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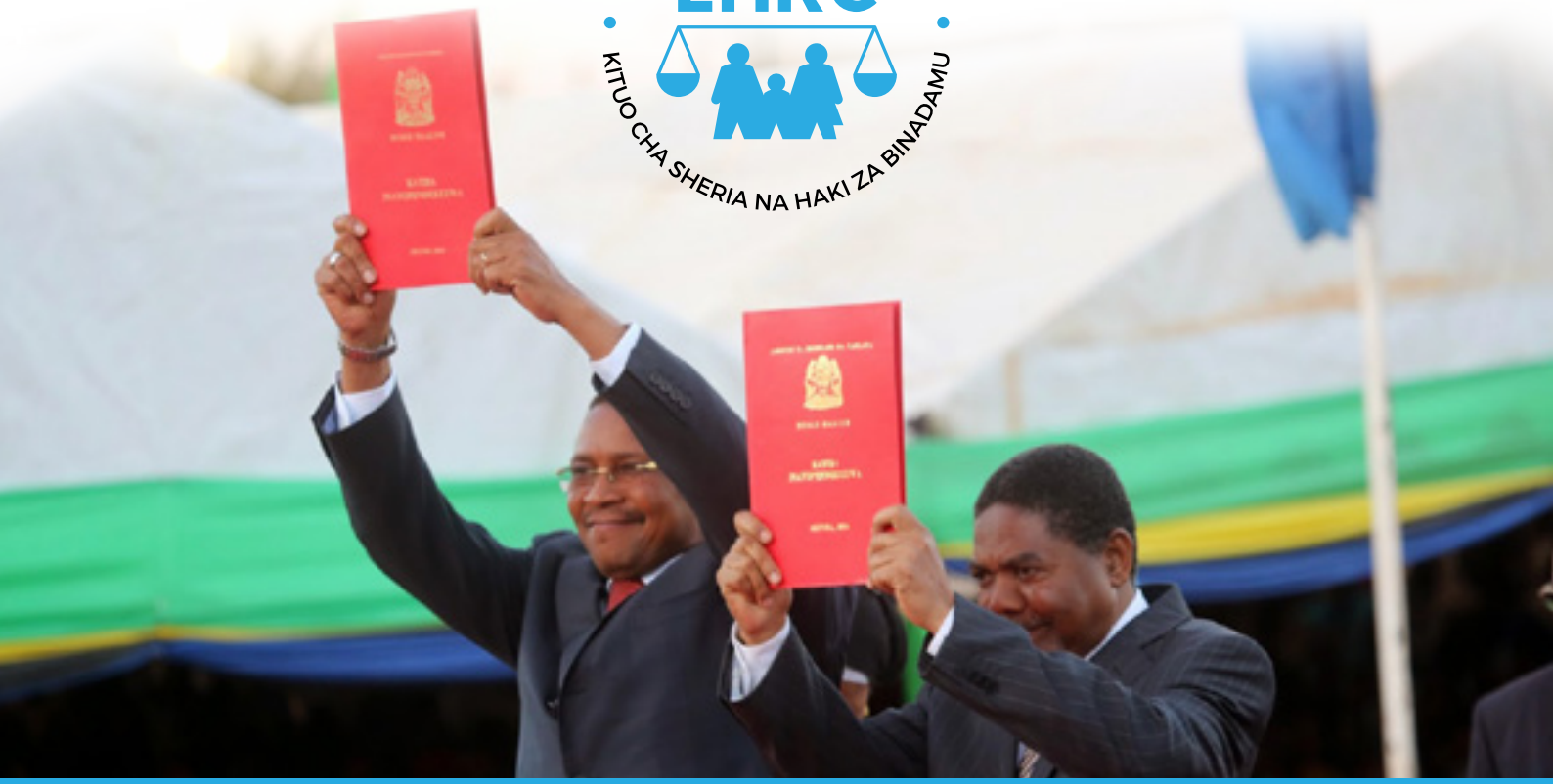

EXPERT ANALYSIS
ON THE CONSTITUTIONAL REVIEW IMPASSE IN TANZANIA

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ABREVIATIONS

ASP	-	Afro-Shiraz Party
CA	-	Constituent Assembly
CCM	-	Chama Cha Mapinduzi
CHADEMA	-	Chama cha Demokrasia na Maendeleo
CoE	-	Committee of Experts
CRC	-	Constitutional Review Committee
IDPs	-	Internally Displaced Persons
KNDRC	-	Kenyan National Dialogue and Reconciliation Committee
LHRC	-	Legal and Human Rights Centre
NEC	-	National Electoral Commission
PEV	-	Post-Election Violence
TANU	-	Tanganyika African National Union
UKAWA	-	Umoja wa Katiba ya Wananchi

FOREWORD

It is now over 23 years since establishment of the Legal and Human Rights Centre (LHRC) and its subsequent engagement in the civic awareness creation on human rights and campaign for peoples centered constitution in Tanzania.

The beginning of the Constitution Review Process in 2011 was upheld with jubilation and anticipation of a step ahead in realization of a JUST and EQUITABLE society in Tanzania until when its stalemate was onset owing number of reasons put forward in this report.

In pursuing its programmatic activities geared towards realization of people's centred process and constitution, LHRC has continuously engaged and hosted constitution experts from different professional fields with the objective of analyzing, documenting and archiving technical information related to the Constitution Review Process in Tanzania. The professional guidance form basis of most LHRC's constitutional reform advocacy programs which aims at raising people's awareness on constitutional issues including the ongoing constitution review process to ensure effective citizenry participation in the process.

With the specific aim of addressing the stalemate of the constitution review process, LHRC commissioned the analysis and writing of this report to independent constitution experts from the University of Dar Es salaam whom we appreciate their immeasurable efforts to the reality of this report.

I hope this report will enlighten all readers especially constitution review process stakeholders and contribute to inform their advocacy strategies and the government decisions towards the continuation of the citizenry centered constitution review process considering its significance.

Dr. Helen Kijo- Bisimba
Executive Director - LHRC

ABOUT LHRC

The Legal and Human Rights Centre (LHRC) is a private, autonomous, voluntary non-Governmental, non-partisan and non-profit sharing organization envisioning a just and equitable society. It has a mission of empowering the people of Tanzania, so as to promote, reinforce and safeguard human rights and good governance in the country. The broad objective is to create legal and human rights awareness among the public and in particular the underprivileged section of the society through legal and civic education, advocacy linked with legal aid provision, research and human rights monitoring. LHRC was established in 1995 and its operations mainly focus on Tanzania Mainland, with specific interventions in Zanzibar.

