited unduly from the upgrades at Nkandla. It dealt with the Public Protector's findings and remedial action by noting that the Public Protector had actually cleared Zuma of many of the serious allegations levelled against him⁴⁵ (such as lying before parliament, benefiting his brother, and so on). With regard to the finding that Zuma and his family had in fact benefitted from non-security related items and should repay expenses incurred, it stated:

Nkandla in the KwaZulu-Natal Province. (2014) available at http://www.publicprotector.org/library%5Cinvestigation_report%5C2013-14%5CFinal%20Report%2019%20March%202014%20.pdf (last accessed 19 October 2015).

40 Ad hoc committee report note 35, p. 2954.

41 These are the Inter-Ministerial Security Cluster Task Team Report, the Joint Standing Committee on Intelligence Report, the Special Investigating Unit Report and the Public Protector's Reports.

42 Ad hoc committee report, note 35, p. 2956.

43 Ad hoc committee meeting report, note 35, at 2957.

44 Ibid.

45 Including that Zuma had lied to Parliament when he said government did not build the house, government build a spaza shop for Mrs Zuma, family benefitted from the project. See ad hoc committee report, note 35, p. 2979.

“The Public Protector in her report has noted that “President Zuma has improperly benefited from the measures implemented in the name of security, which include non-security comforts, such as the Visitor’s Centre, swimming pool, amphitheatre, cattle kraal with culvert, and chicken run (para 10.5.3, p 431). In the judgement of Democratic Alliance v The South African Broadcasting Corporation Limited and Others (Case No:12497/2014), WC High Court Judge Schippers referred to the nature and extent of powers of the Public Protector and stated as follows: “...further...unlike a decision of a court, a finding of the Public Protector is not binding on persons and organs of state. If it was intended that the findings of the Public Protector would be binding, the Constitution would have said so”. Regarding the above, the Committee thus finds that the Constitution, section 167 (4) e specifies that only the Constitutional Court can decide that Parliament or the President has committed a constitutional violation⁴⁶.”

On 13th November, the Report of the Ad Hoc Committee⁴⁷ appeared on the National Assembly’s agenda for vote and passage. This session again made parliamentary history in terms of length and vibrancy. Minority parties spent seven hours filibustering, raising motion after motion, and ostensibly hoping to delay the vote by tiring out ANC MPs so that a quorum would not be sustained. Parliament was sent into disarray and Speaker Mbete again called for riot police to enter the National Assembly. DA members blocked the path of the police, saying their presence was a “violation of the constitutional order” and of the “social contract”⁴⁸. With the ANC’s majority holding firm, the National Assembly eventually passed a vote and adopted the report.

What might these events suggest in terms of the health of parliament and the practical workings of representative democracy? The failure of the Committee to reach consensus on the process to be followed and the consequent walk-out of every single opposition party reflect a breakdown within the committee system and of representative democracy. Parliament’s own website declares that the role of the Committee is to “...ensure executive accountability to an informed parliament. Committees form an important space for intervention from minority parties and the public, so increasing opportunity for informed public debate on policy and legislation⁴⁹.” When political parties do not participate in deliberations, ‘the people’ lose the opportunity to make an input into both legislative process and executive oversight.

The voting session on the Report in the National Assembly was highly unusual. Riot police were called into a parliamentary house, a forum that is meant to serve as a model for debate and exchange in orderly fashion. Opposition parties were arguably making a valid

46 Ad hoc committee meeting report, note 35, p. 2980.

47 Ad hoc committee meeting report, note 35..

48 See ‘Parliament diary scenes of shame’ available at <http://www.dailymaverick.co.za/article/2014-11-14-parliament-diary-scenes-of-shame/#.VQnKRGYy22w> (last accessed on 8 June 2015).

49 http://www.parliament.gov.za/live/content.php?Item_ID=300 (last accessed on 8 June 2015).

point, namely that they agreed neither with the outcome of the report nor with the committee's processes. The Report, which fails to properly probe the President's conduct with sufficient vigour, further relying on the unenforceability of the Public Protector's recommendations rather than on the substance of her findings, demonstrates a practical weakness of South Africa's system of representative democracy: it is too costly for majority party MPs to ask difficult questions of senior party members, especially of the President.

The Committee deliberations on the day when opposition parties withdrew participation demonstrated the ANC MPs' single-minded determination to cover up for Jacob Zuma and the weakness of institutions such as parliament in the face of such dogged determination to do so. The DA, EFF, FF and COPE however all powerfully penetrated ANC positions at every turn, presenting impassioned expositions on accountability and transparency with attention to both detail as well as the bigger context and hitting the ANC in the solar plexus. The predominant underlying tone of the ANC's contribution to the debate was that they had won successive elections and should not have to play second fiddle to recommendations from the Public Protector. As was put rhetorically by a senior ANC MP: can the Public Protector be treated as more important than we who have been elected to parliament by the people?⁵⁰

The debate on the status of the Public Protector itself was once again vigorously pursued during the vote in the National Assembly. Opposition parties suggested that the rightful constitutional status of the Office of Public Protector was being undermined not only by Zuma but also by the Ad Hoc Committee. They sought to interrogate further the Committee's reliance on the High Court judgment invoked, arguing that while Judge Schippers had stated that recommendations of the Public Protector are neither binding nor enforceable, the executive - according to that same judgment - still has a duty to explain why they are not being taken into account and implemented⁵¹. Schippers J. made the crucial point that "...the fact that the findings of and remedial action taken by the Public Protector are not binding decisions does not mean that these findings and remedial action are mere recommendations, which an organ of state may accept or reject." To not accept the remedial action of the Public Protector, the state must have "cogent" reasons and that such a decision would be an exercise of public power that, in turn, must be rational.⁵²

The effect of the decision in the High Court - which is the subject of an appeal - is that in the Nkandla case, the government, and President Zuma specifically, must have cogent,

50 *Richard Calland*, 'Nkandla fiasco reminiscent of arms deal mess', *Mail & Guardian* 9 October 2014, available at <http://mg.co.za/article/2014-10-09-nkandla-fiasco-reminiscent-of-arms-deal-mess>. (Last accessed on 22 February 2015).

51 'Minutes of proceedings in the National Assembly', pp. 3313-3314 available at http://www.parliament.gov.za/live/commonrepository/Processed/20141121/593635_1.pdf (last accessed on 21 March 2015).

52 See also Serjeant at the Bar 'SABC case helps define the public protector's powers', *Mail & Guardian* 31 October 2014. Available at <http://mg.co.za/article/2014-10-30-sabc-case-helps-define-the-public-protectors-powers> (Last accessed 31 Oct 2014).

rational reasons for not executing the remedial action set out by the Public Protector in her Nkandla report, ‘Secure in Comfort’. Accordingly, President Zuma is still required to provide rational grounds for refusing to implement the Public Protector’s report. The explanation offered by the ANC was that inter-ministerial and other similar reports had found that Zuma was not in breach of the law; the opposition of course countered that such reports were government reports and as such did not constitute “rational grounds”.

Furthermore, opposition parties argued that the ANC could not rely on the above-mentioned DA v SABC judgment alone and that the committee was required to engage with the substance of the Public Protector’s report⁵³. Given the political circumstances at hand, it is unlikely that there will ever be consensus on this matter within the National Assembly. But what is most striking from both the Committee and Assembly debates is the emerging disturbing fault-line in contemporary South African politics: the ANC’s growing contempt for the constitution and its increasingly muscular complaint about counter-majoritarianism. While the ANC may be fully aware that the Constitution is the supreme law of the land and that a constitutional body such as the Public Protector therefore has significant authority, this at times does not provide a satisfactory *political* answer to the issues at stake. In effect, the ANC is emphasizing the counter-majoritarian impact of the constitution and its various institutional manifestations, whether in the form of the courts overturning government laws or policy or the Public Protector ordering “remedial action” to be taken by the executive that is not to the President’s liking.

A positive consequence of the fracas around parliament’s treatment of the Nkandla matter is that important questions about the relationship between Chapter Nine institutions and government – and what is at stake when recommendations of Public Protector are essentially ignored – have been raised. Given the sensitive nature of the Office of Public Protector, parliament has a special duty to give it unequivocal support, as with other Chapter Nine institutions. In this case, it was minority party MPs who rose to this call, making impressive arguments around what holding the executive to account means in actual practice. By implication, the bigger question of parliament’s role and authority in a constitutional democracy has been placed on the agenda again.

State of the Nation address (SONA), 12 February 2015

The lead-up to President’s Zuma’s State of the Nation Address in February 2015 was marked by anticipation of another parliamentary disruption by EFF members. ANC members forewarned Malema that questions relating to the President and Nkandla would not be tolerated as “convention” does not allow for questions during SONA. Malema offered the following in response:

“We don’t comply with conventions that are not working for our people, that convention only applies to a President who respects Parliament and who takes Parliament

53 Ibid.

seriously and who consistently accounts to Parliament. The convention also is that the President has never dodged answering questions, so if he can break that convention, then we can break convention of not asking questions. We are learning from him... We waited the whole of three terms last year when we were told that: the President is coming, the President will come when there is order, the President was here long before and why do you want to subject the President to questions. We got excuses from Parliament since President Zuma appeared in Parliament from the last time.”⁵⁴

At the opening of parliament on 12 February 2015, Zuma was to address government's achievements over the past year and outline its proposed plan of action for the year ahead and any law reform. Before he could take to the podium, however, Malema lived up to the heightened sense of anticipation that had been growing in the media all week, rising to offer a point of order (as opposed to a question) as allowed by Joint Rule 14 of Parliament⁵⁵, which grants the option for points of order to be raised without interruption. Malema again demonstrated that his party would engage in the ‘politics of parliamentary disruption’ for as long as Zuma failed to account properly for Nkandla.

Speaker Mbete then made a ruling that the point of order would be disallowed, deeming it to be irrelevant to the proceedings of the day. One after another, EFF MPs rose to defy the ruling and continue to raise the same point of order. Concluding that these members of the EFF were disrupting the National Assembly, the Speaker then once again called in riot police⁵⁶. Armed policemen, not in uniform and dressed in the standard uniform of parliamentary staff (black trousers, with white shirts), arrived immediately and proceeded to remove all EFF MPs. There was an unseemly and violent commotion. Some who tried to resist were physically assaulted⁵⁷. The DA, the largest opposition party, left the House in

54 Interview with Malema on Radio 702 on 10 February 2015 available at <http://www.702.co.za/articles/1672/sona2015-eff-says-plan-is-still-to-ask-questions> (last accessed on 8 June 2015).

55 Joint Rule 14U states that: “A member may speak [during a joint session such as SONA] (a) when called upon to do so by the presiding officer; or (b) to a point of order.”

Joint Rule 14L states that at a Joint Sitting a member “may only speak from the podium, except to raise a point of order or a question of privilege”.

56 The Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, 2004 empowers the Speaker to call in police if any person disrupts the Assembly. However, there is disagreement amongst commentators about whether it was justified under the circumstance. Some also argue that the police conducted themselves in an undue manner.

57 See: ‘EFF disrupts SONA, frog marched from Parliament’ available at <http://www.enca.com/south-africa/eff-disrupts-sona-ordered-leave-parliament> (last accessed on 20 March 2015).

‘Malema calls on ANC to account for Parliamentary chaos’ available at <http://m.ewn.co.za/2014/11/14/Malema-ANC-must-be-held-responsible-for-degeneration-of-Parly> (last accessed on 20 March 2015).

‘One EFF MP taken to hospital: Malema #SONA2015’ available at <http://www.timeslive.co.za/politics/2015/02/12/one-eff-mp-taken-to-hospital-malema-sona2015> (last accessed on 20 March 2015).

protest soon after, having raised as another point of order the question of principle as to whether the security officials that had entered and forcibly removed the EFF MPs were police or not. After prevaricating initially, Speaker Mbete conceded that police were involved, whereupon DA parliamentary leader Musi Maimane led his party from the chamber.

Tensions within the Assembly had also played out in a separate issue that transpired even before Malema and EFF MPs raised the point of order. An hour or so before SONA began, parliament's cellular phone signal was disabled so that those within the precinct could not send or receive phone messages, make or receive calls, or access the internet. The scrambling or disabling of the signal in parliament directly breaches constitutionally protected rights to receive and impart information⁵⁸. The DA, along with the EFF and other parties, objected strongly to the state of the affairs and demanded to know who was responsible for the shut-down. It was pointed out that a violation of the constitutional order, freedom of expression, and the right to access the proceedings of Parliament was taking place. The signals were eventually reinstated, according to procedures that have not yet been satisfactorily explained.

This was arguably the most dramatic opening of parliament in the country's history, one that was watched closely by many South Africans on television and debated voraciously at dinner tables and in the media for many weeks after. So what does this highly dramatic debacle suggest about the state of South Africa's representative democracy? In effect, the EFF disobeyed the authority of the Speaker of the National Assembly by repeating a point of order that she had explicitly disallowed. Arguably, the EFF's refusal to obey the Speaker's ruling undermined parliament in its institutional capacity, since parliament has a legitimate right to engage in its business and carry out its mandate free from disobedience and disruption. By seeking to disrupt the State of the Nation Address, opposition MPs from the Economic Freedom Fighters, it could be argued, abused parliamentary rules and convention to the point where the constitutional rights of other MPs were infringed. Although, it should be added that it is the absence of consensus about such conventions – that close the gap between the formal rules and the contested politics of an increasingly adversarial parliament – that is a major contributory factor.

Importantly, the fact that the two largest opposition parties – the DA and EFF - were absent from SONA highlights the dysfunctionality of parliament on this major occasion. The blocking of signals during SONA also demonstrates weaknesses in parliament's understanding of its own role⁵⁹. The Speaker is required to take direct responsibility for proceedings in the house; however, it was the State Security Services that appeared to be in control

58 See sections 16 and 32 of the Constitution. See also CASAC media statement on SONA available at <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=959623&sn=Detail&pid=71619> (last accessed on 8 June 2015).

59 The Powers Privileges and Immunities of Parliament and Provincial Legislatures Act of 2004 makes it clear that police or other public order forces may only enter Parliament if there is an 'imminent danger' to life or property. The response of the security officials would appear to be entirely disproportionate to the problem of removing recalcitrant MPs. SEE CASAC Media Statement

of communications and who by blocking signals arguably violated constitutional rights of access to information and freedom of expression.

Once again, a likely positive spin-off from the ‘blocked signal affair’ at SONA will come in the form of concrete court judgments on the use of jamming devices in parliament and on the illegality of interrupting broadcasts on account of disruptions in parliament⁶⁰. The SONA case also brings to the fore various significant constitutional issues which are still being contested. Put in a crude manner, EFF members, from their point of view, are being asked to be faithful to the rules and decisions of the National Assembly when President Jacob Zuma himself refuses to properly account for the steps he is taking to redress Nkandla, despite an official report and recommendations from the Public Protector. The Office of the Speaker of National Assembly has itself been compromised, and MPs will arguably be less likely to have faith in her rulings, particularly when they are following a course of parliamentary disruption as a means to draw attention to Zuma's lack of accountability. The statement by the Council for Advancement of the South African Constitution (CASAC) sums up the dilemma at hand:

“The State of Nation Address is the occasion at which the President, as head of the national executive, reports to Parliament on his government's programme. To deny the President this opportunity is to undermine the accountability function of Parliament. If the President is unable to set out the programme of his Government, Parliament will have no basis on which to subsequently hold him to account...the President has not yet provided adequate answers to questions that were posed to him in August last year relating to the Public Protector's findings and remedial action on Nkandla. This, too, represents a failure in constitutional accountability that must be urgently rectified by the President.”⁶¹

Furthermore, in recent times the EFF successfully used the courts to challenge the supposed impartiality of decisions of the presiding Speaker during Zuma's previous State of the Nation Address in June 2014. In *Malema and Another v Chairperson of the National Council of Provinces and Another*⁶², Malema challenged the presiding officer, Thandi Modise's ruling that it was “unparliamentary and did not accord with the decorum of the House” for him to say in parliament that the ANC government had massacred mine workers at Marikana in that the police who killed them represented the ANC government. Modise had asked Malema to withdraw his statement, arguing that he was effectively accusing members of the National Assembly of being mass murderers since many members of the Assembly were also

on SONA issued on 13 February 2015 available at <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=959623&sn=Detail&pid=71619> (last accessed on 8 June 2015).

60 See *Primedia Broadcasting, a Division of Primedia (Pty) Ltd and Others v Speaker of the national Assembly and Others* [2015] ZAWCHC 24.

61 CASAC statement, note 59.

62 *Malema and Others v Chairperson of the National Council of Provinces and Another* (12189/2014 [2015] ZAWCH 39 15 April 2015).

members of the executive. Malema had refused to retract his statement and was subsequently ordered to leave the House. Modise maintained that the only manner in which an MP could accuse fellow MPs of criminal activity according to the rules of parliament was by way of a substantive motion containing a properly motivated claim. Malema, on the other hand, argued that Modise's interpretation of his statement not only impinged upon his constitutional free speech guarantee but that Modise as presiding officer was also 'abus(ing) her powers to protect the governing party against lawful criticism in the parliamentary debate'⁶³.

The court ultimately concluded that Modise's interpretation of what Malema had said was unwarranted as it would place severe limitations on free speech and future debates in the Assembly if such an expansive meaning was ascribed to the term 'government' in the present case.⁶⁴ Importantly, the court emphasised the need for the rules of parliament to safeguard free speech and robust debate - a fundamental requirement of the Constitution.⁶⁵

With regard to the conduct of the Speaker during parliamentary sessions, the court recognized that specific skills and expertise were needed to oversee parliamentary debates – to which the courts should afford due deference rather than readily substitute their own opinions.⁶⁶ However, the court emphasised the trite principle that had been previously articulated in *Lekota and Another v Speaker of the National Assembly and Another*⁶⁷, that “the Speaker although affiliated to a political party, was required to perform the functions of that office fairly and impartially in the interests of the National Assembly and Parliament” and that in maintaining order and applying parliamentary rules, he or she ‘should jealously guard and protect the members’ rights of political expression entrenched in the Constitution’⁶⁸.

Conclusion: Institutional Renaissance or Populist Fandango?

Like many parliamentary, Westminster-style democracies, South Africa's post-1994 parliament has struggled to cope with the dominance of its ruling party, the ANC. As a result, the Constitutional mandate of the National Assembly has been weakened over time. Since the 2014 national election, however, new energy and vitality has been injected into the proceedings of the House. South Africa's representative institution has entered a new phase with a stronger opposition, a weaker ruling party, and a ‘new kid on the block’ in the form of Julius Malema and his small but assertive party of ‘Economic Freedom Fighters’, a political leader who is as courageous and incisive when tackling the ANC as he is effective in

63 Ibid at par 6.

64 Ibid at par 58 -59.

65 Ibid at par 10.

66 Ibid at par 19, 45, 60.

67 *Lekota and Another v The Speaker of the National Assembly and Another* (14641/12) [2012] ZAWHC 385 (last accessed on 11 December 2012).

68 Ibid at par 10.

harvesting media attention and proffering dangerously vacuous populist policy prescriptions.

The EFF's politics of parliamentary disruption arises in a context where President Jacob Zuma is widely perceived as being corrupt and unaccountable, with several issues clouding his Presidency. The crisis in legitimacy surrounding the President has in practice been playing out in parliament, something which has placed this crisis firmly on the public map. Since the April 2014 elections, minority parties have also more actively made use of the rules of parliament in order to hold Zuma to account for the unlawful public expenditure on his private homestead, Nkandla.

The unresolved issue at stake, however, remains that the politics of parliamentary disruption also undermines the functionality and dignity of parliament. The EFF may well have been staging such theatricalities as a tactic to get votes and media attention. By seeking to disrupt SONA, for example – an opportunity where the President, as head of the national executive, reports to parliament on government's programmes – the right of both parliament and individual MPs to debate, to engage with and to hold the executive to account was jeopardised⁶⁹.

Notwithstanding the above, President Zuma has not to date provided satisfactory answers to questions that were posed to him in parliament in August 2014 relating to the Public Protector's findings and proposed remedial action on Nkandla. This in itself represents a failure in constitutional accountability, one which the President needs to rectify⁷⁰. During Question Time on 11 March 2015, Zuma again emphasised that the Public Protector's findings on Nkandla are "recommendations" and not "judicial rulings", and that he will not pay back money until the Police Minister has decided whether he should, and if so, how much."⁷¹ This suggests that the Nkandla issue may well continue to haunt parliamentary processes in the future.

Despite parliament's constitutional mandate to represent public views and to monitor government spending and policy execution, the institution has already in the past appeared lacklustre and impotent with regard to several major oversight matters, suggesting that South Africa's set of constitutional guarantees and accompanying parliamentary rules seeking to promote participatory and representative democracy, however strong in form, depend in practice on the extent to which the political environment allows for their survival and vigour. The ANC's majority in parliament will most likely, for example, ensure that its own position – rather than that of the opposition – will prevail on Nkandla.

On a positive note, parliamentary events since the 2014 election suggest that new life is being breathed into many of South Africa's constitutional precepts and rules. Minority

69 See CASAC statement *op cit* note 44.

70 See CASAC statement *op cit* note 44.

71 See <https://pmg.org.za/hansard/20502/> accessed on 8 June 2015 also see 'Nkandla: Zuma stands his ground' available at <http://ewn.co.za/2015/03/12/Parly-session-Zuma-sets-the-record-straight> (last accessed on 8 June 2015).

party MPs have sought to hold Zuma and the executive to account with sustained doggedness and relevant debates have since been taking place on issues such as the content and occurrence of Question Time, the nature of the Speaker's role, executive accountability, the appropriate methodology for exercising parliamentary oversight and the role and status of Chapter Nine Institutions.

This evidence indicates that there is something of an institutional renaissance. The supreme irony is that it is a uncompromisingly populist party which is now breathing new life into parliament – perhaps suggesting at a further level that ‘polite participatory democracy’ may not be effective when faced by a Zumarite ruling ANC. The EFF is likely to proceed with its militant posture in parliament at least until the local government elections in 2016. This contest will present a critical test for whether Zuma and the ANC are losing support at municipal level in favour of the EFF and the DA. Leading up to those elections, opposition parties may want to ensure that there is a political cost to be paid by the ANC for using its majority in a cynical fashion, as demonstrated by its MPs during the Nkandla debate on November 2014 and discussed earlier in this paper. The more the ANC is forced to rely on the power of its numbers rather than on its arguments, the weaker it will look within the framework of ‘proper’ parliamentary debate. Yet it remains to be seen whether the rules of engagement are currently undergoing a paradigm shift or whether the antics of the EFF is simply a populist parliamentary fandango.

Opposition parties may still have a great deal further to go if they are to turn improved parliamentary engagement into electoral progress, whether by adherence to the spirit of the constitution and parliamentary rules or whether by switching to a newfound populist and more volatile approach, one which arguably by itself may end up undermining the notion of democratic constitutionalism.

Looking towards the future, South Africa's parliament in either case is likely to become more relevant to the citizenry and therefore more politically important, regardless of its structural impediments. This in turn suggests, as this paper has argued, that the answers to questions around how to reinvigorate representative and participatory forms of democracy are to be found not in constitutional law and governance, but in politics and in the ability of opposition political representatives to use democratic institutions to hold the executive to account on things that matter most to the populace.

Constitutional Reform in Tanzania: Developing Process and Preliminary Results

By Juliana Masabo* and Ulrike Wanitzek**

Abstract: *The United Republic of Tanzania, consisting of the two partners in the Union, Mainland Tanzania (formerly Tanganyika) and Zanzibar, is undertaking comprehensive constitutional reforms. The reform process, once finalised, will replace the current constitution, the Constitution of the United Republic of Tanzania, 1977. The reform process has been carried on since the enactment of the Constitutional Review Act of 2011. Two successive drafts for a new constitution were produced by the Constitutional Review Commission in 2013 followed by a Proposed Constitution which was produced by the Constituent Assembly in 2014. A referendum for validation of the Proposed Constitution has not yet been conducted at the time of writing this article.*

This article provides an overview of the reform process and its preliminary results. It starts with a brief historical background of constitution-making in Tanzania. The specific stages of the constitutional review process and selected provisions of the Constitution of 1977, the two Draft Constitutions of 2013 and the Proposed Constitution of 2014 are then compared with each other. The comparison includes the suggested structure of the Union between Mainland Tanzania and Zanzibar, national values, general constitutional principles such as the sovereignty of the people, the supremacy of the constitution and the separation of powers, the status of international and regional law, human rights, citizenship and the electoral process.

This comparison shows that in some regards the Draft Constitutions and the Proposed Constitution made equally significant proposals for reform. However, some progressive provisions contained in the Draft Constitutions were not retained in the Proposed Constitution. The article discusses these points of contention.

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A. Introduction

The United Republic of Tanzania,¹ consisting of the two partners in the Union, Mainland Tanzania (formerly Tanganyika) and Zanzibar, is approaching the end of a constitutional reform process which has been carried on since the coming into force of the Constitutional Review Act in 2011.² This Act was the basis for a comprehensive reform of the Constitution of the United Republic of Tanzania of 1977 (Constitution, 1977).³ Two successive drafts for a new constitution were produced by the Constitutional Review Commission on 3 June 2013 (First Draft Constitution)⁴ and 30 December 2013 (Second Draft Constitution).⁵ The Constituent Assembly then published a “Proposed Constitution” on 2 October 2014.⁶ A referendum on the Proposed Constitution⁷ was originally scheduled to take place

- 1 According to the Population Census held in 2012, the population consists of 44,928,923 persons of whom 43,625,354 persons live in Tanzania Mainland and 1,303,569 persons live in Zanzibar; the land area of Tanzania Mainland is 883,600 km² and of Zanzibar 2,500 km² (total: 886,100 km²), *United Republic of Tanzania, National Bureau of Statistics, Ministry of Finance, Tanzania in Figures 2012*, Dar es Salaam, 2013, pp. iii, 7, http://www.nbs.go.tz/nbs/takwimu/references/Tanzania_in_figures2012.pdf. The national and official language, as well as lingua franca, is Kiswahili, while English is also an official language. Administratively, the country is subdivided into 30 Regions five of which are in Zanzibar, and 169 Districts, *United Republic of Tanzania, Government Portal*, <http://www.tanzania.go.tz/home/pages/68>; *Legal and Human Rights Centre/Zanzibar Legal Services Centre, Tanzania Human Rights Report 2013*, Dar es Salaam, Zanzibar 2014, pp. 11, 305, <http://www.humanrights.or.tz/downloads/tanzania-human-rights-report-2013.pdf>.
- 2 Constitutional Review Act, No. 8 of 2011, in force since 1 December 2011, as amended, Cap. 83 R. E. (Laws of Tanzania. Revised Edition) 2014, http://www.constitutionnet.org/files/constitutional_review_act_amended_up_to_31_dec_2013-cap_83-latest_edition.pdf.
- 3 Constitution of the United Republic of Tanzania, 1977, as amended, Cap. 2 R. E. 2005, http://www.tanzania.go.tz/egov_uploads/documents/Katiba%20ya%20Jamhuri%20ya%20Muungano%20wa%20Tanzania%20_English%20Version_%202009.pdf; <http://www.wipo.int/edocs/lexdocs/laws/en/tz/tz008en.pdf> (in English); http://www.zanzibarassembly.go.tz/katiba_1.pdf and http://www.zanzibarassembly.go.tz/katiba_2.pdf (in Kiswahili).
- 4 First Draft Constitution of 3 June 2013: Rasimu ya Katiba ya Jamhuri ya Muungano wa Tanzania ya Mwaka 2013, http://www.tzonline.org/pdf/RASIMU_YA_KATIBA_2013.pdf (in Kiswahili). An unofficial English translation of the First Draft Constitution is accessible at http://www.constitutionnet.org/files/tanzania_draft_constitution_2013-english.pdf.
- 5 Second Draft Constitution of 31 December 2013: Rasimu ya Katiba ya Jamhuri ya Muungano wa Tanzania, <http://www.kituoachakatiba.org/sites/default/files/legal-resources/RASIMU%20YA%20KATIBA%20YA%20JAMHURI%20YA%20MUUNGANO%20WA%20TANZANIA.pdf> (in Kiswahili); or http://www.sheria.go.tz/index.php?option=com_docman&task=cat_view&Itemid=68&gid=44&orderby=dmdate_published (in Kiswahili). An unofficial English translation of the Second Draft Constitution is in circulation.
- 6 Proposed Constitution of 2 October 2014: Rasimu ya Katiba Inayopendekezwa, http://www.bungemalum.go.tz/files/publications/attachments/KATIBA_INAYOPENDEKEZWA_sw.pdf (in Kiswahili); or http://www.sheria.go.tz/index.php?option=com_docman&task=cat_view&Itemid=68&gid=44&orderby=dmdate_published (in Kiswahili). An unofficial English translation of the Proposed Constitution is in circulation.
- 7 Section 28B of the Constitutional Review Act, 2011, read together with the Referendum Act, No. 11 of 2013, especially Part VI (Sections 35-42).

on 30 April 2015 but was postponed to a later date which was not yet determined at the time of writing this article.

This article provides an overview of the constitutional reform process and its preliminary results. After a brief survey of the historical constitutional background of Tanzania (B.) and the different stages of the constitutional review process since 2011 (C.), selected provisions of the Constitution of 1977, the two Draft Constitutions of 2013 and the Proposed Constitution of 2014 are compared to each other (D.). The comparison includes the suggested structure of the Union between Mainland Tanzania and Zanzibar, national values, general constitutional principles such as the sovereignty of the people, the supremacy of the constitution and the separation of powers, the status of international and regional law, human rights, citizenship and the electoral process. This comparison shows that in some regards the Draft Constitutions and the Proposed Constitution made equally significant proposals for reform. However, in other regards, progressive provisions contained in the Draft Constitutions were not retained in the Proposed Constitution. The article discusses these points of contention.

B. Brief Overview of Tanzania's Constitutional History

I. Before the Union

1. Tanganyika

From 1 January 1891, the areas which are now Mainland-Tanzania, Burundi and Rwanda came formally under German colonial power as the Crown Colony of German East Africa (Kronkolonie Deutsch-Ostafrika), after the ground had been prepared since 1885 by the German East Africa Company (Deutsch-Ostafrikanische Gesellschaft) with the authorisation of the German Government.⁸ When Germany lost its colonial possessions after the First World War,⁹ Tanganyika came under British administration¹⁰ and the British colonial government was established under the Tanganyika Order-in-Council, 1920.¹¹ In 1922, Tan-

8 On the colonial legal history of German East Africa, see *Harald Sippel*, *Arbeit und Recht in Deutsch-Ostafrika (1891-1918)*. Experimentelles Arbeits- und Steuerrecht zur Lösung der kolonialen Arbeiterfrage, Habilitationsschrift, Rechts- und Wirtschaftswissenschaftliche Fakultät, Universität Bayreuth 2005, pp. 27 ff., 45.

9 Under Article 119 of the Peace Treaty of Versailles of 28 June 1919 which entered into force on 10 January 1920, <http://www.documentarchiv.de/wr/vv01.html>.

