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LL.M: CONSTITUTIONAL AND ADMINISTRATIVE LAW

**TOPIC: THE LEGAL STATUS OF ARTICLES OF THE UNION IN
CONSTITUTION MAKING IN TANZANIA**

By

EDUARDO PARPAI SEPERE

**A Dissertation submitted in partial fulfilment of the Requirements for the Degree of
Master of laws (LL.M) of Mzumbe University**

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CERTIFICATION

We, the undersigned, certify that we have read and hereby recommend for acceptance by the Mzumbe University, a dissertation entitled: **The Legal Status of Articles of the Union in Constitution Making in Tanzania** in partial fulfilment of the requirements for award of the degree of Master of Laws of Mzumbe University.

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DEDICATION

This work is wholeheartedly dedicated to all members of my family; and in particular, to my late father, Parpai Nkaakuni Sepere. It is also sincerely dedicated to Mzumbe community, my teachers from elementary school to my LLM and all the people who have so far been inspirational in my academic career.

LIST OF ABBREVIATION

A.G	-	Attorney General
ANC	-	African National Congress
ASP	-	Afro-Shirazi Party
CIA	-	Central Intelligence Agency
Pg.	-	Page
TAA	-	Tanganyika African Association
TANU	-	Tanganyika African National Union
UN	-	United Nations
UNO	-	United Nations Organization
URT	-	United Republic of Tanzania
US	-	United States
USA	-	United States of America
UTP	-	United Tanganyika party
ZNP	-	Zanzibar National Party

ABSTRACT

This research is entitled: **The Legal Status of Articles of the Union in Constitutional Making in Tanzania.** The Articles of Union are the fundamental laws of the Union between The Republic of Tanganyika and the People's Republic of Zanzibar. The articles, therefore, are a marriage certificate between the two independent republics; hence a Union Constitution must derive its mandate from the Articles of the Union.

In other words, the Articles of the Union are the foundation of the Tanzanian Union. Thus, writing a new constitution without first renovating the old foundation is like building a new house on an old cracked foundation, and the risk thereon is the collapsing of the new house due to lack of a strong foundation.

The objective of the study is to examine and analyse the impact of proceeding with the writing of a new constitution without first remaking the Articles of the Union the very foundation of the union between the Republics of Tanganyika and Zanzibar.

This work is a library and partial field research and thus analytical in nature, involving collection of qualitative data, by way of reading books, articles, journals and the media, so as to determine the root causes for such existing challenges. A total of (11) books and (5) Statutes have been consulted to determine the laws, principles and challenges affecting the writing of a new Constitution without amending the basic law, that is the Articles of Union 1964.

The study reveals that not only the Articles were in need of major Amendments but also the making and implementation of the articles in 1964 were mainly carried out by two persons, i.e. Mwalimu Julius K. Nyerere, the then President of the Republic of Tanganyika and Abeid Amani Karume, the then President of the People's Republic of Zanzibar.

This study recommends that it should have been wiser to hear the wish of the people, the Articles of Union should have been revisited and accordingly amended so as to give the people a road map to the new Union Constitution; since Union problems will never be solved unless the very foundation is made by the people themselves.

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CHAPTER ONE

1.0 INTRODUCTION TO THE STUDY

1.1 Introduction

Almost fifty years ago, the two sovereign states, Tanganyika and Zanzibar, motivated by historical experience of colonization, geographical proximity, cultural identity, similar political beliefs and demand for African unity, signed a Treaty to form the United Republic of Tanzania.¹ This Union has been extolled as the only type that has so far been achieved towards the realization of the spirit of the Pan-Africanism.² Tanzanians have prided themselves in having the only Union of Independent states which has been described by many to be unique in Africa. Indeed, no other states have followed their example.³ Tanzanians have not been discouraged by the lack of interest on the part of other African states in their attempts at forging larger political Unions in the continent. On the contrary, they believe that there are lessons to be drawn from the failures of such attempts elsewhere. The Union was realized on 26th April 1964 when two leaders, the late Julius K. Nyerere, the then President of the Republic of Tanganyika and the late Abeid A. Karume, the then President of People's Republic of Zanzibar, had approved it by signing the Articles of Union. It happened within less than four months after the Zanzibar Revolution of 12th January 1964 which overthrew the sultanate in Zanzibar. However, from that time onwards, cracks have appeared, as some people claim, that there are a number of weaknesses that have surfaced since the beginning.⁴ One of the major claims is the increasing number of union matters. These have doubled since the signing of the Articles of Union in April, 1964.⁵ As such, one wonders about the legal status of the Articles; whether it exists or not. Under the 1964 Articles of Union, union matters that were agreed upon were only eleven (11) but today they are more than twenty-two, even though only twenty two appear on the schedule of the Constitution of the United Republic of Tanzania 1977. In this dissertation, we examined the legal status of the Articles of Union, in the Constitution making process in Tanzania, focusing on the new Union constitution in

¹ Articles of Union 1964

² Joram Mukama Biswaro: *Perspectives on Africa's Integration and Cooperation from OAU to AU*

³ Shivji: *Tanzania: The Legal Foundation of the Union*

⁴ Ibid

⁵ Ubwa: *Legality of Additional Matters Outside the Articles of Union*

particular, and further taking into consideration that the constitution making process is well advanced and it is in the first draft stage.

1.1.1 Legal Foundation of the Union between Tanganyika and Zanzibar

The main foundation of the Union of Tanganyika and Zanzibar is the Articles of Union 1964. The Articles of Union were signed on April 22, 1964 by the Founders of the Union, the late Mwalimu Julius Kambarage Nyerere and the late Sheikh Abeid Amani Karume.⁶ After the Union, Mwalimu Julius Kambarage Nyerere became the first President and Sheikh Abeid Amani Karume became the First Vice President of the United Republic of Tanzania. The Articles of Union was an international treaty signed by two executive Heads of state.

In common law legal system, international treaties need to be ratified by their legislative bodies to give them force of law.⁷ Section (Viii) of the Articles of Union specifically stipulates that, they would be subject to the enactment of laws by the parliaments of Tanganyika and by the revolutionary Council of the People's Republic of Zanzibar in conjunction with the Cabinet of Ministers, thereof ratifying the same and providing for the Government of the United Republic and Zanzibar in accordance therewith.

Ratifying was done by the Tanganyikan Parliament on Saturday of 25th day of April 1964⁸. While the ratification process on the side of Tanganyika went through the precise steps and procedures as required under the law and the Articles, the same cannot be said on Zanzibar. The controversy over ratification of the Articles by Zanzibaris was raised publically by the late Wolfgang Dourado, who was by then the Zanzibar Attorney General.⁹ In other words, the late Dourado should have been the first most prominent person to know whether the Articles of Union were ratified or not. If it is confirmed that Zanzibar did not comply with the provision of section (Viii) of the Articles of Union 1964, we may then conclude that the current Union is nothing more but a political Union,

⁶ Articles of Union between The Republic of Tanganyika and The People's Republic of Zanzibar 1964.

⁷ Shivji: *Pan-Africanism or Pragmatism?*.pp 82-83

⁸ Ibid

⁹ Ibid

whereby it is void under the international law¹⁰. And is vide the above circumstances is where the modification of the current Articles of Union and Union matters thereon is called upon.

The one sided Acts of the Union were later incorporated in the interim Constitution of 1965 of the United Republic of Tanzania in which 11 matters were accepted to be part of the Union under the guidance of the Union Government. Section 4 of the Acts of Union proclaims: “The Republic of Tanganyika and the People’s Republic of Zanzibar shall upon Union day and ever after be united into a Sovereign Republic by the name of the United Republic of Tanganyika and Zanzibar” but later the name was changed into “Tanzania” contrary to section 4 of the Articles of Union 1964. Further to that, even the union matters were also un-procedurally changed. Just as during the Union day, people from both Republics were not consulted, so also during the changes of the foundation of the Union, the people were not consulted.¹¹ The reasons advanced by the founding fathers is that, it would have taken too long to educate Tanganyikans and Zanzibaris about the importance of the Union, and secondly, they presumed that conducting any referendum while the two countries were still young and economically under foreigners, would have caused the people to rejected the Union, Zanzibar’s in particular.¹²

There are other factors which are believed to hold together the Union but are not clearly known because it was something between the two presidents. This can be verified by the words of Abdu Jumbe Mwinyi, the former Vice-president of Tanzania and former President of Revolutionary Government of Zanzibar, as quoted by Issa Alli Ubwa:¹³

“It was morning of April 22, 1964, when Julius K. Nyerere arrived in Zanzibar. This President of Tanganyika came with a copy of the Treaty proposals prepared in Tanganyika.....I was not at the State House Zanzibar at the signing. I was in Pemba (that morning) on official duty and when I came back, for the first time, I was informed and had known about the union. President Karume, what he told me was, Tanganyika and Zanzibar were united that morning and President Nyerere shall be the President of the Union Government and he, shall be the Vice- President and the union shall be confirmed in Dar es Salaam on the April 26,196.”

¹⁰ Vienna Convention

¹¹ Addition of Union matters without amending the Articles of Union.

¹² Shivji: *Pan-Africanism or Pragmatism?* At page 76

¹³ Ubwa: *Legality of Additional Matters Outside the Articles of Union* 2005. pg.15

Tanzanian citizens had not been informed or educated about the Union, its benefits and the reason for the two republics to unite. The original Article of Union which contains 11 matters never existed and, often, the Zanzibar Government asked about it only to receive negative replies¹⁴. In Private and Public funded Education, Union topic or history was never a part of it even in General studies and Civic studies. The only place where union matter appears is in the exams in the form of "*When was the union formed?*" And this led to a number of criticisms and grievances since the Nyerere's era to the present¹⁵. Second, the then President of Zanzibar, Aboud Jumbe was among the first public figures to fall on the trap,¹⁶ as a result of the negative impact of lack of public participation in the founding of the Union, the impact that continues to date, whereby Tanganyikans are publically attacked in Zanzibar.

Since its formation in 1964 under the Tanzania's first President, Mwalimu Julius Nyerere, any discussion or debate concerning the Union and its legality has never been allowed in Tanzania and could lead to criminal charges for anyone, including Government officials, who conduct such a discussion or debate. Such a person could be seen as an enemy of the Nation, as in the case of Aboud Jumbe (supra).

As we have seen above, the then president of the Republic of Tanganyika, Mwalimu Julius Kambarage Nyerere, and the then President of the People's Republic of Zanzibar, Sheikh Abeid Amani Karume, signed an agreement called the Articles of Union, thus uniting their respective countries into one sovereign Republic¹⁷.

These Articles of Union, in one way, we can regard as the foundation of the Union, in the sense that through them we can derive the existence of Tanganyika before and after them. It is not disputed that these Articles were made by the two Republics which, before, they had their own independent laws. This pre-supposition can be seen by the words of the

¹⁴ Ibid

¹⁵ ibid

¹⁶ Ibid, pp 181-182

¹⁷ Issa G. Shivji: *Tanzania: The Legal Foundations of The Union*. 2ed (Dar es Salaam University Press, 2009)

agreement that, the existing laws of Tanganyika and of Zanzibar shall remain in force in their respective territories¹⁸.

That means the Articles recognized the existence of Tanganyika and Zanzibar as separate entities with their full mandates over their matters which are not of union. That was the intention of the original Articles of Union. The original 11 union matters as provided by the Articles of Union 1964.¹⁹ These are articles which can be considered as the foundation of the union, is the agreement which can provide the parties to it. As we have said above, the parties to the union are the Republic of Tanganyika and the People's Republic of Zanzibar. Therefore, recognition of both parties in the Agreement is necessary to make the agreement enforceable. It is a settled rule that if one party of the agreement dies it renders frustration of the said agreement.

Therefore, by not recognizing Tanganyika as part of the Union, instead we refer to Tanzania mainland to mean Tanganyika without amending the Agreement (Articles of Union 1964), we are ignoring the enforceability of the Articles of Union. This position was also supported by Paschally Mayega in *Mwanahalisi* Newspaper²⁰

"Ili muungano wowote wa nchi ubaki kuwa muungano lazima sura za nchi zilizoungana zibaki zikionekana ndani ya muungano muda wote. Kuzifuta au kufuta mojawapo ni kufuta muungano....kuonekana kwa Zanzibar ndiko kunakolazimisha kuonekana kwa Tanganyika ndani ya muungano."["For any union between countries to become a union, the uniqueness of the individual countries comprising it must all the time be clearly identifiable within the union. To obliterate both or one of them is to nullify the union ... appearance of Zanzibar is what makes it imperative for Tanganyika to appear within the union."]

¹⁸ Ibid, p.1

¹⁹ 1. The Constitution and Government of the United Republic

2. External Affairs

3. Defence

4. Police

5. Emergency powers

6. Citizenship

7. Immigration

8. External trade and borrowing

9. The public service of the United Republic

10. Income tax, corporation tax, customs and excise duties

11. Harbours, civil aviation, posts and telegraphs¹⁹

²⁰ Mwanahalisi Na.272: Muungano na Mustakabali Wake, Jumatano Desemba 14-20,2011

The strange thing is that, instead of both parties (Tanganyika and Zanzibar) honoring the first agreement, they kept on breaching it to date. Since writing a new Union Constitution without first amending the Articles of Union 1964 is a breach of the original agreement, the first major breach was the addition of Union matters from the original 11 to 22, the current 22.²¹

1.1.2 Background to the Problem

The Main instrument which forms the legal base for the union is the Articles of Union between these two independent states. This legal instrument signed by two sovereign states is a treaty under the International Law.²² The Vienna Convention on law of treaties defines a treaty as an international agreement concluded by two or more states and reduced into a

²¹ 1. The Constitution of Tanzania and the Government of the United Republic;

2. Foreign affairs

3. Defense and Security;

4. Police;

5. Emergency Powers;

6. Citizenship;

7. Immigration;

8. External Borrowing and Trade;

9. Service in the Government of the United Republic;

10. Income tax payable by individuals and by corporations, customs duty and excise duty on goods manufactured in Tanzania collected by the customs Department;

11. Harbors, matters relating to air transport, posts and telecommunications;

12. All matters concerning coinage, currency for the purpose of legal tender (including notes), banks (including savings banks) and all banking business;

Foreign exchange and exchange control;

13. Industrial licensing and statistics;

14. Higher Education;

15. Mineral oil resources, including crude oil and natural gas;

16. The National Examinations Council of Tanzania and all matters connected with the functions of that Council;

17. Civil Aviation;

18. Research.

²² Vienna Convention Treaty

written form. Such an agreement may be embodied in one or more instruments.²³ Based on this definition, the Articles of Union would fall within the above definition. It is important that a valid treaty exhibits the consent of the parties to it. However, under the Vienna Convention on Treaty, there is no express provision whether or not consent is a necessary requisite to a treaty. There are, however, provisions which may be construed to that effect. Article 11 of the Vienna Convention provides:

“The consent of a state to be bound by the treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.”

These Articles form the constitution of the Union or what is commonly known as the *Grund Norm* (Basic law). This *Grund Norm* is the supreme law of the United Republic of Tanzania and no other law, even the Constitutions of the United Republic of Tanzania or that of Zanzibar can be above it. It is on these grounds that one ventures to say that the Articles of Union are supreme, and no other body, even the Parliament can go outside their limit. In this respect, the Articles may be amended only through a consensus of the two contracting sovereign parties, and no other body may do so; not even the Parliament of the United Republic of Tanzania, but only the people of both Republics through debate and referendum.

The greatest weakness of the Articles of Union is its conspicuous lack of people's participation in the decision that led to both people (Tanganyika and Zanzibar) to lose their Sovereignty. For the lack of people's participation in the making of the Articles of Union, some scholars cited as a the reason, that it was made by the principal leaders of the two Republics, Mwalimu Nyerere and Abeid Karume, backed by imperialist pressures, most likely from the USA, Britain and West Germany, fearing that Zanzibar could evolve into another Cuba.²⁴

Throughout the different stages of the Union's development, neither Tanganyikans nor Zanzibaris were fully consulted in decision making that could affect their wellbeing. It was only the decision of leaders of both parties and the people were forced to abide by their

²³ Ibid

²⁴ Issa G. Shivji: *Pan-Africanism or Pragmatism? Lessons of Tanganyika-Zanzibar Union*. pp 72-73

decision, whether good or bad. We know that sometime a leader may act on behalf of his subjects but when it comes to such very sensitive and crucial big decision such as giving up Sovereignty or uniting two or more independent states, it needs the consent of at least the majority of the citizens of both countries. Others factors that make a need for modification of the Articles of Union, before the new constitution is put in place, the real fact that, Tanganyika was obscured since the first day of the Union. This has caused some claims from a good number of Tanganyikans²⁵ that they have been treated unfairly, when they witness that Zanzibar still exists.²⁶ Another reason is that members of the House of Representatives seat in Tanzania Parliament, and are appointed as ministers, while those from Tanganyika cannot seat in the House of Representatives in Zanzibar. Furthermore, the Articles of Union 1964 listed 11 union matters, but the Constitution of the United Republic of Tanzania lists 22 union matters.²⁷ The question is, how did the other 11 matters come about without the Amendment of the Articles of Union?

The current constitution goes further by stipulating contrary to the Basic laws (Articles of Union 1964) when it provides at Article 4 (3) that:

“For the purposes of the efficient Conduct of public affairs in the United Republic and for the allocation of powers among the organs specified in this Article there shall be Union matters as listed in the first schedule and there shall also be non-union matter which are all other matters not so listed”²⁸ One would then want to know what the non-union matters are which are not in the list. Do the non-listed matters belong to Zanzibar or Tanganyika?

It would have been wiser then to make the Articles of Union be known by the members of the public, revisit them and amend them before writing a new Constitution.. Contrary to that, currently the said Articles are like a dead law, while legally, they are the Main Foundation of the Union between the republics of Tanganyika and Zanzibar.

²⁵ G57 as well as the on the ongoing Constitutional review, debate. Many Tanganyikans feel betrayed.

²⁶ Zanzibar Government, Parliament, Courts system, National anthem, Zanzibar National flag, Zanzibar national football team, etc.

²⁷ First schedule of the Constitution of the United Republic of Tanzania 1977

²⁸ The Constitution of the United Republic of Tanzania of 1977.

