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## RESEARCH ARTICLE

# THE DEBATE AROUND THE PROPOSED KADHI COURTS IN THE CONSTITUTION AND ITS IMPACT ON CHRISTIAN- MUSLIM RELATIONS IN MWANZA, TANZANIA

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### ABSTRACT

Muslim relation is a paramount aspect in the Republic of Tanzania based on the historical information that identifies the two religions as major. The study has described the debate around the proposed Islamic *kadhi* courts in the constitution of Tanzania and its impact on Christian- Muslim relations in Mwanza, Tanzania. The Muslim proposal of the inclusion of the Islamic *kadhi* courts into the Tanzanian constitution would cause a split of the country. The study focused on the following objectives; examined the history of Islamic *kadhi* courts in mainland Tanzania; second, explored perspectives around the debate on the proposed Islamic *kadhi Courts* and analyzed the impacts of Islamic *kadhi* courts in the constitution on Christian-Muslim Relations. The study was largely informed by the following reviewed literature; Chesworth and Kogelmann, eds. 2014, Jeppie, Moosa, and Roberts, 2010 and Na'im, ed. 2002 dealing with writings on Christian-Muslim relations from a wider perspective. The study was justified on the following grounds; enlightening readers on the impacts of the proposed of the Islamic *kadhi* courts in the constitution on Christian- Muslim Relations; exploring the knowledge gap that had been not done by other scholars on the impacts of the proposed Islamic *kadhi* courts on Christian- Muslim Relations. The research used a descriptive design employing both qualitative and quantitative approach. Data collection process was done using the questionnaire for quantitative data and, the interviews and Focus Group discussion for qualitative data. The findings were based on the objectives as follows; first, Islamic *kadhi* court was and still an entity considered to be a lawful guiding tool on Muslim social lives that covered the great social concerns on matters of divorce, marriage, inheritance and other day-day occurred disputes. Second, reasons for the inclusion of the *kadhi* court in the constitution were to uphold the faith and settling matters in the Islamic religion. Reasons against the move included; disunity amongst the citizens after the creation of the superiority and inferiority scene, struggle for power could tear apart the nation. Economically, the stability in the income and expenditure is controlled by power. The powerful religion is likely to obtain and use resources at the expense of others. Socially, the society will be divided on matters of marriage, interaction and general social cohesiveness; same to cultural and others. These and other reasons therefore impede the peaceful co-existence between the Muslims and Christians. In conclusion, there is need for the amicable stand to be reached as far as Muslim-Christian relation is concerned; the treatment offered to religions should be fair and equal without special focus, to avoid solving one problem yet creating another. The study recommended the following; first, the need to revisit the debate on the inclusion of the Islamic *kadhi court* back in history to understand its emergence and the role intended for. Second, the state should allow existing bodies to have regionally constituted documents to take care of their matters to avoid superiority and inferiority scenes. Finally, when handling religious matters they should not be done unfairly, selectively and under the influence of the political power.

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## INTRODUCTION

Several countries in Africa and the Commonwealth that have a significant population of Muslims have accommodated the Islamic *kadhi* court system in their Constitutions and laws to cater for the regulation of the personal status of their Muslim citizens. The phrase *kadhi* traces its origin from the Arabic word *Qadi* which literally translates to a person who traditionally has jurisdiction over all legal matters involving Muslims (Majamba, 2002:1). Relations are termed important in establishing a united forum in many life aspects.

A Christian-Muslim relation is one of the earlier existed relations that have run parallel in a single Country like Tanzania. Tanzania is the largest country in East Africa, with slightly more than 120 ethnic groups scattered over the country (Wijsen and Mfumbusa, 2004). There three major religious traditions in Tanzania, are the indigenous comprising various forms of ancestor veneration, the Islamic and Christian traditions. The 120 ethnic groups have lived together without serious friction since independence 1961 (Wijsen and Mfumbusa, 2004). The great concern in this thesis was on the relationship that was developed between the groups that existed peacefully all through since independence and now

with the introduction of the *kadhi* court in the constitution of Tanzania. Mainland Tanzania formerly Tanganyika was a sovereign state that gained her independence from British rule in 1961 to 1964. From 1964 mainland Tanzania signed the article of union joined with the people of Republic of Zanzibar. The two sovereign states changed their names to form the United Republic of Tanzania. According to a census of 2012 Tanzania total population was 44.9 million (Zanzibar 1.304 million and mainland Tanzania 43.9 million). In Zanzibar Island, Islam is the major religion with ninety percent (90%) in the Island being Muslims ( Tanzania International Religious Freedom Report, 2017). Majority of Muslims in the Island are Sunni while minority being *Ibadi*, *Ismaili*, and *Twelvers Shia* who are believed to have come into Zanzibar in the 8<sup>th</sup> century B.C.E.

