The Process of Constitutional Amendments in Tanzania:

With a Reference to the Role of Parliamentary Draftsman

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A. Introduction

The primacy of a constitution in the legal system cannot be overstated. The Constitution provides for the structure of the state, and the power of its organs and it guides the relationships between the governmental organs and citizens.[1] The constitution thus provides a framework for governance and depicts the composition of a government. It also shows how a particular country will be ruled.[2] Therefore, constitution making is one of the most important issues in democratic governance. Wheare defines a constitution as a specific legal document, which contains a selection of the most important legal rules that govern the government, and usually has some priority over other legal rules.[3] The Constitution thus empowers government, its institutions and citizens by setting out their rights and obligations. At the same times it also imposes limitations on those rights and obligations. A constitution therefore, is a supreme law of a country and most if not all, other legal instruments are premised out. Samatta J. said as argues: -

> The Constitution of Republic of Tanzania is a living instrument having a soul and consciousness of its own as reflected in the preamble and fundamental objectives and directives principles of state policy. Court must therefore, endeavor to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in (tune) with the lofty purposes for which it makers framed it.[4]

Accordingly, a constitution is a stable document that is not subjected to unnecessary amendments. Changes to it, must be seen as necessary and as responding to the changing needs and challenges of governance.

On this regard, constitutions generally tend to be rigid rather than flexible. The rigidity protects a constitution from political abuse and legal uncertainty. Excessive

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1 B. O. Nwabueze, Ideas and Facts in Constitution Making 1 (1993).

2 *Id.*

3 K. C. Wheare, The Constitutional Structure of the Commonwealth 17 (1982).

4 Samatta, J in the case of *Ndyanabo v. Attorney General* (2001) 2EA. 485, at 493. *See also Njoya and Others v. Attorney General and Others* (2004) LLR. 4788 (HCK). It was observed that the Constitution is not an Act of Parliament and is not to be interpreted as one.

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rigidity however, can lead to breaches of political tolerance.This situation can provoke political instability, which can lead to the collapse of a governance system or even a government.[5] The rigidity of constitutions is compensated by the introduction of the possibility of constitutional amendments catering for growing social and political needs. Constitutions nevertheless have to yield to social pressures that ultimately lead to amendments. Thus, changes to constitutions have been made through coups, or changes in government.[6] Africa has witnessed such changes. For example, the Constitution of Ghana was changed following a coup d'état,[7] and that of Malawi and South Africa were changed following political changes from authoritarian rule to multiparty democracy. Although constitutions of many countries contain provisions for their amendments, the procedures proposed have been given very little attention. In some countries, constitutional amendment can be done overnight without following any specific procedure.[8]

The constitution of Tanzania came into force in 1977. Between 1964 and 1977 Tanzania was ruled through an interim constitution.[9] Since coming into force, the Constitution of the United Republic of Tanzania has undergone fourteen amendments. Many politicians, including academics, have criticized these changes claiming that there is a need of writing a new constitution rather than piecemeal amendments on the current constitution. Their main argument is that, the present constitution was written at a time when Tanzania was a one party state, which had no regard for the opinion of the citizens. The opinion of the leaders was taken to be opinion of the people.

Article 98 of the Constitution of Tanzania provides for the procedure be followed when amending it. This paper discusses how the fourteen constitutional amendments were initiated by government, before being presented to the parliament for ratification through the procedure the constitution advances. Generally this paper seeks to analyse the procedure that has been taken in introducing the constitutional changes and the participation of the adult franchise towards the constitutional amendments.

A constitution is meant to guide the relationship between citizens and their government. Therefore, the constitution is regarded as an instrument of compromise. Through compromise the constitution serves citizens, at least most of the time.[10] In order for a constitution to become a living document, the amending process must be well organized by making sure that public participation

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[5] J. W. Burgess, Political Science and Comparative Constitutional Law 137 (1896).

[6] J. Hatchard, M. Ndulo & P. Sinn, Comparative Constitutionalism and Good Governance in the Commonwealth: an Eastern Southern Africa Perspective 44, footnote 7 (2004).

[7] Soon after the coup in Ghana the military government announced to suspend the constitution and introduced a decree to rule the country.

[8] H. Chand, The Amendment Process in the Indian Constitution 1 (1972).

[9] Tanzania is the union of two independent countries Tanganyika and Zanzibar, which united soon after the revolution of Zanzibar in 1964. From 1964 up to 1977 the interim union constitution was the only document governing the country under the union umbrella. *See* B. P. Srivastava, *The Constitution of the United Republic of Tanzania 1977 – Some Salient Features – Some Riddles*, 11-14 Eastern African Law Review: A Journal of Law and Development 78 (1978-1981).

[10] K. E. Palmer, Constitutional Amendments 1789 to the Present (2000).

is free and open. Since a constitutional is a superior law of the country, there must be different procedure for it s amendment in comparison to other Act of Parliament.[11]

In modern political democracy, there are many forms of constitutional amendment procedures, but most of these depend on the system of government.[12] For example, in the federal system, the participation of parliamentary of respective state is vital.[13] Most of African countries especially those which were under the British rule, adopted a modified version of the Westminster system known as the commonwealth constitution.[14] Some African countries modified this newer version further and developed what came to be known as the Presidential system.[15] Under the Presidential system, the power to amending a constitution is effected by a two-thirds majority support by Members of Parliament. The process however, does not provide or guide how amendments are to be initiated before being sent to the parliament. This is one of the shortcomings constitution of Tanzania has to contend with.[16]

The purpose of this paper discusses the amendment process undertaken in the fourteen amendments in Tanzania and ascertains whether article 98, which requires a two-thirds majority support, is a sufficient procedure for amending the constitution. This paper resolves that the requirement of two-thirds majority could be sufficient, if the process also sought opinions of citizens before parliament deliberated on the amendment

In their study on the fifth constitutional amendment, of 1985 seeking to entrench a Bill of rights in Tanzania, Bierwagen and Christ evaluate the significance of the changes and the procedure that have been followed to facilitate the amendments. In this work, the writers did not touch on the question of requirements necessary for constitutional amendments especially the two-thirds support in parliament, a thing which this study seek to deal with.[17] Mwakyembe sought to review the eighth constitutional amendment and its implication on constitutional democracy and the union question,[18] thus identifying the problems of the union of Tanganyika and Zanzibar but avoiding to address the aspect of the two-thirds majority support of parliament required for constitutional changes. In his article on the state of the constitution, Shivji argues that the problem of most African constitutions is on concentration of powers that is vested on the leaders. Although he vehemently presents his case on concentration of powers, Shivji does not

[11] The Constitution of South Africa provides a procedure of amending theconstitution, *see* Section 74.

[12] In his thesis B. Dutta discusses different ways of amending the constitution, *see* at 148.

[13] Countries like India, USA, South Africa and Germany to mention few are good examples where State Legislatures have to endorse constitution amendment proposed by a two-thirds majority.

[14] J. Jowell. & D. Oliver (Eds.), The Changing of Constitution 39 (2004).

[15] B. Nwabueze, Presidentilism in Commonwealth Africa 58 (1974).

[16] Constitution of South Africa, Section 74 provides for the initial procedure.

[17] R. M. Bierwagen & C. P. Maina (Eds.), The Constitution of the United Republic of Tanzania 1977: a Study of the Fifth Amendment of 1984 (1989).

