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## RESEARCH ARTICLE

### THE PARADOX OF CONSTITUTIONAL SUPREMACY AND POWER STRUGGLE IN THE EAST AFRICAN COMMUNITY: AN EMPIRICAL REFLECTION OF RWANDA, BURUNDI AND UGANDA

**\*Dr. Philemon Sengati**

The University of Dodoma, Department of Political Science and Public Administration,  
P.O. Box 395, Dodoma, Tanzania

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#### ABSTRACT

Under constitutional supremacy doctrine, if a law or contract violates any norm of the Constitution, that law or contract, whether promulgated by the parliament or by the executive branch or entered into by private persons for private purposes, is null and void and without any force and effect. In this line of argument, the Constitution is the basic and paramount law to which all other laws must conform and to which all persons, including the highest officials of the land, must defer. Despite this constitutional guide the perplexing scenario has been the expediency to sap this constitutional strength for gluttony of leadership power which has debased its rectitude in the practice of some of the EAC member states. A reflection of Rwanda, Uganda and Burundi points to the truth that constitutions have been amended egoistically to legitimize power in the name of the will of the people. This has generated constitutions that focuses on the interest of leaders rather than citizen and has necessitated compliance under constitutional authority. This paper recommends that an ethical understanding of constitutional building process that genuinely integrate the will of the people should be capitalize and regional and global effort should come together recall for respect of appropriate constitutional building processes in some of the East African Community member states.

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## INTRODUCTION

"The idea of constitutionalism is older than the existence of written constitutions. Constitutionalism places limits upon government, prescribing the means by which official power may be exercised. Constitutionalism establishes boundaries between the state and the individual, forbidding the state to trespass into certain areas reserved for private action. Constitutionalism also has a deeper and older connotation, demanding adherence by government to recognized customary procedures. The idea of a constitution in this procedural sense can be traced all the way back to Aristotle, who in his *Politics* and the *Constitution of Athens* described all the known political arrangements of ancient Greece (Blaustein and Sigler, 1998). Though *constitutionalism*, the spirit of constitution, had already been alive and practiced for many years, England's Magna Carta, the Great Charter of 1215, is now widely accepted by general consent of history as the world's first major constitutional document. Indeed it is interesting to read the constitutions of the USA, both the federal constitution and those of individual states, as well as the constitutions of many

Commonwealth countries, and to note how many passages from Magna Carta have simply been copied word for word (Hamid, 2016). The first constitution appeared in England in 1215 with the adoption of the Magna Charta Libertatum but her training process continued after the genesis of the written constitution (Howard, 2016). In the feudal period, the term constitution designate those rules on the organization and functioning of the state, guaranteed certain rights and freedoms, which resulted in a limitation of the powers of the monarch. "Enlightenment" brings a new movement that is constitutionalism movement that aims to replace traditions with a written constitution. Constitutionalism, historically speaking, is offensive aimed at establishing the separation of powers - the basic functions of the state. According to the precepts of constitutionalism, the constitution had to be a written paper (Clark, 2011)). The first written constitution of the United States Constitution was adopted in Philadelphia in 1787, but preceded by the constitutions of American States issued under English rule adopted their own written constitution (e.g. Virginia - 1776 or the State of New Jersey - 1777) before the adoption of the Federal Constitution. In Europe, it is the first written constitution of France, adopted in 1791, and later, other countries have adopted written constitutions, like Sweden in 1809, Spain in 1812, Norway in

\*Corresponding author: Dr. Philemon Sengati,  
The University of Dodoma, Department of Political Science and  
Public Administration, P.O. Box 395, Dodoma, Tanzania.

