APPENDIX

Sovereignty and Statehood of Zanzibar in the Union*

(Critical Comments on *S.M.Z. v. Machano Khamis Ali & 17 Others*[i])

1.1 Introduction

In this paper, I have adopted a hard law, albeit, jurisprudential approach to make a critique of this very important decision made by the Court of Appeal touching on central constitutional issues pertaining to the Union. The case involved some 18 members of the opposition party, Civic United Front (CUF). The alleged offence, according to the charge sheet, was committed between 28th October 1995 and 29th November 1997. Sometime in 1999, the preliminary inquiry, as the law requires, was completed before a resident magistrate which committed the accused for a trial before the High Court of Zanzibar. The decision in this appeal arose from the ruling of the High Court of Zanzibar on a number of preliminary issues raised by the defense. The major constitutional objection was that the offence of treason could not be committed against the Revolutionary Government of Zanzibar because Zanzibar was neither a state nor sovereign.

The appeal was fully argued before the Court of Appeal. The Court also heard arguments from a number of *amicus curiae*. The Court reserved its judgment. While the judgment was pending, there were general and presidential elections in October. Amani Abeid Karume of the ruling party, CCM, was elected president of Zanzibar. Soon after, on 7th November 2000, the prosecution entered a *nolle prosequie* and the accused persons were set free. Two weeks later, on 21st November 2000, the Court delivered its ruling.

Before discussing the ruling, I refer to some peculiar features in the ruling of the Court of Appeal.

2.1 Some peculiar features

There are some peculiar features pertaining to both the way the Court of Appeal assumed jurisdiction in this case and the approach and style of the ruling. I mention three features which, to some extent, affect my presentation of the critique.

2.1.1 Assumption of Jurisdiction

Machano and 17 other Zanzibaris were charged for treason under section 26 of the Penal Decree (cap. 13) of Zanzibar. The charge alleged that these persons 'by words and actions' intended and 'devised ways of treason in order to overthrow the Government of Zanzibar and to remove from authority the President of the Revolutionary Government of Zanzibar.' Before the High Court of Zanzibar, presided over by the then Deputy Chief Justice of Zanzibar, Mr. Tumaka, the accused persons raised a number of preliminary issues. One of these, which was the subject-matter of the Court of Appeal's ruling, stated that the offence of treason could not be committed against the Government of Zanzibar.

The High Court overruled the defense on all preliminary issues. The accused persons appealed to the Court of Appeal. The Court of Appeal heard the appeal including two *amicus curiae.* Judgment was reserved but the Court indicated that they would give their judgment expeditiously. I recall reading in the papers that the presiding judge, Justice Kisanga, answering journalists who were wondering at the delay in delivering the judgment said that the case was a very important one and required intense research.

In ordinary circumstances, once the prosecution withdrew charges, a court of law would not have proceeded to give a judgment where its judgment would be superfluous because the charge had been withdrawn. Under our common law system, courts do not give advisory opinions nor deliver rulings for purely academic interest. Courts have time and again reiterated that they are not courts of academia and do not give opinions on hypothetical matters. In this case, therefore, since the appellants would obviously have had no interest in pursuing the matter, the case would have been marked 'withdrawn' and that would have been the end of the proceedings.[ii] This is not what happened.

The Court explains in its ruling that the case involved an important constitutional matter and the decision of the High Court to the effect that treason could be committed against the Revolutionary Government of Zanzibar could be relied upon in future 'by the High Court' and therefore it ought to be 'revisited and that it cannot be allowed to stand.' The Court therefore *suo motto,* meaning on its own, converted the appeal into an application for revision and used its powers under section 4(3) of the Appellate Jurisdiction Act, 1979, (as amended by Act 17 of 1993) to revise the ruling of the High Court of Zanzibar and set it aside.[iii] The intituling of the case was apparently changed from a 'Criminal Appeal', to 'Criminal Application'; its explanatory subtitle reads, ''Application for Revision from the Ruling of the High Court of Zanzibar at Zanzibar' and the decision is titled 'Order of the Court' (perhaps this is an oversight because decisions in applications are normally called 'Rulings').

The first question that arises is whether this was, legally speaking, a proper way of assuming jurisdiction over a matter whose subject-matter had disappeared.

Section 4(3) of the Appellate Jurisdiction Act provides:

> ..... the Court shall have the power, authority and jurisdiction to call for and examine the record of any proceedings before the High Court for the purpose of satisfying itself as to the correctness, legality and propriety of any finding, order or any other decision made thereon and as to the regularity of any proceedings of the High Court.

Under this section, the Court of Appeal exercises its revisional jurisdiction on its own but over a matter which is still pending, or concluded, before the High Court but not yet removed to the Court of Appeal. To my knowledge, the Court has invoked this section only once before in the case of *Fahari Bottlers v. The Registrar of Companies* (Civil Revision No. 1 of 1999, unreported). The section assumes that the matter called for revision is before the High Court.

