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THE UNION IN TANZANIA: CHALLENGES AND OPPORTUNITIES AS TANZANIA STRIDES TOWARDS A NEW CONSTITUTION

ABSTRACT

It is now 53 years since Tanganyika and Zanzibar united to form Tanzania. Local legal scholars have been always attending the call to address the Union nature, its challenges and legal implication. According to the literature, the Union formation was characterized by absence of public consultation and participation, personal interests, lack of constitutionalism and structural ambiguity. There are Union muddles rooted in anomalies characterizing the Union formation and operation. The Union muddles are posing challenges on the survival of the same. In the year 2014/2015 the constitutional review process was inaugurated. Constitution reforms in Tanzania may offer remedies against Union challenges. Through the review process, there are several opportunities and solutions to the Union problems. All these are addressed in this article.

Key words: *The Union, Challenges, Constitutional review and, Opportunities.*

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1.0 INTRODUCTION

Two and half years after independence of Tanganyika,² and three months after Zanzibar Revolution,³ the two independent sovereign states enjoyed a legal marriage in terms of the Union on 26th April 1964. The merging of the two states resulted into establishment of international person called the United Republic of Tanzania. The Union formation is surrounded by myths fused and confused in social, historical, political and legal paradoxes. From the day of its celebration to date, the Union is subjected to debates, complaints and discontent levelled against both its nature and utility. In extreme cases even the legality of that partnership is questioned.⁴ The discussion is yet to be closed and seemingly endless pending solutions to the Union challenges. This article recaptures salient challenges of the Union by comparative analysis with available literature on state formation and its constitutional principles. The article covers historical foundation of the union, its legality, structural ambiguity and jurisdictional challenges of member States. The article also recalls constitution reforms in Tanzania and available opportunities towards a new constitution. Through constitution review process, there are solutions for the perennial muddles which have characterised the Union.

2.0 THEORETICAL PERSPECTIVES ON THE NATURE OF THE STATE AND ITS FORMATION

Nature of state is a broad concept and jurisprudential aspect in law. There are divergent philosophical views on the concept. They may be grouped into interrelated groups sharing similar outlooks at different intervals in terms of time. The naturalists' outlook on the concept is different from that of the positivists' outlook. For instance, Thomas Hobbes among the naturalists viewed the

concept as any political entity organised as per the wishes of its constituent people in order to form consensus on the form and nature of the state.⁵ John Locke joins hands with Hobbes at different perspective. For him the nature of state is a state of perfect freedom and equality. The common idea to draw is that the agreements by the society determine the form of state, laws and its order whether natural or manmade towards ensuring justice.⁶

Contrary to natural law theorists, the positivists; John Austin; and Bentham developed more paradox. The two believed that the nature of state and law has nothing in connection with morality. What is important is the peoples' desire and agreement to its nature. This perspective develops new idea of sovereignty that, any form of state and its law should establish and encourage sovereignty to itself and its nationals.⁷ Therefore the general idea to be grasped from both naturalists and positivists is that the form of state has to be adopted to reflect peoples' desire through their agreements. The state formed and laws established are authoritative with unquestionable binding nature and sovereignty.

2.1 Forms of United States

Daniel J. Elazar in his article on "*Forms of State*"⁸ distinguishes forms of state and government. He says that, there are two common forms of states namely; federal state and unitary state. On the other hand, there can be many forms of government such as republic, democratic and monarchy.⁹ Although there is no scholarly consensus on the matter, the submission by Daniel J. Elazar seems to be relevant for distinguishing between the two, State and government. The federal and unitary forms will be the base of

this article to scrutinize concisely in order to grasp the form of state the Union in Tanzania is subjected to.

The unitary state may simply refer to a situation where two independent sovereign states competent to enter into international relations unite to form a single state. Through contracts the two states voluntarily venture their dominion and state affairs into one government commonly referred to as union government. Friedmann, defines unitary state as joint ventures of power and authority between two independent sovereign states.¹⁰ There are several principles constitutionally marked to be the bases of this form of state. These principles are traced back from the social contract theory, which developed during the 17th and 18th centuries.¹¹ The theory is rooted in the development of the commodity economy wherein people entered into contractual relationships as equals be it at the level of production or exchange as well as from the theories on nature of state. Generally, the theory develops two major assumptions on the features that any social contract shall possess.

Firstly, the source of political power resides in the people as opposed to the divine theory which provides on the source of any power, authority and law to be God. Secondly, the source of Government (State) is by the mandate of the people through their consent. These propositions were later supported by John of Salisbury in 1159, John of Paris in 1302, and St. Thomas Aquinas 1226-1276.¹²

Subsequently the social contract theory paved way for the development of other theoretical concepts including unionism in the nature of unitary and federal forms of state. The Unitarists conceptualize the form of state in which all the powers are vested on the central

government and the local governments exist and do operate as desired by the central government. It involves the creation of a single integrated system of government which is vested with all the powers.¹³ On looking at the constitutional principles, the Unitary State puts all power and executive authority to a single sovereign state and ruler¹⁴ and such sovereign state shall have full mandate on all administrative powers within its jurisdiction and abroad.¹⁵ More precisely Montesquieu opines that, Unitary State and unitary form of government shall be held with single legitimate authority having acquired its authority from people. This is to say "*In every Unitary State, it is held with single legitimate authority.*"¹⁶

Generally the Unitary State has five major characteristics namely;- a single central all-powerful Government, local Government exist at the will of the Central Government, Constitution can be written or unwritten, flexibility of the Constitution and Administration and a single uniform administration system as practiced in Britain, France, Japan, Italy and China. Such a single Government is well centralized to hold the responsibility, it should also be stable and strong enough to run and administer the affairs of the State.¹⁷