Vision

The LHRC envisages a JUST and EQUITABLE society, in which the three arms of the State as well as non-state actors practice accountability, transparency and there is rule of law; and where there is public awareness, respect and engagement for human rights and good governance; where justice and respect for human dignity are reality.

Mission

To empower the public, promote, reinforce and safeguard human rights and good governance in Tanzania through legal and civic education and information; sound legal research and advice; monitoring and following-up on human rights violations; and advocacy for reforms of policies, laws and practices in conformity with international human rights standards.

LHRC's Values:

- *Integrity*
- *Equality*
- *Transparency*
- *Accountability*
- *Professionalism*
- *Voluntarism and Volunteerism*

SECTION I:
GENERAL INTRODUCTION AND BACKGROUND

1.1. Introduction

This is a study report by a team of experts with a special concern on matters of constitutionalism, and the impasse the Constitutional Review process in Tanzania finds itself in. The analysis is intended to inform the process stakeholders and other readers as to the possible approaches in finding a breakthrough to the impasse.

In view of the foregoing it is important to begin with the main concept. One of the key pillars of a democratic state is the existence of the constitution adopted through consensus and compromises with the greater goal of forging national unity, articulating commonly shared values and capturing long term aspirations of diverse members of society. From a legal standpoint, the constitution is the supreme law of the land, preoccupied with defining the scope and limits of powers of governmental bodies and its officers, on the one hand, and protecting the fundamental rights and freedoms of individuals and groups, on the other. Another fundamental characteristic of a genuinely democratic and modern constitution is the 'separation of powers' and 'checks and balances' principles between the key arms of government – the Executive, Judiciary, and the Legislature.

In the context of a young and politically fragile nation such as Tanzania, the constitution has the unique role of promoting national unity, a sense of civic duty, reconciliation, and constitutionalism. As will become shortly clear, the history of constitution making in Tanzania in the period between 1961 - 1977 reveals severe gaps as regards several of the fundamental constitutional principles discussed above.

Since independence, Tanzania has been involved in constitution-making processes; the country's history of constitution-making starts from 1961 when the Independence Constitution was adopted. Among other provisions, this Constitution provided for, a Governor General representing the Queen of England as the Head of State and an executive Prime Minister, Mwalimu Julius Kambarage Nyerere, from the majority party in parliament. The legitimacy of this constitution was questionable as its formulation and adoption did not involve broad popular consultation.

In 1962 the government adopted the Republican Constitution which combined the powers of the Head of State and government. The Republican Constitution was replaced by the Interim Constitution of the United Republic of Tanganyika and Zanzibar in 1964 which provided for the union of Tanganyika (Mainland Tanzania) and Zanzibar. This union was formalized by signing a treaty called the Articles of the Union by the Presidents of both sides and it is these Articles that form the legal basis of the Union. In 1965, the Interim Constitution was modified in order to formalize the one party state dominated by the Afro-Shirazi Party (ASP) for Zanzibar, and Tanganyika African National Union (TANU) for Tanganyika .

In 1977, the Interim Constitution was replaced by the current Constitution of the United Republic of Tanzania of 1977, again by procedures not involving any meaningful popular consultation. Following the country's adoption of multiparty politics in 1992 there were concerns from various stakeholders such as opposition parties, civil society organizations and the general public that this constitution had several gaps that could not be sufficiently addressed through amendments. It was on the basis of these concerns that the country embarked on the Constitutional Review Process as the next section below highlights.

1.2. Background to the Constitutional Review Process

Demands for a new constitution in Tanzania can be traced to the 1980s during which several stakeholders such as civil society organizations and opposition political parties expressed discontent with the current constitution and called for a participatory constitution review process . Owing to these demands, the government issued a White Paper on Constitutional Reform in 1998 containing 19 issues linked to proposals for amendment. Even with these 19 issues listed in the White Paper, public desire and demand for reforms that would lead to a new constitution were everywhere.

Of particular importance was the need to have a constitution that would expressly and more adequately provide for a multiparty system of democracy. The main justification for the new constitution was anchored on the position that the current 1977 Constitution was outdated. Specific critics directed at this Constitution included: the argument that it was meant for a single party system and was thus unfit for the pluralist democracy; its legitimacy is questionable as it did not originate from a participatory process; and that the constitution conferred too many unfettered powers on the Head of State.

Picture 1: Former President of the United Republic of Tanzania Jakaya Kikwete addressing the Nation on the government intention to begin the Constitution Review Process on 31st December 2010

Despite publicly declared resistance from the Attorney General, and the Minister of Constitutional and Legal Affairs, and whose preference was further amendments to the existing constitution, the grounds well for overhauling the constitution did not cease.

The momentum for the new constitution significantly increased during and after the general elections in 2010. While the 2010- 2015 Election Manifesto of the ruling party Chama Cha Mapinduzi (CCM) did not provide for this process, that of the largest opposition party in Parliament, Chama Cha Demokrasia na Maendeleo (CHADEMA) , contained pledges of giving the nation a new constitution. However, it was only in December 2010 that a more definitive statement was made by Government, in a televised address to the nation, by the then President of the United Republic of Tanzania, H.E Dr. Jakaya Mrisho Kikwete that the country will embark on the constitutional making process.

As a direct follow up to the President's pledge, a Constitution Review Bill was tabled in 2011. The Bill was immediately challenged by various stakeholders on several grounds including unjustifiably concentrating powers in the President in constituting the Constitutional Review Commission. There were appeals especially from opposition parties and the civil society for the appointed members of the Constitutional Review Commission to be approved by Parliament. There were also calls to have the terms of reference for the Commission to be drafted by an independent body. As a result of these discontents towards the Bill and after a series of consultations between the President of the United Republic of Tanzania and the representatives of opposition parties and civil society organizations, the Bill was assented to by the President following some but not all proposed amendments.

One of the key provisions of this Act was the establishment of the Constitutional Review Commission whose members, as pointed out earlier, were to be appointed by the President (this Commission came to be widely known as the 'Warioba Commission', following the name of the Commission's Chair, retired judge, Joseph Sinde Warioba). The President appointed the 32 members of the Commission drawn from Mainland Tanzania, and Zanzibar. The Commission's main task was to collect public opinion on the new constitution and prepare a draft constitution which was to be presented to and approved by the Constituent Assembly. After a series of public hearings, the Commission launched the first Draft Constitution in June 2013 which was subsequently subjected to discussions by nationwide Constitutional fora. Based on the inputs from these forums, the Commission prepared and submitted the second Draft Constitution to the President of the United Republic of Tanzania and the President of Zanzibar in December 2013. This draft was well received by a large and wide range of stakeholders for the remarkable extent the draft captured matters of particular concern to the general population.

