

FREEDOM OF EXPRESSION AND DEMOCRATIC PROCESS:

*An Analysis of Laws and Policies relating to the Right of Freedom of Expression in
Zanzibar*



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LIST OF ABBREVIATIONS

ASP	Afro Shirazi Party
ACHR	American Convention on Human Rights
A.U	African Union
CHRGG	Commission for Human Rights and Good Governance
CCM	Chama Cha Mapinduzi
CPA	Criminal Procedure Act
CUF	Civic United Front
D.P.P	Director of Public Prosecutions
ICCPR	International Covenant on Civil and Political Rights
IACHR	Inter- American Court of Human Rights
IFES	International Foundation for Election Systems
ECHR	European Court of Human Rights
HCZ	High Court of Zanzibar
GA	General Assembly
LEGCO	Zanzibar Legislative Council
NGO	Non Governmental Organisation
OAS	Organisation of American States
OAU	Organisation of African Unity
UDHR	Universal Declaration of Human Rights

U.N	United Nation
UNHRC	United Nation Human Rights Committee
TANU	Tanganyika African National Union
TEMMP	Tanzania Elections Media Monitoring Project
TEMCO	Tanzania Election Monitoring Committee
TVZ	Television Zanzibar
TCA	Tanzania Court of Appeal
ZAA	Zanzibar African Association
ZNP	Zanzibar National Party
ZPPP	Zanzibar and Pemba Peoples Party
ZBC	Zanzibar Broadcasting Commission
ZEC	Zanzibar Electoral Commission

TABLE OF CONTENTS

<u>ACKNOWLEDGEMENT</u>	II
<u>LIST OF ABBREVIATIONS</u>	III
<u>1 GENERAL INTRODUCTION OF THE STUDY</u>	1
1.1 STATEMENT OF THE PROBLEM	1
1.2 BACKGROUND OF THE STUDY	1
1.3 RESEARCH QUESTIONS	5
1.4 LITERATURE REVIEW	5
1.5 RESEARCH METHODOLOGY	7
1.6 SCOPE AND LIMITATION	8
<u>2 THE INTERNATIONAL AND REGIONAL DEVELOPMENT OF FREEDOM OF EXPRESSION</u>	9
2.1 INTRODUCTION	9
2.2 INTERNATIONAL DEVELOPMENT	9
2.3 REGIONAL DEVELOPMENT	10
2.3.1 EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS (1950)	10
2.3.2 ORGANIZATION OF AMERICAN STATES	11
2.3.3 AMERICAN CONVENTION ON HUMAN RIGHTS-ACHR (1969)	11
2.3.4 AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS-ACHPR (1982)	12
2.4 THE NATURE AND CONTENTS OF THE FREEDOM OF EXPRESSION UNDER UDHR AND ICCPR	13
2.4.1 FREEDOM OF OPINION (PAR. 1)	14
2.4.2 FREEDOM OF EXPRESSION AND OPINION (PAR. 2)	15
2.4.3 DUTIES AND RESPONSIBILITIES (PAR 3)	15
2.4.4 PERMISSIBLE LIMITATIONS	16
2.4.5 PROVIDED BY LAW	16
2.4.6 NECESSARY IN A DEMOCRATIC SOCIETY	17
2.5 LISTED PURPOSE OF INTERFERENCE	18
2.5.1 RESPECT THE REPUTATION OF OTHERS	18
2.5.2 PROTECTION OF NATIONAL SECURITY	18
2.5.3 PROTECTION OF PUBLIC ORDER	19
2.5.4 PROTECTION OF PUBLIC HEATH	20
2.5.5 PROTECTION OF PUBLIC MORALS	20
2.6 CONCLUSION	21
<u>3 LAWS AND POLICIES GOVERNING THE FREEDOM OF EXPRESSION IN ZANZIBAR</u>	22

3.1 INTRODUCTION	22
3.1.1 ZANZIBAR CONSTITUTIONAL FRAMEWORK	22
3.2 THE REGISTRATION OF NEWS AGENT, NEWSPAPERS AND BOOKS ACT NO. 5 OF 1988	24
3.2.1 ADVISORY BOARD	24
3.2.2 WIDE POWERS OF THE EXECUTIVE LIKELY TO BE ABUSED	25
3.2.3 WIDE POWERS OF POLICE	28
3.2.4 LICENSING, SUSPENSION, REVOCATION AND APPEAL FOR JOURNALIST	29
3.2.5 SEDITIOUS OFFENCES	31
3.3 ZANZIBAR BROADCASTING COMMISSION ACT NO. 7 OF 1997	33
3.3.1 FUNCTION OF ZANZIBAR BROADCASTING COMMISSION	34
3.3.2 OFFENCES	36
3.3.3 COMPULSORY BROADCASTING AND PROHIBITION OF BROADCASTING RELATING TO NATIONAL SECURITY	37
3.4 ZANZIBAR BROADCASTING POLICY OF 2008	37
3.5 ZANZIBAR INFORMATION POLICY OF 2006	39
3.5.1 WITHHOLDING INFORMATION TO THE PUBLIC	39
3.5.2 RESPONSIBLE ORGAN FOR INFORMATION MATTERS	40
3.6 CONCLUSION	41
<u>4 FREEDOM OF EXPRESSION AND DEMOCRATIC PROCESS IN ZANZIBAR</u>	<u>42</u>
4.1 INTRODUCTION	42
4.2 THE ROLE OF FREEDOM OF EXPRESSION IN A DEMOCRATIC SOCIETY	42
4.3 OVERVIEW OF MULTIPARTY ELECTIONS IN ZANZIBAR	44
4.4 THE REGISTERED POLITICAL PARTIES IN ZANZIBAR	45
4.5 FREEDOM OF ASSEMBLY AND ASSOCIATION	45
4.6 FREEDOM OF EXPRESSION IN ELECTION CAMPAIGNS FROM 1995-2005	48
4.7 CONCLUSION	51
<u>5 CONCLUSION AND RECOMMENDATIONS</u>	<u>52</u>
5.1 CONCLUSION	52
5.2 RECOMMENDATIONS	53
<u>BIBLIOGRAPHY</u>	<u>56</u>
TEXTBOOKS	56
ARTICLES AND JOURNALS	59
UNITED NATION DOCUMENTS	62
INTER-AMERICAN COMMISSION OF HUMAN RIGHTS DOCUMENTS	64
OTHER ONLINE DOCUMENTS	64
INTERNATIONAL CONVENTIONS AND RESOLUTIONS	68
LIST OF CASES	69

DOMESTIC LEGISLATIONS	72
ZANZIBAR ELECTION REPORTS	73
PREVIOUS VISITED THESIS	73
PERSONS MET IN THE COURSE OF STUDY	73

**APPENDIX I: HISTORICAL BACKGROUND OF ZANZIBAR CONSTITUTION AND THE
FREEDOM OF EXPRESSION** **74**

1 GENERAL INTRODUCTION OF THE STUDY

1.1 Statement of the Problem

The Zanzibar Constitution provides that Zanzibar is a democratic society which follows the principle of rule of law, human rights, equality, peace and justice.¹ It further states that all Government organs and its servants shall follow and adhere to the international human rights treaties and good governance.² Freedom of expression is the heart of any democratic society. The Zanzibar authority has adopted various legislations³ and policies⁴ concerning freedom of expression. However the enjoyment of any freedom in any country is measured within the line of international standard. I will therefore start by showing how the right to freedom of expression is enjoyed in Zanzibar. And secondly, I am going to show the discrepancies between the Zanzibar laws and Policies in relation to the International Standard.

1.2 Background of the Study

Article 19 of Universal Declaration of Human Rights (UDHR) proclaims the right to freedom of expression as a fundamental right whereby it includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. This right has been limited by Art.29 of UDHR,⁵ although the UDHR is not directly create legal binding obligations on a State as such. However, parts of its provisions including Article 19 constitute general principle of law and widely acquired legal force as a customary law since its adoption in 1948⁶ and it is considered as authoritative guide to human rights by General Assembly and by many jurists as a part of law of United Nation.⁷ In a similar way this right has been explained in Article 19 of the International Covenant on Civil and Political Rights (ICCPR) which is a legally binding treaty on member states. The ICCPR calls on all states parties to ‘respect and ensure’ to all individuals within their territories and subject to

¹ Article 5 and Art. 10(9) of Zanzibar Constitution of 1984(2006 edition).

² Art 10(9) of the Zanzibar Constitution of 1984(2006 edition).

³ The Registration of News Agents, Newspapers and Books Act, 1988 and The Zanzibar Broadcasting Commission Act No.7 of 1997.

⁴ The Zanzibar Broadcasting Policies of 2006 and the Zanzibar Information Policy of 2008.

⁵ *Art 29 permits restrictions solely for the purpose of securing.....respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in the democratic society.*

⁶ Amy R. West (2003), pg 7.

⁷ *Supra*, note 5.

their jurisdiction the rights in the Covenant⁸ as well as to take necessary steps in accordance with their constitutional process to adopt such laws or other measure to give effect the present covenant.⁹

The obligation to respect means that the states must refrain from restricting the exercise of these rights where such is not expressly allowed.¹⁰ State parties are obliged to take positive steps to give effect to the rights. The obligation to ensure consists of obligation to protect individuals against interference by third parties and the obligation to fulfil, which in turn incorporates the obligation to facilitate the enjoyment of rights and an obligation to provide services.¹¹ In 2004, the Human Rights Committee which monitors the implementation of ICCPR explicitly spelt out in its authoritative interpretation of Article 2 that the legal obligation under article 2 paragraph 1, is both negative and positive in nature. The positive obligations on State parties to ensure Covenant rights will only be fully discharged if individuals are protected by the States, not just against violations of Covenants rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyments of Covenant rights.¹² Freedoms of expression and access to information are indispensable to the protection of all other human rights as well as to a democratic society governed by the rule of law.¹³

Zanzibar is an integral part of the United Republic of Tanzania,¹⁴ whereby on 26th April 1964 it was merged with Tanganyika to create the United Republic of Tanzania.¹⁵ The principal bases for this merger is the Articles of Union¹⁶ between these two independent countries. The Articles

⁸ Art 2(1) of ICCPR.

⁹ Art.2(2) of ICCPR.

¹⁰ Manfred Nowak(2005) pg 37.

¹¹ Supra note 10, pg 38.

¹² U.N Human Rights Committee, General Comment No. 31, Nature of the General Legal Obligations Imposed on state parties to the covenant. U.N DOC E/CN.4/2003/120(26 May 2004).

¹³ Sandra Coliver(1998). Available in: http://muse.jhu.edu/journals/human_rights_quarterly/v020/20.1coliver.html (accessed on 27 March 2010).

¹⁴ Art 1 of Zanzibar Constitution of 1984(2006 edition) *as well as* Art 2(1) of the Constitution of United Republic of Tanzania of 1977(2005 edition).

¹⁵ Art. 2(2) of the Constitution Of United Republic of Tanzania of 1977(2005 edition).

¹⁶ The Articles of the Union were signed by Julius K. Nyerere, the President of the Republic of Tanganyika and Abeid Karume, the President of the People's Republic of Zanzibar on the 22nd of April, 1964. The Articles of Union provides for matters that would be under union arrangements. The original agreed matters were 11. This includes : (a) the Constitution and Government of the United Republic, (b) External Affairs, (c) Defence,(d) Police, (e) Emergence Powers, (f) Citizenship, (g) Immigration, (h)External Trade and Burrowing, (i) The Public Service of the United Republic, (j) Income tax, Corporation tax, Customs and Execise duties, (k) Harbours, Civil Aviation, Posts and Telegraphs. *However the matters have been expanded from 11 to 23 and some Scholars and*

form the Constitution of the Union or what is commonly known as the *Grundnorm*,¹⁷ the fundamental law of United Republic, on which the Constitutions of Tanzania and Zanzibar, and other laws, have to be based and from which they derive their legitimacy.¹⁸ The *Grundnorm* are supreme and no other body, even the Parliament of the United Republic can go outside its limits.¹⁹ In this agreement to become Sovereign Republic of Tanzania, it was categorically stated that in principle Zanzibar would retain autonomy and pursue its own policies over certain issues referred to as ‘non Union- matters’.²⁰ Matters relating to Information are not in the list of union List. They are therefore considered as non Union- matters.

Each part of Union has its own laws regulating the Information sector. The power to decide is left to the Zanzibar Organs such as House of Representatives, Judiciary, the Revolutionary Council and the President of Zanzibar and the Chairman of Revolutionary Council.²¹ This means that Zanzibar has its own Executive, a House of Representatives and a Judiciary.²² The House of Representatives of Zanzibar does not have power to introduce legislation on Union matters. This is the function of Union Parliament, which has power to enact laws relating to Tanzania Mainland.²³ On the other side if the Union Parliament enacts a law under the jurisdiction of House of Representatives that law will not applicable be applicable to Zanzibar.²⁴ A good example which has created a Constitutional problem is the establishment of Commission for Human Rights and Good Governance.²⁵ The founding legislation of the Commission is pan-territorial as it extends to Tanzania Mainland as well as Zanzibar, thus effectively making the Commission a “union institution”.²⁶ However, the Zanzibar authorities prevented this Act on the argument that the Commission has no jurisdiction in Zanzibar in so far as “non-union matters” are concerned, since human rights and good governance are not “union matters. But in 2006, the

some Zanzibaris question the validity of such expansions. Also see First Schedule of Constitution of United Republic of Tanzania. Available in : <http://www.lrct.or.tz/documents/REPUBLIC.pdf> (sited on 30 October 2009).

¹⁷ Chris Maina Peter(2006), pg 3.

¹⁸ Supra, note 16, pg 55.

¹⁹ Supra, note 16, pg 3.

²⁰ Samuel G. Ayany (1970), pg 188.

²¹ Chris Maina(2006), pg 58.

²² Art. 5A (1), (2) of Zanzibar Constitution of 1984(2006 edition) as well as Art. 4(1), (2) of Constitution of United Republic Tanzania of 1977(2005 edition).

²³ Art.64(1) of the Constitution of United Republic Of Tanzania of 1977(2005 edition).

²⁴ Art 64(2) of the Constitution of United Republic of Tanzania.

²⁵ Art. 129- 131 read together with this Act. Available in: <http://www.chragg.go.tz/documents/complaintreports/7-2001.pdf> (sited on 01 November 2009).

²⁶Section 3 of Commission for Human Rights and Good Governance of Tanzania.

Union Government authorities and Zanzibar Official agreed that the quasi governmental CHRGG would be permitted to operate in Zanzibar.²⁷ This Commission does not operate in Zanzibar under the mandate of law establishing it, but it was adopted and made operational in Zanzibar by the law passed by the House of Representative.²⁸

A Bill for an Act to enact or alter any law relating to Union matter shall not be passed by the Parliament unless it is supported by votes of less than two third of members of Parliament from Zanzibar.²⁹ However the Act shall not extend to Zanzibar unless it is passed in accordance with the requirement of Article 98(1b) of the Constitution of the United Republic and that the Act is laid before the Zanzibar House of Representatives.

The international and regional treaties are not part of Zanzibar domestic laws and therefore cannot directly be invoked in the courts. It is therefore upon the Zanzibar authorities to identify international principles and standards that are desirable for application in Zanzibar and take necessary modifications to domesticate those principles in the Zanzibar laws so that the courts could apply them.³⁰ Part three of the Zanzibar Constitution incorporates the protection of fundamental rights and freedom of individuals.³¹ But only Article 18 is relevant for the purpose of this study which read as follows:

18(1) Without prejudice to the relevant laws of the land, every person has the right to freedom of opinion and expression, and to seek, receive and impart or disseminate information and ideas through any media regardless of national frontiers and also has the right of freedom from interference with his communications

(2) Every citizen has the right to be informed at all times of various events in the country and in the world at large which are of importance to the lives and activities of the people and also of issues of importance to society.

From the above provision specific laws and policies on freedom of expression have been adopted.

²⁷ Tanzania (2009). Available in : <http://www.eisa.org.za/WEP/tanagency.htm> (accessed 27 March 2010).

²⁸ An interview with Othman M. Othman.

²⁹ Art. 98(1b) of the Constitution of United Republic of Tanzania.

³⁰ Global Campaign for freedom of Expression (2000), pg 6.

³¹ Part 3 of Zanzibar Constitution of 1984 (2006 edition) (from Art 11- Art 25) whereby it list and explain various fundamental freedoms of individuals.

1.3 Research questions

Under this research I intend to examine the following questions

- Whether the existing laws and policies pertaining to freedom of expression are compatible with the international standards?
- Whether these laws and policies are conducive for democratic society?
- Whether these laws and policies are properly implemented?

