CENTER for
STRATEGIC
LITIGATION

A PRACTICE GUIDE FOR USING STRATEGIC LITIGATION TO ENFORCE THE RIGHT TO INFORMATION AND MEDIA FREEDOM IN ZANZIBAR

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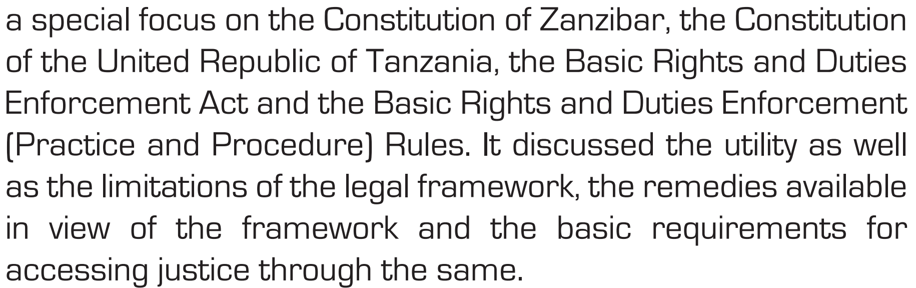
EXECUTIVE SUMMARY

Right to Information and Media Freedom in Zanzibar points out the key technical and jurisdiction considerations in pursuing such litigation with the view to achieve media freedom in Zanzibar. The purpose of the guide is to lead legal practitioners aiming at using the courts of law to realize media freedom in Zanzibar to have the necessary step by step guidance on how to do it through national and regional courts. This will contribute to strengthening the structure including procedural guidance for strategic litigation to improve the legal framework conducive to an independent, free, and plural media. Using the court of laws is an important measure to ensure that there is compliance to the constitution as well as international standards on media freedom. This guide has been developed to equip public interest lawyers in Zanzibar to pursue litigation through domestic and regional courts.

The guide is intended to assist editors, reporters, correspondents and lawyers with an interest in media laws in Zanzibar and the ordinary person to learn about litigating media laws and opportunities for advancing litigation to secure media freedom in Zanzibar. The overall goal of the Practice Guide is to build knowledge and skills on how to use the courts of law in Zanzibar and the region to challenge and reform the laws and regulations that infringe on media freedom based on the Zanzibar and Tanzania constitutions as well regional and international obligations to which Tanzania is a party.
This guide is divided into three major parts; the first chapter pertains to planning and developing a strategic litigation case, the second chapter entails an overview of the national legal framework for the right to information and media freedom with



a special focus on the Constitution of Zanzibar, the Constitution of the United Republic of Tanzania, the Basic Rights and Duties Enforcement Act and the Basic Rights and Duties Enforcement (Practice and Procedure) Rules. It discussed the utility as well as the limitations of the legal framework, the remedies available in view of the framework and the basic requirements for accessing justice through the same.

Realizing media freedom cannot be left to national courts alone. The third and final chapter is on the regional and international legal framework of the right to information and media freedom with a special focus on the East African Court of Justice, the African Charter on Human and Peoples Rights, Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Using the international human rights mechanism, public interest advocates in Zanzibar can pursue remedies available through the international legal system to compel national actors towards compliance with the regional and international norms and standards.

This guide is expected to be a living document that can be further developed, updated, and improved as more and more lawyers garner experience through practice. It is nonetheless, an important first step towards expanding media freedom in Zanzibar.

CHAPTER ONE: PLANNING AND DEVELOPING A STRATEGIC LITIGATION CASE: A FRAMEWORK FOR STRATEGIC LITIGATION

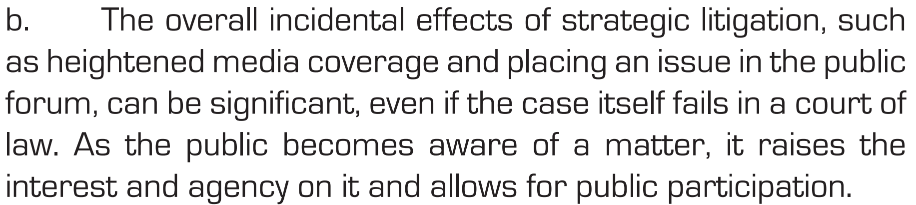
Strategic litigation involves an organization or individual taking on a legal case as part of a strategy to achieve broader systemic change. The case may create change either through the success of the action and its impact on law, policy or practice, or by publicly exposing injustice, raising awareness and generating collective action. It is important that strategic litigation is used as one part of a wider campaign, rather than being conceived as an end in itself. As an advocacy approach, strategic litigation has both some advantages and disadvantages. Moreover, some of the key considerations involved while planning for the institution of a strategic litigation case are discussed below.

Advantages and Disadvantages of Strategic Litigation

Strategic litigation has both advantages and disadvantages, when run well and in the right circumstances, strategic litigation can create significant systemic change that can have a positive impact on a large number of people. However, litigation is not the only tactic or indeed the most appropriate strategy in all circumstances.

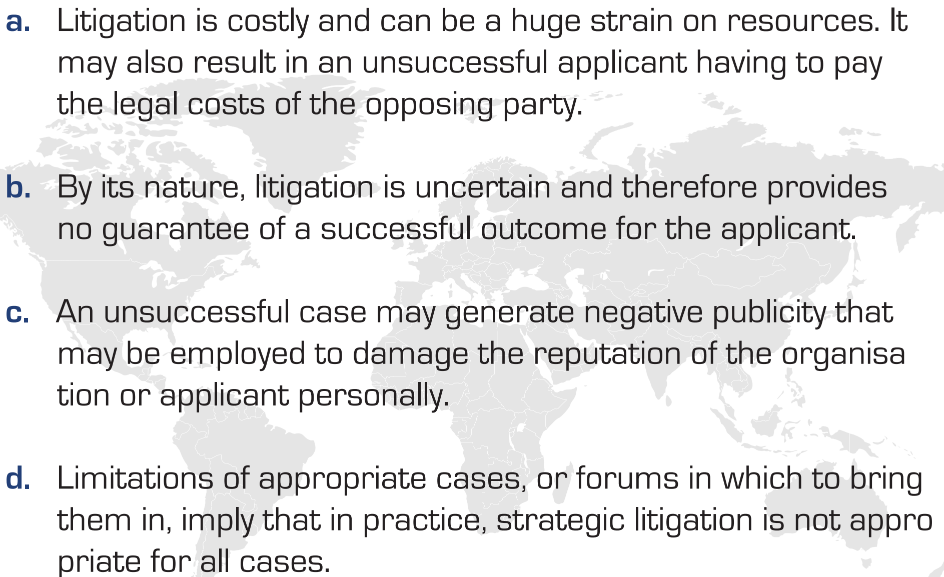
Advantages:

a. Strategic litigation can be a key tool in changing the law by setting a platform for dialogue with the state on the same as well important legal precedent upon conclusion;



b. The overall incidental effects of strategic litigation, such as heightened media coverage and placing an issue in the public forum, can be significant, even if the case itself fails in a court of law. As the public becomes aware of a matter, it raises the interest and agency on it and allows for public participation.

Disadvantages:



a. Litigation is costly and can be a huge strain on resources. It may also result in an unsuccessful applicant having to pay the legal costs of the opposing party.

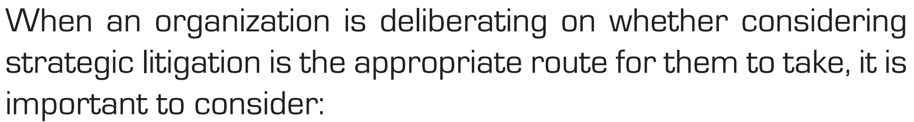
b. By its nature, litigation is uncertain and therefore provides no guarantee of a successful outcome for the applicant.

c. An unsuccessful case may generate negative publicity that may be employed to damage the reputation of the organisa tion or applicant personally.

d. Limitations of appropriate cases, or forums in which to bring them in, imply that in practice, strategic litigation is not appro priate for all cases.

Key Considerations

Important considerations for organizations involved in strategic litigation: Before an organization embarks on a strategic litigation case, it is important to take into consideration a number of considerations relevant to the matter on one hand and the mandate of the respective organization on the other hand.



When an organization is deliberating on whether considering strategic litigation is the appropriate route for them to take, it is important to consider:

a. The organization – What are the organization's objectives, areas of expertise and capacity? Does strategic litigation fit within these? If the capacity does not allow for such under taking, a joint institution of the case is advisable
b. The case - do the facts of the case support the legal challenge and the systemic change that is sought to be achieved?
c. An appropriate forum - is there an appropriate forum to bring the case and if so which court or jurisdiction is the most appropriate to file the claim in?

Mission and objectives

By reference to clear objectives, a successful organization can determine where the greatest impact can be achieved with limited resources. Before taking on a strategic litigation case, organizations should consider not only whether a case is meritorious, but also whether the issues raised in the case clearly fit within the organization's mission and objectives. If it does not, then the case may be more appropriately dealt with by another organization or legal service provider. Without such alignment to the mission and objectives of the organization, it is likely that the litigation may not be sustainable as the organization may not treat it as a matter of priority in order to attend first to its core mission. It is advisable that in the absence of such alignment, organizations consult broadly to identify the most appropriate party for the case. This could nonetheless be an opportunity for the organization to expand its horizon by collaborating with others to leverage their unique skills and expertise on the

Capacity and expertise

The organization must also have the capacity to take on any proposed strategic litigation. In determining such capacity, it is critical for organizations to take into consideration such factors as:

a. whether the organization has either staff or access to lawyers with appropriate legal skills and expertise in the particular field to t conduct the respective case;

b. whether there are any conflicts of interest with parties or key stakeholders;

c. the likelihood of any adverse costs orders in the event that the case is unsuccessful;

d. Pending limitation periods for the forum through which remedy is sought;

e. The capability of the organization to retain its reputation and support amid any public or political backlash;

f. whether the organization has sufficient resources and fund ing to take on the litigation.

Building Blocks for a successful strategic litigation case

Prior to bringing a matter for consideration before the courts of law, it is important for the applicant to satisfy a few important criteria to ensure the case holds and thus stands a chance of achieving the intended objectives of the said litigation.