[18] H. G. Mwakyembe, (1995) Tanzania's Eighth Constitutional Amendments and Its Implications on Constitutional Democracy and the Union Question. Univ. Diss. (1995).

discuss constitutional amendments in this article.[19] Yet elsewhere Shivji discusses the validity of amending the constitution of 1977 by finding out whether the constitutional changes reflect what has been provided under the Union. There amendment procedures are discussed under the interim constitution, albeit without discussing the two-thirds majority required to facilitate constitutional amendments.[20] Warioba[21] and Seaton analyze the historical background of the 1977 constitution but do not refer to constitutional amendments.[22] Srivastava reviewed the features of the Tanzania constitution[23] focusing on the background to the adoption of the Tanzanian constitution since independence and the process of change under political events after independence, but once again avoiding the question of constitutional changes.[24] Mlawa focuses on constitutional changes and proposes the necessary amendments to be effected in the 1977 Constitution, especially at the higher post of Political leadership. Although this article touches on constitutional amendments, analysis is limited to what should be included in the constitutional amendments.[25]

Kivuda, Kimondo and Gathii suggest ways of changing the constitution through direct citizen involvement. Although their work does not touch upon the process of amending the constitution via a two third majority, it is rather useful in establishing why is important to make sure that citizens are fully involved in constitution amendments prior to the ratification process by the parliament.[26] Murungu, Mute and Wanjala studied amendments to the Kenyan constitution and their implications, but the procedure of amending the Kenyan Constitution is not discussed despite the provision of a two-thirds majority rule.[27]

Since most of the laws in Tanzania have been transplanted from India through the process of reception clause, literature on the Indian constitution was also reviewed. Dutta writes on some problems relating to constitutional amendment in India. In his study many issues concerning the problems of amending constitution in India are discussed. He also discusses many ways of amending constitution. The issue of two-thirds majority vote by members of parliament does not come out strongly in this study.[28] The amending process in the Indian constitution[29] discusses whether the amending provision under the Indian constitution contains

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[19] I. G. Shivji, *The State of the Constitution and the Constitution of the State in Tanzania*, 11-14 Eastern Law Review: A Journal of Law and Development 1 (1978-1981).

[20] I. G. Shivji, Tanzania: The Legal Foundations of the Union (1990).

[21] Warioba was the Attorney General when the Constitution was adopted and later became the Vice-President and Prime Minister in 1985.

[22] E. E. Seaton & J. S. Warioba, *The Constitution of Tanzania: An Overview*, 11-14 Eastern African Law Review: A Journal of Law and Development 35 (1978-1981).

[23] Srivastava, *supra* note 9, at 73.

[24] *Id.*, at 75.

[25] G. Mlawa, *The Constitution of the United Republic of Tanzania: Proposed Changes*, 11-14 Eastern African Law Review: A Journal of Law and Development 128 (1978-1981).

[26] K. Kivutha, G. Kimondo & J. Gathii (Eds.), The Citizen and Constitution (year).

[27] L. M. Mute & S. Wanjala (Eds.), When the Constitution Begins To Flower (2000).

[28] B. Dutta, *Some Problems Relating to Constitutional Amendments in India*, (Ph.D. thesis, University of London, Faculty of Law, 1976).

[29] Chand, *supra* note 8, at 220.

power or procedure of amending constitution by parliament. In his study the author was not discussing the two-thirds requirement.

Studies dealing with constitutional changes in the USA are equally relevant to this study. Although there is a big difference in the system of governance between Tanzania and the USA, the process used to pass amendments in United States has been the subject of extensive analysis in Tanzania mainly as a means of studying various ways of amending constitutional provisions within the same constitution.[30]

The literature review on the topic of this paper demonstrates contradictions in arguments and positions. Most of these analyses focus on Tanganyika, and less on Zanzibar, as part of Tanzanian constitutional development.[31]

B. Historical Background

In 1890 Tanganyika became a colony of Germany following the signing of the Charter of protection. The charter was a result of an agreement between the German government and the United Kingdom government on distribution of colonies in East Africa.[32] This charter came to the end, following the defeat of Germany in the First World War. The Charter enables the British government to take over the administration of some former German dependencies, including Tanganyika.[33] Through the Versailles Treaty of 1919 Britain was formally given the mandate to administer the former colonies of German in East Africa. Through the treaty, Britain's administration of Tanganyika was to be supervised by the League of Nations. The treaty also tasked the Britain with preparing citizens of Tanganyika to ultimately form a government of their own.[34] However, at least theoretically Tanganyika was an independent country under the supervision of the League of Nations. In 1946 Britain tabled proposal seeking to make Tanganyika a colony. Chief Makwaia, the first African member of Legislative Council, objected to the move. His objection emanated from the interpretation of the Treaty of 1919, which gave Britain the mandate to administer Tanganyika on behalf of the League of Nations and, in doing so, to prepare its citizens for eventual independence.[35] The lack of express provision on a future British colonization of Tanganyika and the express provision on its preparation for ultimate independence formed the basis of Chief Makwaia's objection.[36]

In administering Tanganyika, Britain was guided by the Trusteeship agreement that emerged from the 1919 Treaty. This agreement gave Britain power to make

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[30] Palmer, *supra* note 10.

[31] Srivastava, *supra* note 9.

[32] J. S. R. Cole & W. N. Delson, Tanganyika: The Development of Its Laws and Constitution 6 (1964). *See also* Bierwagen & Maina, *supra* note 17, at 2.

[33] Cole & Delson, *supra* note 32, at 7.

[34] I. Jenings, Constitutional Laws of the Commonwealth 44 (1957). *See also* Mwakyembe, *supra* note 18, at 2-3.

[35] Mwakyembe, *supra* note 18, at 2-3.

[36] *See* Art. 6 of the Trustship Agreement Applied Laws, Vol.1 1920-1957.

laws for governing Tanganyika. In making these laws Britain was not to act against the spirit of the 1919 Treaty. It can be argued that the trusteeship agreement was the first constitution of Tanganyika. If intention for a constitution is to regulate government power and create administrative structures, as well as establish a relationship with citizens, then this is what the Trustsheep agreement did. Two other laws were passed to guide the day-to-day administration of Tanganyika. In 1920 the Tanganyika Order in Council was passed. The Tanganyika (Legislative Council) Order in Council was passed in 1926. Both these laws provided that they could be amended, when the need arose, and included provisions on the process. It was clear, however, that amending these laws was vested on Britain as the administrator of Tanganyika. From 1920 to 1961 the Tanganyika Order in Council was amended five times and the Tanganyika (Legislative Council) Order in Council was amended six times.

Before Tanganyika attained self-governance the British government -aided by the Legislative Council- initiated a process that developed a new Constitution, which came to be known as the Tanganyika Independence Act of 1961. The enactment of the Act brought the Trusteeship agreement to an end, as the country attained self-administration.[37] It is important to note that this new Constitution contained a clear provision on constitutional amendments. The provision provides the procedures to be followed in making the amendments, as compared to the previous order in council.[38] In fact, the passing of the Republican Constitution facilitated democracy via the introduction of universal suffrage.[39]

Within a spell of three years since its enactment, the Constitution of Tanganyika underwent some amendments.[40] The first change declared the country a single party state.[41] Before presenting a Bill to parliament proposing the amendment, the then president appointed a committee to consider how the changes could be effected. These proposals to change the country into single state were first discussed at party level and thereafter sent to parliament, where the ruling party had a majority who were more than two thirds.[42] Although the procedure of amending the Constitution was followed the process taken to reach the requirement procedure was questionable.

