MUSLIM FAMILY LAW
IN SUB-SAHARAN AFRICA
COLONIAL LEGACIES AND
POST-COLONIAL CHALLENGES

Shamil Jeppie, Ebrahim Moosa
& Richard Roberts (eds.)

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Coping with Conflicts: Colonial Policy
towards Muslim Personal Law in Kenya
and Post-Colonial Court Practice

Abulkadir Hashim

Application of Islamic law along the East African coast dated from the estab-
lishment of the Sultanate of Zanzibar in the early nineteenth century. Kadhi courts were estab-
lished in major towns of the Sultanate along the East African coast. Territories of the Sultan of Zanzibar stretched from the
Benadir coast in Somalia to northern Mozambique. However, with the estab-
lishment of the British Protectorate in Zanzibar and the Kenyan coast in
1890, the role of Islamic law and jurisdiction of kadhi courts were subse-
quently diminished gradually. The aim of this chapter is to outline the appli-
cation of Muslim personal law in Kenya from the beginning of the British colonial period. It starts with the historical background that highlights the
establishment of kadhi courts in the colonial period. Based on court cases, I
will examine how Muslim personal law was applied in post-independence
Kenya. My analysis is based on court cases that were appealed from kadhi
courts to the High Court and Court of Appeal. In order to link the colonial
setting with the post-independent legal practice, I have selected a few court
cases that reflect issues of conflict between the kadhi courts and appellate
courts in Kenya. Analysis of court cases reveal the practical application of
Muslim personal law in Kenyan courts and show the continuity of the colo-
nial legal legacy inherited by the independent Kenyan courts. Although the
focus of the chapter is the application of Muslim personal law in Kenya, it
also represents the general trend of British policy in the administration of
Islamic law in other British territories.
Historical Background

In May 1887, Sultan Barghash bin Said gave a concession for a term of 50 years to the Imperial British East Africa Company (IBEA) to administer the ten-mile coastal strip of Kenya under the authority of the Sultan of Zanzibar. The concession gave all power to the Company 'to pass laws for the Government of districts and to establish Courts of Justice'. The Concession allowed judges for the Courts of Justice to be appointed by the Company, subject to the Sultan's approval, and stipulated that all kadhis were to be nominated by the Sultan. Administration of justice, particularly along the ten-mile coastal strip, was managed by officials of the IBEA company, who were mere administrators without judicial training. Handling the vast lands of East African territory posed challenges to the company, partly due to a shortage of its staff and lack of relevant judicial training. Administrative officers exercised jurisdiction over the Sultan's subjects by virtue of the authority delegated to them under the concession. These officers were also given consular rank, which enabled them to exercise extra-territorial jurisdiction of the Crown over British subjects. In administering their jurisdiction over the Sultan's and British subjects, the administrative officers 'sat in dual capacity either as the Sultan's judges administering Islamic law or as consular officers administering the English laws'.

The British government promised to honour the interests of the Sultan and his subjects by adopting a non-interference policy in religious matters. In September 1888, a charter was granted to the IBEA company. Article 11 stated, 'The Company as such or its officers as such shall not in any way interfere with the religion of any class or tribe of the peoples of its territories or of any of the interests of humanity, and all forms of religious worship or religious ordinances may be exercised within the said territories and no hindrance shall be offered except as aforesaid'.

The charter also stated that 'in the administration of Justice by the Company to the peoples of its territories or to any inhabitants thereof, careful regard shall always be had to the customs and laws of the class or tribe or nation to which the parties respectively belong'. Between May 1897 and August 1899, the Company and the Sultan reached agreements that resulted in granting concessions to the Company to administer parts of the Sultan's territories. Provisions of the Charter also stated that the Sultan's dominions were to be administered according to the Islamic law.
Due to a financial crisis facing the Company, the British government in 1897 decided to buy out the Company in order to relieve it from heavy financial burden. Subsequently, the Sultan entered into a new agreement with the British Government, whereby the administration of his mainland dominions should be ‘entrusted to officers appointed directly by His Britannic Majesty’s government to whom alone they shall be responsible and shall have full powers in regard to executive and judicial administration’. The British government assumed direct control of Kenya, including the ten-mile coastal strip, and gradually exercised its influence on the administrative and judicial structures.

Colonial Policy on the Administration of Justice

Administration of justice was an essential part of the British colonial policy. The British felt that courts were not just meant to administer justice, but ‘rather they were to shine as beacons of Western civilization’. The British saw their administration as ‘a self-appointed mission of civilisation’, which retained the power to interfere with local institutions and customs to keep them on the path of progress, equity, and good government. Based on this self-appointed civilizing mission, the British colonial administrators sought to abandon customary systems of law in favour of their ‘civilized’ English law. Although it was a fundamental principle of English constitutional law to maintain the existing systems of law in the acquired territories, the process of ‘Anglicisation of the systems was in operation ... where Islamic and customary laws are to be played down and eventually eliminated as separate laws, being replaced by modern statutory codes in such fields as family and succession law’.

