

The Status of *Sharī'ah* Courts in Zanzibar and Malaysia: A Comparative Exposition

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Abstract

The existence of *Sharī'ah* Courts with specific jurisdiction in Zanzibar and Malaysia is a reflection of their importance towards the administration of justice among the Muslims. However, these courts have passed through different phases of development prior to colonialism and the period when these countries gained independent. This comparative study shows that *Sharī'ah* and Kadhis' Courts have suffered a considerable intervention of British influences which to the great extent affect the jurisdictions of these courts. The problem is further piled with the introduction of multi-court systems by the British. Though the *Sharī'ah* and Kadhis' Courts are retained after independent, the colonial legacy of the British common law still can be viewed as the hindrance towards the proper administration of Islamic law before these courts. Alongside this backdrop, the paper seeks to examine the current status of *Sharī'ah* and Kadhis' Courts in Zanzibar and Malaysia. To achieve this, this paper examines the historical backgrounds of these courts, their jurisdictions and the procedural laws applied by them. This is made purposely in order to access the effectiveness of these courts particularly after these two nations decided to retain the multi-court systems after independent. The paper concludes by giving some recommendations which if adopted, will enhance the administration of *Sharī'ah* and Kadhis' Courts in the jurisdictions under examination.

Keywords: *Sharī'ah* Courts, Kadhis' Courts, Zanzibar Constitution, Malaysian Constitution

1. Introduction

The nature of legal systems in Zanzibar and Malaysia is a reflection of their social, economic and cultural history. *Sharī'ah* and Kadhis' Courts have been in existence before the colonial era. However, during colonialism, the status of these courts was marginalised. This marginalization was caused by the introduction of British common law system in both countries. Due to this, a dual system of courts was set up in Zanzibar and Malaysia. That is, the civil courts and the *Sharī'ah* Courts. The introduction of dual system has in one way or another brought to stay the British influence in these two countries thereby curtailing the application of Islamic law in these areas. The position seems indifferent after independent where the multi-court systems were retained in these countries. However, many questions remained unanswered as far as the status of *Sharī'ah* and Kadhis' Courts are concerned. These questions particularly based on the narrow jurisdiction given to the courts, conflict of jurisdiction between *Sharī'ah* Courts and civil courts and the issue of procedural challenges.

Therefore, this article seeks to discuss the status of *Sharī'ah* and Kadhis' Courts in Zanzibar and Malaysia. This mainly dwells on examination of the jurisdictions and procedural laws applied by these courts. It also examines the influence of British common law towards the development of *Sharī'ah* and Kadhis' Courts. The discussion on these issues prompted some recommendations to enhance the status of *Sharī'ah* and Kadhis' Courts in Zanzibar and Malaysia while at the same time healing the tense between these courts and civil courts.

2. Historical Background of *Sharī'ah* Courts in Zanzibar and Malaysia

The historical backgrounds of Zanzibar and Malaysia show the existence of the administration of Islamic law before the coming of colonialists in these countries. This is due to the fact that Islamic law was the applicable law of the local people. During that time most of the States in Malaysia were in the administration of the Malay Sultanates who administered Islamic law in a very organized court system. Islamic law was administered by the *Sharī'ah* and Kadhis' Courts (Farid S. Shuaib, 2008). A good example of this administration is in Kelantan where during the reign of Sultan Muhammad I, the Mufti with the help of the Kadhis exercises his judicial functions in the *Sharī'ah* Courts. However, the *Sharī'ah* Court jurisdiction was limited to Islamic personal law and property law. Zanzibar throughout the nineteenth century was a part of the Oman Sultanate along with the coastal regions of present-day Tanzania and Kenya. The Sultan of Oman, Seyyid Said bin Sultan made Zanzibar his capital in 1832 after suffering resistance and defeat at Mombasa against the Mazrui Arabs. (Erin E. Stiles, 2009). During this period, the Kadhis' Courts had their origin in Zanzibar. But when the Kadhi was officially recognised by the then Sultan, there were no official court rooms and disputes were resolved in private homes or even along the public street.

With the emergence of British administration and their influence in these countries, English law was introduced and the administration of *Sharī'ah* Courts became marginalised (Ahmad Ibrahim, 1993). The coming of British forced these countries to have dual systems that accommodate the civil courts and the application of English laws. This is vividly proved with the enactment of Zanzibar Court Decree of 1908. This Decree established four rungs in the court system. Within this system, the lowest rung was Assistant Kadhis' Court which was established in each district as the judge of the British Court may think fit to do so. Kadhis' Court was presided over by a Kadhi or Assistant Kadhi sitting alone. Above the Assistant Kadhis' Courts were District Courts which were established in different districts of Unguja and Pemba. Above the District Courts was the Court for Zanzibar and Pemba which was constituted with one British magistrate sitting alone in criminal matters while in civil matters two Kadhis were selected by the Judge of the British Court from amongst *Ulamaa* (Muslim scholars). This led to the promulgation of Court Decree No. 20 of 1923 which limits the jurisdiction of the Kadhis' Courts to personal status including marriage, divorce and inheritance cases and suit relating to land in which the subject matter does not exceed one thousand and five hundred shillings. Another historical change of the Kadhis' Courts in Zanzibar is the introduction of Court Decree No. 1963 where time Zanzibar was given an internal self-government. According to section 6 (i) (b) of the Decree, Kadhis' Courts were among the courts subordinate to the High Court of Zanzibar. Within the Decree, it

is declared that Kadhis' Courts were subordinate to the High Court. This means that appeals from Kadhis' Courts were being heard by the High Court where majority of the judges were not Muslims (section 26(i) of the 1963 Decree).

