

# THE STATE OF CONSTITUTIONAL DEVELOPMENT IN TANZANIA

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## 1.0 INTRODUCTION

This Report concerns the constitutional developments that occurred in Tanzania during the year 2001. It is a contribution to the efforts of the *Kituo cha Katiba* to document the progress of constitutional development in East Africa in order to audit the progress made and the constraints faced in the region. In this discourse I shall concentrate on two major constitutional developments that took place in Tanzania over the year under review. The first was the establishment of the Commission for Human Rights and Good Governance, following the 13<sup>th</sup> Constitutional Amendment to the 1977 Constitution of the United Republic of Tanzania (Union Constitution), while the second was the political settlement in Zanzibar which gave rise to the 8<sup>th</sup> Constitutional Amendment to the Constitution of Zanzibar of 1984 (Zanzibar Constitution).

## 2.0 CONSTITUTIONAL DEVELOPMENT IN TANZANIA: THE HISTORICAL BACKDROP

The amendments to the Union Constitution and the Zanzibar Constitution both have had some implications on power politics within the sovereign united state of Tanzania and a bearing on the evolution of the two constitutions – the “power maps”<sup>1</sup> of the two entities of the union, that is, Tanzania Mainland and Tanzania Zanzibar respectively. The constitution is taken in the discussion as an instrument for legitimising state policy and sovereign existence as well as to govern the exercise of power, apart from being a legal document as well as a social contract between the governed and the governing and an embodiment of certain values according to which a democratic

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<sup>1</sup> Okoth-Ogendo, H.W.O., (1991) “Constitutions Without Constitutionalism: Reflections on an African Political Paradox” in Shivji, I.G., (ed.) *State and Constitutionalism: An African Debate on Democracy, Human Rights and Constitutionalism Series*, No.1 Southern African Political Economy Series (SAPES) Trust, Harare, Zimbabwe

society is to be governed.<sup>2</sup> However, let us first put into perspective the evolution of the “union constitution.”

## **2.1 The Birth of a Union: Two Governments, Two Constitutions and One Sovereign State**

The fact that Tanzania is a sovereign United Republic,<sup>3</sup> being a “union” of two former independent countries, that is, the People’s Republic of Zanzibar and the Republic of Tanganyika,<sup>4</sup> has had a bearing on how power is exercised between the two constituent units of the Union, that is, Tanzania Mainland and Tanzania Zanzibar.<sup>5</sup> When Tanganyika and Zanzibar gained their independence in December 9<sup>th</sup>, 1961 and December 10<sup>th</sup>, 1963 respectively each had its own constitution – the 1961 Independence Constitution of Tanganyika<sup>6</sup> and the 1963 Constitution of the State of Zanzibar.<sup>7</sup> Zanzibar remained a “sovereign state” under the Sultanate until January 1964 when its government was overthrown and became the People’s Republic of Zanzibar. Three months later, the Presidents of the two countries, the Late Aman Abeid Karume and the Late Julius Kambarage Nyerere signed the Articles of the Union<sup>8</sup> to form the Union of the Republic of Tanganyika and the Republic of the

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<sup>2</sup> Tumwine-Mukubwa, G.P., “Ruled from the Grave: Challenging Antiquated Constitutional Doctrines and Values in Commonwealth Africa” in Oloka-Onyango, J. (ed) *Constitutionalism in Africa: Creating Opportunities, Facing challenges*, Fountain Publishers, Kampala, 2001 at p.288

<sup>3</sup> Article 1 of the 1977 Constitution of the United Republic of Tanzania (the Union Constitution) provides that “Tanzania is one State and is a sovereign United Republic.”

<sup>4</sup> The Union of Tangayika and Zanzibar Act No.22 of 1964, Supplement No.1 to the Tangayika Gazette, Vol.XLV, No.29 dated the 26<sup>th</sup> April, 1964 ratifying the Articles of Union of 22<sup>nd</sup> April, 1964..

<sup>5</sup> Article 2(1) of the Union Constitution proclaims the territory of the United Republic as consisting “of the whole of the area of Mainland Tanzania and the whole of the area of Tanzania Zanzibar, and includes the territorial waters.”

<sup>6</sup> The *Tanganyika (Constitution) Order-in-Council*, S.I. 1961 No.2274 published on 1/12/61, Supplement to the Tanganyika Gazette, Vol.XLII, No.59 dated 1<sup>st</sup> December, 1961, the “Independence Constitution.” The “Independence Constitution” was promulgated by the Parliament of the Government of Her Majesty Queen Elizabeth II at the Court of Saint James in England, on the Twenty-seventh day of November, 1961 and was handed down to the newly independent government of Tanganyika as an “instrument of independence.”

<sup>7</sup> The Constitution of the State of Zanzibar of 5<sup>th</sup> December 1963, which was enacted by the Constituent Assembly of the State of Zanzibar. Article 32(1) of the Constitution stated that “The Sultan shall be the Head of State and he shall bear the tile of “His Majesty the Sultan.”

