In the Name of Allah Most Gracious Most Merciful

International University of Africa
Khartoum - Sudan

African Universities Congress

Academic Conference
Research Papers

(1)

Khartoum January 2006
Unity within Diversity: Unification and Codification of Muslim Law of Personal Status in East Africa

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Introduction

Islam has contributed in shaping the culture of the African communities. This can be seen in the social life of most African societies in which Islam serves as a common feature. This is evident in cases like language. For instance, Kiswahili language, which a substantial part of it originates from Arabic, serves as unifying factor for many African tribes in East and Central Africa. This qualifies that argument that Islam can play a vital role in determining the future course of culture in the African communities. Laying
at the core corner stone of the religion of Islam is the Muslim Law of Personal Status. Despite efforts to water down its application, Muslim Law of Personal Status has stood the test of time and has been continuously applied across borders. Due to the inherent flexibility\footnote{There several secondary sources of Islamic law that could accommodate for changing situations such as Equity (istihsan) and custom ("urf). For a more detailed study of these sources see M.H. Kamali, \textit{Principles of Islamic Jurisprudence}, Cambridge: Islamic Texts Society, 1991} and its compatibility with the African culture, Islamic Law can provide a solid base for the continuous shaping and enhancing the African civilisation. After independence, the East African countries embarked on the exercise of unifying personal laws that included marriage, divorce and succession laws with the view achieving national unity. Commissions were established to review the laws of marriage and succession. East African countries entered into a process of exchanging and borrowing this experience across borders. The result of this exercise was not up to the expectation of the policy makers. For instance, in 1972 a Bill on a unified Law of Succession was proposed in Kenya and was passed in 1982. Another Bill on a unified Law of
Marriage was tabled but unfortunately shelved to date. Interestingly enough, in Tanzania this exercise was reversed so that a unified Law of Marriage was passed in 1971 while the proposed unified Law of Succession was shelved. Muslims have responded by opposing the unification exercise. In Kenya, Muslims have responded by opposing the unification exercise and due to political pressures they were exempted from the Law of Succession Act 1972. In Uganda, the Domestic Relations Bill, 1999 is still debated and Muslim circles continue to oppose it.

The paper will examine the unification of law process in East Africa and its bearing on Muslim Law of Personal Status. It will further explore the current status of Muslim Law of Personal Status by posing the challenges facing Muslims in the post-independent East Africa. The paper seeks to argue that post-independent East African countries have inherited the colonial legacy of regulating the legal process as far as Muslim Law of Personal Status is concerned leading to legal lacunas that face Muslims in the region. Thesis of the paper lies on the premise that policy makers in the East African countries, and the African continent as a whole, should review the colonial inherited legal
structures in line with the current reforms undergoing in the world over. The review process should incorporate the codification and unification of Muslim Law of Personal Status, which the argument of this paper. This could be possible with the establishment of commissions and research centres within the regional organs in the continent that could focus on the teething problems facing Muslim Law of Personal Status and lay down strategies to overcome such issues in line with the current reforms that are undergoing in other parts of the world.

**Historical Background**

The history of Muslim Law of Personal Status in East Africa owes a lot from the colonial past. Much of the current content legal codes in Muslim countries have been part of the colonial inherited legacies. The British administrators rated Islamic Law less significant compared to the Common Law. The difference can easily be discernable when comparing achievements yielded between the two legal codes in the post-independent East Africa. While Common Law has been fairly advanced in legislation and legal structure, application of Islamic Law has been narrowed down to Muslim Law of
Personal Status with little legislation confined to shallow codes on procedural matters.

The Sultans in Zanzibar adopted a status quo approach vis a vis the administration of Islamic Law. While devoting their efforts to administer Islamic Law to suit their subjects, the Sultans had to accommodate its application so as to satisfy the will of their protectors, the British. The policy adopted towards Islamic Law in East Africa differed from other areas like Sudan and Somalia where the British had to accommodate Islamic Law and Muslim religious scholars. The British wanted to portray its paternalist role to the Muslim population so as to win their hearts. This, in turn, served as a strategy to combat revival of the Mahdi movement that threatened colonial interests.

In Zanzibar formal courts were established in 1897 constituting the Şultans court that was presided by the Sultan himself with the assistance of the kadhis who were local damaa. Thereafter successive statutes were enacted to provide for the establishment of proper system of courts.

Major organization of the court system was done by the
Zanzibar Courts Decree of 1908 establishing a four hierarchy court system that involved kadhis.

