

# THE 1984 ZANZIBAR CONSTITUTION

By

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## INTRODUCTION

A government is a necessary institution in every ordered society. In this institution, one has to limit the arbitrariness inherent in it and to ensure that its powers are used for the peace, order and good governance of that society. This is the concept of constitutionalism. It is a set of recognised rules which govern a particular society. The constitution, therefore sets up the main organs of the government and prescribes the functions which those organs have to perform.

Constitutions may be of two types. An *unwritten* constitution which is believed to be an assemblage of customs and institutions derived from fixed principles, or a *written* constitution which refers to a basic norm of a particular constitution that has already been established. The first type is derived from *Hart's* theory of rules of recognition which are not derived from legal norms. The other one is derived from *Kelson's* theory as a grundnorm which refers to a particular constitution that has already been laid down. In this case, the government is a creature or part of the constitution itself. It is here that we speak of a constitution being supreme.

Examples of written constitutions are the Constitutions of Zanzibar, Tanzania, Zambia, U.S.A., Kenya, Papua New Guinea, Guyana etc. An example of an unwritten constitution is that of the United Kingdom, where the foundation of the legal system is lacking. Thus the assemblage of customs, norms and rules forms the basis of the government.

Then a question may be asked as to what is the supremacy of a constitution? It is true that a constitution is a groundnorm derived from a will of a body superior to

the legislature. These are the people themselves. It is the exercise of inherent constituent powers which the people themselves possess. Secondly we can say that the constitution is a "parent" Act from which all other legislative Acts derive their authority. In enacting a constitution, unlike when enacting ordinary laws, the local legislature can act with no authority superior to that with which it makes ordinary laws. The Constitution creates the government; it creates the organs of the government and it dictates terms on which the government and its organs are to be run. This brief account explains the reasons why we say that the constitution is supreme. Judicial decisions have also put it clear that the constitution is supreme and that nobody, even the parliament itself can go outside its limits. In the case of *Ramasinghe* it was stated categorically that a legislature has no power to ignore the conditions of law making that are imposed by the instrument which itself regulates its powers to make law. It was further held that the restriction exists independently of the question whether the legislature is sovereign or whether the constitution is uncontrolled. The constitution can indeed be altered or amended by the legislature if the regulating instrument so provides and if the terms of those provisions are complied with.

The situation is different where there is no written constitution. In the United Kingdom, for example, it has been held by the courts that the Parliament is supreme and a court cannot hold an Act of Parliament to be invalid or unconstitutional. In *Cheney V. Conn*<sup>2</sup> it was held that a Parliamentary enactment, the highest law in the country cannot be illegal while in *British Railways V. Pickin*<sup>3</sup> it was held that the functions of the court was to consider and apply the enactment of Parliament and it was not within its province to say whether it should be on the statute book or not. This legislative supremacy of Parliament, that is an unlimited limitations upon the legislative competence of Parliament is derived from the fact that there is no other superior power as the constitution. Thus the Queen in Parliament could enact any law, be it bad or otherwise. Unless and until it is amended or repealed by the Parliament, the law will be enforced. There may be arguments as to the correct interpretation of the enactment but, as *Lord Morris* said in *Picking* case, "there must be none as to whether it should be on the statute book at all."

The Zanzibar Constitution is also supreme. However, due to what has been stated above, it is not necessary for a constitution to have a "supremacy" clause, but many written constitutions do have supremacy clauses in order to stress further the

supremacy of that constitution. Section 4 of the Zanzibar Constitution provides thus:-

"4. This Constitution is the Constitution of Zanzibar and shall have the force of law throughout Zanzibar and .... if any of the law is inconsistent with this Constitution, this constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."

Other Constitutions which have similar clauses like section 4 of Zanzibar are the Constitutions of Kenya, China, Jamaica, Guyana, Trinidad and Tobago, Barbados and Nigeria. In other countries like Papua New Guinea, this supremacy is further consolidated by providing that all acts, whether executive, legislative or judiciary that are inconsistent with the Constitution shall be invalid. Thus section 11 of the Constitution of Papua New Guinea provides thus:-

"11. Constitution etc as Supreme Law.

- (1) This Constitution ..... (is) the Supreme Law of Papua New Guinea, and ..... all acts (whether legislative, executive or judicial) that are inconsistent with them are, to the extent of the inconsistency, invalid and ineffective.
- (2) The provisions of this Constitution ..... are self executing to the fullest extent that their respective natures and subject matters permit."

This, in short, is to explain how a constitution possesses a special legal sanctity which sets out the framework and principal functions of the organs of government within the state, and that it declares the principles by which those organs must operate. Thus the Constitution always governs the state. Let us now see in detail, the Zanzibar Constitution.

### THE HISTORY OF THE ZANZIBAR CONSTITUTION.

The history of the Zanzibar Constitution goes back to the Independence Constitution of 1963. The Independence Constitution marked the end of approxi-

mately a hundred years of British rule. It was the first comprehensive constitutional document in Zanzibar and was modelled after the Westminster constitution. It however maintained the Sultan as the Head of State and the Prime Minister as the Head of the government. The Constitution vested executive power in the Sultan, which could be exercised by him either directly or through officers subordinate to him.<sup>5</sup> On the other hand, legislative power was vested in Parliament consisting of the Sultan and a National Assembly of not more than thirty one members elected by adult suffrage<sup>6</sup> while the judicature continued to be as that under the colonial era. The Constitution also guaranteed fundamental rights and freedoms of the individual and afforded protection against slavery and forced labour.

However the Independence Constitution did not live for a long time. Hardly one month after Independence, that is, on January 12, 1964, a dramatic revolution took place which placed powers in the hands of workers and peasants. The 1963 Constitution was thus suspended, and there was no other constitution until 1979, when a new Constitution was established.

### ARTICLES OF THE UNION

Less than four months after the revolution, the Peoples' Republic of Zanzibar merged with the Republic of Tanganyika on 26th April, 1964, to form the United Republic of Tanganyika and Zanzibar<sup>7</sup> The new name of Tanzania was passed by an Act of Parliament in December the same year<sup>8</sup>.

In 1965 an Interim Constitution for Tanzania was enacted<sup>9</sup>. It was conceived of as a temporary Constitution, to be replaced by a permanent one after the political thinking had crystallize.

This condition provided for the distribution of powers between the United Republic and Zanzibar. Zanzibar Government had power to deal with all matters relating to Zanzibar which were not union matters. The Interim Constitution of Tanganyika and this was because Zanzibar had no constitution at that time<sup>10</sup>. However, subsequent modifications and amendments were within the competence of the Parliament of the United Republic. The Articles of Union also declared that on the commencement of the Interim Constitution, the Constitution of the Repu-

blic of Tanganyika shall cease to have effect for the government of Tanganyika as a separate part of the United Republic. The Articles also provided that both Tanganyika and Zanzibar shall have separate laws on matters outside the union.

The 1964 Articles of the Union can be termed as a treaty whereby two independent countries voluntarily united on certain basic conditions. This treaty forms the GRUNDNORM of the Union. Any Constitution which is inconsistent with this GRUNDNORM will be void.

Article 1 of the treaty is declaratory and stipulates that Zanzibar and Tanganyika have united to form one Sovereign Republic. Article 3 gives power to Zanzibar to deal with all matters which are not Union matters. Article 4 provides a list of Union matters which fall under the jurisdiction of the Union Parliament and the Executive of the United Republic. These matters are listed below:

1. Constitution and government of the United Republic.
2. External Affairs
3. Defence
4. Police
5. Emergency powers
6. Citizenship
7. Immigration
8. External trade and borrowing
9. The public service of the United Republic
10. Income tax, corporation tax and customs and exercise and
11. Harbours, civil aviation, posts and telegraphs.

The Constitutional instrument of the union is the treaty. This treaty does not abolish the state of Tanganyika nor the state of Zanzibar. It only means that each state surrendered some of its powers to the United Republic and thus the two states had still retained their sovereignty.

