

The Proposed New Constitution and the Union Question

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Abstract

It is fifty years now since the formation of the Union between Tanganyika and Zanzibar in 1964. Over that period of time, the Union has experienced some ups and downs. Despite the incessant “Kero za Muungano”, it is clear that the Tanzanian Government did not want the Union question to be touched in the new dispensation. This article revisits the Union question in relation to the ongoing constitution making process. It argues that the process has been controlled such that the proposed three-tier government structure is highly disputed by the ruling regime to the extent of threatening the entire process. It further argues that what has bedevilled the effort on the part of Zanzibar at this critical stage in their constitutional history to resolve the “Kero za Muungano” has been party divisions on the islands despite the fact that Zanzibar had recently gone through Reconciliation and formation of Government of National Unity at the end of 2010.

Introduction

There were two fundamental reasons for writing a new constitution for Tanzania in the new century, the first that was perceived as a natural sequel to the restoration of multi-party democracy in 1992, but which the authorities wanted to control; and the second that the authorities did not want to countenance despite half a century of “Kero za Muungano” (Problems of the Union). All the previous constitutions of Tanganyika, of Zanzibar since independence, and of the Union have not been based on a social contract between the people and their rulers, both in the process of the formulation of the constitution and in their content. This is especially so as regards the Union between Tanganyika and Zanzibar in 1964 in the immediate aftermath of the Revolution. The hope this time was that the people from both sides of the Union would be fully involved in the whole process of writing the new constitution at every stage, and the final resolution of all the “Kero za

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A. Sheriff

Muungano” once and for all. In both cases, the question is to what extent the authorities have remained in the driver’s seat, and to what extent the people, opposition political parties, and civil society organisations have been able to chart new pathways to have a say in the process.

A Brief History of the Constitution-making Process

Both Tanganyika and Zanzibar achieved their independence from colonial rule with their Independence Constitutions which were fashioned in London through negotiations between the colonial authorities and leaders of the nationalist parties, and drafted by colonial authorities. Tanganyika became independent on 9 December 1961 as a dominion within the British Commonwealth with the British Queen as Head of State, represented in Tanganyika by the Governor. Zanzibar became independent on 10 December 1963, also within the Commonwealth but with a local Constitutional Monarch as Head of State.

Within a year, following the controversy over Africanization, and the resignation of Mwalimu Julius Nyerere as Prime Minister, Tanganyika declared itself a Republic, and promulgated the Republican Constitution of 1962. It did not have a Bill of Rights, and there was no public debate on the issue, although there was intense discussion in Parliament (*Bunge*) which consisted almost entirely of members of the then ruling party TANU. Nyerere returned as the first executive President of Tanganyika.

Within a month of its independence, Zanzibar went through a violent Revolution on 12 January 1964 in which not only was the constitutional monarchy unseated, but also the elected government was overthrown. With it went the Zanzibar Independence Constitution which had contained a Bill of Rights, and was replaced by a series of Presidential Decrees by which Zanzibar was governed without any elections for the next 15 years.

Within a hundred days of the Revolution, the two fully sovereign states were joined in the United Republic of Tanganyika and Zanzibar (later changed to Tanzania in 1964) without any consultation with the people, and without even the Zanzibar Revolutionary Council, the highest executive and legislative body in Zanzibar, being informed until only four days before the public signing of the Union agreement. The Union was based on the Articles of Union, which is the founding document of the Union as its basic constitution, as the Second Draft of the constitution has belatedly recognised in Article 1(3). It was an international treaty between two states, which was

The New Constitution and the Union Question

supposed to be domesticated by Acts of the legislatures of the two states, but while it was ratified by the *Bunge* of Tanganyika, it has never been formally ratified by the Revolutionary Council in Zanzibar (Shivji, 2008: 85-90).

The Articles set up two governments, that of the Union which included the Union jurisdiction over 11 Union Matters, and the Tanganyika jurisdiction dealing with the rest of the non-Union Matters as regards the Mainland; and the autonomous Zanzibar Government (ZG) with jurisdiction over all the residual non-Union Matters as regards Zanzibar. Article (iii) had directed that the Constitution of Tanganyika shall be so modified as to serve as the Interim Constitution of Tanzania. Moreover, the Zanzibar President was recognised as a Vice President of the Union and “the principal assistant of the President of the United Republic in the discharge of his executive duties in relation to Zanzibar.” Article (vii) also provided for the setting up of a Commission to make proposals for a permanent Constitution of Tanzania within a year; but this was prolonged unilaterally and indefinitely by the President of Tanzania the following year. In the meantime, it was not the President of Tanzania, in agreement with the Vice President for Zanzibar, as the Articles had called for, but the National Executive Committee (NEC) of TANU, the ruling party on the Mainland, which directed the President to form a Commission to set up a One-Party State. This resulted in the 1965 One-Party Constitution which was promulgated not by a Constituent Assembly but by an ordinary Parliament. The One-Party State was further reinforced in 1975 when the Constitution was amended to state that the sole Party was supreme even over the *Bunge* which was reduced to the status of a committee of the supreme party.