The federalists conceptualize the matter differently. According to them in a Federal State, the governmental power and authority are split between a Central Government and its constituent States. Usually, an overriding law of the land is the Constitution which allocates duties, rights, and privileges to each level of Government and its departments. The Constitution defines how power is shared between the central government and the component states. Traditionally, in a federal

2 Tanganyika became independent on 9th December 1961

3 The revolution took place on the 12th January, 1964

4 Mandopi K, "44 years of Union and its legal complications" A Discussion paper presented to the Institute of Judicial Administration Lushoto on 4th April, 2008 Marking the Union Day on 26th April, 2008 P.5, 2008

5 M. Lacey, *State of Nature*, Routledge Taylor & Francis Group; www.olevelphilosophy.co.uk, 1989

6 J. Rosceque, *State of Nature*, Routledge Taylor & Francis Group; www.olevelphilosophy.co.uk, 1886

7 J. Austin, *A Theoretician of Law*, Weybridge Law Review, Surrey Stanford, New York., 1970

8 E.J. Daniel, *Forms of State: Federal, Unitary or ...* Jerusalem Center for Public Affairs Volume 2, 2010

9 Ibid

10 W. Friedmann, *Legal Theory*, 5th Edition, Stevens & Sons, London, 1967

11 K.C. Mtaki, *Constitutionals and Legal Systems of East Africa* (General Principles of the Constitution) Open University of Tanzania, Dar es Salaam, 1996

12 Harlow C. & R. Rawling, *Constitution and Administration*, 3rd Edition, Cambridge University Press, London, P.212, 1970

13 Harlow C. & R. Rawling (1970) Ibid also quoted by Mtaki K. C., (1996), Loc.cit

14 H. Phillips, *Constitutional and Administrative Law*, 7th Edition, London, 1987

15 ECS. Wade, *Constitutional Law*, 6th Edition, New York, 1960

16 K.C. Mtaki, (1996), *Infra*.

17 Freidman K., 'Theories and Constitutional Principles,' Analysis of State and Nature of Government, Vol 6 Law Review Journal, Harvard, 2002

state the powers reserved to the central government includes; security and defense, the union legislature and judiciary, foreign affairs and monetary issues. The component states retain autonomous on the rest of state affairs. The United States of America is considered the first modern federation. After declaring independence from Britain, the U.S. adopted its first Constitution, the Articles of Confederation in 1781. This was the first step towards federalism by establishing the Federal Congress. U.S.A is a Government with strong central powers while residing some authority and responsibilities to Constituent States.¹⁸ Generally, the federal form of state is featured by one Central Government identified in the supreme law but with recognition of governments to the other constituencies constituting the federation.¹⁹

3.0 CHALLENGES OF THE UNION

3.1 Nature of Tanzanian Union

There is no doubt that unitary state is held by one central government, basing on this analysis two major legal issues is inevitable, that whether Tanzania is held by a single legitimate authority; and whether survival of Zanzibar is within the discretion of the Union Government. The two questions are negatively answered. The Union Constitution is acknowledging existence of two legitimate authority as it entails that, ‘all state authority in the United Republic shall be exercised and controlled by two organs....’²⁰ The spirit of this provision signifies and acknowledges the existence of two entities vested with authoritative power in a single sovereign State. Also, in the latter question before the Union, Zanzibar and Tanganyika each had competent features of any sovereign State; hence they were able to enter into international contractual relations. Today’s

18 Ibid
19 MC. Thomas, *Constitutional Law in United States of America*, The Lawbook Exchange Ltd, Northcalorina – America p. 67 2004 (available through www.ebooksdownloads.xyz/principles-of-constitutional-law as accessed on 8th Sept. 2017
20 Article 4 of the Constitution of the United Republic of Tanzania, 1977

legal concern is whether the two States are still sovereign state? This constitutional issue over-whelmed the proceedings in the case of *S.M.Z. vs. Machano Khamis Ali and 17 Others*²¹, where the court had to consider if treason can be committed against Zanzibar. Apart from several constitutional issues to be addressed on the matter, of interest to consider was whether Zanzibar is a sovereign state hence treason can be committed against it and their Lordships at page 8 of the type – written page inferred that:-

After the above exposition, we have no difficulty at all to answer that question in the negative. The International Person called Tanganyika and Zanzibar ceased to exist as from 26th April, 1964 because of the Articles of Union. The two states merged to form a new international person called the United Republic of Tanzania.

Therefore, it was ruled out that a person cannot commit treason to non sovereign state. The position was later approved in the case *Mtumwa Said Haji and 49 others v. Attorney General*,²² when it was stressed that:

The constituent states of Tanganyika now Tanzania Mainland and Zanzibar have long (sic) since lost their legal personality; they cannot negotiate a treaty, nor can they negotiate to amend the Treaty of Union.