This entails that both the Constitution of the United Republic and that of Zanzibar should be consistent with the Treaty or the *grundnorm* of the Union. Thus the present Constitution of the United Republic which lists 10 more union matters which are not reflected in the Treaty seems to me to be invalid and ineffective.<sup>11</sup>

These articles of union have been given different names. Some say it is a federation, others term it as a loose federation. Others still translate it as a form of a unitary state<sup>12</sup>. However, it is clear to me that the present structure is not very clear, although it is almost certain that it was intended as a federation with a central government and a government of Zanzibar on one hand and that of Tanganyika on the other. More explanation and set up of the union is needed.

#### THE 1979 CONSTITUTION

This Constitution commenced, as did the Constitution of the United Republic of Tanzania of 1977 by declaring the same principle of a democratic and socialist state with one supreme political party which was to be a final authority in respect of all matters in Zanzibar<sup>13</sup>. The declaration of Party Supremacy in this Constitution had a great impact on the role of Zanzibar executive, the judiciary and the supremacy of the House of Representatives. Serious inroad had been made on the independence of the judiciary and the powers of the House were reduced.

The Constitution on the other hand did not contain provisions on the Bill of Right, although its preamble quite comprehensively incorporated the ideological objectives of the government and a statement on the protection of basic political, civil and human rights. The 1979 Constitution therefore, did not legally guarantee these rights through the organs of state.

An important change in the 1979 Constitution was the election of the President of Zanzibar by the popular election of the electorate. Before this change, the Chairman of the Revolutionary Council who was also styled as the President of the

revolutionary Government of Zanzibar retained his position until such time when he resigned or died. The second important change brought about by the Constitution was the creation for the first time after the revolution, of the House of Representatives for Zanzibar. It was however, sad to note that the composition of this important organs was not all that "representative" as its name implied. The House was an assembly of 109 members composed of only 10 elected members, the rest being appointed or nominated by the Party and Government officials from their respective areas. Thus the people were not involved at any stage in electing the members of the House of Representatives although these Members were supposed to represent the areas from which they came from<sup>13</sup>. It is not disputed that the introduction of the House of Representatives was a good starting point for a democratic system, but the composition of the House at that time ha indeed remained a mockery for a democratic socialist state such as Zanzibar.

The Revolutionary Council was also retained under the 1979 Constitution, but most of its original powers had been stripped off. It remained substantially as the executive branch of the Government, the legislative role being taken over by the House of Representatives. The other function of the Revolutionary Council as the Committee of the National Executive Committee of the Party was also vested in the House of Representatives and this meant a further weakening of the influence of the once powerful Revolutionary Council. However this new function of the House had a substantial impact on the supremacy of the House, both in terms of its legislative function and freedom of debate by the Members.

Regrettably, the 1979 Constitution did not abolish the novel judicial system which was started in 1969 and hence the Peoples' Courts still continued to operate under this Constitution. However, the 1979 Constitution had paved way for further growth and development of Zanzibar. In order to keep pace with this growth, another Constitution was enacted in 1984. This Constitution, which is still in force, has shown a marked departure from its predecessor and has introduced substantial changes which are all intended to establish both political and economic democracy and social justice to all the sections of the people in Zanzibar.

## THE 1984 CONSTITUTION

The 1984 Constitution was passed by the Constituent Assembly on 9th October, 1984, and came into force on the 1st of January 1985. The Constitution retains some of the provisions of its predecessor, but makes substantial changes. The changes include a chapter on Directive Principles of State Policy which are declared to be fundamental but not enforceable by the courts and a chapter on fundamental rights which is justiciable. The Constitution also provides the structure for a socialist government and creates an Executive Presidency type of government. However, unlike the Constitution of the United States of America, the Constitution of Zanzibar is not constrained by the principle of checks and balances, and thus there is a fused legislative-executive relationship and a significant overlap on personnel, with all ministers being members of the House of Representatives. Other characteristic features of the Constitution, such as limitation of parliamentary supremacy, judicial review and independence of the judiciary are also provided for.

In order to see the impact of this Constitution in the development of Zanzibar, it is proposed to examine, separately, the chapters on directive principles, fundamental rights, the executive, the legislature and the judiciary as these show, both a remarkable departure from the 1979 Constitution or any link with or subordination to the original Independence Constitution. However due regard shall be given to the 1992 amendments to the Constitution due to change of policy from a one Party state to the Multiparty system.

## FUNDAMENTAL OBJECTIVES AND DIRECTIVE

### Principles of Zanzibar Policy

The framers of the Zanzibar Constitution were not content in embodying social and economic objectives in the preamble only. Following the example of Guyana, India, Papua New Guinea and China, some of these objectives are contained in chapter two of the Constitution as the Fundamental Objectives and Principles of Zanzibar Policies. The chapter provides that "Zanzibar is a socialist state of the whole people, expressing the interest of peasants and workers.<sup>14</sup> It is a state in which sovereignty belongs to the people and that political economic and social

objectives are guaranteed<sup>15</sup>. It is also provided that Zanzibar shall direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels, that there are adequate medical and health facilities for all and that Zanzibar culture is enhanced and protected<sup>16</sup>. There is also a guarantee for human resources utilization and a guarantee for public assistance in deserving cases, such as the old age, disability, crippled and the children<sup>17</sup>. Probably the idea of inserting these policies in the Constitution is to reflect the basic aims and standards of the Social Policy Convention adopted by the International Labour Organisation in 1962<sup>18</sup>. The Conference declared that appropriate steps should be taken by each member state to promote improvements in such fields as public health, housing, nutrition, education, the welfare of children, the status of women, the condition of employment, social security, etc. What is novel about this chapter is that these objectives and policies are required by the Constitution to be taken into account in the interpretation of the Constitution to be taken into account in the interpretation of the Constitution and in the implementation of the policy<sup>19</sup>. But it is not clear whether a court shall have power to determine any issue or question as to whether any action or omission by any person or authority or as to whether any legislation or any judicial decision is in conformity with those directive principles and objectives<sup>20</sup>.

In Guyana, for example, the Constitution also provides for the directive principles and bases for the political, economic and social system; and guarantees that the state will preserve national culture; that every person has the right to rest, recreation and leisure. There is also a guarantee on the right to free medical attention and also to social care in case of old age and disability.<sup>21</sup> It has been suggested that these principles and rights are only intended to be declaratory of the theory of the Party and Government and do not concern with redress by the courts or other agencies<sup>22</sup>. This presumption is corroborated by the recent Guyanese decision of *A.-G. of Guyana V. Alli and others*<sup>23</sup>. In this case, the Court of Appeal decided that the Guyanese Directive Principles are enforceable by any court of law. This decision was however, swept away by an Act of Parliament<sup>24</sup> which amended Article 39 of the Guyana Constitution and provided that any provision of chapter two which provides for the Principles and Basis of the Political, Economic and Social System of Guyana<sup>25</sup>.

"shall not be enforceable in any court or tribunal and only where, and to the extent to which such law provides for the enforcement of any such

provision and not otherwise, shall that provision be enforceable in any court or tribunal."

Following this legislation, it is obvious, at least for Guyana that the principles are non justiciable and they only lay down certain legislative ideals for the proper governance of the country and that the government is expected to implement them by suitable legislation from time to time. It is thus evident that *Alli's* decision and the enactment of Act number 1 of 1988 of Guyana together with section 7 (2) of the Constitution of the United Republic of Tanzania which provides that the directive principles and fundamental objectives are not justiciable unless a legislation is enacted for that purpose, provide a strong persuasive authority to conclude that even the Fundamental Objectives and Directive Principles of Zanzibar Policy would not be enforceable in a court of law until such time the government has enacted a suitable legislation to that effect.