The first Permanent Constitution of Tanzania was not written until 1977, i.e., 13 years after the signing of the Articles of Union. It came about in the immediate aftermath of the unification of the two ruling parties in Mainland Tanzania (TANU) and in Zanzibar (ASP) to form the CCM. The same Committee that had just drafted the Party Constitution was appointed by the President of Tanzania as a Commission to propose a Constitution for Tanzania; and on the same day the President transformed the sitting *Bunge* into a Constituent Assembly. The Commission submitted its proposals not to the Constituent Assembly, but to the NEC of the newly formed CCM for deliberations for one day, before submitting the draft to the Constituent Assembly which passed it within three hours after it was told by the Prime Minister that since the constitution had already been accepted by the supreme ruling party, there was no need to discuss it at any length. The

A. Sheriff

applause was the sum total of even parliamentary participation. It is therefore clear that there was no public participation in the writing of the 1977 Constitution, and Shivji concludes that “it is difficult to argue that the 1977 Constitution has either political legitimacy or represents a consensus” (Shivji, 1996).

The first Zanzibar Constitution after the Revolution was promulgated in 1979, fifteen years after the Revolution, as the first small constitutional step to democratise governance in the isles at the initiative of the second President of Zanzibar, Aboud Jumbe, but without much popular involvement, although it was popular after so many years of rule by the Revolutionary Council. It followed closely provisions relating to Zanzibar in the 1977 Tanzanian Constitution which had inappropriately and illegally introduced a whole chapter on Zanzibar over whose non-Union Matters, including the Government of Zanzibar, the Union Constitution has no jurisdiction (URT Constitution, Chapter 4).

There were two periods after the promulgation of the 1977 Constitution when significant amendments were proposed in which there was a semblance of popular participation. The first was in 1984 when the NEC of the ruling CCM proposed amendments on the introduction of a Bill of Rights into the Constitution for the first time, correct certain anomalies highlighted by the party's *Mwongozo* (Guidelines) of 1981, reform the powers of the Presidency, supremacy of the Bunge, and introduce more participatory democracy. Contrary to its previous practice, the party for the first time called for a public debate for a whole year. The party received more than 9,000 comments and proposals from all over the country, which were summarised and presented to the Central Committee (CC) and NEC. Only then was the final text submitted to the Bunge for several days of deliberations and adoption as the Fifth Amendment to the Constitution.¹

However, the debate was cut short after only seven months when the party intervened to stop the debate, because it said the political atmosphere had been “polluted” in Zanzibar. The problem was the unique and iniquitous two-government structure of the Union. The President of Zanzibar wanted to follow the judicial path by taking his case to the Constitutional Court provided for by the 1977 Constitution, but the Party Chairman Mwalimu Nyerere pre-empted him by adopting the political path, and dragged him instead to the Party's NEC and forced him to resign (Shivji, 2008: 215-7).

The New Constitution and the Union Question

The second period of significant amendment to the Constitution was in the early 1990s when strong pressure was building up nationally and internationally, following the collapse of the Berlin Wall and the East European single-party states, to reintroduce multi-partyism. The party-led debate was launched by Nyerere who delivered a series of six talks during 1990 on how opposition politics might be accommodated in the Tanzanian political system. In 1991 President Ali Hassan Mwinyi appointed a Presidential Commission, as in 1977, with equal representation from both sides of the Union, under Chief Justice Francis Nyalali, to make recommendations on whether Tanzania should remain a single party state or go multiparty. The Commission organised over 1,000 meetings attended by nearly 36,000 people, and conducted surveys of more than 16,000 people. The Commission submitted its recommendations to the NEC of CCM which convened a National Party Conference where the proposal was adopted 'unanimously', although some with '*shingo upande*' (unwillingly). Only then was it submitted to the one-party Parliament where it was hotly debated for six days. However, only the reintroduction of multi-partyism was accepted, while recommendations for a consideration of a federal three-government structure for the Union, and amendment or annulment of what the Commission had described as "the forty oppressive laws" were shelved.²

Nevertheless, the Government proceeded to further tinker with the Union Question. Fearing that in case the opposition won in the oncoming 1995 multi-party election in Zanzibar, the President from an opposition party will have a seat in the Union Cabinet, the Bomani Commission recommended that the position of the President of Zanzibar as one of the Vice President, enshrined in the Articles of Union, should be replaced by the American system of a running-mate Vice President. Moreover, such a drastic surgery of the Articles of Union was conducted not through consultation and agreement between the governments of Tanzania and Zanzibar, but by the Bunge of the Union Government. The issue eventually blew up in the "*msitikise kibiriti iliojaa*" (do not shake a full matchbox) saga in the Bunge, and ended with the G55 resolution in the Parliament in 1993 calling for a consideration of a three-government federal structure, which was unanimously passed by the Bunge. However, the resolution was defeated outside the Bunge by the former President and Party Chairman Mwalimu Nyerere who argued in a hastily written book that the three-government proposal was contrary to CCM policy.