1814, Holland in 1815, Greece in 1822, Belgium in 1831, etc. After that, "states have adopted constitutions and constitution became not only the fundamental law of a state, but also political and legal document which mark important moments in the development of socio-economic and politico-legal states"(Acemoglu, 2005). Constitution is the fundamental law of the state which includes general rules and principles by which the state is organized, are organized and function state authorities, are established fundamental rights and freedoms and their guarantees. Constitution limits absolute power. This it achieves by placing conditions on the use of that power, by requiring the sharing of power with those subject to it through a process of debate, and by establishing boundaries beyond which the law may not intrude. No government, president or monarch, no institution of law or enforcement, should be created or be allowed to exist and to function without a constitution. No one should have power over others, unless and until that power and the conditions of its use have been strictly defined. In the words of Thomas Paine: "government without a constitution is power without right" (Higgs, 1987). In the modern period constitution building process has been a people centred process and build on the will of the citizen as a contract that sets out conditions on the use of state power. The constitution of a country is the most important legal document. It is the supreme law and at times it has been referred to as 'the social contract'. It is the contract between the rulers and the ruled. It is therefore more than just a document. It embodies the wishes and aspirations of the people in a country. All the laws, by-laws, rules and regulations find their legitimacy from the constitution (Blokker, 2014). " No people should give government power over them, without first setting condition on the use of that power, such is the purpose of the constitution". In this respect the constitution has been the result of the sovereignty of people and the source of ultimate authority, the constitution stipulate how the people would like to be governed. Therefore, due to the notion of people's sovereignty and the fundamental right of the people to participate in public affairs, there is a tendency, indeed compulsion, to promote people's participation in constitution making.

## MATERIALS AND METHODS

The materials used in this paper are both secondary. The analysis of the articles, books, news papers and journal on similar debates were done using thematic analysis. The richness of the reviewed literature information made conclusions of the finding valid and reliable. Generally secondary data forms the bases for key inferential arguments in this article.. In this case it is comprehensive methodology that intended to capture the whole information on the Paradox of Constitutional Supremacy and Power Struggle in the East African Community.

**The Paradoxes on board:** Despite the urgent call by the international, regional and national communities for states to build constitution by evocation of the will of people, the opposite has been evident where some regimes in the East African Community have amended and rewritten constitution by manipulating the will of people to egoistically maintain their leadership power. The United Nations Development Programs (2003) argues that the participation of the public in the drafting of the constitution is a crucial component of the process. It adds indispensable legitimacy to the final document adopted.

It also assists the definition of a national identity and the articulation of common popular aspirations for the future. It is true that, the African Union (AU) committed to a democratic social contract with Agenda 2063, in this agenda there is a formal promise to abide by the will of the people and to respect the rule of law. Indeed, the African Union stresses that: we recognize that a prosperous, integrated, united Africa, based on good governance, democracy, social inclusion, respect for human rights, justice, and the rule of law are the necessary pre-conditions for a peaceful and conflict-free continent. This recognition stems from having "learned from our past". As a result, there is a pledge to "take into account the lessons" as Africa embarks on Agenda 2063. The East African Community Treaty (Biney, 2011). which is a constitution of the respective community reinforces such citizen involvement in a constitutional manner as (Article 3.3a) demonstrate: "adherence to universally acceptable principles of good governance, democracy, the rule of law, observance of human rights and social justice", as one of the main criteria for admission into EAC membership. These fundamental views points to how International, regional and sub-regional communities supports the people will in decision making including constitutional processes.

However, such efforts have not generated positive results in some of the East African member states whereby both Rwanda, Burundi and Uganda demonstrate detrimental features to such constitutional bases and calls by the world community. In these counties the incumbent regimes have irrevocably amended constitutions to retain political powers at the expense of constitutional bases and social contract. In most cases the -people's involvement has been a fiction, as the people may have had little role in making, or even influencing the decisions, on amending and making of new constitution in the respective countries (Report of the Legal and Constitutional Commission of Rwanda, 2002).

