

The State of Constitutionalism in Zanzibar

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Introduction

The notion of constitutionalism produces numerous and often conflicting responses. Constitutionalism has been seen “as a process of political rules and obligations, which bind both governors and the governed, both kings and ordinary citizens.” At the same time, constitutionalism is concerned with the instruments of governance, ranging “from the Constitution itself and other legally constructed documents that have been created to support it, to the structures and institutions that are established under their framework”. A further understanding of constitutionalism posits it “as the conduct of government within a system of checks and of accountability”. Finally, it has been argued that “constitutionalism revolves around the twin issues of individual rights and limited power of government. These issues make room for the rule of law, separation of powers, periodic elections, independence of the judiciary, and the rights to private property among other critical issues”.

While responses on what constitutionalism entails differ, a key common denominator is that constitutionalism involves limited government, with institutions performing their roles according to predetermined and acceptable norms and where individual rights are respected. Hence, having a constitution is not the same as having constitutionalism. As Mazrui points out, constitutions are the product of the 20th century while constitutionalism existed long before that time.

The first constitution of Zanzibar was written by the British in 1963. This constitution had many sound provisions, acceptable in any democratic society. For example, it contained a Bill of Rights yet which, at the time, was lacking in the constitutions of many other countries.

The Zanzibar Revolution of 1964 abrogated the 1963 constitution, following which the country was ruled by presidential decrees. The Constitutional Government and Rule of Law Decree vested legislative power in the Revolutionary Council. The concept of separation of powers was abolished and, in its place, the Revolutionary Council, which had judicial, legislative and executive powers, introduced.

The period 1964-1979 heralded 15 years of autocratic leadership with neither a written Constitution nor elections. The Revolutionary Council

was the centre of each and everything and the people of Zanzibar were recipients of its policies and directives. In this period, constitutionalism atrophied.

A political event which influenced and shaped the Constitution of 1979 was the merger in 1977 of the Afro-Shirazi Party (ASP) of Zanzibar and Tanganyika African National Union (TANU) of the Tanzania mainland to form Chama cha Mapinduzi (CCM). This was the beginning of “Chama kushika hatamu” – party leading the way. The 1979 Constitution was modelled after the Union Constitution and like the Union Constitution did not have a Bill of Rights.

This constitution functioned until 1984 when the demand for a new constitution was accepted by the government and the Constitution of Zanzibar of 1984 was adopted. This constitution opened a new era of constitutionalism in Zanzibar. The constitution did not only repeal the 1979 constitution, but also re-enacted the Bill of Rights.

The Constitution of 1984 has been amended nine times, but the most important amendments, as far as constitutionalism is concerned, were made by the Eighth Amendments in 2002. These amendments were made after the signing of the second CCM-CUF accord of 2001. The amendments established the office of the director of public prosecution to whom the function of prosecution was vested from the attorney general. A provision to entrench the separation of powers between the executive, judiciary and legislature was introduced. The amendment laid down the right to approach the high court when any right in the Bill of Rights or constitution, in general, was violated or was about to be violated. An independent Judicial Service Commission was re-established, and the Zanzibar Electoral Commission was reformed. The amendments established the Voters’ Permanent Register, increased the number of women members appointed in the House of Representatives by their parties and introduced the right against torture, degrading and inhuman punishment. The right to join human rights societies was entrenched. The effect of the limitation clause (claw-back clause) was reduced so that certain rights thereafter could not be limited or derogated.

This chapter dwells on the constitutional developments which took place in Zanzibar in 2004. The chapter examines how the three state organs - the

executive, legislature and judiciary - functioned to protect the constitution of Zanzibar.

The Legislature and the Executive: Tussling for Turf

The legislature in Zanzibar is called the House of Representatives (hereinafter “the House”), established by Section 63 of the Zanzibar Constitution, 1984. Members of the House comprise those directly elected from the 50 constituencies of Zanzibar, 10 nominated by the president under Section 66, female members appointed by their parties (who are 30% of directly elected members), 5 regional commissioners and the attorney general.