As far as Islamic Law is concerned, the Kenyan Coast shared a common history with Zanzibar since the Sultanate period until independence of Kenya in 1963. Sharia was implemented by the Natives Coast Regulations 1897 which was promulgated under the East African order in Council 1897 that empowered the Commissioner, with the consent of the Secretary of State, to make rules and orders for the administration of justice in native courts, including the alteration or modification of the operation of any native law or custom in so far that might be necessary.2

The Mohammedan Marriage, Divorce and Succession Ordinance 1920 was the pioneer ordinance related to Muslim Law of Personal Status enacted by the British in Kenya. After independence, Kadhi courts and the application of Muslim law of personal status was entrenched in the Kenyan

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Constitution. The Kadhis’ Court Act was promulgated in 1967 and was revised in 1986. It provided for the composition and jurisdiction of the Kadhis’ Courts. In Tanganyika, Germans retained the laws and institutions established by Sultan Sayyid Said who ruled the region before German occupation. Later, the British took over from Germans between 1914 and 1918. The British passed legislations that gradually restricted the application of Islamic Law. In addition, the British applied the indirect rule policy that placed the Kadhis and Liwalis (Muslim judicial and administrative officers) under the administrative officers which were manned by the British. Appeals from Kadhis went to District Officers then P.C and finally to the Governor. One of the earliest ordinances in Tanganyika that referred to Islamic law was the Muhammadan Estate (Benevolent Payments) Ordinance 1918. Later, the Tanganyika Order in Council 1920 was enacted. Article 24 This Ordinance placed Islamic law and Customary law at par and incase of a conflict between the two, Customary law was to prevail. Other effect

Constitution of Kenya, 1963, Articles 65 and 66
of the Ordinance was echoed in Article 24 which provided for the repugnancy clause "In all case to which natives and parties every court shall be guided by so far as it is applicable and is not repugnant to justice and morality". Before independence, a process of integration of the court system began and the Judicature and Application of Law Ordinance 1961 was enacted. Later, the Magistrates Courts Act 1965 was promulgated and Kadhis and Liwalis courts were abolished and the Primary courts were conferred with original jurisdiction in proceedings where the law applicable is Islamic law.

In Uganda, the earliest ordinance governing Muslim marriages is the Marriage and Divorce of Mohammedans Act 1906. The Act provides that "All marriages between persons professing the Mohammedan religion customary and usual among the tribe or sect in which the marriage or divorce takes place, shall be valid and registered". Muslim Law of Personal Status in Uganda is only applied in marriage and

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4 Article 24 Tanganyika Order in Council 1920
5 Section 3 of the Marriage and Divorce of Mohammedan Act (Chapter 213, Laws of Uganda 1964)
divorce. The courts have rejected to recognize any further additional application of Islamic in so far as immovable property and instead Common Law related to intestate succession was applicable.\(^6\)

The Constitution provides for the establishment of Kadhis courts to determine marriage, divorce, inheritance of property and guardianship. Although there are no formal kadhis' 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”.\(^7\) A Bill has been tabled in the Parliament to pass an Act to establish kadhis’ courts in Uganda. The Bill entitled “A Bill for an Act entitled The Kadhi Courts Act 2002 has borrowed much from the Kenyan Kadhis Court Act of 1985.

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\(^6\) *Mohamed Habsh Vasila v. Worsta Sophia* [1920] 3 ULR 26

\(^7\) Article 129 (1) (d) of the Constitution of Uganda, 1995
The need to unify Muslim Law
of Personal Status in East Africa

Unification usually aims at having one system of law applicable to all persons within the country in place of multiplicity of systems. East African countries were dissatisfied with the state of their personal laws in the post-independence era. Colonial experience called for the need to restructure the applicable laws and remove the various forms of conflicts and discriminations that have been caused by the colonial legal set up.

In Kenya, the Government set up two Commissions in 1967, one on the Law of Marriage and Divorce and the other on the Law of Succession. The terms of reference for these Commissions were “to make recommendations for a new law providing a comprehensive and, so far as may be practicable, uniform code applicable to all persons in Kenya, which will replace the existing law on the subject comprising customary

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law, Islamic law, Hindu law and relevant Acts of Parliament and to prepare a draft of the new law". The Commission noted that "the Islamic law of succession in Kenya is applied in its pure religious form and does not take into account the modern reforms that have been introduced in several Islamic countries in the Middle East, North Africa and Asia".

