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Shaping of the Sharia courts: British policies on transforming the kadhi courts in colonial Zanzibar

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Administration of Islamic law in colonial Zanzibar should be seen within the context of the cordial relationship between the sultans and the British colonial authorities. Mutual interests were negotiated between the two imperial powers. Britain needed the sultans to secure British economic interests, whereas the sultans appealed for British protection over the Omani-Zanzibar Sultanate. When Britain established a protectorate over Zanzibar in 1890, they accommodated kadhis and their courts in the colonial establishment through the indirect rule policy. After gaining control over the Zanzibar Sultanate, the British colonial authorities embarked on a process of transforming the kadhi courts. The ultimate objective of the transformation process was to incorporate the courts into the colonial enterprise and gradually reform them. The reform process was marked with transformative contradictions that seemed to be a hallmark of British colonial policy in their territories. The British colonial authorities in Zanzibar embarked on a series of reforms towards transforming the mode of operation of the kadhi courts. Within a span of seven decades of their colonial rule, the British colonial enterprise managed to incorporate the kadhi courts in the colonial judicial system and transform their mode of operation.

Keywords: Kadhi courts; Sharia; British; Sultans; Zanzibar; transformation

Introduction

Administration of justice in colonial Zanzibar should be seen within the context of a cordial relationship between the sultans and the British, based on reciprocal protection between the two imperial powers. Since the early nineteenth century, Britain’s interest in the East African coast was to ensure stability in the region in order to protect the Indian Ocean trade routes. Hence, the British needed the support of the sultans of Oman and Zanzibar to protect their interests in the region. Similarly, the sultans of the Omani-Zanzibar Sultanate needed British political as well as military protection in order to consolidate their mercantile economy.

Germany’s threat against Zanzibar forced Sultan Barghash b. Sa’id (r. 1870–1888) to rely on the British to protect his rule. His reliance on British protection paved the way for the Protecting Power to take advantage of this opportunity and entrench its dominance in Zanzibar. Charles Euan-Smith (British Consul in Zanzibar 1889–1891) used the German threat to persuade Sultan Ali b. Sa’id (r. 1890–1893) to declare a British Protectorate over Zanzibar. When Euan-Smith signed a formal...
agreement with Sultan Ali b. Sa'id offering British protection to Zanzibar, he did not mention any British interference in the Sultanate’s internal affairs.

The declaration of the British Protectorate in 1890 marked the last stage in the progressive shrinking of the Sultan’s sovereign powers over his dominions. After the establishment of the British Protectorate, Britain exercised influence on the appointment of the sultans. When Sultan Hamud b. Muhammad (r. 1896–1902) died in 1902, he was succeeded by his 17-year-old son Ali, who was fresh from school in England. With all the powers in his hands, British Consul-General Kestell-Cornish issued a Proclamation appointing Ali b. Hamud as the Sultan and A.S. Rogers, who was the First Minister, as Regent.

With the appointment of Rogers as the Regent and the presence of the British Consul-General, British colonial officials took full control of the Sultanate’s affairs for nearly four years (1902–1906). Britain could not anticipate any opposition from the newly appointed Sultan. For instance, when Sultan Ali b. Hamud (r. 1902–1911) showed opposition to the British colonial administration, he was deposed on grounds of ill health. Sir Edward Clarke, British Consul in Zanzibar (1908–1913), issued a Proclamation to install Khalifa b. Harub (r. 1911–1960) as the new Sultan.

British colonial administrators established Consular courts in Zanzibar to cater for the interests of British subjects. Consular courts were established as a result of treaties entered into between the Sultans and the British Consuls. The first partial surrender by the Sultan of his jurisdiction was by virtue of the Treaty of 1832, whereby the Sultan of Muscat surrendered partial jurisdiction over Zanzibar to Great Britain. Under the provisions of the Treaty, the Sultan agreed to the appointment of a British Agent in Zanzibar and conferred upon him powers to exercise certain jurisdiction over English subjects (Vaughan 1935, 11). In 1886, Sultan Barghash b. Sa'id (r. 1870–1888) was influenced by the British to sign a treaty that gave extra-territorial rights to British Consular Courts over British subjects and their properties within the dominions of the Sultan of Zanzibar.

Conflicts between colonial, customary and Islamic laws

British colonial assumption was based on the fact that customary and religious laws would properly fit into the colonial legal framework. The colonial policy assumed that English law would be applicable to customary and religious laws without contradictions. On the contrary, this assumption was based on a miscalculated policy on the part of the British colonial officials, and in turn raised conflicts between English law, customary and Islamic laws (Lewin 1944, 449).

There was no uniform policy towards 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” (Mann and Roberts 1991, 18). Lack of a clear policy to administer customary and Islamic laws led to a contestation over the law to be applied between British administrators and judicial officers. Tensions between British colonial officials not only demonstrate the lack of a uniform policy on the administration of justice but also portray a continuous controversy between the two arms of the colonial machineries that paved the way for conflict of laws.

British administrative officials argued that English law was inappropriate for applying in the British territories and instead solicited for its substantial modification
so as to suit the local circumstances. On the other hand, British judicial officials saw the technicalities of English law as an integral part of the English legal system and “without them the standard of justice must be lower” (Allott 1974, 204). British judicial officials mistrusted their fellow administrators and their capacity to effect proper English justice if English law was not to be applied to the letter (Hashim 2009, 221).

