

Administration of Islamic Law in Kadhis' Court in Zanzibar: A Comparative Study with the Syariah Courts in Malaysia

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Abstract

Protection and application of Muslim Personal Laws (MPL) is one of the fundamental problems presently faced by many Muslims. The practices that regulate social life of Muslims, particularly at State level, do not appear to be fully in accord with Islamic law, may be because the same are politically controlled and statutorily limited. As a consequence, the functioning of the courts elsewhere and that of Kadhi's Courts in Zanzibar in particular has become both complicated and difficult. The same in view an attempt is made, hereunder to study and examine the legal framework of administration of MPL in Zanzibar its problems and prospects while juxtaposing it with the practice of the courts in Malaysia without losing the sight of historical developments of the both in this regard. Finally suggestions shall be made as how to strengthen the application of MPL in Zanzibar.

I Introduction

Many Muslim countries which guarantee freedom of religion also permit the application and administration of the Islamic law at different levels of their social reality. But the majority of such countries, with exclusion of those which fully follow Islamic law, allow only the matters of personal status to be governed by Islamic law. The states of Zanzibar and Malaysia respectively are among the countries that fall within the latter category. Though unlike Zanzibar, Malaysia allows some criminal offences to be dealt with and adjudicated by the *Syariah* Courts,² yet the significant portion of Islamic law dealing with the matters of personal status are mainly administered by the same courts.

There is agreement among Muslim jurists that subjects like marriage, divorce, maintenance, custody, inheritance and the matters *ejusdem generis* have clearly been dealt with by the *Qur'ān* and *Hadith*. The Islamic Schools of thought invariably subscribe to this view, yet the state legislations are passed only with an aim to smoothen and facilitate

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² See The Administration of Islamic Law (Federal Territories) Act 1993, Act NO. 505. Part V, Sections 58—59. For details of the offences covered see: Syariah Criminal Offences (Federal Territories) Act 1997, Act 559, the offences liable prosecution under this Act relate to '*aqidah*', offences relating to the sanctity of the Religion of Islam and its institution, offences relating to decency, and other miscellaneous offences. In all the States of Peninsular Malaysia, The Syariah Courts (Criminal Jurisdiction) Act 1965, Act 355 regulate such offences. See also List II of the State List of the Ninth Schedule to the Federal Constitution. This paper, however, does not intend to discuss criminal jurisdiction of *Syariah* Courts.

the admiration of Islamic law by the courts in Muslim countries. The legislations made by these states are certainly based on Islamic principles, expected the least to contravene the basic sources of *Shari'ah* because it being the settled principle of Islamic law and jurisprudence that the issues that are expressly dealt with by the *Qur'an* or *Hadith* cannot be re-opened and/or decided under any other law. This in view, it may be timely to examine and analyze the contours of legislation, its application and its administration in the courts of Zanzibar with its genuine comparison with Malaysian Federal Territories Law.³ It is so desired because it was around 10th century A.D that winds of Islamic faith blew over coasts of Zanzibar and Malaysia. Apart from that the things can be understood better by comparison and contrast.

II Introduction of the Islamic Law

It is believed that prior to advent of Islam in Zanzibar there was no system of law, worth the name operative, until the vacuum was filled by *Shari'ah* or say Islamic law which consequently assumed the significance of being the fundamental law of the land over the period of time. The latter has over the period of time gradually absorbed the customs of the people and successfully created both the order and peace society.⁴ Zanzibar people, appear to have embraced Islam back in 10th century, as may be ascertained from the records preserved at the Friday mosques at Kizimkazi that was built in 500 HD/1107 AD, which in turn attest to the fact that Islam may have spread in Zanzibar during that period. Around the same period it is reported that Islam had reached coastal territories of Malaysian may be because both the territories had assumed importance of trading centers en-route to South of Asia and Africa respectively.⁵ Ibn Battuta seems to have pointed at the same when he asserts in his chronicle that around 1331 A.D the whole of the coast of East Africa followed Sunni Muslim faith of Shafi'i creed.⁶

However, it being significant enough that the advent of Islam in Zanzibar in 10th Century A.D was followed by the introduction of Islamic law. As a natural consequence Islamic law thereafter continued to shape the lives of people until the advent of the

³ The Federal Territory is a collectively combination of three territories: Kuala Lumpur, Putrajaya and Labuan, governed directly by the federal government of Malaysia. Kuala Lumpur is the national capital of Malaysia, Putrajaya is the administrative capital, and Labuan is an offshore international financial centre. Both Kuala Lumpur and Putrajaya are enclaves in the state of Selangor, while Labuan is an island off coast of the state of Sabah. For further details see: Wikipedia, The Free Encyclopedia, Federal Territory (Malaysia), <[http://en.wikipedia.org/wiki/Federal_Territory_\(Malaysia\)](http://en.wikipedia.org/wiki/Federal_Territory_(Malaysia)) (accessed on 6 September, 2013).

⁴ W. H. Ingrams, *Zanzibar Its History and Its People*, London: Taylor & Francis Ltd, 1967, at 267. See also. B. Martin, *Zanzibar: Tradition and Revolution*, (London: Hamish Hamilton, 1978), at 40.

⁵ The recognition of Islam in Peninsular Malaysia has been a fact since C.E. 674 (forty-two years after the death of Prophet Muhammad, SAW) when the Umayyad ruler Muawiyah was in power at Damascus. Two hundred years later in C.E. 878 Islam was embraced by people along the coast of Peninsular Malaysia including the port of *Kelang* which was a well-known trading centre. See, Hj. A. Kamar, *Islam in Peninsular Malaysia*, Books and E-Books on Muslim History and Civilization, <<http://www.cyberistan.org/islamic/mmalay.htm>> (accessed on 5 September, 2013). See also <http://www.islamawareness.net/Asia/Malaysia/ismy.html>.

⁶ M. Hariton, *Shanga: The Archeology Muslim trading Community on the Coast of East Africa*, (British Institute in East Africa, 1996), at pages 419 and 427. Also see Wikipedia, <http://en.wikipedia.org/wiki/Islam_in_Zanzibar> (accessed on 15 of March, 2013).