In Malaysia, administration of justice headed by British judge was introduced in all Federated Malay States and the Unfederated Malay States (Farid S. Shuaib, 2008). This led to the introduction of English laws within the States. Though there were cases where the English judges applied Islamic law or local customs, the number of cases was very small. The English legal principles introduced in the Malay Peninsula directly or indirectly were at the detriment of the application of Islamic law and the jurisdictions of *Shari'ah* Courts. With the establishment of a separate court system for English law, the jurisdiction and powers of *Shari'ah* Courts were minimized (Ahmad Ibrahim, 1993). For example, in criminal matters, *Shari'ah* Courts were not given jurisdiction to entertain even offences like immoral acts and adultery involving Muslims. These matters were entertained by the civil courts where in hearing such cases, the presiding civil court judges would be assisted by two Muslims. Besides, civil cases appeals from Kadi's and Assistant Kadi's were heard by the Rulers in Council who are not Muslims.

The above discussion shows that *Shari'ah* and Kadhis' Courts used to enjoy wider recognition before the coming of British in Zanzibar and Malaysia. These countries share similar historical background as far as the administration of *Shari'ah* Courts is concerned. However, the colonial experience have whittle down the powers and jurisdiction of the *Shari'ah* and Kadhis' Courts in these countries with the establishment of dual systems that frequently interfere with the daily activities of these courts. Unfortunately, this was the starting point of British influences within these two countries where the jurisdiction of *Shari'ah* and Kadhis' Courts was slowly curtailed. To achieved this, laws were enacted which allowed the English Court to have a voice particularly in the administration of Islamic matters.

After the 1964 revolution, Kadhis' Courts in Zanzibar went through enormous changes due to its constitutional recognition. In Malaysia, during the period of independence, the Constitutional Commission which was entrusted to come out with a proposed constitution for an independent Malaya recognised and recommended for the *Shari'ah* Courts to be retained within the States because of the Islamic Structures on ground. This proposal is made in conjunction with the idea of recognizing the continuation of legal pluralism and the plurality of court systems in Malaya (Farid S. Shuaib, 2008). This means that apart from retaining the *Shari'ah* Courts, the Commission proposed for the continuation of civil court system and granted it with particular power. However, in order to ensure smooth run of *Shari'ah* Courts in Malaya, proposal was made to empower States to enact law based on Islamic matters (Item 1 of the State List (List II) under the Federal Constitution Ninth Scheduled).

Though the Commission proposed for the continuation of plurality of court systems (civil courts and *Shari'ah* Courts) in the new Malaya, it failed to propose the need to draw demarcation between these two systems. Among the problems caused by this failure is the intervention of civil courts in the *Shari'ah* matters. Generally, this started when there was a continuous sanctioned intervention of civil courts in matters based on Islamic law. Thus, the inherent or supervisory powers of the civil courts have caused the *Shari'ah* Courts to face difficulties in deciding the matters which are regarded to be within the jurisdiction.

With the independence of the Federation of Malaya in 1957, an opportunity arose for Muslims to reassert their belief and to restore the Islamic judicial institution. The Federation of Malaya Constitution 1957 states that Islam is the religion of the Federation with the right of other religions to be professed and practiced in harmony (Article 3(1) of the Federal Constitution). States are allowed to set up *Shari'ah* Courts. However, it is argued that the Federal Constitution ignores the position of *Shari'ah* Courts where even the definition of 'law' within the constitution does not include the Islamic law (Article 160 of the Federal Constitution). It only made mention of *Shari'ah* Courts in the State List (Ahmad Ibrahim, 1993). It is further argued to be contradictory for a country where Islam is proclaimed as the official religion but the *Shari'ah* Courts which administer Islamic law receive little attention apart from Article 121 of the Federal Constitution (Andrew, 1995). There is no even any constitutional obligation for these courts to exist, unlike the High Courts, the Court of Appeal and the Federal Court. Thus, it is submitted that the *Shari'ah* Courts have inferior jurisdiction and their status is not higher than that of the other 'inferior courts' mentioned in Article 121 of the Constitution. The same situation is witnessed in Zanzibar as the Constitution provides for the establishment of the Subordinate Courts to the High Court. Under this provision, Kadhis' Court was established. Article 100 of the Zanzibar Constitution, 1984 empowers the House of Representatives to establish other Courts subordinate to the High Court. This shows that although Kadhis' Court has constitutional flavor, its power is in the true sense limited.

