

**Reforming and Retreating: British Policies on Transforming the Administration of  
Islamic Law and its Institutions in the Busa‘idi Sultanate 1890-1963**

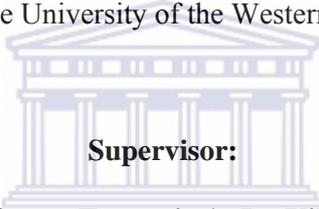
By

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LL.B. in Sharia & Law (Omdurman)

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**DECLARATION**

I declare that **Reforming and Retreating: British Policies on Transforming the Administration of Islamic Law and its Institutions in the Busa'idi Sultanate 1890-1963** is my work and that it has not been submitted for any degree or examination in any other university. All the sources I have used or quoted have been duly acknowledged.

ABDULKADIR HASHIM



23 November 2010

A handwritten signature in blue ink, appearing to read "A. Hashim".

SIGNED.....

**KEY WORDS**

British

Busa‘idi

Colonial

Court

Islamic Law

Kenya

Legal history

Legislation

Slavery

Sultan

Wakf

Zanzibar



**ABBREVIATIONS**

A.C.	Appeal Cases
A.I.R.	All India Reports
Bom.	Bombay High Court Cases
C.M.S.	Christian Missionary Society
Cal.	Calcutta Law Reports
E.A.C.A.	East Africa Court of Appeal cases
E.A.L.R.	East African Law Reports
IBEA.	Imperial British East Africa Company
K.L.R.	Kenya Law Review
KNA.	Kenya National Archives
MPL.	Muslim Personal Law
Sh.	Sheikh/shaykh
Z.L.R.	Zanzibar Law Reports
ZNA.	Zanzibar National Archives

## NOTES ON TRANSLITERATION OF ARABIC AND SWAHILI NAMES AND WORDS

The main sources for this thesis are based on archival materials obtained mainly from the Zanzibar National Archives and Kenya National Archives. I have, therefore, confined myself to using the spelling of proper names as they appeared in the archival sources and omitted diacritical marks as that would reflect the proper pronunciation of the Arabic names. For instance, I have constantly used the word *kadhi* as opposed to the proper Arabic term *qadi* which refers to a Muslim judge. I have also used the words *hanafi*, *shafi'i*, *maliki*, *hanbali* and *ibadhi* referring to the four major schools of Islamic jurisprudence without following proper Arabic diacritics as they appeared in the archival documents. This also applies to names of persons and texts mentioned by English officers. Due to its peculiarity in Arabic pronunciation, I have transcribed the Arabic word 'ayn as /'/. Throughout the thesis I have used abbreviations, such as, Sh. to refer to *shaykh* (learned person) and *bi.* and *bt.* to refer to son and daughter respectively. Years are mentioned in the text according to the Gregorian calendar unless otherwise written with a corresponding *hijri* (Islamic calendar) year.

## GLOSSARY OF ARABIC AND SWAHILI WORDS

<i>al-rad</i>	residue of the inherited estate that is returned to those sharers who are entitled to it, in proportion to their original shares
<i>amir</i>	head of a Muslim group
<i>bait al-Mal</i>	public treasury
<i>Busa‘idi</i>	also spelt <i>El-Busaidy</i> , referring to the Omani ruling family of Seyyid Sa‘id bin Sultan
<i>bulugh</i>	age of puberty
<i>dar al-Islam</i>	Muslim territory
<i>dar al-harb</i>	the territory of war
<i>darsa</i>	lesson
<i>dhikri</i>	religious/mystical sessions
<i>dinar</i>	currency used in Muslim states
<i>dirham</i>	currency used in Muslim states
<i>diya</i>	price of blood money
<i>fatwa</i>	verdict
<i>haylulah</i>	judicial separation
<i>hukm</i>	judgement
<i>ijaza</i>	certificate
<i>ijtihad</i>	legal reasoning
<i>imam</i>	religious leader
<i>kadhi</i> (Arabic: <i>qadi</i> )	Muslim judge
<i>kaffara</i>	expiation

<i>khalifa</i>	Muslim ruler/ head of Muslim State
<i>khalwa</i>	seclusion
<i>kitabiyya</i>	a woman from the people of the book
<i>madhhab</i>	school of thought
<i>madrasa</i>	Muslim traditional school
<i>mimbar</i>	pulpit
<i>mirathi</i>	inheritance
<i>mufti</i>	Muslim jurisconsult
<i>mutawalli</i>	trustee
<i>mutawwi'un</i>	revivalist movement established in Omani
<i>nikahi</i>	marriage
<i>qadha</i>	judiciary / judging
<i>qaid al-Ardh</i>	literally leader of the ground; title given to the Omani ruler <i>Imam</i> Sayf b. Sultan al-Ya'rubī
<i>rais al-Awqaf</i>	head of endowments
<i>shaykh</i>	learned person
<i>shuf'a</i>	pre-emption
<i>sufi</i>	mystic
<i>suria</i> (pl. <i>surias</i> )	concubine
<i>tafwidh</i>	delegation of power
<i>tariqa</i>	mystic brotherhood
<i>'ulama</i>	Muslim religious scholars
<i>umm al-walad</i>	mother of the child
<i>wakf</i>	endowment

<i>wakf ahli (wakf‘ala al-awlad)</i>	private endowment
<i>wakf khayri</i>	public endowment
<i>wakil</i>	representative; in Zanzibar used for Muslim advocate
<i>wala</i>	patronage
<i>wali</i>	governor; also refers to a guardian
<i>wazir</i>	minister
<i>wazir al-wakf</i>	minister of <i>wakf</i>
<i>yamin</i>	oath
<i>yamin al-istidhhar</i>	oath of satisfaction or precautionary oath
<i>zakat</i>	almsgiving

## SWAHILI

<i>ada</i>	custom
<i>akida</i>	village head
<i>baraza</i>	open yard
<i>heshima</i>	respect
<i>kofia</i>	hat
<i>liwali</i>	corrupted Arabic word <i>al-Wali</i> meaning governor; in the Busai‘di Sultanate used for regional governor
<i>majengo</i>	literally buildings; in Swahili areas used for informal settlements
<i>mudir</i>	Arabic word which literally means director; in Zanzibar used for assistant governor



<i>mwambao</i>	coastal strip; referred to the movement which campaigned for the autonomy of the ten mile coastal strip
<i>mzee wa mji</i>	village elder
<i>shamba</i>	farm
<i>sheha</i>	village elder
<i>wazee</i>	village/town elders ( <i>sing. mzee</i> )



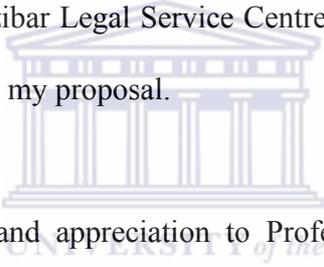
## ACKNOWLEDGEMENTS

The idea of writing the thesis developed when I designed a course under the title 'Islamic Legal System in East Africa', when I was teaching in the Faculty of Law and Sharia at Zanzibar University. I found that there was no detailed research done on the administration of Islamic law in Zanzibar and coastal Kenya. It was out of this curiosity that I embarked on writing this thesis which will, hopefully, pave the way for further research on specific areas of the administration of Islamic law in the East African coast. The completion of this thesis would not have been possible without the support and assistance of many persons and institutions. First and foremost, I thank my main supervisor, Professor Francois de Villiers, for his constant support and assistance during the period of writing this thesis. I am grateful to Professor Najma Moosa who accepted to be a co-supervisor and offered her expertise in Muslim Personal Law matters. I am also greatly indebted to Professor Israel Leeman for his technical assistance on the structure of the thesis which improved my drafts. My thanks are also directed to Ms. Denise Snyders and Ms. Maryna Talliard of the University of the Western Cape for their assistance during the period of my research registration.

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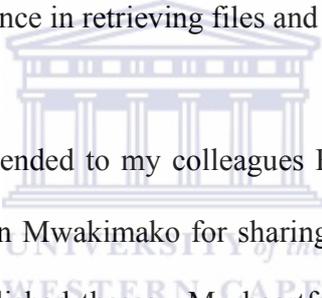
I also thank Frode Lovlie of the Computer Department at Bergen University for his assistance in taking care of my computer needs and internet access. My sincere gratitude goes to Professor Abdul Sheriff who attended to my research questions and provided me with his unpublished articles during our meeting in Bergen. My thanks are also extended to Professor Roman Loimeier who gave me permission to use the draft copy of his research on Islamic education in Zanzibar. I also thank Professor Abdulkader Tayob (University of Cape Town), Professor Abdalla Bujra (Development Policy Management Forum), and Professor Haroub Othman (Zanzibar Legal Service Centre), for their constructive criticism during the initial stage of writing my proposal.



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Last, but not least, I thank my wife for her immense patience with my absencing myself from various family engagements during my research period and my children who always bothered me with the question: Dad when are you going to become a doctor?

## DEDICATION

To my *madrassa* and school teachers who served as a source of inspiration in my academic career and to my Dad in loving memory of my Mum.



## ABSTRACT

After the establishment of the British Protectorate in the Busa'idi Sultanate in 1890, the British colonial administration embarked on a policy of transforming the administration of Islamic law and its institutions which included the *kadhi*, *liwali* and *mudir* courts. The ultimate objective of the transformation process was to incorporate such institutions into the colonial enterprise and gradually reform them. Within a span of seven decades of their colonial rule in the Busa'idi Sultanate, the British colonial authorities managed to transform the administration of Islamic law and its institutions. Key areas of the transformation process included the formalisation of the administration of Islamic law in which procedural laws related to MPL and *wakf* regulations were codified. *Kadhi* courts and *wakf* commissions were institutionalised and incorporated into the colonial apparatus. In the process of transforming the *kadhi* courts, the British colonial authorities adopted three major policies: institutional transformation, procedural transformation, and exclusion of criminal jurisdiction from *kadhi* courts. The focus of the transformation process was on the curtailment of *kadhis* powers. By 1916 criminal jurisdiction was removed from *kadhis* and their civil jurisdiction was gradually confined to MPL. Other significant areas of the transformation process were the *wakf* institutions and slavery. *Wakf* institutions were related to land issues which were crucial to the colonial politics and the abolition of slavery in the Busa'idi Sultanate was a primary concern of the British colonial administration. Through policies of compromise and coercion, the British colonial officials managed to gradually abolish slavery without causing political or social upheavals in the Sultanate. Due to the fact that there was no uniform policy on the transformation exercise undertaken by the British colonial officials on the ground, the reform process was marked with transformative contradictions which seemed to be a hallmark of British colonial policy in the Busa'idi Sultanate. For instance, British colonial policies on transforming *wakf* institutions were caught in a contradiction in that, on the one hand, colonial efforts were geared towards transforming the land system in order to achieve economic development, and on the other hand, the British colonial officials were keen to uphold a paternalistic approach of adopting a non-interference policy in respect of religious institutions. Similarly, in abolishing slavery, the British colonial government, on the one hand, was under pressure from philanthropists and missionaries to end slavery, and, on the other hand, the British colonial officials on the ground portrayed their support of the slave owners and advocated a gradual approach to abolish slavery. Findings of this thesis reveal that the British colonial administration managed to achieve complete reform in some cases, such as, the abolition of *liwali* and *mudir* courts and confining *kadhis*' civil jurisdiction to MPL, while in other areas, such as, the management of *wakf* institutions and the abolition of slavery, the British faced resistance from the Sultans and their subjects which resulted in partial reforms. Hence, in the process of transforming the administration of Islamic law and its institutions in the Busa'idi Sultanate, the British colonial administration adopted a dual policy of reforming and retreating.

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**PART ONE:****Chapter 1: Introduction and background of the study**

Earlier research on Islamic law on the East African coast conducted in the mid-20<sup>th</sup> century was descriptive in nature and focused on reforms undertaken by British colonial authorities across the African continent. The wave of reforming legislation of MPL was apparent in the early 1960s when the British embarked on a process of reforming Islamic law from North and West Africa to East Africa. Anderson's *Islamic Law in Africa* gave an overview of reforms undertaken by the British across the African continent.<sup>1</sup> Schacht's work on Islam in East Africa cursorily touched on the application of Islamic law in the region.<sup>2</sup> Recent research undertaken by historians and anthropologists working on Islam and Muslims along the East African coast focused on the functioning of *kadhi* courts in relation to the fight for social and economic rights. For instance, works of Hirsch attempted to look at aspects of gender and dispute resolution in *kadhi* courts and how Muslim women in the post-colonial Kenya coast used the courts to secure their rights.<sup>3</sup> Stiles provided a detailed study of *kadhi* courts functioning in a rural village (Mkokotoni) in northern Zanzibar.<sup>4</sup> Stiles demonstrated how *kadhis* and disputants utilised legal norms and customs, such as,

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<sup>1</sup> Anderson, J.N.D (1970) *Islamic Law in Africa* London: Frank Cass & Co. Ltd.

<sup>2</sup> Schacht, J. "Notes on Islam in East Africa" (1965) 23 *Studia Islamica* 91.

<sup>3</sup> Hirsch, S. F (1998) *Pronouncing and Persevering: Gender and the Discourses of Disputing in an African Islamic Court* Chicago: University of Chicago Press.

<sup>4</sup> Stiles, E. E (2002) "A Kadhi and His Court: Marriage and Zanzibaris Islamic Legal Tradition (Tanzania)" (Unpublished PhD Thesis submitted to Washington University).

religious laws (*sheria za dini*), customs (*sheria za mila*), and secular laws (*sheria za kanuni*), in the litigation process to achieve marital rights. Stockreiter studied the functioning of *kadhis* courts in Zanzibar Town (1900-1963) and argued that women used the courts in negotiating for their social status in colonial Zanzibar.<sup>5</sup>

Although the above research works are informative in their respective disciplines, little attention has been given to the study of British colonial policies on the administration of Islamic law and its institutions in the Busa'idi Sultanate. Lack of detailed research on how the British colonial authorities handled and administered Islamic law in the Busa'idi Sultanate has created a gap in the study of colonial attitudes to Islamic law. A main contribution of this thesis is to attempt to fill the existing gap by demonstrating the policies adopted by the British colonial authorities in the administration of Islamic law in the Busa'idi Sultanate and the extent to which such policies transformed Islamic law and institutions related to it. The research will, by extension, draw comparisons from other British colonies and Protectorates, such as, India, Nigeria, Sudan and Malaysia, in order to give an overview of British colonial attitudes towards the administration of Islamic law. This thesis focuses on policies adopted by the British colonial administration towards

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<sup>5</sup> Stockreiter, E. E (2007) "Tying and Untying the Knot: Kadhi's Courts and the Negotiation of Social Status in Zanzibar Town, 1900-1963" (Unpublished PhD Dissertation submitted to the School of Oriental and African Studies, University of London).

transformation of the administration of Islamic law and its institutions in the Busa‘idi Sultanate in Zanzibar and the Kenya coastal strip.<sup>6</sup>

## 1.1 Objectives of the study

This thesis seeks:

- a. To investigate the policies adopted by the British colonial administration towards transforming the administration of Islamic law and its institutions in the Busa‘idi Sultanate.
- b. To demonstrate how the British colonial authorities adopted gradual policies on accommodation of *kadhīs* with the aim of transforming their training and modes of operation.
- d. To determine the British colonial policies on bureaucratising the functioning of *kadhi* courts and excluding criminal jurisdictions from *kadhi* courts.
- e. To demonstrate the British colonial policies on transforming *wakf* institutions and the abolition of slavery in the Busa‘idi Sultanate and show resistance of the Sultans and their subjects on the transformation process.

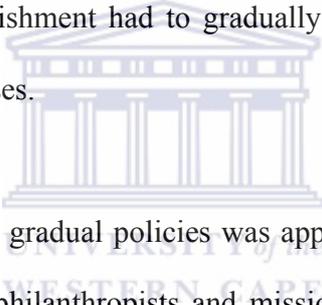
## 1.2 Background of the study

The British declared protection over Zanzibar on 1 November 1890 and later a British protectorate was declared over the Kenya coastal strip on 15 June 1895. These two Protectorates will be the major focus of this thesis, although in some cases reference will be

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<sup>6</sup> The ten mile coastal strip in Kenya extended from the Uмба River in the south (Tanganyika) to the Tana River in the north and included the islands of Mombasa and Lamu and the town of Kipini. See Appendix 1 which illustrates the map of the East African coast showing the main towns and rivers.

made to the British Colony in Kenya which covered areas beyond the Kenya coastal strip. The main argument of this thesis is that after the declaration of British protection over the Busa'idi Sultanate in 1890 and later the Kenya coastal strip in 1895, the British colonial legal officials embarked on a process of transforming Islamic law institutions which included *kadhi*, *liwali* and *mudir* courts. The reform process was guided by political as well as economic considerations which informed the transformation process in the various spheres of influence. British policies on the administration of Islamic law in colonial Zanzibar should be understood within the context of promoting British Imperial interests which informed policy making in the colonial establishment. Based on exigencies of the time, the British colonial establishment had to gradually adopt policies in order to avert political as well as economic crises.



The implementation of Britain's gradual policies was apparent in the abolition of slavery. Despite pressures from British philanthropists and missionaries, British colonial officials implemented a gradual policy from 1897 until the final abolition of slavery in 1907. The transformation process initiated by British colonial authorities was received by the Sultans and their subjects alike with mixed responses. In some cases the British managed to achieve complete reforms, such as, curtailment of *kadhis'* jurisdiction in criminal matters, while in other areas such as MPL, the British faced substantial resistance from *kadhis* which resulted in only partial reforms. Hence, in the process of transforming Islamic law institutions in the Busa'idi Sultanate, the British colonial administration adopted a dual policy of reforming and retreating. On the one hand, the British implemented a reform process in cases where there was not much resistance from the Sultans and their subjects;

on the other hand, the British colonial administration retreated from the reform process in areas where the colonised objected.

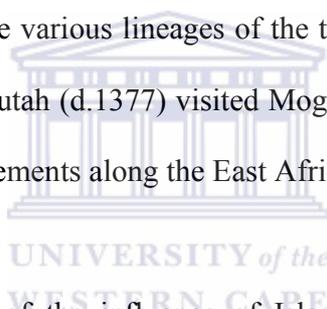
### 1.3 Islamic influence along the East African coast since the 8<sup>th</sup> century

Islam found its way to the East African coast through the Indian Ocean before the coming of the European powers. This chapter seeks to highlight the historical factors which influenced the spread of Islam and, by extension, Islamic law along the East African coast. The history of Islamic influence along the East African coast is documented by two major sources: archaeological excavations and the writings of Muslim geographers and historians who visited parts of the region in the 10<sup>th</sup> century. The first historical source was based on archaeological excavations at Shanga near Lamu from which Horton suggested the presence of a Muslim community who lived at Shanga from as early as 760.<sup>7</sup>

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<sup>7</sup> Horton, M (1996) "Shanga: The Archaeology of a Muslim Trading Community on the Coast of East Africa" *Memoirs of the British Institute in Eastern Africa*: (No.14.) London: The British Institute in Eastern Africa 1. Further archaeological evidence related to the early presence of Muslims along the East African coast was provided by Chittick, N. based on the excavation of a gold *dinar* dated 798 and found at Unguja Ukuu in Zanzibar. The coin had a name on it of Sayf Ullah Jaafar ibn Yahya of the great Barmakid family and *wazir* of Harun ar-Rashid. Chittick, N "The 'Shirazi' Colonization of East Africa" (1965) 4 *Journal of African History* 283. Horton mentioned that he found inscriptions on Friday mosques of Shanga (in 1000), Barawa (in 1105) and Kizimkazi in Zanzibar (in 1107). Horton, *ibid*, 419. Written scripts at the Kizimkazi mosque show that the mosque was built by the order of one Sh. al-Sai'd Abu 'Amran Musa b. al-Hassan Muhammad in the year 500. Other archaeological evidence of the presence of a Muslim community along the Kenya coast since the 14<sup>th</sup> century is the Gedi ruins near Malindi Town. The original town covered an area of about 45 acres with a great mosque and a palace. Kirkman, J. (1975) *Gedi Mombasa*: Rodwell Press 3.

Al-Masudi (d.945) was among the earliest Muslim geographers to mention the East African coast in his book *Muruj al-Dhahab wa Ma'adin al-Jawhar*. In 916 al-Masudi visited Qanbalu which, according to Horton, was most likely to be Ras Mkumbuu in Pemba.<sup>8</sup> Al-Masudi mentioned that in the 10<sup>th</sup> century the island of Qanbalu had a mixed population of Muslims and Zenj pagans and that the ruling family was Muslim.<sup>9</sup> The twelfth century Muslim geographer al-Idirisi (d.1066) mentioned in his work *Nuzhat al-Mushtaq fi Ikhtiraq al-Afaq* that the Zanzibar people were mostly Muslims.<sup>10</sup> Muslim historian Yaqut al-Hamawi mentioned in his work *Kitab Mu'jam al-Buldan* that around 1228 Mogadishu along the Somali coast was inhabited by Muslims who ruled through a representative council of elders drawn from the various lineages of the town.<sup>11</sup> Later in the 14<sup>th</sup> century, Muhammad b. Abdalla Ibn Battutah (d.1377) visited Mogadishu, Mombasa and Kilwa and gave an account of Muslim settlements along the East African coast.<sup>12</sup>



The above historical accounts of the influence of Islam along the East African coast demonstrate the presence of Muslim settlements in the region which called for the existence

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<sup>8</sup> Horton, 1996, 412.

<sup>9</sup> Chittick, N “The Coast before the Arrival of the Portuguese”, in Ogot, A. (ed.) (1974) *Zamani: A Survey of East African History* Nairobi: East African Publishing House 105.

<sup>10</sup> Green, E. L (1985) “Great Britain and Zanzibar 1884-1911: An Examination of British Policy with Particular Reference to Relations between the Foreign Office and Sultan Seyyid Ali b. Hamoud (1902-1991)” (Unpublished PhD Thesis submitted to the Faculty of History, University of South Africa) 19.

<sup>11</sup> Reese, S. S (1996) “Patricians of the Benadir: Islamic Learning, Commerce and Somali Urban Identity in the Nineteenth Century” (Unpublished PhD Thesis submitted to the University of Pennsylvania) 33.

<sup>12</sup> Ibn Battutah, M. A (1967) *Tuhfat al Nadhar fi Gharaib al-Amsar wa al-Asfar*, Cairo: Matba al-Istiqama. For details of Ibn Battutah’s account of *kadhis* see chapter 4 below.

of dispute resolution mechanisms based on Islamic tenets. Based on these inferences, it can, therefore, be argued that Islamic law was administered along the East African coast during the pre-colonial period. There is limited information on the early influence and application of Islam law along the East African coast in the period preceding the establishment of the British Protectorate in Zanzibar.<sup>13</sup> Ibn Battutah gave a brief account of *kadhi* courts in Mogadishu, as will be noted in chapter 4 below. However, there is a need for more detailed research to demonstrate the application of Islamic law prior to the Busa'idi period (1832-1890).

The influence of Islam along the East African coast can be attributed to two major factors: members of Muslim dynasties who fled their regions due to religious persecutions and individual Muslim traders who travelled between the East African coast and the Arabian Peninsula. The first major factor that influenced the presence and penetration of Islam along the East African coast is attributed to the establishment of Muslim dynasties in the region. The earliest trace of Muslim rulers along the East African coast is attributed to Hamza Abdulmalik, a son of the Umayyad Khalif of Baghdad, who settled at Kiwayu (Kismayu along the Benadir coast of Somalia) in 680. Later two princes fled from Oman after a long and bitter struggle with Hajjaj Ibn Yusuf, the Governor of Iraq and settled

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<sup>13</sup> Generally, there is information on the application of Islamic law in Oman and one can assume that the *ibadhi* law in Oman was applicable in the Busa'idi Sultanate in Zanzibar. This was partly due to the fact that Sultan Seyyid b. Said came with *ibadhi* kadhis from Oman. On the influence of *ibadhi kadhis* in Zanzibar see Ghazal, A. N (2005) "Islam and Arabism in Zanzibar : the Omani elite, the Arab world and the making of an identity, 1880s-1930s" (Unpublished PhD Dissertation submitted to the University of Alberta).

along the East African coast in 689.<sup>14</sup> Another wave of Muslim rulers settling along the East African coast arrived in the 10<sup>th</sup> century when, according to local narratives, seven sons of the Sultan of Shiraz in Persia sailed from the Persian Gulf to the Benadir coast of southern Somalia. Oral sources narrated that the seven merchant-princes from the Persian city of Shiraz settled in Mogadishu, Brava, and the Comoro Islands, Mafia, Pemba, Kilwa, Zanzibar and Madagascar. Ali b. al-Hussain (r.957-996) of the ruling family of Shiraz came to Kilwa which became the leading coastal town in the 14<sup>th</sup> century followed by Mombasa in the 15<sup>th</sup> century.<sup>15</sup> Towards the end of the 12<sup>th</sup> century the *Shirazi* began to migrate southward and established settlements along the East African coast. Neville Chittick suggested that *Shirazi* migration could have probably started from the Benadir coast and then spread southwards, and that the *Shirazi* civilization did not come directly from Persia or the Gulf but from Benadir.<sup>16</sup> By the end of the 13<sup>th</sup> century the first *Shirazi* dynasty of Kilwa was replaced by the *Mahdali* dynasty.<sup>17</sup>

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<sup>14</sup> KNA, CA/10/126, 'The Kenya Protectorate', *Weekly News*, 16<sup>th</sup> September 1960. Oral tradition mentions that a Syrian army came to East Africa under Amir Musa ibn 'Umar to settlements which had accepted Islam during the reign of the Second Caliph 'Umar ibn Khattab (634-44). Horton, 1996, 421.

<sup>15</sup> Horton, Mark, and Middleton, John (2000) *The Social Landscape of a Mercantile Society* Oxford: Blackwell Publishers 52.

<sup>16</sup> Chittick (n 7 above) 292. *Shirazi* influence on the East African coast dated back to 1217; a gravestone of a person of Persian origin by the name al-Khurasani was found at Mogadishu. *Idem*, 285.

<sup>17</sup> Hiskett, M (1994) *The Course of Islam in Africa* Edinburgh: Edinburgh University Press 154. The head of the *mahdali* dynasty was Abul-Mawahib al-Hassan b. Sulayman from the *Ahdali* family who were *Seyyids* (*Shariffs*) from Yemen. See Chittick, Neville "Kilwa: An Islamic Trading city on the East African Coast" (1974) 1 *History and Archaeology* 239.

Another Muslim dynasty was established by the *Nabahani* family in Pate near Lamu under the leadership of Sulayman ibn Muzaffar al-Nabahan, who had been driven out of Oman by the *Ya'rubī* rulers in 1203. Sulayman left Oman because he was defeated by the *Ya'rubī*.<sup>18</sup> After the death of Sulayman, his descendants succeeded him to be the rulers of Pate. Muslim dynasties which were scattered all over the East African coast continued to exist until the 15<sup>th</sup> century when the Portuguese were attracted by the economic success of the region.

The second factor that prompted Islamic influence along the East African coast was facilitated by migrations of Muslim trading communities from Arabia and Persia who traded with various coastal people for centuries. The earliest account of the East African trade was reported in the *Periplus of the Erythraean Sea*, which is a trader's handbook on the commerce of the Indian Ocean written in the first century by an Alexandrian Greek. The *Periplus* mentioned that the Ausanitic (East African) coast was by ancient right subject to the sovereignty of whichever state had become the leader in Southern Arabia.<sup>19</sup> Principal actors in the East African trade were Arab merchants from Yemen and their Hindu counterparts from Gujarat.<sup>20</sup>

The earliest presence of Muslim traders along the East African coast was noted in the *Kilwa Chronicle* which mentioned a group of Arabs who left the Arabian Peninsula in the middle

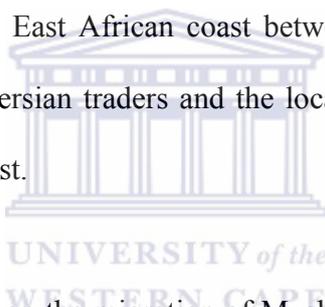
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<sup>18</sup> Chittick, N "A New Look at the History of Pate", (1969) 10 (3) *Journal of African History* 378.

<sup>19</sup> KNA, CA/10/126, "The Kenya Protectorate" *Weekly News*, 16<sup>th</sup> September 1960.

<sup>20</sup> Freeman-Grenville, G.S.P (1966) *The East African Coast: Select Documents from the First to the Earlier Nineteenth Century* Oxford: Clarendon Press 10.

of the 8<sup>th</sup> century and settled in southern Somalia.<sup>21</sup> These mercantile communities who served as commercial intermediaries in the Indian Ocean played a significant role in transmitting Islamic cultural and religious norms along the East African coast. Besides establishing trade links, Muslim merchants established their religious institutions that governed their transactions and daily lives. It is from these scattered Muslim settlements that the early application of Islamic law could be traced along the East African coast. Muslim traders who were joined by religious scholars benefited from the monsoon winds which blew dhows in a south-westerly direction from the East African coast to Arabia, India and Persia between April and August. The north-eastern winds reversed the direction bringing the dhows back to the East African coast between December and March. The interaction between Arab and Persian traders and the local tribes facilitated the spread of Islam along the East African coast.



Pouwels criticised over reliance on the migration of Muslim traders as the only factor that influenced the spread of Islam along the East African coast and the interior. Pouwels pointed out that “there has been too much attention devoted to the migration theory as a way of explaining cultural and religious change in East African towns”.<sup>22</sup> He further noted that, in addition to migrations, there were significant changes that occurred on the East African coast as a result of religious culture. Horton regarded the adoption of Islam along

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<sup>21</sup> Nimtz, A. H (1980) *Islam and Politics in East Africa: The Sufi Order in Tanzania* Minneapolis: University of Minnesota Press 3. The *Kilwa Chronicle* was originally written in Arabic *al-Sulwa fi al-Akhbar Kilwa* by an unknown author born in 1499.

<sup>22</sup> Pouwels, R.L “The Medieval Foundations of East African Islam” (Part 2) 1978 11 (2) *International Journal of African Historical Studies* 203.

the East African coast as a process of urbanisation that resulted in the establishment of Muslim settlements on the coast and in the interior.<sup>23</sup> He pointed out that “Islam has a very long pedigree in East Africa and it should not be seen as something foreign, but linked closely to indigenous practice”.<sup>24</sup> Therefore, the cultural synthesis between Muslim merchants and local people should be seen as the main catalyst in the process of islamisation of the East African coast and the hinterland.

#### **1.4 Spread of Islam in the interior of the East African coast**

Although Islam first came to the East African coast and then penetrated into the interior, British colonial administration embarked on policies to contain Islam within the coastal strip. Early traders from the Arabian Peninsula and the Persian Gulf who visited the East African coast served as agents of islamisation in the interior of the East African coast. Portuguese accounts suggest that settlements of Muslim traders existed in the hinterland before the arrival of Portuguese in the 16<sup>th</sup> century.<sup>25</sup> By the mid-19<sup>th</sup> century trade routes extended from Zanzibar to Lake Tanganyika through Tabora, and from Kilwa to Lake

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<sup>23</sup> Horton, M “The Islamic Conversion of the Swahili Coast, 750-1500: Some Archaeological and Historical Evidence”, in Amoretti, Bianca M. S (ed.) (2001) *Islam in East Africa: New Sources Archives, Manuscripts and Written Historical Sources, Oral History and Archaeology, Proceedings of International Colloquium*, Rome: Herder 450.

<sup>24</sup> Horton, 2001, 466.

<sup>25</sup> Rolingher, L “Constructing Islam and Swahili Identity: Historiography and Theory” (2005) *The MIT Electronic Journal of Middle East Studies* 10.

Nyasa.<sup>26</sup> Islam penetrated into the interior of the East African coast before the advent of European rule through trade routes which were established by Muslim traders. There were three major trade routes linking the coast and the interior. First, was the principal route that connected the Busa‘idi Sultanate and the Buganda Kingdom through the coastal towns of Bagamoyo and Dar es Salaam and the interior towns of Tabora and Ujiji. Tabora served as the main link between Zanzibar and the Buganda Kingdom. The relationship between the two ruling dynasties was cemented through Arab traders who did not only practise trade but also spread Islam. For instance, Ahmad b. Ibrahim, an *ibadhi* trader from Tabora taught Islam to Kabaka (King) Sunna of the Buganda who later became a Muslim. Sunna’s son, Kabaka Mutesa, studied Islam under several Muslim traders and later converted to Islam.<sup>27</sup>

The second route linking the coast and the interior was the southern coast that connected Kilwa with Lake Malawi passing through the town of Lindi. The third route was the northern coast that linked Mombasa and Tanga with Lake Victoria. It was through these trade routes that Muslim merchants managed to carry with them their faith and disseminate it in the hinterland.<sup>28</sup> By the middle of the 19<sup>th</sup> century Arab traders, such as Salim b. ‘Abdalla, had already settled in the interior town of Ujiji. Arab traders were more

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<sup>26</sup> Stephens, J.E.R “The Laws of Zanzibar” (1913) *Journal of the Society of Comparative Legislation* 13 (3) 603.

<sup>27</sup> Nimitz, 1980, 10.

<sup>28</sup> Presence of the principal route linking Zanzibar and the Baganda together with the southern coast route connecting Kilwa and Lake Malawi in the interior of Tanganyika, demonstrates the great influence of Islam on the peoples of these areas at a later period compared to a lesser influence of Islam on the peoples of the hinterland of Kenya.

interested in lucrative trade and did not embark on a project of converting local people to Islam. It was through trade transactions and intermarriages that local people were influenced by Islamic culture and then later converted to Islam.<sup>29</sup>

The advent of colonialism towards the late 19<sup>th</sup> century reinforced the process of islamisation in the interior of the East African coast by opening up new opportunities to Muslim traders and administrators employed by colonial regimes. Colonial enterprise enhanced the means of transport and communication that, in turn, enhanced the diffusion of Islam in the interior. Although it can be argued that the British colonial rule facilitated the spread of Islam by promoting trade in the interior of the East African coast, the British colonial administration prevented the extension of the islamisation of political structures.<sup>30</sup> The British endorsed *sufi* orders, such as the *qadiriyya*, in the East African coast that opened up new possibilities for the diffusion of Islam in the mainland areas.<sup>31</sup> Based on their early colonial experience in other territories, the British categorised Muslims in Eastern Africa into two groups: “good Muslims” represented by *sufi* brotherhoods who cooperated with the colonial authority, and “bad Muslims” who engaged themselves with

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<sup>29</sup> Nimitz, 1980, 8.

<sup>30</sup> Christelow, A “Islamic Law in Africa” in Levtzion, N. and Pouwels, R (eds.) (2000) *The History of Islam in Africa* Athens: Ohio University Press 383.

<sup>31</sup> O’Brien, D. B. C (1979) “Muslim Brotherhoods in Black Africa”, *Christian and Islamic Contributions towards Establishing Independent States in Africa South of the Sahara* (Papers and proceedings of the Africa Colloquium Bonn – Bad Godesberg, 2-4 May, Institut Fur Auslandsbeziehungen Stuttgart) 94.

anti-colonial movements.<sup>32</sup> While the British condoned the activities of *sufi* brotherhoods in the interior, they controlled the spread of Islam that supported anti-colonial ideas which caused uprisings against the colonial establishment throughout the British Empire.<sup>33</sup>

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<sup>32</sup> The British used a similar policy in other colonies. For instance, in Northern Nigeria submissive Muslim brotherhoods such as *qadiriyya*, were classified as ‘good Muslims’; while brotherhoods with anti-colonial agendas, such as *tijaniyya*, were branded as ‘bad Muslims’. Due to their loyalty to the British, the *qadiriyya* were regarded by the British as the official *tariqa* of the Northern Nigeria region and recognised as a basis of a regional Islamic orthodoxy. See Lugard, F.D (1923) *The Dual Mandate in British Tropical Africa* Edinburgh: W.Blackwood, 609. Similarly, after the defeat of the *mahdiyya* in Sudan, the British allied with the *khatmiyya*, the Mahdi’s rival, which gave legitimacy to British rule in Sudan. For details on the role of *sufi* brotherhoods and Muslim resistance in East Africa, see Martin, B.G “Muslim Politics and Resistance to Colonial Rule” (1969) 10 (3) *Journal of African History*.

<sup>33</sup> Between the mid 19<sup>th</sup> and early 20<sup>th</sup> centuries there were several uprisings across the British Empire. For instance, the Mahdist movement in Sudan in 1885 was followed by the Indian mutiny in 1887 and the Mahdist uprising in Northern Nigeria between 1905 and 1907. Weiss, 2005, 78. The French and Belgians adopted a similar policy of preventing the spread of anti-colonial movements in their territories. The French colonists adopted a policy of encouraging Islam which they first perceived as an advanced stage in the evolutionary process from animism to Western culture. But later the French felt threatened by Islam and invented the concept of Islam Noir (Black) to distinguish African Islam from Arab Islam. Pouwels, R.L “Patterns of Islamization and Varieties of Religious Experience among Muslims of Africa”, in Levtzion, N. and Powels, R. L (eds.) (2000) *The History of Islam in Africa*. Oxford: James Currey 14. British and French colonial authorities in West Africa were ever watchful for pan-Islamism movements and used to keep surveillance on Muslim leaders from sub-Saharan Africa and Mediterranean Africa. Hunwick, John “Sub-Saharan Africa and the Wider World of Islam: Historical and contemporary perspectives” (1996) 26 *Journal of Religion in Africa* 235.

British officials were caught between the need to recruit Muslim employees and the zeal to control the spread of Islam that was considered a threat to British rule as well as a rival to Christianity. Due to a shortage of human resources to administer the British Colony and Protectorate in East Africa, the British colonial administration was forced to recruit Swahili, Somali and Sudanese Muslim troops, interpreters and tax-collectors during the Great Wars.<sup>34</sup> After the Wars, Muslim soldiers and administrators settled in the interior parts of the British territories and married members of the local communities enhancing further the process of islamisation in the interior. For instance, in the Kenya Colony, Muslim community settlements were established in the form of *majengo* that were scattered all over the Colony. Muslim ex-soldiers also established their settlements, such as the Kibera slums in Nairobi which is also referred to as the “Sudanese Colony”.<sup>35</sup> Another factor that facilitated the expansion of Islam in the interior was the construction of the Uganda railway.

Despite the various factors initiated by the British colonial administration to facilitate the extension of Islam into the interior from the East African coast, the spread of Islam into the hinterland cannot be solely regarded as an outcome of a deliberate British policy. The British colonial attitude towards Muslims varied from fear of Islamic militancy to outright sympathy.<sup>36</sup> Whereas the British were vigilant on the spread of Islamic militancy in West

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<sup>34</sup> The German colonial administration also employed Muslims, a fact that acted as a catalyst in the spread of Islam in mainland Tanganyika.

<sup>35</sup> Ayubi, S and Mohyuddin, S “Muslims in Kenya: An Overview” (1994) 15 *Journal of Muslim Minority Affairs* 147.

<sup>36</sup> Weiss, H “Variations in the Colonial Representation of Islam and Muslims in Northern Ghana, Ca. 1900-1930” (2005) 25 (1) *Journal of Muslim Minority Affairs* 75.

Africa, as in the case of the Nigeria, British colonial officials in East Africa adopted a sympathetic approach towards their Muslim subjects. Despite the sympathetic attitude adopted by some British officials towards Muslims in the Busa'idi Sultanate, the British colonial administration did not actively support the spread of Islam into the interior. J. Spencer Trimingham's *Islam in East Africa* suggested that penetration of Islam in the interior was facilitated by British and German colonialists in the late 19<sup>th</sup> century.<sup>37</sup> Contrary to Trimingham's view that Islam spread into the interior of East Africa due to the stability and tranquillity brought by European colonial rule, Nimtz maintained that Islam's major expansion into the interior occurred not during tranquil times but, on the contrary, during periods of upheavals and crisis.<sup>38</sup>

### 1.5 Omani and Portuguese contest in controlling the East African coast

Due to its strategic significance, the East African coast represented a scenario of external powers competing to control major ports along the coastal shores. By the mid-15<sup>th</sup> century, European powers led by the Portuguese sought a sea route to India. In order to secure her trade route to India, the Portuguese had to control the main calling points along the Eastern African coast. In 1487, the King of Portugal sent Bartholomew Diaz to find a sea route to India. Diaz did not succeed in reaching India but only managed to sail to the Cape of Good Hope in 1488. Vasco da Gama sailed along the East African coast on his first voyage to

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<sup>37</sup> Trimingham, J. S (1962) *Islam in East Africa: The Report of a Survey Undertaken in 1961*, Research Pamphlets: No.9 London: Published for the World Council of Churches Commission on World Mission and Evangelism House Press, 1.

<sup>38</sup> Nimtz, 1980, 15.

India in 1498. In 1502, Vasco da Gama bombarded Kilwa and demanded acknowledgement of the supremacy of the King of Portugal.<sup>39</sup> Later in 1505, Francis De Almeida seized Sofala thereby paving the way for the Portuguese to invade the East African coast. The fall of Kilwa and Sofala, which were major towns under *Shirazi* rule, led to the demise of the *Shirazi* dynasty and thereafter the Portuguese continued to control other ports along the East African coast until the middle of the 17<sup>th</sup> century.

In 1660, the people of Azania (East African coast) appealed to the Imam Sayf b. Sultan al-Ya'rubī (also known as *Qaid al-Ardh*, [leader of the universe]) of the Ya'rubī dynasty (1624-1741) in Oman for military assistance to expel the Portuguese from Mombasa. Imam Sayf b. Sultan led naval forces to fight the Portuguese and with the help of the local people the Portuguese were defeated in their stronghold Fort Jesus in Mombasa in 1698.<sup>40</sup> Imam Sayf b. Sultan appointed Nasir b. 'Abdalla b. Kahlan as the first *liwali* of Mombasa.<sup>41</sup> The Ya'rubī dynasty continued to rule much of the East African coast by appointing governors from the Mazru'i family until they were defeated by the Bus'aidi Sultans in 1819. Sporadic fighting between Portuguese and Omanis continued from the mid-17<sup>th</sup> to the 19<sup>th</sup> centuries, until 1828, when Seyyid Sa'id, Sultan of Oman, managed to consolidate his powers in Mombasa after taking full control of Fort Jesus. In 1832, Seyyid Sa'id transferred his headquarters from Muscat to Zanzibar putting an end to the

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<sup>39</sup> Nimtz, 19080, 5.

<sup>40</sup> The local tribes included Ribe, Chonyi, Kamba, Kauma, and Digo.

<sup>41</sup> Soghayroun, I (1995) *Makhtut: Tarikh ilayat al Mazari'a fi afriqiya al-sharqiyya*, London: Red Sea Publication 53.

Portuguese threat. After expelling the Portuguese, the Omani Sultanate asserted itself as the dominant maritime power in the region between Oman and the East African coast.

In the late 18<sup>th</sup> century, the Busa‘idi rulers in Oman assumed the title of Seyyid or Sultan instead of Imam abandoning claims to religious authority. The change in title marked a shift in Busa‘idi’s power that focused on establishing a commercial empire independent of religious authority.<sup>42</sup> The shift underscores the fact that when Seyyid Sa‘id shifted his headquarters from Muscat to Zanzibar, his primary objective was to establish a mercantile economy and matters related to the administration of justice were secondary to the economic objective. The main purpose of establishing the Busa‘idi Sultanate was to transform the region into a mercantile state. Seyyid Sa‘id’s efforts to establish an economic empire in Zanzibar demonstrate the Sultanate’s policy of prioritising economic prosperity over religious adherence. Through a policy of indirect rule, Seyyid Sa‘id managed to accommodate religious scholars and asserted control over the administration of justice. During the reign of Barghash b. Sa‘id (r.1870-1888) the Sultanate’s policy changed from an economy based empire to a religious state determined to apply strict rules of Islamic law. Barghash’s change of policy was attributed to the influence of the reformist movement of the *Mutawwi‘un* that emerged in Muscat.<sup>43</sup>

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<sup>42</sup> Bissell, W. C (1999) “City of Stone, Space of Contestation Urban Conservation and the Colonial Past in Zanzibar” (Unpublished PhD Dissertation Vol.2 submitted to the Department of Anthropology University of Chicago) 57.

<sup>43</sup> For details on the influence of *Mutawwiun* movement on Barghash’s reign see Chapter 4 below.

## 1.6 European competition to control the East African coast

The plantation economy created by Seyyid Sa'id and the existence of trade links to the interior of East Africa attracted European nations. British, French and German Consulates were established in Zanzibar and trade agreements were entered into by Sultans and Consuls of European countries. From the middle of the 19<sup>th</sup> century the economy of the East African coast expanded due to the demand for slaves in the French Islands of the Indian Ocean, and an increasing European market for spices and ivory.<sup>44</sup>

Due to economic challenges that faced Europe in the early 17<sup>th</sup> century, European powers were forced to seek new markets. For instance, the economic recession that struck England during the period 1806-10 forced Britain to search for raw materials along the East African coast. In the early 1830s direct commerce between Britain and Zanzibar commenced with no more than seven vessels annually compared with twenty five to thirty ships between England and India.<sup>45</sup> By 1837, there was only one English born merchant and his family in Zanzibar together with a medical practitioner, and at least 2000 British Indian subjects. The first formal presence of a British official in Zanzibar was in 1841 when Captain Hammerton (British Consul in Zanzibar 1841-1857) was commissioned to be an Agent of the East India Company with consular authority from the British Crown.<sup>46</sup>

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<sup>44</sup> Middleton, J "The Immigrant Communities (3): The Arabs of the East African Coast" in D.A. Low and Smith (eds.) (1976) *History of East Africa*. Vol.3 Oxford: Clarendon 499.

<sup>45</sup> Jackson, M (1942) *European Powers and South-East Africa*, London: Longmans, Green and Company 159.

<sup>46</sup> Jackson, 1942, 171.

Towards the end of the 19<sup>th</sup> century competition between Britain and Germany threatened the existence of the Busa'idi Sultanate.<sup>47</sup> The partition of the African continent by European powers during the Berlin conference in 1884 paved the way for European spheres of influence. In 1884 Karl Peters (founder of the Society for German Colonization) travelled to Tanganyika and persuaded the local chiefs to enter into treaties which covered some areas that belonged to the Sultan of Zanzibar.<sup>48</sup> On 3 March 1885 the Imperial German government declared a Protectorate over the areas covered by the treaties entered into Karl Peters. Sultan Bargash b. Sa'id (r.1870 – 1888) protested against the declaration of a German Protectorate in his dominions. In response to the Sultan's protest, the German government sent a fleet of five warships to Zanzibar on 7 August 1885.

The British government felt uneasy about the German response that even threatened the interests of Great Britain and India. However, Britain could not antagonise the Germans and failed to assist the Sultan in recovering his dominions lost to the Germans. Sultan Barghash was forced to sign an agreement to acknowledge the German Protectorate in Tanganyika including the port of Dar es Salaam. Despite the people's refusal to accept the agreement, German colonial officials removed the Zanzibar flag at Pangani and dismissed the *liwalis* and *akidas* appointed by the Sultan. German occupation of the area precipitated local resistance that was known as the Abushiri rebellion named after Bashar b. Salim al-

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<sup>47</sup> Lofchie, M.L (1965) *Zanzibar: Background to Revolution* Princeton: University Press 53.

<sup>48</sup> Among the treaties concluded by the Society for German Colonization with natives in East was the one signed by Karl Peters with Sultan Magungo (the Sultan of Msovero, in Usagara) on 29 November 1884 "Correspondence Relating to Zanzibar" (1886) 1 *Africa* 6.

Harthi, at Pangani in 1888-9.<sup>49</sup> The Germans appointed Herman Voss Wissman to crush the rebellion. The suppression of the Abushiri rebellion ended the aspirations of the Sultan and his subjects to maintain political independence. In order to crush local uprisings, the Germans were forced to recruit local troops, many of whom were Sudanese Muslims.<sup>50</sup>

In a bid to end Barghash's further threats to European interests, the British and Germans joined forces and appointed a Commission to decide on the Sultan's claims and define the extent of his dominions. Barghash was neither consulted nor represented at the deliberations of the Commission that culminated in the signing of the Delimitation Treaty of 1886 in London on 30 October 1885. The Treaty reduced the Sultan's dominions to the Islands of Zanzibar and Pemba including the Kenya coastal strip of the mainland from the River Rovuma to the River Tana. Control over the coastal strip was to ensure smooth access to the mainland by British and German colonial administrators and traders. Competing interests to control the East African coast paved the way for the emergence of local alliances. While the British supported the Sultan of Zanzibar, the Germans backed the Sultan of Witu who was a rival to the Busa'idi Sultanate.<sup>51</sup>

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<sup>49</sup> Martin, 1969, 476.

<sup>50</sup> Salim, A.I "Early Arab-Swahili Political Protest in Colonial Kenya, in Ogot, B. A. (ed.) (1972) *Politics and Nationalism in Colonial Kenya* Nairobi: East African Publishing House 72.

<sup>51</sup> El-Zein, A (1974) *The Sacred Meadows: A Structural Analysis of Religious Symbolism in an East African Town* Northwestern: Northwestern University Press 80. On Witu Sultanate see Allen, J.de Vere "Witu, Swahili History and the Historians", in Salim, A.I. (ed.) (1985) *State Formation in Eastern Africa* Nairobi: Heinmann Educational Books.

## 1.7 Decline of the Busa'idi Sultanate

After the death of Sultan Seyyid Sa'id (r.1806-1856) a succession dispute arose between his two sons, Majid and Thuwayn, as to who should succeed the Sultan. The matter was even more complicated by the fact that Seyyid Sa'id did not leave any instructions as to who was to succeed him, and the only will he left behind was related to his personal property. Abdul Sheriff noted that Sultan Seyyid Sa'id might have been bound by the Omani custom that gave him no right to partition the Omani Empire and that according to *ibadhi* belief, the *imam* had to be elected by the elite of society.<sup>52</sup> Initially the British government wished to remain neutral on the succession dispute, as long as her interests along the Indian trade routes were not disturbed. When Thuwayn sent an expedition against Majid, the British Resident in the Persian Gulf sent a warship to intercept Thuwayn's expedition and forced him to submit to arbitration.<sup>53</sup> The British government intervened and appointed Lord Canning (Governor-General of India) to settle the dispute. Lord Canning took the opportunity of advancing British interests and divided the Omani Empire into two possessions: Zanzibar and its African dominions which were allocated to Majid, while Muscat was given to Thuwayn. The arbitration was known as the Canning Award of 1861 and was later endorsed by the Anglo-French Declaration of 1862 that declared mutual respect for the independence of the two Sultans.<sup>54</sup> The disintegration of the Omani

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<sup>52</sup> Sheriff, A (1987) *Slaves, Spices and Ivory in Zanzibar: Integration of an East African Commercial Empire into the World Economy, 1770-1873*, London: James Currey 210.

<sup>53</sup> Sheriff, 1987, 211.

<sup>54</sup> The Anglo-French Declaration was signed on 10 March 1862 and provided: Her Majesty the Queen of the United Kingdom of Great Britain and Ireland and His Majesty the Emperor of the French, taking into

Sultanate in 1861 and the subsequent signing of the 1862 Declaration paved the way for British intervention in Zanzibar's internal affairs and marked the beginning of the decline of Zanzibar's sovereignty.

Towards the end of the 19<sup>th</sup> century several factors contributed to the decline of the Busa'idi Sultanate which was faced with a political decline caused by the power struggle between Zanzibar and Oman. European competition, particularly by Britain and Germany, to control the region contributed further towards the disintegration of the Busa'idi Sultanate. This was coupled with the military inability of the Sultans to protect their dominions which felt prey to European powers. African chiefs took advantage of the rapid spread of firearms after the 1850s, were able to control their trade, and became more independent of the Sultan's support.<sup>55</sup> The terrible hurricane which occurred in 1872 affected Zanzibar's economy and destroyed clove plantations in the Sultanate. Further economic deterioration resulted from the British anti-slavery cruises along the East African coast in the early 1870s. Indians financed the slave trade and when the trade was abolished in the early 20<sup>th</sup> century, the Indian merchants managed to switch their investments to money lending. The Indians' economic success lay in their aggressiveness to lend money, and to transfer money back and forth across the Indian Ocean.<sup>56</sup> The economic hardship that faced the Sultanate and

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consideration the importance of maintaining the independence of His Highness the Sultan of Muscat and His Highness the Sultan of Zanzibar, have thought it right to engage reciprocally to respect the independence of these Sovereigns. Quoted in Sheriff, 1998, 217.

<sup>55</sup> Middleton, 1976, 499.

<sup>56</sup> Green, 1985, 31.

the political instability of the region towards the end of the 19<sup>th</sup> century paved the way for British protection over Zanzibar.

### **1.8 Establishment of a British Protectorate over Zanzibar**

The relationship between the Sultans and the British was one of mutual benefit. Since the early 19<sup>th</sup> century, Britain's interest in the East African coast was to ensure stability of the region in order to protect the Indian Ocean trade routes. Similarly, the Sultans of the Omani-East Africa Empire needed political as well as military protection in order to consolidate their mercantile economy. For instance, Seyyid Sa'id consolidated his power by playing off Britain and France against one another and obtained protection and friendship from both powers.<sup>57</sup>

British friendship, and later protection of the Busa'idi Sultanate was to enable Britain to consolidate her power along the East African coast and lay a foundation for further extension of the British Empire in the hinterland. Britain's objective of establishing a Protectorate over Zanzibar was intended to prevent annexation of the Sultanate by other European powers, particularly Germany, that had shown an interest to control Zanzibar as well as Tanganyika during the partitioning of East Africa.<sup>58</sup> Establishment of the British Protectorate over Zanzibar was a result of the competitive struggle between the European powers in the scramble of Africa after 1885 to fix spheres of influence and guarantee

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<sup>57</sup> Green, 1985, 27.

<sup>58</sup> Lofchie, 1965, 56.

commercial gains. By extending her influence over Zanzibar, Britain intended to keep her rivals from gaining control over the region, while retaining a free hand in exercising internal control of the Sultanate.<sup>59</sup>

Germany's threat against Zanzibar forced Sultan Barghash b. Sa'id (r.1870-1888) to rely on the British as the only power that could protect his rule. His reliance on British protection opened the way for the 'Protecting Power' to exploit this opportunity and entrench its dominance. Consequently, Barghash granted the administration of the whole Kenyan coast and the Benadir ports to the IBEA.<sup>60</sup> Barghash's partial surrender of his dominions to the Company empowered officers of the Company to administer the affairs of the Kenyan coastal strip. Fragmentation of the dominions of the Sultan paved the way for the British to control the Busa'idi Sultanate that led to the gradual marginalisation of Islamic law.

Similarly, Charles Euan Smith (British Consul in Zanzibar 1889-91) used the German threat to persuade Sultan Ali b. Sa'id (r.1890-1893) to declare a British Protectorate over Zanzibar. When Euan-Smith signed a formal agreement with Sultan Ali b. Sa'id offering British protection to Zanzibar, he did not mention any British interference in the Sultanate's internal affairs. In July 1890 the Under Secretary for Foreign Affairs denied before the

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<sup>59</sup> Morris, H.F and Read J. S (1972) *Indirect Rule and the Search for Justice: Essays in East African Legal History* Oxford: Clarendon Press 43.

<sup>60</sup> Vianello, A and Kassim, M.M (eds.) (2006) *Servants of the Sharia: The Civil Register of the Qadis' Court of Brava 1893-1900* Leiden: Brill 13.

British House of Commons that Britain had any intention of interfering with the Sultan's authority but instead spoke of exercising a friendly influence on the Sultan.<sup>61</sup>

The terms of the agreement stated that the foreign relations of the Sultanate were to be conducted with the sole advice, and through the channel, of the British government. The British government in exchange guaranteed the Sultan's throne and his successors, and the Sultan was given the right to nominate his successor subject to the approval of the British government.<sup>62</sup> Establishment of the British Protectorate over Zanzibar resulted in a situation whereby two sovereign authorities (the Sultan and the British) shared power over the Sultanate in the form of a dual mandate system of administering the Sultanate.<sup>63</sup> However, within a year of the signing of a formal agreement, British colonial officials began to violate provisions of the agreement by intervening in the Sultan's local affairs.

In July 1890, Britain and Germany signed the Heligoland Treaty in terms of which Britain surrendered her sovereignty over Heligoland to Germany in exchange for recognition of British protection over Zanzibar.<sup>64</sup> Britain persuaded Sultan Ali b. Sa'id (r.1890-1893) to give the Mrima coastal strip in Tanganyika to Germany in exchange for Germany's

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<sup>61</sup> Flint, J.E "Zanzibar 1890-1950" in Harlow, Vincent and Chilver, E.M (eds.) (1965) *History of East Africa* Oxford: Clarendon Press 642.

<sup>62</sup> Hailey, Lord (1950) *Native Administration in the British African Territories*, (Vol.2) London: His Majesty's Stationery Office 5.

<sup>63</sup> Lofchie, 1965, 57.

<sup>64</sup> Heligoland (also known as Helgoland) is the coastal area on the Danish German border which was granted to Germany in exchange for Zanzibar.

withdrawal of her claims over Witu Sultanate in favour of the British. As a result of the Heligoland Treaty, Britain established a Protectorate over Zanzibar and the Kenya coastal strip on the mainland from the River Uмба to the River Tana and Germany took control of the Kenya coastal strip from the River Rovuma (Zambezi) to the River Uмба through the German East African Company.

Supremacy of British interests over the Islands of Zanzibar and Pemba was recognised by France and Germany and the Islands were declared a British protectorate in accordance with conventions in terms of which Great Britain waived all claims to Madagascar in favour of France and ceded Heligoland to Germany. When Germany withdrew and left Britain in undisputed possession of Zanzibar, the Sultans no longer had anyone to play Britain off against. From the time of the Heligoland Treaty onwards, Britain had things entirely her own way. The British avoided direct involvement by annexing the Busa'idi Sultanate as a British Colony and preferred to declare a Protectorate instead of a Colony so as to diminish the hostility of European powers on the one hand, and, on the other hand, to avoid legal consequences, such as, the immediate abolition of slavery which would have been the case if it were a British Colony.<sup>65</sup>

The declaration of the British Protectorate marked the last stage in the progressive shrinking of the Sultan's sovereign powers and of his influence over his dominions. After the establishment of the British Protectorate over Zanzibar in 1890, Britain exercised more

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<sup>65</sup> Morris, 1972, 60.

influence on the appointment of the Sultan.<sup>66</sup> Establishment of Protectorate status over the Busa'idi Sultanate imposed a new order by curtailing the authority and control of the Sultan over his territories. Establishment of the British Protectorate over Zanzibar also served as support towards realising the British imperialistic vision of conquering the African continent.<sup>67</sup>

After the establishment of the British Protectorate over Zanzibar, the British colonial administration embarked on a policy of changing the structure and function of the Sultanate. British colonial officials were concerned with introducing change without provoking resistance of the Sultans and their subjects. Based on the contingencies of colonial rule, the

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<sup>66</sup> British colonial officials adopted a similar policy of controlling the administration of the Malay straits. The British Residents in Malaysia carried out the administration of the state with full authority on the appointment of the Malay *Rajas* (rulers). Abd Rahim, Rahimin Affandi "Islamic Law in Malaysia: The Impact of British Colonial Policy" (2000) 44 (1) *The Islamic Quarterly* 337.

<sup>67</sup> British colonial officials working in African territories had a collective vision of controlling the whole of the African continent. The policy was earlier envisioned by Cecil Rhodes with his ambitious project of connecting the Cape with Cairo by establishing a Trans-African railway. Leonel Decele, leader of the *Daily Telegraph* expedition from the Cape to Cairo, predicted that the British African Empire from the Cape to Cairo "will stand as the crowning monument of the most glorious of reigns". He defined the project by stating that "The British African Empire means freedom and civilisation, the amelioration of the people, the fostering of trade, the industrial development of vast countries for the British enterprise, British capital and British administrative ability", *British Success in Africa, Official Gazette of Zanzibar and East Africa*, Vol.474, 27<sup>th</sup> February 1901, 3. Other colonial officials such as, Lord Cromer (in Egypt), Lord Kitchner (in Sudan), and Sir Harry Johnston (in Uganda), further developed the imperialistic idea of establishing the British African Empire. However, the British faced competition from other European powers, such as, Germany and France, which kept the imperialistic ambition of the British African Empire on hold.

British adopted a policy of introducing change in a gradual manner in order to minimise social unrest and avoid rebellion.

In 1891 Euan Smith was succeeded by Sir Gerald Herbert Portal (British Consul in Zanzibar 1891-92) as the British Consul in Zanzibar.<sup>68</sup> Portal was given clear instructions by his superiors in the Foreign Office to handle the affairs of the Sultanate in a diplomatic manner, in that the “iron hand should be concealed by a liberal allowance of velvet”.<sup>69</sup> Portal’s first priority was to gain control of the financial affairs of the Sultan. He justified his policy of interference in the Sultan’s financial affairs by stating:

“it is useless to contrive means for increasing the revenue of the country if every additional dollar he [the Sultan] collects goes into sacks under the palace. Seyyid Ali of his own accord will never spend a farthing for the good of his town, country or people. The Sultan must therefore be given a Civil List, a fixed allowance for his own private and household expenses; a regular Budget must be made year by year and be unchangeable except by consent of the English Consul General.”<sup>70</sup>

In October 1891, Portal staged a *coup d’etat*, took control of the Sultan’s finances, and appointed British officers to exercise a more immediate influence over the direction of local affairs. Portal’s efforts to control the Sultanate marked a step further in the gradual loss of the Sultan’s political role.<sup>71</sup>

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<sup>68</sup> Portal had a rich diplomatic experience and had served as the Acting Consul-General of Egypt. While in Cairo, Portal was trained under Lord Cromer who described him as “oriental diplomatist and administrator with a keen and ready perception of the relations of Eastern life and politics”. Hollingsworth, L.W. (1975) *Zanzibar under the Foreign Office, 1890-1913*, Wesport: Greenword Press 57.

<sup>69</sup> Bissell, 1999, 82.

<sup>70</sup> Letter from Portal to Sir John Kirk dated 13 September 1891. Quoted in Bissell, 1999, 89.

<sup>71</sup> Flint, 1965, 644.

Portal's successor, Rennel Rodd (British Consul in Zanzibar 1892-1894), proceeded with the policy of exercising influence in the appointment of the Sultan.<sup>72</sup> Rodd forced Sultan Ali to sign, under protest, a declaration that he accepted Lloyd Mathews as his First Minister. After the death of Sultan Ali b. Sa'id (r.1890-1893), Rodd's commanding power to appoint the new Sultan was apparent. When Khalid b. Barghash attempted to install himself as the Sultan, Rodd rejected Khalid's self-appointment and instead installed Hemed b. Thuwayn (r.1893-1896) as the Sultan of Zanzibar in 1893. To ensure complete allegiance of the new Sultan to the British Crown, Hemed was required to "take an oath on the Koran to the British Crown as Suzerain, accept all advice from the Consul-General Rodd affecting internal or external affairs".<sup>73</sup> After three years from the establishment of the British Protectorate over Zanzibar, the British had gained control over the Sultanate's affairs. Arthur Hardinge (British Consul-General in Zanzibar 1894-1896) described the position of Sultan Hemed b. Thuwayn as "... merely a little bird in the claws of an eagle, and as the eagle either could release the little bird or rend it to pieces, so England either could give back to him or tear away from him his dominions as she thought fit".<sup>74</sup>

After the death of Sultan Hemed b. Thuwayn in 1896, Khalid b. Barghash again attempted to seize the throne by force. Basil Cave (Acting British Consul in Zanzibar) recommended that Hamud b. Muhammad be appointed as the Sultan but Khalid forced his way into the

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<sup>72</sup> Rennel Rodd also served in the British colonial service in Cairo.

<sup>73</sup> Flint, 1965, 643.

<sup>74</sup> Pouwels, R.L. (1987) *Horn and Crescent: Cultural Change and Traditional Islam on the East African Coast* Cambridge: Cambridge University Press 165.

palace with about 60 armed men and more than 2000 supporters. Khalid seized the palace and proclaimed himself the Sultan. On 26 August 1893, British warships anchored in Zanzibar waters under Rear-Admiral Harry Holdsmith Rawson who gave an ultimatum to Khalid to surrender at 9:00 a.m. When Khalid refused to surrender, the British Navy bombarded the palace at 9:02 a.m. Many of Khalid's supporters fled leaving around 500 people dead and others wounded. At 9:40 a.m. Khalid was forced to surrender.<sup>75</sup> After the bombardment, the British assumed full control on the appointment of the Sultan of Zanzibar. Hamud b. Muhammad (r.1896-1902), an admirer of the European lifestyle, was installed as the new Sultan. Hamud sent his only son Ali to Harrow school in England with an ambition that Ali would succeed him, despite the Zanzibar custom that the Sultan's brother was entitled to succeed as the Sultan.<sup>76</sup>

When Sultan Hamud died in 1902, he was succeeded by his 17 year old son Ali who was fresh from school in England. With all the powers in his hands, British Consul-General Kestell-Cornish, issued a Proclamation appointing Ali b. Hamud as the Sultan and A.S. Rogers, who was the First Minister as Regent. The Proclamation stated:

“I am authorized by His Majesty's Principal Secretary of State for foreign Affairs to appoint Seyyid Ali b. Hamud b. Muhammad b. Sa'id to be Sultan of Zanzibar and by the same authority to appoint Mr. Rogers the First Minister of the Zanzibar Government as Regent until His Highness Seyyid Ali shall have attained the age of twenty one years.”<sup>77</sup>

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<sup>75</sup> <http://www.timegate.demon.co.uk/rule.html>. Accessed on 28 April 2008.

<sup>76</sup> Flint, 1965, 646.

<sup>77</sup> Gazette for Zanzibar and East Africa vol. 11, No.547, dated 23 July 1902. Proclamation by V.K. Kestell-Cornish, the Acting British Agent and Consul-General 20 July 1902, Zanzibar.

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

“HIS MAJESTY has been graciously pleased to allow of the excuse; and out of his princely care for the well-being of the Sultanate, and more especially for that of the Islands of Zanzibar and Pemba, has called to the Throne His Highness Seyyid Khalifa b. Harub b. Thuweini b. Sa'id whom may God long preserve.”<sup>78</sup>

After Sultan Ali b. Hamud was deposed in 1911, the Sultans of Zanzibar lost their political power, and the British colonial administration assumed full control over the Sultanate's affairs. Sultan Khalifa, the longest Busa'idi Sultan serving in Zanzibar, maintained cordial relations with the British colonial administration. Khalifa's allegiance to the British can be noted in his letter to *liwali* of Mombasa, Salim b. Khalfan El-Busa'idi:

“I command that you and all Arabs to remain sincere to the Great Britain and warn you to be influenced by German promises. Great Britain still sincerely loves us and protects our interests and religion.”<sup>79</sup>

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<sup>78</sup> The Special Gazette for Zanzibar, Vol.20, No.1036, dated 9 December 1911.

<sup>79</sup> Letter from Sultan Khalifa to Salim b. Khalfan El-Busai'di (in Arabic), Supplement to the Official Gazette of Zanzibar Government, dated 27 December 1914.

### **1.9 The British policy on controlling the Busa'idi Sultanate**

A striking feature of British colonial rule in the East African territories was the existence of dual systems of administering their colonies. The British government was concerned with the duality of the roles assumed by colonial officials in the various territories that raised conflicts of opinions between colonial officials at the metropolis and in the colonies. When the British Protectorate was established over Zanzibar in 1890, Euan Smith was the British Consul-General in charge of the external affairs of the Protectorate. In addition to the British Consul, Lloyd Mathews was appointed as the First Minister in 1891 to exert more influence on the Sultan's authority. As noted above, A.S. Rogers assumed dual roles as the First Minister and Regent to the Zanzibar throne due to the fact that Seyyid Ali was below the age of 21 years. The duality of roles assumed by British officials in the British Protectorate over Zanzibar caused unnecessary bureaucratic duplication of administrative functions. To overcome the administrative challenges posed by a dual system of administering the Protectorate, the British government embarked on a series of reforms of the administration of the Protectorate affairs.

The first change was the transfer of the Protectorate's affairs from the Foreign Office to the Colonial Office which was implemented by the enactment of the Zanzibar Order in Council of 1914. By virtue of this transfer, British officers were introduced into the civil service and "gradually usurped the functions of the Arab officials" that led to "Arabs being frozen out of the administrative ranks" by the early 1920s.<sup>80</sup> The offices of British Consul and

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<sup>80</sup> Ingrams, W. H. "Islam and Africanism in Zanzibar" (1962) 40 (7) *New Commonwealth* 428.

First Minster were abolished, and merged in a newly established post of British Resident. The creation of the new office marked a further step towards the consolidation of British colonial rule in her East African territories. During the First World War (1914-1918), Britain needed to consolidate her power in the colonies in order to fight her rivals. The process of creating the British East African Empire was already implemented by bringing together Uganda and Somalia under the control of the Colonial Office in 1905.<sup>81</sup> In 1914, Major F. Pearce was appointed as the first British Resident of Zanzibar who served until 1922. Transferring Zanzibar's affairs to the Colonial Office indicated that the Sultanate was no longer to be deemed an independent state with its own sovereign ruler. The British Resident had no sole authority over the islands and was subject to the control of the Governor of the East African Protectorate based in Kenya. Sultan Khalifa (r.1911-60) rejected the new arrangement and argued that it degraded the sovereignty of the Sultanate by subjecting its authority to that of mainland territories which were once ruled his predecessors.<sup>82</sup>

The other reform made by the British government was the establishment of the Zanzibar Protectorate Council in 1914. The British colonial administration filled the Council with British representatives. The Sultan was given a ceremonial title as the President of the Council while the British Resident was the Vice-President assuming full authority over the Council. The Council had no autonomous legislative powers and its purpose was to facilitate the Sultan and British officials consulting local leaders on the affairs of the

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<sup>81</sup> Flint, 1965, 656.

<sup>82</sup> Bissell, 1999, 207.

Protectorate. Four representatives from Arab and Asian communities were appointed as members of the Council.<sup>83</sup> The Protectorate Council was abolished in 1921 and the Executive Council was created in its place. The Executive Council was headed by the Sultan as the President with the British Resident as Vice- President with full control over the Council.

Another change effected by the British colonial administration was the establishment of the Legislative Council that possessed limited law making authority. Decrees enacted by the Council were subject to the approval of the British Resident. British officials occupied the majority of the seats in the Council and other members representing the different racial communities were selected by British officials.<sup>84</sup> Establishment of the Legislative Council was utilised by the British colonial administration as a tool for initiating a series of changes in the administration of justice in the Protectorate. Establishment of the Executive and Legislative Councils was meant to serve as a transition from monarchy rule to constitutional government. The British colonial administration made a series of administrative as well as judicial reforms in order to justify their colonial rule on the basis of developing the Sultanate. Britain wanted to portray her colonial project not only as an economic venture but also as a modernizing project that aimed at bringing civilization to the colonised people. However, due to economic and political obstacles, the reform agenda could not be implemented fully. The main reasons that caused the retreat of British

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<sup>83</sup> Lofchie, 1965, 63.

<sup>84</sup> *Ibid.* 64.

colonial rule from these reforms were the Great Wars, the depression of the 1930s, and the era of failed reform in the 1940s and 1950s.<sup>85</sup>

### **1.10 Outline of the thesis**

Part one of the thesis consists of chapter 1 which introduces the study area. The chapter gives a brief historical background to the influence of Islam along the East African coast and its spread into the interior. It also demonstrates the strategic significance of the region during the early 19<sup>th</sup> century that led to a scenario between foreign powers competing to control the area. The British utilised the competition of other European powers to exert her influence and control over Zanzibar. With the disintegration of the Omani Sultanate, the British gained more power to control Zanzibar's affairs including appointment of the Sultans. Towards the mid-19<sup>th</sup> century, Zanzibar could not withstand European threats and had to seek British protection. This paved the way for the establishment of the British Protectorate over Zanzibar in 1890. After the establishment of the Protectorate, the British were in full control of the Sultanate.

Part two of the thesis consists of chapters 2, 3 and 4 which form the main body of the study on the British colonial policies in transforming the administration of Islamic law and its institutions in the Busa'idi Sultanate. Chapter 2 will examine British policies on transforming Muslim judicial institutions in the Busa'idi Sultanate after the establishment

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<sup>85</sup> Cooper, F and Stoler, A "Tensions of Empire: Colonial Control and Vision of Rule" (1989) 16 (4) *American Ethnologist* 617.

of the British Protectorate. With all the control in their hands, British colonial officials embarked on a process of reforming administrative and judicial institutions in accordance with British notions of justice. The main argument in this chapter is that by adopting the indirect rule policy, British colonial authorities incorporated Muslim judicial institutions into the colonial establishment in order to ensure control and embarked on a gradual process of curtailing the powers of Muslim judicial officers before abolishing them. Chapter 3 will discuss the process of transforming the court system adopted by British colonial authorities in the form of institutional as well as procedural changes. The chapter will also look at the emergence of the parallel court system necessitated by the presence of British courts alongside the *kadhi* courts. Despite British colonial efforts, to establish a unified court system in the Busa'idi Sultanate proved difficult. Chapter 3 will seek to highlight the main obstacles against achieving a unified court system. Chapter 4 is the main focus of the thesis which seeks to examine British policies on the administration of Islamic law in colonial Zanzibar. British colonial policy relied on the administration of justice as a basis for the justification of their colonial rule throughout the British Empire. The chapter will explore British colonial understanding of Islamic law and demonstrate how British colonial officials administered Islamic law. Chapter 4 will also examine conflicts which arose between Islamic law and English law, on the one hand, and Islamic law and customary law, on the other hand.

Part 3 of the study consists of chapters 5 and 6 which serve as case studies of the extent to which British policies of transformation were met with resistance from the Sultans and their subjects. Chapter 5 will focus on British gradual policies in transforming *wakf* (endowment) institutions in the Busa'idi Sultanate. Due to its significance, British colonial officials

adopted a policy of controlling and regulating *wakf* institutions. This chapter will show how British colonial officials managed *wakf* incomes in advancing British interests during the Great War periods. Chapter 6 will be dealing with British gradual policies towards the abolition of slavery in Zanzibar. The basic premise that underlines this chapter is that despite abolitionist efforts in the metropolis to pressurise the British government to end slavery, British colonial officials in the Colonies and Protectorates adopted a gradual process of abolishing slavery due to political as well as economic considerations. Chapter 7 will summarise the study by drawing conclusions from previous chapters.



**PART TWO:****Chapter 2: Retaining and Reforming: British policies on transforming Muslim administrative and judicial institutions in the Busa'idi Sultanate****2.1 Introduction**

Chapter 1 has demonstrated the colonial struggle for supremacy over the East African coast and how the British colonial authorities gained control over Zanzibar affairs and achieved authority in the nomination and appointment of the Sultans. After achieving political power over the Busa'idi Sultanate, the British embarked on a policy of institutional transformation and directed their efforts towards reforming the Muslim administrative and judicial institutions. The ultimate objective of the reform process was to first incorporate such institutions into the colonial enterprise in order to ensure effective supervision and control. This part of the study (part two) will explore British colonial efforts in transforming Muslim administrative and judicial institutions (chapter 2), the court system (chapter 3) and the administration of Islamic law (chapter 4) in the Busa'idi Sultanate.

**2.2 The British policy on the accommodation of Muslim administrative and judicial institutions in the Busa'idi Sultanate through the indirect rule policy**

By adopting the policy of institutional transformation, the British used the indirect rule policy in order to accommodate Muslim administrative and judicial institutions established by the Sultans of Zanzibar. Sultan Seyyid Sultan and his immediate successors adopted a non-interference policy in the social and political lives of their subjects. When Sultan

Seyyid Sa'id arrived in Zanzibar in 1832 he accommodated the existing ruling systems that existed and allied himself with the Chief of the *Hadimu* tribe *Mwinyi Mkuu*.<sup>1</sup> After defeating his rival Mazru'i family of Mombasa in 1837, Seyyid Sa'id signed an agreement with the people of Mombasa that included the 12 tribes, in which the latter were given the right to appoint their own judges and to levy and retain customs duties on all goods entering the port of Mombasa.<sup>1</sup> Busa'idi Sultans differed from earlier rulers in that they adopted the indirect rule policy of accommodating local institutions that prevailed in the region. This demonstrates that the system of indirect rule was already implemented by Busa'idi Sultans before the coming of the British. It follows that Lord Lugard who adopted the indirect rule policy in Northern Nigeria in 1900 was not the first to introduce it on the African continent.<sup>2</sup> Lugard's definition of indirect rule was that natives would be "free to manage their own affairs through their own rulers...under the guidance of the British staff and subject to the laws and policy of the [British] administration".<sup>3</sup>

The British first implemented the indirect rule policy in Northern Nigeria by using local administrative and judicial structures established by the Sokoto caliphate. In administering colonial territories, the British based their rule on the existing pre-colonial political

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<sup>1</sup> The 12 tribes consisted of *Thalatha Taifa* (three tribes) and *Tisia Taifa* (nine tribes) which comprised of: *Changamwe, Kilindini, Tangana, Mvita, Jomvu, Kilifi, Mtwapa, Pate, Faza, Shaka, Bajuni* and *Katwa* respectively. For details on the 12 tribes see Salim, A.I "The Impact of Colonialism upon Muslim Life in Kenya". 1979 1 (1) *Journal Institute of Muslim Minority Affairs* 60.

<sup>2</sup> Lord Lugard was the Governor of Northern Nigeria in 1900.

