

**WARAKA WA MAONI YA CPT JUU YA MCHAKATO WA KUUNDA KATIBA
MPYA YA JAMHURI YA MUUNGANO WA TANZANIA**

Umetolewa na Kuwasilishwa kwenye Tume ya Katiba mnamo November 21. 2012

YALIYOMO

1. UTANGULIZI (<i>PREAMBLE</i>).....	4
2. MAPENDEKEZO YA JUMLA: MISINGI MIKUU YA KITAIFA.....	5
2.1 Changamoto sugu na mapungufu katika Katiba ya sasa	5
2.1.1 Umuhimu na Nafasi ya Katiba katika Jamii yetu Mchanganyiko:	5
2.1.2 Kutambua Ukuu wa Mungu:	6
2.1.3 Maadili na Njia Madhubuti za Kuyajenga na Kuyalinda:	6
2.1.4 Uzalendo Dhidi ya Ubinafsi:.....	7
2.1.5 Kuhimiza Udugu na Upendo:	7
3.0 MAPENDEKEZO MAHSUSI	8
3.1 Vigezo na misingi ya kikatiba na kisheria	8
3.1.1 Nafasi ya watu katika kusukuma Serikali.....	8
3.1.2 Nguvu ya watu kupewa nguvu kupitia vyombo vya kikatiba na kisheria	9
3.2 Uwajibikaji na uzingatiaji wa maadili mema kikatiba na kisheria.....	9
3.3 Maadili Mema.....	9
3.3.1 Mmomonyoko wa maadili kamajanga la kijamii na kitaifa	9
3.3.2 Tume Huru ya Elimu:	9
3.3.3 Tume Huru ya Maadili na Udhhibi wa Ufisadi	10
3.3.4 Udhhibi na uwazi katika mapato na matumizi ya mali ya taifa	10
3.4 Mgawanyo wa Mali na Rasilimali za Nchi	11
3.4.1 Kuna Upendeleo katika Mgawanyo wa Mali na Rasilimali za Nchi.....	11
3.5 Rushwa na Ufisadi.....	13
3.6 Uwajibikaji na Uwajibishwaji	13
3.6.1 Umuhimu wa mfumo unaotuwzesha kuwajibishana	13
3.6.2 <i>Rais na Dola</i> Kikatiba na Kisheria	13
3.6.3 Bunge Kikatiba na Kisheria	14
3.6.4 Tume Huru zinazopendekezwa	16
3.6.5 Ofisi za Serikali Zinazojitegemea.....	17
3.6.6 Kuwzesha Mamlaka ya Wananchi Katika Kuwajibisha Uongozi mikoani	17
3.6.7 Muundo wa Mamlaka ya Kuwajibisha Uongozi kwa njia ya Uchaguzi	18

3.6.8 Utendaji wa Wakuu wa Mikoa.....	18
3.7 Vyombo vya Haki	19
3.7.1 Utendaji wa Polisi na Mahakama.....	19
3.8 Baraza la Wazee.....	20
3.8.1 Umuhimu wa Baraza la Wazee	20
3.8.2 Majukumu ya Baraza la Wazee.....	20
3.9 Haki za Binadamu	21
3.10 Huduma za Kijamii (<i>Social Services</i>).....	21
3.11 Ardhi na Mazingira.....	22
3.11.1 Ardhi	22
3.11.2 Mazingira	22
3.12 Vyama vya Siasa.....	22
3.13 Uweledi katika Uwakilishi wa Wananchi.....	23
3.14 Kuhoji Matokeo ya Uchaguzi wa Rais	23
3.15 Muungano	23
3.16 Dhana ya Serikali Kutokuwa na Dini Teule	25
3.16 Kubadili Katiba.....	26
4. HITIMISHO.....	26
5. VIAMBATANISHO.....	28
5.1 KIAMBATANISHO A: MCHAKATO WA KUANDIKA KATIBA MPYA – MAONI YA CPT.....	28
5.2. KIAMBATANISHO B: MISINGI MIKUU YA MAONI/MAPENDEKEZO YA CPT KUHUSU KATIBA MPYA YA TANZANIA	40
5.3 KIAMBATANISHO C: OPEN-ENDED FEATURES IN CONSTITUTIONALISM AND CULTURAL ATTITUDES IN EAST AFRICA.....	50
5.4 KIAMBATANISHO D: REFLECTIONS ON THE SECULARITY OF THE STATE.....	75

1. UTANGULIZI (*PREAMBLE*)

1.0 Wanataaluma wa Kikristu Tanzania (CPT), wanauona Mchakato wa Kuunda Katiba Mpya ya nchi yetu kuwa ni jambo na tukio muhimu sana kwa sababu kuu, kati ya nyingine, zifuatazo:-

1.1 Ni kwa mara ya kwanza kwamba **wananchi wamepata fursa kamili inayowawezesha kutumia mamlaka yao moja kwa moja kutoa maoni kuhusu mustakabali wa nchi yao na namna ya kusimamia vizuri zaidi maendeleo yao na ya nchi yao kikatiba.** Kwa mara ya kwanza, Utawala hautakuwa na mamlaka ya udhibiti juu ya huo mchakato mzima. Hata rasimu ya Katiba ambayo, baada ya kujadiliwa katika Mabaraza, kuboreshwa na Tume, na kupigiwa “kura ya maoni” na wananchi, itawasilishwa kwa Bunge la Katiba kwa ajili tu ya kurasmishwa.

1.2 Pia, sisi na wadau wengine tumepata fursa ya kuchangia mawazo, hasa kuhusu **msingi bora na muhimu** (*good and basic principles*) ya kuzingatiwa katika Kuunda Katiba Mpya ya nchi yetu.

1.3 Hoja kuu ya kuhitajika kwa Katiba Mpya ni kwamba Katiba ya sasa ina maeneo mengi ambayo yanahitaji kuboreshwa. Pia, licha ya kwamba, hadi 2005, ilikuwa imefanyiwa marekebisho (*amendments*) mara 14, bado imeendelea kulalamikiwa kuwa ina mizizi na mapungufu ya ndani yanayotokana na ukweli kuwa, awali, ililenga mfumo wa utawala wa chama kimoja cha siasa kilichoshika hatamu za uongozi katika nyanja zote muhimu kisiasa, kiuchumi na kiutamaduni. Hivyo, marekebisho yaliyolenga kukidhi mahitaji ya mfumo wa demokrasia ya vyama vingi yamedaiwa kuwa kama viraka vipya kwenye nguo kuu kuu. Katika hali hiyo, **ni muhimu kuwa na Katiba Mpya iliyojengwa kwenye msingi bora ya kidemokrasia na kimaadili na wananchi kwa kutumia vyombo visivyokuwa chini ya udhibiti wa moja kwa moja wa Dola.**

1.4 Aidha, ni vema kurejelea matukio muhimu ya kihistoria katika nchi yetu ili tusije tukarudia makosa na mapungufu ya kimsingi katika Katiba ya sasa na/au kukosa kuyarekebisha kwa njia bora mbadala zenye kuashiria tija na kuweka madaraka na mamlaka (*power/sovereignty*) zaidi mikononi mwa wananchi kimfumo. (Maelezo kuhusu mambo muhimu ya kihistoria

katika nchi yetu, na ambayo tunashauri yapitiwe na kuzingatiwa, yako kwenye **Kiambatanisho A.)**

1.5 Vile vile tunashuhudia sasa **changamoto kuu na “sugu” ambazo zinaelekea kukatisha tamaa wananchi na hasa wanyonge na kusababisha Baba wa Taifa alizojiita nyufa katika misingi mikuu ya Taifa letu. Nyufa hizo ni kuongezeka kwa rushwa, matabaka ya wenye nacho na wasionacho, tofauti za kidini na tofauti kubwa kuhusu Muungano.** Hii fursa tuliyonayo kama nchi inatuwezesha kujipatia ufumbuzi mwafaka na thabiti wa changamoto kuu na ‘sugu’ pamoja na dalili za kusambaratika kwa amani, umoja na udugu kitaifa zinazotokana na mmomonyoko wa maadili nchini na katika ngazi zote za uongozi.

1.6 Aidha, Mchakato wa sasa umekuwa jukwaa la wazi la elimu ya uraia (*public civic education forum*) kuhusu masuala na changamoto za kikatiba katika nchi yetu. Suala la elimu ya uraia juu ya masuala na changamoto za kikatiba liko katika nyanja ya kukuza na kuboresha mahusiano na utamaduni wetu. Hivyo, ni muhimu, kikatiba na/au kisheria kwa msingi wa Katiba Mpya, lifanywe endelevu ili Katiba Mpya, kweli, imilikiwe na wananchi.

2. MAPENDEKEZO YA JUMLA: MISINGI MIKUU YA KITAIFA

2.1 Changamoto sugu na mapungufu katika Katiba ya sasa

Katika hali ya changamoto sugu na mapungufu katika Katiba ya sasa, **CPT inajenga Maoni yake kuhusu Katiba Mpya juu ya misingi ya kimaadili** (Ang. **Kiambatanisho B**): Inayozingatia maslahi ya kijamii; kulenga kila mwanajamii na wananchi wote, na hasa matabaka ya kipato cha chini na walio katika hali hatarishi; na ambayo ina upeo mpana unaolenga mustakabali wa Taifa letu. Kwa kifupi, misingi hiyo ni kama ifuatavyo:-

2.1.1 Umuhimu na Nafasi ya Katiba katika Jamii yetu Mchanganyiko:

2.1.1.1 Hali ya mchanganyiko wa kijamii na kiuchumi (*state of socio-economic complexity*) (Ang. **Kiambatanisho A**) ya nchi yetu inatupasa kutumia Mchakato wa kuunda Katiba Mpya wa sasa kama fursa ya aina yake ya kutuwezesha kupata **Katiba itakayokuwa chombo madhubuti na mwafaka**

kabisa cha kutuunganisha, kutuongoza na kutuwekea misingi bora na imara zaidi kuliko ile ya sasa. Tulenge kuunda Katiba ya kuhakikisha “kutunza kwa uwajibikaji pamoja na wengine zawadi iliyopokelewa” kutoka kwa waasisi wa nchi yetu. Hii iwe ni **pamoja na kuiboresha** hali ya sasa kwa kuondoa au kurekebisha kasoro zote na kujaza mapengo yote ipasavyo na kwa njia mwafaka **kwa ajili ya kizazi chetu na ya vizazi vijavyo.**

2.1.1.2 Katiba inayozingatia **dira inayoongozwa na misingi ya maadili mema** sharti izibe mianya yote na fursa zote za ubaguzi hasi na ukandamizaji wa raia au baadhi yao, makundi, jamii na asasi zenye madhumuni na malengo mema na mwafaka kwa nchi, jamii, jumuiya au taasisi husika. **Misingi hiyo ni Ukweli, Uhuru, Haki, na Mshikamano/Umoja, ambayo, kwa ujumla wake, kimuundo na kimchakato,** huzaa Amani, utulivu na maendeleo ya kweli ya kijamii kwa nchi husika (jamii, jumuiya na taasisi zake), kisiasa, kiuchumi na kiutamaduni.

2.1.2 Kutambua Ukuu wa Mungu:

2.1.2.1 Wimbo wa Taifa letu hutumika katika shughuli zote kubwa anazohudhuria Rais na hivyo ni utambulisho wa nchi yetu na umoja wetu. Pamoja na Wimbo wa Taifa, pia Dua linalotumika kufungua rasmi vikao vya **Bunge la Muungano** na Dua kwa ajili kama hiyo kwa upande wa **Baraza la Wawakilishi la Zanzibar** zinamtaja wazi wazi **Mungu/Allah** kwa sifa, heshima, na tuzo; na kwa imani, matumaini na upendo wa **kiibada. Tukizingatia ukweli huu, tutaona kwamba Katiba ya nchi yetu haimpi nafasi yoyote Mwenyezi-Mungu, iwe katika maudhui au Utangulizi wake.** Katika **Katiba za nchi kadhaa Barani Afrika** kusini mwa Jangwa la Sahara (Ghana, Uganda, Kenya, Afrika ya Kusini), **Mungu anatajwa kwa heshima stahiki kwenye sehemu ya Utangulizi wa katiba hizo** na inapendeza na kushabihiana na nyimbo za kitaifa na dua za kufungua mabunge yao husika.

2.1.2.2 Wakati umewadia kwa Katiba ya Muungano wa Tanzania kumpa **Mungu heshima stahiki kama hiyo angalau kwenye Utangulizi (Preamble) wake mithiri ya katiba za nchi nyingine jirani na nyinginezo.** Nchi hizo pia zina **katiba za kisekula** kama Tanzania; kwani kumtambua na kumtaja Mungu kwa heshima stahiki katika **Utangulizi wa Katiba** hakuipi dini au dhehebu lolote la kidini nafasi au hadhi teule au maalumu katika Katiba; bali kunafaa sana na ni adili.

2.1.3 Maadili na Njia Madhubuti za Kuyajenga na Kuyalinda:

2.1.3.1 Umuhimu wa maadili mema ni wa kimsingi ambao unastahili utambuliwe na kuwekewa misingi na vigezo vyake katika Katiba Mpya: Maadili katika uongozi ni suala linalotugusa na kutuhusu sisi wenyewe kwanza – si la kuwahusu tu na kuwanyooshea kidole watu wengine. Linaanzia kwa kila mtu mzima na mwenye akili timamu, kila familia, Jumuiya, pamoja na kila shirika, taasisi na asasi za kiuchumi, kijamii na kiutamaduni, pia zikiwemo za kidini.

2.1.3.2 Kwa hiyo, hapana budi Katiba Mpya kuundwa kwenye mawazo ya kimaadili na kuitaka sheria ya uongozi na kanuni za maadili kuwa na masharti na/au vigezo vilivyobainishwa katika Katiba, na hatua madhubuti za kiutekelezaji, uwajibikaji na uwajibishwaji wa walengwa wa sheria hiyo na waratibu/wasimamizi wa utekelezaji/uwajibikaji na uwajibishwaji huo.

2.1.4 Uzalendo Dhidi ya Ubinafsi:

2.1.4.1 Matatizo na changamoto nyingi za kitaifa zinatokana na maamuzi na matendo yanayozingatia manufaa ya watu binafsi badala ya watu wengi au Taifa. Moyo wa uzalendo sasa umefifia na kuacha ubinafsi utawale. Kwa hiyo kuna umuhimu wa kuwa na Katiba ambayo imejengwa kwa mtazamo, na ili nayo iweze yenyewe kujenga au kuweka msingi bora wa, kuelekeza **wananchi na viongozi wao kuona na kujihisi salama katika nchi moja inayoshughulikia ustawi wao wote na hasa wanyonge na walio katika hali hatarishi.** Hali hiyo inaweza kujengeka kutokana na kujenga, kuimarisha na kuendeleza shughuli za kisiasa, kiuchumi na kiutamaduni nchini **kiadilifu chini ya Katiba isiyoruhusu mianya ya madaraka yasiyo na misingi, vigezo wala kikomo mwafaka katika kuyatumia.**

2.1.4.2 Hivyo, katika kutoa madaraka, Katiba –

(a) itake uwajikaji, uwajibishaji, na uwajibishwaji wa wote wahusikao;

(b) iweke misingi, vigezo na taratibu za kuratibisha madaraka hayo na utekelezaji wake; uwajibikaji, uwajibishaji na uwajibishwaji huo yatakayofanywa kwa mujibu wa sheria na kanuni mwafaka zinazozingatia matakwa, vigezo na taratibu hizo na zinazotekelezeka kwa njia zote ndani ya muundo rasmi wa Dola (vyombo vya kisiasa, kiutawala na kimahakama). (Ang. Kiambatanisho C: *“Open-ended Constitutionalism ... in EA.”*)

2.1.5 Kuhimiza Udugu na Upendo:

2.1.5.1 Maendeleo hasa yaliyotokea tangu enzi za sera za *Azimio la Arusha za Ujamaa na Kujitegemea* yamekuwa zaidi kwa manufaa ya moja kwa moja ya matabaka ya watu wachache na hivyo kukuza tofauti kati ya walionacho na wasio nacho na migawanyiko ya kijamii. **Moyo na sera za udugu na upendo wa kijamii zilizohimizwa kisiasa na kisheria** na kuwafanya Watanzania kwa ujumla wajihisi ni wamoja katika mshikamano wa kupambana na changamoto za maisha yao na wanyonge wengine Afrika na kwingineko ulimwenguni umefifia sana na hata kuonekana kutoweka.

2.1.5.2 Katiba Mpya iweke misingi bora na imara ya kupiga vita matabaka na ubaguzi wa kidini, kikabila, kitabaka na inayohakikisha fursa sawa kwa wote hasa kwa njia ya huduma za kijamii: elimu, afya, maji, nishati, na miundombinu; pamoja na ajira na fursa za kiuchumi.

2.1.5.3 Aidha, chini ya Katiba Mpya, ambapo **wananchi, kimuundo**, ndio kimsingi yapasa wawe na kauli ya mwanzo na ya mwisho katika masuala muhimu ya kisiasa, kiuchumi na kiutamaduni, **udugu na upendo huo** unaweza tu kulindwa katika **mfumo wa kikatiba** unaowapa hadhi na fursa sawa **kikatiba na kisheria** (kimuundo) za kusimamia utekelezaji wa misingi hiyo.

3.0 MAPENDEKEZO MAHSUSI

3.1 Vigezo na misingi ya kikatiba na kisheria

Kuna umuhimu wa kuwa na **Vigezo na misingi ya kikatiba-kisheria** ya kuhakikisha kuwa watu, ambao ndio wanaoiunda Katiba Mpya na kwa niaba yao Bunge la Katiba linatarajiwa kupitisha hiyo Katiba, watakuwa na mamlaka kwa Serikali:

3.1.1 Nafasi ya watu katika kusukuma Serikali

Nguvu ya watu katika kusukuma Serikali kutimiza wajibu wake wa kusimamia kwa dhati na kistadi mambo ya kiutendaji ya huduma na shughuli zote za umma **ipate fursa za kufanya kazi kihalisia na kuifanya nchi kuendeshwa vizuri kwa manufaa na maslahi ya wananchi, wakiwemo wanyonge kihali na mali.**

3.1.2 Nguvu ya watu kupewa nguvu kupitia vyombo vya kikatiba na kisheria

Jambo hili liwe wazi na halisi, sio tu kwa njia ya vigezo na misingi, bali pia **kimuundo kupitia vyombo vya kikatiba-kisheria ambavyo vinashirikisha na/au kuwakilisha wananchi** katika maamuzi juu ya mambo muhimu kuhusu maisha na maslahi ya kijamii/kitaifa.

3.2 Uwajibikaji na uzingatiaji wa maadili mema kikatiba na kisheria

Katiba **ielekeze uwajibikaji na uzingatiaji wa maadili mema, pamoja na udhibiti wa madaraka**. Tunasisitiza: **Mambo haya ni ya msingi**, yasiende kisiasa bali **yapewe nguvu kikatiba/kisheria**. Ili kufanikiwa katika hili, haitoshi tu kuwa na Katiba bali iwe ni **Katiba inayotekelezeka kikamilifu**.

3.3 Maadili Mema

3.3.1 Mmomonyoko wa maadili kamajanga la kijamii na kitaifa

Kiwango cha maadili na uwajibikaji kiadilifu na kizalendo nchini kimeshuka mno kiasi kwamba **mmomonyoko wa maadili ni janga la kijamii kitaifa**. Hatua maalumu za dhati zinahitajika kulinusuru Taifa letu kutokana na janga hilo:

3.3.1.1 Elimu ya maadili iendeshwe mashuleni na vyuoni.

3.3.1.2 Serikali itakiwe na **Katiba na sheria** husika kuchukua wajibu huu na kuutekeleza katika mfumo rasmi wa elimu kupitia **Tume Huru ya Elimu** ambayo ndiyo iwajibike moja kwa moja katika kusimamia kazi hii.

3.3.2 Tume Huru ya Elimu:

CPT inapendekeza kwamba, kwa njia ya Tume Huru ya Elimu:

3.3.2.1 Katiba au sheria mpya ielekeze **Elimu kutolewa kwa umma** ikilenga kuwezesha wananchi kusaidia Mahakama na Bunge kutimiza wajibu wake wa kudhibiti, kuelekeza na kuwajibisha Serikali katika utekelezaji wa wajibu wake

kwa umma na kuhakikisha **utawala bora ambao unawajibika, unawajibisha na unawajibishwa; ni shirikishi na wakilishi.**

3.3.2.2 Aidha, **uwepo wajibu kikatiba/kisheria**, wa kuelimisha watu juu ya **maovu ya kijamii na athari zake hasi** kwa jamii nzima na kila mwana-jamii (*social evils and their negative impact on the whole society and each of its members*) na kuhimiza maadili mema kwa viongozi, wafanyabiashara, na raia wote.

3.3.3 Tume Huru ya Maadili na Udhibiti wa Ufisadi

CPT inapendekeza kuwa kuwe na chombo kipya kitakachoitwa **Tume Huru ya Maadili na Udhibiti wa Ufisadi (*Ethics and Anti-Corruption Commission*)** ambayo:

3.3.3.1 itapewa uwezo wa kudhibiti na kupambana na rushwa na pia kudhibiti ukiukwaji hasa wa maadili ya uongozi (ikiunganisha shughuli za TAKUKURU na za Tume ya Maadili ya Viongozi ya sasa).

3.3.3.2 Hii itaondoa haja ya kuwa na Tume mbili zenye uwezo na tija ndogo na kuwa na Tume moja yenye sifa hizi mbili. Pia iwe na uwezo wa kuyashughulikia mambo yote ya ufisadi na rushwa nchini yenye athari kwa sekta za umma, binafsi na asasi za kijamii.

3.3.3.3 Tume hii ikishafanya uchunguzi kuhusu rushwa na/au ufisadi na kujiridhisha kuwa kuna kesi ya kupeleka mahakamani, ikabidhi jalada (faili) kwa **Mwendesha Kesi za Jinai Mkuu (DPP) kwa ajili ya kuendesha mashtaka mahakamani.** Pale ambapo DPP atakuwa na maoni kwamba hakuna ushahidi wa kutosha kwa ajili ya kesi ya jinai, ama ashauri uchunguzi zaidi ufanywe kuhusu maeneo/masuala **atakayoelekeza wazi wazi kwa Tume au arejeshe jalada kwenye Tume kwa ajili ya hatua za kinidhamu kuchukuliwa kwa mujibu wa sheria husika isiyo ya jinai dhidi ya mtuhumiwa.**

3.3.3.4 Kwa vyovyote vile, DPP awajibike **kutoa sababu za maamuzi yake** kuhusu mapendekezo kwake ya Tume Huru hii **kwa uwazi.**

3.3.3.5 Aidha, Katiba na sheria ziainishe **msingi mihimili ya maadili** hasa ya uongozi na hatua zitakazochukuliwa kwa wakiukaji.

3.3.4 Udhibiti na uwazi katika mapato na matumizi ya mali ya taifa

CPT inapendekeza kuwa kwa mujibu wa **Katiba na sheria mpya** husika:

3.3.4.1 ielekezwe kuwepo uwazi katika mapato na matumizi ya mali ya taifa;

3.3.4.2 aidha **izuiliwe/iwe marufuku** kwa mtu au mamlaka yoyote kuwa na madaraka au uwezo juu ya mapato na matumizi ya mali ya taifa bila kuzingatia **vigezo na/au masharti yaliyobainishwa na yenye kuwajibisha kisheria.**

3.4 Mgawanyo wa Mali na Rasilimali za Nchi

3.4.1 Kuna Upendeleo katika Mgawanyo wa Mali na Rasilimali za Nchi

Mwelekeo wa **kugawia kiupendeleo sehemu moja dhidi ya nyingine**, au kundi moja dhidi ya jingine imekuwa ndio kichocheo cha wabunge kutaka ama kutakiwa na wapiga kura wao kuingia/kuteuliwa nafasi ya uwaziri. Licha ya mali na rasilimali za nchi, **mambo ni vivyo hivyo kwa misaada na mikopo toka nje. Maoni yetu kwa ajili ya zoezi la Katiba** yako katika sehemu mbili kama ifuatavyo:

3.4.1.1 Maliasili

(a) Kila mara inapopasa, **Serikali itathmini na kuhakiki maliasili husika** ili ipate kujua kwa uhakika na kwa **msingi ya kisayansi kiasi na thamani yake kabla** ya kuingia katika mkataba na mwekezaji/wawekezaji. Hii ifanyike hata kama mkataba ni wa aina ya ubia; makubaliano, kati ya mambo mengine, yazingatie, kwa msingi ya haki na **vigezo vinavyokubalika, uwiano wa thamani hiyo na thamani ya uwekezaji halisi utakaofanywa na mwekezaji/wawekezaji.**

(b) Aidha, njia za kuwawezesha wananchi na taifa kufaidika zizingatiwe – kuwekeza mahalia katika viwanda (*Industrial Capital investments in mining areas*) km. kwa kutumia madini kutengeneza vidani/vito vya thamani (*Jewelry Industry*); kuandaa wataalam ambao wataweza kupata ajira nje baadaye; kuwezesha watu wa ndani kutumia fursa za uwekezaji na, hivyo, kuinua hali yao ya kipato na kujiletea maendeleo; kushiriki katika faida ya wakati huo – **mkataba kunufaisha nchi na watu wake badala ya kufanya karibu kila kitu kwenda kwa mwekezaji na wataalamu kutoka nje;**

(c) **Kushiriki umiliki kwa njia ya ubia**, inatupa nguvu ya kuhakikisha tunafaidika na pia utunzaji mazingira unazingatiwa, tutashiriki kuweka masharti ya utumiaji na uuzaji wakati uvunaji wa rasilimali unaendelea;

(d) **Mikataba isifanyike kwa siri bali kwa njia zinazokidhi kanuni na maadili ya uwazi katika masuala ya mikataba ya kitaifa inayogusa maslahi ya taifa kiuchumi, kisiasa na kiutamaduni** (tukiondoa masuala nyeti ya ulinzi na usalama wa Taifa ambayo **uwazi wake sharti uwe ndani ya vyombo/wizara na idara husika za Dola**); Mikataba itakiwe **kisheria** kuwa na vifungu vinavyotoa fursa au upendeleo wa makusudi kwa wananchi kutoa huduma za kawaida zinazoweza kupatikana nchini kwa matumizi ya viwanda au shughuli za uwekezaji.

(e) Hivyo, wananchi wawe na fursa kubwa ya kushiriki katika kutoa huduma zinazohitajika (*service industry*) - ugavi na usambazaji wake - kwenye sehemu husika.