3. Current Jurisdiction of Kadhis' and *Shari'ah* Courts

The power and jurisdiction of Kadhis' Courts is provided for in the Kadhis' Court Act 1985 and the District Kadhis' Court has been given power to determine matters of Islamic personal such as marriage, claims of maintenance, divorce, guardianships, custody of children, *Wakf* or religious charitable trusts, gift and inheritance (section 6 (1) of Kadhis' Court Act, 1985). From this provision, it can be argued that the Kadhis' Courts in Zanzibar is a judicial institution set out to deal with cases arising from limited matters relating to Islamic personal law. Therefore, it is very clear that the Kadhis' Courts do not deal with any criminal matters and even in dealing with civil matters, their jurisdiction is very restricted. For example, even though the Kadhis' Courts have jurisdiction to deal with the issue of divorce but they lack jurisdiction to deal with the matters arising after divorce like the issue of matrimonial property which is accruing from divorce among the parties.

It cannot be denied that the incompetency of the Kadhis in dealing with the cases of different nature is something to be given attention, but on the other hand this must not be taken as an excuse towards the process of expanding the power and jurisdiction to deal with other civil and criminal matters. This must be done with the view of enhancing justice among the Muslims (who are majority) in Zanzibar.

On the other hand, Malaysia being a Federation has distributed legislative powers to Parliament and States legislative assemblies (Farid Sufian, 2003, Wan Arfah, 2009). The States, or the Federation for the Federal Territories,

establish *Shari'ah* Courts with its own structure and organisation. It is important to note that *Shari'ah* courts are established outside the civil courts system (Mohamed Ismail, 2005). There is no appeal to the civil courts. The law provides for a three-tier system (Shamrahayu, 2011). Appeals are made within the *Shari'ah* courts system. The law provides for the appointment and removal of *Shari'ah* court judges. The law also provides for *Shari'ah* prosecutors and *Shari'ah* enforcement agencies. *Shari'ah* Courts are independent from the religious authority or the *Majlis Agama* and the office of the *Mufti*. Thus, jurisdiction given to the States and the *Shari'ah* courts is limited. Islamic law in Malaysia applies to Muslims only and is basically confined to matters as specified in the State List of the Federal Constitution (Mohammad Hashim, 1997). The State List stipulates marriage, divorce, division of matrimonial property, maintenance, charity endowments, bequest and inheritance. Even in regard to the subjects included, there are many Federal laws which extend the scope and application of Federal laws. Furthermore, Parliament has been given the authority under the Constitution to enact Islamic law in respect of all matters (including Islamic banking and *takaful*). As a result of this power, the Banking and Financial Institution Act 1989 was introduced to allow conventional banks to introduce Islamic Banking services using their current facilities (Shamrahayu, 2009). Therefore, in early 2003 a Muamalat Division was created in the civil courts to deal with matters involving Islamic banking and *takaful*. It is argued that the creation of such a division causes a lot of controversies and constitutional debate. This indicates that the jurisdiction of *Shari'ah* courts in dealing with civil matters is only limited to the Islamic personal law.

As to criminal jurisdiction, the Federal List provides that the Parliament has powers to legislate on criminal law (Item 4 of the Federal List under the Ninth Schedule of the Federal Constitution). Again, the State legislatures have been empowered to legislate particularly on establishing offences against the precept of Islam, except in regard to matters included in the Federal List (Item 1 of the State List under the Ninth Schedule of the Federal Constitution). This means to say that unlike in civil jurisdiction, the jurisdiction of *Shari'ah* courts in criminal matters must be conferred by federal law. However, this is not the case in the *Shari'ah* Courts of the Federal Territories as there is no need for the federal law to confer criminal jurisdiction since the federal law itself is the one which directly establish the *Shari'ah* Courts and confer such jurisdiction (Item 6 (e) of the State List under the Ninth Schedule of the Federal Constitution). It is until 1965 when the Parliament enacted the Muslim Courts (Criminal Jurisdiction) Act (Act No. 23 of 1965) which is applicable to all the States in Malaysia (section 1 (2) of the *Shari'ah* Courts (Criminal Jurisdiction) Act, 1965). The Act confers jurisdiction to the *Shari'ah* Courts in respect of the offences relating to conversion of religion, matrimonial offences such as cruelty to wives, offence relating to sex such as unlawful intercourse, close proximity (*khalwat*), etc. For example, in the penal jurisdiction, the Muslim Courts (Criminal Jurisdiction) Act, 1984 provided that such jurisdiction should not be exercised in respect of any offence punishable with imprisonment for a term exceeding six months or any fine exceeding RM1,000 or with both. The Act was amended in 1984 where the jurisdiction of the *Shari'ah* courts has been extended to deal with cases punishable with imprisonment up to three years, or fine up to RM5,000 or whipping up to six strokes or the combination of all these.