[37] Cole & Delson *supra* note 32, at 9.

[38] *Id.*, at 13. The Section Quoted on this page.

[39] *Id.*, at 25.

[40] Srivastava observed that many African leaders discovered that the monarchy was an alien institution and the Westminster system did not fit in with the African traditions, *supra* note 9, at 76.

[41] *Id.*, at 77.

[42] Bierwagen and Maina, *supra* note 17, at 17, commented that the decision to make changes in the constitution in favor of a one party state was reached by T.N.U National Executive Council and the president was instructed to appoint a committee.

C. Zanzibar

Zanzibar, just like Tanganyika, was under British administration, since 1890 when the Sultanate of Zanzibar agreed to place the country under British protection.[43] The agreement can be interpreted as British interference through administration via the return of the protection pact.[44] The Zanzibar Protectorate Decree of 1914 and 1918 Order in Council guided the administration structure of Zanzibar. As in the past there was no formal constitution governing Zanzibar,[45] the decree played the role of a Constitution. Although the Zanzibar protectorate decree played the role of a constitution, it had no provisions for instituting amendments. Any amendments to the decree were made at the whims and influence of the British. When discussions were initiated to pave way for an independent Zanzibar, a Commissioner was appointed to advice on modalities of self-government.[46] The Commissioner came up with recommendations that were adopted to form the basis of the election in 1961.[47] The election was followed by chaos resulting from allegations of electoral fraud. Because of these conflicts, the constitutional conference convened to resolve the political conflicts.

In 1963 the Constitution of the State of Zanzibar was adopted making the country an independent State. Independence was followed by the Revolution, which was organized by African Zanzibarians who resented the manner in which independence was awarded.[48] As a result, the constitution of the state of Zanzibar had a short life. However, when it was drafted the constitution took cognizance of the need to amend it. The power to amend the constitution provide of two-thirds majority of Members of Parliament.[49] This requirement was limited in application since amendments to some sections did not require this support.

D. The Constitution of the United Republic of Tanzania

The revolution of Zanzibar speeded up the unification of the country with Tanganyika. Unification was formalized through the Union of Tanganyika and Zanzibar Act in 1977. The Act offered guidance on how a new constitution was to be drafted and how the country was to be ruled under the interim constitution.

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[43] Lord Harvely, Native Administration in the British African Territories Part II Central Africa: Zanzibar, Nyasaland, Northern Rhodesia 51 (1950).

[44] Jennings, *supra* note 34, at 14. *See also* the Zanzibar Protectorate Council Decree of 1914 and 1918, CAP 37 of Zanzibar Protectorate Laws.

[45] The only document which existed was the Zanzibar Treaty (Foreign Office) 1890 and it has been observed that the constitutional development started in 1891 with the appointment of the British Representative as first Minister to the Sultan, *see* H. Othman & L.P. Shaid, *Zanzibar's Constitutional Development*, 11-14 Eastern Law Review: A Journal of Law and Development 185 (1978-1981).

[46] Othman & Shahid, *supra* note 45, at 193.

[47] The first election was conducted in 1958 and ended in chaos.

[48] Othman & Shahid, *supra* note 45, at 194.

[49] *See* Art. 58 of the Constitution of the State of Zanzibar.

Shivji called this Act "grand norms" of the interim Constitution.[50] These norms determined constitution making in Tanzania. Section 9 of the interim constitution introduced the procedures to be used for a constitution for the United Republic of Tanzania.

The procedure required that the President with the consent of the Vice President, who was the President of Zanzibar, convene a constituent Assembly. The main duty of the Constituent Assembly was to ratify and adopt the Constitution. Prior to constituting a Constituent Assembly, the President with the advice of the Vice President set up a Committee composed of representatives from Tanganyika and Zanzibar. The purpose of this Committee was to make Constitutional proposals for deliberation by the Constituent Assembly.[51] However, the Act of Union did not introduce the criteria for the selection of representatives, let alone explain how members would be selected from both Tanganyika and Zanzibar. Despite this, the Constituent Assembly required that both members from both parts of the Union be present.[52] It was presumed that the committee was to have equal representation from both countries hence the requirement of the consent of the Vice President who was also the President of Zanzibar was mandatory.[53]

The adoption of the United Constitution of Tanzania was made in 1977 soon after the merging of only two single ruling parties from each part of the Union. Shivji observes that the committee appointed to make constitutional proposals was composed of the same members who were appointed to make proposals for the Party's Constitution following to the formation of the new Party.[54]

In fact, it seems like the committee had to work on cut and paste from what was the party's Constitution as adopted. This is also supported by the fact that only one month elapsed before the committee came up with proposals for a Constitution.[55] One wonders whether a month is sufficient time to draft a National constitution. May be the constitution was already drafted at party level and extrapolated as a National one.[56] As it was the President and his vice that selected the Constituent Assembly, members of that Assembly were also members of the ruling party.[57] Thus, they also knew about the constitution at party level and through the Constitutional Assembly all they had to do was sanction what the part had agreed already.[58] It should be known that debates culminating in passing the

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[50] Shivji, *supra* note 20.

[51] Schedule of the Act of the Union, paragraph (vii).

[52] *Id.*

[53] Shivji, *supra* note 20, at 57.

[54] *Id.*, at 58.

[55] According to Shivji the Commission was appointed by the President on 16 March 1977 and presented its proposal to the Constituents Assembly on 31 March 1977.

[56] Shivji, *supra* note 20, at 59.

[57] *See* J. T. Mwaikusa, *Towards Responsible Democratic Government: Executive Powers and Constitutional Practice in Tanzania 1962-1992* (Ph.D. Thesis, University of London, SOAS 1996) at 180.

[58] Mwakyembe, *supra* note 18, at 104. He pointed out that Art. 54(1) of the Constitution of Union provides that the National Assembly is designated as a Committee of the National Conference of the Multi Party (*id.*, at105).

new constitution lasted only one hour. Also, there were no remarkable changes from what the proposals that had been made by the committee.[59]

The process of adopting the Constitution of Tanzania differs in comparison to many other countries, especially those in the Commonwealth. Representative conclusions can be drawn from three African countries, namely Malawi, Uganda and South Africa, which offered remarkable constitutional developments in their country. Wheare writes that the making of a new constitution in any society signifies the occurrence of major events, which may come from civil war, coup or the changing of government by force of the people who seems to be unsatisfied by the way their country is ruled and they need a fresh start.[60]

Malawi – soon after undergoing political changes – made efforts to make changes to its laws, whereas the constitution was not left untouched either. The country held a referendum in 1993 to ask people whether the country should change to a system of multi party system.[61] With the support of the people for a multi- party system a new constitution introducing this system and many other changes was passed in 1994.[62] The National Consultative Council and a National Executive were formed to carry the changes. These two bodies were given different tasks during the transition period. The National Executive was given task of preparing new constitutional proposals and a Bill of Rights while the National Executive Council had to deal with the monitoring public Authorities.[63] There are substantial differences between the constitutional adoption processes of Tanzania and Malawi. While in Tanzania the president selected a committee of his choice to make constitutional proposals, in Malawi independent institutions were set up.[64] Further still, they sought public opinion for the planned changes and the proposals were sent direct to the resolution body.