British colonial judges applied the repugnancy test in order to scrutinise parts of Islamic law that they considered to be repugnant to English notions of justice. The repugnancy test implies that religious and customary laws must not be repugnant to justice and morality, or inconsistent with any British statute. In dealing with Islamic law cases, British judicial authorities applied the repugnancy clause, which did not recognise laws in conflict with basic principles of natural justice and morality (Phillips and Henry 1971, 134). Customary and religious laws were upheld, except in cases where they failed to pass the repugnancy test or contravened colonial statutes (Mann and Roberts 1991, 21). The other doctrine that was applied to disqualify Islamic law was the Roman law formula of “justice, equity and good conscience.” In cases where customary and religious laws did not provide any guidance to the courts, rules of English law were applied (Anderson 1993, 169).

Among the challenges that faced the British colonial administration along the East African coast was harmonising Islamic law and customary law. Traditional patterns among the local tribes along the East African coast were influenced by Islamic law, particularly in matters of family law. Phillips regarded the flexibility of Muslim law as being due to its capacity to accommodate itself to the traditional rules of African society and observed that “Muslim marriage law can be more easily adjusted than the corresponding European law to traditional African ideas and practices” (Phillips and Henry 1971, 132).

In cases of conflict between English law and Islamic law, judges gave preference to English law. In cases of conflict between Islamic law and customary law, British judges preferred Islamic law. For instance, in the 1927 case of Ali Ganyuma v. Ali Mohamed, the issue was whether the property of a member of the digo tribe who had contracted a Muslim marriage should be distributed according to Islamic law or tribal custom. The suit was first heard and decided by a Native Tribunal, which held that the estate should be distributed according to digo tribal custom along the Kenya coast. On a further appeal, the Supreme Court decided that Islamic law applied to the estate on the grounds that in cases where Natives professed Islam, the Mohammedan Divorce and Succession Ordinance was applicable. Inheritance according to the Islamic law of succession is patrilineal, whereas according to digo tribal custom it is matrilineal.

The Muslim marriage system seems to share much with African traditional marriage. For instance, polygamy, which was practised by African societies for social and economic reasons, was also permitted by Islamic law. Thus most converts to Islam saw no conflict between their traditional marriage system and Islamic practice. Similarly, the Islamic law of inheritance shared much with the African custom of inheritance. In both cases, inheritance is based on consanguinity and marriage in which many people share the belongings of the deceased person. However, there are areas where conflicts arise between the two systems. For instance, while Islamic law allows both male and female relatives of the deceased person to inherit, most African customs did not allow women to inherit from their male relatives (Kaniki 1989, 92).
Applying Indian and English statutes in colonial Zanzibar

The British believed their culture to be part of their civilisation that was good for the colonised peoples in the African continent. According to Mamdani (1996, 119), British judicial officials were supposed to be the torchbearers of implementing colonial civilisation in their conquered territories. The British colonial administration perceived the administration of justice based on English notions as one of the main political and philosophical justifications for their colonial rule (Morris and Read 1972, 253). Based on this philosophy, the British colonial authorities justified imposing their legal system in the colonised territories and perceived the administration of justice as an essential tool to establish and maintain political domination (Mann and Roberts 1991, 3).

British colonial policy was geared towards the adoption of English statutes in their colonised territories. However, this imperialistic ambition could not be realised abruptly. Among the major obstacles for the adoption of English statutes was the lack of legally trained British magistrates who could enforce the common-law principles in the courts (Metcalf 2007, 27).

The British officials took advantage of their colonial experience in India by transplanting Indian statutes to Zanzibar. Due to close political and economic relations between India and Zanzibar, it was more appealing for the British to borrow a leaf from their colonial experience in India. In dealing with administrative as well as judicial matters it was convenient for British colonial officials to resort to India since “British thinking about Africa was much more closely related to British thinking about India” (Mamdani 1996, 50). Hence the British colonial administration in Zanzibar drew largely on India for guidance in judicial matters and for the enactment of administrative regulations. The first Indian Act to be applied in Zanzibar was the Indian Penal Code introduced in 1867, and then the Criminal Procedure Code in 1884 (Morris 1974, 13). The application of the Indian Penal Code in Zanzibar demonstrates the significance attached to criminal law by British colonial officials.

The transplantation of Indian laws into Zanzibar courts caused conflicting opinions among British colonial officials. The British colonial authorities in the United Kingdom ruled that jurisdiction within the African territories 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” (Metcalf 2007, 24). On the contrary, British colonial administrators on the ground perceived inappropriateness in English law which “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 population” (Morris and Read 1972, 73). Sir Arthur Hardinge, the British Resident in Zanzibar (1894–1896), argued that Indian laws were simpler to implement than English law in that they presented fewer difficulties to administrators who lacked special legal training (Metcalf 2007, 185). Hardinge’s view paved the way for the enactment of the East African Order-in-Council 1897 that led to the introduction of several Indian codes, including the Penal Code, the Evidence Act and the Contract and Transfer of Property Act in Zanzibar.

Integrating *kadhi* courts into the colonial judicial system

The establishment of British courts beside the *kadhi* courts resulted in the creation of a parallel court system that posed a challenge to the British colonial authorities.
The existence of a parallel court system was a significant feature in the British administration of justice across the British Empire. The British government was concerned with the duality of the roles assumed by colonial officials in the various territories that raised conflicts of opinion between colonial officials in the metropolis and in the colonies.

