

Constitutional Development of Zanzibar, 1890 - 2005: An Overview¹

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Abstract

The history of Zanzibar's constitutional development from the colonial days to date offers many lessons and challenges. It has been marked by progress and retrogression. This article revisits that history from 1890 when Zanzibar became a British protectorate. The main argument advanced is that post-colonial Zanzibar has experienced a series of constitutional crises which are more or less a replica of pre-independence constitutional struggles. In spite of the inception of multiparty politics in 1992 the fundamental issues of governance in the Zanzibar polity such as the form of government, electoral system, representation, Zanzibar's status within the Union still remain unresolved. Consequently, Zanzibar remains a politically polarized society. The author suggests that any constitutional designing initiative in Zanzibar should take into account the imperatives of power-sharing arrangements due to the fact that the political history of Zanzibar has been characterized by political hatred between the two main political groups, which are almost equal in numerical terms.

Introduction

More than four decades have elapsed since Zanzibar became independent, an event that briefly preceded the 1964 revolution and the subsequent merger of Zanzibar with Mainland Tanzania to form the United Republic of Tanzania. Yet, Zanzibar still experiences a constitutional crisis that resembles the pre-independence constitutional struggles. The fundamental questions of governance, form of government, electoral system, representation as well as the status of Zanzibar within the Union arrangement have been constant themes in the constitutional debates before and after the introduction of multipartyism in 1992.

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The history of post-colonial constitutional development in Zanzibar has been shaped by both endogenous and exogenous developments. These developments have been a response to both internal Zanzibar political dynamics as well as external dynamics from the Union whereby Zanzibar, as a semi-autonomous political entity, is under the hegemonic protection of Mainland Tanzania. This feature of post-independence constitutional development in Zanzibar has parallels with pre-independence constitutional developments whereby Zanzibar, as a British protectorate, was under the colonial administration during the constitutional designing processes leading to independence. Perhaps the only striking difference is that whereas the British colonial administrators detached themselves to some degree from the competing political forces in Zanzibar, the Union Government is an integral part of the broad ruling coalition of the United Republic of Tanzania.

The constitutional development of any country is a reflection of the society itself in terms of its social structure, history and cultural heritage, and above all, power struggles. That is to say the spirit of constitution making and constitutional development may be based on a social pact (social consensus) or be imposed by the elites (single faction or multiple factions). In a situation where a country became independent through the constitutional means of free and fair elections, the general trend was to have constitutions based on elite consensus. On the contrary, in situations where a country became independent through non-constitutional means, the victorious elite faction single-handedly dominates the constitutional making process. The history of constitutional development in Zanzibar displays both features. Prior to independence there were initiatives aimed at establishing a minimum and basic consensus on the drafting of the Independence Constitution. These initiatives were administered and supervised by the protecting power, British colonial authorities. Thus, the Zanzibar independence constitution of 1963 was the outcome of a negotiation process between the elites of different factions in Zanzibar and therefore it could be said that the constitution, in spite of its deficiencies, was supported by a minimum consensus of at least the political elites of different political factions. This article seeks to document the history of constitutional developments in Zanzibar with a view to situating the current political crisis of Zanzibar within a historical constitutional perspective.

Historical Background

The history of Zanzibar's constitutional development goes back to the early period of British domination in Zanzibar. On 14th June, 1890, Zanzibar was

declared a British Protectorate. Immediately after that a British Representative was appointed as the First Minister to the Zanzibar Sultan, where he took charge of Posts, Labour Office, Customs, Harbours, Treasury and Police. The powers of the Sultan were curtailed, and he could not remove or transfer British officials at will. His annual salary was set by the British authorities. Later, on July 1913, Zanzibar was removed from the Foreign Office and placed under the Colonial office (Hollingsworth, 1953).

Within this framework, the Protectorate Council was established in 1914. This was an advisory body to the Sultan, with the Sultan serving as the President and the British Resident as the Vice President. The Attorney General, the Chief Secretary and the Financial Secretary were ex-officio members of the council while there were four un-officio members nominated by the Sultan; two Arabs and one each from of the Indian and European races (Blood, 1960: 57). With these initiatives, the Sultan was put in the background and Britain was in firm control of the show. The thinking that a "protectorate" was different from "a colony" in the eyes of the colonial power became an academic question (Hailey, 1957: 305).

Thereafter, the Legislative and Executive Councils were formed in 1926 by the Zanzibar Order in Council and His Majesty King in Council, i.e., Privy Council. The formation of these two bodies put the administration of the Zanzibar Government in the hands of the British Resident, and required that no decree be enacted by the Sultan without the advice and consent of the Legislative Council (Ayany, 1970: 15). In the same year a constitutional change was made requiring the British Resident to receive his instructions from the Secretary of State for the colonies in London and not from the Sultan (Crofton, 1953: 76). According to Crofton, these changes were intended to safeguard the islands "complete autonomy and independence", but in actual fact they greatly curtailed the powers of Sultan and made him a prisoner in his own regime.

The notion found in some of the contemporary literature on Zanzibar, that during the British colonial period, there existed a dual state, one Arab and the other British, tends to misread the whole situation pertaining at the time. With the 1926 Order in Council and the decrees enacted thereafter, the Sultan's state was dismantled and Britain imposed its own colonial state. By the 1930 no traits of the Sultan's state remained (Othman and Shaidi, 1981: 187).