10 While Burundi and Rwanda came under Belgian administration.

11 This Order-in-Council was proclaimed on 25 September 1920 and came into force on 28 September 1920. On the colonial legal history of Tanganyika under British rule and on the early period of independence, see *J. S. R. Cole/W. N. Denison*, *Tanganyika. The Development of Its Laws and Constitution*, London 1964; *H. F. Morris/James S. Read*, *Indirect Rule and the Search for Justice. Essays in East African Legal History*, Oxford 1972; *Kenneth Roberts-Wray*, *Commonwealth and Colonial Law*, London 1966.

ganyika became a British Mandate Territory under the League of Nations,¹² and in 1946, it became a Trust Territory under the United Nations.¹³

Tanganyika became independent on 9 December 1961. This was on the formal basis of the (British) Tanganyika Independence Act, 1961 and the Tanganyika (Constitution) Order in Council, 1961, passed by the British colonial government, through which Tanganyika's first constitution, the Independence Constitution, 1961 was enacted.¹⁴ One year later, on 9 December 1962, Tanganyika became a Republic. The Republican Constitution, 1962 was passed by the National Assembly, which was converted into a Constituent Assembly for this purpose.¹⁵

2. Zanzibar

Zanzibar was an Oman-Arab Sultanate from the 17th century and was seat of the Sultan of Muscat (Oman and Zanzibar) from 1832. It became a separate Sultanate in 1861 and came under British colonial rule in 1890 as a British Protectorate.¹⁶ Zanzibar became independent on 10 December 1963, with an Independence Constitution of the same year (Zanzibar Independence Constitution, 1963). Shortly thereafter, on 12 January 1964, the Sultan's government was deposed by a revolution¹⁷ and the People's Republic of Zanzibar was established. The Zanzibar Independence Constitution, 1963 was repealed and replaced by a number of

12 Article 22 of the Covenant of the League of Nations, http://avalon.law.yale.edu/20th_century/leagov.asp.

13 Articles 75 ff., 77 in Chapter XII of the Charter of the United Nations; Trusteeship Agreement for the Territory of Tanganyika, approved by the General Assembly of the United Nations on 13 December 1946, http://untreaty.un.org/unts/1_60000/1/7/00000314.pdf; see *Bernard T. G. Chidzero*, *Tanganyika and International Trusteeship*, London 1961.

14 See *Cole/Denison*, note 11, pp. 15 ff.

15 *Issa G. Shivji/Hamudi I. Majamba/Robert V. Makaramba/Chris Maina Peter*, *Constitutional and Legal System of Tanzania. A Civics Sourcebook*, Dar es Salaam 2004, p. 48; *Kituo cha Katiba: Eastern Africa Centre for Constitutional Development*, *Review of the Constitutional Process and the Draft Constitution of Tanzania 2013*, p. 16, http://www.constitutionnet.org/files/report_on_the_tanzania_draft_constitution_jan_2014_0.pdf.

16 *James S. Read*, *Kenya, Tanzania, Uganda. Bibliographical Introduction to Legal History and Ethnology*, Bruxelles 1968, p. 7.

17 *Chris Maina Peter/Nayla Ahmed Sultan*, *The Constitution, Structure of the State and Constitutional Development in the United Republic of Tanzania and Zanzibar*, in: *Chris Maina Peter/Immi Sikand* (eds.), *Zanzibar: The Development of the Constitution, Zanzibar*, 2011, p. 45 footnote 17 with further references.

Presidential Decrees,¹⁸ especially the Constitutional Decree No. 5 of 1964, passed on 25 February 1964.¹⁹

II. *The Union and thereafter*

1. Union Constitutions

On 26 April 1964 the Republic of Tanganyika and the People's Republic of Zanzibar united to form the United Republic of Tanganyika and Zanzibar.²⁰ With regard to the country's constitutional history, this marked the beginning of "the interim period – i.e. from the Union Day to the commencement of the Permanent Constitution in 1977".²¹ During this period, in Issa G. Shivji's view, two documents represented the Constitution of the United Republic, i.e. the Union of Tanganyika and Zanzibar Act, 1964²² and the Interim Constitution. The Republican Constitution of Tanganyika of 1962 was modified to become the Interim Constitution of the United Republic of Tanganyika and Zanzibar, 1964²³ and subsequently the Interim Constitution of the United Republic of Tanzania, 1965 which entered into force on 9 December 1965.²⁴

18 See *Peter/ Sultan*, note 17, p. 63; *Romuald Haule*, Popular Participation in Constitution-Making and Legitimacy of the Constitution: The Experience of Tanzania, *Journal of African and International Law* 5 (2012), pp. 1, 17; *Mahadhi Juma Maalim*, The United Republic of Tanzania in the East African Community: Legal Challenges in Integrating Zanzibar, Dar es Salaam 2014, p. 84.

19 Section 2 of the Constitutional Decree No. 5 of 1964 provided: "The People's Republic of Zanzibar is a Democratic State dedicated to the rule of law. The President as the Head of State, validates legislation by his assent. As an interim measure, legislative power resides in the Revolutionary Council and is exercised on its behalf and in accordance with its laws by the President. The principal executive power is exercised on behalf of the Revolutionary Council and with 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 law and public policy."

20 *Roberts-Wray*, note 11, p. 765; *Issa G. Shivji*, Tanzania: The Legal Foundations of the Union in Tanzania's Union and Zanzibar Constitutions. Professorial Inaugural Lecture, Dar es Salaam 1990, p. 3; *Chris Maina Peter/Haroub Othman* (eds.), *Zanzibar and the Union Question*, Zanzibar, 2006, p. v; *Maalim*, note 18, pp. 59 ff.

21 *Shivji*, note 20, p. 16.

22 Act No. 22 of 1964 (Cap. 557); it incorporated the "Articles of Union", i.e. the treaty between Tanganyika and Zanzibar, of 22 April 1964 as Schedule, *Shivji*, note 20, p. 3.

23 *Maalim*, note 18, p. 84.

24 *Maalim*, note 18, p. 84; *Haule*, note 18, p. 23. This Constitution continued to lack a Bill of Rights. It provided for a single party system, Article 3 (1) of the Interim Constitution, 1965. The Zanzibar Independence Constitution, 1963 contained a Bill of Rights, see *James S. Read*, Human Rights in Tanzania, in: *Colin Legum/Geoffrey Mmari* (eds.), *Mwalimu. The Influence of Nyerere*. London 1995, pp. 125, 131. The programme of the socialist single party, based on the Arusha Declaration of 1967, was formally anchored in the Constitution in 1975, *Chris Maina Peter*, Constitution-Making in Tanzania: The Role of Civil Organisations, in: *Kivutha Kibwana/Chris Maina Peter/Nyangabyaki Bazaara*, *Constitutionalism in East Africa: Progress, Challenges and Prospects* in

The Union structure provided for a two-government structure, with a Union government, dealing also with Mainland Tanzania matters, and another government for Zanzibar.²⁵ In 1977, the Interim Constitution, 1965 was replaced by the first permanent Constitution of the United Republic of Tanzania, which entered into force on 26 April 1977. This Constitution was formally adopted by a Constituent Assembly which was identical to the National Assembly.²⁶ Following criticisms, a Bill of Rights was incorporated into the Constitution in 1984,²⁷ with effect from 1 March 1988.²⁸

As a consequence of both internal and external pressures and following further constitutional debates in the early 1980s,²⁹ a process of political democratisation and economic liberalisation began in the mid-1980s.³⁰ The existing socialist planned economy was gradually transformed into a market economy, and in 1992 a multi-party system was introduced into

1999, Kampala 2001, p. 23. The single party was originally the Tanganyika African National Union (TANU) and, after TANU's unification with Zanzibar's Afro-Shirazi Party (ASP) on 5 February 1977, the joint single party Chama cha Mapinduzi (CCM), i.e. "party of the revolution".

- 25 Due to this unique structure, Mainland Tanzania has no constitution of its own but shares the constitution of the Union, while Zanzibar has its own constitution; see below, B. II. 2; *Dieter Schröder*, Tanzania, eine Herausforderung an die europäische Verfassungslehre, Afrika Spectrum 1969, pp. 31-43; *Yash Ghai*, Tanzania, in: International Encyclopaedia of Comparative Law, Vol. 1, Tübingen etc. 1973, T1-T8; *Yash Ghai*, Constitutional Asymmetries: Communal Representation, Federalism, and Cultural Autonomy, in: Andrew Reynolds (ed.), The Architecture of Democracy. Constitutional Design, Conflict Management, and Democracy, Oxford 2002, p. 156; *Peter/Sultan*, note 17, p. 45 footnote 18 with further references.
- 26 *Shivji*, note 20, p. 59. According to *Peter* 2001, note 24, p. 25, factually, all decisions were in the hands of the powerful single party, Chama cha Mapinduzi (CCM, see note 24).
- 27 Constitution (Fifth) Amendment Act, 1984 (No 15 of 1984); see *Peter* 2001, note 24, at his footnote 29; *Read*, note 24, pp. 125 ff. Until then, the Constitutions of Tanganyika and the Interim Constitutions of the Union had not contained a Bill of Rights (but Zanzibar's very short-lived Independence Constitution, 1962 had had one). Different from other former British colonial territories in Africa which became independent after Tanganyika, such as Uganda (1962), Kenya (1963) and Zanzibar (1963), the Tanzanian Independence Constitution, 1961 was without a Bill of Rights, *Read*, note 24, pp. 128, 129. According to *Read*, "[t]o Nyerere, it would have seemed hypocritical for a colonial power to entrench guarantees of human rights on the eve of decolonisation: colonialism was itself a basic denial of human rights", id. p. 129. See also *Peter*, note 24, pp. 18, 19, 21; *Chris Maina Peter*, The Draft Constitution 2013: A Silent Revolution, The Guardian of Sunday (Tanzania), 9 June, 2013, p. 4.
- 28 Section 5 (2) Constitution (Consequential, Transitional and Temporary Provisions) Act 1984 (No. 16 of 1984).
- 29 *Peter/Sultan*, note 17, pp. 49-57.
- 30 *Benedict T. Mapunda*, Legal Sector Reforms in Tanzania: An Examination of Developments and Status, in: Maria Nassali (ed.), Reforming Justice in East Africa. A Comparative Review of Legal Sector Processes, Kampala 2008, pp. 99, 101; *Issa G. Shivji*, Let the People Speak. Tanzania down the Road to Neo-Liberalism, Dakar, 2006, pp. 8-12 and 15 ff.

the Constitution.³¹ Further constitutional amendments followed until the last amendment of 2005.³²

2. Constitutions of Zanzibar

Under the Union of Tanganyika and Zanzibar Act, 1964, several of the Presidential Decrees of 1964 were seen as the constitutional laws of Zanzibar; Issa G. Shivji therefore identifies these Decrees and the Union Act together as forming the Constitution of Zanzibar up to 1979, when the Zanzibar Constitution of 1979 was adopted.³³ Five years later, Zanzibar adopted the Constitution of 1984 which introduced a catalogue of human rights and entered into force on 12 January 1985.³⁴ The Constitution was amended several times, with the last amendment in 2010.³⁵ This amendment led to heated debates with regard to the question of Zanzibar's autonomy.³⁶

C. Process towards Constitutional Reform

When the constitutional reform process began in 2011, the constitutional arrangement was such that the Constitution of the United Republic of Tanzania was not only the constitution of the Union but served at the same time as the constitution of one of the Union partners, i.e. Mainland Tanzania, while the other Union Partner, Zanzibar, had its own constitution. The same applied to the government structure, with one government for the Union and Mainland Tanzania, and another one for Zanzibar.

31 Constitution (Eighth) Amendment Act, 1992 (No. 4 of 1992); Political Parties Act (No. 5 of 1992). For details see *Michael K. B. Wambali*, The Historical Overview of the Constitutional Reforms towards Limited Leadership in Tanzania, *Commonwealth Law Bulletin* 34 (2008), pp. 287 ff.; *Mwesiga Baregu*, Tanzania's Hesitant and Disjointed Constitutional Reform Process, Conference on Constitution-Making Processes in Southern Africa, Sheraton Hotel [no place indicated], 26-28 July, 2000, pp. 1, 4 ff., 6 ff. on the work of the Nyalali Commission and the Kisanga Committee, <http://www.eldis.org/vfile/upload/1/document/0708/DOC8308.pdf>, via: <http://www.policyforum-tz.org/print/52>. On the latter see also *Wambali*, id., pp. 293 ff.

32 Constitution (Fourteenth) Amendment Act (No. 1 of 2005).

33 *Shivji*, note 20, p. 16; see also *Peter/Sultan*, note 18, pp. 63-65; *Maalim*, note 18, pp. 91 ff.

34 See *Peter/Sultan*, note 17, pp. 65-79 with details. Apart from Zanzibar's (very short-lived) Independence Constitution, 1962, this was the first Bill of Rights in the Constitutions of Zanzibar.

35 10th Zanzibar Constitutional Amendments. See *Sengondo E. A. Mvungi*, 10th Constitutional Amendment of Zanzibar: The Break-Up of the United Republic of Tanzania, in: Chris Maina Peter/Immi Sikand (eds.), *Zanzibar: The Development of the Constitution. Zanzibar 2011*, pp. 219-234; reprinted in: Elinaza Sendoro/Helen Kijo-Bisimba/Chris Maina Peter/Anna Henga/Rodrick Maro (eds.): *Breathing the Constitution. Dar es Salaam 2014*, pp. 245-253.

36 *Maalim*, note 18, pp. 95 ff.

I. Constitutional Review Act, 2011 and Referendum Act, 2013

The recent review process of the Constitution of the United Republic of Tanzania of 1977 (as amended) was formally set in motion by the enactment of the Constitutional Review Act, 2011 which forms the legal basis and provides a road map for the promulgation of a new constitution.³⁷ Part VI of the Constitutional Review Act, 2011 originally contained provisions for validation of the Proposed Constitution through a referendum; this Part was later repealed and replaced by the Referendum Act, 2013.

These two Acts contain detailed provisions for each step of the constitutional review process, these being (i) collection of public opinions and, on this basis, preparation of the First Draft Constitution by the Constitutional Review Commission;³⁸ (ii) a second round of collection of public opinions through so-called Constitutional Fora and thereafter preparing of the Second Draft Constitution by the Constitutional Review Commission; (iii) preparation of the Proposed Constitution by the Constituent Assembly;³⁹ and (iv) validation of the Proposed Constitution by the Tanzanian people through a referendum.⁴⁰ These four steps of the constitutional reform reflect the strong participatory approach provided for in the reform, with the involvement of the Tanzanian people at every level of the reform process.⁴¹

37 The Act was amended several times, starting with Amendment Act No. 2 of 2012, followed by Amendment Acts No. 7 of 2013 und No. 9 of 2013. These amendments are incorporated in the latest version of the Act of 31 December 2013, Cap. 83 R. E. 2014, at http://www.constitutionnet.org/files/constitutional_review_act_amended_up_to_31_dec_2013-cap_83-latest_edition.pdf. See *Juliana Masabo*, The State of Constitutionalism in Tanzania Mainland – 2013, in Thiery B. Murangira, Annual State of Constitutionalism in East Africa – 2013, Kampala 2014, pp. 105-152.

38 The Constitutional Review Commission was established under Part III (Sections 5-16) of the Constitutional Review Act, 2011 which provides in detail for the Commission's composition, functions and mandate. The procedure of the Commission is regulated in Part IV (Sections 17-21) of the Act.

39 The Constituent Assembly was established under Part V (Sections 22-30) of the Constitutional Review Act, 2011 which regulates its composition, its mandate and its functions.

40 It has been noted that a referendum "is a recent development in the region", *Kituo cha Katiba: Eastern Africa Centre for Constitutional Development*, note 15, p. 25.

41 This was seen by some authors as overdue, considering the lack of participation by the people in the development of the previous and current constitutions; see for instance *Peter* 2001, note 24, p. 31: "... since independence the people of Tanzania have never been genuinely involved in the constitution-making process". See also *Khoti Chilomba Kamanga*, The Tanzania Draft Constitution of 2013: Panacea or Pandora's Box? *The Guardian on Sunday (Tanzania)*, 16 June, 2013, p. 2. See however *Kituo cha Katiba: Eastern Africa Centre for Constitutional Development*, note 15, pp. 20-22, for some critical comments on the implementation in practice, pp. 23 ff.

II. Preparation of the Draft Constitutions by the Constitutional Review Commission

1. First Draft Constitution

The task of collecting public opinions on the new constitution, examining and analysing the views collected during public hearings and preparing a First Draft Constitution was the primary responsibility of the Constitutional Review Commission.⁴² The composition of the Commission was to reflect the Commissioners' "experience relevant to constitutional review or professional qualifications on constitutional matters, law, public administration, economic, finance and social science", the country's "geographical and ... population diversity", as well as "age, gender and representation of various social groups".⁴³ Subject to this, the Union partners, i.e. Mainland Tanzania and Zanzibar, were to be represented by equal numbers of Commissioners.⁴⁴ Personal integrity and Tanzanian citizenship of the Commissioners were among the further requirements.⁴⁵ The President was required to invite "fully registered political parties, religious organisations, civil societies, associations, institutions and any other group of persons under whatever name having common interest" to submit suggestions for appointments to him, but he was also free to appoint persons not so suggested.⁴⁶ Chairperson, Vice-Chairperson and Commissioners were to be appointed by the President of the United Republic of Tanzania "in consultation and agreement" with the President of Zanzibar.⁴⁷ These appointments were made on 6 April 2012. The Commission consisted of the Chairperson, the Vice-Chairperson and 30 Commissioners,⁴⁸ 15 from Tanzania Mainland and 15 from Zanzibar.⁴⁹

42 For details of the terms of reference of the Commission, see Section 8 (1), read together with Sections 9 and 17, of the Constitutional Review Act, 2011.

43 Section 6 (3) (a), (b), (c) of the Constitutional Review Act, 2011.

44 Section 6 (2) of the Constitutional Review Act, 2011.

45 Section 6 (4), (5) of the Constitutional Review Act, 2011.

46 Section 6 (6), (7) of the Constitutional Review Act, 2011.

47 Section 6 (1) of the Constitutional Review Act, 2011. See also Section 7 (3) of the Act, 2011.

48 According to Section 7 (1) (c) of the Constitutional Review Act, 2011, the minimum number of members should have been 20, and the maximum 30, in addition to the chairperson and vice-chairperson. Chairperson was Judge Joseph Sinde Warioba, and Vice-Chairperson was Judge Augustino Ramadhani. Assaa A. Rashid served as Secretary and Casimir S. Kyuki as Assistant Secretary to the Commission.

49 Members from Mainland Tanzania were Joseph Butiku, Prof. Mwesiga L. Baregu, Riziki Shahari Mngwali, Dr. Edmund Adrian Sengondo Mvungi, Richard Shadrack Lyimo, John J. Nkolo, Alhaj Said El-Maamry, Jesca Sydney Mkuchu, Prof. Palamagamba J. Kabudi, Humphrey Polepole, Yahya Msulwa, Esther P. Mkwizu, Maria Malingumu Kashonda, Al-Shaymaa J. Kwegyir (MP) and Mwantumu Jasmine Malale. Members from Zanzibar were Dr. Salim Ahmed Salim, Fatma Said Ali, Omar Sheha Mussa, Raya Suleiman Hamad, Awadh Ali Said, Ussi Khamis Haji, Salma Maoulidi, Nassor Khamis Mohamed, Simai Mohamed Said, Mohamed Yusuph Mshamba, Kibibi Mwinyi Hassan, Suleiman Omar Ali, Salama Kombo Ahmed, Abubakar Mohammed Ali and Ally Abdullah Ally Saleh.

In July 2012 the Commission embarked on its first substantive task of collecting people's views through public hearings organised all over the country. About one year after having started, on 3 June 2013, the Commission issued the First Draft of the Constitution which circulated widely throughout the country, by publication in the Government Gazette and in local newspapers, to prepare the public for the second round of collection of public opinions through the Constitutional Fora.⁵⁰

2. Second Draft Constitution

The Constitutional Fora were to be established on an *ad hoc* basis in order to gather public opinions on the First Draft Constitution.⁵¹ The Commission was to form the Constitutional Fora on the basis of the geographical diversity of the United Republic and to "involve and bring together representatives of various groups of people within the communities".⁵² The Constitutional Fora were organised at two levels. Firstly, there were 177 Constitutional Fora directly organised and supervised by the Constitutional Review Commission, 164 in Tanzania Mainland and 13 in Zanzibar.⁵³ Secondly, there were 500 self-supervised or independent Constitutional Fora formed by organisations, institutions and groups of people with common interests, such as higher learning institutions, political parties, pastoral organisations, community-based organisations, non-governmental organisations and professional bodies, including also women's fora and children's fora.⁵⁴ The comments collected during these fora informed the preparation of the Second Draft Constitution which was issued by the Constitutional Review Commission on 30 December 2013.

III. Preparation of the Proposed Constitution by the Constituent Assembly

The preparation of the Proposed Constitution was the responsibility of the Constituent Assembly.⁵⁵ The Constituent Assembly had a total of 628 delegates. It was composed of all

50 Section 6 (5) of the Constitutional Review Act, 2011.

51 Section 18 (2), (3) of the Constitutional Review Act, 2011.

52 Sec. 18 (3), (4) of the Constitutional Review Act, 2011.

53 See Section 18 (2) of the Constitutional Review Act, 2011, and *Jamhuri ya Muungano wa Tanzania*, Tume ya Mabadiliko ya Katiba, Mwongozo kuhusu Muundo, Utaratibu wa Kuwapata Wajumbe wa Mabaraza ya Katiba ya Wilaya (Mamlaka za Serikali za Mitaa) na Uendeshaji wake, pp. 3 and 4, http://matukiodaima.blogspot.de/2013/02/mwongozo-kuhusu-muundo-utaratibu-wa_7065.html, indicating that 13,544 men and 5,789 women participated.

54 See Section 18 (2) of the Constitutional Review Act, 2011, and *Jamhuri ya Muungano wa Tanzania*, Tume ya Mabadiliko ya Katiba, Mwongozo kuhusu Mabaraza ya Katiba ya Asasi, Taasisi na Makundi ya Watu Wenye Malengo Yanayofanana, 2013, http://www.tanzania.go.tz/egov_uploads/documents/PDF_-_MWONGOZO_WA_ASASI_TAASISI_NA_MAKUNDI_YA_WATU_-_FINAL_Sw.Pdf. Also see *Constitutional Review Commission*, Ripoti ya Tume kuhusu Mchakato wa Mabadiliko ya Katiba ya Jamhuri ya Muungano wa Tanzania, 2013, at p. 101.

55 Established under Section 22 of the Constitutional Review Act, 2011.

the (then) 355⁵⁶ Members of the National Assembly of the United Republic of Tanzania, all the (then) 82 Members of the Zanzibar House of Representatives, and an additional 201 delegates who were appointed by the President, in agreement with the President of Zanzibar.⁵⁷ 134 of these hailed from Mainland Tanzania and 67 from Zanzibar.⁵⁸ These 201 delegates represented various organisations and groups listed in the Constitutional Review Act.⁵⁹ The President invited each of these groups to submit four to nine suggestions per group for appointments.⁶⁰ When appointing delegates, the President had to consider the “qualifications and experience of the persons nominated” and gender parity.⁶¹ The delegates elected a Chairperson and a Vice-Chairperson from among themselves who had to represent both parts of the Union.⁶² With regard to the composition of the Constituent Assembly, consisting to a large extent of Members of Parliament and having a CCM⁶³ majority both among the Members of Parliament of the United Republic and the Members of the Zanzibar House of Representatives,⁶⁴ it was critically argued that constitution-making “is not an ordinary legislative act” but that it deals with the “concerns of the wider community of citizens”; for this reason, the involvement of political leaders motivated by party interests was seen as problematic.⁶⁵

The Constituent Assembly started its work on 18 February 2014. Unlike the preparation of the First and Second Drafts of the Constitution, the preparation of the Proposed Constitu-

56 The Members of the National Assembly, with a total of 355 MPs, included (a) 239 members elected to represent the constituencies, (b) 102 women members (“special seats for women”), (c) five members elected by the Zanzibar House of Representatives from among its members, (d) the Attorney General and (e) eight members appointed by the President (out of the maximum of ten he could have appointed), according to Article 66 (1) (a), (b), (c), (d), (e) of the Constitution, 1977. It was only on 26 March 2015 that the President appointed the remaining two members under Article 66 (1) (e) of the Constitution, 1977 (The Guardian, 27 March 2015, <http://www.ippmedia.com/fro ntend/?l=78700>), which led to the grand total of 357 MPs.

57 See Section 22 (1) (a) (b) (c) of the Constitutional Review Act, 2011.

58 According to Section 22 (2) of the Constitutional Review Act, 2011.

59 Section 22 (1) (a), (b), (c) of the Constitutional Review Act, 2011, as amended: 20 persons from non-governmental organisations, 20 from faith-based organisations, 42 from political parties, 20 from higher learning institutions, 20 from groups of persons with disabilities, 19 from trade union organisations, ten from associations representing livestock keepers, ten from fisheries associations, 20 from agricultural associations and 20 from other groups having common interest.

60 Section 22 (2A) of the Constitutional Review Act, 2011.

61 Section 22 (2A) of the Constitutional Review Act, 2011.

62 Section 23 (1), (2) of the Constitutional Review Act, 2011. Samuel Sitta was elected chairperson and Samia Suluhu vice-chairperson.

63 Chama cha Mapinduzi, the majority party.

64 See *Tulia Ackson*, *Winnowing Tanzania’s Proposed Constitution: The Legitimacy Question*, in this issue, p. 372.

65 *Kituo cha Katiba: Eastern Africa Centre for Constitutional Development*, note 15, pp. 27-28; see also *Peter Nyanje*, *Party Interests Threaten Tanzania’s Constitution-Making Process*, *The East African*, 8 March 2014.

tion generated a big controversy regarding the scope of the mandate of the Constituent Assembly, as well as the modality of the proceedings in the Assembly. At the centre of this quagmire was the decision by the Constituent Assembly to materially alter the content of the Second Draft Constitution as presented to it by the Constitutional Review Commission, an act which was deemed to contravene Section 25 of the Constitutional Review Act, 2011 from which the Constituent Assembly drew its mandate.⁶⁶

When there were indications that the Constituent Assembly would overhaul the Second Draft Constitution and remove a number of provisions which had been incorporated by the Constitutional Review Commission on the basis of the people's views collected by the Commission according to its mandate, a group of 130 Delegates left the Constituent Assembly. These were those who formed the Coalition of Defenders of a People's Constitution (UKAWA),⁶⁷ mainly from the major opposition parties.⁶⁸ The major reason advanced by UKAWA was that "the ruling party using its majority membership was taking the CA in the wrong direction by overhauling the draft Constitution, which was the product of people through the CRC..."⁶⁹ UKAWA, through its members, fiercely opposed the move by the Constituent Assembly to replace the Union structure proposed by the Constitutional Review Commission (which the latter regarded as "the key plank of the draft constitution") with a two-government structure as being a move tantamount to an attempt by the ruling party to maintain the status quo.⁷⁰ There were also charges by UKAWA "that the draft is promoting segregation instead of enhancing unity" and concerns that the constitutional drafting process "could lead to social unrest" or promote "discrimination on the basis of origin" from Mainland Tanzania and from Zanzibar.⁷¹ The further preparation of the Pro-

66 Section 25 of the Constitutional Review Act, 2011 reads: "Powers of Constituent Assembly. (1) The Constituent Assembly shall have and exercise powers to make provisions for the New Constitution of the United Republic of Tanzania and to make consequential and transitional provisions to the enactment of such constitution and to make such other provisions as the Constituent Assembly may find necessary. (2) The powers of the Constituent Assembly to make provisions for the proposed Constitution shall be exercised by a Draft Constitution tabled by the Chairman of the Commission and passed by the Constituent Assembly."

67 UKAWA: Umoja wa Katiba ya Wananchi.

68 CHADEMA (Chama cha Demokrasia na Maendeleo), CUF (Civic United Front) and NCCR Mageuzi (National Convention for Construction and Reform – Mageuzi), 'mageuzi' meaning reform.

69 *Mwassa Jingi*, Does UKAWA Boycott Make Sense, *The Citizen*, 1 February 2015. CA: Constituent Assembly; CRC: Constitutional Review Commission.

70 *Erick Kabendera*, Tanzania: As Constitutional Reform Stalls, Jakaya Kikwete Risks Losing his Legacy, *The East African*, 2 October 2014, <http://africanarguments.org/2014/10/02/tanzania-as-constitutional-reform-stalls-jakaya-kikwete-risks-losing-his-legacy-by-erick-kabendera>. For a discussion of these claims see below under D. II.; and *Ackson*, note 64, pp. 375, 385.

71 *World Bulletin/News Desk*, 18 April, 2014, Tanzania Opposition Quits Constitution-Drafting Body, <http://www.worldbulletin.net/servisler/haberYazdir/134093/haber>.

posed Constitution took place in the absence of those 130 delegates.⁷² On 2 October 2014, the Constituent Assembly completed its task and submitted the Proposed Constitution to the President.

IV. Validation of the Proposed Constitution through Referendum

The last component of Tanzania's constitutional reform process, as provided for in the Referendum Act, 2013,⁷³ is the validation of the Proposed Constitution through a referendum organised, conducted and supervised by the National Electoral Commission in collaboration with the Zanzibar Electoral Commission.⁷⁴ Participation in the referendum is open to those registered in the registers of voters established in Mainland Tanzania and in Zanzibar.⁷⁵ The Proposed Constitution will be considered approved if it is supported by more than 50 per cent of the votes cast in Mainland Tanzania and more than 50 per cent of the votes cast in Zanzibar.⁷⁶

D. Some Key Features of the Constitutional Reform

I. Scope and Structure of the Constitution

The two Draft Constitutions and the Proposed Constitution of the United Republic of Tanzania were milestones in Tanzania's constitutional reform process as they introduced new features. Compared to the Constitution, 1977, they are more comprehensive in terms of the scope covered and more voluminous in terms of the number of chapters and articles.⁷⁷ While the Constitution, 1977 has ten Chapters with 152 Articles, the First Draft Constitution of June 2013 had 16 Chapters with 240 Articles, the Second Draft Constitution of December 2013 had 17 Chapters with 271 Articles, and the Proposed Constitution of October 2014 has 19 Chapters with 296 Articles. The increase is due firstly to the introduction of new rights, such as citizenship (in the two Drafts and in the Proposed Constitution) and land, natural resources and environment (in the Proposed Constitution), and secondly to the elevation to independent chapters of certain parts or provisions of the Constitution, 1977, such as human rights, elections and public leadership ethics.

72 See *Akson*, note 64, pp. 376 ff., on the question whether this "walk-out" of a number of delegates led to a "delegitimisation" of the further process and its product.

73 See Section 28B of the Constitutional Review Act, 2011, read together with the Referendum Act, 2013.

74 Section 36 (1) of the Referendum Act, 2013.

75 Section 39 of the Referendum Act, 2013.

76 Section 41 (2) of the Referendum Act, 2013, with the possibility of a repetition of the referendum, Section 41 (3) of the Referendum Act, 2013. See *Kituo cha Katiba: Eastern Africa Centre for Constitutional Development*, note 15, pp. 30 ff., on some problems.

77 Although the increased number of chapters was partly caused by greater differentiation within the existing chapters, some new chapters were also added.

Like the Constitution, 1977, both Draft Constitutions and the Proposed Constitution open with a Preamble. The Constitution, 1977 has two Schedules added at the end; the First and Second Drafts had one Schedule each; and the Proposed Constitution has three Schedules. All these Schedules are small.

The ten substantive chapters of the Constitution, 1977 contain the following titles: (1) The United Republic, Political Parties, the People, and the Policy of Socialism and Self-Reliance; (2) The Executive of the United Republic; (3) The Legislature of the United Republic; (4) The Revolutionary Government of Zanzibar, the Zanzibar Revolutionary Council, and the House of Representatives of Zanzibar; (5) Dispensation of Justice in the United Republic; (6) The Commission for Human Rights and Good Governance, and the Public Leaders' Ethics Secretariat; (7) Provisions Regarding the Finances of the United Republic; (8) Public Authorities; (9) Armed Forces; and (10) Miscellaneous Provisions.

The 16 chapters of the First Draft Constitution covered (1) The Republic of Tanzania; (2) Fundamental Objectives and Directive Principles of State Policy; (3) Leadership Ethics; (4) Human Rights; (5) Citizenship; (6) Structure of the Union; (7) Union Government; (8) Coordination of Partner States; (9) Union Parliament; (10) Judiciary of the Union; (11) Public Service of the Union; (12) Elections; (13) Accountability Institutions; (14) Finances of the Union; (15) Defence and Security of the United Republic; and (16) Miscellaneous Provisions.

The Second Draft Constitution maintained all of these and added one more chapter: (17) General, Transitional and Consequential Provisions. This chapter was specially tailored to facilitate a smooth transition to the proposed new constitutional order. The Second Draft Constitution largely resembled its predecessor, the First Draft Constitution, as most of the proposals made in the First Draft were sustained in the Second Draft, except for a few modifications.

