Perspectives on the Kadhis' Courts in Zanzibar

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1.0 Abstract

This paper provides a brief analysis of some of the salient features of the Kadhis' Courts in Zanzibar. The analysis has been discussed under purposefully selected sub-themes which are considered to reflect some emerging trends in the operation of this judicial system in Zanzibar. One of the sub-themes is premised along the gender paradigm (with a focus on selected cases on some aspects of divorce). Another is focused on the perceptions or influence of common law principles and the international legal regime on the application of Islamic law. The other sub-theme focuses on the limitations placed on the Court of Appeal with regard to cases emanating from the Kadhis' Courts and its reaction to this set up.

The analysis is preceded by a brief historical account which highlights the main factors that set the foundation upon which the Kadhis' Courts system on the Isles is premised. An exploration of this foundation is considered crucial to any meaningful understanding of the salient features analyzed.

It is hoped that the analysis would provide useful insights for jurisdictions seeking to introduce similar systems or provoke thoughts on existing systems that are contemplating reform in the region.[1]

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[1] At the time of writing, there was a debate on the Mainland on whether or not to introduce a Kadhis' Court system to carter for the Muslim population. There were similar deliberations in Kenya during the constitutional reform process sometime in 2005. Hopefully the experiences in Zanzibar will be useful in directing the debate on the Mainland.

2.0 An Overview of Historical Considerations

2.1 Introduction

The Germans had claimed direct control and administration of a territory later to be known as Tanganyika from the German East Africa Company in 1891. They later had to hand over the territory to Britain under the League of Nations and not long thereafter Tanganyika became a UN trust territory under the British before being granted independence in 1961. A year later it became a Republic headed by the President.

There was another country located on an Island, about 37 km east of the Tanganyika territory, across the Indian Ocean. This was Zanzibar, which comprised of two main Islands, Unguja and Pemba. Zanzibar had been a British protectorate with an Arab Sultan. It was granted independence by Britain in December 1963. In January 1964, a violent revolution took place. The Sultan's government was overthrown and replaced by a Peoples' Republic of Zanzibar under an executive President. In the same year, the Presidents of Tanganyika and Zanzibar signed an agreement which united the two countries, forming one sovereign Republic, the United Republic of Tanzania. Since then, Zanzibar elects its own President who is the Head of Government for matters internal to the Island. It has its own Cabinet, known as the Revolutionary Council, and a separate Parliament, known as the House of Representatives.

Each part of the United Republic has its own judicial system. However, the Court of Appeal generally has jurisdiction, except where otherwise expressly stated, to hear and determine appeals from the High Court of both parts of the Union.

2.2 The Pre-British Colonial Period

Interactions among members of a community with outsiders, among other factors, have often influenced the nature, form and kinds of dispute settlement mechanisms and institutions that it establishes. Although there is comparatively little recorded history on the evolution of communities in Zanzibar, it has been noted that the very early inhabitants of the Island of Zanzibar were a Bantu-speaking people of the Hamidu ethnic group.

These invaded earlier intruders on the Island.[2] Apart from the Bantu-speaking people, the other earliest known invaders along the East Coast of Africa were the Assyrians and Sumerians from Iraq, from where the earliest civilization of the world arose many years ago. Historical and archeological findings strongly suggest that the East Coast of Africa was indeed the scene for the earliest sub-Saharan Islamic community.[3] For example, it has been stated that the "black magic" and voodoo beliefs observed and practiced by most of the coastal natives of East Africa today is identical to the kind known to have existed during the Assyrians and Sumerians era.[4]

The Arabs and Persians later ventured out to sail the seas and fortunes and landed in Zanzibar after the Assyrians and Sumerians. These were later followed by the Portuguese whose attempts to spread Christianity on the Island were not very successful. Evidence of the Arabian and Persian invasions that led to commercial trade has been recorded. Coins belonging to Persian and Sassanid empires found near Baghdad have also been unearthed on the Island of Zanzibar.[5] The East Coast also had strong links with the Hamyarite Kingdom of South Arabia, which lasted from 155 BC to 300 A.D.[6]

The heavy blend of Islamic foreign influence came along with rise of Islam on the Islands of Zanzibar and Pemba and the adjacent part of the Mainland, Tanganyika. This influence must also have played a role in shaping the religious perceptions of the earliest inhabitants on the two Islands.

Prior to the earliest foreign influence, some of the well-known tenets of the traditional methods of dispute settlement were applied by communities on the Island. These were initially detached from Islamic influence. These dispute settlement mechanisms were governed by an informal traditional adjudication process which applied customary law. It

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[2] See Gray, J, History of Zanzibar from the Middle Ages to 1856, London, Oxford University Press, 1962 pp.9-10
[3] www.swahilionline.com/features/artciles/islam/binsumet.1htm (7th October 2006)
[4] *Ibid*
[5] The influence of the Persian merchants from Iran is also reflected in the composition of the Muslims on the Island where the majority are of the *Ibatni* and *Ithna' asheri* sects of the *Shia* school.
[6] www.swahilionline.com/features/artciles/islam/binsumet.1htm (7th October 2006

was much later, after the influence of foreign traders that some aspects of Islamic law were filtered into the dispute settlement system of the customary law that was applied.[7]

The *Wakilis,* who were well known personalities versed with pertinent issues related to Islamic law were already practicing Muslim religious forms of dispute settlement which had been in place even before the coming of Portuguese.[8] However, there were no formal institutions such as religious courts. It is mainly due to the influence of Islam by the early Arab traders that informal Muslim religious courts were established along the East Coast of Africa before the advent of British colonial rule.[9] The introduction of Islam to the early inhabitants of Zanzibar by the visitors laid the foundation for institutionalizing 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 is founded.