The Sultan led the Executive Council, which consisted mainly of the senior British Administrators. The British Resident led the Legislative Council, which was also made up mainly of Europeans, Arabs and Indians nominated by the Sultan, but with practically no Africans. Even when Decree No. 14 of 1942, enlarged the Legislative Council, which was basically a "rubber stamping body", no African representation was envisaged. It was only in 1946, when one place in the Legislative Council was reserved for African representation (Blood, 1960: 57). In an apparently deliberate effort to sustain chaos and misunderstanding among the Africans, the Sultan appointed a Shirazi, Sheikh Ameir Tajo, to represent the Africans, at a time when the some administrators treated Shirazi as Asians (Mrina and Matoke, 1980: 51-52).

The next constitutional development came in 1957 following the Coutts Constitutional Commission, which proposed 12 unofficial members for the Legislative Council. The major innovation in the 1957 constitutional changes was the election of half of the twelve unofficial members through the Common Roll system. This was not only a novelty in Zanzibar but it was also a "revolutionary" step in East Africa. The changes envisaged in the constitutional announcement of 1957 placed Zanzibar along the path to self-rule and independence (Othman and Shaidi, 1981: 192).

In April 1960, the British Government appointed another constitutional Commissioner, Sir Hillary Blood, who was called upon to propose further constitutional developments.

The commissioner's recommendations can be summarized as follows:-

- (i) The Sultan of Zanzibar should remain a constitutional monarch and he should stay outside politics. His salary should be a statutory charge instead of being voted on annually in the estimates, whereby it was a subject of annual discussions.
- (ii) The legislature should have its own speaker and 29 members, 21 of whom should be elected.
- (iii) There should be a cabinet under a Chief Minister with seven ministers, three ex-officio (The Civil Secretary, the Finance Secretary and the Attorney General) and four appointees of the Sultan from the party winning the election.
- (iv) There should be an official opposition whose leader should be entitled to Government salary.

These recommendations were adopted with minor alterations, most particularly in the number of ex-officio seats in the legislature and they formed the basis for the subsequent elections. The government had also earlier extended the franchise to women; lowered the minimum voting age from 25 to 21, lowered the property requirement; and lowered the voter eligibility age for illiterates from 40 to 30 years (Zanzibar Government, 1961: 4-5).

Long before the Blood Report was published, the Government announced that the second general election would be held in January, 1961. All three contesting parties (ASP, ZNP and ZPPP) involved themselves in vigorous and, at times, dirty campaigns. The government, at this point, increased the number of seats to be contested through the ballot to 22 from the 21 recommended by the Blood Commission. The extra seat was allocated to the Stone Town Area. The ASP was not happy with the decision to increase seats. This was seen to clearly favour the affluent residents of the Stone Town, most of whom were ZNP supporters. The elections were eventually held in January, 1961 and ASP emerged a narrow winner with 10 seats over 9 seats for ZNP and only 3 seats of ZPPP. With these results, the ZPPP was in a quite enviable position, with each of the other parties soliciting it as a potential coalition partner. But the ZPPP itself became divided, with one of its members, joining ASP and the other two allying with the ZNP. Thus a stalemate ensued, and a new election had to be called. There was criticism at the time over the way British authorities handled the election. The ASP not only had the majority of seats, but also the votes too (Zanzibar Government, 1961). The ASP felt that the British Resident should have called on its leader to form a government. The Government would have had the necessary working majority since the three ex-officio members (the Chief Secretary, the Financial Secretary and the Attorney General) sitting in the Legislative Council were always supposed to vote with the government. But the argument made by the British authorities at the time was that a party had to have a working majority of its own without depending on the ex-officio members. As a result, new elections were planned for June, 1961, and the Chief Secretary acted as Chief Minister for six months, with a coalition government consisting of all political parties.

Before the new elections were held, a new constituency was created in Mtambile Pemba, the idea being to prevent another stalemate. But the addition of the new constituency in Pemba, where ASP did not enjoy great support, worked against the ASP (Middleton and Campbell, 1965: 57). These

elections held on 1st June 1961 were marred by bloody riots that started with minor skirmishes and disturbances at polling stations, spread to the country side and continued for the whole week, resulting in 68 deaths and 381 injured, while over 1000 were arrested and many buildings were damaged (Commission of Inquiry, 1961). In this election, in spite of securing fewer votes (i.e., a combined total of 44,092 against ASP's 45,172), the ZNP/ZPPP alliance won the elections by capturing a total of 13 seats compared to 10 of the ASP.

Then came the constitutional conference, which was held in London between 19th March and 6th April 1962. Earlier, before the conference, the independence issue was a matter of serious discussion in the Legislative Council from August 1961 to early 1962. There were frequent consultations between the political parties, trying to figure out how and when full independence should be granted. This conference was attended by all the political parties in the Legislative Council with the Colonial Secretary as chair. The ZNP/ZPPP alliance demanded an immediate, full, internal self-government to be followed shortly afterwards by full-independence, without holding any further elections. The ASP also proposed that independence be granted the same year but after fresh, free and fair elections. It also demanded a reduction of the minimum voting age to 18 and, an increase of elected members from 25 to 31. However, both sides reaffirmed their loyalty to the Sultan and the Throne and their desire that the dynasty continue. They also agreed on the removal of means and literacy requirements for voting.

The British Government proposed that the three parties form a coalition government. The ZNP/ZPPP alliance agreed and offered 3 out of 9 ministerial posts to the ASP and a veto power in the deliberations of the cabinet. ASP rejected this offer insisting that a fresh round of elections was necessary (Mapuri, 1996: 35). The constitutional conference therefore, ended in a dead-lock.

After the 1962 constitutional conference failed to produce a solution regarding Zanzibar's independence, the British Government appointed Sir Robert Arundell to study the problems regarding electoral constituencies in Zanzibar. In his report, released in October, 1962, he recommended that Zanzibar should be divided into 31 constituencies, coinciding with an earlier ASP proposal.