The ultimate objective of the British colonial administration was to transform the court system in colonial Zanzibar from a parallel court system to a unified court system under British control. The policy was geared towards incorporating the kadhi courts into the colonial court system in which British judicial officers could handle Muslim cases irrespective of their ethnic and religious background.

Throughout their colonial rule in Zanzibar, the British colonial officials were faced with the challenge of integrating the two court systems – the British courts and the kadhi courts – into one unified court system. However, the practical situation in Zanzibar called for the existence of a parallel court system due to the presence of the Sultan’s subjects and citizens of other colonial powers. The British colonial policy of establishing a unified court system did not succeed due to the fact that the two court systems varied significantly. Sir Philip Euen Mitchell, Governor of Kenya (1944–1952), highlighted this challenge by stating that “There cannot be two systems of jurisprudence or conceptions of justice existing simultaneously within the same sovereignty” (Mitchell 1951, 59).

Another reason underlying the failure to integrate the kadhi courts into a unified court system was the inability of British judicial officers to comprehend that the administration of justice in the kadhi courts was judged by the degree of satisfaction that it conveyed to the Muslim litigants as opposed to the notion of justice upheld by the English legal system. To this end, Lord Hailey noted that “it is never easy to assess the quality of the justice administered by native courts, for the standards by which it must be judged depend on the conception of justice held by the population itself.”

Kadhi courts could also not be integrated into a unified court system due to the different approaches adopted in the British courts and the kadhi courts. On the one hand, the British courts adopted the common-law adversarial approach, where the judge was to be seen as a referee in a battle between two contesting parties. On the other hand, the kadhi courts followed an inquisitorial system in which the kadhi took the role of a mediator who attempts to reconcile the parties in a suit (Barakbah 1994, 67).

**Transforming the kadhi courts in colonial Zanzibar**

After achieving political power over Zanzibar, the British colonial officials directed their efforts towards reforming the Muslim administrative and judicial institutions. The focus of the reform process was to incorporate such institutions into the colonial enterprise in order to ensure effective supervision and control. Failure of the British colonial efforts to integrate the kadhi courts into a unified court system forced the colonial enterprise to acknowledge the existence of a parallel court system in which kadhi courts existed alongside the British courts. Hence, the British colonial authorities in Zanzibar embarked on a series of reforms towards transforming the mode of operation of the kadhi courts. British colonial officials implemented the reform process in a gradual manner through the following strategies:
1. **Accommodating the kadhis through the indirect rule policy**

British colonial authorities were concerned about introducing change without provoking the resistance of the colonised people. Therefore, the British colonial officials on the ground adopted a policy of introducing change in a gradual manner in order to minimise social unrest and avoid rebellion.

In order to avoid resistance from the colonised subjects, the British colonial administration employed the indirect rule policy in accommodating local administrative and judicial institutions. Kadih courts were no exception to the manifestation of this policy. The British adoption of the indirect rule policy sought to strengthen the authority of the colonial state. For strategic purposes, the British tolerated the autonomy enjoyed by kadih in the early colonial period when British control was weak. After gaining control over the Zanzibar Sultanate, the British embarked on a process of transforming the kadih courts. The ultimate objective of the policy was to gradually change the local structures in line with the British system of administration and incorporate the kadih courts into the colonial establishment.

The British colonial authorities noted that kadih possessed religious authority that could be utilised by the colonial state to legitimise its authority by incorporating kadih courts into the colonial apparatus (Carmichael 1997, 293). By incorporating Muslim scholars in the colonial framework, the British aimed at controlling the power of the scholars, and placed them under constant surveillance in order to avoid any religious uprisings against colonial rule, as was the case in other British colonial territories.

In Zanzibar, British judicial officers came into contact with various madhhab: hanafi, shafi', ibadhi and shia. This scenario of prevalent madhhab in Zanzibar presented a new dimension to the Anglo–Mohammedan law that accommodated the various madhhab in addition to English law principles. In dealing with cases in the Zanzibar courts, British judges referred to the texts of different schools and applied them to parties of various madhhab. British judicial officers adopted a liberal policy of applying the texts of a particular madhab to followers of another madhab. For instance, in the case of Rukiahbhai Mohamedali Nazarali v. Mohamedali Nazarali, both parties were shias. The appellant was the unmarried daughter of the respondent, claiming maintenance from her father. In giving his judgement for the appellant, Chief Justice Gray relied on a Hanafi text and noted that “Durr al-mukhtar is a Hanafi commentary, but I see no reason for believing that the principle enunciated in the above cited passage, is not common to all schools of Muslim law.”

