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The Influence of Common Law Advocates and Judges in the *Sharīʿah* Adjudication: A Critical Exposition of the Experience in Nigeria and Zanzibar

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Abstract

A considerable influence of advocates and judges of common law training has been recorded over time in adjudication of the *Sharī'ah* disputes in Nigeria and Zanzibar. This is due to the colonial heritage of the British common law which exported the paradigm to these countries. This seems not to go down well with the *Sharī'ah* advocates. The increasing influence of trained advocates and judges in common law in these countries has not comparatively received academic attention over the years. This is more so that judicial institution whose officers in the temple of justice do not have deep knowledge of its legal jurisprudence may affect the justice of the matter in those courts. Against this backdrop, the paper makes a critical exposition of the influence of common law advocates and judges in the adjudication of the *Sharī'ah* disputes in Nigeria and Zanzibar. To achieve this, it examines appearance of advocates in the *Sharī'ah* courts from the constitutional and *Sharī'ah* perspectives. It also discusses how common law trained judges have their influences in the adjudication of the *Sharī'ah* disputes. It makes far reaching recommendations which, if adopted, it will enrich the legal policy of justice of these countries and similar jurisdictions. This paper adopts content analysis of legal issues and interviews conducted for some stake holders in Zanzibar.

Keywords: Common law advocates and judges, *Sharī'ah*/ Kadhis Courts, *Sharī'ah*, Policy, Nigeria, Zanzibar, Constitution

1. Introduction

The ability of any judicial institution to make a meaningful progress in the administration of justice depends to a large extent on its officers in the temple of justice (Sambo & Shamrahayu, 2012). They need to be knowledgeable and versatile in the areas in which they operate. Those who act as advocates for the parties and the court itself play an important role in the justice sector. Where their knowledge of the legal jurisprudence is not taken into consideration in making them to have a say in courts' decision, this may not serve the justice of the matter. This is the major problems with the adjudication of the *Sharī'ah* matters in Nigeria and Zanzibar. This is because at one stage or the other, advocates and judges with common law training have their ways in the administration of the *Sharī'ah* issues.

The choice on Nigeria and Zanzibar seems to be motivated by the similar legal pluralism being operated in both countries. Both countries are based in the African continent with similar colonial heritage having been colonized by

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the British. Even during the period of colonialism, the *Sharī'ah* courts existed and were given some measure of protection in both countries. The legal system, with respect to the issues of the *Sharī'ah*, is similar to the extent that some judges trained in Nigeria are being seconded to Zanzibar to sit as judges in the courts. As a result of the plural legal system, there has been influence of the common law trained judges and advocates in the issues of the *Sharī'ah*.

In view of the above, the paper makes a critical exposition of the experience in Nigeria and Zanzibar with respect to the influence of common law advocates and judges in the *Sharī'ah* Courts. To achieve this, the paper is divided into five parts. The first part is the introduction setting the tone of the paper. The paper will examine the issue of appearance of counsel in both courts. The second part examines the *Sharī'ah* perspective to the role of counsel in the *Sharī'ah* courts. The third part examines the influence of common law judges in the *Sharī'ah* courts while the last makes concluding remarks.

2. Appearance of Counsel in the Sharia Courts

The colonialists introduced lawyers into the Nigerian legal system. Prior to this period, the notion of trained lawyers was practically unknown in traditional legal systems in Nigeria (Adewoye, 1997). The lawyers are not part of the Islamic law system. During the colonial era, legal practitioners appearing in customary and Islamic courts were not common. Area Courts 22 and Sharia Courts of 22 S. 28 (1), Area Courts Edict (No. 2, 1976, Kwara State) prevented lawyers from appearing as counsel (Tabiu, 1985). This has been the creation and throughout the various evolutions of the two courts. These provisions have not been statutorily repealed. Yet, at present, legal practitioners appear in both courts with such regularity that their right of audience may seem settled and beyond question. The lawyer's right of audience in civil cases in the Area Court and the Sharia Court of Appeal appears to be the outcome of *Karimatu Yakubu and Anor v Yakubu Paiko and Anor* (1961–1989) 1 Sh.L.R.N. 126), decided by the Court of Appeal in 1985. It has been argued that the appeal was wrongly decided (Oba, 2002).[1] The decision in the appeal has been said to have had a serious effect on the Nigerian legal system. Nevertheless, in spite of the importance of the issue raised in the appeal, the issue was not adequately in issue before the court, nor was the judgment been subjected to strict scrutiny. Rather, there was no critical examination of the issue before the Court. Thus, the *ratio decidendi* of the case needs further consideration for some reasons.[2]