<sup>8</sup> The Articles of the Union were signed by Julius K. Nyerere, the President of the Republic of Tanganyika and Abeid Karume, the President of the People’s Republic of Zanzibar on the 22<sup>nd</sup> of April

People's Republic of Zanzibar and gave birth to the United Republic of Tanganyika and Zanzibar in 1964,<sup>9</sup> which later on was re-named the United Republic of Tanzania.<sup>10</sup> According to Professor Shivji, the Articles of the Union are considered to be the principal instrument and they form the legal basis for the "union."<sup>11</sup> The formation of the "union" was therefore an important landmark in the constitutional development of Tanzania.

## 2.2 The Form of the Union: A Continuing Debate

The validity of the Articles of the Union has been the basis of political debate and academic discourse ever since the union was born, and a lot of ink has been poured on the subject.<sup>12</sup> The debate however, has largely been dominated by two opposing views - the "unitarists" on the one hand and the federalists on the other. The unitarists argue that the "two governments" (the Union and the Zanzibar) system was merely a temporary expedient to allay the fears of Zanzibar being "swallowed" by Tanganyika.<sup>13</sup> The actual intention was the eventual creation of a unitary state fusing all the three jurisdictions, the Government of the United Republic, the Government of Tanzania Mainland (formerly Tanganyika) and the Government of Zanzibar, by gradually shifting Zanzibar's powers over "non-union matters" to the Union

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1964. The Articles of the Union are set out in the Schedule to the Union of Tanganyika and Zanzibar Act No.22 of 1964, Cap.557

<sup>9</sup> Article 4 of the Union of Tanganyika and Zanzibar Act No.22 of 1964, Cap.557

<sup>10</sup> The United Republic (Declaration of Name) Act, 1964

<sup>11</sup> Shivji, I.G. (1990) *The Legal Foundations of the Union in Tanzania's Union and Zanzibar Constitution*, Professorial Inaugural Lecture, DUP, Dar es Salaam, 1990

<sup>12</sup> See for example, Bailey, M., *The Union of Tanganyika and Zanzibar: A Study in Political Integration* (Eastern African Studies IX), New York: Syracuse University, 1973; Jumbe, A., *The Partner-ship: Tanganyika Zanzibar Union – 30 Turbulent Years*, Dar es Salaam: Amana Publishers, 1994; Kabudi, P.J.A.M., (1986) *International Law Examination of the Union of Tanganyika and Zanzibar: A Federal or Unitary State?* LL.M. Dissertation, 1986, University of Dar es Salaam Library, East African Section (mimeo); Shivji, I.G., *Tanzania: The Legal Foundations of the Union*, Dar es Salaam: Dar es Salaam University Press, 1990; Sirivastava, B.P., *The Constitution of the United Republic of Tanzania 1977 – Some Salient Features – Some Riddles*, Dar es Salaam: Dar es Salaam University Press, 1983 and in Volumes 11-14 *Eastern African Law Review*, 1978-1981, p.73.

<sup>13</sup> Jumbe, A. (1994) *The Partner-ship: Tanganyika Zanzibar Union – 30 Turbulent Years*, Dar es Salaam, Amana Publishers

government.<sup>14</sup> Under the Articles of the Union, Zanzibar became a semi-autonomous polity with its own internal government in charge of “non-union matters.”<sup>15</sup>

Opposed to the unitarists’ view are the federalists who argue that the system of government envisaged by the Articles of the Union is one in which there was a clear-cut dichotomy of powers between the centre and the units.”<sup>16</sup> According to the federalists, the Articles of the Union gave birth to a sovereign Federal Republic of a triangular system in nature, consisting of three governments, namely the Government of the United Republic, Government of Tanzania Mainland and Government of Zanzibar.

The federalists’ argument resurfaced in the Report of the “Nyalali Commission” (1992) – on the single party or multiparty system in Tanzania<sup>17</sup> and in the Report of the “Kisanga Committee” (1999)<sup>18</sup> – on the Government White Paper No.1 of 1998.<sup>19</sup> The Recommendations of the “Nyalali Commission” ushered in the 8<sup>th</sup> Constitutional Amendment,<sup>20</sup> which abolished the single party political system and restored

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<sup>14</sup> Abubakry, K.B, “The Union and Zanzibar Constitutions” an unpublished paper presented at the 10<sup>th</sup> Anniversary Conference of the Zanzibar Legal Services Centre at the Zanzibar Beach Resort, Zanzibar on the 9<sup>th</sup> May 2002

<sup>15</sup> The Articles of the Union, which were entered into between the President of the Republic of Tanganyika and the President of the People’s Republic of Zanzibar on the 22<sup>nd</sup> April, 1964 were attached as a Schedule to the Union of Tanganyika and Zanzibar Act No.22 of 1964. Article (iv) of the Articles contained only eleven matters, which were reserved to the Parliament and Executive of the United Republic. The list of “union matters”, which now appears in the First Schedule to the 1977 Constitution of the United Republic of Tanzania has doubled from the original eleven to twenty-two.