The House is empowered by the Zanzibar Constitution to pass legislation on all matters not within the jurisdiction of the parliament of the United Republic of Tanzania. These powers are recognized by Article 4 of the Union Constitution of 1977. Article 4(2) states:

...the organs vested with legislative and supervisory powers over public affairs shall be the Parliament of the United Republic and the House of Representatives of Zanzibar.

For its part, the executive is the centre of everything in Zanzibar. At its helm is a president with extensive powers. He appoints all top officials down to the level of directors of government departments. Below the president is the chief minister who together with other ministers and attorney general, form the Revolutionary Council. The legislature can be influenced by the executive because, first, the majority of its members are from the ruling party. Second, all the ministers and deputy ministers, regional commissioners and the attorney general are members of the executive as well as being members of the House.

Zanzibar is divided into five regions, three in Unguja and two in Pemba, governed by regional commissioners. Each region is constituted by districts headed by district commissioners. The regional commissioners and the district commissioners are all appointed by the president. Each district is divided into constituencies, each of which has one member of parliament (Union) and one member of the Zanzibar House of Representatives. The smallest unit existing in the district is the shehia, headed by the sheha, who deals with minor administrative matters.

All these organs receive policies and directions from the centre. They do not enjoy any administrative or financial autonomy. Even the members of staff who serve in these offices are employed by the central government. Hence, Zanzibar has a system of government in which powers are concentrated at the centre, something which is anathema to the growth of democratic institutions.

In exercise of its legislative function, the House passed 13 statutes in 2004. At the same time, the executive sought to stamp its authority over the country by managing the manner in which legislation was passed or how the legislature conducted its business. A number of illustrative cases are set out in this chapter.

The House of Representatives Service Commission Act

The Constitution of Zanzibar provides for the establishment of the House of Representatives Service Commission. Section 77(2) provides:

There shall be the House of Representatives Service Commission which shall have the power to employ officers and civil servants for the House, to appoint persons to hold office, to exercise disciplinary action and the power to do any other thing provided for under legislation concerning civil servants of the House, save the Clerk of the House who shall be appointed by the President in accordance with Section 76 of this Constitution.

This provision, while being included in the constitution since its inception, had never been used and no House Service Commission had ever been created. Rather, the House used the Civil Service Commission until 2003, when allegations arose that some employees of the House were involved in leaking secrets of the House to opposition political parties. A committee was formed to investigate the matter and, although its findings were not conclusive, three employees allegedly involved in the alleged incident were transferred to other government departments. One of the employees challenged the transfer decision in the high court of Zanzibar, suing the chairman of the House together with three other officials for the transfer, at the time, no House Service Commission existed. It was in response to that suit, albeit before its determination, that the legislature passed the House of Representatives Service Commission Act in 2004.

The punitive nature of executive power in the legislature

During the House budget session in June/July 2004, the member of the House of Representatives for Chambani Constituency (CUF), Pemba, who was also shadow minister of finance and economic affairs, Hon. Abbas Muhunzi, criticised the government about the ECOTEC-GAPCO saga. ECOTEC had entered into an agreement with the government of Zanzibar to become the sole supplier of petroleum products. Following the enactment of the Petroleum Levy Act, the petroleum business had been liberalised, thereby frustrating ECOTEC's monopoly. GAPCO, another oil importer, took over the supply of petroleum products, replacing ECOTEC. Hon. Muhunzi criticised the whole arrangement and mentioned that the president of Zanzibar was involved. A House Committee was formed to investigate the matter and Hon. Muhunzi was suspended from attending the House for one year when the investigating committee, comprising a majority of CCM members, found his allegations to be unfounded.

Two pertinent issues arose from this incident. The first, was whether the speaker of the House had the power to dismiss a member of the House. Since the constitution of Zanzibar as well as the House of Representatives (Immunities and Privileges) Act, 1990, did not make provision for that punishment, the speaker relied on the regulations of the House made under Section 86(2) of the constitution, which gave him power to suspend a member as a result of certain incidents. The case in question did not involve the grounds mentioned in the regulation. Indeed, when Hon. Muhunzi challenged the decision of the House in the high court of Zanzibar, the high court ruled in his favour, and ordered his reinstatement, observing that the House had acted outside its mandate.