The Proposed Constitution added two more chapters to the 17 chapters of the Second Draft, thus making the total number of 19 chapters. The addition of these chapters, on Land, Natural Resources and Environment (inserted as Chapter Three) and on the Revolutionary Government of Zanzibar (inserted as Chapter Eleven), was necessitated by the return of the Proposed Constitution to the two-government structure, as opposed to the three-government structure provided for in the First and Second Drafts.⁷⁸

In sum, the Proposed Constitution is similar to the two Draft Constitutions in so far as they are all more comprehensive in terms of scope and number of provisions in comparison to the Constitution, 1977. In terms of content, the Proposed Constitution differs significantly from the two Drafts as it identifies itself to a greater extent than the First and Second Drafts with a number of key features of the Constitution, 1977. The first to be discussed here is the structure of the Union.

⁷⁸ See below, D. II.

II. Structure of the Union – Two or Three Governments?

The First Draft Constitution proposed a federal mode of governance with a three-government structure composed of (1) the Government of the United Republic of Tanzania (the Union government); (2) the Government of Mainland Tanzania; and (3) the Government of Zanzibar.⁷⁹ This proposal was sustained in the Second Draft Constitution.⁸⁰ This was a departure from the two-government structure as provided for in the Constitution, 1977, a structure which had been in existence since the formation of the Union in 1964.⁸¹

Within the three-government structure proposed in the First and Second Drafts, the Union government would be responsible exclusively for Union matters, while the government of Mainland Tanzania and that of Zanzibar would each have autonomy over matters falling outside matters listed as Union matters.⁸² The legislative, executive and judicial branches of the federal government would operate independently from those of Mainland Tanzania and of Zanzibar because of their different fields of competence, with the exception of the Court of Appeal⁸³ and the Supreme Court.⁸⁴ These courts would serve as highest appellate bodies for both Mainland Tanzania and Zanzibar, while below this level, Mainland Tanzania and Zanzibar would each continue to have their own separate court structure up to High Court level.⁸⁵ The Supreme Court would also have original jurisdiction in some cases.⁸⁶

As a consequence of the proposal of a three-government structure, the number of Union matters was substantially reduced, from 22 Union matters under the Constitution, 1977 to seven Union matters under the First and Second Drafts, these being (1) Constitution and Authority of the United Republic, (2) Defence and Security of the United Republic, (3) Citizenship and Migration, (4) Currency and Central Bank, (5) Foreign Affairs, (6) Registration of Political Parties, and (7) Income Tax/Excise Duty as specified in the Schedule to the First and Second Draft Constitution, respectively.⁸⁷

79 Article 57 of the First Draft Constitution.

80 Article 60 of the Second Draft Constitution.

81 See above B. II. 1. In the course of earlier reform discussions, a three-government structure had already been suggested by the Nyalali Commission in 1992 and the Kisanga Committee in 1998, see *Peter* 2013, note 27, p. 2. See also the articles in the *African Review*, special issue entitled “Fifty Years of the Union between Tanganyika and Zanzibar” (Volume 41 No. 1, 2014), which was published on the occasion of the 50th anniversary of the Union between Tanganyika and Zanzibar in 1964 and was dedicated to the debate on the Union structure.

82 See the Schedule to the First and Second Draft Constitutions.

83 Article 158 of the First Draft Constitution; Article 165 of the Second Draft Constitution.

84 Article 147 of the First Draft Constitution; Articles 154 of the Second Draft Constitution.

85 Articles 143, 146 of the First Draft Constitution; Articles 150, 153 of the Second Draft Constitution.

86 See below at note 116.

87 Article 60, read together with the Schedule, of the First Draft Constitution (with the following specification of (7): income tax, customs duty and excise duty on goods manufactured in Tanza-

The Proposed Constitution defies these proposals by reverting to the two-government structure of the Constitution, 1977, composed of the Union government, which is at the same time responsible for Mainland Tanzania, and the government of Zanzibar,⁸⁸ thereby maintaining the status quo. Burying hopes for a new government structure and the ensuing reforms as proposed in the first two Drafts, the Proposed Constitution borrows extensively from the Constitution, 1977. It provides that the Union government should oversee Union matters and matters concerning Mainland Tanzania, while the government of Zanzibar should take charge of all non-Union matters concerning Zanzibar.⁸⁹ Each of the two governments should have all three branches of state, that is, the legislative, executive and judicial branches. For purposes of facilitating smooth governance relations, a commission in charge of the coordination of power relations between the two governments is provided for under Chapter Nine of the Proposed Constitution.⁹⁰ A commission similar to this was also provided for in the First and Second Drafts.⁹¹

As a consequence of the return to the two-government structure, the list of Union matters under the Proposed Constitution has been increased to 16 items. The Union matters provided for in the Proposed Constitution are: (1) Constitution and Authority of the United Republic; (2) Foreign Affairs; (3) Defence and Security of the United Republic; (4) Police; (5) Emergency Powers; (6) Citizenship and Migration; (7) Service in the Union Government; (8) Income Tax as specified; (9) Communication; (10) Currency and Central Bank; (11) Higher Education; (12) National Examination Council; (13) Security and Air Transport; (14) Weather Forecast; (15) Supreme Court and Court of Appeal; and (16) Registration of Political Parties.⁹² All these Union matters provided for by the Proposed Constitution are also listed as Union matters in the Constitution, 1977.⁹³ Together with some additional matters,⁹⁴ the total is 22 in the case of the Constitution, 1977, as mentioned above. Under the Proposed Constitution, the government of Zanzibar can enter into regional and international relations on non-Union matters, in cooperation with the Union government.⁹⁵

nia); Article 63, read together with the Schedule, of the Second Draft Constitution (with the following specification of (7): excise duty of goods and non-tax revenue accrued from Union matters). *Peter* 2013, note 27, p. 2.

88 Article 73 of the Proposed Constitution.

89 Articles 75 and 76 of the Proposed Constitution.

90 Articles 127 and 128 of the Proposed Constitution.

91 Articles 102-104 of the First Draft Constitution; Articles 109-112 of the Second Draft Constitution.

92 Article 74 (3), read together with Schedule 1, of the Proposed Constitution.

93 Article 4 (3), read together with Schedule 1, of the Constitution, 1977.

94 These include: (8) External borrowing and trade; (13) Industrial licensing and statistics; (15) Mineral oil resources, including crude oil, other categories of oil or products and natural gas; and (18) Research.

95 Article 76 (2) and (3) of the Proposed Constitution; Union matters according to Article 74 (3) and Schedule 1 of the Proposed Constitution. Cf. Article 62 of the First Draft; Article 65 of the Second Draft.

Under the framework of the Constitution, 1977, international affairs are a preserve of the Union government,⁹⁶ hence, Zanzibar cannot on its own enter into international relations, although Zanzibar itself claims the capacity to do so.⁹⁷

The structure of the executive and the legislature is also worthy of attention in this context. Under the Constitution, 1977, the cabinet is presided over by the President⁹⁸ and otherwise consists of the Vice-President and the Prime Minister of the United Republic, the President of Zanzibar, and the Ministers of the United Republic.⁹⁹ The First and Second Drafts followed this pattern with regard to the President and Vice-President but did not include the President of Zanzibar in the cabinet; they also replaced the Prime Minister by the Senior Minister (who basically would have the same functions as the Prime Minister).¹⁰⁰

The Proposed Constitution provides for three Vice-Presidents.¹⁰¹ Besides the First Vice-President,¹⁰² the President of Zanzibar is to be the Second Vice-President¹⁰³ and the Prime Minister is to be the Third Vice-President.¹⁰⁴ One of the contentious issues in the framework of the Constitution, 1977 was the lack of clarity regarding the status of the President of Zanzibar in the Union hierarchy. The Proposed Constitution tries to resolve this.

As regards the overall size of the cabinet, the original idea of the First and Second Draft Constitutions was to have a lean cabinet with only 15 Ministers.¹⁰⁵ The Constitution, 1977 does not prescribe the number of Ministers. The actual number of Ministers has fluctuated. At present (i.e. in June 2015) there are 30 Ministers. According to the Proposed Constitution, the maximum number of Ministers and Deputy Ministers taken together is 40.¹⁰⁶ Deputy Ministers are not members of the cabinet.¹⁰⁷ If one assumes that the number of Ministers would be about half of this, i.e. 20, the size of the cabinet under the Proposed Constitution could also be called lean, especially as these figures must be seen in the light of the proposed structure of the Union and the number of Union matters under the First and Second Draft Constitutions, the Constitution, 1977 and the Proposed Constitution, respectively.

96 Listed as item 2 in the list of Union matters.

97 *Maalim*, note 18, pp. 67 ff., 74, 75, also discussing the controversial points.

98 Article 54 (2) of the Constitution, 1977.

99 Articles 33, 47, 51, 54 (1) of the Constitution, 1977.

100 Article 92 (1) of the First Draft Constitution; Article 97 (1) of the Second Draft Constitution.

101 Article 99 of the Proposed Constitution. On the possibility of complications arising if there are several vice-presidents, see *John Hatchard/Muna Ndulo/Peter Slinn*, *Comparative Constitutionalism and Good Governance in the Commonwealth. An Eastern and Southern African Perspective*, Cambridge 2004, p. 67.

102 Articles 99 (a), 100-106 of the Proposed Constitution.

103 Articles 99 (b), 107 of the Proposed Constitution.

104 Articles 99 (c), 108, 110-113 of the Proposed Constitution.

105 Article 93 (2) of the First Draft; Article 98 (2) of the Second Draft.

106 Article 115 (2) of the Proposed Constitution.

107 Article 114 (1) of the Proposed Constitution.

The latter point is also relevant with regard to the size of the parliament. While the Constitution, 1977 does not indicate a maximum number of Members of Parliament,¹⁰⁸ and currently has a total of 357¹⁰⁹ MPs, the Second Draft Constitution sought to have a lean parliament with only 75 members which would have been in charge of the Union only.¹¹⁰ The Proposed Constitution does not provide for a maximum number but allows for a number of MPs between 340 and 390 who would be in charge of the Union and of Mainland Tanzania matters.¹¹¹ These varying numbers of MPs are thus the result of the different government structures.

Another feature deserving some attention here is the structure of the judiciary. There are pertinent proposals in terms of both the structure and the actual functioning of the judiciary, with much emphasis on promoting judicial independence. While the highest court under the Constitution, 1977 is the Court of Appeal, the Proposed Constitution, following in this regard the First and Second Drafts,¹¹² modifies the structure of the judiciary by the introduction of a new Supreme Court¹¹³ serving as the highest judicial organ. It would serve as the final appellate body for appeal matters decided by the Court of Appeal of Tanzania,¹¹⁴ which in the proposed structure would be the second highest judicial organ in the hierarchy of the courts.¹¹⁵ Moreover, the Supreme Court would have exclusive and original jurisdiction, *inter alia*, over matters concerning presidential elections, the interpretation and the implementation of the Constitution.¹¹⁶ Also, the Proposed Constitution endorses the proposal to elevate the Judicial Fund to a constitutional body, a proposal which, if sus-

108 But provides for a special distribution of seats; for the details see Article 66 (1) of the Constitution, 1977.

109 See note 56.

110 70 members elected from the constituencies and five members elected to represent persons with disabilities, Article 113 (2) of the Second Draft Constitution. Article 105 (2) of the First Draft Constitution does not expressly indicate a maximum number.

111 Article 129 (5) of the Proposed Constitution. Besides the MPs directly elected from the constituencies, it would include five MPs representing people with disabilities, and ten MPs appointed by the President, Article 129 (2) of the Proposed Constitution.

112 Article 147 (1) of the First Draft Constitution; Article 154 (1) of the Second Draft Constitution.

113 Led by the Chief Justice and Deputy Chief Justice, Article 171 of the Proposed Constitution. See the discussion in *Damian Z. Lubuva*, The Court Structure and the Need for the Establishment of an Appellate Court above the Court of Appeal, in: Chris Maina Peter/Helen Kijo-Bisimba, Law and Justice in Tanzania. Quarter of a Century of the Court of Appeal, Dar es Salaam, 2005, 99-110, pp. 104-110.

114 Article 173 (1) (b) of the Proposed Constitution; see also Article 156 (1) (d) of the Second Draft Constitution. The Court of Appeal is the appeal court both for Mainland Tanzania and Zanzibar.

115 Article 182 (1) of the Proposed Constitution.

116 Article 173 (1) (a) (i), (ii), (iii) of the Proposed Constitution; see also Article 149 (1) (a), (b) of the First Draft Constitution; Article 156 (1) (a), (b) of the Second Draft Constitution.

tained, holds the potential of safeguarding the economic and financial independence of the judiciary.¹¹⁷

III. National Values and Fundamental Objectives of State Policy

Both Draft Constitutions and the Proposed Constitution include a set of national values in their substantive provisions. There are differences, however, in the content of the relevant provisions and the placement of the values.

The Constitution, 1977 mentions the principles of freedom, justice, fraternity and concord in the first paragraph of its Preamble. Article 8 (1) on “The Government and the People” of the Constitution, 1977 mentions democracy and social justice; Article 8 (1) (a): sovereignty of the people; (b) welfare of the people; (c) accountability of the government to the people; (d) participation of the people in government affairs; Article 9: freedom, justice, fraternity, concord, policy of socialism and self-reliance; and Article 9 (a): human dignity and other human rights.

The Preambles of the two Draft Constitutions and of the Proposed Constitution contain in their first paragraph a firm expression of the desire to build a society founded on the principles of human dignity, fraternity, freedom, justice, equality, peace, unity and solidarity.¹¹⁸ Both Drafts listed two of these also as “National Values” in their Article 5, i.e. human dignity and unity, and added further national values: patriotism, integrity, transparency, accountability and the national language. In Article 10 (1) of the Second Draft on “Fundamental Goals”, justice, fraternity, unity and stability were listed and, in addition, democracy, the rule of law and sustainable development and self-reliance. The following sub-articles provided a mechanism for realisation of the fundamental values.¹¹⁹ These provisions stated clearly the political, social, economic and cultural objectives of the government as well as the strategies for achieving these objectives.

The Proposed Constitution, while supporting the inclusion of national values in substantive provisions, has made substantial changes in the relevant provisions. The list of national values, as provided for in the two Draft Constitutions, in Article 5, has been changed. While human dignity and the national language¹²⁰ have been kept as national values, and complemented by the Union (between Mainland Tanzania and Zanzibar), fraternity, peace and stability as further national values,¹²¹ all the other items which were listed in the two previous drafts as national values have been shifted from Article 5 on “National Values” to Article 6 on “Principle of Good Governance”: patriotism, integrity, (national) unity, trans-

117 Article 207 of the Proposed Constitution; see also Article 183 of the Second Draft Constitution. The Judicial Fund is mainly to cover the administrative and operative costs of the judiciary.

118 Preambles of the First and Second Drafts and of the Proposed Constitution. The Proposed Constitution adds to this list: self-reliance and stability.

119 Article 10 (2), (3) (a), (b), (c), (d) of the Second Draft Constitution.

120 Which appears as “Kiswahili language” in the Proposed Constitution.

121 See Article 5 of the Proposed Constitution.

parency and accountability.¹²² On the one hand, the inclusion of these values under the principle of good governance means clear, value-based requirements for leaders' behaviour. On the other hand, it is difficult to comprehend the rationale of placing some of these items under the provision on principle of good governance only. For example, patriotism and integrity should apply to all persons and not only to those in power. Moreover, the question is how such leadership quality can actually be achieved and whether a system of reliable checks and balances is also provided for.

IV. Sovereignty of the People

The First Draft Constitution was described as a "people-centred Constitution".¹²³ Both the First and Second Draft Constitutions contained affirmations of the supremacy of the people, which forms the nucleus of the principle of democracy. The substantive provisions of the two Drafts resonated around the imperative of addressing the needs of the people and the establishment of a democratic order which maximises the people's participation in public affairs. This was unlike the Constitution, 1977, where supremacy of the people is reflected in the Preamble and the Fundamental Objectives and Directive Principles of State Policy only,¹²⁴ which are not enforceable. The First and Second Drafts, in addition to stating the doctrine of sovereignty of the people in their Preambles, went ahead to include it in their substantive provisions in Chapter One. In a Part especially dedicated to the power of the people, both Drafts defined what exactly the doctrine of sovereignty of the people entails,¹²⁵ i.e. that sovereignty resides in the people, from whom the government derives all its powers, authority and legitimacy.¹²⁶ The main objective of the government was described as promoting development and the people's welfare¹²⁷ and, in so doing, the government should be responsible and accountable to the people.¹²⁸

The provisions of the First and Second Drafts in Chapter Three on "Leadership Ethics and Integrity" and in Chapter Four on "Human Rights" also strongly supported the doctrine of sovereignty of the people. It was clearly stipulated, for example, that the power assigned to a public officer vested in that officer the responsibility to serve the people, presumably as

122 Further listed there are democracy, rule of law, people's involvement, human rights, and gender equality.

123 Peter 2013, note 27, p. 7.

124 Article 8 (1) of the Constitution, 1977.

125 Articles 6, 7 of the First Draft Constitution; Articles 6, 7 of the Second Draft Constitution.

126 Article 6 (a) of the First Draft Constitution; Article 6 (a) of the Second Draft Constitution. Cf. Article 8 (1) (a) of the Constitution, 1977.

127 Cf. Article 8 (1) (b) of the Constitution, 1977.

128 Article 6 (b), (c) of both the First and Second Draft Constitutions. Cf. Article 8 (1) (c) of the Constitution, 1977.

opposed to the power to rule over them. And therefore state officers should respect the people in the execution of their functions.¹²⁹

Emulating the First and Second Drafts, the Proposed Constitution stipulates the doctrine of supremacy of the people in its substantive provisions. Articles 7 and 8 which provide for this doctrine are similar to the corresponding provisions in the First and Second Drafts.¹³⁰ The impression that emerges from these two provisions is that the Constitutional Review Commission and the Constituent Assembly shared a desire to promote the sovereignty of the people over the government. Article 6 on “Good Governance” of the Proposed Constitution can also be regarded as supporting this line, as it lays down how leaders should behave vis-à-vis the people, listing as the central elements people’s involvement, transparency and accountability.¹³¹ On the other hand, the Proposed Constitution contains several provisions that reduce the scope of the doctrine of sovereignty of the people, such as the omission of certain items¹³² from the list of national values which were included in the First and Second Drafts and the retention of a powerful presidency.¹³³

Another issue is the powers conferred by the two Drafts on the electorate to recall Members of Parliament in the event that the said Members should fail to represent them well. Citizens were given the right to remove their Member of Parliament from office if the Member of Parliament supported policies which were against the interests of the voters or the nation; if they failed to deal adequately with problems their voters were facing; or if they shifted their residence away from the constituency for more than six months without good reason. Further grounds could be specified by an Act of Parliament.¹³⁴ This provision has been removed in the Proposed Constitution although it is a current problem that in some of the constituencies Members of Parliament disappear immediately after election and are not seen again until near the end of their term.

129 Article 13 (1) (a) (ii), (b) both of the First and Second Draft Constitutions. Article 28 (1) (a) (ii), (b) of the Proposed Constitution confirms this but omits/reduces specific provisions on leadership ethics which were contained in Articles 15-20/21-22 of the First and Second Draft Constitutions (see Articles 28-29/30-31 of the Proposed Constitution). With regard to a Public Leaders’ Ethics Commission see Articles 188-193 of the First Draft Constitution, Articles 200-207 of the Second Draft Constitution and Articles 228-234 of the Proposed Constitution. For the Ethics Commissioner and the Public Leaders’ Ethics Secretariat under the Constitution, 1977 see Articles 69 (4), 132 of the Constitution, 1977.

130 Articles 6, 7 of the First Draft Constitution; Articles 6, 7 of the Second Draft Constitution.

131 See above under D. III.

132 These are patriotism, integrity, (national) unity, transparency and accountability; see above under D. III.

133 See below under D. IX.

134 Article 124 of the First Draft Constitution; Article 129 of the Second Draft Constitution.

V. Supremacy of the Constitution and Entrenchments

Building on the Constitution, 1977,¹³⁵ both the First and Second Drafts made a definite declaration of the supremacy of the Union Constitution over all laws, statutory as well as customary, and over the Constitutions of Zanzibar and the would-be Constitution of Mainland Tanzania.¹³⁶ The Proposed Constitution is basically in agreement with this provision. Its declaration of constitutional supremacy¹³⁷ almost entirely corresponds to that of the Second Draft.

Apart from asserting the supremacy of the Union Constitution, different strategies to safeguard the Constitution against unwarranted amendments can be identified.

Under the Constitution, 1977, amendments to constitutional provisions require a two-thirds majority in parliament.¹³⁸ Amendments in the following areas, however, are qualified by the requirement of a two-thirds majority of all Members of Parliament from Mainland Tanzania and a two-thirds majority of all Members of Parliament from Zanzibar: (1) the existence of the United Republic; (2) the existence of the Office of President of the United Republic; (3) the Authority of the Government of the United Republic; (4) the existence of the Parliament of the United Republic; (5) the Authority of the Government of Zanzibar; (6) the High Court of Zanzibar; (7) the list of Union matters; and (8) the number of Members of Parliament from Zanzibar.¹³⁹

Under the Second Draft Constitution, all constitutional provisions were entrenched by the requirement of a two-thirds majority of all Members of Parliament from Mainland Tanzania and of a two-thirds majority of all Members of Parliament from Zanzibar¹⁴⁰ unless they were among those constitutional provisions which were even further entrenched by denying Parliament the power to change them¹⁴¹ and requiring a referendum with a two-thirds majority of the citizens of Mainland Tanzania and of Zanzibar.¹⁴² These were matters covered in Chapter One (on the United Republic of Tanzania, i.e. the name of the country, the territorial boundaries, national symbols, language and national values, sovereignty of the people and supremacy of the constitution), Chapter Two (fundamental objectives, directives of government principles and state policy), Chapter Four (containing the Bill of Rights), Article 60 (on the structure of the Union), Article 79 (containing qualifications for election as president), the list of Union matters (according to Article 63, read together with

135 I.e. on Article 64 (5) of the Constitution, 1977.

136 Article 8 of the First Draft Constitution; Article 8 of the Second Draft Constitution.

137 Article 9 of the Proposed Constitution.

138 Article 98 (1) (a) and (b) Constitution, 1977.

139 Article 98 (1) (b), read together with Schedule 2, List 2, of the Constitution, 1977.

140 Article 118 (2) of the Second Draft; see also Article 111 of the First Draft.

141 Article 119 of the Second Draft; comparable provisions are contained in Article 112 of the First Draft.

142 On the problem connected with this provision, see below in this section (D. V.).

Schedule 1), the existence of the United Republic (see Article 1), and the entrenching provision (Article 119) itself.¹⁴³

Unlike both the Constitution, 1977 and the Draft Constitutions, the Proposed Constitution does not provide for a general entrenchment of all constitutional provisions but requires only a simple majority for changes to the constitutional provisions,¹⁴⁴ with the following exceptions: constitutional provisions in relation to (1) Union matters and (2) the list of Union matters which are entrenched by the requirement of a two-thirds majority of all Members of Parliament from Mainland Tanzania and of a two-thirds majority of all Members of Parliament from Zanzibar,¹⁴⁵ constitutional provisions with regard to (1) the structure of the United Republic and (2) the existence of the United Republic, as well as (3) the entrenching provision itself, are entrenched by requiring a referendum with an absolute majority of the citizens of Tanzania Mainland and of Zanzibar in order to change these provisions.¹⁴⁶

It is beyond the scope of this overview article to undertake a detailed comparative analysis of the scope and mechanisms of entrenchments provided for in the Constitution, 1977, the two Drafts and the Proposed Constitution. Such an analysis would have to look at the following aspects, among others: (i) The list of entrenched provisions in the Proposed Constitution is considerably shorter than the list in the Second Draft, such that the list of matters requiring a referendum in the event of amendment now contains only two substantive items, namely the structure of the Union and the existence of the Union,¹⁴⁷ and the list of matters requiring a two-thirds parliamentary majority also contains two items, i.e. (1) Union matters, and (2) the list of Union matters; the list of Union matters under the Proposed Constitution is considerably longer than that under the Second Draft.¹⁴⁸ (ii) One would also have to compare and analyse the entrenching mechanisms for each entrenched provision, looking at whether a qualified parliamentary majority or a referendum is provided for, and with which kind of majority it is combined in every single case. For instance, the Second Draft required the support of a majority of two thirds of the citizens both from Tanzania Mainland and from Zanzibar for a referendum for amendments to entrenched provisions.¹⁴⁹ One question here is whether a two-thirds majority of the citizens is not too high a requirement for a referendum. Another question is why the Second Draft spoke of two thirds of the citizens rather than two thirds of the votes cast. It is difficult to imagine how two thirds “of the citizens” from Tanzania Mainland and from Zanzibar, as required by the

143 Article 119 of the Second Draft Constitution.

144 Article 134 (1) (a) of the Proposed Constitution.

145 Article 134 (1) (b), read with Schedule 2, of the Proposed Constitution.

146 Article 134 (1) (c), read together with Schedule 3, of the Proposed Constitution.

147 Article 134 (1) (c), read together with Schedule 3, of the Proposed Constitution.

148 16 items in the case of the Proposed Constitution, Article 134 (1) (b), read together with Schedules 2 and 1, of the Proposed Constitution; seven items in the case of the Second Draft Constitution, Article 119 (d), read together with the Schedule, of the Second Draft.

149 Article 119 of the Second Draft.

Second Draft, could be determined for this purpose. (iii) The protection of the Constitution from being exposed to abuse by those in power and from being changed too easily on the basis of mere political interests was clearly a reason for the far-reaching entrenchments of the Second Draft.¹⁵⁰ The other side of the coin, however, is that such far-reaching entrenchments might make it nearly impossible to change the Constitution at all – even for noble reasons, such as an extension or improvement of human rights.¹⁵¹

Despite the need for a differentiating analysis before a final assessment is made possible, it is clear that, while the Constitution, 1977 and the Second Draft Constitution had residuary clauses providing for overall entrenchment in the form of a required two-thirds parliamentary majority for the remainder of the constitutional provisions which are not contained in the specific lists mentioned above,¹⁵² in the case of the Proposed Constitution the remainder of provisions can be changed by a simple majority vote by the Members of Parliament.¹⁵³ The Constitution is thus treated like an ordinary law. This gives Parliament far-reaching powers to change major parts of the Constitution without a qualified majority or a specific procedure.

VI. International and Regional Law

The position of international law and regional law within the national legal system has not been accorded the attention it deserves in the ongoing constitutional review process. The relationship between international and regional law on the one hand and national law on the other hand has remained undefined. The questions central to defining this relationship are: (i) Is international/regional law part of the law of the land? (ii) What is the place of international/regional law in the hierarchy of the nation's law? and (iii) How should courts handle conflicts between international/regional law and municipal law?¹⁵⁴

The Proposed Constitution, like the First and Second Drafts, and similar to the Constitution, 1977, deals with international law in the following way:

150 The fear was that the Constitution could be manipulated to serve political interests, for instance that, if the incumbent president is contemplating extending his term of office, he could too easily mobilise his or her peers in parliament to have the constitution changed. The maximum period of office as president is two terms of office of five years each; see Article 40 (1), (2) Constitution, 1977; and equally Article 76 (1), (2) First Draft Constitution; Article 83 (1), (2) Second Draft Constitution; Article 92 (1), (2) Proposed Constitution.

151 According to Article 119 (a), read together with Chapter Two, of the Second Draft Constitution, any change affecting constitutional human rights was possible only by referendum.

152 Article 98 (1) (a) of the Constitution, 1977 (two-thirds majority of members of parliament); Article 118 (2) of the Second Draft Constitution (two-thirds majority of members of parliament from Tanzania Mainland and two-thirds majority of members of parliament from Zanzibar).

153 Article 134 (1) (a) of the Proposed Constitution.

154 See *Khoti Chilomba Kamanga*, *The Tanzania Draft Constitution of 2013: Panacea or Pandora's Box?* *The Guardian on Sunday* (Tanzania), 16 June 2013, pp. 7-8.

- human dignity and other human rights are preserved and upheld taking into consideration the Tanzanian customs and traditions, the Universal Declaration of Human Rights and international conventions ratified by the United Republic;¹⁵⁵
- the Parliament has the power to ratify international treaties;¹⁵⁶
- the Parliament has the power to enact laws where implementation (probably meant: of international treaties) requires legislation.¹⁵⁷

The First and Second Drafts had further provided that Parliament should have the power to discuss and ratify all contracts concerning natural resources which are managed by the government of the United Republic.¹⁵⁸ This has not been retained by the Proposed Constitution.

The First and Second Drafts had provided that the rights and freedoms contained in international human rights conventions ratified by the United Republic of Tanzania, except for provisions for which it was stated that they were not binding on the United Republic, would be part of the constitutional human rights.¹⁵⁹ In addition, the Second Draft had also included rights and freedoms contained in regional human rights conventions.¹⁶⁰ This monist approach of the two Draft Constitutions¹⁶¹ was however not followed by the Proposed Constitution.

As regards the relevance of international law in the interpretation of constitutional human rights by the courts and other decision-making bodies, the First and Second Draft Constitutions, and equally the Proposed Constitution, suggested that international law must be considered.¹⁶² In this respect, the two Constitutional Drafts and the Proposed Constitution confirm the long-standing Tanzanian case law jurisprudence¹⁶³ which has always held that

155 Articles 8 (2) (a) and 14 (2) (a) of the Proposed Constitution. See Article 9 (a), (f) of the Constitution, 1977; Articles 7 (2) (a) and 11 (3) (b) (i) of the First Draft; Articles 7 (2) (a) and 10 (3) (b) (i) of the Second Draft.

156 Article 131 (3) (g) of the Proposed Constitution. See Article 63 (3) (e) of the Constitution, 1977; Article 107 (2) (g) of the First Draft; Article 115 (2) (g) of the Second Draft.

157 Article 131 (3) (a) of the Proposed Constitution. See Article 63 (3) (d) of the Constitution, 1977; Article 107 (2) (f) of the First Draft; Article 115 (2) (a) of the Second Draft.

158 Article 107 (2) (h) of the First Draft; Article 115 (2) (h) of the Second Draft. See also similar proposals discussed and made by *Issa G. Shivji*, *Debating Constitutional Amendments in Tanzania*, Haki-Elimu Working Papers, Dar es Salaam, n. y., p. 3, http://hakielimu.org/files/publications/document57debating_constitutional_amendments_tz_en.pdf.

159 Article 51 (3) of the First Draft Constitution; Article 53 (3) of the Second Draft Constitution.

160 Article 53 (3) of the Second Draft Constitution.

161 Cf. the Constitution of Kenya of 2010 whose Article 2 (6) reads: "Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."

162 Article 52 (1) (b) of the First Draft Constitution; Article 54 (1) (b) of the Second Draft Constitution; Article 65 (1) (a) of the Proposed Constitution.

163 See especially *Transport Equipment Ltd. and Reginald John Nolan v. Devram P. Valambia*, Court of Appeal of Tanzania at Dar es Salaam, Civil Application No. 19 of 1993 (unreported). For further discussion and references, see for instance *Juliana Masabo*, *The Protection of the Rights of Migrant Workers in Tanzania*, PhD thesis submitted to the University of Cape Town, 2012, p. 62; *B. C. Murungu*, *The Place of International Law in Human Rights Litigation in Tan-*

international law should be considered in the interpretation of the provisions of the constitutional chapter on Human Rights.