Picture 2: The former CRC Chairperson Hon. Judge (Rtd) Joseph Sinde Warioba together with other commissioners addressing one of the public view's collection meeting in Ijitimai ya Zamazi Mwanakwerekwe Zanzibar on 28/11/2012

Following the submission of this draft to the President, the Constituent Assembly was appointed for purpose of debating and approving the Draft before a referendum. In addition to all members of Parliament, and all members of Zanzibar's House of Representatives, the President appointed an additional 201 members of the Constituent Assembly, bringing total membership to 629. Duly formed, the Constituent Assembly commenced its work of debating the submitted draft constitution on 18th February, 2014. In the course of debating, the Assembly was boycotted by members from the Coalition for the Defenders of People's Constitution (popularly known in Kiswahili as *Umoja wa Katiba ya Wananchi*- UKAWA) on 16th April, 2014 whose number was 101. UKAWA announced that it was boycotting the Constituent Assembly until its grievances about the apparent rejection of key recommendations of the Constitutional Review Commission (CRC) embodied in the Draft Constitution were taken into account. Despite the boycott, on 2nd October, 2014 a draft 'Proposed Constitution' (or in its Kiswahili version,

'***Katiba Inayopendekezwa***') was adopted after obtaining the required vote threshold from the members of the Constituent Assembly representing Zanzibar and Tanzania Mainland.

1.3. Impasse of the Constitutional Review Process

When the country embarked on the process of making the new constitution, expectations were that the process will come to an end in 2014, well ahead of the General Elections of 2015. To date neither has the 'Proposed Constitution' been put to a referendum, nor has a new constitution been promulgated, such that the legal fate of the "proposed constitution' remains in limbo. The stalemate is attributable to several factors.

The first and which appears to be the major factor was the unrealistic timeframe set for the referendum. Further discussion on this issue will be made in Section Two below. According to the Referendum Act, 2013 the President of the United Republic of Tanzania was required within **fourteen days** after receiving the Proposed Constitution to direct the National Electoral Commission (NEC) to conduct the referendum. The President thus ordered that the referendum campaigns to be held between March and April 2015 and on 30th April 2015 a referendum poll. However, this order took little consideration of the fact that NEC had planned to update the Permanent National Voters' Register (PNVR) prior to the 2015 general elections and the referendum. Contrary to the anticipation that the updating exercise would have been completed by the end of April, 2015, the exercise was completed in September 2015. As there was a shared position among stakeholders that referendum should be held using the updated PNVR, it was practically impossible to conduct the referendum on 30th April, 2015 as per the presidential order.

The second reason is the outbreak of the conflict in the Constituent Assembly between members of CCM and their sympathizers, on the one hand, and members affiliated to UKAWA, on the other . This conflict stemmed from two basic factors. The first was different orientations between the two sides towards the '*Warioba Draft*' as CCM was against the draft while UKAWA supported it. CCM's negative view towards the second draft of the constitution was fuelled by the President's expression of his objection to several provisions of the Warioba draft during his opening speech at the Constituent Assembly.

Some of the issues provided for by the draft constitution and which the President challenged included: a proposal that a member of Parliament shall lose his/her post if he/she fails to perform his/her responsibilities; a provision for the member of parliament to serve for three terms only; a recall of a member of Parliament in case he/she fails to deliver; and the proposed three governments union structure. Being the President and the Chairman of the ruling party, his orientation towards the draft constitution significantly shaped the opinion and attitude of the majority of the members of the Constituent Assembly towards the draft.

Picture 3: A segment of members of the Constituent Assembly from Umoja wa Katiba ya Wananchi (UKAWA) walking out of the Constituent Assembly during the boycott on 16th April 2014

The second factor was the imbalanced representation in the Constituent Assembly as it was exceedingly dominated by members and supporters of CCM. Consequently, after the UKAWA boycott of the Constituent Assembly the remaining members replaced the Draft Constitution with what was/is believed to be essentially a completely new version of the draft from that presented to the President.

The Proposed Constitution was strongly opposed by opposition parties and civil society organizations on grounds that it did not reflect public opinion as captured by the Warioba Draft.

The debate and approval of the Proposed Constitution (or, to use its official title, '***Katiba Inayopendekezwa***') was therefore not anchored in the spirit of consensus building characterising modern day democratic constitutions and was instead held captive by the 'politics of numbers' in which narrow, rather than broad national interests prevailed.

Non-involvement of the opposition in the debates and approval of the Proposed Constitution undermined not only the legitimacy of the process but did little in promoting national cohesion and diversity, the intensification of parochial sentiments being the ultimate result. Ignoring the walkout without sparing time for negotiations and reconciliation or addressing their justifiable concerns harmed the credibility of the process and its output considerably.

The last factor in establishing the determinants of the Constitutional Review Impasse is associated with the declared position of the current, fifth phase government towards the constitutional review process. During his first speech to the National Assembly and the speech he made when receiving the reports of the General Elections from the National Electoral Commission, the President of the fifth phase government, H.E. Dr. John Pombe Magufuli promised to proceed from where his predecessor (i.e., President J.M. Kikwete) ended. He nevertheless changed his position later by maintaining that finalizing the constitutional review process was not among his Government's priorities and that in the 2015 Presidential Election campaigns he had at no point promised the nation a new constitution. This position has had both positive and negative effects. With regard to the former, it is true and as earlier shown, the constitutional review process led to an intensification of political polarisation of the nation, and in this context the President's position appears to complicate rather than ameliorate the existing impasse. At the same time, saying that a constitutional review process is not among the fifth phase Government's priorities cannot be reasonably interpreted as ruling out totally, now or in the foreseeable future the search for a new Constitution for Tanzania. If this is so, there is ample room to continue reflecting on the existing impasse with a view to building consensus as to the most acceptable and practical breakthrough.

Picture 4: President John Pombe Magufuli giving speech during the reception of the 2015 General Election Report at the State House, where he promised to continue with the Constitution Review Process on 23/06/2016

1.4. The Rationale for the Analysis of the Constitution Review Process

It is nearly seven years since the country embarked on the process of making the new constitution in 2011. Since then, several activities such as the enactment of relevant legislation, conducting public hearings, compilation and presentation of drafts of a new constitution have been undertaken, but the process has never been finalised, and instead there is a state of impasse. Given that the reasons for seeking to give the nation a new, better Constitution remain valid today as it was in 2011, there is all the justification for pressing forward, instead of remaining captives of history and witch-hunting. Accordingly, this report explores three broad approaches and strategies through which policy-makers, key stakeholders and the general public can consider.