Uganda is another country, which made its constitutional proposal differently from Tanzania. In developing the Constitution, Uganda made sure that the opinion of the people was part of the process.[65] When the NRMA attained power in 1986 it took nine years to develop a Constitution for the country.[66] In 1988 the Constitutional commission was established to draft the new constitution and to sensitize people about the need of Constitution as well as collecting their views

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[59] Shivji quotes the Speech of Introduction delivered by the Prime Minister who generally seems to caution members that the constitutional proposal carry party's directive of which all members of the constituent Assembly have to abide by. *See supra* note 20.

[60] K. C. Wheare, (1966) Modern Constitutions 6 (1966).

[61] Constitutional Change in Malawi: Report of a Delegation of the Council of the Bar of England and Wales and the Scottish Faculty of Advocates, at 1 (year). Although the existing laws still have not yet changed, it is believed that with the new constitution they are in transition.

[62] *Id.*

[63] *Id.*

[64] *Id.* When the National Consultative makes a proposal, this is usually sent to the National Executive for implementations and not to the President.

[65] Legal Notice 1 of 1986 formed the basis of the whole process of making a new Constitution. *See also* D. Mukholi, A Complete Guide to Uganda's Fourth Constitution: History, Politics and the Law 25 (1995). *See also* W. Okumu, *A New Constitution in Uganda: Some Limitations and Issues*, *in* W. Okumu (Ed.), Founding the Constitution of Uganda – Essays & Materials 49 (1994).

[66] Mukholi, *supra* note 65.

on it.[67] Comparatively, the Ugandan constitutional Commission took seven years to come up with a draft constitution, while in Tanzania the Committee that was set up took hardly a month.[68]

The adoption of a constitution for the new South Africa was also remarkable different to Tanzania's adoption process. South Africa witnessed a process of constitution making involving other Political Parties after the dissolution of the apartheid constitution. The process of political negotiations took place between 1990-1993. The process resulted in the 1996 South African Constitution.[69] South Africa seems to follow the Tanzanian process to start with. Both countries formed an interim constitution that was accepted by all Political Parties. However, in contrast to Tanzania, the South African interim constitution proposed to parliament is the one that was ultimately adopted.[70] It took South Africa a four-years wait before the country adopted a new constitution.[71] This was due to debates at political level.[72]

It is clear therefore that the development of the constitution in Tanzania was more of a ruling party prerogative and concern. But this is not surprising as the country was a one party state. Other countries show a clear process of consultation in the constitutional development exercise. The exercise was not done overnight but took sometimes.

E. The History of the Amending Processes in Tanzania

The history of constitution amendments in Tanzania can be traced to the era of the interim Constitution. In fact the constitution amending process in Tanzania had not yet came into hot debate, as the main concern of politician and pressure groups is the need of writing new constitution instead of amending the present constitution. So in Tanzania there is no discussion at the present on how the constitution should be amended. During this period, arrangements for amending the constitution seemed to be made into two pillars. One pillar is known as the interim constitution, whereas other pillars are traced in the Act of the Union of Tanganyika and Zanzibar. These documents work together. The Act of Union plays the role of regulating the interim constitution that should not exceed its power.[73] Nwabueze observed that the interim constitution was not working on its own as a single document to rule the country but it must be read together with

[67] *Id.*, at 28.
[68] Shivji, *supra* note 20.
[69] W. De Klerk, *The Process of Political Negotiation: 1990-1993, in* B. De Villiers (Ed.), Birth of a Constitution 21 (1994).
[70] I. Currie & J. De Waal (Eds.), The New Constitutional and Administrative Law, at v. (2001).
[71] The formation of the Multiparty Congress for a Democratic South Africa (CODESA) in 1991 has been the result of debate and the starting point of the whole constitutional process. *See* De Klerk, *supra* note 69, at 1.
[72] T. Elof, *The Process of Giving Birth, in* B. De Villiers (Ed.), Birth of a Constitution 13 (1994).
[73] Government Paper No.1 of 1998. Government views concerning changes to be made in the constitution of the United Republic of Tanzania, at 11. *See also* Shivji, *supra* note 20, at 45.

the Act of the Union.[74] This is because there are only eleven matters outlined in the Act of the Union and therefore the Union government or the Zanzibar government should exercise their powers according to the Act.

Amendments to the interim constitution were regulated by a provision requiring that issues dealing with amendments be discussed in the National Assembly. Any amendments that were arrived according to the second schedule of this constitution had to be sanctioned by a two-thirds majority of Members of the National Assembly. This two-thirds majority must be achieved even at stage two of the Assembly.[75] The process of amending the constitution had to follow three stages. In stage one the Bill proposing the amendment is read for the first time in the National Assembly. It is then read for second and third time after being discussed by Parliament standing committee. In all the three stages, the Bill to take effect as a law or lead to changes in the constitution has to have a two-thirds majority support. Moreover, the interim constitution empowered the President to amend its provisions with a simple decree.[76] The first amendment to the interim constitution took place in 1965. The purpose was to regulate the financial affairs of the union[77] that were excluded from the competences of the Union. In 1967 the Arusha declaration was passed aiming to introduce socialism as the country's polity. The Arusha declaration meant that Parliament had to effect the necessary amendments to the constitution, namely that Parliament had to amend the constitution in order to declare Tanzania a socialist State.[78] The Arusha declaration can be viewed as a Tanganyikan Party policy initiative, which the interim constitution reverted to a policy for the entire country. It is not clear if the Arusha declaration was a matter that concerned the entire union or just Tanganyika. Further amendments followed, such as the 1969 amendment to the interim constitution that placed all minerals to the protection of the Union.

What can be observed here is the fact that the amendments were made to the schedule of the constitution than in the main constitution itself. Participation of the citizen during these amendments was not direct, as the government seemed to introduce amendments directly to the National Assembly. The citizens only accepted what had been agreed in National Assembly. Since the interim constitution followed immediately after the Zanzibar revolution, it had gaps, which necessitated sporadic amendments. This is due to the fact that when the interim constitution was adopted, Zanzibar was still unsettled politically. Therefore, amendments to it were necessary once the political situation in Zanzibar was calm.[79]

The adoption of the Constitution of the United Republic in 1977 marked the second phase in the history of constitutional amending processes in Tanzania. A single political party deliberated amending the Constitution, thus empowered it to determine the legislative position of the development of the country. During

[74] B. O. Nwabueze, Presidentialism in Commonwealth Africa 264-265 (1974).
[75] Section 51 of the Interim Constitution 1965.
[76] Nwabueze, *supra* note 74.
[77] Interim Constitution (Amendment) Act No. 21 of 1965.
[78] Act No. 40 of 1967. *See also* Mwakyembe, *supra* note 18, at 101.
[79] The union came after only two months of the Zanzibar Revolution.

this period, the concept of party supremacy took over the role of parliamentary supremacy. The role of parliament was thus, reduced to one of the party's committee.[80] The amending process of the constitution, although provided for in the constitution itself, was determined and supervised by the ruling political party as the main actor to a great extent. As a result from 1977 to 1995 the constitution was amended twelve times. The first amendment of this constitution was in 1979. These amendments were a result of the collapse of the East African Community and the East African Court of Appeal of 1977.[81] For this reason, the government introduced amendments establishing the Court of Appeal of the United Republic. The amendments were followed by further amendments seeking to accommodate the new constitution of Zanzibar adopted in 1979. As after the revolution Zanzibar was governed through a decree of the Revolution Council,[82] the amendments provided for the arrangement of the Zanzibar government and also for the introduction of members of the House of Representative of the Revolution Council Government for the first time after almost fifteen years since the Zanzibar Revolution. These amendments were taken at government and party level and therefore citizens were not directly involved it was presumed that their involvement was so through their elected members of parliament. Due to the country being a single party state, the party controlled all the discussions on the amendments.