1.4 Literature Review

My work has been inspired by the work of the previous scholars who have written extensively on the rights to the freedom of expression as discussed below:

Robert Martin³² defines freedom of expression as the freedom to receive and impart ideas, opinion and information without interference, hindrance or intimidation. It belongs to all persons and may be exercised through speaking, writing, publishing and broadcasting or through physical act and it is the primary freedom, an essential precondition to the exercise of other freedoms. It is the foundation upon which other rights and freedoms arise. It may be limited to respect other social interests which are of pressing and substantial significance. Persons who exercise freedom of expression are under obligations to act responsibly and in a manner consistent with established ethical notion. Accepting this notion under the Zanzibar situation Part 3.1.1 of this Research point out the manner and the extent to which this right is guaranteed. It is enough to say that Zanzibar has a lot learn from Part 2.4 of Research and how this freedom should be exercised.

Muhammad Hashim³³ writes that the absence of restraints upon the ability of individuals or groups to communicate their ideas to others, subject to the understanding that they do not in turn coerce others paying attention or they do not invade other essential rights to the dignity of individual is the basis of freedom of expression. Its purpose is to inform, persuade, and convince others as well as to reveal the truth or to clarify and eliminate doubts.

³² Robert Martin (2002), pg 524

³³ Muhammad Hashim (1997), pg 7

Rhona K. M. Smith³⁴ writes on interdependence of freedom of expression with other rights and argued that it is the corner stone of any democratic society. Due to indivisibility of rights, it is linked to a number of other rights including linguistic rights, freedom of assembly and association, freedom of the press, right to the privacy, and the freedom from State interference in correspondence and personal property. The relationship with freedom of thought and conscience is most apparent when addressing issues arising from press and academic freedom and those concerning freedom of religion. It also overlaps with the right to participation in public life, the right to vote, and the right to stand for elections. This ideas is also affirmed by the Council of Europe Publication³⁵ which assert that freedom of expression and democratic process ensures the functioning of democratic process by effecting the two way exchange of information between the public and the government; it is through the media that the public is informed of the activities of the government and the government is made aware of the interests and concerns of the citizens. At no time is this two-way flow of information more important than during the election campaign process. At the times of election, there is a need for media which is independent of the control of the government, and which as a whole, when one takes into consideration public and private media and all different forms of media are able to present a plural and diverse range of views to the electorate. I totally concur with Rhona and Council of Europe Publication, but the Rhona's and Council of Europe Publication ideas is properly reflected in the situation where there is a fair play for all contesting parties where there is free debate between different candidates and then the voters can form their opinions. But this is very different in a situation whereby there is no equal fair play in political field. Part 4 of this Research discusses extensively about this matter under the Zanzibar context.

Thomas David Jones³⁶ writes on the importance of free speech and press arguing that they are only a human idea and hence incapable of exact expression. It is an innate, instinctive desire of a man for the right of self expression and for the right to commune freely with his fellow men. This desire is a natural one and this freedom is a natural right. Some have described it as inalienable, and imprescriptible, but it is better described as primordial. It is essential of organized society and progress from barbarism to civilization. Without its existence,

³⁴ Rhona K.M. Smith(2007), pg 267

³⁵ Council of Europe Publishing, pg 80.

³⁶ Thomas David Jones(1998), pg 31

individuality of man is suppressed. Without the right to acquire and impart information, knowledge becomes static, and subsequent generations can learn nothing from their predecessors.

The Inter-American Declaration of the Principles of Expression³⁷ declare that the freedom of press is essential for the full and effective exercise of freedom of expression and an indispensable instrument for the functioning of representative democracy, through which individuals exercise their right to receive, impart and seek information. In the same way it has been explained by Asbjon Eide³⁸ that media should be free, critical and constructive: free from external control over their reporting, critical of public authorities and private concentrations of power, including transnational corporations and other enterprises, constructive in making space for suggestions and ideas on better performances. They should reflect the concerns of ordinary human beings, and to be supportive of the values inherent in human rights. Obviously, the realization of human rights would be impossible without the efforts of journalists and editors. Again no one can doubt the role of freedom of press and journalists, but this role is properly performed under the environment where there is proper regulatory framework exercised and monitored by the free and independent organs from the government. Chapter 3 of the Research discusses these issues while in Part 4.6 discuss the situation of how journalists perform their duties in Zanzibar.

In general this review is very helpful to me in assessing and analyzing the exercise of the right of freedom of expression in Zanzibar.

1.5 Research Methodology

Theoretical and empirical studies will be used under this thesis on the Freedom of Expression: Case study Zanzibar. I also relied on available literature and documentation such as textbooks, International and Regional Conventions, Constitutions and other Acts of House of Representative (Parliament), International and National Courts decisions, Law Journals, Articles, Newspapers and some other kind of publications relating to the subject.

³⁷ Paragraph 10 of the Preamble of Inter-American Declaration on the Principles of Freedom of Expression.

³⁸ Asbjon Eide and Sigrun Skogly (1998), pg 4

In addition, I conducted interviews with some individuals whose knowledge on the subject I found valuable.

1.6 Scope and Limitation

This research is based on the Zanzibar perspective. It also covered the provisions of International and Regional Conventions on Freedom of Expression. The Bill of Rights enshrined in the two Constitutions (the Zanzibar Constitution and the Constitution of the United Republic of Tanzania) will also be covered.

For those who are not familiar with the History of Zanzibar. Please see the Appendix I

2 THE INTERNATIONAL AND REGIONAL DEVELOPMENT OF FREEDOM OF EXPRESSION

2.1 Introduction

The modern roots of the origin of the right to freedom of expression can be traced from seventeenth century when document such as the 1689 English Bill of Rights provide freedom of speech and debate within the Parliament.³⁹ It was later expanded gradually by the United States Bill of Rights (added to the Constitution in 1791) and the French Declaration of the Rights of Man and the Citizen (1789).⁴⁰ These two declarations reshaped the principle of freedom of expression in the era of United Nation from 1946 till 1948 when finally it was agreed and the provision of Freedom of Expression was included in the UDHR of 1948.

2.2 International Development

Article 19 of UDHR proclaims the general principle on the right to freedom of information and expression to all individuals without any interference. This includes the right to seek, receive and impart information and ideas through any media and regardless of frontiers.⁴¹ This Article does not impose any limitations in the exercising of this freedom. Article 29(2) and (3) contains the general limitations for all rights and freedoms contained in UDHR including the freedom of expression.⁴² It is Article 19 of ICCPR that precisely put out this freedom together with limitations which read as: *Everyone shall have the right to hold opinions without interference. It include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. The right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals*

The ICCPR also establishes the Human Right Committee which monitors the implementation of rights found under the Covenant.⁴³ The Procedures for bringing the Complaint under this

³⁹ Gudmundur Alfredsson and Asbjorn Eide (1999), pg 393.

⁴⁰ Supra, note 108, pg 394.

⁴¹ See Art 19 of UDHR for full text

⁴² *The law may impose the restrictions and limitations for purpose of securing and respecting the rights of others as well as meeting the requirements of morality, public order and general welfare in the democratic society.*

⁴³ See Part IV of ICCPR.

Committee is explained under the Optional Protocol to the International Covenant on Civil and Political Rights⁴⁴.

2.3 Regional Development

The principle laid down in Article 19 of the UDHR not only had enormous impacts on the elaboration of United Nations instruments, but the content of this article, in some modified form, appears in all major Regional human rights instruments as well. These include: (a) The European Convention on Human Rights; (b) the American Convention on Human Rights and (c) the African Charter on Human and Peoples' Rights. Each Region will be explained in separate heading below:

2.3.1 European Convention for the Protection of Human Rights (1950)

Under Article 10 of the European Convention for the Protection of Human Rights, the principle of freedom of expression reads as: *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.*

The situations which a restriction may be justified include the need to protect public interests—such as national security, territorial integrity, freedom from crime and disorder, health and morality, and the authority and impartiality of judiciary as well as protection from individual rights, such as right to privacy or reputation. However, when a Contracting Party imposes restrictions upon the exercise of freedom of expression, the right must not be rendered meaningless. Besides, the restrictions should be “provided by law;” “proportionate,” and “necessary in a democratic society,” and only be imposed for the “specified aims.”⁴⁵ The restrictions permitted under the Convention to the said rights and freedom shall not be applied for any purpose other than those for which they have been prescribed.⁴⁶

⁴⁴ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976.

⁴⁵ Onder Bakircioglu (2007), pg 9.

⁴⁶ Jacob and White (2006), pg 220.

For the purpose of protection of the rights under the European Convention establishes the European Court of Human Rights which came into operation on 1 November 1998, and function on a permanent basis.⁴⁷ In a number of cases on the issue of limitation for the protection of morals, the Court allows wide latitude of the national discretion under the margin of appreciation doctrine.⁴⁸

2.3.2 Organization of American States

The Inter American Human Rights system modeled after the European system come into the existence in 1978 which served as an example for other human rights declarations and charters.⁴⁹ The American system establishes a Commission and Courts to oversee the implementation of specified civil and political rights⁵⁰ and it is believed to be the largest international framework that provides the greatest scope and the broadest guarantees of protection to the right to freedom of thought and expression.

2.3.3 American Convention on Human Rights-ACHR (1969)

The detailed provision on freedom of expression is found in Article 13 of American Convention of Human Rights which read as: *Everyone has the right to freedom of thought and expression. It includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice. In the exercise of the right provided shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: (a) respect for the rights or reputations of others; or (b) the protection of national security, public order, or public health or morals.*⁵¹

⁴⁷ Article 19 of European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11. Available in : <http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/0/englishanglais.pdf> (sited 24 December 2009)

⁴⁸ See Handyside Case, 24 European Court of Human Rights (1976)

⁴⁹ Jonathan L. Black-Branch (1996-1997), pg 8

⁵⁰ See Part II of Convention, Chapter IV

⁵¹ See full text, Article 13 of American Convention on Human Rights. Adopted at San José, Costa Rica, 22. November 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force 18 July 1978. Available in : <http://www.cidh.oas.org/Basicos/English/Basic3.American%20Convention.htm> (accessed 18 April 2010)

Article 13(2) of the Convention put out three conditions for limitations to be admissible i.e. : (1) the limitation must have been defined in a precise and clear manner by a law, in the formal and material sense; (2) the limitation must serve compelling objectives authorized by the Convention; and (3) the limitation must be necessary in a democratic society to serve the compelling objectives pursued; strictly proportionate to the objective pursued; and appropriate to serve said compelling objective.

On top of that, the Inter- American Declaration of Principles on Freedom of Expression was adopted and acts as an authoritative interpretation/clarification of Article the 13 of ACHR.⁵²

2.3.4 African Charter on Human and Peoples Rights-ACHPR (1982)

African Union is less developed as compared with other Regional development by having very weak formulation of freedom of expression.⁵³ Political intolerance, often in the wake of the establishment of military dictatorship or installation of one party state, has put this freedom in jeopardy.⁵⁴ The right to freedom of expression is explained under Article 9 of the ACHPR which read as : *Every individual shall have the right to receive information as well as the right to disseminate opinion within the law.*⁵⁵

The provision contains the claw-back clauses restricting the freedom of expression from the start,⁵⁶ meaning that it recognizes and guarantees the right in question only to the extent that such right is not infringed upon by national law.⁵⁷ The African Commission which established this Charter has given little attention to the freedom of expression.⁵⁸

In the case of *Media Rights Agenda and Others v. Nigeria*, the Commission said that the right what be limited ‘in accordance with law’ should be understood to require such limitations to be

⁵² Approved by the Inter-American Commission on Human Rights during its 108 regular session. It is available in: <http://www.cidh.oas.org/declaration.htm> (sited 28 December 2009).

⁵³ Claude E. Welch (1998), pg 112-113.

⁵⁴ B.Obinna Okere(1984), pg 146-7.

⁵⁵ For full text see Article 9 of ACHPR. Available in : http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/Banjul%20Charter.pdf (sited in 20 November 2009).

⁵⁶ Supra, note 51, pg 113.

⁵⁷ Christof Heyns (2003-2004), pg 688.

⁵⁸ Supra, note 51, pg 107.

done in term of domestic legal provisions which comply with international human rights standard.⁵⁹ As a consequence of serious violations of the rights of freedom of expression in Africa, it adopts the Declaration of Principles on Freedom of Expression in Africa (2002) which come up with several principles for the purpose of improvement of this freedom and is regarded as an authoritative elaboration of the guarantee of freedom of expression found in Art 9 of the African Charter on Human and Peoples Rights.⁶⁰ The declaration affirms that freedom of expression is an individual human right and a cornerstone of democracy as well as a means of ensuring respect for all human rights and freedoms.⁶¹ All laws and customs that repress freedom of expression are disservice to society.⁶² They also acknowledge that respect for freedom of expression, the right of access to information lead to public transparency and accountability, as well as to good governance and the strengthening of democracy.⁶³

2.4 The Nature and Contents of the Freedom of Expression under UDHR and ICCPR

The right to freedom of expression and opinion is a core right of the International Covenant on Civil and Political Rights and described as an essential test right, the enjoyment of which illustrates the degree of enjoyment of all human rights enshrined in the United Nations Bill of Rights, that comprises the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and reflects a country's standard fair play, justice and honesty.⁶⁴ This right has a dual dimension (individual and collective form of freedom of expression).An individual dimension, consisting of the right of each person to express her own thoughts, ideas and information, and a

⁵⁹ See par 66. Available in: http://www1.umn.edu/humanrts/africa/comcases/105-93_128-94_130-94_152-96.html (sited 28 December 2009).

⁶⁰Toby Mendel (2008), pg 13.

⁶¹ Preamble of Declaration of the Principles on Freedom of Expression in Africa. Available in: http://www.achpr.org/english/declarations/declaration_freedom_exp_en.html (sited in 20 November 2009).

⁶² Supra, note 59.

⁶³ Supra, note 59.

⁶⁴ Report of the Special Rapporteur for the promotion and protection of the right of freedom of opinion and expression. U.N DOC E/CN.4/1995/32 (14 December 1994).

collective dimension, consisting of society's right to obtain and receive any information, to know the thoughts, ideas and information of others, and to be well-informed.⁶⁵

It includes the freedom of access to the State and the freedom from the State. The former refers to the participation of the individual in matters of the State. The latter refers to the realm of privacy of the individual and requires absolute protection against any undue external interference.⁶⁶ The legal obligation imposed by Article 2 of ICCPR is that, the State must respect, protect and refraining from interference in these rights either by the State organs itself or by third parties.⁶⁷

2.4.1 Freedom of Opinion (par. 1)

Freedom of Opinion is absolute and not allowed to be restricted by law or any other power since it is a private right⁶⁸ and belonging to the realm of mind.⁶⁹ It is for these reasons that the Covenant in article 19 (1) declares an independent right to hold opinions without interference. It requires state parties to refrain from any interference with the freedom of opinion (by indoctrination, ‘brainwashing’, influencing the conscious or subconscious mind with psychoactive drugs or other means of manipulation) and to prevent private parties from doing so⁷⁰. In the case of *Yong-Joo Kang v. Republic of Korea*,⁷¹ the author was a suspected sympathizer with the North Korean communist regime. He was convicted of subversive activities that were prejudicial to the national security of the Republic of Korea. During his incarceration, he was subjected to the ‘ideology conversion system,’ attempting to convert him from his alleged Communist opinions. Because he continually refused to ‘convert,’ he was held in solitary confinement for 13 years. The HRC confirmed that, this act amount to violation of the right to hold opinion under Article 19(1).

⁶⁵ Par 12-13 of IACHR, Annual Report, 2008. Volume II, Report of the Office of the Special Rapporteur for Freedom of Expression Annual Report of Inter- American Commission on Human Rights, OEA/Ser.L/V/II.134. (25 February 2009).

⁶⁶ Par 19 of Report of Special Rapporteur for the promotion and protection of the right of freedom of opinion and expression. U.N DOC E/CN.4/1995/32 (14 December 1994).

⁶⁷ Article 2 of ICCPR for full provision.

⁶⁸ Paul Sturges (2006), pg 182.

⁶⁹ U.N Human Rights Committee, General Comment N0. 10, Freedom of expression, par 1. *Also* see Principle 5 of Johannesburg Principles on freedom of expression .

⁷⁰ *Supra*, note 10, pg 442.

⁷¹ Par 7.2 of HRC Judgment, 16 July 2003. Available in: <http://www.unhcr.org/refworld/category.LEGAL,HRC.,KOR,404887efa,0.html> (sited 21 November 2009).