2. **Transforming the training of the kadhis**

In colonial Zanzibar, kadih were trained in mosques and scholars’ residences that represented traditional centres of Islamic learning. The British colonial officials found that the Islamic traditional training offered to kadih in the local centres of Islamic learning did not equip them with the necessary legal requirements to handle court cases efficiently. In a number of cases, British judges noted kadih's non-compliance with the procedural aspects of litigation. The British colonial administration also found that Islamic learning provided in mosques and madrasas could not provide graduates that would fit into the colonial administrative and judicial structures. Hence, the efforts of the British colonial administration were directed towards transforming the training of kadih with a view of orienting them towards the British legal system, as was the practice in other British colonised territories.
The British colonial authorities in Zanzibar found that *kadhis* trained in the traditional centres of Islamic learning could not cope with the growing demand of new judicial reforms introduced by the colonial order, and therefore embarked on a policy of establishing a seminary training school for *kadhis*. On April 21, 1952, the Muslim Academy was established, and teaching was based on a five-year study programme that covered Islamic subjects and the Arabic language. Additional subjects offered were English language and elementary mathematics. The inclusion of new subjects such as English language was meant to gradually orient *kadhis* towards the language in order to use it in their future career.\(^5\)

Despite the fact that the Academy exposed *kadhis* to a different system of training, compared to the traditional training offered in mosques and madrasas, the influence of such training on *kadhis* did not achieve the intended objective of transforming the training of the *kadhis* - partly due to the existence of traditional centres of Islamic learning, which operated in parallel to the Muslim Academy.

3. **Transforming the appointment of the *kadhis***

A significant feature of the sultans' policy of accommodating *kadhis* was the appointment of *shafi'i* *kadhis* that formed the majority *madhhab* in the Sultanate, as opposed to the *ibadhi* *madhhab* adopted by the Omani minority ruling class in Zanzibar (Pouwels 1987, 152). In order to gain the support of their subjects, sultans appointed *kadhis* on the basis of affiliation to the dominant sect in the Sultanate. For instance, in 1912, the ratio of *sunnî* *kadhis* in Zanzibar Town was three *shafi'i* *kadhis* – Ahmad b. Sumayt (1925), Burhan b. ‘Abd al-‘Aziz al-Amawi (d. 1935) and Tahir b. Abubakar al-Amawi (d. 1938) – as opposed to one *ibadhi* *kadhi*: ‘Ali b. Muhammad al-Mandhri (d. 1925). The increased number of *shafi'i* *kadhis* reflected the majority of the *shafi'i* population in the Zanzibar archipelago compared to Pemba Island, where the majority of *kadhis* were from the *ibadhi* *madhhab* due to the dominance of the *ibadhi* sect on the island. In 1912, there were three *ibadhi* *kadhis* in Pemba: Gharib b. ‘Ali (d. 1934) in Chake-Chake, Salim b. Ahmad in Wete and Muhammad b. ‘Ali al-Mandhri (d. 1925) in Mkoani, with only one *shafi'i* *kadhi* ‘Abd al-rahim b. Mahmud al-Washili (d. 1936).\(^5\)

Most *ibadhi* *kadhis* who served in Zanzibar were recruited from prominent and wealthy families in Oman. The fact that such prominent *kadhis* were of foreign origin could have contributed towards their allegiance to the sultans and British rulers. Britain adopted a similar policy of recruiting foreign scholars throughout her Empire, so as to break the influence of the local scholars.

*Kadhi* courts were perceived as religious institutions that gave *kadhis* the dual responsibilities of adjudicating cases in courts and serving the community outside the courts' corridors. In some cases, *kadhis* experienced difficulty in distinguishing between their role as civil servants, as required by the British colonial administration, and their role as servants of *Sharia*, to serve the society without subjecting themselves to any bureaucratic procedures. The difficulty of determining their exact role within the colonial framework led *kadhis* to contravene bureaucratic procedures laid down by the British colonial administration. British colonial officials categorised *kadhis* as civil servants and subjected them to a scheme of service similar to that of other colonial officers. Hence, the role of *kadhis* under the new colonial rule shifted from being religious figures to becoming a corps of civil servants (Bang 2001, 59).
Despite the fact that kadhis were employed by the British colonial administration in colonial Zanzibar, they were reluctant to be seen by the society as agents of the colonial government. Perceiving themselves as servants of Sharia (Khadiim al-shar'), kadhis felt that their loyalty and allegiance were more inclined to their religion than to their colonial masters.

Before the establishment of the British Protectorate in colonial Zanzibar, kadhis were appointed by the sultans without formal assessment. Liwails had the authority to recommend potential candidates for kadhis' posts and to forward the names of potential kadhis for approval by the sultan. After the establishment of the Protectorate in 1890, the British embarked on a policy of formalising the appointment of kadhis and introduced a system of assessing kadhis before their appointment. A similar policy was stated by the Senior Commissioner of the Kenyan coastal strip, who noted that "no Kahi should in my opinion be appointed until he has undergone an examination on the salient points of the Koran."

Despite the fact that British colonial authorities accommodated kadhis with their religious authority, the British made it a clear policy that kadhis were appointed to serve as judicial officers subject to civil service conditions. The British colonial administration laid down clear procedures for the appointment of kadhis. Kadhis' posts were advertised in the Zanzibar Government Official Gazette, with clear instructions and requirements. Kadhis were henceforth required to sign a contract of service and serve a probationary period of three years in accordance with the civil procedure rules before being appointed permanently. For instance, kadi Ali b. Muhammad al-Abbasí (d. 1953) of Zanzibar served for three years on probation, after which he applied for confirmation of his appointment.8 Kadi Habib b. Mbaruk al-Ma'uli (d. 1945) was appointed on a probationary basis as a kadi of Pemba in 1930. He was required to sign a contract for appointment on probation that applied to local clerical and engineering staff. Part of the agreement read:

The person engaged undertakes that he will, in the Zanzibar Protectorate, diligently and faithfully perform the duties of a Kadi for the term of his engagement and will act in all respects according to the instructions or directions given to him by the Government through the Head of his Department or other duly authorized officer.9