The second issue related to legislative oversight. The majority of members working in parliamentary committees of the House of Representatives were members of the ruling party who were never critical of government policies and/or actions. No member could criticise the government for fear of retribution. The Committees' role of overseeing the government and making its officials accountable to the people could, therefore, not be performed satisfactorily and, in the long run, this did not help the democratisation process in Zanzibar.

The Zanzibar flag

It was mainly supporters of the opposition who expressed a need for Zanzibar to have its own flag to express its identity inside the Union, though some members of the ruling party were also in favour the idea.

Zanzibar had its own flag when it attained its independence in the early 1960s, but when the Union arrangement between Tanganyika and Zanzibar was adopted, Zanzibar lost its sovereignty and its flag was abandoned in favour of the Union flag. Since then, the Union flag had been used in all offices in Zanzibar, irrespective of whether they are offices of the Union or of the Zanzibari Government.

In 2004, the House of Representatives took cognisance of Section 3 (2) of the Zanzibar Constitution of 1984, which provides that the government of Zanzibar shall have the power to prescribe anything which shall be a symbol of the government and as may be approved by law enacted by the House of Representatives. Using this provision, the Zanzibar Flag Act was passed, and now the flag of Zanzibar is used in all offices of the Zanzibar government, in Zanzibar or on the mainland. Union offices, such as police and immigration offices, fly both Union and Zanzibar flags. However, similar offices on the mainland fly only the Union flag. The flag is also used by Zanzibar athletes when they represent Zanzibar.

The flag of Zanzibar has not only returned the self-esteem of many Zanzibaris, but has also, to a certain extent established the identity of Zanzibar. Significantly, the establishment of the Zanzibar Flag has exerted a strain on the Tanzania Union. Some Tanzanians, especially from the mainland, interpret the step as a move to sabotage the Union and as a statement on Zanzibar's movement towards her own freedom.

In another development, the president of Zanzibar who, since 1985 had been using his own flag and seal, decided to pass legislation to recognise the practice. The Presidential Flag and the Seal of the President Act was enacted in 2004 with retrospective effect from 12 January 1984.

The identity of Zanzibaris and dual citizenship

The move to establish the identity of Zanzibaris was further supplemented by a bill which was passed by the House of Representatives entitled the Registration of Zanzibaris Act. The bill is awaiting presidential assent before it becomes law. Its aim is twofold: to register all Zanzibaris and

provide them with identity cards; and to prepare Zanzibaris for the changes which are about to come with the establishment of the East African Community.

The flag cannot be used officially outside Tanzania as foreign relations and international affairs are Union matters in which the Union government represents the whole Union. This law was long overdue. The Zanzibari Act of 1985 outlined who a Zanzibari was and how a person could be recognised as a Zanzibari. But for political reasons - CCM fears that the Union would split - the Zanzibari Act was never implemented. Hence, when the Registration of Zanzibaris Bill becomes law it will open a new chapter in the constitutional development of Zanzibar. During the past two general elections there have been allegations from both the opposition and the ruling party that people from the mainland have been “planted” in Zanzibar for the purpose of voting. By law these people are not entitled to be registered, and therefore, the Registration of Zanzibaris Act would enable the registration and voting exercises to be conducted without much controversy.

Being a Zanzibari is not about citizenship; it is an identity. The Zanzibari Act, 1985, laid down criteria for being a Zanzibari. One requirement was that a person must be a Tanzanian citizen. The Union Constitution does not recognise dual citizenship. Consequently, someone could satisfy the other criteria of being a Zanzibari, for example, by being a child born of parents who are both Zanzibari, but if he or she acquired citizenship of another country, then he or she would also lose their identity as a Zanzibari, together with all rights and privileges. If Tanzania would permit dual citizenship, it would have great impact on Zanzibaris. Not only would this affect who would be recognised as a Zanzibari, but it would also affect the election laws and who would have a right to vote.

