# Muslim Family Law in Sub-Saharan Africa. Colonial Legacies and Post-Colonial Challenges

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# MUSLIM FAMILY LAW IN SUB-SAHARAN AFRICA

## COLONIAL LEGACIES AND POST-COLONIAL CHALLENGES

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

ISIM SERIES ON CONTEMPORARY MUSLIM SOCIETIES

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# Preface

This volume brings together twelve essays that in various ways explore the histories of Islamic law in Africa. All these essays share a concern with the encounter between Islamic law and the colonial or post-colonial state. Just as there was no single 'Islamic' law in Africa, there was also no singular encounter. Instead, there were a variety of encounters and changes in the nature of these engagements over time. Most of these encounters led to narrowing the practice of shari'a to issues relating to personal status or family law, as we describe it. The legacy of these engagements remains deeply embedded in post-colonial legal systems, political mobilization, and identity politics. Thus, to understand the issues surrounding contemporary claims by millions of Muslims for 'full shari'a' in Nigeria and Sudan, we must understand the historical contexts producing these claims. The essays in this volume bring together historians, legal and constitutional scholars, anthropologists, and religious studies experts in a conversation that enriches the study of Islamic law in Africa.

This volume is the result of the convergence of different scholarly, legal, and political projects. Each editor brought to the volume different interests and training. Based at the University of Cape Town, Shamil Jeppie was engaged in research on the Arabic Study Circle in Durban, writing a nineteenth-century history of the Sudan, and directing the Tombouctou Manuscript Project. Based originally at the University of Cape Town, then moving to Stanford University in Stanford, California, and from there to Duke University, Durham, North Carolina, Ebrahim Moosa worked on writing a book on the twelfth-century Persian scholar Abu Hamid al-Ghazālī and as a Carnegie Scholar, he researched madrasas in the south Asia. While in South Africa, Moosa was deeply involved in discussions surrounding the status of Muslim family law in the new South African constitution. Based at Stanford University in California, Richard Roberts has for many years focused on issues of law and colonialism in Africa, and directs a series of biannual workshops on different aspects of law and colonialism in Africa. It was at Stan-

ford University that Roberts and Moosa first collaborated on issues of family law in Africa, an effort eventually resulting in this volume. Jeppie joined the collaborative effort in the international meetings held on the African continent. The first of four international workshops on Muslim family law in Africa was held in Dar es Salaam in 2000, followed by seminars at Stanford in May 2001, Dakar in June 2001, and Cape Town in 2002.

Well over sixty scholars from a wide range of disciplines, legal practitioners as well as *qadis* engaged in lively debates and generated diverse perspectives on the history and status of Muslim family law in Africa. Participants came from all over Africa, including colleagues from Mauritania, Morocco, Tanzania, Burkina Faso, Senegal, Ghana, Mali, Niger, Egypt, Kenya, Mauritius, and South Africa. This volume, long in gestation, is one result of those sustained discussions.

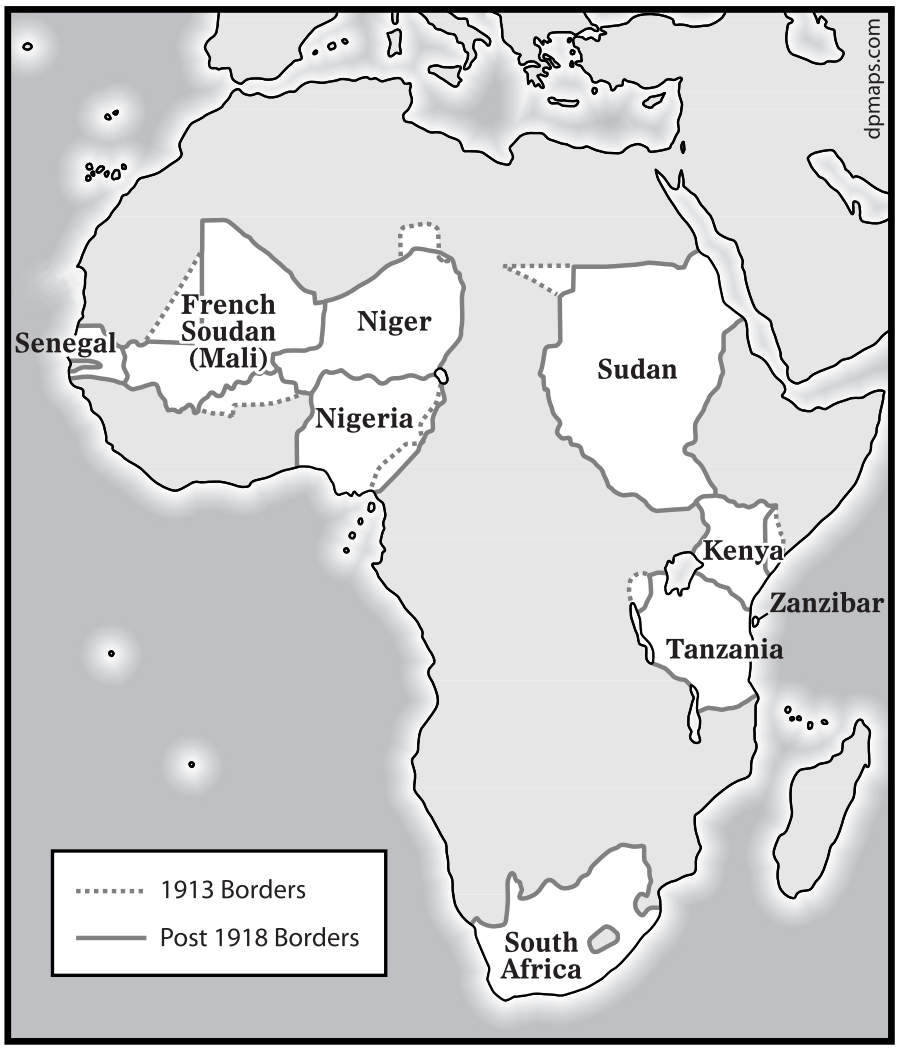
The essays in this volume range from examinations of the colonial encounter between European administrators and African Muslim communities as they implemented colonial legal worldviews and policies, and move to recent decades of the post-colonial situation, when the questions of constitutional equity, equal franchise, and citizenship run up against calls for implementation of 'full shari'a' in certain countries. Experiences in one part of the African continent finds echoes elsewhere, often leading to the politicization of the question of family or personal status law on a trans-continental network. Debates in Niger echo those in Nigeria, or debates about family law in Kenya also find receptivity in Tanzania.

Thus, the title of this work – Muslim family law in sub-Saharan Africa – may appear not to do full justice to its content. Issues of Muslim family law were intimately linked to broader political and social processes. In surveying the state of the research on Islamic law in Africa, the editors were convinced that a collection such as this was very much needed. If it stimulates productive debate and further research – as we expect it will – it could, on these grounds alone, be seen as a worthy contribution. This aside, we believe there is much of value in each essay: new perspectives are offered, and previously ignored or underused historical sources are introduced and interpreted. On the whole, we aim to illustrate the formative process of legal practice, and illuminate specific historical conjunctures which shaped practice. The introduction provides an integrative, synthesizing narrative and argument.

The editors wish to thank the Ford Foundation for the multi-year Islamic Law in Africa grant it provided to the Centre for Contemporary Islam at the

University of Cape Town (UCT). This grant made the conferences held in various African capitals possible, and gave us the opportunity to bring scholars from the African continent into conversation with those from other parts of the world. It is appropriate to remember the late John Gerhart, Ford Foundation representative in Johannesburg and later president of the American University in Cairo, who gave special attention to research in Africa and supported our early scholarly labors. We would also like to thank Stanford University for its support for the first workshop, and Duke Islamic Studies Center's earlier incarnation as a research unit, the Center for the Study of Muslim Networks. Our thanks to Abdulkader Tayob at the Center for Contemporary Islam at UCT for helping to convene the international meetings. The essays in this volume were first presented at one of these conferences, and then revised several times over the course of the past several years. We are especially grateful to Annelies Moors, who took on this project for the Amsterdam University Press for the Institute for the Study of Islam in the Modern World (ISIM) series, and to all others at the Press. Naefa Kahn and Susana Molins Lliteras at the University of Cape Town were steady, efficient and keen assistants at various stages of the project in Cape Town. Erin Pettigrew at Stanford University played a central role in the final stages of this project, as she gently enforced consistency in Arabic transliteration out of a pool of very different styles, tracked down missing notes, and compiled the consolidated bibliography. While we have employed the Library of Congress transliteration style, we chose to leave the distinctive East Africa spelling of Kadhi in the chapters dealing with that region, while elsewhere in the volume we have used the more standard *qadi*. We also want to thank Don Pirius for drawing the maps which appear in this volume.

*Shamil Jeppie, Cape Town*
*Ebrahim Moosa, Durham*
*Richard Roberts, Stanford*




Africa map showing chapters

# Introduction

## Muslim Family Law in Sub-Saharan Africa: Colonial Legacies and Post-Colonial Challenges

**Shamil Jeppie, Ebrahim Moosa, and Richard Roberts**

In August 1947, Margery Perham, one of the leading students of colonial studies in Britain, remarked:

> The relationship between Britain and the colonial peoples in the field of law has produced very deep effects, but it has given rise to problems and ambiguities which urgently need study. It is strange that a people so proud of their achievement in the field of law as the British should have given so little serious attention to their wider significance of this side of their imperial responsibilities.[1]

Britain was not alone in paying scant attention to the effects of colonialism on the law; other colonial powers were equally inattentive. In Africa, what were classified as 'customary law' and 'Islamic law' prevailed. The practice of Islamic law, in turn, is tied to the history of the arrival and spread of Islam in Africa.

### *Islam in Africa: Brief Background*

Islam arrived in Africa from the east and the north. From Egypt, Islam followed the Arab armies on their seventh-century march westward into the Maghreb and southward, along both the Nile into the Sudan and the Red Sea

into the Horn of Africa. By the ninth century, Muslim communities had established themselves along trade routes into the interior. Muslims were present on the east coast of Africa by ca. 780 AD, although Islam spread to the majority of Swahili-speaking people between the thirteenth and sixteenth centuries. In North Africa, Berber tribal resistance to the Arab conquest slowed the spread of Islam into the Sahara. By the eleventh century, however, Muslim merchants were already well-established in the capitals of the sub-Saharan kingdoms of Ghana and Gao, and at the beginning of the twelfth century, the Kingdom of Kanem was a Muslim state. By the time Mansa Musa, the ruler of Mali, made the pilgrimage to Mecca in 1324, Islam was part of the political culture of many West African states. Timbuktu emerged during the second half of the fifteenth century as a major center for Islamic scholarship. By this time, Muslims had established settlements throughout the savanna up to the edges of the forest. Along the east African coast, Muslims had also established themselves in Madagascar, and deep into the East African interior into what is now Tanzania.[2]

The late fifteenth century witnessed the rise of a series of reformist Muslim rulers in the West African kingdoms of Bornu, Songhay, and Kano, who promoted more activist Islamic legal, political, and religious cultures. Even more militant reform movements emerged in West Africa along the desert fringes at the beginning of the seventeenth century, spreading outward over the next two centuries. By the middle of the nineteenth century, militant Islamic states were common throughout the savanna region.[3] Muslim states emerged in the eastern savanna region in the sixteenth century, and many in this region were also drawn into the waves of Islamic reform and revival in the eighteenth and nineteenth centuries. The east African coast witnessed an Islamic revival in the seventeenth century, which led to increased Omani commercial and political interest in East Africa. The relocation of the al-Bussaidi sultanate from Oman to Zanzibar at the beginning of the nineteenth century fostered an Arabization of Swahili coastal culture and a commercial revolution that swept throughout East Africa.[4] The founding of the Cape as settlement and refreshment station half-way to the East by the Dutch East India Company in 1652 also led to the establishment and growth of Islam in South Africa. Exiled Muslim political leaders from the East Indies arrived at Cape Town side by side with labor convicts and slaves, some of whom were Muslims. By the beginning of the eighteenth century, a lively

Muslim culture was firmly established at the tip of South Africa (see the chapter by Allie in this volume).[5]

By the time of the late nineteenth-century European 'scramble for Africa', Islam was firmly established in northern, western, eastern and parts of southern Africa and was making considerable inroads into Central Africa. European colonial ambitions thus confronted Muslim societies throughout most regions of the continent. Exactly what colonial conquest and subsequent colonial rule meant for Muslims and the practice of Islamic law was shaped by prior European experiences with Muslim societies, the history of Islam in the territories thus acquired, the nature of the protectorate that they established over African territories, and the articulation of native policy in the colonies. Moreover, colonial policy often differed depending on whether Muslims constituted the majority in a territory, a significant minority, or merely a presence.[6]

## *A Very Short Introduction to Shari'a*

The impact of colonialism on family law in particular was most contentious, with far-reaching consequences for Muslim populations subject to colonial rule. As many essays in this volume will show, the colonial encounter significantly transformed Muslim perceptions of the shari'a, one that pushed it in the direction of a positive law. Under colonialism, shari'a – a concept historically understood to be a moral and ethical code regulating the private and public domains of Muslim life – was increasingly designated as a positive 'Islamic law'. The bulk of shari'a was a set of ethical duties enforced via self-regulation and ethical formation of the self. However, as Islamic statecraft evolved in the medieval period, more aspects of life, such as criminal offences, property, and inheritance claims and general governance, required legal authority to adjudicate disputes.[7]

Literally, the term shari'a or shar' meant the path to water, symbolically signifying a way to the very essence of life. In its religious usage, it has from the earliest times meant 'the highway of good life', as religious values expressed functionally and in concrete terms, to direct human life.[8] Technically, it meant anything that stemmed from revelatory authority as an expression of God's will.[9] Shari'a was the moral imperative or ideal law that

imposed a moral obligation.[10] In practice, shari'a signified the source of the ethical code approximated by human understanding (*fiqh*); the latter became the preferred term to mark the discursive nature of law and ethics, and the preferred term used by discerning scholars. In reality, fiqh was the outcome of human effort (*ijtihad*) attempting to grasp divine intentions. These intentions were derived from the Qur'an, the prophetic tradition (*sunna*). In the majority Sunni tradition, ample scope was given to the will and consensus (*ijma*) opinions of the scholarly elite. In the absence of any explicit directives, analogy (*qiyas*) was used to solve new problems resembling older ones for which there was a ruling. In the Shi'a tradition, the teachings of the hereditary spiritual and political leaders (*imams*) and reason (*'aql*) replaced Sunni scholarly consensus and analogy. In short, shari'a embodied the fulcrum of the Muslim normative tradition. Pre-modern notions of the shari'a provided a picture of a dynamic normative framework which was sufficiently flexible to accommodate change and transformation, unlike its modern incarnation.

Over the centuries, the *fuqaha*, specialists in the moral and ethical traditions, also called jurists in modern discussions, continued to develop the normative framework. Dating back to the 10th century, hierarchical authority (*taqlid*) in the form of discursive schools and guilds of scholars, known as the *madhhab*, (pl. *madhahib*), increasingly restricted the discretionary interpretative leeway available to individual scholars (*ijtihad*); instead they stressed the binding authority of the normative tradition. These schools emerged first during Umayyad rule and thrived under the Abbasids (to 1250 AD), to constitute the Hanafi, Maliki, Shafi'i and Hanbali schools followed mostly by Muslims adhering to the Sunni creed. The Ja'fari, Zaydi, and Isma'ili schools served those who observed the Shi'a creed. While these schools have mutated over time with significant geographic distribution, they all endure in one form or another in colonial and post-colonial Africa as testimony to the abiding authority of tradition.[11]

Over time, the fuqaha, as experts in designing norms and values, gave greater scope to customary practices (*'urf* and *'ada*). They also devised a theory purporting that the shari'a advanced five objectives (*maqasid*); namely, to preserve religion, life, intellect, property, and progeny, since all social teachings were premised on promoting the public good (*maslaha*).

In terms of the scheme of values, Islam's ethical code took as its default that all actions were *ab initio* permissible (*mubah/halal*). Only a limited number of acts were categorically forbidden (*haram*), and another limited num-

ber of practices were deemed to be obligations (*fard/wajib*). Each of these two categories was accompanied by sanctions for commission and omission, respectively. These sanctions were mostly to be applied to the afterlife, with a few worldly sanctions, such as a range of penalties for homicide and criminal offences, for example. Actions that were not categorically forbidden but came close to being proscribed were deemed reprehensible (*makruh*), while others that were not strictly mandatory but strongly recommended were classified as meritorious (*mustahabb/mandub*).

Classical shari'a dealt with two primary categories of practices: rituals (*'ibadat*) and worldly transactions (*mu'amalat*). However, with the advent of European contact with Muslims, European experts and translators crafted shari'a in the mirror of Western categories of law. Gradually, the body of shari'a teachings morphed into what is now widely known as Islamic law, by including broad categories such as criminal law, family law, commercial law, torts, etc., typologies unfamiliar to traditionalists but gradually acceptable to modern scholars of Islamic law. The European colonial encounter with Muslim societies in Africa, as elsewhere, set into motion a number of transformations that would irreversibly shape the epistemology, ontology, structure, and practice of shari'a from then onwards (see especially chapters in this volume by Jeppie, Lydon, Roberts, Cooper, Hirsch, and Moosa).

Over time, the shari'a/fiqh discourses were not immune to politics, and the Muslim framework of norms and values could not escape the ravages of ideology.[12] To truncate a very long story, which has been amply documented elsewhere, the dynamic process of discovering God's will through continuous intellectual effort gave way to formalism and adherence to doctrinal authority. From the seventeenth century onwards, in places as distant from each other as Yemen and Indonesia, calls for a rejuvenation of the ethical and legal tradition incessantly grew louder, reaching a fever pitch in the nineteenth and twentieth centuries. The intellectual divide between traditionalist (*taqlidi*) and reformist (*tajdidi*) approaches to the law increasingly became evident. In general, traditionalists preferred to follow the doctrinal formulations of their respective legal schools, whereas reformers advocated the reformulation of law by taking a *de novo* approach to the Qur'an and prophetic tradition (*sunna*) by means of *ijtihad,* as was the case in early Islam. By the middle of the twentieth century, this tension was captured in J.N.D. Anderson's observation of Muslim attitudes towards the law in Africa and beyond:

> It appears that in the second half of the nineteenth century and the beginning of the present century, however, many Muslims preferred to maintain the Shari'a intact and inviolable as the ideal law, even if this meant displacing it in practice, in the exigencies of modern life, by some other system, rather than allow any profane meddling with its immutable provisions.[13]

Anderson was clearly referring to the practice of traditional Muslim authorities. What set enlightened practitioners of Islamic law apart from their traditional rivals were their views of the shari'a as a flexible and dynamic law that met the needs of a changing society. European colonial authorities in Africa were keen to introduce the religious leadership of their colonies to reformist modes of thinking in North Africa and beyond.[14] Other colonial officials, especially those who oversaw daily activities in districts, wanted Islamic law to be as codified as soon as possible in order to facilitate their work on grievances, disputes, and appeals (see in this volume Roberts and Cooper). Yet traditional Muslim religious authorities like emirs and qadis/kadhis were skeptical of change, and viewed it as a cover for Westernization, and thus latched on to the immutable and divine nature of Islamic law.

## *Islamic Law in Colonial Encounters*

Despite the wide-ranging issues generated in African history and contemporary society by the struggles over various aspects of Islamic law, there has been surprisingly little reflection – synoptic or critical – on what could be called 'African Islamic law studies'. Although there is a growing body of research on various aspects of Islamic law in Africa, there is as yet no collection or survey that looks historically at the post-colonial period or focuses, given the recent literature on the colonial state, on Islamic law in the discourses and practices of colonialism. The collection edited by Mann and Roberts on 'Law in Colonial Africa' makes occasional references to the encounter between colonialism and Islamic law, but it does not focus on this multifaceted issue.[15]

The first formulations of the field 'Islamic law', often expressed as 'Mohamedan law'/ 'droit Musulman' in Africa, emerged concomitant with the needs of colonial administrators when they were establishing the colonial

state's administrative apparatus on the continent. There was a dialogue between the administrators in the colonies and those in the metropolis concerning what to accept as law and how to rule. Here colonial administrators, in the course of their work with various populations in their territories, came to formulate the rudiments of a policy requiring ratification in the metropolis. There was little European expertise in the field during this period. However, the colonial state was also not overly concerned with changing any situation as long as it did not impede their rule. Thus, Lord Cromer promised the qadis he met in Khartoum in 1899, after the British overthrow of the Mahdist state, that their 'Mohamedan law' would remain untouched by the British. Prior to Cromer, Napoléon Bonaparte too undertook to work closely with *'ulama* in Egypt during the brief French occupation, since he viewed them as the natural leaders, but was rejected on grounds of mistrust of the Europeans.[16] Nevertheless, colonial entanglement with native law, customary or Islamic, could not have occurred without significant co-operation and collaboration with indigenous religious authorities in the case of the formulation of Islamic law (see chapters by Christelow, Makaramba, Jeppie, Roberts, and Lydon).

Beginning in the inter-War period, there was some attempt at co-ordination and to import expertise on Islamic law from outside sub-Saharan Africa. In Francophone West Africa, the French brought in orientalists experienced in working in Algeria to oversee Islamic practices among the Muslim population.[17] The most active phase of the work of administrator-scholars such as Paul Marty, Xavier Coppolani, and Maurice Delafosse was just before and after World War I. Their writings contributed to the idea of a different type of Islam practiced in sub-Saharan Africa – an 'Islam noir' – that we discuss in the section dealing with colonial Muslim policy more fully (pages 29-31, 33-35). For Anglophone Africa, some training was provided to bureaucrats in the rudiments of Islamic family law, drawing on the work of Vesey-Fitzgerald.[18] Trimingham's surveys of Islam in various parts of the continent were an important source of knowledge about African Islam; but his work only appeared in the late 1940s and 1950s. While his work did not focus on law, he addressed aspects of it in his surveys. By this time Islamic law was but one of a variety of legal systems the British were engaged in, alongside various types of 'customary law' they had fostered, in addition to installing English common law in the urban centers, and for the anglicized among the colonized. There was, as Mann and Roberts have

argued, not a plural legal system in colonial Africa but a 'single, interactive colonial legal system'.[19]

After World War II and through the late 1940s and 1950s, the most systematic writings about the nature and scope of Islamic law in Africa took place. 'Islamic law' emerged as a field of expertise, a legal field to be closely studied and in which at least some civil servants were required to have training, especially those working in the legal departments in the colonies. The work of James Norman Dalrymple (J.N.D) Anderson, Head of the Department of Law of the University of London's School of Oriental and African Studies, was a milestone in the growth of the professional study of Islamic law on the continent. The year 1950 appeared to be a turning-point for the study of Islamic law in Africa. That year, the German orientalist Joseph Schacht, an expert on early Islamic law, was dispatched to Africa by the colonial office to investigate the state of Islamic law there. After a tour of roughly three months, he produced two survey articles – one on the state of Islamic law in East Africa and another on West Africa.[20] However, he did not make Africa his field of study.

While Schacht did not make the study of Islamic law in Africa a subfield of research, his report nevertheless preserved interviews with British judges and officials, which provide us with some details of how colonial officials at the time viewed Islamic law. For instance, one consistent observation of both Schacht and Anderson about Northern Nigeria was that the colonial officials found the Muslim qadis to provide a very strict and textbook version of Islamic law.[21] This observation points to a larger political tension between British colonial officials and Muslim authorities there, and its impact on how Islamic law evolved, which will be described later.

Anderson took up the burden of investigating the state of Islamic law in Africa with increased rigor, depth, and detail. He traveled extensively in British Africa on an official research tour from mid-1950 (in East Africa) to early 1951 (in West Africa). His findings were published as *Islamic Law in Africa,* which appeared in 1954 as a 'Colonial Research Publication' of the Colonial Office. This was likely his first major publication and established his reputation as a scholar of Islamic law in Anglophone Africa.

Anderson's approach to Islamic law in Africa was meticulous, but as a lawyer he pursued a narrowly legalistic mode. His focus was always the juridical rules of Islamic law and institutions of the law; with great attention to technical detail he showed how rules, of marriage and divorce, for in-

stance, could differ from one place to another. While by no means a comparativist, Anderson's work still remains the best documentation of Islamic law in Anglophone colonial Africa with details of the practices of the Muslim authorities in certain instances.[22]

The weakness of Anderson's work was that he took the colonial context for granted and did not examine the historical contexts in which Islamic law was incorporated into colonial legal systems. He was never explicit about the conflicts and strains between the often competing systems of law in a single colony or protectorate, and how the politics of governance gave shape to the law (see especially the chapters by Hashim and Mwakimako in this volume). Anderson was also commissioned to write a handbook on Maliki law for use in northern Nigeria, a task he never completed.[23]

The one scholar who understood the social and political contexts in which laws functioned was Antony N. Allott, whose work on customary law had set a new benchmark in the 1960s. For the purposes of this volume on Muslim family law in sub-Saharan Africa, Allott made two important observations. The first was that the centralization of the administration of justice with a professionally trained staff diminished customary law. If itinerant judges in England effectively destroyed local custom by applying a common custom as they viewed it, then in Africa a professional judicial staff also undermined local custom and enforced the opinion of a powerful section of the community instead.[24] The second was to distinguish between those territories where Islamic law was regarded as a special variety of native law and custom, and those territories where Islamic law was considered to be a distinct system of law, alongside customary law and English law.[25] Even in areas in northern Nigeria where Islamic law was recognized only as customary law, it was applied more consistently than elsewhere in British colonies. In other words, the professionalization of Islamic law in the hands of a bureaucracy gradually undermined the flexibility and adaptability of Islamic law to changing contexts. Classical Islamic law in the hands of discerning qadis and academic lawyers (muftis) who were alive to changing social contexts ensured that the law moved in tandem with the altering social milieu. This dynamic was truncated by colonial intervention. Reform of Islamic law gradually turned into a political football between colonial authorities and Islamic elites, and later between representatives of the post-independent states and Muslim religious organizations (see Moosa and Makaramba in this volume).

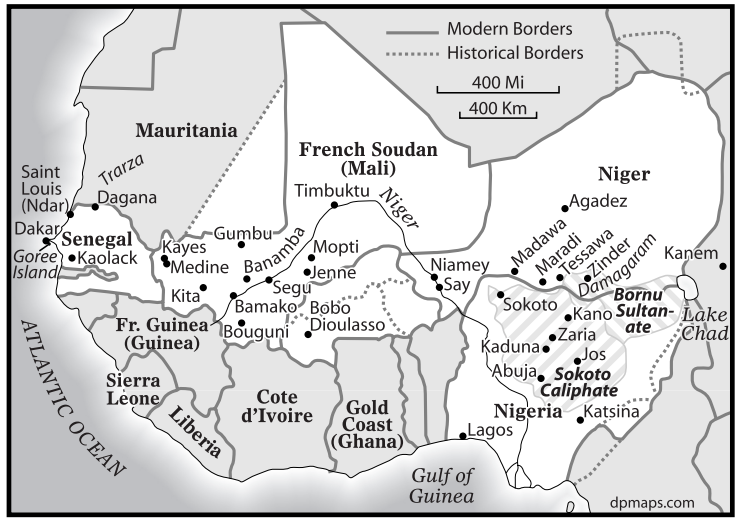
The *Journal of African Law* emerged as an important source on legal developments in the colonies. This journal presents a kind of bridge between the late colonial and the immediate post-colonial period. Anderson remained a figure of importance in the post-colonial legal scene in Anglophone Africa.[26] The former British colonies all adopted a common law legal system with Islamic personal law institutionalized.

## *Muslim Family Law*

At the heart of Muslim family law is the regulation and control of the family. Colonial authorities everywhere felt strongly about regulating the family because they viewed family stability as a cornerstone of the stability of the colony itself. What is now called family law or laws of personal status, as a distinctive body of laws, is a fundamental part of the reproduction of families and communities; changes to laws relating to family life confront deeply rooted, but also highly contested beliefs about power, authority, and gender roles. These laws also have many practical and material effects. In the encounter between European colonial powers and Muslim communities in Africa, family law and its administration were inevitably affected and transformed in various ways. Precisely how, when and why are some of questions that essays in this volume address.

At the outset of the colonial era, neither Britain nor France had a consistent approach to Muslim family laws. Yet, in the process of implementing various forms of colonial administration in the field of law, colonial officials had to address the question of the Islamic laws their subjects practiced and honored. Thus, questions concerning the age of consent, polygamy, divorce, and rights to dissolution of marriage, custody, and inheritance, among others, all came under close scrutiny by the colonial administrations. Even when they claimed that they allowed Muslims to practice their law without interference, they would soon get involved in internal, community, and family disputes. This was inevitable because both the British and French brought their respective European secular legal orders to the colonies – English common law and French civil law, respectively. These laws were meant to apply to the European settlers, but also to the local native populations who resided in urban areas and who had 'evolved' or acculturated sufficiently to qualify for some rights of colonial citizenship. However, in certain

West Africa




cases there were Muslims who claimed the benefits of urban 'citizenship' but did not want to give up their fidelity to Islamic rules regulating family life (see Lydon in this volume). For them, the defense of 'the family' was often the last bastion to protect against colonial encroachment; they may have lost the war against the European powers for control of their lands, but they were not going to succumb easily to colonization of their intimate lives, the private sphere of the family.

Colonial officials often debated whether Islamic law should be approached as but one among several 'customary laws', or as a separate body of law and justice (see Jeppie and Roberts in this volume). As some of the essays in this collection show, local officials were very often highly interventionist. The extent to which Muslims were free to implement various aspects of their family laws was therefore a question that repeatedly drew attention and was very often the scene of conflict. Where the laws were not in question, then the administrators of these laws, the qadis (referred to as kadhis in British East Africa), were the focus of scrutiny. They were the embodiment of the laws, and the extent of their autonomy was often subject to debate and contention. In many ways the traditional Muslim authorities, in northern Nigeria for instance, became part of a system of indirect rule, where Islamic law was recognized as customary law and enabled Muslim po-

litical leaders like customary chiefs to retain some of their authority (see Christelow in this volume). Indirect rule worked perfectly with another instrument of colonial governance, the protectorate.

## *Colonialism, Muslim Societies, and the Protectorate*

The predominant international legal instrument that furthered late nineteenth century imperial expansion was the protectorate. At its most basic, the protectorate was an arrangement 'whereby one state, while retaining to some extent its separate identity as a state, is subject to a kind of guardianship by another state'.[27] The protectorate usually came into being through military conquest or a treaty ceding a certain degree of sovereignty to the superior power. In one form or another, the protectorate has been practiced since Roman times (although in practice by all conquering forces). The modern form of the protectorate gained its legal character most explicitly during the nineteenth century. Distinctions among three main forms of protectorate emerged during this period: European protectorates over smaller European states, which retained their international personality (Swiss protection over Lichtenstein; France over Monaco); protectorates over non-European states not possessing general international recognition (British protection over Indian princely states and Zanzibar, for example); and colonial protectorates over what might be considered unorganized or marginally organized territories (British protection over Uganda and Bechuanaland; French protection over Upper Senegal; German protection over Tanganyika).[28]

In all cases, significant ambiguities existed surrounding the legal authority the parties possessed to conclude these protection agreements, and the conditions which ensued. Alfred Kamanda, a Sierra Leonean scholar and one of the few students of the protectorate treaty, argues that 'by reason of its very vagueness and nebulousness, [the protectorate] could be a cloak for many different, and even diametrically opposed, administrations in practice'.[29] Kamanda's assessment mirrors early twentieth-century legal scholars. 'Protectorates are of many kinds and degrees and each one is more or less a law until itself,' wrote Malcolm McIlwraith in 1917.[30] Lewis Tupper in 1907 praised these agreements for their 'elasticity' in permitting the application of protection with 'discretion'.[31] The practice of protectorates, how-

ever, was legally messy. Paul Dislère, one of the leading French scholars of colonial legislation, argued that '[o]nce a state is placed under the protectorate of another power, it abdicates completely its external sovereignty and abandons entirely its foreign policy. But, in terms of its administration of its internal affairs, the protected state in general reserves more or less full independence to run its local government. ... This regime varies from country to country and it is impossible to establish a precise formula for the operation of the protectorate'.[32] Frantz Despagnet agreed with Dislère on the legal complexity of the protectorate but shifted the emphasis between old and new protectorates, which differed in the degree of internal sovereignty practiced by traditional rulers. With the 'modern' establishment of protectorates, Despagnet wrote, 'the protector nation is required to assist the protected on the road towards civilization'. At its base, however, the protectorate has its origins in the circumstances that obliged the second party to submit to the protection of the first, most often through force or the threat of force.[33]

The nineteenth-century protectorate was shaped in particular by early colonial encounters with Muslim states and societies. British experience with the Mughul states in India and the French with Egypt and Algeria provided the model for the protectorate to serve as a modern form of colonial encounter. Zanzibar was a good example of a British protectorate allowing substantial space for the ruling elite to continue to run its institutions of governance, including the legal institutions. The Zanzibari 'ulama found a comfortable place under the protectorate administration, which allowed them to apply Shafi'i and Ibadi versions of Islamic law in personal status cases (see the chapters by Hashim and Mwakimako in this volume).[34]

The division between internal and external sovereignty had significant implications in the legal sphere. Because the superior power in the protectorate assumed the capacity to enter into international agreements, it also assumed some of the characteristics of the 'sovereign' state. For example, the superior power often took over jurisdiction of capital crimes and other crimes considered threats to public order. By separating criminal prosecution from civil litigation, the protectorate thus profoundly changed the nature of the law in practice. The creation of the protectorate thus relegated all disputes relating to families and personal status to a residual category of family law and ceded varying degrees of autonomy over this domain to existing native authorities. We shall examine below some of the implications

of the separation of criminal and civil litigation for the meaning of shari'a in colonial contexts.

## *The British Empire and Islamic Law: From South Asia to Africa*

Indian precedent was important for the British administration in large parts of Africa; they simply exported legal codes intact from India, such as the Indian Penal Code, to Africa.[35] As in south Asia, British colonial authorities encountered Muslim states in Africa. British conquest led to experimentation with policies of 'indirect rule' that shaped the later histories of large British territories such as Sudan and Nigeria. Partly because of the mode of colonial rule – indirect rule – 'the shari'a question' persisted into the post-colonial period (see Jeppie and Christelow in this volume). Thus, it is necessary to look at British colonial practice in south Asia, since it was a crucial precursor to its practice of power in Africa. This was reflected in both colonial political organization and legal practice.

In south Asia, the British had a long historical experience of ruling over indigenous states of varying size and capacity, as well as having populations of various religious and cultural backgrounds. The south Asian experience had practical relevance for subsequent colonization of various parts of Africa by the British. The employment of the strategy of indirect rule, for instance, was grounded in precedent from south Asia; likewise, in dealing with indigenous law and custom, they drew upon their imperial record in the East. The main theorist of indirect rule in British Africa was Lord Lugard, who was born in India and served in various parts of Asia; he was later stationed in East and then West Africa, rising to the highest administrative ranks. In his magnum opus, *The Dual Mandate in British Tropical Africa,* he drew substantially on examples from south Asian precedent.[36]

By the late eighteenth century, the British in south Asia were politically dominant but continued many of the patterns of rule and administration inherited from the declining Mughal empire; as long as their rule was economically viable, their alliances with local elites stable, and their dominance recognized, they saw little need to act in an overtly interventionist fashion. They adapted to local political conditions and sought not to reform existing indigenous laws, even those they would consider morally offensive. The great rebellion of 1857 – which began among sepoys in Delhi, eventually

spreading through others layers of society – shook British dominance but did not end its rule. After its merciless suppression of the uprising, there was a substantial shift in the modalities of British rule. East India Company rule ended, and colonial administration became a task of the Crown or British state. Through deploying larger numbers of European troops, the British Raj improved means of tax collection, the expansion of communication networks, and Persian became even less important as the language of administration.[37]

In the field of law, the British had a policy of non-interference unless British authority was threatened or tax collection impeded. The promise of non-interference was re-asserted after the rebellion of 1857, even as the entire administrative and legal machinery was transformed. In the field of family law for the substantial population of Muslims, a body of 'Anglo-Muhammadan' law emerged in the first century of British rule, which provided for the utilization of the Hanafi version of shari'a law. Where there were no rules on a matter, then there would be recourse to 'justice, equity and good conscience', a Latin maxim that ultimately meant English law.[38] This hybrid body of laws aimed at some form of standardization of the diversity of Islamic laws among various – for instance, Sunni and Shi'a – Muslim communities. Anglo-Muhammadan scholarship – entailing a prodigious amount of translations and abridgements of classical Arabic and Persian legal manuals – had a distorting effect and reflected 'British preoccupations more accurately than indigenous norms'.[39] *Al-Hidaya* was hastily translated in 1791, with an improved translation appearing in 1807. Later in the nineteenth century, other abridgements of 'Islamic law' texts appeared, providing a fixed textual basis for the practice of law affecting Muslims. The British did not care that the original texts were written in a context of debate and were not meant to be the last authoritative word on Islamic law. British administrators were most interested in having a quick and easily accessible reference guide to Muslim family law to help with their administrative and legal oversight.

Anglo-Muhammadan law was not only a body of texts but also a set of legal assumptions, legal officers, and codifications. This hybrid law, however, was much more than a guide to legislation and litigation. It had cultural and intellectual ramifications on Muslim society well beyond the period of British rule.[40] It was with this distorted colonial legal framework ar-

ticulated in British India that the British attempted to deal with their new Muslim subjects in Africa.

### *Roots of French Colonial Protectorates and Islamic Policy*

Despite its short duration, Napoléon's 1798 Egyptian expedition marked a significant break in French colonial history. It established the principle of the protectorate, in which a conquering power agreed to respect the legal authority of 'customs' as part of ceding authority over the internal affairs of the society to designated indigenous authorities. Keenly aware that Islam was a central part of the political and cultural expression of Egypt, Napoléon sought to establish an 'enlightened' protectorate, which at once respected cultural difference but nonetheless sought to 'regenerate' Egypt into the glorious kingdom it once was.[41] He sought to establish an administration that associated French military leaders with local Muslim notables, and brought with him not merely soldiers, but also scholars whose task it was to understand the civilization of the conquered lands. Napoléon's Egyptian expedition failed, but it set in motion a profoundly different conceptualization of colonialism. Napoléon's experiment was based upon respect, more or less grudgingly, for local Islamic culture and the incorporation of local notables into a colonial administration. This did not mean that the French were not prepared to intervene aggressively to transform institutions and practices they assumed were the bases of 'the degenerative oriental despotism'.[42]

In 1830, the French slid into colonialism in Algeria. By the time the French claimed possession of Algeria in 1834, three distinctive trajectories within French colonialism were already evident. Almost immediately, the French military faced significant resistance; for while it served to promote the military model of colonialism as well as a reluctant respect for Islam, it was matched by the resilience of Muslim institutions. These conquered footholds also gave rise to a frenzy of land speculation, which in turn stimulated European immigration. Hence, the colonialism of the military barracks confronted the colonialism of settlement, and both confronted the colonialism of some ill-defined protectorate in which Berber and Arab tribal leaders ruled.[43]

The French committed themselves to the free exercise of the 'Mahomatan religion' in the treaty of Algiers of 5 July 1830. Respect for Islam also demanded respect for Muslim law, because Muslim law had its source in the Qur'an and was therefore inseparable from Islamic faith. To force Muslims to bring their legal cases regarding their personal status (marriage, divorce, orphans, inheritance, etc.) before French magistrates or French military officers administering French civil law could be perceived as a step toward dismantling Muslim law and leading to the forced conversion of natives to Christianity. Thus, both expediency and cultural awareness led to the incorporation of Muslim courts into the colonial administration of French possessions in North Africa and elsewhere in Africa.[44]

In order to understand and control Muslim societies, indirect rule in Algeria thus rested upon the development of a class of French cross-cultural brokers based in the Bureaux Arabes. Most were mid-level military officers, veterans of the conquest, who had intellectual interests in languages, histories, and cultures, and who participated in the development of scholarship on Islam in Algeria. They became crucial intermediaries between the military administration and the notables charged with running local communities. The foundation of the French program of indirect rule necessitated an ethnographic imperative of 'scientific description and analysis of indigenous institutions'.[45] What emerged was a school of French orientalism that bore striking similarities to British orientalism.[46]

French respect for Islam within the societies and polities of North Africa came not merely from an appreciation of the cultural genius of Muslim civilizations, but from a fear of the passions that bound the faithful to their rightful leaders. The French believed that the Arab and Berber inhabitants profoundly disliked their despotic and corrupt Ottoman rulers, and that if the French respected the Algerians' religion, their women, and their property, they would easily win control over the population.[47] The incorporation of Muslim courts into the administration of colonial Algeria proceeded unevenly and was subject to broad, often contradictory shifts in France's native policy for Algeria. Even at its most pragmatic, French efforts to incorporate qadi justice into the colonial order resulted in fundamental tensions and profound shifts in the nature of legal jurisdiction and practice.[48]

To assist the French officers of the Bureaux Arabes in their efforts to control the legal work of the qadis, the Maliki legal code was translated into a French multivolume edition in 1854, and later condensed in a new one-vol-

ume translation focusing on the Maliki code dealing with property and inheritance. The new translation, published in 1878, was produced by N. Seignette, an officer in the Bureaux Arabes.[49] The Seignette translation would eventually become a staple in the libraries of French district officers, and served as the basis of the British translation of the Maliki code, which played a similar role in British West Africa.[50] The publication and wide circulation of the Seignette translation served colonial administrators' needs in overseeing the practices of qadi courts or Muslim assessors, but it resulted in a profound transformation of Maliki law. The Maliki school never had a coherent legal code in the French sense, but was instead an 'approach' to the law incorporating common jurisprudential assumptions. The original 1854 French translation was a commentary on the jurisprudential writings of Malik bin Anas, but it became through this process of selection and translation a reified and condensed version of a broader and messier corpus of judicial commentary and debate. Moreover, no Maliki legal texts have categories akin to 'family law', which must therefore be understood as a form of colonial invention.[51] Qadis' courts were not the only courts in Algeria, nor was the shari'a the only source of law. French law prevailed where there were dense populations of Europeans; and among the Berbers of Kabyle, village chiefs administered a form of customary law.[52]

When the French expanded their West African colonies in the 1850s, they drew on both their Algerian experience and French personnel who had served in Algeria. This is exactly what Governor Louis Faidherbe did when he decreed the establishment of a Muslim tribunal, established a cadre of local interpreters who used Arabic as France's official diplomatic language, promoted the accommodation of Muslim leaders in the hinterland of St. Louis, and established a Political Affairs Bureau modeled loosely on the Bureaux Arabes.[53] Faidherbe also drew on French experience with militant Islamic resistance in Algeria to develop an 'Islamic policy' that sought to differentiate between those Muslims willing to collaborate with the French and those more militant leaders, such as al-hajj Umar, who was preaching a religious struggle against the French.[54] Faidherbe also adopted the distinction made by Carrère, the head of the judicial service in Senegal, between citizens and subjects. Citizens were bound by French laws, including the 1848 abolition of slavery, but subjects were not.[55] In acting as he did, Faidherbe drew upon the concept of the protectorate. The model of the protectorate, which guaranteed the legitimacy to the domain of custom, demanded that the institu-

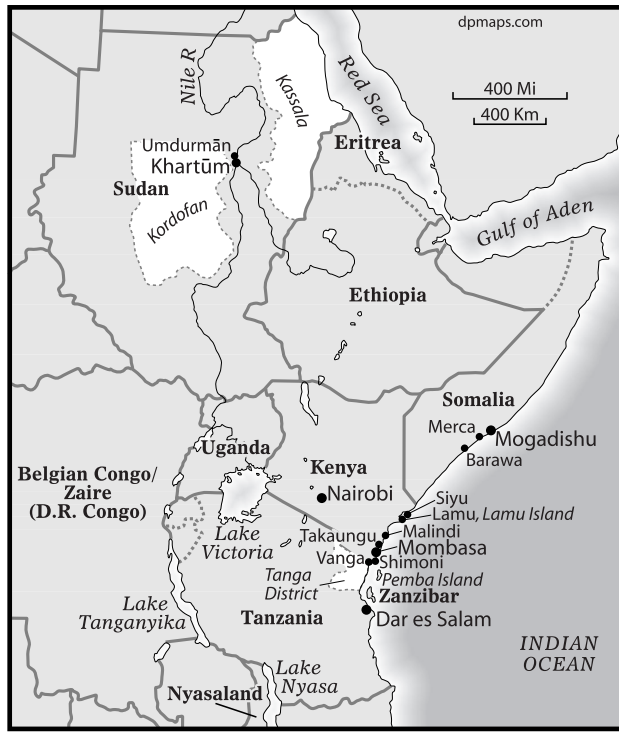
tions of local authority be retained and that natives continue to adjudicate their own disputes. Even as it sought to respect native customs, the colonial state retained its authority to determine whether or not customs were 'contrary to French civilization'.[56]

### *Colonialism, Legal Pluralism, and Muslim Family Law*

Except for the most isolated ones, all societies have some form of legal pluralism in which more than one system of normative beliefs and practices coexist. Colonialism, however, generated what John Griffiths has termed juristic legal pluralism, in which several concurrent legal systems were more or less formally structured.[57] The classic example of colonial legal pluralism was the dual legal system that recognized and separated pre-existing 'native' law from the received law of the metropolis.[58] This model of the law overstates the autonomy of these two legal, political, and cultural regimes. It also reflects an earlier, binary conception of legal pluralism. Lauren Benton's study of colonial legal regimes is concerned with the institutional character of their legal encounters with Europeans moving overseas from the fifteenth through the end of the nineteenth centuries. During the early phase, Europeans negotiated or imposed their legal regimes in contexts where other legal regimes co-existed more or less equally. In these multicentric legal systems, individuals engaged in 'rampant boundary crossing', and collective groups engaged in 'jurisdictional jockeying' for legal advantage. Increased interaction between groups led to shared assumptions about the outcomes of transactions and thus cultural convergence around shared legal concepts and practices. The colonial state was not yet strong enough or sufficiently interested to structure the various legal spheres hierarchically. British practice in India bridged the early and later forms of colonialism and led to the more pronounced form of state-centered legal pluralism in the late nineteenth century, in which the colonial state claimed dominance over other legal regimes. Benton calls for a close analysis and comparison of transformative moments during what she calls the long nineteenth century, in an effort to identify important shifts in the definition of colonial state and its relationships to other law.[59]

Recent research on legal pluralism underscores the need to focus not only on the establishment of formal legal institutions, but also on the liti-

East Africa




gants' practices in using the multiple arenas created by overlapping systems of dispute settlement. This research indicates that multiple forums, including various forms of mediation and arbitration, exist even in advanced industrial societies with seemingly unitary legal systems. Similar types of informal dispute forums existed in colonial settings side by side with the structured hierarchies of native and metropolitan law and courts. These multiple venues provided considerable opportunities for litigants to pursue their grievances in a serial fashion through different forums. The most useful way to thinking of legal pluralism is as a form of encounter between dynamic, local processes of change in indigenous societies that predated colonial conquest and continued after conquest, and dynamic and changing forms of colonialism.[60]

Muslim family law and qadis were incorporated into colonial legal systems. As chapters in this volume demonstrate, such 'colonizing' of Muslim

family law often generated significant disputes over jurisdiction and legal authority that in turn led colonial officials to control further the application of shari'a within the colonial legal system (see especially Jeppie, Cooper, and Mwakimako in this volume). Muslim family law often became one form of customary law that native courts applied to Muslim litigants. Qadis often became employees of colonial states when they served as assessors or judges on native courts.[61] It is important to appreciate that not all disputes were brought before colonial courts. Informal dispute resolution remained a prominent feature of all legal systems, and many qadis continued to adjudicate disputes among Muslims outside of the formal colonial legal system. Only when litigants wanted to avoid these formal systems, or when they wanted state-enforceable judgments, did they bring their disputes to the native court system.[62]

## *Colonial Muslim Policy in Sub-Saharan Africa*

Once the French had decided to enlarge the spatial scale of their territorial possessions in West Africa, which began under Faidherbe at mid-century, they quickly realized that they were a tiny minority in a land dominated by Muslims. Faidherbe's Islamic policy rested on the realization that if France were to expand its territory, it needed to secure the cooperation of some Muslim leaders. The French thus embarked on what David Robinson has called 'paths of accommodation' with selected Muslim communities and leaders. Building on Faidherbe's foundations, governors of Senegal (and later the governors-general of the French West African federation) collaborated with Muslim Sufi orders, which negotiated their participation in the colonial order in exchange for a significant degree of religious, social, and economic autonomy. The challenges to these paths of accommodation were many. Muslims had to reconcile the meaning of French sovereignty and the concept of Dar al-Islam, the jurisdiction of Islam in which Muslims governed themselves according to their own political and normative strictures.[63] French commitment to secularism, and their lack of support for French missionaries, assisted in the processes of accommodation that favored the preservation of a kind of interior or circumscribed Dar al-Islam, a sense of being part of a separate economic and spiritual community while ceding the political sphere to the French.[64] This process of accommodation accelerated as Mus-

lims learned how to negotiate with the French and how to provide them with the kinds of information that they wanted. As Hampaté Ba has argued, Africans easily hoodwinked the colonizers because they learned what information to provide and what to withhold.[65] Muslims also had to negotiate the changes in French ideas about African Muslims, which often simplified complex theological and political differences among Muslims and among different Sufi orders, and changes in judicial practices, which challenged the authority of shari'a.

Based on their experience in Algeria, the French in West Africa quickly sought to differentiate between those Muslims who were willing to accommodate themselves to the colonial order and those whom they decided were militant and thus opposed to French colonialism. Faidherbe easily categorized the militant Muslims as those associated with the Tijaniyya order of al-hajj Umar Tal, who was preaching Islamic revival at the same time as the French were expanding in Senegal. The disparity between those willing to accommodate and those pursuing militant forms of Islam persisted well into the mature phase of colonial rule in French West Africa. The orientalist scholarship on West African Islam emerged through ethnographic research fed by the simplistic binary of Faidherbe's day by discovering a distinctive form of African Islam, which they termed 'Islam noir'. In the view that emerged around World War I, 'Islam noir' was profoundly different from Islam practiced elsewhere, because it remained a religion deeply embedded in African societies, and was not susceptible to calls from foreign Islamic authorities. This view crystallized following the failure of West African Muslims generally to follow the Ottomans into World War I on the side of the Axis. While the French continued to harbor conspiracy theories surrounding coordinated Muslim revolts and to sustain their surveillance of Muslim teachers and leaders, the French colonial authorities eagerly incorporated willing Muslims into their colonial orders.[66]

The French began to think that 'Islam noir' was more like other African religions than the universalist religion they believed Islam to be in North Africa and the Middle East. This notion of the separate nature of African Islam was further articulated through two administrative acts. The first was the major native policy statement by Governor-General William Ponty in 1908, which promoted the 'authentic' rulers of individual African groups and suppressed the heirs of 'foreign' conquerors, most of whom were identified as Muslim overlords. Muslim leaders had a place in Ponty's native pol-

icy, but only if they were part of an 'indigenous' group.[67] The distinctive nature of 'Islam noir' fit neatly together with Ponty's effort to accommodate African rulers within the French system of cantonal or provincial chiefs. The second act preceded Ponty's 1908 native policy, but was clearly a piece with it: this was the 1903 decree establishing a colonial legal system. The 1903 decree was based on the concept of a protectorate, and distinguished clearly between the regime of law for French citizens and nationals and that for subjects. Citizens, including the Muslim *originaires* (original inhabitants and their families of the four communes of colonial Senegal) fell under the rule of metropolitan law; subjects were governed by customs as long as they were not repugnant to French 'civilization'.[68] In effect, the 1903 decree reduced Muslim law to one form of African custom among many.

The 1903 legislation essentially created two legal tracks within one colonial legal system. The courts for Frenchmen or those with French or European citizenship applied metropolitan law and procedure; those for African subjects were to apply African custom. The 1903 legislation did not provide much guidance on the content of 'custom'. Indeed, the legislation made some fundamentally erroneous assumptions about the bounded nature of custom, because it assumed that each ethnic group had its own deeply embedded customs. It also conflated Muslim family law with custom, making Islam merely one of the many customs operating in the colonies. The 1903 colonial legal reform called for the codification of customs, but despite periodic efforts, codes of customs never materialized in any uniform manner. In contrast, the readily available Seignette translation of Maliki law shaped the application of shari'a within the native courts.

The new legal system was designed to be fundamentally different from its pre-colonial predecessor because it was to be public and transparent. Crucial to the transparency of this new legal regime was a process for appeals against the judgment of the court and a written record of the litigation. The process of appeals was a major transformation in the practice of shari'a. Qadis ruled in disputes based on their understanding of the law as it was divinely revealed, and on *ijma* or legal consensus. Their decisions could not be subject to appeal, since the appeal would challenge the infallibility of the law as divinely revealed. Thus, the incorporation of shari'a within a pluralist legal environment, and the possibility to appeal a ruling based on shari'a, formed a profound challenge to Muslim jurists and the status of the shari'a within Islamic thought. This is an area where more re-

search is needed, although chapters in this volume by Cooper, Hirsch, and Moosa in particular address this issue. The provision for appeals, of course, rested on the need to assess the evidence and judgment in the original case. Thus, a written record of all legal judgments was a precondition for the appeal. The grounds for appeal differed among colonial powers, but for those applying the continental code model, appeals were only possible if there was some perceived failure of due process or the application of the code. The problem with this practice was that with the exception of the Maliki code, there were no 'accepted' codes of custom. As Cooper argues in her chapter in this volume, serious debates surrounded each effort to render customs into a written code or *coutumier.*

The 1903 legislation established three levels of native courts. At the base of the system was the village tribunal, staffed by the village chief, whose task it was to seek reconciliation among the parties. The next level, the provincial tribunal, heard disputes among litigants that could not be easily reconciled. This tribunal was to apply 'custom', and the assessors were selected from those reputed to be most knowledgeable in community custom. In Muslim regions – or if the litigants were Muslim – at least one of the assessors was to be a qadi or Muslim judge. Judgments rendered were to be recorded either in Arabic or in French. If the litigants were not pleased with the judgment, they were instructed to proceed to the *tribunal de cercle*, if they wished to pursue their appeal. The French district officer presided over the district tribunal, assisted by two native assessors. The district tribunal heard felony criminal cases and appeals from the provincial court.

As Roberts describes in this volume, colonial administrators were under enormous pressure not to spend all their time discovering custom and adjudicating disputes among Africans. The pressures to move the caseload along expeditiously had the unintended consequence of favoring Muslim family law over custom in the operation of the courts. When assessors and native judges did not agree on what custom prevailed, the execution of justice would be delayed and thus subverted. Above all, administrators wanted to avoid the 'interminable palabres' over custom that took place in the native courts. In contrast, Muslim law was already codified, and even if there was recognition of the ways in which practice shaped application, Muslim law provided administrators and judges with ready-made templates to apply to individual cases. Given the efficacy of applying and controlling Muslim law, it should not be surprising that Muslim judges played a significant role

in the operation of the native courts even in areas where Muslims had only a minor presence. As Roberts describes, the senior administration was not pleased with the ways in which Muslim family law was creeping ever more deeply into the practice of the native courts.

Despite the pledge to respect African customs, the practice of the native courts favored Muslim law. Indeed, Rebecca Shereikis studied the Muslim protest in French West Africa against the 1903 legal system that suppressed the privilege Faidherbe had extended to Muslims of the French colony to take their disputes over family issues to the Muslim tribunal. Shereikis demonstrates that Muslims invoked the French discourse about the more advanced civilization of Islam in order to avoid having to bring their family disputes before provincial tribunals which may have included animist judges.[69]

Even if Muslims were originally reluctant to bring their disputes before the native courts, French administrators found allies in Muslim qadis in their efforts to provide expedient resolutions to disputes and consistent judgments. When thinking about Muslim law in pre-colonial and colonial Africa, we need to bear in mind that shari'a was both a 'fixed' body of laws and practices and a flexible practice adapted to the larger social and cultural environment.

There is also another and important side to the story of Islam and legal pluralism in colonial Africa, which has to do with the impact of shari'a on African customs. Anderson drew attention to this process when he described how Islamic law has spread and is continuing to spread through many parts of the continent: 'As a result, the indigenous customary law has been leavened, in certain areas, by Islamic principles and precepts –to a degree which differs widely, of course, from place to place. In certain areas, moreover, it has been virtually displaced by the law of Islam... but nowhere in tropical Africa has the imposition been complete, for traces of customary law survive even in the most rigidly Muslim areas'.[70] The survival of custom in Muslim law is only one side of the complex encounter that is the history of Islamic law in Africa; the other side is what Anderson refers to as the 'leavening' of custom by Islamic law. The influence of shari'a on African custom is an important area of research.

### *Recruitment of Qadis*

The incorporation of shari'a (even in its truncated form relating only to family law) into colonial legal systems nonetheless required a method of recruiting respected Muslim judges for those roles. In the Anglo-Egyptian Sudan, the British brought in a senior scholar from Al-Azhar University in Cairo to act as the mufti for Sudan. They established new qadi training schools in Omdurman, Khartoum to train a new cohort of qadis sympathetic to the colonial government. However, the geographical extent of the Sudan meant that there was never sufficient numbers of these colonial qadis to work in the system of Islamic law. Furthermore, by 1920, on the advice of Lord Milner, there was a drastic reduction of the number of qadis, the training school was closed, and the British began to foster Muslim customary shaykhs in place of the qadis, as Jeppie shows in his chapter. Despite the promise of a similar selection for East Africa, the appointment of the Shaykh al-Islam fell to a local Muslim notable. As Mwakimako describes in this volume, British policy of selecting the chief kadhi of Kenya pitted different local communities against one another for this honor.

In French West Africa, the earliest such effort followed the creation of a Muslim tribunal in St. Louis in 1856. As described by Lydon in her chapter, the *tamsir* or qadi of that tribunal was appointed by the governor from among the cadre of respected Muslims who had chosen the path of accommodation.[71] Among the earliest efforts in fostering a group of Muslims to work within the colonial state was the founding of the School of Hostages (*Ecole des otages*). This school was designed to train the sons of chiefs who had retained their positions under French protection to be interpreters, clerks, and Francophile chiefs. In the 1890s, this school was renamed the School for the Sons of Chiefs and Interpreters and expanded, but its mission remained the same. Arabic remained the colony of Senegal's primary diplomatic language for relations with neighboring African chiefs, and interpreters were needed to translate Arabic into French until 1911, when use of Arabic was suppressed in favor of French (see the chapter by Lydon in this volume on how this decision affected the Muslim Tribunal in Senegal). A half-dozen promising students were sent to the Franco-Arabic madrasa in Tunis with the expectation that they would return to Senegal and become 'precious auxiliaries of ... a Muslim civilization that expresses itself in French'.[72] By the turn of the century, the French began to develop official *médersas* in West

Africa, based on a similar system established in North Africa. These were to be Franco-Arabic universities, designed to capture the Muslim elite that would otherwise gravitate to traditional venues of Islamic higher learning. These Franco-Arabic médersas would not only offer Islamic subjects, but also elementary French and French history.[73] It is not clear whether or not graduates of these médersas were recruited as qadis for the native courts.

What we do know about the recruitment of qadis as assessors and judges in the native courts of French West Africa was that they were appointed by the governor-general upon nomination by the lieutenant-governors of the West African colonies. Selection was most likely on the basis of proven loyalty, rather than on competence and training. Few French district officers who sent names to their lieutenant-governors were qualified to assess a candidate's competence in Islamic law. The appointment of the qadi to act as the assessor to the native court in Kayes actually undermined his moral authority because he was not a judge, but merely an advisor to a French magistrate. When the French finally agreed to establish a special Muslim tribunal in that city, they tried to recruit qadis who had solid reputations for their Islamic learning and their religious connections.[74] There are frequent references in the archives to qadis being dismissed because of their venal nature or their incompetence. It is not clear from the current state of research whether or not qadis appointed to the native courts were subject to professionalization as judges.

## *Patterns of Reform in Colonial Shari<sup>c</sup>a*

Islamic law was adapted within the limits of consensus of legal scholars (*ijma*), the method of analogies (*qiyas*) to apply legal concepts to new situations, and the recognition of greatly varying customs (*'ada*) among Muslim societies. The adaptability of Islamic law has also generated significant debates among Muslims, as we shall discuss below, with some calling for a return to a purified shari'a. In this section, we are particularly interested in examining the broad patterns of reform within Islamic law, and how these patterns were shaped by colonialism in sub-Saharan Africa. The most important wave of legal reform shaping the colonial encounter with African Muslims was the patterns set in motion during the Ottoman Empire's mid-nineteenth century administrative reforms, referred to as the *Tanzimat*

(Turkish: reorganization). Under pressure from an expanding West, the Ottoman sultans between 1839 and 1876 initiated a series of wide-ranging administrative reforms from taxation to the law. For our purposes, the most important reforms were the promulgation of a series of legal codes (a Penal Code in 1858; a Commercial Code in 1861; a Code of Maritime Law in 1863) and the creation of a series of secular courts to apply this new legislation, especially where disputes arose between Muslims and non-Muslims. These codes were modeled on the French legal codes and reflected the authority of legislation to enact substantive laws. These new codes did not, however, directly repeal provisions of the shari'a; they were merely new bodies of law, designed for new situations, and assisted judges of the new courts to reach judgments expeditiously, without having to return to the classical legal texts.

Between 1869 and 1876, Ottoman jurists and legists plumbed the Hanafi law of obligations to create a Code of Civil Law, commonly referred to as the *Mecelle/Majalla.* The *Majalla* was designed to provide judges with an easily accessible book of references to legal commentaries on a wide range of obligations relating to sales, hires, debt, pledges, joint-ownership, and evidence, among other subjects. The *Majalla* was widely applied throughout the Ottoman Empire, although judges were still permitted to refer to older legal texts directly. Neither did the *Majalla* directly address issues of family law and personal status. The Ottoman legal reforms served to create two distinct domains of legal practice: family law, which remained at this point drawn from shari'a; and all other law, which was subject to legislative reform.[75] The Ottoman reforms took different trajectories in different parts of the Muslim world. Reform of family law itself, which drew on the antecedent of the *Tanzimat* and the *Majalla,* also derived from the notion that the ruler had the authority to legislate the jurisdiction and substance of the law. In 1917, the Ottoman Law of Family Rights was promulgated, which codified prevailing Hanafi doctrine, but also incorporated selected rules from the dominant Sunni legal schools. This code altered the shari'a in certain respects, including the right of the Muslim wife to sue for divorce if her husband deserted her and failed to support her. Subsequent changes to shari'a also involved restrictions on child marriage and the consent of the woman to a proposed marriage.[76] As these internal debates among Muslim authorities took shape and became more public, they also found echoes in regions outside the Ottoman Empire. In other regions, including Muslim Africa, Muslim commu-

nities were experiencing similar issues in their encounters with colonialism and modernity.

Muslim family law in colonial Africa was subject, as was all 'customary law', to the repugnancy clause of the protectorate. This repugnancy clause essentially meant that all pre-existing law would be legally recognized as long as it did not contravene metropolitan standards of 'civilization'. What constituted the standards of civilization in the metropolitan sense changed over time, meaning there were ongoing reforms in Muslim family law, as certain previously acceptable practices became 'repugnant'. In French West Africa, the debate about female consent in marriage was one such area that intruded into Muslim family law and forced reform.[77] In British Africa, issues of women's consent in marriage and prohibitions on child marriage were areas where shari'a practices collided with British metropolitan sensibilities and led to prohibitions and reform.[78]

Besides changing pressure from metropolitan sensibilities, Muslim family law was subject to reform from the very establishment of colonial legal systems and from the process of codification, which was linked to the need to create efficiencies within the court system. As noted above, colonialism in Africa imposed plural legal systems that were linked through the process of appeals. Appeals challenged the judgment of the qadi and the sanctity of the shari'a. An appeal from a Muslim or qadi court thus underscored the relative subordination of shari'a to a wider system of legislated law. This was not dissimilar to the reforms within the Muslim world in the late nineteenth and twentieth centuries. An appeal also necessitated a written record of the case, which led to reforms within the legal process of qadi courts. Qadis were obliged to keep records of their judicial transactions in a form that could be accessible to the appeals court. Keeping records also led to the pressure to create easily accessible 'codes' of Muslim family law, such as those Maliki codes produced by Seignette for the French colonial courts and Ruxton for the British West African courts. Codification simplified the complex tasks of establishing legal authority for judgments and thus transformed the legal training of the qadi, so that those trained in Western schools could also ascend to the roles of judges in Muslim courts.[79]

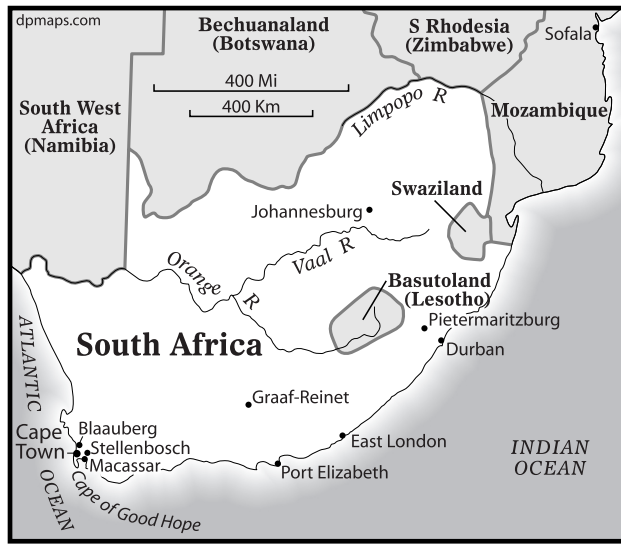
Muslim family law in sub-Saharan Africa was undergoing significant changes in the course of the colonial encounter as it adapted to the pressures of the protectorate and the inter-connected colonial legal system. These patterns of change thus intersected with the challenges facing the ar-

chitects of the post-colonial legal systems in the newly emerging nation-state.

## *Decolonization, Nationalism, and Muslim Family Law*

The period after 1945 witnessed the acceleration of nationalist movements in Africa. By the mid-1950s, African nationalists focused on the goal of taking first the 'political kingdom'.[80] Only after having gained political power would there be time to 'decolonize' the newly independent country. European colonial powers were under considerable international pressure to facilitate the transition to independence; and metropolitan governments wanted the transitions to reflect the benefits of colonial rule. This, of course, would rarely play out as they wished, but there was a convergence of interests between African nationalists and European officials over the shape of the entity to be transferred: namely a sovereign, unitary state. From the standpoint of the legal system, the colonial legacy bequeathed a plural legal system which enshrined diverse customary laws within the native courts system. A more serious problem was linked directly to the native courts; the system of indirect rule rested to some extent on the powers and revenue derived from administering local courts, and few elites were willing to forego these benefits and privileges. As Christelow describes in his chapter in this volume, a particularly significant case emerged in 1948 in Nigeria, one that fundamentally challenged the plural legal system. The West African Court of Appeals ruled on the homicide case of Tsofo Gubba v. Gwandu Native Administration that there was a fundamental 'conflict of laws' between the Nigerian Criminal Code and native law and custom. In this particular case, Tsofo Gubba was sentenced to death under Northern Nigeria's shari'a, which imposed a very different set of standards for evidence and did not admit the existence of extenuating circumstance. In contrast, under the Nigerian Criminal Code, Tsofo Gubba would likely have been convicted of manslaughter and not subject to a capital sentence. The court ruled that there must be a fundamental right of equality before the law, and thus it was not possible to have two separate legal systems such that individuals convicted for the same crimes would have very different sentences. This decision precipitated a political crisis that persisted well into the late 1950s. The appeals court challenge was not only to equality before the law, but to

SOUTH AFRICA




the very place of shari'a within the nation-state. Northern Nigerian nationalists mobilized in protection of the 'Northern way' of life, which was grounded in Islam and Islamic law. A compromise was reached, in which a Muslim Court of Appeal was introduced in 1956, which also permitted further appeal to the Nigerian High Court, thus linking the legal systems through appeal, but the issue of shari'a and nationalism persisted.[81]

The Tsofo Gubba case underscored the inherent problem of the 'conflict of laws' and the problem of equality before the law in the transition from colonial legal systems to independent ones. In most cases, however, the provision of appeals up to the highest court in the colony eliminated this problem, but the inherent problem of multiple and overlapping regimes of the law persisted. At decolonization, most of the colonial legal system was simply transferred, and issues of jurisdiction and the rule of law were dealt with by national legislatures during the early post-colonial period. The first dozen years or so of independence witnessed the legislature's assertion of its authority to create codes and courts. For the purposes of this volume, during this period, colonial codes of family law were often re-authorized by the legislatures, or new codes were promulgated. Many of these family law codes were compromises, between different factions of civil society, which

were rarely satisfactory to any one group. Ironically, in Nigeria the ghost of Tsofo Gubba has yet to be laid to rest as a number of internationally publicized cases involving Muslim women revive the question of the conflict of laws. The prosecution of two Muslim women, Safiyatu Husseini of Sokoto in 2001 and Amina Lawal of Katsina in 2002, for sexual offences under the shari'a were overturned by the appeal and high courts, saving both from severe penalties, including possible death penalties.

In the Gambia, for example, despite efforts by The Law Reform Commission and the Women's Bureau of Gambia to propose reforms in minimum age of marriage and establishing broader grounds for divorce, the prevailing legislation remains the colonial era Mohammedan Law Recognition Act of 1905 and the Mohammedan Marriage and Divorce Ordinance of 1941. In Kenya, which has amended its constitution several times since independence, colonial era legislation regarding Muslim family law (Mohammedan Marriage and Divorce Registration Act of 1906 and Mohammedan Marriage, Divorce, and Succession Act of 1920) is also retained. Constitutional amendments in 1967 formally recognized a series of eight qadi courts under the national legal system (Kadhis' Court Act [1967]). Ghana has been somewhat more proactive in its reform of colonial era legislation, although here too the Marriage of Mohammedans Ordinance of 1907 and the Marriage Ordinance of 1951 still prevail, except where post-colonial legislation has reformed such acts. The Maintenance of Children Decree of 1977 supersedes colonial era legislation, by establishing Family Tribunals to hear complaints about child support issues. The Ghana Law Reform Commission, at work since 1968, has yet to propose substantial unification of family laws, although it has identified this issue as an important goal of the Commission.

Upon independence in 1960, Senegal moved aggressively to create a unified judicial system and work on a code of uniform personal status started in 1961. The Commission proposed legislation that resulted in the Family Code of 1972, which among other reforms abolished *talaq* and required reconciliation before a judge before proceeding to a judicial divorce. The Family Code of 1972 was a compromise that satisfied few of the constituent groups (Islamists and women's groups, for example) and has been subject to periodic modification. A major reform of the Family Code has been blocked by Muslim parties. In neighboring Mali, the major reform of the Family Code was accepted by the government in 2002, but has not yet been approved by the National Assembly. Among the issues blocking the final ap-

proval of the code have been protests by the several Malian Islamist parties, demanding rights to issue marriage certificates for marriages conducted by Muslim clergy and other issues relating to bridewealth, the role of the guardian, etc.[82] In her chapter in this volume, Hirsch explores the complex ways in which the law – in this case, Muslim family law – determines gender and shapes social relations through a comparative study of recent struggles for gender equality in Kenya and Tanzania.

As Moosa describes in his chapter in this volume, after the South African Law Reform Commission provided a draft bill for consideration to Parliament in 2003 on the recognition of Muslim marriages and related matters, the Muslim religious authorities disagreed among themselves about the desirability of letting parliament and the courts decide on matters of a religious provenance. After decades of petitions for the recognition of Muslim personal law, the matter is now deadlocked.[83] In the meanwhile, South African courts are offering relief on issues related to Muslim personal law in the absence of legislation.

### *Shari'a, Legal Pluralism, Post-Colonial Identity, and International Law*

Post-colonial efforts to reform Muslim family law as part of broader reforms generated sharp debates among Muslims about their place in African nation-states. Such was the case in Nigeria in 1977, when the Northern states proposed returning to the shari'a, and in Kenya surrounding the new Law of Succession in 1981. The oil shocks of 1972-74, the subsequent flow of Arab oil money into Africa, and the 1978 Iranian Revolution provided part of the context for the resurgence of Islamism in sub-Saharan Africa. Islamism is a broad set of often contradictory movements aiming to bring Islam into every aspect of human life, including the religious, legal, political, economic, and cultural spheres. For Muslims who oppose this agenda, the struggle is over who has the authority to speak on behalf of Islam and Muslims generally, and who has the authority to define which of the diverse Muslim identities should be the correct one. Family law and the place of women in society often become the galvanizing issues in these struggles.[84]

The resurgence of Islamism coincided also with new global efforts to promote gender equality. In 1979, the United Nations General Assembly built

on the foundation of the Preamble to the Charter of the United Nations, which reaffirmed 'faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women', and the 1948 International Bill of Human Rights, which strengthened and extended the emphasis on the equal rights of women, to enact the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The Convention sets out, in legally binding form, internationally accepted principles on the rights of women, which are applicable to all women in all fields. The basic legal norm of the Convention is the prohibition of all forms of discrimination against women. Most African countries signed CEDAW, which includes Article 15, 'Equality in Legal and Social Matters'. Article 15 confirms women's equality with men before the law, and additionally requires signatories to guarantee women equality with men in areas of civil law where women have traditionally been discriminated against, including property ownership and the ability to enter into contracts in their own right. CEDAW calls for regular reports on the progress of ending discrimination against women to be filed with the Commission.[85] CEDAW and other international instruments of human rights thus enshrine a profoundly different conception of gender and family than those promoting Islamism. Reform of family law thus confronts competing local and international pressures.

In 1983, the President of the Republic of Sudan unilaterally imposed a comprehensive code of shari'a law over the entire country. Theoretically, all the country's laws would be affected by this rather sudden declaration of shari'a. There were certain features of these new laws that attracted international attention, and indeed, condemnation, such as the extent of its coverage of the non-Muslim citizens of Sudan (particularly the populations of the South) and the application of an Islamic criminal code, which included stonings and amputations for specific crimes. The creation of a 'shari'a state' called attention to the issue of Islamic law in Africa's largest country through the rest of the 1980s and into the 1990s. Islamic law became equated simply with harsh punishments in many observers' minds. The renewal of the country's civil war in 1983 and continuing into the new millennium added to the way in which shari'a was viewed.[86] Immediately after the promulgation of the shari'a laws, there was some focused attention on these laws, with some attention to Islamic law in the country's history; but the authoritarian regime and the civil war would soon attract far more at-

tention by researchers – political analysts more than historians or anthropologists. The meanings of Islamic law were not investigated, only its uses by the Islamist regime as it attempted to institute its order and reasserted its will over the population.

On the western side of the continent, in Africa's most populous country, Nigeria, from 1999 onward the governors of twelve northern states declared the application of 'full shari'a' in their states. This came at the end of the dictatorship of Sani Abacha, who died in 1998, and continued into the new democratic order that was subsequently inaugurated in the country. The call for 'full shari'a' – led by certain northern politicians associated with the former dictator Abacha – went along with some popular support for it, and the unleashing of gangs of young men who became the informal police in the application of the new laws. As in the case of Sudan, it was the harsh criminal punishments that attracted most attention, notably the cases of female victims of these laws, Amina Lawal and Safiyatu Husseini, which mobilized human rights groups in Nigeria, as well as elsewhere in the world.

These are examples in the late twentieth century in which Islamic law (re)appeared suddenly to return in full force. Supporters of this type of application of Islamic law spoke of it as the will of God and the return to the only body of laws that can be truly just. Furthermore, they added that Islamic law was an inherent part of the pre-colonial polities in their regions, before colonial conquest in the late nineteenth and early twentieth century. They pointed to the corruption and failure of the existing secular legal establishment which only the shari'a could change. From the side of opponents, detractors, and outside scholars, there were a range of views: from the outright condemnation of draconian anti-modern laws, to skeptical readings that understood the turn of events as politically calculated by unpopular demagogues trying to hold onto power through a (re)turn to religion, and religious laws which discriminated against non-Muslims and women.

Undoubtedly, these events attracted a fair amount of media commentary and scholarly attention, but such interest was usually more concerned with the immediate causes and nature of the laws. Much less attention was paid to the fact that there have been longstanding and ongoing debates inside those countries about religion and law, but these have not been very well covered, or even well known, by outsiders.

The complex histories of Islamic law – of legal thinking and procedures, legal institutions and education, of bodies of laws regarding certain spheres of human action – have remained rather thinly studied for both states. Likewise, ethnographies of Islamic law as practiced inside and outside courts for these states remain virtually non-existent. But these absences speak of a larger problem.

The crises created by the introduction of so-called 'full shari'a' or the building of a 'shari'a state' brought very necessary attention to the question of Islamic law in these two African states. Both Sudan and Nigeria have had experiences of a 'jihad state' in the shape of the Mahdist state (1881 to 1898) and the Sokoto Caliphate (1808 to 1903), in which Islamic law was central to the conduct of state and the character of the judiciary (see Jeppie and Christelow in this volume). These states were strong in certain regions and generated support and an equal amount of animosity, among both non-Muslims and large sections of Muslims. They became strong referents in later struggles over the post-colonial state and the question of shari'a within the new, independent nation-state. There has been some study of Islamic law in these 'jihad states', but there are far more sources available for study than the current research suggests.

They share another crucial experience which shapes their histories. Both countries fell to some form of British rule throughout the first half of the twentieth century, and there was much common thinking by the British on how to handle Islamic law and the religious elite in the two states. These colonial spaces became the African laboratories for Lugard's 'indirect rule' policies. Through this mode of colonial rule, a substantial space was left for the existing legal structures to remain largely in place, at least into the inter-War years. Islamic law also came to be seen as an expression of 'native law and custom' in the northern regions of both countries. British policies towards the two major African Muslim communities were in turn influenced by British experimentation with Muslim peoples and the invention of Anglo-Muhammadan law in south Asia.[87]

Nevertheless, there are other locations on the continent where struggles over Islamic law have a longer but less explosive history and trajectory. Even with the exclusion of North Africa, virtually every state in Africa with a substantial Muslim population has had to address the question of Islamic law at some stage in its colonial and post-colonial history, and most significantly in the field of the laws of personal status. Possibly for the vast majority of

British Muslim subjects and the Muslim citizens of independent African states, 'Islamic law' meant rules regulating marriage, divorce, inheritance, custody and so forth. In Francophone West Africa, this was certainly the case. When these questions were not addressed at the level of the state, then they emerged as struggles within communities. Islamic law has very often been either distinguished or entangled with what became known as 'customary law', and both the colonial state and the post-colonial state at times intervened, creating these fields in the course of their interventions. A series of issues, such as citizenship, the nation-state, and the meaning of community were raised through struggles over Islamic law.

If anything salutary has emerged from these debates about Islamic law, then it has given birth to a growth in literacy about Islamic law and the possibilities of legal reform. In particular, one sector, hitherto ignored in Islamic law debates – namely, women – has emerged as a powerful constituency. A network of Muslim women's organizations has sprung up across the continent, to contest patriarchal interpretations of Muslim family law. These organizations have made interventions and offered solutions (see especially Hirsch in this volume). The non-governmental organization Women Living Under Muslim Laws (WLUML) has made a tremendous impact by supporting national women's groups with resources, education and training, and enabling their voices to be heard.

The debate over Muslim family law is intimately connected to contestations about the meaning of shari'a in a changing world. A key issue that religious thinkers across the Muslim world continue to address, with varying outcomes, is whether rules and norms that worked perfectly during a particular time in history could be replaced by rules that are more appropriate to changed conditions.[88] While many gains have been made for women's equality in certain areas of social and public life in Africa, there has been a lag when it comes to matters of Islamic law. The politicization of family law has made legal reform particularly challenging, since vested interests often obstruct what appears to be reasonable calls for change. While women have the right to vote, earn on par with men in urban areas, lead political parties and governments, paradoxically, in one domain, that of family law, patriarchal norms remained rife.

## *This Collection and Directions for Future Research*

Part I of the collection is entitled *Colonizing Muslim Family Law in Africa*. As the title suggests, each chapter in Part I of the volume deals with the effects of colonialism on Islamic law. Each chapter demonstrates that the relationship between shari'a and the colonial state was complex and ever-changing. These chapters point to the early colonial efforts to solicit and incorporate shari'a and qadis into the plural legal systems that characterized colonialism. Several chapters invoke the idea of the 'protectorate', which recognized the legal space of indigenous and shari'a law, although several authors point to the tendency of the colonial state to restrict the operation of shari'a law within its domain. Both the British and French colonial states sought at different times to limit the special status allocated to shari'a, by defining its practice as one among several customary legal regimes. However, the colonial state was not always capable of 'broadcasting' its power, and thus what we read in the court records and in the archives is likely only a small part of the wider world of litigation and dispute resolution that fell outside of the colonial state's capacity to control and intervene.[89]

The first article, by Shouket Allie, is an historical exposition of the development of Muslim Personal Law at the Cape colony and the colonizer's response to the law. Shamil Jeppie, in his study of native shaykhs and qadis in Sudan, illustrates the way in which the colonial power manipulated the relationship between these two groups and enforced their concept of the difference between shari'a and custom to create, in effect, two distinct legal camps. The status of legal religious leader is also the focus of Hassan Mwakimako's research. He provides a chronological study of the careers of the Shaykh-al-Islam and the Chief Kadhi in Kenya. He argues that ethnic rivalry and colonial acquiescence were instrumental factors in determining who would assume the post of Kadhi.

Moving from Anglophone Africa to Francophone West Africa, Ghislaine Lydon examines civil litigation in the Muslim tribunal of Ndar. Importantly, she notes that the enforced linguistic shift from Arabic to French in the courts affected women's ability to obtain divorces, as colonial authorities became more involved in the court processes. Barbara Cooper analyses the complex ways in which law and legal discourse were structured in the overlapping jurisdictions in colonial Maradi, Niger, and argues that various fora available for mediating conflict permitted more nuanced engagement with

informal legal spaces. Her findings suggest that, contrary to the established clear-cut notions of chiefs as either fronts for colonial subjugation or emasculated men, what played out was considerably more complex. Finally, Richard Roberts, in his study of French Soudan, demonstrates the way in which local inhabitants used the new legal system established by the French in 1903 to their advantage. Far from regularizing and simplifying the legal system, the new system brought to the fore cultural and religious differences which were manipulated to achieve desired ends.