British in the early 18th century. But during the intervening period, it should be admitted that the Islamic system of law was by and large bereft of semblance of system of law as was true of it when compared with other territories inhabited by Muslim people. In the case of Zanzibar it was finally the British who introduced an organized system of courts, based on their model wherein the judges and lawyers were trained in the common law practices of England.⁷

Notwithstanding this, it has to be admitted that the courts were charged with administration of justice and till the year 1908 the only law that covered both civil and criminal matters and thus enforced in the Courts of His Highness the Sultan was Islamic Law.⁸ The British were slow but definite in their resolve to replace Islamic law so the latter survived for some time the onslaught and remained in operation along with introduction and application of the Common law in Zanzibar by British.⁹ But the Decree of 1923 in effect ousted the Criminal jurisdiction of Sultan's Courts consequently both the Islamic Criminal law and Islamic Law of Evidence were wound up leaving only the civil matters to be heard by the Sultan's Court.¹⁰

The period that followed was marked by the conflict between the local law *i.e.*, Islamic law and the Common law principles. This phenomenon was observable in all those territories that had fallen to British occupation and domination. Malaysia and Zanzibar were never an exception to this. We call it phenomenon because control over administration of justice by the colonial powers in effect speeded up intellectual both physical impoverishments. This had to be achieved systematically and intelligently. For the same reason the colonial laws and the judges for some time acknowledged viability of local laws and customs in the administration of justice and treated it in application at par with Common law until they gradually and tactfully ignored the former and preferred the newly imported laws and new legislations over it.¹¹

⁷ A. H. Bin Haji Mohamad, 'Civil and Syariah Courts In Malaysia: Conflict of Jurisdictions' [2002] 1 *MLJA* 130. See also A. H. Yadudu, 'Impact of Colonialism on Islamic Law and Its Administration in Nigeria' [1993] *ICLR XIII*: 2, at pages 144 – 153. Also see N. Haider, 'Islamic Legal Reform: The Case of Pakistan and Family Law' [2000] 12 *Yale J.L. & Feminism* at pages 287 – 341.

⁸ The Muslim Courts were under the authority of the Sultan of Zanzibar prior to the arrival of the British Colonialists. See Hussein Abbas (Muslim), Kadhi Courts and the Clamor for a New Constitution, 02 May, 2010, <<http://kenyapolitical.blogspot.com/2010/05/kadhi-courts-and-clamor-for-new.html>> (accessed on 11March, 2011).

⁹ As was provided, by section 7 of the Zanzibar Court Decree in 1923, under which the Courts of His Highness the Sultan for the time being constituted, that "in civil matters the Law of Islam is and hereby declared to be fundamental law of our Dominion. "After the independence of Zanzibar and major reorganization of the court system in 1985, Islamic law was again declared to be applicable law but only before Kadhis Courts and for the matters pertaining to Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion. See Section 6 (1) of Kadhis' Court Act, 1985 (Act No.3 of 1985). Moreover, the commentators defined law of Zanzibar to mean fundamental law of Islam as interpreted according to the rules of the Ibadhi and Shafi'i schools. See J. H. Vaughan, *The Dual Jurisdiction in Zanzibar*, (London: Watmoughs United, 1935) at 46.

¹⁰ Vaughan, *The Dual Jurisdiction in Zanzibar*, at pages 27 - 38.

¹¹ F. S. Shuaib, 'Constitutional Restatement of Parallel Jurisdiction between Civil Courts and Syariah Courts in Malaysia: Twenty Years on (1988 – 2008), [2008] 5 *MLJA* 35. See also: W. Menski, *Comparative Law in a Global Context: The Legal System of Asia and Africa*, second edition (Cambridge: Cambridge University Press, 2006), at 6.

The consequences that followed were adverse on the socio-political life of Muslims because the role of Islamic law that is itself stated to be the complete code of conduct was limited to private sphere *i.e.*, left to regulate only the matters of personal status. This was followed making a resort to selective codification of laws of personal status. Although it resulted in transformation of Islamic law and unification of Muslim Personal Law (MPL) thereby facilitated the speedy dispensation of justice but this legislation was based only on the translation of certain religious texts. Apart from that the colonial authorities prioritised certain sources of Islamic law while downplaying others thereby limited the confines of MPL, either directly or through selected intermediaries. The main purpose was only to ensure that the jurisdiction of over zealous was not encroached beyond the defined limits.

A Zanzibar: The Reception of Foreign Law

The grafting of Common law on the soil of Zanzibar in late 1800's substantially changed the content of laws and the style of administration of justice. It was by virtue of 1887 Order in Council that established His Highness British Court in Zanzibar, which entirely applied common law. Notwithstanding this the *Sharī'ah*, for some time, continued to enjoy significance as being the fundamental law of the land.¹² However, the position changed when the English Statutory Law of the Crime and the Law of Evidence displaced the principles of Islamic law.¹³ It so happened that around 1917 the Evidence Decree replaced the *Sharī'ah* law of evidence in favor of English Law of Evidence.¹⁴ This should be understood in the background that around 1908 the courts in Zanzibar eagerly applied the statutory law and the principles of Common law and equity in matters that would otherwise call for application of Islamic law.

Around this time, judiciary had reasons to assert and hold to its views because the status of Zanzibar had changed from an independent State to mere a British protectorate that consequently changed the entire power structure. The Sultan stood as an administrative head of the State and on the other hand the British King in Council enjoying the sovereignty and both had the mandate to pass the laws that would regulate the affairs of the people in Zanzibar, with the former having preferential power to legislate for British subjects in Zanzibar and to impose any Act of Parliament, declared by Imperial Enactment (Application) Decree, 1939, to be applicable to subjects of the Sultan.¹⁵

Thus, the Zanzibar Order in Council, 1897, introduced His Majesty's criminal and civil jurisdiction in Zanzibar. As such most of the law enacted by the Indian legislature under the supervision of the Governor-General of India or enacted by the Governor of Bombay in Council whether with respect to substantive law or the procedure, and practice to be observed by or to be followed before, the Court in the Presidency of Bombay or any

¹² Section 7 of Zanzibar Courts Decree, 1908.

¹³ See section 5(1) of The Jurisdiction Decree, 1908.

¹⁴ Section 2 of Evidence Decree.

¹⁵ For more elaboration on the complexity of dual application of law in Zanzibar during this period see S. Abrahams, 'The Conflict of Laws in Zanzibar' [1941] 3rd Series, 23 Journal of Comparative Legislation and International Law, 4, at pages 169 – 215.

other jurisdiction which were in accordance with the common law and statute of law of England were to be applicable to Zanzibar under the afore stated order.¹⁶

On the other hand, the Sultan himself retained the legislative power over his own subjects and it was exercised by virtue of a Decree passed by the Legislative Council. Therefore, Islamic law was applied by his courts *i.e.*, (Kadhis' Courts – exclusively Muslim Courts), though with number of limitations. However, as stated above, *Shari'ah* law was partially replaced by the 1917 Evidence Decree, which was the replica of Indian Evidence Act. Same was true about criminal and civil procedure which were adopted by virtue of Decrees passed by the Legislative Council and assented to by the Sultan. For the reason to bind British Courts in Zanzibar with the same procedure the British Resident also counter signed it along with the Sultan. As such the same laws of procedure were made applicable under both the jurisdictions namely Kadhis Courts and British Courts respectively.¹⁷ This formula has withstood the vicissitudes of the times, so it binds the Courts in Zanzibar until present times.