**Theoretical and Empirical debate:** The Social Contract theorists like John Locke, David Hume, and Jean-Jacques Rousseau, argue that, the fundamental basis for government and law is the concept of the social contract, according to which human beings begin as individuals in a state of nature, and create a society by establishing a contract whereby they agree to live together in harmony for their mutual benefit, after which they are said to live in a state of society (McKeever, 2005). This contract involves the retaining of certain natural rights, an acceptance of restrictions of certain liberties, the assumption of certain duties, and the pooling of certain powers to be exercised collectively. A constitution of government, establishes institutions, offices, procedures, duties, and structures. Such pooled powers are generally exercised by delegating them to some members of the society to act as agents for the members of the society as a whole, and to do so within a framework of structure and procedures that is a government. No such government may exercise any powers not thus delegated to it, or do so in a way that is not consistent with established structures or procedures defined by a basic law which is called the constitution (Ratcliffe, 2013). While it is possible in principle for such a constitution to consist entirely of a body of unwritten practices, traditions, court decisions, and long-established statutes, in practice no such basic order can be considered secure against confusion or corruption if it is not primarily based on a written document, which prescribes the structure, procedures, and delegated powers of government, and the retained rights of the people,

and which is strictly interpreted according to the original intent of the framers who in ultimate analysis should be the people. Although in principle the procedures may allow for the direct adoption of legislation by vote of the people, this is both impractical and potentially dangerous, especially to the rights of minorities, so that it is generally best that most legislation require approval at some point in the legislative process by a deliberative assembly, a body of elected representatives rather than by direct popular vote, and that any such legislation be subject to judicial review, whereby legislation not consistent with the constitution can be voided (Elazar, 2015)). Such a form of government is called a republic, as distinct from a democracy, in which all legislation is adopted solely by direct popular vote. And if it operates under a well-designed constitution, it is a constitutional republic.

The will of the people are represented by deliberative assembly, it is important that the respective assembly fairly represent all the competing interests of the people, so that the concerns of minorities can be weighed and not ignored. But as said the fundamental basis is the concept of the social contract, according to which human begin as individuals in a state and create a social tie by establishing contract representing a delegated will of citizen (Geerth, 2013). Critics of social contract theory argue that almost all persons grow up within an existing society, and therefore never have the choice of whether to enter into a social contract. Not having a choice, they say, makes any such contract void. The original proponents of the social contract theory, John Locke, David Hume, and Jean-Jacques Rousseau, answered these critics, but not in a way that is entirely satisfactory (Locke, 1980). To understand how the social contract comes about, we need to look at the kinds of contract that prevail during each stage in the development of a human being in society. Other critics point out that, fair representation is insufficient if deliberation is not effective in analysing and anticipating all the consequences of any decisions that might be made by citizen. The consent of the majority should be necessary for action, but that consent should never be sufficient for action. Despite the critics the theory remains relevant in analysing constitutional process whose base are people will have delegated to representative body to analyse and ultimately approval by the citizen. This paper conceives a theoretical lacuna in the sense that to a large extent the misuse of people's will to expedite the desire for political power prevails in some of the EAC member states.

Scholars have substantially written about constitutional supremacy and the necessity of evoking the will of the people therein. Lincoln (2006) argues that, the system of government is based upon a secular democratic faith that is, that government of the people, by the people, and for the people shall not perish from this earth. The basic tenets of that faith are embodied in a Constitution to which dignitaries of State, ministers, judges, legislators, and others down to members of the nyaya panchayats in villages, swear allegiance. Thus, place of a living monarch; we have enthroned a set of principles contained in the Constitution. Such a system, loyalty to principles which, viewed as a whole, are 'legally sovereign or supreme, must rise above all other ties such as those of kinship, class, creed, or community. Chambers (2013) argues in Canada Citizens' assemblies might provide some clues about meaningful public participation, public accountability and different assumptions about democracy – the things that have been lacking in constitutional processes.