Francis Alexis has termed the directive principle of Guyana as more like articles of political religion<sup>26</sup>, but, in my opinion, I do not think that these provisions and by the same argument the Fundamental Objectives and Directive Principles of Zanzibar Policy are meant for political power and recognition only as Alexis has suggested. A court may declare any of the provision to have been broken, as declared in the *Canadian Constitutional case*<sup>27</sup> where the court declared that conventions have been broken - The "unconstitutionality" in this case occurred from a breach of convention and there was no legal remedy available since there was no breach of law. However, the result of this declaration was more political than legal, and this type of declaration would be a good substitute for remedies which can not be granted against the government such as injunction and mandamus<sup>28</sup>. The effect of this ruling will be to restrain the government from infringing these objectives and this would lead to political consequences which will be for the better of the country and the citizens in general. Indeed, to borrow Sir Fred's phrase<sup>29</sup>, there was "a sense of pragmatism" for the inclusion of these principles in their respective constitutions.

## FUNDAMENTAL RIGHTS AND FREEDOMS

### General Aspects

The introduction of the Human Rights provisions in the Zanzibar Constitution is an obvious reflection of the ideals which lay behind the revolution. It is a fairly complete code of the principles of constitutional government and the rule of law, and it is the first of its kind in the post revolution constitutions. These rights include equality before the law, the right to life and protection of freedom of movement, expression of conscience and deprivation of property.

The recognition of the right of expression is illustrated in the case of *Mwajuma bt. Koja V.R.*<sup>30</sup>. In this case, the appellant when speaking at a public meeting made certain remarks concerning members of other political parties. It was held by the High Court that the appellant's remarks were not abusive and insulting as to amount to a breach of the peace. Though the plaintiff lost his case, the decision is however important to illustrate the court's recognition of these rights. On the other hand, the protection from deprivation of property provision which has been included in the Constitution<sup>31</sup> which provides that which:

"No property of any description shall be compulsorily taken possession of ..... or acquired, except where the taking..... is necessary in the interest of defence, public safety, public health..... and that provision is made by a law to that taking or possession for the payment of adequate compensation";

has in effect repealed the confiscation of Immovable Property Decree which authorised the President to acquire property without the payment of compensation<sup>32</sup>. Thus the Constitution provides reasonable protection for a citizen as regards adequate compensation for his property if that property is compulsorily acquired or taken possession of by the government. It is however, not clear whether the courts would give a remedy or not on application of the citizen if the government acted ultra-vires the Constitution. In Guyana, for example, the case of *Jaundoo*<sup>33</sup> provides an answer. In this case, land was compulsorily taken from the applicant under the Road Traffic Act of 1909 without payment of compensation.

The applicant successfully invoked her constitutional rights of compensation for deprivation of property.

However, the rights and freedoms set out in the Constitution contain serious exceptions and qualifications which stipulate that the basic human rights, freedoms and duties shall not be construed as invalidating any existing law or prohibiting the enactment of any law or the doing of any lawful act under such law, which makes provisions for ensuring that the enjoyment of any of these rights by an individual does not prejudice the rights and freedoms of others or the public interest<sup>34</sup>. Again, in Zanzibar the 1964 Detention Decree still exists and the Preventive Detention Act of Tanganyika has been amended to apply throughout Tanzania<sup>35</sup>. The 1986 Local Government Act of Zanzibar<sup>36</sup> also gives power to the Regional Commissioners and Area Commissioners to detain any person for a maximum of 48 and 24 hours respectively. All these laws reveal that the constitutional protection of human rights in Zanzibar is questionable. The enjoyment of these rights by an individual has severely been curtailed by these laws. In the cases of *Masoud Omar & Others*<sup>37</sup> for example, several people were arrested without being released or charged despite request by their relatives to be told under what authority they were being held. The case of *Sharrif Haji Dadi and Others*<sup>38</sup>, is another vivid example of the violation of human rights by the government. This case concerned with people in Pemba who were re-arrested by the police and then detained under the authority of the Regional Commissioner after being declared innocent by the court. These people were then transferred to Unguja and were charged with house breaking. The District Magistrate Court in Unguja also declared them innocent and were set free and returned back to Pemba. (It is of interest to note that all these cases were decided during the 1990 election).

Again the case of *Seif Sharrif Hamad*<sup>39</sup> which was also decided during the 1990 elections shows how these fundamental human rights are trampled upon. The accused, former Chief Minister of Zanzibar was searched at his residence without a search warrant and then detained for almost two years. He was then charged with possession of official documents under the Official Secrets Act. It is true that *securities civitatis supreme lex*, that is the liberty of an individual has to yield to the interest of state security, but the way the law operates in Zanzibar reflects a desire on the part of the government to suppress those who are contemptuous of party principles or those who criticise the government or the Union in general<sup>40</sup>.

The few cases cited above have shown that the human right provisions are merely aspects of policy pronouncement in the Constitution, and that the legislation which is aimed at preventing few individuals who are capable of harming the state is not preventive, but rather punitive. It is obvious that the repeal of this legislation is long overdue.

It was declared in the Universal Declaration of Human Rights of the U.N.O. that:

"Everyone has the right to freedom of peaceful assembly and association."<sup>41</sup>

and this has been reflected in the Zanzibar Constitution under section 20. This freedom is bound up with the right to demonstrate on various causes. Often it is to protest against the government or its doings. But it is obvious how much government had disliked these demonstrations. Several times they have regarded these as unlawful assemblies. The best example that can be cited is the case of *Said Gwiji and several others* against the Government where the accused were charged and convicted for unlawful assembly and causing damage to properties. They were then sentenced to various terms of imprisonment. In principle, and under the Constitution, all these should be allowed by law so long as they are peaceful. Indeed very rare in Zanzibar can the subjects, especially those who oppose the government or opposition parties enjoy section 20 of the Constitution.

The Constitution also provides for the protection of right to personal liberty. I will call it *personal freedom*. It provides under section 14 that:

(1) "Every person shall be entitled to his personal liberty and to live as a free person:

(2) ..... no person shall be deprived of his right of movement  
..... and no person shall be arrested or put into custody,  
detained or otherwise deprived of his freedom save as may be  
authorised by law in any of the following cases:

(a) ..... in the execution of lawful orders;

(b) in execution of the sentence or order of the court in respect of criminal offence of which he has been convicted".

Such protection of one's personal freedom need not be emphasized. The law is clear. It says that no man is to be imprisoned except by judgement of the court. This freedom is safeguarded by a *writ of habeas corpus*. Whenever a Zanzibari is detained *against* his will, not by a sentence of the court but by anyone else, then he, or anyone on his behalf is entitled to apply before the Judge of the High Court to determine whether his detention is lawful or not.

The court will then by a writ command the gaoler or whoever is detaining him, to bring him before the court, and, unless the detention is shown to be lawful, the court will at once set him free. Such are the demands of that freedom, short of which there will be no personal liberty of the subject. I will partly blame the government on this because it is its duty to educate the people on their basic and fundamental rights and freedoms. I will also place the burden on the individuals because they are not bold enough to explore this virgin pasture. There have been unlawful detentions characterised by wilful acts of inflicting excruciating pain from sheer cruelty.

These wrongful arrests have their redress before the courts of law yet by ignorance or otherwise people have never instituted any case of this nature. A person who suffered a wrong is in law entitled to obtain redress either when he gets the wrong doer punished or when he obtains compensation for the damage inflicted upon him by the wrong. Here the pasture is also green and ready to be explored.

Let us now come to the freedom of the press. It is chaotic - This freedom of press and in particular its freedom to criticise the Government of the day in Zanzibar is non-existent. Any criticism in the press of the President and or his Ministers is considered to be a seditious liberty. One wonders why this is so; or is it because it will shake the Constitution? And judges are sometimes lions under the throne when considering these cases; and in this case they humiliate the subjects, and by so doing they do not defend the constitution which they have sworn to uphold. It is another crack of the Constitution and indeed, the crisis in the liberties of the subjects.