SECTION II:
THREE POSSIBLE APPROACHES TO REACTIVATE THE CONSTITUTIONAL REVIEW PROCESS

2.1. Introduction

This section focuses on the approaches that can possibly be considered and how the constitutional review process can be managed to enhance its legitimacy credentials while simultaneously contributing towards political stability and national cohesion. As we saw in section one, a modern, democratic constitution for a nation such as Tanzania, is primarily defined by the participatory nature of its making, promoting national cohesion, entrenching widely held national values and the classical constitutional principles of 'separation of powers' and 'checks and balances'.

In the next immediate section the laws and procedures central to the constitutional review process are placed on the spotlight to identify the gaps and what remedial measures should be considered. ***The Constitutional Review Act will*** be discussed at length but so too, the ***Referendum Act 2013***, and its operationalisation.

2.2. Overview of The Legal Framework

The core laws that informed the constitutional review process are The Constitutional Review Act, Cap 83 and The Referendum Act, 2013. Among other things, the Constitutional Review Act provided for the establishment of the Constitution Review Commission ("The CRC"), its Terms of Reference, functions, mode of operation and submission of its report and the Draft Constitution. The Constitutional Review Act also provided for the establishment of the Constituent Assembly ("CA"), its powers and abetment of powers of the CA.

To a large extent most of provisions in the Constitutional Review Act have been exhausted in the sense that all the constitutional review processes from collection of public opinions, preparation of the Draft Constitution, debating of the Draft Constitution and the making of the Proposed Constitution by the CA have been completed. The only process that remains incomplete to-date is validation of the Proposed Constitution through a referendum and official promulgation.

The Referendum Act provides for the legal processes and institutional framework for the conduct of the said referendum and matters related thereto. During its enactment the assumption was that the referendum process would be completed within the timelines set under the law. Unfortunately these timelines have expired without the holding of the referendum for the reasons given above in Section One. These timelines were as follows:

First, Section 4 (1) of the Referendum Act stipulated that within **fourteen days (14)** from the date of receiving the Proposed Constitution, the President shall by Order published in the Gazette, direct the National Electoral Commission to conduct a referendum on the Proposed Constitution. Sub-section (2) required the Order of the President to provide for publication of the Proposed Constitution; such Order to be in a prescribed form (as set out in the Schedule to the Act); specify the period within which the referendum campaign shall be conducted; and the period within which a referendum shall be held. The Schedule to the Act also provided that results of the referendum should be known not later than **seventy days (70)** from the date of the Order.

Second, the Referendum Act required the National Electoral Commission to frame and publish in the Gazette the question for the referendum within **seven days (7)** after the publication of the Proposed Constitution (Section 4(3)).

Third, the National Electoral Commission was also required to, within fourteen days (14) after publication of the referendum question, by Notice specify: (a) the period for sensitization and public awareness on the referendum for the Proposed Constitution, (b) the day on which the referendum is to be held and (c) the polling time of the referendum (Section 5 (1)).

Fourth, the National Electoral Commission was again required under the Act to provide civic education on the Proposed Constitution to the public for a period of **sixty days (60)** from the date of publication of the Proposed Constitution (Section 5 (3)).

Fifth, the National Electoral Commission was given the freedom to allow CSOs which are interested in carrying out civic education or awareness programme on the Proposed Constitution to carry out such civic education or awareness programme for a period of not more than **sixty days (60)** prior to the voting date (Section 5 (4)).

Picture 5: From Left; Former President of Tanzania Dr. J. Kikwete, President of the Revolutionary Government of Zanzibar Dr. Mohamed Shein displaying the Proposed Constitution after receiving from the former CA Chairperson the late Hon. Samwel Sitta at Dodoma on 8/10/2014

The following is what actually happened. On 8th October, 2014 the then President, H.E Dr. Jakaya Mrisho Kikwete received the Proposed Constitution from the Chairman of the Constituent Assembly, Hon. Samwel Sitta. According to the specified timeline (i.e. 14 days), the President was supposed to issue an Order not later than 22nd October, 2014 directing the National Electoral Commission to conduct a referendum.

However, after consultations with the National Electoral Commission on the possibility of holding a referendum within the timeframe provided above, NEC discovered a collision with NEC's responsibilities for updating the Permanent National Voters' Register (PNVR) ahead of the October 2015 General Elections. As a result, the Minister responsible for electoral affairs who is the Prime Minister invoked Section 51 of the Referendum Act by amending the Schedule to the Act. This was done through Government Notice No. 383 published on 17th October 2014. This new schedule (which is actually a prescribed form of the Presidential Order) gave the President Powers to specify dates within which referendum campaigns would be conducted and the date when polling for the referendum shall be held.

Immediately thereafter, in October 2014 Presidential Order was prepared and President Jakaya Mrisho Kikwete declared that referendum campaigns shall be conducted from 30th March to 29th April, 2015 (that means 31 days for such campaigns). He also announced the day on which the referendum was to be held to be on 30th April, 2015. On 17th October 2014 through Government Notice No. 414A the National Electoral Commission (NEC) published the referendum question which asked, "Do you approve the Proposed Constitution?" The anticipation was that until 30th April 2015 the updated Permanent National Voters' Register (PNVR) would have been in place. As it turned out, the process of updating voters' register did not commence immediately owing to, inter alia, lack of financial resources.

The exercise of registering voters started in June 2015 and completed on 31st July 2015. The whole of August 2015 was used by NEC to verify entries in the PNVR and it wasn't until September 2015 that the exercise was completed, in other words, a month after campaigns for the October 2015 general elections had begun.

The rolling out of the referendum was vested in the National Electoral Commission (NEC). However, NEC was never able to accomplish any of the several tasks in preparation of the impending referendum such as the mandatory 60 days of civic education, NEC having prioritised preparations for the general election, with the ultimate result that the constitutional review process was left unattended.

Since all the statutory timelines have lapsed, amendments to the Referendum Act are unavoidable. The crucial issue now is what approach or approaches can be taken to putting the review process on track again. The following is proposed:

2.3. Approaches

There are three major approaches that can be considered: firstly, is to revive the constitutional review process by returning to the last, unfinished business, which was the holding of a referendum (following the necessary amendments to the Referendum Act) and promulgation of a new Constitution; secondly, to reconvene the Constituent Assembly which adopted the 'Proposed Constitution' i.e., ***Katiba Inayopendekezwa***; and thirdly, to appoint a Committee of Experts (CoE) as the first step towards a referendum and promulgation of a new Constitution. Each of these approaches is not without its advantages and disadvantages and these are discussed in the next immediate section.