It should also be noted that although no comprehensive information existed on the judicial system in Zanzibar before the arrival of the Sultan in the early 1830's, Islamic law was the fundamental law administered by the Kadhi.[10] When the Kadhi was officially recognized by the then Sultan, there existed no official court rooms and disputes were resolved in private homes or even along the public streets. The Kadhis were generally given a lot of leeway by the Sultan and since they were not well paid, some Kadhis during this era became biased and corrupt.[11] This is the adjudicative system that the British found on the Island.

A comprehension of the legal system of Zanzibar generally and the institutions of settlement of disputes in particular the Kadhis' Courts, must be contextualized in the light of the above, albeit brief, historical account.

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[7] Peter, C.M *et al*, (Eds.) The Judiciary in Zanzibar (2006) p. 34
[8] See Ahmed Binusumeit.A. Badawy Jamalilyl, "Penetration of Islam in Eastern Africa," http://www.swahilionline.com/features/articles/Islam/binusumet1/htm (December 2006)
[9] 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
[10] Gray, J *op.cit* p. 144. The word Kadhi is derived from an Arabic word *"Quaada"* which translates to Magistrate.
[11] Gray, J. *Ibid*, pp. 146 -147

2.3 Kadhis' Courts During the British Colonial Era

There existed a parallel court system during the colonial era in Zanzibar where Islamic law was applied in tandem with the common law for different sets of target groups. On the one hand, the King had the authority to legislate for the British subjects on the Isles via the Order in Council of 1884 and legislative enactments. The Sultan on the other hand controlled his subject. British citizens appeared in the Courts of His Britannic Majesty (the British Court) where common law was applied. Local folks appeared before the Court of the Sultan where the law applicable was Islamic law and customary law as provided for by statute.[12] This dual system was maintained until 1963 when it was terminated with the coming into force of the 1963 Constitution and the Courts Decree of the same year. In the changes that followed throughout the developments of the legal history of Zanzibar, the Kadhis' Courts system was retained.[13]

3.0 Salient Features of the Kadhis' Court

From the brief historical analysis above, it is evident that the early inhabitants of Zanzibar received a very heavy dose of Islamic influence. Today the Island has a population of close to 97% Muslim out of a population of slightly above one million.[14] The remaining population is a mix of Christians, Hindus and those who practice traditional religious beliefs. Under these circumstances, the existence of the Kadhis Courts in Zanzibar needs no further clarification. Given the composition of the population along religious affiliation, the government need not go to lengths in justifying the use of tax payers' money to maintain the court system. This partly explains the existence of a Kadhis' Court in each of the 10 Districts on the Island.

As is the case in other Muslim populated countries, it is not the whole corpus of Islamic law that is applicable in Zanzibar. It is only some elements of the Islamic law that are applied, as directed by the Constitution of Zanzibar, the Kadhis' Courts Act and other

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[12] 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) (December 2006)

[13] 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.

[14] Data obtained from the Tanzania National Bureau of Statistics web-page: http://www.nbs.go.tz/TZ.FIGURES/TZ/FIG.2005.pdf (December 2006)

relevant and applicable legislative enactments on the subject.[15] In this regard, the jurisdiction of the Kadhis' Court in Zanzibar is limited to family and personal status matters. The court may also preside over marriages in some instances where the consent of the *walii* (parent or guardian) has been denied or withheld.[16]

The government regulates Islamic procedural law especially in terms of evidential requirements relating to witnesses. Otherwise unless expressly provided, the law applicable in the Kadhis' Courts is not codified. However, an express provision in the general law would displace Islamic law to the extent of such inconsistency.[17] 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. According to one of the Kadhi at the Mwanakwerekwe Kadhis Court, Hon. Omar Saidi Omar, the Kadhis are not even bound by the doctrine of precedent.[18]

It is also important to point out here that parties must consent to the jurisdiction of the Kadhis' Court. Being a Muslim by itself does not, *ipso facto*, confine one to the jurisdiction of the Kadhis' Court. In fact the choice of forum, for both Muslims and non-Muslims cannot be curtailed by this court system. 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.[19]

Each of the ten Kadhis' Court is staffed by a Chief Kadhi and at least one Kadhi who is assisted by several clerks. The Chief Kadhi is appointed by the President and has to

[15] Examples of such legislation include the Commissioner for the Administration of *Wakf* and Trust Property Decree No. 5 of 1980, the Succession Decree, Cap. 21 and the Marriage and Divorce (Muslim) Decree Cap. 91

[16] See Mohammed Issa Abdalla *et al* vs. Daudi Bakar Nyange *et al*, at Vuga, High Court of Zanzibar Civil Appeal No. 15 of 2005 (unreported)

[17] Masoud Ali Kombo *et al* vs. Khalid Ali Kombo, High Court of Zanzibar Civil Appeal No. 16 of 1987 (Unreported)

[18] Information obtained from personal interview with the Kadhi.

[19] 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.

possess knowledge of Islamic law.[20] The Kadhis, who must also be well versed in Islamic law, are appointed by the Judicial Service Commission.[21] These are all civil servants employed to resolve disputes among those who profess the Islamic faith. They therefore draw their remuneration from government coffers, out of the tax payers' money.

