Debating Constitutional Amendments in Tanzania

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1. Introduction

*The Citizen* has been recently reporting on the recommendations made for change in the Constitution and other laws by a Committee that was appointed by the Speaker of the National Assembly, Hon. Samuel Sitta. In itself the review of the Constitution and the related laws is a good thing. But some of the recommendations have far-reaching implications and require a serious public debate. For such a debate, the public first has to know exactly the proposals made by the Committee and the reasons and rationale behind them. Secondly, such a debate cannot be and ought not to be piecemeal.

Any amendment of the Constitution, except for the most mundane, is a serious matter and ought to be carefully scrutinized in the context of the Constitution as a whole and the set-up of the State and the Government. In this paper, I will take three, relatively uncontroversial recommendations. The first recommendation relates to the appointment of Regional Commissioners while the second and third recommendations relate to the powers of the National Assembly to approve major agreements before they are signed and sealed and the power to approve certain appointments before they take effect. Currently, it seems, there is nothing to bar the President from appointing a Member of Parliament (MP) to be a Regional Commissioner or vice-versa, that is, to appoint a Regional Commissioner to be a Member of Parliament which the President can do under his powers of nominating up to ten members to the National Assembly.

The Speaker’s Committee considers this to be contrary to the constitutional principle of separation of powers. The Committee argues that such practice tends to increase the presence of the Executive in the Assembly. This is a noble sentiment and the recommendation that Regional Commissioners ought not to be Members of the National Assembly is very welcome. But the proposal to do away with this practice is, with respect, only a partial appreciation of both the principle of separation of powers as well as the role of Regional Commissioner in the government structure of this country. Let me explain.

2. Do we really have Separation of Powers?

Separation of powers, as is now pretty well-known, is the separation of functions between three arms of the State: the Legislature, the Executive and the Judiciary. In other words, State Power is exercised through the State’s three arms. For those who love formula we may say: *Legislative Power + Executive Power + Judicial Power = State Power.* The principle of separation is indirectly recognized in Article 4 of the Union Constitution. Article 5A of the 1984 Zanzibar Constitution, as amended in 2002, is in fact more forthright in its formulation of this principle. It goes further and forbids interference of one branch by the other branch of the State. Sub-article 3 says and deserves to be quoted: *Hakuna mamlaka itakayoingilia Mamlaka nyingine isipokuwa kama na kwa kadri iliyelezwa katika Katiba hi.* The drafters of the Union Constitution may well want to borrow from the Zanzibar provision.

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2 *The Citizen* newspaper is an independent Tanzanian daily. This working paper is based on a series of three articles that were first published in *The Citizen.*
But in spite of this, our system of government is not fully based on the principle of separation of powers. It is actually based on the colonial version of the Westminster (British) system. In Britain, there is what is called the Parliamentary Executive. Thus the whole Cabinet, including the Executive Prime Minister, is part of the House of Commons, that is, the Legislature. That is also the case with us except that our Prime Minister is not an Executive Prime Minister, nor the chairman of the Cabinet, but only a leader of the Government business in the National Assembly.

Secondly, the Head of the Executive in our case is the President. He is the chairman of the Cabinet but not a member of the cabinet. Although he does not sit in the National Assembly, he is part of the Parliament. No bill passed by the National Assembly becomes law unless assented to by the President. In Britain also, a law has to be assented to by the Queen as the head of state but that is a formality. In the colonial set-up the law passed by the Legislative Council had to be assented to by the Governor as the representative of the Queen, but that was not a formality. And in our case too the President’s assent is not a mere formality. So, the Head of the Executive is also part of our Legislature. It is clear therefore that in this regard there is no clear separation between the Legislature and the Executive.

Worse, even the ministers before being appointed have to be Members of Parliament. During various debates on the Constitution beginning in 1983-84, there have been suggestions from the civil society that ministers should be appointed from outside the National Assembly. While the suggestion that a Regional Commissioner, being part of the Executive, should not be a Member of Parliament is welcome, we have to go beyond and scrutinize the principle further. Why should the ministers, who are part of the Executive, be Members of Parliament? Why should the president who is the head of the Executive be part of the parliament? And, why should the Head of Executive (the President) have powers to nominate up to 10 Members of Parliament? Let us elaborate on the place of Regional Commissioners.