The first amendments, which actually involved citizen participation, were those instituted in 1984.[83] The ruling party initiated the debate and sought public opinion before it could initiate changes to the constitution.[84] The party had indicated areas within which citizen were to give their views. However, people went beyond the area delimited by the party. The party had instigated views on the powers of the President; consolidation of the Authority of the Parliament strengthening the Representative character of the National Assembly; consolidation of the union; and consolidation of the people's power. Maina observes that people being given a forum to opine hijacked the debate and widened the areas that the party had not identified to be of main concern.[85] As a result of the different opinions received, government tabled the amendments in parliament. Hence the amendments that were instituted on the constitution included issues which government had not anticipated.[86] This shows just how important it is to involve citizen in constitutional amendments. Here the government has to make proposals for constitutional amendments according to the opinions of citizens.

The 1984 amendments restructured the whole constitution and for the first time a bill of rights was entrenched. These amendments were followed by other amendments. This time, initiation of amendments started at government level

[80] Art. 63(4) of the first version of the United Republic Constitution of Tanzania.
[81] Constitutional (Amendment) Act No. 14.
[82] Constitution (Amendment) Act No. 1 and 45 of 1980.
[83] Constitution (Amendments) Act No. 14 of 1984.
[84] P. Maina, *Constitution Making in Tanzania: The Role of the People in the Process*, at www.KituochaKatiba.co.ug/maina.
[85] *Id.*
[86] *Id.*

instead of within the party. In 1991 the President appointed a Commission to collect views from citizens on the type of political system that the country should follow. The people were given the option to choose whether to remain with the single party system or to adopt a multiparty system. The Commission was required to provide government with recommendations based on public opinion.[87] The findings of this Commission concluded that many citizens were in favour of a single party political system but recommended changes to be made in the ruling party set up. However, the changes could be only effected under a multiparty dispensation. The commission thus, recommended to government to adopt a multiparty political setup.[88] Following the recommendation of the Commission, government introduced changes to the constitution and the country became a multiparty country.[89] Since the government was not ready to effect all changes recommended by the committee *mutatis mutandis,* it continues to this day to effect the recommendations in phases.[90]

One point to note here is that, although government made significance changes in the constitution to accommodate a multiparty system, pressure groups and politicians have criticized the amendments. These groups have urged the government to make a new constitution instead of carrying on with making piecemeal amendments to the present constitution. In supporting these arguments, they refer to the examples of Uganda, Malawi and South Africa. The government has remained adamant that a new constitution will only be adopted when there is a change in the disposition of sovereignty like the disposition, which occurred when Tanganyika attained independence and Zanzibar underwent a Revolution.[91] It is true that the making of a new constitution is not necessary as long as the constitution in force provides for a provision for amendments. Many countries around the world have achieved good constitutions through amendments. The Indian constitution has been amended 85 times, that of the United States 27 times and yet both these countries have a strong and respected constitutions in the world.

The demands for a new constitution led to the government to the appointment of yet another committee with the mandate to identify the views of citizens on constitutional reforms.[92] The committee was given summarized views of the government position and was asked to acquire views of the citizens.[93] The findings of the committee were not in favour of the government.[94] One important thing to note is the fact that the 1998 committee was the first committee to be appointed

[87] The Nyalali Comission authored by Chief Justice Francis Nyalali set out to find the views of the people whether they prefer a single or multiparty system. Nyalali Commision Report on Single or Multiparty System (1992), at 10.

[88] *Id.,* The Report of the Commission, at 712.

[89] Constitution (Consequatial, Transitional and Temporary Provision) Act No.4 of 1992.

[90] Act No. 20 of 1992, Act No. 7 of1993, Act No. 34 of 1994 and Act No. 12 of 1995.

[91] Government White Paper No. 1 of 1998. View of the Government, at 12.

[92] The Kissanga Committee was appointed by the President in 1998.

[93] Maina opposed this method as it goes against the normal procedure of the actual format of a White Paper, *supra* note 84, at 4.

[94] The President gave a speech to the Dar es Salaam Elders reacting on the recommendations made by the Commission on 11 December 1999.

under the multiparty system and therefore many people were free to give their views on matters that are not in favour of government and the committee could not go short on what the citizens observed. But the reaction of President seems that the government was not ready to accept some of the findings of the committee. Although the government seemed to disagree with the Kisanga Committee, yet in 2000 they decided to introduce the thirteenth amendment to the constitution. This time the government claimed it was doing so under the guidance of the Kisanga committee's recommendations.[95] It is not clear why government, which initially objected to the report and its recommendations openly, could revert back to these recommendations. In any case the amendments reflect the powers given to the President to appoint members of Parliament that can be traced back to very early constitutions of Tanzania.[96]

It should be noted that the government also acted on the findings of the same committee to amend the constitution on the fourteenth amendment. In these amendments the government sought to remove the tendency of subjecting articles of the constitution to other Acts of Parliament, especially the provisions of the human right for the purpose of making the constitution to be a complete superior to other laws.[97]

F. Analysis of the Amendment Process

The organization of future changes to constitution is one of the key factors, which must be clearly observed by the constitution itself.[98] The moment where the constitution of a state is reduced to drafting its amending provisions assumes great importance since the very object of a writing constitution depends upon it.[99] When a constitution is in written form, it must find the way to regulate itself according to time. This will prevent those who have acquired power through the normal procedures laid by the constitution from tampering with it for their own benefit. On this understanding, the importance of amending the constitution is brought about by Article 98 of the Constitution, which provides:

> Parliament may enact legislation for altering any provision of this constitution in accordance with the following principles,
>
> a) a bill for an Act to alter any provision of this constitution other than those relating to paragraph (b) of this sub article of any provision of any law specified in list one of the second schedule to this constitution shall be supported by the votes of not less than two–thirds of all members of Parliament.

[95] The Constitutional Amendment Bill in the section which explains the object and reasons of the amendment.

[96] Maina, *supra* note 84, at 5 and *see also* Act No. 3 of 2000 on Constitution Amendments.

[97] This was discussed in the case of *Rev. Mtikila V. The Attorney General* (1995) T.L.R 31, at 58. Lugakingira, J as he then was, observed that the Constitution as basic or paramount law of the land cannot be overridden by any other law. *See also* the bill which introduced fourteen constitutional amendments and Act No. 3 of 2000 which seems to remove the subjection of the Constitution to other laws.

[98] J.W. Burgress, Political Science and Comparative Constitutional Law 137 (1896).

[99] Chand, *supra* note 8, at 16.