Facts of the matter

The facts of any proposed strategic litigation are highly important. They must:

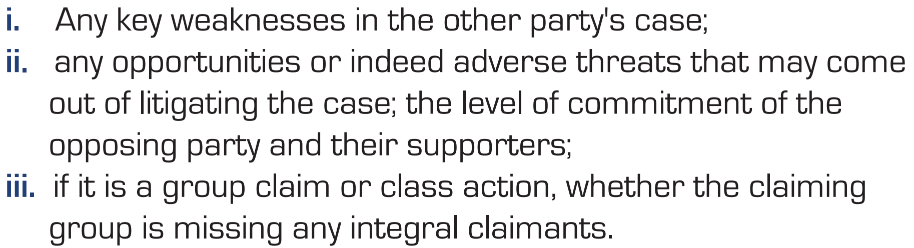
a. be capable of demonstrating the legal merits of the case;
b. demonstrate the injustice or violation the organization wants to highlight; and
c. be backed up by sufficient and attainable evidence. Any strategic litigation case should have strong prospects of success and the claimant should be the most ideal claimant to demonstrate the injustice/violation.

Parties to the claim

In strategic litigation, selecting a party is a very delicate exercise, it is however advised that organizations may highly consider bringing up cases in their own name as they have the capacity to sue or be sued. However this may not always be the case. It is most often advisable to have more than one plaintiff which will assist in sharing the costs of litigation and continuity of the case in the event one is incapacitated.

a. For organizations with limited resources, strategic litigation is about effecting wider justice and reform through the litigation of one case.

b. Litigation can be lengthy and draining on clients, particularly where cases are high profile or deal with sensitive issues. If a client is not committed to the wider cause they may take an early settlement or discontinue the action. It is also important to consider issues relating to the other party that will be subject to the litigation, including:



i. Any key weaknesses in the other party's case;

ii. any opportunities or indeed adverse threats that may come out of litigating the case; the level of commitment of the opposing party and their supporters;

iii. if it is a group claim or class action, whether the claiming group is missing any integral claimants.

Appropriate Forum

When considering conducting any strategic litigation, an organization should consider the effectiveness of the forum they intend to litigate in. The legal system in some countries may not be effective or may not be receptive to legal arguments that support the promotion and protection of human rights. Ideally a court should be competent, independent and impartial. Any limitations of the courts and the bias that may exist within them should be taken into account when developing litigation strategies.

The court must also have the power to hear the case that the organization wants to bring before it. In order to come before a court certain jurisdictions require a case to contain a question of law or infringement of legally recognized rights. If such a question or infringement does not exist then the case cannot come before the court at all and strategic litigation is therefore not an option.

It may also be useful to consider institutions other than courts which may be useful, such as an ombudsman, national human rights institution, or regulatory body. If there is no effective local forum in which to bring a complaint, organizations may wish to consider whether regional or international forums may be available.

Consideration of regional and international remedies

Lawyers considering strategic litigation should be aware of regional bodies that can be utilized at a higher level or incorporated into local strategies. Often, however, any in some cases effective domestic remedies must be exhausted before taking a complaint to a regional or international forum.

a. Depending on the jurisdiction of the case, regional bodies that could be resorted to include the East African Court of Justice, the African Court on Human and Peoples' Rights or The African Commission.

b. International bodies that receive complaints include the treaty bodies, or committees, which are established to over see implementation of the core international human rights treaties, such as the International Covenant on Civil and Political Rights. It is important to check if the relevant state has accepted the jurisdiction of such bodies to receive com plaints.

In the Case of the African Commission, the Special Rapporteur (SR) on Freedom of Expression was established by the African Commission with the adoption of Resolution 71.

The mandate of the rapporteur is, among other things,

1. to analyse national media legislation, policies and practice within member states
2. monitor their compliance with freedom of expression stan dards and advice member states accordingly
3. undertake investigative missions to member states where report of massive violation of the right to freedom of

expres sion are made and make appropriate recommenda tions to the African Commission
4. make public intervention where violations of the right of freedom of expression have been brought to his/her attention.

Communications to the SR may be made by a letter. Notwithstanding, compliance with Article 56 of the charter is necessary for which the requirements are to ensure:

1. to indicate the author of the communications even if the same requests anonymity
2. the communications are compatible with the charter
3. are not written in disparaging or insulting language direct ed against the state concerned
4. are not based exclusively news disseminated through the mass media
5. are sent after exhausting the local remedies, if any, unless it is obvious that the procedure in unduly prolonged
6. are submitted within a reasonable period from the time local remedies are exhausted or from the date the commission is seized of the matter

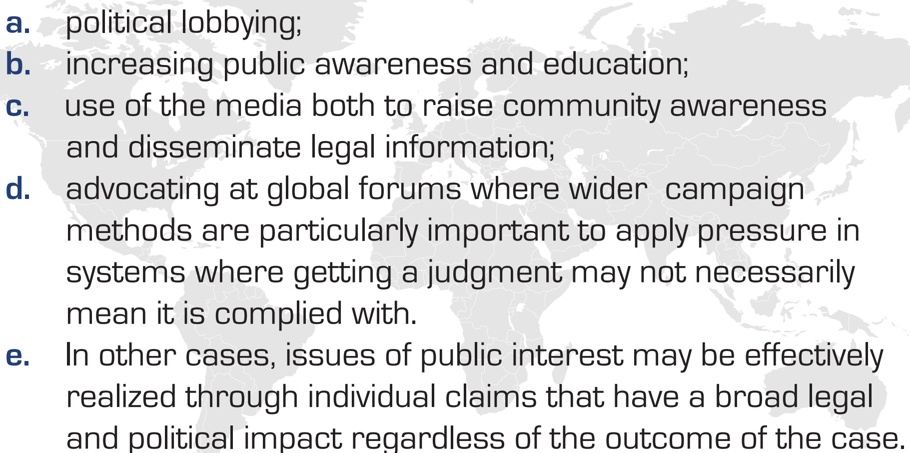
Other Considerations

Beyond filing as a complainant or petitioner, there are other useful means to participate in a public interest matter. One such means is to intervene as a third party in cases. Some legal systems allow for organizations to intervene in running court cases as a friend of the court (known as "amicus curiae"). In this event, an organization needs not seek out a client to run a strategic litigation case on, but rather may strategically choose

existing cases in which to get involved to help further their change agenda.

Alternative avenues for change

Given possible limitations of the system and the high cost and pressure of litigation, there often is an alternative avenue for change than strategic litigation. In any event, strategic litigation is most effective when used by organization as part of a wider campaign which may involve:



a. political lobbying;
b. increasing public awareness and education;
c. use of the media both to raise community awareness and disseminate legal information;
d. advocating at global forums where wider campaign methods are particularly important to apply pressure in systems where getting a judgment may not necessarily mean it is complied with.
e. In other cases, issues of public interest may be effectively realized through individual claims that have a broad legal and political impact regardless of the outcome of the case.

Strategic litigation can place an issue in the public spotlight. Argued properly it can be an opportunity to place a reasoned view in the public spotlight, in opposition to any dominant political or corporate perspective. Coupled with media coverage, failed test cases can also often lead to legislative reform or increased awareness of an issue that may lead to long-term change.

CHAPTER TWO: THE NATIONAL LEGAL FRAMEWORK FOR THE RIGHT TO INFORMATION AND MEDIA FREEDOMS

The right to information and media freedom are inherent in the prevalent constitutional order in the country. It is from such constitutional order such rights are derived and the means to realize and safeguard them are provided.

CONSTITUTIONAL PROVISIONS FOR FREEDOM OF INFORMATION

The foundations of the right to information and by extension media freedoms in Zanzibar are laid out in the Constitution of Zanzibar (1984) and the Constitution of the United Republic of Tanzania (1977), both of which contain Bills of Rights providing for the freedom of expression. Zanzibar being a part of the United Republic of Tanzania is a unique position wherein both constitutions are applicable. Coincidentally, the right is contained under Articles 18 of both constitutions, deriving from the same larger principle of the freedom of expression.

Freedom of expression has three components namely:

A. The right to seek, receive and disseminate information

B. The freedom to communicate with protection from interference with communication

C. The right to be informed at all times of various important events of life and activities

It is important to note that the enjoyment of this constitutional right on the part of the citizens of Zanzibar is not by accident but rather as a result of the requirements of Article 4 of the Constitution of the United Republic of Tanzania, which states that:

Additionally, the definition Article of the Constitution of the United Republic of Tanzania has four definitions worth having a look at:

"Judiciary" has the meaning ascribed to it in subarticle (1) of Article 116 of this Constitution;

"Judiciary of Zanzibar" means the Zanzibar Judiciary which includes all courts within the Revolutionary Government of Zanzibar;

"Chief Justice" means the Chief Justice of the Court of Appeal who is specified appointed and whose functions are prescribed in Article 118 of Constitution of the United Republic of Tanzania **"Chief Justice of Zanzibar"** means the Chief Justice of the High Court of Zanzibar who, pursuant to the Constitution of Zanzibar, 1984 is the head of the Zanzibar Judiciary;

"High Court" means the High Court of the United Republic or the High Court of Zanzibar;

Further to these definitions, it is important to look at the provisions of Article 116 (1) of the Constitution of the United Republic of Tanzania which also deals with the judiciary:

(1) Subject to the provisions of subarticle (2), the Chief Justice shall have no power over any matter concerning the struc ture and administration of the day-to-day business of the courts established in accordance with the Constitution of Zanzibar, 1984[2] , or any law of Tanzania Zanzibar.

(2) The Chief Justice shall, from time to time, consult with the Chief Justice of Zanzibar concerning the administration of the business of the Court of Appeal in general, and also concerning the appointment of Justices of Appeal.

The constitution of Zanzibar on the other hand states vide Article 5 A (1)

5A. (1) Zanzibar shall follow the system of separation of powers between three authorities, the Executive Authority, the Legislative Authority and the Judicial Authority.

(2) The Executive Authority is the Revolutionary Government of Zanzibar, the Legislative Authority is the House of Representatives and the Judicial Authority is the Court.

Article 93 of the Constitution of Zanzibar creates the High court of Zanzibar in the following words

[1]"Jaji Mkuu" maana yake ni Jaji Mkuu wa Mahakama ya Rufani aliyetajwa katika ibara ndogo ya (1) ya ibara ya 115 ya Katiba hii ambaye ameteuliwa kwa mujibu wa masharti ya ibara ndogo ya (2) ya ibara hiyo ya 118 ….

[2]Katika Sehemu hii ya Tano ya Sura hii ya Tano ya Katiba hii na katika sehemu nyingine za Katiba hii, ila iwapo maelezo yahitaji vinginevyo:

"Idara ya Mahakama" maana yake ni Mahakama ya Rufani ya Jamhuri ya Muungano iliyotajwa katika ibara ya 117 ya Katiba hii (au kwa kifupi "Mahakama ya Rufani"), Mahakama Kuu ya Jamhuri ya Muungano iliyotajwa katika ibara ya 108 ya Katiba hii (ambayo itajulikana kwa kifupi kama "Mahakama Kuu) pamoja na Mahakama nyingine zozote za ngazi zilizo chini ya Mahakama Kuu; "Jaji Mkuu" maana yake ni Jaji Mkuu wa Mahakama ya Rufani na ni pamoja na Kaimu Jaji Mkuu au Jaji wa Rufani anayeshikilia au kutekeleza madaraka ya Jaji Mkuu; "Jaji wa Rufani" maana yake ni Jaji yoyote wa Mahakama ya Rufani.