Clearly, the instant case was not before the High Court. It had already been heard and concluded before the High Court. As a matter of fact, it was on appeal before the Court of Appeal and the Court had already heard the arguments. On the face of it, therefore, the section was inapplicable to the circumstances of the case. How did the Court go around this legal difficulty?

The Court does raise the issue but disposes off it in two short sentences thus:

However, we are duty bound to point out that that subsection (meaning 4(3)) empowers this Court "to call for and examine the record of any proceedings before the High Court ... ". We did not have to call for the record in this case because the record was already with us. (at p.2.)

Undoubtedly, this raises more questions than answers. The issue is not whether or not the record was already with the Court of Appeal but whether the matter was still before the High Court. It can well be argued that once the matter has been removed from the High Court, for

instance, where a Notice of Appeal has been filed, it is no longer before the High Court. There are several decisions of the Court of Appeal to that effect.[iv]

In the case of *Kombo Mkabara v. Maria Louise Frisch*[v]**,** whose circumstances are very similar to the instant case, the Court arrived at an exactly opposite decision. It held that once the matter had been removed to the Court of Appeal, it was no longer 'before the High Court' and therefore the Court had no power to invoke its revisional jurisdiction under section 4(3).[vi] True, the case was decided two years after the *Machano* decision, but the Judge who wrote the Ruling in *Mkabara's* case was also a member of the panel in *Machano*. No doubt, one cannot assume either institutional or individual memory to alert the judges but then the least that can be said is that the Court was embarking on a very contentious legal terrain. Under the circumstances, one would have expected that the least the Court could have done was to recall the Counsel involved in the case to assist it in deciding on whether the Court had jurisdiction to revise the proceedings which were already before the appellate court. This was not done.

In spite of not recalling the Counsel, the Court summarizes and discusses the arguments of the Counsel which they made when arguing the appeal. This raises a second issue of no small significance. In an adversarial system, can it really be assumed that the Counsel, who were representing substantial interests of their clients – in this case a life and death situation - in the appeal would have argued the same way in a revision when they would have already known that the interests of their clients were not at stake? I doubt.

It is difficult to avoid the impression that the Court was extremely anxious to make a decision on this matter. This is somewhat strange when the same Court in previous cases has strenuously avoided pronouncing on controversial issues to do with the Union or the Zanzibar constitution or the relationship between the Union and Zanzibar Constitutions.[vii] We should perhaps leave it to our colleagues in political science to analyse the reasons why the judges went to such great lengths to deliver the decision in *Machano* when it was judicially not necessary.

2.1.2 The High Court's Ruling not fully considered

It is usual that appellate courts, whether sitting on appeal or revision, fully consider the reasoning and arguments of the lower court whose decision is being appealed from. Thus the appellate court analyses the lower court's decision and arguments expressing agreement or disagreement, giving reasons and ultimately deciding where the lower court went wrong or why was it correct in its decision. In this case, whose ruling runs to 26 pages, there is only one paragraph on page 24 making reference to only one point in the High Court's decision.

> Let us make some quick observations on certain matters raised by the learned Deputy Chief Justice. He considered federalism and cited authorities from the USA and also from Nigeria. As already pointed out, our constitutional set-up is different from that obtaining in these countries. For example, sections 37 and 38 of the Criminal Code Law of Nigeria, as cited by the learned judge, provide that treason covers acts perpetrated against the President or a State Governor. We do not have such provisions. Therefore, we do not think that we need take time to consider this comparison. (p.24)

It is true that the High Court judge used examples from other countries to argue by analogy, which is a respectable and acceptable mode of judicial reasoning. But it would be somewhat disingenuous to say that that is the only thing he did. In his single space judgment, some six pages are devoted to the issue of whether treason can be committed against the Revolutionary Government of Zanzibar. Perhaps the most important part of that ruling is the judge's

approach. He said: 'Whilst I do not believe that statehood is at the heart of this matter, but rather "Government", I find it imperative to make my brief observation on the submissions.'

Pursuing this line of argument, the judge, relying on the provisions of both the Union and Zanzibar Constitutions, goes on to develop the position that there is a fully-fledged Government in Zanzibar with executive, legislative and judicial powers. He quotes the definition of "Government" from the 6th edition of Black's Law Dictionary which defines "Government" to mean "The sovereign or supreme power in a state or nation", and also as "the machinery by which the sovereign power in a state expresses its will and exercises its functions." (p.13 of the typescript). (Incidentally, this is exactly what article 4 of the Union Constitution seems to imply. I will return to this point later.) He shows that the Government owes duties and protection and welfare to the people and the people in turn have duties towards the Government as stipulated in the Zanzibar Constitution and concludes that it is possible to commit treason in Zanzibar.