Efforts have been taken by some States in Malaysia to extend the jurisdiction of the *Shari'ah* Courts in criminal matters. For example, the *Shari'ah* Criminal Code (II) Enactment 1993 of the State of Kelantan which intends to create *hudud* criminal law was enacted (Andrew, 1995). This enactment (though not yet come into force) imposes a structure of punishments which exceed the jurisdictional limits of the *Shari'ah* Courts as specified under the constitutional specifications of the State List (Mohammad Hashim, 1997). The introduction of this Enactment has brought a debate concerning the application of Islamic law in Malaysia. The Federal government does not accept the idea and consider the Enactment to be over the prospects of attaining justice (Mohammad Hashim, 1997). In this respect the government argued that the application of *hudud* (as proposed by the State of Kelantan) only in a part of Malaysia and as an isolated case from the rest of the Islamic law may cause the failure to achieve justice.

The above discussion proves that though the jurisdiction of *Shari'ah* Courts in criminal matters has been extended recently, yet there is a need for them to be given more powers like the civil courts. This is due to the fact that once *Shari'ah* Courts have been granted the criminal jurisdiction the essence of enhancing the deterrence and punishment measures become mandatory. Thus, some amendments should be made to the *Shari'ah* Courts (Criminal Jurisdiction) Act, 1965 so as to ensure better jurisdiction of *Shari'ah* Courts in Malaysia.

The two court system, namely the *Shari'ah* system and the civil court system, have not always enjoyed an amicable relationship. Overlap and encroachment of jurisdiction occurred and the finality of the *Shari'ah* Court decision was often doubted. *Shari'ah* Courts were established in the various states under their respective Administration of Islamic law Enactments. Although *Shari'ah* Courts are established to deal with *Shari'ah* questions, jurisdictional conflicts arose when civil courts exercised their jurisdiction over Muslim parties by various specious arguments. Furthermore, even the relevant State enactments provide for the prevalence of decisions of civil courts over *Shari'ah* Court decisions in the event of conflict. For instance, it is provided in the Selangor Administration of Muslim Law Enactment, 1952 that:

“Nothing in this Enactment contained shall affect the jurisdiction of any civil courts an in the event of any difference or conflict between the decision of a court of a Kathi Besar or Kathi and the decision of a civil court acting within its jurisdiction, the decision of the civil court shall prevail.”

The above provision has received judicial pronouncement and consideration in a number of cases where it was emphasised that the decision of the civil courts would prevail over the decision of the *Shari'ah* Courts (For example, in *Myriam v Mohamed Ariff* [1971] 1 MLJ 265; *Tengku Mariam v Commissioner of Religious Affairs, Trengganu & Ors* [1960] 1 MLJ 10). The problem is piled more by the Courts of Judicature Act 1964 which is considered to be the overriding legislation. The legislative set up of this Act further undermined the *Shari'ah* Courts and Islamic law. In this effect, the civil courts consider themselves as having jurisdiction over matters that are under *Shari'ah* Courts (Farid Sufian, 2003). Therefore, to address this challenge, the need to make amendment to the Federal Constitution becomes necessary. Generally, the 1988 amendment inserts a clause which expressly excludes civil courts in matters that *Shari'ah* Courts have jurisdiction (Farid Sufian, 1999). It was hoped that the amendment would reduce jurisdictional conflict and friction between the *Shari'ah* Courts and civil courts

(Mohammed Imam, 1994). This is due to the fact that clause (1A) of Article 121 bars civil courts from hearing matters falling under the *Sharī'ah* Courts' jurisdiction (Ahmad Ibrahim, 1989, Abdul Aziz, 2001). This is substantiated with Harun Hashim, a Supreme Court judge (as he then was) when he argued that amendment of Article 121 (1A) was made in order to grant exclusive jurisdiction to the *Sharī'ah* Courts in the administration of Islamic law so as to prevent conflicting jurisdiction between the civil courts and the *Sharī'ah* Courts (Dato' Faiza, 2000, Pawancheek, 2004). However, the conflicts between *Sharī'ah* Courts and civil courts are still burning due to the fact that civil courts still retain the power of judicial review of administrative acts and decisions by inferior tribunals including the *Sharī'ah* Courts (Andrew, 1995). Also there are some areas which cause the conflicts based on subject matter to be determined and type of cases which will fall within the *Sharī'ah* Courts' jurisdiction. According to Farid Sufian, the jurisdictional conflict between *Sharī'ah* Courts and civil courts has provided several issues and questions which remain unanswered (Farid Sufian, 1999). Among those issues is whether item 1 of the State List confers jurisdiction on *Sharī'ah* Courts as most of the statutes which establish *Sharī'ah* Courts do not expressly confer jurisdiction on *Sharī'ah* Courts in all matters under item 1.

Thus, though the legislature intends to solve the jurisdictional conflict between *Sharī'ah* Courts and civil courts by incorporating clause (1A) in article 121 of the Federal Constitution, the decided cases prove otherwise. Thus, in simple words it can be said that the jurisdictional conflict between these courts is still not completely resolved.