In April 1963, the British Minister of state for the Colonies, Sir Ian Macleod announced that Zanzibar would be granted internal self government on 24 June, 1963 and general elections would be held in July the same year. Relations between the parties were becoming more strained at this time (Middleton and Campbell, 1965: 61).

Once again, the ASP with the majority, and this time a very clear majority of votes, ended up with fewer seats, indicating a discrepancy in the demarcation of constituencies. In the elections the ZNP/ZPPP alliance won 18 seats and the ASP 13, while the ZNP had a fall in the percentage of votes cast from 35 percent in 1961 to 29.8 percent. In 1963 the ASP increased its share of votes from 49.9 percent in 1961 to 54.3 percent in 1963. The ZPPP made an increase from 13.7 percent in 1961 to 15.9 percent in 1963. Following the elections, which determined the future government of an independent Zanzibar, the last colonial era constitutional conference was convened in London at Lancaster House in September, 1963 to create the independence constitution.

As expected, the conference was attended by both the government and opposition political parties. It was agreed that Zanzibar should become fully independent on 10 December, 1963. During the proceedings, under the chairmanship of the British Secretary of State for the Colonies, a number of constitutional changes were made. The debates were very hot and where differences could not be reconciled amicably, the Secretary of State undertook to arbitrate and his decisions were adopted. One of the most significant changes was that the Sultan would be declared the Head of State of Zanzibar (British Government, 1963: 3). Also, the Independence Constitution had a Bill of Rights.

The Independence Constitution, which was the first comprehensive constitutional document for Zanzibar, had eleven chapters. However, this document survived and functioned for only a month. Thus, on 10 December, 1963 the British Government declared the Independence of Zanzibar and handed sovereignty to the Sultan and the ZNP formed a coalition government with ZPPP.

ASP was dissatisfied with the way the British government handled the independence of Zanzibar. As Mapuri puts it "the efforts towards true independence for the African majority by constitutional means came to an unsatisfactory end. The British colonialists left behind a political mess and a

complete failure to deliver justice of which they surely could be proud. Alternative routes had to be sought by the victimized African majority" (Mapuri, 1996: 38). Hence, in addition to other factors, the failure to amicably handle the independence and constitutional issues led to the January 12th 1964 Revolution that not only overthrew the ZNP/ZPPP coalition government, but also immediately abolished the monarchy.

The 1964 Revolution and its Aftermath

Immediately after the 1964 Revolution, the Revolutionary Government abrogated the Independence Constitution of 1963. However, the government realized the necessity of having a constitutional basis for its actions. Perhaps that is why one of the first actions taken by the Revolutionary Council was the passing of a Constitutional Decree providing some degree of constitutional government and the rule of law. The Decree spelt out the division of powers in the new Government and declared an intention of codifying the Constitutional Decree, which was to form the basis of the new constitution (Othman and Shaidi, 1981: 195). On division of powers, Section 2 of the Decree provides:

The People's Republic of Zanzibar is a democratic state dedicated to the rule of law. The President as Head of State validates legislation by his assent. As an interim measure, legislative power resides in the Revolutionary council and is exercised on its behalf and in accordance with its laws by the President. The principal executive power is exercised on behalf of the Revolutionary Council and with its advice by the cabinet of Ministers individually and collectively; the principal judicial power is exercised on behalf of the Revolutionary Council by the Courts, which shall be free to decide issues before them solely in accordance with law and public policy.

It is quite obvious from this section that Zanzibar fell into the hands of one man rule and an authoritarian regime. As asserted by Othman and Shaidi, "it is clear from this section that in actual practice, legislative power was vested in an individual who was to exercise it on behalf of the Revolutionary Council." Judicial power was to be exercised by courts also "on behalf of the Revolutionary Council." The orthodox doctrine of division of power was not strictly adhered to since the Revolutionary Council was "everything and everywhere" (Othman and Shaidi, 1981: 196). At the same time the President of Zanzibar became the chairman of the Revolutionary Council. Prior to Decree No. 5, the High Court Decree No. 2 of 1964 was passed to establish

the High Court of Zanzibar, which was given judicial power to work on behalf of the Revolutionary Council.

However, these absolute powers vested in the Revolutionary Council to enact Constitutional Decrees; perform executive functions and exercise judicial power were taken as only interim measures to cope with the environment of the time. This intention was stipulated clearly in section 3 of the Decree No. 5, which provided that:

... Not later than January, 11th, 1965 a Constituent Assembly of the Zanzibar People shall be convened to pass upon these and other basic provisions which after having received the assent of the Constituent Assembly, shall be the Constitution of Zanzibar.

This shows that the new Government gave itself a period of one year, which is very reasonable according to the circumstances, to prepare and then to adopt a new Zanzibar Constitution. Surprisingly, the interim period of one year elapsed and the originally expressed desire never materialized. Instead, section 3 was amended one year later by removing the words and figures "January 11th 1965" ... and substituting for them the words "a day to be appointed by the President". After this amendment, electing a Constituent Assembly became a forgotten issue in Zanzibar. The Government clearly indicated that it was not a priority and the first President of the Afro-Shirazi Party publicly admitted that he had no plan for elections in the isles (Othman and Shaidi, 1981: 197).