Tanzania, do not keep statistics on religious identity however there were reports that Muslim communities are 50 percent and 50 percent Christians and a pew forum survey conducted in 2010 suggests that approximately 60 percent are Christians and 35 percent are Muslims and 3 percent adhere to other religions (Religious Pew survey, 2012). Zweep, 2015 in her dissertation according to Pew Foundation Survey in 2010 estimated 30 -40 percent are Christians and 30 -40 percents are Muslims the remainder are atheist and indigenous religious. In respect of Christians and Muslims percentage are almost equal in number according to these reports. Muslims concentrated on coastal areas and with majority Muslims in urban areas especially along the former caravan routes Dar es Salaam, Kigoma, Mwanza, Singida, Tabora and Tanga (Abdulaziz Y. Lodhi and David Westerlund, 1997). There are other studies done relating to Islamic *kadhi* courts in Mainland Tanzania. The research by Kopwe William Andrew ((Majamba, 2002: 22) under the title Demand for the re-introduction of Islamic *kadhi* courts on the Tanzanian mainland: A religious, social and political analysis. Kopwe argued that the demand of Islamic *kadhi* courts is the infringement of the country constitution and opposed the use of taxpayers' money on religious groups. The government has to abstain from Islamic *kadhi* courts re-introduction as a national entity rather it should remain under Muslims personal matters. Previous studies have been done in Dar es Salaam and Kigoma while this will be conducted in Mwanza the second largest city of mainland Tanzania with people from a diverse background; Christians and Muslims. The study set to explore the knowledge gap which has not been done by other scholars on the impacts of the proposed Islamic *kadhi* courts on Christian- Muslim Relations. Christians and Muslims have together coexisted before and during colonial governments without confrontation. Despite Tanzania being religious and culturally diverse with more than 120 ethnic groups and with traditional beliefs in deities, religion is the right of the individual to agree or not to agree with, choose or not to choose. With the adoption of constitution permeable of 1977, Tanzania adopted *Ujamaa* policies that emphasized much on national identity as opposed to ethnic and religious identity (The Constitution of The United Republic Of Tanzania, 1977:10). After independence and with the reign of the first president *Mwalimu* Julius Nyerere ruled (1961-1985), disputes between Christians and Muslims started and this continues even today. Despite the reported disputes, *Mwalimu* Nyerere managed to guide the country to the extent that Christians and Muslims continued to co-exist peacefully. Besides the efforts done by former president in uniting the different groups in the country, the peaceful co-existence still stands as a need. What will be the state of the religions in terms of the relations to

each other? This is a concern in the study on the debate behind the inclusion of the *kadhi* court in the constitution. Today, there is tension between Christians and Muslims, a situation which threatens the peaceful co-existence between Christians and Muslim in Tanzania. The tension was due to the proposal by Muslims to re- introduce Islamic *kadhi* courts in mainland Tanzania being part of the constitution during the referendum of the United Republic of Tanzania constitution in 2003. The proposal of Islamic *kadhi* courts was widely a prominent debate in mainland Tanzania that is against the constitution and it will divide the national. The bill on Islamic *kadhi* courts proposed in 2003 in the parliament of United Republic of Tanzania to accommodate Islamic *kadhi* courts which were mandated with family matters of marriage, divorce, and inheritance among other social matters in Islam. It was not a smooth transition or a move since some opposing forces from some members of the parliament and Christian leaders were not in support of it. Lack of unanimous move raised some unbearable atmosphere thus causing threats and even some reported attempts of attacks in various places within mainland Tanzania.