Bila ya kuathiri masharti ya ibara ndogo ya (3), Jaji Mkuu hatakuwa na madaraka juu ya jambo lolote linalohusu muundo na uendeshaji wa shughuli za siku hadi siku za Mahakama zilizoundwa kwa mujibu wa Katiba ya Zanzibar au sheria yoyote ya Tanzania Zanzibar.

(1) There shall be a High Court of Zanzibar which shall be a superior Court of record and which shall have unlimited jurisdiction on criminal and civil cases and other powers as may be conferred in accordance with this Constitution or any other law.

It is important to discuss the power of the High Court of the respective jurisdictions as these two courts have separate mandates to deal with enforcement of Human Rights, including the freedom of expression. Nonetheless, the focus of this guide is freedom of expression in Zanzibar which finds its statutory recognition under the provisions of both constitutions.
The relevant provision of the Constitution in Zanzibar states as follows (Article 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.

Article 18[3] of the Tanzanian Constitution on the other hand, is couched in the following words:
18. Every person-
(a) has a freedom of opinion and expression of his ideas;
(b) has a right to seek, receive and, or disseminate informa tion regardless of national boundaries;
(c) has the freedom to communicate and a freedom with pro tection from interference from his communication; and

(d) has a right to be informed at all times of various important events of life and activities of the people and also of issues of importance to the society.

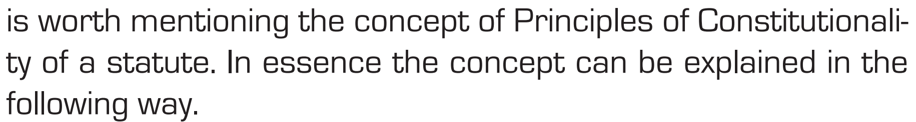
It is also noteworthy to look into what the terms Fundamental Rights, Basic Rights, Bill of Rights and Constitutional Rights mean. In essence these words refer to the declaration that the state pronounces that it will defend the rights which are normally inserted in the Constitution. The Bill of Rights may vary according to their enactment in the relevant Constitution. For example, in the Constitution of the United Republic of Tanzania the Bill of Right is contained in the Part III of the Constitution which comprises Articles 12 to Article 24. Apart from these rights there are duties which are contained from Article 25 to 28 of the Constitution.

PART ONE: THE CONSTITUTION OF ZANZIBAR

As for the Constitution of Zanzibar, the Bill of Rights is contained in Chapter III from Article 12 through Article 22 with the corresponding duties which can be found from Article 22 to Article 23. It is for this reason therefore we find that the Article relating to freedom of expression which is the subject of this guide, is located in Article 18 of the respective Constitutions. In the same regard, it

[3] 18.-(1) Bila ya kuathiri sheria za nchi, kila mtu yuko huru kuwa na maoni yoyote na kutoa nje mawazo yake, na kutafuta, kupokea na kutoa habari na dhana zozote kupitia chombo chochote bila ya kujali mipaka ya nchi, na pia ana uhuru wa mawasiliano yake kutoingiliwa kati.

(2) Kila raia anayo haki ya kupewa taarifa wakati wote kuhusu matukio mbalimbali nchini na duniani kote ambayo ni muhimu kwa maisha na shughuli za wananchi, na pia juu ya masuala muhimu kwa jamii.



is worth mentioning the concept of Principles of Constitutionality of a statute. In essence the concept can be explained in the following way.

All pillars of the state, namely the Judiciary, the Executive and the Legislature, are a creation of the Constitution, the power and duties bestowed upon them come from the Constitution. This is what is known as the supremacy of the Constitution. It is the Constitution which gives power to the legislator to legislate laws to be applied in the country.

While performing this function it is expected therefore that the legislature shall legislate what is in line with the Constitution. In the event that the legislature legislates anything which is beyond the Constitution then the piece of legislation becomes void to the extent of that inconsistency. This principle finds statutory recognition under Article 4 of the Constitution of Zanzibar which states that:

“This Constitution is the Constitution of Zanzibar and shall have the force of law throughout the Country save for provisions of Article 80 if any legislation is found to be in conflict with this Constitution this Constitution shall prevail and that law shall be null and void to the extent it conflicts with this Constitution.”

On the other hand, Article 64(5) of the Constitution of the United Republic of Tanzania provides for the principle of presumption of constitutionality providing that

“Without prejudice to the application of the Constitution of Zanzibar in accordance with this Constitution concerning all matters pertaining to Tanzania Zanzibar which are not Union

Matters, this Constitution shall have the force of law in the whole of the United Republic, and in the event any other law conflicts with the provisions contained in this Constitution, the Constitution shall prevail and that other law, to the extent of the inconsistency with the Constitution, shall be void"

ARTICLE 24 OF THE ZANZIBAR CONSTITUTION

Having established the basic principles of the Constitution in so far as the Bill of Rights is concerned it is important to further expound on them. In attempting to do so a very simple means using the 5 W's approach is adopted namely;

A. WHAT

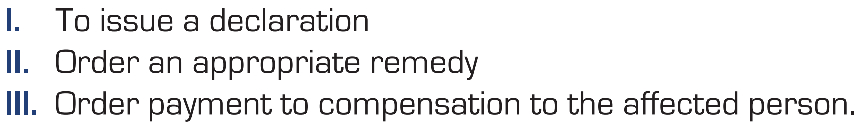
Article 24(2) of the Zanzibar Constitution states that

"Any person alleging that any provision in this Part of this Chapter or in any law concerning his right or duty owed to him has been, is being or is likely to be violated by any person anywhere in Zanzibar, may institute proceedings for redress in the High Court. The High Court shall have the power to declare and order compensation to any concerned person."

This is the first Article in the Constitution which gives someone the right to seek redress in the High Court where one's right under the Constitution has been violated.

B. WHAT ARE THE RELIEFS?

This Article empowers the High Court to issue the following reliefs



I. To issue a declaration
II. Order an appropriate remedy
III. Order payment to compensation to the affected person.

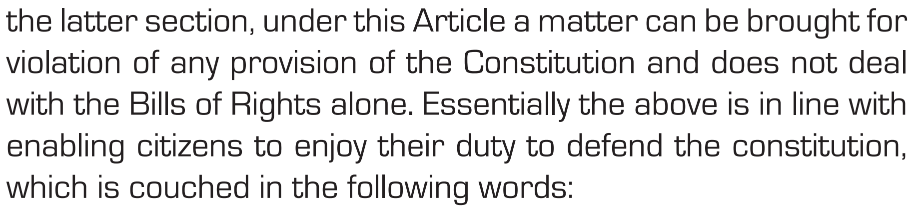
The original jurisdiction to hear and determine a matter is vested upon the High Court under Article 24(4) of Constitution. Article 24(3) of the Constitution creates the right of Appeal to any person aggrieved by a decision of the High Court. In the exercise of powers while hearing an Appeal, the Appellate Court shall consist of three judges of the High Court whose decision that appeal shall be final and no appeal shall lie to the Court of Appeal. In reading Article 24(2) emphasis should be put on the words "concerning his right" , the phrase means that it is only a person who is affected who can approach the Court for relief, which is subject to the next provision we shall discuss.

Article 25 A (1) is another Article in the constitution which gives Right to a person to seek redress. The Article states,

"Any person may institute a suit in the High Court if he sees that the Constitution is violated or is being violated or is likely to be violated."

The catch word in this section as opposed to the words in Article 24(2) is "Any person may institute a suit in the High Court if he sees that the Constitution is violated or is being violated or is likely to be violated."

There are two things which are imputed by this Article, these are firstly that the right to institute proceedings under this section does not necessitate a personal injury to the person similar to the one contained in Article 24(2). Secondly, unlike



the latter section, under this Article a matter can be brought for violation of any provision of the Constitution and does not deal with the Bills of Rights alone. Essentially the above is in line with enabling citizens to enjoy their duty to defend the constitution, which is couched in the following words:

Every person has the duty to observe and abide by this Constitution and the laws of Zanzibar, to take legal action to ensure the protection of this Constitution and the laws of the land.

This duty to defend the constitution brings in essentially recognition of the principle commonly known as Public Interest Litigation (PIL). The third and last mode under which a redress can be sought is provided for under Article 99 A (1) of the Constitution of Zanzibar. The said Article states:

“In any suit before any court below the High Court if the question of interpretation of this constitution appears that question shall immediately be referred to the High Court for the decision and the suit shall not proceed until the decision of the High Court is reached”.

In this mode it should be noted that a constitutional issue can be raised in the course of any judicial proceedings other than the High Court. The aggrieved person’s duty is to point out the constitutional issue before the Court, in the event that is done then the Court hearing the matter will be obliged to forward the case file to the High Court for hearing. The right of appeal in this mode and the one under Article 25 have been provided for by law, the relevant Article 25 A (2) and 99 A (2) of the Zanzibar Constitution.

C. HOW DO YOU SEEK REDRESS?

The provisions mentioned give a person his/her right to such redress, the next question is: how can that redress be sought? Article 24 (4) gives power to the authorities to do the following:

Subject to other provisions of this Constitution, the High Court shall have original jurisdiction to hear and determine any matter brought before it in pursuant to this Article; and the state authority may enact legislation for the purpose of:

(a) regulating procedure for instituting proceedings pursu ant to this Article;

(b) specifying the powers of the High Court in relation to the hearing of proceedings instituted pursuant to this Article;

(c) ensuring the effective exercise of the powers of the High Court, the preservation and enforcement of the rights, freedoms and duties in accordance with this Constitution.

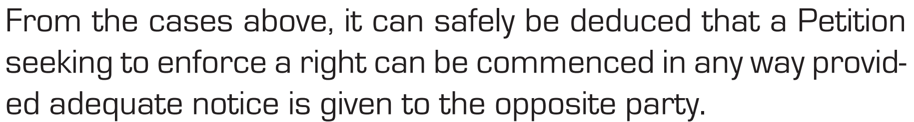
The section which is couched in a discretionary/directory way mandates the state organs if necessary to legislate on the three things mentioned above. To date, the said authorities have not enacted any law. There is indeed the risk that such law could be designed to curtail and contain the inherent right currently enjoyed, as has been observed in other jurisdictions including Mainland Tanzania.