(f) Haya yakizingatiwa, nchi na wananchi wake watafaidika kwa wakati huo na kwa vizazi vijavyo. Tuwe na **msimamo, kikatiba na kisheria**, kuwa kamwe **tusiendeleo kuvuna rasilimali bila kuhakikisha tunafaidika**. Ni bora kuwa na subira, kujipa nafasi ya kujiandaa kuliko kuwaachia nafasi wawekezaji wa kigeni kuvuna faida yote kwa sababu ya kutokuwepo **uwezo wa kutosha wa ndani wa kuibakisha sehemu nono ya faida hiyo (*a substantial share of the profit*) nchini**.

(g) Hivyo, **kuweko na Tume Huru ya Ardhi, Maliasili na Mazingira (*Land, Natural Resources and Environmental Commission*)** kama **chombo cha kikatiba/kisheria cha kutekeleza sera za kizalendo** zinazoweza kulifanya taifa na wananchi wake wanufaike na uwekezaji na uvunaji wa rasilimali ya nchi yao bila kuathiri vibaya mazingira na tabia-nchi.

3.4.1.2 Pato la Taifa

(a) Mgawanyo wa pato la taifa (*national revenue*) uwe ni wa **kiuwiano kwa kuzingatia idadi ya watu na ukubwa wa eneo, maeneo na makundi ya wasio na uwezo (*vulnerable groups*) yakipewa kipaumbele**.

(b) Katika kupanga Bajeti, kila sehemu – **Mikoa** wapate kiwango sawa; na Mikoa iliyo nyuma ipate viwango vya ziada kutoka mfuko maalum (*equalization fund*) kwa lengo hilo.

(c) Fungu la matumizi ya Serikali Kuu liwekwe bayana na matumizi yasiwe ya kifujaji.

(d) **Tume maalumu, Tume ya Mgawanyo wa Pato la Taifa na Udhibiti wa Bajeti (*Public Revenue Allocation and Budget Control Commission*)** iundwe kwa ajili ya kazi ya kuweka misingi na vigezo vya Mgawanyo wa pato la taifa na Udhibiti wa Bajeti; kusimamia/kuratibu utekelezaji, uimarishaji, na tathmini yake kiendelevu kwa **kubainisha vema masuala ya Mgawanyo wa pato la Taifa na ya Udhibiti wa Bajeti; ilmradi masuala hayo yasiingiliane kwa kuasiana kisheria na kiutendaji.**

3.5 Rushwa na Ufisadi

3.5.1 Penye rushwa hakuna haki; kwani haki hugeuka na kuwa bidhaa. Wanaoweza kupindisha sheria ili kujipatia haki yao ni wale wenye fedha na wenye nafasi za madaraka na mamlaka. Tatizo hili limo nchini mwetu na ni la kijamii na mfumo mzima unatawaliwa na uovu huu. Tiba yake ni nini? Tiba itaweza kupatikana hasa kwa njia za **kijamii na kisheria: Elimu na sheria inayotoa kipaumbele kwa umuhimu wa maadili mema katika nyanja zote za kitaifa na kijamii (uchumi, siasa, sheria/haki na utamaduni – dini, elimu, michezo, familia/ndoa na malezi).**

3.6 Uwajibikaji na Uwajibishwaji

3.6.1 Umuhimu wa mfumo unaotuwezesha kuwajibishana

Hili ni suala pana; kwa hiyo, tunahitaji kujenga **mfumo unaotuwezesha kuwajibishana** kuanzia Rais na Serikali/Utawala kwa ujumla, Bunge, Mahakama hadi raia. Mathalan, **Bunge liwajibike kwa wananchi**, na **wenye kushika nafasi za kuteuliwa wawe wanawajibika kwa wananchi** moja kwa moja au kwa njia ya vyombo wakilishi-shirikishi ambamo wao ni watumishi, badala ya kuwajibika kwa yule aliyewateua tu.

3.6.2 Rais na Dola Kikatiba na Kisheria

3.6.2.1 Ihakikishwe kuwa anayeteuliwa kugombea nafasi ya Urais anakidhi **vigezo msingi kimaadili na kiuongozi** na kwamba umri wake usiwe chini ya miaka 40 na usizidi miaka 65.

3.6.2.2 Rais awe anawajibika kwa wananchi kupitia Bunge. Bunge lipewe uwezo wa kumwondoa madarakani kwa vigezo na njia vinavyozingatia kwa dhati maslahi ya kitaifa ya kutoyumbisha nchi **bila kupuuzwa kwa athari za utovu wa nidhamu, uwajibikaji na maadili** mema ya uongozi wa Taifa.

3.6.2.3 Asiwe na mamlaka ya kuteua wale **wanaopaswa kumwajibisha** – hasa viongozi wa Mahakama na wa Bunge.

3.6.2.4 Uteuzi wake wa viongozi uzingatie **sifa na vigezo stahiki** – hasa **uzoefu, utaalam, weledi, uadilifu, uzalendo na ridhaa ya Bunge**. Unasaba na uswahiba viepukwe kabisa.

3.6.2.5 Anapotakiwa kusaini sheria iliyopitishwa na Bunge, apewe **ukomo wa muda**, km. siku kumi, bila kuhesabu siku zisizo za kazi.

3.6.2.6 Kuna haja ya kuwa na **serikali ndogo lakini yenye ufanisi au tija. Wizara na Mawaziri wawe si chini ya 15 na wasizidi 20**. Idara za wizara na Tume Huru zitashiriki kuleta ufanisi wa Serikali.

3.6.2.7 Wabunge **wasiwe** mawaziri. **Mawaziri** wateuliwe na Rais kwa kuzingatia **sifa na vigezo stahiki** tajwa katika 3.6.2.4 hapo juu. Na Rais apendekeze na wajaadiliwe na kuidhinishwa na Bunge kabla ya kuteuliwa rasmi. Aidha, kusiwe na manaibu mawaziri.

3.6.2.8 Kwa kuwa mawaziri watakuwa wataalamu na wenye uwezo wa kusimamia mipango na utekelezaji wa programu za wizara, nafasi ya waziri itaunganisha kazi za mawaziri wa sasa na makatibu wakuu.

3.6.2.9 Bunge lipewe uwezo wa kumwondoa waziri asiyefaa **kwa misingi au vigezo mwafaka vya kisheria na kwa njia** ya kura ya Wabunge ya kutokuwa na imani naye **ambayo Rais alazimike kuikubali**.

3.6.3 Bunge Kikatiba na Kisheria

3.6.3.1 Wabunge wawajibike kwa **wananchi** ambao **wapewe uwezo** wa **kumwondoa madarakani Mbunge** katika jimbo lake la uchaguzi kabla ya ukomo wa muda wa kipindi chake cha kuwa mbunge ikiwa hawajibiki. Kwa ajili ya kupokea taarifa za mara kwa mara kutoka kwa mbunge wao na, panapopasa, kumwajibisha:–

(a) liweko baraza/jukwaa (forum) katika kila jimbo la uchaguzi litakalokutana angalau mara nne kila mwaka na kuwasilisha mapendekezo/maazimio na maamuzi yake kwa **Spika wa Bunge**

(b) Katiba Mpya impe Spika madaraka ya kuchunguza mapendekezo au maazimio ya kuwajibisha mbunge kama inavyoelezwa kwenye kifungu 3.6.3.2 hapa chini.

(c) Utawala wa kila Mkoa, ngazi ya wilaya, uwajibike juu ya maandalizi, uratibu na kumbukumbu za baraza/jukwaa hili.

3.6.3.2 Wabunge wote wawe wa kuchaguliwa ili wawajibike kwa wapiga kura wao na wawajibishwe nao. **Katiba iweke vigezo vya mbunge kusimamishwa au kutakiwa kuonyesha kwa nini asiondolewe katika wadhifa wake wa kuwa Mbunge** kwa kushindwa kukidhi matakwa ya vigezo hivyo. Km. Ukiukwaji wa maadili ya uongozi; kitendo/vitendo vya rushwa/ufisadi vilivyodhihirishwa kwa mujibu wa sheria; kosa/makosa mengineyo ya jinai; kufirisika; kutohudhuria vikao vya Bunge bila sababu mwafaka mara tatu mfululizo; kutofuatilia kwa makini na uweledi masuala muhimu ya jimbo lake; au uzembe uliokithiri katika kutimiza wajibu wake wa Ubunge.

3.6.3.3 Spika asiwe mbunge wala asiwe na cheo katika chama cha siasa.

(a) Mfumo wa sasa unaonyesha udhaifu katika eneo hili kwa kuwa Spika amekuwa akichaguliwa kutokana na chama tawala na waliopendekezwa au waliojitokeza kugombea wametegemea hali yao ya kuwa wanachama wakareketwa wa vyama vyao. Katika kuongoza shughuli za Bunge, kumekuwa na mwelekeo wa Spika kushinikizwa na/ au kupendelea/kulinda chama chake. Hali hii haijengi mazingira adili ya demokrasia ya vyama vingi katika Bunge, chombo kiteule cha uwakilishi na kutunga sheria za nchi.

(b) Hivyo, ni jambo la msingi na adili kwamba Spika awe mtu huru mwenye hekima na busara na ambaye si kiongozi katika chama chochote cha siasa chenye uwakilishi Bungeni wala mbunge.

3.6.3.4 Viti maalum viwe kwa:-

(a) wanawake watatu (3) kila Mkoa na **kijana** mmoja (1) tu kila Mkoa ambao watapendekezwa na vyama kwa kila chama kupendekeza wawili wawili na hao watachaguliwa kwa kura mkoani mwao na wananchi wakati wa Uchaguzi mkuu;

(b) makundi ya **wenye ulemavu** yapate mwakilishi mmoja (1) ambaye atapatikana kwa njia ya ushindani wa kupigiwa kura na makundi husika wakati wa Uchaguzi Mkuu kutokana na mapendekezo ya mgombea mwenye ulemavu mmoja mmoja kwa kila kundi.

3.6.3.5 Muundo wa uwakilishi uwe wa kiuwiano nchi nzima kwa kuzingatia idadi ya watu na ukubwa wa eneo kama itakavyobainishwa kisheria, kutekelezwa na kuratibiwa kitaalamu. **Suala la Muungano lisisababishe kukiukwa kwa kanuni au msingi huu wa uwakilishi katika Bunge la Muungano au chombo chochote cha Muungano chenye uwakilishi. Hii itaifanya hoja ya kwamba Tanganyika/Tanzania Bara imemezwa na Muungano au kuwa Zanzibar imemezwa na Tanganyika/Tanzania Bara ikose msingi halali kwani kila sehemu itapata stahili zake kwa vigezo mwafaka vyenye kuzingatia kanuni za kisayansi na haki.**

3.6.4 Tume Huru zinazopendekezwa

3.6.4.1 Kwa ajili ya **ufanisi na udhibiti** (kujenga uwajibikaji wa kiserikali wenye tija) wa mwenendo wa sera na mipango-mkakati ya dola, **Tume Huru** zifuatazo **ziundwe kikatiba:**

- (a) Haki za Binadamu na Utawala Bora;
- (b) Maadili na Udhibiti wa Ufisadi;
- (c) Ardhi, Maliasili na Mazingira;
- (d) Utumishi wa Ki-Mahakama;
- (e) Mgawanyo wa Pato la Taifa na Udhibiti wa Bajeti;
- (f) Huduma kwa Umma;
- (g) Mishahara na Marupurupu;
- (h) Walimu na Elimu (itakayoshughulikia kiseri na kisheria masuala ya maslahi na maendeleo ya Walimu na Elimu kwa ujumla);
- (i) Huduma ya Polisi;
- (j) Ulinzi/Majeshi ya Ulinzi wa Taifa;
- (k) Utumishi wa Bunge;
- (l) Uchaguzi.

3.6.5 Ofisi za Serikali Zinazojitegemea

3.6.5.1 Ofisi zifuatazo za Serikali ziwe ni za **kujitegemea** ili kuhakikisha **uhuru wake** wa kutenda na kutimiza wajibu wake kwa umma **kwa mujibu wa Katiba na sheria kiadilifu, bila woga, hila wala upendeleo:**

(a) Mkaguzi na Mdhhibiti Mkuu wa Serikali kama ilivyo sasa kukagua na kuhakiki kuwa matumizi ya Serikali yanalingana na malengo na utaratibu na kanuni stahiki.

(b) Mdhhibiti wa Bajeti atakayesimamia utekelezaji wa Bajeti kama ilivyoidhinishwa na pia kuhakikisha kuwa hakuna mamlaka au asasi yoyote inayopokea au kutumia fedha za umma inatumia fedha tofauti na bajeti.

3.6.6 Kuwezesha Mamlaka ya Wananchi Katika Kuwajibisha Uongozi mikoani

CPT inapebdekeza Kuwezesha Mamlaka ya Wananchi Katika Kuwajibisha Uongozi (Devolution of Power over Leadership to the People) kama ifuatavyo:

3.6.6.1 Kuwezesha **mamlaka ya watu katika kuwajibisha uongozi** (*devolution of power over leadership to the people*), na kuondoa kujisikia kwa viongozi kuwajibika kwa aliyewateua,

(a) wakuu wa mikoa (Regional Heads) wapatikane kwa njia ya uchaguzi kutokana na kila Halmashauri ya wilaya mkoani kupendekeza jina moja moja, nao watasimamia utendaji fanisi unaoridhisha wananchi katika wilaya ndani ya mikoa yao.

(b) Wakuu hao watawajibika kwa wananchi wa mkoa husika kupitia Baraza la Madiwani Wateule wa Mkoa, ambao watatoka au kuteuliwa na mabaraza ya Madiwani ya wilaya.

(c) Idadi, vigezo vya au wanaofanya uteuzi na vikao vya Baraza hilo la mkoa viainishwe kwenye Katiba au sheria.

3.6.6.2 Shughuli za Serikali **Ngazi ya Wilaya** zitaongozwa na mtendaji mkuu akisaidiwa na watendaji wengine ambao ni watumishi wa umma kwa mujibu wa sheria ya utumishi wa umma itakayofanyiwa marekebisho mwafaka na watakaoteuliwa na Mkuu wa Mkoa kwa njia ya ushindani na wazi. Kwa maana

hiyo, hakutakuwa na nafasi ya Mkuu wa Wilaya na msaidizi wake (DAS) kama ilivyo sasa.

3.6.6.3 Mikoa iliyopo nchi nzima iangaliwe upya kwa muda wa miaka 10 kufikia hatua ya ugawaji mzuri kwa kuzingatia misingi na ushauri wa kitaamu. Vigezo katika ugawaji viwe ni ukubwa wa eneo, idadi ya watu, miundombinu. Vigezo hivi vizingatie na kutofautisha mazingira ya mijini na vijijini.

3.6.7 Muundo wa Mamlaka ya Kuwajibisha Uongozi kwa njia ya Uchaguzi

CPT inapendekeza kuwepo na Muundo wa Mamlaka ya Watu Mkoani katika Kuwajibisha Uongozi kwa njia ya Uchaguzi (Devolution of Power by way of Elections) kama ifuatavyo:

3.6.7.1 Baraza la Mkoa (*Regional Assembly*): Mkuu wa Mkoa (*Regional Head*) wa kuchaguliwa na wananchi katika Mkoa, ambaye ndiye atakuwa Mwenyekiti, na wajumbe wa kuchaguliwa na Madiwani kutokana nao katika mabaraza ya Wilaya, Majiji, Manispaa na Miji ndani ya Mkoa husika.

3.6.7.2 Baraza la Wilaya, Jiji, Manispaa au Mji (*District, City, Municipal or Town Council*): Mstahiki Meya, ambaye atachaguliwa na Madiwani kutoka kati yao na atakuwa Mwenyekiti wa Baraza, na Madiwani wa kuchaguliwa na wananchi. Hawa watasimamia utendaji wa serikali ya wilaya ikiongozwa na Mkurugenzi Mtendaji.

3.6.7.3 Baraza la Kata au Kitongoji: Mwenyekiti na Wajumbe wote wa kuchaguliwa na wananchi wakazi wa eneo husika.

3.6.7.4 Baraza la Kijiji: Mwenyekiti na wanakamati (wajumbe wa Halmashauri) wa kuchaguliwa na wananchi wakazi wa kijiji husika.

3.6.7.5 Baraza la watu wote wakazi wa Kijiji au Kata: Mkutano wa hadhara ambao ufanyike angalau mara nne kila mwaka kupokea taarifa kutoka kwa halmashauri/uongozi husika za mipango ya maendeleo na utekelezaji wake, huduma, fedha, usalama wa/katika sehemu husika ; na kuwajibisha viongozi wao.

3.6.8 Utendaji wa Wakuu wa Mikoa

CPT inapendekeza kuwa **Wakuu wa Mikoa** wote kwa pamoja -

3.6.8.1 waunganishwe na kuunda **Baraza la Wakuu wa Mikoa la Ushauri na Kushauriana** (*Regional Heads Consultative and Advisory Council*) kwa ajili ya Wakuu wa Mikoa kuwa wanashauriana na kushirikishana/kumegeana uzoefu; kumshauri Rais na kulishauri Bunge pale inapopasa;

3.6.8.2 Mwenyekiti wa Baraza atachaguliwa na Wajumbe wa Baraza hilo kutokana na idadi yao.

3.6.8.3 Baraza hilo liwekewe na Serikali Secretarieti ya watendaji itakayoongozwa na Katibu Mkuu wake.

3.6.9 Mabadiliko haya yatadhihirisha na kuhakikisha kuwa Katiba inamilikiwa na watu na inawasilisha kihalisia uwezo wao na kwamba madaraka yamo mikononi mwao kupitia utaratibu wa uchaguzi wa viongozi wao wanaowajibika na kuwajibishwa kwao kikatiba na kisheria katika ngazi zote, kitaifa, kimkoa na Serikali za mitaa.

3.6.10 Aidha, mabadiliko haya yawe yamekamiliwa ifikapo mwisho wa mwaka 2025; yaani katika muda wa miaka 10 baada ya 2015 ambapo hasa suala la kupanga upya, kwa vigezo bora, Mikoa nchi nzima inabidi liwe limeshughulikiwa kikamilifu.

3.7 Vyombo vya Haki

3.7.1 Utendaji wa Polisi na Mahakama

CPT tunaangalia zaidi Polisi na Mahakama. Ili kutenda haki sawa kwa wote, vyombo hivi vinahitaji kuwa huru.

3.7.1.1 Mahakama

(a) Uteuzi wa viongozi na watendaji (Jaji Mkuu, Jaji Kiongozi, majaji na Wasajili wa Mahakama Kuu na Mahakama ya Rufani) ufanyike kwa **njia shirikishi na wakilishi na vile vile ya ushindani na wazi, kupitia Tume Huru ya Mahakama na pia kuidhinishwa na Bunge baada ya kusainiwa na Rais ambaye hatakuwa na mamlaka ya kubadilisha maamuzi ya Tume.**

(b) Maamuzi kuhusu **masuala ya nidhamu ya Mahakimu** yawe mikononi mwa **Tume Huru ya Mahakama**. Viongozi wa Serikali (Wakuu wa Mikoa na Wilaya) wasihusishwe kabisa katika masuala haya kwani

kuhusishwa kwao kunawafanya watawala kuingilia uhuru wa Mahakama kwa namna isiyokubalika.

(c) **Bajeti** ya Idara ya Mahakama iwe toshelevu ili kesi ziendeshwe kwa wakati.

3.7.1.2 Mahakama ya Katiba iundwe na ifanye kazi kulingana na azma ya uundwaji wake hasa ya **kushughulikia tafsiri na ukiukwaji wa Katiba** na mamlaka yoyote ikiwa ni pamoja na Serikali na Bunge. Watendaji wahakikishiwe ajira yao (*security of tenure*) ilmradi wanatenda kwa mujibu wa sheria na maadili ya kazi yao. **Kutokuwepo kwake kihalisia kunazuia masuala ya kikatiba yanayohusu Muungano yasishughulikiwe ipasavyo kwa wakati.**

3.7.1.3 Polisi

(a) **Uteuzi wa Inspekta Generali na wasaidizi wake wakuu** utokane na njia ya wazi na ushindani ukisimamiwa na **Tume Huru ya Huduma ya Polisi, na pia kuidhinishwa na Bunge.**

(b) Polisi izuiwe kikatiba kuwatesa na kuwadhalilisha raia kwa sababu yoyote ile.

Kila tukio la kifo, ikiwa ni pamoja na vifo vinavyosemekana kuwa ni vya ‘majambazi’, **sharti lifanyiwe uchunguzi wa kisheria (*coroner’s inquest*)** na wanaogundulika kusababisha mauaji kwa ulegevu, kutojali, hila, nk., wachukuliwe hatua za kisheria zinazostahili.

3.8 Baraza la Wazee

3.8.1 Umuhimu wa Baraza la Wazee

Wazo la kuwa na Baraza la Wazee ni zuri likiundwa kwa sura ya uwakilishi, na kupewa majukumu maalum. Lakini kwa kuwa mapendekezo yetu yanawasilisha Tume kadhaa, mengi ya yale ambayo yangeorodheshwa kama majukumu yake yanaweza kutekelezwa na Baraza la Wakuu wa Mikoa (*Consultative & Advisory Council of Regional Heads*) wakutanapo na Rais au Bunge na kushauriana naye/nalo kuhusu masuala ya kipekee.

3.8.2 Majukumu ya Baraza la Wazee

Bali kuna masuala mengine kama yale ya **migongano ya kidini na, mathalan, kati ya jumuiya za wakulima na wafugaji**, ambayo ni bora yakashughulikiwa na **baraza la watu wenye hekima, uzoefu katika masuala ya kiutawala, kijamii, kisiasa na itikadi/theolojia** ili kuyapatia suluhu nje ya taratibu za sheria ya makosa ya jinai na za kimahakama na vyombo vya kawaida vya kiutawala. **Kama njia ya kuhimiza uratibu mzuri na wenye tija**, Baraza hili linaweza kuwekwa (*may be established*) kama **kitengo kimojawapo cha mojawapo ya Tume** tunazopendekeza chini ya kifungu cha **3.6.4.1 (a) au (b)** hapo juu.

3.9 Haki za Binadamu

3.9.1 Haki hizi ni kama zilivyoainishwa na kuridhiwa na ziko tayari katika Katiba ya sasa ingawa itakuwa vyema kuimarisha sehemu nyingine.

3.9.1.1 Utekelezaji wake, kiutawala na kimahakama, **uwe mkamilifu na kulindwa kikatiba**.

3.9.1.2 Vifungu vyote vinavyozuia au kudhoofisha utekelezaji wa haki hizi au baadhi yake vifutwe.

3.9.2 Haki za binadamu zote ziheshimiwe kwa makundi yote na maeneo yote ya **jamii na nchi nzima ya Tanzania** pasipo ubaguzi wa aina yoyote **kwa kuwa nia yake asilia ni kuheshimu utu** wa kila mmoja nchini, awe mwenyeji au mgeni; mtu huru au mfungwa.

3.10 Huduma za Kijamii (*Social Services*)

3.10.1 Haki za kijamii (*social rights/rights to social services or social justice*), hasa zile zilizo katika mfumo wa miundo ya huduma za kijamii, **zihakikishwe kwa viwango maalumu na pia kulindwa kikatiba** (*should be guaranteed at specified acceptable minimum standard levels and constitutionally protected/enforceable*).

3. 10.2 Kwa **makundi ya pekee au katika hali hatarishi** kama wazee, wenye ulemavu na wanaoishi katika umaskini uliokithiri, pawepo **mpango maalum** wa kuwahudumia **ulioelekezwa kikatiba** (rej. Katiba ya Kenya Sura ya 4).

3.11 Ardhi na Mazingira

3.11.1 Ardhi

3.11.1.1 Haki ya umiliki iwe sawa kwa raia wa Bara na Visiwani katika sehemu zote mbili za Jamhuri ya Muungano, sio upande wa Bara tu.

3.11.1.2 Kwa wawekezaji, wawe ama wa ndani au wa nje ya nchi, au pale Serikali inapochukua ardhi kwa manufaa ya umma, Katiba na sheria husika ielekeze kutolewa kwa maelezo wazi na raia wakazi wa eneo husika washirikishwe kuhusu kutolewa ardhi, masharti husika na jinsi au namna uwekezaji utakavyofanyika yakiwemo manufaa/athari zake. Hatua inayofuata baada ya makubaliano iwe ni kuhamishwa na kuwalipa fidia halali, ya haki na kwa wakati wale ambao ardhi yao itachukuliwa.

3.11.2 Mazingira

3.11.2.1 Kwa ajili ya maisha salama ya leo na vizazi vijavyo kukabiliana na uharibifu wa mazingira, **suala la mazingira liwe jambo la kikatiba.**

3.11.1.2 Jitihada kubwa zielekezwe katika **kulinda maeneo oevu (*wet lands*)** chini ya usimamizi wa chombo kilichoundwa kwa maelekezo ya Katiba tunachopendekeza: **Tume ya Ardhi, Maliasili na Mazingira.**

3.12 Vyama vya Siasa

3.12.1 Katiba ianishe:-

3.12.1.1 **Ulazima wa kila chama kujenga na kudumisha demokrasia** ndani yake. Hii itasaidia kuondoa na kuepuka uongozi wa kibabe na kidikteta wa vyama na wa nchi.

3.12.1.2 Pia, **ukiukwaji wa maadili na uendelezaji wa vitendo vya rushwa ndani ya vyama uwekewe mfumo wa kuukabili** kisheria chini ya **Sheria ya Vyama vya Siasa na ya Maadili na Udhhibiti wa Ufisadi (Tume ya Maadili na Udhhibiti wa Ufisadi)**. Udhhibiti wa shughuli za vyama usifanyike kwa njia ya kuhujumu mwenendo wa kujenga demokrasia, na chama tawala kisichukuliwe kama chama teule na kupewa nafasi kiupendeleo.

3.13 Uweledi katika Uwakilishi wa Wananchi

3.13.1 Kiwango cha elimu ya Wawakilishi wa wananchi kitajwe ili kulipa uwazi na umuhimu stahiki suala la uweledi wa uwakilishi wa wananchi katika ngazi zote muhimu za mfumo wakilishi: Shahada kwa Rais na Mkuu wa Mkoa; Kidato cha Sita kwa Mbunge; na Kidato cha Nne kwa Madiwani.

3.13.2 Pasiwepo **ukomo wa kushika nafasi ya Mkuu wa Mkoa na Ubunge** kwa kuwa, kwa mujibu wa Maoni yetu haya na kama yangekubaliwa, ikiwa hatimizi wajibu wake, wananchi wake wangukuwa na uwezo wa kumwondoa, ama kabla au wakati wa uchaguzi.

3.13.3 Wagombea binafsi waruhusiwe katika ngazi zote za uchaguzi ikiwa ni pamoja na ya Urais, Ubunge, Udiwani na Ukuu wa Mkoa.