<sup>3</sup> Lugard, 1923, 94.

systems.<sup>4</sup> In India, the British adopted the Mughal system that existed until the defeat of the Mughal ruler in mid-18<sup>th</sup> century. Towards the end of the 19<sup>th</sup> century, the British inherited from the Sokoto caliphate in Northern Nigeria a highly centralised administrative and judicial system.<sup>5</sup> It was a common colonial policy that conquering powers adopted well-established indigenous systems although modifying or subordinating them to their control.<sup>6</sup> It was more efficient and economic for the British to run native affairs in this manner, due to lack of adequate resources and personnel to run institutions established by the Sokoto caliphate.

In the process of transforming Muslim administrative and judicial institutions in the Busa'idi Sultanate, the British adopted the indirect rule policy as a mechanism for effecting change in the local institutions. By applying the indirect rule policy, British colonial officials established native courts in order to administer justice in the Busa'idi Sultanate. Indirect rule policy engaged local officers to administer their own affairs with a view to dispelling the fear that they were dominated by an alien power. By implementing the indirect rule policy, the British aimed at establishing a central administration that could ensure control of the administrative and judicial machineries. In Northern Nigeria, the British retained native courts, whether indigenous or Islamic, but gradually subjected them to institutional changes. Lord Lugard pointed out the significance of having a centralised

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<sup>4</sup> Anderson, M.R "Islamic law and the Colonial Encounter in British India" in Arnold, D and Rubb, P (eds.) (1993) *Institutions and Ideologies: A SOAS South Asia Reader*, Richmond: Curzon Press 166.

<sup>5</sup> Yadudu, A.H "Colonialism and the Transformation of Islamic Law in the Northern States of Nigeria" (1992) 32 *Journal of Legal Pluralism and Unofficial Law* 111.

<sup>6</sup> Mann, K and Roberts, R (eds.) (1991) *Law in Colonial Africa*, New Portsmouth: Heinemann 8.

system of administration in that “there are not two sets of rulers - British and native - working either separately or in cooperation, but a single Government in which the native chiefs have well-defined duties and an acknowledged status of equality with British officials”.<sup>7</sup> The policy of indirect rule was implemented by the British to control native rulers who were regarded as “the pivot around which local administration revolves”.<sup>8</sup> In Northern Nigeria, Lugard retained defeated Emirs who accepted to be under him, while unwilling Emirs were deposed.<sup>9</sup> Retained Emirs were allowed to administer justice and appoint local administrators, but the right to land, mineral resources and taxation was under British control. The British did not challenge the traditions of the Emirs who retained their judicial roles except on sensitive issues, such as, theft and slavery.<sup>10</sup> By adopting the indirect rule policy, the British gradually weakened the powers of the local rulers. In Northern Nigeria, Lugard reduced the status of the rulers of Sokoto Caliph to *Amir* in order to ensure loyalty was due wholly to the British Governor instead of being divided between the Governor and the Caliph.<sup>11</sup> Indirect rule policy was also used to undermine Islamic law courts, as in the case of Sudan where Islamic law was withdrawn from tribal regions by

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<sup>7</sup> Lugard, 1923, 298.

<sup>8</sup> Elias, T.O “The Evolution of Law and Government in Modern Africa” in Kuper H. and Kuper L. (eds.) (1965) *African Law: Adaptation and Development* Los Angeles: University of California Press 18.

<sup>9</sup> Umar, S.M (2006) *Islam and Colonialism: Intellectual Responses of Muslims of Northern Nigeria to British Colonial Rule* Brill: Leiden 25.

<sup>10</sup> Christelow, 2000, 382.

<sup>11</sup> Tibendarana, P. K “The Role of the British Administration in the Appointment of the Emirs of Northern Nigeria, 1903-1931: The Case of Sokoto Province” (1987) 28 *Journal of African History* 233.

granting native courts jurisdiction on matters related to Islamic law.<sup>12</sup> I will discuss below the British policy that was gradually implemented to transform the structure of *kadhi* courts and the training of *kadhis* in the Busa‘idi Sultanate.

The British Empire, throughout her colonies, took advantage of the legitimacy of the defeated local rulers. In India, defeated Mughal Kings were treated as ‘protected princes’. After the British conquest of Northern Nigeria, the Fulani ‘defeated Emirs’ had to negotiate the parameter of their power and authority and were used as colonial agents to carry out colonial policies.<sup>13</sup> In Zanzibar, Sultans had no powers after the establishment of the British Protectorate in 1890. The British controlled the Sultanate and the ‘protected Sultans’ remained titular head of the Sultanate.<sup>14</sup> After the establishment of the British Protectorate in Zanzibar, the British managed to control almost all the administrative and judicial structures. I argue that from this period onwards the British adopted direct rule for the Busa‘idi Sultanate and its dominions. British policy was geared towards subjecting local affairs to the supervision of British colonial officials. In implementing this policy, the British adopted a direct rule policy in controlling the existing local administrative structures

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<sup>12</sup> Ibrahim, A.A “Tale of Two Sudanese Courts: Colonial Governmentality Revisited” (1997) 40 (1) *African Studies Review* 15.

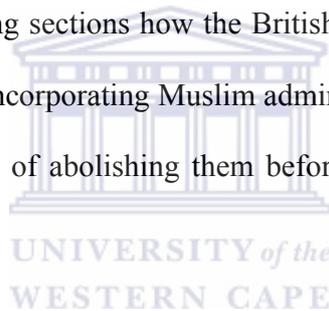
<sup>13</sup> Onyeali, E.F (1986) “Aspects of British colonial Administration in Nigeria, 1900-1960: The Inter-relationship of Amalgamation, Indirect rule, Constitutional Development and Economic policy” ” (Unpublished PhD Dissertation submitted to the Bowling Green State University) 29.

<sup>14</sup> A similar system of rule was evident in Malaya where British officials established a system of direct rule in which the British Resident ran the government in the name of the Prince. Metcalf, R.T. (2007) *Imperial Connections: India in the Indian Ocean Arena, 1860-1920* Los Angeles: University of California Press 42.

that included *akidas* and *shehas* and judicial institutions incorporating *kadhi*, *liwali* and *mudir* courts.

### **2.3 The influence of British indirect rule policy on Muslim administrative and judicial institutions in the Busa'idi Sultanate**

By adopting the indirect rule policy, the British colonial authorities embarked on a strategy of incorporating the local administrative and judicial structures into the colonial establishment in order to control them. The ultimate objective of the policy was to gradually change the local structures in line with the British system of administration. I will demonstrate in the following sections how the British colonial authorities managed to implement a gradual policy of incorporating Muslim administrative and judicial institutions before embarking on a strategy of abolishing them before independence in Zanzibar and Kenya.



In this section the thesis will explore the influence of indirect rule on Muslim administrative institutions. Although office bearers of these institutions were recruited as administrative officers, the British colonial administration empowered them with judicial powers. The policy to give dual roles, administrative and judicial powers, to *liwalis* and *mudirs* was intended to undermine the jurisdiction of *kadhis* and gradually curtail their powers in adjudicating on MPL.

#### **2.3.1 Liwali and mudir courts**

In Zanzibar, Sultan Seyyid Sa'id ruled through a patriarchal organisation of local administrative officers consisting of *liwalis*, *mudirs*, *masheha* and *akidas* who were

responsible for the maintenance of law and order.<sup>15</sup> By adopting the indirect rule policy, Sultans of Zanzibar appointed *liwalis* from members of notable Arab families to represent the Sultan in their local areas. *Liwalis* were only appointed outside the islands of Zanzibar and Pemba. After the establishment of the Zanzibar Protectorate, the British retained the *liwali* system along the East African coast. Sir Arthur Hardinge, British Consul in Zanzibar, supported maintaining the *liwali* system in that it afforded “a guarantee to the natives that their interests will receive sympathetic consideration at the hands of the protecting power”. Hardinge preferred appointing Arab officials in the administration so as “to induce them, and through them the leading natives, to co-operate with us, and to identify their interests with ours”.<sup>16</sup>

The duties and roles of *liwalis* varied according to their qualifications and the stations where they were posted.<sup>17</sup> The hierarchy and jurisdiction of local officers were not clearly defined during the Sultanate period. After the establishment of the British Protectorate in Zanzibar, the British introduced a system to streamline the operation of the local administration. They enacted statutes that defined the jurisdiction of *liwalis* and *mudirs*.<sup>18</sup>

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<sup>15</sup> The term *liwali* originates from the Arabic word *al-wali* which means a Governor. Similarly, *mudir* is an Arabic word which means a manager/director. *Sheha* is a corrupted Arabic word *Shaykh* meaning a religious leader or head of a place.

<sup>16</sup> KNA/CA/1/13, Correspondence Respecting the Abolition of the Legal Status of Slavery on Zanzibar and Pemba, Letter from Sir A.Hardinge to Marquess of Salisbury, dated 2 April 1898, Zanzibar, 78.

<sup>17</sup> Salim, 1972, 77.

<sup>18</sup> For instance, The District (Mudirial) Court Proclamation of 1945 provides for the establishment of Mudirial courts and their jurisdiction. Civil and criminal jurisdictions were conferred on *mudirs*.

The powers of *liwalis* were equivalent to the second class magistrates who were empowered to hold a subordinate court. *Liwalis* were given jurisdiction to try civil and criminal cases within the coastal region over natives residing within it.<sup>19</sup> *Liwalis* were bound to follow the English civil and criminal procedures and not Islamic law.<sup>20</sup> The East Africa Order in Council 1897 provided for the number of *liwalis* along the East African coast. There were six *liwalis* covering various districts from Kismayu (Somalia) to Vanga (border town between Kenya and Tanzania).<sup>21</sup> The territorial jurisdiction of the *liwalis* was based on the administrative boundaries which the British colonial administration had set.<sup>22</sup>

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<sup>19</sup> Article 35 of the East African Order in Council 1897.

<sup>20</sup> KNA/CA/9/6, courts, *liwalis*, *mudirs* and *kadhis*, record of a meeting held in the Chief Justice's Chambers on Friday 26 January 1962 to consider the future of Muslim subordinate courts.

<sup>21</sup> *Liwali* of Vanga and Gazi, *liwali* of Mombasa, *liwali* of Takaungu, Malindi and Mambrui, *Liwali* of Lamu, Siyu and Faza, *liwali* of Itembe, and *liwali* of Kismayu.

<sup>22</sup> *Wilayet* of Vanga and Gazi in the district of Vanga: from the mouth of the River Uмба to the mouth of the River Mamoja and 10 miles inland. District of Gazi; from the mouth of the River Mamoja to the mouth of the creek Diani and 10 miles inland. *Wilayet* of Mombasa in the district of Mombasa: from the mouth of the creek Diani to the north of Kurwitu and 10 miles inland. *Wilayet* of Takaungu, Malindi and Mambrui in the district of Malindi; from the northern boundary of the *Wilayet* of Mombasa to the mouth of the Uyombo creek and 10 miles inland. *Wilayet* of Malindi from the mouth of the Uyombo creek to the mouth of the River Sabaki and 10 miles inland, the boundary following the course of the River and 10 miles inland. *Wilayet* of Mambrui from the mouth of the River Sabaki to the mouth of the River Tana and 10 miles inland, the boundary of the Provinces of Seyyidieh and Tanaland. *Wilayet* of Lamu, Siyu and Faza in the district of Lamu; the islands of Lamu and Manda from the northern boundary of *wilayet* of Mambrui to the western Sultanate of Witu. The island of Siyu and the Island of Faza. *Wilayet* of Itembe in the District of Port Durnford. *Wilayet* of Kismayu in the Lower Juba District.

Before their appointment, local officers were trained in special courses to improve their legal knowledge. Prospective candidates for judicial posts were examined on basic legal subjects. Appointment and promotion depended on their performance in the examinations. Pouwels noted that prior to the establishment of the Zanzibar Protectorate, *liwalis* in Lamu used to preside over cases in a *baraza* with the assistance of the local elders and two *kadhis*.<sup>23</sup>

*Mudirs* were appointed from local families that included Arabs and Swahili. Appointment of *mudirs* was made by the Sultan with the advice of the British Resident. Successful candidates for the post of *mudir* were first appointed as Assistant *mudir* and trained by a senior *mudir* for around two years, and upon successful completion they were promoted to full *mudir*.<sup>24</sup> In addition to their court work, *mudirs* were assigned general administrative duties for the maintenance of order within their areas. The administrative powers of *mudirs* were equivalent to those of a District Officer who had the jurisdiction of a third class magistrate.<sup>25</sup> They exercised limited criminal jurisdiction for offences, such as, theft, and assault. *Mudirs* were supervised by the Senior Commissioner and appeals from *mudirs*

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<sup>23</sup> Pouwels, 1987, 135.

<sup>24</sup> Topical discussion with former *mudir* in Zanzibar, Abdulrahman Swaleh, Zanzibar, 25 May 2005. According to Mr. Swaleh, most of the persons who were appointed as *mudirs* completed secondary school education.

<sup>25</sup> Topical discussion with former *mudir* in Vanga, Kenya, Zayd Muhammad Suleiman al-Mazrui, Takaungu, 8 June 2006. Mr. Zayd was a *mudir* in several towns along the Kenya coastal strip.

courts laid with the High Court.<sup>26</sup> The *mudir* courts also had limited civil jurisdiction and in cases related to native land and native law they were bound to call in the aid of two or more assessors. *Mudir* courts applied “any custom which is recognized by any natives residing in the Protectorate as being binding upon them as having the force of law and which is not repugnant to justice and morality or inconsistent with any other law”.<sup>27</sup> Customary and religious laws were upheld except in cases where they failed to pass the repugnancy test or contravened colonial statutes.<sup>28</sup>

The British colonial administration in Zanzibar established formal *mudir* courts in 1925. The British Resident in Zanzibar made provision for these courts by amending the Zanzibar Courts Decree 1923, and the British Subordinate Courts Order 1923. *Mudir* courts were created by a Proclamation of the British Resident that specified the constitution of the court and its jurisdiction. A hierarchy of the courts was also introduced where each court consisted of a *mudir* and a number of members from the local area.<sup>29</sup> *Mudir* courts were presided over by a *mudir* together with two or more assessors from the Arab, Indian or African population.<sup>30</sup>

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<sup>26</sup> Sec. 16 (1) of The District (Mudirial) Courts Proclamation 1947 provided that “The Senior Commissioner or District Commissioner may call for and examine the record of any proceedings, civil or criminal, before a Mudirial Court for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, judgment, sentence or order recorded or passed, and as to the regularity of any proceedings of such Court”.

<sup>27</sup> Sec.2 (1) of the District (Mudirial) Courts Proclamation 1947.

<sup>28</sup> Mann, 1991, 21.

<sup>29</sup> Vaughan, J.H (1935) *The Dual Jurisdiction in Zanzibar* Zanzibar: Government Printer 34.

<sup>30</sup> ZNA/BJ1/323, Colonial Reports, Zanzibar Protectorate, 1934.

Although the British colonial authorities adopted the policy of indirect rule in appointing local officers, the views of British officials relating to the conferring of judicial powers on *liwalis* and *mudirs* were not uniform. While British administrative officers supported the view of conferring judicial powers on *liwalis* and *mudirs*, their fellow judicial officers opposed such initiative. The Chief Justice of Zanzibar expressed his concern about conferring jurisdiction over *liwalis* and *mudirs* by stating:

“I am aware that as a matter of policy it was considered desirable to utilize these courts as means of indulging certain sections of the population to take their part in the machinery of state. Without wishing to intrude upon questions of major policy with which I am not concerned, I would express the view that the administration of justice is hardly the best venue of approach to this question and that the introduction of a popular element might better be confined to administrative activities by way of village or district advisory councils.”<sup>31</sup>

The British adopted the indirect rule policy in the Kenya coastal strip and incorporated *liwalis* and *mudirs* in the colonial administration. Appeals from *liwali* and *mudir* courts were heard by British judges in the High Court. Supervision of administrative work of *liwalis* and *mudirs* was undertaken by the *liwali* for the Coast who was, in turn, appointed and supervised by the Provincial Commissioner of the Coast. With all the control in their hands, the British colonial officers gradually curtailed the powers of *liwalis* and *mudirs* before embarking on the process of abolishing them. The ultimate objective of the British colonial administration was to abolish the local administrative system.

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<sup>31</sup> ZA/AB62/80 Vol.2, Report by the Chief Justice dated 9 January 1942.

British policy succeeded in gradually abolishing the *liwali* and *mudir* courts in the Kenya coastal strip by integrating the *liwali* and *mudir* courts into the administrative service. British policy to abolish Muslim administrative institutions was apparent in 1962 when the Chief Justice of Kenya reviewed the status of Muslim subordinate courts and recommended that the *liwali* and *mudir* be incorporated into the Kenyan judicial system as ex-officio magistrates entitled to hold a subordinate court of the third-class, equivalent to that of the District Officers.<sup>32</sup> This marked the start of an end to the *liwali* and *mudir* courts following a deliberate British policy to abolish them in the Kenya coastal strip.<sup>33</sup>

The incorporation of the *liwalis* and *mudirs* in the Kenyan judicial system before dependence of Kenya was a calculated colonial policy to gradually abolish the institutions. Due to the fact that *liwali* and *mudir* courts have been entrenched in the administrative in the colonial system, it proved difficult for the British to abolish them outright. It was therefore imperative for the British colonial officials to gradually diminish the roles of *liwalis* and *mudirs* before abolishing their courts.

Abolition of *liwali* and *mudir* courts was recommended by the Minister of State for Constitutional Affairs and Administration and the Minister for Legal Affairs in a joint memorandum. The Ministers pointed out that *liwali* and *mudir* were administrative officers in the Provincial Administration without special training in civil and criminal procedure

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<sup>32</sup> KNA/CA/9/6, courts, *liwalis*, *mudirs* and *kadhis*.

<sup>33</sup> *Liwali* courts in Tanganyika were abolished in 1961. Functions of *liwalis* were taken over by the District Commissioners and Regional Commissioners. Schacht, 1965, 13.

codes and therefore recommend their courts to be abolished.<sup>34</sup> After Kenyan independence in 1963, the *liwali* and *mudir* courts were abolished. *Liwalis* and *mudirs* were absorbed into the provincial service and appointed as District Commissioners and District Officers, respectively.

### 2.3.2 *Akidas and shehas*

*Akida* was a title used in the Arab system, equivalent to that of *mzee wa mji*. After the enactment of the Native Administration and Authority Decree No.15 of 1922, the title of *akida* was changed to that of *mudir*. It was part of the indirect rule policy to incorporate traditional rulers into the colonial administration. An *akida* had no judicial powers and his administrative powers rested on his personal influence and his *heshima* derived from the social position of his family.<sup>35</sup> The main duty of the *akida* was the maintenance of law and order. He also acted as an intelligence officer who was required to report on any matter that threatened the colonial administration. Other duties of the *akida* included collection of poll tax, protection of the estate of any deceased Muslim, and providing information as to heirs of the estate. The duties and powers of the *akida* and other local administrative officers were defined in the Native Administration and Authority Decree No.15 of 1922.<sup>36</sup>

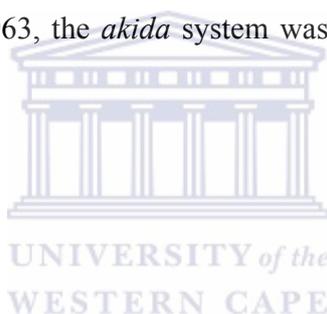
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<sup>34</sup> KNA/CA/9/6, courts, *liwalis*, *mudirs* and *kadhis*, joint memorandum by the Minister of State for Constitutional Affairs and Administration and the Minister for Legal Affairs, Council of Ministers amendments to the Courts Ordinance and Criminal Procedure Code in respect of Muslim subordinate courts, held on 8 December 1962.

<sup>35</sup> KNA/PC/Coast/1/20/96, *kadhis mudirs*, *liwalis* etc.

<sup>36</sup> Hailey, 1950, 7.

*Shehas* were subordinate to *akidas* and their main duty was to assist *akidas* in the maintenance of law and order.<sup>37</sup> The appointment of *shehas* was hereditary, from the people of the village. *Shehas* were not full-time employees of the administration; hence they were not expected to devote their time to government throughout the day. *Shehas* were charged with the responsibility of informing the higher authority of any unusual occurrences that threatened security of the place. Other duties of the *shehas* were to circulate decrees or laws enacted by the government among the inhabitants of the village, and to cater for the welfare of the people in their *shehas* (villages). *Akidas* and *shehas* were prevalent in Zanzibar and Tanganyika during the pre-independence period. After the independence of Zanzibar in 1963, the *akida* system was abolished whereas the office of the *sheha* was retained.



### 2.3.3 Muslim *wakils*

Muslim *wakils* were perceived to be a symbol of Muslim identity in the judicial system along the East African coast. *Wakils* functioned in Zanzibar and the Kenya coastal strip, particularly in the towns of Mombasa, Malindi, Takaungu and Lamu. The appointment of *wakils* in Zanzibar was established around 1900 and they were subjected to similar regulations as other advocates.<sup>38</sup> The jurisdiction of *wakils* was confined to *kadhi* courts in matters of MPL that included marriage, divorce, custody of children and inheritance. They were equivalent to advocates in representing disputing parties before courts of justice.

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<sup>37</sup> ZA/BJ1/323, Colonial Reports, Zanzibar Protectorate 1934.

<sup>38</sup> Stockreiter, 2007, 98.

Possessing essential knowledge of Islamic law was a requirement before a person was granted a certificate to practise as a Muslim *wakil*. In addition, a person desiring to become a *wakil* must furnish two sureties who were required to sign a security bond.<sup>39</sup> Sultan Hamud b. Muhammad (r.1896-1902) laid down the regulations for the appointment and conduct of *wakils*. The regulations required persons desiring to become *wakils* in any of the Courts of His Highness the Sultan to obtain a certificate from the Sultan. The right to grant a certificate to *wakils* or to withhold them was reserved to the Sultan.<sup>40</sup>

*Wakils* were required to conduct their pleadings in accordance with Islamic substantive and procedural law. In Mombasa, chief *kadhis* were assigned the responsibility of examining candidates aspiring to become *wakils*. In one case, Sh. Al-Amin b. Ali al-Mazru‘i (d.1947), the Acting chief *kadhi* of Kenya, examined Sa‘id Mohamed b. Khamis Hijazi on technical points in Islamic law and noted “I find him capable of carrying out the duties of vakil (sic.)

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<sup>39</sup>Rules of Court (Legal Practitioners) No. 2 of 1911. The validity of a *wakil* certificate is one year subject to renewal. Another requirement for being licensed as a native *wakil* was the provision of two sureties for the applicant from people of some means, who had to sign a security bond under the Rules of Court (Legal Practitioners) No. 2 of 1911.

<sup>40</sup> Regulations for the appointment and conduct of *Vakils* appearing in the courts of Justice of His Highness the Sultan, Decreed and published at Zanzibar the 29 Safar 1319 (19 June 1901). Article I: “Every person desirous of acting as a Vakil in any of the Courts of His Highness the Sultan, shall obtain a certificate enabling him so to do from His Highness the Sultan”. Article II: “Every person applying for such a certificate shall satisfy His Highness the Sultan in writing or otherwise that he is fit and proper person to perform the duties of a wakil”. Article III: “The right is reserved to His Highness the Sultan of granting or withholding any certificate at his discretion”.

and I therefore recommend him that be given a license to practice as a native vakil".<sup>41</sup> *Wakils* were allowed to attest documents and their jurisdiction was confined within *kadhi* courts. Fees charged by *wakils* were regulated by the Regulations that provided a scale of fees amounting to an average of 5 per cent of the amount of the subjectmatter in a case. Remuneration of *wakils* was negotiable and cheaper compared to that of advocates. The role of *wakils* was significant in assisting Muslim litigants who could not afford advocates' fees. In disputes before *kadhi* courts, Muslim litigants relied on the expertise of *wakils* on matters of MPL.

Advocates in Mombasa complained to the then Attorney-General of Kenya, Charles Njonjo, that *wakils* were not trained as common law lawyers and therefore did not qualify to practice before the *kadhi* courts. The advocates could not challenge *wakils* in *kadhi* courts on cases related to MPL due to the fact that *wakils* were conversant with Islamic law. This caused embarrassment to the advocates who lost most of their cases in *kadhi* courts.<sup>42</sup> These factors contributed to the abolition of Muslim *wakils* along the Kenya coastal strip. Prior to Kenyan independence, the Chief Justice of Kenya held a meeting to review the status, powers and distribution of the various categories of Muslim Subordinate Courts. It was noted that since the government had decided to abolish *liwalis'* and *mudirs'* courts, it

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<sup>41</sup> KNA/DC/KSM/1/15/19, Native vakils - Sai'd Mohamed b. Khamis Hijazi, Letter from the Acting Chief Kathi to the District Registrar Supreme Court, Mombasa dated 22 March 1934. Another *wakil*, Khamis b. Shafi, was examined on technical points of Mohammedan law by the Chief Kadhi, Mombasa, and passed on 22 July 1933. KNA/DC/KSM/1/15/137 Native vakils - Khamis b. Shafi.

<sup>42</sup> Topical discussion with former Muslim *wakil* Shariff Muhammad Hassan al-Nadhir, Mombasa, 1 January 2008.

followed, therefore, that *wakils* would automatically lose their right of appearance before all Muslim Subordinate Courts.<sup>43</sup> *Wakils* continued to function in Kenya until shortly after independence when they were abolished by Charles Njonjo, the then Attorney-General.<sup>44</sup>

#### **2.4 The British policy on the accommodation of *kadhi* courts in the Busa‘idi Sultanate**

In the above section, the thesis has demonstrated how the British adopted the indirect rule policy and incorporated *liwalis* and *mudirs* in the colonial administrative system before they were abolished prior to the independence of Zanzibar and Kenya. In this section I will demonstrate how the British used a similar policy of incorporating *kadhis* in the colonial judicial system with a view to reforming their mode of operation. This section will look at the accommodation of Muslim judicial institutions represented by *wakils* and *kadhis* in the Busa‘idi Sultanate. As noted above, Busa‘idi Sultans and the British used the indirect rule policy in accommodating local administrative and judicial institutions. *Kadhi* courts were no exception to the manifestation of indirect rule policy.

During the Busa‘idi reign in Zanzibar, the Sultans adopted the policy of accommodating *kadhis* and other Muslim scholars.<sup>45</sup> *Kadhis* in the Busa‘idi Sultanate enjoyed recognition

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<sup>43</sup> KNA/CA/9/6, Courts, courts, *liwalis*, *mudirs* and *kadhis*.

<sup>44</sup> Topical discussion with Mr. Hassan Muhammad Hassan, Mombasa, 17 December 2007.

<sup>45</sup> Hashim, A “Servants of Sharia: Kadhis and the Politics of Accommodation in East Africa” (2005) 16 *Sudanic Africa* 29. Some Muslim dynasties, such as, the Nasird Kingdom of Granada, Spain (629-897/1232-1491), accommodated *kadhis* inside the King’s palace, the Alhambra, and provided houses for them. See

from society and occupied religious authority. Based on this religious recognition, Busa'idi Sultans adopted a policy of accommodation by incorporating them into the Sultan's court. Since the establishment of the Busa'idi Sultanate, *kadhīs* were tied to the Sultan's court and played an influential role in running the affairs of the Sultanate. In the earlier part of the Busa'idi Sultanate, *kadhīs* were commissioned to attend various state functions outside Zanzibar. For instance, *kadhi* 'Abd al-'Aziz b. 'Abd al-Ghani al-Amawi (d.1896) was commissioned to represent the Sultan in a settlement outside Zanzibar. Al-Amawi became a close confidant of successive Sultans and was regarded as "more than a *kadhi*: he was almost a minister".<sup>46</sup>

*Kadhīs* in the Busa'idi Sultanate, as is the case in other Muslim dynasties, occupied dual roles as *kadhīs* and *muftīs* who advised Sultans on religious matters and served as judicial officers.<sup>47</sup> Both the Sultans and the British considered *kadhīs* as *muftīs* and used to consult them on Islamic matters.<sup>48</sup> The roles of *kadhīs* and *muftīs* are complimentary ones although

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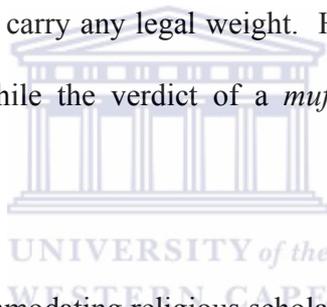
Secall, M. I. C "Rulers and Qadis: Their Relationship during the Nasrid Kingdom" (2000) 7 (2) *Islamic Law and Society* 239

<sup>46</sup> Mkelle, M. B. "A Scholar For All Seasons: Sheikh Abdul Aziz al-Amani [Amawi] of Zanzibar" (1992) 13 (1) *Journal of the Institute of Muslim Minority Affairs* 117.

<sup>47</sup> For instance, in 1846 Seyyid Sai'd sent *kadhi* Muhiddin al-Qahtani to negotiate a truce between Sultan Seyyid Sai'd and the people of Siu, Kenya. Farsy, A.S. (1982) *al-Busa'idyyun hukkam Zinjibar* Muscat: Ministry of National Heritage and Culture. 41.

<sup>48</sup> Reliance on *kadhīs* as *muftīs* continued even after the Zanzibar revolution. It was only in 2001 that the Zanzibar government enacted the Mufti Act 2001 in which a *mufti* was appointed by the President with powers distinct from the judicial functions of *kadhīs*. See Peter, C. M (2008) *Mufti Act of Zanzibar: The Fundamental Rights and Freedoms of Muslim in the Isles*, Zanzibar: Zanzibar Legal Services Centre.

their functions are distinct. A *mufti* gives legal opinions in the form of *fatwas* for new situations by interpreting the legal texts, whereas a *kadhi* is merely a technocrat who applies the law to cases brought before him. In cases where a *kadhi* was faced with complicated legal problems, he usually consulted a *mufti*.<sup>49</sup> Al-Qarafi, Maliki *mufti* (d.1868), described the *kadhi's* role in adjudicating cases, as a creative or original one (*inshai*), while that of the *mufti* in interpreting the law was an informative one (*khabari*).<sup>50</sup> Ibn al-Qayyim al-Jawziyya (d.1931) identified a *fatwa* of a *mufti* as a general and abstract rule, while a *hukm* of a *kadhi* was a particular and concrete one.<sup>51</sup> As a consequence of the juridical powers conferred on *kadhīs*, judgements issued by *kadhīs* were binding whereas verdicts given by *muftis* did not carry any legal weight. Hence a *kadhi's* judgment carries the presumption of finality, while the verdict of a *mufti* enters a world of competing opinions.<sup>52</sup>



By adopting the policy of accommodating religious scholars, Busa‘idi Sultans established a number of posts, such as, *rais al-awqaf* and *kadhīs*. A significant feature of the Sultans’ policy of accommodating *kadhīs* was the appointment of *shafi‘i kadhis* that formed the majority *madhhab* in the Sultanate, as opposed to the *ibadhi madhhab* adopted by the

<sup>49</sup> Shaham, R “An Egyptian Judge in a Period of Change: Qadi Ahmad Muhammad Shakir, 1892-1958” (1999) 119 (3) *Journal of the American Oriental Society* 451.

<sup>50</sup> Hoexter, M “Qadi, Mufti and Ruler: Their Roles in the Development of Islamic Law”, in Shaham, R (ed.) (2007) *Law, Custom, and the Statute in the Muslim World* Leiden: Brill 84.

<sup>51</sup> Masud, M.K “Muftis, Fatwas, and Islamic Legal Interpretation” in Masud, M.K. (ed.) (1996) *Islamic Legal Interpretation: Muftis and their Fatwas* Massachusetts: Harvard University Press 267.

<sup>52</sup> Masud, 1996, 18.

Omani minority ruling class.<sup>53</sup> In order to gain support of their subjects, Sultans appointed *kadhis* on the basis of affiliation to the dominant sect in the Sultanate. For instance, in 1912, the ratio of *sunni kadhis* in Zanzibar Town was three *shafi'i kadhis*: Ahmad b. Sumayt, Burhan b. 'Abd al-'Aziz al-Amawi (d. 1935) and Tahir b. Abubakar al-Amawi (d.1938) as opposed to one *ibadhi kadhi*: 'Ali b. Muhammad al-Mandhri (d.1925). The increased number of *shafi'i kadhis*: reflected the majority of the *shafi'i* population in the Zanzibar archipelago compared to Pemba Island where the majority of *kadhis* were from the *ibadhi madhhab* due to the dominance of the *ibadhi* sect on the island. In 1912 there were three *ibadhi kadhis* in Pemba: Gharib b. 'Ali (d. 1934) in Chake Chake, Salim b. Ahmad in Wete and Muhammad b. 'Ali al-Mandhri in Mkoani, with only one *shafi'i kadhi* 'Abd al-rahim b. Mahmud al-Washili (d.1936).<sup>54</sup>

As part of the policy of accommodation, Busa'idi Sultans awarded medals to *kadhi* in recognition of their services. Among medals awarded to *kadhis* in Zanzibar was the Order of the Brilliant Star of Zanzibar. *Kadhis* awarded membership of the fourth class of the Order of the Brilliant Star of Zanzibar included Tahir b. Abubakar al-Amawi on 19 July 1919, 'Ali b. Muhammad al-Mandhri on 29 May 1922, 'Abd al-rahim b. Mahmud al-Washili on 24 March 1928, Sa'id b. Nasor al-Ghaythi (d.1942) on 1 April 1932, and 'Umar b. Sumayt (d.1973) on 4 April 1940. Another type of medal awarded by Sultans to *kadhis* was His Highness Sultan's Silver Jubilee Medal. Recipients of this medal included Tahir b. Abubakar al-Amawi, Sa'id b. Nasor al-Ghaythi, Habib b. Mbaruk al-Mauli (d.1945), and

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<sup>53</sup> Pouwels, 1987, 152.

<sup>54</sup> The Official Gazette of the Zanzibar Government, Vol.20 No.1042, 15<sup>th</sup> January 1912, 8.

Sa'id b. Rashid al-Ghaythi (d.1954), who were all awarded the medal on 7 January 1937.<sup>55</sup>

The British administration also awarded medals to *kadhis* in recognition of service rendered to the British Empire. For instance, in 1919 Burhan b. 'Abd al-'Aziz al-Amawi was invested with the Order of the British Empire (OBE),<sup>56</sup> while 'Amer Tajo (d.1992) was awarded the Order of the British Empire Honorary Officer of the Civil Division of the Most Excellent Order of the British Empire in 1957.

Based on Busa'idi's policy of accommodating Muslim scholars, the British colonial administration recognised the religious authority of *kadhis* in order to legitimatise its rule and win the confidence of the Muslim society. By incorporating Muslim scholars in the colonial framework, the British aimed at controlling the power of the scholars, and placed them under constant surveillance in order to avoid any religious uprisings against colonial rule, as was the case in other British territories.

In dealing with *kadhis* and their courts, the British colonial administration paradoxically adopted two conflicting policies: inclusion and exclusion. On the one hand, the British adopted a policy of inclusion by accommodating *kadhis* and their courts within the colonial framework as a basis for gaining legitimacy of the colonial rule. On the other hand, the

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<sup>55</sup> Personal files of the *kadhis*: ZNA/HC26/19 Tahir al-Amawi, ZNA/AB86/137 Sa'id Nasor al-Ghaythi, ZNA/AB86/135 Habib Mbaruk al-Mauli and ZNA/AB86/139 Sai'd Rashid el-Ghaythi.

<sup>56</sup> Bang, A.K "Intellectuals and Civil Servants: Early 20<sup>th</sup> Century Zanzibari Ulama and the Colonial State" in Amoretti, Biancamaria Scarcia (ed) (2000) *Islam in East Africa: New Sources (Archives, Manuscripts and Written Historical Sources, Oral History, Archaeology* Proceedings of International Colloquium, Rome: Herder 65.

British adopted a policy of exclusion by curtailing *kadhis*' powers and their jurisdiction as regards the application of both substantive as well as the procedural laws of Islam. The British policy of accommodating *kadhis* was a double-edged sword. On the one hand, the incorporation of *kadhis* in the colonial order aimed at achieving recognition of Islamic orthodoxy. On the other hand, *kadhis* lost religious legitimacy by associating themselves with non-Muslim judges in courts. By being incorporated into the colonial framework, the religious authority of the *kadhis* was gradually being subverted.

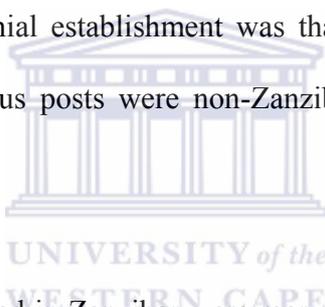
Despite the fact that *kadhis* were employed by the British colonial administration after the establishment of the British Protectorate in Zanzibar, they were reluctant to be seen by society as agents of the colonial government. Perceiving themselves as servants of Sharia (*Khadim al-shar'*), *kadhis* felt that their loyalty and allegiance was more inclined to their religion more than their colonial masters. Hence, *kadhis* did not feel that they were morally bound to serve the colonial establishment. This attitude, however, did not preclude some *kadhis* from showing their loyalty to the British administration. For instance, the Principal Judge in Mombasa praised the loyalty of Shaykh al-Islam *Mwenye Abudu* (d.1922) to the British authorities by stating:

“the official relationship between the Sheikh al-Islam and the Government are both close and excellent. He is the Chief Kadhi and as such is treated by the Courts and Government as the representative of Islam. He has served the ‘serkal’ (government) loyally and does not intervene or express opinions on disputed matters except when they are officially referred to him by the courts of the Administration.”<sup>57</sup>

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<sup>57</sup> KNA/AP/1/606, Increase of salary of Sheikh al-Islam, letter from the Principal Judge, Mombasa, to the Secretary to the Administration dated 21 February 1910.

The loyalty of Shaykh al-Islam in the Kenya coastal strip was in contrast to the attitude of *kadhis* in other British territories, such as Northern Nigeria, where *alkalis* (*kadhis*) disassociated themselves from the British and played a significant role in fighting the British Imperial authorities.<sup>58</sup> Pouwels attributes the lack of violent resistance of *kadhis* in the East African coast to their affiliation to popular *sufi* brotherhoods that prevailed in the region, such as, the *qadiriyya* and *shadhilyya*.<sup>59</sup> In addition to Pouwel's explanation, *kadhis'* non-violent attitude towards the British in the East African coast was due to the fact that most *kadhis* were trained in traditional centres of Islamic learning that required great respect for one's superiors. The other possible explanation for the lack of resistance of *kadhis* against the British colonial establishment was that most of the renowned *kadhis* assigned to judicial and religious posts were non-Zanzibaris of Yemeni, Comorian and Barawian origins.



Most of *ibadhi kadhis* who served in Zanzibar were recruited from prominent and wealthy families in Oman. The fact that such prominent *kadhis* were of foreign origin could have contributed towards their allegiance to the Sultans and British rulers. The Busa'idi adopted a policy of recruiting *kadhis* from outside Zanzibar. The appointment of 'foreign' *kadhis* could possibly have been caused by the lack of qualified 'local' scholars to assume *kadhis'* posts. In any case, Busa'idi Sultan's took advantage of the intellectual vacuum by recruiting religious scholars from outside Zanzibar so as to ensure support of 'foreign' recruits to the Sultanate. Sultan Seyyid Sa'id appointed Muhiddin al-Qahtani (d.1869) and

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<sup>58</sup> Umar, 2006, 158.

<sup>59</sup> Pouwels, R.L "Sheikh Al-Amin b. Ali Mazrui and Islamic Modernism in East Africa 1875-1947" (1981) 13 (3) *International Journal of Middle Eastern Studies* 330.

‘Abd al-‘Aziz al-Amawi both of Barawa origin, as *kadhis* of Zanzibar and Kilwa, respectively. Similarly, Abubakar b. Sumayt (d.1874), of Hadhrami origin, was appointed as *kadhi* in Zanzibar by Sultan Majid b. Sa‘id (r.1856-1870).<sup>60</sup> Descendants of these pioneer *kadhis* were subsequently recruited as *kadhis* in Zanzibar and occupied high posts in the Sultanate. Britain adopted a similar policy of recruiting ‘foreign’ scholars throughout her Empire so as to break the influence of the ‘local’ scholars. For instance, the Grand *mufti* and *kadhis* of Sudan were appointed by the British colonial administration from Egypt. It was only in 1947 that the Grand *mufti* was appointed from among the local Sudanese scholars.<sup>61</sup>

## 2.5 Dual roles of *kadhis* between the State and society

In addition to their judicial functions, *kadhis* were perceived by society as religious leaders.<sup>62</sup> *Kadhis* served both as servants of the community and agents of the State. By virtue of their religious authority, on the one hand, *kadhis* felt a sense of pride in fulfilling their religious obligations as servants of Sharia. On the other hand, *kadhis* felt resentment of British judges’ arrogance and their interference with the religious jurisdiction of the *kadhis*. Hence, the position of *kadhis* was a difficult and ambivalent one.<sup>63</sup> *Kadhis*

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<sup>60</sup> Farsy, 1982, 53.

<sup>61</sup> Ibrahim, 1997, 18.

<sup>62</sup> *Kadhis* were conferred with other non-judicial functions since the Umayyad and early Abbasid periods. Blich-Abramski, I “The Judiciary (Qadis) as a Governmental-Administrative Tool in Early Islam” (1992) 35 *Journal of the Economic and Social History of the Orient* 41.

<sup>63</sup> Christelow, 2000, 388.

perceived themselves as the representatives of Islamic religious authority in society and therefore relied on religious tradition that remained “their fundamental frame of reference, the basis of their identity and authority”.<sup>64</sup>

*Kadhis* were also considered by society to represent symbols of Islam and Islamic law.<sup>65</sup> By assuming dual roles, *kadhis* found themselves caught between the dictates of judicial work and demands of social obligations. Despite the fact that British colonial authorities accommodated *kadhis* with their religious authority, the British made it a clear policy that *kadhis* were appointed to serve as judicial officers subject to civil service conditions. *Kadhi* courts were perceived to be religious institutions that gave *kadhis* the dual responsibilities of adjudicating cases in courts and serving the community outside the courts corridors. In some cases *kadhis* experienced difficulty to distinguish between their role as civil servants, as required by the British colonial administration, and their role as servants of *sharia*, to serve the society without subjecting themselves to any bureaucratic procedures. The difficulty of determining their exact role within the colonial framework led *kadhis* to contravene bureaucratic procedures laid down by the British colonial administration.

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<sup>64</sup> Zaman, M. Q (2002) *The Ulama in Contemporary Islam: Custodians of Change* Princeton and Oxford: Princeton University Press 10.

<sup>65</sup> Peletz, M.G (2002) *Islamic Modern: Religious Courts and Cultural Politics in Malaysia* Princeton: Princeton University Press 51.

From the establishment of the Busa‘idi Sultanate, *kadhis* used to operate informally by presiding over cases either in their houses or along the *barazas*.<sup>66</sup> Being dissatisfied with the informal roles played by *kadhis*, British colonial authorities adopted a policy of formalising the functions of *kadhis* by confining their judicial work to within the courts at the prescribed official hours. British administrators were concerned with *kadhis*’ tendency of adjudicating cases in their houses. The Acting Chief Justice of Kenya remarked:

“it has been brought to my notice that it is the practice of certain Kathis (*sic.*) and Mudirs to transact their official duties at their private houses at any hour of the day or night. This practice is open to grave objection and it must stop. I therefore issue the following instructions through the *liwali* for the coast. In future the work of all Kathis (*sic.*) and Mudirs will be done only at their Government offices and only during office hours.”<sup>67</sup>

Following this strict requirement to adhere to bureaucratic orders, British judges invalidated *kadhis*’ judgements given in their houses. In one case a husband obtained a judgement in his favour against his wife from a *kadhi* at the latter’s house. On appeal, Chief Justice G.G. Robison rejected the *kadhi*’s rule on the ground that the judgement was made at the *kadhi*’s

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<sup>66</sup> In Ottoman Aleppo, *kadhis* used to adjudicate cases in places that were accessible to all people, including mosques, and in some cases *kadhi* courts were convened at their houses. Rafeq, A. “The Application of Islamic Law in the Ottoman Courts in Damascus: The Case of the Rental of Waqf Land” in Masud, M.K (ed.) (2006) *Dispensing Justice in Islam: Qadis and their Judgments* Leiden: Brill 30. Similarly, in Northern Nigeria, the *Alkalis* had no special court building and they handled cases either in their houses or other places. Ubah, C.N “Islamic Legal System and the Westernization Process in the Nigerian Emirates” (1982) 20 *Journal of Legal Pluralism* 70.

<sup>67</sup> KNA/PC/Coast/1/20/96, *kadhis mudirs, liwalis* etc., notice from the Acting Chief Justice, Supreme Court of Kenya, Nairobi, dated 7 January 1924.

residence and therefore the *kadhi*'s judgement was invalidated on the ground that it was issued *ex parte*<sup>68</sup>.

The British policy on the functioning of *kadhīs* and their courts was directed towards transforming the traditional way in which *kadhīs* operated. Judicial reforms implemented by the British colonial establishment aimed at orienting *kadhīs* to function in a bureaucratic and punctual manner. However, *kadhīs* could not adjust easily to the reforms and in some cases showed lack of interest to implement colonial orders. For instance, a report noted that “Kadhīs were continually ill to come [to court] and if they did come, they often were late. Sometimes they refused to come at all without an order from the First Minister”.<sup>69</sup>

Among the strategies employed by British colonial administrators to implement the policy of transforming the *kadhīs*' institution was to replace older *kadhīs* by young energetic ones. In his letter to the Chief Secretary, the Provincial Commissioner of Kenya coastal strip noted:

“it is now an accepted policy of Government to replace, as quickly as may be, the old time purely decorative Arab officials by young, energetic, educated, English-speaking Arabs, and there has been a very great clearance out of old timers.”<sup>70</sup>

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<sup>68</sup> Stockreiter, 2007, 117.

<sup>69</sup> Randall P.L (1979) “Islam and Islamic Leadership in the Coastal Communities of Eastern Africa, 1700-1914” (Unpublished PhD Dissertation submitted to the University of California at Los Angeles) 191.

<sup>70</sup> KNA/PC/Coast/1/20/96, *kadhīs. mudirs, liwalis* etc., letter from the Provincial Commissioner, Coast, to the Chief Secretary, Nairobi, dated 28<sup>th</sup> March 1946.

## **2.6 The British policy on transforming the training of kadhis in the Busa‘idi Sultanate**

In her study on the *kadhi's* court in Zanzibar, Stiles observed that there was no standard training for *kadhis* and their appointment was based on their reputation as religious scholars.<sup>71</sup> Due to lack of formal training on the part of *kadhis*, the British colonial authorities embarked on the process of transforming training of *kadhi* in the Busa‘idi Sultanate. The British colonial authorities found that traditional training offered to *kadhis* in the local centres of Islamic learning did not equip them with the necessary legal requirements to handle court cases efficiently. In a number of cases British judges noted *kadhis* non-compliance with the procedural aspects of litigation. Hence, efforts of the British colonial administration were directed towards transforming the training of *kadhis* with a view of orienting them towards the British legal system as was the practice in other British colonised territories. I will first demonstrate how *kadhis* were trained in the traditional centres of Islamic learning in the Busa‘idi Sultanate and then proceed to examine British policies on transforming the training of *kadhis*.

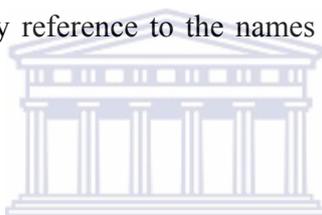
### **2.6.1 Training of *kadhis* in the centres of Islamic learning in the Busa‘idi Sultanate**

*Kadhis* along the East African coast were trained in mosques and scholars' residences that represented traditional centres of Islamic learning. These tutorials were given in the form of study circles conducted in mosques. Learning sessions were not restricted to specific

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<sup>71</sup> Stiles, 2002, 10.

persons but were open to the public. Students who attended the sessions were from different backgrounds cutting across various social boundaries. The mode of training in these tutorials followed a structured and comprehensive syllabus that incorporated various disciplines which aimed at equipping learners with the necessary qualifications for their future career as *kadhis*. Students were exposed to different disciplines by various tutors who had mastered areas of their specialisation. It was a common practice for learners to go to specific scholars in pursuit of particular disciplines. In cases where a scholar did not master a specific discipline, he would refer his students to a competent scholar in the field. In the event of a student travelling to other towns along the East African coast, his knowledge could be assessed by reference to the names of his teachers and the series of books that he had studied.



The disciplines which were taught to *kadhis* included recitation of Quran (*al-tajwid*), commentary of Quran (*tafsir al-Quran*), sayings of Prophet Muhammad (*hadith*), Islamic jurisprudence (*fiqh*), Arabic language (*al-lugha al-‘arabiyya*), mysticism (*tasawuf*) and theology/monotheism (*‘aqida/tawhid*).<sup>72</sup> I will describe below the methodology of training *kadhis* that was adopted by traditional centres of Islamic learning in the East African coast. I will give an account of the syllabi that were used to train *kadhis* in various disciplines which were considered necessary for the profession of Kadhiship.

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<sup>72</sup> On details of these disciplines and texts used in training *kadhis* along the East African coast, see Hashim, A “Scholars of the Circles: Role of Qadis in Training and Transmission of Islamic Learning along the East African coast between mid nineteenth and twentieth centuries” (2009) 29 *Journal for Islamic Studies* 104-140.

Teaching of the Quran preceded other disciplines and was considered to be the basis of Islamic learning. The Quran contained a significant number of verses on rules related to MPL. It was, therefore, imperative for *kadhis* to study and understand the Quran. Before proceeding to study the Quran, students were expected to have undergone an early childhood learning of the recitation of the Quran. The basic text used in *al-tajwid* (recitation of Quran) was *hidayat al-mustafid fi ahkam al-tajwid*.<sup>73</sup> At their later study years, students were taught *Tafsir al-Quran* (Commentary of the Quran). The most popular commentary of the Quran used in the East African coast was *tafsir al-Quran al-adhim li al-Imamayn al-Jalalayn*<sup>74</sup> by Jalal al-Din al-Mahalli (d.1459/60)<sup>75</sup> and Jalal al-Din al-Suyuti (d.1505), locally referred to as *tafsir al-Jalalayn*.

Another important field of training for *kadhis* was the study of *hadith* (Sayings of the Prophet Muhammad). The main sources in the discipline of *hadith* were texts written by Imam al-Nawawi (d. 1278). Reliance on al-Nawawi's texts in *hadith* reflects the preference of the *shafi'i madhhab* that prevailed along the East African coast. It was part of the canon to use texts interchangeably between disciplines. For instance, the text of *bulugh al-maram min adillat al-ahkam*<sup>76</sup> together with its commentary *subul al-salam sharh*

<sup>73</sup> Written by Muhammad al-Mahmud al-Najjar, famously known as Abu Rima The author was a teacher at *al-Madrassa al-Tahdhibiyya* in Hamah, Syria The book was published in Mombasa by Maktaba wa Matba'a al-'Alawiyya (n.d). The book contains basic teachings of the science of recitation (*'ilm al-tajwid*).

<sup>74</sup> Published in Singapore *Maktaba was Matba'a Suleiman Mara'i*, Singapore. (n.d).

<sup>75</sup> Brockelmann, C. *Geschichte*, supp. vol. I, 681, ff.15.

<sup>76</sup> Written by Abu Fadhl Shihab al-Din Ahmad ibn Hajar al-'Asqalānī (d.853/1449) See Brockelmann, *Geschichte*, vol. II, ff. 80.

*bulugh al-maram*<sup>77</sup> were used in training *kadhis* in *hadith* as well as *fiqh* (Islamic jurisprudence).

The focus of training *kadhis* was on the teaching of *fiqh*. Ulrike Freitag noted the significance of *fiqh* and the “weight which was laid on jurisprudence and the training of future judges and muftis”.<sup>78</sup> The syllabus of Islamic jurisprudence seemed to be the most extensive one in comparison to other disciplines. The syllabus demonstrated a system of gradual learning that would take the student from basic texts (*mabadi*) to major references (*ummahat al-kutub*). Students were first taught basic texts of Islamic jurisprudence that started with *al-risala al-jami‘a wa al-tadhkirat al-nafi‘a al-mushtamil ‘ala ma la budda minhu min al-‘aqaid wa al-ibadat wa al-‘adat*.<sup>79</sup> The text was locally referred to as *Risala* and was compiled from Imam al-Ghazali’s books on *Shafi‘i* jurisprudence.<sup>80</sup> Teaching of *Risala al-jami‘a* was complemented by *Irshad al-Muslimin li ahkam furu al-din mufatahan bi bab jalil al-miqdar fi bayan ma jaa fi ittiba‘i al ‘ilm wa fadhl al ‘ulama al abrar*, also

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<sup>77</sup> Written by al-Amir Muhammad Ismail al-San‘ani (d.1203/1789) see Brockelmann, *Geschichte*, supp. vol. II, 74, ff.19.

<sup>78</sup> Freitag, Ulrike “Hadhramaut: a religious centre for the Indian Ocean in the late 19<sup>th</sup> and early 20<sup>th</sup> Centuries?” (1999) *Studia Islamica* 171.

<sup>79</sup> Written by Ahmad b. Zayn al-‘Alawi al-Hibshī (d .1145 /1733) see Brockelmann, *Geschichte*, supp. vol. II, 814 The book was published by Shamsudin Haji Ahmed & Co., Mombasa (n.d.) and *Maktaba was Matba‘a Sulayman Mara‘i*, Singapore.(n.d).

<sup>80</sup> The text covered basic teachings of Islam for beginners, including rules for ritual purity such as ablution (*wudhu*). It further provided brief details on the pillars of Islam. The final part explored the means of protecting the heart and other parts of the body from sins.

known as *bab ma jaa*.<sup>81</sup> After completion of *risala al-jami'a* the student was further exposed to *Matn Safinat al-Naja fi usul al-din wa al-fiqh 'ala madhhab al-Imam al-Shafi'i*<sup>82</sup> *Safinat al-naja* follows the format of *risala al-jami'a* that focused on rituals (*'ibadat*) such as purification (*al-tahara*) and prayer (*salat*) with more detailed information. Students are then taught *al-durar al-bahiyya fi ma yalzimu 'ala al-mukallaf min al-'ulūm al-shar'iyya*<sup>83</sup> together with *al-riyadh al-badi'a fi 'ulum al-din wa ba'dh furu al-shari'a*.<sup>84</sup>

After going through the above series of elementary texts on Islamic jurisprudence, *kadhis* were expected to have learnt the basic rituals, and thereafter were exposed to advanced texts with detailed matter on transactions (*mu'amalat*). The first in the series of advanced texts in Islamic jurisprudence was *matn al-ghayat wa al-taqrib*.<sup>85</sup> The text was locally

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<sup>81</sup> Despite its popularity in the East African coast, the author of *Irshād al-muslimīn* and its place of origin are not known. *Kadhi* Abu Bakar Sumayt of Zanzibar (d. 1290/1874) wrote an Arabic commentary on *irshad al-muslimin* under the title *al-tiryāq al-nafi' min al-'ama sharh ma jaa fi ittiba'i al-'ilm wa fadhl al-'ulama* in 1283/1867 which was published in Delhi by *Maktaba Isha'at al-Islami* (n.d). The text has a brief introduction on the etiquettes of learning, and the rewards (*fadhl*) of scholars. It focuses on ritual purity and provides details of ablution (*wudhu*), complete ablution (*al-ghusl*), and conditions for prayer (*salat*).

<sup>82</sup> Written by Salim Samir al-Hadhrami who flourished in the 19<sup>th</sup> century. See Brockelmann, *Geschichte*, vol. II, 651, ff. 4c. The text was published in Mombasa by *Maktaba wa Matba'a al-'Alawiyya*. (n.d.).

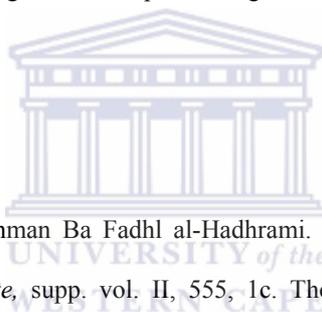
<sup>83</sup> Written by Abu Bakar Muhammad Shatta al-Shafi'i (d. 1310/1893) see Brockelmann, *Geschichte*, vol. II, 650. The book was written in 1303/1886.

<sup>84</sup> Written by Muhammad Sulayman Hasaballah, an Egyptian scholar who lived in Hijāz and flourished in the 19<sup>th</sup> century. See Brockelmann, *Geschichte*, vol. II, 651, no.6.

<sup>85</sup> Written by al-Qadi Abu Shuja' Ahmad al-Husayn al-Asfahani (d. 1106). Abu Shuja' died after 500/1106. Brockelmann, *Geschichte*, supp. vol. I, 492, no. 23.

referred to as *matn Abu Shuja'*, in the name of the author. The book starts with purification (*al-tahara*) and pillars of Islam. Then students are taught *al-muqaddima al-hadhramiyya i fiqh al-sada al-shafi'iyya*, also known as *rub'u al-'ibad*.<sup>86</sup> After completion of *al-muqaddima al-hadhramiyya* followed *umdat al-salik wa uddat al-nasik*.<sup>87</sup> The next book that followed in the series was *fath al-qarib al-mujib*<sup>88</sup>. Mr. L.W.C. Van den Berg noted in his preface to the edition of *fath al-qarib* that:

“from year to year European control over Moslem peoples is extending, so it is unnecessary to insist upon the importance of rendering the two works [*fath al-qarib* and *minhaj al-talibin*] that form the basis of the legal literature of the school of Shafei (*sic.*) accessible not only to a small number of Arabic scholars, but also to magistrates and political agents.”<sup>89</sup>



<sup>86</sup> Written by Abdallah b. Abd al-Rahman Ba Fadhl al-Hadhrami. The author flourished in the 10<sup>th</sup>/16<sup>th</sup> century. See Brockelmann, *Geschichte*, supp. vol. II, 555, 1c. The book was written in 1367/1948 and published in Singapore by *Maktaba wa matba'a* Suleiman Mara'i, Singapore. (n.d)

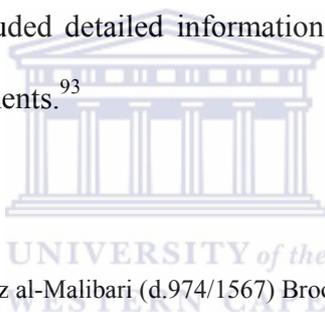
<sup>87</sup> Written by Imam Shihab al-Din Abi al-Abbas Ahmad al-Naqib al-Misri (d. 769 /1367). See Brockelmann, *Geschichte*, supp. vol. II, p. 104, 12a. The book was published in Cairo by *Maktaba wa matba' Mustafa al-Babi al-Halabi wa auladihi bi Misr* in 1368/1948.

<sup>88</sup> Written by Imam Shihab al-Din Abi al-Abbas Ahmad al-Naqib al-Misri (d. 769 /1367). See Brockelmann, *Geschichte*, supp. vol. II, 104, 12a. The book was published in Cairo by *Maktaba wa matba' Mustafa al-Babi al-Halabi wa auladihi bi Misr* in 1368/1948.

<sup>88</sup> Written by Muhammad Qasim al-Ghazzi (d.918/1512) See Brockelmann, *Geschichte*, vol. I, 492, no. 23. The text was published in Singapore by *Maktaba wa matba'a* Suleiman Mara'i, Singapore.(n.d).

<sup>89</sup> Howard, E.C (1914) *Minhaj et Talibin: A Manual of Muhammadan Law According to the School of Shafii* London: W. Thacker & Co. 5. Translated into English from the French edition of L. W. C. Van Berg. The French translation was published in 1882 in Batavia by the Government of the Netherlands.

Students were then taught *fath al-mu'in bi sharh qurrat al-ayn bi muhimmat al-din*.<sup>90</sup> Finally, students were exposed to the major reference text in *shafi'i* jurisprudence *minhaj al-talibin wa umdat al-muftina fi fiqh madhhab al-Imam al-Shafi'i*.<sup>91</sup> *Kadhis* in the Busa'idi Sultanate used *minhaj al-talibin* as the basic reference text for their legal cases. It was translated into English to assist British Judges and Magistrates in dealing with Islamic law cases. According to Howard, *minhaj al-talibin* "occupies the first rank for deciding legal cases".<sup>92</sup> The text presents an extensive coverage of topics in Islamic jurisprudence according to the *Shafi'i madhhab*. It explores in detail areas, such as, rituals (*'ibadat*) that are covered in the introductory part. The significance of *minhaj al-talibin* in training *kadhis* was due to the fact that it included detailed information on transactions (*mu'amalat*) on which *kadhis* based their judgements.<sup>93</sup>



<sup>90</sup> Written by Zayn al-Din 'Abd al-Aziz al-Malibari (d.974/1567) Brockelmann, *Geschichte*, supp.vol. II, 604, 2

<sup>91</sup> Written by Sharaf al-Din al-Nawawi. The text was published in Cairo by *Maktaba wa matba' Mustafa al-Babi al-Halabi wa auladihi bi Misr* in 1338/1920.

<sup>91</sup> Howard, 1914, 5.

<sup>92</sup> *Ibid*, 5.

<sup>93</sup> *Minhaj al-Talibin* provided details of transactions, such as, sale (*al-bay'*), sale by advance (*al-salam*), security (*al-rahm*), bankruptcy (*al-taflis*), partnership (*al-shirka*), agency (*al-wakala*), loan (al -'ariya), usurpation (*al-ghasb*), pre-emption (*al-shuf'a*), farming leases (*al-musaqa*), and hire (*al-ijara*). On the law of personal status, the text presents regulations relating to endowment (*al-waqf*), gifts (*al-hiba*), inheritance (*al-faraidh*), wills (*al-wasiyya*), marriage (*al-nikah*), divorce (*al-talaq*), and maintenance (*al-nafaqa*). The final part of the text deals with crimes and punishments (*hudud*), war (*jihad*), poll tax (*al-jizya*), hunting and slaughtering of animals (*al-sayd wa dhabih*), animal sacrifices (*al-udhhiya*), oaths (*al-ayman*), vows (*al-*

Another area which *kadhis* were expected to master was the Islamic law of Inheritance (*mirath*). The main text used in training *kadhis* in the Islamic law of inheritance was *Matn al-rahbiyya fi 'ilm al-faraidh wa al-mirath 'ala al-madhahib al-arba'a*.<sup>94</sup> In addition to *matn al-rahbiyya*, students used a commentary, *hashiyat 'ala Muhammad b. 'Umar al-Baqri 'ala sharh matn al-rahbiyya fi 'ilm al-faraidh li al-Imam Sibt al-Maridini*.<sup>95</sup> It was a normal routine for the learners to memorise the basic text on the Islamic law of inheritance, *matn al-rahbiyya*.<sup>96</sup>

Arabic was regarded as a necessary tool for training *kadhis* and advancing their Islamic learning. Due to the fact that Arabic was the *lingua franca* of the time, *kadhis* were expected to demonstrate their competence in the language. References used in the courts were in Arabic and *kadhis* were expected to write their court proceedings and judgments in Arabic as well. Hence, emphasis was put on an Arabic syllabus to ensure that *kadhis* had a good command of the language. It is interesting to note that *kadhis*, particularly along the Kenya coastal strip, could not speak Arabic fluently despite their ability to read and write in Arabic. Lack of proficiency in speaking Arabic can be attributed to the environment in which *kadhis* were brought up. Most of *darsas* were conducted in Kiswahili. A striking

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*nadhr*), administration of justice (*al-qadha*), evidence of witness (*al-shahadat*), procedure (*al-dawa wa al-baynat*), and manumission of slaves (*'itq*).

<sup>94</sup> Written by Muwaffiq al-Din Abu 'Abdallah Muhammad 'Ali Muhammad al-Hasan al-Rahbi. (d. 579/1183) Published in Cairo by *Dar al-Qahira li al-Tiba'a* (n.d).

<sup>95</sup> Published in Cairo by *Matba'a al-Mashhad al-Husayni* in 1393/1973. The book was written in 1146/1734.

<sup>96</sup> In my topical discussions, I noticed that a number of *kadhis* in Zanzibar and Kenya had memorised *Matn al-rahbiyya*.

feature of *kadhis*' training is that almost all texts taught to them were written in Arabic. Teachers would normally ask a student to read the text and the teacher would give his commentary in Kiswahili. Students would interact with their teacher in discussion in Kiswahili as well. Reliance on Kiswahili has contributed a lot in orienting students to use that language as the medium of instruction in their training, instead of Arabic. Another explanation for the lack of fluency in speaking Arabic among *kadhis* was due to the intermarriages that took place between scholars of Arab origin and local people along the East African coast, which resulted in the diminishing role of using Arabic in society. In one case, applicants for the post of a *kadhi* were examined by the chief *kadhi* of Kenya who found that all the three candidates could not speak Arabic despite the fact that they understood questions which were set in Arabic.<sup>97</sup> In the field of Arabic language, *kadhis* were first taught *matn al-ajrumiyya*<sup>98</sup>. The text presented the basic teachings of Arabic grammar, including the structure of sentences, nouns and verbs. Then the students were exposed to the text *qatr al-nada wa bal al-sada*<sup>99</sup> and finally the text of *alfiyyat ibn Malik fi al-nahau wa al-sarf*.<sup>100</sup>

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<sup>97</sup> KNA/AP/1/1205, *mudirs, katdis* and *liwalis*, letter from the chief *kadhi*, Mombasa, to the Supreme Court of Kenya, Mombasa, dated 9 April 1926.

<sup>98</sup> Written by Abu Muhammad 'Abd Allah Muhammad Muhammad, famously referred to as *Ibn Ajrum al-Sanhaji* (d. 723/1323). The book was published in Cairo by *Maktaba wa Matba'a Mustafa al-Babi al-Halabi wa auladihi bi Misr* in 1367/1948.

<sup>99</sup> Written by Abu Muhammad Abd Allah Jamal al-Din ibn Hisham (d. 761/1359).

<sup>100</sup> *Ibid.*

Another significant discipline taught to *kadhīs* was *tasawwuf* (mysticism). *Tasawwuf* was considered to be part and parcel of *kadhī's* training. At times, *kadhīs* would receive *tasawwuf* teachings in addition to their normal *darsas* (lessons). For instance, Fatawi b. 'Issa (d. 1987) attended *qadiriyya* sessions while being taught other disciplines by his mentor 'Abd al-Rahim al-Washili in Zanzibar.<sup>101</sup> Almost all *tasawwuf* teaching was dominated by the writings of al-Imam Abu Hamid Muhammad al-Ghazzali's (d. 505). Among the basic texts used in training *kadhīs* was Imam al-Ghazzali's *bidayat al-hidaya*.<sup>102</sup> A commentary text commonly used for al-Ghazzali's *bidayat al-hidaya* was the book *maraqī al-'ubudiyya 'ala al-ajwiba al-makkiyya*.<sup>103</sup> Other texts that were taught to *kadhīs* in the field of *tasawwuf* included al-Ghazzali's *minhaj al-'abidin ila jannat rabb al-'alamin* and *'ihya 'ulum al-din*.

Upon completion of the above structured syllabi, learners were awarded *ijaza* that demonstrated their competency to be appointed as *kadhīs*. Awarding of *ijaza* was a well-known custom which was practiced along the East African coast. The *ijaza* was normally given by the teacher to his student either verbally or in writing. In most cases, the *ijaza* gave the student permission to teach and hold *darsas* in almost all Islamic sciences

<sup>101</sup> Farsy, A.S. (1972) *Baadhi ya wanavyuoni wa kishafi wa mashariki ya Afrika* 4 (No name of publisher).

<sup>102</sup> The text is divided into two parts. Part one deals with the etiquette of sleeping (*adab al-naum*), ablution (*wudhū*) and preparation for prayer and fasting (*salat, saum*), while part two covers topics on avoidance of sins (*ma'asi*), sins of the heart, and the etiquette of friendship with Almighty God.

<sup>103</sup> Written by Muhammad 'Umar 'Arabi al-Nawawi al-Jawi (d. 1888) Brockelmann, *Geschichte*, vol. II, 651, 7.

although in some cases it will be confined to a specific discipline. Students used the *ijaza* to support their academic standing among their peers and the public in order to avoid any embarrassment that would question their qualifications. The tradition of awarding an *ijaza* was institutionalised in that recipients of *ijazas* were in turn entitled to award similar *ijazas* to their qualified students. This ensured continuity of the tradition of awarding *ijazas* over generations. The following is an example (in translation) of an *ijaza* that was written by former chief *kadhi* of Fatawi b. ‘Issa (d.1987) for one of his students who was also a *kadhi* in Zanzibar.



## CERTIFICATE

This certificate has been issued by al-Madrasa al-Shiraziyya

In the name of Allah the Most Merciful, the Most Beneficent

Praise is to Allah who has taught Adam the names and achieved testimony from His Lord the Creator of Earth and Heaven, and to whom the Angels have submitted and prostrated to His command. And praise and prayers be upon our master Muhammad companion of the miracles and his companions.

The disciplined and dedicated student and one of the *kadhis* of Zanzibar, Brother Sheikh Hadhar b. Abdallah Hadhar, has spent his efforts in pursuit of knowledge from renowned scholars including Sheikh Musa b. Qasim and Sheikh Muhammad b. Hasan in various disciplines such as commentary of Quran, sayings of the Prophet and jurisprudence, and in Arabic language such as Arabic grammar and morphology, and part of mysticism. It has come to my mind to award him certificate from what I have taught him with justice from those disciplines and I grant him *ijaza* to read and guide the people and learn from various scholars as I have been granted *ijaza* by my renowned teachers, particularly my master and teacher al-Imam who is conversant in all disciplines and knowledgeable of Abdallah and former Mufti of Zanzibar [Hasan b. ‘Amir]. I have permitted the bearer to grant *ijāza* to whomever deserves to be granted and to continue studying the Holy Quran and associating himself with *awrad*, *adhkar*, *ad’iya* (supplications) and *istighfar* (repentance) and I have advised him to fear Allah and revise books, specifically books of the three Imams after revising jurisprudence (*fiqh*) books, and these are books of al-Imam al-Ghazali, al-Imam al-Shahrani, and our master al-Haddad. And I have reminded him not to forget me in his supplications. And Allah will take us and him under His care and will not deny us seeing Him in the name of Muhammad and his companions, and praise of Allah be upon our master Muhammad and his companions.

Written by the needy for the mercy of Allah Fatawi b. ‘Isa al-Shirazi al-Shafi’i al-Qadiri may Allah forgive them (*Amin*) written in *Rabi’i al-awwal*. (I have granted to this brother whatever has been granted to me by my teacher Hasan b. ‘Amir.)<sup>104</sup>

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<sup>104</sup> Translated by Abdulkadir Hashim. The year in which the *ijaza* was written is not mentioned. I have obtained a copy of the original *ijaza* from Sh. Hadhar Abdalla Hadhar, former *kadhi* in the southern region of

The above *ijaza* demonstrates the traditional training of *kadhis* in the local centres of Islamic learning in the Busa'idi Sultanate. It shows the various disciplines in which *kadhis* had to be trained, including commentary of Quran (*tafsir*), sayings of the Prophet (hadith), Islamic jurisprudence (*fiqh*), Arabic language (*al-nahau*) and mysticism (*tasawwuf*). An interesting aspect of the certificate is the teacher's emphasis that his student attaches himself to *Tasawwuf* teachings reflected in the writings of Imam al-Ghazali's and other scholars. The *ijaza* also highlights the significance of *adhkar* (supplications) and *istighfar* (repentance), and urges the *murid* (follower) to associate himself with these rituals.

The influence of Islamic of learning was not only confined to *kadhis* but also extended to other Muslim officials, such as, Muslim *wakils* and *liwalis*. Students who attended *darsas* which were taught in mosques during their early youth benefitted from these tutorials that enhanced their Islamic knowledge. Having acquired the basic knowledge of Islamic sciences, learners were enabled to occupy positions of Muslim *wakils* and *liwalis* in the Busa'idi Sultanate. In a topical discussion with former Muslim *wakil* in Kenya, Shariff Muhammad Hassan al-Nadhiri (locally known as Shariff Karama), I noted that his training was based on a similar syllabus to the one taught to *kadhis*. He was first taught Quran by Sayyid Anwar and Maalim Hemed and then studied Islamic sciences under Sh. Abdulrahman b. Muhammad Bashaykh and later Shaykh Muhammad b. Ahmad Bereki (d.1986) in Mombasa. Sheikh Bereki taught a generation of scholars in Mombasa that included: Nasor Nahdi (chief *kadhi* of Kenya 1982-2002), 'Ali Darani and 'Ali Mwinzagu

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Zanzibar, and translated it from Arabic. Topical discussion with Shaykh Hadhar was conducted at his residence in Kizimkazi, Zanzibar on 24 July 2005.

former *kadhis* of Mombasa. The following is a translation of an *ijaza* given to former Muslim *wakil*, Shariff Muhammad Hassan al-Nadhiri, by his teachers:

“Let it be known that Shariff Muhammad b. Hassan has studied *Fiqh* (Science of Islamic jurisprudence) and other disciplines that include *Nahau* (Arabic language), *Sarf* (Morphology), *Balagha* (Rhetoric), *Usul al-Fiqh* (Principles of Islamic jurisprudence), *Mustalah al-hadith* (Science of Prophet’s Sayings), *Mantiq* (Logic), and *Tafsir* (Commentary of Quran) from the the renowned scholar Shaykh Muhammad b. Ahmad al-Berekī under my supervision. He is competent to practice as Muslim *wakil* in *kadhi* courts in Kenya.”

Written by: Abdulrahman Muhammad al-Hatimi and signed by: Muhammad b. Ahmad al-Berekī, Dated 1<sup>st</sup> June 1977, Mombasa<sup>105</sup>

Similarly, *liwalis* along the Kenya coastal strip attended *darsas* during their early years of learning. In a topical discussion with former *liwali* Rashid Azan al-Sukri (d.2008), I found that in addition to his early secular education, he attended *darsas* of the former *kadhi* of Malindi Sh. Nasor b. Ahmad al-Mazru‘i (d.1950).<sup>106</sup> This early orientation towards Islamic learning gave the opportunity to *liwalis* to adjudicate minor cases of MPL in areas where *kadhis* courts did not exist.

The above section has demonstrated training of *kadhis* in the traditional centres of Islamic learning. The comprehensive syllabus taught to *kadhis* equipped them with the necessary

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<sup>105</sup> Translated by Abdulkadir Hashim. Topical discussion with former Muslim *wakil*, Shariff Muhammad b. Hassan, famously known as Shariff Karama, Mombasa, 17<sup>th</sup> December 2007. I have obtained a copy of the original *ijaza* from Shariff Karama and translated it from Arabic.

<sup>106</sup> Topical discussion with former *liwali* Rashid Azan al-Sukri, Malindi, 23 August 2006.

knowledge in their judicial work as well expanded their intellectual horizons. *Kadhis* who completed the structured syllabus discussed above, were scholars in their own right. Opinions of learned *kadhis* such as Ahmad b. Sumayt were sought in the Busa‘idi Sultanate and beyond. An interesting feature of Islamic learning in the Busa‘idi Sultanate was that *kadhis* transmitted Islamic knowledge within a scholarly network over generations. In the following section I will demonstrate on how Islamic knowledge was transmitted through an intellectual chain of *kadhis* within their own network.

### **2.6.2 Transmission of Islamic learning through *kadhis*’ intellectual chain in the Busa‘idi Sultanate**

In her study of Ahmad b. Sumayt, Anne K. Bang noted that the *tariqa* ‘*Alawiyya*’ operated within a network based on scholarly links which was re-enforced by social and religious connections.<sup>107</sup> Drawing on Bang’s account of the ‘*Alawiyya*’s networks, I argue that training of *kadhis* in the Busa‘idi Sultanate was based on transmission of Islamic learning over generations. *Kadhis* were the main actors in establishing and maintaining an intellectual tradition in the region. The transmission of Islamic learning was done through an intellectual chain in which Islamic knowledge was passed from one generation to the next. Family connections played a significant role in the transmission of Islamic knowledge and it was a common phenomenon along the East African coast to find *kadhis*

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<sup>107</sup> Bang A. K (2003) *Sufis and Scholars of the Sea: The Family Networks in East Africa c.1860-1925* London: Routledge Curzon, 202.

being trained within their families.<sup>108</sup> In the case of intellectual families, the father would normally teach his children and be regarded as their main tutor. An example of family influence on the transmission of Islamic learning in Zanzibar is the case of the Bin Sumayt family in which the pioneer Abu Bakar b. Sumayt taught his son Ahmad b. Sumayt who in turn taught his son Umar b. Sumayt. Another case in Zanzibar was that of ‘Abd al-‘Aziz al-Amawi who taught his son Burhan b. ‘Abd al-‘Aziz al-Amawi.