The appellate court may well have disagreed with the lower court but that is not to say that these were not plausible arguments and positions which ought to have been taken account of, and considered, before the Court arrived at its own position. That is the usual practice in judicial decisions of appellate tribunals. It is not clear why this was not done in this case. Is it that the Court wanted to avoid dealing with the provisions of the Zanzibar constitution? And that brings me to the next feature of this case.

2.1.3 The Constitution of Zanzibar not referred

The third, perhaps the most frustrating feature of the **Machano** ruling, is that the Court does not make any reference to the Constitution of Zanzibar except for article 1 which declares that "Zanzibar is part of the United Republic". This is surprising because the central question in the case, which was whether or not Zanzibar is a state, directly involves the constitution of Zanzibar. What is that the Constitution of Zanzibar constitutes? One would have therefore expected that the Court would have obviously and logically indulged in a close analysis of the provisions of the Zanzibar constitution. The Court seems to have scrupulously avoided the Zanzibar constitution and instead relied almost exclusively on the Union constitution. And yet the Union constitution itself points to the Zanzibar constitution when it provides in article 102(2) that 'the Revolutionary Government of Zanzibar will be constituted and exercise its powers in accordance with this Constitution and the Constitution of Zanzibar, 1984.' (Translation mine).

It may be that the Court adopted this approach conscious of article 99(a) of the Zanzibar constitution which explicitly stipulates that the Court of Appeal shall not have jurisdiction to interpret the Zanzibar constitution. Or, perhaps, the Court was avoiding, once again, dealing with very substantial inconsistencies and plain contradictions between the two constitutions and determining which constitution prevails. The relationship between the two constitutions is undoubtedly a Pandora's Box. But then in the process of avoiding the Zanzibar constitution and relying exclusively on the Union constitution, the Court ended up doing obliquely, what it wanted to avoid openly, as we shall see.

3.1 The Analysis

3.1.1 The approach

In analyzing the ruling I propose to adopt the following approach. In the first part of the analysis, I will make a critique from a standpoint internal to the ruling. That is to say, I will

take the same premises, materials and sources used by the Court and raise issues as to whether the reasoning and conclusions are consistent.

In the second part of my analysis, I will subject the findings and conclusions of the Court to an alternative standpoint, that is, the standpoint of the Zanzibar constitution.

I must point out at the outset that the ruling does not render itself to easy analysis partly because the subject-matter is complex but mainly because of its style and approach. At critical stages of the Court's ruling, there are digressions whose relevance to the process of argumentation is not always clear. There is also another type of break in continuity which is more serious. This is when the Court shifts ground and proceeds on a very different level or order of argument without, apparently, being conscious of it. Broadly, however, I have tried to concentrate on major findings and propositions rather than pick bones on the style and sequence although of course in any legal reasoning the issue of internal consistency cannot be ignored.

3.1.2 Critique from the internal standpoint

The major issue on which the Court decided to concentrate, in its own words, was 'the constitutional issue of whether or not treason can be committed against the Revolutionary Government of Zanzibar' (p.2) After examining the definitions of treason and the English case of *Joyce v. DPP*, the Court crystallized four elements of the offence of treason, two of which being most pertinent to the constitutional question. These are: (1) that the treasonable act must have been committed against a sovereign or a state, and (2) the act was done by a person who owes allegiance to the sovereign or the state. The second is no doubt contingent on the first in that if the body against whom the act is committed is neither a sovereign nor a state then the question of allegiance does not arise because there is no body to owe allegiance to.

In the first 15 pages, the Court concentrates on the issue of whether Zanzibar is sovereign and/or a state. After two pages of digression, the Court shifts ground in the second part where the issue is whether treason is a union matter. The link between the two parts is not very clear until the penultimate paragraph at the end where the apparent link is made but on different premise altogether. I will discuss this in the course of the paper. Let me begin with the first part.

3.1.2.1 Part One: Whether Zanzibar is a state and/or sovereign

After examining several authoritative texts on International Law, the Court arrives at the following propositions or findings:

There are two aspects of sovereignty, external and internal; external in relation to other states or powers where it expresses itself as 'freedom from outside control' and internally it relates 'to the power of making and enforcing laws.' (p.7)

In modern International Law jurisprudence, sovereignty, at both external and internal levels, need not be either absolute or unified. It may be limited and divided. The extent of sovereignty therefore is a question of (legal) fact to be determined by examining the constitutional and external arrangements of each country and or polity.