4. Procedural Laws Applied in the *Sharī'ah* Courts

The rules of evidence and procedure play very important role in the administration of justice. These rules prohibit false evidence. As to the position of rules of procedure and practice in Zanzibar, the Chief Justice is given power to make rules of court to be followed in Kadhis' Courts (section 9 (1) of the Kadhis' Courts Act, No. 3, 1985). However, the said rules are yet to be made. This further pave way for a continue application of Civil Procedure Decree in the absence of those rules as prescribed.

Meanwhile, failure of Kadhis' Courts to have their own Civil Procedure based on Islamic principles together with the lack of knowledge of Civil Procedure Decree among the Kadhis have caused many problems particularly when the parties decide to go for appeals. For instance, parties may not know under which grounds or by which procedures a Kadhi gives a particular decision. Also, they do not know which issue he/she should raise before the higher court. It is important to note from District Kadhis' Court up to the Chief Kadhis' Court, the involvement of advocate is not allowed; only *Wakils* and person who are holding power of attorney are allowed to appear in Kadhis' Court to represent the parties. The term '*Wakil*' has been 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.

Though, it can be argued that there are some reasons for not allowing advocates to appear before the Kadhis' Courts, generally, the idea of not granting them audience before these courts is another setback in the administration of justice. The case might be different when it appears that those *Wakils* appointed hold the qualifications of having Islamic knowledge and Civil Procedure Decree. If that was the case, they might improve the administration purpose under Kadhis' Courts. The main question is how 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.

As to the point of evidence, it is provided that the law and rules of evidence to be applied in Kadhis' Courts including that of a Chief Kadhis' Court shall be those applicable under Muslim law (Section 7 of Kadhis' Courts Act, 1985). The same section insists for all witnesses who appear before these courts to be heard without discrimination on ground of religion, sex or otherwise and each issue of fact to be decided upon an assessment of credibility of all evidence before the court and not upon the number of witnesses who have given evidence. It is observed that the law of evidence which was introduced since colonial period and being applied by Kadhis in their courts had caused some problems for many Kadhis particularly when they preferred proper Muslim witnesses. For example, it is reported that Sheikh Umar (who was a Kadhi in 1945) in his judgment did not accept the plaintiff's witnesses on the ground that they were not socially knowledgeable on the subject, holding that proof could only be established from two knowledgeable men (Stockreiter, 2010). By doing so, he ignored the stand of the Evidence Decree 1917 which made people regardless of their religion, sex and social background acceptable witnesses in the Kadhis' Courts. Though it is well stated that the law and rules of evidence to be applied currently in the Kadhis' Courts shall be those applicable under Islamic law, the involvement of Evidence Decree based on common law principles cannot be undermined. This can be clearly seen when the High Court is involved to hear appeal from case emanated from Kadhis' Courts. For example, in *Idrissa Hussein Mrisho v Sihaba Soud Waziri*, Civil Appeal No. 30 of 2009 held at High Court, Zanzibar (Unreported), Omar O. Makungu J. (the Chief Justice) in his judgment considered the application of law of Evidence Cap. 5 and argued that evidence under Kadhis' Court must be considered without any discrimination based on religion, sex etc.

The above verdict given by the court proves that there are no specific rules of Evidence based on Islamic principles to be followed in the Kadhis' Courts. The failure of having these rules has caused a lot of difficulties to the Kadhis particularly when they are hearing cases of different nature.

While Kadhis' Courts are still in dilemma on enacting the procedural laws based on Islamic principles, the case is not the same in Malaysia. The current position of procedural laws in the *Sharī'ah* Courts in Malaysia is much better compare to the Kadhis' Courts in Zanzibar. However, in the early period the case was similar between Kadhis' Courts and *Sharī'ah* Courts as Kadhis and judges in both Zanzibar and Malaysia have to apply the procedural laws as applied in the civil courts. It is stated that in the past, the only legislation on the administration of the Muslim law in the Malay States was the Administration of Muslim Law Enactment. This law among other thing dealt with the constitution and powers of the Council of Muslim Religion, the Mufti and the power to issue *fatwa* or rulings on Muslim Law, the law relating to Muslim marriage, divorce, *wakafs* and *baitulmal* and the *Sharī'ah* Courts. The provisions of this enactment were very limited in their scope and

in particular the law relating to the procedure and evidence to be applied in the *Sharī'ah* Courts was inadequate and required reference to the civil law applicable in the civil courts. There was a need to have new law to deal with the evidence and procedure to be applicable in the *Sharī'ah* Courts. Due to this, and in order to assist the *Sharī'ah* Court in its daily functions, laws relating to the *Sharī'ah* law of Evidence, the *Sharī'ah* Code of Criminal Procedure and the *Sharī'ah* Civil Procedure have been enacted in different States of Malaysia. It is worthy to note that in Malaysia, the substantive and procedural laws are within the legislative powers of the State for States' *Sharī'ah* Courts and the Federation for the Federal Territories' *Sharī'ah* Courts (Halsbury, 2002). With the enactment of these laws, the judges and officers of the *Sharī'ah* Court and the lawyers and parties who appear before them have been given an adequate guidance on the rule of procedure and evidence to be applied (for example, the Civil Procedure (Federal Territories) Act 1998).

