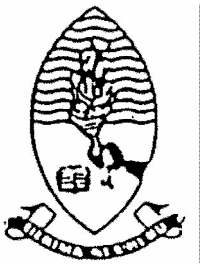
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POSSIBILITY AND RATIONALE OF ESTABLISHING KADHI COURTS IN TANZANIA MAINLAND

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1.0 Introduction

Several countries in Africa and the Commonwealth that have a significant population of Muslims have accommodated the Kadhi court system in their Constitutions and laws to cater for the regulation of the personal status of their Muslim citizens. The phrase Kadhi traces its origin from the Arabic word *Qadi* which literally translates to a person who traditionally has jurisdiction over all legal maters involving Muslims. Accordingly the Kadhi's judgment must be based on *ijumaa* (the prevailing consensus) of the *ulema* (traditional Islamic scholars).

Save for those countries that have established Islamic States which apply Islamic Law throughout the country, other States tend to limit the jurisdiction of the Kadhi's Courts to matters affecting the personal status of Muslims. In some cases, the jurisdiction is exclusive to the Kadhis Courts wile in others the Courts are established as subordinate Courts to the Secular High Courts. The Kadhis Courts are known by different names in different jurisdictions. They are called Qadhis Courts in Uganda, Cadi Courts in Gambia and Sharia Courts in Nigeria. In Ethiopia, they are referred to as shariat courts.

This paper explores the genesis and emerging trends in the operation of the Kadhi Court system in selected jurisdictions on the African continent. The exploration reflects upon the experiences of Kadhi Court system in these jurisdictions and identifies lessons that could be drawn from them and their implications for establishing Kadhi courts on mainland Tanzania. There has been an on-going debate on the establishment of the Kadhi court on Mainland Tanzania.[1] Setting such a foundation is crucial to any meaningful understanding of the salient features in the operation of the Kadhi Courts in a democratic secular State such as Tanzania.[2]

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[1] Kadhi courts are in existence in Zanzibar by virtue of the Constitution and a legislative enactment. This is because, the judiciary, save for the Court of Appeal of Tanzania, is not a Union matter. See Article 4 (3) and the 1st Schedule (item 21) of the Constitution of the United Republic of Tanzania, 1977 (as amended)

[2] See Article 19 (2) of the Constitution of the United Republic of Tanzania

The exploration covers the emergence and demise of the Kadhi Courts in the country. An analysis of the main legislation, case law and practices governing the settlement of disputes under Islamic law is made. The implications of establishing the Kadhi Courts under the present legal framework in Mainland Tanzania is also discussed. The paper makes an attempt to contribute and hopefully provide guidance on the on-going debate by generating empirical and objective information and data.

2.0 Evolution of the Kadhi Court in Tanzania

2.1 Pre-Colonial Era

The influence of Islam, as a result of interactions between local communities and early Arab and Persian traders led to the rise of formal institutions of Islamic law, including the court systems. This was before the arrival of the colonial administrators. The penetration of Islam and institutions of dispute settlement based on Islamic law from the Coast to the interior of Tanganyika, (now Tanzania) was also a result of this influence. This influence came along with the evolution of the Kadhi courts in the hinterland where liwalis' courts administered Islamic law together with customary law.

In areas where Islam was strictly applied, the customary law that was applied was interpreted as being Islamic law when adjudicating on issues relating to personal status and family law of Moslems. Islamic law was, however, not applied in the adjudication of disputes relating to other branches of law, such as contract and criminal law. In areas where the influence of Islam was found only in isolated pockets, local tribal law was applied in dispute resolution processes and occasionally a Muslim member would be invited as *amicus curiae.* Otherwise, in general, local courts applied customary law without taking into account whether the parties were Muslim or not. However, in areas where the chiefs were staunch Moslems, some attention was paid to Islamic law, but it was clear that customary law in general prevailed in Inland tribes which professed Islam.[3]

2.2 Colonial Era

[3] See Anderson, J.N.D. Islamic Law in Africa, (1970) p. 135 and 142. Anderson made general remarks on Africa, but his findings are relevant in tracing the application of Islamic law by local inhabitants in the historical context of Tanzanian.

During the era of German colonial rule in Tanganyika, two branches of judicial administration were put in place. One of the branches catered for foreigners, the other for natives. The liwalis, kadhis and akidas continued to adjudicate cases but were not formally established by legislation.[4] The local institutions of dispute settlement that existed in the pre-colonial era, including those that applied Islamic law were therefore left intact by the German colonial administration.[5]

The British colonial regime enacted the Native Court's Ordinance to regulate the administration of justice in the territory.[6] The Ordinance formally established courts of the liwali, cadi (kadhi), akida, chief, headman as native courts subordinate to the High Court.[7] The Native Courts Ordinance initially did not cover the liwalis' courts. The liwalis' featured prominently along the coast where most of the local communities profess Islam. One plausible explanation for omitting these courts was the existence of the1895 Agreement entered into between the Sultan of Zanzibar and the British government. In this Agreement, the British agreed not to interfere with the Islamic system of dispute settlement in the administration of the coastal strip along Kenya and Zanzibar. The liwalis' courts were covered by the Ordinance after over a decade, in 1941.[8]

Another possible explanation for having left out the liwalis' courts from the scope of the Native Court Ordinance is that native courts in many areas in the territory were under the leadership of traditional rulers (chiefs) who came onto the throne mainly through a hereditary or partly hereditary process. This was not the case with most of the coastal communities where liwalis, kadhis and akidas were chosen along religious (Islamic) lines.[9] In fact, the non-existence of native courts in Zanzibar supports this contention.

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[4] A liwali, who used to be the representative of the Sultan with executive and judicial powers; an akida, an executive in the periphery areas and the kadhi, was resorted to where the liwali lacked jurisdiction.
[5] For more details on the court system during the German period, see; J.P. Mefett, *"Native Courts in Tanganyika: A History of the Development of Native Courts from German Times,"* (1952) 4 Jo. African Administration, 17-21
[6] No. 6 of 1920
[7] Section 3
[8] See Ordinance No. 15 of 1941
[9] Cole, J.S.R. The Development of Its Laws and Constitutions, Steven & Sons London, 1964 p. 82

Traditional local coastal communities were (and have since been) governed by Islamic law administered by Kadhis.[10]

The British colonial regime used the chiefs, as a conduit in maintaining peace and in the general administration of local communities. This system of indirect rule worked well in centralized, chiefly, societies because, *"to the African living in a rural area, "the Government" meant first and foremost his native authority."*[11] The focus of the British was to utilize resources on the mainland of Tanganyika, initially. There was therefore no immediate need to apply the indirect rule approach to communities along the coast. As noted, the native authorities along the coast were not based on inheritance through chiefs. In this respect there was therefore no guarantee of sustainability and continuity if an alliance between the colonial administrator and the community leadership was to be formed. As Sir F.D. Lugard stated:

"The first step is to endeavour to find a man of influence as chief, to group under him as many villages as possible, to teach him to support his authority, and to inculcate a sense of responsibility."[12]

The courts established in 1929, including the liwalis' courts were all reclassified as "local courts" in 1951.[13] The colonial administration put the local courts under very close supervision. It published a Manual in both Kiswahili and English to be applicable by local courts to ensure administrative guidance, instructing that cases should be conducted as far as possible in a traditional manner.[14] The application of Islamic law during this era was in a piece meal fashion. Islamic law did not apply throughout the territory as an integral part of municipal law. The Judicature of Application of Laws Ordinance did not make specific reference to Islamic law. However, some laws recognized it as part of the law of the land. On the whole, Islamic law was adopted and merged into native

[10] See Morris, *op.cit.* footnote 12 (p. 136)
[11] Ibid.
[12] Quoted in Mamdani, M (1996) Citizen and Subject: Contemporary Africa and the Legacy of Colonialism, p. 53
[13] See Tanganyika Local Courts Ordinance, 1951
[14] Local Courts Manual, Local Government Memorandum No. 2 of 1957

customary law and was administered by local courts. In the course of administering Islamic law, the courts were required to confine it to matrimonial, inheritance, bequests and *wakf*.[15]

The native courts that were established during the colonial era in Tanganyika, as was the case elsewhere in the region, were aimed at providing services to different ethic groups. This approach divided the natives further along racial, ethic and religious lines. The court set up seemed to have worked perfectly well for the colonial administrators whose main administrative policy in the territory, among others, was to divide indigenous communities with a view to facilitating easier control over them – a perfect reflection of the divide and rule strategy. Morris agrees with this contention when he notes that: *"Native courts were not merely an integral part of the native-authority structure, but were essential for the effective working of the (colonial administrative) system."*[16] The application of the law in these courts was controlled by the colonial administration since they were intended to form an arm of the executive, rather than that of the judicial branch of the colonial government. The establishment of the liwalis' and Kadhi courts and application of Islamic law by local community members who professed the Moslem faith was certainly not an exception to general rule.

In 1953, the colonial administrators commenced a radical reform process of the native courts system. At the Judicial Advisers' Conference held at Kampala in 1953, an agreement was reached by the three East African colonial governments to integrate the court systems and retain only one body of law to be applied equally to all persons. This was a time when the prospect of independence in the three East African countries started to materialize.

The colonial government realized that the doctrines of indirect and divide and rule had outlived their usefulness and commenced a process of abolishing the courts and creating a court system where the judiciary and the administration were separated. The merger

[15] See sections 5 and 15, respectively of the Local Courts Ordinance, Cap. 299
[16] Morris, H.F., *"Native Courts: A Corner-Stone of Indirect Rule,"* in Morris H.F. and Read, J.S. Indirect Rule and the Search for Justice: Essays in East Africa Legal History, (1972) Oxford Claredon Press p. 143

would no longer have served the interest of the colonial masters as the wave of independence ushered and the colonialist felt that they would not want the existing system to apply to its subject. A system where the subjects would ultimately be subjected to the jurisdiction of courts composed of persons without legal training, where there was no guarantee of appeal or an advocate to protect their interests in certain cases was what the colonial administrators abhorred.

2.3 Independence Period

The independence government inherited the whole corpus of colonial legislation and institutions of adjudication, including those that applied Islamic law. This was effected through the Judicature and Application of Laws Ordinance of 1961 (now the Judicature and Application of Laws Act (Cap. 385 R.E. 2002). The Ordinance identified three source of law for Tanzania Mainland, namely, received law, local law and customary law. Islamic law was considered an off-shoot of customary law.

In 1962, reforms aimed at unifying the systems of courts along a single tier commenced. From the point of view of the emerging independence governments, the local courts were based along racial and tribal lines and had to be discarded. A more effective and acceptable system had to replace the territorial courts with jurisdiction over all races. Aside from the colonial government's efforts, the independence government also wanted the local courts abolished. This was in line with the independent government's policy of stamping out discrimination which had entrenched itself in a number of areas, including the local courts structures. In his inaugural address to Parliament, in 1962, Mwalimu Nyerere made a number of inferences to the dangers of not addressing the injustices of colonial days. He pointed out that the injustices were grounded in tribalism, racial discrimination and discrimination on the basis of religion and education.[17]

The reform process culminated with the passing of the Magistrate Court Act of 1941[18] (MCA) which among other colonial statutes repealed the Subordinate Courts Ordinance

[17] Julius K. Nyerere, Freedom and Unity/Uhuru na Umoja: A Selection from Writings and Speeches, 1952-65, Oxford University Press, Dar-es-Salaam,1966 pp. 178 -182

[18] 1963, Act No. 55 of 1963.

of 1941 and the Local Courts Ordinance of 1951. The MCA set up an integrated judicial system of the High Court and Magistrates' Courts. This led to the demise of the Kadhi Courts. There was an attempt to codify Islamic law in 1964 as is evidenced by the provisions of the Islamic Law (Restatement) Act.[19] This Act requires the Minister responsible for legal affairs to codify and regularly publish statements of Islamic law in the Government Gazette. This, however, did not materialize then and nothing has been done to date.

The MCA establishes Primary Courts in every district as the lowest court in the judicial ladder and gives it power to determine cases on inheritance and civil matters arising out of customary and Islamic law. It is important to point out here that the demise of the Kadhi court did not do away with the Kadhi. The Law of Marriage Act recognizes the role of the Kadhi in the application of Islamic rites in marriages issues. It defines a Kadhi as a Muslim priest or preacher, or a leader of the Muslim community who has been licensed to perform marriages in Islamic forms. It also recognizes a Kadhi as a minister for religion.[20] The MCA restricts the application of Islamic law to matters of personal status, marriages, divorce, guardianship, inheritance and *wakf* to communities following such law.

Another important piece of legislation that was retained from the colonial legacy, and has a significant bearing on the application of Islamic law, is the Probate and Administration of Estates Act. The provisions of this law provide that the estate of a deceased Muslim shall be governed in accordance with Islamic law where the deceased intended his estate to be determined according to such law.[21]

The above review reveals that the law regulating subjects on the Mainland has evolved through a historical process and is a product of specific society and systems. The influence of the colonial administration in shaping the application of Islamic law along the coast of East Africa played a significant role in directing the system that was inherited

[19] Cap 375 [RE 2002]
[20] Cap. 29 [R.E. 2002] Section 2
[21] Cap. 352 [R.E. 2002] section 88

by the independence government. To a great extent, the colonialist also strongly influenced Islamic judicial systems and institutions in other jurisdictions. A review of experiences in the application of Islamic law and the place of Kadhi courts in selected jurisdictions would assist in illustrating the extent to which historical processes and society specific needs shaped the evolution, development and subsequent adoption of Kadhi courts in judicial systems. The analysis provides indicators for the course that Tanzania should adopt in deliberations on the establishment of the Kadhi court.