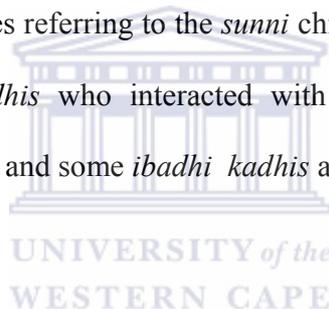
In Mombasa, the influence of family connections on the transmission of Islamic learning can be seen in the case of the Mazru‘i family. ‘Ali Abdallah Mazru‘i (d.1894), who was the *kadhi* of Mombasa from 1856 to 1870, taught his son Sulayman (d. 1937), who served as the *kadhi* of Mombasa from 1895 to 1932. Sulayman taught his kinsman Al-Amin b. ‘Ali Mazru‘i who was appointed as the *kadhi* of Mombasa in 1932. Al-Amin continued the trend by teaching his son-in-law Muhammad b. Kasim (d. 1982), who was appointed as the *kadhi* of Mombasa in 1946. To complete the circle, Muhammad b. Kasim taught his son Hammad, who was appointed as *kadhi* of Lamu in 1992. Family influence on the transmission of Islamic knowledge can also be noted in Lamu with the Jamal al-Layl and al-Ma‘awi families that occupied prominent places in Islamic scholarship. Islamic knowledge was transmitted within family members of these tribes that monopolised Islamic scholarship in Lamu. For instance, ‘Ali b. Muhammad b. ‘Ali al- Ma‘awi (d. 1995), who was appointed as the *kadhi* of Lamu in 1957, was taught by his father, a renowned scholar

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<sup>108</sup> Kresse, K (2007) *Philosophizing in Mombasa: Knowledge, Islam and Intellectual Practice on the Swahili Coast* Edinburgh: Edinburgh University Press, 87.

and poet in Lamu.<sup>109</sup> Seyyid Ali Ahmad Badawi Jamal al-Lyl (d.1987), who was the chief *kadhi* of Kenya in 1948, was briefly taught by his grandfather Habib Saleh ‘Alwi b. ‘Abd Allah Jamal al-Lyl (d.1935), then by his father Sayyid ‘Ahmad Badawi (d.1939).<sup>110</sup>

An interesting aspect that emerges from the transmission of Islamic learning is the influence of the intellectual chain on the training of chief *kadhis* in Zanzibar and Kenya. I will demonstrate below how the training of chief *kadhis* in the two regions influenced their appointment within a network created by the intellectual chain over generations. In illustrating the intellectual chain, I will deal only with *sunni* chief *kadhis* in Zanzibar due to the availability of written sources referring to the *sunni* chief *kadhis*.<sup>111</sup> Nevertheless, there were a number of *ibadhi kadhis* who interacted with their *shafi’i* colleagues in the transmission of Islamic learning and some *ibadhi kadhis* assumed the post of chief *kadhi* in Zanzibar.<sup>112</sup>



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<sup>109</sup> Topical discussion with Muhammad b. Ali b. Muhammad al-Maawi, Mombasa 3 January 2008.

<sup>110</sup> Topical discussion with Sh. Bahsan, Malindi, 20<sup>th</sup> August 2006. Sh. Muhsin Sayyid Ali Badawi, Lamu, 22 December 2007.

<sup>111</sup> For a comprehensive review of *shafi’i kadhis* and ‘ulama in the East African coast see Farsy, 1972.

<sup>112</sup> For instance, chief *kadhi* Ali b. Muhammad al-Mundhiri (d.1925). See Bang, 2003, 154.

**Figure 1 Chief *kadhis*' intellectual chain in Zanzibar and Kenya coastal strip**

Source: Abdulkadir Hashim

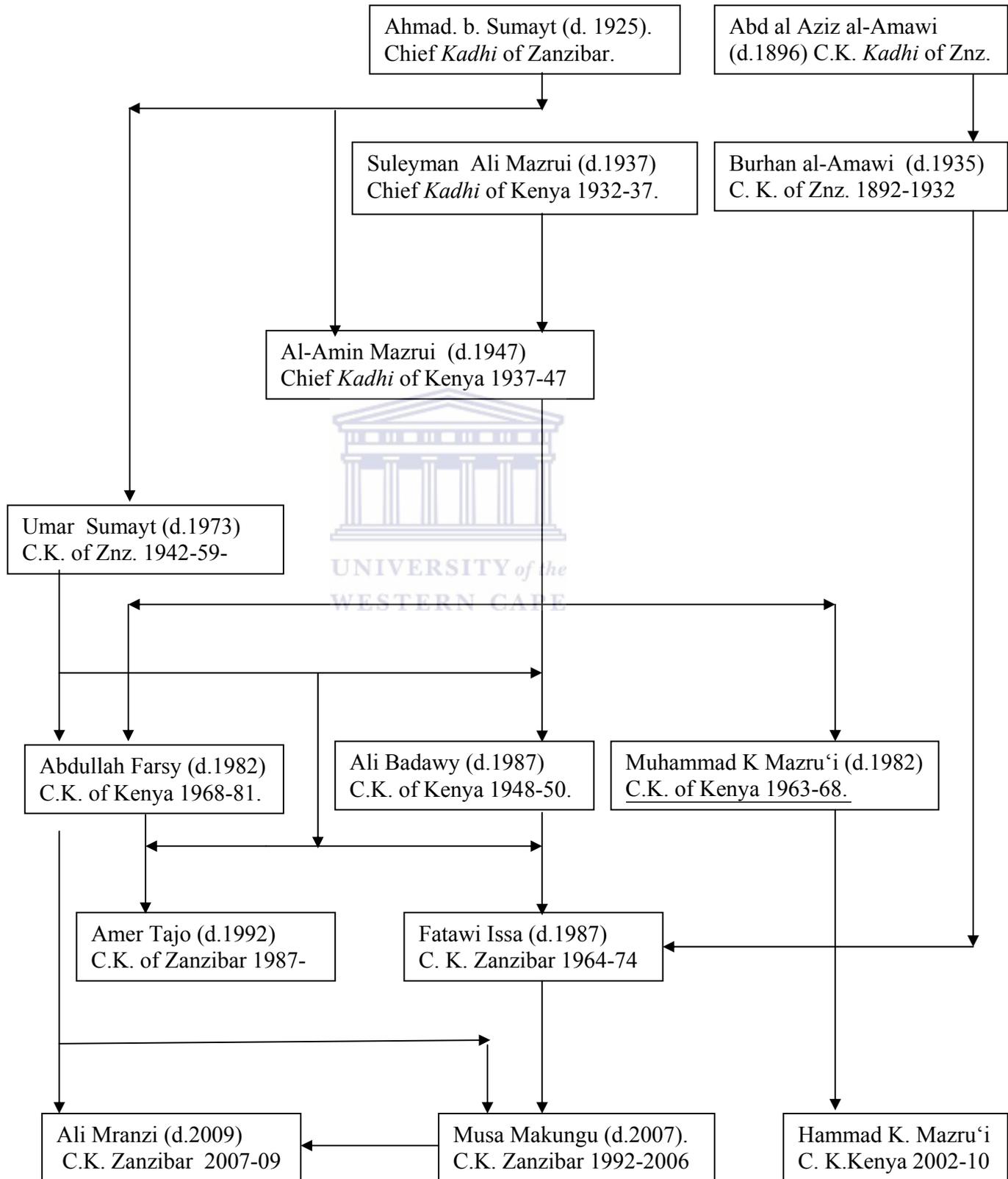
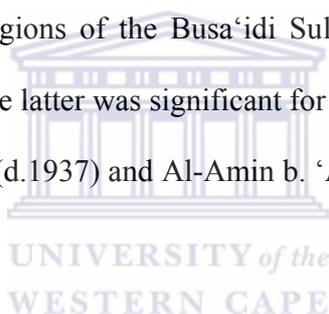


Figure 1 above illustrates *Sunni* chief *kadhis*' intellectual chain in Zanzibar and the Kenya coastal strip between the late 19<sup>th</sup> and 20<sup>th</sup> centuries. Among the pioneer *Sunni* chief *kadhis* in Zanzibar was 'Abd al-'Aziz b. 'Abd al-Ghani al-Amawi who represented the first part of chief *kadhis*' intellectual chain in Zanzibar. 'Abd al-'Aziz al-Amawi taught his son Burhan, who served as the chief *kadhi* of Zanzibar until 1932. To continue the chain, Burhan taught Fatawi b. 'Issa (d.1987), who was appointed as the chief *kadhi* of Zanzibar in 1964 until 1974. The other part of chief *kadhis*' intellectual chain in Zanzibar was symbolised by Ahmad b. Sumayt who served as a *kadhi* from 1883 and later was appointed to the post of chief *kadhi* of Zanzibar. Bin Sumayt's scholarly efforts influenced the chief *kadhis*' intellectual chain in the two regions of the Busa'idi Sultanate: Zanzibar and the Kenya coastal strip. His influence in the latter was significant for the Mazrui scholars in Mombasa. Both Sulayman b. 'Ali Mazru'i (d.1937) and Al-Amin b. 'Ali Mazru'i (d.1947) were taught by Ahmad b. Sumayt.



The Mazru'i family maintained continuity of the chief *kadhis*' intellectual chain in Mombasa. Sulayman b. 'Ali Mazru'i was appointed the chief *kadhi* of Kenya from 1932 to 1937. He taught his kinsman Al-Amin b. 'Ali who took over the chief *kadhiship* of Kenya in 1937 until his death.<sup>113</sup> In turn, Al-Amin taught his son-in-law Muhammad Kasim Mazru'i (d.1982) who was appointed as the chief *kadhi* of Kenya from 1963 to 1968. To complete the circle, Muhammad Kasim taught his son Hammad who was appointed as the chief *kadhi* of Kenya in 2002.

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<sup>113</sup> For life history of Sh. Al-Amin b. Ali Mazrui, see Tamim, G. Y. (2006) *Maisha ya Sheikh Al-Amin bin Ali Mazrui* Nairobi: Signal Press Ltd.

In Zanzibar, Ahmad b. Sumayt taught generations of scholars who became *kadhis*, and others who were appointed as chief *kadhis*. Bin Sumayt's tutelage of his son Umar b. Sumayt enhanced the chief *kadhi*'s intellectual chain in Zanzibar. Umar b. Sumayt assumed the kadhiship of Zanzibar in 1936 and later was appointed as the chief *kadhi* of Zanzibar from 1942 to 1959. A number of *kadhis* in Zanzibar and the Kenya coastal strip studied under 'Umar b. Sumayt. Among his students who were appointed chief *kadhis* in Kenya were 'Ali Ahmad Badawi (d.1987) who served briefly in the post in 1948, and Abdalla Saleh Farsi (d.1982) who was appointed as the chief *kadhi* of Kenya from 1968-1981. In his earlier years in Zanzibar, Farsi taught Musa Makungu (d.2007), who served as the chief *kadhi* of Zanzibar from 1992 to 2006. Umar b. Sumayt's students, who were appointed as chief *kadhis* in Zanzibar, were Fatawi b. 'Issa (d.1987) and 'Amer Tajo who was the chief *kadhi* of Zanzibar between 1987 and 1992. The latter maintained the chief *kadhi*'s intellectual chain by teaching 'Ali Khatib Mranzi who was the chief *kadhi* of Zanzibar from 2007 until 2009.

### **2.6.3 Bureaucratisation of the training of *kadhis* in Zanzibar**

When the British declared the Zanzibar Protectorate in 1890, they embarked on a gradual policy of transforming *kadhis*' training that was based on the traditional system of Islamic learning. The British had earlier implemented the policy of transforming Islamic traditional institutions in India by establishing the Muhammadan Anglo-Oriental College in

Aligarh.<sup>114</sup> Similarly in Nigeria, the British adopted a gradual policy of transforming the Islamic judicial system to conform to the British legal system. In Northern Nigeria, local judicial staff were recruited and then sent to Britain for legal training.<sup>115</sup> In 1934 the British established a law school in Northern Nigeria in order to provide legal education to train *alkalis (kadhis)* in the modern English legal system. Establishment of the law school in Kano aimed at transforming Islamic legal training and replacing the traditional training offered to *alkalis*.<sup>116</sup>

Towards the later part of the 20<sup>th</sup> century, the British colonial authorities in Zanzibar had adopted a gradual policy of formalising the system of training *kadhis*. British administrators found that *kadhis* trained in the traditional centres of Islamic learning in the Busa'idi Sultanate could not cope with the growing demand of new judicial reforms introduced by the colonial order, and therefore embarked on a policy of establishing a training seminary school for *kadhis*.

Muslim members of the Legislative Council in Zanzibar pressurised the government to send potential students abroad so as to be trained as *kadhis*. Legislative Council member Muhammad Nasir S. Lamki asked the government whether it had considered the necessity of sending some students to Egypt or Arabia in order to study Islamic law. G.C. Grant

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<sup>114</sup> Metcalf, 2007, 186.

<sup>115</sup> Yadudu, A.H “Colonialism and the Transformation of Substance and Form of Islamic Law in the Northern States of Nigeria” (1991) 9 (1) *Journal of Law and Religion* 38.

<sup>116</sup> Oba, A.A “Lawyers, Legal Education and the Shariah Courts in Nigeria” (2004) 49 *Journal of Legal Pluralism and Unofficial Law* 133.

replied on behalf of the British Protectorate, that the government had already taken the matter under consideration.<sup>117</sup> Another member of the Legislative Council, Sa'id b. Ali al-Mughayri, proposed that the government send students to Egypt or elsewhere to be trained as *kadhis*. Despite the sympathy of the Chief Justice of Zanzibar with al-Mughayri's proposal, he ruled out the possibility of sending students outside Zanzibar. The Chief Justice justified his position by noting that training students in Islamic law in Britain was based on the Hanafi and Shia law which were not relevant to Zanzibari students. The Chief Justice also pointed out that it would be difficult to train *ibadhi kadhis* due to the fact that *ibadhi* law was not taught at Cairo University which was considered to the nearest available university in the British Empire.<sup>118</sup> British colonial officials were concerned with the issues raised by Muslim members of the Legislative Council in Zanzibar who preferred to send students to Muslim universities in order to train them in Islamic law and become future *kadhis* of Zanzibar. However, the British authorities considered the financial implications before sending the students outside Zanzibar. In order to cut the cost, the British first proposed to send a few students to the School of Oriental and African Studies (SOAS) in London.

The British Secretary of State consulted Prof. S. Versy Fitzgerald of the SOAS and proposed that students from Zanzibar should go to the School in order to be trained in

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<sup>117</sup> Proceedings of the Legislative Council at a meeting held on 16 June 1947 in Zanzibar Supplement to the Official Gazette of the Zanzibar Government No.3062 of 21 June 1947.

<sup>118</sup> ZA/AB62/150/14, letter from the British Resident, Zanzibar, to the Secretary of State for the Colonies, dated 29 November 1947.

Arabic and Islamic law.<sup>119</sup> Prof. S. Versy Fitzgerald proposed that the students should join the regular lectures on Islamic law in the LL.B course and remarked: “it is essential to give these young men some general grounding in English legal ideas and in the comparative theory of law. These courses will have to be specially prepared for them, and as they do not form part of the regular LL.B curriculum, they will have to be prepared at this school.”

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As the process of sending students to the SOAS continued, the British Resident in Zanzibar proposed the establishment of a Muslim seminary in Zanzibar that “would provide for education in Moslem law, religion and culture for a limited number of pupils. Besides being of value here, it would assist us in the provision of *kadhis* both here and on the mainland”.<sup>121</sup> Based on this proposal, the Zanzibar Director of Education wrote a comprehensive report on the establishment of a Muslim seminary in Zanzibar and noted:

“the chief object in teaching Islamic law would be to produce men capable of filling the posts of Kadhis and Liwalis throughout East Africa. When the present holders retire there appears to be no local candidates whatever for these posts and the only alternative to local training would be the appointment of men from outside East Africa at very considerable costs or to send every potential candidate away for training.”<sup>122</sup>

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<sup>119</sup> ZA/AB62/150/16, reply by the Secretary of State for the Colonies, to the British Resident, Zanzibar, dated 30 January 1948.

<sup>120</sup> ZA/AB62/150/30C, letter from Prof. S. Versy Fitzgerald, to the Colonial Office, dated 3 June 1948.

<sup>121</sup> ZNA/AB62/150/27, letter from the British Resident, Zanzibar, to H.E. Sir Reginald Champion, dated 3 April 1948.

<sup>122</sup> ZNA/AB/23/17, British Council Reports.

Based on this new proposal for establishing a Muslim seminary in Zanzibar, the initiative of sending students to the SOAS was abandoned and instead, the British Resident in Zanzibar suggested that Sh. Omar b. ‘Abdallah to be sent to SOAS with a view to becoming the principal of the Muslim seminary upon completion of his studies. In a letter addressed to the Secretary of State for the Colonies, the British Resident remarked:

“it has now been decided that Shaykh Omar Abdallah should receive training, not with a view to his becoming a Kadhi as originally contemplated, but as a teacher in the Muslim Academy, Zanzibar. A course suggested by Prof. Fitzgerald would not be wholly suitable; it is most desirable for Shaykh Omar to pursue his studies in an essentially Mohammedan atmosphere and environment.”<sup>123</sup>

Among the difficulties that faced the British administration in establishing the Muslim seminary was the search for a local scholar to head the institution. The British consulted a renowned scholar and Legislative Council member, Amer Tajo, in 1949 to assist in recruiting teaching staff for the proposed Muslim seminary.

When the search for a local candidate to head the institution proved difficult, the British administration appointed a scholar from al-Azhar University, Muhammad Muhammad al-Dahhan to the post of Principal of the Muslim Academy on 27<sup>th</sup> September 1951.<sup>124</sup> The Muslim Academy was opened on 21<sup>st</sup> April 1952 under the headship of Shaykh al-Dahhan with 25 students who were required to enrol for a five year course in Arabic and Islamic

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<sup>123</sup> ZA/AB62/150/50, letter from the British Resident, Zanzibar, to the Secretary of State for the Colonies, dated 2 December 1948.

<sup>124</sup> *Ibid.*

studies.<sup>125</sup> Establishment of the Muslim Academy was based on an Indian model that was introduced in Sudan in the 1930s and then in Nigeria in the late 1940s. The British found that Islamic learning provided in mosques and *madrasas* could not provide graduates that would fit into the colonial administrative and judicial structures. Therefore, the colonial administration aimed at introducing a new system of learning that differed from the traditional centres of Islamic learning. When the Academy started in 1952, teaching was based on a five year study programme that covered Islamic subjects and the Arabic language. Additional subjects offered were calligraphy and English language as optional subjects from the third year, and in 1957 subjects, such as, elementary mathematics, were included. Inclusion of new subjects in the curriculum of the Muslim Academy, such as English language, was meant to gradually orient *kadhis* on the language in order to use in their future career. The Muslim Academy was meant to serve as a channel through which the British colonial administration could recruit *kadhis*.<sup>126</sup>

Despite of the fact that the Academy exposed *kadhis* to a different system of training, compared to the traditional training offered in mosques and *madrasa*, it can be noted that influence of such training on *kadhis* did not achieve the intended objective set by British colonial administration to transform functioning of *kadhi* courts. In my topical discussion

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<sup>125</sup> ZNA/AB/5/22, Exchange of information on native affairs. For a comprehensive study on of Islamic education and the establishment of the Muslim Academy in Zanzibar, see Loimeier, R. (2009) *Between Social Skills and Marketable Skills: The Politics of Islamic Education in 20<sup>th</sup> Century Zanzibar* Leiden: Brill.

<sup>126</sup> Further development of the syllabus was done in 1972 when the Zanzibar government incorporated subjects such as Kiswahili, Geography, Physics, Chemistry and Biology. The Muslim Academy was closed by the Zanzibar government in 2007 and became a campus of the State University of Zanzibar.

with the former chief *kadhi* of Zanzibar, Sh. Musa Makungu (d.2007) who studied at the Muslim Academy and later became its Principal, I noted that he relied on classical Islamic law texts in his judgments and followed Islamic rules of procedure.<sup>127</sup> Generation of *kadhis* who studied at the Academy after the Zanzibar Revolution were still attached to the traditional Islamic learning offered in the mosques and scholars' residences. The British colonial policy of transforming training of *kadhis* in Zanzibar did not succeed partly due to the existence of traditional centres of Islamic learning which operated parallel to the Muslim Academy.

## 2.7 The British policy on the assessment of *kadhis* in the Busa'idi Sultanate

Before the establishment of the British Protectorate in Zanzibar, *kadhis* were appointed by the Sultans without formal assessment. *Liwalis* had the authority to recommend potential candidates for *kadhi* posts and to forward names for approval by the Sultan. After the establishment of the Protectorate in 1890, the British embarked on a policy of formalising the appointment of *kadhis* and introduced a system of assessing *kadhis* before their appointment. This policy was clearly stated by the Senior Commissioner of Kenya coastal strip who noted: "no Kathi should in my opinion be appointed until he has undergone an examination on the salient points of the Koran."<sup>128</sup> British administrators were strict in ensuring that before *kadhis* were appointed they had to sit formal examinations. In cases where *kadhis* were appointed without sitting for examinations and later were found to be

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<sup>127</sup> Topical discussion with Sh. Musa Makungu Ali, Zanzibar, 23 May 2005.

<sup>128</sup> KNA/PC/Coast/1/20/96, *kadhis*, *mudirs*, *liwalis* etc, letter from the Senior Commissioner, Mombasa, to the Chief Native Commissioner, dated 29 January 1924.

incompetent, they were required to sit for special examinations. In one case, the District of Lamu noted that the *kadhi* of Lamu had insufficient knowledge of Islamic law and therefore requested him to sit for a special examination.<sup>129</sup>

The British policy of subjecting *kadhīs* to formal examinations exceeded local tradition that could not dare to subject renowned scholars to examinations. Some *kadhīs* resisted this policy openly and perceived such process to be a humiliation. When asked to sit for an examination, an applicant for the post of chief *kadhi* remarked:

“that to ask me to now at this period of my career to sit for an examination, in competition with others, who are so junior both in length of service and of age to myself, is demanding more than I should be expected to perform.”<sup>130</sup>

British administrators were concerned with the competency of *kadhīs* in handling their work. By adopting a gradual policy, British judicial officers tolerated the incompetence of *kadhīs* in cases where suitable substitutes could not be found. For instance, Sir John Gray, Chief Justice of Zanzibar, recommended the appointment of Sa‘id b. ‘Abd Allah al-‘Azri to be the *kadhi* of Pemba and noted that “even at the time of recommending his appointment I had misgivings as to his competence to fill the post, but it was essential to appoint an Ibathi Kadhi as soon as possible, and I had hoped that with practical experience Shaykh Sa‘id would become more proficient”.<sup>131</sup> Gray noted that most of al-‘Azri’s cases taken on

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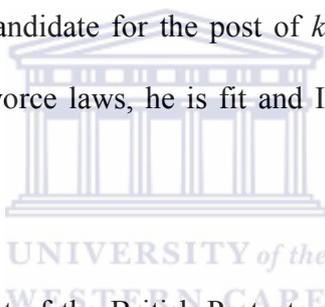
<sup>129</sup> KNA/PC/Coast/1/20/96, *kadhīs, mudirs, liwalis* etc, letter from the District Commissioner, Lamu, to the Senior Commissioner, Coast, Mombasa, dated 12 December 1923.

<sup>130</sup> KNA/CA/20/31, Arab Officers – *liwalis, kadhīs* and *mudirs*, letter from Muhammad b. Jambeni- *kadhi* of Lamu to the Provincial Commissioner, Mombasa, dated 29 January 1948.

<sup>131</sup> ZNA/AB86/140, confidential letter from the Chief Justice of Zanzibar, John Gray, to the Chief Secretary.

appeal were reversed, causing lack of public confidence. Gray's dissatisfaction with al-'Azri was clear when he remarked: "I feel that the public ought not to be made to put up with incompetent administration of justice any longer than is absolutely necessary." However, due to the shortage of *ibadhi kadhis* in Pemba, Gray had no option except to retain al-'Azri.<sup>132</sup>

The incompetence of candidates for kadhiship was also noted by chief *kadhis* who raised their concerns about incompetent candidates being appointed as *kadhis*. In one case, the first chief *kadhi* of Kenya, Sh. al-Islam *Mwenye Abudu*, wrote to the Principal Judge in Nairobi informing him that a candidate for the post of *kadhi* was "not fit for all general laws but as to marriage and divorce laws, he is fit and I found him to be intelligent and competent man if he learns".<sup>133</sup>



A decade after the establishment of the British Protectorate in Zanzibar, the British were concerned about the efficiency of the *kadhis*, particularly since "slight confidence was felt by the inhabitants in the *kadhis*' purity, integrity or independence."<sup>134</sup> Other concerns that occupied the minds of the British colonial officials were related to the accusations of bribery against *kadhis*. The earliest account accusing *kadhis* of being engaged in bribery was that of Burton who mentioned that in 1856 *kadhis* in Zanzibar were involved in

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<sup>132</sup> *Ibid.*

<sup>133</sup> KNA/AP/1/368, Appointment of Kadhi for Nairobi, letter from Sheikh al-Islam Abdulrahman b. Ahmad to the Principal Judge, Nairobi, dated 15 October 1907.

<sup>134</sup> Quoted in Bang, 2003, 157.

bribery.<sup>135</sup> Similarly in 1859, the British Consul in Zanzibar, Captain Hamerton Rigby, noted that:

“Cazees (sic.) are persons of no character, are not at all respected by the people, and bribery is Sa‘id to very common. I have myself detected the cazee (sic.) in conniving at a most impudent case of forgery, and the exposure and denunciation of it appeared to excite no surprise. The right of direct appeal to the sultan exists in all cases and his decision is final.”<sup>136</sup>

The British policy to transform the functioning of the *kadhi* courts did not spare *kadhis* who were recognised and highly respected in society when apparent cases of inefficiency arose. In one case, the British Consul General, Clifford Crawford, convicted Sh. Sulayman ‘Ali Mazru‘i (d.1932) and Sh. Muhammad Qasim al-Ma‘amiri (d. 1910) (*kadhis* of Mombasa) of gross neglect of duty related to the offence of bribery and sentenced them to imprisonment.<sup>137</sup> Accusations by British colonial officials against *kadhis* for bribery seemed to have stemmed from the lack of a proper understanding of the severe financial circumstances that faced *kadhis* due to their poor remuneration. *Kadhis* were paid low salaries that could hardly provide their living expenses, and in some cases British colonial officials expected *kadhis* to supplement their income by conducting marriage ceremonies. The other possible explanation for accusing *kadhis* in bribery cases was that British colonial administrators misunderstood the local traditions of giving gifts to *kadhis* and regarded such gifts to be a form of bribery in exchange for a favour in a court case. It was

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<sup>135</sup> Pouwels, 1979, 195.

<sup>136</sup> Rigby, C.P *Report on the Zanzibar Dominions, Bombay*, Selections from Records of the Bombay Government, 1861, 6.

<sup>137</sup> The Gazette for Zanzibar and East Africa, 5 (240), 2 September 1896.

an accepted *ada* (custom) in society for *kadhis* to receive gifts as a token of appreciation for conducting wedding ceremonies.

In some cases, unsuccessful parties accused *kadhis* of engaging in bribery. The Attorney-General of Zanzibar, Peter Grain, dispelled such accusations and noted that:

“in spite of what has been said of them in the past, with regard to bribery and injustice, I think that at the present time they do their work justly and honestly ... it is a common practice for the natives, if the decision goes against them, to say that the judge was bribed. Many cases have been brought before me in this way which on investigation proved to be absolutely false.”<sup>138</sup>

Despite such accusations of being levelled against *kadhis*, archival sources reveal a number of incidents where *kadhis* were praised for their competency in their work. For instance, the Assistant District Commissioner of Takaungu commended Sh. Sulayman b. ‘Ali, the *kadhi* of Takaungu in the following terms: “the Kadhi is one of the most conscientious and painstaking Arab officials, I have ever met.”<sup>139</sup> Obituaries written by British officials in respect of deceased *kadhis* reveal the extent of *kadhis*’ integrity. For instance, after the death of *kadhi* ‘Ali b. Muhammad al-Mandhri, the British administration described him as follows:

“from his far-reaching knowledge of the Sheria he enjoyed a very high degree of authority in matters of law and his opinions were very much sought and greatly valued. He was of irreproachable character, possessed a great gentleness and charm of manner and was eminently suited for the judicial duties which he discharged with distinction.”<sup>140</sup>

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<sup>138</sup> ZA/AC18/2, Report by Peter Grain, the Attorney-General of Zanzibar, dated 19 September 1907.

<sup>139</sup> KNA/PC/Coast/1/1132, letter from the Assistant District Commissioner, Takaungu, to the District Commissioner, Malindi, 6 October 1908.

<sup>140</sup> Quoted in Bang, 2000, 64.

Further testimony of *kadhis*' competence can also be seen in the reports of condolences written after the deaths of *kadhis*, such as in the case of Sh. 'Ali b. Muhammad Bakashmar, *kadhi* of Zanzibar, in which the Chief Justice of Zanzibar wrote that "by his death, the Judicial Department lost an able and conscientious officer".<sup>141</sup> Due to their competency, some *kadhis* were retained despite the fact that they had reached the age of retirement. For instance, the Registrar of the High Court of Zanzibar requested to retain the services of Habib b. Mbaruk al-Ma'uli, the *kadhi* of Pemba, after reaching the retirement age, and noted that "despite his age, he is an efficient and competent officer and discharged his duties with satisfaction".<sup>142</sup>

## 2.8 The British policy on the appointment of *kadhis* in the Busa'idi Sultanate

As part of the strategy to transform the functioning of *kadhis* in the Busa'idi Sultanate, the British colonial administration laid down clear procedures for the appointment of *kadhis*. *Kadhis*' posts were advertised in the Zanzibar Government Gazette with clear instructions and requirements for the posts. The following section will highlight the appointment of *kadhis* in Islamic history and the practice of Sultans of Zanzibar. Then I will discuss British policies on the appointment of *kadhis* in Zanzibar and Kenya coastal strip.

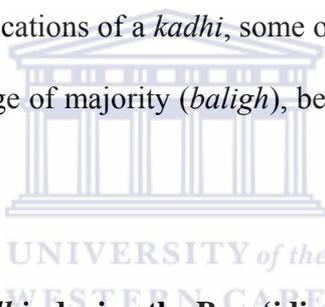
In theory the responsibility of appointing *kadhis* in a Muslim state rested with the *khalifa*, based on the fact that judicial office was part of the ruler's functions and therefore the

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<sup>141</sup> ZNA/AXI/11, Zanzibar Judiciary Annual Report, 1953, 64.

<sup>142</sup> ZNA/AB86/135, letter from the Registrar, High Court, Zanzibar, to the Chief Justice, Zanzibar, dated 16 April 1937.

*khalifa* was considered to have the mandate to appoint and delegate jurisdiction to *kadhis*.<sup>143</sup> The *khalifa* also had the responsibility to adjudicate cases even though in practice he delegated this duty to *kadhis* based on the principle of *tafwidh*. During the *Ummayyad* period the *khalifa* was not involved in the appointment of *kadhis* and the administration of justice was left to *walis* and their legal secretaries. It was during the *Abbasid* reign that *kadhis* were directly appointed by the *khalifa* in the same manner as *walis*.<sup>144</sup> When the *khalifa* appointed a *kadhi* as his agent, the appointment had to state the extended limits of the powers of the *kadhi*. Before a *kadhi* was appointed, he was required to meet the essential requirements for the post. Although there is no agreement among Muslim scholars as to the qualifications of a *kadhi*, some of the essential requirements were that he must have attained the age of majority (*baligh*), be of sound mind, and must be just (*'adil*).<sup>145</sup>



### **2.8.1 The appointment of *kadhis* during the Busa‘idi rule in Zanzibar (1832-1890)**

During the earlier part of the Busa‘idi rule in Zanzibar, Sultans adopted a non-interference policy in local affairs. *Kadhis* were appointed by local people and approved by the Sultans.

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<sup>143</sup> Vogel, F (2000) *Islamic Law and Legal System: Studies of Saudi Arabia*, Leiden: Brill, 280.

<sup>144</sup> Bakar, M.D (1997) “A Note on Muslim Judges and the Profession Certificate” (unpublished paper presented at the Joseph Schacht Conference on Theory and Practice of Islamic law, Granada, 16-20 December 1997) 2.

<sup>145</sup> According to al-Mawardi, a person is just if he speaks the truth, is trustworthy, is free from acts which are forbidden or sinful, and avoids acts which are doubtful. In addition to the formal qualifications, *kadhis* were to should observe the etiquettes (*adab al-kadhi*) inside and outside the court. Ibrahim, A. M. (2000) *The Administration of Islamic Law in Malaysia*, Kuala Lumpur: Institute of Islamic Understanding Malaysia 72.

For instance, Sultan Seyyid Sa'id (r. 1806-1856) appointed separate *kadhis* in Mombasa for the local 12 tribes and in cases where the tribes opted not to use *kadhis* appointed by the Sultan, they reserved the right to appoint their own *kadhis*.<sup>146</sup> In Zanzibar, Sultans appointed two *kadhis* (one *ibadhi* and one *shafi'i*) and in some cases *kadhis* were appointed for certain families where cases were heard in their houses.<sup>147</sup> With the growing power of the Busa'idi Sultans, control over the appointment of *kadhis* increased steadily during the period of Sultan Barghash b. Sa'id (r.1870-1888). Initially, *kadhis* were appointed directly by the Sultan without any formal assessment. But at a later period, the Busa'idi Sultans issued proclamations appointing *kadhis*.<sup>148</sup> The following translation is an example of a proclamation that was issued by Sultan Khalifa b. Harub (r. 1911-1960) to appoint Abdallah Saleh Farsi (d.1982) as the *kadhi* of Zanzibar:

“ be it known to you that We have appointed Sheikh Abdalla el-Farsy to be a Kadhi in the Protectorate of Zanzibar to administer justice to the people in accordance with the sacred Law of God. He should mete out equal treatment to all people in the course of his administration of justice. He should treat the strong and the weak, the high and the low on the same footing. Be it known to anyone who may come across this proclamation. Signed by Khalifa b. Harub, Sultan of Zanzibar, 17<sup>th</sup> March 1960.”<sup>149</sup>

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<sup>146</sup> Pouwels, 1987, 106.

<sup>147</sup> For instance, Sultan Seyyid Sa'id appointed Sayyid Ahmad b. Salim b. Abubakar b. Salim (d.1870) as a *kadhi* for the Shatiri family in Zanzibar. Farsy, 1972, 5.

<sup>148</sup> The formal appointment of *kadhis* does not seem to have been a strict requirement. Al-Mawardi mentioned in his book *al-Ahkam al-Sultaniyya* that a *kadhi* may be appointed verbally if he is present. Where the appointee is not present, then he can be appointed in writing. Bakar, 1997, 20.

<sup>149</sup> ZNA/AB86/136, personal file, Abdalla Saleh Farsy.

After their appointment, it was customary for *kadhis* to retain their posts until their retirement or death. Sometimes *kadhis* died in service, as was noted by a British administrator: “*kadhis* continued in the service till they dropped down dead in law courts, a fitting place for a Kadhi to die!”<sup>150</sup> When appointing *kadhis* outside Zanzibar, Sultans relied wholly on the recommendation of *liwalis* who had the greater say in recruiting candidates of their choice.<sup>151</sup> *Kadhis*’ tenure depended on the good relations they had with *liwalis* and appointments and dismissals were tied to political considerations.

### 2.8.2 The appointment of *kadhis* during the British rule in Zanzibar (1890-1963)

After the establishment of the Zanzibar Protectorate, the British took over the administration of justice and controlled the appointment of *kadhis*. Despite the fact that the British adopted the indirect rule policy when dealing with local institutions, it is argued that the British authorities took control of appointing *kadhis* directly. British policy was to transform the system of appointing *kadhis* that was based on a hereditary arrangement to a

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<sup>150</sup> ZA/AB86/140, letter dated 1 April 1961.

<sup>151</sup> This attitude seemed to be the trend in earlier Muslim dynasties where the appointment of *kadhis* was based on their loyalty to the ruler and their willingness to implement the ruler’s policies. Masud, 2006, 13. A similar situation was present in Northern Nigeria, where Alkalis were appointed not because of their qualifications or piety but because the British Resident was agreeable to their candidacy and that they had the previous endorsement of the Emir. Yadudu, 1997, 124.

colonial appointment subjected to the rule of ‘hire and fire’.<sup>152</sup> The British formalised the process of recruiting *kadhis* and subjected their appointment to the civil service procedures. *Kadhis* were henceforth required to sign a contract of service and serve a probation period of three years in accordance with the civil procedure rules before being appointed permanently.<sup>153</sup> For instance, *kadhi* Ali b. Muhammad al-Abbasi (d. 1953) of Zanzibar served three years as a probation period, after which he applied for confirmation of his appointment.<sup>154</sup> *Kadhi* Habib b. Mbaruk al-Ma‘uli was appointed on a probationary basis as a *kadhi* of Pemba in 1930. He was required to sign a contract for appointment on probation that applied to local clerical and engineering staff. Part of the agreement read:

“the person engaged undertakes that he will, in the Zanzibar Protectorate, diligently and faithfully perform the duties of a Kadhi for the term of his engagement and will act in all respects according to the instructions or directions given to him by the Government through the Head of his Department or other duly authorized officer.”<sup>155</sup>

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As noted above, in the process of transforming the functioning of *kadhis*, the British colonial administrators advertised vacant posts for *kadhis* in the local press. The following is an example of an advertisement which was placed in the *Zanzibar Official Gazette*:

<sup>152</sup> In order to exert control over the appointments of Alkalis in Northern Nigeria, the British Resident and the Chief Justice were given powers to appoint Alkalis and to dismiss them. Yadudu, 1992, 23.

<sup>153</sup> For an example of a formal contract between *kadhis* and the Zanzibar Protectorate government see ZNA/AB86/135, personal file of *kadhi* Habib b. Mbaruk al-Ma‘uli, that contains an agreement of appointment on probation between the *kadhi* and the Chief Secretary to the Zanzibar Government.

<sup>154</sup> ZA/AB86/138, letter from Shaykh Ali b. Mohamed el-Abbasi to the Chief Justice of Zanzibar, dated 27 October 1941.

<sup>155</sup> ZNA/AB86/135, personal file, Habib Mbaruk El-Ma‘uli.

“vacancy for a Shafei Kathi. Judicial Department, Zanzibar.

The post is permanent and pensionable. Qualifications required: The applicant must be a Shafei Muslim possessing sufficient knowledge of the sharia appertaining to the Shafei School of law. He must have a through knowledge of the Arabic language and be able to understand and speak Kiswahili.”<sup>156</sup>

A number of scholars in the Busa‘idi Sultanate refused to be appointed as *kadhīs* fearing that justice could not be properly achieved due to interference by the rulers with their judgements. Sh. ‘Abdallah Farsi mentioned that Muhammad b. Ahmad al-Moroni (d.1890), who was a *kadhi* in Zanzibar, received a note from the Sultan to assist one of the parties. Based on this interference, the *kadhi* abandoned his profession and left Zanzibar forever, going to Mecca.<sup>157</sup> Other scholars declined to be appointed as *kadhīs* due to their piety and respect for their seniors. For instance, when ‘Umar b. Sumayt resigned from the post of chief *kadhi* of Zanzibar, several names were proposed to succeed him. Among the proposed candidates were students of ‘Umar b. Sumayt: Abul Hassan Jamal al-Lyl (d. 1959), Sulayman al-Alawi and Hamid Mansab. As a sign of respect to their teacher, ‘Umar b. Sumayt, all the three proposed persons declined to take the post of chief *kadhi* of Zanzibar.<sup>158</sup>

Despite the fact that vying for positions, particularly in the *kadhi* profession, was discredited by earlier scholars, candidates who applied for a kadhiship in the Busa‘idi Sultanate had to conform to the new colonial order introduced by the British administration

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<sup>156</sup> General Notice No. 1289, the Zanzibar Government Official Gazette, Vol.LXVIII No.3968 dated 5 December 1959.

<sup>157</sup> Farsy, 1972, 27.

<sup>158</sup> Topical discussion with Yunus Sameja, Zanzibar, 17 July 2005.

in order to apply for the post. Reforms introduced by the British colonial authorities with respect to the process of recruiting *kadhīs*, forced aspiring candidates for the kadhiship to go out of their traditional way to compete with their peers in vying for such positions.<sup>159</sup> In one application for a kadhiship, a candidate stated:

“besides my knowledge of Shariah, I beg to state that by birth I am an Arab, I know Arabic, I can read and write it and fluently speak the language. I can read and understand any Shariah book. I have also learnt more Shariah from the Chief kadhi during the tenure of four years service under him. If the Government really wished a right man for either of the posts, preference should I think be given to me.”<sup>160</sup>

When the post of chief *kadhi* in Kenya became vacant after the death of Al-Amin b. Ali Mazru‘i, several candidates applied for the post. Among the applicants for the post was a renowned Muslim Scholar from Lamu, Ali Ahmad Badawi Jamal al-Lyl (d.1987). The following is a translation of Badawi’s formal application letter addressed to the Provincial Commissioner, Coast, in which he provided an extensive resume of his intellectual background:

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<sup>159</sup> Some earlier jurists, such as, Abu Hanifa (d.150 A.H.), declined to be appointed as a *kadhi* on the ground that such appointments would render the administration of justice void of religious principles. Bakar, 1997, 12.

<sup>160</sup> KNA/AP/1/1205, *mudirs*, *kathis* and *liwalis*, letter from Mohamed Jambeni, clerk to the *chief kadhi*, Mombasa, to the Acting Chief Justice, Nairobi, dated 26 April 1929.

I the signed below reside in Lamu and my reputation is beyond the need to be publicised. I teach Islamic law subjects such as jurisprudence (*fiqh*), the Prophet's sayings (*hadith*), and commentary of Quran (*tafsir*). I am the Imam of *Riyadha* mosque-college which is considered to be a university in Kenya. A number of students have graduated from the mosque-college and most of the 'ulama in East Africa are affiliated to it. I have studied under most of the 'ulama in Kenya, Hadhramawt and Hijaz in all disciplines and jurisprudence of the four *madhhabs*. My father gave me an *ijaza* in all these disciplines. Among my teachers are: my uncle Sh. Abūbakar 'Abdallāh Bakathīr who died in Zanzibar, chief *kadhi* of Kenya Sh. Al-Amīn b. 'Ali al-Mazru'ī and chief *kadhi* fo Zanzibar Sayyid 'Umar b. Sumayt, former *kadhi* of Lamu, Sh. Abd al-Majid Zahran, former *kadhi* of Siyu Sayyid Muhammad al-Rudaini, Sh. Muhammad 'Ali al-Ma'awi among the poets of Lamu and the like. Therefore I regard myself, not boasting but based on the need to this appointment, to be competent to assume the post of chief *kadhi*. I am obliged to apply for it and I am obliged to accept it based on the enough knowledge I have acquired in *shafi'i madhhab* known in Islamic law.

My proof for my competence is that in 1933, I was attached to the Arab school in Mombasa to teach and supervise it. Some 'ulama in Mombasa, such as, Sh. Abdalla al-Husni requested me to teach religious subjects in some mosques and I asked permission from Sh. Al-Amin who allowed me to teach in any mosque that I preferred to hold *darsa* (lesson). I lived in Mombasa for four years where Sh. Al-Amin delegated to me the power to conduct Muslim marriages and consulted me on some issues as was the practice of *kadhis* to consult 'ulama. I have written on Islamic law and arts including; poem on Islamic inheritance, the most important and intricate discipline in Islamic jurisprudence (*fiqh*), a poem on Arabic grammar (*al-nahau*) and another on science of *hadith* (*mustalah al-hadith*). In addition to my good command of the Arabic language, I have enough knowledge of reading and writing the English language. I also have knowledge of medicine, algebra and metrological science (*'ilm al-miqat*). On my character, it is known by all individuals and the public and that a person should not recommend himself.<sup>161</sup>

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<sup>161</sup> KNA/CA/20/31, Arab Officers – *liwalis*, *kathis* and *mudirs*. Translated by Abdulkadir Hashim

An interesting aspect of Badawi's application is that, despite the fact that the Quran clearly discourages a person to recommend himself, Badawi found himself bound by the colonial requirement to write a formal application and support his case.<sup>162</sup> By narrating his background and achievements, Badawi was not boasting of his intellectual standing but rather he responding to the colonial requirement to apply for the post. Sayyid Badawi's application was supported by a petition written on 27 May 1948 by *'ulama* and dignitaries of Lamu. Signatories of the petition included his teachers, Muhammad 'Abd Allah al-Rudaini and Muhammad b. 'Ali al-Ma'awi, and a dignitary, 'Abd Allah Muhammad al-Jahadhmi, from Lamu. The petition stated:

“this is a petition from us the signed below who certify that Sayyid Ali Ahmad Badawī residing in Lamu is known to all of us for his good conduct, behaviour and knowledge. He is qualified to assume the post of chief *kadhi* due to the enough knowledge he has acquired in Shafi'i and other *madhhabs* known in Islamic law. We certify that he has studied the techniques of these sciences from his teachers who are known and recognized.”<sup>163</sup>

## **2.9 The British policy on the appointment of chief *kadhis* and *kadhis* in the Kenya coastal strip**

Due to the significance of the position of the chief *kadhi* in the Kenya coastal strip, the British colonial administration adopted a policy of accommodating the post in the colonial machinery. The Kenya coastal strip was part of the Zanzibar Protectorate under the sovereignty of the Sultan of Zanzibar. Areas beyond the Kenya coastal strip belonged to

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<sup>162</sup> Quran chapter 53 verse 32 reads: “So do not recommend yourselves. He (Almighty God) knows best him who fears Almighty God.”

<sup>163</sup> KNA/CA/20/31, Arab Officers – *liwalis*, *kathis* and *mudirs*.

the British Colony. With dual authority in both territories; the Colony and the Protectorate, the British had control of appointing chief *kadhis* and their subordinates. It was through this authority that the British controlled the appointment of chief *kadhis* in the Kenya coastal strip.

In 1897, Sir Arthur Hardinge (British Consul in Zanzibar 1894-1896, and then Commissioner of the British Colony and Protectorate 1895-1900) proposed the establishment of the post of *shaykh al-Islam* in the Kenya coastal strip.<sup>164</sup> Hardinge's proposal was informed by his colonial experience in Egypt. In order to ensure control over the religious leadership, Hardinge suggested the appointment of a scholar from Egypt to assume the post of *shaykh al-Islam* in the Kenya coastal strip. However, due to financial constraints, the proposal did not materialise and instead a local scholar, Sh. 'Abd al-Rahman Saggaf (*Mwenye Abudu*), was appointed as the first *shaykh al-Islam* in 1897.<sup>165</sup>

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<sup>164</sup> Before his appointment to Zanzibar in 1894, Sir Hardinge had served in various diplomatic posts in Constantinople and Cairo where he gained ample experience in dealing with Muslims. Mungeam, G.H (1966) *British Rule in Kenya 1895-1912*, Oxford: Clarendon Press 17.

<sup>165</sup> The title of *shaykh al-Islam* was first established during the reign of the Ottoman ruler Murad II (r.1421-1451) when a single *mufi* was recognised as the ultimate source of religious authority in Islamic law. Prior to the appointment of a *shaykh al-Islam*, *muftis* in the Ottoman Empire operated independently of the State. With the expansion of the the Ottoman Empire, *muftis* were accommodated into a centralised judicial administration. *Masud, 1996, p.11*. The office of Chief Kadhi (*qadi al-qudat*) was first created by Caliph Harun al-Rashid (r.170-193) when he appointed Abu Yusuf (d.182) as the Chief *Kadhi*. Bligh-Abramski, 1992, 56. For a comprehensive report on the appointment of Chief *Kadhis* in the Kenya Protectorate, see Mwakimako, H. A (2003) "Politics, Ethnicity and Jostling for Power: The Evolution of the Institutions of Muslim Leadership and Kadhiship in Colonial Kenya, 1895-1963" (Unpublished PhD dissertation submitted

The British adopted a double-edged policy of accommodating a *shaykh al-Islam* as the head of the Muslim religious authority, on the one hand, and on the other hand, exerted control over his authority and functions. When the British colonial authorities noted the increasing popularity of the *shaykh al-Islam* and his influence on Muslim society, gradual changes were put in place to weaken his authority. The British colonial administration was concerned that the elevation of the position of the *shaykh al-Islam* could create a parallel authority that would challenge the colonial authorities. Among the strategies implemented by the British to weaken the post of the *shaykh al-Islam* was to abolish the title of *shaykh al-Islam* and replace it with that of chief *kadhi*. Change of nomenclature reflected a change of policy in terms of the privileges attached to the post. Muhammad b. ‘Umar Bakore (d.1932) succeeded *Mwinyi Abudu* as the chief *kadhi* of Kenya in 1922. Sh. Bakore received a lower salary than his predecessor, a fact that induced the former to complain to the British administration. In a letter supporting Bakore’s case, T.D. Maxwell, the Acting Chief Justice of Kenya, stated:

“I am fully aware of the present financial difficulties of the government but I would submit that the difference between \$72 and \$42 per annum is a small price to pay to maintain the dignity and the contentment of a distinguished servant of the Crown whose loyalty and whose usefulness are above questions.”<sup>166</sup>

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to the University of Cape Town); Mwakimako, H “The ‘Ulama’ and the Colonial State in the Protectorate of Kenya. The Appointment of *shaykh al-Islam* Sharif Abd al-Rahman b. Ahmad Saggaf (1844-1922) and Chief Kadhi Sh. Muhammad b. Umar Bakore (c.1932)” in Loimeier, R. and Seesemann, R. (eds.) (2006) *The Global Worlds of the Swahili: Interfaces of Islam, Identity and Space in 19th and 20th-Century East Africa*, Berlin: Lit Verlag 289-315.

<sup>166</sup> KNA/AP/1/1313, Mohamed bin Omar, chief *kadhi*, letter from T.D. Maxwell, the Acting Chief Justice to the Acting Governor, dated 15 July 1923.

After abolishing the title of *shaykh al-Islam*, British officials adopted a strategy of reducing the post of chief *kadhi* to that of a mere civil servant whose function was gauged by the number of cases he handled in court. In one case, the Deputy Registrar, Supreme Court of Kenya complained about the lack of cases handled by the chief *kadhi*, stating that “The Resident Judge has never had occasion to seek advice on Islamic law [from the chief *kadhi*] except at the bare half dozen appeals each year”.<sup>167</sup> As a means of further weakening the post of the chief *kadhi*, the British authorities transferred the supervision of the chief *kadhi*'s function from the Judiciary to the Provincial Administration. In addition to the judicial duty, other functions were assigned to the chief *kadhi*, including:

- (1) To advise Her Majesty's Judges on questions of Islamic law.
- (2) To advise the Provincial Commissioner.
- (3) To supervise the work of *kadhis* throughout the country.
- (4) To examine candidates for the post of *kadhi* and to train them in Islamic Law.<sup>168</sup>

The British policy of abolishing the post of chief *kadhi* was apparent after the resignation of Sayyid ‘Ali Badawi (d.1987) in 1953. British colonial administrators took advantage of the resignation by keeping the post unfilled.<sup>169</sup> Consequently, no appointment of another chief

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<sup>167</sup> KNA/CA/9/96, Muslim Subordinate Courts, letter from the Deputy Registrar, Supreme Court of Kenya, to the Provincial Commissioner, Coast, dated 31 October 1960.

<sup>168</sup> KNA/CA/9/96, Muslim Subordinate Courts, letter from the Provincial Commissioner, Coast, D.W. Hall to the Registrar, Her Majesty's Supreme Court of Kenya, dated 18 July 1960.

<sup>169</sup> In my topical discussions with several scholars in Mombasa and Lamu, it was mentioned to me that among the reasons for Sayyid Ali Badawi's resignation were that he did not comply with British colonial instructions and that he was not comfortable working with the colonial establishment.

*kadhi* was made for almost a decade, and instead, Sh. Muhammad Kasim Mazru‘i (d.1982), the *kadhi* of Mombasa, served as the Acting chief *kadhi*. The Judiciary displayed a lack of interest in re-establishing the post of chief *kadhi*.<sup>170</sup> It was only through pressure from the Muslim community and the intervention of the *liwali* for the Coast that the post was reinstated by appointing Sh. Muhammad Kasim Mazru‘i as the chief *kadhi* in 1968. S.M. Muhashamy, the *liwali* for the Coast, appealed to the British administration by stating:

“I feel there is a greater need now more than ever before, for the reinstatement of this post since the Muslim population has increased enormously and there is a clamour for an independent authority to advise the Judiciary on matters concerning Mohammedan Law.”<sup>171</sup>

Muhashamy recommended that the *kadhi* of Mombasa, Sh. Muhammad Kasim Mazru‘i, be appointed as the chief *kadhi* of Kenya by stating:

“after giving the matter of the appointment of Chief Kadhi, which is under review by the Government, my careful consideration, I am of the opinion that the only person in this country who is suitable for this post is Sheikh Mohamed Qasim Mazru‘i, the present Kathi of Mombasa. Sheikh Mohamed comes from a respectable family of Mombasa, was educated at the Arab Government School here and was brought up and trained in Sheria by an eminent scholar of Sheria in East Africa – the late Chief Kadhi, Sheikh Al-Amin b. Ali El-Mazru‘i. His character is above reproach and his advice on matters concerning Sheria has always been reliable and useful.”<sup>172</sup>

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<sup>170</sup> See KNA/CA/9/96, Muslim Subordinate Courts, letter from the Deputy Registrar, Supreme Court of Kenya, to the Provincial Commissioner, Coast, dated 31 October 1960, and KNA/CA/9/6, *liwalis*, *mudirs* and *kadhis* courts, letter from D.W.Hall, the Provincial Commissioner, Coast Province to the Chief Commissioner, Office of the Leader of the House, Nairobi, dated 8 January 1962.

<sup>171</sup> KNA/CA/9/96, Muslim Subordinate Courts, letter from the *liwali* for the Coast, to the Provincial Commissioner Coast Province, dated 15 July 1960.

<sup>172</sup> KNA/CA/9/96, Muslim Subordinate Courts, letter from the *liwali* for the Coast, S.M. Muhashamy to Justice Rudd, Chief Justice, dated 10 August 1962.

As noted above, the British policy of appointing *kadhīs* in the Kenya coastal strip was tied to financial considerations. In areas where *kadhīs* handled few cases, the British colonial officials advocated the abolition of *kadhi* courts. For political as well as economic reasons, British colonial authorities adopted a policy of restricting *kadhi* courts within the Busa‘idi Sultanate which included the Kenya coastal strip. However, due to the migration of Muslim workers, particularly Indian Muslim immigrants, who served the colonial administration beyond the coastal strip, the British were forced to cater for the religious needs of the Muslim immigrants in the Kenya Colony. The growing Muslim population in the interior of Kenya called for the establishment of *kadhi* courts beyond the Kenya coastal strip. Hence the British colonial administration was caught between two difficult situations: the need to cater for Muslim British subjects who had migrated into the interior of Kenya, on the one hand, and, on the other hand, restricting *kadhi* courts to within the coastal strip so that they did not extend towards the interior of Kenya. Based on the practical situation on the ground, British colonial officials were forced to extend *kadhi* courts to the interior of Kenya on condition that the jurisdiction of *kadhīs* had to be confined to civil cases. The policy of confining *kadhīs* jurisdiction to civil matters only was clearly stated in a letter to the Chief Secretary which noted, “provided that no *kadhi*’s court established outside the Coast districts shall exercise any criminal jurisdiction”.<sup>173</sup>

Another aspect that caused considerable trouble to the British colonial administration was the registration of Muslim marriages and divorces outside the Kenya coastal strip. Muslim marriages outside the Kenya coastal strip were not recognized by the courts and such

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<sup>173</sup> KNA/CA/9/6, *liwalis*, *mudirs* and *kadhīs* courts.

marriages were considered to be void. R.W. Hamilton, the Chief Justice of Kenya, pointed out the predicament of Muslims who resided outside the Kenya coastal strip by stating:

“the Mohammedan native up country is naturally in a different position from that which he enjoys at the coast, and could not for instance claim to have a case decided by the procedure of the Sheriah; but do not apprehend that he loses his status as a Mohammedan and the rights and liabilities attaching to that status because he crosses the 10 mile limit and I am afraid it would be well nigh impossible to refuse to administer to him his own civil law in matters of marriage, inheritance and divorce as it is administered to Mohammedan Indians.”<sup>174</sup>

Due to the absence of *kadhi* courts outside the Kenya coastal strip, cases arose in which Muslim men married daughters of pagans and the courts refused to recognize such marriages. As a consequence of these irregular marriages, disputes arose to the property and the children of such unions. In the absence of *kadhi* courts, the British colonial administration was forced to delegate to administrative officials, such as the District Officers, the power to issue marriage certificates in order to validate such marriages. Despite the British attempt to grant marriage certificates for such marriages, the courts questioned the validity of the certificates that were issued by the administrative officers. In order to combat the difficulty, the British administration borrowed from the Indian experience by enacting the Indian Mohammedan Marriage and Divorce Ordinance of 1906. This resulted in the enactment of the Mohammedan Marriage and Divorce Ordinance in 1920 which aimed to avoid marriage disputes outside the Kenya coastal strip. The main objective of the Ordinance was to require parties marrying outside the Kenya coastal strip to register their marriages and divorces.

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<sup>174</sup> KNA/PC/Coast/1/3/2, letter from R.W. Hamilton, to the Secretary of State, dated 30 September 1910.

Although British administrators were obliged to appoint *kadhis* outside the Kenya coastal strip in order to register marriages and divorces, the colonial administration considered the financial implications of such appointments. For instance, after it was established that there was a need to appoint a *kadhi* in Machakos, the British anticipated that the appointee would serve without pay during his probationary period. A High Court judge, R.W.Hamilton, interviewed Rashid b. Hamed Mazru‘i and proposed him to be appointed as the *kadhi* of Machakos. Hamilton remarked:

“I would recommend that he should be appointed provisionally for a year without pay on the understanding that if satisfactorily his appointment would at that time be confirmed and that he would receive a fixed salary and be required to give up trading.”<sup>175</sup>

The other policy adopted by the British administration to reduce the cost of appointing *kadhis* outside the Kenya coastal strip was to permit them to earn their living through the collection of marriage fees. The Governor of Kenya issued a notice which stated:

“a Registrar of Mohammedan Marriages and Divorces, may, if he is not a person receiving a salary from the Government retain for his own use any fee which he is authorized to levy and collect under the said Ordinance or any rules thereunder.”<sup>176</sup>

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<sup>175</sup> KNA/PC/Coast/1/3/2, letter from R.W. Hamilton, Mombasa, to the Secretary, Nairobi, dated 13 September 1910.

<sup>176</sup> KNA/PC/Coast/1/3/2, Official Gazette of 15 May 1911, 203, rules made by His Excellency the Governor under the Mohammedan Marriage and Divorce Ordinance 1906, Nairobi.

## 2.10 The British policy on the remuneration and entitlements of kadhis in the Kenya coastal strip

After their appointment, *kadhis* were offered inferior remuneration compared to other judicial officers. Despite the fact that *kadhis* had been incorporated in the colonial judicial system since 1897, the British adopted a policy of discriminating against them in respect of payments and privileges. In a letter dispatched by the Secretary for Native Affairs, it was pointed out that since *kadhis* were appointed in the Kenya coastal strip in 1909 they did not have a scheme of service.<sup>177</sup> The British administration adopted a policy of categorizing civil servants in accordance with which *kadhis* received the lowest pay, even when compared to their fellow Muslim officers, such as *mudirs*.

Table 1.1 Remuneration of Muslim officials along the Kenya coastal strip

Grade	Title	Salary
1 <sup>st</sup> grade	<i>liwalis</i>	£160p.a.
2 <sup>st</sup> grade	<i>liwalis</i> and <i>shaykh al-Islam</i> or chief <i>kadhi</i>	£120-£160 p.a
3 <sup>rd</sup> grade	<i>mudirs</i>	£60-£100 p.a.
4 <sup>th</sup> grade	<i>kadhis</i>	£40-£80 p.a

Source: KNA/PC/Coast/1/1/44, few rough notes by W.M. Mathews, Zanzibar, 12 April 1896.

Table 1.1 reflects the low remuneration of *kadhis* compared to that of other Muslim officials. The payment of low salaries to *kadhis* could explain why some *kadhis* had to find

<sup>177</sup> KNA/AP/1/569, Terms of Service for Liwalis and Cadis of East Africa, letter from the Sectary for Native Affairs to Secretariat, Nairobi dated 19 November 1909.

other means to earn their living. From the establishment of the British Protectorate in Zanzibar, *kadhis* received a small payment so that “a well paid native judge would not levy black mail to support himself”.<sup>178</sup> One possible explanation for paying low salaries to *kadhis* could be their lack of formal training in English law, as opposed to their fellow Muslim officials, such as *mudirs* and *liwalis*. The *kadhis*’ training was based on traditional Islamic learning and, therefore, did not merit a payment equal to that paid to *mudirs* and *liwalis*. The other reason for *mudirs* and *liwalis* receiving higher remuneration was that they handled administrative work, which included the collection of taxes and licence fees from the people, in addition to their judicial work.<sup>179</sup>

The British adopted a policy of categorizing civil servants that ranked British officers at the top followed by Asians, Arabs and then Africans. The policy reflected the superiority of British officers over other civil servants in terms of remuneration and privileges. Based on the discriminatory policy of categorization of civil servants, *kadhis* together with other Arab officials were appointed without pensionable rights which were given to Asian civil servants.<sup>180</sup> As a result of this discrimination, Muslim officials in the Kenya coastal strip complained of unequal treatment and demanded to be paid and be placed on similar conditions of service as other civil servants. It was only after pressure from Muslim representatives in the colonial government that the conditions of service of Muslim officers

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<sup>178</sup> KNA/Coast/1/1/44, Lamu – Outward file, few rough notes by W.M. Mathews, Zanzibar 12 April 1896.

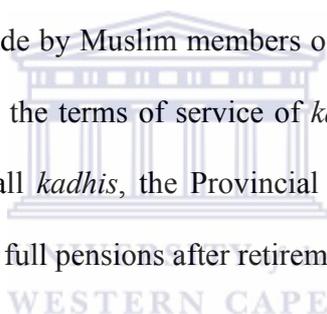
<sup>179</sup> KNA/Lamu/2/22/4, *mudir* Kiunga.

<sup>180</sup> Salim, A.I. 1970b “Native or Non-Native: The Problem of Identity and on Social Stratification of the Arab-Swahili of Kenya”, in Ogot, B. A (ed.) (1970) *Hadith* 6: 65-85 Nairobi: East African Publishing House 75.

were improved. The *liwali* for Coast complained to the British administration regarding the poor conditions of service accorded to Muslim officers. He noted:

“It seems to me that it would not act fairly to the officials [Muslim officers] who are now in the service and who are giving the best of their lives in the Government service. I dare to say that you will realize that a great deal has been said among certain sections of the Arab community that the Government has not dealt with them fairly as she has dealt with the Indian and other communities.”<sup>181</sup>

In addition to the lack of pension rights, *kadhis* were not entitled to an incremental increase of their salaries. Because of this discrimination, a Muslim member of the Legislative Council proposed that *kadhis* should be placed on an incremental salary scale.<sup>182</sup> It was only through representations made by Muslim members of the Legislative Council that the British administration improved the terms of service of *kadhis*.<sup>183</sup> In a letter addressed to the chief *kadhi* and copied to all *kadhis*, the Provincial Commissioner of Coast assured them that they would be granted full pensions after retirement.<sup>184</sup>



The British policy of discriminating against *kadhis* in respect of remuneration and other entitlements was not confined to the Kenya coastal strip. For instance, in Zanzibar the British adopted a similar discriminatory policy of denying *kadhis* the right to reside in

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<sup>181</sup> KNA/CA/20/31, Arab Officers – Liwalis, Kathis and Mudirs, Letter from the Office of the Late Sir Ali b. Salim to the Provincial Commissioner, Mombasa, dated 24 November 1942.

<sup>182</sup> KNA/CA/20/31, Arab Officers – *liwalis, kadhis and mudirs*, letter from the Chief Secretary, Nairobi, to the Provincial Commissioner, Mombasa, dated 2 January 1943.

<sup>183</sup> KNA/AG/37/46, pension to *liwalis, kadhis and mudirs*.

<sup>184</sup> KNA/CA/20/31, letter from the Provincial Commissioner, Coast, to Sheikh Al-Amin b. Ali the Chief Kathi, dated 10 May 1943.

government staff houses. This policy was clearly stated to *kadhīs* even before they were appointed; advertisements stated that successful applicants for the post of *kadhi* would not be entitled to be provided with government quarters.<sup>185</sup> Habib b. Mbaruk al-Ma‘uli, *kadhi* of Pemba, could not tolerate the denial of the house allowance, and complained to the Registrar High Court Zanzibar by stating:

“consequently out of my small salary I have to provide a house for myself and my family in the township of Chake Chake. Apart from the humiliating position involved by the denial of this privilege [house allowance], the financial burden is too heavy for me to be able to pay for a decent house in the Chake Chake township where the rents are very high.”<sup>186</sup>

Due to the policy of discrimination adopted by British colonial officials, *kadhīs* did not rely on their salaries. It was a common practice in the Busa‘idi Sultanate that in addition to their court work, *kadhīs* would have their own private practices so as to earn extra income.<sup>187</sup> The most common profession practiced by *kadhīs* was weaving of *kofia*, particularly in the Lamu Islands. Some *kadhīs* from wealthy families, such as, the Shatiri and Ruwayhi in Zanzibar and the Mazru‘i in Mombasa, had other sources of income derived from their family *shambas* and properties.

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<sup>185</sup> General Notice No. 1289, The Zanzibar Government Official Gazette, Vol.LXVIII No.3968 dated 5 December 1959.

<sup>186</sup> ZA/HC26/4, letter from Habīb al-Ma‘uli, Kadhi of Chake Chake, to the Registrar High Court, Zanzibar, dated 18 January 1936.

<sup>187</sup> This custom was also practiced by Muslim scholars in Northern Nigeria who refused to accept stipends from the public treasury (to which they were legally entitled) and maintained themselves on earnings from their work. Kumo, S. “Shar‘ia under Colonialism-Northern Nigeria”, in *Islam in Africa*, Proceedings of the Islam in Africa Conference, Alkali, N. (1989) (eds.) Ibadan: Spectrum Books Limited 2.

Some *kadhis* declined to accept the salaries paid to them, on the ground that such payments were given by the British government. For instance, *Shaykh al-Islam Mwenye Abudu* declined to accept his salary until his wife reported the matter to the Court officials in Mombasa. Even after being forced to take his salary, *Mwenye Abudu* distributed almost all of it to the needy, and exhausted it before reaching his home.<sup>188</sup> Another possible explanation for the non-acceptance of salaries by some *kadhis* could be based on the idea advocated by earlier Muslim jurists that *kadhis* should not receive any payment. According to these jurists, serving in the judiciary was considered to be serving Almighty God, and that was to be rewarded in the hereafter.<sup>189</sup>

### 2.11 The British policy on the abolition of *kadhi* courts in the Kenya coastal strip

The ultimate objective of British colonial policy was to transform the *kadhi* courts into a unified court system to conform to English notions of justice and procedure. The policy of transforming the *kadhi* courts was implemented to avoid the parallel system of courts that existed in colonial Zanzibar. In the process of transforming the *kadhi* courts, the British embarked on a policy of abolishing *kadhi* courts in areas where they felt that it was uneconomic to retain such courts. In implementing such a policy, the British were keen not to interfere with *kadhi* courts in urban areas where Muslim litigants used the courts. Hence, the British policy of abolishing *kadhi* courts was directed to the rural areas.

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<sup>188</sup> Topical discussion with Maalim Saggaf, Mombasa, 18 December 2007.

<sup>189</sup> Zubaida, S (2003) *Law and Power in the Islamic World* London: I.B. Tauris 47.

The British policy of abolishing *kadhi* courts was apparent in the Kenya coastal strip particularly in areas where the number of cases handled by these courts had decreased. The British policy on appointing *kadhīs* was dictated by financial considerations. The British colonial authorities regarded the *kadhīs* as civil servants and considered their remuneration according to the volume of work done in their courts. *Kadhīs*, therefore, were paid salaries from the fees collected in court cases and were expected to supplement their monthly income with fees collected from conducting marriage ceremonies. As a consequence of this policy, proposals were made to merge *kadhi* courts with *mudir* courts in order to cut expenditure on salaries. The Senior Commissioner, Kenya Coastal strip, recommended a reduction of Arab officials by stating that:

“the Arab official staff in this province is large and not entirely satisfactory: the number of officials was reduced in 1922 after the report of the Economic and Finance Committee and now I am going to recommend some further reductions and also changes in the personnel of some posts. *Kathīs* will always be necessary and it may be possible to appoint *kathīs* who could do *Mudirs* work or *Mudirs* competent to be gazetted as *kathīs*.”<sup>190</sup>

The British policy of reducing expenditure on *kadhīs* salaries was not only confined to the junior *kadhīs* but was also extended to include the office of the chief *kadhīs*. After the resignation of *Sayyid* ‘Ali Ahmad Badawi as the chief *kadhi* of Kenya in the early 1950s, the post of chief *kadhi* remained vacant for almost a decade. The Muslim community petitioned the *Liwali* for Coast demanding re-instatement of the post. The *liwali* for the Coast expressed his concern to the Provincial Commissioner by stating:

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<sup>190</sup> KNA/AP/1/1205, *mudirs*, *kadhīs* and *liwalis*, letter from the Acting Senior Commissioner, Coast, to the Chief Native Commissioner, Nairobi, dated 21 April 1927.

“for a considerable time now the above post has remained unfilled despite the fact that there have been uneasing and constant demands from the Muslim Community for its re-instatement. As far as I am aware the only reason which entailed the discontinuation of this very important post was, to sum it briefly, lack of sufficient work to warrant retaining the services of a highly paid officer such as chief *kadhi*.”<sup>191</sup>

British administrators proposed the abolition of *kadhi* courts in places where the number of cases handled by *kadhis* decreased. In a letter addressed to the Registrar, Supreme Court of Kenya, the Provincial Commissioner, Coast proposed the abolition of the *kadhi* court in Vanga:

“during 1930, the kathi tried 10 civil cases only and during 1931, 14 civil cases and criminal cases. I feel very strongly that there is no real justification for the further retention of this post, more particularly in view of the general financial position at the moment, and I would therefore, enquire from His Honour on whether He would agree to the abolition of the post, which would entail a saving of £120 during the current year.”<sup>192</sup>

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<sup>191</sup> KNA/CA/9/96, Muslim Subordinate Courts, letter from the *liwali* for the Coast, to the Provincial Commissioner Coast Province dated 15 July 1960.

<sup>192</sup> KNA/AP/1/1205, *mudirs*, *kadhis* and *liwalis*, letter from from the Provincial Commissioner, Coast, Mombasa, to the Registrar, Supreme Court of Kenya, Nairobi, dated 26 January 1932.

Table 1.2 Civil and criminal cases heard by Native Courts in Lamu

	1930	1931	1932	1933	1934	1935	1936	1937	1038
<b><i>Liwali's courts</i></b>									
Civil cases	88	58	70	80	73	55	27	10	43
Criminal cases	69	155	81	134	125	139	61	58	72
<b><i>Kadhi's courts</i></b>									
Civil cases	6	12	32	30	23	18	28	38	21
Criminal cases	1	13	11	3	3	7	16	34	10
<b>Magistrate's courts</b>									
Civil cases	51	46	54	115	220	38	58	45	59
Criminal cases	34	45	35	71	45	10	16	46	28

Source: KNA/DC/LMU/1/6, Judicial Statistics: Native Courts in Tanaland Province.

Table 1.3 Civil cases heard by *Kadhi* courts in Zanzibar and Pemba

	1931	1932	1933	1934	1935	1936	1937
Zanzibar Town	504	260	174	184	243	215	342
Mkokotoni (Zanzibar)	134	49	22	13	---	---	---
Chwaka (Zanzibar)	98	40	44	86	146	131	140
Makunduchi (Zanzibar)	49	13	10	14	---	---	---
Chake Chake (Pemba)	567	236	257	380	613	545	553
Wete (Pemba)	543	380	255	623	590	424	499
Mkoani (Pemba)	299	118	394	159	29	---	---

Source: ZNA/BJ1/315

Table 1.2 is a sample to illustrate the few cases handled by *kadhi* courts in Lamu compared to the *liwalis* and magistrate courts.<sup>193</sup> The decreasing number of cases in *kadhi* courts along the Kenya coastal strip seemed to have influenced the British policy to abolish *kadhi* courts. On the contrary, the situation in Zanzibar and Pemba, as illustrated by Table 1.3, differed in that *kadhi* courts handled a larger number of cases compared to the Kenya coastal strip. Hence, there was no clear policy of the British to abolish *kadhi* courts in Zanzibar and Pemba.

The British colonial administration embarked on a policy of abolishing *kadhi* courts in the Kenya coastal strip on the basis of the decreased number of cases heard in those courts. Despite the significance of *kadhis* in society, the British colonial administration was more concerned with the financial burden imposed by *kadhi* courts, particularly in areas which the courts could not generate enough income to sustain their existence. An advocate practising in Mombasa properly understood the role of *kadhis* in the society and pointed out the danger of abolishing *kadhi* courts. In a letter addressed to the Chief Justice of Kenya, he noted:

“I think there is a great danger of those who do not know the function of a kathi thinking that a kathi is just a native Magistrate who has certain judicial functions. He is more than that and enters very largely into any important step of a Mohammedan’s life. He is infact a necessary officer to a Mohammedan population and his usefulness can not be judged by the number of cases tried by him.”

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<sup>193</sup> The number of cases handled by *kadhi* courts in other towns within the Kenya coastal strip, such Mombasa and Malindi, could be relatively higher than the figures presented in Table 1.2.

<sup>194</sup> KNA/AG/12/21, The Courts (Jurisdiction of Cadis) Ordinance 1929, letter from J.W. Barth, the Chief Justice of Kenya, to the Governor of Kenya, Nairobi, dated 18 June 1928.

Before Kenya's independence, uncertainty arose as to the future status of the Kenya coastal strip. The strip occupied a peculiar situation in that, while it was administered by the British, the Sultan of Zanzibar had sovereign rights over it. The main point of contention between the Sultan's subjects residing along the coastal strip and the people residing in the interior of Kenya was whether the coastal strip should achieve its autonomy after the independence of Kenya or should join the independent Republic of Kenya. This led to political unrest that divided the people along the Kenya coastal strip into two main groups. The first group, which was led by the *Mwambao* movement, represented by Arabs and Swahili tribes, preferred the autonomy of the coastal strip, while the second group, represented by African tribes residing along the coastal strip, called for the cessation of the Sultan's sovereignty over the coastal strip and its integration into an independent Kenya.<sup>195</sup> The second group was supported by pre-independence political parties in the interior of Kenya. Muslims along the coastal strip feared that upon Kenya's independence, the sovereignty of the Sultan would be relinquished and that Muslim institutions that included the *kadhis*, *liwalis* and *mudirs* courts would be abolished.

Due to the political tension generated by the uncertainty regarding the future prospects of the coastal strip, a nine-member delegation from Arabs and Swahili tribes along the Kenya coastal strip met the Sultan of Zanzibar in 1960.<sup>196</sup> Members of the delegation expressed

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<sup>195</sup> For a comprehensive study on the movement see Salim, A.I "The Movement for 'Mwambao' or Coast Autonomy in Kenya, 1953-63" in Ogot, B. A (ed.) (1970) *Hadith 2* Nairobi: East African Publishing House 212-228.

<sup>196</sup> Bashir, A.A (1996) "The Kadhis' Court system in Kenya: A Forgotten Arm of the Judiciary?" (Unpublished LLB Dissertation, University of Nairobi) 29.

their concerns to the Sultan and demanded that their religious rights and properties be safeguarded in the event that the Sultan would surrender the Kenya coastal strip to the independent Kenya. At the request of the Sultan of Zanzibar, the British government appointed a Commissioner, James W. Robertson in September 1961. His terms of reference were: “to report to the Sultan of Zanzibar and Her Majesty’s Government jointly on the changes considered to be advisable in the 1895 Agreement relating to the coastal strip, as a result of the course of constitutional development in East Africa.”<sup>197</sup>

In his report submitted to the British Government and the Sultan of Zanzibar, Mr. Robertson recommended incorporation of the coastal strip into Kenya before independence subject to certain safeguards being given to the coastal people which should be entrenched in the Constitution. Robertson also recommended that the 1895 Agreement signed by Her Majesty’s Government and His Highness the Sultan of Zanzibar should be abrogated and that His Highness the Sultan should enter into a new agreement with the Kenyan Government. Among the safeguards suggested by Robertson was the grant of the freedom of worship to all people living in the strip and more particularly the Sultan’s subjects and their descendants. Robertson recommended that the *kadhi* courts be integrated within the judicial system of the independent Kenya due to the fact that *kadhis* in the Kenya coastal strip operated separately from the judiciary.<sup>198</sup>

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<sup>197</sup> Robertson, J. W (1961) *The Kenya Coastal Strip: Report of the Commissioner*, Presented to the Parliament by the Secretary of the State for the Colonies by command of Her Majesty, London: Her Majesty's Stationery Office, 1961, 6.

<sup>198</sup> Robertson, 1961, 33.

Based on the recommendations made by Robertson, a conference was held in London in order to ascertain the views of the inhabitants of the Kenya coastal strip. Representatives of all the stakeholders were invited to a conference at Lancaster House in London, held between 8 and 12 March 1962 under the chairmanship of the Secretary of State for the Colonies. Those who attended included elected members of the Kenya Legislative Council representing the coastal strip, elected members for the Bajuni lands, the Governor of Kenya, the British Resident of Zanzibar, and a legal adviser to the Sultan of Zanzibar. During the Lancaster House conference, the Sultan's legal adviser noted that the 1895 Agreement in no way touched on the question of sovereignty, and that its only effect was to transfer to the British Government responsibility for the administration of the area. He further noted that:

“His Highness main concern is not with abstract juridical questions or with his legal rights, although these, he is advised, are beyond dispute. A large number of people living in and around the Coastal Strip are his subjects. His Highness sole concern is for the welfare of his people. Before he could agree to any arrangement for their future government he would wish to be satisfied that their institutions and way of life would be fully safeguarded.”<sup>199</sup>

The Sultan of Zanzibar was prepared to relinquish his sovereignty over the coastal strip on condition that he would be assured that the religious persuasions of his subjects would be safeguarded as set out in the Robertson's Report. Based on the assurance given by the British Government that the welfare and religious interests of the Sultan's subjects and their descendants would be safeguarded in the independent Kenya, the Sultan agreed to relinquish his sovereignty over the Kenya coastal strip.

