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SERVANTS OF SHARĪ' A: QĀDĪS AND THE POLITICS OF ACCOMMODATION IN EAST AFRICA

ABDULKADIR HASHIM

Qādīs have a long history in East Africa. This article attempts to explore the existence of qādīs in Eastern Africa and examine the extent to which such popular figures have been accommodated within the state and society. In addition, to their role as judicial officers, qādīs made tremendous contributions on the East African coast.¹ They played the role of jurist-consultants in their respective communities and even served as consultants to the state in religious matters at various capacities. Hirsch has noted that qādīs’ courts were used by Muslim women as venues to achieve justice and that ‘qādīs are held more accountable than elders or family members who assist in resolving disputes in more informal settings’.²

Inheriting the existing legal structures was among the dilemmas that faced the post-colonial states. The qāḍī’s court system was not an exception to this predicament. The states managed to get rid of some court structures such as the native customary courts but for political reasons could not dare to change the qāḍī’s courts system. Native institutions were maintained so as to strengthen the indirect rule policy observed by the British. The argument of this article


Sudanic Africa, 16, 2005, 27-51
is that the policy from colonial rule was to accommodate the religious leadership, including the qādis, within the ambit of the state apparatus so as to effect control on their operations. This seems to be the case with the sultans who employed the ‘ulamā’ to consolidate their rule. The trend was not only confined to the legal arena but included other areas such like Islamic education and the administration of waqf properties. Qādis were instrumental in the functioning of these ‘essential’ areas and their presence was quite significant in the commissions that were established by the state as was the case in Kenya and Zanzibar.

**Historical background**

The history of Islamic Law in Kenya before independence dates back to 1889 when the sultan of Zanzibar granted concessions to the Imperial British East Africa Company (IBEA) to administer the sultan’s dominions according to the Sharī‘a. Qādi’s courts were retained under such agreements and continued to exist even after the period of independence. In addition to the qādis, other Muslim judicial personnel such as the liwalis and mudirs were operating, although with a quasi-judicial role including administrative powers. In successive concessions between the sultan of Zanzibar and the British companies qādis were nominated by the sultan and operated under his authority. In the Tanzania (mainland) formerly known as Tanganyika, the sultan of Zanzibar ruled the coastal part of Tanganyika during the reign of Sayyid Sa‘īd. In this period Muslim judicial institutions were established. The Germans retained the institutions established by the sultan without any substantial interference. Later the British took over from the Germans retaining the existing judicial bodies. By a gradual process, the British enacted legislation that encroached on both Sharī‘a and customary law. Sharī‘a was applied in matters of personal status subject to the repugnancy clause
stating that 'In all cases, civil and criminal, to which a Native are parties every court shall be guided by so far as it is applicable and is not repugnant to justice and morality or inconsistent with any order in council.'

Muslim judicial institutions such as the courts of a liwali, qādī, akīda, were operating under the title of 'Native Courts'. Later, in 1963, the qādī's and liwali's courts were abolished. Primary courts were conferred with the original jurisdiction in proceedings where the law applicable was Islamic Law.

Further, the Magistrates Courts Act 1984 vested the Primary courts with the power to hear and determine all cases of a civil nature where the law applicable is Islamic law. A step was taken to codify the Islamic family law, giving due recognition to various schools of thought. This innovative measure was codified in the Islamic Law (Restatement) Act of 1964 which provided that Islamic law of any sect shall be followed by the courts in matters of personal status. However, the scheme was shelved and abandoned. Qādī's courts and Sharī'a in Zanzibar occupies a significant place in the history of Muslim legal institutions in East Africa. Islamic law was applied in Zanzibar and Coastal Kenya prior to the British arrival in East Africa. When Seyyid Saği b. Sultān, the first Bū Sağiidi sultan, ruled Zanzibar in 1832, there were no formal courts established by the sultan to implement Islamic Law. The court of the sultan took the form of a 'magisterial monarchy' whereby the sultan 'preferred to govern directly, delegating specific responsibilities on a piecemeal basis to trusted advisers and friends rather than relying on formal structures. Under Sayyid Saği, the office of the sultan combined the legislative, administrative and judicial functions of

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3 Article 24, Tanganyika Order In Council 1920.
4 The Tanganyika Courts Ordinance, 1920.
5 Section 67(1), the Magistrates Courts Act 1963.
government. In Uganda, through the indirect policy rule, indigenous legal systems were allowed by the British rule to exist but each operating within its own sphere of jurisdiction. Islamic law was applied in matters of marriage and divorce excluding inheritance which was ruled by English common law. The independent state inherited such legal infrastructure and maintained the status quo in adopting them. Although the Muslim population in Uganda is far smaller than other East African countries, they form ‘a substantial and an extremely important and critical minority.’