There is no necessary correspondence on the issue of unity or divisibility of sovereignty between the external and internal aspects of sovereignty. This means that it is possible that external sovereignty may be single and undivided while internal sovereignty is divided. 'For the purposes of treason internal sovereignty is more relevant.' (p.7)

The most important characteristic of a sovereign **state** is that it has treaty-making powers

The Court then proceeds to apply these propositions to the Tanzanian situation. It does this through a short digression on the nature of the Union (pp.9-10) and quotes a passage from *Oppenheim* which it then uses in a modified form to make findings on the nature of the Tanzanian union in its external aspect. This leads the Court to the conclusion that in its external aspect, Zanzibar is neither a sovereign nor a state and that the 'state and sovereign is the United Republic of Tanzania' (p. 11).

Since the *Oppenheim* passage and the Court's paragraph stating its findings are very crucial I quote both and then subject them to analysis.

> A Real Union is in existence when two sovereign States are, by an international treaty, recognised by other Powers, linked together for ever under the same monarch, so that they make one and the same International Person. A Real Union is not itself a State, but merely a union of two full sovereign States which together make one single but composite International Person. They form a compound Power, and are by the treaty of union prevented from making war against each other. On the other hand, they cannot make war separately against a foreign Power. Nor can war be made against one of them separately. They can enter into separate treaties of commerce, extradition, and the like, but it is always the Union which concludes such treaties for the separate States, as separately they are not International Persons. (Quoted at p. 10)

Then follows this decisive passage:

> We can in all fairness say that The United Republic of Tanzania closely resembles a real union but for the situation that a real union is not itself a state. There is no speck of doubt that the United Republic of Tanzania is a state. The two parts forming the United Republic of Tanzania can neither separately go to war against a foreign power nor can war be made against one of them separately as was amply demonstrated in the war against Idi Amin Dada of Uganda. The whole of Tanzania went to war and each part contributed towards the cost of that war. The United Republic of Tanzania is the treaty-making power. This was illustrated by the abortive attempt of Zanzibar to join the Organisation of Islamic Conference. (at p. 11)

This passage has three problems. The first problem relates to the interpretation of the *Oppenheim* passage. The *Oppenheim* passage is discussing the international legal status of a Real Union and says that a Real Union itself is not a state but a 'composite International Person.' The Court says the Tanzanian union resembles a Real Union in the *Oppenheim* sense but for the fact that it is definitely a state. What argument/evidence does the Court rely on to assert that the Union is a state? This leads to the second problem. The Court relies on two pieces of purported evidence, the Ugandan war and the Zanzibar's OIC membership.

Let us pause here. In law, there are certain notorious historical or political or social facts that courts may take judicial notice of. Otherwise courts have to rely on evidence to draw its conclusions. In my submission, both the Ugandan war and the OIC saga were extremely controversial and they are hardly the kind of 'facts' which a court of law can take judicial notice of. For example, are we sure that Zanzibar participated fully in the Ugandan war and that it contributed to its execution? Without uncontroverted material to support its assertion, is a court of law justified to make such an assertion particularly when it is so crucial to its reasoning?

But even if the Court's assertion on the Ugandan war were true, it only goes to support the *Oppenheim* proposition which should lead to the conclusion that **the United Republic is a composite International Person** and not that it is a state. This is supported even by the Articles of Union which stipulated that the Republic of Tanganyika and the Peoples Republic of Zanzibar are united in 'one Sovereign Republic'. It can well be argued with great force that that phrase actually refers to what *Oppenheim* calls 'composite International Person' which, for the purposes of international bodies (for example a seat in the UN), treaties etc. is the International Legal Person.

As for the treaty-making power, again it is not at all clear what the Court was trying to say when it asserted that Zanzibar's attempt to join OIC was abortive? Was the attempt aborted legally or politically? After all, we know that Zanzibar was accepted in the OIC; it attended a couple of meetings, and, we do not know if it ever withdrew, or, if it did withdraw, whether it withdrew for political or legal reasons. More research could well show that Zanzibar withdrew, if at all, because of political pressure rather than because it was legally incompetent to enter into a treaty.

As a matter of fact, further research might just reveal that the incidence of Zanzibar's entry into OIC fits into Oppenheim's proposition that the uniting states can **enter** into separate treaties but it is always the Union which **concludes** such treaties for the separate states. In other words, the distinguished author is making a distinction between entering into treaties and concluding them. Now, of course, what happened or did not happen in the case of Zanzibar's entry and withdrawal from OIC is speculative on my part. The point I am trying to make though is that the Court's own assertion was equally as speculative and therefore could not be used to buttress its conclusions. It was not a set of facts which could be taken judicial notice of without further ado.

In sum, therefore, it could be argued with equal force, contrary to the position of the Court, that the Tanzanian union fits like a hand in glove into Oppenheim's Real Union; that therefore in international law the United Republic is not a state but a composite International Person and that Zanzibar is a state and although it cannot conclude treaties it can enter into treaties. Even if the United Republic were a state, it does not alter the argument that Zanzibar is a state in terms of Oppenheim's proposition.