3.13.4 Kwenye **ngazi za kitongoji na kijiji, wagombea wote wawe wagombea binafsi.** Hii itahakikisha kuwa **umoja, udugu na upendo unaimarishwa/unadumishwa kwenye ngazi hizi za msingi wa Taifa letu.** Itaweza kusaidia kufanyika kwa tija mikutano inayoshirikisha wakazi wote kwenye maeneo husika bila kuwepo migawanyiko kutokana na hisia za kiitikadi kwa misingi ya vyama, kama hali inavyoelekea kuashiria sasa.

3.14 Kuhoji Matokeo ya Uchaguzi wa Rais

3.14.1 Katiba itoe fursa ya Kuhoji Matokeo ya uchaguzi wa Rais na kuweka ukomo wa muda kwa kila hatua hadi kuapishwa kwake (rej. Katiba ya Kenya na kuzingatia mazingira na ukubwa wa nchi yetu).

3.15 Muungano

3.15.1 Kimsingi, tuendelea na Muungano.

3.15.1.1 Bali, Uwakilishi na uteuzi uangaliwe upya ili kuweka uwiano, kwa vigezo vya ukubwa wa eneo na idadi ya watu. Kwa sababu ya Zanzibar kujisikia kumezwa, Muungano ulianza na serikali mbili; na pia, ili kuepuka gharama, Muungano wa serikali tatu haukukubalika; Tanganyika tu ikaonekana imemezwa ndani ya Muungano. Kwa udhaifu huo au hekima na busara hiyo ya kuendelea matakwa/maslahi ya Zanzibar, pakaendelea kuwemo katika Katiba ya sasa **vipengele vinavyoendelea na kulea utangano badala ya umoja.**

3.15.2 Kwa hiyo, maoni ya CPT ni kwamba **kilicho bora na stahiki ni kuwa na Muungano wa Serikali moja na iliyofanywa kuwa thabiti na kufanya kazi kwa tija (*made to be effective and efficient*)**. Huu ni muundo pekee utakaotupeleka kwenye ngazi ya juu ya **umoja, upendo na udugu**. Nafasi zote za uongozi na utawala zitolewe kwa kuzingatia **vigezo** vilivyokwishaatajwa. **Kigezo cha upendeleo wa ama Bara au Visiwani kisiwepo kabisa.**

3.15.3 Tumeona kuwa:-

3.15.3.1 mfumo wa Serikali mbili hauna tija na umeshindikana kwa kubeba na kuzua masuala na changamoto nyingi zisizokuwa na suluhu mwafaka.

(a) Hoja za msingi ni tatu: kuifanya Zanzibar kutojiona au kujihisi, katika Serikali moja, kuwa imemezwa na nchi jirani kubwa mara nyingi kuliko yenyewe;

(b) kuiwezesha Zanzibar ishughulikie mambo yake ya ndani yasiyo ya Muungano kwa mujibu wa Katiba, sheria na kanuni zake vinavyozingatia utamaduni na mahitaji yao mahsusi; na

(c) kukwepa gharama za kiutawala za kuwa na mfumo wa Serikali tatu ambao, pia, hauendani na dhana ya Jamhuri ya Muungano wa Tanzania kama nchi moja yenye sehemu mbili zilizojivua sifa zake za awali, za kuwa nchi na Jamhuri mbili tenganifu, kwa kuunda Umoja wa kuzifanya nchi moja yenye mipaka ya zilizowahi kuwa Jamhuri ya Tanganyika na Jamhuri ya Watu wa Zanzibar.

3.15.3.2 Kwa hiyo, tangu mwanzo, mfumo wa Serikali tatu ulionekana kutokuwa na uhalali katika hali ya kukosa uwiano kati ya sehemu mbili zilizoungana na pia kwamba unahalalisha siasa za utengano badala ya kujenga umoja, upendo na udugu.

3.15.4 Aidha, tukiwa katika **hali ya amani na utulivu** na tukiongozwa na hekima na busara inayozingatia misingi tajwa ya kizalendo, **tuanze mchakato wa kuunda Katiba ya Serikali moja ya Jamhuri ya Muungano wa Tanzania yenye uwakilishi na ugawanaji wa mapato ya kitaifa kulingana na idadi ya watu na ukubwa wa maeneo.**

3.15.5 Tunahitaji muda kushauriana hadi kufikia mwafaka kuhusu jinsi ya kuusimika vyema muundo huu. Tulenge kuelekea huko (Muungano wa Serikali Moja) kwa

3.15.5.1 kuendelea kupanua wigo (*continue to expand the scope*) na idadi ya Masuala ya Muungano; na

3.15.5.2 Mahakama ya Katiba inayopendekezwa kupewa mamlaka ya kutoa miongozo juu ya mwenendo wa Mchakato huo kila inapopasa.

3.16 Dhana ya Serikali Kutokuwa na Dini Teule

3.16.1 Dhana hii ni msingi bora wa Katiba ya sasa uliowekwa kwa hekima na busara kubwa ya waasisi wa nchi yetu walioona mbali. Aidha, walikuwa na uchungu wa kizalendo kuhusu nchi yao iliyo huru, inayoheshimu ukweli, haki kwa kila mtu na watu wote na kuenzi umuhimu wa mshikamano wao dhidi ya changamoto zinazotukabili kama nchi na taifa la watu wanaofuata dini na madhehebu tofauti. Kwa misingi hiyo, nchi yetu kwa ujumla imekuwa na amani. Waasisi walifuta mfumo wa kikoloni uliokuwa na milolongo mikuu miwili ya kutoa haki: Mmoja kwa ajili ya watu wote na masuala yote ya kisheria; na mwingine kwa ajili ya wazawa na wageni kutoka nje ambao si Wazungu, wakiwa katika makundi ya kijadi au kidini: Waafrika, Waislamu, Wahindu, nk. Badala yake, waliweka mfumo mmoja wa kutoa haki kwa watu wote kwa mujibu wa sheria zinazotumika kwa watu wote kuanzia Mahakama ya Mwanzo hadi Mahakama ya Rufani. Masuala ya sheria za jadi na za kidini yakiletwa katika mfumo rasmi yanaanzia Mahakama ya Mwanzo ambazo zina utaratibu wa Wazee wa Mahakama wanaomsaidia Hakimku kufikia maamuzi bila kukinzana na matakwa ya sheria hizo husika almradi hazipingani na haki za msingi za binadamu (*basic human rights*) na kanuni za haki za kimaumbile (*rules of natural justice and morality*).

3.16.2 Katika hali hiyo, Mahakama ya Kadhi isingeingizwa katika mfumo rasmi wa kutoa haki kimahakama na, kama ilivyo kwa dini na madhehebu mengine nchini, taratibu za kusuluhisha kwa misingi ya *Sharia* ziliachiwa wafuasi wa Koran kuishughulikia katika mfumo wa dini au madhehebu ya dini yao. Katika nchi ambako raia wake ni wa mchanganyiko wa kidini na kimadhehebu, haiwezekani kurasimisha kikatiba na kisheria dini au dhehebu mojawapo kuwa teule (*established religion*) na nchi ikawa na haki, amani na utulivu.

3.16.3 CPT, kwa kuzingatia hayo na umuhimu wake:-

3.16.3.1 inasisitiza kuwa masuala yoyote ya kidini yasiingizwe katika mfumo rasmi wa nchi kwa kuwa kila dini iko huru kikatiba na kisheria

kuwa na utaratibu wake wa kushughulikia mambo yake ikiwa ni pamoja na usuluhishi wa migogoro au kesi kati ya waumini wao.

3.16.3.2 Hata hivyo, hoja halali zozote za uonevu na/au unyanyasaji kwa dini au dhehebu lolote kwa msingi au kisingizio chochote haukubaliki na ukidhihirika uchukuliwe hatua kwa mujibnu wa sheria za nchi.

3.16 Kubadili Katiba

3.16.1 Katika Katiba ya sasa madaraka ya kurekekebisha Katiba kiutaratibu ni kama yamekasimiwa kwa Rais au Serikali (*Executive*) kama suala la utashi (*matter of discretion*), sio la lazima hata pale hali inapolazimu.

3.16.2 Aidha, **hakuna misingi endelevu ya kuboresha mfumo wa kikatiba** wa nchi yetu na inampa Rais uwezo mkubwa mno juu ya mustakabali wa maisha ya wananchi na nchi kwa ujumla.

3.16.3 Inapendekezwa kwamba:-

3.16.3.1 Katiba Mpya ianishe vigezo vya uhitaji wa mabadiliko **na kuweka utaratibu wa kufanya mabadiliko au moja kwa moja ndani yake au kwa mujibu wa sheria maalumu itakayozingatia vigezo husika vya hiyo Katiba.** (rej. Katiba ya Jamhuri ya Kenya, Sura ya 16; ...).

3.16.3.2 Maeneo muhimu yaainishwe ambayo **mabadiliko yatafanywa na wananchi tu kupitia kura ya maoni.**

4. HITIMISHO

4.1 Maoni ya CPT yametolewa baada ya kutafakari na kuzingatia mambo kadhaa ya kimsingi ikiwemo historia ya nchi yetu, umuhimu na nafasi ya katiba katika jamii yetu, maana ya katiba kimsingi na walengwa/wadau wake halisi, umuhimu wa maadili mema, uzalendo na moyo wa udugu. Tumetoa mawazo juu ya jinsi wananchi wanavyoweza kuimiliki Katiba kinadharia na kimatendo kwa kushiriki moja kwa moja na kwa njia za uwakilishi katika utawala wa nchi na maisha yao kwa ujumla.

4.2 Tumbainisha misingi ya kikatiba inayoweza kusaidia uimarishwaji wa heshima kwa utu, haki ya uhai, uhuru, maendeleo kwa wote pamoja na

mshikamano na amani. Hata kama yote tuliyopendekeza yangeweza kukubaliwa, pangetakiwa kuwepo uongozi wa kizalendo na mipango ya kiuchumi na kijamii inayolenga maslahi ya walio wengi nchini: matabaka ya kati, ya wafanyakazi na ya wanyonge, mijini na vijijini, viwandani-migodini na mashambani.

4.3 Na hiyo ndiyo changamoto kubwa na kali kuliko zote mbele yetu. Sharti tuikabili kitaifa kwa ibada (tukiomba msaada wa Mwenyezi Mungu), tafakari na mdahalo endelevu, pamoja na juhudi zinazoongozwa na uzalendo, umoja, upendo na udugu.

TUNAWASILISHA,

Tarehe: 21 Novemba, 2012

5. VIAMBATANISHO

5.1 KIAMBATANISHO A: MCHAKATO WA KUANDIKA KATIBA MPYA – MAONI YA CPT

HISTORIA YA NCHI YETU

Mambo kadhaa muhimu na ya msingi kihistoria yapasa kuzingatiwa katika Mchakato wa Kurekebisha Katiba au kuunda Katiba Mpya ya Nchi yetu ya Jamhuri ya Muungano wa Tanzania. Ni kwa kuzingatia mambo hayo tutaweza kujielewa vizuri zaidi sisi kama nchi na taifa changa na mizizi yetu pamoja na hali yetu ya sasa ya kijamii, kisiasa, kiuchumi na kiutamaduni. Katika hali ya uelewa huo, au kumbukumbu ya mambo hayo, tutaweza kuwa na msingi mzuri wa kuitathmini hali na mahitaji halisi ya maendeleo ya nchi yetu na wa kurekebisha Katiba yetu ya sasa au kuunda Katiba Mpya inayokidhi mahitaji, maslahi na matarajio yetu yanayozingatia pia maslahi ya vizazi vijavyo. Mambo hayo muhimu na ya msingi kihistoria ni kama ifuatavyo:-

- 1.1 Tanzania Bara na Tanzania Zanzibar zilipata Uhuru kama nchi wakati tofauti na katika mazingira ya kisiasa na kisheria tofauti bali kwa nchi zote mbili Uhuru huo ulikuwa wa kisiasa zaidi na sio wa kiuchumi, kikatiba na kiutamaduni.
- 1.2 Bara (Tanganyika) ilipata Uhuru huo ‘wa bendera’ Desemba, 1961 kutokana na **hali yake ya kuwa nchi tawaliwa ya Wakf wa Umoja wa Mataifa kupitia Udhamini wa Uingereza** (*from the status as a UN Trust Territory under British Trusteeship*) baada ya miaka saba (1954-1961) ya mapambano ya wananchi chini ya chama cha *Tanganyika African National Union (TANU)* kudai Uhuru kwa amani **dhidi ya utawala kandamizi, onevu na dhalilishi wa kikoloni**. Ilibaki chini ya Malkia/Ufalme wa Uingereza na kuwa mjumbe-nchi mpya wa Jumuiya ya Madola ya Mataifa na Nchi-tegemezi za Kiingereza (*The British Commonwealth of Nations*

Dominions and Dependencies). Mwaka uliofuata, Bara (Tanganyika) ilijitangaza kuwa Jamhuri ya Tanganyika ndani ya hiyo Jumuiya ya Madola ya Mataifa na Nchi-tegemezi za Kingereza, ikiwa na mfumo wa siasa ya demokrasia ya vyama vingi, angalau kinadharia. Kihalisia, nyanja ya siasa ilitawaliwa na chama kimoja cha *TANU* kilichoweza kujenga mshikamano na vyama vingine vidogo vidogo vyenye wafuasi wachache na kuwa na mvuto na ushawishi mkubwa vile wa kisiasa kwa umma kwamba, nyakati zile, ilikuwa vigumu kuanzisha na kujenga chama/vyama mbadala dhidi yake.

- 1.3 Kwa upande mwingine, Zanzibar (Unguja na Pemba) ilipata Uhuru wake wa aina iyo hiyo Desemba, 1963 pia baada ya muda takriban ule ule kama wa Bara na kwa njia ya amani. Ila Zanzibar ilipata Uhuru huo 'wa bendera' kutokana na hali yake ya kuwa nchi tawaliwa, yenye utawala mkongwe wa ndani wa Kisultani kutoka Omani, Uarabuni, ulioswekwa chini ya Hifadhi ya/Ulinzi wa Kiingereza (*from its long-established status of an Omani-Arab sultanate which fell under British Protectorate*). Madai ya Uhuru na harakati za kuupata kwa upande wa Visiwani zilikuwa katika ngazi (*levels*) mbili, sio moja kama ilivyokuwa Bara (ukiondoa suala la utitili wa tawala dhaifu za jadi za kichifu): ile ya Ukoloni wa Kiingereza na ya utawala mkongwe wa ndani wa kimwinyi wa Kisultani-Kiarabu au Kisultani-Kiomani. Hivyo, kwa walio wengi Visiwani, sio tu kwamba ushindi dhidi ya Waingereza kwa njia ya amani uliwaachia nafasi ya kuendeleza utawala wao kwa njia ya uchumi, sheria na utamaduni bali pia kwa kupitia **utawala onevu, kandumizi, na dhalilishi wa kisultani na kiutumwa uliohifadhiwa kikatiba**. Ndio sababu na msingi halisi wa Mapinduzi ya Zanzibar ya tarehe 12 Januari, 1964 hata kabla ya wino uliowekewa saini za 'zana za Uhuru wa Zanzibar' mwezi jana yake ulikuwa bado haujakauka. Na ndipo Zanzibar nayo ikajitangaza kuwa Jamhuri ya Watu wa Zanzibar (*The People's Republic of Zanzibar*) chini ya **Baraza la Mapinduzi** na *Afro-Shirazi Party* (ASP). Wakati wa kupigania Uhuru na wa kufanya Mapinduzi, Zanzibar pia ilikuwa na mfumo wa siasa ya demokrasia ya vyama vingi na hapa kweli vyama kadhaa vilikuwa na nguvu, hasa chama cha Isbu (cha nyendo ya kisultani), ASP na vyama kadhaa vya uringo wa kushoto (itikadi za kisoshalisti/kijamaa). Baada ya Mapinduzi, ni ASP peke yake kiliweza kufanya mambo ya kisiasa wazi wazi kihalali kama chama. Vingine vilizuiliwa au vililazimika kujisalimisha kwa ASP.

- 1.4 Nchi huru hizo za kijamhuri, Tanganyika na Zanzibar, zikiwa katika Jumuiya ya Madola ya Mataifa na Nchi-tegemezi za Kiingereza, Umoja wa Matifa (UNO) na *East African Common Services Organisation (EACSO)*, mwaka 1964/1965, kwa kupitia viongozi wao wakuu, ziliafikiana na kuamua kuungana na kuunda **nchi moja ya Jamhuri ya Muungano wa Tanganyika na Zanzibar ambayo rasmi na kikatiba ikapewa jina la Jamhuri ya Muungano wa Tanzania**. Pia, kikatiba, Muungano huo ukawa ni **wa Serikali mbili**, moja ya Muungano kwa masuala yote ya Muungano na ya Tanzania Bara na nyingine ya Zanzibar, ikiwa inaongozwa na Katiba mahsusi ya Zanzibar, kwa masuala yote yanayoihusu Zanzibar na ambayo sio ya Muungano. **Tangu hapo, Tanganyika na Zanzibar kama nchi na Jamhuri moja moja zikafutika kikatiba na kimataifa; kukazaliwa nchi moja ya Jamhuri ya Muungano wa Tanzania yenye sehemu mbili ndani ya mipaka yake, Tanzania Bara na Tanzania Zanzibar/Visiwani**. Ingawa tangu wakati huo hadi leo, Katiba ya Muungano imefanyiwa Mabadiliko mara kwa mara, lakini katika masuala ya **muundo wake kiinchi, kiutawala na kimataifa** hakujatokea mabadiliko yoyote.
- 1.5 Hata hivyo, katika **Mabadiliko ya Katiba ya Zanzibar ya 1984 na 2010** kuna hali inayoashiria kwamba **Katiba hiyo haishabiiani tena na Katiba ya Muungano** katika masuala haya na mengine ambayo yamo katika Katiba ya Muungano kama ilivyorekebisha mara kwa mara na Bunge la Jamhuri ya Muungano. Suala hili, ambalo tutalirejelea tena baadaye, yapasa liangaliwe kwa makini na ustahimilivu mkubwa ili liweze kupatiwa ufumbuzi mwafaka, kwa misingi ya haki, busara na hekima.
- 1.6 Kuna mambo muhimu ya kuzingatia katika kuieleza na kuielewa misingi ya kuanzishwa na kuendelezwa kwa Muungano huu wa aina yake kati ya zilizokuwa nchi mbili huru za kijamhuri na zikaamua kujifuta na kujigeuza/kujibadilisha kuwa nchi moja yenye sehemu mbili zisizolingana wala kufanana katika kila hali – kieneo, kiidadi ya watu wake, kirasilmali wala kihistoria na kiutamaduni.
- 1.6.1 Tanzania Bara ina eneo kubwa, idadi kubwa ya watu wake katika makabila yao na tamaduni zao za kijadi (na siku hizi pia za kidini,

hasa Kikristu na Kiislamu) mbalimbali, rasilmali na maliasili nyingi kuliko Zanzibar kwa viwango vikubwa mno visivyolinganishika. Historia na utamaduni wa Visiwani una mengi yanayotofautiana sana na ya Bara (ukiondoa Mrima au ukanda wa pwani mwa Bahari ya Hindi ambao ni sehemu ndogo sana ya ardhi na idadi ya watu wa Bara), hasa katika muundo wake wa kijamii, kidini/kiitikadi na kidegesturi na uhusiano wake wa karibu na Uarabuni-Omani ilikotoka familia asilia na ukoo wa Masultani wa Zanzibar. Yote haya yanaonyesha tofauti kati ya sehemu hizi mbili za Muungano.

1.6.2 Lakini kuna **mambo yaliyowafanya viongozi waasisi wa Muungano na raia wengi wakati huo waunge Mkono wazo na hatua za kuunda Muungano kwa wakati ule, namna na njia ile iliyotumika.**

Hatunui kuliingilia kwa undani sana jambo hili ila mambo muhimu ya kutaja na kuzingatiwa wakati tuko kwenye Mchakato wa Kurekebisha Katiba au Kuunda Katiba Mpya ni kama ifuatavyo:-

1.6.2.1 **Adui mkubwa wa watu** wa sehemu hizi mbili alibainishwa kuwa ni yule yule mmoja: **Utawala onevu, kandamizi, dhalilishi na nyonyaji wa kikoloni/kibeberu na kimwinyi.** Adui huyo alikuwa amefanikiwa kwa kutumia mikakati na mbinu za **‘tawanya, teka na tawala’** (*divide, conquer and rule strategies and tactics*) na kunufaishwa na **ujinga, umasikini na maradhi** ya umma wa watu wanyonge.

1.6.2.2 **Adui huyo alitokea nje ya sehemu hizi mbili na alitumia udhaifu na unyonge alioukuta ndani ya tawalala, uchumi na tamaduni za jamii zake za enzi zile.** Mambo mema, kama kueneza **imani** ikomboayo roho za watu na kuwafanya wamtambue, kumsadiki na kumwabudu Mungu-Mwenyezi wa kweli na kuachana na imani na tamaduni potofu za kishirikina, yaliweza kutendeka chini ya utawala huo. Naye huyo adui aliweza kunufaishwa na mambo hayo kana kwamba yalikuwa ni sehemu ya mifumo hiyo onevu, kandamizi, dhalilishi na nyonyaji ya kikoloni na kimwinyi. Viongozi na wafuasi wao kwa wingi, **wakiwa pia wafuasi wa dini na madhehebu mbalimbali, wakitoka kwenye makabila, mataifa na rangi tofauti na mbalimbali, waliweza kutenganisha mambo hayo mema na muhimu ya kiimani (ya kiroho na kidini) na masuala ya kisiasa, kiuchumi**

na kiutamaduni (ya kimwili au kidunia na kidola au kiutawala). Waliona uwezekano wa wageni na wazalendo kuabudu Mungu Yule Yule na kushiriki ibada zile zile kwa pamoja au dini mbalimbali pasipo wageni hao (au nao wazalendo kwa wageni) kuwatawala kwa misingi ya kikoloni, uonevu, dhuluma, udhalilishaji na unyanyapaa bali kwa kuheshimiana, kuthaminiana na mshikamano. Hapo, wanyonge na watu wenye mapenzi mema wakaona Umuhimu wa kujenga Umoja imara na endelevu dhidi ya Adui wao huyo dhalimu.

1.6.2.3 Hivyo, viongozi na wafuasi hao katika uwingi wao, baada ya kutafakari kwa kina, busara na hekima kubwa na kubaini kuwa adui wao ni mmoja na kubainisha mambo muhimu yaliyomsaidia, walitambua vema ukweli wa usemi **“Fimbo/Silaha ya mnyonge ni Umoja! Umoja ni nguvu, utengano ni udhaifu!”** Kuweza kuhimili upinzani wa nguvu za kisultani/kimwinyi ndani na nje ya Zanzibar, ambazo zingeungwa mkono na nguvu za kigeni, labda zikiwemo za Waingereza, Mapinduzi ya watwana na wakwezi wa Zanzibar chini ya uongozi wa ASP na baadhi ya vyama vyenye itikadi za mrengo wa kushoto, yalihitaji hifadhi ya **Umoja** ulio mpana na mkubwa zaidi kuliko ule wa hao Wazanzibari **kama nchi. Hifadhi hiyo ilibidi ipatikane kutokana na jirani mwenye uhusiano wa karibu wa kihistoria kati ya watu walio wengi katika nchi hizo mbili na ambaye viongozi wake walikuwa na msimamo wa kizalendo unaofanana na kushabiiiana juu ya ukombozi wa wanyonge na wa Mwafrika. Jirani huyo alikuwa ni Tanganyika!**

1.6.2.4 Bila Muungano wa kisiasa kati ya Tanganyika na Zanzibar, **Mapinduzi ya Zanzibar chini ya ASP yangekuwa hatarini kutoka ndani na nje.** Vivo hivyo, **kiusalama, Tanganyika ingeathirika vibaya** kwa kuwa na jirani ubavuni mwake anayeyumba kiusalama kutokana na hali yake tete na tata iliyosababishwa na Mapinduzi ya watwana, wakwezi na wazalendo wengine, wengi wao wakiwa na **mizizi ya kijamii** Tanganyika.

