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Muslim Personal Law in Kenya and Tanzania: Tradition and Innovation

ABDULKADIR HASHIM

Abstract

This article is based on a comparative case study of Common Law jurisdiction involving case law in Kenya and Tanzania where both or either of the parties are Muslims. The status of Muslim Personal Law and its applicability in both jurisdictions raises various issues of conflict. The article analyzes contentious matters arising from such conflicts and suggests possible ways to reconcile between the two judicial trends, taking into consideration the contributions made by modern Muslim scholars such as Rashid Ridha and Imam Muhammad Abu Zahra. The article further points to the influence of Common Law principles on cases that involve Muslim disputants that has led to conflicts in areas such as presumption of Common Law marriage which cannot be accommodated in the Shari'ah. The article attempts to argue that in issues that Muslim scholars are silent or have divergent opinions, reconciliation between the Shari'ah and Common Law principles can be effected. These include, inter alia, adopting the progressive approach in evaluating domestic services and contributions of the wife in divorce settlements, and granting the right to custody of children to either of the parents under the welfare principle. Contemporary Muslim legal scholars need to accommodate these notions without sacrificing their religious values.

Introduction

The aim of this article is to give a brief account of the historical background and constitutional basis of the application of Shari'ah law in Kenya and Tanzania. The status of Shari'ah and its applicability in both jurisdictions raises various issues of conflict between what the Common Law courts apply, following the principles of justice, and the position of traditional madhahib upheld by the Muslim Kadihi Courts. The article will analyse contentious matters arising from such conflicts and suggest possible ways to reconcile the two judicial trends, taking into consideration the contributions made by modern Muslim scholars such as Rashid Ridha and Imam Muhammad Abu Zahra.

The article focuses on the application of Muslim Personal Law in post-independent Kenya and Tanzania (mainland). Zanzibar will not be discussed in the paper due to the fact that it has common features with regard to the application of Islamic Family Law in Kenya. In addition, the Court system in Zanzibar provides adequate provision for the application of Muslim Family Law.

Prior to independence, Islamic Law was applied in both Kenya and Tanzania in the limited sphere of personal status. 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 Shari'ah. Since then, Islamic Law on personal status was applied in
Kenya. In Tanzania (mainland), formerly known as Tanganyika, the British retained the judicial bodies which they had inherited from the Germans. Muslim Family Law was applied 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 is applicable and is not repugnant to justice and morality or inconsistent with any order in council.’

**Basis and Jurisdiction of Muslim Courts**

The establishment of the Kadhisi Courts in Kenya was a result of the Constitutional Guarantee given to the Muslims of Kenya during negotiations prior to independence. This guarantee was enshrined in Section 66 of the Constitution of Kenya. This provision outlines the establishment and jurisdiction of the Chief Kadhi and other Kadhisi. Article 5 of the Constitution of Kenya provides that:

> The jurisdiction of a Kadhi’s Court shall extend to the determination of questions of Muslim Law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion.

The jurisdiction of the High Court is extended to cover appeals from the subordinate courts. The Civil Procedure Act provides that: ‘An appeal shall lie to the High Court ... (c) from a decree or part of a decree of a Kadhi’s Court, and on such an appeal the Chief Kadhi or two other Kadhisi shall sit as assessor or assessors.’ The Mohammedan Marriage, Divorce and Succession Ordinance provides that: ‘The Supreme Court and every judge thereof shall, subject to the provisions of this Ordinance, have jurisdiction to hear and determine all matrimonial causes and suits arising out of Mohammedan marriages.

In Tanzania, application of Muslim Family Law is provided in the Judicature and Application of Laws Ordinance, 1961. After independence the ‘reception clause’ in the Tanganyika Order-in-Council 1920 was retained under Section 2(2) of the Judicature and Application of Laws Ordinance 1963. Another statute that referred to the application of the Islamic Law of succession in Tanzania is the Administration (Small Estates) Ordinance which provides that:

> 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.