The most significant intervention was the British desire to base the administration of justice on English notions. This, together with other ‘civilizing’ features, such as abolishing the slave trade, served as the basis for British colonial rule in the East African coast region. Morris rightly observed that ‘the introduction of new forms of law and order was claimed to be one of the main political and philosophical justifications for colonial rule’. Metcalf further argued that ‘a fundamental concern of British policy was a belief that imperial rule could be justified only by a commitment to the rule of law’. Hence, the rule of law was central to British colonial policy and
formed an essential element in the establishment and maintenance of political domination.19

There was, however, no uniform policy regarding the administration of justice in the British colonial territories, and 'officials on the spot developed varying systems of law and government in response to local realities and pragmatic considerations'.20 Lack of consistency in British legal policy can be seen in the process of transplanting Indian statutes into East Africa, causing legal tension between the imported statutes and local laws.21 This tension was even worse when principles of English law were deemed to be applicable in East African courts. For instance, the East African Order in Council of 1889 provided that jurisdiction within continental Africa was to be exercised 'upon the principles of, and in conformity with, the substance of the law for the time being in force in England'.22 This led to a disagreement between British colonial officials regarding the adoption of English law in foreign lands. Owing to the inherent technicalities embedded in English law, British administrative colonial officials felt that much of English law and procedure 'needed very considerable modification if injustices were to be avoided or indeed if it were to bring any real benefit to the largely illiterate African populations'.23 They accused English law of being inappropriate if it were to be applied in the British territories. Instead, they argued for its substantial modification in order to meet the local circumstances.24

However, British judicial colonial officials saw technicalities of English law as an integral part of the English legal system and 'without them the standard of justice must be lower'.25 Tensions between British colonial officials and British judicial officials not only demonstrate a lack of uniform policy on judicial matters, but also portray a difference of opinion on policy matters that paved the way for conflict. This 'colonial tension' led to a situation whereby British judges mistrusted their fellow colonial administrators and their capacity to conduct proper 'English justice' if English law was not to be applied to the letter.

As with native laws and customs, the application of Islamic law in British territories was subjected to the repugnancy clause. British colonial administrators regarded Islamic law and other forms of native law as 'backward with the tendency to be repugnant'.26 In dealing with customary laws, the British applied the repugnancy clause: rejecting customary laws which were repugnant to English principles of natural justice and morality. Other similar phrases employed by the British officials in the colonies included 'nat-
ural justice, equity and good conscience’ that kept ‘cropping up in colonial enactments, either as a rule of last resort for the choice of law, or as a test for the exclusion of customary law’. The Roman law formula of ‘justice, equity and good conscience’ meant that in cases where indigenous laws could not attain this standard, rules of English law were applicable. In East Africa, British judges refused to accept the Islamic law principle that allowed a fugitive wife to be forcibly returned to her husband. British judges also refused to apply Islamic rules governing cases of guardianship and custody of minors where such rules would prejudice what they understood to be in the best interests of the child.

In northern Nigeria, British judges permitted the Emirs to uphold religious rituals that were not deemed repugnant to natural justice and humanity. The Emirs were allowed to make regulations to curb drinking and selling of home-brewed beer, and to enforce the statutory punishment of flogging for drinking intoxicating liquors. In his Dual Mandate, Lugard portrayed the British policy towards religious matters in stating that ‘the attitude which the British Government have endeavored to assume is that of strict neutrality, impartiality and tolerance in all religious matters [unless] any particular form of religion sanctions or enforces acts which are contrary to humanity or good order’. For more detail on northern Nigeria, see the chapter by Allan Christelow in this volume.

Establishment of Native Courts under British Colonial Rule

Native legal institutions which existed in the pre-independence period were retained by the British colonial administration under the indirect rule policy, subject to general supervision by British authorities. By adopting the indirect rule policy, British colonial officers established native courts in order to administer justice along the East African coast. The architect of indirect rule policy on the East African coast, Arthur Hardinge (British consul in Zanzibar 1894-1900), enacted the East Africa Order in Council 1897, which established native courts. By implementing indirect rule policy through the establishment of native courts, Hardinge gradually delimited the powers of kadhi courts. The East Africa Order in Council 1897 instituted several important changes. The first change was the establishment of two categories of native courts along ethnic lines. The first category was presided over by
an European officer and included the High Court, the chief native court, provincial courts, district courts and assistant collector’s courts. The other was presided over by a native authority that included Wālis’ courts (Arab governors’ courts), Court of Local Chiefs (African local courts), and Mussulman religious courts (kadhi courts). Native courts were bound to follow the Indian civil procedure code and the Indian penal and criminal procedure codes. In dealing with Muslims in the protectorate, courts were to be guided in civil and criminal cases by the general principles of Islamic law. Further enhancement of the native courts system was done through the enactment of the native courts regulations, under the East African Order in Council of 1897, which empowered the British Commissioner, with the consent of the Secretary of State, to make rules and orders for administration of native courts, including alterations in any native law or custom.

Arthur Hardinge formalized the establishment of kadhi courts (referred to in the Order in Council as Mussulman Ecclesiastical Courts) in every wilayat (district) along the ten-mile coastal strip. Jurisdiction of the kadhi court was confined to matters of personal status. The Order in Council provided that ‘within every wilayet of the protectorate the cadi (sic. kadhi) of the wilayet shall hold a court, to be called a Cadis’ Court’ and that ‘the Cadis’ Court shall take cognizance of all matters effecting the personal status of Mohammedans (such as marriage, divorce, and inheritance). The second change was the creation of a Chief Kadhi position, called Shaykh al-Islam, who was responsible for supervising the kadhi courts along the coast and hearing appeals. The third change was the creation of new administrative posts for Arab local governors, the Liwali and Mudir, who were granted magisterial powers under the supervision of the District Commissioner. Although Liwali and Mudir courts were administrative offices with civil and criminal jurisdiction, they were also conferred concurrent jurisdiction with kadhi courts in Muslim personal law.

A remarkable feature of the 1897 Order in Council was the sweeping power granted to the chief native court presided over by British judicial officers, who exercised general supervision over all inferior native courts within the Protectorate, including the kadhi courts. British policy was to contain kadhi courts within its colonial machinery. This policy succeeded partly in bureaucratizing kadhi courts and bringing them under the colonial judiciary system. In order to obtain full control over the kadhis, the
order in council established an appeals system, where cases from kadhi courts were channelled through the Chief Kadhi to the High Court.32

The political and legal situation in Kenya was quite complicated. Most statutes enacted by the British administration were enforced in the Colony of Kenya, which covered the interior of Kenya. The ten-mile coastal strip of Kenya was under the sovereignty of the Zanzibar Sultan. In 1890, the Sultan of Zanzibar requested British protection, and on 4 November 1890 a British Protectorate was declared in Zanzibar, together with the Sultan's other dominions. The establishment of the British Protectorate brought confusion among British magistrates in distinguishing their jurisdiction between the British Colony in Kenya and the Protectorate under the Sultan of Zanzibar. Persons domiciled in the Kenya Protectorate along the ten-mile coastal strip were subjected to the Sultan's Courts in Zanzibar as the Sultan's subjects, although they were regarded simultaneously as British protected persons.