In the meantime, the question is, in the absence of law providing for the procedure, what should be the way forward?
The Constitution of Tanzania has a provision in Pari Materia (similar to Zanzibar). The High Court of Tanzania in the earliest cases relating to Enforcement of Rights had this to say in the case of **Ephrahim vs Pastory and Another PC Civil Appeal No**

70 of 1989, 1990 LRC (Const) 757. "When Article 30(4) of the constitution states that the Authority may make rules of the court for the filing petitions, in the absence of those rules of the court it does not mean that the courts are impotent to act. The High Court will invoke its inherent powers and use the available rules of the (High) Court... failure to invoke the correct rules of the court cannot defeat the course of justice, particularly when human rights are at stake."

"In the case of Chumchua Marwa vs Officer in Charge Musoma Prison and Another Misc. Criminal Case No. 2 OF 1998..." it may be asked as to whether the Bill of Rights may be enforced when the procedure and rules of the High Court for conducting such cases are yet to be enacted by the Government as indicated in Article 30(4) of the Constitution. In my judgement the High Court may enforce the Bill of Rights without the requisite rules of the Court because that Article provides that the Government may enact such rules of the court." So it is not a must that such rules are enacted prior to the enforcement of the Bill of Rights.

The Court of Appeal in the case of **DPP v. Daudi Pete 1993 TLR 22** at page 29 stated as follows on the absence of procedure for enforcement of Fundamental Rights in the absence of legislation: "We also concur that until the Parliament legislates under sub Article 4 the enforcement of the Basic Rights and Freedoms and Duties may be effected under the procedure and practice that is available to the High Court in the exercise of its original jurisdiction depending on the nature of the redress sought".



From the cases above, it can safely be deduced that a Petition seeking to enforce a right can be commenced in any way provided adequate notice is given to the opposite party.

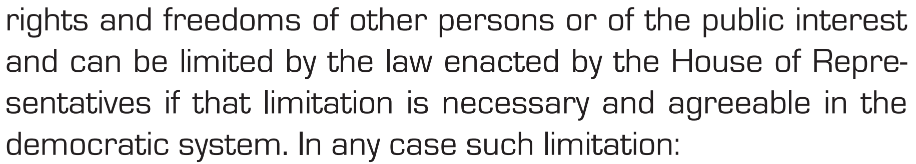
Such a wide provision can be found in other constitutions, under Article 226 of the Indian Constitution the wording which allows access to court to enforce fundamental rights provides that: " Notwithstanding anything in Article 32 every High Court shall have powers, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose."

This wording allows aggrieved persons to bring petitions by way of newspaper articles and letters. Such a situation allows wide access of people to the courts of law as well as flexibility of procedure.

Derogation

Normally all rights provided under the constitution are not absolute, the rights are exercised subject to some limitation as imposed by law. In a similar vein, the Constitution of Zanzibar has limitations to the enforcement of the rights contained in Article 24(1) which states that:

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 harms to the society more than what is there.

1. **LEGALITY:** this requires that the restriction on freedom of expression be provided by laws or regulations which are clear and precise

2. **LEGITIMACY:** the law or regulations interfering with free dom of expression be narrowly tailored to achieve a legitimate aim

3. **PROPORTIONALITY:** the limitation on freedom of expression should apply only when it is necessary and should meet the criterion of fairness. No restriction should outweigh the interest of the people

The proportionality test is a legal method used by the courts, typically constitutional courts, to decide cases in which two or more conflicting legitimate rights collide. Courts will quash exercise of power where there is no reasonable relationship between the objective which is sought to be achieved and the means to that end.

D. WHEN

A suit for the enforcement of basic rights can be instituted any time. The wording of the section is in three tenses and goes as follows; " if a person alleges that any of the provisions of sections 12 to 29 of the Constitution has been, is being or is likely to be contravened in relation to him ..."

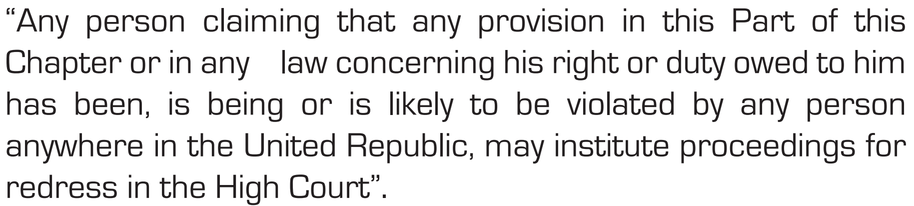
E. HOW DO YOU ENFORCE A RIGHT?

Rights to enjoyment of Rights in Zanzibar like many other countries, does not have a provision on how a decision of the Court on the enjoyment can be enforced. This is another area which has to be looked at as the pronouncement of a right without the requisite procedure on how such right can be obtained will likely lead to litigants having judgements that are hardly enforceable. The current situation in Zanzibar, where there isn't a specific legislation envisaged under Article 24 may be a blessing in disguise. Experience has shown that with a law in place enforcement of fundamental rights becomes more complicated and cumbersome, clothed with a lot of technicalities.[4]

PART TWO: THE CONSTITUTION OF UNITED REPUBLIC OF TANZANIA

Under the Constitution of United Republic of Tanzania ('Tanzania Constitution'), the right to institute proceedings for the enforcement of Fundamental Rights obtainable under the Constitution is provided for under Article 30(3) of the Constitution which states:

[4]Authors Opinion



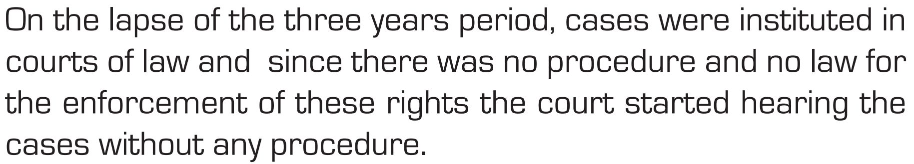
"Any person claiming that any provision in this Part of this Chapter or in any law concerning his right or duty owed to him has been, is being or is likely to be violated by any person anywhere in the United Republic, may institute proceedings for redress in the High Court".

Like the Zanzibar Constitution, original jurisdiction lies in the High Court of Tanzania vide Article 30(4) and the power to make laws for the enjoyment of the rights, power of the Court and laws for the better carrying on the effects of Article 30(3) is provided under the same Article 30 (4)

"Subject to the other provisions of this Constitution, the High Court shall have original jurisdiction to hear and determine any matter brought before it pursuant to this Article; and the state authority may enact legislation for the purposes of-

(a) regulating procedure for instituting proceedings pursuant to this Article;
(b) specifying the powers of the High Court in relation to the hearing of proceedings instituted pursuant to this Article; and
(c) ensuring the effective exercise of the powers of the High Court, the preservation and enforcement of the rights, freedoms and duties in accordance with this Constitution."

These articles in the Tanzanian Constitution were brought about by the Constitutional Amendments of 1984 which necessitated the enactment of the Consequential Provision Act, the effect which was to suspend the operation of the Bill of Rights for three years so as to put the house in order and allow the Government to amend laws which were violative of the Constitution.



On the lapse of the three years period, cases were instituted in courts of law and since there was no procedure and no law for the enforcement of these rights the court started hearing the cases without any procedure.

Some of the early cases include Attorney General vs Marwa Mgosi Civil Appeal No. 95 of 1988 Mwanza Registry (unreported) where it was held: "... firstly all Courts of law in this Country are duty bound to take Judicial notice of all Constitutional matters. Secondly Courts in this Country are not Courts of the parties but are Courts of law and have thus inherent power to raise and consider matters which are necessary and fair and just decision of a case provided the parties are given adequate notice."

In the case of Chumchua Marwa vs Officer i/c Musoma Prisons & another Misc.Criminal case No. 2 of 1988 stated in every clear manner as follows: "It may be asked whether the Bill of Rights may be enforced when the procedure and rules of the High Court for conducting such cases are yet to be enacted by the Government as indicated in Article 30(4) of the Constitution. In my judgment the High Court may enforce the Bill of Right without the requisite rules of the Court because that Article provides that the Government may enact such rules of the Court."

The Court of Appeal in the case of DPP vs Daudi Pete 1993 TLR 22 at page 25 held: "We concur with the learned trial Judge that the provisions of sub-art (3) and (4) of Article 30 sufficiently confer original jurisdiction upon the High Court to entertain proceedings in respect of actual or threatened violations of the Basic Rights Freedoms and Duties.

We also concur that until Parliament legislates vide Sub-Act(4) the enforcement of basic rights, freedom and duties may be effected under the procedure and practice that is available to the High Court in the exercise of its original jurisdiction depending on the nature of the remedy sought".

This case cleared the controversy which hitherto was in existence and henceforth a Pandora's Box was opened witnessing the growth of Human Rights jurisprudence leading eventually to the enactment of the Basic Rights and Duties Enforcement Act. At this juncture it should be noted that during the six years when there was no procedure in existence, the Enforcement of the Rights came up in different ways as demonstrated in a number of the early cases;

a. AG vs Dominic Mnyaroje (1995) TLR 97 the issue of constitutionality of the sentence of death came up at the time of Mitigation

b. Khasim Hamis Manywele vs DPP Criminal Appeal No 39 of 1990 Dodoma registry (unreported) the constitutionality of the legislation was raised during the hearing of the Appeal.

c. Kukutia Ole Pumbun vs AG (1993) TLR 159 - the matter was brought by way of Petition

d. Rev Mtikila vs DPP Criminal Appeal No 90 of 1992 Dodoma Registry Unreported the issue of constitutionality of the statute came up during the hearing of the Appeal

e. AG vs Lohay Akonay & Another (1995) TLR 80 this matter came by way of a Petition.

PART THREE: THE BASIC RIGHTS AND DUTIES ENFORCEMENT ACT CAP 3 (BRADEA)

This Act was enacted in 1994 in fulfillment of the dictates of Article 30(4) of the Constitution of the United Republic of Tanzania. It is important to mention a few of the salient features of the Act.

a. **PREAMBLE:** the purpose of the Act was to provide for the procedure for enforcement of Constitutional Rights and related matters.
b. **APPLICABILITY:** section 1(2) of the Act shall apply to Tanzania Zanzibar as well as mainland Tanzania in relation all suits the causes of action which concerns Article 12 to 29.
c. **OPERATIVE PART:** section 4 gives right to redress to the High Court by any person who alleges any provisions of articles 12 to 29 of the Constitution has been, is being or is likely to be contravened in relation to him.
d. **MANNER OF INITIATING PROCEEDINGS:** application to the High Court is to be made by way of petition and shall be filed in the appropriate registry of the High Court by originating summons (refer to the case of BAWATA).
e. **CONTENTS OF PETITION: SECTION 6**
   ORIGINAL JURISDICTION:
   Jurisdiction is vested in the High Court to hear and deter mine application made under section 4 and may make such orders and give directions as it may consider appropriate for the enforcing or securing the enforcement of any of the provisions of Article 12 to 29.