According to the constitution of United Republic Tanzania, a secular state is constitutionally guaranteed freedom of worship of her citizens Act.No.19 of 1977. Christians opposed Islamic *kadhi* courts because religious affairs are personal matters which should not be entrenched into the national constitution unless otherwise. The question rotates on the special public recognition given to a religious personal matter. Religious leaders both in Kenya and Tanzania have been reported demanding for the acknowledgment of religious institutions in their constitutions (Ochieng, 2009). In March 2015 Christian religious leader's representatives from the Christian Council of Tanzania, Tanzania Episcopal Conference and the Council of Pentecostal Churches of Tanzania all signed the appeal to withdraw the bill of Islamic *kadhi* courts from the parliament (Jukwaa la Wakristo Tanzania, 2015). The *kadhi* court bill which was proposed by the majority of Muslims to be included in the constitution was postponed after the Christian leader's opposition. The reason for the opposition is associated with what is likely to accompany the *kadhi* court contrary to the Christians. The acceptance of the inclusion of the *kadhi* courts in the constitution implied the one supreme rule for Muslims as opposed to the sovereignty of the nation. On the same, Muslims associations responded on March 2015 by insisting that Islamic *kadhi* courts existed before and during the colonial era, even now it exists in Zanzibar and neighboring countries of Kenya and Uganda. This implied that it had the possible right to be included in the constitution of the republic of Tanzania. Muslims further argued that there was no logic for Christians to oppose Islamic *kadhi* courts to be part of the constitution. They regarded any attempt by Christians to reject the proposal of Islamic *kadhi* courts in the constitution as an attack on their religious practices. The study dealt with the tension caused on the Muslim-Christian relations when the *kadhi* court is included in the constitution through racing the history, the reason for the proposal of Islamic *kadhi* courts in the constitution and how it affects Christian-Muslim relations in mainland Tanzania.

**Statement Problem:** The Muslim proposal of the inclusion of the Islamic *kadhi* courts into the Tanzanian constitution would cause a split of the country. The United Republic of Tanzania being a secular state based on the 1977 constitution gives freedom of worship to its citizens, with no preference given to

any religion in the constitution. In the 2003 referendum of the new constitution of the United Republic of Tanzania, Muslims proposed Islamic *kadhi* courts to be part of the national constitution which brought confrontation from Christians since Tanzania as a secular state; such a proposal believed to undermine other religions in the country. With the historical peaceful coexistence between Muslims and Christians, the proposal of the inclusion of the Islamic *kadhi* courts into the constitution would impact on the Muslim-Christian relation in Nyamagana- Mwanza and divide the nation.

### Research Objectives

- To examine the history of Islamic *kadhi* courts in mainland Tanzania.
- To explore perspectives around the debate on the proposed Islamic *kadhi* courts in the Tanzanian constitution.
- To analyze the impacts of Islamic *kadhi* courts in the constitution on Christian-Muslim relations.

### Research Questions

- What was the history of Islamic *kadhi* courts in mainland Tanzania?
- What were the perspectives around the proposed Islamic *kadhi* courts in the Tanzanian constitution?
- How did the proposed Islamic *kadhi* courts in the constitution impact the Christian-Muslim relations?

**Justification of the Study:** The study was influenced by Muslims proposal for Islamic *kadhi* courts in the constitution during the referendum of the new constitution in 2003. The study focused on *kadhi* courts because of what it contains and how effective the policies in the *kadhi* courts can affect the practices within and outside the Islamic religion. The study was based in Mwanza, one of the regions with a large population comprising of both Muslims and Christians, a good case for the exploration of the study objectives. The propelled religious extremism has an impact to the peaceful co-existence in the country. Failure to address such custom, the country can face instability. This study focused on obtaining a balanced aspect, avoiding the one religion supremacy and rule of law against the other religions.