The jurisdictional boundary between the Colony and the Protectorate remained unclear. When the judges treated the Colony of Kenya and the Protectorate as similar, it often led to conflicts of law and miscarriages of justice.33 Moreover, the legal status of Muslims domiciled in the Colony was uncertain. Such confusion was enshrined in decrees such as Article 3 of the East African Order in Council of 1897, which provided 'that all Muslims domiciled under the dominions of the Sultan of Zanzibar were to be governed by the Islamic law in matters related to criminal, civil and personal status laws'. The same Order, however, excluded Muslims domiciled in the Colony of Kenya from being under the jurisdiction of Islamic law courts, as far as matters related to criminal law were concerned.34 The history of restricting Islamic law to personal matters in Kenya can be traced to this particular juncture, where the application of Islamic law was limited to matters related to divorce, succession, and marriage. Article 57 of the Order authorised the High Court to apply Islamic law in deciding matters related to divorce, succession and marriage brought before it by Muslims.

Although Britain practised indirect rule as colonial policy in most of its territories, I argue that along the East African coast, British colonial authorities adopted the indirect rule policy as a temporary measure, due to the shortage of staff and resources. When the British declared Zanzibar to be a British Protectorate in 1890, indirect policy was adopted provisionally in order to take advantage of the existing Arab administrators and kadhis to run the civil service. However, as the influence and power of the British
gradually increased, the policy changed from indirect rule to direct rule. This was apparent when British-Consuls achieved more power in controlling the Sultan’s court. For instance, in 1891 the British Consul-General Portal seized control of the Sultan’s finances and administration with the power of appointing British officials.35 This period marked the beginning of direct rule, whereby the sovereignty of the Sultan of Zanzibar was gradually diminished, and subsequent Sultans were just retained as ceremonial rulers.

Post-Colonial Policies on the Administration of Justice

Prior to the independence of Kenya in 1963, subjects of the Sultan of Zanzibar residing along the ten-mile coastal strip of Kenya regularly agitated for special status. This resulted in the establishment of the Mwambao movement, which opposed a proposal to join the ten-mile coastal strip together with Kenya colony, and instead preferred to remain under the sovereignty of the Sultan of Zanzibar.36 Alarmed by this political crisis, the British pushed for a solution, resulting in the constitutional guarantees made in 1962 between the representatives of the British colonial government, the people of Kenya and the Sultan of Zanzibar, where Muslims were assured that their fundamental rights would be protected and preserved by the successive independent Kenyan governments.

As a result of this guarantee, the Sultan of Zanzibar was satisfied with the assurance given on the protection of Muslim law and religion. Hence, the 1895 Agreement between the Sultan of Zanzibar and the British government was abrogated, and the Sultan renounced his sovereignty over the ten mile coastal strip of Kenya. This led to an agreement that was signed on 8 October 1963 by Duncan Sandays, Sayyid Jamshid, Jomo Kenyatta, and Sheikh Muhammad Shamte to surrender the ten-mile coastal strip to the independent Kenya. The agreement included safeguards that (1) freedom of worship to all people living in the strip, and more particularly the citizens of the Sultan and future generations, would be protected; (2) powers of the Chief Kadhi and other kadhis should be protected, and that they should rule according to Islamic law in matters of marriage, divorce and inheritance.37 These provisions were later reflected in the Kenyan constitution. Entrenching these provisions in the Kenyan constitution demonstrates the significance of the kadhi courts in the judicial system of Kenya, owing to its con-
stitutional nature. This guarantee was incorporated in the Constitution of Kenya, which provided for the establishment and jurisdiction of the Chief Kadhi and other kadhis.

The Constitution of Kenya provides for the appointment of the Chief Kadhi and other kadhis in Section 66(1): 'There shall be a Chief Kadhi and such a number, not being less than three, of other Kadhis as may be prescribed by or under an Act of Parliament'.

The Constitution of Kenya provided for qualifications of the appointment of a Kadhi. Section 66(2) provides that 'a person shall not be qualified to be appointed to hold or act in the office of Kadhi unless (a) He professes the Muslim religion; and (b) He possess such knowledge of the Muslim law applicable to any sect or sects of Muslims as qualifies him, in the opinion of the Judicial Service Commission, to hold a Kadhi's Court.'

As for the jurisdiction of the Kadhi Courts, Section 5 of the Constitution of Kenya states, 'The jurisdiction of a Kadhi's Court shall extend to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion'.

By a legal notice issued in September 1963, kadhis' powers were limited to jurisdiction over all persons professing the Muslim faith in all matters relating to personal status, marriage, inheritance and divorce. This was a significant departure from the 1930 Kenya Courts Ordinance which had granted the kadhi criminal jurisdiction. After independence, the Kenyan government worked towards integrating of the court systems in order to overcome problems caused by the parallel system of courts. The Magistrates Courts Act was passed in 1967, by which the courts were fully integrated.

One of the steps taken to ensure this integration was to channel appeals from native courts to the High Court. Hence, appeals from the kadhi courts were also sent to the High Court. During the parliamentary discussion on the Kadhi Courts Act, Muslim parliamentarians raised an objection against the provision of appeals to the High Court, since it was considered illogical to allow non-Muslim judges, who might not apply Muslim law, to have the final decision on legal matters.