   Exclusion of jurisdiction. The Act excludes the court's power to hear such matters when there exist adequate means of redress or if that application is frivolous or vexatious

NB: the Act imposes a legislative bar by disallowing and challenging a proposal contained in a Bill and any application filed shall be dismissed. This seems to defeat the provisions of the constitution and the Act which allows challenging an anticipated violation worded likely to be contravened.

f. **ANCILLARY MATTERS:** when a matter relating to a constitution arises in the course of proceedings, in the subordinate court, the procedure to be followed is to take the constitu tional matter to the High Court, while the original matter shall be stayed pending the determination of the constitu tional issues. Unlike the situation in Zanzibar where such a situation is a Constitutional Right, in Tanzania it is a statutory right which is more often than not ignored.

g. **CONSTITUTION OF THE COURT:** Three judges of the High Court are mandated to hear a constitutional matter save for where there is a determination whether the application is vexatious, frivolous[5] or otherwise fit where in the matter is attended by one judge. The decision in such proceedings shall be determined by majority opinion.

h. **POWER OF THE HIGH COURT:** Section 13 conflicts with Article 64(5) which we referred to earlier: see section 23(1) of the Constitution of Zanzibar.

i. **APPEAL:** lies to the Court of Appeal which is different from the procedure obtainable in Zanzibar. Whereas under Section 14 (1) of BRADEA an appeal lies with the Court of Appeal of Tanzania, in Zanzibar under the provisions of Article 24(3) of the Constitution an appeal against a ruling on a determination of constitutionality lies with the High Court presided by three Judges of the Court.

[5]Decisions made under Section 9 of BRADEA regarding frivolous and vexatious application shall be by way of reference to three judges of the High Court as per the provisions of Section 14(2) of BRADEA.

NB: Automatic stay is granted to the Government under section 14(3) of the Act, a right which is not enjoyed by the opposite party.

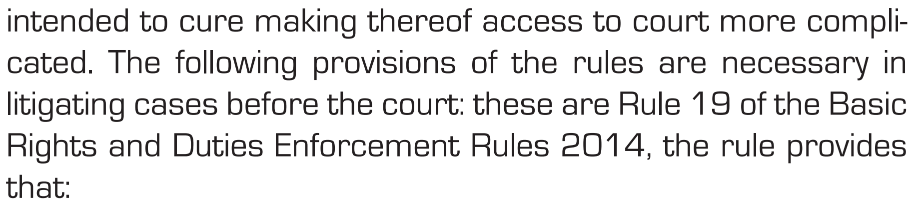
j. **RULES OF PROCEDURE:** under section 15, the Chief Justice is to make Rules relating to practice and procedure of the High Court and subordinate Courts in relation to the jurisdiction and powers conferred by the Act.

NB: the law lacks adequate execution proceedings, explaining how one can execute a decision of the Court in the Enforcement of the Act.

PART FOUR: THE BASIC RIGHTS AND DUTIES ENFORCEMENT (PRACTICE AND PROCEDURE) RULES 2014[6]

Purporting to act under section 15 of the Basic Rights and Duties Enforcement Act (BRADEA), the Chief Justice caused to be enacted the rules as titled above.
The rules cover among other things how petitions should be, how and time within which the petition should be served, reply to petitions, preliminary objection, consolidation of applications, provisions for an Amicus Curiae, procedure of hearing after disposal of preliminary issues, withdrawal of petition, settlement by consent and costs. The notion of costs in these rules tends to completely defeat the whole notice of public law under which it is a rule that cost should not be awarded in such cases. Lastly the rules provide that where there is any matter not provided for in the rules then the practice and procedure applicable shall apply.

These rules have brought more problems than they were



intended to cure making thereof access to court more complicated. The following provisions of the rules are necessary in litigating cases before the court: these are Rule 19 of the Basic Rights and Duties Enforcement Rules 2014, the rule provides that:

"Where there is any matter not provided for in the Rules the practice and procedure applicable to the High Court shall apply".

The law applicable to the High Court in so far as civil proceedings are concerned is the High Court of Tanzania Cap 33 vide section 2 which states:

"Subject to the express provisions of any written law, the provisions of this code shall apply to all proceedings in the High Court of the United Republic..."

The import of these two is that in the event nothing is mentioned in the Rules above then the law applicable shall be the Civil Procedure Code Cap 33.

[6]GN 304 or 29th AUGUST 2014

AMICUS CURIAE

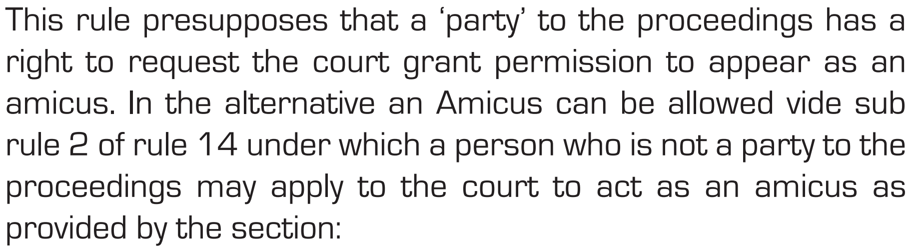
Amicus Curiae or amici (plural), amicus curiae is a Latin word for friend of the Court. Normally in proceedings, an amicus is a person or group not a party to an action, but who may have a very strong interest in the case. Such a person or group will normally petition before the court for permission to submit a brief in the matter with the intention of influencing the Court's decision. The submission to the court by an Amicus is normally known as "amicus brief".

The Amicus Curiae when granted permission to appear and submit a brief in court will never be a party to the case and as a consequence therefore an amicus cannot appeal against a decision of the court and the court cannot condemn an amicus to costs. An amicus brief may be on points of facts or law and normally it is expected to contain:

a. A statement of the interest of the amicus in the case and the person or group an amicus present
b. Statement of the familiarity with the issues involved in the review and with the scope of the argument to be presented
c. Statement of specific issues which the amicus brief will address
d. Statement of the reason for believing that additional arguments are necessary on the points

The Basic Rights and Duties Enforcement Rules 2014, vide Rule 14 of the rule is the relevant provision in regard to amicus, the rule provides that,

"The Court may, upon a request by any party invite or allow any person with expertise in particular issue to appear as a friend of the Court in the proceedings before it".



This rule presupposes that a 'party' to the proceedings has a right to request the court grant permission to appear as an amicus. In the alternative an Amicus can be allowed vide sub rule 2 of rule 14 under which a person who is not a party to the proceedings may apply to the court to act as an amicus as provided by the section:

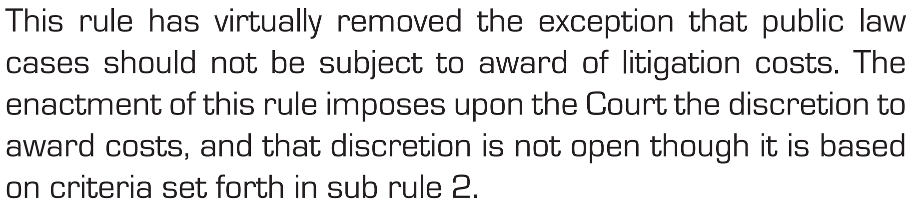
"The Court may, on application, allow any interested person to join in the proceedings".

Though it is not stated at what particular moment an Amicus Brief can be submitted, it is however desirable that an Amicus brief (application) be submitted before immediately when the pleadings are complete and before the hearing on the matter commences as this will allow effective understanding of the real dispute before court.

COSTS

The general rule in Civil litigation is that costs follow events meaning that the loser has to pay the winner his costs.
However, an exception to that is in public law litigation where normally each party has to bear its own costs in the case. Rule 18 of the Basic Rights and Duties Enforcement Rules is the relevant rule as regard to costs the same states:

1. The award of the costs shall be in the discretion of the Court
2. The Court in determining the award of costs, shall consider the bona fide of the proceedings, its public interest and the Courts role in advancing Human Rights jurisprudence
3. The Court shall in exercising its powers to award costs take appropriate approaches to ensure that citizens have access to the Court



This rule has virtually removed the exception that public law cases should not be subject to award of litigation costs. The enactment of this rule imposes upon the Court the discretion to award costs, and that discretion is not open though it is based on criteria set forth in sub rule 2.

From the above therefore it is highly desirous for litigants to join forces in litigation by way of amicus as in such a situation the court hearing the has have many parties and in the event it awards costs it will do so in respect of the sole party to the case and the amici will not be subject to orders of costs.

PART FIVE: THE GOVERNMENT PROCEEDINGS ACT

In practice, one of the key questions that lawyers often have to contend with is whether the provisions of the Government Proceedings Act apply in Zanzibar prior to the institution of proceedings under Articles 23 (1) and 24 of the Zanzibar constitution. This important question is discussed below:
The Government Proceedings Act No. 3 of 2010, was enacted to provide for the rights and liabilities of the Government in Civil Matters and the procedure in Civil Proceedings by and against the Government. This is in accordance with the preamble to the Act.

Section 6(2) states:

"No suit against the Government shall be instituted, and heard unless the claimant previously submits to the Government Minister, Department or officer concerned a notice of not less than ninety days of his intention to sue the Government, specifying the basis of his claim against the Government, and he shall send a copy of his claim to the Attorney-General."

What is a "suit"? A suit presupposes a manner in which a private right may be enforced in a court of law following a private wrong.

In the case of a public wrong, namely a wrong deemed to be committed against the society,redress is sought by way of a constitutional remedy or prerogative writ or order and these are not brought by way of suit. So an enforcement of any Public wrong cannot be commenced by a suit, but rather by another way as may be prescribed by law. Hence the Government Proceedings Act can't be applicable in matters falling under Articles 23, 24 (2) and 99 (A) of the Constitution of Zanzibar.

CHAPTER THREE: THE REGIONAL AND INTERNATIONAL LEGAL FRAMEWORK OF THE RIGHT TO INFORMATION AND MEDIA FREEDOMS

Besides national courts, regional and international courts and mechanisms provide an important avenue for redress of media freedom violations. We discuss below some of the most relevant forums for those seeking to redress media freedom violations in Zanzibar.