3.0 Experiences from Selected Jurisdictions

3.1. Kenya

Before the advent of British colonial rule in the 19th century the Kenyan coastal strip was under the control of the Sultan of Zanzibar. In 1895, the Sultan permitted the British to administer the coastal strip as a protectorate rather than a colony as was the case for mainland Kenya. The Agreement entered into between the Sultan and the colonial power was subject to certain conditions. This included the British agreeing to respect the Islamic law judicial system practiced by the local community members along the strip. The British agreed to this condition. Throughout their administration of the coastal strip the British therefore did not temper with this judicial system, which included the institution of the Kadhi court.

Just before Kenya's independence, while negotiating the format the independence constitution should take, the British Government and the Sultan of Zanzibar appointed a commissioner, one James Robertson, to report on the viability of the 1895 Agreement relating to the coastal strip of Kenya. The Commissioner recommended that the coastal strip be merged with the mainland before independence on certain conditions. One condition was that the institution of the Kadhi courts should be reflected in the Constitution. The other was that the Kadhi courts should be integrated within the judiciary under the control of Chief Justice. The 1895 Agreement was annulled two months before independence. The Governments of Kenya and Zanzibar entered into a new agreement where Zanzibar relinquished its sovereignty over the coastal strip. In

reciprocity, Kenya guaranteed the existence of the Kadhis courts at all times. The government of Kenya also committed itself at the United Nations to honour the agreement protecting the existence of Kadhi courts.[22] Chapter 5 of the Independence Constitution of 1963 recognized the courts and in 1967, the Kadhis Courts Act was passed. At independence, there were only 3 Kadhis courts. In 1967 the number increased to 6. Today there a number of them spread throughout the country. This historical process is important in explaining the retention and continued existence of the courts to date.[23]

The Kenyan Constitution provides for the establishment of Kadhis courts and appointments of Kadhis under section 66. The other details are to be found in the Kadhis Courts Act (Cap 11). The jurisdiction of the Kadhi court includes the determination of questions of Muslim law relating to personal status, marriage, divorce, succession or inheritance in proceedings in which the parties are Muslims.[24] During the Constitutional review process, some stakeholders had suggested that the jurisdiction of the Kadhi court be extended to cover commercial and criminal transactions.[25]

To be appointed as Kadhi, one must profess the Muslim religion and possess sufficient knowledge of Muslim law. Kadhis are appointed by the Judicial Service Commission. The Kadhis Courts Act provides for the establishment of 12 Kadhis courts in addition to the Chief Kadhi and provides for their jurisdiction.

The Constitution empowers the Chief Justice to make rules to regulate the practice and procedure for the court. The rules have not been made. In their absence Kadhi courts are required to apply the Civil Procedure rules as applied by other courts. Appeals from Kadhi Courts are determined by the Chief Kadhi's Court or the High Court. The High Court sits in appeal with the Chief Kadhi or other Kadhis as assessors whose opinions do not bind the Judge. Appeals may also reach the Court of Appeal where Kadhis do not sit

[22] http://africa.peacelink.org.wajibu/articles/art_2120.html (June 2007)
[23] In the Constitutional review process in Kenya, which has since been postponed, there were debates on whether the Kadhi courts should be retained in the Constitution.
[24] Cap. 11 Laws of Kenya, section 5
[25] See the East African Standard, 30th April 2003

as assessors. It should be emphasized here that that the law does not vest Kadhis Courts with exclusive jurisdiction over matters concerned with Muslim personal law. Other courts have concurrent jurisdiction to determine cases relating to the application of Muslim personal law. These courts are not bound to apply Muslim law in the course of determining cases brought before them.[26]

3.2 Zanzibar[27]

Muslims in Zanzibar form 97% of the total population of a little over one million.[28] As stated earlier, each part of the United Republic has its own judicial system and the Court of Appeal of Tanzania generally has jurisdiction, except where otherwise expressly stated, to hear and determine appeals from the High Court of both parts of the Union. The establishment of Kadhi courts in Zanzibar is therefore proper, in terms of the Constitution of the United Republic of Tanzania.

As was the case with Kenya, Islamic foreign influence along the coast of East Africa also had a significant effect on the rise of Islam on Zanzibar. *Wakilis,* (persons well versed in Islamic law) were, however, already solving disputes before foreign influence on the Island.[29] However, there were no formal institutions such as religious courts. The introduction of Islam to the early inhabitants of Zanzibar provided the framework for formal institutionalization of the earliest forms of dispute settlement of the *Wakilis* and set the main foundation upon which the application of Islamic law in the legal system in Zanzibar is founded.[30]

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[26] Harvey, W.B. Introduction to the Legal System of East Africa, East Africa Literature Bureau, Nairobi 1975 p. 43

[27] Some information in this part has been condensed from the author's publication, *"Perspectives on the Kadhis Court in Zanzibar,"* Orient Journal of Law and Social Sciences, Vol. 1 issue No. 2, January 2007

[28] Data obtained from the Tanzania National Bureau of Statistics web-page: http://www.nbs.go.tz/TZ.FIGURES/TZ/FIG.2005.pdf (June 2007)

[29] See Ahmed Binusumeit.A. Badawy Jamalilyl, "Penetration of Islam in Eastern Africa," http://www.swahilionline.com/features/articles/Islam/binusumet1/htm (June 2007)

[30] Othman H. and Shaidi, L.P. *"Zanzibar Constitutional Development,"* East African Law Review, Vol. 11-14, (1978-1981) p. 186; See also Makaramba, V. *"A Report on Research on Judicial Application of Islamic Law in Zanzibar,"* (1990) who notes that Islamic Law was applied in Zanzibar before the enactment of the Order-in Council of 1884; and Peter, C.M. *et al, op.cit* p. 34

Prior to the emergence of the Sultan Empire in the early 1830's, Islamic law was the fundamental law administered by the Kadhi.[31] Kadhis who were officially recognized by the then Sultan did not have formal court premises. They resolved disputes in private homes and sometimes on public streets.[32]

The British did not overhaul the Islamic court system they found in Zanzibar. They introduced their common law system which ran parallel with the system they found. The King made laws for his subjects while the Sultan enacted his for local community members, who were governed by customary and Islamic law.[33] The 1895 Agreement between the Sultan and the British with respect to the coastal strip along the east coast of East Africa played a vital role in ensuring the Kadhi courts continuity in Zanzibar.

In the same year (1963) when Kenya entrenched Constitutional provisions recognizing Kadhis courts, Zanzibar enacted the Constitution and Courts Decree, which saw the demise of the dual legal system on the Island but the Kadhi Court system was retained.[34] The courts were established by Article 100 of the Zanzibar Constitution and the Kadhi's Act.[35] The hierarchy of the Kadhi courts system comprises of the Chief Kadhi's Court for Zanzibar and the Kadhi's courts. The former determines appeals arising from decisions of the latter courts found in each district.