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<sup>199</sup> Robertson, 1961, 6.

On 26 February 1963, a joint statement was signed between Duncan Sandys, the British Secretary of State for the Colonies, and Mohammed Shamte, the Chief Minister of Zanzibar, to provide for the safeguards required by the Sultan of Zanzibar for his subjects residing along the Kenya coastal strip. The joint statement stated:

“the government of Zanzibar express their satisfaction that Kenya will shortly receive full Internal self-government; and they re-affirm that their sole concern is for the well-being of His Highness’s subjects in the Coastal Strip. They welcome the assurance by the Secretary of State for Colonies that, in the new Constitution of Kenya, provision will be made to protect Muslim law and religion and to safeguard the rights of minorities. They also note with satisfaction that the Constitution will accord substantial legislative and executive powers to the regions, thereby affording to the people of the Coast the opportunity to secure greater consideration for their special needs and wishes. In view of this, the Government of Zanzibar is content that, after the introduction of the new Constitution, the coastal strip should continue to be administered as a part of Kenya.”<sup>200</sup>

Following the signing of the joint statement between the British and Zanzibar governments, the Prime Minister of Kenya, Jomo Kenyatta, wrote a letter of undertaking on 5 October 1963. The letter addressed to the Prime Minister of Zanzibar stated:

I have the honour ... to place on record the following undertakings by the Government of Kenya in relation thereto-

(1) The free exercise of any creed or religion will at all times be safeguarded and, in particular, His Highness’s present subjects who are of the Muslim faith and their descendants will at all times be

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<sup>200</sup> Kenya Coastal Strip: Joint Statement by the Secretary of State for the Colonies and the Chief Minister of Zanzibar. Presented to the Parliament by the Secretary of State for the Colonies by command of Her Majesty, March 1963 (London: Her Majesty's Stationery Office, 1963) 1.

ensured of complete freedom of worship and the preservation of their own religious buildings and institutions.

(2) The jurisdiction of the Chief Kadhi and all other Kadhis will at all time be preserved and will extend to the determination of questions of Muslim law relating personal status (for example marriage, divorce and inheritance) in proceedings in which all parties profess the Muslim religion.

(3) Administrative officers in predominantly Muslim areas should, so far as is reasonably practicable, themselves be Muslims.

(4) In view of the importance of teaching of Arabic to the maintenance of Muslim Religion, Muslim children will, so far as is reasonably practicable, be taught Arabic and, for this purpose, the present grant-in-aid to Muslims primary schools now established in the Coast region will be maintained.

(5) The freehold titles to land in the Coast Region that are already registered will at all times be recognized, steps will be taken to ensure the continuation of the procedure for the registration of new freehold titles and the rights of the freeholders will at all times be preserved save in so far as it may be necessary to acquire freehold land for public purposes, in which event full and prompt compensation will be paid.

I have the honour to propose that this letter and your reply in confirmation thereof shall constitute an agreement between our two Governments.

Yours sincerely, Jomo Kenyatta.<sup>201</sup>

After an exchange of communications between the three concerned parties, the British, Zanzibar and Kenyan governments, a final agreement was signed on 8 October 1963 between Duncan Sandys (representing the British Government), Sayyid Jamshid (the Sultan of Zanzibar), Sheikh Muhammad Shamte (Chief Minister of Zanzibar), and Jomo

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<sup>201</sup> Kenya Coastal Strip: Agreement between the Government of the United Kingdom, His Highness the Sultan of Zanzibar, the Government of Kenya and the Government of Zanzibar, presented to the Parliament by the Secretary of the State for the Colonies by command of Her Majesty, October 1963 (London: Her Majesty's Stationery Office, 1963) 4.

Kenyatta (Prime Minister of Kenya) to surrender the Kenya coastal strip to Kenya. The agreement provided:

“and whereas by Exchange of Letters concluded in London on 5<sup>th</sup> October 1963 between the Prime Minister of Zanzibar and the Prime Minister of the Government of Kenya entered into certain undertakings concerning the protection, after Kenya has attained independence, of the interests of His Highness’s present subjects in the Kenya Protectorate and their descendants;

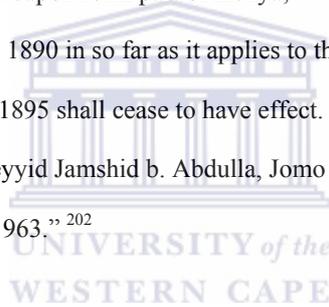
NOW THEREFORE it is hereby agreed and declared that on the date when Kenya becomes independent –

(1) the territories comprised in the Kenya Protectorate shall cease to form part of his Highness’s dominions and thereupon form part of Kenya;

(2) the agreement of 14<sup>th</sup> June 1890 in so far as it applies to those territories and the Agreement of 14<sup>th</sup> December 1895 shall cease to have effect.

Signed by Duncan Sandys, Seyyid Jamshid b. Abdulla, Jomo Kenyatta and Mohamed

Shamte London, 8<sup>th</sup> October 1963.”<sup>202</sup>

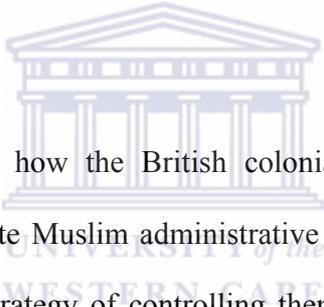


Undertakings made by the then Prime Minister of Kenya, Jomo Kenyatta, paved the way for the *kadhi* courts to be enshrined in the 1963 Constitution of Kenya. Section 66 of the Constitution provided for the establishment of *kadhi* courts and the qualifications of *kadhis*. Section 5 of the Constitution of Kenya provided that: “the jurisdiction of a Kadhi’s Court shall extend to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion.” Based on this constitutional guarantee, *kadhi* courts were retained in the Kenya coastal strip. Section 66(1) of the Constitution provided for the appointment of a chief

<sup>202</sup> Kenya Coastal Strip: Agreement, 3.

*kadhi* and not less than three other *kadh*is to be prescribed by an Act of Parliament. This constitutional provision paved the way for the enactment of the Kadhis' Court Act in 1967. By virtue of the Act, six *kadhi* courts were established in various districts of Kenya. Due to the need for *kadh*is' services, more *kadhi* courts were established between 1970 and 1986, reaching a total number of 17 courts all over Kenya. Although the British colonial authorities had earlier implemented a gradual policy of abolishing *kadhi* courts in the Kenya coastal strip, political events forced the British colonial administration to adopt a strategy of incorporating the courts in the independent Kenya's new judicial system.

## 2.12 Conclusion



This chapter has demonstrated how the British colonial administration employed the indirect rule policy to incorporate Muslim administrative and judicial institutions into the colonial establishment with a strategy of controlling them. Control over the institutions gave the British colonial officials the authority to supervise the functioning of the *liwali*, *mudir* and *kadhi* courts. As part of the transformation process, the British introduced hierarchies of *liwali* and *mudir* courts which were under the supervision of the High Court. The jurisdiction of the courts was defined and the courts were bound to follow English civil and criminal procedures. The British policy of empowering *liwalis* and *mudirs* undermined the jurisdiction of the *kadh*is whose powers were confined to MPL. When the *liwalis* and *mudirs* gained authority, the British colonial administration embarked on a policy of weakening the *liwalis* and *mudirs* courts. This in turn paved the way for the abolition of the courts before the independence of Zanzibar and Kenya. Muslim *wakils* existed in the Busa'idi Sultanate since the early 20<sup>th</sup> century. Although the British colonial

administration accommodated the institution of Muslim *wakils*, the role of this institution was gradually curtailed, until its final abolition shortly before Kenyan independence in 1963.

In transforming the *kadhi* courts, the British adopted two conflicting policies of inclusion and exclusion. On the one hand, *kadhis* and their courts were contained within the colonial system by recognising their religious authority, which also served as a tool for British legitimacy. On the other hand, by accommodating *kadhis*, the British exercised control over their mode of operation and gradually curtailed their jurisdiction. British efforts were also geared towards transforming the traditional mode of training *kadhis* into a formal and bureaucratic one. Initially, the British colonial officials in Zanzibar wanted to send potential candidates to train as *kadhis* into the United Kingdom. Due to financial and logistical constraints, British colonial officials proposed the establishment of a Muslim seminary in Zanzibar to train *kadhis*. The proposal led to the establishment of the Muslim Academy in 1952. In addition to the traditional Islamic curriculum, training at the Academy was intended to expose *kadhis* to disciplines related to their profession such as English language. The long-term objective of establishing the Academy was to provide legal training for *kadhis*, particularly in procedural aspects in which the incompetence of the *kadhis* was most apparent in their court work. However, this objective could not be achieved partly due to the fact that the curriculum of the Academy was tailored to train Islamic teachers as opposed to *kadhis*, as it has been intended earlier. As mentioned above, most of the *kadhis* in Zanzibar based their judgements on classical Islamic texts without complying with English procedural rules. As part of transforming the functioning of *kadhi* courts, the British introduced a system of assessing *kadhis* before being appointed and

subjected them to a civil service scheme. The British adopted a policy of restricting *kadhi* courts within the Kenya coastal strip in order to avoid their extension into the interior. However, due to the influx of Muslim workers in the colonial service, the British were forced to recognise the needs of these subjects. The British colonial administration first recognised Registrars of Muslim marriages in the British Colony and later established the *kadhi* courts to perform this function.



### **Chapter 3: Exclusion and inclusion: British policies on transforming the court system in the Busa‘idi Sultanate**

#### **3.1 Introduction**

Chapter 2 has highlighted the British policies on the transformation of Muslim administrative and judicial institutions. British colonial authorities accommodated these institutions with the aim of transforming their mode of operation. The transformation process was accomplished by empowering Muslim administrative institutions, which included the *liwali* and *mudir* courts, by extending their jurisdiction. When the British colonial administration noticed that the *liwalis* and *mudirs* gained an influential role in administering the affairs of the Busa‘idi Sultanate, the British adopted a gradual policy of weakening the powers of the *liwalis* and *mudirs* which resulted in the abolition of the *liwali* and *mudir* courts before the independence of Zanzibar and Kenya. With regard to the judicial institutions, the transformation process was partly successful, with the abolition of Muslim *wakils* and the incorporation of the *kadhi* courts in the judicial system. This chapter forms a major part of the thesis and will focus on the transformation process undertaken by the British colonial authorities in reforming the court system in the Busa‘idi Sultanate. The chapter will first highlight the court system which existed before the establishment of the British Protectorate in Zanzibar and then proceed to look at British policies on the transformation of the judicial system in Zanzibar.

### 3.2 Court system during the reign of the Sultans of Zanzibar 1832-1890

When Seyyid Sa‘id (r.1806-1856) established his Sultanate in Zanzibar in 1832, there were no formal courts or written codes of law along the East African coast. Lack of formal structures gave the Sultan the power to make judicial decisions and act informally in “a sort of royal magistracy”.<sup>1</sup> The Sultan appointed *kadhis* who handled civil disputes and adjudicated according to Islamic legal principles. In 1861, Rigby noted that delivery of justice in the early Busa‘idi Sultanate was simple. In civil cases *kadhis* decided matters according to the principles of the Quran while criminal matters were decided by the Sultan himself aided by his principal officers.<sup>2</sup> In attending to criminal matters, the Sultan used to sit in a public place twice daily and his decision was final. When the accused was convicted of murder, he was taken to the market place and beheaded unless *diya* was paid to the victim’s family. In cases of theft, a person who had been repeatedly convicted of robbery was punished with the mutilation of his right hand. During the reign of Seyyid Sa‘id (r.1806-1856), Rigby noted that the occurrence of serious crimes was very rare and only one execution occurred in Zanzibar during his time.<sup>3</sup>

Decrees and regulations issued by Sultans of Zanzibar had the force of law throughout the Sultan’s dominions that stretched from Barawa in Somalia to Mafia Island south of Zanzibar.<sup>4</sup> *Kadhis* considered regulations issued by the Sultans, whether verbal or written,

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<sup>1</sup> Pouwels, 1987, 102.

<sup>2</sup> Rigby, 1861, 7. During the Ottoman Empire, the Ottoman Sultans handled criminal cases themselves.

<sup>3</sup> *Ibid.*

<sup>4</sup> Al-Isma‘ily, I.N (1999), *Zanzibar: Kinyanga ’nyiro na utumwa* 21. (No name of publisher).

as part of the applicable law in Zanzibar.<sup>5</sup> For instance, *kadhis* in Zanzibar regarded Sultan Barghash b. Sa‘id (r.1870-1888) to be the law-giver and final Court of Appeal.<sup>6</sup> The Sultan’s decrees were given the force of law and were regarded as the final word. Nasor b. Salim al-Ruwaihy, *kadhi* of Zanzibar (d.1920), stated that “the Sultan is the head of law and that his word is law”.<sup>7</sup> British judges also noted that “the Sultan was absolutely supreme in all questions of law affecting his own subjects and his will was obediently followed”.<sup>8</sup>

However, decrees issued by the Sultans did not always conform to the strict rules of Islamic law. Where the application of Islamic legal rules would lead to a conflict in policy matters in administering the affairs of the Sultanate, the Sultans following the advice of the British colonial officials, would deviate from applying such rules. An example of a Sultans decree which contradicted Islamic legal rules was the Declaration on the Limitation of Claims of 1889, issued by Sultan Khalifa b. Sa‘id (r.1888-1890), that barred any claim from being entertained by a court after the lapse of a period of 12 years from the date of the claim. The Declaration stated that “... no claim in any civil matter which has been dormant for a

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<sup>5</sup> In Saudi Arabia, judges of the Sharia courts generally refuse to enforce decrees or regulations issued by the kings but they leave other administrative courts to enforce these regulations. Judges of the Sharia Court apply only the Quran and the Sunna and regulations (*nizams*) are implemented by other courts. See Vogel, 2000, 174.

<sup>6</sup> This was noted by *kadhis* in the case of *Saleh Lalji v. Mohammed b. Ahmed b. Hemid and others* (1911) 1 Z.L.R. 424.

<sup>7</sup> *The Wakf Commissioners for Zanzibar v. Wallo Ramchor* (1907) 1 Z.L.R. 230. In the same case, *kadhi* Ahmad b. Sumayt, on an appeal, stated that “this judgment [lower court’s judgment] is in accordance with Sheria with regulations made by the rulers”. (1907) 1 Z.L.R. 237.

<sup>8</sup> (1907) 1 Z.L.R. 231.

period of twelve years shall be recognizable, save in case of fraud by the defendant, by any Native Court in any portion of the Busa'idi Sultanate".<sup>9</sup> According to Islamic law rules, a person who owns a property does not lose it by lapse of time as long as he/she could prove his/her claim. Referring to the Declaration on the Limitation of Laws, Sir Arthur Hardinge (British Consul in Zanzibar 1894-1900) noted that some of the enactments made by Sultans under British pressure were in "flat contradiction to the law of Islam although they were held to be valid".<sup>10</sup>

Until the reign of Sultan Khalifa b. Sa'id (r.1888-1890) cases that involved subjects of the Sultan and foreign subjects were handled by the Sultan himself. In cases where a Sultan's subject claimed against a British citizen, the Sultan gave a verdict that was communicated to the British Consul. In appeal cases the matter was handled by the British Consul.<sup>11</sup> *Kadhi* courts were held at a designated place known as *baraza ya makadhi* (meeting place for *kadhis*) next to the entrance of the house of Sultan Khalifa. *Kadhis* used to adjudicate on various legal matters for an hour daily from 4 p.m. to 5 p.m. except Fridays. Some

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<sup>9</sup> Generally the prescription of claims does not apply in Islamic law as long as the claimant or his heirs could prove their claim with evidence.

<sup>10</sup> Hardinge, A.H "Legislative Methods in the Zanzibar and East Africa Protectorate" (1899) 1(1) *Journal of the Society of Comparative Legislation* 4. Before Hardinge was appointed in Zanzibar, he served in Egypt and Turkey.

<sup>11</sup> Bromber, K (ed. and trans.) (2001) *The Jurisdiction of the Sultan of Zanzibar and the Subjects of Foreign Nations* Würzburg: Ergon Verlag 29.

*kadhis* handled cases in their houses while others would preside over cases at the Sultan's palace.<sup>12</sup>

### 3.3 Establishment of British courts in the Busa'idi Sultanate

Administration of justice in Zanzibar should be within the context of the cordial relationship between the Sultan of Muscat and British based on mutual exchange of interests between the two Imperial powers. It was through this relationship that Consular Courts were established in Zanzibar as a result of treaties entered into between the Sultans and the British Consuls. British policy in establishing Consular Courts in Zanzibar can be regarded as a stepping stone towards judicial dominance in the 19<sup>th</sup> century of the East African coast. The first partial surrender by the Sultan of his jurisdiction was done by virtue of the Treaty of 1832 whereby the Sultan of Muscat surrendered partial jurisdiction over Zanzibar to Great Britain. Under the provisions of the Treaty, the Sultan agreed to the appointment of a British Agent in Zanzibar and conferred upon him powers to exercise certain jurisdiction over English subjects.<sup>13</sup> The first consular jurisdiction in Zanzibar was established by the Treaty of 1839 and was exercised by the British Consular Courts. Later, consular jurisdiction was secured by a number of Foreign Powers whereby the Sultan surrendered part of his jurisdiction to the foreign powers.<sup>14</sup>

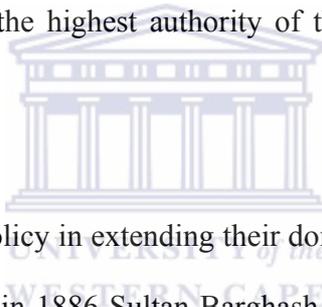
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<sup>12</sup> Bromber, 2001, 35.

<sup>13</sup> Vaughan, 1935, 11.

<sup>14</sup> For instance, France in 1844, Portugal in 1879, Belgium and Germany in 1885, Austria in 1887 and Russia in 1896. Ramadhani, A (1992) "The Evolution of the Zanzibar Legal System and the Constitution" (Paper

Establishment of the British Consular Court conferred power on the British colonial administration to embark on gradual encroachment upon the Sultan's authority over subjects of European nations in the Busa'idi Sultanate. British Consular Courts acquired more powers by the Treaty of 1839 which provided that "the authorities of His Highness the Sultan should not interfere in disputes between British subjects, or between British subjects and other Christian nations, and that all disputes between subjects of His Highness the Sultan and British subjects in which the former were plaintiffs should be heard by the British Consul".<sup>15</sup> In addition to the surrender of the Sultan's jurisdiction, the Treaty provided that cases in which British subjects complained against subjects of His Highness the Sultan should be heard by the highest authority of the Sultan in the presence of the British Consul.



The British adopted a gradual policy in extending their dominance through empowering the Consular Courts. For instance, in 1886 Sultan Barghash was influenced by the British to sign a treaty that gave extra-territorial rights to British Consular Courts over British subjects and their properties within the dominions of the Sultan of Zanzibar.<sup>16</sup> Another agreement was made between Zanzibar and Great Britain in 1891 which conferred jurisdiction on Consular Courts over Her Majesty's persons who are not Consular

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presented to the International Conference on the History of Culture of Zanzibar, Zanzibar, December 14-16, 1992) vol. 2, 1.

<sup>15</sup> Article 5 of the Treaty of 1839.

<sup>16</sup> Treaty of Friendship, commerce and navigation between Her Majesty and His Highness the Sultan of Zanzibar signed at Zanzibar, April 30, 1886.

Officers.<sup>17</sup> British colonial officials did not trust the Sultans and *kadhīs* to handle cases that involved foreign subjects. Sir Gerald Portal (British Consul in Zanzibar 1891-92) suggested that English judges should hear all cases between British and Zanzibar subjects due to the lack of impartiality of the Sultan and *kadhīs* towards the British subjects. Portal's efforts culminated in the signing of a declaration by Sultan Ali b. Sa'īd on 16 December 1892 which conferred on the British Consul jurisdiction over all cases in which British subjects.<sup>18</sup> Portal initiated a series of changes in the various departments of the Sultanate after gaining control over the Sultan's affairs.

Further delegation of the Sultan's jurisdiction was made in 1892 when the Sultan Ali b. Sa'īd (r.1890-1893) delegated to the British Consul General his jurisdiction over "all cases arising within the British Protectorate of Zanzibar, in which the plaintiff or complainant is subject to the jurisdiction of the Protecting Power and the defendant or accused is a subject of His Highness the Sultan or of other non-Christian power not represented by Consuls".<sup>19</sup> Consular Courts were abolished after the enactment of an Order-in-Council of 1897 that established Her Britannic Majesty's Court for Zanzibar.

After the establishment of the British Protectorate in Zanzibar in 1890, British colonial administrators extended their influence over the Sultan by establishing separate courts to

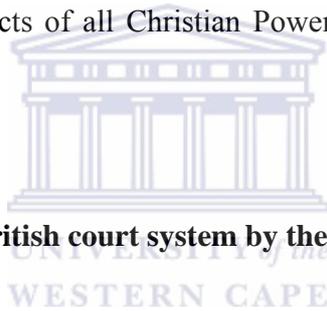
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<sup>17</sup> ZA/AC1/2, Declaration to enable persons other than Consular officers, to exercise judicial functions within the territories of Zanzibar Signed by H.H. Seyyid Ali and C. Euan-Smith Consul General on 2<sup>nd</sup> February 1891.

<sup>18</sup> Green, 1985, 166.

<sup>19</sup> Vaughan, 1935, 14.

cater for the interests of British subjects. This policy was implemented by establishing the Court of Delegated Jurisdiction in 1892. The Sultan delegated his jurisdiction in civil and criminal cases brought by British subjects against subjects of the Sultan to the Consul-General. The Court consisted of the Consul-General assisted by a *kadhi*, and later of the judges of the British Court assisted by a *kadhi*. Cases brought to this Court were known as ‘Arabic cases’ or ‘delegated cases’ and the verdict of the Court was final.<sup>20</sup> It continued to sit until 1908 when its jurisdiction was finally surrendered to His Britannic Majesty’s Court. By Decree No.7 of 1908, the British Court was conferred with jurisdiction over the subjects of His Britannic Majesty, subjects and citizens of Friendly Powers whose Consular courts were closed and over the subjects of all Christian Powers not represented by Consuls at Zanzibar.



### **3.3.1 Establishment of the British court system by the IBEA in the Kenya coastal strip**

Administrative officers of the IBEA exercised jurisdiction over the Sultan’s subjects by virtue of a Treaty that was signed between the British government and Sultan Barghash b. Sa’id (r.1870-1888) in May 1887. The Treaty gave the IBEA a concession for a term of 50 years to administer the Kenyan coastal strip in the name of the Sultan. Officers of the Company were also given consular rank that empowered them to exercise extra-territorial

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<sup>20</sup> *Ibid*, 23.

jurisdiction of the Crown over British subjects.<sup>21</sup> The administrative officers “sat in dual capacity either as Sultan’s Judges administering Islamic law or as Consular Officers administering the English laws”.<sup>22</sup> In 1890 the IBEA established a British Court at Mombasa that was presided over by an English barrister.<sup>23</sup>

The British colonial administration adopted a gradual policy of exercising influence upon the Sultanate through enacting laws. For instance, the Native Courts Regulations of 1897 were enacted in order to establish subordinate courts. Due to a lack of judicial personnel, the British colonial authorities granted administrative officers of the IBEA judicial powers that allowed them to preside over subordinate courts. Among the courts established was a peculiar type of court, named ‘railway courts’ that had jurisdiction within three miles of the station-master's office. The 1897 Native Regulations gave power to administrators of the IBEA to appoint railway engineers as magistrates although their help was very nominal because of their ignorance of “the natives and their ways”.<sup>24</sup> Constrained by lack of qualified judicial staff, British colonial administrators had to make *ad hoc* appointments of staff to preside over the courts.

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<sup>21</sup> Extra-territorial privileges were granted to citizens of various states, including, Britain, the United States of America, France and others.

<sup>22</sup> Allott, A “The Development of the East African Legal Systems during the Colonial Period” in Low, D.A and Smith, A (eds.) (1976) *History of East Africa* Oxford: Clarendon Press 352.

<sup>23</sup> Hamilton, R.W (1918) *The Origin and Growth of British Jurisdiction of the Judicial System of the East African Protectorate* Nairobi: Government Printers 2.

<sup>24</sup> Allott, 1976, 355.

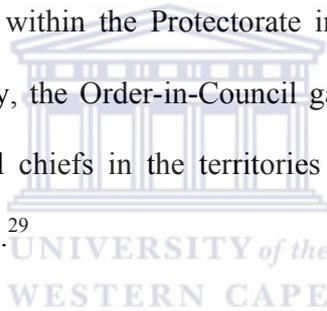
Sir Arthur Hardinge enacted the East Africa Order-in-Council 1897 that entrenched British dominance in the courts and restricted the powers and jurisdiction of *kadhi* courts in the Busa'idi Sultanate.<sup>25</sup> Enactment of the East Africa Order-in-Council 1897 made significant changes in the administration of Islamic law along the East African coast. The first change made by the Order-in-Council was the creation of two categories of native courts that were established along racial and ethnic lines. The first category was headed by European officers who presided over the High Court, the Chief Native Court, Provincial Courts, District Courts and Assistant Collector's Courts. The second type of court, presided over by native officers, included *Walis'* Courts (Arab governors' courts), Court of Local Chiefs (African local courts) and *Mussulman* Religious Courts (*kadhi* courts). Hardinge formalised the court system in the Kenya coastal strip by establishing *kadhi* courts (referred to in the Order-in-Council as Mussulman Ecclesiastical Courts) in every district (*wilayet*). Jurisdiction of the *kadhi* courts was confined to matters affecting MPL. By virtue of the Order-in-Council, *kadhis* were to keep regular written records of all cases tried by them and were required to furnish a report to the Chief Native Courts.<sup>26</sup>

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<sup>25</sup> The East Africa Order-in-Council 1897 (1315 A.H.) (Supplement to The Gazette for Zanzibar and East Africa, Vol.6 No. 290, 18<sup>th</sup> August 1897). In the Preamble to 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 Sa'id power made an Order-in-Council commonly called East Africa Order-in-Council 1897".

<sup>26</sup> Article 63 of the East Africa Order-in-Council 1897.

The second significant change made by the Order-in-Council 1897 was the establishment of a chief *kadhi* position and the post of *shaykh al-Islam* who was appointed by the British Commissioner. In order to obtain full control over the *kadhis*, the Order-in-Council established an appeal system where cases from *kadhi* courts would be taken to the chief *kadhi's* court and then channelled to the High Court.<sup>27</sup> The third change made by the Order-in-Council was the creation of new administrative posts of *liwali* and *mudir* who were granted magisterial powers and supervised by the District Commissioner. A remarkable feature of the Order-in-Council is the sweeping powers granted to the Chief Native Court, presided over by British judicial officers, in exercising general supervision over all inferior Native Courts within the Protectorate including the *kadhi* courts.<sup>28</sup> By adopting the indirect rule policy, the Order-in-Council gave concurrent jurisdiction, both civil and criminal, to the tribal chiefs in the territories within the Protectorate situated outside the Kenya coastal region.<sup>29</sup>



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<sup>27</sup> *Ibid*, Article 57.

<sup>28</sup> *Ibid*, Article 15.

<sup>29</sup> Article 46 of the East Africa Order-in-Council 1897 provided for the jurisdiction of Tribal Chiefs namely: The Chiefs and Elders of the *Wasegua* and *Wadigo* in the District of Vanga, the Chiefs and Elders of *Duruma*, *Kambi*, *Jibana* and *Chonyi* in the District of Mombasa, the Chiefs and Elders of *Giriama*, *Kauma* and the local tribes of *Galla* in the District of Malindi, the Chiefs and Elders of *Wapokomo* and the local tribes of *Gallas* in the District of Tana River, the Somali Chiefs of *Biscaya* and *Yonte* in the Lower Juba District, the Somali Sultan and Chief of *Afmadu* and the Chiefs and Elders of *Gosha* in the Upper Juba District, the Chiefs and elders of the *Wakikuyu* and *Masai* in the District of Kenya, the Chiefs and Elders of the *Wakamba* in the Athi District, the Chief and Elders of *Taita* and *Taveta* in the Taita District.

The Chief Native Judicial Officer was given supervisory jurisdiction over the procedure and judgments of the *kadhi* courts. Native courts, such as *liwali* and *mudir* courts, were given concurrent jurisdiction with *kadhis* in adjudicating MPL in addition to their criminal and civil jurisdiction. Empowering the Chief Native Officer with supervisory powers and giving the *liwali* and *mudir* courts jurisdiction over MPL undermined the jurisdiction of *kadhi* courts. The East African Order-in-Council 1897 required the Natives Courts to follow the Indian Civil Procedure Code, and the Indian Penal and Criminal Procedure Codes. In dealing with Muslims, the courts were to be guided, in civil and criminal cases, by the general principles of the Law of Islam.<sup>30</sup> Further entrenchment of the Native Courts system was achieved by the enactment of the Native Courts Regulations, under the East African Order-in-Council of 1897, which empowered the British judicial officers to make rules and orders for the administration of Native Courts including alterations in any native law or custom.<sup>31</sup> The East Africa Order-in-Council 1897 introduced of a hierarchy of civil and criminal courts which were required to follow Indian rules of procedure. A decade after the declaration of a British Protectorate in Zanzibar, the British colonial administration managed to curtail the powers of *kadhis* by subjecting them to the supervision of British judges.

### 3.3.2 Establishment of a formal court system in Zanzibar in 1890

The first formal court system in Zanzibar was established after the declaration of a British protectorate in 1890. The British Court for Zanzibar in Her Majesty's name was

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<sup>30</sup> Article 2 of the East Africa Order-in-Council 1897.

<sup>31</sup> Pouwels, 1987, 176.

established by the Zanzibar Order-in-Council of 1897 and was opened by Arthur Hardinge on 14 August 1897.<sup>32</sup> The Court was entirely separated from the authority of the Consul-General and therefore devoid of any political character. Under the Zanzibar Order-in-Council of 1897 magistrates of the British Court for Zanzibar were appointed directly by the Queen and the Consul-General was no longer a judge of the court.

Establishment of British jurisdiction in the Sultanate of Zanzibar is considered to be the first in the East African region. According to A.N. Allott, “any account of the growth of British legal and judicial institutions in East Africa must begin with the Sultanate”.<sup>33</sup> The jurisdiction of the British courts was extended to foreigners whose governments had surrendered their jurisdiction and by 1907 Britain had full jurisdiction on almost all subjects of foreign states. The British colonial administration introduced judicial reforms after 1890 in order to gradually transform the court system along the East African coast.

During the reign of Sultan Hamud b. Muhammad (r.1896-1902) procedures in the courts were established and system of appeal was introduced whereby the Sultan presided over the Supreme Court. Sultan Hamud b. Muhammad issued a Decree in 1899 that established Courts of Justice for criminal and civil matters in accordance with the Islamic law that was declared to be the fundamental law of the Sultanate.<sup>34</sup> The Decree established two tier hierarchies of courts. The first one was the Supreme Court of His Highness the Sultan which was the highest Court of Appeal in civil and criminal matters. The Court consisted

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<sup>32</sup> The Gazette for Zanzibar and East Africa, vol. 6, No.289, 10.

<sup>33</sup> Allott, 1976, 350.

<sup>34</sup> Decree by Sultan Hamud b. Mohamed signed 26<sup>th</sup> Day Shaaban 1316/ 1<sup>st</sup> January 1899.

of two *kadhis* appointed by the Sultan (one *ibadhi* and one *sunni*) and one British Judge from the Court of Delegated Jurisdiction. The other court that was established was the Court for Zanzibar and Pemba which consisted of two (one *ibadhi* and one *sunni*), and one British Judge from the Court of Delegated jurisdiction.<sup>35</sup> The Court for Zanzibar and Pemba had unlimited power in civil and criminal matters. The Decree emphasized that the British Judge in both courts shall not take part in any proceeding unless requested to do so by the Sultan. The Decree also provided for punishments for offences according to Islamic law and mentioned the maximum number of lashes the courts were allowed to inflict. It also made a provision for capital punishment that could be inflicted either by shooting or hanging.<sup>36</sup>

#### **3.4 The British policies on the institutional transformation of *kadhi* courts in the Busa‘idi Sultanate**



After the establishment of the British Protectorate in 1890, British policy was directed towards transforming the court system through gradual changes over a period of time. The policy focused on transforming the *kadhi* courts. In the process of transforming the *kadhi* courts, the British colonial authorities adopted three major policies: institutional transformation, procedural transformation, and exclusion of jurisdiction. The first policy of institutional transformation was implemented through three strategies. Re-organisation of

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<sup>35</sup>Article 3 of the Decree by Sultan Hamud b. Mohamed signed 26<sup>th</sup> Day Shaaban 1316/ 1<sup>st</sup> January 1899.

<sup>36</sup> Article 21 the Decree by Sultan Hamud b. Mohamed signed 26<sup>th</sup> Day Shaaban 1316/ 1<sup>st</sup> January 1899 provided that the maximum number of lashes for the Supreme Court was 100, Court for Zanzibar and Pemba 40, Court of Delegated Jurisdiction 40, District Court 24, Assistant Kadhi's Court 12.

the courts was the first strategy, followed by integration of the courts, and finally by a policy of centralisation. The policy of institutional transformation aimed at giving ultimate control to the British colonial authorities over the *kadhi* courts.

The second major policy of procedural transformation was also implemented by three strategies. First was the strategy of enacting statutes based on English law, followed by introducing court procedures based on the English law of procedure, and finally by adopting a strategy of ascertaining Islamic law. The policy of procedural transformation aimed at bureaucratising the functioning of *kadhi* courts, and determining the extent to which Islamic law could be transformed in its substantive as well as procedural aspects.

The third major policy was the exclusion of jurisdiction from the *kadhi* courts. This was implemented in three phases: the exclusion of civil jurisdiction, the withdrawal of criminal jurisdiction, and the removal of the Islamic law of evidence. The policy of limiting jurisdiction of the *kadhis* courts was aimed at curtailing the powers of the *kadhis* and gradually incorporating them into a unified court system under the control of the British colonial administration.

### **3.4.1 The policy of re-organisation of the courts**

In order to implement the policy of institutional transformation of the judicial system in the Busa'idi Sultanate, the British started with the process of re-organizing the courts in Zanzibar. The re-organisation of the courts was a continuing exercise that reflected the British policy of transforming the court system in the Busa'idi Sultanate. As noted above, the first re-organization of the Sultan's courts was made by the Decree of 1897 that established a Supreme Court of His Highness the Sultan and the Court for Zanzibar and

Pemba which consisted of two *kadhis* who were appointed by the Sultan (one *ibadhi* and one *sunni*) with one British judge who did not participate in any court proceedings unless requested to do so by the Sultan. From 1897 onwards the policy was geared towards a gradual entrenchment of British judicial officials within the court system. The policy was achieved by the second re-organisation of the courts in 1908, where British officers obtained full control of the court system. The Sultan's court system that had been established by Sultan Hamud b. Muhammad (r.1896-1902) in 1897 was retained by his successor, Sultan Ali b. Hamud (r.1902-1911), until the latter issued the Court Decree of 1908 which made significant changes in the court system.

By the 1908 reforms, the powers and influence of the *kadhis* were curtailed, in that the Court for Zanzibar and Pemba consisted of one British magistrate sitting alone in criminal matters, whereas in civil matters the Decree required two *kadhis* to sit together with a British magistrate in order to advise him on civil matters related to Islamic law. The two *kadhis* had no voice in the decision made by the British magistrate. However, in the practice judgements of the British magistrates in civil cases were based upon the advice given by the *kadhis*. The Decree of 1908 also gave criminal jurisdiction to the British judicial officers, and from 1909 onwards criminal cases were to be handled only by British magistrates to the exclusion of *kadhis*. The removal of criminal jurisdiction from the *kadhis* was in line with British policy in other colonial territories, such as Nigeria and Sudan. British judicial officers were also given the power to exercise civil jurisdiction in the Sultan's courts where issues of Islamic law were raised. Thus, British judicial officers occupied the dual roles of "servants of the Crown and of His Highness the Sultan

depending on which court they were sitting”.<sup>37</sup> Lord Hailey argued that by conferring a dual role to the British judicial officers, British colonial administration implemented a dual system of justice in order to avoid a conflict of jurisdiction within the British colonial territories.<sup>38</sup> The duality of roles and the existence of a parallel system of courts were significant features of the British administration of justice across the British Empire.

Another significant departure from the Decree of 1897 was that, while Islamic law had been declared by the Decree of 1897 to be the fundamental law of the Busa‘idi Sultanate in both criminal and civil matters, the Decree of 1908 provided that the Sultan’s court would apply Islamic law in civil matters only while in criminal cases the Indian Penal Code, the Code of Criminal Procedure and the Indian Evidence Act were applicable.<sup>39</sup> By virtue of the changes made by the Decree of 1908, the British obtained control over the Sultan’s courts and the reform, as noted by Vaughan, “constituted the first important step in the gradual assimilation of the two jurisdictions”.<sup>40</sup> Although the Decree of 1908 resulted in the amalgamation of the jurisdiction of the British and Sultan’s courts, the British judicial

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<sup>37</sup> Bang, 2003, 160. Peter Grain, the Attorney-General of Zanzibar, mentioned: “When I first took over this Department I was Town Magistrate...I found I had no jurisdiction and therefore at my request His Highness the Sultan appointed me a full kathi with full powers with regard to criminal matters.” ZNA/AC18/2, Report by Peter Grain Attorney-General dated 19 September 1907.

<sup>38</sup> Hailey, 1950, 10.

<sup>39</sup> Article 9(1) of the Zanzibar Courts Decree 1908 provided: “The Acts of His Britannic Majesty’s Governor-General of India in Council known as the Indian Penal Code, the Code of Criminal Procedure and the Indian Evidence Act, as at present in force in India, shall henceforward apply to all persons who are subject to the jurisdiction of our Courts.”

<sup>40</sup> Vaughan, 1935, 28.

officers were overburdened with criminal cases in addition to the bulk of civil cases that they handled. In addition to this workload, the British judges were compelled to deal with cases where the plaintiffs or defendants were British subjects, while British magistrates dealt with cases where both litigants were the Sultan's subjects. This anomaly not only caused inconvenience to the British judicial officers but "created an undoubted grievance and an impression among subjects of the Sultan that foreigners received better justice than them".<sup>41</sup> In order to remove these anomalies, further re-organisation of the courts was deemed necessary.

The third major re-organisation of the Zanzibar courts was effected by the Zanzibar Courts Decree of 1923. The 1923 Decree established the British Court (Her Britannic Majesty Court) and Zanzibar Court (His Highness the Sultan's Court for Zanzibar). The Decree declared Islamic law to be the fundamental law of the Protectorate in civil matters.<sup>42</sup> The Decree aimed for the full integration of the existing parallel system of courts by appointing the Judges of the British Court to preside over the Zanzibar Court.<sup>43</sup> A remarkable feature of the 1923 Decree is that, while it has maintained the criminal jurisdiction of the subordinate courts (Courts of Resident Magistrate, Senior Commissioner, District Commissioners and District Officers), the jurisdiction of the *kadhi* courts was limited to the law of personal status and petty civil cases.

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<sup>41</sup> Abrahams, S.S. "The Reorganization of the Zanzibar Courts" (1924) 6 (4) *Journal of Comparative Legislation and International Law* 300.

<sup>42</sup> Article 7 of the Zanzibar Courts Decree 1923.

<sup>43</sup> *Ibid*, Article 3.

Article 13 (5) of the Zanzibar Courts Decree of 1923 provided:

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

Judicial reform came full circle with the enactment of two statutes: the Zanzibar Courts Decree of 1923 and the British Subordinate Courts Order of 1923. These statutes conferred on the British colonial officials’ powers to control and supervise all subordinate courts. By virtue of the Zanzibar Courts Decree of 1923 and the British Subordinate Courts Order of 1923, the two systems of courts - His Britannic Majesty and His Highness the Sultan - were assimilated under one judicial establishment although no fusion of jurisdictions occurred.<sup>44</sup> The assimilation was achieved through the efforts of Mr. Tomlinson, the Chief Justice of Zanzibar.<sup>45</sup> Despite Tomlinson’s efforts to assimilate the Sultan’s and the British court

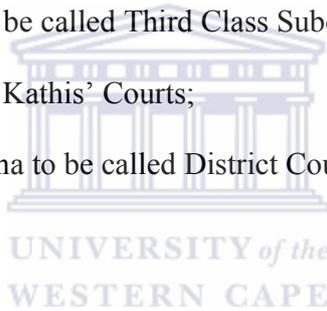
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<sup>44</sup> In the mid-19<sup>th</sup> century, *kadhi* Ahmad Muhammad Shakir in Egypt proposed total amalgamation of both secular and sharia courts on the basis of equality and justice so that each would be able to compensate for the shortcomings of the other. See Shaham, 1999, 443.

<sup>45</sup> Abrahams, 1924, 300.

systems, the intended objective was not realised. Instead of the assimilation of the two systems of courts, the parallel system continued to exist.<sup>46</sup> Both statutes commenced on 29 July 1923 and established identical systems of courts that existed parallel to each other. Section 10 (1) of the Zanzibar Courts Decree of 1923 and section 4 (1) of the British Subordinate Courts Order of 1923 established the following courts that operated concurrently:

- (a) Courts of Resident Magistrate or District Commissioners to be called First Class Subordinate Courts;
- (b) Courts appointed under Section 4 to be called Second Class Subordinate Courts;
- (c) Courts of District Officers to be called Third Class Subordinate Courts;
- (d) Courts of Kathis to be called Kathis' Courts;
- (e) Courts of Mudirs and Masheha to be called District Courts; and
- (f) Juvenile Courts.



The establishment of British courts alongside *kadhi* courts resulted in the creation of parallel court systems that posed a challenge to the British colonial authorities. The presence of the Sultan's subjects and citizens of other colonial powers called for the existence of a parallel system of courts in order to cater for the various categories of litigants. Between 1908 and 1923 all magistrates received a double appointment from the Secretary of State and the Sultan.<sup>47</sup> This led to the existence of dual jurisdiction where the Sultan delegated part of his jurisdiction to British officers who also presided over cases in

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<sup>46</sup> Judge Murison of Her Britannic Majesty's Court in Zanzibar proposed that the Sultan's jurisdiction should be amalgamated with that of the British courts in 1909. ZNA/AB 62/1.

<sup>47</sup> Allott, 1976, 352.

the Sultan's courts.<sup>48</sup> This in turn paved the way for the British judges to establish their courts beside the Sultan's courts.

The ultimate objective of the British colonial administration was to transform the court system in the Busa'idi Sultanate from a parallel courts system to a unified court system under British control. However, the practical situation in the Busa'idi Sultanate promoted the existence of a parallel courts system. The British policy of establishing a unified court system did not succeed due to the fact that the administration of justice in the British and *kadhi* courts' systems varied significantly. On the one hand, the British courts adopted the common law adversarial approach where the judge was seen as a referee in a battle between two contesting parties. On the other hand, the *kadhi* courts followed the inquisitorial system in which the judge has the power to take cognisance of the facts in order to ascertain and discover the truth.<sup>49</sup> By adopting the inquisitorial system, the *kadhis* employed religio-moral ethics and avoided applying the full force of the law in cases where disputes could be settled amicably.<sup>50</sup>

British colonial rule established a parallel court system across their territories. For instance, in Northern Nigeria, Lord Lugard established a parallel system of courts in which native

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<sup>48</sup> In India British judges used to sit on Islamic law courts and administer Islamic law. See Masud, 2006, 37.

<sup>49</sup> Barakbah, S.A "Judges and the Judicial Function" (1994) 4 (1&2) *Islamic International University of Malaysia Law Journal* 67. The inquisitorial system is used in civil law countries like France, Holland and Belgium.

<sup>50</sup> Antoun, R.T "The Islamic Court, the Islamic Judge, and the Accommodation of Traditions: A Jordanian Case Study" (1980) 12 *International Journal of Middle Eastern Studies* 462.

courts were presided by *kadhis* and provincial courts by British officers.<sup>51</sup> The British policy was not prepared to allow Islamic law to exist as an independent and autonomous partner of the English common law, but rather as “an appendage of and a tolerated nuisance in relation to the English law”.<sup>52</sup> The existence of a parallel court system in Zanzibar and Northern Nigeria was a result of the dual British colonial policy of controlling the colonised societies while at the same time allowing the local religious leaders to administer their affairs through the indirect rule policy.

With the presence of parallel a system of courts, there was a juridical contest between the British and the Sultan’s courts to determine who had ultimate control of administering justice in the Busa’idi Sultanate.<sup>53</sup> The existence of the parallel legal system in the Busa’idi Sultanate reflected a sharing of power between the Sultan and the British. The Sultan’s courts, which were established by Decrees of the Sultans, operated parallel to the British courts, which were established by British Orders-in-Council. Despite the fact that the Decree of 1897 formalised the court system and the later Decree of 1908 paved the way for assimilating the two parallel systems of courts, the existence of these courts led to practical problems. The main challenge that emanated from the parallel system of courts in the Busa’idi Sultanate “was the lack of uniformity between the two court systems, which did not give all Zanzibar residents (Sultan and British subjects) equal opportunities for

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<sup>51</sup> Umar, 2006, 44.

<sup>52</sup> Yadudu, 1992, 118.

<sup>53</sup> Similar legal contestation on controlling the administration of justice was also prevalent in other British colonial territories where British administrative officers administered native courts while British judicial officers administered other non-native courts.

appeal”.<sup>54</sup> The existence of a dual court system was not a new phenomenon in the Busa‘idi Sultanate as parallel legal systems had existed in the history of Muslim empires.<sup>55</sup>

### 3.4.2 The policy of the integration of kadhis courts

The failure of the British colonial efforts to assimilate the British courts and the *kadhi* courts forced the colonial enterprise to acknowledge the existence of a parallel court system. After the third re-organisation of the courts in 1923, the British colonial authorities embarked on a strategy of integrating the *kadhi* courts into the judicial system in order to ensure effective control over them. This was the second strategy adopted by the British colonial administration to achieve institutional transformation. The British colonial authorities aimed to transform the *kadhi* courts by incorporating them into the judicial system under one unified court system. The accommodation of religious courts within the colonised territories was central to British colonial policy. The accommodation of the *kadhi* courts in the Busa‘idi Sultanate marked British recognition of the religious institutions in the British territories. By recognizing the *kadhis* and their courts, the British

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<sup>54</sup> Bang, 2003, 160.

<sup>55</sup> For instance, during the Ottoman Empire *Kanun* was applied alongside Islamic law. The Ottoman Sultans towards the end of the 18<sup>th</sup> century enacted a series of reforms, and several types of tribunals were established and operated parallel to the Sharia courts. Shahr, I. “Legal Pluralism and the Study of Sharia Courts” (2008) 15 *Islamic Law and Society* 116. In some British territories, such as Northern Nigeria, there was a tripartite legal system that included the British, Islamic and customary traditions, and reflected the triple heritage of legal systems in the post-independence era. Mazrui, A. A. and Mazrui, A. M. (1998) *The Power of Babel: Language and Governance on the African Experience* Oxford: James Currey 108.

portrayed a paternalistic view advocated by the colonial administrators throughout the colonial territories.

The British policy was to contain the *kadhi* courts within its colonial machinery. This policy succeeded partly in integrating the *kadhi* courts into the colonial court system. However, the *kadhi* courts remained distinct from other religious and customary courts by demonstrating their own autonomy. The nature of the *kadhi* courts was a peculiar one compared to the other types of customary courts in the colonial administration. The autonomy of the *kadhi* courts derived its basis from Muslims' perception of *kadhis* as religious leaders in addition to their judicial positions. *Kadhis* regarded their courts as strongholds to demonstrate resistance against British domination and interference in their jurisdiction. By using the *kadhi* courts, Muslim colonised peoples along the East African coast demonstrated how they sought to preserve their religious practices in legal contexts.<sup>56</sup> It was in this regard that the British colonial officials had to strike a balance between retaining *kadhis* as judicial officers and considering them as religious leaders in order to win the support of their Muslim subjects. More significant for the British striving to control the *kadhis*' powers was the fact that the British "feared that the Sharia courts were capable of assuming executive authority in addition to their prescribed judicial powers".<sup>57</sup>

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<sup>56</sup> Hirsch, S.F. "Kadhi's Courts as Complex Sites of Resistance: The State, Islam, and Gender in Post-Colonial Kenya." in Mindie, Lazarus-Black and Hirsch, S.F (eds.) (1994) *Contested States: Law, Hegemony and Resistance* New York and London: Routledge 2.

<sup>57</sup> Jeppie, S "The making and unmaking of colonial Shariah in the Sudan" in Roberts, R., Jeppie, S and Moosa, I (eds.) (2009) *Muslim Family Law in Colonial and Postcolonial Sub-Saharan Africa*, Amsterdam: University of Amsterdam Publishers, 173.

Based on earlier experiences in other British territories, such as Nigeria and Sudan, the British colonial administration in Zanzibar adopted a policy of accommodating the Muslim religious leadership in order to exert control over their mode of operation.<sup>58</sup> By adopting the policy of accommodation, British colonial policy sought to integrate the *kadhi* courts into the British colonial legal system based on English law principles. The British colonial authorities perceived the integration process as a long term strategy, and, therefore, one that had to be implemented gradually.<sup>59</sup> The British ultimate policy was to integrate the *kadhi* courts into a unified court system where judges and magistrates would handle all cases irrespective of their religious affiliations. Prior to Kenyan independence, British policy was to subject the *kadhi* courts to the control of the judiciary. A Muslim member of the Legislative Council, Mr. Muhammad Jeneby, raised Muslims' concern that *kadhi* courts on the Kenya coast would be abolished or changed after independence if they were to remain under the direct control of the government.<sup>60</sup>

Among the challenges that faced the British colonial administration in integrating the *kadhi* courts within a unified court system was the foundational difference between the notions of justice in English law and Islamic law. The British believed that English notions of justice

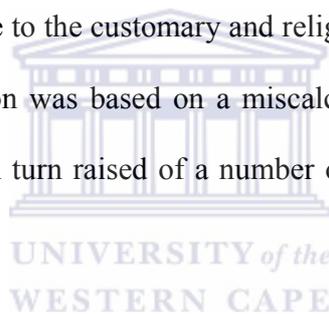
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<sup>58</sup> Hashim, A. "Servants of Sharia: Kadhis and the Politics of Accommodation in East Africa" (2005) 16 *Sudanic Africa* 28.

<sup>59</sup> Brooke, N.J. "The Changing Character of Customary Courts" (1954) 6 (2) *Journal of African Administration* 70.

<sup>60</sup> KNA/CA/9/6, courts, *liwalis*, *mudirs* and *kadhis*, minutes from the Deputy Chief Secretary to the Permanent Secretary, Office of the Chief Secretary, dated 2nd November 1961.

reflected by the rule of law were superior to Islamic law. Symbols of law were employed by the British colonial administration as vehicles in the making of hegemony and to ensure domination in the legal structures.<sup>61</sup> Founded on this colonial hegemony, British colonial legal policy was based on an assumption that English law was the dominant system of law and therefore should prevail, and Islamic law was subordinate to it. Some of the earlier British officials demonstrated the supremacy of the English system by using the lash and regarded the local legal systems as being inferior to the English law.<sup>62</sup> The British colonial assumption was based on the fact that customary and religious laws would properly fit into the colonial legal framework. The colonial policy assumed that the rules and procedure of English law would be applicable to the customary and religious laws without contradictions. On the contrary, this assumption was based on a miscalculated policy on the part of the British colonial officials, and in turn raised of a number of conflicts between English law and religious laws.<sup>63</sup>



British colonial policy kept the *kadhi* courts in a contradictory situation by expecting them to enforce religious customs yet at the same time participate in upholding the rule of law.<sup>64</sup> Out of this tension emerged contesting plural legal systems that competed for supremacy in one sovereign state. British colonial administrators were faced with the challenge to reconcile these competing legal systems. Sir Phillip Mitchell (Governor of Kenya from 1944 to 1952) understood this predicament by stating that “there can not be two systems of

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<sup>61</sup> Hirsch, 1994, 6.

<sup>62</sup> KNA/PC/Coast/1/1/44, Lamu – Outward file, few rough notes by W.M. Mathews, Zanzibar, 12 April 1896.

<sup>63</sup> Lewin, J “Native Courts and British Justice in Africa” (1944) 14 (8) *Africa* 449.

<sup>64</sup> Metcalf, 2007, 26.

jurisprudence or conceptions of justice existing simultaneously within the same sovereignty”.<sup>65</sup>

Due to these conflicts the policy of integrating the *kadhi* courts into the colonial judicial system could not be fully implemented. Failure of the policy of integrating the *kadhi* courts into a unified court system was due to the inability of British judicial officers to comprehend that the administration of justice in the *kadhi* courts was judged by the degree of satisfaction that it conveyed to the Muslim litigants as opposed to the notion of justice imposed by the English legal system.<sup>66</sup> To this end, Lord Hailey noted: “it is never easy to assess the quality of the justice administered by native courts, for the standards by which it must be judged depend on the conception of justice held by the population itself.”<sup>67</sup> The other reason that led to the failure of the integration policy was the fact that the newly appointed British judicial officers had no knowledge of the languages and experience of the local people and their laws. Lord Hailey quoted instances where British “administrators have been betrayed into error by lack of knowledge of the character of indigenous institutions or by failure to give due weight to the value attached by natives to them”.<sup>68</sup>

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<sup>65</sup> Mitchell, P. E “Review” of Lord Hailey’s (1935) *Native Administration in the British Africa* London: His Majesty’s Stationery Office in (1951) 3 (1) *Journal of African Administration* 59.

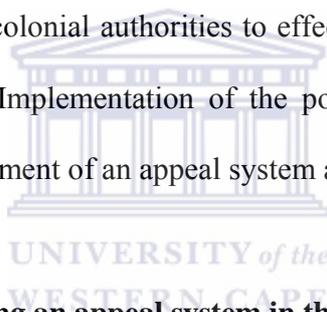
<sup>66</sup> Hailey, W.M (1942) “Native Administration and Political Development in British Tropical Africa” (unpublished report) 23.

<sup>67</sup> Quoted in Mitchell, 1951, 58.

<sup>68</sup> Hailey, 1942, 7.

### 3.4.3 The policy of judicial centralisation

The third strategy adopted by the British colonial administration towards achieving institutional transformation of the *kadhi* courts was by implementing a policy of judicial centralisation. British colonial authorities adopted the policy of centralisation in order to establish control over the *kadhi* courts in the Busa'idi Sultanate. The policy focused on giving control to the British judicial officers over *kadhi* courts. To ensure complete control of the court system in the Busa'idi Sultanate, the British colonial administration devised a centralized system of administration through reforms in all colonial departments. These reforms paved the way for the colonial authorities to effect changes and interfere with the jurisdiction of Islamic law.<sup>69</sup> Implementation of the policy of centralization was done through two processes: establishment of an appeal system and supervision of the courts.



#### 3.4.3.1 The policy of establishing an appeal system in the Zanzibar courts

The British colonial authorities established hierarchies of appeal that gave British judicial officers powers to preside over and control appeal cases from the *kadhi* courts. The creation of hierarchies of appeal established a centralised court system that gave control to

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<sup>69</sup> In Northern Nigeria, British political officers were given powers to intervene at any stage of the proceedings of the *alkali* courts and ensure that no 'inhumane punishment' was imposed. Umar, 2006, 42. This policy of interfering with Islamic law was also implemented in Algeria by the French through centralised judicial system. On French policy on Islamic law and custom in Algeria see Christelow, Allan (1985). *Muslim Law Courts and the French Colonial State in Algeria* Princeton: Princeton University Press.

the British administrators.<sup>70</sup> The appeal system in the Busa‘idi Sultanate was established by virtue of the East Africa Order-in-Council of 1897 whereby a High Court for the East Africa Protectorate, including Zanzibar, was established. The Order-in-Council gave powers to the British judicial officers to preside over appeal cases in civil and criminal matters from all *kadhi* courts in the Busa‘idi Sultanate.<sup>71</sup> The High Court consisted of the British Commissioner and two senior Judges of the British Court at Zanzibar. *Kadhis* were regarded as assessors with a consultative voice only. The East Africa Order-in-Council of 1897 also conferred powers on the Chief Native Court, presided over by a British judicial officer, to supervise all inferior Native courts within the Protectorate including Mussulman religious (*kadhi*) courts. These powers included the right to inspect and call for court records and enforce compliance with rules and orders issued in terms of British ordinances.<sup>72</sup> The British judicial officers managed through their appellate powers to scrutinise the judgments of the *kadhis* and check their conformity with English procedures. British officials checked the types of cases brought to the *kadhi* courts and the manner in which these cases were handled by the *kadhis*. Appeals from the *kadhi* courts were taken to the High Court. Section 6 of the East Africa Order-in-Council of 1897 stated: “an appeal shall lie from the Chief Cadi’s Court to the High Court.” A member of the Zanzibar Legislative Council objected to subjecting appeals from *kadhis* to British judges and requested the Government to channel appeal cases from *kadhi* courts to the chief *kadhi* instead of being referred to the Chief Justice. The Attorney-General’s justification for

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<sup>70</sup> Christelow, 2000, 374.

<sup>71</sup> Article 6 of the East Africa Order-in-Council of 1897 provided: “A High Court for the Protectorate is hereby established. It shall be the highest Court of Appeal in civil and criminal matters from native courts.”

<sup>72</sup> *Ibid*, Article 6.

subjecting appeals from *kadhis* to the High Court was that “Kadhis belong either to one of the schools of law and each Kadhi decides cases according to his own school of law (Shafii or Ibadhi) which might cause difficulty if an appeal from one Kadhi was heard by a Kadhi of the other school of law”.<sup>73</sup>

Until the reign of Sultan Hamud b. Muhammad (r.1896-1902), Sultans were assisted by *kadhis* to preside over appeal cases in the Sultan’s Court. Sultan Hamud b. Muhammad enacted the 1899 Decree that introduced reforms in the administration of justice on the islands of Zanzibar and Pemba.<sup>74</sup> By virtue of the Decree, two types of courts, the Supreme Court of Zanzibar and Pemba and the Court for Zanzibar and Pemba, were established which were presided over by the Sultan together with two *kadhis* (one *ibadhi* and one *sunni*). The Decree clearly stated that British judges “shall not take part in any proceeding in the Supreme Court (and the Court for Zanzibar and Pemba) unless requested to do so by ourselves (the Sultans).”<sup>75</sup>

However, the appeal system was changed by the enactment of the Zanzibar Courts Decree 1908 that incorporated British judges in the judicial system. The Supreme Court for the Islands of Zanzibar and Pemba consisted of a judge and an assistant judge of the British

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<sup>73</sup> ZA/BA16/51, question asked by Hon. Rashid b. Ali El-Khafi. Debates of the Legislative Council 33<sup>rd</sup> Session 1958-1959. For handling of cases by *shafi’i* and *ibadhi kadhis* see the section on British policy towards *madhhab* in chapter 4 below.

<sup>74</sup> Decree enacted on 26 Shaaban 1316 A.H. corresponding to 9 January 1899.

<sup>75</sup> Sections 2 and 3 of the Decree of 26<sup>th</sup> Shaaban 1316 A.H. *The Gazette for Zanzibar and East Africa*, Vol.7 no.374, 29th March 1899, 1.

court and two *kadhis*, whereas the court for Zanzibar and Pemba consisted of one British magistrate sitting alone in criminal cases and with two *kadhis* as assessors in civil matters.<sup>76</sup> The Zanzibar Court Decree of 1908 provided that English judges presiding over cases related to Islamic law should sit with *kadhis* as assessors. Judge Tomlinson proposed an amendment to this provision, making “the attendance of the *kadhis* at the option of the court instead of making their attendance compulsory”.<sup>77</sup> The entrenchment of British judges in the Zanzibar Court was further achieved by the Zanzibar Courts Decree of 1923 which provided that in civil matters the Court consisted of one or more British judges of the British Court sitting either together or alone.<sup>78</sup>

In the Busa‘idi Sultanate, appeals from the *kadhi* courts went to His Highness the Sultan’s Court for Zanzibar and Pemba in which a British Magistrate sat with two *kadhis* (one Sunni and one Ibadhi). A second appeal was then laid to the Supreme Court of His Highness the Sultan in which a British judge sat with two *kadhis* (one *Sunni* and one *Ibadhi*). Further appeals went to the Bombay High Court. However, a significant change was effected by the Order-in-Council of 1914 which provided that appeals from Zanzibar go to the Court of Appeal for Eastern Africa instead of the Bombay High Court. The Court of Appeal for Eastern Africa consisted of British judges only. Final appeals were taken to the Privy Council. In the Kenya coastal strip, appeals from *kadhi*’s courts went to the Supreme Court

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<sup>76</sup> Sections 4 and 5 of the Zanzibar Courts Decree of 1908.

<sup>77</sup> ZA/A62/1, memorandum on the proposed Zanzibar courts decree (1923) by judge Tomlinson dated 26<sup>th</sup> October 1922, 3.

<sup>78</sup> Section 13 (5) of Zanzibar Courts Decree of 1923.

of Kenya where British judges sat with *kadh*is as assessors only. Further appeals went to the Court of Appeal for Eastern Africa and finally to the Privy Council.

On appeal, British judges overruled *kadh*is decisions and applied English law and principles of natural justice. For instance, the case of *Soud v. Jokha* involved the appellant's drunkenness and violence, and the respondent asked for a *haylulah*. The *kadhi* held that the violence was not of such a nature as to entitle her to an order for a *haylulah*. Being unsatisfied with the *kadh*'is decision, the wife appealed. Chief Justice Law allowed the appeal and held that the wife was entitled to a *haylulah*.<sup>79</sup>

Similarly, in the case of *Biubwa alias Fadhila bt. Nassor El-Yuribi v. Nassor b. Hemed El-Kharusi*, the plaintiff, wife of the defendant, pleaded for a *haylulah* from her husband on the ground of assault. The husband admitted that he only assaulted her once. The trial *kadhi* refused to grant judicial separation and stated that:

“parties have lived together in good terms for a long period and as no ill-treatment on the part of the husband has ever occurred, there is no sufficient ground for the “haylulah”. The plaintiff after being provided with monthly maintenance must obey her husband and in case the husband does not comply with the above order, the plaintiff shall be entitled to dissolution of marriage.”<sup>80</sup>

On appeal, Chief Justice J.M. Gray overruled the *kadhi*'s judgment and granted judicial separation to the wife. Chief Justice Gray stated:

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<sup>79</sup> (1935) 5 Z.L.R. 16.

<sup>80</sup> ZNA/HC/10/1549 Civil Case 43 of 1945 (unreported).

“neither a single not four assaults are necessarily a ground for granting a wife a *haylulah*. In view of the fact that she has already been assaulted by her husband, I think she is justified in having a reasonable apprehension of such violence of a character likely to endanger her personal safety and is therefore entitled to a *haylulah*.”<sup>81</sup>

In the case of *Amina bt. Sa'id b. Abdulla El-Mazruia v. Sadi b. Mohamed El-Bahri* the appellant refused to rejoin her husband on the ground that she had miscarried, rendering her incapable of resuming intercourse with her husband. She applied to the *kadhi* to be separated from her husband and granted maintenance.<sup>82</sup> The *kadhi* rejected her application. On appeal, Chief Justice Gray granted her maintenance and noted that “this is a very clear case in which the wife is entitled to live apart from her husband and to maintenance whilst so doing”. Chief Justice Gray based his judgement on an Indian case, *Husain v. Kubra Begum*, which stated that “if the court is of the opinion that a return by a wife to her husband’s custody would endanger her health and safety, it ought not to order her to return even if a good deal of the husband’s treatment of her falls short of physical cruelty”.<sup>83</sup>

Although British judges sat with *kadhis* in appeal cases, the former handed down judgements while the latter were confined to giving religious opinions. In almost all cases reported in the Zanzibar Law Reports, British judges handed down judgements in appeal

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<sup>81</sup> Chief Justice Gray quoted the decision of the Privy Council in the case of *Moonshee Buzloor Ruheem v. Shamsoonisa Begum* (1867) 20 E.R. 208, which stated: “actual violence of such a character as to endanger personal safety or a reasonable apprehension of such violence will be sufficient.”

<sup>82</sup> (1946) 7 Z.L.R. 54.

<sup>83</sup> (1918) 40 A.I.R. 332

cases although in some cases *kadhis* were part of the Appellate Court. British administrators were empowered to supervise the work of Islamic and customary law courts.

### 3.4.3.2 The policy of supervising the *kadhi* courts

The other strategy of implementing the policy of centralization was achieved through supervision of the *kadhis*' functions. The British supervised Muslim courts in their colonial territories. For instance, in Northern Nigeria the British enacted the Nigerian Order-in-Council 1899 which empowered Lord Lugard to make proclamations, that restricted the application of Islamic law. Through these proclamations the British political officers had the power to supervise and control the *alkali* (*kadhi*) courts. The first proclamation was the Native Proclamation of 1900 which stated in Section 4: "The Resident had the power to enter courts and inspect them. He could transfer a case from one court to another, review the findings of a court and order retrial or modify its sentence".<sup>84</sup>

In Zanzibar, the British colonial administration enacted statutes in 1923 which conferred on British judicial officers supervisory powers over all subordinate courts that included the *kadhi* courts.<sup>85</sup> The supervision of works of the *kadhis* was undertaken by British judicial as well as provincial administrators who were given authority by statute to supervise the *kadhi* courts. British judicial officers preferred to have *kadhis* sitting beside them in the same courts in order to have close supervision of their court work. Peter Grain, the

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<sup>84</sup> Kumo, 1989, 6.

<sup>85</sup> Section 4 (5) of the British Subordinate Courts Order of 1923 provided that "The British Court shall exercise general powers of supervision over all subordinate courts".

Attorney-General of Zanzibar, advocated bringing *kadhis* together in one place so as to make their supervision easier and “teach the Kathis to conduct their work in a systematic and a regular manner.”<sup>86</sup>

To ensure complete control, the British empowered local administrators to supervise the subordinate courts. *Kadhis*, *liwalis* and *mudirs* were subjected to the orders of the British District Commissioners of their respective areas.<sup>87</sup> In the Kenya coastal strip, the Attorney-General requested additional powers for the *liwali* of Mombasa in order to inspect all court records of Muslim subordinate courts that included *kadhi*, *liwali*, and *mudir* courts.<sup>88</sup> The Attorney General’s request resulted in the enactment of the Liwali’s Courts Ordinance 1921 that empowered the Governor to appoint a *liwali* for the Coast who, in addition to his ordinary judicial powers conferred by the Courts Ordinance 1907 and the Criminal Procedure Ordinance 1913, was given powers to inspect all records and proceedings of *liwali*, *mudir* and *kadhi* courts, and report to the High Court.

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<sup>86</sup> ZNA/AC18/2, Report of the Attorney General’s Department by Peter Grain, the Attorney General, dated 19 September 1907.

<sup>87</sup> KNA/PC/Coast/1/20/96, *kadhis*, *mudirs*, *liwalis* etc., letter from the Senior Commissioner Coast, Mombasa, to the Colonial Secretary, Nairobi, dated 17 January 1924.

<sup>88</sup> KNA /AG/12/17, The *Liwalis* Courts Ordinance 1920, letter from the Attorney-General, Nairobi, to the Acting Chief Secretary, Nairobi, dated 6 November 1920.

The supervision of *kadhi* courts was also effected by subjecting *kadhis'* judgments to the repugnancy test.<sup>89</sup> The British colonial judges applied the repugnancy clause in order to scrutinise parts of Islamic law that they considered to be repugnant to English notions of justice. In dealing with Islamic law cases, British judicial authorities applied the repugnancy clause which did not recognise laws that conflicted with basic principles of natural justice and morality.<sup>90</sup> Customary and religious laws were upheld except in cases where they failed to pass the repugnancy test or contravened colonial statutes.<sup>91</sup>

In the case of *Maleksultan w/o Sherali Jeraj v. Sherali Jeraj* it was held that “marriage of persons belonging to a recognized religious community is a matter to be governed by the religious and personal law of the community concerned subject only to the provision that the customs of such community are not repugnant to good order and natural justice”.<sup>92</sup> The other doctrine that was applied to disqualify Islamic law was the Roman law formula of

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<sup>89</sup> The repugnancy test implies that religious and customary laws must not be repugnant to justice and morality, or inconsistent with any British statute. In civil and criminal cases, courts in the British colonies were guided by the repugnancy test. For instance, in South Africa, although customary law has been sanctioned by statute, its application is subjected to the repugnancy clause; therefore the customary law should not be opposed to the principles of public policy or natural justice. Hosten, W.J. (1995) *Introduction to South African Law and Legal Theory* Durban: Butterworths 1249.

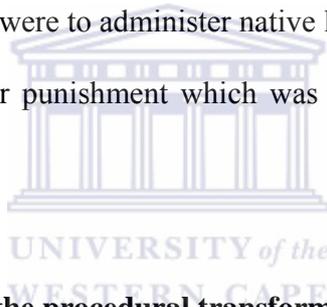
<sup>90</sup> Phillips, A and Henry F. M (1971) *Marriage Laws in Africa*, London Oxford University Press 134. Application of the repugnancy clause was applied in India in 1668. The East India Company was required by Charter to enact laws “consonant to reason, and not repugnant or contrary to and as near as may be agreeable to English law”.

<sup>91</sup> Mann, 1991, 21.

<sup>92</sup> (1955) 22 E.A.C.A. 142.

'justice, equity and good conscience'. In cases where religious laws did not provide any guidance to the courts, they followed the rules of English law.<sup>93</sup>

British colonial officials regarded religious and customary laws to be repugnant to the traditions and morality of the ruling race. For instance, rules of Islamic criminal law were practiced by the Moghul state in India prior to the advent of the British. English magistrates regarded such rules as repugnant, and hence could not enforce them. In Northern Nigeria, the British permitted the Emirs to uphold religious rituals that were not repugnant to natural justice and humanity. For instance, Section 2 of the Nigerian Order-in-Council 1899 stated: "Courts were to administer native law and custom prevailing except mutilations, torture or any other punishment which was repugnant to natural justice and humanity."<sup>94</sup>



### **3.5 The British policies on the procedural transformation of the Zanzibar courts**

The second major policy undertaken by the British colonial administration was with regard to procedural transformation which aimed at bureaucratising the functioning of the *kadhi* courts. The policy was implemented through three strategies: applying English statutes, adopting English procedural law, and ascertaining Islamic law.

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<sup>93</sup> Anderson, 1993, 169.

<sup>94</sup> Kumo, 1989, 6.

### 3.5.1 The policy of applying English statutes

In the process of bureaucratising the *kadhi* courts, the British colonial authorities adopted a policy of applying English statutes. Throughout her colonial territories, Britain applied Orders-in-Council that empowered colonial officials to enact local statutes. Towards the mid-20<sup>th</sup> century British colonial authorities found it necessary to apply in their colonies substantive and procedural laws enforced in England, and the application of Indian codes was withdrawn from many British territories.<sup>95</sup>

British colonial policy was geared towards the adoption of English statutes in their colonised territories. However, this imperialistic ambition could not be realised abruptly. Among the major obstacles for the adoption of English statutes was the lack of legally trained British magistrates who could enforce the common law principles in the courts.<sup>96</sup> By the first quarter of the 20<sup>th</sup> century, the British colonial administration managed to apply English statutes in Zanzibar courts.<sup>97</sup>

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<sup>95</sup> Doorly, A.N “British Magistrates in East Africa” (1945) 27 (3/4) *Journal of Comparative Legislation and International Law* 90.

<sup>96</sup> Metcalf, 2007, 27.

<sup>97</sup> English statutes were introduced in India by Charters of Justice, and courts were established in three towns, viz. Madras, Bombay and Calcutta. The Charters introduced English common and statute law in so far as they were applicable to Indian circumstances. Ilbert, C “Application of European Law to Natives of India” (1896) 1 *Journal of the Society of Comparative Legislation* 212. Similarly, in Malaysia English law was introduced in the second quarter of the 19<sup>th</sup> century by Charters of Justice of 1826 through legislation and decisions of English judges. See Ibrahim, 2000, 38.

The strategy of applying English statutes in the Busa'idi Sultanate was implemented by virtue of the first Order-in-Council enacted in 1866. The Order-in-Council stated that “the British Consul was empowered to issue regulations for the enforcement of the stipulations of any treaty between Her Majesty and the Sultan of Zanzibar, and also for the peace, order, and good government of British subjects in Zanzibar.”<sup>98</sup> These statutes were in the form of ordinances or regulations that dealt with details of the administration of justice in the Protectorate. After the establishment of the British Protectorate in Zanzibar in 1890, control over legislation was in the hands of the First Minister. British control over the Sultanate's affairs was extended to the extent that even Decrees of the Sultans had to be countersigned by the English Prime Minister.<sup>99</sup>

In the process of applying English statutes in the Zanzibar courts, the British took advantage of their colonial experience in India by transplanting statutes to the Busa'idi Sultanate. Due to the close political and trade relations between India and Zanzibar, it was more appealing for the British to borrow a leaf from their colonial experience in India. In dealing with administrative as well as judicial matters it was convenient for British colonial

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<sup>98</sup> Vaughan, 1935, 21. Order-in-Council of 1866 provided: “Order of Her majesty in council for the regulation of Consular Jurisdiction in the Dominions of the Sultan of Zanzibar.” By this Order the British Consul was empowered to issue regulations for the enforcement of the stipulations of any treaty between Her Majesty and the Sultan of Zanzibar and also for the “peace, order, and good government of British subjects in Zanzibar.

<sup>99</sup> Vaughan noted that the first Decree to be countersigned was the Jurisdictions Decree 1908. After that year the practice of issuing Consular Regulations was abandoned and applying Indian Acts was discontinued. Vaughan, 1935, 70.

officials to resort to India since “British thinking about Africa was much more closely related to British thinking about India”.<sup>100</sup> Hence the British administration in Zanzibar drew largely on India for guidance in judicial matters and for the enactment of administrative regulations. The Indian legal influence on the East African coast came through Zanzibar.<sup>101</sup>

Contacts between Zanzibar and India were enhanced by the continuous voyages made by Indian merchants who followed Seyyid Sa‘id when he transferred his capital from Muscat to Zanzibar in 1832. Towards the end of the 19<sup>th</sup> century, Indians formed the majority of the members of the legal profession and the government civil service in Zanzibar.<sup>102</sup> Anthony Allott provided the logic for adopting Indian statutes in East Africa by stating that “they were suitable for application by inexperienced magistrates who found themselves far from any law library”.<sup>103</sup> The influence of Indian laws was not only confined to the East African coast but extended to other jurisdictions, and these laws were regarded as “the root from which sprang much of the law of countries on the shores of the Indian Ocean”.<sup>104</sup>

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<sup>100</sup> Mamdani, M. (1996) *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*

Princeton: Princeton University Press 50.

<sup>101</sup> Allott, 1976, 350.

<sup>102</sup> Morris, 1972, 109.

<sup>103</sup> Allott, 1976, 380.

<sup>104</sup> Matson, J. N. “The Common Law Abroad: English and Indigenous Laws in the British Commonwealth” (1993) 42 (4) *International and Comparative Law Quarterly* 760. For instance, the Malay Rulers enacted various Indian codes that included the Penal Code, Evidence Act, Criminal Procedure Code and Civil Procedure Code. Shuaib, F.S (ed.), (2001) *Administration of Islamic Law in Malaysia: Texts and Materials*, Kuala Lumpur: LexisNexis 174.

Although Britain had earlier experience with colonies, the Indian experience compelled the British administrators to deal with large non-European communities with their own systems of laws and customs. The initial policy of the British in such colonies was to govern the colonies and protectorates through the peoples' own religious and customary laws. In India, the British first attempted to govern the natives by native law, and Englishmen by English law. This policy was adopted in conquered territories where complete sovereignty was not assumed.<sup>105</sup> In maintaining such religious and customary laws, at least in the earlier years of the colonial establishment in India, the British wanted to “avoid emphasizing the fact that the country was passing under dominion of a Power professing an alien faith”.<sup>106</sup>

In India the British found a structured system of Hindu and Muslim religious laws which were based on texts having religious authority. British jurists had to devise a system of jurisprudence to enable the colonial authorities to administer justice without causing conflict with the existing systems of religious laws which prevailed in India. The early British colonial administrators in India applied the English common law to English citizens and the religious laws to the Indians. Later, the policy was changed and the British found a need to reform the civil and criminal systems of laws that operated in India. The British found Islamic criminal law contained provisions which were difficult for the British Government to enforce.<sup>107</sup>

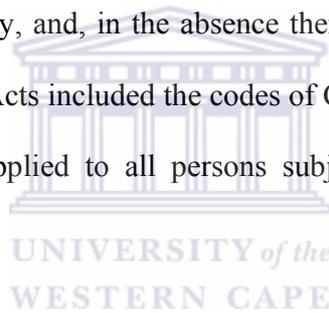
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<sup>105</sup> Ilbert, 1896, 223.

<sup>106</sup> Mamdani, 1996, 49.

<sup>107</sup> Hailey, W.M (1938) *African Survey: A Study of Problems Arising in Africa South of the Sahara* Oxford: Oxford University Press 262.