A visit to some of the institutions dealing with Kadhis' Courts paints a disturbing picture with respect to the general conduct of business at the courts, revealing a number of salient features. Generally Kadhis' Courts are thinly staffed and they serve a jurisdiction of over an entirely rural area with a population of about 100,000.[22] The court usually sits on Mondays through Thursdays between 8:30a.m. - 3:00p.m, handling an average of six cases per day. Fridays are often left out for prayers. A payment of Tshs. 5,000:00 (about half a dollar) is required to file a case. In some cases, parties may be required to pay for the court process server when summons are to be issued. The parties are required to go through *suluhu (suhu)* (a reconciliation process) first at the *Sheha's* (local leader) office. It is only where the *Sheha* fails to reconcile them that they can invoke the jurisdiction of the Kadhi's Court. The court proceedings are not open to the public. The official language in the court is Kiswahili. It is, however, not uncommon to come across judgments of the Kadhis' Courts written in Arabic script.[23] Cases are heard and determined in the poorly furnished chambers of the Kadhis. The wooden chairs used by the Kadhis and the cupboards used for storing case files and other court documents are in a dilapidated state.

The absence of security at the Kadhis Court is notable. This situation puts the court personnel especially the Kadhis and court documents are a great risk. One of the Kadhis at the Kadhis' Court at Mwanakwerekwe stated that he not a single police officer had been assigned to the courts for the sixteen years of his service as a Kadhi. He recalled one incident when fracas erupted in his chambers and the Parties and witnesses resorted to

[20] See sections 4 (1) and 5 (3) (b) of the Kadhis' Courts Act, respectively. See also the Written Laws (Misc. Amendments) Act, No. 4 of 2003

[21] One of the Kadhis at Mwanakwerekwe did not know his appointing authority. He maintained that he was an appointee of the President.

[22] Although this applies to one village in Mkokotoni, (see www.swahili.com/features/articles/islam.htm) (December 2006), the situation is worse at the Mwanakwerekwe Kadhi's Court in Zanzibar town.

[23] Makaramba, *op.cit* at p. 2

physical confrontation in the course of proceedings before him. It was the workers at the court and some of the people who had come to make follow-ups on their cases at the court who came to the Kadhi's rescue. The security situation is slightly better at the High Court where the Chief Kadhi's office is located.[24]

In some cases people summoned by the Kadhi's Court blatantly refuse to sign the summons and at times even refuse to show up in court. The Kadhi at Mwanakwerekwe noted that in isolated cases police have provided assistance, but often their assistance is difficult to get. He attributed this, to among other factors inhibiting the police force, corruption and political interference along party lines. Enforcement of judgements of the Kadhi's Court is equally a difficult task. According to one State Attorney, there is a misconception that the Court is a "lover's court" (*Mahakama za Mapenzi*). This may partly explain the lack of seriousness accorded to these courts by a cross section of the people and institutions on the Isles, including those required to enforce its judgements.

As noted, to be appointed a Kadhi one must be a Muslim who has a fairly firm grip of Islamic law principles. Some of the Kadhis in Zanzibar have formal training in Islamic law.[25] It is therefore safe to assume that it is easier for the Kadhis to understand and correctly apply concepts and principles of Islamic law in cases that they preside over. It is very likely that where the system is applied or introduced in a jurisdiction where the majority of judges are predominantly non-Muslim, problems are likely to occur. In fact it may be offensive to and indeed inappropriate to some Muslim groups for non-Muslim adjudicators to administer Islamic law for Muslims in family matters without training in Islamic law. Of course non-Muslim adjudicators may get formal training and become well versed in the application of Islamic law principles but it is those who have been groomed in and practice the religion that are likely to have an added advantage.

[24] In comparison with the Kadhi's Chambers, the office of one of the State Attorneys at the Attorney General's Chambers, who only completed law school only two years ago, is far much better. It is spacious with among other amenities, lockable filing cabinets, a modern bookshelf and an air conditioner. One has to go through a checkpoint where an armed security guard is stationed to access the State Attorney office.

[25] Hon. Omar Saidi Omar, of the Kadhi's Court at Mwanakwerekwe taught Islamic law for a number of years at an Islamic Primary school on the Isles before being appointed to become a Kadhi. After serving for four years as Kadhi, he, with four other Kadhis now stationed in various courts in Zanzibar, obtained a Diploma in Islamic law from the world's oldest and renowned *Al Azhar* Islamic University in Cairo, Egypt.

4.2. Gender Dimensions

Under Islam 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. The provisions of the Kadhis' Courts Act categorically state that there shall be no preferential treatment on the basis of sex and that evidence shall be assessed on its credibility and not on the number of witnesses.[26] In this respect, the Kadhis' Courts Act makes a radical departure from some long held tenets of Islamic law relating to the evidentiary weight of women witnesses. To some radical Islamist, the approach by the Kadhis' Courts Act is intolerable. On the other hand, most gender activists would consider the provisions as welcome development.

Apart from the evidentiary provisions relating to women witnesses, the Kadhis' Courts Act contains other provisions which would not augur well with die hard gender activists. Also, the institutional and administrative structure of the Kadhis' Court system in Zanzibar, like elsewhere where Islamic law is applied, is in essence prejudiced against females.

Not surprisingly, all the Kadhi's in Zanzibar are male. This must be viewed from the point of view of the place and role of women in traditional Muslim societies where women are generally not expected to take up roles that entail adjudication on matters of public life.[27] In fact the provisions of the Kadhis' Courts Act in some respects re-echo the traditional Muslim societies' approach. For example, where it provides that appeals from the Kadhis' Court shall be determined *"by a judge of the High Court and in presence of four Sheikhs…"* [28] It is submitted that the use of the word Sheikh in the context of this provision, *prima facie*, implies that it is only men who are targeted by this provision. If women were to be included, the word *Sheikha*, the feminine for Sheikh, would also have

[26] See section 7 (i) and (ii) of the Kadhis' Courts Act

[27] See generally Susan Hirch, Pronouncing and Preserving: Gender and the Discourses of Disputing in an African Islamic Court, Chicago University Press, 1998. One of the Kadhi's at the Mwanakwerekwe Kadhi's Court held similar views.