In Zanziba, however, advocates have little or no influence in the *Sharī'ah* courts. However, this is not without some effects. it is important to note that under the level of District Kadhis' Court up to the Chief Kadhis' Court, the involvement of advocate is not allowed; only *Wakils*[3] and person who are holding power of attorney are allowed to appear in Kadhis' Court to represent the parties. On the other way around, it can be argued that, though there are some reasons for not allowing advocates to appear before the Kadhis' Courts. This has the advantage to the extent that the court will not be polluted with common law ideas knowingfullywell that the *Sharī'ah* has its own separate legal jurisprudence. However, generally, the idea of not allowing them to serve as advocates before these courts is another set back towards the administration of justice particularly to women who appear before these courts to defend their cases. The case might be different when it appears that those *Wakils* appointed hold the qualifications of having Islamic law and Civil Procedure Decree. If that was the case, they might improve the administration purpose under Kadhis' Courts. The main question now is based on how the aspect of justice can be done in a situation where both the Kadhis and parties to the cases are not well conversant with the procedure provided by the law of the country. This is well

emphasised by the Zanzibar Constitution, 1984 which provides that:

> When the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned (Article 12 (6) of the Zanzibar Constitution, 1984).

The situation is a bit different to the level of High Court where most of the time a judge who hears the appeal from Chief Kadhis' Court with the help of four *Ulamaas* and sometimes with the involvement of advocates comes up with detailed and explanatory judgment after referring different Islamic sources

3. The *Sharīʽah* Perspective

The issue of appearance of lawyers in Sharia Courts of Appeal and Area Courts at present may still be an issue in court. A more basic question, however, relates to the role of legal practitioners within an Islamic legal system. It has been argued that whilst the *Sharīʽah* allows for legal representation, lawyers in the common law mould are not known in the *Sharīʽah* system, (Zubair, 1996, Joseph, 1964). There is clear tradition of the Prophet (s.a.w), which cast doubt on eloquent advocacy in a litigant. The tradition states: I am but a human, and I give judgment according to what I hear [from parties], but should I decide in favour of a party because that party is better in tendering their own case, when in fact the other party to the dispute is the one in the right, then the party in whose favour judgement was erroneously rendered has reserved for himself a place in hell (Doi, 1990).

Two main features of the *Sharīʽah* system: the concept of legal representation and the role of muftis are commonly confused with lawyers. This uncertainty is unlimited to non- *Sharīʽah* practitioners (Ambali, 1998). Legal representation under Islamic law is just a form of agency (*Wikalah*). The agent (*Wakili*) is not a professional pleader. There appears to be no such known profession in Islamic law. The *Wakili* has no special status in court and need not be an expert in law. He appears in court in place of and at the place of a party. It is as if he is the party himself. This is different from the common law arrangement where advocacy is a professional calling and the lawyer being an officer of the court has distinct status and privileges in court. The nearest equivalent of a *Wakili* in the common law system is probably a non-lawyer who is authorised by a party to represent him in a case.