It should be noted that although with the adoption of the Articles of Union, Tanganyika lost structural existence in total, Zanzibar is alive with her original fixed territorial boundaries, the Constitution and Government. It is from this stance, debates and legal

21 Criminal Application No. 8 of 2000 Court of Appeal of Tanzania at Zanzibar (unreported)
22 [2001] TLR 425

forums have been witnessed on the nature of the Union. Two schools of thoughts have developed on the issue, namely, the unitarists, who maintain that the created person after 26th April, 1964 is a Unitary state. Federalists on the other side consider the nature of a legal person created to be a Federal State. There is also a neutral group standing in between unitarists and federalists. The latter maintains that Tanzania is characterized by both unitary and federal features therefore, is a semi federal and semi unitary state.²³

3.2 The Motives and Foundations of the Union

The foundations and reasons for the Union are questionable. The Union formation was featured by lack of transparency.²⁴ The secrecy on its foundation may reveal lack of peoples’ participation on both, the need for the Union and its structural formula. The propositions that the Union has both unitary and federalist features are within the mind of many scholars. Much labour may not be devoted to substantiate a need for unity. Historically, unity was categorized as the only means of success as it was even encouraged among workers by establishing the Tanganyika Federation of Labors which ventured with Federation of Zanzibar for strengthening workers unity.²⁵

Rarely do academic and legal corners consider the question on whether or not a union was needed. Scholarly treatises, in particular, local ones have been sparingly addressing the matter.²⁶ Did the people express the need for the union or it was just a leaders’ affair? Overwhelming legal and historical evidence presents the Union as a leaders’ personal

23 Makaramba V, ‘The State of Constitutional Development in Tanzania’ *Eastern Africa Law Review* vol. 258 - 274, December, 2003
24 Mvungi S., ‘Legal Problems of the Union between Tanganyika and Zanzibar’ *Eastern Africa Law Review* vol. 213 - 257, December, 2003
25 F. Kamughisha, *African Advanced History*, 2nd Edition, Mkuki na Nyota Publishers, Dar es Salaam, p. 301, 1994
26 Kabudi P. K., ‘The United Republic of Tanzania after a Quarter of a century: A legal Appraisal of the state of the union of Tanganyika and Zanzibar pp.313-315, 1993

designation.²⁷ For example Mvungi had this to say:

‘...the political leaders of the two states first met secretly in Zanzibar and agreed to unite their two countries before the public was made aware of the union.’²⁸

This observation is squarely correct for nowhere is the idea for the Union recorded to have ever been made the subject of public discussion before signing of the Union treaty. It is unconceivable that such an important matter and of far reaching consequences to the two states missed public awareness and debate. It is beyond dispute that the current union challenges are traced from its original form and nature. According to Shivji for instance:

The Articles of the union were a masterly piece of legal draftsmanship guided by immediate requirements of power sharing rather than, any grand principles of constitutionalism.²⁹

Again, that is absolutely true. That proposition is supported by the personal interests of the two leaders secured under the Articles of the Union, as it reads;

*Art (vi) (a) The first president of the United Republic shall be Mwalimu Julius K. Nyerere.....
(b) The first vice president from Zanzibar ...shall be Sheikh AbeidKarume.³⁰*

27 The idea for a union was rooted from Nyerere and Karume
28 Mvungi S., (2003) *Infra*.
29 Shivji I. G., ‘Problems of constitution making as consensus building: The Tanzania experience in the state & constitutionalism in southern Africa (1998), owensichone (Ed.) (Harare Southern African Printing House (SAPPHO) Ltd pp. 126 -144, 1998)
30 The Articles of union between the Republic of Tanganyika and the peoples Republic Zanzibar

The recording and approval of the two names in the articles of the Union addressed the personal interests of the leaders. This move epitomised their ambitions in the process. While on other hand with political ambitions by the leaders, security and ideological reasons backed the union³¹. The union intended to enhance security as against external and internal political upheavals, and ideological tensions. The minister for foreign affairs at the material time was recorded saying that;

*Our first concern was the growing communist presence, and second the danger of cold war coming in.....the problem was how to isolate Zanzibar from Eastern countries yet not to be used by the west for its own purposes.*³²

That being the case, the argument by J. K. Nyerere that the Union was a step towards African Unity is an eye wash.³³ It is submitted here relatively in affirmation to Kabudi that factors like geographical proximity; common historical, cultural and political heritage; and the long standing friendship between the people, leaders and the nationalist movements which led the two countries to unite,³⁴ are subsidiary if at all had anything to influence on formation of the Union.

Indications that the union was in principal activated by personal interests of the leaders are axiomatic; hast in union making, overstepping of the people in the process, suspension of the Zanzibar Attorney General at the material time,³⁵ personal inclusion of J. K. Nyerere and Sheikh. A. Karume as parts of the Articles of the Union and, the Union ambiguous structure. From the foregoing, justification for constant political and legal

31 Kabudi (1993), *Infra.* and Shivji (1998), *Infra.*

32 WE. Smith, *Nyerere of Tanzania* Gollancz London, pp. 176 -177, 1973

33 JK. Nyerere, *Freedom and Development Dar Es Salaam*, Oxford University press p. 293, 1973

34 Kabudi (1993), *Infra.*

35 Mandopi K. (2008), *Infra.*, p.4

voices against the nature and utility of the Union is realised.

Nevertheless, despite the fact that the union celebration was influenced and characterized by the personal interest, once Mwalimu Julius Kambarage Nyerere, issued the following statement at the conference of independent African states in Addis Ababa, Ethiopia, in 1960:

*Many of us agree without pretences or inhibitions that the East African Federation will be a good thing. We have stated this, and it remains true, that the borders separating our countries were put in place not by ourselves but by imperialists. Therefore, we should not allow them to be used against our unity ... we must persistently knock at the offices of the colonialists not to demand the independence of Tanganyika, then Kenya and Uganda and finally Zanzibar, but we must do it to demand the independence of East Africa as one political federation.*³⁶

Thus, the following were the reasons for Union according to union founders:-

- i. The people of Tanganyika and Zanzibar have historically enjoyed very close relations in various areas, including family ties, trade, culture, language and political interactions.
- ii. A strong spirit of African unity has prevailed, especially with the formation of the East African Community as a building block for the establishment of the proposed United States of Africa. Even before Tanganyika achieved its independence, Mwalimu Nyerere

36 The Tanganyika Standard Newspaper, November 1964

and other leaders in East Africa who were fighting for the liberation of the continent from colonialists were determined to achieve African Unity.