To be appointed a Kadhi or Chief Kadhi, as is the case in Kenya, one has to be a Muslim and have sufficient knowledge of Muslim law applicable to any sect or sects of Muslims. The President appoints the Chief Kadhi. Other Kadhi's are appointed by the Judicial Service Commission in consultation with the President and the Chief Kadhi. [36]

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[31] Gray, J *op.cit* p. 144
[32] Gray, J. *Ibid*, pp. 146 -147
[33] Sidney Abrahams, *"Conflict of Laws in Zanzibar,"* Journal of Comparative Legislation and International Law, 3rd Ser. Vol. 23 No. 4 (1941) pp. 169-171 (http://links.jstor.org/sici?sici) (June 2007)
[34] The Kadhis' Court system was not mentioned in the 1969 Peoples Courts Decree No. 11 of 1969, but the courts nevertheless proceeded to be in place. The "oversight" was rectified by the 1975 Decree, No. 6 of 1975.
[35] 1985; Act No.3 of 1985
[36] Sections 5 (3) and 6

Like other jurisdictions, save for some States in Nigeria, the jurisdiction of Kadhi's courts in Zanzibar is restricted to matters of Muslim law relating to personal status, marriage, divorce and inheritance. The rules of evidence applicable deviate from traditional Islamic law. The rules of evidence relating to witnesses illustrate one example. Witnesses are to be accorded the same status regardless of their religion or sex and assessment of credibility of all evidence adduced is to guide the court, as opposed to the number of witnesses. In traditional Islamic law, the evidence of two women is considered equivalent to that of one man in certain cases where it is impossible to obtain one male witness to testify. Appeals from the Kadhi's courts go to the Chief Kadhi's court and appeals from the latter are determined by the High Court. Unlike in Kenya, the Court of Appeal of Tanzania has no jurisdiction in matters of Islamic law.[37]

Unless the law expressly provides otherwise, the law applicable in the Kadhis' Courts is not codified. Where there is an inconsistency between Islamic law and general law, an express provision in the general law would displace Islamic law to the extent of such inconsistency.[38] The Kadhis are generally free to interpret Islamic law and pronounce judgments in the manner they consider appropriate with regard to the circumstances of the cases that come before them.

People have the right to refuse to be subjected to the jurisdiction of the Kadhi courts. This is because there are constitutional provisions which guarantee the citizens of Zanzibar the right to freedom of religion, the right not to be discriminated against in whatever form and the right to access the courts.[39]

The state of affairs with respect to the operation of Kadhi courts in Zanzibar is to a great extent deplorable. The chambers are poorly equipped and the court structures are in a pathetic state. There is a general lack of security for court personnel and documents. The

[37] Article 99 (2) (c) of the Constitution of Zanzibar, 1984
[38] This position was re-echoed in the case of Masoud Ali Kombo *et al* vs. Khalid Ali Kombo, High Court of Zanzibar Civil Appeal No. 16 of 1987 (Unreported)
[39] See Articles 12 and 19 of the 1984 Constitution of Zanzibar (2002 edition) which provide for the right to access to and protection by the courts and freedom of religion, respectively.

capacity of the courts to handle cases, which are predominantly divorce petitions, is also low.[40]

3.3 Ethiopia

Ethiopia is ranked as the third largest Muslim populated country after Nigeria and Egypt. In 1991 the number of Muslims in the country ranged between forty eight and fifty two percent of the total population.[41] Islam arrived in Ethiopia sometime in 615 from Muslim refugees from Mecca. Today a significant percentage of the Ethiopians practice Islam. Kadhi's courts had existed on de facto basis before the 1930's in Ethiopia. After the 1935 – 40 Ethio- Italian war, shariat courts were established for a short time and kadhi's who served the courts were appointed by the Italian colonial administration.

After the war, Muslims persuaded the Emperor to legally establish shariat courts to administer Muslim personal law. The Kadi's Court Proclamation of 1944 formally established the shariat courts under the supervision of Kadhis (Kadi) with a two tier system. One comprised of the shariat court and the other the shariat court, which had appellate jurisdiction. These courts had jurisdiction to deal with matters of marriage, divorce, maintenance, guardianship of minors and family relations concluded in accordance with Islamic law. The Kadhi was appointed by the Emperor after recommendation by the Minister.

In 1955 the Constitution established the Ethiopian Orthodox Church, and activities of the State were conducted along the church's policy. The Church was a substantial holder of land during the imperial era. Officially, the Muslim population interacted in government organs. Muslim courts were retained to deal with family and personal law matters in accordance with Islamic law.

Following the revolution in 1975, the general policy of the Mengistu regime was to detach itself from the influence of the Ethiopian Orthodox Church and other religions in

[40] See generally Majamba, H.I. op. cit.
[41] Europe World Year Book, 1991, UNICEF/ETHIOPIA

State matters. The regime declared all religions equal, including declaring a number of official Muslim holidays as public holidays together with the Christian holidays which had already been honoured. Shariat courts continued to exist.

The relevance of the institutions of Islamic legal system (shariat and kadi courts) in Ethiopia was subjected to a serious test sometime in 1994 in a constitutional amendment declaring Ethiopia a secular state, and henceforth detaching the State from religion. One of the main reasons for the amendment was the need to protect minority religions in the wake of religious pluralism declared officially by State policy.

Arguments similar to those advanced by a cross-section of stakeholders in the case of Tanzania were put forward relating to the need for Kadhi courts. Notable among these was the argument that the rights of minority religions would be undermined. A compromise was nevertheless arrived at in deliberations at the constituent assembly and shariat courts were subsequently incorporated in the 1994 Constitution. To ensure and guarantee the respect of secularism, the constituent assembly made sure that a provision was put in the Constitution that guaranteed parties to a dispute a choice of forum, that is to say, not to be compelled to be subjected to the jurisdiction of shariat courts.

Like Kenya and Zanzibar, the jurisdiction the shariat court is limited to marriage, divorce, maintenance and matters relating to guardianship of minors and family relations. The court's jurisdiction can only be invoked where the marriage or any such other relationship is governed by Islamic law. The courts' jurisdictions extends to matters of w*akf*, gifts, wills and where the endower or donor is a Muslim or the deceased was a Muslim at the time of death. A person served with a summons to appear before a shariat court may either consent or object to its jurisdiction. Where a person objects, the matter must be transferred to an ordinary (State) court with relevant jurisdiction. However, a case filed in an ordinary court cannot be transferred to a shariat court.