Another concern of Muslim representatives in the colonial Legislative Council was that subjecting kadhi courts to the control of the government could threaten the future existence of kadhi courts in Kenya. A Muslim member of the Legislative Council, Mr. Jeneby, raised the fear of Muslims liv-
ing along the Kenyan coast to the effect that kadhi courts would be abolished or changed after independence if they were to remain under direct control of a Minister, as in the case of Sudan and Nigeria. Kadhi courts could be overruled by the High Court on appeal. This anomaly led to cases of miscarriage of justice, because judges sitting in the High Court or Court of Appeal ruled in cases where they were not conversant with Islamic law and procedure. The High Court or Court of Appeal, when hearing such appeals from the kadhi courts, in most cases applied statutes of general application to the exclusion of Muslim personal law. I will explore below several judgments of the High Court and Court of Appeal of Kenya where they overturned decisions of the kadhi court.

Conflict of Laws in Kenya and the Colonial Legacy

In enforcing the rule of law according to English standards, the British confronted difficulties caused by a clash between English law and local custom. Contact between the British common law, Islamic law, and customary law systems raised issues of conflict. This situation has contributed towards the choice of law problem: which of the two or more systems or bodies of law co-existing within a single national or territorial system is the court to apply in a particular case? Internal conflict of laws occurs in Kenya as a result of the colonial legacy, which introduced various legal regimes for the different races and religions in the country.

David Pearl attributes these conflicts to the difficult choice which the colonial powers faced between continuing the personal regime and imposing from above a uniform Western law applicable to all people. He further concluded that ‘if for whatever policy reason, the colonial power opted to continue the personal law regimes, then a systematic internal conflict of laws ought to have been developed’. Customary laws continued to apply to the great majority of persons and were the primary law in the local courts. Nevertheless, these customary laws did not stand on the same footing as the foreign law in the superior courts, such as the Supreme or High Court, where the fundamental law was of English origin.

Defining conflicts arising within a single jurisdiction has been a subject of discussion among various authors. Allot refers to ‘internal conflict of laws’ when a judge is required to choose between two or more systems or bodies
of law which are not territorially distinct. Decrees such as the Imperial Enactments (Application) Decrees 1939 were enacted to avoid these legal conflicts. For instance, Section 3 of the Decree stated, 'Every Imperial Enactment now in force within the protectorate shall (unless the contrary intention appears) be deemed to extend to all subjects of His Highness the Sultan within the protectorate'. This position was also prevalent in Zanzibar, where in the case of 

_Mbwana v. District Commissioner, Pemba_ it was held 'that no supposed conflict with the fundamental law can derogate in the slightest degree from the validity and enforceability of His Highness's Decrees, though the Decrees clearly ought not to be construed as affecting the Islamic law in any way unless they do so in clear and unequivocal language'.

Due to the cultural diversity of its people and the various personal laws prevalent in Kenya, the issue of conflict of laws is especially apparent in the arena of personal law. I will attempt to illustrate below certain areas where conflicts of laws have occurred, involving kadhi courts and superior courts in Kenya.

*Marriage and Division of Matrimonial Properties*

Issues of conflict of laws are frequent in marital disputes, particularly when the spouses involved are of different faiths. Marriage of a non-Muslim man with a Muslim woman is not allowed in accordance with Islamic law. However, statute law provided that marriage of a non-Muslim man with a Muslim woman of not less than twenty-one years of age (or, if less, with the written consent of her father or, if he be dead, insane or absent, of her mother, etc.) would be perfectly valid, although null and void according to Islamic law. The Marriage (Solemnisation and Registration) Decree 1915 provided a loophole by which a Muslim girl could validly marry a Christian man, regardless of the attitude of her guardian, provided she was over 21 years of age or with the written consent of her father or (if he were dead, of unsound mind or absent from the protectorate) her mother.

Conflict is the distribution of property between Muslim spouses, acquired during the subsistence of a valid marriage, and the consequences arising from dissolution of such marriage. This has been echoed in the case of *Fatihya Essa v. Mohamed Alihakie Essa*, where the Court of Appeal was called upon to adjudicate on the distribution of such property. The parties had
contracted an Islamic marriage in 1972, which was dissolved in 1988. The appellant sought various declarations, \textit{inter alia}, to state that properties acquired during the subsistence of their marriage were jointly owned by herself and the respondent. Justice of Appeals Omolo held that the (UK) Married Women's Property Act 1882 was an act of general application and applied equally to Muslims and non-Muslims in Kenya.

Although the kadhi courts are conferred jurisdiction to apply Muslim personal law, either party to a dispute has an option to go to the High Court. In the case of \textit{Neema Nungari Salim v. Salim Ali Molla},\textsuperscript{53} the spouses were married according to Islamic law but when the marriage irretrievably broke down, the husband filed a suit to petition for divorce at the High Court, whereby the marriage was dissolved. At issue was the status of the matrimonial property. The court had to decide on whether the properties disclosed were matrimonial properties acquired during the subsistence of the marriage, as envisaged by Section 17 of the Act, and whether the parties had directly or indirectly contributed to the acquisition and/or development of the properties.