[28] Section 10 (2)

been used. Although still controversial among some Muslim circles, *Sheikhas* existed in traditional Islamic law in the 12th and 13th Centuries and in countries such as Syria, women Sheikhs are not hard to come by.[29]

Aspects of gender imbalances are also manifested in the nature of cases and the manner in which the cases are handled by the Kadhis' Courts. As noted above, the provision for having women Kadhis in the institutional and administrative arrangement of Zanzibar is not provided for. It is only in the supporting staff cadre, mainly filing clerks and typists, where females are found. Most of these are untrained and unskilled.

Secondly, most of the divorce cases in the Kadhis' Court in most parts of Zanzibar are filed by women. This is the general trend in other parts of the world where Islamic law governs relations between couples. Women in countries governed by Islamic tenets were for quite sometime not generally accustomed to going to Kadhis' Courts. They preferred to maintain their privacy in accordance with religious teachings. In any event, according to the teachings of Islam, it is lawful for a person to appoint another to act on their behalf (an agent) for the settlement of any contract which they might lawfully have concluded such as sale and even marriage. Although this teaching targeted men, women who had claims or wished to file a case, had used this avenue to appoint agents with a power of attorney who appeared on their behalf.[30] This trend has changed significantly and now women along the East Coast of Africa are on the forefront in the pursuit of their rights. They have increasingly used the Kadhis' Courts to transform religious traditions that have for a long time undermined their destitute position.[31]

Thirdly, a larger percentage of the cases dealt with by the Kadhis' Court in Zanzibar are concerned with marital disputes. The findings of a study on one the Kadhi's Courts in Zanzibar revealed that on average about 40 cases are filed annually and that out of these,

[29] See G. Willow Wilson *"Listen to the Sheikha"* at http://www.gwillowwilson.com/listen_to_the_sheikha.html
[30] See Ahmed Binusumeit.A. Badawy Jamalilyl, *op.cit*.
[31] See generally Susan Hirch, *op. cit*

over 90 per cent are matrimonial disputes, which range from divorce suits and claims for maintenance.[32]

Divorce is extremely common in Zanzibar, as elsewhere on the Swahili coast, and it is not unusual for women and men to divorce and remarry several times. The dimension of gender disparity in Zanzibar is manifested in the peculiarity of divorce where men have the right to unilaterally divorce their wives by way of *talak* without the wife's consent. The practice is different in some jurisdictions such as Tunisia and Egypt where legislation has been enacted to limit the right of men to divorce their wives through *talak* without the consent of the wife or that of the court. Similar legislation in Malaysia and Singapore also require the consent of the court.[33] Divorce cases filed with the Kadhi's' courts also provide some insights on the dimension of gender imbalances. Generally divorce is permitted in Islam as a last resort when all other avenues of dispute resolution provided for by teachings of Islam have been exhausted. In most cases, either spouse has the right to seek divorce, although in practice, it is the man who concludes the divorce by issuing the *talak* to the woman.

Most Islamic religious experts, including Kadhis admit that men are not generally permitted to divorce their wives through *talaka* without just cause. However, they are of the opinion that they have no means of enforcing the standard and that ultimately the issue should be left between a man and his God. A woman may also "divorce" her husband by way of a *khuluu* divorce. In this case the woman agrees to refund the bride price that had been paid by her husband. The Kadhi's Court has on a number of occasions reiterated that *khuluu* is recognized by the Holy Qur'an, which directs that women can liberate themselves from marriage by returning bride price.[34]

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[32] Stiles Erin, *"When is a Divorce a Divorce? Determining Intention in Zanzibar Courts,"* http://www.goliath.ecnext.com/coms2/summary (December 2006)

[33] Donald Horowitz, *"The Qur'an and the Common Law: Islamic Reform and the Theory of Legal Change,"* American Journal of Comparative Law, (1994) Vol. 42, 233 at pp. 274 and 277, respectively.

[34] See Juma Mrisho vs. Zakia Juma Shamte, High Court of Zanzibar, Civil Appeal No. 24 of 2006; Saida Ali Haji vs. Dude Hassan Juma, High Court of Zanzibar, Civil Appeal No. 20 of 2003 and Zakia Nassor Suleiman vs. Edha Riziki Edha, High Court of Zanzibar, Civil Appeal No. 20 of 2005 (all unreported).

The increase in the rate of divorce has been a subject of concern of the government in Zanzibar. According to one Kadhi, more than 95 percent of the marriage disputes brought before the court usually ended up in divorce.[35] The main challenge faced by the government in its attempt to address this problem is that Islamic family law permits divorce, if the procedure is complied with. A government spokesperson is quoted to have stated that the relevant ministry had received numerous complaints related to fathers neglecting to provide child support after divorce and that between January and March 2006, 33 divorce cases relating to the issue of child support had been filed. In a move to try and salvage the situation, the government had even gone to the extent of trying to convince fathers to provide child support following breakdown of marriages outside the court system but often with little success.[36] Despite this difficulty, there have been some further attempts by the government, this time geared at reforming the divorce legislation to guarantee support for women and children in the event of a breakdown of marriage.[37]

The increase in divorce rates is an indication that women in Zanzibar have increasingly been sensitized about human rights issues by, among other players, civil society organizations.[38] Efforts to address the problems by way of religious teachings to spouses have also been made but with little success. In some instances Courts have been intervened and ordered husbands to provide maintenance to children.[39] In other cases, however, Courts have frustrated the initiatives. In the case of Zakia Nassor Suleiman vs. Edha Riziki Edha,[40] for example, the husband had refused to send child support to the wife. The wife had spent her own funds to support the child. The Court held that the wife had deserted her matrimonial home and directed her to return the bride price in full