2.4.2 Freedom of Expression and Opinion (par. 2)

This is a public right⁷² which includes the right to seek, receive and impart information and ideas, it relates to all generally accessible information and it is known. Freedom of expression is protected in article 19 (2) with respect to "information and ideas of all kinds",⁷³ for example: paintings, books, films, statements in radios interviews, and information pamphlets and with any kind of information.⁷⁴ Thus it is impermissible to attempt to close out undesirable contents such as pornography or blasphemy, by restrictively defining the scope of the protection.⁷⁵ Though for the protection of public morals within the community, the pornography can be restricted.⁷⁶ Where free exchange of information and opinion is possible, there is normally diversity of views, which implies having to tolerate the views that may sometimes be opposed to one's teaching and wider tolerance in relation with other society.⁷⁷ The state obligates to guarantee with positive measures access to state or private information or to make information available themselves.⁷⁸ This issue has been insisted in *Claude Reyes et al. v. Chile*,⁷⁹ whereby the Inter-American Commission, interpreted article 13 of the American Convention as comprising the positive obligation of the State to provide its citizens with access to the information in its possession, and the corresponding right of individuals to access the information held by the State. In another case of *Gauthier v. Canada*,⁸⁰ the HRC rules out that the restriction of the author's access to the press facilities in Parliament amounts to a violation of his right under article 19 of the Covenant, to seek, receive and impart information.

2.4.3 Duties and Responsibilities (par 3)

The special duties and responsibilities under this article 19 contrasts with the general nature of the Covenant that establishes rights of the individual and duties of States. The Covenant in

⁷² Supra, note 66, pg 182.

⁷³ Supra, note 10, pg 443.

⁷⁴ Supra, note 46, pg 318.

⁷⁵ Supra, note 10, pg 444.

⁷⁶ Infra, note 3.5.5.

⁷⁷ Dragos Cucereanu (2008), pg 9.

⁷⁸ Supra, note 10, pg 447.

⁷⁹ Par 59 of IACHR, Judgment of 19 September 2006. Available in: <http://www1.umn.edu/humanrts/cases/60-03.html#4> (sited 22 November 2009).

⁸⁰ Par 13.3 of HRC Judgement, 7 April 1999. Available in: http://www.bayefsky.com/pdf/159_canada063.pdf (sited 22 November 2009).

principle establishes rights of the individual and duties of the state parties.⁸¹ The special duty and responsibility referred to can therefore be said to be part of the general principle that is embodied in human rights that are horizontally effective.⁸² In the exercise of freedom of expression, as well as freedom to seek information is capable of encroachments upon other rights.⁸³ Thus, these responsibilities obligate the opinion makers not to abuse their power at the expense of others and obligate the State to interfere in such cases where the rights of others are violated.⁸⁴ State parties must establish an optimal balance between various human rights claims and that it is interplay between the principle of freedom of expression and such limitations and restrictions which determine the actual scope of the individual's rights.⁸⁵

2.4.4 Permissible Limitations

There some circumstances of public authority that can justify and can limit the exercise of this freedom. A key question is when and which circumstances for that justification. The answer is provided in Article 19 (3) that, the restrictions must be provided by law, must serve one of the listed purposes mentioned in the article and must be necessary for attaining this purpose.⁸⁶ When State decides to do so, they should not put this right in jeopardy.⁸⁷

2.4.5 Provided by Law

A limitation on the freedom of expression must comply with the requirement of legality⁸⁸ i.e. must be established in advance, expressly, restrictively and clearly, in a law in formal and material sense. The laws that set limits to freedom of expression must be drafted in the clearest and most specific terms possible, as the legal framework must provide legal certainty to the

⁸¹ Supra, note 10, pg 459.

⁸² Supra, note 10.

⁸³ Par 36 of Special Rapporteur for the Promotion and Protection of the right of freedom of opinion and expression. U.N DOC E/CN.4/1995/32 (14 December 1994).

⁸⁴ Supra, note 147.

⁸⁵ Supra, note 10, pg 459.

⁸⁶ Par 12.2 of HRC Judgement. Available in :

<http://www.unhcr.org/refworld/country,,HRC,,KOR,4562d8cf2,3f588eff7,0.html> (sited 24 November 2009)

⁸⁷ Par 3 of U.N Human Rights Committee, General Comment N0. 10, Freedom of expression..

⁸⁸ Supra, note 81, pg 14.

public,⁸⁹ so as to enable the individuals to understand their obligations and to foresee whether particular action is unlawful.⁹⁰ Interference based solely on an administrative provision or vague statutory authorization violates this Article,⁹¹ even if made public and approved by legislature, is not sufficient because it is not legally binding on the public authorities.⁹² Vague or ambiguous legal provisions are incompatible with this provision, because they can support potential arbitrary acts that are tantamount to prior censorship, or that establish disproportionate liabilities for the expression of protected speech.⁹³

2.4.6 Necessary in a Democratic Society

The UDHR and ICCPR are silent under these criteria. But the Johannesburg Principle made clear about these criteria. It states that ‘‘no restrictions of freedom of expression or opinion unless the government demonstrate that the restrictions ...is necessary in democratic society’’.⁹⁴ In European system this is the main test applied by the Court in determining the acceptability of restriction on freedom of expression under ECHR⁹⁵ and it must comply with the genuine interest of democracy and is not merely political expediency in disguise.⁹⁶ The word necessary implies the existence of pressing social needs.⁹⁷ In American system any States that impose limitations upon freedom of expression are obligated to demonstrate that they are necessary in a democratic society to serve the compelling objectives pursued.⁹⁸ While under African system, Principle II of Declaration of the Principle of Freedom of Expression states that:’’ any restrictions on freedom of expression shall be provided by law..... and be necessary in a democratic society’’.

⁸⁹Par 64 of IACHR, Annual Report, 2008. Volume II, Report of the Office of the Special Rapporteur for Freedom of Expression Annual Report of Inter- American Commission on Human Rights, OEA/Ser.L/V/II.134. (25 February 2009).

⁹⁰ Principle 1 of the Johannesburg Principles on freedom of Expression.

⁹¹ Supra, note 10, pg 460.

⁹² Par 34 of *Malone v. United Kingdom*, Application no. 8691/79 ECHR-STRASBOURG, 1984.

⁹³ Par 64 of IACHR.

⁹⁴Principle Id and 1.3 of the Johannesburg Principles on National Security , Freedom of Expression and Access to Information.

⁹⁵ Supra, note 81, pg 16.

⁹⁶ Secrecy and Liberty: National Security, Freedom of Expression and Access to Information(1999),pg 115.

⁹⁷ Supra.

⁹⁸ Par 76-77 of Report of the Office of the Special Rapporteur for Freedom of Expression. 25 February 2009.

2.5 Listed Purpose of Interference

The right of freedom of expression not only restricted by law, but also it must be necessary to attain one of the following purposes, i.e.: (a) to respect the rights or reputations of others; (b) to protect national security; (c) to protect public order; (d) to protect public health; and (e) to protect public morals. HRC state that, the right to freedom of expression is of paramount importance in any democratic society and any restrictions to the exercise of this right must meet a strict test of justification.⁹⁹

2.5.1 Respect the Reputation of Others

In the course of exercising the rights of freedom of expression sometimes may conflict with others rights. For example it may clash with the right of privacy.¹⁰⁰ This situation raises the classic human rights conflict between freedom of expression and protection of the personality.¹⁰¹ Therefore the respect for the rights and reputations of others justify restrictions on the right to freedom of expression for the purposes of protection of freedom of religion, the protection against discrimination and the protection of minorities.¹⁰² States are bound to provide the statutory limitation for the purpose of protecting others rights. Criminal law, civil and administrative may ensure the protection of the rights and other reputation. The principle of proportionality should be observed when a State decides to do so; hence there is a danger that this freedom could be undermined.¹⁰³

2.5.2 Protection of National Security

Serious cases of political and military threat to the entire nation can justify the restrictions on the right of freedom of expression for the purpose of protection of national security.¹⁰⁴ Gathering of

⁹⁹ Par 10.3 of HRC Judgment. 3 November 1998.

Available in: <http://www.unhcr.org/refworld/publisher/HRC,,KOR,3f588effe,0.html> (sited 24 November 2009)

¹⁰⁰ The right is protected under Art. 17 of ICCPR.

¹⁰¹ Supra, note 10, pg 462.

¹⁰² Par 47 of the Report of the Special Rapporteur report for the promotion and protection of the right of freedom of opinion and expression. U.N DOC E/CN.4/1995/32 (14 December 1994).

¹⁰³ Supra, note 34, pg 275.

¹⁰⁴ Principle 6 Johannesburg Principles on Freedom of Expression. Available in: <http://www.article19.org/pdfs/standards/joburgprinciples.pdf> (sited 25 November 2009).

intelligence and publication of 'memoir' of former intelligence personnel,¹⁰⁵ procurement or dissemination of military secrets, publications aiming to incite violence to overthrow legitimate government as well as the propaganda for war¹⁰⁶ falling within the permissible restrictions. When the State decides to restrict on this ground they should not too lightly in an attempt to justify infringements on the right to freedom of expression that might be unnecessary and impermissible because they do not serve its stated purpose.¹⁰⁷ National security and related concepts (such as "state security," "internal security," "public security," and "public safety") are so imprecise that they may be, and frequently have been, invoked by governments to suppress precisely the kinds of speech that provide protection against government abuse, such as information or expression exposing circumvention of the democratic process, attacks on opposition parties, damage to the environment, and other forms of wrongdoing by government officials and their associates.¹⁰⁸ In the case of *Keun-Tae Kim v. Republic of Korea*,¹⁰⁹ the Republic of Korea found in violation of freedom of expression for failure to justify how the publication threatens public security.

2.5.3 Protection of Public Order

Public order has been defined as the conditions that assure the normal and harmonious functioning of the institutions on the basis of a coherent system of values and principles.¹¹⁰ The protecting of public order (ordre public) can justify the restrictions on the right to freedom of expression under ICCPR. The justification to limit freedom of expression must be based on real and objectively verifiable causes that present the certain and credible threat of a potentially serious disturbance of the basic conditions for the functioning of democratic institutions.¹¹¹ Strict

¹⁰⁵ Supra, note 102, pg 273.

¹⁰⁶ Supra, note 10, pg 464.

¹⁰⁷ Par 51 of the Report of the Special Rapporteur report for the promotion and protection of the right of freedom of opinion and expression. U.N DOC E/CN.4/1995/32 (14 December 1994).

¹⁰⁸ Supra, note 12, pg 1.

¹⁰⁹ Par 12.4-5 of HRC Judgement, 4 January 1999. Available in:

<http://www.unhcr.org/refworld/country,,HRC,,KOR,4562d8cf2.3f588eff7,0.html> (sited 24 November 2009).

¹¹⁰ Par 68 of Advisory Opinion of OC-5/85 of November 13, 1985. Compulsory Membership in an Association Prescribed By Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights).

¹¹¹ Par 75 of See par 64 of IACHR, Annual Report, 2008. Volume II, Report of the Office of the Special Rapporteur for Freedom of Expression Annual Report of Inter- American Commission on Human Rights, OEA/Ser.L/V/II.134. (25 February 2009).

requirements must be placed on the necessity (proportionality) of a given statutory restriction otherwise it can lead to undermining of the freedom of expression.¹¹²

2.5.4 Protection of Public Health

Protection of public health has a minor practical relevance in freedom of expression. States are permitted to prohibit misleading publications on health-threatening substances (drugs, medicine, poisons, and radioactivity)¹¹³ or on social or culturally inspired practices negatively affecting health (female genital mutilation, dowry debts and bride-burning).¹¹⁴ In the case of *Omar Sharif Baban v. Australia*,¹¹⁵ a detainee who has been removed from one location to another for participating in hunger strike, the HRC held that a hunger strike may be subsumed under the right to freedom and expression protected by that article 19, and in the light of the concerns invoked by the State party about the health and safety of detainees, including young children, and other persons, steps lawfully taken to remove the hunger strikers from a location giving rise to these concerns may properly be understood to fall within the legitimate restrictions provided for in article 19, paragraph 3 and hence no violation by this act.

2.5.5 Protection of Public Morals

Protection of public morals also is ground for a State to restrict the right of freedom of expression. For example restrictions on pornographic or blasphemous publication justify this restriction. In the case of *Hertzberg v. Finland*,¹¹⁶ the HRC held that public morals differ widely. There is no universally applicable common standard. Consequently, in this respect, a certain margin of discretion must be accorded to the responsible national authorities. The nature and requirements of morals vary from one country to another, from one region to another.¹¹⁷ Therefore, the lack of a uniform conception of morals provides a legitimate justification for the Court to evade its supervisory role.¹¹⁸

¹¹² Supra, note 10, pg 465.

¹¹³ Supra, note 10, pg 466.

¹¹⁴ Par 54 of Special Rapporteur report for the promotion and protection of the right of freedom of opinion and expression. U.N DOC E/CN.4/1995/32 (14 December 1994).

¹¹⁵ Par 6.7 of HRC Judgement, 18 September 2003. Available in: <http://www.unhcr.org/refworld/docid/404887ee3.html> (sited 24 November 2009).

¹¹⁶ Par 10.3 of the HRC judgement of 7 August 1979. Available : <http://www1.umn.edu/humanrts/undocs/newscans/61-1979.html> (sited on 25 November 2009)

¹¹⁷ Supra, note 114.

¹¹⁸ Supra, note 114.

2.6 Conclusion

Generally the U.N system and Regional System have developed a lot of jurisprudence concerning how this right should be practiced and guaranteed by the States as well the criteria for limiting this right. The above discussion will act as my guidance in the next chapter for assessing/ examining the laws and policies governing the freedom of Expression in Zanzibar. It should be noted that under International law the States are required to fully comply with human rights obligations even though the domestic legislations provides a less level of protection or is in discrepancies with international standard.

3 LAWS AND POLICIES GOVERNING THE FREEDOM OF EXPRESSION IN ZANZIBAR

3.1 Introduction

Zanzibar is part of United Republic of Tanzania¹¹⁹ and automatically by virtue of Union matters, Zanzibar become a party to ICCPR,¹²⁰ the African Charter on Human and Peoples Rights,¹²¹ as well bound by the Declaration of the Principles of Freedom of Expression in Africa¹²² once ratified by United Republic of Tanzania. The International and Regional Convention does not automatically applied in Zanzibar authority unless incorporated into domestic legislations, because Tanzania has ratified the ICCPR, the Zanzibar authority is bound by that treaty and required to obey and observe the guidance of International and Regional Conventions once incorporated into the domestic legislation.

3.1.1 Zanzibar Constitutional Framework

The right to freedom of expression which also covers the right of free press is protected under Art 18 of Zanzibar Constitution which read as follow:

18(1) Without prejudice to the relevant laws of the land, every person has the right to freedom of opinion and expression, and to seek, receive and impart or disseminate information and ideas through any media regardless of national frontiers and also has the right of freedom from interference with his communications.

(2) Every citizen has the right to be informed at all times of various events in the country and in the world at large which are of importance to the lives and activities of the people and also of issues of importance to society

The wording of the provision starts up with a claw back clause ‘without prejudice to the relevant law of the land’ and it open up for something else which mean that the enjoyment of this freedom

¹¹⁹ Art 2 of the Constitution of United Republic of Tanzania of 1977(2005 edition).

¹²⁰Tanzania has ratified a number of Human Rights Conventions. Available in: <http://search.conduit.com/?ctid=CT2124320&SearchSource=13> (accessed 29 March 2010)

¹²¹ Ratified on 18th February 1984.

¹²² ACHPR /Res.62(XXXII)02.

is subject to the relevant legislations which can impose restrictions on the enjoyment of this right and hence there is a possibility there is a possibility for this provision to be abused. The natural question to be asked under this context is that, what are the legal parameters of the free speech under this context. However there has never been a universal answer to that question. But under the Zanzibar context Article 24 of Zanzibar Constitution set out the general limitations to the rights and freedoms which read as:

(1) The human rights and freedoms, the principles of which are set out in this Constitution, shall not be exercised by a person in a manner that causes interference with or curtailment of the rights and freedoms of other persons or of the public interest and can be limited by the law enacted by the House of Representatives if that limitation is necessary and agreeable in the democratic system. In any case such limitation:

- (a) shall not limit the right not to be tortured, inhumanly punished and humiliated; or*
- (b) shall not limit the foundation of that right; or*
- (c) Shall not bring more harm to the society more than what is there.*

The above provision gives a room for the House of Representatives to limit the enjoyment of any freedom including the freedom of expression if that limitation is necessary and agreeable in the democratic system. Therefore the Article lay out the requirements for limitations to be valid in the eyes of law. This are:

- a) It must be necessary;*
- b) It must be justified or acceptable in a democratic society;*
- c) It must not undermine or affect the essential content of rights;*
- d) It must not do greater harm than the one which is supposed to prevent.¹²³*

The constitution has clearly identified the manner in which the right to freedom of expression can be restricted yet even such sophisticated demarcation has not given a clear solution. Professor Maina comments that this provision is very problematic for exercising the freedom of expression because this limitation clause is formulated in very ambiguous language and can be interpreted to cover many situations which can undermine the very basis of rights.¹²⁴ For example the use of term like ‘*public interest*’ without elaborating it is open to subjective

¹²³ Constitutional and Legal System of Tanzania (2004),pg 94.