1.6.2.5 **Suala la kuwa na muundo wa Serikali moja, mbili au tatu, wa kimuungano (union) au kishirikisho (federal),** liliamuliwa pasipo kuchanganya maneno ingawa masuala mengi yameibuliwa

katika mijadala kuhusu aina ya Muungano wa sasa wa Jamhuri ya Tanzania: **Serikali mbili, sio moja au tatu. Madhumuni ya mfumo wa Serikali mbili yalikuwa hasa matatu kama ifuatavyo:-**

- (a) kuifanya Zanzibar kutojiona au kujihisi, katika Serikali moja, kuwa imemezwa na nchi jirani kubwa mara nyingi kuliko yenyewa;**
- (b) kuiwezesha Zanzibar ishughulikie mambo yake ya ndani yasiyo ya Muungano kwa mujibu wa Katiba, sheria na kanuni zake vinavyozingatia utamaduni na mahitaji yao mahsusi; na**
- (c) kukwepa gharama za kiutawala za kuwa na mfumo wa Serikali tatu ambao, pia, hauendani na dhana ya Jamhuri ya Muungano wa Tanzania kama nchi moja yenye sehemu mbili zilizojivua sifa zake za awali, za kuwa nchi na Jamhuri mbili tanganifu, kwa kuunda Umoja wa kuzifanya nchi moja yenye mipaka ya zilizowahi kuwa Jamhuri ya Tanganyika na Jamhuri ya Watu wa Zanzibar.**

1.6.3 Kuna mambo mengine muhimu na ya kimsingi ya kuzingatiwa katika Mchakato wa sasa wa Kurekebisha Katiba/Kuunda Katiba Mpya **yanayotokana na historia yetu** ya kisiasa, kiuchumi, na kiutamaduni ni kama ifuatavyo:-

1.6.3.1 Vipaumbele na kanuni-msingi za sera, mipango-mkakati, Katiba pamoja na sheria na kanuni-tekelezi zake husika ziliundwa juu ya kutambua, kuheshimu na kuzingatia yafuatayo –

- (a) Mungu na Utu wa binadamu (God and the dignity of the human person)**, kiumbe wake aliyekabithiwa usimamizi wa viumbe wengine wote pamoja na Mazingira-nchi (*the natural environment*) kwa manufaa yake na kwa sifa na utukufu Wake Mungu-Mwenyezi; **viongozi walitarajiwa kuwa wacha Mungu na/au wanaotimiza matakwa ya raia wao waliowaweka madarakani**, na kuwa tayari kupokea kwa njia halali za amani changamoto kutoka kwa wapinzani na raia wengine;

- (b) **Uhuru, Haki, Umoja/Mshikamano wa kitaifa wa raia na hasa wazalendo** ambao wengi wao ni wanyonge, maskini wa hali na mali na baadhi yao wakiwa katika hali hatarishi (*vulnerable conditions/circumstances*), huku **wengi wakikabiliwa na ujinga na maradhi** katika hali ya kukandamizwa, kunyonywa, na kupuuzwa na Ukoloni mambo-leo/Ubeberu wa nje na washiriki wake wa ndani ya nchi: Hivyo, **ufisadi** na kuomba na/au kupokea **rushwa kwa viongozi wa kisiasa na katika nafasi za utawala vilipigwa vita kama** sehemu ya **adui wa Uhuru, Haki na Umoja huo wa kitaifa**;
- (c) **Amani ya kitaifa na kwa raia** kama msingi muhimu wa maendeleo ya kitaifa na raia unaopaswa **kujengwa, kuimarishwa na kusimamiwa** na dola kwa mujibu wa sheria na kutegemea ushirikishwaji wa umma wa wananchi /raia wote;
- (d) **Msingi na lengo kuu la maendeleo ni watu/rasilmali-watu** (*people/live capital or living labour*) si vitu au rasilmali-vitu (*property, capital/money or accumulated dead labour*): Hivyo, Katiba na sheria, sera na mipango-mkakati ya kisiasa, kiuchumi na kiutamaduni ya kitaifa **iwalenge, bila ubaguzi asi, na kuwategemea watu (wakulima, wafanyajikazi na wasioweza kujitegemea kutokana na hali zao za kiafya au kimaumbile) ili kuwainua na kuwawezesha kufanya maendeleo**; sio hasa vitu au faida ya wawekezaji na matajiri tu wa nje na ndani;
- (e) Umuhimu wa kuwa na **Mipango-Maendeleo ya Kitaifa** ya vipindi (vya mwaka mmoja, miaka mitatu mitatu na miaka mitano mitano) ikilenga utumiaji bora (*proper and rational exploitation*) wa rasilmali na maliasili za kitaifa **kwa ajili ya maendeleo ya vipindi na kizazi husika na vya nyakati zijazo kwa kuzingatia uwezo wa ndani wa kitaaluma/kitaalamu na wa nchi kwa ujumla kunufaika kwa kiwango mwafaka kutokana na utumiaji huo**; hasa pale ambapo kuna haja ya kutegemea wahisani/wawekezaji na wataalamu wa kutoka nje ya nchi;

- (f) **Mfumo wa utawala wa nchi** kuzingatia Umuhimu wa **kuwashirikisha watu kitaasisi katika utawala wa nchi kwa njia na misingi ya kidemokrasia** (kushiriki katika kutunga, kusimamia na kutekeleza sera na sheria kitaifa kupitia uwakilishi katika Chama/vyama vya siasa na Bunge na mabaraza ya Serikali-mtaa na ya viwandani na sahemu kuu za kazi); pamoja na mikutano ya wote kimitaa/ki-vijiji; ‘madaraka mikoani’ kupitia watendaji wa kidola: **Yote yakilenga maendeleo ya watu vijijini na mijini na uimarishaji na uendelezaji wa amani na utulivu nchini kwa misingi mwafaka;**
- (g) **Kuwa na dira, sera, uongozi bora, siasa safi na msimamo fasaha wa kizalendo wa ndani unaozingatia maslahi ya watu wote, wakiwemo wanyonge, maskini na vikundi au jumuiya za walio katika hali hatarishi (wanawake na watoto, wakimbizi wa migogoro ya kisiasa au harakati za vita vya ukombozi, wenye ulemavu wa viungo, nk.) na iliyowekewa sheria, kanuni, taratibu na mazingira ya utekelezaji wake;**
- (h) Kuwa na **dira, sera, siasa na msimamo wa ujirani mwema kwa nchi jirani, na wa kimataifa, ambao uliongozwa na dira, sera na msimamo wa kizalendo wa ndani** na kuifanya nchi na wananchi (Watanzania) wajitambulishe na kujulikana pamoja na kuheshimika kwayo Barani Afrika na kimataifa kwa ujumla: Maendeleo yalitegemewa kutokana na ‘Watu, Siasa Safi na Uongozi bora’; katika mazingira ya Uhuru wa Kitaifa na wa Bara la Africa – ‘Tanzania haitakuwa huru mpaka Afrika yote iwe huru’.

1.6.3.2 Kilimo ni Uti wa Mgongo wa Uchumi (‘Siasa ni Kilimo’) na **Ardhi** ni muhimu na **ni zawadi kutoka kwa Mungu kwa watu wote**: Hivyo, si halali kumilikiwa kibinafsi kikamilifu (*individual freehold title to land*) bali **kwa masharti** ya kutumika kwa maendeleo ya watu wanaoitumia **na kwa vipindi vya muda na ada kwa mujibu wa sheria** husika (*under ‘right of occupancy or Government leasehold title’*). **Milki iwe ni ya umma** (*public ownership*) kwa njia ya **Rais kama Mdhamini- Msimamizi Mkuu** wa masuala ya Taifa na umma wa Tanzania Bara, kwa upande wa Bara na Rais wa Zanzibar kwa upande wa Visiwani. Bali, kama ilivyo kuhusu mfumo mzima wa Katiba na sheria na kanuni

tekelezi zake nchini kwa ujumla na kwa upande wa Visiwani, **mwanya mkubwa umeachwa katika sheria za ardhi** kwa 'Rais mtendaji' kuweza kuyatumia madaraka yake ya kuwa Mdhamni-Msimamizi Mkuu wa masuala ya ardhi **kinyume na maadili na maslahi ya kitaifa pasipo kuchukuliwa hatua yoyote** wakati yupo na baada ya kutoka madarakani kama Rais.

1.6.3.3 1984/85 - 1991/92: Kuyumba kwa uchumi duniani na kuanguka kwa tawala na mifumo ya kikomunisti na kisoshalisti Urusi/USSR (Muungano wa Jamhuri za Kisosialisti na Kisoviet) na Ulaya Mashariki kwa ujumla kuliyumbisha nchi zote katika Dunia ya Tatu, kama Tanzania, zilizokuwa na sera za kizalendo na za mreno wa kushoto zikiiga mifumo ya kiutawala na kiuchumi ya nchi za kikomunisti au kisoshalisti.

1.6.3.4 Hali hiyo, chini ya **wimbi la Utandawazi**, ilisababisha kuanzishwa kwa **sera mpya na mwelekeo mpya tegemezi wa kisiasa na kiuchumi-liberali** (*neo-liberalist economy under globalization*) nchini kwa ushauri wa/shinikizo la Benki ya Dunia (IBRD/WB) na Shirika la Kifedha la Kimataifa (IMF) na mipango yake ya kurekebisha uchumi (*Structural Adjustment Programmes (SAPs) as IMF and IBRD/WB conditionality packages*).

1.6.3.5 Sera ya Uchumi wa Kitaifa kuhusu umuhimu wa watu na hasa wanyonge, uongozi bora na siasa safi ilibadilishwa tangu Awamu ya Pili ya Serikali ya Uhuru na Utawala wa Chama Kimoja (1985-1995): 1990 'Azimio la (NEC CCM) la Zanzibar' lilitoa **rukosa kwa Viongozi kufanya biashara. Maadili ya viongozi na Miiko ya uongozi ikawa haizingatiwi tena**; Sheria ya Maadili ya Uongozi, 1995 (*Public Leadership Code of Ethics Act, No. 13/1995*) haikubadilisha chochote kwani **chombo cha** (Tume ya) **Usimamizi wake hakikupewa uwezo wa kuchukua hatua** dhidi ya wasiotimiza masharti ya maadili ya uongozi kwa mujibu wa sheria hiyo.

1.6.3.6 Sera ya Uchumi chini ya Azimio la Arusha ililenga kujenga Uchumi wa Kizalendo – Kitaifa - katika nyanja za –

- (a) Uzalishaji (Viwanda, Madini, Kilimo, Uvuvi);
- (b) Usambazaji wa Bidhaa (Biashara ya Jumla ngazi ya Taifa na ya Mikoa na Wilaya [*Regional and District Trading Corporations - RTCs & DTCs*], ya Nje na Ndani [*Board of External Trade and Board of Internal Trade (BET & BIT)*]);
- (c) Fedha (Mabenki, Makampuni ya Bima, Karadha);

(d) Usafirishaji wa nchi kavu, majini na hewani (*Tanzania Railways Corporation, Kampuni ya Mabasi Tanzani and Air Tanzania Corporation [TRC, KAMATA & ATC]*):

Madhumuni kwa ujumla yalikuwa kwamba **watu wapate faida ya uhuru wao kwa njia ya ajira na maendeleo ya kiuchumi.**

(e) Hata hivyo, **baadhi ya athari mbaya za sera hiyo** zilikuwa ni: -

- (i) Uhuru wa ushirika uliingiliwa, vyama vya ushirika vikawekwa chini ya Chama Tawala na Dola;
- (ii) Serikali za Mitaa zikafutwa;
- (iii) Uhuru wa kuagiza na kupeleka Bidhaa nje ya nchi na kumiliki fedha za kigeni ulidhibitiwa kwa kiwango kikubwa mno na Serikali kupitia Benki Kuu (BoT);

1.6.3.7 Sera ya Ujamaa Vijijini - na hata baadaye, ile mbadala, ya Maendeleo Vijijini - ilitelekezwa na vijiji vikazorota. Kwa upande mwingine, **Sera ya Ubinafsishaji wa Mashirika ya Umma** katika Awamu ya Tatu ya Serikali ya Uhuru na Chama tawala kimoja (1995-2005) ilianzishwa na kutekelezwa pasipo mjadala na tafakari ya kina ya kitaifa: **Matokeo yake** yakawa ni **uuzaji kiholela na kwa bei ya kutupa wa mali ya taifa** kwa wawekezaji wasio na uwezo wala dhamira ya kutimiza masharti ya mikataba ya mauzo na manunuzi kati ya “Wawekezaji” wa hasa nje na Dola. **Viwanda vingi vilivyobinafsishwa havijafufuliwa na baadhi ya vile vilivyokuwa hai vimekufa;** na kinyume chake, shughuli mbadala ndizo zinazoendeshwa badala ya zile za awali. Hata hivyo, **hakuna hatua madhubuti za kisheria zimechukuliwa dhidi ya “Wawekezaji” na wasimamizi au waratibu husika ili kutetea maslahi ya kitaifa yaliyoathirika!**

1.6.3.8 **ANGALIZO:** Sio nia ya CPT au mada hii kueleza kuwa yote hayo yaliyobainishwa kama ‘mambo muhimu na ya msingi ya kuzingatiwa katika Mchakato wa sasa wa Kurekebisha Katiba/kuunda Katiba Mpya’ yalifanywa kwa ustadi, tija wala mafanikio makubwa na kwamba hapakuwepo mapungufu. La; bali ni kwamba, **nia ya kufanya na hatua za kuashiria kuwa nia hiyo ilikuwa ya dhati zilionyeshwa wazi na kueleweka nchi nzima.** Pia, mapungufu yake na kukwama kwa utekelezaji wa mengi yaliyopangwa na kujaribiwa ni mambo ambayo wengi ndani na nje ya nchi wanayafahamu. Aidha, pamoja na hayo, hapana shaka kwamba **historia hiyo imetuachia urithi wa**

kutuwezesha kuweka misingi bora ya Katiba yetu katika hali yetu ya sasa ya kisiasa, kiuchumi na kiutamaduni pasipo kurudia makosa yaliyotendeka kipindi kile cha siasa, sera na mfumo wa kikatiba (utawala) wa chama-dola kimoja, mengine kudelea baadaye hadi leo ambapo pia mengine tena mapya yametendeka. Pia, kwa mara ya kwanza, **suala na zoezi la kuunda/kurekebisha Katiba ya nchi yetu linafanywa kwa njia na namna iliyo wazi, shirikishi na ya kidemokrasia zaidi kuliko wakati wowote katika historia ya nchi yetu.** Hivyo, tuendelea na Kumbukumbu kwa kujengea Maoni na Mapendekezo yetu humu juu ya misingi katika historia iliyokamilifu zaidi.

1.6.3.9 Katiba na Mabadiliko ya Katiba Tanzania Kihistoria: Vile vile, mambo yafuatayo **yapasa yazingatiwe** katika Mchakato wa Kurekebisha Katiba/Kuunda Katiba Mpya unaoendelea sasa **ili kuzuia kurudiwa kwa makosa au kasoro zinazogusiwa kuingizwa katika Katiba Mpya:-**

- (a) Tangu 1964 hadi sasa **Katiba ya Muungano** imefanyiwa marekebisho mara 15, yakiwemo yale ya **kutoka kwenye mfumo wa siasa ya vyama vingi**, ambavyo havikuwahi kuwepo kihalisia Tanzania Bara ya Uhuru, na kuingia kwenye mfumo wa siasa ya chama-dola kimoja (1965-1992); na tena **kurejea kwenye mfumo wa siasa ya vyama vingi, ukiwa unashikilia utamaduni na unabakwa na nguvu ya chama-dola tawala kile kile kikongwe (1965-1992).**
- (b) **Zanzibar nayo Katiba yake**, kuanzia 1963 hadi leo, imefanyiwa marekebisho mara kadhaa kama ile ya Muungano, yakiwamo ya 1984 na 2010 – na ambapo mabadiliko ya 2010 yaliruhusu na kujihalalisha kwa kura ya maoni (*Referendum*) ya wananchi Wazanzibar ya kuunga mkono Serikali ya Mseto inayoundwa na Chama Tawala (CCM) na Chama kikuu cha Upinzani Visiwani (CUF). Serikali ya Mapinduzi ya Zanzibar, Baraza la Mapinduzi la Zanzibar na CCM Zanzibar waliyanadi, kuyabariki na kuyakubali hayo mabadiliko kabla na baada ya kura ya maoni. Bali kuna mgongano katika baadhi ya Sehemu/Ibara za Katiba ya sasa ya Zanzibar na baadhi ya zile za Katiba ya sasa ya Muungano; km., kuhusu kwamba ‘Zanzibar ni nchi’; Bendera ya Taifa la Zanzibar! Serikali ya Mseto

1.6.3.10 Kumekuwa na **mwingiliano asi katika mihimili mitatu ya Dola:** Utawala (*Executive*) dhidi ya Bunge (*Parliament*), dhidi ya Mahakama (*Judiciary*). Kwa mfano:

- (a) **Bunge** kutunga sheria kwa ajili ya kuingilia maamuzi ya Mahakama – (kuzuia kuhalalishwa kwa ‘Mgombea binafsi’ kwa misingi ya Kikatiba);
- (b) **Wakuu wa Mikoa/Wilaya** kuwa wajumbe katika Kamati za Nidhamu za Mahakimu na wakati mwingine kuingilia uendesaji wa kesi au kuzuia utekelezaji wa hukumu za kimahakama ngazi za chini ya Mahakama Kuu (Hakimu Mkazi au wa Wilaya, Mahakama ya Mwanzo na ngazi ya Mabaraza ya Ardhi na ya Kata).
- (c) **Rais amekasimiwa madaraka makubwa mno; kinadharia na kiutendaji, yuko juu ya sheria.** Aidha, kikatiba, Rais ni sehemu ya Bunge na, kama ilivyokuwa hadi leo, anaweza wakati huo huo kuwa Mwenyekiti wa chama chake ambacho ndicho papo hapo chama tawala!

5.2. KIAMBATANISHO B: MISINGI MIKUU YA MAONI/MAPENDEKEZO YA CPT KUHUSU KATIBA MPYA YA TANZANIA

UTANGULIZI

- 1.1 CPT, katika muktadha wa changamoto sugu na mapungufu katika Katiba ya sasa, inajenga Maoni yake kuhusu Katiba Mpya juu ya misingi ya kimaadili: Hii ni misingi inayotoa kipaumbele kwa Utu na, hivyo, kuzingatia maslahi ya kijamii; kulenga kila mwanajamii na wananchi wote, na hasa matabaka ya kipato cha chini na walio katika hali hatarishi; na kuwa na upeo mtambuka unaolenga mustakabali wa Taifa letu wenye kina na masafa marefu ya kijamii.**
- 1.2 Misingi hiyo, tukianza na hazina ya historia ya nchi yetu, inaainishwa na kufafanuliwa katika makundi mawili yafuatayo hapa chini, Masomo msingi kutokana na historia fupi ya nchi yetu changa, na maoni ya CPT kuhusu Misingi bora ya kuunda Katiba Mpya ya Jamhuri ya Muungano wa Tanzania ya leo na ya kesho.**

MASOMO MSINGI KUTOKANA NA HISTORIA FUPI YA NCHI YETU CHANGA

2. Mambo muhimu na ya kimsingi yanayotokana na historia yetu kwa kifupi ni kwamba Vipaumbele na kanuni-msingi za Katiba, sera, mipango-mikakati pamoja na sheria na kanuni tekelezi zake husika zilijengwa juu ya kutambua, kuheshimu na kuzingatia yafuatayo:

2.1 Mungu na Utu wa binadamu (*dignity of the human person*): Viongozi walitarajiwa kuwa wacha Mungu na/au watu wanaotimiza maslahi na mahitaji ya wale waliowaweka au kuwawezesha kushika nafasi za madaraka; kila mtu alitakiwa kuheshimu utu wa kila binadamu na imani yake pasipo ubaguzi asi wa aina yoyote. Hata hivyo, vifungu vya Katiba kuhusu Haki za Binadamu havikuingizwa ndani ya Katiba ya nchi mpaka mwaka wa 1984 (Mabadiliko ya Tano ya Katiba ya Muungano). Hata hivyo, vifungu husika vilikuwa na vipengele vilivyovifanya baadhi viheshimiwe tu bila nguvu ya kisheria ya kulazimisha utekelezaji wake na baadhi vitekelezwe kwa masharti yaliyotegemezwa kwa uwezo na ridhaa isiyodhibitiwa ya Dola. Haya ni baadhi ya mapungufu yanayolengwa na baadhi ya Mapendekezo ya CPT kwa Tume ya Kurekebisha Katiba ya Tanzania.

2.2 Maadili mema yalitakiwa kwa viongozi; na Taifa zima lilielekezwa na kuongozwa na uongozi wa kitaifa kuwa na mwelekeo/mtazamo adilifu (*The National Ethic*). Ilitegemewa wananchi wakemee, kupinga na hata kupiga vita mawazo na vitendo vyote vilivyo kinyume na miiko tuliyojiwekea kitaifa katika Katiba na sheria zetu. Pia, miiko hiyo ni pamoja na ile ambayo ni sehemu ya mapokeo yetu mema yatokanayo na dini zetu, mira, desturi na tamaduni zetu za jadi na za kisasa.

2.3 Uhuru, haki, umoja/mshikamano wa kitaifa na raia, wengi wao wakikabiliwa na umaskini, ujinga na maradhi, ni masuala yaliyopewa umuhimu wa pekee na kuufanya ufisadi na rushwa kupigwa vita kama sehemu ya adui wa raia na uhuru, haki na umoja/mshikamano huo wa kitaifa.

2.4 Amani ya kitaifa na kwa raia kama kiashiria cha uhuru, haki na umoja/mshikamano huo, imekuwa msingi muhimu wa kulijenga Taifa letu change lenye jamii mchanganyiko (*with a complex society*) na kulipa hadhi ya pekee katika Bara la Afrika na “Nchi za Dunia ya Tatu” na kwingineko duniani.

2.5 Watu/rasilmali watu kuwa ndio msingi na lengo kuu la Katiba, maendeleo, mipango-mikakati, sheria na kanuni tekelezi zake. Jambo hili liifanya siasa na mipango ya kitaifa kuwa na mvuto, sio tu kwa wananchi wa takriban matabaka yote, wazalendo na wafuasi wa siasa za mreno wa kushoto nchini, bali pia kwa watu wa nchi na sehemu nyingine za Afrika, ‘Dunia ya Tatu’, nchi za Kikomunisti/Kisoshalisti, Ulaya na Marekani.

2.6 Mipango-Mikakati ya Maendeleo ya Kitaifa ya Miaka Mitano Mitano (*National Five-Year Development Plans*) iliimarisha juhudi nyinginezo za kujenga Umoja na Amani kitaifa.

2.7 Vyivyo hivyo Mfumo wa kuwashirikisha wananchi kitaasisi au kimuundo katika utawala/uongozi wa nchi kwa njia na misingi ya kidemokrasia ya chama kimoja kuanzia nyumba kumi kumi hadi kitaifa.

2.8 Kuwa na dira na sera iliyothamini: uongozi bora, siasa safi ya watu wote, wakiwemo wanyonge, maskini na vikundi/jumuiya za walio katika hali hatarishi.

2.9 Dira, sera, siasa na msimamo wa kitaifa wa ujirani mwema kwa nchi jirani na nchi zote ulimwenguni.

2.10 Kumiliki ardhi kitaifa kupitia kwa Rais kama Mdhamini-Msimamizi Mkuu wake kwa masharti ya kuitumia kimaendeleo kwa kipindi maalumu Kinachoweza kuongezwa na kuilipia kodi kila mwaka.

MISINGI BORA YA KUUNDA KATIBA MPYA

3.1 Umuhimu na Nafasi ya Katiba katika Jamii yetu Mchanganyiko

3.1.1 Katika maisha yake, wakati unafika mtu anapojiuliza **yeye ni nani na nafasi yake ni ipi katika viumbe, maumbile na jamii yote ya binadamu**. Na haya yamejitokeza vile vile kijamii kwa karne na karne za maendeleo ya binadamu ya kisiasa, kiuchumi na kiutamaduni. Yalikuwa msingi wa maoni mbalimbali ya hekima na busara ya kibinadamu na, kwa mujibu wa **hulka yake**, katika historia ya starabu na tamaduni zake, amelishughulikia suala hili akitaka **kung'amua ukweli wa nafsi ya mtu katika jamii**. Kuhusu hili, tunaweza kuyakumbuka maonyo yasemayo **“Jitambue mwenyewe”** yaliyochongwa kwenye lango la hekalu kule Delphi.

3.1.2 Ni katika kutafuta na kutafakari kwa kina majibu ya kuridhisha na kukidhi kiu ya nafsi ya mtu kujua yeye ni nani, nafasi yake katika viumbe vingine, maumbile kwa ujumla na jamii yote ya binadamu kwamba binadamu anafikia kilele chake kwa **kugusa Imani ya Kidini inayomwelekeza kwenye ung'amuzi wa uwepo wa Muubaji, Mungu**.

3.1.3 Mungu anaonekana kuwa asili ya kila kilichopo, kama ambaye anawahakikishia wanaume na wanawake, **wanaoishi kwa utaratibu katika jamii, hali ya msingi ya maisha, akiwapatia mema yote yaliyo ya lazima**. Lakini pia, kwa upande mwingine, Yeye anaonekana kuwa kama **kipimo cha kila kinachotakiwa kuwa**, kama Yule ambaye anahoji matendo ya binadamu – yawe ya kibinafsi au ya kijamii – kuhusiana na mema hayo hayo, **katika mahusiano na watu wengine**. Kwa hiyo, katika kila mang'amuzi ya kidini, **umuhimu ni katika sehemu ya zawadi na majitoleo na, hivyo, kwamba binadamu huishi pamoja na wengine duniani**.

3.1.4 Pia, kutokana na hali hiyo, mang'amuzi hugusa **dhamiri ya binadamu inayomtaka kutunza kwa uwajibikaji pamoja na wengine zawadi iliyopokelewa**. Ukweli huo unashuhudiwa na utambuzi wa wote wa **kanuni kuu** inayoelekeza kuhusu mahusiano ya watu, yaani ile amri iliyoagizwa kwa

watu wote na Fumbo la kinabii: “Basi yoyote myatakayo mtendewe na watu, nanyi watendeeni vivyo hivyo” (Mt 7:12).

3.1.5 Kupanuka na kukomaa kwa mang’amuzi ya aina hiyo hiyo ndiyo yanawafanya watu **kuishi kijamii, katika makudi yanayounganishwa sio tu na mizizi ya kidamu-kifamilia, bali pia na maslahi ya kisiasa, kiuchumi, kitabaka na kiutamaduni.** Na hapa ndipo tunaona uhusiano uliopo kati ya maelezo haya ya kinadharia-kifilosofia na **suala la Mchakato wa Kurekebisha Katiba au Kuunda Katiba Mpya ya nchi yetu.**

3.1.6 Katika **hali ya mchanganyiko** wa kijamii-kiuchumi (*state of socio-economic complexity*) tuliyoelezea hapo awali (aya Na. 2.2.2.1.2), tunapaswa kutumia Mchakato wa Kurekebisha Katiba wa sasa kama fursa ya aina yake ya kutuwezesha kupata **Katiba Mpya itakayokuwa chombo madhubuti na mwafaka kabisa cha kutuunganisha, kutuongoza na kutuwekea misingi bora na imara zaidi kuliko ile ya sasa. Tulenge kuunda Katiba ya kuhakikisha kuwa kuna ‘kutunza kwa uwajibikaji pamoja na wengine zawadi iliyopokelewa’ kutoka kwa waasisi wa nchi yetu.** Bali, hii iwe ni **pamoja na kuiboresha** ile ya sasa kwa kuondoa au kurekebisha kasoro zote na kujaza mapengo yote ipasavyo na kwa njia mwafaka kwa ajili ya kizazi chetu **huku tukizingatia umuhimu wa kutunza, kwa uwajibikaji pamoja na wengine, yaliyo bora katika zawadi hiyo iliyopokelewa, kwa ajili ya vizazi vijavyo.**

3.2 Walengwa na Malengo Makuu ya Katiba: Kwa nini Katiba Mpya?

3.2.1 Msingi huu unabeba masuala ya kimsingi kadhaa. **Maswali matatu mafupi** lakini ya kimsingi sana ya kujiuliza hapa ni kama ifuatavyo nasi tutajaribu kuyajibu kwa lugha ya kawaida ili tueleweke kwa urahisi: (a) Katiba kimsingi ni nini? (b) Katiba ni ya nani au kwa maslahi ya nani (dira yake na walengwa/malengo yake ya msingi ni nini)? (c) Kwa nini Katiba Mpya (sababu kuu kimsingi ni nini/zipi)?