[35] See "Divorce Style Zanzibar,": http://headheeb.blogmosis.com/archieves/2006_html (December 2006)
[36] *Ibid*.
[37] See Joachim Omolo Ouko, *"The Challenges of Modernity to Islamic Divorce Law,"* Kenya Times, 15th May 2006
[38] A high ranking official in the office of the Director of Public Prosecutions has made similar observations. See http://www.marriagedebate.com/2006/05/divorce-zanzibar-style-april-27-2006.htm (December 2006)
[39] See for example the case of Msuri Muhamed Khatibu vs. Amina Issa Kara (on behalf of her 7 children) High Court of Zanzibar, Civil Appeal No.8 of 1987 (Unreported).
[40] High Court of Zanzibar at Vuga, Civil Appeal No. 20 of 2005.

despite the wife having requested the Court to deduct the amount she had used for supporting the issue of the marriage from the bride price.[41]

The Zanzibar government's attempt to reform the law and address the plight of women is a welcome development. It may, however, take time and would certainly meet challenges. Women of Zanzibar are also likely to pressurize the government if the process is unnecessarily delayed. The Canadian government found itself under pressure from Muslim women when a proposal was made to apply Islamic law in courts in the country at one time. The Canadian Council of Muslim Women did not mince its words in its position paper:

"..."We see no compelling reason to live under any other form of law in Canada, and we want the same laws to apply to us as to other Canadian women. We prefer to live under Canadian laws, governed by the Charter of Rights and Freedoms, which safeguard and protect our equality rights..." [42]

It is only a matter of time for a re-echoing of the Canadian Council for Women's position in Zanzibar where a cross-section of women will rise and demand changes in the divorce law to accommodate their concerns.

The above analysis suggests that the adequacy of the Kadhis' Courts to handle these matters is increasingly being called into question, both because their dockets are overwhelmed with divorce cases and because their child-support awards are often insufficient. Ultimately it is the women in most cases who end up with the burden.

4.3. Potential Areas of Conflicts

4.3.1 Islamic Family Law

The rise in the rate of divorce cases is Zanzibar, as noted above is intrinsically linked to the increasing awareness of individual rights, especially women's rights which have been

[41] The material facts of these two cases are basically the same, but decisions of the court are totally opposed.
[42] Quoted by Faisal Kutty in *"Canada's Islamic Dispute Resolution Initiative Faces Strong Opposition,"* http://www.washington-report .org/archives/May_2004/0405070.html (December 2006)

advocated at the international legal arena.[43] To some extent women's' rights movements have strong affiliations with the common law principles of equity and the rule of law. From this perspective therefore, the dimension of the potential conflict between Islamic law rules and common law notions of human rights is an issue that would have to be addressed with a view to providing some compromise. This would have a profound effect on Islamic family law principles in view of the fact that some influential jurists and scholars unfortunately often take male-centered approaches.

For a slightly over two decades now the Kadhis Courts have operated without rules of procedure and practice as is required by the law establishing them.[44] Section 9 (1) of the Kadhis Courts Act provides that the Chief Justice may, in consultation with the Chief Kadhi, make rules to guide the Kadhis Courts. Of course, the provision is not mandatory. In the absence of the rules, section 9 (2) directs the Kadhis Courts to apply the procedure and practice provided for by the Civil Procedure Decree. It should be noted here that the foundation of the practice and procedure of the Civil Procedure Decree is basically the common law. In this regard, the application of the practice and procedure of this Decree leaves a lot of leeway for the application and subsequent influence of common law principles in cases that are to be determined by Islamic law principles.

The other dimension of the potential conflict between the family laws applicable in the Kadhis' Court and common law can be detected from a review of some of the cases involving custody of children that have been resolved by the Court. The case of Asha Bint Khamis Thney vs. Abdissalaam Haji Dau,[45] for example, illustrates the potentiality of the perceived conflict. In this case, the common law welfare principle was applied with approval to ensure that the custody of the child was given to the mother. Fortunately, in this instance, the principle is also re-echoed in Islamic law where it is directed that the custody of the issue, if below the age of seven years old is to be granted to the mother.

[43] Some members of the ZAFELA (Zanzibar Females' Lawyers Association) had similar observations during interviews with the author

[44] See Justice Mbarouk Salim Mbarouk, *"Kadhi's Courts,"* p. 16. Paper presented at a workshop on Strengthening the Legal Profession in Zanzibar, Zanzibar Legal Services Center, 24th-25th February 2007, Bwawani Hotel, Zanzibar

[45] High Court of Zanzibar, Civil Appeal No. 40 of 1983 (Unreported)

The choice of precedent in this case, however, brings to the fore indications that hard cases would be difficult to deal with in future. In this regard, it is interesting to note that in arriving at its decision the court in the case of Asha Bint Khamis Thney made reference to the case of Waryoba d o/o Katara vs. Kirimi s/o Wangari.[46] In the latter case the court had reversed the lower court's decision that had granted the father custody of the child and gave it to the mother by applying the child welfare principle under common law.

The doctrine of precedent fortunately does not tie the hands of High Court judges faced with a decision of another High Court judge. In some cases, especially those that interpret religious teachings, the court is likely to exercise due care to avoid inconsistencies. This is especially true because it would be dealing with matters of faith where beliefs are considered to be directives from God.[47] It is in this regard, and with utmost due respect, that we submit that it is very unlikely that the court in the case of Asha Bint Khamis Thney vs. Abdissalaam Haji Dau simply overlooked the decision in the case of Paulo John Iddy vs. Mashauri Milanga[48] which is reported in the same Digest, immediately preceding the case of Waryoba before it opted to refer to the case of Waryoba. It must have been in the exercise of due diligence and care that the court avoided making reference to the reasoning in the case of Paulo John Iddy.