The introduction of multiparty politics has yet witnessed another constitutional crisis. It is indeed disturbing to see that political parties, other than the ruling party do not enjoy freedom of expression as provided for under section 18 of the Constitution. I think the government is duty bound to uphold this fundamental right. One must bear in mind that today television and radio are the most powerful media of communication in the modern world. This necessitates the use of such media by other political parties to express their political views. As the chief Justice of Belize once said: "..... Today television is the most powerful medium for communications of ideas and disseminating of information. The enjoyment of freedom of expression therefore includes freedom to use such a medium.'<sup>42</sup>

I would urge the government to bear in mind what the Chief Justice of Belize had said. Again there is a case from Trinidad and Tobago where an opposition member of Parliament was denied his constitutional rights to broadcast his political thoughts. In this case<sup>43</sup>, it was categorically stated by Justice Deyalsing that:

".....Government is duty bound to uphold the fundamental rights and with television being the most powerful medium of communication in the modern world, it is in my view idle to postulate that freedom to express political views means correlative adjunct to express such views on television. The days of soap-box oratory are over, so are the days of political pamphleteering....."

The Constitution also provides for the protection of freedom of assembly and association<sup>44</sup>. This right is also provided for under section 62 of the Penal Code, cap 13 of the Laws of Zanzibar. Yet threats have been given by the ruling party that any group of persons who assemble together without a permit shall be charged. Under what provision of the law, it is only the ruling party which knows.

### THE SUBJECTS AND THE RULE OF LAW

In brief, the rule of law embraces three aspects. First, it is the point that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct

breach of law established in the ordinary legal manner before the ordinary courts of the land. Secondly, we mean that no man is above the law and that every person whatever be his rank or condition is subject to the ordinary law of the land and amenable to jurisdiction of the ordinary tribunals and thirdly is that disputes as to the legality of acts of government are to be decided by judges who are wholly independent of the executive.

The concept of the Rule of Law has been incorporated in the Zanzibar Constitution under sections 11 and 12. They respectively provide that:-

- 11 (1) "All people are born free and equal"
- (2) Every person is entitled to respect and human dignity.'
- 12. (1) All people are equal before the law and have right without any discrimination to be protected by law and shall be given a fair hearing and equal right before the law.
- (2) No law shall make any provision which is discriminatory either of itself or in its effect.
- (3) The determination of the existence or extent of any civil right or obligations shall be established by a court of law or other adjudicating authority prescribed by law.
- (4) No person shall be treated in a discriminatory manner by any person acting by virtue of any written law in the performance of the functions of any public office or any other authority of the party and its organs.
- (5) .....
- (6) .....



This in essence indicates Governments' commitment to a just society based on the principles of constitutional government and the rule of law.

However, inspite of all these nice and evident promises, a number of shortcomings may be cited. People have been seen publicly destroying other peoples' properties or committing criminal offences, yet the government of the day protects them. A senior government official had once directed demolition of somebody's house, despite an injunction order of the court against a government institution not to demolish the house until the matter was finally adjudicated by the court. That senior government officer went without even a reprimand. Are we here not being reminded of the famous example from George Owells' satire upon dictatorship in his *Animal Farm* that "all animals are equal, but some animals are more equal than others?" Clearly this is a breach of section 12 (1) of the Constitution.

Again, the absolute supremacy of regular law as opposed to the influence of arbitrary power is not seen in Zanzibar. Arbitrariness of prerogative and wide discretionary owners have crept in the government. A biting example is seen when one very senior government official ordered that all trees and other structures painted in short form the symbol of one opposition party, should immediately be rubbed off. This very senior government official had forgotten that even public roads and other public structures are painted in short form the symbol of the ruling party. Dale Carnegie, a famous psychologist advises us not to complain about the snow on ones roof while our own door steps are not clean; and to change people giving offence or arousing resentment, he suggests that "we should talk about our own mistakes before criticising the other person."<sup>45</sup>

A number of employees have been dismissed from government services either for belonging to the opposition party or for not registering as voters for the 1990 General elections. The right to vote is provided for under section 7 of the Constitution, but it is not mandatory for a person who has attained the prescribed age of voting to register himself as a voter. He is only entitled to.

Under the Political Parties Act<sup>46</sup>, the rights and privileges of a registered party are, among other things, to hold and address public meetings in any area in the United Republic after obtaining permit from the District Commissioner. Yet permits have been unreasonably withheld by District Commissioners. Cases are known where leaders of opposition parties have been held for questioning only because they

have conducted meetings inside their own branches. In one case of *Christopher Mtikila & 3 others V.R.*<sup>47</sup> it was decided that a law which requires that the District Commissioner should issue permit for the meeting is unconstitutional. Section 12 (1) of the same Act prohibits any registered political party to revive the name or acronym of a party which was formed or existed in Tanzania prior to 5th February 1977. This, in effect, prohibits the use of symbols of the then existing TANU, ASP, ZPP, ZNP or Umma Party. Yet in Zanzibar one can see openly the use of the name, flag, symbol and other acronyms of the then existing ASP. The ruling Party, the Government and even the Registrar of political parties are all silent on this.

The Civil Servants (Participation in Politics) Act of Zanzibar<sup>49</sup> prohibits an employee of the government under section 9, to propagate, instigate, show sympathy, or involve himself in the political activities in public during office hours, or to wear uniform, pictures, emblems of a party which show that he is in favour of that party. The ruling party ignores this section and allows its members who are government employees to take part openly and during office hours, in demonstrations organised by the ruling party and even deliver speech in such political meeting. Such activities would turn out to be a thorn in the flesh if an opposition member who happens to be a government employee does the same. In fact he can't live long before he is dismissed from his daily bread.

All these example are signs of constitutional breakdown. Yet the principal organs of the government, namely the executive and the legislature, and to some extent the judiciary have not shown their active role. I assume that this may be because of the present constitutional set up which is not constrained by the principles of checks and balances like the Constitution of the United States. Thus the fused legislature — executive relationship with a significant overlap on personnel with all Ministers being members of the House of Representatives might be a major factor contributing to this shortcoming.

On the of other hand, the legislatures, because their careers lie in ministerial advancement, do not stand firmly in their deliberations. The executives thus slowly control it (the legislature) and thus major constitutional issues are not

systematically debated nor is the government pressed to justify its decisions. Thus the legislature is only a rubber stamp for what the executives do. This is a pure encroachment of the rule of law on the part of the legislature and the executive. Infact the Rule of Law in Zanzibar is on the wane.

## A CONCLUDING COMMENT

In conclusion, the government must be aware that fundamental human rights are of fundamental importance in a democratic society. Zanzibar must therefore ensure that no institution shall allow these basic rights to be derogated from. Even those who criticize the government and its policies cannot always be interpreted to mean that they intend to undermine the Government or the Union. In fact, it has even been held by the European Court in *Handyside case* that:

"..... freedom of expression..... is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of that pluralism, tolerance and broad mindedness, without which there is no "democratic society."<sup>49</sup>.

This becomes the duty of the judiciary to see that the executive does not violate or cross those limits declared in the Constitution, otherwise the whole concept of embodying these rights in the Constitution would become of little value.

## THE EXECUTIVE

In Zanzibar, the executive powers are vested in the President who is the Head of State and is responsible to the people.<sup>50</sup> The President may exercise these powers either directly or through officers subordinate to him although the House of Representatives is free to regulate the detailed operation of the executive power by conferring functions on persons or authorities other than the President<sup>51</sup>. It is intended that the term of the President will be conterminous with the life of the

House. The House is elected for five years though it is possible that a dissolution may take place before that. So in normal circumstances, a President would hold office for five years and can stand for a second term of office but not for a subsequent term<sup>52</sup>.