A. Sheriff

Therefore, from this survey of our constitution-making process since the independence of Tanganyika and Zanzibar and the Union between them, it is clear that we had not built up a democratic and participatory practice of involving the people in the whole process at every stage to justify the usual phrase in many constitutions that claims that it was devised by the people for themselves. As Shivji argues, constitution-making is not a legal exercise but a political process to develop a national consensus on which can be based an enduring constitution (Shivji, 1996). All the constitutions had been bestowed from above by the ruling class who got used to the idea of controlling the whole process to provide a legal justification for the exercise of their power, rather than developing a national consensus between the people and their rulers.

The only departures from this practice were the two major periods of amendments to the 1977 constitution in 1984 which was short-circuited half-way when the voice of the people from one part of the Union became too loud for comfort; and again in the 1990s when the Government chose to hear with only one ear to reintroduce multi-partyism, while closing its second ear to the call for a reform of the Union structure. One of the most important justifications for writing a new constitution in the new century was therefore to see whether we could make a break from our previous practice, and involve the people fully in the formulation of the new constitution, rather than trying to control them while writing it in their name.

The New Constitution

The 1977 Constitution had hardly reached its puberty before people began to ask for a new constitution, not only in terms of its content, but more importantly in terms of how it should be obtained. Professor Shivji was among the first to write as early as 1991, making a proposal for a Democratic Constitution that emphasised the need for a constitution-making process that will provide for popular participation to arrive at a constitution based on a national consensus (Shivji, 1991). He had proposed four stages in the process:-

- a. *A National Commission* to propose constitutional and other legal and administrative changes to permit a democratic debate on the constitution by civic organisations to carry forward the debate;

The New Constitution and the Union Question

- b. *A National Convention* involving all organised groups to discuss and arrive at a consensus on the major principles to guide the formulation of the draft constitution by a small elected committee;
- c. *The Constituent Assembly* which should be elected from both sides of the Union for the sole purpose of discussing and adopting the draft constitution;
- d. *Referendum* conducted separately in the two parts of the union to enact the constitution into law.

This proposal contained the most important ingredients for a democratic constitution against which can be measured the actual process followed in Tanzania to write the New Constitution. Therefore, the very first question is how was the decision to have a New Constitution arrived at in the first place. Some people and political parties had been calling for a new constitution since the 1990s, but it was not in the manifesto of the ruling party even in the 2010 election. Until mid December, the Union Minister of Legal and Constitutional Affairs was saying in Parliament that there was no need for a new Constitution (*Raia Mwema*, 8.12.2010). Three weeks later, in his New Year message President Kikwete announced that Tanzania will write a new constitution. Was the Cabinet or Central Committee of the ruling party involved in this decision, or was it the decision of the President? Was he motivated by a real felt need, to leave his legacy, or was it to steal the agenda before it was snatched by the opposition parties that had performed very strongly in the just-ended election and threatened to run with it?

There was certainly a claim by the authorities that the people will be involved in writing their constitution, but contrary to the experience of Kenya, the authorities bypassed the stage of a National Conference/Convention representing a cross section of the people to discuss the needs and aspirations of the people that should be the guiding light of the New Constitution. Instead they took a short cut in trying to pass a law on the process of writing the New Constitution, without adequately consulting even the ZG which is a natural partner in the Tanzanian Union and is vitally concerned with it.

In the very first draft of the Constitutional Amendment Law, the government had tried to limit the voice of the people on what they described initially as matters that were "sacrosanct", including the Union. Is it up to the Executive in a democratic state to limit the sovereignty and freedom of the people in

A. *Sheriff*

writing their constitution? Here the people in Zanzibar did speak very loudly when the draft law was presented by Hon. Samuel Sitta, the Minister of East African Cooperation, at two meetings in Zanzibar which led to a mighty row. In the first meeting with government and other leaders, some of the ministers of the ZG vented their anger at inadequate consultation in preparing the draft. The second was with NGOs and ordinary people who said that if they cannot say anything about the Union, then they have nothing to say about the Tanzanian Constitution dealing with the remaining non-Union Matters of Tanganyika. This even led to the public tearing of the draft law. The Union Government was forced to revise the law, but only to please the ZG, and modifying the wording to say that the Constitutional Review Commission (CRC) “shall adhere to national values and ethos and shall ... safeguard and promote”, among other things, “(a) the existence of the United Republic” [Constitutional Review Act, Section 9(2)].

The next stage was the formation of the CRC, but here the President still had the power to appoint all its members, although it tried to mollify the ZG by agreeing to “consult and agree” with the President of Zanzibar at every stage of the process, but both belong to the same ruling party, and the people of Zanzibar by having an equal number of Commissioners (as in previous commissions) from both sides of the Union. This was another mechanism to control the process perhaps in the expectation that the CRC will deliver the Constitution that the ruling party wanted. To their credit the CRC took its task with the solemnity that it deserved, and not to be bound by party affiliations of its members.