The Proposed Constitution provides that the foreign policy of the United Republic shall be pursued so as to promote regional and international cooperation and to adhere to international and regional agreements.¹⁶⁴ There are no provisions which are more specific on the status of laws adopted by regional economic communities and which provide for a transfer of sovereign powers to the regional community in either of the two Drafts or in the Proposed Constitution. Despite the important legal developments taking place in regional economic communities of which Tanzania is a member, the East African Community and the Southern African Development Community in particular, the Constitutional Review Commission and the Constituent Assembly saw no need to include articulate provisions on the position of the law of these regional communities in Tanzania's legal system.¹⁶⁵

VII. Human Rights

The two Draft Constitutions proposed substantial improvements to the Bill of Rights, as compared with the Constitution, 1977; and the Proposed Constitution has maintained and

zania, in: M. Killander (ed.), *International Law and Domestic Human Rights Litigation in Africa*, Pretoria 2010, pp. 57-69; *Ulrike Wanitzek*, *Women's and Children's Rights in Africa: A Case Study of International Human Rights and Family Law in Tanzanian Courts*, *Recht in Afrika – Law in Africa – Droit en Afrique* 11 (2008) 1, pp. 43-44; *Khosi Chilomba Kamanga*, *International Human Rights Law as Reflected in Tanzania's Treaty and Court Practice*, in: W. Binchy and C. Finnegan (eds.), *Human Rights, Constitutionalism and the Judiciary: Tanzanian and Irish Perspectives*, Dublin 2006, pp. 53-70; *Chris Maina Peter*, *Incorporation of International Conventions in Tanzania*, *International Law Review* 1997, pp. 172-173; *Palamagamba John Kabudi*, *The Judiciary and Human Rights in Tanzania: Domestic Application of International Human Rights Norms*, *Verfassung und Recht in Übersee* 24 (1991) 3, p. 277.

164 Article 22 (1) (a), (e) of the Proposed Constitution. See Article 12 (1) (a), (e) of the First Draft; Article 12 (1) (a), (e) of the Second Draft.

165 But successful regional economic integration requires the accommodation of community law in the national laws of the member states; see *Richard Frimpong Oppong*, *Legal Aspects of Economic Integration in Africa*, Cambridge 2011, pp. 209-210, with examples of European Union Member States, including Article 23 of the German Basic Law (Grundgesetz), and with the example of Article 3 of the Proposed New Constitution of Kenya of 2005 which was rejected in a referendum in 2005. Article 23 (1) of the German Basic Law provides specifically that “[w]ith a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. ...”. And the rejected Article 3 of the Proposed New Constitution of Kenya of 2005 read: “The laws of Kenya comprise this Constitution and each of the following laws to the extent that it is consistent with this Constitution: ... (f) the laws of the East African Community; and (g) customary international law, and international agreements, applicable to Kenya.” Instead, the Constitution of Kenya of 2010 now contains the provision contained in its Article 2 (6); see note above.

extended them. A progressive and up-to-date Bill of Rights was one of the key features for which the First Draft Constitution was applauded. Commenting immediately after the release of the First Draft Constitution, Chris Maina Peter observed that the Bill of Rights in the First Draft Constitution was “a relatively modern Bill of Rights. To be fair to the Commission, it has gone beyond what most of the civil society organisations have been demanding to be included in the new Constitution”.¹⁶⁶ Indeed, the Bill of Rights, as incorporated in the First Draft and maintained in the Second Draft and, with some modifications, in the Proposed Constitution, has been extended to the fullest by introducing some rights which were alien to the Bill of Rights under the Constitution, 1977, such as the right to recognition of one’s citizenship,¹⁶⁷ the rights of accused persons and convicts,¹⁶⁸ the right to a clean and safe environment,¹⁶⁹ and the rights of vulnerable and special groups, such as women,¹⁷⁰ children,¹⁷¹ elderly persons,¹⁷² persons living with disabilities,¹⁷³ and minorities.¹⁷⁴ In addition, the Proposed Constitution, like the two Drafts, proposes elevation of the right to education from State Objectives and Directive Principles of State Policy under the Constitution, 1977¹⁷⁵ to a right that is legally enforceable if denied.¹⁷⁶ The provision concerning the right to freedom of religion contained in the Constitution, 1977¹⁷⁷ has also been expanded in both the First and Second Drafts and in the Proposed Constitution.¹⁷⁸ The Pro-

166 Peter 2013, note 27, p. 5.

167 Article 37 First Draft; Article 28 Second Draft; Article 69 Proposed Constitution; see below at note 192.

168 Article 38 First Draft; Article 39 Second Draft; Article 48 Proposed Constitution.

169 Article 40 First Draft; Article 41 Second Draft; Article 50 Proposed Constitution. See *Lawyers’ Environment Action Team (LEAT)/Policy Forum*, Environmental Rights, Protection and Management in Tanzania. Justification for their Inclusion in the Would-Be New Constitution, Dar es Salaam 2012, <http://www.policyforum-tz.org/files/EnvironmentalRights.pdf>; *Hamudi Ismail Majamba*, Environmental Protection within the Framework of the East African Community: Lessons for Constitutional Reform in Tanzania, in: Johannes Döveling/Kennedy Gastorn/Ulrike Wanitzek (eds.), *Constitutional Reform Processes and Integration in East Africa*, Dar es Salaam 2013, 137-153.

170 Article 46 First Draft; Article 47 Second Draft; Article 57 Proposed Constitution.

171 Article 42 First Draft; Article 43 Second Draft; Article 53 Proposed Constitution.

172 Article 47 First Draft; Article 48 Second Draft; Article 58 Proposed Constitution.

173 Article 44 First Draft; Article 45 Second Draft; Article 55 Proposed Constitution.

174 Article 45 First Draft; Article 46 Second Draft; Article 56 Proposed Constitution.

175 Article 11 (2) of the Constitution, 1977.

176 Article 52 of the Proposed Constitution; see Article 41 of the First Draft Constitution; Article 42 of the Second Draft Constitution.

177 Article 19 of the Constitution, 1977.

178 Article 31 of the First Draft Constitution; Article 32 of the Second Draft Constitution; Article 41 of the Proposed Constitution. The introduction of Kadhi Courts in Mainland Tanzania (Kadhi Courts are in existence in Zanzibar) was a controversial issue during the constitutional review; see: Mahakama ya Kadhi Yazikwa, Mtanzania, 30 September 2014, <http://www.tanzaniatoday.co.tz/news/mahakama-ya-kadhi-yazikwa>; Pinda Aiokoa Mahakama ya Kadhi, Mwananchi,

posed Constitution, apart from modifying some of the rights mentioned above, adds further rights, such as the right to health and to clean and safe water,¹⁷⁹ the rights of prisoners¹⁸⁰ and the rights of peasants, livestock holders, fishermen and miners.¹⁸¹

The Proposed Constitution sets certain new parameters within which the limitation of rights can be imposed.¹⁸² A limitation of rights, if imposed, must be transparent and democratic and should be based on respect for human dignity, equality and freedom, taking into account factors such as the nature of the right or fundamental freedom; the importance and purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; the requirement that if less restrictive means to achieve a similar purpose are available, they should be preferred; and the importance of preserving national security.¹⁸³

The Proposed Constitution retains the claw-back clause on the right to life contained in the Constitution, 1977,¹⁸⁴ and subjects this right to the law.¹⁸⁵ This limitation has been used to justify continued reliance on the death penalty for people convicted of capital of-

30 September, 2014, <http://mobile.mwananchi.co.tz/Habari/Pinda-aiokoa-Mahakama-ya-Kadhi/-/1597580/2469628/-/format/xhtml/-/15t4vqj/-/index.html>. Kadhi Courts were not incorporated into the Draft Constitutions and the Proposed Constitution. A Bill of the Written Laws (Miscellaneous Amendments) (No. 2) Act, 2014, Bills Supplement No. 9 of 31 October 2014, mentions Kadhi Courts within the Islamic Law (Restatement) Act, Cap. 375. However, the Islamic Law (Restatement) Act itself has never formally entered into force. The Bill providing for the introduction of Kadhi Courts was shelved as it had caused much uproar, see: Proposal for Kadhi Courts Set to Spark Fierce Debate, *The Citizen*, 27 January 2015, <http://www.thecitizen.co.tz/News/national/Proposal-for-Kadhi-courts-set-to-spark-fierce-debate/-/1840392/2603414/-/128s5bez/-/index.html>; Mtikila Sues Govt over 'Kadhi Court', <http://www.pesatimes.co.tz/news/governance/mtikila-sues-govt-over--kadhi-court/-tanzania>.

179 Article 51 of the Proposed Constitution.

180 Article 48 (2) of the Proposed Constitution.

181 Article 46 of the Proposed Constitution.

182 Not contained in Article 30 of the Constitution, 1977, but in the two Drafts, see note 183.

183 Article 66 of the Proposed Constitution; cf. Article 53 of the First Draft Constitution, which is similar to Article 55 of the Second Draft Constitution. The question arises whether a limitation of rights requires a formal Act. Article 67 of the Proposed Constitution speaks only of an Act to “oversee the use and implementation of the rights, freedoms and duties”.

184 Article 14 of the Constitution, 1977; Article 33 of the Proposed Constitution; similarly Article 23 of the First Draft Constitution; Article 24 of the Second Draft Constitution.

185 Within the boundaries set by the law.

fences.¹⁸⁶ Although the last execution was carried out in 1994,¹⁸⁷ a number of persons are still on death row.¹⁸⁸ It would have been desirable to take the constitutional review process as an opportunity to abolish the death penalty. A report by the Legal and Human Rights Centre indicates that “public opinion regarding the death penalty remains divided”, referring to a report by the Law Reform Commission according to which the majority view of the people favours retention of the death penalty,¹⁸⁹ and to another report according to which the majority does not approve of it.¹⁹⁰

VIII. Citizenship

First of all, it is notable that, unlike the Constitution, 1977, both the two Draft Constitutions and the Proposed Constitution provide for a right to recognition of one’s citizenship.¹⁹¹ Bonaventure I. Rutinwa observed (with regard to the First Draft Constitution) that, although the marginal note formulates “right to citizenship”, the provision as such “does not, strictly, protect the right to citizenship. It simply protects the right to *recognition* of citizenship.”¹⁹²

186 The death penalty is provided for in the case of murder (Sections 26, 196, 197 of the Penal Code, Cap. 16) and treason (Sections 39, 40 of the Penal Code, Cap. 16), see *Leonard P. Shaidi*, *The Death Penalty in Tanzania: Law and Practice*, n. p. n. y., http://www.biiicl.org/files/2213_shaidi_death_penalty_tanzania.pdf; *Legal and Human Rights Centre/Zanzibar Legal Services Centre*, note 1, pp. 16-17. In *Republic v. Mbushuu @ Dominic Mnyaroje and Kalai Sangula*, High Court of Tanzania at Dodoma, Criminal Sessions Case No. 44 of 1991, reported in [1994] TLR 146, the High Court had held the death penalty unconstitutional; but it was declared constitutional by the Court of Appeal in *Mbushuu @ Dominic Mnyaroje and Another v. Republic*, Court of Appeal of Tanzania at Dar es Salaam, Criminal Appeal No. 142 of 1994, reported in [1995] TLR 97; critically *Hatchard/Ndulo/Slinn*, note 101, p. 180. See also *Helen Kijo-Bisimba/Chris Maina Peter*, *Justice and Rule of Law in Tanzania. Selected Judgements and Writings of Justice James L. Mwalusanya and Commentaries*, Dar es Salaam, 2005, pp. 37-39.

187 Tanzania is therefore characterised as “de facto abolitionist”, *Legal and Human Rights Centre/Zanzibar Legal Services Centre*, note 1, p. 17.

188 *Legal and Human Rights Centre*, *Tanzania Human Rights Report 2008: Progress through Human Rights*, 2009, http://www.humanrights.or.tz/downloads/tanzania_human_rights_report_2008.pdf; see also *Cornell University Law School*, *Death Penalty Worldwide*, Tanzania, 2014, <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Tanzania#f110-5>; and *Legal and Human Rights Centre/Zanzibar Legal Services Centre*, note 1, p. 17.

189 *Law Reform Commission of Tanzania*, *Draft Discussion Paper on the Review of Capital Punishment, Corporal Punishment and Long Term Sentences in Tanzania*, 2008, p. 40, as referred to in *Legal and Human Rights Centre*, note 188.

190 *Cornell University Law School*, note 188.

191 Article 37 of the First Draft; Article 38 of the Second Draft; Article 69 of the Proposed Constitution.

192 *Bonaventure Rutinwa*, *Citizenship and Related Rights: Implications of the Proposed New Constitutional Dispensation in Tanzania*, in: T. L. Maliyamkono/H. Mason/B. Rutinwa (eds.), *A 100 Academics Search for Katiba Bora Tanzania*, Dar es Salaam, Tema Publishers for Eastern and Southern African Universities Research Programme (ESAURP), 2014, p. 121.

Both Draft Constitutions and the Proposed Constitution contain a chapter on citizenship,¹⁹³ enumerating the modes of acquisition of citizenship, loss of citizenship and other matters pertaining to citizenship.¹⁹⁴ The provisions largely correspond to the Tanzania Citizenship Act, 1995¹⁹⁵ with modifications, particularly with regard to the categories of citizens proposed by reducing the modes of acquisition of citizenship from three (birth, descent, naturalisation) under the Tanzania Citizenship Act¹⁹⁶ to two (birth and registration) under the two Drafts and the Proposed Constitution.¹⁹⁷

Citizens by birth are to be persons born in Tanzania if at the time of their birth at least one parent is or was a citizen of Tanzania, persons born outside Tanzania if at least one parent is a citizen of Tanzania,¹⁹⁸ and foundlings below the age of seven who have been found in Tanzania and whose parents are unknown.¹⁹⁹ Citizenship by registration can be applied for by migrants who are resident in Tanzania and are observant of the law and by spouses of Tanzanian citizens after seven years of marriage if they are resident in Tanzania and are observant of the law; a child adopted by a Tanzanian citizen can also acquire citizenship by registration.²⁰⁰ It is remarkable that both Draft Constitutions and the Proposed Constitution provide for gender parity in the transmission of citizenship to a non-citizen (whether a spouse or a child), the right to which under the current regime is exclusively reserved for male citizens.²⁰¹ Of interest is also the development with regard to dual citizen-

193 Chapter Five of the First Draft Constitution; Chapter Five of the Second Draft Constitution; Chapter Six of the Proposed Constitution. *Bonaventure Rutinwa*, *Constitutionalising Citizenship in Tanzania: Lessons from Other East African Jurisdictions*, in: Johannes Döveling/Kennedy Gastorn/Ulrike Wanitzek (eds.), *Constitutional Reform Processes and Integration in East Africa*, Dar es Salaam 2013, p. 118, notes that the Constitution, 1961 had contained a chapter on citizenship which however „mysteriously disappeared in subsequent editions of the Constitution“.

194 Chapter Five of the First Draft Constitution (Articles 54-56); Chapter Five of the Second Draft Constitution (Articles 56-59); and Chapter Six of the Proposed Constitution (Articles 68-72).

195 Cap. 357 R. E. 2002.

196 Sections 5, 6, 8-12 of the Tanzania Citizenship Act, Cap. 357 R. E. 2002.

197 Article 54 (2) of the First Draft Constitution; Article 56 (2) of the Second Draft Constitution; Article 68 (2) of the Proposed Constitution. It is therefore imperative that the proposed categories take care of all the modes of acquisition of citizenship prescribed under the Citizenship Act.

198 This would replace citizenship by descent with its disadvantages, *Rutinwa*, note 192, p. 123; the disadvantages are explained in *Rutinwa*, note 193, pp. 120-121. However, in *Rutinwa*'s view the new provision goes too far, *Rutinwa*, note 192, pp. 123-124 (with a comparison with the Kenyan and Ugandan provisions).

199 Article 55 (1), (2) and (4) of the First Draft Constitution; Article 57 (1), (2) and (4) of the Second Draft Constitution; Article 70 (1), (2) and (4) of the Proposed Constitution. On foundlings see *Rutinwa*, note 192, pp. 124-125.

200 Article 71 (1), (2) and (5) of the Proposed Constitution; Article 58 (1), (2) and (5) of the Second Draft; Article 56 of the First Draft. This replaces citizenship by naturalisation under Section 9 (1) of the Citizenship Act, 1995, *Rutinwa*, note 192, p. 125.

201 The Tanzania Citizenship Act, 1995 (Cap. 357 R. E. 2002) which restricts this right exclusively to male citizens will have to abide with the Constitution. Section 11 of the Act reads: “Naturalization of women married to citizens of the United Republic (1) Subject to the provisions of sub-

ship. While neither the two Drafts nor the Proposed Constitution allow dual citizenship, the Second Draft and the Proposed Constitution contain provisions to take care of persons of Tanzanian descent who were once citizens of Tanzania but lost this citizenship because they acquired the citizenship of another country,²⁰² by proposing enactment of a law that would bestow a special status on this category of people.²⁰³

*IX. Separation of Powers*²⁰⁴

The Constitution, 1977, although it enshrines the doctrine of separation of powers in its provisions,²⁰⁵ does not put in place any mechanism for ensuring strict adherence to the tenets of this doctrine. It establishes the three branches of the state, the legislative, executive and judicial branches, and outlines the mandate and functions of each of these branches.²⁰⁶ However, the remainder of the provisions of the Constitution, 1977 do not entrench this position further by ensuring that the separation of powers so envisaged also entails separation of functions as well as separation of personnel. There is, therefore, no strict separation of powers in terms of the functions of each branch of the state and the personnel vested with state powers.

section (2) and of section 6, a woman who is married to a citizen of the United Republic shall at any time during the life-time of the husband be entitled, upon making an application in the prescribed form, to be naturalized as a citizen of the United Republic. (2) A woman who has, previous to her marriage to a citizen of the United Republic, renounced, or been deprived of, her status as a citizen of the United Republic in accordance with the law for the time being in force shall not be entitled to be naturalized under subsection (1), but may be naturalized with approval of the Minister.”.

202 Article 59 of the Second Draft Constitution; Article 72 of the Proposed Constitution.

203 For comparative purposes an example from Ethiopia is provided here: In Ethiopia, a proclamation issued by the government of Ethiopia in 2002 allows foreign nationals of Ethiopian origin (other than those who have forfeited Ethiopian nationality and acquired Eritrean nationality) to obtain special identity cards that entitle the holders to enjoy rights and privileges not enjoyed by other foreigners, such as visa-free entry, residence, and employment, the right to own immovable property in Ethiopia, and the right to access public services.

204 See already *Ibrahim Hamisi Juma*, *Public Order Laws in Changing Political Landscape: The Role of the Executive, the Legislature and the Judiciary*, in: Chris Maina Peter/Ibrahim Hamisi Juma (eds.), *Fundamental Rights and Freedoms in Tanzania*, Dar es Salaam, 1998, pp. 83-100.

205 Indirectly, in Article 4 of the Constitution, 1977; see *Issa G. Shivji*, *Debating Constitutional Amendments in Tanzania*, Haki-Elimu Working Papers, Dar es Salaam, n. y., p. 1, http://hakielimu.org/files/publications/document57debating_constitutional_amendments_tz_en.pdf, where he compared the (Union) Constitution, 1977 with the Zanzibar Constitution, 1984, as amended, in this regard, and quoted Article 5 (A) (3) of the latter as a good example of a clear separation of powers.

206 Article 4 of the Constitution, 1977.

1. Simultaneous Membership in the Executive and Legislative

A point of relevance is the membership in parliament of members of the executive. Under the Constitution, 1977, the Prime Minister, Cabinet Ministers and Deputy Ministers must be Members of Parliament to qualify for their government offices: the President appoints them from among Members of Parliament.²⁰⁷ Although in line with the Westminster model where the whole cabinet is part of the legislature,²⁰⁸ this system has been criticised in Tanzania since the early 1980s.²⁰⁹ Instead, it was proposed that Ministers should not be Members of Parliament.²¹⁰ As simultaneous membership of the executive and legislature was seen as a violation of the principle of separation of powers, the First and Second Draft Constitutions wanted the three branches of government²¹¹ to be redesigned in respect of their relations with one another. It was proposed by both Drafts that the Cabinet Ministers and their Deputies should not at the same time be Members of Parliament. The two Drafts therefore provided that a person serving as a Member of the Parliament of the United Republic, of the (would-be) Parliament of Mainland Tanzania or of the Zanzibar House of Representatives would be disqualified from being appointed as a Minister or Deputy Minister.²¹²

The Proposed Constitution, however, does not follow this proposal. It returns to the position of the Constitution, 1977, that the Prime Minister,²¹³ Ministers and Deputy Ministers²¹⁴ all have to be appointed from amongst the Members of Parliament, and Regional Commissioners may be appointed from amongst the Members of Parliament.²¹⁵

207 Articles 51 (2) and 55 (4) of the Constitution, 1977. Regional Commissioners can be Members of Parliament but need not be so. This can be concluded from Article 61 of the Constitution, 1977 as it does not exclude membership in parliament. On the functions of the Regional Commissioners, being part of the central government to carry out executive functions at regional level, see *Shivji*, note 205, p. 2. There are actually a few instances where Regional Commissioners also serve as full Members of Parliament: Engineer Stella Manyanya is both, a Member of Parliament and the Regional Commissioner for Rukwa; also, Dr. Christine Ishengoma serves as a Member of Parliament (special seats for women) and Regional Commissioner for Iringa.

208 *Shivji*, note 205, p. 2.

209 *Shivji*, note 205, p. 2.

210 Thus “[d]eparting from the old Westminster arrangement copied from [the United Kingdom]”, *Peter* 2013, note 27, p. 4. See also *Issa G. Shivji* who suggests to ask: “Why should the ministers, who are part of the Executive, be Members of Parliament?”, rather than asking why they should not, *Shivji*, note 205, p. 2.

211 Articles 57 (2) and 58 (1) of the First Draft Constitution which correspond with Articles 60 (2) and 61 (1) of the Second Draft Constitution.

212 Article 94 (2) (a) of the First Draft Constitution and Article 101 (2) (a) of the Second Draft. Obviously the First and Second Drafts did not contain any provisions on Regional Commissioners as those would be covered by the constitutions of Mainland Tanzania and Zanzibar, respectively.

213 Article 110 (2) of the Proposed Constitution.

214 Article 116 (1) (d) of the Proposed Constitution.

215 As Article 123 of the Proposed Constitution does not exclude this membership.

Looking at other constitutions in the region, Hatchard, Ndulo and Slinn observed in 2004 that “[u]nder the new multi-party constitutions of the 1990s, the model of a Cabinet consisting of the President, Vice-President and Ministers appointed by the President from members of the legislature remains commonplace”.²¹⁶ Uganda may serve as an example²¹⁷ and Kenya (since its Constitution of 2010), Burundi and Rwanda as counter-examples.²¹⁸ While the First and Second Drafts followed the Kenyan, Burundian and Rwandan models, the Proposed Constitution returned to the pattern of the Constitution, 1977 and the Ugandan model.

2. Parliamentary Approval of Presidential Appointments

Another key proposal made in both Drafts had the goal of substantially reducing the powers of the President (as part of the executive) vis-à-vis the other branches of the state. For example, there was a requirement in both Drafts that key presidential appointments should have parliamentary approval.²¹⁹ While under the Constitution, 1977, the requirement of parliamentary approval applies to the post of Prime Minister only,²²⁰ the First and Second Draft Constitutions required parliamentary approval for appointments with regard to a number of offices, such as the Senior Minister,²²¹ Ministers and Deputy Ministers,²²² Chief Justice and Deputy Chief Justice,²²³ the Attorney General,²²⁴ Chief Secretary²²⁵ and Chief Au-

216 *Hatchard/Ndulo/Slinn*, note 101, p. 68. According to Thomas Fleiner and Cheryl Saunders, it is typical of common law countries that ministers are required to be Members of Parliament, while it is typical of civil law countries that they are not, although there are variations, *Thomas Fleiner/Cheryl Saunders, Constitutions Embedded in Different Legal Systems*, in: Mark Tushnet/Thomas Fleiner/Cheryl Saunders (eds.), *Routledge Handbook of Constitutional Law*, London, New York 2015, p. 25.

217 Article 113 (1) of the Constitution of Uganda, 1995 (as amended up to 2005).

218 Article 152 (3) of the Constitution of Kenya, 2010; Articles 104-105 of the Constitution of Burundi of 2005; Article 68 (2) of the Constitution of Rwanda of 2003.

219 See *Hatchard/Ndulo/Slinn*, note 101, p. 73, on the importance of parliamentary approval for certain important appointments, and generally of an “independent transparent appointment system for public servants”; and p. 72 on the role of public service commissions. See also *Shivji*, note 205, p. 4.

220 Article 51 (2) of the Constitution, 1977.

221 Article 99 of the Second Draft, referring to the Senior Minister (Waziri Mwandamizi). The impression is that the Constitutional Review Commission tried to replace the Prime Minister (Waziri Mkuu) with the Senior Minister (Waziri Mwandamizi), while still referring to the Prime Minister (Waziri Mkuu) in Article 262 (1) of the Second Draft with the provision that he would stay in office only until the general election in 2015.

222 Article 98 (1) of the Second Draft.

223 Articles 158 (1) and 159 (1) of the Second Draft.

224 Article 104 (1) of the Second Draft.

225 Article 105 (1) of the Second Draft. For the functions of the Chief Secretary, see Article 105 (2)-(5) of the Second Draft.

ditor-General.²²⁶ Moreover, appointment of chairpersons and vice-chairpersons of a number of constitutional bodies, such as the Electoral Commission,²²⁷ the Leadership Ethics and Accountability Commission²²⁸ and the Human Rights Commission,²²⁹ also required parliamentary approval in the two Drafts.

In contrast to this, the Proposed Constitution returns to the position of the Constitution, 1977 and endows the President with powers to appoint any civil servants without requiring parliamentary approval²³⁰ except for the appointment of the Prime Minister.²³¹ These far-reaching powers of the President under the Proposed Constitution reflect the continued concentration of power in this office.²³²

In theory, one may raise the question whether the requirement of parliamentary approval for the appointment of Ministers is not a violation of the principle of separation of powers as the legislature would be given power to interfere in functions of the executive. However, in practice this requirement is considered as an instrument in the system of checks and balances needed because of the powerful position of the President.²³³ This is confirmed if one looks at the Constitutions of some of the neighbouring countries. Both the Ugandan and the Kenyan Constitutions require parliamentary approval for the appointment of Ministers.²³⁴ Yet, the Proposed Constitution does not follow this example.²³⁵

226 Article 215 (1) of the Second Draft.

227 Article 191 (5) of the Second Draft. In this case also the appointment of ordinary members of the Electoral Commission required parliamentary approval.

228 Article 200 (4) of the Second Draft.

229 Article 209 (5) of the Second Draft.

230 Article 82 of the Proposed Constitution.

231 Article 110 (2) of the Proposed Constitution. Also, contrary to the proposals of the First Draft (Article 71) and the Second Draft (Article 74), under the Proposed Constitution the President is not obliged to take advice given to him unless so provided for by the Constitution; Article 83 of the Proposed Constitution. For instance, Article 95 (3) of the Proposed Constitution: National Advisory Committee to advise the President on the prerogative of mercy. Emulating the provision of Article 45 of the Constitution, 1977, Article 95 of the Proposed Constitution gives the President wide prerogative powers; he/she can change any sentence or pardon any person convicted by a court of any offence.

232 On the position under the Constitution, 1977, see *Wambali*, note 31, p. 278.

233 See the reflections on the imperial character of presidency in a number of African states by *H. W. O. Okoth-Ogendo*, *Constitutions without Constitutionalism: Reflections on an African Political Paradox*, in: Issa G. Shivji (ed.), *State and Constitutionalism: An African Debate on Democracy*, Harare 1991, pp. 13-14.

234 Uganda: Article 113 (1) of the Constitution; Kenya: Article 152 (2) of the Constitution.

235 Likewise, the Constitution of Burundi (Articles 87-94) and the Constitution of Rwanda (Article 116) do not contain this requirement.

3. Presidential Assent to Legislation

Another example of the powers of the President in the context of the separation of powers is that the legislative function is shared between the parliament and the executive as the President, being the head of the executive, has to assent to legislation.²³⁶ If the President ultimately refuses, he/she has to dissolve the parliament.²³⁷ This is another case of interference with democratic principles, especially the separation of powers, even though it is not uncommon.²³⁸ It was maintained both in the Drafts and in the Proposed Constitution.²³⁹

The discussion of the three items above leads to the conclusion that the Proposed Constitution does not provide for reform in the area of separation of powers. The provisions of the Proposed Constitution regarding the separation of powers are similar to the corresponding provisions in the Constitution, 1977 in that, while it declares recognition of the principle of separation of powers,²⁴⁰ the provisions discussed above have the effect of maintaining the strong power of the executive, and especially a powerful President, which the First and Second Drafts sought to change.²⁴¹

The strong role of presidents in many African democracies is well known.²⁴² As Hatchard, Ndulo and Slinn note, “[a]t independence, most [Eastern and Southern African] states made an attempt to blend Westminster-style Cabinet government with an American version of presidential power.”²⁴³ In Tanzania, the strong position of the President as part of the executive was achieved, among other factors, by abolishing the separation between

236 Article 97 (1) Constitution, 1977; Article 137 (1) Proposed Constitution.

237 Article 137 (5) of the Proposed Constitution; see Article 97 (4) of the Constitution, 1977. *Hatchard/Ndulo/Slinn*, note 101, p. 76 give examples of other countries (Uganda and South Africa) which “strengthen the positions of parliamentarians” by providing solutions other than the dissolution of parliament. Josaphat L. Kanywanyi provides evidence that delays in presidential assent are actually a significant problem in Tanzania, see *Josaphat Laurean Kanywanyi*, *Open-Ended Features in Constitutionalism and Cultural Attitudes in East Africa: Basis for Prevalence of Corruption, Poor Public Servant Responsibility, Accountability and Public Services Delivery?*, in Johannes Döveling/Kennedy Gastorn/Ulrike Wanitzek, *Constitutional Reform Processes and Integration in East Africa*, Dar es Salaam, 2013, 9-48, pp. 21, 39 ff. See also *Shivji*, note 205, p. 2.

238 *Hatchard/Ndulo/Slinn*, note 101, p. 76.

239 Article 114 of the First Draft; Article 122 of the Second Draft; Article 137 of the Proposed Constitution.

240 Article 74 (3) of the Proposed Constitution.

241 Cf. *Kanywanyi*, note 237, pp. 21, 39, on the roots of the “tendency to authoritarianism” which “foster attitudes and do create conditions that may explain the unabated major open-ended features of constitutionalism and prevalence of corruption, poor public servant responsibility, accountability and public services delivery”.

242 *Hector Fix-Fierro/Pedro Salazar-Ugarte*, *Presidentialism*, in: Michel Rosenfeld/Andrés Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford 2012, p. 637.

243 *Hatchard/Ndulo/Slinn*, note 101, p. 58.

head of state and head of government, thereby deviating from the Westminster model.²⁴⁴ This led to “the *colonial* version of the Westminster (British) system”.²⁴⁵ Josaphat L. Kanywanyi speaks of the often “virtually unlimited powers granted to executive presidents”.²⁴⁶ This includes some of the examples presented above, such as appointment to important offices and assent to legislation.²⁴⁷

The doctrine of separation of powers does not necessarily mean separation in the strictest sense.²⁴⁸ But a mutual limitation of powers in the sense of checks and balances is indispensable. The Proposed Constitution misses the chance to balance the power relations between the executive and the legislative branches in a more satisfactory way.

X. Electoral Process

Reform of the electoral process and establishment of an independent electoral commission were also among the key topics behind the constitutional reform because the position under the Constitution, 1977 is highly controversial.²⁴⁹ It is therefore not surprising that the two Drafts and the Proposed Constitution attempt to address this concern by proposing various reforms to the electoral processes in a bid to enhance fair elections.²⁵⁰

1. Establishment of an Independent Electoral Commission

Both the two Drafts and the Proposed Constitution are in agreement in respect of the need to enhance independence in the administration of elections by establishing an “Independent

244 *Jürgen Herzog*, *Geschichte Tansanias. Vom Beginn des 19. Jahrhunderts bis zur Gegenwart*, Berlin 1986, p. 181.

245 *Shivji*, note 205, p. 2; *Shivji/Majamba/Makaramba/Peter*, note 15, pp. 47-48.