PART ONE: THE EAST AFRICAN COURT OF JUSTICE (EACJ)

The East African Court of Justice is a regional Court established by the treaty for the Establishment of the East African Community. The court is established under Article 23 of the treaty. The role of the Court according to the treaty is to be a judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with the treaty. The jurisdiction of the Court is provided for under Article 27 of the treaty which states:

" the court shall initially have jurisdiction over the interpretation and application of this treaty."

Sub Article 2 of the same provides:
"The Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the council at a suitable and subsequent date."

Jurisdiction of the EACJ

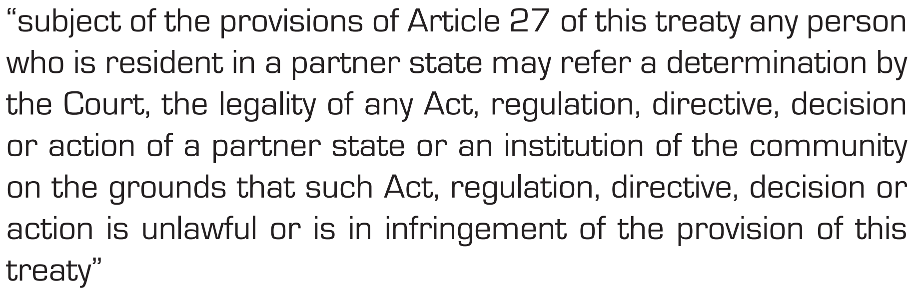
A point to note is that the Court has no human rights jurisdiction. Notwithstanding, it is as a result of progressive judicial interpretation and application of laws that this Court has opted to take such matters using the avenue of the interpretation of the treaty particularly the fundamental principles of the community provided in terms of Article 6(d). The fundamental principle that shall govern the achievement of the objectives of the community by the partner states shall include:

"d) good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples rights in accordance with the provisions of the African Charter on Human and Peoples' Rights."

Further, Article 7(2) of the treaty further states

"... the partner states undertake to abide by the principles of good governance, including adherence to principles of democracy, rule of law, social justice and the maintenance of universally accepted standards of human rights."

It is on the strength of these two Articles of the treaty that the Court has progressively ruled that dealing with matters of human rights under the two Articles would be akin to interpreting the application of the treaty in that these are undertakings of the partner states under the treaty. The treaty among other things provides under Article 30 on the competency of the people who bring suits in the Court.



"subject of the provisions of Article 27 of this treaty any person who is resident in a partner state may refer a determination by the Court, the legality of any Act, regulation, directive, decision or action of a partner state or an institution of the community on the grounds that such Act, regulation, directive, decision or action is unlawful or is in infringement of the provision of this treaty"

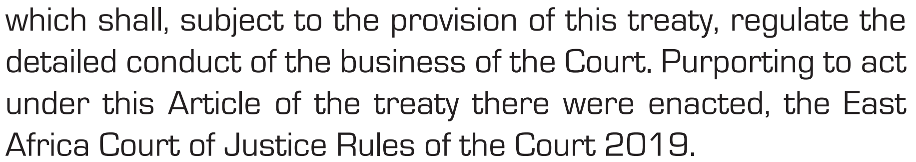
A person has been defined in the definition section to mean a natural or legal person which means that the concept of public interest litigation has found statutory recognition in the treaty. Another important thing which is somehow different from the other two systems we have gone through is that in this court there is a time limit within which proceedings have to be instituted. Article 30(2) provides

"The proceedings provided for in this article shall be instituted within two months of the enactment, publication, directive, decision or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complaint, as the case may be."

The right of Appeal from any judgment or any order of the First Instance Division of the Court is provided in the treaty and appeals under Article 35 A (i) shall lie to the appellate division of the Court on:

i. Points of law
ii. Grounds of lack of jurisdiction
iii. Procedural irregularity

Rule 42 of the treaty mandates the Court to make rules of the



which shall, subject to the provision of this treaty, regulate the detailed conduct of the business of the Court. Purporting to act under this Article of the treaty there were enacted, the East Africa Court of Justice Rules of the Court 2019.

RULES OF THE COURT

To start with let`s get conversant with the provisions of rule 4 which states;
"Nothing in these rules shall be deemed to limit or otherwise affect the relevant powers of the court to value such orders as give such directions as may be necessary for the ends of justice and to prevent abuse of the process of the court."

This section is very important for it acts as a resort in situations where the rules are silent and it is important to have access to the court. In such situations this section must be used to seek a relief desired.

NB: vide article 47 of the treaty the parties' states agreed that the seat of the court shall be determined by the summit. It was decided that the seat of the court be in Arusha Tanzania and sub registries have been set in each of the partner states. Vide rule 9 (2) of the rules. For Tanzania the sub registry is situated at the building housing the land division of the High Court of Tanzania.

So in Tanzania all the documents relating to any matter filed in the East Africa Court of Justice (thereafter EACJ) may be filed in Arusha or Dar es salaam.

Appearance of parties is determined by rule 19 (1) in which it is stated;
"A party to any proceedings in the court may agree in person or by an agent or an advocate duly appointed to act on his or her behalf."

A recognized agent has been defined under rule 19(2) as;

"A person holding a power of attorney authorizing that person to make or do such appearances applications or acts on behalf of the party"

It is mandatory for the notice of appointment to be filed in the Court vide article 19 (3).

The following persons may appear by virtue of their positions, these are; a Director, Manager or Company Secretary appointed by resolution due seat of the composition as the company. In case of a person of legal disability, he may appear by a guardian ad interIm as next friend. There is a requirement that in the case of an Advocate, he has to file with the registrar a current practicing certificate as a document that he or she is entitled to appear before a Superior Court of the party's state.
NB: For one to appear in the EACJ one has to have more than five (5) years' experience which would entitle him to appear in CA by virtue of rule 33 (3) of the Court of Appeal Rules [Cap 141].

The process in the EACJ may be initiated by an individual or a party state. Take note that the definition section defines a Statement of Claim and Statement of Reference as follows: Statement of claim means "a party's written statement seeking

the court's determination of a reference brought before it under Article 28, 29 and 30 of the treaty". While a Statement of Reference means a party's written statement seeking the court determination of a dispute "between the community and an employee."

So in our case we will be guided by Rule 25 (1) which states: "A reference by a party state, the Secretary General or any person under Articles 28, 29, 30 respectively of the treaty shall be instituted by lodging in the Court a Statement of Reference"

Of importance to note is the format on how or rather what the statement of reference shall contain as provided by Rule 25 (2). On the other hand Rule 25 (3) makes it mandatory for a statement of reference to be accompanied by an affidavit in cases whose the reference seeks to challenge the legality of the Act, regulation, directive decision or action. After filing a reference in the registry, a notification will be issued by the registrar requiring the respondent to file a statement of defense thereto, the said response/defense to the reference ought to be filed within 45 days of service as provided under Rule 32 (1) of the rules. Thereafter the applicant may under Rule 32 (2) file, within 45 days file and serve upon the respondent a reply to the response. In the event there is a counter claim by the respondent, has to be replied within the time stipulated under Rule 32 (2). No further pleadings shall be permitted 14 days to the closure of pleadings, unless leave of the court is sought and granted. The same would apply to a person seeking leave to produce a document.

APPLICATIONS

As per rule 52 (1), all applications to the court shall be by notice of motion, which shall state the grounds of the application. No applications shall be heard without notice to the parties affected however there is an exception to that; under the proviso of rule 2 which allows the court to proceed with an application if satisfied that the delay caused by the proceedings in the ordinary way would or might entail irreparable injustice, may hear the application ex-parte. After granting the ex-parte order, the court shall set down the hearing date of the application inter-parties, the application before the court may be supported by one or more affidavits of the applicant or some other person.

THIRD PARTY PROCEEDINGS

Rule 55 (1) of the rules provides for third party proceedings in a situation where a respondent makes claims against any other person not already a party to the claim or reference addressing:

a. Any contribution or indemnity
b. Any relief or remedy relating to or connected with the origi nal subject matter of the claim
c. That any question or issue relating to or connected with the said subject matter is substantially the same question or issue arising between the claimant or respondent.

PROCEDURE FOR THIRD PARTY PROCEEDINGS

To effect proceedings against a third party, the claimant must fulfill procedural requirements including;

Ø Application to sue a third party Ex-parte notice
Ø application to be filed or served to a third party
Ø a notice which:
i. addresses the nature and ground of reference
ii. Is filed within time limited for filing response
iii. Shall be served to the party with a copy of the reference

Ø Third party intending to dispute a reference shall within 30 days after service file and serve the applicant a statement of reference if it disputes the original claim by the claimant of application.
Ø If no response is filed within the reasonable period the third party shall be deemed to admit the validity of the reference.

INTERVENTION

The Right to intervene is provided for under Article 40 of the treaty which states;

"A party state, the secretary general or a resident to a party state (our emphasis) who is not a party to a case before the court may with leave of the court, intervene in that case but the submissions of the intervening party shall be limited to evidence supporting or opposing the argument (our emphasis)"

For one to be an intervenor, the following conditions are necessary;

AMICUS CURIAE

The term Amicus curiae is a Latin word for friend of the Court. S/he is someone who is not a party to a case who assists a court by offering information, expertise or insight that has a bearing on the issue in the case. The relevant provision for proceedings of an Amicus is rule 60 which provides that;

"At any stage of the proceedings, the court may if it considers it desirable for the proper determination of the case invite or grant leave to a party state, organization or person to submit in writing any observation of any issue that the court deems appropriate"

A leave to appear as amicus curiae may be granted by the President or Principal Judge upon request in writing detailing therein that persons' interest in the matter.

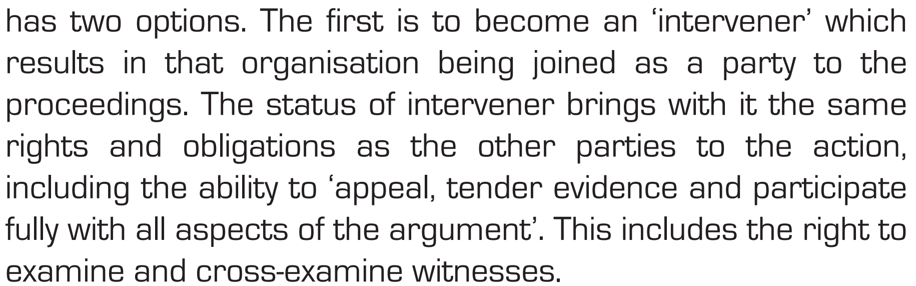
Difference between amicus curiae and intervener:

The role of amicus curiae can be distinguished from the role of an intervener. While the role of an amicus curiae is to assist the court, the role of an intervener is to represent the intervener's own legal interests in proceedings. As a result thereof an intervener's legal interests may be affected in a number of ways:

a. First, the intervener's interests may be directly affected by the court's decision.

b. Second, the intervener's interests may be less directly affected.