<sup>16</sup> See Jumbe, A. and Sirivastava, B.P. (1983) *The Constitution of the United Republic of Tanzania 1977: Some Salient Features – Some Riddles*, Professorial Inaugural Lecture, DUP, Dar es Salaam

<sup>17</sup> The Presidential Commission on Single Party or Multiparty System in Tanzania, 1991, Report and Recommendations of the Commission on the Democratic System in Tanzania, Vol. One 1992 (English Version)

<sup>18</sup> *Jamhuri ya Muungano wa Tanzania, Kamati ya Kuratibu Maoni Kuhusu Katiba, Ripoti ya Kamati, Kitabu cha Kwanza, Mpiga Chapa wa Serekali*, Dar es Salaam, 1999 (the Report is not yet available in English)

<sup>19</sup> The United Republic of Tanzania, *Government White Paper No.1 of 1998*, Government Printer, Dar es Salaam, 1998

<sup>20</sup> *Sheria ya Marekebisho ya Nane Katika Katiba ya Nchi*, 1992 Act No.4 of 1992 (Eighth Constitutional Amendment). See Mwakyembe, H.G., *Tanzania’s Eighth Constitutional Amendment and Its Implication on Constitutionalism, Democracy and the Union Questions*, Munster and Hamburg: LIT Verlag, 1995 for an in-depth discussion of the Eighth Constitutional Amendment.

multipartism in the country. The recommendations of the “Kisanga Committee” ushered in the 13<sup>th</sup> Constitutional Amendment to the 1977 Union Constitution.<sup>21</sup> Perhaps the most significant thing about the 13<sup>th</sup> Constitutional Amendment is the abolition of the first Ombudsman on the continent, the Permanent Commission of Enquiry (PCE) of Tanzania<sup>22</sup> and the incorporation into the Constitution of a new national human rights institution - the Commission for Human Rights and Good Governance (CHRAGG).<sup>23</sup> The Commission’s founding legislation applies to the Mainland and in Zanzibar.<sup>24</sup>

The most controversial issue in the debate on the status of the Union has always been whether Zanzibar remained a sovereign state, and therefore exists as an integral part of the United Republic of Tanzania, in accordance with the terms and conditions stipulated in the Articles of the Union, and by the same stretch of argument, “Tanganyika” also exists as an integral part of the United Republic although fused in the Union Constitution.<sup>25</sup> The issue whether Zanzibar is a state was recently raised in the first Zanzibar “treason” trial,<sup>26</sup> and the Court of Appeal of Tanzania resolved the issue negatively.

Polemics aside, both the Union government and the Zanzibar government have been discharging their respective functions as stipulated under their respective Constitutions - the 1977 Union Constitution and the 1984 Constitution of Zanzibar.

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<sup>21</sup> *Sheria ya Marekebisho ya Kumi na Tatu Katika Katiba ya Nchi*, 2000, (the Thirteenth Constitutional Amendments).

<sup>22</sup> The Permanent Commission of Enquiry (PCE) had been incorporated in the 1965 Interim Constitution. The Interim Constitution, which declared Tanzania a single party state was replaced in by the 1977 Constitution of the United Republic of Tanzania, following the merger of the Tanganyika African National Union (T.A.N.U) – the then ruling party for the Mainland and the Afro Shiraz Party (Zanzibar) to form *Chama Cha Mapinduzi* (C.C.M).

<sup>23</sup> The Commission for Human Rights and Good Governance of Tanzania is incorporated in Article 129 of the Union Constitution and established by Act No 7 of 2001 as amended by Act No.16 of 2001. It is a national human rights institution, which combines the functions of an ombudsman.

<sup>24</sup> Section 3 of the Commission for Human Rights and Good Governance Act, 2001, Act No.7 of 2001

<sup>25</sup> Abubakry K. op. cit

<sup>26</sup> *S.M.Z. vs Machamo Khamis and 17 others*, Criminal Session case No.7/99 High Court of Zanzibar (unreported). One of the issues before the Court was whether the offence of treason could legally be committed against the Revolutionary Government of Zanzibar.

Tanzania has continued to resolve the challenge of further democratising its political system through strengthening its “power map” by resorting to amendments in the Constitution, the latest being the 8<sup>th</sup> Constitutional Amendment of 2002 (to the Constitution of Zanzibar of 1984) and the 13<sup>th</sup> Constitutional Amendment of 2000, to the 1977 Union Constitution. Taking stock of the political gains since independence and counting on the rapid changes that have taken place since 1992 when the country restored multiparty democracy, it seems that those in power have been trying to attend to the pressing needs for political settlement particularly in Zanzibar, which is the other part of the union and where politics have always been volatile.