B Malaysia: The Reception of English Law

Significantly, the mode and manner of introduction of foreign law in Malaysia has been similar to that of Zanzibar. In this regard, it is observed that before the coming of the colonial powers, the Islamic law, which had successfully absorbed customs of the peoples, assumed significance of law of the land in the Malay States.¹⁸ Even in some States like Malacca, the Islamic law had reached to the level of compilation and codification. However, with the downfall of the Malacca Empire the version of the Malaccan Laws were adopted and followed by the courts of the neighboring States¹⁹ like Pahang, Johore and Kedah.²⁰ However in Trengganu the Islamic Law was applied particularly in the times of Sultan Zainalabidin III.²¹ Likewise, in *Johore the Turkish Civil Code namely Majallat al-Ahkam* and the Hanafite Code of Qadri Pasha of Egypt were translated into Malay, and together formed the *Ahkam Shariyyah* of the Johore state.²²

The advent of British the Islamic law in Malaysia was influenced by the English law and its instant effect was remarkably noticeable in most of the Malay States.²³ For

¹⁶ Among the law introduced by this order are India Lunacy Act; so much of the India Post Office Acts relates to offence against the Post Office; the India Divorce Act except so much as relate to Divorce and nullity of marriage; Bombay Civil Court Act; the Indian Evidence Act; The Indian Contract Act; The India Limitation Act 603, Penal Decree, Criminal Procedure Decree, Evidence Decree and others.

¹⁷ J. E. R. Stephens, 'The Laws of Zanzibar,' Journal of the Society of Comparative Legislation New Series, [1913] Vol. 13, No. 3 at pages 603 – 611. Contributed by J. E.R. Stephens Magistrate of the Court of His Britannic Majesty and His Highness The Sultan of Zanzibar. Article 14 of 1914 Zanzibar Order in Council.

¹⁸ A. Ibrahim and A. Joned, *The Malaysian Legal System*, (Kuala Lumpur: Dewan Bahasa dan Pustaka, 1987) Chapters 1 – 3 and *Shaykh Abdul Latif and Other v. Shaikh Elias Bux* [1915] 1 *FMSLR* 204 at p. 214.

¹⁹ L. Y. Fang (Editor) *Undang-Undang Melaka*, (The Hague, 1976).

²⁰ J. E. Kempe and R. O. Winstedt, 'A Malay Legal Digest of Pahang' [1948] *JMBRAS* 21 Part I at pages pp. 1 - 67.

²¹ *ibid*

²² *Majallah Ahkam Johore* 1331 AH and *Ahkam Shariyyah Johore*, 1949.

²³ Historically, there were at least four colonial powers in Malay before it finally achieved independence. Despite that, British influence on the legal system is the most evident. English law had the greatest influence on the local system.

example, the English law that had by now taken both the form and shape of the codes promulgated in India was earnestly introduced by the British in Malaysia and the Malay Sultans had been left with no choice but to graft it on their soil. As a result of this, the Indian Penal Code, the Contract Act, the Evidence Act, the Civil Procedure Code, the Criminal Procedure Code and the like had become applicable. Pursuant to this, the land law legislation based on the Torrens System was introduced. However the British were deliberate to exempt the application of this law to the matters of personal status. For example, under the Strait's Settlement of 1878 that introduced the Charters of Justice it was stated that English law was not to be applied if it caused hardship or injustice to the inhabitants; in that case the inhabitants were allowed to apply their personal laws as the English law it was observed sometimes came into sharp conflict with the morals and values of the local people.²⁴

This gesture apparently prepared the ground to import the Common law of England and its rules of equity to Malaysia that mixed it with the local system of Malay law and finally clothed as the Civil Law Ordinance in 1956.²⁵ This Ordinance has remained in vogue until this date except it being known as Civil law Act 1956 Act 67 and being revised in 1972.²⁶ The Act enabled British to import the principles of Common law and its rules of equity as the Act declares the same "shall be applied in so far as the circumstances of the States of Malaysia and their respective local inhabitants permit and subject to such qualifications as local circumstances render necessary."²⁷ This in fact diminished the significance of Islamic law and its area of application was quarantined.

From the above, it becomes clear that in both the territories of Zanzibar and Malaysia the British allowed application of Islamic law only in matters of personal status that too subjected to the condition that Islamic law should not be repugnant to constitution or any law for the time being in force nor should it be immoral or against principles of natural justice. The permission to allow limited application of Islamic law was in fact looked at by the British as a means to an end, but not the end in itself. They intended to enhance colonial rule over local communities, and sanctioned limited legal autonomy to these communities as a matter of strategy only to tighten the noose around the Muslim populace without injuring their religious sensibility.

III DILUTION OF THE SHARĪ'AH JURISDICTION

The administration of Islamic law for obvious reasons could not grow and develop in Kadhis' Courts any more after the reception of Common law in Zanzibar. The Common

²⁴ M. Rutter, *The Applicable Law in Singapore and Malaysia*, Singapore, (Malayan Law Journal Pte Ltd, 1989), at pages 117 – 118. See also S. Aziz, 'The Malaysian Legal System: The Roots, The Influence And The Future' [2009] 3 MLJA 92 at 93

²⁵ *Ibid.*

²⁶ Before that there were Civil Law enactments of the Federated Malay States of 1937, which was later extended to the Unfederated Malay States by the Civil Law, (Extension) Ordinance, 1951. The Civil Law Ordinance, 1956, Federation of Malaya Ordinance No. 5 of 1956, was again modified and extended to Sabah and Sarawak by PU (A) 424/1971.

²⁷ Section 3 of the Civil Law Act 1956.

law practices adversely affected both the and the jurisdiction of the Kadhi's Courts no sooner the Zanzibar Order in Council of 1914 was passed which introduced the Evidence Decree, 1917.²⁸ This affected the abrogation of Muslim law of evidence and the Kadhi's Courts would not apply the Islamic principles of evidence any more as section 2 of the Decree clearly stated "the Muslim Law of evidence shall not apply in any of the court in Zanzibar."²⁹ The instant effect of the same may be gathered from the case of *Rashid Bin Said El-Hanoi v. Abdulah Bin Ali El-Hinawi*³⁰ before His Highness the Sultan's Court for Zanzibar. Knight Bruce, Acting J., granted the appeal of the applicant against the order of the Kadhi demanding the respondent to take an oath of satisfaction or precautionary oath. The Judge while referring to section 2 of the Evidence Decree, 1917 quashed the order of the Kadhi on the ground that the Muhammadan law of evidence did not apply in any court in Zanzibar.³¹

It was latter emphasized that the intention of the legislature was that no court should order an oath to be taken for the purpose of deciding an issue.³² The colonial influence is hitherto noticeable as may be gathered from the case of *Idrisa Hussein Mrisho v. Sihaba Soud Waziri*³³ which emanated from Kadhis' Court, that was challenged by the Appellant and the appellate court invoked section 118 of the Evidence Decree and turned the decision around.³⁴

IV POST-COLONIAL PERIOD AND THE ISLAMIC LAW

Notwithstanding the truncated application of Islamic law in the territories of Muslims the *Shari'ah* has ostensibly been recognized as supreme everywhere in these lands. In Zanzibar, it is *de facto* recognized since it being the sacred and thus had been proclaimed as the supreme law of the land that regulated all aspects of social reality. However, with the advent of the British in 18th century changed the very notion of civil law. The philosophical foundations of law changed as result Zanzibar was influenced and guided by western theories of governance apart from experiencing the inevitable pressure of modernization. As a result Zanzibar adopted British model and proclaimed democratic³⁵

²⁸ Evidence Decree, 1917 (Cap. 5 of 1917).

