

The Paradox of Eternity Nature of Article 9(3) and Article 80A of the Constitution of Zanzibar, 1984 Over the Sustainability of Zanzibar Government of National Unity: The Glance of 2015-2016 and Perspective for Future General Elections

Ramadhan J. Suleiman

PhD Student, Zanzibar University

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ABSTRACT

The Constitution of any country is the most important legal document. It is the highest law of the land in which all other laws get their legality as it is the ground norm. Normally, the Constitution incorporates the wishes and aspirations of each particular state. This signifies that no country can be well administered without having good and strong constitution. Understanding that fact situation, this study assessed the eternity nature of articles 9(3) and 80A of the Constitution of Zanzibar, 1984 over the sustainability of Zanzibar Government of National Unity with the view of examining to what extent these two important provisions protect the life of Zanzibar Government of National Unity. The study used the doctrinal research method which is the library based research methodology and complemented by comparative methods. Doctrinal legal research relies extensively on using primary and secondary source of law. This is why the study has clearly analyzed various provisions of the Constitution of Zanzibar of 1984 and more specifically articles 9(3) and 80A. The study concludes that articles 9(3) and 80A are not real and strongly an eternity clauses because these articles are simply undermined by the simple and only one provision of article 39(3) of the Constitution of Zanzibar, 1984 and that possibility or reality do not concretely assure the sustainability and life of the Zanzibar Government of National Unity.

Keywords: Constitution of Zanzibar, 1984 ; Government of National Unity; 2015-2016 General Elections, Articles 9(3) and 80A

INTRODUCTION

Constitution is a set of rules that govern the basic structure and operation of the institutions of governance in a state.^[1] In essence, the Constitution of a country is the most important legal document as the vast majority of contemporary constitutions describe the basic principles of the state, the structure and process of governance. It also reflects the history of the nation and mirrors the interests and aspirations of its people with regard to how they wish to be governed. The modern philosophy of constitution sees the constitution as a product of consensus among the people themselves as it gives the political power legitimacy, structure the state powers by establishing and defining the powers and functions of different organs and institutions of the state and limits the exercise of such powers to such organs and institutions. The constitution to any state is much like the nerves to a human body. Their imperative is integral to the soundness of maintaining states as well as shaping the governance. Therefore, the constitution of any country is always meant to provide solution to historical, social and governance problems and to be a good constitution, the decisive criteria should be the degree with which political reality conforms to the norms of constitution.^[2] Considering

what Juma , T. O., & Ogaro have said it is my view that this was one of the reason for the constitution of Zanzibar, 1984 has established the ZGNU so as to acquire the participation of main political forming in forming and running the Revolutionary Government of Zanzibar.

The constitutional rules must be self-enforcing in order to safeguard democratic system and to avoid relapses into violent political conflicts and the constitutions are self-enforcing when political officials have incentives to honor constitutional provisions. This has been the fact that Africa has experienced an increase in the number of countries adhering to democratic institution, however such democracy is vulnerable if the constitution is not self-enforcing.

METHODOLOGY

The study is short analysis of the eternity nature of article 9(3) and article 80A of the Constitution of Zanzibar,1984 over the sustainability of Zanzibar Government of National Unity. The researcher employed the doctrinal research method which focused on analyzing various provisions of the Constitution of Zanzibar of 1984, articles, journal papers and various other sources. This is simply due to the reason that doctrinal research method is the research method which make analysis of statutory provision and cases through the application of power logic and reasoning with the view of analyzing legal rules, doctrines and principles.

THE CONCEPT OF ETERNITY CLAUSES UNDER THE CONSTITUTION

Modern constitutionalism entails as one of its core elements, restrictions on the ability to amend the constitution and it is therefore not surprising that most of the post 1990 substantially revised or new African constitutions attempt to place some limits and restrictions on the powers of governments to amend the constitution.^[3] These limits and restrictions are found in provisions which contain numerous legal devices that are either designed to make the amendments process difficult or prohibit the amendment of certain provisions.^[4] The overall objective is to ensure that the general will of the people as reflected in the constitution, is not casually and capriciously frustrated by self seeking political leaders or transient majorities in order to perpetuate themselves in power.^[5] Therefore, having all those constitutional safeguards and limits is one among the very integral initiatives for ensuring the sustainable survival of the government.

Usually, unamendable constitutional provisions are used in a situation that the constitution of a certain country puts the provisions which are unamended or more difficult to amend than other provisions. These provisions are commonly referred to as the eternity clauses. It is provided that almost 35% of the world constitutions use this kind of safeguard and make certain provision or specific provisions or principle unamendable.^[6] The first use of an unamendable constitutional provisions began with the world's first experiment in democratic constitutionalism, the American Constitution of 1787.^[7] In this document, it was provided that no act can change the state's equal suffrage in the United States Senate.^[8] Usually, eternity clauses is one among the instruments used to protect the core constitutional values.^[9] They are the constitutional provisions or principles that are immune from amendment and they function as barriers or stop lines to constitutional amendment.^[10] These provisions are put to the effect that certain constitutional provisions or principles should not be easily amended and by having these eternity clauses it always ensures that a certain system or constitutional principles last longer in a particular state.