246 *Kanywanyi*, note 237, p. 24.

247 *Id.*, p. 21.

248 *Jenny S. Martinez*, *Horizontal Structuring*, in: Michel Rosenfeld/András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford 2012, p. 540, observes degrees of separation of powers (“horizontal structuring”) “from constitutional systems with strong separation of powers (eg the United States) to those with greater fusion of powers (eg the United Kingdom), with many falling somewhere in the middle”.

249 See *Gamaliel Mgongo Fimbo*, *The National Electoral Commission of Tanzania in Support of Constitutional Democracy: A Comment*, in: Johannes Döveling/Kennedy Gastorn/Ulrike Wanitzek (eds.), *Constitutional Reform Processes and Integration in East Africa*, Dar es Salaam 2013, pp. 105-115; and *Damian Z. Lubuva*, *The Independence of the National Electoral Commission of Tanzania as an Oversight Constitutional Organ*, in: Johannes Döveling/Kennedy Gastorn/Ulrike Wanitzek (eds.), *Constitutional Reform Processes and Integration in East Africa*, Dar es Salaam 2013, pp. 89-103.

250 Chapter Twelve of the First Draft Constitution (Articles 180 ff.); Chapter Twelve of the Second Draft Constitution (Articles 189 ff.); Chapter Fourteen of the Proposed Constitution (Articles 215 ff.).

Electoral Commission".²⁵¹ The Commission is to be composed of nine members, including a chairperson and deputy chairperson²⁵² who must be persons who have served as judges of the Supreme Court, Court of Appeal or High Court for at least five years.²⁵³ The Commission members are to be appointed by the President on recommendation of the Nominating Committee. The members of the Nominating Committee are to include the Chief Justice of the United Republic as chairperson; the Chief Justice of Zanzibar as deputy chairperson; the Speaker of the Union Parliament, the Speaker of the Zanzibar House of Representatives, the Senior or Principal Judge,²⁵⁴ and the Chairperson of the Commission of Public Leadership Ethics and Accountability.²⁵⁵ This is a departure from the contentious position of the Constitution, 1977 under which the power to appoint the members of the Commission, including the chairperson and deputy chairperson, resides exclusively in the President of the United Republic.²⁵⁶ However, some of the members of the Nominating Committee are to be appointed by the President,²⁵⁷ insofar the question arises whether the introduction of the Nominating Committee makes a significant difference with regard to the independence of the Electoral Commission because some of its members are presidential appointees. But nevertheless it is different from the current practice. The President is confined to appointing persons from the recommended list and not otherwise and, secondly, all the three state organs are also represented in the process which is a measure of checks and balances. The mandate of the Independent Electoral Commission is similar to the mandate of the Electoral Commission under the Constitution, 1977.²⁵⁸

251 Article 181 of the First Draft Constitution; Article 190 of the Second Draft Constitution; Article 217 of the Proposed Constitution. Article 74 of the Constitution, 1977 provides for an "Electoral Commission".

252 Article 217 (2) of the Proposed Constitution.

253 Article 217 (5) (b) of the Proposed Constitution. Under the Constitution, 1977 and the National Elections Act, 1985 (Cap. 343 R. E. 2002), "the Commission comprises seven Commissioners including the Chairman and Vice Chairman who shall be persons who have been or qualify to be Justices of Appeal or Judges of the High Court", *Lubuwa*, note 249, pp. 91-92.

254 Article 218 (1) (e) of the Proposed Constitution.

255 Article 218 (1) of the Proposed Constitution. In Article 191 (1) of the Second Draft Constitution, the Speaker of the Parliament of Tanganyika and the Chief Justice of Tanganyika were also listed which was due to the three-government structure suggested in the Second Draft; see above D. II.

256 Article 74 (1) of the Constitution, 1977. The suggestion had been made that appointment by an independent commission should be required, i.e. not only recommendation by a nomination committee, *University of Dar es Salaam School of Law*, Proposals Submitted to the Constitutional Review Commission of Tanzania: Executive Summary, in: Johannes Döveling/Kennedy Gastorn/Ulrike Wanitzek (eds.), *Constitutional Reform Processes and Integration in East Africa*, Dar es Salaam 2013, p. 200.

257 For example, the Senior or Principal Judge is appointed by the President upon suggestion by and after consultation with the Judicial Service Commission, Article 194 (6), (7) of the Proposed Constitution.

258 Article 74 (6) of the Constitution, 1977. This is to supervise and co-ordinate the registration of voters in the United Republic; to supervise and co-ordinate the conduct of parliamentary and presidential elections (the president is elected by the people too, Article 87 (1) of the Proposed

2. Presidential Election

The second major proposed reform concerning the electoral process is the presidential election, an area which was equally contested, particularly with regard to the total number of votes which the presidential candidate must obtain, and with regard to the contestation of the results of the presidential election. While the Constitution, 1977 requires only a simple majority,²⁵⁹ the two Drafts and the Proposed Constitution are in agreement that the candidate must obtain the absolute majority.²⁶⁰ On the contesting of presidential election results, the Constitution, 1977 provides: “When a candidate is declared by the Electoral Commission to have been duly elected in accordance with this Article, then no court of law shall have any jurisdiction to inquire into the election of that candidate.”²⁶¹ By contrast, the two Drafts and the Proposed Constitution all provide for the possibility to challenge the results of presidential elections in court.²⁶² These proposals mark a reversal of the position under the Constitution, 1977 where not only is the President elected by simple majority, but also once a presidential candidate is declared to have won the election, the courts of law cannot inquire into the election of that candidate even if the said election was marred by multiple irregularities.

3. Independent Candidates

The third important reform regards independent candidates. Unlike the Constitution, 1977 and electoral laws under which affiliation to a political party is the only ticket to electoral posts,²⁶³ under the First and Second Drafts and the Proposed Constitution persons can exercise their right to contest general elections and be elected without having to rely on a political party.²⁶⁴ This position follows the decision of the African Court on Human and Peoples’ Rights in *Tanganyika Law Society and the Legal and Human Rights Centre and Reverend*

Constitution); to review and declare the boundaries of constituencies in the United Republic for the purposes of parliamentary elections; to supervise and coordinate the referendum; and to announce the results of the elections and of the referendum, Article 220 (1) (c), (a), (d), (b), (e) of the Proposed Constitution.

259 Article 41 (6) of the Constitution, 1977.

260 Article 77 (6) of the First Draft; Article 80 (6) of the Second Draft; and Article 89 (6) of the Proposed Constitution.

261 Article 41 (7) of the Constitution, 1977.

262 Article 78 of the First Draft (Supreme Court); Article 81 of the Second Draft (Supreme Court); and Article 90 of the Proposed Constitution (High Court).

263 Article 39 (1) (c) of the Constitution, 1977 provides that a person “shall not be entitled to be elected to hold the office of President of the United Republic save only if ... he is a member of, and a candidate nominated by, a political party”.

264 See, among other provisions, Articles 88 (1) (f), 140 (1) (c) of the Proposed Constitution; Articles 79 (1) (f), 125 (1) (c) of the Second Draft Constitution; Articles 75 (g), 117 (1) (c) of the First Draft Constitution. Cf. for Kenya Articles 99 (1) (c), 137 (1) (c) of the Constitution of Kenya, 2010.

Christopher R. Mtikila v. The United Republic of Tanzania,²⁶⁵ which directed Tanzania to amend its laws so as to allow independent candidates to take part in elections.

4. Representation of Women in Parliament

The fourth major reform is on representation and participation of women in senior decision-making bodies, the parliament in particular. The two Drafts and the Proposed Constitution all propose that there should be an equal number of female and male Members of Parliament.²⁶⁶ This would mark an end to the system of proportional representation of women in parliament, popularly known as “special seats for women” which are allocated to political parties on the basis of proportion of representation.²⁶⁷ The First and Second Draft Constitutions were very articulate on the way to achieve the desired gender parity in parliament. They proposed that each constituency must have two representatives, meaning that there should be a male and a female representative for each constituency.²⁶⁸ However, the Proposed Constitution, while maintaining the requirement of equal representation for men and women in parliament,²⁶⁹ does not give any specific indication of ways to achieve this end.

5. By-Elections

The fifth and last major point of reform touches upon the conduct of by-elections in the event that a parliamentary seat falls vacant before the expiry of the parliamentary period. Unlike the Constitution, 1977 under which by-elections are conducted each time a constituency seat falls vacant for reasons other than expiration of term,²⁷⁰ the First and Second Draft Constitutions proposed that a by-election should only be conducted if a constituency seat that has fallen vacant was previously occupied by an independent candidate. As for seats occupied by Members of Parliament affiliated to political parties, the First and Second Draft Constitutions provided that a by-election was unnecessary. They proposed that the constituency seat that falls vacant should be filled by a person from the list of candidates submitted during the general election by the political party that won that election.²⁷¹ This

265 *Tanganyika Law Society and The Legal and Human Rights Centre and Reverend Christopher R. Mtikila v. The United Republic of Tanzania*, African Court on Human and Peoples’ Rights at Arusha, Applications 009 and 011/2011, Decision of 14 June 2013.

266 Article 105 (4) of the First Draft Constitution; Article 113 (3) of the Second Draft Constitution; and Article 129 (4) of the Proposed Constitution.

267 Articles 66 (1) (b), 78 (1) of the Constitution, 1977; see *Rose Shayo*, Gender Issues in the Context of Constitutionalism and the Constitution in Tanzania, in: Joseph Oloka-Onyango/Chris Maina Peter (eds.), *Constitutionalism and Transition. African and Eastern European Perspectives*, Kampala, 2014, pp. 166 ff.

268 Article 105 (4) of the First Draft; Article 113 (3) of the Second Draft.

269 Article 129 (4) of the Proposed Constitution.

270 Article 76 (2) of the Constitution, 1977.

271 Article 116 (4) of the First Draft Constitution and Article 124 (4) of Second Draft Constitution.

proposal takes account of popular views which protest against the high costs of conducting by-elections every time a parliamentary seat falls vacant before the expiry of the parliamentary period. However, the Proposed Constitution does not support this proposal but rules, like the Constitution, 1977, that there should be a by-election every time a seat falls vacant outside of general elections.²⁷²

E. Conclusions

The constitutional review process is indeed an important development in Tanzania's history. The two Draft Constitutions of June and December 2013 and the Proposed Constitution of October 2014 are milestones in Tanzania's constitutional reform process. They are more comprehensive in terms of the scope covered and more voluminous in terms of the number of chapters and articles compared to the existing Constitution, 1977. More importantly, their preparation was guided by views collected by means of wide consultations and popular participation. They have all attempted, at different levels, to respond to the demands of the reform by introducing new features not included in the Constitution, 1977 or by modifying existing features. For instance, the Bill of Rights incorporated in all three documents is comprehensive and more progressive than the one in the Constitution, 1977. The Draft Constitutions and the Proposed Constitution are all in agreement with regard to modification of the electoral process, through, among other things, establishment of an independent electoral monitoring body, improving the representation of women in parliament, allowing independent candidates to take part in national elections, requiring an absolute majority vote for presidential elections and subjecting presidential electoral results to judicial inquiry.

Further comparison of the content of these three documents, however, leads to the conclusion that the First and Second Drafts were more progressive than the Proposed Constitution in several respects. They had firm statements and elaborate provisions on the sovereignty of the people, national values and fundamental objectives of state policy. They both sought to introduce a new form of governance, transforming the two-government structure of the Union into a federal mode of union with three governments, the Union government and the governments of Mainland Tanzania and Zanzibar. They also proposed significant improvements regarding the principle of separation of powers and regulating the power relations between the parliament and the executive, particularly with regard to ending simultaneous membership in the executive and the legislature, and requiring parliamentary approval of key presidential appointments. The Proposed Constitution on the other hand rejects these proposals and keeps to the existing structure with little modification.

272 Article 139 (2) of the Proposed Constitution.

Winnowing Tanzania's Proposed Constitution: The Legitimacy Question

By *Tulia Ackson**

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

A. Introduction

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

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

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

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

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

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

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

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

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

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

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

B. The Concept of Legitimacy

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

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

7 Constituent Assembly Hansard, 16 April 2014.

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

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

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

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

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

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

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

12 Rosen, note 10, p. 67.

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

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

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

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

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

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

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

C. The Constitutional Review Process

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

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

18 *Weber-Schäfer*, note 16, p. 89.

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

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

21 Section 9(1) of the CRA.

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

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

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

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

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

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

25 Section 17(4) of the CRA.

26 Section 18 of the CRA.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

40 Section 26(2) of the CRA.

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

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

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

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

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

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

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

Now, where consensus may not be achieved and decisions have to be made, they do not turn illegitimate just for lack of consensus, after all, as Sajó notes, “[c]onsensus is a dream (more like a nightmare) in all societies other than that of the angels (and they must be bored for all eternity).”⁴⁹ Understandably, in constitution making processes, there may be divisive issues, such as the structure of the Union in the case of Tanzania, and the CA had to make decisions. Although there were calls for a referendum on the issue, it is our considered opinion that it would have been unlawful for lack of an enabling provision in the CRA, not even in the existing United Republic of Tanzania Constitution of 1977.⁵⁰ Even then, at times, where there are sensitivities among the public about divisive issues, the public is not called to opine or decide on the same. Kenya and the issue of Kadhi’s Courts offer a good example. A sizeable number of Christians objected the inclusion of Kadhi’s courts in the Kenya Constitution and promised to veto should the provisions stay intact.⁵¹ However, Kadhi’s court was not one of the issues upon which people were asked to decide on before

46 Goldoni, note 41, p. 933.

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

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

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

50 CA Hansards, 10 April – 25 April 2014.

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

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

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

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

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

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

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

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

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

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

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

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

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

58 *Padraig O'Malley*, Constitutional Making with reference to CODESA, Namibia and Zimbabwe, available at https://www.nelsonmandela.org/omalley/index.php/site/q/03lv_02039/04lv_02046/05lv_02047/06lv_02049/07lv_02056.htm, accessed on 17 April 2015 and *D. M. Davis*, Constitutional borrowing: The influence of legal culture and local history in the reconstitution of comparative influence: The South African experience, *Int J Constitutional Law* 1(2003).

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

60 *Marina Ottaway*, note 57.

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

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

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

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

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

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

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

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

D. The Proposed Constitution: Legitimacy of Content

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

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

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

65 Section 25(1) of the CRA.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁷⁷ Constitutional Review Commission, note 2.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

E. As We Wait for the Referendum

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

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

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

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

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

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

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

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

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

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

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

BERICHTE / REPORTS

Ensuring Justice, Reparations and Truth through a Truth Commission and Other Processes in Uganda

By *Jeremy Sarkin**

Abstract: *This article reviews issues concerning the way that Uganda ought to be dealing with its past. It examines what a transitional justice process ought to look like, and what its component parts should be. The article examines the rights to justice, truth and reparations in international law, to examine why dealing with these rights are a necessity in Uganda, as well as why they are desirable. The article also reviews what ought to be implemented to ensure that the best approach is adopted.*

A. Introduction

Because of Uganda's violent history,¹ and the numerous gross human rights violations committed against hundreds of thousands of its people, especially over the last 25 years, few doubt that the country needs to deal with its past.² The Ugandan government has not been willing to do that for a variety of reasons, including its own involvement in human rights violations. Still, the nature of a transition (or lack thereof in the case of Uganda) plays a major role in determining how human rights violations of the past will be approached.

Generally, states make choices about what transitional justice model, amongst many to choose from, to encourage the establishment of a stable democracy and a human rights culture.³ The fact that Uganda has not had an overthrow or had to compromise with those in conflict with the state, will mean that there is no dramatic or discernable transition process.

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1 See for example *Alicia C. Decker*, 'Sometime You May Leave Your Husband In Karuma Falls Or In The Forest There': A Gendered History of Disappearance in Idi Amin's Uganda, *Journal of Eastern African Studies* 7.1 (2013) p. 125.

2 *Ronald Atkinson*, *The Realists in Juba? An Analysis of the Juba Peace Talks*, in: Tim Allen/Koen Vlassenroot (eds.), *The Lord's Resistance Army: Myth and Reality*, London 2010, p. 205.

3 *Laura K. Taylor, Alexander Dukalskis*, *Old Truths and New Politics: Does Truth Commission 'Publicness' Impact Democratization?*, *Journal of Peace Research* 49.5 (2012) p. 671.

Thus, the transitional justice model will largely follow what other countries that have been reformist have done. Consequently there will not be a large number of prosecutions. In fact, it is likely that there will be very few trials. Even less likely are many, if any, prosecutions of government officials (especially senior ones) or state security forces, who have committed violations.⁴ It is more likely that processes of reconciliation and reparations will be developed. It is less likely that there will be extensive processes to achieve justice and truth or putting in place mechanisms to achieve non-recurrence of the past. It must be remembered that President Museveni and his political party have been in power since 1986, and dealing with the past has much to do with their roles over the last 30 years.⁵ It will also be difficult to deal with the issues as the political opposition is very wary of the government, and is often unwilling to cooperate with it.⁶ This is compounded by the fact that opposition politicians have been intimidated, harassed and imprisoned. Getting all stakeholders to participate will be critical to the success of a transitional justice project. Much will need to be done to obtain the buy in from the various stakeholders.

This article reviews issues concerning the way that Uganda ought to be dealing with its past. It examines what a transitional justice process ought to look like, and what its component parts should be. The article examines the rights to justice, truth and reparations in international law, to examine why dealing with these rights are a necessity in Uganda, as well as why they are desirable. The article also reviews what ought to be implemented to ensure that the best approach is adopted.

B. A transitional justice process for Uganda

A Ugandan transitional justice process needs to cover all aspects of truth, justice, reconciliation, reparations and guarantees of non-repetition. Because Uganda is a relatively poor country such a process needs to be designed to maximize resources.⁷ Resources could be obtained from a variety of international donors, while internally resources could be obtained from savings from government spending in less needed fiscal areas. Resources need to be stretched by, for example, using existing institutions rather than creating new ones, and by prioritising community reparations over individual ones. Symbolic reparations should also play a key part rather than only material reparations. The process should not be too complex for people to understand, otherwise it will appear foreign to them. If this is the case, those who should be interested in its work may not want to or be able to access it.

4 See further *Hun Joon Kim*, Structural Determinants of Human Rights Prosecutions After Democratic Transition, *Journal of Peace Research* 49.2 (2012) p. 305.

5 *Robert Senath Esuruku*, Horizons of Peace and Development in Northern Uganda, *African Journal on Conflict Resolution* 11 (3) (2011), p. 111.

6 *Phillip Kasaija Apuuli*, The Prospect of Establishing a Truth-Telling and Reconciliation Commission in Uganda, *US-China Law Review* 10 (2013), p. 597.

7 See *Lisa J. Laplante*, The Plural Justice Aims of Reparations, in: Buckley-Zistel/Beck/Braun/Mieth (eds.), *Transitional Justice Theories*, New York 2013, p. 66.

Thus, the process should not be difficult to understand and its role and functions ought to be clearly disseminated. Thus, the process must have an education component that educates people about the system and how to access it.

The intricacies of various processes need to be carefully and comparatively researched.⁸ The research must include ways of ensuring equity, non-discrimination, and ways to ensure access by all victims in all areas of the country. This must be done to ensure that it does not replicate the problems that other processes have suffered. However, not too much time should pass before the process is set in motion and before reparations are paid, especially to those in dire need of urgent reparations to cover medical and other immediate needs.⁹ However, it must be recognised that victims have already been waiting many years and making them wait much longer will further undermine the process. Further delays will have an adverse impact on the eventual acceptance of such mechanisms.

How the process is rolled out and implemented is a key to its success. The hiring of competent, skilled, enthusiastic staff is essential to the success of the process. Timing and sequencing are important, too.¹⁰ They are essential to ensure that the process is rolled out systematically, in a viable fashion, and in a way that avoids logistical problems as far as possible. The time lag between the conclusion of the process and the implementation of its recommendations should also not be too long. In some places there have been long gaps between recommendations and implementation. This can have major adverse effects by raising expectations and causing anxiety amongst the populace.

C. Justice

A state has duties to prosecute and punish perpetrators of human rights and humanitarian law violations.¹¹ This is linked to the right to a remedy, including the right to an effective investigation, verification of the facts, and the disclosure of the truth. In this regard the United Nations Human Rights Commission noted that “state parties should also take specific and effective measures to prevent the disappearance of individuals and establish effective facilities and procedures to investigate thoroughly, by an appropriate and impartial body, cases of missing and disappeared persons in circumstances which may involve a violation of the right to life.”¹²

8 See *Joanna R. Quinn*, ‘Dealing with a Legacy of Mass Atrocity: Truth Commissions in Uganda and Chile’, *Netherlands Quarterly on Human Rights* 23 (2001) p. 383.

9 See *Max Du Plessis and Steve Pete*, *Repairing the Past? International Perspectives on Reparations for Gross Human Rights Abuses*, Antwerp 2007, p. 57.

10 *Joanna R Quinn*, ‘Chicken and Egg? Sequencing in Transitional Justice: The Case of Uganda’, *International Law Journal of Peace Studies* vol. 14 no. 2 (2008), p. 35.

11 *Jean-Marie Henckaerts, Louise Doswald-Beck*, *Customary International Humanitarian Law: Rules*, Cambridge 2005, p. 342.

12 *Laureano v. Peru*, U.N. GAOR, Human Rights Committee, 56th Session, P8.3, U.N. Doc. CCPR/C/56/D/540/1993 (1996).

The European Court of Human Rights¹³ has held that a state's failure to conduct an effective investigation "aimed at clarifying the whereabouts and fate" of "missing persons who disappeared in life-threatening circumstances" constitutes a continuing violation of its procedural obligation to protect the right to life under Article 2 of the Convention.¹⁴ In this regard, the comments of the UN Working Group on Enforced or Involuntary Disappearances, in their General Comment on the Right to the Truth in Relation to Enforced Disappearances in 2010, are important. The Working Group noted that "the relatives of the victims should be closely associated with an investigation into a case of enforced disappearance. The refusal to provide information is a limitation on the right to the truth."¹⁵ As a result of the myriad of developments, in recent decades, there has been a rise in international criminal tribunals, truth commissions and other bodies, on both the international level and within specific states, which focus on human rights abuses.

Uganda's issues concerning justice and amnesty are complicated.¹⁶ It is complicated by the fact that thousands of rebels have been given amnesty, and the fact that the ICC is seized with the Ugandan situation and has issued arrest warrants for five senior commanders of the the Lords Resistance Army (LRA), one of whom is now in their custody. He handed himself over to United States forces, who handed him over to the ICC. It is further complicated by the fact that Uganda's own security forces have committed violations. This has seen calls for justice on all sides, and thus a reluctance by the Government to prosecute anyone. Even though Uganda has established a special division of the High Court, now called the International Crimes Division, it has only one such case. That case has been going on for years because of the constitutional issues concerning amnesty.

D. Giving effect to the right to the truth in Uganda

The right to the truth has recently become a right recognised fully in international law. It is both an individual and collective right. While the community as a whole is entitled to know what was done to them, each victim has the right to know the truth about the violations that were perpetrated against them specifically. As Naqvi notes:

For victims and family, the right entails an obligation for the state to provide specific information about the circumstances in which the serious violation of the victim's human rights occurred, as well as the fate of the victim. For society in general, the right to the truth imposes an obligation on the state to disclose information about the cir-

13 See also *Nikola Kyriakou*, *Enforced Disappearances in Cyprus: Problems and Prospects of the Case Law of the European Court of Human Rights*, *European Human Rights Law Review* 2 (2011), p. 190.

14 *Cyprus v. Turkey* (Applic. no. 25781/94), ECHR Judgment (10 May 2001), para. 136.

15 Paragraph 3.

16 *Michael Otim, Marieke Wierda*, *Justice at Juba: International Obligations and Local Demands in Northern Uganda*, in: Nicholas Waddell/Phil Clark (eds.), *Courting Conflict? Justice, Peace and the ICC in Africa*, London 2008, p. 21.

*cumstances and reasons that led to 'massive or systematic violations', and to do so by taking appropriate action, which may include non-judicial measures.*¹⁷

Truth is important to deal with denials,¹⁸ manipulations and myths surrounding a conflict. Greater truth assists in knowing who the perpetrators were, who, and how many victims there were, and what was done to the victims by the perpetrators.¹⁹ Individual families want to know what happened,²⁰ but the society as a whole also has a right to know the truth. The truth is a fundamental aspect in ensuring a historical record. Processes of truth recovery can assist in dealing with those who deny what happened or their role.²¹ Certainly, truth recovery processes are useful, but are not substitutes for the search, recovery and identification of missing persons. In this regard Michael Ignatieff has noted that "all a Truth Commission can achieve is to reduce the number of lies that can be circulated unchallenged in public discourse." In Argentina, its work has made it impossible to claim, for example, that the military did not throw half-dead victims in the sea from helicopters. In Chile, it is no longer permissible to assert in public that the Pinochet regime did not despatch thousands of entirely innocent people.²² Thus, where the forensic evidence exists, there is much more certainty about what occurred than through a general truth examination process, such as a truth commission. Forensic analysis also provides in many cases, where DNA and other examinations are performed, specific and verifiable information about specific missing persons, where they are and what happened to them. In this way the right to the truth has become much more accessible for the families of the missing.

A process of public truth telling in Uganda should be an essential component of any attempt at healing and reconciliation.²³ There is discussion today in Uganda about the need to establish such a process.²⁴ The process ought to be supported in every possible way and all recommendations of the TRC ought to be speedily implemented. There are however

17 *Yasmin Naqvi*, The Right to the Truth in International Law: Fact or Fiction?, *International Review of the Red Cross* 88 (862) (2006), p. 260.

18 See *Margriet Blaauw, Virpi Lähteenmäki*, 'Denial and Silence' Or 'Acknowledgement and Disclosure', *International Review of the Red Cross* 84 (848) (2002) p. 767.

19 On the need to engage with these issues in general see: *Lars Waldorf*, Anticipating the Past Transitional Justice and Socio-Economic Wrongs, *Social and Legal Studies* 21 (2) (2012), p. 171.

20 *Pauline Boss*, Loss, Trauma, and Resilience: Therapeutic Work With Ambiguous Loss, New York 2006; see also *George A. Bonanno*, Loss, Trauma, and Human Resilience: Have We Underestimated the Human Capacity to Thrive After Extremely Aversive Events?, *American Psychologist*, 59 (1) (2004), p. 20.

21 *Melanie Klinkner*, Proving Genocide? Forensic Expertise and the ICTY, *Journal of International Criminal Justice* 6.3 (2008), p. 447.

22 *Michael Ignatieff*, 'Articles of Faith', *Index on Censorship* (5) 1996, p. 113.

23 *Tristan Borer*, Truth Telling as a Peace-Building Activity: A Theoretical Overview, in: *Tristan Borer* (ed.), *Telling the Truths: Truth Telling and Peace Building in Post-Conflict Societies*, Notre Dame 2006, p. 1.

24 *Kasajja Phillip Apuuli*, The Prospect of Establishing a Truth-Telling and Reconciliation Commission in Uganda, *US-China Law Review* 10 (2013), p. 598.

many people, particularly in government, but also in civilian life, that do not favor a truth telling process. They are seemingly concerned about the consequences of such a process. They fear what may emerge from it. This is particularly true of those in government. However, hiding the truth at the macro-level, and also for individual victims, will have a long-term negative effect. It will also affect individuals adversely. While peace and stability may exist in the country now and in the short-term future, the way to ensure that this continues for the long term is to deal effectively and holistically with the past.²⁵

It is not surprising that more than 50 such processes have been established around the world over the last 25 years or so. Many countries have established processes and institutions which address the truth about the past. About a third of all the Commissions that have been established, have occurred in Africa. Despite the many models that have been established they have not always been effective. It is clear that many of them have suffered a lack of resources and their establishment was not always done in the best way for the circumstances that existed in their countries. Some of them were more effective than others.

Where truth-telling processes have been implemented, victims across the political spectrum have had a credible forum through which to reclaim their human worth and dignity. Such a process can facilitate a national catharsis. Failure to establish this kind of process disregards the rights and views of victims, denies the need for a healing process, prevents recovery of the past, imagines that forgiveness can take place without full knowledge of whom and what to forgive, and fails to establish human rights values as the core standard for the future.

In this context, the discovery of the truth destroys that element which, while not useful in itself for eradicating impunity, fulfills at least a dual role. First, it is useful for society to learn, objectively, what happened in its midst, which translates into a sort of collective catharsis. Second, it contributes to create a collective conscience as to the need to impede the repetition of similar acts. It shows those capable of doing so that even if they may escape justice, they are not immune from being publicly recognized as the persons responsible for very grave attacks against other human beings. In this regard, even though these processes do not constitute punitive mechanisms, they may perform a preventive function that is highly useful in a process of building peace and the transition to democracy.²⁶ This has utmost relevance for Uganda, where few investigations have occurred, and fewer prosecutions, in spite of the fact that Uganda has international obligations to prosecute and punish perpetrators of human rights and humanitarian law violations.

Truth is an essential component of allowing a society to move on. However, it is unlikely that such a process will reveal all the 'truth'. Such processes should at least highlight the broad trends within the time frame and the available resources. It should provide a plat-

25 *Makau Mutua*, Beyond Juba: Does Uganda need a National Truth and Reconciliation Process? *East African Journal of Peace and Human Rights* 13 (2007) p. 142.

26 *Kimberly Hanlon*, Peace or Justice? Now that the Peace is being Negotiated in Uganda, will the ICC still Pursue Justice?, *Tulsa Journal of Comparative and International Law* 14 (2) (2007), p. 295.

form for those individuals who want to come forward and participate. It is important to have an insight into the past mistakes so that recommendations can be made effectively to deal with the causes of the conflict. It is essential to put into place mechanisms, institutions and processes in order to avoid such conflict issues again.

Truth discovery at the macro level will allow the society at large and communities all over Uganda to learn about the bigger picture - what was done; by whom was it done; to whom was it done; and why it was done.²⁷ This will allow victims and their family members to know more about what happened. Truth telling through hearings might bring victims and perpetrators together, through their testimonies. Truth telling and the creation of human rights abuse narratives could also be an essential means for showing who was responsible for past human rights violations.²⁸ Thus, these mechanisms should play important roles in providing different types of truth as well as acknowledging what occurred. Officially sanctioned knowledge should become part of the public conscience and acquire a higher status than mere truth.

The work of the truth commissions ought to be sanctioned fact finding with its main function being to establish an accurate record of the country's past, and thus help to provide a fair record of the country's history and its governments much disputed acts.²⁹

If a TRC can operate independently and has the resources to achieve its goals, it should allow an accurate historical record to be produced of what occurred, the causes of the conflict, and what can be done to rectify the mistakes of the past. This will be useful for the society as whole, but very beneficial for individual victims who will benefit from the cathartic effects of the process.³⁰ Victims should receive public acknowledgement³¹ about their suffering.³² By attaining official recognition of what has happened to them, victims should be able to have their legal status issues addressed and other problems resolved.³³

27 *Cecily Rose*, Looking Beyond Amnesty and Traditional Justice and Reconciliation Mechanism in Northern Uganda: A Proposal for Truth-Telling and Reparations, *Boston College Third World Law Journal* 28 (2) (2008), p. 345.

28 *Ayreh Neier, Jose Zalaquett, Adam Michnik*, Why Deal with the Past, in: *Boraine/Levy/Scheffer* (eds.), *Dealing with the Past: Truth and Reconciliation in South Africa* (second edition), Cape Town 1997, p. 6.

29 *Priscilla Hayner*, Fifteen Truth Commissions 1974-1993: A Comparative Study, in: *Neil Kritz* (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Vol. I: General Considerations, Washington D.C. 1995, p. 227.

30 *Kevin Avruch*, Truth and Reconciliation Commissions: Problems in Transitional Justice and the Reconstruction of Identity, *Transcultural Psychiatry* 47.1 (2010), p. 33.

31 See generally *David Lyons*, Rights and Recognition, *Social Theory and Practice* 32 (2006), p. 1.

32 *Julie M. Mazzei*, Finding Shame In Truth: The Importance of Public Engagement in Truth Commissions, *Human Rights Quarterly* 33.2 (2011), p. 431.