One of the most important issues raised in the chapters in Part I relates to the impact of 'collaboration' on the status and practice of shari'a under colonial rule. For shari'a and qadis to have legal status and recognized authority within the colonial legal system, there had to be a certain 'accommodation' characterized by a Muslim subject and a Christian ruler. This accommodation resulted in institutional and doctrinal adaptations yielding new practices, such as appeals, and new institutions characterized by contested intercultural spaces but also many anomalies in terms of inherited shari'a doctrines that were not easily resolved except by *de facto* political fiat. Colonial shari'a courts were thus legal hybrids, which Jeppie calls 'in-between' institutions. As legal hybrids operating in an environment of changing rules regarding the place of Muslim family law, these shari'a courts were always in jeopardy of violating jurisdictional boundaries. Such violations might invalidate judgments and send the cases up to a higher court. Moreover, as Robert Makaramba argues, colonial officials often misunderstood Muslim law and the history of lively debate surrounding Muslim ideas of justice and morality. More research is needed on exploring the nature of these 'in-between' institutions and the debates among Muslims about these institutions.

One of the areas of productive future research will be to examine the nature of the cases heard in colonial shari'a courts. Several chapters in this volume have laid the foundation for this research (especially Lydon, Cooper, Jeppie, and Hashim). Such research should be attentive to the nature of the disputes and the language in which they were expressed. In an early study, Susan Hirsch argued that kadhi courts in Mombasa 'empowered' women to complain publicly about a move that changed their gendered vulnerability in marriage.[90] In the most extensive study of court cases in this volume, Lydon examines in particular the changing nature of divorce cases heard at the Muslim Tribunal. Cooper points to the importance of inheritance cases

brought by women. More attention to the nature of disputes heard in the colonial shari'a courts will provide more evidence on how Muslims responded to the challenges of colonialism.

Part II of the collection, *Muslim Family Law, the Post-Colonial State, and Constitutionalism in Africa,* focuses on the role of Islamic law in post-colonial Africa. Abdulkadir Hashim discusses the difficulties which arose as a result of the hybrid legal system existing in Kenya. A case may be brought before a kadhi court, as well as a high court, and this sharing of jurisdiction has created problems. Such problems, as Hashim argues, have their roots in the colonial legacy of legal and religious pluralism. Similarly, Robert Makaramba discusses the role of Muslim family law in Tanzania's plural legal system. However, his focus is on the interplay between the constitution and Muslim family law, and he examines issues of gender equality as mandated by the constitution and the practices of the shari'a. Makaramba is especially interested in using high court decisions to examine the influence of the constitution on Muslim legal practices, including burial, marriage, divorce, succession, and inheritance. Ebrahim Moosa examines similar kinds of tensions in the debates surrounding the creation of the post-apartheid South African constitution, which is widely recognized as promoting gender equality, yet also recognizes the legal bases of shari'a and customary laws. Susan Hirsch's chapter then compares state intervention in Kenya with what has occurred in Tanzania, and argues that the form which intervention takes affects and shapes gender relations, as well as influences the power dynamics which exist between the state and the Muslim community. Hirsch argues that Muslims in Kenya and Tanzania are engaged in lively debates surrounding gender, but that legal institutions exert 'subtle, enduring forms of gendering' and yet provide insight into how Muslim men and women negotiate gender and forms of hierarchy. Allan Christelow's chapter examines the history of the current Islamic revival in Northern Nigeria most clearly seen in the establishment of Islamic courts. His chapter highlights the importance of avoiding reductionist views on this phenomenon since there is considerably more to the Islamic revival than the dominant discourse surrounding contentious and highly publicized cases such as the adultery cases. Indeed, the thrust of Christelow's argument traces the long and tortured history of the rule of law in colonial and post-colonial Nigeria through the lens of the status of shari'a within the realm of criminal law. The origins of the current debate in Nigeria may be found in the status of

the colonial protectorate that granted internal autonomy to the northern Nigerian Islamic aristocracy, but with significant restrictions over criminal jurisdiction. Finally, Ebrahim Moosa's chapter shows how petitions to several governments under apartheid and after apartheid resulted in the constitutional recognition of family laws based on religion and custom, provided they passed constitutional muster. The issue of constitutional requirements for gender equality and fairness forced the production of a reformist Muslim family law proposal, which caused a sharp and paralyzing divide among the Muslim religious leadership on the matter. The South African case also underscores the tough dilemmas advocates of legal pluralism will of necessity have to encounter in democratic societies.

As the chapters in Part II most clearly demonstrate, the colonial legacy continues to play a significant role in the debates surrounding the status of shari'a in post-colonial Africa. Equally important to these debates must be, as Hirsch describes, a recognition of the multiplicity of Muslim interests in the debates about shari'a. Such debates are most pronounced in areas where international human rights conventions bump up against entrenched interests, wishing to restrict the application of these conventions by invoking shari'a and custom.[91] Similarly, constitutional innovations mandating gender equality or legislative efforts to reform colonial-era family codes confront diverse opinions and political groups promoting alternative visions of social organization and modernity. Such questions are bound to emerge with greater intensity as the global economy undergoes profound shifts and changes, promoting or eroding new forms of wealth and status.

As the chapters in this volume make clear, the issues surrounding Muslim family law in Africa are enriched by engaging historians, legal constitutional scholars, anthropologists, and religious studies experts in conversation. We are confident that the approaches taken in this volume will continue to influence the study of Muslim family law in Africa for decades to come.

*Notes*

1 Margery Perham (1948), 'Editor's Preface' to C.K. Meek, *Colonial Law: A Bibliography with Special Reference to Native African Systems of Law and Tenure* (London: Oxford University Press), v.

2 N. Levtzion and R. Pouwells (2000), 'Introduction'; Peter von Sivers, 'Egypt in North Africa'; N. Levtzion, 'Islam in the Bilad al-Sudan to 1800'; R. L. Pouwells, 'The East African Coast, c. 780 to 1900 C.E.'; and E. Alpers, 'East Central Africa', all in Levtzion and Pouwells, (eds.), *The History of Islam in Africa* (Athens: Ohio University Press).

3 See M. Last, *The Sokoto Caliphate* (Harlow: Longmans, 1967) and David Robinson (1988), 'French Islamic Policy and Practice in Late Nineteenth Century Senegal', *Journal of African History* 29 (4).

4 Alpers, 'East Central Africa'.

5 Robert C.H. Shell (2000), 'Islam in Southern Africa, 1652-1998', in Levtzion and Pouwells.

6 See the suggestions for such an approach in Lord Hailey (1954), 'Foreword', in J.N.D. Anderson, *Islamic Law in Africa* (London: The Colonial Office, Her Majesty's Stationary Office), v-viii.

7 Wael B. Hallaq (2005), *The Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press), 79-101.

8 Fazlur Rahman (1979), *Islam* (Chicago: University of Chicago Press), 100.

9 The Shafi'i jurist al-Amidi (d. 1233) refers to the fact that the companions of the Prophet were in possession of the *Shari'a*-value (*hukm*) on the basis of which they could limit or restrict the ambit of a Qur'anic text (*nass*).

10 See W.C. Smith (1981), 'Shari'ah and Shar': The Concept of the Shari'ah among the Mutakallimun', in *On Understanding Islam,* ed. W.C. Smith (The Hague: Mouton), 87-109.

11 See N. J. Coulson (1964), *A History of Islamic Law* (Edinburgh: Edinburgh University Press); Nehemia Levtzion and Randall L. Pouwells (eds) (2000), *The History of Islam in Africa.* (Athens: Ohio University Press).

12 Aziz al-Azmeh (1988), 'Islamic Legal Theory and the Appropriation of Reality', in *Islamic Law: Social and Historical Contexts*, ed. Aziz al-Azmeh (London: Routledge), 250-52.

13 J.N.D. Anderson (1971), 'The Role of Personal Statutes in Social Development in Islamic Countries', *Comparative Studies in Society and History,* 13: 18.

14 Nineteenth- and twentieth-century Muslim reformers like Shaykh Muhammad Abduh of Egypt (d. 1905), Muhammad Iqbal of India (d.1938) and others were acutely aware of the modern context in which Islam found itself. Iqbal, for instance wrote:
'... [T]he Holy Book of Islam cannot be inimical to the idea of evolution. Only we should not forget that life is not change, pure and simple. It has within it elements of conservation also. While enjoying his creative activity, and always focusing his energies on the discovery of new vistas of life, man has a feeling of

uneasiness in the presence of his own enfoldment... but since things have changed and the world of Islam is to-day confronted and affected by new forces set free by the extraordinary development of human thought in all its directions... The claim of the present generation of Muslim liberals to re-interpret the foundational legal principles, in the light of their own experience and the altered conditions of modern life is, in my opinion perfectly justified. The teaching of the Quran that life is a process of progressive creation necessitates that each generation, guided but unhampered by the work of its predecessors, should be permitted to solve its own problems'. Muhammad Iqbal, *The Reconstruction of Religious Thought in Islam* (Lahore, reprinted 1960), 166-168. Iqbal was acutely aware of the need for intellectual forward movement in Islam, namely *ijtihad*, while also considering the principle of conservation.

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# PART I

# COLONIZING MUSLIM FAMILY LAW IN AFRICA

# 1 A Legal and Historical Excursus of Muslim Personal Law in the Colonial Cape, South Africa, Eighteenth to Twentieth Century

**Shouket Allie**

For obvious reasons, research on Muslim personal law in the context of the colonial history of the Cape is extremely scant and unexplored. Until fairly recently, legal historians have avoided the challenge of this fairly complex and sensitive area of the law. It is therefore not surprising that information concerning this aspect of Muslims is meager, despite the group's historical presence in the Cape. This is despite the fact that Muslims in the Cape are a people of diverse geographical, cultural and ethnic backgrounds who managed to keep their religion alive and thriving. Their law and custom, their art and architecture, their names and nomenclature became an integral and irreplaceable part of their life, which they managed to preserve throughout the colonial and post-colonial tenure of the Cape.[1]

As the title suggests, this chapter explores and assesses the attitude and position of colonial authorities towards Muslims of the Cape, particularly within the field of personal status law.[2] It examines the various legislative edicts to determine the extent to which Muslim personal law was accommodated and tolerated by the colonial legislatures.[3] This chapter begins with a brief historical account of Islam at the Cape of Good Hope, and surveys its process of consolidation and establishment through the Dutch, Batavian and British colonial interludes. This chapter also examines the ef-

forts of some of the notable personalities who were instrumental in this process.

## *Islam in the Cape of Good Hope*

Although the exact date of arrival of the first Muslims at the Cape is disputed, a number of scholars maintain that Islam first reached the shores of South Africa in 1654, shortly after the Dutch established a settlement at the Cape. Besides serving as a settlement and refreshment station for ships travelling back and forth from the Low Countries, it served as a penal colony for convicts and political exiles from the East who had resisted Dutch occupation of their countries.[4] The year 1658 marked the arrival of the first group of Muslims known as the Mardijkers[5] (foreign-born settlers not of European origin), who arrived here at the request of Jan Van Riebeeck. These were free people from the East, who were serving in the army of the Dutch East India Company in Ceylon. They were transferred from there to the Cape, to provide the Dutch with a buffer against the local indigenous people, and the Company with a cheap and efficient labor force.[6]

In 1681 when the Cape was made the official place of confinement for Eastern political prisoners of rank and high standing, several of them arrived, including princes of Ternate and some Makassarians who resisted Dutch occupation of their territories.[7] One of the best-known political exiles and important figures in the annals of Islam in South Africa was Shaykh Yusuf (Abidin Tjoessoep), who is referred to as the founder of the Muslim faith in South Africa.[8] The shaykh was born in Makassar in 1622 and went to Java, where he served as a religious scholar to the sultan. There he played an active role in spreading Islam and resisting Dutch occupation. Along with his followers, the shaykh engaged the Dutch in a prolonged guerrilla war, but was eventually captured by the Dutch authorities. He was imprisoned in Batavia and thereafter in Ceylon. Fearing that he would foment a rebellion from prison, the Dutch shipped him off on board the *Voetboog* to South Africa. Sheikh Yusuf arrived at the Cape on 2 April 1694, along with his entourage, which consisted of 49 members, some of whom were religious clerics. Well aware of his revolutionary background, the authorities at the Cape confined him and his party to a farm at Zandvleit.[9] There the shaykh restricted his efforts primarily to his retinue. After the death of the shaykh in

1699, most of his followers were shipped back to Java. The embryonic Muslim community at the Cape was thus destroyed after barely ten years of existence.[10]

Another noteworthy political exile was the Rajah of Tambora, who was sentenced as a convict to the Cape Colony in 1697 for waging an insurrection against the Dutch. The Rajah was isolated in Stellenbosch, on the holding of the then-governor Simon Van der Stel, where he died in 1719. Oral tradition maintains that while resident there, he transcribed the Qur'an from memory, and presented it to Van der Stel. Just as in the case of Sheikh Yusuf, the Dutch policy on dealing with rebellious Muslim leaders was to isolate them and prevent them from assuming any leadership in the fledgling Muslim community in the Cape. As Robert Shell argues, 'The policy of isolating the influential political exiles, though primarily designed as a measure of safety for the colonists, effectively prevented them from establishing Islam or influencing its spread at the Cape of Good Hope. The credit, therefore, for the establishment of Islam here at the Southern tip of Africa belongs to the slaves'.[11]

Quite apart from the political prisoners interned at the Cape, whose role in establishing and consolidating Islam was rather minimal, Indonesian and Indian convicts and slaves were primarily responsible for setting into motion the process of Islamization at the Cape.[12] Beginning around 1701, a number of Indian convicts arrived at the Cape. Many were sentenced to labor without remuneration (*zonder loon*).[13] Despite the company's unenthusiastic attitude towards slaves and convicts in the colony, more of them were brought to the Cape in 1743 as the demand for labor increased, to build a breakwater in the bay and to help solve the labor problems for the growing numbers of farmers. Many of these convicts from India and Indonesia were generally freed when their sentence expired, and they chose to remain at the Cape, forming the nucleus of the *vryezwarten*, or free black community.[14] From amongst these convicts, Abdullah Abdus Salaam, known as Tuan Guru (d. 1807), features prominently in oral traditions and scholarly works for the crucial role he played in establishing Islam and perpetuating its teachings.[15] Upon his release in 1793, he devoted his attention to the affairs of the local community, where he became the qadi and imam. As Shell notes, 'Within a year of his release Tuan Guru [Abdullah Abdus Salaam] had brought about a veritable revolution in the nature of social relations within the Muslim community in Cape Town. Apart from having played a crucial

role in the establishment of a mosque in Dorp Street, he had opened a school for the education of the children of Cape Town's underclasses, established the Jumu'a prayers at a quarry on the edge of the town, and made significant inroads towards creating the rudimentary political apparatus of an Islamic society'.[16]

## *The Attitude of the Dutch towards Muslims and Their Legal Status in the Colony*

Historians argue that during the Dutch colonial tenure at the Cape, the prevailing attitude of the Dutch was rather hostile to Islam, and that Muslims were initially severely handicapped by legislative measures imposed upon them from Batavia. This attitude of the company can be clearly discerned by the nature of the provisions contained in the Statutes of India which governed the colony. It is also quite observable from the various individual decrees (*plakaaten*), and the frequency with which they were issued in the colony, that religious practices were quite restricted.[17] The Statutes of India, which prescribed the legal system to be enacted in a Dutch overseas territory (*buitencomptoiren*), had this to say about the position of religion in general:[18]

> That within the town of Batavia no other religion should be exercised, instructed or propagated in private or public, than the Reformed Protestant church – as doctrined in the public churches of the United Provinces – and that should any congregation ... be held or kept, either Christian, heathen or Moor (Islam) all the property of such (keeper) should be forfeited and be put in irons, or banished out of (the) country or be punished corporally or with death, according to the circumstances of the case.[19]

Whilst the above may be described as the normative legal position to which Muslims were supposed to have been subjected, there is also considerable evidence that suggests that although Islam was handicapped under Dutch rule, it was not actually forbidden. Except in the Dutch Reformed Church, public worship for all religions was circumscribed; however, those professing other religions were allowed to worship in private without fear of criminal prosecution, even though according to the *plakaaten*, transgression was punishable by death. There are well-documented reports of Muslim slaves

who frequented the homes of their *vryezwarten* co-religionists, where they regularly prayed and held religious gatherings without state supervision. It was also well-known that Sheikh Yusuf's farm at Zandvliet soon became a rallying point for other Muslims where they regularly assembled for religious purposes.[20]

After their Indonesian and Indian experience, the Dutch authorities had become considerably more tolerant of Islam and Muslims at the Cape. In fact, historical data relating to the affairs and activities of the free blacks under Dutch rule in the early 1700s show that, apart from the limited degree of religious freedom accorded to the free blacks, they also enjoyed other substantial liberties: they could inherit, bear witness, earn money, own property, they could complain and receive redress, and they had recourse to the law. There is also some evidence to suggest that free blacks were permitted for a time to carry arms in the colony and to form their own free black militia.[21] Towards the latter part of the century, a number of the non-European settlers also became civil servants in the colony which suggests, as Shell observes, 'that the Cape had some attractions for free persons of color'.[22] The situation for free blacks deteriorated during the second half of the eighteenth century, when there was a systematic attempt by the legislature to limit the rights of the free blacks in the colony. For instance, certain restrictions were placed on their mode of dress, and in 1771 their legal status was declared to be on par with slaves for the punishment of certain crimes. By 1790, free blacks as well as slaves were required to carry passes whenever they wished to leave town.

On the other hand, the legal status of slaves at the Cape was very similar to the position of slaves in Roman law. This is evident from the provisions contained in various Cape *plakaaten,* and also from Van Diemen's Code of 1642 (also known as the Statutes of India). According to this code, the activities of slaves were subject to numerous policing regulations. For instance, slaves were forbidden from being on sidewalks at the same time as a European, even of the lowest rank. Slaves were forbidden to carry weapons unless accompanied by the master, and it was an offence to sell a weapon of any kind to a slave. Armed or unarmed offences against the master were punishable by death.[23] Slaves were not allowed out at night without a lamp and a pass from their master. The code further enumerates punishments for a host of other acts and offences, such as gambling, fighting, making a noise, and appearing in a public divine service. The report by Fiscal Denny-

sen to Governor Cradock further clarified the legal status of slaves in the colony:

> Slaves have not any of those rights and privileges which distinguish the state of the free in civil society; they cannot marry, they do not possess the right of disposing of their children, even if they be minors, they cannot possess any money or goods in property, they cannot enter into any engagements with other persons, so that they can compel them to the fulfillment of such engagements, they cannot make a will, and they are therefore considered in civil law as not existing.[24]

I would argue that the discrimination Muslims faced under the Dutch in the Cape has been overstated. Slaves and free blacks suffered discrimination because of their status as slaves and free blacks, not primarily because they were Muslims. Individual *plakaaten* must be viewed in terms of actual practice and effect within the larger political context of the Cape, which was characterized by effective group exclusivity. Furthermore, the ethos of the Company at the Cape, including its legal structure, was primarily geared towards reinforcing its mercantile authority. The Dutch were principally motivated by economic factors, and issues of governance were secondary. Moreover, during this period Muslims were too few to significantly impact the political and socio-economic dynamics of the colonial Cape polity. As a religious constituency, Muslims were not perceived as a threat and were given considerable freedom to practice their religion. There is a glaring absence of data regarding the prosecution of Muslims in the colony.

### *The Status of Muslim Family Law during the Dutch Period*

Within the context of the general non-interference with the private pursuit of religion in the Cape, what was the status of Muslim family law under the Dutch and Batavian colonial tenure? According to the law of the colony, slaves could not contract a valid civil marriage. Although this was the legal position initially, the authorities encouraged unbaptized slaves to form permanent conjugal unions.[25] In the case of Muslim slaves, they turned to their religious clerics who conducted such ceremonies on a regular basis and who also acted as arbitrators in the event of marital disputes. While these slaves may not have been married according to the law of the land, they could con-

tract a valid marriage according to the tenets of the Muslim faith. It seems that the authorities were also well aware of this and raised no objection to the practice, which persisted well into modern times.

There is considerable debate regarding the legal status of Muslim marriages among the free black community. Some writers have argued that the Dutch never accorded Muslim family law legal standing and thus never recognized Muslim marriages. On the contrary, several legislative documents contradict these claims, and suggest that the Dutch provided the free blacks in the colony with the means to apply Muslim family law; and that the authorities expressed what amounted to a tacit approval of Muslim personal status laws in the Colony.[26] At this juncture it would prove opportune to have recourse to the Statutes of India which served as the *grondwet* (legal groundwork) of the colony to determine which special enactments it contains concerning the issue and what the requisites were for a valid marriage.

The code of Governor-General Van Der Parra (1766) provides the first systematic treatment of Muslim family law in the colony. This code superseded the previous code of Anthonio van Diemen (1642) initially in force at the Cape.[27] Although scant mention is made of Muslim family law in this code, there are no statutory provisions forbidding free Muslims from contracting valid civil marriages by appearing before the colony's matrimonial court. The only discriminatory provision, which has been exaggerated by a few commentators, states 'that Mohammedans shall marry Mohammedans only'. This provision tacitly recognized the validity of Muslim marriages as such.[28] Whilst the treatment of matrimonial law (*huwelijks saken*) was generally uniform in both codes insofar as formalities and requisites of a valid marriage are concerned, Van Der Parra's revised code was much more extensive in its treatment of the issue of Muslim family law. Commenting on the legal effects of this code, General Roos noted, 'This code immediately superseded the old one at Batavia, and also in the *buiten comptoiren*, in terms of the following clause: "We order that the Council of Justice at Batavia, as well as the various councils of Justice at all the subordinate *comptoiren* of Dutch India, shall strictly observe these amplified and amended statutes ...".'[29]

Van Der Parra's code consists of 102 articles dealing with what it calls 'laws and regulations concerning Mohammedans and other inhabitants of the settlement'. The code further explicitly observes that in '... suits regarding succession, inheritance by will and ab intestato, marriage and divorce, Mohammedan law as compiled from Mohammedan law books approved by

the council of India shall be invariably observed as the general law from which judges may form their decision'.[30] The 102 articles were further subdivided into two sections. The first was a modest exposition of the law as it relates to succession, inheritance, and bequests (*successie, erffnissen en besterfnissen*).[31] The second section of the code, which extends from section 34 to 102, dealt largely with matrimony and divorce and commenced with a description of the procedure and essential requirements of a valid marriage to be contracted in the colony.[32]

According to the code, the requirements of a valid marriage were fairly straightforward: that the parties had the legal capacity to enter into such marriage; that they were not prohibited or related to one another by consanguinity or other prohibited degrees; and that they had the consent of the parents and the presence of two witnesses. Thereafter, it enumerates the formalities to be observed by the priest, namely to enquire (*verklaring*) of the parties whether they were free to marry, their age, and then to conduct the ceremony in the language of the parties. The marriage was recorded by the priest, and the commissioner of the matrimonial court was then informed that such a marriage had taken place according to the manner prescribed.[33] These articles in Van Der Parra's code are quite detailed, and on numerous occasions they have retained the original Arabic usage of certain terms. The code further stipulates where marriages may be contracted, and by whom such marriages may be conducted. The code then set out the procedure to be followed in the event of divorce, as well as the conditions for maintenance of the divorced wife.[34] It is also interesting to note that in Article 100, there appears to be tacit approval of polygamy, with certain conditions attached thereto; this follows from the statement,

> A Mohammedan man is allowed to marry up to four wives. This permission however, is subject to certain conditions which amongst others include the ability of the husband to provide for all spouses on an equitable basis. Equitable basis is measured by the ability to maintain all wives by providing them with the comfort that they are accustomed to.[35]

This then was the actual legislative status of Muslim family law in the Cape colony during the Dutch colonial tenure.[36] This status continued with minor administrative changes during the British colonial period, until the latter part of the nineteenth century, when courts became hostile to the notion of

a Muslim marriage. This transition coincides with the celebrated *Hyde v. Hyde* case which is discussed later on in this chapter.[37]

## *Islam and Muslim Family Law during the Batavian Colonial Interlude*

The Cape of Good Hope was occupied by the British in 1795 during the Napoleonic Wars. As a result of the Treaty of Amiens, British troops withdrew and the Cape was handed over to Batavian administration in 1803. The Batavian interlude, under the administration of Commissioner De Mist and General Jansen, was brief and extended up to 1806. According to the policy report of De Mist, which contains the main outline for drawing up a constitution for Cape government, sweeping legislative reforms were envisaged and introduced at the Cape.[38] In his memorandum, De Mist envisioned a complete transformation. He overhauled existing central and local government structures, transformed the Council of Policy into an instrument of government, democratized the Burgher Senate and renamed it the Raad der Gemeente (City Council). De Mist also abolished the much hated fiscal authority, which was replaced by the attorney-general, and reconstituted the court of justice around a core of salaried, legally trained judges enjoying a considerable degree of independence and prestige.[39] The Batavians initiated a series of legislative reforms which considerably shaped the future of the colony and that of Muslims at the Cape. Apart from the sweeping legislative reforms which affected the judicial, the fiscal, and educational systems, a number of crucial concessions were also made to the Muslim community. In terms of legislation, the Batavians softened much of the alleged discriminatory provisions of the Statutes of India. During this period, Muslims were granted permission to erect a place of public worship, and on 25 October 1805, the first land grant was made available to Frans van Bengalen for a Muslim cemetery. These reforms suggest that Muslims enjoyed a cordial relationship with the authorities and that they were favorably disposed towards the state during this period.[40]

According to Davids, these concessions were made as part of the expression of goodwill that came with the granting of religious freedom, to secure Muslim loyalty in the event of a British invasion.[41] This period also witnessed a marked degree of Islamization, owing to the official relaxation of

religious freedom by De Mist. On 25 July 1804, De Mist issued his church ordinance (*kerkenordre*), which officially guaranteed religious freedom in the colony. According to the historian Theal,

> He [De Mist] published an ordinance declaring that equal protection of the law should be enjoyed by all religious societies which for the promotion of virtue and good morals worshipped an Almighty Being; and that no civil privileges to be attached to any creed. At the same time, in order to prevent immoral or dangerous teaching, the erection of places of worship and assemblages for public services were forbidden without the knowledge and consent of the governor.[42]

Thus, the brief Batavian interlude was characterized by a marked degree of tolerance and legislative reform. Several scholars question the significance of the Batavian reform in the colony. They argue that the Batavians only codified and slightly modified existing laws and practices.[43] As far as the legal status of Muslims was concerned, the Batavian reforms considerably ameliorated their status and extended new rights, such as the benefit of free trade and the rights to acquire and own property in the colony. These concessions played an important role in the process of Islamization, consolidation, and politicization of the Muslims at the Cape. The site of these processes was the mosque, which plays a central role in the life of a Muslim community as the center of communal activity, regulating and patterning Muslim social and religious life.[44]

Marriage, of course, was central to Muslim social and religious life. During the Batavian period, changes were enacted which had a major impact on how marriages were contracted by free blacks. As I have argued, up to this point legislative provision had allowed Muslim free blacks in the colony to contract a marriage according to the tenets of Islamic law.[45] However, the law of the land also stipulated certain other requirements to which Muslims had to adhere. Amongst these requirements, the law required that intending parties appear before a Commissioner at Cape Town to obtain a certificate stating that no legal impediments existed to prevent the parties from contracting a valid marriage. Furthermore, the law required that the marriage be publicly announced, which took the form of the calling of banns and most often took place in a public religious service. Finally, the law required that the marriage be registered. These legal requirements were prescribed by the Statutes of India for a binding marriage in the colony. De Mist

introduced a slight modification with his ordinance dated 31 October 1804, which dispensed with the obligation to make the cumbersome journey to Cape Town to appear before the governor to obtain his consent for marriage.[46] Residents of outlying areas such as Graaff Reinet and Stellenbosch could now appear before a magistrate (*landrost*) and two assessors (*heemraden*) of the district in which the bride had been resident for the previous three months.[47] It is not clear from the records if this ordinance applied to Muslims, but there is also no reason to assume that it did not. The Van Der Parra code was not abrogated during the Batavian period and therefore the liberal attitude of that code probably persisted. Moreover, the Batavians never expressed any reluctance or legislative aversion towards the recognition of Muslim marriages. Oral tradition from the Cape Muslim community supports the claim that imams continued to conduct marriages of both slaves and free blacks according to the tenets of Islamic law.[48]

## *Judicial Response to the Legal Status of Muslim Marriages in the Nineteenth and Twentieth Centuries*

In 1806 the Cape once again capitulated to the British. According to the eighth article of the Articles of Capitulation, all laws in force in the colony, including the rights and privileges enjoyed by the inhabitants, continued to exist. By this time, Islam had become well-established in the Cape. After the emancipation of slaves in 1834, the Muslim community expanded, and Islam became an increasingly observable phenomenon in the Cape. Muslims established themselves as a viable community with a complex social and judicial structure, operating in its own exclusive jurisdiction. During this period, the Muslim community established a hierarchically structured judicial organization that extended its jurisdiction to matters of Muslim personal law and arbitration.[49] The British government recognized the judicial institutions then existing and left the people to be governed by the system of law to which they had grown accustomed. Despite the retention of Roman Dutch law and institutions as they existed under the Batavian government, in the early decades of the nineteenth century, there was a manifest movement by the courts towards the adoption of English law, English legal theory, jurisprudence, and increasing reliance on English precedents.[50]

In the course of the nineteenth and twentieth centuries, the legal status of Muslim marriages was challenged by the courts. Muslim marriages conducted by recognized officials continued to have validity, but the main challenges addressed the status of polygyny and repudiation in Muslim family law. Innes C, J recognized this situation when he observed in *Mashia Ebrahim v. Mahomed Essop* in 1905 (TS 59, 61) that

> it is quite possible for Malays to be validly married in the Cape Colony by a law which duly specifies the formalities to be observed in such a case. Turning to the Cape statutes, we find that under Act 16 of 1860 special power is given to the governor to appoint marriage officers for solemnizing the marriages of persons professing the Jewish faith and of those also who profess the Mohammedan religion. The probability, almost the certainty, is that the power has been acted upon in the Cape Colony; at all events there was nothing preventing the governor from exercising it.[51]

A perusal of the statutory law of the Republic from 1910 reveals that there was no explicit statutory provision preventing Muslims from contracting marriages according to Islamic rites, or stating that Muslim marriages were invalid. It was the courts rather than the legislature that challenged the validity of Muslim marriages. Towards the end of the nineteenth century, the courts began to consider a union between Muslims as unsanctioned, according to the tenets of the Roman Dutch legal system and prevalent English ideas. The prevalent English idea was of marriage as a monogamous union. This was the opinion propounded by Lord Penzance in the landmark case of *Hyde v. Hyde and Woodmansee* in 1886, where he concluded marriage to be 'the voluntary union for life of one man and a woman to the exclusion of all others; persons joined in a union not complying with that requirement could not be considered husband and wife...and so such persons were not entitled to the remedies, the adjudication, or the relief provided by such law'.[52]

Very similar views were also later advanced by South African courts, whose attitudes were rather uncompromising towards Muslim marriages. Thus in *Mashia Ebrahim v. Mahomed Essop* [1905], the court expressed the following view:

> With us marriage is the Union of one man with one woman to the exclusion, while it lasts, of all others; and no union would be regarded as a marriage in this country, even though it were called, and might be recognized as, a marriage elsewhere, if it were allowable for the parties to legally marry a second time during its existence.[53]

Throughout the twentieth century, South African courts seem to have adopted an uncompromising position and objected strongly to the recognition of Muslim marriages, primarily on grounds of their admission of polygyny and repudiation. Like indigenous African law that allows a husband to enter into a subsequent marriage during the subsistence of the first, Muslim marriages were not accorded recognition because their system of personal law allows polygyny. In another leading case concerning the issue, *Seedat's Exec v. The Master (Natal)* 1917 AD 302-309, Justice Innes said:

> But there are exceptions to the widely accepted rule by which foreign courts recognize the validity of a marriage contracted in accordance with local law.[54] And one of them is based upon the principle that no country is under an obligation on grounds of international comity to recognize a legal relation which is repugnant to the moral principles of its people. Polygamy vitally affects the nature of the most important relationship into which human beings enter. It is reprobated by the majority of civilized peoples, on grounds of morality and religion, and the courts of a country which forbid it are not justified in recognizing a polygamous union as a valid marriage.

By a polygamous union I mean one the nature of which is consistent with the husband marrying another wife during its continuance. Whether he exercises his privilege or not is beside the question. The fact that the man and woman contract on the basis that he shall be at liberty to do so differentiates their relationship from that which we give the name marriage, and stamps their union as polygamous.[55]

An essential ingredient of the common law marriage, espoused above and by quite a number of other commentators, is the exclusiveness inherent in the Christian notion of marriage. This position is reiterated by the court in *Bronn v. Frits Bronn's Executors*,

> Now marriage is a condition divine in its institution, originating with our first parents; therefore older than the Jewish dispensation, and it is only by the development of Christianity that the sacred and mysterious union has been clearly revealed to mankind, and has enjoined a strict observance of its requirements, and one of the first of these requirements is amongst all Christian nations, that polygamy is unlawful, and that marriage is only good when contracted with a man who is not already married to another woman ... Christianity is understood to prohibit polygamy and incest, and therefore no Christian would recognize polygamy or incestuous marriages.[56]

The question of recognition of polygynous marriages was also dealt with at considerable length in the appeal division of the South African court in 1983. In *Ismail v. Ismail* (1983), polygyny was held to be a bar against the recognition of Muslim marriages. A Muslim marriage contracted in or outside of the Republic was invalid, and the status of married persons was not conferred upon the parties of such marriages. According to South African law, though, the rule was that the validity of a marriage was governed by the law of the land where such a marriage was contracted (*lex loci celebrationes*). Because it does not preclude further and subsequent marriages by the husband, Muslim family law has been further held to be *contra bonos mores* although these may concern de facto monogamous marriages.[57] Further grounds for non-recognition were also enunciated by Trengrove, wherein he roundly denounced the inequitable status and position of the wife in such unions.

> Furthermore, in view of the growing trend in favor of the recognition of complete equality between marriage partners, the recognition of polygamous unions solemnized under the tenets of the Muslim faith may even be regarded as a retrograde step; ex facie the pleadings, a Muslim wife does not participate in the marriage ceremony; and while her husband has the right to terminate the marriage unilaterally by simply issuing three 'talaaqi', without having to show good cause, the wife can obtain an annulment of the marriage only if she can satisfy the Moulana that her husband has been guilty of misconduct. While this may be consistent with the tenets of the Muslim faith, it is entirely foreign to our notion of a conjugal relationship.[58]

The consequences of non-recognition of Muslim marriages were also quite serious, with far-reaching implications for Muslims. Thus, whilst they may regard themselves as married according to the prescriptions of their own religious law, the law of the land regards them as unmarried and party to a union classified as cohabitation. In terms of South African law, this union had several consequences. First of all, the children born of such a union were deemed to be illegitimate, and as a result the father ('natural father') cannot claim custody of the child as a right.[59] There was also no reciprocal duty of support, and a 'common law' wife had no claim to maintenance. Likewise, in the event of wrongful death of the husband by a third party, the common law widow was not entitled to claim damages for loss of support from such a party. Furthermore, the South African law of succession also operated to the detriment of those whose marriages are solemnized according to Islamic law only. Because of non-compliance with the formalities of the 1961 Marriage Act (25), the wife and children born of such marriages are excluded from protection if the husband failed to draft an Islamic will during his lifetime.[60] To overcome these problems of legal non-recognition of Muslim marriages, a number of academics writing on the issue have proposed various models for the implementation of Muslim family law in South Africa within our constitutional framework. It was in the 1980s that SALC was instructed to investigate the possibility of recognition of some limited aspects of Muslim Personal Law (MPL).[61]

The political transformation in the country, commencing with the adoption of an interim constitution on 27 April 1994 (Act 200 of 1993) and a final constitution (Act 108 of 1996), which came into force on 4 February 4 1997, has served as a major catalyst for renewed attempts at the legal recognition and implementation of a MPL regime. A central challenge to the new South African constitution has to do with the issues of Muslim family law and constitutional guarantees of equality. This is particularly salient for the issues of Muslim divorce and inheritance. The South African Bill of Rights guarantees equality and non-discrimination on the basis of gender, yet Muslim family law enshrines certain powers to husbands and differential shares of inheritance to wives and daughters. Despite the conflicts between Islamic and South African law, there is also sufficient ground that allows the Muslim family law regime to operate within the dominant system and without weakening the shari'a.

So pervasive are the values of the constitution that it significantly altered fundamental concepts of family law and the family.[62] Quite apart from a host of guarantees and rights extending from first to third generation, and enforceable to the fullest degree, the Bill of Rights has also undertaken a firm commitment to freedom of religion, belief, and universal rights instruments.[63] The ultimate implications of the new South African constitution on the status of Muslim family law remain to be determined in the courts and in legal policy.

*Notes*

1 See A.K. Tayob (1995), *Islamic Resurgence in South Africa: The Muslim Youth Movement* (Cape Town: University of Cape Town Press), 39-77. Also see Izak David Du Plessis (1972), *The Cape Malays: History, Religion, Tradition, Folktales* (Cape Town: A.A. Balkema).

2 The period under review extends from the seventeenth to the nineteenth century. During this period, the Cape was under Dutch, Batavian and British colonial administration. This chapter will focus primarily upon an examination of the attitude of the colonial authorities towards the legal status of Muslims and Muslim family law. The review also extends to the period of the Union of South Africa, which was formed in 1910 out of the Cape, Natal, Transvaal and Free State colonies. The following information is quite apt at the commencement of this research. Although Muslims constitute only 2% of South Africa's population today, they have come to play an important role in the socio-economic and political affairs of the country. For example, more than 10% of all members of Parliament and cabinet members are Muslims. Among the many influential positions held by Muslims are, to name but a few: a premier of the Western Cape, ministers of education and senior members of the legislature in the Western Cape, Nelson Mandela's formal legal advisor, his autobiographer, the head of the Truth and Reconciliation Commission Amnesty Committee, the late Minister of Justice, Abdullah Omar, and the late Chief Justice. See also Ebrahim Mahomed Mahidah (1993), *History of Muslims in South Africa: A Chronology* (Durban: Arabic Study Circle).

3 In this regard there is a considerable amount of legislation concerning religion and Muslim family law that existed during the period under review. Some of the acts and orders referred to include Cape Marriage Order in council; Act 16 of 1860; Statutes of India promulgated in 1842; Muslim family law code of Van Deer Parra of 1766.

4 The first Easterners arrived along with Jan van Riebeeck on 6 April 1652. Although they were registered as slaves, there is no record of their religion, and it is not certain whether they were Muslim. See also Samuel Zwemer (1925), 'A Survey of Islam in South Africa', *International Review of Missions* 14: 563.

5 The term '*Mardijker*' is a Dutch corruption of the Portuguese versions of '*Maharddhika'* (Sanskrit for 'great man' or 'high and mighty') which in the Malay archipelago acquired the meaning of a freed person, a person freed from slavery. The *Mardijkers* constituted a separate community in Batavia. They were the Portuguese-speaking descendants of freed slaves, mostly of Indian origin, who had arrived in Batavia in large numbers, especially after the Dutch conquest of Malacca. See also Robert Shell (nd), *The Point of the Sword: Mardijkers, Jihaads and the Toleration of Islam in the Cape 1633-1846,* 2-20. Also see A.M. Van Rensburg, 'Slave Glossary', *Let Them Speak: Slave Stamouers of South Africa*, Accessed online 30 January 2009. www.geocities.com/sa_stamouers/Slaveglossary.htm. Also Zinto, 'An Overview

of the Cape at the First Four Decades of Settlement', *Slavery and Creolization: Heritage in the Cape.* Accessed online 20 January 2009. http://slaveryheritage.amagama.com/category/the-free-blacks/page/2/

6 Richard Elphick and Hermann Giliomee (eds.) (1979), *The Shaping of South African Society 1652-1820* (Cape Town, Maskew Miller Longman), 75-115.

7 George McCall Theal (1963), *History of South Africa before 1795* (London: Swan Sonnenschein & Co.), vol. 3, 261.

8 Du Plessis, *The Cape Malays,* 4.

9 See Achmat Davids (1980), *The Mosques of the Bo Kaap* (South African Institute of Arabic and Islamic Research) 35. See also Suleman Dangor (1982), 'Sheikh Yusuf', *al 'Ilm Journal of the Centre for Research in Islamic Studies* 2, 95.

10 See Robert Shell (1974), 'The Establishment and Spread of Islam at the Cape from the Beginning of Company Rule to 1883' (Honours thesis, University of Cape Town), 30.

11 Ibid. See also Davids, *Mosques of the Bo Kaap*, 40-41. See also Tayob, *Islamic Resurgence in South Africa*, 39-77.

12 Davids, *The Mosques of the Bo Kaap*, 40-41.

13 See J.S. Mayson (1963), *The Malays of Cape Town* (Capetown: Afrikana Connoisseurs Press), 11.

14 'Free Blacks' meant all free persons wholly or partially of African (but not Khoikhoi or Asian descent. This was roughly what the term meant in the Company period, though its boundaries were shifting and imprecise. Apparently the VOC never applied the term 'free black' to either the Khoikhoi or the other major category of free people of colour. It was, however applied to Chinese. See footnote in Elphick and Giliomee, *The Shaping of South African Society 1652-1820*, 116.

15 The word Tuan in Malay is used as a title of respect; it may also refer to a teacher or Imam. Tuan Guru from Tidore in the Ternate islands was incarcerated on Robben Island in 1780. It was alleged that he conspired against the English. See also Bunyamin Marasabessy (2004), 'Tuan Guru: The Cape Muslim Philosophy Education System', *Makara, Social Humaniora 8, no. 3*, 126-132. Accessed online, 31 January 2009. http://journal.ui.ac.id/?hal=download&q=258.

16 See footnote 10. Also see Mahidah, *History of Muslims in South Africa,* 6. See also M.A. Bradlow (1988), 'Imperialism, State Formation and the Establishment of Muslim Community at the Cape of Good Hope, 1770-1840' (Master's Thesis, University of Cape Town), 145.

17 See J.A. van der Chijs (1885-1900), *Nederlandsch-Indisch Plakaatboek*, *1602-1811*, 17 vols. (Batavia and The Hague.

18 The Statutes of India, also known as the Code of Batavia, was promulgated in 1642 by the Batavian governor Van Diemen to meet the legislative needs of the Batavian empire and was formally adopted in the Cape in the year 1715. See

also J.R. De Villiers (1897), *The Plakaat Books of The Cape* (Cape Town: Cape Law Journal).

19 Binne deze stad en dies jurisdictie zullen geen andere godsdiensten ofte religien geoeffend, veel min geleerd ofte voortgeplant werden, 't zy in 't heymelyk of openbaar, als de Protestante Christelyke religien, gelyk die in de publicque kerken van de Vereenigde Nederlanden geleerd worden; en zo wie bevonden zal worden eenige byzondere byeenkomsten ofte conventiculen gemaakt ofte gehouden te hebben, het zy Christen. Heyden ofte Moor, zal boven verbeurte van alle zyne goederen, in de ketting geklonken, uyt den lande gebannen ofte wel aan lyf ofte leefen gestraft worden, na gelegentheid van zaaken. See Van der Chijs, *Nederlandsch-Indisch Plakaat Boek 1602-1811.*

20 Frank R. Bradlow and Margaret Caines (1978), *Early Cape Muslims: Study of their Mosques, Genealogy and Origins* (Cape Town: A.A. Balkema), 19. See also Yusuf da Costa and Achmat Davids (1994), *Pages from Cape Muslim History* (Pietermaritzburg: Shuter & Shooter), 20-46.

21 See Elphick and Giliomee, *The Shaping of South African Society,* 116-172. See also Timothy J. Keegan (1996), *Colonial South Africa and the Origins of the Racial Order* (Charlottesville: University of Virigina Press), 20.

22 Robert Shell, *The Establishment and Spread of Islam.*

23 See Elphick and Giliomee, *The Shaping of South African Society,* 100-104.

24 Theal, *History of South Africa from 1795- 1872*.

25 Elphick and Giliomee, *The Shaping of South African Society*.

26 See the contents of the Muslim family law code of Van Der Parra of 1766 as well as that of Anthonio Van Diemen, wherein express provision is made for the regulation of Muslim marriages (*huwelijks saken*). Furthermore, concessions such as a reasonable time period to register a marriage were also made along with the existence of a Muslim marriage officer. Careful perusal of these documents also reveals subtle attempts for establishing a uniform marriage law in the colony.

27 Ryland v. Edros 1997 (2) SA 690 (C) at 117 B-F.

28 J. De V. Roos (1897), '*The Plakaat Books of the Cape*', CLJ 7. Also see introduction of Van Der Parra's Code, which states that 'it is to come into force in all the establishments of Netherlands India, for as far as applicable there, and for as far the situation of the settlement and our legislative powers in the same do permit, and it is our express desire that the said local code shall for as far as possible be everywhere considered to be of force and value'. See J.L.W. Stock, H.D.J. Bodenstein (1915), 'The New Statutes of India at the Cape', 32 SALJ 328.

29 Ibid.

30 Die volgende civile wetten en gewoontes, waar na de Mahometanen zig reguleeren in het decideeren der onder hen opkomende verschillen, in zo verre de successien, erf-en besterfnissen, item hunne huwelyken en egrscheydingen, enz. betreffen, sodanig als uyt het Mahometaanse wetboek by een versamelt en

in Rade van India geaprobeert zyn, zullen moeten geobserveert werden, daar en zo het behoort. See Van Der Chijs, *Nederlandsch Indisch Plakaatboek*, 417-431.

31 See Article 1-63.

32 See Article 64-73.

33 See Article 26.

34 See Article 75-102.

35 'Een man is volgens de wet van Mahomet gepermitteerd vier vrouwen te trouwen, egter maar allen de zoodaanige, die tot de vrouwelyke sexe buyten gemeen geneegenzyn en de vermogens bezitten zig omtrent dezelve, niet allen van haar pligt te kwyten, maar ook middelen genoeg hebben haar van nodig onderhoud te voorsien'.

36 See further C. Graham Botha (1913), 'The Common and Statute Law at the Cape of Good Hope During the 17th and the 18th Centuries', 30 SALJ, 292-299.

37 Hyde v. Hyde and Woodmansee 1866, LR 1P&D, 130.

38 The origin of this policy report or memorandum, as it is more commonly known, was a result of Batavian government instructions to the Council for Asiatic possessions and Establishments to propose a viable form of governance for the Cape. The Council entrusted De Mist a lawyer, editor and Member of Parliament, with this task; and it was on this basis that he was appointed as Commissioner to the Cape. See also Petrus Johannes Idenburg (1963), *The Cape of Good Hope at the Turn of the Eighteenth Century* (Leiden: Universitaire Pers), 48-73.

39 For a more detailed discussion of reforms initiated by the Batavian government at the Cape, see M.W. Spilhaus (1966), *South Africa in the Making 1652-1806* (Cape Town: Juta), 311-370. See also Albie Sachs (1975), *Enter the British Legal Machine: Law and Administration at the Cape, 1806-1910,* Collected Seminar Papers (London: Institute of Commonwealth Studies, University of London), 1.

40 See Tayob, *Islamic Resurgence in South Africa*, 4-5.

41 See Davids, *Mosques of the Bo-Kaap*, 89-94.

42 See Bradlow, *The Early Cape Muslims*, 19.

43 Elphick and Giliomee, *The Shaping of South African Society*, 173-203.

44 See Davids, *Mosques of the Bo-Kaap*, 89-91.

45 Ryland v. Edros 1997 (2) SA ( C) 690.

46 See Kathleen M. Jeffreys (1920), *The Memorandum of Commissary J.A. De Mist* (Cape Town: The Van Riebeeck society), 197.

47 Theal, *History of the Cape Colony,* 174. The issue is dealt with in section 33 of the Memorandum of De Mist.

48 Bradlow, *The Early Cape Muslims*, 41.

49 Davids, *Mosques of the Bo-Kaap*, 50-61. See also Da Costa, *Pages from Cape Muslim History*, 20-46.

50 Hahlo, *The History of the Roman Dutch Law of Marriage, THRHR* Vol 7 1943. Accessed online 31 January 2009. http://web.wits.ac.za/NR/rdonlyres/92956303-2D6B-45AD-8D7F-DA2217CBE0EA/0/Overhead.doc.

51 Mashia Ebrahim v. Mahomed Essop 1905 TS 59, 61.

52 This was a petition by a husband who had an English domicile for divorce on grounds of adultery by the wife. The petitioner joined the Mormons in 1847 aged only about 15 and was afterwards ordained as a priest in that faith. He later met the respondent and her family, who all subscribed to the Mormon faith, in London, where they were engaged. However, in 1850 the respondent and her mother emigrated to Utah, where they were followed by the petitioner in 1853. The marriage was there celebrated by Brigham Young, the chief priest of the Mormons, according to their customs and usages. They both lived in Utah as husband and wife. In 1856 the petitioner proceeded to the Sandwich Islands as a missionary; upon his arrival he renounced the Mormon faith as erroneous and was subsequently excommunicated. His wife was divorced from him and declared free to take another husband, which she did, in 1860. Lord Penzance refused to adjudicate on the petition on grounds that polygamy was part of the Mormon faith, and that English matrimonial law is designed to deal only with monogamous unions. Hyde v. Hyde and Woodmansee 1866 L R 1P&D 130.

53 See comments of Bronnn v. Fritz Bronn's Executors (1860) 3 SC 313. See also R v. Fatima (1912) TPD 59-63.

54 The lex loci celebrationis, in this case the Muslim personal law of the appellant as it was administered in India, allowed Muslims to enter into polygamous unions.

55 Seedat's Exec v. The Master (Natal) 1917 A D. It was further stated that even if such marriage is in fact monogamous, it cannot be recognized as a valid marriage according to our law.

56 Bronn v. Frits Bronn's executors 1860 ( 3) S C 313. The view of a Christian marriage espoused above by Hodges has come under severe criticism from modern scholarship.

57 Trengrove further adds, ' I would not regard a polygamous union solemnized under the tenets of the Muslim faith, and the customs related thereto, as being *contra bonos mores* in the narrower sense in which the expression is ordinarily used, i.e. as immoral (see Ngqobela v. Sihele and Docrat v. Bhayat), but such a union can be regarded as being *contra bonos mores* in the wider sense of the phrase, i.e. as being contrary to the accepted customs and usages which are regarded as morally binding upon all members of our society or, as Innes C J said in Seedat's case at 309, 'as being fundamentally opposed to our principles and institutions'.

*58* Ismail v. Ismail 1983 (1) 1006 (AD).

59 See Docrat v. Bayat (1932) TPD 25.

60 For a summary of the problems and consequences of non-recognition, see also Abdul Karim Toffar (1993), 'Administration of Islamic law of Marriage and Divorce in South Africa' (MA Thesis, Department of Islamic Studies, University of Durban, Westville).

61 See Tayob, *Islamic Resurgence in South Africa*, 164-166.
62 I.M. Rautenbach (2002), 'Engaging the text of section 8 of the Constitution in applying the Bill of Rights to law relating to private relations', TSAR 747-756.
63 See Julia Sloth-Nielsen and Belinda Van Heerden (2003), 'The Constitutional Family, Developments in South African Family Law Jurisprudence under the 1996 Constitution', *International Journal of Law Policy and the Family,* 1-8.

# 2 Custom and Muslim Family Law in the Native Courts of the French Soudan, 1905–1912

**Richard Roberts**

Tensions between custom and Muslim family law in the native courts of the French Soudan emerged immediately after the new courts were established in 1905. These tensions have their roots in the late eighteenth and early nineteenth-century changes in France's imperial policies, and revolutionary changes in metropolitan France. On the one hand, France increasingly sought to 'respect' differences between cultures, and as France began more aggressive colonial expansion, it applied the legal category of 'protectorate' over its colonial dominions. On the other hand, reform of the French legal system promoted by jurists and politicians sought ever more 'regularity' in the organization and practice of the courts. Thus, the judicial logic of regulation and regularity confronted the multicultural and plural legal world of French West Africa. This chapter examines these tensions at the level of French colonial legal policy, and explores how African litigants confounded French expectations by their use of the new courts.

## *Making of the Colonial Legal System in French West Africa*

Since their first sustained contact in the sixteenth century, the French in Senegal operated within a plural legal environment. Interactions between local inhabitants and Frenchmen were often conducted by a sense of mutual benefit. Not all transactions were mutually beneficial, and thus some recourse to adjudication was required. Far from imposing a uniform and for-

mal set of institutions, adjudication of conflicts involved improvisation.[1] France lost its two tiny Senegalese outposts of St. Louis and Gorée to the British during the Napoleonic wars, before recovering them in 1817.

In the interim, two important events occurred that shaped the nature of the colonial legal regime in French West Africa. The first was Napoleon's Egyptian expedition. While the expedition failed in its geo-political goals, it clearly represented a profound change in French colonialism. Bonaparte sought to establish an 'enlightened' protectorate, which respected cultural differences as it helped Egypt 'regenerate' into the glorious kingdom it once was. To accomplish this, Bonaparte established a form of 'cultural administration' which sought to incorporate local notables into the colonial administration and to respect, however grudgingly, Islam.[2] The second event began immediately after the failure of the Egyptian expedition and concerned the compilation and institutionalization of the Code of 1804. Also called the Napoleonic Code, the Code of 1804 represented an important break with the past. It affirmed the unity of the law to all Frenchmen and sought to create a common field in which law would be administered.[3] These two events – the Egyptian Expedition, which sought to respect 'difference', and the Code of 1804, which sought to establish uniformity – are idiomatic of tensions inherent in French colonialism and in French colonial legal practice.

As France regained its foothold in Senegal in 1817, French officials realized that they were a tiny minority living among a mass of Muslim and animist inhabitants. In 1822, a tribunal was established on Gorée, which heard cases involving French citizens. The French 'received' the metropolitan civil code in Senegal in 1830, thus extending the space of uniform metropolitan law to Senegal. According to the principles of the 1830 decree, all 'persons born free and living in Senegal or its dependencies will have the rights of a French citizen as guaranteed by the Civil Code'.[4] Extending the French civil code to the free inhabitants of St. Louis and Gorée forced the authorities to confront the fact that the majority of the Senegalese inhabitants of St Louis and Gorée were Muslim. For them, marriage and the organization of the family were founded in religion and in religiously sanctioned law. As such, Muslim law lay outside the purview of the civil legislator, whose jurisdiction was defined by legal separation of church and state.[5] At its very foundation, then, Muslim law was incompatible with the French civil law tradition. This act probably meant very little on the ground, since Muslims continued to turn to qadi courts to resolve their disputes. However, it established a potential

minefield of legal and political conflicts. In 1840, provisions were made to employ professional magistrates to preside over the courts of the first instance, which lay at the base of the French judicial system. Qadis, if they participated at all in these courts, did so as assessors or advisors to the French magistrates. As the pace of commercial activity accelerated in Senegal, due to the expansion of the trade in gum arabic, there were increasing opportunities for commercial conflicts to emerge between African traders and French merchants.[6]

Bowing to the sustained pressures of the Muslim inhabitants to recognize the separate jurisdiction of Muslim family law, the French established a consultative committee, which was charged with advising the French tribunal on issues of Muslim law submitted to the courts. The Minister of the Marine and Navy, the metropolitan ministry in charge of colonial affairs, replaced this consultative committee with a Muslim tribunal.[7] This decree, however, was never enacted. It was overtaken by the revolutionary events of 1848, which led to the rise of the Second Republic. The Second Republic reiterated its commitment to the extension of political and legal rights of citizenship to all free inhabitants of Senegal, called the *originaires*. The Muslim inhabitants of these two towns welcomed the privileges of French citizenship, but they did not welcome changes in their personal status which negated their rights to have conflicts over family and related civil issues heard by Muslim judges. All cases under the civil code were heard by French administrators, who were assisted by local notables.

In 1852, however, Louis Napoleon rescinded the electoral rights of the inhabitants of St. Louis and Gorée. But he did not undo the extension of legal rights. Ambiguities regarding the jurisdiction of French and Muslim law remained unresolved until the forceful governorship of Louis Faidherbe in 1854. Faidherbe was a military engineer, who came to Senegal with considerable Algerian experience. Part of his strategy for the expansion and consolidation of French control lay in building the core of an army around African recruits, and in encouraging Muslim collaboration. Encouraging what David Robinson calls 'paths of accommodation' involved including prominent Muslims in his political affairs bureau, building mosques, sponsoring Arabic education for interpreters, subsidizing the Mecca pilgrimage of loyal Muslim notables, and recognizing Muslim legal jurisdiction.[8] His 1857 decree re-established the Muslim Tribunal of St. Louis and recognized its jurisdiction in matters of family law, inheritance, and related civil matters.[9]

For the actual functioning of the Muslim tribunal, see Ghislaine Lydon's chapter in this volume.

The establishment of the Muslim tribunal was part of several administrative acts that had significant implications for the establishment of a colonial legal system in French West Africa. The other was Faidherbe's policy of selective application of the 1848 abolition of slavery decree. Slaves were actually freed in the three core territories France controlled along Senegal's coast, but Faidherbe's governorship had included a more aggressive military policy, which resulted in newly conquered territories. Fearing that the wholesale abolition of slaves within these newly conquered territories would undercut African slave owners' loyalty to France, at the same time as the militant Islamic leader al hajj Umar was preaching a religious struggle against the French, Faidherbe conveniently adopted the distinction made by Carrère, the head of the judicial service in Senegal, between citizens and subjects.[10] Citizens were bound by the abolition decree, but not subjects. Faidherbe also disannexed territory and created protectorates. Hence, Faidherbe could minimize the consequences of the abolition decree by limiting the physical space where French law prevailed.[11] Faidherbe's administrative acts of distinguishing citizen from subject and establishing a separate legal jurisdiction for Muslim personal law within the colony had the unintended consequence of creating ambiguities concerning legal jurisdictions. The expansion of French military conquest after 1879 dramatically increased the space where legal jurisdictions remained ambiguous.

In order to put the newly conquered regions of West Africa under a more systematic organization, in which there would be more fiscal control of each of the constituent parts, the Minister of Colonies established the West African Federation in 1895 and appointed Jean-Baptiste Chaudié as the first governor-general. In his struggles with the French military for control over colonialism in the Soudan, Chaudié used the regularization of justice in French West Africa to argue for a more centralized and stronger civilian control apparatus.[12] Before Chaudié left office, he established a commission to review the status of the law in French West Africa and propose modifications. It fell to Governor-General Ernest Roume to bring this commission to fruition. He did so as part of his efforts to strengthen the power of the government-general.

Under the direct authority of the attorney-general, Georges Cnapelynck, the commission presented its report to the General Council of the govern-

ment-general in June 1903. All 96 articles of the proposed legislation were debated, modified where necessary, and approved for submission to the Minister of Colonies, Gaston Doumergue, who presented the legislation to the French National Assembly on 10 November 1903.[13] The legislation unified the diverse legal regimes in French West Africa, but it essentially established two jurisdictions within one legal system: one for French nationals and assimilated Africans, and the other for African natives. Both jurisdictions were conjoined at the top, because of the supervisory role the attorney-general played over judgments from the lower courts, and because appeals moved upward towards the superior court (*cour de cassation*). The superior court also had a special chamber on 'homologation', designed to regularize judgments and to ensure that procedures established by the 1903 legislation were followed correctly and fully.

The 1903 legislation establishing the new colonial legal system was the result of intense debate within the commission regarding the jurisdiction of French and 'customary' law, reflecting the distinctions between citizens and subjects.[14] Article 46 defined the domain of the customary in negative terms: 'In the territories that do not fall under the purview of the court of the first instance (*tribunal de première instance*) or the justice of the peace with expanded competence at Kayes (*justice de paix à compétence étendue*), native justice is administered in regard to individuals not under the jurisdiction of the French courts by the village courts (*tribunaux de village*), the provincial courts (*tribunaux de province*), and the district courts (*tribunaux de cercle*)'. What form of justice was to prevail for those who were not French citizens or subject to French metropolitan law? Again framed in negative terms, Article 75 stated that 'native justice applies in all matters of local customs, insofar as they are not contrary to the principles of French civilization'. Defined as everything that was not French metropolitan law, the domain of the custom in the colonial legal system lumped together all varieties of local customs and Muslim law. The only section of the 1903 legislation that addressed Muslim law was Article 49, which mandated the structure of the provincial court. 'At the headquarters of each province, a tribunal will be established, composed of the provincial chief or canton chief, assisted by two notables designated by the governor of the colony in a proposal to the procureur-général. In regions where Muslim personal status prevails, one of the two notables will be the qadi if one exists'.[15]

Muslims in the four communes and the *originaires* residing in Kayes and Medine thus fell under the rule of French metropolitan law.[16] Rebecca Shereikis has reconstructed the story of the Muslim reaction to the 1903 decree in Kayes and Medine, especially the efforts by the Senegalese Muslims to establish a formally recognized qadi court for their family disputes.[17] Faced with a flood of petitions from Muslim *originaires,* Governor-General Roume reinstated the Muslim tribunals in St Louis, Dakar, and Kayes. The Muslim *originaines* thus succeeded in reasserting their rights to have their private affairs heard by a qadi. The Muslim *originaires'* success did not provide a legal precedent for Muslims everywhere in French West Africa, however. Roume's 1905 accommodation to the Muslim *originaires* re-asserted their special status, but limited their privileges to those living in urban areas. For the mass of Muslim subjects in French West Africa, the 1903 decree made Muslim law merely one of the many customs jostling about in an increasingly mobile world of African communities.

## *Custom and Muslim Family Law in the Native Courts*

Article 75 of the 1903 decree shaped the way in which the French expected their new courts to run. Already in 1904, Roume drew the attention of the lieutenant-governors of the federation to the provisions of this article.[18] I want to quote this at length, because it reveals the administration's naivety in regard to complexities of implementing a native court system in a plural legal environment. Roume wrote to his local administrators,

> I draw your particular attention to the dispositions of Article 75 and to the terms under which native justice applies in all areas of local custom, in so far as it is not contrary to the principles of French civilization.
>
> Native courts will judge applying either Malikite rites, which are accepted in a large portion of our territories and are more or less modifications of Qur'anic law by local practice, or by applying local traditions in regions where Muslim influence is not yet strong. Such application will be mostly in civil matters, property, obligations, contracts, marriage, affiliation, child custody, inheritance, in which the judges will conform to these written records or oral traditions.
>
> We shall not, in effect, impose on our subjects the disposition of our French law, which is manifestly incompatible with their social status. But we shall not toler-

> ate the maintenance, under our authority, of certain customs that are contrary to our principles of humanity and natural rights. It is in this order of ideas that the native courts can not recognize disputes relative to the condition of captivity, which we do not legally recognize ...
>
> In regard to civil [law], customs are not the same throughout the full extent of our territory. Variable by regions and by native group, it is not uncommon for customs to be different from village to village. Within this very great diversity, it may become difficult to supervise the practices of the native courts without imposing arbitrary conclusions.
>
> It is nonetheless our firm intention to respect customs without restraining progress towards the regularization and amelioration of customs. With the approval of the native courts themselves, it will be possible gradually to establish a rational classification of customs leading to a generalization of practices compatible with the social condition of our subjects while rendering these practices more and more in conformity, not necessarily with our metropolitan legal doctrines, but with natural rights, the foundation of all legislation.[19]

These instructions are important on two accounts: first, Roume's comments on Muslim law reflected French bias towards written, codified law that seemed so different from evolving and inchoate custom. As Lydon makes clear in her chapter in this volume, in practice, qadis on the Muslim Tribunal based their judgments less on textual tradition than on their personal conscience and local practices. Second, Roume called for the eventual rationalization and codification of custom. Surveys on custom went out to district administrators in 1908-09. The lieutenant-governor of the French Soudan charged Maurice Delafosse with the task of compiling these surveys into a coherent statement, which he published in 1912. In Delafosse's view, French West Africa was neatly divided between a 'Soudanese' society and a 'Soudanese Islamic' one, defined in opposition to each other.[20]

Despite Roume's description of a neatly divided world of custom and Muslim law and Delafosse's binaries, the reality in the new native courts was quite different. For the purposes of this chapter, I will examine three aspects of these new native courts, which were up and running in most districts in the French Soudan in 1905. First, I will examine the initial response by Africans to these new courts and argue that there was a 'bleeding' of shari'a categories into disputes over divorce. Second, I will use a body of evidence from one district to demonstrate the different kinds of disputes that

Muslims brought before these new courts. Finally, I shall examine the bias towards the application of Muslim family law, even where Muslims were a small minority of the population.

## *Initial Responses to the New Courts*

When the new courts first opened in most districts in the spring of 1905, the French administrators were unprepared for the wave of women seeking divorces. The Bamako administrator wrote in the third quarter of 1906, just one year after the new courts were established, that 'the incidence of divorce cases is ... very frequent. It is almost always the woman who brings the request for divorce before the provincial tribunal'.[21] The Gumbu administrator in 1906 echoed his Bamako counterpart when he wrote that 'nearly all of the grievances brought before the provincial tribunal during the course of this quarter concerned divorce'.[22] The Mopti administrator wrote in 1911 that 'the principal category of civil process [in the district] is the divorces; many women come forward to demand the rupture of their marriages'.[23] Women were quick to learn that the new native courts would listen to women's complaints and, at least initially, act favorably in terms of their requests to end marriages they did not want.[24] In this volume, chapters by Lydon and Cooper argue that women's responses to the colonial courts varied considerably by colony and by the social and political contexts.

Plaintiffs seeking divorce in the courts of the French Soudan had to explain their reasons for seeking the dissolution of their marriages. Among the most common reasons for seeking divorce were abandonment, mistreatment, failure to complete payments of bridewealth, illness of one spouse, and incompatibility. For this chapter, I am especially interested in abandonment and neglect (as a subset of mistreatment) cases because women complained to the courts about the failures of their husbands to provide subsistence for them. Abandonment cases appear regularly in the court records of the Muslim tribunal of St. Louis, and are analyzed by Lydon in this volume. Judith Tucker describes marriage according to Islamic law as a 'relationship of material support' (*nafaqa*) in which the husband has to provide for his wife's and her children's 'nourishment, clothing, and shelter'. Failure to provide such basic material support was a grave infraction that could lead to the imprisonment of the husband, the borrowing of funds

to provide such support, and divorce.[25] Susan Hirsch argues that despite strong cultural aversion to publicly complaining about domestic problems, Muslim Swahili women in the qadi courts of Kenya empower themselves by invoking their husbands' failures to provide maintenance, thus initiating divorce. Hirsch's argument is that the qadi courts essentially permit women to 'talk' about their marital problems and to frame their grievances in such a way as to set in motion the dissolution of their marriages, especially when husbands have failed to provide adequate support.[26]

The following table provides the data on the distribution of the causes cited in divorce cases in eight district tribunals (Banamba, Bouguni, Gumbu, Kita, Jenne, Mopti, Segu, and Timbuktu).

Causes of Divorce in Eight District Tribunals, n=554

| District and Dates | Number of Divorce Cases | Divorce as % of all Disputes | Abandonment as % of Divorce Disputes | Mistreatment as % of Divorce Disputes | Other Causes as % of Divorce Disputes |
|---|---|---|---|---|---|
| Banamba, 1907–1912 | 131 | 30 | 33 | 16 | 50 |
| Bouguni, 1907–1912 | 22 | 22 | 9 | 23 | 68 |
| Gumbu, 1905–1912 | 138 | 23 | 16 | 30 | 53 |
| Jenne, 1905–1912 | 36 | 6 | 33 | 36 | 31 |
| Kita, 1905–1912 | 76 | 18 | 25 | 37 | 38 |
| Mopti, 1909–1912 | 46 | 22 | 47 | 33 | 20 |
| Segu, 1905–1912 | 69 | 16 | 26 | 25 | 49 |
| Timbuktu, 1907–1912 | 36 | 39.5 | 19 | 42 | 39 |
| Total/ averages | 554 | 22 | 26 | 30 | 44 |

This table shows that abandonment and mistreatment complaints together constituted 56% of all causes in divorce cases.

Husbands seem to have abandoned their wives and children with considerable regularity. Some were traders who set out on trips and failed to return. Others simply left. Some were slaves who wanted to return to their homelands and their wives refused to accompany them.[27] Because defendants rarely made it back to court to defend themselves, we do not have good evidence on the causes of abandonment. Wives petitioned for divorce when it became obvious that their husbands had abandoned them. Sometimes it took wives 23 years before they came to court; others waited barely a year.[28] Most came when after two or three years it was clear that their husbands were not returning or providing news of their whereabouts. The records are not clear about how the courts evaluated the evidence on abandonment, although the courts occasionally required a three-month delay before granting a divorce.[29] The plaintiff was often back in court at the end of this waiting period, and the court granted a divorce.[30] Common were the complaints of women who like Malado Diabite claimed that her husband 'left her alone for four years without money or food or clothing'.[31]

Where the slave exodus seems to have been most marked, in Banamba and Gumbu, we can detect a pattern in abandonment cases. The flurry of abandonment cases in Banamba followed the slave exodus by about three years. This delay may reflect the application of Muslim family law in the provincial courts, which were charged with applying the legal status of the litigants. It may also reflect a tendency for *shari'a* to 'bleed' into African customs, particularly in regard to issues of the contractual nature of the male household head's responsibility to provide for his dependents. The Maliki school was widespread in French West Africa, and it allowed for divorce when a husband did not provide subsistence for his wife.[32] Abandonment is cited increasingly after 1909, reflecting the largest wave of the exodus that started in 1906, increased up until 1910, and then leveled off. In Gumbu, abandonment cases began to be seen in 1909, during the exodus itself, but also one year after the first wave of slaves left. Abandonment cases continued to increase until the end of my records, in 1912.

Inheritance disputes brought by Muslims before the *tribunal de province* provide a lens for examining the tensions between custom and Muslim family law, and what it meant to be Muslim in relationship to the broader Bambara household norm of extended families. When Muslims disputed inheritance in the native courts, they were challenging the authority of local qadis and entrusting judgments to colonial courts composed also of non-believers.

In bringing cases of disputed inheritance before the tribunals, litigants raised issues of the authority of Muslim law and custom and forced the colonial state to intervene ever more fully into the most intimate issues of domestic life. Precisely because these records are about the most intimate matters of domestic life, they also provide a starting point for our efforts to reconstruct what David William Cohen calls the 'interior architecture' of African societies.[33]

## *Muslim Inheritance Disputes in the Tribunal de Province, Segu*

Following the first month of the new court's operation, the Segu administrator wrote at the end of April 1905 that 'we can not yet judge the results of the reform in the organization of justice. During the first days of its operation, the district court did not meet and the provincial court met only to adjudicate a very small number of cases. I should remark, however, that the predominant Bambara element among the judges appears to have discomforted above all the Muslims and made them hesitant to bring forward their disputes'.[34] What were merely his initial observations about Muslims' reluctance to use these new courts had by the end of the year become a discernible pattern. Muslims were clearly avoiding these new courts. The 1903 decree mandated that at least one of the judges of the provincial court be of the same personal status as the disputants. For Muslims, this meant at least one judge at the provincial court or one assessor at the district court was the qadi or other Muslim notable. This, indeed, was the case in Segu. 'At both the provincial and district courts, the disputants will find at least one judge of the same personal status. Despite this, it is necessary to note that in the first efforts of the new courts, Muslims have demonstrated a certain reluctance about bringing their disputes before these mixed courts. The numbers of civil disputes has diminished and one can suppose that the reasons are that the litigants are choosing other ways to resolve their disputes'.[35]

This is a telling remark and reminds us that the colonial courts were not the only venue for dispute resolution. Indeed, the establishment of the colonial legal system merely introduced a new element into the landscape of the plural legal system operating in the Soudan. Barbara Cooper examines the complex interplay of Muslim law, colonial courts, and socio-economic

change in Maradi, Niger, in her chapter in this volume. Such a plural legal environment essentially empowered litigants to choose which venue would provide the best chance of success for their desired outcome. Local qadi courts persisted in the plural legal environment of the Soudan even if they no longer had 'official' recognition. Muslims, as the Segu administrator noted, and especially males, probably took their cases before local qadi courts. In addition, litigants could pursue a multiple strategy of trying out their disputes in a number of different venues until they got the outcome they wished. For the colonial provincial courts for which I have examined the records, there is no indication that the litigants tried or did not try other venues before bringing their cases to the new native courts. Yet the presence of Muslim inheritance cases in the provincial tribunal suggests that African litigants were certainly making calculated choices about the sequence of courts to use to resolve their grievances.

Muslims preferred, however, to avoid bringing their disputes before courts in which non-Muslims served as magistrates. Rebecca Shereikis found the same pattern in Kayes. Muslim *originaires* protested the implementation of the 1903 decree that put their disputes before a French magistrate who, while obliged to consult with a Muslim assessor, nonetheless ruled in ways that fundamentally changed gender and spousal relations in Muslim households. The Muslims of Kayes also protested the 1912 judicial reorganization, which eliminated the Muslim tribunal and directed Muslims to the native courts, where Muslim family law was merely one in the variety of other native customs. The nature of the Muslims' grievances is probably indicative of earlier sentiments as well. Shereikis quotes a 1913 Kayes petition:

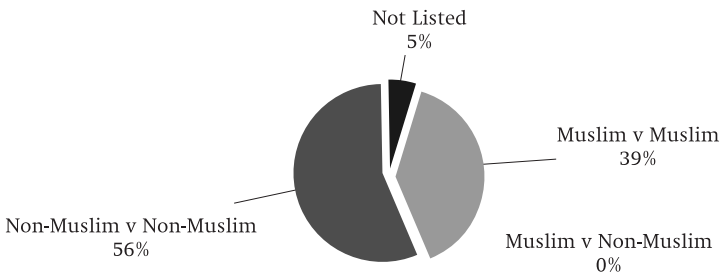
> As a consequence [of the Decree of 1912], we Wolof Muslims, who came from Senegal to bring commercial and industrial knowledge to this new country, we who are for the most part literate, [who] exercise a profession or a trade and who for a long time have been used to a modern civilization, we find ourselves currently being treated ... like the most backward natives of the Soudan. In effect these subdivisional tribunals are composed of natives of Bambara and fetishist races, and because they apply fetishist customs ... we find ourselves returned to the laws and customs of a previous generation.[36]

This and other petitions concerning the suppression of the Muslim tribunals in French West Africa reveal the cultural universe in which many Muslims lived. They clearly considered themselves part of the modern world and saw themselves participating in the advance of commerce and industry. They were thus defining themselves in opposition to animists, whom they lumped together as 'uncivilized'. These Muslims were also concerned that animist judges on the native courts would not and could not apply Muslim family law to their disputes involving their families.

A similar sentiment can be seen already in 1905 in Segu. While this document was not written by Seguvian Muslims, it captures the same concerns expressed by the Muslims in Kayes in 1913. In explaining why the Muslims of Segu were avoiding bringing their disputes to the new native courts, the administrator attributed this refusal to 'the arrogance and the spirit of independence of a caste that would like to be superior – and believes that to be the case – and who want their cases judged by their peers'.[37]

Among the Segu court records, I have found only a handful of registers that mention the religious status of the litigants. These data may be anomalous, reflecting specific local events that influenced short-term decisions to use the native courts. Despite the fact that the Segu administrator wrote as late as July 1905 that Muslims 'have demonstrated a certain reluctance about bringing their disputes before these mixed courts', data from the Segu provincial court from October to December 1905 indicates that Muslim litigants made up a sizeable minority of the cases (39%). Those claiming customary status brought 56% of the cases. In a region where Muslims com-

FIGURE 1
RELIGIOUS IDENTITY OF LITIGANTS, SEGU, OCT–DEC 1905, N=41



posed a significant part of the population, the data suggest that Muslims were under-utilizing these courts relative to their population. This makes those Muslims who actually went to the provincial courts even more significant.

The following two charts illustrate the nature of the disputes that Muslim and non-Muslim litigants brought before the Segu provincial court. These charts are revealing of the kinds of grievances Muslims and non-Muslims brought before these new courts.

FIGURE 2
TYPES OF CASES, MUSLIM LITIGANTS, SEGU, OCT–DEC 1905, N=15

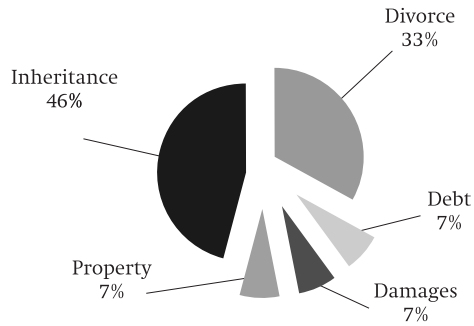
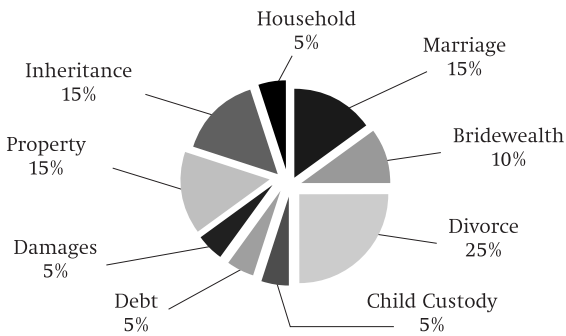



FIGURE 3
LITIGANTS CLAIMING CUSTOMARY STATUS, TYPES OF CASES, SEGU, OCT–DEC 1905, N=20



Inheritance cases clearly predominated among the kinds of disputes Muslims brought before the native courts, followed by divorce cases. A third of the cases were requests for divorces, and nearly all of these were brought by women. Somewhat surprising, given the dominance of Muslims in the commercial sector of the regional economy, is the relatively insignificant number of disputes involving property, debt, and damages. Given the small sample of these cases, a momentary surge in inheritance cases could easily skew the data.

In contrast, the Segu litigants claiming customary status brought a fuller range of cases before the new courts. Inheritance disputes constituted only 15% of the cases for non-Muslims, compared to 46% for Muslims. Similarly, non-Muslims brought relatively fewer divorce cases (25%) compared to Muslims (33%), but the difference is not significant. When taken together, divorce, marriage, bridewealth, and child custody cases composed 55% of all the disputes brought by non-Muslims. This suggests that marriage was a cause of most of the disputes non-Muslims brought.

There are two explanations for the appearance of Muslim inheritance cases in the colonial courts. The first is the increased physical movement of people, which coincided with other social and economic changes. These included the coincidental erosion of social boundaries around occupations, which encouraged former slaves and others to enter crafts or skilled activities that had been hitherto restricted to those who were endogenous to the group.[38] People were moving physically and socially, thus undermining that presumed symmetry between group, location, and custom. This change was captured in a 1907 report from Segu. Reflecting on the end of slavery and changes in what he called the mores of the people of the region, Administrator Charles Correnson wrote that

> it is important to note the progressive emancipation of the individual in relationship to the domestic group. From being a mere cog in the machinery of the household head, the individual begins to develop a distinct personality that is related to the emerging distinctions between communal property and personal property. The latter emerges to the detriment of the former and has the effect of encouraging the commercial activity, which had been shackled by the immobilization of goods and the lack of individualization in the communal domain.[39]

The second explanation has to do with the litigants' strategies to succeed in their disputes. The new courts offered a relatively new arena for litigants who may have avoided the other arenas of dispute resolution. Even though these courts were staffed by animist and Muslim magistrates, the custom of the litigants was to prevail. Used as they were to the idea of a 'code', they could fairly easily turn to the French translation of Sidi Khalil's Maliki law, the Seignette edition of which was published in 1898. Administrators could easily locate the appropriate section on marriage, divorce, inheritance, guardianship, etc.[40]

Such presumed naturalness in the application of shari'a law, however, obscured a much more dynamic process of legal adaptation and change. It also obscured the meaning of Muslim identity in an era of rapid conversion to Islam. Despite its written traditions, shari'a law never remained static, especially in contact with 'customary law'. As J.N.D. Anderson notes, 'Islamic law has never wholly ousted the indigenous law, but either co-exists with it as a separate and distinct system, each being applied in suitable circumstances, or else had fused with it into an amalgam that may be termed 'Islamic law' or 'native law and custom' according to local taste or local practice'.[41] Perignon, district officer in Segu in 1900, observed the same kind of amalgam of legal spheres identified by Anderson, when he wrote that 'it is necessary to take into consideration that here justice is a mixture (*mélange*) of quranic principles and local ones'.[42]

Delafosse, notoriously anti-Muslim throughout his study, also noted in passing the same conflation of legal spheres. 'There where Islam has profoundly penetrated, the moeurs, rule of inheritance, and even the order of succession have often been notably modified. Thus, among the Muslims of the Soudan, the woman may inherit a part at least of the possessions of her husband, and the children of the deceased each receive an equal portion of the paternal inheritance. These two patterns are absolutely contradictory to the spirit of the primitive natives' customs'.[43] If some Muslims were wary of the mixed composition of the new tribunals, other litigants probably saw in this composition new opportunities to press cases based on a more 'flexible' reading of either shari'a or customary law. I think that this helps explain the significant presence of Muslim inheritance cases in disputes brought by Muslim litigants.

### *Authority of Muslim Judges in the Native Courts*

Despite the concerns expressed by the Muslims in Kayes and Segu about subjecting their personal disputes to the native courts, there is some evidence that the French district administrators actually favored Muslim judges over animist ones. The French had long harbored ambivalent feelings towards African Muslims. They were simultaneously respectful of Islamic civilization and the authority of written texts, and distrustful of the power of Muslims to challenge and ignore French authority. French colonial Islamic policy has been the subject of considerable research and debate.[44] While I am not concerned here with French Islamic policy per se, the third element of this preliminary investigation of custom and Muslim family law in the native courts deals with the place of Muslim judges.

Rome's 1905 instructions to district administrators had urged them to engage with African customs in order to develop a rational, general compilation of prevailing customs in order to facilitate the court's deliberations. When assessors and native judges did not agree on what custom prevailed, the execution of justice would be delayed and thus subverted. Codification of custom never materialized despite many efforts to call for a synthesis of the diversity of custom into a more ordered form. Above all, administrators wanted to avoid the 'interminable palabres' over custom that took place in the native courts.[45] In contrast, Muslim law was already codified, and even if there was recognition of the ways in which practice shaped application, Muslim law provided administrators and judges with ready-made templates to apply to individual cases. The Segu administrator in 1906 wrote to Lieutenant-governor Clozel requesting that his and all district headquarters be supplied with copies of Muslim legal compendia. 'Each district and each site for a provincial tribunal should possess the *traite de droit musulmane ou zohfait d'Ibn Acem*, translated by Houdas and Martel, as well as the *précis de législation musulmane de Sidi Khalil*, in the Seignette translation edited by Challamal. These books will permit administrators a rapid control over the interpretations of Muslim law provided by the qadi'.[46] The Seignette edition was published with the express purpose of providing an easy guide for French colonial administrators.