Establishment of ṣādi‘i’s courts

There is no uniform policy on ṣādi‘i’s courts in East Africa. Each individual country has adopted its own mode of dealing with them. The colonial background of the territories has also contributed to variant state policy towards the ṣādi‘i’s courts and the Sharī‘a. In Kenya, ṣādi‘i’s courts existed before the British Protectorate. In a bid to consolidate their rule, the British retained the Muslim judicial structures that were established by the sultan. Statutes were enacted to give due recognition to such courts. ṣādi‘i’s courts were given the mandate to ‘take cognisance of all matters affecting the personal status of Muslims’ (such as marriage, divorce and inheritance). Later in 1931, the Court Ordinance 1931 was enacted containing the provisions of establishing mudīr’s and wāli’s courts as well as the ṣādi‘i’s courts. It gave the ṣādi‘i’s courts (which was a native subordinate court) ‘full jurisdiction over Muslim natives in all

8 Article 55 of the British Native Courts Regulations, 1897.
matters relating to personal status, marriage, inheritance and divorce, and over all native in all matters in which the value of the subject in dispute does not exceed 50 pounds. Despite the changing of hands in administering the coastal strip of Kenya, the qāḍī’s courts were in all cases preserved. In a congregation (baraza) at Mombasa on 8 July 1895 to commemorate the formal transfer of authority of the coastal strip from the Imperial British East Africa Company to the British Government, Sir Lloyd Mathews had this assurance to give: ...all affairs connected with the faith of Islam will be conducted to the honour and benefit of religion, and all ancient customs will be allowed to continue.9

Robertson’s report strongly recommended that the qāḍī’s courts should be continued and noted that:

At present the kadhis, who are really Arab or Muslim magistrates, are quite separate and distinct from the judiciary. I consider that this is anomalous and that they should be integrated within the judicial system proper under the Chief Justice’s administration... I also consider that on their being fully integrated in the Judicial Department, they should be liable for posting to any area where Muslims reside and where cases are submitted for consideration under Sharia Law.10

Qāḍī’s courts were retained in Kenya as a result of a constitutional guarantee given to the Muslims during the negotiations prior to independence. This demonstrates the significance of the qādīs courts in the judicial system of Kenya owing to its constitutional nature. This guarantee was enshrined in Section 66 of the Constitution of Kenya, which provided for the establishment and jurisdiction of the Chief Qāḍī and other Qādīs. The Qādīs Courts Act section 5 provides that:

A Kadhi’s Court shall have and exercise the following jurisdiction, namely the determination of questions of Muslim law relating to

10 Robertson, Kenya Coastal Strip, 34.
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.

The position in Uganda differs to some extent from that of Kenya. Although there are no formal qādī's courts in Uganda, a provision has been made in the Constitution stating that:

The judicial power of Uganda shall be exercised by the Courts of judicature which shall consist of ... (d) such subordinate courts as Parliament may establish, including kadhis' courts for marriage, divorce, inheritance of property and guardianship, as may be prescribed by Parliament.¹¹

Muslims in Uganda have raised concerns on the application of Islamic law in matters of personal status and called for the establishment of qādīs courts. As a result of this the Uganda Constitutional Commission deliberated on the issues and came up with a report that noted:

Islamic Law is applied in Uganda at present mainly in personal matters such as marriage, divorce and inheritance ... Any additional formal role for Islamic Law would involve many complex technical issues which were beyond the competence of this commission to study. If there is to be any change, it should be based on a detailed study of these issues, which might perhaps be carried out by a body such as the Law Reform Commission.¹²

The Uganda Law Reform Commission undertook the task by preparing a working document which recommended the introduction of qādī's courts in Uganda. The document proposed to expand the jurisdiction of Qādīs to include determination of matters of personal status borrowing from the