The delay in the establishment of the Constituent Assembly provided room for the President to continue to exercise his absolute powers of issuing Constitutional Decrees, appointing members of Revolutionary Council and to carry out other executive functions. Among the Decrees enacted was the High Court Decree No. 2 of 1964 which established the High Court of Zanzibar, Cabinet Decree; Afro-Shirazi Party Decree which marked the beginning of party supremacy, and the Confiscation of Immovable Property Decree No. 8 of 1964 that legalized confiscation without compensation. Section 2(1) the Confiscation of Immovable Property Decree No. 8 of 1964 provides:

Whenever it appears to the President that it is in the national interest of the Republic to acquire any property and that the acquisition of such property without the payment of compensation would not cause undue

hardship to the owner thereof, the President may by order confiscate such property.

There are no provisions for compensation, the only criterion was whether such confiscation would cause undue hardship to the owner or not. If no undue hardship was caused thereby then such immovable property would be liable for confiscation. Unfortunately, the Decree did not define the criteria for determining if confiscation would cause undue hardship or not. Under this decree a number of immovable properties such as plantations and buildings formerly owned by people believed to be supporters of the overthrown Government were confiscated without compensation. These properties were redistributed to landless people, most of them A.S.P. members, and a substantial portion of the confiscated properties were distributed to highly placed ASP leaders.

Another Decree enacted during this period was the People's Courts Decree of 1969. The provisions of the Decree provided that the Chairman of the Revolutionary Council was to appoint the Chairman of the Court at area or district levels and two other members of the court. However, the Decree did not provide any qualifications required for the appointment of the Chairman or members of the Courts. Thus, it is not surprising that most of the Chairmen and members of the People's Courts not only lacked any kind of legal training but were also illiterate or semi-illiterate (Kharusi, 1970: 9).

Further, it should be noted that in criminal matters, District People's Courts had jurisdiction over all cases except murder, manslaughter, attempted murder and treason. In the same chain of the judicial system, at the top was the Supreme Council Decree of 1970 that established the Supreme Council as an Appellate Court against decisions of the High Court in the cases of murder, attempted murder, manslaughter and treason. Also, the Council was given the responsibility to deal with any matter of public interest referred to it by the President of Zanzibar. It is striking that there was no qualification requirements prescribed for appointment to the Council.

Generally, the period from 1964 to 1979 is when the post-revolution constitution by decree was adopted and it is also when the state of constitutionalism and human rights in Zanzibar were in recession and stagnation. Legislative, executive and judicial powers were concentrated and fused in only one body - the Revolutionary Council. Those powers within the Revolutionary Council were excessively exercised by a single person who

was the President, Chairman of the Revolutionary Council and Chairman of the ruling party.

As earlier mentioned, the orthodox doctrine of separation of powers and checks and balances was not adhered to. The only existing political party, ASP became supreme and was the only political organization allowed to exist in Zanzibar. No elections were held and the President alone was vested with discretionary powers to appoint members of the cabinet and Revolutionary Council. It is interesting to note that before the adoption of the new Constitution of 1979, no woman was appointed as a member of Revolutionary Council, and hence no woman member of the cabinet. Human rights and rule of law were not subjects of discussion in Zanzibar. There were gross violations of human rights but there were no open avenues through which citizens could air their grievances. Detentions without trial for long periods of time and the mysterious disappearance of scores of people who were believed or suspected to be opponents of the regime was the order of the day (Ayany, 1970).

On April 26, 1964, the People's Republic of Zanzibar and the Republic of Tanganyika announced that they had merged to form the "United Republic of Tanganyika and Zanzibar" (Act No. 22 of 1964). In December of the same year, by an Act of the Union Parliament, a new name for the United Republic was adopted, i.e., Tanzania (Act No. 61 of 1964). Immediately after the ratification of the Articles of Union, the Constitution of Tanganyika was adopted as the Interim Constitution of the United Republic, which was supposed to last for one year until a new constitution would be adopted by the Constituent Assembly. The Interim Constitution of Tanzania, however, in effect, became a permanent document as it lasted for 13 years. The Interim Constitution was repealed and replaced in 1977 by the Constitution of Tanzania (1977), which was adopted by the Union Parliament that had converted itself into a Constituent Assembly.

The Zanzibar Constitution of 1979

The first post-revolution Constitution of Zanzibar was enacted in 1979. This Constitution can rightly be called a "child" of the Union Constitution. It was modelled after the Union Constitution providing the same format and organization of government. It incorporated the principle of separation of powers between the three branches of government - the executive, legislature and judiciary. It also endorsed all provisions in the Union Constitution relating to Zanzibar, making only modest modifications where appropriate.

The draftsman of the Zanzibar Constitution must have drafted it with a clear desire to avoid any contradictions or inconsistencies with the Union Constitution (Othman and Shaidi, 1981: 208).

Another salient feature of the 1979 Zanzibar Constitution was that it provided for, the first time since the 1964 revolution, a presidential election in Zanzibar. The Constitution altered the procedure of electing the President of Zanzibar laid down by the 1977 Union Constitution. According to the 1977 Union Constitution, a special sub-committee of the Central Committee of CCM was to select a candidate for the Zanzibar Presidency. Then the name was to be confirmed by CCM's National Executive Committee. After such confirmation the name would be forwarded to the Revolutionary Council of Zanzibar to accept or reject the candidate. Under the 1979 Zanzibar Constitution, the special sub-committee had to submit not less than two names to the National Executive Committee, which made the final selection. Instead of the name of the selected candidate being submitted to the Revolutionary Council, it was now sent to the electorate.

Section 22 of the Zanzibar Constitution of 1979 established the "House of Representatives" as the sole law making organ for everything other than Union matters. Legislative power, which was previously exercised by the Revolutionary Council, shifted to the House of Representatives. The creation of the House of Representatives fundamentally eroded the powers of the Revolutionary Council, which was an excessively conservative body.