Given the efficiencies of applying and controlling Muslim law, it should not be surprising that Muslim judges should play a significant role in the operation of the native courts. Lieutenant-governor Clozel noted exactly this

tendency throughout the Soudan and especially in regions where Muslims were numerically insignificant. 'As a result of a common tendency among many administrators, they have chosen Muslims as their legal counselors, even in animist regions. In Bobo-Dioulasso, where the number of animists is 440,950 and the number of Muslims is only 15,112, there are only Muslims [judges] on the native tribunals. In the Sokolo district, the 11,304 animists have no judicial representation'. This was a situation, Clozel argued, that was in direct violation of the principles of the 1903 decree and undermined the 'assurances of respect for the individual status of the litigants'.[47]

Not all Muslim assessors or judges performed their duties as the French expected. The 1903 decree provided for a formal mechanism in which lieutenant-governors nominated assessors for the district courts and judges for the provincial courts. Lieutenant-governors, in turn, relied upon their district administrators to recommend assessors and judges. There was, therefore, a filtering process that selected Muslims who were willing to aid the French and knowledgeable in Muslim law. Demands, however, on the disposition of judge's favor were commonplace, and in 1906, De la Bretesche, the Segu district administrator, wrote to the lieutenant-governor requesting that Seidou Haidera replace Omar Ba as Muslim judge and Arabic translator at the district's provincial court. 'I wish to propose replacing Omar Ba because he lacks independence in regard to the parties concerned [in disputes] and provided dangerously specious interpretations of texts. Moreover, he has participated in resolving affairs in which he was an interested party. The reason for seeking his replacement is also due to questions regarding the fidelity of his translations'.[48]

The deep ambivalence many administrators harbored towards Islam sometimes expressed itself in a nuanced assessment of the treatment of the individual under Muslim family law. Charles Correnson, administrator of Segu, captured exactly this sentiment in his discussion of the condition of women under custom and Muslim family law. Correnson's thoughts coincided with a significant debate among administrators about how to explain and what to do about the wave of women coming before the native courts seeking divorce. Many administrators in the period up to 1910 or so were sympathetic to women seeking divorce. They contributed to a debate about the condition of women and the nature of marriage in the Soudan. Correnson echoed much of the critique of custom, in which it appeared that women were 'sold' into marriage through bridewealth payments and inher-

ited by brothers upon the death of their husbands. Correnson picked up on this debate as he compared women under custom to women under Muslim family law.

> My previous discussion of custom among the Bambara has indicated that custom is evolving. It is, nonetheless, still oriented harshly against individuals. Custom is changing slowing under the combined pressure of our influence and the machinations of the marabouts. The Quran, if interpreted apart from its political persuasion, is a religion of kindness and charity and the marabouts are its principle propagators.
>
> Women are the ones who benefit the most. They are incontestably moving towards the improvements of their social condition. For example, the condition of women has improved particularly among the Somono, who were previously animists and ruled by custom, and are today Muslims.
>
> The organization of justice, the repression of misdemeanors and crimes against individuals is developing among our subjects and implanting the concept of a society. Although this idea remains imprecise among them, it is nonetheless being anchored among them through their experience in seeing how justice is being rendered [in the new courts]. The Muslim conception of justice strongly aids us in this task.[49]

Despite the pledge to respect custom, the practice of the native courts favored Muslim law and Muslims, even if Muslims originally were reluctant to bring their disputes before these courts because the judges often included animists. French administrators found in Muslim qadis allies in their efforts to provide expedient resolutions to disputes and consistent judgments. Notables knowledgeable about custom often argued with other notables about the meanings of custom and the appropriate remedies. The need to provide efficiency in the administration of justice led administrators to favor Muslim assessors and judges, despite the 1903 decree requiring equality of custom and Muslim family law in the construction of the native courts.

## *Conclusion*

The colonial legal system introduced in 1903 and implemented in 1905 contained within it serious procedural conflicts that reflected equally serious

legal, policy, and cultural debates within the West African colonial government. The 1903 legal system glossed over deep ambivalences that France and French administrators harbored in regard to Islam and Muslim law, as well as towards African animism. Far from creating a venue where custom and Muslim family law could cohabitate equally, aspects of shari'a informed how non-Muslims articulated their grievances, as well as the calculus that African judges used in rendering judgments.

The colonial legal system was created to impose 'regularity' in the application of justice within French West Africa. To some extent it did this by mandating an architecture of courts and regular forms of reporting. Governor-General Roume called for a codification of customs to facilitate the application of custom to dispute. But codification of custom remained unrealized. Nor did the new courts end improvisation. The architects of the new colonial legal system did not anticipate the range of social changes, and they underestimated the high degree of variability in customs. Nor did they anticipate that litigants to the new courts would bring with them complex cultural strategies for maximizing the outcomes they wanted. The colonial legal system of 1903 was built on a set of profound social changes that politicized the courts by creating new opportunities for litigants to use the native courts to pursue their grievances in new ways.

*Notes*

1 For a general approach, see Lauren Benton (2002), *Law and Colonial Cultures: Legal Regimes and World History, 1400-1900* (New York and Cambridge: Cambridge University Press). See also Emilien Pétit (1771), *Droits publics, ou govuvernement des colonies françaises, d'après les lois faits pour des pays* (Paris: P. Gauthier), quoted in Arthur Girault (1921), *Principes de colonisation et de législation coloniale* (Paris, 4th edition) I, 201.

2 Edward Said (2005), 'Orientalism: The Cultural Consequences of the French Preoccupation with Egypt', in *Napoleon in Egypt: Al-Jabarti's Chronicle of the French Occupation, 1798*, introduced by Robert Tignor (Princeton and New York: Markus Wiener), 171. See also Jean-Joë Brégeon (1991), *L'Egypte française au jour le jour: 1798-1801* (Paris: Perrin), 251-304; Baron Jean Thiry (1973), *Bonaparte en Egypte, Décembre 1797-24 Août 1799* (Paris: Berger-Levrault), 207-14; J. Saintoyant (1931), *La colonisation française pendant la période Napoléonienne (1799-1815)* (Paris: La Renaissance du Livre), 149-50. On the place of regeneration in Bonaparte's Egyptian expedition, see especially Jean-Loup Amselle (1996), *Vers une mutliculturalisme française: L'empire de la coutume* (Paris: Aubier), 56-61.

3 François Furet (1988), *Revolutionary France, 1770-1880,* trans. by Antonia Newell, (London: Blackwell), 230-33; Edmond Seligman (1901), *La justice en France pendant la Revolution (1789-1792)* (Paris: Plon-Nourrit), chapter 2.

4 The decree of 24 April 1833 further confirmed the principles of the 1830 decree by declaring that 'every free person possesses, in the French colonies, civil rights and political rights under the conditions prescribed by law'. Lamine Guèye (1955), *Étapes et perspectives de l'Union française* (Paris: Éditions de l'Université), 30, quoted in G. W. Johnson (1971), *The Emergence of Black Politics in Senegal: The Struggle for Power in the Four Communes, 1900-1920* (Stanford: Stanford University Press), 79.

5 By far the best discussion surrounding the politics of legal jurisdiction of the Muslim tribunals is Bernard Schnapper (1961), 'Les tribunaux musulmans et la politique au Sénégal (1830-1914)', *Revue historique de droit français et étranger,* 39. Schnapper argues that the debates on the jurisdiction of Muslim tribunals in Senegal dates from 1832, fully 25 years before a Muslim tribunal was enacted in 1857. The anti-clericism of the early Third Republic contributed to the tensions regarding the purview of Islamic law in colonial French West Africa.

6 Yves-Jean Saint Martin (1989), *Le Sénégal sous le second Empire* (Paris: Kathala); James L.A. Webb, Jr. (1995), *Desert Frontier: Ecological and Economic Change along the Western Sahel, 1600-1850* (Madison: University of Wisconsin Press); David Robinson (2000), *Paths of Accommodation: Muslim Societies and French Colonial Authorities in Senegal and Mauritania, 1880-1920* (Athens: Ohio University Press).

7 Seck Ndiaye (1984), 'Les tribunaux musulmans du Sénégal de 1857 à 1914' (unpublished memoir, University of Dakar).

8 Robinson, *Paths;* Schnapper, 'Les tribunaux musulmans'; David Robinson (1988), 'French "Islamic" Policy and Practice in late nineteenth century Senegal', *Journal of African History* 29, no. 3: 415-435.
9 Alain Quellien (1910), *La politique musulmane dans l'Afrique Occidentale Française* (Paris: Émile Larose), 224-25. See Lydon's essay this volume.
10 See François Renault, 'L'Abolition de l'esclavage au Sénégal: L'Attitude de l'administration, 1848-1905', *Revue française d'histoire d'outre mer,* 63: 197. The legal nature of the protectorate as practiced in the late nineteenth century is worth pursuing. The distinction between citizen and subject is prominent in Mahmood Mamdani (1996), *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton: Princeton University Press), but he overstates the separateness of the realms of custom and civil law.
11 Renault, 'L'Abolition de l'esclavage au Sénégal'; Leland C. Barrows, 'Louis Léon César Faidherbe (1818-1889)', in *African Proconsuls: European Governors in Africa,* eds. L. H. Gann and Peter Duignan (New York: Free Press, 1978), 64-71.
12 For more detail, see Richard Roberts (2005), *Litigants and Households: African Disputes and Colonial Courts in the French Soudan, 1895-1912* (Portsmouth, NH: Heinemann), chapters 2-3.
13 *Annuaire du gov't general de l'AOF*, 1904, 54; Procès-verbal, Conseil du gouvernement-général, Séance du 6 June 1903, Dakar, Archives Nationales, Sénégal – Afrique Occidentale Française (hereafter ANS-AOF) 5 E 1; Ernest Roume (1905), *Justice indigène: Instructions au administrateurs sur l'application du Décret de 10 November 1903 portant réorganisation du service de la justice dans les colonies relevant du Gouvernement général de l'AOF* (Gorée: Imprimerie du Gouvernement-général), 60-61.
14 Alice Conklin (1997), *A Mission to Civilize: The Republican Idea of Empire in France and West Africa, 1895-1930* (Stanford: Stanford University Press), 89-90.
15 Rapport au Président de la République, suivi de decret portant réorganisation du service de la justice dans les colonies relevant du gouvernement général de l'Afrique occidentale', *Journal officiel de la République Française*, 24 November 1903.
16 Johnson, *Emergence of Black Politics*; Dominque Sarr and Richard Roberts (1991), 'The Jurisdiction of Muslim Tribunals in Colonial Senegal, 1857-1932', in *Law in Colonial Africa*, eds. Kristin Mann and Richard Roberts (Portsmouth: Heinemann).
17 Rebecca Shereikis (2001), 'From Law to Custom: The Shifting Legal Status of Muslim *originaires* in Kayes and Medine, 1903-13', *Journal of African History*, 43 (2).
18 Gov-Gen Roume to lieut-govs, 4 Mar 1904, Dakar, ANS-AOF M 79. These instructions were used verbatim in Roume, *Justice indigène.*
19 Roume, *Justice indigène*, 29-30.
20 See Maurice Delafosse (1912), *Haut-Sénégal-Niger* (Paris: Emile Larose, reissued 1972), 3 vols, see vol. 3 in particular.

21 Rapport sur le fonctionnement de la justice indigène, Bamako, 3rd Quarter 1906 Archives Nationales, Mali (hereafter ANM) 2 M 54.
22 Rapport sure le fonctionnement des tribunaux indigènes, Gumbu, 4th Quarter 1906, ANM 2 M 65.
23 Rapport sur le fonctionnement de la justice indigène, Mopti, 1st Quarter 1911, ANM 2 M 79.
24 For more information, see Roberts, *Litigants and Households,* chapter 5.
25 Judith Tucker (1998), *In the House of the Law: Gender and Islamic Law in Ottoman Syria and Palestine* (Berkeley: University of California Press), 42-46, 52-67.
26 Susan Hirsch (1998), *Pronouncing and Persevering: Gender and the Discourses of Disputing in an Islamic Court* (Chicago: University of Chicago Press), chapter 4.
27 Doire Ocume v. Fatoumata Sy, 16 Mar 1909, Tribunal de Province, Kita.
28 For example, Sira Toure v. Saidou Tall, 9 Sept 1912, Tribunal de Province, Kita.
29 Daidaba Ousman v. Amadou Diallo, 3 Jan 1911 and Awa Gamo v. Amadou Nso, 9 Apr 1911, Tribunal de Province, Mopti.
30 Fatouma Baitatou v. Ousma Diapato, 31 July 1911, Tribunal de Province, Mopti.
31 Malado Diabite v. Mamadou Soumare, 1 July 1909, Tribunal de Province, Mopti.
32 Maliki family law approves divorce for women whose husbands have abandoned them, although the duration of abandonment varies considerably. See Jamal J. Nasir (1990), *The Status of Women under Islamic Law and Modern Islamic Legislation* (London: Graham and Trotman) and Lydon's chapter in this volume. Maliki family law approves divorce for women whose husbands have abandoned them, although the duration of abandonment varies considerably.
33 David William Cohen (1989), 'Pim's Doorway', in *The Worlds of Social History*, ed. Olivier Zunz (Chapel Hill: University of North Carolina Press), 112-146.
34 Rapport sur le fonctionnement des tribunaux indigènes, Segu, 30 Apr. 1905, ANM 2 M 92.
35 Rapport sure le fonctionnement des tribunaux indigènes, Segu, 2nd Quarter 1905, ANM 2 M 92.
36 Petition to the Lt-gov, Kouluba, 12 May 1913, ANM 2 M 236, quoted in Shereikis, 'From law to custom', 278-79.
37 Rapport sur le fonctionnement des tribunaux indigènes, Segu, 2nd Quarter 1905, ANM 2 M 92.
38 Fredrik Barth, (ed.) (1969), *Ethnic Groups and Boundaries: The Social Organization of Cultural Difference* (Boston: Little Brown); David Conrad and Barbara Frank (1995), eds., *Status and Identity in West Africa: The Nyamkalaw of Mande* (Bloomington: Indiana University Press); Richard Roberts (1988), 'The End of Slavery in the French Soudan', in *The End of Slavery in Africa,* eds. Suzanne Miers and Richard Roberts (Madison: University of Wisconsin Press).
39 Charles Correnson, De l'organisation de la justice et des moeurs chez les populations de la région de Segu, Segu, 5 Sept 1907, ANM 1 D 55-3.
40 David Robinson (1992), 'Ethnography and Customary Law in Senegal', *Cahiers d'Études Africaines* 32, no. 2: 221-237, 234-235. In 1878, on the eve of the

conquest of the French Soudan, N. Seignette, an official with the Algerian bureaux Arabes, compiled an short version of Maliki law, *Code musulmane, statut reel* (Constantine: Impr. L. Arnolet; Alger: Jourdan; Paris: Challamel aîné, 1878), which probably appeared in the libraries of district officers throughout the region.

41 J.N.D. Anderson (1965), 'The Adaptation of Muslim Law in Sub-Saharan Africa', in *African Law: Adaptation and Development,* ed. by Hilda Kuper and Leo Kuper (Berkeley: University of California Press), 153.

42 Perignon, 'Généralités sur le Haut Sénégal et du Moyen Niger', Segu, 1900, ANS-AOF 1 G 248.

43 Delafosse, *Haut-Sénégal-Niger*, III, 31-32.

44 For instance, D. B. Cruise O'Brien (1971), *The Mourides of Senegal: The Political and Economic Organization of an Islamic Brotherhood* (Oxford: Clarendon Press); Robinson, *Paths;* Christopher Harrison (1988), *France and Islam in West Africa, 1860-1960* (Cambridge: Cambridge University Press).

45 Charles Correnson, De l'organisation de la justice et des moeurs chez les populations de la région de Segu, Segu, 5 Sept 1907, ANM 1 D 55-3.

46 Rapport politique, Segu, Oct 1906, ANM 1 E 72.

47 Lt-gov Clozel, letter to Gov-gen, Bamako, 29 Apr 1911, ANS-AOF M 83.

48 De la Brestesche, letter to lt-gov, Segu, 6 Dec 1906, ANM 2 M 34. On influencing outcomes of court cases, see the wonderful novel by Amadou Hampaté Ba (1999), *The Fortunes of Wangrin,* translated by Aina Pavolini Taylor (Bloomington: University of Indiana Press).

49 Correnson, De l'organisation de la justice et des moeurs, Segu, 5 Sept 1907, ANM 1 D 55-3.

# 3 Conflicts and Tensions in the Appointment of Chief Kadhi in Colonial Kenya 1898–1960s

**Hassan Mwakimako**

This chapter attempts to understand the position of Chief Kadhi in the Muslim communities of Kenya through an examination of the conflict and tensions surrounding the appointments to the post of Shaykh-al-Islam and in its revised form, the Chief Kadhi. This chapter makes no claim to a bold exposé of what the kadhi is all about, where it originated, and what directions it ought to take. Rather, I contextualize a chronology of *'ulama* appointed to a post created by British colonial powers, and explain its implication on the problem of leadership provided by religious elites. I take a critical perspective on colonial agency in the evolution of Muslim institutions in Kenya.

I want to begin with the point that colonialism is itself a word deeply imbued with political meanings, both unimaginable and difficult to discuss without reference to the power relationship it constitutes. In this case, I concur with Homi Bhabha that while colonialism takes its power in the name of history, it repeatedly exercises its authority through the drama deployed by practitioners and interlocutors of law, culture or custom appearing in historically and culturally specific milieus.[1] Its occurrence in the Muslim societies of Kenya left a continuing legacy that defines authority and power in Muslims' everyday lives. Amongst Muslims in Kenya, the colonial experience was both historically and culturally specific. Its ways of knowing and ordering experience, that is, its power relations are inherently different for the colonizer and the colonized. In the Muslims' colonial world, power relations between the indigenous people and the colonizers were usually

amplified in both confrontational and accommodating modes. In Kenya, the Muslim elite played a crucial role in relation to the hegemony of colonial power. Colonialism in Kenya was reinforced not only by modernization of the infrastructure of Kenyan society, but included the mental services of elites, including religious ones. Undoubtedly, hegemony and dominance, two key elements in the mechanism of colonialism, were established and secured by coercion and consent in Muslim areas. This echoes the notion that for hegemony to be complete, dominance must be secured by overtly peaceful means.[2] In other words, colonial projects achieved success in societies because of the active participation of local communities, although the balance between coercion and consent in the exercise of hegemony varied historically. Generally, the weaker the engineering of consent, the stronger the repression by the state had to be.[3] At the heart of British colonial power was how to negotiate the relationship between the interlocutors of religious knowledge and authority in Muslim society.

## *Precolonial Authority of the ʿulama*

In pre-British colonial rule, Muslims recognized the authority of *ʻulama* on the basis of their influence within the boundaries of *miji* (locales), racial and ethnic groups. During the reign of the sultans of Zanzibar, Muslim courts were established in the coastal towns. Kadhis who were appointed were more or less local elders representing their communities in the Sultan's court, rather than legal practitioners executing rational judgments. The onset of British rule in 1895 initiated fundamental changes in the organization of Muslim social life. Protectorate agreements recognized the authority of Islamic judges (qadi or kadhi) and guaranteed the continuation of Muslim codes of law.[4] In implementing the agreements, British authority entrenched a process of change with far-reaching consequences.

Amongst the changes initiated by colonial rule was the establishing of bureaucratic posts for *ʻulama* as part of the process of streamlining the way in which the Muslim elite operated in a colonial bureaucracy. Consequently, contests over positions emerged amongst the *ʻulama*. While the *ʻulama* vied for positions in competition with others, communities supported appointments of individuals from their towns and racial communities, thus further exacerbating ethnic and racial tensions. Whereas during the pre-colonial

era, differentiated, non-homogenous Muslim communities were not obligated to accept or recognize the influence and authority of *'ulama* from 'outside' their communities, under colonial rule, the most important consideration in deciding appointments to official posts for *'ulama* included one's ethnic affiliation together with proven loyalty to the colonial state.

Through tracing the careers of the Shaykh-al-Islam and the Chief Kadhi, and a chronological review of the appointments of *'ulama* to fill these positions, this chapter argues that racial feuds, ethnic challenges, loyalty to colonial policy, and an ability to bridge the divide between Muslims and the colonial state were important considerations for appointment of *'ulama* as Kadhis. The post of Shaykh-al-Islam was established in conformity with the 'Protectorate Agreements', but colonial officers sought unilaterally to abolish it. Although colonial officials failed to abolish the office, their efforts led to a gradual weakening of the authority and influence of its holders. I argue that colonial officials maintained the position of Shaykh-al-Islam and its later form as Chief Kadhi as a means to appease Muslims, despite the persistent attempts to abolish these positions.

The most appropriate starting date for a study of the colonial period is 1898. In this year, Sir Arthur Hardinge, the British Consul General, introduced changes with far-reaching consequences. Hardinge thought of ways to streamline and organize the *'ulama* while meeting the condition of the 'Protectorate Agreements'. To ensure that the shari'a was applied, the 1898 Mohammedan Marriage Divorce and Succession Ordinance was promulgated. This ordinance achieved two goals. First, it created the Shari'a Courts with authority vested in the 'ulama. Second, it established a hierarchy of offices for Kadhis who were incorporated into a state bureaucracy.[5]

## *The Shaykh-al-Islam: Sharif Abdulrahman bin Ahmad Saggaf 1844-1922*

In any study of Islam in Africa, the question of how Muslims organize themselves in a socio-political environment is a crucial one. The issue is one that questions the social and political history of Muslim communities and their evolution through various phases. On the coast of east Africa and in other parts of the Muslim world, the *'ulama* are the most visible interlocutors in influencing the social lives of Muslim people. They are imams or khatibs in

mosques where they perform ritual duties. During the colonial period in East Africa, the *'ulama* also gained prominence when they were appointed to serve in various official positions as in the colonial court structures as Kadhis, the Shaykh-al-Islam and Chief Kadhi.

The first colonial era Shaykh-al-Islam was Sharif Abdulrahman bin Ahmad Saggaf (1844-1922). Born in Siyu in the Lamu Archipelago, Sharif Abdulrahman bin Ahmed Saggaf, popularly known as Mwenye Abudi, was unexpectedly appointed to the top echelons of Muslim elite leadership. His appointment to serve Muslims on the coast of Kenya was unexpected, since the British discouraged the appointment of local *'ulama*. They had hoped that the first Shaykh-al-Islam would be from Egypt, but financial considerations prevented such an appointment.[6] When a local candidate was appointed, it was to be only temporary until a permanent one was found. If the government had appointed an Egyptian as Shaykh-al-Islam, perhaps the debates and conflicts about the legitimacy of the office holders would have been different from what occurred. However, a local person was appointed, and the community responded to this appointment.

The position of Shaykh-al-Islam was tenable in Mombasa. Its *wamiji* (townspeople) had expected their *'ulama* to be appointed, and they were not pleased with the appointment of Sharif Abdulrahman. The British may have anticipated a challenge; this may have been another reason for declaring the appointment of Sharif Abdulrahman as a temporary measure. Nevertheless, the appointment resulted in a vociferous debate. He was a resident of Lamu with no knowledge of the prevailing intense communal rivalry over Islamic learning and leadership that existed in Mombasa.

Sharif Abdulrahman was probably chosen because of his experience, having served Sultan Sayyid Barghash as Kadhi of Siyu.[7] In fact, this action meant that Sharif Abdulrahman was a supporter of the Sultanate which most residents of Mombasa opposed. In early 1902, Swahili residents protested Sharif Abdulrahman's continued role as Shaykh-al-Islam, at the expense of Swahili *'ulama,* notably from the Thelatha Taifa and Tisa Taifa Swahili people. For example, the Mazrui were initially in favor of Shaykh Suleman bin Ali bin Khamis Mazrui (1867-1937)[8], while Swahili patriots of the Thelatha Taifa and Tisa Taifa communities supported one of their *mwanachuoni mkubwa* (great scholars), Shaykh Ahmad bin Mohammad Matano, whose *madrasa* (Islamic school) was situated at the Mji wa kale quarters of Mombasa.[9] However, Shaykh Abdulrahman possessed personal

qualities, like a peaceful character and disposition and an attitude that shunned controversy. This won him accolades from the government and the sympathy of the Mazrui, who allowed him to deliver *darsa* (mosque lectures) at Shaykh Mbaruk Mosque at the Makadara grounds in Mombasa.

The establishment of the position of the Shaykh-al-Islam and the subsequent first appointment perpetuated communal strife and competition over kadhiship, which already had a long history. When Hardinge established the position, he was influenced by his experiences servicing the British colonial service in various Arab countries. He failed, however, to set up guidelines for how the position would fit into the colonial bureaucracy. In fact, there were no clear guidelines for the post of Shaykh-al-Islam during the first decade of its existence. It was a period of trial and errors. Sometimes the post depended on the whimsical attitudes of senior officers in the colonial state. It is not clear whether colonial authorities favored the existence of Muslim elites in the bureaucracy as a constitutional arrangement or as a means to appease the disgruntled Muslim population. During his tenure, Sharif Abdulrahman's position was rather ambiguous. He was a *qadi* (a judge) and not a *mufti* (jurist). As a judge, he was expected to implement the shari'a in the kadhi court, thus he acted as a state functionary. However, the Muslim population expected much more than this stipulated role and expected the Shaykh-al-Islam to use his authority as the titular head of the community, and not act merely as a judge. He was also expected to guide Muslims on religious and political matters.

Defining the proper role of the Shaykh-al-Islam was a dilemma that Muslims and colonial officers had to grapple with from the time the post was established. Was Sharif Abdulrahman a judge or an administrator? Judge Bonhar Carter was of the opinion that the Shaykh-al-Islam was a judicial officer, while the Provincial Commissioner, upon realising the important role of the Shaykh-al-Islam amongst the Muslim populations, wanted to patronize Shaykh Abdulrahman and insisted that the *alim* was an administrator.[10] While government officers argued over what was Sharif Abdulrahman's role in colonial society, they were equally concerned that the position had almost developed into a parallel authority.

The undefined role of the Shaykh-al-Islam worried some colonial officers, who raised concerns that he was such an influential officer and sat as an assessor in the Supreme Court, but was not under the supervision of either the judiciary or the administrative branches of government. Questions were

asked as to the desirability of having a non-European member of the administration holding an office independent of the European executive.[11] These debates over the role of the Shaykh-al-Islam led in 1912 to the confinement of Shaykh-al-Islam to judicial functions.[12] Nonetheless, Sharif Abdulrahman became famous, and his reputation was based on piety, moral righteousness and a Sufi-like denial of wealth, pride, and worldly concerns.

When Sharif Abdulrahman reached the age of retirement, his productivity was questioned, but he was not relieved of his position, nor was the post abolished. Rather, he retired with a pension. On 20 May 1922 the venerated Shaykh-al-Islam passed away. Colonial officials informed Winston Churchill,[13] who in turn authorized a condolence dispatch to the family expressing his sympathy with the family and the Muslim community in their bereavement. Sharif Abdulrahman's career illustrates several matters pertaining to the relationship between Muslims and the colonial state, as well as among diversified Muslim communities. It laid the foundations on which to review the perspectives on Muslim and colonial state relationships, future reactions to changes concerning the position, and changing Muslim views on the role of Shaykh-al-Islam.

## *Another Chief Kadhi from Lamu: Shaykh Mohammad bin Omar Bakore ca. 1932*

The death of Sharif Abdulrahman necessitated a search for his replacement. Debates about whether to abolish the position were halted, and instead gradual changes in the office were implemented. For example, the next occupant was not given the more respectful title of Shaykh-al-Islam, but was rather termed the Chief Kadhi. What seemed to be a mere change in the nomenclature ended up being a conscious effort by the government to weaken the influence of the Chief Kadhi.

An interesting development ensued in the search for a replacement for Shaykh Abdulrahmanbin Ahmad Saggaf. Mombasa was reputed to have amongst its residents some influential and knowledgeable *'ulama*. Senior administrator Farsy, for example, noted that Shaykh Suleman bin Ali bin Kassim bin Said Mazrui (1867-1932) was one of the most erudite *alims* in Mombasa. He was passed over when Sharif Abdulrahman was appointed. I argue that Shaykh Suleman expected to be appointed, since the *wamiji* of Mom-

basa had earlier expressed dissatisfaction with the continued presence of Shaykh Abdulrahman bin Ahmad Saggaf. However, when J. W. Barth consulted with other leaders in the government, the Mazrui were completely disregarded. Liwali Ali bin Salim was of the opinion that there was hardly any local expertise to be relied upon to occupy the position.[14] In my research in Mombasa, I was informed that Liwali Ali bin Salim had purposely attempted to bypass the appointment of a Mazrui kinsman, since the family had considerable political clout in Mombasa. If the government was worried about the position of Chief Kadhi developing into a parallel institution of Muslim authority, an appointment of a Mazrui kinsman could not be made. These worries inevitably ruled out the possible appointment of Shaykh Suleman or his equally capable nephew, Shaykh-al-Amin bin Ali Nafi al-Mazrui (1891-1947).

With the Mazrui ruled out for the second time, non-Mazrui candidates Shaykh Mohammed bin Omar Bakore and Shaykh Hamed bin Mohammed were proposed. The latter was a seasoned and experienced kadhi who had served in Lamu since 1902, while the former seemed to have qualified on the basis of his experience as a clerk or assistant to the Shaykh-al-Islam. The senior commissioner favored Shaykh Mohammed bin Omar as a 'most straightforward, and in every way a reliable Arab official'.[15] The other competitor, Shaykh Hamed bin Mohammed, was a protégé of Liwali Ali bin Salim, who took the opportunity to recommend him as 'an Arab of good family who had served faithfully, with diligence as a clerk in the High Court'.[16] Hamed was not a kadhi, nor had he held the position at any moment in his career; his knowledge of the shari'a was based on the claim that he had been spending his spare time studying the shari'a with the late Shaykh-al-Islam.[17] Both candidates were described as suitable for the post because they were 'Arabs above suspicion'.[18] The colonial state started to develop a bias towards Arabs, whom it appointed exclusively as kadhi at the expense of other Muslim groups. This racial preference for loyal appointments was fundamental in the second round of conflicts over the appointment of the Chief Kadhi. The Mazrui were Arabs, but they did not yet fit into the realm of reliable Arabs for high-level appointments. Liwali Ali bin Salim had already made sure that they would only remain as kadhi in towns, but could not be elevated to the post of Chief Kadhi. Amongst other Muslim groups in Mombasa, the Thelatha Taifa demand was disqualified on the basis of its non-Arab status, thereby disqualifying Shaykh Ahmad Mohammed Matano. Once such

protagonists were out of the race, a decision had to be reached between Shaykh Mohammed bin Omar and Hamed bin Mohammed.

In order to determine the most suitable Arab candidate, both candidates had to write a qualifying exam. In line with a long tradition of scholarly collaborations between Muslims of the Eastern Coast of Africa, the eminent Comorian alim who had taken residence in Zanzibar, Sayyid Ahmad bin Abi Bakr bin Sumayt (1861-1925), was asked to prepare the examination for the two candidates.[19] Between the two candidates, Shaykh Mohammed bin Omar fared better, and he was duly appointed. Hamed bin Mohammed was distraught over Omar's appointment, and he declined the post of Kadhi of Lamu left vacant by Shaykh Mohammed bin Omar.[20]

Shaykh Mohammed bin Omar, the first person to hold the position of Chief Kadhi after the changes, is an enigma. He was not revered amongst the *'ulama* of the Coast of Kenya. His name does not appear in other studies on prominent *'ulama,* and his appointment raises more questions than answers. Did his predecessor recommend him because they both hailed from Siyu? There is a strong likelihood that this happened. When he was appointed, the people of Lame acknowledged the honor bestowed on their town for the second time when Shaykh Mohammed bin Omar had replaced Shaykh Abdurrahman bin Ahmad as kadhi for Lamu. Their accolades to the government expressed their pride at the appointment of another Lamuian. The people of Lamu praised Shaykh Mohammed bin Omar as an honest kadhi, who never judged impartially against the poor or the illiterate, but judged equally and rightly according to the law.[21] The bottom line was that Lamuians were proud of having surpassed the *wamiji* of Mombasa, with the second appointment of someone from Lamu to replace Sharif Abdulrahman.

However, the position to which Shaykh Mohammed bin Omar was appointed was going through changes that did not meet his expectations of the post. The changes were not mere changes in the nomenclature, but a systematic attempt to erode the influence of the post in the community. The changes clarified that the Chief Kadhi was but a mere judge, and one amongst many other state functionaries in the judiciary. His authority was curtailed and confined to personal matters of marriage, divorce, and succession. Against the expectations of Muslim people, the Chief Kadhi could not comment on matters beyond his court duties.

Among these changes were decreases in salary and the withdrawal of housing benefits. The government complained that the office of the Chief

Kahdi was unsustainable economically given the low case load, but Shaykh Mohammed bin Omar felt slighted over the reduction of his emolument; even more so when the government argued that emolument granted to Shaykh Abdulrahman bin Ahmad was unique to him. Shaykh Mohammed bin Omar argued that since he was performing similar duties to those the former Shaykh-al-Islam performed, he deserved an equitable consideration. There was no reason for the government to pay him less, but by doing so the act illustrated the government's wish to prove that the position was not significant anymore.

Although some European officials were sympathetic towards Shaykh Mohamed's plight, animosity and an uncompromising relationship had developed between the government and its employee. These officials were concerned that the government was unnecessarily antagonizing a leader on whom they should depend to win Muslim confidence. Was the government aware that the Chief Kadhi could influence antagonism between the state and Muslim faithful? Such officials did not concur with the treatment meted on the Chief Kadhi, who was already held with high esteem, and an elderly gentleman of deservedly high prestige.[22] T.D. Maxwell, the Acting Chief Justice, was particularly concerned by the attitude of the government towards Shaykh Mohammed bin Omar, especially since the Chief Kadhi had proved his effectiveness in assisting the government in its confrontation with younger, hot-headed Mohammedans in 1923.[23] T.D. Maxwell wanted the government to reconsider paying the small price to maintain the dignity and support of a distinguished servant whose usefulness was beyond question.[24] With T.D. Maxwell's influence, Shaykh Mohammed bin Omar's remuneration was improved, but his authority remained weakened. He was only the Chief Kadhi and not the Grand Shaykh of Islam. Consequently, Shaykh Mohammed bin Omar was not pleased with his position. He constantly argued over mistreatment by the government because such actions were responsible for loss of his *heshima* (respect) in the community.

## *Shaykh Suleman bin Ali bin Khamis bin Sayyid al-Mazrui 1867-1937: The Re-Emergence of Mazrui 'ulama*

Despite its reduced role, the Chief Kadhi was still a popular position, and *'ulama* competed for the appointment. The government had set its own stan-

dards and preferences on the basis of the significance of the position. It was important that appointees were loyal and sympathetic to government policies. Inter-communal rivalry also meant that communities would oppose the appointment of an individual from another community, as illustrated by the Swahili in Mombasa's opposition to the appointment of Sharif Abdulrahman bin Ahmad Saggaf. The support and boasting expressed by the people of Lamu when Shaykh Mohammed bin Omar succeeded Sharif Abdulrahman further expressed the relevance of communal bonds as a consideration for the post. The government was also wary of appointing people whose families had a tradition of opposing European rule in their communities. The fact that the Mazrui were opposed to European rule in Mombasa initially weakened the chances of one of its *'ulama* being considered for Shaykh-al-Islam and Chief Kadhi. Top posts had eluded the Mazrui *'ulama,* though some of their highly knowledgeable members maintained lower positions in areas where they exercised considerable influence, like Takaungu.[25] Those that had junior postings waited to spring into the major ones whenever an opportunity availed itself.

In fact, the Mazrui never failed to take advantage of a situation if it improved the chances of one of them being appointed Chief Kadhi. In 1924, such an opportunity arose when Shaykh Mohammed bin Omar asked for accumulated leave after working for a couple of years with none. Before Shaykh Mohammed's leave was approved, someone had to be found to replace him during his absence. Liwali Ali bin Salim suggested Hamed bin Mohammed for the temporary appointment. This gentleman had unsuccessfully competed with Shaykh Mohammed bin Omar for Chief Kadhiship. This time Hamed could not assume the position, since he was already serving as an 'unofficial member' of the Legislative Council. Liwali Ali bin Salim also thought that with the assistance of a competent clerk he could also sit in for the Chief Kadhi, but possible conflicts of interest ruled him out. Acting as Chief Kadhi meant he would hold two official positions concurrently. While other individuals were being considered, there was no mention of any Mazrui *'ulama* for the temporary appointment. It was only when all the possible appointees were ruled ineligible that Shaykh Suleman bin Ali, then the only Mazrui in the hierarchy of kadhiship was considered. As kadhi of Mombasa, Shaykh Suleman was appointed ad hoc Chief Kadhi, and the Mazrui began to gradually assert their authority.[26] According to Mazrui thinking, Shaykh Suleman bin Ali was within his intellectual obligations to recom-

mend his nephew, and later his son-in-law, Shaykh Al-Amin bin Ali b. Nafi al-Mazrui to succeed him, albeit on a temporary basis, as kadhi of Mombasa. Within a short time, the Mazrui fortunes began to rise again as they entrenched themselves into official kadhiship.

The Mazrui were not minnows in kadhiship or strangers to leadership politics in Mombasa. During the reign of the Sultanate of Zanzibar, the Mazrui were a prominent community. They had been appointed as kadhi, liwali and mudir. Shaykh Ali bin Abdalla bin Nafi al-Mazrui (1825-1894) was one of the earliest and most visionary of pre-colonial Mazrui Kadhi. He was widely traveled and patronized prominent *'ulama* in the Middle East, especially the Hijaz. He also held the position of kadhi under various Sultans. Shaykh Ali bin Abdalla pioneered pre-colonial Mazrui scholarship while his progeny sustained its tradition in colonial and post-colonial Kenya. Thus, even though they were passed over in the first two appointments during the early colonial period, all that was required was a little patience, since their fortunes began to rise during the Chief Kadhiship of Shaykh Mohammed bin Omar.

During his Chief Kadhiship, Shaykh Mohammed bin Omar did not particularly cultivate a cordial working relationship with the government. He was disillusioned and complained about poor government treatment. In 1926, the government awarded some individuals medals of honor in recognition for their services during World War I, but the Chief Kadhi was not amongst the recipients. He thought that he deserved the honor after serving the colonial state as an *askari*. He wrote a letter to the government stating that he had observed that several persons were awarded war medals, and requested that his honor be respected and that he be awarded a medal for his services during the war.[27] This demand had underlying significance for the role of *'ulama* during the war. Shaykh Mohammed revealed that the *'ulama* did not just teach or give mosque lectures; they also participated in censoring Swahili, Gujarat, and Urdu mail that passed through the postal services.[28] The kadhi also claimed that he had replaced the kadhi of Lamu in 1908, and worked for free, since that government did not have adequate funds. Shaykh Mohammed was a frustrated person. When he could no longer cope, he contemplated resigning from the post of Chief Kadhi. In 1932, Shaykh Mohammed tendered his resignation, having served the colonial state for three decades.[29]

Whenever the position of Chief Kadhi became vacant, the government sought to abolish the position altogether, or include new changes to either weaken the authority of the next holder or curtail his influence on society. In the 1930s, when Shaykh Mohammed bin Omar contemplated retiring, the government revived its intentions to abolish the post by arguing that the workload was not enough to justify the post of Chief Kadhi. The fact that the Chief Kadhi was an appellate position in the court structure and that Shaykh Mohammed bin Omar had heard thirteen cases during the period 1930-1931, which was adequate by any standard, illustrated that the workload argument was merely a ruse. Furthermore, the Chief Kadhi did not simply perform legalistic duties; he was acknowledged as an important officer who was consulted by most administrators on many aspects of the Islamic community. The constant efforts to abolish the post were therefore inexcusable.[30]

Thus, when the Chief Kadhi resigned and before a decision to abolish the post was made, Muslims and some government officers began to influence the next choice. C. W. Hobley, the Provincial Commissioner for the Coast, revived hopes for the Mazrui kinsmen. Hobley recommended Shaykh Suleman bin Ali, citing his successful tenure as kadhi of Mombasa, his leadership abilities, and the considerable command of *heshima* (respect or honor) in the community.[31] Shaykh Suleman also served as ad hoc Chief Kadhi on a number of occasions. Shaykh al-Amin bin Ali also harbored ambitions to be Chief Kadhi, thereby continuing his late father's tradition. He did not hesitate to write to the government requesting to be considered for the post.[32]

Colonial officials were still divided. C. W. Hobley supported the appointment of Shaykh Suleman as Chief Kadhi, but notions to abolish the post were not resolved yet. Murray Jack, the Registrar of the Supreme Court, was against the appointment of Shaykh Suleman and favored abolishing the post. He argued that Shaykh Suleman was more effective as Kadhi of Mombasa, where there were more disputes for him to handle than at the Chief Kadhi's office. He was concerned that Shaykh Suleman's departure would adversely impact the effectiveness and smooth functioning of the Kadhi Court in Mombasa.[33] Despite the misgivings and a strong lobby to abolish Chief Kadhiship, the post survived for the second time. More significantly, it propelled a Mazrui kinsman to the helm of Islamic leadership, but not before additional changes further weakened the position.

In late 1932, Shaykh Suleman bin Ali bin Khamis was appointed the first Mazrui Chief Kadhi in the colonial era. The Chief Kahdi's position, however, had lost its status as a pensionable appointment.[34] Shaykh Suleman held the position of Chief Kadhi from 1932-1937. His tenure represented the beginning of Mazrui power in the colonial state. There was grumbling in the Muslim community over the inevitable rise of the Mazrui. Upon his retirement, Shaykh Suleman favored and supported the appointment of his nephew and son-in-law, Shaykh Al-Amin bin Ali bin Nafi al-Mazrui (1891-1947) to Kadhiship.

The most ardent critics of the Mazrui were the Swahili, especially the Thelatha Taifa and Tisa Taifa. Like the Mazrui, these Swahili communities had also been passed over when the two *'ulama* from Lamu were appointed. The Thelatha Taifa and Tisa Taifa communities thought they would split the positions of kadhiship with the Mazrui. Their plan was that when a Mazrui was appointed to Chief Kadhiship, then colonial officials would appoint other *wamiji,* preferably non-Mazrui *'ulama,* especially from amongst the Thelatha Taifa and Tisa Taifa communities of Mombasa, to the lower position of Kahdi of Mombasa. The Mazrui rejected the wishes of the Swahili, and they sought both the Kadhiship of Mombasa and the Chief Kadhiship. Indeed, when Shaykh Suleman passed away in 1937, another Mazrui, Shaykh Al-Amin bin Ali bin Nafi al-Mazrui (1891-1947), was chosen.

## *Shaykh Al-Amin bin Ali bin Nafi al-Mazrui*

Perhaps the most popular and well-documented kadhi during colonial Kenya was Shaykh Al-Amin bin Ali bin Nafi al-Mazrui. Studies on the Shaykh reveal that he was largely associated with directing, advancing, and dominating the Islamic intellectual tradition and Islamic modernism in Kenya.[35] There was no doubt that Shaykh Al-Amin had patronized some of the most prominent and well respected *'ulama,* including his father and his father's contemporaries like Sayyid Ahmad bin Sumayt and Shaykh Abdalla Bakatir. With an insatiable search for knowledge, Shaykh Al-Amin acquainted himself with the ideas of Ibn Taymiyya and Muhammad Abdu to sharpen his already critical contributions to Islamic social discourses in Kenya. Shaykh Al-Amin's reign as kadhi can be regarded as the most eventful period in the history of Chief Kadhiship. Inducted into an official government position in 1910 as a clerk to the kadhi of Mombasa, he rose through the ranks to act-

ing kadhi, full-fledged kadhi, and then the Chief Kadhi. During his rise, he interrupted his services to the government when he briefly resigned, from 1919 to 1921, to teach Arabic at the Arab school in Mombasa. He returned to kadhiship and government service in 1924. His illustrious career can lead to the conclusion that his appointment was conducted smoothly and was unanimously accepted in the community. However, Shaykh Al-Amin's kadhiship was strongly opposed, especially since it was associated directly with claims and accusation of favoritism and patronage by the Mazrui. B.G. Martin argues that being the son of an *alim* is very important for attaining authority and recognition among the *'ulama*. This point is particularly true among the Mazruis.[36]

Conflict flared again when in 1932 Shaykh Suleman bin Ali was appointed Chief Kadhi, and he supported Shaykh Al-Amin bin Ali for the vacant post of Kadhi for Mombasa. The District Commissioner in Mombasa thought the support for Shaykh Al-Amin was unanimous.[37] However, the Thelatha Taifa and Tisa Taifa were opposed to the possibility of two Mazrui kinsmen holding both the post of Chief Kadhi and kadhi of Mombasa. They suspected the Mazrui were attempting to monopolize the kadhiship in Mombasa. Under the auspices of the Afro-Asian Association (AAA), they demanded clarifications. They posed questions to the government, demanding to know if the posts of kadhiship were hereditary. Relations between the Mazrui and other communities in Mombasa were not always peaceful. The Thelatha Taifa and Tisa Taifa claimed that the Mazrui lured one of their leaders, Stambul, into Fort Jesus, murdered him, and left him to decompose without a proper Muslim burial. Mombasa poets have also immortalized his death. The historical animosity between the Mazrui and the Thelatha Taifa and Tisa Taifa prevailed, and continues to be reenacted in important political affairs of the Mombasa polity. The opposition that the Mazrui meet from other communities should therefore be viewed with this history in mind.

However, the Thelatha Taifa and Tisa Taifa were also concerned over possible miscarriages of justice because the Chief Kadhi was expected to review judgments emanating from a lower kadhi's court, where his son-in-law, student, and nephew was the judge. In order to avoid the conflicts of interest in the course of the two Mazrui kadhis' work, the AAA proposed that other non-Mazrui candidates be considered for appointment. While the AAA opposed the appointment of Shaykh Al-Amin bin Ali on the basis of ethnic favoritism on the part of Shaykh Suleman, they could also be accused of simi-

lar attitudes. While proposing alternative candidates, the AAA supported candidates like Shaykh Muhammad Ali Bashir, Ali Mwinzagu, Shaib bin Shallo, Ali bin Salim Darani Khamis bin Hussein, Khamis bin Shafy and Said bin Ahmed. All these were members of the Thelatha Taifa and Tisa Taifa ethnic groups and ardent supporters of the AAA. Other political reasons were also advanced to oppose the appointment of Shaykh Al-Amin bin Ali. In 1932, three elders and active members of AAA from the Thelatha Taifa and Tisa Taifa — Shaykh Ali Mohammed Muses, Ahmed bin Matano and Mohammad bin Ali Bashir — averred that Shaykh Al-Amin bin Ali was not suitable because of his political involvement as editor and owner of a controversial bi-lingual weekly, *al-Islah*.[38]

However, the Mazrui continued to support the appointment of their kinsmen whenever the opportunity arose. In 1934, Shaykh al-Amin was appointed as Acting Chief Kadhi. He infuriated other Muslims when he appointed his relative, Shaykh Maamun bin Suleman, as Acting Kadhi in Mombasa. Although these were acting positions, the Thelatha Taifa and Tisa Taifa argued that the Mazrui were practicing nepotism in the appointment of the kadhi. According to some elders, such as Shaykh Mohammed bin Abdulkarim, Sudi bin Ali, Ali bin Mohammed, Ahmed bin Tahir and Ahmed bin Matano, Shaykh Maamun lacked sufficient knowledge for the post but was appointed because he was a Mazrui kinsman.[39]

In 1937, Shaykh Al-Amin was elevated to Chief Kadhiship, resulting in further conflicts among the Muslim population. The conflict was triggered by Shaykh Al-Amin's apparent support for the son of his mentor and relative, Shaykh Maamun bin Suleman Mazrui, to be appointed kadhi once he was appointed Chief Kadhi.[40] This time the *'ulama* of the Thelatha Taifa and Tisa Taifa petitioned colonial authorities to be considered for appointment. These petitioners included Khamis Shafy and Ali Mwizagu. The government's response was that 'there were already several persons eligible for the post of kadhi'.[41] This response seems to have infuriated Khamis Shafy, who wrote back stating that it was quite clear to him that other people would also be interested in the position and, therefore, he anticipated that the government would make the position competitive, and he wished to compete with the rest.[42] Shaykh Mohammed bin Abdalla Rudain and Shaykh Sayyid bin Ahmedwere also attracted to the Kadhiship.[43] Though the Thelatha Taifa and Tisa Taifa argued against the apparent intentions of the Mazrui to turn kadhiship into a hereditary post, they were unable to prevent the appoint-

ment of any Mazrui candidates. Shaykh Maamun bin Suleman was made the Kadhi of Mombasa and Shaykh Al-Amin bin Ali bin Nafi al-Mazrui continued to be the Chief Kadhi from 1937 -1947, until he died in Mombasa. Shaykh Al-Amin bin Ali al-Mazrui was one of the greatest Muslim scholars along the coast of eastern Africa. He contributed considerably to Islamic intellectual life, but the study of his career is incomplete if the role played by racial identity and *miji* rivalry for the posts he held is omitted.

## *Another Challenge from Lamu*

In 1947, the death of Shaykh Al-Amin rekindled another intriguing search for his successor. This time, conflicts pitted the Mazrui against the *'ulama* of Lamu. Already the Swahili of Mombasa had expressed resentment over the Mazrui dominance of Kadhiship, but the people of Lamu also expressed dissatisfaction over Mazrui dominance. They thought that since two *'ulama* from Lamu had held the position concurrently, followed by two from Mombasa, it was now the turn of a Lamuian to ascend to the position after Shaykh Al-Amin.[44]

In both Lamu and Mombasa, Muslims engaged in discussions concerning which town would produce the Chief Kadhi. As in 1897, when the government did not believe that local *'ulama* were capable of performing the duties of Shaykh-ul-Islam, Liwali Ali bin Salim revisited this idea to avoid the appointment of another Mazrui. He argued that it was not prudent to appoint a local person. To avoid further animosities between the people of Lamu and Mombasa, he suggested the position be given to someone from outside the feuding communities. Liwali Ali bin Salim suggested that the legendary Comorian and a long-time resident of Zanzibar, Sayyid Omar bin Ahmed bin Sumayt (1896-1973?), be appointed. When Sayyid Omar bin Ahmed bin Sumayt was proposed for Chief Kadhiship of Kenya, he was in the service of the Sultanate of Zanzibar as its Chief Kadhi. He was highly regarded, and the government of Zanzibar refused to release him to serve in Kenya. Zanzibar argued that it would be a great loss to its judiciary and difficult to replace the indispensable Sayyid Omar bin Ahmed bin Sumayt.[45]

The failure to secure the services of the illustrious Sayyid Omar bin Ahmed was disappointing for Kenya, but he was nevertheless involved in the process to appoint the Chief Kadhi. Three candidates were identified: Shaykh

Maamun bin Suleman, the kadhi of Mombasa and a Mazrui kinsman; Shaykh Mohammed Jambeni, the kadhi of Lamu; and Shaykh Abdulla bin Mohammed bin Bafadhil, the kadhi of Takaungu. Sayyid Omar bin Ahmed Sumayt was asked to prepare an examination for the candidates. However, not every candidate favored the examination as a means to fill the post.[46] Liwali Ali bin Salim supported the method.[47] Once Shaykh Mohammed was included in the list of candidates to take the exam, Shaykh Maamun bin Suleman withdrew, apparently in favor of his uncle and probably avoiding pitting one Mazrui against the other. Likewise, Shaykh Bafadhill declined to sit the examination and withdrew, but he gave the excuse that the examination was a smokescreen to sneak in a Mazrui. He argued that he was not only much older than the other candidates, but also the most experienced, having served many years as Kadhi and intermittently as ad hoc Chief Kadhi, in the absence of Shaykh Al-Amin. Shaykh Bafadhil was sure he was going to replace Shaykh Al-Amin bin Ali, and felt that the requirement for him to write an examination with younger and certainly junior staff was an attempt to embarrass him. He felt ridiculed and realized the possibility that he may lose his *heshima* (respect), in the event that the younger candidates performed better. He placed all the blame on Liwali Ali bin Salim and withdrew from the race.

Liwali Ali bin Salim had a different story in exonerating himself from the accusations made by Shaykh Bafadhil. He dismissed the notion that serving as ad hoc Chief Kadhi was a guarantee or prerequisite for direct accession to a substantive post. He also believed that younger people were eligible for nomination for the post, as age was not a consideration. Moreover, Shaykh Mohammed bin Kassim Mazrui, whom Shaykh Bafadhil referred to as 'the younger man who was also junior in a service', had actually impressed senior colonial officials when he served as ad hoc Chief Kadhi. It was Shaykh Mohammed's impressive work that led Justice Bartley to recommend him when a position of Chief Kadhi became available. Liwali Ali bin Salim argued that his suggestion for the examination was not to embarrass older *'ulama* in favor of the young, but was guided by the need to see that the most competent Chief Kadhi served Muslims.[48]

The withdrawal of Shaykh Maamun and Shaykh Bafadhil left Shaykh Mohammed bin Kassim Mazrui and Shaykh Mohammed Jambeni, both hailing from Mombasa. To include a regional balance, especially since the people of Lamu had raised a concern over a possible Mazrui dominance, an 'unofficial'

candidate was included. This inclusion gave the exercise a more representative outlook.[49] Sayyid Ali bin Ahmed Badawy (1907-1950) from Lamu was recommended and described as a 'highly suitable individual, both as regards his knowledge of the law and his upright character'.[50] Meanwhile, to prove his good intentions, Liwali Ali bin Salim impressed upon government the need to hasten the process to appoint the Chief Kadhi, because the post had remained vacant for too long, and Muslims in the whole of East Africa were anxiously waiting for the appointment.[51]

The examination was thought of as a convincing way to appoint the Chief Kadhi, but its results were nullified because candidates sat the exam on different days. Sayyid Ali bin Ahmed Badawy wrote his papers two days later than the other aspirants, and it was rumored that he could have had prior knowledge of the examination questions. This cast aspersions on Sayyid Badawy's standing. As a result of the differing examination dates, the Provincial Commissioner ruled out Sayyid Badawy, arguing that he would not be appointed even if his answers were the most satisfactory or his appointment most desirable.[52] In fact, the Chief Secretary was not particularly impressed by the examination as a reliable or suitable way to appoint a Chief Kadhi. He favored the use of a board to interview and select the most impressive candidate.[53] Thus, instead of the examination, a selection board was constituted to appoint the Chief Kadhi.

Since 1898, when the first *alim* was appointed to serve in the colonial state, the posts of Shaykh al-Islam and Chief Kadhi had exclusively attracted Muslims from the Coast. This was because the post of kadhi was confined to the dominions initially under the control of the Sultanate of Zanzibar. However, in the late 1940s, Muslims who lived outside the coastal strip also demanded to have Kadhi appointed in their regions. When the post of Chief Kadhi was vacant, Muslims in the interior were invited to apply. An advertisement was posted in all administrative centers inviting candidates for the post of Chief Kadhi. Candidates were required to possess a thorough knowledge of Muslim law pertaining to all sects, and particularly the Shaf'i sect, and to be of exemplary character and integrity. Knowledge of the Arabic language was essential and English would be an added advantage.[54] Contrary to previous attempts to abolish the post due to inadequate workload, large numbers of appeal cases awaiting the new Chief Kadhi made the appointment more urgent.[55]

Once the position was opened to general competition, it attracted members of the Swahili group, as four Swahili kinsmen Haji Shaibo bin Shallo,[56] Mohammed bin Ali Bashir,[57] Khamis Shafy and Mohammed bin Ali Haji,[58] from the Thelatha Taifa and Tisa Taifa applied. Apart from Sayyid Ali bin Ahmed Badawy, Shaykh Isahak Mohammed from Uasin Gishu also applied,[59] while Shaykh Mohammed bin Kassim withdrew in apparent support of the candidature of Sayyid Ali bin Ahmed Badawy. The selection board appointed Sayyid Ali bin Ahmed Badawy, making him the third *alim* from Lamu to assume the position. No one doubted Sayyid Ali bin Ahmed Badawy's knowledge or his standing. He was the son of the venerated Sayyid Ahmed Badawy bin Salih Jamal al-Layl (1889-1936). Having been tutored by his father and his contemporaries, Sayyid Ali bin Ahmed Badawy was appointed to the position of Chief Kadhi with the understanding that he would bring both his filial connections and knowledge to bear for the benefit of the Muslims of Kenya. However, he was disadvantaged by a lack of experience in the colonial bureaucracy and its standards of duty.

The government, however, had made clear that Sayyid Badawy was not eligible for appointment, but the selection board went ahead and appointed him anyway. Sayyid Ahmed resigned within a year after appointment, for reasons that remain unclear. When he resigned, questions were asked. Was he forced to resign? Was he found incompetent, or was there *fitna* (witch hunt) involved in his resignation?

Some reasons advanced for Sayyid Ali bin Ahmed Badawy's resignation include claims that he was steadfast and unwilling to be pushed around by European District Commissioners and Provincial Commissioners. He could not withstand the supervision by colonial officers on when and how to perform his duties as a Muslim judge. It is also argued that amongst all the Chief Kadhis during the colonial period, he was the only one who left with his respect intact, because when he realized that he could not cope with the demands of the position, he did not continue to cling to it but resigned to preserve his dignity.[60] His detractors claimed that Sayyid Badawy fared so badly that his tenure strengthened the resolve of colonial officers to abolish the post of Chief Kadhi. Indeed when he resigned in 1950, Muslims had difficulty convincing colonial authorities to appoint his replacement immediately. Contentious issues surrounding Badawy's short tenure remain. Perhaps the difficulty is best expressed by the efforts undertaken by S.M. Muhashamy, the Liwali for Coast, to have the post revived.

## *The Lost Decade, 1950-1960*

For about a decade after Sayyid Ali bin Ahmed Badawy's resignation, the post of Chief Kadhi remained vacant. There was no substantive appointment, though Shaykh Mohammed bin Kassim Mazrui was occasionally appointed ad hoc Chief Kadhi to sit as Appellate Judge in the High Court. Though Muslims agitated for the post's revival, it was not until the mid-1960s that concerted efforts were made. S.M. Muhashamy felt duty-bound as Liwali of the Coast to represent the interest of Muslims to the government. He reminded the government of constant demands from the Muslim community for the re-instatement of the post of Chief Kadhi.[61] The government responded with mixed reactions to Muhashamy. It argued that there were few cases to warrant the appointment and claimed shortage of funds to sustain the post. Muslims viewed these as excuses to deny them the opportunity to be served by such an official. Some sensed interference in their religious affairs, contradictory to the 'Protectorate Agreements'. It was during this time that Muslims started to critically analyze the relevance of having the Chief Kadhi appointed by the government.[62]

A sense of frustration had engulfed Muslims over the extensive absence of the Chief Kadhi. In his petition to the government, Muhashamy acknowledged that there were fewer cases that the Chief Kadhi could preside over. He concurred that Sayyid Badawy was a respected theologian but did not have experience as kadhi. He argued that circumstances had changed since the early 1950s. With an increase in the population of Muslims, the Chief Kadhi would be kept busy.[63] There was also a clamoring for an independent authority to advise the judiciary on matters pertaining to Islamic codes. Furthermore, there was a popular feeling amongst Muslims that there were qualified and suitable persons available and ready for appointment if only the government was willing to revive the post.

The views espoused by the government and those of Muhashamy on behalf of Muslims were diametrically opposed. The government was of the opinion that the post was not abolished. It did not concur with the Muslim sentiment and accusations that it had abolished a statutory post meant to serve Muslims. To support its argument the government had appointed an ad hoc Chief Kadhi whenever there were appeals that demanded the attention of such an official. The argument by the government to maintain a Kadhi in the District, due to the availability of an extensive workload, and to

appoint a Chief Kadhi who worked on a case-by-case basis, was consistent with this impasse. Other government officers blamed Sayyid Badawy for the demise of the position because he was neither able nor willing to fulfill the functions of the Chief Kadhi.[64]

S.M. Muhashamy started the process to have the Chief Kadhi appointed in 1960. By 1962, no positive action had been taken by the government. However, this was a period of transition to independence, and the colonial government was involved in negotiations with various communities in Kenya. During one such meeting, Muhashamy held a 'corridor discussion' with Justice Rudd that triggered another sequence of events towards appointing the Chief Kadhi.[65] In fact, that meeting is probably responsible for the institutionalization of the post of Chief Kadhi in independent Kenya, since it was after this meeting that Muhashamy assisted other government officers in drafting concise roles and functions of the Chief Kadhi. The main tasks envisioned included allowing the Chief Kadhi to advise judges on matters of Islamic law, especially junior kadhis, who heard matters of Muslim marriages, divorce and succession; to supervise the work of other junior kadhis throughout Kenya; to examine candidates for the post of kadhi; and to train kadhi clerks in Islamic law, since it would be from amongst these men that future candidates for the post of kadhi would be drawn. Once these guidelines were agreed upon, Muhashamy wrote back to the government informing them that he had given the matter of the appointment of Chief Kadhi due consideration, and was of the opinion that Shaykh Mohammed bin Kassim al-Mazrui was the most suitable person for the post. Muhashamy recommended Shaykh Mohammed bin Kassim because he came from a respectable family in Mombasa. He was also brought up and trained in shari'a by an eminent scholar (Shaykh Al-Amin bin Ali Mazrui), and his character was beyond reproach. His service on matters concerning shari'a had always been reliable and useful. Apart from holding the post of kadhi of Mombasa, Shaykh Muhammad bin Kassim had also acted as ad hoc Chief Kadhi since Sayyid Badawy resigned from government service.

Shaykh Muhammad bin Kassim's curriculum vitae was enhanced by both intellectual achievements and filial connections, factors that propelled him to great heights of *'ulama* power. He was appointed Chief Kadhi on 1 May 1963, although he had acted as ad hoc Chief Kadhi since the resignation of Sayyid Ahmad Badawy in 1950. He had wished to be appointed Chief Kadhi since the late 1940s but was appointed to an ad hoc position instead. When

he was finally appointed to a substantive post, he enhanced not only his career but also the Mazrui dominance of the post of Chief Kadhi in Kenya. He fits well into a common Swahili adage, *mvumilivu hula mbivu* (patience bears rewards). Shaykh Mohammed bin Kassim maintained this post with dignity until early 1968 when he resigned, citing ill health.

## *Conclusions*

As Muslims in Kenya hold the view that the post of Chief Kadhiship is basically a manifestation of religious leadership by the *'ulama*, it is equally probable that the reasons for the establishment of the post were political rather than religious. It may be concluded that the British were more interested in how much the holders of the post of Chief Kadhi could be relied upon to help the British administrators control the Muslim population. The chronology of appointments of *'ulama* to the post equally shows the complicity of the *'ulama* themselves in the role of racial diversity in their choice of 'leaders'. The *'ulama* indeed went along with this, and depended on their racial and regional affiliations to boost individual chances to be appointed. The relevance of filial connection was also made prominent as *'ulama,* probably fearing competition from others, chose relatives and acquaintances to replace them, or appointed them to strategic posts anticipating they would take over at some later point. The whole process of appointing *'ulama* to bureaucratic posts reveals that the British colonial powers failed to abide by agreements for non-interference in the religious concerns of Kenyan Muslims.

*Notes*

1 Homi Bhabha's actual words are: 'If colonialism takes power in the name of history it repeatedly exercises its authority through the figures of force'. See Bhabha (1997), 'Of Mimicry and Man: The Ambivalence of Colonial Discourse' in *Tensions of Empire: Colonial Cultures in a Bourgeois World,* eds. Frederick Cooper and Ann Laura Stoler (Berkeley and Los Angeles: University of California Press), 153.

2 See especially Ranajit Guha (1992), 'Discipline and Punish', *Subaltern Studies VII: Writings on South Asian History and Society*, eds. P. Chatterjee and G. Pandey (New Delhi: Oxford University Press), 69.

3 See N. Abercrombie, S. Hill, and B. Turner (eds.) (1980), *The Dominant Ideology Thesis* (London: G. Allen & Unwin), 12.

4 Under British rule, kadhis were expected to serve as legal advisors and to decide all cases affecting the personal status of coastal Muslims in regard to marriage, divorce, inheritance and religious disputes. In 1897, an Order-in-Council created the new position of Shaykh-ul-Islam, later changed to Chief Kadhi, charged with hearing appeals from kadhi's courts and serving as Islamic legal advisors to the High Court. A. I. Salim (1973), *Swahili-Speaking Peoples of Kenya's Coast* (Nairobi: East African Publishing House), 79, 82; and Y.P. Ghai and J.P. McAustin (1970), *Public Law and Political Change in Kenya* (Nairobi: Oxford University Press), 165.

5 For an ethnographic discussion of the functions of the men appointed as Kadhi and the gendered aspects of the Kadhi courts in Kenya and Tanzania, see Susan Hirsch, 'State Intervention in Islamic Family Law in Kenya and Tanzania' (this volume).

6 Egyptian *'ulama*, especially from Al-Azhar, were popular with the British as most appointments to positions of Grand Qadi were by default Egyptians. For Sudanese cases, see Jeppie in this volume.

7 It is important to note that Sharif Abdulrahman bin Ahmad had initial troubles with the Sultanate of Zanzibar, as he was incarcerated at Fort Jesus on the orders of Sultan Majid. See Farsy Abdalla Salih (1989), *The Shaf'i Ulama of East Africa, ca.1830-1970: A Hagiographic Account,* translated, edited and annotated by Randall L. Pouwels (Madison: University of Wisconsin), 51-54.

8 See Randall L. Pouwels (1981), 'Sh. Al-Amin b. Ali Mazrui and Islamic Modernism in East Africa, 1875-1947', *International Journal of Middle Eastern Studies,* 13, 3: 329-345, 337.

9 See Kenyan National Archives (hereafter KNA) /PC/Coast/1/17/118.

10 See exchange of opinions on the position of the Shaykh-al-Islam in the state bureaucracy in communication between the Provincial Commissioner, Coast, the chief Justice J. W. Barth and Judge A.T. Bonhar Carter, in KNA/PC/Coast/1/21/92

11 Provincial Commissioner, Coast, to Chief Justice in ref. No. 38 of September 08, 1912 in KNA/PC/Coast/1/21/92.

12 J.W. Barth, Acting Chief Justice to Acting Provincial Commissioner, Coast on 18 September 1912 in KNA/PC/Coast/1/21/92.

13 Winston Churchill was then the Secretary of State for Colonies and Downing Street, London. See correspondences in KNA/Coast/1/21/302.
14 These sentiments are expressed in correspondences between the Senior Commissioner, Coast as he responded to queries directed to him by the Acting Colonial Secretary in ref. 3726/87 of September 22nd, 1922, in KNA/PC/Coast/1/21/302.
15 These were remarks by the Senior Commissioner, Coast expressed in KNA/AP/1/21/302.
16 See correspondence emanating from Chief Justice J.W. Barth to Colonial Secretary in confidential letters ref. No. 5562/2 of 31 December 1921 in KNA/AP/1/313
17 It was inexcusable for Liwali Ali bin Salim to recommend his relative, whose only experience was working as a clerk in the High Court, at the expense of seasoned and experienced *'ulama* and kadhi-like Shaykh Suleman bin Ali and Shaykh Al-Amin b. Ali Mazrui. The fact that Liwali Ali bin Salim did not favor a Mazrui appointment was clear, and the Mazrui *'ulama* were aware of these machinations. If Liwali Ali b. Salim used a non-Mazrui identity as a qualification for the post of Chief Kadhi, he also introduced another category.
18 See correspondences emanating from Chief Justice J.W. Barth to Colonial Secretary in confidential letter ref. 5562/2 of 31 December 1921 in KNA/AP/1/313
19 Sayyid Ahmed bin Abi Bakr bin Sumayt is well documented in A.S. Farsy, *The Shafi 'Ulama of East Africa, ca.1830-1970*, 74; see also R. L. Pouwels (1987), *Horn and Crescent: Cultural Changes and Traditional Islam on the East African Coast, 800-1900* (Cambridge: Cambridge University Press). See also Anne Bang (2003), *Sufis and Scholars of the Sea: Family Networks in East Africa, 1860-1925* (New York: Routledge Curzon).
20 See Colonial Secretary to Chief Justice in confidential communication ref. no. S. 3726 of 29 July 1922 in KNA/AP/1/1313. See also J. W. Barth to Colonial Secretary in confidential ref. 984/22 of August 1922 in KNA/AP/1/1313.
21 These sentiments were expressed by residents of Lamu in support of the appointment of one of them as the Chief Kadhi; see KNA/AP/1/1313.
22 T. D. Maxwell, Acting Chief Justice to Acting Governor, ref no. J. C. 9488/41-22 of 15 July 1923 in KNA/AP/1/1313
23 Ibid.
24 Ibid.
25 For a history of Takaungu, see Peter Langer Koffsky (1977), 'History of Takaungu, East Africa 1830-1896' (unpublished PhD dissertation, University of Wisconsin-Madison).
26 This first temporary appointment amongst many for Shaykh Suleman bin Ali lasted from 30 August 1924 to 19 February 1925. His other similar temporary appointments were made during the periods 1 April 1929 to 13 July 1929 and 14 August 1932 to 13 November 1932.
27 Shaykh Mohamed bin Omar to Chief Justice on 30 January 1926 in KNA/AP/1/1313.
28 Ibid.

29 Chief Kadhi Shaykh Mohamed b. Omar to Chief Justice on 11 April 1932 in PC/Coast/2/2/107.
30 See comments by District Registrar of High Court, Mombasa to Registrar, Supreme Court of Kenya, ref. no. C 236/32 MP. no. 11/32 of 16 April 1932 in KNA/AP/1/313.
31 C.W. Hobley to Registrar Supreme Court of Kenya in confidential letter ST. 4/1/10/6 of 21 April 1932 in KNA/AP/1/313.
32 His letter was dated 20 April 1932 in KNA/PC/Coast/2/2/106.
33 Murray Jack to Colonial Secretary, ref. No. JC 1646/19-24 of 18 August 1932 in KNA/AP/1/1313.
34 Colonial Secretary to Registrar, Supreme Court of Kenya, ref. S/E 3726/II/28 of 7 October 1932 in KNA/AP/1/1386.
35 See articles by F.H. El-Masri (1987), 'Sheikh al Amin b. Ali el Mazrui and Islamic Intellectual Tradition in East Africa', *Journal Institute of Muslim Minority Affairs* 8, n. 2 (July): 229-237; R. L Pouwels (1981), 'Sh. Al-Amin b. Ali Mazrui', *International Journal of Middle Eastern Studies* 13 (3): 329-45.
36 B.G. Martin (1971), 'Notes on Some Members of the Learned Classes of Zanzibar and East Africa in the Nineteenth Century', *African Historical Studies* 4: 525-546.
37 See District Commissioner, Mombasa to Provincial Commissioner, Coast on 10 August in KNA/PC/Coast/2/2/106.
38 The government was equally concerned over Shaykh Al-Amin's involvement with Al-Islah, which took a rather pan-Islamic and oppositional view towards Europeans and their treatment of Islam and colonization of Muslim communities. However, Shaykh Al-Amin had already indicated that he would sever his relationship with Al-Islah in the event of his appointment as Kadhi of Mombasa. See Provincial Commissioner, Coast to Chief Native Commissioner on 18 October 1932 in KNA/PC/Coast/2/2/106.
39 These were representing the views of the AAA, see KNA/PC/Coast/2/2/168.
40 See C.H.C. Boulderson, Provincial Commissioner, Coast to District Commissioner, Mombasa in KNA/PC/Coast/2/2/106.
41 See Khamis b. Shafy to Provincial Commissioner, Coast on 24 March 1937 in PC/Coast/2/2/168.
42 Ibid.
43 Shaykh Muhammad b. Abdalla Rudain had previously served as Kadhi of Siyu from 1923, but was retrenched in 1928, while Shaykh Said b. Ahmed had served as Kadhi of Takaungu between 1926/27 and Vanga from 1929-1932, when the post was abolished. From then on, Shaykh Said went to live in Moshi, Tanzania.
44 See E. J. O'Farell, Registrar, Supreme Court to Chief Justice ref. 659/6 of 28 April 1947 in KNA/AP/1/1206.
45 Chief Secretary, Zanzibar to Chief Secretary, Kenya in confidential letter no. CPF of 28 June 1947 in KNA/CA/20/31.

46 See Joyce R. Ginn, District Registrar, Supreme Court of Kenya to Registrar, Supreme Court of Kenya ref. No. 'C' 772/P. 7/34 of 11 August 1947 in KNA/CA/20/31.
47 Surprisingly, the candidate that Liwali Ali bin Salim was accused of favoring was Shaykh Mohammad bin Kassim Mazrui (1912-1982), who was earlier mentioned positively, though he did not seem to have pursued the idea after that.
48 Liwali Ali bin Salim to Provincial Commissioner, Coast on 1 March 1948 in KNA/CA/20/31.
49 'Unofficial' implied an *alim* who was not yet in the service of the government as a kadhi.
50 E. R. A Davies, Provincial Commissioner, Coast to Chief Secretary in confidential letter ref. no. SF. 29/2/52 of 15 March 1948 in KNA/AP/1/1206.
51 Ali bin Salim to Provincial Commissioner, Coast on 1 March 1948 in KNA/CA/20/31.
52 Provincial Commissioner, Coast to Chief Secretary in confidential ref. No. SF. 29/2/52 of 15 March 1948 in KNA/AP/1/1206.
53 J.B. Gould for Chief Secretary, to Provincial Commissioner, Coast, in confidential letter No. E. 7/3/123 of 23 April 1948 in KNA/AP/1/1206.
54 E.R.A. Davies, Provincial Commissioner, Coast to Provincial Commissioner, Nyanza, Rift Valley, Central, Northern Frontier Province and Officer-in-Charge, Ngong, in ref. no. SF. 29/2/58 of 8 May 1948 in KNA/CA/20/31.
55 District Registrar, Supreme Court to Provincial Commissioner, Coast in ref. no. 'C'814/P.7/34 of 23 June 1948 in KNA/CA/20/31.
56 He stated that he was a student of Shaykh Abdul Majid bin Zahran, who was Kadhi of Lamu and also studied under Shaykh Abdulrahman bin Ahmad Saggaf, the former Shaykh al-Islam.
57 He was serving as a member of the Wakf Commission.
58 These two had previously worked as Muslim *vakils*.
59 While all the candidates were invited to appear before the board, Shaykh Isahak was not, as he did not receive a favorable recommendation from the District Commissioner, Uasin Gishu. See P.F. Forster, Provincial Commissioner, Coast to Registrar, Supreme Court ref. no. ST.4/3/VI/252 of 25 June 1948 in KNA/CA/20/31.
60 Oral interview with Abdulrahman Mwinyi Faki, Madina, Saudi Arabia 28 January 2002.
61 S.M. Muhashamy to Provincial Commissioner, Coast, on 15 July 1960 in KNA/CA/9/96.
62 Oral interview, Salim Hoka, Nairobi, January 2002.
63 S.M Muhashamy to Provincial Commissioner, Coast on 15 July 1960 in KNA/CA/9/96.
64 These sentiments are found in a memo addressed to the Provincial Commissioner Coast, dated 7 July 1960 signed HJC in KNA/CA/9/96.
65 See Justice Rudd to D.W. Hall, Provincial Commissioner Coast, on 6 July 1962 in KNA/CA/9/96.

# 4 Obtaining Freedom at the Muslims' Tribunal: Colonial Kadijustiz and Women's Divorce Litigation in Ndar (Senegal)*

**Ghislaine Lydon**

The Muslims' Tribunal was established in the French colonial enclave of Saint-Louis du Sénégal on the African coast, a port city locally known as Ndar.[1] The court operated in perhaps one of the most violent, transformative, and culturally cataclysmic periods in the history of Western Africa. Indeed, from the late nineteenth to the early twentieth century, the region encompassing present-day Senegal, Mauritania and Mali witnessed a very rapid expansion of the number of Muslim converts in the face of the mounting pressures of foreign occupation. This period coincided with the French conquest of the African hinterland, launched from the colonial capital located in Ndar, and the establishment of a colonial infrastructure and economic mechanisms of extraction. The archives of this tribunal offer a unique lens into the daily struggles of prominent and not so prominent men and women who sought legal mediation.

Like many houses of law in the colonial world, the Muslim tribunal of Ndar was an institutional anomaly. In Lauren Benton's words, the tribunal was in 'an "in-between" and seemingly contradictory legal position'.[2] It was an Islamic institution run by a non-Muslim colonial state, which operated on an incongruous blend of Muslim faith-based or sacred law and French re-

publican ideals of assimilation. The tribunal was run by the *qadi* or head Muslim judge of Ndar, who also assisted the French in their colonial mission. Because of the nature of this collaboration, one of power and obligation between Muslim subject and Christian ruler, the running of the Muslim tribunal of Ndar was not dissimilar to that of the 'native' or customary courts established elsewhere in late nineteenth-century Africa. Over time, the brand of colonial justice dispensed at the Muslim tribunal was not unlike what Max Weber termed '*kadijustiz*', that is to say a procedure whereby legal decisions were reached on the basis of personal judgment instead of legal codes.[3] This was especially the case from 1911 onwards, when the tribunal was forced to use French for recordkeeping and correspondence.

A sample of the Muslim Tribunal's records dating from the 1880s to the 1920s reveals that marital disputes and divorce settlements were the most common cases. Over half of these for this period were introduced by women. These trends mirror Richard Roberts's findings for customary law courts in colonial Mali, where his data for the first decade of the twentieth century shows women initiated three-quarters of the litigation, and that they were the main plaintiffs in divorce cases.[4] Based on a sampling of court records, this chapter examines the judicial process and the patterns of civil litigation in the Muslim Tribunal of Ndar. First I present a brief history of this institution, leading up to the language policy of 1911 whereby the French banned the use of Arabic in the justice system. Then I discuss how legal procedure became 'routinized' over time, focusing on women's divorce litigation. The chapter offers some insights into the methodological challenges involved in using Muslim court records, identifying legal hybridity and interpreting justice in a colonial context, while positing that knowledge of Islamic legal codes alone does not suffice for understanding the decisions of legal officials or the motivations of their clients shopping for legal outcomes.

## *Muslims' Tribunal of Ndar and the Arabic Language Question*

The *Tribunal musulman* opened its doors to the public in the port city of Ndar sometime after it was constituted by a decree in May 1857. While often attributed to the initiative of Louis Faidherbe shortly after his becoming Governor of Senegal, the idea of a Muslim tribunal was not his to claim.[5] It was the outcome of 25 years of negotiations between Senegalese Muslims and

the French governing body of the colony, the *Conseil privé du Sénégal*, to create a house of the law for dispensing Islamic justice.[6] The court was an important element of France's 'Muslim policy' in West Africa, and arguably its centerpiece. Certainly Governor Faidherbe had a very clear notion of its purpose, and especially the role of the head Muslim judge who also served as the leader of the local Muslim community or *tamsir*. He had to be chosen from an 'influential family' fit to serve in France's best interests while on the colonial payroll.[7] The tribunal was modelled after Muslim courts in colonial Algeria, which in turn had Ottoman antecedents.[8]

Despite the centrality of the *Tribunal musulman* to France's Muslim policy in West Africa, the history of this institution remains to be thoroughly researched. This may be partially explained by the fact that the court archives have only recently been housed in the national archives of Senegal.[9] In 1961, the French legal scholar Bernard Schnapper published an informative article summarizing the history of the Muslim tribunal system in Senegal from an institutional perspective.[10] Twenty years later, Ndiaye Seck wrote a Master's thesis on the subject, based primarily on official records.[11] More recently, Seydou Diouf completed a dissertation in law, where he examined Muslim women's rights in Senegal in the nineteenth and twentieth centuries.[12] This is a very useful study, based on both the Arabic and French archives of the Muslim tribunal, which seeks to inform on current debates on Senegal's 'Code de la Famille'. Diouf is primarily concerned with women's rights in marriage and cases of wife-beating, adultery and slavery, but hardly touches upon the question of women's divorce rights. Dominique Sarr and Richard Roberts examined disputes surrounding the jurisdiction of Muslim law and Muslim tribunals in Senegal, but they did not use records from the Muslim tribunal in Dakar.[13] Finally, Rebecca Shereikis has studied the colonial courts in Kayes, Senegal, which included a short-lived Muslim tribunal.[14]

The Muslim Tribunal of Ndar was originally designed to provide legal services to Muslims born in the four communes of Senegal, the so-called *originaires*, who theoretically could apply for French citizenship.[15] As stated in the constitutive decree of 20 May 1857, 'The tribunal was to rule *exclusively the affairs between Muslim natives* and related to questions of civil matters, marriage, inheritances, donations and wills. The cases are to be judged in accordance to the law and following the procedures prevailing among Muslims'.[16] Court rulings could be appealed in the French tribunal in Saint-Louis. The tribunal was designed to service the Muslim community free of

charge. The Muslim judge (*qadi*), assisted by a surrogate and a court scribe, formed the core personnel of the court. In principle, court records were to be translated into French, but the rule was never enforced. Only occasionally were specific cases ever translated.

Until the 1910s, the Muslim tribunal records were compiled in classical Arabic, a language also used for much of the diplomatic correspondence exchanged between the French and West African Muslim chiefs and clerics. With the exception of notable scholar-administrators such as Governor Faidherbe or the colonial ethnographers of Islam, such as Paul Marty and Vincent Monteil, French officers were not trained in Arabic and so, by and large, they depended on the services of African scribes and interpreters for information gathering and public relations.[17] Arguably, the use of Arabic was a key weapon of the French in their dealings with western African Muslims alongside their financial assistance in the construction of mosques, the sponsorship of the pilgrimages of loyal Muslim civil servants and the pragmatic relationships with local Muslim leaders described by David Robinson.[18] Public announcements, and even the weekly official newsletter, the *Moniteur du Sénégal*, issued bilingual articles and official missives in Arabic typeset. Tellingly, the Governor of Senegal was locally referred to as the 'emir of Saint-Louis' (*amir Ndar*).