### **3.0 THE POLITICAL SETTLEMENT IN ZANZIBAR: SOME CONSTITUTIONAL ASPECTS**

It is important to discuss the recent political developments in Zanzibar as they relate to the democratisation process and political settlements initiatives and their impact on constitutional development in Zanzibar in particular and in Tanzania in general. Most notable in this regard is the “political settlement” in Zanzibar, which finally gave rise to the 8<sup>th</sup> Constitutional Amendment of 2002 to the 1984 Constitution of Zanzibar. According to Bakari, political settlement means a “programme of reconciliation to eradicate or minimize suspicion and hostility.”<sup>27</sup>

Zanzibar is currently faced with the twin immediate challenges, namely the urge to democratise the political system and the pressing need for political settlement. The need for political settlement arose in the aftermath of the 1995 first general multiparty elections wherein politics were characterised by intense suspicion and hostility between the two main political parties, the ruling *Chama Cha Mapinduzi* (CCM) and the opposition Civic United Front (CUF).<sup>28</sup>

#### **3.1 Politics of Hatred and the Political Settlement**

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<sup>27</sup> Bakari, M.A. (2002) “Democratisation and Political Settlement in Zanzibar” an unpublished paper presented at the 10<sup>th</sup> Anniversary Conference of the Zanzibar Legal Services Centre at the Zanzibar Beach Resort, Zanzibar, on the 9<sup>th</sup> May 2002

<sup>28</sup> Ibid.

Hostility between CCM and CUF has marked the political situation in Zanzibar since 1995, immediately after the first general multiparty elections. CUF claimed that the results of the presidential election were manipulated by the partisan electoral commission in favour of the ruling party, and gave a marginal victory to the CCM presidential candidate, that is, 50.2% against 48% for the CUF presidential candidate.<sup>29</sup>

There was a strong feeling among the independent observers of the election that the 1995 general election in Zanzibar was seriously flawed. The rules of the game were partisan, and the final results were manipulated in favour of the ruling party.<sup>30</sup> CUF secured 24 constituency seats against 26 for the ruling CCM. CUF contested the results and refused to recognize the incumbent president who had been “re-elected” and boycotted taking part in the House of Representatives. This action had constitutional implications. In the post-1995 election, the House of Representatives was constituted of 75 members instead of 76, as provided by the Constitution of Zanzibar, as the one seat reserved for women remained unfilled. Overall, CCM had 47 members (3 members less to reach a two-thirds majority) and CUF had only 28 members.<sup>31</sup> Technically neither of the parties could amend the Constitution without support from the other party.<sup>32</sup>

In the aftermath of the October 1995 election in Zanzibar, the situation was extremely volatile.<sup>33</sup> The situation remained very tense and was characterised by sporadic acts of violence and allegations and counter allegations. In November 1997, 17 CUF activists (including 4 Members of the House of Representatives) were arrested and charged with “treason.”<sup>34</sup> They were accused of plotting to overthrow the Zanzibar

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<sup>29</sup> Bakari, loc. cit

<sup>30</sup> Zanzibar Electoral Monitoring Group, 1995 and Bakari, loc.cit

<sup>31</sup> Bakari, loc. cit

<sup>32</sup> Article of the 1984 Constitution provides that “A Bill for an Act to alter any provisions of this Constitution shall be supported by the votes of not less than two-thirds of all Members of the House of Representatives.

<sup>33</sup> Bakari, loc. Cit

<sup>34</sup> *S.M.Z. Machamo Khamis and 17 Others*, Criminal Session, Case No.7/99, High Court of Zanzibar (unreported)

government as well as the Union government. The plot was alleged to be carried out by retired soldiers. The case dragged on for a long time until November 2000 when the accused persons were released after the newly elected president, Amani Karume had been sworn in.

### **3.2 The Commonwealth Brokered Peace Accord (*Muafaka I*)<sup>35</sup>**

The first initiative to mediate the Zanzibar conflict, that is, between CCM and CUF, was undertaken by the Secretary General of the Commonwealth, Chief Emeka Anyaoku who assigned this task to Dr. Moses Anafu. The Commonwealth mediation initiatives started in February 1998 and CUF endorsed the initial proposals on July 19, 1998. However, the ruling party delayed to accept the deal, which frustrated the mediator, Dr. Anafu, who decided to return to London, promising to come back only when satisfied that enough progress had been made to move forward in the reconciliation process. The Commonwealth brokered Peace Accord (*Muafaka I*) would have been signed on August 15, 1998, but due to the delay by the ruling party it was signed on June 9, 1999, at a time when preparations for the October 2000 general elections were already underway.

The Memorandum of the Commonwealth brokered Peace Accord (*Muafaka I*) were divided into three parts. The first was a preamble, which acknowledged the existence of the political impasse and its implications on the socio-economic development of Zanzibar. The two parties expressed their commitment to put the past behind them, and cooperate in the spirit of reconciliation, democratisation, promotion of human rights and good governance. The two parties to the dispute agreed on a programme of action, which involved the reform of the Zanzibar Electoral Commission (ZEC), compilation of a credible register of voters, a sustained programme of voter and civic education, a review of the Constitution of Zanzibar, and the review of electoral laws.<sup>36</sup> Under the terms of the Accord, the President of Zanzibar was also required to appoint an independent assessor to establish the validity of the claims of those who alleged

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<sup>35</sup> “*Muafaka baina ya Chama xcha Mapinduzi (CCM) na Chama cha Wananchi (CUF) wa tarehe Juni 9, 1999.* (Literally “Peace Accord between CCM and CUF) of June 9<sup>th</sup>, 1999. “*Muafaka*” is a Kiswahili word for accord.