Kenyan legislation. However, it warned that ‘the introduction of the kadhi courts system would not mean the introduction of Sharia law and that the system will not be imposed on non-Muslims in Uganda’. It went further to provide that the jurisdiction of the High Court or any subordinate court in any proceedings should not be limited. Hence parties though Muslims would be permitted to opt out if they so wish from having their dispute entertained by qāḍī court. The document noted that there was a shortage of people qualified at high levels in Shariʿa law in Uganda. Hence, it proposed to increase the status of the courts in the following manner:

(1) Either by establishing a division within the High Court as a highest level of qāḍīs courts, with persons qualified to be appointed as judges or; (2) constituting an ad hoc qāḍī court in the High Court, as and when the need arises. A bill has been tabled in the Parliament to pass an Act to establish qāḍī’s courts in Uganda. The bill was entitled ‘A Bill for an Act entitled The Qadhi Courts Act 2002’.

The aim of the Act was to ‘establish Qadhis Courts in Uganda; to prescribe certain matters relating to Qadhi Courts under the Constitution and for purposes connected there with and incidental thereto’. In Tanzania (Mainland), as in other neighbouring countries, Shariʿa was confined to matters of personal status. Qāḍī’s courts in Tanzania (Mainland) were abolished 1963. Earlier, statutory recognition of Islamic law was given and can be found in various statutes such as the Administration (Small Estates) Ordinance (Cap. 30) which refers to the application of the Islamic Law of succession stating: Where a deceased person is an African or a member of a tribal community ‘Customary Law’ shall apply except, where the deceased Muslim through written or oral declaration provides that Islamic Law should apply or his acts or manner of life show an intention that his/her estate should wholly or in part be administered in accordance with Islamic Law. Other statutes
that recognised Islamic law are the Land (Law of Property and Conveyancing) Ordinance, Cap.114, and the Mohamme-
dan Estates (Benevolent Payments) Ordinance, Cap. 29. On
30 April 1998 a Bill for the establishment of qāḍī’s courts in
Tanzania (Mainland) was presented to the Parliament. The
Bill was entitled ‘A Bill for an Act of parliament to pres-
cribe certain matters relating to Kadhis’ Courts under the
Constitution, to make further provision concerning Kadhis’
Courts, and for purposes connected therewith and purposes
incidental thereto.’ The bill is yet to be discussed and passed
by the Parliament.

In Zanzibar, formal courts were established in 1897
constituting the sultan’s court that was presided by the sultan
himself with the assistance of the qāḍīs who were local
‘ulamā’. Thereafter successive statutes were enacted to
provide for the establishment of proper system of courts.

One of the striking features of the court system in
Zanzibar was the existence of dual jurisdiction\textsuperscript{13} of court
system. The British magistrates presided over the sultan’s
courts sitting together with the qāḍīs. Interestingly enough
there was a ‘spirit of co-operation’\textsuperscript{14} between them and the
British magistrates rarely interfered with the decisions made
by the qāḍīs. The major organization of the court system
was done by the Zanzibar Courts Decree of 1908 establish-
ing a four-level hierarchical court system that involved
qāḍīs.

\textit{The jurisdiction of the qāḍīs and their role in the society}

In addition to being judicial officers, qāḍīs engaged themsel-
ves in various communal activities. Qāḍīs were viewed by

\textsuperscript{13} For a detailed study see J.H. Vaughan, \textit{The Dual Jurisdiction in
Zanzibar}, Zanzibar 1935.

\textsuperscript{14} Anne Bang, ‘Intellectuals and Civil Servants: Early 20th Century
Zanzibar ‘Ulamā’ and the Colonial State’, in B. Scarcia Amoretti
the Muslim society to occupy a distinguished position compared to that of their counterparts in the Common law courts. Bang points out that ‘As the Bū Saʿīdī state came under British suzerainty, the ʿulamāʾ retained a number of central positions, especially within the legal system but also in other positions where they essentially served as consultants in matters Islamic’. The jurisdiction of the qādīs is one of the areas where the states have been keen to control since the colonial period. The British rule in Zanzibar cautiously handled matters within the jurisdiction of the qādī. For instance in a Memorandum on the Draft Proclamation (District Court Proclamation) of 1944, the Chief Justice of Zanzibar noted that:

The statute excludes matters which may be described as forming part of the ‘spiritual’ jurisdiction of kadhis’ courts. It is realised that this at the present time is a somewhat difficult question and that public opinion may be opposed to an encroachment of qādī’s courts. We are of opinion that individual courts might in course of time prove quite capable of dealing with these matters, but it was felt that until public opinion was educated to the view that, as in England, the ‘temporal’ magistrate is just capable as the ‘spiritual’ magistrate of dealing these matters, it was better to exclude them from the cognisance of District Courts.