In the case of Paulo John Iddy, Biron, J, coming from a strong background and influence of the common law, awarded custody of the child to the mother by stating that such an approach was in line with the modern trend found in "*more modern sophisticated societies.*" It is submitted that had the court in Asha Bint Khamis Thney vs. Abdissalaam Haji Dau, referred to the case of Paulo John Iddy vs. Mashauri Milanga, it would most probably have put Islamic family law jurisprudence regarding custody of the child in jeopardy. The application of such an analogy would have been tantamount to setting a precedent for progressively accommodating the common law principle applied by the

[46] [1969] HCD 6
[47] Accordingly it is the teachings from the Holy Qu'ran and *Hadith* (oral traditions relevant to the actions and customs of Muslims) that provide the main guidance in the application of Islamic law. In some cases, however, the High Court has resorted to precedents not directly related to Islamic law.
[48] [1968] HCD 5

"more modern sophisticated societies" in Islamic family law. The Court cautiously and tactfully avoided doing so.

4.3.2 The Influence of Common Law Principles and the International Legal Order

The cautious approach taken by the court in the case of Asha Bint Hamis in the application of the child welfare principle is an important indicator for the approach likely to be taken by the High Court when faced with similar facts when called upon to interpreting Islamic law in the light of common law influences. The approach in the case of Asha Bint Hamis shows an example of how courts can leave little room for accommodating other common law principles such as the contribution of the wife in the division of matrimonial assets following divorce and domestic service. In this respect, therefore, it is difficult to agree with the assertion, advanced in some circles, that courts would easily entertain a "progressive approach" in reconciling Islamic law and common law principles.[49]

In taking the cautions approach, the court in Asha Bint Hamis seems to have re-echoed the caution sounded by Gluckman who has observed that:

"[P] redominately Muslim populations will not readily accept the adulteration of their personal law and religion by the introduction into their courts of alien procedures (common law principles)" [50]

We should quickly point out here that the court in the case of Asha Bint Hamis did not loose sight of the basically developments of at the international legal arena with regard to the rights of the child. In this case, the judge cited, with approval, Articles 33 and 35 of the United Nations Convention on Human Rights of 1948 which provide for children rights in the course of making a case for his decision. Of course, the judge cited other sources of Islamic law in the course of delivering judgment, but the point we would like to emphasize here, is the courts "acceptance" of the developments at the international legal order that have a significant bearing on the application of Islamic law.

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[49] See Abdulkadir Hashim, *"Muslim Personal Law in Kenya and Tanzania: Tradition and Innovation,"* Journal of Muslim Minority Rights Vol. 25 No. 3/Dec. 2005 pp. 449-460

[50] Gluckman, Ideas and Procedures in African Customary Law, p. 133

In the case of Khamis Mahunda Mpenda vs. Asia Ali Salum,[51] the court refused an application by a husband who had wanted to revoke a *talak* he had issued to his wife, claiming that he had not divorced her in accordance with the regulations prescribed by Islamic law. The wife was adamant. She did not want to return to her husband. The Court applied the rules of evidence rather loosely in order not to restrict the wife's right to end the marriage. No direct evidence was tendered before the court to prove that the husband had divorced the wife as is required under Islamic law. It is our considered view that the Court simply did not want to coerce the woman to be confined in a marriage which she did not want to be a part of. We also note that the approach taken by the Court in this case reflects an attitude change towards the rights of Muslim women under traditional (conservative) Islamic law.[52] It is submitted further that this trend also reflects elements of the concept of freedom of contract and equity under common law. Obviously, the approach taken by the Court may have not been received well among some hard - line believers on the Island, with due respect, including some of the High Court judges.[53]

The approaches taken by the courts in the cases of Khamis Mahunda Mpenda vs. Asia Ali Salum, and Asha Bint Khamis discussed above, seems to bring to the fore a trend which later led to further international concern on the rights of women and children on the Isles towards the end of the 1990's. It was therefore not merely by sheer coincidence that in 1999, the Zanzibar Declaration on Women and a Culture of Peace was adopted by a Pan-African Conference that was held in Zanzibar.[54]

It has also been pointed out that in its very nature Islamic law concerns itself with individual rights as opposed to group rights.[55] Group rights are essentially premised on a

[51] High Court of Zanzibar, Civil Appeal No. 2 of 1987, (Unreported)
[52] A similar trend has also been noted with the approach of the Kadhis' Courts in Kenya. See Susan Hirsch, (1998) Pronouncing and Preserving: Gender and the Discourse of Disputing in an African Islamic Court, University of Chicago Press, Chicago,
[53] See the case of Pili Pongwa Khamis vs. Ishau Abdalla Khamis High Court of Zanzibar, Civil Appeal No. 19 of 2005, (Unreported) where the court ordered a woman to return to her husband despite her protesting and instating on being issued with *talak*.
[54] For a copy of the Declaration, see http: www.africa.upenn.edu/Urgent_Action/apic_6799.html (December 2006)
[55] Gluckman, op. cit p. 134

combination of traditional African orientation and some features of the common law system, such as equity and social security rights. In this arrangement, the views of members of a community are usually taken into account before a dispute is settled. Certainly, an application of the categorization of the individual rights inclination would not easily achieve the harmonization of Islamic law and common law principles as suggested by some authorities.[56] On the other hand, the approach taken by the Courts in custody and divorce cases discussed is commendable. This is because it reflects, although with some slight divergence in the rulings, a gradual shift that seeks to resuscitate the need to chart out strategies to address the plight of women in the face of a rigorous application of Islamic law.