As part of transforming the process of appointing kadhis, the British introduced a system of assessing kadhis before their appointment. British colonial administrators were strict in ensuring that kadhis had to sit for formal examinations before their appointment. In cases where kadhis were appointed without sitting for examinations and later were found to be incompetent, they were required to sit for special examinations. The British colonial policy of subjecting kadhis to formal examinations exceeded the expectations of the local tradition that could not dare to subject renowned scholars to examinations. Some kadhis resisted this policy openly and perceived this process to be a humiliation. For instance, when asked to sit for an examination, an applicant for the post of Chief Kadi in Mombasa remarked:

To ask me to now at this period of my career to sit for an examination, in competition with others, who are so junior both in length of service and of age to myself, is demanding more than I should be expected to perform.10

In the process of transforming the appointment of kadhis, British colonial administrators advertised vacant posts for kadhis in the local press. The following is an example of an advertisement that was placed in the Zanzibar Government Official Gazette:
Vacancy for a Shafei Kathi. Judicial Department, Zanzabar.

The post is permanent and pensionable. Qualifications required: The applicant must be a Shafei Muslim possessing sufficient knowledge of the sharia appertaining to the Shafei School of law. He must have a thorough knowledge of the Arabic language and be able to understand and speak Kiswahili.¹⁷

4. Re-organising the Zanzibar colonial courts

It seemed impractical for the British colonial administration to embark on a full-scale reform of the *kadhi* courts in Zanzibar. Therefore, the British colonial policy preferred to retain Muslim personal laws without much interference due to the fact that the personal laws represented the culture and religious values of the colonised people. It was a deliberate British policy not to interfere with personal laws that did not deal with vital issues affecting the interests of the British colonial administration.

Through gradual changes, the British colonial administration first embarked on a process of re-organising the courts in colonial Zanzibar by enacting the East African Order-in-Council of 1897 that established a Supreme Court of His Highness the Sultan and the Court for Zanzibar and Pemba. The Court consisted of two *kadhis* who were appointed by the Sultan (one *ibadh* and one *sunmi*) with one British judge who did not participate in any court proceedings unless requested to do so by the Sultan. The second re-organisation of the courts took place in 1908 where British officers obtained full control of the court system.

Judicial reform came full circle with the enactment of two statutes: the Zanzibar Courts Decree of 1923 and the British Subordinate Courts Order of 1923. These statutes conferred on British colonial officials powers to control and supervise all subordinate courts. By virtue of the two statutes, the two systems of courts – His Britannic Majesty and His Highness the Sultan – were assimilated under one judicial establishment, although no fusion of jurisdictions occurred.

5. Establishing an appeal system in the Zanzibar colonial courts

Among the strategies adopted by the British colonial authorities in transforming *kadhi* courts was the introduction of a hierarchy of appeal system that gave British judicial officers powers to preside over and control appeal cases from the *kadhi* courts. Until the reign of Sultan Hamud b. Muhammad (r. 1896–1902), sultans were assisted by *kadhis* to preside over appeal cases in the Sultan's Court. In 1899, Sultan Hamud enacted a Decree that introduced reforms in the administration of justice on the islands of Zanzibar and Pemba. By virtue of the Decree, two types of courts, the Supreme Court of Zanzibar and Pemba and the Court for Zanzibar and Pemba, were established, which were presided over by the Sultan together with two *kadhis* (one *ibadh* and one *sunmi*). The Decree clearly stated in Sections 2 and 3 that British judges “shall not take part in any proceeding in the Supreme Court (and the Court for Zanzibar and Pemba) unless requested to do so by ourselves (the Sultans).”¹²

However, the appeal system was changed by the enactment of the Zanzibar Courts Decree of 1908 that incorporated British judges in the judicial system. Pursuant to Sections 4 and 5 of the Decree, the Supreme Court for the Islands of Zanzibar and Pemba consisted of a judge and an assistant judge of the British court
and two *kadhis*, whereas the Court for Zanzibar and Pemba consisted of one British magistrate sitting alone in criminal cases and with two *kadhis* as assessors in civil matters. The Decree of 1908 provided that English judges presiding over cases related to Islamic law should sit with *kadhis* as assessors. Although British judges sat with *kadhis* in appeal cases, the former gave judgments while the latter were confined to giving only religious advice.

The establishment of appeal mechanisms gave British colonial judges the authority to supervise the functioning of *kadhi* courts. British judicial officers preferred to sit beside *kadhis* in order to have close supervision and control over their judicial work. Peter Grain, the Attorney-General of Zanzibar, advocated bringing *kadhis* together in one place so as to make their supervision easier and to “teach the Kadhis to conduct their work in a systematic and a regular manner.”

The British judicial officers managed, through their appellate powers, to scrutinise the judgments of the *kadhis* and check their conformity with English procedures. British officials checked the types of cases brought to the *kadhi* courts and the manner in which these cases were handled by the *kadhis*. Appeals from the *kadhi* courts were taken to the High Court. Section 6 of the East Africa Order-in-Council of 1897 stated that “an appeal shall lie from the Chief Cadi’s Court to the High Court.” A member of the Zanzibar Legislative Council objected to subjecting appeals from *kadhis* to British judges and requested the Government to channel appeal cases from *kadhi* courts to the Chief *Kadhi* instead of being referred to the Chief Justice. The Attorney-General’s justification for subjecting appeals from *kadhis* to the High Court was that “Kadhis belong either to one of the schools of law and each Kadhi decides cases according to his own school of law (Shafi’i or Ibadi) which might cause difficulty if an appeal from one Kadhi was heard by a Kadhi of the other school of law.”