There are, to be sure, limitations in a citizens' assembly model but the model reminds us about the importance of participation that is not based on adversarial activities that place a premium on individual interest aggregation but stresses the importance of talk that is framed around consensus. According to this view, citizens talking to citizens about politics are the essence of democracy.

**Underpinning Arguments:** There have been “constitutional changes” in recent years in the East African member states both Rwanda, Burundi and Uganda have amended or changed constitutions to sustain incumbent regimes in power. The respective changes in most cases are timely and intent to fix additional leadership tenure as constitutionally agreed schedule comes to cessation. Rwanda's President Paul Kagame run for a third term in 2017. This was possible after the constitutional was amended to allow him another term, following a referendum to that effect. He may be in power until 2034 as a two-year process to secure a constitutional amendment allowing Rwandan President Kagame to run for a third term finally ended in 2017 mid-decembers with 98.3% voter approval (Oluoch, 2011). The country's 2003 constitution had limited the number of terms a president could sit to two. The campaign for the change was run by the governing Rwandan Patriotic Front (RPF) as well as the parties represented in parliament. It was largely supported by the regime-dependent media and opinion makers.

The result was near-total unanimity in favour (Adelman and Suhrke, 1999). The sole registered opposition party, the Democratic Green Party, was the only one to publicly oppose the move, and even petitioned the Supreme Court to have the amendment declared unconstitutional. But it had no legal case and was rightly denied its claim. In all, 3.7 million Rwandans out of a total voting population of six million signed petitions in a regime-organised “spontaneous” expression of support. The country's population is estimated to be just over 12 million. There were no debates, no demonstrations - not even peaceful ones. This was to be expected as since the RPF took power in 1994 every demonstration in the country has been organised by the government. Ultimately both chambers of parliament unanimously approved the amendment (Crook, (1999). One Member of Parliament abstained while during the nationwide “consultations”, MPs and senators only found ten Rwandans opposing the move. Strongly worded expressions of discontent by the US and the EU didn't help. Kagame was quick to denounce international interference in Rwandan affairs. The revised constitution was published in the Official Gazette on 24 December 2017. Kagame, having displayed a noncommittal attitude throughout the campaign, announced on New Year's eve that he would seek a third presidential term. The focus is to draws attention to some legal peculiarities of the revised constitution. In the efforts to justify extension of tenure and fictions constitutional review the BBC News (2017) reports when Kagame said in a televised address:

*“You requested me to lead the country again after 2017. Given the importance and consideration you attach to this; I can only accept. But I don't think that what we need is an eternal leader.”*

The situation in Burundi started, where President Pierre Nkurunziza's machinations for a third term in 2015, this led to political instability and a failed military coup. He subsequently emerged victorious in an election marred by violence and

intimidation in 2015. The Constitution itself was adopted in 2005 and was in part an outcome of the Arusha Agreement of 2000 that ended Burundi's civil war. (Burundi's Constitution, 2005, Constituent Project; Arusha Peace and Reconciliation Agreement for Burundi (Aug. 28, 2000). The current plan for the revision of the Constitution was adopted by the government in October 2017. (*Burundi President Launches Campaign to Extend Rule, supra*). Among the proposed changes to be considered in the referendum is a revision of the current constitutional limit on presidential terms to two spans of five years each; this amendment allowed Nkurunziza to remain in office for two additional seven-year terms (Constitution, art. 96.) The President is now serving an additional term following a controversial 2015 court decision. (Constance Johnson, *Burundi: Court Permits Third Bid for Presidency*, Global Legal Monitor May 7, 2015).