- iii. Mwalimu Nyerere personally advocated for African unity starting with the formation of regional economic groupings as the building blocks, following consultations with various leaders from the then Pan-African Freedom Movement for East and Central Africa (PAFMECA).

Therefore, it was the elite's mission that charity begins at home. By virtue of the union of Tanganyika and Zanzibar, it was believed that the Union will be the foundation for East African Unity, Central Africa and African Unity. One of the prominent leaders and founders of Pan-African Freedom Movement in the New World, Marcus Garvey said;

*...the liberation of Blacks resides on their hand, but with unity may be achieved either abroad or in their home land.*³⁷

However, there are several averments from both scholars and activists against above reasons for the Union formation. They are said to be subsidiary if at all hold anything to do with the Union.³⁸ Also once Hon. Pius Msekwa commented that:

... many present day Tanzanians are presumably aware of the current challenges facing the Union of Tanganyika and Zanzibar, which are known in Kiswahili as 'kero za Muungano'. Party leaders who were in the Revolutionary Council at that time, have confirmed that the matter was discussed

37 F. Kamughisha, *African Advanced History, 2nd Edition*, Mkuki na Nyota Publishers, Dar es Salaam, 1994

38 Jembe's speech, 1994: Quoted by Shivji(1998), *Infra.*, p. 133

*in the Council, and that while there were reservations on the part of some members, as were inclined by Abdallah Kassim Hanga who made an emotional appeal in support of the Union.*³⁹

However, it must be acknowledged that this Union was secretly negotiated in favour of founders' mission.⁴⁰ It is from this base, that the whole process was featured by personal interest; other than constitutionalism principles leading to its ambiguous structure which now hits the mind of legal and political practitioners.

3.3The List of Union Matters under the Articles of Union

Articles of union are the foundation of the Union. They provide for the basic structure and essentials of the Union. The Union dance was to be tuned and played within the Articles parameters. Item (IV) of the Articles is a fundamental one. The Union Matters listed in the Articles of Union are: The Constitution and Government of the United Republic; External Affairs; Defense; Police; Emergency powers; Citizenship; Immigration, External Trade and Borrowing; The Public service of the United Republic and Income Tax, Corporation, Tax, custom and Excise; Harbours, civil Aviation, posts and Telegraphs.

Original version and spirit of the Union was limited to those eleven items. No doubt that the framers of the Articles of the Union had paid the necessary consideration on the matter. The list of union matters according to the Constitutional Bill (Second version) tabled before the Constitutional Assembly were reduced to 7 items.⁴¹ This was according to the views collected from the electorate. It should be noted that the list was expanded up-to 16 union matters by the Constituent

39 Msekwa's comment, 1993 Quoted by Kabudi (1993), *Infra.*, p. 23
40 The Msemakweli (News paper) Issued No. 211 of October, 2 1993

41 The schedule of the Constitutional Bill (second version) of January, 2014

Assembly.⁴² This trend also expands both legal and political debate on the sustainability of Union. The Union matters presented by the commission for constitutional change included;⁴³

- i. The constitution of the United Republic of Tanzania
- ii. Security and Military base of the United Republic of Tanzania
- iii. Nationality and Immigrations
- iv. National currency and the Central Bank of Tanzania
- v. International relations
- vi. Political Parties and its registration process
- vii. Union goods revenues and any revenues collected.

The alterations of these union matters from those provided in the Articles of Union were evidencing the theme of establishing a federal state as opposed to the unitary state. However, those propositions were altered by the Constituent Assembly as the list was enlarged up-to sixteen (16) Union Matters whereas five (5) items were added to the list recorded in the Articles of Union. Modification made to the nature of the Union provided for in the report of the Commission for Constitution change and the proposed Constitution by the Constituent Assembly add to the confusion and legal debate on the nature of the Union.

3.4 Extension of the Union Matters in the List

Amendments to the constitution adopted after formulation of the Articles of Union increased the powers of the Union Government through enlargement of the Union matters in the list. Today; the list is hitting on twenty two items.⁴⁴

The legality of the extension of the list is another fertile ground for debates. According to Mvungi extension of the list does not bring any problem. He states:

It is now pertinent to conclude that, in a union of states with strong unitary characteristics like the one of Tanzania has adopted, powers are given to the parts of the union as long as they are not required and necessary to the union. Therefore, the exclusiveness of non-union matters is as a matter of fact only a question of degree to which a matter is of importance to the existence of the union. Once matter is deemed to be of importance to the union, then its surrender to the union becomes only a matter of course and cannot be denied on grounds of "belonging or not, belonging to the list of union matters"⁴⁵

The position by Mvungi is supported by the school of thought he subscribes to on the nature of the union. He believes that the union is structured in a semi – federal character with strong unitary characteristics. For federalists, the contrary is the position. Shivji forcefully submits:

That scheme was implicitly made immutable and a 'fundamental condition' of the association of the two states. To tamper with those provisions is the surest way to destroy the legal foundations of the union so carefully laid down by framers and signatories of the Articles of union (embodied in the Acts of union). Additions to and subtle alterations of the reserved list on union matters is like hammer – blows delivered at the core of those foundations...⁴⁶

Once again, this debate must be resolved by importing explicit meaning of the Articles of union. A thorough reading of the Articles brings no doubt that there is no ambiguity on the matter. The Articles means what they provide. Nothing in the Articles indicates possible extension or deduction from the list. Any attempt to construe the contrary is unattainable and is just like opening the Pandora's Box.