6. **Confining jurisdiction of the *kadhi* courts to Muslim personal law**

When the British colonised their territories, they initially adopted a policy of non-interference in religious matters. The policy was implemented in order to legitimise their rule and avert any possible resistance from the local people (Zaman 2002, 22). British motives for adopting a non-interference policy in respect of personal laws were aimed at avoiding apprehension on the part of the colonised people that their personal laws were being threatened by a foreign power. However, after gaining political and judicial authority in Zanzibar, the British colonial officials implemented a gradual policy of confining the jurisdiction of the *kadhi* courts to the Muslim law of personal status.

British colonial officials felt that the religious laws were within the exclusive jurisdiction of the Bishops’ courts and that the applicable law was the ecclesiastical law, as was the case in England (Derrett 1968, 233). For instance, Sir John Gray noted that *kadhis* retained wide jurisdiction in civil matters and stated (Gray 1955):

> Kadhis are out of their depth in dealing with such matters as the law merchant and local systems of land tenure [...] 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.

The British colonial authorities perceived Islamic law with a secular attitude to be a set of religious regulations that should be confined to Muslim law of personal
status. Sir Arthur Hardinge enacted the East Africa Order-in-Council of 1897 that entrenched British dominance in the courts and restricted the jurisdiction of *kadhi* courts to Muslim law of personal status. Enactment of the East Africa Order-in-Council of 1897 made a significant change in the administration of Islamic law in Zanzibar. It created two categories of native courts that were established along racial and ethnic lines. The first category was headed by European officers who presided over the High Court and the Chief Native Court. The second type of court was presided over by native officers, included *Walis*’ Courts (Arab governors’ courts) and *Mussulman* Religious Courts (*kadhi* courts). Jurisdiction of the *kadhi* courts was confined to Muslim law of personal status.

### 7. Excluding criminal jurisdiction from the *kadhi* courts

Throughout the British Empire, criminal jurisdiction was regarded as being the domain of the colonial powers. Neither customary law nor Islamic law were given the authority to govern criminal matters due to the fact that “criminal justice was under the rules of the colonial order itself” (Mazrui 1989, 253). Criminal jurisdiction was closely related to the control of the social order of the colonised people. For this reason, British colonial policy was directed towards excluding criminal jurisdiction from the *kadhi* courts. British colonial policy distinguished between civil and criminal jurisdictions within the colonial territories. This was based on the understanding that “dealing with crime was about social control and the exertion of power whereas civil laws deal with relationships between individuals” (Mamdani 1996, 15).

After the establishment of the British Protectorate in Zanzibar, the British colonial authorities adopted a policy of excluding criminal jurisdiction from the *kadhi* courts. The policy was gradually implemented in the early twentieth century and by 1916 all criminal cases in Zanzibar courts were determined according to the Indian Penal Code. For instance, in the case of *Abdulla b. Masood v. Rashid b. Masood*, the appellant and the respondent’s wife were found in a hut in the middle of the night. The British magistrate inferred from the circumstances of the case, which included the time of night and the position in which the woman was found, that sexual intercourse had taken place. Based on these facts, the magistrate found the appellant guilty and sentenced him to one year of imprisonment and a fine pursuant to Section 47 of the Indian Penal Code. The appellant lodged an appeal against the lower court’s judgement. The appeal was heard by Acting Chief Justice Tomlinson and *kadhis* Ahmad b. Sumayt and Ali b. Muhammad. Tomlinson upheld the decision of the Magistrate that sexual intercourse had taken place and based his judgment entirely on Indian authorities.

### 8. Excluding Islamic law of procedure and evidence from the *kadhi* courts

Until 1897, *kadhi* courts in Zanzibar applied the Islamic law of procedure. Section 55 of the East Africa Order-in-Council of 1897 provided that the “law and procedure in the Mussulman Ecclesiastical Courts shall be identical with that which has been observed by them in accordance with the laws of the Sultanate of Zanzibar.” The British colonial policy of excluding Islamic law of procedure in the *kadhi* courts was firm. This resulted in binding the *kadhi* courts in Zanzibar to follow the civil procedure rules based on the English and Indian Evidence Acts.
British colonial officials regarded the Islamic law of procedure to be rigid and therefore denied the kadhis the authority to exercise discretion (Anderson 1949, 4). Hence, the British colonial administration embarked on a policy of reforming procedural laws and rules of evidence applied in kadhī courts. British colonial officials found that kadhis applied Islamic procedural laws and rules of evidence that in some cases conflicted with English law and rules. In order to achieve uniformity of procedural laws, British colonial officials introduced English procedural law and evidence in kadhī courts with a view to substituting that for Islamic procedural laws and rules of evidence.

The British colonial administration gradually changed the rules governing oral testimony and by 1917 the rules of the Islamic law of evidence were excluded from application in the Zanzibar courts. Section 1 of the Evidence Decree No. 1 of 1917 stated that “English Evidence Act shall apply to all courts in Zanzibar” and Section 2 provided that “The Mohammedan law of evidence shall not apply in any court in Zanzibar.” The introduction of English procedural law and rules of evidence in kadhī courts led to a conflict between English and Islamic laws that resulted in kadhis’ rejection of applying English procedural laws and rules of evidence. Despite the fact that the British colonial administration enacted procedural laws and rules of evidence based on English common law in order to achieve uniformity in all colonial courts, kadhis did not conform and instead applied Islamic procedural laws and rules of evidence. Non-adherence of kadhis to English procedural laws and rules of evidence was due to significant differences between the two systems of law.