Establishment of Special Departments

Section 121 of the Constitution of Zanzibar, 1984, allows the government of Zanzibar to create its own forces, which are called special departments. The section provides:

(1) There shall be established Special Departments for Zanzibar whose duties and functions shall be as provided under the Acts establishing them.

In 2004 , the Law Reform Commission of Tanzania issued a position paper on the introduction of dual citizenship in Tanzania after collecting views of the people regarding dual citizenship and its possible models.

(2) The Special Departments referred to in subsection (1) of this section are:

- a) Jeshi la Kujenga Uchumi
- b) Kikosi Maalum cha Kuzuia Magendo
- c) Chuo cha Mafunzo

(3) The President of Zanzibar may, in addition to Special Departments specified under subsection (2) of this section, establish other Special Departments from time to time as he may think fit.

The president of Zanzibar had exercised his power under Subsection (3) in 1999 by establishing a fire brigade, and in 2004 by establishing Kikosi cha Valantia. This was a volunteer brigade, which has now been re-established as a special department. During the reign of ASP (1964-1977), the Valantia were soldiers of the party. When the ASP and TANU united, Valantia became the soldiers of CCM but with decreasing significance.

Now the Valantia have joined the ranks of special departments, comprising soldiers in all but name, working with the police and the armed forces of the Union. The Act stipulates the duty of the volunteers as:

To cooperate with defence and security forces or any other institution in the defence of the United Republic of Tanzania or security of the citizens and their properties or to undertake other duties for which “Valantia” is responsible under any existing law.

Valantia are not party soldiers any more; in fact it is an offence for any Valantia to be a member of a political party, attend meetings, demonstrations, wear emblems or clothes affiliated to parties, insult political leaders or show any sign of political affiliation. A convicted service person shall be dismissed from the force.

Further, Valantia have powers of search and arrest and the right to bear and use arms. They are granted immunity against any act or omission done in the bona fide exercise of their duties. Valantia are also supposed to be trained militarily.

The establishment of special departments has created friction in the Union. Under article 147 of the Constitution of United Republic of Tanzania,

1977, it is only the Union Government which has the mandate to establish armed forces of any kind. This constitutional dilemma was explained by the court of appeal of Tanzania in *Machano Khamis Ali and 17 others v SMZ*. The question that lingers is whether the government of Zanzibar has the mandate to establish its own “armed forces” by whatever name called.

Be this as it may, the creation of this special department is a blow to democracy in Zanzibar. There is a strong feeling that special departments are, in many instances, being used by the government to further its interests. A relevant question is whether Zanzibar needs another special department, especially when it faces economic hardship to the extent that civil servants sometimes remain unpaid for over a month. The irony of this is the importance which is given to this special department. The annual budget of the Kikosi cha Valantia is Tshs. 1.4 billion, while the budget of the judiciary, the third pillar of democracy, is only Tshs. 600 million. Quite clearly, the creation of Kikosi cha Valantia has not enhanced constitutionalism in Zanzibar.

Zanzibar Electoral Commission

An important aspect of democracy is free and fair elections. For elections to be free and fair, good supervision is needed in all its stages, including the appointment of election officers, registration of voters, nomination of candidates, election campaigns, voting procedures, counting of votes and announcement of results. In order to ensure the success of this process, good legislation and a strong and independent organ to supervise the process are required.

The election process in Zanzibar is supervised by the Zanzibar Electoral Commission (ZEC) and the laws which guide the process are the Constitution of Zanzibar and the Election Act. The Election Act has been amended eight times to make the law relevant to Zanzibar’s political, constitutional and administrative changes.