33 *Dyan Mazurana, Christopher Carlson*, Reparations as a Means for Recognizing and Addressing Crimes and Grave Rights Violations against Girls and Boys during Situations of Armed Conflicts and Under Authoritarian and Dictatorial Regimes, in: *Ruth Rubio-Marín* (ed.), *The Gender of Reparations*, Cambridge 2009, p. 162.

Truth in its wide, or in its narrow form, should also benefit from such a process. Thus, a historical narrative should be drawn up which allows for a fuller version of the history to be reclaimed and settled. At the same time, smaller accounts of what occurred to individuals must be collected³⁴ to paint the macro version of what occurred. A public report, drafted by credible, legitimate and diverse commissioners can be a long term benefit to Uganda and help to prevent future violence and rebuild the state. However, if the process is tainted by perceptions of bias, lack of representivity, or an understanding that the process is not thorough or insufficient in any way, this will negatively affect the process.³⁵

A truth telling process, possibly a truth and reconciliation commission in Uganda, should be an independent, credible and legitimate process aimed at uncovering truth, publicly acknowledging the violent past and furthering national unity and reconciliation.³⁶ If such a process succeeds in being inclusive, the society as a whole would be able to promote acknowledgement and initiate the healing process that ultimately leads to a national reconciliation. Some of the benefits resulting of such a process in Uganda initiated by a truth and reconciliation commission could be the following: a public and collective acknowledgement of the violent past through the establishment of as complete as possible public record of the nature and extent of gross violations of human rights as well as the names and fates of the victims; the furthering of a healing process by opening communication channels between the different groups in society and thereby installing an outlet for feelings such as pain, resentment, hatred and revenge. The assistance to victims in their personal recovery and restoration of their dignity by offering them the opportunity to tell their story and publicly acknowledging their suffering would be beneficial to all individuals and the society as a whole. Thus, the TRC should provide opportunities to survivors who are willing to explore and explain their own feelings and experiences. The exchange should culminate in a permanent record of the public historic experience of the nation³⁷ and the private emotional experience of the people. A truth and reconciliation process could also provide for a mechanism that would facilitate confession of crimes. It would help to deal with the problems surrounding amnesties within the country.

There also needs to be a process to find those missing as a result of the conflict, including the means to locate, identify and repatriate the remains of those found to their families.³⁸ Dealing with the missing needs to be a critical aspect of a transitional justice pro-

34 *Nneoma V. Nwogu*, When And Why It Started: Deconstructing Victim-Centered Truth Commissions in the Context of Ethnicity-Based Conflict, *International Journal of Transitional Justice* 4.2 (2010), p. 275.

35 See further *Avruch*, note 30, p. 33.

36 See *Mutua*, note 25, p. 142.

37 On the value and role of public information see: *Howard Schuman, Amy D. Corning*, Collective Knowledge of Public Events: The Soviet Era from the Great Purge to Glasnost, *American Journal of Sociology* 105 (4) (2000), p. 913.

38 *Erin Jessee*, Promoting Reconciliation Through Exhuming and Identifying Victims in the 1994 Rwandan Genocide, *AfricaInitiative policy brief no. 2* (2012), p. 5.

gramme. It is vital for the families waiting for information about their loved ones. Not dealing with these issues could have long term harmful consequences. It may be necessary therefore, to have a process dealing specifically with the missing and the needs of their families. An institution dealing with this issue specifically may be helpful, as has occurred in a number of other countries. This will be taken as a sign of government commitment to deal with the issue. Consulting victims on such a process and its design are essential.

E. Reparations

The provision of reparations is crucial in Uganda. Many victims have suffered severely and need to be given reparations. In addition, victims in both domestic and international law have the right to reparations.³⁹ The right to reparations has recently come to the fore. The right is delineated in the “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law”.⁴⁰

Reparations are crucial as they go “to the very heart of human protection – it has been recognized as a vital process in the acknowledgment of the wrong to the victim, and a key component in addressing the complex needs of victims in the aftermath of violations of international human rights and humanitarian law”.⁴¹ In a 2004 report by the United Nations Secretary-General to the Security Council entitled: ‘The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies: Report of the Secretary-General’, it was noted that:

“States have the obligation to act not only against perpetrators, but also on behalf of victims – including through the provision of reparations. Programmes to provide reparations to victims for harm suffered can be effective and expeditious through complements to the contributions of tribunals and truth commissions by providing concrete remedies, promoting reconciliation and restoring victims’ confidence in the State.”⁴²

39 On the right to reparations in international law see: *Christine Evans*, *The Right to Reparation in International Law for Victims of Armed Conflict*, Cambridge 2012, p. 7; and *Carla Ferstman et al.*, *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, Leiden 2009, p. 89.

40 On these issues in Bosnia and Herzegovina see: *Eric Rostand*, *The Right to Compensation in Bosnia: An Unfulfilled Promise and a Challenge to International Law*, *Cornell International Law Journal* 33 (2000), p. 113.

41 ‘Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law’.

42 UN Security Council, ‘The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies: Report of the Secretary-General’, UN document S/2004/616, New York 2004, paras. 54-55.

Measures to satisfy victims, such as revealing the truth, holding perpetrators accountable, and ceasing on-going violations, can also have a reparative effect.⁴³ Thus, steps to prevent non-recurrence should accompany reparations, as this offers reassurance to victims that reparation is not an empty promise or a temporary stopgap. Reparations however cannot be a substitute for justice and prosecution. They need to be part of any transitional justice strategy together with strategies to obtain truth, justice and reconciliation. A comprehensive and workable process has component parts of each. They are mutually supporting and often overlap.⁴⁴

Critically, the process in Uganda must not be too cumbersome or onerous. There must be an easily accessible method to receive reparations with common measures. It must be a fair process and be perceived by the victims as reparative. Many victims have suffered severely and their plight is urgent. Many have critical needs, especially as far as their health needs are concerned. While NGOs and others such as the ICC Trust Fund are playing an important role in addressing some of the needs, many victims are not being attended to. Doing so, especially for those in need of urgent immediate attention, is crucial. Long term issues are also important to deal with; otherwise peace and stability will continue to evade Uganda in the future.

The process of providing reparations will be complex and difficult. These processes are difficult to set up and run. There are many challenges that will need to be overcome.⁴⁵ There are many issues to be considered including both procedural and substantive matters in the implementation of these processes. All of them are important and the process needs to be implemented carefully and with a great deal of consideration. Sequencing is critical, but so are issues including the process, ensuring sufficient research and mapping, the type and source of funding, the type of reparations to be granted, the type of institution and the registration process, what categories of victims ought to be covered, and the time period to be covered by reparations. Also to be considered is how the process ought to be victim centred, why a gender focus is necessary, why traditional mechanisms need to be a part of the process and why there must not be discrimination in the process.

A transitional justice policy incorporating a reparations programme cannot be designed without researching the scope of the problem and the extent of the needs of victims.⁴⁶ Without proper research, problems can arise including raising expectations of victims which are

43 See *Rama Mani*, *Reparation as a Component of Transitional Justice*, in: De Feyter/Parmentier/Bossuyt/Lemmens (eds.), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*, Antwerp 2006, p. 54.

44 *Ibid.*, p. 67.

45 *Rianne M. Letschert, Theo van Boven*, *Providing Reparation in Situations of Mass Victimization: Key Challenges Involved*, in: Letschert/Haverman/de Brouwer/Pemberton (eds.), *Victimological Approaches of International Crimes*, Antwerp 2011, p. 155.

46 See *Thomas Craemer*, 'Framing Reparations,' *The Policy Studies Journal* 37 (2) (2009), 275-298.

not then met.⁴⁷ This is also critical to ensure that all victims and categories of victims are addressed and taken into account.

A mapping exercise is essential in Uganda to understand what has happened, who the victims are, what are the categories, how many people fit in each category and what are the needs. It is also essential to know which programs are already in place in the country and what is being offered already. Thus, examining what programmes are already on offer, to whom and where it has been rolled out, is important to coordinate all existing processes. It is also important to know what the government is doing and planning for future, with regard to building infrastructure in conflict-affected areas. It must be understood what resources are available for the process. This is fundamental, so that a proposed policy does not raise expectations unnecessarily, which often leads to difficulties. Thus, there ought to be a process established to engage with the government to determine what resources may be put on the table and what type of systems the government may be willing to support.

It is also essential to know what other role players, including donors, and the other players engaged in Uganda, including the ICC Trust Fund for Victims, are doing and are planning to do in the future.⁴⁸ This is important as donors may be willing to support the process and engaging with them early would be useful to avoid duplication. As far as the ICC Trust Fund is concerned, it is important to remember that the ICC Trust Fund has already been playing a role, and will continue to remain engaged. The Trust Fund is set up by Article 79 of the Rome Statute⁴⁹ which states that: "A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims." This means that the awards received by the victims of gross human rights violations via orders made by the ICC are monitored and administered by the ICC, in the best interest of those victims.⁵⁰ Moreover, since the Trust Fund operates on a separate budget from that of the ICC, voluntary contributions by states, international organizations, NGOs and civil society are important for the Fund's effective functioning.⁵¹

47 *Martien Schotsmans*, Victims' Expectations, Needs And Perspectives After Gross And Systematic Human Rights Violations, in: de Feyter/Parmentier/Bossuyt/Lemmens (eds.), *Out of the Ashes: Reparations for Victims of Gross and Systematic Human Rights Violations*, Antwerp 2005, p. 105.

48 See *Adrian Di Giovanni*, The Prospect of ICC Reparations in the Case Concerning Northern Uganda: On a Collision Course with Incoherence, *Journal of International Law and International Relations* 2 (2005-06), p. 25.

49 Rome Statute of the International Criminal Court, 1998.

50 *Anne-Marie de Brouwer*, Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and at the Trust Fund for Victims and Their Families, *Leiden Journal of International Law* 20 (2007), p. 207.

51 *Ibid.*, p. 207.

F. Conclusion

At some point in the future, Uganda will have to face the tensions between justice, truth, and reconciliation. These pillars of transitional justice can be incompatible with one another if not dealt with in a manner relevant to the circumstances. If they are applied methodically and independently⁵² they should be mutually supporting. If used in a manner appropriate to the circumstances they should have a positive and useful effect.

This article has argued that it is essential that truth mechanism(s) and other transitional justice mechanisms are established in the country. While Uganda has had such processes before, they were not successful for a variety of reasons, primarily because it was not considered open, transparent, credible, accepted or able to play the role that such bodies ought to. It is maintained that the right to the truth is an accepted right, and a version of the accepted truth ought to emerge as a part of a broader transitional justice approach, and specifically as a component of reparations.

The chances for more justice in Uganda are remote. Thus, dealing with impunity is seemingly off the table. A change in government is probably the only way for this to change.

Critically, the other components of transitional justice, reconciliation and guarantees of non-repetition, must also be implemented. It is also crucial to embark on a constitutional and legal reform, which must include the reform of state institutions. New institutions also need to be formed to promote democratic norms as well as greater accountability.

52 *Rani Mani*, *Conflict Resolution, Justice and the Law: Rebuilding the Rule of Law in the Aftermath of Complex Political Emergencies*, *International Peacekeeping* 5 (1998), p. 8.

Constitutionalism, Parliamentary Condemnation and the South African Public Protector

By *Ilyayambwa Mwanawina* and *Busisiwe Charmaine Lekonyane**

Abstract: *The South African Constitution under chapter 9 establishes state institutions that are mandated with the obligation to strengthen the concept of constitutional democracy in the Republic. The Constitution requires that other organs of state, through legislative and other measures, must assist and protect these institutions to ensure their independence, impartiality, dignity and effectiveness. One such institution established under chapter 9 is the office of the Public Protector whose mandate includes the power to investigate any conduct of state affairs and to take appropriate remedial action. It has been very active in clamping down on the constitutional breaches of other organs of state including Cabinet members and the institutions they oversee. This paper explores the effectiveness and enforceability of the remedial actions of the Public Protector and further examines the preservation of various constitutional values surrounding its processes. It establishes that the current legislative framework falls short of rendering the institution fully effective within a constitutional context.*

A. Introduction

Constitutionalism is the idea, often associated with the political theory that an authority wielding public power or purporting to represent the interest of the governed can and should be legally limited in its powers, and that its authority or legitimacy depends on its observing these limitations.¹ The premise from which a constitutional democracy functions is such that all governance processes have to pass a constitutional muster in which the separation of powers, rule of law and independence of the judiciary are guaranteed. Constitutionalism and legality have thus developed to be ideals that complement each other. Since public officials and public institutions are tasked with exercising public power, good governance and social trust are premised at least partly on reasonable and responsive decision-

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¹ See generally *Maurice John Crawley Vile*, *Constitutionalism and the Separation of Powers*, Oxford 1967.

making² within the parameters of section 237 which establishes a constitutional principle to perform diligently and without delay whenever an obligation arises. An obligation to perform, vary, reconsider or suspend a decision may arise for instance when a court, tribunal or forum with the requisite jurisdiction pronounces on a set of facts. The Office of the Public Protector established under section 181 of the Constitution³ is a constitutional structure established to strengthen the idea of a constitutional democracy within the country.

The Public Protector Act⁴ regulates the operations of this institution. It details, amongst others that it has the competence to investigate matters and to protect the public against matters such as maladministration in connection with the affairs of government, improper conduct by a person performing a public function, improper acts with respect to public money, improper or unlawful enrichment of a person performing a public function and an act or omission by a person performing a public function resulting in improper prejudice to another person.⁵ There is no scarcity of cases as is evidenced from the annual reports that are submitted to the National Assembly in terms of section 181(5) of the Constitution. With reference to the legislative provisions that empower the office, this paper will attempt to establish the effectiveness and enforceability of the remedial recommendations in respect of matters investigated by such an office.

In order to determine the above, this work will have to develop arguments based on methodological foundationalism.⁶ The first part of this paper will explain what legal effect, if any, the recommendations of the Public Protector have on an institution or public official whose decisions have fallen within the jurisdiction of the Public Protector. This will involve canvassing the literature and case law that already exists. The second part will illustrate how the *lacuna* in relation to compliance with reports of the Public Protector identified in the first part of the paper defeats the values of responsiveness and integrity that characterize the whole idea of constitutionalism in South Africa.

B. The enforceability of the decisions of the Public Protector

The Public Protector Act grants investigative powers to the Public Protector who may initiate such investigations either on his/ her own initiative or as a result of complaint or allegation. The Act further grants the office the powers to enter premises and seize articles or in-

2 See Minister for Justice and Constitutional Development v Chonco and Others 2010 (1) SACR 325 (CC) at para 45 and South African Police Service v Solidarity Obo Barnard 2014 (6) SA 123 (CC) at para 33.

3 Philippe C. Schmitter, *Imagining the Future of the Euro-Polity with the Help of New Concepts* in: Gary Marks, Fritz Scharpf, Philippe C. Schmitter and Wolfgang Streeck (Eds.), *Governance in the European Union*, London 1996, p. 121 (133).

4 Public Protector Act 23 of 1994.

5 See Preamble of the Public Protector Act.

6 *Richard Fumerton*, "Foundationalist Theories of Epistemic Justification", in: Edward N. Zalta (Ed.) *The Stanford Encyclopedia of Philosophy* (Summer 2010 Edition), <http://plato.stanford.edu/archive/s/sum2010/entries/justep-foundational/> (last accessed 26 October 2015).

formation that may be relevant to the investigation upon the issuing of a warrant by a judge or magistrate.⁷ Under section 8 of the Act, the Public Protector may make known to any person any finding, point of view, or recommendation in respect of any matter investigated by the office. Further, an annual report of all the activities of the Public Protector is submitted to the National Assembly and the National Council of Provinces. The first inquiry of this paper lies here, what legal force do the recommendations or viewpoints of the Public Protector have on the parties involved?

In the recent decision of *Democratic Alliance v South African Broadcasting Corporation Ltd and Others*⁸ the Western Cape High Court had to settle the question whether the recommendations outlined in the report titled "*When Governance and Ethics Fail*"⁹ in which the Public Protector recommended inter alia that disciplinary action be taken against the South African Broadcasting Corporation's Chief Operations Officer for his dishonesty relating to the misrepresentation of his qualifications, abuse of power and improper conduct in appointment, salary increases, suspensions and dismissals of various officers in the SABC. Despite a well investigated report rooted in constitutional law as well as good corporate governance practices, the SABC did not adhere to the recommendations and remedial action as outlined in the report. The Corporation subsequently proceeded to recommend the appointment of Mr Motsoeneng by the Minister to the position of COO at its meeting on July 2014 reasoning that "it did so in order to secure the interests of the SABC, and in the knowledge that there was no reasonable basis to discipline him for any misconduct".

The Court in this case reasoned that unlike an order or decision of a court, a finding by the Public Protector is not binding on persons and organs of state but this does not mean that these findings and remedial action are mere recommendations, which an organ of state may accept or reject.¹⁰ The Court further elaborated that the findings of the Public Protector were indeed valid and that the conduct of the SABC board and the Minister in rejecting the findings and remedial action of the Public Protector was arbitrary and irrational.¹¹ Further Schippers J stated that "it goes without saying that a decision by an organ of state rejecting the findings and remedial action of the Public Protector is itself capable of judicial review on conventional public law grounds".¹²

7 Sec 7 and 7A.

8 2015 (1) SA 551 (WCC).

9 *Thuli N Madonsela, When Governance and Ethics Fail: Report on an Investigation into Allegations of Maladministration, Systemic Corporate Governance Deficiencies, Abuse of Power and the Irregular Appointment of Mr. Hlaudi Motsoeneng by the South African Broadcasting Corporation (Sabc), 2014.*

10 *Democratic Alliance v South African Broadcasting Corporation Ltd and Others* 2015 (1) SA 551 (WCC) at para 51 and 59.

11 *Democratic Alliance v South African Broadcasting Corporation Ltd and Others* 2015 (1) SA 551 (WCC) at para 83.

12 *Democratic Alliance v South African Broadcasting Corporation Ltd and Others* 2015 (1) SA 551 (WCC) at para 73.

In essence what this judgment clarified is the fact that a decision of the Public Protector is not enforceable on the parties affected. The decision to follow the recommendations of the Public Protector depends on the discretionary analysis in terms of rationality by the party upon whom the recommendation is directed. It is only upon a court of law finding that the decision by such a party to ignore the recommendations of the Public Protector was unreasonable and irrational that the court would make a declaration or order that the remedial actions be enforced. This then places the effectiveness of the remedial actions by the Public Protector below that of other institutions such as the CCMA¹³ and the Competition Commission.¹⁴ The decisions of these two institutions are enforceable as if they were decisions of a court of law whilst the decisions of the Public Protector are subject to acceptance by the parties involved. Despite the Constitution outlining that organs of state, through legislative and other measures must assist in ensuring the effectiveness of the Chapter 9 institutions, there is no legislative equivalent to section 141 of the Labor Relations Act or Section 64(1) of the Competition Act that complements the powers of the Public Protector.

Having identified the *lacuna* in the legislative framework and that there is an obligation on the party receiving the remedial recommendations to evaluate them with reasonableness and rationality, another challenge in terms of effectiveness arises. Placing the obligation to evaluate the rationality and reasonableness of the recommendations on the affected party is a defeat of the initial constitutional obligation placed on the Public Protector in terms of section 181 and 182 to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice. The Court in *Carephone (Pty) Ltd v Marcus No and Others*¹⁵ concluded that, in order to establish whether an administrative action was justifiable, it had to be asked whether there was a rational, objective basis justifying the connection made by the decision-maker between the material properly available to him and the conclusion arrived at.¹⁶ This involves a lot of subjective reflection and it would amount to an unnecessary delay to allow parties that have been granted the opportunity to present evidence and reasons of their decision during the investigative processes of the Public Protector, another opportunity to determine themselves if the findings of the Public Protector are “valid”. The ideal position in this constitutional sphere would be to make the decisions of the Public Protector valid and enforceable pending a decision by a court of law setting aside or altering such a decision at the request of the affected parties.

13 Section 143(1) of the Labour Relations Act 66 of 1995 provides that an arbitration award issued by a commissioner is final and binding and it may be enforced as if it were an order of the Labour Court, unless it is an advisory arbitration award'.

14 Section 64(1) of the Competition Act 89 of 1998 provides that 'any decision, judgment or order of the Competition Commission, Competition Tribunal or Competition Appeal Court may be served, executed and enforced as if it were an order of the High Court'.

15 1999 (3) SA 304 (LAC).

16 *Carephone (Pty) Ltd v Marcus No and Others* 1999 (3) SA 304 (LAC) at para 37.

Further, it should be appreciated that in most instances the matters that are reviewed by the Public Protector are politically charged and intertwined with the exercise of public powers. In these instances, it would be very unusual for the political climate and partisan interests to not have an interest in influencing the determination of rationality. It is thus wise to place the obligation of pronouncing on these matters in an independent and impartial body that is subject only to the Constitution as envisaged in section 181(2).

C. The public interest implications

Having outlined the conundrums that surround the determination of rationality, it is tempting to seek compensation for this *lacuna* in the fact that the Constitution and the Public Protector Act require that the Public Protector must report on its activities and the performance of its functions to the Assembly at least once a year.¹⁷ The Public Protector Act specifically enunciates that these reports have to be submitted on a half yearly basis but does not preclude the office to submit such reports when he/she deems it necessary or on the request of the President or Speaker of the National Assembly.¹⁸ The idea herein was that once a report or finding has been made available to Parliament, the novel idea of holding executive members accountable within a *trias politica* arrangement would come into realisation thus compelling Ministers to reconsider their policy positions or decisions within the ambit of the finding of the Public Protector.¹⁹

This arrangement has however also proven not to be the most effective mechanism of supporting the findings of the Public Protector. The nature of our constitutional democracy arrangements has designed the composition of Parliament in such a way that the elected representatives are free to make decisions in a manner they deem fit, subject to the Constitution. This wide Parliamentary freedom has been a great advantage to the consolidation of democratic ideals in South Africa but has also borne what has become identified as partisan identification and voting patterns that are conceived from the beginning of election campaigns and are sustained even when one has already been sworn into office.²⁰ From a political science perspective, the formation of political parties is a critical step towards getting the civil society to participate in the construction of government and its policies. Additionally the fall of the apartheid state in South Africa and many other undemocratic regimes

¹⁷ See 181(5).

¹⁸ See 8(2).

¹⁹ See the reasoning outline in para 106-113 of the *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC). See also *Democratic Alliance v South African Broadcasting Corporation Ltd And Others* 2015 (1) SA 551 (WCC) at para 42 as an example of MP's putting questions to Ministers.

²⁰ *Adam Habib and Rupert Taylor*, Political Alliances and Parliamentary Opposition Post-Apartheid South Africa, *Democratization* 8 (2001), p. 207 ff.

all over the world can be credited to the concerted efforts of the civil society²¹ as such the legitimacy of partisan identities in parliament is intact.

Since the partisan nature of South African Parliament is an indispensable component of democracy, it then renders Parliament as not the best institution from which we society can wait for a determination on the validity or rationality of a finding of the Public Protector. Parliament provides one of the best forums for the scrutiny of decisions of public officials because it is "accepted that the National Assembly would not take their resolutions lightly, particularly because there may be considerable public outcry if it is perceived that the resolution has been wrongly taken".²² It is however unwise to depend on public outcry as a safeguard to secure the enforcement of remedial action or any other recommendations of the Public Protector as depending on the strength of the partisan relations, one decision may be enforced with much openness and determination whilst other decisions may be subjected to silent accountability tactics until such a matter attract less interest from the civil society.

D. Delayed constitutional justice

The mandate of the Public Protector focuses on strengthening democracy by ensuring that all state organs are accountable, fair and responsive in the manner they conduct their affairs. The principles of integrity and general good governance in the exercise of public power to the benefit of all citizens are therefore some of the guiding pillars from which the recommendations of the Public Protector should be interpreted. It is submitted that the *lucuna* that has already been identified in the previous paragraphs leads to delays in dispensing the constitutional justice. These delays are a breach of the fair and responsive traits that should characterize any institution that is exercising public power or performing a public function.

In the report titled "*When Governance and Ethics Fail*" which is discussed at the beginning of this paper, the recommendations of the Public Protector to the SABC directing the same amongst others to institute a disciplinary hearing and review various decisions related to the appointment and salary adjustments of the Chief Operations Officer (COO), the dismissal of various officers from the SABC and other related decisions did not receive the full compliance of the SABC Board. In fact after the report the Board proceeded to recommend to the Minister the same officer that was implicated in the report as their preferred permanent COO.²³ The Minister accepted this recommendation.

In another report, "Secure in Comfort" on an investigation conducted into allegations of impropriety and unethical conduct relating to the installation and implementation of security and related measures at the private residence of the President of the Republic of South

21 *Nancy L Clark and William H Worger*, South Africa: The Rise and Fall of Apartheid, New York, 2013.

22 Certification Judgment, note 19, at para 163.

23 *Democratic Alliance v South African Broadcasting Corporation Ltd And Others* 2015 (1) SA 551 (WCC) at para 14-19.

Africa, it was established amongst others that the implementation of the security measures failed to comply with the parameters set out in the laws in question for the proper exercise of public authority; that the expenditure incurred by the state in respect of the measures taken, including buildings and other items constructed or installed by the Department of Public Works at the request of the South African Police Service and the Department of Defence, many of which went beyond what was reasonably required for the President's security, was unconscionable, excessive, and caused a misappropriation of public funds; and that the excessive and improper manner in which the Nkandla Project was implemented resulted in substantial value being unduly added to the President's private property. The acts and omissions that allowed this to happen constitute unlawful and conduct improper conduct and maladministration.²⁴ The report was received with the much anticipated "public outcry". It then proceeded to recommend various remedial actions including that the President pay a reasonable percentage of the cost of the measures as determined as excessive and unrelated to the purpose of the upgrades.

The report was ultimately tabled before Parliament and an Ad Hoc Committee on the President's Submission in response to Public Protector's Report on Nkandla was established. Eight (8) months post the "*Secure in comfort*" report and after much debate in Parliament, the Ad Hoc Committee reported that "the matter of what constituted security and non-security upgrades at the President's private residence be referred back to Cabinet for determination by the relevant security experts".²⁵ With hindsight, this referral back to the cabinet basically amounts to referring back a matter for determination to the same person or institution that has been implicated in such a matter. Similarly, the same referral can be observed in the case of *Democratic Alliance v South African Broadcasting Corporation Ltd and Others* wherein the court held that "as the findings (*of the Public Protector*) are not binding and enforceable, the organ of state must decide whether or not the findings should be accepted and the remedial action implemented".²⁶ Coincidentally, this judgment was also delivered eight (8) months after the Public Protector had made public her findings in relation to the decisions surrounding the SABC governance practices.²⁷

Notwithstanding the meticulous and cautious investigative efforts of the Public Protector, the argument being established here is that there is a significant delay between the con-

24 See *Thuli N. Madonsela*, *Secure in Comfort: Report on an Investigation into Allegations of Impropriety and Unethical Conduct Relating to the Installation and Implementation of Security Measures by the Department of Public Works at and in Respect of the Private Residence of President Jacob Zuma at Nkandla in the Kwazulu-Natal Province*, 2014.

25 National Assembly Committee Report on Report by President on Nkandla security upgrades: 11 Nov 2014.

26 *Democratic Alliance v South African Broadcasting Corporation Ltd And Others* 2015 (1) SA 551 (WCC) at para 72(a).

27 *Thuli N. Madonsela*, *When Governance and Ethics Fail: Report on an Investigation into Allegations of Maladministration, Systemic Corporate Governance Deficiencies, Abuse of Power and the Irregular Appointment of Mr. Hlaudi Motsoeneng by the South African Broadcasting Corporation (Sabc)*, 2014.

clusion of an investigation and the commencement of tangible efforts by a public entity or officer to begin “considering” the recommendations contained in a report. This, it is argued that it is not in line with Constitution, particularly the requirement outlined in section 237 of the Constitution which requires that the exercise of public power performance of public functions should be done diligently and without delay whenever an obligation arises.

There is no doubt that the South African public as well the institutions involved in these cases have a great interest in reaching finality of the matters contained therein. Finality would ensure that public confidence and integrity is adequately restored as well as the putting into effect appropriate remedies as flowing from the finality of the matters. The undue delay, administratively, legally or otherwise is a miscarriage of the social trust embedded in the Constitution that the public machinery would always act in the best interest of justice. There have been instances wherein South African courts have emphasized the twin relationship between obligations and timeousness. In the cases of *Mahambehlala v MEC for Welfare, Eastern Cape*²⁸ and *Mbanga v MEC of Welfare Eastern Cape*²⁹ the Court relied on the fact when an entity tasked with a constitutional obligation fails to arrive to a fair administrative decision, either by conduct, negligence or omission and thus resulting in a delay, such delay was unreasonable and that the applicant's constitutional right to lawful and reasonable administrative action enshrined in s 33(1) of the Constitution thereby been infringed by such an entity. It is further argued that due to the philosophical underpinnings on how governments and their organs are constituted, the theory of a “social contract” lays the perspective from which these arguments should be interpreted.³⁰ Theoretically, the South African public has placed the power to run all spheres of their lives in the government, the government, in reciprocity, then has an obligation to ensure the smooth, responsive and accountable nature of their machinery. The above principle has been used in various case law such as *Khumalo and Another v MEC for Education, Kwazulu-Natal*³¹ in which the court reiterated that public functionaries, as the arms of the state, are further vested with the responsibility, in terms of s 7(2) of the Constitution, to 'respect, protect, promote and fulfill the rights in the Bill of Rights'. As bearers of this duty, and in performing their functions in the public interest, public functionaries must, where faced with an irregularity in the public administration, in the context of employment or otherwise, seek to redress it. This is the responsibility carried by those in the public sector as part of the privilege of serving the citizenry who invest their trust and taxes in the public administration.³²

28 2002 (1) SA 342 (SE).

29 2002 (1) SA 359 (SE).

30 *Johnson David, Steve Pete, and Max Du Plessis*, Jurisprudence: A South African Perspective, Durban 2001, p.48.

31 2014 (5) SA 579 (CC).

32 *Khumalo and Another v MEC for Education, Kwazulu-Natal* at para 36. See also *Mazibuko No v Sisulu and Others NNO* 2013 (6) SA 249 (CC) at para 43-47 in which the Court noted that Section 102(2) of the Constitution confers on a member of the National Assembly the entitlement to give notice of and have a motion of no confidence in the President tabled and voted, the lacuna herein

Additionally under section 195, the Constitution enumerates various principles that should serve as a guide for governance in the public sphere. The two reports by the Public Protector illustrate, with evidence, that values such as a high standard of professional ethics, good human resource management, and efficient, economic and effective use of resources have been compromised. Ideally this should prompt swift and decisive action to rectify the elements of maladministration in an open, democratic and transparent manner but instead, the reports are subjected to much bureaucracy and delays. Having mentioned the idea of a social contract, this paper then re-introduces a party that all these processes and determinations have not placed much recognition on, the governed. The arguments presented in this paper illustrate that there is a type of harm that the governed are subjected to. This harm manifests itself in various forms such as loss of confidence in the government, feelings of betrayal, uncertainty about the truth or in years to come, voter apathy. The government then has a duty towards the people to bring within reasonable time certainty and finality of to all these matters that cloud the functioning of the government. Inference may be drawn from the statement of the Court in *Mokgatla v South African Municipal Workers Union* wherein the court observed that if victorious party suffers irreparable harm because of a pending appeal, then the very foundation of our social contract, the rule of law, will be seriously compromised. It bears the risk of people losing faith in the law and in the courts. Such a consequence is not to be treated lightly.³³

E. Conclusion

South African democracy can only be protected if the rule of law is adhered to. In order for democracy to thrive, the institutions strengthening such an ideology need to be respected and rendered effective. This paper has articulated the legal infrastructure that allows the Public Protector to investigate and pronounce on matters related to the exercise of public power and the legal effect of its decisions. It has also highlighted the relationship between the Public Protector and the National Assembly and argued that this mechanism is not sufficient to compensate for the *lacuna* compelling organs of state to be responsive and accountable to the findings of the Public Protector. This paper has further established that although the Constitution and the Public Protector Act grants the Public Protector investigative powers, these pieces of legislation fall short of rendering the institution fully effective since they rely on the premise that public outcry and parliamentary condemnation is sufficient to sway public bodies or officers to act in congruence with the remedial recommendations of the Public Protector.

being that the law did not compel the Assembly to table and vote on such a motion within reasonable time.