To be sure, such constitutional developments: the introduction of the presidential election and the establishment of the House of Representatives were instrumental in the process of building a democratic society in Zanzibar. Although the majority of members of the House were not directly elected from the constituencies, they were in a better position to discharge the House functions of oversight and representation than the Revolutionary Council, which was basically a governing oligarchy.

The judicial system was left almost the same by the Zanzibar Constitution of 1979. The constitution made only modest changes to the system leaving the People's Courts and the High Court, which had concurrent jurisdictions with the Tanzania High Court on Union matters, and the Supreme Council, which had appellate jurisdiction. The Supreme Council, like the Peoples Courts, was composed of people who were not lawyers. In fact, advocates were barred from all levels of judicial proceedings in Zanzibar. Thus, it is not

surprising also to note that the Bill of Rights was not included in the 1979 Constitution.

Further, the new Constitution retained the Revolutionary Council. However, it was stripped of most of its original powers. Under the Constitution the main function left to the Revolutionary Council was to advise the Chairman of the Council on all governmental matters, other than Union matters. Its legislative functions were now assumed by the House of Representatives and it no longer had direct control over judicial matters. Also, it lost its power to select the Zanzibar President. Admittedly, the adoption of the Zanzibar Constitution of 1979 was a significant step forward in the constitutional development of Zanzibar, but still Zanzibar had a long way to go.

The 1984 Zanzibar Constitution

The current Constitution was adopted in 1984, soon after a pollution of the political atmosphere in Zanzibar, which led to the resignation of the second post-revolution Zanzibar President Sheikh Aboud Jumbe from both his State and party positions. The 1984 Constitution differs in a number of aspects from the 1979 Constitution. This Constitution has a Bill of Rights, which entrenches basic human rights and guarantees the right to elect and be elected. It also defines who a Zanzibari is, limits the Zanzibar President to two terms in office, repeals the Supreme Council and extends the jurisdiction of the Union Court of Appeal to Zanzibar. It also, stipulates State directives and makes a House of Representatives that consists mostly of elected members. Further, it is the Zanzibar Constitution of 1984 that established the Special Departments (brigades) of the Revolutionary Government of Zanzibar.

It is apparent that most of the new parts of the 1984 Constitution are progressive and congruent with the ongoing democratization process in Zanzibar, but in the quest for a Constitutional government that does not just remain on paper, it must be put into practice. It requires readiness and the political will of all stakeholders, especially those who are at the helm of government. A constitutional document provides a framework within which governance is organized, but a constitutional order presupposes the willingness to implement and apply all provisions of the Constitution and other legal instruments. To that end, effective and appropriate control mechanisms have to be in place to curtail the abuse of power. As a general assessment, Zanzibar still lacks these important ingredients (East Africa Law Society, 2004/5). The Zanzibar Constitution, for example, imposes

democratic requirements on the Government to engage with citizens when making the decisions that affect their lives. Section 9 of Constitution states that the power to govern emanates from the people. Seen broadly, the Constitution provides for a right to participate in the legislative and policy making processes that goes well beyond the right to vote in periodic elections. Not only must citizens be given the opportunity to speak on issues that affect them; there is also the onus on the legislature and the executive to take their views seriously. Yet, this has not been the case and citizens have often been made mere recipients of government policies (East Africa Law Society, 2004/5: 62).

The CCM-CUF political accord spurred the Zanzibar Government to send to the House of Representatives the 8TH Constitutional amendment, which affects many changes to the Constitution. The changes spell out more clearly the division of power between three organs of the government. Section 5A of the Constitution, in intent, directs a virtual separation of powers. The Election Commission has been re-organized to include two members from the opposition camp. Also, the number of special seats for women was increased to 30% of direct elected members.

The 8th amendment provides for positive reforms in the judicial system of Zanzibar in order to secure its independence and integrity. The Judicial Service Commission gained independence and one member is selected by the President from a recommendation of the Zanzibar Law Society, as stipulated in section 102 of the Constitution. Similarly, the 8th Constitutional Amendment entrenches, for the first time in Zanzibar, the Office of Director of Public Prosecution as an independent department aimed at separating prosecution from criminal investigation, which is one of the cardinal principles in the dispensation of justice.

However, the Constitution remains with a number of negative elements. Section 63 makes the President of Zanzibar a part of the Legislature, while the intent of the Constitution is to separate powers. The Constitution of Zanzibar, in section 5A, provides that Zanzibar shall follow the system of distribution of powers between three authorities; executive, legislative and the judiciary. Even though the powers and limitations on each of the three branches of government have been set out, the Presidency's powers are out of proportion to those of the other branches. The House of Representatives has no real control over the executive; it may be dissolved by the President at any time under conditions specified in section 91(2). Under section 66 of the

Constitution, the President has the power to nominate 10 members to the House and under section 64(d) 5 Regional Commissioners are members of the House. This makes a total of 15 directly appointed members by the President, with the Attorney General making them sixteen. The number is too big for a democratic society that firmly believes in the principle of separation of powers and checks and balances.

Another controversial issue in the Constitution can be found in chapter 10, section 121, which established the Special Departments. There are underlying constitutional questions whether in fact the President of Zanzibar has the power to establish these Special Departments. Under article 147 of the Constitution of United Republic of Tanzania of 1977, only the Union Government can establish armed forces of any kind. The Court of Appeal of Tanzania has, albeit in passing, already hinted that there are constitutional dilemmas posed by Special Departments established by the President of Zanzibar under article 121 of the Zanzibar Constitution. At any rate, this issue is viewed differently by the Zanzibar Government and the Union Government. Whereas the Zanzibar Government views it positively, as a form of exercising local autonomy, the Union Government seems to view it as an encroachment into its sovereignty over matters of national defence and security, which are Union matters.