²⁹ *ibid.*

³⁰ *Rashid Bin Said El-Hinawi v. Abdulah Bin Ali El-Hinawi* [1934] Civil Appeal No. 16 ZLR 85.

³¹ *Ibid.*

³² *Aley Bin Saleh Abdusalami v. Muhamed Bin Saleh Abdusalami* (4 ZLR 63).

³³ [2009] Civil Appeal No. 30 High Court, Vuga, (Unreported).

³⁴ Section 118 of Evidence Decree, 1917. The section provides that "all people shall be competent to testify unless the court considered that they are prevented from understanding the question put to them or from giving rational answers to those questions by tender years, extreme old age, disease, whether of body or mind or any other course of the same mind."

³⁵ The preamble of the Zanzibar Constitution, 1984 provides: "AND WHEREAS, those principles can only be realized in a democratic society in which the Executive is accountable to a House of Representatives composed of elected members and representatives of the people and also a judiciary which is independent and dispenses justice without fear or favour thereby ensuring that all human rights are preserved and protected and that the duties of every person are faithfully discharged." See also section 5 of the Constitution which provides Zanzibar shall be a state of multiparty democracy which shall uphold the rule of law, human rights, equality, peace, justice and equity.

and took the secular out look that dominated the intellectual and political sight of the people.³⁶ In turn, the Common law inspired legislations did comfortably over ride *Sharī'ah* and significantly reduced personal status. This was caused by many reasons but not limited to radical nature of the traditions, pressing demand of Western modernization, the less regard of colonial rulers to develop Islamic law.³⁷ Only they did was to pay lip service to *Sharī'ah* so as to avoid avoided an open confrontation with its guardians.

A *Sharī'ah and the Constitutional Ambivalence*

Although Zanzibar is not an Islamic state nor does it proclaim Islam as being the official religion yet the Islamic law is both *de facto* and *de jure* recognized. The same is not true of Malaysia where Islam is declared under Article 3 of its Constitution to be the official religion, despite the fact that the state is practically a secular entity.³⁸ The Constitution of Zanzibar on the contrary provides distinct treatment to religion. Though the constitution avoids any reference to its Islamic or secular but the fact is to the contrary. The importance and of Islam and its exalted position is discernible from the Constitutional postulates. Its application is impliedly recognized since the same is subjected to no legal restriction. Furthermore, it receives special attention in all official and non-official activities.

The Constitution of Zanzibar proclaims in Article 9 (2) that “without prejudice to the relevant laws the profession of religion, worship and propagation of religion shall be free and a private affair of an individual . . .; To clear the doubt as to what religion refer to in this section, subsection 3 of the same section provides that the word “religion” shall be construed as including any reference to religious denominations and cognate expressions shall be construed accordingly. Thus, the dominion religion in Zanzibar is Islam where over 98 percent of the population is Muslim.³⁹

In addition, the Zanzibar Constitution empowers the legislature to establish courts subordinate to the High Court and without prejudice to the provisions of this Constitution, those courts so established are vested with power and jurisdiction as provided by law.⁴⁰

³⁶ See, A. Najmabadi “Hazards of Modernity and Morality: Women, State and Ideology in Contemporary Iran,” in D. Kandoyoti (ed.) *Women, Islam and the State*, (London: Macmillan, 1991).

³⁷ See Z. Mir-Hosseni, *Marriage on Trial, A Study of Islamic Family Law in Iran and Morocco Compared*, (London: I. B. Tauris & Co Ltd Publishers, 1993), at 10.

³⁸ According to the Article 3 (1) of the Federal Constitution In Malaysia, *Incorporating all amendments up to P.U.(A) 164/2009, First introduced as the Constitution of the Federation of Malaya on Merdeka Day: 31st August 1957 Subsequently introduced as the Constitution of Malaysia on Malaysia Day: 16th September 1963* “Islam is the religion of the Federation; but other religions may be practiced in peace and harmony in any part of the Federation.” But despite of the political testament of the Alliance dated 25 September 1956 which stated “the religion of Malaysia shall be Islam.” The observance of this principle shall not impose any disability on non-Muslim nationals professing and practising their own religions and shall not imply that the state is not a secular state. Furthermore, other religions may be practised in peace and harmony in any part of the Federation. For more clarification on Status of Islam in Malaysia see Dato Faiza Tamby Chik, “Malay and Islam in the Malaysian Constitution” [2009] 1 *MLJA* 129 at pages 137 – 138.

³⁹ And though the section guarantees for freedom of religion, in the Islamic context, freedom of religion does not mean freedom from religion. See *Kamariahbe Ali dan lain-lain lwn Kerajaan Negeri Kelantan, Malaysia dansatulagi* [2002] 3 *MLJ* 657 (CA), at 665.

⁴⁰ Article 100 of the Zanzibar Constitution [R.E. 2006] as amended by section 32 of Act No. 2 of 2002.

In regard with this Article existing Kadhis' Courts were created by the legislature. The Kadhis' Courts so created have, therefore, been empowered to exercise jurisdiction with regard to matters involving the determination of questions of Muslim law relating to personal status.⁴¹ More significantly the law to be applied in these courts is Islamic law. For the same reason section 6(1) of the Constitution provides that "A Kadhis Court shall have and exercise jurisdiction in the determination questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion." This section does not provide the details regarding the kind and nature of matters which powers have to be exercised by Kadhis' Court. As a sequel to it cases and claims of diverse nature are presented to the Kadhis for adjudication which apparently do not fall court under the Kadhis' jurisdiction.⁴²

On the contrary, same is not the position under Malaysian laws. All matters which are under the jurisdiction of Syariah Courts have been mentioned and enumerated in the Malaysian federal constitution under List I para.(1) states:

Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; Zakat, Fitrah and Baitulmal or similar Islamic religious revenue; mosques or any Islamic public places of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List...