¹²⁴ Supra, note 121, pg 92.

interpretation and can easily be abused for either political or personal interests.¹²⁵ The criteria for evaluating the necessity of interference is not only the principle of democracy but rather should be judged according to the proportionality of a given case¹²⁶ and meet the strict test of justification.¹²⁷

The Constitution only provides the framework or foundation of the right. There must be other legislations explaining the details of the said right. This is the case of Zanzibar, from the above provision, specific laws and policies have been enacted on freedom of expression as discussed below:

3.2 The Registration of News Agent, Newspapers and Books Act No. 5 of 1988

The primary purpose of this Act is to provide for registration, deposit and printing of newspapers and books in Zanzibar.¹²⁸ It is a good thing having the regulatory framework relating to this field. But a good regulatory framework should comply with international standard. Therefore let us see the content of this legislation and how it complies with international standard.

3.2.1 Advisory Board

Section 4 of the Act establish an Advisory Board consisting of Chairman appointed by the President together with other members not more than five who shall be appointed by the Minister. The functions of the Board are provided under Section 5 of the Act as follow:

- a) *To consider the applications made under the Act and advise the Minister;*
- b) *To advise the Minister on the implementation of the Act;*
- c) *To perform any other work in relation to Act assigned to the Board by the Minister¹²⁹.*

The Act is silent on the qualifications of Chairman and its members as well the criteria used in assessing the application. Lacking of statutory operation guidelines within the Act make the

¹²⁵ Supra, note 121.

¹²⁶ Manfred Nowak(2005), pg 460.

¹²⁷ Par 10.3 of *Tae Hoon Park v. Republic of Korea*, HRC Judgment of 3 November 1998. Available in: <http://www.unhcr.org/refworld/publisher,HRC.,KOR,3f588effe,0.html> (sited 27 November 28, 2009).

¹²⁸ SADC Media Law(2005), pg 80.

¹²⁹ Section 5 of the Registration of News Agents, Newspapers and Books Act, No 5 of 1988.

Board to exercise broad discretionary powers. In terms of compositions and its appointments this Board is under the control of the executive and there is a possibility of a political interference. The above provisions may pose a threat to the enjoyment of the freedom of expression since there is a room for manoeuvre. This situation might develop a poor performance of the Board. By no way they can tolerate any kind of expression against the government and its officials. Freedom of expression can be effectively exercised if there is self independent regulatory body monitoring and regulating the matters specified in this Act which they can function satisfactorily only in well established democracies with a strong of the rule of law.¹³⁰ With the exception of broadcast media for which regulation is commonly acceptable under international standard, statutory bodies are always at risk of political interference and abuse.¹³¹ It is not necessary to set up specific regulatory regimes which govern the print media. This is based on the idea that, unlike broadcasters, who make use of a limited and public resource, there are no natural constraints on the number of print media outlets in operation and so no need for particular regulation. However, media are subject to same laws that apply to everyone – for example, defamation laws, seditious laws – and, if they have been set up as corporations, or as non-profit bodies, then they are subject to the same rules that apply to other corporations or non-profit bodies.¹³² A recent examples is the prohibition of publication of privately owned Newspaper named *Taifa Huru (Independent State)* which has complied with all requirements relating to registration.¹³³ The Declaration of the Principles on the Freedom of Expression in Africa insisted that the effective self-regulation is the best system for promoting high standards in the media.¹³⁴

3.2.2 Wide powers of the Executive likely to be abused

Section 34(1) empowers the President if he is in opinion that the importation of any publication would be contrary to the public interest he may in his discretion by order prohibit importation of such publication. Again through public interest, the President may exercise discretionary powers

¹³⁰ Global Campaign for free expression(2006), pg 3.

¹³¹ Supra, note 196, pg 2-3.

¹³² Global Campaign for free expression.

¹³³ See IPP Media. Available in: <http://216.69.164.44/ipp/nipashe/2009/01/24/130201.html> (accessed 17 April 2010).

¹³⁴ Principle IX(3) of the Declaration of the Principle of Freedom of Expression in Africa.

of prohibiting importation of the publication of any special person either absolutely or conditionally.¹³⁵ Similarly the Minister responsible for information in the name of public interest or in the interest of peace and good order may order the suspension of Newspaper.¹³⁶ He shall notify the Advisory within seven days after such order as whether to prohibit the publication of newspaper or to allow it either conditionally or unconditionally.¹³⁷ In addition to that, the Minister may exclude any specified person or class of person or institution from registration of newspaper either absolutely or conditionally as he may think fit.¹³⁸ Suspension of Newspaper, prohibiting the importation publications and excluding persons or class of person from registration without giving them the right to be heard or assigning the reasons for doing so is against to the principles of natural justice as well as the Art 12(6a) of the Constitution.¹³⁹ It amounts to denial citizens the right to information. A recent example is the suspension of an independent private newspaper named *Dira Newspaper* on November 24, 2003 by order of the Minister made under subsection (1) of Section 30 of this Act on the ground that it violates the professional ethics and fomenting hatred between the government and its people.¹⁴⁰ *Dira*, was banned by the authorities, after the newspaper had made accusations against the government.¹⁴¹ No professional ethics has been relied as a justification for suspension.

A short history of this case is that *Dira* applied for registration on November 2002 and the registration was granted the next day. However at the time of registration the Advisory Board was not yet established by then as required by section 4 and 5 of this Act.¹⁴² This mean that at the time of banning this Newspaper on 24 November 2003 the Board was not yet constituted. While the case is already been filed in the court the government realising this omission immediately on 13 January 2004 they established the Advisory Board for the sole purpose of

¹³⁵ Section 34 (2) of the Registration of News Agents, Newspapers and Books Act, No 5 of 1988.

¹³⁶ Section 30(1) of the Registration of News Agents, Newspapers and Books Act, No 5 of 1988.

¹³⁷ Section 30(2) of the Registration of News Agents, Newspapers and Books Act, No 5 of 1988.

¹³⁸ Section 7(2) of the Registration of News Agents, Newspapers and Books Act, No 5 of 1988.

¹³⁹ The Article read as: *To ensure equality before the law, the government shall make procedures which are appropriate or which take into account the following principles namely:*

(a) when the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned.

¹⁴⁰ MISA Annual Report (2003), pg 40. Available in:

<http://www.misa.org/researchandpublication/annualreport/Annual%20Report%202004.pdf> (sited 10 March 2010)

¹⁴¹ Tanzania pg 7. Available in: http://demcoalition.org/pdf/31_Tanzania.pdf (sited 10 March 2010).

¹⁴² *Infra*, note 3.2.1.

legalising and justifying the Minister's act and the Board was given the retrospective effect from November 2003 at the time of banning this Newspaper.

They challenge the legality of Ministers order made under section 30(1) of this Act for failure to comply with the requirement of section 30(2) of this Act before the High Court of Zanzibar.¹⁴³

Section 30 read as follow:

- 1) *Where the Minister is of the opinion that it is in the public interest or in the interest of peace and good order to do so, he may by order direct the suspension of publication of the Newspaper named in the order, and such newspaper shall cease publication as from the date specified in the order.*
- 2) *An order made pursuant to subsection(1) shall be notified 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 order or allow it publication with or without any instructions.*

The Court acknowledges that the procedure for granting application for publication was not followed because the Advisory Board was not yet constituted when *Dira* application was made and hence had not advised the Minister in accordance with section 5(a)¹⁴⁴ of the Newspaper Act. Since the procedure for granting application for publication was not observed, it was expected that the High Court will overrule the Minister's decision because it does not follow the procedures laid down under section 4 and 5 of the Registration of News Agents, Newspapers and Books Act of 1988. But the Court also ignore the provisions of law and support the banning of *Dira* by holding that the application was '*locally made and locally granted*'. This decision is erroneous because the granting of application was illegal and no effect and the order of Minister to burn and prohibit the publication of *Dira* are also ineffective.

The prohibition of a publication without giving the writer the opportunity to defend himself and without the clarity of how the publication is a threat to national security or public order constitutes a violation of article 9(2) of African Charter of Human Rights. Harassment of the press not only has the effect of hindering certain persons in disseminating their opinions, but also

¹⁴³ *Dira Newspaper and another v Ministry of State (Chief Ministers Office) and others*, High Court of Zanzibar of. 24 November 2004 . Available: <http://www.pambazuka.org/en/category/media/25910> (sited 13 January 2010).

¹⁴⁴ *Infra*, note 3.2.1.

poses a risk that journalists and writers will subject themselves to self-censorship in order to be allowed to carry on their work.¹⁴⁵ Permanently banning or temporarily suspending a print media outlet is a highly intrusive interference with the right to freedom of expression and deprive individual's right to practice journalism profession.

3.2.3 Wide Powers of Police

There are some categories of offences to which a police officer may not arrest an offender or search the premises unless he/she obtains the arrest warrant or search warrant. This is the requirement of Zanzibar Criminal Procure Act. However the Registration of News Agents, Newspapers and Books Act of 1988 seems to overlook this requirement and authorize the police officer below the rank of inspector without a search warrant may enter the premises and seize any newspaper which has been printed or published in contravention of this Act.¹⁴⁶ Any newspaper or any other thing seized shall be brought before a Magistrate to satisfy her/him if the publication is in contravention of the Act.¹⁴⁷ This provision is so harsh in considering the nature of allegation itself, the powers given by police is so wide and might be abused by authority hence it can lead to harassment of the print media and it can have the effect of discouraging the person concerned, or others in the same profession, from continuing their activities, even if those activities are in fact legal. For example, in October journalist Mwinyi Sadala was arrested while investigating a cholera outbreak in Karakana. When he reportedly refused to give police his camera, they seized it and charged him with taking pictures without the permission of the permanent secretary of the Ministry of Health and Social Welfare. After deleting the pictures from the camera, police returned it to Sadala and withdrew the case against him.¹⁴⁸ The journalist should be given immunity because search and seizure of journalist materials and premises amount to interference in the freedom of expression.¹⁴⁹

¹⁴⁵ Par 37 of Judgment of the case *Organization and Media Rights Agenda v. Nigeria*, ACHPR Nos. 140/94, 141/94, 145/95 (1999). As well see the Amsterdam International Law Clinic (2002), pg 11.

¹⁴⁶ Section 27(1),(2),(3) of the Registration of News Agent, Newspapers and Books Act No.5 of 1998.

¹⁴⁷ Section 27 (4) of the Registration of News Agent, Newspapers and Books Act No.5 of 1998.

¹⁴⁸ 2009 Human Rights Report:Tanzania. Available : <http://www.state.gov/g/drl/rls/hrrpt/2009/af/135980.htm> (accessed 17 April 2010).

¹⁴⁹ Central Asia Pocketbook on the Freedom of Expression (2006), pg 89.

3.2.4 Licensing, Suspension, Revocation and Appeal for Journalist

Section 39(1) proclaims that no person can work as a journalist (collect or cause to be collected in Zanzibar any news or material for the purpose of dissemination; or distribute or cause to be distributed, whether within or outside Zanzibar any news or material intended for dissemination collected in Zanzibar) unless he/ she obtains a written authorization from the Director responsible for Information Services. The Director may, on receipt of an application made in that behalf and upon payment by the applicant of the prescribed fee (if any), issue to any person described in subsection (1) of this section in writing upon such conditions as it may consider fit in the authorization: Provided that the Director may, without assigning reasons therefore refuse to issue any authorization under this subsection or suspend or revoke any authorization issued by him.¹⁵⁰ However under Section 40 of the Act it empowers the Minister of Information to revoke any issued licence in the interest of public. Section 40 read as follow:

The Minister may revoke any authorization issued by the Director under section 39 of this Act if in his opinion such revocation would be in the interest of the public or would be in the interest of peace and good order.

But failure to define what is interest of public/interest of peace and good order it may lead the Minister's powers to be exercised arbitrarily. The International law allows a purely administrative requirement for publications to provide basic information about themselves to the authorities, such as the location of their offices, and the names of their owners, so long as there is no discretion on the part of the government to refuse registration.¹⁵¹ Imposing special registration requirements on the print media is unnecessary and may be abused and should be avoided. Registration systems which allow for discretion to refuse registration, which impose substantive conditions on the print media or which are overseen by bodies which are not independent of government are particularly problematic.¹⁵² It is for this reason that until now in Zanzibar there only two newspapers were privately owned. The Zanzibar peoples have to rely on the Newspaper published from Tanzania Mainland which covers a little information concerning Zanzibar. The

¹⁵⁰ Section 39(2) of the Registration of News Agent, Newspapers and Books Act No.5 of 1998.

¹⁵¹ Principle VIII of the Declaration of Principles on Freedom of Expression in Africa, 2002.

¹⁵² U.N Press Release 18 December 2003. Available in:

<http://www.unhcr.ch/hurricane/hurricane.nsf/view01/93442AABD81C5C84C1256E000056B89C?opendocument>
(sited 18 December 2009).

only daily newspaper was government owned. National newspapers were sold in Zanzibar without restriction as compared to the privately one.

The UN Human Rights Committee has repeatedly expressed its concerns at licensing requirements for the print media, holding that they constitute a violation of the right to freedom of expression.¹⁵³ In the case of *Compulsory Membership in Association Prescribed by Law for the Practice of Journalism*,¹⁵⁴ the Inter American Court of Human Rights unanimously concluded that the compulsory licensing of press violates the freedom of expression which guarantees the individual and public the right to express and to receive information and ideas. It is commented that in Zanzibar the purpose of registration or licensing is typically not spelled out, and the system is not administered by an independent authority. It seems that many governments keep the *status quo* because it gives them direct power over print media should they decide to use it. Political will and respect for media freedom in a democracy are not at the level at which they could or should be.¹⁵⁵ I am in agreement with Guy Burger with this issue.

Section 39(3) and (4) spell out the procedure for Appeal against the decision of refusal by Director. The Section read as follows:

(3) Any person aggrieved by any refusal by the Director to issue an authorization, or the suspension or revocation of an authorization, or any condition specified in the authorization under subsection (2), may appeal against the refusal, suspension, revocation or condition as the case may be, to the Minister within such time and in such manner as the Minister, may by regulations, prescribe.

(4) Every decision of the Minister on any appeal under subsection (3) shall be final and conclusive and shall not be subject to review by any court.

The administrative process should not stop the power of court to determine the legality of mater or order imposed by the administrative process. The final determination of the matter should be by the court and not otherwise. The ACHPR was more concerned about “the total discretion and

¹⁵³ Paragraph 23 of concluding observations of the Human Rights Committee: Lesotho, 8 April 1999, UN Doc. No.CCPR/C/79/Add.106. Available in: <http://www1.umn.edu/humanrts/hrcommittee/lesotho1999.html> (sited 18 December 2009).

¹⁵⁴ Inter American Court of Human Rights (1986) pg 916.

¹⁵⁵ Guy Berger(2007), pg 149.

finality of the decision of the registration board, which effectively gives the government the power to prohibit publication of any newspapers or magazines they choose. This invites censorship and seriously endangers the rights of the public to receive information protected by article 9(1) of the Charter.¹⁵⁶ In the case of *Anisminic v. Foreign Compensation Commission*,¹⁵⁷ the House of Lords said that, the finality clauses which attempt to prevent the judicial determination are incapable of ousting judicial review jurisdiction of the Court. Where jurisdictional issues are involved ouster clause, no matter how tightly worded would not prevail and the Court has the jurisdiction to declare any decision as nullities.¹⁵⁸ To exempt a public authority from the jurisdiction of the courts of law is, to that extent, to grant doctorial power. Lord Denman comments that a statute cannot affect our right and duty to see justice executed and they have always been thought of as defenders of the rights of individuals from attack by government.¹⁵⁹

3.2.5 Seditious Offences

Section 48 of the Act creates seditious offences as follow:

“48(1) Any person who-

- a) *does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act with a seditious intention;*
- b) *utters any word with a seditious intention;*
- c) *prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication;*
- d) *imports any seditious publication, unless he has no reason to believe that it is seditious, shall be guilty of an offence and shall be liable upon conviction to a fine of not less than five thousand shillings but not exceeding fifty thousand shillings or imprisonment not exceeding five years or to both such fine and imprisonment and such publication shall be forfeited to the government.”*

¹⁵⁶ ACHPR, *Media Rights Agenda (on behalf of Mr. N. Malaolu) v. Nigeria*, No. 224/98, decision adopted during the 28th session, 23 October–6 November 2000. Available in: <http://www1.umn.edu/humanrts/africa/comcases/224-98.html> (sited 08 January 2010), par 69.

¹⁵⁷ [1969] 1 ALL ER 208.