A key ingredient of constitutional government is an independent and impartial judicial system. In Zanzibar the judicial system is established under Chapter Six of the Zanzibar Constitution. Among the weakness of the current system is the political influence that is exerted by the executive in the appointment of judges. According to section 94 of the Constitution of Zanzibar, the President appoints the Chief Justice of Zanzibar and Judges of the High Court of Zanzibar on the advice of the Judicial Services Commission. It should be noted however, that a majority of members of the Commission, established by section 102 of the Constitution of Zanzibar, are direct appointees of the President. Likewise, the Chief Justice who is the Chairman, the Attorney General who is the Deputy Chairman and the Chairman of the Civil Service Commission, are all presidential appointees and members of the Judicial Service Commission. In addition, the President can appoint any other person he "thinks fit" to be a member of the Commission and this is not restricted by qualifications. This is according to the section 102(1) (h) of the Constitution. Thus, clearly reflecting on the political influence in the system, there are no legally stipulated criteria set for the President to adopt when appointing members of the Commission. This is

against the principles of rule of law. Therefore, precedents in the Zanzibar Judiciary are not inspiring. The judiciary has been suffering from serious credibility questions, especially when political issues are involved.

The 26 and 27 January, 2001 events offer a good illustration on how political influence affects the credibility of the judicial system. CUF supporters and other citizens were arrested and seriously beaten up by the police. The 27th January, 2001 was not a working day but because of the large number of suspects who could not be accommodated in the Police cells, the courts at Mwanakwerekwe were ordered to be on duty by the Chief Justice, presumably at the request of the state security organs. Even though all the alleged offences were bailable, all suspects were denied bail even in the face of the over-crowding. One magistrate stated that they had been instructed not to grant bail (East Africa Law Society, 2004/5: 67).

Another setback in the judiciary took place in 2004 when the Government refused to execute a decision of the High Court of Zanzibar. A demolition order was issued in the case of Abdalla Ahmed and Yamu Ahmed vs Khatib Abdalla Makame and 2 others. The order was against the interest of some important persons, including the former head of intelligence in Zanzibar and a former Regional Commissioner. The police did not execute the court order on the pretext that the site was guarded by people armed with machetes.

The Status of Human Rights

Zanzibar has passed through different phases of human rights developments in the post-revolution era. Generally, however, the history of human rights in Zanzibar has been punctuated by gross violations. After the 1964 revolution until the late 1970s, human rights as a concept was not in the government vocabulary and as a practice was not a matter of concern for almost every act and incident of human rights abuse was viewed by the authorities as justified in the spirit of safeguarding the revolution (Ayany, 1970; Bakari, 2001). The first years of the revolution under President Abeid Karume were the worst in the post-independence history of Zanzibar. Under the second President, Aboud Jumbe, gross abuses of human rights continued but the human rights situation remarkably improved particularly in his later years.

The 1984 Constitution included a Bill of Rights which stipulated basic rights and freedoms of citizens. In 2004, the House of Representative passed an Act to Provide for the Extension of Jurisdiction of the Human Rights and Good Governance Commission (HRGGC) to Zanzibar. In May, 2005 the extension

of jurisdiction was approved in Zanzibar following an amendment to the mainland human rights and good governance law. It was agreed that the Zanzibar Minister for Good Governance would be allowed to present any findings of human rights violations to the Zanzibar House of Representatives, rather than to the Union Parliament, and that the Mainland Minister for Good Governance would consult with his Zanzibar counterpart before making any regulations that would affect Zanzibar. Evidently, this was a positive step towards promoting and protecting human rights. However, the promotion and protection of human rights can never be measured by only looking on how good the scripts are in the Constitution and Acts. Rather it requires a real commitment in the application and implementation by stakeholders, particularly the Government and its institutions. In the case of Zanzibar, there have been remarkable improvements in the legal scripts, but the application of these laws leaves a lot to be desired.

Human rights in Zanzibar have suffered a number of setbacks since 1984 when the Bill of Rights was introduced. A number of citizen rights are clearly stipulated from section 10 to 25 of the constitution. In practice, however, almost all the rights given by the right hand are taken away by the left hand through a number of claw back and derogation clauses. Consequently, the end result is that citizens are denied their basic rights. There is no equality before the law, especially where political issues are involved. Freedom of association and expression are not guaranteed as provided by section 18 of the Constitution. Citizens are not treated equally. Public offices arbitrarily discriminate against citizens who are believed to be opposition supporters, most of whom are of Pemba origin (Bakari, 2001: 136-140). Thus, in practice, there is no freedom of association because if a person associates with opposition parties, that is a justification to deny him/her of some of their citizen's rights including, for example, public employment.

Since the introduction of multiparty politics in Zanzibar in 1992, the record of human rights, which noticeably improved between the late 1970s and 1980s, drastically deteriorated. Violation of human rights in Zanzibar may be observed on a daily basis – e.g., the way people are discriminated against on political grounds in various aspects of public life, including public employment and the way state organs deal with political opponents. What is evident, however, is that there is a clear pattern of human rights abuse associated with elections. As elections approach, starting with the registration of voters, during the campaigns, voting and in the aftermath of

the elections, the state of human rights drastically deteriorates. This has been the case with all three multiparty general elections since 1995.