Some problems have been experienced in the operation of shariat courts in Ethiopia. The lack of codification of Islamic law implies that there is no general guidance for the shariat

courts with regard to the school of Islamic law that is to be applied. Secondly, a controversy arises when a Kadhi elects to adopt and apply a particular school of Islamic jurisprudence at the expense of others. There problem here arises since there are three basic rules which are applied. One of the rules is set by legislation which binds the Kadhi to apply the law. The other rule recommends for the following of the school which the parties to the suit conform to. The third rule gives leeway to the Kadhi to adopt his own school of jurisprudence. In some cases, controversies arise when the applicable rules of procedure contradict with Islamic law.[42]

We should point out that the recognition of shariat courts in the Constitution of Ethiopia is unprecedented. The Constitution clearly provides that the law to be applied by the courts would only be valid where the Constitutional guarantees of fundamental rights and freedoms are not transgressed. Also, the parties, by virtue of the Constitution, must also consent to the jurisdiction of the courts.

3.4 Nigeria

Nigeria is one of the largest Muslim populated countries in Africa where public life and the conduct of business often begins and ends with a Muslim prayer. Islam was introduced in this country around the 10th century. The country's Constitution, The Constitution of the Federal Republic of Nigeria (1999) has provision for the establishment of the Kadi and Sharia Courts in the States and in the Federation.[43] Accordingly, the Sharia Court of Appeal is comprised of a Grand Kadi and such number of Kadis as may be prescribed by legislation. The jurisdiction of the Sharia Courts is provided for under Sections 262 (2) and 277 of the Constitution. It is limited to Islamic personal law, marriage and guardianship. The qualification for appointment to the office of Grand Kadi or Kadi of the Sharia Court of Appeal is set out by Sections 261 and 266 of the Constitution. Sections 264 and 279 give the grand Kadi, who is equivalent to the Chief Kadhi in Zanzibar or Kenya, the Power to make rules for regulating the Practice

[42] Ibrahim Idris, *"Status of Federal Shariat Courts Under the 1994 FDRE/Federal Democratic Republic of Ethiopia/Constitution,"* in Center for Contemporary Islam, Islamic Law in Africa Project (ILAP) University of Cape Town, Proceedings of Symposium (2000)

[43] The Constitution can be accessed at http://www.nigeriacongress.org/resources/constitution (June 2007)

and Procedure of the Sharia Court. The major difference between the Kadhis Courts in Nigeria, Zanzibar and Kenya is that in Nigeria, the courts apply Islamic Sharia law to its fullest extent while in Zanzibar and Kenya, the jurisdiction is limited to personal law, to wit, marriage, divorce and inheritance which is the case in Gambia and Uganda. In some States in Nigeria, sharia courts met out harsh punishments which include amputation of limbs for theft and stoning for adultery.

3.5 Gambia

Muslim Berbers from Mauritania were the agents for Islam in Gambia. Traditional rulers were converted to Islam and used Islamic law to consolidate their powers in the beginning of the 19th century. Muslim's in Gambia consists of about 90% of the total population. The legal system of Gambia is based on English common law, Islamic law and customary law. The peaceful period during the British colonial rule (1888-1965) played a major role in ensuring that Islam was left intact. The colonial legislation relating to Muslin personal law was retained after independence.

The Constitution of the Second Republic of Gambia (1997) identifies Islamic law as a source of law in matters of personal status and inheritance. Article 120 (b) of the Constitution provides for the establishment of the Cadi (Kadhi) Court to be constituted by the Cadi and two other Scholars qualified to be a Cadi or Ulama. (Islamic Scholar) Appeals from this Court go to a review Court composed of the Cadi and four ulamas. The Cadi Court has jurisdiction to apply Islamic Sharia in matters of marriage, divorce and inheritance where the parties before the Court are Muslims. The qualification for appointment to the position of Cadi requires a person of high moral standing and professional qualification in Sharia Law.[44]

It has been noted that the Cadi courts form an important and integral part of Gambia's judicial system and that they have helped to maintain peace, security and social justice.

[44] See generally Rubin and Cotran, *"Gambia: An Annual Survey of African Law,"* Vols. I and IV, 1967 and 1970 Redden *"Gambia," Modern Legal Systems Cyclopedia,"* Vol. 6 Buffalo, N.Y 1990

They courts have also been applauded for keeping families and loved ones together, strengthening Islam and Islamic law.[45]

3.6 Uganda

Islam arrived in Uganda from the north through interactions in the course of the East African coastal trade. The first elected President of Uganda, Kabaka Mutesa I who was an influential leader in the first days of Uganda's independence was a Muslim convert. Being a Monarch, he wielded a lot of influence. Chiefs and other local leaders followed suit and converted as well. The advent of Christian missionaries and change in religion of subsequent leadership led to a significant reduction in the number of Muslims.[46]

Today Uganda, a secular State, has a relative small percentage of the Muslim population, (12 % according to the 2004 census).[47] Despite this, the Ugandan Constitution (1995) makes provision for the establishment of Qadhis (Kadhi) Courts under Section 129 as one of the subordinate Courts of judicature. The jurisdiction of this court is limited to matters of marriage, divorce, inheritance of property and guardianship. Like Gambia and Kenya, the Constitution does not establish the Kadhi court. It provides for their establishment as a subordinate court by an Act of Parliament. However, the Kadhi courts have not been established in Uganda.

The above review provides some highlights on the Kadhi court system in other jurisdictions. A number of lessons could be drawn from the set up and operation of Kadhi courts in the selected jurisdictions. First and foremost, the evolution, development and formal establishment of the courts has been through a gradual historical process. In jurisdictions where the courts have been firmly grounded, there was a strong influence from Muslim traders and merchants or outsiders.

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[45] Welcome address by the Judicial Secretary at the opening of the 28th July 2006 Law Court Buildings (The Point Newspaper, 3rd August 2006)

[46] For further insights, see Kateregga, B.D. "Muslim Personal Law in Uganda from Colonial to Present: Challenges and Prospects," in Center for Contemporary Islam, op.cit

[47] Although the country's Motto is *"For God and my Country,"* Article 7 of the Constitution provides that the country shall not adopt a State religion.

The retention of Islamic institutions and legal systems by the colonial rulers also played a major role in laying the foundation for the subsequent adoption of the Islamic legal systems by independence governments in most cases. In the case of Kenya and Zanzibar, the British colonial regime entered into a specific agreement to ensure the continued existence of the courts. The independence government subsequently followed suit by entrenching constitutional provisions to guarantee the continued existence of Kadhi courts. Also, in most jurisdictions where Kadhi courts have firm roots, there is a significant Muslim population. In such cases, the Kadhi court is a State institution, funded by tax payers of all denominations, including atheists.

Secular States have also accommodated provisions for the courts but with guarantees for citizen's freedom of choice of forum and protecting minority religions. In States where Muslims do not comprise of a significant majority, the application of Islamic law by the Kadhi courts is limited to certain matters, essentially those relating to Muslim family and personal law. The Constitutional provisions establishing the Kadhi courts are supplemented by specific legislation enacted by Parliament.