ZEC is established under section 119 (1) of the Constitution of Zanzibar and Section 4 of the Election Act. The functions of ZEC are stipulated in Section 120 of the Constitution and Section 5 of the Election Act. Some of the duties of ZEC are:

- To supervise election of the president of Zanzibar, members of the House of Representatives and councillors;

- To divide Zanzibar into constituencies; and
- To undertake civic education and voter education.

The holding of free and fair elections has been a problem in Zanzibar since the establishment of multiparty democracy in 1992. The 1995 general elections were marred by serious irregularities. Commonwealth observers described the 2000 general elections as a shamble. Voting had to be repeated in 17 constituencies in the Urban West region of Unguja after they were nullified, and counting for the rest of the country was suspended for a week after the voting.

ZEC was reformed following a constitutional amendment in 2002. Presently, it comprises seven members appointed by the president, including two members appointed on the recommendation of the head of government activities in the House of Representatives, and another two on the recommendation of the opposition leader in the House. One member must be a judge of the high court and one is the chairperson of the Commission. The aim of this reform is greater independence and impartiality for the ZEC. The test case for a reformed ZEC was the 2005 general elections.

Free and fair elections in Zanzibar were also dependent on a number of factors witnessed developments in 2004.

Permanent Register of Voters and Residence Requirements

The Constitution of Zanzibar provides that any Zanzibari who has attained the age of 18 years is entitled to vote unless he or she is disqualified by any law. In line with the second CCM-CUF Accord of 2001, the procedure for registering voters were changed following the constitutional amendment establishing the Permanent Register of Voters. The Election Act was also amended to comply with the constitution. The Permanent Register of Voters is intended to include the names of all Zanzibaris who are entitled to vote in a particular constituency so as to create an environment where free and fair elections can be held.

Registration of voters in the Permanent Voters register started in December 2004 in Pemba South region then proceeded to the North Region of Pemba. The registration exercise encountered problems in its very first week.

The first was the use of shehas in the registration exercise. Under the Election Act, shehas were agents of ZEC entrusted with the role of identifying persons who qualified to be registered. But in most cases, shehas were affiliated to the ruling party, and consequently, objected to the registration of supporters of the opposition. On the other hand, shehas encouraged registration of supporters of the ruling party, even if they did not qualify for registration. This led to chaos in the registration centres.

The second problem arose from the residency requirements stipulated by the Election Act. For a person to be registered in a particular constituency, he or she must have resided in that constituency for 36 consecutive months. This was to create many problems because no documentary evidence is issued when a person moves from one constituency to another. Many people were refused registration for their apparent failure to meet this residential requirement. When these people returned to their old constituencies, they were again refused registration on the same grounds of failing to meet the residential requirement, as they had moved out of the constituency. These people were not provided any written explanations from the shehas to explain why they could not register. The result was the disenfranchisement of Zanzibaris who were entitled to be registered and to vote.

The third problem also related to the residency requirements. There were strong objections to the registration of Union armed forces and members of the Zanzibar special departments. The law did not require members of the armed forces or civil servants and their families to comply with the 36 months residential requirement. They would be entitled to register and vote in whichever constituency they were transferred to, regardless of the period they had stayed there. This provision was abused in some cases, as armed forces were transferred to particular areas to increase the numbers of voters there in order to tilt the balance in favour of a particular party.

An incident took place in Pemba when local residents objected to members of a special department registering in their constituency. In response, members of the armed forces opened fire, killing one civilian and wounding two others.

In spite of these irregularities and problems, the two major parties in Zanzibar, CCM and CUF, are supportive of the Permanent Register of

Voters. It is hoped that if the registration process continues relatively well, the next general elections will have fewer controversies.

Following the amendment of the Election Act in 2002, the residency requirement was reduced from 5 years to 36 months.

Division of Zanzibar into Constituencies

Section 120 of the Constitution of Zanzibar empowers ZEC to divide Zanzibar into constituencies for election purposes. The constitution further provides that the constituencies shall not be less than 40 and not more than 55. In undertaking this division, ZEC has to ensure that all constituencies contain equal numbers of inhabitants. The division should not be made in a way that specifically favours or undermines a political party.