3.5 The Legislative Relations under the Union

Article 64 of the Union Constitution⁴⁷ read together with Article 78 of Zanzibar Constitution⁴⁸ appears to govern legislative relations in Tanzania. It is provided that the parliament has legislative powers over union matters and all other matters concerning Mainland Tanzania. Legislative powers in Tanzania Zanzibar over non-union matters are vested in the House of Representatives.⁴⁹ This article subscribes to the tenet that union in Tanzania has some strong features of a federal State. That being the case, the two legislative bodies are at per. Shivji submitted rightly that:

The Zanzibar legislature is not subordinate to the union parliament. Its powers are not devolved or delegated. Its powers are plenary in all respects bound only by the instrument that creates it....⁵⁰

That is the position. Each organ is competent in its own sphere. Loudly, the union constitution is self- illustrative:

Article 64(3) of the Constitution provides to the effect that any law enacted by the House of Representatives concerning any matter in Tanzania Zanzibar which is within the legislative jurisdiction of parliament, that law

shall be null and void and likewise if any Law enacted by parliament concerning any matter which is within the legislative jurisdiction of the House of Representatives that law shall be null and void.

Necessarily, it must be inferred that, since the above relations have their root in the agreement by the two parts of the Union any change on the terms of agreement is subject to consensus. Nothing can be imposed without such consensus. Indeed, this is the spirit of Article 98(1) (b) of the Union Constitution which requires two – third majority consent by members of parliament from both parts of the Union for alteration of the Union Matters.

3.6 Autonomous of Zanzibar

One of the most controversial issues on the debate of the Union has always been on the autonomy of Zanzibar. The issue is whether Zanzibar remained a sovereign state internally although it exists as an integral part of the United Republic of Tanzania. The subject became more complicated by the Zanzibar Constitution Amendment of 2010 which declared Zanzibar to be a state with fixed territorial boundaries. It has her own constitution, government though still claimed to be an integral part of the United Republic of Tanzania.⁵¹ Despite the Union, Zanzibar retains unlimited freedom in discussing and addressing internal affairs which are not in the Union Matters list. The confusing fact is the continuous and endless extension of the items in the Union list. Unless the trend is curbed, it may lead to total absorption of the Island into the Union. Nevertheless the latter may not be the fact because of the legal hurdle which calls for Zanzibar's consent for any proposed constitution amendment affecting matters in the Union list.⁵²

42 The 1st Schedule of the Proposed Constitution by the Constitution Assembly October, 2014

43 Ibid.

44 The first schedule to the Constitution of United Republic of

Tanzania, 1977

45 Mvungi S., (2003), *Infra*, p.235

46 Shivji I. G., (1998), *Infra*.

47 The Constitution of the United Republic of Tanzania of 1977

48 The Constitution of Zanzibar of 1984

49 Section 106 (3) of the Constitution of Zanzibar of 1984

50 Shivji I. G. (1998), *Infra*.

51 Section 2 of the Constitution of Zanzibar, 1984

52 Article 98(1) of the Constitution of United Republic of Tanzania, 1977

3.7 Subsumption of Tanganyika

Critics to the federal state in Tanzania stand centrally on the proposition maintaining absorption of Tanganyika in the Union. That, since the Union Government discharges all functions and deal with all matters over Tanzania mainland, the latter had disappeared. It is further argued that continuous enlargement of the Union Matters list is a step towards absorption of Zanzibar. This is also the view by the ruling regime in Tanzania that Tanganyika kissed the dust after the Union and it is no longer surviving.⁵³ That proposition is absolutely wrong. It is maintained here that in the absence of Tanganyika there can neither exist Union Matters nor matters concerning Mainland Tanzania in the constitution. Absorption of Tanganyika might implicate either that the Union Government is of Tanganyika or that Tanganyika is a Union Government. Irresistible inference in such a case may be that Zanzibar surrendered some of her powers to Tanganyika and that Tanganyika allotted nothing in exchange. Surely, such an inference is inconceivable be it in fact or law.

Ambiguous structure of the Union and its absurd operation does not imply non-existence of Tanganyika. Truly, structural anomalies invite fair critics to the Union. It is the living fact that Zanzibar's members of the Union parliament do legislate over Non – Union Matters for Tanganyika. Mainland counterparts are not availed in equal terms for Zanzibar. Further confusion arises from the fusion of Union Government with that of Tanganyika. Zanzibari holding administrative posts in the Union Government have automatic jurisdiction and powers over all Tanganyika affairs. But to the isles, there is no avenue for a Non – Zanzibari to exercise powers over Zanzibar in non-union matters. In the current constitutional structure, it is possible and has happened for the supposed three governments in Tanzania to be headed by Zanzibari.⁵⁴ More

⁵³ Kabudi P., (1993), *Infra*.

⁵⁴ That was a position from 1985 -1995 where a Zanzibar President (President A. H. Mwinyi) headed the Government of United

difficulties are created with establishment of the special Constitutional Court.⁵⁵ The court's jurisdiction is limited to the dispute between the Union Government and Revolutionary Government of Zanzibar. What will be the case if the dispute is between Tanganyika and Zanzibar or Tanganyika's interests with the Union? It must be noted that the *Locus stand* by a necessary implication is limited to the union and Zanzibar Governments. Where it is possible for Zanzibar interests to conflict with those for the Union or Tanganyika why not the vice versa for Tanganyika? Or do the Government of the United Republic of Tanzania means also the Government of Tanganyika? If the latter is the case, the confusion will go deeper. For the union will imply Zanzibar surrendering some of its powers (Union Matters) to Tanganyika.