Problems in the operation of the Kadhi court system have also been noted. In the wake of developments at the international legal order, the influence and application of common law principles and international law by Kadhi courts may significantly compromise Islamic law. In some jurisdictions, effective operation of the Kadhi courts has been hindered by the absence of rules to guide the courts. As a result the courts have been compelled to apply common law rules of procedure, which may sometimes conflict with Islamic law.[48] In Ethiopia, the application of diverse schools of Islamic jurisprudence and its potentiality for creating problems has been noted.

4.0 Contextualizing the Kadhi Court Debate on Tanzania Mainland

[48] Abdulkadir Hashim, *"Muslim Personal Law in Kenya and Tanzania: Tradition and Innovation,"* Journal of Muslim Minority Affairs, Vol. 25 No. 3 December 2005

It was not until towards the end of last year, (2006) that a number of sentiments were publicly articulated which have since led to varying interpretations in relation to the idea of re-establishing Kadhi courts in the judicial system on Tanzania Mainland.[49]

As noted earlier, the issue of applying Islamic law by courts on the Mainland had been deliberated in Parliament much earlier, in 1964 when Parliament passed the Islamic Law (Restatement) Act that was intended to codify Islamic law. This Act puts in place a mechanism for the preparation of statements on Islamic law on any subjects according to the schools to be applied by courts in all cases determined in accordance with Islamic law. The wording of the provision is obligatory, not mandatory. This may explain why the Minister responsible for legal affairs has not published any statement.

A more direct reference to establishing Kadhi courts on the Mainland can be deduced from a perusal of Parliamentary proceedings. These reveal that following suggestions for establishing the courts from a cross-section of members of society in 1998, Parliament set up a committee to follow up the matter and report to it.[50] However, according to the MP, the committee was compromised and the issue was clamped down by a prominent and well respected political guru who has served in the capacity of Minister in all the governments. The committee had already completed the task but it was not in time to submit its report to Parliament in 2000. The Speaker directed the Parliamentary Committee on Constitutional and Legal Affairs to take up the matter. This Committee complied and submitted its report on 11th February 2005 to Parliament after making familiarization tours to Mozambique, Kenya and the UK. For unknown reasons, Parliament did not discuss the report.[51]

It is also on record that in 2004, the issue of the establishment of a Kadhi court in Mainland Tanzania cropped up again in Parliament. While responding to questions from

[49] The establishment of the Kadhi court on the Mainland was raised again in the June-July 2007 Parliamentary Session. See The Citizen, p.6 30th June 2007.
[50] Earlier, a Member of Parliament had tabled a private member's Bill for establishment of a Kadhi court. (Bill Supplement No. 3 of 1/05/1998)
[51] *Bunge la Tanzania, Majadiliano ya Bunge, Mkutano wa Nne, Kikao Cha Thelathini na Moja, Tarehe 27 Julai* 2006 p. 90

MPs on the establishment of the Kadhi court, the government responded by informing the MPs that it had formed another committee to conduct research and get the views of citizens on the establishment of the Kadhi court and its modus operandi. This Committee was, however, directed to combine the establishment of the Kadhi court with matters related to the administration of estates of deceased persons, marriage and children. The government was of the view that these issues were inherently intertwined. The MPs were informed that the government had committed itself to publish a White Paper to get views upon the committee submitting its report.[52]

Further developments in tracing the genesis of the debate on establishing the Kadhi court debate takes one back to Parliament. This time in July 2006, just three months before the National Parliamentary elections where Chama Cha Mapinduzi (CCM) was to face off with stiff opposition from other political parties. Chief among these parties was the Civic United Front (CUF), the main opposition party in Tanzania, whose membership maybe significantly Muslim but not exclusively so. In fact CUF has on certain occasions been singled out, unfairly in our view, as a political party with a strong inclination towards Islam and that its members are predominately Muslims.[53] The Party has constantly refuted these allegations. It would be safe, and indeed proper to assume that if the allegations are anything to go by, the Registrar of Political Parties ought to have de-registered it. The Party has not even been summoned by the Registrar to respond to these allegations, which strengthens the Party's position that these are mere allegations aimed at tainting the image of the Party in the eyes of citizens.

In 2005, a year after the issue of Kadhi courts last surfaced in Parliament, CCM's Election Manifesto provided that it would follow up measures already introduced (ostensibly in Parliament) to seek a solution to the establishment of the Kadhi court on Tanzania Mainland. An MP had demanded an explanation on what he considered as a

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[52] See Hansard, (Parliament Proceedings); Speech by Minister for Justice and Constitutional Affairs, Hon. Bakari Mwapachu, (MP): *Bunge la Tanzania, Majadiliano ya Bunge, Mkutano wa Kumi na Sita, Kikao Cha Thelathini, Tarehe 21 Julai, 2004* p. 25

[53] Rukyaa, J.J, *"Muslim-Christian Relations in Tanzania with Particular Focus on the Relationship between Religious Instruction and Prejudice,"* Islamic and Christian-Muslim Relations, Vol. 18 issue 2, April 2007

delay in establishing the Kadhi court after recounting the history of the deliberations on the issue in Parliament. He also pointed out the fact that CCM's Election Manifesto had to be implemented as the directive the President (Chairman of CCM) implied that the court would be established.[54] In a rather trivializing response, to be a little diplomatic, the government stated that it had decided to broaden the scope of investigations and that the process would continue for the benefit of the nation. The government responded by stating that the matter would be brought to Parliament "at an appropriate time" and pleaded for the MPs' patience.[55]

A month after the discussion of the issue of the Kadhi court in Parliament in 2006, some section of the public, commenced a discussion on the issue. This was catalyzed by some section of the media. There have since been a number of proposals made to give effect to the establishment of the Kadhi courts. In some quarters, it has been suggested that Parliament should enact a law to establish the Kadhi court. The idea was seemingly put forward by a group of Muslim clerics who feel that that the system is an essential part of their faith. The mass media and influential public figures and prominent personalities have since joined the debate. The main reference point for all these has been the CCM Election Manifesto. Proponents in favour of the Kadhi Court have also stated, among other opinions that issues of Islamic law are enshrined in the Holy Book and therefore a court system needs to be put in place, by the Constitution, to interpret these laws according to the scriptures of the Book.[56]

As expected, there are also divergent views on the other extreme. Those in this camp have argued that the establishment of a court that is modeled along religious lines is not only unconstitutional but could also divide the peoples of this country. The Tanzania Roman Catholic Bishops are on record in advancing this viewpoint.[57] It has also been

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[54] Hansard; *Bunge la Tanzania, Majadiliano ya Bunge, Mkutano wa Nne, Kikao Cha Thelathini na Moja, Tarehe 27 Julai* 2006 p. 90 The commitment by CCM on the Kadhi court is found in Chapter 9 paragraph 108(b) of the Party's Election Manifesto, which can be accessed at http://www.ccmtz.org/ilani/sura8/pdf (June 2007)

[55] Ibid. p. 152

[56] See *"Kadhi Court Debate Generates More Heat,"* by Judica Tarimo, The Guardian, 9th August 2006

[57] See *"ELCT: No to Kadhi Court,"* by Pati Magubira, Daily News, 18th August 2006

stated by other religious groups that any move to establish such court would open up the Pandora's Box as other religious sects may demand similar establishments.