- i. They collected the views of a cross-section of the experts, and some of us received a very hostile environment at the beginning, but there is evidence that they listened and took into account even the unpleasant suggestions;
- ii. They went to the people in public meetings throughout the country to listen to the views of the people, and again there is evidence that they listened, although there is also evidence that some of the political parties tried to influence the people’s views through political pressure or even bribes;
- iii. Finally, they convened District *Mabaraza* (Assemblies) consisting of elected members from the wards/*shehias* to represent the youth (between 18 and 35), women (all ages), and old people above 55, (but somehow men between 35 and 55 were inexplicably left out at least in Zanzibar (my own

The New Constitution and the Union Question

observation), to discuss the first Draft of the Constitution. Unfortunately, this exercise was marred by some parties coming out with their *Mwongozo* (Guidelines) which tended to silence the voice and creativity of even their own people at the grassroots.

The next stage was the *Bunge la Katiba* (Constituent Assembly - CA). It had been recommended by many that its members should be elected directly by the people for the sole purpose and with a direct mandate from them to write the New Constitution, uncontaminated by their personal or party interests. Unfortunately, in Tanzania we never had such an experience since we got used to the President miraculously converting the Bunge into a CA every time since independence.

However, in this case the ZG had begun to assert its rights, and therefore the Bunge of the Union as well as the Zanzibar House of Representatives (*Baraza la Wawakilishi* - BLW) had to be combined to form the CA. But all of their members were elected in 2010 when the New Constitution was not on the agenda or in the manifesto of the ruling party. Therefore, their members did not have a direct mandate from the people specifically to write a new Constitution, especially as more than 70% of them belonged to the ruling party. With such a majority, they will naturally not entertain any reforms that will affect their interests, such as limitation of number of terms that the MPs can hold on to their seats.

Moreover, all of them were politicians with scarce representation of the people and Civil Society Organizations (CSOs). So there was another compromise to include a certain number of representatives of the CSOs. It led to another row in the Bunge since the opposition parties wanted a much larger share for the CSOs to reduce the dominance of politicians and of the ruling party. The Government initially offered 166, but after a lot of haggling, it was agreed to have a total of 201 members, and a formula that at least one-third of them will come from Zanzibar. However, they included two members from each of the 21 registered political parties since a majority of them do not have any representatives in the two legislatures, thus adding another 42 to the list of politicians in the CA. As if that was not enough, several more politicians were smuggled into the list of the CSOs. Since the appointments were to be done from a list of up to nine names from each of the CSOs by the two presidents, the criteria of their selection may be questioned. For example, it is amazing that not a single member was appointed from the Zanzibar Law Society which represents all the lawyers in

A. *Sheriff*

Zanzibar, and which has a specific role even in the selection of the judges of the Court of Appeal and the Supreme Court in the Draft Constitution, and could have made a very significant contribution in drafting the new Constitution.

Although party affiliations of the 201 appointed members are not known for certain in all cases, it is clear from the analyses made by several scholars that CCM will have more than two-thirds majority in the CA as a whole. However, it seems that it did not have a two-thirds majority in the Zanzibar House of Representatives or among the MPs from Zanzibar, which is critical since that is the requirement to pass the new Constitution. Whether the appointments from the CSOs have been done to make up for this shortfall, we will have to wait to see (See Shivji, 2013; Mkumbo, 2014). The fact is that the authorities resisted all arguments for either a direct election of the members of the CA, or an increase in the number of members from the CSOs, as well as their determination that all those members from the CSOs will be appointed by the two presidents belonging to the same ruling party, rather than allowing the CSOs elect their own representatives.

The second question is whether the ruling party will use its overwhelming majority to have its way in the determination of the New Constitution in the CA, or will it allow its members to express their own opinions or those of their constituencies by voting with their conscience. The hardliner section of the party in Zanzibar in fact wanted to add a 'fourth line' to the parliamentary three-line whip by asking its members of the CA to swear on the Qur'an with the threat of a curse (*Halbadiri*) if they voted against the party line. On the eve of the convening of the CA in Dodoma, from 16 to 17 February 2014, the National Executive Committee of CCM came out with their stand to require all CCM members to abide by its stand (*Mwananchi*, 18.2.2014).

So the question is whether this whole exercise has not been a desperate attempt by the ruling party to pretend to let the people speak, but ultimately to control it and to hold a veto power over any change that it may not like. If that was the case, was the exercise worth all the enormous expenditure in time (three years) and money (TShs. 100 billion) that has been incurred, and whether it has not nullified all the hopes that the people had placed in this apparently first attempt to have a democratic constitution in Tanzania?

The New Constitution and the Union Question

The saving grace of this whole exercise may be the last stage of this process. For the first time, the Constitutional Review Act provided for the people to have their final and definitive say over the New Constitution through a Referendum, following a precedent set by Zanzibar in achieving Reconciliation and the Government of National Unity in 2010. The law calls for a referendum in both sides of the Union where a simple majority in both Zanzibar and Tanganyika will be needed to confirm the New Constitution.