The above discussion shows that procedural laws are very important rules to be applied in the *Sharī'ah* and Kadhis' Courts. However, among *Sharī'ah* and Kadhis' Courts in these two countries, Malaysia is quite far ahead in terms of enacting and applying these procedural laws. The situation in Zanzibar reveals that Kadhis' Courts are still applying the Evidence and Civil Procedure Decrees which are cemented by the practice and procedure of Common law. This encourages the pollution of Common law principles with that of the Islamic law. It is observed that lack of rules of procedure and practice (based on Islamic principles) to be applied before the Kadhis' Courts as well as the ignorance of most of the Kadhis in applying the procedures and practices as provided under Civil Procedure Decree can be seen as the main sources of miscarriage or misplacement of justice in these courts.

5. Lessons to be Learnt

The above comparative analysis shows that the *Sharī'ah* and Kadhis' Courts are very important institutions in the administration of Muslim affairs in Malaysia and Zanzibar. Currently, these courts face a lot of drawbacks. This, to a great extent, affects the level of expectation as expected by the communities. Therefore, this article reveals the lessons that if implemented will solve the problems which face the *Sharī'ah* and Kadhis' Courts. It will also ensure proper administration of justice within the countries under review.

5.1 Unification of National Courts

The existence of legal pluralism in Zanzibar and Malaysia is a reflection of the historical background of these countries. There are two court systems in Zanzibar (the civil courts and Kadhis' courts) and three court systems in Malaysia (the civil courts, the *Sharī'ah* courts and the native courts) which have jurisdiction over different groups of people and apply different laws. It is alleged that colonialism over these countries is essentially responsible for the existence of multi-court systems (Farid Sufian, 1999). This is further piled due to the fact that even after independent these two nations determine the fate of their indigenous law and the received law as practiced during the colonialism. Though it is argued that the existence of different court systems and laws in Zanzibar and Malaysia is a reflection of the reality of the different cultures and religions practice and profess by the people, the need to unify the court systems within these countries is something mandatory. It can be observed that justice and equality are the cherished values of both Islamic law and common law and they are inherently holistic and Unitarian (Mohammad Hashim, 1997). There is no inherent need for bifurcation and division of justice under the Islamic and statutory laws of Malaysia and even Zanzibar.

Due to the above, there is a need for Zanzibar and Malaysia to consider reorganization of their judiciaries along the lines that have been taken by some countries like Egypt and Sudan by having a system of unified national courts that are committed to the same standards of efficiency and diligence in the services of justice, but may decide to have *Sharī'ah* benches within the general structure of a unified judiciary. In order for this process to work efficiently there is a need to have uniformity particularly in the administration of Islamic law within these two countries. The situation might be easier in Zanzibar where no much complication since there is a straight application of Islamic law administered by the Kadhis' Courts together with the involvement of High Court at the level of appeal. However, this is not the case in Malaysia as the administration of Islamic law is within the States' powers and solely to the *Sharī'ah* Courts. Therefore, in order to ensure that the process of unifying the court system in Malaysia is gaining a full swing, there is a need to have a substantive uniformity in the administration of Islamic law for the whole States in Malaysia. It must be noted that the idea proposed by the authors is not a strange thing mainly with the historical background of Malaysia. For this purpose, the efforts to unify the administration of family law in Malaysia can be used to substantiate the need of having uniformity in the administration of Islamic law within the country.

The development of Islamic Family Law was under review during the 1970s. As at that time each state had its own Administration of Muslim Law Enactment that regulated all matters under Islamic law, from mosques and offences against the precepts of the religion to family law (Mehrun, 1994). Noting the reality and weaknesses which existed in the enactments passed previously, new enactments were proposed as substitute to the previous ones (Abdullah Abu, 1990). The aim of drafting the model Islamic Family Law Act was to separate family law from other matters, to introduce measures to resolve existing problems, and to bring about uniformity in the state laws (Mehrun, 1994). Before 1984, each State had its own legislation on the administration of the family law (Ahmad Ibrahim, 1997). There was a need to have a uniform law on this matter and a Committee headed by Tengku Zaid from the Attorney-General's Chambers was appointed to prepare a model enactment. This model code was later agreed to by the Council of Rulers and after that referred to the various States for enactment of the legislation. Unfortunately, the hope to have a uniform Islamic family law in this way was not achieved, as some states particularly Kelantan, Kedah and Malacca, made significant changes to the draft. In this respect, each state passed an enactment based on the model but with modifications that were deemed necessary by each State's Religious Affairs Department (Mehrun, 1994).