The formal constitutional entrenchment of the control measures is an absolutely essential and possibly necessary condition to functional and substantive control of the constitutional amendment process.^[11] Often such entrenched principles are related to a country's past experiences. For stance, one of the first modern constitution to contain an eternity clause was Germany, in its first constitution after the National Socialist

Party ran rampant throughout Europe. The entrenched elements of this document mainly create assurance that such atrocities will never again be committed.^[12] Therefore, it is believable that having unamended provisions or eternity clauses under the constitution provides strong safeguards against the demise of the required system to exist in a long time or fulfil the required expectation by the country.

THE ETERNITY NATURE OF ARTICLE 9(3) AND ARTICLE 80A OF THE CONSTITUTION OF ZANZIBAR 1984 OVER THE SUSTAINABILITY OF ZANZIBAR GOVERNMENT OF NATIONAL UNITY: AN EXPERIENCE OF 2015-2016 AND COMING GENERAL ELECTIONS

Generally speaking, all constitutions claim to mark a new era in the history of a given political community by improving the institutional framework, re-allocating powers between state institutions or advancing human rights protection.^[13] To comply with this reality, the House of Representatives of Zanzibar amended the Constitution of Zanzibar 1984 in 2010 which amended almost forty percent (40%) of the provisions of this Constitution. Among other things, this amendment included the enactment of new and very important provisions of article 9(3) and 80A of the Constitution of Zanzibar, 1984.

In its clear stipulation, the provision of article 9(3) of the Constitution of Zanzibar, 1984 led to a major changes in the government system of Zanzibar by establishing a hard fought form of power sharing government between two political parties which is commonly known as the Zanzibar Government of National Unity (ZGNU) and provides its structure by expressly postulating that the structure of the Revolutionary Government of Zanzibar (RGoZ) shall be of National Unity and the performance of its functions shall be carried out in the manner that will ensure national unity for the purpose of achieving democracy. This postulation makes the provision of article 9(3) of the Constitution of Zanzibar, 1984 the main constitutional provision that establishes the ZGNU in Zanzibar and the heart of the advent of ZGNU.

A part from that article 80A of the Constitution of Zanzibar of 1984 is also one of the new articles which puts the obligatory conditions for the conduct of Referendum for a change of certain provisions of the Constitution of Zanzibar. Those provisions which its amendment necessitate the Referendum include the provisions under part one of the Constitution, article 9(3), all provisions under part three of the Constitution, article 26, article 28, all provisions under part two and part three of article four of the Constitution, article 80A and article 121(1) and 123 of part ten. This means that no change can be made under those identified articles without first conducting the referendum.

This position justifies the reality that the Constitution of Zanzibar, 1984 has enacted or involved the eternity clauses or unamendable constitutional provision among its very important constitutional provisions in a way to protect the sustainability of ZGNU in Zanzibar. This means that there are several constitutional provisions or parts under the Constitution of Zanzibar, 1984 which are unamendable. The only remaining condition to amend such unamendable constitutional provision is through the popular referendum where the referendum is to be called upon or conducted to collect the people's opinion or approval on the proposed change of the constitution and if the general public approve, such changes are made and if the people through referendum disagree with the proposed change or amendment of the constitution, such change or amendment cannot be made.

In essence, there are almost thirty six (36) provisions of the Constitution of Zanzibar, 1984 which are equal to 48.2% of all provisions of the Constitution of Zanzibar, 1984 which are not easily amendable unless the popular referendum is conducted for approval of its amendment and the public should accept such amendment. This include the most important constitutional provision of article 9(3) of the Constitution of Zanzibar, 1984 which establishes the ZGNU and is not amendable by the simple procedure of amendment and such amendment should be accepted or approved by the people through referendum. In this situation,

Bakery (2011) argued that the most important amendment in the Constitution of Zanzibar, 1984 is the introduction of a referendum clause in article 80(A)(2) and nothing under articles 1,2,3,4,5,9,11 up to 25A,26, 28,39 up to 48, 80A and 121(1) and 123 shall be amended, revised or deleted unless a referendum is called for that purpose. These entrenched provisions are aimed at consolidating the Government of National Unity.

Suteu rightly argued as well that unamendable provisions work as mechanism intended to safeguard the constitutional project and in an efforts to safeguard hard-fought agreements, drafters often declares unamendable what they consider the fundamentals to the political deal including democracy, the form of state and the territorial division of power. Taking what was argued by Suet and real situation of Zanzibar political history, it is firmly believable that the ZGNU is without doubt a hard-fought form of government in Zanzibar as it took more than twenty(20) years of political conflicts and two(2) unsuccessful peace accords(Mufasa) before its introduction or its establishment under the Constitution of Zanzibar, 1984. That is why the drafters of the Constitution of Zanzibar,1984 have deliberately declared article 9(3) which established the ZGNU to be unamendable provision unless the popular referendum is called so as to protect the presence and operation of ZGNU in Zanzibar at all times.