The office of the President shall become vacant by reason of death or resignation or when he is elected the President of the United Republic. The President can also be removed for inability to perform the functions of his office due to mental or physical infirmity<sup>53</sup>. Before the 1993 amendments, the Constitution did not provide for any mechanism for the removal of the President for gross misconduct, incompetence or violation of the Constitution; and the house of Representatives had thus no power to impeach the President. This flow has been rectified by sections 5 of the 1993 Constitutional Amendment Act which gives power to the House of Representative to impeach the President on gross misconduct, incompetence or on violation of the Constitution. The amended provisions provides thus:-

- "36A (1) Notwithstanding the provision of section 36 of the Constitution, the House of Representatives may pass a resolution to remove the President from office if a resolution to impeach the President is passed in accordance with the provisions of this section.
- (2) Without prejudice to any provisions of this section, no proposal to prefer charge to impeach the President shall be made unless there is allegations of violation of the Constitution by the President or that his conduct is prejudicial to the Union of Tanganyika and Zanzibar and no such proposal shall be made within twelve months after the same proposal being made and rejected by the House of Representatives; and then sub sec. (3) to (8) provides the procedure for such removal.

However this section has its problem, and the power of impeachment seems to be of little use especially when one takes into consideration the President's constitu-

tional power where he may, at any time, by proclamation dissolve the House<sup>54</sup>. It is obvious that the President can wield a potential threat of dissolving the House and therefore, indirectly influencing its members to decide the motion in his favour. The President may therefore remain office even though he has committed gross misconduct or violated the Constitution. Thus for an effective impeachment procedure, it is obvious that the President should not have the constitutional power of dissolving the House whenever there is a motion alleging that he has committed any violation of the Constitution or any gross misconduct until such time the motion has been resolved and a decision taken.

The President has enormous powers in respect of appointments which range from the appointments of general managers to heads of departments. In relation to the Legislature, the power allows the President to appoint members of the House of Representatives to hold other positions such as Chief Minister<sup>55</sup>, Ministers, deputy Ministers and chairmen or members of boards. The office of the Chief Minister was established by the 1984 Constitution. Its holder is described as the principal assistant of the President in the discharge of his functions. However sec. 6 of the 1993 Constitutional amendment Act gives power to the House of Representatives to pass a resolution for a vote of no confidence against the Chief Minister. It provides that:-

- 39A (1) Notwithstanding any provision of this Constitution, the House of Representatives may pass a resolution for a vote of no confidence against the Chief Minister if such resolution is proposed and passed in accordance with the provisions of this section.

This power of appointment of members of the House by the President seems to have an indirect effect on the House, and not very long ago, it was used, and very successfully, to silence the few outspoken critics or those members of the House who honestly and frankly discuss national issues but unfortunately are being regarded as constituting an opposition. A typical example is Hon. Khamis Suleiman Dadi, a very outspoken member of the House, who criticised the government strongly on the poor administration and improper expenditure of government money at Makurunge ranch. He ended up being appointed the Chair-

man of the Committee to investigate those problems which he himself had raised. This member of the House has now been appointed Deputy Minister for regional Administration, thus effectively silencing any useful criticisms from him.

The President has also power to dismiss public servants in the public interest<sup>55</sup>. This principle of dismissal at pleasure is a received principle deriving its legal basis as an implied term of a contract of service between the Crown and its servants. In effect it means the right to dismiss without hearing or without assigning any reasons. But it is obvious that this principle can no longer be valid in the light of sub-sections (3) and (4) of section 21 of the Constitution which give every Zanzibari a right to work. These sub-sections provide that:

- (3) "Every Zanzibari has the right to work including the right to choose his trade or profession....."
- (4) "Every person..... has the right to receive a fair pay for his work....."

Indeed the right to work is non justiciable, but if one has to give meaningful effect of the section it implies that the President cannot dismiss any public servant at pleasure. However, the Constitution embodies an ouster clause, denying a claimant access to court for actions done by the President while in office. This would therefore warrant the President to enjoy this amazing power of dismissal over any public office without any constitutional restraint. In Guyana, Article 232 (7) of the Constitution confers the President power to remove a public officer from his office in the public interest. It is also established in the case of *Brandit V.A. - G of Guyana*<sup>57</sup> that the President cannot be compelled to give reasons for dismissal.

This seems to be against the rule of natural justice, and it is only fair to conclude by adopting the words of Persaud J in *Hayder Ali's case*<sup>58</sup>. Where he said that:

"I concede that the state should be free to terminate the services of a public officer who is an embarrassment or who is an obstructionist to state policy and aspiration but, on the other hand, unless there is a clear statement, a public officer should be heard before he is either dismissed or reduced in status."

The protection of the President of Zanzibar in respect of criminal and civil proceedings applies only when the President is in office<sup>59</sup>. The section provides that:

"No criminal.....(or) civil proceedings.....shall be instituted .....against the President.....while he holds office....."

This immunity from judicial proceedings of the Head of State therefore protects him from lawful exercise of his functions. In this respect, the Constitution confers final power on the President to decide on specific questions and it is clear that the court loses its jurisdiction to entertain any proceeding instituted against the President, since the court cannot override the Constitution. Since the non justiciability of these issues does not extend after the President ceases to hold the office, it is most likely that a citizen may institute Proceedings against the incumbent President immediately after he vacates the office for acts done by the President while holding the office. To avoid this lacuna it is recommended that the provision of the Constitution of the Co-operative Republic of Guyana which provides that:

"the holder of the office of the President shall not be personally answerable to any court for the performance of the functions of his office or for any act done in the performance of those functions and no proceedings whether criminal or civil shall be instituted against him in his personal capacity in respect thereof either during his term of office or threaten.<sup>60</sup>

be adopted in the Zanzibar Constitution<sup>61</sup>.

The President also possesses wide powers of law making. The Constitution does not provide for a time limit within which the President may assent to a Bill; and this allows the President to sit on the Bill indefinitely; although it may be assumed that no reasonable President would, in the interest of the State, do such an act.

Another constitutional implication on the assent of a Bill is where a Bill is rejected by the President and returned to the House. The Bill cannot be returned to the President until after the expiry of six months, unless it has the support of two thirds majority of the Members of the House. Thus where the Bill is sent to the President after the expiry of a six months period, the President can also refuse his assent for the second or even for the subsequent time. In fact, the President can adopt this practice in order to kill any Bill which he is not in favour of, especially when the Bill originates from the private members' motion.

The powers of the President can also be exercised to threaten the members of the House of dissolving the House, thereby effectively requiring them to pass the Bill which the members are not in favour of. This threat was once used by President Nyerere when the Parliament had rejected the Income Tax Bill at the first instance. The Bill was subsequently passed after President Nyerere had briefed the Members of Parliament at the State house the next day. This happened in 1974/5. When the Bill was rejected by the Members of Parliament, the then President, Mwalimu Nyerere summoned all the Members of Parliament at the State House. It is presumed that he briefed them on the consequences of not passing the Bill, which could lead to the dissolution of the Parliament, resignation of the President and a call for fresh elections. Thus under this threat, the Bill was passed the next day when the Parliament met. Although this seems to be an isolated case, it is intended to show how effective the executive powers can be over the legislature, although it is constitutionally supposed to be the other way round.

## THE LEGISLATURE

Chapter five of the Constitution provides for the Legislature which consists of four types of membership, the most important group being that of the elected members, each of whom represents a single member constituency. The second category is that of the appointees of the President, while the third category represents mass organizations. It is however important to note that the 1993 Constitutional amend-

ments abolished this category of membership and this is left open to the Party in power. The final category is meant to provide for five special seats for women in addition to any other seat they might occupy in the House. Although women are equal to men in the eyes of the law, it seems that the authorities in Zanzibar still perceive them as a weaker sex that is incompetent to compete with men openly. These special seats therefore are intended to give them opportunity that can ultimately spur greater political and social change. Generally when a person is elected or nominated to the House, he retains his seat until its dissolution, but it is however possible for the member to lose his seat before then for a number of reasons. A member may lose his seat if he incurs any of the disqualifications that would prevent him from standing for the House or if he resigns<sup>62</sup>.