In cases of conflict between Islamic Law and Statutory Law, the latter prevails. By virtue of the Magistrates Court Act 1963, customary courts including Kadhi and Liwali courts were abolished and Magistrate Courts were established. Hence, primary courts were given exclusive jurisdiction in Muslim Family Law. Another interesting piece of legislation, which provides detailed provisions on Muslim Family Law, is the Islamic Law (Restatement) Act No. 56 of 1964 that has not yet been enforced.

**Regulating Marriage**

In Kenya the Mohammedan Marriage, Divorce and Registration Ordinance briefly focuses on the procedure of registration of marriages and divorces. Hence the Kadhisi have wider powers to apply principles of Muslim Family Law without any statutory
sanction unless the matter is taken for an appeal to the High Court. In Tanzania, the Law of Marriage Act\(^9\) regulates Islamic marriage and divorce. The application of this Act has raised a number of judgements contrary to the tenets of Islamic Law. On the other hand, the Act has provided a number of innovations in line with reforms that have been introduced in other Muslim countries. The Act\(^10\) provides for the minimum age of marriage of 18 years for males and 15 years for females. It has also introduced the requirement of a marriage certificate although its non-issuance does not invalidate the marriage. These reforms, described by Makaramba as innovations,\(^11\) may be regarded as a platform to accommodate Common Law and the *Shari'ah*.

**Presumption of Marriage**

Presumption of marriage is a concept alien to Islamic Law although in Common Law jurisdictions, and more particularly in Kenya and Tanzania, it is recognized. This concept has been applied to parties irrespective of their religion. In Kenya this happened in the case of Wariara Mbuigua v. Al Amin Mazrui.\(^12\) The applicant, a Christian, cohabited with the respondent, a Muslim, while studying in the US for some four years. The applicant became pregnant and gave birth in 1978. Their relationship ended in 1979 and the parties mutually agreed to leave their child with the respondent’s relatives. The High Court Judge held that ‘It seems to me, however, that this is a case in which presumption of marriage should be considered … I would declare that the applicant was the respondent’s wife at the time the child was born.’

In Tanzania (mainland) presumption of marriage is recognized by the Law of Marriage Act 1971,\(^13\) which provides that a rebuttable presumption will arise where a man and a woman have cohabited for at least two years and acquired the reputation of being married. In the case of *Theresia Msiwao v. Mwamba Mohamed*\(^14\) it was held that: ‘Where the presumption of marriage under S.160 is not rebutted, the marriage remains intact until one takes necessary steps to end it.’ The Act provides protection to the woman by stating that if the presumption is rebutted she may nevertheless apply to the court for maintenance for herself and any child of the union. This approach diminishes the sanctity of the marriage institution and makes a mockery of those who marry according to religious rites or otherwise.\(^15\)

In the case of *Pazi v. Hamis*, the Judge held that Islamic Law was just like many codes which presume the existence of marriage where a man and woman have lived together as husband and wife for a considerable period of time. However, in the case of *Zaina Ismail v. Saidi Mkondo*\(^16\) the Court declined to recognize presumption of marriage where the parties had never contracted a marriage but lived together in cohabitation for five years, out of which a child was born. It was held that ‘the intention of the legislature under Section 160(1) of the Law of Marriage Act is not to give a general licence of legal Marriage Status to parties who live together for two years and above in such circumstances. ... Section 160(1) of the Law of Marriage Act only creates a rebuttable presumption of Marriage. It does not create another method of contracting of lawful marriage under the Act.’

It can therefore be seen from the above that in both Kenya and Tanzania, the concept of presumption of marriage is sanctioned by the statutes and practised by the courts of law. It is in this context that issues of conflict arise in applying such norms upon Muslim disputants. Common Law courts follow the adversarial approach and the judge is bound to apply the uniform law to the parties without inquiring into their religious tenets. This will in turn be against the party’s religious adherence.
Divorce and Marriage Dissolution

In Kenya the Mohammedan Marriage, Divorce and Succession Ordinance governs matters of divorce related to Muslims in Kenya. Most of the cases presented to the Kadhi’s Courts are dealt with according to Islamic Family Law rules based on the *Sha'fi madhhab*. It is therefore rare to find cases of conflict in Kenya unless the matter goes for an appeal from the Chief *Kadhi* to the High Court.