9. Codifying Islamic law in colonial Zanzibar

Among the challenges that faced British colonial officials in the administration of Islamic law in colonial Zanzibar was the lack of a codified Muslim law that could guide British legal officers. British colonial policies were informed by the need for precise and reliable information to understand colonised cultures and societies. To this end, the British authorities employed the colonial courts to serve as mechanisms of inquiry in search for precise information on customary and religious laws and their legal texts (Anderson 1993, 172). The British colonial officials adopted a policy of codifying Islamic law in order to ensure uniform operation and predictability of the law (Christelow 2000, 374).

Codification of the religious and customary laws was another area that revealed colonial tension between British officials. The rejection of codifying religious and customary laws resulted in a conflict between British administrators and judicial officials. British administrative officials objected to codification of religious and customary laws on the ground that reducing such laws to a code would crystallise them and alter their evolutionary nature (Shadle 1999, 40). British colonial administrators perceived the codification process as a threat to their control over the religious and customary courts. The officials therefore preferred to keep the religious and customary laws unwritten due to the fact that it excluded judicial officials from interfering with their jurisdiction that functioned without written codes.

On the contrary, British judicial officers advocated for the codification of the religious and customary laws on the basis that it would ensure the smooth and efficient running of the religious and customary courts. British judicial officers also perceived Islamic law to be uncertain, and the nature of Islamic legal practice to be
arbitrary. For instance, William Murrison, Chief Judge of Her Britannic Majesty Court in Zanzibar, noted that "one wonders sometimes if the writers of the holy Sheria of Islam intended that their meaning should be clear."\(^{16}\)

By adopting the policy of codifying Islamic law in colonial Zanzibar, British judicial officials did not only tackle the problems of uncertainty and arbitrariness of the customary and religious laws, but also avoided dependence on the expertise of local Muslim scholars. The British colonial policy of codifying Islamic law in Zanzibar was not implemented fully. Most of the codified statutes focused on Muslim personal laws and were confined to procedural matters such as the Mohammedan Marriage and Divorce Registration of 1906, the Mohammedan Marriage and Divorce and Succession Ordinance of 1920, and the Kadhis' Court Act of 1967.

**Resistance of the kadhis to the British policies of transforming kadhi courts**

*Kadhis* regarded their courts as strongholds demonstrating resistance against British domination and interference in their jurisdiction. *Kadhis* felt resentment towards British judges' interference with the *kadhis'* religious authority. *Kadhis* perceived themselves as the representatives of Islamic religious authority in society and therefore relied on religious tradition that remained "their fundamental frame of reference, the basis of their identity and authority" (Zaman 2002, 10). For instance, in cases related to the custody of children, the *kadhis* applied the Islamic law rule that when the child is under the age of *hulugh*, custody is given to the father and in his absence to male relatives of the father to the exclusion of the mother. In the case of *Khamis b. Abeid El-Maaghy v. Sa’id b. Abeid El-Maaghy and Atiye bt. Maarufu* (ZA/HC10/64), the father (plaintiff) travelled abroad before the birth of the child and subsequently divorced his wife (second defendant). When the father returned to Zanzibar after a period of 13 years, he claimed custody of his daughter. *Kadhi* ‘Umar b. Sumayt (d. 1973) gave custody of the daughter to the father (plaintiff) on the grounds that no one had the right of guardianship except her father. Being unsatisfied with the *kadhi*'s judgment, the mother appealed. Chief Justice John Verity overruled the *kadhi*'s judgment and gave custody to the mother.

*Kadhis*’ objection against British colonial policies was in the insurance of *wakf* properties against all risks on the grounds that Islamic law did not allow for the insurance of *wakf* properties.\(^{17}\) *Kadhis*, who were members of the *Wakf* Commission, opposed proposals made by British colonial officials to invest *wakf* funds in areas other than the *wakf* properties that were intended by the donors. In a letter addressed to *kadhis* of Zanzibar, the Secretary of the *Wakf* Commission enquired as to the possibility of disposing of *wakf* properties and putting the proceeds into the general funds of the commission. In response to the question, *kadhi* Ahmad b. Sumayt and Ali b. Muhammad al-Mandhri disapproved the sale of *wakf* properties and responded by stating: "It is absolutely forbidden according to Sharia to sell or remove anything from any property dedicated. According to the *wakf* legal deeds wording, no property dedicated can neither be sold nor inherited, although the price of coconuts is low the property cannot be sold."\(^{18}\)

A striking feature of *kadhis*’ response towards British colonial policies in reforming *kadhi* courts in Zanzibar is the lack of violent resistance, as was the case in other British territories, such as northern Nigeria, where alkalis (*kadhis*) disassociated themselves from the British colonial establishment and played a significant role in fighting the British imperial authorities.
Pouwels attributes the lack of violent resistance by kadhis on the East African coast to their affiliation to popular sufí brotherhoods that prevailed in the region, such as the qadiriyya and shadhilyyya (Pouwels 1981, 330). In addition to Pouwels's explanation, the kadhis' non-violent attitude towards the British on the East African coast was due to the fact that most kadhis were trained in traditional centres of Islamic learning that required great respect for one's superiors. The other possible explanation for the lack of resistance of kadhis against the British colonial establishment was that most of the renowned kadhis assigned to judicial and religious posts were non-Zanzibaris of Yemeni, Comorian and Barawian origins.