The main functions of the House are the making of laws and the control of the executive, although this can mean a little more than the House's ability to ask the "government" embarrassing questions. To this extent, the House is a check on the executive, although its control over the executive has now declined tremendously. Again, before the constitutional amendment the role of the House had changed, since the Party had become supreme. Apart from their normal functions, members of the House were given added responsibility. The House as a whole had been designated as a committee of the party that is charged with a responsibility of supervising the government in the implementation of the Party policies<sup>63</sup>. This reflected the intention of the Party, that it should be supreme and be able to give directions to the government about the general policy which must be adopted for national development. Thus the identity of the House as a sovereign law making body had been stripped off and reduced to a status of a mere committee of the Party virtually performing the duty of rubber stamping decisions taken by the National Executive Committee of the Party. However this has now changed since the introduction of multiparty politics.

After the coming general elections, it is hoped that the House will be supreme and will have a true control over the executive.

Other functions of the House include the authorization of public expenditure<sup>64</sup>, and the alteration of the Constitution<sup>65</sup>. The Constitution of Zanzibar requires a simple procedure of a special parliamentary majority for the alterations of all of its provisions<sup>66</sup>. A bill for an Act to alter the Constitution shall only be passed if it has been supported at the first and second reading by the votes of not less than two

thirds majority of all the Members of the House. In Zanzibar only two readings are required for a Bill to be passed into law. As much as changes would be needed from time to time if the Constitution were to endure and keep pace with the growth of Zanzibar, I do not however agree with this procedure of amendment whereby the executive and the legislature could easily amend the Constitution at any time they feel like doing so. The process of change should not be facile, permitting ill conceived and hastily passed amendments; nor should it be designed in such a way that a minority could easily block action desired by most Zanzibaris. It is proposed that the provisions of the Constitution be entrenched whereby a simple majority of the Members of the House and an agreement of the electorate at a referendum would be able to amend the Constitution.

The essential condition of an effective House should be that its members be given an untrammelled power to speak their minds on any matter of public concern. This freedom of debate is ensured under section 86 of the Zanzibar Constitution which provides that there shall be freedom of speech, debate and proceedings in the House and that the freedom shall not be impeached or questioned in any court or place out of the House. This privilege seems to me to be restricted in a number of ways. In the first place, most of the Bills or other policies originate from the Party, and this entails, as we have seen above, the absence of debate because of the Party's supremacy. The very few bold spirits of the House who dare to point out genuine mistakes end up being condemned by the party. It is only hoped that this will cease after the general multiparty elections. Secondly, the members are given very limited time for debating the Bills and this is sometimes aided by the certificate of urgency which is signed by the President, and thirdly, most of the members of the Houses owe their loyalty to the President and not to the House. This group include the Ministers, deputy Ministers, regional Commissioners, appointees of the President to hold other positions such as chairmen or members of boards. In a very recent case, a member of the House who won a constituency elections lost his seat in an election petition, and yet this member has again entered the House by being appointed the Regional Commissioner by the President<sup>67</sup>. In this case, it is very difficult, if not impossible, to see this Member speaking his mind on any matter of public interest, as he will always have fears of being removed. All these events show how the Houses' sovereignty has diminished and it is difficult for one to say that members of the House can freely speak their mind on any matter of public concern.

Bradford M. Tait<sup>67A</sup>, had this to say when lecturing on the Role and Place of Administrative law in the Caribbean.

"Members of the Parliament are Professional Politicians whose careers lie in Ministerial Advancement and who are, therefore, unlikely to deviate too far when they live close to power. The uncommitted backbencher is virtually non-existent. The ability of Members of the Government itself to control the Legislative and Parliamentary process is very apparent in such small systems. In consequence the elected Houses of the region have ceased to play any significant role in the control or scrutiny of Government authority. Legislation is quickly passed, postures are struck by government and opposition, major items of policy are not systematically debated, government is not pressed to justify its decisions. The Parliament quickly becomes in part an extension of the election platform and in part a legislative rubber stamp called on when the government has the need."

This is a typical example of the Zanzibar legislature. It thus gives concentration of power in the hands of the executive. In this respect the question of separation of powers under the Zanzibar Constitution is somewhat questionable.

## THE JUDICIARY

### The High Court

Apart from the 1984 Constitution, several other laws have been enacted to provide for judicial system in Zanzibar; which at present is comprised of the High Court, the resident Magistrates' Courts, the District Magistrates' Courts, the Kadhis' Courts, the Primary Courts and the Juvenile Courts<sup>68</sup>.

The High Court of Zanzibar is a superior court of record having unlimited jurisdiction in both civil and criminal matters. It is composed of the Chief Justice who is appointed by the President and other judges of the High Court not being less than two who are also appointed by the President after consultation with the Judicial Service Commission. For a person to qualify for an appointment as a

judge, he must possess a degree in law plus a minimum practice of seven years, or should be, or have been a judge of the Commonwealth Countries, but the President may waive the minimum requirement if he is satisfied that such person is capable and suitable for such appointment. This by itself does not provide a serious inroad into the independence of the judiciary since the judges do not hold office during the pleasure of the President. Thus as a court of great stature and entirely independent of local pressure, much reliance is placed in the provisions of the Constitution and the High Court Act which together provide an attempt to protect the integrity of the judges<sup>69</sup>.

The powers of the High Court, which are mainly derived from the High Court Act include appellate jurisdiction, review of the proceedings of, and supervision over all subordinate courts. In its proceedings, the High Court may also call not more than four assessors to advise the judge on points of facts but their advice is not binding. In cases originating from the Chief Kadhi's Court, the Court sits with four sheikhs who assist it in its application of Muslim law and the decision on such a case is based on the majority opinion of all the members.<sup>70</sup>

For the Court to enforce the law impartially, an element of separation of powers is needed, whereby the judiciary is independent of the other organs of government. Thus the High Court should be able to determine whether the legislation or executive acts conform to the Constitution. This power of judicial review is not specifically provided for by the Constitution; but it can however be inferred by the Court from its reading of the Constitution<sup>71</sup>. The preamble to the Zanzibar Constitution incorporates the independence of the judiciary as one of the ideals, and this is further consolidated in the Constitution itself and the High Court Act.

However, it is doubtful whether a judge in Zanzibar could decide a case before him exclusively on the basis of merit without fear or favour or any other extraneous conditions which could motivate his decision. Recent events have shown that a judge may be given another position and thereby effectively removing him from the bench. In the case of *R.V. Commissioner of Prisons exp. Seif Shariff hamad*<sup>72</sup>, the accused, a former Chief Minister was searched at his residence without a search warrant and then detained. He was later charged with possession of official documents contrary to the provisions of the Official Secretes Act of Tanzania. Hamad unsuccessfully applied for bail. During his bail application before the Hon. Deputy Chief Justice, he complained of ill treatments he received while in his detention cell. The Deputy Chief Justice allowed him to

state his complaints, and he then ordered that Hamad be afforded with the basic requirements as provided for under the Offenders Education Act. As a result of his decision, the Deputy Chief Justice was exposed to unjustified removal from the bench and transferred to the Law Review Commission. The decision ran contrary to the interests and wishes of the powers of State, although it was in accordance with the laws of the land. Thus the judiciary seems to be placed under the authority of other organs in which case the administration of the law has no longer an impartiality which is required and which is essential for the maintenance of justice in Zanzibar.

### THE MAGISTRATES COURTS.

The other reforming legislation in the judicial system of Zanzibar was the Magistrate' Courts Act which had established the Resident Magistrates' Courts, the District Magistrates' Courts and the Primary Magistrates Courts<sup>73</sup>.

The Resident Magistrate's Court is established in every region and has both original and appellate jurisdiction in civil and criminal cases. Its appellate jurisdiction is for cases originating from the District Magistrates' Court and this makes a distinct departure from the Mainland Tanzania's judicial system where no appeal lies from the District Magistrate's Court to the resident Magistrate's Court. Probably this departure was made for two reasons, namely the refinement of the decisions of the District Courts before they reach the High Court and secondly to facilitate the disposition of cases and ease the burden on the High Court. The resident Magistrate is also an ex-official chairman of the Juvenile Court, which is established under the Children and Young Persons Decree, Cap. 58 of the Laws of Zanzibar. Appeals from these Courts lie to the High Court.