On the other hand, in Tanzania (mainland) the Law of Marriage Act (LMA), 1971 applies on matters of divorce irrespective of the religion of the parties. The Act amends the Judicature and Application of Law Ordinance 1963 to the effect that rules of Islamic Law are made inapplicable in regard to any matters provided for in the Law of Marriage Act. With respect to Islamic divorces, Section 107(3) of the Act sets the pre-requisition for the dissolution of an Islamic marriage as follows:

1. That the parties must have contracted a marriage in accordance with Islamic Law.
2. That they should have referred their matrimonial difficulty to the Marriage Conciliation Board.
3. That subsequent to the reference to the Board which should result in the issue of certificate that the Board has failed to reconcile the parties, both parties, or either one of them, has done any act/thing which according to Islamic Law would dissolve the marriage.
4. That subsequent to the proceeding events both parties, or either of them, petition(s) the court for a decree of divorce. On proof of (1) to (3) the court shall make a finding that the marriage has irreparably broken down and proceed to grant a decree of divorce.

In the case of *Haruna Makwata v. Fatuma Mselemu*, the High Court followed the procedure of hearing the evidence first to determine whether or not the marriage had broken down irreparably. The Court held that:

The right of a Muslim husband to divorce his wife by pronouncing a *talaq* was given a peaceful and decent burial. The funeral ceremony took place on May 1, 1971, the day the Law of Marriage Act, 1971 came into force. Since that day a Muslim husband like a husband professing any other religion must seek and obtain a decree of divorce if he wants to bring his lawful marriage to an end.

The High Court of Tanzania has upheld the Common Law ‘breakdown’ principle irrespective of the religious affiliation of the parties. This has been echoed in the case of *Abdallah Said v. Mwanamkuu Yusufu*, in which it was held that except in cases where the provision of S.107(3) of LMA, 1971 apply, a court of law is empowered to grant a divorce only if it is satisfied that the marriage in question has irreparably broken down. A similar approach was upheld in the case of *Rattansi v. Rattansi*. The parties in this case were married in accordance with Islamic rites. There was sufficient evidence to show that the parties had fulfilled the first two conditions stipulated under S.107(3) yet neither of them had done any act or thing that could have dissolved the marriage in accordance with Islamic Law. The Court therefore held that *talaq* is not a ground to dissolve the marriage and that the act of filing a petition of divorce by either party does not amount to an ‘act’ envisaged by the law.
According to Muslim Family Law, the husband has a unilateral right to divorce his wife. The wife, on the hand, has the right to petition the Court for judicial separation in the presence of any valid legal ground. In addition, the wife may divorce herself from the husband through the process of *khul*’ or ‘isma. The Holy Qur’an has adequately provided for a mode of reconciliation where a dispute arises between the spouses. This reconciliation process resembles the approach adopted by the Tanzanian Law of Marriage Act, 1971 and Muslim countries like Pakistan, to establish Marriage Conciliatory Boards.

The process of reconciliation has been stressed by Muhammad Rashid Ridha who argued that marriage in Islam is built on three foundations: tranquillity, love (affection) and mercy. In case of a dispute between the spouses it was obligatory upon Muslims to appoint two arbitrators who are conversant with the spouses’ interests.

The Muslim husband’s unilateral right to divorce has been challenged in various jurisdictions. In Tanzania, the legislature seems to have been influenced by reforms in parts of the Muslim world, like Tunisia whereby the husband’s right to divorce is sanctioned by the Court. With regard to the husband’s unilateral right to divorce his wife, Muhammad Rashid Ridha notes that Islam gave the right of divorce to man (husband) alone due to his liability to maintain the marriage for which he has incurred a financial burden. Moreover he had the ‘mental facility and mood to be patient’ for any abhorrent act done by the wife. He further argues that the woman lacks such features and due to the fact that she was not financially bound to the consequences of divorce, she is prone to end the marriage relationship on insufficient grounds.