The analysis of the selected cases reveals some of the difficulties that have been and those that are likely to be encountered by Courts in accommodating Islamic law in a society which is undergoing increasing reform in terms of its social, economic and cultural structure. These changes call for the need to take into account, even if cautiously, interests that may have a common law bearing but without compromising Islamic law principles. The Court's task in this endeavor has not been easy, and will certainly no be for quite sometime to come.

4.3.3 On the Limitations of the Jurisdiction of the Court of Appeal

The Constitution of Zanzibar vests onto the House of Representatives the power to make laws curtailing the jurisdiction of the Court of Appeal.[57] The House of Representatives used the power vested in it in 1985, via the Kadhis' Court Act.[58] The Constitution itself also clearly ousts the appellate jurisdiction of the Court of Appeal on cases emanating from the Kadhis' Court.[59] The Appellate Jurisdiction Act, which provides for appeals to the Court of Appeal, also acknowledges the fact that the Court's jurisdiction could be ousted where it provides that:

[56] See footnote 23
[57] Article 99 (2) (c)
[58] See section 10 (3) of Kadhis' Courts Act No. 3 of 1985
[59] Article 99 (2) (b)

"In civil proceedings, except where any other written law for the time being in force provides otherwise, an appeal shall lie to the Court of Appeal…"[60] (emphasis underlined)

As noted earlier, the Kadhis' Court has exclusive jurisdiction on questions of Muslim law relating to the status, marriage, divorce and inheritance where all parties profess Islam. The jurisdiction of other courts, except the Court of Appeal of Tanzania, in matters of divorce is strictly confined to situations where the Kadhis' Courts process has been fully exhausted and either party seeks to appeal its decision. They also have power to determine matrimonial disputes that involve non-Muslims on matters of marriage performed in accordance with Islamic custom.

The jurisdiction of the Kadhis' Court is clearly provided for by the Kadhis' Court Act.[61] The Constitutionality of the provision ousting the jurisdiction of the Court of Appeal in Islamic law matters would be difficult challenge. This kind of exclusion is common in jurisdictions where Islamic law is applied, for example, in Malaysia where appeals from Muslim courts to secular courts are precluded. The main reason for this kind of exclusion, it has been suggested, is to give a zone of independent legal development of Muslim courts.[62]

Despite the clear legislative and constitutional provisions limiting the jurisdiction of the country's highest judicial organ, as noted above, in some cases, it is possible for the Court of Appeal of Tanzania to be called upon to determine a suit that commenced purely on issues of Islamic law. This is possible in situations where a case that commenced purely on Islamic law but it transpires that there is a mix of Islamic law and general law. A party in such a case may opt to appeal up to the Court of Appeal and the court would have jurisdiction to entertain the matter.[63]

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[60] Section 5 (1) of the Appellate Jurisdiction Act, Cap. 141 (R.E. 2002)
[61] Act No. 3 of 1985.
[62] Donald Horowitz, *op. cit*.
[63] Makaramba, *op.cit*. at p. 22 aptly analysis the case of Hamid Idd Bavuai et al vs. Abdalla Ahmed et al, (High Court of Zanzibar, Civil Appeal No. 16 of 1988 [unreported]) in the course of illustrating this possibility.

We should caution at this stage that in the event that a technicality in the application of Islamic law arises, the Court of Appeal may find itself is some difficulty. At the level of High Court, the law provides that 4 sheikhs who are well versed with Islamic law must preside and their decision is final. The position of the Court of Appeal may, in some case, be seriously jeopardized when confronted with appeals from the High Court in cases similar to that of Hamid Idd Bavuai *et al* vs. Abdallah Ahmed Abdalla. Even with the experts on Islamic law, the High Court itself has had to seek for external assistance in the interpretation of Islamic law. This happened in the case of Masoud Ali Kombo et al vs. Khalid Ali Kombo,[64] where the court was compelled to seek the assistance of the Attorney General as *amicus curie*, in what is stated as *"an awkward situation"* that it had been confronted with in the application of Islamic law.[65]

The case of Mohamed Rafik Ishaq et al vs. Anwar Hussein Jaffer *et al* [66] also has some significant bearing on the need to think over the curtailment of the jurisdiction of the Court of Appeal from entertaining appeals from the Kadhis' Court on matters of Islamic law. In this case the Court cited the relevant and applicable provisions of the law curtailing its jurisdiction. However, it still proceeded to determine the matter after tactfully interpreting the provisions of the Kadhis' Act to distinguish the facts of the case before it and bring it under its ambit. In its interpretation of the provisions of the Kadhis' Courts Act, the Court seemed to have implied that a decision of the Kadhis' Court on certain matters, for example, inheritance, does not determine the owner of the property in question, and therefore taking the issue out of those vested exclusively onto the Kadhis' Court.

The examples of instances where the Court of Appeal has or may exercise jurisdiction on matters vested exclusively on the Kadhis' Court leaves room for invoking the *per-incuriam* rule on appeal. There are plausible reasons why the appellate courts' jurisdictions have been ousted in cases dealing with some aspects of Islamic law. Some

[64] High Court of Zanzibar, Civil Appeal No. 16 of 1987 (unreported)
[65] See the letter bearing reference No. A/JM/19/87/84 dated 5th December 1987 from the Court addressed to the Attorney General of Zanzibar. (The letter is annexed to the Report by Makaramba, *op. cit* at pages 73-74
[66] Civil Appeal No. 35 of 1994 (unreported)

of the issues dealt with are technical and require persons well versed in Islamic law. These are usually settled at the level of the High Court where persons well versed with Islamic law sit with the judge. In such a set up the decision of the majority that counts. This implies that the judge could easily be outnumbered or overruled by the Sheikhs. Historically, the Court of Appeal has zealously guarded its appellate status, rebuffing any attempts to ouster its jurisdiction, ostensibly on the basis of the Court of Appeal Rules, which provides that this court may assume wider powers in order to ensure that justice is achieved.[67] This may be understandable in some cases. However, in our considered opinion, in Islamic family law matters, especially where the Justices of the Court of Appeal do not fully comprehend certain technical principles of Islamic law, it would be injudicious for the Court to take up cases from the Kadhis' Court.