In time, the Muslim tribunal of Ndar would become so popular that it provided legal services not only to the Senegalese *originaires*, but also to residents and transients from elsewhere, including north of the Senegal River and regions beyond the colonial orbit. The tribunal's far-reaching activities may have raised local criticism, but perhaps not as much as the ongoing debates in Ndar between Muslim notables and the Catholic *métis*.[19] To be sure, the tribunal's authority was subject to repeated contestation. As Sarr and Roberts explain, the ambiguity of the status of the court itself 'established fertile grounds for the continued tensions between judicial officials, colonial administrators, and the Muslim originaires of Senegal'.[20] Beyond the anomalous positioning of Muslim law in the French civil code, the fact that both the Muslim tribunal's legal domain and the job description of the principal *qadi* were ill-defined in the original decree would become a contentious issue. Starting in 1865, in the course of litigation on an inheritance case, questions were raised about the jurisdictional boundaries of the Muslim tribunal.[21] The underlying issue had to do with the *qadi*'s growing financial responsibilities. His handling of sizeable transactions in the course of settling

inheritances, namely his managing and auctioning the property of orphans, came to the attention of French legal officials.[22]

But it was not until the late 1880s that a special commission was set up to revisit the terms of the original 1857 decree.[23] In an attempt to better monitor the tribunal's activities, the French administration decided to train more African interpreters, 'especially responsible for translating the Arabic language'.[24] Official resentment towards the special status of the Muslim court did not abate, however. In fact, when the governor-general of French West Africa, Ernest Roume, implemented his general reform of the colonial justice system in 1903, the first thing to go was the Muslim tribunal system. By this time, there were satellite Muslim courts established in Dakar, the new municipality that replaced Saint-Louis as the locus of French power, as well as in Kayes and Rufisque, and a fourth court (later closed together with the one in Kayes) operated in Kaolack. As Roberts explains in this volume, the November 1903 decree, which went into effect two years later, eliminated the special status of Muslim courts and redirected Muslim legal affairs to the jurisdiction of 'native courts'.[25] Faced with a 'sharp outburst of the Mahometan population of Senegal' led by the people of Ndar, Roume was forced to reinstate the Muslim tribunals in a corrective decree in May 1905.[26] The decree included a number of amendments to afford the colonial justice system more oversight of the activities of Muslim courts. Legal cases were to be systematically numbered, translated and communicated to the French *tribunal de première instance* within forty-eight hours of being sentenced.[27]

By dictating the new legal order, the French sought to gain control over a Muslim justice system they hardly administered. Arguably, the language barrier and the question of transparency, together with a change in France's accommodation of Islam, occasioned a political about-face orchestrated by the new governor-general. On 8 May 1911, William Ponty issued a circular to all governors of French West Africa, including Mauritania, ordering the elimination of the use of Arabic in the justice system. The use of the Arabic language, he argued, was especially problematic in Muslim and customary courts, whether for recordkeeping or correspondence, because it promoted Islam while sending the wrong message to non-Muslim Africans regarding France's colonial mission. In Ponty's words, worth quoting here in full,

> Arabic … a language that is foreign to our country … is considered a sacred language by the Blacks. To force our colonial subjects, even indirectly, to learn it for

> the purposes of engaging in public relations with us, amounts to encouraging Muslim propaganda ... What is more, the majority of our civil servants do not know Arabic and therefore they are incapable of exercising control over documentation written in this language ... Our efforts to train natives for the administration and command of our colonies must have a single objective: to ensure that our African subjects and those under our protection increasingly understand the French mindset (*la mentalité française*) and colonial principles ... Furthermore, the French language, which is undeniably easier than Arabic for the native to comprehend and to pronounce, has gained considerable ground in West Africa ... Therefore, I would be obliged if you prescribe that all rulings rendered in native courts be recorded entirely in French from this moment forward.[28]

The backdrop to this decision was what France perceived as a mounting 'Islamic threat', represented by the growth of the Muslim community in West Africa and the authority of certain charismatic Muslim leaders, such as the Sufi Shaykh Amadu Bamba, together with the rise on the world stage of Pan-Islamism. After decades of promoting Muslim institutions, including training in Arabic, France's Muslim policy took a radical turn when the French language was imposed at all levels of the colonial administration. It is not difficult to appreciate the long-term effects of this language policy on Arabic literacy, Islamic learning and Muslim scholarship throughout French West Africa, beginning with Senegal. The reform was also accompanied by a 'bureaucratization' of the legal personnel, illustrated by the adoption of legal administrative standards and the change in title of the chief judge from 'cadi-tamsir' to 'cadi-président', with a larger aim of 'assimilating' Muslim tribunals into the colonial system of justice. The language policy curtailed the tribunals' autonomy, and conceivably it rattled local Muslim identity. Perhaps this explains why the Muslims' Tribunal of Ndar did not abide by the new law until 18 September 1911, four months after it had been issued. The following year, as Roberts describes in this volume, the French reformed the entire colonial legal infrastructure. Twenty years later, in 1932, the jurisdiction of Muslim courts was further restricted.[29]

## *The Development of Colonial Kadijustiz*

On 24 June 1857, Hamat Ndiaye Ane was nominated the first *qadi* of what locally was known as the Muslims' tribunal (*mahkamat al-muslimin*). Like his father before him, who had led the effort for the establishment of the Muslim tribunal in the 1840s, Ndiaye Ane (1813-1879) was the *tamsir*, or head of the Muslim community, of Ndar.[30] France's chief Arabic interpreter Bu al-Mughdad was appointed surrogate *qadi,* and Paté Ndiaye became the court secretary or 'greffier' (*katib*).[31] All three men would set the *modus operandi* of the court. The first two formulated judgments based on their interpretations of the Maliki doctrine of Islamic law practiced in the region, as well as their knowledge of local cultural norms. In their capacities as Muslim civil servants, the judge and the scribe applied their translation skills to serve the French colonial administration.

The Muslim's tribunal, located in the upper-west side of the island of Ndar, was a relatively small courthouse open Monday through Thursday from seven until noon.[32] All court sentences were recorded in registers, and unlike any other documentation written by Muslims in the area, the tribunal records were devoid of any religious invocations and were dated in the Gregorian calendar.[33] The court registers reveal a regular flow of activity, except on occasions when it suspended services, such as during Muslim holidays.[34] Although court entries appear to have been written in one sitting, they summarize lengthy interactions, not all of which would have taken place in a single day. The voices and performances of litigants, together with their court statements, are typically muffled in the course of recordkeeping that generated monotonic interpretations of testimonies and verdicts written by way of transcriptions by a single pen.[35] It goes without saying that the language of the court was neither Arabic nor French, but Wolof and less frequently Pulaar, Hassaniya and perhaps Bamana.

Rarely more than a handful of cases were considered on any given day between 1885 and September 1911, in the age when Arabic was the language of court recordkeeping. A rough estimate of court cases shows that in the last two decades of the nineteenth century, divorce cases amounted to close to 50% of case activity at the Muslims' Tribunal.[36] By the first decade of the twentieth century, the rate had increased to 70%. Similar trends were recorded by Roberts, based on the activity of 'native courts' in colonial Mali, where he also noted a sharp rise starting in 1910.[37]

The procedure of Muslims in colonial courts was the product of negotiations between local Muslim legal specialists and colonial bureaucrats bent on relying on legal institutions for political purposes and as instruments of social control. As such, it shared little in common with Muslim legal practice in non-colonial settings. In the Muslims' tribunal of Ndar, the leadership of the court became 'secularized' to the point that this colonial-cum-Islamic institution transformed religious authorities into bureaucrats. At the same time, there was a routinization of Muslim legal practice that would emerge from a court culture shaped by local norms, and a selective set of legal principles drawn from Maliki texts. This routinization would have been amplified after 1912, when the French reformed the justice system and began to impose legal directives on African judges. In time, the standardization of this legal culture was passed on by succeeding Muslim civil servants with diminishing levels of Islamic legal training.

As David Powers explains when describing the legal system in the Maghrib in the period before the sixteenth century, which is not unlike the pre-colonial situation in nineteenth-century West Africa, scholars of Islamic law or *muftis* shaped legal discourse and provided counsel to *qadis* through the writing of legal opinions (*fatawa*).[38] Indeed, the consultative exchanges between *muftis* and *qadis* were central to determining Islamic legal practice. Colonial courts, for their part, did not make use of scholars of the law, and therefore they operated in a vacuum of the practice of jurisprudence, a point often missed by scholars of colonial legal systems.[39] In other words, colonial *qadis* did not partake in Islamic legal discourse, as was the practice of pre-colonial or even outer-colonial (that is to say those outside the realm of colonial states) *qadis*.

Arguably, it is in the context of colonial courts that one can find anything remotely resembling the Weberian notion of *kadijustiz*.[40] In addition to the tendency of many Muslim judges to adjudicate based on subjective opinions on the merits of individual cases, rather than on formal legal codes, as per Weber, the routinization of Islamic legal principles in a colonial context contributed an element of arbitrariness to the system. This was amplified by the fact that 'colonial qadi justice' was disconnected from the discursive environment that 'naturally' characterized Islamic legal practice. This state of affairs was characteristic of many colonial projects of legal codification, with notable exceptions, including the Ottoman Empire's system of legal governance structured on both legal hierarchy and judicial feedback.[41]

In her insightful discussion of the Muslim Tribunal of Kayes that was closed down after 1913, Shereikis quotes Ponty's correspondence, where he remarks, with perhaps a touch of disdain, that Muslim judges did 'not follow Qur'anic law, but Muslim customs of the land'.[42] This legal hybridity was acknowledged by Marty, the colonial expert on Islam who described the court of Ndar as 'a Muslim tribunal with ethnic chambers'.[43] It must be said, however, that Islamic legal literature considered customary law (*'urf*) and common practice (*'ada*) as determinants of the law alongside the classical sources of Islamic jurisprudence, especially when the latter failed to provide answers or simply when the law of the land prevailed.[44] Therefore, the inclusion of customary law in the *qadi*'s repertoire of references was a feature of Islamic legal practice.

Like their North African counterparts, West African Muslims followed the Maliki legal doctrine, the second of the four law schools of Sunni Islam.[45] The classic sources of jurisprudence were the Qur'an, the Prophet's traditions (*hadith*), the consensus of the Muslim community (*ijma'*) and comparative analogy (*qiyas*). Unlike the other schools, the Maliki doctrine, considered the most adaptable to social circumstances, included public interest (*maslaha*) as an additional source of the law. The two most common Maliki reference manuals used in the Muslim tribunal of Ndar were the fourteenth-century Egyptian Khalil Ibn al-Ishaq's *Al-Mukhtasar fi al-fiqh 'ala madhhab al-Imam Malik* (The Compendium of Jurisprudence of Imam Malik's Doctrine), and the tenth-century Tunisian Abu Muhammad 'Abdallah Ibn Abi Zayd al-Qayrawani's *Risala al-fiqhiya* (the Treatise of Jurisprudence).[46] The first, by Khalil, was designed to be memorized, and as such it was the most influential Maliki code in West Africa. Judges also relied on a selection of other Maliki scholars to support their rulings, including Sahnun (*al-Mudawwana*), Ibn Farhun (*Kitab al-Dibaj*), Ibn 'Asim (*Tuhfat al-Hukkam*), Ibn Rushd (*Bidayat al-Mujtahid*), and occasionally scholars from other legal traditions.

Typically, the *qadi* ruled in accordance with one or a combination of the following: his interpretation of Maliki rules, knowledge of local customary norms, judgment of the merits of individual cases, and an evaluation of the interpersonal dynamics of litigants as played out in court. Sometimes the *qadi* would allow the litigants to settle their disputes out-of-court.[47] At times, local customary laws were called upon to settle cases where Islamic law was inapplicable. A good third of the cases examined between 1885 and 1911 make no reference whatsoever to legal sources. Often Maliki texts were

roughly paraphrased and in certain instances they came to be misquoted, as shown below. On the other hand, in high-profile cases, rulings contained numerous references to a variety of texts.

The record of the Muslim tribunal of Ndar reflects uneven levels of training in Islamic jurisprudence across the different qadiships and court clerkships. In the period of forty-five years covered in this chapter, the legal process became progressively simplified. Qadi Ndiaye Saar (1880-1895) seems to have possessed the most methodical knowledge of Maliki law. By the late 1910s, rulings only made abbreviated citations to a handful of legal clauses. In many cases, these references were replaced by partisan statements about the meaning of the law. On another note, the tribunal did not always abide by the rules in other ways, such as requiring testimonial evidence of at least two male witnesses. This seeming decline in legal literacy would have been on the part of judges as much as on court scribes, and it is tempting to attribute it directly to the French language decree of 1911.

## *Divorce Laws and Domestic Litigation*

Despite the inherent gender inequality characteristic of Muslim women's marital rights, they were exceptional by world standards when considering that women's right to divorce was granted only relatively recently in most countries, including in Western Europe. Certainly this was an area where the women of Ndar had a major advantage in seeking the services of the Muslims' Tribunal, since they could not have turned to French tribunals to terminate unhappy marriages. Domestic litigation was indeed the most commonly deliberated aspect in Ndar in the period under review. Divorce rights were granted to both men and women, as there were several kinds of divorce recognized in Sunni legal traditions (see Table 1). The first was unilaterally declared by the husband, known as 'repudiation' (*talaq*); the second was a wife's initiative known as 'withdrawal' or 'renouncement' (*khul'*); the third was a marriage annulment (*faskh*) due to circumstances; and the fourth was the dissolution of a marriage through mutual consent (*mubara'a*). In all cases, divorce was followed by a legal waiting period (*'idda*) of three menstrual cycles to determine the state of her womb, if indeed the marriage had been consummated. While *khul'* was a permanent divorce (unless she remarried and then divorced a third party), men could divorce the same

woman through *talaq* twice only. As for the parenting of children in divorce cases, the Maliki rule, according to Khalil and followed in the Muslims' tribunal of Ndar with some exceptions, was that women had custody of sons until puberty and daughters until they married.[48]

Table 1: Divorce in the Maliki School of Islamic Law

| Types | Description |
|---|---|
| I. Husband's Divorce (*Talaq*) | Divorce obtained by a man by pronouncing the sentence 'I divorce you' three times in the presence of his wife and two or three witnesses. The husband was then required to complete payment of the original bridewealth (*sadaq*) negotiated at the time of the marriage contract, if it was not paid in full. This was in theory owed to the wife but most commonly paid to her father. The divorce was final and did not require the intermediation of a judge, unless the wife needed to put pressure on her husband to pay his due. There were variants of this type of divorce which was revocable. |
| II. Wife's Divorce (*Khulʿ*) | Divorce initiated by the wife typically in exchange for monetary compensation. Several issues were contested in the Maliki legal literature regarding *khulʿ*, including the matter of compensation and whether the husband's consent was required. Typically, a wife was required to reimburse the bridewealth (*sadaq*). Remarriage in this case was not permitted until after the woman married a third party and then became widowed or divorced. |
| III. Marriage Annulment (*Faskh or Tafriq*) | Divorce granted to women and men based on the testimony of witnesses in cases of abandonment or spousal disappearance, physical abuse, failure to pay the family maintenance (*nafaqa*), adultery, illness and failure to perform spousal duties (such as a wife withholding intercourse or a husband's impotence). This divorce was free-of-charge to both parties. |
| IV. Marriage Dissolution | Marriage dissolution by mutual consent where both spouses waived rights to financial compensation, sometimes considered a khulʿ divorce without compensation. |

A Muslim man's divorce rights were clearly superior, since he needed simply to utter his decision thrice in front of witnesses to terminate a marriage without any legal proceedings.[49] The decision was final once he paid to the

wife the totality of the bridewealth (*sadaq*), if it had not yet been paid in full. Obviously, the practice of paying bridewealth amounts in instalments represented both a woman's insurance against an abrupt divorce, and a disincentive for a husband to make hasty marital decisions. Women often came to the Muslims' tribunal of Ndar to have this type of divorce registered, but also to put pressure on former husbands to finalize bridewealth reimbursements.

Women's divorce rights varied across legal doctrines, but also within the schools themselves, as Judith Tucker explains in her useful study.[50] The three debated questions were first, whether *khul'* divorce required the husband's assent (in which case it differed little from a *mubara'a*, or divorce by mutual consent); second, the amount of compensation, if any, required of the wife; and third, the role of the judiciary in the process. As per Khalil, the mediation of a *qadi* was not necessary for *khul'* cases. Yet the evidence from the Muslims' tribunal, which seems to follow divorce patterns elsewhere in the Muslim world, shows that men divorced on the spot, while women tended to have recourse to formal legal institutions. Because of the potential for disagreement arising in the process of negotiating compensation amounts, including confirming the original bridewealth price by use of witnesses, it is not surprising that women came to rely *en masse* on the court to settle *khul'* divorces.

The opinions of legal scholars, even within the Maliki school, were divided on the issue of compensation. While it appears that many legal scholars considered the husband's demand for compensation in *khul'* cases to be reprehensible, the two most popular Maliki references used in West Africa maintain that a divorcing wife had to compensate her husband. Indeed, both Ibn Abi Zayd and Khalil seem to overlook the Qur'anic verse stating, 'It is not lawful for you, (men), to take back any of your gifts (from your wives), except when both parties fear that they would be unable to keep the limits ordained by Allah'.[51] In other words, it was not considered lawful for husbands to take back what they had gifted to their wives. While returning the bridewealth became customary in *khul'* cases, Maliki legal codes made this a suggested and not a required amount. Ibn Abi Zayd's *Risala* states that *khul'* was a divorce a woman obtained in exchange for 'giving him something', and 'the woman can redeem herself from her husband with her bridewealth or more or less, if she was not beaten by him. But if she was beaten by him, then she may demand that he return to her whatever she gave to him'.[52] The

stated rules in Khalil's *Mukhtasar* are considerably more ambiguous and address a variety of situations involving negotiated amounts of compensation in cash and in kind.[53]

The 'customized' practice of Islamic law at the Muslims' tribunal of Ndar was to use the two most common legal manuals to defend two different positions on the question of *khul'* compensation. Ibn Abi Zayd was usually cited, and sometimes misquoted, to justify the wife's reimbursement of the bridewealth to settle her divorce suit. Typically, the ruling contained the phrase, or a variation thereof, 'Ibn Abi Zayd states in his *Risala* that the woman must redeem herself from her husband with her bridewealth'.[54] Here again, the practice contradicted the spirit of the legal letter for as the code, cited above, makes clear, the reimbursement of the bridewealth 'or more or less' was suggested only for cases involving wife beating. When husbands demanded the return of additional property, namely all the gifts they had ever given to their wives, including jewellery and domestic animals, the *qadi* of Ndar then would cite Khalil. But in both such cases, the ambiguity in the legal texts gave room for Muslim judges to personalize their divorce rulings.

Amassing the necessary capital to purchase a divorce was not within the reach of the average woman, especially when considering the fact that in most cases the original bridewealth was a direct transaction from the groom to the father of the bride. Divorces were simply not an option for most Muslim women, unless a divorcing woman was aided by a future husband who could buy her out of the *khul'* divorce.[55] A further consideration, raised by Diouf, is that women had to pay the bridewealth in full and on the spot in order to purchase their freedom.[56] In *talaq* divorces, on the other hand, men negotiated payment plans with judges for unpaid bridewealth or maintenance fees. This preferential accommodation is yet another example of gender discrimination in the customized legal practice of the Muslims' tribunal of Ndar.

A common area of domestic disagreement was the exact amount of the original bridewealth, whether it was paid in full or only partially, in cash or in kind, and how it computed against other financial transactions. In the absence of witnesses able to certify bridewealth amounts, the court followed the rule that 'if the disagreement occurs after the consummation of the marriage, the word of the husband prevails on the condition that he takes the oath'.[57] The court records show that on occasion, the *qadi* of Ndar ac-

cepted a wife's oath over that of her husband.

The third category of divorce, the marriage annulment (*faskh*), granted in cases of moral or physical abuse, sexual impotence, adultery, neglect and abandonment, was always difficult to prove in a court of law since it required the voluntary testimony of witnesses. According to Maliki law, a marriage could be dissolved if a spouse had gone missing for a period of at least four years. Yet the *qadis* of Ndar considered a variety of timeframes for these types of divorces, which generally were granted not on the grounds of spousal desertion, but on husbands' failure to provide for their families. This concerned the maintenance payment (*nafaqa*) in the form of food, lodging and clothes necessary for the family upkeep that husbands were legally required to make. According to Khalil's *Mukhtasar,* 'The wife can dissolve a marriage if a husband is unable to provide the current amount of maintenance … even if the husband is absent'.[58] The actual value of the *nafaqa* changed with relative prices. In the sample examined here, *nafaqa* ranged from a monthly 10 Francs (2 *dirham*) in 1885 to 30 Francs (15 *dirham*) in 1929.[59] These amounts also changed according to the means and sizes of individual families, but judging from court sentences specifying payments, there was no standard or average maintenance sums.

The divorce could be pronounced as early as one month later, on the condition that the wife took the oath and furnished witnesses to back her declarations. Abandonment, combined with non-payment of maintenance fees which amounted to spousal neglect, was the most frequent cause of divorce women brought to the Muslims' tribunal in Ndar, and its incidence increased in the first decades of the twentieth century. As for the fourth type of divorce, the marriage dissolution by mutual consent (*mubara'a*), it was typically negotiated as an outcome of domestic disputes, as in the example given below.

Divorces and the question of bridewealth and maintenance payments were regular subjects of litigation at the Muslims' tribunal. Other types of cases were introduced by women seeking bridewealth payments from husbands who had repudiated them on the basis of *talaq*. Overall, the *qadis* of Ndar tended to rule in favour of women's divorces, but they did not curb the excessive demands of husbands when negotiating compensations or deliberating bridewealth payments. Therefore, the price of women's divorce, expressed primarily in cash by 1920, was the subject of intense contestation, especially since spousal property rights were so ambiguously defined, and

sometimes went unrecorded even by way of witnessing.[60] In fact, economic verbiage permeated descriptions of divorce cases. In one such expression, concerning the fate of a young married woman, her female friend is said to have declared, 'If I had money, I would have bought [her] freedom back'.[61]

### *Divorce Rulings for Abandonment and Neglect*

Given their unequal rights to divorce, to say nothing of the prevailing patriarchal norms, it is not surprising that a sizeable portion of the litigation brought to the Muslims' tribunal was introduced by women. Their most common grievances were abandonment and neglect by husbands, which usually resulted in either annulments or divorces by mutual consent. As noted above, a divorce for abandonment was automatically granted after four years, but a spouse could file a legal complaint following a ten-day absence. In the practice of the court of Ndar, divorce rulings concluded on this basis cited abandonment periods ranging from as little as thirteen days (Amuja Buya in 1887) to a lengthy seven years (Rama Uthman in 1885). A considerable amount of divorce litigation was brought to court by non-residents of Ndar. Such was the case of Kumba Jaiti who lived in Mekki, a small town about fifteen kilometres south of Ndar. She appeared at the Muslims' tribunal with seemingly the intent of having the *qadi* locate her husband. After the legal month-long waiting period, she obtained a divorce for reasons of abandonment in 1889.[62]

Long absences of husbands oftentimes were related to their outmigration for the purposes of work. Judging from the frequency of such abandonment cases, the incidence of male spousal desertion increased markedly over time, to such an extent that *qadis* came to play an active role in domestic mediation. They practically served as go-betweens, contacting parties, communicating information and collecting settlements. Invariably, husbands failed to send maintenance payments (*nafaqa*), disappeared without a trace or stopped communicating with their spouses even after returning to Ndar. It was on this basis that women often recorded their first complaints with the court. If husbands did not show any signs of life after one month, the *qadi* usually granted the divorce.

Complaints about recent and short-term desertions often were related to polygyny. This was the case of Amuja Buya, who first presented her com-

plaint to the French court of Saint-Louis before being redirected to the Muslims' tribunal.[63] According to her testimony, Momar Jakk, her husband,

> exited her home, left her for 17 days, and subsequently he did not come to her shift (*nawbatiha*). Then he travelled without informing her or disbursing her maintenance. When he returned, he did not go to her and she was not informed for he did not send word to her. For this reason she addressed herself to the court.[64]

This is clearly a case where a husband was favouring one wife over the other. After he failed to appear in court, the *qadi* of Ndar summoned Momar Jakk, who declared that he left his wife's home because she had refused him intercourse. Amuja Buya swore under oath that his statement was untrue, and so, uncharacteristically, the court ordered the husband to return to Amuja Buya on the basis of her oath. After the ruling, the husband in turn denied his wife intercourse, which prompted her to return to court on 4 April 1887. At this time she was granted a divorce on the grounds that her husband neglected to perform his sexual duties. Since both agreed to part ways without compensation, this was a divorce settled by mutual consent, and therefore it was free-of-charge to both parties.

Another domestic dispute involving polygyny was the case filed by Bidi Ndiaye against her husband Yacine Jawu. She brought him to court in June 1911 seeking domestic mediation after: 'He threw her out of his home to take on another wife telling her not to come back until she masters cooking. She wants to return to the house but he refuses and for that reason she asked the court whether she was his wife or not'.[65] The husband answered that indeed he ordered her to leave because she 'spoils the *nafaqa*' and does not cook his meals. Here the *qadi* ordered Bidi Ndiaye to return to her husband's house with the recommendation that she better 'start cooking'!

From 1911 to 1929, the longest absence recorded for a husband was nine years, while the shortest was seventeen days. Although women introduced the majority of marital cases, men also brought litigation to court against runaway wives. Wives' 'disobedience' was a commonly cited grievance, as in the case introduced by Cherif Ould Barid against his wife Oumoul Khayr, who spent her days at her mother's home.[66] In several instances, husbands brought charges on their wives for remarrying in their absence.

The year 1914 marked a decisive change for the enforcement of court rulings, no longer linked to the symbolic capital of individual *qadis,* but directly to the colonial state. That year the following sentence appeared for the first time on the bottom the of rulings: 'The French Republic mandates and orders that all civil servants and members of armed forces (*agents de la force publique*) implement the present ruling or enforce it themselves'. Another marked change was the increased correspondence by *qadis* and their scribes for matters of surveillance and the location of missing persons, namely runaway husbands. Through letter-writing, *qadis* now attempted to stall the granting of divorces to women by locating their husbands and reconciling married couples, to keep families together and curb divorces, as per the directives issued by the French colonial justice system in the 1910s.[67]

During World War I, abandonment cases were frequent and obviously reflected military conscription and the war effort. On 3 December 1917 alone, the *qadi* of Ndar dispatched five letters to the *qadi* of Dakar, the presidents of the 'native' courts of Dagana and Kaolack, as well as two letters to the police commissioner of Kelle, all inquiring about deserting husbands.[68] Letters were being dispatched to the presidents of colonial courts and other legal clerks throughout western Africa. By this time, though, the colonial police department had expanded to the point that public control was becoming more effective, and so some letters were addressed to police commissioners who would have intelligence on migrants, including information on transients such as traders, soldiers and other workers of the colonial economy. By the 1920s, cases of abandonment were so frequent that the *qadi* and his scribe held a special register with detachable printed forms for expediting inquiries on husbands' whereabouts. Lengths of abandonment cited on the stubs of the register varied from about several months to over eight years. The reach of the *qadi* of Ndar's correspondence by then was staggering. He was exchanging letters with counterparts in Brazzaville, on the other end of the French continental empire. He also sent letters to the British colony of Gambia, and all the way over to Stanleyville in the Belgian Congo.

Women were not the only ones seeking justice for marital abandonment. Men also brought domestic complaints to court. Sometimes husbands sought rulings to force wives to follow them on their travels, as Fudi Kulibaly Traore Senekali attempted in June 1911.[69] Incidentally, three cases were introduced by women that same day (two *khul*' cases and one demanding a husband pay maintenance fees). Fudi Kulibaly planned to travel up-

country, but his wife Tani Sukha refused to accompany him. The *qadi* ruled that: 'If the husband journeys with his wife from country to country, he provides her maintenance. But if she stays behind and is resolved on separation (*ghazamat 'ala al-faraq*), then she must pay what he paid to her in bridewealth'.[70] So, as per her lawful right, Tanti Sukha demanded a *khulʿ* divorce. As stated in the record,

> The bridewealth is 74 *dirham* [370 Francs] and she will redeem (*tafada*) herself with it. Ibn Abi Zayd states in his *Risala* that the woman must redeem herself from her husband with her bridewealth. And by this we sentenced that Fudi Kulibaly's wife Tanti either go with him or pay him the amount that he paid for her bridewealth that is 74 *dirham*. This is what took place in the court on the date inscribed above.[71]

Rather than forcing the wife to follow the husband, the court gave her the option to divorce him by reimbursing the bridewealth. Here, as with all *khulʿ* cases, *qadis* were only on the side of Muslim women who had the means to satisfy the materialistic demands of their husbands in order to obtain their freedom.

## *Khulʿ Divorce Cases*

Cases of *khulʿ* were either introduced by women or negotiated at the outcome of domestic disputes deliberated at the Muslims' tribunal, as in the abovementioned case. The most contentious issue was determining the amount of compensation paid by a woman. Based on a preliminary survey of the source sample, I discern a decreasing trend in the volume of *khulʿ* cases from the 1880s to the 1920s. At the same time, the legal position of the *qadis* of Ndar evolved in the course of the early twentieth century when they came to sanction husbands' excessive demands for further compensation in addition to reimbursing the bridewealth. Determining what caused this erosion of Muslim women's divorce rights awaits an analysis of a more comprehensive dataset, but I suspect that it may be partially related to the loss of the economic power of Senegalese women in this period.

Women once frequently brought their husbands to court, resolutely determined to divorce them and prepared to pay the cost. In all of the *khulʿ*

cases judged from 1885 to 1889, the compensations were limited to the bridewealth only. The practice of allowing husbands to exact compensations amounting to over and above this amount would have evolved over time to become quite common by the 1910s. By the second half of the twentieth century, excessive compensation payments would have become the customary norm, according to studies of marriage in Senegal.[72] How these changes in the legal culture affecting women's divorce rights in Senegal came about, however, remains to be understood.

While polygyny was invariably discussed in these claims, it was never the primary motive women publicly stated for seeking the court's mediation or a divorce. Disputes related to spousal desertions were often settled through a *khul*ʿ divorce settlement when wives could afford it. Cases of physical abuse, such as beatings and mistreatment, were not commonly litigated, before or after 1911. Some exceptional records contain quite graphic descriptions of the types of wounds abusive husbands inflicted upon their wives. Mariam Sy, for example, described how her husband's blows caused bleeding wounds on her head and shoulders. In this case, filed in 1906, she was able to produce witnesses who testified to the fact that the beating was physical abuse and not simply a case of a husband reprimanding his wife.[73] This was made especially clear when the husband proceeded to beat the wife with a stick in the middle of the courtroom, and so a circumstantial divorce was granted to Sy.

For the most part, women could rarely produce witnesses to testify to their husband's violent behaviour. Obviously, physical abuse typically was carried out beyond public purview. In several instances, abused women succeeded in negotiating a *khul*ʿ divorce despite the fact that their original plea was for a circumstantial divorce. An example of domestic abuse was the spousal desertion case introduced by Diam Diallo in 1913.[74] A railway conductor, he complained that his wife left home without authorization two months and ten days prior. He tried, both directly and through the intermediary of relatives, to make her leave 'her home' (meaning the home of her parents) to no avail. When Lena Diallo was asked to explain her position, 'she answered that she can no longer continue [living] with her husband because of the mistreatment (*mauvais traitements*). We asked Lena Diallo [to present] the witnesses to prove the abuse, but she could not produce any and declares that she simply wants to separate from her husband'. Because there were no witnesses who could testify to husband's abusive behaviour,

Lena Diallo's only exit option was to buy her way out of the marriage. And so the Muslim judge gave her the following ruling:

> Diam Diallo is therefore invited to make known the amount of the bridewealth given to his wife. He declares the sum to be 278 francs that his wife Lena Diallo recognizes as correct and that she counted in the hands of the *qadi* who then immediately gave it to Diam Diallo... given that according to Ibn Aby Zayd, 'to obtain a divorce by compensation the wife can give her bridewealth as ransom to her husband'.

Citing Ibn Abi Zayd's *Risala*, the divorce ruling was concluded when Lena Diallo was made to pay the price for her freedom.

Oftentimes, couples agreed about the bridewealth but quarrelled about the other expenses added to the equation. As already suggested, the excessive demands of husbands for full refund of all of their gifts on top of the bridewealth did not comply with the spirit of Holy Book of Muslims, as conveyed in the verse cited above. The legal culture that developed at the Muslims' Tribunal can be said to have been shaped by local patriarchal norms and a set of select legal principles drawn from Maliki legal manuals. In other words, women's divorce cases were settled in accordance with a localized brand of justice that blended Maliki principles, local norms and individual preferences.

The following case demonstrates to what extent the *qadis* of Ndar were prepared to consider customary law in compensation negotiations in the case of *khul'* divorces. At issue was not the bridewealth, established at 221 *dirham* and one *tank* (or 1105.50 Francs), but past expenses incurred during the wedding ceremony in the region of Gandiole (southeast of Ndar), which the husband demanded that his divorcing wife be asked to pay. During the trial, the *qadi* 'asked the people of Gandiole who were with [the litigants] in court about their customs and so they said that if the man built for his wife the hut (*baka* in Wolof), he pays her 20 *dirham* (100 Francs) and the food during the days of the wedding is divided between the brothers of the husband'.[75] Zaynabu Gaye, the divorcing woman in question, was asked to pay only the bridewealth and nothing more, since the judge ruled that she was not responsible for the wedding expenses her husband demanded from her. The very fact that the judge did consult customary law to determine the amount of compensation in this case is indicative of the hybridity of legal

practice of the Muslims' tribunal. It also illustrates the authority of husbands in determining compensation amounts in a context where the *qadi* was prepared to accommodate male preferences. Indeed, had the laws of the people of Gandiole concerning wedding expenses turned out to be different, then conceivably they would have superseded Maliki legal codes.

Saharans transiting through Ndar, or otherwise residing there, also brought their civil litigation to the Muslims' court. In a most unusual case recorded in July 1910, Ahmad b. 'Aly al-Kuri claimed to be the husband and father of the child of a woman named Mas'uda, who denied his parental claim.[76] He was asked to bring two witnesses, and so he presented two men also residents of the Trarza region (southwestern Mauritania), who testified that Ahmad had paid 40 *dirhams* (200 Francs) as bridewealth on the day of the marriage contract (*yaum al-'aqd*). Mas'uda, who obviously came prepared to pay for a divorce, then produced the amount to obtain her freedom.

Another similar case involved Mulay Ahmad bin Mulay 'Aly, son of a very prominent caravan trader from the northern edge of the Sahara.[77] He was summoned to court by his wife, Munaya mint al-Mukhtar mint Ahmad al-'Amran, to settle the case of her *khul'* divorce. As in the previous case, there was no discussion concerning the compensation amount equal to the bridewealth or six bales of cotton cloth (*baysas*; known as *guinées* in French, these were units that functioned as a commodity-money).[78] That same day, 6 June 1911, another Saharan woman settled her *khul'* divorce for the price of two camels.[79]

## *Conclusion*

From the late nineteenth to the first decades of the twentieth century, the Muslims' tribunal was a legal and intercultural space of social contestation and negotiation of marital power and property. *Qadi*s of Ndar were once authoritative figures who interpreted Maliki law, local customs and litigants' interests. They mediated across gender lines in their capacity as divorce brokers, seeking the best outcomes for discontented marital partners who sought to exit or, on the contrary, to force their partners to remain in unhappy marriages. Over the course of this period, the cases brought to the Muslims' court reflect important social and economic changes affecting the Muslim communities in colonial Senegal and its outlying region. This ex-

plains in large part why abandonment would become the number one reason for women to obtain divorces from their absentee husbands. Such changes in the orientation of legal mediation should be understood within the context of the increasingly restricted position of Muslim tribunals in the legal landscapes of French West Africa.[80]

The creation of the Muslims' tribunal was of great benefit to African women. It served not just the assimilated population of the four communes for which it had been originally intended, but it carried a wider regional appeal, attracting litigants from among the non-*originaires*, the people of the immediate vicinity of Ndar, as well as Saharan transients and even non-Muslims. That women, like men, used this legal institution seems to point to the fact that the oldest courthouse in the region had established a reputation as a legitimate arena for civil litigation. In the nineteenth century women frequented the court with great ease, presenting their cases and claims, demanding that *qadis* investigate their deserting husbands, and negotiating costly divorces. At the same time, the *qadis* of Ndar invariably granted circumstantial divorces to women for reasons of spousal abandonment, or for more litigious matters such as neglect or physical abuse. The incidence of women's divorce cases would have decreased in the course of time, however, due to a shift in the legal culture of the court with regards to compensation amounts and French colonial policy concerning family law, to say nothing of the loss of women's economic means to purchase their freedom.

Until the first decade of the twentieth century, this colonial-cum-Islamic institution operated in relative autonomy, as a language barrier sheltered it for the most part from the colonizer's gaze and interference. When the 1911 language policy was finally enforced and the court scribes began recording rulings in the French language, the nature of the records was transformed, both in terms of narrative and legal content. The court continued to operate in a vacuum of Islamic legal discourse, as was the case in many colonial court systems. In this sense, the Muslim's Tribunal of Ndar was indeed what Charles Stewart called 'a *rationalized* Islamic practice under colonial hegemony'.[81] The power and prestige of the *qadi* evolved as the position became increasingly bureaucratized with the 'secularization' of the court and its staff. This would lead to the routinization of the legal practice of these legal civil servants. A more comprehensive analysis of the rulings of individual *qadis* is necessary, however, in order to better under-

stand the evolution of the brand of colonial *kadijustiz* dispensed at the Muslims' Tribunal of Ndar.

## *Notes*

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1 Throughout this chapter, I switch back and forth between using the French and the Wolof name for this port city, while denoting a preference for the latter term. Note that this chapter does not use diacritics for the transliteration of Arabic.

2 Lauren Benton (2002), *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (Cambridge: Cambridge University Press), 157.

3 For a discussion of Weber's 'kadi justice' see David S. Powers (2002), *Law, Society and Culture in the Maghrib, 1300-1500* (Cambridge: Cambridge University Press), 1-2 and Johansen Baber (1999), *Contingency and Sacred Law: Legal and Ethical Norms in Muslim Fiqh* (Leiden: Brill), Chapter 1.

4 Richard Roberts (2005), *Litigants and Households* (Portsmouth: Heinemann), 126-7.

5 This is a common misunderstanding prevailing in oral histories as well as published histories. See for example, Lauren Benton, *Law and Colonial Cultures,* 157.

6 'La création des trois Tribunaux Musulmans, Saint-Louis, Rufisque, Dakar', Gouvernance de Saint-Louis (4 March 1969). See also Bernard Schnapper (1961), 'Les Tribunaux musulmans et la politique coloniale au Sénégal, 1830-1914', *Revue historique de droit français et étranger*, 39: 93-4; and Alain Quellien (1910), *La politique musulmane dans l'Afrique occidentale française* (Paris: Larose).

7 Allan Christelow, 'The Muslim Judge and Municipal Politics in Colonial Algeria and Senegal', *Comparative Studies in Society and History* 24, 1 (January 1982): 3-24.

8 Jean Savvas-Pacha (1902), *Le Tribunal Musulman* (Paris: Larose).

9 See fn 1. Currently, Mame Ngor Faye of the Archives Nationales du Sénégal, is in the process of preserving the tribunal archives in microfilm format.

10 Schnapper, 'Les Tribunaux musulmans'.

11 Seck (1984), 'Les Tribunaux musulmans du Sénégal de 1857 à 1914'. Mémoire de maîtrise, Université Cheikh Anta Diop, Senegal.

12 Seydou Diouf (2000), 'Les droits de la femme dans le marriage en droit musulman d'après la jurisprudence musulmane Sénégalaise aux XIXe et XXe siècles', Thèse de doctorat d'état en Droit, Faculté des Sciences Juridiques et Politiques, Université Cheikh Anta Diop, Senegal.

13 Dominique Sarr and Richard Roberts (1991), 'The Jurisdiction of Muslim Tribunals in Colonial Senegal, 1857-1932', in *Law in Colonial Africa*, eds. Mann and Roberts.

14 Rebecca Anne Shereikis (2003), 'Customized Courts: French Colonial Legal Institutions in Kayes, French Soudan, c. 1880-c. 1913 (Mali)', (PhD dissertation, Northwestern University).

15 For a discussion of the case of Muslim *originaires*, see Rebecca Shereikis (2001), 'From Law to Custom: The Shifting Legal Status of Muslim *Originaires* in Kayes and Médine, 1903-191', *Journal of African History* 42: 261-283. On the *originaires* and French colonial policy, see Alice Conklin (1997), *A Mission to Civilize: The Republican Idea of Empire in France and West Africa, 1895-1930* (Stanford: Stanford University Press).

16 'Arrêté promulguant le décret impérial du 20 mai 1857, qui crée à Saint-Louis un tribunal musulman, 25 Juin 1857', *Moniteur du Sénégal,* no. 66 (30 Juin 1857): 2-3.

17 Although many Algerian-trained French officials, such as Faidherbe, may have had some training in Arabic, it was not until the early twentieth century, with the arrival in Senegal of colonial officer-scholars such as Paul Marty and Vincent Monteil, that the French had bilingual expertise.

18 David Robinson (2000), *Paths of Accommodation* (Athens: Ohio University Press). It is important to note that the French, under Governor Bouët, helped build a mosque in Saint-Louis as early as 1844. It was also this governor who made the first official request for the creation of the Muslim tribunal (Schnapper, 'Tribunaux musulmans', 93-5).

19 Ibid., 133-4.

20 Sarr and Roberts, 'The Jurisdiction of Muslim Tribunals in Colonial Senegal', 131-45. See also Schnapper, 'Tribunaux musulmans', 92-105 and Roberts in this volume.

21 'Gouvernement du Sénégal, dépêche ministérielle – Justice musulmane; successions et ventes judiciaires', *Journal Officiel du Sénégal et Dépendances* (14 Mars 1889), 99. Official correspondence on this issue was exchanged in 1865, 1866, 1867, 1875 and 1884. Some of the main concerns are summarized in 'Réorganisation de la justice musulmane, Procès verbal de la commission' (6 June 1889), Archives Nationales du Sénégal (hereafter ANS) M8 (28). See also Schnapper, 'Tribunaux Musulman', 116-121.

22 'Avis', *Journal Official du Sénégal et Dépendances,* no. 35, 28 août 1860, 83. For a discussion of Muslim judges position as financial intermediaries, see Ghislaine Lydon (2009), *On Trans-Saharan Trails: Islamic Law, Trade Networks and Cross-Cultural Exchange in Western Africa* (Cambridge: Cambridge University Press), Chapter 6.

23 The commission was composed of the *qadi* Ndiaye Saar, the director of political affairs of Senegal, several 'private counselors' and Couchard, the main lawyer of St. Louis. It was to 'revise the decree of 30 May 1857'. See 'Administration de la Justice', *Journal Officiel du Sénégal et Dépendances,* 21 March 1889, 111.
24 *Journal Officiel du Sénégal et Dépendances,* 12 September 1889.
25 For a discussion of the 1903 legal code, see Richard Roberts (1999), 'Representation, Structure and Agency: Divorce in the French Soudan During the Early Twentieth Century', *Journal of African History,* 40: 398-403. For a discussion of the implications of this reform for Muslims, see Sarr and Roberts, 'Jurisdiction', 135-138.
26 Quellien, *Politique Musulman*, 231-234.
27 Ibid., 233. The 48-hour rule, part of the original decree of 1857, had never been systematically enforced.
28 William Ponty, 'Circulaire no. 29 au sujet de l'emploi de la langue française dans la rédaction des jugements des tribunaux indigènes et dans la correspondance administrative', Dakar, 8 May 1911. *Journal Officiel du Sénégal et Dépendances* (8 Mai 1911), 346-7. It is noteworthy that Ponty was particularly critical of the 'marabouts' who rendered Muslim justice, whom he saw as overall incompetent and not always well-read. He probably was referring to the *qadi* of the Dakar tribunal which, according to Christelow', 'The Muslim Judge', was reputedly under-qualified.
29 Brévié (1932), *La Justice Indigène en Afrique occidentale française* (Gorée: Imprimeries du Gouvernement Général).
30 Robinson, *Paths,* 80-1 and Schnapper, 'Tribunaux musulmans', 111-2. Because of his dual position, the chief *qadi* earned the French designation of 'cadi-tamsir'. According to Schnapper, both roles were combined until 1894, when Ndiaye Saar was named *qadi,* but was not *tamsir* of Ndar. By recognizing *qadis* as rulers of the Muslim community, the French were following pre-existing patterns of authority in this region of Muslim Africa.
31 *Moniteur du Sénégal,* no. 66 (30 Juin 1857), 3.
32 Arrêté fixant les heures d'ouverture des audiences des tribunaux. Saint-Louis le 22 juin 1857. *Moniteur de Sénégal,* no. 66 (30 June 1857).
33 Only once was reference made to the Islamic calendar, interestingly on Christmas Eve. Archives-Tribunal Musulman de Saint-Louis, case of Sika 24 December 1897 (*jumad al-'awal* or the fifth month).
34 For example, closures occurred between 2 April 1888 to 5 May 1888; 2 September and 3 October 1895; and again from 24 December 1897 to 25 January 1897.
35 See Susan F. Hirsch and Mindie Lazarus-Black (1994), 'Performance and Paradox: Exploring Law's Role in Hegemony and Resistance', in *Contested States: Law, Hegemony and Resistance*, eds. Susan F. Hirch and Mindie Lazarus-Black (New York: Routledge).

36 These preliminary numbers are intended to provide for an overall sense of the distribution of legal cases. I do not have complete data sets for any given year or register, but reasonable coverage of the following years: 1885-89 (except 1886), 1892, 1895, 1906-07, 1910-11, 1913-14, 1916-17, 1920-9. For the years 1910-11 and 1929, I photographed entire court registers. The biggest gaps in the data are from 1897-1906 and from 1920-1928. In the nineteenth and early twentieth century, cases are typically not numbered.

37 See graph and table in Roberts, *Litigants and Households,* 137-139, and 236.

38 Powers, *Law*, 18-22. See also Muhammad Khalid Masud, Rudolph Peters, and David Powers (2005), 'Qadis and Their Courts: An Historical Survey', in *Dispensing Justice: Qadis and their Judgements*., eds. Muhammad Khalid Masud, Rudolph Peters, and David Powers (Leiden and Boston: Brill), 1-44. See Lydon, *On Trans-Saharan Trails,* Chapter 6, for a discussion of pre-colonial legal practice in Mauritania and Mali.

39 Benton, *Law and Colonial Cultures*, especially her discussion of Islamic legal systems on pages 102-107. While she notes the absence of appellate courts in Muslim legal systems, she does not discuss the role of *mufti*s and their fatwas. In her work on Ottoman courts in Syria and Palestine, Judith E. Tucker (1998), *In the House of the Law: Gender and Islamic Law in Ottoman Syria and Palestine* (Berkeley: University of California Press) notes that the application of Islamic law was almost 'a form of arcane and mummified knowledge' were it not for the engagement of some jurists with the legal scriptures.

40 For a discussion of Weber's problematic term see Powers, *Law,* 23 and Benton, *Law*, 102.

41 Roberts, *Litigants and Households,* 36-48, for a discussion of the codification of customary law in French West Africa. On Ottoman history, see Tucker, *In the House of the Law,* 11-12.

42 Shereikis 'From Law to Custom', 281. See also Réné Pautrat (1957), *La Justice locale et la justice musulmane en A.O.F.* (Rufisque: Imprimerie du Haut Commissariat de la République en Afrique Occidentale Française), 103-8, who discusses how Muslim judges relied on customary legal codes.

43 Marty (1917), *Études sur l'Islam au Sénégal* (Paris: Ernest Leroux), 205.

44 For a discussion of the place of customary law and practice in Islamic legal theory and practice, see Ghislaine Lydon (2007), 'Islamic Legal Culture and Slave Ownership Contests in Nineteenth-century Sahara', *International Journal of African Historical Studies,* 40 (3): 391-439 and Lydon, *On Trans-Saharan Trails,* 276-283. On the issue of Islamic legal pluralism, see Wael B. Hallaq (2001), *Authority, Continuity, and Change in Islamic Law* (Cambridge: Cambridge University Press).

45 Imam Malik ibn Anas (c.713-c.795) was a scholar in the city of Medina, whose code of law was based on the legal practices of Medina. The primary reference is the *Muwatta'* ('the Beaten Path') which is a series of legal questions and Malik's answers organized in thematic chapters. Another classic Maliki text is

the *Mudawwana al-Kubra,* compiled by Sahnun who recorded the teachings of his teachings of Malik's student Ibn al-Qasim.

46 I used Khalil's (1887) *Al-Mukhtasar* (Paris: Imprimerie Nationale) [hereafter Khalil]. Léon Bercher's text and translation, *Ibn Abi Zayd al-Qayrawani, La Risâla ou epître sur les élements du dogme et de la loi de l'islâm selon le rite malékite* (Alger, 1968) [hereafter Ibn Abi Zayd]. The *qadis* of Ndar invariably made use of other works, especially Sahnun's *Mudawwana* (see note above).

47 Archives-Tribunal Musulman de Saint-Louis, case no. 81, 22 September 1913, Adiouma Diallo v. Ahmadou Diallo. He owed 11 out of a total of 15 guinée cloth units (or *baysas*). She would have had to redeem four of these in order to obtain the *khul'*.

48 In some exceptional cases, women gave up their custody rights, as with a woman who obtained a divorce by *khul'* who relinquished her daughter in the process (Archive-Tribunal Musulman de Saint-Louis, case on 11 May 1909).

49 There was discussion across the legal schools of the intent of a husband's pronouncement, in cases where the husband pronounced the *talaq* without meaning it. Known as 'doubtful *talaq*', such a variant was not accepted by the Maliki school, that did not give wriggle room for a husband to renege or not take such oaths seriously. On the different categories of divorce see Aharon Layish (1991), *Divorce in the Libyan Family* (New York: New York University Press), 27-40, John L. Esposito (1982), *Women in Muslim Family Law* (Syracuse: Syracuse University Press), 30-9, Mohamed Hashim Kamali (2003), *Principles of Islamic Jurisprudence* (Cambridge, UK: The Islamic Texts Society), 391-2, and Tucker, *Women*, 84-132.

50 Tucker, *Women, Family and Gender*, 95-100. See also Hashim Kamali, *Principles*, 234 and Layish, *Divorce*, 80.

51 Qur'an II: 229. Translation based in part on A. Yusuf Ali (ed.) (1983), *The Holy Qur'an: Translation and Commentary by A. Yusuf Ali* (Brentwood, MD: Amana Corp.).

52 Ibn Abi Zayd, 184-5, 192-3.

53 Khalil, 66-71.

54 Archives-Tribunal Musulman de Saint-Louis, case no. 79, 22 June 1911, Fudi Kulibaly Traoré Senekali v. Tanti Sukha; this case discussed in the next section.

55 Layish reported this to be the case in early twentieth-century Libya. Layish (1988),'Customary *Khul'* as Reflected in the *Sijill* of Libyan *Shari'a* Courts', *Bulletin of the School of Oriental and African Studies, University of London*, 51, 3: 428-439. See also Roberts, *Litigants and Households,* 160 and 171.

56 Diouf, 'Les droits de la femme', 206. I did not find any reference in the Maliki texts I consulted to the gender discrimination in payment issues.

57 Khalil, 89.

58 Khalil, 234.

59 Archives-Tribunal Musulman de Saint-Louis, 24 February 1885, Njaye Jaub v. Mabaati Faal. Archives-Tribunal Musulman de Saint-Louis, case no. 22, 9 April 1929, Madieye Dieye v. Kouna Dio. See Roberts' *Litigants and Households* for a

sense of relative prices in this time period. The *dirham* (*derëm* in Wolof) was the monetary unit in Senegal equivalent to the five Franc piece.

60 J.L. Comaroff (ed.) (1980), *The Meaning of Marriage Payments* (London: Academic Press) on the judicial nature of marriage payments.

61 Archives-Tribunal Musulman de Saint-Louis, 29 November 1913, Makha Keita v. Moussa Sankaré; the first was an officer of the *tirailleurs sénégalais* or Senegalese Riflemen, and the second was a police agent. Doussouba was the wife of the first and daughter of the second, and Mayemouna Kamara is said to have spoken these words as a witness.

62 Archives-Tribunal Musulman de Saint-Louis, case on 26 January 1889.

63 It would be interesting to locate information about her first appearance in the French court to understand Amuja Buya's motivations and her decision to shop for a better legal outcome at the Muslims' tribunal. Perhaps her case was simply referred to the appropriate court.

64 Archives-Tribunal Musulman de Saint-Louis, case on 4 April 1887, Amuja Buya and Momar Jakk.

65 Archives-Tribunal Musulman de Saint-Louis, case no. 110, 17 August 1911. Yacine Jau and Bidi Ndiaye.

66 Archives-Tribunal Musulman de Saint-Louis, case no. 67, 29 April 1914. Cherif Ould Barid v. Oumoul Khayr.

67 Roberts, *Households and Litigants*, especially 89-91, 126-136, and 144.

68 Archives-Tribunal Musulman de Saint-Louis, cases nos. 267-273, Cahier de Correspondence 3 December 1917.

69 Archives-Tribunal Musulman de Saint-Louis, case no. 79, 22 June 1911, Fudi Kulibaly Traore Senekali v. Tanti Sukha. Judging from his name, he was obviously a Mandingo who resided in Senegal. This is the first time that the name 'Senegal' appears in the court records collected.

70 Here the *qadi* referred to Sahnun's *Mudawwana* (see fn. above).

71 Ibid.

72 See Abdoulaye Bara Diop (2000), *La Famille Wolof* (Paris: Karthala) and Seck Ndiaye, 'Islam et Mariage traditionnel Wolof au Sénégal', Thèse de doctorat 3ème cycle, University Cheikh Anta Diop (1992-1993), 292-297.

73 Archives-Tribunal Musulman de Saint-Louis, case of Mariam Sy v. Ajama Thiam 30 September 1906.

74 Archives-Tribunal Musulman de Saint-Louis, case 50, 24 July 1913, Lena Diallo v. Diam Diallo.

75 Archives-Tribunal Musulman de Saint-Louis, case on 6 April 1887, Madumba Jaay v. Zaynabu Gaye.

76 Archives-Tribunal Musulman de Saint-Louis, case no. 101, 6 July 1911.

77 Mulay 'Aly's commercial itinerary and progeny are discussed in Lydon, *On Trans-Saharan Trails*.

78 Archives-Tribunal Musulman de Saint-Louis, case no. 64, 6 June 1911.

79 Archives-Tribunal Musulman, case no. 65, 6 June 1911.

80 The concept of a 'legal landscape' was developed by Roberts, 'Representations'. See also Roberts, *Ligitants and Households.*

81 Charles Stewart (1997), 'Colonial Justice and the Spread of Islam in the Early Twentieth Century', in Le *temps des marabouts: itinéraires et stratégies islamiques en Afrique occidentale française, v. 1880-1960, eds.* David Robinson and Jean-Louis Triaud (Paris: Karthala), 55 (emphasis added).

# 5 The Making and Unmaking of Colonial Shariʿa in the Sudan

**Shamil Jeppie**

## *Political and Legal Contexts*

Until Sudanese independence in 1956, shariʿa courts were part of the colonial machinery. Shariʿa was a key component of a three-tier judicial system, the two others being the English common law courts and so-called native courts. Shariʿa was partly codified in the *Manshurat al-mahakim al-shariʿa* (circulars). It was part of a modernizing colonial bureaucracy and was given a modern shape and, to some extent, modern content, as reflected in certain legal reforms.[1]

The dominant *madhhab* ('school' of legal interpretation) in the Sudan was Maliki, but the Egyptian Grand Qadis often ignored this fact and based their decisions on the Hanafi *madhhab*, dominant among the *ʿulama* in Egypt since Ottoman times.[2] The qadis also made innovations in their application of the shariʿa, especially in the area of family and personal law. Many of their judgments drew on both Hanafi and Maliki opinions.[3]

The highest authority was the governor-general, in 'supreme military and civilian command of the Sudan', and the colonial bureaucracy under him staffed by Britons. The civil courts would serve the British, Europeans and other 'non-Mohammedans' in the country, such as the Greek community, and local and Egyptian Copts. These courts were called 'ordinary courts', revealing the norm set by the British. Muslims, with the means and desire, could also bring their cases to these courts. Indeed, in all areas not

covered by the shari'a or native courts, the 'ordinary courts' had jurisdiction.

Muslims, the subjects of shari'a, and who were the majority in the northern regions, and the biggest religious group in the country as a whole, primarily had recourse to the shari'a courts. In the south and among the nomadic Muslim peoples in the north, native or tribal courts practising 'customary law' were steadily given more authority in the 1920s and 1930s.[4] However, each sphere of authority was ultimately subject to the approval of the British governor-general. Egypt was supposed to be a co-domini of the Sudan, but the Egyptians played a secondary role in the running of the colony. The Egyptians were kept at bay, and in the 1920s their presence was reduced even further.[5] Insofar as the law was concerned, the Egyptians were sent to Khartoum to oversee the operation of the shari'a courts. Thus, until independence an Egyptian was always the Grand Qadi.[6]

The British regarded the civil courts, their methods and precepts as the superior system. The legal triad was not one of equally valid components. The civil courts effectively applied English common law, and this legal tradition, through the sheer weight of British colonial dominance, became the pre-eminent tradition in the country. The Civil Justice Ordinance of 1929 had a 'justice, equity and good conscience' clause for cases in which there was no precedent or clear-cut legislation. This clause, however, was interpreted to mean English common law, and thus colonial Chief Justices and judges drew extensively on English precedents, legal (Latin) terminology and treatises.[7] Section 5 of the Civil Justice Ordinance of 1929 gives custom and 'Mohammedan law' preference in personal law matters unless contrary to 'justice, equity and good conscience'.[8] A separate Sudan Penal Code was promulgated wholly based on the Indian Penal Code drawn up in British India.[9]

Shari'a was seen as substantially less significant, but some measure of it had to be tolerated because of the Muslim population and especially the fear of offending the 'traditional' Muslim elite. After the conquest of the Sudan in late 1898, Lord Cromer, British agent and consul-general in Cairo, travelled from Cairo to Khartoum and proclaimed the new authority and the government's respect for 'Mohammedan Law' to the religious notables he met. Very soon afterwards, legislation was passed giving effect to Cromer's promises.

The Mohammedan Law Courts Ordinance of 1902, and subsequently the Mohammedan Law Courts Procedure Act of 1915, governed the administra-

tion of shari'a.[10] The first Act (section D) provided for the Grand Qadi (Qadi al-Qudat) to issue regulations relating to shari'a for the courts to apply. These regulations took the form of periodic circulars issued by the Grand Qadis. However, the circulars had to have the approval of the governor-general before becoming shari'a. In due course, judicial circulars were regularly published reflecting respective qadis' close interaction with Sudanese realities.[11] These circulars (*manshurat*) largely displaced the *fatwa* as the source of law. It was a type of legal codification, and the Egyptian *'ulama* appear not to have opposed this innovation; indeed, they participated in this process, from the Grand Qadi down.

The 'native courts' were given official recognition twenty years after the conquest, immediately after the 1920 investigation led by Lord Milner, after which he recommended the use of 'native authorities' and decentralization to achieve effective government. In the north, the British began by promoting these courts' judicial functions, largely to displace the shari'a courts. In the south, they fostered the courts' administrative role, such as how and when to collect taxes.

This was the beginning of the end of 'direct rule' and the beginning of indirect rule. From then on, 'native courts' were gradually used in attempts to displace shari'a courts in the North. For instance, on personal status issues, the native courts were given concurrent jurisdiction with shari'a courts. This led to several conflicts between colonial officials and native shaykhs, on the one hand, and qadis on the other.

There were also attempts in the 1920s to halt the work of the Qadi College, established in Umdurman before World War I to train shari'a judges. By 1929, numerous shari'a courts had been abolished, and native shaykhs' courts established. In the same year, one-third of the shari'a judges were pensioned off, and about half of the 42 shari'a courts were abolished.[12] Efforts to completely displace the role of shari'a were never successful. So shari'a remained, but as a poor relation in the family of laws recognized by the state and applicable in the Sudan. The British, after all, did not operate anything close to the Ottoman *millet* system. On the contrary, they were highly interventionist in the field of law.

It is nevertheless significant that the British entertained shari'a at all. They could have restricted its legal space or hampered its operation from the outset, but only began to do so in the late 1920s. The recognition of shari'a was strategic. Its sphere of jurisdiction was also slowly but substan-

tially narrowed. Fear of Mahdist revivals, and placating the religious elite who could be moved to mobilize against the infidels running the country, were primary considerations. By allowing the courts to operate, they also incorporated Egyptians and a handful of locals into the structure of authority. Egyptians were supposed to be co-partners in ruling the Sudan, and served in numerous positions throughout the country, but never above the British.[13]

In the legal structure, the Egyptians were given pre-eminent positions in the shari'a courts. However, the Sudan Political Service and the Civil Service, staffed by an Oxbridge-educated elite, had ultimate authority. In the provinces, the District Commissioners often also took on the role of judges, although they had no legal training in most instances. The D.C. was 'judge, administrator, chief surveyor, inspector of education, chief of police, and military ruler all in one'.[14] The total number of senior British administrators was small. Between 1899 and 1959, they numbered no more than 400 members in total, 'rarely reaching one hundred and twenty-five officials on the ground to administer almost a million square miles'.[15] Indirect rule, through the native authorities but also to an extent the shari'a courts, was therefore an absolutely necessary device in the colonial apparatus. This was certainly the case from the 1920s onward.

Mahmood Mamdani has argued that the late colonial state was bifurcated between a small, urbanized civil society and a vast rural domain dominated by despotic native chiefs and tribal authorities.[16] The Sudan is an example of this argument, especially after 1920, when the elevation of native authorities became a priority of the state. However, the Anglo-Egyptian Sudan also complicates Mamdani's thesis, because the 'Mohammedan law Courts' were neither the courts of dependent native chiefs nor an expression of urban colonial civil society. The shari'a courts were a problem because they were neither; they were in a sense in-between. While they were dependent on colonial power, they also demonstrated the potential for autonomy. Colonial officials said they feared that the shari'a courts were capable of assuming executive authority in addition to their prescribed judicial powers.

Mamdani argues that urban civil society was non-racial, but open only to those with the 'civilized' standards of education. This opening of civil society to the Sudanese happened in the 1920s, as the graduates from Gordon Memorial College found employment in the lower ranks of the civil service.

This group was also the first to agitate for independence. This movement remained small even at the time of independence. The native chiefs and the traditional religious figures maintained their dominance over the majority in the rural areas. The shariʿa courts were in a curious in-between position: they were neither English nor customary, and often conflicted with both. Shariʿa judges were not hereditary chiefs, but educated in a specialized college for the purpose. Yet these were not the western institutions that would admit them to privileged status in colonial civil society.

After World War I, a number of factors led to the attempts to weaken the shariʿa courts while giving native administration more influence. Extensive anti-colonial protests in Cairo between 1919 and 1922, fears about their spread to the Sudan, and glimmers of nationalist agitation in Khartoum made the British acutely concerned about their somewhat unstable position in the Nile Valley. In March 1919, thousands of Egyptians took to the streets in what was to become a sustained period of protest against the British presence. Nationalist mobilization against the British in Cairo resonated in Khartoum. While on a visit to Cairo, the governor-general of the Sudan, Sir Lee Stack, was assassinated during the nationalist protests. In 1924, there was a pro-Egyptian uprising in Khartoum.[17]

Large numbers of the Egyptian military and civilian staff of the Anglo-Egyptian Condominium were then immediately evacuated from the Sudan. Such staff had not cost the regime much, and in any case until 1913, the Egyptians had borne most of the costs of the Condominium.

As a result of these developments, the state drastically slowed down its efforts to 'Sudanize' the bureaucracy. Thus in the 1920s, native administration was given great weight; it started off as pragmatic policy and became unquestionable belief after 1924. Native authorities would be one way in which the emerging Sudanese educated elite could be displaced. Since the qadis in the 'Mohammedan Law Courts' had the potential to cross the boundaries of their office into the spheres of 'executive authority', they too had to be curtailed.

Lord Milner's team toured the country, and their trip resulted in his 1921 Report recommending decentralization and increasing use of native authorities. Thus, the Power of Nomad Sheikhs Ordinance was passed in 1922 (repealed in 1928 and replaced by the Power of Sheikhs Ordinance), and the Village Courts Ordinance in 1925 (amended in 1930). By 1929, there were 72 such courts, and they had tried over ten thousand cases by the end of that

year.[18] It is clear that one of the reasons for 'recognizing and organizing native administration in the North was to minimize reliance upon the Sudanese educated class ... (and) judicial and administrative powers were transferred from the Sudan civil servants and judicial staff to the native authorities'.[19] Therefore, very little was done to develop a modern educated elite. Education in the north did not expand, and definitely not legal education, in either shari'a or the common law.

This is an outline of the broad setting in which the various shifts and moves were made to restrict what I term 'colonial shari'a', or Islamic law practised and constructed in, and enabled by, a colonial setting. Through this colonial shari'a, Muslims had access to key legal symbols and practices of Islam, though they were limited by the fact of state power being in non-Islamic, British, colonial hands. The rest of the chapter takes a closer look at the late 1920s and 1930s, when the encounter between the colonial bureaucracy and representatives of the 'Mohammedan law courts' to inhibit their expansion and replace them with native courts was at its height.

## *The School and Court of Fiki wad Hashi: a Native Shaykh and a Model Qadi*[20]

Shaykh Abd al-Qadir Ahmad al-Badawi, or Fiki wad Hashi as he is known in colonial correspondence, ran a Qur'anic school and presided over a 'customary' court serving the Red Sea and Kassala provinces, mainly groups classified as Mesellamia, Hadendowa, Bisharin and Amarer. In late 1927, his school had forty pupils coming from throughout these provinces and from among these groups. During the cultivation season, the pupils would disperse to work in the fields and reassemble after their period of work. While they paid no fixed fee, they offered their teacher gifts in return. He also supplied them with basic food and clothing during school terms. He cultivated some land himself, enough to allow him 'to live the life of a scholar, with dignity, in modest comfort'. His school, which offered classes in Qur'anic reading, literacy, and 'Mohammedan law as set out in the Risala of al-Khalil', earned high praise from the colonial officials who had met him. More than the school, it was the court that received accolades.

Fiki wad Hashi was born around 1863. A young man during the Mahdiyya, he had not supported the movement that swept through north-

ern Sudan, and was in fact slated for execution by Osman Digna, the eastern region's prominent Mahdist leader. Wad Hashi belonged to the Qadiriyya tariqa and had made the hajj in 1915. In 1914, the colonial authorities awarded him a 'Second Class Religious Robe', one of the recently invented ranks and regalia for Sudanese notables and civil servants whom the British wanted to reward for loyal service.[21]

His honorary robe came before his recognition as a judge. His function as a judge in his informal court, possibly at his *tukl* or his mud-brick home, made him a man of unique importance to the officials. The moment of his 'discovery' coincides with renewed attempts to restrict shari'a courts and foster their 'native' counterparts, or any other courts but the shari'a ones. He gained attention to him came during the late 1920s, late 1927 to be exact, when legislative efforts were renewed to enforce recognition of native tribal Shaykhs and restrict shari'a courts.

Wad Hashi was seen as the model customary judge. He had local legitimacy, administered 'customary law' which had a strong Islamic element, but did not attempt to make it part of the Mohammedan Law Courts infrastructure. If he had requested to be recognized as an official colonial Qadi, the qadis may have been divided on whether to accept him into their fraternity, since he appears not to have come through the official college in Umdurman for training qadis; instead, he was a decidedly local man.

Moreover, Wad Hashi apparently claimed no judicial authority except that he 'exercise(s) the common right to arbitrate in disputes voluntarily brought to him for settlement'. His was the epitome of the native court whose authority was widely respected, whose judgments were recognized and who was simply 'found' by the state and not appointed or imposed. What made him particularly attractive was that he handled 'all types of cases, criminal, civil and shari'a', except homicide cases. Furthermore, 'controversial' cases, such as slavery, were simply not taken to him, say the officials. Thus, the description given in the official transcript runs:

> His personal reputation for legal learning, knowledge of tribal custom, and equity, added to his family tradition, causes Arabs to resort to him to an extent which attracts considerable notice and gives to his decisions a very considerable weight in their eyes: but there is no other compulsion, either to take cases to him or to accept his decisions.[22]

Furthermore, cases that he could or would not deal with were sent along to the provincial colonial authority. He awarded only compensations, not punishments, and thus he had no need to refer back to the colonial authorities. He kept no records except of 'serious cases', which in any case would land up with the colonial authorities at the 'Merkaz'.

Wad Hashi's informal court was considered as a 'well-established native institution of great value'. It was considered unnecessary to bring his court under the 'Powers of Sheikhs Ordinance', which sought to increase and bolster the authority of heads of 'tribes' through giving them judicial powers, at the expense of the shari'a courts.

This court was recognized neither as a shari'a court nor as a customary native court. It had elements of both, and was viewed as useful since it had legitimacy, and yet its head made no attempt to expand its role and scope, which is what worried the state about the shari'a courts. The qadis were expansionary, local officials felt. They feared that the qadis were always on the verge of transforming their judicial authority into executive authority, of breaking out of the limits of 'colonial shari'a'. Wad Hashi was thus a model shaykh, far more than any qadi or 'conventional' native shaykh.

It is quite possible to read the story of Wad Hashi as a colonial fiction, necessary to the work of the colonial administrators at the time. All parts of the discourse on the Fiki fit too neatly together: it has loyalty to the state, legitimacy at the grassroots, schooling, legal order, and even efficiency. His image was possibly 'constructed' so as to demonstrate to the colonial bureaucracy itself, in the first instance, that there were workable institutions and men who just needed to be 'discovered' and fostered. Finally, it may also have been used to demonstrate that constraining, if not abolishing completely, the institutions of colonial shari'a was a proper course of action.

## *The Case for Native Authorities*

Despite Milner's recommendation that 'native authorities' be cultivated in the years immediately after his inspection, central authority in fact was extended to more areas of the country. Ordinances were issued in 1922 and 1925 giving *umdas*, *nazirs*, and nomad shaykhs various powers; but in practice these ordinances were only partially implemented when not wholly neglected. From 1927 onward, bold attempts at decentralization began, or

as the discussion paper of the Assistant Legal Secretary was entitled, there were 'further steps in devolution'.[23] The Powers of Sheikhs' Ordinance of 1928 was a key piece of legislation in the development of indirect rule.

One of the reasons for giving 'tribal' shaykhs judicial authority was to prepare the way for conferring executive authority on them later. In this way, the colonial bureaucracy would not be burdened with administrative details in each province, but would rely on 'tribal' or 'native' authorities to exercise control over their people.

Officials believed that the tribal shaykhs deserved to have power – judicial and executive – for they were the 'natural' leaders and rulers over their respective peoples. These leaders understood the 'custom' of their 'tribes', which could in many cases be altered and changed by the leaders. They were not 'alienated' from their people through urbanization or modern education, as was the case with what they liked to call 'the intelligentsia', nor were they like the qadis who were literate and a potential challenge to colonial authority. The fear of a return of Mahdism was still very much alive.

So we could argue that by the 1920s, the state in a sense attempted to undo the 'mistake' made at the foundation of the Anglo-Egyptian condominium, which was to give shari'a an elevated, albeit unequal, status in the judicial order of the new state. This 'mistake' was committed in a moment when the British were still somewhat dizzy with victory over the Mahdist 'dervishes'. Lord Cromer promised the Sudanese notables whom he met in Khartoum after the reconquest that shari'a would not be violated, but respected. While the thought of winning them over instead of losing them to residual Mahdism was the dominant idea in Cromer's promise, he possibly also had in mind the few 'reformist' *'ulama* he had encountered in Cairo. There is some indication that he relied on the Mufti of Egypt, his friend Shaykh Muhammad Abduh, to make appointments to the Sudanese shari'a bench.[24] Thus, the first Chief Qadi of the Sudan was Shaykh Muhammad Shakir, a prize student of Abduh. Abduh would himself visit the Sudan in 1905, the year of his death.[25]

Nonetheless, the growth in the number of qadis led in many places to them wanting to displace the tribal shaykhs, and criticizing their judgments. There was a feeling that the qadis were difficult to keep in line. In the late 1920s and through the early 1930s, reports flowed in from District Commissioners and lesser officials in the provinces complaining about cantankerous qadis.[26] In Kordofan province in particular, there were numerous

reports of problems with qadis. For example, in Rashad in 1931, a new qadi arrived, described as a 'very northern-minded pedant of a type particularly unsuitable to a district like Rashad' and was 'making very heavy weather' for everyone by 'simply raking up charges'.[27] In the same province, the *ma'zuns* (clerks in the shari'a courts) were 'used as propaganda agents on behalf of the M.L.C. [Mohammedan Law Courts] to which they were attached', and it was suggested that they be withdrawn. Moreover, the *ma'zuns* were 'probably the least satisfactory class of M.L.C. employee'.[28] In these conflicts the qadis were usually objecting to the encroachment of native courts, in other words to the containment of their authority.[29]

In Kordofan, the colonial officials reported growing conflict over jurisdictions and advised the abolition of qadi courts in a number of villages and towns. In the south and west of the province, there were great difficulties, and the conflicts were fierce, while in the east no conflict was reported.[30] There was consensus that 'colonial shari'a' had to be contained, if not dismantled, especially where customary courts could be established.

## *The 'Clash of Jurisdictions'*

Examples of native and shari'a court decisions conflicting recur in the field of family law in the period when native courts were expanding. A typical case occurred in 1930 in Kordofan, when a man was convicted by a native court for stabbing his wife and was fined by the court.[31] The wife then also petitioned the qadi for divorce on grounds of maltreatment. The qadi refused to grant her a divorce due to lack of evidence. The case landed up with the governor of Kordofan, J.A. Gillan. He found it hard to accept that the shari'a court would not accept evidence presented in the native court, and sent along the case to the Legal Secretary in Khartoum, where correspondence then circulated between him and the Grand Qadi on the question of evidence and jurisdiction. The Legal Secretary wrote to the Governor that a civil court would have the same approach to evidence presented elsewhere, although he would himself admit such evidence. (He added that he doubted whether it would stand on appeal to the Privy Council.) The Grand Qadi's response was that a qadi may need additional evidence to what has already been presented, without necessarily rejecting the existing evidence.

Another case occurred in 1932 in Kordofan, when a customary court found one Ahmed Gabr el Dar al-Hamari guilty of adultery with one Umm Khawwal, whereas the shari'a court accepted his marriage to her.[32] He had married the latter before a *ma'zun* (and two witnesses and a *wakil* [guardian], but not her father) at the shari'a court, but her father complained to the native court that Ahmed had forced her to separate from her first husband and then married her. The native court dissolved the marriage. The judgment of the native court argued that since Ahmed had admitted to having committed adultery and causing the break-up of a home, and then married the woman, the only option for the court was to decree the dissolution of the marriage. As the judgment says: 'If a man commits adultery with a woman and has not given up the adulterous union, and then marries the woman in question, the marriage is irregular (*fasid*) and the marriage is dissolved (*yufsakh*) legally'. However, Ahmed was dissatisfied with the judgment and took his case to the Grand Qadi himself. In presenting his case to the Grand Qadi, Ahmed claimed that Umm Khawwal had a valid 'bill of divorce'. When Ahmed had gone to the shari'a court to complain about the native court's decision, he was told that the shari'a court does not interfere in the work of the native courts. The Grand Qadi was also of no help to Ahmed, for the Grand Qadi wrote a single line to the Legal Secretary on this case: 'Passed for any action as you may deem fit'. Here the Grand Qadi simply withdrew from a legal question that fit into his area of jurisdiction, and handed over authority to the secular colonial power. This was not a common occurrence, it would appear.

These clashes landed up with the Legal Secretary and frequently in the Civil Secretary's office, and taxed the resources and energies of the Khartoum administration. Reducing the number of shari'a courts and replacing them with native courts was a simple way of dealing with the situation. This would not happen without a struggle.

## *The Strategy against 'Colonial Shariʿa'*

Shaykh Mohammed Amin Qura'ah, the Grand Qadi, and his qadi colleagues soon felt the moves against them. The Grand Qadi began a prolonged correspondence with the Legal and Civil Secretaries over the general thrust of reforms against the shari'a courts, and on specific issues and encounters at

the provincial level between qadis and colonial officials. The officials represented themselves as referees in a struggle between the shari'a courts and the native courts, whereas they were in fact promoting the latter against the former. While the exchange of correspondence continued, colonial action against the shari'a courts began. Eliminating shari'a courts one by one was the final move. In their place, native courts were given jurisdiction. By April 1929, more than 18 shari'a courts had been abolished, while 38 native Shaykhs' courts were established. In the same year, one third of the shari'a judges were pensioned off, and 20 of the 42 shari'a courts were abolished.[33] More courts would be closed in the 1930s and qadis pensioned off.

In closing the courts, the state had to avoid clashes, and the Legal Secretary and District Commissioners attempted to offer reasons for their closure. Reasons varied, but ran along these lines: they were underused, were in too much conflict with the native courts, the personality of the local qadi was unsuited for the area, and curiously also that a particular shari'a court was overused. In the thick correspondence on this subject, there emerge details on what the officials felt were the excesses of the qadis. More telling details emerge about what they believed was 'custom' and how this clashed with 'shari'a'. For example, Khartoum was informed that the shari'a courts in Nahud and El-Odaiya in western Kordofan assessed 'maintenance and alimony on a scale absolutely disproportionate with the economic conditions of the people'. Not only that; these courts had 'tardy methods of hearing cases which frequently entailed five or more attendances at the court'. Finally, their 'bias in favor of women all tend to cause this unpopularity'. Yet 'the tribe' (the Hamar in this case) avoided taking shari'a matters to the native court, even when 'given the opportunity of avoiding the Mohammedan Law Courts'.[34]

Abolition was vital, because the officials took seriously the revised clause in the 1928 native Shaykhs ordinance, which said that native courts may 'not exercise shari'a jurisdiction in cases where either party lives in a town where there is a Mekhama shari'a'.[35] The officials argued among themselves as to which courts should be closed and what should be the grounds for their abolition. They were on the whole united in the belief that the fewer of these courts they had to deal with the better, for them and of course, they believed, the Sudanese. Civil Secretary Harold MacMichael wrote in November 1927 to the Legal Secretary:

> I think that you would be safe in assuring the shari'a authorities that there is no intention of abolishing any shari'a court which is doing good work on a scale which justifies its existence ... At the same time I look forward myself to the day when, under a system of native administration it may have proved possible gradually to do away with shari'a courts in several out-districts, where they will have ceased to justify their existence.[36]

The qadis without work were powerless and could simply request transfers to courts still in operation. A few were given measly pensions. The administration was also faced with the problem of current students at the qadi college in 'Umdurman and the qadi training section of Gordon Memorial College. The office of the Grand Qadi, however, remained untouched. Reducing or abolishing this position would have been a cause for political rallying. His formal authority and influence reached over an increasingly diminished realm.

## *Conclusion: Colonial Orientalism and the Construction of 'Colonial Shariʿa'*

At the height of the controversy over the endowment of tribal shaykhs with legal powers in customary courts, Mohammed Amin Qura'ah, the Grand Qadi at the time, wrote to the Legal Secretary complaining about this development. Giving shari'a powers to tribal shaykhs 'would curtail useful Native hands'; it transferred these powers from those 'who have shown efficiency' to those who 'are unlikely to do good work at all'.[37] He did not disqualify the native shaykhs on the grounds of inadequate knowledge of shari'a, or of possibly confusing 'shari'a' and 'custom'. No doubt these criticisms also appeared, but they were far less scathing and absolute than one would expect. There is plenty of reference to detail but little full-scale condemnation of the native shaykhs; the native courts get the division of inheritance wrong, fines are imposed unnecessarily (e.g. for not entering the court without shoes and so on). The qadis also wanted the native shaykhs' decisions on matters relating to shari'a to be referred to them for final scrutiny.[38]

However, the official view was that the shari'a establishment and the customary authorities were always bound to conflict. Ultimately, shari'a and custom are two different matters completely. Their logic was that the

native shaykhs could operate on their own in a field defined as customary or tribal law, which in most cases mixed local customs and shari'a. Furthermore, the qadis in the Mohammedan Law Courts would only apply a textbook shari'a unfettered by custom. This reflects the developing orientalist discourse on the way shari'a worked and what it means – it was 'holy law', fixed, unchanging, unalterable, in conflict with custom, and so on. As the Legal Secretary put it to the Governor of Kordofan regarding the question of evidence in the case mentioned above: 'I am afraid you have overlooked the fact that it purports to be the word of the Prophet and therefore unalterable'.[39] The place accorded to 'custom' in Maliki *fiqh* is either not known to the colonial orientalists or conveniently ignored. Classical legal categories such as *maslaha, istihsan, istislah*, and *'urf* all in various ways cover the question of 'custom' and actually existing practice, which could potentially be incorporated into legal reasoning. Officials were ordered to compile replies on what laws were applied by native shaykhs in family law matters such as marriage, alimony, dowry, divorce, inheritance, *idda*, gifts and so on in their respective provinces. These replies contributed to the standardization of customary law. The officials were more confused than enlightened when they saw the extent of *fiqh* in the replies by the native shaykhs.[40]

In the adultery case referred to above, the translator for the Legal Secretary was the Arabist S. Hillelson, who noted that for the word *fasakh* he had to 'see Vesey-Fitzgerald (sic), p.70', referring to a work on Islamic law by the British orientalist. The administration's position was that shari'a is not a living law but a textual tradition. Thus, it is necessary to refer back to the earlier, preferably the earliest, interpreters, as compiled by orientalists, of this tradition irrespective of changes in place or time.

In the same way the gap between the qadis and the native shaykhs was made unbridgeable, for the one dealt with texts and the other with 'custom', which was oral. Fiki Wad Hashi, for example, kept no written records. The textual tradition was therefore frozen in time. This orientalist prejudice about 'the holy law of Islam' enabled the type of colonial policy that attempted to create a watertight division between the qadis and the tribal shaykhs, as operators of two wholly separate systems of law and authority. The articulation of the policy of indirect rule in the 1920s gave impetus to widen the gulf between the two groups further. In the process, colonial shari'a was restricted. Once seen as 'useful and efficient hands', to use the Grand Qadi's formulation, the qadis were then marginalized and the native

shaykhs elevated. This was a political move that built upon the intellectual elaboration of the differences between shariʿa and custom.

*Notes*

1 On the circulars and reforms, see Carolyn Fluehr-Lobban and Babiker Hillawi (trans. and eds) (1983), 'Circulars of the Shari'a Courts in the Sudan (Manshurat el-Mahakim el-Sharīa fi Sudan) 1902-1979', *Journal of African Law* 27, 79-140.

2 For an introduction to these schools, see any introduction to Islamic law such as, for instance, Noel J. Coulson (1964), *A History of Islamic Law* (Edinburgh: Edinburgh University Press).

3 On the application of these legal techniques, called talfiq and takhayyur, see Coulson, *A History of Islamic Law,* 185-201, and 208.