Conclusion

The declaration of the British Protectorate in 1890 marked the last stage in the progressive shrinking of the Sultan's sovereign powers over his dominions. After achieving political power over Zanzibar, British colonial officials directed their efforts towards transforming the Muslim administrative and judicial institutions. The reform process was focused on incorporating such institutions into the colonial enterprise in order to ensure effective supervision and control.

Lack of a uniform policy towards the administration of justice in Zanzibar led to a contestation over which law to apply. Where conflicts arose between English law and Islamic law, the British judges gave preference to English law and applied the repugnancy test to scrutinise Islamic law and its conformity to English law. British colonial authorities established Consular courts that initially were intended to cater for the interests of British subjects. After gaining control over Zanzibar, British judicial officers were given powers to supervise the kadhi courts.

The establishment of British courts beside the kadhi courts resulted in the creation of a parallel court system that raised conflicts of opinion between British judges and kadhi courts. The ultimate objective of the British colonial administration was to transform the court system in colonial Zanzibar from a parallel court system to a unified court system that would integrate the British courts and the kadhi courts. The process of incorporating kadhi courts into the colonial judicial system did not succeed due to the fact that the two court systems differed significantly.

Failure of the British colonial efforts to integrate the kadhi courts into a unified court system forced the colonial enterprise to acknowledge the existence of a parallel court system. Hence, the British colonial authorities directed their efforts towards transforming the mode of operation of the kadhi courts. The transformation process was implemented in a gradual manner through various policies.

The British colonial administration accommodated kadhis through the policy of indirect rule in order to ensure effective control over them. The indirect rule policy aimed at incorporating kadhi courts into the colonial establishment, with a view of gradually changing their mode of operation.

Transforming the training of the kadhis was a key area of the reform process. The British colonial authorities in Zanzibar found that kadhis trained in the traditional centres of Islamic learning could not effectively serve in the colonial judicial system and therefore established the Muslim Academy in 1952 to train kadhis in secular subjects. However, the objective of transforming the training of kadhis did not succeed partly due to the fact that kadhis were more attached to the traditional centres of Islamic learning.
British colonial officials found that appointment of kadhis was based on heredity. In order to streamline the appointment of kadhis, the British colonial officials adopted a policy of formalising the appointment of kadhis and a system of assessing kadhis before their appointment. Kadhis’ posts were advertised and clear procedures for the appointment were laid down. Recruitment and appointment of kadhis was bureaucratised in that they were subjected to the colonial scheme of service.

The transformation process established an appeal system that gave powers to the British colonial judges to supervise and monitor the functioning of the kadhi courts. British judges subjected Islamic law to the repugnancy test in order to disqualify Islamic law rules that were contrary to notions of justice based on the English law.

The approach of British colonial officials in dealing with kadhi courts was influenced by ecclesiastical courts in England, which were confined to matters of succession, marriage and divorce. After the major re-organisation of the Zanzibar courts in 1897, the British colonial administration embarked on a policy of excluding civil and criminal jurisdiction from kadhi courts. The policy was implemented gradually and by 1916, criminal jurisdiction was removed from kadhis and their civil jurisdiction was confined to the Muslim law of personal status.

The British colonial authorities also adopted a policy of transforming the Islamic procedural laws and rules of evidence. The British colonial administration succeeded in gradually substituting Islamic rules of evidence with English rules of evidence and by 1917 the rules of the Islamic law of evidence were excluded from application in Zanzibar. However, the transformation process could not be fully implemented due to the reluctance of the kadhis to adhere to the English laws of procedure and rules of evidence.

As part of the transformation process, the British colonial authorities embarked on a strategy of codifying Islamic law. The British officials took advantage of their colonial experience in India and transplanted Indian statutes in Zanzibar. The aim of the codification process was to avoid the uncertainty and arbitrariness of Islamic law, as perceived by some British colonial judges. The British colonial policy of codifying Islamic law in Zanzibar was confined to procedural matters, and succeeded in codifying few statutes.

The period between the establishment of the British Protectorate in 1890 and the independence of Zanzibar in 1963 can be characterised as a transformative phase that engaged the British colonial enterprise in reforming kadhis and their courts. Although the British colonial policy of integrating the British courts and the kadhi courts into one unified court system did not succeed, the transformation process managed to incorporate kadhi courts in the colonial judicial system and bureaucratisate the function of kadhis and their courts. By 1963, the British colonial enterprise succeeded in transforming the functioning of the kadhi courts. This colonial legacy continued to shape the structure of kadhi courts and their mode of operation in post-independent Zanzibar, and by extension, Kenya.

Notes
1. The Special Gazette for Zanzibar 20 (1036), 1911.
5. ZNA/AB/5/22.
7. KNA/PC/Coast/1/20/96.
8. ZNA/AB86/138.
10. KNA/CA/20/31.
13. ZNA/AC18/2.
14. ZA/BA16/51.
15. [1916] 1 ZLR 519.
16. [1918] 1 ZLR.
17. ZNA/HD10/51.

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