From the above statement it can be observed that the idea of unification is not new in Malaysia. Thus, the efforts taken to unify Islamic family law can be taken as a means towards the process of having a substantive uniformity in the

administration of Islamic law for the whole Malaysia. This can be done by reviewing the previous efforts to unify the Islamic family so as to know the factors which caused the process not to get full success as it was anticipated.

The unification of legal systems among other things will prove to be more economically effective in these countries and at the same time it will substantially reduce the overlapping of jurisdiction (between *Shari'ah*/Kadhis' Courts and civil law courts) which has been witnessed in many occasions particularly in Malaysia. It cannot be denied that for the process of merging the court systems to materialise there is a work to be done. It is proposed for the judiciary in Zanzibar and Malaysia to formulate a structure that will suit and maintain the demographical nature of religious and cultural pluralism within the countries. In doing so, the existence of *Shari'ah*/Kadhis' Courts together with the application of Islamic law will still continue to apply to the Muslims. This assurance will not curtail the rights of non-Muslims as the reality of these countries being multi-religious societies will still be maintained and acknowledged within the proposed unified courts system. This argument is substantiated by Ahmad Ibrahim (2002) in the following dictum:

“We are proud in Malaysia, of our inter-racial harmony and in building up a caring and loving society for our nation. We should strive to understand one another better and in the application of our laws try to find ways of respect and reconciliation rather than create conflict and dominance.”

The above quotation shows the importance of solving the social and even judicial conflicts amicably within a particular society. This can be used as a cornerstone towards the process of resolving the judicial conflicts between civil and the *Shari'ah*/Kadhis' Courts in Zanzibar and Malaysia by introducing the unified national courts within these countries.

5.2 The Essence of Extending *Shari'ah*/Kadhis' Courts' Jurisdiction

Many doubts have been raised on the ability of *Shari'ah*/Kadhis' Courts to administer wide jurisdiction. In other words, the ability of the Kadhis and judges to maintain justice within the society has been put in question. The doubters argue that the aspect of justice dispensed by the Kadhis and judges are unprincipled and arbitrary. Thus, the term 'Kadhi justice' would symbolize a total denial of the law. The above argument against the Kadhis and judges has been the stand of many civil court judges even in other jurisdictions. For example, in the case of *Terminiello v Chicago* (1949) 337 US 1 it was stated that:

“This is a court of review, not a tribunal unbounded by rules. We do not sit like Kadi under a tree dispensing justice according to considerations of individual expediency.”

The above quotation shows the wrong perception of many people particularly judge of the civil courts towards the courts with *Shari'ah* jurisdiction. However, the critics fail to understand that Islam emphasises much on the aspect of doing justice. Therefore, unprincipled and arbitrary law-making are not the characteristics of the administration of justice in Islam as applied by the Kadhis' Courts.

The ability of the *Shari'ah*/Kadhis' Courts to be entrusted to administer current issues like Islamic banking and *Takaful* is another argument given by the doubters. This can be proved by looking at the current position of Malaysia where Parliament has been given the authority under the Constitution to enact Islamic law in respect of Islamic banking and *takaful*. As a result of this power, the Banking and Financial Institution Act 1989 was introduced to allow conventional banks to introduce Islamic Banking services using their current facilities. Therefore, Muamalat Division was established in the civil courts to deal with matters involving Islamic banking and *takaful*. However, the creation of such a division causes a lot of controversies and constitutional debate. The simple question which is clicking the mind of any reasonable man is why civil courts have been entrusted to deal with Islamic banking and *takaful* instead of *Shari'ah* Courts. While someone still thinking the answer, it is worthy to note that in Zanzibar, Islamic Banking services have already been established. Apparently, if the problems arose from the administration of Islamic Banking services, it is the civil courts which are entrusted to deal with these matters. This indicates that the jurisdiction of Kadhis' Courts in Zanzibar is only confined to civil matters. Nonetheless, even in entertaining the civil matter, the jurisdiction of Kadhis' Courts is only limited to the Islamic personal law. This situation shows the need to expand the jurisdiction of Kadhis' Courts in dealing with civil matters while at the same time emphasis must be given for the introduction of criminal jurisdiction to deal with criminal matters. Though it may be argued that time is not up for the expansion of civil jurisdiction and the introduction of criminal jurisdiction in the Kadhis' Courts in Zanzibar, there is a need to consider the historical nature and demands of Muslims (who are majority) in Zanzibar. It must be known that in order to ensure that the teachings and principles of Islam are well practiced by the Muslim community; there is a need for the administration of justice to be administered according to Islamic law.

The above discussion shows that though the doubters might have strong arguments against the notion of expanding the jurisdiction of the *Shari'ah* and Kadhis' Courts, the Zanzibar and Malaysian legal histories show the ability of these courts to administer Islamic law and maintaining the administration of justice by using their own competent officials. Therefore, there is a need to extend the jurisdiction of *Shari'ah*/Kadhis' Courts in both civil and criminal matters so as to ensure better administration of Muslim affairs within these two countries. Thus, to guarantee smooth process, the introduction of training to the Kadhis and judges is something indispensable. This must go hand in hand with the idea of heightening the qualifications for someone to be appointed as a Kadhi or a judge of the *Shari'ah*/Kadhis' Courts.