<sup>36</sup> Bakari, loc.cit



that their properties were destroyed or damaged on political grounds after the 1995 elections with the aim of suggesting measures of compensation. In order to restore normal political life, CUF members of the House of Representatives were required to resume attending House sessions, and the President was to appoint two CUF members to the House of Representatives.<sup>37</sup> In addition, an Inter-party Committee (IPC) composed of CUF and CCM members of the House of Representatives was established.<sup>38</sup>

Unfortunately, the Revolutionary Government of Zanzibar and the ruling CCM did not implement the Commonwealth brokered Peace Accord. In the opinion of Mughwai, the Commonwealth Brokered Accord “ended in the dustbin” due largely to “lack of political will between the warring parties to implement it.”<sup>39</sup> The Accord also had some inherent deficiencies, one of which was the lack of an authoritative enforcement mechanism. The Inter-Party Committee (IPC) that was proposed in the Accord and given the responsibility for implementing it was merely an advisory body without constitutional or legal backing. Likewise, the Accord was merely a moral guarantor of the “gentleman’s agreement” between the two parties. Its implementation relied on the goodwill of the only authoritative bodies, that is, the Zanzibar and Union Governments, which were both the governments of the ruling party. Such goodwill was not forthcoming.

Hence the Commonwealth brokered Peace Accord (*Muafaka I*) remained unimplemented and Zanzibar entered into the second multiparty general election in 2000 without a broad consensus on the rules of the game.<sup>40</sup> According to the Tanzania Electoral Monitoring Committee (TEMCO) Report, the 2000 general multiparty election was much more flawed than that of 1995.<sup>41</sup> It was considered an “aborted

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<sup>37</sup> Bakari, M, loc. cit.

<sup>38</sup> Ibid.

<sup>39</sup> Mughwai, A. “Forty Years of Struggle for Human Rights in Tanzania: How Far Have We Travelled” in Mchome, S.E. (ed.) *Taking Stock of Human Rights in Africa*, Faculty of Law, University of Dar es Salaam, 2002 at p.56

<sup>40</sup> Ibid.

<sup>41</sup> Tanzania Electoral Monitoring Report, Dar es Salaam University Press, 2000

election” as it did not reach its final stage.<sup>42</sup> CUF refused to recognize the October 2000 general election results and demanded fresh elections throughout the Isles. Both Governments refused to heed and instead insisted that fresh elections will be held only in sixteen constituencies where election irregularities were massive.

### 3.3 The “Black” Friday Episode

Still aggrieved by the Government refusal to hold fresh elections as demanded, CUF announced that it was going to hold peaceful demonstrations throughout the country on 27<sup>th</sup> January 2001 to express their displeasure against the conduct of the general elections, which had been held in October the previous year. The two Governments banned the proposed demonstrations.<sup>43</sup> Some of the country’s top leaders including the Vice President, the Minister for Home Affairs and the Dar es Salaam Regional Police Commander warned the public that anyone defying their orders to stay away from the demonstration would be dealt with severely.<sup>44</sup> CUF refused to give in citing the Constitutional right to assemble and freely express one’s opinion.<sup>45</sup>

On Friday January 26<sup>th</sup> 2001 two people including an Imam of a mosque in Dar es Salaam were shot dead by the police a few steps from the mosque from which they had performed the Friday prayer. This act, which was clearly an excessive use of force by state organs was carried out to ensure that the-would be demonstrators are scared from attending the earlier call by CUF for a countrywide demonstration.<sup>46</sup>

Two days before the January 27<sup>th</sup> 2001 demonstration, some CUF followers, including their national Chairman, Prof. Ibrahim Lipumba, while proceeding to a public meeting in Dar es Salaam were severely beaten up by the police, several of

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<sup>42</sup> Bakari, M., loc. cit.

<sup>43</sup> Bakari, M, loc. cit

<sup>44</sup> Ibid.

<sup>45</sup> Both Article 20 of the Union and Zanzibar Constitutions provides for the freedom of every person to freely and peaceably assemble, associate and cooperate with others, express views publicly, and more specially to form or join associations or organisations for purposes of preserving or furthering his or her beliefs or interests or any other interests.

<sup>46</sup> Bakari, M, loc. cit.

them got injured including Prof. Lipumba himself whose arm was fractured in the ensuing fracas between the police and the marchers. Lipumba and some of his followers were arrested, detained and denied bail. Despite the naked use of force by the state authorities against the peaceful demonstrators, CUF followers were not scared and they took to the streets of Dar es Salaam, Zanzibar Town and Pemba (the strongholds of CUF) on Saturday January 27<sup>th</sup> 2001 to demonstrate as planned. In other parts of the country, demonstrations were called off.