The first Indian Act to be applied in Zanzibar was the Indian Penal Code introduced in 1867, and then the Criminal Procedure Code in 1884.<sup>108</sup> The application of the Indian Penal Code in Zanzibar demonstrates the significance attached to criminal law by British colonial officials. Further reliance on Indian statutes was provided by the Order-in-Council 1884 that “directed the British courts in Zanzibar to apply the statute law as applied by the courts in Bombay and in default thereof in accordance with the Common law and statute law of England”.<sup>109</sup> Various Indian Acts were then introduced to Zanzibar by the Zanzibar Order-in-Council 1884 which directed the British courts in Zanzibar to apply the statutes applied by the courts in Bombay, and, in the absence thereof, apply the common law and statute law of England. These Acts included the codes of Criminal and Civil Procedure and the Evidence Act that were applied to all persons subjected to the jurisdiction of the Sultan’s Courts.



In applying the Indian Acts, the courts in Zanzibar were required to pay due regard to “the general principles of the law of the island, and to any native law and customs not repugnant to justice or morality”.<sup>110</sup> As for civil matters, the Law of Islam was declared to be the fundamental law of the Sultan’s dominions. The East Africa Order-in-Council of 1897

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<sup>108</sup> Morris, H.F. “A History of the Adoption of Codes of Criminal Law and Procedure in British Colonial Africa, 1876-1935” (1974) 18 (6) *Journal of African Law* 13.

<sup>109</sup> Allott, 1976, 351.

<sup>110</sup> Stephens, 1913, 610.

applied the civil and criminal codes of India in the Busa'idi Sultanate.<sup>111</sup> Furthermore, the Zanzibar Order-in-Council of 1897 gave criminal and civil jurisdiction to the British courts in Zanzibar.<sup>112</sup> The jurisdiction of the Zanzibar courts was regarded of be a territory equivalent to a district of the Bombay Presidency under the Zanzibar Order-in-Council 1884, and until 1914 appeals lay to the High Court of Bombay.<sup>113</sup>

The transplantation of Indian codes into Zanzibar caused a conflict of legal systems within the colonial courts. By virtue of the East African Order-in-Council 1889, the British colonial authorities ruled that jurisdiction within the African territories was to be exercised “upon the principles of, and in conformity with, the substance of the law for the time being in force in England”.<sup>114</sup> Contrary to this policy, British administrators on the ground, such as, Sir Arthur Hardinge, argued that the Indian codes were simpler to implement than the English law in that they presented fewer difficulties to administrators who lacked special

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<sup>111</sup> Article 11 of the Zanzibar Order in council, 1897, provided that “I hereby order that the following acts of the Governor General of Indian in Council, that is to say, The Hindu Wills Act 1870 and The Probate and Administration Act 1881 and any enactment amending or substituted for these Acts shall, as from the day on which this order is first publicly exhibited in the Consulate at Zanzibar, apply to Zanzibar”. Salisbury, Foreign Office 30<sup>th</sup> September 1898 Gazette For East Africa vol. vii, No. 353, 2<sup>nd</sup> November 1898, 6.

<sup>112</sup> These enactments included: the Indian Penal Code, Succession Act, Evidence Act, Limitation Act, Civil Code of Civil Procedure and any other enactments of the Governor-General of India-in-Council or of the Governor of Bombay in Council were also applicable to Zanzibar. Stephens, 1913, 604.

<sup>113</sup> Morris, 1972, 112.

<sup>114</sup> Metcalf, 2007, 24.

legal training.<sup>115</sup> Hardinge's view paved the way for the enactment of the East African Order-in-Council 1897 that led to the introduction of several Indian codes, including the Penal Code, the Evidence Act and the Contract and Transfer of Property Act, to the East African Protectorate.<sup>116</sup>

The British colonial administration paved the way for British settlers to occupy agricultural land in East Africa, particularly the Kenya highlands and the Kenya coastal strip. In the early 20<sup>th</sup> century the settlers were very influential and opposed British colonial policies which affected settlers' interests. The British colonial authorities were caught between the administrative demands to implement the Indian codes, on one the hand, and on the other hand, opposition from the British white settler community to adopting Indian laws in East Africa. The British settlers, through their Colonists Association of British East Africa, felt that the Indian codes were not fit for free Englishmen and objected "in principle to placing white men under laws intended for a coloured population despotically governed".<sup>117</sup> The British colonial government rejected the settlers' claim and argued that the codification of Indian law enabled its administration to be entrusted to persons with no special legal

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<sup>115</sup> Hardinge served in Russia and the Ottoman Empire before he was posted to East Africa. Metcalf, 2007, 185.

<sup>116</sup> The East African Order-in-Council 1897 provided that "Her majesty's criminal and civil jurisdiction in the Protectorate shall, as far as circumstances admit, be exercised on the principle of, and in conformity with, the enactments hereafter mentioned of the Governor General of India in Council, and the Governor of Bombay-in-Council, and according to the course of procedure and practice observed by and before the courts in the Presidency of Bombay as if the Protectorate were a District of a Presidency of India".

<sup>117</sup> Metcalf, 2007, 26.

training, and that for English law to be implemented it would require the appointment of legally trained magistrates.

Disagreement arose among the British colonial officials regarding the transplantation of the Indian codes into the East African territories. Owing to the inherent technicalities embedded in the English law, British administrative officials perceived an inappropriateness of English law which “needed very considerable modification if injustices were to be avoided or indeed if it were to bring any real benefit to the largely illiterate African population”.<sup>118</sup> They argued for its substantial modification so as to fit the local circumstances.<sup>119</sup> On the other hand, British legal officials perceived the technicalities of English law to be an integral part of the English legal system and that “without them the standard of justice must be lower”.<sup>120</sup> Tensions among the British colonial officials not only demonstrate a lack of a uniform policy on judicial matters but also portray a continuous controversy between the two arms of the colonial machinery that paved the way for a conflict of laws. This ‘colonial tension’ led to a situation whereby British judges mistrusted their fellow colonial administrators and their capacity to effect proper ‘English justice’ if English law was not to be applied to the letter.<sup>121</sup>

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<sup>118</sup> Morris, 1972, 73.

<sup>119</sup> Allott, A.N “East African Legal History” (1974) 18 (2) *Journal of African Law* 204.

<sup>120</sup> Allott, 1974, 204.

<sup>121</sup> Hashim, A “Coping with Conflicts: Colonial Policy towards Muslim Personal Law in Kenya and Post-independent Court Practice” in Roberts, R. Jeppie, S. and Moosa, I. (eds.) (2009) *Muslim Family Law in Colonial and Postcolonial Sub-Saharan Africa* Amsterdam: University of Amsterdam Publishers, 221.

Among the statutes which were transplanted from India to Zanzibar was the Mohammedan Marriage Divorce and Succession Ordinance that was enacted by Sir Arthur Hardinge, and later renamed the Mohammedan Marriage, Divorce and Succession Ordinance 1906. The Ordinance provided for the formal roles and functions of persons entitled to preside over Muslim marriages and laid down procedures for the registration and validity of marriages. The codes of marriage, divorce and inheritance that applied in the Busa'idi Sultanate were inherited from the Anglo-Muhammadan laws in India. Influence of these Indian codes on the East African coast was limited to MPL. This process seemed to influence most of the British colonies and protectorates.<sup>122</sup>

### 3.5.2 The policy of adopting English procedural laws<sup>123</sup>

The second strategy adopted by British judicial officers towards transforming the procedural aspects of Islamic law in the Busa'idi Sultanate was by adopting English procedural laws. Procedural changes focused on substituting English procedural law for the Islamic law of procedure applicable in the *kadhi* courts. The introduction of

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<sup>122</sup> This process was in contrary to the practice in certain Arab countries that embarked on full codification of its laws in mid twentieth century that covered many areas including family and commercial laws. On the codification of laws in the Sub-Saharan Africa see Serag, M. "Modern Changes in Muslim Family Law in Sub-Saharan Africa" (Paper presented at the Third Symposium of the Islamic Law in Africa Project, Cape Town, 11-14<sup>th</sup> March 2002) 18..

<sup>123</sup> For details on Islamic law of procedure see Howard, 1914, 526-536, Anderson, J.N.D "Muslim Procedure and Evidence" (1949) 1(3) *Journal of African Administration* 123-129, and Qadri, A. A (1997) *Islamic Jurisprudence in the Modern World* Delhi: Taj Company, 279-286.

bureaucratic procedures in the *kadhi* courts was a hallmark of the 19<sup>th</sup> century judicial system that increased the use of standardised printed court documents.<sup>124</sup> From the establishment of the British Protectorate in Zanzibar, the British had embarked on a policy of bureaucratising the functioning of the *kadhi* courts. Subsequent to the establishment of the British Protectorate in Zanzibar, various regulations were enacted to formalise and register court documents.<sup>125</sup> The appeal process was bureaucratised by writing appeal judgments in English.

Reliance on Indian case law was a remarkable feature of British legal policy in the Zanzibar courts. For instance, in the appeal case of *Asha bt. Juma v. Juma b. Mahmoud*, the Zanzibar Town Magistrate, Abrahams, based his judgment on Indian case law and stated: “I have consulted the Indian authorities, and I am now completely satisfied that District courts [including *kadhi* courts] were as much intended to try matrimonial causes as cases of any other kind”.<sup>126</sup>

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<sup>124</sup> Anderson, 1993, 172.

<sup>125</sup> Among these regulations was a form printed during the reign of Sultan Hemed b. Thuwain (r.1893-1896) which stated “In accordance with our Government Notice dated 25th Shaban, all rights must be written on these forms and must be registered at the office of General Llyod W. Mathews. All rights which are not written in papers above mentioned will be refused in courts of Justice. This law comes into force from 12th Shawal, 1310 A.H. corresponding with 1st May 1893”. (1911) 1. Z.L.R. 610.

<sup>126</sup> (1911) 1 Z.L.R. 540. The Indian authorities referred by Abrahams were *Zair Hussein Khan v. Khurshed Jan*, (1845) 5 Moo., P.581, *Jan Mohamed Mandal v. Mashar Bibi*, (1906) 28 ALL., 545, and *Jasodu Chhotu v. Chhotu Mannu Dalvalu*, (1910) 34 Bom., 236. (1911) 1 Z.L.R. 541.

Keeping written records of courts proceedings and judgements can be considered to be a milestone of the British colonial legacy on the administration of Islamic law in the Busa'idi the Sultanate. Section 63 of the East Africa Order-in-Council of 1897 provided: "All Musulman Ecclesiastical Courts shall keep regular written records of all cases tried by them." The success of the policy of bureaucratisation can be seen in the *kadhis'* judgments, particularly in Zanzibar, where court proceedings were written in a legal format. For instance, in the case of *Fatuma bt. Hashim v. Juman b. Khamis*, *kadhi* Tahir b. Abubakar Al-Amawi reflected details of the proceedings in the *kadhi* court.<sup>127</sup> *Kadhi* Al-Amawi started by mentioning the facts of the case and advocates representing the parties. He then narrated issues raised by the advocates in their submissions. After considering the facts of the case and points raised by the advocates, Al-Amawi referred to the relevant passages in Islamic law texts and gave his judgment.<sup>128</sup> In the process of transforming the functioning of the *kadhi* courts, the British colonial officials in Zanzibar controlled the distribution of cases to the *kadhis* in each year.<sup>129</sup>

British colonial policy in the Busa'idi Sultanate was directed towards transforming the content and procedure of Islamic law applied in the *kadhi* courts in line with the English

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<sup>127</sup> ZA/HC10/31 Civil Case no.64 of 1930 (unreported).

<sup>128</sup> In the post-independent period, *kadhi* courts along the East African coast were required to keep records of their court proceedings. For instance, Section 7 of the Kadhis' Courts Act provides: "Every Kadhi's court shall keep such records of proceedings and submit such returns of proceedings to the High Court as the Chief Justice may from time to time direct."

<sup>129</sup> On distribution of cases to *kadhis* in Zanzibar see Bang, 2003, Fig. 8.1 at p.162 and Stockreiter, 2007, Appendix A at 313.

common law. Until 1897, the *kadhi* courts in the Busa'idi Sultanate applied the Islamic law of procedure. Section 55 of the East Africa Order-in-Council of 1897 provided that: "the law and procedure in the Mussulman Ecclesiastical Courts shall be identical with that which has been observed by them in accordance with the laws of the sultanate of Zanzibar." British colonial officials regarded the Islamic law of procedure to be rigid and designed to deny the *kadhis* any discretion in order to protect the community from an arbitrary use of a *kadhi's* position.<sup>130</sup>

In Kenya, Justice Thacker found that many cases from the *kadhi* courts departed from the procedure laid down in the subordinate courts. He, therefore, proposed a short circular setting out the essential features of procedure to be issued to the *kadhi* courts.<sup>131</sup> The Chief Justice of Kenya noted that a number of *kadhis* in the Coast province did not follow the procedure laid down in the Criminal Procedure Code, and therefore instructed the Registrar of the Supreme Court to issue a circular to the magistrates of the Muslim subordinate courts to follow the designated criminal procedure in their courts.<sup>132</sup> A circular was issued instructing the Muslim magistrates to abide by the rules criminal procedure, which included recording statements of the charge and taking down the evidence of witnesses. However, the Acting Chief Justice of Kenya earlier found that it was absurd to expect *kadhis* to apply proper court procedures without being acquainted with these procedures. He observed:

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<sup>130</sup> Anderson, 1949, 124.

<sup>131</sup> KNA/API/1/1206, *mudirs, kadhis and liwalis*, letter, from the District Registrar, Supreme Court of Kenya, Mombasa to the Registrar, Supreme Court, Nairobi, dated 2 April 1941.

<sup>132</sup> *Ibid*, circular letter to magistrates of Muslim subordinate courts in the coast province by Registrar Supreme Court of Kenya, Nairobi dated 20<sup>th</sup> September 1941.

“it is in my opinion that it would be farcical to impose on these courts a technical code written in a language unintelligible to the Judges of those courts, and I should have imagined that no reasonable and sensible man would ever have expected them to apply an unknown law. If it is desired that they should follow the provisions of the Criminal Procedure Code and the Code of Civil Procedure, they must be translated into the Arabic language.”<sup>133</sup>

To add confusion to these contradictory opinions from the office of the Chief Justice, British judges gave conflicting judgments regarding the procedure applicable in *kadhi* courts. Judge Lane decided that the Islamic law of procedure and evidence applied in the *kadhi* courts in cases where the parties were Muslims and that they were not to be subjected to the provisions of the Civil Procedure Ordinance.<sup>134</sup> On the contrary, in the earlier case of *Sheksi bt. Sheikh Tiro & Others v. Mohamed b. Sheikh Tiro*, the *kadhi* gave an *ex parte* judgement in favour of the respondent (original plaintiff) after the appellants (original defendants) failed to appear before the *kadhi* court.<sup>135</sup> On appeal, *shaykh al-Islam* sat

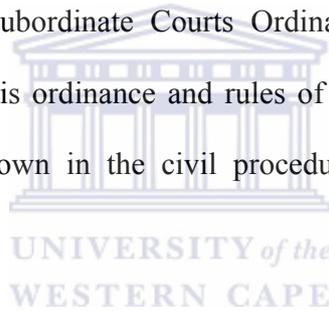
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<sup>133</sup> KNA/API/1205, letter from the Acting Chief Justice to the Provincial Commissioner, Mombasa, dated 14 June 1930.

<sup>134</sup> *Hussein b. M'Nasar v. Abdulla b. Ahmed*, (1937) 17 K.L.R. 95. The Courts Ordinance of 1927 does not require the Subordinate Native Courts that included courts of the *liwali*, *kadhi* and *mudir* to apply neither the Civil Procedure Code nor the Criminal Procedure Code. Section 7 of the Order-in-council of 1927 provided that “In all cases civil and criminal to which Natives are parties, every court (a) shall be guided by native law so far as it is applicable and it is not repugnant to justice and morality or inconsistent with any order-in-council or ordinance. (b) shall decide all such cases according to substantial justice without undue regard to technicalities or procedure and without undue delay”. In another case, Judge James Hayden held that the Civil Procedure Ordinance does not apply to the *kadhis* courts and that the *kadhi* should follow the Mohammedan law as to procedure and evidence. (1942) 20 K.L.R 10.

<sup>135</sup> (1911) 4 E.A.L.R. 66.

together with Judge Barth and was of the opinion that, according to the text *Minhaj al-Talib.*, the *kadhi* should have gone to, or sent a representative to the women (appellants) to hear their case. Judge Barth remarked “I have no doubt that the learned Sheikh’s opinion is a correct exposition of Mohamedan law on the matter but I regret that I am of the opinion that Mohamedan law does not apply in this case. The matter in issue is clearly one of procedure and not affecting Mohamedan family law, and is, *prima facie*, one governed by the Civil Procedure Code”.<sup>136</sup> In another case, Mr. Justice Thacker decided that the Islamic law of procedure and evidence did not apply in the *kadhi* courts, and that instead, the Indian Evidence Act and Civil Procedure Ordinance rules applied.<sup>137</sup> Thacker’s judgement was based on section 12 of the Subordinate Courts Ordinance 1931 which provided that “subject to the provisions of this ordinance and rules of court all courts shall follow the principles of procedure laid down in the civil procedure so far as the same may be applicable and suitable”.



The Secretary of the Mombasa Law Society supported the idea that the *kadhi* courts should follow the Indian Evidence Act and the Civil Procedure Ordinance, and noted that almost all the decisions of the *kadhi* courts were challenged in appeals on account of having failed to apply correctly the rules of civil procedure and the law of evidence.<sup>138</sup> Justice Thacker

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<sup>136</sup> (1911) 4 K.L.R. 67.

<sup>137</sup> KNA/API/1206, letter from Judge Thacker, the Supreme Court of Kenya, Mombasa, to the Registrar, the Supreme Court, Nairobi, dated 17 March 1943.

<sup>138</sup> KNA/API/1206, memorandum on the procedure and evidence to be applied to Muslim subordinate courts from the Secretary of Mombasa Law Society to the Registrar, the Supreme Court of Kenya, Nairobi dated 10 February 1943.

seconded the suggestion forwarded by the Secretary of the Mombasa Law Society, but was reluctant to impose his judgment and noted that “as to the question what procedure should be laid down [in Kadhi Courts], I prefer not to express any opinion as this is a question in which there may be important political implications and questions to be considered”.<sup>139</sup> Thacker’s statement shows the limit of the extent to which judgments of British judicial officers could interfere with colonial policies related to political issues. Judge Thacker expressed a similar sentiment when he gave judgment in the case of *Baraka bt. Bahmishi v. Salim b. Abed Busawadi* by stating:

“in arriving at this judgment I am merely interpreting the law as I see it and I must not be taken to be expressing in any way any opinion on the question, a matter which is quite separate and distinct from the legal questions namely which is the more appropriate or desirable procedure for Muslim subordinate courts to follow”.<sup>140</sup>

In some cases British colonial administrators were careful not to enforce policies that would interfere with the morals of their subjects. In the case of *Rajab b. Ali vs. Mwana Hamisi bt. Omar*, the defendant (wife) was sued in a *kadhi* court by her husband (plaintiff) for restitution of conjugal rights. The *kadhi* issued an order for her to return to her husband.<sup>141</sup> The defendant refused to return to her husband. Due to her refusal, the *kadhi* sentenced the wife to six months imprisonment. The chief *kadhi* and *liwali* for the Coast noted that the punishment for imprisonment imposed by the *kadhi* of Mombasa on the wife was out of all proportion and should not be repeated since it brought shame on the women. The

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<sup>139</sup> KNA/API/1206, letter from Judge Thacker, the Supreme Court of Kenya, Mombasa, to the Registrar, the Supreme Court, Nairobi, dated 17 March 1943.

<sup>140</sup> (1942) (1) 20 K.L.R. 34.

<sup>141</sup> KNA/API/1206 civil case No.9 of 1941 Kadhi’s Court, Mombasa (unreported).

Provincial Commissioner of Mombasa noted that although the procedure is legally in order, he proposed the amendment of the law to substitute imprisonment of women with other forms of punishment.<sup>142</sup>

Despite the support given by British judges to the application of the Indian procedure and law of evidence in the *kadhi* courts, some advocates preferred the Islamic rules of procedure and evidence to be applied in *kadhi* courts. J.A. Burke, an advocate in Mombasa, noted that it was impracticable for the Indian rules of procedure and law of evidence to be applied in the *kadhi* courts due to the fact that they presented great difficulty to the courts. He noted that it was unnecessary to depart from applying the Islamic law of procedure and law of evidence, and that Islamic law in general was suitable to litigants in the *kadhi* courts.<sup>143</sup> In supporting the application of the Islamic rules of procedure and law of evidence in the *kadhi* courts, another advocate, Atkinson, in Mombasa noted that “the Muslim subordinate courts, applying the Mohammedan law with regard to procedure and evidence, give satisfaction to the Mohammedan community, and will inevitably cease to do so if other rules of procedure and evidence are applied to them”.<sup>144</sup>

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<sup>142</sup> KNA/API/1206, letter from the Provincial Commissioner, Mombasa, to the Chief Secretary, Nairobi, dated 3 May 1941.

<sup>143</sup> KNA/API/1206, letter from Advocate J.A. Burke to the Registrar, Supreme Court, Nairobi, dated 25 May 1943.

<sup>144</sup> KNA/API/1206, letter from Atkinson, Morrison, Brown & Ainslie Advocates, to the Registrar, Supreme Court, Nairobi, dated 25 May 1943.

The chief *kadhi* of Kenya, Sh. Al-Amin b. Ali Mazru'i appealed to the Judge of the Supreme Court for *kadhis* to be allowed to apply the Islamic rules of procedure and law of evidence. Sh. Al-Amin expressed the unanimous view of all the officers of the Muslim subordinate courts that included the *kadhis*, *liwalis* and *mudirs*. Sh. Al-Amin pleaded by stating that:

“Mohamedan law is part and parcel of the Muslim religion and therefore, any judicial decision arrived at without strict application of the Mohammedan rules of evidence is bad and interferes with the Muslim conscience. Under these circumstances it is hoped that some means will be found whereby the Muslim subordinate courts will be entitled to follow the Mohammedan law of evidence instead of the Indian Evidence Act more especially in matters relating to personal status.”<sup>145</sup>

Despite all efforts to request the British government to apply the Islamic law of procedure and evidence in the *kadhi* courts, the Chief Justice of Kenya preferred the judgment of Justice Thacker that supported the application of the Indian law of procedure and evidence in the *kadhi* courts. The District Registrar of the Supreme Court responded by stating that:

“I am directed by His Honour the Chief Justice to say that he is of the opinion that Justice Thacker correctly states the law in his judgement. If any person is dissatisfied with that judgment, it is for him, should a suitable opportunity occur, to take the question to the court of Appeal for Eastern Africa.”<sup>146</sup>

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<sup>145</sup> KNA/API/1206, letter from the chief *kadhi*, Sheikh Al-Amin b. Ali, to Justice Hayden, Supreme Court of Kenya, Mombasa, dated 4 April 1944.

<sup>146</sup> KNA/API/1206, letter from the District Registrar, Supreme Court of Kenya, Nairobi, to the Secretary Mombasa Law Society, dated 20 November 1944.

Notwithstanding the official position of the British Government to apply the Indian rules of procedures to the *kadhi* courts, Muslims in the Kenya coastal strip opposed the British colonial position to subject the *kadhi* courts to the Indian rules of procedure and evidence. The Tullabat Society, a local Islamic organisation in Mombasa, criticised the Government's interference in the *kadhi* courts due to "unawareness of the existing link between the law and tradition and our religion", and therefore appealed for "reviving the previous procedure of abiding with the Mohammedan Law in Muslim courts".<sup>147</sup>

The British policy to exclude the Islamic law of procedure in the *kadhi* courts was firm. This resulted in binding the *kadhi* courts in the Busa'idi Sultanate to follow the civil procedure rules based on the English and Indian Evidence Acts. After Kenyan independence in 1963, the Kadhis Courts Act was enacted which provided in section 8(1) that "the Chief Justice may make rules of court providing for the procedure and practice to be followed in the Kadhis' court".<sup>148</sup> However, since independence, not one Chief Justice has ever made rules to govern the procedure in the *kadhi* courts. Instead, the *kadhi* courts in Kenya continued to be bound by the civil procedure applicable to the subordinate courts. Section 8(2) of the Kadhis Court Act stated that "until rules of court are made under subsection (1), procedure and practice shall be that prescribed for subordinate courts under the Civil Procedure Act". Similarly, in post-independent Zanzibar, the *kadhi* courts were

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<sup>147</sup> KNA/CA/9/6, courts, *liwalis*, *mudirs* and *kadhis*, letter from A. Mohamed, Secretary, Tullabat Society, to the Governor of Kenya, Sir Patrick Renison, through the Provincial Commissioner, Mombasa, dated 2 January 1962.

<sup>148</sup> The Kadhis Courts Act, Chapter 11 of the Laws of Kenya.

bound by the Civil Procedure Decree, although in practice they did not strictly follow the Decree.<sup>149</sup>

### 3.5.3 The policy of ascertaining Islamic law

The third strategy adopted by the British colonial authorities towards transforming the procedural aspects of Islamic law was by adopting the policy of ascertaining the Islamic law applicable in the Zanzibar courts. British colonial policies were informed by the need for precise and reliable information to understand colonised cultures and societies. Towards this end, the British authorities employed the colonial courts to serve as mechanisms of inquiry in the search for precise information on the customary and religious laws and their legal texts.<sup>150</sup> There were various religious texts recognised as authoritative by different Muslim communities in the British colonial territories. British colonial officials felt the need to ascertain these religious laws and customs; they treated “every social phenomenon as a bounded entity: that ought to be ascertained.”<sup>151</sup>

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<sup>149</sup> Similarly, the Zanzibar Kadhis Courts Act 3 of 1985 provides that the Chief Justice of Zanzibar in consultation with the Chief Kadhi make rules of procedure. However, such procedures have not yet been made to date.

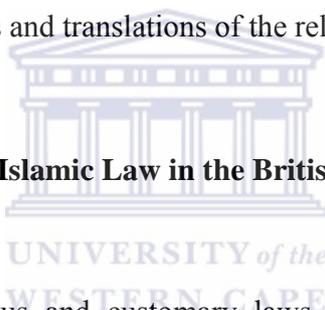
<sup>150</sup> Anderson, 1993, 172.

<sup>151</sup> Ewing, K.P “Ambiguity and *Shari’at*: A Perspective on the Problem of Moral Principles in Tension” in Ewing, K.P (ed.) (1988) *Shari’at and Ambiguity in South Asian Islam* Los Angeles: University of California Press 14.

The policy of ascertaining the local laws was influenced by Jeremy Bentham's theory that law must be simplified and ascertained.<sup>152</sup> Following Bentham's theory, Macaulay proposed codification of the laws in India so as to achieve certainty. Macaulay stated:

“We know that respect must be paid to feelings generated by differences of religion, of nation, of caste. Much I am persuaded may be done to assimilate the differences in laws without wounding those feelings. But, whether we assimilate those systems or not, let us ascertain them; let us digest them. We propose no rank innovation; we wish to give no shock to the prejudices of any part of our subjects. Our principle is simply this – uniformity where you can have it – diversity where you must have it – but in all cases certainty.”<sup>153</sup>

In order to ascertain the religious and customary laws, the British adopted two strategies: codification of the religious laws and translations of the religious texts.



### 3.5.3.1 The policy of codifying Islamic Law in the British Empire

The codification of the religious and customary laws was another area that revealed colonial tension between British officials. The rejection of codifying religious and customary laws resulted in a conflict between British administrators and judicial officials. British judicial officers advocated codification of the religious and customary laws on the basis that it would ensure the smooth and efficient running of the religious and customary courts. On the contrary, British administrative officials objected codification of religious and customary laws on the ground that reducing such laws to a code would ‘crystallize’

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<sup>152</sup> Metcalf, 2007, 18.

<sup>153</sup> Anderson, J.N.D (1955) “Customary Law and Islamic Law in British African Territories” (Paper presented to The Future of Customary Law in Africa Symposium, Amsterdam) 79.

them and alter their evolutionary nature.<sup>154</sup> British administrators saw that codification of religious and customary laws did not provide an opportunity to adjust laws nor the control functioning of the courts. They perceived a codification process as a threat to their control over the religious and customary courts and therefore preferred keeping the religious and customary laws unwritten due to the fact that it excluded judicial officials from interfering with their jurisdiction that functioned without written codes.<sup>155</sup>

The opinions of Muslim scholars on the codification of the Islamic law were by no means unified. Proponents of codification of Islamic law argued that codification of the rules of Islamic law achieved a degree of certainty, and precision to some extent.<sup>156</sup> On the other hand, opponents of codification based their argument on the fact that it reduced the mental activity of *ijtihad* that was crucial to the development of Islamic law. In his study of the Saudi legal system, Frank Vogel pointed out that the great majority of Saudi '*ulama* rejected codification of the Islamic law on the ground that the judiciary (*qadha*) was based on *ijtihad* and that, therefore, *kadhis* must be free to apply their discretion, as their conscience dictates.<sup>157</sup> An early attempt to codify Islamic law was the Ottoman Empire's codification of penal law and property law in 1858, and commercial law in 1860. The Civil Code (*Majjalat al ahkam al sultaniyya*) was codified in 1876 and was based on *hanafi*

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<sup>154</sup> Shadle, B. L. "Changing Traditions to Meet Current Altering Conditions: Customary Law, African Courts and the Rejection of Codification in Kenya, 1930-60" (1999) 40 (3) *Journal of African History* 412.

<sup>155</sup> Shadle, 1999, 431.

<sup>156</sup> Shuaib, 2001, 38.

<sup>157</sup> Vogel, 2000, 336.

*madhhab*. In 1917 the Ottomans codified the law of family rights that incorporated opinions of the leading four *madhhabs*; *hanafi*, *shafi'i*, *maliki* and *hanbali*.<sup>158</sup>

Divergent legal opinions in Muslim legal texts caused difficulty for the British colonial courts. The lack of uniformity in religious *fatwas* among the various *madhhabs* raised issues of ambiguity in the courts. The British colonial officials adopted a policy of codifying the Islamic law in order to ensure the uniform operation and predictability of the law.<sup>159</sup> The British perceived the Islamic law to be uncertain, and the nature of Islamic legal practice to be arbitrary.<sup>160</sup> William Murrison, Chief Judge of Her Britannic Majesty Court in Zanzibar, noted that “one wonders sometimes if the writers of the holy Sheria of Islam intended that their meaning should be clear”.<sup>161</sup>

By adopting the policy of codifying the Islamic law, British judicial officials did not only tackle the problems of uncertainty and arbitrariness of the religious laws, but avoided dependence on the expertise of local Muslim scholars. For instance, in India by 1864 the British Government dispensed with the services of Muslim law officers altogether.<sup>162</sup> The British embarked on the process of codifying Islamic law in India so as to provide guidance for British judges and magistrates who were not trained in Islamic law. The British faced a

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<sup>158</sup> Kamali, M.H (2008) *Shari'ah Law: an Introduction* Oxford: One World, 251.

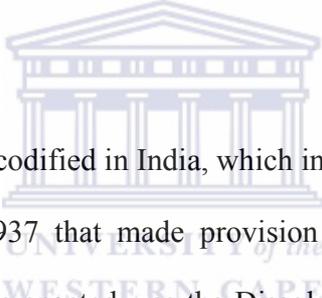
<sup>159</sup> Christelow, 2000, 374.

<sup>160</sup> Zaman, 2002, 22.

<sup>161</sup> (1918) 1 Z.L.R. 10.

<sup>162</sup> Wilson, R. K (1894) *An Introduction to the Study of Anglo-Muhammadan Law* London: W. Thacker and Co. 125.

challenge in codifying religious law in India. Muslims, as well as Hindus, were very sensitive about legislative interference in their religious laws and customs. The British colonial officers were concerned about such sentiments, and therefore had to put in place a gradual policy of codifying the religious laws. In implementing a gradual policy of codifying laws in India, Sir Henry Maine proposed “to apply a code to a particular province, where its enactment would meet no opposition, and gradually extend its operation after the country had become familiarized with its contents”.<sup>163</sup> The process of codification of personal laws in India was not accomplished due to the fact that most of the personal laws were unwritten, thereby creating the need for them to be gathered from the existing religious communities.<sup>164</sup>



Few codes related to MPL were codified in India, which included the Muslim Personal Law (Shariat) Application Act of 1937 that made provision for the application of MPL to Muslims. Another code that was enacted was the Dissolution of Muslim Marriage Act of 1939 which consolidated and clarified the provisions of Muslim law relating to suits for dissolution of marriage by women married under Muslim law. The codification of Muslim law in India should be distinguished from the emergence of Anglo-Muhammadan law, in that the former was confined to codes enacted by the British colonial authorities in the form of laws, while the latter was a corpus of legal principles formulated by English judicial officers based on a hybrid of legal principles of *hanafi madhhab* and common law doctrines.

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<sup>163</sup> Ilbert, 1896, 226.

<sup>164</sup> Wilson, 1894, 129.

The British colonial policy to codify the Islamic law in the Busa‘idi Sultanate was not implemented fully. Most of the codified statutes focused on MPL and were confined to procedural matters. Provisions for the appointment and jurisdiction of *kadhis* were contained in various statutes, such as, the Zanzibar Courts Decree of 1908 and 1923, and the British Subordinate Courts Order of 1923. Among the codified statutes which incorporated MPL in Zanzibar was the Marriage and Divorce (Mohammedan) Registration Decree 10 of 1922.

In Kenya, the British codified a few statutes on MPL that included the Mohammedan Marriage and Divorce Registration, 1906, (Chapter 155 of the Laws of Kenya), the Mohammedan Marriage and Divorce and Succession Ordinance 1920, (Chapter 156 of the Laws of Kenya) and the Kadhis’ court Act 1967, (Chapter 11 of the Laws of Kenya).<sup>165</sup> Lack of codification of MPL gave *kadhi* courts the option to function without written codes, and they relied in their judgements on classical Islamic law texts.<sup>166</sup>

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<sup>165</sup> A comprehensive codification of MPL was undertaken on the Tanzania mainland after independence in the form of a Bill entitled “Restatement of Islamic Law (No.56 of 1964)”. The Bill incorporated opinions of the various *madhhabs* with a view to applying MPL according to the different *madhhabs* adopted by Muslim parties in a dispute. It contained four chapters: marriage, divorce, guardianship of children, and inheritance. However, the Bill has not been passed to date.

<sup>166</sup> Kamali defined the word ‘classical’ to refer to the early pioneers of Islamic jurisprudence (*mutaqaddimun*) who in each school of thought included the Imam of the school and his disciples. In Islamic legal history, the term *mutaqaddimun* has been used in contradistinction to the late-comers (*muta’akhirun*) who played a distinctive role in elaborating and consolidating the works of the leading Imams. Kamali, M. H. “Shari’ah as Understood by the Classical Jurists” (1998) 6 (1&2) *International Islamic University Law Journal* 41

The records of judgements delivered by the *kadhis* held in the Zanzibar Archives were based on the classical Islamic law texts written in Arabic. The *kadhis*' decisions which went on appeal to the British judges had to be translated to English. In addition to the translations, English judges quoted in their appeal judgments Muslim classical texts translated into English such, as *Minhaj al Talib*. by Imam al-Nawawi.

### 3.5.3.2 The policy of translating the classical Islamic legal texts in India

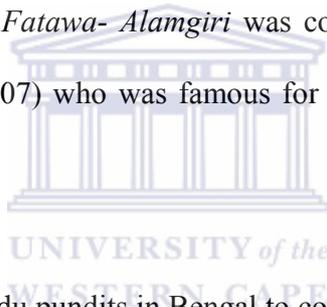
The relationship between British judges and Muslim judicial officers was not always cordial and in some cases it amounted to persistent distrust among them. In view of this prevailing contemptuous attitude, British officials adopted the strategy of translating religious texts into English in order to avoid reliance on Muslim religious authorities. The most comprehensive work on the translation of classical Islamic law texts in the British Empire was undertaken in the later part of the 18<sup>th</sup> century on the Indian sub-continent. The success of translating classical Islamic law texts led to the emergence of what later came to be referred to as Anglo-Muhammadan law.

In India, Warren Hastings (Governor of Bengal in 1772) believed that the religious textual traditions would serve to develop British administrative and legal institutions.<sup>167</sup> Hasting noted the ignorance of British judicial officers of Islamic laws, and therefore embarked on a project to translate classical Islamic law texts into English. He employed staff to translate

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<sup>167</sup> Cohn, B. S (1996) *Colonialism and its Forms of Knowledge: The British in India* Princeton: N.J: Princeton University Press 61.

texts from local languages, such as Persian, to English. This project led to the formation of the Anglo-Muhammadan law which was a hybrid of Muslim legal principles and English law that was practised by British colonial judges in India.<sup>168</sup> Anderson regarded the emergence of Anglo-Muhammadan law in India as one of the significant features of the rise of scripturalist Islam in the 19<sup>th</sup> century.<sup>169</sup> The classical Islamic law texts which were first translated from Arabic to Persian and then to English formed the basic references for Anglo-Muhammadan law in India. The first Persian work to be translated into English was the *Ain-i-Akhbari* on the mode of governance under the Mughal Emperor Akbar (r. 1546-1605).<sup>170</sup> Another *Hanafi* text which was an abbreviated version of the *Fatawa- Alamgiri*,<sup>171</sup> was translated into English. *Fatawa- Alamgiri* was compiled by the Mughal Emperor Aurangzeb ‘Alamgir (r.1685-1707) who was famous for his efforts to implement Islamic law in the Mughal Empire.<sup>172</sup>



Hastings also engaged local Hindu pundits in Bengal to compile from the Shastric literature a Hindu code of law that was translated for English judges. The compilation was later

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<sup>168</sup> Zaman, 2002, 20.

<sup>169</sup> Anderson, 1993, 80.

<sup>170</sup> Cohn, 1996, 61. Emperor Akbar ruled India from 1546 to 1605. Judge William Murison describes him as “an ardent religious reformer who attempted the establishment of an eclectic system that approached pretty nearly to pure atheism”. (1918) 1 Z.L.R. 661.

<sup>171</sup> *Fatawa-Alamgiri* was named after the Emperor’s title *Alamgir* in India meaning “Lord of the World”. *Fatawa-Alamgiri* was an annotated compilation of *fatwas* of the *Mujtahids* and their judicial opinions and was translated by Neil Baillie in 1865 and published under the title *A Digest of Muhammdan Law*. Ilbert, 1896, 224.

<sup>172</sup> Zaman, 2002, 20.

translated from Persian into English by N. Halhed and published in 1776 with the title *Ordinations of the Pundits*. Among the basic *Hanafi* texts translated into English was *al-Hidayah* a 12<sup>th</sup> century text written by Burhanuddin Al-Mirghinani which was translated into Persian by a group of employees of the East India Company and then into English by Charles Hamilton in 1791. *Al-Hidayah* lacked treatment of the Islamic law of inheritance that was regarded by the British as an important aspect of Mohammedan law. It followed, thus, that *al-Sirajiyah*, a 15<sup>th</sup> century treatise on Islamic law of inheritance' was translated from Arabic into Persian under the auspices of Warren Hastings and then into English by Sir William Jones in 1792 with the title *The Mahomdan (sic) Law of Inheritance*.<sup>173</sup>

When Sir Williams Jones Hastings (1746-1794) was appointed as a judge of the Crown Court in Calcutta in 1783 he supervised the compilation of materials in 1794 and begun translating them into English. By 1797 the English translation was completed by H.T. Colebrooke and published as *The Digest of Hindu Law on Contracts and Successions*.<sup>174</sup> Other translated texts included *The Mohummudan (sic) Law of Inheritance according to Aboo Huneefa (sic) and his followers, with appendix containing authorities from the original Arabic* by Neil E. Baillie.<sup>175</sup> In the same year, another translation was made,

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<sup>173</sup> Calcutta: The Sanskrit Press, 1861. Sir William Jones's admiration for the Islamic law of inheritance led him to conclude that "it bore no resemblance to any other [system of inheritance] that the world ever knew". Power, D. S. "Orientalism, Colonialism, and Legal History: The Attack on Muslim Family Endowments in Algeria and India" (1989) 31 *Comparative Studies in Society and History* 556.

<sup>174</sup> Cohn, 1996, 70.

<sup>175</sup> Calcutta: Baptist Mission Press, 1832.

entitled *A Treatise on inheritance, gift, will, sale and mortgage* by F.E. Elberling.<sup>176</sup> The classical Islamic law texts which were translated from Persian and Arabic into English were based on the *Hanafi madhhab* prevalent in India. These translations afforded little assistance to British judicial officers in Zanzibar courts due to the fact that Muslim litigants in the Zanzibar courts followed *shafi'i* and *ibadhi madhhabs*.

### 3.5.3.3 The policy of translating the classical Islamic law texts in the Busa'idi

#### Sultanate

Translations of classical Islamic law texts seemed to be the practice that was followed by British judicial officers throughout the British Empire. The policy of translating classical Islamic law texts was adopted by the British colonial authorities in the Busa'idi Sultanate, although not at the same level as in India. British magistrates and judges in the Busa'idi Sultanate adopted the same approach of using translated classical Islamic law texts taking into consideration different *madhhabs* prevalent in the region. For instance, in the East African coast the basic text relied on by the British judicial officers was the translation of *minhaj al-talibin* based on the *shafi'i madhhab*.<sup>177</sup> In addition to providing guidance to British judicial officers, the translations of the texts were meant to remove difficulties and obscurities found in Islamic law. The process of elimination of such difficulties was

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<sup>176</sup> Serampore: Serampore Press, 1832. For details on these texts see Power, 1989, 556.

<sup>177</sup> Howard, 1914, 513.

achieved through the decisions of the Indian High Courts and textbooks, such as those by Ameer Ali, Baillie and Macnaghten.<sup>178</sup>

Among the texts translated from Kiswahili into English were the books by the *kadhi* of Tanga Sh. Ali b. Hemed al-Buhri (d.1957), *Mirathi* that was translated by P.E. Mitchell<sup>179</sup> and *Nikahi* translated by J.W.T. Allen.<sup>180</sup> In other territories, the British colonial administration translated English statutes into Arabic. For instance, in Northern Nigeria the English criminal code was translated into Arabic for the *alkalis* in order to facilitate its implementation.

In implementing the policy of ascertaining Islamic laws, the British colonial administration embarked on a project of compiling judgements of the courts. The objective of compiling court decisions was to build up a body of legal precedents in accordance with the British common law practice of enforcing judicial precedents. For instance, in India the most effective contribution towards this objective was the work of W.H. Macnaghten in 1825, *Principles and precedents of Moohumudan (sic.) Law being a compilation of the primary rules relative to the doctrine of inheritance (including the tenets of the shia sectaries), contracts, and miscellaneous subjects, together with notes illustrative and explanatory and preliminary remarks.*<sup>181</sup> In Zanzibar, William Murison and Sidney Abrahams compiled

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<sup>178</sup> (1911) 1 Z.L.R.10.

<sup>179</sup> *Mirathi* (Swahili text with English translation by P.E. Mitchell) Nairobi, Government Printer, 1923 and reprinted in 1949.

<sup>180</sup> *Nikahi* Translated by J.W.T. Allen, Dar es Salaam, Government Printer, 1959.

<sup>181</sup> Calcutta: The Brahma Samaj Press, 1825.

collections of court decisions from 1868 to 1918 and published them as the *Zanzibar Protectorate Law Reports*.<sup>182</sup> Another attempt was made by R.W. Hamilton who compiled cases determined by the High Court of Mombasa, the Appeal Court of Zanzibar and the Judicial Committee of the Privy Council on appeal from 1897-1905 as the *East Africa Protectorate Law Reports*.

### **3.6 The British policies of excluding civil and criminal jurisdiction from the *kadhi* courts**

The third major strategy adopted by the British colonial administration in transforming the *kadhi* courts in the Busa'idi Sultanate was the policy of excluding civil and criminal jurisdiction from the *kadhi* courts. The policy was implemented gradually, and resulted in restricting the jurisdiction of the *kadhi* courts to MPL. The policy of exclusion was implemented through three processes: restriction of civil jurisdiction, criminal jurisdiction, and, the Islamic law of evidence. Before we look at the implementation of these policies, this section will first explore the policies adopted by the British colonial authorities in the British territories and then proceed to discuss British policies of excluding civil and criminal jurisdiction from the *kadhi* courts in the Busa'idi Sultanate. The British colonial administration adopted a policy of restricting the jurisdiction of the Muslim courts

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<sup>182</sup> Murison W and Abrahams, S.S *Zanzibar Protectorate Law Reports 1868-1918*, London, Waterlow & Sons, 1919.

throughout her colonies.<sup>183</sup> This section will first highlight the British policy of restricting the jurisdiction of the Muslim courts in British territories namely: India, Malaysia and Nigeria. Then the section will proceed to discuss the implementation of the policy of restricting the jurisdiction of the *kadhi* courts in the Busa'idi Sultanate.

In India, the British colonial authorities perceived the colonised communities as “bounded self-contained communities” and confined traditional personal rights of the communities to the two religions Hinduism and Islam.<sup>184</sup> When the British Crown took over control of India from the East India Company in 1858, the British policy was geared towards restricting Islamic law to personal status.<sup>185</sup> By 1864, the British in India had completely transformed Hindu law into a form of English case law by publishing authoritative decisions in English. Hindu and Muslim officers were abolished in the various courts of India.<sup>186</sup> When the British established their rule in Malaysia in the middle of the 19<sup>th</sup>

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<sup>183</sup> The restriction of the jurisdiction of Islamic law courts can be justified under Islamic law by resorting to the mechanisms of *takhsis al-qada* based on the ruler's authority to restrict the jurisdiction of his judges in terms of time, place and subject-matter. See Shaham, 1999, 450.

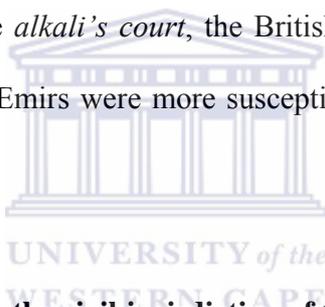
<sup>184</sup> Hastings mentioned that in matters of marriage and inheritance, “the laws of the Koran with respect to Mohammedans and those of the Shaster with respect to Hindus shall be invariably adhered to”. Metcalf, 2007, 17.

<sup>185</sup> By the end of the 19<sup>th</sup> century, the application of Islamic law in the Muslim world was largely restricted to matters of personal status. For instance, in Egypt, the jurisdiction of Islamic law was significantly reduced in favour of the civil courts and was limited to personal status. Legislation was based on European models and introduced to the Islamic law courts. See Shaham, 1999, 440.

<sup>186</sup> Cohn, 1996, 75.

century, the jurisdiction of Muslim courts was restricted to personal status and the courts were relegated to the bottom of the hierarchy of courts.<sup>187</sup>

After defeating the Emirs in Northern Nigeria at the turn of the 20<sup>th</sup> century, the British established two distinct judicial institutions to administer Islamic law: the Emir's judicial council and the *alkali's* court. The former was given jurisdiction over real property while the latter dealt with the law of personal status.<sup>188</sup> British policy was inclined towards bolstering the superiority of the Emir's judicial council over the *alkali's* court by conferring more powers upon the former and restricting the *alkali's* court to matters of personal status. By restricting the powers of the *alkali's court*, the British were assured complete control over them. To the British, the Emirs were more susceptible to political pressure than the *alkalis*.<sup>189</sup>



### 3.6.1 The policy of restricting the civil jurisdiction of the *kadhi* courts

The British allowed the application of Islamic law, although with limited jurisdiction, to prevail in the territories controlled by Muslim rulers, such as the Sultanate of Zanzibar. The British colonial authorities adopted a policy of restricting the *kadhi* courts within limited regions. For instance, although the British recognised *kadhi* courts in the Busa'idi

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<sup>187</sup> Ibrahim, 2000, 91.

<sup>188</sup> Christelow, A "Islamic law and Judicial Practice in Nigeria: An Historical Perspective" (2002) 22 (1) *Journal of Muslim Minority Affairs* 189.

<sup>189</sup> Umar, 2006, 190.

Sultanate, they confined them to Zanzibar and the Kenya coastal strip.<sup>190</sup> Another strategy employed by the British colonial authorities was to recognise customary courts with a view to curtailing the powers of *kadhi* courts. In territories under British rule, such as the interior of Kenya, the policy tended towards establishing customary courts that applied African customary laws.

It seemed impracticable for the British colonial administration to embark on full scale reform of the court system in the Busa'idi Sultanate. Therefore, the British policy preferred to retain the personal laws of their colonies without much interference due to the fact that the personal laws represented the culture and religious values of the colonised people. It was deliberate British policy not to interfere with personal laws which were considered not to deal with vital issues affecting the British colonial administration. British recognition of the various existing personal laws was intended to consolidate the authority of the communities and ensure political control over them.<sup>191</sup> British colonial officials were informed by local administrators about the significance of MPL so as to avoid any interference with the sentiments of the Muslim subjects. For instance, the *liwali* for the Coast of Kenya noted the importance of MPL in the life of Muslims by stating: "Personal status matters such as marriages, divorces and inheritance are essentially religious affairs

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<sup>190</sup> The British policy of confining *kadhi* courts to the Kenya coastal strip was similar to the French policy in Senegal where Muslim courts received formal recognition in specific areas. Christelow, 2000, 381.

<sup>191</sup> Anderson, 1993, 170.

and any interference as to applicability of the Sheria in such questions renders the parties concerned non-Muslim.”<sup>192</sup>

The restriction of civil jurisdiction in the *kadhi* courts was effected by the British colonial administration in a gradual manner. Before the establishment of the British Protectorate in the Busa‘idi Sultanate in 1890, *kadhīs* enjoyed wide powers in the Sultan’s courts. As stated above, towards the end of the 19<sup>th</sup> century, British colonial officials embarked on a policy of extending their dominance in the judicial system. The policy led to the curtailment of the *kadhīs*’ powers and restriction of their jurisdiction. The restriction of the *kadhīs*’ jurisdiction was first achieved by the East Africa Order-in-Council of 1897 that confined *kadhi* jurisdiction to matters of personal status, such as marriage, divorce and inheritance.<sup>193</sup> Similarly, the Zanzibar Courts Decree of 1923 restricted *kadhi* jurisdiction to matters relating to personal status although it conferred powers on *kadhīs* to preside over petty civil cases. Section 13 (5) of the Decree stated:

“the jurisdiction of the Kathi’s Courts shall be limited to-

- (a) matters relating to personal status, marriage, divorce, guardianship and (subject to the provisions of any other law for the time being in force) the custody of children in cases which the parties are Muslims of the Ibathi sect or the Shafei sect;
- (b) matters relating to wakfs, religious or charitable trusts, gifts *inter vivos* and inheritance where the claim in respect of any such matter does not exceed three thousand shillings and the parties are Muslims of the Ibathi sect or the Shafei sect;

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<sup>192</sup> KNA/AG/52/47, civil Muslim cases, letter from the Provincial Commissioner, Mombasa, to the Member for Law and Order, dated 6 August 1949.

<sup>193</sup> Section 55 of East Africa Order-in-Council of 1897.

- (c) claims for maintenance (where such claim is for a lump sum not exceeding one thousand shillings or for a periodical payment to be made at a rate not exceeding one hundred shillings per month) and the parties are Muslims of the Ibathi sect or the Shafei sect; and
- (d) suits and proceedings of a civil nature in which the subject matter can be estimated at a money value and does not exceed one thousand shillings.”

After the major re-organisation of the Zanzibar courts in 1923 and integration of the *kadhi* courts into the colonial court system, the British colonial administration adopted a policy of restricting the jurisdiction of the *kadhi* courts in the Busa’idi Sultanate to matters of MPL, while giving wide powers to the administrative officials, such as *liwalis* and *mudirs*. The Chief Justice of Zanzibar supported giving powers to *liwali* and *mudir* courts on to deal with matters of MPL. Although he noted that public opinion may be opposed upon the encroachment of the “spiritual jurisdiction of *kadhis*”, he felt that the public should be “educated to the view that as in England the temporal magistrate was just as capable as the spiritual magistrate in dealing with these matters”.<sup>194</sup>

In the Kenya coastal strip, the British colonial authorities utilised the indirect policy by using the office of the chief *kadhis* to issue directives restricting the jurisdiction of *kadhis*. Sh. Mohammed b. Omar Bakor (d. 1923), the chief *kadhi* of Kenya, noted that *kadhis* dealt with civil cases that were beyond their jurisdiction, which resulted in their judgements being reversed by the appellate courts. To avoid this problem, Sheikh Bakor issued a circular to all *kadhis* stating: “It is desired from all Kadhis to confine their jurisdiction to

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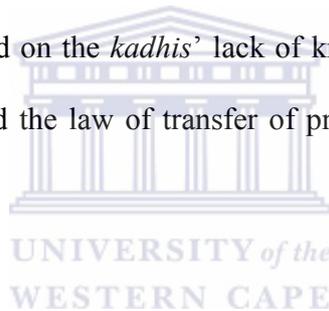
<sup>194</sup> ZA/AB62/42 (A), Memorandum on Draft Proclamation (District Courts Proclamation, 1944) by the Chief Justice dated 17 February 1944.

the litigations where the questions of Shariah only is involved and which they have jurisdiction, these are marriage, divorce and inheritance.”<sup>195</sup>

By 20<sup>th</sup> century, the British colonial authorities in Zanzibar noted that *kadhis* retained wide jurisdiction in civil matters. Sir John Gray noted that:

“Kadhis are out of their depth in dealing with such matters as the law merchant and local systems of land tenure” and suggested that “the ultimate aim should be to restrict Kadhis’ courts to matters such as were formerly dealt with by ecclesiastical courts in England, e.g. succession, marriage, divorce”.<sup>196</sup>

The objection of British colonial officials in the Zanzibar courts to the exercise of civil jurisdiction by *kadhis* was based on the *kadhis*’ lack of knowledge of English statute law, such as the law of contract, and the law of transfer of property, that they were unable to study and apply.<sup>197</sup>



The policy to restrict the *kadhi*’s jurisdiction to MPL continued to be applied in the Busa’idi Sultanate until the post-independence period. For instance, after the Zanzibar revolution of 1964 the same colonial policy of restricting the *kadhi*’s jurisdiction to MPL

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<sup>195</sup> KNA/AP/1/1205, *mudirs, kadhis and liwalis*, circular to the *kadhis*, by the chief *kadhi* Mohammed b. Omar Bakor dated 25 June 1925.

<sup>196</sup> Gray, J. “Review” of J.N.D. Anderson’s *Islamic Law in Africa* (1955) 2 (1) *Journal of African Administration* 36.

<sup>197</sup> ZA/AB62/42 Report by the Chief Justice dated 9 January 1942.

was retained.<sup>198</sup> Similarly, the *kadhi's* jurisdiction in the Kenya coastal strip was limited to matters of personal status. Section 5 of the Kadhis' Courts Act provided:<sup>199</sup>

“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 of any subordinate court in any proceeding which comes before it.”

In addition to the appellate powers given to British judicial officers to supervise *kadhi* courts, the British colonial authorities enacted laws that conferred judicial powers to encroach on the *kadhi's* jurisdiction. In Kenya, the Mohammedan Marriage, Divorce and Succession Ordinance conferred powers on the Supreme Court to preside over cases where Muslim parties opted to bring their disputes to the superior courts.<sup>200</sup> Section 3 (2) of the Mohammedan Marriage, Divorce and Succession provided:

“the Supreme Court and every judge thereof shall, subject to the provision 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.”

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<sup>198</sup> Courts Decree of 1966 reinstated the jurisdiction of *kadhis* according to section 13 (5) of the Zanzibar Courts Decree of 1923 with additional pecuniary jurisdictions.

<sup>199</sup> Chapter 11, Laws of Kenya. The Kadhis' Court Act commenced on 1 August 1967.

<sup>200</sup> Chapter 156, Laws of Kenya. The Mohammedan Marriage, Divorce and Succession Ordinance commenced on 29th December 1920.

### 3.6.2 The policy of excluding the criminal jurisdiction from the *kadhi* courts

Throughout the British Empire, criminal jurisdiction was regarded as the domain of the colonial powers. Neither customary law nor Islamic law were given the authority to govern criminal matters due to the fact that “criminal justice was under the rules of the colonial order itself”.<sup>201</sup> Criminal jurisdiction was closely related to the control of the social order of the colonised people. For this reason, British colonial policy was directed towards excluding criminal jurisdiction from the *kadhi* courts. British colonial policy distinguished between civil and criminal jurisdictions within the colonial territories. This was based on the understanding that “dealing with crime was about social control and the exertion of power whereas civil laws deal with relationships between individuals.”<sup>202</sup>

Islamic criminal law attracted the attention of British colonial officials before their arrival in Zanzibar. When the East India Company was established in India, Warren Hastings laid down a plan for the administration of justice in the interior of Bengal in 1772. The plan required the courts of India to administer criminal justice according to Islamic law. In implementing such plan, officials of the East India Company found that parts of the Islamic

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<sup>201</sup> Mazrui, A, A “Post - Colonial Society and Africa’s Triple Heritage of Law: Indigenous, Islamic and Western Tendencies” in MacCormick, Neil and Bankowski, Zenon (eds.) (1989) *Enlightenment, Rights and Revolution: Essays in Legal and Social Philosophy* Aberdeen: Aberdeen University Press 253.

<sup>202</sup> Mamdani, 1996, 15.

criminal law could not be applied.<sup>203</sup> These areas of Islamic criminal law included the law of retaliation for murderer, stoning for adultery, mutilation for theft, and incapacity of unbelievers to give evidence in cases affecting Muslims.<sup>204</sup>

Although the administration of criminal justice under the East India Company was guided by Islamic criminal law, the British colonial administration in India adopted a gradual policy of abolishing the criminal jurisdiction of the Muslim courts. In 1790 the criminal jurisdiction was removed from the Muslim courts and brought under the direct control of the East India Company. In 1791, mutilation punishment was substituted with imprisonment with hard labour, and in 1792 prosecutions for murder ceased to depend on the concurrence of the murdered man's relatives. British colonial officials in India regarded some sections of Islamic criminal law as uncivilised; and from 1821 such sections were removed by regulations.<sup>205</sup> Henceforth, the British adopted a policy of repealing and amending Islamic criminal law by enactments based on English legal principles. In 1860 Islamic criminal law was abolished by the enactment of the Indian Penal Code. In 1861 the Code of Criminal Procedure was promulgated and the process of substituting Islamic

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<sup>203</sup> A similar approach was adopted in the Northern Nigeria Emirates where *hadd* (prescribed) punishments could not be accommodated by the British. No sentence of amputation of hands for theft and stoning for *zina* (adultery) was carried out and instead a fine or imprisonment was imposed. Ubah, 1982, 71.

<sup>204</sup> Ilbert, 1896, 231.

<sup>205</sup> A similar perception was adopted by some British judges in East Africa who regarded Islamic criminal law to be too draconian for modern use. In the case of *Rex Bidoda v. bt. Abdalla* Judge Maxwell noted: "Like the Mosaic Law of Leviticus much of Sheria has for various reasons, fallen into disuse. The Indian Penal Code has in fact superseded Sheria as the basis of the criminal law of this country [Kenya]". Law Reports of East Africa, 1922-23 (9) 16.

criminal law and procedure with English law principles was completed by the enactment of the Evidence Act in 1872. In order to eliminate the harsh features of Islamic criminal law, the British colonial administration in India instructed the courts to substitute imprisonment for punishments of amputation and stoning so as to bring Islamic criminal law in line with the British notion of criminal justice.<sup>206</sup>

A similar policy was adopted by the British in Northern Nigeria in cases. Where *alkalis* sentenced a defendant to amputation or death by stoning, the British judges substituted imprisonment for the punishment. Despite the fact that *alkalis* could convict a person under Islamic criminal law, they had no power to impose a sentence which amounted to inhuman treatment.<sup>207</sup> By implementing the policy of non-interference, the British allowed the Emirs of Northern Nigeria to retain criminal jurisdiction.<sup>208</sup> Islamic criminal law in Northern Nigeria was abolished by the introduction of the Penal Code in 1959.<sup>209</sup>

British policy on the exclusion of criminal jurisdiction from the *kadhi* courts in the Busa‘idi Sultanate was influenced by the earlier colonial experiences in India and Nigeria, as described above. After the establishment of the British Protectorate in Zanzibar, the British adopted a gradual policy of excluding criminal jurisdiction from the *kadhi* courts. *Kadhi*

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<sup>206</sup> Masud, 2006, 37.

<sup>207</sup> Yadudu, 1991, 114.

<sup>208</sup> Anderson, J.N.D. “The Future of Islamic Law in British Commonwealth Territories in Africa” (1962) 27 *Law and Contemporary Problems* 627.

<sup>209</sup> Yadudu, A.H. “Impact of Colonialism on Islamic Law and Its Administration in Northern Nigeria” (1993) 13 (2) *Islamic and Comparative Review* 147.

courts in the Busa‘idi Sultanate exercised criminal jurisdiction in which *kadhis* had all the ordinary powers of a third-class Magistrate under the Code of Criminal Procedure until 1908. The Zanzibar Courts Decree 1908 conferred criminal jurisdiction on *kadhis* who had “all the ordinary powers of a third-class Magistrate and may try any offence for which the maximum punishment is imprisonment for one year or less, and may pass a sentence of imprisonment for a term not exceeding one month, or impose a fine not exceeding 50 rupees”.<sup>210</sup> The policy of excluding criminal jurisdiction from the *kadhi* courts was gradually implemented due to the fact that British colonial officials were in control over administrative as well as judicial structures.<sup>211</sup> Although the Sultan was regarded as the sovereign ruler, in a practical sense his powers were ceremonial, particularly in the judicial sphere that was under the control of British officials.

By 1916 criminal cases in the Busa‘idi Sultanate were determined according to the Indian Penal Code. In the case of *Abdulla b. Masood v. Rashid B. Masood*, the appellant and the respondent’s wife were found in a hut in the middle of the night.<sup>212</sup> The Magistrate inferred from the circumstances of the case, which included the time of night and the position in which the woman was found, that sexual intercourse had taken place. Based on

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<sup>210</sup> Section 16 of the Zanzibar Courts Decree 1908.

<sup>211</sup> The policy of excluding criminal jurisdiction continued to be applied in the post-independence period across the Muslim world. For instance, criminal cases in Egypt in the 19th century used to be tried by *kadhis*, but then the jurisdiction of criminal cases was later conferred to the secular courts and other authorities such as the regional councils. Peters, R. “Islamic and Secular Criminal Law in Nineteenth Century Egypt: The Role and Function of the Qadi”, (1997) 4 *Islamic Law and Society* 78.

<sup>212</sup> (1916) 1 Z.L.R. 519.

these facts, the Magistrate found the appellant guilty and sentenced him to one year of imprisonment and a fine, according to Section 47 of the Indian Penal Code. The appellant lodged an appeal against the lower court's judgement. The appeal was heard by Acting Chief Justice Tomlinson and *kadhis* Ahmad b. Sumayt and Ali b. Mohammed. Tomlinson upheld the decision of the Magistrate that sexual intercourse had taken place and based his judgment entirely on Indian authorities.<sup>213</sup> In dismissing the appeal, Tomlinson remarked: "looking at all the circumstances of the case, I am not prepared to say that the Magistrate was not justified in coming to the conclusion that sexual intercourse had taken place."<sup>214</sup>

In the case of *Rex v. Fundi Athman and Another*, the two accused, a Muslim man and woman, cohabited for some years.<sup>215</sup> They later intended to go through a Muslim marriage ceremony. Before the ceremony, they were arrested by order of the *liwali* of Lamu and were convicted of the offence of fornication by the *liwali* in accordance with Islamic criminal law. On appeal, R.W. Hamilton reversed the judgment of the *liwali*. Hamilton noted:

"whilst admitting the good intentions of the Liwali to improve the morals of the people of Lamu, and affirming that fornication is forbidden by the Sheriah, there is but one Penal Code enforced by the Government throughout East Africa. The Code does not make it an offence for a native man to go with a native woman unless he knows that the woman is married and that her husband is alive. In such cases the adulterer may be punished on the complaint of the husband."<sup>216</sup>

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<sup>213</sup> *Emp. V. Dhunno Kazi*, (1882) 8 Cal., 121, *Ram Ranjan v. Emp.*, (1915) 42 Cal., 422. (1916) 1 Z.L.R. 521.

<sup>214</sup> (1916) 1 Z.L.R. 522.

<sup>215</sup> (1919) 8 E.A.L.R.2.

<sup>216</sup> *Ibid.* 5.

From the declaration of British protection over Zanzibar, the British had gained control over the court system, which gave them the power to exclude criminal jurisdiction from the *kadhi* courts.<sup>217</sup> As noted above, the process of excluding criminal jurisdiction from the *kadhi* courts was initiated by the enactment of the Zanzibar Courts Decree of 1908. By 1916 criminal cases in Zanzibar were determined according to the Indian Penal Code based on English law principles. In his memorandum on reviewing the courts system of Zanzibar, Judge Tomlinson in 1922 criticised previous Orders-in-Council that gave criminal jurisdiction to *kadhis* and noted that “the Kadhis are unfitted both by education and outlook for dealing with criminal cases and their duties should be confined to their proper function of hearing civil cases between natives and advising on questions of Mohammedan law”.<sup>218</sup>

Although the policy to exclude the *kadhi* courts from exercising criminal jurisdiction was adopted, the attitudes of British colonial officials in the Busa'idi Sultanate were not uniform as to its implementation. In the Kenya coastal strip, the Chief Native Commissioner on Coastal Administration noted that “although the Criminal Procedure Ordinance 1913 gives criminal jurisdiction to Kadhis such is really foreign to their proper

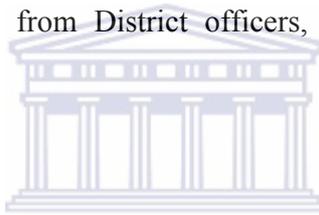
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<sup>217</sup> This is contrary to the situation in Northern Nigeria during the reign of the Sultans of Sokoto where the authority of the Sultans and their judicial role were closely identified with the application of Islamic criminal law. Criminal cases and property disputes were in the hands of the Sultans, and Emirs and the British intervened little in matters subject to Islamic law. British intervention in Islamic criminal law was apparent in 1947 when the Court of Appeal reversed the judgment of an Emir in a murder case. Christelow, 1985, 273.

<sup>218</sup> ZA/A62/11 Memorandum on the proposed Zanzibar Courts Decree (1923) by Judge Tomlinson dated 26 October 1922, 4.

functions and it would be better if Kadhis did no criminal work”.<sup>219</sup> In a response to this report, the Chief Justice of Kenya confirmed that *kadhis* had had criminal jurisdiction since 1907 and stated that “to the best of my information and belief a Kadhi is both a criminal and a civil judge”.<sup>220</sup>

Some British administrative officers objected to the exclusion of criminal jurisdiction from the *kadhi* courts. In Kenya, the Provincial Commissioner of the Coast Province opposed removing criminal jurisdiction from *kadhis* and instead preferred to “improve their knowledge and quality so that they could take over some at least criminal work from Liwalis and Mudirs, and even from District officers, freeing them for administrative work”.<sup>221</sup>



In addition to the exclusion of criminal jurisdiction from the *kadhi* courts, British colonial officials embarked on a policy to remove criminal offences based on Islamic law that were applicable in Zanzibar. Before implementing the policy, the Chief Secretary in Zanzibar consulted the Arab Association and stated:

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<sup>219</sup> KNA/PC/Coast/1/20/96, *kadhis, mudirs, liwalis* etc., extract from the Report by the Chief Native Commissioner on coastal administration.

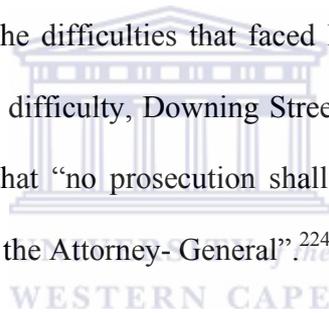
<sup>220</sup> KNA/PC/Coast/1/20/96, *kadhis, mudirs, liwalis* etc., letter from the Chief Native Commissioner dated 29 November 1922.

<sup>221</sup> KNA/CA/9/6, *courts, liwalis, mudirs* and *kadhis*, letter from D.W. Hall, the Provincial Commissioner, Coast Province, to R.E. Wainwright, the Chief Commissioner, Nairobi, dated 3 January 1962.

“Sir I am directed to inform you that attention has been drawn to the fact that, although adultery is not a criminal offence by the law of most European countries, is and has been for many years a criminal offence by the law of Zanzibar and India. His Excellency would therefore be obliged if your Association would express its opinion as to the desirability or otherwise of the retention of this wrongful act as an offence under the criminal law.”<sup>222</sup>

In a response, the Secretary of the Arab Association noted that his Association “could not see the proper reason of its withdrawal and regrets that the law is not rigidly observed”.<sup>223</sup>

Based on these consultations, the British colonial administration preferred not to alter the law related to adultery in the Penal Decree. However, the main concern of the British administration in London was the difficulties that faced British subjects convicted of the adultery offence. To avoid this difficulty, Downing Street proposed an amendment to the Penal Decree which provided that “no prosecution shall be instituted under section 154 except by or with the consent of the Attorney- General”.<sup>224</sup>



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<sup>222</sup> ZNA/A62/47, letter from the Acting Chief Secretary to the Government, J.P. Jones, to the Secretary of the Arab Association, Zanzibar, dated 25 May 1935.

<sup>223</sup> ZNA/A62/47, reply from the Secretary of the Arab Association, to the Acting Chief Secretary to the Government, J.P. Jones, Zanzibar, dated 7 June 1935.

<sup>224</sup> ZNA/A62/47, letter from the Officer Administering the Government, Downing Street, to the British Resident, Zanzibar, dated 28 November 1935.

### 3.6.3 The policy of excluding the Islamic law of evidence from the *kadhis* courts<sup>225</sup>

In addition to the restriction of *kadhis*' jurisdiction to MPL, the British colonial authorities established a policy of excluding the rules of Islamic law of evidence from being applied in the *kadhi* courts. With the existence of the parallel system of courts in the Busa'idi Sultanate, the rules of the Islamic law of evidence and procedure were applied in the *kadhi* courts, while English rules of evidence and procedure were applied in the British courts. In the Busa'idi Sultanate, the British colonial administration gradually changed the rules governing oral testimony, and by 1917 the rules of the Islamic law of evidence were excluded from application in the Zanzibar courts.<sup>226</sup>

The application of the English rules of evidence and procedures in the Zanzibar courts resulted in cases of conflict between the English and Islamic laws in areas such as the administration of oaths and admissibility of witnesses.<sup>227</sup> British judges were concerned

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<sup>225</sup> For details on rules of Islamic evidence see Mahmassani, S (1961) *Falsafat al-Tashri fi al-Islam: the Philosophy of Jurisprudence in Islam*, Translated by Farhat J. Ziadeh, Leiden: E.J. Brill 168-200, Howard, 1914, 515-525 and Qadri, 1997, 287-292.

<sup>226</sup> Section 1 of the Evidence Decree No.1 of 1917 stated that "English Evidence Act shall apply to all courts in Zanzibar" and section 2 provided that "The Mohammedan law of evidence shall not apply in any court in Zanzibar"

<sup>227</sup> The administration of an oath in Islamic law is based on the saying of Prophet Muhammad that the "burden of proof is on the accuser (plaintiff) and the oath is on him who denies (defendant)". In cases where the plaintiff is unable to produce any proof, the defendant would be required to take an oath. If the defendant takes the oath, then a judgment will be given in his favour. Otherwise, if he refuses, the burden of proof will

with the administration of an oath, particularly with regard to their fellow countrymen. Judge Thacker noted that in cases where the plaintiff was a European who preferred to take his case to a Muslim court, then “it would be difficult to apply one of the peculiar and inherent principles of Mohammedan procedure i.e. the administration of *yamin*, if one of the parties were a European”.<sup>228</sup>

By 1932, British judges were reluctant to accept the system of administering oaths practiced by *kadhis* in Zanzibar. In the case of *Mohamed b. Rabie El-Sawafi v. Fatma b. ti Mohamed El-Karuia*, the *kadhi* ordered the defendant to take an oath to prove that the plaintiff did not have any inheritance right.<sup>229</sup> The *kadhi* pointed out that the defendant was bound to take an oath so that the suit could be settled in her favour; to take the oath would result in a judgment being entered against her. Due to the fact that the defendant refused to take an oath, a judgment was entered in favour of the plaintiff. The defendant being dissatisfied, she appealed. On an appeal, Judge Eric T. Johnson held that the *kadhi* court “has no power whatever to order a party to take an oath” and allowed the appeal on the ground that the *kadhi* improperly tendered an oath to the defendant and gave her no opportunity to be heard.<sup>230</sup>

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shift to the plaintiff and a judgment will be given in his favour on the basis of his oath. Anwarullah (1992)

*The Islamic Law of Evidence* Lahore: Research Cell, 101.

<sup>228</sup> *Baraka bt. Bahmishi v. Salim b. Abed Busawadi*, (1942) 20 K.L.R. 34.

<sup>229</sup> ZA/HC10/47, Zanzibar Court Civil Case no.60 of 1932 (unreported).

<sup>230</sup> High Court Civil Appeal no. 7 of 1932.

In the case of *Raschid b. Sa'id El-Hinawi v. Abdullah b. Ali El-Hinawi*, the defendant absented himself, and the *kadhi* ordered the plaintiff to take *yamin al-istidhhar* based on the fact that such an oath was obligatory in Islamic law.<sup>231</sup> *Minhaj al-Talibin* provides a rule which states that “the plaintiff after proving his case is obliged to swear that his claim still exists and has not been satisfied”.<sup>232</sup> The British judge objected and noted:

“I must admit that I find it difficult to support the demand for this oath to be taken. By section 7 of the Oaths Decree, 1917, the taking of any oath of this nature must be voluntary and by section 2 of the Evidence Decree of 1917 the Mohammedan law of evidence shall not apply in any court in Zanzibar.”<sup>233</sup>

Reliance on an oath was not only confined to *kadhi* courts. In the case of *Crown v. Halima bt. Sheikh Mohamed (accused)*, the *mudir* of Faza (an island in the Lamu area) ordered the accused to take an oath that she has not assaulted the complainant. Based on the refusal of the accused to take an oath, the *mudir* convicted her of assaulting the complainant.<sup>234</sup>

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The Islamic law of evidence privileges oral testimony over written documents. The significance of an oath in Islam is based on reminding the person who takes it to his or her commitment to the Islamic faith which demands integrity.<sup>235</sup> Islamic courts place special emphasis on the honesty of witnesses, and the evidence in court was based on the oral

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<sup>231</sup> (1934) 4 Z.L.R. 85.

<sup>232</sup> Howard, 1914, 508.

<sup>233</sup> ZA/HC10/47 Civil Appeal No.16 of 1934 also reported in (1934) 4 Z.L.R. 86. A similar view was adopted earlier in the case of *Aley b. Saleh Abdisalam v. Mohamed b. Saleh Abdisalam* ( 1929) 4 Z.L.R. 63.

<sup>234</sup> KNA/A/P1/1206 Mudir Court at Faza, Criminal Case no. 81 of 1941 (unreported).

<sup>235</sup> Mahmasani, 1961, 194.

testimony of reliable witnesses.<sup>236</sup> In cases related to marital disputes, *kadhis* relied on oral testimony in the form of an oath to prove the disputed facts.<sup>237</sup> In a Brava court (1893), where a wife instituted a divorce against her husband, the *kadhi* ordered the husband to take a scared oath on the *minbar*, to the effect that he had not divorced his wife.<sup>238</sup> In the case of *Mgeni b.ti Salim b. Abdulla El-Marhubia v. Sayf b. Mohammed b. Abdulla El-Marhubi*, the wife appealed against the judgment of the *kadhi* who refused her application for divorce. The wife sued for divorce on two grounds: that her husband did not maintain her, and that he had intercourse with her during her menstruation. The husband denied the allegations, and the *kadhis* ordered the husband to take an oath of denial, after which judgment was given in his favour.<sup>239</sup>

The significance of oral testimony in the Islamic litigation process lies in the presumption that written documents can be faulty or falsified and that therefore, witness testimony was needed to validate the documents.<sup>240</sup> The preference for oral testimony, in the form of oaths, over written documents demonstrates the authority of the spoken word over the written document in the courts. The admissibility of written documents in the *kadhi* courts

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<sup>236</sup> Anderson, 1993, 179.

<sup>237</sup> *Kadhis* also presided over cases that involved non-Muslim parties in which the parties took Christian oaths. For instance, in the case of *John Kihana Mnyassa v. Stella bt. Petro* (ZNA/HC10/3655 Civil Case No.147 of 1959, unreported), the parties took Christian oaths before the *kadhi* Mohammed Salim Ruweihy.

<sup>238</sup> Vianello, 2006, 79. For more examples of cases in Brava's *kadhi* courts, see the chapter on "The Civil Register of the Qadi's Court of Brava (1893-1900), in Vianello, 2006.

<sup>239</sup> ZA/HC8/86 Civil Case No.259 of 1913 (unreported).

<sup>240</sup> Zubaida, 2003, 44.

needed to be corroborated by witnesses who had written them.<sup>241</sup> Hence, documents not supported by witnesses were not regarded as evidence in the Muslim courts.<sup>242</sup> Similarly, medical reports submitted by the prosecution in Islamic courts needed to be supported by the oral testimony of witnesses. Due to the emphasis placed by Islamic law upon oral testimony, it was easier for litigants to dispute evidence in an Islamic law court than in a British court.<sup>243</sup> While in English law circumstantial evidence in homicide cases leads to a conviction for manslaughter, according to Islamic law acquittal could be decided upon an oath of innocence.