In a review of Anderson’s book *Islamic Law in Africa*, Sir John Gray has pointed out that:

The jurisdiction of kadhis courts is matter, which also appears to call for consideration. Very often kadhis are out of their depth in dealing with such matters as the law merchant and local systems of land tenure... The reviewer ventures to suggest that the ultimate aim should be to restrict kadhis’ courts to matters such as were formerly dealt with by ecclesiastical courts in England, e.g. succession, marriage, divorce and, in view of its religious sanctions, wakf.

16 Chief Justice, 17 February 1944 in ZA/Ab62/80/42A.
17 John Gray, ‘Book review on Islamic Law in Africa’, *Journal of*
During the colonial rule in Kenya, the *Qādis* courts had full jurisdiction in all matters relating to personal status, marriage, inheritance and divorce, and within the Coast Districts, over all Arabs, Baluchis and Africans (including Somalis, Malagasies and Comoro Islanders), in all matters in which the value of the subject-matter in dispute did not exceed one thousand shillings.\(^{18}\) *Qādi*’s courts also had criminal jurisdiction similar to the *liwalis*’ courts although in practice *qādi*’s courts exercise criminal jurisdiction only in places where no *liwali*’s court has been established.\(^{19}\)

Islamic law is in Uganda recognized only in marriage and divorce. The statutory provision states:

All marriages between persons professing the Mohammedan religion, and all divorces from such marriages celebrated or given according to the rites and observances of the Mohammedan religion customary and usual among the tribe or sect in which the marriage or divorce takes place, shall be valid and registered as provided in this Act.\(^{20}\)

The *qādis* in Uganda are operating under the Mufti’s office. The hierarchy stretches down from the mosques’ imams followed by county shaykhs and then the district *qādis* who were under the Director of Shari‘a. There are no formal *qādi* courts in Uganda. Muslim parties take their disputes to the *qādis* who preside as a religious conciliatory board without judicial powers.

In Zanzibar, the jurisdiction of the *qādi*’s courts has been narrowed down to family matters since colonial rule. In the earlier period of the Sultanate, the jurisdiction of the *qādis* extended to criminal matters. Section 16 of the Zanzibar Decree 1908 stated:

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\(^{18}\) *African Administration*, vii, 1, January 1955, 36.

\(^{19}\) Section 17 of the Courts Ordinance, 1931.


\(^{21}\) Section 3 of the Marriage and Divorce of Mohammedans Act (cap. 213) 1964.
A Kathi or Assistant kathi, appointed to hold an Assistant Kathi’s Court shall have all the ordinary powers of a third-class Magistrate under the Code of Criminal Procedure and may try any offence for which the maximum punishment is imprisonment for one year or less, and may pass a sentence of imprisonment for a term not exceeding one month, or impose a fine not exceeding 50 rupees.

The Zanzibar Courts Decree 1923 limited the jurisdiction of qādis only to civil matters. It provided in Section 7 that ‘In civil matters the law of Islam is and is hereby declared to be the fundamental law of the Protectorate’. The Decree gave wide powers to the qādis in civil matters. It provided that:

13 (5) the jurisdiction of Kathis’ Courts shall be limited to:-(a) matters relating to personal status, marriage, divorce, guardianship and subject to the provisions of any other law for the time being in force, the custody of children in cases in which the parties are Muslims of the Ibadhi sect or the Shafei sect; (b) matters relating to wakfs, religious or charitable trusts, gifts inter vivos and inheritance where the claim in respect of any such matter does not exceed five thousand shillings, in cases in which the parties are Muslims of the Ibadhi sect or the Shafei sect; (c) claims for maintenance (where such claim is for a lump sum not exceeding one thousand shillings or for a periodical payment to be made at a rate not exceeding one hundred shillings per month, in cases in which the parties are Muslims of the Ibadhi sect or the Shafei sect; (d) suits and proceedings of a civil nature in which the subject matter can be estimated at a money value and does not exceed one thousand shillings.