5.0 Conclusion

The late Chief Justice of Tanzania, Hon. Justice Francis Nyalali once indicated that an understanding of a country's past systems is crucial to a better understanding of the existing ones.[68] Justice Nyalali's advice was re-echoed by his predecessor, Hon. Mr. Justice Barnabas Albert Samatta, almost a decade later when he said:

> ""*If future generations in our country are to make their decisions on the basis of adequate background information, history recording must be accorded the weight it deserves. It is very unwise, we believe, to shut the door on yesterday and throw the key away.*"[69]

It is in the light of the truism echoed by the two Chief Justices, among other factors, that this paper has traced the rise, development and concretization of the Kadhis' Courts system in Zanzibar to the invasion of the East African Coast by early Arab traders. It must be emphasized here that the paper has pointed out that even prior to these early traders, rudiments of the application of Islamic law in the institutions of dispute settlement were already in place on the Island. The arrival of the traders merely acted as a

[67] See Rule 3 of the Tanzania Court of Appeal Rules, [Cap. 141 R.E. 2002] [Subsidiary]
[68] See the case of A.G. vs. Lohay Akonaay *et al* [1995] T.L.R 80
[69] See the Chief Justice's speech on the official inauguration of the 25th Anniversary of the Court of Appeal of Tanzania on 15th September 2004.

catalyst to the establishment of a fully developed Kadhis' Court system that is in place today.

It has also been noted that aside from the early Arab commercial traders, another factor that played a significant role in laying a foundation for the emergence of a fully fledged Kadhis' Courts system in the Isles is the fact that over 90 per cent of its inhabitants process Islam and Islamic teachings are taken seriously.

The legislative reforms that took place since the era of the Sultanate throughout the British rule and the merger with the Mainland left the Kadhis' Court system intact. This was another important factor in cementing the system.

The case studies undertaken in this paper by way of sub-themes reveal some of the potential areas that may affect the smooth operation of the Kadhis' Court system in view of a number of developments in Zanzibar. With regard to Islamic family law it is likely that with the increasingly awareness of rights, gender activists and other stakeholders in Zanzibar would increasingly pressurize the government to invoke international legal instruments and common law principles to demand their rights. This trend has been witnessed, albeit after long periods of struggles, in some jurisdictions with similar legal settings.

Also, the Court of Appeal's insistence to zealously guard its mandate as the custodian of justice at the highest ranking may unfold a different outlook on the exclusive jurisdiction vested onto the Kadhis' Courts on matters of Islamic law. This may lead to a backlash from some sections of the population if reform processes to accommodate the Court of Appeal's position within a secular society do not take into account the views of and involve all crucial stakeholders.

On gender, we have pointed out some of the emerging trends at the international legal arena and even in the court system where efforts are being made to take on board the rights of women in Islamic family law. Of course, under certain circumstances, the

boundaries between Islamic law and common law on this matter are to some extent porous especially when pure Islamic teachings of gender equity, justice and freedom are brought onto the fore by applying interpretation which is consistent with the spirit of Islam. An attempt of grafting the western paradigms onto the existing Islamic rules will be neither fair nor just.

In concluding, we should highlight one crucial dimension which may set a basis for potential conflict in the operation of the Kadhis' Court system in Zanzibar. Our concern here relates to the differences in the sects among the Muslim community on the Isles. Sometime in October this year (2006), towards the end of the Holy month of Ramadhan, it was reported that some people of the *Ansar Sunna* sect were sent to court for celebrating the end of the Holy month before the citation of the Moon by the Kadhi.[70] The fallacy here is that the Kadhis' Courts Act which provides for the qualifications for one to become a Kadhi are very clear and on the face of it so simple: He must be a follower of Islam who has knowledge of Islamic law that applies to <u>any</u> sect or sects of Muslims.[71] It is not too far fetched to imagine the extremity in the positions likely to be taken by Kadhi's from different sects if the above case was brought to them for determination.

Non-recognition of the diversity of sects and the subsequent differences in the perception of Islamic law within the sub-set of Muslims on the globe in general and the Isles in particular poses a danger with respect to the effective operation of the Kadhis' Court system.

The Kadhis' Court system in Zanzibar is recognized by the Constitution and exists within a secular State. However, the Court is for all intents and purposes, a State institution but unlike other courts which are also dependent on tax payer's money, the Kadhis' Court is seriously under funded. The security of the Court's personnel and documents is also in a serious state and needs recuperation. We have also demonstrated that it is not the whole

[70] See home.globalfrontiers.com/zanzibar/zanzibar_news.htm(December 2006). There was no sufficient time to make a follow-up of this case due to time constraint.
[71] See section 5 (3) of the Act.

corpus of Islamic law that is applicable in the Kadhis Court. Rather it is only that part of the law that regulates marriage, divorce and inheritance which applies. Furthermore the parties who appear before the Kadhis' Court must profess the Islamic faith and the evidentiary provisions are regulated by the State to ensure non-discrimination on the basis of, *inter alia*, sex.

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