The British colonial authorities were concerned with the admissibility of non-Muslims' testimony in the courts. According to a majority opinion of the leading *madhhabs*, the evidence of a non-Muslim is not admissible.<sup>244</sup> In cases where a Muslim killed a non-believer, the death penalty could rarely be imposed due to the fact that the blood of a Muslim was regarded as being of superior value.<sup>245</sup> In Northern Nigeria, the British established a policy of equal treatment in homicide cases that involved Muslims and non-Muslims. Muslim judges were instructed to suspend the application of Islamic law and the rules of evidence that discriminated against non-Muslims. In cases of inheritance involving

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<sup>241</sup> Anderson, 1993, 179.

<sup>242</sup> Muslim jurists did not attach great significance to written evidence, and there were controversies among them regarding the acceptance of written documents. See Mahmasani, 1961, 196.

<sup>243</sup> Umar, 2006, 47.

<sup>244</sup> Anwarullah, 23. Contemporary opinion of some Muslim scholars is that evidence of non-Muslims is admissible in matters others than *Hudud* (prescribed punishments in the Quran). See Anwarullah, 24.

<sup>245</sup> Anderson, 1962, 627.

non-Muslims entitled to inherit from a deceased Muslim relative, *alkalis* in Northern Nigeria were instructed by British political officers not to distinguish between persons of different faiths.<sup>246</sup>

Due to the fact that the *kadhi* courts did not have jurisdiction in criminal matters in the Zanzibar Protectorate, case law does not reveal instances of testimony of non-Muslims against Muslims in criminal cases. However, in civil cases *kadhis* presided over matters that involved testimony between non-Muslims parties. A remarkable feature of these civil cases is that *kadhi* courts adjudicated between non-Muslim parties who took oaths according to their Christian faiths.<sup>247</sup>

Although *kadhis* were bound to follow the English rules of evidence and procedure, they were ignorant of their requirements and unwilling to apply them. Justice Thacker elaborated on the predicament of *kadhis* in implementing English rules of evidence by stating: “It is quite clear that the present Muslim subordinate Courts neither understand nor are capable of learning the civil procedure and rules of the Evidence Act, which present difficulties even to Judges and advocates learned in the law.”<sup>248</sup>

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<sup>246</sup> Umar, 2006, 49.

<sup>247</sup> See ZNA/HCI0/1194, Civil Case No.142 of 1943 *Margaret b.ti Dandaro v. Suzeni b.ti Jumbe*, (unreported), ZNA/HCI0/2167, Civil Case No.260 of 1947 *Lucy Viktor v. Francis Mnyamwezi*,(unreported), ZNA/HCI0/3655 Civil Case No.147 of 1959 *John Kihanana v. Stera b.ti Petro*,(unreported).

<sup>248</sup> KNA/API/1206, letter from Judge Thacker, the Supreme Court of Kenya, Mombasa, to the Registrar, the Supreme Court, Nairobi, dated 17 March 1943.

British judges sitting in appeal cases from the *kadhi* courts noted that *kadhis* did not adhere to the English rules of evidence. In the case of *Ali b. Mwaraku v. Mkubwa bt. Nasibu*, Chief Justice Murison noted non-compliance by the *kadhis* with the common law rules of evidence. He found that the *kadhi* did not examine the evidence or the credibility of the witnesses and did not give substantial reasons for disbelieving the witnesses.<sup>249</sup> In another case, *Juma b. Sayf v. Sa'id b. Sayf*, Acting Chief Justice Doorly found that the *kadhi* handed down a judgement in relation to a marriage which he himself had solemnised, and based his judgment largely on facts which were not in evidence but which had come to his notice as a witness of those facts.<sup>250</sup>

The *kadhis'* non-compliance with the English rules of evidence was coupled with conflicting judgments of British judges. In the case of *Baraka bt. Bahmishi v. Salim b. Abed Busawadi*,<sup>251</sup> the appellant (original plaintiff) appealed against the *kadhi's* judgment in dismissing the case on the ground that the plaintiff had no evidence to prove that the defendant took a chain from him wrongfully and that he did not make an application for an oath to be taken by the defendant. The Appellant argued that it was the duty of the *kadhi* to administer an oath to the defendant, and submitted that the Islamic law of procedure and evidence should be applicable in order to force upon the *kadhi* to administer an oath to the defendant. Judge Thacker dismissed the appeal and held that *kadhi* courts were bound by the Indian Civil Procedure Ordinance and Evidence Act and not by the Islamic law of procedure and evidence. He cited section 12 of the Courts Ordinance 1931 that stated:

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<sup>249</sup> (1917) 1 Z.L.R. 582.

<sup>250</sup> (1942) 6 Z.L.R. 62.

<sup>251</sup> (1942) 20 K.L.R. 34.

“subject to the provisions of this Ordinance and rules of Court, all courts shall follow the principles of procedure laid down in the Civil Procedure Ordinance 1924 and in Criminal Procedure Code, so as the same may be applicable and suitable”.

He concluded by remarking that “Section 12 of the Courts Ordinance 1931 make it clear that the Civil Procedure Code applies to all courts including all Muslim subordinate courts. This is an Ordinance of sovereign authority”. Judge Thacker followed the judgment of Judge Lucie-Smith in the case of *Sa'id b. Sayf v. Shariff Mohamed Shatry* in which he held that Mohamedan law did not apply where there was an applicable Indian Act that suited the case.<sup>252</sup>

Similarly, in the case of *Masood b. Sa'id, Executor of Salim b. Mohamed Ghulum (Deceased) and Hafsa bt. Sa'id v. Sa'id b. Salim b. Mohamed Ghulum*, the respondent instituted proceedings in a *kadhi* court claiming a declaration that he was the son of his deceased father and therefore entitled to a share of the inheritance.<sup>253</sup> The *kadhi* dismissed the case on the ground that the first witness was the respondent's mother whose evidence is not admissible under the rules of the Islamic law of evidence. The issue on appeal was whether the *kadhi* was right to apply the rules of the Islamic law of evidence to the exclusion of the Indian Evidence Act. Chief Justice Nihill remarked:

“I am well aware that the conclusion this Court has reached may have serious and possibly embarrassing repercussions on the administration of justice in Muslim courts in the coastal district of Kenya, but that is a matter which if it is thought expedient must be set right by the Legislature. The duty of this Court is to declare the law as it is, not as to what it might more conveniently be.”

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<sup>252</sup> 1940, 19, K.L.R. 9.

<sup>253</sup> (1954) 21 E.A.CA.1.

Chief Justice Nihill stated: “I find no difficulty whatever in holding that the rules of evidence governing the Kadhi’s court were no longer the Mohammedan rules of evidence but those contained in the Evidence Act”.<sup>254</sup>

Contrary to these judgments, in the case of *Khamis b. Ahmed v. Ahmed b. Ali b. Abdulrehman and eight others*,<sup>255</sup> Chief Justice Law followed the decision of the Court of Appeal of East Africa that with regard to a question of marriage between Muslims heard in a *kadhi* court, the Islamic rules of evidence applied.<sup>256</sup> Similarly, in the case of *Hussein b. M’Nasar v. Abdulla b. Ahmed*, Justice Lane in the Supreme Court held that in a Muslim subordinate court, the Mohamedan law of evidence and procedure applied where the parties were Arabs or Mohamedan natives.<sup>257</sup> The Supreme Court based its judgment on the fact that the applicable law for Muslims in the Zanzibar Protectorate was Mohamedan law and that for many years *kadhi* courts administered only Islamic law in the exercise of their jurisdiction.

This state of colonial tension on whether the rules of the Islamic law of evidence were applicable in *kadhi* courts during the colonial period had an impact on the post-independence countries along the East African coast. Although section 6 of the Kadhis' Courts Act in Kenya provided that the law and rules of evidence to be applied in a *kadhi* court shall be those applicable under Muslim law, the Act made further provision to restrict

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<sup>254</sup> (1954) 21 E.A.C.A. 1.

<sup>255</sup> (1934) 1 E. A.C.A. 130.

<sup>256</sup> *Athman bin Mohamed v. Ali bin Salim* 6 E.A.L.R. 91.

<sup>257</sup> (1937) 17 K.L.R 95.

the application of the rules of the Islamic law of evidence in *kadhi* courts. In contradiction to the rules of the Islamic law of evidence, the Act provided in section 6:

- “(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.”

The above Section on the application of rules of Islamic law of evidence in the *kadhis* courts was literally adopted by the post-revolution courts in Zanzibar.<sup>258</sup>

### **3.7 Co-operation and conflict between British judges and *kadhis* in the Zanzibar courts**



Before the establishment of the British Protectorate in Zanzibar, *kadhis* operated separately from British judicial officers. When the British took over control of the Sultanate in 1890, *kadhis* were gradually integrated into the colonial courts. This in turn resulted in a situation that brought *kadhis* into contact with British judges and magistrates. With the existence of a parallel court system in Zanzibar, the British judicial officers and *kadhis* had to work together.<sup>259</sup> This legal scenario created a number of conflicts, as well as, opportunities for co-operation, between the two categories of judicial officers.

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<sup>258</sup> Section 7 of the Zanzibar Kadhis Court Act 1985.

<sup>259</sup> Anderson noted that in India *Mufitis* collaborated with the British colonial rule by giving *fatwas* (verdicts) based on questions raised by British judges in the abstract and often short of relevant details. Such *fatwas* resulted in a highly formalised and rigid application of Islamic legal rules. Anderson, 1993, 173.

### 3.7.1 Co-operation between British judges and *kadhis* in the Zanzibar courts

As noted above, the policy of re-organising the Zanzibar courts in 1923 and integrating the *kadhi* courts into the colonial court system paved the way for interaction between British judges and *kadhis* in the courts. British judges rarely interfered with the *kadhis*' judgments in civil cases and matters of personal status. The British Magistrate in Zanzibar, A.M. Grieve, expressed this approach in the case of *Doovya bt. Silima v. Administrator General in the estate of Chambi b. Silima Deceased* in which he stated

"I am always very loath to interfere with the finding of a Kathi on fact, but the learned Kathis who have sat with me are so dissatisfied with the respondent's case that they have asked me to send this case back for retrial."<sup>260</sup>

In the case of *Mohammed v. Abdulla*, the *kadhi* refused to enforce a contract with a condition for charging an interest on the ground that it was contrary to the rules of Islamic law.<sup>261</sup> The British judges supported the *kadhi*'s judgment due to the fact that in civil matters the law of Islam was the fundamental law.<sup>262</sup> In civil cases that involved technical points of Islamic law, British judges consulted *kadhis* for their legal opinions. For instance, in the case of *Saleh Lalji v. Mohammed b. Ahmed b. Hemid and others* the question raised in the trial court was whether the right of *shuf'a* existed in Zanzibar.<sup>263</sup> Presiding over the case, Lindsey Smith, the Chief Justice of Zanzibar, consulted the *kadhis* who sat with him

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<sup>260</sup> ZNA/HC10/1 Civil Case No.229 of 1922 (unreported).

<sup>261</sup> (1938) 5 Z.L.R. 26.

<sup>262</sup> Anderson, 1970, 69.

<sup>263</sup> (1911) 1 Z.L.R.424.

in the trial court in order to ascertain whether the law of pre-emption by vicinage existed in Zanzibar. The *kadhis* pointed out that Sultan Barghash b. Sa'id (r.1870-1888) instructed *kadhis* in Zanzibar not to apply the law of pre-emption by virtue of vicinage. Based on the fact that there was no evidence to show a revocation of Sultan Barghash's direction by his successors, Chief Justice Smith held that the schools of law followed by *kadhis* in Zanzibar do not recognise the law of pre-emption by reason of vicinage, and therefore dismissed the appeal.

The British judges' endorsement of the *kadhis*' decisions is also apparent in matrimonial cases. As noted above, in the case of *Mgeni bt. Salim b. Abdulla El-Marhubia v. Sayf b. Mohammed b. Abdulla El-Marhubi* where a wife petitioned for divorce on the ground that her husband had intercourse with her during her menstruation period, Justice Reed dismissed her appeal for a divorce and confirmed the judgment of the *kadhi* in the lower court. He noted that the evidence of the appellant was grossly exaggerated and therefore could not prove her case.<sup>264</sup>

A concurrence of decision between British judges and *kadhis* occurred in civil and matrimonial cases. In criminal matters, the *kadhis*' role was confined to that of assessors with no power to give judgement. This policy was clearly communicated by British judicial officials to the *kadhis*. In a letter to the Acting chief *kadhi* of Kenya it was mentioned that "there does not appear to be any authority for a *kadhi* to sit as a member of

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<sup>264</sup> ZA/HC8/86, Civil Case No.259 of 1913 (unreported).

the court in appeal but merely as an assessor”<sup>265</sup> In almost all the reported criminal cases, judgments were given by the British judges and the role of the *kadhis* was confined to that of assessors. For instance, in the case of *Abdulla b. Masood v. Rashid b. Masood*,<sup>266</sup> the matter was heard by Acting Chief Justice Tomlinson and *kadhis* Ahmad b. Sumayt and ‘Ali b. Mohammed.<sup>266</sup> It is noted from the proceedings of the case that role of the two *kadhis* was a passive one and that the entire judgement was given by Tomlinson.

### 3.7.2 Conflict between British judges and kadhis in the Zanzibar courts

Court records of the Busa‘idi Sultanate reflect the colonial tensions between the British judges and the *kadhis* in cases of the custody of children. In cases related to the custody of children, the *kadhis* applied the Islamic law rule that when the child is under the age of *bulugh*, custody is given to the father and in his absence to male relatives of the father to the exclusion of the mother. In the case of *Khamis b. Abeid El-Maaghy v. Sa‘id b. Abeid El-Maaghy and Atiye bt. Maarufu*, the father (plaintiff) travelled abroad before the birth of the child and subsequently divorced his wife (second defendant).<sup>267</sup> When the father returned to Zanzibar after a period of 13 years, he claimed the custody of his daughter. *Kadhi* ‘Umar b. Sumayt gave the custody of the daughter to the father (plaintiff) on the ground that no one had the right of guardianship except her father. Being unsatisfied with

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<sup>265</sup> KNA/AP/1/1386, Sheikh Suleiman b. Ali, Letter from the Acting Registrar, the Supreme Court, to the Acting chief *kadhi*, Mombasa, dated 16 April 1934.

<sup>266</sup> (1916) 1 Z.L.R.519.

<sup>267</sup> ZA/HC10/64, Kathi’s Court Civil Case 138 of 1940.

the *kadhi's* judgment, the mother appealed.<sup>268</sup> Chief Justice John Verity overruled the *kadhi's* judgment and gave the custody to the mother. Judge Verity justified his deviation from applying the rule of custody according to Islamic law by stating:

“through the lifetime of the child the father evidenced no interest in his daughter, recognized no responsibility for her welfare and contributed nothing towards her maintenance. It is only thirteen years later when the child may be of value of use to him that he purport to recognize his responsibilities and seeks to secure his rights ... the inference of deliberate intention to abandon is irresistible and fully justifies the court in deviating from the strict rule of Mohammedan law.”<sup>269</sup>

A similar issue occurred in Kenya in the case of *Sheriff Abdulla b. Mohammed v. Zwena bt. Abed* in which the appellant claimed to be the father of a female child and therefore asked for the custody of the child.<sup>270</sup> From the evidence given to the court there was a proof of non-access by him to his wife (the respondent) prior to the birth of the child. The appellant's claims were based on the irrebuttable presumption of Islamic law adopted by the *shafi'i madhhab* that due to the fact that the child was born within four years of the last cohabitation of the husband and wife, the child was deemed to be his legitimate daughter. The Court found that the child had lived all her life with the mother. The Court dismissed the appeal and denied that the father had an absolute right to the custody of his daughter. The Court held:

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<sup>268</sup> *Ibid.*

<sup>269</sup> *Ibid.*

<sup>270</sup> KNA/PC/Coast/1/3/129, marriages and divorces, His Majesty's Court of Appeal for Eastern Africa, Civil Appeal No.20 of 1923 (unreported).

“the father who by a fiction of Mohammedan law claims to be her father ... He seeks to obtain custody and possession of her for the purpose of arranging her marriage for which he expects to benefit permanently. We are asked to say that because Mohammedan law is to apply to custody of his daughter and therefore the Mohammedan Marriage, Divorce and Succession Ordinance of 1920 should have prevailed and must apply to guardianship of children. We find nothing in the Ordinance to justify this argument. The questions of guardianship are part of the Common law of England and have always been determined by English courts. We must apply the principles of common law.”<sup>271</sup>

The decision of the East African Court of Appeal to apply the English common law to the custody of Muslim children agitated the Muslim community along the Kenya coastal strip. As a result of this agitation, seven hundred signatures were collected to petition the Muslim Member of Legislative Council, Sir Ali b. Salim. The petition stated: “Mohammedans from the tribes in the Colony of Kenya beg to bring to your notice the very unsatisfactory manner in which the law relating to Mohammedan Marriage, Divorce and Succession Ordinance No.34 of 1920 is administered.”<sup>272</sup> The British colonial administration rejected the petition and responded by stating:

“the person responsible for the petition was the unsuccessful appellant on the case. I am of the opinion that the Ordinance No.34 of 1920 perfectly meets the purpose for which it was intended and requires no amendment.”<sup>273</sup>

The decisions of the British judges in the Busa‘idi Sultanate were not consistent on whether English or Muslim law applied to the questions of the custody of children. In the case of

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<sup>271</sup> *Ibid.*

<sup>272</sup> KNA/PC/Coast/1/3/129, marriages and divorces, letter from petitioners to Ali b. Salim, Mombasa, Kenya, dated 17 December 1923.

<sup>273</sup> KNA/PC/Coast/1/3/129, marriages and divorces, letter from the Senior Commissioner, Coast, to the Colonial Secretary, Nairobi, (no date mentioned).

*Mbaraka b. Diwanship v. Hamisi b. Jumbe Kimemeta*, it was held that Islamic law was applicable,<sup>274</sup> but in the case of *Fazalan Bibi v. Tehran Bibi and Mohamed Din Kashmiri*, Judge Guthrie-Smith held that in cases related to guardianship of children, English law applied and not Muslim law.<sup>275</sup>

A similar approach was adopted in the case of *Nana bt. Mzee v. Mohamed Hassan*, where the mother died after two weeks after the birth of the child.<sup>276</sup> The grandmother (plaintiff) in the trial court was given the custody of the female child on the basis of Islamic law. Judge Lucia-Smith of the Supreme Court held that English law applied to the determination of the custody of a Muslim child. However, on appeal, Chief Justice Sheridan gave custody to the father and held that consideration should be given to the welfare of the child.<sup>277</sup> He based his decision on English law authorities which he quoted in the judgment.<sup>278</sup>

In the case of *Abdulreman Bazmi v. Sughra Sultana* the Supreme Court awarded the respondent (mother) custody of her child until he attained 7 years of age, in accordance with the *hanafi madhahab*.<sup>279</sup> However, on appeal, Sir Kenneth O'Connor held that "the [Guardianship of Infants] Ordinance applies with full force to Mohamedans not less than to

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<sup>274</sup> (1927) 11 K.L.R. 56.

<sup>275</sup> (1921) 8 E.A.L.R 200. See also *Hamisi b. Ali v. Mariamu b. ti Ali* (1929) 12 K.L.R. 51 where it was held that questions of the guardianship and custody of children were determined according to English law.

<sup>276</sup> (1942) 20 (1) K.L.R. 3.

<sup>277</sup> *Mohamed Hassan v. Nana b. ti Mzee* (1944) 11 E.A.C.A. 4.

<sup>278</sup> *In re Fynn* 2 De. G. & S. 457.

<sup>279</sup> (1960) 1 E.A.L.R 801.

other infants and under Section 17, the welfare of the child, and not the right under Mohamedan law, is paramount consideration in deciding questions of custody”.

A difference of religion between parents presented another complexity to the courts in deciding the right to the custody of children. In *Innocent Jadoni v. Kandaki Mame Ramzan* the plaintiff was a Native Christian of the Roman Catholic faith.<sup>280</sup> His wife (the defendant) was also brought up in the same faith but converted to Islam. The two separated and the mother had the custody of the eldest child, a boy aged 10 years. The father filed a case and requested for the right of custody of the eldest child. In his judgment, Stephens, Acting J, awarded the custody to the father and stated:

“I consider it is better for the welfare of the children that they should continue to be brought up in their father’s faith until they come to years of discretion and can judge for themselves. I do not decide this on the ground that the Christian religion is better than the Mohammedan, but solely on the ground that by English law the child must be brought up in the religion of its father.”<sup>281</sup>

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### 3.8 Conclusion

This chapter has demonstrated the development of British colonial policy on transforming the court system in the Busa‘idi Sultanate. The thrust of the transformation process focused on the exclusion of civil and criminal jurisdiction from the *kadhis* and confining them to MPL. In realising the exclusion process, the British paradoxically adopted an inclusion policy which incorporated *kadhi* courts into the colonial judicial system. The British colonial administration established British courts which operated beside the *kadhi* courts.

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<sup>280</sup> (1918) 1 Z.L.R.585.

<sup>281</sup> *Ibid.* 594.

The existence of dual courts empowered some British judicial officials to preside over both British and *kadhi* courts, particularly in appeal cases. To avoid this anomaly, the British embarked on a policy of incorporating the *kadhis* in a unified court system in order to exercise control over them.

British efforts towards transforming the court system in Zanzibar were implemented through two major processes: institutional and procedural transformation. A number of strategies were put in place in order to fulfil the transformation process. Statutes were enacted to give authority to the British colonial administration to re-organise the courts in the Busa'idi Sultanate and to transplant codes from India and England. The earliest British Order-in-Council which was enacted in 1866 paved the way for the enactment of English statutes in the Busa'idi Sultanate. The Indian Penal Code was introduced to Zanzibar in 1867 and by 1916 criminal cases were determined according to the Indian Penal Code. The East Africa Order-in-Council of 1897 was enacted in order to initiate the re-organisation of the courts, which was later accomplished by the Zanzibar Courts Decree of 1923. The enactment of these statutes gave control to the British judicial officers and contributed towards undermining the powers of the *kadhis* courts.

The British also embarked on a process of transforming the procedural aspects of Islamic law applied in the *kadhi* courts. In achieving this objective, efforts were made to codify the Islamic law and to translate the classical Islamic law texts. The process of codifying and translating the Islamic law texts was meant to ascertain the corpus of the applicable law in the *kadhi* courts in order to acquaint British magistrates with a basic knowledge of Islamic law. The outcome of the transformation process culminated in the exclusion of civil and

criminal jurisdiction from the *kadhi* courts. Within a period of 25 years from the establishment of the British Protectorate in Zanzibar, the British colonial policy had succeeded in removing the powers of the *kadhis* in civil and criminal matters which they had the prerogative of enjoying before the coming of the British.



## **Chapter 4: Conflicts and tensions: The British policies on transforming the administration of Islamic Law in the Busa'idi Sultanate**

### **4.1 Introduction**

Chapter 3 has demonstrated the gradual policies adopted by the British colonial administration to dominate and control the judicial system in the Busa'idi Sultanate. The chapter has shown how the process of transforming the court system unfolded from the establishment of the British Protectorate in 1890 until the first quarter of the 20<sup>th</sup> century. In the process of re-constituting *kadhi* courts, the British adopted institutional as well as procedural transformation by implementing policies of exclusion and inclusion. This chapter is a continuation of chapter 3 as part of the major focus of the thesis on British policies to transform the administration of Islamic law and its institutions in the Busa'idi Sultanate. The first part of this chapter will give a historical background to the application of Islamic law along the East African coast before the Busa'idi and British eras. The chapter will then proceed to explore the administration of justice during the Busa'idi and British periods. By extension, it will highlight the administration of Islamic law in the Kenya coastal strip and coastal part of Tanganyika which formed part of the Busa'idi Sultanate. The focus of chapter 4 will be on policies implemented by the British to transform the application of Islamic law in *kadhi* courts. The transformation process led to cases of conflict, on the one hand, between English law and Islamic law, and, on the other hand, between customary law and Islamic law. This chapter will discuss cases of conflict and demonstrate how the British handled such cases. The chapter will also highlight how the British manipulated ethnic identities in influencing the administration of justice.

Islamic law has a broader meaning that includes almost all spheres of a Muslim's life. Mohammad Hashim Kamali noted that Islamic law encompasses a broad concept that is not only confined to legal rules but comprises the totality of guidance that God has revealed to mankind. He defined Islamic law to mean "the totality of guidance that Allah has revealed to the Prophet Muhammad pertaining to the dogma of Islam, its moral values, and practical legal rules".<sup>1</sup> Although the broader meaning of the 'Islamic law' refers to the complete way of a Muslim's life, I will confine my use of the term 'Islamic law' to refer to Islamic legal rules that are applied in courts.<sup>2</sup> I will also use the term 'Muslim Personal Law' (abbr. MPL), that reflects confining the jurisdiction of *kadhi* courts to applying Islamic law to matters of marriage, divorce and succession applicable in the Busa'idi Sultanate. Lord Reading defined the personal law of a Muslim as "The law of his religion is the applicant's personal law: it is not the general law applicable to all who are domiciled in India, It is not law peculiar to India, but to Mohammedans wherever they may be domiciled".<sup>3</sup> Since the establishment of the Busa'idi Sultanate in Zanzibar in 1832, Islamic law was applied to few criminal cases whereas in civil matters Islamic law was considered to be the fundamental

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<sup>1</sup> Islamic law is also used synonymously with *fiqh* (rules of Islamic jurisprudence), which is the knowledge of the practical rules of Islamic law. However, Islamic law is wider than *fiqh* in that the former comprises, in addition to legal rules of *fiqh*, instructions on morality and dogma. Kamali, 1998, 42. Islamic law is also defined to refer to a comprehensive system of law that is divine in origin, religious in essence and moral in scope. Ajijola, Alhaj D (2002) *What is Shariah?* New Delhi: Adam Publishers & Distributors 15.

<sup>2</sup> Vikør, K (2005) *Between God and the Sultan: A History of Islamic Law*, London: Hurst and Co. 21

<sup>3</sup> *R v. Hammersmith Superintendent Registrar of Marriages – Ex. Parte Mir –Anwarudin* (1917) 1 K. 634, 643.

law. However, after the establishment of the British Protectorate in Zanzibar in 1890, the application of Islamic law rules was gradually curtailed and confined to MPL.

#### 4.2 Influence of Islamic law on the East African coast since the mid-14<sup>th</sup> century

The fourteenth century voyager, Ibn Battutah (d.1377), travelled to the East African coast in 1331. He mentioned in his book *Tuhfat al Nadhar fi Gharaib al amsar wa al Asfar* that the people were Muslims who adopted the *shafi'i madhhab*.<sup>4</sup> He visited Mogadishu, Mombasa and Kilwa. Ibn Battutah, who was a *kadhi* in India and later in the Maldivian islands, was the only historian who described how *kadhis* functioned in the Sultan's court in Mogadishu. He remarked:

“the Qadi, the *wazirs*, the private secretary and four of the chief *amirs* sit to hear cases and complaints. Questions of religious law are decided by the Qadi: other cases are judged by the council, that is, the *wazirs* and *amirs*. If a case requires the views of the Sultan, it is put in writing for him. He sends back an immediate reply, written on the back of the paper, as his discretion may decide. This has always been the custom among these people.”<sup>5</sup>

Ibn Battutah's description of *kadhis* in Mogadishu can be regarded as the earliest written account of *kadhis* courts along the East African coast.<sup>6</sup> Apart from Ibn Battutah's work,

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<sup>4</sup> Published by *Maktaba al-Istiqama*, Cairo, 1967, 163.

<sup>5</sup> Freeman-Grenville, 1966, 30.

<sup>6</sup> In other regions of the Muslim world early Muslim historians have written in detail on workings of *Kadhis* such as Waki's (d.306/918) *Akhbar al-qudhat* on Egypt and Syria, al-Kindi's (d.362/972) *Kitab al-wulat wa-kitab al-qudhat* contains on *kadhis* and judicial practice in early Islamic Egypt. See Masud, 2006, 2.

earlier archaeological excavations and geographers' writings are extremely brief and provide very little information regarding *kadhi* courts and the administration of Islamic law in the Busa'idi Sultanate. Since the written work of Ibn Batuta on *kadhis* in Mogadishu in the second half of the 14<sup>th</sup> century, there exists no eyewitness account of the East African coast until the arrival of the Portuguese at the end of the 15<sup>th</sup> century.<sup>7</sup> As far as the administration of Islamic law is concerned, even the Portuguese reports were of limited use due to the fact that their writings were primarily concerned with describing commercial links between the region and those of the wider Indian Ocean.<sup>8</sup> Lack of detailed information on the administration of Islamic law along the East African coast during the period preceding the Busa'idi reign limits our knowledge of the administration of Islamic law. However, archaeological evidence and the historical narratives mentioned above prove that Muslim settlements existed along the East African coast since the mid- 14<sup>th</sup> century. Based on this historical evidence, it can be inferred that the affairs of Muslim communities who settled along the East African coast must have been regulated by a system of religious law based on Islamic teachings. The presence of *kadhis* along the East African coast since the 15<sup>th</sup> century has been documented by Imam al-Sakhawi who

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<sup>6</sup> Swartz, M.J. "Religious Courts, Community and Ethnicity among the Swahili of Mombasa: an Historical Study of Social Boundaries" (1979) 49 (1) Africa 32.

<sup>7</sup> For a comprehensive study of the history and influence of the Portuguese on the East Africa coast see Chittick, 1974 and Berg, F.J. "The Coast from the Portuguese Invasion to the Rise of the Zanzibar Sultanate", in Ogot, B.A (ed.) (1974) *Zamani: A Survey of East African History* Nairobi: East African Publishing House 115-133.

<sup>8</sup> Reese, 1996, 38.

mentioned in his book that al-Maqrizi met the *kadhi* of Lamu, Muhammad b. Ishaq b. Muhammad, in Mecca in 1436.<sup>9</sup>

Most of the early Muslim settlements on the East African coast were established along the trade routes linking the region with Arabia and Persia. Among the earliest Muslim dynasties that were established along the East African coast was the Shirazi dynasty that was established in Kilwa in the latter part of the tenth century.<sup>10</sup>

Another Muslim dynasty along the East African coast was established in Pate near Lamu by Sulayman ibn Muzaffar al-Nabahan, who had been driven out of Oman by the Ya‘rubi rulers in 1203.<sup>11</sup> After the death of Sulayman, his descendants succeeded him as the rulers of Pate. Muslim dynasties which scattered all over the East African coast continued to exist

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<sup>9</sup> al-Sakhawi, Shams al-Din M. A (1987) *al-Maqasid al-Hasana fi Bayan Kathir min al-Ahadith al-Mushtahira ‘ala Alsinat al-Nas* Beirut: Dar al-Kutub al-‘ilmiyya 470.

<sup>10</sup> Oral sources narrated that seven merchant princes from the Persian city of Shiraz settled in Mogadishu, Brava, Comoro islands, Mafia, Pemba, Kilwa, Zanzibar and Madagascar. Ali b. al-Hussain (r.957-996) of the ruling family of Shiraz came to Kilwa and established a dynasty of rulers, Horton, 2000, 52. Chittick suggested that the *Shirazi* migration could have probably started from the Benadir coast and then spread southwards, and that *Shirazi* civilization did not come directly from Persia or the Gulf but from Benadir. Chittick, 1965, 92. *Shirazi* influence on the East African coast dated back to 1217; a gravestone of that year of a person of Persian origin, al-Khurasani, was found at Mogadishu. Chittick, 1965, 285. By the end of 13<sup>th</sup> century the first *Shirazi* dynasty of Kilwa was replaced by the Mahdali dynasty, Hiskett, 1994, p.154. The head of the *Mahdali* dynasty was Abu'l-Mwahib al-Hassan b. Sulayman from the *Ahdali* family who were Seyyids (*Shariffs*) from Yemen. Chittick, 1974, 239.

<sup>11</sup> Chittick, 1969, 378.

until the 15<sup>th</sup> century when the Portuguese were attracted by the cultural and economic wealth of the region. In 1498, the first European explorer, Vasco Da Gama, sailed along the East African Coast on his first voyage to India. Later, in 1505, Francis De Almeida seized Sofala, thereby paving the way for Portuguese control of the East African coast. By the 16<sup>th</sup> century, the Portuguese had imposed their hegemony over much of the East African coast.<sup>12</sup> In 1660 people of Azania (East African coast) that included local tribes sent a delegation to the *Ya‘rubi* Imam Sayf b. Sultan (known as *Qaid al-Ardh*) in Oman and requested assistance to fight the Portuguese. The *Ya‘rubi* dynasty (1624-1741) defeated the Portuguese and conquered Fort Jesus in Mombasa in 1698.<sup>13</sup> Thereafter, Imam Sayf b. Sultan established the *Ya‘rubi* dynasty and appointed the first *wali* Nasir b. Abdalla b. Kahlan.<sup>14</sup> The *Ya‘rubi* dynasty continued to rule much of the East African coast by appointing governors from the Mazru’i family until they were defeated by the Busa‘idi Sultans in 1819. Fighting between the two powers of the time, the Portuguese and the Omanis, continued from the end of the 15<sup>th</sup> until the 19<sup>th</sup> century when Seyyid Sa‘id b. Sultan, the ruler of Oman transferred his headquarters to Zanzibar in 1832 putting an end to the Portuguese threat.

### **4.3 The administration of Islamic law during the Busa‘idi Sultanate in Zanzibar**

As stated above, affairs of early Muslim settlements along the East African coast were regulated by Islamic law since mid-fourteenth century. However, it should be noted that the application of Islamic law along the East African coast during the period preceding the

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<sup>12</sup> Salim, 1979, 60.

<sup>13</sup> The local tribes included Ribe, Chonyi, Kamba, Kauma, and Digo. Soghayroun, 1995, 4.

<sup>14</sup> Soghayroun, 1995, 53.

establishment of the Busa'idi Sultanate in Zanzibar in 1832 was not formalised compared to other Muslim territories under British influence. Contrary to the situation in the East African coast, Islamic law was applied in a formalised structure in the Hausa states of Northern Nigeria since the 15<sup>th</sup> century where the King of Kano Muhammad Runfa (1463-99) established a judicial department.<sup>15</sup>

*Kadhis* used to operate along the East African coast before Sultan Seyyid Sa'id's arrival in Zanzibar. During my topical discussions with several *kadhis* and Muslim scholars in Zanzibar and in coastal towns of Kenya, they pointed out that *kadhis* from Barawa and the Comoro Islands worked in Zanzibar. The influx of Barawian *kadhis* on Zanzibar can be supported by the fact that the first *shafi'i kadhi* appointed by Seyyid Sa'id was Muhiddin al-Qahtani born in Barawa. Another Barawian born *kadhi* who served in Zanzibar in the mid-19<sup>th</sup> century was 'Abdulaziz b. 'Abdulghani al-Amawy (d.1896) who was appointed as the *kadhi* of Kilwa in 1870 and then served as a *kadhi* in Zanzibar during the period of Sultan Barghash b. Sa'id (r.1870-1888).<sup>16</sup> Prior to the establishment of the Busa'idi Sultanate in Zanzibar, Islamic law was administered in an informal manner.<sup>17</sup> When Sultan

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<sup>15</sup> Naniya, T. M. "History of the Sharia in Some States of Northern Nigeria to Circa 2000" (2002) 13 (1) Journal of Islamic Studies 18. Formalised application of Islamic law in Northern Nigeria can be attributed to the early influence of Islam in the Western African region as a result of the influx of Muslim religious scholars through *hajj* (pilgrimage) routes, and links with the depleted Muslim dynasties in Northern Africa.

<sup>16</sup> Farsy, 1972, 15.

<sup>17</sup> Pouwels, R.L "The East African Coast, c.780 to 1900 C. E.", in Levtzion, N. and Pouwels, R. L (eds.) (2000) The History of Islam in Africa. Oxford: James Currey 262. Abdulaziz Lodhi noted that before the coming of Seyyid Sai'd to Zanzibar, Arab settlement and rule were limited to the port of Zanzibar, while the

Seyyid Sa'id (r.1804-1856) settled in Zanzibar in 1832 he established a formal judicial structure and appointed two *kadhis*: one from the *ibadhi madhhab*, 'Abdalla b. Mbaruk b. 'Abdalla al-Nazwi, and the other one from the *shafi'i madhhab*, Muhiddin al-Qahtani. In his account of the Busa'idi Sultans, 'Abdallah Saleh Farsi (d.2002) noted that during Sultan Seyyid Sa'id's period, *kadhis* used to handle cases in their residences in their own time.<sup>18</sup>

In Zanzibar, *kadhis* held court sessions outside the Sultan's palace every day after evening (*asr*) prayers, for litigants who preferred not to go to *kadhis*' residences.<sup>19</sup> Sultan Seyyid Sa'id had unlimited power in running the affairs of the Sultanate and there was no distinction between the Sultan's powers in state affairs and the administration of justice.<sup>20</sup> During the reign of Seyyid Sa'id, the application of Islamic law was mainly confined to Zanzibar Town from which it gradually expanded to rural areas with the expansion of the Sultan's power throughout his dominions. In the 1840s enforcement of law and order remained in the hands of the *Mwinyi Mkuu*, the ruler of the *Hadimu* tribe, who resided in Dunga in the centre of Zanzibar Island.<sup>21</sup> Sultan Seyyid Sa'id had recognised the sovereignty of the indigenous *Hadimu* tribe headed by their leader *Mwinyi Mkuu* who occupied the central and southern part of Zanzibar. Sultan Seyyid Sa'id adopted a non-

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local kingdoms, which included the Hadimu and Tumbatu, paid tribute to the Omani governor as they did to the Portuguese. Lodhi, A.Y "The Arabs in Zanzibar: From Sultanate to the People's Republic" (1986) 7 (2) *Journal Institute of Muslim Minority Affairs* 409.

<sup>18</sup> Farsy, 1982, 24.

<sup>19</sup> *Ibid*, 39.

<sup>20</sup> Green, 1985, 475.

<sup>21</sup> Stockreiter, 2007, 48.

interference policy regarding the social and political life of the *Hadimu* tribe as long as the poll tax was remitted to him.<sup>22</sup>

Sultan Majid b. Sa'id (r.1856-1870), successor to his father Sultan Seyyid Sa'id, adopted his father's policy in giving freedom to the town elders to run their local affairs, including arbitration of disputes, without much interference. Sultan Barghash b. Sa'id's (r.1870-1888) approach differed from that of his predecessors in that he exercised greater control over the judicial structures along the coastal towns.<sup>23</sup> It was during the period of Sultan Barghash that much of the development of Islamic law took place. Barghash's efforts were directed towards a revival of the Islamic religious heritage and respect for religious scholars. His commitment to the *ibadhi madhhab* was demonstrated by efforts to import the first printing press in Zanzibar that published *ibadhi* legal texts.<sup>24</sup> Several collections of *ibadhi* religious texts were printed, including *Qamus al-Sharia* (the Dictionary of Sharia) by the Omani scholar Jumayliyil ibn Khamis al-Sa'di.<sup>25</sup> Towards the end of the 1880's *ibadhi* books printed in Egypt and supporting Pan-Islamic goals were circulating in Zanzibar.<sup>26</sup>

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<sup>22</sup> Purpura, A (1997) "Knowledge and Agency; The Social Relations of Islamic Expertise in Zanzibar Town", (Unpublished PhD Dissertation submitted to the City University of New York) 60

<sup>23</sup> Pouwels, 1987, 134.

<sup>24</sup> Bang, 2003, 119.

<sup>25</sup> The original collection of the dictionary was 90 volumes but only 127 volumes were published during Barghash's period.

<sup>26</sup> Green, 1985, 97. For a comprehensive list of *ibadhi* publications, see Custers, M.H (2006) *Ibadhi Publishing Activities in the East and in the West c.1880-1960s: An Attempt to an Inventory, with References Related to Recent Publications* Maastricht-Netherlands. On the influence of the Pan-Islamic movement in the Busa'idi Sultanate, see Ghazal, 2005.

#### 4.4 The administration of Islamic law in the Kenya coastal strip by the IBEA

Due to scarce financial resources, the British government relied on chartered companies in order to protect her imperial interests all over her conquered territories. Delegating responsibilities to the chartered companies assured extension of British colonialism without burden of the Empire to the metropolitan government.<sup>27</sup> The first chartered British chartered company along the East African coast was the East African Association Company which was established in 1887 by a group of British philanthropists and businessmen founded to make profits and secure new lands for the British Empire. In May 1887, Sultan Barghash gave a concession for a term of 50 years to the East African Association Company to administer the Kenyan coastal strip in the name of the Sultan.<sup>28</sup> The concession gave all the powers to the Company “to pass laws for the government of districts and to establish courts of justice”.<sup>29</sup> The treaty also provided that judges of the

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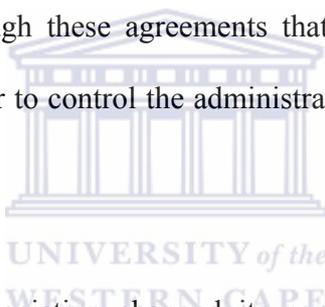
<sup>27</sup> Mann, 1991, 15.

<sup>28</sup> The policy of establishing trade companies was adopted by the British Crown throughout her territories. British occupation of India began as commercial enterprise around 1784 through the establishment of the East India Company. When the Company assumed sovereign rights in 1772, British magistrates began to replace Muslim *kadhis* in Bengali courts. In Nigeria, the British established the Royal Niger Company (RNC) which was given a Royal Charter in 1886. Later the RNC was amalgamated with other British military formations in West Africa to form the West African Frontier Force (WAFF). On 1 January 1900 Colonel Lugard, commander of the WAFF, proclaimed the establishment of the Protectorate of Northern Nigeria. In 1903, Lugard nullified unilaterally all existing treaties with the Sokoto caliphate and claimed right of conquest as the basis of British colonial rule. Umar, 2006, 21.

<sup>29</sup> Article 2 of the Concession.

courts of justice were to be appointed by the Company subject to the approval of the Sultan, and that all *kadhīs* were to be appointed by the Sultan.

Despite the fact that Sultan Khalifa b. Sa'id (r.1888-1890) opposed the presence of a British company within his dominions, he was forced by the British to recognise and support the East African Association. Sultan Khalifa entered into a new agreement with the British government in which the administration of his mainland dominions was "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".<sup>30</sup> It was through these agreements that the British colonial authorities applied a gradual policy in order to control the administrative and judicial structures in the Busa'idi Sultanate.



In 1888, the East African Association changed its name to IBEA and established its headquarters in Mombasa.<sup>31</sup> The British government officially recognised the Company and granted it a Charter in September 1888. Articles 11 of the Charter provided:

"the Company 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 Sa'id territories and no hindrance shall be offered except as aforesaid."<sup>32</sup>

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<sup>30</sup> Hamilton, 1918, 3.

<sup>31</sup> Al-Ismaili, 1999, 26.

<sup>32</sup> Hamilton, 1918, 1.

The Charter further stated in Article 12:

“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, especially with respect to the holding, possession, transfer and disposition of lands and goods, and testate or intestate succession thereto, and marriage, divorce and legitimacy, and other rights of property and personal rights”.<sup>33</sup>

The British government supported the Company in order to protect British acquired territories, and to include disputed areas within its sphere of influence. British colonial officials had already thought of expanding their Empire to the interior of Kenya in order to secure Lake Victoria and its outlets. In realising this objective, the Company secured for Britain the route from coastal Kenya to Uganda by establishing a railway line connecting between coastal Kenya and Uganda. The Company also made treaties with a number of tribes that formed the basis of British occupation in the territories.<sup>34</sup> In the following years, the Company gradually gained control on the administration of the coastal strip. In 1899, the Company changed the provisions of the 1887 concession in that Sultan’s approval for appointing judges from the Company’s officials was no longer required.<sup>35</sup>

Among the difficulties that faced the Company was that most of its personnel were young British officers with no previous legal experience and in most cases “found themselves in

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<sup>33</sup> *Ibid.*

<sup>34</sup> Mungeam, 1966, 13

<sup>35</sup> Pouwels, 1979, 175.

increasingly embarrassing situations”.<sup>36</sup> Sir Arthur Hardinge, who was in charge of the Company, stated that some of these young inexperienced officers were “merely raw and wanting in knowledge, whilst a few were, I fear from what I have heard, really bad”.<sup>37</sup>

Due to shortage of judicial staff, British colonial administrators adopted a policy of conferring judicial powers to administrative officers throughout the British colonial empire.<sup>38</sup> For instance, in India Warren Hastings (Governor of Bengal in 1772) appointed a collector in Bengal with executive and judicial powers.<sup>39</sup> The first magistrate in East Africa was an officer of the Indian police who presided over the Railway Court.<sup>40</sup> Although functions of the officers of the Company were initially administrative, they found themselves increasingly administering justice to the local people. In the early days of British colonial settlement, magisterial work was a branch of the administrative officer who was appointed in England by the Foreign Secretary. By applying the indirect rule policy, British colonial officers established native courts in order to administer justice along the East African coast. Indirect policy was adopted in order to engage the native officials to administer their own affairs with a view of dispelling the fear that they were dominated by

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<sup>36</sup> Mungeam, 1966, 10.

<sup>37</sup> KNA/Coast/1/1/44, Lamu – outward file, letter from Hardinge, Zanzibar, to Marquis of Salisbury, dated 12 April 1896.

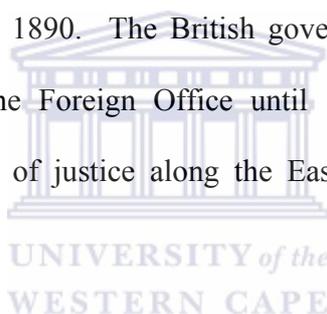
<sup>38</sup> This policy was implemented by the British in various territories. For instance, in Northern Nigeria administration of justice was done by officials of the Royal Niger Company whereas in South Africa administration was done by officers of the British South African Company. See Mann, 1991, 15.

<sup>39</sup> Cohn, 1996, 60. In Malawi and Zambia, missionaries acted as judges where transplanting English law was done together with proselytisation of Christian beliefs. See Mann, 1991, 15.

<sup>40</sup> Doorly, 1945, 88.

alien power.<sup>41</sup> Administration of justice, along the Kenya coastal strip, was thus managed by members of the Company who were mere administrators and not judicial officers. Handling the vast lands of East Africa territory posed challenges to the Company partly due to shortage of its staff and lack of relevant judicial training to its staff.

The other difficulty that faced the Company was lack of enough capital to run its territories. To avoid the Company's collapse, the British Foreign Office took full control of it in 1895. After taking over the administration of the Kenya coastal strip from the Company in 1896, the British government appointed a vice consul to preside over the court that was established by the Company in 1890. The British government continued to control the Kenya coastal strip through the Foreign Office until 1913 when it handed over the responsibility of administration of justice along the East African coast to the Colonial Office.<sup>42</sup>



After the British government took over the property rights and assets of the Company on 15<sup>th</sup> June 1895, a British Protectorate was declared over all areas previously administered by the Company.<sup>43</sup> In a formal transfer of authority which took place in Mombasa on 1<sup>st</sup> July 1895, Sir Lloyd Mathews assured Sultan's subjects that:

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<sup>41</sup> The indirect policy was introduced by Lord Lugard in Nigeria in 1900 when he was the Governor of Northern Nigeria.

<sup>42</sup> Doorly, 1945, 87.

<sup>43</sup> Robertson, 1961, 6.

“the Company has retired from the administration of this territory, and the great English Government will succeed it. Mr. Hardinge, the Consul General at Zanzibar, will be the head of the new administration, and will issue all orders in the territory under the sovereignty of His Highness. And all affairs connected with the faith of Islam will be conducted to the honour and benefit of religion, and all ancient customs will be allowed to continue, and his wish is that everything should be done in accordance with justice and law.”<sup>44</sup>

Mathew’s assurance to the Sultan’s subjects in the Kenya coastal strip was in line with the British colonial policy of non-interference in the administration of Islamic law. Before the British took over the Kenya coastal strip, *kadhis* administered Islamic law in the Kenya coastal strip.<sup>45</sup> However, by adopting a gradual policy, the British colonial authorities managed to gain control over the administration of the coastal strip. To enhance her dominance over the coastal strip, the British signed an agreement with the Sultan of Zanzibar in 1895 that gave the former powers to administer the coastal strip. The agreement provided, *inter alia*:

“His Highness Seyyid Hamed b. Thuwain, Sultan of Zanzibar, agrees for himself, his heirs and successors that as regards his predecessors on the mainland and adjacent islands, exclusive of Zanzibar and Pemba, the administration shall be entrusted to officers appointed direct by Her Britannic majesty’s Government, to whom alone they shall be responsible. These officers shall have full powers to executive and judicial administration. This Agreement shall not affect the sovereignty if the Sultan in the above-mentioned territories.”<sup>46</sup>

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<sup>44</sup> *Ibid.*

<sup>45</sup> For instance, in 1837 Sultan Seyyid Said signed an agreement with the people of Mombasa and gave them the right to appoint *kadhis* from their tribes.

<sup>46</sup> Report of the Kenya Coastal Strip Conference, 1962. Presented to the Parliament by the Secretary of the State for the Colonies by command of Her Majesty, April 1962, London: Her Majesty's Stationery Office, 1962, 5. For a full text of the 1895 Agreement see Appendix

British colonial authorities adopted a policy of integrating all her territories under one colonial administration. Although the coastal strip was under the Sultan's sovereignty, by virtue of the 1895 Agreement, the British had the ultimate power in administering the region. On 3<sup>rd</sup> August 1896 the British Foreign Office declared that all territories in East Africa under the protection of Her Majesty, except Zanzibar and Pemba, were for the purpose of administration, included in the East Africa Protectorate. In 1920 the British government enacted the Kenya Annexation Order-in-Council 1920 by which the Kenya Colony was annexed to form part of His Britannic Majesty's dominions.<sup>47</sup> By 1920, the whole of East Africa Protectorate was administered by a single Public Service under control of British colonial officers. Muslim judicial and administrative officers in the coastal strip were appointed by the British administration. James Robertson noted that "The Sultan was not consulted on any matter affecting the day-to-day administration of the coastal strip of Kenya. His sovereignty was very nebulous and little more than a vague sentimental idea".<sup>48</sup> Despite the curtailment of Sultan's influence, the British continued to assure Muslims in the British Protectorate in Kenya that *kadhis* courts would not be interfered with. On 4 November 1958, Sir Evelyn Baring, the Governor of Kenya, assured Muslims residing along the coastal strip that the 1895 Agreement remained to be the basis of the administration of the Protectorate.

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<sup>47</sup> Robertson, 1961, 7.

<sup>48</sup> *Ibid*, 3.

#### **4.5 The administration of Islamic law in the coastal part of Tanganyika**

The coastal part of Tanganyika which extended from the southern part of the River Uмба to the River Zambezi formed part of the Busa'idi Sultanate. In 1884 Karl Peters, founder of the German Society for Colonisation, crossed into Tanganyika and persuaded the chiefs to enter into treaties with him. The local chiefs of some of the regions with which he entered into agreement were regarded as part of the dominions of the Sultan of Zanzibar. On the 3 March 1885 the Imperial German Government declared a protectorate over the areas covered by Peters' agreements.

The signing of the Delimitation Treaty on 7 December 1886 between British and German colonial authorities forced Sultan Barghash b. Sa'id (r.1870-1888) to surrender the ports of Dar- es Salaam and Pangani to the German East African Company.<sup>49</sup> In 1886 Sultan Barghash b. Sa'id was persuaded by the British to lease the coastal strip of Tanganyika, from the River Ruvuma to the River Uмба, to the German East Africa Company. In July 1890 a new arrangement was made between Britain and Germany whereby Britain agreed to use her influence on the Sultan to cede the coastal strip of Tanganyika absolutely to Germany. The Sultan's territory on the mainland was eventually divided between Britain, which took the coastal strip of Kenya from River Uмба until River Tana, and Germany, took the coastal strip of Tanganyika from the River Uмба to the River Zambezi.<sup>50</sup> Sultan Majid b.

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<sup>49</sup> Al-Ismaili, 1999, 21.

<sup>50</sup> KNA/CA/10/126, Coastal Strip, The Kenya Protectorate, Weekly News, 16<sup>th</sup> September 1960

Sa'id (r.1856-1870) signed an agreement to acknowledge the German Protectorate in Tanganyika which included the port of Dar es Salaam.

After the Germans took over the coastal part of Tanganyika from the Sultan of Zanzibar, they retained the administration of Islamic law according to the system established by the Sultan. *Kadhi* and *liwali* courts continued to operate under German rule. Among the reasons for retention of the *kadhis* courts, was that Germany had few colonial officials in the administration of justice. Between 1914 and 1918 the British took over the administration of Tanganyika from the Germans by a gradual process. The British adopted the indirect rule policy that placed the administration of Islamic law under British administrative officers. Appeals from the *kadhi* courts went to the District Officers, then to the Provincial Officers, and finally to the Governor. The application of Islamic law along the Tanganyika coastal area was provided for in the Tanganyika Courts Ordinance of 1920. Section 17 (2) of the of the Ordinance provided that “civil and criminal jurisdiction, shall so far as circumstances admit be exercised in conformity with civil procedure, criminal procedure and penal codes of India and other Indian Acts”.<sup>51</sup> The Ordinance also restricted the application of Islamic law by enacting a provision that Islamic law was to be applicable on condition that it was not repugnant to justice and morality or inconsistent with any Order-in-Council. Furthermore, the Ordinance classified Islamic law under “Native law” and in cases of conflict between Islamic law and Native law, the latter to prevail.

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<sup>51</sup> Shaaban, B. and Asaa R. (2000) “Problem in Application of Islamic Law by Courts in Tanzania Mainland” (Unpublished LLB Dissertation, University of Dar es Salaam) 16.

The Tanganyika Courts Ordinance 1920 classified *kadhi* and *liwali* courts under the “Native courts” subordinate to the High Court presided over by British judges which heard appeals from the *kadhi* courts. Before Tanganyika’s independence, the Judicature and Application of Law Ordinance 1961 retained the colonial court system and embarked on a process of integrating the *kadhi* courts into the court system. Section 9(3) of the Ordinance provided that “Islamic law shall not apply in matters expressly provided by the Ordinance and where the two are in conflict, the Ordinance prevailed”.<sup>52</sup> The Judicature and Application of Law Ordinance 1961 was repealed by the Magistrate Courts Act 1963. Section 4(1) of the Magistrate Courts Act 1963 abolished the customary courts, including the *kadhi* courts, and established a three tier system of courts; the Primary Court, the High Court, and the Court of Appeal. Section 14 conferred upon the Primary Court the jurisdiction to hear and determine all cases under Islamic law. Complete integration of the court system was effected by the Magistrate Courts Act 1963.

#### **4.6 The administration of justice and its role on establishing colonial authority**

The administration of justice throughout the Muslim dynasties played a significant role in establishing the legitimacy of the rulers. Muslim rulers were faced with the challenge of establishing their legitimacy through governing the state in accordance with the principles of Islamic law. In most Muslim dynasties, rulers portrayed an image of being good Muslims by acknowledging their intention to administer justice in accordance with Islamic

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<sup>52</sup> Abdalla, H and Mwitasy, F (1997) “The Legal Impact of the Unification of Law of Succession on the Application of Islamic Law of Succession: The Case of Tanzania Mainland” (Unpublished LLB Dissertation, University of Dar es Salaam) 19.

law.<sup>53</sup> Due to its significance in a Muslim state, Islamic law played a key role in arguing for or against the legitimacy of rulers.<sup>54</sup> The Busa'idi Sultanate was not an exception to this rule. The significance of Islamic law during the Sultanate period can be seen there in that it symbolised the connection between religion and politics in the Sultan's court.<sup>55</sup> The relationship between the Sultan and his subjects was a religious as well as a political one. Hence, the distinction between the political and the religious, on the one hand, and the spiritual and temporal, on the other hand, seemed not to have been appreciated. Based on the fact that Islam was the religion of the ruling class in Zanzibar, the Sultans relied on Islam as the basis of national integration.<sup>56</sup> This notion was enhanced by the fact that political legitimacy of a government in a Muslim region was tied up with the people's perception of the rulers as devout Muslims.<sup>57</sup>

The administration of justice was central to British policy in order to establish and maintain colonial power.<sup>58</sup> In administering justice in the Busa'idi Sultanate, the British adopted a gradual policy of introducing a new form of legal system based on English law. The

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<sup>53</sup> Ewing, 1988, 9. For instance, the Muslim rulers of the Ummayds and Abbasids dynasties used *kadhis* to disseminate their religious ideology and to increase the popularity of their regime. Masud, 2006, 12. Similarly under the Mughal administration in India, Islamic law formed an important part of the symbolisation of imperial legitimacy. Anderson, 1993, 170.

<sup>54</sup> Christelow, 2000, 379.

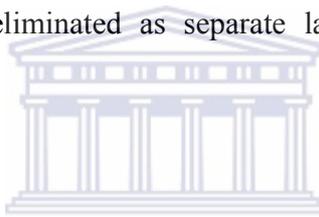
<sup>55</sup> Reynolds, J "Good and Bad Muslims: Islam and Indirect Rule in Northern Nigeria" (2001) 34 (3) *The International Journal of African Historical Studies* 601.

<sup>56</sup> Christelow, 2000, 387.

<sup>57</sup> Lugard, 1923, 604.

<sup>58</sup> Anderson, 1993, 166.

British colonial administration perceived the administration of justice based on English notions as one of the main political and philosophical justifications for their colonial rule.<sup>59</sup> Based on this philosophy, the British colonial authorities justified imposing their legal system in the colonised territories. Colonel Pearce noted this colonial attitude of his British fellow administrators in their zeal to impose their legal culture onto the colonised people.<sup>60</sup> It was a fundamental principle of English constitutional law to maintain the existing religious and customary systems of law in acquired territories. However, the British gradually adopted a policy of excluding the religious and customary laws that resulted in a process of “Anglicisation of the systems ... where Islamic and customary laws were to be played down and eventually eliminated as separate laws, being replaced by modern statutory codes”.<sup>61</sup>



In addition to the motive of establishing colonial power through the administration of justice, the British colonial administration used legislation as an instrument for securing order and maintaining social relations. By administering justice, British officials employed

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<sup>59</sup> Morris, 1972, 253.

<sup>60</sup> In this regard, Pearce stated “We English are so fond of thrusting our own ideas and institutions upon other people, without inquiry as to whether they are suited to the conditions of life of those we are so anxious to benefit, that I fear our unfortunate protégés sometimes live to curse instead of to bless our gift of complete personal liberty ...the law of Islam is wiser in this respect than our own”. Pouwels, 1979, 189. Earlier, the French Consul in Zanzibar, M. Lacau, made similar observation by stating: “The progress of the British will be made very difficult by the mistrust, hatred and revolts consequent on the unintelligent and singularly pretentious act of imposing without transition and without moderation on Arab and African laws and customs so different from their own”, letter from Lacau to Goblet 10 August 1888. Quoted in Green, 1985, 123.

<sup>61</sup> Allott, 1976, 3.

law as an instrument of social change that regulated the social life of the colonised people.<sup>62</sup> Law was seen by the colonial authorities as a means of expressing change to improve the social life of the colonised people.<sup>63</sup> Another justification to colonize people was the upholding of rule of law in the colonized territories. British colonial policy was based on the “belief that imperial rule could be justified only by a commitment to the rule of law”.<sup>64</sup> Hence, the rule of law was central to the British colonial policy that formed an essential element in the establishment and maintenance of political domination. Based on this justification, British colonial officials perceived the administration of justice as an essential tool to establish and maintain political domination.<sup>65</sup>

The British colonial authorities felt that the courts were not just meant to administer justice but rather to serve as “the beacons of imperial power ... intended not only to settle disputes but also to proclaim the reach of government and the values of Western civilization”.<sup>66</sup> According to Winston Churchill the British tradition of an independent judiciary was “a part of our message to the world”.<sup>67</sup> British colonial administrators perceived the British concept of justice as part of the essentials of British civilization brought to the British colonies. Besides political motives in dividing the spheres of interest among colonial

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<sup>62</sup> Mann, 1991, 6.

<sup>63</sup> Hailey, 1938, 264.

<sup>64</sup> Metcalf, 2007, 17.

<sup>65</sup> Mann, 1991, 3.

<sup>66</sup> Hosten, 1995, 1256.

<sup>67</sup> Scotton, J.F. “Judicial Independence and Political Expression in East African Town: Colonial Legacies” (1970) 6 (1) *East African Law Journal* 1.

powers, the administration of justice was seen as a civilising influence in Africa. Sawyerr considered this type of ‘civilization’ on the part of the British administration to be “a self appointed mission of civilization” which retained the power to interfere with local institutions and customs to keep them on the path of righteousness.<sup>68</sup> Based on this self-appointed civilising mission it was a natural consequence for the British colonial administrators to replace the religious and customary systems of law with their ‘civilized’ English law.<sup>69</sup> This, together with other ‘civilising’ features, such as abolishing slave trade, were used to justify British colonial rule in the Busa‘idi Sultanate.

#### **4.7 The British perception of Islam and Islamic law in the British Empire**

The British perception of Islam varied among colonial officials and depended on their backgrounds and the territories in which they had served. In dealing with Muslim subjects, the British colonial experience informed the colonial enterprise of the significance of Islam in the lives of Muslim subjects, and therefore that the religion Islam could not be ignored in shaping colonial policies. In British colonies, such as India and Malaysia, the British colonial authorities were exposed to Islamic culture and law. The British colonial policy on Islamic law varied according to expediencies of time and place. Hence, British colonial officials formulated individual policies in dealing with Muslims and matters related to Islamic law. British colonial officials perceived Islamic law according to Max Weber’s definition of ‘Kadhi justice’ that it lacked the formal rationality found in the Roman law

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<sup>68</sup> Sawyerr, G.F.A (ed.) (1967) *East Africa Law and Social Change* Nairobi: East African Publishing House 134.

<sup>69</sup> Allott, 1976. 366.

tradition which was essential for the development of law in the modern state.<sup>70</sup> Max Weber (1864-1920) defined ‘kadijustiz’ as a legal system in which *kadhis* were empowered to decide each case “according to what they see as its individual merits, without referring to a settled and coherent body of norms or rules and without employing a rational set of judicial procedures”.<sup>71</sup> Based on the Weberian contention that judicial process in the *kadhi* courts was irrational and arbitrary in nature, the British colonial officials found Islamic law not open to change.

There was no uniform policy on the administration of Islamic law in the British colonies and protectorates. The policy varied from one territory to another due to differences in local conditions and “each territory seems to have tackled this question in almost complete isolation”.<sup>72</sup> During the British colonial period in Tanganyika and Nyasaland, Islamic law was not applied to Asian Muslims in personal matters, including marriage and inheritance. Similarly, in Tanganyika a distinction was made between a deceased member of a Native tribe and a deceased Swahili, whereby the customary law of inheritance was applicable to the former unless the court was satisfied that the deceased preferred his estate to be governed by Islamic law; whereas Islamic law was applied to the latter unless the court was satisfied that the deceased wished some other law or custom to apply.<sup>73</sup> In Kenya, the

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<sup>70</sup> Christelow, 1985, 7.

<sup>71</sup> Masud, 2006, 5.

<sup>72</sup> Anderson, J.N.D “The Legal Tradition”, in Kritzeck, James and Lewis, William H. (eds.) (1969) *Islam in Africa* New York: Van Nostrand – Reinhold Company 43.

<sup>73</sup> Administration (Small Estates) (Amendment) Ordinance, 1947.

Islamic law of succession was applied to the estate of a deceased Muslim only if he or she was the child of a Muslim marriage or had contracted such a marriage.<sup>74</sup>

Most of the British colonial officials who had been appointed to key roles in the Busa‘idi Sultanate had already been exposed to Muslim cultures. For instance, Sir Arthur Hardinge (British Consul in Zanzibar 1894-1896) had served in various diplomatic posts in Istanbul and Cairo.<sup>75</sup> This colonial exposure informed the attitudes of British policy makers towards Islam and shaped their policies in dealing with the administration of Islamic law. Despite the fear of Islamic uprisings in Northern Nigeria, Lord Lugard paradoxically felt that Islam was well suited for Africans notwithstanding the fact that it was inferior to Christianity. Lugard mentioned that “Islam has a civilizing effect and higher standard of life and decency, a better social organization and tribal cohesion with a well-defined code of justice”.<sup>76</sup> In order to utilise the civilising element of Islam mentioned by Lugard, on the one hand, and to avert the fear of fanaticism emanating from Islam on the other hand, the British in Northern Nigeria devised a mechanism of classifying the followers of the *qadiriyya* brotherhood as good Muslims and supporting them in preference to the *sanusiyya* and *tijaniyya* followers who were regarded as bad Muslims.<sup>77</sup> By praising Islam to the Muslim Emirs and their followers, Lugard was soliciting for support for his indirect rule policy that ensured continuous control of the region. Lugard’s accommodation of the Muslim Emirs was a measure to dispel any anticipated Islamic religious uprising that

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<sup>74</sup> Mohammedan Marriage, Divorce and Succession Ordinance, 1920.

<sup>75</sup> Mungeam, 1966, 17.

<sup>76</sup> Lugard, 1923, 78.

<sup>77</sup> *Ibid.*

threatened British colonial rule in Northern Nigeria. Hence, as much as British colonial policy was willing to acknowledge and praise Islam as a civilising religion, it had to consider the fact that “if the civilizing elements of Islam were to be utilized, it was necessary to protect against the spectre of fanaticism.”<sup>78</sup>

When the British colonised its territories, they initially adopted a policy of non-interference in religious matters. The policy was implemented in order in order to legitimise their rule and avert any possible resistance from the local people.<sup>79</sup> British motives for adopting a non-interference policy respect of personal laws was aimed at avoiding apprehension on the part of the colonised people that their personal laws were threatened by a foreign power. In India, the British colonial administration did not interfere much with laws regulating personal affairs, such marriage and inheritance. Hastings’ regulations of 1772 undertook to respect and apply Islamic law although the regulations provided that in the absence of any rule in the local laws the matter was to be decided according to the English principle of “justice, equity and good conscience”.<sup>80</sup> The British attitude towards religious laws was tolerant unless such laws were deemed by British officials to be contrary to humanity or

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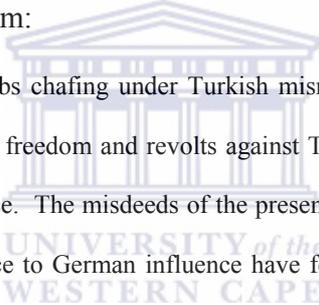
<sup>78</sup> Reynolds, 2001, 603.

<sup>79</sup> Zaman, 2002, 22.

<sup>80</sup> Anderson, 1993, 69. In 1780 the first regulation enacted by the Bengal Government parliament had invested the Governor-General and Council with that power embodied in section 27 which stated: “that in all suits regarding inheritance, marriage and caste and other religious usages and institutions, the laws of the Koran with respect to the Mohammedans shall be invariably adhered to”. KNA/PC/Coast/1/3/129, Marriages and divorces, Memorandum on the clash of English Laws and Sheria by Mbarak Ali Hinawy, dated 6<sup>th</sup> June 1922.

good order.<sup>81</sup> In Northern Nigeria, Lord Lugard adopted the non-interference policy and assured the Muslims that he would not to interfere with their religion and that Islamic law courts would not be tampered with. In 1903, Lugard announced that “the Alkalis and Emirs will hold the law courts and that ...the Government will in no way interfere with the Mohammedan religion”.<sup>82</sup>

In Zanzibar, the British colonial administration adopted the non-interference policy during the First World War. Britain portrayed itself as a protector of the Holy Places against her rival Germany. The Secretary of State for the Colonies made the following statement to safeguard the Holy Places of Islam:



“for many years Arabs chafing under Turkish misrule have looked forward to the day of reigning their former freedom and revolts against Turkish domination in Arabia have been of frequent occurrence. The misdeeds of the present Government in Constantinople and its complete subservience to German influence have forced Turkey into a disastrous war and have brought matters to a climax. The Sheriff of Mecca and other ruling Chiefs of Arabia now have decided to throw the Turkish yoke and assert their independence. Great Britain has always viewed Arab aspirations sympathetically but hitherto her traditional friendship with Turkey has compelled her to stand aloof. It remains the fixed policy of Great Britain to abstain from all interference in religious matters and to spare no effort to secure the Holy Places of Islam from all external aggression. It is the unalterable point of British policy that these Holy Places should remain under independent Moslem rule and authority.”<sup>83</sup>

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<sup>81</sup> Lugard, 1923, 605.

<sup>82</sup> Yadudu, 1992, 121.

<sup>83</sup> Telegram from the Secretary of State for the Colonies embodies a pronouncement of the deliberate policy of Great Britain in regard to the Mohammedan religion and safeguarding of the Holy Places of Islam, The Official Gazette of the Zanzibar Government Vol. 25 No.1279 31<sup>st</sup> July 1916, 396.

Although the British government adopted the non-interference policy with regard to religious matters, British colonial officials in the Busa‘idi Sultanate embarked on a policy of transforming Islamic law institutions which paved the way for curtailing the powers of religious institutions.

#### **4.8 The British policy on transforming the administration of Islamic Law in the Busa‘idi Sultanate**

Adopting Umar’s view, the colonial understanding of Islamic law should not be seen as a unified perception leading to one direction, but rather as a scenario that was pulled in different directions by competing imperatives.<sup>84</sup> Since the early colonial occupation of India, the British had felt that the religious laws were within the exclusive jurisdiction of the Bishops’ courts, and that the applicable law was the ecclesiastical law, as was the case in England.<sup>85</sup> This perception informed British policy in confining the *kadhi* courts to matters of MPL. For instance, the East African Order-in-Council 1897 referred to *kadhi* courts as ecclesiastical courts. The British colonial authorities perceived Islamic law with a secular attitude as a set of religious regulations which must be confined to MPL. The other strategy for delimiting Islamic law was that British colonial officials classified it under customary law. The British perception was that rules of Islamic law and African customary practices were always bound to conflict. The British colonial view reflected the orientalist

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<sup>84</sup> Umar, 2006, 254.

<sup>85</sup> Derrett, J.D.M (1968) *Religion, Law and the State in India* London: Faber and Faber 233.

discourse that treated Islamic law and African custom as two different matters completely.<sup>86</sup> In Nigeria, the British classified Islamic law as customary law which led to the hampering of the development of Islamic law by subjecting it to the repugnancy test like any other customary law.<sup>87</sup>

British colonial policy on the East African coast was geared towards transforming the administration of Islamic law in line with the British legal system. The transformation of Islamic law in the Busa'idi Sultanate was implemented through a gradual policy that facilitated the accommodation of the *kadhi* courts, and confined Islamic law to MPL. Lugard referred to the British colonial policy of accommodating Islamic law as a temporary measure in order to realise the ultimate objective where Islamic law would “gradually be destroyed and replaced by a hybrid based on the British law”.<sup>88</sup> In the process of implementing the policy of accommodating Islamic law, many aspects of substantive law as well as rules of evidence were adversely affected. British colonial policies on Islamic law were dictated by different circumstances of time and place. For instance, the British adopted different strategies in Northern and Southern Nigeria. In Northern Nigeria, initially British colonial officials implemented a non-interference policy due to the fact that Islam was firmly established in the region. On the contrary, the British adopted a policy of excluding Islamic law from the customary courts in Southern Nigeria despite the large

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<sup>86</sup> Jeppie, 2009, 166.

<sup>87</sup> Oba, A.A “Islamic Law as Customary Law: The Changing Perspective in Nigeria” (2002) 51.

*International and Comparative Law Quarterly* 827.

<sup>88</sup> Lugard, F.D (1906) *Political Memoranda: Revision of Instructions to Political Officers on Subjects Chiefly Political and Administrative 1913-1918* London: Her Majesty's Stationery Office, 600.

Muslim population residing in the region. Due to the policy of exclusion, Muslims in the Southern Nigeria were forced to take their disputes to customary law courts.<sup>89</sup> By adopting the non-interference policy, the British in the Busa'idi Sultanate embarked on a gradual policy to curtail the powers of the *kadhis* and to restrict their jurisdiction.<sup>90</sup>

#### **4.9 The British policy on controlling the influence of Islamic religious movements in the Busa'idi Sultanate**

Towards the end of the 19<sup>th</sup> century a number of anti-colonial movements threatened European colonial rule in the Muslim world. The British colonial authorities were vigilant to contain such anti-colonial activities in order to avoid their spread to other parts of the British Empire. Among these anti-colonial movements was Pan-Islamism which was perceived by the British to be a threat to their colonial rule. The Pan-Islamism movement spread in many parts of the Muslim world and gained momentum during the reign of Sultan Abdulhamid II (r.1876–1909). Sultan Abdulhamid II established ties with the Sultan of Zanzibar and in 1887 he awarded the Meyidi (*Majidiya*) Order to Sultan Bargash b. Sa'id (r.1870-1888), and assured him that “the spiritual ties bounding together the Muslim community would be strengthened”.<sup>91</sup> Cordial ties between the Ottoman Empire and Busa'idi Sultanate were apparent in the official visit of Sultan Ali b. Sa'id (r.1902-1911) to Istanbul in 1907 where he was received by Sultan Abdulhamid II. Pan-Islamism was seen

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<sup>89</sup> Oba, 2002, 825.

<sup>90</sup> For a comprehensive overview of British policies on the court system in the Busa'idi Sultanate see Chapter 3 above.

<sup>91</sup> Ghazal, 2005, 125.

as a counter-force to British colonial rule along the East African coast, and by the end of the 19<sup>th</sup> century it had already influenced the Busa‘idi Sultanate.<sup>92</sup> In 1886 Ahmad b. Sumayt travelled to Turkey where he met Sultan Abdulhamid II and was awarded the Meyidi Order of the Fourth Class in addition to a pension. Bin Sumayt spent much of the time in Istanbul with a fellow ‘Alawi Sayyid Fadhl b. Alwawi b. Sahl known as Fadhl Basha.<sup>93</sup> Muslim scholars from Oman and North Africa who were firm supporters of Pan-Islamic goals and strongly opposed to Western imperialism travelled to Zanzibar. Some of the scholars were exposed to Pan-Islamic movement outside Zanzibar and exercised considerable influence over the Sultans.

Other religious and reform movements included the *ibadhi mutawwiun* movement that emerged in Muscat.<sup>94</sup> The movement applied strict interpretations of the Ibadhi law.<sup>95</sup> Sultan Barghash was influenced by the *mutawwiun* movement through his close connection with prominent religious figures of the *mutawwiun* who visited Zanzibar. Supporters of the *mutawwiun* movement from the *ibadhi madhhab* in Zanzibar took an active role in advising Sultan Barghash in state affairs as well as religious matters. H.A. Churchill (British Consul in Zanzibar 1866-70) noted the *mutawwiun*’s strict adherence to the canons of Islam in

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<sup>92</sup> Christelow, A “The Muslim Judge and Municipal Politics in Colonial Algeria and Senegal” (1982) 24 (1) *Comparative Studies in Society and History* 14.

<sup>93</sup> Bang, 2003, 88.

<sup>94</sup> The *mutawwiun* movement was led by Sai’d b. Khalfan al-Khalili between the 1840s and 1871 in the Oman towns of Sohar and Rustaq. For details see Pouwels, 1987, 204.

<sup>95</sup> *Ibadhi* is a Muslim sect named after its founder, Abdalla ibn Ibadh in Oman. For a detailed and comprehensive study of *ibadhi* influence in the Busa‘idi Sultanate see Ghazal, 2005.

Zanzibar by describing them as “a council of priests that direct the affairs of state and the law of Koran is to be revived”.<sup>96</sup> In addition to religious motives, Barghash needed the political support of the *mutawwiun* to avoid the religious opposition that his predecessors encountered in Oman. More significant in Barghash’s connection with the *mutawwiun* was the fact that, in the event of their successful revolution in Oman, Barghash hoped that he would succeed as the *Imam* for Zanzibar and Oman.<sup>97</sup>

Coinciding with these religious movement, was the *salafiya* movement in Egypt led by Jamal al-Din al-Afghani and Muhammad Abduh. The *salafiya* movement “prompted unity of Muslims and reform in Islam by a return to the fundamentals of religion as practiced during the era of the *salaf* (predecessors)”.<sup>98</sup> Journals such *al-Urwat al-Wuthqa* established by Jamal al-Din al-Afghani and Muhammad Abduh in 1884 and *al-Manar* published by Rashid Ridha reached Zanzibar.<sup>99</sup> The influence of Pan-Islamism ideas on Muslim scholars along the East African coast can be seen from students of Sayyid Ahmad b. Sumayt such as Al-Amin b. Ali Mazru’i. Bin Sumayt exposed his students to influences beyond the East African coast. Like his mentor Sayyid Ahmad b. Sumayt, Al-Amin was influenced by the reformist ideas of the *salafiya* movement from Egypt through the writings of Rashid Ridha, Muhammad Abduh and Jamal al-Din al-Afghani.<sup>100</sup> Despite the fact that

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<sup>96</sup> Pouwels, 1987, 118.

<sup>97</sup> Sheriff, 1987, 218.

<sup>98</sup> Ghazal, 2005, 129.

<sup>99</sup> *Ibid*, 131.

<sup>100</sup> EL Masri, F.H “Sheikh al-Amin bin Ali al-Mazru’i and the Intellectual Tradition in East Africa” (1987) 7 (2) *Journal Institute of Muslim Minority Affairs* 231.

the *mutawwiun* and *salafiya* were diverse in their ideologies, their approach converged with regard to their opposition to colonial occupation of Muslim lands and their call to apply Islamic doctrines in running state affairs. Hence, in the process of accommodating religious scholars in Zanzibar, the British monitored the influence of religious movements on the local religious establishments.