Apart from this the Federal Constitution has made it straight and clear that the civil courts shall have no jurisdiction in respect of any matter that falls within the jurisdiction of the Syariah courts.⁴³

In Malaysia, Syariah courts, which are lexically similar to Kadhis' Courts of Zanzibar, were established by virtue of a specific provision of the Federal Constitution. The list II Para (1) (state list) of Malaysia Federal Constitution provides, inter alia:

... The constitution, organization and procedure of Syariah Courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only

⁴¹ Section 6 (1) of Kadhis Court.

⁴² See the case of *Suleiman Ali Haji and Ngwali Suleiman Ali v. Moh'd Ali Haji and Kidawa Ali Haji* [2009] Civil Case No. 462, District Kadhis' Court, Mwanakwerekwe, (unreported). The plaintiff filed a case of selling a house fraudulently which is typical a case within a jurisdiction of civil courts. Kadhis' Court however, entertained the case and convicted the defendant. It is shown here that the Kadhis' Court exercised its power out of jurisdiction but neither party appealed.

⁴³ Article 121 (1A) of the Malaysian Federal Constitution.

of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by Federal Law, the control of propagating doctrines and beliefs among persons professing the religion of Islam, the determination of matters of Islamic Law and doctrine and Malay customs.

It was under this paragraph that state legislatures made laws (called Enactments) thereby created the Syariah Courts in their respective states.⁴⁴ The administration of Islamic law in all of States identified in Constitution, therefore, depends upon the said enactments. On the contrary in Federal Territories of Malaysia, the constitution, jurisdiction and powers of Syariah Courts is enumerated under part IV of the Administration of Islamic Law (Federal Territories) Act 1993, Act No. 505.⁴⁵

B Protection of Islamic Law by other Laws

Apart from the above mentioned legislations that deal with the administration of Islamic law in Zanzibar there are some statutory Institutions like Wakf and Trust Commission created under the Wakf and Trust Act, 2007 (Act No. 2 of 2007),⁴⁶ which is vested with powers to administrator Wakf properties, Trust properties and estate of deceased Muslims.⁴⁷ The other functions of the Commission are to coordinate Hajj (pilgrimage) activities in relation to pilgrims from Zanzibar and to regulate individuals, firms or associations providing travel and other services to pilgrims;⁴⁸ to coordinate and regulate the provision, collection and distribution of Zakkah and other charitable gifts, provisions and offerings for religious purposes or cause;⁴⁹ and to coordinate national ‘Idd prayers and “Idd Baraza” (the council of ‘eid).⁵⁰

Another important government Institution namely Office of the Mufti is established to deal with the personal matters of Muslims that may be bearing mundane or divine nature.⁵¹ This Office was introduced in 2001 by the Office of Mufti Act.⁵² As a guardian of Muslims in Zanzibar, the Office of Mufti is assigned number of functions that involve the application and interpretation of Islamic law on the basis of opinion of ‘*ulamā*. The functions of the Mufti *inter alia* include issuing of a “*fatwa*” or ruling on any issue whether secular or religious nature brought before him for his opinion. The office of the

⁴⁴ M. Mokhtar, ‘Administration of Family Law in the Syariah Court’ [2001] 3 *MLJA* at 82.

⁴⁵ See section 40 – 56.

⁴⁶ This law was made to repeal The Wakf Property Decree, 1980 (Chapter 103 of 1980), the Wakf Validating Decree, 1980 (Chapter 104 of 1980) and the Wakf and Trust Decree, 1980 (No.5 of 1980). See section 68 of the Act.

⁴⁷ Section 4 (1) (a) (i) – (iii) of the Wakf and Trust Commission Act.

⁴⁸ Section 4 (1) (b) *ibid*.

⁴⁹ Section 4 (1) (c) *ibid*.

⁵⁰ Section 4 (1) (d) *ibid*.

⁵¹ Mufti in this regard is appointed by President from Zanzibari who, in the opinion of the President, is qualified and has adequate knowledge in Islamic “*Sharī‘ah*” and other religious matters and that he commands respect among Islamic scholars and Muslim community in general, see Section 4 (2) of the Office of Mufti Act, 2001 (Act No.9 of 2001) [R.E. 2006].

⁵² See section 3(1) of the Office of Mufti Act, 2001 (Act No.9 of 2001) [R.E. 2006].

Mufti may, on occasions, perform adjudicatory functions as well. As he may be asked to settle any religious dispute arising between Muslims; and or arising between Muslims and other with the consultation with leaders of that other religion.

The office of Mufti is also assigned some academic functions as well. It has to supervise Islamic research activities and organize lectures, workshops, seminars and other Islamic activities within the country.⁵³ It is the responsibility of the Office of Mufti to coordinate, supervise and keep record of the activities of all mosques. Besides, it coordinates and announces the sighting of a new moon. To approve the registration of Islamic Societies in accordance with the provisions of Societies Act, 1995 (No. 6 of 1995) and to do all such acts as may be incidental or conducive to the attainment of the objectives of this Act for the benefit of Muslim community.⁵⁴

In keeping the collaboration of other Islamic institutions, the Mufti of Zanzibar is required to work hand in hand with the Office of Chief Kadhi and Executive Secretary of the Wakf and Trust Commission.⁵⁵ This shows that except the office of Mufti has no powers to take *suo moto* notice of the social conduct that violates the principles of Islamic law otherwise the social life in Zanzibar is per se controlled the office of Mufti in Zanzibar.

In Malaysia, process of administration of MPL has been incorporated into The Administration of Islamic Law (Federal Territories) Act 1993. The main objective of this Act being to provide for the enforcement and administration of Islamic Law, the organization and Constitution of the Syariah Courts, and other matter related thereto. It established *majilis*, bodies, and other committees to regulate the affairs of Muslims in accordance with the principles of Islamic law.⁵⁶ The Act also defines constitution and the jurisdiction of *Syariah* Courts along with matters relating to appeals.

All matters with regard to the religion of Islam are governed by the body known as the “*Majlis Agama Islam Wilayah Persekutuan*” which is constituted by 22 members⁵⁷ empowered to advise the Yang di-Pertuan Agong in matters relating to the religion of Islam.⁵⁸ The *Majlis* is a body corporate having perpetual succession and a corporate seal. Apart from giving advice to the Yang di-Pertuan Agong, it is powered to act as an executor of a will or as an administrator of the estate of a deceased person or as a trustee of any trust.⁵⁹ It is a duty of the *Majlis* to promote, stimulate, facilitate and undertake

⁵³ See section 9 (1) (a) – (h) of the Office of Mufti Act.

⁵⁴ See section 9 (1) (i) – (p) *ibid*.

⁵⁵ Section 9 (2) *ibid*.

⁵⁶ Apart from matters mentioned in List II of the Federal Constitution, Act No. 505 also clarifies other matters which fall under the scope of Islamic law within a jurisdiction of Syariah Court. These include issues of marriage and family, charitable trust (*Baitulmal*), *Wakaf* and *nazr*, mosques, charitable collections, and matters relating to conversion to Islam.