So, to conclude this part of the paper on the process, it can be fairly said that it has throughout been a controlled process to prevent the people to have their untrammelled say in writing their constitution, and the resounding words "We the people hereby give ourselves this new Constitution" will sound very hollow, a sad end to a shaky beginning. Let us now look at the other side of the coin, the content of the Draft Constitution.

The Content: the Union Question

The authoritarian constitution-making process in some ways pre-determined an authoritarian content of past constitutions of Tanzania, each one building on the foundations of the preceding without a significant break. Professor Shivji argues in his 1996 article that while the Independence and Republican Constitutions of Tanganyika laid the foundation of an "Imperial Presidency" (*urais wa kifalme*) built on an earlier foundation of the monopoly of power by the colonial governor - President Nyerere himself declared in 1978 that he had enough power to be a dictator, forgetting to mention that all that power had been accumulated under his watch. The Articles of Union in the immediate aftermath of the Zanzibar Revolution provided for a two-government Union structure imposed from above without popular consent. And the 1965 Interim Constitution and its 1975 amendment consolidated One-Party Supremacy which merged the party with the state, the state-party (*chama-dola*) - instead of deriving its legitimacy from its members, the Party began to use the powers of the state to enforce its control, and the state used the popularity of the party to justify its use of force (Shivji, 1996).

While the reintroduction multi-partyism was only the first step in the separation of the party from the state, there is considerable evidence that the half-hearted reform of the 1990s, under the control of the same ruling party, did not demolish the supremacy of the ruling party or diminish the powers of the Imperial Presidency. It was not enough to bring about the necessary

A. *Sheriff*

transformation and thoroughgoing democratisation of political practice in Tanzania, which was the second task of the new Constitution. But I will leave this part of the task to others better placed to analyse to what degree the new constitution will succeed in performing its historic task at this stage.

The primary reason is the fact that as the Chairman of the Zanzibar Constitution Forum [Baraza la Katiba, Zanzibar (BAKAZA)], our own initial attempt in February-March, 2011, even before the first draft of the Constitutional Review Bill was published, to open up discussion on these issues - we had devoted some of the first four topics for our public forums to the Imperial Presidency and Human Rights - did not resonate with Zanzibaris. They argued strongly that for Zanzibar the most fundamental task at this stage of writing the new constitution, following *Maridhiano* (Reconciliation) and the formation of the Government of National Unity in Zanzibar was to transform the Union structure which they said was lying too heavily on the limited and diminishing autonomy of Zanzibar. As the Constitutional Commission Chairman has reported, Zanzibaris all across the islands focussed almost entirely on the Union Question (Warioba, 2013).

As mentioned above, the Union was formed in April, 1964. While the four East African countries were fighting for their independence, there was a call for an East African Federation (EAF), but there was never a public discussion or consent among the people of Zanzibar for an eventual union with Tanganyika in particular, whatever secret agreements that there may have been (Shivji, 2008: 31). Tanganyika's nationalist leader Julius Nyerere was prepared for a postponement of Tanganyika's independence if the four countries could get independence together and form the EAF from the start, but this proposal did not fly, and Tanganyika became independent on 9 December 1991. Only four months before Zanzibar got its independence on 10 December 1963, the Kenyan nationalist leader Tom Mboya was sent by his colleagues on the mainland to ask if the ZG was prepared to start discussion on the EAF, and having seriously considered the proposal, it had responded positively (Shivji, 2008: 70-1). Therefore, the formation of the Union only 100 days after the Zanzibar Revolution, followed by a series of army mutinies in all the three mainland countries, and in the murky Cold War rivalry of the times, cannot be seen as the natural outcome of a long-held aspiration for African unity. Not only the common people, but even the Revolutionary Council was kept in the dark while the Union was being cooked and its constitution drafted by Mwalimu Nyerere's British legal officers on the model of the then Northern Ireland (Shivji, 2008: 78-9).

The New Constitution and the Union Question

The fundamental problem of the Union, which has been the source of most of the “*Kero za Muungano*” (Problems of the Union), was a union between two disparate countries in terms of size and population, and its unique and iniquitous two-government structure encompassing three jurisdictions. While the minute Zanzibar was left with limited autonomy over the non-Union Matters, the much larger Tanganyika took over all the Union Matters, including Defence, Police, Citizenship, Immigration, Foreign Affairs, and all the major sources of revenue, to constitute the Tanzanian Union Government, thus combining two jurisdictions into one government. The Tanganyikan President became the Tanzanian President; the Tanganyikan constitution became the Interim Constitution of Tanzania, as well as the Tanganyikan National Anthem and Coat of Arms, modified here and there where necessary. To all intents and purposes, as Pius Msekwa, a former Speaker of the Bunge, has stated, Tanganyika was ‘miraculously’ transformed into Tanzania, putting on the new Tanzanian giant’s robe (Msekwa, 2000: 32). The Union was neither federal nor completely unitary. In one sense it was unitary because Tanganyika had absorbed all the Union Matters of Zanzibar to constitute the Tanzanian Government. On the other hand, there was still a division of powers between two governments within one country that gives it a federal character.