**Historical reflection of Islamic *kadhi* courts:** During the era of *jahiliyah* in Arabia customary law of personal status and family of inheritance and criminal law was dominating among the Bedouins. However, the absence of political authority in Arabia implies an absence of organized judicial systems (Joseph and Schacht, 1964). Private justice prevailed in settling homicide disputes concerning rights of property and succession (Coulson, 1964). Coulson, 1964 and Schacht, 1964 together reported that cases of two parts negotiated and when the two parties led to no agreement the case was forwarded to "*hakam*" arbitrator. The arbitrator was any person appointed by the two parties on whom they agreed. The chosen *hakam* qualification was due to his family famous, and competence in dealing with disputes. During pre-Islam, no evidence of an arbitrator with an office which cases were handled according to Islamic law rather than the competence of arbitrator during that time. The fact that Muslim-Christian relation is still an issue implies that the negotiation did not bear fruits that could last in handling the relationship- related issues. This creates a need for the investigation of the impact that comes with the

inclusion of the *kadhi* court in the constitution. After the period *jahiliyah* Muhammad the prophet of Islam emerged in 610 C.E in Mecca as a religious reformer, not a mere "*kahin*" a priest of a pagan cult who claimed supernatural powers of divination (Schacht, 1964:3). In 622 C.E Muhammad became a ruler when he was in Medina, lawgiver, and arbitrator in disputes of the new society basis on the religious community of Islam. Muhammad acted in the function of *hakam* in his community. Whenever the Quran speaks of prophets' *hakam* from which the term *kada* or *qadi* was delivered from the Quran is referring to the sovereign ordinance of Allah (Schacht, 1964:3). This instance of Prophet Muhammad arbitration aspect is the first emergence of a new Islamic ideal of administration of *kadhi* courts. However, Muhammad position of political and military power gave him much authority that could be claimed by the arbitrator. Muhammad legislation was an innovation of Arabian customary law with the aim to teach men how to act, what to do and what to avoid (Schacht, 1964:11). These rules are Islam in general and Islamic law, in particular, a system of duties, rituals, legal and obligations by bringing them under the same religious command (Schacht, 1964:11). The reasons for *Quranic* legislation on marriage, divorce, inheritance, guardianship and all matters of life was to protect women, orphans and weak people in the community (Schacht, 1964:12).

After the death of Muhammad the Prophet of Islam in 632, Islamic society created its own legal institution. Arab system of arbitrator continued under caliphs in Medina 632-661 A.D (Schacht, 1964:15). The administrative legislation was hardly modified to the existing customary law. The object of modifying the customary law was to organize the newly conquered territories for the benefits of Arabs (Schacht, 1964:15). The first Caliph went beyond the sanctions enacted in the Quran by employing severe punishment which does not exist in the Quran obviously taken from Mosaic Law. The first Caliphs do not appoint *kadhis*' and did not lay the foundation of the Islamic system. Umayyad 661-750 considered themselves disputes of God on earth and looked the Qur'an as a source of law from which they can draw their legal decision (Hallaq, 1997:8). During this time Umayyad governors were responsible for developing Islamic worship and rituals. Both Schacht, 1964 and Coulson, 1964 consensus that governors during Umayyad era took the step on appointing Islamic *kadh's*, the office of *kadhi* was created for the new conquered Islamic society (Schacht, 1964). The arbitration of per-Islamic *hakam* was replaced by Islamic *kadhi*. Schacht, 1964 and An-Na'im, 2002, the *kadhi* arbitration extended to Muslims only and non-Muslim retained their own traditional legal institutions *mazalim* courts. Islamic *kadhi's* officials of the Umayyad laid the basic foundation of Islamic law (Schacht, 1964:25).

The earliest Islamic *kadhi* gave arbitration according to they are own "*ra'y*" sound opinion based on customary practices. On the late Umayyad period, the work of *kadhi* becomes a professional to individuals who are pious persons (Coulson, 1964:26). Members of Raja and Abu Kilaba were among familiars. They made the sphere of law with religious and ethical ideas subjected to Islamic norms to every Muslim (Schacht, 1964:26). Islamic law under Abbasids 750 A.D when Umayyad was overthrown from the power they established the rule of Allah on earth by recognizing religious law. The office of *kadhi* was permanently connected to *sharia* the sacred law. The *kadhi* became the fixed specialist in the *sharia* appointed

by the government (Schacht, 1964:50). The *kadhi* office was separate from the general administration to become bound to Islamic law. The Abbasid government also led to the appointment of the chief *kadhi* “*kadi l-kudat*” who advised the caliph administration of justice. The chief *kadhi* appoints and dismissal other *kadhi*'s was the function of his office (Schacht, 1964:51).