*Critics of the amendment argues that*, the process of having a referendum launched by the President has been criticized by Agathon Rwasa, First Deputy-President of the National Assembly. Rwasa has said that the Electoral Code requires the President to consult the offices of the two parts of the bicameral legislature, the National Assembly and the Senate, and that in this case no consultation took place (BBC News, 2017). The President of the Republic may, after consulting the two Vice-Presidents of the Republic, the Bureau of the National Assembly and the Senate Office, submit to referendum any draft constitutional, legislative, or other text, likely to have profound repercussions on the life and future of the nation or the nature or functioning of the institutions of the Republic (Burundi Presidency website.) Ruffyin (2015) the President of the organization Watchdog Against Corruption and Embezzlement (Olucome), called the government's referendum initiative a "suicidal path" and argued that the leaders are ignoring the problems of poverty and poor governance in the country. He said that the "political authority is giving priority to a group of individuals to the detriment of a whole population (Human Rights Watch Report, 1999)

In the context of Uganda, "the Ugandan government wants to remove the age limit for presidential candidates, a senior official said, a move that would allow Yoweri Museveni to stay in office". The rules were already changed in 2005 to remove a two-term limit that allowed Museveni, now 72 and in his fifth term, to stay on. Under the current constitution, he would be too old to run in the next election, due in 2021. Mwesigwa Rukutana, Uganda's deputy attorney general, said the cabinet was examining several possible changes to the constitution and that the age limit was one of them. The proposals will be put to parliament. If anybody has been serving very well and the population thinks he still has a lot to contribute he should not be precluded from doing so merely because he has clocked 75 (years)," he told Reuters (Kjaer, 2015).

There are so many people who like that (age limit) amendment ... as long as people are voting, age of the candidate doesn't matter," Rukutana said. Museveni, president since 1986, has not publicly stated he intends to run for another term but many Ugandans assume the move to lift the 75-year age limit is to let him do so. He is already one of the longest-serving leaders in a continent where many presidents have changed their constitutions to hold on to power beyond what was initially envisaged. Rukutana denied the proposal was being crafted to benefit Museveni, and declined to say when the government

planned to present its proposals. Museveni's spokesman, Don Wanyama, declined to say if the president would seek another term, calling such talk "speculation". Museveni's critics accuse him of using security forces and the judiciary to stifle opposition and say government officials are rarely punished for widespread corruption (Ottaway, 2014).

## Conclusions and Recommendation

Supremacy of the Constitution is its quality, which positioned it on top of all state institutions and businesses, making it a legal and political reality, not just legal. It is a complex notion comprising elements that ensure a supreme position in the entire state system. Supremacy of the Constitution is having an historical character. The paper therefore recommend adherence with constitution supremacy principle and refrain from egoistic and unilateral decision to amend constitution for power retention by some of the leaders in the EAC. The AU has to be commended for taking a firm stance against regime change through military coup. It has suspended countries for "unconstitutional regime change". But it has not been as effective in its opposition to dealing with the problem of extended presidential terms. This could be due to the sovereignty principle, which makes African states reluctant to interfere in others' affairs. The paper recommends a relook into such principles and possibly amendment should be done to mitigate such despotic and illegitimate elongations of leadership tenure in some of the African and specifically the EAC.

The problem of leaders clinging to power is only one manifestation of a lack of respect for constitutional rules in Africa. Others include the fact that opposition political parties are often harassed and their leaders locked up in Uganda, Rwanda and Uganda. They are also painted as illegitimate proxies for harmful foreign third forces, seeking regime change. The paper recommends that, there should be sustainable plans for respect of constitutional rule in Africa and the EAC and thus diversification of appropriate strategies to enforce such adherence should be a priority to the international community. The African Union (AU) committed to a democratic social contract with Agenda 2063. Thereby argues that "We reviewed past plans and commitments, and pledge to take into account the lessons as we implement Agenda 2063. These include putting mobilization of the people and their ownership of continental programmes at the core; the principle of self-reliance and Africa financing its own development; the importance of capable, inclusive and accountable states and institutions at all levels and in all spheres, the critical role of Regional Economic communities as building blocks for continental unity, and holding ourselves and our governments and institutions accountable for results. Therefore recommitment into such fundamental value is one of the recommendations this article put forth in order to rejuvenate the mass based and democratic dimension in Africa and the EAC.

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