In Dar es Salaam, a small group of CUF demonstrators were able to proceed to their destination and issued their statement in a very tricky style before they were violently dispersed by the police. In Zanzibar Town and Pemba, demonstrators could not reach their destinations as they were violently blocked by the police on their way. Several of them were left dead (23 people, including one policeman – according to government sources and over 60 according to CUF sources), several hundreds were injured and over 2000 refugees, mainly from Pemba fled to Kenya and were located at Shimoni, Mombasa.<sup>47</sup>

Immediately after the bloody episode of January 27<sup>th</sup> 2001, police brutality continued for nearly two weeks in Pemba where there were beatings, the mass arrest of suspected “instigators” and various forms of harassment. Coincidentally, the Union President promoted some police officers, including some of those who had carried out the January operation.

Clearly the January 27<sup>th</sup> demonstrations constituted a watershed moment for post-independence politics in both Tanzania and Zanzibar. The episode was unprecedented in Tanzania’s political history. A country once hailed as the epitome of peace on the continent and as a haven for refugees found itself in a deep political crisis and producing its own share of refugees. The show of state power and the use of excessive force by state organs, tainted the image of a seemingly peaceful country and was clearly a blow to the democratisation process that had started gaining momentum since 1992, when the country reverted to multiparty democracy. The sheer use of state violence against peaceful demonstrators clearly was an abrogation of the basic norms

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<sup>47</sup> Bakari, M, loc. cit

of constitutionalism. Surely, the use of naked state power against peaceful demonstrators was not controlled and thus it became destructive of the very values it was intended to promote. Neither can it be stated that the people consented to be governed by violent institutions, rules, values and customs that they had voluntarily put them in place.

In the aftermath of the bloody events of January 27<sup>th</sup>, donor pressure continued to mount on Tanzania to seek a peaceful solution to the long-standing Zanzibar crisis.<sup>48</sup> Donor pressure was supplemented by the covert pressure exerted by some sections of concerned individuals and eminent persons within the political establishment. There were fears among a significant fraction of the members of the political establishment, who were of the opinion that if the Zanzibar crisis would be left to drag on for a long time without being resolved, it could escalate and possibly lead to national disintegration and even the break-up of the union. The Union government finally took a more active position in finding a solution to the Zanzibar crisis by admitting that there was a serious crisis in Zanzibar and that it was prepared to engage in a constructive dialogue with CUF with the aim of easing the political tension and resolving the crisis.<sup>49</sup>

### **3.4 The Second Peace Accord (*Muafaka II*)**

In an attempt to end hostile politics between the two main parties in Zanzibar Islands, a second reconciliation accord between CCM and CUF (*Muafaka II*) was ultimately signed on October 10<sup>th</sup>, 2001.<sup>50</sup> The terms of *Muafaka II* were more or less similar to those of *Muafaka I* of June 1999.<sup>51</sup> However, although both accords were negotiated and signed against the background of seriously contested elections, their context was remarkably different. The second accord was signed after the January 26/27, 2001

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<sup>48</sup> Bakari, M. loc. cit

<sup>49</sup> Ibid.

<sup>50</sup> *Muafaka wa Kisiasa baina ya Chama cha Mapinduzi (CCM) na Chama cha Wananchi (CUF) wa Kumaliza Mgogoro wa Kisiasa Zanzibar*, 10 Oktoba 2001 (literally "Political Accord between CCM and CUF to end the Political Crisis in Zanzibar")

<sup>51</sup> Article 1 of the Second Accord affirmed the terms of the First Accord between CCM and CUF that had been signed on June 9<sup>th</sup> 1999

bloody episode in Zanzibar, which had changed the perceptions of the two contending parties, although their interests and motives basically remained the same.

This time around both the Union and Zanzibar governments are ostensibly committed to implement the terms of the agreement.<sup>52</sup> However, there was an attempt by the Zanzibar Government through the House of Representatives to change some of the agreed provisions of the accord thus raising some suspicion and protest by the opposition. Timely intervention by the Union President through a presidential decree rescued the situation. Some of the measures that have so far been taken to implement the agreement include, among others, the release of all detainees accused of cases related to the January 27 demonstration, the formation of a Presidential Commission of Enquiry to investigate the January 27/26 killings,<sup>53</sup> the appointment of the Inter-Party Commission that will help in the implementation of the accord, and the passing of the 8<sup>th</sup> Constitutional Amendment of 2002 to the Zanzibar Constitution by the House of Representatives as agreed in the accord.<sup>54</sup>

#### **4.0 The Commission for Human Rights and Good Governance**

Tanzania has now joined a number of other countries on the continent, which have established national human rights institutions. The establishment in the year 2000 of the Commission for Human Rights and Good Governance in Tanzania has brought to twenty-five the number of countries in Africa with similar institutions.<sup>55</sup>

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<sup>52</sup> The Second Accord has five annexes detailing the various activities and steps, which are to be undertaken by the parties to the Agreement in order to ensure its effective implementation. Annex One contains an implementation plan for the First Accord of June 9<sup>th</sup>, 1999. The Second Annex is a Draft Bill for the 8<sup>th</sup> Constitutional Amendment to the Constitution of Zanzibar of 1984. The Third Annex is an agreement for the establishment of a Joint Presidential Supervisory Commission (JPSC). The Fourth Annex is a Draft Bill for an Act to establish the Commission and the Fifth Annex contains details of activities and time frame for the implementation of the Agreement.