The Lawyer is similar to the *Mufti* in the fact that he is an expert learned in law. Judges and litigants alike can consult lawyers for his legal opinion. He appears different from lawyers because he does not fight partisan causes in court. He only does religious duty on him to make available his knowledge for the guidance of his community. Adewoye aptly summarised the role of Muftis in the pre-colonial Sokoto Caliphate thus

In the performance of their judicial duties, the alkalai usually bore much of the judicial burden, holding the scale of justice evenly between the parties. But in such centers of Islam as Sokoto, Kano, Zaria, they sometimes sought the assistance of the *mufti,* learned Mallams who were deeply knowledgeable about the *Sharīʽah*. Their duty was to develop the law. They were like the jurisconsults of the Roman times, except that their judicial opinion was invariably based on actual cases and precedents. They gave their opinions in the open court upon questions submitted

to them by the *alkali*. Although they were the expounders of the *Sharī'ah* law, they differ from professional advocates in the European sense in that they could not be engaged to fight partisan causes in open court. They could be consulted on any legal question. Usually important figures in the state performing other functions, they did not derive their livelihood from their role as expounders of the law (Adewoye, 1977).

Under the *Sharī'ah*, the judge plays a dynamic role that eliminates the need for lawyers. Again, Adewoye rightly commented thus: It would appear that in many parts of Sokoto Caliphate, the *alkalai* themselves obviated the necessity for professional intermediaries between themselves and litigants. The point was made earlier that, as judges, they bore much of the judicial burden in the discharge of their duties. They cross-examined parties and their witnesses, sifted the evidence before them, and decided on the law applicable to particular cases (Adewoye, 1977). Whilst the concept of legal representation permitted under the *Sharī'ah* can be extended to accommodate lawyers, as has been done in some countries in the Muslim world where advocates called *Muhamum* (sing. *Muhami*) appear for litigants before *Sharī'ah* courts, (Ajetunmobi, 1988) the role of such 'lawyers' appears different from their role in common law courts. The introduction of lawyers into Sharia courts has not improved the administration of Islamic law in those courts. Yadudu observed that though a few lawyers possess "a smattering of fragmented knowledge of Islamic law", the overwhelming majority lack any expertise in Islamic law (Yadudu, 1992). The main contributions of lawyers to those courts have been increased cost, delays, and technicalities (Bellgore, 2000, Yadudu, 1992).

4. The Influence of Common Law Trained Judges in the *Sharī'ah* Matters

Islamic law was administered in northern Nigeria by highly trained Qadis before the advent of colonialism (keay & Richardson, 1966, Yadudu, 1993). When the colonial masters gained full control of the area, they allowed the continued existence of these courts but steadily modified and patterned them along lines in line with their own notions of justice Yadudu,1988, Ubah, 1982). Area Courts (and lately Sharia Courts) are the generally the courts of first instance for *Sharī'ah* cases (Sections 15, 18, 20 and 21, Area Courts Edict, 1967). Appeals from Area Courts go to the Sharia Court of Appeal in matters of Islamic personal law (section 54(1) [as amended by Edict No. 5 of 1986]). In other matters appeals go to the High Court (section 54(3) [as amended]). Appeals from the Sharia Court of Appeal and the High Court go to the Court of Appeal (Sections 241, 242 and 244, 1999 Constitution). From the Court of Appeal, they go to the Supreme Court (S. 233(1), 1999 Constitution). Apart from the Area Courts and the Sharia Court of Appeal, all the courts mentioned here are manned exclusively by common law trained lawyers. Lawyers have even made their presence felt at the Area Courts and Sharia Courts of Appeal.[4]

The issues inherent in this arrangement are numerous. First, it appears that there is a plan to make all judicial positions in Nigeria the exclusive preserve of common law practitioners. The second problem is that the training of lawyers does not adequately prepare them for the task since their training is focused exclusively on common law. Another is that it is difficult to understand the rationale between the appellate jurisdiction of the High Court vis-à-vis that of the Sharia Court of Appeal. Why should the High Court have a wider jurisdiction in the *Sharī'ah* matters than the Sharia Court of Appeal? Why should the High Court have any jurisdiction in Islamic law matters at all? Kadis used to sit with High Court judges during the appellate sessions of the High Court for the purposes of hearing appeals in Islamic law matters. This was until it was held by the Court of Appeal in 1982 in *Mallam Ado v Hajia Dija*