Whereas the pattern of human rights abuse is evident in every general election, the events of January 26/27, 2001 mark the climax. Unarmed demonstrators and other victims who did not even participate in the demonstrations were shot by the government security forces. According to the Presidential Commission of Inquiry, 37 people, including one policeman, were killed, and according to CUF sources, more than 45 people were shot dead. Dozens of people sustained serious injuries and some remain incapacitated. Intimidation and harassment of innocent people continued several days after the demonstrations. Properties were looted by the government security forces and scores of people were reportedly raped and more than 2300 people fled to neighbouring Kenya as political asylum seekers (Amnesty International Report, 2002; CUF, 2003).

The backdrop to these events was that both the Union and Zanzibar governments seemed to have prepared themselves well in advance for the violent crackdown on the opposition. In mid-January, 2001 an estimated 500 Tanzanian government police and army reinforcements with armoured vehicles and artillery were sent to Zanzibar, adding to the forces that had already been deployed there since the elections. In addition to the security and defence forces of the Union government, the Zanzibar government also deployed its own quasi military units (*vikosi*). These units include the Army for the Building of the Economy *Jeshi la Kujenga Uchumi* (JKU), the Coastal Guard – the Anti-smuggling Naval Unit *Kikosi Maalum cha Kuzuia Magendo* (KMKM), as well as the ruling party militia *mgambo*. The massive deployment of the defence and security forces on the islands during the elections and the later addition of reinforcements went abreast with the government's strong statements to intimidate would-be demonstrators. Top government officials issued public statements warning that force would be used: "The government has prepared itself in every way to confront whatever occurs ... any provocation will be met with all due forces of the state", said Tanzanian Prime Minister Frederick Sumaye (*Nipashe*, January 26, 2001). A similar statement was also given by the late Dr. Omar Ali Juma, the Tanzanian vice-president at the time. An assessment of the chronological events leading to the January 26/27 events suggests that violent confrontations were not an accident but rather there was a systematic preparation on the part of both politicians and members of the defence and security forces for a political clampdown.

The pattern of excessive human rights abuse, particularly during election times, repeated itself for the 2005 general elections in Zanzibar. There were several violent events and human rights violations, including an event in Mkoani Pemba where a student was shot dead allegedly by a member of the Zanzibar paramilitary unit in December 2004 during the time of voter registration. By the end of 2005, there were no reports of progress in investigating the killing.

Intimidation and arbitrary beatings and arrest of people on political grounds have been a regular practice in Zanzibar, especially during election periods since 1995. A number of cases are reported where people are humiliated, opposition supporters are also tortured and refused registration while others are attacked in queues with iron bars and machetes (Atunga 2005: 3). The Right to vote is a constitutional right for all citizens. Therefore, denial of registration in the Permanent Voter Register to a significant number of prospective voters on flimsy grounds is not only against the Constitution but also neglects the internationally recognized democratic right to vote for all citizens.

As regards the conduct of the coercive organs of the state, it is worth mentioning the role of the Special Departments of Revolutionary Government of Zanzibar established under section 121 of the Constitution. Their actual conduct violates the same section that restricts them from participating in any political activities, other than voting during a election. The Departments are usually used in a partisan political way, contrary to the aim of their existence, which includes assisting other state organs in eliminating crime and other undesirable activities. As stipulated earlier, these special Departments are established under the Constitution of Zanzibar of 1984 and their activities, which include "search and arrest, possession and use of firearms", clearly violate the rights of Zanzibaris because only the Union Parliament has powers to establish armed forces under Article 147 of the Constitution of the United Republic of Tanzania.

The 2005 election offers a good illustration. During the whole electoral process the Special Departments, in collaboration with other security forces and an unofficial party youth wing nicknamed *Janjaweed* (after the pro-government militia in Darfur, Sudan) that served as a pro-CCM militia, harassed people, burnt and looted homes, beat people and committed many

acts of violence. A number of organizations which observed the 2005 general elections in Zanzibar reported such acts (e.g., TEMCO, 2005; ERIS, 2005).

Of all the acts of violence committed by the coercive organs of the state and paramilitary units of the Zanzibar government during the 2005 general elections, the worst were committed in Piki, Wete (on the nights of 31st October and the 1st of November) and at Konde on the 1st of November. Residents in these areas were severely beaten by the police or by forces under police command. These incidents occurred after a member of a paramilitary unit was abducted and killed at Piki. Many people found their houses looted after they fled and returned from hiding. In Wete, a person was shot dead and he died on the spot. About 16 CUF members from Konde were detained. In Piki, where the situation was more tense, the harassment lasted for several days before the Tanzania Defence Forces (TPDF) took control of the situation.

In the area of freedom of information and expression the Zanzibar government is still too restrictive. The public media work under the close scrutiny and control of the state. It is the government that decides what information should be disseminated to the citizens. State interference in the news media is of such an extent that some government officials exercise significant editorial control before news can be released. Before the 2005 General Election, the media, especially, Television Zanzibar and Radio Zanzibar, were openly promoting the ruling party, even before the electoral Commission officially launched the campaign. The only private paper based in Zanzibar, *Dira*, which was critical of the government of the day, was temporarily banned in 2004 and by the end of the year the ban was still on. Its Managing Director, Ali Nabwa was deprived of his citizenship in 2004, apparently for publishing articles critical of the government. In August the Zanzibar Immigration Department notified Nabwa that since he was "not a Tanzanian citizen", and was *persona non grata* in Zanzibar, he should pay 400 US dollars for a temporary residence permit or 600 US dollars for a permanent residence permit. Nabwa defied the notice arguing that the Union Ministry of Home Affairs has the final say regarding his citizenship status.