In 2004, constituencies were re-organised. In this process, ZEC was confronted by the URT constitution's provision that requires the number of members of parliament from Zanzibar not to be increased or decreased without the consent of at least a two thirds majority of the Zanzibar's parliament. ZEC met this provision by ensuring that the re-organisation left the total number of constituencies unaltered. Before this re-organisation, there were 21 constituencies in Pemba and 29 constituencies in Unguja, making a total of 50 constituencies. The re-organisation reduced the number of constituencies in Pemba to 18, while in Unguja, the number of constituencies was increased to 32. ZEC's reason for this re-organisation was that the number of inhabitants in Pemba had decreased while the number of inhabitants in Unguja had increased. The opposition complained about this re-organisation, claiming it was a strategy for the ruling party to win the elections. Pemba was the stronghold of the CUF and the reduction of constituencies meant a reduction of seats in both the House of Representatives and Parliament.

The Election (Amendment) Act

Another development which took place in 2004 is the amendment of the Election Act, to among other things, grant the presiding officer powers to announce election results at his or her polling station. With this amendment, interested groups (including the media and political parties) would be able to tally the votes from each polling station and prepare an

unofficial result before the announcement of the result by ZEC. This was expected to reduce the possibility of results being doctored, thereby encouraging democracy and transparency.

The State of Political Parties

The introduction of multiparty democracy in 1992 necessitated the amendment of several laws to allow the multiparty system to function. Among the amended laws were the Constitution of Zanzibar and the Election Act. A specific provision was introduced in the Constitution to provide for the multiparty system as follows:

Zanzibar shall be a state of multiparty democracy which shall respect the Constitution, the rule of law, principles of human rights, equality and justice.

One of the requirements for the registration of a political party was for it to have a presence both in Zanzibar and on the mainland. Presently, 18 political parties are registered by the office of the registrar of political parties. However, only CCM and CUF are strong in Zanzibar. No other political party secured a seat in the House of Representatives or the parliament of the United Republic from any constituency in Zanzibar in the last two multiparty general elections (1995 and 2000) and the several by-elections. The performance of the small parties has not been encouraging in the Isles. This was evidenced in the 2003 by-elections in Pemba, where the disqualification of all CUF candidates, other opposition parties failed to secure a single seat, leaving CCM to win, as it were, by default.

In 2004, the office of the registrar of political parties was opened in Zanzibar. Henceforth, grievances and complaints of political parties could be submitted to this sub-office and leaders of political parties no longer had to travel to Dar es Salaam to meet the registrar. A Zanzibari was also appointed deputy registrar of political parties. Unfortunately, his office is based in Dar es Salaam rather than Zanzibar, where he would have been better positioned to follow political happenings in Zanzibar.

135 Section 5. In 2004, the freedom to form political parties was tested. Three parties with temporary registration were deregistered. Safina Political Party, which had a strong base in Zanzibar, was removed from the register because of its failure to resolve internal conflicts. The Sasa Safi Political

Party and the Soft Political Party - based in Zanzibar - were de-registered because they failed to obtain 200 sponsors from each of the ten regions of Tanzania - two regions from Zanzibar and eight regions from Tanzania mainland - thereby failing to satisfy one of the requirements of obtaining permanent registration.

By and large, while the Election Act and the constitution have been amended to promote democracy and constitutionalism, this did not sufficiently liberalise Zanzibar to allow parties and individuals to exercise their rights to the full. For example, independent candidates are still not recognised under Zanzibar laws. This limits the people's rights to select and be selected for public leadership positions.

The Judiciary

For any state to observe principles of democracy and the rule of law, it must establish and maintain an independent and impartial judiciary. The judiciary is established under Chapter Six of the Zanzibar Constitution. It is headed by the chief justice of Zanzibar. The judiciary is not a Union matter; hence each party to the Union has its own judiciary. The two parts of the Union, however, share a common court of appeal since 1979 when the court of appeal of Tanzania was established following the demise of the East African Court of Appeal.