2.3.1. The Referendum Approach

As indicated in the discussion above the constitutional review process came to a standstill after reaching the immediate pre-referendum stage. If the Government intends to continue from where the process ended (as the incumbent President had once declared), what is required is to wrap the process once again in fresh legal linen by amending the Referendum Act and put in place new timelines. It is common knowledge that changes to an enabling Act of Parliament by way of amendment, revision or repeal will likely have an impact on delegated legislation made by the Executive unless otherwise stated. To breathe life into the constitution review process Sections 4 and 5 of the Referendum Act should be amended by replacing their provisions, for example, with the following provisions:

Section 4

(1) The President in Consultation with the President of Zanzibar shall, by Order published in the Gazette, direct the National Electoral Commission to conduct a referendum on the proposed Constitution.

(2) An Order for a referendum shall be in the Form set out in the Schedule to this Act, and shall-

a. Specify the proposed Constitution to be determined;
b. Specify the dates within which the referendum campaigns shall be conducted; and
c. Specify the date on which the referendum is to be held.

(3) For the purpose of subsection (2), the Commission shall, within seven days after the publication of the Order, frame and publish in the Gazette the question to be determined by the referendum.

(4)... the current provision remains as it is....

Section 5

(1) The Commission shall, within **fourteen days** after publication of the referendum question, specify by Notice published in the Gazette-

a. The period for sensitization and public awareness on the referendum for the proposed Constitution;
b. The polling time of the referendum.

(2) ---This present sub-section is unnecessary. It should be deleted---

The reason is, Section 50 empowers the Commission to make regulations providing for many matters, including the manner and procedure of voting at the referendum. In addition, the Commission is vested with responsibilities under Section 6 to organize and supervise the conduct of poll during the referendum, promotion and regulation of voters' education for the referendum and general supervision of the general conduct of a referendum.

(3) ---This sub-section should remain but re-numbered into sub-section (2).

(4) Subsections (4)—(6) should remain and renumbered.

The other provision requiring amendment is Section 34(2) of the Referendum Act in which the High Court of Tanzania in Misc. Civil Cause No. 30 of 2015 ***between Rashid Salum Adiy v. Minister of Constitutional and Legal Affairs and the Attorney General*** held that this provision is unconstitutional and directed the Attorney General to make the necessary amendment through Parliament with a view to ensuring that section 34(2)(b) of the Act read "(b) votes of Zanzibaris registered under the National Electoral Commission."

2.3.1.1. Advantages of this approach

Two main advantages can quickly be mentioned.

First is responding to the wishes of the Public and restore public confidence. Many stakeholders have demanded the constitutional review process to continue. If the government expresses its desire to revive the constitutional review process by making the necessary amendments into the Referendum Act this would restore public confidence, that the government is still determined to have a new constitution. However, most of these stakeholders have not clearly stated whether the process should continue where it ended by continuing with referendum process or an alternative route should be taken.

These stakeholders include the following: Jukwaa la Katiba, a Consortium of Civil Society organisations, Tanzania Centre for Democracy (TCD), and Tanzania Episcopal Conference (TEC). Be that as it may, continuing with the constitutional review process by embarking on the referendum exercise would be a vital milestone in the constitutional reform in Tanzania.

The second advantage is addressing challenges brought by electoral competition for the next general elections. For many years election results have been disputed and sometimes accompanied by acts of violence. At the time the constitutional review process was initiated it was widely seen as an expression of Government's commitment to have the largely outdated 1977 Constitution replaced by a more egalitarian constitution more capable to foster national cohesion and continued tranquillity.

In particular, the issues of particular concern included the establishment of an impartial and independent Electoral Commission, a structure of the union that responds to present and future needs and realities (this being among the issues given scant attention by the Proposed Constitution), challenging presidential election results in a court of law, and providing for an 'independent candidate'. Also on this wish list were issues of accountability of political leaders and civil servants and a binding ethical code for those in position of leadership. Most of all, the 1977 constitution had been patched up by amendments so many times, that it had to be replaced by a new constitution.

To be fair, the Proposed Constitution has addressed some of these concerns and issues. Should it be validated during the referendum, a new political climate will ensue and guarantee to a large extent political stability of the country as the nation heads towards general elections in 2020, Other concerns and issues not addressed adequately in the Proposed Constitution may be the subject of future amendments.

2.3.1.2. Disadvantages of this approach

The first apparent disadvantage with this approach is that demands for constitutional review will persist rather than come to an end. This is likely to be the case if the Proposed Constitution is approved in the referendum but in circumstances in which the key concerns such as the union structure remain unresolved satisfactorily. As alluded under Section One above, when the Constituent Assembly met in Dodoma in April 2014 to exercise its powers "to make provisions for the New Constitution," in April 2014, UKAWA announced that it was boycotting the Constituent Assembly until its grievances about the apparent rejection of key recommendations of the Constitutional Review Commission (CRC) embodied in the Draft Constitution were taken into account. Mr. Humphrey Polepole, a former Commissioner of CRC correctly noted that "The CA got it all wrong, but that's history now, what transpired in the CA was a manifestation of going into the CA with a divided understanding, coupled with rigid party positions with no consensus built or compromises reached.

Polepole whose observations are widely shared, continued:
"I will be frank and candid when I say that the conduct of the CA and particularly the CA leadership deliberately ignored all calls for consensus building. The CA started divided and no effort was made to bridge the division, it seemed from the first day the majority of the members in the CA were never independent and rigidly stood by party positions. As the CA session progressed, it was quite evident that polarization was anticipated, the practice of 'tyranny of the majority' in almost all discussions in the CA made the CA deliberations quite subjective."

From this standpoint, the Proposed Constitution, unlike the 'Warioba Draft', is perceived as not remaining true to popular aspirations, and therefore presenting such a draft for approval in a referendum is a recipe for continued polarisation and perhaps even political instability.

2.3.3. Reconvening the Constituent Assembly Approach

The second approach is to reconvene the Constituent Assembly (CA) and effect necessary changes or amendments to the Proposed Constitution as a first step towards the referendum and ultimate promulgation of the new Constitution. Fortuitously, reconvening the CA was foreseen by the Constitutional Review Act, under the terms of Section 28, therefore precludes the necessity of effecting any amendments to the Constitutional Review Act. The only amendments necessary would be in respect to the Referendum Act, as discussed in a previous section. Section 28 of the Constitutional Review Act states, inter alia, that-

"(1) After the enactment of the proposed Constitution.. the Constituent Assembly shall stand dissolved..

(2) Dissolution of... the Constituent Assembly shall not be construed as derogating powers of the President to reconstitute the Constituent Assembly for enactment of provisions amending the proposed Constitution."