3. Who are Regional Commissioners?

Regional Commissioners are appointed by the President. They are considered part of the Executive. They have the responsibility of carrying out all the executive functions of the government at the regional level. They are part of the central government. Regional Commissioners are clearly not elected leaders. Therefore, are they civil servants or politicians? Our Constitution is not explicit on this and our leaders have tended to treat them as politicians. In a multiparty system, a confusion of this kind is not healthy.

If we examine the scheme of governance in our Constitution in its totality, then Regional Commissioners should clearly be civil servants just the way permanent secretaries are. I will explain. It is often forgotten that in Tanzania we have only three levels of governance – national, district and village. Only at these three levels we have elected organs (Parliament, District Councils and Village Councils) to which appointed functionaries and public servants are accountable. The regional level is not a level of governance. It is an extension of the Central Government to regional level. The Regional Commissioner does not derive any political legitimacy from the people. He or she derives his/her authority from law and is accountable to the appointing authority. Therefore, there is a crying need for the Constitution to make it clear that the Regional Commissioner is a public servant akin to a permanent secretary and not a politician.

In reviewing article 61 on Regional Commissioners, the Speaker’s Committee should have gone further. In using the principle of separation of powers to support its recommendation on
In the next section, we discuss the approval of agreements and appointments by the National Assembly.

3. Checks and balances?

Approval of Agreements
The Speaker’s Committee apparently finds article 63(3)(e) of the Constitution which requires ratification of treaties and other agreements by the Parliament confusing and inadequate, because some large controversial contracts dealing with privatization and mining have not been brought before the National Assembly. The Committee is right. But not so much that the article is confusing; it is simply inadequate. The ratification mentioned in that article relates to treaties (that is agreements between states) and other agreements of similar nature (for example, agreements with inter-governmental organizations) but does not include contracts with mining conglomerates and multinationals, or contracts giving concessions to exploit natural resources or contracts privatizing large infrastructural projects or utilities, for example. The Committee suggests that these types of contracts should also be subject of scrutiny by the Parliament and be approved before they are signed and sealed by the Executive.

This is a very welcome recommendation and one wonders why it was not made ten years ago. During the third phase government when some honourable Members of Parliament wanted some contracts to be brought before the Assembly, they were admonished by the then Attorney General that private contracts were confidential and therefore not open to discussion by the National Assembly. A very strange and curious argument indeed! It is like saying that what one arm does is secret from the other arm. One of the principal functions and duties of the Parliament is to supervise the Executive and hold it publicly accountable. How can some dubious principle of the commercial world – secrecy of contracts – override provisions of our Constitution? Yet the Attorney General was hardly challenged, not even by learned lawyers in the Parliament. It seems party loyalties and political expediency rule supreme over professional competence, ethics and public responsibility.

Anyway, now that the Speaker’s Committee has recommended that public contracts be subjected to parliamentary scrutiny, albeit after the horse has bolted, it should be supported. The provision should go further in three respects. Firstly, the contracts to be submitted to the Assembly should be clearly identified, not by name, but by certain characteristics; and the Assembly should have power to call upon the Executive to submit any contract for its scrutiny even if it does not fall within the criteria prescribed. This should also apply to past contracts. Secondly, the contracts should be brought to the Assembly, through its relevant parliamentary committee, after they have been negotiated and initialed but not yet signed, sealed and delivered. Parliament should not and ought not to intervene at the negotiating stage; that is the prerogative of the Executive. Thirdly, the report of the relevant parliamentary committee on the contracts should be tabled to an open session of the National Assembly for discussion.

Confirmation of Appointments
The Speaker’s Committee also recommends that certain constitutional and other public appointments to important public positions should be confirmed by the National Assembly before they take effect as happens in other countries. Again this is welcome. In fact, I recall that this suggestion was made by the Tanganyika Law Society in the early 1990s when multiparty
amendments were under consideration. In my view, the recommendation should be expanded and deepened.