4 For a case study of one southern group see Douglas H. Johnson (1986), 'Judicial Regulations and Administrative Control: Customary Law and the Nuer 1898–1954', in *Journal of African History* 27 (1), 59-78.

5 Heather Sharkey-Balasubramaniam (2000), 'The Egyptian Colonial Presence in the Anglo-Egyptian Sudan 1898-1932', in *White Nile, Black Blood: War, Leadership and Ethnicity from Kampala to Khartoum,* eds. Stephanie Beswick and Jay Spaulding (Lawrenceville: Red Sea Press), 279-314.

6 The Egyptian Grand Qadis in the Sudan were: Shaykh Muhammad Shakir (1900-04), Sh. Muhammad Harun (1904), Sh. Mustafa al-Maraghi (1904-19), Sh. Muhammad Amin Quraa (1919-32), Sh. Nuaman al-Jarim (1932-41), Sh. Hasan Mamun (1941-47), Sh. Hasan Muddathir (1956).

7 See Zaki Mustafa (1971), *The Common Law in the Sudan: An Account of the 'Justice, Equity and Good Conscience Provision'* (Oxford: Clarendon Press).

8 Section 5 & 9 of the Civil Justice Ordinance of 1929 (previously section 3 & 4 of CJO of 1900) read: 'Where in any suit or other proceedings in a civil court any question arises regarding succession, inheritance, wills, legacies, gifts, marriage, family relations, or the constitution of waqfs the rule of decision shall be: (a) any custom applicable to the parties concerned, which is not contrary to justice, equity and good conscience, and has not been by this or any other enactment altered or abolished and has not been declared void by decision of a competent court; (b) the Mohammedan Law, in cases where the parties are Mohammedans, except in so far as that law has been modified by such custom as above mentioned','.

9 For a British view of the legal administration in the Sudan, see Sir Donald Hawley (1991), 'Law in the Sudan under the Anglo-Egyptian Condominium', in *The Condominium Remembered: Proceedings of the Durham Sudan Historical Records Conference 1982*, ed. Deborah Lanvin (Centre for Middle Eastern and Islamic Studies: University of Durham), vol. 1, 39-53.

10 See *The Laws of Sudan*, vol.2, title 28: Shari'a.

11 Between 1902 and 1979 62 circulars were issued. See Fluehr-Lobban and Hillawi, 'Circulars of the Shari'a Courts', in *Journal of African Law.*

12 M. A. Salman (1983), 'Lay Tribunals in the Sudan: an Historical and Socio-legal Analysis', *Journal of Legal Pluralism* 21, 61-128.

13 Sharkey-Balasubramanian, 'The Egyptian Colonial Presence in the Anglio-Egyptian Sudan, 1898-1932'.
14 Mudadthir 'Abd al-Rahim (1969), *Imperialism and Nationalism in the Sudan: A Study in Constitutional and Political Development, 1899-1956* (Oxford: Clarendon Press), 51.
15 See Anthony Kirk-Greene (1982), *The Sudan Political Service: A Preliminary Profile* (Oxford: privately published).
16 Mahmood Mamdani (1996), *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton: Princeton University Press).
17 Ahmad Diyāb (1985), *Al-'Alāqāt al-Misriyyah al-Sudāniyyah 1919-1924* (Cairo), 37-51.
18 'Abd al-Rahim, *Imperialism and Nationalism*, 70.
19 Salman, 'Lay Tribunals in the Sudan'.
20 The story of Fiki wad Hashi is reported among papers in National Records Office (hereafter NRO), Khartoum; Civsec File, 42.A.2. vol. 1. See Note from F.T.C. Young to R. Davies dated 20 November 1927.
21 See 'Personality Report Form' attached to the correspondence in Civsec File 42.A.2. vol. 1, which gives some biographical details on him, including an assessment of his 'political sympathies'.
22 From sources noted in note 20 above.
23 NRO, Civsec 42.A.2, vol. 1; R. Davis, Assistant Civil Secretary, 'Further Steps in Devolution', circulated by the Civil Secretary, 20 January 1930.
24 On Cromer's respect for and friendship with Abduh, see Earl of Cromer (1908), *Modern Egypt* (London: Macmillan), vol. 2, 178.
25 On Abduh's influence over appointments in the Sudan, see Muhammad Sulayman (1985), *Dawr al-Azhar fi al-Sudan* (Cairo), 103-115.
26 A good article on this period and on the conflict is Abdullahi Ali Ibrahim (1989), 'Tale of Two Sudanese Courts: Colonial Governmentality Revisited', *African Studies Review* 40, n. 1: 13-33.
27 NRO, Civsec 42.A.2, vol. 2, Governor of Kordofan to Civil Secretary, 24 May 1931.
28 M.L.C. refers to Mohammedan Law Courts. NRO, Civsec 42.A.2, vol. 2, 'Shariʿa vis à vis Native Administration in Kordofan Province', 21 November 1931.
29 See for instance Civil Secretary to Legal Secretary, 2 January 1930 in NRO, Civsec 42.A.2, vol. 1.
30 Governor of Kordofan to Civil Secretary, 21 November 1931.
31 Governor of Kordofan to Legal Secretary, 27 March 1930, in NRO, Civsec 42.A.2 vol 1.
32 NRO, Civsec 42.A.2, vol. 2, Legal Secretary to Civil Secretary, 4 October 1932.
33 Salman, 'Lay Tribunals in the Sudan'. Another figure on the suppression of the shariʿa courts is that between June 1927 and January 1930, ten such courts were suppressed, of which four were in Kordofan. See Civsec 42.A.2, vol 2. See Memorandum entitled 'Shariʿa Courts and the Native Courts' dated 16 February 1932.

34 NRO, Civsec 42.A.2, vol. 1, Report by Assistant District Commissioner for Western District of Kordofan Province on situation in Dar Hamar. 21 December 1928.
35 NRO, Civsec 42.A.2, vol 1. 'Some Revisions of the Sheikhs Ordinance issued by the Civil Secretary', 1 April 1928.
36 NRO, Civsec 42.A.2, vol.1, Macmichael to Legal Secretary, 17 November 1927.
37 Grand Qadi to Legal Secretary, 1 November 1927, NRO, Civsec 42.1.1.
38 See NRO, Civsec 42.A.2, vol. 1, Enclosure to letter dated 11 January 1931.
39 NRO, Civsec 42.A.2, vol. 1, Legal Secretary to Governor of Kordofan, 5 April 1930.
40 See for instance, NRO, Civsec 42.A.2, vol.2, submission by District Commissioner at El-Dueim, 4 February 1931.

# 6 Injudicious Intrusions: Chiefly Authority and Islamic Judicial Practice in Maradi, Niger

**Barbara M. Cooper**

In this chapter, I will draw upon the history of colonial Niger to move beyond two currently opposed visions of colonial era chieftaincy: on the one hand, we have Mahmood Mamdani's influential theory that chiefs have served as decentralized despots in a continent-wide system of de facto apartheid;[1] and on the other, we have the more familiar vision among political scientists that French colonial chiefs (unlike those under British indirect rule) were emasculated subjects, whose authority was largely replaced by French colonial administrators and Napoleonic law.[2] My purpose here is to draw upon the case of a Hausa-speaking region of Niger to suggest how contradictory this process of acquiescence to chiefly authority was. Nigériens have simultaneously submitted to and refused state dominance through the personage of the chief. This has been an unpredictable outcome of the injudicious intrusions of colonial rule in Niger; the extra-legal violence of colonial intervention in the form of military rule and the *indigénat* in this distant outpost of the French empire guaranteed that local populations would perpetuate local sites of dispute mediation beyond the judicial fora preferred by the state, sites in which indigenous authorities continued to have tremendous authority.[3] At the same time, military administrators were deeply reliant upon the local chiefs (in this instance the Sarki of Maradi, Niger) in order to administer these territories effectively. As Robert Delavignette was

to remark in his personal reflections on the realities of colonial rule, 'The Commandant of the *Cercle* is not truly a commander except in so far as he can understand the chiefs and get a hearing from them', going on to offer as an example the case of how the French administration in 1923 gained access to land from an autochthonous cultivator in Maradi through the intercession of the Sarki.[4] Indeed, it was partly Jules Brévié's experience working with such chiefs in Niger that contributed to the major change in French policy towards chieftaincy, which ushered in the major change in thinking that came to be known as an associationist policy.[5] From its inception relatively late in French colonial expansion, the territory of Niger was central to the development of a patriarchal associationist mode of rule. Colonial and postcolonial regimes alike have struggled to co-opt the powers, authority, and staff of chiefs while at the same time attempting to supersede, control, and contain them. If, as Cohen points out, the French tended to emphasize the merely instrumental quality of chiefs within the command apparatus, it is by no means clear that colonial subjects saw indigenous rulers in the same light.[6] Delavignette commented revealingly regarding the 'black peasantry' that 'they have already forced us to reconsider the powers of native chiefs', suggesting that while colonial administrators attempted to co-opt the powers of chiefs as a practical matter, local populations were neither passive nor neutral in influencing how the complex symbiosis of 'custom' and empire was to develop.[7]

Mamdani argued that the apartheid regime in South Africa, far from being a continental exception, was in fact the norm throughout colonial Africa, with profound consequences for contemporary politics. The colonial state was 'Janus-faced', with one side emphasizing civil law for 'citizens' in urban settings, the other side relying upon Native Authority for its coercive force over the mass of 'subjects'. Mamdani tends to see the chief as always and only coercive – the chief is less an individual than an office of the state – while Africans in general have little role, whether positive or negative, in shaping colonial and post-colonial politics. However, Sara Berry's work on chieftaincy in British colonial Asante shows that chiefs and subjects alike devoted tremendous amounts of time and energy to struggles to create, maintain, and define chiefly authority, legitimacy, and wealth.[8] Her work invites us to devote similar attention to how Africans themselves shaped the performance of French colonial institutions, whether through participation, evasion, or subtle contestation.

Mamdani's concept of decentralized despotism underplays, perhaps for rhetorical effect, the role of Africans in the shaping of colonial era political institutions. Nevertheless, he does take seriously the *significance* of chiefs throughout Africa. More commonplace in comparisons of French and British rule have been dismissive assessments of the relevance of chiefs in French territories as a consequence of colonial rule; chiefly authority is seen to have been supplanted by the power of French administrators and French law. William Miles reflects this understanding of the differences between French and British uses of chiefs by remarking, 'If the Hausa chiefs in Nigeria were co-opted in the interests of British imperialism, we may say with Michael Crowder ... that those in Niger were "debased". The British ruled through their Hausa emirs; the French ruled over theirs'.[9] Similarly T. O. Elias describes the chiefs in ex-French territories as 'emasculated'.[10]

Most theoretical work on customary law as a colonial invention has centered upon British-ruled territories. The assumption often seems to be that because direct rule in the abstract does not seem to accommodate 'custom', the issue of whether and how colonial rule transformed or invented tradition in French territories is moot. In fact, as Virginia Thompson and Richard Adloff noted, from 1903 onwards the French judicial system in Africa in principle drew upon local custom 'whenever it did not contravene the basic principles of French law. To most French legislators of that period this meant a tolerance of what they vaguely called African "usages", aside from those involving barbarous customary punishments'.[11] Furthermore, as Richard Roberts has pointed out, French West Africa was a 'hybrid' judicial field in which metropolitan, military, customary, and Muslim law all came into play. The broad array of judicial arenas and discourses available after conquest 'created opportunities for both Africans and Frenchmen to implement different cultural projects'.[12] Roberts shows that if the state, elders, and men in general may have struggled to use the courts to control rights in property and persons, women, too, could seize upon the new opportunities offered within the shifting 'landscape of power' of the very early colonial period to obtain divorces in sympathetic colonial courts, rather than seek reconciliation through 'traditional' village authorities. (See also Lydon and Hirsch in this volume for the ways women used Muslims' courts with varying degrees of success over time.)[13]

Alice Conklin's work on the shifting discourses of French Republicanism alerts us to the inadequacy of labeling any and all shifts in African political

and legal structures as 'Republican' inventions, as if Republicanism were static. By the time Niger was conquered, the universalist luster of an assimilated French 'citizenry' was wearing off, as the political implications of such an approach gradually emerged. Well before the formal adoption of any associationist policy, assimilation was replaced in practice by an emphasis on 'customary rule' understood, in the spirit of Rousseau, as the time-honored 'will of the people' to be protected and upheld. The chief, rather than being rejected (as was the case during the anti-feudal zeal of early imperial Republicanism), was by World War I to serve as an instrument of French rule. Thus, Gouverneur Général Von Vollenhoven was to assert in a memorandum in 1917:

> We created civil justice, but native society was scared by the rights we granted to individuals, particularly to women and to young people, [who began] challenging with impunity conjugal and paternal authority, ageless foundations of the African family. We suppressed the great commands, feared and respected, but we also deprived the collectivity of the tyranny that constituted a solid framework ... I do not criticize these measures ... only assert that these reforms have profoundly troubled the natives who ... observe that the rigorous hierarchy of yesterday has been replaced by a well-intentioned but emasculated one.[14]

Niger's late absorption into the postwar French empire guaranteed that by the time administrative authority was fully consolidated in the 1920s, chieftaincy would no longer be deliberately 'emasculated' but rather enhanced. Having found that colonial subjects could draw upon the assimilationist moment for their own unruly purposes, later administrators ensured that the purportedly benevolent 'customary' authority of chiefs would be protected in an explicitly patriarchal mode.

In *Citizen and Subject*, Mamdani draws very little upon the historical and anthropological literature on French West Africa – the particularly rich and varied contours of legal structures in that setting belie the bifurcated 'Janus-faced' depiction of law and authority that he sets out. Rather than being limited to debating one sense of 'tradition' (namely, what constitutes indigenous 'custom') and relying upon one 'Native Authority' (namely, a chief created or co-opted by the system), individuals in this region could play qualitatively different understandings of law, rights, and obligations against one another by appealing to contending judicial discourses, alternative loci of

mediation, and figures of authority ambiguously subsumed into the legal hierarchy. By the same token, French colonial constructions of the locus of law, of citizenship, and of subject status were to shift substantially over time.[15]

In much of French colonial Africa, Muslim law served as a critical resource for mediating between the metropolitan predisposition for codified law and local contests over what should be seen as 'customary'. Richard Roberts' and Ghislaine Lydon's chapters in this volume bear striking evidence of the timing and processes through which perceptions about the relationship between Islamic 'law' and local 'custom' were forged. Because Muslim legal practice had a long association with the urban settings of centralized kingdoms antedating colonial rule, the judicial landscape of French West Africa is rather poorly captured within Mamdani's town/country dualism. The Islamicized discourses of urban judicial settings gradually became the middle term, mediating a series of different approaches to law, rural and urban, increasingly relevant to both the urban elite and relatively disempowered rural subjects. In Maradi, for example, because urban courts privileged urban Hausa self-conceptions, to be 'Hausa' was tantamount to being Muslim. Entries in court records listing the *coutume* of the parties might list '*coutume haoussa*', '*musulmane*', or '*coutume haoussa musulmane*' indiscriminately, effacing the complex range of spiritual beliefs and practices of the region and equating ethnic or cultural adherence with religious law. Hausa '*custom*' was to gradually emerge in outline as equivalent to Maliki law, largely as a result of colonial legal practice, yet in the process, a very particular inflection of Maliki law was to be privileged. At the same time, however, the ideal universal quality of Islamic law was undermined, for it was registered in this setting as one of many potential (Muslim) customs – Zerma, Tuareg, Hausa, etc. Negotiation and slippage between 'Hausa custom' and 'Islamic law' were thus to become central to the actual practice of Muslim family law in this region.

This historical overlay of judicial options and loci of mediation and negotiation has served to preserve the strategy of calling into question the fixity of custom, the superiority of French codified law, and the sanctity of any given interpretation of Islam. In Maradi, displeasure with military authority and the *indigénat* could be countered by avoiding administrative centers; restrictive readings of 'custom and usage' invented in the quasi-codified *justice indigène* could be evaded by appealing to the living traditions of the Al'kali

(qadi), Sarki and Iya rather than the *commandant de cercle*; speculation on the legal market could give rise to shifts in claims to identity outside the courts as women, rural farmers, juniors, slaves and landowners maneuvered to seize upon new opportunities. The range of alternative loci of mediation both generated and preserved competing idioms and discourses with which to debate the control of persons, access to land, and the nature of authority and propriety. It also made possible a constant adjustment and reinterpretation of identity in ongoing efforts to capitalize upon the shifting ground of religion, ethnicity, and nationality. In sum, rather than fix into law any one judicial mode, the dual effects of the colonial situation were to give rise to perennial debate about where and through what idiom local practice should be determined, and to make a historical precedent of the evasion of formal state control through the use of semi-legal and extra-legal fora for dispute mediation.[16] It is this quality of multiple overlapping discourses, contestation and impermanence that, it seems to me, both Mamdani's dualistic approach and the more conventional image of a defeated chieftaincy fail to capture.

## *Primary Points of Orientation: The Territoire Militaire du Niger and the Indigénat*

Work on law in French West Africa has often focused upon the overlapping and contested judicial fields I am suggesting characterize this particular landscape.[17] Little work, however, has explored the implications of this 'hybrid' judicial field for that majority of Africans who were not themselves in positions of power within the colonial structures, who were quite distant from the unique legal situation of the *originaires* of Dakar and St. Louis (those who could have opted to be governed by French civil law but preferred a parallel system of Muslim courts; see Lydon in this volume), or of those rare Muslims who were briefly successful in arguing for special Muslim courts (such as the *originaires* who had emigrated to Kayes and Medine).[18] Most subjects within French West Africa experienced something more like the ever-evolving 'custom' to be found in the native courts for French Soudan which Richard Roberts describes in this volume.[19] However, I would argue that for populations in Niger, their formative experience of French

colonial law was not of the vagaries of civil, administrative or 'native' law, but rather of that residue of military conquest, the *indigénat*.

The *indigénat* rested not on custom or civil law, but rather upon the brute force of the state. The dominance of the *indigénat* in the Nigérien population's experience of French colonial law has had powerful implications for the nature of the judicial field, both during the colonial period and after. French administrators made use of the authorized violence of the *indigénat* as a matter of course, with no need to veil coercion in customary authority. If the defining quality of a subject in British territories was his or her submission to an evolving regime of tribally defined 'custom', the defining quality of the French colonial subject was his or her vulnerability to the *indigénat.* As Asiwaju observes, in practice 'the French *justice indigène* was far less important both to the colonial administration and the local subject populations than the much older, more established, and more dominant *code d'indigénat*'.[20] Prior to 1946, any African *sujet* was governed by administrative decrees emanating from the French president. To be a *sujet* was to be subject to trial without notice by the local French administrator, and to sentences (a maximum of 15 days' imprisonment) and fines (a maximum of 50 francs) for any of 26 offenses under the *indigénat*. Among those offenses were the refusal or reluctance to carry out requisitions, non-payment of taxes, disrespect towards the administrators or the French in general, and a non-collaborative attitude.[21] In his study tour of African colonial territories in 1925-6, Harvard professor R.L. Buell remarked: 'French administrators summarily punish thousands of offenses every year which in a British or Belgian colony would go to the courts, or which would not be legally punishable'.[22]

The significance of police rule may be more striking in Niger than in other areas, given its particular geography and history. Niger was ruled as a Military Territory well into the twentieth century because of a long series of revolts among the Tuareg peoples. There was no effective administration on the ground until the 1920s, and for years the personnel manning the stations was drawn from the ranks of the military. When, in 1906, as France attempted to regularize indigenous law throughout her territories, Niger occasioned a special decree setting out the exceptional conditions through which courts would be set up. In this territory – which was regarded as too different, too backward, and too rebellious to be ready for more or less autonomous courts overseen by indigenous authorities – all courts with the power to make judgments rather than simply seek reconciliation (the

'provincial' and 'cercle' level courts) would be overseen by French military officers.[23] Customary authorities were to be assessors in the new courts, and would be useful for the collecting of labor, taxes, and requisitions – prestations couched at least in part in a traditional idiom. It was the existence of military administrators, their oversight of the practice of *justice indigène*, and the continuing importance of the *indigénat* that guaranteed the compliance of native authority and subject alike.

If the *indigénat* gave French colonial administrators wide discretionary powers, the oversight of the local courts by military officers was potentially even more repressive. The *indigénat* code included precise fines and sentencing limits, inhibiting to some degree the caprices of local military authorities. Ironically, criminal and correctional sentences imposed by the local *commandant de cercle* through the trial system – intended in principle to protect subjects from excesses of government – could be even more repressive than the *indigénat*, since the 15-day sentencing limit did not at first appear to apply.[24] To illustrate how broad the powers of local administrators overseeing these *tribunaux* could be, a Muslim scholar, Mallam Mijinyawa of Maradi, was sentenced to three years in prison followed by exile for composing a song in Arabic, ridiculing the Sarki's willingness to follow the French command to move the city from the valley to the plateau in 1945.[25] The case is emblematic of the manner in which significant local leaders regularly became the targets of the legal system. The broad powers of the *indigénat,* combined with the lack of either trained magistrates or indigenous judges, rendered the French administrator less beholden to the indigenous power structure than was generally the case in British territories, where a more formal and protracted legal process had to be set in motion to punish or regulate political and economic life. The result was strikingly different attitudes towards local Hausa chiefs on either side of the Niger-Nigeria border:

> The Lugardian rules of 'Native Etiquette' laid down for the guidance of political officers, with their insistence on ... how to receive a Grade I chief by offering him a carpet or mat (in the Southern Provinces a chair) to sit on and the protocol instruction that 'the Resident should rise to meet him and should dismiss him with similar courtesy', seem to be a thousand light-years away from the dire tales from across the border of the *commandant de cercle* at Maradi in Niger who, on being told that the chief was outside his office, replied, 'Qu'il attende au soleil, le vieux bougre'.[26]

William Miles has documented the implications of these differences for the Hausa experience of colonial rule on either side of the boundary, showing that the Hausa population of Niger came to regard French rule as 'hot', arbitrary, and violent, while British rule was seen as comparatively 'easy', reasonable, and moderate. He further argues persuasively that the patterns of administration and Hausa attitudes towards them have continued into the postcolonial period.[27]

### *The 1903 Decree in Practice: Colonial Courts in Maradi*

While in principle Africans could turn to the French Tribunal and to the *justice indigène* meted out by the administrator in consultation with local notables, in practice, because the commandant presided over the judicial system, the local population associated the formal court within the Maradi region of the Territoire Militaire du Niger with arbitrary exactions and punishments, and took little interest in airing their affairs before the tribunal.[28] The Hausa population came to fear and revile the arbitrary exactions derived through the *indigénat* and the colonial administrators who could enforce its penalties for quite minor offenses. They were not blind to the ways in which their traditional aristocracy was itself subject to that coercion, and they came at least partially to sympathize with a 'native authority' that was simultaneously the instrument and subject of French despotism. As a result, after the French established a formal court system through the decree of 10 November 1903, alternative judicial and mediating arenas persisted, despite French attempts to co-opt and overshadow them, and despite their supposed irrelevance.

The new legal system engendered by the 1903 decree and modified in December 1907 to suit the particular circumstances obtaining in the Territoire Militaire du Niger was to consist of a hierarchy of courts of widening territorial jurisdiction and with successive power to hear appeals. At the lowest level would be the village courts or *tribunaux de village*, in which the chef de village would have authority to work out reconciliation between the parties in civil matters. In practice these 'courts' were not regularized or overseen by the colonial administration in the Maradi region, so it is hard to know whether they in fact limited themselves to mediation. At the next level were to be the *tribunaux de province,* located in provincial centers, in which the colonial officers or resident military officers could make judgments in civil

and commercial cases that remained unresolved after mediation in village level courts. Tessawa, for example, was a police post, which did on occasion handle cases – almost exclusively concerning theft and violence rather than civil or commercial matters. Such officers were in principle to be assisted by two assessors knowledgeable in customary law, but it was only in the 1930s that any systematic record was kept of who those assessors might be. In Maradi proper, those assessors were generally the Al'kali or Muslim judge (qadi) appointed by the Sarki, and a court dignitary known as the Durbi, who in principle oversaw the interests of the 'animist' population. Finally, the district courts, or *tribunaux de cercle,* were to serve as the next courts of appeal and handle the more serious criminal cases. In these courts, it was the French administrative authority, the *commandant de cercle*, who would oversee the cases personally in consultation with two assessors. The records of cases brought before the administrative officers show that, however local level disputes were regulated, Maradi's subjects rarely if ever chose to appeal civil or commercial decisions made by local notables to the local commandant. Strikingly, at a time when in Niamey, a bustling military center well to the west, a small number of urban individuals, often soldiers or traders, found it useful to draw upon the administrator as a mediator, in Maradi, Zinder, and other jurisdictions to the east with a very limited administrative staff, there were almost no appeals before the French administrators, suggesting a profound lack of confidence in their ability to adjudicate fairly or effectively.[29] After the reform of the legal system in 1912, the *tribunal de province* was replaced by a *tribunal de subdivision* with approximately the same structure. It was henceforth to serve analogously to the *tribunal de première instance,* overseeing French civil law in France, while the district *tribunal de cercle* would function somewhat like the *tribunal de deuxième instance*.[30]

In some areas under French rule, the initial implementation of the 1903 decree seems to have opened up new possibilities. Richard Roberts argues that the creation of the new courts resulted in some segments of the population, in particular women seeking divorce, bringing cases directly before the French administrator. In this way they could circumvent the time-consuming and perhaps undesired reconciliation of the village courts, and seek a more decisive and 'impartial' outcome from paternalistic colonial administrators. In other words, there was a 'speculative air' to the local population's choice of which courts to use and when.[31] It was only later, as the

winds of colonial policy shifted in favor of bolstering the authority of male household heads, that this kind of opportunistic use of the *tribunal de cercle* by women began to close down – a pattern common in many parts of Africa.[32]

However, the actual implementation of the 1903 decree must have varied tremendously depending upon local historical circumstances, geography, and timing. As I have indicated, Maradi was very far from any real center of oversight, and was also situated on the border with Nigeria. While in many regions of Africa colonial administrators 'invented' chiefs to serve as functionaries, Maradi shared with other Hausa kingdoms a long heritage of centralized authority under chiefs known as Sarkis. In the absence of any sustained administrative presence until 1927, and with a French colonial staff that was distinguished primarily by its lack of impressive figures (the striking exception being Jean Périé), the Sarki retained tremendous importance in this region.[33]

In Maradi, the establishment of the courts came very late – military executions without a real trial continued as late as 1918, as a result of the ongoing Tuareg rebellion. The *commandant de cercle* was located in Madawa until 1921, and Maradi had no provincial-level court. In effect, the court was only relevant to discipline recalcitrant chiefs, such as the hapless Sarkis Bature and Kure.[34] In 1921, the administrative center was moved to Tessawa, and Maradi briefly had a provincial court that was separate from the district court. In 1922, Niger was transformed from a military territory to a colony, with its first civilian administrator posted in 1923.[35] It was only after 1927 that the city of Maradi served simultaneously as the seat of the Province de Maradi and the Cercle de Maradi, so that in one location were to be found both the *tribunal de subdivision* and the *tribunal de cercle*. In other words, the longstanding and locally sanctioned authority of the Sarki competed for the first time with the new and unwelcome authority of the *commandant de cercle*. Both would have made use of the same assessors (the Al'kali and the Durbi); however, in the court overseen by the *commandant de cercle*, the Sarki would have no role – indeed it would be his judgments, which had only recently been legitimized in a formal sense after the *territoire militaire* became a colony, which would come under scrutiny. All cases before the *tribunal de cercle* were adjudicated by the military personnel or by career administrators in place; it was only in 1946 that the civilian *justice de paix*, or professional judge trained in law, was introduced, with the abolition of the *indigénat*.[36]

The role of chief in this context was, not surprisingly, highly contradictory. On the one hand, in spite of the rhetoric of direct rule, the French found it necessary to draw upon the indigenous political infrastructure in order to rule. In some ways, the powers of chiefs were enhanced. Certainly in the Hausa region, the tenure of any given individual as Sarki was far more secure than it had been in the late nineteenth century, despite the power of French administrators to depose recalcitrant or 'corrupt' rulers. In this respect, local rulers in the colonial situation could be seen as having been co-opted and their indigenous fides compromised. On the other hand – precisely because the French often did not respect their indigenous proxies and tried to bypass their authority – some, such as the Sarki in Maradi, retained a kind of covert sympathetic support locally. As Philippe David notes in his brief apercu of the 'new law' in Maradi under the French, it was the traditional rulers themselves who were the most conspicuous targets of the new court system.[37] By quietly turning to the Sarki, the Al'kali, and other indigenous figures of authority while bypassing or ignoring the French administrator, the local population could seriously curtail the intrusions of French rule. In practice this meant that the local population almost never appealed any of the Sarki's decisions to the higher court overseen by the military administrator, the 'justice of the whites'.

In this context, what did it mean to apply '*justice indigène*'? The French understanding of local 'custom' was often quite naive, since administrators seemed to have little grasp of the fact that it was in essence something to be negotiated and debated. Their impatience with 'endless palabres' reveals a poor understanding of the deeply contested ground upon which they had built the entire colonial judicial edifice. Debates over tradition and custom in the service of contesting control of land, labor, and productive wealth were hardly new to colonial Africa. The history of nineteenth-century Africa immediately prior to colonial rule is rife with conflicts over and transformations of authority, identity, and tradition.[38] Most major social and political movements in pre-colonial Africa depended, in one way or another, upon the promotion of one vision of 'tradition' over another.

The highly textured judicial practices of this region of Niger emerged from the complex pre-colonial history of the Maradi valley, to which the resistant forces of Kano, Katsina and Gobir retreated when forced from the Habe kingdoms by the jihad of Usman 'dan Fodio, launched in 1804. The former rulers of these kingdoms combined forces to harass and raid the Sokoto

and Gwandu Caliphates to the south throughout the nineteenth century. Maradi became the locus of sustained resistance to Sokoto, and in Maradi were to be found many remnants of the political culture of the pre-jihad kingdoms. Their transplantation into a new milieu – a valley controlled by well-armed Hausa non-Muslims (referred to in Maradi as Arna), who dictated the terms under which the recusant kings could rule – led to the emergence of institutions and practices whose apparent continuity with their pre-jihad forms in the Habe kingdoms could be deceptive.[39] The Katsinawa and Gobirawa aristocrats regarded themselves as Muslims. At issue was not whether Islam was the true religion, but how that religion should be interpreted; whether some kinds of concessions to local pre-Islamic practices and populations could be supported, and whether the local political hierarchy should be dominated by a scholarly elite.

Islamic law and governance are neither fully nor unambiguously set out in the Qur'an and the Sunna. No one school of law fully determines how a Muslim community should conduct itself in unexpected situations. Islam therefore enjoins obedience to the leader of the community, and in some circumstances the ruler's discretionary judgment can supersede *shari'a* law, meaning that in practice more than one system of adjudication could in effect be in force. Furthermore, where the *shari'a* sets no clear stipulations as to how members of a community should behave, social relations are recognized as being governed by *'urf*, or valid tradition: 'In practice the *shari'a* has various sources and an application that varies inversely with the range of *siyasa* [discretionary governance by the ruler] and *'urf* [tradition]'.[40] In Maradi, political realities dictated that local practices and traditions (known locally as *al'adu*) be respected.

Thus, even before the arrival of the French in the region, several 'traditions' with distinctive judicial practices contended with one another. The reformist vision of Islam forwarded by the jihadists relied solely upon the teachings and practices of the Prophet's early community to regulate social and political life. Taxation, labor, family life and dress would all be adjudicated according to Qur'anic injunction and the Sunna. In practice, of course, the jihadists had to make significant concessions to local political realities and local traditions, a source of much disillusionment on the part of its more idealistic leaders. The Katsinawa and Gobirawa aristocracies transplanted into the Maradi valley espoused a far more accommodationist version of Islam, one that consciously integrated non-Islamic social and judicial

practice by absorbing and adapting elements of it into the local political structures. The Muslim aristocracy mediated their occasionally contradictory practices uneasily, periodically engaging in internal reform, only to discover that their very claim to legitimacy as rulers was more than ever defined by their integrative practices. In this context, to reform those practices in order to accommodate a purer version of Islam would, in a sense, be to capitulate to the jihadists they had so long resisted.

It was into this unstable and contested context (in which tradition, custom, and law were of necessity very much subject to negotiation) that the French colonial regime intruded. The French, for their part, brought into this setting a whole series of contradictory prejudices and predilections stemming from their unpleasant encounters with Islamic resistance in the course of subjugating their West African territories, and from their justification of conquest in the name of Republican values (universalism, liberty, egalitarianism). The French administration was accordingly uncertain and inconsistent in its handling of law in its Muslim territories. The tripartite judicial system that emerged was, as I argued above, profoundly shaped by the sustained military quality of France's encounter with the region. The most important and earliest experience of French law, from the point of view of the local population, was the *indigénat* discussed above. The second element of this system was the *justice indigène*, a court system distantly related to the customary law courts so common in British territories. The third element was French civil law, embodied in the Napoleonic Code, largely irrelevant in Niger.

Because much of the resistance to French rule in West Africa had been couched in the idiom of Islamic jihad, early military administrators were distinctly hostile towards Islam, and preferred 'customary law' despite its long co-mingling with Islam. Thus, an early administrator within the military territory of Niger was suspicious of the indigenous assessors in the *tribunaux* and argued, not altogether without reason, that the *shari'a* law the Al'kali promoted was a departure from 'coutumes locales': 'From a political standpoint it would be better to apply local customs exclusively [rather than *shari'a* law], even though they are generally derived from the Qur'an'.[41]

Despite the French administration's ambivalence towards the Muslim law represented in the Tribunal by the Al'kali, the local population in general seems to have preferred to declare themselves Muslim for the purposes of such court appearances, rather than rely upon the 'tradition' represented

by the figure of the Durbi. Both the Durbi and the Al'kali, from the perspective of the non-Muslim Arna, were outsiders to the traditions of the valley, and the law of the Al'kali had, it seems, a number of advantages, which I shall explore more fully in a moment. Furthermore, the intrusions of the French into the judicial field had the unintended consequence of promoting Islam despite frequent pronouncements to the contrary (Roberts, this volume). As seems to have been the case elsewhere in French West Africa, administrators in Maradi evidently found it convenient to assume that Islamic law could be applied in a fairly general fashion.[42] French administrators on the ground in Maradi showed remarkably little interest in the nuances of law in pre-colonial Maradi, as historian and jurist Philippe David observes:

> The Maradi region has too many ties with the animist world for its political, judicial, and social life to be systematically reduced to Islam and the Qur'an. This misconception was nevertheless so common among the few European soldiers and functionaries who troubled to even collect information [on the region] that we know almost nothing about Arna justice, despite the fact that [in the pre-colonial era] the Sarki did not have exclusive or total jurisdiction over all of his subjects.[43]

Unadulterated Maliki law had the appeal of offering beleaguered administrators a familiar understanding of land as a heritable form of wealth that could be sold. Furthermore, Islamic practices regarding women and inheritance may have fit in well with contemporary French notions of the ranking of civilizations according to the position of women within them. Even one of the most 'liberal' of the colonial administrator/scholars, Paul Marty, could see Islamic practices as superior to 'pagan' practices when women's treatment was at issue.[44]

Thus, the predilections of French administrators in Maradi, as elsewhere, had the effect of promoting Islamic law, particularly as it touched upon women, despite the deep controversies surrounding this issue in debates among French administrators and scholars,[45] and despite the fact that in many regions, Muslim populations had not, in fact, applied Islamic law indiscriminately in the pre-colonial period (for an interesting parallel in Sudan see Jeppie, this volume). In fact, in the nineteenth century, the elite of the city of Maradi prided themselves on their independence from restrictive interpretations of Islam, and worked to accommodate the practices of the Arna population that had proven so loyal to them in the face of the Sokoto jihad.

## *Inventing Custom: Contradictions of the Coutumier Juridique*

It was in an effort to counterbalance the tendency of French rule to advance Islam that the *Coutumiers juridiques* through which local customary law was to be recorded and eventually quasi-codified were originally collected.[46] By the early 1930s, as the military era of Niger's colonial history receded, and in a romantic climate far more sympathetic to indigenous languages and institutions, administrators in Maradi began to systematically collect information on local 'custom'.[47] If the motivation for collecting a corpus of customary law was to counter the unsuitability of French law and the perceived dangers of Islamic law, the effort in fact failed, for the *coutumiers* registered as law the preferences of senior male notables of the ruling class, dexterous in the language of a codified version of local 'Muslim tradition', notables who had an interest in advancing their own vision of the social order. Not surprisingly, their preferences accorded well with the prejudices of administrators accustomed to codified French law. The written legitimation of one version of Islamic practice, of course, brought with it the danger of ossifying what had in the past been a highly adaptive and flexible practice.[48]

The *Coutumier* for the Maradi region is a peculiar and contradictory document, offering brief statements about Hausa 'Muslim' practice, followed by even briefer addenda suggesting that Hausa 'animist' practice could often differ considerably. The document's assumption that the population was unambiguously divided between a homogeneous collection of animists and a unified body of Muslims belied the complexity of the history of settlement and religion in the region. It also glossed over the power issues that must have come into play any time an 'animist' entered a court dominated by Muslim notables. Thus, the *Coutumier* asserted: 'Among Muslims farmland and urban concessions have a value and can be sold, rented, or mortgaged. Among animists land can never be sold; only the harvest has value, not land itself'.[49] Oral interviews suggest that, in reality, the Katsinawa Muslim ruling class of Maradi rarely sold either houses or farmland prior to the 1940s, and that the inheritance of a *gida*, which meant not only the 'house' but also the family, the clan, and the broader heritage of the clan, entailed considerable obligations to a broad community of family, lineage, and settlement that would have made such a conception of freehold tenure quite unworkable. The document, hedging on the locus of authority for deciding such issues, suggested alternately that law is handled by the Al'kali, and that the

Sarki rules through local custom. The question of who would in practice adjudicate is, of course, key for if land transfers were governed by Maliki law, then freehold tenure would certainly be defensible. If, on the other hand, the more flexible practices of the Katsinawa elite were carried on through the intervention of the Sarki, in recognition of valid local practice (al'adu), then the unfettered mortgage, sale, and transfer of land and property implied by the *Coutumier* would be, at the very least, controversial.

If the *Coutumier*'s suggestions regarding land ownership contained contradictions and obscured the nature of actual practice in the region, its suggestions regarding men's control over their wives invite even greater skepticism. In the context of the gradual abolition of slavery in the region, the *Coutumier* clearly became the locus of aristocratic attempts both to replace the loss of female slave labor through loosely defined junior 'wives', and to protect against the abuse of their own daughters in marriage just as others would have been pursuing precisely the same strategy. The ambiguity surrounding the distinctions between wife and concubine, and concubine and slave, made it possible for wealthy and sizeable households in the early decades of colonial rule to maintain concubines as 'extra wives', to perform the burdensome labor of maintaining the household well after slavery had been abolished. As colonial rule continued and access to slaves from elsewhere declined, control of women was expressed in terms of differences between 'legitimate' wives and concubines, and between 'Muslim' women and non-Muslim women. Thus, the *Coutumier juridique* for the Maradi region reports:

> A legitimate wife must obey her husband. A Muslim [husband] may administer light physical correction, but if she is the daughter of the chief or the Al'kali he may not. Animist men have no right to use corporal punishment, however light, upon their wives ... A concubine must also obey the household head. She is considered to be a captive, and he has the right to beat her ... A legitimate wife must cook, wash clothes and clean the home of her husband. But her husband may not force her to work the fields or to collect water. A concubine, since she is treated as a captive, may be required to carry out any labor the household head requires of her ... A 'head wife' is the woman who has been married longest of the married women. She can command the other women if her husband authorizes her to do so. She may be in charge of the distribution of grain and food to the other wives ... The captives or concubines of the husband are not required to obey his wives other than those who have children.[50]

Other evidence suggests that the document (dated 1933) proposed powers over women far in excess of those actually witnessed in Maradi in the first two decades of French presence in the region. In 1907, Landeroin (the historian for the Tilho-O'Shee Mission) reported that a man whose wife committed adultery could repudiate her and reclaim his bridewealth payment, or beat her and retain her as his wife.[51] In 1913, the administrator Villomé reported from his observations of local practice that in general one could avoid any physical punishment by paying a fine, and that adultery was punished by a fine for the man involved and 'exposure to public ridicule' for the woman.[52] By contrast, the 1933 report on Hausa custom claims that a Muslim woman caught in the act of adultery was to be stoned to death.[53]

What this document and interviews suggest is that with the decline of slavery and the rise of the potential influence of the French administration over local practices, senior males struggled to claim for themselves powers and sanctions they had not had in the past, concerning the marriages, labor and sexuality of nominally free junior women.[54] The formal recognition of men's right to provide 'physical correction' for their wives, to beat captive concubines, and to seek capital punishment for illicit sexual alliances would serve at the very least to inhibit women's ability to resist the labor and sexual demands of their masters and husbands, and would make it more difficult for women to seek protection and redress with their own kin or with the courts.

At the same time, senior men attempted to secure protections and powers for senior aristocratic ('Muslim') women that were not expressed in any of the earlier discussions or observations of local law. Senior women, understood as older married women successful in bearing children, as well as women from aristocratic families more generally, could thereby control junior female labor, which was to include both junior wives and 'captive' concubines: women taken into households in informal marriages who had no male kin to establish and protect their marital rights. Thus, while the French had a de jure policy of abolishing slavery, their understanding of local marriage – as evidenced rather damningly in this document – did not distinguish captive slave women from wives, and in their efforts to minimize the dislocation resulting from the abolition of slavery, they consistently turned a blind eye to domestic servitude so long as it concerned only women – women who could be distinguished from, but at the same time assimilated to, wives.[55]

Clearly, the *Coutumier* reveals the anxiety of senior members of the aristocratic class to shore up their access to labor and control over junior women through the idiom of marriage and under the pretext of Islam. However, we should not assume that the draconian punishments and vast powers suggested in the document necessarily reflect actual practice on the ground. The notion that anyone in Maradi was actually stoned for adultery, for example, is quite distant from the tone of amused but scandalized tolerance observed in my oral interviews. The *Coutumier* is evidence of how the discourse of Islam and custom could be deployed in the interests of male power and of the willingness of the French to turn a blind eye to what was in essence domestic slavery. While aristocratic families succeeded for a time in employing informal wives/concubines in something approaching domestic servitude, to compensate for the loss of legitimate female slave labor, as Chanock observes, 'Where people are trying to make others change what they do, law is a weapon. It describes not regular behavior, but what some people want others to do'.[56]

## *Invented Tradition and the Expansion of Islam*

While in theory even under colonial rule the non-Muslim Arna benefitted from the presence of the Durbi and 'customary law', as institutionalized in the *tribunaux* system, in practice the residents of the valley preferred by far to turn to the Sarki and other Muslim scholars in contexts not overseen by the state for arbitration. In his study of the region, Paul Marty was perplexed to find that 'all sorts of agreements are regulated by the literate class [of Islamic scholars], although the indigenous people know very well that the justice of the Whites is free'.[57] When locals did turn to the Tribunal, they tended to claim Muslim status, rather than Arna status, before the court. Anthropologist Guy Nicolas accounted for the tendency of the Arna to claim Muslim status for judicial purposes by noting the contempt of urban functionaries for non-Muslims, and the association of prestige with Islam.[58] However, the notable appointed the title of Durbi – one of the Muslim Katsinawa elite – was just as much an outsider to the people of the Maradi valley as was the Sarki or the French administrator. It seems probable that the appointed notable's understanding of local practices was arbitrary, and his application of sanctions draconian, with the overall effect that he imposed a

uniform version of 'tradition' imported from elsewhere upon a highly localized and diverse population. Furthermore, the means through which his mode of adjudication was carried out may have met with increasing disfavor, both from the French and from the local population; trial by ordeal seems to have been preferred by the Durbi, whereas reconciliation and fines were by most accounts the norm with the Sarki and Al'kali.[59]

Most important, however, were the advantages to individuals of making use of Islamic law through the court rather than observing practices that had evolved to protect the broader Arna communities. For example, under Arna land distribution norms, when a head of household died, the household land was managed by the next senior male, who might be an eldest son, a younger brother, or simply an older man in the community. This pattern protected the larger community's control over the land in question, since the holding was understood to be for the use of a household and not of individuals. The land was not divided among the remaining children unless one of the sons or brothers wanted to set up a new household on his own, which until the 1970s he could do by clearing new land for himself. Women were given part of the household land to farm in usufruct, or helped their husbands with the *gamana* plot. Until quite recently, women (particularly older women) seem to have enjoyed uncontested usufruct rights to land provided by their husbands, although the land available may have been poor in quality and limited in area. However, under Maliki law, which has increasingly become the norm governing inheritance, when a man dies, his land and property may be divided among the children, sons receiving twice the share of daughters.

While Éliane de Latour sees this shift as resulting primarily from the French imposition of a 'Republican' vision of law,[60] the debates within the French administration about the uncontrolled expansion of Islamic practices through local law suggest that in fact local Africans also had a great deal to do with the transformation of land law. Elite Katsinawa individuals attempted to gain greater controls over land and labor through the judicial system in the moment of recording 'local custom', as local agriculturalists resisted the deformation of their practices by claiming Muslim status over Arna, and juniors and women seized upon the potential for land ownership presented in the newly simplified 'Muslim' code.

By preferring the Katsinawa norms of inheritance in the nineteenth century, and Maliki law increasingly under French rule in this century, individ-

uals in the valley could gain control of land that in the period prior to the arrival of the Katsinawa would have been available to them only in usufruct. Such control became more desirable as the population in the region swelled and as access to bush and fallow land declined. Appealing to colonial courts in matters pertaining to marriage could prove disadvantageous. By and large the courts did not confer on either husbands or wives options they could not activate through other means; for example, a woman who wanted a divorce could through a variety of stratagems (among them running off to her kin) at length obtain one. By contrast, in taking advantage of the courts in issues related to land inheritance, individuals gained entirely new options, options occasionally worth risking the ire of their kin and the cupidity of the court. Which individuals would have found it desirable to pursue the colonial vision of 'custom' through the courts depended very much on which 'custom' was at stake. When control of labor was at issue, male elders would have had the most interest in employing the powers of the state. When, on the other hand, control of diminishing land was the question, younger men and women would have had the most to gain from the courts. One common pattern in Africa, as Chanock observes, has been that the wealthy are likely to prefer customary law regarding persons (particularly wives and dependent junior males whose labor is necessary for farming), while the disadvantaged often attempt to sustain land access through customary land law (where communal tenure guarantees all some access to land).[61] In the more complex 'hybrid' judicial field of the Maradi region, it appears that it was young men and women whose access to land in usufruct was threatened by the spread of 'traditional' Islamic understandings of land and property, who were most inclined to use the courts to stake a definitive claim to their own potential portion of a divisible inheritance or their right to purchase land. In the face of the growing power of Islamic discourse in the field of law, rather than attempt to use the Durbi and Arna custom to uphold communal tenure, younger men and women seem to have pursued the more promising strategy of preemptively deploying Muslim discourse themselves, whether in the formal courts or without, to gain access to land they otherwise would never have controlled on their own. Certainly today, Maliki norms of inheritance and land distribution prevail in the region, producing rapid fragmentation of land holdings in the past several decades. Whether that land can then be sold is a question that provokes considerable

debate, since 'traditional' claims via a more communal understanding of land control still have salience.

In practice, this potential to inherit land only benefitted men in the nineteenth century and in the early decades of the twentieth, for Katsinawa norms preferred that daughters receive their share of an inheritance in livestock, cloth, or cash, rather than in land or property. As one elderly woman of the aristocratic class put it, 'It is the man who inherits the *gida* [household, house, family, clan, heritage]'.[62] The close cultural association of maleness with the continuation of the family heritage, and of that heritage with land and real estate, effectively eliminated women from the inheritance of one of the most important factors of production. However, under colonial rule this understanding of inheritance began to shift with the more literal application of Maliki law, and it became possible for women to inherit fairly regularly according to the proportions set out in the Qur'an, although there is still today a preference for sons to inherit farmland.

Prior to about 1945, then, women were systematically excluded from the inheritance of houses and land, although the principle of female inheritance in proportions set out by the Qur'an was respected. It was only with the rebuilding of the city on the plateau in 1945, and the growing influence of the Islamic discourse of the colonial courts, that women began to have access to land consistently through inheritance. One of the features of Islam admired by colonial administrators like Marty was its protection of women's rights to property, and it is likely that colonial 'customary law' had the effect of gradually drawing the interpretation of Islamic inheritance in the direction of female inheritance of fixed property. Furthermore, as the city expanded, women began buying land to build their own houses on, particularly women who had had prolonged exposure to the operation of the state through marriages to soldiers. This combination of female inheritance of landed property and the related trend of female investment in real property has produced a respectable number of female property owners in the city of Maradi today. It is commonly assumed in studies of French colonial rule that the Napoleonic code prevailed, eliminating women and wives from property ownership;[63] in fact, in Maradi at least, women's property rights were enhanced rather than undermined. Women's rights to property were already strongly embedded in Islamic law.[64] It was the enhancement of the status of Islamic law under colonial rule, as urban Hausa 'custom' was gradually conflated with Maliki law, that promoted women's access to urban

land. Sadly, one implication of this shift in land distribution patterns is that married women's 'customary' access to farmland in usufruct has precipitously declined in the past decade, with disastrous consequences for the security of rural women and children.[65]

### *Collusion and Evasion*

If the *Coutumier juridique* makes legible the invention of tradition and the inconsistencies and unexpected consequences of those inventions, we should not suppose that simply because these inventions were written down, they in fact governed the outcome of all or most judicial encounters. Although Governor-General Roume promoted the codification of local law from 1903, it was not until 1933 that 'custom' was collected in Maradi, and not until 1939 that the *Coutumier* was actually published; furthermore, it is not altogether clear that it was ever used in native tribunals.[66] French colonial officers would have found it useful to have a written law to refer to as they handled cases in the *tribunaux de cercle*, but indigenous judicial authorities, such as the Sarki, would be unlikely to resort to such an inflexible document.

My perusal of colonial administrative reports and my oral interviews lead me to question whether substantial numbers of cases would have been regulated before the *tribunaux de cercle*. As I have argued above, particular individuals might occasionally have had an interest in bringing land and inheritance disputes before the tribunal (or simply in deploying Islamic discourse to gain legitimacy for inheritance claims). Yet by the time these courts were in place, little would be gained for a woman by taking a marital dispute to such a setting, given the shift towards a patriarchal associationist mode of rule. Any dispute not favorably mediated at the village level could be appealed to the familiar arena of the Sarki's court, where the mystique of a written *Coutumier* would be irrelevant. Most disputes, as I have suggested above, probably never saw their way to the court overseen by the *commandant de cercle*, given its association with the *indigénat*. Moreover, with the expansion of cash cropping and crises over labor, the likelihood is that the most important disputes would have involved questions concerning the control of women who were de facto captives. After 1903, French courts no longer formally recognized slave status.[67] Many disputants would out of necessity have had to content themselves with the decisions of the Sarki and

Al'kali, beyond the gaze of the *commandant de cercle*. There would be little incentive to appeal a case adjudicated at the level of the Sarki's court to the court overseen by the French administrator.

Such a suggestion is, of course, difficult to prove, resting as it does in part upon an absence of evidence – a kind of aporia. My suspicion that the *tribunaux*, as constituted in the 1903 decree, were not the principal arenas for the adjudication of most cases in the Maradi region derives from the fact that the most conspicuous traces of the courts within colonial records are regular expressions of puzzlement as to why 'natives' so rarely took advantage of them! Does this mean that France's subjects in Maradi never made use of the judicial authority of the Sarki, who oversaw the *tribunal de subdivision* once Niger was finally granted the status of colony? Or that they never appealed to the Al'kali and Durbi, who had roles in both the *tribunal de subdivision* and the *tribunal de cercle*? It seems to me that it is important to distinguish between the formal *tribunal de subdivision* as conceived on paper on the one hand, and the Sarki's or Alkali's courts in practice on the other. In principle, the Sarki acted as judge in the *tribunal de subdivision*, but, in practice, it appears that the court as represented in the 1903 decree had little or no salience for Maradi. What seems to have occurred instead is that local figures of authority simply went about their business as before, handling disputes as they appeared within their respective spheres of authority, and relying by and large on the collective memory of court members (representatives of each of the major non-migratory population groups of the region) rather than upon written records. So, while there are few traces of cases from the *tribunal de subdivision* or the *tribunal de cercle*, this can hardly be taken to mean that the Sarki and Al'kali never handled any disputes. The regular perplexity of administrators as to why the *tribunaux* were not in use reveals a kind of persistent gap between the dictates of the decree on paper and the actual practice of 'natives' in Maradi. Prior to the end of military rule, subjects evidently simply continued to handle disputes before the Sarki. After 1923, the Sarki was in principle integrated into the tribunal judicial apparatus but, since no one kept systematic records or troubled to share whatever records they might have kept with the *commandant de cercle*, there was no evidence visible to the French administration that these *tribunaux* were operating.

Given that the *tribunal de subdivision* was in practice simply the Sarki's court, family law cases would only become visible within the colonial

records at the moment when an individual chose to contest the position taken by the Sarki by appealing the matter before the *commandant de cercle* in the *tribunal de cercle*. Those cases, in turn, became visible within the central colonial records of the AOF when, after 1931, they were reviewed by the central judicial authorities at the court of appeals in Niamey, and sent along to the Procureur Général in Dakar for approval. I have found no evidence at any level that anyone in the Maradi region ever appealed a *civil* case involving a family matter such as marriage or inheritance before the French administration in the period up to 1937. There seems to be ample suggestive evidence that Hausa speakers of the Maradi region were at the very least reluctant to make use of the French administration's judicial mediation in civil matters.

The paucity of formal judicial cases before the *tribunaux* seems to me to be very much of a piece with the general strategy of the Hausa population regarding the colonial administration. The Hausa consistently infuriated local administrators with highly effective evasive strategies, most notably emigration to Nigeria. In a war of passive resistance, the Hausa thereby won political concessions and considerable autonomy. As Colonel Ruef was to remark after a particularly striking episode of mass migration, the Hausa exodus to northern Nigeria was only stanched when the local administration conceded the need for 'a bit more flexibility in our administrative methods'.[68] While the Hausa of Maradi could not altogether relieve themselves of the disproportionate burden they bore in Niger as the agricultural backbone of the colony, they could nevertheless contain some of the excesses of colonial rule through passive strategies.

The early years of the French colonial presence were marked by outmigration from urban centers, in striking contrast to the influx into urban centers characterizing the later colonial period. Hausa peasants could emigrate to Nigeria, or they could simply move to a region where the French administration had not yet successfully established its control. The superiority of agricultural land near the city of Maradi only partially accounts for the exodus of farmers in the 1920s away from Tessawa (where the French commandant was active, and where the local aristocracy had been drawn into the colonial ambit) and towards Maradi (where the Katsinawa court presented an alternative center of power and authority). The French response was to accept the shift of population and power as a fait accompli, moving their own chef-lieu from Tessawa to Maradi.[69]

Similarly, the Hausa could evade the French administration simply by working through institutions that had not been fully co-opted by the colonial system. Even in periods when Hausa outmigration had declined as French exactions were moderated, the Hausa declined to 'take advantage' of the courts and system of justice French colonial rule offered. The Hausa population was, in the words of an administrator in Tahoua, waging a 'silent battle' with the administration on every front.[70] By keeping well beyond the watchful eye of the colonial state, the Hausa not only evaded the *indigénat*; they generated in contrapuntal fashion alternative nodes of discourse and debate through which to negotiate the shifting terrain of the colonial era. In assessing the puzzling paucity of cases brought before the subdivision Tribunals, Colonel Ruef was to remark: 'Some indications suggest that law is too often left to the qadis and other unqualified interlopers beyond the control of the local and regional Commandants'.[71] His elliptical remark suggests that both the African population and the local French administrators had a hand in undermining the role of the *tribunaux* as formally constituted. Some colonial officers, particularly as colonial rule progressed, were evidently all too happy to leave these apparently trivial matters to others, complacent in the conviction that local authorities were of no real importance and did not threaten French hegemony.[72]

From the perspective of the African population, the strategy of appealing to colonial law could backfire rather spectacularly. As Asiwaju notes, concerning the difference between pre-colonial dispute arbitration and colonial-era conceptions of law, 'In the context of European rule, law did not serve as a means of arriving at social equilibrium, as in the pre-colonial period. Gone was the conciliatory focus of local law, replaced by the adversarial tradition of both French civil law and British common law. In sharp contrast to the situation in the pre-colonial period ... the winner took all under the French and British colonial systems'.[73] Thus, for example, under a conception of 'custom' in which paternal authority over daughters is unconditional and a woman's departure from her marital home becomes a crime, real reconciliation of a sort that would have been quite common prior to colonial intrusion becomes unimaginable.[74] On the other hand, this same winner-takes-all philosophy could also mean that where the intended outcome does not emerge because some unforeseen principle prevails (such as a residual French paternalism towards women in forced marriages), one of

the parties to the dispute is likely to be deeply unhappy with the colonial legal process.[75]

William Miles's assessment, then, that 'in French Hausaland, colonial administrators assumed much of the onus of meting out justice themselves, with the corresponding denigration of the indigenous judicial system. The Napoleonic code prevailed over Qur'anic shari'a'[76] seems, at least for the Maradi region, to be an overstatement. Certainly he is correct that in British Nigeria, *shari'a* courts were quite deliberately recognized and employed within the colonial structure. By contrast, in Niger, neither the *shari'a* court of the Al'kali nor the Sarki's *fada* as it had existed prior to colonial intrusion were given formal recognition; instead, a new court system dubbed the *tribunal* was instituted. While the existence of the colonial court certainly altered the judicial terrain, it neither eliminated Islamic judicial practices nor entirely supplanted other fora for mediating disputes. The presence of the colonial court, in fact, made it far more likely than in the past that Islamic norms would prevail in any given dispute. Given the potential intrusion of the colonial administration into the equation, Maliki law loomed on the horizon in any altercation. To forestall any appearance before the commandant, the primary alternative fora for mediation would have been the unrecognized but viable arbitration by the Sarki outside the *tribunal,* and of the Al'kali in his home, both of whom, to varying degrees, would have drawn upon Muslim law. One extremely important effect of this evasion of the hierarchy of colonial era *tribunaux* is that the principle stating decisions of higher order representatives of the centralized state take precedence over those of local authorities at lower levels was never entirely recognized. The courts as conceived in local practice were parallel and alternative, rather than hierarchical.

## *Legacies of Colonial Law*

The contemporary legal situation in Niger, then, is extraordinarily complex, and that messy complexity is perhaps most evident in the realm of land tenure. As Christian Lund observes, Niger's land regime suffers from a fundamental ambiguity because of the multiple legal frames ('custom', Islamic practice regarding real property, and populist interventions by the state under the rubric of '*mise en valeur*') through which individuals generate strik-

ingly different claims to land, none of which has prima facie priority over the others.[77] While state-appointed judges understand the legal system as hierarchical – their adjudication can overturn previous decisions made by chiefs and functionaries – in fact, chiefs (and their clients) do not tend to see the system that way. They do not regard chiefly interventions as being of a lower order than those of judges. To some degree they are correct, for judges are regularly reassigned to new settings, while chiefs have the advantage of longevity in office – once any given judge moves on, the chief's previous decision can be reasserted. As Lund observes, 'hierarchy, complementarity and competition between different illicit but effective jurisdictions' have, since the late 1970s, characterized the Nigérien legal system.[78]

Clearly, here we can see evidence of considerable African agency and resistance. Rather than celebrate this 'resistance' as worthy as an end in itself, I would emphasize how problematic this pattern can be. This plural judicial situation leads to tremendous uncertainty about rights and about the legitimacy of decisions. The result is that no disputes can be permanently settled, and tensions have a tendency to escalate and expand. Land disputes in Niger are often bloody and are in any case costly and time-consuming, with particularly unfortunate consequences for nomadic and formerly nomadic peoples, whose capacity to make arguments to protect access to pasture, wells, farmland and even schools is undermined by the power of sedentary chiefs.[79] Whether or not one espouses the logic of those proponents of land reform who believe that development goes hand in hand with freehold tenure, it is clear that the existing situation undermines the ability of individuals and communities to make the most of their land and to protect it for future generations.

The injudicious intrusions of the colonial period, then, have generated an involuted stalemate in which the state, politicians, chiefs, local administrators, and religious authorities all compete within the judicial domain in a bid to retain power, to capture resources, and to support a following.[80] To move beyond this impasse would require more than overcoming the tribalized discourses that have infected politics in Africa. It would also require recasting the relationship of the state to Muslim law. It would entail a broad public debate about the nature of law in Niger, and about how best to resolve disputes, so that all parties can move forward with some certainty as to the outcome. It would, even more urgently, require a realization on the part of contemporary interlopers into the African political scene that with-

out the means to pay an ample and well-trained civil service and judiciary, states such as Niger will resort consciously or unconsciously to 'traditional authorities' as their ambiguously integrated personnel,[81] with all the attendant conflict and evasion their continued significance will inevitably entail.

*Notes*

1 Mahmood Mamdani (1996), *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton: Princeton University Press).

2 See Éliane de Latour (1992), *Les temps du pouvoir* (Paris: Éditions de l'École des Hautes Études en Sciences Sociales); T.O. Elias (1965), 'The Evolution of Law and Government in Modern Africa', in *African Law: Adaptation and Development*, eds. Hilda Kuper and Leo Kuper (Berkeley and Los Angeles: University of California Press), 184-195; Anthony Kirk-Greene (1995), '"Le Roi est mort! Vive le roi!": The Comparative Legacy of Chiefs after the Transfer of Power in British and French West Africa', in *State and Society in Francophone Africa since Independence,* eds. Anthony Kirk-Greene and Daniel Bach (New York: St. Martin's Press), 16-33; William F.S. Miles (1994), *Hausaland Divided: Colonialism and Independence in Nigeria and Niger* (Ithaca: Cornell University Press).

3 The phrase 'injudicious intrusions' plays upon Sara Berry's observation that colonial era state was 'intrusive rather than hegemonic in its effects'. Sara Berry (1993), *No Condition is Permanent: The Social Dynamics of Agrarian Change in Sub-Saharan Africa* (Madison: University of Wisconsin Press), 20. Special thanks to Richard Roberts, Ebrahim Moosa, Jean Hay, Donald Moore, Philippe David and the participants in the 7th Stanford-Berkeley Law and Colonialism Symposium, 'Muslim Family Law and Colonialism in Africa', in May 2001 for comments and observations that have significantly sharpened my thinking.

4 Robert Delavignette (1968), *Freedom and Authority in French West Africa* (London: Frank Cass & Co. Ltd., 1946), 72, 77.

5 On the whole, the administrative staff posted to Niger was undistinguished, to say the least, but those few perceptive and able administrators (notably Delavignette and Brévié) who did work there and found themselves working closely with local chiefs seem to have been among the vanguard supporting the emerging associationist policy. See William B. Cohen (1971), *Rulers of Empire: the French Colonial Service in Africa* (Stanford: Stanford University Press), 100, 115.

6 Ibid., 117.

7 Delavignette, *Freedom and Authority in French West Africa*, 107.

8 Sara Berry (2001), *Chiefs Know Their Boundaries: Essays on Property, Power, and the Past in Asante, 1896-1966* (Portsmouth: Heinemann).

9 Miles, *Hausaland Divided*, 145.

10 Elias, 'The Evolution of Law and Government in Modern Africa', 191 and Kirk-Greene, 'Roi est mort! Vive le roi!'.

11 Virginia Thompson and Richard Adloff (1957), *French West Africa* (Stanford: Stanford University Press), 215.

12 Richard Roberts (1991), 'The Case of Faama Mademba Sy and the Ambiguities of Legal Jurisdiction in Early Colonial French Soudan', in *Law in Colonial Africa*, eds. Kristin Mann and Richard Roberts (Portsmouth: Heinemann), 185-204, 187.

13 Richard Roberts (1999), 'Representation, Structure and Agency: Divorce in the French Soudan During the Early Twentieth Century', *Journal of African History* 40, 3: 389-410, 410.
14 Alice L. Conklin (1997), *A Mission to Civilize: The Republican Idea of Empire in France and West Africa, 1895-1930* (Stanford: Stanford University Press), 185.
15 Catherine Coquery-Vidrovitch (2001), 'Nationalité et citoyenneté en Afrique occidentale français: Originaires et citoyens dans le Sénégal colonial', *Journal of African History*, 42, 2: 285-305.
16 For some glimpses of the advantages and disadvantages of fora for mediation that are not entirely under the control of the state today, see Hirsch, Moosa, and Christelow, this volume. As sites for mediation become more formalized, some of the contradictions between local practices and constitutional arrangements can become acute; tensions within communities over who should act as authority in a context of debate about how to practise Islam in the modern context emerge, occasionally violently. See Berry, *No Condition is Permanent*.
17 Roberts, 'The Case of Faama Mademba Sy', and David Groff (1991), 'The Dynamics of Collaboration and the Rule of Law in French West Africa: The Case of Kwame Kangah of Assikasso (Côte d'Ivoire), 1898-1922', in *Law in Colonial Africa*, 146-66, for example, illustrate how the French loi administratif governing functionaries of the state ran up against the invented traditions and the indigenous understandings of authority that underwrote the power of local chiefs and dignitaries necessary to colonial rule even in French territories. Dominique Sarr and Richard Roberts (1991), 'The Jurisdiction of Muslim Tribunals in Colonial Senegal, 1857-1932', in *Law in Colonial Africa*, 131-45, sketch out struggles in Dakar over whether Muslim originaires should have access to a separate tribunal to regulate their affairs according to Muslim law rather than statutory law.
18 Shereikis, Rebecca (2001), 'From Law to Custom: The shifting legal status of Muslim originaires in Kayes and Medine, 1903-13', *Journal of African History*, 42, 2: 261-283.
19 Richard Roberts (2005), *Litigants and Households: African Disputes and Colonial Courts in the French Soudan, 1895-1912* (Portsmouth: Heinemann).
20 A.I. Asiwaju (1991), 'Law in African Borderlands: The Lived Experience of the Yoruba Astride the Nigeria-Dahomey Border', in *Law in Colonial Africa*, 224-238, 230.
21 Finn Fuglestad (1983), *A History of Niger 1850-1960* (Cambridge: Cambridge University Press), 81; Roberts and Mann, *Law in Colonial Africa*, 17.
22 John D. Hargreaves (1974), *West Africa Partitioned* (Madison: University of Wisconsin Press), 224.
23 Archives Nationales, Sénégal (hereafter ANS) M89 Justice indigène organisation judiciaire; décret 20 Décembre 1907.

24 This phenomenon becomes more visible after 1931, when local judicial proceedings became subject to review from Niamey and Dakar – many judgments for disobedience handled under 'customary law' carried much heavier sentences than the fifteen days permitted under the indigénat. Higher-level administrators and magistrates were regularly moved to reduce the sentences, pointing out that they exceeded the sentencing limits for the same infraction under the indigénat. Resistance to tax payments and labor requisitions were often the occasion of such inappropriately harsh sentences. See, for example, ANS 3M/109 Notice des arrêts rendus sur appel, Réquisition no. 12 Septembre 1934.
25 Philippe David (1964), *Maradi: l'ancien état et l'ancienne ville* (Niamey: République du Niger, Études Nigériennes no. 18), 161-166.
26 Kirk-Greene, 'Roi est mort! Vive le roi!', 17.
27 Miles, *Hausaland Divided*.
28 Some evidence for how little confidence local populations had in the fairness and rationality of the Commandants de Cercle is to be found in an interesting case in which an ex-soldier took advantage of his war injuries and uniform to extract 'gifts' from villagers who would do almost anything, it seems, to avoid being taken before the Commandant for an array of fabricated and utterly arbitrary infractions, such as wearing coins with holes in them. ANS 3M/109 Chambre d'accusation, Notice des Arrêts Réquisition No 24, Affaire Mamadou Faya, Usurpation de fonctions et escroqueries 24 Juillet 1925.
29 It is hard to find any civil appeals from the Maradi region; all the appeals I have found were initiated by local administrators who were exercising their right from the 1930s on to call into question judgments made by indigenous judges on criminal and correctional cases. Interestingly, colonial subjects in Niamey in the same period were far more comfortable with using the court system to handle marital disputes to their own ends, rather than simply evading colonial courts altogether. See for an example a complex marital dispute involving a Niamey woman who could not quite settle on which 'husband' she wanted finally to live with, occasioning a dispute over both the status of the marriage and some minor property. One of the husbands, unhappy with the original civil verdict, successfully won a more favorable settlement upon appeal. The woman, incidentally, was expelled from Niamey as a potential troublemaker 'en raison de sa conduite qui est des plus irregulières'. ANS M/119 18 État des jugements rendus en matière civile et commerciale pour le Tribunal de Cercle de Niamey, 2ème trimestre 1906: 26 juin 1906 Koke Coulibaly, Boula Diarra.
30 Roberts, 'Representation, Structure and Agency', 398-399; David, Maradi: *l'ancien état et l'ancienne ville*, 128.
31 Roberts, 'Representation, Structure and Agency', 402. Roberts borrows this useful phrase from Robert Kidder: 'Western Law in India: External Law and

Local Response', in *Social System and Legal Process*, ed. Harry M. Johnson (San Francisco: Proquest Info & Learning, 1978).

32 Roberts, *Litigants and Households*. Judith Byfield notes that Egba women made use of the colonial apparatus in a similar fashion early in British Nigeria. Judith Byfield (2001), 'Women, Marriage, Divorce and the Emerging Colonial State in Abeokuta (Nigeria) 1892-1904', in *Wicked Women and the Reconfiguration of Gender in Africa*, eds. Dorothy L. Hodgson and Sheryl A. McCurdy (Portsmouth: Heinemann), 27-46. Often the constriction of women's options was linked to anxieties produced by their vigorous entry into the cash economy, see Jean Allman (2001), 'Rounding up Spinsters: Gender Chaos and Unmarried Women in Colonial Asante', in *Wicked Women and the Reconfiguration of Gender in Africa*, eds. Dorothy L. Hodgson and Sheryl A. McCurdy (Portsmouth: Heinemann), 130-148. See also Alan Booth (1992), 'European Courts Protect Women and Witches: Colonial Law Courts as Redistributors of Power in Swaziland 1920-1950', *Journal of Southern African Studies* 18, 2: 253-275; Margaret Jean Hay and Marcia Wright (1982), *African Women and the Law* (Boston: Boston University African Studies Center) ; and Catherine Coquery-Vidrovitch (1994), *Les Africaines: Histoire des Femmes d'Afrique Noire du XIXe au XXe Siècle* (Paris: Éditions Desjonquères), 112.

33 Philippe David's memoir of his experiences as a judge during the transition to independence confirms the 'weighty mediocrity' of much of the administration in Niger. Philippe David (2007), *Niger en Transition, 1960-1964: Souvenirs et rencontres* (Paris: L'Harmattan), 17.

34 David, *Maradi: l'ancien état et l'ancienne ville*, 128.

35 Ibid., 122.

36 Ibid., 128.

37 Ibid., 128.

38 In Southern Africa, for example, a series of population movements in the context of rapid population growth and European intrusion to the south gave rise to new states built upon 'traditional' age-grade systems turned into military machines. See J. D. Omer-Cooper (1967), *The Zulu Aftermath* (Essex: Longman). In East-Central Africa, the ravages of the Indian Ocean slave trade with the expansion of the Omani empire saw the emergence and sometimes equally rapid decline of a series of kingdoms that simultaneously capitalized upon and defended themselves against the chaos of the moment by operating under a loose and expansive understanding of 'marriage'. Nakanyike Musisi (1991), 'Women, "Elite Polygyny", and Buganda State Formation', *Signs* 16, 4: 757-786; Marcia Wright (1993), *Strategies of Slaves and Women: Life Stories from East/Central Africa* (New York: Lilian Barber). West Africa experienced a series of Islamic jihads, justifying the expansion of authority of one group over another, through claims to the primacy of a 'pure' and 'traditional' vision of Islam over the 'debased' admixture of Islamic practices with local customs. See *Bulletin of the School of Oriental and African Studies*, 23, 3: 553-79; Hiskett (1973), *The Sword of*

*Truth, the Life and Times of Shehu Usman Dan Fodio* (New York: Oxford University Press); and Hiskett (1984), *The Development of Islam in West Africa* (London: Longman).

39 M.G. Smith (1965), 'The Sociological Framework of Law', in *African Law: Adaptation and Development*, eds. H. Kuper and L. Kuper (Berkeley: University of California Press): 24-48; David, *Maradi: l'ancien état et l'ancienne ville*.

40 Smith, 'The Sociological Framework of Law', 31.

41 Wary local administrators tended to be more 'vigilant' regarding the perceived threat of Islam than ministers at higher levels of government. In 1921, when Muslim tracts were mailed from British Northern Nigeria to 'Arab' scholars in Zinder, the local French administration monitoring the mail gave an order expelling the recipients. Higher authorities in Paris responded blandly that the tract itself didn't seem very explosive, and wondered in any case why an order of expulsion was given for the recipients, who could hardly be held responsible for the package's contents. Lt. Col. Ruef, 1921 Rapports politiques, 1er trimester, Archives d'Outre Mer (hereafter AOM) 2G21 (14). Rapport Politique 1912, 1er trimestre AOM 2G12 (18).

42 See Marty's criticisms of this practice in Christopher Harrison (1988), *France and Islam in West Africa, 1860-1960* (Cambridge: Cambridge University Press), 136.

43 Davids, *Maradi: l'ancien état et l'ancienne ville*, 4.

44 Harrison, *France and Islam in West Africa*, 132; for the complexity of gaining access to those protections see Lydon in this volume.

45 Ibid., 94-117.

46 Ibid., 129.

47 See for example Rapport Politique Annuel 1935 – Colonie du Niger AOM 2G35 7; Rapport Politique Annuel 1937 AOM 2G37 6.

48 Ebrahim Moosa points out in this volume that a fixed rendition of Islamic religious practice is not necessarily more 'authentic' historically than a more fluid approach to law. In fact, the highly dynamic quality of African palabres may be quite consistent with the spirit of exertion and understanding of the early Muslim community.

49 'Coutumes Haoussa et Peul (Cercle de Maradi) 1933', *Coutumiers juridiques de l'Afrique Occidentale Française* (Paris: Larose, 1939), 265-302, 294.

50 Ibid., 281-283.

51 Captain Landeroin (1911), 'Du Tchad au Niger. Notice historique', *Documents scientifiques de la mission Tilho, 1906-1909* (Paris: Ministère des Colonies), vol. 1 309-552, 515.

52 Archives Nationales Niger (hereafter ANN)/14.1.12.

53 'Coutumes Haoussa et peul', 292.

54 For a fuller treatment of this issue, see Barbara M. Cooper (1997), *Marriage in Maradi: Gender and Custom and a Hausa Society in Niger, 1900-1989* (Portsmouth: Heinemann), 1-19.

55 The French were not alone in pursuing this approach to the abolition of slavery: complicity between the colonial administration and the male aristocracy concerning female slavery occurred in British northern Nigeria as well; see Lovejoy, Paul (1988), 'Concubinage and the Status of Women Slaves in Early Colonial Northern Nigeria', *Journal of African History* 29, 2: 245-266, 145-146; Allan Christelow (1991), 'Women and the Law in Early Twentieth Century Kano', in *Hausa Women in the Twentieth Century*, eds. Catherine Coles and Beverly Mack (Madison: University of Wisconsin Press), 130-144, Ibrahim M. Jumare (1994), 'The Late Treatment of Slavery in Sokoto: Background and Consequences of the 1936 Proclamation', *International Journal of African Historical Studies*, 27, 2: 303-323.
56 Martin Chanock (1985), *Law, Custom, and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge: Cambridge University Press), 17.
57 Paul Marty (1930), *L'Islam et let tribus dans la Colonie du Niger* (Paris: Librairie Orientaliste Paul Gauthier), 427.
58 Guy Nicolas (1975), *Dynamique sociale et appréhension du monde au sein d'une société hausa* (Paris: Musée National d'Histoire Naturelle), 198, 204, 382, 509.
59 Villomé 'Monographie', ANN/14.1.12.
60 Latour, *Les temps du pouvoir*, 128.
61 Chanock, *Law, Custom, and Social Order*, 72.
62 Jeka Hajjiya, Interview with the author, Maradi, Niger, 4-13-89. On deposit with the Archives of Traditional Music at Indiana University in Bloomington, 1989.
63 Coquery-Vidrovitch, *Les Africaines*, 111-12; Miles, *Hausaland Divided*, 288; Latour, *Les temps du pouvoir*, 128.
64 Leila Ahmed (1992), *Women and Gender in Islam: Historical Roots of a Modern Debate* (New Haven: Yale University Press), 110-112.
65 Marthe Diarra and Marie Monimart (2007), 'Déféminsation de l'agriculture au sud Niger, un lien avec la crise?' in *Niger 2005: Une catastrophe si naturelle* eds. Xavier Crombé and Jean-Hervé Jézéquel (Paris: Karthala).
66 Sarr and Roberts, 'The Jurisdiction of Muslim Tribunals in Colonial Senegal', 136 note 7.
67 Roberts and Mann, *Law in Colonial Africa*, 39.
68 Lt. Col. Ruef. Rapport Politique Mensuel 4eme trimestre 1922 AOM 2G22 16.
69 Rapport Politique Annuel 1925, AOM 2G25 20.
70 AOM Commandant Tellier, quoting the commandant de cercle of Tahoua, 1931 Rapport politique, vue d'ensemble sur la Colonie (Niger) 1931, AOM 2G31 8.
71 AOM Rapport Politique Mensuel. Col. Ruef. 4eme trimestre 1922, AOM 2G22 16.
72 Thompson and Adloff, *French West Africa*, 222.
73 Asiwaju, 'Law in African Borderlands', 229.
74 Marie Rodet (2009) 'Le délit d'abandon de domicile conjugal' ou l'invasion du pénal colonial dans les jugements des "tribunaux indigènes" au Soudan Français (1900-1945)', *French Colonial History*, vol 10, 151-70.
75 For an extended discussion of these issues, see Cooper, 20-39.

76 Miles, *Hausaland Divided*, 289.
77 Christian Lund, 'Law, Power and Politics in Niger: Land Struggles and the Rural Code' (PhD dissertation, Roskilde University, 1995).
78 Ibid., 101.
79 Eric Komlavi Hahonou (2006), 'La chefferie coutumière face au projet de décentralisation dans une localité de l'Ouest nigérien', *Le bulletin de l'APAD,* n° 23-24, La gouvernance au quotidien en Afrique, URL: http://apad.revues.org/document141.html. Accessed online, 27 July 2007.
80 On the decidedly mixed results of recent land reform in Niger, see Tor A. Benjaminsen, Stein Holden, Chrsitan Lund and Espen Sjaastad (2009), 'Formalisation of land rights: Some empirical evidence from Mali, Niger and South Africa', *Land Use Policy* 26, 1: 28-35.
81 Sometimes chiefly authority can be thinly repackaged in the language of 'civil society' and 'decentralization', see Hahonou, 'La chefferie coutumière'.

# PART II

# MUSLIM FAMILY LAW, THE POST-COLONIAL STATE, AND CONSTITUTIONALISM IN AFRICA

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

**Abdulkadir Hashim**

Application of Islamic law along the East African coast dated from the establishment of the Sultanate of Zanzibar in the early nineteenth century. Kadhi courts were established in major towns of the Sultanate along the East African coast. Territories of the Sultan of Zanzibar stretched from the Benadir coast in Somalia to northern Mozambique.[1] However, with the establishment of the British Protectorate in Zanzibar and the Kenyan coast in 1890, the role of Islamic law and jurisdiction of kadhi courts were subsequently diminished gradually. The aim of this chapter is to outline the application of Muslim personal law in Kenya from the beginning of the British colonial period. It starts with the historical background that highlights the establishment of kadhi courts in the colonial period. Based on court cases, I will examine how Muslim personal law was applied in post-independence Kenya. My analysis is based on court cases that were appealed from kadhi courts to the High Court and Court of Appeal. In order to link the colonial setting with the post-independent legal practice, I have selected a few court cases that reflect issues of conflict between the kadhi courts and appellate courts in Kenya. Analysis of court cases reveal the practical application of Muslim personal law in Kenyan courts and show the continuity of the colonial legal legacy inherited by the independent Kenyan courts. Although the focus of the chapter is the application of Muslim personal law in Kenya, it also represents the general trend of British policy in the administration of Islamic law in other British territories.

## *Historical Background*

In May 1887, Sultan Barghash bin Said gave a concession for a term of 50 years to the Imperial British East Africa Company (IBEA) to administer the ten-mile coastal strip of Kenya under the authority of the Sultan of Zanzibar. The concession gave all power to the Company 'to pass laws for the Government of districts and to establish Courts of Justice'.[2] The Concession allowed judges for the Courts of Justice to be appointed by the Company, subject to the Sultan's approval, and stipulated that all kadhis were to be nominated by the Sultan. Administration of justice, particularly along the ten-mile coastal strip, was managed by officials of the IBEA company, who were mere administrators without judicial training. Handling the vast lands of East African territory posed challenges to the company, partly due to a shortage of its staff and lack of relevant judicial training. Administrative officers exercised jurisdiction over the Sultan's subjects by virtue of the authority delegated to them under the concession. These officers were also given consular rank, which enabled them to exercise extra-territorial jurisdiction of the Crown over British subjects. In administering their jurisdiction over the Sultan's and British subjects, the administrative officers 'sat in dual capacity either as the Sultan's judges administering Islamic law or as consular officers administering the English laws'.[3]

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

The charter also stated that 'in the administration of Justice by the Company to the peoples of its territories or to any inhabitants thereof, careful regard shall always be had to the customs and laws of the class or tribe or nation to which the parties respectively belong'. Between May 1897 and August 1899, the Company and the Sultan reached agreements that resulted in granting concessions to the Company to administer parts of the Sultan's territories. Provisions of the Charter also stated that the Sultan's dominions were to be administered according to the Islamic law.[4]

Due to a financial crisis facing the Company, the British government in 1897 decided to buy out the Company in order to relieve it from heavy financial burden. Subsequently, the Sultan entered into a new agreement with the British Government, whereby the administration of his mainland dominions should be 'entrusted to officers appointed directly by His Britannic Majesty's government to whom alone they shall be responsible and shall have full powers in regard to executive and judicial administration'.[5] The British government assumed direct control of Kenya, including the ten-mile coastal strip, and gradually exercised its influence on the administrative and judicial structures.