> b) A bill of any Act to alter provisions of this constitution or any provisions of any law relating to any of the matters specified in list two of the second schedule to this constitution shall be passed only if it is supported by the votes of not less than two-thirds of all members of Parliament from Mainland and not less than two-thirds of all members of Parliament from Tanzania Zanzibar

It can be deduced that the constitutional amendment processes in Tanzania follows a dual process. According to Art.98 there are amendments that need the two-thirds majority support of all members of parliament without regard to the part of the union that they come from. This article further stresses that a two-thirds majority drawn equally from both Tanganyika and Zanzibar should support other constitutional matters concerning directly matters of the union.

Parliament has been given the power to amend the constitution. Its power is unlimited when it comes to amending the constitution.[100] Usually the government initiates changes to the constitution and to date government has moved all fourteen amendments. The government has always appointed committees or commissions to hear views of citizens and after this preliminary process the government prepares a bill of constitutional amendments according to recommendation of commission or Committee. The government then instructs the Parliamentary draftsman to prepare the amendments in line with government's findings.

The constitutional amendments of 1984 were the first amendments to involve citizens at a different level and it led to the entrenchment for first time of the Bill of Rights, after almost twenty years of the union and independence. Generally this was open debate which were introduce by the Party for a constitutional comments.[101]

Furthermore, whenever government seems to encounter pressure specifically on constitutional matters, it comes up with the solution on how to deal with the problems. Following the collapse of the Eastern block, the President appointed the Nyalali commission. This Commission was mandated to identify the views of the citizens on whether the country should remain with a single political party or opt for a multiparty system. In fact, the commission did what it had been instructed to do and came up with recommendations facilitating government in the introduction of the multiparty system.

Apart from constitutional amendments under Article 98, Parliament has a set of Standing Orders that regulate debates and parliamentary sessions in general.[102] Constitutional amendments are brought to parliament in the same way and form as any other Bill.[103] The role of the Parliamentary draftsman is to note areas suggested and prepare for their inclusion into the schedule of amendment. The draftsman can promote a two-thirds majority by removing ambiguities, being

[100] *Mtikila case*, *supra* note 97.

[101] The party set up an 'inner committee' to collect citizens opinions and it was collecting any type of comments without discrimination.

[102] Parliament Standing Orders Part 8.

[103] In the debate of the Fourteenth Amendments, the Speaker gave many members the opportunity to talk about the Amendment. Four days were devoted to the discussions to which 85 Members of Parliament contributed. *See* Parliament Hansad of 8 February 2005.

precise, ensuring flexibility of the amendment and even helping to provide clarifications to Ministers on issues that are controversial.[104]

The legality of constitutional amendments was invoked in the High Court of Tanzania when politician Mtikila questioned the validity of the 1992 amendments, which provide that no person can stand as an independent candidate unless that person is a member of the political party involved. Mtikila objected that the new article violated the right to participation provided under the constitution[105] and requested the court to declare unconstitutional the constitutional amendments under Arts.39, 67 and 77. In this petition His Lordship Lugakingira J had the following views:

> Although the amendments pass the test of validity by virtue of the very wide definition of 'alteration' in art. 98(2) it is only tenuously that they came within the ambit of Art 30(2). The literal application of the amendments could lead to monstrous and nationality injurious results. It is believed that there are between three and four million peoples in this country who subscribed to some political parties leaving over twenty millions a free decision in the government of their country is unjust, monstrous and potentially calamitous. It must be said that any talk of the parties at this juncture in the country's history cannot be serious. Apart from chama cha mapinduzi whose presence is all pervasive, the rest exist more in name than practice. The amendments are therefore capable of being abused to confine the right of the governing into hands of members of a class and render illusory the emergence of a truly democratic society. I do not think this was the intention of the legislature.

After this observation his Lordship went further to rule out that candidates may stand for elections without necessarily being members of any political party.[106] In fact, the Judge did not expressly declare that the constitutional amendments were unconstitutional; however, he indirectly stated so as he declared a violation of an article of the constitution.[107] The important thing to note is that although the parliament seems to have unlimited power for constitutional amendments, these powers are regulated within the constitution itself. The Parliament cannot claim to make amendments and insert new provisions that violate basic human rights as enshrined in the constitution.[108]

To avoid such confusion it is the duty of Parliamentary draftsman at the time of introducing constitutional amendments to be aware of the nature of the proposed constitutional amendments. It is important for the drafters to be given time and to be fully involved in the preliminary stages of proposing of

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[104]In the debate of the Fourteenth Constitutional Amendments the Government agreed to drop the provision which creates a Presidential Advisory Body, comprised of formers presidents of the Union and the Zanzibar Government together with other proposed amendments. Parliament Hansad of 8 February 2005.

[105]Art. 30 of the United Republic Constitution of Tanzania.

[106]*Mtikila v. Attorney General case*, *supra* note 97. In this particular case the Judge reluctantly avoids the decisions of the case of *Golaknath v. State of Punjab* and *Kesvanada v. State of Keral* as he was of the opinion that amendments are valid within the meaning of Article 98(2).

[107]The question of the unconstitutionality of constitutional amendments are discussed in S. Brooke, *The Constitution-Making and Immutable Principles Thesis*, at http:// fletcher.tufts.edu, at 52.

[108]*Golaknath case*, *supra* note 106, at 486.

amendments. The legislative drafter for the purpose of good governance should not be taken unaware of any constitution amendments. On understanding the importance of the Parliamentary draftsman, the government in both commissions that were formed to collect opinions from citizen on constitutional amendments appointed the Chief Parliamentary Draftsman to be secretary of the Commission. The secretariat was mainly comprised of lawyers from the office of the Attorney General some of them being draftsman.

G. The Role of Parliamentary Draftsmen in Constitutional Amendments and Bills

Constitutions as superior laws should be on the tip hands of the drafters whenever they are called upon to draft new laws.[109] The amendment of any constitution involves legislative drafting skills. The Office of the Parliamentary Draftsman in Tanzania is under the Office of the Attorney General in the Ministry of Justice and Constitutional Affairs. The Parliamentary Draftsman has power to draft all government legislation from principal legislation, Regulations, Rules to other subsidiary legislations from all government offices around the country except Zanzibar. The office is also responsible for codifying all laws of the Country.[110] The set up of the Office of Parliamentary draftsman differs with that in the UK, where the office of the First Parliamentary Counsel is independent and the First Parliamentary Counsel reports directly to the Prime Minister and not to the Attorney General.

The role of Parliamentary draftsmen is vital in the conception and birth of an Act of Parliament. They have a duty to express legislative policy in language free from ambiguity. Transforming government policy into law is the prime function of Parliamentary Counsel.[111] Parliamentary draftsmen are expected by government, parliament and citizens to ensure that government policies are given legal effect. Government expects parliamentary draftsmen to express legislative intention clearly and easily according to the intention of the government.[112] The drafter is required to make sure that the new law, which is being drafted, will not collide with the existing laws. In its capacity as the soul and body of drafting laws in the country and as the carrier of one aspect of good governance in recent years, the drafting office has been involved in the early stages of making policy in Ministries and other government department. This helps to make sure that the drafter is in a position to understand with a clear mind what is being anticipated in the proposed draft.[113] Drafting involves extensive intellectual elaboration before indulging in drafting. Also, the drafter is required to think about society since the

[109] D. R. Miers & A. C. Page, Legislation 33 (1982).
[110] Law Revision Act No. 7 of 1994, section 4.
[111] V. C. Crabbe, Legislative Drafting 2 (1993).
[112] *Id.*
[113] In Tanzania the drafter attends workshops in which policy is discussed, thus getting a chance to hear different views from the participants. This is usefull when drafting a bill.

art of drafting is for the purpose of regulating society. Policy decisions usually have legal consequences upon members of society.[114]

H. The Drafting Process

The process of drafting legislation in Tanzania takes three forms. The first form refers to drafting a bill to be passed in parliament. The second form refers to the drafting of legislation that has been delegated by the parliament to different Ministries as part of administrative laws. The third involves By Laws.