In the same vein, Imam Muhammad Abu Zahra has opposed that the right of divorce be given to the *Kadhi* and stated that ‘the role of the Court is to adjudicate upon a right or an oppression and that the marriage life is not based upon oppressor (*dhali*in) or oppressed (*madhluum*) but rather upon the presence of love and affection or their absence’. He further posed a question that ‘if the cause of the divorce is apart from the issue of love and hatred is it for the social benefit that secrets of the spouses should be exposed in courts? Islam has not made the right of divorce in the hands of the court except in the instance of the wife’s application.

**Custody of Children**

In Kenya, despite the fact that the application of Muslim Family Law is limited to personal matters, issues related to custody and guardianship of infants are excluded from the jurisdiction of the Kadhis Courts. This is due to the absence of a clear reference in the Muhammedan Marriage, Divorce and Succession Ordinance, 1920 to custody issues. In practice, *Kadhi* exercise this power as part of their jurisdiction.

In the case of *Yasmin v. Mohamed* the plaintiff applied under Guardianship of Infants Act for the custody of the child of the marriage. It was held that the welfare of infants was paramount and dear to the heart of the court. All infants in Kenya of whatever community, tribe or sect fall within the ambit of the Guardianship of Infants Act, and the Court is charged with the sacred duty of ensuring that their interests remain paramount and are duly observed.

This principle was applied in the case of *Zuletikha Mohammed Naaman v. Gharib Suleiman Gharib*. The appellant, being the mother, applied for custody of her children. The father denied the mother’s right to custody alleging that she had been unfaithful. The Chief Kadhi gave custody to the mother because of the interest and welfare of the children with reasonable access to the father. The father appealed to the High Court
and the Court gave joint custody to both parties and physical custody to the mother, with reasonable access to the father. The father applied for the review of this order stating that the children had reached the age of seven, which according to Shari‘ah, marks the start of proper moulding of the character of the child. The court hearing the application for review gave the custody of the two children to the father solely on the ground that the religious welfare of the children would be best addressed if they were placed in the father’s custody though the mother was given unfettered access.

The mother appealed and it was held by the Court that Section 17 of the Guardianship of Infants Act provides that where the question of custody of an infant is to be decided, the court ‘shall regard the welfare of the infant as the first and paramount consideration’. The learned judge contended that ‘It is clear to me that in deciding the question of custody in favour of the father, the learned Judge placed undue emphasis on Mohammedan Law of the father . . . Under Islamic tenets that duty appears to lie with the father. But the applicable law in this case is Section 17 of the Act which applies to all children across the board and makes no exception to accommodate Muslim children.’ The Court of Appeal gave the custody of the children to the mother.

Another case in point is that of Warika Mbugua v. Al Amin Mazrui. The Applicant, who is a Christian, sought custody of her female child from the Respondent, a Muslim father. The child was born in 1978 and stayed with her father’s relatives and later with her mother. The child was therefore exposed to the Muslim faith and culture and it was the contention of the respondent that such religious connection will be severed if the child continued in the care of the Applicant.

The Court pointed out that Section 7(1) of Guardianship of Infants Act lays the relevant considerations in awarding custody as the welfare of the infant, the conduct of the parents and wishes of the mother and father. It was held that the Act does not include religious upbringing in the factors to be considered in relation to custody under Section 7(1) and therefore gave custody to the mother.

Similarly, in Tanzania the Law of Marriage Act, 1971 has provided that the welfare of the infant is of paramount consideration in cases of custody. The Act went further to harmonize between Common Law and Islamic Law in establishing that it is better for an infant below the age of seven years to be with his/her mother. Under the Law of Marriage Act 1971, Section 125(1) provides that:

The court may, at any time by orders place an infant in the custody of his or her father or his or her mother or where there are exceptional circumstances making it undesirable that the infant be entrusted to either parent, of any other relative of the infant or of any association the objects of which include child welfare. Section 125(2) of the Act provides that in deciding in whose custody an infant should be placed, the paramount consideration shall be the welfare to the infant and subject to this, the court shall have regard: (a) to the wishes of the parents of the infant and (b) to the wishes of the infant, where he or she is of an age to express an independent opinion and (c) to the customs of the community to which parties belong.