On the other hand, a District Magistrate Court is established in every district of Zanzibar and is presided over by a District Magistrate who is, just like the Resident Magistrate appointed by the Judicial Service Commission. The language of the Court is, just like the High Court, and the resident Magistrate Court, either Kiswahili or English and advocates or attorneys have also *locus standi* to appear on behalf of any party. This is a major breakthrough from the Old People's Courts system where advocates and attorneys were not allowed to appear before these courts.

A Primary Magistrate Court is under section 3 of the Act established in every district and has jurisdiction within the district in which it is established. But where the Chief Justice deems it necessary, he may establish other primary courts in the district.

Although there is no mention of the independence of the magistrates in the Constitution, the High Court provides for their protection<sup>74</sup>, they are immune from being sued for any act done or ordered to be done in the discharge of their duties whether in or outside their jurisdiction, provided that the act complained of was done in good faith. However, the impartiality of these courts, just like that of the High Court, is also questionable for the same reasons as those given for the High Court. Apart from those reasons, there is also a probability for a magistrate to be influenced by politicians or under the pressure or threat of adverse criticisms by irresponsible journalists. Thus it is not inconceivable that a magistrate, because of lack of independence will base his decision on external factors not based on law and facts.

### The Kadhi's Courts

From the time of the British rule in Zanzibar, the Muslims have received special consideration in relation to their religion, and one of the matters for which provision, either in the constitution or in other enactment has always been made is the system of courts. The Constitution provides that the House of Representatives may establish courts subordinate to the High Court, and a court so established shall, subject to the constitution have such jurisdiction and powers as may be conferred on it by any law<sup>75</sup>. In pursuance of this section, the Kadhis' Court' Act was enacted to establish a Kadhi's court in each district and Chief Kadhi's Court in zanzibar<sup>76</sup>. The jurisdiction of Kadhi's Court is limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the muslim religion. Each Kadhi's Court is comprised of one Kadhi who is appointed by the Judicial Service Commission in Consultation with the President and the Chief Kadhi. Appeals from the Kadhis' Courts go to the Chief kadhis Court.

The Chief Kadhi is appointed by the President and is assisted by two senior Kadhis who are also appointed by the Judicial Service Commission in consultation

with the President and the Chief kadhi. One senior Kadhi is based in Unguja and another one in Pemba and each senior Kadhi has power to hear appeals from the Kadhis' Courts in Unguja and Pemba respectively. Appeals from the chief Kadhi's Court lie to the High Court whose decision shall be final.

### The Court of Appeal

Appeals from the High Court go to the Court of Appeal of Tanzania, which is the final Court in Tanzania. It hears appeals which formerly used to go to the then Court of Appeal for Eastern Africa. The Court of Appeal is a union matter. It has and exercises the jurisdiction conferred upon it by the Constitutions or by any other legislation<sup>77</sup>. It is a superior Court of record on matters of appeal, but the Court has no jurisdiction to hear and determine cases involving any question on the interpretation of the Zanzibar Constitution, or involving Islamic law where the case has started from a Kadhi's Court<sup>78</sup>.

It is not clear why the Constitution has ousted the jurisdiction of the Court of Appeal on matters of Islamic law, but it may be presumed that the strong Islamic influence of the community may have contributed to such a decision. In Nigeria for example, the Constitution provides that an appeal shall lie from decisions of the Sheria Court of Appeal of a State to the Federal Court of Appeal before the Sheria Court of Appeal with respect of any question of Islamic personal law which Sheria Court of Appeal is competent to decide.<sup>79</sup> Such a Federal Court of Appeal when sitting as Sheria Federal Court of Appeal shall consist of at least the Grand Kadhi, the deputy Grand Kadhi and two other judges who will determine the issue in accordance with Muslim law.<sup>80</sup> It is thus suggested that the rules of the Court of Appeal for Tanzania be amended to incorporate this type of arrangement whereby special consideration is given to Zanzibar in relation to their religion so that the Court of Appeal for Tanzania becomes a final Court of Appeal even for matters relating to Muslim law.

By the express exclusion from the Court of Appeal of the powers to interpret the Constitution of Zanzibar it is implicit that this function is within the province of the High Court of Zanzibar, though nowhere, either in the Constitution itself or under the High Court Act is this power specifically provided for. It is also not clear as to what will happen where in any proceeding before any court a question

arises as to the effect of any provision of the Constitution. It is thus suggested that the Constitution be amended to give original jurisdiction to the high Court to the exclusion of other courts as to any question relating to the interpretation or application of any provision of the Constitution.

In this regard, I do not see any constitutional problem whereupon the Court of Appeal is given the final power to determine the question of interpretation of the Constitution and then remit the case to the High Court for disposal in accordance with that determination.

### CONCLUSION

In spite of all evident present short-comings in the Zanzibar Constitution, what has been achieved so far gives cause for optimism. The eight years of growth of this Constitution have proved the foresight of not only the framers of the Constitution, but also of the eighty members of the House of Representatives who on the 9th of October, 1984, passed this great land-mark document as the foundation of the Zanzibar Government and the peoples' search for progress. And on plotting the progress chart of this Constitution, one might wish to refresh himself of a very familiar story of two persons examining the contents of the same vessel. The pessimist laments that it is half empty. The optimist rejoices that it is half full. Perhaps this story is not totally inapt as one contemplates the achievements obtained as a result of the implementation of this Constitution.

Finally, even if the Constitution is perfect, it seems very unlikely that the Union can live longer unless the problems underlying it are solved. The present state of federalism in the fusion of the two unitary states of Tanganyika and Zanzibar is not enough. It has long been a basic principle of International Law reflected in the Charter of the United Nations that States are defined as equal and have the right to self determination. This right of self determination is the right of the people, and this indicates the necessity of giving the people a chance to speak for themselves in the form of a referendum whether they like the union or not. However, a more logical solution seems to be a multi-party federal state with three government and three legislatures. The structure should provide that the party winning an outright majority forms the government. On the other hand, the Union Legislature be divided into two chambers, the Upper House and the Lower House., the Upper



house be composed of equal members from Tanzania Mainland and Zanzibar who will be elected by electorate, and should have power to over-ride the Lower House in some specified important matters.

The Lower House should be composed of elected members representing the constituencies. The Constitution of the united republic of Tanzania shall then give the details of the structure of the Union Government and the functional principles of the main organs of that government.

The Constitution shall also give the details of the business and spell out important matters which would require, for either their legislation or alteration, the concurrence of certain percentage of all Members of Parliament or the concurrence of certain percentage of Members of Parliament hailing from Tanzania Mainland and the same percentage of Members of Parliament hailing from Zanzibar. This is the only solution which can guarantee the continuation of the Union and at the same time preserve both the autonomy of Zanzibar and the future generation of the Zanzibaris.

## FOOTNOTES

\*\*LLB (DAR) LLM (UWT), Chairman, Law Review Commission.