1.1. 3 Statement of the Problem

The Articles of Union are the fundamental laws of the Union between the Republic of Tanganyika and the People's Republic of Zanzibar,²⁹ yet it has been unclear as to when exactly the decision to form the Union was made, since it seems the whole process was shrouded in great secrecy. Furthermore, the Articles of Union do not stipulate their legal status as an instrument of the Union or whether they are the basic law superior to the Union Constitutions. Even the amendments of the Union Constitution or writing of a new constitution should have been clearly stipulated under the Articles of Union 1964. Since that has not been provided by the Articles of Union, then before writing a new Union Constitution, the first step should have been to conduct a debate on the Articles of Union to propound their legal status followed by a referendum to seek the people's mandate, as the first ones were an agreement between two principal leaders, i.e. Nyerere and Karume, by Nyerere own words: had this to say "*The Union between Tanganyika and Zanzibar has been determined by our two governments for the interest of Africa and African Unity...*"³⁰ One can clearly see that the motive for the formation of the Union was not the interests of the people of the two Republics, and that is why there was no consultation to seek for their mandate. Otherwise, the Articles of Union, being the basic law for the Union of Tanzania, should have disclosed their legal status, for providing a method of getting a Union Constitution and those of the two republics; or should have provide for a method of the union government, whether unitary or federal.

As of now, Zanzibar has its own Constitution, its government, parliament and court system, while Tanganyika has none. In case the Union breaks up, the legitimacy of the current Union President and his Government shall be nil and void. It is the same with the union parliament. Hence, it will be very costly for Tanganyika to stay without a government until it holds a general election to elect a new president and members of parliament. Lastly but not least, is the question of uncertainty over the union matters. This has generally caused confusion due to the inconsistencies between what is done in practice and what is due to the lack of clear spirit of the Articles of Union 1964.

²⁹ Shivji: *Pan-Africanism of Pragmatism?*

³⁰ Shivji; *Ibid.* p. 82-83

1.1.4 Hypothesis

- i. Whether the Articles of Union 1964 are the basic law of the Union of Tanzania and whether they have any legal enforcement against the Union Constitution and other laws.
- ii. Whether the additional matters outside the original 11 provided under Articles of Union 1964 render the legal status of the Articles of Union void.
- iii. Constitutional Review Act, (Cap 83 R.E.2012) lacking provisions that specifically stipulate the legal status of the Articles of Union in the process of making of the union Constitution is a sign that Articles of Union do not exist.

1.1.5 Objective of the Study

1.1.6 General Objective

The general objective of the study is to examine the legal status of the Articles of Union in the making of the new Union Constitution of Tanzania.

1.1.7 Specific Objectives

These objectives include the following:

- To examine the legality of writing a new Union Constitution of Tanzania without consideration of the Union's basic law, i.e. the Articles of Union.
- To examine the weaknesses of the Constitutional Review Act Cap 83 R.E 2012 with regard to the Articles of Union as far as the new Union Constitution is concerned.
- To examine the legality of additional Union matters, outside the original 11, and the legal status of the Articles of Union thereof.

1.1.8 Significance/Justification of the Study

This study is useful in identifying the defects in the 1964 Articles of Union between Tanganyika and Zanzibar, to an effect that the same Articles are not suitable to be used for the new Union Constitution after 48 year of the said union humps.

The study is going to help to identify the intention of Government primacy drive for the Union in 1964 as well as behind the enactment of Cap 83 without people's participation to avoid a debate on the Union matters.

Finally, the study is useful to academicians, law students and students in related fields of study, particularly in Constitutional law and also to other researchers who shall research on the challenges regarding the legal foundation of the Union Constitution.

1.1.9 Scope of the Study

Due to financial constraints, this study was carried out in Arusha, Morogoro, Dar es Salaam and Zanzibar. These areas were purposely selected because they host some important and responsible offices that could provide data; as well as the availability of the National Library and University Libraries which were the researcher's source of information. Additionally, Arusha and Dar es Salaam host other important sources of data like the High Court of Tanzania, Court of Appeal, and the Constitutional Review Commission; while Zanzibar, on the other hand, had been vocal on the Modification of the Union.

1.2 LITERATURE REVIEW

There are lots of literatures and writings on the Union between The Republic of Tanganyika and The People's Republic of Zanzibar. Most of the literatures, however, have not sufficiently addressed the issue in discussion. Instead, they have discussed other key issues on the Union and the legal status of the Articles of Union in Constitution Making in Tanzania. However, there are some literature and writings which have tried to address the issue in discussion. Issa G. Shivji in his Book³¹ on page 2; on the status of the Articles at Municipal Law, contends that Tanzania and Zanzibar follow the principles and practice of Common law, whereas in British Common law system, it is the prerogative of the executives to sign international agreement or treaties.

³¹ Tanzania: The Legal Foundation of the Union

Prof. Shivji further contends that the said treaties do not ipso facto have the force in law. Whereas municipal courts may take judicial notice of a treaty entered into by the executive, and in more modern approach, even construe local legislation in conformity with the state's treaty obligations to the extent this is possible, they are not in principle bound by it unless such a treaty has been expressly adopted or incorporated in local legislation.

Articles of Union expressly provide in Article (Viii) that the Articles shall be subject to ratification by respective legislatures, i.e. the parliament in the case of Tanganyika and the Revolutionary Council in conjunction with the Cabinet, in the case of Zanzibar, in accordance therewith.” with Union agreements made on the twenty-fifth day of April 1964, the Parliament of Tanganyika passed an Act ratifying and approving the Articles of Union. Shivji further contends that, on the other side of the Union, doubts have been expressed whether the Revolutionary Council of Zanzibar also ratified and enacted a law to effect the Union. Shivji also adds that the then Attorney General of Zanzibar, Mr. Wolfgang Dourado publically claimed that law ratifying the Articles of Union¹⁹⁶⁴ exists in the statute book of Zanzibar.

Professor Shivji in Tanzania: The Legal Foundation of the Union complains about the illegality of the addition of the union matters, but did not suggest anything on the legal status of the same to meet both Union expectations. On page 75³², he contends that, when the constitution was first enacted in 1977, it had seventeen items in the list, the original eleven from the Articles of Union and six which were purportedly added between 1964 and 1973. Professor Shivji further adds that, in his opinion, the six added items are invalid. Professor Shivji further avers that, seven years later, the list underwent another significant revision. The fifth Constitution, according to Professor Shivji, purportedly repealed and replaced the list. The list now contained twenty two items, which most Tanzanians are not aware of how they came about. The Court of Appeal is another significant change that was made which could easily pass unnoticed, says Professor Shivji.

³² Tanzania: The Legal Foundation of the Union

The addition of the Court of Appeal in the Union matters and the amendment of the associated legislation, the Appellate Jurisdiction Act 1979³³, raise some interesting questions as far as the current Union is concerned, since the Constitution of Zanzibar under Section 99(a)(b)(c)³⁴ had denied the Court of Appeal's jurisdiction on cases related to the interpretation of the Constitution and other matters as per sub-section (b)(C). In respect of the above, professor Shivji posed a question, as by the virtue of section 99 of Zanzibar Constitution no one could claim that the court of Appeal is a Union matter. Again that is another thing that make us argue that Union matters must be revised before the new Constitution is written. The ratification of the Articles of Union is another reason why we are strongly submitting that the said Articles should be revised. Once again professor Shivji covered this area in his Book³⁵ on page 85. But the Professor also left a lacuna when he did not give advice on the revision of the defective Union.

Mussa Ali Ubwa in the thesis, *The Union Between Tanganyika and Zanzibar*, "Legality of Additional Matters Outside the Articles of Union, tracing the history of the Union, on page 28, first paragraph, comes to the line that the Articles of Union is supreme than the Union Constitution. The author quoting from the former Chief Justice of Zanzibar has this to say: "The Article of the Union (as grund norms) should be above the Constitution or any other law of the country because this is the basic document creating, through a treaty, a United Republic. To the contrary, the Constitution (and other law) of the United Republic are not totally guided by the Articles nor (do they) reflects its spirit;" and for the above reason we also holds that since the Articles of Union are supreme than the Union Constitution, it would have been the first to be debated before making the new constitution, as its clearly legally the Articles of Union is superior than any other laws in the land.

³³ No 15 of 1979 as amended by the Constitution (Consequential, Transitional and Temporary Provisions) Act 1984 No. 16 of 1984 which extended the Appellate Act to the whole of the United Republic, in effect, therefore, empowering the Court of Appeal to hear all appeals from Zanzibar in accordance with this Act.

³⁴ Katiba ya Zanzibar 1984, Toleo la 2010

³⁵ Shivji: *Pan-Africanism or Pragmatism?* 2008

In, Ernest T.Mallya Journal³⁶ at page 37, avers that the structure of the Union is an issue, as one Camp of those who Wanted changes proposed that the two- government structure was faulty in that the Tanganyikans did not have their government while Zanzibaris did, Mallya Further avers that that Camp proposed a three government structure, where there would be a Tanganyika, Government, Zanzibar Government and a federal Government. While another smaller Camp, was of the Opinion that there should be only one government-The Union Government. There was also a demand for referendum to determine the legitimacy of the Union itself.

For the same as above is where we argue that, it is very important to modify the structure of the Union vide, the Articles of Union to clear out the above confusion, so as when writing a new constitution the Union would be in a clear position to both side of Tanganyika and Zanzibar.

In Dr. Sengondo Mvungi's in his paper³⁷ on page 65, Mvungi argues on the confusion of the Union, that it has lots of quasi features, in both Unitary and federal areas. It mean that, when taking on the Zanzibar Government's point of view, one would point out that the Union is not absolutely unitary, nor absolutely federal.

Dr. Robert Makaramba in his paper³⁸ avers that the validity of the Articles of Union has been the basis of political debate and academic discourses ever since the Union was born and a lot of ink has been poured on the subject. Makaramba argues that the debate, however, has largely been dominated by two opposing views - the Unitarians on the one hand and the federalists on the other. The Unitarians argue that the system of two governments (the Union and the Zanzibar governments) was merely a temporary expedient to allay the fears of Zanzibar being swallowed up by Tanganyika. Makaramba further argues that the actual intention of the Union was the eventual creation of a Unitary state, fusing all the three jurisdictions, the Government of Tanzania Mainland (formerly

³⁶ Constitution Development in East Africa for year 2000 PDF

³⁷ Constitutionalism in East Africa/progress, Challenges and Prospects in 2002 PDF

³⁸ State of Constitutional Development in Tanzania 2001 PDF

Tanganyika) and the Government of Zanzibar by gradually shifting Zanzibar's power over "non-union matters" to the Union government. However, Makaramba, just like other writers mentioned herein above did not mention the legal status of the Basic law (Articles of Union). The research, intention therefore, was to fill the gap left by the scholars reviewed herein above.

1.3 RESEARCH METHODOLOGY

1.3.1 Research Design

This Dissertation based itself on case study, exclusively dealing to a great extent with the views and opinions of academicians in Constitutional development in Tanzania. The area of case study will focus on Articles of Union 1964, and its significance to the constitution development. Other area touched by the case study is Acts of Union, Original 11 Union matters, and the legality of the additional Union matter without people's participation. The reason for the type of this research lies in the fact that its main concern is the analysis of the principles of foundation of the Union between The Republic of Tanganyika and The People's Republic of Zanzibar, and the forthcoming new Union Constitution of Tanzania and the challenges thereto which are more theoretical in nature. It is also important to note that the nature of the research, though theoretical, would require some interview with the judges of the High Court, Constitutional Academician elders and Politician. As a result, owing sometimes due to their tight schedules, being situated in Zanzibar, Dar es Salaam or Dodoma; and the existing funds and time constraints makes it difficult to achieve everything needed. Therefore, doing limited interviews and tape recording were employed to minimize the chances of not getting the required data. In case of the use of questionnaires, only a few people are comfortable to fill the same on time.

The primary sources of data in this research were the Articles of Union 1964, Acts of Union 1964, the Interim Constitution 1965, the Union Constitution 1977, Zanzibar Constitution 1984 and the Constitutional Review Act Cap 83 R.E.2012.

The secondary sources that involved library research were used to compare other international Union Constitutions and articles that were to be consulted from the Libraries

of the University of Dar es Salaam, Mzumbe University, Makumira University and other relevant international instruments.

Electronic data sources, like the Bunge, USA and UK websites; and other similar websites with related materials in the area of study were consulted.

Journals, Case laws and articles were also consulted on the matter of constitution and the state of union. Thus the majority of ideas in respect of the modification of the post Union of Tanzania were obtained from various articles written by international scholars from different institutions across the globe.

1.3.2 Data Collection

The data collection, in most cases, was based on documentary review of primary and secondary sources. It also included the media review of the on-going atrocities or situations in Zanzibar and Tanganyika relating to the research problem on the basis of secondary data collection during which this research was written.

1.3.3 Primary Sources

The primary sources of data that were used in this research included the Independence Constitution of Tanganyika 1961; the Constitution of the Republic of Tanganyika (Republican Constitution 1962); the Articles of Union between Tanganyika and Zanzibar, 1964, The Acts of Union, ratifying the Union of Tanzania Act No 22 of 1964, the Interim Constitution of the United Republic of Tanzania 1965. The Constitution of United Republic of Tanzania 1977, the Zanzibar Constitutional law Decree No 5 of 1964, Zanzibar Presidential Decree No. 4 of 1965 Zanzibar Constitution 1984 and New Zanzibar Constitution 1984 version 2010 Union matters, these also include amendment thereon.

1.3.4 Secondary Sources

The researcher conducted a detailed library research which involved the analysis of the research problem through statutes, textbooks, journals, articles, case laws and conventions on the related study, plus the analysis of relevant materials on international relations.

The researcher visited the following libraries: Mzumbe University Library, the University of Dar es Salaam Library, Makumira University Library and Zanzibar University Library.

1.3.5 Electronic Sources

The researcher also visited and browsed all the relevant websites and search engines, with relevant information on the Constitutional law and Union materials. These included online articles, reports, journals and online libraries of academic institutions and any other relevant information on the research problem.

1.3.6 Data Collection Methods

In the collection of data from various sources, the methods that were employed were the following:

Library research on the drafting of the Articles of Union and the Parliament ratification of the same as would, to a great extent, provided the study with sufficient data, which would be use in the analysis of the challenges to the problem and offer the understanding of the proper working on the writing of a New Union Constitution.

Unstructured interviews were conducted with academicians in the field of Constitutional law at major Universities in Tanzania. Also, interviews were conducted with High Court Judges, Senior Advocates, State Attorneys and Members of Parliament; and their opinions and directions as to proper sources and advice on the problem of the study. These, to a great extent, were very helpful in the collection of further and related data.

1.3.7 Data Processing

The collected data underwent serious and in-depth analysis. Such preliminary scrutinizing helped the researcher in the determination of whether or not the data collected tallied with the objectives of the research study. The method employed by the researcher was qualitative analysis.

The aforementioned method involves summarizing of key findings in both data collected from the libraries and from electronic sources. The data was narrowed down to the smallest

units that tally most appropriately with the research objective of the study. This thus helped the analysis in enabling the researcher to draw proper logical conclusion that represents the actual situations with regard to the research problem.

1.3.8 Area of Study

The study was conducted in the field of Constitutional law, specifically focusing on the legal status of the Articles of Union in Constitution making in Tanzania and the lacuna in the Constitution Review Act Cap 83 R.E 2012.

1.3.9 Data Analysis

The method of data analysis that was used in this study was logic in terms of deduction and induction of facts related to the research problem. The focus specifically analysed ideas and proposals of academicians in the field of law and other related fields of study with respect to the Union of Tanzania and the new Union Constitution and the analysis covered mainly books, articles and journals from both actual libraries and electronic sources.

1.3.10 Research Limitations and Setbacks

The researcher no doubt met with several obstacles during the collection of the relevant data that to some extent impaired the research. The obstacles included the following:

Lack of sufficient funds and time to meet and interviewees, the leading Constitutional law scholars around Tanzania and go through all the available books and articles written on the Union of Tanzania.

Lack of sufficient literature that has been written on the Modification of the Union itself, taking into account that Cap 83 just came into force in 2011.

CHAPTER TWO

2.0 HISTORICAL BACKGROUND TO TANGANYIKA AND ZANZIBAR

2.1 Introduction

2.1.1 Tanganyika and Zanzibar under Colonial Rule

The two countries of Tanganyika and Zanzibar were administered separately during the colonial era. When Tanganyika became a German colony as a result of the Berlin Conference of 1884/1885 that divided Africa amongst the European powers, Zanzibar was already under the Arab rule. Due to the inter-imperialist rivalry in the region, especially between Germany and Britain, the Zanzibar – Heligoland Treaty of 1st July 1890, gave Zanzibar to Britain while Germany acquired Tanganyika.³⁹ Seyyid Said's son, Seyyid Ali bin Said, accepted British protection and so the islands formally became a British protectorate on 4th November 1890.

This continued the separate administration of these two countries, namely Tanganyika under German colonial rule and Zanzibar under the British rule. This situation of separate administrations went on until the First World War. When Germany was defeated in the First World War, its colonial possessions were divided up amongst the victorious powers.⁴⁰ Thus Tanganyika became a British administered territory under the League of Nations' mandate and later, with the creation of the United Nations, the Trusteeship System,⁴¹ replaced the mandate system. But it must be pointed out that even when the two countries were ruled by the same colonial power, their administrations were different.⁴² The British Governor in Tanganyika was reporting directly to the colonial office in London, and periodically, the British had to make a report to the League of Nations and later to the United Nations.⁴³ On the other hand, even though the British power representative in Zanzibar was answerable to London, he had to take into consideration the sensitivities of the Arab Sultan when making decisions. This indicates that during this period Zanzibar was under a dual power rule although Britain was ultimately the colonial power.