First, the appointments that should be brought before the Assembly for confirmation should be specified clearly. The Committee mentions ministers, the Attorney General, the Chief Justice Jaji-Kiongozi, judges of the Court of Appeal, diplomats accredited to certain countries, chairman of the electoral commission, top executives of the Bank of Tanzania and the Revenue Authority. This is fine except that there are certain omissions. In my opinion, there is hardly any need for the confirmation of Ambassadors. The tradition of confirmation of diplomats by the Congress comes from the US. Its rationale is partly historical and partly because of the super power status of the US. Historically, diplomats accredited to foreign states played an important role in international relations and therefore issues of war and peace. And, given the super power status of the US today, its diplomats act as the eyes and ears of the State to keep a watch on rival powers and control over client states. None of these reasons applies to us.

For us, the rationale for parliamentary confirmation of important appointments is, one, to ensure that the people who make major national decisions are of high moral integrity and socially acceptable, which means that their credentials must be subjected to public scrutiny. In our case, diplomats do not make major decisions. I do not see the need for including them in this list. In sum, I would suggest that all constitutional offices must be confirmed. This would include, in addition to those mentioned in the Committee’s proposals, judges of the High Court and Regional Commissioners. The other category would be heads of significant institutions such as the State Bank and the Revenue Authority.

The second clarification I would like to add is that confirmation proceedings should be open, not a closed-chamber affair between a parliamentary committee and the proposed appointee. This is the most crucial aspect of confirmation proceedings. Without it, the whole exercise would be virtually meaningless and reduced to the same syndrome of ‘I-scratch-your-back-you-scratch-mine.’

The proposal on the scrutiny of contracts and confirmation of appointments is based on another fundamental constitutional principle, and that is the ultimate parliamentary authority over the Executive and the Executive’s accountability to Parliament. In the light of this principle, I propose to examine other, more controversial, items in the Committee’s proposals in the next section.

4. Should the Parliament supervise the Executive?

The Speaker’s Committee makes two other suggestions of amendment which are debatable. One relates to the inclusion of the Parliamentary Service Commission in the Constitution and the other to the establishment of a Constituencies Development Fund (CDF) by amending the Parliamentary Immunities, Powers and Privileges Act of 1988. I will discuss these, one at a time.

Parliamentary Service Commission

‘Parliamentary service’, which refers to employment with the National Assembly, was established as a separate service in 1997 by the Parliamentary Service Act of 1997. Previously, it was part of the civil service under the Civil Service Commission. We have a number of service commissions in this country, which deal with the appointment, disciplining, termination, that is, generally with the terms and conditions of service of officers in the employ of the State. Thus, for example, there is the Public Service Commission covering central and local government servants as well as teachers. There is also the Police and Prisons Service Commission and the Judicial Service
Commission. As the name implies, these commissions deal with terms and conditions of employees in the service of various organs and departments of the State. Except for the Judicial Service Commission, none of these Commissions is provided for in the Constitution. All of them have been established by their respective Acts of Parliament. The exception to the rule is the Judicial Service Commission and there is a very good reason for it.

As is well known, first the Judiciary is one of the three arms of the state and therefore partakes of the principle of separation of powers/functions as we discussed in the previous sections. But underlying the Judiciary is another constitutional principle, that is, the independence of the Judiciary. One of the mechanisms for securing independence of the Judiciary is to provide for the security of tenure of judicial officers and also to ensure that their disciplining etc. is done by a separate, impartial body under the chairmanship of the Chief Justice. This principle does not apply to the Executive and the Legislature, the other two arms of the State.

So, while there is separation of powers between the Legislature and the Executive, they are not independent of each other, in making their decisions. Rather they are interdependent. For instance, the Parliament can override the decisions of the Executive and there is nothing to prevent the Executive from lobbying and influencing the decisions of the Parliament. It is for this reason that, unlike the Judicial Service Commission, neither the Public Service Commission nor the Parliamentary Service Commission has to be entrenched in the Constitution. Changes in these commissions can be made without having to amend the Constitution. Thus before 2002 the three separate commissions, civil service, local government service and the teachers’ service commissions, were merged to form one service under the Public Service Commission and this was done by passing an Act of Parliament, the Public Service Act of 2002.