(1983) 2 F.N.R. 213) that the provisions of the High Court Law that made this possible was inconsistent with the provisions of the 1979 Constitution. Since then appeals in Islamic law matters in the High Court have been heard exclusively by High Court judges. This has not gone down well with *Sharī'ah* proponents. Justice Bappa Mahmud commenting on this case aptly expressed the disappointment of most Muslims at the development. His Lordship said: Islamic law was put to such a humiliation, the like of which it has never experienced even in the hands of colonial masters who defeated and conquered the country. For the first time, they put the determination of appeals or cases decided under Islamic law in the hands of judges who are not conversant with Islamic law and most of whom are non-Muslims from the South (Mahmood, 1993). The point was also taken up in the Court of Appeal in *Maida v Modu* (2000 4 NWLR (Pt. 659) 99) by Justice Muntaka–Comassie thus: "It seems to me settled that the new 1999 Constitution of the Federal Republic of Nigeria does not in any way improve the jurisdiction of the Sharia Court in this country. It does not enhance the jurisdiction of those courts. This in my view, with all sense of responsibility, is unfair. In most cases, this appeal inclusive, one discovered that the land in dispute is situated in such a way that the rule of *lex situs* applies. The parties are both Moslems and consented to be governed by Islamic Law in *Sharī'ah* Courts and lastly that the subject matters and issues involved called for intensive application of Islamic law and procedure which are not available in common law system. Moreover, the law to be applied in the High Court is quite alien to the parties and the *Sharī'ah* Court. I do not think that in such circumstances justice could be said to have been done to the parties and the subject matter."

The jurisdiction of the Court of Appeal in Islamic law matters might appear excusable because the Constitution makes it compulsory that the Court of Appeal have on Islamic law appeal panels at least three justices who are learned in Islamic Law (section 247 (1) (*a*), 1999 Constitution). However, this is not satisfactory to many *Shariah* proponents because those justices are merely common law practitioners with generally no more than a smattering of knowledge of the *Shariah*. The Constitution merely requires that the justices who are experts in Islamic personal law have in addition to the regular qualification for appointment into the court, "a recognised qualification in Islamic law from an institution acceptable to the National Judicial Council" (section 288(2)(*a*), 1999 Constitution). The position of the Supreme Court is unsatisfactory. The Constitution does not provide for any minimum number justices of the court who should be learned in the *Sharī'ah*. The Constitution merely states that the President in making appointments to the Court should have regard to the need to have justices in the court learned in the *Sharī'ah* (section 288(1), 1999 Constitution). The court is duly constituted to hear any appeal by at least five justices of the court (section 234, 1999 Constitution).

The result is that Islamic law appeals are heard at the final appellate stage by a Supreme Court manned by persons who need not have any knowledge of Islamic law. This arrangement does not augur well for the development of Islamic Law nor can it earn the respect and confidence of litigants and *Sharī'ah* proponents alike. As rightly suggested, (Ajetunmobi, 1988) the Supreme Court should have at least five justices learned in Islamic law so that a special panel can be constituted to hear Islamic law cases as is being done in the Court of Appeal. The problem of lack of appropriate qualifications in Islamic law is not limited to judges with a common law background alone. Even some of those appointed to the *Sharī'ah* Courts as learned in Islamic personal law have grave defects in qualifications. In Islamic law, judges "must be not only men of deep insight, profound knowledge of the *Sharī'ah* but also be Allah-fearing, forthright, honest sincere men of integrity" (Doi, 1990). The issue of "profound knowledge of Islamic law" has been neglected. The Constitution left it to the discretion of the National Judicial Council. The

Constitution and other relevant laws relating to the appointment of judges for *Sharīʹah* courts do not make the crucial and necessary distinction between Arabists (who have studied Arabic), Islamists (who have engaged in Islamic Studies) and *Sharīʹah* practitioners (who have studied *Sharīʹah*) (Ambali, 1998, Ajetunmobi, 1988). In North Africa and the Middle East this distinction is widely known and jealously guarded.