³⁹ W. Fengler, *Konfliktformationen und Zukunftsperspektiven der Tansanischen Union*, (Hamburg, 1997), 23-24

⁴⁰ Norman Lowe, *"Modern World History"* 3rd edition, pp 35-36

⁴¹ UN Charter, Chapter VII and VIII

⁴² Ibid

⁴³ CIA fact files www.ciafactfile.com

The period of the struggle for independence, not only united East African Countries but also instigated the unity of Tanganyika and Zanzibar.⁴⁴ In Tanganyika, the Tanganyika African National Union (TANU), an organization that was to be the political vehicle of the people in voicing out their demands for independence, was founded on 7th July 1954. In Zanzibar, the Zanzibar Nationalist Party (ZNP) was founded in December 1955 and the Afro-Shirazi Party (ASP) was established on 5th February 1957. Most African nationalist movements during this time recognized the need for waging common struggles in order to achieve independence.⁴⁵

Unity in the struggle for independence was the motive that moved TANU to set up a conference on September 1958 in Mwanza in which the Pan-African Freedom Movement for East and Central Africa (PAFMECA) was founded.⁴⁶ One of the recommendations of the Mwanza Conference was that where more than one nationalist organization existed, in the area, they should try to merge, and if this was not possible, then they should at least coordinate their activities. For this reason, ZNP and ASP agreed to synchronize their activities and a coordinating body was formed.⁴⁷ Tanganyika was the first country in Eastern, Central and Southern Africa to gain its independence on the 9th December 1961. The Tanganyika Independence Act⁴⁸ and the Tanganyika (Constitution) Order in Council of 1961, made the application of the international trusteeship system to Tanganyika possible. This meant that Britain was no longer the responsible administering authority of the territory according to the terms of the Trusteeship Agreement of 1946.⁴⁹ Tanganyika acquired a new constitution, known as the Dominion Constitution⁵⁰, with an African Prime Minister, Julius K. Nyerere, a multi-racial cabinet and parliament comprising of African Ministers and MPs in the majority, a national anthem and flag, and an assured seat in the

⁴⁴ Ibid

⁴⁵ Ibid

⁴⁶ Julius K. Nyerere: *Uhuru na Umoja* (Oxford university Press, 1968)

⁴⁷ Within a short time, tensions emerged among these parties because of racial factors. The parties in Zanzibar were agreed on one objective but they opposed each other due to race. This caused the split of the ASP in 1959 and the Zanzibar and Pemba People's Party (ZPPP) emerged.

⁴⁸ Tanganyika Independence Act 1961

⁴⁹ A resolution seeking the approval of the United Nations for the termination of the Trusteeship Agreement was introduced by Cyprus in April 1961 and was supported unanimously by the General Assembly. Tanganyika used the same as its precedent for her 1961 independence.

⁵⁰ This is called the Dominion Constitution because its ultimate source was an external sovereign authority and not the will of the people of Tanganyika. Ian Macleods Civile, *Tanzania and Nyerere: A Study of Ujamaa and Nationhood*, (New York 1976), p. 68

United Nations as its 99th member.⁵¹ The Tanganyika Independence Act *inter alia* abrogated Britain's right to legislate for Tanganyika and the Constitution Order in the Council revoked all Orders in the Council made by the Crown for the territory between 1920 and 1961.

One month after the coming into force of the Dominion Constitution, the ruling party communicated to the government its desire to make Tanganyika a Republic as soon as possible. On 15th February 1962, the National Assembly adopted a motion inviting the government to draft an amendment to the Constitution that made Tanganyika a Republic within the Commonwealth without delay.⁵² On 22nd November 1962, the National Assembly dissolved itself and formed a Constituent Assembly, and on the following day the Constitution of Tanganyika known as the Republican Constitution of Tanganyika was enacted. Tanganyika under the leadership of Julius K. Nyerere felt that its own independence was meaningless until the whole of Africa was free. It therefore gave support, with all the resources available, so that other people in the region could gain their independence.⁵³

Tanganyika opened its borders to patriots from other areas running away from persecution and allowed its territory to be used for the training of freedom fighters, etc. TANU decided to give full support to Zanzibar, taking also into consideration that the political situation in Zanzibar was very tense. On 10th December 1963, Zanzibar was granted "full independence" within the Commonwealth by the British,⁵⁴ although the government was still mainly in the hands of the Sultan. From 8th to 15th July 1963, elections were held in Zanzibar.

The ZNP/ZPPP alliance won 18 seats and the ASP 13 seats. The elections were considered very controversial due to ASP and its supporters feeling cheated during the whole

⁵¹ *idem*

⁵² CIA fact file www.ciafactfile.com last visited on 28th March 2013

⁵³ Tanzania: The Story of Julius Nyerere from the pages of Drum Fountain Publishers

⁵⁴ The Zanzibar Independence Constitution of 1963 was apparently similar to the other "Independence Constitutions" in former British dependencies. But in essence, it was differentiated by the fact that, instead of the Queen of England, the Zanzibaris had "His Majesty, the Sultan of Zanzibar". And no bill could become law without his assent. Cf. Zanzibar Independence Constitution of 1963 Art. 32 (1) & 39.

exercise.⁵⁵ On 12th January 1964, a group of about 330 African militants led by John Okello, a migrant labourer from Uganda, overthrew the government of Sultan Seyyid Jamshid bin Abdullah. With this takeover of power through revolution, the 1963 Constitution was abrogated and a “Constitutional Decree”⁵⁶ providing for a Constitutional Government and the Rule of Law was proclaimed. The decree stated clearly that “The People’s Republic of Zanzibar is a democratic state dedicated to the rule of law.”⁵⁷

The President, as the Head of State, validates legislation by his assent.⁵⁸ This decree also provided that a constituent Assembly was to be convened within a year so that a Constitution of the People’s Republic of Zanzibar could be adopted.⁵⁹ This did not take place. Rather it was found to be more beneficial that Zanzibar enters into a Union with Tanganyika. This happened on the 26th April 1964.

2.1.2 Zanzibar

Zanzibar, consisting of the islands of Unguja and Pemba and situated 40 kilometers into the Indian Ocean, is Mainland Tanzania (Tanganyika)’s closest neighbor to the east. The history of Zanzibar can be characterized as the East African meeting point of various cultures while the close relationship enjoyed between Tanganyika and Zanzibar dates back to the pre-Christian era.⁶⁰ It is believed that the indigenous population of Zanzibar, consisting of Wahadimu and Watumbatu, must have originated from the Mainland.⁶¹ The Persian explorers and merchants who, as well as many others, visited Zanzibar in the 7th Century A.D. chose Zanzibar to be their main base among the city states along the East Coast of Africa. The Arab rulers who came to these areas in the early 18th century extended their rule and influence to the Mainland through Zanzibar.⁶² The European explorers and missionaries, who appeared on the scene in the 19th Century, used Zanzibar as a starting point to launch their penetration into the African hinterland. The slave trade made Zanzibar an important centre of this human merchandise. Thousands of people were

⁵⁵ Wikipedia. Last visited on 28th march 2013

⁵⁶ Issa G. Shivji: *Pan-Africanism or Pragmatism? Lesson of Tanganyika-Zanzibar Union*

⁵⁷ No. 5 of 1964.

⁵⁸ Zanzibar Const. Decree par. 2.

⁵⁹ Const. Decree par. 3.

⁶⁰ S. Ayany, *A History of Zanzibar. A Study in Constitutional Development 1934-1964*

⁶¹ M. F. Lofchie: *Zanzibar: Background to Revolution*, (New Jersey 1965), 23 et seq.

⁶² idem

taken from the Mainland and sent to Zanzibar to be sold before they were shipped to Mauritius, Reunion, Arabia and other places as slave labour. When the clove plantation economy replaced the slave trade as the main economic activity of the island, it was the farm hands acquired from the Mainland that came to the island to open up the virgin land, till it and plant clove trees.

2.1.3 Tanganyika

Tanganyika is the second part of United Republic of Tanzania. She got her independence from the British colonial rule on December 9, 1961. The name Tanganyika begun to be known when the European powers divided Africa, after the 1884-1885 Berlin Conference.⁶³ Before that, the area was comprised of different tribal groups and was a dominion of the Sultan of Zanzibar. Each tribe had had its own system of leadership and distinct way of living in every aspect as each considered itself a state with full identity. After the Berlin Conference, Tanganyika became a German Colony until the First World War, 1914-1918. The outbreak of the First World War (1914- 1918) marked the end of the German domination in Tanganyika when it was replaced by the United Kingdom under the Trusteeship Council of the League of Nations.

British Rule existed in Tanganyika until 1961 when Independence was granted. During that time, political activities initiated as people formulated trade unions to air their grievances. Later on, particularly after the Second World War, political awareness intensified. Several political parties were formed but TAA, which later transformed itself into TANU, mobilized the masses under the late Julius K. Nyerere who galvanized Tanganyikans to demand for their independence. Other political parties that were present included U.T.P, A.N.C and AMNUT. A road to Independence started in December 1958 when the first election for new Legislative Council was held. TANU won all the seats. The second election was conducted in February 1959 and again TANU got great victory.⁶⁴

There was another election in August 1960 where TANU entered the election with the only opposition from three ANC candidates and a few independent candidates. TANU won 70

⁶³ CIA fact file: www.ciafactfile.com last visited on 12th April, 2013

⁶⁴ Drum Magazine: Tanzania: The Story of Julius Nyerere-1961-1985

seats out of 71 seats available. The great victory seized by TANU indicated that Tanganyika was ready for Independence; and by 1961 Tanganyika attained full internal self-government and the late Julius. K. Nyerere became the first Prime Minister who led the Council of Ministers, which was collectively accountable to the National Assembly. The new Constitution which conferred full internal-self government came into force on May 1st, 1961, and made provision for Mr. Nyerere as Prime Minister to form a Cabinet of Ministers.⁶⁵

2.1.4 The Birth of the Union of Tanganyika and Zanzibar (Tanzania)

The fact that Tanzania is a sovereign United Republic,⁶⁶ being a “Union” of two former independent countries, that is the People’s Republic of Zanzibar and the Republic of Tanganyika,⁶⁷ has had a bearing on how power is exercised between the two constituent units of the Union. That is, Tanzania Mainland and Tanzania Zanzibar.⁶⁸ When Tanganyika and Zanzibar gained their independence in December 9th, 1961 and December 10th, 1963 respectively, each had its own Constitution – the 1961 Independence Constitution of Tanganyika and the 1963 Constitution of the State of Zanzibar.⁶⁹ Zanzibar remained a “sovereign state” under the Sultanate until January 1964 when its government was overthrown and became the People’s Republic of Zanzibar.⁷⁰ Three months later, the Presidents of the two countries, the late Aman Abeid Karume and the late Julius

⁶⁵ *ibid*

⁶⁶ 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.”

⁶⁷ The Union of Tanganyika and Zanzibar Act No.22 of 1964, Supplement No.1 to the Tanganyika Gazette, Vol.XLV, No.29 dated the 26th April, 1964 ratifying the Articles of Union of 22nd April, 1964.

⁶⁸ 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.”

⁶⁹ 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 1st 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.”

⁷⁰ The Constitution of the State of Zanzibar of 5th 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 title of “His Majesty the Sultan.”

Kambarage Nyerere signed the Articles of Union,⁷¹ to form the Union of the Republic of Tanganyika and the Republic of the People's Republic of Zanzibar and gave birth to the United Republic of Tanganyika and Zanzibar in 1964,⁷² which later on was re-named the United Republic of Tanzania.⁷³ According to Professor Shivji, the Articles of Union are considered to be the principal instrument and they form the legal basis for the "Union."⁷⁴ The formation of the "Union" was therefore an important landmark in the constitutional development of Tanzania.

2.1.5 The Foundation of the Union of Tanzania

The principal instrument which forms the legal base for the Union is the Articles of Union 1964, between these two independent states. This legal instrument signed by two sovereign states is a treaty under the International law.⁷⁵ The Vienna convention on law of treaties defines a treaty as an international agreement concluded by two or more states reduced into a written form. Such agreement may be embodied in one or more instruments.⁷⁶ Based on this definition, the Articles of Union would fall within the said definition. It is important that for a treaty to be valid, it must exhibit the consent of the parties to it. However, under the Vienna convention on Treaty, there is no express provision whether or not consent is a necessary requisite to a treaty.

The former Chief Justice of Zanzibar had this to say on the Articles of Union:

*"The Articles of the union (as grund norms) should be above the constitution or any other law of the country because this is the basic document creating through a treaty, a United Republic. To the contrary, the Constitution (and other law) of the United Republic are not totally guided by the Articles nor (do they) reflects its spirit"*⁷⁷

⁷¹ The Articles of 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 22nd of April 1964. The Articles of Union are set out in the Schedule to the Union of Tanganyika and Zanzibar Act No.22 of 1964, Cap.557

⁷² Article 4 of the Union of Tanganyika and Zanzibar Act No.22 of 1964, Cap.557

⁷³ The United Republic (Declaration of Name) Act, 1964

⁷⁴ Shivji, I.G. (1990) *The Legal Foundations of the Union in Tanzania's Union and Zanzibar Constitution*, DUP, Dar es Salaam, second Expanded Edition 2009

⁷⁵ Vienna Convention Treaty

⁷⁶ Ibid

⁷⁷ Hon Ali Haji Pandu: *The Union Waves*, (1984)

In *McCormick v. The Lord Advocate*⁷⁸ it was similarly argued with approval that, the Parliament of the United Kingdom could not temper with the provisions of the treaty of Union between England and Scotland since that treaty is supreme over all other bodies. It is true that the Articles were agreed upon and signed on 22 April 1964 by the Presidents Nyerere of Tanganyika and Karume of Zanzibar on behalf of their respective countries, thus making the Articles the basic law of the land. Lord Atkins in *A.G for Canada v. A.G. for Ontario*⁷⁹ said *inter alia* that:

“It will be essential to keep in mind the distinction between (1) the formation, and (2) the performance of the obligations constituted by a treaty, using that word as comprising any agreement between two or more sovereign states. Within the British Empire, there is a well established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law requires legislative action....”

The Articles provides that the Republic of Tanganyika and the People’s Republic of Zanzibar, shall be united in one sovereign Republic.⁸⁰ It was also agreed that during the interim period, that is the period from the commencement of the union until the union constituent assembly adopts a Union Constitution (Art ii), the union shall be governed by the Constitution of Tanganyika (Art iii) as the Interim Constitution. The executive and legislative programs were to be constituted in accordance with the existing laws of Zanzibar (Art iii (a)). The legislature and the executive for Zanzibar were vested with exclusive jurisdiction for all non-union matters.

Further, the Interim Constitution had also to provide for the representation of Zanzibar in the Union parliament (Art iii (c)) and establishment of the office of two vice-presidents, one of whom would be the Principal Assistant of the President in Tanganyika and the other would be the head of executive in and for Zanzibar and the Principal Assistant of the President of the United Republic in discharge of his executive functions in relation to Zanzibar. (Art iii (b)) The Articles were flexible to allow modification for other matters desirable to give effect to the United Republic or the Treaty. (Art iii (d)).

⁷⁸ Scottish Law Times (1953)

⁷⁹ (1937) A.C. 342

⁸⁰ Article I of the Articles of Union 1964

2.1.6 People Participation in the Unification of the Two Republic.

The Union Agreement, signed by Karume and Nyerere in Zanzibar on 22 April 1964, is known as the ‘Articles of Union’. When this agreement was announced the following day, many people inside and outside the two countries were taken by surprise. The Articles were no doubt prepared in great secrecy.⁸¹ Only two foreign expatriate legal officers, one Brown and Fifoot, were closely involved.⁸² There was no legal advisor involved on the side of Zanzibar. Karume did not inform the Revolutionary Council, neither did Aboud Jumbe know about it. It is quite unclear whether any other leader from Tanganyika new apart from Nyerere.⁸³ The strong feeling was that the West had won in their intention to containing the Zanzibar Revolution. In fact, there were military preparations by both Britain and the United States in case there was a violent reaction in Zanzibar against the Union.⁸⁴ What the Tanganyika leadership wanted at the time was to play down the whole event. In a cable message of 23 April 1964 sent to the U.S. Secretary of State, the U.S. Ambassador in Dar es Salaam, William Leonhart, informed:

*“Mbwambo, Chief protocol, has just telephoned a personal request that, to the maximum extent, any US public statements on Tanganyika government –Zanzibar union be avoided. Situation over the next few days in Zanzibar could be very critical and both the Soviet and Chinese reaction is undetermined.”*⁸⁵

In an address later to the National Assembly requesting the ratification of the ‘Articles of Union’, Nyerere insisted that the move was inspired by the ideals for an African Unity. “Unity in our continent does not have to come via Moscow or Washington,” he insisted.⁸⁶

The ‘Articles of Union’ have been given different interpretations and characterized as federal, quasi-federal, an interim arrangement towards one government, etc. Some have seen the Union as similar to the relationship between the United Kingdom and Northern Ireland.⁸⁷ Those who were close to the scene at the time also differ as to what type of relationship it is. The U.S. Ambassador in Dar es Salaam, in a cable message to his

⁸¹ Shivji: *Pan-Africanism of Pragmatism?*, 1980

⁸² *ibid*

⁸³ *Ibid*

⁸⁴ *Ibid*

⁸⁵ *Ibid*

⁸⁶ Romuald Haule, *Torturing the Union? An Examination of the Union of Tanzania and its Constitutionality* PDF

⁸⁷ *Ibid*

government on 22nd April, 1964, the day the ‘Articles of Union’ were signed by Karume and Nyerere, stated:⁸⁸

“Like the relationship between Northern Ireland and Britain, the union of Zanzibar and Tanganyika gave the island limited regional administrative autonomy ... but ensured overall power ... was held by the centre at Dar es Salaam”. But Frank Calucci, reporting from Zanzibar the next day, said that Karume was “still under the impression that he is agreeing to a federation of two autonomous states, not a centralised union envisaged under the present articles”. Attwood, the U.S. Ambassador in Kenya at the time, says he was informed by Dustan Omari, Nyerere’s Permanent Secretary then, “that the major power would rest in the centre ... but that Zanzibar would retain its own internal governmental affairs.”