The plaintiff did contribute by playing a supervisory role, which on its own amounted to a contribution by the plaintiff. The plaintiff also cared for the family and its development in the absence of the defendant. The court held that the plaintiff thus contributed indirectly to the acquisition of the matrimonial properties. Justice and fairness demand that she be considered having equally contributed to the acquisition of the development of properties. The court therefore held that the wife was entitled to an equal share of the matrimonial properties.\textsuperscript{54}

In the case of \textit{Amina O. Abdulkadir v. Ravindra N. Shah},\textsuperscript{55} the advocate for the plaintiff argued that the Married Women's Property Act 1882 was not applicable to Muslim parties, since they were governed by the provisions of the Mohammedan Marriage, Divorce and Succession Act cap 156 of the Laws of Kenya. Based on an earlier decision of the Court of Appeal in \textit{Essa v. Essa},\textsuperscript{56} the High Court judge held that the MWOA 1882 Act as a statute of general application also applied to Muslims in Kenya.
Custody and Guardianship of Children

Despite the fact that the application of Islamic law in Kenya is limited to personal matters, issues related to custody and guardianship of children were excluded from the jurisdiction of the kadhi courts.55 Since the enactment of the Mohammedan Marriage, Divorce and Succession Act, there has been an academic debate as to whether the jurisdiction of the kadhi includes the power to decide on the custody of children. Although the Act does not explicitly confer such jurisdiction upon the kadhis, in practice kadhis exercise this power.56

The British colonial approach seemed to reflect divergent opinions on issues related to custody and the maintenance of children. In Nana binti Mzee v. Mohamed Hassan,57 the Court of Appeal held that English law applied in determining the custody of a Muslim child. In an earlier decision, however, in the case of Fazlan Bibi v. Tehran Bibi and Mohamed Din Kashmiri,58 the Court held that 'when questions of Muslim law arise in British courts, the judges are not at liberty to put their own construction on the Qur'an in opposition to the ruling of commentators of great antiquity and high authority'. Guthrie-Smith maintained, 'As to the guardianship of the infant child of the first marriage, Muslim law lays down clearly that the right of a mother to the guardianship of a boy under 7 years of age is lost by reason of her remarriage'.

In the case of Raya bin Salm bin Khalfan El Busaidy v. Hamed bin Suleiman El Busaidy and Another,59 the East African Court of Appeal ruled, 'It would be wrong to apply principles of equity devised to import a presumption whereby to gauge the intention of a Muslim husband and wife living in Zanzibar whose social and cultural background is very different'. Similarly, in the case of Abdulreman Bazmi v. Sughra Sultana,60 it was stated that the mother was entitled to the custody of the child until he attained seven years of age, as practised by the Hanafi Muslim school of thought. However, in an appeal, Sir Kenneth O'Connor held that 'the Guardianship of Infants Ordinance applies with full force to Muslims not less than to other infants and under Section 17 of the Guardianship of Infants Ordinance ... the welfare of the child, and not the right under Muslim law, is the paramount consideration in deciding questions of custody'.

The welfare principle was reiterated by High Court Judge Githinji in the case of Noordin v. Karim.61 He noted that in cases involving very young female
children, there was a rule in favour of the mother in the absence of exceptional cases. However, in this case since the children were boys and big enough, he gave their custody to their father ‘as one of the exceptional cases where the mother should be denied custody of the children’.

In the case of *Zuleikha Mohammed Naaman v. Gharib Suleiman Gharib*, the appellant, being the mother, applied for custody and maintenance for herself and her children. The father denied the mother’s right to custody, alleging that she had been unfaithful. Based on Islamic law rules regarding custody of children, the Chief Kadhi gave custody of the children to the mother on the grounds that it was in the best interest of the children to stay with their mother, due to their tender ages. The Chief Kadhi gave also reasonable access to the father. Unsatisfied with Chief Kadhi’s judgment, the father applied for review of the ruling, arguing that the children had reached the age of seven, which according to Islamic law marks the start of proper moulding of the character of the child, hence he was best qualified for their custody. Upon hearing the application for review, The High Court judge, Justice Waki, gave custody of the two children to the father, solely on the grounds that the religious welfare of the children would be best addressed if they were placed in the father’s custody, though the mother was given unfettered access.

The mother appealed and lodged an application with the Court of Appeal. Justice of Appeal Kwach invoked Section 17 of the Guardianship of Infants Act (Chapter 144), which provided that where the question of custody of an infant is to be decided, the court ‘shall regard the welfare of the infant as the first and paramount consideration’. He contended that this section takes precedence over the personal law of the parties, and therefore it applies to all children in Kenya, including Muslim children. He further maintained that the so-called religious welfare on which Waki placed so much emphasis was irrelevant, and that by equating religious upbringing with the welfare of the children, the learned judge misunderstood the law.

In his concluding decision, Kwach stated that ‘a man who walks out on his wife and children of tender age to start a new life and a family with a “bimbo” has no right to demand the custody of the children of the woman he has abandoned on the false pretext that he is under a religious duty to bring them up as good Muslims’. He therefore allowed the appeal, giving the mother custody, care and control of the children and allowed the father access on any one weekend each month.
Although the decision of the Court of Appeal confirmed the judgment of the Chief Kadi in giving custody to the mother, it reflects divergent approaches between the two judicial institutions. Kwach's judgment echoes the supremacy of the common law principle of the welfare of the infant, against the Islamic law rule of puberty, in determining the custody of children. The father, being dissatisfied in the above case, filed another appeal in the case of Gharib Suleiman Gharib v. Zuleikha Mohamed Naaman, where he sought the disqualification of one of the judges on the grounds that he did not understand Islamic law. The court held that 'we shall not disqualify ourselves because of our alleged ignorance of any particular branch of the law, however intricate that branch might be'.

The practice of non-Muslim judges presiding over cases involving Muslim parties was not peculiar to East Africa. M.K. Masud observed that 'the most salient feature of nineteenth-century Indian legal history is that Islamic law was administrated by British judges sitting on Islamic law courts'. British colonial judges who administered Islamic law in the Indian courts were responsible in large part in the formation of the Anglo-Muhammadan law. This legacy was inherited by Kenyan judges, who were conferred powers to overrule kadi's judgments.

Another case involving two parents from different faiths was the case of Wariara Mbiyu v. Al Amin Mazrui. The mother (applicant), a Christian, sought custody of her female child from the respondent, a Muslim father. The child was born in 1978 and stayed with her father's relatives, where she was exposed to the Muslim faith and culture. The father contended that the Muslim religious connection the child had previously acquired would be severed if her daughter continued in the care of her Christian mother. The Court pointed out that Section 7(1) of Guardianship of Infants Act laid out principles in awarding custody, namely, the welfare of the infant, the conduct of the parents, and wishes of the mother and father. It therefore held that the Act does not include religious upbringing in the factors to be considered in relation to custody under Section 7(1), and therefore gave custody to the mother.