All in all, there have been a wide range of undemocratic practices and many acts of human rights violations which defy the doctrine of constitutionalism and rule of law in Zanzibar. In part, due to the fact that Zanzibar is not a sovereign state, these practices have not attracted adequate international concern. Zanzibar remains an island within the United Republic of Tanzania where citizens have been suffering from gross violations of human rights and

the trend of violation accelerates during election times. This state of affairs denies citizens their political right to change their government. The events of 2005 demonstrated for the third time (1995, 2000, 2005) that although the Zanzibar constitution provides citizens with the right to change their government through a peaceful and democratic process, this right is not respected in Zanzibar by both the Zanzibar and the Union governments. The persistence of legal constraints, ineffective and partisan election management bodies (ZEC and NEC), and political violence committed by the state in collaboration with the ruling party do not allow for a peaceful transfer of power in Zanzibar outside of CCM.

Conclusion and Recommendations

Zanzibar society has been grappling with the constitutional question since the colonial days. During colonial times, the ultimate goal of constitutional development was to exercise effective control over the colonial subjects through an indirect rule based on a divide-and-rule policy. In the twilight of the colonial era the purpose of constitutional development was to prepare the country for independence under a constitutional monarch and parliamentary form of government. In the post-revolution period up to 1979, the main objective was to consolidate one party authoritarian rule and the politics of exclusion. From 1979 onward, before the introduction of multiparty politics, the objective was to allow partial political liberalization of the polity by making it more inclusive as well as improving the observance of human rights. Following the introduction of multiparty politics the goal has been to allow a partial political liberalization but under a restrictive constitutional and legal framework so as to ensure the survival of the ruling party under multiparty politics. That said, the achievements, on the whole, have not been impressive in terms of nation building and political reconciliation on the islands. The basic constitutional issues have not yet been resolved. Some positive developments have certainly been recorded, particularly since 1979, but progress has been slow. In a situation where more than 50 per cent of the citizens are contesting the legitimacy of the regime in power, and where a peaceful transfer of power through a free and fair election is not possible, there is a constitutional crisis.

Although there have been some changes here and there in response to various pressures from within and outside the country, the changes that have so far been effected are not fundamentally aimed at establishing a new constitutional order which enjoys the support of citizens. These changes could be viewed as a survival strategy of the ruling oligarchy in Zanzibar,

which claims to derive its legitimacy from the 1964 revolution in the wake of rising international concern for democratization, respect of human rights and good governance.

The ruling oligarchy in Zanzibar is backed by the unwavering support and protection of the Union Government and is resistant to genuine changes aimed at establishing a new constitutional order that guarantees government accountability, rule of law and respect of human rights as well as democratic principles, including election processes. Thus, even the seemingly positive constitutional and legal instruments that have been enacted rarely provide positive results due to lack of political will to implement them.

In order to establish a consensual, just and sustainable constitutional order the following recommendations are useful.

First and foremost, what is required is political will from all stakeholders, especially the government in power. The issues of constitutionalism and governance have to be viewed not simply as power struggles between competing political forces, but rather they must be recognized as issues of national interest with a bearing on political stability, government accountability and economic development. With this understanding, constitutionalism could be pursued abreast with institutional crafting aimed at eliminating resistance to democratic change on the part of political actors, both those in authority and those outside the government.

Secondly, the existing constitution of 1984 was adopted at a time when Zanzibar and the whole of Tanzania were under a one party system. As a result, only a few of the recommendations of the Nyalali Commission, the minimal necessary, were made to both the Union and Zanzibar Constitutions in 1992 to allow Tanzania to be a multiparty state. What was required then, and is still required now, is to adopt a genuine multiparty constitution for both the Union and Zanzibar. In that case, the adoption of a new constitution should follow proper international standards and procedures of constitutional design and adoption in order to avoid previous mistakes. As a societal consensus, a constitution is adopted by a Constituent Assembly after having seriously taken into account inputs from various stakeholders. Apart from rules and procedures, core values of the society should be entrenched in the new constitution. Given the centrality of these values, it must be provided in the constitution that only through a referendum, can the values can be changed. These core values may include; terms for the Office of

President, defining who is a Zanzibari, a Bill of Rights, security of tenure of High Court Judges and the demarcation of powers between three organs of government.

Thirdly, the constitution should not allow the President to be part of a legislature. This is unhealthy for democratic development. It undermines the concept of separation of powers and it confirms the assertion of academics that in Africa there has developed an imperial presidency. Relatedly, the constitution should curtail the powers of the President to appoint 10 members of the House of Representatives and no longer allow Regional Commissioners to be members of the House of Representatives in order to make the House a more independent institution able to work more effectively in upholding accountability of the Government. The original intention of having the President appoint members of legislature was to allow the President to appoint people with no interest in partisan politics, professionals, retired civil servants, priests and Imams and other respected members in society so that they could help the House. The idea had never been to increase the majority of a ruling party in the House. In recent years the practice diverged from the original intention. The President appoints people from his party who lost in the elections and other partisans to increase the majority of his party in the House.

By way of conclusion, I would like to underscore that Zanzibar has been a politically polarized society for a long time. Any constitutional designing has to take into account the fact that the political history of Zanzibar has been characterized by political hatred between the two main political groups and that these groups are almost equal in numerical terms. Any attempt to exclude one group from the political process is likely to have a detrimental outcome for the society as a whole. After many years of abuse of power and lack of trust among the people, confidence building measures and *power-sharing* between the two main political camps do not seem to have a contending alternative during this period of democratic transition in Zanzibar. In this regard, constitutionalism and rule of law need to be facilitated by the creation of a Truth and Reconciliation Commission that could help heal the wounds inflicted upon the people and establish trust among the people for the wellbeing of their community.

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