While we have difficulty in accepting some of the assertions of some of the writers on the character of the Union for reasons that we will advance later, we would only want to agree with the notion that the ‘Articles of Union’ are the Grund norm (Basic Law) - the fundamental law of the United Republic, on which the Constitutions of Tanzania and Zanzibar, and other laws, have to be based, and from which they derive their legitimacy. Like any supreme law in any other legal system, no other law or constitutional act can be in conflict with it.⁸⁹

‘Articles of Union 1964’ provide for matters that would be under the Union arrangement. From the original 11 items in 1964,⁹⁰ the list has now expanded to 22.⁹¹ Some people have questioned the validity of such an expansion.⁹² The ‘Articles of Union’ also provide for the existence of two governments: one for the whole United Republic for all Union matters and for non-Union matters in Tanganyika, which, under the 1977 Union Constitution is referred to as Tanzania Mainland, and another for Zanzibar in all matters that are non-Union. According to Nyerere, Karume wanted a total union, but he (Nyerere) cautioned against it, saying that such a move might be construed by Zanzibaris and others as meaning that Zanzibar had been swallowed up,⁹³ annexed, incorporated into or taken over by Tanganyika. He insisted that Zanzibar’s identity must be maintained.⁹⁴

⁸⁸ (Supra)

⁸⁹ Section (iv)(b)(c) Article of Union 1964

⁹⁰ *ibid*

⁹¹ First Schedule to the Constitution of the United Republic of Tanzania

⁹² Ubwa: Legality of Additional Matters outside the Article of Union PDF

⁹³ Shivji: *Pan-Africanism of Pragmatism?* 2008

⁹⁴ *ibid*

There is no way one can construe the ‘Articles of Union’ as a basis for a federal set-up; nor can they be seen as an interim arrangement towards a one government. They intended to create a single state with two authorities, but with one of those authorities having a limited geographical jurisdiction. Was the intention to retain the identity of the smaller unit? Has Tanganyika, by this event, not been lost her identity? In fact, it has been lost. Even if it is accepted that the Union was a Western conspiracy against the Zanzibar Revolution, the effect of the intention was to deny Zanzibar and Tanganyika the capacity to be an international actor, so as not to interfere with what was happening inside the country. To be able to change the internal course of events would have entailed changing the regime. What might have confounded some of the law experts looking at the relationship between Zanzibar and Mainland Tanzania was the fact that no such example existed in the Anglo-Saxon legal system. The closest they could think of then was that between the United Kingdom and Northern Ireland.

2.1.7 Tanganyika’s Identity in the Union

In the Articles of Union 1964, Zanzibar is allowed to retain its autonomy and pursue its own policies in all matters other than those stipulated as Union matters.⁹⁵ In this case, the power to decide is left upon the Zanzibar organs such as the House of Representatives, the Revolutionary Council and the President of Zanzibar and Chairman of the Revolutionary Council.⁹⁶ The Union Constitution stipulates that constitutional amendments require the approval of two-thirds of Zanzibaris sitting in the Union Parliament and the same proportion of Mainlanders.⁹⁷

In order to avoid a clash in the legislative functions of the two sides of the Union, it has been provided that if the House of Representatives enacts any law which should be under the jurisdiction of the Union Parliament, that law will be null and void; and also if the Union Parliament enacts a law on any matter under the jurisdiction of the House of

⁹⁵ Section (iii) (a)(b) Articles of Union 1964

⁹⁶ *ibid*

⁹⁷ Article 98(1)(b) Constitution of the United Republic of Tanzania 1977

Representatives, that law will be null and void.⁹⁸ Since the Articles of Union are basic law, and superior to the Constitution of Tanzania 1977, then the Articles should have provided for the means to amend the Constitution of the Union and not otherwise.

The Articles of Union 1964 also provide for effective Zanzibaris representation in the Union Parliament but not Tanganyikans in the House of Representative.⁹⁹ Strange enough, the Articles of Union 1964 is silent on matters concerning the Judiciary; instead, the Constitution of the United Republic took care of it. One may want to know where the Union constitution derived the jurisdiction to that effect from? It guarantees a separate judiciary system for Zanzibar which has jurisdiction over Zanzibar alone.¹⁰⁰ Even though the Court of Appeal of the United Republic is a Union organ, it has no power to decide on cases involving disputes between the Union Government and the Zanzibar Revolutionary Government.¹⁰¹ This clearly an indication that the Articles of the Union are illusion thus needed major amendment before writing a new union constitution.

2.1.8 Nyalali Commission on the Union of Tanzania

One of the major recommendations of the Nyalali Commission was for the replacement of the present Union set-up with a federal one.¹⁰² This was one of the areas that brought about a very heated debate within the Commission and which necessitated members of the Commission having to vote. Later, those who were opposed to the federal idea had to append their own Dissenting Opinion to the main report to explain their position. But the division in the Commission on this issue almost came to a Mainland/Zanzibar division.

Of the 11 members from Zanzibar, 7 wanted the present Union set-up to stay, with some major changes; 3 wanted a federal and 1 was undecided. Of the same number from the Mainland, 9 wanted a federal set-up and 2 wanted the present arrangement to continue. What is important is that both sides agreed that there were problems within the Union. Even though at the time the complaints from the Mainland were not so loud compared to those from Zanzibar, it would have been wiser if those complaints were addressed and

⁹⁸ Article 64(3)(4)(a)(b)

⁹⁹ Section (iii)(c) Articles of Union 1964

¹⁰⁰ Article 114 Constitution of the United Republic of Tanzania 1977

¹⁰¹ Article 117(2) Constitution of the United Republic of Tanzania 1977

¹⁰² Tume ya Rais mfumo wa chama kimoja au vyama vingi vya siasa Tanzania, 1991

resolved. The majority of members of the Commission felt that in a federal set-up, both Tanganyika and Zanzibar would retain their identities, federal areas would be clearly defined and the responsibilities of each would be understood, and the federal entity would be distinct from the national ones.¹⁰³

Those holding the minority opinion, on the other hand, were of the view that there was nothing in the 'Articles of Union' to suggest that their framers had a federal set-up in mind; that a federation would be a step backward and might be a prelude to the dissolution of the Union; that corrective measures could be taken, if there is political will, which would define Union matters, list Union institutions and apportion the responsibilities of each side on those matters. Examples were provided from the two Scandinavian countries of Denmark and Finland where entities (Faroe Islands, Aaland Islands and Greenland) have full autonomy in a number of areas that they exercise within a non-federal state. The Dissenting Opinion in the Nyalali Report pointed out.¹⁰⁴

Greenland and Faroe Islands, both of which are part of Denmark, have full autonomies in many matters. For example, a parliament that is not subject to interference from the Central Government of Denmark and all political and economic matters agreed upon and even in international relations. The islands of Faroe have their own flag hoisted in all government buildings and on ships registered in Faroe Islands. Also, Faroe Islands issues passports.¹⁰⁵

Denmark had agreed to join the European Economic Community. So did Greenland. But later, Greenland withdrew from the Community. Therefore, all EEC agreements and conditionalities accepted in Denmark did not apply in Greenland. Similarly, the Islands of Faroe are not a member of the EU.

¹⁰⁶With regard to Finland, the islands of Aaland have their own parliament and government. The islands of Aaland also have their own 'identity' for persons born in the islands and who have not lived abroad consecutively for five years or more. The islands have their own flag, they issue their own stamps and their citizens are not subject to

¹⁰³ *ibid*

¹⁰⁴ *ibid*

¹⁰⁵ CIA fact file www.ciafactfile.com last visited on 12th April 2013

¹⁰⁶ Thomas E. Patterson: *We the people, a Concise Introduction to the World Politics*; sixth edition.

military service. The islands of Aaland are a demilitarized zone.¹⁰⁷ The Central Bank of Finland must consult the government of Aaland before it takes measures that might harm the economy of Aaland. This happens despite the fact that they share a common currency.

The islands of Aaland, as is the case for Greenland and Faroe, are, on their own right, represented in the Nordic Council that consists of Denmark, Finland, Sweden, Norway and Iceland.¹⁰⁸ One may ask whether Tanzanian union is similar to the above illustrated one. When, therefore on 26th April, 1964, the People's Republic of Zanzibar and the Republic of Tanganyika announced that they had merged to form a Union, the international community felt that Zanzibar and Tanganyika had succeeded where the four East African countries together had failed. But were they the ideals of Pan-Africanism that brought Zanzibar and Tanganyika together?¹⁰⁹ Was the Union the result of an African initiative or was it propelled by cold war rivalry? The circumstances in which the Union was formed raised a lot of questions, many of which are still unanswered today, and some have been at the centre of continuing debates and controversies in Tanzania in the last forty nine years. Have the fears of ZNP that Zanzibar would be 'taken over' by Tanganyika been proven true? In later years, the Union was to haunt the Zanzibar politicians for a long time, with each of them playing the "Union card" either for legitimacy on the Mainland or for support at home.

Nyerere stated that he casually proposed the idea of the Union to Karume when the latter visited him to discuss the fate of John Okello. According to Nyerere, Karume immediately agreed to the idea and suggested that Nyerere should be the President of such a Union. In a New Year message to the Nation on 2nd January 1965, Nyerere implied that even if the ASP had come into power through constitutional means and not as a result of a revolution, the Union would still have taken place. But Amrit Wilson's research has revealed that there was a very strong Western pressure, especially from the United States, for the Zanzibar Revolution to be contained because it was felt that it held the threat of the spread of

¹⁰⁷ *ibid*

¹⁰⁸ *ibid*

¹⁰⁹ Shivji: *Pan-Africanism of Pragmatism?* 2008

communism in the East African region.¹¹⁰ The United States, Britain and the then West Germany, which Tanganyika was heavily dependent upon at the time, viewed the revolutionary government in Zanzibar as either a surrogate of the communist powers or dancing to their tune. The international press had already started to characterize Zanzibar as the 'Cuba of Africa', though to be fair to Duggan, he had referred to Zanzibar as "Tanganyika's Cuba" far back in July 1963 when he had interviewed Nyerere in Washington during the latter's state visit to the US.¹¹¹

In a cable message to US embassies in Dar es Salaam, Nairobi and Kampala, the US Secretary of State Dean Rusk instructed his diplomats to urge Nyerere, Kenyatta and Obote to explain to Karume the dangers involved in his dependence on Babu and the dangers Babu represents... to the security of Zanzibar and East Africa generally... they should recognize here that the big problem is that Karume himself has great confidence in and dependence on Babu... also that Nyerere has said that Karume needs Babu who, despite his background, can and must be worked with. Kenyatta and Joseph Murumbi on the other hand appear to regard Babu as undesirable and the chief threat to Karume. Would it be useful to raise with Nyerere, despite his previous objection, the idea of a Zanzibar-Tanganyika Federation as a possible way of strengthening Karume and reducing Babu's influence? Such action at this time may also help Nyerere's own position.¹¹²

In an interview with Amrit Wilson in 1986, Frank Carlucci, the US Consul in Zanzibar at the time of the Union who was later thrown out of Zanzibar because of CIA activities (and who later rose to become the Director of CIA and US Secretary of State for Defence), confessed that there was United States' pressure on Nyerere.¹¹³

Susan Crouch in her book *Western Responses to Tanzanian Socialism 1967-1983* reveals that: To this end the American Central Intelligence Agency was active in trying to create the conditions for union, fanning antagonisms among Zanzibar's revolutionary leaders, and creating a fear of Zanzibar as a communist threat among East African leaders. Was the

¹¹⁰ *ibid*

¹¹¹ Professor Haroub Othman: Union of Tanganyika and Zanzibar PDF

¹¹² *Ibid*

¹¹³ CIA fact book Africa

Union then, as is indicated in U.S. State Department papers, dictated by cold war considerations first and the questions of pan-African ideals of unity were secondary to ideological factors and questions of personal survival?¹¹⁴

It has also been suggested that Karume wanted a Union with Tanganyika as a means of warding off his Marxist and left wing colleagues. What seems to be the case is that after the electoral defeat of July 1963, Karume's leadership within the ASP parliamentary group was shaky. There was a schism in it, with Karume being challenged by Othman Shariff, and some of the party's MPs calling for a government of national unity that would bring together in the government all the political parties in parliament. After the revolution, Umma Party's radical elements in the government (Babu, Khamis Abdalla Ameir, Ali Sultan Issa, Ali Mahfoudh, Salim Rashid, Badawi Qullatein, etc) were forging links with the ASP leftists (Abdallah Kassim Hanga. Abdulazizi Ali Twala, Hassan Nassor Moyo, etc.), and this might have scared Karume and other moderate elements within the regime. At the same time, the radical way in which the revolution was surging ahead might have alarmed the regime in Dar es Salaam.¹¹⁵ It should not be forgotten that within days of the revolution in Zanzibar, an army mutiny took place in Tanganyika (later repeated in Kenya and Uganda); and even though we know now that there was no link between the revolution and those mutinies, it was difficult to see it that way at the time.

As a result of the army mutiny in Dar es Salaam, Tabora and Nachingwea, there was virtually no government in Tanganyika for three days. Anarchy prevailed and Nyerere was forced to request British military intervention to bring the country back to normalcy.

The West, particularly the United States, perceived developments in Zanzibar in the context of East-West rivalry, and given the leftist credentials of the Umma Party and some of the ASP leaders that were prominent in the Revolutionary Council, assumed that a Cuba-type situation was evolving. The best way of averting it, short of direct military

¹¹⁴ *ibid*

¹¹⁵ Professor Haroub Othman: Union of Tanganyika and Zanzibar PDF

intervention a la Playa Giron (though this was thought of and preparations made), was to try an ‘African initiative’. And it worked.¹¹⁶

2.1.9 Legitimacy of the Union

Many questions continued to be raised regarding the legal basis of the Union: whether the two Presidents on their own had the powers to sign such a Union Agreement; why the Zanzibar’s Attorney-General, as the principal legal advisor to the government, was not consulted; and why there was no referendum in joining such a union; was Zanzibar not in fact ‘swallowed’ and ‘annexed’ by Tanganyika? And why did the name ‘Tanganyika’ disappear? Discussions on the Union were conducted very secretly. From the archival materials and the statements of those who were in the ‘corridors of power’ at the time, it would appear that not many people in the then Tanganyika government or that of Zanzibar Revolutionary Council knew what was happening. Apart from Nyerere and Karume, the only other people who might have been privy to those discussions were Rashidi Kawawa, Oscar Kambona, Job Lusinde, Abdallah Kassim Hanga, Abdul-Aziz Ali Twala and Salim Rashidi.¹¹⁷

When these discussions were at an advanced stage, Nyerere is said to have called in his Attorney-General at the time, British expert Roland Brown, and asked him to draft a Union Agreement without anybody knowing. In the case of Zanzibar, the Attorney-General, Wolf Dourado, is said to have been sent on a one-week ‘leave’ and instead a Ugandan lawyer, Dan Nabudere (according to his own account which was corroborated by Babu), was brought in to advise Karume on the draft submitted by Tanganyika. Both Brown and Nabudere were present in the Karume-Nyerere discussions. One can speculate that one reason why Dourado was not involved was because he was ‘inherited’ from the previous ZNP/ZPPP regime and the revolutionary government was hesitant to involve him in such a sensitive matter.¹¹⁸

Under both the 1962 Republic of Tanganyika Constitution and the Zanzibar Presidential Decree No. 5, the two Presidents had the powers to enter into international agreements on

¹¹⁶ *ibid*

¹¹⁷ CIA fact book last visited on 17th day of January 2013

¹¹⁸ Shivji: *Pan-Africanism of Pragmatism?* 2008

behalf of their governments. What is in doubt to date is whether the Union Agreement was ratified by both the Tanganyika Parliament and the Zanzibar Revolutionary Council. Contrary to what some writers have said, the Nyalali Commission was satisfied that the Revolutionary Council met to ratify the 'Articles of Union'. Both Abdulrahman Babu and Khamis Abdallah Ameer, the two former Umma Party leaders who were in the Revolutionary Council at the time, have confirmed that the matter was discussed in the Council, and while there were reservations on the part of some members, these were 'quashed' by Abdallah Kassim Hanga who made an emotional intervention to support the Union. However, Professor Issa Shivji insisted in his book *Pan-Africanism or Pragmatism? Lesson of Tanganyika –Zanzibar Union* that there is no any documentary evidence that the Revolutionary Council ratified the Articles of Union 1964.

If the Articles of Union had been ratified by the two legislative bodies in Tanganyika and Zanzibar, there was no further requirement in law to make them enforceable.¹¹⁹ The question of referendum would not have arisen because under the Commonwealth legal tradition, in which the two countries were brought up, the notion of a referendum, was unknown. The referendum was introduced as a legal requirement under British law in the 1970s during the heated debate in the United Kingdom on the question of its entry into the European Economic Community. If that was the case, why didn't Tanganyika and Zanzibar contact the same?

CHAPTER THREE

¹¹⁹ Case of additional Union matters and the writing a new Constitution without debating or amending the basic laws, Articles of Union.

3.0 THE MAKING OF THE UNION OF TANZANIA

3.1 Introduction

3.1.1 The Articles of Union 1964 between Tanganyika and Zanzibar

The principal instrument which forms the legal base for the Union is the Articles of Union 1964 between the Republic of Tanganyika and The People's Republic of Zanzibar. In other words, the Articles of Union are the foundation of the Constitution of United Republic of Tanzania (a strong foundation mean a strong house, a weak foundation constitutes a weak house). The humps witnessed by the Tanzanian Union for the last 49 years could be due to the weakness of the Articles of Union 1964. This legal instrument signed by two sovereign states is a treaty under the International law, The Vienna Convention on law of treaties defines a treaty as an international agreement concluded by two or more states reduced into a written form. Such an agreement may be embodied in one or more instruments¹²⁰. Based on this definition, the Articles of Union would fall within this definition. It is important that for a treaty to be valid, it must exhibit the consent of the parties to it.

3.1.2 The Historical Perspective into Constitution-Making Process

The de-colonisation history of Tanganyika is well-known to many to have been peaceful, and the immediate events leading to the formal "handing over" of independence in 1961 quite orderly.¹²¹ Both this and the traditionally gradual, nearly uneventful passage of constitutions characteristic of the British who ruled Tanganyika and Zanzibar, accounted for a similar way in which the first Tanganyikan Constitution was brought about in 1961, that is, uneventfully.¹²² Similarly, in keeping with the British attitude of regarding constitutional construction and reform as specialized events best left to the elite or to representatives, the 1961 constitution took root without the consultation with a broad mass of the population. Since then, there have been four major reorientations of the Second Constitutional Process, or four other constitutions in Tanzania, depending on whether one takes the interpretation of the government or that of its critics respectively. These four constitutional events or constitutions have come about in the following way.