Worse still, although the division of authority between the two states in the Union should have been frozen according to the Articles of Union, an international treaty between two sovereign states, especially as one of the partners had miraculously disappeared, more and more non-Union Matters continued to be transferred to the Union Government, eventually rising from 11 to a total of 22 Union Matters, which was not provided for in the Articles of Union. The end of that process was to reduce ZG to an empty shell, a complete absorption of Zanzibar in the Union. This seems to have been an undeclared policy of the ruling party of “*serikali mbili kuelekea moja*” (two governments towards one) which was kept secret from the people of Zanzibar until the then Tanzanian President Ali Hassan Mwinyi let the cat out of the bag in the Bunge in 1995. The ultimate cut was delivered in 1993 when the Zanzibar President was deprived of his position as the ex-officio Vice President of Tanzania. The drastic surgery had the effect of creating a festering grievance among most Zanzibaris, as the Chairman of the Constitutional Commission admitted in his speech at the launch of the second Draft of the Constitution (Warioba, 2013).

A. Sheriff

The two-government Union structure was one of the foundations of the Tanzanian state enshrined in the 1977 Constitution in which a whole chapter is devoted to the Revolutionary Government of Zanzibar - the Revolutionary Council, the House of Representatives, the lot - as if these institutions were derived from the Tanzanian Constitution instead of the Articles of Union, as was its twin, the Tanzanian Government itself. Apart from the diminution of the autonomy of Zanzibar, the 1977 Constitution stealthily inserted an article that provided an easier way of diverting additional non-Union Matters of Zanzibar into the laps of Tanzania which, because the Zanzibari members of the Constituent Assembly were not given time to digest in their three-hour deliberation of the Constitution, they were not able to object to; and even if they had, they were told that the document had already been accepted by the Supreme One Party. This was Article 64 which states correctly in the first three sections that the powers of passing laws relating to Union Matters as well as non-Union Matters in Mainland Tanzania rests with the Bunge of Tanzania, and similarly for Zanzibar in the Zanzibar House of Representatives; and that if either legislature encroaches on the mandate of the other, that law will be null and void. However, the Article goes on to add the fourth section that the Tanzanian Bunge can pass any law on any matter that will apply to Zanzibar if it only states at the top that it will apply to Zanzibar. This was to give free licence to the Union Bunge to increase the number of Union Matters indefinitely and thus reduce the authority of the ZG, without having to even consult its Zanzibari partner, and without having to have a two-thirds majority from both sides of the Union in the Bunge. Under this Article more than 30 laws relating to non-Union Matters, including the Deep Sea which caused such commotion in 2011, were extended to Zanzibar, thereby enormously extending the real list of Union Matters infinitely.

It is this fundamentally iniquitous two-government Union that has been the cause of the never-ending "*Kero za Muungano*." The problems started even during the incumbency of the first President of Zanzibar, Abeid Karume, who is reported to have said that "*koti likikubana livue*" (if the coat is too tight, take it off). It has also been reported by one of the Members of the Revolutionary Council, Hon. Hasan Nassor Moyo, that in 1970, Karume led the whole Revolutionary Council to meet President Nyerere to ask for a reduction of the Union Matters. Nyerere replied that the time had not come yet, and the two never met again until Karume was assassinated a year later.

Nyerere used the opportunity thereafter to consolidate the Union by uniting the two political parties in Zanzibar and Tanganyika into a single CCM; but

The New Constitution and the Union Question

that only led to “pollution” of the political atmosphere in 1984 and the forced resignation of the President of Zanzibar Aboud Jumbe. Altogether, 19 Committees or Commissions have been appointed to resolve the “*Kero za Muungano*”, 12 of them in Zanzibar and 7 on the Mainland (dealing with such questions as Foreign Affairs, the East African Federation, Oil, Debt between Zanzibar and the Union, Exclusive Economic Zones, Finance and the Central Bank, Telecommunication, Union Matters, Customs Harmonization, and Telephone), but without being able to resolve any substantial problems (Sheriff and Jussa, 2009: 89). It is against this background that Zanzibaris have looked to the New Constitution to resolve once and for all the conundrum over the vexed question of the Union.

The Draft Constitution and the Union

Since the selection of members of the Constitutional Review Commission was firmly in the hands of the two presidents from the ruling party, they had apparently hoped that the stalwarts appointed to the Commission, including the Chairman Joseph Sinde Warioba who was a retired Judge and President Nyerere’s last Prime Minister, Joseph Butiku (Director of the Mwalimu Nyerere Foundation), and Salim Ahmed Salim (former Prime Minister under Nyerere), will ensure that they will deliver the constitution that the Government and the ruling party wanted. Until only a couple of months before his appointment, Warioba had repeatedly stated that “to build a three-government Union is to break the Union.” I personally faced a very hostile audience when I was invited to speak to the Commission in August 2011, and began to elaborate on the legitimacy or efficacy of the inherited Union structure, and the sources of the “*Kero za Muungano*” in the dysfunctional two-government Union structure. I came out from that meeting with a strong feeling that the CRC cannot but come out with a structure that they were expected to deliver by the ruling party. I am happy to say that I was proved wrong, because regardless of his own personal opinion or preference, Warioba has proved himself a worthy successor to a line of other judges, including former Chief Justices Francis Nyalali and Robert Kissanga appointed to head such commissions in 1991 and 1998, who were able to demonstrate the maturity of their judicious and independent minds on such vital national issue as the country’s constitution, although their recommendations on this issue were ignored, sometimes savagely. After releasing the first draft of the Constitution, Warioba famously said that “to insist on the two-government structure is to break the Union.”