**Research Design:** The research designs used in this study were both descriptive and design. Descriptive research was a preference in obtain information concerning the current status of the phenomena and to describe "what exists" with respect to variables or conditions in a situation. The study employed mixed methods; both qualitative quantitative methods to produce findings arrived at by means of quantifying and qualifying data (Strauss and Corbin 1998:11). Words are grounded into categories and the main sources of data is through interviews for qualitative data collection (Kimalu and Marimba, 2014: 18). The focus was on the relations experienced between the Muslims and Christians after the proposal of the inclusion of the Islamic *kadhi* courts in the constitution. In qualitative research, the respondents understand their social reality as the central motifs of qualitative research (Bryman, 1988:8). It consists of a set of interpretative, material practices that makes the world visible. These practices turned into a series of field notes, interviews, conversations, photographs, recording and memos to the self. Qualitative research study things in their natural settings, attempting to make sense of, to interpret phenomena in terms of the meanings people bring to them. With this remark, the use of Qualitative research in this study will help the study to collect data, interpret the phenomena of Muslims proposal of Islamic *kadhi* courts deeply in terms of the meaning of the selected sample to represent others.

**Ethical considerations:** Ethical issues are important in every study and unethical practices may cause legal and moral consequences. The study has observed the following ethical consideration as part of the profession concerned during the generation of knowledge. Ethics is a system of beliefs which controls the study; observation and balance between the search for knowledge and respect for the respondent's dignity and welfare of participants throughout the process. Ethical standards of conducts which are informed consent, and confidentiality, plagiarism and permission from authorities will be observed. The respondents in this study were given the freedom to make their decision to contribute their opinion, feeling, based on the study. The respondent's participation was voluntarily and informed consent. The researcher explained about the purpose of the study to the participants, unforeseen risks, and benefits to influence their willingness to involve or to decline in the study. The intellectual theft is presenting somebody else work, ideas as one's own is avoided in this study by recognition of every work referred according to the format acceptable by St. Paul University. The study did not claim the ideas and written words of another scholar as own without acknowledging the source.

**Research findings:** This section brings together the study objectives and the findings highlighting on the responses towards the aim of the study. The objectives under study were to; examine the history of Islamic *kadhi* courts in mainland Tanzania, explore perspectives around the debate on the proposed Islamic *kadhi* courts in the Tanzanian constitution and analyze the impacts of Islamic *kadhi* courts in the constitution on Christian-Muslim relations.

- Research findings in response to the first objective clearly indicated that Islamic *kadhi* courts although not universally used and observed, it was existing in coastal areas, distributed in some regions of mainland Tanzania even though no exact number of the *kadhi* courts were identified. The purposes of the Islamic *kadhi* courts were purely to settle Muslims disputes concerning marriage, divorce, guardianship and inheritance.
- Study findings on the debate for inclusion of the Islamic *kadhi* court in the constitution raised views were from Islamic point of view touching on the unfair and unjustified way of handling disputes among the Muslims in the absence of the Islamic courts and practice of *Sharia* law by Islamic experts as final decision makers in cases of marriage, divorce and inheritance. This among other reasons set a ground for the demand of Islamic *kadhi* courts inclusion in the Tanzanian constitution. Christians agreed with the practice of Muslims Islamic *kadhi* courts on the condition that it should not be included in the Tanzanian constitution just for those who profess Islamic religion. “The Islamic *kadhi* courts should not be under government expenses using money by taxpayers who are not Muslims; we have civil courts for every citizen of the country.
- The findings indicated that the inclusion of the Islamic *kadhi* courts in the constitution has great impacts on the Christian-Muslims relation. Development of the superiority and inferiority, disunity in the state and struggle for power were among the findings which showed the presence issues to be put into consideration to ensure.

## Conclusion

In deduction, the Islamic *kadhi* courts and Muslim-Christian relation is a debatable and a disputable aspect that calls for the agreeable approach that considers the state religions and their rights as stipulated in the constitution without biasness. In a nutshell, this study has the following as a conclusion as obtained and analyzed from the data collected;

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