3.8 Union Challenges and Judicial Dilemma

Before launching a move for Constitutional change courts had time to comment on the challenges of the Union and suggested some possible solutions. This is well explained in the case of *S. M. Z. Vs. Machano Khamis Ali* (supra), where the Court while referring to the case of *Sheik Sharif Hamad vs. SMZ*⁵⁶ had the following to comment;

We mused over a number of incongruent provisions of the two constitutions and after we had this to say on page 18 of the type-written judgment: We recommend to the relevant authorities on both sides of the Union, to take necessary steps to harmonize these conflicting sections and other sections of the two constitutions which are potentially irreconcilable.

Republic of Tanzania with powers over both union matters and non-union matters for Tanzania Mainland. Zanzibar at the material time had its own Government. As a result, all matters (union and non-union matters) in Tanzania were under the Governments headed by Zanzibar's

⁵⁵ Established chapter five part seven of the Constitution of United Republic of Tanzania

⁵⁶ Criminal Appeal No. 171 of 1992 (Unreported)

In the two above cases the court noted serious conflicts between Zanzibar and the Union Constitutions. Strangely, the court departed from its traditional adjudicatory role and it ventured and trespassed into the advisory chamber. This is a new and interesting innovation by the court which attracts critical discussion. Since the inherent function of the judiciary has been adjudication, it is not clear on the weight to be accorded on the advice of the court when acting in the position of advisory committee or organ. Nevertheless judicial intervention albeit in advisory capacity is additional proof on the confusion on the form and operation of Union in Tanzania. More interesting on judicial practice is that while the provisions of item 21 of the First Schedule of the Constitution⁵⁷ provides the Court of Appeal of the United Republic of Tanzania to be among the Union Matters, in the case of *Mwajuma Ali Mtipula v. Shomarali Mtipula*⁵⁸ his Lordship Mroso J. A. held that;

Since the Court of Appeal has no jurisdiction to interpret the Constitution of Zanzibar, one cannot go into the question if a revision case is or is not included in the words "kesizozote" (in article 96(2) of the Constitution of Zanzibar, 1984.

The Court of Appeal which is a union matter is vested with limited jurisdiction in Zanzibar. It has neither power to interpret the constitution of Zanzibar nor to attend appeals originating from Chief Kadhi's Court. Worse still, doors are still open for other laws limiting the jurisdiction of the Court of Appeal to be made.⁵⁹ Apparently, the Court is lamenting against her limited jurisdiction. In the case of *Mohamed Rafiki Ishak Ayoub and Others*

⁵⁷ The Constitution of United Republic of Tanzania, 1977

⁵⁸ [2005] TLR 245

⁵⁹ Art 117(1) of the United Republic of Tanzania, 1977 read together with Art. 99 of Zanzibar Constitution, 1984.

v. Anwar Hussein Jaffar and Others,⁶⁰ when the Court was moved to invoke its power to entertain matters originating from Zanzibar it stated;

... the Court of Appeal stepped into the shoes of the High Court of Zanzibar to quash decisions of Kadhi's Courts which had been obtained by fraud... If leave to appeal is granted therefore, the Court of Appeal will be called upon to act in similar manner as in Civil Appeal Number 35 of 1994. The Court of Appeal would have jurisdiction notwithstanding the provisions of article 96(2) of the Constitution of Zanzibar 1984.

and in its 'obita' had this to comment:-

This practice is so embarrassing that the Court has vested with power but limited, (sic) the regulatory authority should find the alternative to solve these existing challenges.

This muse by judiciary of incongruent provisions of the two Constitutions should not be left isolated which has turned the judiciary from law interpretation and implementation to advisory board of the executive, all being the legal incongruent of Union presenting structural and operational paradox. Inevitably, this presents an urgent call for solution. An opportunity for remedies is within the process for Constitution review.

⁶⁰ Court of Appeal of Tanzania, Civil Appeal Number 35 of 1994 (Unreported)

4.0 TOWARDS ADOPTION OF A NEW CONSTITUTION

The Union founded in the Articles of Union is now featuring in the current Constitution.⁶¹ Its structural ambiguity and incongruent practices has not only been a political issue but also a legal debate. The Union is characterized by challenges and as part of the solution efforts to adopt a new constitution is now ongoing. The Constitutional Review Act,⁶² was enacted by the Parliament to bridge the process as its long title provides

An Act to provide for the establishment of the Constitutional Review Commission for purposes of co-ordination and collection of public opinions on the Constitution; to examine and analyze public opinions; to provide for fora for constitutional review; to provide for preparation and submission of report on the public opinions; to provide for the procedure to constitute the Constituent Assembly, the conduct of referendum and to provide for related matters.

In ensuring fulfillment of the purposes, the Commission for Constitution Review was established and commissioned to initialize the process pursuant to section 5 of the Act (Supra) and was responsible to adhere to its establishment Act.⁶³ This marked the beginning of Tanzanian Constitutional Review process.

4.1 Opportunity through Constitutional Review Process

Now it is over fifty three (53) years of the Union survival, but due to internal pressure generated by the current challenges, Constitution review process was ongoing. Indeed, this was and still is the golden

opportunity to formalize the Union as per public consensus and constitutionalism principles. Section 8 of the Constitution Review Act⁶⁴ provide for terms of references during the process whereas sections 9 and 17 of the Act (supra) are cementing on the matter. Much attention of legal scholars was placed on the terms of references. It is unfortunate to the Union that the Act provided for the Commission to adhere to the national value and ensure safeguard of the existence of the United Republic but further provided for ensuring the existence of the Revolutionary Government of Zanzibar divorcing the realization of the other side of the Union, the Republic Government of Tanganyika. This being the fact, the said opportunity was also subjected to criticisms worth of consideration for the public interest.