1. See the cases of (i) *Hinds V. Queen* (1977) AC 195  
(2) *Colloymore V A.G of T & T* (1967) 12 WIR 15.  
(3) *Bribery Commission V. Ramasinghe* (1965) AC 172.
2. (1968) IALLER 779.
3. (1974) AC 765.
4. SS. 3, 5, 2, 8. 2.1 and 1 respectively.
5. Independence Constitution, sec. 70.
6. *Ibid*, ss 39, 41
7. Tanganyika became independent on 9/12/61, for the union see Act No. 22/64 of Tanzania - the Union of Tanganyika and Zanzibar.
8. Declaration of Name Act, No. 61/64 of Tanzania.
9. The Interim Constitution Act. The Interim Constitution came into effect on 11th July 1965.
10. The Union of tanganyika and Zanzibar Act, No. 22/64. Section 5 of the Act provided that the United Republic shall be governed during the Interim period in accordance with the provisions of the Constitution of the Republic of Tanganyika.
11. These additional matters include security, matters concerning currency, coinage and legal tender, industrial licensing and statistics, civil aviation - for details, see First schedule of the Constitution of the United Republic referred to in section 4.
12. See Tanzania, *The Withering away of the Union*, by Haroub Othman p. 22.
13. 1979 Zanzibar Constitution, sec. 3. For comparative reasons, see also section 3 of the 1977 Constitution of the united Republic of Tanzania.
- 13A. The Composition of the House was as follows.
  1. 34 members were appointed by the President i.e. Members of the Revolutionary Council i.e. 31. 192%.
  2. 10 members were elected by popular vote i.e. 9.174%.
  3. 20 members were representatives of the 10 districts of Zanzibar i.e. 18.348%
  4. 10 members were representatives of the 5 regions i.e. 9.174%

5. 5 Regional Commissioners as ex-official members i.e. 4.587%
6. 10 members as representatives of Regional Executive Committee i.e. 9.174%.
7. 10 members as representative of the 5 mass organs of the Party i.e. 9.174%.
8. 10 members appointed by the President from among the broad population i.e. 9.174%.
14. Part of the preamble to the Constitution.
15. The 1984 Constitution, ss 9, 10(3), 10(4), and 10(5).
16. Ibid; sec 10(6)
17. Ibid; sec. 10(7)
18. Convention adopted by General Conference of I.L.O. on 22nd June 1962 and entered into force on 23rd April. 1964. For details of this declaration, see Basic Document on Human Rights edited by Ian Brown 1971 p. 313.
19. The 1984 Const. sec. 8. The section provides:  

"It shall be the duty and responsibility of organs of government and all authorities and persons exercising legislative, executive and judicial powers to conform to, observe and apply these objectives and directive principles of Zanzibar policy."
20. Compare with sec. 7(2) of the Constitution of the United Republic of Tanzania which specifically states that the objectives and directive principles shall not be enforceable by any courts.
21. Constitution of the Co-operative republic of Guyana, cap. 2, Art. 9-39 and see in particular Arts, 35, 23 and 14 respectively.
22. Sir Red Phillips in West Indian Constitution p. 57.
23. (1989) LRC (Const) 474 - Law Report of the Commonwealth.
24. An Act to amend the Constitution No. 1/88 of Guyana.
25. Arts 9 - 39.
26. Changing caribbean Constitutions by Francis Alexis - pp 98, 99.
27. 125 DLR (3) 1.
28. Compare with *Dyon V A.G. (1912) I ch. 158* where a taxpayer obtained a declaration that the tax authority (gvt) had no power to request certain information from Dyson on pain of \$50 penalty for disobedience.
29. West Indian Constitutions by Sir Red Phillips, p. 60.
30. (1960) EA 924.

31. Sec. 17 of the 1984 Constitution
32. Presidential Decree No. 8/64.
33. *Jaundoo V. A.G.* 16 WIR 141.
34. See cap 3 of the constitution, ss 11-25
35. Act No. 60/62 of Tanganyika which has been amended to apply throughout Tanzania.
36. Act No. 3/86 of Zanzibar
37. 1990 Pemba criminal case, - DMC - (unreported).
38. 1990 Pemba criminal case - DMC - (unreported).
39. 1990 criminal case (unreported).
40. Most of those detained during the 1990 election were critics of the Government; the union and the ruling party. These included Shaaban Mlo, Seif Sharrif, Ali Haji Pandu, Sound Yusuf, Masoud Omar, Maulid Makame Juma Ngwali, Machano Khamis, Suleiman Seif, Mzee Khatib, Ali Khamis and others.
41. Art 20.
42. In *courtenay and Hoare V. Belize Broadcasting Authority* - Judgement of the supreme court of Belize - 30/7/75 quoted in Developing Human Rights Jurisprudence pp 30, 31.
43. *Rambachan V. Trinidad & Tobago T.V. company* -decided on 17/7/85 (unreported) (see also, developing Human Rights Jurisprudence pp 30, 31).
44. Sec 20 of the Constitution.
15. See How to Win Friends and Influence People, by Dale Carnegie pp 39 and 202.
46. Act No. 5 of 1992 of Tanzania; sec 11.
47. Dodoma H.C. cr. App. case no. 90/92.
48. Act No. 15 of 1992.
49. Judgement of 7th December 1976, Series A No. 21; IEHRR 737. at para 49. Quoted in Developing Human Rights Jurisprudence, Judicial colloquium in Bangalore Common Wealth Secretariat p. 28.
50. Cap 4 of the Constitution, ss 26 (1) and 49 (1).
51. Ibid, sec, 49(2).
52. Sec. 28 (2) and (3) of the Constitution
53. ss. 28(1), 32 and 33, ibid.
54. Sec. 91(2) of the Constitution

55. Sec 38; *ibid*.
56. Sec. 52 (1), *ibid*.
57. (1971) 17 WIR 488.
58. *Hyder Ali V. The Public Service Commission* (civil Appeal, No. 37/1974 decided on 31/7/75 - Guyana court Appeal).
59. The 1984 Constitution, sec.. 36(1) and (2).
60. The Constitution of the Co-operative republic of Guyana, Art. 192.
61. For a comparative study, see the case of
  - (i) *Re Alva Bain*, No. 3260/1879 of T&THC (un reported) decided on 30/7/87 and
  - (ii) *Kila Warji V. Gabriel Ramoi* (1986) PNGLR 1123 where it was held, in both cases that the head of state is immune from judicial proceedings because of the ouster clause in the Constitution which is non justifiable. See also commentary on the Constitution of India by Dr. Durga Das Basu at p. 307 where he talks of the final powers of the President conferred by the Constitution; that these powers are non justifiable since courts have no power to override the constitution.
62. The 1984 Constitution, sec. 71.
63. *Ibid*, Sec. 88 (10 as it was before the 1993 constitutional amendments.
64. The 1984 constitution, ss 104 and 108.
65. *Ibid*, sec 80 (1).
66. *Ibid*., sec 80 (2).
67. Hon. Abdulla Rashid. He was a member of the House for Dimani Constituency, and is now the Regional Commissioner for Zanzibar North.
- 67A Adjunct Lecturer in Law at the University of the West Indies.
68. These laws include Cap. 6 of the 1984 Zanzibar Constitution, Sec. 93 (1); The High Court Act No. 2/85 Sec. 3; The Kadhis Court Act, No. 3/85; The Magistrates Court Act No. 6/85 and sec 114 of the constitution of the United Republic of Tanzania.
69. See ss. 95(1) & (2); 96, 119 of the constitution; and ss 15 and 18 of the High Court Act - No. 2/85.
70. Sec 19(2) & (3) of Act No. 3/85 - Khadhis Court Act.
71. Compare with the American case of *Marbury V. Madison* 1 Cranch (1803) 137 where the court held that legislative act contrary to the Constitution is not law; and further observed that "it is emphatically the province and duty of the judicial department to say what the law is."
72. H.C. Cr. case No. 6/89 (unreported).

73. Act No. 6/85 ss 8(1), 9 and 3 respectively.
74. High Court Act No. 2/85, sec 18 and Magistrates; Court Act No. 6/85 sec. 36.
75. Sec 99(1) of the 1984 Constitution.
76. Act No. 3/85.77. Sec. 117 of the Constitution of the United Republic and section 97 of the Constitution of Zanzibar. See also item 21 of schedule one of the Constitution of the United Republic - on union matters.
78. Sec. 98 of the Zanzibar Constitution.
79. Sec. 223 (10 of the Constitution of the Federal Republic of Nigeria, 1989.
80. Nigeria Legal System by T. Olawale Elias, p. 175.