¹⁵⁸ *R v. Cheltenham Commissioner*, x, 1841, QB, pg. 467.

¹⁵⁹ *Supra*, note 221.

Possession of any seditious publication without lawful excuse is also an offence.¹⁶⁰ A recent example is the case of *DPP v Mwinyi Hamad Sadala and Ramadhan Muhammed Vuai*¹⁶¹ who has been accused and charged with publication and uttering seditious statement against the President of Zanzibar.¹⁶² Printing machine used for or in connection with the printing or reproduction of a seditious publication may on conviction be forfeited to the government.¹⁶³ The ECHR said that, confiscation or seizure of the means through which information and ideas are disseminated is another possible interference. Thus, the Court decided that the temporary confiscation of the paintings considered as obscene by the national courts constituted an interference with the painter's freedom of expression.¹⁶⁴ The national courts must refrain from applying criminal sentences, in particular imprisonment because these endanger the very core of the freedom of expression and function as censorship for the entire media, hampering the press in its role of public watchdog.¹⁶⁵

The intention for this offence is provided under Section 47(1) A which reads as:

A "seditious intention" is an intention –

- (a) to bring into hatred, contempt, to excite disaffection against the lawful authority of Zanzibar or the Government thereof; or*
- (b) to excite any of the inhabitants of Zanzibar to attempt to procure the alteration, otherwise than by lawful means, of any other matter in Zanzibar as by law established ; or*
- (c) to bring into hatred, contempt, to excite disaffection against the administration of justice in Zanzibar; or*
- (d) to raise discontent or disaffection amongst any of the inhabitants of Zanzibar; or*
- (e) to promote feelings of ill-will and hostility between different categories of the population of Zanzibar.*

¹⁶⁰ Section 48(2) of the Registration of News Agent, Newspapers and Books Act, No 5 of 1988.

¹⁶¹ The case was instituted in July 2009 and is before the Regional Court of Zanzibar.

¹⁶² *That the GAPCO Oil company has constructed a petrol station in Chwaka village by the approval of President Karume, and the President Karume gets 30% shares from that company.*

¹⁶³ Section 48(4) of the Registration of News Agent, Newspapers and Books Act, No 5 of 1988.

¹⁶⁴ *Müller v. Switzerland, 1986.*

¹⁶⁵ Council of Europe(2004), pg 52.

Sara comments on the effect of sedition law that the legal elements of sedition were not clearly defined. And the vagueness of the sedition provisions have been framed and the ambiguity of *mens rea* (seditious intention) makes it difficult to discern with any certainty what a seditious offence is and probable no crime has been left in such vagueness of such offences.¹⁶⁶ But this has been intentionally left vague so that unpopular political dissenters could be brought in under its umbrella. It is argued that as long as the sedition offences remain, governments will inevitably be tempted to use them improperly especially when high unpopular opinion is expressed. This law is anachronistic and unjustified interference with the freedom of expression and the abolition of the sedition offence is more preferred.¹⁶⁷

3.3 Zanzibar Broadcasting Commission Act No. 7 of 1997

The purpose of this Act is to establish the regulatory framework of broadcasting services in Zanzibar. This is provided under Section 4(1) of the Act which read as follow:

The Minister may:-

- a) *provide for and carry on broadcasting Services in Zanzibar to be known as Zanzibar Broadcasting Services, for the education, entertainment and information of listeners and viewers in Zanzibar;*
- b) *provide for and carry on such broadcasting services for reception by listeners and viewers outside Zanzibar as he deem desirable;*
- c) *carry on or operate such other services including diffusion services and such undertakings in connection with these services as he may deem necessary or expedient;*
- d) *establish, maintain, or continue to maintain and operate in any part of Zanzibar such number and size of broadcasting stations as he may consider necessary of expedient for the carrying out of the provisions of this section*

¹⁶⁶ Sarah Sorial (2006-2007), pg 432.

¹⁶⁷ Laurance W. Maher (1992), pg 228.

The Act provides for the operation of Zanzibar Broadcasting Services (ZBS), which is the state-owned radio and television service.¹⁶⁸ Under Section 5 of the Act it establishes the Zanzibar Broadcasting Commission. The composition of the Commission is explained under Section 6 which consists of:

- a) *a Chairman who shall be appointed by the President;*
- b) *executive Secretary who shall be the Chief Executive Officer and who shall be appointed by the President;*
- c) *not less than four nor more than eight other members appointed by the Minister;*
- d) *a State Attorney from the Attorney-General's Office.*

No qualification of the Chairman and he is appointed under the pleasure of the President.¹⁶⁹ The Act is silent on the independence of this Commission as well as the grounds for their removal. The current appointments process and the absence of any legal safeguarding of its independence mean that the Zanzibar Broadcasting Commission completely lacks efficiency and credibility. This situation encourages interference by the Executives and undermines the concept of Separation of powers. The Act does not guarantee the independence of the governing body or that editorial policy and decision-making should be free from interference by government. In practice, ZBS has always been a mouthpiece of the ruling party- CCM in Zanzibar. The Zanzibar government controlled all content of radio and television broadcasts, whether privately or publicly owned. However, the radio stations operated relatively independently, often reading the content of national dailies including articles critical of the Zanzibar government

3.3.1 Function of Zanzibar Broadcasting Commission

Section 7 this Act provide that the Commission has the following functions: *to issue broadcasting licenses; to regulate and supervise broadcasting activities; to maintain a register of all persons licensed as broadcasters; to regulate the activities of broadcasters and their conduct of broadcasting; to be responsible for the standardisation, planning and management of the frequency spectrum; to protect policy, security, culture and tradition of Zanzibar ; to inspect*

¹⁶⁸ Section 4(2) of the Zanzibar Broadcasting Commission Act, No 7 of 1997.

¹⁶⁹ Section 6(6) of the Zanzibar Broadcasting Commission Act, of 1997 for other qualifications of the member.

institutions which carry on broadcasting business; and to give any direction to the broadcasting business which in its opinion deem necessary.

The Commission shall also perform any other function which may be assigned to it by the President in writing under his hand or under any other written law.¹⁷⁰ The conditions for granting license is prescribed under Section 12(1) of the Act that: An application for a licence under this Act may be made only by: - *a Zanzibari or Tanzanian; a Company registered in Zanzibar at least 20% of whose share holding is beneficially owned by Zanzibar Government; a Company not registered in Zanzibar but at least 30% of whose share holding is beneficially owned by Zanzibar Government which is not, directly or indirectly, controlled by persons who are not Zanzibaris.*

Provided that the license shall not be granted unless accompanied by the prescribed application fee and prescribed deposit.¹⁷¹ Any aggrieved person by the Commission's decision may appeal to the Minister. This is according to Section 13(5) of the Act which read as:

(5) Any person aggrieved by a decision of the Commission granting or refusing an application may appeal to the Minister in the form and manner to be prescribed in regulations.

The Act is silent on further right of judicial appeal and which criteria used for consideration in granting license. In order to ensure transparency, the process for assessing license applications should be set out clearly and precisely in law. Time limits within which decisions must be made should be specified, in such a way that each of the applicants has an opportunity to be heard and the general public is able to submit comments. The criteria by which applications are judged should be announced in advance, and preferably set out in the primary legislation.¹⁷² In established democracies, this task is entrusted to an independent broadcast regulator which is required by law to promote a number of values, such as freedom of expression, accuracy,

¹⁷⁰ Section 7(2) of the Zanzibar Broadcasting Commission Act, of 1997.

¹⁷¹ Section 12(2) of the Zanzibar Broadcasting Commission Act, No 7 of 1997.

¹⁷² Central Asia Pocketbook on the Freedom of Expression(2006), pg 109.

impartiality and pluralism.¹⁷³ This would have consequences for the overall composition of these bodies, the method by which their members are chosen and their security of tenure.¹⁷⁴

3.3.2 Offences

Section 26 of the Act provides for a list of offences. These are: *carrying the business of a broadcaster without license; failing to comply with the conditions of a broadcasting or licence under the Act; fails or refuse to furnish a return or to supply information in the prescribed time; fails or refuses to produce to an inspector or a police officer a license or record or document relating to any broadcasting; interferes with or obstructs the transmission or reception of any radio communication; obstruct an inspector or a police or other authorized officer in the exercise of powers conferred under this Act; fails or refuses to comply with any order or direction lawfully given to him by the Commission; fails or refuses to comply with the terms and conditions of the license; making a declaration or statement which is false is guilty of an offence and shall be liable on conviction to a fine not less than five million shillings (5,000,000/=) or to imprisonment for a term not exceeding twenty four months or to both that fine and imprisonment.*

A court convicting a person of an offence under this Act may, in addition to any penalty that it may impose, order the forfeiture to the government of any broadcasting apparatus or other material in relation to or in connection with or by means of which the offence was committed.¹⁷⁵

Imposition of heavy sanctions and forfeiture of broadcasting materials seriously amount to interference and can destroy freedom of expression. As the ECHR states, the nature and severity of the penalties imposed are also factors to be taken into account when assessing the proportionality of the interference.¹⁷⁶ Claudio Grossman said that imposition of penal sanction suffocates democracy and responds to an authoritarian logic that is incompatible with democratic tenets.¹⁷⁷

¹⁷³ Supra, note 240, pg 106.

¹⁷⁴ E.M. Barendt (1995), pg 35.

¹⁷⁵ Section 26(2) of Zanzibar Broadcasting Commission Act, No 7 of 1997.

¹⁷⁶ *Okçuoğlu v. Turkey*, 1999. See also Council of Europe(2004), pg 26.

¹⁷⁷ Claudio Grossman (2000), pg 450.

3.3.3 Compulsory broadcasting and prohibition of broadcasting relating to National Security

Section 27 the Act provides that:

(1) the Minister or any person authorized by the Minister, may by order under his hand require any license holder to broadcast forthwith or within or at any time and in any manner specified, any announcement which as its content any matter which the Minister deems to be in the interest of national security or in the public interest;

(2) if the Minister is of opinion that, the broadcasting of any matter or matter of any class or character, would be contrary to the national security or public interest he may, by notice in writing delivered at the principal office of the license holder, prohibit the license holder from broadcasting such matter or matter of such class or character and the license holder shall comply with any such notice so delivered.

No where the national security and public interest are defined as a basis for ordering broadcasting or prohibition of broadcasting. The possibility of this loose wording of the provision is very problematic hence there is a possibility of using it under improper consideration. The Principle I of Johannesburg Principle requires that no restriction on freedom of expression or information on the ground of national security unless the government demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest. The burden of demonstrating the validity of the restriction rests with the government.¹⁷⁸ The abuse of restrictions on freedom of expression and information in the name of national security has been, and remains, one of the most serious obstacles to respect for freedom of expression.

3.4 Zanzibar Broadcasting Policy of 2008

To some extent this Policy is in line with the International Standard as far as the establishment of the Public Service Broadcasting is concerned. It contains a number of positive provisions on freedom of expression and press. For example under its objectives in Part 5.1 of the Policy it provides the following:

¹⁷⁸ Principle 1(d)-1.3 of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information. Available in: <http://www.article19.org/pdfs/standards/joburgprinciples.pdf> (sited 20 December 2009).

- a) *To make sure that the broadcasting sector contributes in respecting customs, culture and value of all systems kept by the community in the preservation of environment and continuance of agricultural sector;*
- b) *To contribute in the protection and preservation indigenous knowledge and culture of Zanzibar for their development and improve protection, and for widely usage of the knowledge and provide a direct benefit for concerned peoples and other people respectively;*
- c) *To improve usage, transparency, respect and mutual understanding between one community and other.*¹⁷⁹

In reaching these objectives the Policy prohibit and restrict the broadcasting in radios and televisions all advertisement related to insult, provocation and arrogant language.¹⁸⁰ Prohibition of advertisement relating to alcohol and other intoxicating substances¹⁸¹ as well as setting a process that will remove all advertisements relating to nude image¹⁸² and protect the use of picture of naked violence especially for children.¹⁸³ This was intentionally done for the protection of customs, culture and values of Zanzibar.¹⁸⁴ Though culture and customs are always not static and it is dynamic, there is a possibility for this Policy to be abused by authorities by using the loophole of the terms customs and culture.

At the same time, the Policy contains a number of features which give rise to a great cause of concern. For example it acknowledges the need of having an effective Broadcasting Regulatory Board for the purpose of building nation outside and inside Zanzibar at large.¹⁸⁵ But it is silent on the independency of this organ. A key aspect of the international standards relating to public broadcasting is that State broadcasters should be transformed into independent public service broadcasters with a mandate to serve the public interest.¹⁸⁶ In addition to that, the Declaration of the Principles of Freedom of Expression in Africa which require that any public authority that

¹⁷⁹ Note that: the Original text is in Swahili Language. Therefore this translation is not official one it is only my translation for the sake of understanding the provision.

¹⁸⁰ Part 5.1 of Zanzibar Broadcasting Policy.

¹⁸¹ Part 5.1 of Zanzibar Broadcasting Policy.

¹⁸² Part 5.2 of Zanzibar Broadcasting Policy.

¹⁸³ Part 5.2 of Zanzibar Broadcasting Policy.

¹⁸⁴ Part 5.1 a-d of the Zanzibar Broadcasting Policy.

¹⁸⁵ Section 3.1a,b of the Zanzibar Broadcasting Policy.

¹⁸⁶ *Access to Air Wave*, Principle 34. Available in: <http://www.article19.org/pdfs/standards/accessairwaves.pdf> (sited 21 February 2010).

exercises powers in the areas of broadcast or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature. Their appointments process should be open and transparent, involve the participation of civil society, and shall not be controlled by any particular political party and should be formally accountable to the public through a multi-party body.¹⁸⁷ Again this issue has been also insisted under African Charter on Broadcasting.¹⁸⁸

3.5 Zanzibar Information Policy of 2006

The purpose of this Policy is explained under Section 3.0 of the Policy which includes the following:

- (i) To inform the public about the exchange of economic, political and social situations so as to run away with poverty and provide a better service for education, health, pure cleaning water and improving democracy and rule of law.*
- (ii) To use the broadcasting sector in building unity and solidarity for public by writing and broadcasting the truthful news having researched in detail.*
- (iii) To keep goals that provides and follows the ethics of mass media.*

Under this Policy there also some provisions which requires special attentions. This includes the following:

3.5.1 Withholding Information to the Public

Under Section 4.2 of the Policy proclaims that, competition in providing information would be very meaningful, if the journalists would be provided the information that is demanded in one way so as to improve their performance. But it is better for journalists to be aware that it is not all kind of information that is needed by public and not all acts done by the Government amounting to information so as to be informed to the public.¹⁸⁹ The language used in this provision creates a loop hole for Government to conceal some information to the public because for the public it is their right to be informed of what has been done by their government so as to

¹⁸⁷ Principle VIII of Declaration of the Principles of Freedom of Expression in Africa.

¹⁸⁸ See Part I(2) of the Charter. The Charter is Available in :

http://portal.unesco.org/ci/en/files/5628/10343523830african_charter.pdf/african%2Bcharter.pdf (sited 20 December 2009).

¹⁸⁹ Zanzibar Information Policy Part 4.2. The original text is in Swahili language this is only my translation and not the official translation.

ensure transparency. In addition to section 114 of Public Service Regulations states that no body, without the permission of the Principal Secretary or Head of Department is allowed to communicate with any officer of the Ministry concerned or other institution or any other person.¹⁹⁰ This means that the public official are not free to view out their voices to the public regarding their respective offices and departments unless from a written authorization of Principal Secretary or Head of Department. The U.N Special Rapporteur on the freedom of expression condemns this tendency of withholding information to the public.¹⁹¹ He further said that “the right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems. ...”¹⁹². On the side of Regional level, the Declaration of the Principles on Freedom of Expression in Africa clearly states that public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.¹⁹³

3.5.2 Responsible Organ for Information matters

Section 11.3 of the Policy confers power to administer the freedom of expression to the Government Information Department, while under Section 8.4 assigns the same power under the Zanzibar Medial Council. This is the contradicting provisions for the same power to be assigned between different organs. Again the Policy is silent on the independence of either of the two organs assigned that power. It is well established under International Standards that any regulation and administration of the freedom of expression and of the media should be exercised by bodies which are independent of government and protected against political interference; otherwise the body will be run on political considerations contrary with its basic responsibility of protecting and respecting freedom of expression and to promote the free flow of information and ideas. In 2003, the three Special Rapporteurs for the protection of freedom of expression at the United Nations, Organization of American States and Organization for Security and Cooperation

¹⁹⁰ Section 114 of Zanzibar Public Service Regulations of 1997.

¹⁹¹ Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1998/40, 28 January 1998, para. 14. Available in <http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/7599319f02ece82dc12566080045b296?Opendocument> (sited 23 December 2009).

¹⁹² Supra, note 188, par 43.