<sup>53</sup> The Commission, headed by Major General Hashimu Mbita, who once served as Chairman to the OAU Liberation Committee, has yet to conclude its work.

<sup>54</sup> The 8<sup>th</sup> Constitutional Amendment to the Constitution of Zanzibar of 1984 (*Sheria ya Mabadiliko ya Nane Katika Katiba ya Zanzibar ya 1984*) was tabled in March 2002 in the House of Representative as a strategy for implementing the Second Peace Accord between CCM and CUF. The 8<sup>th</sup> Constitutional Amendment contains about 39 Articles.

<sup>55</sup> Other African countries with national human rights institutions include Algeria, Benin, Cameroon, Central African Republic, Chad, Ethiopia, Ghana, Liberia, Malawi, Mali, Mauritania, Morocco, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, South Africa, Sudan, Togo, Tunisia, Uganda and Zambia. The Government of Kenya has already passed a law to establish a National Human Rights Commission.

Perhaps what is striking about the Commission for Human Rights and Good Governance of Tanzania is the way in which it was established. Earlier in 1996, the Government had appointed a Legal Task Force under the auspices of the Financial and Institutional Legal Management Upgrading Programme (FILMUP). The Task Force was headed by Mr. Mark Bomani, (the first Attorney General of Tanzania) and prepared a Report (the “Bomani Report”)<sup>56</sup> wherein it was recommended among other things that there should be established a Commission for Human Rights and Administrative Justice.<sup>57</sup> In 1998, the Government issued a White Paper, which also recommended the establishment of such institution in the country.<sup>58</sup>

Following the Bomani Report, the Government appointed a Committee, under the Chairmanship of Justice Kisanga (the so-called “Kisanga Commission”), to collect peoples’ views on this and other issues contained in the White Paper. The “Kisanga Commission” submitted its Report to Government in 1999 and made known to the public that the majority of the people interviewed were in favour of the establishment of a national human rights institution. On the basis of the people’s views on the White Paper, in 2000 the Government tabled in Parliament the 13<sup>th</sup> Constitutional Amendment to the 1977 Constitution of the United Republic of Tanzania, which among other things established the Commission for Human Rights and Good Governance as an independent Government department with a mandate to promote and preserve human rights and duties of the society in the country. The Commission also performs an ombudsman’s function<sup>59</sup> as it is empowered to investigate

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Previously the function of the promotion and protection of human rights was being handled by a Standing Committee on Human Rights.

<sup>56</sup> The United Republic of Tanzania, Financial and Legal Management Upgrading Project (FILMUP), *Legal Sector Report*, which was submitted to the Minister for Justice and Constitutional Affairs on the 25<sup>th</sup> of January, 1996

<sup>57</sup> *Ibid.* at page 120

<sup>58</sup> White Paper No.1 paragraph 48 at page 51

<sup>59</sup> The ombudsman is a Western concept whose roots can be traced back to the Justitieombudsman (Ombudsman of Justice) of Sweden, which was established in 1809. Its main function is to deal with complaints from the public regarding decisions, actions or omissions of public administration. Its main role is to protect the people against violation of rights, abuse of powers, error, negligence, unfair decisions and mal-administration in order to improve public administration and make the government’s actions more open and the government and its servants more accountable to members of the public. For more elaboration on the concept see Peter Vedel Kessing “Implementation of the Western Ombudsman

allegations and complaints of mal-administration and abuse of power of both public and private institutions. The powers, mandate and functions of the Commission are elaborated upon in its founding legislation, the Commission for Human Rights and Good Governance Act.<sup>60</sup>

#### 4.1 Some Constitutional Implications

The 13<sup>th</sup> Constitutional Amendment of 2000 to the Union Constitution, which gave birth to the Commission for Human Rights and Good Governance has created some constitutional problems in as far as its operations in Zanzibar is concerned. The founding legislation of the Commission is pan-territorial as it extends to Tanzania Mainland as well as Zanzibar, thus effectively making the Commission a “union institution.” However, there is an argument current in Zanzibar that the Commission has no jurisdiction in Zanzibar in so far as “non-union matters” are concerned, since human rights and good governance are not “union matters.”<sup>61</sup> However, one can also argue that since the Constitution of Tanzania is also part of the “union matters” stipulated in the First Schedule of the Union Constitution and that the Constitution itself contains a Bill of Rights and Duties and applies to Mainland Tanzania as well as Tanzania Zanzibar<sup>62</sup>, then the Commission, which is also a union institution has jurisdiction in Zanzibar with respect to violations of human rights provisions contained in the Union Constitution.