The Speaker's Committee recommends that the Constitution should be amended to include the Parliament Services Commission. Given the background I have just traced, in my view, this recommendation has no good justification. It may be that this recommendation arises from the Committee’s (with respect) misconception of a service commission. For instance, the Swahili rendering of the Parliamentary Service Commission by the Committee is Tume ya Huduma za Bunge rather than Tume ya Utumushi or Tume ya Kuajiri. The Constitution uses the latter two terms to describe service commissions. The Committee’s conception of the Parliamentary Services Commission seems to include giving services to the Parliament. Not surprisingly, therefore, among the proposed functions of the Commission, the Committee has included such other functions as preparing the annual budget of the Parliament, fixing rates of allowances of parliamentarians and administering of the proposed Constituency Development Fund. Except for the last one, which I shall discuss separately, the other two functions actually belong to the Secretariat of the Parliament which is established by Article 88 of the Constitution and not to a service commission.

In my humble opinion, therefore, there is no need for including the Parliamentary Service Commission in the Constitution. Nor would it be proper to expand its functions as suggested by the Committee. In fact, if this suggestion were implemented, it might run counter to the whole concept of a service commission and undermine its purpose. It is also quite conceivable that it will create an overlap of functions and powers between the Commission, the Secretariat and, perhaps, one or the other of Parliamentary Committees.

Constituencies Development Fund
The Committee recommends the establishment of a Constituencies Development Fund by amending the Parliamentary Immunities, Powers and Privileges Act. As the draft of the Committee says, the Fund ‘shall be administered by a Constituency Development Fund
Committee (CDFC) under the direction of a Constituency Member of Parliament’. The moneys for the Fund will be appropriated by Parliament and donations etc, received from any other source. The Fund will be spent on constituency level local projects conceived and administered by the CDFC. The Speaker’s Committee has drafted detailed regulations to govern the Fund. I will leave aside some of the technical flaws in these drafts and concentrate on fundamental issues of principle.

This suggestion is undoubtedly novel. To the best of my knowledge, such a thing has not existed before, at least not in law. In my view, the establishment of such a Fund would be in clear breach of two basic constitutional principles and it will also be contrary to the scheme of administration and governance underlying the State structure.

First, the function of using public funds for administration and development is an executive function. It falls squarely under the jurisdiction of the Executive. Parliament approves funds but does not administer or spend them. The Executive administers and spends the funds for which it is accountable to the Parliament. Now, if the Parliament approves money for parliamentarians and parliamentarian themselves administer and spend it, who would they be accountable to? Clearly, this breaches both the principle of separation of powers/functions and the principle of the Executive’s accountability to the Parliament. In fact, it was these two principles which the Parliament correctly deployed to justify some of its recommendations that we discussed in the previous sections. There is, therefore, a huge contradiction between the principles underlying the Committee’s other recommendations and this one.

Secondly, there are three levels of governance – national, district and village - and five basic levels of administration – national, regional, district, ward and village. Public funds are usually allocated at these levels. ‘Constituency’ is neither a level of governance nor a level of administration. It is purely a demarcation of geographical spaces based on consideration of numbers for the sole purpose of representation and election. Thus we talk of development of villages, districts etc. not constituencies. In fact, when ministers try to divert funds to their constituencies instead of sending them to districts, there is a big hue and cry. Therefore, while it may be good for electioneering and campaigning by Members of Parliament to have money set aside for funding projects in their constituencies, it is certainly not proper administration to have funds for constituency level projects which are not under the supervision of an organ of the Executive.

The proposal is to divide three-fourths of the moneys in the Fund equally among constituencies. This in itself would lead to enormous bias, and therefore bickering among Members of Parliament, since the needs of the constituencies are not equal or same. Secondly, one of the sources of the Fund is expected to be donations. Can we then rule out funds from dubious sources so as to gain favour of the parliamentarians?

These two recommendations of the Speaker’s Committee need to be revisited and carefully thought through. They can give rise to serious problems and compromise the oversight role of honourable Members of Parliament.
References
The Constitution of the United Republic of Tanzania of 1977, as amended from time to time;
The Constitution of Zanzibar
Public Service Act of 2002
Parliamentary Service Act of 1997
Parliamentary Immunities, Powers and Privileges Act of 1988
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