An organisation desirous to become involved in a proceeding



has two options. The first is to become an 'intervener' which results in that organisation being joined as a party to the proceedings. The status of intervener brings with it the same rights and obligations as the other parties to the action, including the ability to 'appeal, tender evidence and participate fully with all aspects of the argument'. This includes the right to examine and cross-examine witnesses.

The second way in which an outsider can become involved in proceedings is as 'amicus curiae'. The circumstances in which a court will permit this intervention are, in simple terms an amicus curiae will be allowed to appear if that organisation would assist the court to be properly informed of material relevant to reaching its decision. If such an appearance is permitted, the role of amicus curiae is more limited than that of an intervener. Traditionally, an amicus gives disinterested advice to the court on a point of law, which was achieved through oral submissions. The amicus is not a party and so is not entitled to file proceedings, requiring service. Further, as an amicus is not a party to the proceedings and thus the court's decision is not binding on it.

Lastly as an intervener is a party on record and therefore S/he can appeal against the decision of the court in the event S/he is aggrieved with the decision unlike an Amicus Curiae who cannot appeal. As regard to orders as to costs, no costs can be awarded to an Amicus Curiae unlike in intervention proceedings wherein an order for costs can be made against a losing intervener.

PRE-TRIAL PROCEEDINGS

Scheduling Conference[7]: a scheduling conference is a conference conducted by the Court within 14 days after the closure of proceedings which is meant to ascertain among other things;

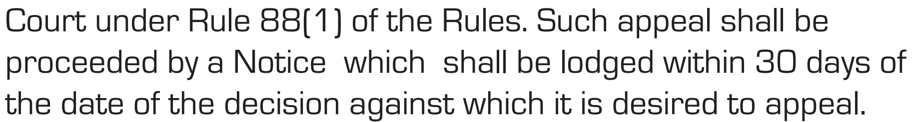
a. Points of agreement and disagreement
b. Possibility of mediation, conciliation or any other form of settlement
c. Whether evidence is to be oral or by affidavit and time limit within which such affidavits are to be filed and served
d. Whether legal arguments be written, oral or both
e. Consolidation of references, claims and or applications
f. Estimated length of the hearing and or any other matter as the Court may deem fit.

Alternative dispute resolution is a procedure found under Rule 64 of the Rules whereby if there are prospects for settlement, the court directs that the case proceed to mediation and other forms of settlement. The said mediation or settlement has to be completed within 21 days after commencement and the mediator is at liberty to extend the mediation period for another 15 days on application by the parties, showing reasons for the extension. In the event mediation or other forms of settlement succeeds, the Court shall record the settlement orders and if it fails the matter shall proceed to trial.

APPEALS

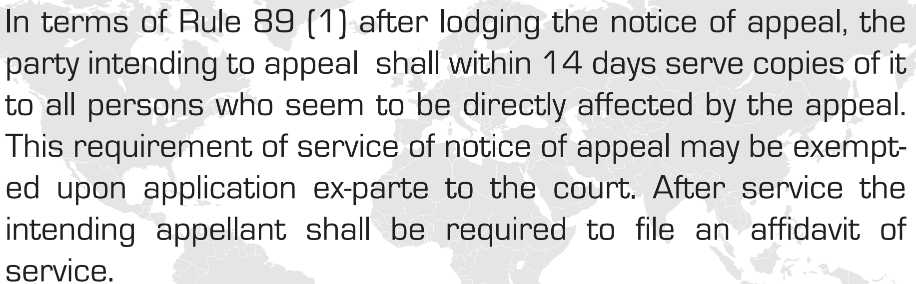
Any person aggrieved with the decision of the Court and is desirous of appealing has a right to move to the Appellate

[7] Article 63(5)



Court under Rule 88(1) of the Rules. Such appeal shall be proceeded by a Notice which shall be lodged within 30 days of the date of the decision against which it is desired to appeal.

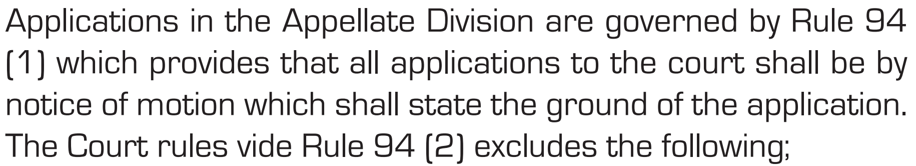
The Notice shall state whether it is intended to appeal against the whole or only part of the decision. Where it is intended to be part of the decision it should specify the part complained of. The notice shall specify the part complained of, the address for service for the appellant and the names of addresses as required by all the persons intended to be served with copies of the notice.



In terms of Rule 89 (1) after lodging the notice of appeal, the party intending to appeal shall within 14 days serve copies of it to all persons who seem to be directly affected by the appeal. This requirement of service of notice of appeal may be exempted upon application ex-parte to the court. After service the intending appellant shall be required to file an affidavit of service.

Every person on whom a Notice of Appeal is served shall within 14 days after service serve on the intended appellant notice of sufficient address for service and serve a copy to other persons named in the notice, after which this should be filed in court as per rule 90 (1)

Failure of the intended appellant to follow the steps mentioned in Rule 88/90 of the rules shall be enough to have the Court strike out the Notice of Appeal or the appeal itself as provided for by Rule 91 of the rules.



Applications in the Appellate Division are governed by Rule 94 (1) which provides that all applications to the court shall be by notice of motion which shall state the ground of the application. The Court rules vide Rule 94 (2) excludes the following;

a. Applications made in the course of hearing which may be made informally or application made by consent of the parties which may be made informally

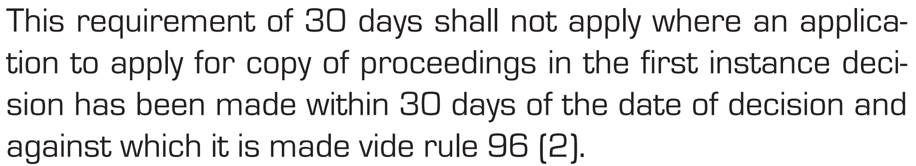
Apart from the Right to appeal a party of the proceedings may apply for review of judgment of the court after discovery of new important matter of evidence which after the exercise of due diligence was not within its knowledge or could not be produced by it at the time which the judgment was passed on or order made.

Other reasons for review are on account of some mistakes, fraud, errors apparent on the face of record or because injustice has been done. However, an application for review of the judgment has to be made without unreasonable delay.

INSTITUTION OF APPEAL AND CONTENTS OF APPEAL

An appeal shall be instituted by lodging in the appropriate registry within 30 days of the date when the notice of appeal is lodged the following;

a. A memorandum of appeal 8 copies
b. The record of appeal 8 copies
c. Payment of 300 US Dollar as security to costs of the appeal as provided for by rule 96 (1)



This requirement of 30 days shall not apply where an application to apply for copy of proceedings in the first instance decision has been made within 30 days of the date of decision and against which it is made vide rule 96 (2).

The completion of the 30 days shall start at a time to be certified by the registrar as having been required for preparation by the registrar and collection of that copy by the appellant. An appellant is obliged to collect the proceedings applied for within 7 days after being notified by the court that they are ready for collection.

Rule 98 (1) provides that the record of appeal shall comprise documents mentioned in the rule and the same shall be bound in the order in which they are specified in rule 98 (1). Each copy of the record of appeal shall be certified to be correct by the appellant or by a person entitled under rule 19 to appear on his behalf.

Under Rule 98 (3) the appellant (memorandum of record) after lodging the appeal in the appropriate registry, serves copies of the same on each respondent who has complied with the requirements of providing notice of address as required by rule 90 within 7 days

A respondent under rule 102 (1) may, if S/he desires that any part of that decision of the first instance division be varied or reversed, is at liberty to give a notice of cross appeal to that effect. The notice under rule 2 has to state the names and addresses of all the persons intended to be served with copies of the notice and shall be lodged with copies not more than 30 days after service on the respondent of the memorandum of appeal and the record of appeal.

In the event parties do not agree on matters referred above then each party may file its own memorandum of issues under Rule 110 (4) and a date of hearing of the appeal may be filed thereto.

Hearing of the appeal may either be in writing under Rule 111 (1) by lodging in the appropriate registry a written statement of his/her arguments or orally in open court under rule 115 (1) of the rules of the Court.

PART TWO: THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

The African Charter on Human and Peoples' Rights (also known as the Banjul Charter) is an international human rights instrument that is intended to promote and protect human rights and basic freedoms in the African continent. Oversight and interpretation of the Charter is the task of the African Commission on Human and Peoples' Rights, which was set up on November 2, 1987 in Addis Ababa, Ethiopia and is now headquartered in Banjul, Gambia. A protocol to the Charter was subsequently adopted in 1998 whereby an African Court on Human and Peoples' Rights was to be created. The protocol came into effect on 25 January 2004.[8]

Articles 9 (1) and (2) of the African Charter on Human and Peoples' Rights, to which Tanzania is a signatory are relevant in the issue of freedom of expression. The Article states

1. Every individual shall have the right to receive information.

[8]Wikipedia. African Charter on Human and Peoples' Rights. 01 April 2021.https://en.wikipedia.org/wiki/African_Charter_on_Human_and_Peoples%27_Rights

2. Every individual shall have the right to express and disseminate his opinions within the law.

NB: Vide notice of withdrawal dated 14th November 2019, the Government of the United Republic of Tanzania decided to withdraw the declaration it made on the 9th March 2010, under Article 34(6) of the Protocol of the African Charter on the Establishment of An African Court on Human And Peoples Right.

Prior to that Tanzania had signed a declaration which allowed individuals and NGO to institute cases in the African Court. The effect of the notice is that one year from the date of the Notice individuals have no locus to institute cases in the African Court unless they go through the Commission.

That notwithstanding, remedies may still be available vide the African Commission for Human and People's Rights guided by the rules Adopted by the Commission on during its 27th Extra-Ordinary Session held in Banjul (The Gambia) from 19 February to 04 March, 2020. As per Articles 30 and 45 of the African Charter, the African Commission is an autonomous treaty organ with the mandate of promoting human and peoples' rights and ensuring the protection of human and peoples' rights in Africa. In this regard, the commission is tasked with the mandate to interpret the African Charter, including in response to a request for an advisory opinion pursuant to Article 45(3) of the Charter.