Judgments issued by the various courts mentioned above on the custody of children reflect a continuity of British colonial legacy in enforcing common law principles and ignoring Islamic law rules applicable in the kadi courts. Even within the colonial courts, there was no consistent policy on law regarding custody of children involving Muslim litigants.
Matters of Inheritance

Matters of inheritance involving Muslims in Kenya are under the jurisdiction of the kadhi court. This power is conferred by the Mohammedan Marriage, Divorce and Succession Act, which provides that

Where any person contracts a marriage, or being a married person, in accordance with Mohammedan law, whether such marriage or marriages are contracted before or after the commencement of this Ordinance, and such a person dies after the commencement of this Ordinance, and where the issue of any such marriage or marriages dies after the commencement of this Ordinance, the law of succession applicable to the property both movable and immovable of any such person shall be in accordance with the principles of Mohammedan law, any provision of any Ordinance or rule of law to the contrary notwithstanding: Provided that where in any sect of Mohammedans to which the deceased belonged the law of succession differs from the ordinary law of succession in accordance with the ordinary principles of Mohammedan law, then the law of succession applicable to such sect shall apply.

The Act uses marriage as the only basis for a Muslim’s qualification to inherit under the Islamic law of succession. Hence, the strict application of Section 4 may legally disinherit a Muslim. Issues of conflict arise in the area of probate and administration in cases involving Muslims. The power to administer an estate of the deceased is given by the High Court Registry to the litigants, regardless of their religion. This causes inconvenience when Muslim parties file their suit at the kadhi courts, while obtaining the power to administer the estate is granted by the Registry of the High Court. In addition to this, the Public Trustee also has the jurisdiction to handle cases where Muslim litigants present their cases for determination in succession matters. One possible way of avoiding these parallel jurisdictions between judicial organs of the state is to confer jurisdiction only to the kadhi courts in dealing with administration of the estate of Muslims.

In the case of Chelango v. Juma, it was decided that since the deceased died as a Muslim, his estate was to be administered according to the Islamic law of inheritance. Relying on the kadhi’s advice, the Court held that two illegitimate daughters of the deceased were not entitled to a share of their father’s inheritance on the ground that they were not Muslims. Justice
Etyang dispelled the possibility that the provisions of Section 82 (1) and 82 (4) of the Constitution of Kenya could be applicable in the case of the two daughters of the deceased in rendering Islamic law discriminatory against them. He averred, 'it is my ruling that the application of Islamic law is not inconsistent with the provisions of the Constitution of Kenya.'

**Burial Disputes**

Burial disputes reflect another area of conflict in the Kenyan courts, particularly in cases involving parties from Muslim and Christian backgrounds. Disputes arising from burial matters have been a subject of debate involving not only Islamic law, but customary law as well. Diversity among the religious and cultural backgrounds of the people in Kenya has contributed towards legal conflicts in courts. Various complexities emanate from such disputes, which raises the question of the applicable law in a given situation where multiple legal systems contest each other. The case of *Sakina Sote Kitany and Another v. Mary Wamaitha* illustrates an aspect of this complexity.

The dispute was between two widows, a Muslim appellant and a Christian respondent. The respondent wanted to bury her deceased Muslim husband, who later converted to Christianity. Justice Githinji of the High Court ordered that the remains of the deceased be released to the Christian widow (respondent) for burial in accordance with the rights of the Presbyterian Church of East Africa. The Judge further held that as a result of the deceased’s apostasy, his marriage to the Muslim widow (appellant) was automatically dissolved, notwithstanding the fact that the deceased did not inform her.

On appeal, Kwach disagreed with the judge of the High Court that the deceased’s apostasy automatically dissolved his marriage to the appellant. In his view, there was no supportive evidence either by scholarship or authority to declare automatic dissolution of the marriage based on apostasy of the deceased. Kwach further contended that members of Islam, Christianity and Hinduism are all members of the greater community of the human race and should therefore be accorded equal treatment before the law. Kwach’s judgment shows a clear ignorance of Islamic rule on apostasy. His misapprehension of the Islamic law rule on apostasy was based on equating Islam with Hinduism, when he cited the *Hindu Marriage and Divorce Act*, where
a spouse can petition for divorce when the respondent has ceased to be a Hindu by reason of conversion to another religion. He wondered that while a Hindu has to petition for divorce on the same grounds of apostasy, a Muslim was given preferential treatment by not being required to apply for a declaration that his marriage has been dissolved on the ground of apostasy. Kwach declared, 'I can see no reason for this selective application of the law.' Despite Kwach's opinion, two judges on the Court of Appeal, Gicheru and Lakha, ruled that the marriage between the deceased and the appellant was automatically dissolved by apostasy of the former.

The above judgment by Kwach regarding apostasy conflicts supports the stand made earlier by the same Court of Appeal, when it stated: 'We know ourselves when it would be proper for us not to sit on a matter. None of us would dream of sitting on a matter in which we know our impartiality would be suspect.'

**Law of Evidence**

During the British colonial period, kadhi courts were bound by the provisions of the Indian Evidence Act, although the kadhis were in fact both ignorant of its requirements and unwilling to apply them. Kadhis' non-compliance with common law rules of evidence was coupled with the lack of clear policy and conflicting judgments made by British judges. In the case of Baraka binti Bahmishi v. Salim bin Abed Busawadi, the judge held that according to Section 11 of the Courts Ordinance, kadhi courts were bound by the Civil Procedure Ordinance and Evidence Act and not by Islamic rules of procedure and evidence. On the contrary, in the case of Hussein bin M'Nasar v. Abdulla bin Ahmed, it was held that Islamic rules of procedure and evidence were to be followed in a Muslim subordinate court where the parties were Arab or Muslim natives.