### *Colonial Policy on the Administration of Justice*

Administration of justice was an essential part of the British colonial policy. The British felt that courts were not just meant to administer justice, but 'rather they were to shine as beacons of Western civilization'.[6] The British saw their administration as 'a self-appointed mission of civilisation', which retained the power to interfere with local institutions and customs to keep them on the path of progress, equity, and good government.[7] Based on this self-appointed civilizing mission, the British colonial administrators sought to abandon customary systems of law in favour of their 'civilized' English law.[8] Although it was a fundamental principle of English constitutional law to maintain the existing systems of law in the acquired territories, the process of 'Anglicisation of the systems was in operation ... where Islamic and customary laws are to be played down and eventually eliminated as separate laws, being replaced by modern statutory codes in such fields as family and succession law'.[9]

The most significant intervention was the British desire to base the administration of justice on English notions. This, together with other 'civilizing' features, such as abolishing the slave trade, served as the basis for British colonial rule in the East African coast region. Morris rightly observed that 'the introduction of new forms of law and order was claimed to be one of the main political and philosophical justifications for colonial rule'.[10] Metcalf further argued that 'a fundamental concern of British policy was a belief that imperial rule could be justified only by a commitment to the rule of law'.[11] Hence, the rule of law was central to British colonial policy and

formed an essential element in the establishment and maintenance of political domination.[12]

There was, however, no uniform policy regarding the administration of justice in the British colonial territories, and 'officials on the spot developed varying systems of law and government in response to local realities and pragmatic considerations'.[13] Lack of consistency in British legal policy can be seen in the process of transplanting Indian statutes into East Africa, causing legal tension between the imported statutes and local laws.[14] This tension was even worse when principles of English law were deemed to be applicable in East African courts. For instance, the East African Order in Council of 1889 provided that jurisdiction within continental Africa was to be exercised 'upon the principles of, and in conformity with, the substance of the law for the time being in force in England'.[15] This led to a disagreement between British colonial officials regarding the adoption of English law in foreign lands. Owing to the inherent technicalities embedded in English law, British administrative colonial officials felt that much of English law and procedure 'needed very considerable modification if injustices were to be avoided or indeed if it were to bring any real benefit to the largely illiterate African populations'.[16] They accused English law of being inappropriate if it were to be applied in the British territories. Instead, they argued for its substantial modification in order to meet the local circumstances.[17]

However, British judicial colonial officials saw technicalities of English law as an integral part of the English legal system and 'without them the standard of justice must be lower'.[18] Tensions between British colonial officials and British judicial officials not only demonstrate a lack of uniform policy on judicial matters, but also portray a difference of opinion on policy matters that paved the way for conflict. This 'colonial tension' led to a situation whereby British judges mistrusted their fellow colonial administrators and their capacity to conduct proper 'English justice' if English law was not to be applied to the letter.

As with native laws and customs, the application of Islamic law in British territories was subjected to the repugnancy clause. British colonial administrators regarded Islamic law and other forms of native law as 'backward with the tendency to be repugnant'.[19] In dealing with customary laws, the British applied the repugnancy clause: rejecting customary laws which were repugnant to English principles of natural justice and morality. Other similar phrases employed by the British officials in the colonies included 'nat-

ural justice, equity and good conscience' that kept 'cropping up in colonial enactments, either as a rule of last resort for the choice of law, or as a test for the exclusion of customary law'.[20] The Roman law formula of 'justice, equity and good conscience' meant that in cases where indigenous laws could not attain this standard, rules of English law were applicable.[21] In East Africa, British judges refused to accept the Islamic law principle that allowed a fugitive wife to be forcibly returned to her husband. British judges also refused to apply Islamic rules governing cases of guardianship and custody of minors where such rules would prejudice what they understood to be in the best interests of the child.

In northern Nigeria, British judges permitted the Emirs to uphold religious rituals that were not deemed repugnant to natural justice and humanity. The Emirs were allowed to make regulations to curb drinking and selling of home-brewed beer, and to enforce the statutory punishment of flogging for drinking intoxicating liquors.[22] In his *Dual Mandate,* Lugard portrayed the British policy towards religious matters in stating that 'the attitude which the British Government have endeavored to assume is that of strict neutrality, impartiality and tolerance in all religious matters [unless] any particular form of religion sanctions or enforces acts which are contrary to humanity or good order'.[23] For more detail on northern Nigeria, see the chapter by Allan Christelow in this volume.

### *Establishment of Native Courts under British Colonial Rule*

Native legal institutions which existed in the pre-independence period were retained by the British colonial administration under the indirect rule policy, subject to general supervision by British authorities.[24] By adopting the indirect rule policy, British colonial officers established native courts in order to administer justice along the East African coast. The architect of indirect rule policy on the East African coast, Arthur Hardinge (British consul in Zanzibar 1894-1900), enacted the East Africa Order in Council 1897, which established native courts.[25] By implementing indirect rule policy through the establishment of native courts, Hardinge gradually delimited the powers of kadhi courts. The East Africa Order in Council 1897 instituted several important changes. The first change was the establishment of two categories of native courts along ethnic lines. The first category was presided over by

an European officer and included the High Court, the chief native court, provincial courts, district courts and assistant collector's courts. The other was presided over by a native authority that included *Walis*' courts (Arab governors' courts), Court of Local Chiefs (African local courts), and Mussulman religious courts (kadhi courts). Native courts were bound to follow the Indian civil procedure code and the Indian penal and criminal procedure codes. In dealing with Muslims in the protectorate, courts were to be guided in civil and criminal cases by the general principles of Islamic law.[26] Further enhancement of the native courts system was done through the enactment of the native courts regulations, under the East African Order in Council of 1897, which empowered the British Commissioner, with the consent of the Secretary of State, to make rules and orders for administration of native courts, including alterations in any native law or custom.[27]

Arthur Hardinge formalized the establishment of kadhi courts (referred to in the Order in Council as Mussulman Ecclesiastical Courts)[28] in every *wilayet* (district) along the ten-mile coastal strip. Jurisdiction of the kadhi court was confined to matters of personal status. The Order in Council provided that 'within every wilayet of the protectorate the cadi (sic. kadhi) of the wilayet shall hold a court, to be called a Cadis' Court' and that 'the Cadis' Court shall take cognizance of all matters effecting the personal status of Mohammedans (such as marriage, divorce, and inheritance)'.[29] The second change was the creation of a Chief Kadhi position, called *Shaykh al-Islam,*[30] who was responsible for supervising the kadhi courts along the coast and hearing appeals. The third change was the creation of new administrative posts for Arab local governors, the *Liwalis* and *Mudirs,* who were granted magisterial powers under the supervision of the District Commissioner. Although *Liwali* and *Mudir* courts were administrative offices with civil and criminal jurisdiction, they were also conferred concurrent jurisdiction with kadhi courts in Muslim personal law.

A remarkable feature of the 1897 Order in Council was the sweeping power granted to the chief native court presided over by British judicial officers, who exercised general supervision over all inferior native courts within the Protectorate, including the kadhi courts.[31] British policy was to contain kadhi courts within its colonial machinery. This policy succeeded partly in bureaucratizing kadhi courts and bringing them under the colonial judiciary system. In order to obtain full control over the kadhis, the

order in council established an appeals system, where cases from kadhi courts were channelled through the Chief Kadhi to the High Court.[32]

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

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

Although Britain practised indirect rule as colonial policy in most of its territories, I argue that along the East African coast, British colonial authorities adopted the indirect rule policy as a temporary measure, due to the shortage of staff and resources. When the British declared Zanzibar to be a British Protectorate in 1890, indirect policy was adopted provisionally in order to take advantage of the existing Arab administrators and kadhis to run the civil service. However, as the influence and power of the British

gradually increased, the policy changed from indirect rule to direct rule. This was apparent when British-Consuls achieved more power in controlling the Sultan's court. For instance, in 1891 the British Consul-General Portal seized control of the Sultan's finances and administration with the power of appointing British officials.[35] This period marked the beginning of direct rule, whereby the sovereignty of the Sultan of Zanzibar was gradually diminished, and subsequent Sultans were just retained as ceremonial rulers.

### *Post-Colonial Policies on the Administration of Justice*

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

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

stitutional nature. This guarantee was incorporated in the Constitution of Kenya, which provided for the establishment and jurisdiction of the Chief Kadhi and other kadhis.

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

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

As for the jurisdiction of the Kadhi Courts, Section 5 of the Constitution of Kenya states, 'The jurisdiction of a Kadhi's Court shall extend to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion'.[38]

By a legal notice issued in September 1963, kadhis' powers were limited to jurisdiction over all persons professing the Muslim faith in all matters relating to personal status, marriage, inheritance and divorce. This was a significant departure from the 1930 Kenya Courts Ordinance which had granted the kadhi criminal jurisdiction. After independence, the Kenyan government worked towards integrating of the court systems in order to overcome problems caused by the parallel system of courts. The Magistrates Courts Act was passed in 1967, by which the courts were fully integrated.[39]

One of the steps taken to ensure this integration was to channel appeals from native courts to the High Court. Hence, appeals from the kadhi courts were also sent to the High Court.[40] During the parliamentary discussion on the Kadhi Courts Act, Muslim parliamentarians raised an objection against the provision of appeals to the High Court, since it was considered illogical to allow non-Muslim judges, who might not apply Muslim law, to have the final decision on legal matters.[41]

Another concern of Muslim representatives in the colonial Legislative Council was that subjecting kadhi courts to the control of the government could threaten the future existence of kadhi courts in Kenya. A Muslim member of the Legislative Council, Mr. Jeneby, raised the fear of Muslims liv-

ing along the Kenyan coast to the effect that kadhi courts would be abolished or changed after independence if they were to remain under direct control of a Minister, as in the case of Sudan and Nigeria.[42] Kadhi courts could be overruled by the High Court on appeal. This anomaly led to cases of miscarriage of justice, because judges sitting in the High Court or Court of Appeal ruled in cases where they were not conversant with Islamic law and procedure.[43] The High Court or Court of Appeal, when hearing such appeals from the kadhi courts, in most cases applied statutes of general application to the exclusion of Muslim personal law. I will explore below several judgments of the High Court and Court of Appeal of Kenya where they overturned decisions of the kadhi court.

## *Conflict of Laws in Kenya and the Colonial Legacy*

In enforcing the rule of law according to English standards, the British confronted difficulties caused by a clash between English law and local custom.[44] Contact between the British common law, Islamic law, and customary law systems raised issues of conflict. This situation has contributed towards the choice of law problem: which of the two or more systems or bodies of law co-existing within a single national or territorial system is the court to apply in a particular case?[45] Internal conflict of laws occurs in Kenya as a result of the colonial legacy, which introduced various legal regimes for the different races and religions in the country.[46]

David Pearl attributes these conflicts to the difficult choice which the colonial powers faced between continuing the personal regime and imposing from above a uniform Western law applicable to all people. He further concluded that 'if for whatever policy reason, the colonial power opted to continue the personal law regimes, then a systematic internal conflict of laws ought to have been developed'.[47] Customary laws continued to apply to the great majority of persons and were the primary law in the local courts. Nevertheless, these customary laws did not stand on the same footing as the foreign law in the superior courts, such as the Supreme or High Court, where the fundamental law was of English origin.

Defining conflicts arising within a single jurisdiction has been a subject of discussion among various authors.[48] Allot refers to 'internal conflict of laws' when a judge is required to choose between two or more systems or bodies

of law which are not territorially distinct.[49] Decrees such as the Imperial Enactments (Application) Decrees 1939 were enacted to avoid these legal conflicts. For instance, Section 3 of the Decree stated, 'Every Imperial Enactment now in force within the protectorate shall (unless the contrary intention appears) be deemed to extend to all subjects of His Highness the Sultan within the protectorate'. This position was also prevalent in Zanzibar, where in the case of *Mbwua v. District Commissioner, Pemba*[50] it was held 'that no supposed conflict with the fundamental law can derogate in the slightest degree from the validity and enforceability of His Highness's Decrees, though the Decrees clearly ought not to be construed as affecting the Islamic law in any way unless they do so in clear and unequivocal language'.[51]

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

### *Marriage and Division of Matrimonial Properties*

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

Conflict is the distribution of property between Muslim spouses, acquired during the subsistence of a valid marriage, and the consequences arising from dissolution of such marriage. This has been echoed in the case of *Fathiya Essa v. Mohamed Alibhai Essa*,[52] where the Court of Appeal was called upon to adjudicate on the distribution of such property. The parties had

contracted an Islamic marriage in 1972, which was dissolved in 1988. The appellant sought various declarations, *inter alia,* to state that properties acquired during the subsistence of their marriage were jointly owned by herself and the respondent. Justice of Appeals Omolo held that the (UK) Married Women's Property Act 1882 was an act of general application and applied equally to Muslims and non-Muslims in Kenya.

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

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

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

### *Custody and Guardianship of Children*

Despite the fact that the application of Islamic law in Kenya is limited to personal matters, issues related to custody and guardianship of children were excluded from the jurisdiction of the kadhi courts.[57] Since the enactment of the Mohammedan Marriage, Divorce and Succession Act, there has been an academic debate as to whether the jurisdiction of the kadhi includes the power to decide on the custody of children. Although the Act does not explicitly confer such jurisdiction upon the kadhis, in practice kadhis exercise this power.[58]

The British colonial approach seemed to reflect divergent opinions on issues related to custody and the maintenance of children. In *Nana binti Mzee v. Mohamed Hassan,*[59] the Court of Appeal held that English law applied in determining the custody of a Muslim child. In an earlier decision, however, in the case of *Fazlan Bibi v. Tehran Bibi and Mohamed Din Kashmiri,*[60] the Court held that 'when questions of Muslim law arise in British courts, the judges are not at liberty to put their own construction on the Qur'an in opposition to the ruling of commentators of great antiquity and high authority'. Guthrie-Smith maintained, 'As to the guardianship of the infant child of the first marriage, Muslim law lays down clearly that the right of a mother to the guardianship of a boy under 7 years of age is lost by reason of her remarriage'.

In the case of *Raya bin Salim bin Khalfan El Busaidy v. Hamed bin Suleiman El Busaidy and Another,*[61] the East African Court of Appeal ruled, 'It would be wrong to apply principles of equity devised to import a presumption whereby to gauge the intention of a Muslim husband and wife living in Zanzibar whose social and cultural background is very different'. Similarly, in the case of *Abdulreman Bazmi v. Sughra Sultana,*[62] it was stated that the mother was entitled to the custody of the child until he attained seven years of age, as practised by the Hanafi Muslim school of thought. However, in an appeal, Sir Kenneth O'Connor held that 'the [Guardianship of Infants] Ordinance applies with full force to Muslims not less than to other infants and under Section 17 of the Guardianship of Infants Ordinance ... the welfare of the child, and not the right under Muslim law, is the paramount consideration in deciding questions of custody'.

The welfare principle was reiterated by High Court Judge Githinji in the case of *Noordin v. Karim.*[63] He noted that in cases involving very young female

children, there was a rule in favour of the mother in the absence of exceptional cases. However, in this case since the children were boys and big enough, he gave their custody to their father 'as one of the exceptional cases where the mother should be denied custody of the children'.[64]

In the case of *Zuleikha Mohammed Naaman v. Gharib Suleiman Gharib,*[65] the appellant, being the mother, applied for custody and maintenance for herself and her children. The father denied the mother's right to custody, alleging that she had been unfaithful. Based on Islamic law rules regarding custody of children, the Chief Kadhi gave custody of the children to the mother on the grounds that it was in the best interest of the children to stay with their mother, due to their tender ages. The Chief Kadhi gave also reasonable access to the father. Unsatisfied with Chief Kadhi's judgment, the father applied for review of the ruling, arguing that the children had reached the age of seven, which according to Islamic law marks the start of proper moulding of the character of the child, hence he was best qualified for their custody. Upon hearing the application for review, The High Court judge, Justice Waki, gave custody of the two children to the father, solely on the grounds that the religious welfare of the children would be best addressed if they were placed in the father's custody, though the mother was given unfettered access.

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

In his concluding decision, Kwach stated that 'a man who walks out on his wife and children of tender age to start a new life and a family with a "bimbo" has no right to demand the custody of the children of the woman he has abandoned on the false pretext that he is under a religious duty to bring them up as good Muslims'. He therefore allowed the appeal, giving the mother custody, care and control of the children and allowed the father access on any one weekend each month.

Although the decision of the Court of Appeal confirmed the judgment of the Chief Kadhi in giving custody to the mother, it reflects divergent approaches between the two judicial institutions. Kwach's judgment echoes the supremacy of the common law principle of the welfare of the infant, against the Islamic law rule of puberty, in determining the custody of children. The father, being dissatisfied in the above case, filed another appeal in the case of *Gharib Suleiman Gharib v. Zuleikha Mohamed Naaman,*[66] whereby he sought the disqualification of one of the judges on the grounds that he did not understand Islamic law. The court held that 'we shall not disqualify ourselves because of our alleged ignorance of any particular branch of the law, however intricate that branch might be'.

The practice of non-Muslim judges presiding over cases involving Muslim parties was not peculiar to East Africa. M.K. Masud observed that 'the most salient feature of nineteenth-century Indian legal history is that Islamic law was administrated by British judges sitting on Islamic law courts'.[67] British colonial judges who administered Islamic law in the Indian courts were responsible in large part in the formation of the Anglo-Muhammadan law.[68] This legacy was inherited by Kenyan judges, who were conferred powers to overrule kadhis' judgments.

Another case involving two parents from different faiths was the case of *Wariara Mbugua v. Al Amin Mazrui.*[69] The mother (applicant), a Christian, sought custody of her female child from the respondent, a Muslim father. The child was born in 1978 and stayed with her father's relatives, where she was exposed to the Muslim faith and culture. The father contended that the Muslim religious connection the child had previously acquired would be severed if her daughter continued in the care of her Christian mother. The Court pointed out that Section 7(1) of Guardianship of Infants Act laid out principles in awarding custody, namely, the welfare of the infant, the conduct of the parents, and wishes of the mother and father. It therefore held that the Act does not include religious upbringing in the factors to be considered in relation to custody under Section 7(1), and therefore gave custody to the mother.

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

### *Matters of Inheritance*

Matters of inheritance involving Muslims in Kenya are under the jurisdiction of the kadhi court. This power is conferred by the Mohammedan Marriage, Divorce and Succession Act,[70] which provides that

> Where any person contracts a marriage, or being a married person, in accordance with Mohammedan law, whether such marriage or marriages are contracted before or after the commencement of this Ordinance, and such a person dies after the commencement of this Ordinance, and where the issue of any such marriage or marriages dies after the commencement of this Ordinance, the law of succession applicable to the property both movable and immovable of any such person shall be in accordance with the principles of Mohammedan law, any provision of any Ordinance or rule of law to the contrary notwithstanding: Provided that where in any sect of Mohammedans to which the deceased belonged the law of succession differs from the ordinary law of succession in accordance with the ordinary principles of Mohammedan law, then the law of succession applicable to such sect shall apply.[71]

The Act uses marriage as the only basis for a Muslim's qualification to inherit under the Islamic law of succession. Hence, the strict application of Section 4 may legally disinherit a Muslim.[72] Issues of conflict arise in the area of probate and administration in cases involving Muslims. The power to administer an estate of the deceased is given by the High Court Registry to the litigants, regardless of their religion. This causes inconvenience when Muslim parties file their suit at the kadhi courts, while obtaining the power to administer the estate is granted by the Registry of the High Court. In addition to this, the Public Trustee also has the jurisdiction to handle cases where Muslim litigants present their cases for determination in succession matters. One possible way of avoiding these parallel jurisdictions between judicial organs of the state is to confer jurisdiction only to the kadhi courts in dealing with administration of the estate of Muslims.

In the case of *Chelanga v. Juma,*[73] it was decided that since the deceased died as a Muslim, his estate was to be administered according to the Islamic law of inheritance. Relying on the kadhi's advice, the Court held that two illegitimate daughters of the deceased were not entitled to a share of their father's inheritance on the ground that they were not Muslims.[74] Justice

Etyang dispelled the possibility that the provisions of Section 82 (1) and 82 (4) of the Constitution of Kenya could be applicable in the case of the two daughters of the deceased in rendering Islamic law discriminatory against them. He averred, 'It is my ruling that the application of Islamic law is not inconsistent with the provisions of the Constitution of Kenya.'[75]

### *Burial Disputes*

Burial disputes reflect another area of conflict in the Kenyan courts, particularly in cases involving parties from Muslim and Christian backgrounds. Disputes arising from burial matters have been a subject of debate involving not only Islamic law, but customary law as well. Diversity among the religious and cultural backgrounds of the people in Kenya has contributed towards legal conflicts in courts. Various complexities emanate from such disputes, which raises the question of the applicable law in a given situation where multiple legal systems contest each other. The case of *Sakina Sote Kaitany and Another v. Mary Wamaitha*[76] illustrates an aspect of this complexity. The dispute was between two widows, a Muslim appellant and a Christian respondent. The respondent wanted to bury her deceased Muslim husband, who later converted to Christianity. Justice Githinji of the High Court ordered that the remains of the deceased be released to the Christian widow (respondent) for burial in accordance with the rights of the Presbyterian Church of East Africa. The Judge further held that as a result of the deceased's apostasy, his marriage to the Muslim widow (appellant) was automatically dissolved, notwithstanding the fact that the deceased did not inform her.

On appeal, Kwach disagreed with the judge of the High Court that the deceased's apostasy automatically dissolved his marriage to the appellant. In his view, there was no supportive evidence either by scholarship or authority to declare automatic dissolution of the marriage based on apostasy of the deceased.[77] Kwach further contended that members of Islam, Christianity and Hinduism are all members of the greater community of the human race and should therefore be accorded equal treatment before the law. Kwach's judgment shows a clear ignorance of Islamic rule on apostasy. His misapprehension of the Islamic law rule on apostasy was based on equating Islam with Hinduism, when he cited the Hindu Marriage and Divorce Act,[78] where

a spouse can petition for divorce when the respondent has ceased to be a Hindu by reason of conversion to another religion. He wondered that while a Hindu has to petition for divorce on the same grounds of apostasy, a Muslim was given preferential treatment by not being required to apply for a declaration that his marriage has been dissolved on the ground of apostasy. Kwach declared, 'I can see no reason for this selective application of the law.' Despite Kwach's opinion, two judges on the Court of Appeal, Gicheru and Lakha, ruled that the marriage between the deceased and the appellant was automatically dissolved by apostasy of the former.

The above judgment by Kwach regarding apostasy conflicts supports the stand made earlier by the same Court of Appeal, when it stated: 'We know ourselves when it would be proper for us not to sit on a matter. None of us would dream of sitting on a matter in which we know our impartiality would be suspect.'[79]

### *Law of Evidence*

During the British colonial period, kadhi courts were bound by the provisions of the Indian Evidence Act, although the kadhis were in fact both ignorant of its requirements and unwilling to apply them.[80] Kadhis' non-compliance with common law rules of evidence was coupled which the lack of clear policy and conflicting judgments made by British judges. In the case of *Baraka binti Bahmishi v. Salim bin Abed Busawadi*,[81] the judge held that according to Section 11 of the Courts Ordinance,[82] kadhi courts were bound by the Civil Procedure Ordinance and Evidence Act and not by Islamic rules of procedure and evidence. On the contrary, in the case of *Hussein bin M'Nasar v. Abdulla bin Ahmed,*[83] it was held that Islamic rules of procedure and evidence were to be followed in a Muslim subordinate court where the parties were Arab or Muslim natives.

Current practice in Kenya with regard to rules of evidence is that Section 2(1) of the Evidence Act[84] precludes its provisions to apply to proceedings in kadhi courts. The Kadhi Courts Act[85] states, 'The law and rules of evidence applied in a Kadhi court shall be those applicable under Muslim law: Provided that (i) all witnesses called shall be heard without discrimination on grounds of religion, sex or otherwise; (ii) each issue of fact shall be decided upon an assessment of the credibility of all the evidence before the court

and not upon the number of witnesses who have given evidence; (iii) no finding, decree or order of the Court shall be reversed or altered on appeal or revision on account of the application of the law or rules of evidence applicable in the High Court, unless such application has in fact occasioned a failure of justice'.[86]

## *Conclusion*

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

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

Application of Muslim personal law in the Kenyan courts caused issues of conflict between the superior courts, which apply principles of common

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

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

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

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

In the post-colonial era, Muslim personal law has survived challenges aiming either to abolish or to curtail its application in the Kenyan courts. Among the challenges was the exercise of unifying personal laws in East Africa after independence. The existence of the kadhi courts was most recently challenged during the hotly debated Constitution of Kenya review process in 2005.[89] In this process, attempts were made to remove the provisions of the Constitution of Kenya that protected the kadhi courts. Kadhi courts and Muslim personal law in Kenya were challenged on the one hand by political pressure to abolish their existence, and on the other hand by judicial force to overrule their judgments. Despite all these threats, kadhi courts have managed to survive political pressure and cope with various conflicts.

*Notes*

1 Benadir coast of Somalia included the towns of Merca, Mogadishu and Barawa. On kadhi courts in coastal Somalia, see Alessandra Vianello and Mohamed M. Kassim (eds.) (2006), *Servants of the Shari'a: The Civil Register of the Qadis' Court of Brava 1893-1900* (Leiden: Brill), 2 vols.
2 See R.W. Hamilton (1918), Chief Justice, East Africa Protectorate, *The Origin and Growth of British Jurisdiction and of the Judicial System of the East Africa Protectorate* (Nairobi: Government Printer), 1.
3 Extra-territorial privileges were granted to citizens of various states including Britain, United States, France and others. See A. Allot (1976), 'The Development of the East African Legal Systems during the Colonial Period', in *History of East Africa*, eds. D.A. Low and A. Smith (Oxford: Clarendon Press), 351.
4 Kuria Mwangi (1995), 'The Application and Development of Islamic Law in Kenya: 1895-1990', in *Islam in Kenya,* eds. Mohamed Bakari and Saad S. Yahya (Mombasa: Mewa Publications), 252.
5 Ibid., 3.
6 Mahmood Mamdani (1996), *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton: Princeton University Press), 111.
7 G.F.A. Sawyerr (ed.) (1967), *East Africa Law and Social Change* (Nairobi: East African Publishing House), 134.
8 A.N. Allot (1976), 'The Development of the East African Legal Systems during the Colonial Period', in *History of East Africa*, 366.
9 A.N. Allot (1960), *Essays in African Law with Special Reference to the Law of Ghana* (London: Butterworths), 3.
10 H.F. Morris and James S. Read (1972), *Indirect Rule and the Search for Justice: Essays in East African Legal History* (Oxford: Clarendon Press), 253.
11 R.T. Metcalf (2007), *Imperial Connections: India in the Indian Ocean Arena, 1860-1920* (Los Angeles: University of California Press), 17.
12 K. Mann and R. Roberts (eds.) (1991), *Law in Colonial Africa* (Portsmouth: Heinemann), 3.
13 Mann and Roberts, *Law,* 18.
14 Metcalf, *Imperial,* 26.
15 Ibid., 24.
16 Morris, *Indirect***,** 73.
17 A.N. Allott, 'East African Legal History', *Journal of African Law* (Autumn 1974) 18, 2: 204.
18 Ibid.
19 Mohamed Serag, 'Modern Changes in Muslim Family Law in Sub-Saharan Africa', Unpublished paper presented at the third symposium of the Islamic Law in Africa Project, Cape Town, 11-14 March 2002, 7.
20 J. N. Matson (1993), 'The Common Law Abroad: English and Indigenous Laws in the British Commonwealth', *International & Comparative Law Quarterly*, 42, no. 4, 761.

21 M.R Anderson (1993), 'Islamic and the Colonial Encounter in British India', in *Institutions and Ideologies: A SOAS South Asia Reader*, eds. D. Arnold and P. Rubb (Richmond: Curzon Press), 169.
22 C.N. Ubah (1982), 'Islamic Legal System and the Westernization Process in the Nigerian Emirates', *Journal of Legal Pluralism* 20, 72.
23 Sir F.D. Lugard (1922), *The Dual Mandate in British Tropical Africa* (London: Cass), 594.
24 This policy was introduced by Lugard in 1900 when he was the Governor of Northern Nigeria. On policy of indirect rule, see Lugard, *The Dual Mandate in British Tropical Africa.*
25 In the preamble of the Order in Council, Hardinge stated, 'Whereas by Treaty, grant, usage, and sufferance, Her Majesty has jurisdiction in the East Africa Protectorate and has power to make laws, by Order in Council or otherwise, for peace, order and good Government in the same, and has in the exercise of the said power made an order in Council commonly called East Africa Order in Council 1897'.
26 Article 2 of the East African Order in Council 1897.
27 Randall L. Pouwels (1979), 'Islam and Islamic Leadership in the Coastal Communities of Eastern Africa, 1700-1914', unpublished PhD dissertation, University of California at Los Angeles, 176.
28 The East Africa Order in Council 1897/1315 in the Supplement to the Gazette for Zanzibar and East Africa, Vol. 6, no. 290, 18 August 1897.
29 Ibid., Articles 53 and 54.
30 On history of the appointment of *Shaykh al-Islam* in Kenya, see Hassan Mwakimako's contribution in this volume.
31 Article 15 of the East African Order in Council 1897.
32 Ibid., Article 57.
33 Mwangi, *The Application*, 254.
34 The Kenya Protectorate Order in Council 1920 conferred jurisdiction of courts established in the Colony. It provided that 'courts now or hereafter established in the Colony shall have in respect of matters occurring within the Protectorate, so far as such matters are within the jurisdiction of Her Majesty, the same jurisdiction, civil and criminal, original and appellate as they respectively possess from time to time in respect of matters occurring within the colony'.
35 J.E. Flint (1962), 'Zanzibar 1890-1950', in *History of East Africa,* eds. Harlow and E.M. Chilver (Oxford: Oxford University Press), 644.
36 On the history of this movement see A.I. Salim (1970), 'The Movement for *Mwambao* or Coast Autonomy in Kenya 1956-63', *Hadith* 2:212-228.
37 Ibid., 225.
38 Section 5 of the Kadhi Courts Act also provides for similar jurisdiction by stating, 'A Kadhi's Court shall have and exercise the following jurisdiction, namely the determination of questions of Muslim law relating to personal

status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion; but nothing in this section shall limit the jurisdiction of the High Court or any subordinate court in any proceeding which comes before it'.

39 Chapter 10 of Laws of Kenya.

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

41 Amina A. Bashir, 'The Kadhis' Court System in Kenya: A Forgotten Arm of the Judiciary?' Unpublished LLB degree dissertation (University of Nairobi: 1996), 34.

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

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

44 Mann and Roberts, *Law,* 4.

45 Allot, *Essays,* 108.

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

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

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

49 Allot, *Essays*, 112.

50 5 Zanzibar Law Reports, 20.

51 Hugh E. Kingdon (1940), *The Conflict of Laws in Zanzibar* (Zanzibar Government Printer), 29.

52 Civil Appeal no. 101 of 1995 at Nairobi (unreported).
53 Kenya Law Reports (hereafter KLR) [2006] pp.1-13, www.kenyalaw.org
54 Ibid., 11.
55 KLR [2006],1-4, www.kenyalaw.org
56 Essa v. Essa (1996) EA 53.
57 Compare this situation with what prevailed in the Muslim Tribunal of St. Louis in the chapter by Ghislaine Lydon in this volume.
58 Section 48 of the Interpretation and General Provisions Act (Chapter 2 of the Laws of Kenya) can be used to confer upon the kadhis such jurisdiction. The Act provides that 'where a written law confers power upon a person to do or to enforce the doing of an act or thing, all powers shall be deemed to be also conferred as are necessary to enable the person to do or to enforce the doing of an act or thing'.
59 1944 East African Court of Appeal 4 (EACA).
60 1919/1921 8 EA 200.
61 1962 East African Court of Appeal 249 (EACA).
62 1960 EA 801 see also Yasmin v. Mohamed [1973] EA 370.
63 KLR [1990], 627-633. www.kenyalaw.org.
64 Ibid., 627.
65 Civil Appeal no. 123 of 1997 at Mombasa (unreported).
66 Civil Appeal no. 31 of 1999 at Mombasa (unreported).
67 M.K Masud (ed.) (2006), *Dispensing Justice in Islam: Qadis and their Judgments* (Leiden: Brill), 37.
68 Muhammad Qasim Zaman (2002), *The Ulama in Contemporary Islam: Custodians of Change* (Princeton: Princeton University Press), 25.
69 Misc. Civil Suit no. 209 of 1985 [1990] LWR 224.
70 Chapter 156 of Laws of Kenya.
71 Ibid., Section 4.
72 Kuria Mwangi, 'Muslim Response to the Law of Succession Act in Kenya: 1967-1990', Unpublished paper presented at *Islam in Kenya Seminar,* 22-24 April 1994. (Mombasa, Kenya), 9
73 KLR [2002] pp. 1-23, www.kenyalawreports.or.ke
74 Ibid., 16.
75 Ibid., 17.
76 Civil Appeal 108 of 1995, Court of Appeal at Nairobi (2008) KLR (G&F), 119-154. www.kenyalaw.org.
77 Ibid., 145.
78 Section 10(1).
79 Gharib Suleiman Gharib v. Zuleikha Mohamed Naaman, Civil Appeal no. 31 of 1999, 5.
80 J.N.D. Anderson noted that Qadi courts in the Protectorates of Aden, Somaliland, Zanzibar and Kenya all followed the Islamic rules of evidence with

varying degrees of rigidity and contrary to the Indian Evidence Act. See J.N.D. Anderson (1970), *Islamic Law in Africa* (London: Butterworth & Co).

81 K.L.R. 20 (1939) Pt. I. 34.

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

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

84 Chapter 80 of the Laws of Kenya.

85 Chapter 11 of the Laws of Kenya.

86 Ibid., Section 5.

87 Mwangi, *Muslim*, 15.

88 Civil Appeal no. 365 of 1998 at Nairobi.

89 On kadhi courts and the Constitution of Kenya review process, see Abdulkadir Hashim (2005), 'Muslim-State Relations in Kenya after the Referendum on the Constitution', *African Association for the Study of Religions Bulletin,* no. 24: 21-27.

# 8 Persistence and Transformation in the Politics of Shariʿa, Nigeria, 1947–2003: In Search of an Explanatory Framework

**Allan Christelow**

In January 2000, the remote, impoverished state of Zamfara in northwestern Nigeria grabbed the world's attention by establishing Islamic courts with jurisdiction over criminal matters. Within the next two years, the other predominantly Muslim states of northern Nigeria had taken similar, though not identical measures.[1] There were also large-scale incidents of religious-ethnic violence in the cities of Kaduna, Jos, and Kano, in which thousands of Nigerians perished.

The leaders of Zamfara State set a ball rolling which gathered momentum over the next few years. In the process, it has helped set in motion other dramatic events and challenged core elements of the Nigerian constitution. These events have also challenged external observers, who are often ill-prepared to interpret these events or formulate appropriate responses to them. Fundamental assumptions dominating European and American academic literature on Islamic law in the modern world and post-colonial African political institutions are inadequate to the task of formulating a coherent explanation of Nigeria's shariʿa question.

The purpose of this chapter is to suggest elements of an explanatory framework, bearing in mind that this is an enormously complex and sensitive matter much in need of serious research and thoughtful discussion. I will first briefly sketch some of the assumptions that govern the academic

discussion of Islamic law in the modern world and of post-colonial African political institutions, then touch upon how Nigeria challenges those assumptions. Next, I will present a synopsis of the history of Islamic legal policy in Nigeria since the run-up to independence in the 1950s. Finally, I will comment on a few of the specific legal, constitutional, and humanitarian issues that have emerged in the new Islamic courts over the last few years and mention some possible scenarios for addressing them.

## *Northern Nigeria: a Land on the Border between Islamic Studies and African Studies*

If Nigeria, and particularly northern Nigeria, poses serious challenges to established academic thinking, there is a ready explanation. There exists a well-entrenched division between Middle East studies and African studies, each with their own traditions, and an assumption that the Middle East, or the Islamic world, is distinct and separate from the African world. But what is intellectually elegant is sometimes of limited use, even counterproductive, when it comes to understanding human realities. Northern Nigeria, and indeed many other parts of Africa, needs to be understood as combining elements of Islam and local tradition. In attempting to understand it, we need to draw upon the best of both Middle East/ Islamic studies and African studies scholarship, and we need to call into question some of their assumptions.

In Middle East and Islamic studies literature, one finds an emphasis on those matters that are of concern to government-controlled judicial institutions in a modern setting. Thus, Islamic law is seen largely in terms of family law. Other aspects of shari'a, including ritual, commercial, and criminal and penal law, are given short shrift, except in the works of scholars specializing in the classical and medieval periods.[2] It is assumed that, in the process of modernization, ritual law becomes a strictly civil matter, and commercial and criminal and penal law fall into the domain of the secular state. In the domain of family law, particular countries' policies are judged on a gauge running from conservative to reformist.

It is acknowledged that one country, Saudi Arabia, has maintained a strict adherence to Islamic law in matters of personal comportment and criminal and penal law. The anomaly is explained in terms of Saudi Arabia

having experienced very little western influence until recently. Since the late 1970s, we have seen the rise of what might be called neo-conservative politics in parts of the Muslim world, bringing with it the restoration of aspects of Islamic criminal law. It is usually military rulers who sponsor such legislation: Nimeiry and Omar al-Bashir in Sudan, Zia ul-Haq in Pakistan. They are seen to be using such policies in a narrow, instrumental way to bolster their authoritarian regimes.

The dominant assumption in African studies is that family law policies must accommodate themselves in some fashion with the ethnic pluralism of their societies. In the process, Islamic law is viewed as a form of customary law. Local custom can remain in force under the oversight of superior state courts, or different customs can be deftly fused into a single code. It should be pointed out that 'family law' often conveys a sense of concerning minor matters of limited consequence, but this is misleading. Real property disputes often fall into this domain, and they can have major economic ramifications. Criminal and penal law and commercial law are seen perforce as matters to be governed by a uniform, modern law of European derivation. All citizens must be equal in the marketplace, and be punished in the same fashion for harm caused to life or property.

The case of northern Nigeria is not easily accommodated to these assumptions. The key difficulty arises from the fact that in matters falling under the modern concept of criminal and penal law, Islamic law had been closely followed in the territories of the Sokoto Caliphate and the Bornu Sultanate up to the time of the British conquest in the early 1900s. In many instances, what modern Western law defines as a 'crime' to be prosecuted by the state was treated in accordance with Islamic law as a conflict between civil parties. Court records suggest that Islamic law was followed more scrupulously in 'criminal' matters than in matters of family law, especially real property questions.[3] These territories continued to follow Islamic law in criminal matters, up until the institution of the Criminal and Penal Codes of the Northern Region in 1959. This is often ignored, even by Professor Ali Mazrui, who has done so much to explain the role of Islam in Africa to a global audience.[4] When the continuation of Islamic law in criminal matters under colonial rule is noted, its implications and consequences are not considered.

Regardless, we need to think of law as more than a set of abstract statutes that can be changed by governmental decree. It is interwoven with

culture, with modes of everyday speech and behavior. Change can be decreed in official institutions, but grass-roots legal culture is not so easily transformed. This is especially the case where new institutions are associated with personnel speaking unfamiliar languages, and where these institutions do not prove effective in dealing with ordinary people's problems.

## *Economic and Legal Change in the Early Colonial Era*

At the outset of their occupation of the territories that became Northern Nigeria, in 1903, the British abolished certain aspects of Islamic law seen as contrary to modern humanitarian standards. Raiding for slaves and the sale of slaves were no longer legal. Amputation for theft and stoning to death for adultery were eliminated. To gauge the actual impact of these changes, we need to judge the extent to which they actually changed legal practice and changes in the incidence and nature of crimes accompanying the changes introduced by the British. We also need to note what practices the British allowed to continue.

Written court records only begin in 1909, so one cannot document legal practice before this time, other than in a few exceptional cases.[5] Fortunately, the records of the early colonial period provide rich material on key issues of theft and homicide, and they permit some deductions about legal practice in the pre-colonial period, and the impact of colonial rule. The records suggest that the introduction of silver coins, replacing the existing cowry shell currency, had powerful ramifications. This change coincided with the creation of a sizable floating underclass as slaves, especially young male ones, deserted their masters.[6]

In the pre-colonial era, most theft would have involved objects that were easily identified: a garment with a distinctive stain, a goat with a spot on its nose. Such property was often recovered, and witnesses were called to testify as to its proper owner. In strict legal terms, this was a property dispute, terminated by the return of property to its rightful owner and perhaps the public disgrace of the party who had wrongfully taken possession of it. Islamic law did not punish a hungry person who took food. Thus, there are grounds for thinking that the punishment of amputation was seldom applied.

Silver coins were all the same, and they could be easily concealed, typically buried. Both imprisonment and physical pressure were methods used in the early colonial period to persuade an accused thief to reveal his hiding place. At the same time, with the economic and social dislocations created by colonialism, exacerbated by severe drought in 1912-1914, there was an epidemic of theft, and theft became more markedly violent than it probably had been prior to this time. Thieves who broke into houses at night were assumed to be armed and to be kinless strangers, perhaps runaway slaves. Attacking, even killing such an intruder was seen to be justified and of little legal consequence, since there were no kin to make a claim. At worst, the killer of such a thief would be given the *alhakin Allah* (God's right) penalty of one hundred lashes and a year in prison. In sum, the British abolished a penalty that was likely seldom applied, and they contributed to a wave of crime that could only be answered by vigilante justice.

Adultery apparently still could be punished by lashes and so could the consumption of alcohol. Available data suggest that while such measures were applied, it was not with great frequency.[7] The British did take certain measures against corporal punishment, following an incident at Bukuru in Plateau Province in 1933, but this was only in matters of administrative law. The principle of corporal punishment continued to be accepted throughout the colonial period, and in the Penal Code of 1959 and the Haddi Lashing Ordinance of 1960.

## *Islamic Law in a Pluralist Setting*

Scholars in the field of Middle East studies paint a picture in which Islamic criminal law is to be found in two settings: the ultra-traditional Saudi Arabia and in authoritarian regimes such as those of Sudan and Pakistan. One might argue that northern Nigeria bears some similarity to Saudi Arabia. In the Saudi case and in the Sokoto Caliphate, Islamic legal practices were revivified by religious-political movements in the mid-eighteenth to early nineteenth century: the Wahabiyya in Arabia and Shehu ʿUthman Dan Fodio's *jihad*.

Yet the Sokoto Caliphate and the Bornu Sultanate, the states that dominated what was to become northern Nigeria, were in many respects different from Arabia, notably in that they contained substantial numbers of non-

Muslims, followers of traditional religions, who were accorded the status of *majus*, by analogy to the Magians mentioned in the Qur'an as a group who could be given the status of protected people. In Hausa, they were termed Maguzawa. The courts did not hold them to Islamic norms; for instance, the requirement that one eat the meat of ritually slaughtered animals. Moreover, the image and rituals associated with the rulers who applied Islamic law had roots in local tradition. Also, women occupied a more prominent role in the Islamic culture of the Sokoto Caliphate than is the case in our classical image of the Middle East. Sokoto Caliphate founder Uthman Dan Fodio was noteworthy for his encouragement of women's education, and his daughter, Nana Asma'u, was both a noteworthy poet and a major force in creating women's organizations within an Islamic framework.[8]

Thus, Islamic law in northern Nigeria has always existed in a setting that can be termed pluralist. In the wider Nigerian picture, especially since the return to civilian rule in 1999, pluralism is clearly a dominant theme. Thus, the context in which elements of Islamic criminal law are being restored is different from Nimeiry's Sudan or Zia ul-Haq's Pakistan of the 1980s. It is elected local politicians at the state level, not authoritarian military figures at the national level, who are carrying out this policy. They have vigorous vocal support, and equally vigorous opposition. To some observers, this augurs civil war, but Nigerian leaders remember all too well the disaster of the civil war of the late 1960s. They are dedicated to negotiating their way through even the toughest issues. Modern expressions of pluralism – in the form of political parties, voluntary associations, newspapers, and academic debate – have affected the shari'a question in Nigeria from the 1940s onward. The economic stimulus of World War II helped invigorate a new class of entrepreneurs in the north, who were willing to weigh in on legal policy questions to protect their interests. By the early 1950s, we see the emergence of a populist opposition to the traditional establishment in the north. This took the form first of the Northern Elements Progressive Union (NEPU) and in the Second Republic of the People's Redemption Party (PRP), both led by Mallam Aminu Kano. A consistent theme of NEPU activists in the 1950s and 1960s was protest against the abuse of judicial power by the Native Authority (NA) judicial councils and by NA-appointed *alkalai* (singular: *alkali*, in Arabic *qadi).* At the same time, traditional authority in the north sought to reinvent itself under the leadership of the Sardauna of Sokoto, Sir Ahmadu Bello, leader of the Northern Peoples' Congress (NPC).[9] This task came to in-

clude the modernization and centralization of the judicial system, within a regional framework, a project not warmly welcomed by more conservative traditional rulers.

The political pluralism of the north is reflected in its intellectual arena. The populist tendency is exemplified by Yusuf Bala Usman, a professor of history at Ahmadu Bello University (ABU) in Zaria, the north's premier institution of higher learning. Until his death in September 2005, he was head of the Center for Democratic Development and Research Training (CEDDERT). He had long warned against the manipulation of Islamic legal issues for narrow partisan ends and against the subordination of the judiciary to political authority. A leading neo-conservative figure has been Abubakar Mahmud Gummi, chief justice of the Muslim Court of Appeal in the 1960s and proponent of demands for a federal shari'a Court of Appeal in the 1970s. In the university milieu, a leading example of this tendency has been Ibraheem Suleiman of the Center for Islamic Legal Studies at ABU. He has long put forward an argument, variants of which can be found in the early colonial period, that colonial rule was a temporary deviation from northern Nigeria's Islamic itinerary. He added to this the idea that independent Nigeria perpetuated this temporary deviation. Suleiman emphasizes northern Nigeria's distinctive identity, with its roots in the Sokoto *jihad*.[10]

Since the late 1970s, a new tendency has emerged, which places greater emphasis on the universal character of Islam and less on locally rooted Islamic identity. First the Iranian revolution and then the intensification of conflicts with Israel in the Middle East contributed to this. The leading exponent of this Islamist tendency has been Ibrahim al-Zakzaky, a man who inspired the wrath of the military rulers of Nigeria in the 1990s when they imprisoned him from September 1996 until December 1998. In the democratic Nigeria of post-1999, however, his has been one of many vigorous voices in the nation's freewheeling debates, offering criticisms of northern politicians' piecemeal restoration of shari'a from an Islamist point of view.

Thus, even if we confine our attention to the heavily Muslim areas of northern Nigeria, we find a vigorous, deeply rooted pluralism. Within the larger federation one finds even more diversity, with a dazzling array of ethnic and religious associations, women's and human rights groups. Yet as much as one finds voices stridently defending the interests of particular groups, one also finds leaders who recognize the importance of bridge-building between groups and of restraining the most militant particularists

for the sake of peace and unity. In the north, traditional rulers often step into this role. For instance, in the wake of Yoruba-Hausa clashes in Lagos in early February 2002, the Emir of Kano, Alhaji Ado Bayero, met with the city's Yoruba community leaders to ensure that this did not set off clashes in Kano. At the national level, one can see such an approach being pursued by the Christian Association of Nigeria (CAN). A key figure with respect to Muslim-Christian relations is Matthew Hasan Kukah, a Christian northerner who has become the Catholic Church's leading authority on Muslim-Christian relations. When we seek to understand the cautious response of President Obasanjo to the recent shari'a crisis, we can sense the influence of the advice on a cautious approach emanating from groups like CAN or northern traditional rulers.

Soon after taking office, Obasanjo helped establish the Nigeria Inter-Religious Council (NIREC) to serve as a forum for negotiating issues related to religion. Groups such as CAN and the Jamaatu Nasril Islam (JNI), the north's most prominent Islamic association, sit on this council. Such diverse groups are of course not in perfect harmony, but they recognize the need for dialogue and negotiation. The establishment of the NIREC reflects a view long voiced by Obasanjo that there exists 'an African genius for compromise'.[11]

## *Patterns of Collective Violence*

Large-scale incidents of collective violence have greatly complicated the shari'a debate in the years immediately after the restoration of Islamic criminal law, but they need to be seen as part of a long-term pattern of problems in Nigeria, the explanation for which needs to be sought in domains other than religion. Nonetheless, the patterns of collective violence can be seen to have implications related to Nigeria's legal institutions.

The emergence of large-scale collective violence involving clashes between groups (defined in ethnic, religious or political terms, or in a combination of those factors) is a phenomenon that has emerged together with the growing urbanization of Nigeria and the opening of organized political competition in the 1950s. Kano, the north's largest and most diverse city, has been the theater of numerous clashes since the 1950s. The most serious, at least in terms of political implications, were the conflicts pitting Kano Muslims against Igbo immigrants in 1966, at the beginning of the civil war.

The most serious in terms of duration and loss of life were the ʻYan Tatsine disturbances in December 1980, an event I witnessed firsthand. Some 4,000 people died over a period of ten days. The disturbances were set off when a dissident Islamic sect challenged and defeated local police forces at the heart of the city, near the main mosque and the emir's palace. A contributing factor was the newly elected state governor's inability, or unwillingness, to take measures to keep the group under control until matters had gotten out of hand. When the police failed to quell the initial disturbance, youth vigilante groups in the old city quickly emerged to take up the battle against the sect. Bizarre rumors about how to identify sect members spread like wildfire. People merely suspected of being members were summarily killed. Only after ten days of anarchy did the armed forces enter the scene and restore order.[12]

Several key factors can be discerned here. First, under civilian regimes, when political rivalries flourish, popular violence easily spins out of control.[13] Second, locally based police forces are inadequate to the task of maintaining control, for they are poorly equipped and trained. Third, rumors about acts of extreme violence or feats of magic easily grab the public imagination, intensifying the violence. Finally, federal security forces eventually do restore order, but this takes time, both for practical logistical reasons and because such intervention raises the delicate issue of federal intervention in a state matter.[14]

Though the motifs of the recent violence in Kaduna, Jos, and Kano are vastly different from those of the ʻYan Tatsine disturbances, some of the underlying factors are the same: political rivalries, rumors, the inadequacy of the local police, the mobilization of vigilante forces, and the delayed, sometimes heavy-handed intervention of federal security forces. At the root of all this is a poor articulation between security mechanisms at the federal and state levels. At the federal level, assuring national unity has always been the dominant preoccupation. It has led to an emphasis of federal control over police and the posting of police outside their home regions. Local needs for preventing crime and controlling minor conflicts are correspondingly neglected. Aspirants for power at the local level, feeling they are frozen out of the system, even humiliated by those who triumphed in the elections, all too easily consider developing links with vigilante groups or relish the idea of fishing in the troubled waters of riot and mayhem.

At the heart of these problems is an inherent asymmetry in the Nigerian system. In terms of security forces, Nigeria is heavily centralized, along patterns resembling a French system. Under democratic civilian rule, though, the political structure is a federal one, much like that of the United States. The potential for explosive political conflicts sustains the rationale for heavily centralized security forces. This in turn undermines the potential for keeping conflicts under control at the local level. When such conflicts become especially intense, Nigeria reverts to military rule. In effect, the asymmetry between security structures and political structures creates a sort of vicious circle.

The post-1999 shari'a question in Nigeria needs to be understood in this light, as does the resurgence of ethnic militias in southern Nigeria and violent incidents in southern cities such as Aba, set off by incidents in the north. Arguments over shari'a contribute to these conflicts but are certainly not the prime cause. The roots must be seen in economic hardship, political machinations, and the inadequacy of Nigeria's conflict resolution and control mechanisms. However, it is conceivable that the arguments over shari'a may lead to an answer of sorts to the problem of institutional asymmetry. To see this, we need to review the history of Nigeria's shari'a questions.

## *The First Shari'a Question: Homicide and the Criminal Code, 1947-1958*

The shari'a question first burst on to the scene in Nigeria in the case of *Tsofo Guba vs. Gwandu Native Authority*, in which the West Africa Court of Appeal overruled a verdict of culpable homicide issued by an emir's judicial council in Northern Nigeria. The ruling, by a court composed of British judges, can be seen as an expression of growing sensitivity to the death penalty in post-World War II Britain, the looming question of unification of the Northern and Southern Nigerian legal systems, and a profound philosophical difference between British and Islamic approaches to homicide.

To put the difference in legal approaches in a nutshell, British law was rooted in empiricism, and its workings involved agents of the government ('the crown' as the British would have it), supplemented by police, who gathered evidence and statements concerning the crime, and defense counsel, whose job was to protect the rights of the accused. In homicide, British law

takes into account motives and context to differentiate between culpable homicide and manslaughter. The difficulty of making a clear distinction led to the abolition of the death penalty in Great Britain in 1949.

In dealing with matters of homicide, Islamic law stresses the roles of plaintiff and defendant. The outcome of the case rides on the testimony of witnesses, or on oaths of denial by the accused. The Maliki tradition, which is followed in northern Nigeria, provides for an oath by male agnates of the victim (the *qasama* oath) to prove an accusation where there is sufficient circumstantial evidence (*lawth)*. If police are involved at all, it is because they are called to serve as witnesses by one of the parties. The leading judicial figure in Kano from the 1910s to his death in 1937, the Waziri Muhammadu Gidado, took a dim view of police testimony, considering police to be unreliable and all too easily influenced to stray from the truth. As he and classical jurists understood it, homicide cases had a structure similar to other types of civil cases. Only cases that clearly involved public security, such as highway robbery, would draw government authorities into assuming an active role.

The tremors set off by the *Tsofo Guba* decision might also be seen in light of the profound political changes underway in Nigeria at the time. Control of homicide matters by traditional rulers was associated, in popular perception, with their role as arbiters of life and death.[15] The political dominance of traditional rulers, and with it their role as arbiters of life and death, was being challenged by new generations of political leaders, in the Yoruba southwest, in Northern Nigeria, and also in Ghana.[16] As these disputes played out, they were sometimes accompanied by incidents of murder that had ritual overtones. The West Africa Court of Appeals' ruling reflected not simply a legal argument over whether the incident in this case involved manslaughter or culpable homicide. For northern traditional rulers and their Islamic legal advisers, this was a meaningless distinction, and the decision was clearly designed to undermine their authority, indeed to insult them. To understand the sources and the ramifications of the *Tsofo Guba* dispute, one needs to understand Islamic law in its cultural and political context, rather than as an isolated abstraction.

In late colonial Nigeria, coming to terms with the future role of shari'a was complicated by the fact that there were no British colonial officers or judges on the scene with a thorough grounding in Islamic law who might act as intermediaries. The British resorted to importing Muslim scholars

from the Sudan, starting in the 1930s, to teach in government-run law schools, hoping they would introduce some of the more modern methods and techniques that could be found in the Sudan or Egypt. There were indeed changes in the 1930s and 1940s, making northern Shari'a Courts more centralized and insuring greater uniformity in decision-making and record keeping. Native Authorities (NAS) still dominated the judicial process with little effective oversight or control from a higher level.

In the early 1950s, as the dispute over shari'a intensified, authorities on Islamic law were imported from Britain to provide advice. These distinguished scholars had no experience with the Nigerian setting and did not speak Hausa. One of them was Joseph Schacht, a scholar of German origin, teaching at Oxford University, best known for his skepticism over the authenticity of the *hadith*. He dismissed Northern Nigerian Islamic legal practice as archaic (especially use of the *qasama* oath) and offered scathing comments about the quality of British colonial administrators.[17] Sir Norman Anderson of London's School of Oriental and African Studies (SOAS) was more patient, and regularly contributed through the 1950s to working toward a codification of law that he thought would assuage Islamic sensibilities.

As the debate over shari'a proceeded, political competition heated up in Nigeria. There was not simply rivalry between regions or ethnic groups, as some paradigms of African politics would lead us to expect, but *within* regions and ethnic groups, notably in Northern Nigeria. Populist opponents of the NAs, grouped in the NEPU, bitterly resented the judicial authority of the emirs and their *alkalai,* who had a propensity for jailing NEPU activists on the flimsiest of pretexts. By the late 1950s, NEPU activists even resorted to claiming to be non-Muslims, so their cases would be sent to the Magistrate's Court. In the regional legislature, NEPU spokesman Ibrahim Imam argued for a centralized judicial system and strict separation of judicial from political authority.

The dominant conservative leader, Northern Region Premier Sir Ahmadu Bello, held out for a transformation of the legal system, within a regional framework that kept the Islamic character of the law intact as much as possible. Central features of the compromise that materialized in 1958 were the establishment of Criminal and Penal Codes, modeled on those of the Sudan, and the establishment of a Northern Region Muslim Court of Appeal. While this compromise struck many as conservative, it was not greeted warmly by some traditional rulers, who could see that it undermined their judicial au-

thority, and indeed their very image of authority. The key figure in the new judicial set-up was to be Abubakar Gummi, a man who in his earlier career as a schoolteacher in the late 1940s had won a sharp rebuke from the Sultan of Sokoto for questioning him on a matter of religious policy. Both he and Ahmadu Bello represented a new generation, seeking to build modern regional institutions outside the old NA framework, but still preserving many interests of the traditional elite.

### *The Second Shariᶜa Question: the Federal Shariᶜa Court of Appeal and a Place for Shariᶜa in the Nigerian Constitution*

Within six years of independence, Nigeria was plunged into crisis, and the regional system fell victim to that crisis. So, too, did northern traditional rulers' judicial authority. By 1967, the emirs no longer had any formally recognized judicial authority. As part of the regional framework, the Northern Region Muslim Court of Appeal disappeared. Thus, in one fell swoop, a key element of the old judicial system was eliminated, and a carefully crafted new mechanism for mediating between the federal legal system and the Muslim courts of Northern Nigeria was done away with. What was left were the Area Courts, still presided over by the *alkalai*. They were theoretically part of the federal judicial hierarchy leading up to the Supreme Court, but judges in the upper levels of this hierarchy had little if any expertise in Islamic law. This made it difficult to develop a unified jurisprudence on Islamic family law questions.

When the task of formulating a new constitution began in the mid-1970s, northern political leaders put forward a proposal for a Federal Shariʿa Court of Appeal. Initially, this seemed a reasonable proposal that would sail through the Constituent Assembly, but it was soon ensnared in polemics and allegations of hidden agendas. The chief spokesman for the idea of an appeals court was Abubakar Gummi, former Chief Justice of the regional Muslim Court of Appeal. Gummi was a combative figure, often stirring up his followers with talks on Kaduna's radio station or contributing eloquent tracts to the Hausa language newspaper, *Gaskiya ta fi Kwabo.* His opponents within the north saw him as a partisan figure, dogmatically opposed to the popular Sufi orders, notably the Tijaniyya, and pitting a new movement, the ʿYan Izala, against them. His opponents throughout Nigeria recalled his con-

nection to the deceased Northern Region Premier, Sir Ahmadu Bello, and his campaigns that seemed to pressure northern traditional religionists to convert to Islam.

Political animosities and personality conflicts aside, serious debate was stymied by the incompatible premises taken by the two sides in the debate. These premises were borrowed from western political discourse, which the debaters had learned so well in Nigerian universities. They had a limited relation to Nigerian historical and social realities. Proponents of the courts argued that the proposal was grounded in the principle of religious freedom, to be entrenched in the new constitution. Opponents argued that to create a federal Shari'a Court of Appeal would establish Islam as a state religion, thus violating the principle of separation of religion and state, and violating the rights of non-Muslims. Supporters chanted 'No Nigeria without shari'a' in the streets of Kaduna, while opponents devised snide songs to belittle the idea. With the two sides at loggerheads, then-military ruler Olusegun Obasanjo intervened in the debate, saving the constitution-making process at the expense of the Shari'a Court of Appeal.

While the idea was opposed by many southerners and by some progressive northerners, the support of northern conservatives may have been less than whole-hearted. Traditional rulers had not been keen on the policy of judicial centralization in the 1950s, and nothing had happened since to change their views. Leaders of the National Party of Nigeria could see that they would have to make an alliance with a southern party, most likely the Igbo dominated National People's Party, in order to win the presidency. Pushing the shari'a issue would only make it more difficult to cement this alliance. The alliance did indeed come to fruition, and as a result, the NPN's Shehu Shagari became president of the Second Republic.

The problem of lack of articulation between the north's Muslim courts and the federal judicial hierarchy remained, however, and the issue bubbled to the surface periodically in the 1980s. At the same time, the north's university system had been growing. More students were pursuing degrees in Islamic studies or Islamic law, and some were travelling abroad, especially to Saudi Arabia, to study. Just as a progressive discourse stressing class conflict and nationalism, and attacking traditional ruling establishments, had taken root in Nigerian universities in the 1960s and 1970s, Islamist discourse opposing western influence and calling for a revival of Islamic principles was now gaining a wide audience. This perspective was given support

by emerging models in Sudan, Iran, and Pakistan, and fueled by escalating conflict in the Middle East.

## *The Third Shariᶜa Question: Restoration of Islamic Penal Law at the State Level, 1999-2002*

While the idea of restoring aspects of Islamic criminal and penal law may have been stimulated by external models, the way it came about was shaped by Nigerian political structures and dynamics. Its ramifications, on the other hand, have been global, for Nigeria's pluralism reflects that of global society.

Given the failure of proposals for a Federal Shari'a Court of Appeal to deal with family law matters, it was clearly futile to propose such a court for criminal cases. The constitution of 1999 did however give states leeway to legislate on their own. It was this constitutional power that Zamfara State first seized upon, mandating the creation of new Islamic courts in October 1999. These courts went into business in January 2000. Since then, other northern states have pursued this, in some cases by limited incremental changes rather than the sweeping sort of change undertaken in Zamfara.[18]

Some observers have suggested that lurking behind these measures is a political agenda, perhaps a scheme by powerful figures from previous northern-dominated military regimes to sow the seeds of a crisis that would bring them back to power. If there is some basis to this speculation, it is clearly a stratagem that has not worked. Moreover, such speculation fails to take account of the fact that these measures have wide popular support. They respond both to a sense of resentment over the north's political and economic marginalization since 1999, and to a sense of social crisis which is shared by many Nigerians in all regions.

One element in this crisis is a feeling of insecurity, that there is a growing wave of violence and theft that existing police and judicial structures have been unable to quell. While the rich could hire security guards, ordinary people felt they could only protect themselves through spontaneous vigilante justice. In the south, such spontaneous measures have been formalized with the establishment of ethnic militias. In the north, the response has involved restoring Islamic criminal and penal law, and establishing *hisba* police units charged with enforcing them.

A second element is a sense of moral crisis that can be traced back to the late 1970s, when the oil boom brought rapid change to Nigeria, especially to the north, where colonial rule had reinforced traditional institutions and provided little in the way of a modern education system. Access to higher education, travel, and the availability, at least in northern cities, of new kinds of entertainment all contributed to the erosion of traditional social patterns.[19] Such change affected men far more directly than it did women. Men gained greater mobility and a wider range of options for social activity, while women living in new settings lost access to traditional networks. A graphic example of this was the 1980 case of Nafiu Rabiu, son of a prominent Kano businessman, who murdered his wife, whom he had imprisoned in an upstairs apartment in his house.

Two major issues (and a host of others[20]) emerged from the first two years of shari'a restoration. Both involve *hudud* punishments: the amputation of hands for theft and stoning to death for adultery. The debates surrounding these issues are markedly different.

The debate over amputation of thieves' hands has been relatively restrained. The first instance of its use, on a cattle thief in Zamfara, received some international comment of a critical sort, but it certainly did not set in motion a wave of international protests. Everyone concerned seemed to agree that the accusation had been proven beyond doubt and that the duly accused thief deserved to be punished. The question was how. Nigerians recognized that the alternative in many cases was vigilante justice, which might well have resulted in the killing of the thief. If there was a widespread criticism in the Nigerian media, it was that the punishment was not systematically applied. Petty thieves lost their hands, while high-level politicians continued to use both hands to help themselves to public wealth. Some northern Muslim intellectuals argued that this sort of penalty could only be introduced once policies of social justice had been implemented, so that no one would have reason to steal. The Sokoto State government perhaps took a step toward meeting this objection by awarding a disability payment to a thief whose hand had been amputated.

It is the penalty of flogging (for unmarried individuals) and stoning to death (for those married or divorced) that has set off the greatest storm of controversy both in Nigeria and at a global level. The explanation for this is partly to be found in the Maliki tradition of Islamic law, which is followed in northern Nigeria. This tradition considers pregnancy as proof of *zina* (ex-

tramarital or premarital sex). Other traditions require four witnesses to the actual act. Of course, only one partner to the act gets pregnant and therefore can be found guilty on this basis. When this happens, the woman naturally names the partner and may offer statements that force, pressure, or trickery was used. Since no witnesses are available, the accused man can escape flogging or stoning by taking an oath of denial, and this has been consistently the case in northern Nigeria's state courts.

This pattern is evident in the widely publicized case of Safiya Husseini, who was sentenced to execution by stoning in a shariʿa court in Sokoto State, only to have the case dismissed by the state court of appeal. The life story of the accused woman mirrors the recent history of Nigeria. The daughter of a traditional herbal healer,[21] she was born at about the time Nigeria was plunging into civil war. Safiya was first married, at age twelve, in 1978. It was a happy time for Nigeria, as oil revenue poured in, and as the nation prepared for a return to democracy. According to her own story, she loved her young husband and they had four children together by the time she was nineteen. By then, oil boom had turned to oil gloom, and Safiya's mother-in-law had turned against her, pressuring her son to divorce her. Safiya went through two subsequent marriages, one of which ended in her being divorced, the second with her taking the initiative to demand divorce, which an *alkali* granted in 1998. The failure of the two subsequent marriages apparently stemmed from the economic hardship involved in maintaining Safiya and her children. Following the last divorce, she returned to live with her blind father. She contributed to the household by gathering herbs in the surrounding countryside, and it was on such occasions that a 60-year-old cousin, Yakubu Abubakar, would importune her and eventually pressured her into a sexual relationship. In the isolated setting where Safiya was gathering herbs, screams for help would have been of no avail. When pregnancy ensued, he apparently tried to wash his hands off the matter. The situation was reported to the *hisba* police. Safiya reported that Yakubu was the father. Yakubu initially admitted having had a relationship with her, but then denied this before the shariʿa court judge. This was accepted, since apparently only three police had heard his confession, and not four. Thus, Safiya was condemned to die, and Yakubu went free.[22]

There are two legal questions at stake here. One is whether it is possible to prove that a woman pregnant out of wedlock freely consented to intercourse, or whether there was some element of force or trickery. To apply

such a drastic penalty as flogging, much less stoning, any fair-minded person would insist that there not be a shadow of doubt. Given human nature, there is always a shadow of doubt in these cases. The western world has no basis for contending that adultery cannot be punished. Many state laws in the US punish adultery, though they are seldom if ever applied today. It can be and is punished under the US Military Code of Justice. The argument against Safiya's sentence focused on mitigating issues, such as force and trickery, which would bar a serious physical punishment.

The second issue is inconsistency. The man in adultery cases brought since the restoration of Islamic criminal law always gets off by taking an oath of denial. Thus, one could well conclude that modern influences have indeed corrupted Nigeria, to the point where men use women as they please and then take a solemn oath denying their guilt. As has been the pattern, it is the women who suffer the consequences. Moreover, it is they who suffer because of Nigeria's dire economic straits, which are a key factor in explaining Safiya's repeated divorces and her need to support herself, her children and her blind and aging father by working in an isolated setting. Many Nigerians of all faiths perceive this inconsistency and can see that such abuse of the law, by ambitious politicians or by men seeking to avoid punishment, is not consistent with the spirit of justice. One could invoke here the same argument as is often made with regard to amputation for theft: that severe penalties cannot be applied outside of a just society governed in all respects by Islam. Nigeria plunged into oil gloom at least in part because its politicians made poor decisions, and they enriched themselves at the expense of ordinary citizens. Now the most defenseless of those citizens is, in effect, told she must pay the supreme price.

Those who advocated proceeding with the stoning seemed to reason in an inverse direction. The way to create an Islamic society is by actually applying the *hudud* penalties. A grizzly amputation or public stoning would provide a salutary warning to all. Opponents in turn argue that in a society still reeling from the impact of colonial rule, and then rapid social and economic change in the independence era, carrying out such an execution is not a carefully considered, just punishment, but rather a propitiatory sacrifice.[23]

Since the dismissal of the adultery case against Amina Lawal in March 2003, international interest in the restoration of shari'a in northern Nigeria has rapidly, to use President Obasanjo's aptly chosen term, 'fizzled'. Yet there are other aspects of the restoration of shari'a, not connected to the

sensational issue of stoning to death for adultery, which have received scarcely any international attention. The new laws have had an important impact on the production of videos in northern Nigeria. The response of video makers has not been to follow narrow puritanical guidelines, but rather to come up with creative responses drawing on their major sources of inspiration – local Hausa tradition and the themes and motifs of Indian cinema.[24] Another domain of change has been in the implementation of *zakat*, the collection and distribution of resources for charity. In this domain, it appears that administrative obstacles and limited resources have led to limited success in addressing problems of poverty.[25]

## *Conclusion: The Subtlety and Complexity of Nigeria and of Shariʿa*

The shariʿa debate unfolded in particularly dramatic fashion in the years 2001-2003, when global attention was drawn to adultery cases. The consideration of Safiya Husseini's appeal was postponed until March 2002. There was a widespread movement of protest against the death penalty ruling, both within Nigeria and internationally. The Federal Minister of Justice, Chief Bola Ige, who had announced his determination to prevent Safiya's execution, was himself murdered in December 2001 in his home in Osun State in Southwestern Nigeria, apparently as a result of a local political feud.[26] The image of Nigeria's armed forces suffered a severe blow with the massive explosion of an ammunition depot in Lagos, which caused gruesome deaths for over a thousand people, mostly women and children. Not long thereafter there was a new outbreak of violence between Yoruba and Hausa in Lagos.

While the motivations of Bola Ige's murderers apparently had nothing to do directly with the shariʿa issue, the event relates to wider problems discussed in this paper. Nigeria's stability is a delicate matter. The inclusion of Bola Ige, long associated with Yoruba causes, in Obasanjo's government marked an effort at inclusiveness, but to some Yoruba militants, it marked him as a 'sell-out'. Both his death and the shariʿa issue raise the question of how the requirements of national unity and stability can be accommodated to the demands of groups stressing an ethnic or religious particularism. Violent deaths are all too common as a result of political or communal strife, desperate poverty, or sheer carelessness. Violence is inevitably accompanied by rumors and speculation. Yet Nigerians are also adept at recovering from

violent conflict and stopping conflicts from spinning totally out of control. This suggests that Nigeria does possess the potential to develop conflict resolution mechanisms, though the task is a monumental one.

Under the circumstances prevailing in the delicate situation in 2001-2003, it was difficult for President Obasanjo, or any federal official, to simply step in and impose a solution, declaring in effect that the Islamic courts of Sokoto, or any other state, can be overruled by the federal government. Humanitarian organizations outside Nigeria seemed to be hoping for precisely such an intervention. Their pressure may have helped create the context in which a solution of sorts was found, but Obasanjo seemed convinced that, in this situation, patience, tactful argument, and negotiation were the only possible ways forward. A confrontational approach might simply have encouraged hardliners to dig in their heels, interpreting protests as an assault on Islam rather than rooted in a debate over what constitutes Islamic justice.[27]

If we accept these assumptions, then the most effective protests were those that called into question the merits of the Sokoto judge's decision in Islamic terms. It is these sorts of arguments which are advanced by Muslim women's and human rights groups and individual Muslim commentators within Nigeria. It is crucial for outsiders to see that this debate was taking place within a vibrantly pluralistic Nigeria and that, within the Nigerian Muslim community, there were a wide array of points of view, energetically expressed. The Islamic legal arguments against Safiya's execution focused on an array of mitigating circumstances in the case and on the apparent manipulation of the *hisba* police by the man in question.

When the Sokoto State Shari'a Court of Appeal dismissed the charges against Safiya Husseini in March 2002, it was not on the grounds of such arguments rooted in a sense of social justice but on the basis of a technicality. The event in question had taken place before the law instituting the new Islamic courts had taken effect. Thus, the law was simply not applicable. Soon after this decision, another charge of adultery was brought against Amina Lawal. After another round of intense debate, this charge was dismissed, in September 2003, on the grounds that the defendant had not had adequate legal representation. In all, four other adultery cases came to similar conclusions.

In effect, a compromise seems to have been negotiated. Federal authorities avoided making a head-on assault on the state shari'a courts, which

would have been interpreted as a challenge to Islamic law, and hence to Islam itself. Islamic judicial authorities in their turn found reasons to dismiss charges. They were, in effect, following an old tradition in Maliki judicial practice, allowing charges to be aired and debated and giving time for at least the majority to reach the compassionate conclusion that the charges against the impoverished mother of a young child should be dismissed.

These arguments might be expanded into a discussion of the course the shari'a question has taken over the last half-century in Nigeria. It began with an argument over homicide law, in essence a clash over whether law involves primarily resolving disputes between civil parties, as in the classical Islamic system, or an emphasis on the role of the state as an agent of justice, as in modern European systems. Proponents of the latter carried the day. Nigeria has had limited success in establishing the state as an agent of justice. Hence spontaneous vigilantism and organized local militias have in effect sought to fill the vacuum. Proponents of the restoration of shari'a seem to have accepted the premise that law is a matter of the state imposing justice. In the Islamic tradition, it is the *hudud* penalties, seldom if ever applied in pre-colonial northern Nigeria, which offer the greatest scope for this. The Islamic nature of the courts in northern Nigeria had, through the colonial period, been most clearly visible in homicide law – which involved resolving a dispute between civil parties. In modern, state-centered political theory, there is nothing glorious in this. Yet in a setting where the modern state is, depending on one's perspective, either inadequately developed or poorly adapted, such an approach to law may be in fact highly relevant.[28]

The problem is amplified when Islamic law is reduced to codes, applied by a hierarchy of judges. These are modern European notions, based on the idea that law can be reduced to a set of clear, simple propositions, and human acts can be easily described so as to fit these propositions. Classical Islamic law operates on very different suppositions. Here a subtle understanding of human behavior and of the classical sources of law is the key to justice. The Islamic legal tradition emerged in a society where 'honor killings' – the slaying of adulteresses by their male kin – were not uncommon. One might argue that the harsh punishments for *zina*, but also the extremely stringent demands for proof, and the harsh penalty meted out for false accusation were a means of stemming violence against women, allowing time for passions to cool and for individuals concerned to negotiate a solution.

It might be possible in the Safiya Husaini case to argue that one mitigating circumstance arose from the limited protection for the rights of women in matters of marriage and divorce in northern Nigeria. Women are often married at a very young age, go through repeated divorces, and receive scant financial support when divorced. This is not a result of Islamic law, but of the social and economic history of Nigeria. Indeed the *alkalai*, the Muslim judges of northern Nigeria, often work valiantly to foster reconciliation and justice in a society suffering from the multiple vicissitudes of its recent history. Conceivably, their work would be made easier if there were, at the federal level, an Islamic jurisdiction committed to finding in Islamic law the resources needed to protect women's rights. Such a jurisdiction might also be useful in working, in a case such as that of Safiya Husseini, both to assure a careful consideration of all the facts in the case and to consider what norms should be applied in Nigeria. Within the corpus of classical Islamic law, and among the Nigerian people, there are vast resources available for the wise and just solution of human conflicts. While there are certainly grounds for apprehension, there are also grounds for hope that Nigeria will not only survive but offer many useful lessons to the rest of our diverse but divisive global community.

*Notes*

1 I have limited references in this article to the most essential ones. More detailed references can be found in my article, 'Islamic Law and Judicial Practice in Nigeria – a Historical Perspective', *Journal of the Institute of Muslim Minority Affairs*, 22, 1 (April 2002): 185-204.

2 One of the best recent works on the history of Islamic law is Amira al-Azhary Sonbol (1996), *Women, the Family, and Divorce Law in Islamic History* (Syracuse: Syracuse University Press).

3 Allan Christelow (1995), *Thus Ruled Emir Abbas: Selected Cases from the Emir of Kano's Judicial Council* (East Lansing: Michigan State University Press). This study covers cases from the period 1912-1914. Most cases involve homicide, theft, slaves, or real property disputes.

4 Ali Mazrui, 'Shariʿacracy and Federal Models in the Era of Globalization: Nigeria in Comparative Perspective', *Nigeria Muslim Forum*, UK. Accessed online, 29 June 2001. www.Shariah2001.nmonline.net.

5 These cases involve disputes over whether an individual is of slave status. The documents are in a collection of material from the Sokoto Caliphate kept at Arewa House in Kaduna.

6 Allan Christelow (1987), 'Property and Theft at the Dawn of the Groundnut Boom, 1912-1914', *International Journal of African Historical Studies*, 20, no. 2: 225-243.

7 On this and other details, see Neville Brooke (1952), *Report of the Native Courts (Northern Provinces) Commission* (Lagos: Government Printers).

8 Jean Boyd and Beverly Mack (1997), *The Collected Works of Nana Asmaʿu, 1793-1864* (Ann Arbor: University of Michigan Press); and Beverly Mack (2000), *One Woman's Jihad: Nana Asma'u, Scholar and Scribe* (Bloomington: Indiana University Press).

9 Key works on the political context are Ibrahim Tahir, 'Scholars, Saints, Sufis, and Capitalists in Kano, 1904-1974' unpublished PhD diss., Cambridge University, 1975; and John Paden (1973), *Religion and Political Authority in Kano* (Berkeley: University of California Press).

10 On the various intellectual positions, see Matthew Hasan Kukah (1993), *Religion, Politics and Power in Northern Nigeria* (Ibadan: Spectrum Books); Abubakar Gummi with Ismaila Tsiga (1992), *Where I Stand* (Ibadan: Spectrum Books); and Allan Christelow (1987), 'Three Voices of Contemporary Nigeria', in *Islam and the Political Economy of Meaning*, ed. William Roff (Berkeley: University of California Press).

11 Obasanjo (1999) used this phrase in appealing for calm in the midst of the Shariʿa debate in the Constituent Assembly in 1978. It reflects what seems to be a consistent theme in his outlook, expressed at length in his book, *This Animal Called Man* (Abeokuta: ACF Publications).

12 Allan Christelow (1985), 'The 'Yan Tatsine Disturbances in Kano: a Search for Perspective', *The Muslim World,* 75, no. 2: 69-84; and Christelow (1985),

'Religious Protest and Dissent in Northern Nigeria: From Mahdism to Qur'anic Integralism', *Journal of the Institute of Muslim Minority Affairs,* 62: 375-393.

13 In a speech he made on 1 March 2000, soon after an outbreak of inter-communal violence in Kaduna, President Obasanjo suggested that 'what seems to have happened is that after so many years of tyranny and mindless violence (under military rule) ... we have all grown indifferent to the moral, even religious duties that we owe to one another'. See www.africaaction.org/docs00/nig2003.html.

14 Tekena Tamuno (1970), *The Police in Modern Nigeria: 1861-1965: Origins, Development and Role (*Ibadan: Ibadan University Press); and G. Oka Orewa (1997), *We Are All Guilty (*Ibadan: Spectrum Books).

15 The great scholar of traditional rulership in northern Nigeria is M.G. Smith, whose works include (1997), *Government in Kano, 1350-1950* (Boulder: Westview Press).

16 Richard Rathbone (1993), *Murder in Colonial Ghana* (New Haven: Yale University Press); and Wole Soyinka (1975), *Death and the King's Horseman* (London: Eyre Methuen).

17 Joseph Schacht (1952), 'L'administration de la justice en Afrique Occidentale Française et Britannique', Symposium Intercolonial, 27 juin-3 juillet 1952, Bordeaux: Institut de la France d'Outre Mer.

18 For detailed analysis and documents relating to the shari'a question in Nigeria since 1999, see Philip Ostien (2007), *Sharia Implementation in Northern Nigeria 1999-2006: a Sourcebook* (Ibadan: Spectrum Books). This is available online at: www.Sharia-in-africa.net.

19 This theme is explored Alhaja Lateefah Okunnu in 'Women, Secularism, and Democracy: Women's Role in the Regeneration of Society', *Nigerian Muslim Forum*, UK, 29 June 2001, Accessed online. www.Shariah2001.nmnonline.net. The sense of moral crisis that has contributed to the movement to reinstitute aspects of Shari'a has stimulated an upsurge in Christian Pentecostal movements in southern Nigeria. See Karl Maier (2000), *This House Has Fallen: Midnight in Nigeria* (New York: Public Affairs Press), especially chapter 9. A factor potentially related to the issue of punishment for adultery is the sharp rise in HIV infection rates in Nigeria. The estimated adult infection rate rose from 1.8% in 1990 to 6% by the early 2000s, with the highest rate in one locality 21%. An argument has been put forward that HIV rates are higher in Christian areas of Nigeria than in Muslim areas, perhaps due to differing rates of alcohol use and circumcision. See Claire Mack, 'Religion and HIV/AIDS in Nigeria', *Institute for Global Engagement*, 22 December 2006, Accessed online. www.globalengage.org/media/article.aspx?id=2034. However, a look at geographic distribution data suggests that the picture is more complex. The mixed religion areas of the Yoruba southwest appear to have the lowest incidence, in spite of high urban density. Less urbanized areas of the hilly center and southeast have the higher rates, with Benue State being the only

one with above an 8% adult infection rate. See the '2005 National HIV Seroprevalence Sentinel Survey', *Journalists Against AIDS Nigeria.* Accessed online: www.nigeria-aids.org/pdf/2005SentinelSurvey.pdf.

20 The other issues are themselves hardly minor, and some are politically explosive. These include the right to build churches, or expand existing ones in northern cities; the rights of non-Muslims, living in territories governed by Islamic law, to behave or dress in ways that violate that law, but are not punished by the Nigeria Penal Code; and the right to play music. A potentially very sensitive issue is determining whether a person is a Muslim or not.

21 Her father's occupation may raise questions for some observers as to whether her family might have been looked upon negatively by orthodox Muslims. However, research indicates that traditional medicine in northern Nigeria has won the acceptance of Islamic scholars. See Ismail Hussein Abdalla (1997), *Islam, Medicine, and Practitioners in Northern Nigeria* (Lewiston: E. Mellen Press); and C. Lewis Wall (1988), *Hausa Medicine*: *Illness and Well-Being in a West African Culture* (Durham: Duke University Press).