Once the late Mvungi S., (Constitutional Review Commission's member) was quoted saying that;

... this is an ample time to solve the long experienced challenges of the Union, but unfortunately the provisions of section 9(2) of the Constitution Review Act, (Supra) challenges if not to bar at all the entire theme. The spirit of its provisions restricts the commission to address much on the nature of the Union.⁶⁵

However, the provisions of section 8(2) of the Act (supra) opened the door to the Commission to add or operationalize any matter not within the terms of references if it considers fit and appropriate to do so during the process of the Constitution review. This provision bridged the bar and the Commission had the First Version of Constitutional Bill presented and among many other things, the Bill touched the Union and its nature.

⁶⁴ Ibid

⁶⁵ Mwananchi Newspaper, ISSN.0856-7573NO. 5125 of August

4th, 2014.

4.1.1 Constitutional Bill (First Version) of 2013

The spirit of Article 57(1) & (2) of the Constitutional Bill (first version), 2013 which provides for adoption of three independent authorities that is, the Government of the United Republic of Tanzania, the Revolutionary Government of Zanzibar and the Government of Tanzania Mainland,⁶⁶ revealed the citizens' desire on the matter. It was recommended that just like in Zanzibar, the Tanganyika autonomy should be recognized and legally established in the Constitution. This observation paves way to Federal government. It is believed by some scholars that the Bill (first version) simply introduced the new approach regarding the Union. Robert Makaramba earlier before had this to say:

Opposed to the unitarists' view are the federalists who argue that the system of government envisaged by Articles of the Union is one in which there was a clear-cut dichotomy of powers between the centre and the units. According to the federalists, the Articles of the Union gave birth to a sovereign Federal Republic of a triangular system in nature, consisting of three governments, namely the Government of the United Republic, Government of Tanzania Mainland and Government of Zanzibar.⁶⁷

Over all, the first draft of the Commission for Constitutional Review process may simply be construed that it is nothing than introducing federal state made out of the sovereign States of Tanganyika and Zanzibar. However, the Bill was criticized for addressing more on the nature of the Union than scrutinizing the constitutionalism principles on the matter.

⁶⁶ Constitution Bill tabled by the Commission for Constitution

Review, June, 2013.

⁶⁷ Makaramba V. R., (2001), *Infra*.

4.1.2 Constitution Bill (second version), 2014

In nutshell, the Constitutional Bill (second version) stressed much on what was already covered by the first version. The spirit of Chapter Six of the Bill (supra) envisages the subject; pure Federal State was addressed and the recognition of federal member States was legally addressed. Of interest to note, this version addressed much on the Union challenges experienced in Tanzania. Several issues like legislative authority was addressed under Part II of Chapter six of the Bill, nationality matters under chapter five of the Bill, Executive authority and its authoritative execution under chapter seven of the Bill, and the Judiciary under chapter ten of the Bill (supra). Indeed, the Constitutional Bill (second version)⁶⁸ to a large extent addressed much on the long existed challenges of the Union including the wealth distribution, and constitutionalism principles.

While presenting the Constitutional Bill before the Constituent Assembly, the chairperson of the Commission for Constitution Change, retired Judge Warioba stated:

All over the surroundings and circumstances of this Constitution is centered on the nature of union, the citizens' view are divided on this matter, there are some who maintain that we shall proceed with the current structure (two governments in a single international person – Tanzania), others maintaining that three government shall be established and be the solution of the existing union challenges, that is to say, Republic Government of Tanganyika, Revolutionary Government of Zanzibar, and the Government of the United Republic of Tanzania which will be the core on all union matters; while others maintaining that only one government (the Government of the United Republic of Tanzania) is the solution to union muddles.⁶⁹

⁶⁸ Constitutional Bill tabled before the Constituent Assembly by the Commission for Constitutional Review, 2014

⁶⁹ www.bungetanzania.go.tz/hotubayamwenyekitiwatumeyamaba-

⁶¹ The Constitution of the United Republic of Tanzania, 1977

⁶² Cap. 83 R.E. 2014

⁶³ Ibid

However, the report was criticized for its insufficient statistics especially on the exact number of citizens who opined for radical reforms on the nature of Union.⁷⁰In his introductory remarks to the Constituent Assembly when discussing the Constitution Bill (the second version) the President of the United Republic of Tanzania, addressed some of the union muddles including the status of Zanzibar and International recognition of the Union member States, total merging of Tanganyika in the Union, distribution of wealth, insufficient and ambiguous government structure and extension of Union matters. On the structural ambiguity, the President denounced its negative impacts on the sustainability of the Union. The President preferred some minor modifications as a solution for the alleged muddles. He was of the view that adoption of Federal state with three governments as proposed in the Constitution Bill will weaken the Union which has been in existence for many years. The president maintained that the Union has more advantages than challenges.⁷¹

4.1.3 The Proposed Constitution, 2014

This is the final version as per section 28A of the Constitutional Review Act,⁷²after being discussed and adopted by the Constituent Assembly established under section 22(1) of the Act, (supra). The said proposed Constitution differed with the Constitutional Bill (Second Version) submitted by the Commission in respect of the nature of the Union. The Constituent Assembly proposed adoption of Unitary State with existence of two authorities. This is to say the Government of the United Republic and the Revolutionary Government of Zanzibar as provided for under section 73 of the Proposed Constitution.⁷³ This approach by the Constituent Assembly is

not only legally challenged but also politically challenged for lack of involvement, political resolution and denial of some core aspects of constitutionalism principles. For example, the LHRC report on the Constitution review process was concisely against the political intervention in the process. It further reported noting that the proposed structure by the Commission for Constitutional Review was far better than the structure which was proposed by the constituent Assembly. The structure adopted by the latter is featured with absorption of Tanganyika in the Union.⁷⁴