However, the courts have often held that the welfare principle prevails over both customary and Islamic Law. In the case of Hamis Msanga v. Njia Hussein, the parties had already divorced when the appellant brought an action claiming custody of two children born while the respondent was living away from her matrimonial home. The learned Judge awarded custody of the children, who were both under the age of four, to the applicant.
Right of custody in Islamic Law is primarily vested in the mother when the child is at a tender age. Imam Muhammad Abu Zahra\textsuperscript{35} subscribes to the view that the right of custody is established to women due to the need of the child to female care. In addition, it has been reported that a woman went to the Prophet Muhammad to claim for the custody of her child whereas her husband wanted to take the child and the Prophet told her that she would have the right of custody so far as she did not remarry. According to Al Khassaf, custody of the child ends at the age of seven years for a boy because it is the minimum age of discernment (tamyiz) whereas for girls it ends at nine years of age because she needs to be accustomed to female rites.\textsuperscript{36} Hammudah Ab al At\textsuperscript{37} also maintains that young children remain in the custody of their divorced mother, unless she is otherwise unfit. Divorce as such does not disqualify her or affect her right to custody.

**Division of Matrimonial Property**

Division of matrimonial property after divorce is another interesting area that Common Law principles have been applied to Muslim spouses. In Kenya, the Married Women’s Property Act, 1882 of the United Kingdom is applicable to Muslims. In the case of \textit{Fathiyya Essa v. Mohamed Alobhai Essa}\textsuperscript{38} the parties had contracted an Islamic marriage in 1972 and dissolved it in 1988. The appellant contended that properties acquired during the subsistence of their marriage to be declared as jointly owned by herself and the respondent. It was held that the Married Women’s Property Act 1882 of the United Kingdom is an Act of general application and applies equally to Muslims as it does to non-Muslims in Kenya. The Court therefore gave the wife a share in the matrimonial property owned by her former husband.

Equating wife’s domestic services to monetary contribution has been a matter of debate in Tanzanian courts. In the case of \textit{Zawadi Abdallah v. Ibrahim Iddi},\textsuperscript{39} it was held that the wife’s domestic services could not be considered as contributions in the husband’s economic gains or enterprises, and if the legislature had intended to be so it would have stated that clearly and in plain language.\textsuperscript{40} This approach was similar to the decision of the English case of \textit{Lloyds Bank plc v. Rosset and another}\textsuperscript{41} whereby it was held that ‘the monetary value of the wife’s work expressed as a contribution to the cost of acquiring the property was almost \textit{de minimis} . . . It followed that the wife was not entitled to a beneficial interest in the property’.

In Tanzania, the matter reached the Court of Appeal and was settled in the case of \textit{Bi Hawa Mohamed v. Ally Sefu}.\textsuperscript{42} The Respondent was married to the Applicant at Mombasa, Kenya, in accordance with Islamic Law in 1971. The Respondent had bought a house in Dar-es-Salaam before 1970. In 1980 the parties obtained a divorce. The former wife applied for division of matrimonial assets that comprised essentially of the couple’s former matrimonial home. The issue that was before the court was whether the applicant, a former housewife, was entitled to a share in the property of the matrimonial home. The Primary Court held that she was not entitled to any share because the house belonged solely to the husband who had purchased it with his own money. On appeal, the High Court upheld the decision of the Primary Court to the effect that ‘housework’ as such did not constitute a ‘contribution’ within the meaning of Section 114 of the Law of Marriage Act, 1971 and hence did not entitle a wife to a share in the husband’s property.

The applicant was not satisfied with the decision and appealed. The Court of Appeal held that a spouse’s domestic services, rendered during the subsistence of the marriage,
amounted to an ‘effort’ and are a ‘contribution’ within the provisions of Section 114 of the Law of Marriage Act.

In this case the proper construction of Section 114 of the Marriage Act 1971 was invoked by applying the mischief rule and their Lordships held that ‘Guided by this objective of the Act, we are satisfied that the words their “joint efforts” and “works towards the acquiring of the assets” have to be constructed as embracing the domestic efforts or ‘work’ or husband and wife’. The Court of Appeal found in its deliberations that many of these women, who remain married for many years, have no future economic support when their marriages break down.