⁵⁷ According to section 10 (1) of Act No. 505, The *Majlis* shall consist of the following members: (a) a Chairman; (b) a Deputy Chairman; (c) the Chief Secretary to the Government or his representative; (d) the Attorney General or his representative; (e) the Inspector-General of Police or his representative; (f) the Mufti; (g) the Commissioner of the City of Kuala Lumpur; and (h) fifteen other members, at least five of whom shall be persons learned in Islamic studies.

⁵⁸ Section 4 (1) of the Administration of Islamic Law (Federal Territories) Act 1993, Act No. 505.

⁵⁹ See Section 5 (1) – (4) *ibid*.

the economic and social development and well-being of the Muslim community in the Federal Territories consistent with Islamic Law.⁶⁰

Also that the Act No. 505 stands for establishing the institution of Iftah for the administration of Islamic law in Malaysia (Federal Territories). It empowers the Yang di-Pertuan Agong to appoint fit persons as Mufti and Deputy Mufti under section 32(1) on the advice of the Minister, and only after consulting the Majlis for the Federal Territories. The main function of Mufti is to issue *fatwa*, either upon the direction of Yang di-Pertuan Agong or on his own initiative or on the request of any person after formally making a representation addressed to him.⁶¹ Once *fatwa* is issued, it is published in the *Gazette*, which thereafter becomes binding on every Muslim resident in the Federal Territories and it becomes his religious duty to abide by and uphold the *fatwa*, unless he is permitted by Islamic Law to depart from the *fatwa* in matters of personal observance, belief, or opinion.

From the above it is discernible that there are the areas wherein English law leaves Sharia alone and in some areas it trenches on Sharia were as some other areas have been tolerated by it. The same may need some elaboration.

V ISLAMIC LAW V/S CIVIL LAW: COMPROMISES AND CONFLICTS

It may not be strange to argue that Modern civilization does not belong to any particular nation or people because all the peoples of the world have contributed towards its growth and development. As a sequel to it is not illogical to argue that the legal systems share common foundation except that emphasis on the significance of their components varies from system to system. It is why these components found in Common law and its philosophy is traceable in Islamic legal system and its legal thinking as well.⁶² Some may argue that the development of Common law has been on account of being based more on human liberty not exclusively on their intelligence. It is undeniable that the components like custom, legal precedent and analogy (*qiyas*) used by *Shari'ah* are equally the heart throb of the Common law.⁶³ As such is it safe to assert that the Common law has borrowed number of the legal principles such as equity and justice, from Islamic law? ⁶⁴ It may

⁶⁰ For details see duty of the Majlis for socio-economic development of Muslims section 7 (1) – 7 (2) (g).

⁶¹ Section 34 (1) *ibid*. However, according to subsection (2) “No statement made by the Mufti shall be taken to be a *fatwa* unless and until it is published in the *Gazette* pursuant to subsection (1).” In exercising the process of issuing any *fatwa*, or certifying any opinion, the Mufti is statutorily bound to follow the accepted views (*qaulmuktamad*) of the *Mazhab Syafie*. However, if he considers that following that will lead to a situation which is repugnant to public interest, the Mufti is allowed to the *qaulmuktamad* of the *Mazhab Hanafi, Maliki* or *Hanbali*. And if the Mufti considers that none of the *qaulmuktamad* of the four *Mazhabs* may be followed without leading to a situation which is repugnant to public interest, the Mufti may then resolve the question according to his own judgment without being bound by the *qaulmuktamad* of any of the four *Mazhib*. See section 39 of the Act. Moreover, before it is published the Islamic Legal Consultative Committee, established under section 37 of the same Act, would have to be called by Mufti for discussion of the proposed *fatwa*.

⁶² C. Roederer and D. Moellendorf, *Jurisprudence*, (Lansdowne: Juta & Company Ltd., 2001), at 495.

⁶³ A. Akgnduz, *Islamic Law in Theory and Practice: Introduction to Islamic Law*, (Rotterdam: IUR Press, 2010), at pages 28 – 30.

⁶⁴ A. Haydar, *Durar al-Hukkâm Sharhu Majalla a-Ahkâm*, (Translated into Arabic by Fahami Al-Husayni), Vol. 1, Beirut: Publisher, n.d) at 17 – 20 (in Arabic), in Ahmed Akgnduz *ibid*.

not be fair because the two systems of law are practically different and share different historical background. As a result these systems can not be put together in one basket.

It is true that academia have been attempting to show impact of influences of one legal system on another legal system as some debate the influence of foreign laws like Roman law on Islamic law and conclude that the former has profoundly influenced the latter but the debate remains till date inconclusive.⁶⁵ This is possible only where philosophies espoused by the two were similar that not being the case the conclusion is bound to be different. It is why Islamic law did not and would not absorb the influence of existing Common law system like the case has been of the Roman law because it being different from Islamic law both in philosophy and ramification. The major difference being that Islamic law is based on divine revelation whereas Common law is the product the human intelligence. This being the core issue hence the rules that contradict the Islamic teachings cannot percolate into broader framework and such rules that contradict the fundamentals of *Sharī'ah* exist in abundance in Common law.

However, on account geo-political reasons the Islamic world has preferably sought to protect to Muslim personal laws than reclaiming the whole of the Islamic legal system. This necessitated reclaiming Islamic values at gross root level which could be possible only with reorientation of the family. The method per se appears to have sociological roots because family is the nucleus of the nation. It begins with marriage, which includes divorce, child custody, and other issues pertaining to family, to be governed by Islamic law while other laws, like criminal codes or commercial codes, are imported from Western countries are left untouched. Needless to mention that personal laws currently in operation in the Muslim countries is available in the form of codes promulgated by the states. These codes are the product of the people and their deliberations therefore plays their role towards nation/state building. This explains the significant variation in particular laws and their application in different Muslim countries, notwithstanding the claim that they are *Sharī'ah* rules.⁶⁶

It may be interesting to note that the legal history of Zanzibar is almost similar to the legal history of Malaysia particularly from the time of introduction of the British rule in 18th century down to their time of independence. But contrary to Malaysian situation soon after the independence, the speed of reformation of legal system in Zanzibar was very slow that resulted in long time legal problems which still need special attention. With respect to the administration of Islamic law, which is the core of this article, Malaysia unlike Zanzibar has taken many positive steps. The Federal Constitution of Malaysia has reiterated under Article 121 (1A) that the *Syariah* Courts, have the power to administer Islamic law hence enjoy exclusive jurisdiction over Muslim personal matters under their jurisdiction.