¹⁹³ Principle IV of the Declaration of the Principles of Freedom of Expression in Africa.

in Europe insist on this that all public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.¹⁹⁴

3.6 Conclusion

From the above analysis of legal provision and policies it seems that the law and policies create a lot of loop holes for the authority to restrict and control the enjoyment of this freedom, hence it contains a lot of tricky provisions that ensure this freedom is enjoyed subjecting to their legal parameters. On top of that as shown above there are a lot of discrepancies under the law and policies toward the enjoyment of this freedom in comparison to what is required by the international standard. For examples the issue of discretionary powers of Minister to prohibition or banning of publications, seditious offences, prohibition of broadcasting and withholding information to the public made this freedom less enjoyed in Zanzibar. The same concern has been raised by the Freedom House that has publish an annual report on the freedom of expression and press showing that, the situation in semiautonomous Zanzibar remains more restrictive than in the rest of the country.¹⁹⁵ Since Zanzibar has ratified the International and Regional standard treaties relating to freedom of expression, it is obliged to comply with their commitment under the said treaties and taking off those discrepancies found under the law and policies by guaranteeing full enjoyment of this right.

¹⁹⁴ Adopted 18 December 2003. Available in: <http://www.unhcr.ch/hurricane/hurricane.nsf/0/93442AABD81C5C84C1256E000056B89C> (sited 24 December 2009).

¹⁹⁵ Available in: <http://www.unhcr.org/refworld/docid/4b2741f421.html> (accessed 17 March 2010).

4 FREEDOM OF EXPRESSION AND DEMOCRATIC PROCESS IN ZANZIBAR

4.1 Introduction

Freedom of expression has been recognized authoritatively as not only important fundamental human rights but also described as the oxygen of democracy. It is a right whose existence allows other rights and democratic freedoms to be guaranteed.¹⁹⁶ Hence both rights of ‘democratic entitlement’ and ‘political participation’ under international law are essential but incomplete without the right of freedom of expression.¹⁹⁷ No country can seriously profess to be a democracy, or pretend to be making efforts towards this, if its citizens cannot freely express their opinions.¹⁹⁸ The right to be governed democratically was meaningless unless there was as freedom to communicate about matters relevant to the performance of the government, so that peoples could exercise an informed choice.¹⁹⁹ At its very first session, in 1946, the UN General Assembly adopted Resolution 59(I) which states: “Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.”²⁰⁰

4.2 The role of Freedom of Expression in a Democratic Society

Democracy and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing.²⁰¹ The media becomes a key factor in the struggle for democracy.²⁰² It is the heart of the government whether democratic or authoritarian.²⁰³ Guy Godwoodwin comment that “it best serves to facilitate individual and collective expression of freedom of opinion... the

¹⁹⁶ Commonwealth Secretariat (2003), pg 15.

¹⁹⁷ Forzia Nazir Lone (2007), pg 63.

¹⁹⁸ Charles Manga Fombad (1995), pg 211.

¹⁹⁹ Justice Michael(1993), pg 1779.

²⁰⁰ 14 December 1946.

²⁰¹ Commission on Human Rights resolution 2003/36, ‘Interdependence between democracy and human rights’, 23 April 2003, second preamble paragraph.

²⁰² *Media, Crisis and Democracy: Mass Communication and the Disruption of Social Order*(1992), pg 5.

²⁰³ Robert Trager and Donna L. Dickerson (1999), pg 2.

widest participation in the democratic dialogue by all sectors and actors of society must be promoted in order to come to agreements on appropriate solutions to the social, economic and cultural problems of a society.’’²⁰⁴ Also it is recognized that freedom of opinion and expression is reflected in a democratic society through an electoral system which allows all tendencies, interests and feelings to obtain representation at the level of the executive and legislative power.²⁰⁵ The electoral process is essential component in the democratic process .It is insisted by HRC that free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. A free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.²⁰⁶ It symbolize that citizens, in particular through the media, should have wide access to information and the opportunity to disseminate information and opinions about the activities of elected bodies and their members for the making of independent decisions.²⁰⁷

The Inter- American Declaration of Principles on Freedom of Expression confirm that, freedom of expression is fundamental and inalienable right to all individuals and it is the requirement for the existence of democratic society.²⁰⁸ In a *Compulsory Membership case*, the Court expressed the role of freedom of expression in the following terms: “It is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a *conditio sine qua non* for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.”²⁰⁹

²⁰⁴Guy S. Goodwin-Gill (2006), pg 28.

²⁰⁵ Supra, note 273.

²⁰⁶U.N Human Rights Committee, General Comment No. 25 , The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25) : CCPR/C/21/Rev.1/Add.7, 12/07/96 par a 11.

²⁰⁷ *Communicating Democracy: the Media and Political Transitions*(1998), pg 120.

²⁰⁸ Principle 1 of Inter- American Declaration on the Freedom of Expression.

²⁰⁹ *I-A Court HR, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85 of November 13, 1985, Series A, No. 5, p. 123, para. 70.*

The European Court has emphasized from the outset the important role played by freedom of expression in a democratic society, in the early *Handyside case* it ruled that freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'.²¹⁰

A similar insistence is found in the case of *Liesbeth Zegveld and Messie Ephrem v. Eritrea*,²¹¹ whereby the ACHPR comment that freedom of expression as an individual human right and a cornerstone of democracy as well as a means of ensuring respect for all human rights and freedoms.²¹² Also the Declaration of the freedom of expression in Africa in 2002 also acknowledges that freedom of expression and information of whatever forms is inalienable human rights and indispensable component of democracy.²¹³

4.3 Overview of Multiparty Elections in Zanzibar

Tanzania changed its political system from a one-party state to a multiparty democracy in 1992²¹⁴ and thus broadening the civil and political rights which followed by the first multi-party elections in October 1995.²¹⁵ It is important to note that there are two distinct parts of United Republic of Tanzania as far as elections concerned. Also there two different electoral regimes governing elections. Elections involving the whole of United Republic of which is governed by the Constitution of United Republic of Tanzania and the Election Act.²¹⁶ This law deals with the Presidential election and members of the Union Parliament. While in Zanzibar the law applicable for election of the President of Zanzibar, the members of House of Representatives and local councilors governed is by the Zanzibar Constitution and the Election Act of 1984.²¹⁷ My main

²¹⁰ *Eur. Court HR, Handyside Case v. the United Kingdom, judgment of 7 December 1976, Series A, No. 24, p. 23, para.49.*

²¹¹ Comm . No. 250/2002 (2003), African Commission on Human and Peoples' Rights. Available: <http://www1.umn.edu/humanrts/africa/comcases/250-2002.html> (sited 12 March 2010).

²¹² *Supra*, note 287, par. 58, 59 and 60 of the judgment.

²¹³ Preamble. Available in: http://www.achpr.org/english/declarations/declaration_freedom_exp_en.html (sited 12 March 2010).

²¹⁴ Samuel S. Mushi and Rwekaza S. Mukandala (2000), pg 178.

²¹⁵ *The Many Faces of Human Security Case Study of Seven Countries in Southern Africa*(2005), pg 40.

²¹⁶ Act No 1 of 1985(including its amendments).

²¹⁷ Election Act of 1984(including 2002 and 2004 amendments).

focus is Zanzibar side whereby the Zanzibar Constitution provides the right to vote²¹⁸ and the right to participate in the national affairs for every Zanzibari.²¹⁹ In addition to that the Article 119 of the same Constitution and section 5 of the Zanzibar Electoral Commission Act; authorizes the Zanzibar Electoral Commission (ZEC) to be responsible for conducting Presidential, House of Representatives and Local Authorities elections in Zanzibar. Even though the Commission consists of member of opposition party, but its impartiality is questionable. Many eligible voters are denied the right to be registered as voters for Zanzibar Election, many of them believed to be from opposition side.²²⁰ The registration of under ages and other peoples who did not meet the registration requirements who were taken from Tanzania Mainland are very common in Zanzibar many of them prepared to vote for ruling party.²²¹

4.4 The Registered Political Parties in Zanzibar

The political activity in Zanzibar and in Tanzania Mainland is regulated by the Political Parties Act of 1992. All political parties were required by law to register with the Registrar of Political Parties.²²² The Political Parties Act does not allow parties to be established along religion, tribal or regional identities.²²³ Till now 17 political parties have been registered and operated in whole Tanzania. The strong contesting parties in Zanzibar are CCM (ruling party) and CUF (opposition party).

4.5 Freedom of Assembly and Association

The enjoyment of freedom of expression in any country is dependent on the extent to which freedoms of assembly and association are guaranteed. Therefore freedom of assembly and association has been described as being not only cognate to freedom of expression, but as

²¹⁸ Article 7(1) of the Zanzibar Constitution read as: *Any Zanzibari who has attained the age of eighteen years shall have the right to vote in the election taking place in Zanzibar*

²¹⁹ Article 21 of Zanzibar Constitution read as: *Every Zanzibari is entitled to take part in matters pertaining to governance of the country either directly or through representatives freely elected.*

²²⁰ Mzalendo. Net. Available in: <http://www.mzalendo.net/wachache-wajiandikisha-daftari-la-kudumu-zanzibar> (accessed 17 March 2010). Also Tanzania Daima Newspaper of 28 February 2010. Available in: <http://www.freemedia.co.tz/daima/habari.php?id=13513> (accessed on 17 March 2010).

²²¹ International Law and Policy(2010), pg 14-16.

²²² Section 8 of Tanzania Political Party Act. CAP 258(R. E 2002). Available in: <http://www.tanzania.go.tz/pdf/Political%20Parties%20Act%205.pdf> (sited 01 January 2010).

²²³ Supra, Section 9.

another essential element of any democratic system.²²⁴ Article 20 of Zanzibar Constitution provides the right of peaceful assembly which read as follow:

Every person is entitled to freedom, subject to one's free choice to freely and peaceably assemble, associate and co-operate with other persons, and more specially to form or join associations or organizations formed for workers human rights organizations or other organizations for his benefit and which are established in accordance with the laws of the land.

The Political Association is also governed by a Political Parties Act of 1992 whereby it gives rights for a registered Political Parties the right to organize and address assemblies anywhere in the United Republic of Tanzania for the purposes of publicizing themselves and to attract membership, provided that they acquire a permit to hold public meeting pursuant to Section 11(1) of the Political Party Act. Other kind of association is governed by the Zanzibar Societies Act of 1995.²²⁵ Even though the Constitution guarantees the rights, in practice it is limited by sections 40, 41, 42 and 43 of Police Force Ordinance.

Section 40 of Police Force Ordinance requires the permit from District Commissioner of Police to organize an assembly or procession in a public place. While Section 41 of the Ordinance empowers a police officer above the rank of inspector or any magistrate to stop or prevent any assembly or procession of the holding or continuance of it "*is imminently likely to cause a breach of the peace, or to prejudice the public safety . . .*" The police officer or magistrate may therefore give orders, including orders for the dispersal of the assembly or procession. Section 42 defines what constitutes an unlawful assembly or procession, namely an assembly or procession not authorized by a permit, where one is required, or one held in contravention of the conditions thereof or in disregard of orders by the police or magistrate. Section 43 is the penal provision for disobediences, etc.

The usual practices, it is a very rare case for a Police in Zanzibar to grant permit to demonstrate and sometimes without any justifiable reason. The most common reasons they relied upon include a lack of police staff to ensure safety of the demonstrators; or that the police are afraid

²²⁴ Global Campaign for Freedom of Expression(2001), pg 8.

²²⁵ Act No. 6 of 1995.

that people with ill motives may join in; or the general security issues.²²⁶ Other practice used by police they issue prohibitive orders that a planned meeting, assemblies claiming that they had information that the meetings were likely to cause chaos, but without giving evidence.²²⁷ A good example is the 26 and 27 January 2001 peaceful demonstration organized by opposition party (CUF) called for re-run of the controversial election, demanding the reconstitution of the Zanzibar Electoral Commission; and for radical constitutional amendments to both the Zanzibar and Union Constitutions. However, the government banned the protest rallies, saying that they were intended to instigate chaos in the country.²²⁸ Any kind of assembly which does not comply with section 40, 41, 42 and 43 of the Police Ordinance are considered as unlawful assembly within the meaning of section 49, 50 and 51 of which is punishable under the Zanzibar Penal Act.

In dealing with any kind of assembly considered to be unlawful, the police were required to use reasonable force so as to disperse the demonstrators. This is according to section 14 of Zanzibar Criminal Procedure Act.²²⁹ However the Police use excessive force to disperse the opposition January 26th and 27th, 2001 demonstrations resulting to the death of 30 persons, but other estimates have put the figure at close to 60 and several hundreds were injured.²³⁰ The Human Rights Watch said that, the Tanzanian army and police opened fire without due cause on January 27, 2001, attacking thousands of supporters of the opposition Civic United Front (CUF) who were protesting against alleged fraud in national elections held three months earlier.²³¹ None of those responsible for the abuses at the end of January 2001, including shootings of demonstrators, beatings and sexual abuse, had yet been held to account.²³²

Harassment of opposition leaders during the campaign period is the main threat faced by freedom of political association. Whereas in the past political opponents were dealt with in extra-legal attacks, now they are pursued through legal system on trumped-up or flimsy charges. An early example of this tactic was the charge brought against Seif Sharif, for organizing an illegal

²²⁶ International Law and Policy Institute (2010), pg 18.

²²⁷ Cheggy Clement Mziray (2004), pg 2.

²²⁸ International Federation for Human Rights and Legal Human Rights Centre (2001), pg 19.

²²⁹ Act No 7 of 2004.

²³⁰ *Constitutionalism and Political and Political Stability in Zanzibar: the Search for a New Vision* (2003), pg 15.

²³¹ The Report is available in: <http://www.hrw.org/node/78557> (sited 7 May 2010)

²³² Supra note 231.

meeting and possession of government documents. Mr Hamad was denied bail, his counsel was terrorized into withdrawing from defending him and repeated changes were made in the charges against him.²³³ More recent cases include the prolonged detention on charges of treason of 18 members of the CUF in Zanzibar, including four elected members of the Zanzibar House of Representatives.²³⁴ The 18 were released in November 2000, following three years' incarceration and after the national elections.²³⁵

4.6 Freedom of Expression in Election Campaigns from 1995-2005

The election campaign is regulated under section 56 of the Zanzibar Election Act of 1984. The Government is duty bound to afford equal opportunities to all political parties in the use of mass media available in Zanzibar (Radio, TV and local press) in political meeting.²³⁶ But the running of campaign was subjected to various discrepancies because the ruling party being control of everything- the police and all means of freedom of expression including the broadcast media (television station called TVZ, and a radio station, STZ as well as a print media (*Nuru* Newspaper) and therefore it was very smooth for them.²³⁷ The opposition parties particularly CUF had to rely on private independent television channel based on Dar-es-Salaam such as ITV, DTV and privately owned newspapers (*Majira*, *Nipashe* and *Mtanzania*) as the main means of disseminating their campaign message to a broader electorate both in urban and rural areas.

The conduct of the TVZ was overt partisanship toward the ruling party and their campaigns were accorded greater weight than those of opposition party. Some portions of the opposition's party speeches taken out of their proper context and use them to castigate the opposition parties without giving them the chance to counter the accusations.²³⁸ While in Radio Zanzibar, the news from the opposition candidate was not properly covered despite the fact that it had been

²³³ Chris Maina Peter (2001), pg 661-663.

²³⁴ Tanzania: Prisoners of conscience face treason trial in Zanzibar. Available in: <http://www.amnesty.org/en/library/asset/AFR56/001/2000/en/e4c8bd3f-dfd2-11dd-8e17-69926d493233/afr560012000en.pdf> (accessed 15 March 2010).

²³⁵ *S.M.Z. v. Machano Khamis Ali &17 Others*. Available in: <http://www.saflii.org/tz/cases/TZCA/2000/1.html> (accessed 15 March 2010).

²³⁶ Zanzibar Electoral Commission(1995), pg 31.

²³⁷ Mohammed Ali Bakar (2001), pg 221.

²³⁸ ZEMOG Report(1995), pg 146.

addressed in several mass rallies.²³⁹ In their daily morning political programmes it regularly carried speeches of the ruling candidate, many of which contained negative comment on the opposition parties. The right of reply is unknown in the Zanzibar state media. No distinction was made between governmental and party-political activities.²⁴⁰

Denying some opposition parties' space for campaign meetings was very common during election campaign.²⁴¹ Douglas comments that the campaign leading up to the election was conducted in an atmosphere of intimidation with denial of the rights of assembly and of freedom of expression biased reporting by radio and television in Zanzibar and the prevention of some citizens from exercising their legal right to register to vote and make an informed choice.²⁴²

The steep conditions has been introduced concerning the broadcasting and print media following the announcement of 1995 presidential election results by independent private media based in Dar es Salaam, the new provision has been inserted into the Election Act concerning the announcement of the presidential results which read as follow:

42(5) Any person or institution which shall declare the election results of the president before being announced by the Commission is an offence and shall be liable to pay fine not less than 5,000,000/- or be imprisoned of not less than five years or both punishments..