Indeed the debate of establishing a Kadhi Court system on Mainland Tanzania has lately perturbed the minds of a wide-ranging group of stakeholders. The views advanced by most of the stakeholders on either side of the debate cuts across religious, political and in some cases ethical lines. It has been rightly observed that the trends in the diverse arguments advanced may create instability which may lead to an atmosphere that is not conducive for a State that is renowned for its peace, stability and religious and political tolerance.[58]

5.0 Conclusions and Recommendations

Although the issue of establishing the Kadhi court had featured earlier in Parliament in Tanzania mainland, its recent resurgence has been catalyzed mainly by the fact that the matter has been listed in the Election Manifesto of the ruling Party, CCM. The Manifesto has seven items relating to CCM's strategies on addressing concerns in the legal system. These include amending laws that seemingly discriminate against or oppress women, establishing High Court centers in every region and separating prosecution and investigation matters. Others are to improve the laws for combating corruption, establishing a system of providing legal aid to the indigent and introducing Para-legal services in Primary courts throughout the country.

First and foremost, the pressure to implement the Election Manifesto from stakeholders (majority of who are perhaps not members of CCM) raises some eyebrows. Secondly, there is a conspicuous focus on only one item from the list of the Manifesto's coverage of areas of the legal system. The lack of a holistic approach by focusing on the implementation of other components of the Manifesto (which are equally important for a vibrant legal system) is clearly evident.

[58] See *"Regulate Kadhi Court Debate,"* Daily News, 25th August 2006 (Editorial)

We would also wish to point out that an Election Manifesto is not a sacrosanct document, whose lack of implementation, for whatever reasons, whether natural or man-made, would see heads roll or lead to bloodshed. In fact the wording of the relevant paragraph of the Manifesto does not make it mandatory to establish the Kadhi court. The Manifesto states in Chapter eight paragraph 108 (b): "*Kulipatia ufumbuzi suala la kuanzishwa kwa mahakama ya Kadhi Tanzania bara"* Literally translating to: *"To find a solution to the establishment of Kadhi court on Tanzania Mainland."* (Emphasis underlined). Looked from a different perspective, finding a solution may not necessarily entail establishing the Kadhi court. It may mean revisiting existing laws with a view to revising them to address any identifiable problems that have inhibited the application of Islamic law in the current legislative framework. A radical and extreme interpretation of the Manifesto could also translate to taking measures to ensure that the courts do not resurface! It is also interesting to note that proponents of establishing the Kadhi court have not identified any quandary or weakness with the existing legislative framework to conclude that the only way of addressing the problems identified is the establishment of the Kadhi court. At the same time, the government is on record to have stated in Parliament that the building of High Court centers in all regions, one of the items listed in the CCM Election Manifesto, is subject to availability of funds.[59]

Lawyers are in essence not political scientists. However, they can open up new frontiers for political decisions. In this respect, it is submitted that although the implementation of Manifesto is not legally binding, it is proper for CCM to honour its pledge. The Kadhi courts can be established and the CCM government appears determined to address this concern.[60] If the court is to be established, then certain constitutional and legislative reforms may have to be undertaken. There are a number of ways that Kadhi courts could be established.

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[59] *Majira*, 27th June 2007, p. 4 (*Habari za Bunge, "Azma ya Kujenga Ofisi za Mahakama Mikoa ipo – Nagu"*

[60] Responding to a question raised by a Member of Parliament from the Opposition in the 8th Parliamentary Session, the Minister for Justice and Constitutional Affairs stated that a report on the Kadhi Court issue would be submitted to the government by October 2007. See Mwanachi Newspaper 7th July 2007

One of the options of establishing the Kadhi court system is through the Constitution. Being the fundamental law of the land, the Constitution may have to be amended, as is the case in other jurisdictions. If the constitutional review process is followed to the letter, the concerns of unconstitutionality of the Kadhi courts advanced in some quarters would be taken on board. The reform process could take the form adopted by in Ethiopia. As long as a substantial number of people do not object to the establishment of the Kadhi courts, there should be cause for alarm. The Kadhi court would have to be integrated within the judicial set-up in the constitutional review process. The courts could be recognized and established by the Constitution itself, or just recognized and their establishment be through a law enacted by Parliament. In Uganda and Gambia, the Constitution does not establish the Kadhi courts. They are to be established by an Act of Parliament. In Zanzibar the Constitution establishes the courts. One of the concerns of establishing Kadhi courts ordinary law by an Act of Parliament without the Constitution recognizing them has been that it would make them vulnerable. The likelihood of the courts being abolished by a simple majority of the members of the legislature is not far fetched. A relatively larger number of MP's would be required to change the Constitution.

The constitutional guarantees ranging from equality before the law, non discrimination on the basis of religion and the non-involvement of the State in religious matters would not necessarily be compromised if safeguards are put in place.[61] The safeguards could include entrenching in the Constitution a provision for the right to choice of forum. This process worked in Ethiopia where the interests of minority religions and cultures were safeguarded.

The concern that the introduction of Kadhi courts to administer issues to Muslims would be tantamount to singling Muslims from believers of other denominations could be addressed. First and foremost, there already exist laws which were enacted by Parliament to carter for specific needs of Muslims in relation to personal and family matters. These laws have not been characterized as unconstitutional. Secondly, in jurisdictions where the

[61] See Articles 13 and 9 (g)

Muslims are a minority, for example Uganda, the Constitution recognizes the Kadhi courts. Also, if the process is acceptable, the use of tax payers' coffers to subsidize the courts would not be a problem.

The Kadhi courts could also be established through another avenue that would not entail a review of the Constitution. This would involve amending some of the existing laws that provide for the application of Islamic law, after having identified constraints. The Magistrate Courts Act (Cap. 11 R.E. 2002) which deals with courts subordinate to the High Court of Tanzania would have to be amended to recognize the Kadhi court. Also, since Kadhi courts would have exclusive jurisdiction over matters falling under Islamic law, the Primary court's jurisdiction in determining Islamic law suits under the MCA would have to cease.[62] The fifth Schedule to the MCA (Parts I and II) which grants powers to Primary courts to administer estates of deceased Moslems in accordance with Islamic law would also have to be annulled.