The civil jurisdiction of the qādis was retained in toto by the Courts Decree 1966 with only minor changes in the amount of the subject matter. This situation prevailed until the Qādi’s Court Act, 1985 was enacted.

The scope of the qādis’ jurisdiction was limited by the Act to matters of personal status only. It seems that the Zanzibari legislature has borrowed from the Kenyan Kadhis Courts Act 1967 as in the case of Section 6 of the former Act which provided that:
A kadhis Court shall have and exercise jurisdiction in 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.

Interestingly, Zanzibar has gone ahead of Kenya in reforming the qādi’s courts. The reform process, which included part of the recommendations made by the Kenya Constitutional Review Commission, has been smooth and quite unlike the Kenyan experience. These reforms were reflected in the Written Laws (Miscellaneous Amendments) Act 2003. The Act reinstated the qādi’s civil jurisdiction as provided by the Courts Decree 1966 and altered the pecuniary jurisdiction. Jurisdiction of the qādīs has been extended to include matters relating to waqfs (religious or charitable trusts), gifts inter vivos and inheritance in cases all parties are Muslims. A new appointment of the appellate qādi was made. Additional qualifications for the appointment in the office of chief qādi, deputy chief qādi or appellate qādi were added to include:

A person who has attended and has obtained recognised qualifications in Islamic Laws from any Institution approved by council of Ulamaa established under the provisions of the Establishment of the Office of Mufti Act, 2001 and held qualifications for a period of not less than seven years and has considerable experience in the knowledge of Islamic laws.\(^{21}\)

Another initiative taken by the Zanzibar Government is the establishment of the Office of the mufti. The Mufti’s office is closely linked with the qādīs in that it relieves the Chief Qādi from conducting religious matters that were regarded to be under his authority. On the other hand, the mufti is duty bound to ‘work hand in hand with the Office of Chief Kadhi and Executive Secretary of the Wakf and Trust Com-

\(^{21}\) Section 4 (5) of the Written Laws (Miscellaneous Amendments) Act 2003.
mission’.

Religious matters that were conducted by the chief qāḍī have been delegated to the mufti. These included:

(a) to give fatwā on any issue raised to him public relating to any Islamic question which need to be decided;
(b) to settle any religious dispute arising among Muslims;
(c) to coordinate and announce the sighting of a new moon.\(^\text{22}\)

In addition, the mufti has been given legal powers that included:

(a) to summon any person or body of persons for the purpose of settling of any religious dispute or any matter under his jurisdiction;
(b) to give orders, directives or conditions on any matter under his jurisdiction.\(^\text{23}\)

*State policy towards the qāḍī’s courts*

In post-independence East Africa, the discussion on qāḍī’s courts and their jurisdiction has gained momentum since the early 1980s. It has been a trend in East Africa that developments taking place in one territory will always closely affect the neighbouring country. This seems to be the case with the qāḍī’ courts and their jurisdiction as it will be seen below. However, state policy towards the qāḍī’s courts and application of Islamic law in the region varied from one country to the other. During the colonial rule Qāḍī’ courts were established incorporated in the legal system with little interference. After independence, steps were taken by the East African countries to unify personal laws and integrate

\(^{22}\) Section 9 (1) of the Establishment of the Office of Mufti Act 2001.
\(^{23}\) *Ibid.*, Section 10(1).
local courts which included qāḍī’s courts. Muslims, as well as other circles, opposed uniformity of laws in personal status. This was the case in Kenya with the Succession Law 1972 which was passed in 1981 and due to political pressures, Muslims were exempted from its application. Another bill on a unified Law of Marriage was tabled but has unfortunately been shelved to date. Interestingly enough, in Tanzania this exercise was reversed in that a unified Law of Marriage was passed in 1971 while the proposed unified Law of Succession was shelved.

The Tanzanian Law of Marriage Act 1971 was made applicable to all the citizens including Muslims. Religious conciliatory bodies were established by the Act to reconcile family disputes before reaching the courts. Hirsch observed that ‘Tanzania has had a history of placing family law in the realm of religious law, to be applied by leaders associated with the community (customary or religious) rather than the state.’