33 2014 JDR 2488 (GJ) at para 13.

BUCHBESPRECHUNGEN / BOOK REVIEWS

John Hatchard: Combating Corruption. Legal Approaches to Supporting Good Governance and Integrity in Africa, Edward Elgar Publishing, Cheltenham, UK / Northampton, MA, USA, 2014, 416 pages, hardback, 95.00 £; ISBN 978-1-78100-436-4

“Every dollar that a corrupt official or a corrupt business person puts in their pocket is a dollar stolen from a pregnant woman who needs health care; or from a girl or a boy who deserves an education; or from communities that need water, roads, and schools,” World Bank President *Jim Yong Kim* only recently emphasised during an anti-corruption event in Washington, D.C., pointing out that „[i]n the developing world, corruption is public enemy number one.“¹ His words neatly illustrate that since corruption has been identified in the international debate as the major obstacle to good governance having severe detrimental effects on economic, social and democratic development,² the necessity to fight corruption remains until today an important factor in development policy. Over the past fifteen years, several international and regional legal instruments with the objective to combat corruption have emerged, which led in turn to major changes in national legislation around the globe. However, the ‘cancer of corruption’³ is far from being defeated - as we can still observe, in practice, cases of corporate bribery and looting of state assets, especially within African states.

Against this background, *John Hatchard’s* book *Combating Corruption: Legal Approaches to Supporting Good Governance and Integrity in Africa* addresses a highly relevant and topical subject. With his work *Hatchard* seeks to contribute to the discussion on how to effectively fight corruption on national and transnational level and, in particular, on how to ensure that the numerous international good governance obligations are fulfilled in practice (p. 2). As the title suggests, the author puts emphasis, on the one hand, on the legal issues surrounding the strategies to combat corruption through good governance mechanisms and, on the other hand, on the African perspective on this subject. The objective of the book is to give a comprehensive overview of the current status of the implementation of the legal anti-corruption/good governance obligations placed upon African states by analysing the laws and institutions that have been enacted in this regard and by presenting numerous examples of good and bad practice in their application (pp. 7-8). For this work, *Hatchard*,

1 Remarks by World Bank Group President *Jim Yong Kim* at the “Speak Up Against Corruption” Event on 19 December 2013 in Washington, D.C., <http://www.worldbank.org/en/news/speech/2013/12/19/world-bank-group-president-jim-yong-kim-corruption-event> (last accessed on 31 May 2014).

2 Since the mid 1990s, social scientists have devoted much attention to the examination of the causes and consequences of corruption and its impact on development. See, in particular: *Susan Rose-Ackerman*, *Corruption and Government: Causes, Consequences, and Reform*, Cambridge 1999.

3 To use the famous words of former World Bank President *James D. Wolfensohn*, Annual Meetings Address, 1 October 1996.

barrister and law professor in the UK, draws not only on his research background in criminal and constitutional law with a regional focus on the Commonwealth and Anglophone Africa, but also his consulting experience in the field of anti-corruption, good governance and human rights as well as his personal experiences from working and living in southern Africa.

The book at hand contains twelve chapters and – after two introductory chapters – broadly follows in terms of structure the four good governance ‘pillars’ as they derive from the *United Nations Convention Against Corruption* and the *African Union Convention on Preventing and Combating Corruption*: (i) prevention, (ii) investigation and prosecution of corruption-related offences, (iii) international cooperation, and (iv) asset recovery.

Regarding, first, the aspect of preventing corruption, the author explores the most common strategies to maintain integrity in the public service, namely the operation of codes of conduct as a means to address conflicts of interest among public officials, the regulation of election campaign financing, and the control of public sector finances (Ch. 3). Chapters 4 and 5 discuss, inter alia, the role of constitutions and constitutional oversight bodies in upholding good governance principles by outlining, on the one hand, the increasing tendency of victims to use human rights protection mechanisms to combat corruption, and on the other hand, the constitutional limits to the effective implementation of anti-corruption strategies, i.e. immunities and fundamental rights of presumed offenders.

As regards the second ‘pillar’, the criminalisation of corruption, *Hatchard* sheds light on the practical challenges to the effective investigation and prosecution of corruption-related offences, the difference in scope between these offences, and the controversial issue of concluding deals, meaning the dropping of criminal charges in exchange for the return of looted state assets (Ch. 6). Furthermore, Chapter 7 deals with the question of the necessity and the potential mandate of independent anti-corruption commissions, whilst Chapter 8 discusses the appropriate balance between judicial independence and judicial accountability and the particular challenge to combat corruption within the judiciary. In the following chapter, the author highlights the importance to equally target the private sector with regard to the prevention and criminalisation of corruption (Ch. 9). *Hatchard* emphasises that persuading multi-national corporations to refrain from corruption in their business activities is a major and foremost transnational challenge. Nevertheless, he offers a set of strategies to make further progress in combating corruption in the corporate sector, namely through the use of ‘gentle persuasion’ (i.e. development of international *soft law* standards), ‘forceful persuasion’ (i.e. prosecution of offending companies and their senior officials in the victim state, de facto implementation of the *OECD Convention on Combating Bribery* in the home states, use of civil remedies) and ‘persuasive threats’ (i.e. debarment from future projects).

With regard to the third and fourth ‘pillars’, international cooperation and asset recovery, Chapter 10 outlines the challenges posed to African states to effectively combat the laundering of the proceeds of corruption through the international financial system, and the role of the Financial Action Task Force in this regard, whilst Chapter 11 points out the im-

portance to prevent public officials from enjoying their proceeds of corruption by developing effective legal assistance mechanisms, and recovering the looted state assets.

The final chapter summarises the main argument of the book: that the 'art of persuasion' is fundamental to develop the necessary political will - on both national and transnational level - to ensure that the anti-corruption laws and institutions in place actually work in practice (Ch. 12).

Hatchard's work is the result of a comprehensive research project that processed a large amount of literature in the field of corruption, legislation and judicial decisions from a great number of African states as well as numerous reports drafted by international organisations (e.g. UN, World Bank, OECD) and non-governmental organisations (e.g. Transparency International, Global Witness, Human Rights Watch), not to forget his personal anecdotes and experiences. In terms of research method, the book follows a legal approach to discuss and compare the different good governance laws and institutions that have been developed on national level in African states in response to the obligations stemming from the international anti-corruption conventions. In order to illustrate his findings, *Hatchard* draws upon a series of case studies from the African context. For example, he refers on several occasions to the Lesotho Highlands Water Project case as a success story, where the government of Lesotho had the necessary political will and international support to successfully prosecute those foreign companies responsible for paying bribes in the procurement process regarding a major dam project (pp. 245-254). In contrast, the Anglo Leasing affair in Kenya highlights the practical challenges to carry out effective investigations against senior public officials when these prerequisites are missing, i.e. when there is no political will in the administration, and when court proceedings are used to undermine the gathering of evidence located abroad (pp. 313-314).

However, from a methodological viewpoint, the chosen legal approach with reference to selected case studies has some substantial deficits. First, the laws, institutions and cases analysed throughout the book stem almost exclusively from Anglophone African countries, which seems to result rather from practical reasons (e.g. common law background, previous experience) than theoretical considerations (pp. 7-8). This is problematic because an African cross-country comparative analysis in order to produce significant results needs to take into account the legal and practical situation in the Francophone African countries and the particularities of civil law jurisdictions (e.g. the differences in criminal procedural law). Second, since the domestic laws and cases were selected with the purpose to illustrate the (non-)implementation of the corresponding international legal provisions, they are not representative for the actual situation in these countries in terms of corruption. Instead of simply providing examples of good and bad practice, it would have been preferable, for instance, to mirror these findings with the Transparency International Corruption Perception Index (CPI) and the development of the latter over time, especially when the given examples correspond with the perceived level of corruption, as it is the case for Lesotho and

Kenya.⁴ Finally, if the objective of the book is to sketch out best practices in implementation of the international anti-corruption obligations within African states, the chosen legal approach is only of limited use. Instead, the author should have referred more frequently and directly to empirical findings on the effectiveness of the various good governance instruments in practice.

In consequence, these methodological deficits make it difficult from the outset to build a strong theoretical argument that explains the differences in the levels of corruption between African states. Nevertheless, *Hatchard* develops his central idea of the ‘art of persuasion’ as a guiding principle for combating corruption through law. He argues that the progress made by African states in the fight against corruption depends to a large extent on the political will, and that it is crucial to use the appropriate degree of pressure to persuade private and public actors alike to implement and apply the discussed good governance mechanisms and, ultimately, abstain from corruptive practices. Yet, this seems like a very intuitive conclusion since the idea of the ‘art of persuasion’ can methodologically not derive from the legal approach taken throughout the book. Indeed, as convincing as this main argument may seem at first, it is not breaking new ground. This is because the work in general neglects to take account of the existing social sciences literature on how law can influence the behaviour of different actors. On the one hand, the author does not even attempt to relate his argument with other theoretical concepts about how legal rules can persuade corrupt actors to abstain from corruptive practices.⁵ On the other hand, he does not refer to the existing literature in international relations theory on how states translate international legal obligations into domestic policies, and *Risse’s* ‘spiral model’ in particular, which accounts for the variation in the domestic effects of international norms.⁶ Moreover, to give an example with regard to the fight against corruption, *Abbott* and *Snidal* theoretically explained the interactions between value and interest actors in the international legalisation process,⁷ ideas that can be found in *Hatchard’s* concepts of ‘moral persuasion’, ‘persuasive threats’ and ‘transnational will’.

4 According to the Transparency International CPI 2013, Lesotho is ranked 55 out of 177 states, whereas Kenya is ranked 136, with the CPI being relatively stable over the preceding years.

5 See, for example, *Lambsdorff’s* principle of the ‘invisible foot’ stating that anti-corruption strategies need to exploit the handicap that corrupt actors cannot credibly promise reciprocity to their corrupt counterparts: *Johann Graf Lambsdorff*, *The Institutional Economics of Corruption and Reform: Theory, Evidence, and Policy*, Cambridge 2007. This idea is reflected in *Hatchard’s* ‘reveal everything’ principle according to which the use of ‘persuasive threats’ can make a significant contribution to convince corrupt actors to reveal information on their transactions with corrupt counterparts (pp. 340-341).

6 *Thomas Risse / Kathryn Sikkink*, *The Socialization of International Human Rights Norms into Domestic Practices: Introduction*, in: Thomas Risse et al. (eds.), *The Power of Human Rights: International Norms and Domestic Change*, Cambridge 1999. While the ‘spiral model’ was developed to explain the steps that states must go through to change their norms and behaviour regarding human rights, it may equally apply to international anti-corruption norms.

7 *Kenneth W. Abbott / Duncan Snidal*, *Values and Interests: International Legalization in the Fight against Corruption*, *Journal of Legal Studies* 31 (2002), p. 141.

Despite these criticisms, the book with its legal approach and African cross-country perspective gives a comprehensive overview of where we stand today in the fight against corruption on the African continent and reminds us that further efforts of persuasion are needed in order to make the legal strategies work in practice. Against this background, it meets the purpose it set out to achieve in the beginning. It is also worth emphasising that the author's findings support the tendency in the current legal debate on corruption, and in international law in general, that *soft law* is an important instrument and that for enforcement of international obligations transnational cooperation is as important as the scrutinising function exercised by civil society.⁸ However, a more interdisciplinary approach to the subject would have underpinned the main thesis with a sound theoretical basis. Hence, in the end, the book adds conceptually only little to the academic literature on the fight against corruption.

In sum, *Combating Corruption: Legal Approaches to Supporting Good Governance and Integrity in Africa* constitutes a well written, easily accessible and illustrative work with a clear structure despite the complex nature of the issue of corruption. This makes it an interesting handbook predominantly for practitioners in African countries, be it legislators, government officials, journalists or civil society activists. As an extensive compendium of the state of play of the good governance reform process in Africa, *Hatchard's* work will have a share in the global efforts to fight the 'cancer of corruption' in the developing world.

Julia Lemke, Hamburg

⁸ *Anne van Aaken*, Korruption und Entwicklung, in: Philipp Dann / Stefan Kadelbach / Markus Kaltenborn (eds.), *Handbuch Recht und Entwicklung*, Baden-Baden 2014, p. 619.

Benedikt Naarmann: Der Schutz von Religionen und Religionsgemeinschaften in Deutschland, England, Indien und Pakistan. Ein interkultureller Strafrechtsvergleich, Tübingen, Mohr Siebeck 2015, xlv + 928 S., 134 Euro, Leinen, ISBN: 978-3-16-153162-0

Es geschehen noch Wunder, auch im säkularen Europa, und dieses hervorragende, in jeder Hinsicht schwere Buch in hochgestochenen Juristendeutsch dient als Beweismaterial. Vergleichende Rechtswissenschaft ist weder tot noch total anglozentriert, und schon gar nicht nutzlose Faselerei von Träumern, die die Welt auf ihre Art verbessern wollen. Diese Berliner Dissertation ist in guter Gesellschaft mit anderen neuen europäischen Studien, die auch zum besseren Verständnis besonders des südasiatischen Rechts beitragen.¹

Naarmann zeigt, dass der Schutz religiöser Werte vor allem außerhalb Europas nach wie vor als wichtig angesehen wird. Er bestätigt in diesem massiven Projekt im Detail was Spezialisten wissen, aber die Welt nicht wahrhaben will, nämlich dass sich Pakistan als islamische Republik heutzutage als globaler Behüter dieser Perspektive und seiner Weltreligion versteht (812), offensichtlich in Konkurrenz zu Saudi Arabien. Mittlerweile bedeutet dies, dass Pakistan in rechtlich extremer Form den Islam und die Person und Position des Propheten Mohammed gegen Anfechtungen aller Art zu schützen trachtet. Naarmann nimmt seine fleißig gesammelten und verarbeiteten Hinweise und Belege, Beobachtungen und Erkenntnisse aus den vier untersuchten Rechtssystemen als Anlass, abschließend tiefergehende Fragen zu Beziehungen und Wechselwirkungen zwischen Staat, Religion und Recht zu erforschen und vor allem die Interaktionen zwischen Recht und Moralität herauszuarbeiten. Eine weitere Frage ist dann, ob ein Festhalten an rechtlichen Schutzbestimmungen für Religion eher Gewalt produziert oder zu reduzieren hilft. Für Pakistan gilt leider das erste, während rezente englische Änderungen des Blasphemierechts zu seiner Abschaffung führten, was dann letztendlich Fragen aufwirft, ob ein staatsrechtliches System sich wirklich komplett aus solchen explosiven Szenarien heraushalten kann.

Nicht nur dänische Karikaturen, sondern auch interne Probleme vor allem mit den zahlreichen Ahmadis haben in Pakistan zu vielen gewaltsamen Ausschreitungen geführt, die hier sorgfältig aber natürlich bei weitem nicht vollständig dokumentiert sind.² Jegliche angebliche Form von Verspottung oder Kritik irgendwo in der Welt wird heutzutage in Sekundenschnelle als Beschimpfung oder Verhetzung gedeutet und oft global publiziert. Solch extreme Sensibilität zieht, das ist eine der wichtigsten praktischen Erkenntnisse

1 In Bezug auf Deutschland siehe vor allem das nun auch auf Englisch erschienene Werk von *Mathias Rohe*, *Islamic Law in Past and Present*, 2014. In Italien ist jetzt starkes Interesse an indischem Recht offensichtlich. Siehe *Domenico Amirante*, *Lo Stato Multiculturale. Contributo Alla Teoria della Stato Dalla Prospettiva dell' Unione Indiana*, 2014. *Marco Ventura*, *From Your Gods to Our Gods. A History of Religion in Indian, South African, and British Courts*, 2014.

2 Zum Beispiel ist es nicht erfasst, dass sofort nach der Danish Cartoon Episode auf den Straßen pakistanischer Großstädte Jagd auch auf christliche Männer gemacht wurde, die dann später als Asylanten in Europa auftauchten, mit angeblich ungläublichen Geschichten sexueller Gewaltausübung.

dieser Arbeit, nach sich, dass Privathandlungen umstrittener Art in Bezug auf Religion und spezifisch auf den Islam sowie die Person und Position des Propheten jetzt als direkter Angriff auf den pakistanischen Staat und seine Identität und Souveränität gedeutet werden und dementsprechend drastisch und brutal geahndet werden. Nur so erklärt sich, warum sogar eine abfällige Bemerkung im Familienkreis in Pakistan heutzutage blitzschnell zu einem Todesurteil führen kann, untermauert von privater Lynchjustiz und offiziell geduldetem Missbrauch verwaltungsrechtlicher Verfahren, die beide in dieser Intensität woanders nicht so ausgeprägt sind.

Im weiten Feld des Strafrechts untersucht diese Studies daher vergleichend, wie die Rechtssysteme dieser vier Staaten mit Beschimpfung und Verhetzung von Religion und religiösen Gruppen umgehen und wie dies mit Minderheitenschutz und allgemeinem Schutz von Menschenrechten zusammenhängt. In der heutigen Welt beobachtet man zwar die Weber'sche 'Entzauberung der Welt', aber eben nicht überall in gleicher Weise. Überall auf der pluralistischen Erde bleibt es daher von grundlegender Bedeutung, besser zu verstehen, wie man die richtige Balance findet zwischen Meinungs- und Religionsfreiheit und Respekt vor religiösem Dogma, Mythos oder Praxis auf der einen Seite, und privater Freiheit und öffentlicher Sicherheit auf der anderen. Dass es unvermeidlich ist, Kontextualität zu respektieren und sozio-politische Erklärungen zu berücksichtigen (6) bedarf nicht vieler Worte in der ausgezeichneten Einleitung (1-29). Man kann also Rechtspluralismus nicht einfach beiseitelassen, auch wenn in einem letztendlich massiven Buch kaum Platz gefunden wird, diesen zu theoretisieren. Produktiver für dieses Projekt ist jedoch die klare Erkenntnis, dass "Eingrenzung zwingend geboten ist" (12) und dass sich diese Studie daher vor allem mit Religionsbeschimpfung und Religionsverhetzung in den vier untersuchten Systemen befassen soll (13). Dass in einer solchen vergleichenden Arbeit die jeweilige Verfassungsordnung und daher grundrechtliche Fragen relevant sind (20), steht außer Frage. Meines Erachtens nicht genügend berücksichtigt ist jedoch die Tatsache, dass die hier studierten Probleme, die ja eben nicht nur rechtlicher Art sind, nicht nur in parlamentarischen oder juristischen Strukturen und Prozessen verhandelt werden. Dazu später mehr.

Die vier detaillierten Länderdarstellungen sind in Kapitel 2 zu finden (31-635), dessen Umfang die Frage anregt, ob deutsche juristische Dissertationen heutzutage wirklich so riesig sein müssen. Ein vergleichendes Projekt wird wohl automatisch länger, und es ist natürlich Teil des eingangs betonten Wunders, dass solch eine Studie überhaupt produziert wurde. Also ist dies kein Kritikpunkt, nur eine Bemerkung, sozusagen *obiter*. Der deutsche Teil liest sich gut, erklärt plausibel dass die Gefühlsschutztheorie historisch dominierte (35), dass es aber heute mehr um öffentliche Ordnung geht. Wenngleich Statistiken eine Abnahme der Verurteilungen in Deutschland dokumentieren, ist das Grundproblem jedoch nicht vom Tisch. Verspottungen treffen nicht nur die katholische Kirche, etwa wenn man Personen nahelegt dass die richtige Bethaltung so aussieht als ob man seinen Wellensittich erwürgt (104). Das erste deutsche Strafverfahren unter Paragraph 166 StGB, in dem der Islam betroffen war, beinhaltete 2006 auf Toilettenpapier geschriebene Koranverse, was diplomatischen Protest auslöste und das deutsche Rechtssystem zu Aktion und Stellung-

nahme zwang. Die offizielle leichte Strafe, sogar zur Bewährung ausgesetzt, steht natürlich in massivem Kontrast zu dem, was in Pakistan geschehen würde. Naarmann zeigt abschließend, wie die relevanten Diskussionen in Deutschland zu dem jetzigen status quo führen. Jedoch später, im vergleichenden dritten Kapitel, sieht man wie brisant die Thematik bleibt, weil mittlerweile die Säkularisierungsthese global widerlegt ist (698), Deutschland auch nicht komplett säkular ist (703) und es eben auch in Deutschland islamische Terrorakte gibt (811). Zudem untermauern neue religiöse demographische Entwicklungen in Europa (863) erhebliche Risiken, dass Spannungen auch in Deutschland zunehmen werden (864), so dass eine komplette Abschaffung des relevanten Rechts nicht anvisiert ist (866).

Der englische Teil ist sehr sachkundig verfasst und sollte vom Autor idealerweise als separates Werk auf Englisch produziert werden.³ Das englische Szenario dokumentiert, dass nicht nur Muslime in Protestaktionen und Gerichtsfälle verwickelt sind, wenngleich die politischen Motivationen ganz anders sein mögen. Naarmann übersieht zum Beispiel, dass Sikhs in England durch ihre Anerkennung als ‘ethnic or racial group’ den indischen Staat ins schlechte Licht rückten, wenn es um Anerkennung der Sikhs als Religionsgruppe in Indien geht. Er zeigt jedoch gut, wie Muslime in England sich vom exklusiven Bezug des Blasphemiedelikts auf das anglikanische System benachteiligt, aber auch mundtot im Vergleich zu Sikhs und Juden unter dem Race Relations Act 1976 fühlten (159). Die Tendenz zur Schaffung eigenständiger Strafbestimmungen gegen das Schüren religiösen Hasses ist im Detail aufgezeigt. Die darin implizierte Weigerung, sich mit religiösen Fragen zu beschäftigen, wird von Naarmann als Zeichen weitergehender Säkularisierung interpretiert. Es ist jedoch, wie erst im dritten Teil des Buches gezeigt wird, auch eine Methode zur Konfliktvermeidung. Angesichts der drastischen Rechtsentwicklungen in Pakistan sah man keine Vorteile darin, Kläger in England in diesem Bereich zu ermutigen. Das Ergebnis, die Abschaffung des Blasphemietatbestands im Jahre 2008, macht England säkularer, aber die neuen rechtlichen Bestimmungen scheinen doch sehr symbolisch zu sein und bringen neue Fragen aufs Podium. Auch hier sehen wir jedoch, dass Klagen und Auseinandersetzungen über religiöse Fragen zunehmend in Alternativforen stattfinden, zum Beispiel auf Schulebene, über Kleidungsnormen,⁴ oder Esskulturen, da auch in England vor allem lokale religionsdemographische Veränderungen extrem relevant sind.

Im Teilkapitel über Indien (227-439, also fast ein ganzes Buch) gelingt es Naarmann ausgezeichnet, die grundlegenden Schwierigkeiten, internen Widersprüche und Rätsel über dieses System herauszuarbeiten. Naarmann identifiziert eingangs (228) klar die Notwendigkeit von rechtlicher Gymnastik (“die Auslotung der Grenzen verfassungsrechtlich garantierter Rede- und Religionsfreiheit”). Absolute Rechtssicherheit und

3 Naarmann benutzt Samantha Knights, *Freedom of Religion, Minorities, and the Law*, 2007, aber speziell zur Abschaffung des Blasphemiedelikts im englischen Recht ist sein Teilkapitel weitführend und detaillierter.

4 Roberto Scarciglia und Werner Menski (Hrsg.), *Islamic Symbols in European Courts*, 2014.

strikte Grenzziehung ist hier unmöglich, weil das Primat der individuellen Rechtsfreiheit auch in Indien beinhaltet, dass man legal Dinge sagen und tun kann, die anderen ganz und gar nicht gefallen. Dass in Indien der Grad der Öffentlichkeit vielleicht eine wichtige Rolle in dieser Beziehung spielt, könnte man besser herausarbeiten, zum Beispiel bezüglich der weitgehend privaten aber nicht öffentlichen Duldung homosexueller Praktiken (337). Kein indischer Richter wird darüber offen sprechen wollen oder können, unter anderem weil die indische Verfassung es absichtlich vermeidet, Recht und Religion zu definieren und den hinduistischen Kernbegriff *dharma* (die Pflicht, jederzeit das Richtige zu tun) erst gar nicht benutzt. Man muss also immer zwischen den Zeilen lesen. Zum Beispiel, wenn Artikel 51-A(f) der indischen Verfassung allen Bürgern Indiens die Pflicht auferlegt “to value and preserve the rich heritage of our composite culture”, bedeutet dies nicht nur tolerantes Zusammenleben von Hindus, Muslimen, Christen und anderen, sondern auch Respekt für interne Differenzierung innerhalb dieser Religionen. Also kann man als Aktivist Klagen bereits auf diesen Artikel stützen, weil heutzutage fast alle Problematiken mit dem garantierten Grundrecht in Artikel 21 (‘Protection of Life and Personal Liberty’) verbunden werden können.

Trotz kolonialer Einwirkungen und Elementen wie des Indian Penal Code, 1860 ist das indische Recht eben kein europäisches System. Und der Hinduismus als Basisstruktur des indischen Identitätssystems kann eben nicht dazu benutzt werden, einheitliche Denk- oder Handlungsmodelle zu privilegieren oder Abweichungen von vermeintlichen Mehrheitsnormen zu bestrafen. So sehr dies versucht wird, wie Naarmann oft zeigt, vor allem durch Kampagnen gegen das Schlachte von Kühen und Konversionsbarrieren, in der Praxis lassen sich solche ideologischen Ziele nicht mit dem Strafgesetzbuch in der Hand durchsetzen. Also werden jeden Tag viele tausende Rinder geschlachtet und verzehrt, in der Tat nicht nur von Muslimen und Christen. Die hier von Naarmann benutzte Argumentation über Mangel an gutem Vieh (327) ist übrigens nicht mehr aktuell: Indien ist heute der größte Milchproduzent der Welt, und weil Kühe nur Milch geben nachdem sie gekalbt haben, werden Indiens Probleme auch kuhdemographisch stets brisanter. Auch wenn die jetzige BJP Regierung weiß, dass man Stimmen durch Kuhmordrhetorik gewinnen kann, sind ökonomisch gesehen landesweite Schlachtverbote totaler Unsinn, signifikant hier rhetorisch versteckt als “politisch nicht durchsetzbar” (307, 310), und sie bleiben effektiv symbolisch. Dass in Indien so vieles unklar bleibt, wie Naarmann mehrfach korrekt konstatiert, zeigt einmal mehr, dass Gerichtsdokumente und -aktivitäten in diesem riesigen Land nur einen Teilbereich des Ganzen beleuchten. Die Absichtlichkeit solcher Flexibilitäten als Schmieröl für Ermessensspielräume verschiedener Arten wartet auf weitere detaillierte Analysen.

Während Indien in der vergleichenden Bewertung also gar nicht so schlecht abschneidet, und Naarmann gut daran tut, trotz Versuchungen nicht in die Fallen der Anti-Hindu-Kommunalisten zu geraten,⁵ sieht die Situation in Pakistan (439-635, also noch ein Buch in

5 Während die ständige Bedrohung Indiens durch pakistanische Terroranschläge unkommentiert bleibt, ist der wohl unbedachte Verweis auf über 2000 getötete Muslime in Gujarat im Jahre 2002 (389) doch etwas fraglich und einseitig.

diesem Buch) ganz anders und wirklich dramatisch aus. Hier geht es vorrangig um den Schutz des Islam und des Propheten vor Beschimpfungen. Beschränkungen der Redefreiheit werden brutal privilegiert, um dem islamischen Staat und seiner Staatsreligion nichts von ihrem Glanz zu nehmen. Alles andere ist quasi Landesverrat. Die Todesstrafe wird äußerst liberal gehandhabt und oft durch private Lynchjustiz implementiert, so dass Pakistan heute eines der gefährlichsten Länder der Welt ist (602), nicht nur für Ahmadis, sondern für alle, die für Meinungsfreiheit und Minderheitenrechte eintreten. Weder Anwälte noch Richter können in Sicherheit leben, und schon gar nicht Politiker, wenn sie nicht mit den islamischen Wölfen heulen. Ein weiteres Problem ist jedoch, dass dieser Chor polyphon ist, und daher niemand voraussagen kann, was in jenem Land in der nahen Zukunft passieren wird.

Im wichtigen dritten Kapitel wird daher, um hier eine lange Diskussion kurz zu machen, letztendlich diskutiert, inwieweit eine staatliche mehrheitsinspirierte Methode der Kriminalisierung von Dissens und Abweichung, gekoppelt mit Verfahrensmissbrauch, letztendlich ein Rezept für Terror im Namen des Gesetzes darstellt. Weil mittlerweile in Pakistan verstärkt sogar verschiedene muslimische Sekten gegeneinander kämpfen (817) ist ein Endpunkt der Analyse erreicht: Wenn ein angebliches Religionsverbrechen zu einem Staatsverbrechen wird (836), und ein Prozess der Selbstverstärkung eintritt (839), dann wissen wir dass die richtige Balance nicht mehr gegeben ist. Nicht ohne Grund sind die englischen Blasphemiereformen von 2008 durch die Exzesse in Pakistan beeinflusst. Jedoch, so Naarmann abschließend, bleibt das Risiko, dass ein Staat, der sichtbar zu wenig tut um Religionen und Religionsgemeinschaften zu schützen, auch kritisierbar ist, eben weil er seine Schutzfunktion verweigert und daher an Legitimität verlieren kann.

Wie so oft im Recht geht es also auch hier um die richtige Balance. Und weil sich die Rahmenbedingungen demographischer und anderer Faktoren auch im reifen Europa signifikant ändern können (863), sollte ein agiler Staat wohl ständig ein Auge mit Blick auf die hier diskutierte Thematik offenhalten. Was immer wir privat über Religion denken, als globales Phänomen bleibt es rechtsrelevant. Daher ist es potentiell riskant auch für die säkularsten Staaten der Welt, Religion einfach als anachronistisch und irrelevant abzuschreiben. Naarmann hat, auch mit Hinweisen auf Durkheim, ganz klare Forschungsergebnisse produziert und wird hoffentlich Kernteile dieses Buches auch auf Englisch produzieren. Anglophone Leser brauchen solche Denkanstöße, heute vielleicht sogar mehr als andere. Das Buch ist nahezu perfekt produziert und sehr wertvoll, und in Bezug auf Pakistanis auch sogar direkt praxisrelevant für Asylfälle.

Werner Menski, London

Ulrike Müssig (Hrsg.): **Ungerechtes Recht**, Mohr Siebeck, Tübingen 2013, 192 S., 42 €, ISBN 978-3-16-152393-9

Gern macht der Rezensionsteil dieser Zeitschrift auch auf Schriften aufmerksam, die zwar nicht unmittelbar deren Gegenständen gewidmet sind, aber ungeachtet dessen Anregungen für die wissenschaftliche Beschäftigung mit Verfassung und Recht in Übersee vermitteln können. Das ergibt sich manchmal regional oder besser kontinental, manchmal auch schon wegen des Umstandes, dass gewisse Grundfragen bei jeglicher Beschäftigung mit dem Kulturgut „Recht“ auftauchen. Bei dem hier angezeigten Band gilt teils das eine, teils das andere.