5.3 The Need to Enact Substantive and Procedural Laws

It cannot be denied that law has certain purposes within the community. Apart from ensuring order, it aims to satisfy social wants by expressing the values and convictions of a given society. As a consequence, law is an indispensable mechanism for the creation and maintenance of peace and stability in society. Meanwhile, law must adapt changes, mainly when the society needs changes in order to meet the demands of the social changes in a particular society. In other words, laws are changed to meet the new needs and requirements of society and law is a response to social 'demands'. The above remarks prove the need

of enhancing the substantive and procedural laws which must be applied in the courts with *Shari'ah* jurisdiction in Malaysia and Zanzibar. However, in order to accomplish this process, more emphasis must be given to the Kadhis' Courts of Zanzibar where these things seem to be forgotten. Though the Kadhis' Courts Act gives power to Chief Justice to make rules of the court to be followed in the Kadhis' Courts, these rules have yet to be made. Lack of rules before the Kadhis' Courts has caused difficulties for the Kadhis as mostly they are obliged to apply the Civil Procedure Decree and Evidence Decree which are cemented by the practice and procedures of Common law. As to the introduction of Islamic criminal procedure, this cannot be materialized without Kadhis' Courts being given the jurisdiction to deal with criminal matters. It is insisted above that considering the Muslim population in Zanzibar, the extension of Kadhis' Courts' jurisdiction to deal with criminal matters is something indispensable. Therefore, the introduction of criminal jurisdiction in the Kadhis' Courts must go hand in hand with the enactment of procedural law (Islamic criminal procedure) which will enhance the administration of criminal matters. Generally, the enactment of substantial and procedural laws will enhance the case management of these courts as they will guide Kadhis towards the process of reaching decisions which are just and equitable.

As far as the Malaysian experience is concerned, much has been done on enacting the procedural laws within the States and the Federal Territories. Nevertheless, the substantial changes which continue to occur in Malaysia must also involve the enactment of other substantial laws so as to accommodate the changes and needs of the Malaysian community. Though it is argued that the codification of Islamic law has its positive and negative implications, but due to the need of the societies, the purpose of codification is not questionable (Mahmud Saedon, 1989). Ideally, the codification of substantial and procedural laws in different countries has been shaped by their various sociopolitical contexts; however, most of these modern laws continue to espouse the *Shari'ah* principles on the issues of marriage and divorce, evidence and procedures (civil and criminal) to be applied in the courts which have *Shari'ah* jurisdiction. Therefore, due to the need of doing justice among the parties in the *Shari'ah* and Kadhis' Courts, the codification of substantial and procedural laws become inevitable.

6. Conclusion

From the discussion above, it is clear that the *Shari'ah*/Kadhis' Courts in Zanzibar and Malaysia play a pivotal role in the administration of justice among Muslims before and after independence. Although these courts were retained after independence, the colonial legacy of the British common law can be said to be the hindrance for proper administration of Islamic law. This perception is substantiated in view of the constitutional position of these courts. It is also obvious from its jurisdiction which always conflict with jurisdiction that of civil courts and the procedural laws applied by them.

There are similarities and differences between *Shari'ah* Courts in Malaysia and Kadhis' Courts in Zanzibar as far as the status in their legal systems is concerned. The study shows that the Constitutions of Zanzibar and Malaysia ignore the position of *Shari'ah* and Kadhis' Courts. This is due to the fact that *Shari'ah* Courts in Malaysia receive little attention apart from Article 121 of the Federal Constitution while Kadhis' Courts have been established as one of the subordinate courts to the Zanzibar High Court. This position has led to the constitutional amendment which takes out the Article which directly established the Kadhis' Courts in Zanzibar. This led many people to believe that the *Shari'ah* and Kadhis' Courts status is not higher than that of the other inferior courts. Also, the status of *Shari'ah* Courts in Malaysia appears to be higher than the Kadhis' Courts in Zanzibar. This is due to the fact that while their jurisdiction in civil matters is very narrow, no criminal jurisdiction is granted to them. However, the *Shari'ah* Courts in Malaysia do not always enjoy an amicable relationship with the civil courts. This happens mostly when the civil courts make doubt on the final decisions of the *Shari'ah* Courts.

The difference between these courts is evident in substantive and the procedural laws which are applicable in the courts. While both legal systems fail to record good development on enacting substantive laws in the *Shari'ah* and Kadhis' Courts, much has been done on enacting the procedural laws within the States and the Federal Territories of Malaysia compared to Zanzibar. Thus, failure of Kadhis' Courts to have comprehensive procedural laws, to a great extent, jeopardises the whole process of reaching a just conclusion.

Therefore, to overcome the above problems and in order for the *Shari'ah* and Kadhis' Courts to gain their true status in these two legal systems, the above suggestions proposed by the authors can be used as the cornerstones of the intended changes.

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