For a long time now, the judiciary in Zanzibar has been facing a shortage of judges and magistrates. In the period 1995 to 2000, judges were recruited from Nigeria to serve in the high court of Zanzibar. The government was criticised for this state of affairs as it could easily have recruited judges from Tanzania mainland or from other East African countries. The cost of retaining Nigerian judges was very high. Eventually, the contracts of these judges were not renewed and the last Nigerian judge left Zanzibar in 2003. Currently one judge who had been recruited from Tanzania mainland, is working under contract. A number of law graduates have joined the judiciary as regional magistrates and, at the moment, there is no shortage of magistrates. However, the shortage of judges persists.

Enforcing decisions of the courts against the government of Zanzibar or people who have the backing of individuals in government is problematic. A decision may be delivered, but the judiciary may be reluctant to enforce it. In 2004, a demolishing order was issued in the case of *Abdalla Ahmed and*

Yamu Ahmed v. Khatibu Abdalla Makame and two others. The order was against the interests of powerful persons, including a former head of intelligence in Zanzibar and a former regional commissioner. The police force failed to effect execution on the pretext that whenever they visited the site, they found people with machetes guarding the property. The irony is that the police force is notorious for mercilessly persecuting people when it has orders from the executive to do so, or when the force perceives the interests of the executive to be in jeopardy.

Following the second CCM-CUF accord of 2001, it was agreed that the judiciary should be reformed so that its independence and integrity are not be compromised. It was also agreed that the capacity of the judiciary should be rebuilt. Accordingly, the Judicial Service Commission has been re-established and, for the first time ever, one commissioner is elected by the president from members of, and upon recommendation from, the Zanzibar Law Society. The Commission has the power to advise the president on the appointment of the chief justice, puisne judges, magistrates, kadhis and other senior officers of the court.

Besides executive interference in the judiciary, many other factors have contributed to the judiciary's lack of independence. Corruption, inefficiency and lack of resources, have all prevented the judiciary from providing expeditious and fair trials and from being fully independent and impartial. However, it should be noted that while the judiciary has been criticised for its pro-state attitude, it has, in some cases, demonstrated impartiality and boldness against the government.

An important constitutional decision was made in December 2004 in the case of *Omar Ali Jadi and five others V. Zanzibar Electoral Commission*. The applicants were CUF candidates for different constituencies in the Pemba by-elections held in May 2003. The applicants were challenged by NCCR Mageuzi's candidates from contesting seats of the House of Representatives on the grounds that the law barred them from doing so for the next five years as they had been dismissed from the House. The objection was upheld by ZEC. The high court heard the matter and reversed the decision. The full bench of the high court having analysed various provisions of the Zanzibar Constitution and Election Act, concluded that the petitioners had not been dismissed from the House, but had decided to withdraw from the business of the House. The court held:

We are of the opinion that the ZEC was wrong in its finding that the petitioners were dismissed from leadership and as a result they were not allowed to contest for seats in the House until the expiration of five years. The finding of the minority members of the ZEC was, in our view, the correct finding, to the effect that the petitioners did not fall within the provisions of Article 69(4)(c) of the Constitution as they ceased to attend the sittings of the House of Representatives on their own volition.

Another important and bold decision delivered against the government in 2004 is that of *Dr. Mohamed Kaumbwa and 176 others v Ministry of Health and two others*. In this case, a judgement was delivered to the effect that the Ministry of Health and two others, were jointly and severally liable to pay the amount of Tshs. 35 million to the plaintiffs, who had been defrauded of their money, advanced to the defendants, for the purchase of motor vehicles. During execution, the court ordered the attachment of a bus belonging to the College of Health which falls under the Ministry of Health. Following this, the Ministry prepared a plan to pay the decree amount.

Freedom of Expression

Section 18 of the Constitution of Zanzibar guarantees freedom of expression. In order for the media to discharge its obligation of providing information to the public, it must have freedom and space to do its work. In Zanzibar, information has been considered to be the property and monopoly of the government, which decides what information should or should not be disseminated to its citizens.