Similarly, a number of provisions of the Law of Marriage Act (Cap. 29) (LMA) would be lined up for amendment in as far as they relate to the application of Islamic law.[63] Some of the provisions likely to be affected include those related to issues of marriage. The LMA provides that in order to contract a legal marriage parties must be 18 and 15 years or above for men and women respectively.[64] There is a likelihood of conflict if no amendment or reconciliation is made between the LMA and Islamic law to be applied by Kadhi courts. Under Islamic law, a woman (girl) can be married after puberty.

The provisions of the LMA governing payment of dowry would also have to be looked into if a decision to establish the Kadhi courts is taken. While dowry must be paid under Islamic law, under section 41(a) of the LMA the non-payment of dowry would not invalidate a marriage.[65] Also, the LMA vests original concurrent jurisdiction in

[62] Cap. 11, s. 18.
[63] *Ibid. ,see for example,* ss. 10 & 115.
[64] *Ibid.,* s. 13. Parties may apply to court to lower the age to 14 years.
[65] *Ibid.*

matrimonial proceedings to the High Court, Magistrates Courts and Primary Courts.[66] There would be a need to incorporate the Kadhi court too.

Another law that has a bearing on the application of Islamic law is the Probate and Administration of Estates Act. (PAEA) (Cap. 352, R.E. 2002) When a person dies, the administration of his/her property may have to be governed in accordance with their religious belief. The (PAEA) provides that the estate of a deceased person shall be administered in accordance with Islam where the deceased is Muslim. The provision places a maximum ceiling of the value of the estate.[67] If established and accorded concurrent jurisdiction, the Kadhi courts would probably deal with the administration of estates of deceased persons irrespective of the value. In this regard, it may be necessary to do away with this provision.

It would be helpful to codify agreed principles of Islamic law to avoid conflicts. In this respect, the preparation of statements of Islamic law on any subjects and according to the schools of Islam envisaged by the Islamic Law (Restatement) Act, Cap. 375 (R.E.2002) should commence to set a foundation for the smooth operation of Kadhi courts. Some thorough background research which should involve consultations with all major stakeholders would certainly need to be conducted in preparing the statements.

While considering the logistical issues of financial, human and capital resources the issue of training of judicial personnel should not be lost sight of. This is because the capacity of the judiciary to effectively adjudicate on matters of Islamic law is to some extent limited. In the event Kadhi courts are established, there may be a need to provide training for this cadre, which may be required to deal with appeals. Cases that commenced on a purely Islamic matter, may find their way out of the Kadhi courts into the normal courts.[68] Kadhi's would also have to be trained on the normal laws, to enable them distinguish cases in which they may not have jurisdiction.

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[66] S. 76.
[67] See Section 88
[68] See for example Executive Secretary *Wakf et al* vs. Said Salum [1991] T.L.R 198. The concerned *Wakf,* and commenced in Zanzibar but ended at the Court of Appeal of Tanzania.

The cases of Basiliza B. Nyimbo vs. Henry Simon Nyimbo[69] and Halima Athumani vs. Maulidi Hamisi[70] are examples that illustrate the difficulties that may arise in the application of Islamic law by normal courts and lack of awareness of normal laws by Kadhis. In the case of Halima Athumani, the appellant and respondent were spouses who celebrated their marriage under Islamic law. Halima had successfully applied for divorce at the Primary court in Singida District on the ground of cruelty. The husband, Maulidi, successfully appealed to the District court on the ground that the Board that attempted to reconcile them, as required by the law before a petition for divorce is entertained, was not a Board of the Moslem community.

The High court held, *inter alia,* that the mere fact that it was not a Moslem Conciliatory Board that reconciled the parties did not render the reconciliation a nullity. The judgment in this case reveals some salient features. One, it is evasive. Secondly, to some extent, it shows a lack of thorough comprehension of some Islamic issues. This is evident where the Judge remarks that: *"It is doubtful whether a proper Moslem Conciliation Board existed in Singida..."* and *"Most likely the Local Moslem Reconciliation Boards have not registered with the Registrar of Marriages and Divorces in accordance with GN 245 of 1971."* (Emphasis underlined) With utmost due respect, although obiter, the remarks reveal a weakness: The Judge is simply not sure. The Judge also observes that the District Magistrate's comprehension of Islamic law on divorce is wanting. On a more inspiring note, the Judge shows a relatively good command of Islamic law on divorce where he aptly elaborates instances where *fashk, kuhului (khuluu), mubaraat* and *talak* are applicable.

The case of Basiliza B. Nyimbo, illustrates an example of the lack of an understanding of the application of law by Kadhis. In this case, a Kadhi purported to dissolve a Christian marriage. The High Court correctly found that the Kadhi had surpassed his jurisdiction by

[69] [1986] T.L.R. 93
[70] [1991] T.L.R 179

stating that a Kadhi may only preside over marriages contracted under Islamic law as provided for by the Law of Marriage Act, 1971.

We would like to re-iterate the caution sounded by Chief Justice Samatta in the case of Hamisi Rajabu Dibagula vs. R[71] as we find it befitting as a conclusion to this paper. The caution provides some very useful insights to the religions inclinations in the course of deliberations on establishing the Kadhi court. In delivering the judgment, the Chief Justice stated:

"The appeal raises two questions of considerable public importance concerning the limits, if any, of the right to freedom of religion guaranteed under Article 19 of the Constitution of the United Republic of Tanzania, 1977..." [72] He went to add that:

"The Freedom enshrined in this Article includes the right to profess, practice and propagate religion. Since profession, practice or propagation of religious faith, belief or worship is also a form or manifestation of a person's expression, it must be correct to say, as we do, that freedom of religion is also impliedly guaranteed under Article 18 (1) of the Constitution. That freedom, like other freedoms is not absolute. The exercise of it, just as the exercise of other freedoms, is subject to the requirements of public peace, morality and good order, which are requisites of the common good of society..." [73]

Going by the guidance from the country's highest court, as long as there is an agreement and guarantees to ensure public peace and good order, then the establishment of the Kadhi courts should not be a cause for alarm. The Kadhi Courts (and the application of Islamic law) are currently recognized, by Acts made by Parliament with the authority of the Constitution itself.

In our view, Kadhi Courts, as in other jurisdictions, should be seen in the context of the judiciary and the legal system and not as a religious issue or an issue for Muslims alone.

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[71] Criminal Appeal No. 53 of 2001 Court of Appeal of Tanzania at Dar-es-Salaam, (Unreported)
[72] At page 2 of the typed judgment
[73] Ibid, page 8

Those opposing the Kadhis Courts and making allegation of bias for Muslims by making reference to the CCM Election Manifesto are politicizing the issue which may result in creating unnecessary tension and disharmony between citizens. We must equally hasten to caution that the establishment of the courts should be conducted in a manner that would not lead to, or have the elements of the State according prominence to one religion.

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