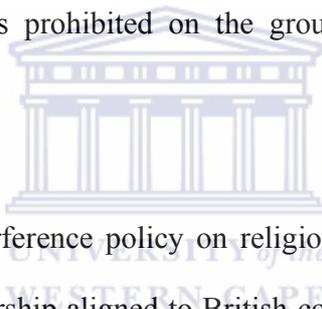
The British apprehension of a resurgence of anti-colonial movements and strict adherence to Islamic law can be noted during the reign of Sultan Khalifa b. Sa'id (r.1888-90). Sultan Khalifa was strongly opposed to Western imperialism and sought to apply Islamic law in running the state. Sir Euan Smith (British Agent and Consul General Colonel in Zanzibar 1889-91) described Sultan Khalifa as "a weak leader who does not understand what is going around the world outside Zanzibar".<sup>101</sup> The British concern was that Islamic law should not be implemented fully in the Sultanate, as had occurred in other regions like Northern Nigeria. In Zanzibar, the *kadhis* had a close relationship with the Sultans, a fact that made the British keen to monitor their relationship. For instance, *kadhi* Abdulaziz Al-Amawi (d.1896) advised Sultan Khalifa b. Sa'id "to execute all criminals in Zanzibar prison and to restore the island completely to the letter of Islamic law." Euan-Smith, in turn, reported that Sultan Khalifa was "in the hands of low advisors who virtually ruled the State" and that "he had now determined to rule and be guided solely by the precepts of the Koran".<sup>102</sup>

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<sup>101</sup> Al-Ismaili, 1999, 23.

<sup>102</sup> Pouwels, 1987, 169.

Another haunting spectre that occupied the minds of the British colonial administrators was the spread of Mahdist ideas that were used by Muslim reformists to fight British interests in the name of Pan-Islamism. The Mahdist state in Sudan that was established in 1885 represented another threat to the British Empire.<sup>103</sup> Although the *Mahdiyya* movement was defeated by a joint force of British and Egyptian troops in 1898, the British feared the rise of a new *Mahdiyya* movement in other territories. Britain's initial recognition of Islamic law in Sudan was a measure to counter a Mahdist revival that threatened British rule.<sup>104</sup> In his memorandum to *mudirs*, Lord Kitchener in Sudan noted that religious teachings were responsible in a great measure for the Mahdist rebellion. Hence, re-establishing centres of religious teaching (*zawiya*) was prohibited on the ground that they formed centres of unorthodox fanaticism.<sup>105</sup>



The British adopted a non-interference policy on religious matters and embarked on the creation of a new Muslim leadership aligned to British colonial interests. In the early 19<sup>th</sup> century, the British kept surveillance on Islamic practices and movements in order to counter any opposition to colonial rule. The British fear of these anti-colonial movements forced them to embark on a policy of keeping surveillance on religious figures. In order to avert the rise of a new Mahdist movement in Nigeria, the British adopted a policy of “respect and non-interference”.<sup>106</sup> By adopting the indirect rule policy, the British allowed

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<sup>103</sup> Ibrahim. 1997, 16.

<sup>104</sup> Jeppie, 2009, 173.

<sup>105</sup> Abushouk, A.I and Bjorkelo A (2006) *The Native Administration in the Anglo-Egyptian Sudan 1898-1956* University of Bergen: Centre for Middle Eastern and Islamic Studies 51.

<sup>106</sup> Ibrahim, 1997, 18.

Muslim Emirs to rule after the establishment of the Protectorate of Northern Nigeria in 1900. The Muslim Emirs were required to show their loyalty to the British monarch by taking an oath of office by swearing on the Quran.<sup>107</sup>

Due to the historical ties between Nigeria and Sudan, the Mahdist movement had significant repercussions in the Sokoto caliphate.<sup>108</sup> Tied to this fanaticism was the British fear of the revival of the implementation of Islamic law in her colonial territories. British efforts to contain the revival of Islamic law were based on the premise that it created a trans-territorial framework that could influence other parts of the British territories.<sup>109</sup> Since the establishment of the Sokoto Caliphate by Sh. Usman Dan Fodio in the early 1800s, the colonial fear of Islamic uprisings was recurrent throughout the British colonies.<sup>110</sup> In Northern Nigeria, Britain was first and foremost concerned with the spread of Dan Fodio's *jihad* movement which Lugard termed "waves of fanaticism bounded by no political frontiers".<sup>111</sup> It was based on these fears of religious uprisings that Britain prohibited the spread of Islamic law throughout her territories. By adoption of the policy of

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<sup>107</sup> The Emirs were required to take an oath: "I swear in the name of God to well and truly serve His majesty King George V and his representative the Governor –General of Nigeria to obey the laws of Nigeria and the lawful commands of the Governor, provided they are not contrary to my religion and if they are so contrary I will at once inform the Resident and the Governor." See Umar, 2006, 8.

<sup>108</sup> Christelow, 2002, 189.

<sup>109</sup> Christelow, 2000, 381.

<sup>110</sup> The Sokoto caliphate was established by Usman Dan Fodio's *jihad* in the early 1800s. British established the Protectorate of Northern Nigeria in 1900 and in 1903 defeated the Sokoto forces at the battle of Burmi. See Umar, 2006, 1.

<sup>111</sup> Reynolds, 2001, 610.

transforming Islamic law, the British colonial authorities in the Busa'idi Sultanate restricted the influence of Islamic law and confined its application to MPL.

#### **4.10 The conflicts between British colonial officials regarding the administration of justice in the Busa'idi Sultanate and the British Colony in Kenya**

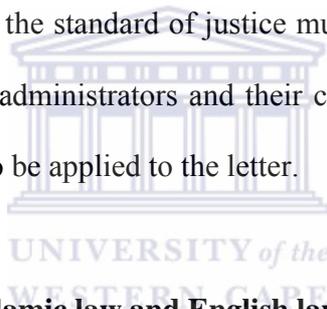
There was no uniform policy regarding the administration of justice in the British colonial territories and “officials on the spot developed varying systems of law and government in response to local realities and pragmatic considerations”.<sup>112</sup> This led to a conflict of laws in the courts, on the one hand, between British administrators and judicial officers, and on the other hand, between Islamic law and English and customary laws. Tensions between British colonial officials not only demonstrate the lack of a uniform policy on the administration of justice but also portray a continuous controversy between the two arms of the colonial machineries that paved the way for a conflict of laws. The lack of uniformity of British legal policies is reflected by the conflicting opinions of British colonial officials on the adoption of English law in East Africa, particularly in cases where the principles of English law were deemed to be applicable in the 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”.<sup>113</sup> This led to a disagreement between British colonial officials regarding the adoption of English law in a foreign land.

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<sup>112</sup> Mann, 1991, 18.

<sup>113</sup> *Ibid*, 24.

British administrative officials saw the inappropriateness of much of English law as applied in England and argued either for substantial modification of the law or its suppression in the colonial territories. Owing to the inherent technicalities embedded in the English law, British colonial administrators felt that much of English law and procedure “needed very considerable modification if injustices were to be avoided”.<sup>114</sup> They argued that English law was inappropriate to be applied in the British territories and instead argued for its substantial modification so as to suit the local circumstances. On the other hand, British judicial officials saw the technicalities of English law as an integral part of the English legal system and “without them the standard of justice must be lower”.<sup>115</sup> British judicial officers mistrusted their fellow administrators and their capacity to effect proper ‘English justice’ if English law was not to be applied to the letter.



#### **4.10.1 The conflict between Islamic law and English law in the Busa‘idi Sultanate and the British Colony in Kenya**

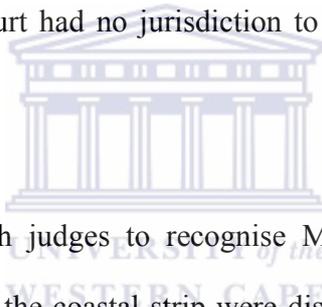
British courts faced difficulties in administering Islamic law beyond the Kenya coastal strip. In 1890 the British declared a Protectorate over the Kenya coastal strip which was under the Sultan’s dominion. Later, in 1895, the British colonial administration declared a Colony in areas beyond the Kenya coastal strip. Based on this division, the British courts were caught in a conflict of jurisdiction. While British judges administered Islamic law

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<sup>114</sup> Morris, 1972, 73.

<sup>115</sup> Allott, 1974, 204.

within the Sultan's dominions on the basis that it was the law of the land, they refused to recognise Islamic law beyond the Kenya coastal strip. It followed that British judges recognised the validity of Muslim marriages within the Sultan's dominion, on the one hand, and refused to recognize such marriages beyond the Kenya coastal strip, on the other hand.<sup>116</sup> This situation also affected Muslim litigants who lived in the British colony beyond the Kenya coastal strip. In the case of *Gulam Mohamed v. Gulam Fatima and Kabir Shah* the parties had married in Nairobi according to Muslim family law in 1907.<sup>117</sup> At the time of the ceremony, the plaintiff was married to another woman in India. It was held that the East African Marriage Ordinance 1902 contemplated monogamous marriages only, and that therefore the Court had no jurisdiction to make an order for restitution of conjugal rights.<sup>118</sup>



Based on the refusal of British judges to recognise Muslim marriages, the estates of deceased Muslims domiciled in the coastal strip were distributed according to the Islamic law of inheritance, while the estates of deceased Muslims who died beyond the coastal strip were distributed according to English common law. To overcome this problem, R.W. Hamilton, Chief Justice of Kenya, proposed that a policy should be established to recognise Muslim marriages throughout the British Protectorate, and noted that "it would in practice

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<sup>116</sup> British judges referred to the judicial practice in South Africa where a Muslim marriage was regarded merely as a consortium, which did not have the legal status of a marriage as known in the common law.

<sup>117</sup> (1916) 6 E.A.L.R 119.

<sup>118</sup> A similar decision was reached in the case of *Fatuma bt. Athumani v. Ali Baka* where the High Court held that a marriage according to Islamic family law in Nairobi was not recognised by the East African Marriage Ordinance 1902 and that consequently the Court did not have the power to dissolve it (1918) 7 E.A.L.R. 171.

be difficult, and might be politically unwise, not to accord both to British subjects and British protected persons the same recognition of Mohamedan law up-country that we are bound to extend to them at the Coast”.<sup>119</sup> In proposing this view, Hamilton pointed out the possibility of opposition from Christian missionaries in the British Protectorate who could object to “what would appear to them to be unnecessary legalizing of Mohamedan religion and polygamy in the British Protectorate in which the Christian religion is making great strides”.<sup>120</sup>

Hamilton’s apprehension was apparent not only in the churches’ stand on opposing the recognition of Muslim marriages beyond the coastal strip, but also in that British administrators expressed their concerns on this matter. The Chief Native Commissioner in Nairobi rejected the possibility of recognising Muslim marriages that would be inconsistent with the East African Marriage Ordinance 1902. He remarked:

“the hinterland is not a Mohamedan country nor is the actual inhabitants Mohammedans. True there are numbers of converts to Islam in the interior and efforts are made in a small way to procure additional converts, but these matters form no reason why we should introduce laws allowing polygamous union so to amend our marriage law as to provide for their legalization”.<sup>121</sup>

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<sup>119</sup> KNA/AG/27/48, letter from R.W. Hamilton, the Chief Justice, High Court, Mombasa to the Attorney-General, Nairobi, dated 24 April 1919.

<sup>120</sup> *Ibid.*

<sup>121</sup> KNA/AG/27/48, letter from the Chief Native Commissioner, Nairobi, to the Attorney- General, dated 1 September 1919.

The colonial situation presented a scenario of competing legal systems in which Islamic law competed with English law, on the one hand, and, on the other hand, with customary law, in responding to various factors.<sup>122</sup> In cases of conflict between Islamic law and English law, statutory provisions that were applied by British judicial officers gave preference to English law. For instance, in the British Colony in Kenya, the Marriage Ordinance 1902 provided that whoever contracts a Muslim marriage being at the time married under the Marriage Ordinance or in accordance with the law of any Christian country and without having first obtained a lawful divorce, shall be liable to imprisonment for a period not exceeding five years, and in such a case Muslim law shall have no application.<sup>123</sup> A conflict between English and Islamic laws occurred in marital disputes, particularly when the spouses involved were of different faiths.

A marriage of a non-Muslim man with a Muslim woman is not allowed in accordance with Islamic law. However, statute law provided that a marriage of a non-Muslim man with a Muslim woman of not less than 21 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. Prior to 1902, there was no monogamous

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<sup>122</sup> Christelow, 2000, 373.

<sup>123</sup> Anderson, J.N.D (1976) *Law Reform in the Muslim World*. London: Athlone Press 87. A contradiction can be observed between the decisions of the courts, in that in 1948 the East African Court of Appeal held in *Fatuma bt. Salim Bakhshuwen and Aisha bt. Salim Bakhshuwen v. Mohamed b. Salim Bakhshuwen* that “it has always been regarded in this Court and in the Supreme Court of Kenya that in cases affecting personal status arising between Mohammedans the law to be applied is Mohammedan law as interpreted by judicial decision”. (1949) 14 E.A.C.A. 11.

marriage law in the British Colony and Protectorate in Kenya but in that year the East Africa Marriage Ordinance was enacted. In the Ordinance the expression “Non-natives” included Europeans and Asians but did not include Arabs and African tribesmen who professed Islam. Therefore the Ordinance applied to Europeans and Asians whereas Islamic law applied to Non-natives professing Islam, including Arabs.

In some cases the British passed legislation that contradicted principles of Islamic law. For instance, in the British Colony in Kenya, the Marriage (Solemnisation and Registration) Decree, 1915 provided a way in which a Muslim girl could marry a Christian man without the consent of her guardian provided that she was over 21 years of age.<sup>124</sup> According to Islamic law a Muslim woman is not permitted to marry a non-Muslim man. In addition, the Decree gives the mother the right of guardianship and to agree to the marriage of her daughter which is contrary to the rules of guardianship in Islamic law. In the case of *Fanuel Lemama*, that concerned a proposed marriage between a Christian man and a Muslim girl aged 15 years,<sup>125</sup> the mother of the girl gave her consent in the place of the deceased father. The uncle of the girl objected to the proposed marriage on the ground that under Islamic law he had the right to be the guardian of the girl after her father’s death. He also contented that under Islamic law the girl could not contract a valid marriage with a non-Muslim. Presiding Judge Thacker rejected these grounds and held that Islamic law was inconsistent in this respect with the provisions of the Marriage (Solemnisation and Registration) Ordinance 1915, and that there was nothing in the Ordinance to prohibit a

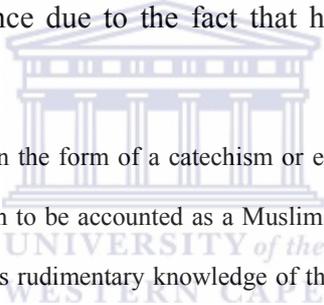
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<sup>124</sup> Similar provision was made by the Marriage Ordinance 1914 of Nigeria to allow Muslim women to marry a non-Muslim despite violation of the provisions of Islamic family law. Serag, 2002, 7.

<sup>125</sup> 19 K.L.R. (1941) 48

marriage between a Muslim and a Christian. He further held that although the uncle would appear to be the girl's guardian by Islamic law, his consent was not necessary for the girl's marriage.<sup>126</sup>

The British were concerned with the status of non-Muslims in the *kadhi* courts. British judges encountered difficulties in cases where either of the parties claimed to be non-Muslim. For instance, in the case of *The Administrar General of the Estate of Sharifa bt. Abdulkarim b. Aboud Askar, deceased v. (1) Omar b. Salim (2) Moosa Arobi*, which occurred in Zanzibar, an objection was raised on the ground that the *kadhi* disqualified the second defendant from inheritance due to the fact that he was a non-Muslim.<sup>127</sup> Chief Justice J.M. Gray noted

  
“I know of nothing in the form of a catechism or examination test, which is a requisite in order to enable a man to be accounted as a Muslim. If such a person says he is a Muslim and shows that he has rudimentary knowledge of that religion, then it is in my opinion for the person, who alleges that he is no more than a colourable Muslim, to prove that he is in fact not a Muslim”.<sup>128</sup>

Another reason to disinherit the second defendant was raised: that his mother was not a Muslim at the time of her marriage to the second defendant's father. According to the rules of the Islamic law of inheritance, a difference of religion is a bar to inheritance between

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<sup>126</sup> Anderson, 1970, 135. In this connection Sir John Gray has quoted Lord Haldanes's words of caution in the *White Caps* case (1921) 2 A.C. 399 that English judges should be “on their guard against a subconscious tendency to treat matters arising in Muslim law conceptually in terms which are appropriate only to systems which have grown up under English law”. Quoted in Gray, 1955, 34.

<sup>127</sup> ZNA/HC3/4129 Civil Case No.2 of 1948 (unreported).

<sup>128</sup> *Ibid.*

relatives. It follows that a non-Muslim relative is not allowed to inherit from his or her Muslim relatives or vice versa. The Judge refuted this ground of objection and noted: “if the woman was a Protestant, she was a *kitabiyya* and her marriage to a Muslim was perfectly valid in the eyes of Muslim law.”<sup>129</sup>

Matters of inheritance involving Muslims in Kenya fall within the jurisdiction of the *kadhi's* court.<sup>130</sup> This power is conferred by the Mohammedan Marriage, Divorce and Succession. Act. Section 4 of the Act provides:

“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

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<sup>129</sup> *Ibid.* Chief Justice Gray based his judgement on the case of *Abulrazak v. Aga Mohammed* (1893) 21 Cal. 666 at p.673 in which the Privy Council held: “no court can test or gauge the sincerity of a religious belief. In all cases where, according to Mohammedan law, unbelief or difference of creed is a bar to marriage with a true believer, it is enough if the alien in religion embraces the Mohammedan faith. Profession with or without conversion is necessary and sufficient to remove the disability.”

<sup>130</sup> Section 2 (3) of the Law of Succession Act of Kenya (Chapter 160 of Laws of Kenya) states: “the provisions of this Act shall not apply to testamentary or intestate succession on the estate of any person, who at the time of his death is a Muslim, to the intent that in lieu of such provision the devolution of the estate of any such person shall be governed by Muslim law.”

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.”<sup>131</sup>

In the case of *The Administrator –General, Zanzibar v. Mtumwa bt. Bakari Wasu*<sup>132</sup> the deceased left a widow and no other heir. The British judge noted that the application of *shafi'i* law, which entitled the widow to only her one-quarter share, would cause hardship to her since it would force a sale of the house in which she had always lived. The judge cited modern trends in Indian judicial decisions, that where there were no surviving blood relations of the deceased, the widow would be entitled to benefit from the principle of *rad* in the absence of *bait al-Mal*. The judge pointed out that the situation differed from that in India in that in Zanzibar *bait al-Mal* enjoyed statutory recognition by virtue of section 327 of the Succession Decree.<sup>133</sup> The judge held that since *bait al-Mal* had statutory recognition in Zanzibar a mandatory duty is placed on executors of the estate to hand the residue of the estate to the Surplus Fund. However, in order to alleviate the hardship of the widow, he recommended that the Administer-General should allow the widow to remain in her home during her life time either by giving her a lease at a nominal rental or by waiver of the claim.

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<sup>131</sup> Chapter 156 of Laws of Kenya.

<sup>132</sup> (1958) E.A.L.R. 285.

<sup>133</sup> Section 327 provided: “(1) In any case in which the Bait al-Mal is entitled to the whole or any portion of an estate it shall be lawful for the court in its discretion to order (a) a sum not exceeding one hundred rupees to be distributed in such proportions as it may think fit among persons who were dependant on the deceased; (b) a sum not exceeding five hundred rupees to be paid to the husband or wife or wives surviving the deceased.”

#### **4.10.2 The conflict between Islamic law and customary law in the Busa‘idi Sultanate and the British Colony in Kenya.**

The British colonial authorities allowed Islamic law, although with limited jurisdiction, to prevail in the Colonies and Protectorates where Muslims ruled, such as in the Busa‘idi Sultanate. However, where British colonies were established in the hinterland, such as the interior of Kenya, the policy leaned towards applying African customary laws. In other cases, such as Tanganyika, Islamic law strictly applied to Muslims although it was regarded as part of the customary law. Conflicts between Islamic law and customary law were further increased by the British policy on ethnicity. Natives in the Kenya coastal strip were subjected to the jurisdiction of His Highness’s Court.<sup>134</sup> In some cases the British treated Islamic law as part of the Native law.<sup>135</sup> However, the Court of Appeal for Eastern Africa held that the law of Islam cannot be described as “native law merely because it is the law applicable to many or even all natives of the Kenya Protectorate”.<sup>136</sup> The British judges contended that what constituted “native law and custom” of a certain community was not determined by whether the relevant law was indigenous to the community concerned, but rather by whether it had been accepted through usage by any section of the community.<sup>137</sup>

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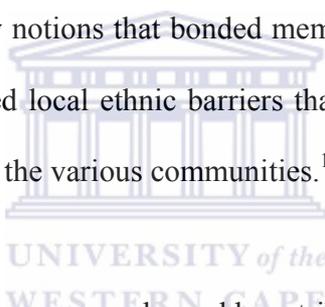
<sup>134</sup> Vaughan, 1935, 20.

<sup>135</sup> Salamone, F.A “The Clash between Indigenous, Islamic, Colonial and Post-Colonial Law in Nigeria” (1983) 21 *Journal of Legal Pluralism and Unofficial Law* 29.

<sup>136</sup> *Khamis v. Ahmed* (1934) 1 E.A.C.A. 130.

<sup>137</sup> Anderson. 1955, 77.

Among the challenges that faced the British was to harmonize between the existing systems; Islamic law and customary law. Conflicts that existed between Islamic law and African customary law were increased by the imposition of English common law that led to a complex system of legal pluralism.<sup>138</sup> Traditional patterns among the local tribes along the East African coast were influenced by Islamic law particularly in matters of family law. Morris observes: “Muslim marriage law can be more easily adjusted than the corresponding European law to traditional African ideas and practices”.<sup>139</sup> He regarded the flexibility of Muslim law as due to its capacity to accommodate itself to the traditional rules of African society.<sup>140</sup> Islamic law enhanced the already existing tribal relationship in the local communities. It introduced new notions that bonded members of the various communities based on faith. This transcended local ethnic barriers that led to the strengthening of the Islamic faith among members of the various communities.<sup>141</sup>



In cases where the religion of Islam was embraced by a tribe as a whole, the customary law of that tribe tended to assimilate itself to the Islamic way of life. In cases where certain individuals of a tribe or family groups embraced Islam, either members of such tribe become detribalized and embraced Islamic law (as in the case of the *giriama* tribe in the Kenya Protectorate) or they remain integral members of their tribe and continued to be

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<sup>138</sup> Presence of plural systems of law: customary law, Islamic law and English law during the colonial period gave rise to a triple heritage of laws in post-colonial Africa. See Mazrui, 1989, 252.

<sup>139</sup> Phillips, 1971, 132.

<sup>140</sup> *Ibid.*

<sup>141</sup> Christelow, 2000, 374.

governed by their tribal customs.<sup>142</sup> The Muslim marriage system seems to share much of the African traditional marriage. For instance, polygamy which was practiced by African societies for social and economic reasons was also permitted by Islamic Law. Thus most converts to Islam saw no conflict between their traditional marriage systems and Islamic practice.<sup>143</sup>

The Islamic law of inheritance shared much with the African customs. In both cases inheritance is based on consanguinity, marriage and clientship, and many people share the belongings of the deceased person. However, there are areas where conflicts arose between the two systems. For instance, while Islamic law allows both male and female relations of the deceased person to inherit, most African customs did not allow women to inherit from their male relatives.<sup>144</sup> In cases of conflict between Islamic law and customary law, British Judges preferred Islamic law. For instance, in the case of *Ali Ganyuma v. Ali Mohamed*, the issue was whether the property of a member of the *digoo* tribe who had contracted a Muslim marriage should be distributed according to Islamic law or tribal custom.<sup>145</sup> Inheritance according to the Islamic law of succession is patrilineal whereas according to *digoo* tribal custom it is matrilineal. The suit was first heard and decided by a Native

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<sup>142</sup> Anderson, 1955, 78.

<sup>143</sup> Kaniki, M.H. (1989) "Religious conflict and cultural accommodation: the impact of Islam on some aspects of African societies" (Paper presented at a seminar in the History Department, University of Dar es Salaam) 89. Despite the fact that marriage between parallel cousins was permitted in Islam, such practice was prohibited by some African customary customs.

<sup>144</sup> Kaniki, 1989, 92.

<sup>145</sup> (1927) 11 K.L.R. 30.

Tribunal which held that the estate should be distributed according to *digo* tribal custom. On a further appeal, the Supreme Court decided that Islamic law applied to the estate on the ground that in cases where Natives professed Islam, the Mohamedan Divorce and Succession Ordinance was applicable.

Conflicts between Islamic law and customary law were apparent in cases where members of a certain tribe converted to Islam and such members of the tribe retained their customs which contradicted Islamic legal rules. For instance, although some members of the *mijikenda* tribe in the coastal part of Kenya embraced Islam, they followed their tribal customs that contradicted Islamic legal rules.<sup>146</sup> Morris articulates this conflict in that particularly “where Islam has come into contact with African tribes possessing matrimonial institutions, the process of mutual adjustment of Islamic law and customary law is particularly difficult”.<sup>147</sup> Abu Rannat mentioned that in the Western Kordofan in Sudan, the *Messariya* tribe did not recognize the right of a married woman to acquire an estate and as soon as a girl is married, her property acquired before marriage passed to her brothers

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<sup>146</sup> The *mijikenda* (also known as *midzi-chenda*) is a confederation of nine groups of Bantu speaking people residing along the East African coast. It consists of the following tribes: *giriama*, *digo*, *kauma*, *chonyi*, *jibana*, *kambe*, *ribe*, *rabai* and *duruma*. For instance the *giriama* tribe along the Kenya coast permit free love between unmarried men and women. If a woman became pregnant she would be married by her seducer and in case he refused he had to pay compensation (*malu*). For details of the customs of this tribe, see KNA/PC/COAST/1/1/199, Political Record Book. For details on native customs generally see “Some notes on native law and customs” in Hamilton, R.W “East Africa Protectorate Law Reports, Cases determined by the High Court of Mombasa, the Appeal Court of Zanzibar and the Judicial Committee of the Privy Council on appeal from 1897-1905” 97-111.

<sup>147</sup> Phillips, 1971, 132.

making it impossible for her husband to dispose of her property. The Native courts applied such custom in cases where disputes arose. To avoid this anomaly, such disputes were taken to the Privy Council which declared the custom to be contrary to justice, morality and order.<sup>148</sup>

Muslim immigrants from India to the East African coast presented a legal complexity that was not to be found in other communities. In the case of *Abdulrahim Haji Ismail Nathu v. Halimabhai*, the issue in question was whether the estate of a member of an Indian sect whose members had converted to Islam was to be governed by Hindu law or Islamic law.<sup>149</sup>

The deceased, Haji Ismail Mithu, father of the appellant and husband of the respondent, was a member of the Indian sect known as Memons. Upon their conversion to Islam, the Memons retained the Hindu law of succession as their customary law. The appellant, who was a son of the deceased, claimed that succession to the estate of the deceased was to be governed by Hindu law which entitled the respondent, widow of the deceased, no more than maintenance. The respondent claimed that the estate was to be governed by the Islamic law of inheritance which entitled her to a one eighth share of her deceased husband's estate. The High Court decided in favour of the appellant that Hindu law applied, on the ground that the burden of proof lay with the respondent to show that the Islamic law of inheritance applied to Memons in East Africa coast instead of Hindu law. The Court of Appeal held in favour of the respondent that Islamic law applied on the ground that the Judge of the High Court had wrongly stated the character of the burden of proof. The

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<sup>148</sup> Abu Rannat, S.M "The Relationship between Islamic and Customary law in the Sudan" (1960) 4 *Journal of African Law* 11.

<sup>149</sup> (1915) 1 Z.L.R.669. Also reported in (1915) 6 E.A.L.R. 113.

appellant being unsatisfied appealed to the Privy Council which confirmed the judgment of the Court of Appeal in favour of the respondent. The Privy Council held that when a Hindu family, being themselves Mohammedans, emigrate from India and settle among Mohammedans, the presumption arises that they have accepted the law of the people whom they have joined and therefore the law regulating succession must be Islamic law and not Hindu law.<sup>150</sup>

#### **4.11 British manipulation of ethnic identities in the Busa‘idi Sultanate and the British Colony in Kenya**

British policy on the administration of Islamic law in the Busa‘idi Sultanate was influenced by ethnic factors. Following Mamdani’s argument, the British established judicial systems in her colonies in “a bipolar scheme where customary justice was dispensed to natives by chiefs and commissioners, black and white; modern justice to non-native by white magistrates”.<sup>151</sup> The existence of various ethnicities and religious affiliations in the colonies paved the way for the British to differentiate the colonized society along ethnic and religious lines. Due to the various existing religious differences among the subjects, the colonial powers attached significance to religion as a factor in ruling their subjects. For instance, French policy distinguished between ‘white Islam’ which was also referred to as ‘Arab Islam’ and ‘Islam noir’ (black Islam) also referred to as ‘African Islam’. According to the French, the former represented fanatical Islam while the latter represented tolerant

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<sup>150</sup> *Ibid.*

<sup>151</sup> Mamdani, 1996, 109.

Islam that integrated with African traditions.<sup>152</sup> Although the British view differed from that of the French, both views seem to agree that Islam was adaptable to African customs. Institutions along the East African coast were organized according to ethnicity and religious boundaries in which British colonial policies were employed to shape social and political life. Hence, British policy was directed towards reserving certain types of rights for members of particular ethnic categories at the expense of others. British policy was centred on a tripartite division of the courts; English, Islamic and customary designed to serve different ethnic and religious communities.<sup>153</sup>

British colonial policy took advantage of the ethnic and cultural differences that existed among the colonized and adopted a policy of manipulating ethnic identities in differentiating among the colonized along ethnic and religious lines.<sup>154</sup> In India, the British classified the people according to their caste and religion. The British transplanted the ethnic policy from India to their territories in East Africa. Johnston (d.1927), the British commissioner in Uganda, placed the Indian race at a higher status than the African one in order to develop the latter's racial improvement. Johnston noted that "what the African required to rise above his current level of culture was the admixture of a superior type of

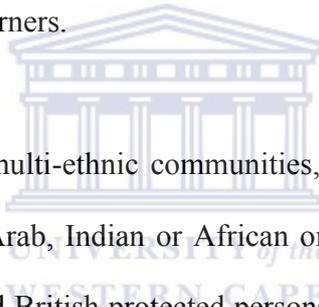
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<sup>152</sup> Bonate, L. J. K (2007) "Traditions and Transitions: Islam and Chiefship in Northern Mozambique, ca. 1850-1974" (Unpublished PhD Dissertation submitted to the Department of Historical Studies, University of Cape Town) 75.

<sup>153</sup> Brown, B. B, "Islamic Law, Qadhis' Courts and Muslim Women's Legal Status: The Case of Kenya" (1993) 14 (1&2) *Journal Institute of Muslim Minority Affairs* 95.

<sup>154</sup> Salih, K.O "British Policy and the Accentuation of Inter-Ethnic Division: The Case of the Nuba Mountains Region of Sudan, 192-1940" (1990) 89 *African Affairs* 417.

man who was the Indian”. Johnston argued that the White man could not improve the racial status of the African “because the black and white races were too widely separated in type to produce a satisfactory hybrid” and that the only hope for Africans lay with Indians in that “the mixture of the two races would give the Indian the physical development which he lacks, and he would transmit to his half Negro offspring the industry, ambition, and aspiration towards a civilized life which the Negro lacks”.<sup>155</sup> The British in India also used religious factors in distinguishing the legal status between Muslims and Hindus.<sup>156</sup> In Sudan, the British distinguished between the Arab Muslim northerners from the African Christian southerners. In Nigeria, British policy distinguished between the Muslim northerners and Christian southerners.



In Zanzibar where there were multi-ethnic communities, the British classified the people along ethnic lines as being of Arab, Indian or African origin. For instance, the Zanzibar Order-in-Council 1924 classified British protected persons to include the Indian population in Zanzibar and the Natives of Kelati Baluchistan. British subjects included the Natives of Kenya Colony, Baluchis from British Baluchistan and persons from the Island of Bahrain in the Persian Gulf. The British colonial authorities also supported Omani Arabs in the Busa'idi Sultanate to retain their dominant political status. Arabs were given preferential status in legislative and administrative positions.<sup>157</sup> The British admiration for the Arabs, which was portrayed in Hardinge's writings, regarded them as a civilising influence on the

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<sup>155</sup> Metcalf, 2007, 174.

<sup>156</sup> *Ibid*, 46.

<sup>157</sup> Lofchie, 1965, 52.

Africans.<sup>158</sup> Hardinge stated: “I regard the Arabs and the Arabized Swahilis, and in general the native Mohammedans population of the coast as the one civilized element which stands between us and the utterly barbarous races of the interior.”<sup>159</sup> With the existence of multiple racial groups, the British policy created a racial hierarchy that placed Europeans at the top, followed by Arabs and Indians in the middle, and Africans at the bottom.<sup>160</sup>

Distinguishing the colonized people along ethnic and religious lines led to the sharpening of divisions between the communities. The British policies of manipulating ethnic identities weakened the social bonds which existed between the various tribes in the Busa‘idi Sultanate. British colonial policy utilized ethnic factors in categorising and controlling the colonized people. In employing this policy, the British recognized an external identity, as in the case of the Omani Sultans in Zanzibar. Based on this colonial stratification of ethnic identities, various ethnic groups in the Busa‘idi Sultanate utilized the ethnic factor to secure their rights.

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<sup>158</sup> Before his appointment to Zanzibar in 1894, Hardinge had served in various posts in the Middle East and had interacted with Arabs. His plan for the East African coast was to have an administration that would primarily rely on Arab support. Mungeam, 1966, 17.

<sup>159</sup> Mungeam, 1966, 26.

<sup>160</sup> In Zanzibar, the British adopted a policy of racial discrimination that was implemented in areas such as education. For instance, the Educational Commission of 1920 upheld the concept of racial separation in the professions in educating Arabs for agriculture, Indians for commerce and Africans for industry. Flint, 1965, 658. Similarly, during World War II, access to rationed materials and commodities was restricted along racial lines whereby rations were distributed by the allocation of colour-coded cards: Asian (green card), Arab (brown) and African (tan). Fair, Laura (2001) *Pastime and Politics: Culture, Community and Identity in Post-Abolition Urban Zanzibar, 1890-1945* Oxford: James Currey 47.

The British exploited the available human resources to run the Busa'idi Sultanate. Based on the colonial system of education, Indians and Arabs by being given access to education were more privileged than Africans. British colonial policies shaped the stratification of the colonised people in the civil service. Based on this colonial stratification, certain classes, such as the Arabs and Indians, were more privileged than the Africans. African Muslims along the Kenya coastal strip raised their concern about the preference given to Arabs over Africans in the appointment of *kadhīs*. In a letter addressed to the Provincial Commissioner of the Kenya coastal strip, the General Secretary of the Coast People's Party complained of the appointing of *kadhīs* from Arabs only, and remarked:

“although we do not wish to appear racial, such appointment should go to an African Muslim. There are a number who could be considered for the post. So far only Arabs have been appointed to the posts of Kathis and this is causing a lot of hard feeling amongst Muslims in the Protectorate.”<sup>161</sup>

The British colonial administration replied by stating that the Government's policy of appointing its officers was in no way racial and that such posts are filled impartially and entirely on the basis of the merit of the applicants. The Permanent Secretary of the British colonial administration in Kenya noted:

“you will appreciate that these appointments require specialised knowledge in such matters as Islamic law and the Koran, and this being the case, the only qualified people who have been eligible for such positions to date are members of the Arab community. Should suitably qualified candidates from other communities present themselves as candidates

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<sup>161</sup> KNA/CA/20/1, Appointment of *liwalis*, *mudirs* and *kadhīs*, letter from the General Secretary of the Coast People's Party to the Provincial Commissioner, coast province, dated 21 March 1961.

when vacancies for the position of Liwalis or Mudirs occur at any future date then their application will be given, of course, careful consideration.”<sup>162</sup>

British colonial officials were caught in a difficult situation in trying to balance the diverse ethnicities of their subjects. The policies adopted by the British colonial administration in appointing local officials from a certain ethnic group was seen by another ethnic group to be biased, and the British colonial officials were blamed for upholding such policies. Towards the 1940s, the British gradually changed their policy of favouring Arabs by establishing Native Tribunals and appointing African headmen in administrative posts along the coast. The Provincial Commissioner of Coast Province noted that “in Mombasa the Liwali’s position has been weakened owing to the appointment of a gazetted native headman with assistant from the main up country tribes. The Arabs feel that their officials have been pushed into the background and that they have lost *heshima*”.<sup>163</sup> Although the British regarded Arabs and Indians as belonging to the same racial category, Arabs felt they were given inferior treatment compared to that of their fellow Indians. The editor of *Al-Falaq* (The Dawn) newspaper in Zanzibar expressed the Arabs’ grievances about being denied privileges in employment that were given to Indians. He instead praised the German rule in Tanganyika for making no distinction between Arabs and Indians.<sup>164</sup>

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<sup>162</sup> KNA/CA/20/1, letter from the Permanent Secretary, to the General Secretary of Coast People’s Party, dated 30 March 1961.

<sup>163</sup> KNA/CA/20/31, Arab Officers – *liwalis*, *kadhis* and *mudirs*, letter from the Provincial Commissioner, Coast, to the Chief Secretary, Nairobi, dated 15 March 1939.

<sup>164</sup> ZNA/AB12/28/36A, *Al-Falaq*, Saturday 17 March 1945.

During their rule in the Busa‘idi Sultanate, the British colonial authorities did not have a consistent definition of the term ‘Native’. Lack of a consistent definition of ‘Native’ contributed to the absence of a clear policy in handling ethnic categories in the Busa‘idi Sultanate. The British colonial authorities used ethnic identities for inclusion and exclusion purposes. For instance, the term ‘Native’ was used by British colonial officials in early 20<sup>th</sup> century Zanzibar in legislation to exclude people of European and American origin from the application of ‘Native’ rules against them, whereas persons other than Europeans and Americans were subjected to ‘Native’ regulations. The East Africa Order-in-Council of 1897 defined a ‘Native’ as a “any native of Africa not of European or American origin and included any person not of European or American origin, who within the dominions of the Sultan of Zanzibar, would be subject to his Highness’ jurisdiction, even though such person should not have been born in Africa”.<sup>165</sup> In Kenya, the definition of a ‘Native’ by statute resulted in contradictory connotations by distinguishing between persons in relation to civil and criminal jurisdiction. For instance, Arabs in the Kenyan Protectorate were treated as ‘non-Natives’ under the taxations laws, but ironically were considered ‘Natives’ under the Criminal Law Amendment Ordinance of 1913. By comparison, in Nigeria, the term ‘Native’ was used as a blanket racial category in that it was defined by a court to refer to a “person of African descent”, while the Interpretation Act distinguished between a “native of Nigeria” and a “native foreigner”.

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<sup>165</sup> Section 1(a) of the East Africa Order-in-Council 1897, Supplement to the Gazette for Zanzibar and East Africa, Vol.6 No.290, 1.

Salim pointed out that the British colonial laws categorized the colonized people in the East African Protectorate as ‘Natives’ and ‘non-Natives’, imbuing the former with all sorts of connotations of inferiority to the extent that the term lost its basic meaning of “being indigenous”.<sup>166</sup> Classification of the colonised peoples resulted in discriminatory laws. For instance, in 1901 the British colonial administration introduced the Native Hut Tax Ordinance in Kenya. The Ordinance regarded Arabs and Swahilis as ‘Natives’ like the Africans who were required to pay the Hut Tax. Arabs in the Kenya coastal strip protested against the enactment of the Ordinance on the ground that Europeans and Asians ought not to be privileged by being exempted from the Hut Tax. The agitation of the Arabs led to an amendment of the Ordinance in 1901 that exempted them from paying the Hut Tax.<sup>167</sup>

In the enactment of laws, the British distinguished between Her Majesty’s subjects and those of the Sultan. This in turn led to discrimination among the people seeking justice from the courts of law. The policy paved the way for the introduction of laws that distinguished between Natives and non-Natives. For instance, Arab and Swahili Muslims in the Busa‘idi Sultanate were classified as ‘Natives’ and Islamic law was applied to them. Non-Muslims in the Busa‘idi Sultanate, including African tribes, were categorised under ‘Natives’ and ‘Native law’ was applied to them provided that it was not repugnant to justice or morality. English and Indian people were classified under ‘non-Natives’ whereby English and Indian Acts were applied to them.

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<sup>166</sup> Salim, 1970, 66.

<sup>167</sup> *Ibid*, 70.

In enacting laws along ethnic lines, the British contributed towards shaping the identity of the people according to their ethnic origin. Ethnic factors impeded the upholding the rule of law in the colonial territories where legal jurisdiction was determined by racial considerations and “the actual operation of colonial legal systems remained quite arbitrary”.<sup>168</sup> Classifying the colonized people along ethnic lines partly contributed towards the failure of the British policy to transform the Islamic law institutions and to assimilate the *kadhi* courts into the colonial judicial system.

#### **4.12 British policy on madhhab in the Busa‘idi Sultanate and the British Colony in Kenya**

Islamic law does not bind the State to force *kadhīs* to adjudicate according to a particular *madhhab*.<sup>169</sup> According to the majority of Muslim scholars, litigants in a dispute have the option to take their matter to any judge irrespective of his *madhhab* affiliation. Ibn Hajar al-Haytami (d.974), a *shafi‘i mufti* (jurist-consult), mentioned that “the habit of approaching a judge adhering to a different school for the purpose of obtaining more advantageous decision than the original school can offer, has long been practiced and is legitimated by consensus”.<sup>170</sup> During the Mamluk Dynasty in Egypt, Sultan Baybars (r.1260-1277) appointed a chief *kadhi* from each *madhhab* in order to avoid the hardships

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<sup>168</sup> Mann, 1991, 4.

<sup>169</sup> Vogel, 2000, 338.

<sup>170</sup> Shahar, 2008, 135. A number of Muslim countries have adopted in their statutes the principle of selection (*takhyir*) among the leading *madhhabs*. See Kamali, 2008, 271.

faced by litigants appearing before kadhis of different *madhhabs*.<sup>171</sup> Although the *hanafi madhab* was the official *madhhab* of the Ottoman Empire, Assistant (*naib*) *kadhis* were appointed from other *madhhabs* and used to sit together with the *hanafi kadhi*.<sup>172</sup> The Ottomans also allowed *kadhis* of other *madhhabs* to sit together with the *hanafi* chief *kadhi* (*qadi al-qudat*).<sup>173</sup> In cases where the rules of a particular *madhhab* were rigid, Hanafi jurists referred litigants to *kadhis* of other *madhhabs* to seek judgments that were more flexible. For instance, *hanafi muftis* of 18th century Syria and Palestine directed *hanafi kadhis* to endorse the rulings of *shafi'i* and *hanbali kadhis* who accept the annulment of a marriage when a husband does not support his wife.<sup>174</sup> Similarly, *muftis* in colonial India who followed the *hanafi madhhab*, adopted the view of the *maliki madhhab* which allows dissolution of marriage for a divorced woman who does not undergo menstruation period. The *hanafi* view is strict in that it binds the divorcee to wait until she has ceased further menstruation by reason of age. The *maliki* opinion is more liberal, in that it requires the divorced woman to wait for one year after the divorce.<sup>175</sup>

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<sup>171</sup> Shahar, 2008, 131.

<sup>172</sup> Zubaida, 2003, 68.

<sup>173</sup> Rafeq, 2006, 411.

<sup>174</sup> Shahar, 2008, 135.

<sup>175</sup> Zaman, 2002, 26.

In Zanzibar, Sultan Seyyid Sa‘id (r.1804-56) issued a Proclamation in 1845 that directed *kadhis* to be governed by their own *madhhabs*.<sup>176</sup> The issue was brought up again in 1914, when it was ruled that *kadhis* were bound by their legal schools, and that the plaintiff had the right to bring his case before a *kadhi* of his own school.<sup>177</sup> British judicial officers in Zanzibar adopted a liberal policy that was contrary to the local practice prevalent in Zanzibar. For instance, Chief Justice Pickering held that “any Mohammedan may elect to follow the commentators of another sect. A shafei woman, for instance, should she find the Shafei marriage laws inconvenient, is entitled to elect to follow Hanafi law”.<sup>178</sup>

As part of transforming the functioning of *kadhi* courts, British judicial officers, as opposed to *kadhis*, gave their judgments according to the *madhhab* of the litigant before the court. During his visit to Zanzibar in 1953, Joseph Schacht noted that litigants were given the choice to take their disputes to either a *shafi‘i kadhi* or an *ibadhi kadhi* who sat in rooms that faced each other in the court building.<sup>179</sup> In the case of *The British Resident v. Hafiz b. Mohammed b. Hamed El-Busa‘idi*, it was held that in Mohammedan law the plaintiff can bring his action before a *shafi‘i* or *ibadhi kadhi* according to his choice and that the

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<sup>176</sup> Vaughan, 1935, 39. Conversely, the Ottoman Empire decreed that all courts should adjudicate only according to the *hanafi* doctrine, although *shafi‘i kadhis* continued to operate in the large cities in the Arab provinces. See Shahar, 2008, 138.

<sup>177</sup> Vaughan, 1935, 40.

<sup>178</sup> *The Public Trustee v. Her Highness, The Sultana, Seyyida Matuka bt. Hamoud and Others*, (1930) 4 Z.L.R.16.

<sup>179</sup> Schacht, 1965, 32.

defendant was bound by the choice.<sup>180</sup> In the case of *Hamed b. Suleiman El Mandri v. (1) Sadha bt. Suleiman b. Mohammed, (2) Omar b. Mohammed and (3) Mohammed b. Abdulla Wazir*, the plaintiff, a brother of the first defendant, sought a declaration that the marriage of his sister with the second defendant was null and void on the ground that the latter was unequal to the former.<sup>181</sup> The defendant was originally an *ibadhi* but before her marriage to the second defendant she adopted the *shafi'i madhhab*. Based on the authority of an Indian case, the Court held that the matter should be decided according to the *shafi'i madhhab* of the defendant.<sup>182</sup>

In reaching this decision, the Court relied on the Indian case of *Mohamed Ibrahim b. Mohamed Sayad Parkar v. Gulam Ahmed b. Mohamed Sayad Roghe*. In this case, a girl whose family were *shafi'i madhhab* declared on attaining puberty that she wished to adopt the *hanafi madhhab*.<sup>183</sup> She married in accordance with *hanafi* rites but her father did not consent to the marriage. The point raised during the trial court was whether the marriage was void in consequence of the girl's father's refusal to consent to the marriage. The Court held: "According to Mohamedan law a Muslim female belonging to any of the four schools can after attaining puberty elect to belong to whichever of the other three schools she

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<sup>180</sup> (1916) 1 Z.L.R. 526.

<sup>181</sup> (1912) 1 Z.L.R. 399.

<sup>182</sup> In the case of *Mohamed Ibrahim b. Mohamed Sayad Parkar v. Gulam Ahmed b. Mohamed Sayad Roghe*, (1864) 1 Bom. H.C. Rep., 236, the Court held that according to Mohamedan law a Muslim female belonging to any of the four schools can after attaining puberty elect to belong to whichever of the other three schools she pleases and the legality of her subsequent acts will be governed by the school she has adopted.

<sup>183</sup> (1864) 1 Bom. H.C. Rep., 236. Quoted in (1868) 1 Z.L.R. 399.

pleases and the legality of her subsequent acts will be governed by school she has adopted.”<sup>184</sup>

In the case of *Nasor b. Khalfan El-Kharusi v. Awena bt. Mahomed*, both parties were *ibadhi* and the case was presided over by a *shafi'i kadhi*.<sup>185</sup> The plaintiff sued his wife for restitution of conjugal rights. *Kadhi Ahmad b. Sumayt* gave judgment in favour of the plaintiff and rejected the defendant's claim that there was a divorce according to Sunni law. On an appeal to His Highness Court for Zanzibar and Pemba, a British Magistrate sat with two *kadhis*; one *sunni* and one *ibadhi*. The *sunni kadhi* upheld the judgment of *kadhi Ahmad b. Sumayt* as correct according to *sunni* law, while the *ibadhi kadhi* rejected the judgment due to the fact that it was against the *ibadhi* law. The British Magistrate followed the opinion of the *ibadhi kadhi* on the ground that the parties were *ibadhi* and therefore allowed the appeal by giving judgment in favour of the defendant. The plaintiff, being dissatisfied with this decision, appealed to the Supreme Court of His Highness the Sultan. Presiding over the appeal, Chief Justice Murison noted that “when parties have decided to choose a *kadhi* and judgment is made according to the *madhhab* of the *kadhi*, any appeal from that decision should be confined to the question whether the law of that *madhhab* has been accurately applied to the facts of the case.” The Judge further held: “if *sunni* law was incorrectly applied to the *ibadhi* parties in the *kadhi's* court, the defendant should have raised this point by way of a cross-objection in her appeal.” Consequently, Murison restored the judgment of *kadhi Ahmad b. Sumayt* and held that “whatever may be the differences

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<sup>184</sup> *Ibid.*

<sup>185</sup> (1917) 1 Z.L.R. 547.

between the parties, or however different may be the tenets of the Kadhi from those of the parties, yet the Kadhi is to decide according to his own tenets".<sup>186</sup>

In the case of *Kassim b. Mohamed Barwani v. Awadh b. Salim b. Awadh* both parties belonged to the *shafi'i madhhab* and the case was tried by an *ibadhi kadhi*.<sup>187</sup> The *ibadhi kadhi* decided the case according to his *madhhab* and followed the rule that *kadhis* were bound to give judgment according to their *madhhab*. In cases where disputing parties followed different *madhhabs*, British judicial officers took the liberty to apply common law principles of fairness and equity.<sup>188</sup>

In some cases, British judges applied common law principles of fairness and equity which were against the rules of the *madhhab* of the parties. For instance, in the case of *Re Juma Sadala's Estate*, the deceased who belonged to the *shafi'i madhhab* died intestate leaving a widow and no other heirs.<sup>189</sup> The Public Trustee, as administrator of the deceased's estate petitioned the court for a declaration to give the whole estate to the widow on the ground that with regard to the residue of an estate, in the absence of any other heirs, the principle of *rad* in the Islamic law of inheritance would be applicable. The Wakf Commissioners opposed the petition and claimed that the widow was only entitled to her one-fourth share and that the balance was to be given to the Wakf Commissioners representing the *Bayt al-Mal*. The *shafi'i* law provided that husband and wife were excluded from the heirs entitled

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<sup>186</sup> *Nassor v. Awena* (1917) 1 Z.L.R. 542.

<sup>187</sup> (1948) 7 Z.L.R. 24.

<sup>188</sup> Stockreiter, 2007, 54.

<sup>189</sup> (1958) 1 E.A.L.R. 308.

to benefit from the application of the doctrine of *rad*. However, the judge of the Supreme Court applied equitable principles and ordered that the whole residue of the estate revert to the widow. On an appeal, the Court of Appeal pointed out that the Trial Court erred in deviating from the *shafi'i* law which does not allow the application of the equitable principle of *istihsan*.<sup>190</sup> The Court held that the widow was entitled to be paid only her one-quarter share of the estate, and that the residue was to be handed to the Surplus Fund as prescribed by Section 18 of the Wakf Commissioners Ordinance 1951.<sup>191</sup>

In Zanzibar, British judicial officers came into contact with various *madhhabs*: *hanafi*, *shafi'i*, *ibadhi* and *shia*.<sup>192</sup> This scenario of prevalent *madhhabs* in Zanzibar presented a new dimension to the Anglo-Muhammadan law that accommodated the various *madhhabs* in addition to English law principles.<sup>193</sup> In dealing with cases in the Zanzibar courts, the

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<sup>190</sup> *The Wakf Commissioners v. The Public Trustee* (1959) 2 E.A.L.R. 368. *Istihsan* is the setting aside of analogy (*qiyas*) in favour of a stronger source. The *shafi'i* school has rejected the use of *istihsan* by other schools as opposed to the Hanafi school which adopted the principle. See Mahmasani, 1961, 85.

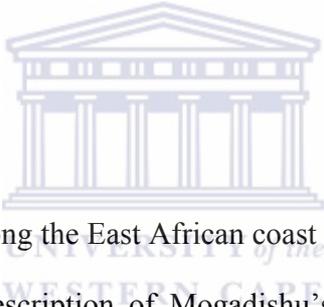
<sup>191</sup> Section 18 provides that: “(1) any property of a deceased Muslim to which no claim has been established within one year from the date upon which such property vested in the administrator of the estate or in the public trustee shall be handed over to the Wakf Commissioners ... into a special fund casted for the purpose to be known as the Surplus Fund. (2) The Surplus Fund shall be utilized by the Wakf Commissioners for such benevolent or charitable purposes for the benefit of Muslims as the Wakf Commissioners may consider proper.”

<sup>192</sup> On Shia Ismailia see the Agakhan case *The Advocate-General v. Muhammad Husen Huseni*, (1868) 1. Z.L.R. 630

<sup>193</sup> In India, the Anglo-Muhammadan law was a mixture of Islamic law principles based on the Hanafi *madhhab* and English law.

British judges referred to the texts of different schools and applied them to parties of various *madhhabs*. British judicial officers adopted a liberal policy of applying the texts of a particular *madhhab* to followers of another *madhhab*. For instance, in the case of *Rukiabhai Mohamedali Nazarali v. Mohamedali Nazarali*, both parties were *shias*. The appellant was unmarried daughter of the respondent, claimed maintenance from her father. In giving his judgement for the appellant, Chief Justice Gray relied on a Hanafi text and noted that “*Durr al-mukhtar* is a Hanafi commentary, but I see no reason for believing that the principle enunciated in the above cited passage, is not common to all schools of Muslim law”.<sup>194</sup>

#### 4.13 Conclusion



The existence of *kadhi* courts along the East African coast since the mid-14<sup>th</sup> century can be inferred from Ibn Battutah’s description of Mogadishu’s *kadhis* in 1331 and Imam al-Sakhawi’s meeting with the *kadhi* of Lamu in Mecca in 1436. From the establishment of the Busa’idi Sultanate in Zanzibar, the Sultans accommodated *kadhis* and their courts and recognised the authority of indigenous rulers in the administration of justice. When the British declared their protection over Zanzibar in 1890, they embarked on a policy of transforming the administration of Islamic law and the *kadhi* courts. The transformation process was implemented across the British territories. In 1888 the British government granted a Royal Charter to the IBEA Company which mandated it with the administration of justice along the Kenya coastal strip. The Company pioneered the transformation of

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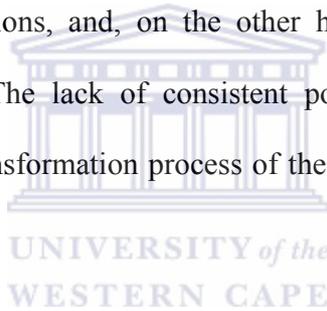
<sup>194</sup> (1951) 8 Z.L.R. 307.

*kadhis'* functioning by implementing the East Africa Order-in-Council which made significant changes in the administration of Islamic law in the coastal strip. Due to financial and logistical constraints, the British government took over the administration of the Kenya coastal strip and declared British protection over it in 1895. Through the Foreign Office, the British government continued to control the Kenya coastal strip until mid-20<sup>th</sup> century, when the process of decolonization emerged. Among the key issues that occupied the minds of both the British and the Sultans, was the future of the Kenya coastal strip. After a lengthy negotiation, the British managed to convince the Sultan of Zanzibar and the representatives of political parties from the Kenya Colony to sign an agreement integrating the coastal strip with the Kenya Colony in exchange for constitutional guarantees to safeguard the religious welfare of the Sultan's subjects and their descendants in the coastal strip. The constitutional guarantees paved the way for the entrenchment of *kadhi* courts in the Constitution of Kenya in 1963.

In the process of transforming the administration of Islamic law and its institutions in the Busa'idi Sultanate, the British were concerned with the emergence of religious movements in the Muslim world which propagated anti-colonial campaigns and the revival of the application of Islamic doctrines in Muslim countries. The main concern of the British colonial authorities was to prevent the influence of these religious movements on *kadhis* and Muslim scholars in the Busa'idi Sultanate.

The process of transforming the administration of Islamic law and its institutions led to competition between English law and Islamic law, on the one hand, and customary law and Islamic law, on the other hand. The British colonial authorities did not establish a clear

policy on resolving conflicts caused by the various legal traditions. The lack of such a policy led the British judges to adopt a particular approach to resolve cases of conflict. In cases of conflict between English and Islamic law, judges gave preference to English law, whereas when a conflict arose between customary and Islamic law, the latter was preferred to the former. The British colonial authorities also adopted a policy of categorizing the colonized people according to their ethnic identities. The implication of such policy led to the creation of a three tier court system: English, Islamic and customary courts. By manipulating ethnic identities, the British colonial authorities applied the strategy of inclusion and exclusion. On the one hand, ‘foreign’ persons were excluded from the application of ‘Native’ regulations, and, on the other hand, ‘indigenous’ persons were subjected to ‘Native’ laws. The lack of consistent policy on ethnic identities partly contributed in impeding the transformation process of the administration of Islamic law in the Busa‘idi Sultanate.



In cases of *madhhab*, British judges adopted a liberal policy of giving judgement according to the *madhhabs* of the litigants, as opposed to the local custom practiced by *kadhis* who gave judgement in accordance with their *madhhabs*. In cases where litigants followed different *madhhabs*, British judges applied common law principles of fairness and equity. The colonial judges also adopted a liberal approach of applying the texts of a particular *madhhab* to litigants who followed a different *madhhab*.

**PART THREE:****Chapter 5: Between the divine and development: The British policies on transforming *wakf* institutions in the Busa'idi Sultanate****5.1 Introduction**

The thesis has demonstrated in part two the British policies on the institutional and procedural transformation of Muslim judicial and administrative institutions in the Busa'idi Sultanate (chapter 2), the transformation of the judicial system (chapter 3), and the transformation of the administration of Islamic law and its institutions in the Busa'idi Sultanate (chapter 4). Part three will demonstrate the transformation process in two significant areas: *wakf* institutions (chapter 5) and the institution of slavery (chapter 6). The significance of part three lies in illustrating resistance by the local Muslim religious leadership to British policies on transforming *wakf* institutions in the Busa'idi Sultanate. Part III of the study will demonstrate the resistance of the Sultans to the British efforts towards abolition of slavery. In response to this resistance, the study will show the adoption of dual policies by the British colonial officials, on the one hand, by implementing gradual policies in transforming *wakf* institutions and abolishing slavery, and, on the other hand, by refraining from the transformation process in areas which generated discontent.

*Wakf* is an Arabic word synonymous to *habs* which literally means 'detention', 'stoppage' or 'tying up', and technically means "a dedication of a specific property for a pious purpose

or succession of pious purposes”.<sup>1</sup> Section 2 of the Wakf Commissioners Act defines ‘Wakf’ as meaning “the religious, charitable or benevolent endowment or dedication of any property in accordance with Muslim law”.<sup>2</sup> There is no specific mention of *wakf* in the Quran but commentators on the Quran mentioned that several verses of the Quran implicitly refer to the concept of *wakf*.<sup>3</sup> Reference to the institution of *wakf* during the lifetime of Prophet Muhammad was attributed to ‘Umar ibn al-Khattab (d.644).<sup>4</sup> ‘Umar acquired a piece of land in Khaybar, near Medina and sought advice from the Prophet on how to utilize it in the cause of Almighty God. The Prophet told ‘Umar “If you wish tie up *asl* (corpus) of the property and devout the usufruct to charity”.<sup>5</sup> Thereafter, “Umar declared the piece of land as charity not to be sold, gifted or inherited and devoted its usufruct to the needy and family members”.

*Wakf* institutions catered for the religious as well as the social welfare of Muslim societies. Educational institutions were established through *wakf* funds, such as, the Al-Azhar mosque in Cairo that was built in 1243 and is considered to be among the pioneer Islamic institutions of higher learning. Among the earliest written treatise on *wakf* is the work of Muhammad b. Abdalla Ibn Battutah (1304-1377) *Kitab Mu‘jam al-Buldan*. Ibn Battutah

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<sup>1</sup> Ahmad A (2000) *Mohammadan Law* Allahabad: Central Law Agency 260.

<sup>2</sup> Chapter 109 of the Laws of Kenya.

<sup>3</sup> For instance, chapter 3 verse 92 which provide that “Never will you attain the good [reward] until you spend from that which you love”.

<sup>4</sup> Umar ibn al-Khattab was the second Caliph of the Islamic State in Medina from 634 to 644.

<sup>5</sup> Ahmad, 2000, 259.

visited Damascus in 1326 and noted the existence of *wakf* institutions in various spheres of life.<sup>6</sup>

The significance of *wakf* institutions in Muslim societies lies in that “it is interwoven within the entire religious life and social economy of Muslims”.<sup>7</sup> Based on the importance of the *wakf* institutions in Muslim societies, British colonial authorities anticipated challenges which would face them in interfering with *wakf* properties. Hence, British colonial authorities implemented gradual policies on transforming *wakf* institutions in the Busa‘idi Sultanate so as to avoid any confrontation with Muslims.

## 5.2 Wakf institutions in the Busa‘idi Sultanate

*Wakf* institutions existed along the East African coast before the establishment of the Busa‘idi Sultanate in Zanzibar in 1832. *Wakf* institutions in the East African coast served multipurpose functions at both local and global levels. Main beneficiaries at the local level

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<sup>6</sup> Ibn Battutah noted that *wakf* institutions in Damascus operated in various spheres of life. He noted: “the variety and expenditure of religious endowments at Damascus are beyond computation. These are endowments in aid of persons who can not undertake the pilgrimage to Makkah... There are other endowments for supplying wedding gifts to girls whose families are unable to provide them and others for the freeing of prisoners. There are endowments for travellers out of revenues of which they were given good clothing and expenses of conveyance to their countries. Then there are endowments for the improvement and paving of the streets, as all the lanes in Damascus have pavements either side, on which the foot passengers walk. Besides these there are endowments for other charitable purposes.” Nasution, K.S. “Colonial Intervention and transformation of Muslim Waqf Settlements in Urban Penang: The Role of the Endowments Board” (2002) 2 (2) *Journal Institute of Muslim Minority Affairs* 299.

<sup>7</sup> Ameer Ali, *Muslim Law*, Vol.1, 207.

were mosques and *madrasas*. Mosques demonstrate the oldest surviving *wakf* institutions since the early Muslim settlements along the East African coast.<sup>8</sup> Almost all mosques along the coastal shores have been built by private families and bear the names of such families.<sup>9</sup>

Table 1.5 below demonstrates various mosques along the Kenya coastal strip which were named after the families and persons who constructed them. Trustees of such mosques would normally be appointed from among family members to cater for the management of the mosque. Usually individuals who built mosques created endowments to be used for the upkeep of the mosque and its personnel.



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<sup>8</sup> Examples of earlier mosques supported by *wakf* funds are: Pwani mosque in Lamu (built in 1370), Basheikh mosque in Mombasa (built in 1500), and Juma mosque in Lamu (built in 1511).

<sup>9</sup> A number of mosques have been built by Muslim NGOs along the East African coast since the 1990s. An interesting feature of this post-independence development is that such mosques were built by individual wealthy persons from Gulf countries as *wakf* seeking nearness (*qurba*) to Almighty God.

Table 1.5 Examples of mosques with *wakf* properties in the Kenya coastal strip

Name of mosque	Town	Date	Endowment
Pwani	Lamu	1370	4 residential plots
Basheikh	Mombasa	1500	2 residential plots (0.045 acre) 1 residential flat
Al-Mandhry	Mombasa	1570	2 residential plots (0.83 acre) 3 residential flat with 6 shops
Bulushi	Mombasa	1875	6 residential flats with 5 shops 1 residential flat with 2 shops
Rawdha	Lamu	1877	1 residential plot (0.45 acre) 2 residential flats
Mazru'i	Mombasa	1890	1 residential plot (0.092 acre) 1 residential flat
Riyadha	Lamu	1901	1 residential plot (14 acres)
Sheikh Nasor	Malindi	1940s	6 residential plots (0.53 acre) 1 residential house with 2 flats

Source: Ali Hemed Awadh, *al Awqaf wa Dauruha fi Sahil Kenya: Dirasa Tahliliyya Taqwimiyya* PhD thesis, International University of Africa, Khartoum, 2007

Income from *wakf* properties in the Busa'idi Sultanate was also used to construct and support the maintenance of *madrasas*. For instance, in Mombasa, Sh. Abdallah Husni (locally known as Bar'ede) established *Madrasat al-Falah* in the 1930s. An endowment

fund was created to support the institution by allocating one residential house and six shops for the benefit of the *madrasa*. Similarly, in the village of Mambrui near Malindi, a *wakf* endowment was created for *Madrasat al-Nur* which consisted of one residential flat in Mombasa and two houses in Malindi.<sup>10</sup> In Zanzibar, *wakf* funds were used to purchase houses and convert them to Muslim educational institutions. An illustrative example of such institutions is the *Ukutani madrasa* that was initially a house bought by the Bakathir family in Zanzibar. In 1944, the house was converted to a *madrasa* to teach Islamic law and Arabic. Sh. Al-Amin b. Ali Mazru‘i (d.1947) and other local Zanzibar religious leaders were appointed as Trustees of the *madrasa*.<sup>11</sup>

A number of *wakf* properties in the Busa‘idi Sultanate were dedicated to the advancement of Islamic knowledge. *Wakf* deeds in Zanzibar provided that part of the income from the *wakf* properties was to be paid to Muslim religious teachers and students. Islamic texts were also created as *wakf* endowments dedicated to learners. The following is a translation of a *wakf* deed written by ‘Ali b. Muhammad b. ‘Ali al-Mandhri dedicating volumes of *Minhaj al-Talibin* as *wakf*:

“I bought this book which is four volumes of the *Minhaj al-Talib*.. I bought them from brother *Salim b. al-Shaqsi* for five silver rupees. I have added them to the books that my grandfather ‘Ali b. Muhammad b. ‘Ali al-Mandhri donated in waqf to his children and those that might come after them.

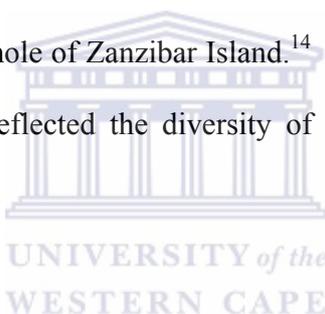
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<sup>10</sup> Awadh, *al Awqaf*, 2007, Appendix 6.

<sup>11</sup> Sheriff, A “The Records of the “Wakf Commission” as a Source of Social and Religious History of Zanzibar”, in Amoretti, Bianca M. S (ed.) (2001) *Islam in East Africa: New Sources (Archives, Manuscripts and Written Historical Sources, Oral History, Archaeology)* Proceedings of International Colloquium, Rome: Herder 34.

They are donated as an eternal waqf so that they may learn from it. ‘Then, if any man changes it after hearing it, the sin shall rest upon those who change it, surely God is All-hearing All-knowing’. [Q 2:181]. I am ‘Ali b. Muhammad b. ‘Ali al-Mandhri, and wrote this in my hand 17 Safar 1324 [11<sup>th</sup> April 1906].”<sup>12</sup>

*Wakf* properties were also used to serve as endowments for burial sites. The dedication of endowments for graveyards was a common practice, particularly among wealthy families who reserved portions of land as graveyards for their relatives. Families such as the Mazru‘i in Mombasa designated part of their family land to serve as a graveyard for their tribesmen.<sup>13</sup> In Zanzibar, a survey revealed that in 1921 there were around 64 burial sites covering nearly a third of the whole of Zanzibar Island.<sup>14</sup> Existence of different grave sites allocated for particular tribes reflected the diversity of the various tribal groups in the Busa‘idi Sultanate.



At the global level, the proceeds of *wakf* properties were transmitted from Zanzibar to Oman and Saudi Arabia. In 1926, thousands of rupees from *wakf* funds were dedicated for the relief of the poor of Mecca and Medina. Sultan Khalifa b. Harub (1911-1960)

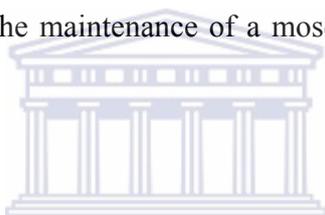
<sup>12</sup> Translation of the *wakf* deed quoted in O’Fahey R.S. and Knut V. “A Zanzbari Waqf of Books: The Library of the Mundhiri Family” (1996) 7 *Sudanic Africa* 23.

<sup>13</sup> The Mazru‘i family own about 2716 acres of land along the Kenya coast under the Mazrui Lands Board of Trustees which was established in 1931. Yahya, S. S “The uses and abuses of wakf”, in Bakari, M. and Yahya, S. S (eds.) (1995) *Islam in Kenya*, Proceedings of the National Seminar on Contemporary Islam in Kenya, Mombasa: Mewa Publications 221.

<sup>14</sup> Sheriff, 2001, 35.

instructed the *Wakf* Commission in Zanzibar to distribute *wakf* funds to *ibadhi* and *sunni* poor people residing in Mecca and Medina.<sup>15</sup>

A number of wealthy Omani people in Zanzibar created endowments for the benefit of their poor relatives in Oman. For instance, in 1904 Muhammad b. Khalfan al Ghaythi dedicated one third of the income from his house in Zanzibar to the poor of his tribe in Oman.<sup>16</sup> An interesting aspect of the trans-oceanic movement of *wakf* funds was that it was a two-way process in that affluent family members in Oman endowed properties for the benefit of the *ibadhi* people in Zanzibar. Abdul Sherriff gave an example of irrigation water in Oman that was created as a *wakf* for the maintenance of a mosque in Zanzibar and a hostel for *ibadhi* visitors.<sup>17</sup>



Another charitable aspect of *wakf* institutions was the provision of endowments for freed slaves. Slave owners created endowments to provide for their slaves during their lifetime. For instance, Sayyid Hamud b. Sayf al- Busa'idi in a will dated 18 December 1877, dedicated one of his farms for the benefit of his freed slaves who survived him. The will stipulated that the freed slaves were entitled to use the farm and its income subject to the condition that none of them had the right to dispose the farm and that after their death it would revert to the poor persons of the al-Busa'idi tribe. The will further provided that upon the extinction of the tribe, the farm should go to the poor Muslims of the *ibadhi* faith

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<sup>15</sup> ZNA/HD10/5, Letter from the Secretary of the *Wakf* Department, Zanzibar, to the Private Secretary to his Highness the Sultan, dated 2 June 1926.

<sup>16</sup> Sheriff, 2001, 38.

<sup>17</sup> *Ibid*, 36.

“without having any right to dispose it in any way whatsoever until God inherits the earth with its occupants”.<sup>18</sup> In another will dated 1885, Abdallah b. Abd al-Karim al-Najdi dedicated his *shamba* and all the furniture and jewellery to his *surias* Tarangi, Warasi Habshiya and Ubayda, , as well as the slaves to work for them during their lifetimes, but these properties were due to revert to the dedicator’s heirs upon the *suriyas* deaths.<sup>19</sup>

### 5.3 The British policy on transforming *wakf* institutions in the Busa‘idi Sultanate

After the establishment of the British Protectorate in Zanzibar in 1890, the British colonial administration adopted a policy of transforming *wakf* institutions in order to serve British interests. The British found that *wakf* properties included large tracts of land that were managed by individual private *mutawallis* who were appointed by families holding such properties.<sup>20</sup> The British also noted that the use of *wakf* land was confined to family members indefinitely, which hampered development of the Busa‘idi Sultanate. In some cases, *mutawallis* handling of *wakf* properties led to improper use and mismanagement of such properties that rendered vast tracts of land being rendered dormant.

British colonial concern regarding the institution of *wakf* was based on the fact that *wakf* properties were related to land issues which were crucial to colonial politics. Colonial

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<sup>18</sup> ZNA/HD/3/7, quoted in Sheriff, 2001, 43.

<sup>19</sup> ZNA/HD/3/30, Malindi plot of land (No. 2) near Sheikh Ahmad bin Sumeit.

<sup>20</sup> The main function of a *mutawalli* is to administer the *wakf* property for the advantage of the beneficiaries. The *mutawalli* is not similar to a trustee as known in English law where the property is vested in him but principal duty of the *mutawalli* is to administer the *wakf* according to the founder’s wishes.

policies were focused on the exploitation and control of land resources in which “pressures on and confiscation of land was a fundamental feature of colonialism”.<sup>21</sup> During the period of the First World War (1914-1918), British colonial policies were dictated by the need to acquire more resources, which led to the confiscation of significant tracts of land in East Africa.<sup>22</sup> Based on the policy of non-interference with religious institutions, the British colonial administration did not confiscate *wakf* lands. However, British efforts were directed to transform the management of *wakf* properties by the establishment of *wakf* commissions and the enactment of legislation.

The British adopted a policy of transforming *wakf* institutions by establishing *wakf* commissions in the Busa‘idi Sultanate. The establishment of *wakf* commissions was meant to ensure proper management of *wakf* properties and to prevent their improper use. *Wakf* commissions were also mandated to ensure that the proceeds from *wakf* properties were utilised according to the specific intentions of the donor (*waqif*).<sup>23</sup> In 1899, Sir Arthur

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<sup>21</sup> Chanock, M “Paradigms, Policies and Property: A Review of the Customary Law of Land Tenure” in Mann, K and Roberts, R (eds.) (1991) *Law in Colonial Africa* New Portsmouth: Heinemann 61.

<sup>22</sup> Carmichael, T “The British Practice towards Islam in East Africa Protectorate: Muslim Officials, Wakf Administration and Secular Education in Mombasa 1895-1920” (1997) 17 (2) *Journal Institute of Muslim Minority Affairs* 298. For instance, before Kenya’s independence, the British colonial administration acquired land for settlement and then introduced the Indian Transfer of Property Act, 1882, to govern the ownership of land that belonged to the British which was called the ‘White Highlands’. The local inhabitants were moved into areas known as ‘reserves’ where they were governed by African customary laws. Wanjala, S. (1990) *Land Law and Disputes in Kenya* Nairobi: Oxford University Press 1.

<sup>23</sup> The mandate of the Wakf Commission is limited to cater for *sunnis* and *ibadhis*, whereas *shi‘as* have their own *wakf* system.

Hardinge established the first *wakf* commission in Mombasa in order to manage *wakf* properties along the Seyyidie and Tana land provinces in the Busa‘idi Sultanate. By establishing a formalised *wakf* commission, Hardinge intended to exert control over the management of *wakf* institutions in the Busa‘idi Sultanate.

In Zanzibar, the first formal *wakf* commission was established during the reign of Sultan Ali b. Hamud (r. 1902-1911) by virtue of the *Wakf* Decree of 1905. The Commission was considered to be an independent statutory body with powers to administer *wakf* properties. The duties of the *wakf* commission included management of properties dedicated as *wakf*, such as, mosques, buildings, and farms.

Control over the management of mosques was effected, after the establishment of the British Protectorate, under the supervision of *wakf* commissions. For instance, Section 11 of the Zanzibar *Wakf* Decree of 1907 provided that “Any person desiring to build a mosque must obtain the prior consent of the Commissioners and must satisfy the Commissioners that the building will be sufficiently endowed to provide for its maintenance and up-keep”.<sup>24</sup>

In order to ensure control over *wakf* commissions, the British colonial administration used the indirect rule policy of appointing members from prominent families in the Busa‘idi Sultanate. Hardinge appointed Arab officials who were close to, and co-operative with, the British colonial administration. For instance, Salim b. Khalfan al-Busa‘idi (*Liwali* for the

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<sup>24</sup> Chanock, 1991, 298.

Coast) and his son ‘Ali b. Salim al-Busa‘idi were appointed as *wakf* commissioners in Mombasa. Salim b. Khalfan al-Busa‘idi was later invested as a Companion of the Most Disguised Order of St. Michael and St. George.<sup>25</sup>

The *wakf* commission in Zanzibar was also responsible for the supervision of the *bayt al-mal* which was in charge of unclaimed properties of deceased Muslims without heirs. The British colonial administration needed to control the funds of the *bayt al-mal*, and therefore transferred them to the newly established *wakf* commission. The British colonial authorities exploited the enactment of the *Wakf* Decree of 1905 to streamline the *wakf* system and to ensure the complete control of the *wakf* commission.

In the process of reforming *wakf* commissions, British colonial authorities adopted a policy of revising laws related to *wakf* institutions. Several amendments of *wakf* decrees were made in order to ensure British control over *wakf* commissions, and to adapt *wakf* rules to the dictates of the colonial government. The first *wakf* statute to be enacted along the East African coast was the *Wakf* Ordinance of 1900 which was transplanted from India. Other decrees that followed were the enactment of the Zanzibar *Wakf* Property (Amendment) Decree No.11 of 1914 and the *Wakf* Property Decree No.16 of 1916. Amendment of the

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<sup>25</sup> Carmichael, 1997, 298. The British adopted a similar policy in Malaysia around 1905 when they established the Endowments Board and co-opted Muslim dignitaries to be members of the Board, with the English-speaking elite being favoured. See Nasution, 2002, 312.