3.2.1.1 Katiba kimsingi ni nini?

(a) Jibu kwa swali la kwanza linahitaji jibu kwa swali la pili. Hivyo, tuanze na la pili: Katiba, kwa maana ya jambo lihusulo jamii ya binadamu, ni dhana ambayo imeelezwa, kufafanuliwa na kuchambuliwa na wataalamu wengi hasa wa mambo ya katiba na ya siasa. Kulingana na uelewa wetu, dhana hii inahusishwa na maamuzi ya kimsingi ya watu katika kundi, jumuiya, jamii au nchi fulani juu ya namna ya kujipanga, kuishi na

kuendesha mambo yao maalumu kwa madhumuni na malengo fulani yanayoongozwa na dira na wito/utume waliojiwekea. Kwa wahusika hao, ni wao wenyewe wote **katika ujumla wao, licha ya tofauti zao au kati yao**, mmoja mmoja na katika makundi yao mbalimbali. Pamoja na tofauti na migawanyiko yao hiyo, wahusika huyapa **kipaumbele cha juu kabisa yale mambo** na masuala muhimu na ya kimsingi **yanayowaunganisha katika umoja unaowawezesha kufanikisha malengo makubwa yaliyo muhimu na ya lazima kwa usalama, uimara na/au maendeleo yao kwa kipindi/wakati husika**. Hivyo, wao huona kuwa ni **kwa kuwa pamoja na katika umoja wao huo wanaweza kumudu na kukidhi madhumuni na malengo yao husika yenye kuzingatia maslahi ya kila mmoja wao na ya wao wote kwa wakati/kipindi husika na labda hata baadaye**.

(b) Kwa mtazamo huu, tunaweza kusema kuhusu swali la kwanza kwamba katiba ama ni andiko maalumu, maelewano muhimu (*important popular/common understanding/undertaking*), au mkataba wa kijamii au hata utamaduni, mira na desturi ambazo kwazo wahusikao wameamua kwa dhati na hiari kuifuata na kuizingatia katika mambo yao ya maendeleo ya kijamii (katika siasa, uchumi, haki/sheria, na utamaduni).

(c) Kumbe, kwa lugha ya kawaida, **katiba** ni dhana ambayo inamaanisha **majumuisho (summation) mwafaka ya mambo muhimu na ya msingi yanayokubaliwa au yanayokubalika kwa watu wenye tofauti kati yao katika mambo mengine fulani fulani ambayo wanaamua kuyaweka kando au umuhimu wa muungano wao unayafanya yanayowatofautisha yawekwe kando**. Majumuisho hayo huwa ndio **Mwongozo wao mkuu na mwafaka** na kila mwanajamii huyajua maudhui yake yote muhimu, ikiwa ni pamoja na maadili yake mema ya kimsingi.

(d) Katika hali hiyo, wanaona kuwa wanaweza kuishi na kufanya kwa **tija** mambo ya **maendeleo yao ya pamoja kwa manufaa na maslahi yao wote na ya kila mmoja wao**. Bila kuwa na umoja na muungano huo kama nyenzo yao maalumu ya kijamii iitwayo katiba, wanatambua fika kuwa mambo yao hayo yasingefanywa au hayawezi kufaulu kiendelevu kwa tija bali ama kwa shida kubwa au pasipo mafanikio wanayotaka au wanayohitaji.

3.2.1.2 Katiba ni ya nani au kwa maslahi ya nani (dira yake na walengwa/malengo yake ya msingi ni nini)?

(a) **Dira yake inatawaliwa au imejengwa kwa dhamiri gani na kwa ajili ya nani?** Kwa lugha nyingine, je, ni dira na mwelekeo wa ubinafsi/umimi wa kundi la wachache wenye nguvu na mali au ina mtazamo wa maslahi ya

walengwa/wadau husika wote katika ujumla wao na kila mmojawapo (*is its vision and general goal one for selfish ends of a few rich and powerful or for the interest of each and the common good of all stakeholders*) na hasa wanyonge na walio katika hali hatarishi? Je, Mungu na jirani wana nafasi gani katika dira hiyo na mwelekeo pamoja na walengwa wake hao? Je, upeo wa dira unaishia kwa maslahi finyu ya wadau wenyewe tu au pia inazingatia yale ya jirani (watu, makundi, jumuiya, jamii na nchi nyingine zenye mapenzi mema)? Huu ndio upeo wa swali letu la pili.

(b) Maadili mema ambayo kwayo katiba inaweza kuwa na manufaa endelevu kwa waasisi wake na vizazi vyao ni yale yanayoelekeza dira na walengwa wa hiyo katiba kwa **Utu** (*the human person*): **Watu wote wahusikao, na hasa wanyonge kati yao; hivyo, kila mmoja wao; na kwa ajili ya Mungu na jirani** (*has a genuine humanist and internationalist orientation or vision and mission*).

(c) Katika kupitishwa na baadaye katika kutekelezwa kwake, sharti **walengwa wake ndio wawe wategemewa halisi wa kwanza na wa mwisho**, sio wale wenye mamlaka na nyadhifa za uongozi kwani hawa ni **watumishi** wa walengwa hao. **Hili la utumishi (ulio adili) sharti**, katika katiba, **lipewe maana halisi** ambayo iko **wazi na bayana**. Katiba sharti **iagize utekelezaji wake kwa vyombo maalumu vya kikatiba vyenye mamlaka pamoja na uwezo wa kuwawajibisha watovu wa nidhamu na maadili ya utumishi huo wa kikatiba ama kwa mujibu wa katiba yenyewe au sheria na kanuni zinazotekeleza maelekezo ya katiba hiyo**.

(d) Je, **msingi mikuu na muhimu yenye kuzingatia dira na madhumuni husika ni ipi?** Katiba inayozingatia **dira inayoongozwa na maadili mema sharti izibe mianya yote na fursa zote za ubaguzi asi na ukandamizaji wa raia au baadhi yao, makundi, jamii na asasi zenye madhumuni na malengo mema na mwafaka kwa nchi, jamii, jumuiya au taasisi husika**. Misingi hiyo ni **Ukweli, Uhuru, Haki, na Mshikamano/Umoja** na ambayo, kwa ujumla wake, **kimuundo na kimchakato**, huzaa **Amani** ya *kweli, utulivu na maendeleo ya kijamii (kisiasa, kiuchumi na kiutamaduni) kwa nchi, jamii, jumuiya au taasisi husika*.

(e) Tunasema 'kwa ujumla wake, kimuundo na kimchakato' kwa kumaanisha kuwa haya ni mambo ambayo yanapaswa kujitokeza katika katiba pamoja na sheria na kanuni tekelezi zake (hivyo, **kimuundo**); na katika **mchakato** wa **kiutawala** (bungeni, mahakamani na serikalini), **kiuchumi** (sheria na kanuni muhimu za kuendesha biashara na shughuli za viwanda,

uchimbaji wa madini, kilimo, ujenzi na miundombinu, ukandarasi, uvuvi, nk. na taaluma [*professions*] zake husika), **kiutamaduni** (sheria na kanuni za kuendesha elimu na mafunzo dunia, ikiwemo mitaala ya **maadili** mema), **na kimahakama** (taratibu na maudhui ya utoaji na utekelezaji wa haki kwa mujibu wa maamuzi ya kimahakama katika kesi za aina zote – jinai, daawa, mikataba – na taratibu za aina zote – patanishi/suluhishi, shindanishi). *Katika haya yote, inapasa misingi, kimaadili, ya Ukweli, Uhuru, Haki, na Mshikamano* izingatiwe kwa dhati, kwa dhamiri iliyo wazi, ili **Amani na maendeleo** ya kila mtu na watu wote, na hasa wanyonge na walio katika hali hatarishi kijamii, kiuchumi, ki-haki na kiutamaduni, yajiri kihalisia.

3.2.2 Kwa nini Katiba Mpya (sababu kuu au kimsingi ni nini/zipi)?

3.2.2.1 Wananchi wameonyesha wazi kutaka mabadiliko ambayo yataweza **kujibu kero na changamoto zinazowakabili** katika maisha yao na kama Taifa. Hasa changamoto ambazo zimeonekana hazina ufumbuzi katika **mfumo wa utawala uliopo** na zinaelekea kukatisha tamaa wananchi walio wengi.

3.2.2.2 Hadi 2005 Katiba ilikuwa imeishafanyiwa **Mabadiliko 14** lakini yote yamedhihirika kuwa kama **viraka vipya kwenye nguo kuu kuu**. Hii ni kwa sababu kimsingi Katiba ya sasa iliundwa kwa **msingi na malengo ya mfumo wa utawala wa chama-dola kimoja** (chama kimoja kilichoshika hatamu zote za kiutawala kisiasa, kiuchumi na kiutamadudi). Mabadiliko yaliyofanywa kuanzia mwaka 1992 kuzingatia **uwepo wa vyama vingi vya siasa na, hivyo, siasa/itikadi na sera mbadala za kijamii na kiuchumi**, yamejenga imani na matumaini ya maendeleo bila kurekebisha misingi ya kikatiba na kuwaweka wananchi katika nafasi yao stahiki.

3.2.2.3 Alama za nyakati zinaonyesha hasira ya jamii kwa sababu wananchi walio wengi wanaona mambo mengi hayaendi vizuri. Kwa hiyo, inatakiwa **Katiba itakayoweza kuleta mabadiliko yatakayokuwa msingi wa kurekebisha hali hiyo**, kwa kujibu kero na changamoto ambazo zimekuwa kikwazo kwa maendeleo ya Watanzania wengi na pia kuathiri tunu ya amani katika nchi yetu.

3.2.2.4 Katiba inaainisha **mamlaka ya wananchi**; kwa hiyo, haitoshi tu kuwa na Katiba nzuri. **Ni lazima pia iwe Katiba inayotekelezwa** katika maisha ya kila siku ya raia na Taifa. Ikiwa ukiukwaji unatokea, basi, mfumo uwepo wa kulazimisha, kwa mujibu wa sheria, Katiba kutekelezeka kwa **kuwajibisha** mhusika/wahusika wa ukiukwaji huo.

3. 3 Kutambua Ukuu wa Mungu

3.3.1 Ingawa nchi yetu kikatiba na, hivyo, kisheria, haina dini, watu wake walio wengi wana imani na itikadi za kidini na huishi kwa mujibu wa imani na tamaduni za dini zao husika. Wengi wanasadiki katika uwepo wa Mungu na uweza Wake juu ya vitu na mambo yote ya duniani na Mbinguni kwani Yeye ndiye Muumba wake.

3.3.2 Wimbo wa Taifa letu na Dua linalotumika kufungua rasmi vikao vya **Bunge la Muungano** na Dua kwa ajili kama hiyo kwa upande wa **Baraza la Wawakilishi la Zanzibar** zinamtaja wazi wazi **Mungu/Allah** kwa sifa, heshima, na tuzo; na kwa imani, matumaini na upendo wa **kiibada**.

3.3.3 Licha ya ukweli huo wote, Katiba ya nchi yetu haimpi nafasi yoyote Mwenyezi-Mungu, iwe katika maudhui au Utangulizi wake. Katika **Katiba za nchi kadhaa Barani Afrika** Kusini mwa Jangwa la Sahara (Ghana, Uganda, Kenya, Afrika ya Kusini), Mungu anatajwa kwa heshima stahiki kwenye sehemu ya Utangulizi wa katiba hizo na inapendeza na kushabiiana na nyimbo za kitaifa na dua za kufungua mabunge yao husika.

3.3.4 Wakati umewadia kwa Katiba ya Muungano wa Tanzania kumpa Mungu heshima stahiki kama hiyo angalau kwenye **Utangulizi (Preamble)** wake mithri ya katiba za nchi nyingine jirani na nyinginezo. Nchi hizo pia zina katiba za kisekula kama Tanzania; kwani kumtambua na kumtaja Mungu kwa heshima stahiki katika **Utangulizi wa Katiba** hakuipi dini au dhehebu lolote la kidini nafasi au hadhi teule au maalumu katika Katiba; bali kuna faa sana na ni adili.

3.4 Maadili na Njia Madhubuti za Kuyajenga na Kuyalinda

3.4.1 Umuhimu wa maadili mema ni wa kimsingi kiasi kwamba ingefaa sana **utambuliwe na kuwekewa misingi na vigezo vyake katika Katiba Mpya:** Maadili katika uongozi ni suala linalotugusa na kutuhusu sisi wenyewe kwanza – si la kuwahusu tu na kuwanyooshelea kidole watu wengine. Linaanzia kwa kila mtu mzima na mwenye akili timamu, kila familia, Jumuiya, pamoja na kila shirika, taasisi na asasi za kiuchumi, kijamii na kiutamaduni zikiwemo za kidini (Kanisa, Msikiti, Hekalu/Pagoda) na za dola (Serikali, Bunge, Mahakama) na hata taasisi na mashirika ya kikanda (AU, SADC, EAC) na kimataifa (UNO, IBRD, IMF, na taasisi zake, ILO), n.k.

3.4.2 Katika ngazi zote hizi, yapasa kujiuliza **maswali ya kimsingi, ambayo ni ya kimaadili: Je, ni lipi lililo bora, ‘Yarabi nafsi yangu!’ au ‘Nimpende (na kumheshimu) jirani kama nafsi yangu’?** Usipowekwa uwiano huo wa upendo (na heshima) na badala yake ukapewa kipaumbele umimi/ubinafsi uliokithiri, wenye chuki na dharau kwa ‘jirani’, pasitarajiwe amani na utulivu bali vurugu na mtafaruku wa kijamii. Hii ndiyo sababu ya akili na uzoefu wa kawaida kuonyesha kuwa **watu wenye mapenzi mema na walio wengi** na kwa

kiwango kikubwa hupendelea kukaa katika hali ya mahusiano ya uwiano wa namna hiyo ya upendo na, hivyo, **kuvuna matunda yake (amani na utulivu wa kijamii).**

3.4.3 Kwa hiyo, hapana budi **Katiba Mpya kuundwa kwenye mawazo ongozi ya kimaadili na kuitaka sheria ya uongozi na kanuni za maadili kuwa na masharti na/au vigezo vilivyobainishwa katika Katiba, na hatua madhubuti za kiutekelezaji, uwajibikaji, uwajibishaji na uwajibishwaji wa walengwa wa sheria hiyo na waratibu/wasimamizi wa utelezaji/uwajibikaji, uwajibishaji na uwajibishwaji huo.**

3.4.4 Katika hali hiyo, tutaweza kujihakikishia matunda bora ya Mchakato wa sasa wa Kuunda Katiba Mpya ambayo ni rasimu ya Katiba ya Jamhuri ya Muungano wa Tanzania yenye maudhui bora kuliko ya sasa.

3.5 Uzalendo Dhidi ya Ubinafsi

3.5.1 Pia, Maoni na Mapendekezo yetu haya, yanasisitiza umuhimu wa kuwa na Katiba ambayo imejengwa kwa, na ili nayo iweze yenyewe kujenga au kuweka msingi bora wa, mtazamo na mwelekeo wa **wananchi na viongozi wao kuona na kujihisi salama katika nchi moja inayoshughulikia ustawi wao wote na hasa/hata wanyonge na walio katika hali hatarishi.** Hali hiyo inaweza kujengeka kutokana na kujenga, kuimarisha na kuendeleza shughuli za kisiasa, kiuchumi na kiutamaduni nchini **kiadilifu chini ya Katiba isiyoruhusu mianya ya madaraka yasiyo na misingi, vigezo wala kikomo mwafaka katika kuyatumia.**

3.5.2 Katiba iweze kuwajibisha, kutoa madaraka na taratibu za kuyaratibisha pamoja na kuweka misingi lazimishi na wajibishi ya kutathimini utendaji wa wanaowajibika, wanaowajibishwa na wanaowajibisha, kwa kanuni mwafaka za kisheria zinazotekelezeka kwa njia zote ndani ya muundo rasmi wa Dola (kisiasa, kiutawala na kisheria/kimahakama). (Ang. Kiambatanisho B)

3.6 Kuhimiza Udugu, U-jamaa/Upendo *(Brotherhood, Familyhood/Charity)*

3.6.1 Tunaweza kuwa na kumbukumbu asi ya enzi za sera za *Azimio la Arusha* (1967-1986), hasa hali ya kiuchumi ilivyogeuka na kuwa mbaya sana tangu 1973/74 kutokana na mgogoro wa mafuta Mashariki ya Kati uliosababisha bei za bidhaa kutoka nje kupanda sana. Vitu vikawa adimu na kupatikana kwa taabu na adha kubwa, urasimu ukakithiri chini ya siasa ya 'Chama kushika hatamu za kidola', nk.

3.6.2 Hata hivyo, siasa ya Ujamaa na Kujitegemea iliyotokana na *Azimio la Arusha* na sera husika zilizo tekelezwa kwa mujibu wa sheria kadhaa, iliibua aina ya **moyo wa udugu** tunaozungumzia hapa. Sio tu kwamba **watu** walitakiwa kuitana “Ndugu”, lakini pia, walio wengi vijijini na mijini, **walijihisi na kutendeana hivyo** katika huduma na mahusiano ya kawaida ya kijamii. Hii ilikuwa hivyo licha ya uduni wa huduma hizo kadiri ya muda ulivyopita, uchumi kuyumba na maadili kumomonyoka kutokana na hali hiyo mbaya kiuchumi na kiurasimu.

3.6.3 Mchakato wa Katiba au Kuunda Katiba Mpya wa sasa unatoa fursa kwa wananchi kujiwekea taratibu kikatiba za **muundo** utakaowahakikishia kwamba, hapo Katiba Mpya itakapoanza kutumika, **wao ndio watakuwa na kauli ya mwanzo na ya mwisho katika masuala muhimu ya kisiasa, kiuchumi na kiutamaduni. Udugu wao** unaweza tu kulindwa katika **mfumo wa kikatiba** unaowapa hadhi hiyo **kikatiba na kisheria** na si vinginevyo.

3.7 Kwa kuzingatia misingi mikuu hiyo hapo juu, CPT, kwa heshima na unyenyekevu, ilitoa Maoni yake kwa Tume ya Kuunda Katiba wakati mwafaka mwaka Novemba, 2012.

5.3 KIAMBATANISHO C: OPEN-ENDED FEATURES IN CONSTITUTIONALISM AND CULTURAL ATTITUDES IN EAST AFRICA

OPEN-ENDED FEATURES IN CONSTITUTIONALISM AND CULTURAL ATTITUDES IN EAST AFRICA: Basis for Prevalence of Corruption, Poor Public Servants' Responsibility, Accountability and Public Services Delivery?

By Josaphat Laurean Kanywanyi*

1. GENERAL INTRODUCTION

'It is easier said than done!', says an old adage. The title of this paper sounds judgmental and conclusive. It should, rather, be understood to be largely hypothetical. That is why there appears a question mark at the end of its parenthesized aspect. Still, the main heading is assertive: It patently asserts that the Constitutions (and related legal systems) as well as peoples' cultural attitudes in East Africa bear 'open-ended features' which, presumably, form the basis for the indicated adverse socio-economic effects. That assertion calls for some explanation regarding its meaning at the very outset of the presentation as it is also, indeed, the main focus of the paper.

'Open-ended features in constitutionalism' is meant to describe a **phenomenon of constitutions and their related implementing principal and subsidiary legal instruments** which prescribe what should ("shall") or "may" be done without always indicating:-

- a) **The goal(s) to be attained and, where necessary or appropriate, the time frame and relevant quality and quantity for each aspect in question;**
- b) **The criteria, principles, values, standards and/or rules to be observed and to form the objective basis for monitoring and evaluation of implementation steps;**
- c) **The state person, authority, organ or body corporate who/which specifically bears the responsibility for necessary action in respect of what is prescribed or allowed to be done;**
- d) **The state person, authority, organ or body corporate who/which is to play the role of supervisor/over-seer, monitoring and evaluation;**
- e) **The sanctions for default(s) in implementation or for non-implementation, and the state person, authority, organ or body corporate to play the role of applying them once the supervisory/over-sight, monitoring and evaluation state person, etc. has played his/its part and reported default(s); and**

- f) **The sanctions for default(s) by the supervisory/over-sight, monitoring and evaluation persons, etc. in (d) and (e) and the way and/or state person, etc. to effect them: Everything in (d) – (f), ought, of course, to be done with due diligence and in accordance with due process.¹**

The lack of some, if not many, of the above-enumerated points is a weakness that may partly explain the generally observable slow progress in the political (democracy-in-practice) and socio-economic spheres of the respective Partner States and the sub-region as a whole. This, as will soon appear in this paper, is partly and primarily due to that condition in respect of the Partner States and, consequently, also now partly because of the existence of the same flaw in the Treaty and Protocols of the EAC as well.

‘Open-ended features in cultural attitudes’, on the other hand, is meant to depict a **social-cultural-ethical phenomenon** in each Partner State and, hence, in the sub-region as a whole **of cultural environmental attitudes which foster, tolerate, encourage or ignore and, thus, perpetuate non-abidance by progressive general policies and related legislation, due diligence in public service as well as due process in policy, administrative and legal decision-making and implementation by over-seers, executives, judicial and/or quasi-judicial officers, and operatives**. This tends to happen in public offices, authorities, and organs, on the one hand, and, on the other, formal or regulated private business enterprises particularly where and when it does not have direct or immediate adverse/severe consequences on the people concerned.

For instance, there is a tendency to defend or protect politically, instead of allowing proper legal steps to be taken in due process and with due diligence against, individual personalities who are alleged to be defaulters in their performance of public service duties. Such defence may, for example, be on the basis of mere familiarity with the defaulter(s), or that the defaulter(s) belong(s) to the same ethnic, cultural or religious community, political ideology, orientation or affiliation as that of the defending supporters who may be many and/or politically powerful or influential.²

In short, this is what may be referred to as a tendency to commit the **social-political-legal fault (social ‘sin’)** of unprincipled favouritism in disregard of legality meant to promote and enhance the interests of

¹ Since writing the original draft of this paper, the present author has had an advantage of reading a paper entitled “The Ineffectiveness of the Tanzanian Accountability Framework” ‘by *Sikika*, July 2011’, Dar es Salaam. While the paper envisages financial accountability *per se*, its basic concept and rendition of “The Tanzanian Accountability Framework” are interesting reading in relation to the present paper. The basic concept envisages principles of (i) transparency by the concerned, (ii) answerability by the agent, (iii) controllability of the agent, (iv) independence (of the monitoring body vis-à-vis the monitored agent), and (v) reporting (by the monitoring body to the agent “before being able to question and eventually sanction the agent”). *Ibid.*, pp. 4-5. One of the major flaws in the system is well captured by the following observations: “The provisions of the law do not give power to the National Assembly to hold the CAG [Controller and Auditor-General] accountable for his/her failure to execute proper implementation of his/her duties or to wilfully produce and submit inadequate information. Therefore, even if the CAG misrepresents the information or fears or favours anyone or otherwise, s/he can still be safeguarded by the provisions of [s.] 11(7) of the Public Audit Act (2008) which assigns the CAG complete discretion on whether and how the audits are carried out. Therefore, the CAG’s reports are unquestionable and unchallengeable responsibilities, but it is the government which is questioned and challenged about the contents of the CAG report.” *Ibid.*, p. 14. This is characteristic of corresponding legislation in the other Partner States except, perhaps, to some extent, Kenya (see and cf. Ar.229 (4), Constitution of the Republic of Kenya, 2010).

² See the reference and related quotation in the text under Note 5 *post*, which, though found belatedly, perfectly supports these and other observations made thus far and hereinafter.

each and of all in the society or community of a given country, sub-region or region (the common good). It is a case and **function of cultural environments** in which the level of literacy, political experience in democratic practice and rights-enforcement by due (judicial, political and administrative) process is low; in which political and civil society organizations are still young and/or weak, and the private news media are weak in professionalism (technical knowledge, experience and skills) or censored. **The said environments tend to allow, encourage and/or tolerate great latitude in laxity, inefficiency and ineffectiveness of government, and consequent misallocations and misuse of public resources and abuse of office and power contrary to law** (including codes of ethics and discipline which tend to be discriminately applied) as well as general constitutional order and good governance.

These two sets of phenomena may take many pages and hours to describe, analyse and illustrate with literary material and field research data in order to convincingly establish their respective authentic veracity to an audience. But that would be necessary if one were to address an audience not quite familiar with what the phenomena described above are all about in theory and in practice. What one may observe on the subject within the East African sub-regional setting may, however, be found to obtain, to a certain degree, in so many other countries and sub-regions, including even where one may happen to be or to come from. This, as a subsidiary hypothesis at any rate, gives some relief to the author of this paper, who is not really an expert in constitutional law matters, in his effort to make a modest presentation of the subject within the limited time frame allocated to him for its preparation and subsequent delivery at Bayreuth.ⁱ

The paper focuses on the open-ended features which are characteristic of constitutionalism and cultural attitudes in East Africa (the East African Community Partner States of Kenya, Tanzania, Uganda, Rwanda and Burundi severally and, under the Treaty, jointly) as an hypothetical principal basis for the prevalence of corruption, poor public servants' responsibility, accountability and public services delivery in the sub-region: It is an hypothesis because its authentication cannot be provided here and now although some illustrations of such open-ended features can be and are given or cited.³ Reliance is principally made on some public reports and generally known information, statutory instruments, parliamentary sources, books and other literary materialⁱⁱ as well as the author's personal experience.

"Prevalence of corruption" is intended to be a wide encompassing phrase that describes both **institutional, systemic or inbuilt defects in constitutional and other related legal (substantive and procedural) provisions (bearing unlimited powers to individual officials)⁴ and resultant practices.** It also covers personal corrupt practices by public servants involving bribery; forgery; misuse, abuses, failures and negligence or laxity in the use of **public office, positions and resources for unauthorized or**

³ It is considered unnecessary to take illustrative instances from *The Treaty for the Establishment of the East African Community (EAC)*, East Africa Community (EAC), Secretariat with GTZ, 2000, Arusha, Tanzania, which is replete with open-ended provisions, because that instrument itself inherently requires ample flexibility. This is due to the need for ratification procedures necessarily involved in its entering into force, as *per* Art. 152 thereof and the implementation of its provisions by the respective Partner States.

⁴ Prof. G. Mgongo Fimbo, in a manuscript titled "Combating Corruption in Tanzania: Analysis of Legislation Enacted During the Year 2001", p. 1, adopts Klitgaard's following (paraphrased) 'mathematical definition of corruption' for the purpose of his paper: 'C=M+D-A where C stands for corruption, D for discretion, M for monopoly A for accountability. According to [Klitgaard], whether [an] activity is public, private or non-profit and [wherever] it is carried out ... one will tend to find corruption when the first person or organization has monopoly power over a good or service, has the **discretion** to decide who will receive it and how much the second person will get and the first person or organization is **not accountable**. ...'. (Emphasis supplied.) See and *cf.*, Klitgaard, R. "Corruption as a System," in *The Next Stage of Anti-Corruption, Special Report*, by Kaufmann, D., *ibid.*, p. 17. It is also adopted for the present paper. See also the quotation in respect of Note 5 *post*.

illegitimate personal interests. There is also the aspect of corrupt practices engaged in by **members of the public among themselves** (own and neighbour's child abuse, acts of cruelty to other persons in vulnerable circumstances, taking law into one's own hands, etc.) **and towards public property and officials** (damage to, destruction, theft, pilferage and/or adulteration of communal and/or public property; bribing of officials).