A similar provision is found in Section 10(2) of the Bill relating to Referendum in Zanzibar which read that: *Any person or organization that will announce the result of Referendum before officially announced by Zanzibar Election Commission is guilty of the Offence, and shall be liable to pay fine not less than one 1,000,000/- and not exceeding 10,000,000/- or imprisonment for a term not less than three years or both imprisonment and fine.*²⁴³

These provisions had an effect of depriving the public of getting information at the earliest opportunity, even through, constituencies wise.

²³⁹ Supra note, 237, pg 222.

²⁴⁰ Supra, note 237, pg 27.

²⁴¹ *The Many Faces of Human Security Case Study of Seven Countries in Southern Africa*(2005), pg 58.

²⁴² Douglas G. Anglin (2000), pg 43.

²⁴³ Official Zanzibar Gazette of 3 March 2010. Available in: <http://www.mzalendo.net/mswada-kura-ya-maoni> (accessed 29 March 2010).

In some matters peoples are not free to air and comment their views to the public. When they do so, the government officials judge their views as amounting to treason. A good example is the case of 12 Pemba's protest who presented a demand for their *island* to secede from the Union and from the other Zanzibar island Unguja. They were arrested but it is understood that they have not been charged. The Inspector General of Police said that hatching a secessionist plot clearly amounted to treason because it would be seeking to break a national government structure formed according to the country's constitution.²⁴⁴ Also in another incident when one member of opposition side Mr Abass Juma Muhunzi during the Ministry budget for the Minister responsible for Finance and Economic Affairs from the opposition side comments in his speech that the prices of GAPCO Petrol are fixed at state house for the interest of the top Brass. He provides a justification for this statement but he was suspended from the House for one year. He then challenges the illegality of his suspension to the High Court of Zanzibar.²⁴⁵ The High Court overturns the decision of House hence it contravene the provisions of Section 12 (6) c of the Constitution. It is necessary for member of Parliaments to exercise their immunity and to comment anything within the House provided that they did not exceed their legal boundaries.

Intimidation and harassment of journalists who wrote and publish anti-government articles is very common in Zanzibar. In August 2006, a senior journalist in Zanzibar, Mr. Ali Nabwa who was the Editor in-Chief of privately owned newspaper especially *Dira* was harassed by Immigration officials who claimed that he was not bonafide Tanzanian and must undergo certain formalities in order to get his Nationality back. Under the intervention of the Minister of Home Affairs, Mr Omar Mapuri had his citizenship restored and was given a Tanzania passport.²⁴⁶ In another incident the female journalist has been chased out by the former Director of Information Mr. Talib Enzi without any justification while allowing other to remain and sit in his office.²⁴⁷ A similar threat from the government officials faced by various independent journalists for writing anti government articles.²⁴⁸

²⁴⁴ Tanzania Affairs(2008), pg 13.

²⁴⁵ *Abbas Juma Muhunzi v. Speaker of the House of Representative and A..G*

²⁴⁶ Tanzania Human Rights Report(2006), pg 163. Also see the US Department Report 2006. Available in: <http://www.state.gov/g/drl/rls/hrrpt/2006/78761.htm> (sited 07 January 2010). Also available in: http://www.accessmylibrary.com/coms2/summary_0286-23637749_ITM (sited 13 January 2010)

²⁴⁷ An Interview with Salma Said, the Deutsche Welle correspondent in Zanzibar and Editor of Mwanachi Newspaper.

²⁴⁸ An interview Ali Saleh , BBC correspond in Zanzibar.

4.7 Conclusion

In order to ensure free and fair election, the media should avoid favoritism of either party. Whenever there is any kind of favoritism there is a danger of media being used as an instrument of inciting hatred and violence in the society. It is high time for Zanzibar authority to reform public media and avoid political bias by giving equal opportunities to all while covering political activities. Again the Police should act impartially under democratic process and should not prohibit the right of citizen to demonstrate because it is the breach of Constitutional right of peaceful assembly as stated in the case of *Rev. Christopher Mtikila v. the Attorney General*,²⁴⁹ that any law which seeks to make the exercise of the rights subject to the permission of another person cannot be consistent with the express provisions of the Constitution for it makes the exercise illusory. Hence the requirement for a permit infringes the freedom of peaceful assembly and procession and is therefore unconstitutional because in the Tanzanian context this freedom is rendered the more illusory by the stark truth that the power to grant permits is vested in cadres of the ruling party. The prohibition right of peaceful assembly or any other right may be curtailed provided it is justified by the "*clear and present danger*" test enunciated in *Saia v. New York*,²⁵⁰ that the substantive evil must be extremely serious and the degree of imminence extremely high.

²⁴⁹ Civil Case No. 5 of 1993, High Court of Tanzania.

²⁵⁰ 334 U.S. 558(1948)

5 CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

Generally the domestic legislations in Zanzibar recognize the importance of freedom of expression by incorporating some necessary International and Regional human right standards relating to freedom of expression. A number of significant safeguards under the Constitution, Statutes and Policies are justified in this regard. However the issue of *claw-back clauses* found under Article 18 of the Zanzibar Constitution requires special attention because it create loop hole and it is open up for the possibilities for other legislations to use this loop hole and to undermine the granted right. For examples **the Registration of News Agent, Newspapers and Books Act No.5 of 1988** and **the Zanzibar Broadcasting Commission Act No.7 of 1997** uses the words *through public interest* and *national security* which is very easy to be abused. The Court of Appeal of Tanzania insist that any law which seeks to limit or derogate from the basic right of the individual on grounds of public interest will be saved by the Constitution only if it satisfies two essential requirements: First such a law must be lawful in the sense that it is not arbitrary. It should make adequate safeguards against arbitrary decision, and provide effective controls against abuse by those in authority when using the law. Secondly, the limitation imposed by such law must not be more than is reasonably necessary to achieve the legitimate object. This is what is also known as the principle of proportionality. If the law does not meet both requirements; such law is not saved by the Constitution and is null and void.²⁵¹ This means that the claw-back clauses that take away, water down or seek to defeat the substance of the guaranteed rights are not allowed to prevail. The rights guaranteed by the constitution must be strictly construed “otherwise the guaranteed rights under the constitution may be rendered meaningless by the use of such derogative or claw back clauses of the very constitution”.²⁵² The claw back clauses in the Constitution is very trouble because they accord undue deference to legislation regarding the enjoyment of right, and as such, fall foul of the principle of constitutional supremacy and the paramountcy of rights.²⁵³ The Jurisprudence of the African Commission on Human and Peoples’ Right also in a range of cases, it has held that limitations on rights through claw back clauses may not be permitted unless they are done through laws of

²⁵¹ *Ole Pumbun v. Attorney General*, (1993), 21 LRC 317

²⁵² *Supra*

²⁵³ Danwood Mizengwe Chirwa (2007), pg 10-11.

general applications;²⁵⁴ are consistent with the obligations under the African Charter;²⁵⁵ are proportionate, necessary and acceptable in a democratic society;²⁵⁶ and do not undermine rights guaranteed by the Constitutional and international standard²⁵⁷. From the effect of claw back clauses it is argued that the previously granted rights is meaningless²⁵⁸ and destroy the right almost completely and render the provision an empty promise.²⁵⁹

5.2 Recommendations

The Registration of News Agent, Newspapers and Books Act of 1988 establishes an Advisory Board consisting of Chairman appointed by the President together with other five members appointed by the Ministers having the function of considering applications. While the Zanzibar Broadcasting Commission Act of 1997 establishes Broadcasting Commission consisting of Chairman and Executive Secretary appointed by President together with other eight members appointed by Minister responsible for Information. This introduces the danger of significant political interference. Under the International standard it is well established that any bodies that have regulatory powers over the media should be free from any commercial or political interference. It was insisted by the Special Rapporteurs for the Protection of freedom of expression that all public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.²⁶⁰ Therefore to ensure independence there should be an independent regulatory Board which is subjected to the Parliament rather than to the Executives.

Among the function of Broadcasting Commission Act of 1997 is to grant license. The Act is silent on what criteria used for licensing consideration. So in order to ensure transparency, the

²⁵⁴ *Constitutional Rights Project and Another V. Nigeria(2000)*, AHRLR 227(ACHPR 199), par 44.

²⁵⁵ *Constitutional Rights Project and Another V. Nigeria(2000)*, AHRLR 227(ACHPR 199), pars 14, 39.

²⁵⁶ *Constitutional Rights Project and Another V. Nigeria(2000)*, AHRLR 227(ACHPR 199), pars 74-75.

²⁵⁷ *Amnesty International V. Zambia(2000)* AHRLR 325(ACHPR 1999), par 42.

²⁵⁸ Amsterdam International Law Clinic(2002), pg 6.

²⁵⁹ Sandhiya Singh (2000),pg 101.

²⁶⁰ The Joint Declaration on Freedom of Expression (2003). Available: http://www.osce.org/documents/rfm/2007/12/28855_en.pdf (sited 18 January 2010).

process for assessing license applications should be set out clearly and precisely in law. Time limits within which decisions must be made should be specified, in such a way that each of the applicants has an opportunity to be heard and the general public is able to submit comments. The criteria by which applications are judged should be announced in advance, set out in the primary legislation. Once the regulator has taken its decision, it should be communicated to the applicants, accompanied by written reasons. Anyone who has been refused a license should be able to apply to the courts for judicial review.²⁶¹

The Acts give wide discretionary powers to the Executives to suspend or prohibit publication of any newspaper if they are in opinion that it is *in public interest, national security or in the interest of peace and good order*. But there is no clear definition of public interest, and that its interpretation depends on the opinion of the decision maker, such discretionary powers of the Executives are exercised without giving the other party an opportunity to be heard which is contrary to section 12 (6)(a) of the Zanzibar Constitution 1984. This provision should be amended. It is recommended under the Johannesburg Principle that no restriction on freedom of expression or information on the ground of national security unless the government demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest.

The right to access to information to the public should be considered as their fundamental rights and not a privilege to them. And hence the citizens can only be considered to be fully informed and able to participate as democratic citizens if they are able to access the information held by them and on their behalf by the government. In the age of administrative state, expression and participation become meaningless if the polity is ignorant of the internal working of the government²⁶². Therefore we urge the Zanzibar authority to enact the Freedom of Information Law²⁶³ and to amend all laws which conceal the information to the public. This situation will improve transparency and trust in the eyes of the peoples.

²⁶¹ Central Asia Pocketbook on Freedom of Expression (2006)Pg 109.

²⁶²John M. Ackerman (2006), pg 92.

²⁶³ Principle IV(2) of the Declaration of Freedom of Expression in Africa require that the right to Freedom of Information should be guaranteed by Law.

In democratic conditions, elections represent an expression of political pluralism. Therefore media ownership and expression must represent the pluralism which the society is composed of. Uniformity in ideas, opinions, perspectives and interests therefore are incompatible with the democratic conditions²⁶⁴. The public funded media should make balance and inform the public impartially about the election process²⁶⁵. The legislative framework for elections should ensure that all political parties and candidates have access to the media and *equitable* treatment in media owned or controlled by the state, so that the general public can be informed of the political platforms, views and goals of all parties and candidates in a fair and unbiased manner. This should include all forms of print and electronic media.²⁶⁶

²⁶⁴ TEMCO(2005), pg 128.

²⁶⁵ TEMMP(2005), pg 12.

²⁶⁶ Media Access and Freedom of Expression, p.g 62. Available In:
<http://www.idea.int/publications/ies/upload/10.%20Media%20access%20and%20freedom%20of%20expression.pdf>
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ICCPR	International Covenant on Civil and Political Rights (Adopted and opened for signature, Ratification and accession by General Assembly Resolution 2200A (XXI) of December 1966)

European Conventions

ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
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American Conventions and Declarations

ACHR	American Convention on Human Rights, San Josi, Costa Rica, 22 November 1969
Declaration of Principles on Freedom Of Expression-OAS	Approved by the Inter-American Commission on Human Rights during its regular 108 session

African Convention and Declarations

ACHPR	African Charter on Human and Peoples Rights Adopted in June 27, 1981
African Charter on Broadcasting	Adopted in Windhoek in May 2001
Declaration of the Principles on Freedom of Expression in Africa	Adopted in Banjul 23 October, 2002

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Mrs. Salma Said (Journalist the of the *Deutsche Welle* correspondent in Zanzibar and Editor of Mwanachi Newspaper)

APPENDIX I: HISTORICAL BACKGROUND OF ZANZIBAR CONSTITUTION AND THE FREEDOM OF EXPRESSION

1.1 Introduction

This Chapter gives a brief panorama of the historical background of Zanzibar Constitutional and the freedom of expression. I have divided into three phases, i.e. in Pre- Colonial Period, during Colonial Period and lastly the Post- Colonial Period.

1.2 Pre-Colonial Period (-1698)

Leaving out the exchange of information from one individual to another or even to the group at large , this period mostly witnessing the traditional means of exchanging information .As the case with many African countries, different ways were used as there medium of communications and expressions. Drums, horns and gongs were used to disseminate information concerning rallies, weddings and other important occasions.²⁶⁷ There were members of the community whose task was to use horn-hooting to inform the community populace that tomorrow there would be ceremony for annual harvest.²⁶⁸ There were drum beating, to inform the community that the season had come for the young boys and girls to undergo initiations. There were also drum beating to inform the community soldiers and other members that their empire had been invaded.²⁶⁹

Drums and horns were used by both Wavumba and Wahadimu (Zanzibar tribes) at the enthronement of the chieftain at the marriages and deaths of the important persons and also in connection with religious services for rain, victory in warfare, etc.²⁷⁰Most of these drums and horns were used by the local leaders and chiefs in communicating with their subjects. Forexmples in the sixteen century Mwinyi Mkuu (the local leader) consisted of two beautiful drums and two wooden horns called ‘siwa’ which was only used on great functions and occasions. The last times it was blown for three days after the death of Mwinyi Mkuu in 1865.²⁷¹ During this period Zanzibar has its own indigenious rulers who maintained the unofficial

²⁶⁷ Hamdan, MM. (1998), pg. 6.

²⁶⁸ Ayubu Rioba (2008), pg 8.

²⁶⁹ Supra, note 262.

²⁷⁰ W.H. Ingrams (1967), pg 125.

²⁷¹ Supra, note 267, pg 6.

adjudicating system which applies the customary and Islamic laws as their major source of law.²⁷²

The freedom of expression and information during this time was meant to serve the following functions; namely: surveillance (survival), conformity (harmony), continuity (values) and escape (entertainment).²⁷³

1.3 Colonial Period

The history tells us that Zanzibar has fallen under various colonies. From 1698 and 1699, Zanzibar became part of the overseas holding of Oman falling under the control of Sultan of Oman²⁷⁴ after succeeding Portuguese in the 16th and early 17th centuries.²⁷⁵ Seyyid Said bin Sultan, the founder of modern Zanzibar, was elected to the Imamate in 1804 and transferred the capital from Muscat to Zanzibar in 1832²⁷⁶ and remained one empire until his death in 1856.²⁷⁷ During the rule of Sultan of Muscat in Zanzibar, he neither establishes a formal legislative system nor establishes a formal court system. The orders of Sultan formed the laws of Zanzibar, in the exercise the legislative powers while Sheikhs (Kadhis) informally exercise the judicial powers using the Islamic law and customary laws using native law statute.²⁷⁸ In October 1888 the first newspaper publication known as *Msimulizi* (The Storyteller) for the first time appeared in Zanzibar when Sultan bring a print machine from Great Britain.²⁷⁹

In November 4, 1890 Zanzibar became a British Protectorate- the Sultan remained a symbolic head of State where the British took charge not only defence and foreign affairs (as initially contemplated under the Protectorate agreement), but virtually all key political and administrative matters of the Protectorate.²⁸⁰ For the purpose of facilitation of communication among the government officials in the empire's East African territories, Kenya, Uganda and Zanzibar in 1892 the British Protectorate establish the Government newspaper known as '*the Zanzibar*

²⁷² Chris Maina Peter (2006), pg 16.

²⁷³ Supra note 268, pg 9.

²⁷⁴ Supra, note 272, pg 31.

²⁷⁵ Commonwealth Observer Group (2000), pg 5.

²⁷⁶ Mohammed Bakari (2000), pg 47.

²⁷⁷ Supra, note 276.

²⁷⁸ Supra note 276, pg 5.

²⁷⁹ Martin Sturmer (1998), pg 274.

²⁸⁰ Supra, note 276, pg 47.