Despite the fact that the Union in Tanzania is characterized by some gray areas which are considered to be challenges on its survival, there are still some opportunities to be utilized for solutions. These includes:-

- a) Constitution review process: this is a clear opportunity to be utilized as it follows the proper channel of gathering both legal and political approaches and solutions to existing challenges.
- b) Public awareness, readiness and sensitization: these have developed nationalism enthusiasm among citizens hence psychologically motivated to the process.
- c) Political will and economic capacity: despite power transfer from the former President to the current President which may signify different thoughts on the matter, still political will is witnessed among the actors and, finalization of the process cannot consume much cost compared to its initialization.
- d) Peace, Unity and solidarity among the civilians: these are major core opportunities for development or for any other socio-political affair of the state. The more solidarity and peace in the state, the more likely to have

better solutions on the existing Union challenges.

- e) Clear chance for Constitutionalism principles adherence: It is time now to have a new constitution accommodating the desired structural formula of the union after taking into consideration existing constitutional principles governing state formation

In the upshot there is demand for reformulation of approaches to Union challenges; the Constitution review process channeled the matter but it was surrounded by political maneuver, political interventions, lack of publicity, less citizens' awareness on the process to *fora* among the many. Also, the guiding Act, (Constitution Review Act, (supra) surrendered the process to Politicians as opposed to constitutional law scholars. Apparently there is high call for the process to be insulated from political maneuver in order to have a national consensus. The new regime has much to do, and is indebted to the citizenry to revive the move for Constitution reforms.

4.2 Constitution Review Current Status

Despite the opportunities created by the Constitutional review process, the opportunities are still not well utilized as the process was grabbed by political differences, lack of common ideologies and consensus to the matter which have left the process in dilemma. No doubt that the process of Constitution review is pending and its revival is subjected to political power's mercy. This dismay is witnessed by the Tanzanians as the process consumed much resources and energy. The existing challenges and opportunities are available for the revival of the process which should be utilized by the decision maker to by amending the Constitutional Review Act, to suit for further progress and recasting the weaknesses that existed.

4.3 Union Challenges: The Way Out

Based on aforementioned challenges and opportunities which are available for rescuing the process and addressing the long standing discontents and disillusion of Union, the following may be considered to form part of the solutions:-

- i. A need for a civic monitored constitutional review process addressing the general will of the populace. The review process should be insulated from political hijack and manoeuvre. The civic will must prevail as against political impulses.
- ii. The Constitution review process shall address properly the nature of Union by clearly identifying the form of government established based on internationally recognized principles of Constitutionalism. This will abolish the structural paradox featuring the current Union formula.
- iii. The list of union matters should be subjected to the citizenry approval. The union matters need to be part of the basic structure of the constitution entrenched as against flexibility calling for frequent derogation through amendments.
- iv. The new constitution should address Legislative authority succinctly. If the Legislative Assembly of Tanzania enjoys its full mandate in the Union there is no need for ratification of Acts made in Tanzania by the House of Representatives of Zanzibar since the Zanzibaris are represented in Legislative Assembly or otherwise there is no essence for representatives in the Legislative Assembly constituted in Tanzania.

dilikoyakatibabungemaalum la Katiba, 2014 as accessed on 27th January, 2016

70 President Dr. Jakaya Mrisho Kikwete Opening remarks to Constitutional Assembly, 2015

71 Ibid

72 Cap. 83 R.E. 2014

73 The proposed Constitution by the Constituent Assembly, October, 2014

74 <http://www.lhrc.go.tz/recommendation-of-LHRC-to-the-Commission-and-constitutional-assembly-towards-president's-speech-on-its-commencement>. Accessed 26th January, 2016

- v. Article 4 of the Constitution of the United Republic of Tanzania vests power of Executive, Judiciary and Legislature to two organs established in Tanzania. This imply that the two organs are those established in Tanzania Mainland and Zanzibar however the Tanzanian Court of Appeal is among the Union matter. This adds practical challenges in the field that judicial system in the United Republic of Tanzania is vested to Court of Appeal only and other tertiary system serve for State members in the Union. The Union government should have a judicial system with jurisdiction fostering the Union essence.
- vi. Survival of Zanzibar with her partial autonomous, in the absence of the other partner in the Union ‘Tanganyika’s fairly calls for the latter resurrection and recognition. Disappearance of Tanganyika and the lone survival of Zanzibar after the Union is the reason behind structural ambiguity of the United Republic of Tanzania.

5.0 CONCLUSION

In this discourse we have sketched both the legal and political challenges of the Union since its formation. The Union formation was not only speedy but also characterized by high degree of secrecy. Hasty and secrecy in the process were arguably influenced by personal interests. This marks the first glaring weakness of the Union. The weakness is rooted in the lack of people’s consultation and participation in the formation of the Union. Such features divorced constitutionalism principles which led the Union to have a unique structure. While there is unexplained disappearance of Tanganyika as party to the Union, Zanzibar exists with questionable autonomous and ambiguous state armies’ jurisdiction. The Union is unique and alone in the global systems of States and governments. The structural form of the Union is featured with semi-federal and semi-unitary characteristics. The initialized Constitutional change was the available opportunity to address these challenges though the process seems abandoned which attracts a need for a rescue. Yet, the problem is being surrounded with several opportunities including, public awareness, readiness and sensitization; political will, less costing as compared to its implications; social peace, unity and solidarity and the available Bills, and earlier Commission’s report if all utilized effectively acts as strategic drivers and opportunities to meet the desired ends.