As one generally knows and understands, humans are naturally and inherently corruptible since their respective inner selves are characterized by attributes of 'good-and-evil' inseparably bound up together. While the 'good' continuously contends with the 'evil' aspect for dominance of each individual's character and *vice-versa*, the quantity and quality of daily 'good' or 'evil' thoughts and deeds or actions (of commission and omission) of the individual greatly influence the general and daily outcome of that incessant internal contest in both quantity and quality.

By way of extension, one can make similar observations about society and its institutions. The general inner ethical character of a society as well as, therefore, the ethical foundations, basic values and principles of its main institutions may be seen as a function of cumulative 'good' and 'evil' thoughts and deeds or actions of its individual members and especially leaders as well as those of its institutions. All these are performed in the course of the dynamics of the processes of historical time and space. Its cultural attitudes and the general behaviour of its leaders, therefore, stem from and are influenced by the same foundations, values and principles as well as those circumstantial dynamics.

It is thus befitting to conclude this Introduction with the following belatedly found summary observations on the institutional-societal foundations of corruption and its consequences:

In general terms, corruption arises from **institutional attributes** of the state and **societal attitudes** toward formal political processes. Institutional attributes that encourage corruption include wide authority of the state, which offers significant opportunities for corruption: minimal accountability, which reduces the cost of corrupt behavior; and perverse incentives in government employment, which include self-serving rather than public-serving behavior. Societal attitudes fostering corruption include allegiance to personal loyalties over objective rules, low legitimacy of government, and dominance of political party or ruling elite over political and economic processes.⁵

Such, in short, is the philosophical basis of the theme of this paper. The rest of the presentation assumes that the reader will appreciate what is presented in here against the background of all the foregoing general observations.

Besides Section 1 which is the Introduction, the paper is divided into four other sections. Section 2 examines briefly, for illustrative purposes, the open-end features of Constitutionalism in East Africa by looking at a number of the Partner State constitutions' and related implementing legislation's provisions, which demonstrate the type of gaps and shortcomings enumerated above. The open-endedness of cultural environments and probable attitudes in the sub-region is adumbrated in Section 3

⁵ USAID: *A Handbook on Fighting Corruption*. Development Report 1997, p. 3. Emphasis in the original. www.usaid.gov/policy/ads/200/crpthdbk.pdf

with some citation of illustrative historical and contemporary instances derived from literary sources and the present author's personal experience. On the other hand, in Section 4, an attempt is made to broach the issue of open-ended constitutionalism and cultural attitudes in East Africa as a basis for the prevalence of corruption, poor public servants' responsibility, accountability and public services delivery. Section 5 contains brief general observations in lieu of a conclusion. The account in each Section is brief to obviate an unduly lengthy presentation without added real value in variety of illustrative instances.

2. THE OPEN-ENDED FEATURES OF CONSTITUTIONALISM IN EAST AFRICA: Gaps and Loopholes which Allow Irremediable Derogations and Indefinite Defaults

2.1 Opening Remarks and Observations

De Smith's descriptive definition of constitutionalism, though characterized as being "firmly set in a western liberal democratic mould" by John Hatchard *et al.*⁶ and " ... 'minimalist' by one of Africa's most distinguished academic lawyers ...", still, in the present author's humble opinion, bears some basic truth which should neither be ignored nor belittled. Thus, although the present author, being neither one of "Africa's most distinguished academic lawyers" nor an expert in constitutional theory and/or practice, does not wish to get entangled in a critique of any view on the subject, he nevertheless agrees with de Smith when he says:

The idea of constitutionalism involves the proposition that the exercise of governmental power shall be bound by rules, rules prescribing the procedure according to which legislative and executive acts are to be performed and delimiting their permissible content – Constitutionalism becomes a living reality to the extent that these rules curb the arbitrariness of discretion and are in fact observed by the wielders of political power, and to the extent that within the forbidden zones upon which authority may not trespass there is significant room for the enjoyment of individual liberty.⁷

The account on the gaps in the constitutional and implementing legislative instruments in this paper, to a large extent, bears witness to the criticized viewpoint of de Smith quoted here. The critical characterization "as 'minimalist' ... noting that western constitutionalism was often argued to be representative of a foreign element which had no place in African tradition, history or practice...", is, from an academic point of view, both curious and, yet, interesting especially when, in elaborating the criticism, the account adds: "This latter perspective led to a 'developmental' argument in favour of authoritarianism: no fetter should be placed on the exercise of state power in the interests of the development of the masses. ..."⁸

The curiosity arises from the fact that the argument by 'developmental' authoritarianism advocates and political practitioners of it based on the claim that "western constitutionalism was often argued to be representative of a foreign element which had no place in African tradition, history or practice" might

⁶ *Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern Africa Perspective*. Cambridge University Press: Cambridge, New York, Melbourne, Cape Town, Singapore, Sao Paulo, 2004; pp. 1-2.

⁷ Cited *ibid*, p.1. The original source is S. A. de Smith, *The New Commonwealth and its Constitutions*, London, Stevens, 1964, p. 106.

⁸ *Ibid.*, p. 2.

have been swallowed bait, hook and line by an accomplished academic as though it were sacrosanct! Indeed, one may, rhetorically, ask whether Western constitutionalism is the only “foreign element which had no [such] place ...”?!

Interesting, because, Western constitutionalism accompanies Western capital- dominated socio-economic bases as concomitant and necessary superstructure in former colonial possessions and most of the dependencies of Western Powers, especially in the absence of direct colonial control. Moreover, the so-called African tradition, history or practice, in general historical perspective, is by no means unique to Africa or at all static.⁹ It may be generalized in terms of historical epochs of socio-economic development as understood today and similar instances of it are still visible especially in Asia, Latin America, Oceania, and among Native Americans – so-called Red Indians. The process of colonial domination in the political, economic, legal and cultural-ethical spheres was bound, as historical records of former times in Europe itself clearly show,¹⁰ to erode and imperceptibly transform local traditions, histories or practices everywhere and orientate them towards Western constitutionalism.¹¹ Interestingly, Western constitutionalism itself was, in turn and on its part, positively affected by its imperial acquisitions, domination and exploits of these other places, regions and continents – a matter one cannot address in a paper of this kind but is historically verifiable.¹²

Centuries ago, Western Europe itself went through some stages of what still persists in these other places. Who does not know of or recall the episodes of the Mercantilist era and its ‘benevolent absolute’, despotic and/or authoritarian monarchs, kings and emperors as well as country-inward-looking and protectionist traditions, history or practices?!¹³ The tendency to manipulate modern (western) constitutionalism in Continental Europe itself in the first half of the 20th Century,¹⁴ and even till today in some of the former ‘Communist Bloc Countries’ in favour of totalitarianism was and is still demonstrably manifest. One wonders whether that alone should necessarily belie the general argument and basic truth (and value) in de Smith’s descriptive definition of ‘western constitutionalism’.

Since, however, presumably, all this may have missed the gist of the whole argument of the expert colleague(s), it is better to let the matter rest here. Still, generally speaking, however, the tradition,

⁹ See and *cf.*, among so many others, Childe, G.: *What Happened in History?* Penguin Books, 1964 (Reprint 1967); de Burgh, W. G.: *The Legacy of the Ancient World*. Penguin Books Ltd., 1967; Anderson, P.: *Passages from Antiquity to Feudalism*. NLB, London, 1974 (Reprint 1977) Cipolla, C. M. (Gen. Ed.): *The Fontana Economic History of Europe*, Vol. 1 *The Middle Ages*. Fontana/Collins, London and Glasgow, 1974 (Repr. 1976).

¹⁰ See and *cf.*, all references *ibid.*

¹¹ See and *cf.*, *inter alia*, Snyder, F. G.: *Capitalism and Legal Change: An African Transformation*. Academic Press, New York, London, Toronto, Sydney, San Francisco, 1981.

¹² See and *cf.*, *inter alia*, Hobsbawm, E. J.: *Industry and Empire*. Penguin London, 1969; Nabudere, D. W.: *The Political Economy of Imperialism*. Zed Press Ltd. London and TPH Dar es Salaam, 1977.

¹³ See an interesting account of this phenomenon by Anderson, P.: *Lineages of Absolute State*. NLB London, 1974.

¹⁴ On a panoramic visit to the Deutscher Bundestag in Berlin recently (18th August, 2012), the present writer read the following interesting piece from part of the historical brief in the pavilion of the huge glassy dome, ascribed to August Bebel of SPD. He was speaking on the Budget on December 7, 1905: “397 deputies of the German Reich are elected in a general direct and secret ballot. Their influence on government policy is limited to their veto power regarding budget and legislation and their ability to raise and discuss questions of policy in the public forum of the Reichstag. **The Chancellor reports, however, not to the parliament but to the Kaiser.**” (Emphasis supplied.) The whole upsurge of the Nazi-Fascist dictatorships are classical instances of such manipulation pegged on populist ideologies and tendencies in local populations and cultural environments under the sway of capitalist individualism and nationalism and whipped up by the Nazi-Fascist politicians against the Jews and communism. There are too many writings on this to need citing any of them here. The Stalinist and post-Stalinist era in Eastern Europe witnessed similar trends and tendencies in matters of governance styles, subject to notable differences, no doubt, between the Nazi-Fascist and ‘Communist’ approaches to socio-economic and foreign/international-relations-affairs policy matters. See also Wistemann, E.: *Europe of the Dictators 1919-1940*. The Fontana History of Europe. Collins London and Glasgow, 1966.

history or practice of peoples everywhere does, in reality, progressively exert influence on constitutionalism in political life process. On the other hand and at the same time, noble constitutional ethos, principles, goals and values as well as their further articulation in implementing instruments, all aimed at promoting the present and future common good and aspirations of the people in question at their level and in their times of development, tend to play an upgrading cultural-revolutionary role: They set standards of governance and general conduct of life and socio-economic affairs of the country concerned to be observed and adhered to by both those in authority and common subjects. Derogations, defaults, violations and manipulations of them by totalitarian and/or corrupt rulers, leaders and wealthy individuals do not detract from this basic historical quality, value or truth about them!¹⁵

Moreover, constitutionalism from a socio-economically more advanced culture, whether introduced peacefully and imperceptibly among, or by conquest over, a people or peoples is bound to influence or bring about trends of change in the local tradition, history in process or practice over time in tandem with the progress made in the socio-economic base. This is particularly true where and when such 'constitutionalism' is accompanied with introduction or imposition of that superior culture's socio-economic system. It is, indeed, as natural a tendency as what is witnessed in water flowing from upper to lower reaches of a land mass.

To be sure, a significant aspect of the main argument in this paper is that the tendency of having a high incidence of open-ended features in constitutionalism in East Africa derives from the legacy of constitutions and other legislation handed down at independence from the former colonial Powers. These powers could not give anything better in terms of constitutionalism than what their own constitutionalism contained and was, thus, capable of granting to their hitherto colonial territories upon the latter's gaining of political independence, peacefully or otherwise, from the former.

It should also be noted with some emphasis in these regards that Western constitutionalism has developed as a sophisticated and highly regulated system of governance based on **a common Christian, democratic and cultural-ethical foundation**. It has been built and evolved over centuries of short and long inter-state wars of conquest and/or internal revolution.¹⁶ But this matter is beyond the scope of this paper.

In this Section, our interest centres on instances of open-ended features of constitutionalism in East Africa. Partly for the sake of brevity and partly for failure to sight a copy of relevant instruments from all

¹⁵ See and cf. Bartolo, Sergio: *Good Law Making Principles*. Report for a Meeting of the European Commission for Democracy through Law (Venice Commission). Strasbourg, 1 January 2010. [http://www.venice.coe.in/docs/2010/CDL-UDT\(2010\)016-e.pdf](http://www.venice.coe.in/docs/2010/CDL-UDT(2010)016-e.pdf) He asserts: "When we make law we have in mind very practical aims, we don't want only [to] leave a written message of our intention and will, we want [to] create [a] concrete situation of the public life in accordance [with] our intention and will. Therefore the necessary follow up of the legislative and normative activities are the concrete application of the law we made to the real life, to the living experience of our society in view of obtaining the compliance with it by the destinataires [sic] of the legislative and normative acts." Luce, Robert: *Legislative Principles. The History and Practice of Law Making by Representative Government*. The Riverside Press Cambridge, Boston, 1930. He defines law thus: "LAW is that which systematically impels conduct."

¹⁶ See, among many others, Hobsbawm, E. J.: *The Age of Revolution: Europe 1789 – 1848*. ABACUS edn. Sphere Books Ltd., London, 1977; Cipolla: *op.cit.*; Mann, G.: *The History of Germany since 1789*. Pelican Books, Middlesex 1974; cf. Thomas Asbridge: *The Crusades: The War for the Holy Land*. Simon & Schuster, London, New York, Sydney, Toronto, New Delhi, 2010, 2012. A close reading of the very well rendered and balanced account of the Crusades reveals the commonalities and differences in both policy and cultural-ethical leanings and alliances of those times, which form the foundations of what is still noticeable even today.

the Partner States of the EAC, the instances have been drawn from instruments of Partner States that were readily accessible to the present author at the material time of writing this paper. These appear in supportive direct (footnoted) references in the text.

2.2 Common Observable Significant and Recurring Open-ended Features in Legislation

2.2.1 Opening remarks

There are significant common and recurring open-ended features which one may observe in most of the constitutions and related implementing principal and subsidiary legislation of the respective Partner States. In order to make a moderate presentation of them for the limited purposes of this paper, this subsection makes a descriptive listing of **a sample** of them here as follows below:

2.2.2 Constitutional provisions

(a) *Unlimited presidential powers*

It is evident in all the Constitutions of the Partner States that the respective **Presidents are both of the executive type and, at that, have been granted virtually unlimited powers and privileges of an absolute or despotic monarch nature!** This derives both from our colonial past and pre-colonial local objective (socio-economic) and subjective (traditional cultural-ethical) conditions that are still with us today. Initially, it did not even seem untenable in a democracy, however young or weak it might have been, to have such unlimited powers left in the hands of the head of State, hitherto an anti-colonial nationalist, pro-democracy-and-good-governance mass movement leader and son of the land.ⁱⁱⁱ

Thus the so-called tendency to authoritarianism by our leaderships derives both from **our own local histories, customs, traditions and usages as well as legacies of colonial constitutions and implementing legislation** meant to sustain neo-colonial socio-economic and cultural-ethical interests of the former colonial powers.¹⁷ It was rationalized around post-independence nationalist developmental policies in typical classical fashion;¹⁸ yet, its roots were and remain deeper than that even though they are increasingly being shaken by growing democratic practice and free press/media.

In their positions of President, the Heads of State in the EAC sub-region are, either directly under the constitution or specific pieces of principal legislation, endowed with the powers of Commander-in-Chief of their respective States' armed forces; to authorize ("assent") by signature all principal legislation; determine the size of the cabinet of ministers and the number of ministries, main

¹⁷ See and cf. Nkrumah, K.: *Neo-Colonialism, The Last Stage of Imperialism*. Nelson, London, 1965; Nabudere, D. W.: *Imperialism in East Africa*. Vol. I. Zed Press, London, 1981.

¹⁸ See Nkrumah: *supra, passim*; Nyerere, J. K.: *Freedom and Unity. A Selection from Writings and Speeches 1968-1973*. OUP, Dar es Salaam, 1973; *Freedom and Socialism. A Selection from Writings and Speeches 1965-67*. OUP, Dar es Salaam, 1968; *UJAMAA: Essays on Socialism*. OUP, Dar es Salaam, Nairobi, London, New York, 1968, *passim*.

departments and other subdivisions of the government as deemed fit or politically expedient; appoint cabinet ministers, permanent secretaries and other upper/senior State officers, chairpersons, CEOs and Deputy CEOs of boards of State executive (business, educational/cultural or other public) agencies, institutions and organizations; they also have legislative powers to issue charters, proclamations, orders and directives/decrees.^{iv}

Obviously, these are inordinately extensive and concentrated or centralized powers, in one office. Since there are rare limitations on them under most of the constitutions, the tendency to abuse, lack of immediate capacity or failure to use them effectively and efficiently and, hence, sloppiness or negligence in their application is bound to feature predominantly, in varying degrees, in the political, administrative and judicial landscapes of the respective Partner States. In **Tanzania, Kenya and Uganda**, for example, there are many instances of unexplained delayed Presidential “assent” action to Bills which had been through all the requisite parliamentary “Readings” and related procedural and substantive processes.¹⁹ This would not happen if the equivalent of the following virtually ‘self-executing’ provisions in Art. 1 of **the Constitution of the United States** or those similar to them was in our local Constitutions and would be honoured:

Section 7. All bills for raising Revenue shall originate in the House of Representatives; ...

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States. If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by [Y]eas and Nays, and Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. **If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.**

[The Rules and Limitations prescribed in the Case of a Bill shall apply to every] Order, Resolution, or Vote to which the Concurrence of the Senate and the House of Representatives may be necessary (except on a question of the Adjournment) [and which] shall be presented to the President of the United States; ... [Emphasis added.]

Other alternative approaches could also be explored towards achieving better or quicker responses to performance of duty in high offices including **the Office of the President: Disaggregating the**

¹⁹ Though this is true, no easily accessible comprehensive account of its incidence was available to the present author at the time of writing this paper. It is, however, an interesting matter to investigate. Some few illustrative instances picked at random from Tanzania are: (i) The Occupational Health and Safety Act, 2003, “Passed in the National Assembly on the 14th February, 2003 [and assented] ... 5th April, 2003”; (ii) The Government Loans, Guarantees and Grants (Amendment) Act, 2005, “Passed ... on the 9th April, 2003 [and assented] ... 23rd May, 2003”; (iii) The Banking and Financial Institutions Act, 2006, “Passed ... on 5th April, 2006 [and assented] ... 7th June, 2006”; and (iv) The Social Security (Regulatory Authority) Act, 2008 “Passed ... on the 15th April, 2008 [and assented] ... 6th June, 2008”. A rough counting suggests a lapse of an average of about 45 days (allowing for Sundays and public holidays) between the date of passing and that of assenting to a Bill – some Bills taking as long as two (2) months and a day or two! A USA President is required, when everything is equal and he has no objection, to assent to a Bill within ten (10) days or else the Bill shall automatically be counted as having been duly passed and assented. See and *cf.* Art. 1, S. 7 of the Constitution of the United States of America cited in the text, *supra*.

disgorged power package and distributing most of the powers to other higher State organs, such as the Vice-President, Prime Minister, Sectoral Ministers, Heads of Main Departments – the Judiciary, the Attorney General and the like. The **Constitution of the Republic Kenya** has, here, made a break with the past and one hopes that actual implementation will bear the new provisions out in practice.²⁰ It is also imperative here to make reference to **the Constitution of the Republic of Ghana**²¹ which provides in Art. 1, among others, thus: “The Sovereignty of Ghana resides in the people of Ghana The Constitution shall be the supreme law of Ghana ...”. It then goes on, under the next Art., to state as follows:

2. (1) Any person who alleges that –

(a) an enactment or anything contained in or done under the authority of that or any other enactment; or

(b) any act or omission of any person;

is inconsistent with, or is in contravention of any provision of this Constitution, may bring an action in the Supreme Court for a declaration to that effect.

(2) The Supreme Court shall, for the purpose of a declaration under clause (1) of this article, make such orders and give such directions as it may consider appropriate for giving effect, or enabling effect to be given, to the declaration so made.

(3) Any person or group of persons to whom an order or direction is addressed under clause (2) of this article by the Supreme Court, shall duly obey and carry out the terms of the order or direction.

(4) Failure to obey or carry out the terms or direction made under or given under clause (2) of this article constitutes a high crime under this Constitution and shall, in the case of the President or the Vice-President, constitute a ground for removal from office under this Constitution.

The provisions of Art. 2. (4) quoted immediately above render it clear that the position of **the President of Ghana under the Constitution** may, in a proper case, be jeopardized by his disobedience of an order or direction by the Supreme Court. **The executive President is made subject to law** while still in office. Even if, in a given instance, there is defiance of such Supreme Court order by an incumbent President and it becomes practically or politically impossible to remove him, the illegality would have been established against him and his political standing and that of his party locally and internationally seriously damaged.

The **virtually unlimited constitutional powers granted to executive presidents** not only transform each ostensibly democratically elected president, but also ostensibly democratically and good-governance-based local and regional constitutionalism into **authoritarian presidents and systems**: Presidents tend to become authoritarian not necessarily of their own wish and ill-intended design but **by means of the constitution and the law in general**. And so also does the system of law-making, justice, administration and governance tend to become **oppressive** while democratic values, principles and goals remain on the

²⁰ See, e.g., Arts. 132 (2) subjects the appointment power of the President regarding senior public officers to approval of the National Assembly; Chapter Eleven (**Devolved Government**) Arts.174 *et seq.* under which power has been devolved to counties in a more democratic manner.

²¹ The Constitution of the Republic of Ghana, 1992 as amended up to 1996. < www.unhcr.org/country,,,LEGISLATION,GHA,,3ae6b5850.0.html >

Statute Book as virtually irrelevant in practice and decorative appendages of the Statute Book, good material for academic researches and debates.

The adage, “Power corrupts; absolute power corrupts absolutely” thus tends to be played out in the full view of all in the local jurisdictions and the international community. This would, indeed, tend to happen even if it were the present author or any other person, for that matter, who were to assume the mantle of president or any other office endowed with absolute discretionary power for a term or terms of years. One, and the system, would tend to increasingly become, at best, benevolent-authoritarian and, at worst, corrupt-dictatorial and dependent on the security and armed law enforcement forces and agencies of state power. This would happen, as, indeed, historically, it has, certainly, happened, in Europe²² as in America,²³ in Africa²⁴ as in Asia and Oceania!²⁵

Yet, the high sounding and emotive provisions of the constitution of any country which may seem to remain as virtually irrelevant and mere appendages thereto for lack of serious or consistent abidance by those in power during any particular period of time are not by that fact alone totally useless. For they represent historical landmarks and set the tone and level of noble aspirations of the people for the ‘goods’ to be striven for and attained under their popularly and democratically elected leaders and the institutions set up for the purpose. The fact that such aspirations are or tend to be dashed initially or in course of time due to derogations does not necessarily negate the historical relevance, significance or irreversible urge for progressive transformative change towards that **illusive and virtually unattainable ideal of ‘the common good’** which can only be achieved in the context of genuine **freedom, truth, justice and solidarity that together yield peace.**²⁶

Such change takes place mainly imperceptibly in course of time and social, economic and cultural interactions of peoples. Its toll in human freedom and even life itself in certain places, countries or regions is sometimes or for a time heavy and bitter but the end result cumulatively is bound to be better in both the quantity and quality of ‘the common good’ attained. Such is what historical trends everywhere reveal when carefully studied and analysed despite the natural law of uneven development which is also, equally, historically manifest – in USA, Europe (West and East), Asia, Latin America, Africa and Oceania.²⁷

(b) Discretionary ministerial powers in relation to principal and subsidiary legislation

²² Such as happened in Germany under Bismarck and, later, the Third Reich of Adolf Hitler, the ‘Communist’ regimes of Eastern Europe and the USSR. See and *cf.*, *inter alia*, Owen, R.: *Studies in the Theory of Imperialism*. Longman, London, 1972; Hobsbawm, E. J.: *Industry and Empire, op.cit., passim*; Mann, G.: *op.cit., passim*; Henrik Eberle and Matthias Uhl (eds.): *The Hitler Book. The secret report by his two closest aides*. John Murray (publishers), London, 2005; Wistemann, E.: *Europe of Dictators ...*, *op.cit.* See also item 6.4 in the reference in note 22 *post*.

²³ In Latin America similar trends and tendencies are generally known to obtain accentuated by the fight against drug barons.

²⁴ The instances of most of the presidents in military and one-party-state Africa from the 1960’s to the late 1980’s/early 1990’s come to mind.

²⁵ One could say the same with respect to leaders of the military and one-party-states in Asia as one says with regard to those in Africa and Latin America. See a general survey, Wikipedia the free encyclopedia: *Military Dictatorship*. “6.1 Africa; 6.2 The Americas; 6.3 Asia – Pacific; 6.4 Europe.” < en.wikipedia.org/wiki/Military_dictatorship > With specific reference to China, see and *cf.* Schumann, F. and Scheel, O. (eds.): *Communist China*. China Readings 3, Penguin Books, London, 1968

²⁶ Pontifical Council for Justice and Peace/Libreria Editrice Vaticana: *Compendium of the Social Doctrine of the Church*. Paulines Publications Africa, Nairobi, 2004, *passim*.

²⁷ See and *cf.*, Nabudere, D. W.: *The Political Economy of Imperialism*. Zed Press, London, 1977? Amin, Samir: *Unequal Development: Essay on the Social Formations of Peripheral Capitalism*. The Harvester Press, Sussex and MRP, New York, 1976.

It is common in the EAC Partner State jurisdictions for principal pieces of legislation to empower the relevant sectoral ministry to –

- i. determine the date or dates when they or certain aspects thereof shall, respectively, come into operation (commencement date(s)); and
- ii. make regulations/statutes/decrees or rules by order published in the official *Government Gazette*.

In many such instances,^v however, unlimited discretion is left to the authoritarian president or a sectoral minister to determine the time frame and establish more specific criteria where, say, implementing regulations are imperative, on the basis of technical expert advice from within his office or ministry or hired consultants. Therefore, in order for required action to be taken within a reasonable time scale, much may depend on the position of the legislation's standing on the ministry's priorities list, availability of local expert capacity and either internal budgetary or donor-provided resources.^{vi} That may explain recurring delayed action in respect of the two aspects (i. and ii) stated above. Some of the legislation concern seriously negotiated and pressing organized labour-employer-State interests, such as social security and other labour-employment related legislation.²⁸ Unduly delayed action in such and similar situations, like those concerning investor interests and social services delivery improvement matters, would tend to result in widespread adverse consequences.

2.3 Other Instances Drawn from some of the Partner States

2.3.1 Constitutional provisions

Starting with the author's own country, such instances appear in many Sections and sub-Sections of the Constitution of the United Republic of **Tanzania**, 1977, as amended from time to time. Only a few significant ones among them, however, are cited for the already-said sake of brevity.