¹²⁰ Shivji: *Pan-Africanism of Pragmatism?* 2008

¹²¹ Tanganyika Independence 9th day of December 1961

¹²² Tanganyika Order in council 1961 (The independence Constitution 1961)

In 1962, Tanganyika severed its last sovereignty ties with Britain.¹²³ The British Crown, through its representative, the Governor of Tanganyika, ceased to be the Head of State.¹²⁴ This brought about the Republican Constitution, which was enacted by the existing Parliament after its National Assembly had met and converted itself into a constituent assembly.¹²⁵ In December 1963, Zanzibar attained her independence on the basis of a Constitution tailored along the Westminster Constitution.¹²⁶ The second occasion was when Tanganyika formed a Union with Zanzibar¹²⁷. Following the ratification of the treaty (Articles of Union) by Tanganyika through the instruments known as Acts of Union,¹²⁸ the immediate constitutional arrangement put in place was to regard the Constitution of Tanzania as being constituted by the Tanganyikan Constitution and the Articles of Union. Article VII of the Articles of Union had directed that the President of the United Republic, in agreement with the Vice President, would appoint a commission to draft a Constitution and, within a year, call a constituent assembly of representatives of Tanganyika and Zanzibar to adopt the Constitution. This requirement was modified by the Parliament through Act No. 18/65,¹²⁹ which now directed that such a constitutional process be effected at "an opportune time". In 1965, the Parliament amended the Constitution to accommodate and implement the Articles of Union and to legalise the one party-system, which had been proposed by a commission of the governing party, TANU. The constitution was further amended in 1975 by an Act of Parliament to legalize the notion of the doctrine of the supremacy of the party over all state organs. Finally, in 1977, the long-delayed implementation of the Articles of Union requirement for a permanent Constitution of the United Republic of Tanzania took place. The constitutional process involved a constitutional commission appointed by the President; the National Executive Committee of the Party, to which the proposals were initially presented; the Cabinet, which prepared and discussed the necessary bill; and the Constituent Assembly, which deliberated on and passed the bill. None of these constitutions or constitutional events came about through significant agitation. Neither were the broad masses of the population involved in the

¹²³ Republican Constitution 1962 (The Constitution of Tanganyika 1962)

¹²⁴ *ibid*

¹²⁵ Constituent Assembly Act 1962 (Act No 66 of 1962)

¹²⁶ Dr. Cornell K. Mtaki; *Constitutional Development in Tanzania 1961-2000*, pp 61-62

¹²⁷ Articles of Union 1964

¹²⁸ Act No 22 of 1964

¹²⁹ Act No 18 of 1965

shaping of the constitution.¹³⁰ With a minor exception for the 1965 one-party system amendment, which was preceded by a country-wide canvassing of opinion by a presidential commission, though not on whether the system should be adopted, but on how it could best be implemented without the loss of the democratic ideal. The first extensive involvement of the broad masses of the population in constitutional reform was in 1991-1992, when a commission appointed by the President and headed by the Chief Justice (otherwise known as the Nyalali Commission), and in the current review for a new Constitution under the chairmanship of Judge Joseph Sinde Warioba.

The state and the territory that has since 1964 been known as the United Republic of Tanzania is currently under ‘clear and present danger.’¹³¹ After 1964 and for much of the next three decades, the Articles of the Union and the Acts of Union that legally created Tanzania were systematically undermined and the autonomy of Zanzibar subverted using the political guise of ‘consolidating the Union.’¹³²

By the advent of multiparty politics in the early 1990s, Zanzibar had not only lost her independence in matters of monetary policy, internal security and a host of other matters reserved to her under the Articles of Union and the Acts of Union, but has also lost her statehood; and the right to choose her leaders has shifted from Zanzibar to Dodoma.

And as Professor Issa G. Shivji has shown in his exhaustive studies of the Union, the history of the Union is a history of illegality and unconstitutional behaviour by the Union Government.¹³³ Indeed, the Union itself is a product of the insecurities, deceit and the subterfuge of its two protagonists, Mwalimu Julius K. Nyerere and Sheikh Abeid Amani Karume, and the imperialist powers that were then hovering in the background.¹³⁴

¹³⁰ Shivji, 1991; Nassoro, 1995

¹³¹ Under Article 57(a)(b)(c) of *Rasimu ya Katiba ya Jamhuri ya Muungano wa Tanzania* the proposal is to have two states in terms of provinces, in which Zanzibar is vehemently objecting as they want a full sovereignty state

¹³² Addition of Union matters from the original 11 provided under the Articles of Union.

¹³³ Issa G. Shivji: *Tanzania the Legal foundation of the Union*

¹³⁴ CIA fact file www.cia.org.com visited 3.7.2013

By the beginning of its second decade, the Union was being questioned by prominent Zanzibaris, led by Karume's successor Alhaj Aboud Jumbe. Although, following the 'pollution of the political atmosphere' in January 1984, Jumbe and his key lieutenants were made to pay a heavy political price for challenging the constitutionality of a wide range of aspects of the Union. The debate on the Union and its future has since then never left the political stage and the academic discourse. And, at least in Zanzibar, recent constitutional developments point towards independence and the end of the Union.¹³⁵

3.1.3 Is This what Nyerere and Karume Agreed Upon?

On 13th August, 2010, the Zanzibar House of Representatives enacted the Tenth Amendment to the Constitution of Zanzibar. Though touted as the consummation of the *Muafaka wa Kisiya* between the ruling Chama cha Mapinduzi (CCM) and the opposition Civic United Front (CUF) – and thus paving the way for the formation of the Government of National Unity – the Tenth Amendment has to be seen as a unilateral declaration of Zanzibar independence.

Both legally and politically, it challenges the constitutional basis of the Union as agreed upon in the Articles of Union. Significantly, it also 'claws back' the various aspects of the Zanzibari autonomy that were lost in dubious circumstances after 1964. For example, whereas the Zanzibar Constitution, 1984 had previously – and rather sheepishly – recognized Zanzibar as 'a part' of the United Republic, following the enactment of the Tenth Amendment, Article 2 of the current Constitution now declares boldly that 'Zanzibar is amongst the two countries that form the United Republic of Tanzania.'¹³⁶

And whereas the President of Zanzibar was previously a mere Chairman of the Revolutionary Council of Zanzibar and head of the government thereof, Article 26(1)¹³⁷ of the current Constitution proclaims the Zanzibar President as the 'Head of State of Zanzibar, Supreme Head of the Revolutionary Government and Chairman of the Revolutionary

¹³⁵ Shivji: *Pan-Africanism or Pragmatism?*

¹³⁶ The Constitution of the United Republic of Tanzania 1977

¹³⁷ Katiba ya Zanzibar 1984, Toleo la 2010

Council.’ The constitutional myth of Tanzania as ‘one country’ could not have been brought into a sharper relief!

Unfortunately for the Union, the story does not end there. As Shivji observes in his Pan-Africanism or Pragmatism, “... Zanzibar has never fully accepted to be without any armed personnel under its control.” This reluctance to be defenseless continues to this day. Thus, whereas the Acts of Union had reserved ‘defence’ and ‘police’ as Union Matters under the exclusive jurisdiction of the Union Government, Article 121(1) of the current Zanzibar Constitution creates what can only be termed as the nucleus of the Zanzibari armed forces.

Mysteriously called ‘Special Departments’ (Idara Maalum za Serikali ya Mapinduzi ya Zanzibar in their Kiswahili rendering), these units are listed – under Article 121(2)¹³⁸ – as Jeshi la Kujenga Uchumi (JKU), Kikosi Maalum cha Kuzuia Magendo (KMKM) and Chuo cha Mafunzo. Ominously for the Union, Article 121(3) empowers the Zanzibar President, ‘if he sees fit’, to establish any other Department to be an Idara Maalum.¹³⁹

Now, on the basis of the Articles of Union and the Acts of Union, the successive Constitutions of the United Republic have recognized the President of the United Republic of Tanzania as Head of State, Chief of the Union Executive and the Commander-in-Chief of the Tanzanian Armed Forces.

Now however, Article 123(1) of the Zanzibar Constitution confers upon the Zanzibar President the title of ‘the Supreme Commander of the Special Departments’ with powers “... to do anything which he feels, in the (Zanzibari) national interests, appropriate.” Under Sub-Article (2), the powers of the Supreme Commander under Sub-Article (1) “... include the power to issue orders to perform any function related to that Department for (Zanzibar) interests.” It is my humble submission that these are, inter alia, war-making powers!

At the very least, the provisions cited above challenge the very basis of the Union by questioning the Articles of Union and the Acts of Union – all of which reserved ‘defence’

¹³⁸ *ibid*

¹³⁹ *ibid*

and ‘police’ matters to the Union Government – and various provisions of the Union Constitution, all of which relate to the powers of the Union Government in defence and security matters and the status and prerogatives of the Union President as Commander-in-Chief. And although Article 151(1)¹⁴⁰ of the Union Constitution defines ‘Government’ as including the Revolutionary Government of Zanzibar, etc., in that trend the power of the ‘Government’ to create armed forces under Article 147(1) of the Union Constitution¹⁴¹ does extend to the Revolutionary Government of Zanzibar in view of the Articles of the Union and the Acts of Union which reserved defence and security matters to the Union Government.

These Articles form the Constitution of the Union or what is commonly known as the *Grund Norm (Basic law)*. This *Grund Norm* is the supreme law of the United Republic and no other law, even the Constitutions of the United Republic of Tanzania or that of Zanzibar can be above it. It is on these grounds that one ventures to say that the Articles of Union are supreme, and no other body, even the Parliament can go outside their limits. In this respect, the Articles may be amended only through a consensus of the two contracting sovereign parties, and no other body may do so, not even the Parliament of United Republic. The former Chief Justice of Zanzibar had this to say on the Articles of Union:

“The Articles of the union (as grund norms) should be above the constitution or any other law of the country because this is the basic document creating through a treaty, a United Republic. To the contrary, the Constitution (and other law) of the United Republic are not totally guided by the Article nor (do they) reflect its spirits” 12

In *McCormick v. The Lord Advocate*¹³ it was similarly argued with approval that the Parliament of the United Kingdom could not temper with the provisions of the treaty of the Union between England and Scotland since that treaty is supreme over all other bodies. It is true that the Articles were agreed upon and signed on 22 April 1964 by the Presidents Nyerere of Tanganyika and Karume of Zanzibar on behalf of their respective countries. Lord Atkins in *A.G for Canada v. A.G. for Ontario*¹⁴ said *inter alia* that:

“It will be essential to keep in mind the distinction between (1) the formation, and (2) the performance of the obligations constituted by a treaty, using that word as

¹⁴⁰ The Constitution of the United Republic of Tanzania 1977

¹⁴¹ *ibid*

comprising any agreement between two or more sovereign states. Within the British Empire, there is a well established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law requires legislative action....” The Article provides that the Republic of Tanganyika and the People’s Republic of Zanzibar shall be united in one sovereign Republic. 15

It was also agreed that during the interim period, that is, the period from the commencement of the Union until the Union constituent assembly adopts a Union Constitution, (Art ii), the Union shall be governed by the Constitution of Tanganyika (Art. iii) as the interim Constitution. The interim Constitution was to be modified to provide a separate executive and legislative in and for Zanzibar. The executive and legislative programs were to be constituted in accordance with the existing laws of Zanzibar (Art iii(a)).

The legislature and the executive for Zanzibar were vested with exclusive jurisdiction for all non-union matters. Further, the interim constitution had also to provide for the representation of Zanzibar in the Union parliament (Art iii (c)) and establishment of the office of two vice- presidents, one of whom would be the Principal Assistant of the President in Tanganyika and the other would be the head of executive in and for Zanzibar and the Principal Assistant of the President of the United Republic in discharge of his executive function in relation to Zanzibar (Art iii (b)). The Articles were flexible to allow modification for other matters desirable to give effect to the United Republic or the treaty (Art iii (d)).

3.1.4 The Making of a New Constitution of the United Republic of Tanzania

There is a broken silence in the Country! At long last, Tanzania has embarked on a search for a brand new Constitution. But what does this mean? Is it real a brand new constitution? The law that gives power for the making of a new constitution is the Constitutional review Act¹⁴² but what does review mean? According to Cambridge English dictionary, “Review” means “*evaluation, assessment, examination or evolution.*” Could this mean that there is no new Constitution in the first place? Could this be the reason why the Articles of Union,

¹⁴² Cap 83 R.E 2012

the foundation of the Tanzania Constitution, were ignored by the makers of the said new Constitutions?

There is lack of consensus as to what this implies for the nation and how far we have gone in it. Tanzania has never had a new, people-centred and democratic Constitution before this process. The current constitution has its roots in the order-in-Council,¹⁴³ which Tanganyika's colonial masters, the British, brought to the country as part of the soft power handing over in 1961.

Starting with the consolidated document made on 27th November that year, the Constitution of the United Republic of Tanzania as re-named for the last time in July, 1977, is by far not Tanzanian¹⁴⁴. Even its patches out of the 14 amendments to it until 2005 cannot justify ownership by Tanzanians, rather it make it even more confusing. No Tanganyikans were involved in the making of this country's first Constitution.

Even Julius Kambarage Nyerere, the founding father of Tanganyika once admitted not to have been involved in the making of the Constitution of Tanzania.¹⁴⁵ No Zanzibaris were involved in the making of the said Constitution either. It is that serious! No wonder President Kikwete came in at the close of the year 2010 and decided that it is enough! We must build a new Constitution for this country!

But, should we write one? The history of Constitutionalism in Tanzania after 1961 shows that there has been two major problems with regard to Constitution making. First, it is hard to prove serious citizen participation.¹⁴⁶ Secondly, there has never been a moment in time during or before the making of Tanzania in April 1964, when a new Constitution was made.¹⁴⁷ The Articles of Union were never a consensus between Tanganyika and Zanzibar, just like the first Tanganyikan Constitution was never a consensus between the UK and any other country or person in the world.

¹⁴³ Toc 1920 later amended by Toc 1926

¹⁴⁴ Constitution of the United Republic of Tanzania 1977

¹⁴⁵ The Citizen newspaper of Saturday 27 April 2013

¹⁴⁶ The Tanganyika order in council 1961, inherited from Britain. No Tanganyikan participated in its making.

¹⁴⁷ The republican Constitution 1962 was a replica of the Tanganyika order in council 1961

Subsequent Constitutions have had very cosmetic 'public' participation in amending the supreme law. Most of the Constitutions in Tanzania were made by way of Commissions appointed by Presidents.¹⁴⁸ But Presidential Commissions by themselves produce Constitutions without Constitutionalism at best! Democratic Constitutions must follow a particular path - Framework bill to lead to an act of Parliament; Constitutional Convention or conference and a Commission; Constituent Assembly and lastly a referendum.¹⁴⁹

In addition, all electoral activity mid way must be overseen by a special and independent body. Tanzania has never written a new Constitution! It is for the first time we are attempting it; an undertaking that began in January, 2011! But are we going to make it? How? How far have we gone into the process? A new Constitution must come. The Articles of Union 1964 are the foundation of the Union between Tanganyika and Zanzibar; the same Union that has been experiencing humps for the last forty nine (49) years. The foundation is therefore very poor to rebuild another house upon it. It would have been wiser, before writing a new Constitution, first to reconstruct the Articles of Union (Build a new foundation), and let the full participation by people from both former republics, to review the Articles of Union, to be followed by a referendum. Upon the majority's vote in favour of the Articles of Union, then we proceed with the writing of a Union Constitution, guided by the Basic law, the new Articles of Union.

3.1.5 Legitimacy of Making a New Union Constitution without Re-making the Articles of Union

Constitution making is normally supposed to be a purely civilian exercise through which citizens are expected to effectively exercise and make use of their fundamental democratic right to self-determination. Participation in the process is the right of every citizen.¹⁵⁰ The main actors in the Constitution making are the people themselves.¹⁵¹ The whole process will be futile and just a sham if it is monopolized or hijacked by any other person or a group of persons. Government, political parties, civil societies and private individuals have

¹⁴⁸ The Republican Constitution 1962, interim Constitution, 1965 also see Presidential Decree No. 4 of 1965

¹⁴⁹ The Making of The Constitution of Kenya 2010

¹⁵⁰ Example of Kenyan Constitution 2010

¹⁵¹ Yash Ghai Constitution of Kenya Review Commission

their roles to play in the process of constitutional review. During the debates for Constitution making or reviewing, differences of opinions become obvious but they should be settled by a democratic method of discussion, criticism, persuasion and education, and not by a method of coercion or repression.

The United Republic of Tanzania is now forty nine years old. The union has been a subject matter of discussion and debates and has attracted both praises and criticisms. There is a divergence of views and interpretations relating to the motive for the Union. In the first place, proponents of African unity view the Union as a first step towards African cooperation, unity and Pan-Africanism in general.¹⁵² Secondly, western writers have documented that the Union was a product of neo-colonial politics of the cold war by super powers (USA and USSR) in the 1960's.¹⁵³ Thirdly, the union has also been perceived as a result of political expediency and pragmatic considerations of the main political actors in Tanganyika and Zanzibar. Fourthly, the union has been cited by some people as an attempt of one African country to swallow and colonize another African country.¹⁵⁴

To some legal scholars, the Union has raised some complex questions with no available answers. Professor Srivastava has called these questions “riddles” whereas Honourable Othman Masoud Othman described them as “Questions without Answers in the Union”. While legal scholars were wondering about the complex questions in the Union, the Revolutionary Government of Zanzibar realized that there were two categories of the specific problems of the union: (i) the problem of the system and lack of transparency. (ii) Constitutional problems. Milestones in the history of the Union Constitution can be broadly defined as “a framework of rules defining the functions, composition and inter –

¹⁵² Nyerere: Freedom and Unity speech

¹⁵³ CIA file marked (Secret)” Because the Zanzibar revolution was so unexpected and so quickly over, there was confusion and uncertainty about the most basic questions, even about who started it and why. The need for an immediate assessment on which to base U.S. policy toward the new regime, however, required that conclusions be drawn on the basis of the information then available, though this was recognized to be inadequate. With the passage of time, therefore, and the accumulation of a great mass of retrospective reporting on the coup, a second look at the evidence seemed called for. As it turns out, the new evidence justifies a new verdict.CIA/DD”

¹⁵⁴ Professor Srivastava:The Union in question

relationships of the institutions of government, and the rights and duties of the governed. These rules describe the location, distribution, exercise and limitation of political power among the instruments of the state...”¹⁵⁵ If we take this definition to be correct and apply the same to the Union of Tanganyika and Zanzibar, it can be confidently asserted that the bedrock of the Union Constitution is to be found in the **Articles of the Union** that were signed by two former presidents on the 22nd of April 1964 and supposedly ratified by two respective legislatures and added as schedules to the respective union laws (Acts of Union).