Several attempts were made to enact a Bill on marriage and divorce drafted by the Commission but they all failed. The last Bill was forwarded to the House in 1979. The male dominated Parliament rejected the Bill on the ground that it was too western and gave too many rights to women. On the other hand, the Commission on the Law of Succession drafted a Bill of the Law of Succession and forwarded it to the Parliament in 1970 but failed due to Muslim opposition. However, the Bill was passed in the second attempt in 1972, paving the way for the Law of Succession Act 1972. Due to political reasons, the Act remained inoperative until 1st

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July 1981 when it was gazetted. Due to Muslim political pressures, the then President Daniel Arap Moi directed the exemption of Muslims in 1990 from the application of the uniform Law of Succession Act and provided for the devolution of testate and intestate succession in accordance with Islamic law.\textsuperscript{13}

In Tanzania, the Law of Marriage Act was enacted in 1972 with a view of unifying and harmonizing the various laws of marriage aiming at fostering equality, individual dignity and respect to the people. This Law applies to all citizens of Tanzania irrespective of their religious persuasions. The application of this Law has raised various issues inconsistent with Muslim Law of Personal Status. For instance, it provides that for a divorce to be granted two conditions have to be fulfilled. These are 

\begin{enumerate}
\item neither of the parties can petition for divorce before expiry of two years from the date when the marriage was conducted unless exceptional cases of hardship
\item the petition has been refereed to the marriage
\end{enumerate}

\textsuperscript{13}Amendment to Section 2 of the Act vide Legal Notice No. 21/90
conciliation board and that it has failed to reconcile the parties.\textsuperscript{14} Judges of the Tanzanian High Court took the advantage of this Law to make sweeping judgments that offended Muslim parties. In a case of divorce, the High Court held:

The right of a Muslim husband to divorce his wife by pronouncing a talak was given a peaceful and decent burial. The funeral ceremony took place on May 1, 1971, the day of 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.\textsuperscript{15}

In addition, the Law adopts the notion of presumption of marriage by providing that “a rebuttable presumption will arise, where a man and a woman have cohabited for two years and acquired the reputation of being married, that they are duly married.”\textsuperscript{16}

In Uganda, the Domestic Relations Bill 1999 has been proposed with a view of unifying personal laws for all the

\textsuperscript{14} Section 100, Law of Marriage Act, 1971
\textsuperscript{15} \textit{Haruna Makwata v. Fatuma Mseleme}, (1978) Tanzania Law Reports 8
\textsuperscript{16} Section 160, Law of Marriage Act, 1971
citizens on the line of the Tanzanian Law of Marriage Act 1971. The Bill has raised contentious issues that have led Ugandan Muslims to reject it. It provides that in order to marry the second wife, the husband must obtain the express permission of the first wife. The right of divorce has been sanctioned by the courts of law whereby divorced will not allowed except after lapse of two years. In addition, the Bill expressly prohibits customary and religious inheritance practices which discriminate on the basis of gender.

Codification process in Egypt and Sudan

Codes related to Muslim Law of Personal Status in East Africa were transplanted from British India. The Anglo-Mohammedan experience brought to East Africa came with its problems that included the superficial treatment of Muslim Law of Personal Status. Legal codes of this law were very brief in nature and could hardly be compared with Common Law codes that were codified with comprehensive laws in various legal areas.
Partial codification of Muslim Law of Personal Status has been undertaken in North and West Africa though not at the same rate of the Common Law codes.

In Egypt, efforts to codify Muslim Law of Personal Status were initiated in the second decade of the twentieth century. Muhammad Abu Zahra gives a lengthy account of the process and its consequences in Egypt.\(^{17}\) He points out, that Muslim Law of Personal Status was not codified hence giving the liberty to the *Kadhis* to choose the preferred opinion of the Hanafi school that led to conflict in their decisions.\(^{18}\) Due to this reason a committee was established in 1915 consisting Muslim scholars who represented the four *madhhabs* (schools of thought). The committee forwarded its recommendations to the judges and scholars for their opinion but a lot of criticism was made and the project was suspended in the verge of the First World War. Later, Act. No. 25 1925 was enacted comprising some of the recommendations made

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\(^{17}\) Muhammad Abu Zahra, *Al Ahwal asha-xsiyya*, Dar al Fikr al Arabi, Cairo, 1957, p.3