The reasoning for this principle of economic partnership was also based on the fact that in certain cases a wife may have sacrificed her own career in order to bring up the children and provide domestic services for the whole family and therefore may not have earned any money with which to acquire tangible assets. It would be unfair indeed if such a wife were to be divorced after many years of marriage without any provisions for her future.43

A similar approach was followed in the case of Bibie Mauridi v. Mohamed Ibrahimu,44 where the parties were married under Islamic Law in 1979. In 1986 the respondent issued talaq in accordance with Islamic Law. Their dispute had been referred to a Marriage Conciliation Board, which certified that it had failed to reconcile the spouses. The wife’s contribution to the marriage was domestic duties, like cooking and looking after the house. She also assisted in supervising labourers who were constructing one of the houses. But the husband had provided all the funds for the purchase of the farms, household properties and construction of the house. Section 114(1) of the Law of Marriage Act gives powers to a court when granting, or subsequent to the grant of divorce, to order division of matrimonial assets acquired by the parties during the subsistence of the marriage by their joint efforts. It was held that the duties performed by a wife to look after the house should be considered as her contribution towards the acquisition of matrimonial assets. The wife was given a share equal to one half of the matrimonial assets.

Muslim scholars have dealt with the issue of a wife’s contribution towards the matrimonial property in a superficial manner. Imam Abu Hanifa, Malik and Shafi’i have stated that marriage is contracted for marital relationship and not domestic services. More recent scholars have stated that it is the duty of the wife to cater for the home according to the financial means of her husband and his social status. They have based their opinion upon the practice of the wives of the Prophet Muhammad and his Companions. Imam Muhammad Abu Zahra45 maintains that among the husband’s rights upon his wife is her obligation to take care of the household according to the means of her husband and depending on the background from which the wife comes.

Inheritance

The Law of Succession Act 1981 of Kenya was intended to be a uniform law applicable to all cases of testate and intestate succession on Kenyans irrespective of their religious affiliations. Muslims from different fraternities united in a bid to exempt themselves from the ‘Uniform’ Law of Succession Act. Muslims were exempted from the application of the Law of Succession Act in August 1990. Matters of inheritance related to Muslims in Kenya are therefore dealt with under Islamic Law of Succession rules under the auspices of the Muhammedan Marriage, Divorce and Succession Ordinance 1920.

In Tanzania there is no uniform law of succession, so the traditional Islamic Law principles still apply as modified by various sectarian enactments. The Administration (Small Estates) (amendment) Ordinance46 provides the statutory basis for the application of
Islamic Law of succession. The Ordinance provides the test for the application of the Islamic Law of succession. If the deceased professed Islam at any time and the Court is satisfied that from the written or oral declarations of the deceased or his acts or manner of life he intended his estate to be administered either wholly or in part according to Islamic Law then Islamic Law will apply. What is startling about these provisions is that the mere professing of Islam is not sufficient to invoke Islamic Law in the distribution of the deceased’s estate. The deceased must have made written or oral declarations of his intention to have his estate administered according to Islamic Law. 47

A further complexity in inheritance arises where a non-Muslim party is involved in an estate owned by a deceased Muslim. In the case Re Salim Mkeremi, 48 the deceased, a Muslim, was survived by his Christian widow with whom he had contracted a civil marriage. The issue before the Court was whether the Christian widow could inherit from the deceased under Islamic Law. On this issue, the court held that so long as the marriage was recognized under Islamic Law, the Christian could inherit. In this case a provision of Administration (Small Estates) Ordinance was used to justify the court’s decision that the Christian widow can inherit in the estate of her deceased Mohammedan husband as long as their civil marriage was one recognized under that law.

The inheritance of a non-Muslim spouse was further justified in the case of Shambaa Jumaa & Others v. Rashid Juma, 49 whereby it was held that the right of inheritance is essentially founded on the relationship of the heir to the deceased; such relationships, in the majority of cases, arise from birth or marriage and not from religion, and had this not been so, strangers could validly claim inheritance on the grounds of religion.