Current practice in Kenya with regard to rules of evidence is that Section 21 of the Evidence Act precludes its provisions to apply to proceedings in kadhi courts. The Kadhi Courts Act states, 'The law and rules of evidence applied in a Kadhi court shall be those applicable under Muslim law: Provided that (i) all witnesses called shall be heard without discrimination on grounds of religion, sex or otherwise; (ii) each issue of fact shall be decided upon an assessment of the credibility of all the evidence before the court.
and not upon the number of witnesses who have given evidence; (iii) no finding, decree or order of the Court shall be reversed or altered on appeal or revision on account of the application of the law or rules of evidence applicable in the High Court, unless such application has in fact occasioned a failure of justice. 86

Conclusion

In the early colonial period, the British adopted a non-interference policy in the administration of religious and customary laws. However, they gradually interfered with the jurisdiction of the kadhi courts, which resulted in confining its jurisdiction to Muslim personal law. Contrary to the British practice of adopting an indirect rule policy, I argue that in Zanzibar and the ten-mile Kenyan coastal strip, the British adopted a direct rule policy that gave them power to control and supervise kadhi courts. Towards the end of the nineteenth century, British authorities were controlling the political, administrative, and judicial institutions in the Zanzibar Sultanate and its dominions. After the declaration of British protection in Zanzibar on 4 November 1890, British Consuls adopted a direct rule policy in running the Sultanate, and Sultans were only retained as ceremonial rulers.

British colonial policy was based on the supremacy of the principles of common law. Hence customary laws, including Islamic law, were given unequal treatment and in some cases rejected on the ground of being repugnant to the English principle of ‘natural justice, equity and good conscience’. As a consequence of this deliberate policy, substantive and procedural aspects of Islamic law were marginalized and even ignored. Kenyan courts in the post-independence period followed suit by inheriting this colonial legacy, as demonstrated in the court decisions above. Another remarkable feature of the British colonial legacy was the incorporation of the kadhi courts into the judicial system that gave the British administration the authority to supervise and control them. In post-independence Kenya, kadhi courts were fully integrated into the national judicial system, giving the judiciary extensive powers over them. The High Court and Court of Appeal were given powers to overturn decisions of the lower courts, including kadhi courts.

Application of Muslim personal law in the Kenyan courts caused issues of conflict between the superior courts, which apply principles of common
law, and kadih courts, which apply principles of Islamic law. Judgments of the High Court and Court of Appeal mentioned above reveal that when judges of superior courts base their judgments related to Islamic law issues on the advice of kadhis, conflict rarely occurs. On the other hand, conflicts become tense when judges strictly apply principles of common law, ignoring Islamic law rules. Hence, a possible solution to ease this tension between the superior courts and the kadih courts seems to lie in requiring judges to consult kadhis on cases requiring Islamic expertise, and base their judgments on the same.

Another cause of conflict occurs in cases where Muslim litigants are given the option to file a suit either in the kadih court or the High Court. To avoid conflict, the High Court has the discretion to refer such cases to the kadih court if the parties are Muslims. This will work towards giving the kadih courts exclusive jurisdiction on matters pertaining to Muslim personal law and all civil matters where the litigants are Muslims.87

The High Court, in some rare instances, has referred cases to the kadih court as in the case of Jaffer Shariff Omar v. Habiba Shariff.88 In this case, Mohammed Shaikh Amin (himself a Muslim) ordered that the dispute be heard afresh before the same kadih, after an appeal was filed in the High Court on the basis of an error in law purported to have occurred in the kadih court.

Conflicts between the superior courts and kadih courts need to be explored in terms of procedural aspects as well as the content of Muslim personal law. Little has been written on Muslim case law in Kenya, and there is a need for detailed research on case law in a comparative approach highlighting common law and Islamic law principles.

In the post-colonial era, Muslim personal law has survived challenges aiming either to abolish or to curtail its application in the Kenyan courts. Among the challenges was the exercise of unifying personal laws in East Africa after independence. The existence of the kadih courts was most recently challenged during the hotly debated Constitution of Kenya review process in 2005.89 In this process, attempts were made to remove the provisions of the Constitution of Kenya that protected the kadih courts. Kadih courts and Muslim personal law in Kenya were challenged on the one hand by political pressure to abolish their existence, and on the other hand by judicial force to overrule their judgments. Despite all these threats, kadih courts have managed to survive political pressure and cope with various conflicts.
Notes

1 Benadir coast of Somalia included the towns of Merca, Mogadishu and Barawa. On kadhi courts in coastal Somalia, see Alessandra Vianello and Mohamed M. Kassim (eds.) (2006), Servants of the Shari'a: The Civil Register of the Qadis' Court of Brava 1893-1900 (Leiden: Brill), 2 vols.


3 Extra-territorial privileges were granted to citizens of various states including Britain, United States, France and others. See A. Allot (1976), 'The Development of the East African Legal Systems during the Colonial Period', in History of East Africa, eds. D.A. Low and A. Smith (Oxford: Clarendon Press), 351.