On the contrary there being ambiguity in Zanzibar with respect to jurisdiction of the Kadhis' Courts on the matters of personal status which almost is similar to one that existed in Malaysia for more than two decades ago this is now only a part of Malaysian

⁶⁵ H. J. Liebesny, *The Law of Near & Middle East: Readings, Cases & Materials*, (New York: SUNY Press, 1975), at 33 – 8.

⁶⁶ A. Sonbol, 'Shari'ah and State Formation: Historical Perspective' 8 *Chi. J. Int'l L.*, at 60.

history. Now the Constitutional amendment in 1988 helped to correct the problem. As a result it has helped to straighten the jurisdiction of the Common law and the Islamic law courts. In this regard it may not be out of place to refer to Tun Mahathir Mohamad, as the then Prime Minister, who referred to the problem of interference by Civil Courts in the administration of justice of the *Syariah* Courts, at the time of tabling the constitutional amendment and is reported to have observed: ⁶⁷

At that time the civil courts had reviewed and interfered with proceedings of *Syariah* courts. There were instances where civil courts entertained applications that sought to re-adjudicate matters that *Syariah* courts had determined.⁶⁸ There was also a case where the civil court had applied laws of general application which are contrary to Islamic law with regard to the legitimacy of a child born during a marriage between Muslims.⁶⁹ As the *Syariah* Court system predates the civil court system, this should not have happened. Furthermore, civil courts also prescribe to the principle of abuse of process of courts where parties are not allowed to use the courts to unjustifiably frustrate proceedings in other forums.

Professor Ahmad Ibrahim while expressing his feelings on the subject expressed his satisfaction and did not only appreciate the perspective of the change but highlighted also the objective of the amendment which he found was consistent with the speech of the Prime Minister. For him, the amendment was to ensure that *Syariah* Courts exercise their jurisdiction.⁷⁰

This is a kind of movement within the system for correcting the shortcomings which should rejuvenate with the progress and development of the people and the same kind of movement is also required to be initiated in Zanzibar system so as to make Kadhis' Court independent and exercising exclusive jurisdiction over the Muslims personal matters. The existing structure does not ensure that independence and apparently does not seem to manifest any activity like the administration of Islamic justice. This apart, the law applied by the Kadhis' Courts should be purely Islamic be it matter of procedure or evidence. This would call for reform and improvement so that the environment of contradiction and confrontation between Islamic and Common law in Kadhis' Courts that virtually obstruct the administration of Islamic law comes to an end.

It may not be out of place to mention that in Malaysia, which has almost same legal system like that Zanzibar; the *Syariah* Courts are independent and administer Islamic law independent from encroachment of the Civil Courts. In practice, *Syariah* Courts have their own evidence Act and procedural rules which are made according to the precepts of Islamic law. Kadhis' Courts in Zanzibar are not independent in the sense the courts lack full powers as unlike Common Law Courts and are under the hierarchical supervision of

⁶⁷ F. Shuaib, *Powers and Jurisdiction of Syariah Courts in Malaysia*, second edition, (Petaling Jaya: LexisNexis, 2008), at pages 36 – 37.

⁶⁸ *Myriam v. Mohamed Ariff* [1971] 1 *MLJ* 265.

⁶⁹ *Ainan bin Mahmud v. Syed Abubakar* [1939] *MLJ* 209.

⁷⁰ A. Ibrahim, 'The Amendment to Article 121 of the Federal Constitution: Its Effect on Administration of Islamic Law' [1989] 2 *MLJ* xvii at 17.

the non-*Sharī'ah* courts.⁷¹ Even the final appeals are heard by the Common Law Courts without any regard to the sensitivity of the Islamic law requirements. It is not unusual to find non-Muslim judges deciding Islamic law cases that bring to forth the instances of constant conflict between Islamic and Common law principles in the matters of administration of justice.

A Islamic Courts and the Procedural Law

The intermixing of Islamic law with Common law in Zanzibar is discernible from the fact that the procedural law followed in the Common law courts is equally followed by the Kadhis Court. This tendency practically vitiates the purpose of the establishment of these courts. The same can be evaluated in the light of decided cases and court rulings. The same Decree which is applied in Common law is referred to the cases that are heard by the Kadhis' Court. This has been a practice since the introduction of the Civil Procedure Decree in 1917. In *Rashid Bin Said El-Hinawi v. Abdulah Bin Ali El-Hinawi*⁷² Knight Bruce, Acting J., rejected the opinion of Sheikh Tahir, which was attached to his judgment, on demanding the oath of satisfaction from plaintiff and observed that:

Such an oath is obligatory according to the *Sharī'ah*, But according to the Zanzibar Court Decree, 1823, section 28 (1) "all courts hereby constituted shall follow as far as circumstances will admit the procedure set out in Civil Procedure Decree." And the procedure adopted in hearing ex-parte case is laid down in O.IX r. 6 of the first schedule of the Decree with the exceptions that it be demanded this oath from the plaintiff. The learned Kadhi has in fact followed the procedure. I must admit that. I found it difficult to support the demand for this oath to be taken.

Recently, in the case of *Pili Pongwa Khamis v. Ishau Abdallah Kahmis*,⁷³ in trial court the appellant requested dissolution of marriage through *fasakh* but the District Court found no grounds for *fasakh*. In her appeal to Chief Kadhi's Court, she demanded a divorce on *khulu'* but did not succeed. The appellant petitioned for a review of her judgment to the High Court and claimed that she can no longer able to live with her husband by insisting her right of *khulu'*. On the ruling of her application, the High Court held that it cannot proceed with the application since the conditions for applying review mentioned under O. L of Civil Procedure Decree, 1917 (Cap. 8 of 1917) were not met. Hence, in this case the petition was dropped since it did not meet the requirement of civil law postulate incorporated in Cap. 8.

Similarly, in the case of *Idrisa Hussein Mrisho v. SihabaSoud Waziri* several provisions of Civil Procedure Decree were mentioned. These include s. 83 (1) (c), O. XVI r. 1 and O. XXVIII rule 4 and 3. For civil matrimonial case Order XI rule 3 of Civil

⁷¹ Structurally, Kadhis' Courts in Zanzibar are subordinates courts of the High Court which is technically common law Court.

⁷² *Rashid Bin Said El-Hinawi v. Abdulah Bin Ali El-Hinawi* [1934] Civil Appeal No. 16

⁷³ *Pili Pongwa Khamis v. Ishau Abdallah Khamis* [2005] Civil Appeal No. 19 High Court, Vuga, (Unreported).

Procedure Decree was applied in *Jackson Bulezi Musiki v. Zaina Iddi Ramadhan*⁷⁴ which is typical civil case.