PART THREE: THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

The Universal Declaration of Human Rights (UDHR) is an international document adopted by the United Nations General Assembly that enshrines the rights and freedoms of all human beings. It was accepted by the General Assembly as Resolution 217 during its third session on 10 December 1948 at the Palais de Chaillot in Paris, France.[9]

Article 19 of the Universal Declaration of Human Rights States:

"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

Subsequent to the declaration, the United Nations have adopted subsequent legislation to allow for the enforcement of the rights therein prescribed. Critical to this guide is the International Covenant on Civil and Political rights (ICCPR).

PART FOUR: THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

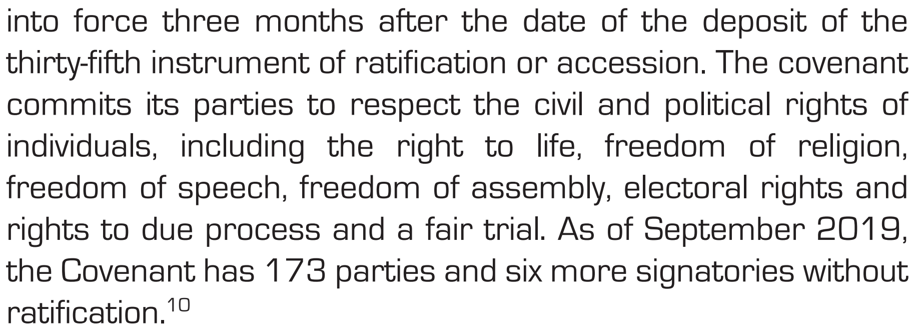
The International Covenant on Civil and Political Rights (ICCPR) is a multilateral treaty adopted by United Nations General Assembly Resolution 2200A (XXI) on 16 December 1966, and in force from 23 March 1976 in accordance with Article 49 of the covenant. Article 49 allowed that the covenant would enter

[9]Wikipedia. universal Declaration of Human Rights. 20 September 2021. https://en.wikipedia.org/wiki/Universal_Declaration_of_
Human_Rights

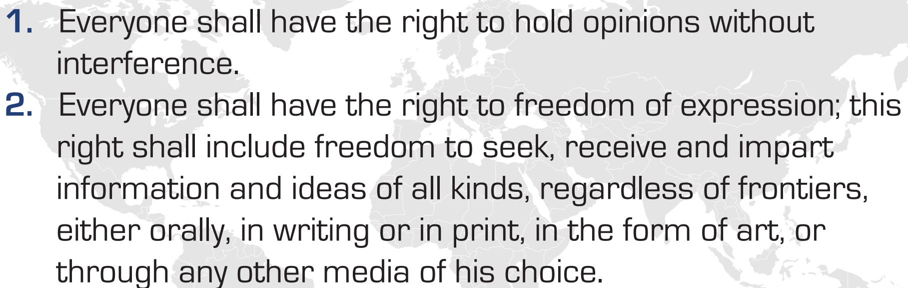
[10]Wikipedia. International Covenant on Civil and Political Rights. 02 September 2021.

into force three months after the date of the deposit of the thirty-fifth instrument of ratification or accession. The covenant commits its parties to respect the civil and political rights of individuals, including the right to life, freedom of religion, freedom of speech, freedom of assembly, electoral rights and rights to due process and a fair trial. As of September 2019, the Covenant has 173 parties and six more signatories without ratification.[10]

The International Covenant on Civil and Political Rights vide Article 19 states:

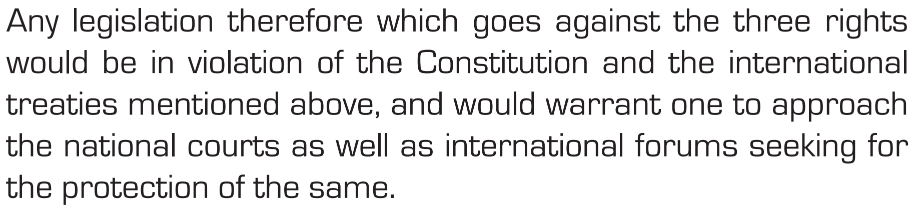


1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.



It can be said without fear of contradiction that freedom of expression is a right contained in the constitutions of Zanzibar and the United Republic of Tanzania, the African Charter, the Universal Declaration as well as the International Covenant of Civil and Political Rights. Freedom of expression found under Articles 18 of both countries can be summed up to include

i. Right to hold opinion
ii. Right to seek receive and disseminate or impart information
iii. Right to be informed at all times of various important events



Any legislation therefore which goes against the three rights would be in violation of the Constitution and the international treaties mentioned above, and would warrant one to approach the national courts as well as international forums seeking for the protection of the same.

In order to access the international human rights mechanism, aggrieved parties may channel their complaints through the Human Rights Council, the Universal Periodic Review, the Special Procedures and the Treaty Monitoring Bodies. The rules governing the mechanisms vary and one would have to acquaint themselves with them before reaching out. Special Procedures, the largest body of independent experts in the UN Human Rights system, is the general name of the Council's independent fact-finding and monitoring mechanisms that address either specific country situations or thematic issues in all parts of the world. Special Procedures' experts work on a voluntary basis; they are not UN staff and do not receive a salary for their work. They are independent from any government or organization and serve in their individual capacity. Of relevance to media freedom in Zanzibar is the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. Such special procedures may be instrumental in accessing the UN human rights mechanisms. They may also participate in domestic and regional litigation as Amici Curiae.

https://en.wikipedia.org/wiki/International_Covenant_on_-Civil_and_Political_Rights

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2. International Covenant on Civil and Political Rights

Regional Legal Instruments:

1. African Charter on Human and People's Rights. African Union, 1981.
2. Treaty for the Establishment of the East African Community. East African Community, 1999
3. Rules of Procedure. East African Court of Justice, 2019

Domestic Laws:

Tanzania Mainland (Principal Legislations)

1. Basic Rights and Duties Enforcement Act Cap 3 RE: 2019
2. Constitution of the United Republic of Tanzania, 1977
3. Civil Procedure Code Cap 33 RE: 2019
4. The Government Proceedings Act No. 3 of 2010

Subsidiary Legislation

1. Basic Rights and Duties Enforcement (Practice and Procedure) Rules 2014

Zanzibar (Principal Legislations)

1. Constitution of Zanzibar, 1984
2. The Censorship and Cinematographic Exhibition Act No. 1 of 2009
3. The House of Representatives (Immunities Powers And Privileges) Act No. 4 of 2007

4. The Registration of News Agents, Newspapers and Books Act No. 5 of 1988

5. Penal Decree No. 6 of 2004

Case Law:

1. AG vs Dominic Mnyaroje (1995) TLR 97

2. AG vs Lohay Akonay & Another (1995) TLR 80

3. Attorney General vs Marwa Mgosi Civil Appeal No. 95 of 1988 Mwanza Registry (unreported)

4. Chumchua Marwa vs Officer in Charge Musoma Prison and Another Misc. Criminal Case No. 2 OF 1998

5. DPP v. Daudi Pete (1993) TLR 22

6. Ephrahim vs Pastory and Another PC Civil Appeal No 70 of 1989, 1990 LRC (Const) 757.

7. Khasim Hamis Manywele vs DPP Criminal Appeal No 39 of 1990 Dodoma registry (unreported)

8. Kukutia Ole Pumbun vs AG (1993) TLR 159 Misc. Criminal Case No. 2 of 1998

9. Rev Mtikila vs DPP Criminal Appeal No 90 of 1992 Dodoma Registry Unreported

Annex 1: AN INDEX OF THE LAWS OF ZANZIBAR LIMITING FREEDOM OF PRESS[11]

Laws in Zanzibar which limit the exercise and full enjoyment of freedom of expression enshrined under the constitution, these laws are:

1. THE REGISTRATION OF NEWS AGENTS, NEWSPAPERS AND BOOKS ACT NO 5 OF 1988
    a. Section 17(1) requirement of Bond
    b. Section 30 Suspension of a newspaper if in the opinion it is in Public interest and good order
    c. Section 31 Prohibition of publication
    d. Section 33 creates a penal offence for printing or publishing, criminalize selling offering for sale or expose for sale distribute or exhibit prohibited newspaper
    e. Section 34 Prohibition the importation of publication or importation
    f. Section 39 Prohibits collection and distribution of news and news material subject to written authorization issued by the director
    g. Section 39(2) director to issue upon application Authorization
    h. Section 48 seditious offences
    i. Section 48(2) being found in Possession of any seditious publication
    j. Section 53 defamation defined

2. THE HOUSE OF REPRESENTATIVES (IMMUNITIES POWERS AND PRIVILEGES) ACT NO 4 OF 2007
    a. Section 32 criminalizes publication of false or scandalous libel on House or committee

3. PENAL DECREE NO 6 OF 2004
    a. Section 44(1)
    b. Section 45(1)
    c. Section 72(1)
    d. Section 79(1)
    e. Section 123
4. THE CENSORSHIP AND CINEMATOGRAPHIC EXHIBITION ACT NO 1 OF 2009

Annex 2: CASES ON FREEDOM OF SPEECH

1. Lohe Issa Konate vs Burkina Faso Application No. 004/2013
2. Scanlen and Holderness Vs. Zimbabwe.
3. East African Court of Justice Burundi Journalist Association Vs. AG of Burundi Reference No 7 of 2013
4. ECOWAS Court Federation of African Journalists Vs. The Republic of Gambia ECW/CCJ/JUD/04/18
5. Supreme Court of Zimbabwe Chavunduka and Choto Vs. Minister of Home Affairs and The Attorney General Civil Application No. 156 of 1999.
6. Constitutional Court of Uganda UGCC 5/2010 Andrew Mujuni Mwenda & Others Vs. The Attorney General.
7. Inter American Court of Human Rights Kimel Vs Argentina IACHR series C No 177
8. EACJ Reference No 2 of 2017 MCT & 2 others vs Attorney General of Tanzania
9. Constitutional Appeal no 2002/2 of 2004 UGSC 81 Charles Onyago Obbo & Another vs AG
10. Siracusa Principles on the Limitation and Derogation.

[11]These provisions of law can be challenged in the National Court as well as the Regional Court. This can effectively be done by way of strategic litigation and the institution as to which is the appropriate forum will very much depend on several considerations as shown below.

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With the support of the
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A PRACTICE GUIDE FOR USING STRATEGIC LITIGATION TO ENFORCE THE RIGHT TO INFORMATION AND MEDIA FREEDOM IN **ZANZIBAR**

ZANZIBAR
September, 2021