The discussion so far has been with regard to the external aspect of sovereignty and statehood. We now turn to the internal aspect as indeed the Court does beginning page 12 where it poses the issue, 'The question then is whether sovereignty vested in the United Republic of Tanzania is divisible as between the two parts. To determine that we have to analyse the provisions of the Constitution of the United Republic of Tanzania, 1977.' (at page 12) In passing, the Court notes Article 1 of the Union Constitution which says '*Tanzania ni nchi moja na ni Jamhuri ya Muungano*' which it translates as, 'Tanzania is one country and is the United Republic'. The Court disapproves of the version in the English translation which translates article 1 as 'Tanzania is one State and is a sovereign United Republic'. The Court regrets that the 1977 Union Constitution has dropped the element of 'sovereignty' which was contained in the 1965 Interim Constitution which stipulated that 'Tanzania is a United Sovereign Republic.' Pausing here I might add that the 1965 formulation is no more than a reproduction of the Articles of Union in this regard and does not add much to our understanding of the issues at hand. The phrase 'United Sovereign Republic' does not in itself show that Tanzania is anything other than a composite International Person, in Oppenheim's phraseology.

But the most crucial argument and conclusion of the Court that Tanzania is 'one country, one state' (p.15) and therefore internally, as is the case externally, Zanzibar is neither sovereign

nor a state, is based on its interpretation of a single article in the Union Constitution, article 103(1). That sub-article provides:

> There shall be a Head of the Revolutionary Government of Zanzibar who shall be the President of Zanzibar and the Head of the Revolutionary Government of Zanzibar and also the Chairman of the Revolutionary Council of Zanzibar.

This is the Court's translation. Since the Swahili version is the controlling one, as the Court has decided in its previous decisions,[viii] we must also reproduce the Kiswahili version.

> *Kutakuwa na Kiongozi wa Serikali ya Mapinduzi Zanzibar ambaye ndiye atakuwa Rais wa Zanzibar na Mkuu wa Serikali ya Mapinduzi ya Zanzibar na vile vile Mwenyekiti wa Baraza la Mapinduzi la Zanzibar.*

Let us pause here. There is a significant variation in the translation of the Court which translates both 'Kiongozi wa Serikali ya Mapinduzi Zanzibar' and 'Mkuu wa Serikali ya Mapinduzi ya Zanzibar' as 'Head of the Revolutionary Government Zanzibar'. If these terms mean the same thing why were they used twice? They would be superfluous. In statutory construction, the principle is that meaning should be given to all the words used by the legislature. I would therefore submit that the term '*Kiongozi wa Serikali ya Mapinduzi Zanzibar'*[ix] is used as a generic term to refer to the **Leader of the Zanzibar Polity** which resolves itself into three, that is, President of Zanzibar, Head of the Revolutionary Government of Zanzibar and Chairman of the Revolutionary Council of Zanzibar. We will return to this issue later.

After quoting article 103(1) the Court draws following conclusions:

> It is significant to note that that Article categorically provides for the Head of the Revolutionary Government of Zanzibar and not for the Head of State of Zanzibar even though this Head of the Revolutionary Government is also titled the President of Zanzibar. This clinches the debate and drives home the fact that Zanzibar is not a state, not only in international law but also under the Union Constitution. Louis XIV of France bragged: "the State is me". In the like manner, here at home, the unflinching legal position is that "the State is the Union". There is absolutely no iota of dispute that the United Republic is indeed one country, one state. (p.15)

This is indeed a forceful and assertive statement and conclusion drawn from the examination of a single article which, in any case, with respect, is partly mistranslated. But let us analyse the passage further.

The Court first asserts that the Article does not provide for the Head of State of Zanzibar but only the Head of the Revolutionary Government who is also 'titled the President of Zanzibar.' First, the article does not say that the Head of the Revolutionary Government shall also be called the president ("*ataitwa Rais wa Zanzibar*") or shall be known as the President of Zanzibar ("*atajulikana kama Rais wa Zanzibar"*). It says he shall be the President of Zanzibar ("*atakuwa Rais wa Zanzibar*"). Thus the issue of the President of Zanzibar is not one of nomenclature but rather one of substantive position.