The main problem is that, Kadhis' Court Act, which seems to empower Kadhi Courts to administer Islamic law, does not specifically provide for the application of Muslim procedural laws in such Courts rather it directs only for the enactment of those laws. Section 9 provides:

- (1) The Chief Justice in consultation with the Chief Kadhi may make rules of court providing for the procedure and practice to be followed in Kadhis' Courts.
- (2) Until rules of court are made under subsection (1) of this section, and so far as such rules do not extend, procedure and practice in a Kadhis' Court shall be in accordance with those prescribed for subordinate courts by and under the Civil Procedure Decree.

Since 1985 when this law was passed no attempts have ever been made to pass those rules of procedure and practice for Kadhis' Courts. The wording of this section indicates that, the use of Islamic rules of procedure and practice are allowed in Kadhis' Courts in Zanzibar but failure of its enactment the legislatures, the Civil Procedure Decree is applied.

On the contrary in Malaysia, all civil proceedings commencing in any Syariah Court, except as otherwise provided under any other written law or ordered by the Court, has to be regulated by the *Shari'ah* based procedures, in particular the *Syariah* Court Civil Procedure (Federal Territories) Act 1998, Act No. 585.⁷⁵ Accordingly, the proceedings before Syariah Courts are required to be made in conformity with this Act. The Act ordains in this regard that, "Any provisions or interpretation of the provisions under this Act which is inconsistent with *Hukum Syarah* shall, to the extent of the inconsistency, be void. (2) In the event of a *lacuna* or where any matter is not expressly provided for in this Act, the Court shall apply *Hukum Syarak*."⁷⁶

This Act therefore signifies the fact that no civil or common law procedures are to be applied in Syariah Courts. Thus the non-compliance with any provisions of this Act or any rules made thereunder shall not render any proceedings void unless the Court shall so order, But the Court may, of its own motion or on the application of any party, set aside any proceeding wholly or in part as irregular, or order such amendments to be made on such terms as it thinks just.⁷⁷

B Islamic Courts and the Principles of Evidence

Another instance that testifies an intermixing of the Islamic and Common law practices in Zanzibar is manifested from the application of rules of evidence in Kadhis' Courts. As the above analysis indicates that apart from the substantive laws, which are said to be

⁷⁴ *Jackson Bulezi Musiki v. Zaina Iddi Ramadhan* [2005] Matrimonial Case No. 36 High Court, Vuga (Unreported).

⁷⁵ Section 2.

⁷⁶ Section 245 of the *Syariah* Court Civil Procedure (Federal Territories) Act.

⁷⁷ See section 5 *ibid*.

different but the matters relating to personal status heard by Kadhis Courts in Zanzibar are procedurally controlled by the law generally applicable to the Common law court. .

Contrary to what is practice the Kadhis' Court Act specifically mentions that Muslim law of evidence shall be applicable in Kadhis' Courts including that of Chief Kadhi. The Act as revised in 2006 provides under Section 7 that "The law and rules of evidence to be applied in Kadhis Courts including that of a Chief Kadhi shall be those applicable under Muslim law." But no legislation of Islamic law of procedure is passed. Consequently, the proceedings before Kadhis' Courts are conducted and regulated by a hybrid procedure of traditional Islamic law and Common law. The decisions of the Kadhi show that there are only few Judgments refer to the provisions of *Qur'ān*, *Hadith*, and or juristic writings, and much more, only a few cases refer Civil Procedure Decree and Evidence Decree respectively.⁷⁸ The observation from District Kadhis' Courts reveals that only Common law practice is applied without due regard whether it is given by particular provision from Civil Procedure Decree.

Contrary to the practice in Malaysia, the *Syariah Court Evidence (Federal Territories) Act 1997, Act No. 561* is the law applied for the evidence matters in Syariah Courts. As according to section 2 of this Act, it applies to all judicial proceedings in or before any Syariah Court. The Act covers all essential issues of evidence in Islamic law, that includes *qarinah*, *iqrar*; oral evidence, documentary evidence, burden to produce, witnesses – capacity, number, relation,- examination of witnesses, and special provisions relating to testimony of witnesses. To assure the compatibility of the Islamic principles, the Syariah Court Evidence Act provides that "Any provision or interpretation of the provision of this Act which is inconsistent with "*Hukum Syarak*" shall, to the extent of the inconsistency, be void. Moreover, it express that in the event of a *lacuna* or where any matter is not expressly provided for in this Act, the Court shall apply *Hukum Syarak*.⁷⁹

VI CONCLUSION

Although Zanzibar has a good modernized legal system, which gives opportunity to the application of both Islamic and Common Law. This article reveals that the present system collides between the two in application. The said mixing of the systems is more appearing in laws and court structures. The most noticeable uniqueness of Zanzibar legal system is the existing of the coherent relationship between these two systems. The impact of the Evidence Decree, 1917,⁸⁰ in abrogation of Muslim law of evidence is still unattainable. Despite of the fact that section 7 provides for the application of Muslim law of Evidence in Kadhis' Court, in practice the application the Common Law of evidence is applied instead.

⁷⁸ *Idrisa Hussein Mrisho v. Sihaba Soud Waziri* [2009] Civil Appeal No. 30 High Court, Vuga, (Unreported).

⁷⁹ Section 130 of the Syariah Court Evidence (Federal Territories) Act 1997 at 130.

⁸⁰ Evidence Decree, 1917 (Cap. 5 of 1917), as given under section 2 of the Decree "the Muslim Law of evidence shall not apply in any of the court in Zanzibar." This was also shown in the case of *Rashid Bin Said El-Hinawi v. Abdulah Bin Ali El-Hinawi op cit*. Moreover, in recent case of *Idrisa Hussein Mrisho v. Sihaba Soud Waziri op cit*, section 118 of the Evidence Decree was applied, in a case emanated from Kadhis' court, to accept the evidence of the respondent's witness which was questioned by the appellant.

Contradiction of laws was also shown in the scope of court procedures. Thus the study reveals that the procedures followed in Kadhis' court are the same as applied in common law courts.⁸¹ Though the Kadhis' Court Act gives permission for the formation of the rules in accordance with the Islamic precepts these permission had never been exercised and in turn an alternate of using common law procedure is opted.

The analysis above explores position of the legal framework in administration of Islamic law in Zanzibar as it is compared with Malaysian experience. It inspires the advanced modification which would bring about a positive change in framework of administration of Islamic law in Zanzibar. The Government may ensure that non-Muslims and communal organizations should refrain from hearing and deciding any case relating to Muslim personal matters. People should profess their respective religions in the true spirit of religious coexistence and should avoid any undesirable criticism. The Government should ensure it, by own actions and necessary directions. Improving and strengthening the administration of MPL in Zanzibar by imposing a separate system which will work on the merits of each system would ease the administration of Islamic law. It is the legitimate expectation of Muslims to be governed by Islamic law before Kadhis' Courts.

⁸¹ See section 9 (1) of Kadhis' Court Act, 1985 also *Pili Pongwa Khamis v. Ishau Abdallah Kahmis op cit.*