\(^{18}\) *Ibid*, pp. 9
earlier. The committee was comprised of the Grand Mufti of Egypt, Sheikh of Azhar and other Muslim scholars. In October 1926 another committee was established comprising students of Imam Muhammad Abdo and laid recommendations that were not restricted by the teachings of the four madhabs. The committee recommended reforms such as restricting the right of the husband to marry a second wife unless obtaining permission from the Kadhi and secondly, to validate conditions put by the wife during the marriage contract if those conditions will serve the interest of the wife and were not repugnant to the objectives of marriage. A lot of criticism was made against these reforms until a law was enacted in Act. No. 25 of 1929 restricting Muslim Law of Personal Status to the opinions of the four madhahbs adopting few reforms that have been recommended.¹⁹

In Sudan, the status of Muslim Law of Personal Status followed the same trend as in other British colonies. The 1902 Ordinance provided for the establishment of Kadhis.

¹⁹Ibid, p.15
Courts with limited jurisdiction to Muslim Law of Personal Status that included succession, inheritance, wills, legacies, marriages, and divorce. This law continued to apply in the Sharia courts until 1973 whereby Sharia courts were abolished and merged with the civil courts by the Judiciary Act of 1973. The first initiative to lay a comprehensive code of Muslim Law of Personal Status was done in 1991 by virtue of the Law of Personal Status 1991 (Qanun Al Ahwal ash-\textit{siyya}, 1991). The code has adopted the Hanafi madhab with references to the Maliki school in some cases.

\textit{The need for codification of Muslim Law of Personal Status in East Africa}

Calls to codify Muslim Law of Personal Status have been proposed by various Muslim circles in Kenya during the review process of the Constitution of Kenya. In its proposals for reform, the Constitution of Kenya Commission Review pointed out that Islamic law on personal matters has not been codified, and the matter is left to individual courts. A Commissioner has noted "Muslim law of personal status on
marriage, divorce, inheritance and succession is not codified into legislation in Kenya. It is left to the Kadhi's in their different courts to interpret the law as they understand it. There are no reports of the Kadhi's Court's decisions—hence this has hampered the growth of Islamic Law jurisprudence in Kenya.”

20. The lack of codification of Muslim Law of Personal Status has led superior courts to give judgements that were inconsistent with Islamic Law. In a case that was related to custody, a judge of the court of Appeal concluded that “a man who walks out on his wife and children of tender age to start a new life and a family with a “bimbo”, has no right to demand the custody of the children of the woman he has abandoned on the false pretext that he is under a religious duty to bring them up as good Muslims”.

21. In another case concerning the share of a childless widow whose deceased husband left two daughters from his previous marriage, one of the children Monday was awarded the share of all four children. This case is important because it demonstrates the principle that the children of a previous marriage are entitled to a share in the estate of the deceased husband.

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marriage and a brother, the court held "I see no rationale forgrab to grab the lion share from the estate leaving the widow at the age of 63 to do justice to this case. I would award the repellant widow a house". 22

The first initiative to codify Muslim Personal Law in East African has been undertaken by the Tanzanian Legislature. After independence, the Islamic Law (Restatement) Act no. 56 of 1964 was tabled in the Parliament. The Act is comprehensive in its content covering marriage, guardianship, maintenance, dower including temporary marriage (mut’aa). It compiles the views of various schools of thought including Shafi‘i, Hanafi and Shiah Ismaili and Na‘Asheri schools. Unfortunately, the Act has been elved pending approval of the Minister concerned.

Conclusion

African countries share common features with a firm historical background. There has been a lot of cross borders change in legal as well political experiences. African countries are coming closer by merger of regional blocks

22 Appeal no. 11 of 1982 High Court, Dar es Salaam (Unreported) Tanzania
such as the African Union and East African Community. This merger will entail the need to have a common ground to face problems arising within societies of the member states. This will include legal issues that have been a subject of controversy in a number of countries.

The process of unifying and codifying Muslim Law of Personal Status in East Africa could serve as a base in lying strategy for having a unified stand in legal as well as religious issues. This nascent experience can benefit other Anglophone countries in the south of sub-Saharan Africa. Experience has proved in various parts of the African continent that Muslim Law of Personal Status could be unified and codified despite the inherent cultural diversities within the African societies. The African continent has a lot to share in terms of religious as well as cultural experiences. As far Muslim Law of Personal Status is concerned, East Africa can benefit a lot from her neighbors in North and West Africa.
Bibliography

Abu Zahra, M., *Al Ahwal asha-khtiyya*, Dar al Fikr al Arabi, Cairo, 1957


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