According to Professor Shivji, “the Acts of Union are a constitutional instrument”¹⁵⁶ The first union constitution therefore was the Constitution of Tanganyika as modified by Presidential Decrees by virtue of the powers vested in the President of the United Republic under the Articles and Acts of Union. Simply, the President made the constitution. The appointment of a Constitutional Commission and a summoning of a Constituent Assembly were delayed for unknown reasons. That was contrary to the contemplation of the Articles and Acts of Union. By using its powers of amending the constitution, the ordinary Parliament of Tanzania passed the Interim Constitution through Act No. 43 of 1965. Under the Interim Constitution of 1965, Tanzania became a one-party state. That decision had been made by the National Executive Committee (NEC) of TANU. The TANU Constitution was made a schedule to the 1965 Interim Constitution. Professor Chris Maina Peter in one of his writings commented that “It is not clear why then it was decided to append the Constitution of one party only – TANU and exclude that of ASP while in fact the two parties existed simultaneously in the country.” The 1965 Interim Constitution survived for twelve years. To avoid such confusion in future, it would have been wise to review the Articles of Union first before proceeding to write a new Constitution of Tanzania.

The permanent Constitution was adopted in 1977. Legally, the provisions of the Articles and Acts of Union were technically followed because the Constitutional Commission was appointed and the Constituent Assembly was summoned. However, from the point of view of political legitimacy, it is something questionable. The twenty members (ten from each part of the union) of the Constitutional Commission were appointed on the 16th of March

¹⁵⁵ Yash Ghai: Constitution Development 2004

¹⁵⁶ Shivji: *Tanzania: The Legal Foundations of the Union*

1977 and they were gazetted on the 25th of March 1977 through a Government Notice.¹⁵⁷ The appointed members of the Constitutional Commission were the same ones who constituted the committee for the merger of TANU and ASP and the birth of CCM. Again, on the same 16th of March 1977 the President of the United Republic of Tanzania, through Government Notice,¹⁵⁸ published on the 25th of March 1977, appointed members of the existing parliament to become members of the Constituent Assembly that would meet on the 25th of April 1977. The Bill for the new constitution was published on the 18th of April 1977 and when the Constituent Assembly met a week later, it was adopted in less than three hours. Total membership of the Constituent Assembly was 207, out of which only 45 were from Zanzibar.¹⁵⁹ Hence, the members from Zanzibar were more or less one fifth of the total membership in the Constituent Assembly.

The 1977 Constitution has been in force for 36 years now and it has been amended fourteen times. In relation to the constitutional amendments, it can be remembered that the heated debates on the Union took place in 1983 when the NEC of CCM presented proposals for amendments to the Constitution of the United Republic of Tanzania which included the famous Part IV of the NEC proposals on the Consolidation of the Union. Honourable Juma Abdalla Machano, a member of the House of Representatives moved a private motion in the House of Representatives to remind the party (CCM) that any amendments that were to be made in the Union Constitution had to guarantee and respect Zanzibar's autonomy. Furthermore, opinions were expressed through the media by someone under the pseudoname "Kiroboto" advocating for a federation of three governments.¹⁶⁰ Also, Aboud Jumbe's letter that was surreptitiously stolen from Zanzibar State House and sent to President Nyerere advocated a federation of three governments.¹⁶¹ Moreover, Wolfgang Dourado's paper which was presented to the Tanganyika Law Society's seminar did also question the legality and the legitimacy of the union. It too advocated a federation of three governments.¹⁶² The 1983 constitutional debates led to the so-called 'pollution of political atmosphere' and the early resignation of Honorable Aboud

¹⁵⁷ No. 38 of 1977

¹⁵⁸ No. 39 of 1977

¹⁵⁹ Dr Cornel K. Mtaki: *Constitutional Developments in Tanzania 1961-2000*

¹⁶⁰ CIA fact book East Africa Politic last visited on 16th April 2013

¹⁶¹ Shivji: *Pan-Africanism or Pragmatism?*

¹⁶² Ibid

Jumbe in January 1984 from Zanzibar presidency and CCM vice-chairmanship.¹⁶³ After the re-introduction of multi-party politics in the mid 1990's, another amendment came into being which aroused a lot of discussions in Zanzibar was the separation of the Zanzibar presidency from the Vice-presidency of Tanzania.

On the other hand, in Tanzania Mainland there was a landmark move of Members of Parliament popularly known as G55 which demanded a creation of the Government of Tanganyika so as to have a federal set up of three governments.¹⁶⁴ There are different opinions as regards the status of the Articles and Acts of Union after the adoption of the 1977 Constitution. Professor Shivji, for instance, is of the view that they still constitute Grund norm (Basic Laws) of the Union from which all other norms and rules pertaining to the Union derive their legal authority and validity; and in case of conflict, they prevail over the 1977 Constitution. Thus, the process of writing a new constitution should have drawn its mandate from the basic law. But, its status as the basic law seemed to have been ignored all together. Even the Rasimu ya Katiba 2013 breached the basic law for proposing three governments.¹⁶⁵

3.1.6 The Process of Constitutional Review under the Constitutional Review Act

The Act No. 8 of 2011 as amended by the Act No. 2 of 2012 provides the scheme of the current constitutional review process. It includes, among other things, the appointment of a Constitutional Commission and its secretariat, terms of reference for the commission, a mechanism for the public to express their opinions on new constitution, drafting of a new constitution and preparation of report of the commission, a mechanism for scrutiny of a Draft Constitution Bill, appointment of a Constituent Assembly and its secretariat, and the validation of a newly proposed constitution by referendum.

The Constitutional Review Act was passed by the Parliament by using its legislative capacity as an ordinary law under Article 64 of the 1977 Constitution. It was not passed by using Parliament's constituent capacity under Article 98 of the 1977 Constitution because

¹⁶³ Ibid

¹⁶⁴ Ibid

¹⁶⁵ Rasimu ya katiba ya Muungano wa Tanzania at Article 57

it did not amend any provision of the existing 1977 Constitution. The 1977 Constitution does not provide for procedure of adopting a new constitution. It only entails procedure for amending the existing 1977 Constitution. The question may be raised whether is it jurisprudentially sound for a legislature to enact an ordinary law providing the adoption of a new constitution and the abolition of the current one.

There has been a progressive step in the modality of appointing the members of the Constitutional Commission. Members of civil societies and the public at large had the opportunity for the first time at least to propose names of persons whom they thought were suitable.

The functions of the Constitutional Commission are listed in sub-section 9 (1) of the Constitutional Review Act as to: (a) co-ordinate and collect public opinions; (b) examine and analyse the consistency and compatibility of the constitutional provisions in relation to the sovereignty of the people, political systems, democracy, rule of law and good governance; (c) make recommendation on each term of reference; and (d) prepare and submit a report. In my opinion, paragraph (b) is vague and ambiguous. It is not clear which constitutional provisions shall be examined: is it the constitutional provisions of the existing 1977 Constitution or the constitutional provisions of the newly proposed constitution or any constitutional provisions in general at a theoretical level? However, if we read the Kiswahili version, which is also authentic according to sub-section 38 (4) of the same Act, the likely interpretation in my view is the third alternative indicated above. We are not quite sure which interpretation the Constitutional Commission will adopt. Apart from the general functions specified in section 9, the detailed functions of the Commission have been provided under section 17 of the Act.

Under sub-section 9 (2) the Commission is required to adhere to national values and ethos and to safeguard and promote, inter alia, the existence of the United Republic and the existence of the Revolutionary Government of Zanzibar. As regards the existence of Revolutionary Government of Zanzibar, there is a backing in the 1984 Zanzibar Constitution. Section 26 (1) of the 1984 Zanzibar Constitution provides that “Kutakuwa na Rais wa Zanzibar ambaye atakuwa Mkuu wa Nchi ya Zanzibar, Kiongozi Mkuu wa

Serikali ya Mapinduzi na Mwenyekiti wa Baraza la Mapinduzi.” Section 80A (2) (d) of the 1984 Zanzibar Constitution has entrenched the above cited section 26 of the same constitution that it cannot be amended even by the House of Representatives without prior referendum. Therefore, the Constitutional Review Act was legally correct to invoke safeguards and promotion of the existence of the Revolutionary Government of Zanzibar.

Regarding the existence of the United Republic, we find similar support in neither the 1977 Union Constitution nor the 1984 Zanzibar Constitution. On the contrary, the 1977 Union Constitution provides that among the matters that can be voted by two-thirds majority of each part of the union is the existence of the United Republic. In these circumstances, it can be submitted that the safeguard imposed by the Constitutional Review Act¹⁶⁶ relating to the existence of the United Republic is at best unnecessary and at worst unconstitutional. History repeats itself.

The composition of the Constituent Assembly is almost identical to the one that adopted the 1977 Tanzania Constitution except for two things: First, the Constituent Assembly this time includes all 82 members of the House of Representatives of Zanzibar (in 1977 there was no House of Representatives in Zanzibar, the House was established in 1980). Second, the Constituent Assembly also this time involves one hundred and sixty six presidential appointees from civil societies (at least one-third from Zanzibar). The commonalities between the 1977 Constituent Assembly and the coming Constituent Assembly are the followings: Both are appointed by the President and they are not directly elected for constitution – making. There is no equal number of members in the Constituent Assembly between the two parts of the Union, the only safeguard is that provisions of the proposed Constitution shall be passed by two third majority of Members from Tanzania Mainland and two third majority of Members from Zanzibar.

It is strange that equality between nations is ignored within two mutual partners of the Union of Tanzania but it is highly respected and preserved in the Partner States of EAC. Out of approximately 600 members of the Constituent Assembly, members from Zanzibar

¹⁶⁶ Cap 83 of 2012

will be more or less one third of the total membership. In 1977 members from Zanzibar were more or less one-fifth of the total membership.¹⁶⁷

Again, in 1977 and in the current constitutional review processes, equality in number of members was and is observed in the creation of the Constitutional Commission for preparation of drafts but it is not adhered to with regard to the composition of the Constituent Assembly which passes the proposed Constitution. The Chairman of the Constituent Assembly is elected amongst its members by simple majority. Who are the majority in the Constituent Assembly? Definitely, members from Tanzania Mainland, but as usual, don't worry, the vice chairman must be from the other part of the United Republic.

Section 21¹⁶⁸ of the Constitutional Review Act creates offences and punishments. It is an offence to obstruct, hinder or prevent any member of the Commission or Secretariat from performing their functions, or to obstruct, hinder or prevent any person or group from giving public opinion to the Commission. Also, inciting for any of those activities is an offence. Impersonation to be a member of the Commission or Secretariat is also an offence. As well, carrying on an activity of coordinating and collecting public opinion contrary to this Act¹⁶⁹ or conducting awareness programmes on constitutional review contrary to this Act are offences created by the Act.¹⁷⁰

The line of demarcation between the constitutional right of freedom of expression and the limitation posed by the Act must be clearly drawn and observed. Otherwise, the Act may be impugned for unconstitutionality. The requirement of notification to the Commission or other public authorities before conducting any public awareness programme for constitutional review under section 17¹⁷¹ of the Act can be a source of problems and encumbrance for civil societies and individuals who may wish to conduct such programmes. The requirement that the proposed Constitution must be submitted for

¹⁶⁷ Mtaki: *Constitutional Developments in Tanzania 1961-2000*

¹⁶⁸ Cap 83 2012

¹⁶⁹ Cap 83

¹⁷⁰ Cap 83

¹⁷¹ *ibid*

referendum is a great step forward towards greater democratization in the country. Zanzibar has a law which provides for referendum but Tanzania Mainland has not. Whether the Parliament of Tanzania is going to enact a referendum law for Tanzania Mainland only or for the whole of Tanzania remains to be decided. And for the same reason, we hold that writing a new Union Constitution without first re-making the Articles of Union is illegal as the Articles of Union is superior to both the Union Constitution and that of Zanzibar.

3.1.7 Debate During the Ended Constitutional Review

First of all, it seems that the debate on the structure of the Union occupied a greater part of people's time in the processes of constitutional review. Should the country continue with the two government system and its uniqueness? Whether the country should or should not adopt a unitary government, federation or confederation system.

But, the gist of the issue is the demand for equal distribution of powers between the two parties of the Union and the demand for devolution of powers from the central government to local governments. Should ministers continue to be appointed from among the members of legislature? Whether the enormous powers of the President of the United Republic should be retained or reduced. The so-called imperial presidency can be an important subject of discussion. All these questions would have had a good answer if the Articles of Union were brought to the light and debated by the people.

The idea of rotation of the United Republic Presidency between the two parties of the Union was also argued notably from Zanzibar. On the other hand, there was debate on whether the President is to be elected by simple majority or by obtaining more than fifty percent of valid votes. More than fifty percent of the people we interviewed were proposing for a fifty plus percent of the valid votes for a person to be duly elected president. The role and status of the President of Zanzibar in the Union also brought up the problem in which if the Articles of Union were negotiated first, it would have been solved, since the role of the President of Zanzibar was stipulated in section (III)(b).¹⁷² Thus

¹⁷² Articles of Union 1964

the Union Constitution to create (provide) otherwise is contrary to the basic law (Articles of Union 1964). A list of union matters were likely to be re-negotiated though at the end that was not done. Even the formula for adding new items or subtracting present items that are no longer required can be a subject matter for debate. There is likelihood that the representation of Zanzibar in the union cabinet which makes policy decisions on union matters would have been examined.

The discussion on Articles of Union would have reconsidered the number, scope, and role of Zanzibaris in the union cabinet. The structure and composition of the Parliament would have been restructured and provided for everlasting solution, as currently only Zanzibari Members of Parliament participate in the Union Parliament but Tanganyikans are not allowed in Zanzibar House of Representative. Another area of discussion is the civil service sector in the United Republic of Tanzania and how people from both parties of the Union can equally make use of the available employment opportunities in the union government. Also, there is the question of the right of the Zanzibaris to be appointed to take leadership posts in the union institutions such as National Electoral Commission, Secretariat of the Union Cabinet, and Secretariat of the National Assembly.

Revenue, expenditure, grants, loans and Joint Account of the Union can also be a central focus of public opinions. Majority of people in Zanzibar are not comfortable with the 4.5% share given to Zanzibar as regards grants and loans. The proposals for reforms in the electoral system may come up, e.g. first past the post versus proportional representation, necessity or redundancy of special seats for women, term limits for Members of Parliament, the right of the constituents to recall their MPs before the expiry of their terms, a possibility of having private candidates, and continuation of membership in Parliament despite expulsion from a political party.

Constitution making is normally supposed to be a purely civilian exercise through which citizens are expected to effectively exercise and make use of their fundamental democratic right to self determination. Participation in the process is the right of every citizen. The main actors in constitution making are the people themselves. The whole process will be futile and just a sham if it is monopolized or hijacked by any person or a group of persons.

Government, political parties, civil societies and private individuals have their roles to play in the process of constitutional review.

During the debates for constitution making or reviewing, differences of opinions may become obvious but they should be settled by democratic methods of discussion, criticism, persuasion and education, and not by method of coercion or repression.¹⁷³ As it appears to be the case under the Constitutional review Act¹⁷⁴ in which there is skipping of the Articles of Union. Not undertaking modification of the same and proceeding to writing a Union Constitution, amounts to the breaching of the Articles of Union 1964, hence the proceeding is illegal as vide the evidence we showed herein above, since the current Union appears as if **“Tanganyika and Zanzibar united to create One Country of Tanzania and Zanzibar”**; and due to this outlook, it is important to modify the Articles of Union to create a new Union outlook, a people’s choice Union and not that of two politician, supported by their political parties.

In modern times, political powers are no longer justified by charisma or traditions but by legal rational rules. Since the Constitution is the power map of a state, its justification and legitimacy must base on legal rational rules of today’s politics, namely democracy and justice. The Constitutional Review Act should have provided for a mechanism to modify the Articles of Union 1964 before the writing to a new constitution of Tanzania.

CHAPTER FOUR

4.1.0 CONSTITUTIONAL REVIEW ACT WITH REGARD TO ARTICLES OF UNION AS FAR AS THE NEW UNION CONSTITUTION IS CONCERNED

4.1.1 Background to the Constitutional Review Act, 2012

On 11th March, the Bill for the Constitutional Review Act, 2011 (“the Bill”) was published in the Gazette of the United Republic of Tanzania.¹⁷⁵ On Tuesday, 5th April, the Bill was

¹⁷³ Yash Ghai: *Constitution of Kenya Review Commission 2002*

¹⁷⁴ Cap 83 R.E 2012

¹⁷⁵ No.1 Volume 2 of 2011

presented before the Parliament of Tanzania under a Certificate of Urgency for its first reading. On 7th April, the TLS President submitted in writing the recommendations and proposals made by TLS members on the Bill to the Committee. On 8th April, the TLS President presented the recommendations orally. Following its participation in the public hearings, the TLS hosted a debate on the Bill for its members with a view to ensuring that as many members' views as possible were collected to ensure that the position of the TLS is representative of the majority of its members. The Bill was later enacted and dully signed by the president, and became the Constitutional Review Act 2012. The same provoked sharp criticisms from the public, politician and lawyer, something that forced the amendment of the Act in 2012, to form the Constitutional Review Act Revised Edition 2012.¹⁷⁶ However, not much has been changed. Most sections were left intact.

On the language of the Act:¹⁷⁷ It was published English. The recommendation that it should be published in Kiswahili, in keeping with the principles of access to justice (which call for physical access and layman understanding) for all (rural and urban based, common, middle-income and elite) Tanzanians, and in line with the language of the officially recognized version of the Constitution of the United Republic of Tanzania, 1977 ("the Constitution") was ignored. On the title of the Act:¹⁷⁸ It would have been wise to read The Articles of Union Review Act, 2012 to accurately reflect the will of the people (that of wanting a new and not a revised Constitution upon the referendum for the Union dully contacted) throughout the process. On the opening statement of the Act:¹⁷⁹ It would have been wise if the opening statement clearly expressed what was intended, an Act for Reviewing the Articles of Union to provide a framework for the enactment/adoption of a new constitution of Tanzania.

That is in line with internationally recognized principles of democracy and good governance. On the abatement of the Constitution and the enactment of a new Constitution, we caution that the Constitution is silent on the issue of abatement and enactment of a new constitution. Under Article 98, it only speaks of the procedure for

¹⁷⁶ Cap 83 R.E 2012

¹⁷⁷ Ibid

¹⁷⁸ Cap 83 R.E 2012

¹⁷⁹ ibid

amendment of its provisions. The absence of such provisions would, therefore, render unconstitutional any attempts to formulate a new Constitution. So, as a matter of necessity, it was only the Articles of Union that would have given the mechanism for the amendment of the Constitution in favour of inserting provisions which speak of a procedure for abatement of the Constitution and enactment of a new Union Constitution.