The root of the problem bedevilling the Commission and other “union institutions” whose establishing legislations apply to the whole of the Union lies in the allocation of legislative competence between the “two legislatures.”<sup>63</sup> According to Article 64(1)

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Model in Countries in Democratic Transition in Birgi Lindsnaes et al. (eds) *National Human Rights Institutions and Working Papers*, The Danish Centre for Human Rights, 2000

<sup>60</sup> Act No.7 of 2001 as amended by Act No.16 of 2001.

<sup>61</sup> Some lawyers in Zanzibar raised this concern during a Human Rights Conference organized by the Zanzibar Legal Services Centre early this year and which the author of this article attended.

<sup>62</sup> Article 152(1) of the Union Constitution states that “This Constitution shall apply to Mainland Tanzania as well as Tanzania Zanzibar.” However, the First Schedule to the Constitution of the United Republic of Tanzania of 1977 contains a list of twenty-two “union matters” and human rights is not on the list.

<sup>63</sup> The “two legislatures” in the Union are the National Assembly (Union Parliament) and the House of Representatives in Zanzibar respectively.

of the Union Constitution, legislative competence with respect to “*all union matters in and for the United Republic and with respect to all other matters in and for Mainland Tanzania*” ii vested in the Parliament of the United Republic (the National Assembly). The House of Representatives on the other hand has legislative powers in Tanzania Zanzibar over “all matters, which are not “Union Matters.” The Union Constitution however, contains only a list of “union matters” but not of “non-union matters.” Furthermore, the Union Constitution stipulates very clearly that a law enacted by the Union Parliament “shall apply to Tanzania Zanzibar” if it “relates to Union Matters.”<sup>64</sup> Otherwise a law passed by the Union Parliament that extends to Zanzibar with regard to non-union matters would be “null and void” for being inconsistent with the clear constitutional provisions reserving legislative competence over all non-union matters to the House of Representatives.<sup>65</sup>

The Union Constitution declares categorically that in order for a law enacted by the Parliament of the United Republic “*concerning any matter*” to apply to Tanzania Zanzibar it has to state so expressly.<sup>66</sup> This means that the extension of the application of a union law to Zanzibar by express declaration will not be automatic. It has to be ratified by the organ with legislative competence in Zanzibar - the House of Representatives, to avoid a “constitutional conflict.”

The Commission for Human Rights and Good Governance has also been haunted by the “union” legacy. To overcome this stalemate the required procedure under the Constitution for ratifying union laws by the House of Representatives has to be

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<sup>64</sup> Article 64(4)(c) of the Union Constitution stipulates that “Any law enacted by Parliament concerning any matter shall not apply to Tanzania Zanzibar save in accordance with the following provisions: (c) such law relates to Union Matters...”

<sup>65</sup> Article 64(3) of the Union Constitution stipulates categorically that “*Where any law enacted by the House of Representatives concerns any matter in Tanzania Zanzibar which is within the legislative jurisdiction of Parliament, that law shall be null and void, and likewise if any law enacted by Parliament concerns any matter which is within the legislative jurisdiction of the House of Representatives that law shall be null and void*” (emphasis supplied).

<sup>66</sup> Article 64(4) of the Union Constitution provides that “*Any law enacted by Parliament concerning any matter shall not apply to Tanzania Zanzibar save in accordance with the following provisions: (a) such law has expressly stated that it shall apply to Mainland Tanzania as well as to Tanzania Zanzibar or it replaces, amends or repeals a law which is in operation in Tanzania Zanzibar*” (emphasis supplied).



followed so that the Commission can claim legitimacy for its operations in Zanzibar. This means that the operation of the Commission in Zanzibar requires a special sanction by the House of Representatives through the enactment of a legislation extending its jurisdiction to Zanzibar. The House of Representatives has already given this idea some consideration and efforts are being made to fulfil this requirement so that the Commission can operate freely in Zanzibar.

## **5.0 CONCLUSION**

In this discourse we have sketched some of the landmark constitutional developments in Tanzania in 2001. The development of the constitution of Tanzania is not different from other ex-British colonies. Being a combination of colonial legacy and the legacy of a one party state within a “union” setting, the Tanzanian constitution is characterised. Each of the constituent units of the Union has its own constitution. Apart from embodying constitutional principles and doctrines developed in Britain, the Constitution of Zanzibar has also been shaped by the politics of the revolution on the Isles, which continues to dominate the exercise of power by the various players in the political game there.

During the election turmoil in the aftermath of the general elections in 1995 and 2000 respectively, the history of the people played a very significant role in influencing the outcome of the constitution making process in Zanzibar. The problems that have occurred during the elections reflect what Tumwine-Mukubwa calls “antiquated constitutional doctrines” which are “ruling us from the grave.”<sup>67</sup> There is a need therefore to revisit some of the inherited constitutional doctrines and principles and create our own home grown ones, which take into consideration our contemporary African socio-political realities. The “crisis of constitutionalism” witnessed on the African continent currently is much food for thought in the thinking process while taking stock of our experiences in democracy, the rule of law, human rights and good governance.

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<sup>67</sup> Tumwime-Mukubwa, loc. cit at p. 287