Secondly, the Court says the constitution does not say that 'he shall be the "Head of the State of Zanzibar"'. Before we arrive at any conclusion, however, we must ask: what is the term for 'state' in Kiswahili as used in the Constitution which could be translated as "state.' To clarify, let us look at the most obvious and analogous article which is the one dealing with the President of the United Republic. Is he a Head of State? Article 33 after stipulating that there shall be the President of the United Republic says in sub-article (2) that '*rais atakuwa Mkuu*

wa Nchi, Kiongozi wa Serikali na Amri Jeshi Mkuu' which is translated into English to mean 'The President shall be the Head of State, Head of the Government and Commander in Chief of the Armed Forces' (see 1998 English translation of the Constitution.) So, 'nchi' here is translated as 'state'. This is not incorrect, even in English, the terms 'country' and 'state' are often used interchangeably and only the context can tell whether what is implied is 'state' or 'country'. Using this analogy, how are we supposed to translate and understand the phrase '*Rais wa Zanzibar'* used in the Union Constitution? What does 'Zanzibar' stand for in that phrase if not for 'nchi' in the sense of 'state'?

On this score, the clearest provision is article 4(1) of the Constitution. It provides:

> 4(1) All state authority in the United Republic shall be exercised and controlled by two organs vested with executive powers, two organs vested with judicial powers and two organs vested with legislative and supervisory powers.
>
> (2) The organs vested with executive powers shall be the Government of the United Republic and the Revolutionary Government of Zanzibar; the organs vested with judicial powers shall be the Judiciary of the United Republic and the Judiciary of Zanzibar; and 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.

First, this is another place where '*Mamlaka ya Nchi'* is used to mean 'state authority' in which case '*nchi*' can only mean 'state'. Article 4 is as clear as clarity can be to denote the existence of two states. State authority or state power is expressed in two sets of three organs each. The three 'organs' or branches of the state, as they are usually called, are the Executive, the Judiciary and the Legislature (sub-article 1). These then are named in sub-article 2. We may sum up the article as follows in a formula.

Union Government + Union Judiciary + Union Parliament = State of the United Republic.

No one questions that the United Republic is a state or, to use the Court's phrase borrowed, rather inappropriately, from Louis XIV, "the State is the Union". If so, then the sum of the:

Revolutionary Government of Zanzibar + the Zanzibar Judiciary + House of Representatives = State of Zanzibar.

Again, to use the Court's phrase, it seems to me article 4 clinches the debate on whether or not Zanzibar is a state.

To be fair, the Court does refer to article 4 on page 15 immediately after the passage quoted above but does not use it to understand the issue at hand. Rather the argument shifts to the functions and the list of union matters and classification of the list. After yet another digression, the Court comes back on page 17 to ask "which of the two pigeonholes we slot in treason" meaning whether treason is a union matter or a non-union matter. That brings me to the second part of the analysis.

3.1.2.2 Part Two: The classification of treason

The discussion on the classification of union and non-union matters from pages 17 to the end of the ruling is to classify the offence of treason. The logic of this is difficult to understand unless one admits that this argument actually shifts the ground and the whole concept of sovereignty itself. I will explain.

On page 17 after concluding on the principle of duality, first developed in the case of *Haji v. Nungu*, the Court shifts back to the issue of sovereignty and says 'the only logical conclusion

is that sovereignty is divisible (sic!) within the United Republic. Now, in order to determine which of the two Governments exercises sovereignty over any given matter one has to determine whether or not the matter is Union or non-union.' This is a major shift of premise from sovereignty as an exercise of power (or making and enforcing of laws, as the Court formulated in the first part of the ruling) to a matter of jurisdiction over matters or, as in this case, offences.

Oblivious of this shift the Court proceeds and, taking a hint from the description of subversion in the Tanzania Intelligence and Security Act, 1996 (Act No. 15 of 1996,) concludes that treason is part of security and since security is a union matter so is treason. For the sake of argument let us grant that treason is a union matter. If that is so, the furthest one can go is to say that treason can only be provided in a union law and therefore if it is stipulated in a Zanzibar law, then, to that extent the Zanzibar law would be invalid. Therefore section 26 of the Penal Code Decree, under which the accused were charged, is invalid.

But that does not still answer the issue of whether or not treason can be committed against the Zanzibar Government, that is, whether Zanzibar is a sovereign or a state. In our opinion, the issue of whether Zanzibar is sovereign or a state is independent, and has to be determined independently of the classification of the offence of treason as a union or a non-union matter. Even if treason were a union offence, it can be committed against the Government of Zanzibar if Zanzibar is a state. By the same token, it cannot be that the United Republic is a state because treason is a union matter. Yet, the discussion leads the Court to precisely end up drawing such conclusion in the penultimate paragraph which deserves to be quoted in full:

> In a nutshell we have found that treason can only be committed against a sovereign. However, as treason is a breach of security, which in the United Republic is a Union Matter, **therefore, the sovereign is the United Republic and not the Revolutionary Government of Zanzibar** or the Head of the Executive of Tanzania Zanzibar who is also called the President of Zanzibar. (p. 26) (emphasis supplied)

So, why is the United Republic sovereign? Because treason is a union matter. Why is the Government of Zanzibar not sovereign? Because treason is not a non-union matter. Is this the *ratio decidendi*[x] of the case? If, yes, then patriotic Zanzibari lawyers may take solace in the fact that the whole discussion concluding that Zanzibar is not a sovereign or a state is *obiter dicta* and therefore not binding in a future case!