From the Preamble up to Article 6 in Chapter One, Parts I and II, one gets the impression that the Constitution is seriously meant to promote ideals of a society set on the path of realizing and enjoying the noble and “ Fundamental Objectives and Directive Principles of the State Policy” in Part II of the said Chapter One relating to “The Government and the people” (Ar. 8); “The pursuit of *Ujamaa* [Socialism] and Self-Reliance” (Art. 9); and “Right to work, to education and other pursuits” (Art. 11). Art. 9 is

²⁸ An interesting instance of this is the Tanzania Mainland's Workers' Compensation Act, No. 20 of 2008, Cap. 263 R.E. 2002, which was passed by the National Assembly and subsequently assented by the President in the same year, and is yet to come into force. It was, among others, a product of tripartite (organized/unionized labour, employer organization and Government representatives) discussion and recommendation and is still awaited to replace an anachronistic and cumbersome piece of legislation bearing the same name and Chapter (Cap.) number. There is no time scale provision and needed guaranteed funding for actuarial aspects requiring budgetary provisioning. See also Note 40 *post* on the delayed rendering operational the provisions of the Tanzania Insurance Regulatory Authority (TIRA) Act, 2009 on the Ombudsman Services established thereunder.

rendered in quite elaborate terms spelling out eleven (11) specific duties or obligations to the State Authority and all its organs to direct all its policies and operations towards ensuring the implementation of the fundamental principles of *Ujamaa*/Socialism and Self-Reliance²⁹ with due regard to the obtaining circumstance within the United Republic.

But any such impression is soon dashed when one reads Section 7 that renders all these provisions on the duty of the State to implement them non-justiceable or not enforceable by court action:

7. (1) Notwithstanding the provisions of sub-article (2), it shall be the duty and responsibility of the Government, all its organs and all persons or authorities exercising executive, legislative or judicial functions to take cognizance of, observe and apply the principles of this Part of this Chapter.

(2) The provisions of this Part of this Chapter are not enforceable by any court. No court shall be competent to determine the question whether or not any action or omission by any person or any court, or any law or judgment complies with the provisions of this Part of this Chapter.

Indeed, these and those other provisions in Part II of Chapter One constitute perfect examples of open-ended features in the Constitution. For they leave absolute discretion to the State Authority (the Government of the United Republic for all Union Matters and the Revolutionary Government of Tanzania Zanzibar for all non-Union Matters concerning the Isles) to determine whether or not, how or by what means and in what way(s), at what objectively measurable rate and on what specific basis or criteria to fulfil their duty. If they cannot be judicially or legally accountable for the duty stipulations in that Part II of Chapter One, at best, the provisions have only moral value and, at worst, are worthless hoodwinkers! No similar provisions are found in the constitutions of the other EAC Partner States, except those that provide for derogations under a statute by Parliament to address special circumstances or emergency situations, a feature also found in the Constitution under our present discussion.

Part III (Basic Rights and Duties)³⁰ of the same Chapter One, contains some Articles which attempt to provide principles, criteria and guidelines regarding steps to be taken towards their implementation. But many do not do so while those which do, still exhibit gaps that allow room for derogation, non-abidance or inaction: In this regard, for instance, Art. 13 (Equality before the law) sub-art. (6) provides for such specific principles, criteria and guidelines to “the state authority [to] make procedures which are appropriate or which take into account [those] principles ...”. Still, in respect of sub-Art. 6(d) and (e), one is left wondering as to what is to happen if the police and security officers do not observe the stipulated principles; how they are to observe those principles; what constitutes “human dignity”, “torture” or “degrading punishment or treatment”? Indeed, there is the further question of the default by law enforcement officers/agencies, what sanctions are to apply in respect of them, by whom or what authority/organ and under what procedure?

One could always think of and come up with an answer to each and to all of these and similar queries within a proper understanding of the system in question as well as application of interpretation skill and

²⁹ It is not quite clear what those principles are in the *post-Arusha Declaration (post-1986/87) era*. But see and *cf.*, Nyerere, J. K.: *Freedom and Socialism, op.cit.*; *UJAMAA; Essays on Socialism, op.cit.*

³⁰ Arts. 12 – 32.

technique. But, by itself, that may not always elicit the basic spirit and intention of the framers of the Constitution and what bears out the public interest or best serves the ends of justice, equity and the common good.

To be sure, the grisly accounts on “Torture and Inhuman and Degrading Treatment or Punishment” generally and with respect to Tanzania particularly provided by Chris Maina Peter in his famous publication on *Human Rights in Tanzania*,³¹ among others,³² renders credence to the concern expressed here by the present author regarding the gaps in the constitutional provisions referred to above. It is evident from the renditions, particularly the aspects concerning court cases, that judicial intervention is not normally available nor when courts are seized of opportunities for intervention is it always timely, effectual or even availed in favour of victims of torture, inhuman and degrading treatment or arbitrary punishment under investigating police, State Security officers and/or prison officers and warders. This observation equally applies to many other countries and places in East Africa³³ and beyond, both in terms of how vague the provisions on the subject tend to be and the actual practice by law enforcement agencies and officers as well as the ineffectual role of judicial intervention.

There are numerous provisions in the Constitution which one could cite and elaborate upon with a view to further clarification of the general argument of this paper concerning gaps that render constitutionalism in, *inter alia*, Tanzania open-ended, etc. To avoid self-repetition in essence, only one further illustrative instance will be cited: The Special Constitutional Court of the United Republic.

This very important organ exists on paper only; it has thus far not been physically established: No judges or other officers of the Court have been appointed; no time frame is provided for its commencement; it is not a court of justice, as such, but essentially a conciliation/arbitration tribunal whose awards have no legal effect on decisions of the High Court or the Court of Appeal of Tanzania, on relevant constitutional matters, and are final and not appealable to any court or other authority. This Court, however, would, if it were in operation, presumably, be useful in resolving the various apparent and latent as well as future conflicts between the Constitution of the United Republic and the Constitution of Zanzibar, which are bound to render further constitution-making, including the on-going constitutional review process, arduous, if not explosive and dangerous to peace and harmony in the Union.

Some illustrative instances drawn from the Constitution of the Republic of **Burundi**, 2004 and the Constitution of **Kenya**, 2010 should suffice to further demonstrate both the nature of the problem and its manifestation in the different constitutions of the countries in the sub-region. We start with **Burundi**.

³¹ Chris Maina Peter: *Human Rights in Tanzania. Selected Cases and Materials*. Rudiger Koppe Verlag . Koln, 1997.

³² See especially, The Tanzania Legal and Human Rights Centre (LHRC) annual *Report .. With Zanzibar Chapter* series which continually portrays numerous accounts of human rights violations by both public officers (armed forces and civil) and private citizens individually or in mobs of those taking law into their own hands. See also The United States Department of State, Bureau of Democracy, Human Rights and Labour *Country Reports on Human Rights Practices for 2011, The [Tanzania] Union Ministry of Home Affairs Public Complaints Department and a Prison* ... < www.state.gov/documents/organization/186460.pdf >

³³ See and *cf.*, for instance International Crisis Group (ICG) Working to Prevent Conflict Worldwide: “Burundi Democracy and Peace at Risk. Executive Summary and Recommendations” (in English). *Africa Report No. 120*, 30 November 2006. < Worldwide.//L:/120-burundi-democracy-at-risk.aspx.htm > It features, *inter alia*, serious human rights violations.

Under Part II: The Charter of Fundamental Rights and Duties of the Individual and the Citizen, Arts. 19, 25, 36 and 37, respectively, provide (as per a preliminary translation from the French³⁴) as follows:

[Art. 19] The rights and duties proclaimed and guaranteed, among other things, the Universal Declaration of Human Rights, the International Covenants on Human Rights, the African Charter on Human and People's Rights, the Convention on Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child are integral part of the Constitution of the Republic of Burundi.

These fundamental rights are not subject to any restriction or derogation, except in certain circumstances be justified by public interest or protection of a fundamental right.

[Art 36.] Everyone has the right to property.

No one shall be deprived of his possessions except in the public interest in the cases and manner established by law and subject to fair and prior compensation or pursuant to a decision casting as res judicata.

Here the clear general provisions are made subject to exceptions "in certain circumstances [which may] be justified by public interest" which is a vague concept and may be abused unless some basic criteria and reasonable and transparent procedure acceptable in a free, democratic society are also stipulated to abide the exceptions "in the cases and manner established by law". It is, of course, arguable that there is no need to repeat what is generally provided as fundamental principles to guide legislative, administrative/executive and judicial decisions and actions. Yet, experience provides many instances of abuse or failure to abide by the spirit of constitutional provisions because of the vagueness and gaps they leave in areas of great concern to the liberty and well-being of the citizens and subjects generally.

[Art. 25.] Every woman, every man has the right to freedom of person, including the physical and mental integrity and integrity and freedom of movement. No one shall be subjected to torture or to cruel, inhuman or degrading treatment.

The observations made in respect of the provisions of the Constitution of Tanzania apply here, *mutatis mutandis*, except that in this case the provisions of Art. 19 may enable accessibility to comprehensive definitions and interpretations of the concepts and rights in question in view of the international and regional instruments contained in Article 19 cited above.

[Art. 37.] The right to form trade unions and join, and the right to strike, are recognized. The law may regulate the exercise of these rights and to prohibit certain categories of people to strike. In all cases, these rights are forbidden to members of the defence and security as well magistrates.

There ought to be a clear stipulation of the criteria to be observed in the passing of the law to regulate the exercise of the rights and those upon which to prohibit certain categories of people, apart from those specifically mentioned in the above Article, to strike.

The Constitution of **Kenya**³⁵ avails us of very good illustrative instances of comprehensive provisions that leave little room for error both as to the meaning and intention or spirit thereof. Let us look at only a

³⁴ Chan Robes Virtual Law Library Constitution of the Republic of Burundi: "Proposed New Constitution Post-Transition The Republic of Burundi (September 2004)." <http://www.chanrobes.com/Burundi.htm>

select few for the sake of demonstration of the point being made here. This is not to suggest that other country constitutions do not, in some specific provisions, stipulate criteria, particular principles or sources thereof for future legislative, judicial and administrative/executive actions. It does not also mean that the respective constitutions do not contain provisions which are open-ended or have observable gaps because this is a characteristic feature of many a constitution. It is, rather, to indicate that, in certain cases like that of **Kenya** (South Africa,³⁶ Namibia,³⁷ Ghana³⁸ and, to some extent, Uganda³⁹, to mention those the present author is aware of), owing to country-specific practice or historical experience and socio-economic circumstances, the incidence of such comprehensiveness is high while in the others it is generally low. This may signify that in most of the countries, the need for complete clarity was not felt at the time the respective constitutions were made or reviewed or that vagueness was/is designed to served certain political (party or class) interests within the principle of ‘flexibility of legislation’.

Art. 20. [Application of Bill of Rights]

- (1) The Bill of Rights applies to all law and binds all State organs and all persons.
- (2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.
- (3) In applying a provision of the Bill of Rights, a court shall –
 - (a) develop the law to the extent it does not give effect to a right or fundamental freedom; and
 - (b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.
 - (c) In interpreting the Bill of Rights, a court, tribunal or other authority shall promote –
 - (d) the values that underlie an open and democratic society based on human dignity, equality and freedom; and
 - (e) the spirit, purport and objects of the Bill of Rights.
 - (f) In applying any right under Article 43 [**Economic and social rights**], if the State claims that it does not have resources to implement the right, a court, tribunal or other authority shall be guided by the following principles –
 - (i) it is the responsibility of the State to show that the resources are not available;
 - (j) in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and
 - (k) the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion.

Here we have an instance of a constitutional article that not only prescribes what should (shall) be done and by whom (which organ or authority) but also the criteria upon which to base action in a way or manner that bears out the letter and spirit of the provisions in question. It is curious, though that, in sub-art., (4) para. (a), reference is not made to the “**National values and principles of governance**”

³⁵ The Constitution of Kenya, 2010. *Kenya Gazette Supplement* No. 55, Nairobi, 27 August, 2010.

³⁶ The Constitution of the Republic of South Africa No. 108 of 1996 (as amended up to 2003). *Statutes of the Republic of South Africa – Constitutional Law*.

³⁷ The Constitution of the Republic of Namibia, 1998 as amended up to May, 2010.

³⁸ The Constitution of the Republic of Ghana, 1992.

³⁹ The Constitution of the Republic of Uganda, 1995 as amended from time to time.

under Art. 10 of the same Constitution. On the contrary, the said reference relates to a wider and more general (undefined) spectrum or set of vague (i.e., “open”) and politically popular concepts which are quite familiar to both domestic and international legal and political forums. There are many other very good examples of a similar kind as well as those which display gaps. Such gaps could have been deliberately allowed to remain in order to permit flexibility that, presumably, would work in favour of the target beneficiaries of the Bill of Rights. But for the sake of brevity, we leave them out of consideration here for the time being.

Indeed, for the purposes of this paper, these illustrative provisions drawn from the Constitutions of **Tanzania, Burundi and Kenya** do suffice to show both the kind of problem which is the main concern of this paper and how, in some of the Partner States, it is addressed. It is clear that it can be remedied in all critical areas of basic rights and freedoms covered by the Constitutions of EAC Partner States. One may concede that where, in a given context, it is unnecessary or would be tantamount to tautology to set out clarifying specific criteria, guidelines or principles for any of such areas, such clarification need not be made.

There, then, would be a risk of either arbitrary execution of the provisions in practice because of the grant, under those provisions, of absolute discretion or their lack of clarity. But in any instance where a provision allows discretion, then, the exercise of such discretion should not be left without prudential limits or guiding criteria. This should be done even when or where, say, in the light of the applicable English common law and equity principles and doctrines, the exercise of discretion is supposed to be always ‘judicious’ – itself a vague notion!

2.3.2 Illustrative instances from some implementing legislation

In this sub-section we also cite a few illustrative instances of gaps in principal legislation drawn from Tanzania, Uganda and Rwanda so as to broaden and render all-inclusive the reference base for the paper, given its ostensible scope.

For the case of **Tanzania**, we take two brief instances from each of two regulatory/supervisory bodies: The Tanzania Insurance Regulatory Authority (TIRA) and the (Tanzania) Social Security Regulatory Authority (SSRA). Both are statutory bodies and run under boards, chaired by Presidential appointees, and consisting mainly of other members representing State and relevant industry stakeholder interests as well as persons with relevant or specified knowledge and experience who are appointed by the specified Minister in each case respectively. Their chief executive officers (CEOs) are also formally appointed by the President but their attributes are either vaguely stated, as in the case of TIRA, or not at all mentioned, as with regard to SSRA.

It is also generally observable in both instances that, while each Authority, Board and CEO has a tall order of powers, functions and/or duties, which should form the basis for regular statutory either internal/self or external technical performance audit or monitoring and evaluation, there is no provision which requires it. Provisions envision only regular internal (quarterly, half yearly and annual) as well as external annual financial reporting and performance audits. But these do not necessarily tell one the

whole story about the inner workings, challenges, strategies and trends in actual operational performance levels of achievements and failures as well as actual internal and external causes thereof. Moreover, for presumably the same reason, there are no clear sanctions for default cases in these regards: For without such regular comprehensive (financial and operational) performance audits, there can be no satisfactory objective basis for sanctions against a board or its chair, an authority or its CEO.

Moreover, in both instances, no general principles and values or criteria are stipulated generally or specifically for certain aspects to guide the policy formulation (ministerial) and industry regulation (supervisory) functions, respectively. It is as though Parliament abdicated to technical experts in insurance and social security fields working in these institutions its general legislative policy guidance role. These experts should in or for each relevant case, recall the applicable basic principles or formulate whatever criteria they deem fit, appropriate or necessary. That may imply either lack of adequate necessary knowledge and experience in these disciplines at both Government (Attorney-General's Chambers) and Parliament (Speaker's Office) levels or precedent legislation which bears such features!

There are also many provisions under which Parliament left too much discretion in the hands of the CEOs by using the term "may" instead of "shall" and by not setting down any limits, guiding principles and/or criteria to be observed. For instance, section 18 of the TIRA Act,⁴⁰ No. 10 of 2009, requires separation of insurance and brokerage by limiting the degree of ownership of shares or participation in the equity of a brokerage firm by a "Tanzanian insurer", or in shares or equity of a "Tanzanian insurer" by a "Tanzanian registered insurance broker". Sub-section (4), on the other hand, provides:

The Commissioner may, where he deems that it is in the interest of the insurance industry and the public in general and by notice published in the *Gazette*, grant specific exemption to any person, company or body of persons from application of the provisions of this section under any terms and conditions.

The Commissioner of Insurance, upon being satisfied that an applicant for registration as an insurer has complied with all the registration requirements under the Act, "... may grant the registration and issue a registration certificate to the applicant". Moreover:

(3) The Commissioner may, in granting registration, impose such terms and conditions as he may deem appropriate.

But why, one may ask, did Parliament consider it prudent to grant so much discretionary power to the CEO of TIRA: to determine "the interest of the insurance industry and the public in general", and, then, to "impose such terms and conditions as he may deem appropriate"? In the one case, if he is satisfied with the applicant's compliance with the relevant statutory requirements, why should he still have absolute discretion to grant or to deny grant of the registration? In the other cases, one would have expected some prudential guidelines or criteria which the Commissioner would have to observe or heed in the exercise of the discretion instead of open-checke-like grants of discretionary power under the quoted provisions.

⁴⁰ No. 10 Of 2009 which repealed Act No. 18 of 1996 but both falling under Cap. 394 R. E. 2002. Another variation of this is born in the TIRA Act, 2009 provisions (ss. 122-125) concerning the establishment of "the Ombudsman Services" as a new in-house dispute resolution organ, which, by the time of writing this paper, had not been made operational because of lack of requisite ministerial regulations prescribed in s. 124(4).

One instance may be noted from the SSRA Act⁴¹ in this regard:

19.(1) The Authority may refuse to register any scheme or any person proposing to act as a manager or custodian if it is satisfied that the application for registration does not meet the requirements provided for under this Act.

In this latter case, how can there be discretion where the statutory requirements for registration have not been met? One would, in a case like this, tend to read “shall” in “may”; otherwise, such granting of discretion would be unprecedented and basically untenable for its lack of logic and good sense.

Some few instances drawn from the **Rwanda** Decree which “regulates traffic on the public highway, of pedestrians, of vehicles public and loaded or mounted draught animals, and livestock.” It is a long and very detailed piece of legislation with obviously large subject coverage. In Chapter 3. (Qualified Agents), Art. 3, as many as nine categories of “qualified agents” are detailed to execute the provisions of the Decree as specified under the article. Some legislative power is granted to the “Minister having Transports in his duties under, *inter alia*, Part 3. (Vehicles), Chapter 3. (Minimum Weights Authorised), as follows:

Article: 67

5. The Minister having Transports in his duties may:

- (a) authorise, on parts of the public highway that he designates, normal traffic of vehicles of which the weight exceeds the ones indicated above[omitted here];
- (b) authorise, by means of particular and temporary decisions, those same special vehicles to move on determined routes.

He fixes, where necessary, the special conditions to which these transports must comply.

Article: 68

- 1. The Minister having Transports in his duties may reduce the maximum total weight fixed by Article 67, on some sections of the public highway as well as on crossing of bridges, ferries or other civil engineering works, within limits as dictated by the preservation of these ways or works and traffic security.

...

There are no clear guiding criteria or limits in all cases to be observed by the Minister in the exercise of the powers granted to him by the quoted provisions. For example, under Art. 67.5(b), the Minister seems to have discretion embedded in his power to “authorise, by means of particular and temporary decision ...” and to fix “where necessary, the special conditions to which these transports must comply”. In the case of Art. 68.1, the discretion left to the Minister is more evident. It is extremely doubtful that the Minister would always act fairly, prudently or judiciously in his exercise of the virtually unlimited discretionary power. The ‘Klitgaardian’ mathematical-definition-based principle or rule is likely to apply

⁴¹ No. 8 of 2008, Cap. 135.

here as elsewhere: discretion without accountability or prudential criteria/guidelines induces corruption.⁴²

Perhaps, all these illustrative instances suffice to demonstrate the point the paper is attempting to make about the open-endedness of our constitutionalism. There is a need to be more keen at a societal level about the rights and obligations provisions we make that have a bearing on the dignity of the human person, the interests of private citizens, of the public and its related communities (cultural, religious, political, economic, professional). It is imperative to provide necessary regulations, prudential guidelines as well as ethical and disciplinary codes of conduct to ensure more abidance than derogation and, thus, to develop a rule-abidance-based culture of responsibility and accountability of public officers for what they do as such.

3. IMPACT OF FEATURES OF OPEN-ENDED CULTURAL ATTITUDES ON TENDENCY TO CORRUPTION, LOW RESPONSIBILITY, ACCOUNTABILITY AND PERFORMANCE IN PUBLIC SERVICE

3.1 Opening Remarks

The discussion here is not intended to delve into deep questions and issues of culture and either law-making or law-implementation and observance. But as indicated at the beginning of the paper, largely by way of hypothesis, it is the view of the paper that the cultural environments and historical backgrounds of the people(s) in the EAC sub-region foster attitudes and do create conditions that may explain the unabated major open-ended features of constitutionalism and prevalence of corruption, poor public servants' responsibility, accountability and public services delivery. It would require extensive and intensive research data collection, close study and analysis and synthesis to arrive at some scientifically verifiable conclusions on this matter. That is out of the question here as already observed before. Yet, there are generally known historical-cultural-ethical facts upon which one can comfortably rely to make generally acceptable observations which are appropriate for the purposes of this paper as is done herein below.

3.2 Historical Basis and Impact of Open-ended Cultural Practices and Attitudes

The Partner States are composed of different ethnic communities, both indigenous and immigrant. Thus they have different and variegated cultural backgrounds and uneven levels of socio-economic development and status. They were forcefully formed, unified and transformed into single dependent "people" groupings in Territories under Western colonial rule in the course of the latter part of the 19th

⁴² Prof. Mgongo Fimbo, G., "Combating Corruption in Tanzania ...", *loc.cit.*, USAID: *loc.cit.* (Note 5).

century and the first six-and-a-half decades of the 20th century.⁴³ The indigenous ethnic communities composing each Territory had had each its own (unwritten) historical background, cultural-ethical principles, values, rules and/or norms 'code'.⁴⁴

By the time of colonial rule, there were already settled in most of the EAC Partner States smaller immigrant communities from Southern Africa as well as (for slaves and spices) Sudan, Somalia, and Oman.⁴⁵ Colonialism brought with it more immigrant small communities mainly from Asia,⁴⁶ who came as virtually indentured Railways and Harbours construction labourers and small traders, as well as those from Great Britain and Europe, who came as settler farmers, traders and colonial civil servants, police and military officers.⁴⁷ The traders groups were encouraged by the colonial regime to facilitate the import-export trade and local distribution of commodities imported from the respective colonial Powers and their allies. Except for the immigrants from Southern Africa (such as the peasant *Nguni/Ngoni*), the others, during the colonial era, tended to settle in ghetto-like style in urban and semi-urban areas as communities engaged largely in retail trade. Some of these were followers of Islam (the Koran), others Buddhism, others Hinduism, 'Bahaism', etc.

This multiplicity of communities, cultural-ethical groupings, historical backgrounds and experiences, which were collapsed forcefully into "peoples" under colonial conditions that included colonial legislation and governance, cultural-ethical principles and values, was bound to give rise to countries and States with **complex** cultural-ethical formations rather than popularly accepted and practised cultural forms. **There lies the deeper historical basis for largely open-ended country cultural attitudes.** Then, from the colonial period to the present time, we have had a phenomenon increase in and expansion of the multiplicity of religious (including denominational sub-divisions thereof) communities. Political and civil-society-organization communities and groups have added to the complexity of the situation in each Partner State and the sub-region as a whole. (Of course, this has also tended to happen in other areas, countries and regions worldwide and it is not, therefore, a peculiarity of our EAC sub-region.)

The strength of such a country scenario lies in its **variety of cultures and cultural-ethical values and principles** which calls for evolution and observance of the unifying democratic and ethical **principle of**

⁴³ Harlow, V. and E. M. Chilvers: *History of East Africa*. Vol. II, Oxford 1965; Ingham, K. A. : *A History of East Africa*. London, 1966; Listowel, J.: *The Making of Tanganyika*. Chatto & Windus London, 1965; Louis, W. R.: *Ruanda-Urundi 1884-1919*. Clarendon Press, 1963; Ogot, B. A. and Kieran, J. A. (eds.): *Zamani: A Survey of East African History*. EAPH and Longman Kenya, 1968 (reprinted 1971).

⁴⁴ See and cf. Roscoe, J.: *The Baganda: An Account of their Native Customs and Beliefs*. Macmillan & Co. Ltd. London 1911; Davidson, B.: *The Growth of African Civilization: East and Central Africa to the late Nineteenth Century*. Longman Group Ltd, 1967; *The African Past: Chronicles from Antiquity to Modern Times*. Penguin African Library, 1964; *The Africans: An Entry to Cultural History*. Penguin, 1973; Gibbs, J. L., Jr.: *Peoples of Africa: Original Analysis of 15 Cultures of Africa South of the Sahara*. Holt, Rinehart and Winston, Inc., New York, 1965 (reprinted 1966); Fortes, M. and Evans-Prichard, E. E. (eds.): *African Political Systems*. OUP London, 1940 (reprinted 1969); Kollman, P.: *The Victoria Nyanza: The Land, the Races and the Customs*. Swan Sonnenschein & Co. Ltd. London, 1899 (Available in University of Dar es Salaam Library).

⁴⁵ See and cf. Coupland, R.: *East Africa and Its Invaders from the earliest times to the death of Seyyid Said in 1856*. OUP, London, 1938; Gray, R. and Birmingham, D. (eds.): *Pre-Colonial African Trade: Essays on Trade in Central and Eastern Africa Before 1900*. OUP, London, New York, Nairobi, 1970; Roberts, A. ed.): *Tanzania Before 1900*. EAPH for HAT, Nairobi, 1965 (reprinted 1970).

⁴⁶ See, *inter alia*, Illife, J.: *A Modern History of Tanganyika*. African Studies Series, CUP Cambridge, London, New York, Melbourne, 1976; and *Tanganyika Under German Rule 1905-1912*. EAPH Nairobi and CUP London, 1969.

⁴⁷ *Ibid.*

tolerance of the views and beliefs of others.⁴⁸ Other people's views may well be opposite to those which one holds dear but so long as they are held and expressed honestly and peacefully, they should be given opportunity to exist and, if they can, thrive or grow for whatever they may be worth to the community that holds and practises them and/or the society as a whole.

The existence of such an environment also provides opportunities for the evolution of various democratic institutional methods and processes of **handling and resolving peacefully** local and national social conflicts. People develop mature strategic and pragmatic ways of living together in their state of ethnic, cultural, economic and political/ideological **diversity** and become increasingly conscious of that reality and its necessity for their well-being as a polity.⁴⁹ They thus grow stronger in culture, ethics, politics, and matters of economy, etc., in their **unity-in-diversity** than they would ever have been or would ever be in their respective specific ethnic-religious individualities.