Picture 6: The late Hon. Samwel Sitta being sworn in as CA Chairperson at Dodoma

2.3.2.1. Advantages of this approach

This approach has several superior advantages over the other two remaining approaches, because it is better placed in producing a constitution based on consensus, and therefore more acceptable to most people which in turn is likely considerably to enhance the goals of national cohesion and political stability. However, the approach is exceptionally demanding in terms of time but also finances. It also presupposes a successful completion of preliminary intra and inter party consultations and dialogue on all the sticking points, i.e. the determinants of the polarisation of opinion in the CA, and ultimate paralysis of the constitutional review process.

In a constitution making process, negotiations among stakeholders on key constitutional principles and issues is crucial. Extended deliberation and consultation among key groups clarifies the commitment of the participants to the constitution-making process and lays the groundwork for a political culture of multiparty consultation and cooperation. This process adds indispensable legitimacy to the final document adopted. It also assists the definition of a national identity and the articulation of common popular aspirations for the future. Equally important, if the constitution-making process is inclusive and transparent, it may succeed in managing conflict and in facilitating bargaining, reciprocity and collaboration. Tanzanians are still inspired by the statement made by the founding father of Tanzania, Mwalimu Julius Kambarage Nyerere way back in 1973 when he said:

"No one person has the right to say, 'I am the People.' No Tanzanian has the right to say, 'I know what is good for Tanzania and others must do it.' All Tanzanians have to make the decisions for Tanzania."

When in 2010 President Jakaya Mrisho Kikwete announced his Government's intention to initiate a process of giving the nation a new Constitution, there was an intense debate on the nature of the process. It was argued by some that the following elements were necessary to be taken into consideration. First, the constitutional review process ought not to be hurried. Second, the process itself of making a constitution was equally, if not more important than the outcome. Third, the issue at hand was of getting a legitimate constitution rather than just a good constitution in technical terms. Fourth, there should be a protracted national debate on what kind of country Tanzanians want. Fifth, the process should be extra-parliamentary and fully participatory. Sixth and more important of all, there was a need to build a national consensus before writing the constitution.

It is along these arguments that a recommendation is made to take an approach of building a national consensus on issues of concern to the people of both Mainland Tanzania and Zanzibar before proceeding to the Constituent Assembly and enact provisions for the new Constitution.

It should be remembered that inclusive constitution making not only is a reflection of the principle of the sovereignty of the people, and popular ownership of the constitution, but contributes considerably to strengthening national unity, democracy, peace and national development. This principle is embodied under Article 4 (1) (e) and (j) of the Constitutional Review Act.

2.3.2.2. Disadvantages of this Approach

The greatest weakness of this approach is that it is both time and resource consuming, given the nature and level of consultations it entails. A wide section of stakeholders prefer a constitutional review process that is capable of being finalised in the shortest time possible by adhering to specified timeframes so that the forthcoming general elections are held under a new Constitution. However, while it is good to have a roadmap that contains strict timelines, experience shows that that is not feasible unless the focus is on the outcome, rather than the integrity of the process, strengthening national unity, stability and above all, getting an inclusive and legitimate constitution.

Picture 7: A Member of Parliament (CCM) celebrating adoption of the Proposed Constitution in the Parliament Building in October 2014, the process of which was boycotted by UKAWA members

If this approach is taken it is possible to mitigate concerns for the demand of a new electoral legal framework before the next general elections, while reasserting the positive role of inclusive consultations and consensus building. Before the last general elections of 2015, the Tanzania Centre for Democracy held discussions with the then President, Hon. Jakaya Mrisho Kikwete, reaching an agreement to the effect that: (a) the referendum vote should be postponed until after the 2015 general elections; (b) that the general elections will be conducted using the 1977 Constitution after effecting some minimum amendments, in particular, with respect to contesting presidential results in court; 50 percent plus one qualification for presidential results; establishing an Independent Electoral Commission; and the introduction of 'independent candidates'. This consensus between the Government and key stakeholders can be emulated to address the existing impasse in the constitutional review process, and in that way arrive at the forthcoming General Elections in 2020, with a new, people-centred Constitution.

Picture 8: Former President of the United Republic of Tanzania, Jakaya Kikwete, in meeting with the Tanzania Centre for Democracy (TCD members in Dodoma State house on 31/08/2014

2.3.4. Committee of Experts (CoE) Approach

Another approach in addressing the existing impasse in the constitutional review process is to procure the services of experts whose key Terms of References shall be to reconcile the key recommendations of the Constitutional Review Commission contained in the 'Warioba Draft Constitution', on the one hand, with the provisions of the Proposed Constitution ('***Katiba Inayopendekezwa***'), as adopted by the Constituent Assembly in October, 2014. Enlisting the services of a Committee of Experts is one efficient way of employing the gathered mass of collective experience and documents, and in that way take the constitutional review process forward. As was made clear in Section One of this report, despite the existing impasse, considerable progress had been achieved in terms of the constitutional review process. Relevant laws and subsidiary legislations had been enacted, a Constituent Assembly duly constituted, the widest possible country-wide consultations were held, and ultimately, a Proposed Constitution adopted. The holding of a referendum on the Proposed Constitution, the pinnacle in the constitutional review unsuspectingly collided with priorities relating to preparations of the 2015 General Elections, but a significant minority of honourable members of the Constituent Assembly also walked out of the Assembly to express dissatisfaction (in the so called UKAWA walk out).

Once adopted as the preferred option, the 'Committee of Experts' approach like the other two options would require certain preliminary political, administrative and legislative measures, chief of which is the amendment to the Constitutional Review Act to accommodate this Committee along with the framing of TOR and related issues and creation by the President of the United Republic of Tanzania, of the said 'Committee of Experts' (CoE), preferably in consultation with the Chief Justice and the Attorney General (depending on what the Act would provide).

To take this discussion further, let us consider the experience of Kenya, a fellow Partner State within the East African Community (EAC), which employed the services of a Committee of Experts to arrive at a new constitution promulgated in 2010. It will be recalled that the search for a contemporary constitution in post-independence Kenya has been long and arduous, going as far back as 1994 with the publication of ***Katiba Tuitakayo*** by the National Constitutional Convention.

Kenyans have lived to see several review initiatives, referendum, and even finalized drafts scuttled all together in the course of successive political regimes.

Consensus among observers is that the more direct and immediate determinant or impulse to the process, which culminated in the Constitution of 2010, is the so-called 'Post-Election violence' (PEV) that ensued following the general elections of December 2007. Not only were the elections accompanied by an unprecedented number of deaths of unarmed civilians from brutal, premeditated attacks (most estimates cite 1,200 – 1,500). An equally unprecedented number of Kenyans were left without shelter as Internally Displaced Persons (IDPs). On taking stock of the PEV, Kenyans came to the realization that it is, inter alia, in reviving the scuttled constitutional review process and related legal reform lies the key to finding solutions to the very national ills that precipitated the PEV; in particular, national cohesion and unity, land reform, transparency, accountability, impunity, and devolution.