I will now quickly discuss an alternative approach to critiquing the case from the standpoint of the Constitution of Zanzibar.

4.1 The Standpoint of the Zanzibar Constitution

Given the fact that the central issue that the Court had to determine was the character of Power in Zanzibar, the primary document it would have considered would have been the Constitution of Zanzibar. The question would be what is it that the Constitution of Zanzibar **constitutes?**

Let me begin by some propositions which I will not attempt to prove here because I have done so in my other writings.[xi]

1) The Constitution of Zanzibar is made by the people of Zanzibar through the Revolutionary Council. It does not derive its legal authority or political legitimacy from the Union Constitution nor it is subordinate to the Union Constitution. This is stated very explicitly in the Preamble of the Zanzibar Constitution.

2) The Articles of Union, through the Acts of Union, are part of the Constitution of the Union and that of Zanzibar. Both the Constitution of Zanzibar and the Union Constitution are subordinate to the Acts of Union and in case of conflict the Acts of Union prevail.[xii]

3) The constitutional structure of the union may be described as a unitary state with federal characteristics. Seen from the vantage point of the Zanzibar Constitution, it is more federal than unitary; opposite is the case when seen from the standpoint of the Union Constitution. This means that there are some very fundamental and substantial inconsistencies between the two constitutions. The Eighth Constitutional Amendment to the Zanzibar Constitution further reinforces this hiatus.

4) The Courts have tended to ignore the Zanzibar Constitution as a way of avoiding pronouncing on the inconsistencies but in the process, as the *Haji v. Nungu, Mtumwa Saidi Haji v. The Attorney General* and this case show, the result has been to slowly diminish the federal characteristics of the union and make it more unitary by nibbling away at Zanzibar's autonomy.

Very briefly, if one were to approach the issue raised in this case from the standpoint of the Zanzibar constitution then the answer is pretty clear. The Constitution of Zanzibar constitutes the State of Zanzibar whose sovereignty is limited, more limited in the international sphere than in the domestic sphere. Throughout the Constitution, the terms '*nchi*', '*wananchi*', 'Zanzibar' are used. Taken in the context of the union, the terms '*nchi*' and 'Zanzibar' denote the 'political society' or the state of Zanzibar and '*wananchi*' connotes the people of Zanzibar in a collective sense as the 'civil society' of Zanzibar while Mzanzibari refers to the individual member of this 'civil society' who owes loyalty and allegiance to the state of Zanzibar from which he has right to demand protection of his/her person, integrity and welfare.

As in the case of the Union Constitution (see article 8(1)(a)), in the Zanzibar Constitution the source of sovereign power are the People and they exercise it through various organs constituted by the Constitution (article 9(1)(2)(a). Thus the Constitution of Zanzibar constitutes State Power which is the sum of executive, legislative and judicial power. This proposition is also supported by article 4 of the Union Constitution as already analyzed above.

The conclusion from this quick examination of the Zanzibar Constitution is that Zanzibar is a sovereign and a state, albeit its sovereignty is limited and the jurisdiction of the Executive and the Legislature is limited to non-union matters in Zanzibar while its Judiciary, as epitomized by the High Court, has unlimited jurisdiction. A Mzanzibari owes allegiance to the state of Zanzibar and therefore an offence of treason can be committed against the state of Zanzibar. This is irrespective of the fact that treason may be stipulated as an offence in the union law; nevertheless it can be tried in the courts of Zanzibar.

Concluding Ironies

It is ironical that the case of *Machano* whose decision resulted in declaring that the Zanzibar is neither sovereign nor a state should have involved members of a party whose political position has been, and continues to be, for greater autonomy for Zanzibar in the union. Such ironies are not unknown. Of course, the life and freedom of individual members was at stake, so their legal representatives had to do everything, including arguing that Zanzibar was not a state or sovereign, to persuade the Court so as to gain freedom for his clients. Ironically though, what ultimately freed the accused was a political and not a legal decision.

This then raises another question which relates to the role of a defense lawyer defending a political client whose political beliefs and positions may clash with the defense strategy. The

simple answer would be that a lawyer should adopt any defense strategy so long as that helps to free his client regardless of its political implications. In my view, this is not only a simple but a politically incorrect answer. The choice of different defense strategies is a political choice. Every lawyer must know that law is not politically neutral. In preferring one strategy to other, a lawyer is making a political choice and in a case like the instant one that choice has to be made in consultation with the client. In this case, for instance, the defense could have well argued that treason was a union matter and therefore the section of the Zanzibar Penal Decree under which the accused were charged was invalid. Admittedly, this would involve taking a risk because under normal circumstances a defense lawyer ought to deploy all possible defenses in favour of his client. No doubt there is no easy answer to the dilemma. I would suggest though that the least that a defense lawyer ought to do is to make very clear to his client the possible political implications of the legal strategies available and let the client make the ultimate choice.