Courts have sometimes ignored the rules of the Islamic Law of Inheritance in favour of applying the Common Law rules of equity. This is apparent in the case Mameno Salehe v. Tama Salum 50 which concerns the share of a childless widow whose deceased husband left two daughters from his previous marriage and a brother. The deceased’s estate consisted of two houses and a farm. The widow was challenging the Primary Court decision to award her one eighth as her share from her deceased husband’s net estate. The court held that the childless widow was entitled to one quarter of the deceased’s estate. But it ordered that the wife be given a house plus all the household goods present at the death of her husband. The Magistrate said: ‘I see no rationale for asab (agnatic heir) to grab the lion’s share from the estate, leaving the widow at the age of 63 to do justice to this case. I would award the appellant widow a house.’ However, on an appeal against this decision, the High Court reinstated the Primary Court’s decision.

Conclusion

The article has highlighted the nature of the application of Muslim Personal Law in Kenya and Tanzania. It is clear from the above cited statutes and case laws that the application of Muslim Family Law in these jurisdictions is influenced by Common Law principles. This can be seen in all instances where the states enact uniform laws that apply to all citizens irrespective of their religious affiliation. At the same time, evidence is cited that the constitutions of these states guarantee to their citizens the freedom to follow religious practices.

It can be noted from the above that a number of challenges face the application of Muslim Personal Law in view of the prevailing reforms undertaken in various jurisdictions around the world. Although Muslim Personal Law has enjoyed non-encroachment, the tides of modernism and globalization tend to extend to this ‘sacrosanct’ area. 51 Some of the principles that have found a place in the Common Law system, such as
presumption of marriage, can under no circumstance be accommodated in the Shari‘ah. On the other hand, issues on which Muslim scholars are silent or have divergent opinions, may pave the way for reconciliation between the Shari‘ah and Civil Law. These include, inter alia, equating domestic services of the wife to monetary contributions in acquiring the matrimonial property subsequent to divorce.

The right to custody may also be extended to either of the parents under the welfare principle. Contemporary Muslim legal scholars need to accommodate these notions without sacrificing their religious values. The noble initiative undertaken to harmonize Shari‘ah and Civil Law in various disciplines should be encouraged and supported. Muslim scholars such as Jamaludin Al Afghani, Muhammad ‘Abdu, Rashid Ridha and others, have faced the challenges of their time and proposed harmonious solutions to them. Rashid Ridha has declared that:

There is nothing in our religion that is incompatible with modern civilized nations except some few questions ... and I am ready to sanction everything that the experience of the Europeans before us shows to be needed for the progress of the state in the terms of true Islam ... I must not confine myself to a school of Law—only to the Qur’an and the authentic Tradition.52

Notes

3. Laws of Kenya, Chapter 21, Section 65(1).
5. Laws of Kenya, Chapter 156, Section 3(2).
6. Laws of Tanganyika, Chapter 453, Sections 9(i) and (iii).
7. Laws of Tanganyika, Chapter 30, Section 19(1).
8. Laws of Kenya, Chapter 21, Section 65(1).

Section 13(1).
13. Section 160.
17. Laws of Kenya, Chapter 21, Section 65(1).
20. Ibid., p. 43.
23. Chapter 4, Verse 35.
25. Ibid., p. 162.
27. Ibid.
30. Civil appeal 123 of 1997 at Mombassa (unreported).
32. Makaramba, "The status and application of Islamic Law", *op. cit.*
33. Civil appeal 123 of 1997 at Mombassa (unreported).
38. Civil appeal 101 of 1995 at Nairobi (unreported).
42. Dar-es-Salaam, Court of Appeal, Civil Appeal No. 9 of 1983.
44. Tanzania Law Reports, 1989, p. 162.
46. *Laws of Tanganyika*, Chapter 453, Sections 9(i) and (iii).
47. Act No. 5 of 1971, p. 295.
50. Civil appeal No. 11 of 1982 High Court, Dar-es-Salaam (unreported).