Private media started to emerge after the first multiparty election in 1995. The first private newspaper was Jukwaa, which is still a registered newspaper although it has stopped publication. This newspaper had many backers in the ruling party, and the opposition believed that it was a mouthpiece of the ruling party - CCM. The other private newspaper was Dira, that was banned less than two years after its first publication. Similarly, people, especially CCM followers, considered Dira to be an opposition newspaper. All electronic media are owned by the government. When Dira was banned, its directors challenged the decision of the high court in *Managing Director Dira Newspaper and another v Ministry of State (Chief Minister's Office) and another*. Dira argued that the order of the minister was

illegal and violated the rule of natural justice as Dira had not been given the right to be heard. Dira also argued that the order was arbitrary and violated the rule of law and good governance. In suspending and prohibiting the publication of Dira, the government relied on Section 30(1) of the Newspaper Act which provides:

Where the Minister is of the opinion that it is in the public interest or in the interest of peace and good order so to do, he may by order direct the suspension of the publication of the newspaper named in the order and such newspaper shall cease publication as from the date (hereinafter) referred to as effective date specified in the order.

Section 30(2) requires the notification of the said order to the Advisory Board within seven days, which shall as soon as practicable, advise the Minister on whether to prohibit the publication of the newspaper named in the order or to allow its publication with or without any instruction.

The interesting part of the case is that when Dira applied for registration on 11 November 2002, the board was not in place, and the registration was granted the next day. When Dira was suspended on 24 November 2003, the board was yet to be constituted. Realising the effect of its omission, the government constituted the Advisory Board on 13 January 2004, and gave it retrospective powers with effect from November 2003. It is obvious that the board was established for the sole purpose of legitimising the actions already taken against Dira.

To the surprise of many, the high court supported the prohibition of Dira albeit for different reasons. It held that since the Advisory Board had not yet been constituted when the application of Dira was made, and hence, had not advised the minister in accordance with Section 5(a) of the Newspaper Act, the procedure for granting the publication was not followed. It held:

The application was locally [sic!] made and locally [sic!] granted. The provisions of the law ... were totally ignored. The only remedy on ignoring the provisions of the law of the land is to declare the order legally ineffective. Hence, the granting of the application was illegal and of no effect and the order of the Minister to suspend and prohibit Dira is also ineffective because it was against a non-legal [sic!] existing newspaper.”

The high court decision is, in fact, erroneous since it is premised on a false assumption. Section 5(a) does not lay down a procedure to be followed in

the application. It merely lays down one of the functions of the advisory board, which is to consider applications and advise the minister. The provision does not say what will happen if the minister does not take advice or consult the board. It appears that the provision does not lay down a condition on the minister to consult the board in the application; he has discretion. Furthermore, the applications are submitted to the registrar, not to the board. Failure of the board to advise the minister does not make the decision illegal. To the contrary, under Section 30(2) it is mandatory that the board be notified within seven days about the order of suspension. Section 31 stipulates that it is mandatory for the minister to consider the advice of the board before prohibiting the newspaper. The same cannot be said of Section 5(a), on which the court based its judgement.

In this case, clearly, the court failed to uphold the freedom of expression guaranteed by the constitution. The Newspapers Act, one of the most repressive legislations in Zanzibar, was once again used by the court as a tool to suppress press freedom.

Conclusion

The year 2004 witnessed progress regarding the development of constitutionalism in Zanzibar. Constitutionalism, however, has not yet taken root. The past still looms over the shoulders of Zanzibaris and attitudes of the ruling elite, who use the law and the constitution as instruments for perpetuating and maintaining power, has not changed much.

The year 2004 also witnessed continuing implementation of the CCM-CUF political accord, which was reached in 2001 and followed by the Eighth Constitutional amendments in 2002. These amendments were unique compared to the previous ones. They enhanced democratisation, transparency and human rights. It is no exaggeration to say that the future of constitutionalism in Zanzibar looks much brighter than the past.