22 Detailed accounts have emerged recently in the international press. See for example, 'Safiya, Nigériane condamnée à mort pour adultère', *Le Monde*, 15 janvier 2002; 'Death by Stoning', *The New York Times*, 27 January 2002; 'Storia di Safiya: verrà lapidata perché hanno abusato di lei', *Corriere della Sera,* 11 dicembre 2001. The case has also received wide attention from women's groups. See Nkiru Nzegwu (2001), 'Islam and its Bigots: The Case of Safiya Huseini Tugur', *Jenda: A Journal of Culture and African Women's Studies,* 1, no. 2. Accessed online: www.jendajournal.com/vol1.2/nzegwu2.html. Within Nigeria, the Lagos-based women's human rights organization, BAOBAB, has been particularly active with respect to this case, and an earlier one in Zamfara State involving Bariya Ibrahim Maguzu, a young, unmarried woman who was given one hundred lashes for adultery.

23 The combination of ritual impulses and moral arguments is illustrated in a rampage against bars, hotels, and brothels owned by southerners in the northeastern city of Maiduguri in January 2001, on the occasion of a lunar eclipse. It was argued that the eclipse was a punishment for the city's sinfulness. See 'Eclipse Triggers Nigeria Riot', BBC News, 10 January 2001. One can find, at least in oral tradition, evidence that this is part of an older pattern. Periods of crisis, especially drought, led to efforts to purge the community of sin.

24 Matthias Krings (2005), 'Muslim Martyrs and Pagan Vampires: Popular Video Films and the Propagation of Religion in Northern Nigeria', *Postscripts*, 1, no. 2-3: 183-2005.

25 Mustapha Adam Kolo (2004), 'The Economic Dimensions of Sharia in Northern Nigeria: Case Studies – Borno and Yobe States', Paper presented at the Fifth In-House Forum on the Economic Dimensions of Sharia in Northern Nigeria, 29 May.

26 Bola Ige was a veteran Yoruba political activist, a prominent figure in Action Group in the First Republic, in the Unity Party of Nigeria in the Second, and a staunch opponent of military rule thereafter. Though a member of the Alliance for Democracy (AD), he accepted a position in the government of his old friend, Olusegun Obasanjo, where the People's Democratic Party (PDP) prevailed. This won him the enmity of some activists in the pan-Yoruba association Afenifere, notably Iyiola Omisore, Deputy Governor of Osun State. This incident brings to mind sharp internal rivalries among the Yoruba during the First Republic. It is worth noting that only four days before Bola Ige's murder, a northern critic of his was arrested. Dr. Abubakar Siddique Mohammed, director of the CEDDERT and Head of the Political Science Department at ABU Zaria, had penned an essay condemning Bola Ige's alleged praise for the Hutu massacre of Tutsi in Rwanda, and suggesting the same fate might await Nigeria's Fulani. The reason given for his arrest was a murky story about the mailing of an anthrax letter accompanied by another tract condemning Bola Ige. See 'CEDDERT News Bulletin', *Gamji Forum*. 19 December 2001. Accessed online: www.gamji.com.

27 This stance is reflected in the position of Dr. Lateef Adegbite, Secretary General of the Nigeria Supreme Council of Islamic Affairs. He rejected all attempts to force a change of verdict, yet he also seemed to hold out the possibility that the Sokoto State Shari'a Court of Appeal would find a reason, such as rape, which would provide an Islamic justification for quashing Safiya's sentence. See 'No alla Pena di Morte', *Communità di Sant' Egidio News*, 20 December 2001. Accessed online: www.santegidio.org/pdm/news/20_12_01_b.htm. For important insights on patterns of conflict resolution in Nigeria, see John Paden (2005), *Muslim Civic Cultures and Conflict Resolution: The Challenge of Democratic Federalism in Nigeria* (Washington DC: Brookings Institution).

28 Disillusionment with modern institutions in Africa, and the argument that traditions and practices with local cultural roots might need to be investigated, has inspired numerous works, including I. William Zartman (ed.) (2000), *Traditional Cures for Modern Conflicts: African Conflict 'Medicine'* (London: Lynne Rienner); and Mahmood Mamdani (1996), *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton: Princeton University Press).

# 9 The Secular State and the State of Islamic Law in Tanzania

**Robert V. Makaramba**

This chapter focuses on the impact the application of Muslim family law in Tanzania has on the family, the individual, the state, and the other sources of law involved. It examines the role Muslim family law has played in the plural legal system of Tanzania and the compatibility between Muslim family law and the Constitution of the nation. The discussion will be limited to mainland Tanzania, although where appropriate, reference is made to Muslim law in Tanzanian Zanzibar, referred to hereafter as Zanzibar.

Tanzania, which is a secular sovereign united state, comprises a union resulting from a merger in 1964 of two formerly independent states, the Republic of Tanganyika and the People's Republic of Zanzibar, constituting the spice islands of Unguja and Pemba. The country has an area of 364,900 square miles, with a population of approximately 36 million, of which approximately 35 million live on the mainland and about 1 million on Zanzibar. Current statistics on religious demography are unavailable. However, religious leaders and sociologists generally believe that the country's population is 30 to 40 percent Christian and 30 to 40 percent Muslim, with the remainder consisting of followers of other faiths, traditional indigenous religions, and atheists. Zanzibar, which accounts for about 2.7 percent of the country's population, is estimated to be 99 percent Muslim.[1]

Tanzania has a plural legal system[2] within a multifarious social setting, composed of matrilineal and patrilineal tribes. The legal system of Tanzania is characterized by the 'triple heritage' of laws comprised of 'received' common law, customary law, and Islamic law.[3] Although a sovereign united state, the United Republic of Tanzania's legal system is not unified, as each

of the constituent units of the union has its own separate and distinct legal and court system. The Zanzibar court system generally parallels the mainland's single-tier system; the only exception is the existence in Zanzibar of a separate and distinct system of religious courts, kadhi courts, which try cases involving Muslim parties who claim to follow Muslim personal law. All cases tried in Zanzibar courts, except those involving Islamic law, can be appealed to the Court of Appeal of Tanzania, which hears and determines appeal cases from both sides of the union. Both on the mainland and Zanzibar, Christians and Muslims are governed by statutory law in criminal cases. If both parties profess Islam, Muslim law is applied in personal status matters.

Within the context of the plural legal system of Tanzania, the secular state treats religion as purely a personal matter. Freedom of worship is guaranteed in the country's constitution, the permanent Constitution of the United Republic of Tanzania of 1977 (as amended) in Article 19, and the state controls the practice of religion through law. Although the Government respects freedom of worship, in practice it has put some limits on such freedom in order to ensure public order and safety. Religion in Tanzania has generally not served as a primary fault-line for sustained political violence and conflict although, contrary to the much politically touted religious tolerance, religious conflicts cannot entirely be ruled out.[4] In April 1998, the Government arrested 38 alleged Muslim 'fundamentalists' and charged them with destroying several pork butcheries in Dar es Salaam. A subsequent demonstration during a court hearing led to the arrest of at least 12 Muslim sympathizers for illegal assembly. The Government also banned the Qur'an Reading Association (*Baraza la Kusoma Kurani Tanzania – BALUKTA)* for its alleged involvement in the incidents. In July 2000, the Government banned the publication and distribution of a book by a Muslim academic, Dr. Hamza Njozi, entitled *The Mwembechai Killings and Political Future of Tanzania,* on the grounds that it was inflammatory.[5] The book described Muslim grievances against the Government and provided the author's version of events surrounding the killings of three Muslim protesters in the Mwembechai area of Dar es Salaam.[6]

## *Muslim Law in Pre-Colonial and Colonial Tanzania*

Although no exact date can be placed on the advent of Islam in Tanzania, the people along the East African coast of the Indian Ocean came into contact with Islam long before the advent of European colonization.[7] The Washomvi, sometimes known by the alternative name of Shirazi, had some past connection with immigrants from Persia.[8] The first Arab settlement at the place now called Dar es Salaam (an Arabic name meaning 'Haven of Peace') was effected around 1860 by peaceful means and with the consent of the local inhabitants.[9] The settlers brought with them the Muslim tradition and did not interfere with the existing customs of the inhabitants. The process of transplanting Muslim legal ideology to the East African coast from Mogadishu to Sofala was relatively smooth, because its inhabitants related easily to some of the Muslim traditions, and because Muslim tradition was not imposed onto the indigenous population.[10]

The Germans began their colonization of what they called Tanganyika in 1884 in the aftermath of the infamous Berlin Conference, which demarcated the African continent among colonial powers in what they called their 'spheres of influence'. Consequently, Germany acquired a ten-mile coastal strip from the Sultan of Zanzibar. After suppressing coastal resistance, the Germans allied with Arab and Swahili notables. In towns, some of these notables were appointed to the highest subordinate positions, called *liwali,* and in the countryside small chiefs called *jumbe* were included in larger administrative units headed by coloured officials, termed *akida*. The titles were the same as had been used by the pre-colonial Zanzibar-based administration along the coast, but the functions of colonial *liwali* and *akida* were rather different. *Akidas* in particular increased their power, as the functions of tax collector, policeman, and lower judge were combined in one person.[11] Urban *liwalis* were appointed at an early stage; and *akida* administrations were gradually built by incorporating existing small *jumbeates* (*Jumbenschaft*) in most coastal districts starting at Tanga.[12] The Germans relied heavily on local allies and auxiliaries – the *jumbes*, *akidas* and *sultans* – possibly due to the relatively small number of German officials and soldiers stationed in Tanganyika. The Germans had no policy analogous to British 'indirect rule' as to the kind of administrative arrangements that required establishment at a local level.[13]

Britain acquired the Tanganyika colony from the Germans in early 1919 after the end of World War I. The British colonial state recognized the exist-

ing native institutions of justice, and they established a system of courts based on the class of the parties, divided between rural and urban and between 'natives' and Europeans. Native courts were established in 1929 by the Native Courts Ordinance, Cap.73, which constituted Native Subordinate Courts, subordinate to the High Court under Section 3(e) of the Ordinance. These courts included *liwali*, *kadhi*, *akida*, chief, headman courts and were to exercise civil or criminal jurisdiction within an area prescribed by the governor. Although the British colonial state recognized indigenous judicial institutions under native law and custom, it nevertheless only permitted customary criminal law[14] to be applied by the Native Subordinate courts, not Muslim criminal law.[15] Muslim family law continued to be applied in the colony under the rubric of 'native law'.[16]

The year 1920 was the turning point for the administration of justice in the country. This was when the British colonizers officially imported and imposed an alien legal system on the territory of Tanganyika: the common law of England and doctrines of equity through the 'reception clause' in the 1920 Tanganyika Order in Council. According to Article 24 of the Order, courts were to apply 'native law' subject to English notions of justice and morality.[17] Muslim law was not specifically mentioned in Article 24 as one of the laws which were to 'guide' the courts. Most probably Muslim law was considered by the colonial state to be part of 'native law'. This later became a recipe for conflict between English law, Muslim law, and customary law.[18]

The mirroring of Muslim law through the 'spectacles of English domestic law' and notions of justice and morality, as J.N.D. Anderson has argued, was a misconception on the part of the colonial bureaucrats on the nature of the Muslim legal system.[19] Instead, they considered Muslim law simply as being unfavourable to their 'rational orientation' and notions of justice and morality, as perceived in contemporary democratic societies, which cherish the disunity between law and religion, church/mosque and the state.[20] This created a 'masking effect', attributed largely to a lack of historical understanding by some of the English colonial bureaucrats and judges of the dynamics and relationship between 'native communities' governed by a different set of beliefs, customs and traditions. They failed to understand that it is a system based on theological constructs.

Some decisions by English judges during the colonial period clearly indicated a lack of appreciation of the status and role of Muslim law principles in 'native societies'.[21] English judges, mainly those working in India, even

coined the term 'Mohammedan law', apparently named after Prophet Mohammed (peace be upon him), the 'founder' of Muslim law. In their mission to 'modify' and ultimately 'modernize' the strict and 'inequitable' rules of Muslim law, English judges introduced what they perceived to be 'more modern rules of equity in the application of the general principles of Muslim law'. They did not feel compelled to follow the strict rules of Muslim law.[22]

Native courts ceased to exist in 1951, when the Local Courts Ordinance, Cap.299, was enacted. Local courts were confined to Africans, administering customary criminal, civil law, and a limited number of statutory laws. In 1958, urban courts were established by the Liwalis (Functions and Powers) Ordinance, Cap.408. Liwali courts were presided over by government-employed magistrates, under the title of *liwalis*, who also exercised executive functions within their own urban area.[23] The rural courts were generally presided over by traditional and non-traditional rulers, be they chiefs or sub-chiefs. Customary criminal law continued to be applied by local courts until its abolition after independence in 1963.[24]

### *Muslim Law in Post-Colonial Tanzania*

After independence, the 'reception clause' in the Tanganyika Order in Council was inherited word for word under Section 2(2) of the 1963 Judicature and Application of Laws Ordinance (JALO), Cap 453. A proviso to that section, however, made it appear as if the 'received law' was now to apply 'in so far as the circumstances of Tanganyika and its inhabitants permit, and subject to such qualifications as local circumstances may render necessary'. The practice has been for our courts to continue to be 'persuaded' by English precedents. Section 9(1) of the JALO continued the application of customary law in matters of a civil nature, and according to proviso (ii) of Section 9(1), courts were not to be *precluded* from applying rules of Islamic law.

Although the JALO made a clear distinction between customary law and Muslim law, thus doing away with the colonial legacy of categorizing them simply as 'native law', it introduced different tests for the application of the two sources of law. According to section 9(1)(a) of the JALO, customary law was to apply 'between members of community in which rules of customary law relevant to the matter are established and accepted'. Proviso (ii) of Sec-

tion 9(1) introduced the phrase 'member of a community which follows that law' in determining the applicability of Muslim law in matters of marriage, divorce, guardianship, inheritance, *waqf,* and similar matters. The impact of the provision that Muslim law was to apply to a 'member of a community which follows that law' was that professing Islam was not a necessary condition for Muslim law to apply. The fact that religion is not a bar to intestate succession on the Tanzanian mainland and Muslim law being partially applied in the administration of the estate of a deceased Muslim further reinforces this point. In Zanzibar, Muslim personal law applies between parties who profess the Muslim religion.[25] There is however not much legal significance between 'following' the Islamic law and/or 'professing' Islam, since followers of that religion are also required to abide by its law. However, Muslims do not regard anyone as a Muslim simply because he or she claims to be one. Being a Muslim is more than a mere label. It is to 'profess or follow the religion of Islam' and to read and interpret the Holy Qur'an, and to try his or her best to live his life accordingly, so as to be rewarded with eternal life.

Despite the clear delineation of customary law and Muslim law as sources of law, under the country's Constitution, these two sources of law are lumped together under the rubric of 'existing laws'. Much as state law recognizes Muslim family law, the 'colonial ghost' of authorizing it has continued to haunt the post-independent secular state of Tanzania. In a fashion typical of decolonizing sub-Saharan Africa, the independent state of Tanzania inherited most of the colonial statutes authorizing the application of Muslim personal law within specified limits.[26] This is evident in the state 'accommodation process' that began some two years into independence, when the independent government accepted the customary law of some patrilineal tribes[27] and 'reinstated' Muslim personal law in respect of some sects.[28] The independent Tanzanian state, as was the case with the colonial state, still authorizes the application of Muslim law but only in personal status matters such as marriage, divorce, inheritance, guardianship and *waqf*, and in proceedings of a civil nature in which the parties are 'members of a community that follow that law', thus amounting to what one may call 'secular authorization' of Muslim law.[29] This has been a breeding ground for discontent among the Muslim community, in a country that has been demanding the establishment of separate Islamic courts, since it considers it inappropriate for 'Christian' judges and magistrates to administer Muslim law. In practice, a magistrate presiding over a case involving issues of Muslim law

will normally seek the expert opinion of *shaykhs* from the National Muslim Council – *Baraza Kuu la Waislam wa Tanzania* – (BAKWATA).[30] Lack of separate religious courts for Muslims on the mainland has in the recent past constituted one of the Muslims' main demands. This reached its peak on 19 January 1999, during celebrations to mark the end of Ramadan. Muslims presented their demand to the former President Mr. Benjamin William Mkapa, who was present at the celebrations, for the establishment of Islamic courts and to have Islamic judges and magistrates presiding over civil cases involving Islamic personal status matters, in order to help the government correctly interpret Islamic issues.

The fate of Muslim law in the post-colonial period has varied from one African country to another. While Muslim law is still alive in Tanzania, Kenya, Uganda, and Zanzibar, the role of Islam in the lives even of Muslims has declined.[31] In Kenya[32] and Zanzibar,[33] there is a separate system of religious courts called kadhi courts. In some jurisdictions, it is even easier now than it was under the British for Muslims to opt out of the Muslim law of inheritance.[34]

## *The Politics of Muslim Family Law in Post-Colonial Tanzania*

This section examines the impact Muslim family law has on the individual, society, and state law. It addresses two main issues: to what extent does the existence of Muslim family law in a plural legal system within a secular state highlight a conflict – if not incompatibility – between pre-modern law and a nation state? Secondly, how does the existence of Muslim family law accentuate reformist versus anti-reformist tendencies within Muslim communities? Finally, is there a conflict between religious tradition, human rights, and gender rights?

## *Pre-Modern Law and the Nation State: Conflict or Compatibility?*

In the preceding section, I argued that both Muslim family law and African customary law have continued to govern the lives of the people in Tanzania, and that the combined effect of this has been conflict between these two sources of law and state law. In Tanzania, primary courts have exclusive jur-

isdiction in Muslim law or customary law.[35] If controversy emerges as to which law to apply in particular cases, it has to be referred to the High Court for determination.[36] Since the colonial period, the High Court has approached the issue from the standpoint of the 'rigidity and immutability' of Muslim law, as opposed to the 'dynamic' character of customary law. For example, in the case of *Re Estate of the late Suleman Kusundwa* (1965),[37] Sir Windham, Justice of the Court, quoting Spry, in *Hussein Mbwana v. Amir Chongwe* (1962),[38] stated

> It has sometimes been stated that Islamic law is to be regarded as applying to Africans as part of the customary law. In my view this is not a sound proposition. Customary law is the body of customs which by usage has acquired the force of law. As such, it is constantly changing with changing ways of life. It cannot, therefore, in my view include a complete and fully developed system of religious law. Some elements of religious law may, of course, be absorbed into the customary law, but they are then to be judged and are subject to change as part of the customary law, and they lose the attributes of the religious law from which they were derived. I hold, therefore, that there are two systems of law which may apply in an African Muslim community, religious law in matters peculiarly personal, such as marriage, and customary law which may apply in all spheres of life.[39]

The presiding English judge in the above-mentioned case delineated the sphere of the two bodies of rules, that is, customary law and Islamic law, by looking at their roots. This has been the procedure when the application of either body of rules to a dispute could lead to unwelcome consequences. In *Mbwana v. Chongwe*, the widow of an African Muslim had been omitted from the list of beneficiaries to the estate of her deceased husband. If the court in that case had decided that Islamic law was part of customary law, the widow would have received nothing from the estate of her deceased husband, since the estate would have devolved in accordance with customary law, under which a widow gets nothing from the estate of the deceased husband. In *The Estate of the late Suleman Kusundwa (supra),* Sir Ralph Windham decided that rights of an African Muslim wife at and during her marriage are to be governed by Muslim law. Likewise, her rights of inheritance upon her husband's death are to be governed by the same corpus of law as governed them before his death.[40]

The position taken by the court in the above cases looks at the consequences of the decision, rather than establishing a clear statement on the status of Muslim law in Tanzanian legal system. This position provides ammunition for the proponents of the view that Muslim law is a separate body of rules, divinely ordained. A dearth of Muslim legal philosophy in the jurisprudential treatment of the status of Muslim law in the Tanzanian legal system has also affected the way the 1971 Law of Marriage Act treats Muslim *nikah* (marriage) and *talaq* (divorce). Although regarded as 'uniform', the Law of Marriage Act condones 'disunity' in respect of *nikah, talaq,* and *iddat*. This is significant, because while the law has tried to bring under the law all matters relating to marriage and divorce in respect of the different types and forms of marriages recognized, it has in the same vein retained some aspects that defeat the intention of having a unified system for regulating the rights of married people.

The Law of Marriage Act allows Muslims to marry according to Muslim religious rites, but does give details of how this should be done. Furthermore, the Act leaves intact the unilateral power of divorce of a Muslim husband, the only procedure being for a party to petition a court for an order confirming the divorce. Muslims in the country have continued to criticize the provisions of the Law of Marriage Act, particularly those relating to the presumption of marriage, divorce and equal division of matrimonial assets, as violating principles of Islamic law and tradition.

Sometimes courts have approached the question of the status of Muslim law in the Tanzanian legal system by invoking the 'policy and justice' clause. In the case of *Ramadhan s/o Bakari v. Kichunda Mwenda* (1973),[41] the court was confronted with a dispute in which the parties were Muslims of the Rangi tribe, and the issue was whether the bridewealth was governed by Muslim law or Rangi (customary) law. Under Muslim tradition, *mahr* (dower) is the property of the bride herself, whereas under customary law it belongs to her parents. In Muslim tradition *mahr* serves a specific purpose – it is the equivalent of consideration for the *nikah* (marriage). According to Muslim tradition, marriage is a civil contract and not a sacrament as is the case for Christians. Dower is security for good behavior on the part of the husband. It is payable in two installments: prompt dower payable at the time of the marriage, and deferred dower, payable in the event of its dissolution.[42] In spite of the colonial adage that 'bride price' for Africans is similar to 'wife purchase' and state law which discourages it, the practice of paying dower is

still alive in Tanzanian society.[43] Section 41(a) of the Law of Marriage Act declares categorically that non-compliance with any custom relating to dowry or the giving or exchange of gifts before or after marriage does not invalidate a marriage.

The conflict or incompatibility between Muslim law and state law arises mainly from lack of equal status between the various sources of law that govern personal status matters in the country. Arguing for the recognition of Muslim law as a separate body of rules distinct from customary law would not fare any better either, at least as far as mainland Tanzania is concerned, where state law prevails over both Muslim and customary law. Case law and academic discourse point to the direction that customary law has the same status as state law.[44]

The argument for a higher status of Muslim law in the plural legal system of Tanzania, however, is even more tenacious than for customary law, because Muslim law comprises a body of codified rules, compared to customary law rules, which are still largely uncodified save for the few patrilineal tribes in the country, whose customary law was codified in a 1963 Customary Law Declaration Order. The requirement for customary law to be proven by experts has, however, been done away with in Tanzania.[45] Courts normally are required to take judicial notice of customary law. The late Justice of Appeal Mwakasendo once termed customary law 'a reinless horse', which only 'the expert horsemen can mount and control'.[46]

## *The Debate about Reform of Muslim Family Law*

At the core of the debate about the status of Muslim family law in the plural legal system of a secular state such as Tanzania is how to apply shari'a to the reality of contemporary situations. The anti-reformists argue that Muslim law is part and parcel of Muslim religion, an immutable and perfect system, divinely ordained (Allah's very own words) in the Holy Qur'an and incapable of change by human beings. For reformists, the argument is that changes in Islamic law can be effected by secular laws, because this has occurred even in those countries believed to be strongly Muslim. The reformists further argue that Islamic law has to be applied within the context of contemporary realities. These debates play themselves out in the case of

the institution of the kadhi court and in the application of specific rules regarding marriage, divorce, division of the household assets, and inheritance.

### *Establishment of Kadhi Courts in Mainland Tanzania*

Judicial application of Muslim law in Tanzania reflects a form of legal dualism. As noted earlier in this paper, while Zanzibar kadhi (*qadi*) courts cater exclusively to Muslims, such courts do not exist on the mainland. The Tanzania Court of Appeal does not enjoy appellate jurisdiction in respect of Muslim cases originating from Zanzibar either; the High Court of Zanzibar has the final word in such cases.[47] This could be grounds for conflicting decisions on similar issues on Muslim law within the legal system of Tanzania.[48] In early 1998, a member of Parliament from the opposition tabled a motion for a private bill for the establishment of kadhi courts on the mainland.[49] The motion collapsed, however, on its first reading in the House. The bill sought 'to establish kadhi courts in mainland Tanzania to allow Muslims to have their own instrument for the determination of Islamic matters like Muslims in Tanzania Zanzibar and in neighboring countries of Kenya and Uganda'. Perhaps a brief background illustrating the evolution of the institution of qadi in Islamic legal history will shed some light on exactly what was being proposed in that bill.

As with the *waqf,* the institution of the qadi is not a creature of the Qur'an. According to some Islamic sources, qadis were appointed by the Prophet Muhammad for different provinces. In the 'constitution' of Medina, the Prophet prescribed rules to govern relations with the mixed community living in and around Arabia, although he had no real executive power over the community.[50] However, apart from performing the task of introducing far-reaching reforms in the so-called 'barbarous and primitive modes of the people', he was also involved in settling disputes between Muslims.[51] The Prophet, to a large extent, was forced to maintain the Arabian customary practice of freedom in the choice of a *hakim* and the right of a *hakim* to refuse to act in certain cases.[52] Whereas in pre-Islamic Arabia, a *hakim* was commonly a soothsayer (*kahin*) agreed on by the parties to the dispute, in the time of the Prophet it was a *hakim* with a difference.[53] The Prophet was not a soothsayer and was concerned, as a religious leader and not a tribal chief (*shaykh*), with the organization of the new religious community.[54] The

Qur'anic *hakim* therefore amounted to the personalization of the administration of justice in the Muslim community, as opposed to the qadi which is a formal judicial institution.

During the period of the rightly guided Caliphs of Medina (*al-rashidun*) in the first century of Islam, the ancient Arab system of arbitration and Arab customary practices in general as modified and completed by the Qur'an continued.[55] Upon the founding of the Umayyad dynasty, the Caliphs, the temporal and religious leaders of the Muslim state, served as political leaders of the Muslim community ('*umma*). However, they were concerned more with the organization of the newly conquered territories for the benefit of the Arabs than with the systematization and development of Muslim law. Consequently, the old Arab tribal ideas began to re-assert themselves.[56] It is during the Umayyad Dynasty that the qadi arose as a formal and distinct institution of administration of justice in the Muslim state. The religious functions of the qadis were *qada* (justice) and *futya* (legal interpretation). The qadis were required to apply the law as it is laid down in the sacred texts.[57] The autocratic and monarchic type of rule of the Umayyad impacted the institution of the qadi in no small measure. The Umayyads appointed qadis who had to rely on their own personal opinion (*ray*) in deciding disputes. Since there was a lack of precedent to fall back on, the qadis also had to rely on a chain of transmission (*isnad*), and the power of committing everything to memory.[58]

In contemporary times, the institution of qadi has been formally incorporated within state court systems and given specific powers by state legislation. In Tanzania, then Tanganyika, the qadi together with *liwalis*, *akida*, chief, and headman were recognized for the first time by the British colonial state in the 1929 Native Courts Ordinance as 'native subordinate courts'. The Native Courts Ordinance, however, merely recognized the qadi as an indigenous institution that had existed since the arrival of Arabs on the coast of East Africa, and continued to exist during the German colonial period. The British 're-categorized' the qadi as a 'native subordinate court' and subordinated it to the High Court. In 1951, when native subordinate courts ceased to exist (*vide* the Local Courts Ordinance, Cap 299), the qadi court was not retained. Currently, the office of qadi is recognized under the Law of Marriage Act of 1971, but only in relation to celebrating Muslim marriages. Whereas in Zanzibar a qadi is a judicial officer, on the mainland a qadi is merely a Muslim priest, preacher, or leader licensed to celebrate Muslim marriages.[59]

Qadi courts in one form or another have existed in Zanzibar since the arrival of Islam to the East African coastal area. In 'Coping with Conflicts: Colonial Policy towards Muslim Personal Law in Kenya', which appears in this volume, Abdulkadir Hasim has ably charted out the history of the establishment of the first formal kadhi court in East Africa in the Zanzibar Sultanate in 1897. As is the case in Kenya, in Zanzibar, kadhi courts are both constitutionally recognized and statutorily established; in Kenya under Section 66 of the Constitution of Kenya, and in Zanzibar under Article 99 of the 1984 Constitution of Zanzibar. Kadhi courts in Zanzibar are legislatively established under the 1985 Kadhis Courts Act, and in Kenya under the Kadhis Courts Act, Chapter 11 of the Laws of Kenya, albeit with reduced jurisdiction compared to its 1897 colonial predecessor, which had jurisdiction over Muslims in the Protectorate of Kenya and Zanzibar, and applied the Islamic laws of evidence, procedure and criminal justice. As is the case in Kenya, kadhi courts in Zanzibar exercise only limited jurisdiction in the determination of questions of Muslim law relating to personal status, marriage, divorce, or inheritance in those proceedings in which all the parties profess the Muslim religion. Jurisdiction over Muslim personal status matters on the mainland falls within the normal magistrates' courts.

The 1998 private Bill for the establishment of kadhi courts therefore sought to turn the judicial historical clock of this country back by 're-establishing' kadhi courts. It also proposed an expanded jurisdiction of kadhi courts to cater only for Muslims but without exclusive jurisdiction. Section 4(5) of the Bill sought to give kadhi courts jurisdiction not only in Muslim personal status but also in 'burial and civil matters of minors'. This is particularly significant because there are no provisions in the existing law on Muslim personal status matters regulating burial and guardianship (wardship) matters. In Zanzibar, the office of mufti, which was established by the Mufti Act of 2001, deals with a host of non-legal Islamic religious matters. The 2001 Mufti Act authorizes the President of Zanzibar to appoint the mufti, who serves as a public employee of the Zanzibar Government. The mufti possesses the authority to settle all religious disputes involving Muslims, to approve any Islamic activities or gatherings in Zanzibar, to supervise all Zanzibar mosques, and to approve religious lectures by foreign clergy or the importation of Islamic literature from outside Zanzibar. The Mufti Act is controversial, because some Muslim groups believe it gives the Zanzibar Government undue influence in religious affairs. In March 2004,

*Uamsho,* an umbrella 'fundamentalist' Muslim organization in Zanzibar which does not recognize Zanzibar's Mufti Act, refused to seek a permit from the mufti's office as required and organized a demonstration. The Zanzibar police had to use tear gas to disperse the crowd.

The bill for the establishment of kadhi courts did not preclude the jurisdiction of the High Court or of any subordinate court in 'any proceedings, which come before it'. Section 4(6) of the bill envisaged the application of Muslim law and rules of evidence. In Zanzibar, kadhi courts apply Muslim law and rules of evidence subject to certain limitations.[60] The motion was also accompanied by a private bill for the amendment of the Constitution of the country, to provide for the office of Chief Kadhi and qualifications of kadhis.[61]

The motion for the establishment of kadhi courts on the mainland, while seemingly consoling to a number of Muslims, equally met with severe criticism from 'bourgeois skeptics' and other religious denominations, particularly the Christian Council of Tanzania (CCT), which issued a strongly worded pastoral letter condemning the move to establish religious courts in the country. It seems, however, that there is an apparent fear among bourgeois thinkers that 'restoring' Muslim law in 'all its vigour' might be 'socially and legally disruptive of the social realities of the present day'.[62]

The motion for the establishment of kadhi courts in mainland Tanzania in my view did not seek merely to restore Muslim law, but sought to re-establish a lost glory by creating separate courts for Muslims, which would handle cases concerning personal status matters. Some Muslims complain of a lack of magistrates knowledgeable in Muslim law, in the mainstream courts, which has resulted in injustices to Muslim parties appearing before secular courts. The effort to re-establish kadhi courts therefore has a certain inherent logic. Kadhi courts were once part of the inherited colonial legal system and are part of the legal system in Zanzibar and in neighboring Kenya and Uganda. Caution, however, must be taken to ensure that such courts once 're-established' do not overstep their jurisdiction, which should be limited to personal status matters, something which could be done through statutory limitations on their jurisdiction. Another consideration is the manner in which appeals from these courts should be presented to the High Court and further on to the Court of Appeal, and the qualifications of the judges who will be presiding over such appeals. However, in my view, rather than shutting out ideas on the need for the establishment of kadhi

courts, there is a need for a country-wide public debate on the role of such courts within the plural legal system of Tanzania, and the modalities for its establishment.

In its current form, Muslim personal law applies in the mainland without separate Muslim courts. In the field of family law, in Zanzibar, Muslim marriages are still regulated by Muslim tradition, but Muslims can bring their family disputes to kadhi courts. In mainland Tanzania, disputes among Muslims over family matters are governed by a uniform law on marriage, the Law of Marriage Act of 1971, which has altered a number of Muslim principles and retained some with modifications.[63] The following sections examine the ways in which Muslim family law on the Tanzania mainland has been modified by state law and raises questions about the integrity and adaptability of shari'a in plural legal and secular systems.

*Muslim Marriage Contract (nikah)*

The first controversial piece of legislation as far as Muslim legal rights in the country are concerned is the 1971 Law of Marriage Act. The Act is modeled in the main upon the draft Bill appended to the 1968 Kenya Commission on Marriage and Divorce Report.[64] The Act recognizes the Muslim form of marriage without elaborating how a marriage can be concluded in that form. In the case of *talaq*, the issue of whether the parties were married according to Muslim law becomes crucial. The 1971 Law of Marriage Act recognizes polygamy as a Muslim form of marriage. This in fact amounts to a codification of Muslim tradition enshrined in Sura IV:13 of the Qur'an, which limits to four the possible number of wives a Muslim can marry at one particular time.

*Muslim Divorce (talaq)*

The Muslim *talaq* is recognized under section 107(3)(a)-(c) of the 1971 Law of Marriage Act, together with the different legal consequences, which defines the manner in which a marriage in Islamic law can be dissolved.[65] It also includes recognition of the period (*iddat*) a divorced Muslim woman is to observe following divorce. Unlike Muslim tradition, the court is now the ultimate authority in the divorce process, though it acts merely as a 'clearinghouse' for the parties' actions.[66] Under the Act, the *talaq* serves as evidence of 'irreparable breakdown' of marriage.[67] A *talaq* can only be granted either after a Marriage Conciliatory Board has certified that it has failed to recon-

cile the parties subsequent to their performing an 'act or a thing'.[68] The act or thing here means either the pronouncement of an unilateral *talaq* by the husband or the demand by the wife for divorce from her husband (*khul'*), by the wife paying money or waiving of the unpaid part of the dower (the deferred dower) as consideration for the divorce. Subsequent court rulings have provided the possibility in extraordinary conditions of forgoing the conciliation requirement.[69] The Act has thrown both the courts and Muslim parties into confusion with regard to the legal consequences of the Muslim *talaq*. According to Section 112(3) of the Act, the dissolution of a Muslim marriage takes effect in accordance with Muslim law, which means upon the termination of the customary *iddat* period recognized under Section 38(1)(j) and Section 115(1)(f) of the Act, respectively. According to section 112(1) of the Act, though, the dissolution of the marital status of the parties occurs thirty days from the date of the decree.

*Division of Matrimonial Assets*

Another area where the 1971 Law of Marriage Act has changed Muslim tradition is the introduction of the 'joint efforts' test in the division of matrimonial assets following divorce.[70] This clearly conflicts with Muslim tradition, which recognizes separate spousal property and the giving of a gift after divorce. The first landmark case in Tanzania to have given judicial interpretation to the meaning of the phrase 'joint efforts' was *Bi Hawa Mohamed v. Ali Seif*.[71] This case, by the highest court of the land, laid down the principle that the housework of a housewife constitutes sufficient contribution to the matrimonial property. This ended a decade of conflicting decisions of what constituted 'joint efforts'.[72] The Court of Appeal in *Bi Hawa*'s case, however, denied the wife her share in the division because she had 'squandered' the money for the construction of the house being built by the parties. Thus, although the judicial opinion is that wives contribute to the household's joint assets, the misconduct on the part of the wife is the only factor that may be used to deny her rights to the division of the household property.[73]

*Muslim Succession (mirath)*

Succession to property of a deceased Muslim is another area in which Muslim family law in Tanzania is a remnant of religious law. Both in mainland Tanzania and Zanzibar there is no uniform law of succession.[74] The Muslim

law of succession as laid down in the Qur'an and authoritative texts therefore still applies, but is subject to certain modifications. On the mainland, the Probate and Administration of Estates Act, [Chapter (CAP.) 352, R.E. 2002], which now incorporates the provisions of the Administration (Small Estates) (Amendment) Ordinance, Cap. 30 in its Part VII, provides the test for the application of Muslim law to the estate of a deceased 'native' Muslim. According to Section 88(1)(a) of the Act [previously section 19(1)(a) of Cap.30], the estate of a 'member of a tribe' is to be administered according to law of the tribe. If the deceased had professed Islam at any time and from his 'written or oral declarations or his acts or manner of life' he intended his estate to be administered either '*wholly or in part*' according to Islamic law, and the court has been so satisfied, it will apply. If the estate is that of a 'Swahili', then Islamic law applies; otherwise tribal law is applicable [Section 88(1)(b) of the Act]. In the Act, a 'Swahili' is defined to exclude an Arab or Somali or a person of Asian descent.

The provision in the Act stating that apart from professing Islam, the deceased must have made 'written or oral declaration' of his intention to have his estate administered by Muslim succession law is rather puzzling. In the Muslim tradition, professing Islam is sufficient to establish the nexus between the estate of the deceased and the law to be applied in its administration and distribution. Furthermore, the provision that the deceased could have, before his demise, intended Islamic law to be 'partially' applied to the distribution of the estate is equally baffling. According to Muslim tradition, once established that the Muslim law of succession is applicable to the administration of the estate of a deceased Muslim, it will apply to the whole of it, subject only to the intestacy and testacy portions of two-thirds and one-third, respectively.

The recognition of partial application of Muslim law of succession to the estate of a deceased 'member of a native tribe' is testimony to the fact that within a community, customary law and Muslim law may apply in the distribution of the estate of a deceased Muslim. This is reinforced further by the non-recognition of preclusion from or renunciation of religion as a bar to succession. In effect, this recognition alters the Muslim tradition that a non-Muslim cannot inherit from a Muslim, with the exception of a *kitabiyya* woman: that is, a non-Muslim woman of the 'People of the Book', such as Christians and Jews. Section 89(1)(c) of the Act [previously Section 20(1)(c) of the Administration (Small Estates) (Amendment) Ordinance, Cap.30], recog-

nizes testamentary disposition if the will is valid according to Muslim law. The partial application of Muslim law in administering the estate of a deceased Muslim 'member of a native tribe' has in effect subsumed Muslim law into customary law. The Act defines a small estate to mean 'an estate the gross value of which a court, district court or other authority having jurisdiction in probate or administration is satisfied does not exceed ten thousand shillings'.

*Muslim Charitable Grants (waqfs)*

Both in Tanzania and Zanzibar, the substantive applicable legal principles on *waqf* are still those established by Muslim tradition.[75] The *waqf* institution was not identified in the Qur'an but was established through Muslim practice during the formative years of Muslim law, as a means of dealing with Muslim property for the benefit mainly of the poor.[76] A *waqf* can only be created in respect to the one-third portion of the estate, and the rules of Muslim testamentary succession will apply.[77] It can be oral or written.[78]

## *Muslim Family Law, Human Rights, and Gender Rights: Compatibility or Conflict?*

A core question that legal scholars and Muslim activists are currently asking is to what extent is Muslim family law and human rights/gender rights compatible within the plural legal system of a secular state such as Tanzania? Our point of departure in discussing the potential conflict between Muslim tradition, human rights and gender rights is the constitutional guarantee of freedom of worship and secular authorization of Muslim family law in Tanzania.

Freedom of worship is expressed in human rights language in the Bill of Rights and Duties in Article 19 in the 1977 Permanent Constitution of the United Republic of Tanzania (as amended), and carries with it a *positivus* and *negativus* status. The Constitution guarantees the right to defend one's religion against encroachment by the state. The 'profession, practice, worship and propagation of religion' is a free and private affair of individuals, and the conduct and management of religious communities are not part of the functions of the state.[79] The state's secular neutrality in matters of religion is a remnant of the evolution from the medieval non-separation of church and state to the modern nation-state. In the medieval era, the church and

state were inseparable. This created confrontation between the two entities, which finally led to their separation. This does not, however, hold true for Muslim societies.

The classical Muslim theory of state does not admit dualism: in Islam the state and religion are inseparable.[80] The theory of separation of church and state is widely accepted in the West and thus has become a globally accepted political thought. Historically, the idea emerged as a practical strategy for dealing with issues related to the Christians and other people in Western culture. Advocates of the theory of separation of state and religion find that it is best if a state takes a secular approach, neither supporting nor denying any religion. It is therefore up to the citizens themselves to follow individually whatever faith and values they choose and practise what rituals they please. This is what finds expression in many a modern secular states' constitutions, including Tanzania's, although with some limitations. The assumption is that it is possible for a secular state to take a neutral stand toward all religions, based on the implication that religion could interfere with, and possibly upset, matters of state. Proponents of contemporary theories on the inextricability of state and religion argue that the theory of separation of state and religion could be possible if there was in fact no relationship between state affairs and religion, and that the two were separate entities. The argument goes further that religions not only deal with collections of beliefs, rituals and individual behaviors that do not affect the society, but also that most of the well-known religions (Judaism, Christianity and Islam) have laws that regulate relationships between people, whether on an individual basis, among the family, or with the society at large, in addition to other laws regarding food and drink, and many other daily details that cannot be separated from the business of the state. The argument – which borders on fundamentalist dogma – goes further that Islam cannot be separated from the state because it guides Muslims through every detail of running the state and their lives and that Muslims have no choice but to reject secularism, for it excludes the laws of God; considering that the basic belief in Islam is that the Qur'an is the word of God, and the Sunna was also as a result of the guidance of God to the Prophet Mohammed (peace be upon him).

The guarantee of freedom of worship in the Tanzanian Constitution cannot, however, be interpreted to mean that religious laws have automatically been allowed to operate in the country. State law has to expressly stipulate

so. Although freedom of worship has assumed a constitutional status, there is no corresponding status for religious laws. The sphere of operation of Muslim family law in Tanzania and the exercise by Muslims of their legal rights still has to be expressly delineated in sectarian legislation.[81]

The conflict between human/gender rights and Muslim law arises in cases of inheritance rights of Muslim widows and children. According to Muslim tradition, a son inherits double the share of a daughter. Moreover, a childless Muslim widow inherits one-fourth of her deceased husband's estate and one-eighth if she has children. The Law Reform Commission of Tanzania has attacked this tradition for violating constitutional provisions that bar discrimination on grounds of sex and guarantee equality of all before the law (LRCT, 1986). This principle of non-discrimination is also enshrined in Tanzania's signing of the UN Convention to Eliminate Discrimination against Women.

Muslim reformists and human and gender rights activists also criticize the Muslim tradition relating to the inheritance rights of a widow of a Muslim decedent. In Muslim tradition, not every widow can inherit: she must be a *kitabiyya* – that is, 'people of the book', meaning those who follow a religion with a book. This refers to Christians and Jews and excludes 'fire-worshippers' or pagans. This condition could be a pretext for denying widows their inheritance rights. Tanzania has legislated against religion being a bar to the succession of a deceased Muslim estate, also ripe ground for protest among Muslims.

Conflict between Muslim family law and the Constitution may also arise because of the nature of the legal system of Tanzania, which allows the application of customary law and Muslim law in determining inheritance rights. A conflict of law issue arose in the case of *Re Salum Omari Mkeremi.*[82] The issue in that case was whether Islamic law or the tribal law of a deceased African Muslim of the Hehe tribe would apply. It was resolved in favor of Islamic law, by invoking the 'acts or manner of life' test.[83] In this case, the widow, a Christian, was entitled to her one-eighth Qur'anic share in her deceased Muslim husband's estate according to Muslim law. If the customary law had been applied, she would have been denied her share in the estate. Based on this decision, the religion of a widow can no longer be a bar to succession to property upon death.

Of the various laws on succession in force in the country, the 1865 Indian Succession Act, [Act X of 1865] and customary law allow unrestricted testa-

mentary power. On the other hand, Muslim law restricts testamentary disposition to only one-third of the decedent's estate. If the testament exceeds this limit, or if it is made to a legal heir without the consent of the rest of the heirs, it is considered invalid.[84] Restrictions on testamentary disposition powers under Muslim law is another source of conflict between Muslim family law and human rights and could be seen as interfering with the bourgeois notion of private property firmly embedded in Article 24 of the Tanzanian Constitution.

The conflict between the Muslim tradition and constitutional rights of testamentary power came out very clearly in a recent ruling of the Court of Appeal, in *Anwar Z. Mohammed v. Saidi Selemani Masuka* (1997).[85] This was a ruling by a single justice of the Court of Appeal of Tanzania, on an appeal from a Probate and Administration Cause No.44B of 1995 by the High Court of Tanzania. The High Court had dismissed a caveat lodged by Anwar Z. Mohammed, the son of a deceased Muslim woman, Rukia Ahmed, against grant of letters of administration. The deceased, Rukia Ahmed, a Muslim woman, left behind a will in which she had devised and bequeathed the whole of her estate to one Saidi Selemani Masuka, her husband. Anwar was a son of the deceased woman by another man.

The High Court found the will to be invalid for two reasons. First, the testatrix purported, contrary to Islamic law, to bequeath more than one-third of her estate. Secondly, the respondent being one of the heirs to the testatrix, the absence of the consent of the other heirs to the bequest made the will inoperative under the Islamic law. In the course of his ruling, the learned Judge of the High Court, Justice Msumi, remarked that:

> In his submission the learned counsel for the applicant Justice Korosso urged the court to ignore this rule of Islamic law because *it infringes the constitutional right of a person to own property and dispose it in a manner he wants*. I must say that I was utterly astounded by this submission. *The Islamic rules of inheritance are part of religious tenets enshrined in the Qur'an.* It is mandatory that an estate of a deceased Muslim must be administered in accordance with these rules. Hence *any attempt of interpolation on these rules amounts to amending the Qur'an*. I don't think anybody wishing this country good can encourage a court of law to entertain such a move. (emphasis added)

The husband, Saidi Selemani Masuka, applied for leave to appeal, but his application was dismissed. Thus, he appealed against this ruling to the Court of Appeal of Tanzania, which was handled by a single judge. In his ruling, Justice of Appeal Ramadhani was of the clear opinion that Msumi had misdirected himself in law. His Lordship stated *inter alia* that:

> As already said the learned judge held that the Islamic Law rules on wills were violated and so, rejected the will produced by the applicant. But we need *legalistic grounds, rather than religionist or patriotic*, for rejecting the submission that these *Islamic Rules, which are part of the laws of this country in matters of inheritance, do not violate the constitutional rights to property*. (emphasis added)

However, on reference to the entire court, a panel of three Justices of Appeal set aside the learned single Judge's decision and allowed the judgment with costs to the applicant, Anwar. The Court of Appeal did not however concern itself with the unconstitutionality issue. It is interesting to see what will be the decision on the issue, whether a court of law can declare Islamic rules unconstitutional.[86]

The efforts to reform the Muslim law of succession in Tanzania have been carried out under the auspices of the Law Reform Commission. The Commission has recommended that there should be a 'uniform' law of succession in Tanzania (MJ&CA, 1995). The Commission did not, however, propose any new rules that will govern succession to property under the proposed unitary system. Thus, the issues of compatibility or conflict between Muslim family law and both the Constitution and international human and gender rights instruments remain unresolved and sites for future debate.

## *Conclusion*

This chapter has examined the legal status of Muslim family law in Tanzania in terms of the colonial developments, and post-colonial state formation and nation-building projects. Muslim law recognized during the colonial period has continued to apply in the country, with a fair degree of continuity in terms of legislation, legal policy, and the administration of the law. Overall, there has been a happy accommodation between state law and Muslim law within the plural legal system of Tanzania. The administration of secular law

clearly accommodates Muslim family law in the country, and the law has adjusted with topics such as codification and the bureaucratization of pre-modern legal practices. However, there are areas where Muslim family law confronts constitutional protections against gender discrimination. It is not yet clear how these areas of legal conflict will work themselves out in the future. Attempts at codifying Muslim law have not, however, proven to be very successful, and the Statements of Islamic Law of 1967 [G.N 222 of 1967], which were made pursuant to the Islamic Law (Restatement) Act, 1964 [Act No.56 of 1964], are not yet in force. The Statements cover principles of Islamic law followed by Shafii, Hanafi and Shiah schools, with respect only of *nikah* (marriage), *mahr* (dower) and *mutah* (temporary) marriages, as per the Shi'a school. The laws of the different schools of Islamic jurisprudence therefore continue to be enforced by courts and extra-judicial bodies in the country, subject to the written law of the land.

*Notes*

1 US State Department, International Religious Freedom Report, 1999.

2 Legal pluralism refers to the numerous and often contradictory sets of norms used to regulate social, economic and political relationships within a single geopolitical space. From the perspective of legal pluralism, state law is one source of regulatory norms. Other sources include customary and religious laws such as Hindu and Islam.

3 A. A. Mazrui (1989), 'Post-Colonial Society and Africa's Triple Heritage of Law', in *Indigenous, Islamic and Western', Enlightenment, Rights and Revolution: Essays in Legal and Social Philosophy*, eds. Neil MacCormick and Zenon Bankowski (Aberdeen, Scotland: Aberdeen University Press). The 'received' law was imported into the country in 1920 by the Tanganyika Order in Council.

4 In July 2000, the University of Dar es Salaam program 'Research and Education for Democracy in Tanzania' (REDET) conducted a country-wide survey on religion, religious conflicts and democracy in Tanzania because of the seemingly growing number of incidents of conflicts within religious denominations in the country. The results of the survey are published into a book titled *Justice Rights and Worship: Religion and Politics in Tanzania*, eds. Prof. Rwekaza Mukandala, Prof. Saida Yahya-Othman, Prof. Samwel S. Mushi and Dr. Laurian Ndumbaro (Dar es Salaam: E & D Ltd., 2006). In her article in that volume, 'Rural Islamism during the "War on Terror": A Tanzanian Case Study', Felicitas Becker gives an account of conflict between traditionalist Sufi Muslims and anti-Sufi Islamists, which she encountered during her fieldwork in a southern Tanzanian country town called Rwangwa. Sufism is the Islamic mystical path, which puts great emphasis on personal piety as opposed to book learning.

5 In this 264-page study, *Mwembechai Killings and the Political Future of Tanzania* (Ottawa: Globalink Communications), Dr. Hamza Njozi looks (2000) at the Mwembechai killings as a manifestation of a simmering political crisis in Tanzania. The book provides unsettling details about religious discrimination in a country which is thought by many as setting a shining example to the rest of the world on political stability and unity. The author's analysis of the looming political tragedy in Tanzania is both illuminating and sympathetic. The full version of the book is available on the internet, though downloading it is at a person's own legal risk since possession still constitutes a criminal offence in Tanzania.

6 On Friday, 13 February 1998, at the instigation of a Catholic priest of Mburahati parish in Dar es Salaam, the Tanzania government ordered its para-military police force to open fire on unarmed Muslims at Mwembechai area, killing at least four of them. It was soon discovered that the seditious claims made by the Catholic priest and repeatedly broadcast on a Catholic radio (Tumaini) that Muslims were ridiculing Jesus were a sheer fabrication. Muslims' demands for an independent investigatory team to investigate the

killings were immediately rejected by the Minister for Home Affairs. The government also banned a meeting organized by Muslim women to speak out about the sexual humiliations and indignities they suffered at the hands of male police officers while in remand prison. K. Tambila and Yunus Rubanza (2006), 'Muslims vs. State: The Mwembechai Conflict', in *Justice, Rights and Worship: Religion and Politics in Tanzania, Research and Education for Democracy in Tanzania*, ed. Mukandala et al (Dar es-Salaam: E&D Limited).

7 C.H. Becker (1968), 'Materials for the Understanding of Islam in German East Africa', *Tanzania Notes and Records*, 68: 117.

8 Mtoro Bin Mwamba v. The Attorney-General (1953) 2 T.L.R. 327 (C.A).

9 Etymologically, 'Arab' is a Semitic word meaning 'desert' or the inhabitant thereof, with no reference to nationality. In the Qur'an, a'rab is used for Bedouins. The first certain instance of the biblical use of the word as a proper name occurs in Jer. 25:24, 'kings of Arabia' (P.K. Hitti (1970) *Islam as a Way of Life,* Minneapolis: University of Minnesota Press), 41; by Sir Newham Worley quoting from *Tanganyika Notes and Records*, no. 3 April 1947 at 118-119 in Mtoro bin Mwamba v. Attorney-General (1953) 20 EACA 108. See also Couplan (1947), 'The Exploitation of East Africa', *Tanzania Notes and Records*, no.3 April, 36-37.

10 R.V. Makaramba (1991), 'The Status and Application of Islamic Law in Tanzania', *East African Law Review*, 18: 277.

11 J. Koponen (1994), *Development for Exploitation: German Colonial Policies in Mainland Tanzania, 1884-1914* (Helsinki/Hamburg: Lit Verlag, Studien zur Afrikanischen), 119.

12 G.O. Ekemode (1973), 'German Rule in North-East Tanzania 1885-1914' (PhD Thesis, University of London), 138-140.

13 Koponen, *Development for Exploitation*, 117, 133.

14 See the interesting Kenyan cases of Kasau wa Muiga & Others v. Rex (1912), *East African Law Review* 4, 103 and Rex v. Karoga wa Kithengi & 53 Others (1913), *East African Law Review* 5, 50 in which native courts purported to exercise jurisdiction in murder cases, which they did not have.

15 The Court of Appeal for East Africa observed in the case of Rex v. Fundi Athmani and Another (1919-1921), 3 E.A.P.L.R. 2, that acts forbidden by Mohammedan law only are not punishable by courts in the exercise of their criminal jurisdiction.

16 J. N. D. Anderson (1970), *Islamic Law in Africa* (London: Frank Cass & Co. Ltd.).

17 See the case of Gwao bin Kilimo v. Kisunda bin Ifuti (1938) 1 T.L.R. (R) 403 on the impact of the repugnancy test on Nyaturu customary law.

18 J.N.D. Anderson (1960), 'Colonial Law in Tropical Africa: The Conflict Between English, Islamic and Customary Law', *Indiana Law Journal* 35 no. 4, 436.

19 Ibid.

20 R.V. Makaramba, 'The Judicial Application of Islamic Law in Zanzibar' (mimeo), East Africana Section, University of Dar es Salaam Main Library.

21 The Privy Council in Abul Fatah Mohamad Ishaks (1894) 22 I.A 76 (P.C.) held that a perpetual family settlement expressly made as *waqf* was not legal merely because there was an ultimate but illusory gift to the poor. Its effect had to be mitigated by various common law countries' *waqf* validation statutes to restore the traditional Muslim principle that such *waqfs* are legal. In Tanzania (then Tanganyika) by the Waqf Commissioners Ordinance, Cap.326 and in Zanzibar by the Waqf Validating Decree of 1946 amended by the Waqf Validating Decree of 1966. Hamilton, C.J., in Administrator Native Estates v. Abubakar bin Mohamed and Nine Others (1915-16) *Law Reports of East Africa*, *6* 147 decided that *kadhi* courts did not have jurisdiction in waqf cases!

22 See Abul Fatah Mohamad Ishaks (1894) 22 I.A 76 (P.C) (supra note 10)

23 According to the Ordinance, a *liwali* means a person in the employment of the Government who is appointed to the office of *liwali*, *akida* or town headman in an urban area. The main duty of a *liwali* was to prevent the commission of any offence, to bring offenders to justice, and to assist in the maintenance of peace, order and good government (Id. s.4). The independent state appears to have 'forgotten' to repeal the Ordinance until 1994 via the Laws Revision (Miscellaneous Repeals Act, No.8 of 1994).

24 Koponen, *Development for Exploitation*, 119. Customary criminal law was abolished in Tanzania in 1963 vide section 66 of the 1963 Magistrates' Courts Act, now repealed and replaced by the 1984 Magistrates' Courts Act.

25 Section 6 of the Kadhi Courts Act, no.3 of 1985, provides that Islamic law applies to matters relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion.

26 The Administration (Small Estates) (Amendment) Ordinance, Cap.30; Muhammadan Estates (Benevolent Payments) Ordinance, 1918; the Waqf Commissioners Ordinance, Cap. 326.

27 The Local Customary Law (Declaration) (no.1) Order, GN. 279 of 1963 which deals with rules of law in relation to dowry (*mahari*), marriage (*ndoa*), divorce (*talaka*) and children (*hali za watoto*); and the Local Customary Law (Declaration) (no.4) Order, GN. 436 of 1963 which deals with customary law rules in relation to guardianship (*ulinzi*), inheritance (*mirathi*) and wills (*wasia*).

28 The Statements on Islamic Law, GN 222 of 1967, which were made pursuant to the Islamic Law (Restatement) Act, 1964, Act no.56 of 1964. The Statements never came into force, however, according to the case of Adamu Mtondo v. Likuna Omari (1968) H.C.D. 289 they are helpful as a guide. The Statements cover only *nikah* (marriage), *mahr* (dower) and *mutah* (temporary) marriages in respect of Shafiä, Hanafi and Shiah schools. *Mutah* (temporary) marriages are prohibited under the Law of Marriage Act of 1971.

29 Anderson, Islamic *Law in Africa*.

30 The National Muslim Council (BAKWATA) was established in 1968 following the state ban on the East African Muslim Welfare Society (EAMWS), which had been founded in Mombasa, Kenya in 1945 by His Highness then Aga Khan

Sultan Muhammad Shah to promote Islam and to raise the standard of living of East African Muslims. Lodhi and Westerlund (1997) claim that the main reason for the state banning BAKWATA was its opposition to the 1967 Socialist politics. Tambila, 181.

31 J.N.D. Anderson (1965), 'The Adaptation of Muslim Law in Sub-Saharan Africa', in *African Adaptation and Development*, eds. Hilda Kuper and Leo Kuper (Berkeley: University of California Press).

32 Under the Kadhi's Courts Act no.14 of 1967.

33 Under Section 99 of the 1984 Zanzibar Constitution as amended and the Kadhi's Courts Act no.3 of 1985.

34 See the case of Salum Omari Mkeremi (1973) LRT n.80 which confirmed that preclusion from or renunciation of religion is no bar to succession. But see the West African case, Adesubokan v. Yunusa (1972) *Journal of African Law* 83: a Muslim subject to customary law died, leaving property and had purported to make a will under the Wills Act of 1837 which offended Islamic law in certain respects, notably by depriving his Muslim heirs of their share in the estate. Justice Bello decided that the deceased was subject to Muslim law of the Maliki school, so that Muslim law would apply to the devolution of the estate of the deceased.

35 Section 18(1)(a) of the Magistrates Courts Act no.2 of 1984.

36 Ibid. Section 47(1)(c)(iv).

37 (1965) E.A 247.

38 (1962) Dig. 232.

39 (1965) E.A 247 at 251.

40 This confusion has been brought about by the Administration (Small Estates) Ordinance, Cap.30 on the mainland [now incorporated in Part VIII of the Probate and Administration of Estates Act, Cap. 352 R.E. 2002, which allows for partial application of Islamic law in the distribution of the estate of a deceased Muslim. Section 7 of the Succession Decree of Zanzibar provides that questions of inheritance 'shall be decided according to the personal law of the school to which the deceased person belonged'. See also Kassim bin Mohamed Barwani v. Awadh Salim 8 Z.L.R. 24 emphasizing this position.

41 (1973) LRT.

42 See also the case of Matei Kijuu v. Omari Saleh (1961) Dig. 206. The 1967 Statements of Islamic Law, GN 222 of 1967 which are not yet in force deal extensively with *mahr* (dower). The 1963 Local Customary Law (Declaration) Order, GN 263 of 1963 also has a whole chapter on dowry (*mahari*) or brideprice/bridewealth.

43 In Maagwi Kimito v. Gibeno Werema, Civ. App. No.20 of 1984, (unreported) CJ Nyalali noted at 6 that Rule 37B of the First Schedule to the Local Customary Law (Declaration) (no.4) Order, 1963, which deals with refund of bride price has not been superseded by any provision of the Law of Marriage Act 1971 or any other statute.

44 Nyalali in Maagwi Kimito v. Gibeno Werema, Civil Appeal No.20 of 1984 upholding the Kuria customary norm on the duty of sole heir to refund bride price. See Barthazar Rwezaura and Ulrike Wanitzek, 'Family Law Reform in Tanzania: A Socio-Legal Report', *International Journal of Law and the Family*, 12.
45 Section 37(3)(a) of the Magistrates Courts Act No.2 of 1984.
46 In Mbaruku v. Chimomyogoro (1971) H.C.D. 406.
47 The 1984 Constitution of Zanzibar and the 1985 Kadhi's Courts Act.
48 Makaramba, 'The Status and Application of Islamic Law'.
49 'A Bill for an Act of parliament to prescribe certain matters relating to Kadhi's Courts under the Constitution, to make further provision concerning Kadhi's Courts, and for purposes connected therewith and purposes incidental thereto'. Dated 30 April 1998, Bill Supplement No.3 of 1 May, 1998.
50 Majid Khaddduri and Herbert J. Liebesny (1955), *Law in the Middle East*, Vol. I: 'Origins and Development of Islamic Law' (Washington: The Middle East Institute), 206; M. Watt (1956), *Islam and the Integration of Society* (London: Routledge), 243, 207; P. K. Hitti (1966), *A Short History of the Near East* (Princeton: D. Van Nostrand).
51 Anwar Ahmad Qadri (1997), *Islamic Jurisprudence in the Modern World* (New Delhi: Taj Company), 6.
52 For example, in a marital dispute, Sura IV:59; V:42; XIV:48-51; IV:35 of the Qur'an respectively, prescribe the appointment of a hakam each from the families of the husband and of the wife.
53 R.V. Makaramba (1989), 'Theory and History of Islamic Law: The Development of the Shariah prior to the Classical Period' (unpublished LL.M Coursework Paper, School of Oriental and African Studies (S.O.A.S), University of London).
54 J. Schacht (1964), *Introduction to Islamic Law* (Oxford: Clarendon Press).
55 N.J. Coulson (1964), *A History of Islamic Law* (London: Edinburgh University Press, reprinted 1999), 27.
56 Khadduri and Liebesny, *Law in the Middle East*, 236; Coulson, *History of Islamic Law*, 27.
57 Khadduri and Liebesny, *Law in the Middle East*, 243.
58 M. Kerr (1966), *Islamic Reform* (Berkeley: University of California Press), 19.
59 According to Section 2(1) of the 1971 Law of Marriage Act, a 'Kadhi' is 'a Muslim *priest* or *preacher* or a *leader* of a Muslim community who has been licensed under the Act to celebrate marriages in Islamic form' (emphasis mine).
60 Section 7(I) – (iii) of the Kadhi's Courts Act, No.3 of 1985 provides that 'the law and rules of evidence to be applied in Kadhi's Courts including that of a Chief Kadhi shall be those applicable under Muslim law. Provided that – all *witnesses called shall be heard without discrimination on grounds of religion, sex* or otherwise; each issue of fact shall be decided upon an assessment of the credibility of all evidence before the court and not *upon the number of witnesses* who have given evidence; no finding, decree or order of the court shall be reversed or altered on appeal or revision on account of the application of the law or rules of

evidence applicable in the High Court, unless such application has in fact occasioned a failure of justice' (emphasis mine).

61 A Bill for (an) Act to amend the Constitution of the United Republic of Tanzania for the purposes of establishing Kadhis and Kadhis' Courts for Muslims in Tanzania Mainland and other matters connected thereto, dated 30 April 1998.

62 A.N. Allot (1972), 'Ghana: Court's Act, 1971', *Journal of African Law* 16, no.1: 59-65

63 Makaramba, 'The Status and Application of Islamic Law in Tanzania'.

64 James S. Read (1972), 'A Milestone in the Integration of Personal Laws: The New Law of Marriage and Divorce in Tanzania', *Journal of African Law* 16, no.1: 19-39, 4.

65 Section 107(3)(a)-(c) of the Law of Marriage Act provides that 'where it is proved to the satisfaction of the court that: (1) the parties were married in Islamic form; and (2) a Board has certified that it has failed to reconcile the parties; and (3) *subsequent* to the granting by the Board of a certificate that it has failed to reconcile the parties, *either of them has done any act or thing* which would, but for the provisions of this Act, have *dissolved the marriage in accordance with the Islamic law*, the court shall make a finding that the marriage has irreparably broken down and proceed to grant a decree of divorce' (emphasis mine). In Mwinyihamisi Kasimu v. Zainabu Bakari (1985) LRT n.217 (HC), Justice Sisya held that all three conditions have to be satisfied before a court can grant a decree of divorce.

66 For more detail, see Makaramba, 'The Status and Application of Islamic Law in Tanzania'.

67 This point was considered by Justice Maina in Bibie Maulidi v. Mohamed Ibrahim (1989) TLR 162.

68 The case of Rattansi v. Rattansi [1975] LRT n.55 interpreted the meaning of the phrase 'act' or 'thing' in section 107(3) of the 1971 Law of Marriage Act.

69 Section 101(f) of the Law of Marriage Act gives the possibility for a person not to refer a matrimonial difficulty to a Marriage Conciliation Board. This can happen 'where the court is satisfied that there are extraordinary circumstances'. The case of Halima Athumani v. Maulidi Hamisi (1991) TLR 179 considered whether reference to a Marriage Conciliation Board was always necessary, as well as whether reconciliation of a Muslim by non-Muslim body was illegal. See also the case of S. Zainat Khan v. Abdallah Khan [1973] LRT n.57.

70 Section 114(1) of the Law of Marriage Act provides that 'the court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, to order the *division between the parties of any assets acquired by them during the marriage by their joint efforts* or to order the sale of any such asset and the division between the parties of the proceeds of sale' (emphasis mine).

71 Civ. App. no.9 of 1983 (Court of Appeal of Tanzania at Dar es Salaam (unreported).

72 Rukia Diwani Konzi v. Abdallah Issa Kihenga, Matr. Cause No.6 of 1977, High Court of Tanzania, Dar es Salaam, (unreported) representing the 'liberal approach' that domestic services of the wife count in the division of the matrimonial property; and Hamid Amir v. Maimuna Amiir (1977) LRT 55 and Abdallah v. Ibrahim Iddi, Civ. App. no.10 of 1980, High Court, Dsm, (unreported) representing the 'conservative approach' that only direct financial or material contribution of the wife counts and not her domestic services.

73 See the case of Omari Chikanoto v. Fatuma Mohamed Malungu (1989) TLR 39 where Kazimoto observed that loose or immoral character, though a matter to be considered, is not a ground for forfeiture of her share in the division.

74 In Zanzibar, the Succession Decree, Cap.21, regulates matters of succession to property. The Decree declares in section 1(1) and 2 that Muslims will be governed in such matters by their own personal law. On the mainland, the Probate and Administration of Estates Act, Cap.352, R.E. 2002, which incorporates the Administration (Small Estates) (Amendment) Ordinance, Cap.30 in its Part VIII, provides the statutory basis for the application of the Muslim law of succession in the case of a member of a tribe who professes Islam or a Swahili.

75 On the mainland *waqf* is governed by the provisions of Part XV of the Probate and Administration of Estates Act. Cap. 352, R.E. 2002, which incorporates the Waqf Commissioners Ordinance, Cap.326. Section 140 of the Act defines a *waqf* to mean 'an endowment or dedication in accordance with Islamic law of any property within Tanzania for religious, charitable or benevolent purposes or for the maintenance and support of any member of the family of the person endowing or dedicating such property'. In Zanzibar *waqf* matters are governed by the Waqf Validating Decree, Cap.104 and the Waqf Property Decree, Cap.103 as amended by the Waqf Property (Amendment) Decree, Decree No.12 of 1966. There is also a Commission for the Administration of Waqf and Trust Property established by Decree No.5 of 1980 bearing a similar title. In mainland Tanzania, there is also a Waqf Commission established under section 142 of Cap. 352, as a body corporate.

76 Asaf A.A. Fyzee (1964), *Outlines of Muhammadan Law*, 3rd ed. (London: Oxford University Press), 26; J.N.D. Anderson (1959), 'Waqfs in East Africa', *Journal of African Law* 3: 152-164.

77 See the case of Hassan Matola v. Kadhi wa Msikiti, Mwinyi Mkuu Street (1985) TLR 53.

78 Khalid Moulid Said v. Zuwena binti Masoud Muhamed 8 Z.L.R. 326.

79 Makaramba, 'The Status and Application of Islamic Law in Tanzania'.

80 Khadduri and Liebesny, eds, *Law in the Middle East*; N. J. Coulson (1956), 'Doctrine and Practice in Islamic Law', *Bulletin SOAS* 18, 2 (1956); N. J. Coulson (1957), 'The State and the Individual in Islamic Law', *International and Comparative Law Quarterly* 6: 49-60; Hitti, *A Short History of the Near East*.

81 Makaramba, R.V. (2006).

82 (1973) LRT 80.

83 The test of 'way of life' of the deceased was successfully applied in *Re Innocent Mbilinyi* (1967) H.C.D. 283.

84 N.J. Coulson (1971), *Succession in the Muslim Family* (Cambridge: Cambridge University Press).

85 Civil Reference no.18 of 1997, (unreported) Samatta.

86 In Bernado Efraim v. Holaria Pastory and Gervazi Kaizilege, Civil Appeal No.70 of 1989 H/C (PC) at Mwanza, (unreported) Mwalusanya declared Rule 20 of the Customary Law (Declaration) Order, GN 436 of 1963, unconstitutional for being inconsistent with Article 13(4) of the Constitution, which bars discrimination on account of sex. The Rule legislates inequality in inheritance between males and females.

# 10 State Intervention in Muslim Family Law in Kenya and Tanzania: Applications of the Gender Concept[1]

**Susan F. Hirsch**

When I began research in the Islamic Court in Mombasa, Kenya, in 1985, the outer office was always filled with *mabuibui*, the Kiswahili metonym that identifies Muslim women by referring to their long black cloaks and veils, called *buibui*. *Mabuibui* lined the long bench, turning inward to converse quietly in twos and threes. Muslim men stood to the sides of the office and in the corridor, thus gendering the space: female in the center, male at the perimeter. Some of those present would end up behind the long, high counter, sitting at the desks of the clerks who sorted through claims involving marriage, divorce and more rarely, inheritance, dismissing many, resolving some through mediation, and sending a few cases to the Islamic judges or kadhis who heard them in adjacent offices. The kadhi court office, though occupying only a small area of the large, impressive Mombasa Law Courts building operated by the Kenyan secular government, was a Muslim space in many ways; moreover, the kadhi court has been a Swahili space: one serving, symbolizing, and cementing the ethnicity of Afro-Arab Swahili people, a minority community of Sunni Muslims living on the East African coast.[2]

When I entered this same court about ten years later in the mid-1990s, only the clerks were present. The women's bench was gone. I panicked; I had just finished a book asserting that these courts are a busy site for the negotiation of gender relations in Swahili Muslim society.[3] Could it be that they had lost all their business? As I walked into the hallway to wait for my au-

dience with the kadhi, I assured myself that the lateness of the hour accounted for the emptiness of the office. The clerk, who was in training, followed me out and told me that I had better move along, as the police might come by and jail me for violating the Senior Resident Magistrate's recent edict that corridors of the Law Courts Building be kept clear. Startled, I followed her to a courtroom where about fifteen people were waiting to see the kadhis. Men and women sat awkwardly in silence on rows of benches facing the empty judge's seat. That this was neither a Swahili space nor a Muslim space became clear when a police officer entered and glared at those waiting. They stiffened visibly, uneasy under the menacing gaze of the secular state.[4]

This description of the Mombasa Kadhi Court, which is based on my ethnographic research in coastal Kenya, highlights how a secular state can shape Muslims' experiences of Islamic family law. In my research, carried out in Kenya since 1985 and in Tanzania since 1990, I have witnessed some of the implications – both overt and subtle – of the direct involvement of these two post-colonial states in the operation of law in Muslim minority communities. As is common in other African contexts, some states (e.g. Kenya) directly intervene in the application of Islamic law, and this intervention has implications for those who seek to use Islamic law and for the affected Muslim communities more generally (see chapters by Jeppie, Moosa, and Roberts in this volume). The Kenyan case is a stark reminder of a secular state's ability to control Islamic courts to varying degrees and thereby to shape the application of Islamic family law. In this chapter I argue that the particular form of a secular state's intervention in Islamic law has implications for gender relations among the Muslims under its jurisdiction, and for power relations involving the religious community and the state. This initial argument will be demonstrated through a comparison of state intervention in Islamic family law in Kenya and Tanzania, where the governments differ considerably in their approach to personal law involving Muslims.

Although a largely Muslim population spans the coastal strip of the bordering nations of Kenya and Tanzania, Islamic family law has been incorporated into the two legal systems in very different ways, a point also made by other authors in this volume. At independence, Kenya authorized kadhi courts, presided over by Islamic judges (kadhis), to hear claims of marriage, divorce, and inheritance involving Muslims (see Hashim and Mwakimako in

this volume).[5] At the time, the Muslim population – concentrated on the coast – numbered about 15% of the population.[6] Over the past decades, kadhi courts have continued to operate under the jurisdiction of Kenya's secular legal system, which has managed them with increasing scrutiny. In Tanzania, which has a Muslim population of roughly 30% on the mainland, the secular Primary and District Courts are recognized as the official sites for adjudicating matters of family law.[7] In cases involving Muslims, magistrates' decisions can incorporate the opinions of court assessors, who are sometimes provided by BAKWATA (Baraza Kuu Waislamu wa Tanzania), a national organization of Muslim men.[8] Prior to filing claims in court, Muslims are expected to seek mediation through a local BAKWATA branch or through another mediation body (see also Makaramba in this volume).[9] Let me note here that, similar to Makaramba, my discussion addresses only mainland Tanzania. A comparison with the very different treatment of Islamic family law in Zanzibar would have been quite interesting, yet lies beyond the scope of this chapter.[10]

The differing forms of state involvement – establishing Islamic courts in Kenya and empowering Muslim committees in mainland Tanzania – reflect divergent national goals, with respect to civil pluralism, which were initially articulated in the 1960s. Moreover, the current situations result from political struggles – some of them ongoing – that address these goals and also represent the disparity in political and religious approaches to the role of Muslim law in society. Throughout the post-colonial period, state involvement in Islamic legal practice has determined how legal issues are addressed by Muslims, which local elites are empowered in the community and in relation to the government, as well as which citizens take their claims to court and how they fare, all of which have had multiple effects on Islamic legal practice, on Muslim populations, and on gender relations.

The effects on gender could have been predicted by numerous studies in the field of law and society, which have demonstrated that law and legal institutions constitute and shape the subject positions of individuals – in terms of gender, ethnicity, religion, class, etc. – in relation to the state and to each other.[11] By institutionalizing law in particular ways, states create, reconfigure, and manipulate relations among individuals and groups with respect to a wide range of interrelated social distinctions and power hierarchies. For example, through a state's application of law, relations between men and women, that is, gender relations, are constructed through mar-

riage, divorce, parenthood, etc. As scholarship suggests, Islamic family law plays a large role in shaping gender relations.[12] This chapter illuminates how law shapes gender, by comparing the effects of the complex interweavings of state policy and Islamic family law on gender relations among Muslims in Kenya and Tanzania.

However, the argument goes beyond merely insisting on a role for the state in determining the gendered effects of Islamic legal practice. Specifically, it draws upon innovative applications of the concept of gender to understanding law's complex and significant role in shaping social relations. Along with much of my other scholarship, the chapter challenges common academic and popular depictions of Islamic law, which tend to offer a singular message about gender: women are subordinated to men through Islamic law. To move beyond this limited and thereby flawed perspective, my comparison of these two contexts demonstrates two points about gender. First, the application of Islamic law in actual disputes displays multiple messages about gender relations in the two nations. These messages go well beyond the rather simplistic portrayal of gendered hierarchy as mentioned above. Second, the practice of Islamic law in these nations is itself a 'gendered' social activity. With respect to the second point, scholars of the East African coast routinely depict coastal culture dualistically, linking Islamic law with maleness and customary law with femaleness. However, this view fails to capture the perspectives of many Kenyan Muslims, particularly men, who view the Kenya kadhi courts as 'women's spaces', even though they are presided over by men. I will attempt to shed light on this apparent contradiction and, as well, to contrast this arrangement of gendered law with that present in Tanzania. I hope to show that innovative understandings of gender from sociolegal studies illuminate Islamic law's complex role in shaping the social life in African nations.

The following section draws upon the concept of gender as developed through sociolegal studies in order to illuminate the operation of Islamic family law in East Africa. Explaining the complex relation between Islamic law and gender requires paying attention to the role of each national government in establishing a place for religious law in its secular, post-colonial legal system. Two subsequent sections on Kenya and Tanzania, respectively, address this issue. The concluding sections offer a comparative analysis of the processes whereby Islamic law contributes to constructing gender relations and relations among groups in pluralistic, post-colonial societies. By

treating gender as a fundamental construct through which social distinctions are created and expressed, this chapter tracks the simultaneous making of multiple pluralisms and multiple hierarchies through and in relation to Islamic law.

## *Concepts of Gender in the Study of Islamic Law*

### *Approaches to Gender, Law, and Islam*

More often than not, popular representations of Islamic law leave the impression that women are disadvantaged by the principles embedded in legal texts and the processes through which these are applied. For the past several decades, scholars of Islamic law and gender have endeavored to address misconceptions and misrepresentations by offering detailed interpretations of Islamic legal tenets.[13] Others have attempted to display the operation of Islamic law in ongoing social life.[14] This approach has the effect of highlighting the diverse ways in which law shapes gender, depending on the vagarities of its application and the particularities of historical and economic context. The diversity of Islamic legal practice suggests that debating against popular accounts is perhaps a misplaced effort. What is needed instead are detailed studies of how gender operates in contexts where Islamic law is applied.[15]

### *Approaches to Gender, Law, and Islam in East Africa*

Along with prescriptive and descriptive studies of Islamic law and gender in East Africa,[16] a few scholars have studied the topic ethnographically and historically.[17] In discussing gender and disputing on Mafia Island (off the southeastern coast of mainland Tanzania), Caplan questions the assumption (by anthropologists Eastman, Swartz, and many others) that links maleness with Islam, on the one hand, and femaleness with local custom, on the other. This dualistic perspective assumes the continuing effect of a marriage pattern common in previous centuries, whereby Arab Muslim men migrated from the Arabian peninsula to marry local women resident on the African coast.[18] Scholars argue that this particular gendered mixture of Arab and African has ramifications in many aspects of social life, as depicted in the list below.[19]

| Shari'a/Sunna (*Islamic law/tradition*) | Mila |
|---|---|
| Islamic | non-Islamic |
| male | female |
| patrilineal | cognation |
| hierarchy | egalitarianism |
| cash economy | subsistence economy |
| women secluded | women productive |
| women dependent | women autonomous |

Caplan challenges the assumed connection between gender and law by examining the behavior of men and women in marital disputes.[20] She questions whether men are more likely than women to use Islamic law (*shari'a*) and whether women prefer customary law (*mila*). She describes how women involved in disputes on Mafia Island rely on a wide variety of legal strategies, including Islamic law, customary law, state law, and generalized appeals to norms and ethics. This finding leads her to the excellent point that none of these legal forms is a fixed entity, which parallels the concept of 'living law' developed by Wanitzek.[21] Accordingly, how legal processes are used and how they relate to one another are subject to change rather than determined by neat binary associations.[22]

Despite this finding with respect to the *use* of legal forms, Caplan affirms an ideological connection between Islamic law as an institution and male forms of authority. That is, *ideologically*, East African Muslim men are invested with more direct connection to shari'a, even though women also make use of it in disputes. The ideological connection persists – for example, only men are regarded as appropriate authorities over Islamic law – despite very different actual uses of the law. With respect to Kenyan Islamic courts, tension over this ideological link is high. Only men can serve as legal authorities; however, women's use of the courts is so prominent, and their success so evident, that some coastal Muslims assert that the courts represent women's interests over men's.[23] Thus, the ideological connection between gender and particular legal institutions varies across the coastal region. As I will argue, the state's involvement in Islamic law accounts in part

for this variation. The concepts of gender described below directs analytic attention to the role played by the state.

### *New Concepts of Gender in Sociolegal Studies*

Anthropologists and scholars of law and society who have conducted research in post-colonial societies have developed the concept of gender and applied it to show how gender is inextricably linked to, and negotiated in relation to, other forms of power. As Susan Philips, Sally Merry, Mindie Lazarus-Black, Anne Griffiths, myself and others have noted in studies of post-colonial courts, ideologies of gender are evident in the law and in legal practice in multiple ways. The laws themselves express particular notions of gender, as do the processes of applying those laws. Ideological messages about gender can be gleaned from rules determining who controls legal processes and who has access to law. Relatedly, the disposition of disputed claims (including who wins in court) also provides significant information about the ideologies of gender embedded in legal processes. Finally, as discussed above with reference to Caplan, the symbolic force of laws and courts in the broader social context also have gendered entailments.[24]

These studies show that, in most legal systems, the positioning of gender and of women as gendered subjects can be diverse and contradictory. At the same time, though, the ideological messages about gender that emerge through law can be strong and can wield significant social force. For example, the provision that wives are entitled to financial maintenance from their husbands constitutes significant communication about the relationship (e.g. dependency) that should exist between husbands and wives and, perhaps by symbolic extension, to men and women as categories of people. Such ideas are evidence of the law's role in constructing gender relations and gendered subjects. The effects of such laws and legal processes are far-reaching and affect the negotiation not only of gender relations, but also of other forms of social hierarchy and difference.

In her study of law and gender in Trinidad, Mindie Lazarus-Black uses the concept 'regendering' to mark a change relating to gender in the post-colonial state's legal system.[25] In Trinidad, an instance of regendering was brought about through legislation that recognized harm to women which had previously been ignored. Specifically, new domestic violence laws insti-

tuted in Trinidad redefined men and women as gendered citizens in relation to the state.[26] With respect to Islamic law, the analysis of regendering is especially relevant to those states that have undertaken significant reforms of personal law, such as Egypt, Senegal, and Sudan. Enacting regendered law requires concerted attention to articulating explicitly how men and women should be treated under the law. Instances of regendered law need not advantage men or women, per se. Rather, the process of legal change that results in regendering directs attention to the state's role in creating gender distinctions, including by altering them or erasing them.

Regendering can be a highly politicized act in which, for example, a state adopts a particular approach to Islamic law (e.g. a 'reformed' version) or, alternatively, dispenses with religious and/or customary options altogether. Each of these possibilities 'regenders' the law in a particular way. As well, an instance of regendering can reveal not only a state's approach to men and women as gendered citizens, but also its goals with respect to incorporating ethnic and religious perspectives in the national judicial system. This is further evidence that gender is negotiated in relation to other social hierarchies and distinctions.