The laxity in the Nigerian approach makes the Shari'a courts to contain Arabists and Islamists. The adverse effect of this is that such judges are apt to be weak in *Ijtihad* (legal deductions), since they lack in some cases even the most elementary knowledge of *Usul al-Fiqh* (the science of Islamic law). The qualification common law of ten years' post qualification experience has also been imported into the requirement of Islamic law judges. What is the relevance of this arbitrary time requirement to Islamic law? The uncertainty is made even worse by the introduction of the hierarchy based on the common law system. This hierarchy divides courts into superior and inferior courts, with the Area Court (Sections 261, 276 and 288, 1999 Constitution) [5] being an inferior court while the Sharia Court of Appeal is a superior court (Section 6(3), 1999 Constitution). Judges of superior courts may now tend to place themselves in the position of *Mujtahid* solely by virtue of the appointment. The *Sharīʹah* insists that judges should be male and Muslim (It is significant that section 5(*a*), Sharia Court of Appeal Law, includes the religious qualification. Ambali, 1998).[6] These requirements can no longer be insisted upon in view of the provisions of the Constitution precluding discrimination on grounds of religion and sex (section 42(1), 1999 Constitution). *Sharīʹah* proponents complain about the colonial suppression of Islamic law by common law principles and English notions of justice (Sulaiman, 1998). They note about the equating of common law and Islamic law courts and the application of the same principles to both as if they form part of the same legal system. Yadudu articulates this objection thus: The Islamic law, as other customary laws in the country, exists as an appendage of the English common law. It does not exist as an autonomous and self-regulating legal system. It is defined in terms of the common law. It applies subject to the standard of the common law. Its courts are established and its personnel trained and appointed in the same way and using virtually the same criteria as those of the common law courts and justice (Yadudu, 1988). One other problem is that the influx of common law practitioners into the *Sharīʹah* Courts entails the danger of pollution of *Sharīʹah* with common law ideas. We have pointed out earlier that the common law and the *Sharīʹah* are two very different systems. This needs some elaboration which will be done presently.

In Zanzibar, although the law requires those who mount Kadhis Courts to have sufficient knowlegge of Islamic law, the problem seems to be with the appellate system. Appeal from any judgement of the Chief Kadhis' Court, Deputy Chief Kadhis' Court and Appellate Kadhis' Court lie to the High Court of Zanzibar which is the final court on cases emanated from Kadhis' Courts and such appeal shall be heard by a panel of five members presided by a judge of the High Court and the decision is reached by taking the opinion of the majority of members (Section 10 (2) of the Kadhis, Courts Act, 1985).

The other four members sitting with the judge must be persons who are well conversant in Islamic laws hereinafter referred to as '*Ulamaas'* and they are appointed by the Judicial Service Commission (Section 10 (3) of the Kadhis' Courts Act, 1985). In terms of qualifications of the members, there is no much difference with the qualifications that someone must possess to be appointed as a District Kadhi whereby he has to attend and obtain a recognised qualification in Islamic Laws from any Institution approved by the Council of *Ulamaas* and has held the qualification for a period of not less than three years and has considerable experience in the knowledge of Islamic Laws (Section 10 (7) of the Kadhis' Courts Act, 1985).

Generally, it can be found that majority of people from different cadres and groups are not satisfied with the nature of rungs (levels) of appeal involved in Kadhis' Courts. It is insisted that, the scope of appeals in the Kadhis' Courts is very narrow as compared to the ordinary court where only two-tier of appeal are allowed i.e Chief Kadhis' Court or Appellate Kadhis' Court and High Court. While appeals from ordinary courts start from Primary Court and reach to the Court of Appeal of Tanzania. Under simple mathematics, it can be seen that, four stages of appeal exist from that scope contrary to the stages of appeal exist in the Kadhis' Courts.