2.3.3.1. The Kenyan Committee of Experts on Constitutional Review

It is worth stressing that Kenyans were also a beneficiary of international mediation which facilitated the creation of the home grown forum, the Kenyan National Dialogue and Reconciliation Committee (KNDRC) as a political first step in setting in motion the constitution review process afresh. KNDRC not only proposed clear timelines to arriving at a new constitutional dispensation and the requisite constitutional amendments. In its wisdom, KNDRC also underscored the need for enlisting the services of experts in matters of constitutionalism and governance.

The essential elements of the KNDRC proposals were well received and found articulation in the Constitution of Kenya Review Act, 2008, and the Constitution of Kenya (Amendment) Act of the same year, the constitutive and regulatory basis of the (Kenyan) Committee of Experts (CoE). The National Accord spawned by the KNDRC initiative gave rise to one additional law – the National Accord and Reconciliation Act, and creation of the Interim Independent Constitutional Dispute Resolution Court.

At the core of CoE were its 9 members, in addition to its Director and the Attorney General, as ex officio, and the work of CoE was to be guided by certain fundamental principles (National interest over sectoral and regional interests; accountability to people of Kenya; protecting national diversity, inclusiveness, respect for human rights). The nine members were to be appointed by the President but on nomination by the National Assembly, and would have to finalise their work within twelve months.

The law was also preoccupied with stating the professional qualifications (and criteria for disqualification) which would make one eligible for nomination, and which were variegated – (anthropology, comparative constitutional law, electoral systems, democratic governance, mediation and consensus building, land law, public finance). In addition to the type of references CoE should rely on in its work, the law also made provision for the modus operandi in executing the Committee's TOR. The law explicitly directs CoE to rely on information solicited from members of the public, but also from consultations with other experts and interest groups, beside comparative constitutional studies of its own.

CoE was also directed to identify areas of convergence in the existing draft, along with contentious as well as non-contentious issues, with a view of arriving at acceptable solutions, bearing in mind the pros and cons of recommendations made. The work of CoE was to culminate in a harmonized draft.

2.3.3.2. Administrative, Political and Legal Implications for Operationalizing a Committee of Experts in Tanzania

International mediation leading to political consensus between the major political constituencies – the ruling NARC party and its opponents, the Orange Democratic Movement (ODM), the so called 'Banana' and 'Orange' confrontation, was perhaps the first solid step in adopting the CoE option. The consensus was most likely facilitated by the realization of grave governance gaps in the aftermath of the 2007 post-election violence, but also in no small measure was influenced by rulings of the High Court on acceptable legal and constitutional benchmarks governing a constitutional review process.

It is precisely in this environment that the Kenyan National Dialogue and Reconciliation Committee (KNDRC) was established. In like manner to the Waki Commission, KNDRC also prioritized "constitutional, institutional, and legal reforms" but more pertinently, the "preparation of a comprehensive draft [constitution] by stakeholders with assistance of experts"

In the context of the constitutional review process in Tanzania, the experience of Kenya seems to point to the acute significance of mediation and consensus building between the contending sides. A signed accord capturing the essence of the consensus but also the key steps in the road map towards constitutional reforms, which in the case of Kenya, entailed the preparation of draft constitution by stakeholders with facilitation by experts.

Another observation from the Kenyan experience was the level of attention required in drawing the scope of functions of the CoE in particular, the framing of the ToR in relation to what are loosely termed 'contentious issues'. CoE was required to observe a cut-throat time line (in fact 12 moths) to accomplish the herculean task of producing a draft constitution acceptable to all. Wisely, CoE began by identifying all those issues which, over time and in several previous drafts, remained unchanged. Having taken out of its radar these so called 'non-contentious issues,' CoE created sufficient time to confront the 'sticking points', matters over which stakeholders felt not only very strongly about, but often held conflicting viewpoints. This elimination strategy warrants consideration in Tanzania. Identifying non-contentious issues not only considerably reduces the workload in seeking a harmonized draft constitution (not to mention the element of time) but it allows a more focused examination of the few issues over which there is deep divergence. As was clear from the Kenyan experience, this elimination exercise, because of its focused nature, affords moments of deeper reflection and reconsideration of previously deeply held positions and interpretations.

As the CoE Final Report notes, Kadhis Courts was one such issue. Many assumed it to be a contentious issue when in truth all previous draft constitutions contained provisions which were in content and formulation, strikingly and consistently similar. Equally, despite a long history of land-related conflicts, all previous constitutional review processes and resultant drafts captured the same enduring public viewpoint.

In other words, leave alone non-contentious issues, public opinion/position of a hitherto contentious issue may with time, change.

The experience of CoE in Kenya contains one further important lesson. In addition to the general political goodwill it enjoyed and its legally entrenched status, the Committee was expected to wind up and submit a draft constitution within clearly defined time frames. The highlights of its work plan were as follows:

- 2009 February: Establishment of CoE
- 2009 March : Swearing in
- 2009 November: Submission of a Harmonised Draft Constitution
- 2010 January: Submission of the Revised Harmonised Draft Constitution
- 2010 February: Submission of the Proposed Constitution

The cut-throat deadlines notwithstanding, CoE displayed an extraordinary sense of civic duty in its unilateral pledge to respect the prescribed work plan and embarking on the task ahead of the completion of the relevant preparatory administrative arrangements, including office accommodation, equipment and accessories-all of which goes to show the exceptional caliber of individuals who comprised the Committee.

Beating the prescribed deadline in submitting the Proposed Constitution was also influenced by the realization that there would be grave consequences for the nation, if the constitutional review process would not be finalized ahead of the impending general elections of 2012. The "risk of further polarization and violence would increase as the country approached the election", the CoE Report observed. In the words of CoE Chairperson, [a]ny proximity to a general election would render [the constitutional review process] meaningless" in large part because "Kenyan politicians become ridiculously hostile to each other as general election (sic) approaches"

CoE members were appointed by the incumbent President but on nomination by the National Assembly, but there is nothing magical in this appointment formula such that other options may be considered, including for an example, the appointment to be made by the President in consultation with the Chief Justice and the Attorney General.