In Uganda, the Domestic Relations Bill, 1999 is still debated and Muslim circles continue to oppose it. Qāḍī’s Courts on the other hand, are operating in Kenya although there is an on going controversy as to the constitutionality of their existence. The other policy undertaken by the independent states in East Africa was to abolish the qāḍī’s courts system. This was accomplished in Tanzania (Mainland) and partly in Uganda. However, there is a growing concern of re-establishing qāḍī’s Courts in Tanzania and Uganda.

In Kenya, although the qāḍī’s courts exist, objections have been raised as to their constitutional basis amid the review of the Constitution of Kenya. The intensity of the debate on qāḍī’s courts increased during the constitutional review process. Muslims in Kenya, on the other hand, have proposed for more reforms to enhance the Qāḍī courts.

Since the colonial period, the policy was to contain the qādis within the coastal strip of Kenya where Muslims were dominant. The British colonial government was not in favour of appointing qādis outside the coastal strip of Kenya neither was it bound by concessions entered into with the sultan of Zanzibar. However, the government recognised to a certain degree the existence of religious leadership so to consolidate its political power and avoid the creation of ‘undesirable centers of power’.  

The policy of the East African courts towards the qādi’s courts was to accommodate them within the judicial structure. In Uganda, despite the fact that qādi’s courts are not incorporated in the judicial system, the Government has tabled a Bill in a view of establishing them.

In Kenya, like the case of Zanzibar, qādi’s courts have been fully incorporated in the judicial system. Subordinating the qādi’s courts to the state was effected to ensure complete control over the courts and their functioning. Various measures have been implemented by the State to influence the proper performance of the courts. Hirsch cited that:

The government has narrowed the courts’ jurisdiction by designating Children’s Officers, public trustees, and juvenile courts as forums for some claims previously heard by kadhys. These officers, in conjunction with Magistrate’s Courts, are better able to enforce decisions than kadhys.

The qādis are bound to follow the court procedures. Moreover appeals from the Chief Qādi are heard by the High Court Judges. Hirsch observed that:


26 Hirsch, Pronouncing and Persevering, 130.
In postcolonial Kenya, the kadhis’ courts operate under close supervision of the secular state. Supervision takes a variety of forms: qādīs must comply with the edicts concerning the administrative operation of the courts; their work is periodically reviewed; and any appeals of their decisions are heard in the Kenyan High Court rather than in an Islamic Court of Appeal.  

In Zanzibar, the Sultanate had a close working relationship with the qādīs who often belonged to the class of ‘ulamā’. Some of the qādīs even acted as personal advisers to the sultan whereas ‘the learned man might also play the role of confidant, wazir (chief minister) and personal qādi to the ruler, as Shaykh ‘Abd al-’Aziz al-Amawi did for Sayyid Khalifa b. Said.’

It is through this cordial relationship that the sultans used the qādir’s influence to strengthen their rule. In this connection, Bang noted that:

The Muslim rulers strove to bring the legal system under their control, i.e. to regulate the process of iftā. This was a feature of the early Caliphates, and became a prominent characteristic of the Ottoman state. ... The four qādīs who actually were granted any significance in the system, were hand-picked, and were tied to the existing order by social and moral obligations. ... Their role, then, was to serve as shields behind which the powers-that-be could tighten their grip on the process of iftā. In the same vein, the qādis may be viewed as a filter, through which the colonial power transmitted their ordinances.

The powers of the sultans to influence the qādīs extended also to the appointment of qādīs. In the earlier period of the Sultanate, qādīs were appointed by the sultan with consultation of the ‘ulamā’. This position changed at the later

period of the Sultanate. Pouwels points out that ‘with the growing power of the Busaidi in local affairs, the liwalis played an even greater role in the selection of kadhis, and so consequently the kadhis increasingly became the instruments of the Sultanate. The liwalis were becoming the principal figures in choosing the kadhis, overshadowing even the town wazee in the selection process.’\textsuperscript{30} The selection process of qādis was one of the ways employed by the sultans to exert control over the appointment of qādis involved no examination and was done informally. The other measure applied by the rulers was that ‘the sultans and their liwalis occasionally tried to break the grasp of some clans over religious offices for example the case of appointment of Mwinyi Abudi as chief qādi of Kenya to thwart the Mazrui hold over qadi-ship’.\textsuperscript{31}