On the title of the Act: Scholars¹⁸⁰ strongly advise that the title of the Act, should be The New Constitution Act, 2012 to accurately reflect the will of the people (that of wanting a new and not a revised Constitution) throughout the process. On the opening statement of the Bill: It has been recommended that the opening statement be amended to clearly express what is intended: A BILL for an Act to provide a framework for enactment/adoption of a new constitution that is in line with internationally recognized principles of democracy and good governance; but further to that, we are of the view that the bill should have read the Article of Union review Act 2012, as Articles were to be reviewed to usher a way for writing a new Union Constitution.

On Section 5 of the Act¹⁸¹ - Establishment of a Commission: It would have been wise that the Commission should directly and expressly have been established by this Act.¹⁸² The present language in the Bill vests authority for establishment of a Commission with the President of the United Republic of Tanzania (“the President”) who may exercise discretionary powers in so doing. To overcome these anomalies, this section should read, “There is hereby established the Constitution Commission.”

On Section 6 - Appointment of members of the Commission: The following observations are recommended: Representation on the Commission: the Bill recommends that the Commission has representation from Mainland Tanzania and Tanzania Zanzibar in equal numbers. However, this section wholly ignores the disparity in the sizes of the population and the fact that the Union Constitution relates to Zanzibar insofar as when reference is

¹⁸⁰ Tanganyika Law society

¹⁸¹ Cap 83 R.E 2012

¹⁸² *ibid*

made to Union matters alone.¹⁸³ Therefore, to ensure that there is proper Representation on the Commission, the number of members from Mainland Tanzania and Tanzania Zanzibar should be proportionate to the population ratio.¹⁸⁴ Composition of the Commission: the Commission should have consisted of a Panel of Experts, pooled from various professional, organizational and social cadres with due regard given to gender, religion and level of expertise and previously, the members should not have held any political position.¹⁸⁵

On Section 8 - Terms of Reference (“TORs”) of the Commission, referred further to section 9 and 17¹⁸⁶ for transparency and accountability purposes, TORs should have been drafted by an independent body and approved by the Parliament of Tanzania, instead of the President.

On Section 14 – Expenses of the Commission – the Bill informs that the will of the Government is to charge the expenses of the Commission on the Consolidated Fund, instead it should have been an open, transparent and accountable process in approving and reporting on expenditures of the Commission.

On Section 16 - Submission of the Commission’s Report: for the sake of an open and transparent process, it would have been wise for the Report to be made available to the public and people should be allowed to comment on it, even if the report is submitted directly to the President.

On the Inviolability Clauses – s.9(2) and 21(1): the Act renders inviolable key matters, which touch on the fundamental provisions of the Constitution. For example, s. 9(2) renders inviolable the mere consideration of any issues relating to Union matters and the Office of the President (among others), all of which are created under the Constitution and

¹⁸³ Article 4(3) Constitution of the United Republic of Tanzania 1977 (as Amended)

¹⁸⁴ According to the census conducted in 2012 the population in the Main land is about 41 Million while in Zanzibar about 3 million

¹⁸⁵ Constitution of Kenya Review commission was an example

¹⁸⁶ Cap 83 R.E

should be left open to debate. S. 21(1) runs contrary to Article 26(2) of the Constitution,¹⁸⁷ which preserves the right of an individual to challenge the constitutionality of the laws of the land. These sections should have been removed altogether. Furthermore, in the event that the sections are allowed to stand, they contravene the Rule of Law.

The President should not have the powers to turn the National Assembly into the Constituent Assembly and that the composition of the Constituent Assembly should be mandated by the citizens to be chosen from different cadres (i.e. professions and expertise, organizations, religious groups and constituencies).

On Section 31¹⁸⁸ – Conduct of referendum: it is observed that the National Electoral Commission is wrongly placed to oversee the validation of the Constitution. Civil society organizations, religious organizations, political parties and other individuals and groups should be allowed to participate in openly educating and sensitizing the public on the referendum question. Ultimately, however, the Commission should be in control over the conduct of the referendum.

4.1.2 The Process of Constitutional Review under the Constitutional Review Act

The Act No. 8 of 2011 as amended by the Act No. 2 of 2012,¹⁸⁹ provides the scheme of the current constitutional review process and not the Articles of Union nor writing a new Constitution of Tanzania. The Act¹⁹⁰ includes, among other things, the appointment of a Constitutional Commission and its secretariat, terms of reference for the commission, a mechanism for the public to express their opinions on new constitution, drafting of a new constitution and preparation of a report of the commission, a mechanism for scrutiny of a Draft Constitution Bill, appointment of a Constituent Assembly and its secretariat, and the validation of a newly proposed constitution by referendum.

The Constitutional Review Act¹⁹¹ was passed by the Parliament by using its legislative

¹⁸⁷ Constitution of the United Republic of Tanzania 1977

¹⁸⁸ Cap 83 R.E 2012

¹⁸⁹ Cap 83 R.E 2012

¹⁹⁰ Ibid

¹⁹¹ Cap 83 R.E 2012

capacity as an ordinary law under Article 64 of the 1977 Constitution. It was not passed by using Parliament's constituent capacity under Article 98 of the 1977 Constitution because it did not amend any provision of the existing 1977 Constitution that by itself stipulate the basic need of re-writing the Articles of Union to provide for mechanism of amending a Union Constitution. The 1977 Constitution does not provide for a procedure of adopting a new constitution. It only entails a procedure for amending the existing 1977 Constitution. The question may be raised as to whether it jurisprudentially sound for a legislature to enact an ordinary law providing the adoption of a new constitution and the abolition of the current one. The functions of the Constitutional Commission are listed in sub-section 9 (1) of the Constitutional Review Act as to: (a) co-ordinate and collect public opinions; (b) examine and analyse the consistency and compatibility of the constitutional provisions in relation to the sovereignty of the people, political systems, democracy, rule of law and good governance; (c) make recommendation on each term of reference; and (d) prepare and submit a report. Our opinion is that, paragraph (b) is vague and ambiguous. It is not clear which constitutional provisions shall be examined: are they constitutional provisions of the existing 1977 Constitution or constitutional provisions of the newly proposed constitution or any constitutional provisions in general at a theoretical level?

History repeats itself. The composition of the Constituent Assembly is almost identical to the one that adopted the 1977 Tanzanian Constitution except for two things: First, the Constituent Assembly this time includes all 82 members of the House of Representatives of Zanzibar (in 1977 there was no House of Representatives in Zanzibar. The House was established in 1980). Second, the Constituent Assembly also this time involved one hundred and sixty six presidential appointees from civil society (at least one-third from Zanzibar) . The commonalities between the 1977 Constituent Assembly and the coming Constituent Assembly are the followings: Both are appointed by the President and they are not directly elected for constitution – making.

There is no equal number of members in the Constituent Assembly between the two parties to the Union. The only safeguard is that the provisions of the proposed Constitution shall be passed by two thirds majority of Members from Tanzania Mainland and two thirds majority of Members from Zanzibar. It is strange that equality between nations is ignored

between the two mutual partners of the Union of Tanzania but it is highly respected and preserved in the Partner States of EAC. Out of approximately 600 members of the Constituent Assembly, members from Zanzibar will be more or less one third of the total membership. In 1977 members from Zanzibar were more or less one-fifth of the total membership.¹⁹²

Again, in 1977 and in the current constitutional review processes equality in number of members was and is observed in the creation of the Constitutional Commission for preparation of drafts but it is not adhered to with regard to the composition of the Constituent Assembly which passes the proposed Constitution.¹⁹³ The Chairman of the Constituent Assembly is elected amongst its members by simple majority. Who are the majority in the Constituent Assembly? Definitely, members from Tanzania Mainland, but as usual, the vice chairman must be from the other part of the United Republic.

Section 21 of the Constitutional Review Act¹⁹⁴ creates offences and punishments. It is an offence to obstruct, hinder or prevent any member of the Commission or Secretariat from performing their functions, or to obstruct, hinder or prevent any person or group from giving public opinion to the Commission. Also, inciting for any those activities is an offence. Impersonation to be a member of the Commission or Secretariat is also an offence. As well, carrying on an activity of coordinating and collecting public opinions contrary to this Act or conducting awareness programmes on constitutional review contrary to this Act are offences created by the Act. The line of demarcation between the constitutional right of freedom of expression and the limitation posed by the Act must be clearly drawn and observed, otherwise, the Act¹⁹⁵ may be impugned for unconstitutionality. The requirement of notification to the Commission or other public authorities before conducting any public awareness programme for constitutional review under section 17 of the Act was a source of problems and encumbrance for civil societies and individuals who wished to conduct such programmes within the pastoral community in particular was a big problem.

¹⁹² Mtaki: *Constitutional Development in Tanzania 1961-2000*

¹⁹³ Cap 83 R.E 2012

¹⁹⁴ Ibid

¹⁹⁵ ibid

The requirement that the proposed Constitution must be submitted for referendum would have been a great step forward towards greater democratization in the country if only the Articles of Union were modified and the referendum was held to decide the Union's fate as now there is confusion regarding the death of Tanganyika, and on whether Tanganyika and Zanzibar United to Create ONE COUNTRY OF TANZANIA AND ZANZABAR?¹⁹⁶ Zanzibar has a law which provides for referendum¹⁹⁷ but Tanzania Mainland has not. Whether the Parliament of Tanzania is going to enact a referendum law for Tanzania Mainland only or for the whole of Tanzania remains to be seen.

CHAPTER FIVE

5.0. THE MAKING OF THE UNION CONSTITUTION AND THE LEGAL STATUS OF THE ARTICLES OF UNION 1964

5.1 Introduction

The fact that Tanzania is a sovereign United Republic,¹⁹⁸ being a "Union" of two former independent countries, that is, the People's Republic of Zanzibar and the Republic of

¹⁹⁶ Section 2 Katiba ya Zanzibar 1984 Toleo la 2010, Section 2 provides "Zanzibar ni miongoni mwa Nchi mbili zinazounda Jamhuri ya Muungano wa Tanzania" (Which is the second Country?)

¹⁹⁷ Katiba ya Zanzibar 1984 Toleo la 2010

¹⁹⁸ 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."

Tanganyika,¹⁹⁹ has had a bearing on how power is exercised between the two constituent units of the Union, that is, Tanzania Mainland and Tanzania Zanzibar.²⁰⁰ When Tanganyika and Zanzibar gained their independence in December 9th, 1961 and December 10th, 1963 respectively, each had its own constitution – the 1961 Independence Constitution of Tanganyika,²⁰¹ and the 1963 Constitution of the State of Zanzibar.²⁰² 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 Union,²⁰³ to form the Union of the Republic of Tanganyika and the People’s Republic of Zanzibar and gave birth to the United Republic of Tanganyika and Zanzibar in 1964,²⁰⁴ which was later re-named the United Republic of Tanzania.²⁰⁵ According to Professor Shivji, the Articles of Union are considered to be the principal instrument and they form the legal basis for the “Union.”²⁰⁶ The formation of the “Union” was therefore an important landmark in the constitutional development of Tanzania.

¹⁹⁹ The Union of Tanganyika and Zanzibar Act No.22 of 1964, Supplement No.1 to the Tanganyika Gazette, Vol.XLV, No.29 dated the 26th April, 1964 ratifying the Articles of Union of 22nd April, 1964

²⁰⁰ 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.”

²⁰¹ 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 1st 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.

²⁰² The Constitution of the State of Zanzibar of 5th 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 title of “His Majesty the Sultan.”

²⁰³ 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 22nd of April 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

²⁰⁴ Article 4 of the Union of Tanganyika and Zanzibar Act No.22 of 1964, Cap.557

²⁰⁵ The United Republic (Declaration of Name) Act, 1964

²⁰⁶ Issa G. Shivji: *The Legal Foundations of the Union in Tanzania’s Union and Zanzibar Constitution*, Professorial Inaugural Lecture, (DUP, Dar es Salaam, 1990)

5.1.1 The Validity of the Articles of Union 1964

The validity of the Articles of 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. 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.²⁰⁷ 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,²⁰⁸ by gradually shifting Zanzibar’s powers over “non-union matters” to the Union government.²⁰⁹ Under the Articles of Union, Zanzibar became a semi-autonomous polity with its own internal government in charge of “non-union matters.” Opposed to the unitarists²¹⁰ view are the federalists who argue that the system of government envisaged by the Articles of Union is one in which there was a clear cut dichotomy of powers between the centre and the units.”²¹¹ According to the federalists, the Articles of 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 Tanganyika and Government of Zanzibar.²¹² The most controversial issue in the debate before and during the constitutional review both in the mainland and Zanzibar 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 Union, and by the same stretch of argument, “Tanganyika” also exists as an integral part of the United Republic although

²⁰⁷ Aboud Jumbe: *The Partnership: Tanganyika Zanzibar Union – 30 Turbulent Years*, (Dar es Salaam, Amana Publishers, 1994.)

²⁰⁸ See Rasimu ya Katiba ya Muungano wa Tanzania 2013 Articles 57

²⁰⁹ Abubakary, K.B, “The Union and Zanzibar Constitutions” an unpublished paper presented at the 10th Anniversary Conference of the Zanzibar Legal Services Centre at the Zanzibar Beach Resort, Zanzibar on the 9th May 2002

²¹⁰ Those who are pro a single Union government

²¹¹ 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 22nd 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

²¹² If the current Draft (Rasimu ya Katibu ya Muungano wa Tanzania 2013) passes, then the wish of the federalists would have become a reality.

fused in the Union Constitution. The issue whether Zanzibar is a state was recently raised in the first Zanzibar “treason” trial,²¹³ and the Court of Appeal of Tanzania resolved the issue negatively. That is another big lacuna in the Articles of Union, as it does not stipulate the method of the Union, whether it is unitary or federal, and what was in the mind of the founders of the union. Also, a secret buried with them.

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. One other issue raised by the debate on the Union of Tanzania was the issue of ratification and thus the validity of the Union Act Treaty itself. It was Dourado, the Attorney General of Zanzibar at the time of the Union, who caused a small sensation among lawyers in 1983 when he told a Tanganyika Law Society seminar that there was no law ratifying the Articles of Union of 1964 in the statute books of Zanzibar.²¹⁴ Shivji G, in his 1990 analysis of the Union question,²¹⁵ supports the idea that there was no publication of the law in Zanzibar for the ratification of the Articles of Union Treaty. This then became a hot topic because the Articles of Union had expressly stated that they were subject to ratification by the Parliament of Tanganyika and by the Revolutionary Council of Zanzibar. But Shivji, later in the same work²¹⁶ was to point out that there was one reference from General Notice No. 243 of 1st May 1964 in the Tanganyika Gazette which stated that a law ratifying the Articles of Union was made by the Revolutionary Council of Zanzibar in connection with the Cabinet of Ministers on 25th April 1964. He also admits that non-publication of a law ratifying the Union in the Zanzibar Government Gazette cannot be taken as conclusive evidence of no ratification. Shivji also recalls that on 27th April 1964 a ceremony of exchanging the Instrument of Ratification attended by Presidents Karume and Mwalimu Julius K. Nyerere took place in the National Assembly.²¹⁷

²¹³ *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.

²¹⁴ Shivji: *Tanzania The Legal Foundation of the Union*

²¹⁵ *ibid*

²¹⁶ *ibid*

²¹⁷ *ibid*

This shows that the fact of the validity of the Articles of Union *per se* has at no point been challenged. The Nyalali Commission, of which Dourado was a member, was satisfied that the Revolutionary Council did meet to ratify the Articles of Union on the basis of personal accounts of the two former members of the Revolutionary Council of Zanzibar at that time, Abdulrahman Babu and Khamis Ameir.²¹⁸ Thus it can be concluded that there was not in any way a case of ratification by acquiescence. Another question which continues to be raised concerning the legal nature of the Union, is whether the two Presidents had the power in their own right to sign such a Union Treaty and why they did not call for a referendum before taking the step of signing the Treaty. The unification process in Tanzania was done not only quickly but also secretly.²¹⁹ On 1st February 1984, addressing the Union parliament as a Party Committee member, Nyerere was heard as saying:

*“I casually told Sheikh Karume that ‘I have told President Kenyatta that any time when Kenya is ready, we in Tanganyika are ready to unite our two countries’. I have communicated the same to Obote. I am telling you the same. Once you are ready let us unite our countries. And Karume immediately replied: ‘Mwalimu what do you mean by being ready. I am ready now. Summon the pressmen, tell them now that we are uniting our two countries into one, one government and you are the leader.’”*²²⁰

As a consequence of the issues that have been raised, Srivastava argues that, although the Union came into existence, that element of mutual trust so essential for its perseverance has been missing.²²¹ And Shivji comments along the same lines that the 1964 Union itself was an agreement between two leaders for reasons of expediency and practical politics rather than a Union of two peoples.²²² Here it must be pointed out that in the then legal system of Tanganyika and Zanzibar, the question of a referendum did not exist and this was because it did not exist in the Anglo-Saxon legal system of that time. The referendum was only introduced into the British legal system in the 1970s.²²³ The then Constitutions of Tanganyika and Zanzibar did not contain the necessary provisions for a referendum.

²¹⁸ *ibid*

²¹⁹ Shivji: *Pan-Africanism or Pragmatism?*

²²⁰ Nyerere told Karume to wait a bit as it was too early for the press to be informed. See, J. K. Nyerere, *Hotuba ya Mwenyekiti wa Chama cha Mapinduzi na Rais wa Jamhuri ya Muungano wa Tanzania* 1st February 1984, in: *Taarifa ya kazi za Chama* (1982-1984), 152

²²¹ Shivji: *Pan-Africanism or Pragmatism?*

²²² *ibid*

²²³ A referendum was used for the first time in the British legal system in relation to a constitutional matter in Northern Ireland in 1973 and 1997; in relation to devolution in Scotland and Wales in 1977

If one had asked Nyerere in 1964 to call for a referendum, under which article of the Constitution or Articles of Union one would have asked him to do so? Moreover, under both the 1962 Republic of Tanganyika Constitution and the Zanzibar Presidential Decree No. 5, the two Presidents had the powers to enter into international agreement on behalf of their governments. The will of the people was there, as Othman argues that the leaders were representing the will of the people. As you know also this agreement was sent to the Parliament here on the Mainland and to the Revolutionary Council in Zanzibar and these two bodies ratified it. *De facto* and *de iure*, the Articles of Union Treaty are not only valid, but also legitimate. Therefore, ignoring the Articles of Union during the process of writing a new union constitution is the breach of the Union in the first place, hence the New constitution will be void.