The parliament will discuss any proposed bill brought before it.[115] The Parliament Standing Orders (PSO) provides how government or private member bills can introduce a bill for debate.[116] In fact, Tanzania has no Private members laws or bills up to date. Since the government has been the one, which introduces bills, most Members of Parliament think it is the duty of government to draft bills and it is their duty to debate bills brought by government.[117]

The legislative process of bills to be passed by parliament starts at the Ministry, which is responsible for the matter proposed. The Ministry will prepare policy to be presented and discussed by the cabinet committee.[118] The cabinet Committee is known as Inter Ministerial Technical Committee (IMTC). All Permanent Secretaries are members of this Committee. The committee will discuss and make its recommendations to the Cabinet. When the Cabinet receives the cabinet paper from IMTC, it will discuss the document from a political perspective solely, as all technicalities have already been resolved at the level of the IMTC.[119] In fact, the intention of the cabinet discussion is to ascertain if political goals have been covered and there are no conflicts with political interests[120]. The Cabinet then instructs the office of the Parliamentary Draftsman to draft a bill according to the general observation of the cabinet. In this meeting the Chief Parliamentary attends too.[121]

Upon receiving instructions from the Cabinet Secretariat, the Parliamentary draftsman makes arrangements with the Ministry responsible for the proposed bill, if there is a need of communication for clarifications on any technical issues

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[114]C. C. Thornton, Legislative Drafting 1 (1996).

[115]Art. 97. *See also* H. Calvert, An Introduction to British Constitutional Law 120 (1985), for a good explanation.

[116]Part 8 of the Parliamentary Standing Orders.

[117]I spoke to twenty Members of Parliament about a Private Member Bill, and only five understand how they may propose a Private Member Bill. Another five know that they can propose a Private Member Bill, but they are not familiar with the procedure; and three members stated that the procedure of preparing a Private Member Bill is cumbersome and that sometimes government could hijack the process.

[118]S. Kaare, *The Policy Process and Civil Societies Access to that Process in Tanzania*, at www.pacttz.org, at 11 (2003).

[119]D. C. M. Yardley, Introduction to British Constitutional Law 49 (1990).

[120]Miers & Page, *supra* note 109, at 34.

[121]Chief Parliamentary Draftsman when I interviewed her on her position in the whole process of drafting bills. Sometime she has to clarify matters of laws at this level.

in the bill.[122] It has been observed that legislative drafting demands the ability to work with colleagues and those skilled in other disciplines.[123] After the draftsman finishes drafting the bill, the latter is returned to the office of the Cabinet Secretariat with various copies distributed to members of the Constitutional Committee. This committee is formed by the Prime Minister as the chairman and other senior Ministers for the purpose of discussing the draft and checking if the instruction has been fulfilled. In this meeting, all officers from the office responsible for the bill and other officers from the office of the Parliamentary Counsel attend to make necessary clarifications and take note of changes suggested. If the Committee gives the go ahead, then the Parliamentary Draftsman will include all changes before sending the approved Bill to the Government printer. From this juncture, the role of parliamentary drafter becomes more important since when the bill is published, the interested member of the public may seek clarifications. Also during parliament discussions at committee level, Members of Parliament tend to seek clarifications from drafters rather than officers of the competent Ministry.[124]

The second form of drafting legislation refers to Acts empowering competent Ministries to make regulations, rules or instruments. The drafter will be required to check whether the Regulation is ultra vires or intra vires, whether it violates the constitution or other existing laws and lastly whether its format is in the normal drafting style. This verification of subsidiary legislation also applies to the local government and their By Laws, namely to the third form of drafting legislation. Before their coming into force, they must be verified by the Parliamentary Counsel. If the draftsman is satisfied that subsidiary legislation is in order, the latter is sent to Printer. The printer cannot print any piece of legislation if it has not passed through the Parliamentary draftsman office. This Office therefore plays a big role in legislation process in the country.

I. Drafting Process of Constitution Amendments and Other Laws

Constitutional affairs in Tanzania are in the competence of the Ministry of Justice and Constitutional Affairs. The department dealing with constitutional affairs is the department of Human Rights and Constitutional Affairs. As has been stated, the government usually processed constitutional amendments before being presented to parliament by appointing a Commission to collect views and give recommendations and proposals.[125] However, the government happened

[122]Miers & Page, *supra* note 109, at 69.

[123]The role of Parliamentary Counsel in legislative drafting: Document 11, at 10. *See also* chapter 2 of Commonwealth Secretariat, Legislative Drafting: Manual and Bibliography 2 (1973).

[124]At this stage a Member of Parliament may even move amendments through the Minister. If the Minister agrees, the schedule of amendment will be prepared and distributed in Parliament during the second reading.

[125]This is demonstrated by the two commissions which were formed for that purpose referred to earlier, Nyalali & Kissanga Commissions, *supra* note 87 & 92. The Nyalali Commission, formed in

to introduce amendments in the constitution without forming the necessary commissions. Thus, there seems to be no specific process of constitutional amendment initiation.[126]

Usually, after receiving the Commission recommendations, the government will study and review them before sending them to the office of parliamentary draftsman for preparation into bill. The department of Human Rights and Constitutional Affairs reviews the proposals. One important thing to note is that the office of the Attorney General has been dealing with constitutional amendments in a very careful way by trying to see what and how other countries have dealt with issues that seem to be controversial and advise government positively. This office has been done this under its capacity as government advisor.[127] When Parliamentary draftsmen finish drafting the bill, they will follow the same process of preparing bills by taking it to the Cabinet secretariat ready to be distributed to the member of constitutional committee.

The amendments of existing laws are processed after the competent Ministry identifies to the Attorney General the need to amend the Act. The Attorney General through the office of the Parliamentary draftsman studies the proposal for amendment and the reason adduced by the Ministry. The intention of studying this proposal is to see whether there is a contradiction with the objects and reason of the Act when it was proposed for the first time. It must be noted that there is no significant difference between the process of drafting constitutional amendments and the process of amending other Acts. However, usually amendments of the constitution begin with a discussion by the cabinet, whereas amendments of other laws may be introduced without sending the file to the Cabinet. When the bill of amendments is presented at the parliament level the role of the draftsman increases, as it is the draftsman that notes the views of Members of Parliament as a means of assessing whether any necessary amendments should be effected for the purpose of reach consensus. The Members of Parliament tend to enjoy getting clear and precise clarifications and notes on what has been amended. This is one of the functions of the drafters.[128] Another function for the drafter is to ensure that the necessary majority is achieved.

1991 is followed by an amendment which introduced a multiparty system, and in 1998 the Kissanga Commission was formed which facilitated the amendment in the year 2000.

[126]The 9th to 14th Constitutional Amendments were made without forming a commission and the government claimed at the time of introduction of amendment in Parliament, that the amendments were made to fulfill the recommendations of the two previous commissions.