In its own admission, one key challenge confronting CoE was the uncertainty in the minds of many, as to the difference between the CoE and the erstwhile Constitution of Kenya Review Commission (Chaired by Prof. Yash Pal Ghai), given what appeared to be an overlapping mandate, namely, the production of a draft Constitution. For this very reason, embracing the CoE in Tanzania is likely to lead to a similar situation, that is, inability to distinguish the proposed CoE, from the Constitutional Review Commission (whose Chairperson was retired judge, Joseph Sinde Warioba), thus creating unwarranted expectations and demands. In Kenya, the problem was mitigated by the inadvertent inclusion of 'civic education' in the TOR of CoE. At the same time, the dissemination (and distribution) faced three related challenges. Not only was the budget line for the exercise glaringly inadequate. Delineation of roles and functions between CoE and other stakeholders, such as the Attorney General, were blurred, thus threatening to paralyse the process. Lastly, was the question of infiltration of the dissemination exercise by persons and groups with ulterior motives, most notably malicious misrepresentations and distortions.

Lastly, and on top of the several challenges CoE had to deal with, was a determined group of persons whose undisguised intention was to frustrate the search for a more legitimate and fair constitutional dispensation in favour of the status quo.
These detractors adopted a range of strategies but four appear to be the more prominent: adverse media coverage of CoE members' competence, religious profile and partisanship; statements promoting narrow, ultra-conservative faith-based positions; unfriendly interference on the part of the Parliamentary Select Committee; and insincere advice and indiscriminate attacks on recommendations by CoE.

This observation is made with a view to input into the process of selecting members of the CoE should this approach be found suitable to the Tanzanian context. Potential CoE members should, as a minimum, be persons of such state of mind as to withstand and instead remain steadfast, in discharging their respective functions with the required professionalism and commitment.

Picture 9: Rt. President Mwai Kibaki shows off the new constitution during the promulgation of the new constitution at Uhuru Park 27-8-10.He is flanked by Former Attorney General Amos Wako

2.3.3.3. Summary of the Advantages of the CoE Approach

Firstly, although no two constitutional review processes occurring in different jurisdictions will ever be carbon copies of one another; there is nevertheless ample room to learn from one another especially if, as is the present case, the experience being referred to is from a jurisdiction that is in many fundamental ways similar to that of Tanzania. Besides this general observation, is a second and related fact that the CoE approach in Kenya successfully brought the existing 5-year long constitutional review impasse to an end; and gave the nation a Constitution widely accepted by a large section of the nation, as the results of the referendum confirmed.

Thirdly, given the fact that there are conflicting and deeply held opinions over Katiba Inayopendekezwa, on one hand, but also in respect of the 'Warioba Commission Draft Constitution', on the other, a logical solution seems to lie in the intervention of an impartial and technically sophisticated arbiter/mediator to develop a harmonized version, which essentially is the core task of the proposed CoE approach.

Fourthly, a CoE approach can be accomplished in a relatively short period of time and without presenting excessive demands in terms of resources, human, financial or material.

2.3.3.4. Summary of Disadvantages of the CoE Approach

The constitutional review process ended up in bitter acrimony not only among members of the Constituent Assembly, but left the nation at large polarized, emotionally-drained and possibly many left suspicious about the genuine intentions of the constitutional review process, in general. Reviving the constitutional review process therefore requires considerable reconsideration of one's positions, consensus, compromise and requisite political will, all of which cannot be taken for granted, and in fact, require sacrifices of the highest order.

Some might argue that the Kenyan approach is hardly relevant and therefore inapplicable, given that the drivers (Post-Election Violence in 2007-2008, Devolution, Grand Corruption, Gross and Systematic Human Rights Abuses) of constitutional reforms are not exactly similar to those at play in Tanzania. Finally, opposition towards the CoE approach is likely to come from those who will demand a more prominent and substantive role of the political class, and especially political parties and the legislature.

SECTION III: CONCLUSION

This report is a result of analysis by a team of experts with a special concern on the impasse of the Constitutional Review process in Tanzania. The foregoing analysis has reflected on the process of making the new constitution in Tanzania by assessing the progress made so far, existing challenges and the way forward.

The analysis has established three possible reasons for the stalemate. The first and which appears to be the major factor was the unrealistic timeframe set for the referendum. Invoking his powers under the Referendum Act the President ordered that the referendum campaigns to be held between March and April 2015 and on 30th April 2015 a referendum poll. However, this order took little consideration of the fact that NEC had planned to update the Permanent National Voters' Register (PNVR) prior to the 2015 general elections and the referendum.

Contrary to the anticipation that the updating exercise would have been completed by the end of April, 2015, the exercise was completed in September 2015, a month before the 2015 general elections. The second reason for the stalemate appears to be the outbreak of the conflict in the Constituent Assembly between members of the ruling CCM and their sympathizers, on the one hand, and members affiliated to opposition camp, UKAWA, on the other. Consequently, the latter decided to boycott the Constituent Assembly. Non-involvement of the opposition in the debates and approval of the Proposed Constitution undermined not only the legitimacy of the process but did little in promoting national cohesion and diversity, the intensification of parochial sentiments being the ultimate result. The third reason for the impasse is associated with the declared position of the current fifth phase government towards the constitutional review process, that it is not one of the Government's priorities.

This report underscores the need of ensuring that the process that had started during the fourth phase government is completed; with an emphasis that the final constitution made should as far as possible be a result of participatory processes and consensus building which are essential for its legitimacy. One of the key pillars of a democratic state is the existence of the constitution adopted through consensus and compromises with the greater goal of forging national unity, articulating commonly shared values and capturing long term aspirations of diverse members of society

Since all the statutory timelines for the referendum have lapsed, to revive the constitutional review process, amendments to the Referendum Act are unavoidable. The crucial issue now is what approach or approaches can be taken to putting the review process on track again. This report has suggested three alternative approaches. The first one is to revive the constitutional review process by returning to the last, unfinished business, which was the holding of a referendum (following the necessary amendments to the Referendum Act) and promulgation of a new Constitution. This approach does not take into account consensus building. The second approach is to reconvene the Constituent Assembly which adopted the 'proposed constitution' i.e., ***Katiba Inayopendekezwa*** and make some amendments to the Proposed Constitution. This approach presupposes a successful completion of preliminary intra and inter-party consultations and dialogue for purpose of building consensus on all the sticking points before the Constituent Assembly is reconvened. The third approach is to appoint a Committee of Experts (CoE) as the first step towards a referendum and promulgation of a new Constitution. The idea is to have a team that would harmonize the Draft Constitution and Proposed Constitution. The report highlights the advantages and disadvantages of each approach with a view to guiding decision-making in the course of choosing the approach to be taken. Finally, the report proposes to the Legal and Human Rights Centre possible advocacy strategies.

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