Es handelt sich um acht Abhandlungen, die auf ein Symposium zurückgehen, das im Jahre 2011 zu Ehren Dietmar Willoweits von ihm verbundenen Personen veranstaltet wurde. Dessen Ausgangspunkte markiert z.B. Frau Müssig in ihrem Vorwort mit dem Satz, „ungerechtes Recht“ dürfe es wohl nach dem „rechtspositivistischen Credo moderner Jurisprudenz“ „streng genommen gar nicht geben“. Und Alexander Ignor mit dem Hinweis auf Überlegungen Willoweits, dass dem Begriff des Rechts als „Minimum“ ein Ausschluss willkürlicher Gewalt innewohne. Der Jubilar selbst resümiert dann entsprechend im Nachwort, worauf noch einzugehen ist. Lassen wir dahin stehen, welche Rechtsgebiete und Rechtsordnungen Frau Müssig im Sinne hat mit dem unterstellten „Credo moderner Jurisprudenz“ - jedenfalls der Betrachter der Verfassungsentwicklungen außerhalb Europas und des Völkerrechts wird zumal gegenwärtig ein solches Credo nicht pflegen wollen; der Europäer für Europa besser auch nicht. Das Phänomen ungerechten Rechts begegnet in Geschichte und Gegenwart. Was als Recht daher kommt, aber eine Behandlung als Recht nicht verdient, wirft allerdings Fragen auf, die sich für Rechtsanwender und anderweitig mit dem Recht befasste Interpreten unterschiedlich darstellen können. Das gilt gerade auch, wenn man, wie der Jubilar und viele seiner Schüler, mit dem Recht vornehmlich in historischer Perspektive beschäftigt ist oder in schwesterlich-disziplinärer Verwandtschaft dazu: vergleichend.

Kontinental ins Blickfeld dieser Zeitschrift fallen die Abhandlungen von Ignacio Czeguhn über Sklavereigesetzgebung im Spanien der frühen Neuzeit (vor allem deshalb, weil es in diesem Beitrag auch um die ersten Jahrzehnte der Kolonisierung in Amerika geht) sowie die am Beispiel Barbados der britischen kolonialen Sklavereigesetzgebung gewidmeten Ausführungen von Christiane Birr.

Interessante Ausführungen in Aufspürung rechtsimmanenter Gerechtigkeitspostulate finden sich – in historischer Reflexion, aber auch im Blick auf die Gegenwart – für das Strafverfahren bei Alexander Ignor, der in diesem Sinne Ziele des Strafverfahrens umreißt und hinterfragt, damit notwendig auch dessen Zweck und was daraus (begrenzend) für (zulässige) Formen folgt und folgen sollte. Mit Sorgen übrigens hinsichtlich der auch von anderen Rechtssystemen her aufmerksam betrachteten deutschen „Verständigungsregelung“ für das Strafverfahren, hier geäußert noch vor der einschlägigen Entscheidung des Bundesverfassungsgerichts, deren (damals noch mutmaßlichen) Inhalt aber bereits

voraussehend und mit einer zutreffend skeptischen Bemerkung dahingehend, dass das „Problem“ einer „Mitleidenschaft“ von Zweck und Ziel Wahrheitsfindung im Strafverfahren auch ungeachtet dieser Entscheidung fortbestehen werde.

Ulrike Müssig – ihr Beitrag heißt „Summum ius, summa iniuria“ – präsentiert unter diesem Titel deutsche und englische Rechtsquellen in Ergiebigkeit zu diesem dem Cicero zugeschriebenen Diktum, das für ein Spannungsverhältnis steht, welchem keine Rechtsordnung auszuweichen vermag: Die Frage nach der Korrekturfähigkeit gesetzten Rechts. Auch bei Steffen Schlinker geht es um ein Phänomen von axiomatischer Bedeutung, freilich im Ausgangspunkt gerichtsbezogen: Die Rechtsverweigerung; der Autor präsentiert mittelalterliche Rechtsquellen dazu. Hinzu treten zwei Beiträge zu „administrativem Unrecht“ von Fabian Wittreck einerseits, dem Rechtshistoriker-Kollegen Bernd Schildt aus Bochum andererseits, letzteres auch ein Erfahrungsbericht aus der Endzeit der DDR.

Und schließlich: Das Nachwort Dietmar Willoweits, mit dem Titel „Ungerechtes Recht oder Grenzen des Rechts?“. Hier finden wir einen Satz, der zur Eingangsbemerkung dieser Rezension passt: „Wenden wir uns der Vergangenheit oder auch nur den heutigen Verhältnissen weniger entwickelter Länder zu, dann drängt sich die Frage förmlich auf: Unter welchen Voraussetzungen fehlt ungerechtem Recht die Qualität des Rechts überhaupt?“. W. meint, die Beiträge des Symposiums ließen „zunächst“ denken, die Frage nach einer aufgrund formeller oder inhaltlicher Kriterien vorzunehmenden Unterscheidung zwischen Recht und solchem, das „in Wahrheit Nicht-Recht“ sei, bedürfe unterschiedlicher Beurteilung je nach der (angebliches) Recht manifestierenden „Gewalt“ im Sinne der Lehre von der Trennung dieser. Denn der Gesetzgeber entscheide doch, welcher „Ethik“ er den Vorzug geben wolle und sogar auch, ob er überhaupt Anlass zur Berücksichtigung ethischer Erwägungen sehe. Was bei Einzelakten schon im Ausgangspunkt anders sei. Das „Nachwort“ dient dann dazu, diese Ausgangsbeobachtung zu relativieren, zu Recht. Dass hierbei die Martens'sche Klausel der Haager Landkriegsordnung für das Völkerrecht als „längst vergessenes Beispiel“ erscheint, ist keine glückliche Bemerkung, man möchte sagen „zum Glück“. Wir haben die Klausel nicht vergessen, sie inspiriert! Dass W. das Gebot der Verhältnismäßigkeit als eine Art allgemein-menschenrechtliche Vorgabe erscheinen lässt, verdient demgegenüber Zustimmung. Das gilt erst recht für die abschließende Forderung, auch Gesetzesrecht, gleich welcher Provenienz und ungeachtet der jeweiligen Verfassungsfragen „stets einer meta-rechtlichen Kontrolle“ zuzuführen. Auch und gerade dann gilt dies, wenn Institutionen, die es leisten können, in den Verfassungen nicht vorgesehen sind. W. hat Recht: „Es war die zeitgebundene Idee der Souveränität mit dem Vorrang des Gesetzesrechts, die diesen eigentlich selbstverständlichen Sachverhalt verdunkelt hat.“ Dessen Aufhellung ist in den einzelnen Teilrechtsordnungen unterschiedlich weit vorangeschritten, aber sie ist unabweislich. Und man möchte noch hinzufügen: Es gibt nicht nur „ungerechtes Recht“, sondern auch „ungenügendes Recht“.

Philip Kunig, Berlin

Heinz-Gerhard Justenhoven & Ebrahim Afsah (Hrsg.): Das internationale Engagement in Afghanistan in der Sackgasse? Eine politisch-ethische Auseinandersetzung, Nomos Verlagsgesellschaft Baden-Baden 2011, 182 S., 29 €, ISBN 978-3-8329-6689-8

Im zehnten Jahr nach Beginn des massiven internationalen Einsatzes in Afghanistan setzen sich die beiden Herausgeber *Heinz-Gerhard Justenhoven* und *Ebrahim Afsah* einleitend das Ziel zu ergründen, „ob das internationale Engagement in Afghanistan noch die elementarsten politischen Ziele erreichen kann“. Ihr zentrales Anliegen ist es, der „Frage nach den ethischen Mindeststandards politischer Ordnung als Voraussetzung für eine *exit strategy*, die gerade gegenüber der afghanischen Bevölkerung verantwortbar sein muss“, nachzugehen. Trotz des inzwischen weitgehenden militärischen Abzugs ist diese Thematik auch angesichts des nach wie vor großen zivilen Aufgebots in Afghanistan weiter aktuell.

Der in der Schriftenreihe „Beiträge zur Friedensethik“ erschienene Sammelband umfasst zehn Aufsätze von Experten aus Wissenschaft und Praxis, teils auf Deutsch, teils auf Englisch. Gemäß der Einleitung zum Sammelband soll der erste Beitrag den Kontext der Intervention in Afghanistan umreißen, die nächsten drei sollen das „Spektrum der politischen Debatte im In- und Ausland“ widerspiegeln, die beiden folgenden „ethische Positionen zur Bewertung des politisch-militärischen Engagements“ entwickeln und die letzten vier in Afghanistan implementierte politische und militärische Konzepte untersuchen und bewerten.

Den Auftakt macht *Fouzieh Melanie Alamir* mit ihrem Beitrag „The International Approach to Afghanistan. Could We Have Done Better?“. Mit Bedacht zeichnet die Autorin die Beweggründe und Vorgehensweisen des militärischen und zivilen Engagements in Afghanistan nach und zeigt prägnant Defizite auf. Mit dem Wissen, dass die Lehren aus Afghanistan prägend für künftige Ansätze internationalen Krisenmanagements sein werden, hebt sie einerseits die Besonderheiten im Fall Afghanistan hervor und kann andererseits verallgemeinerungsfähige Aussagen ziehen. Sie kommt zu dem Ergebnis, dass die internationale Krisenbewältigungsstrategie in Afghanistan insbesondere wissenschaftlicher, vorausschauender, ziel- und bedürfnisorientierter sowie kohärenter hätte sein können. Auch eine ständige begleitende Evaluierung wäre erforderlich gewesen. Dennoch würde sich die Situation in dem Land dadurch nicht zwingend besser darstellen, denn dafür hätten strukturelle Gegebenheiten und situationsbedingte Dynamiken einen zu großen Einfluss.

Als erster Autor jener Beiträge, welche die Bandbreite politischer Auffassungen zum Engagement in Afghanistan wiedergeben sollen, befasst sich *Mohammad Homayon Hashimi*, Mitglied der Afghanistan Independent Human Rights Commission, in „Human Rights Situation and International Forces. An Afghan NGO-Perspective“ schwerpunktmäßig mit den Gründen für die kritische Wahrnehmung der internationalen Streitkräfte in der afghanischen Öffentlichkeit. *Daniele Riggio*, im Bereich der Öffentlichkeitsarbeit bei der NATO tätig, beleuchtet die Rolle dieser Organisation unter dem Titel „NATO’s long-term Commitment to lasting Security in Afghanistan“. Sodann erklärt *Winfried Nachtwei*, bis 2009 langjähriges Mitglied des Verteidigungsausschusses des Deutschen Bundestages,

in seinem Beitrag „Der deutsche Afghanistan-Einsatz: Bedeutung, Bilanz und Konsequenzen“, welche Chancen Deutschland bei seinem Einsatz vertan habe und welche Schwerpunkte Deutschland künftig setzen müsse, um zur Stabilisierung und zum Aufbau Afghanistans beizutragen. Dabei gibt er die Hoffnung auf Erfolge nicht auf, betont aber, wie gewaltig die Herausforderungen seien. Erstrebenswert wäre gewesen, dass die Herausgeber statt der beiden vorangehenden Beiträge mehr kritisch-differenzierte, wohlbegründete Ansichten wie jene von *Nachtwei* ausgewählt hätten. Denn zum einen ist es angesichts der großen Anzahl der nationalen und internationalen Akteure in Afghanistan kaum möglich, in einem schmalen Sammelband den verschiedenen Handelnden selbst eine Stimme zu geben, ohne deren Auswahl beliebig erscheinen zu lassen. Zum anderen erscheinen analytisch stärkere Beiträge der von der Schriftenreihe angestrebten friedensethischen Vertiefung der außen- und sicherheitspolitischen Debatte eher zuträglich.

Die beiden folgenden Beiträge zweier Theologie-Professoren sollen dazu dienen, ethische Maßstäbe an das Engagement in Afghanistan anzulegen. Dazu stellt *Wolfgang Liene-mann*, unter dem Titel „Recht und Gewalt. Grundlagen und Grenzen völkerrechtlich zulässiger Gewaltanwendung im Blick auf den Militäreinsatz in Afghanistan“ zunächst Betrachtungen zum Einsatz militärischer Gewalt an, um dann zu erörtern, dass ein dauerhafter Frieden nur durch den Aufbau einer rechtlich geordneten Zivilgesellschaft entstehen könne. Abschließend befasst er sich mit den ethischen Aspekten, die bei einem militärischen Abzug zu berücksichtigen seien. Dabei wäre unter anderem eine Straffung dieses längsten Beitrags des Sammelbands durch die Konzentration auf die konkrete Situation Afghanistans wünschenswert gewesen, statt zum Beispiel wiederholt allgemeine Überlegungen zu verschiedenen völkerrechtlichen Aspekten, etwa dem Internationalen Strafgerichtshof, anzustellen. Dagegen erkundet *Heinz-Gerhard Justenhoven* präzise die aktuellen Pflichten Deutschlands in „Wozu sind die intervenierenden Staaten in Afghanistan verpflichtet? Ethische Erwägungen im zehnten Jahr der politisch-militärischen Intervention“. Ernüchtert von den Misserfolgen der letzten Dekade müsse sich die Politik nun realistisch erreichbare und ethisch verantwortbare (Zwischen-)Ziele setzen, diese priorisieren und dann auch die benötigten Mittel für ihre Erfüllung bereitstellen. Vorrang müsse die Sicherung physischer Grundbedürfnisse der afghanischen Bevölkerung haben. Dabei sei eine internationale militärische Präsenz im Land solange erforderlich, bis Afghanistan selbst in der Lage sei, den Staatsaufbau abzusichern.

Im Zentrum der letzten vier Beiträge soll die Analyse verschiedener in Afghanistan angewandeter Konzepte stehen. *Hans-Georg Ehrhart* und *Roland Kästner* befassen sich mit „Aufstandsbekämpfung: Konzept für deutsche Sicherheitspolitik? Lehren aus Afghanistan“. Sie beschreiben die Konzeption der Aufstandsbekämpfung in Afghanistan sowie die Gründe für ihr Scheitern und weisen wohl informiert und mit klaren Worten an moralischen Maßstäben orientierte Handlungsoptionen auf. *August Pradetto* konzentriert sich auf „Zivil-militärische Zusammenarbeit im Kontext post-bipolarer westlicher Weltordnungspolitik am Beispiel der Afghanistan-Mission“. Er erklärt Ursprünge und unterschiedliche Verständnisse der zivil-militärischen Zusammenarbeit, einschließlich der Widerstände gegen sie,

und kommt zu dem Ergebnis, dass die zivil-militärische Kooperation in Afghanistan nicht funktionieren könne. *Ebrahim Afsah* skizziert kenntnisreich und sehr lesenswert die Hürden des Staats- und Verwaltungsaufbaus in Afghanistan unter dem Titel „The Challenge of Civil Service Reform: The Elusive Goal of Governance“. Er verdeutlicht nüchtern, dass signifikante Erfolge nicht zu erwarten seien. Zum Schluss des Buchs nimmt *Udo Steinbach* die Rolle des Iran in „Iran as a Partner for a Solution to the Afghanistan Conflict?“ in den Fokus. Für seinen Beitrag wäre es bereichernd gewesen, sowohl durch mehr Struktur und Abwägung die Lesenden verstärkt zu führen und an die Hand zu nehmen als auch den Blick auf andere Nachbarländer Afghanistans zu erweitern.

Letztlich verbleibt ein gespaltener Eindruck von dem Sammelband: Dem sinnvollen und ehrenhaften Wunsch der Herausgeber, die Erfolgsaussichten eines weiteren Engagements in Afghanistan und mögliche Handlungspflichten ehrlich einer Prüfung zu unterziehen, werden einige Beiträge auf sehr fundierte und weiterbringende Weise gerecht. Andererseits wäre mehr Akribie bei der Auswahl der einzelnen Autoren und der Eingrenzung der Themen der Publikation förderlich gewesen. Zudem überrascht, wie die Beiträge sich im Hinblick auf formale Qualitäten wie etwa sprachliche Richtigkeit und eine akkurate Endredaktion unterscheiden.

Auch in Anbetracht der Fülle der existierenden Literatur zu verschiedenen Aspekten des internationalen Engagements in Afghanistan kann eine Leseempfehlung daher leider nicht im Hinblick auf den gesamten Sammelband ausgesprochen werden, aber durchaus – wie im Laufe der Buchbesprechung angedeutet – umso nachdrücklicher für einige Beiträge.

Sabiha Beg, Berlin

Frithjof Ehm: Das völkerrechtliche Demokratiegebot. Eine Untersuchung zur schwindenden Wertneutralität des Völkerrechts gegenüber den staatlichen Binnenstrukturen, Jus Internationale et Europaeum Band 72, Mohr Siebeck, Tübingen, 2013, 359 S., 69 Euro, ISBN 978-3-16-152039-6

Seit *Thomas M. Franck* zu Beginn der 1990er Jahre die These eines sich graduell herausbildenden völkerrechtlichen Anspruchs auf „democratic governance“ formuliert hatte,¹ nimmt die Frage nach dem Stellenwert der Demokratie im gegenwärtigen Völkerrecht einen festen Platz in der rechtswissenschaftlichen Debatte ein. Bis heute lassen allerdings die Antworten, die in der inzwischen ausgesprochen reichhaltigen Literatur zu dieser Frage und den zahlreichen mit ihr verbundenen Detailproblemen gegeben werden, keinen allgemeinen Konsens erkennen. Verbreitet ist nach wie vor die Auffassung, wonach dem Völkerrecht heute zweifellos eine gewisse „Demokratiefreundlichkeit“ attestiert werden könne (im Sinne einer Präferenzierung demokratischer gegenüber autokratischen Herrschaftsformen), ihm aber weiterhin kein echtes „Demokratiegebot“ (im Sinne einer Verpflichtung der Staaten zur Einrichtung und Aufrechterhaltung einer demokratischen Binnenordnung) zu entnehmen sei. Andere folgen dagegen dem Ansatz *Francks* und erkennen gewisse demokratische Grundwerte (v. a. das Recht des Volkes auf demokratische Selbstbestimmung sowie das Recht des Einzelnen auf politische Teilhabe) als Teil des gegenwärtigen Völkerrechts an, betrachten aber ein darüber hinausgehendes Demokratiegebot allenfalls als eine normative Zielbestimmung bzw. als eine Völkerrechtsnorm *in statu nascendi*. Eine dritte (bislang in der Minderheit verbliebene) Position geht schließlich bereits heute von der Existenz eines inhaltlich hinreichend determinierten Demokratiegebots als Bestandteil des geltenden Völkerrechts aus.

Frithjof Ehm ist mit der vorliegenden Schrift, seiner Dissertation aus dem Jahr 2011, unzweifelhaft der letztgenannten Gruppe zuzuordnen. Beherzt und in gewisser Weise auch mutig, weil nur selten derart prononciert vorgetragen, vertritt er darin die Ansicht, das (allgemeine) Völkerrecht fordere von den Staaten inzwischen einen demokratischen Staatsaufbau. Sein diesbezügliches Argument entwickelt der Verfasser dabei, nach einem kursorischen Ausflug in die historische Entwicklung der Idee der Demokratie im ersten Teil, vor allem im zweiten Teil der Arbeit (S. 15 – 228), der schon aufgrund seines Umfangs ohne Zweifel als Kernstück der gesamten Untersuchung zu betrachten ist. Im dritten Teil geht der Autor der Frage nach der rechtlichen Bedeutung des von ihm identifizierten Demokratiegebots für den Staat und dessen Stellung in der Völkerrechtsgemeinschaft nach. Der vergleichsweise knapp gehaltene vierte Teil, der sich der Relevanz des in Rede stehenden Gebots für das Völkerrecht selbst zuwendet, bildet sodann den inhaltlichen Abschluss der Arbeit. Teil Fünf liefert am Ende noch eine Zusammenfassung der gewonnenen Erkenntnisse.

1 *Thomas M. Franck*, The Emerging Right to Democratic Governance, *AJIL* 86 (1992), S. 46 ff.

Ehm nähert sich seiner Hauptthese anhand einer eingehenden Analyse der bekannten Primärrechtsquellen des Völkerrechts, allen voran dem Vertragsrecht und dem Völkergewohnheitsrecht. Er überrascht dabei alsbald mit der von inhaltlicher Nuancierung weitestgehend befreiten Feststellung, „dass das Demokratiegebot mittlerweile eine Norm des Völkervertragsrechts ist“ (S. 80). Begründet wird dies damit, dass v.a. seit dem Ende des Kalten Krieges zahlreiche internationale Abkommen, aber auch Resolutionen des UN-Sicherheitsrats (die hier dem Bereich des Völkervertragsrechts zugeordnet werden), „von den Staaten eine demokratische Verfasstheit einfordern, und zwar zum Teil auf unmissverständliche Art und Weise“ (S. 77). Soweit es die Regionalräume in Europa, Amerika und Afrika betrifft (seit der Unterzeichnung der ASEAN-Charta 2007 mit Vorbehalt auch den südostasiatischen Raum), mag dem zugestimmt werden. Ob dies aber auch für die universelle Ebene gilt, bleibt fraglich. *Ehm* belässt es hier im Wesentlichen bei einem Verweis auf vereinzelte Bezugnahmen zum Demokratiebegriff in den Präambeln einiger (weniger) globaler Verträge (z.B. der UN-Konvention gegen Korruption) sowie die im UN-Zivilpakt von 1966 enthaltenen politischen Rechte. An der Reichweite und demokratischen Substanz dieser Rechte scheiden sich freilich seit jeher die Geister. So ist etwa mit Blick auf Art. 25 IPbürgR (Recht auf politische Teilhabe, einschließlich des aktiven und passiven Wahlrechts) nach wie vor umstritten, ob diese Norm von den Vertragsstaaten tatsächlich die Einführung eines Mehrparteiensystems fordert; ebenso, welche konkrete Rolle jenem Organ, das den Gegenstand der jeweiligen Wahl bildet, im innerstaatlichen Machtgefüge zukommen soll bzw. muss, um der „freien Äußerung des Wählerwillens“ effektiv Geltung zu verschaffen.² Die kontroverse Diskussion hierzu wird vom Autor nicht aufgegriffen; auch der Umstand, dass (ungeachtet eines inzwischen durchaus beeindruckenden Ratifikationsstandes) Staaten wie China und Saudi-Arabien dem IPbürgR bislang ferngeblieben sind, wird nicht weiter thematisiert. Hinsichtlich der jüngeren Entschließungspraxis des Sicherheitsrates befindet *Ehm* (zu Recht), diese zeichne sich zunehmend durch eine Stärkung demokratischer Regierungen aus, hält aber gleichzeitig fest, es werde dabei kaum das Ziel der im Rat vertretenen Staaten sein, „kund zu tun, dass bestimmte Normen von nun an als bindend betrachtet werden sollten“ (S. 76). Dass er dessen ungeachtet in der Praxis des Sicherheitsrates einen „gewichtigen Beitrag“ für die Bejahung eines im Völkervertragsrecht (!) verankerten Demokratiegebots sieht, vermag insofern doch zu erstaunen.

Tiefergehend und in Summe ergiebiger sind die Erörterungen des Autors zur völkergewohnheitsrechtlichen Qualität des von ihm postulierten Demokratiegebots. Akribisch werden hier die konstitutiven Elemente des Völkergewohnheitsrechts durchdekliniert, um im Ergebnis sowohl das Vorliegen einer allgemeinen Übung wie auch einer diese Übung begleitenden Rechtsüberzeugung im Hinblick auf die gesuchte Völkerrechtsnorm zu bejahen. Den Nachweis ausreichender Übung sieht *Ehm* zum einen dadurch erbracht, dass mittlerweile zahlreiche (formalrechtlich zumeist unverbindliche) Dokumente und Erklärungen auf

² Skeptisch zu beiden Punkten etwa *Brad R. Roth*, *Governmental illegitimacy in international law*, Oxford 1999, S. 329 ff.

globaler wie regionaler Ebene in unterschiedlicher Weise auf die Demokratie bzw. demokratische Prinzipien Bezug nehmen. Hinzu komme eine Vielzahl im Bereich der internationalen Beziehungen angesiedelter Maßnahmen, die direkt oder mittelbar auf die Förderung der Demokratie abzielen. Näher behandelt werden dabei insbesondere die rezente Staatenpraxis hinsichtlich der Anerkennung von Neustaaten und Regierungen, die Mitgliedschaftspolitik internationaler Organisationen, die konditionale Gewährung bilateraler Finanzhilfe, das am Aufbau demokratischer Strukturen orientierte Engagement internationaler Akteure in Rahmen des *Post-Conflict Statebuilding* sowie der fallweise Einsatz militärischer Gewalt im Zuge (multilateraler) pro-demokratischer Interventionen. Nach Auffassung des Autors werden die von ihm dargestellten Erklärungen und Maßnahmen in aller Regel auch von *opinio iuris* in Bezug auf ein völkerrechtliches Demokratiegebot begleitet, welche überdies noch weiteren einschlägigen Rechtsbekundungen der Völkerrechtssubjekte entnommen werden könne (etwa den schon früher zitierten Verträgen, v.a. aber diversen Resolutionen der UN-Generalversammlung mit Demokratiebezug).

Die Ausführungen *Ehms* zur völkergewohnheitsrechtlichen Natur eines internationalen Demokratiegebots fördern einiges an Interessantem zu Tage und seine diesbezügliche Conclusio erscheint als solches durchaus argumentierbar. Streckenweise kann man sich allerdings kaum des Eindrucks erwehren, dass der Autor allzu sorglos über heikle rechtliche Problemlagen hinweggeht, deren Erörterung in vergleichbaren Analysen zu deutlich differenzierteren Ergebnissen führt vgl. z. B. *Niels Petersen*, Demokratie als teleologisches Prinzip, Berlin 2009; zuletzt auch *Jure Vidmar*, Democratic Statehood in International Law, Oxford 2013.³ Erinnerung sei nur an die gerade auch für die Bildung von Völkergewohnheitsrecht auf dem Gebiet der Menschenrechte bedeutsame und bis heute umstrittene Frage, inwieweit rein verbale Praxis (etwa in der Form allgemeiner Bekenntnisse zu den Menschenrechten in internationalen Erklärungen) auch von entsprechenden faktischen Verhaltensweisen der Staaten unterlegt sein muss, um als „general practice“ im Sinne von Art. 38 Abs. 1 lit. b IGH-Statut gelten zu können. *Ehm* streift diese Debatte nur am Rande, meint aber die erforderliche faktische Praxis in den erwähnten Handlungen der Staaten auf zwischenstaatlicher bzw. internationaler Ebene (s. oben) ausreichend festmachen zu können. Zwar räumt er ein, dass man sowohl in Bezug auf das Kriterium der Übung als auch jenes der Rechtsüberzeugung „angesichts der politischen Lage in vielen Ländern zumindest in puncto Einheitlichkeit und Verbreitung doch einige Zweifel haben [könne]“ (S. 212). In Summe wäre gleichwohl ein großer, auf ein verbindliches Demokratiegebot gerichteter Konsens der Völkerrechtsgemeinschaft feststellbar; da diese „die größte Rechtsgemeinschaft überhaupt [ist]“, seien „gewisse gegenläufige Entwicklungen ganz einfach hinzunehmen und einzelne Kontradiktionen oder Antinomien eine Zwangsläufigkeit“ (S. 213).

3 vgl. z. B. *Niels Petersen*, Demokratie als teleologisches Prinzip: zur Legitimität von Staatsgewalt im Völkerrecht, Berlin 2009; zuletzt auch *Jure Vidmar*, Democratic statehood in international law: the emergence of new states in post-Cold War practice, Oxford 2013.

Dass hinter diesen Ansatz ob seiner Großzügigkeit gegenüber „gegenläufigen Entwicklungen“ mehr als nur ein Fragezeichen gesetzt werden kann, liegt auf der Hand. Dies gilt umso mehr, als hier auch keinerlei Hinweis auf die mögliche Relevanz der sog. *persistent objector*-Regel zu finden ist, obwohl dies an dieser Stelle eigentlich zu erwarten gewesen wäre. Hinterfragbar sind aber auch andere Grundannahmen der vorgetragenen These; etwa jene, wonach vielen der vom Autor erhobenen Erklärungen und sonstigen *soft law*-Dokumenten „zweifelsohne“ ein auf ein völkerrechtliches Demokratiegebot gerichteter Rechtsüberzeugungsgehalt unterstellt werden könne, da diese von den Staaten „in klarer Sprache“ eine demokratische Verfasstheit einfordern würden (S. 190, 198). Ähnlich wie schon im Fall des Völkervertragsrechts lässt sich dies für die regionale Ebene (insbesondere in Bezug auf Europa, die beiden Americas sowie Afrika) sicher gut begründen, auf universeller Ebene sind derartige imperative Forderungen allerdings, jenseits rein politischer Bekenntnisse und Absichtserklärungen, nach wie vor kaum auszumachen. Auch die vom Autor ins Treffen geführten, zum Teil mit großer Mehrheit angenommenen „Demokratie-Resolutionen“ der UN-Generalversammlung helfen hier nicht weiter, da sie bei näherer Betrachtung nur die Bereitschaft der Vereinten Nationen zum Ausdruck bringen, Staaten, die sich aus freien Stücken für die Demokratie bzw. die Einleitung demokratischer Prozesse entschieden haben, durch verschiedenste Maßnahmen in ihren Bemühungen zu unterstützen. In der Tat ist kaum zu bestreiten, dass die Staatengemeinschaft im Lichte der einschlägigen Praxis der UN sowie regionaler Organisationen inzwischen eine verhältnismäßig klare Vorstellung von den Mindestelementen eines allgemein akzeptierten Demokratiebegriffs entwickelt hat (was vom Autor auch überzeugend herausgearbeitet wird). Ob aber dieser Begriff – der u.a. den Schutz der Menschenrechte, freie Wahlen, Rechtsstaatlichkeit, politischen Pluralismus und Gewaltenteilung umfasst – schon in seiner Gesamtheit als Grundlage und Inhalt eines universell rechtsverbindlichen Demokratiegebots betrachtet werden kann, bleibt bis auf weiteres doch zu bezweifeln.

Auf der Basis der im Hauptteil der Arbeit vertretenen Position untersucht *Ehm* im Anschluss die konkrete Bedeutung eines völkerrechtlichen Demokratiegebots sowohl für den demokratischen wie auch den undemokratischen Staat sowie für das Völkerrecht selbst. Das in Rede stehende Gebot wird dabei als ein legitimitätsstiftendes „Grundprinzip der konstitutionalisierten Völkerrechtsordnung“ festgemacht (S. 289 ff.), das zu einem weiteren Verschwimmen von völkerrechtlicher und innerstaatlicher Sphäre führe und insofern maßgeblich zur Herausbildung einer „kommunitären“ Weltrechtsordnung beitrage. *Ehm* lässt keinen Zweifel daran, dass diese neue Ordnung auch eine radikale Neuvermessung des gegenwärtigen Konzepts der Souveränität erforderlich mache, die – wende man das völkerrechtliche Demokratiegebot konsequent an – an sich nur noch demokratisch verfassten Staaten zukommen könne (S. 260). Da die Eröffnung einer „Zweiklassengesellschaft der Staaten“ aber abzulehnen sei, spreche eine Güterabwägung letztlich doch für die Aufrechterhaltung des Prinzips der souveränen Gleichheit und ein Zurücktreten des Demokratiegebots.

Die Bedenken gegen eine völkerrechtlich sanktionierte Zweiklassengesellschaft halten den Verfasser insgesamt freilich nicht davon ab, demokratischen Staaten dezidiert eine „Hegemonialstellung“ im internationalen System zuzusprechen. Als Hüter des völkerrechtlichen Demokratiegebots befänden sich diese Staaten „auf den ‚Höhen‘ des Völkerrechts“ und besäßen daher „einen weiten, souveränen Blick und eine bessere, prinzipienorientierte Kontrolle über das weltweite Geschehen“ (S. 269). Es sind triumphalistische, über das Ziel hinauschießende Behauptungen wie diese, welche die Lektüre des Buches selbst für den der Thematik gegenüber aufgeschlossenen Leser zuweilen zu einer schwer verdaulichen Kost werden lassen. Dass es in Summe – schon wegen der darin vorgenommenen umfassenden Sichtung des einschlägigen Normenmaterials – einen wertvollen Beitrag zur weiter andauernden Debatte um die Bedeutung des Demokratieideals im gegenwärtigen Völkerrecht liefert, sei damit jedoch keinesfalls in Frage gestellt.

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