Since the Qādis were educated in the local institutions managed by ‘ulamā’, little interference could be done by the statesmen. The ‘ulamā’ ‘controlled instutionalised Islam and … held a near monopoly of the educational structure, in which they inculcated the norms and values of their own style of Islam.’\textsuperscript{32} Training qādis is an area that has not received much of the rulers’ attention from the colonial period. For instance, in reply to a question raised in the Legislative Council on the issue of training qādis, the British Resident had this to say:

Although the Chief Justice expressed himself as fully in sympathy with the proposal in principle, he stated that ways and means of giving effect to it were another matter and observed:—

(a) The instruction in Mohammedan law (Hanafi and Shia as taught in the U.K. by the Council of Legal Education) is therefore not likely to serve a useful purpose.


\textsuperscript{31} Pouwels, \textit{Horn and Crescent}, 151.

\textsuperscript{32} Martin, ‘Notes on some members of the learned classes’, 526.
(b) Ibadhi law is not provided at Cairo University the nearest university at which it is available being Algiers.
(c) He is unaware whether instruction in Shafi and Ibadhi law is obtainable at Gordon College, Khartoum.33

*Muslim-Christian responses on qāḍī’s courts*

In Kenya, unlike other East African countries, the debate on qāḍī’s courts generated great controversy between the supporters and opponents of such institutions. Controversy on Shari‘a issues in Kenya dated back to 1967 when the Commission on the Law of Succession was appointed to recommend on the viability of having a ‘uniform’ law of Succession. The Commission submitted its report on 3 September 1968 and the Draft Bill on the Law of Succession was passed by the National Assembly in 1972.34 However, the Bill remained shelved until 1 July 1981 when President Moi assented and the bill was passed by the Legal Notice 93 of 1981. Muslims agitated throughout the country with a unified stand to oppose the Law of Succession Act on the ground that it infringed their religious rights. President Moi heeded the Muslim grievances and directed the National Assembly to make necessary amendments so as to reflect wishes of the Muslims. Consequently, Muslims were exempted from the application of the Law of Succession Act on 13 December 1990. During this period, Kenya was undergoing a transitional state of multi-party politics. Hence, the KANU government faced a lot of opposition from several political and religious groups. Presumably, it could be due to this critical atmosphere that the ruling party invested in exempting Muslims from the Law of Succession with the

33 British Resident, Zanzibar to the Secretary of State for the Colonies on 29th November 1947 in ZA/AB62/150/14.
view of gaining their support.

The next controversial debate on Sharī'a was triggered by the constitutional review process where qādī’s courts enjoyed public attention and invited criticism from Christians as well as Muslims. Religious and political groups joined hands under the *Ufungamano* initiative to pressure the Government on reviewing the Constitution and giving due regard to the voice of the people. These efforts culminated in the formation of the Kenya Constitutional Review Commission in 2001.

A striking feature of the commission is the fact it consisted of approximately one third of Muslim commissioners compared to only one Muslim commissioner in the 1967 Commission on the Law of Succession, the former District Commissioner of Nairobi, S.M. Akram. The Kenya Constitutional Review Commission consulted with Muslims from various levels to collect their views on the qādī’s courts. Some of the issues raised are:

— There should be some minimum academic qualifications for the chief qādī and the qādis, such as a degree in Islamic law from a recognised university.

— That the qādī’s court should have a separate Appeal Court and no appeal should go to the High Court.

— That qādī’s courts be expressly empowered to deal with not only divorce in Islamic marriages but also on issues arising out of such divorces e.g. maintenance and custody of children, guardianship, adoption, division of matrimonial properties after divorce and other incidental thereto and connected therewith.

— The powers of the qādī’s Courts be increased to include handling civil and commercial cases involving Muslims.

— That a qādī’s work should be restricted to judicial work and Muslims to elect their own Islamic spiritual leader (mufīți) who will be either official spokesman and an advisor
to the government on issues affecting Muslims in Kenya.\textsuperscript{35}

The commission prepared a draft constitution reflecting the views collected from the people. Recommendations of the commission included proposals to reform the structure and functions of the qādī’s courts. Some of the recommendations included:

— Restructuring the hierarchy of qādī courts ranging from district qādī to provincial qādī and qādī court of appeal at the highest level.