On the other hand, within that very strength, there also resides **their transitory weakness**, namely, the very liberality or open-endedness which has strong roots in an internally divided cultural-ethical environment whose inner divisions and sub-divisions are not always easily reconcilable. Such a state of affairs, then, is inherently weak from its very sources of strength which also render the leaderships of the countries in question vulnerable: That is another way of saying that the leaderships, along with the respective systems they serve, are **inevitably corruptible unless they are well formed politically and ethically and that they abide strictly to provisions of well-formulated power-sharing democratic constitutional and related legal and ethical frameworks**. Such well formed systems, which evolve over time through systemic institutionalization and practice, should nurture,⁵⁰ in theory and practice, **principles and values that give centre stage to the dignity of the human person and the common good, responsibility and accountability of leaders based on genuine^{vii} transparency, due diligence and due process as well as a just and fair (equitable) resources-distribution-and-sharing system.**⁵¹

Within the historical and current context of cultural-ethical customs, traditions and practices, one finds reported instances of ethical values which honour that which others would consider criminal and unethical. For example, commission or omission of certain acts involving, in present day enlightenment terms, moral turpitude but **customarily regarded as insignia of bravery and/or heroism: cattle-rustling;⁵² theft or cheating committed against 'strangers',⁵³ common, communal, or public property; rape; girl abduction into forced marriages; bribery of public figures;⁵⁴ and the like. There is also hero-**

⁴⁸ See and cf. Menon, Madhawa N. R.: "Impact of Cultural Pluralism in Political Discourse and in Legal Development: Some Reflections from the Indian Scene", in Yash Vyas et al. (eds.): *Law and Development in the Third World*. Faculty of Law University of Nairobi, Nairobi, 1994, pp.307-311.

⁴⁹ *Ibid.*

⁵⁰ Such as has happened in and with mature democracies in Europe, America and Asia, where the progressive process towards attaining the ideal is more advanced in certain significant socio-economic areas than in 'emergent democracies' in the Third World.

⁵¹ The basic elements of such a revolutionizing and nurturing system to be realized should be expressly stipulated or rooted in the given country's Constitution.

⁵² This is, even today, still a haunting peace-disturbing habit among traditional large live-stock-owning communities in the EAC sub-region, particularly, those in Tanzania and Kenya in the East and Uganda and Rwanda in the North-West.

⁵³ For very interesting historical accounts on such practices in the past, see, inter alia, Gray, R. and Birmingham, D. (eds.): *op.ci., passim*; Roberts, A. (ed.): *op. cit., passim*.

⁵⁴ Trading communities are popularly believed to be in the notorious habit of 'bribing their way through the bureaucratic red tape' of governments in the sub-region.

king-, chief- or religious community-leader worship-like reverence and loyalty by members of the respective subject traditional and/or religious communities.⁵⁵

All these and similar historical factors, cultural-ethical values, principles, customs, traditions and practices invariably tend to influence outlooks and attitudes not only of performers and displayers of such acts and conduct but also the beneficiaries thereof both within their inner family/community groupings and public life generally. And this happens oftentimes in ways and by means that are not always easily detectable by ordinary observation but they are real and verifiable by one's own experience, media-reported incidents as well as careful and purposeful research. It is a basic assumption of this paper that all these factors do actually operate within our national political, administrative and legal-judicial spheres as much as they do in particular localities with increasingly mixed multi-ethnic and multi-religious communities and denominational groups. There is also **the dimension of multi-party and multi-civil-society-organization groups operating there as well, which adds to the complexity and is affected by the very same factors as a matter of course.**^{viii}

The features of cultural open-ended attitudes appearing in the subtitle of this paper is also now, presumably, fully justified and, theoretically at least, reasonably established.

4. BASIS FOR PREVALENCE OF CORRUPTION, POOR PUBLIC SERVANTS' RESPONSIBILITY, ACCOUNTABILITY AND PUBLIC SERVICES DELIVERY

It is reasonable to assume that it is now evident that a linkage does exist between the generally reported incidents of deep-rooted and wide-spread corruption, poor levels of public servants' responsibility, accountability and public services delivery, on the one hand, and, on the other, the demonstrated open-ended features of constitutionalism and cultural attitudes in the EAC Partner States. It is unnecessary here to present a lengthy account of the reported incidents. Suffice it to say that reports by researches,⁵⁶ the popular media press,⁵⁷ State/Parliamentary⁵⁸ and other public commission⁵⁹ or committee as well as IBRD/IMF reports⁶⁰ contain general accounts of information and specific data all of which together suggest prevalence of instances of the mischief focused upon by this paper.

⁵⁵ Most traditional societies and modern ones still abiding by their traditions of pre-capitalist eras tend to display some of these social-cultural-ethical behavior dispositions and the sources already cited contain very instructive background reference material for the points being made under this Sub-section: See *supra*, notes 43 and 44 at p. 21 on traditional culture in East Africa.

⁵⁶ International Crisis Group (ICG): *Burundi: A Deepening Corruption Crisis*. Africa Report No. 185 21 March 2012. Translation from French. < [www.crisisgroup.org/-media/files/central-africa/burundi/185_burundi_la_crise-corruption-English >](http://www.crisisgroup.org/-media/files/central-africa/burundi/185_burundi_la_crise-corruption-English_>); Department for Business Innovation & Skills (BIS): "Country Profile Sources General Information [on anti-corruption] Uganda Country Profile [indicating also Kenya and Tanzania but not Burundi and Rwanda]". File: L:/businessanticorruption/Sources

⁵⁷ Virtually all the dailies, weeklies, magazines and journals feature lots of information allegations and critical commentaries regarding rampant corruption in the throughout the sub-region. See also Agenda Participation 2000: "Tanzania Corruption Tracker System. War against corruption in Tanzania; High Court Rules in Favour of Dowans ..." L:/index.php.htm 2011

⁵⁸ The Republic of Uganda Inspectorate of Government: *Report to the Parliament July – December 2010* "13 Inspectorate of Government have been involved in corruption ...". www.igg.go.ug/static/files/publications/IG_Report_to_parliament_july_Dec_2010.pdf; The Republic of Uganda Inspectorate of Government: *SECOND ANNUAL REPORT ON CORRUPTION TRENDS IN UGANDA USING THE PARLIAMENTARY ACCOUNTABILITY COMMITTEE*. www.epic.or.ug/pdf_files/corruptiontrends2011.pdf

⁵⁹ See, e.g., The United Republic of Tanzania: *Presidential Commission of Inquiry Against Corruption Report on the Commission of Corruption, 1996 (The Warioba Commission on Corruption, 1996)*; Dar es Salaam, 1996.

⁶⁰ Independent Evaluation Group (IEG): *op.cit.* (Note 53).

The reported incidents include: (a) high incidence of demand and receipt of monetary and material benefits (bribes, sex in respect of female applicants for jobs, promotion, admission to studies, etc.) at all levels of Government and other public institutions;⁶¹ (b) grand corruption involving millions in terms of money by people in high office⁶² (presidential, ministerial, parliamentary, departmental, regional or provincial and district), in professional and enterprise supervisory boards, organizations and agencies; (c) lack of proper or poor control/supervision over, or accountability for, expenditure of public funds and use of public resources or property allocated under annual budgets or as State-foreign-donor-grants-in-aid of specific projects or general expenditure;⁶³ (d) lack of accountability for quick acquisitions of property of enormous monetary value by State and other public leaders and officers as well as private citizens;⁶⁴ (e) failure to apply or inconsistent, arbitrary or selective application of staff disciplinary codes to enforce discipline among employees, staff schemes of service to promote staff on basis of seniority and merit, and the like;⁶⁵ (f) apparent general public or popular approval of corrupt practices of leaders and public servants and despise for or low appreciation of meritorious performance, integrity, probity and rectitude of character of public leaders and officers (suggested, *inter alia*, by hero-like popular receptions accorded by their communities to public leaders or officers demoted due to proved or alleged scandalous conduct in their public service);⁶⁶ and (g) a high incidence of wanton acts of inter-communal violent encounters, ‘street/mob justice’ meted out against petty thieves, incendiarism/arson due to bigotry in some places with intolerant religious groups, and similar incidents involving ordinary citizens in rural and urban areas of EAC Partner States.⁶⁷

⁶¹ See an excellently researched, argued and presented account by Odd-Helge Fjeldstad: “Fighting Fiscal Corruption. Lessons from the Tanzania Revenue Authority.” Public Administration and Development – Public Admin. Dev. **23**, 165-175 (2003) Published online (www.interscience.wiley.com) DOI.1002/pa.278 ; ‘Low pay contributed to perceived corruption in certain units.’ United States Department of State Bureau of Democracy, Human Rights and Labour: “Country Reports on Human Rights Practices for 2011, The [United Republic of Tanzania] Union Ministry of Home Affairs Public Complaints Department and a Prison ...” www.state.gov/documents/organization/186460.pdf *op.cit.*, *passim*.

⁶² See, *inter alia*, The Republic of Kenya: *Report of the Judicial Commission of Inquiry Into the Goldenberg Affair*. Nairobi, October 2005; *Republic of Kenya v The Judicial Commission of Inquiry Into the Goldenberg Affair & 2 Others Ex-parte George Saitoti* [2006] EKLK www.kenyalaw.org

⁶³ For many years, annual financial and audit reports of the Comptroller and Auditor General or equivalent designation, in the respective Partner States (especially Kenya, Tanzania and Uganda) have been revealing chronic mismanagement and non-accountability for funds allocated under the National Budget for various investment and general revenue expenditure both at central and local government levels. The World Bank and IMF have raised similar concerns. The current stringent provisions of the Kenya Constitution on public financial and budgetary scrutiny and control (see especially Chapter Twelve, Arts. 201-231) largely stems from this notorious fact: Corruption would seem to be the main cause of the problems, among others, in these regards. With respect to Tanzania Health sector and generally concerning financial accountability, see *supra* note 1; Controller and Auditor-General: *Annual General Report of the Controller and Auditor-General on the Audit of the Financial Statements of Central Government for the Year Ending 30th June, 2007*, National Audit Office, Dar es Salaam, 2008; - *ditto- for the Year Ending 30th June, 2009*; Sikika: “Do Audit Reports Affect Financial Discipline, Integrity and Accountability?”, Sikika, Dar es Salaam, 2011.

⁶⁴ With respect to Tanzania, see ‘*The Warioba Commission Report on Corruption*’, *op.cit.*, *passim*.

⁶⁵ This is particularly true with respect to public sector essential services departments: education (teachers), health (doctors and nurses), police and military (lower cadre grades). Occasionally reported strike actions by these groups of public employees raise low pay, delayed or lack of opportunities for career progression and other employment-related issues as root causes of their grievances. Thus incentive packages for staff form an important feature of departmental and ministerial strategic plans. See, e.g., United Republic of Tanzania Ministry of Health: *Second Health Sector Strategic Plan (HSSP), July 2003-June 2008*. Ministry of Health Tanzania, April 2003.

⁶⁶ The press in Tanzania reported such welcoming receptions accorded to particularly former Prime Minister, Edward Lowassa (MP), and ex-Attorney General and Minister of Infrastructural Development, Andrew Chenge (MP), back in their respective constituencies upon their having been found by a Parliamentary investigation committee (the ‘Harrison Mwakyembe Committee on Richmond’) to have been involved in a serious scandal in 2009. About the scandal, see, *inter alia*, Tanzania Corruption Tracker System, *op.cit.*: “Parliamentary Committee rejects govt Corruption report on Richmond [officially on July 30th 2009]” as well as *Tanzania Daima* daily newspaper of 29th July, 2009 and *The Citizen* daily newspaper of 31st July, 2009.

⁶⁷ The high incidence of some of these grass-root events and the rate of popular press reporting on them are so high that it would not be prudent to attempt to cite sources in respect of them here – only a sample like of them should do. The seriousness of cattle rustling in the sub-region caused the signing by the members of the Eastern African Police Chiefs Cooperation Organization (EAPCCO) in partnership with the

5. GENERAL OBSERVATIONS IN LIEU OF A CONCLUSION

All those incidents and the rest of the presentation thus far are indicative of deep-rooted elements of corruption in constitutionalism itself and cultural-ethical dispositions in our countries. Indeed, they illustrate the impact of open-ended features in our constitutionalism and cultural-ethical attitudes and, of course, **our still-low level of development of the more fundamental socio-economic conditions in each Partner State and the sub-region as a whole.** It is the progressive development of these conditions as well as such conscious political (policy), legal (legislative and judicial) and administrative (executive) decisions and concrete reform steps as deemed necessary or expedient in course of, and in proper, time and space, that will create the conducive environment for the abatement of the incidence and extent of prevalence of corruption, poor public servants' responsibility, accountability and public services delivery.

Both progressive constitutional-legal-judicial changes in each Partner State and the sub-region as a whole, on the one hand, and, on the other, the peoples' (individually and as groups) sustained striving for **freedom, justice, truth and in solidarity** will egg on equally progressive trends of change in constitutionalism and cultural-ethical attitudes. Such trends will, in course of time, involve a positive impact on and, hence, a decline in the prevalence of corruption, poor public servants' responsibility, accountability and public services delivery. **Thus, depending on what we plan to, can and actually, do today, the future should not be viewed as bleak, problematic and hopeless but rather, as bright, challenging and promising.**

Institute for Security Studies (ISS). The signatories include Kenya, Tanzania, Ethiopia, Sudan and Uganda. See and *cf.* ISS-Programme-Mifugo Project (MIFUGO) http://www.issafrica.org/programme_item.pdf?PID=2 . See also National Council of Churches of Kenya: "Memorandum on Cattle Rustling Presented to the Parliamentary Select Committee to Investigate the Root Causes of Cattle Rustling on 4th January 2009." http://www.ncck.org/indx.php?option=com_content&view=article&id=112&Itemid=62 On mob justice, *inter alia*, The Legal and Human Rights Centre Report 2009 etc., Dar es Salaam, *passim*; MOB JUSTICE [Uganda] http://gupea.ub.gu.se/bitstream/2077/23084/1/gupea_2077_23084_1.pdf

5.4 KIAMBATANISHO D: REFLECTIONS ON THE SECULARITY OF THE STATE

SOME REFLECTIONS (ON THE SECULARITY OF THE STATE) AFTER READING “JUKWAA LA WAISLAMU LA KURATIBU MCHAKATO WA MABADILIKO YA KATIBA TANZANIA

The document agrees that it must be a Katiba kwa maslahi ya Watanzania wote.

Its authors and promoters recognize that there are two types of constitutions

- One of a secular and democratic type
- An Islamic one, where God is the Lord and the writings of the Prophet to guide the way a country is organized and governed, and where there is no separation of religion and politics.

In Tanzania the present Constitution is secular and democratic. The founding fathers of the nation chose this type of Constitution because there is in Tanzania plurality of religion, tribes and races.

They refused to make one religion to be the established religion or one race to be more important than another race.

These founding fathers came from different religions and races, representing the variety of the population. When Tanganyika united itself with Zanzibar into a Union, a new reality was created. One country, two separate units, two Constitutions. The provisions of these two Constitutions show important differences. The social reality of Zanzibar being a unit where the great majority are Muslims, finds its way into the Constitution of Zanzibar.

The Jukwaa document states that the Moslims want to protect the rights of Moslims in the new Constitution. This is a legitimate exercise.

They express their grievances concerning the present Constitution which denies them their rights. On page 10 they say that they want, among others, the following rights:

- Mahakama ya kadhi
- Kutakuwa na muwakilishi bungeni
- Kuwa na mfumo wetu wa elimu
- Kunufaika kwa misaada ya shirika la kimataifa la Waislamu OIC.
- Usawa katika miliki ya ardhi
- Usawa katika uteuzi wa ngazi mbalimbali za uongozi wa nchi.
- Haki ya kuheshimiwa sheria za Kiislamu.

The Teachings of Islam recognize that there are different social situations in the countries of the world. They recognize that a country like Tanzania is not 100% Moslim, and therefore the Islamic laws cannot be imposed on the conduct of the State Business. A country with a mixed population must chose a way

of living together where all people are respected in their differences and where all agree on a modality of Constitution which caters for the common good and which guarantees the basic rights of each and everyone. Therefore the importance of the democratic principle is recognized.

Muslims argue in the Jukwaa document that it is the Christians who impose themselves in Tanzania and deny the Muslims their rights. And the examples cited above are expressing this view. Most of these points are concrete and touch policy and structural realities. But these concrete points have a basic question of principle underlying them: Do these Muslim rights clash with the rights of others who are not Muslims?

Is it possible to give Muslims these rights if they create segregation and create inequality among the people? Several times, the Jukwaa document states that these requests are derived from their religion, they indicate the revealed nature of these rights, the *ibada* nature. They are of a religious nature and it is therefore a duty and obligation for a good Muslim to implement them.

They argue that the Constitution guarantees religious freedom and the right to practice it. Hence the Muslim community claims the right to live in a political arrangement which respects their religious convictions and allows them to live under a political system and laws which respect the Koranic teaching, and that these must be integrated into the institutions of the State.

The crux of the question becomes – can a Muslim agree and accept a Secular and democratic type of Constitution, which will not always accept the Muslim view because a sizeable section of the population is of different religious views and convictions and does not want the Muslim view to predominate over the views of other religions and Islam to be the established religion in the State. These other views ask for equality of rights and duties, equal dignity and equality of opportunities. Can the Muslim community (or the one represented by the Jukwaa document view point) agree that some of the Muslim rights claimed in the Jukwaa document clash with this principle of agreeing to a common basis for all in terms of rights and duties? Would they agree that the State does not privilege one religion over another? That State institutions and values are based on the equality of human nature, on the basic teaching of the natural law, the laws that are laid in people's hearts by the Creator?

If Muslims can agree to the Secularity and democratic mode of Constitution making, then the grievances of the Jukwaa, or the Muslim rights claimed, can be discussed as concrete questions and one can see whether they are compatible with a secular and democratic nature of the Constitutions.

That is why, we Christian Professionals, stress the necessity of having a secular and democratically made constitution. Once that is agreed upon, then the Muslim grievances can be looked at with an open mind.

We have a certain fear that some members of the Muslim community are pushing a hidden agenda and working and lobbying in such a way as to come one day to an Islamic Constitution. To ask for Muslim rules to be integrated into secular institutions of the State, so as to make the State to follow the Islamic rules leaves no other sensible alternative interpretation. We know it is not the way the majority of

Muslims in Tanzania want to push things but there are some sections of the community agitating in this direction.

That is why when we read that they ask for the right to join the OIC, we are not at ease, because in reading the Statutes of OIC it is clearly stated that the aim of this institution is to establish an Islamic State among its members.

When we read that they claim the right to have Kadhi Courts, we wonder what it is they are asking. Because Kadhi Courts are recognized as a valid Muslim institution, just like church tribunals of Christian churches are recognized. However such institutions cannot be part of the secular institutions of the judiciary in Tanzania. On this point we see a major difference in the Constitutions of the Union, which governs the Mainland in all matters, and the Constitution of Zanzibar which applies in the Isles with respect to all non-Union matters. So we ask ourselves what is it exactly that the Muslims are seeking when they say they want Kadhi Courts to be established?

We see that it irks many Muslims that the Vatican has a recognized representative in the Nuncio. As a representative of a small State, called the Vatican State, which is internationally recognized, the Nuncio has no more or no less a place than a representative from an Islamic State. However it does not mean that the Nuncio would have the right to make the Catholic religion to become the religion of the State in Tanzania. Apart from his diplomatic status, he has a duty of helping the local Catholic community to remain in touch with the international Catholic community. That is internal within the Catholic community and in no way intervenes in the public life directly. We also observe that within the Islamic community in Tanzania and on the international level, there is no unity of vision on how to apply and interpret the Islamic teachings to the concrete political and social realities. We even observe that conflicts arise from these differences. Such situations may also arise within Tanzania if the unity among the Islamic community cannot be guaranteed and one opinion may want to impose its views on the nation, claiming to be the representative voice of the whole Islamic community, while in fact they may not be.

It is often stated by Muslims that the State gives financial support to Christian institutions like hospitals, but refuses to give financial support for kadhi courts, or refuses that the country becomes a member of OIC which would enable the State to obtain money.

It is true that the State grants subsidies to Christian hospitals. This has a long history, already from Colonial times. The reason was that the percentage of hospitals run in the country by Christian churches was very high, and that many of them were in the poor rural areas. These hospitals were always open to people of any religion, they were seen as supplementing the effort of providing service to the population and that government was not able to take over the service provisions responsibility there. It was the open social service to all which made the Government agree to grant subsidies, to those running them.

We observe furthermore that in countries where there are two groups of mainstream religions (Christian and Muslim) there are serious tensions and clashes, leading even to violence. These are at times the result of intolerant religious sub-groups within the main groups, or sometimes they are the

result of political struggles for power by politicians who use the religious feelings of people to excite them into aggressive behavior in the name of their faith.

Therefore we Christian professionals believe, that it is important that in our new Constitutions we maintain that the State does not have a religion of the establishment, and hence, **we defend the secularity of the State**. We know that other countries do have an established religion, like England, Norway, Saudi Arabia, Iran. But in our situation where we have a plurality of religious groups, and because of our historical experience as a united people, we see the wisdom of continuing with the basic foundation of a secular state and a separation of State and religion.

In proposing this we are in no way saying that our people and our nation must not have a religious and moral foundation. Indeed a nation without moral principles is a nation without an aim and firm purpose, handed over to the whims of changing opinions, a nation in the grip of relativism.

In fact the Christians and the Moslims do have these principles in common and can defend them together to get them enshrined in the new Constitution.

We agree together that our political community must accept God's Lordship over our human society and God's vision over the dignity of the human person, every human person, and over the dignity of the whole human society. We also agree together that those who hold political authority do so in the name of the people, we agree that it is the people who are sovereign in saying what they want to be done by the authorities. It is the people, in all its diversity, that hold together the sovereignty over their country. They elect people in order to ask them to organize the way we are living together. The legitimacy of the elected authority comes from the moral foundation people want for their nation, from the moral and human values they want to see realized in the national life. The legitimacy of the political elected and appointed authorities has this foundation as guiding light in their decision making and it is also the criteria on which to judge whether acts, decisions and policies correspond to these fundamental principles and values. And these principles and values must be stated in the Constitutions to guarantee the common good and the good of any individuals, to make clear also the rights and duties of the various groups in society and of every person.

Together therefore, Christians and Moslims, we can agree that we have this common view on human life, on these basic moral principles and values, as they are laid in the human heart by the creator. Insisting that the State is secular, means for us that the State does not adhere to one of the main religions as the religion of the State. But that the State must respect this common fundamental religious view on life and human dignity and the value of the common good.

As Christian Professionals, and in line with what the Vatican Council II taught about religious freedom as willed by God and inscribed in human nature, we are convinced that truth cannot be imposed except by virtue of its own truth. For us the Word of God is the source where human society takes its lights to come to the truth and come to an educated judgment. Seeking also the light and inspiration and guidance of the religious leaders of the community, because seeking the truth is not an arbitrary exercise.

We know that Moslims will not go as far as we do in this and believe that the Islamic prescriptions come directly from the Koran and the Prophetic teachings. We respect this view, but as we said above, we see also within the Moslim community that there are differences of interpretation on how these are to be applied in concrete social economic and political situations. We call for an intelligent and tolerant debate in our society on issues of this nature.

CONCLUSION

- 1) It is our view, as Christian Professionals, it is appropriate and legitimate to insist that the Constitutions repeat clearly the principle of the Secularity of the State as a basic guide for our nation. That we accept the separation of religion and State. If the Moslim community can express the same conviction clearly and not want to turn Tanzania into an Islamic State, then there is possibility of looking at the grievances which Moslims may have with regard to the actual situation of policies and legislations with a view to seeing how to give everyone equal rights and opportunities. This is a call for open dialogue, in mutual acceptance and respect.
- 2) It is normal that in any human society there are differences of views and approaches. It is part of human nature. Therefore it is necessary to have some organized and structured ways of dealing with such differences. Great care must be taken not to politicize such issues, that means for us that such issues must not be solved through the political battles of trying to come to power working on the emotions of people and making them into religious issues of one group against the other.
- 3) It can also arise in a country that the majority view on a certain point is integrated into the legislation of a country, and against which a minority group has objection on moral or conscientious grounds. These are often the delicate issues in any society which may cause great uneasiness. It does not give us the right to throw out the rule of law and order and disrupt the peace. But it does not mean either that it is the end of the debate and that a group cannot continue to raise debate. It also may need regulations to protect the rights of conscience of those who disagree. In any society a Constitution is a Sacred instrument. But it is a dynamic tool for the social order and, therefore, open to debate and to change – even after it has been proclaimed.

We state then that:

- 1) If the secularity of the State is guaranteed in the constitutions, that there is room for debating together on how to receive and deal with the grievances as expressed in the Jukwaa document and see how things can be organized better.
- 2) We need an independent Constitutional Court to verify the Constitutionality of any legislation.
- 3) The debate about possible changes in the Constitution in the future require an instrument for regular review of the Constitutions which is above party politics and away from electoral campaigns. It could be a Council of Elders, (as proposed in our waraka) one of whose principal functions would be to serve as a forum for receiving and processing views on constitutional review/changes/amendments and preparing drafts for consideration by members of the public, the Constitutional Court of Parliament/Constituent Assembly, as the case may be or the particular circumstances/moment or the Constitution may require.

ENDNOTES

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ⁱ The paper was originally prepared and delivered as a "Guest Lecture" at a special seminar at the University of Bayreuth Faculty of Law in Germany, which has undertaken to publish it in its journal (not yet specified, including issue No. and date of publication).

ⁱⁱ These will as far as possible be cited either directly in the text or footnotes in relation to matters or facts they support, illustrate or clarify.

ⁱⁱⁱ Virtually all the anti-colonial movements on the continent, subject to such exceptions as Haile Selassie's Ethiopia, and Eritrea, Morocco, Libya, Egypt and others with emirates and sultans who were retained in their positions as figurehead leaders without their substantive traditional powers, were led by intellectuals and politicians with peasant or other mean family background.

^{iv} This is the case under all the present constitutions of the Partner States and does not really call for specific illustration or citation of authority.

^v It would serve no purpose to cite many illustrative instances in these regards as the incidence is so high that everyone in the legal and political community is well aware of it.

^{vi} It is quite common for ministries to seek and rely on donor funding for developing legislation bills and later for their implementation once passed by parliament. Such legislative process tends to move faster and the follow-on implementation to be more efficacious than non-donor-supported ones.

^{vii} *I.e.*, those which are based on fair/reasonable and objective criteria, principles and values acceptable to the majority and favourable to the poor and vulnerable groups and communities in the country and society.

^{viii} The EAC provides another level at which these attitude tendencies are played out but it is not part of our operational stage in this paper.