Subtle, enduring forms of gendering in legal institutions offer similar insight into the negotiation of gender and other forms of hierarchy and distinction. Writing about law in Tonga, Philips argues that gender ideologies can be incorporated into legal processes, and the state more generally, in forms that are implicit, explicit, symbolic, or material.[27] She criticizes the notion that post-colonial states attempt to impose a unitary ideology throughout the legal system. Her approach counters the familiar argument that secular states seek to undercut customary or religious law. Instead, Philips describes post-colonial legal systems as typically inflected with multiple ideologies, even though one ideology might be presented (by legal practitioners or by lay people) as characterizing the system. In the Tongan legal system, sometimes the fact that men occupy roles as legal personnel is taken for granted, and other times it must be explicitly stated why women cannot, for instance, serve as judges. With reference to the gendering of law in the Tongan state, Philips claims: 'What law is and does is quite varied in Tonga, and the genderedness of the Tongan state in the legal realm is not an implicit, seamless web, but consists as well of flashes, of displays of explicit stances on gender that themselves are not necessarily coherent'.[28] She maintains that her approach 'will counter the image of the agents of nation-

states as constantly pushing for more coherence and uniformity with an image of state domination that involves the active proliferation of ideological diversity as well'.[29]

Using Philips's approach, I am able to argue that the legal system in neither Kenya nor Tanzania is characterized by a singular stance on gender or one set of symbolic messages. Rather, as shown below, the treatment of Islamic law by each state results in multiple messages about gender, making it impossible to identify a unitary ideology of gender promulgated through Islamic family law in either context. My discussion highlights the variety of messages about gender conveyed through just two aspects of legal practice: 1) who controls legal processes and 2) what kinds of family law claims succeed under the two arrangements. Both of these areas of inquiry highlight the role of states in shaping the messages about gender ultimately conveyed through Islamic legal practice. Moreover, social theory would suggest that these multiple messages are crucial in that, along with other social processes, they operate to constitute gender relations and gendered subjects in society.

## *Islamic Courts and Family Law in Kenya*

In Kenya, the ideological messages about gender relations encoded in Islamic law were given constitutional recognition at independence when the kadhi courts were established as branches of the national judiciary (see Hashim in this volume).[30] Similar to many other post-colonial nations, including those that sought to modernize the judiciary soon after independence, Kenya chose to recognize the multiple forms of personal law within its borders.[31] From the perspective of the Muslim community, the state's recognition of Islamic law did not constitute significant regendering. Rather, Islamic versions of the relationship between men and women were adopted wholesale by the Kenyan state, with the important exception of evidence rules.[32] By all accounts at the time, the move to incorporate Islamic family law into the Kenyan legal system was accompanied by little discussion of the implications for gender relations. Rather, Muslims viewed the state's action as an appropriate recognition of the religious community's semi-autonomous status, particularly at the coast.[33]

In post-colonial Kenya, the kadhi courts operate under the close supervision of the secular state. Supervision takes a variety of forms: kadhis must comply with state edicts concerning the administrative operation of the courts; their work is periodically reviewed; and any appeals of their decisions are heard in the Kenyan High Court rather than an Islamic Court of Appeal. The state requirement that kadhis speak and write in English has meant that only Muslim men with secular education can qualify for the position. Following Philips, one must accept that *who* occupies legal authority conveys an ideological message about gender. All kadhis are men, thus reinforcing the message that connects Islamic law to male authority.[34]

The kadhis occupy an unique position in the realm of Kenyan Muslim authority figures. They are generally younger than other Muslim elders (e.g. mosque leaders) and, in many cases, from families that hold progressive views, at least of secular education. Moreover, as civil servants, kadhis are subject to frequent reassignment and thus have limited personal influence in local areas, where they are strangers as often as not. Although they occupy positions of nationally recognized power, they struggle for authority with other Muslim leaders representing a variety of constituencies and factions. Yet, as people who are frequently not 'of the community', they sometimes offer a more neutral context for the pursuit of legal remedies, particularly for women who find that local elders have difficulty taking their claims seriously or prejudge them. Although most kadhis wield limited on-the-ground authority among men in communities, their recognition by the state has meant that ethnically Swahili men are empowered almost exclusively, thus perpetuating an ethnic political hierarchy that has only recently (and rather ineffectively) been challenged. [35]

If the control of the Kenyan kadhi courts by male judges offers one message about gender, what messages come through the disposition of cases? One important message is that women can and do use the kadhi courts. Moreover, they win their claims in virtually all cases.[36] In increasing numbers, women go to court and succeed in claims for maintenance, custody, and divorce for a combination of reasons. First, kadhis themselves admit to sympathy for women who have suffered. They believe the stories of these women, many of whom appear to have endured and persevered through very difficult marital circumstances. The fact that many women hesitate to bring cases to the court – thus allowing time for more neglect or abuse to occur – tends to ensure that they will bring 'good' cases once they decide to

go to court. A second reason why women succeed follows from the Kenyan state's oversight of kadhi court procedure. Kadhis are held more accountable than elders or family members, who assist in resolving disputes in more informal settings. Some of the state's attention is directed toward ensuring that Muslim women, in particular, are being treated fairly.[37] It is precisely the disconnection of kadhis from local communities of men that has offered Muslim women the possibility of using Islamic law independently and successfully in court.[38] Women tend to come to court in increasing numbers because they face limited options in the community and experience difficulties pursuing claims through family mediators or local elders.

With respect to the disposition of cases, Kenyan Muslim women, particularly in the coastal area, are empowered to resolve difficult disputes through the kadhi courts. The message has been spreading that these courts offer women justice. Yet frequent decisions against men have caused some in the community to express skepticism about whether the courts show favoritism or whether they actually apply 'Islamic' law. Moreover, many men raise questions about the power of the courts in relation to the state. They are concerned that the courts are too subordinated to the secular state to serve religious law appropriately, a topic addressed in a later section.

### *Islamic Courts and Family Law in Tanzania*

Similar to many other colonial and post-colonial nations, Tanzania has had a history of placing family law, and some property law, in the realm of religious law, to be applied by leaders associated with the community (customary or religious) rather than by the state (see Makaramba in this volume). Tanzania's Marriage Act of 1971 effectively regendered the state by recognizing the equal rights of men and women as legal actors in many matters relating to divorce, child custody, consent to marriage, and several other issues. This Act altered not only the relationships between men and women, but also their connections to the state as male and female citizens. Behind the Marriage Act of 1971 were two ideological goals.[39] The first was to make personal law reflect Tanzania's state ideology of gender equality, an emerging, though not uncontested, tenet of President Julius Nyerere's African socialism.[40] Related to African socialist ideology was the second goal, of reducing the state's role in perpetuating religious or ethnic differences. Thus,

after passage of the Act, every marriage and divorce had to be authorized through the state legal system, regardless of the religious or customary authority under which it was conducted (see Makaramba in this volume).

Although the Act did not recognize specific religious or customary principles, it empowered 'Marriage Conciliation Boards' to apply local understandings in mediating disputes among couples and also authorized religious leaders to conduct marriages using religious and customary rites. Although permitted to apply religious law in resolving disputes, the elders on these Boards were supposed to refer parties to the state if they failed to resolve a claim or if certificates (e.g. divorce or marriage) had to be issued. As the Act was implemented, these boards were also enlisted to provide advice, based on religious law, in cases before secular magistrates. Thus, the regendering of citizens in relation to the Tanzanian state through the Marriage Act of 1971 (which was very progressive for its time) also operated to solidify pre-existing local interpretations of gendered, religious law by recognizing and empowering religious authorities.

In Tanzania, BAKWATA, a national organization of Muslims, was recognized and legitimized as the central arbiter of Muslim affairs in the eyes of the state.[41] This gave the organization a prestigious position relative to other local-level political entities. Attempts by other groups to gain the state's favor have continued to ignite ethnic and sectoral struggles that are beyond the scope of this chapter. Although BAKWATA has been actively involved in politicized battles for local and national prestige and influence, it has, from its inception, generally drawn its constituency from a broader ethnic base than some of the groups opposing it, depending on the region.[42] In Tanzania, the empowerment of BAKWATA to mediate claims and provide assessors for Magistrate's Court cases has meant that somewhat conservative versions of Islamic law are afforded official recognition. Again, however, this depends on the region.

BAKWATA leaders have consistently rejected efforts at legal and religious reform promulgated by other Islamic leaders, women's organizations, and the secular state. Although the Committees operate in name only in some local areas, in many communities BAKWATA Committees offer sites for the application of Islamic law that are relatively disconnected from the national government and are definitively controlled by men who have come to wield social, political, and legal power in the name of Islam.[43]

Ideally, BAKWATA can operate as a 'court' of first resort at the local level. By turning to these forums, or by relying on discussions among family elders, Tanzanian Muslims insure that many claims involving maintenance, resumption of spousal duties, or divorce, etc., are decided using Islamic principles. By pursuing these options, they avoid having personal matters heard in secular courts. A history of tension between BAKWATA committees and the Tanzanian state means that the former hesitate to refer Muslims to magistrates, even if committee members are unable to facilitate resolution. Also, Muslim men have concerns about using the secular courts for family law matters. In a case involving Muslims heard in a Tanzanian Primary Court outside Dar in the mid-1990s, the male defendant said simply, 'I do not recognize this court. I want to return to the Muslim committee.'

My interviews with Tanzanian Muslim women in the coastal region confirm that many are reluctant to take claims to BAKWATA committees, which have a reputation of minimizing women's concerns and generally favoring men. Several women concluded: 'They [BAKWATA] don't do anything'. Most women are also unwilling to pursue claims in magistrate's courts, which would, in any case, send them back for an initial consultation with BAKWATA. My analysis of court records in Dar es Salaam suggests that parties fail to follow up in secular court, even for required, routine matters, such as obtaining a divorce certificate. Therefore, the legal system's recognition of BAKWATA has made it difficult for Tanzanian Muslim women to pursue claims involving Islamic law in *any* venue. In short, whether women are married, abandoned, or divorced, they have little recourse to seek maintenance for themselves or their children, or even to remarry, if they have failed to obtain a divorce certificate through the proper channels.

A Tanzanian woman's ability to resolve marital difficulties using Islamic family law depends on where she lives, her degree of access to legal authorities, and whether and how those authorities apply Islamic principles. My limited observations in a remote town in southwestern Tanzania suggest that the lack of a viable BAKWATA committee, that is, a committee that is more than an entity in name only, leads family members to resort to resolving conflicts among themselves. Defunct committees are the norm in communities – similar to the one I observed – in which the Muslim population is small.

During my visit to this town, one family had experienced a serious problem involving their daughter. The young woman had returned to her natal

home after two years of living in Saudi Arabia with her husband, a Tanzanian Muslim also from the same area. From the wife's perspective, their marriage was emotionally abusive, and her husband's cruelty had plunged her into a severe depression. After several months at home, she was feeling better, and her family gingerly tried to discuss how the matter would be resolved. Finding a solution became critical when the husband telephoned to ask for the return of his wife, as a matter of law. Forced to speak with her husband, the young woman screamed that she wanted a divorce. Following the call, a group of the woman's female relatives tried to make her understand that the men in the family not agree to sue for a divorce. They also acknowledged that arguing her claim in a magistrate's court, or before local officials of the state or party, would be embarassing and inappropriate. Friends and family continued discussing her problem with her, and in her presence during family gatherings, in an effort to convince her to return to her husband. When members of her husband's family came to urge reconciliation, she capitulated, lamenting that she had no other options. With the support of her mother and sisters, she was able to negotiate monetary compensation from her husband for her illness and her travel.

In the case of this young woman, both men and women helped the aggrieved party to understand the problem and to seek resolution using Islamic principles. This family-based means of dispute resolution appears to be quite common, although the effects for women vary considerably. Thus, the particular Tanzanian state arrangement – which disallows official Islamic courts – opens the opportunity for women to have some informal input, even if their role is constrained by the ultimate decision-making power of male family elders. Clearly, though, Tanzanian men and women have difficultly pursuing family law claims in forums that are both officially recognized and religiously sanctioned (see especially Makaramba in this volume).

## *Comparing Varieties of Intervention*

At the level of the state, both Kenya and Tanzania perpetuate a taken-for-granted message about the gendering of Islamic law by empowering Muslim *men*, and not women, as legal authorities. This is less remarkable as a point about gender and Islam than the fact that, in empowering *particular* men as legal authorities, each state has intervened in relations among Muslim men.

In Tanzania, BAKWATA members – though recognized by the state – sometimes compete with other local male authorities. By contrast, the Kenyan kadhis' power and influence in community affairs has diminished, even as their recognition by the state has held strong. By reconfiguring relations among Muslim men, these governments are also intervening in struggles over ethnicity and factionalism. In Tanzania, the state has had difficulty maintaining control over these struggles, although they rarely involve Islamic family law specifically. (Increasingly, calls for the institutionalization of Islamic family law courts on the Tanzanian mainland pose a challenge to the government.) The consequences are clearer in Kenya, where Swahili ethnic domination of the courts has generally been the rule.

With respect to the disposition of claims, the gendered contrast between the two examples is stark: Muslim women actively use Islamic law through the Kenyan state, while their Tanzanian counterparts tend to shy away from state legal institutions. On the one hand, this means that Kenyan Muslim women can exercise their rights as gendered citizens (e.g. they can appeal to the state for assistance) and at the same time affirm their status as Muslims. Tanzanian women have less connection to enacting their status as citizens through the disputing process. Those who manage to enter the secular legal system must often risk leaving their religious commitments behind. Moreover, many of the options available to Tanzanian women for dispute resolution are unsatisfactory and unpredictable, and access to authoritative interpretations of Islamic law is difficult.

From these observations in the two contexts, I conclude that Islamic legal processes are themselves *gendered symbols*. That is, in relation to each state, Islamic law occupies a *gendered* position. As described at the outset of this paper, the change in scene in the Kenyan kadhi courts over a few years dramatically illustrates what, following Ferguson, I call the 'feminization' of Muslim courts in post-colonial Kenya.[44] Feminization, a term that is easily misunderstood, was used by Katherine Ferguson in her 1984 study of US bureaucracy, in which she describes how bureaucrats and their clients, dominated by the structures of power in a bureaucracy, rely upon feminized, power-evasive, strategies of accommodation. For Ferguson, feminization is the 'structural complement of domination'.[45] She argues that in a bureaucracy:

> The client is rewarded for his/her success in becoming what Foucault calls the obedient disciplinary subject, 'the individual subjected to habits, rules, orders, an

> authority that is exercised continually around him and upon him, and which he must allow to function automatically in him'. Clients, in other words, are required to adopt the strategies of femininity to ensure survival, just as women have traditionally done and just as administrators themselves also must do in the bureaucratic climate.[46]

The idea that bureaucrats (including perhaps judges) are 'feminized' in relation to the state can be extended to understand how court personnel, and even subordinate courts, occupy a position that is gendered female, while the overarching state remains male and dominant.

It is possible to posit that, over the last several decades, Kenyan kadhi courts have become feminized in the sense described above, while Tanzanian applications of Islamic law have facilitated new legal orders that are, for the most part, practically and ideologically linked to male authority. The Kenyan kadhi courts have been brought under the control of the Kenyan state, and thereby one could see them as feminized. According to both Ferguson's criteria *and* the estimations of Swahili Muslim men (and some women), kadhi courts have been rendered somewhat powerless. This is not a comment on their ability to carry out the important tasks of dispute resolution. Rather it reflects both the structural relationship and the views expressed by some in the community. The feminization of the Kenyan kadhi courts results in part from the reality that Muslim women make most of the claims heard by kadhis, and win virtually all of the cases. According to some Muslim men (especially those who are disgruntled because they have lost in court), the kadhi courts have become 'women's courts'. Further, kadhis are also condemned for failing to stand up to the secular state and its discrimination against Muslims. Thus, kadhis and other court personnel can be viewed as feminized, in the specific sense of being subordinate to or dominated by the state.[47] From Ferguson's perspective, the feminization of these courts could also result from their subordinate position in the Kenyan judiciary, which is a bureaucracy. Specifically, kadhi court personnel enact their dominated positions in the bureaucracy by stalling (so as to avoid controversial actions), using conciliatory and empty language (especially in responding to challenges from the state), and avoiding responsibility for controversial acts (allowing other bodies to take up political questions, e.g. the Succession Law), as is common in a bureaucracy. Thus, court personnel reflect the feminization that Ferguson identifies for bureaucracies more gen-

erally.[48] Feminization as it is used here is not intended as a negative term, but rather an analytic category that helps illuminate power dynamics.

In the Tanzanian context, Islamic law does not occupy a feminized position relative to the state. It is marginalized, rather than dominated. First, as described above, Islamic law is less connected to the state, and the Tanzanian state itself is weaker, although that issue is not addressed herein. Although marginalized with respect to the magistrate's courts, Islamic law is only rarely applied in circumstances that emphasize its subordinate role. Rather, local committees tend to operate independently, in ways that establish their connection to men and male authority. In many areas, these committees do not operate at all; however, when they do, they offer quicker, rougher justice than the secular system. The masculinized authority of these committees and elders is thereby linked to Islam rather than to the secular state. Moreover, the committees are themselves male entities, places that men control and where men have more standing than women in terms of legal authority and success in disputes. At times when the state sought to intervene more directly in the application of Islamic law, BAKWATA fought to retain decision-making independence. For a minority religious population, contesting the authority of the state can serve as a demonstration of admirable commitment to the community through a gendered, specifically masculinized, act.

Applying the concept of feminization might be most relevant when legal institutions are heavily bureaucratic. Yet the notion that some legal institutions can be seen as gendered in relation to the state is an important one for understanding the way in which the concept of gender can be used to analyze law. This raises an especially interesting problem for Islamic law in secular nations. If the secular state establishes and recognizes Islamic courts, does this offer yet another channel for domination of the minority religious community? Under such arrangements, will there necessarily be tension between the religious and the secular, and/or subordination of the former by the latter? Answering these questions, and indeed working against undesirable arrangements of power, requires examining in detail the relation between the state and Islamic legal practices, as I have attempted to do in this chapter. Such concerns also lead to broader questions of the role of the state generally with respect to Islam, and the challenge of building states – both secular and Islamic – that are more receptive to Islam's principles.

## *Conclusion*

Since the 1990s, women's organizations, primarily secular, in both Kenya and Tanzania have demanded legislation that would regender their nations. Their calls for statutory recognition of domestic violence and marital rape and for uniform codes of inheritance, divorce, and child custody are increasingly louder and shape the context in which Islamic law is applied, as well as the symbolic role of Islam in nations seeking to reform the legal system. In the midst of a global discourse on Islam and gender that views Islamic law and other religious laws with skepticism and, relatedly, donor nations' demands for secularizing judicial reforms, these efforts at regendering have rendered the application of Islamic law both tenuous and crucial, from the perspectives of Muslim men and women in each nation. Comparative analyses in a variety of post-colonial contexts will assist all the relevant actors in developing their political strategies with respect to law reform. Moreover, in African contexts, the comparison of adjoining nations might become an increasingly important research strategy, given newly formed regional alliances of nations and of women's activist groups.

In this post-colonial moment, marked by migrations and new pluralisms, it is increasingly important to study legal processes across contexts where Muslims reside. In examining this expanding continuum of Islamic social formations, we will need to direct increasing attention to gender in ways that counter the simplicity of the current popularized accounts circulating globally. In an important article on Islam and feminism, Majid charts a provocative approach:

> While one must expose Islamist ideologies to rigorous criticism and categorically reject all coercive and intolerant practices espoused in the name of religion, the recovery of a long-obfuscated egalitarian Islam together with an effort to reconceptualize a progressive Islam for the future are necessary undertakings if one is to go beyond a negative critique of homogenized Islamic cultures and rethink a possible indigenous path to women's emancipation.[49]

Any project directed toward fostering more liberatory or egalitarian approaches to women under the law must appreciate that gender – as a metaphor of difference and hierarchy – is embedded in legal institutions

and legal practices in multiple ways, particularly in those courts that adjudicate family law claims.

*Notes*

1 This chapter was presented at the Ford Foundation conference 'Islamic Law in Africa', held in Dar es Salaam, Tanzania, in July 2000. Drafts of some sections were presented previously at the American Anthropological Association's annual meeting of November 1996, and the Law and Society annual meeting of May 1997. I am grateful to colleagues at the seminar and this volume's editors for their comments on this chapter.

2 There are nine kadhi courts in Kenya. Most are located in the Coast Province. The Chief Kadhi presides over the other kadhis and is the only officially recognized Muslim leader at the national level. Although Swahili people (Waswahili) have occupied the positions of kadhis for most of this century, kadhis from other ethnic groups have been appointed in recent years. Non-Swahili Muslims, such as WaGiriama and WaDigo people, also use these courts. As Marc Swartz has pointed out, Muslims of South Asian origin tend to avoid these courts. The majority of Muslims in Kenya are Sunni of the Shaf'i sect. Marc J. Swartz (1979), 'Religious Courts, Community, and Ethnicity Among the Swahili of Mombasa: An Historical Study of Social Boundaries', *Africa* 49, 1: 29-40.

3 Susan F. Hirsch (1998), *Pronouncing and Persevering: Gender and the Discourses of Disputing in an African Islamic Court* (Chicago: University of Chicago Press). Susan F. Hirsch (1994), 'Kadhi's Courts as Complex Sites of Resistance: The State, Islam, and Gender in Postcolonial Kenya', in *Contested States: Law, Hegemony, and Resistance,* eds. M. Lazarus-Black and S. F. Hirsch (New York: Routledge).

4 Distrust of the secular police has a long history in the Swahili Muslim community. On several occasions police involved in investigating claims or following suspects have entered mosques without removing their shoes, causing public outcry. Relations became particularly strained during political upheavals in the 1990s and, in the next decade, as a result of the war on terror conducted in the region.

5 Hirsch, *Pronouncing and Persevering*.

6 This number is an estimation of the population of Muslims in the early post-independence period. Most Kenyan Muslims are concentrated in the coastal region. The current percentage of Muslims in Kenya is the subject of dispute. The government offers a conservative estimate of between 10% and 15%, while Muslim activists put the figure at well over 20%.

7 The situations in mainland Tanzania (formerly Tanganyika) and on Zanzibar are very different, as the two parts of the United Republic of Tanzania are governed separately. The ideology of socialism meant that Tanzania did not establish Islamic courts on the mainland. Rather, it empowered local level committees in the areas where Islam is heavily practised, such as Tanga, Dar es Salaam and the South Coast Region. Kadhi courts, headed by a Chief Kadhi, operate on Zanzibar, where the percentage of Muslims is much higher.

8 BAKWATA was formed in the early 1970s and was initially closely connected to the socialist state with respect to matters of political activism. Francois Constantin (1993), 'Leadership, Muslim Identities and East African Politics: Tradition, Bureaucratization and Communication', in *Muslim Identity and Social Change in Sub-Saharan Africa*, ed. Louis Brenner (Bloomington and Indianapolis: Indiana University Press); August H. Nimtz (1980), *Islam and Politics in East Africa: The Sufi Order in Tanzania* (Minneapolis: University of Minnesota Press). BAKWATA does not exist in the same way on Zanzibar.

9 Members of these committees can also offer opinions on customary law, which is generally less relevant in the capital and the Tanga area of the North Coast than on the South Coast.

10 Tanzania is a United Republic comprised of the islands of Zanzibar and the mainland. The United Republic government has little to do with the legal systems which operate independently in each part of the Union. The Zanzibari government established kadhi courts to adjudicate matters of Islamic personal law among Muslims on the islands where the Islamic population is 95-98%. For a discussion of Islamic courts in Zanzibar, see Erin E. Stiles (1980), 'When is a Divorce a Divorce?: Determining Intention in Zanzibar's Islamic Courts', *Ethnology* 42, 4,: 273-288; Erin E. Stiles (2006), 'Broken Edda and Marital Mistakes: Two Recent Disputes from an Islamic Court in Zanzibar', in *Dispensing Justice in Islam: Qadis and their Judgments*, eds., M. K. Masud, Rudolph Peters, and David S. Powers (Leiden and Boston: Brill).

11 See Jane Collier and Bill Maurer (eds.) (1980), Special issue on *Sanctioned Identities*. *Identities: Global Studies in Culture and Power* 2, 1-2; Mindie Lazarus-Black (2003), 'The (Heterosexual) Regendering of a Modern State: Criminalizing and Implementing Domestic Violence Law in Trinidad', *Law & Social Inquiry* 28, 4: 979-1008; Hirsch, 'Kadhi's Courts as Complex Sites of Resistance: The State, Islam, and Gender in Postcolonial Kenya'.

12 See Leila Ahmed (1992), *Women and Gender in Islam: Historical Roots of a Modern Debate* (New Haven and London: Yale University Press); Hirsch (2006), 'Islamic Law and Society Post-911', *Annual Review of Law and Society* 2: 165-182; Fatima Mernissi (1975), *Beyond the Veil: Male-Female Dynamics in a Modern Muslim Society* (Bloomington: Indiana University Press) and Mernissi (2002), *Islam and Democracy: Fear of the Modern World* (Cambridge: Perseus Publishing).

13 See Ahmed (1992), *Women and Gender in Islam*; Abdullahi An-Na'im (2002) *Islamic Family Law in a Changing World: A Global Resource Book* (London/New York: Zed Books); Léon Buskens (2003), 'Recent Debates on Family Law Reform in Morocco: Islamic Law as Politics in an Emerging Public Sphere', *Islamic Law and Society* 10, 70-131; Anouar Majid (1998), 'The Politics of Feminism in Islam', *Signs: Journal of Women in Culture and Society* 23, 321-362; Mernissi, *Islam and Democracy*.

14 Shahla Haeri (1989), *Law of Desire: Temporary Marriage in Shi'i Iran* (Syracuse: Syracuse University Press); Hirsch, *Pronouncing and Persevering*; Ziba Mir-Hosseini

(2000), *Marriage on Trial: A Study of Islamic Family Law: Iran and Morocco Compared* (London and New York: I.B. Tauris); Arzoo Osanloo (2009), *The Politics of Women's Rights in Iran* (Princeton: Princeton University Press); E. Snajdr (2005), 'Gender, Power, and the Performance of Justice: Muslim Women's Responses to Domestic Violence in Kazakhstan', *American Ethnologist* 32, 294-311; June Starr (1978), *Dispute and Settlement in Rural Turkey: An Ethnography of Law* (Leiden: Brill); Starr (1990), 'The Role of Turkish Secular Law in Changing the Lives of Rural Muslim Women, 1950-1970', *Law and Society Review* 23, 497-523; Stiles, 'When is a Divorce a Divorce?'.

15 For a provocative discussion of this strategy, see Majid, 'The Politics of Feminism in Islam'.

16 Sheikh Abdallah Swaleh Farsi (1965), *Ndoa-Talaka na Maamrisho Yake* (Zanzibar: Mulla Karimjee Mulla Mohamedbhai) and Miriam Kadri (1995), 'Interpretation of Islamic Sheria', in *Tanzania Gender Networking Programme Gender and Development Seminar Series* (Dar es Salaam).

17 Patricia Caplan (ed.) (1995), *Understanding Disputes: The Politics of Argument* (Oxford and Providence: BERG); Hirsch, 'Kadhi's Courts as Complex Sites of Resistance'; Hirsch, *Pronouncing and Persevering*; Makaramba this volume; Stiles, 'When is a Divorce a Divorce?'; Stiles, 'Broken Edda and Marital Mistakes'; Swartz, 'Religious Courts, Community, and Ethnicity Among the Swahili of Mombasa', *Africa*; Ulrike Wanitzek (2002), 'The Power of Language in the Discourse on Women's Rights: Some Examples from Tanzania', *Africa Today* 49, 3-19.

18 See Kelly Askew (1999), 'Female Circles and Male Lines: Gender Dynamics along the Swahili Coast', *Africa Today* 46, 67-101; Carol Eastman (1988), 'Women, Slaves, and Foreigners: African Cultural Influences and Group Processes in the Formation of Northern Swahili Coastal Society', *International Journal of African Historical Studies* 21, 1-20; John Middleton (1992), *The World of the Swahili: An African Mercantile Civilization* (New Haven: Yale University Press); Margaret Strobel (1979), *Muslim Women in Mombasa, 1890-1975* (New Haven: Yale University Press).

19 Ibid.

20 Caplan, *Understanding Disputes*.

21 Wanitzek, 'The Power of Language in the Discourse on Women's Rights'.

22 While accepting that these divisions are relevant in some contexts, especially in the 20th century, anthropologist Kelly Askew argues that this pattern is not historically defensible, given that gender relations have shifted dramatically depending on the time period, political and economic circumstances, and also the precise area of the coast. Askew, 'Female Circles and Male Lines'.

23 Hirsch, *Pronouncing and Persevering*.

24 Caplan, *Understanding Disputes*; Hirsch, 'Kadhi's Courts as Complex Sites of Resistance'; Sally Engle Merry (1990), *Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans* (Chicago: University of Chicago

Press); Susan U. Philips (1994), 'Local Legal Hegemony in the Tongan Magistrate's Courts; How Sisters Fare Better than Wives', in *Contested States: Law, Hegemony and Resistance*, eds. M. Lazarus-Black and S. F. Hirsch (eds.) (New York: Routledge); Starr, *Dispute and Settlement in Rural Turkey*; Starr, 'The Role of Turkish Secular Law'.

25 Lazarus-Black, *Everyday Harm.*

26 With reference to Trinidad, Lazarus-Black argues that the passage of laws relating to conflicts between men and women effects a '(heterosexual) regendering of the state'. The addition of the term 'heterosexual' reflects the anti-homosexual statutes contained in Trinidad's new Sexual Offenses Act. Through regendering, the state directs attention to the categories of male and female and the ways in which the latter might have been marginalized in law. Lazarus-Black is careful to point out that a regendered state does not necessarily guarantee more access to rights for women, or even any changes in gender hierarchy in the courts or other contexts. However, the ideological shift as reflected in the laws influences any subsequent negotiation of gender relations. See Lazarus-Black, 'The (Heterosexual) Regendering'.

27 Philips, 'Local Legal Hegemony in the Tongan Magistrate's Courts'.

28 Ibid., 84-85.

29 Ibid., 62.

30 See generally, Hashim, this volume; Hirsch, *Pronouncing and Persevering*; Mwakimako, this volume; Kuria Mwangi (1995), 'The Application and Development of Sharia in Kenya, 1895-1990', in *Islam in Kenya*, ed. B. al-Yahya (Nairobi: Mewa Publications); Swartz, 'Religious Courts, Community, and Ethnicity Among the Swahili of Mombasa'.

31 My point here is that Tanzania's Marriage Act of 1971 was much more progressive, with respect to recognizing women's rights within marriage, than its Kenyan counterpart. In areas of the law other than family law, the new Kenyan government instituted the kind of uniformity that the Tanzanian state was developing. On the issue of family law, however, it allowed for ethnic and religious division. There is the question here of what kinds of law were seen, at the time, as being central to the project of building citizens. Curiously enough, in many African contexts, family law was not seen as centrally important to this project.

32 Kenyan kadhi courts are expected to apply the same rules of evidence and procedure that are used by Kenyan magistrates. They accede to this demand in part because the state has monitored this issue through the appeals process. Hirsch, *Pronouncing and Persevering*; H.F. Morris (1968), *Evidence in East Africa* (London: Sweet and Maxwell).

33 For historical discussion of the prominent role of this community, see Middleton, *The World of the Swahili.*

34 In both Kenya and Tanzania, there have been female Muslim magistrates.

35 Swartz. 'Religious Courts, Community, and Ethnicity Among the Swahili of Mombasa'.
36 Hirsch, *Pronouncing and Persevering.*
37 The reasons for the state's interest in monitoring the treatment of women are complex. State officials use this approach partly to comply with international discourses of women rights and also as an opportunity to control the local population of Muslim men. Hirsch, *Pronouncing and Persevering*.
38 The kadhis (in conjunction with the Kenyan state) have, in fact, tended to work against the local level leaders who used to provide advice in much the same way as BAKWATA members in Tanzania. Hirsch, *Pronouncing and Persevering*; Hirsch, 'Kadhi's Courts as Complex Sites of Resistance'.
39 See Malingumu Rutashobya (n.d.), *Marriage, Customs, and Women's Legal Rights in Tanzania* (Dar es Salaam) and Barthazar Rwezaura and Ulrike Wanitzek (1988), 'Family Law Reform in Tanzania: A Socio-Legal Report', *International Journal of Law and the Family* 12: 1-26.
40 Government of Tanzania (1961), *Government's Proposals on Uniform Law of Marriage*, (Dar es Salaam).
41 Nimtz, *Islam and Politics in East Africa.*
42 Ibid., 90.
43 The degree of actual power wielded by any given BAKWATA differs depending on the community in which it is located. Informants gave very different interpretations of the roles of BAKWATA elders across contexts.
44 Katherine Ferguson (1984), *The Feminist Case Against Bureaucracy* (Philadelphia: Temple University Press).
45 In defining feminization, Ibid. 121 offers the following: 'By viewing feminization as a political rather than a biological process, one then sees feminization, in the sense used here, as the structural complement of domination. As long as one group of people is primarily concerned with maintaining and exercising power, others will of necessity be primarily concerned with coping with that power held over them. They will need the skills of femininity to accomplish this. Thus, as long as people's lives are constrained by radically unequal power relations, whether they are racial, sexual, economic, administrative, or some other, there will be femininity in the sense described here. It both protects the powerless from the worst aspects of subordination and simultaneously perpetuates that subordination'. Although Ferguson has formed her argument in opposition to the feminist embrace of an equality model of bureaucracy, it is relevant to understand other contexts where bureaucrats and their clients are subordinated or feminized.
46 Ibid, 145.
47 One ideology expressed by Muslim men is that the kadhis are feminized in part because they, like women, are incapable of controlling their physical desires. That is, they do not use *akili* or sense to control their desire for the women

who come to see them in court. By helping these women, they are seen as giving into temptation out of moral weakness. More explicit accusations of kadhis using their position to take sexual advantage of women have been made in the past, although there is little evidence to suggest that these accusations are plausible.

48 A striking exception to this subordinate behavior is the role the kadhis played in countering the proposal for a uniform Succession Act in Kenya. For a brief time they were seen as representatives of the community locked in struggle against the state. The fact that it took twenty years for the kadhis to assume this position diminished their status in the community. Hirsch, *Pronouncing and Persevering*.

49 Majid, 'The Politics of Feminism in Islam', 322.

# 11 Muslim Family Law in South Africa: Paradoxes and Ironies

**Ebrahim Moosa**

A proposed draft bill on Muslim Personal Law (MPL) for South Africa's Muslim minority might pass the country's rigorous constitutional standards of justice and equality, but it might not get approval from all Muslim organizations. An influential and disgruntled group of ultra-conservative religious leaders (*'ulama*) opposed to the content of the proposed draft bill have managed to stymie the process for nearly six years. In doing so they postponed the aspirations of several generations of Muslim South Africans to have MPL recognized and legislated by the government. As the internecine disputes within the Muslim religious leadership continue, there is a likelihood that petitions from women's groups and other organs of civil society might restart the process to submit the proposed draft bill for consideration to the South African parliament. In 2009, the Women's Legal Centre Trust, a nongovernmental organization, unsuccessfully petitioned South Africa's Constitutional Court, arguing that the government had failed to enact laws recognizing Muslim marriages.

Ironically, the Muslim religious leadership, namely the *'ulama*, who previously energetically petitioned for the recognition of MPL, were now divided. A minority of ultra-conservative *'ulama* were opposed to a reformist version of MPL, one consistent with South Africa's constitutional order and human rights safeguards. It appeared that the South African government was loath to antagonize minority communities or be caught in the crossfire of divisions. Now, the future of MPL might well be in the hands of the country's various courts and, finally, the government's willingness to enact legislation.

In the absence of legislation, the judiciary, from the Supreme Court of Appeal, the various High Courts and the Constitutional Court, have since 1996 addressed different aspects of Islamic law related to the family and provided relief to petitioners who would otherwise have faced hardship, especially women.

In order to understand the most recent developments surrounding MPL in South Africa, some of the history surrounding the demand for MPL, from the apartheid era to the post-apartheid period, is instructive in several respects.[1] Not only does it show how governments used the special interests of religious minorities in order to elicit compliance, but this story also demonstrated the ideological contestation centered around MPL between different Muslim role-players and constituencies. The last part of the chapter will examine how the post-apartheid courts have effectively given recognition to aspects of MPL.

## *Attempts to Recognize MPL under Apartheid*

Towards the end of 1987, the South African Law Commission (SALC), under the then-apartheid government, circulated a questionnaire to several Muslim organizations and individuals, inviting comment on certain matters affecting MPL.[2] Muslim efforts to have MPL recognized dated back to the middle of the twentieth century.[3] Another trigger for MPL in the last quarter of the twentieth century was the advent of the internationally discredited tricameral parliament in 1984, which gave parliamentary representation to coloureds and Indians, with several Muslim participants. Politicians at the time hoped to gain credibility with the Muslim community by highlighting MPL as an electoral issue.[4]

Foremost among the supporters of the SALC initiative were the established clergy groups, like the Jamiat al-Ulama (Association of Muslim Theologians), representing the province of Transvaal, now Gauteng, and Natal, now Kwazulu-Natal; the Cape-based Muslim Judicial Council (MJC); the Majlisul Ulama of the Eastern Cape; and the Islamic Council of South Africa (ICSA). The *'ulama* groups were joined by an influential group of professionals, known as the Association of Muslim Accountants and Lawyers (AMAL). The SALC inquiry raised the expectation of the recognition of MPL.[5] The *'ulama* bodies in turn were reluctant to co-operate with other role-players

and viewed the entire enterprise to be their exclusive domain. As a harbinger of what was to come a few decades later, the Port Elizabeth-based conservative *'ulama* grouping called the Majlisul 'Ulama had already cautioned in the 1980s that the lobbying for MPL could only occur under the auspices of the *'ulama*. This body urged the Muslim public to reject the proposals of the non-*'ulama* groups, whom it labeled 'modernists'. They staked their claim on the theological presumption that the *'ulama* alone were rightly the *'ulul-amr* (legitimate authority) in terms of Islamic theology to give guidance in matters of doctrine, of which MPL was one such matter.[6]

A cross-section of Muslim religio-cultural and political organizations involved in civil society and anti-apartheid activities were opposed to the SALC proposal.[7] They viewed it as the apartheid government's ploy to co-opt sectors of the Muslim community, and they thus resisted the *'ulama* groups' claim to a monopoly on matters related to MPL. Among the most vocal were progressive groups like Muslim Youth Movement (MYM), the Call of Islam (COI), and the Qibla Mass Movement, as well as the Muslim Students' Association (MSA).

Both the *'ulama* and politically active Muslim groups understood the recognition of MPL would bring relief to the lives of ordinary Muslims. Nonrecognition of Muslim family law meant that children from Muslim marriages were declared to be illegitimate, female spouses were often denied patrimonial benefits on divorce, and intestate succession resulted in costly litigation. Some activists agonized in having to choose between delaying the implementation of MPL and the prospect of its immediate availability. However, it was the political atmosphere of the 1980s that made the issue politically controversial.

What surfaced in the intra-Muslim controversies during the 1980s were the class differences: generational divides that shaped the disparate 'readings' and 'strategies' vis-à-vis the apartheid government and the proposal to recognize MPL. These differences were informed by the historical tensions evident among Muslims, which had shaped their varying attitudes towards colonial rule as discussed by Allie in this book and later under apartheid. During the tumultuous 1980s, there were frequent stand-offs, alliances, between sections of the educated elite and the politicized youth against some of the *'ulama'* groupings. The *'ulama'* groupings, obviously with notable exceptions, could not come to terms with the Muslim version of liberation theology that was being advocated by a small group of nouveaux *'ulama* who

served as ideologues for anti-apartheid political activism.[8] Conservative elements among the *'ulama* saw Muslim liberation theology as compromising 'pure' Islam, as a result of its association with Christian, communist, socialist and secular ideologies.[9] Clearly, the controversy over MPL only heightened the existing tensions and exacerbated intra-Muslim rivalry.

That burst of MPL-related activity in the 1980s was short-lived. Dramatic political developments that changed the face of modern South Africa eclipsed all law reform activities. Once negotiations between the formerly banned parties in the liberation movement, like the African National Congress (ANC), and the apartheid-era National Party began, the demand for the recognition of MPL became part of the quest for a democratic future. All the major Muslim organizations petitioned political parties involved in the multiparty Conference for a Democratic South Africa (CODESA). Such successful lobbying made it possible for the recognition of religion-based family laws, like MPL, to be written into the constitution. The ANC, as the major political party, made an electoral pledge to legislate MPL if it succeeded at the polls in the first democratic elections in 1994.

Once in power, the ANC realized that the Muslim community was not as unified as they expected. Furthermore, the claims by the traditional *'ulama* as the sole representatives of a diverse Muslim community were hotly contested by Muslim organizations who did not share such convictions. At the behest of the ANC, an inclusive working structure known as the Muslim Personal Law Board (MPLB), consisting of nearly all the major role players, was formed in August 1994. However, the tensions between the traditional *'ulama* and the progressive Muslim groupings that were noted earlier dramatically re-emerged. The *'ulama* participating in the MPLB were often more inclined to please their more conservative colleagues, like the Majlisul Ulama, rather than reach compromises on constitutionally viable interpretations of family law with Muslim progressives. Not only reasonable interpretation; the conservative *'ulama* objected to the participation of Muslim women in the MPLB or objected to the fact that women were not sequestered in gender-segregated spaces during MPLB meetings.

The MPLB finally imploded once irreconcilable differences between the *'ulama* and progressive Muslims became manifest over the place of human rights in any envisaged MPL framework. There were two main reasons for the breakdown. Firstly, the *'ulama* found the constitutional constraints on any MPL so offensive that they contemplated petitioning the Constituent As-

sembly to exempt Muslim family law legislation from the human rights provisions of the new constitution. They also made futile appeals to President Nelson Mandela to exempt MPL from adhering to the requirement of the constitution. Secondly, the Muslim progressive groups like the MYM and Call of Islam maintained that Muslim family law, if it were properly interpreted, did not have to conflict with the values of the constitution.

Mr. Shuaib Omar, a lawyer representing the *'ulama*, made it abundantly clear that gender equality, a notion distinct to reformed versions of MPL as envisaged by the Muslim progressives would be incompatible with the *'ulama*'s interpretation of Islamic law or shari'a. In fact, the *'ulama* lobby viewed their own interpretation of the shari'a to be final but failed in their insistence that all other stakeholders in the MPLB sign a document endorsing the supremacy of the shari'a as they understood it. Following acrimonious divisions among the various stakeholders in the consultation process, by April 1995, the majority *'ulama* grouping met privately and unilaterally dissolved the MPLB.

After further delay, in March 1999 the Minister of Justice established an eight-person committee of the now renamed South African Law Reform Commission (SALRC) to investigate the feasibility of Muslim marriages and related matters. Representation on the committee included all persons of Muslim background: two from the *'ulama* community, Moulana A.A. Jeena and Sheikh M.F. Gamieldien; a female academic, Professor N. Moosa; a sitting female parliamentarian, Mrs. F. Mohamed; a veteran politician, R.A.M. Saloojee; and two practising attorneys one male, Mr. M.S. Omar, and one female, Ms. Z. Seedat, under the chairmanship of Judge Mohammed S. Navsa.[10]

### *The Aftermath of the Law Reform Commission Proposals*

In July 2003, the SALRC released a report, known as Project 59, on 'Islamic Marriages and Related Matters' to announce its findings. The widely circulated draft bill in Discussion Paper 101 issued by the SALRC elicited an energetic response from a cross-section of respondents and stakeholders, a summary of which was included in the final report. The final report also included a proposed draft bill called the Muslim Marriages Act, and it was left to the legislature to contemplate the future of MPL, based on the findings of the SALRC report.

Two years later, in October 2005, the Commission for Gender Equality (CGE) in South Africa, a statutory commission, proposed an alternative draft bill called the Recognition of Religious Marriages Bill, hereafter referred to as the CGE Bill. This bill aimed at recognizing all religious marriages, with no reference to any specific religious law, in a bid to adhere to South Africa's constitutional and international law obligations.[11]

However, the South African government and parliament have yet to respond to either the SALRC-proposed draft bill or the CGE Bill. Unofficially, the word was that the government was reluctant to take sides in the matter of MPL, given the extensive divisions within the Muslim community. There was, however, no explanation of why the government did not entertain the secular CGE proposal, since it was designed to recognize all religious marriages in terms of the existing secular statutes regulating marriage, divorce and succession. One can only speculate as to reasons for the reluctance. Recognizing religious marriages might elicit objections from religious communities, like Muslims, that secular legislation and not religion-specific laws would regulate their family practices. In other words, the South African government was in a precarious position: on the one hand, it had a duty to fulfill a constitutional mandate to legislate family laws based on religion, and on the other hand, it had to be impartial and not take sides in instances when religious communities were divided among themselves.

### *The Proposed SALRC Draft Bill*

The authors of the proposed draft bill clearly tried to provide outlines for legislation that would pass constitutional muster. The proposed draft bill has a declaratory statement affirming the equality in status and capacity of spouses. 'A wife and a husband in a Muslim marriage are equal in human dignity, and both have, on the basis of equality, full status, capacity and financial independence, including the capacity to own and acquire assets and to dispose of them, to enter into contracts and to litigate'.[12] If this provision survived legislation, then it would enable future judges on the grounds of equality and human dignity to strike down aspects of MPL interpretation that would discriminate against women.

Apart from approving existing Muslim marriages retroactively, the proposed draft bill recognized polygyny but made the practice subject to certain

conditions. While the SALRC did use the term polygyny in an earlier draft, the final draft bill does not use this term, but it does contemplate a Muslim man having more than one wife. If a husband was contemplating polygyny, then he was required to apply to a court in order to satisfy the authorities that he could 'maintain equality' between his spouses.[13] Failing to get permission from a court when marrying a second spouse can result in a penalty. In making the practice of polygyny subject to an assessment by an impartial court and with a stiff penalty for non-compliance, the authors of the proposed SALRC bill have turned towards reformist thinking on this matter. For orthodox traditionalists, Muslim men have a right to take more than one spouse, with the burden of equality between the spouses being more of an ethical guideline rather than an enforceable standard. The SALRC has in the case of polygyny followed the lead of modernist thinking, as applied in Pakistan and a few other countries, but has also added additional deterrents to polygyny; and, they have made material affordability and fairness between multiple wives an enforceable requirement.

One of the most controversial differences between modernizing reformist thinking and traditional orthodox modes of thinking in matters related to MPL was the place of the male unilateral right to repudiation (*talaq*) to end the marriage. This practice took place extra-judicially; in other words, the husband pronounced the formula, and the separation between the spouses was effective immediately. If the husband uttered the *talaq* formula three times, in one meeting, even in a state of anger or distress, then according to some Islamic law authorities the marriage was irrevocably severed. A minority of Muslim authorities have argued that three utterances in one meeting were equal to a single revocable repudiation. Legal refinements aside, this practice often caused great hardship to families. Women were frequent victims, since they had no say in the dissolution of the marriage when this procedure was used.

The proposed SALRC draft bill provided a variety of procedures for the dissolution of a marriage. While the bill retained the practice of *talaq* as one mode of dissolution, among others, it did introduce regulations to make *talaq* partly a judicial matter. Unlike Tunisia, where the dissolution of marriage can only be a formal judicial procedure, the proposed SALRC draft bill partly reformed a traditional practice by requiring the husband to register an irrevocable *talaq* immediately and within thirty days after its pronouncement. The pronouncement had to be done in the presence of a mag-

istrate, along with witnesses and the presence of the wife and/or her representatives.

The bill did not make any mention of a revocable *talaq,* since spouses had an opportunity to reconcile among themselves if such a form of repudiation was practised. However, another positive move that the proposed bill did contemplate was the possibility that on or during the course of a marriage, the husband could delegate his power of *talaq* (*tafwid al-talaq*) to his wife or another institution or person, to be exercised according to prior agreements and stipulations the spouses might have reached. In delegating the power of repudiation (*talaq*), the husband renounced the right to unilaterally end the marriage.

The proposed bill also made provisions for women to initiate the dissolution of a marriage by way of judicial dissolution (*faskh*) and by mutual agreement (*khul'*), the latter involving a financial incentive for a husband to agree to the dissolution of the marriage tie. Despite these improvisations, which might offend the sensibilities of conservative Muslim authorities, there was still a chance that the legislator, feminist and women's groups could object that *talaq* was an unfair practice towards Muslim women. However, the matter was a delicate one, a balancing act between radical reform and gradual reform. The use of the *talaq* procedure could be easily minimized if the standard marriage contract had a default option that automatically delegated the power of *talaq* to a court or a Muslim arbitration council. Such a provision could substantially reduce objections to the proposed draft bill, and the constitutional hazards the practice might pose if it was not subject to further revision.

Another advance in the proposed draft bill was the distribution of marital property upon divorce. Classical Islamic law assumed as a default position that spouses maintained separate marital estates and property. In other words, the husband had to financially maintain the wife, and spouses had control over their personal wealth and property. Modern marriages functioning like economic partnerships between spouses make different kinds of assumptions. Spouses jointly contribute to their family wealth through a variety of direct and indirect means. On the dissolution of such marriages, there was a need for the equitable distribution of wealth accrued during the subsistence of the marriage. The proposed SALRC draft bill made provision for the 'just and equitable' distribution of marital assets in the absence of any express agreements. Courts will be able to distribute assets equitably if

a spouse has contributed towards the operation and conduct of a family business or businesses during the subsistence of such a marriage. The courts will also be required to equitably adjudicate on marital assets in which a spouse had actually contributed to an estate during the subsistence of a marriage. This was a major departure from traditional interpretations of MPL, and it also met the constitutional criteria of fairness and justice. In practice, women often received the short end of the stick at the end of Muslim marriages. In many households the major asset, like the family home, was registered in the name of the husband, but in reality an income-earning wife often contributed to expendable household needs. If she indirectly contributed to the payment of the property, often at the end of the marriage she was unable to quantify her share of contributions to the household estate. This proposed draft bill clearly attempted to rectify such a practice.

A wife will also be able to claim maintenance in arrears under the terms of the proposed bill. Courts will be able to make an order for a conciliatory gift, *mut'ah al-talaq*, especially if the husband initiated the termination of a marriage. There are also elaborate provisions made for compulsory mediation prior to the dissolution of the marriage. Parties can either refer disputes to a court, where a Muslim judge will attempt to resolve them, or they could seek the help of an arbitrator.

All in all, the proposed draft bill offers guidelines for MPL that will enable Muslim family laws to pass constitutional muster. In doing so, the SALRC had reached for some of the best interpretations of Islamic law, signaling a departure from the more patriarchal interpretations unofficially in practice among Muslims in South Africa and as regulated by the informal Islamic family law tribunals. If there was one silver lining in this long and arduous process in search of a viable MPL regime, then the proposed SALRC draft bill had clearly shown that Islamic law could be compatible with human rights criteria and constitutional governance. If the proposed draft bill made it into legislation, then the South African experience could also serve as a viable model for other Muslim minorities, especially those living in Europe and North America, should they seek recognition for Muslim family law. There have already been calls for such recognition in Britain, controversial as it might be.

## *The Politics of MPL in SA*

Anxieties with respect to MPL are far from over. A sector of the conservative *'ulama* have rejected the SALRC report and proposed bill despite the fact that some of the major *'ulama* councils have blessed the bill. It seems that a large sector of the *'ulama* have recognized that to have some version of MPL is better than having none. Furthermore, even if they at first resisted reformist and modernist interpretations of MPL, they also recognized that the political and constitutional conditions in South Africa made no other version of MPL a realistic option. Denunciatory charges that *'ulama* bodies once hurled at their progressive Muslim opponents were now directed at the moderate *'ulama* by their ultra-conservative colleagues. Leading the charge against the proposed SALRC draft bill was the Majlisul 'Ulama of South Africa. This group had managed to split the *'ulama* councils affiliated to the Deoband school in South Africa over MPL. The Muslim Judicial Council of the Cape, for instance, favored the proposed SALRC draft bill. The ultra-conservative Majliusl 'Ulama managed to convince sections of the Deoband-aligned *'ulama* councils that the MPL proposals were totally un-Islamic. Using trenchant and condemnatory language, the Majlisul 'Ulama effectively denounced those *'ulama* participating in the MPL process by labeling them demonic.[14] In fact, the Majlisul 'Ulama argued that it was actually preferable not to have any family law legislation recognized by the government. The political dispensation in South Africa in the twenty-first century, the Majlisul 'Ulama argued, allowed Muslims to practise the shari'a in the private sphere without state supervision or secular interference.

All the issues pertaining to Islamic law addressed in the proposed SALRC draft bill, ranging from the regulation of polygyny, the distribution of marital property, to the regulation of repudiation (*talaq*) involved alterations to traditional interpretations of the shari'a. In the view of the Majlisul 'Ulama, this was an anathema and a complete distortion of 'pure shari'a'. The Majlisul 'Ulama ridiculed the *'ulama* groups who supported the proposed SALRC draft bill, saying it was the handiwork of 'evil learned scholars' (*'ulama-i su'*), which amounted to strong jeremiads and heresy-mongering.

The Majlisul 'Ulama's leader, Mawlana Ahmad Sadick Desai, had also managed to convince a younger generation of *'ulama* to join him in opposing the proposed draft bill, with the result that the Councils of Theologians

for the Gauteng and Kwazulu-Natal provinces were split into anti-MPL radicals and pro-MPL moderates.

The dispute among the *'ulama* groups was in part exacerbated by the fact that reformist interpretations of shari'a were introduced by stealth. How? It appears that representatives of the *'ulama* groups who served on the SALRC committee, especially Moulana Abbas Jeenah of the Jamiatul 'Ulama of the Gauteng, and Mr. Shuaib Omar, a lawyer in private practice close to the Jamiatul 'Ulama of Kwazulu Natal, often rhetorically trumpeted claims that the proposed MPL draft bill was going to be shari'a compliant. In doing so, they raised expectations that a very orthodox and conservative version of shari'a doctrine would inform MPL. When the conservative *'ulama* realized that there was considerable dissonance between the rhetoric of their colleagues on the SALRC and the outcome of the proposed MPL draft bill, they raised objections. In order to convince the conservative *'ulama* about the viability of the proposed SALRC draft bill with reformist content, a senior traditional authority figure, Mufti Taqi Usmani, a former shari'a court judge from Pakistan, was invited in order to quell the concerns of the shari'a hardliners. The conservative *'ulama* were not swayed by Mufti Usmani's endorsement of the proposed MPL draft bill following a number of workshops that were convened; in the end, it only helped fuel the divisions among the *'ulama* who were affiliated to Indo-Pakistan networks of the *'ulama* tradition.

For the conservative *'ulama* led by the Majlisul 'Ulama, the pursuit of MPL was now regarded as an irreligious act, since what was proposed as MPL draft legislation was in their view no longer 'pure shari'a' but rather an amalgam of secular laws masquerading as shari'a. The issues that specifically raised their ire were the regulation of male repudiation (*talaq*) powers by means of mandatory court procedures, the division of marital property, and the regulation of polygyny, among other controversial issues.

Similar concerns were expressed, albeit in more nuanced juristic discourse, by US-based Howard University law professor Ziyad Motala. Motala argued that the proposed MPL draft bill amounted to the state prescribing religion and coercing particular forms of religious behavior on its citizens.[15] He also took exception to the fact that the legislature would decide on the content of Islamic law, while the judiciary would have the final word as to what constitutes shari'a. In so doing, MPL legislation would take away the autonomy of Muslim communities to decide on matters of religion, which Motala believed properly belonged in the realm of the private. He also en-

visaged instances where the constitution, the legislature and the judiciary would be in a position to amend or reject aspects of Islamic law stemming from a conflict of laws and values. Motala was totally opposed to the proposed MPL draft bill. What Motala failed to recognize was that the South African constitution enabled and welcomed the possibility of legislating as well as promulgating family laws based on religion. His objections might be more properly directed at the Constitution, which enabled the family law dispensations in the form that he finds objectionable. It is interesting to note that the objections Motala invoked were more compatible to the United States' constitutional order that created a wall of separation between religion and state, which was on occasion breached as in the case of New York where Jewish husbands had to obtain a religious decree of divorce, called a 'get', before the secular court gives a final ruling. In South Africa a democratic and consultative process determined the contours of the constitution and the mode of relationship between religion and state. The objections Motala raised amounted to an anomalous claim that the South African constitution itself was unconstitutional! This would then beg the rhetorical question: by which standards?

While he opposed MPL legislative efforts in South Africa, Motala instead proposed an arbitration process related to family law that would be available to Muslims and regulated exclusively by Muslims.[16] His model for such a system of arbitration was the Jewish tribunal in Ontario, Canada, and the fact that several states in the US accepted the decisions of an arbitrator in matters related to family law. One of the weaknesses of the proposed SALRC draft bill was that it made no provision for transforming the existing informal regulatory tribunals, managed by a variety of *'ulama* organizations adjudicating family law matters in accordance with Islamic law. While women's organizations were at times skeptical of the fairness of the process in such arbitration councils, if arbitration were to be accepted, then the procedures and practices of such bodies could be subject to proper regulation and oversight.

It was not the first time that Muslim stakeholders objected to secular institutions and courts regulating matters of family law inspired by the shari'a. The concerns were raised by the conservative *'ulama,* who balked at the prospect that MPL would be regulated by non-Muslim legislators and judges who they assume will violate the shari'a. Such objectors assume that there is a singular interpretation of the shari'a. The fact that different *'ulama*

groups either support what they view to be a shari‘a-compliant proposed MPL draft bill, or oppose it since it violates the shari‘a, is itself suggestive that the meaning of shari‘a is contested, even among the *‘ulama* themselves. That is notwithstanding the views of Muslim women’s groups and activists, who will differ with the *‘ulama* about the substantive meaning and content of the shari‘a.

In pre-partition India, *‘ulama* who were aligned to the same Deoband seminary network to which many of the conservative *‘ulama* in South Africa belonged, had for decades recognized that MPL in India was far from ideal. They recognized that it was administered by secular authorities, yet they never decreed the MPL legislation to be un-Islamic or unworthy of eliciting compliance. In fact, senior *‘ulama* aligned with the Deoband school in India, like Mawlana Ashraf ‘Ali Thanvi for instance, submitted proposals to reform MPL in India in the first half of the twentieth century. Unlike the conservative South African *‘ulama*, Thanvi did not challenge the legitimacy of MPL in India for use by Muslims.

One major cause for confusion was the fact that a whole range of stakeholders, in order to gain the consent of lay Muslims, unfortunately marketed MPL as their religious code, the shari‘a. The truth is that in the case of MPL, the state selectively facilitated the application of certain elements of the shari‘a, not its totality, as a matter of prudent statecraft. Realist advocates of MPL recognize that a ‘pure’ version of the shari‘a, meaning a doctrinaire construction of it, will often be impossible to implement in a secular nation-state context. Asaf A. Fyzee, a leading Indian lawyer, long ago addressed the conundrum of whether MPL as a version of religion might enhance doctrinal entanglement, where the state adjudicates in matters of religion. Fyzee stated that the application of shari‘a required a political authority that was distinctly Islamic, but the application of family law did not require such type of authority. In Fyzee’s view, enforcing MPL in India during his day or in South Africa later was a move mandated by the constitution and not by the shari‘a. When a secular government enforced MPL, Fyzee argued, it did so as a ‘matter of policy’, not as a matter of religion.[17] This might sound to some like a matter of semantics, but then the entire question of family law in relation to the state was a matter centered around symbolism and reality. In South Africa, the case could well be made that it was the Muslim community in that country who petitioned the constituent assembly to recognize MPL. When the state facilitated practices informed by

religion, then it did so as a matter of public policy; the state did not act as an arbiter of religious practice or by prescribing a specific version of religion. Therefore, as a matter of public policy, a state was within its rights to require that religiously informed practices conform to certain standards of scrutiny and adjudication. It might be hard for opponents of MPL to mount a constitutional challenge and make the case that MPL infringed on religious freedom. Firstly, citizens were free to choose their marital regime and were not coerced to be subject to the mandate of MPL to regulate their family relations. They could opt for civil law marriage and its consequences. Secondly, MPL could not be challenged on grounds of religious freedom, since there was strong international precedent in many Commonwealth countries for its enforcement. While MPL no doubt created a great deal of political strife and legal consternation from time to time, it had yet to be viewed as a violation of religious freedom.

Even in Motala's envisaged MPL arbitration tribunals, managed by Muslim experts, it can hardly be conceivable that judicial and political oversight will be absent. It seems unlikely that the state would relinquish its judicial sovereignty, nor would such arbitration councils be immune to public interest litigation if there were constitutional violations. If the authority of the arbitration councils is to be recognized, courts would invariably adjudicate settlements and pronounce on the content of Islamic law. In other words, any version of MPL, whether in the form of legislation or arbitration within a nation-state context that also had a justiciable constitution, cannot avoid a degree of doctrinal entanglement.

## *Muslim Personal Law in South African Courts*

Preceding the inter-Muslim wrangling over the content and future of MPL, the post-apartheid South African courts made the first interventions in giving relief in family law matters derived from Islamic law.[18] Prior to 1996, Muslim marriages were stigmatized by British colonial courts, a juridical policy that was upheld by successive apartheid-era courts. Muslim marriages were deemed 'repugnant', as were many African customary and Islamic practices by colonial regimes in other parts of Africa. Under apartheid rule the country's courts judged Muslim marriages to be *contra bones mores* of society. The chief reason for repugnancy was that Muslim marriages were po-

tentially polygynous. The two leading case-law precedents were determined in *Seedat's Executors v. Master* (Natal-1917) and *Ismail v. Ismail* (1983).[19] In both these cases, these aforementioned reasons were proffered as grounds for non-recognition of Muslim marriages. Only legislation could authoritatively instruct the courts how to proceed with aspects of Islamic law. Yet as the experience with MPL recounted above showed, it would take some effort, political will and a great deal of time before such legislation was actualized.

The 1996 constitution created an opening for South African courts to entertain aspects of Islamic law. Section 15 of the 1996 constitutional text enshrining freedom of religion, belief and opinion also redressed the practical aspects of religion and culture that were denied by apartheid rule. Paragraph 3 (a) & (b) of Section 15 added:

> (3) (a) This section does not prevent legislation recognizing
> (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
> (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
> (b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.[20]

Some lawyers have interpreted the key phrase 'does not prevent legislation' to mean that the recognition of marriages based on religion, tradition, family and personal law was not a constitutional right per se.[21] This clause served as an advisory, some experts argued, and it only made a recommendation to the legislature that culture, tradition and religion should not be stigmatized for legislative purposes. However, when Section 15 of the constitution is read teleologically and contextually, together with the clauses on 'rights' (Sect. 7), 'equality' (Sect. 9), 'human dignity' (Sect. 10), 'children' (Sect. 28) and 'cultural, religious and linguistic communities' (Sect. 31), then it would be difficult to conclude that the recognition of a family law regime based on religion or custom was not a right. What supported such an affirmative reading was Section 39 (3), which proclaimed that 'the Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.' Whatever the nature of the religious, personal or family law, the constitution had ensured that these must

comply with the general framework of constitutional values in terms of which rights were claimed.

Thus, Section 3 of the constitution framed the legal groundwork in order to challenge the judicial bias against entertaining cases involving Islamic law. So the constitution helped to breach the impregnable barrier established by case law against the recognition of anything remotely related to Muslim marriages.

The facts of *Ryland v. Edros* showed that the parties ended their marriage when Mr. Ryland pronounced the repudiation (*talaq*) formula, and notified his ex-wife through one of the informal Muslim tribunals in the Cape Town area that she was no longer his spouse. In terms of the prevailing informal practice of Islamic law, Mrs. Ryland (nee Edros) was not entitled to any patrimonial benefits, save for maintenance for a mandatory period of three months after the date of repudiation. In order to secure further entitlements, she approached a secular court to claim the following in terms of the Shafiʿi school of Islamic law: maintenance in arrears owed to her by her ex-husband; a conciliatory payment for unjustifiable termination of the marriage; and an equitable share of her contributions to the joint marital estate.

Imaginative lawyering and the ethos of the new constitution made it possible for a favorable judgment in support of Ms. Edros to be issued. Since Muslim marriages were not recognized in South African law, the court was asked to take note of the Muslim marital *contract* and its consequences in terms of which the partners entered into a marriage. Once the court was persuaded that the marriage contract in Muslim law was functionally similar to a contract in Roman-Dutch and common law, the effects of such a contract could be enforced. In rebutting previous judgments, which deemed Muslim marriages to be offensive to public policy, Judge Ian Farlam said:

> Can it be said, since the coming into operation of the new Constitution, that a contract concluded by parties which arises from a marriage relationship entered into by them in accordance with the rites of their religion and which as a fact is monogamous is 'contrary to the accepted customs and usages which are regarded as morally binding upon all members of our society' or is 'fundamentally opposed to our principles and institutions?' ... it is quite inimical to all the values of the new South Africa for one group to impose its values on another ... [A]nd that the courts should only brand a contract as offensive to public policy if it is offensive to those values which are shared by the community at large, by all

> right-thinking people in the community and not only by one section of it. It is clear, in my view, that in the *Ismail* case the views (or presumed views) of only one group in our plural society were taken into account.[22]

In his verdict, Judge Farlam went on to explain that no 'right-thinking person' would say that two Christians married in a church of their choice by a minister who was not a recognized marriage officer in terms of the Marriage Act were acting immorally if they lived as husband and wife. If the parties to such a union were to agree to support each other, then such an agreement could not be rendered unenforceable. By the same analogy, Judge Farlam said, Muslims who agreed to live in terms of an agreement decreed by their religious law can also enforce such an agreement, even though the marriage was invalid in terms of the Marriage Act.

Following his bold reasoning, Judge Farlam awarded Ms. Edros a limited amount of arrears maintenance owed to her, as well as a consolatory gift, as the dissolution of the marriage was at the unjustified behest of the husband. Both claims awarded were in accord with Islamic law. The court did not award her claim to an equitable share of her tangible and intangible contributions to the growth of her husband's estate because the issue was not entirely acceptable among all contemporary Muslim jurists.

*Ryland v. Edros* signaled a judicial change of heart in accommodating the 'other' law within the dominant legal system. Liberalizing and culturally inclusivist tendencies in judicial attitudes impacted legal thinking in favor of Islamic law, but it also affected the Roman-Dutch and common law heritage of South African law in the years after *Ryland v. Edros* was decided.[23]

Two subsequent cases, one heard in the Supreme Court of Appeal and the second heard in the Constitutional Court, both systematically began to undo the discriminatory jurisprudence that dated back to the colonial and the apartheid regimes with respect to Muslim marriages.

*Amod v. Multilateral Motor Vehicle Fund* 1999 was an appeal heard by the full bench of the Supreme Court of Appeals, in which chief justice Ismail Mahomed wrote the judgment. The case involved Mrs. Hafiza Amod, married by Muslim rites to her late husband, who was killed in a motor vehicle accident. A lower court refused her claim for damages suffered from her loss of her late husband's income from the Accidents Fund. The reason given why she was denied the right to claim was that her marriage to her late husband did not enjoy the status of a marriage in the civil law. Therefore, the duty

that the deceased had to support his surviving wife, Mrs. Amod, flowed from a contractual consequence between them, not as a consequence of their marriage per se. Lawyers for the Accidents Fund argued that given that Mrs. Amod was not recognized as the deceased's wife in terms of the law, her action for loss of support was irrelevant. A lower court upheld that viewpoint, based on earlier case law.

On appeal, Mrs. Amod was joined by the Commission for Gender Equality as amicus curiae. In his judgment, Judge Mahomed examined the history of Roman Dutch law and case law in order to develop the common law. The proper test, he argued, was to establish whether a deceased person was under a legal duty to support his dependent during the subsistence of a marriage, and whether that right also applied to his widow. He disagreed, Mahomed stated, with earlier precedent that made the test about the lawfulness or unlawfulness of a customary marriage.

Courts had previously pronounced on the unlawfulness of Muslim marriages on the grounds that they were contrary to the *boni mores* of society. The implication of this standard, said Mahomed, was that only marriages solemnized by one faith, namely Christianity or a philosophy approximating that faith, were acceptable. Refuting this presumption, Mahomed stated: 'This is an untenable basis for the determination of the *boni mores* of society. It is inconsistent with the new ethos of tolerance, pluralism and religious freedom which had consolidated itself in the community even before the formal adoption of the interim Constitution on 22 December 1993. The new ethos had already begun in 1989 with the publication of the report on Group and Human Rights by the South African Law Commission, recommending the repeal of all legislation inconsistent with a negotiated bill of fundamental rights.'[24]

Mahomed further argued that it was not the enforceable contractual duty alone that sustained Mrs. Amod's claim. In his view, she had shown that:

a. the deceased had a legally enforceable duty to support the dependent [Mrs. Amod]
b. it was a duty arising from a solemn marriage in accordance with the tenets of a recognized and accepted faith
c. it was a duty which deserved recognition and protection for the purposes of the dependent's [Mrs. Amod] action.

While Judge Mahomed established the duty to support a dependant, he simultaneously removed any discriminatory grounds whereby the status of a marriage could become an obstacle and serve as a cause for disqualification. In so doing, he scripted marriages solemnized according to Muslim rites as part of the new ethos and good mores of South African society.

In *Daniels v. Campbell* 2004, a Muslim wife was deprived from inheriting from her deceased husband's estate.[25] The Cape High Court reluctantly denied her the right to inherit, since Muslim marriages did not meet the requirement of the meaning 'spouse' in terms of South African law. That discriminatory practice also deprived Ms. Daniels from qualifying to inherit under the Intestate Succession Act 81 of 1987. The matter was referred to the Constitutional Court for deliberation as to whether widows married only according to Muslim rites were denied the protections of the statute under the new constitution.

Writing for the majority, Justice Albie Sachs invoked the legal reasoning in the *Amod* case, but supplemented it by also appealing to the constitutional values of 'equality, tolerance and respect for diversity' all of which in his view pointed to the fact that the word 'spouse' had a broad and inclusive construction.[26] The constitutional goal was also to achieve substantive equality, Sachs argued. Drawing on the new ethos of the new society was central to Sachs' judgment, and he concluded that the word 'spouse' in the legislation could no longer exclude women who were married according to Muslim rites. Justice Dikgang Moseneke grounded his judgment not on an interpretation of the word spouse, but rather appealed to the constitutional value of equality. Not only did the non-recognition of Muslim marriages advance 'unfairness' towards Muslim women, argued Judge Moseneke, but he added: 'It has created real disadvantage and violated dignity and freedom. Its impact on the applicant and on other surviving spouses in her position is most adverse and demeaning. It treats her as undeserving of the legal recognition enjoyed by other religious and civil marriages. The Acts withhold from Muslim widows economic protection they extend to socially vulnerable widows of Christian, Jewish and secular civil marriages and, recently, customary unions.'[27]

## *Lessons from Elsewhere*

MPL in its various manifestations can provide volatile shocks to the political systems of nation-states, as evidenced in recorded experiences from India to Mauritius. Even though the state facilitates a select number of religious practices as a matter of public policy, not as matter of religion, to meet the needs of its religiously conscientious citizens, the results are often different. Often faith communities view MPL to be the equivalent of a religious practice and do not tolerate any alteration or amendment to the law irrespective of the validity of such change. In post-independence India, the famous case of Shah Bano in 1985 demonstrated the agonies of judicial reform attached to MPL. A 60-year-old plaintiff, Mrs. Shah Bano Begum, demanded maintenance from her husband, Mr. Muhammad Ahmad Khan, in excess of the statutory three-month period that traditional Muslim law allowed. Her special circumstances required additional maintenance, and her case was in the final instance referred to the Indian Supreme Court, consisting of Justice Y.V. Chandrachud, Justice Murtaza Fazal Ali and Justice A. Vardarajan. The court in its decision did two things: firstly, it invoked the objectives of the Indian constitution and the desirability of having a uniform civil code; secondly, it invoked the spirit of Islamic law, and in so doing argued that Mrs. Shah Bano was entitled to extended maintenance from her ex-spouse. This decision outraged Indian Muslims, resulting in widespread riots, death and mayhem, and forced the Rajiv Gandhi government to pass legal amendments to isolate the provisions of MPL from the intrusive effects of other statutes, such as the one by which Shah Bano and her lawyers succeeded.[28] The lesson from this episode was that, rightly or wrongly, many Indian Muslims believed that such judicial activism was tantamount to the abrogation of their religious-based personal laws.[29]

The Indian experience holds valuable lessons for South Africa. The South African Muslim minority has a strong pan-Islamist sentiment. They are also readily influenced by experiences in other parts of the Muslim world. Throughout much of the limited public debate on MPL, it became evident that *shari'a* law plays an important role in South African Muslim communal life. Personal law matters were mainly in the non-state domain and supervised by the *'ulama'* organizations.

Recognition of MPL has several implications for Muslims. For the first time, their legal values and norms would be subject to public and judicial

scrutiny. Codification and its accompanying problems, as well as the training and preparation of personnel to implement the law, could pose problems in the short term. Notwithstanding their intense desire to have Muslim law recognized by the state system, it remains unclear whether the Muslim leadership has contemplated the fact that they would have to forego the control they had over their legal 'subjects' when MPL would become a reality.

As religious communities negotiate their identities and ideologies in changing circumstances, it is inevitable that paradigm shifts would also occur. Law, especially family law, has been the site of intense conflict in various parts of the Muslim world, and the focal point of measuring community traditions undergoing change.

## *Conclusion*

The future of MPL in South Africa still remains undecided, despite a great deal of progress, and it would be hazardous to predict its outcome. It will depend on the will of the government and whether it will enable a minority group to maintain its nomos: the normative universe in which law and cultural narrative are inseparably related, of which MPL is a prime exemplar.[30] At another level it will also depend on whether those groups who most oppose the proposed draft bill can be appeased by adding arbitration councils for those who prefer such an option, while also giving citizens an option to access MPL. Another variable is the extent to which the human rights community can move the constitutional court to instruct the government to fulfill its constitutional obligations to provide for MPL. It will remain to be seen to what extent the courts will continue to provide relief in the realm of Islamic law in the absence of laws devised by parliament. Courts might well reach a point after which they could say that beyond redressing discrimination, it would be the duty of the legislature to provide guidance. The future of MPL in South Africa might still have some surprises in store for observers.

*Notes*

1 See Ebrahim Moosa (1996), 'Prospects for Muslim Law in South Africa: A History and Recent Developments,' in *Yearbook of Islamic and Middle Eastern Law*, eds. Eugene Cotran and Chibli Mallat (London), 130-155; also see Abdulkader Tayob (2005), 'The Demand for Shari'ah in African Democratisation Processes: Pitfalls or Opportunities?', in *Comparative Perspectives on Shari'ah in Nigeria*, eds. Philip Ostien, Jamila M. Nasir, and Franz Kogelmann (Abuja, Benin City, Lagos & Owerri), 27-73. Abdulkader Tayob ed. (2004), 'Race, Ideology, and Islam in Contemporary South Africa', in *Islam in World Cultures: Comparative Perspectives*, ed. R. Michael Feener (Santa Barbara & Denver: ABC Clio).

2 South African Law Commission (SALC), 'Islamic Marriages and Related Matters', Project 59 (Questionnaire), (i).

3 The Cape-based, Muslim Judicial Council, in its founding statement issued in 1945, included among other goals to have Muslim personal law recognized by the state. Also see Gert Johannes Alwyn Lubbe (1989), *The Muslim Judicial Council – a Descriptive and Analytic Investigation* (Pretoria: University of South Africa).
In 1975 the Director of the Cape Town-based Institute of Islamic Shari'a Studies, Shaykh Abdulkarim Toffar, made representations to then Prime Minister B. J. Vorster, urging the government to 'recognize' aspects of Islamic law relating to marriage, divorce, succession and custody. The response of the SALC at the time was it was 'unwilling to include the investigation in its program, firstly, because it was of the opinion that the recognition of the relevant aspects of Islamic law could lead to confusion in South African law and, secondly, because the existing rules of South African law do not prohibit a Muslim from living in accordance with the relevant directions of Islamic law'. SALC, Project 59: ii.

4 The inquiry included 1. an investigation into the position of illegitimate children [Project 38]; 2. marriages and customary unions of Black persons [Project 51]; 3. a review of the law of evidence [Project 6]; and 4. the law of intestate succession [Project 22], SALC, op. cit. The SALC also mentioned that among the motivating factors was a private Bill proposed in 1987 by Mr. Pat T. Poovalingam MP (Indian-House of Delegates) to grant recognition to the Islamic law of succession.

5 Other independent efforts by some Muslim academics and lawyers also supported the introduction of MPL in the 1980s. Here I have in mind Professor S. Habibul Haq Nadvi's proposal published as a working paper titled: 'Problem of Safeguarding Muslim Personal Law in South Africa'; S. Habibul Haq Nadvi (1990), 'Towards the Recognition of Islamic Personal Law', in *The Internal Conflict of Laws in South Africa*, ed. A.J.G.M. Sanders (Durban), 13-24. Advocate A.B. Mohamed's research, Human Science Research Council Section for Political Science Research, 'Research Project – Muslim Law', Ref. No 3/10/121, 1984; also see the editorial of the *Journal for Islamic Studies*, 8, 1988, Centre for Islamic Studies, Rand Afrikaans University, which took unkindly to criticism directed at the Centre by Muslims critical of its conference on personal law.

6 'Announcement: Muslim Personal Law', title of an undated pamphlet issued by the Secretary, Central Committee, *'ulama'* of South Africa, stated: 'Muslims have been yearning for the introduction of Islamic Law in some form or another to govern their affairs ... under the leadership of the *'ulama'* of this country, representing and speaking for the overwhelming majority of Muslims, [who] should on this issue present a united front by replying with an unanimously agreed voice [to the SALC]'.

7 An indication of government awareness of Muslim resistance is well encapsulated in this quotation of then President P.W. Botha, who addressed parliament after a group of insurgents consisting of several Muslims were arrested in their attempt to enter the country from Botswana: 'As you are aware we have a large Muslim community who, like all other religious denominations, enjoy complete freedom of religion. Furthermore, you also know that South African Muslims are respected citizens. However, a small group has emerged within this community who, under the influences of Libya, Iran and with funding from these quarters, have committed themselves, with the ANC (African National Congress) and PAC (Pan-Africanist Congress), to terror and violence ... I have already issued instructions in this regard and our security and intelligence services are taking necessary countermeasures.' (Republic of South Africa, *Debates of the House of Assembly*, Hansard, Third Session – Eighth Parliament, 14-18 April, 3590)

8 The nouveaux *'ulama* are South Africans who were trained in traditional Muslim seminaries abroad. They differ from their general '*ulama* counterparts in so far as their juristic-theology is also informed by the social sciences, and they critically engage with the tradition.

9 See Ebrahim Moosa (1979), 'Muslim Conservatism in South Africa', *Journal of Theology for Southern Africa* 69: 73-81.

10 The committee consisted of the Honorable Mr. Justice M.S. Navsa, Sheikh/Advocate M.F. Gamieldien, Moulana A.A, Jeena, Mrs. F. Mahomed (MP), Professor N. Moosa, Dr R.A.M. Salojee, Mrs. Z. Seedat, and Mr. M.S. Omar.

11 Rashida Manjoo (2007), 'The Recognition of Muslim Personal Laws in South Africa: Implications for Women's Human Rights', in *Human Rights Program at Harvard Law School Working Paper* (Cambridge), 4.

12 'South African Law Reform Commission, Project 59, Islamic Marriages and Related Matters Report' (Pretoria, 2003), 113-114.

13 Ibid., 120.

14 Mujlisul (nd) '*Ulama* of South Africa, 'Muslim Personal Law: An Attempt to Introduce a New Shariah'. www.inkofscholars.com/print.php?file=article.php&id=192.

15 Ziyad Motala (2004), 'The Draft Bill on the Recognition of Muslim Marriages: An Unwise Improvident and Questionable Constitutional Exercise', *The Comparative and International Law Journal of Southern Africa* 37, 332.

16 Ziyad Motala (2004), 'Recognition of Arbitration and Mediation as an Alternative Paradigm for the Recognition of Faith Based Personal Law' (Washington DC).
17 Asaf A.A. Fyzee (1971), *The Reform of Muslim Personal Law in India* (Bombay).
18 Ashraf Mahomed'-Ryland v. Edros [1996] 4 All SA 557 (C', *De Rebus* (March 1997).
19 *The South African Law Reports* (1917), Appellate Division (ed.) A.F. Russell (Johannesburg: Digma Publishers, 1973), 302-316; Ismail v. Ismail, 1983, 1 SA 1006 A; also see Kalla and Another v. The Master and Others, *The South African Law Reports* (1995) 1 January (Cape Town; Juta, 1995), 261-271.
20 Constitution of the Republic of South Africa 1996, as adopted by the Constitutional Assembly on 8 May 1996 and as amended on 11 October 1996.
21 Lourens du Plessis, 'A Christian Assessment of Aspects of the Bill of Rights in South Africa's Final Constitution', *Journal of Theology for Southern Africa, (*November 1996): 69.
22 1997 (2) SA 690 (C) at 707 E-H.
23 See David Pearl (1985-86), 'Cross-Cultural Interaction between Islamic Law and Other Legal Systems: Islamic Family Law and Anglo-American Public Policy', *Cleveland State Law Review* 34: 113-27; Carlos Esplugues (1984) 'Legal Recognition of Polygamous Marriages', *Comparative and International Law Journal of Southern Africa* 17: 302-21.
24 'Amod v. Multilateral Motor Vehicle Accidents Fund' (1999).
25 'Daniels v. Campbell NO and Others' (2004).
26 Ibid.
27 Ibid.
28 'The Muslim Women (Protection of Rights on Divorce ) Act, 1986', *Islamic & Comparative Law Quarterly* 6 (1986): 96-100. Also see Janak Raj Jai (1986), *Shah Bano* (New Delhi); Gregory C. Kozlowski (1990), 'Shah Banu's Case, Britain's Legacy and Muslim Politics in Modern India', in *Boeings and Bullock-Carts: Law, Politics and Society in India,* eds. Yogendra Malik and Dhirendra Vajpeyi (Delhi).; A.R. Momin (1986), 'Conflict of Law and Religion in Contemporary India', *Social Compass* xxxii, 2-3: 223-237; Arun Shourie (1986), 'The Shariat', *Illustrated Weekly of India*, 12 Jan. & 19 Jan.; also see Rafiq Zakaria's rejoinder in the same publication of 9 March 1986.
29 Abdullah Ahsan (1985), 'A Late Nineteenth Century Muslim Response to the Western Criticism of Islam – an Analysis of Amir 'Ali's Life and Works', *American Journal of Islamic Social Sciences* 2. See in particular the view of Moulana Said Akbarabadi, 174-178; also Momin, 'Conflict of Law and Religion in Contemporary India', 228.
30 Ayelet Shachar (2001), *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge; New York), 2.

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