A. Sheriff

The strength of the Warioba report rests precisely on the fact that it is based on the views of the people in the numerous public meetings across the country. Of those who had discussed the structure of the Union, 60% of the people on the Mainland wanted a three government federal structure, and the same proportion in Zanzibar wanted “*Muungano wa Mkataba*” (Union by Treaty) or a looser form of confederation. Less than one-third on both sides wanted retention of the current structure. Some of the people have questioned the authenticity of these statistics, saying that the 27,000 people on the Mainland and 19,000 in Zanzibar who had talked specifically on the structure of the Union is not representative of the whole population of Tanzania. Yet while the same people constantly quote the Nyalali report saying 80% of the people in 1991 wanted a retention of the two-government Union structure, now they want to reject the Warioba report which says 60% of them now want a three-government federal or even confederal structure (Warioba, 2013). Since the CRC was bound by the terms of reference to retain the Union at all costs, they adopted a three government federal structure as a compromise.

The draft constitution creates a clear federal structure including a federal government with jurisdiction over seven specified matters, including defence and security, nationality and immigration, currency and the central bank, foreign affairs, registration of political parties, and excise duty to cover the costs of running the federal government. This list includes most of the original 11 Union Matters when it was formed in 1964. The draft constitution also recognizes a separate government of Tanganyika that had hitherto been hidden in the more comfortable robes of the Union Government, as well as the existing government of Zanzibar, with jurisdiction over all the residual non-Union matters.

Whether this will satisfy the voluble demands in Zanzibar for “*mamlaka kamili*” (complete sovereignty) is another question. Many had demanded that police should not be a federal matter because it deals with the civil society within the countries in the federation as opposed to defence from external invasion; and the constituent governments of Tanganyika and Zanzibar will require their own internal security especially in a multi-party context where there is a possibility of the three governments being led by different parties. They were also asking for recognition of the existence of two states in the federation especially in terms of internal immigration since Zanzibar is already very heavily populated (1,300 per square miles as opposed to less than 60 in Tanganyika). As regards foreign affairs, there is satisfaction that

The New Constitution and the Union Question

international cooperation has been removed to enable Zanzibar, and Tanganyika, to forge their own external economic relations, but they are still worried whether the Union Ministry of Foreign Affairs will offer them an equitable gateway to the outside world. They also feel that there is no need for the Federation to retain control over registration of political parties, especially as politics is not a federal matter. While appreciating that each government should have its own major source of income to run its affairs, they query whether excise duty is an appropriate source for the federal government which, in the new dispensation, does not have in its portfolio economic matters, while excise duty rests entirely on the health of the economy in the two parts of the federation which need to control legislation on this crucial source of income.

At the political level, our preliminary estimation is that the second Draft Constitution does not solve the deeper problem of the great disparity between the two partners in terms of land, people and resources, between what Mark Bomani has described as the problem of the *sato* (tilapia) and the *sangara* (Nile perch) fishes in Lake Victoria - the latter will surely eat the former. For example, in the election of the Union President by popular vote, the disparity between 97% of the voters in Tanganyika against 3% in Zanzibar cannot but open a whole new book on "*Kero za Shirikisho*" (Problems of the Federation). In the Union Parliament Zanzibar has been awarded 20 seats against 50 seats for the Mainland, now clearly labelled as Tanganyika as most of the people had demanded. Although Zanzibar's share is less than a third, the requirement of two-thirds of the votes from both sides of the Federation to pass any legislation gives adequate protection to Zanzibar that it will not be swamped by its big brother.

Naturally, the first draft of the Constitution had provided for some degree of entrenchment as regards amendment to the Constitution, requiring two-thirds majority from both sides of the Union; but on two significant issues: an increase or decrease in the number of Union Matters, and the existence of the Union, the federal parliament had no authority without a referendum in both halves of the federation separately. This seemed to offer the necessary and adequate protection against the previous practice of adding to the number of Union Matters from 11 to 22 and numerous laws under Article 64 of the 1977 Constitution. However, the fear of the conservatives about the survival of the Union seems to have led the CRC in the second draft to assure them that Tanzania will not break up by lengthening the list of the entrenched provisions from two to seven, and including three whole chapters, and in