From that particular situation, the first question which comes to the mind of any reasonable man is concerning the essence of having wide scope of appeal in a particular judicial system. Thus, an effective system of appeals is an essential part of a well-functioning system of civil justice and there can be no doubt about the importance of the availability of appeals to ensure that redress can be obtained for mistakes by the lower courts (Sethu, 1999). Ideally, appeals serve two purposes: the private purpose, which is to do justice in particular cases by correcting wrong decisions, and the public purpose, which is to ensure public confidence in the administration of justice by making such corrections and to clarify the law and to set precedents (ibid).

After realising the importance of having reasonable tier of appeals within the Kadhis' Courts in Zanzibar, then the problem comes on the number of rungs to be established or to be followed. It is strongly argued that, there is no need for the cases starting at Kadhis' Courts to reach at the level of High Court (Makungu, 2010). It is further insisted that, the current practice where a judge sits with four *Ulamaas* is not what has been proposed as it was suggested for a Chief Kadhi to seat with these four *Ulamaas* instead of a judge (ibid). Thus, this suggestion focused on making Chief Kadhis' Court as the last rung of appeal for all cases emanating from District Kadhis' Court.
The involvement of High Court on hearing appeals from Kadhis' Court causes two issues to emerge; one is the involvement of a judge who might be a non-Muslim and two is the involvement of four *Ulamaas* at the level of High Court. On the issue of judge who might be a non-Muslim or Muslim without having knowledge of Islamic law, different arguments have been given.

On one side, it is argued that there is no problem for the cases emanating from Kadhis' Court to reach to the High Court once a judge (Whether a non-Muslim judge or Muslim without Islamic knowledge) is sitting with four Muslim scholars (Issaya Kayange, 2010). This is substantiated with the argument that, once the decision is reached under the majority basis, there is nothing to fear on the implementation of justice (ibid). If one reads between the lines, it may be realised that the above arguments might be correct but it must be stressed that when it comes to the point of voting for the decision, the presiding judge has the last cast.

It is very likely that where the system is applied or introduced in a jurisdiction where the majority of judges are predominantly non-Muslims, problems are likely to occur (Majamba, 2008). Even though it can be argued for the judge who is a non-Muslim to undergo training in Islamic law, yet this may be taken to be offensive to most of Muslim groups. Though a non-Muslim judge may get a formal training and become well versed in the application of Islamic law principles, but in reality it is those who have been groomed in and practice the religion that are likely to have an added advantage (ibid). In this respect, it is argued that, the idea of sending cases established from Kadhis' Courts to the High Court must be refrained (Abdallah, 2010).

On the issue of involvement of four *Ulamaas* at the level of High Court, it is insisted that these four *Ulamaas* must not sit with a High Court judge because most of the time these four *Ulamaas* have not the qualifications that the Chief Kadhi has (Makungu, 2010). Therefore, by allowing these *Ulamaas* to sit at the higher level (High Court) to hear appeals from Chief Kadhis' Court, this might cause problems within the Muslim scholars. It is further argued that in order for the Kadhis' Courts to work properly in Zanzibar, there must be separate systems between Ordinary Courts and Kadhis' Courts (Mubarak, 2010). To put this into effect, it is suggested for the Chief Kadhi to administer Islamic issues within the jurisdiction of Kadhis' Courts and the Chief Justice to administer all matters under the ordinary courts (ibid).

5. Conclusion

From the foregoing, those who are trained as advocates and judges under common law doctrine have much influence in the determination of the *Sharī'ah* matters in countries under review. The degree of influence however differs. The influence with respect to Nigeria appears greater than Zanzibar. This is because lawyers trained in common law have an unhindered access to the *Sharī'ah* courts. They appear as counsel representing litigants in the *Sharī'ah* courts. This is not withstanding their inadequate knowledge of the *Sharī'ah* since they not wholly trained or are partly trained in this legal jurisprudence. It needs to be observed that we are not in doubt as to the role of regal practitioners in a court of law. The issue seems to be that which role a counsel not adequately trained in the Islamic legal jurisprudence will to play in the *Sharī'ah* courts. Their contribution in the *Sharī'ah* courts will be nothing but increased costs, delay and undue adherence to legal technicalities. The position seems to be different in Zanzibar. This is because advocates have no rights of audience in the Kadhis (Sharia) Courts. They can appear at the High Court level. This also does not adequately balance the position. The effect of this as stated in this paper is that the interests of weak clients will not be adequately represented in the court. The better approach seems to be that those who are certified as learned in the *Sharī'ah* should be allowed to act as advocates in the *Sharī'ah*/Kadhis courts in both countries. This will really assist the courts in coming to a just conclusion.