Gazette,²⁸¹ and the *East African Protectorate*.²⁸² Letter on the Government open doors for independent press.²⁸³ To ensure the smooth administration of the British Protectorate in 1897 Zanzibar Order-in Council was established whereby various foreign laws applicable in other British Colonies (like India) became applicable in Zanzibar through the Foreign Jurisdiction Act of 1890.²⁸⁴ This Zanzibar Order-in Council of 1897 repealed by the Order in-Council of 1906. Imperial Orders –in Council and Acts of Parliaments applicable to form part of the law administered in all courts of Zanzibar. The British Courts also apply the Common law Principles as well as Principle of Equity while under Sultans Courts are guides by Islamic Law and Native Laws.²⁸⁵

Duality system was the most interesting thing since the establishment Protectorate whereby enactment having force of law have been made by Sultan’s Prime Minister, in the Sultan’s name, and acting on his behalf but without His Highness signature. This enactment are submitted and approved by him, and are said to be made by His Highness Government. They are not like the Sultan’s own proclamations called ‘*Decree*’ but ‘*Ordinance*’ or ‘*Regulations*’ and deal rather with subordinate details of administration than with what may be termed important legal or constitutional questions.²⁸⁶ In terms of Courts jurisdiction Sultan’s courts were ancillary to the Britannic Majesty’s Courts. This change has been developed by Order in Council of 1924. In order to avoid any conflict of jurisdiction between the Sultan’s and His Majesty’s Courts, it was arranged for the same judge to sit on both courts so as to preserve the traditional features of Zanzibar as an Arab state under the British protection while at the same time retaining an effective British control in the background while the Sultan still remained the nominal Supreme Authority.²⁸⁷ Two sets of laws applied simultaneously, i.e. those passed by the Legislative Council as decrees, and orders in Council issued on behalf of British Crown as well as Common

²⁸¹ Zanzibar Information policy (2006), pg 2.

²⁸² Supra, note 279, pg 275.

²⁸³ Supra note 279: the first independent newspaper to be established in 1902 is ‘*Samacher(The News)*’ whose main language is English and Gujarat focusing on political and economic situation in India. Others are the weeklies *The Hindi* (Gujerati) and *El-Najah* (Arabic) were both founded in 1912 and disappeared as early as 1914.

²⁸⁴ J.E.R Stephens(1914), pg 604.

²⁸⁵ Sir Abrahams (1941), pg 169.

²⁸⁶ Sir Arthur(1899), pg 5.

²⁸⁷ Samuel G. Ayany(1970), pg 33.

law and certain imperial statutes of general applications. While on the side of Sultan's courts Islam were the fundamental law in a civil matters.²⁸⁸

In 1926 the Sultan established the Executive and Legislative Council and hence the laws which were issued by the Sultans as a decrees and which received his assent required the approval of the Legislative Council. In certain instance if the laws would affect the interest other than those of Sultan's subject, the British resident was required to countersign them.²⁸⁹ The purpose of introduction of the Legislative Council were intended to ensure that the future of Protectorate would be safeguard the islands 'complete autonomy and independence' but in actual sense its intention was the reduction of Sultan control over his subjects.²⁹⁰ Again in 1936 another Constitutional change happen when the Zanzibar Order in Council for the first time the Sultan's subjects were given the right to Appeal in certain cases to His Majesty's Court of Appeal for Eastern Africa. In 1938 the British Protectorate establish the first formal legislation on freedom of expression which is *Newspaper Decree*,²⁹¹ for the purpose of control and monitor the independent press as well as the freedom of expression at large. It was followed by Decree No 14 of 1942 when the Sultan announces to enlarge the size of Legislature.²⁹² The African representation to enter into Zanzibar Legislative Council was made by the 1946 Constitutional changes.²⁹³ The reconstituted Legislative Council comprise the British Resident, who replace the Sultan as President, there were also unofficial members consisted three Arabs, two Indians, one African and European.²⁹⁴

The emergence of different political parties from 1940's to 1950's also lead to give birth of different newspapers which were used by them to spread their political propaganda. These newspapers are *Mwongozi* which associated with Zanzibar National Party (ZNP), which include highly learned individuals which portray the entire range of contemporary liberal belief such as the in alienable rights of national freedom and self government, popular sovereignty, civil

²⁸⁸ Supra, note 287.

²⁸⁹ Supra note 287, pg 31.

²⁹⁰ Supra note 287, pg 32. It was the retiring British Commissioner for Zanzibar who made that comments.

²⁹¹ *A Decree to make provision for the registration of newspapers and for the purpose ancillary thereto, No 11 of 1938 which entered into force on 17th December 1938.*

²⁹² Mohamed Bakari (2005), pg 3. It was only his son and Heirs who has been appointed.

²⁹³ Supra, note 287, pg 35, Sheikh Ameir Tajo appointed and represent the Africa.

²⁹⁴ Supra,note 287.

liberties, and political and social equality.²⁹⁵ The *Afrika Kwetu*, a newspaper for Zanzibar African Association (ZAA), then became the official newspaper of ASP.²⁹⁶ The *Al Falaq* which was the major expression the Arab Association published a series of Articles condemning the operation and injustice of colonialism as well as demanding the constitutional reforms, including common- roll elections, universal suffrage and the establishment of ministerial system as well as the establishment of self government and independence for the Protectorate.²⁹⁷ Latter on this newspaper had been found guilty of sedition by British Resident Magistrate after publishing statements of bloodshed in Kenya and Malaya in which the editor given six months imprisonment and was to be bound over after serving the sentence on personal surety of £250 to keep peace.²⁹⁸ These newspapers issued weekly and were read and discussed passed from hand to hand, and taken to the villages. At coffee shop where the vendor sold small cup of strong coffee the paper would be read loudly, so that even the illiterate could participate in the argument that ensued.²⁹⁹

In June 1954 after the completion of *Al Falaq* case, the Arab Association staged a boycott of the Legislative Council (LEGCO) and all other officials and semi- officials' governmental bodies, for the purpose to force the British administration to make constitutional reforms.³⁰⁰ In October 1955 the new Constitution was introduced marking the increase of Zanzibari participation in government in which twelve (nominated) representative Zanzibaris to sit in the Legislative Council. This situation has been followed by the major innovation in the 1957 constitutional changes whereby the election of the half of the twelve unofficial members through the Common Roll system. This was not only a novelty in Zanzibar but it was also a 'revolutionary' step in East Africa. This changes envisaged in the constitutional announcement of 1957 placed Zanzibar along the path to self-rule and independence.³⁰¹

In 1959 another new constitutional change has been adopted which enlarge the size of LEGCO to 25 members comprising of thirteen official members, four unofficial members appointed by

²⁹⁵ Michael Lofchie (1963), pg 187.

²⁹⁶ Jonathon Glassman (2000), pg 399.

²⁹⁷ Jane Campbell (1963), pg 76.

²⁹⁸ Supra, note 287, pg 45.

²⁹⁹ Supra, note 296, pg 400.

³⁰⁰ Michael Lofchie (1967), pg 189.

³⁰¹ Supra,note 300, pg 4.

sultan on the Resident advise and eight representative members occupying elective seats.³⁰² These changes followed up by the appointment of Constitutional Commissioner, Sir Hilary Blood in April 1960 to examine the Zanzibar constitutional position and to make recommendations for further developments. In 15th June 1960 the Commissioner came with 4 recommendations,³⁰³ which were adopted and Zanzibar receives new Constitution and election planned for January in 1961 so as to establish the responsible government in the Protectorate.

The twenty two elective seats of LEGCO were contested by the ASP, ZNP, and ZPPP. However this election was stalemated by single vote. In Chake-Chake, on Pemba, the vote was 1538 for the ASP and 1537 for the ZNP. This vote gave the ASP ten seats in LEGCO, the ZNP nine, and the ZPPP three. The ZPPP members split-two for the ZNP and one for the ASP-thus causing an even (11-11) division between the ASP and the ZNP.³⁰⁴ To resolve this, the new elections were called for June and a new seat was created on Pemba raising the number of elective seats in LEGCO to 23.³⁰⁵

The second election held on June 1962 in which the new Legislative Council, the A.S.P. won ten seats, eight in Zanzibar and two in Pemba; the Z.N.P. won ten seats, five in Zanzibar and five in Pemba; and the Z.P.P.P. again won three seats, all in Pemba. There was now no doubt that the Z.N.P. and Z.P.P.P. would form a coalition government and ASP become an opposition party.³⁰⁶ These Election Day were marred by bloody riots resulting the death of 68 and the number of injured people and beaten 400³⁰⁷ while 1,205 has been arrested.³⁰⁸ This situation leading another Constitutional conference held in London from 19th March and 6th April 1962 which attended by all political parties. However no deal has been reached under this conference.³⁰⁹ Beside the conference had held three meetings in the committee to consider the exclusively public service questions and problems relating to human rights provisions. On human rights issue, it was agreed

³⁰² Supra, note 287, pg 68.

³⁰³ *The recommendation are: a) the Sultan of Zanzibar was to be kept completely outside of politics only he should remain a constitutional monarch; b) there should be a new wholly elected LEGCO of 29 members instead of the existing 25 with only eight elective seats; c) there should be a cabinet under the Chief Minister in which the British Resident will still retain the ultimate powers and continues to preside over Executive Council; and d) There should be recognition of Official Opposition leader who entitle to Government salary.*

³⁰⁴ Supra, note 297, pg 84.

³⁰⁵ Supra. Note 297

³⁰⁶ Supra, note 292, pg 206.

³⁰⁷ Supra, note 292, pg 295.

³⁰⁸ Supra, note 295, pg 85.

³⁰⁹ Supra, note 292, pg 6.

that the Bill of rights to be drafted to cover the fundamental freedoms of the individual which would come into force upon the island's entering internal self –government status.³¹⁰ In September 1963 another constitutional conference was convened in London which led to attainment of independence in December of 1963 and British handed the sovereignty to Sultan as a Head of State. This is to say that Zanzibar attains independence with its constitution which contained a Bill of Rights.³¹¹ Among them is the freedom of expression found under Article 25 which read as follow:

Except with his consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference , freedoms to receive ideas and in formations without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.

Nothing in contained in or done under the authority of any law shall be held to be inconsistent or in contravention of this section to the extent that the law in question makes provision:

- (a) That is reasonably required in the interest of defence , public safety, public order, public morality or public health or*
 - (b) That is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or private lives of persons concerned in legal proceedings, maintaining the authority and independence of courts and regulating the technical administration or technical operation of telephony, telegraphy, wireless broadcasting or television, or*
 - (c) That imposes restrictions upon public officers*
- a) And except so far as the provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justified in a democratic society*

³¹⁰ Supra, note 287, pg101.

³¹¹ Chris Maina Peter (2008), pg 193.

However this constitution survives only for a month when the revolution takes place and as a cardinal norm of most revolutions, the first step taken was to suspend the constitution and abolish all democratic institutions.³¹²

1.4 Post Revolution

Most African societies do not have a tradition of liberal democracy and those leaders who took power after independence destroyed whatever checks and balance contained in their constitutions.³¹³ Soon after revolution of 12 January 1964, the first action of the Revolutionary government was to abrogate the Independence Constitution of 1963 and marked a clear break of the continuity and establishes a new basic norm and replaces by the *Constitutional Decree No.5 of 1964* that provide for constitutional government and Rule of law.³¹⁴ The Constitutional Decree had no provision concerning the Bill of Rights because human rights were not considered as priorities of the post- revolutionary government. All democratic institutions, political parties, trade unions, and other civil society organizations were abolished.³¹⁵ The President was vested with absolute powers while legislative and judicial powers were entrusted to the Revolutionary Council as an'' *interim measure*'' . It envisaged that the constitutional basis of the revolutionary government would be built through constitutional decrees and eventually, there would be a Constituent Assembly to enact permanent constitution.³¹⁶

In 26th April, 1964, the Union was forged between J.K Nyerere and Abeid Karume as an immediate step to neutralize the radical faction of the ASP, as well as to ensure security of the new Revolutionary government. Only three months after the Revolution, Zanzibar united with Tanganyika to form the United Republic of Tanzania. The fully-fledged African state of the People's Republic of Zanzibar was short-lived. It enjoyed sovereign power for only three months before surrendering part of it, and becoming a micro-state under the Union government. Being in power for a mere 100 days, Zanzibar's merger with the larger partner state.³¹⁷ It is said that the signing of the Articles of the Union in 1964 between the then People's Republic of Zanzibar and

³¹² Supra, note 276, pg 109.

³¹³ Samuel M. Makinda (1996), pg 557.

³¹⁴ Supra, note 311, pg 193.

³¹⁵ *Constitutionalism and Political and Political Stability in Zanzibar: the Search for a New Vision* (2003), pg 10.

³¹⁶ East African Human Rights Reports-Zanzibar(2003), pg 60.

³¹⁷ Bernadeta Killian (2008), pg 111.

the Republic of Tanganyika was without public consent. The Zanzibar Revolutionary Council was not allowed to debate the essence of the Union.³¹⁸ They were only required to grant a legal status to the Articles of the Union. In other words, the Articles of the Union embodied more the aspirations and wishes of the two Presidents than the general public as the principle of constitutionalism was not followed.³¹⁹ In 1965 the party dictate was reduced into law vide Interim Constitution which formally declare Tanzania as a one party State.³²⁰

Although the Revolutionary government allowed itself a period of one year to call to a Constituent Assembly to adopt a constitution, such body never called, and Zanzibar only come to have a written constitution 15 years later in 1979 when the first House of Representative enacted.³²¹ The new Constitution introduce among other issues includes the separation of powers by establishing distinct organs of state power. In particular, it separated the legislature from the Revolutionary Council. The House of Representatives had power to legislate over all matters of Zanzibar and to supervise government activities by way of parliamentary debate. The judiciary was made independent from the Revolutionary Council.³²² However this Constitution contains no provisions of Bill of Rights. The 1979 Zanzibar Constitution has been influenced and shaped by political event which lead the unification of two parties, i.e. : Afro-Shirazi Party(ASP) of Zanzibar and Tanganyika African National Union (TANU) of Tanzania mainland to form Chama cha Mapinduzi (CCM) [Party of Revolution] in February 1977.³²³ The 1979 Construction was modelled after the Union Constitution did not have the Bill of Rights.³²⁴

This period of 1964-1979 heralded 15 years of autocratic leadership with neither a written Constitution no elections.³²⁵ This time it was impossible for any social group to challenge the regime and any dissent was severely suppressed.³²⁶ In terms of freedom of expression during this period the grievances and dissatisfaction were high but there was no room for such grievances to surface. One could not even talk with his wife in the bed-accusing the government or mere

³¹⁸ G. Thomas Burgess (2009), pg 191-192. Also see <http://www.mzalendo.net/majibu-zanzibar-leteni-hoja-kuuvunja-muungano/> (sited 23 February 2010).

³¹⁹ Ndumbaro(2003), pg 3. Also see McHenry (2007), pg 7. Available in: <http://www.cgu.edu/PDFFiles/SPE/workingpapers/politics/Are%20Unity%20and%20Human%20Rights%20Comparable4.pdf> (sited 17 January 2010).

³²⁰ Chris Maina Peter (1999), pg 6.

³²¹ *Constitutional and Political Stability in Zanzibar: the Search for a New Vision* (2003), pg 11.

³²² Supra.320

³²³ Supra, note 320, pg 6.

³²⁴ Mahadhi J. Mwalim (2004), pg 2.

³²⁵ Supra, note 320, pg 44.

³²⁶ Supra, note 317, pg 111.

grumbling of food shortages and other items could be eavesdropped by informers, and one could be branded as enemy of the revolution, that could serve as enough ground for one to languish behind the bars.³²⁷ Human rights in this period were not subject of discussion in Zanzibar. There were gross violations of human rights but there were no avenue through which citizens could air their grievances.³²⁸

As a result of pressure inside and outside the country for demanding the inclusion of bill of rights in the constitution, then in 1984 the new Zanzibar Constitution (Act No. 5 of 1984) was enacted and replaces the 1979 Zanzibar Constitution.³²⁹ In Part III of this new Constitution incorporates all provisions of Bill of Rights (including the freedom of expression) which become enforceable immediately till now³³⁰. Unlike the Constitution of the United Republic of Tanzania of 1977, the Bill of Rights was incorporated in 1984 following a fifth amendment and enter into operation in March, 1985. However the justiciability of the provisions of the basic rights and freedoms in the courts was suspended for period of three years due to accumulation of oppressive legislation in its statute books and the likelihood of being declared unconstitutional.³³¹

³²⁷ Supra, note 276, pg 111

³²⁸ Supra, note 292, pg 11

³²⁹ Article 134A and 135 of the Zanzibar Constitution of 1984(2006 edition)

³³⁰ *Constitutional and Legal System of Tanzania*(2004), pg 91

³³¹ Supra, note 292, pg 13