5.1.2 Are Articles of Union treated as Artificial Laws?

Throughout the Constitutional development in Tanzania since 1965, the Articles of Union were never involved. The Interim Constitution 1965 was endowed with two major characteristics right from the date of its inception. It re-enacted all the changes brought about by the Union, that is, changes which related to amending the Republic Constitution 1962 in order to accommodate the Union.²²⁴ 1977 Constitution at least the Articles of Union was considered somehow. The procedure for enactment of the permanent Constitution of Tanzania 1977 was pronounced in section 9 of Acts of Union and Article (vii) of the Articles of Union 1964.²²⁵ Thus was born the Constitution of Tanzania 1977.

There was no public Consultation or debate. The provision of the Articles of Union was, at best, only technically complied with-its spirit and necessary intention were mutilated. Coming to the new Constitution that commenced to collect views Under the Constitutional

and 1997; in London in 1998 in relation to the establishment of a directly elected mayor and the establishment

of a London-wide elected authority; and in the United Kingdom as a whole in 1975 in relation to the United Kingdom's continued membership of the European Community. Cf. H. B a r n e t t , Constitutional and Administrative Law, London 2004, 198

²²⁴ Mtaki: *Constitutional Developments in Tanzania 1961-2000*, p 78

²²⁵ Articles of Union 1964

review Act,²²⁶ Articles of Union were fully ignored as if they never existed in the addition of Union matters. The mandate of the Articles of Union as the basic law for the Union and the Union Constitution should have been sought before the amendment of the Union matters, but that was not done. So, one may ask what the status of Articles of Union 1964 is in constitutional development in Tanzania.

Although the official increase of the articles of Union is from 11 to 23 over the 49 years of its operation, a close reading reveals over 30 items, because there are some articles which address a number of key issues in a single article. In addition to these formal amendments, some Union issues are expanded through administrative directives. There is also a practice in the drafting of legislations that applies matters to both Tanganyika and the islands, for non-union matters. At the extreme end of the above arguments is the question of the very constitutionality of the expansion of the Union matters and the creation of the permanent Union Constitution. In other words, the process which was envisaged at the time of the Union was not followed. The process was mainly a CCM party process, which according to this view, was effected without any discussion and subsequent ratification in Zanzibar.

Furthermore, although the additions to Union matters were discussed in Dodoma with the participation of representatives from Zanzibar, several reasons were advanced to illuminate the illegality of the amendments. In the first instance, it is contended that the effect of Article 98 is to ensure a veto against Zanzibar opinions on any Union issues, given that the Zanzibaris constituted less than a $\frac{1}{4}$ (60/230) of the Dodoma Parliament. Secondly, the Zanzibaris in Dodoma do not represent the interests of Zanzibar as a partner state. Instead, they are there as members of CCM/CUF parties. This is why it is mandatory to have the amendments ratified in the House of Representatives of Zanzibar in order to ensure that the representatives of the people of the islands have a say in them. On the flip side of the coin, is the argument that the amendments were effected with the connivance of the Zanzibaris in Dodoma, who acquiesced in their promulgation by keeping quiet as they were being passed. Furthermore, it is contended that some amendments were proposed by the

²²⁶ Cap 83 R.E 2012

Zanzibaris themselves. A case in point was the making of internal security a Union issue. Vuai Kondo Ame²²⁷ is of the opinion that:

“...additional matters were added wrongly since both parties of the union did not give their consent... though additional matters are going simultaneously with the global changes...”

In summation, it is asserted that the non-observance of the procedures of the Union matters warrants a review of the whole process represented in the United Nations. The Articles of Union explicitly provide that Zanzibar was a sovereign state and it had united with Tanganyika to form Tanzania. However, the preamble to the Union Constitution is silent on this matter and merely recognizes Zanzibar as part of Tanzania, without explicitly providing whether or not it is a state. At the same time, the Zanzibar Constitution declares Zanzibar as a state.²²⁸ Zanzibaris have been persistent and consistent on the issue of their sovereignty.

For example, in 1984, former President Jumbe drafted a constitution for Zanzibar, with a national flag and plans for a currency and was allegedly forced to resign on that account.²²⁹ Even when Seif Shariff Hamad became Chief Minister of Zanzibar, he maintained the same position as Jumbe. In the immediate past, President Dr. Salmin Amour insisted on being sworn in by the Chief Justice of Tanzania and not by the President of Tanzania, upon being appointed into the Union Government as required by the 11th Amendment of the 1994 to the Union Constitution because he did not consider himself subordinate to him and argued that Zanzibar was a sovereign state.²³⁰ The issue of Zanzibar’s sovereignty *vis á vis* the Union was addressed by both the Nyalali Commission and Kisanga Committee. However, the recommendations of both Commissions on this issue were never implemented, and thus remain unresolved. There are several dimensions to this issue, which point to the need for its comprehensive resolution, extending from the socio-economic to the cultural and legal.

²²⁷ Interview of Vuai Kondo Ame, former member of House of Representatives, May 2013 in Zanzibar

²²⁸ Section 1 of Katiba ya Zanzibar ya 1984 toleo la 2010

²²⁹ Shivji: *Pan-Africanism or Pragmatism?* pp 201-225

²³⁰ *ibid*

For example, in the case of *Machano Khamis v. Republic (2000)*, the Court of Appeal ruled that Zanzibar was not a state recognized under international law. As such, a person could not commit treason against the Zanzibari government. We therefore insist that it would have been wise to modify the Article of Union since the problems mentioned herein above will never go away, as it was the case for the last forty nine years of the Union of Tanganyika and Zanzibar. Despite 49 years of existence of the union of Tanzania, there has been claims in various aspects both in Zanzibar and Tanganyika (Mainland).²³¹ Some of the common claims are: One, the nature of the union. The intention and the current form of the Union are always questioned. Some contended that the union was intended to be unitary while others contended that it was meant to be a federal arrangement.

It was hoped that time would demonstrate the usefulness of the Union and propel the peoples of the two countries to endorse it. According to this line of argument, a Constitutional Commission charged with the task of preparing a permanent Constitution for the Union was to be subsequently established. Unfortunately, to date both the form and the substantive content of the Union remain issues of considerable contention and dissatisfaction.

While it might have been agreed upon that a Constitutional Commission should be established within a year to discuss the form of the Union, the establishment of such a Commission is useless if the foundation of the Union (Articles of Union 1964) has big cracks. The only solution, therefore, is modification of the Union and subsequently enacting a provision thereon to provide the Amendment of the Union Constitution, and addition of any Union matters in future. Without the modification of Articles of Union and referendum thereon, the new Constitution will bring more disputes and mistrust to both Zanzibaris and Tanganyikans as each side blames the other for being a source of problems.

While Zanzibaris do not support the idea of a unitary government as they think that this created for them a local and subordinate government to Tanganyika without any autonomy of its own, Tanganyikans claim that the Union government is biased against them, and

²³¹ G 55 member of Parliament from Mainland Tanzania

even, through some of their MPs, they demanded to have the government of Tanganyika with its full authority.²³² While the ideals of the Union are not in dispute, there are different preferences for the form that the relationship should assume. There are those who argue that the current two government system should be retained.²³³ On the other extreme, some have argued that, in fact, only a single (fully unified) government is appropriate. Considerable bodies of opinions have made the point that the Union should comprise three governments. The Article of Union should have been the basic law for providing the type of Government that is suitable for the Union and not otherwise.

CHAPTER SIX

6.0. CONCLUSION AND RECOMMENDATIONS

6.1 Introduction

As far as the Union of Tanganyika and Zanzibar is concerned, a lot has been done but more is needed in order that the Union is suitable to the situation of Tanzania today. After more than four decades of the Union, its main motive of strengthening and stabilizing the situation of Zanzibar by uniting Tanganyika and Zanzibar has proved that more needs to be

²³² G55

²³³ Opinions during constitutional review 2012-2013

done to eradicate the confusion as far the legal status of the Articles of Union is concerned. It is crucial that a clear distinction is made between the centre exercising powers over union matters in respect of the United Republic of Tanzania and the centre exercising powers over non-union matters in respect of the Tanzanian Mainland alone. The function of a Constitution is, of course, to balance power, be it legislative, executive or judicial. But the main reason for having a constitution is identity; the constitution serves as the identity of the people.

The Union of Tanzania would have been something to be proud of because, after the struggle for independence, it is one of the most important decisions made in Tanzania. Unfortunately, it was not done by Tanzanians themselves and for Tanzanians. The need for modification of Articles of Union is a paramount so as to restore something that had always been there, the identity of being one people in one choice and that can only be realized through debating the Articles of Union and holding a referendum thereon to decide the fate of the Union. Even if there was some external influence, it can only be termed as *felix culpa* because it has contributed to helping Tanzania reach its desired goal, the people's choice Union. As pointed out earlier, a federal structure of three governments, as recommended by Nyalali Commission appears to be a good start and after foreseeing the problem of disproportionate size of the regions, the federal structure of more than three governments could also be taken into consideration but only if the Articles of Union provide so and not otherwise. But it must be pointed out too that even a fully-fledged federal structure cannot be a solution where the constituent parts do not share a strong mutual desire to maintain it. If Tanzania, with the good will of the current political body, is not able to find a sustainable solution for the present Union, then the people should be courageous enough to say that the alternative is too horrendous to contemplate. If there were tensions and violence in Zanzibar even before the Union, there is no guarantee that these would cease after the Union. Neither would there be any guarantee that those tensions would diminish after the promulgation of the new Union constitution as long as the foundation of the Union (Articles of Union 1964) is very poor.

Perhaps one of the major aspects to require reconsideration would have been the state of the Union and the answer would have come from the Articles of Union if only the

commission had thought of its importance on the Union's future. In particular, the reinstitution of the Government of Tanganyika so as to create a federation of three governments and enhance the status of the Mainland vis-à-vis Zanzibar which operates as an autonomous government. The need to re-examine the state of the Union has been additionally fuelled by constitutional reforms in Zanzibar in 2010 through which Zanzibar has been described as a 'sovereign state' within the Union.

In the light of those reforms, is the Union threatened by Zanzibar's status and does it affect the original purport of the Articles of Union? Will the creation of a Tanganyika government undermine the autonomy of Zanzibar or strengthen the Union? The researcher for one, enjoins the Commission to observe, amongst others, the sanctity and inviolability of the Articles of Union, the existence of the Revolutionary Government of Zanzibar and national union, cohesion and peace. Another major aspect to be discussed during the *Mabaraza ya katiba* would possibly be the extent of presidential powers - limiting those powers and reconsidering the whole separation of powers system. This implies a consideration of the system of government and the way forward. Would it be a presidential system or parliamentary system? Presently, Tanzania operates a fascinating 'hybrid' system composed of elements of parliamentary and presidential systems and a peculiar Parliament consisting of 'two parts'- the National Assembly and the President (1977 Constitution, s. 62(1)). Given the nature of the separation of powers system, the President has been imbued with wide ranging powers which many see as an 'imperial presidency'. This obviously is fundamental to the democratic future of Tanzania. Yet, the researcher enjoins the Commission to observe the sanctity and inviolability of the executive, the legislature and judicature and the presidency.

A final issue to mention here relates to reform of the electoral system. In that respect, two aspects may be mentioned. The first is the possibility of a complete overhaul of the electoral system in view of the fact that the 1977 Constitution was adopted against the backdrop of a one-party system from which Tanzania has now moved away. Given that it is now a multi-party democracy, there is perhaps need for a fresh start to construct a democratic system based on the contemporary political practice in Tanzania. Secondly, under the current system special provisions are made to ensure that seats are reserved for

women in the parliament to promote gender equality.²³⁴ It may be necessary to review that practice to ensure compatibility with the democratic principles by which Tanzania purports to be governed.

6.2 Recommendations

The union between Tanganyika and Zanzibar is now more than forty nine (49) years old, but its history road has been very bumpy throughout the period under almost every President of Zanzibar and Tanzania Mainland. It has led to the forced resignation of one President; dismissal of two chief Ministers and last blow being the withdrawal of Zanzibar from OIC in late 1990s and a series of riots.

The following are some recommendations that may reduce or eliminate the tug of war between Tanganyika and Zanzibar. First, as the issue addressed in this particular dissertation is the legal status of Articles of Union in Constitution making in Tanzania. There is a need to keep a sharp eye on the foundation of the Union so as to avoid more problems in future. As the Union is deemed to be of mutual agreement, there is a need to revisit the Articles of Union and Tanzanian constitution so as to understand the real position of those bumps in the last 49 years. This is because, it's only the Articles of Union that will give a clear road map for the future strong Union of Tanzania.

Vuai Ame Kondo is of same opinion. He says:

*"In general, we should revisit the Articles of Union and amend those doubtful, useless matters and add the most useful ones for the benefit of both sides in the union. If our union was really agreed upon by free consent and mutual agreement why is the public from both sides of the union not allowed to debate the Articles of Union? And to adjust the problems in such a way that our neighbouring countries may be motivated to join our Union..."*²³⁵

The researcher suggests that, Articles of Union should have made clear that both Tanganyika and Zanzibar can directly negotiate grants with foreign countries and entities. Again, it is strongly suggested that it would have been wise for the Articles of Union to have stipulated, that the partner states are allowed to establish states Banks and be allowed to enter into bilateral and multilateral arrangements and take part in the field of

²³⁴ 1977 Constitution, Articles. 66(1) (b), 78(1)

²³⁵ My interview with Vuai Ame Kondo former member of the House of Representatives in May 2013 in Zanzibar

International co-operation, while the union government should be limited to defence, citizenship and currency. Second, there should be a referendum on the Articles of Union so as to give an opportunity to discuss the real form of the union needed by Tanganyikans and Zanzibaris. The tendency to leave everything about the Union to the executive is definitely not the best solution. Tanzanians should be given a forum to discuss the kind of Union they prefer. Dr Bakari has the following questions:

*“Sensitivity is not an objective of union. Virtually, everything is subject to discussion. If it was sensitive for the past four decades why should it be sensitive today? What is particularly sensitive within the union- are there non –negotiable sacred principles? Is the founding fathers’ creation not subject to discussion? Had Nyerere and Karume before signing the treaty foreseen the problems to be encountered under the union arrangement? Did they suggest solutions to the unanticipated problems...”*²³⁶

Prince Bagenda insists on the Referendum so as to avoid further tugs of war between the people even if our union has existed for many years. He says:

*“... The soviet Union existed for more than 70 years but it came suddenly to collapse as there was no involvement of the people at the beginning..”*²³⁷

Mayage (an independent journalist) is of this particular view:

*“This is an era of diplomacy. Give chance to the majority to give their opinions and give their ... which should prevail while safeguarding the interests of the minority to consolidate our democracy. An era of ruling by a strong arm has withered away.”*²³⁸

The researcher has learnt from the opinion of the people of both sides, Tanganyika and Zanzibar that they want the Union, but they need a Union that is clear- cut. Furthermore, they want to get hold of the first Contract, the Articles of Union and debate it before the writing of the new Constitution. Very unfortunately, as at the time of writing this dissertation, the writing of a new constitution of Tanzania is at the last stage and the first Constitution Draft was launched on 3rd day of June 2013. Hence, the chances of revisiting the Articles of Union are minimal. What does that mean? It means that there will be no valid Union Constitution since it has not been build on its Union foundation, the Articles of Union.

²³⁶ Ubwa: *Legality of Additional Matters Outside the Articles of Union*.

²³⁷ *ibid*

²³⁸ *ibid*

The present structure of the Union, which is a fusion of two governments into one with the wider jurisdiction to deal with the union matters and matters related to Tanganyika lead to invisible strong Tanganyika, it is advisable for the centre not to be too strong if the fears of the smaller state of being swallowed up are to be allayed. Though the Warioba first Constitution draft released on 3rd June 2013 suggest for three governments,²³⁹ the researcher has a view that, it will be illegal because the main question remains: Where does the Constitution derive its mandates? As that will be contrary to section (i) of Articles of Union 1964²⁴⁰ The making of federal structure will help to address the issues which exist such as contribution and funding of the Union and others if only the federal structure is provided by Articles of Union, because the Articles of Union is the Basic law hence supreme than that of the Union Constitution and the constitution of Zanzibar. During the Constitutional review collection *majority* of people from Tanganyika and Zanzibar advised that even the union legislature should be of two chambers (houses), the upper chamber comprising of equal members from both partners of the Union, who are elected by the electorate; and should have the constitutional power to over-ride the lower chamber in matters agreed by the two states and provided in the constitution. The lower chamber should be comprised of elected members presenting the constituencies, but the researcher again advises that it would be possible only if the Articles of Union does provide so.

*“ We should find the best form of the union as the current one is under complaints from both sides of the union, to have one unitary government will totally differ with the Articles of Union 1964 but at least we can have federal form of the union”*²⁴¹

The researcher strongly suggests that it would have been wise if the Articles of Union were modified first before writing a new Union Constitution, since there cannot be any Union of any sort without the Articles of Union providing the structure of the said Union.

Last but not least, when the union parliament makes any amendment to the union matters, it should not ignore the Articles of Union as it's the Union's basic law and the Union

²³⁹ Articles 57 of the Rasimu ya Katiba ya Muungano wa Tanzania 2013

²⁴⁰ Articles of Union 1964

²⁴¹ Nassoro Ali Kombo, Interviewed by the researcher at Mwakangale Konde in Pemba on 24th day of May 2013

Constitution is an offspring of the Articles of Union. It has been experienced that now is a normal life to de-value the treaty whenever the constitutional amendments occur. It is important that the treaty's obligations arising out of the Articles of Union, 1964 be faithfully discharged. The Articles of Union is the "marriage certificate" between the founders of the union. It is strongly suggested to the partners to sit down, evaluate and assess 'their marriage' vide the conditions set by the Articles or, if the said condition are outdated, they should be renewed with a full participation of citizens of both republics. The Union's 49 years of existence is a short time for a nation, but it is a long time for assessing the strengths and weaknesses. A number of socio-political developments have taken place within Tanzania and in the World in general. For example, the reasons which led to the Union, which were security considerations that possible threats of a counter revolution in Zanzibar and fear that Zanzibar would have been used by enemy super powers are no longer relevant. The researcher suggests that partners should sit down and formulate an equitable and workable Articles of Union for a federal structure for the interest of Tanganyikans and Zanzibaris.

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