5 Ibid., 3.


13 Mann and Roberts, Law, 18.

14 Metcalf, imperial, 26.

15 Ibid., 24.

16 Morris, Indirect, 73.


18 Ibid.


23 Sir F.D. Lugard (1922), The Dual Mandate in British Tropical Africa (London: Cass), 594.
24 This policy was introduced by Lugard in 1900 when he was the Governor of Northern Nigeria. On policy of indirect rule, see Lugard, The Dual Mandate in British Tropical Africa.
25 In the preamble of the Order in Council, Hardinge stated, 'Whereas by Treaty, grant, usage, and sufferance, Her Majesty has jurisdiction in the East Africa Protectorate and has power to make laws, by Order in Council or otherwise, for peace, order and good Government in the same, and has in the exercise of the said power made an order in Council commonly called East Africa Order in Council 1897'.
26 Article 2 of the East African Order in Council 1897.
28 The East Africa Order in Council 1897/1315 in the Supplement to the Gazette for Zanzibar and East Africa, Vol. 6, no. 290, 18 August 1897.
29 Ibid., Articles 53 and 54.
30 On history of the appointment of Shaykh al-Islam in Kenya, see Hassan Mwakimako's contribution in this volume.
31 Article 15 of the East African Order in Council 1897.
32 Ibid., Article 57.
33 Mwangi, The Application, 254.
34 The Kenya Protectorate Order in Council 1920 conferred jurisdiction of courts established in the Colony. It provided that 'courts now or hereafter established in the Colony shall have in respect of matters occurring within the Protectorate, so far as such matters are within the jurisdiction of Her Majesty, the same jurisdiction, civil and criminal, original and appellate as they respectively possess from time to time in respect of matters occurring within the colony'.
37 Ibid., 225.
38 Section 5 of the Kadhi Courts Act also provides for similar jurisdiction by stating, 'A Kadhi's Court shall have and exercise the following jurisdiction, namely the determination of questions of Muslim law relating to personal
status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion; but nothing in this section shall limit the jurisdiction of the High Court or any subordinate court in any proceeding which comes before it.

39 Chapter 10 of Laws of Kenya.

40 A striking comparison is that of Nigeria, where appeals from the customary law courts go to the High Court of their respective states, as in the case of the Northern State, where special courts of appeal are established to hear appeals exclusively from customary courts with original jurisdiction, and the Islamic law Court of Appeal with appellate jurisdiction to hear such cases.


42 Kenya National Archives (hereafter KNA), KNA/CA/9/6/8.

43 The Civil Procedure Act (Chapter 21 of the Laws of Kenya) states: ‘An appeal shall lie to the High Court ... (c) from a decree or part of a decree of a Kadhi’s Court, and on such an appeal the Chief Kadhi or two other Kadhis shall sit as assessor or assessors’. In enhancing the powers of the High Court, Section 65(2) of the Constitution of Kenya stipulates: ‘The High Court shall have jurisdiction to supervise any civil or criminal proceedings before a subordinate court’. In addition to this, the Mohammedan Marriage, Divorce and Succession Ordinance (Chapter 156 of the Law of Kenya) establishes: ‘The Supreme Court and every judge thereof shall, subject to the provisions of this Ordinance, have jurisdiction to hear and determine all matrimonial causes and suits arising out of Mohammedan marriages, wherever contracted, at the suit of either party to such marriages, whether such marriages are contracted before or after the commencement of this Ordinance: Provided that the Supreme Court shall not exercise any jurisdiction as is hereby conferred unless the petitioner is resident in Kenya at the time of the institution of such matrimonial cause or suit’. However, Section 3(3) guides the Supreme Court in exercising its jurisdiction in dealing with Muslim personal cases to ‘act and give relief upon the principles of Mohammedan law applicable to the same respectively or otherwise’.

44 Mann and Roberts, Law, 4.

45 Allot, Essays, 108.

46 Ahmednasir M. Abdullahi (1999), Burial Disputes in Modern Kenya (Nairobi: Faculty of Law), 195.

47 David Pearl (1981), Interpersonal Conflict of Laws in India, Pakistan and Bangladesh (London: Stevens & Sons), 23.

48 Abdullahi, Burial, 193 and McAuslan, Basic, 61.

49 Allot, Essays, 112.

50 5 Zanzibar Law Reports, 20.

52 Civil Appeal no. 101 of 1995 at Nairobi (unreported).
54 Ibid., 11.
55 KLR [2006],1-4. www.kenyalaw.org
57 Compare this situation with what prevailed in the Muslim Tribunal of St. Louis
in the chapter by Ghislaine Lydon in this volume.
58 Section 48 of the Interpretation and General Provisions Act (Chapter 2 of the
Laws of Kenya) can be used to confer upon the kadhis such jurisdiction. The
Act provides that ‘where a written law confers power upon a person to do or to
enforce the doing of an act or thing, all powers shall be deemed to be also
conferred as are necessary to enable the person to do or to enforce the doing of
an act or thing’.
59 1944 East African Court of Appeal 4 (EACA).
60 1919/1921 8 EA 200.
61 1962 East African Court of Appeal 249 (EACA).
64 Ibid., 627.
65 Civil Appeal no. 123 of 1997 at Mombasa (unreported).
66 Civil Appeal no. 31 of 1999 at Mombasa (unreported).
(Leiden: Brill), 37.
68 Muhammad Qasim Zaman (2002), The Ulama in Contemporary Islam: Custodians of
70 Chapter 156 of Laws of Kenya.
71 Ibid., Section 4.
72 Kuria Mwangi, ‘Muslim Response to the Law of Succession Act in Kenya: 1967-
(Mombasa, Kenya). 9
74 Ibid., 16.
75 Ibid., 17.
www.kenyalaw.org.
77 Ibid., 145.
78 Section 10(1).
79 Gharib Suleiman Gharib v. Zuleikha Mohamed Naaman, Civil Appeal no. 31 of
1999, 5.
80 J.N.D. Anderson noted that Qadi courts in the Protectorates of Aden,
Somaliland, Zanzibar and Kenya all followed the Islamic rules of evidence with


82 Section 11 of the Courts Ordinance 1931 reads, ‘Subject to the provisions of this Ordinance and to rules of court, all courts shall follow the principles of Procedure Code, so far as the same may be applicable and suitable’.

83 K.R.L. 17 (1973), 95.

84 Chapter 89 of the Laws of Kenya.

85 Chapter 11 of the Laws of Kenya.

86 Ibid., Section 5.


88 Civil Appeal no. 365 of 1998 at Nairobi.