Usually, the promise of constitutional unamend ability is taken as the guarantee of the terms of the agreement both before and after the adoption of the new fundamental law. That is why article 9(3) of the Constitution of Zanzibar,1984 tries to guarantee the life of ZGNU after its establishment. The eternity clauses remain at the heart of the political settlement, both as the embodiment of its core elements and as the guarantees of the settlement's survival. Therefore, the provision of article 80A (1) of the Constitution of Zanzibar, 1984 tends to guarantees the sustainability of ZGNU established under article 9(3) as it was the political settlement reached after many tried and failed peace accords(Mufasa).Having the eternity clause or unamendable constitutional provision is to the advantage or effect that the ZGNU established under the provision of article 9(3) of the Constitution of Zanzibar, 1984 is not simply waved or wiped out and should always be in existence unless it is constitutionally removed through the popular referendum.

However, despite having this constitutional provision of article 9(3) of the Constitution of Zanzibar, 1984 as the eternity clause or unamendable constitutional provision in the Constitution of Zanzibar, 1984, the same provision seems to be very weak. In this stationed ZGNU in Zanzibar maybe simply relinquished by election results from the general election without popular referendum. This is very unfortunate that the constitutional provisions of article 39(3) of the Constitution of Zanzibar,1984 easily undermines the survival of ZGNU in Zanzibar without the conduct of popular referendum as required by the provision of article 80A of the Constitution of Zanzibar,1984. This was evidenced in 2016 general re-election in Zanzibar and the same situation may happen again and again at any time as the life of ZGNU is an electoral dependent where only general election results, specifically the presidential election results, decides whether to have the ZGNU or not in Zanzibar.

The experience in 2015-2016 Zanzibar General Elections shows us that there are certain circumstances in which article 80A is useless or is of low value compare to another article of the Constitution of Zanzibar, 1984 especially article 39(3) as substantiated by the retired President of Zanzibar and Chairman of the Revolutionary Council, Honourable Dr. Ali Mohammed Shien during the inauguration of 9th House of Representatives on 5th April 2016. He clearly said that according to the provision of article 39(3) of the Zanzibar Constitution of 1984, there is no political party which fulfil the conditions of providing the First Vice President to form the Government of National Unity. [14] This statement clearly substantiate and shows that though there is article 80A of the Constitution, the same Constitution overrides the same provision of the Constitution and it is the real place where the weakness of article 9(3) of the Constitution of Zanzibar, 1984 as the eternity clause is without doubt proved.

Obviously, the Constitution of Zanzibar1984 vowed to make the provision of article9(3) as the eternity

clause and article 80A as the safeguard for the sustainable ZGNU but unfortunately they seem to be very weak and lost its eternity nature as they are simply broken by the constitutional provision of the same Constitution of Zanzibar 1984. This situation makes the provisions of articles 9(3) and 80A (1) of the Constitution of Zanzibar 1984 to be of no concrete value and become very light for safeguarding the ZGNU especially when the provision of article 39(3) of the same Constitution of Zanzibar 1984 is applied. This may result in to the position that the ZGNU seem to exist in the words of the Constitution of Zanzibar, 1984 but may not be in operation as the result of the same Constitution of Zanzibar, 1984. This situation clearly shows that the Constitution does not protect the sustainability of ZGNU adequately. In this phenomenon, one of the constitutional shortfalls that undermine the sustainability of ZGNU is the provision of article 39(3) which removes the ZGNU due to general election results only and the popular referendum as required by the provision of article 80(A) of the Constitution is deliberately forgotten or powerless as if it does not exist.

CONCLUSION

The provision of articles 9(3) and 80A of the Constitution of Zanzibar, 1984 have weak eternity nature and are inadequate safeguard for the sustainability of ZGNU. This is due to the obvious reasons that the provision of article 9(3) of the Constitution of Zanzibar, 1984 is silently and directly amended by the provision of article 39(3) of the same Constitution within the existence of the provision of article 80A without following or complying with the amendment procedure or requirement of conducting the popular referendum. This reality depicts that article 39(3) of the Constitution of Zanzibar 1984 is stronger provision as it silently amends the provision of article 9(3) of the Constitution and in particular justifies what was said by Fobbed that the constitution will lose its value as the supreme law if it is altered easily.

The study is of the concrete opinion that it is a true situation that article 39(3) of the Constitution easily and silently amends the provision of article 9(3) of the Constitution and undermine the sustainability of ZGNU in Zanzibar and in that reality the eternity nature of article 9(3) and 80A paradoxically exist under the Constitution of Zanzibar, 1984.

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FOOTNOTES

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[4] Ibid.

[5] Ibid.

[6] Fombard, Op.cit.at p.4

[7] Friedman, A” Dead Hand Constitutionalism: The Danger of Eternity Clauses in New Democracies” at p.79.

[8] Ibid,

[9] Zahima, D” Eternity Clauses: A Safeguard of Democratic Order and Constitutional Identity” at p.1.

[10] Ibid,.

[11] Fombad, loc.cit at p.384.

[12] Friedman, loc.cit.

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