A. Sheriff

addition, requiring two-thirds majority in the referendum from both sides of the federation. This makes the constitution completely inflexible and not a living document. It is strange that while the whole New Constitution will be passed by a simple majority in the referendum, the new Constitution requires a two-thirds majority to amend its entrenched provisions. Why the desperation to keep Zanzibar in the Union by hook or crook? In the event, for example, that the federation becomes unworkable and loses all its legitimacy in the eyes of an overwhelming majority of the citizens in one half of the federation, to require it to be supported by two-thirds majority from the other half before it can get relief is like a Catholic marriage or a marriage that is irreparably broken, but the husband refuses to give a divorce. We should remember the profound words of the architect of the Tanzanian Union itself, the late first President of Tanzania Julius Nyerere, when he said in a BBC interview in 1978:

If the mass of the people of Zanzibar should, without external manipulation, and for some reason of their own, decide that the Union was prejudicial to their existence, I could not bomb them into submission...The Union would have ceased to exist when the consent of its constituent members was withdrawn (*The Observer*, London 20.4.1978).

In an earlier address in 1969 he had said: "If they came in freely, they can leave freely" (Smith, 2011: 135).

Conclusion

The second Draft of the Constitution has now gone to the Constituent Assembly that according to the law is required to deliberate on the draft before sending it to the people for their final judgment in a referendum in both sides of the country. The major issue of discussion is to what extent we can live with a three-government federal structure that the Warioba Commission has proposed, or how far we are prepared to go to overturn it. The Constitutional Review Act itself defines the task of the CA in its authoritative English version as 'to make provisions for the New Constitution', while the Swahili version of the law says its task is "*kujadili na kupitisha*" (to discuss and pass) the draft. Hon. Warioba has been arguing that in a constitution-making process in which a commission was tasked to collect the views of the people on the new constitution, and to the extent that its report reflects those sentiments, the CA, a vast majority of whose members were not specifically mandated by the people to write the

The New Constitution and the Union Question

constitution when they were elected in 2010, cannot overturn the essential principles of the draft. In this the CRC seems to have support among several opposition parties which have embraced the three-government federal structure, which they see as the fundamental principle of the New Constitution. Others argue that the only things that the CA cannot change are the nine items of “national values and ethos” listed in section 9 of the law which were supposed to guide the CRC in its work. Some of the members of the ruling party have argued that the CA, which it dominates numerically, can change anything and everything, even consigning it to the dustbin of history. So they are attempting to interpret the task of the CA in its regulations (*Kanuni*) as “*kurekibisha, kuboresha au kubadilisha*” (to correct, to improve, or to change) anything in the draft. That is where the battle lines may be drawn.

The other issue is to what extent the proceedings of the CA will adhere to the basic agreements about the relative weight of the two partners in Tanzania. In proposing a three-government federal structure, the Draft Constitution described the two partners as having “equal rights and status” (*haki na hadhi sawa*) [Art. 64(5)]. The Constitutional Review Act had defined the process of passing the Draft Constitution as involving voting on the basis of “two-third majority of the total number of the members” from both sides of the Federation. Although Zanzibaris constitute only about a third of the total number in the CA, it has been agreed that the quorum should be on the basis of half the total number from both sides, and the voting should be on the basis of two-third majority on every article and on the New Constitution as a whole at the end, which was an important achievement.

However, what has bedevilled the effort on the part of Zanzibar at this critical stage in their constitutional history to resolve the “*Kero za Muungano*” has been party divisions on the islands despite the fact that Zanzibar had recently gone through Reconciliation and formation of Government of National Unity (GNU) at the end of 2010. Although the Zanzibar House of Representatives had only a year ago declared on the major principles they wanted to see in the New Constitution, including (1) recognition of Zanzibar as a state (*Nchi*); (2) division of powers between the federal jurisdiction, and the Zanzibar and Tanganyika jurisdictions; and (3) equality between the two partners in the federation, the spirit of “*maridhiano*” has been cut asunder by the party political interests especially of the CCM section in Zanzibar. Before coming to the CA, repeated attempts to develop a common position in the Zanzibar House of Representatives were deliberately blocked; this placed

A. Sheriff

party positions above national interests. However, while the ruling party may be able to count on a two-third majority on the Mainland, they may not be able to do so in Zanzibar unless it has been able to make up for the shortfall from the appointed members for the CSOs.

In case the ruling party succeeds in overturning the three-government federal structure proposed by the CRC, there is still the last hurdle in the referendums in both sides of the country. Here, the actual votes may be more evenly balanced in Zanzibar because in the last election, despite the advantages of incumbency and attendant influence, legitimate or otherwise, of the ruling party, the President was able to win by only 50.1%. In the preceding referendum to bring about the GNU, which represented the *Maridhiano* spirit, support for it was nearly two-thirds. In the meantime, although party divisions have tended to harden, there has been greater degree volatility among the youths of in favour of a reform of the current two-government structure. That is where the final fate of the Draft Constitution may lie.

Notes

1. <http://www.princeton.edu/~pcwcr/reports/tanzania1984.html> (accessed: February 15, 2014).
2. <http://www.princeton.edu/~pcwcr/reports/tanzania1992.html> (accessed: February 15, 2014).

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