As the analysis of this case further demonstrates even judges make political choices, whether or not they admit or are conscious of it. Legal decisions are not purely so. We lawyers are responsible for mystifying law and creating a dichotomy between political and legal power. Ultimately the two are united as expressions of State Power, however much we may trumpet separation of powers. That is not to say that we stop blowing the trumpet. While trumpets may not kill elephants they may at least scare them away so long as we do not become foolhardy to believe that trumpets are guns.

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[*] This paper was originally presented to a meeting of the Zanzibar Law Society held at Bwawani Hotel in Zanzibar on 23rd April, 2005. It has been edited and slightly revised for inclusion in this volume. The original paper is reproduced in Peter & Othman 2006, pp. 162-187.

[i] The ruling is not yet reported but it is reproduced in Peter & Othman 2006, pp. 188-213. Page number of the ruling cited in the text are from the original certified (mimeographed) copy.

[ii] In the case of *DPP v. Anjelina Ojare*, the Court was faced with the issue whether a resident magistrate's court had jurisdiction to rule on the constitutionality of a provision in a statute. In that case too *nolle prosequie* had been entered by the time the Court came to hear the matter. However, the circumstances of that case are distinguishable because there the DPP, who was the appellant, did not withdraw the appeal; instead he prayed to continue. The Court therefore did not have the problem of jurisdiction and the case proceeded as an ordinary appeal. I am indebted to Chris Peter for drawing attention to this case.

[iii] [This raises an interesting query as to whether the Court of Appeal can exercise revisional jurisdiction over the High Court of Zanzibar. The answer would depend on whether or not the Court of Appeal is lawfully a union matter in which case its jurisdiction is determined by the union law and not the constitution of Zanzibar (see for discussion supra pp. xxx]. In any case, assumption of revisional jurisdiction by the Court of Appeal over the High Court of Zanzibar does undermine the Zanzibar judiciary as an exclusively Zanzibar organ.]

[iv] See, for instance, *Aero Helicopter (T) Ltd. v. F. N. Jansen*, [1990] T.L.R.142.

[v] Court of Appeal at Dar es Salaam, Civil Application No. 3 of 2000, unreported. In that case this writer unsuccessfully pleaded with the Court to invoke its revisional jurisdiction *suo motto* under section 4(3) in favour of a legally aided person whose case had been messed up in the High Court.

[vi] "We are ... of the settled view that subsection (3) applies to proceedings under the consideration or cognisance of the High Court, in other words, proceedings in which the High Court is still seized of jurisdiction. This construction is underscored by the words 'to call for', similarly emphasized, which can only mean calling for a record still before the High Court. It is known, of course, that calling for the record may sometimes assume a fictional nature where the record is for some reason already with the Court of Appeal, but legal fictions are not unknown. It is common ground that in this case a notice of appeal is already filed. ... [T]he effect of that notice is to remove the proceedings from the High Court into this Court. An intended appeal has come into existence. The proceeding is therefore no longer before the High Court and is beyond the ambit of subsection (3)." (at p.6)

[vii] See, for instance, *Seif Shariff Hamad v. S.M.Z.*, Criminal Appeal No. 171 of 1992 (unreported) but reprinted in Peter 1997, pp.702-710, at p. 709.

[viii] See the case of *Daudi Pete v. R.* at p.33, cited and applied by the Court in this case.

[ix] Query: is it significant that 'ya' is omitted between Mapinduzi and Zanzibar, or, is it simply a printing error?

[x] This refers to the reasoning or reasons which are crucial to the ultimate decision of the case while obiter dictum means observations and statements made by the court in passing or which are not central to the reasoning of the judgement.

[xi] See the main lecture text in this volume.

[xii] This proposition has yet to be fully accepted judicially. But both the immediate past Chief Justice (Mr. Justice Samatta, see Samatta 2000) and the former Chief Justice (Mr. Justice Nyalali, see Nyalali 1990) have, in extra-judicial statements, accepted that the Acts of Union are part of the Constitution and the current Chief Justice has gone as far as accepting that in case of inconsistency, the Acts prevail. However, in the case of *Mtumwa Saidi Haji and 49 Others v. The Attorney General*, another very important case on the union which has gone unnoticed, the court while agreeing that the Articles/Acts of Union still have force of law decided that they could be amended by the Constitution because they are a schedule to it. This is rather strange. Space and time does not allow further analysis of the case but see the Introduction..