[127]The previous fourteen amendments were sent to the parliamentary draftsman. A senior officer in the Office of the Attorney General was appointed to study the proposal for constitutional amendment.

[128]Benion wrote that the legislative drafter functions are basic to democracy but the democratic process requires that he does so as an ardent democratic. He needs to be aware of he public importance of his function, *see* F. A. Benion, Benion on Statute Law 21 (1990).

J. Conclusions

The Parliament of Tanzania is the institution with exclusive powers to amend the Constitution under Art. 98 (1). The Tanzanian constitution has been amended fourteen times following different methods of introducing amendments. These differences can be categorized into two separate sets of initiating constitutional amendments. Under the first method, the government usually appoints a commission, which is guided by terms of references to collect public opinion on a proposed amendment issue. The second method involves initiation of the process by government when the latter identifies gaps in the existing constitutional provisions that require amendment. The government is normally obliged to make such changes following a court judgment, which sometimes declares the provision of a certain Act of parliament as unconstitutional.[129] These types of amendments are known as judicial interpretation of the Constitution.[130]

All provisions of the constitution of Tanzania can be amended by the parliament in its capacity as the Constituent Assembly. Therefore, the parliament can make amendments in any article of the constitution through the attainment of a two-thirds majority support of all Members of Parliament. The constitution introduces two forms of amendments: amendments requiring the support of two thirds of the Members of Parliament from each part of the union, and amendments requiring a total of two thirds irrespective of origin.[131] Thus, changing any article of an Act of the Union is more rigid according to the first arrangement.

Both methods of initiating amendments to the constitution are relevant, as long as they ensure that citizens are kept aware of the amendments proposed by the Commission. Many countries have failed to involve citizens in the constitutional amendment process. The fourteenth amendment of Tanzania resulted in remarkable developments, as citizens were encouraged to attend public hearings of the Committee of Parliament for Justice and Constitution Affairs. This committee went to the regions to collect views of citizens before the second reading of this bill.[132] This way of involving people in the process helps Members of Parliament understand the views of citizens and to make sure that the proposals made to the government by Commission are embodied in the bill. If this is not the case, Members of Parliament may advise the government to make necessary amendments before the second reading. At this juncture, the draftsman comes in to make sure that amendments undertaken through the schedule of amendment

[129]The amendments of 1994. The Government proposed amendment which requires the court not to declare any law unconstitutional straight forward but to give time to government to amend such Act. This amendment was made after the Court declared Section 148(5)(e) of Criminal Procedure Code on the refusal to grant bail to a person who caused grievous harm to be unconstitutional. *See* the case of *D.P.P v. Daudi Pete*, Criminal Appeal No.28 of 1990. (CA). (1993) T.L.T 22.

[130]Palmer, *supra* note 10, at xiii.

[131]Art. 98(1)(b).

[132]Swahili Newspaper Nipashe, 10 Jan. 2005. The committee urge people to attend public hearings of the committee and issue its timetable in the media.

are accepted by parliament. If government falls short of doing this, the Committee will point the shortcomings in its report to parliament. This may cause a lot of embarrassment for the government.

Generally the procedure for amending the constitution is not different from amending other laws. In debating the fourteenth amendment, members of Parliament presented their views not only orally but also in writing. Thus, these constitutional amendments were debated for four consecutive days. This is because the speaker allowed more time for many Members who wished to discuss these amendments to do so.[133] At the time of voting, Members of the opposition party walked out on a protest that their views were not considered and left members of the ruling party to vote for the amendments. Obviously, walking out was a sign of dissatisfaction. However, it had no effect since the number of opposition Members of Parliament does not exceed even a quarter of all Members of Parliament.

The question is, whether changing the constitution via a two-thirds majority is satisfactory. This question can be addressed from a number of perspectives. Generally, in Tanzania, a Commission is appointed to obtain the views of citizens. The government reviews the Commission's proposal and presents a Bill to Parliament. The Parliament convenes a meeting for a public hearing that is very useful.[134] Actually the Committee reports its findings and recommendations to review by government and thereafter the government will channel them to Parliament in the form of Bill. In this way it secures the obvious support of the two-thirds majority as it offers ground for extensive scrutiny of the amendments. The two-thirds majority can be influenced by party ideology, but –as the system of voting in Parliament is not secret ballot- it is possible for Members to vote against the party will. Thus two-thirds majority can be of increased significance in the case of a secret ballot and also when the numbers of Member of Parliament is balanced instead of having one party dominate the house. Also the initiating process of proposal of amendments will depend to the views of citizens. If their views are sought in openness then the two thirds support will be of significance because member would be discuss on the lines of views the citizen.[135]

In South Africa constitutional amendments are introduced in Parliament at least 30 days in advance. The bill must be published for public comments. This is a mandatory requirement and in introducing the Bill in parliament the committee, which collected public comments, must submit any written comments received from the public and from the provincial legislature to the Speaker. The Bill cannot be put to the vote for 30 days.[136]

Wheare, writes that

[133]According to Parliament Hansad of 8 February 2005. 85 members contributed to constitutional amendment in four days' time.

[134]Kivutha suggested that Government nor Parliament can change the constitution without agreement of all, even for small changes consultation with citizen is essential, *see* K. Kivuta, Constitutional Review through Parliament 14 (2001).

[135]Kivutha, *supra* note 134.

[136]G. Devenish, A Commentary on the South African Constitution 137 (1998).

> A constitutional which is completely unalterable tends to invite and to justify disobedience. On the other hand a constitution which easily alterable by a numerical popular majority may so threaten or destroy the rights of a minority that it provokes the minority to justifiable disobedience, while a constitution which permits a minority to obstruct the wishes of the majority indefinitely may lead a majority to lay violet hands upon it in just assertion of their rights. A Constitution admirably suited to the needs of its people at one time may come to be completely distorted with the passing of time and the change in the social structure of the community. Not only Constitutions themselves but also the process by which they can be changed required adaptation to changing conditions.[137]

Therefore according to Wheare, four recommendations can be made to any country carrying out constitutional amendments following the two-thirds majority support:

- The government seeking to make amendments in the constitution must make sure that the commission, which is appointed, is independent or the Law Review Commission is used to find views from citizens, academics and political parties;
- Amendments must be debated by parliament in a special session designated for this purpose instead of debating at the normal parliament sessions;
- When the parliament votes and agrees through a two-thirds majority, the requirement for Presidential assent should be waved; after all, constitutional amendment is a debate, which follows attainments of public opinion directly;
- The procedure of debating constitutional amendments should be different from the procedure of discussing other bills of parliament and the vote should be made under secret ballot;[138] and
- When the parliament seems to have one party majority, amendments must achieved via a two third majority amongst the opposition and, if the opposition does not achieve two-thirds, then the court must decide or referendum.

To sum up, this paper concludes that the two-thirds majority of Members of Parliament needed to amend the constitution is sufficient, provided that there is active involvement of citizens based on the model of the Tanzanian fourteenth constitutional amendment.

[137]K. C. Wheare, Modern Constitution, *supra* note 60, at 66.

[138]It has been commented that in practice, a rigid constitution cannot be amended or infringed by legislation passed in the ordinary manner but only by formal amendments enacted according to some special and more onerous procedure. *See* S. Ratnapala, Australian Constitutional Law: Foundation and Theory 289 (2002).