In the same vein, the influence of those trained in common law is well pronounced in the adjudication of *Sharī'ah* matters in courts. This is especially at appellate levels. In Nigeria, for instance, the trends in the appointment of the *Sharī'ah* Khadis (judges) seems to favour those who are trained in common law and the *Sharī'ah*. This position appears to be a welcome development. However, this should not be to the detriment of those who are specially trained in the *Sharī'ah* itself. Emphasis should be laid on the knowledge of the law and other criteria for judicial appointments. In Zanzibar, those who sit as Kadhis in the Kadhis' (*Sharī'ah*) courts must be learned in the *Sharī'ah*. The problem in both countries seems to relate to the issues of appeals in *Sharī'ah* matters. This is because the common law trained judges have some influence in the determination of the appeals. Yet, they do not and are not required to have sufficient knowledge of the *Sharī'ah* better than the original *Sharī'ah* courts judges. This is the best way to justify their sitting on the *Sharī'ah* matters as appellate courts. There is therefore the need to recognize the *Sharī'ah* as a distinct source of legal jurisprudence and make sure that its officers in the temple of justice have sufficient knowledge of the *Sharī'ah*. It is only then that justice will not only be done to the parties but will also be manifestly seen to be done in those courts.

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Notes

Note 1. The substance of our argument is that the decision was based on a misinterpretation of the relevant

provisions of the 1979 Constitution. Justice Mohammed JCA, who delivered the lead judgment in the appeal, read the proviso to subsection (1) to section 33 as if it was also a proviso to subsection (4). This oversight, in our humble opinion, was responsible for the erroneous decision. A.A. Oba 2002 "Islamic law as customary law: the changing perspective in Nigeria" *International and Comparative Law Quarterly,* 51, 817 – 850.

Note 2. These reasons are, in summary: 1 There was an erroneous reading of the relevant constitutional provisions. 2 Full arguments were not taken on the point before the Court of Appeal as counsel for the respondent conceded the point without argument. 3 The other two judges in the case did not write judgments of their own but merely concurred with the lead judgment.4 There was no further appeal to the Supreme Court in the case. 5 The judgment of the Court of Appeal was not widely circulated and thus could not be subjected to critical analysis. The only 'report' of the appeal to my knowledge is Mahmood 1993, published eight years after the judgment.

Note 3. *Wakil* is defined by Rule 6 of the Legal Practitioners Rules, Chapter 28 of the Law of Zanzibar, 1946 as a person admitted to practice as such as licensed to practice as such under this Rule. Most of the time these Wakils are those retired court clerks or magistrates given the opportunity to represent litigants before the court of law. It can be observed from practical point of view that the idea of appointing Wakils by that time might be good especially with the shortage of qualified advocate which faced Zanzibar till in the recent years but with the good number of lawyers now in Zanzibar the need of having these Wakils cannot be justified.

Note 4 Legal Practitioners from both LL.B. Civil Law and LL.B. Combined Law programs are appointed in many states as Area Court judges. The Constitutional qualification for appointment as Khadi of the Sharia Court of Appeal allows common law practitioners to be appointed: s. 276(3) (*a*), 1999 Constitution.

Note 5. The Council cannot be an appropriate body to decide this since, out of its 21 members, only one (a Grand Kadi appointed by the Chief Justice) represents the *Sharī'ah*. 18 others are judges or lawyers, while two are non lawyers: Item 20, Part I, Third Schedule, 1999 Constitution.

Note 6. It is significant that s. 5(*a*), Sharia Court of Appeal Law, includes the religious qualification.

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