— Extending the jurisdiction of the qādī courts to deal with civil and commercial law where all the parties profess the Muslim faith, in the manner of small claims courts.

— Qādīs to have jurisdiction over matters arising out of administration of wakf properties.

— Qādīs shall be full time judicial officers and shall not have responsibilities of a spiritual nature.

These recommendations generated controversial debates between Muslims and Christians in Kenya. The Kenya Church, representing ‘all major Churches in Kenya and other independent church groups’ responded by presenting recommendations to the Constitution of Kenya Review Commission.\textsuperscript{36} The recommendations directed criticism at the existence of the qādīs courts. The argument of the Church is that qādī’s courts fall under religious institutions, hence they should not be incorporated in the court system and burden the tax-payer.

The Church was of the view that personal laws like the Islamic and Hindu laws should not be given a constitutional recognition in the total exclusion of all other religions in Kenya ‘especially the mainstream Christian religion which


comprises over 80% of the population’. The document further stressed that establishing qādī’s courts will also be favouring Muslims only. A commissioner had perhaps foresight of the anticipated criticisms that they favoured of Muslims by establishing qādī’s courts. He stated that;

In recommending improvements to the Kadhis Courts, the commis-
sion was faithfully reflecting an analysis of the views it received. It is therefore wrong to suggest that CKRC is favouring Muslims or creating parallel court structure or introducing Sharia Law through the back door.37

It is interesting to note that qādīs did not engage themselves in this controversy. Instead, other Muslim circles responded to the Kenya Church recommendations.

A document titled ‘The Muslim position – A response to the Kenya Church concerns’ pointed out that ‘the conduct of State is manifestly Christian in nature. Other religions have not enjoyed a similar history and state patronage as has Christianity.’ The document concluded that:

Indeed, Christianity or any other religion does not suffer any prejudice by the existence of such courts while on the other hand, any arrangement that removes the office of the qādī from the legal structure is a direct infringement of the rights of, and discriminatory against, the Muslims of Kenya. We must reiterate the fact that the office of the Qādī is not a religious office, but a judicial one. A Muslim commentator on the controversial qādī’s courts debate has warned the Nation that ‘the end result is that we now suddenly have a religious confrontation in Kenya and if we are not careful, we may be laying the seeds for religious animosity.’38

38 O.A. Pakh, ‘An insight into the qādī system as the national constitutional conference discusses the draft new constitution at Bomas of Kenya’, Nairobi n.d.
Conclusion

The comparative analysis of state policy towards qādī’s courts in East Africa demonstrates a varied approach of each country. Qādīs were accommodated by the State and different policies have been adopted according to the need of the time. During the Sultanate period in Zanzibar and the Coastal Kenya, qādīs enjoyed much respect and recognition from the society due to their intellectual contributions. Hence, the qādīs were given special status in the court of the sultan. This explains the raison d’être of the sultans to accommodate qādīs within their domain. Qādīs were first appointed by the sultans with the consultation of the townspeople. However, with time, this process was altered when the sultans gained control of the local affairs through their administrative officers, the liwalis.

In the post-colonial East Africa the approach towards qādī’s courts remained unchanged. It reveals a continuity of the inherited legacy of accommodating qādīs within the state domain. With the exception of Tanzania (Mainland), qādīs have been incorporated in the judicial hierarchy as is the case of Zanzibar and Kenya. In Uganda, although qādīs do not enjoy formal status, their existence seems to be significant in the society.

Debates on the establishment and reform of qādī’s courts have instigated a lot of controversies between proponents and opponents in East Africa. In other parts of the continent debates on Shari‘a have taken a different discourse. Such debates are expected in a pluralistic and multi-religious society. What needs to be ascertained is that the debates should aim at reaching an amicable solution far from religious objectives as Lord Macaulay stated:

We know that respect must be paid to feelings generated by differences of religion, of nation, of caste. Much, I am persuaded, may be done to assimilate the differences in law without wounding those feelings. But, whether we assimilate those systems or not, let us
ascertain them ... we wish to give no shock to the prejudices of any part of our subjects. Our principle is simply this – uniformity where you can have it – diversity where you must have it – but in all cases certainty. 39

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