*Wakf* Ordinance of 1900 was made in order to increase the number of British officials in the *wakf* commission.<sup>26</sup>

Among the challenges that faced British colonial government in transforming *wakf* institutions was the static nature of *wakf* properties. The Secretary of *wakf* commission in Mombasa noted:

“there are large numbers of plots of land along the coast which are wakfed, but bring no revenue. The survey fees on some of them would be more than the value of the land, but without anyone possessing them or registering them, there is a danger of areas being forgotten and used by other people. Have the commissioners the power to take over these lands, and who is to pay the costs of transfer? According to Sharia and the wording of the wakf Deeds, no property wakfed can be sold or mortgaged for all time. The words used are “Until God shall inherit the earth.”<sup>27</sup>

In order to overcome such situation, the Wakf Commissioners Ordinance of 1951 provided that the Commissioners could apply to the Court to utilize the income of rich *wakf* to support the lesser ones. Another solution proposed to deal with problems arising from supporting poor *wakfs* was to establish a single fund in which the surplus income from all *wakf* properties that could be applied to support poor *wakfs* or other good or charitable

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<sup>26</sup> Similarly, the *Wakf* Property (Amendment) Decree No.21 of 1927 was enacted in order to amend the principal *wakf* decree by increasing the membership of the *wakf* commission. Other amendments of *wakf* laws in Zanzibar include: *Wakf* Decree No. 2 of 1905, *Wakf* Property Decree No.2 of 1907, *Wakf* Property (Amendment) Decree No.15 of 1909, *Wakf* Property (Amendment) Decree No.6 of 1913, *Wakf* Property (Amendment) Decree No.11 of 1914, *Wakf* Property Decree No. 16 of 1916, *Wakf* Validating Decree No. 5 of 1946, *Wakf* Validating (Amendment) Decree No. 6 of 1951 and *Wakf* Property Decree Chapter 103 of 1959.

<sup>27</sup> KNA/AP/1/1769, *Wakf* – rules governing funds etc., letter from the Secretary of *wakf* commissioners to His Honour Justice Webb, Judge of the Supreme Court of Kenya, dated 15 May 1937.

purposes. However, these solutions could not be implemented due to the fact that hands of the *wakf* commissioners were tied to use surplus income of one *wakf* for any other purpose than that designated by the dedicator.

In Zanzibar, the British experienced resistance from Muslim scholars to utilize *wakf* funds in areas other than the *wakf* properties that were intended by the donors. In a letter addressed to *kadhis* of Zanzibar, the Secretary of *wakf* commission enquired on the possibility of disposing *wakf* properties and put its proceeds into the general funds of the commission.<sup>28</sup> In response to the question, *kadhis* Ahmad b. Sumayt and Ali b. Muhammad al-Mandhri disapproved sale of *wakf* properties and responded by stating that: “It is absolutely forbidden according to Sharia to sell or remove anything from any property dedicated. According to the *wakf* legal deeds wording, no property dedicated can neither be sold nor inherited, although the price of coconuts is low the property can not be sold”.<sup>29</sup>

The Secretary of the *wakf* commission regarded the *kadhis*’ to be a rigid interpretation of Islamic law and further enquired from them with the following hypothetical example: “A shamba [farm] containing 12 coconut trees is situated in a bad position. No one will lease it. It has cost Rs.10/- to clean it and we have received from the sale of coconuts Rs.3.31 only. Such properties, so far from benefiting the Commission, are simply a continual drain on its resources.”<sup>30</sup>

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<sup>28</sup> ZNA/HD10/9, letter from the Acting Secretary, *Wakf* Commission to Sheikhs Ahmed b. Sumeit and Ali Mohamed dated 11 March 1915.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

The Secretary of the *wakf* commission was of the opinion that the *kadhis* ought to have applied the spirit of Islamic law and remarked that the “true interpretation of the Sharia would be to adopt such means as would prevent the total disappearance of this endowment”. Instead, the *kadhis* adopted the strict letter of Islamic law by applying the rules related to prohibition of selling *wakf* properties. They maintained that “The wakf shamba or any property can not be sold, but the crops can be sold unless the wakf owner prevented”.

#### **5.4 The British policy on controlling *wakf* institutions in the Busa‘di Sultanate**

The ultimate objective of the British colonial administration was to transform the *wakf* institutions and regulate how land was to be consolidated and utilized.<sup>31</sup> In order to seek control over *wakf* properties, the British adopted a policy of centralization which ensured that all *wakf* properties were under the authority and control of *wakf* commissions. To realize this objective, a provision was made to the effect that “all wakf property is hereby vested in the Commissioners”.<sup>32</sup> *Wakf* commissioners were further empowered to acquire properties in their name by the *Wakf* Decree that stated:

“if a Trustee of a wakf is not properly constituted or a Trustees appears to be acting in an improper or unauthorised manner, the Commissioners may apply to the First Minister who shall make an order declaring that the property has vested in the commissioners or may remove the trustee if he is not administering the wakf in a proper manner or appoint another Trustee or make an order vesting the property in the Commissioners.”<sup>33</sup>

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<sup>31</sup> Jones, C “*Plus ca change, plus ca reste le meme?* The New Zanzibar Land reform Project” (1996)

40 (1) *Journal of African Law* 38.

<sup>32</sup> Section 4 of the Wakf Decree of 1905.

<sup>33</sup> *Ibid*, Section 7.

By virtue of the Zanzibar *Wakf* Decree of 1907, *wakf* commissioners were also given delegated powers to acquire surplus revenue accruing from *wakf* properties. Section 10 of the Decree provided: “in cases where (a) such intentions can not be carried out or (b) where any surplus revenue remains after fulfilling the intentions of the founder the Commissioners may frame schemes for the application of such property or of such surplus revenue to such good or charitable purposes.”

Despite the British policy of non-interference in religious matters, the colonial government made efforts to limit the powers and functions of the *wakf* commissioners. For instance, the Wakf Commissioners Ordinance 1951 of Kenya gave powers to the *wakf* commissioners to utilize income from *wakf* properties for charitable purposes to benefit communities. Section 11 of the Ordinance stated:

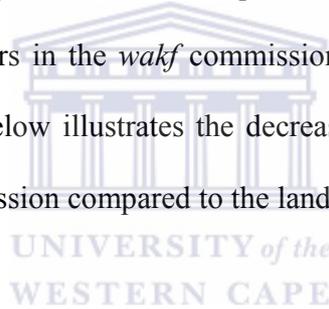
“where the intentions of the founder of the *wakf* can not be carried out or where any surplus revenue remains after those intentions have been carried out, the Commissioners may apply such original property or such surplus revenue to such good or charitable purposes on behalf of Mohammedans as may appear desirable”.

However, the Acting Provincial Commissioner of Coastal Kenya ruled out the possibility of the *wakf* commissioners using the surplus funds as required by the Ordinance. He noted:

“section 11 [of the Ordinance] implies that the money must be spent directly on charities, but what the Wakf Commissioners are doing is to pool such amounts and use them to buy land which they think likely to improve in value and then lease it for commercial purposes. There is presumably an intention that profits shall eventually be used for charity, but it seems extremely unlikely that it was

ever intended that the wakf commissioners from being a body charged with administering charities, should become a joint landowning concern".<sup>34</sup>

British control over *wakf* institutions in Zanzibar contributed to the decline of *wakf* dedications. Abdul Sheriff noted in Zanzibar the *Wakf* Commission had 158 *wakf* houses in 1944 whereas in 1952 the number of *wakf* houses decreased to 135.<sup>35</sup> Archival records in the Zanzibar Archives reveal that in 1949 the *wakf* commission in Zanzibar had around 165 houses and 100 plantations whose income was utilized for the maintenance of *wakf* properties that included the management of various mosques.<sup>36</sup> In Kenya, the amount of *wakf* land entrusted to the *wakf* commission for public use declined due to the lack of confidence on the part of donors in the *wakf* commission that was supervised by British colonial officials. Table 1.5 below illustrates the decrease of agricultural land under the management of the *wakf* commission compared to the land managed by private families.



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<sup>34</sup> KNA/PC/Coast/2/17/1, The Wakf Commissioner's Ordinance: Legislation, letter from the Acting Provincial Commissioner, Coast, to the Colonial Secretary, Nairobi, dated 11 May 1934.

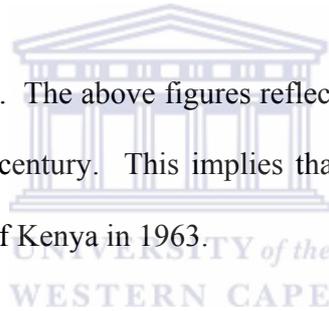
<sup>35</sup> Sheriff, 2001, 33.

<sup>36</sup> ZNA/HD10/85.

Table 1.5 Comparison between *wakf* property held by *wakf* commission of Kenya and Trustees of private *wakf* in the Kenya coastal strip.

	Agricultural land	Residential plots	Residential houses
<i>Wakf</i> commission	387 acres	42 acres (leasehold) 126 acres (freehold)	39
Private <i>wakf</i>	3,087 acres	90 acres	30

Source: Awadh, *al-Awqaf*, 2007. The above figures reflect *wakf* plots and houses endowed until the latter part of the 20<sup>th</sup> century. This implies that parts of the endowments were created after the independence of Kenya in 1963.



In the process of transforming the *wakf* institution in the Busa‘idi Sultanate, the British adopted a strategy of appointing British officials on the *wakf* commissions. By virtue of the Zanzibar *Wakf* Property Decree of 1907, two *wakf* commissions were established: one in Zanzibar and another in Pemba. One British officer was appointed as a *wakf* commissioner on each of the two commissions that constituted one *ibadhi kadhi* and one *shafi‘i kadhi*. By 1916, the representation of British officials in the *wakf* commission outnumbered the *kadhis*. During this period, the British colonial administration gained control of appointments in the civil service. The appointment of *wakf* commissioners was ceremonially made by the Sultan upon the recommendation of the British Resident. Based on the recommendation of the British Resident, four British officials Frank Campbell McClellan, Stanley River-smith,

Claude Dudley Wallis and William Maybury Keatinge (Secretary of the Wakf Commission), and two *kadhis*, Ahmad b. Sumayt and ‘Ali b. Muhammad (d.1925), were appointed as *wakf* commissioners in 1916.<sup>37</sup> British dominance of the *wakf* commission was enhanced from this period, and a British official was appointed as the Secretary of the Commission. The trend of appointing British officials to control the *wakf* commission continued until the independence of Zanzibar in 1963.<sup>38</sup>

The policy of appointing British staff on the *wakf* commission was also adopted in the Kenya coastal strip. In 1914, three British officials: Mr. W.S. Wright, Captain H. Pidcock and Mr. .W. Parkinson (Secretary of the *wakf* commission), were appointed as *wakf* commissioners in Mombasa together with Salim b. Khalfan, *Shaykh al-Islam Mwenye Abudu*, Majid b. ‘Ali and Rashid b. Sud.<sup>39</sup> The appointment of *wakf* commissioners in Mombasa was made by the British Governor of Kenya.

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<sup>37</sup> ZA/HD10/4. British adopted a similar policy of appointing their officials in Malayasia. For instance, the British Governor in Malaysia established an Endowment Board for Penang in 1906 and appointed British officials that included the Solicitor-General and the councillor of Land revenue and co-opted Muslim members to sit on the Board. Nasution, 2002, 306.

<sup>38</sup> The last British official to serve as the Secretary of the *Wakf* Commission in Zanzibar was Eric Steven from 1953 to 1964. Mr. Steven also served as the Administrator-General of Zanzibar and did not have Islamic law knowledge but relied on the advice of the *kadhis* in the *Wakf* Commission. Interview with Dopiwala, Zanzibar, 21 May 2005. Dopiwala was appointed as a clerk in the Administrator-General’s office in 1953.

<sup>39</sup> KNA/PC/Coast/1/1/186, *Wakf* Commissioners, The number of British officials in the Wakf Commission decreased in the 1950s. For instance, in 1952 there was only one British *wakf* commissioner in Mombasa, R.A. Hawkins, together with seven Muslim officials: Liwali Sh. Mbarak Ali Hinawy (Ex-Officio and Chairman), Sayyid Ali b. Ahmad Badawi (Chief *Kadhi*), Khamis Muhammad b. Juma, Hon. Shariff Abdalla

The policy of appointing British officers on the *wakf* commissions was deliberately adopted by the British authorities in order to ensure control over the *wakf* commissions during the First World War period (1914-1918). During the war period, the British Empire needed financial support to pay the war expenses. For the British, *wakf* funds seemed to be a feasible option that could support the war's expenses. Due to the demand for funds to support the First World War, the British took advantage of the *wakf* funds in Zanzibar by investing them in war loans. For instance, in 1916 the Zanzibar Treasury invested six £100 Exchequer Bonds on behalf of the *Wakf* Commissioners in Zanzibar at an interest rate of 5%. The bonds were to be retained in Britain and the interest credited to the *Wakf* Commissioners' accounts.<sup>40</sup> A further £700 was invested in the 1927 National War Loan Bonds on account of the *Wakf* commissioners in Zanzibar.<sup>41</sup> In 1940, the Secretary of the Wakf Commission in Zanzibar explained to the Commissioners that they were holding funds on fixed deposit in a bank, being the sale proceeds of *wakf* properties, awaiting the purchase of other suitable properties. He sought approval to invest these funds temporarily

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Salim (Member of Legislative Council), Muhammad Abdalla Shatry, Sh. Maamun b. Suleiman El-Mazrui (Kadhi of Mombasa), Amir b. Nihed El-Nahdi and Hyder Muhammad El-Kindy. In Zanzibar, the number of British officers on the *Wakf* Commission decreased in the 1960s. For instance, British members of the Commission were two: the Administrator- General and the Assistant Administratpr-General; while Muslim officials were six: Shariff Omar b. Ahmad b. Sumayt, Muhammad b. Salim b. Muhammad al-Ruweih, Sultan Khamis al-Mugheiry, Shariff Omar Abdalla, Ali Isa Khalfan Barwani Isa and Ahmad Zaharan.

<sup>40</sup> ZA/HD10/12, letter from the Treasury, Zanzibar, to the Crown Agents for the Colonies, London, dated 11 May 1916.

<sup>41</sup> ZA/HD10/12, letter from the Treasury, Zanzibar, to the Crown Agents for the Colonies, London, dated 11 January 1918.

in East African War Bonds. In response to this request, the *Wakf* Commissioners approved the Secretary's proposal.<sup>42</sup>

Besides utilizing *wakf* funds for the purchase of bonds, British officials also invested the funds to buy shares in British financial institutions. Based on the control the British officials had achieved in the Commission, they managed to influence the Muslim officials to accept such investments. *Kadhi* Tahir b. Abubakar al-Amawi and Gharib b. 'Ali endorsed the investments by stating: "we agree with the method of the Acting Secretary of the *Wakf* Commission in investing the money in Queensland stocks as it is not out of Law of Islam. This action amounts to that of lending money."<sup>43</sup> Al-Amawi's inclination to agree to the British requests can be attributed to his close relationship with the colonial administration. Besides his duties as a *kadhi*, al-Amawi had served in various capacities in the British colonial establishment. He was once a member of the British War Relief Fund and served as an interpreter during the Red Cross Carnival in 1915.<sup>44</sup> The Secretary of the *Wakf* Commission, who was a British official, donated Rs.500 from *wakf* funds towards the Royal Red Cross.<sup>45</sup> In appreciation of the donation by the *wakf* commission, the Secretary of the Zanzibar War Relief Fund noted: "I beg to acknowledge with the grateful thanks of

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<sup>42</sup> ZNA/HD10/54, minute No. 10 of the *wakf* commissioners meeting held on the 21 February 1940.

<sup>43</sup> ZA/HD10/38, translation of the document that was signed by *kadhi* Tahir b. Abubakar al-Amawi and Gharib b. Ali on 8 August 1932.

<sup>44</sup> Bang, 2000, 66.

<sup>45</sup> ZA/HD10/9, letter from the Secretary, *Wakf* Department, Zanzibar, to Manager, National Bank of India, dated 5 October 1918.

my Committee the handsome donation of Rs.500 which the Wakf Commissioners have been so good as to make towards the British Red Cross Fund.”<sup>46</sup>

Interestingly, there is no trace of any resistance on the part of the Muslim *Wakf* Commissioners regarding such investments and donations. The only response from Muslim *Wakf* Commissioners found in archival sources was their objection to the insurance of *wakf* properties against all risks, on the ground that Islamic law did not allow for the insurance of *wakf* properties.<sup>47</sup>

Muslim members of the Legislative Council in Zanzibar raised concerns about the management of *wakf* properties. For instance, Sayf b. Hamud b. Faysal enquired about the total amount of interest that accrued from *wakf* funds deposited in the banks and how the interest was utilised. The Senior Commissioner in Zanzibar responded by stating that the *Wakf* Commission was a statutory body distinct from the government and therefore enquiries related to the management of *wakf* properties should be directed to the *Wakf* Commission.<sup>48</sup>

Another aspect that generated criticism among Muslim members of the Legislative Council was the increased number of British officers on the *wakf* commission. The members felt that by having a stronger British presence on the *wakf* Commission, Muslims were losing

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<sup>46</sup> ZNA/HD10/9, letter from the Secretary, Zanzibar War Relief Fund, to the Secretary, *wakf* commissioners, Zanzibar, dated 5 October 1918.

<sup>47</sup> ZNA/HD10/51, minutes of the *wakf* commissioners, 10 March 1954.

<sup>48</sup> Supplement to the Official Gazette of the Zanzibar Government No.3136 of 14 August 1958.

control of the *wakf* institution. The members proposed that additional Muslim members be appointed in order to reflect the views of Muslims. The British colonial administration responded by stating:

“the Wakf Commission is simply a Government Department appointed to administer Mohammedans religious endowments in the light of Islamic law. This being so, there can be no question of popular representation on it, and the inclusion of private members is purely an act of grace on the part of the Government, which is anxious to secure to Mohammedans sectional interests an opportunity of ventilating their points of view.”<sup>49</sup>

In 1957, a Muslim official of the Legislative Council, Muhammad Nasir S. Lamki, proposed to reform the composition of the *Wakf* Commission in Zanzibar in order to allow for a Muslim majority. He also suggested the appointment of the chief *kadhi* as the chairman of the *Wakf* Commission. After a lapse of around 13 months, the British colonial administration declined to accept the proposals and instead noted that “after careful consideration government has decided not to give effect for the present to changes in the composition of the *Wakf* Commission suggested by the honourable member”.<sup>50</sup>

The zeal of British colonial administrators to control the *wakf* commissions was clear in a case where the *Wakf* Commissioners in Mombasa allowed a client to erect an advertisement in a Muslim burial ground. Muslim trust lands including the burial grounds were under the authority of the *Wakf* Commissioners. In 1912 the *Wakf* Commissioners in Mombasa

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<sup>49</sup> ZNA/BA16/2, Report of the Select Committee of the Legislative Council appointed on the 29 July 1927 for the purpose of considering the Bill entitled a Decree to amend the *Wakf* Property Decree.

<sup>50</sup> Supplement to the Official Gazette of the Zanzibar Government No.3136 of 14<sup>th</sup> August 1958.

allowed Messrs. Costa Birr & Souza to erect an advertisement board on one of the burial grounds in return for an annual rent. The Provincial Commissioner for the Coast, Mombasa, objected to the erection of the advertisement and stated:

“I desire to place on record my strongest disapproval of the erection of this advertisement in a Mohammedan burial ground. I am surprised that the Commissioners should consent to the resting place of the dead being profaned by a commercial notice of this kind. Unless your Committee can give me an assurance that no further erection of this nature will be permitted on the property and that the board in question will be removed ... I shall consider it necessary to report the matter to His Excellency as a lapse of duty by a public body.”<sup>51</sup>

The ‘advertisement’ case triggered a conflict between the *wakf* commissioners and the British colonial administration. The *wakf* commissioners countered the Provincial Commissioner’s argument by pointing out that the colonial government had earlier placed lamp and telegraph posts on the same burial ground. The Secretary of the *Wakf* Commission responded by stating:

“the Commissioners do not consider the burial ground is desecrated by the board ... the Commissioners desire me to point out that sanction appears to have been given to the Government to place a lamp post on the said burial ground, also a telegraph post reaching 8 feet within the boundary of the boundary ground.”<sup>52</sup>

The *Wakf* Commissioners further pointed out that a large portion of a cemetery owned by the Mazru’i family was sold by the colonial government contrary to Muslim law, in April

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<sup>51</sup> KNA/PC/Coast/1/1/186, Wakf Commissioners, letter from the Provincial Commissioner, Mombasa, to the Secretary, *Wakf* Commission, dated 31 May 1912.

<sup>52</sup> KNA/PC/Coast/1/1/186, Wakf Commissioners, letter from the Secretary, *Wakf* Commission, to the Provincial Commissioner, Mombasa, dated 14 June 1912.

1899, and that the government promised to give a piece of land in exchange but that promise was not fulfilled. Another incident pointed out by the *wakf* commissioners was that construction of the Uganda Railway had passed over a Muslim burial ground and that the government made a promise to provide another piece of land as compensation for that, but again the promise was not fulfilled.<sup>53</sup>

Based on the response of the *wakf* commissioners, the Provincial Commissioner wrote a memorandum to the Acting Chief Secretary stating that the allowance of the Secretary of the *Wakf* Commission was paid by the British colonial administration and noted: “the time has come when the position of the *Wakf* Commission should be considered with a view to obviating in the future occurrences such as that which has led the present correspondence.”

<sup>54</sup> The Chief Secretary threatened the *wakf* commissioners with the following communication:

“His Excellency [the Governor] considers that your letter is a most improper one to address to the Acting Provincial Commissioner and he agrees with Mr. Tate that the Commissioners should not have approved of the erection of the advertisement board in a Mohamedan ground. Your letter appears to afford proof that the Wakf Commissioners are unaware that their Commission is a semi-Government body, their secretary being granted an allowance from Protectorate funds and some of their members being Government servants. You should inform the Commissioners, that in the event of any further letters being addressed to the Provincial Commissioner, similar in tone and matter to your communication of 14<sup>th</sup> June

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<sup>53</sup>*Ibid.*

<sup>54</sup> KNA/PC/Coast/1/1/186, Wakf Commissioners, letter from the Provincial Commissioner, Mombasa, to the Acting Chief Secretary, Nairobi, dated 3 July 1912.

1912, the allowance paid to their Secretary will be stopped and officials will not be allowed to serve as commissioners.”<sup>55</sup>

The threat contained in the Chief Secretary’s letter to the *wakf* commissioners generated different responses from the members of the Commission. Two members, Rashid b. Sood and Majid b. Ali, who apparently seemed to be independent members of the *wakf* commission, resigned, while the other two civil servants, Salim b. Khalfan El-Busa‘idi (*liwali* for the coast) and *Mwenye Abudu* (chief *kadhi* of Kenya), tendered their apologies.

Rashid b. Sood resigned and stated:

“I have the honour to point out that the Wakf Commissioners were appointed by the Government to look after and protect the wakf property and interests by using their judgement and discretion according to the Sheria and ancient customs, but from your letter under reference it appears that the wakf commissioners are mere instruments to carry out government orders and have no right to use their judgement and discretion. I regret I am unable to with this view of the position of a Wakf Commissioner and therefore request to be allowed to resign from my position as such.”<sup>56</sup>

Similarly, Majid b. Ali declined to heed the colonial government and resigned, stating:

“I have the honour to say that I have understood that the Government had appointed Wakf Commissioners to watch the interests of wakf but from the tone of the above letter I understand that I must listen only to what the Government says whether it is right or not therefore I am sorry to say

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<sup>55</sup> KNA/PC/Coast/1/1/186, Wakf Commissioners, letter from the Acting Chief Secretary to the Government, Nairobi, to the Secretary, Wakf Commission, dated 16 July 1912.

<sup>56</sup> KNA/PC/Coast/1/1/186, Wakf Commissioners, letter from Rashid b. Sood, to the Secretary to the Government of East Africa, Nairobi, dated 9 August 1912.

that I can not work as a Wakf Commissioner and would request that I may be allowed to tender my resignation.”<sup>57</sup>

*Wakf* Commissioners who were on the payroll of the colonial government were left with no option except to accede to the threat. Salim b. Khalfan (*Liwali* for the Coast) stated:

“in everything what you have written and say is right and true, and the board will be removed and that is law also, and everything what you see is not proper let us know. We are under your order and also it is true that you appointed us to look after wakf property. And we beg your pardon and forgive us. And you are proper people to forgive and we shall never do things which we have done, by God’s will.”<sup>58</sup>

*Mwenye Abudu* (the chief *kadhi* of Kenya) was also not spared from the threat. He apologized and stated:

“I am Sheikul Islam not a head of Government but the Government is head of me, and I am ready to remove the board. And the reason of writing our previous letter because the Government did not tell us that anything which the Government does , do not interfere, and also the Government did not make such rule, but I thought this which has been done was for the benefit of the wakf and nothing else.”<sup>59</sup>

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<sup>57</sup> KNA/PC/Coast/1/1/186, Wakf Commissioners, letter from Majid b. Ali, to the Secretary to the Government of East Africa, Nairobi, dated 9 August 1912.

<sup>58</sup> KNA/PC/Coast/1/1/186, Wakf Commissioners, translation of the letter from Salim b. Khalfan, to the Secretary to the Government of East Africa, Nairobi, dated 9 August 1912.

<sup>59</sup> KNA/PC/Coast/1/1/186, Wakf Commissioners, translation of the letter from Sheikhul Islam, to the Secretary to the Government of East Africa, Nairobi, dated 9 August 1912.

Despite the efforts of the British colonial administration to control the *Wakf* Commission in the Kenya coastal strip, the attitude of the Commissioners reflected diverse opinions regarding their subordination to the colonial authorities. The resignations tendered by the two independent members of the Commission clearly pointed out their refusal to be used as ‘instruments’ by the colonial authorities. However, the conduct of the other two government appointees reflected their loyalty to the colonial administration.

### 5.5 The exclusion of Islamic law to land tenure system in the Busa‘idi Sultanate

During the Busa‘idi Sultanate, *kadhis* were conferred with wide powers to handle *wakf* matters. The British colonial authorities recognised the influence of the *kadhis* in the management of *wakf* institutions and therefore embarked on a policy of controlling their ability to manage *wakf* institutions. After the establishment of the British Protectorate in Zanzibar and the Kenya coastal strip, the powers of the *kadhis* to deal with *wakf* matters were curtailed. For instance, in the case of *Administrator of Native States, Lamu v. Abubakar b. Mahomed (sic.) and Others*, the respondent sued in the *kadhi*’s court in Lamu for a declaration that a portion of a house of a deceased person was subject to a *wakf*. The *kadhi* gave judgement in favour of the respondent.<sup>60</sup> The appellant objected to the decision of the *kadhi* on the ground that the *kadhi* had no jurisdiction to hear the suit related to a *wakf* and that his jurisdiction was confined to hear matters of personal status. Chief Justice Hamilton allowed the appeal and reversed the decision of the *kadhi*. He further held: “the Kadhi had no jurisdiction to entertain the suit. It cannot be said here that because the

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<sup>60</sup> (1916) 4 E.A.L.R. 147.

decision of this suit would affect the amount of the deceased's estate, that it is matter relating to inheritance.”<sup>61</sup>

The British colonial administration adopted a policy of excluding the application of *wakf* rules and instead applied Indian statutes. In the case of *Sa'id b. Seif v. Shariff Mohamed Shatry*, the appellant let his plot of land to the respondent for building a house at a monthly rent.<sup>62</sup> Later the appellant served the respondent with a notice to quit terminating the tenancy. The appellant sued for possession of the land and relied on the Indian Transfer of Property Act of 1882. The respondent defended the action on the ground that it was governed by Islamic law under which he was entitled to remain in possession on payment of rent or to be paid compensation equal to the value of the house. The Court allowed the appeal and held that the Indian Transfer of Property Act applied. In reaching this decision, the Court followed the judgement in *The Wakf Commissioner for Zanzibar v. Wallo Ramchor* in which the plaintiffs sued an Indian British subject for use and occupation of their *wakf* land.<sup>63</sup> The defendant pleaded that he had been in uninterrupted possession of the land for nearly twenty years and that therefore the plaintiffs were barred by the law of limitation. The Court noted that the question raised was one of limitation that the Indian Limitation Act fitted the case. Chief Justice Lindsay Smith and Judge Murison held:

“we are therefore of opinion that in all cases where the English law had made its own enactments as to disputes concerning land, these enactments, so long as they are not inconsistent with existing

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<sup>61</sup> *Ibid.*

<sup>62</sup> (1940) 19 K.L.R. 9

<sup>63</sup> (1918) 1 Z.L.R. 227.

Treaties, apply as against the local law wherever a British subject is defendant. The Indian Limitation Act is therefore in our opinion, applicable to this case.”<sup>64</sup>

In the case of *Sa'id b. Abdulla Shikely and another v. The Wakf Commissioners, Mombasa and the Registrar of Titles*, the plaintiffs were the heirs of two deceased each of whom was the registered owner of an undivided two half shares in a property which they created as *wakf*.<sup>65</sup> After the death of the second deceased, the plaintiffs sought a declaration that the two *wakfs* were void on the ground that they did not comply with the provisions of the Registration of Titles Ordinance under which the two properties were registered. The Court declared the two *wakfs* to be invalid and held that “nothing in the Mohamedan law governing *wakfs* can be deemed to override the statutory requirements”. Section 20 of the Registration of Titles Ordinance provided:

“After coming into operation of this Ordinance all land which is comprised in any grant issued subsequent to the coming into operation of this Ordinance, shall be subject to this Ordinance, and shall not be capable of being transferred, transmitted, mortgaged, charged, or otherwise dealt with except in accordance with the provisions of this Ordinance and every attempt to transfer, transmit, mortgage, charge or otherwise deal with the same shall be null and void and of no effect”.

In the case of *Wakf Commissioner of the Colony and Protectorate of Kenya v. Alimohamed Ali Nahdi, the executor of the will of Aisha bt. Shafi* in the Court of Appeal for Eastern Africa (Mombasa), the property was the subject of a testamentary disposition by the deceased *Aisha bt. Shafi* who directed by her will that: “the whole of her house to go to the Shimbwa mosque and its income to be spent on the interests of the said mosque and some

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<sup>64</sup> (1918) 1 Z.L.R 235.

<sup>65</sup> (1949) 23 (2) K.L.R.39.

to be spent in reciting Koran for the benefit of her own soul and for the soul of her parents in perpetuity.”<sup>66</sup>

The appellants contended that being trustees of the mosque they were entitled to the legacy. The respondent, who was the appointed executor of the will, resisted the claim. The Court of Appeal held that the testatrix’s direction as to the whole of her house to be invalid on the ground that a testamentary disposition of a house apart from the land on which it stands is invalid even if Mohamedan law recognizes such a disposition, and that therefore Mohamedan law must be regarded as ousted by the express provisions of the Land Titles Ordinance. The Court of Appeal further held:

“Mohamedan law will not apply to land in Mombasa when-

- (a) There is an applied Indian Act ousting Mohamedan law which “fits the case”,
- (b) There is a doctrine of equity of a statute of general application which ousts Mohamedan law
- (c) There is an Order of His Majesty in Council or any Ordinance for the time being in force which ousts the *lex loci rei sitae* –i.e. Mohamedan law”.<sup>67</sup>

The above judgement was in contradiction to an earlier decision of the Privy Council in the case of *The Secretary of State for Foreign Affairs v. Charlesworth, Pilling & Co.* in which the Privy Council held that Mohamedan law was applicable to the case.<sup>68</sup> Similarly, in the case of *Edward Pows Cobb v. Rashid b. Salim*, which involved an Englishman’s claim against an Arab in 1909 for damages for breach of contract in respect of a land transaction,

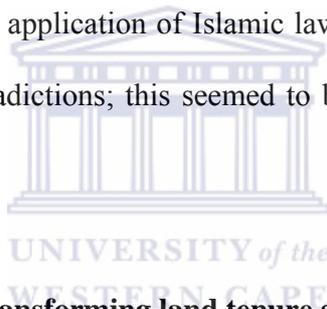
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<sup>66</sup> (1951) 18 E.A.C.A. 90.

<sup>67</sup> *Ibid.*

<sup>68</sup> (1901) 1 Z.L.R. 105 also reported in (1901) 1 E.A.L.R. 24.

<sup>69</sup> the High Court of East Africa held that the law governing land in the Kenya coastal strip was Islamic law and that Indian Acts did not apply in such cases. In a similar case, *Ibrahmji Allibhoy v. Mwenye Shimbwa and Others*, Judge Hamilton held: “here we have a contract relating to land in the Sultan’s dominions, the defendants being subjects of the Sultan and as such subject to the Sheriah relating to sales, I see no reason to depart from the general rule applicable to such cases which was affirmed by this Court in the case of *Cobb v. Rashid b. Salim*.”<sup>70</sup> In another case, *Shariff Ali b. Mohamed v. Abdulmajid b. Mwijabu*, Judge Thomas held that “the land is subject to the *lex loci rei sitae* and being in Mombasa, the Mohamedan law applies even though the parties are not Mohamedans”.<sup>71</sup> The British colonial policy of excluding the application of Islamic law in land issues and using Indian statutes was marked with contradictions; this seemed to be a hallmark of British colonial rule in the Busa‘idi Sultanate.



## **5.6 The British policy on transforming land tenure system in the Busa‘idi Sultanate**

According to Morag Bell, colonial policies on land tenure in Africa varied markedly in the colonized regions. Bell noted that the dominant feature of the West African colonial experience was that land remained under African ownership, and that colonial capital

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<sup>69</sup> 2 E.A.L.R. 35.

<sup>70</sup> 4 E.A.L.R. 3.

<sup>71</sup> (1929) 12 K.L.R. 53.

concentrated on trading activities, whereas in Eastern and Southern Africa, colonial settlers occupied land and established agricultural estates.<sup>72</sup>

Before the establishment of the British Protectorate in Zanzibar, transactions related to the purchase and sale of land were handled according to Islamic rules and customary practices. The application of Islamic rules was not restricted to land issues but also included various other matters, such as households and plantations. The British colonial administration adopted a policy of transforming the land tenure in the Busa'idi Sultanate by introducing a new concept of land ownership and a system of land registration. When the IBEA Company took over the administration of the Kenya coastal strip in 1891, it introduced a new system of registering land transactions. After handing over the coastal strip to the British government, the latter enacted the Registration of Documents Ordinance in order to ascertain the land rights of the owners. Under the Ordinance, persons entitled to registration of their land were required to furnish the signature of a *kadhi* or other Muslim officials such as a *liwali or mudir* to be appended in the title deed.<sup>73</sup> However, the powers given to *kadhis* to witness and adjudicate on land transactions were later curtailed.

The British colonial policy on *wakf* in the Busa'idi Sultanate was caught between the need to transform the land system in order to achieve economic development, on the one hand,

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<sup>72</sup> Bell, M (1986) *Contemporary Africa: Development, Culture and the State* New York: Longman 72.

<sup>73</sup> Abd Hamid, H (2000) "Unfinished Business: The Implementation of the Land Titles Ordinance in Coastal Kenya, 1908-1940s" (Unpublished PhD Thesis submitted to the School of African and Oriental Studies, University of London) 36.

and on the other hand, to uphold the paternalistic approach of respecting Muslim religious institutions, in order to maintain political and social stability.<sup>74</sup> The British colonial administration faced a difficulty in drawing a boundary between promoting a capitalist economy and retaining religious institutions such as the *wakf* system. Whereas the British colonial authorities needed to expand their commercial empire in the Busa'idi Sultanate, they had to retain religious institutions and traditions in order to gain the support of religious authorities in maintaining colonial rule.

During the early years of the establishment of the British Protectorate in Zanzibar, the British needed resources to sustain the administration of their territories. Land was perceived by the British colonial government as a potential resource to increase colonial revenue. Most of the land on the islands of Zanzibar and Pemba was owned by Omani Arabs who turned vast tracks of land into plantations. The British authorities found that there was a lot of abandoned land in the Kenya coastal strip. The British colonial officials took advantage of the Declaration on the Limitation of Claims of 1889 issued by Sultan Khalifa b. Sa'id (r.1888-1890), in order to validate their policy of declaring any unoccupied land as 'abandoned land'. According to the Declaration, any piece of land unoccupied for more than 12 years reverted to the State. The Declaration stated:

“it is hereby declared that under Her Majesty's authority by Her Majesty's Commissioner and Counsel-General for the East Africa Protectorate that the abovementioned instruction of His Highness Seyyid Khalifa, dated 23rd *Shaaban* 1306 [24<sup>th</sup> April 1889], is valid in every portion of the Sultanate of Zanzibar situated within the East Africa Protectorate, and that no claim in any civil matter which has been dormant for a period of twelve years shall be recognizable, save in case of

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<sup>74</sup> Christelow, 1985, 3.

fraud by the defendant, by any Native Court in any portion of Zanzibar Sultanate situated within the limits of the said Protectorate.”

In order to consolidate the ‘abandoned land’ in the Kenya coastal strip and put it under their control, the British authorities enacted the Waste Lands (Seyyidieh and Tanaland) Regulations of 1897 which provided:

“any person laying claims to any land that may appear to be waste or abandoned shall forthwith apply for a certificate of ownership to the Sub-Commissioner of the Province within which such land is situate, and no private ownership in any land that appears to be waste and abandoned shall be recognized except on production of such certificate, duly registered in the office for register of deeds.”<sup>75</sup>

In dealing with ‘abandoned land’ British colonial officials rendered judgments that contradicted the prevailing local customs and Islamic rules on land ownership. For instance, the British judgements were based on the notion that once land was abandoned for more than three years then it was declared a ‘waste land’. The misconception held by the British colonial administrators of the basic Islamic rules related to land tenure was apparent in their lack of understanding of the notion that the moment a person occupied a piece of land, he/she was deemed to be the owner of the land irrespective of any lapse of time in not utilizing it. In one case, a lady Salima bt.. Masud, claimed that Mohamed b. Sa‘id had encroached upon her piece of land. The District officials ruled against her because the land

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<sup>75</sup> KNA/PC/Coast/1/11/137, Howell Esq., land at Mazeras, letter from C.W. Hobley, the Provincial Commissioner, Coast, to the Attorney-General, Nairobi, 12 March 1913.

had been abandoned for more than three years.<sup>76</sup> A.C. Hollis noted that British officials' perceived land to be 'abandoned land' once it was covered with bush, and without conducting any proper survey. Hollis stated that the colonial government "entertained applications for privately owned land and in spite of the protests of the owners [the government] has in certain instances leased or sold land which is neither waste nor abandoned".<sup>77</sup>

The British colonial administration embarked on a policy of enacting ordinances in order to control land tenure in the Kenya coastal strip. After the enactment of the Waste Lands (Seyyidieh and Tanaland) Regulations of 1897, the British colonial government paved the way for British settlers to occupy the 'abandoned land'. In 1902 the Crown Land Ordinance was enacted so as to pave the way to revert unoccupied land to the British Crown. The two ordinances were enacted in order to secure enough land to assist British settlers in the Kenya coastal strip.<sup>78</sup> The enactment of the Crown Land Ordinance of 1902 was followed by the Land Titles Ordinance of 1908 which aimed to provide title to individual persons owning land. The British policy on land tenure in the Kenya coastal strip

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<sup>76</sup> KNA/PC/Coast/1/1/21, Sub-Commissioner's office, Malindi, general correspondence, letter from James Weaver, Assistant District Officer, Malindi, to H. Crawford, Sub-Commissioner, 3 June 1896.

<sup>77</sup> Quoted in Hamidin, 2000, 67.

<sup>78</sup> Hamidin noted the British adopted a different land policy in the Kenya coastal strip in that it did not encourage European settlers, as was the case in the Kenyan Highland areas, but instead provided land to British settlers in the Kenya coastal strip and developed it through British chartered companies. Hamidin, 2000, 48. For instance, in 1910 the British colonial government provided 350,000 acres south of Mombasa to a British controlled company. Hamidin, 2000, 117.

was caught in a contradiction between the colonial advocacy of the individual ownership of land on one hand, and, on the other hand, creation of native reserves for various ethnic groups based on communal ownership of land. Ironically, although the primary object of the Land Titles Ordinance of 1908 was to encourage individual ownership of land, it contributed towards the creation of Native reserves which were based on communal ownership of land.

Among the paradoxes of the concept of individual ownership of land was that it created a barrier to the concessions made by the colonial government to British settlers particularly in Muslim areas where individuals were allowed to own land. In order to reconcile the contradictions in the policies on land tenure, the British colonial authorities created Native reserves. However, conversion to Islam by local African tribes in the Native reserves added a complication to the colonial policy on land tenure in that Islamized tribes were allowed to own land as opposed to the prior communal tenure that prohibited alienation of land. For instance, members of the *Mijikenda* tribe who converted to Islam took advantage of the provision that land could be bought and sold under Islamic law despite the fact that such a rule was prohibited by their local customs.<sup>79</sup>

The British colonial authorities enacted a number of statutes governing land occupation in order to acquire control of land in the Busa'idi Sultanate. The British colonial

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<sup>79</sup> According to *mijikenda* custom, land belonged to the spirit world and therefore it could not be alienated but could only be used by a living person. Hamidin, 2000, 34.

administration distinguished persons owning land along ethnic and religious lines.<sup>80</sup> Section 2 of the *Wakf* Commissioners Act of 1951 defined a “Muslim” as “an Arab, a member of the Twelve Tribes, a Baluchi, a Somali, a Comoro Islander, a Malagasy or a native of Africa of the Muslim faith”.<sup>81</sup> Such a narrow and divisive definition of a Muslim in Kenya was intended to safeguard the interests of certain sections of the Muslim community and exclude others.<sup>82</sup> British colonial administration categorized Muslim communities and excluded them from the application of colonial laws. For instance, Indian Muslims were excluded from the operation of the *Wakf* Decree of 1907 on the ground that they were not the Sultan's subjects.<sup>83</sup> The British colonial authorities also adopted a policy of confining the administration of *wakf* properties within the Kenya coastal strip.<sup>84</sup>

The British colonial policy in the Busa'idi Sultanate regarding land tenure was intended to achieve a higher degree of agricultural prosperity in which the land could be cultivated to the best advantage of British interests. By 1912 Edward Clarke (British Consul in Zanzibar 1908-1913), had already drafted a decree to transform land tenure in Zanzibar. Clarke noted:

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<sup>80</sup> Jones, 1996, 19.

<sup>81</sup> Chapter 109 of the Laws of Kenya.

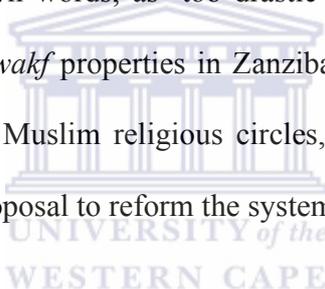
<sup>82</sup> Yahya, 1995, 214.

<sup>83</sup> ZNA/HD/4/6.

<sup>84</sup> The consequence of the British colonial policy to confine *wakf* legislation within the Kenya coastal strip was inherited by Kenya on independence in that until to date *wakf* properties registered in Kenya are limited to those in the coast province. Legislation subsidiary to the *Wakf* Commissioners Act of 1951 limits the application of the Act to the coast province.

“I do not wish to proceed to the execution of the decree in anything approaching hurry. Armed with the legal powers which it will give us in the last resort, our object should be for some time to come rather to persuade them to force and to convince the people that the measures we advocate are really for their own advantage. Should the provisions of our draft appear to you to be too drastic and as involving too great an infringement on a man’s right to do what he likes with his own, I can only say that it is very much less severe than several ordinances and laws which have been passed in British colonies with a similar object to ours.”<sup>85</sup>

Sources in the Zanzibar National Archives do not indicate the response of the British government to Clarke’s proposal. It seems that the proposal was perceived by the British government, to use Clarke’s own words, as ‘too drastic’ in that it could have generated resistance from the trustees of *wakf* properties in Zanzibar. In order to avoid anticipated resistance from the Sultan and Muslim religious circles, the British colonial officials in Zanzibar abandoned Clarke's proposal to reform the system of land tenure in Zanzibar.



### **5.7 *Wakf* institutions in English law and rules of Islamic law**

Tensions between English law and Islamic law were apparent in *wakf* cases which generated disagreement among English judges and *kadhis*, on the one hand, and, on the other hand, between the British colonial officials and other Muslim circles. This section will highlight three areas of conflict which demonstrates tensions between British colonial officials and Muslims in the Busa‘idi Sultanate. The first two areas which caused tensions are related to the imposition of English law concepts of the rule against perpetual

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<sup>85</sup> ZA/AC1/153, letter from the British Consul, Zanzibar, Edward Clarke, to the Secretary of State, Edward Grey, dated 8 May 1912.

endowments and the English Law of Charitable Uses Act over *wakf* properties in the Busa'idi Sultanate. The third area is concerned with British colonial efforts to reform the Public Trustee Ordinance in the British Protectorate in Kenya.

### **5.7.1. *Wakf ahli* and the rule against perpetual endowments**

A significant feature of *wakf ahli* is that properties were subject to collective ownership of either the family of the donor or his/her community. *Wakf* property is collectively owned and the interest in the property is considered inalienable in that “no human can alienate it for his own purposes ... and can not be sold, transferred or encumbered” and once a property was endowed as a *wakf*, then it belonged to Almighty God “Until God shall inherit the earth”.<sup>86</sup> *Wakf* properties are classified into two categories: *wakf khayri* which are meant for public, religious or charitable purposes, and *wakf ahli* (also referred to as *wakf ‘ala al-awlad*) which are for the founder’s own family and descendants.<sup>87</sup> *Wakf* properties established in the Busa'idi Sultanate fell under both categories and in some cases dedicators used to direct their endowments to both categories in a single deed. In such cases, there was no clear cut distinction between the two categories of *wakfs*.

The British colonial authorities were concerned with the *wakf ahli* created to provide a family settlement in perpetuity. The *Wakf* Ordinance defines *wakf ahli* as: “A *wakf* made for the benefit of an individual or family or for the performance of rites or ceremonies

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<sup>86</sup> Ahmad, 2000, 269.

<sup>87</sup> *Ibid*, 273.

recognized by Muslim law as being for the benefit of the soul of an individual (including the dedicator) or the souls of the members of a family.”<sup>88</sup>

The British colonial officials considered *wakf ahli* to offend the English rule against perpetuities in that successive life interests created by the *wakf* included living individuals and unborn ones. The main contentious features of the private *wakf* were the collective ownership of the *wakf* property by family members of the founder, and the inalienability of such property. The British notion of land ownership was based on individual or private ownership of land as opposed to the *wakf* institution that permitted communal or family ownership of land. The British colonial policy on land tenure was geared towards the introduction of individual ownership of land in which individual persons were encouraged to own land to the exclusion of all others.<sup>89</sup>

The British objection to the perpetual endowment of *wakf* properties was that land declared to be *wakf* property was taken away from free circulation, and that this hindered development. Despite the advantages of the *wakf* institution in ameliorating poverty, and providing for other charitable purposes in society, British colonial officials opposed the private *wakf* on the ground that “a sizeable portion of the community’s wealth was frozen, and considerable sections of the population were taken from productive activity by perpetual creation of sinecures”.<sup>90</sup> The rule against perpetuities was first decided in England in the case of *Duke of Norfolk* in which Lord Chancellor Nottingham held that a

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<sup>88</sup> Section of 2 of the *Wakf* Ordinance 1951 of Kenya.

<sup>89</sup> Wanjala, 1990, 1.

<sup>90</sup> Sheriff, 2001, 30.

future interest in property should be limited to any contingency that must occur within lives in being.<sup>91</sup> A limitation on the period of perpetuity was set by the decision in the case of *Cadell v. Palmer* in which it was decided that the validity of an executory deed to an unborn child of a living person should be 21 years.<sup>92</sup>

The British policy to adopt the rule against perpetuities with regard to the institution of wakf frustrated Muslim communities across the British Empire. Anderson pointed out the frustrations caused by the imposition of British concepts on the *wakf* institution by stating:

“there can be no branch of the law in which Muslim peoples who are subject to the jurisdiction of British courts, or courts trained in English tradition, have been made to suffer so many frustrations- by judicial infusion of alien ideas, by misinterpretation or basic ignorance of the Islamic doctrines, and even by what can only be termed a rigidity of mind which ill-accords with this illustrious tradition- as in the law of Wakf.”<sup>93</sup>

In India, the rule against perpetuities was applied by British judges in the case of *Abdul Fata Mohamed Ishak and Others v. Russomy Dhur Chowdhry and others* in which the income of *wakf* property was to be applied for the benefit of the founder’s descendants from generation to generation, and the trust for charitable puposaes was not to come into operation until after the extinction of the whole line of the founder’s descendants.<sup>94</sup> The Privy Council held that the *wakf* dedicated to charity was illusory and that the sole object of

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<sup>91</sup> 3. Ch. Ca. (1681). Quoted in Majid, S.A. “Wakf as Family Settlement among the Mohammedans”

(1908) 9 (1) *Journal of the Society of Comparative Legislation* 136.

<sup>92</sup> Cl. & F. 372 (1833).

<sup>93</sup> Anderson, J.N.D “Waqfs in East Africa” (1959) 3 (3) *Journal of African Law* 152.

<sup>94</sup> 22 Indian Appeals 76 (1894).

the founder was to create a family settlement in perpetuity. The Privy Council further held that the poor have been put into the settlement merely to give it the colour of piety and so to legalize arrangements meant to serve the enhancement of a family settlement, and therefore the *wakf* was declared to be invalid.<sup>95</sup>

As part of the process of transforming the management of *wakf* institutions, the British judges adopted a strategy of defining Islamic legal terms according to their meaning in terms of their equivalents in English law. By defining the *wakf* institution according to the English legal vocabulary, the British judges removed the *wakf* institution from its social and religious contexts and treated Muslim endowments as legal abstractions.<sup>96</sup> The Privy Council decided that for a particular object to be considered a charitable one, it had to be decided in accordance with the definition of a charity in England.<sup>97</sup> The decision of the Privy Council caused a lot of hardship among Muslims in India who opposed the rule against perpetuities on the ground that it was against Muslim law. In response to this opposition, the Indian government enacted the Mussalman *Wakf* Validating Act of 1913 in order to remove the discontent and hardship created by the decision in *Abdul Fata's* case. The Indian Validating Act was not intended to deal with the validity of *wakfs* in general, but only with a specific kind of *wakf* created in favour of dedicators, their families, children

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<sup>95</sup> Mulla, D.F (1922) *Principles of Mahomedan Law* Bombay: Tripathi & Company 135.

<sup>96</sup> Kozlowski, G.C “British Judges, Muslim Law and Contemporary Perspectives on Muslim Endowments in South Asia” (1988) 8 (1) *Islamic and Comparative Review* 24.

<sup>97</sup> Tyabji, F. B (1919) *Principles of Muhammadan Law: An Essay at a Complete Statement of the Personal law Applicable to Muslims in British India* London: Butterworth & Co. 531.

and descendants with the ultimate benefit of the poor or other religious or charitable purposes.<sup>98</sup>

The British courts in the Busa‘idi Sultanate were not spared by the decision in the *Abdul Fata’s* case. The British judges in the Busa‘idi Sultanate gave conflicting opinions on matters related to *wakf*. In the case of *Talibu b. Mwijaka v. Executors of Siwa Haji*, Judge Hamilton declined to consider himself bound by the decision of the Privy Council in *Abdul Fata* stated: “the Mohamedan law in East Africa has, however, not been subjected to the same modifying influence as in India and remains the same as when the *Minhaj* [referring to the book *Minhaj al-Talib*] was written in the 6<sup>th</sup> century of Hejira”.<sup>99</sup>

Contrary to Hamilton’s judgement, in the case of *Ali b. Nassor b. Khalid and others v. Zwena bt. Hamood*, Magistrate Sillis sitting in His Highness Court in Pemba relied on Indian authorities and held that the property in question was not considered to be a *wakf* on the ground that the *wakf* deed did not mention any charitable use.<sup>100</sup> Two *kadhis* who sat with the Magistrate dissented and held that the *wakf* was a valid endowment on the ground that a *wakf* for the benefit of children and their successors was acceptable in Islamic law. On an appeal to the Supreme Court of His Highness the Sultan, Chief Justice Lindsey Smith agreed with views of the two dissenting *kadhis* that the *wakf* deed was good. Smith held:

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<sup>98</sup> Tyabji, 1919, 526.

<sup>99</sup> (1907) 2 E.A.L.R 33.

<sup>100</sup> (1911) 1 Z.L.R. 365.

“Mr. Sillis was mainly influenced by the Indian authorities, but they have no application in this Court as the local Mohamedan law of India is not the same as that of Zanzibar ... According to the law prevailing in most Mohamedan countries, a dedication of land as wakf to a man’s descendants is good even without an ultimate remainder to the poor, as that is always implied”.<sup>101</sup>

Hamilton’s decision in *Talibu b. Mwijaka v. Executors of Siwa Haji* was challenged by the case of *Sa’id b. Mohamed b. Khamis El-Riyami and Others v. The Wakf Commissioners, Zanzibar* in which the Eastern Africa Court of Appeal found itself bound by the decision of the Indian case of *Abdul Fata*, and held that a gift to the poor was so remote rendering it to be illusory and therefore invalid.<sup>102</sup> As was the case in India, Muslims in Zanzibar felt offended by the decision of the Court of Appeal and protested to the Zanzibar government. After the decision of the Court of Appeal in the case of *Sa’id b. Mohamed b. Khamis El-Riyami and others v. The Wakf Commissioners, Zanzibar*, the Zanzibar government enacted the *Wakf Validating Decree 1946* declaring the validity of *wakfs* made in favour of the founder’s descendants and the poor. The Zanzibar *Wakf Validating Act 1946* was based on the Indian Mussulman *Wakf Validating Act of 1913*.<sup>103</sup> The objective of the Zanzibar *Wakf Validating Act 1946* was to remove hardship or doubt created by the decisions of the Court of Appeal for Eastern Africa in respect to matters related to the law of wakf applicable in Zanzibar. The *Wakf Validating Act of 1946* provided:

“whereas doubts have arisen regarding the validity of wakfs by certain of Our subjects and others professing the Muslim faith in favour of themselves, their families, children, descents, and kindred

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<sup>101</sup> *Ibid*, 367.

<sup>102</sup> (1946) 13 E.A.C.A. 32.

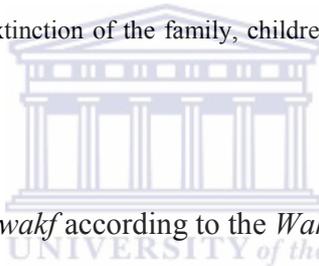
<sup>103</sup> *Wakf Validating Decree* enacted 22 June 1946.

and ultimately for the benefit of the poor or for other religious, pious or charitable uses: and whereas it is desirable to remove such doubts:

3. Every *wakf* created by any Arab or African professing the Muslim faith, which is in all other respects in accordance with Muslim law, and subject to the provisions of the Land Alienation Decree is hereby declared to be a lawful and valid *wakf* notwithstanding that it may have been, or may be, created for the following amongst other purposes, namely-

(a) for the maintenance and support wholly or partially of his family, children, descendants or kindred, and, (b) where the person creating the *wakf* is an Ibadhi Muslim also for his own support during his life time out of the rents and profits so dedicated;

4. No such *wakf* as is referred in section 3 shall be deemed to be invalid merely because the benefit reserved therein for the poor or other religious, pious or charitable purpose of a permanent character is postponed until after the extinction of the family, children, descendants or kindred of the person creating the *wakf*".



Essentials conditions for a valid *wakf* according to the *Wakf* Validating Act of 1946 were:

1. The *wakf* should be in accordance with Muslim law;
2. It should be for the maintenance and support of any person, including the descendants of the maker; and
3. The ultimate benefit in the *wakf* property should be reserved for the poor or for some other purpose recognized by Muslim law as of a religious, pious or charitable nature.<sup>104</sup>

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<sup>104</sup> Other requirements for a valid *wakf* according to the majority of the Muslim schools are: (1) A permanent dedication of a property; (2) The dedicator (Waqif) should be a person professing the Muslim faith and of sound mind; and (3) The dedication should be for a purpose recognized by the Muslim law as religious, pious or charitable. Ahmad, 2000, 261.

Despite the enactment of the *Wakf* Validating Act of 1946 in Zanzibar, British judges in the Kenya coastal strip declined to follow the Act and instead felt that they were bound by the Indian case of *Abdul Fata*. In the case of *Fatima bt. Salim Bakhshuwen and Aisha bt. Salim Bakhshuwen v. Mohamed b. Salim Bakhshuwen* in the Court of Appeal for Eastern Africa (Mombasa), the respondent created two wakfs of property for the benefit of his two daughters (the appellants) and their children from generation to generation in perpetuity, and in the event of their total extinction, for the benefit of the respondent's nearest relatives, and in the event of their extinction, for the benefit of three mosques.<sup>105</sup> Later the respondent sought a declaration to invalidate the said *wakfs*. The Court of Appeal dismissed the case on the ground that although the *Wakf* Validating Decree of 1946 had been enacted in Zanzibar to validate such *wakfs*, this afforded no relief to the respondent in this case because the appeal was from the Supreme Court of Kenya and not Zanzibar. The Court noted: "until the legislature in Kenya may see fit to enact legislation of a similar character to that enacted in India and Zanzibar, wakfs of this nature remain invalid in Kenya."<sup>106</sup>

Although both Zanzibar and Mombasa were within the Sultan's dominions, the British judges adopted a policy of distinguishing between the courts within the Busa'idi Sultanate as in the case of *Fatuma bt. Salim Bakhshuwen*. The Court of Appeal followed the decision of the Indian case of *Abdul Fata Mohamed Ishak and Others v. Russomy Dhur Chowdhry and others* which required Indian courts to follow the principle that a perpetual family

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<sup>105</sup> (1949) 14 E.A.C.A. 11.

<sup>106</sup> *Ibid*, 12.

settlement expressly made as a *wakf* was not legal merely because there was an illusory gift to the poor.<sup>107</sup>

The decision of the Court of Appeal in the case of *Fatuma bt. Salim Bakhshuwen* caused hardship to the Muslims residing in the Kenya coastal strip who petitioned the British Governor of Kenya. In a letter addressed to the Secretary of State for Colonies, the Acting Governor of Kenya noted:

“the petitioners claim that an important branch of social system of the Muslim community consists of Wakf Ahli , which are form of religious trust created for the purpose of providing in perpetuity for the family, children, descendants, and kindred of the persons who dedicates the property in such a way. Such a concept may easily offend the English legal concept enshrined in the rule against perpetuity; and as a result of decisions of the courts in India and Kenya, invalidating wakfs for this reason, legislation has been enacted to overrule decisions which ran counter to the generally accepted view among Mohammedans as to the validity of such trusts or wakfs, and to bring the law into closer harmony with general Mohammedan jurisprudence”<sup>108</sup>

The British colonial administration responded by enacting the *Wakf* Commissioners Ordinance of 1951 which was based on the Indian Mussalman *Wakf* Validity Act of 1913.<sup>109</sup>

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<sup>107</sup> (1894) 22 Indian Appeals 76.

<sup>108</sup> KNA/GH/1/26, Muslim Affairs, letter from Acting Governor W.F. Coult to the Secretary of State for Colonies, dated 16 January 1959.

<sup>109</sup> Laws of Kenya Act No.30 of 1951.

However, the British judges in Kenya did not subscribe to the view that the passing of the Kenya *Wakfs* Commissioners Ordinance of 1951 gave a licence for the full application of the *Wakf* Ordinance in Kenya. In the case of *Amina bt. Abdulla v. Sheha bt. Salim*, Sir Newham Worley remarked that by enacting the *Wakf* Ordinance 1951, the legislature intended to overrule earlier court decisions dealing with the rule against perpetuities only to the extent of validating *wakfs* for the family and descendants of the maker himself but not to the extent of validating *wakfs* for the benefit of the descendants of strangers in perpetuity. Sir Newham Worley held:

“the Wakf Ordinance 1951 was specially enacted to get over the decision (*Fatuma bt. Salim Bakhshwen*) and bring the law back into closer harmony with the general Mohamedan jurisprudence. But there is no ground for saying that the legislature intended to, or did, restore the pure Mohamedan law of Arabia in its full force, and it is true to say that except so far as the decision in *Bakhshuwen’s* case is expressly repealed by the 1951 Ordinance, it is still good law”.<sup>110</sup>

Despite the fact that the Wakf Commissioners Ordinance 1951 in Kenya meant to validate *wakf* properties that offended the English rule against perpetuities, British judges declined to follow the Act and instead based their decisions on Indian cases. In the case of *Abdulla b. Sa‘id b. Hassan v. Halima bt. Sa‘id and another* in Her Majesty’s Supreme Court of Kenya at Mombasa, the father of the plaintiff created a *wakf* and directed that the net income should be divided equally among his three children and any further children born to him and to their descendants.<sup>111</sup> The *wakf* did not contain any specific gift over to the poor or to any other charitable purpose upon the extinction of the founder’s descendants.

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<sup>110</sup> (1954) 21 E.A.C.A. 12.

<sup>111</sup> (1957) 1 E.A.L.R 688.

The plaintiff sought a declaration that the *wakf* was invalid on the ground that it did not specify any charitable gift according to Islamic law. The defendants asserted the validity of the *wakf* on the ground that the use of the word '*wakf*' in itself gave rise to an implied dedication to the poor.

The Supreme Court declared the *wakf* to be invalid and gave judgment for the plaintiff on the ground that the use of the word '*wakf*' did not give rise to an implied gift in favour of the poor. The Court based its decision on an Indian case, *Nizamudin Gulam and Others v. Abdul Gafur and others*, in which the court rejected the proposition that a *wakf* could be valid, in the absence of a specific gift to some purpose regarded by Islamic law to be of a religious or charitable nature.<sup>112</sup> Similarly, in the case of *Sheikha bt. Ali b. Khamis and Another v. Halima bt. Sa'id and Others* at the Court of Appeal in Mombasa, the trial judge held that the *wakf* was invalid on the ground that successive life interests created by the *wakf* in favour of various individuals living and unborn offended the rule against perpetuities and did not comply with the requirements of section 4 of the *Wakf Ordinance of 1951*.<sup>113</sup> The Judge further held that the benefits were not trusts for the maintenance and support of the individuals but were absolute gifts to them. On an appeal, the appellants contended that the maintenance and support of relatives was recognized as a charitable

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<sup>112</sup> (1) (1889) 13 Bom. 264.

<sup>113</sup> (1958) 1 E.A.L.R. 623. Section 4 of the *Wakf Commissioners Act of 1951* provided that "the valid purposes of *wakf* to be: (a) For the benefit, either wholly or partly, of the family, children, descendants or kindred of the maker or of any other person; or (b) if the maker of the *wakf* is an *ibadhi* or *hanafi* Mohamedan, for his own behalf during his lifetime, is declared to be a valid *wakf*."

purpose in Islamic law. The Court of Appeal dismissed the case and held that the life-interests given by the *wakf* deed were not within the permitted purposes of maintenance and support of the founder's family, and that the *wakf* was void for breaching the rule against perpetuities.

The British judges in the Kenya coastal strip preferred to follow Indian cases as opposed to the *wakf* ordinances on the ground that application of the Zanzibar *Wakf* Validating Decree of 1946 was confined to validate *wakfs* in Zanzibar only. The tendency of British judges in the Kenya coastal strip to rely on Indian decisions continued even after enactment of the *Wakf* Ordinance 1951. The Ordinance was meant to validate *wakfs* which offended the English rule against perpetuities. Basing their judgements on Indian case law, the British judges argued that the *Wakf* Ordinance 1951 confined its application to the immediate family and descendants of the donor and excluded other distant descending generations.

### **5.7.2. Charitable purposes in English law and rules of Islamic law**

Another contentious area that created conflict between the British judges and the *kadhis* was the scope of the purposes that qualify to be charitable. The purposes for which *wakf* properties were founded in Islam were innumerable and included charitable public facilities, such as, the construction of mosques, hospitals and graveyards. In Islam, *wakf* institutions demonstrate the great variety of charitable purposes designed to cater for the community and the poor.<sup>114</sup> Under Muslim law, the real purpose of creating a *wakf* is to acquire merit in the eyes of God and all other purposes are subsidiary. Therefore, every purpose

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<sup>114</sup> Sheriff, 2001, 28.

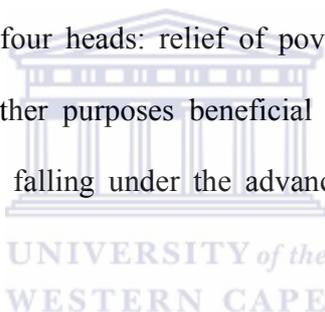
considered by Muslim law as religious, pious or charitable would be considered valid'.<sup>115</sup>

Section 4 of the Wakf Commissioners Act of 1951 states the valid purposes of *wakf* to be:

“(a) for the benefit, either wholly or partly, of the family, children, descendants or kindred of the maker or of any other person; or

(b) if the maker of the *wakf* is an Ibadhi or Hanafi Mohamedan, for his own behalf during his lifetime, is declared to be a valid *wakf*.”

Although both a *wakf* and a trust require the purpose to be a charitable one, the charitable purpose under Islamic law has to be perpetual and the property inalienable. In English law, the Statute of Elizabeth 1601 (also referred to as the English Charitable Uses Act of 1601) lists charitable purposes under four heads: relief of poverty, advancement of education, advancement of religion and other purposes beneficial to the community.<sup>116</sup> Purposes which were later considered as falling under the advancement of religion, included the saying of masses for the dead.<sup>117</sup>



In deciding *wakf* matters, the British judges applied the notion of charitable purposes according to English law. For instance, the British judges in Mombasa rejected that recitation of the Quran at a grave to be a valid purpose of a *wakf*. In the case of *Aisha bt. Hamed b. Rashid and Others v. Mohamed b. Essa El-Mandry and Another* in Her Majesty's Supreme Court of Kenya in Mombasa, the deceased created a *wakf* deed in which she transferred rights to and interests in her property to herself as trustee, and after her death to

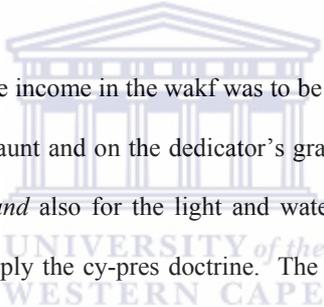
<sup>115</sup> Fyzee, A. A.A. (1964) *Outlines of Muhammadan Law* (3<sup>rd</sup> edition) Oxford: Oxford University Press 248.

<sup>116</sup> The four categories of charitable purposes were summarized by Lord Macnaghten in the case of *Commissioners for Special Purposes of Income Tax v. Pemsel* [1891] A.C. 531 at 583.

<sup>117</sup> This purpose was decided in the case of *Re Caus* [1934] Ch. 162.

relatives.<sup>118</sup> The expressed purposes of the *wakf* were that out of the income of the property an amount should be spent on reading the Quran daily for the souls of her late relatives, and also at her grave in the event of her death, and that any surplus income was to be utilized for the relief of the poor Muslim of Mombasa and also for light and water for the al-Mandri mosque in Mombasa. The plaintiffs who were heirs of the dedicator sought a declaration to invalidate the *wakf* on the ground that the reading of the Quran at the grave of a deceased person was not a valid purpose. The Supreme Court held that the reading of the Quran at a private grave was not a valid object and declared the *wakf* void *ab initio* on the ground that the dedicated objects had failed.

Judge Edmonds held:



“had the deed provided that the income in the *wakf* was to be utilized for the reading of the Koran on the graves of the mother and aunt and on the dedicator’s grave after her death, *and* for the relief of poor Muslims in Mombasa, *and* also for the light and water, if necessary for the Mosque, then I would have been proper to apply the *cy-pres* doctrine. The evidence before me clearly established that in fact there would have been no surplus from the income of the *wakf* property, and hence the charitable objects mentioned would not have benefited. It cannot, therefore, be held that a clear charitable intention is expressed in the deed. The property the subject of the *wakf* was specifically dedicated to objects which have failed, and in the absence of a clear charitable intention the *wakf* must in my opinion be declared void *ab initio*.”<sup>119</sup>

The validity of reciting the Quran at a grave was a contentious issue even among the *kadhis* in Zanzibar. In the case of *Jokha bt. Ahmad b. Nasor al-Riyamiyya*, the settler created a *wakf* in which she provided in her will for the recitation of the Quran at the graves of her

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<sup>118</sup> (1960) 1 E.A.L.R. 713.

<sup>119</sup> *Ibid.*

relatives.<sup>120</sup> The *ibadhi kadhis* invalidated the *wakf* on the ground that it was not lawful to recite the Quran at graves. However, the *sunni kadhis* validated the *wakf* and argued that it was lawful to recite the Quran at the graves, and considered it as a way to approach Almighty God.<sup>121</sup>

The British judges also invalidated *wakfs* created for the benefit of adopted daughters in cases where income of such *wakfs* was devoted to charitable purposes recognised by Muslim law. In the case of *Riziki bt. Abdulla and Another v. Sharifa bt. Mohamed b. Hemed and Others*, the dedicator sought to create a *wakf* in favour of two adopted daughters (appellants) and other beneficiaries. The respondents were heirs of the dedicator entitled to inherit the estate of the dedicator. Among the provisions of the *wakf* deed was the following:

“the income of the wakf property shall be divided each month between my said adopted daughters in equal shares and upon the death of one or other of my said adopted daughters, her share shall be divided equally among her sons and daughters and their issue per stirpes. If the beneficiaries so appointed shall die out or fail, the income of the wakf shall be devoted to assisting poor Mohamdens, promoting the Mohamdean faith, educating Mohamdean children, maintaining and assisting improvised mosques and other charitable purposes”.<sup>122</sup>

Lord Evershed, of the Privy Council, dismissed the appeal and held that inclusion of the adopted daughters in the *wakf* deed was invalid.

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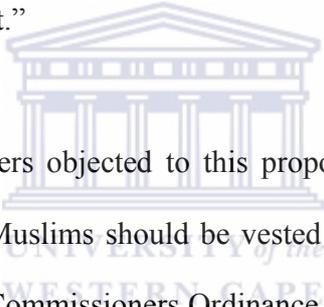
<sup>120</sup> ZNA/HD/5/55 (unreported).

<sup>121</sup> Sheriff, 2001, 37.

<sup>122</sup> (1963) 2 E.A.L.R 429.

### **5.7.3 The contention between the *Wakf* Commissioners and the Public Trustee in the Kenya coastal strip**

The British policy to control the income of the Kenya coastal strip went beyond the properties owned by *wakf* institutions. The British colonial officials in the coastal strip proposed to amend section 11(3) of the Public Trustees Ordinance of 1923, to entitle unclaimed estates of deceased Muslims to revert to the British Crown after the lapse of 21 years. The proposal to amend section 11(3) of the Public Trustees Ordinance of 1923 stated: “all estates or portions thereof in respect of which no claim shall have been lodged with the Public Trustee shall lapse or be escheat to the Crown on the expiry of twenty years from the date of the final account.”



However, the *wakf* commissioners objected to this proposal and instead argued that the unclaimed estates of deceased Muslims should be vested in the *wakf* commission, on the basis of section 13 of the *Wakf* Commissioners Ordinance of 1951 that stated: “all property of deceased Mohammedans natives to which no claim can be established shall vest in the Commissioners, but no such property shall be handed over to the Commissioners without the sanction of the Court.”

In order to reconcile the two conflicting enactments, the British colonial authorities consulted the Muslim religious authorities in the Kenya coastal strip. The District Officer of Malindi noted:

“I have discussed the Public Trustee’s proposals with the Kadhi and he is of the opinion that will regard the arrangement with feeling of dissatisfaction because it is not in accordance with

Mohammedans law. Therefore good Mohammedans might display some reluctance in conforming to such a practice”.<sup>123</sup>

The District Officer of Kwale aired similar views of Muslims in his area by stating:

“I have consulted the Liwali and Mudir and Mohammedan communities on this matter and I find that the general affecting is against the suggestion. The point of view seems to be that the Government is not in a position to review the Sharia with which I must say I agree in principle”.<sup>124</sup>

Despite these alarming views from Muslims religious leaders, the Public Treasurer advocated for the amendment of Section 11(3) of the Public Trustees Ordinance of 1923. The Public Treasurer argued that giving the *Wakf* Commissioners the right to hold unclaimed estates of deceased Muslims was to privilege Muslims compared to persons of other religions. He remarked:

“It is difficult to appreciate why the property of the deceased Mohammedans natives should be singled out for special treatment. I submit that if its considered necessary to preserve the distinction between the unclaimed coastal property of deceased Mohamedan natives and the unclaimed property of other inhabitants of the Colony, then adequate steps should be taken to ensure that the Wakf Commissioners do, infact, administer this money to the public advantage or to the advantage of the Mohammedans on the Coast, and that they show clearly in published accounts the manner in which such money is being administered.”<sup>125</sup>

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<sup>123</sup> KNA/PC/Coast/2/3/12, Mohammedans, letter from the District Officer, Malindi, to the Senior Commissioner Coast, Mombasa, dated 6 April 1926.

<sup>124</sup> KNA/PC/Coast/2/3/12, Mohammedans, letter from the District Officer, Kwale, to the Senior Commissioner Coast, Mombasa, dated 3 May 1926.

<sup>125</sup> KNA/PC/Coast/2/17/1, The *Wakf* Commissioner's Ordinance: Legislation, The *Wakf* Commissioner's Ordinance: Legislation, Memorandum on Unclaimed Estates of Deceased Mohamedan Natives, prepared by the Treasurer dated 5 January 1933.

In response to these criticisms, the Colonial Secretary directed for a committee of enquiry to be established and report on the need for an amendment of the Wakf Ordinance “so as to effect closer control on the expenditure from monies obtained under the *Wakf* Ordinance as suggested by the Treasurer”.<sup>126</sup> The *Wakf* Commissioners objected to furnish accounts of the *Wakf* Commission to a committee of enquiry and stated that “the Commissioners do not see any reason for any committee of enquiry as everything is done according to the *Wakf* Ordinance and Sharia, all accounts being subject to complete audit by the Colonial Auditor”.<sup>127</sup> Due to criticisms made by Muslims and *Wakf* Commissioners against the amendment of Section 11(3) of the Public Ordinance 1923, British colonial authorities in the Kenya coastal strip abstained from amending the Ordinance.

Another area of contention between the *Wakf* Commissioners and the Public Trustee in the Kenya coastal strip was the payment made to a spouse of a deceased Muslim in excess of his or her legal share. The Public Trustee in Kenya argued that distribution of estate according to Islamic law of inheritance gave a bare share of a fourth or a half, as the case may be to the surviving husband or wife respectively, whilst the balance was retained and then paid to the *Wakf* Commissioners in the absence of any other heirs. The Public Trustee therefore proposed to amend section 11(2) of the Public Trustee Ordinance of 1923 to the effect that in the event of no claim forthcoming for the residue of an estate of a deceased

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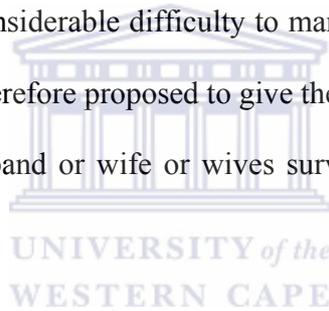
<sup>126</sup> *Ibid.*

<sup>127</sup> KNA/PC/Coast/2/17/1, The *Wakf* Commissioner's Ordinance: Legislation, letter from the Secretary of *Wakf* Commissioners, to the Provincial Commissioner, coast, dated 8 September 1933,

Muslim, the husband or the wife when the sole heir, shall be permitted to receive an amount in excess of his or her legal share.

The proposed amendment Section 11 (2) of the Public Trustee Ordinance of 1923 stated: “In any case in which the wakf commissioners are entitled to any portion of an estate it shall be lawful for the Public Trustee to pay or transfer property not exceeding fifty pounds in value to the husband or wife or wives surviving the deceased.”

The Public Trustee pointed that shares of either a fourth or a half to the surviving wife or husband respectively caused considerable difficulty to many poor widows and husbands of the deceased persons. It was therefore proposed to give the Public Trustee the power to pay or transfer property to the husband or wife or wives surviving the deceased in excess of their legal share.<sup>128</sup>



The *liwali* for the coast and *kadhi* of Mombasa objected to the proposal by mentioning that:

“We do not agree to the proposed amendment of the Public Trustee Ordinance. The proposed amendment to section 11(2) directly interferes with one of the fundamental principles of the Sharia and such interference will certainly be considered as a step towards interference in Religion which, we are sure, is not the object of the Government.”<sup>129</sup>

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<sup>128</sup> KNA/PC/Coast/2/17/1, The *Wakf* Commissioner's Ordinance: Legislation, letter from the Senior Commissioner's office, Mombasa to the District Officer, Malindi, dated 2 January 1926.

<sup>129</sup> KNA/PC/Coast/2/17/1, The *Wakf* Commissioner's Ordinance: Legislation, letter from the *liwali* and *kadhi*, Mombasa, to the District Commissioner, Mombasa, dated 5 May 1932.

Despite that fact British colonial administrators were persuaded by the Public Trustee's argument, they were forced due to 'political reasons' to reject the proposal to amend section 11(2) of the Public Trustee Ordinance of 1925. The Provincial Commissioner of the Coast noted:

"the District Commissioner and I are in agreement that the object underlying section 11(2) of the Public Trustee's (Amendment) ordinance is sound in equity, and we would like to see incorporated in the law...The objections raised appear to be based mainly on the argument that the amendments proposed are at variance with the sharia. In view of the opinions expressed by the Kadhi and Liwali we can see that the Bill as it stands might certainly be regarded as an attempt to interfere with the religious precepts of the Arabs: and that being so we consider that for political reasons it should not be proceeded with in its present form."<sup>130</sup>



## 5.8 Conclusion

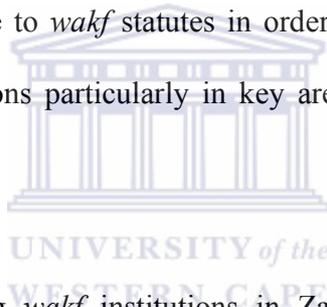
The chapter has demonstrated how the British colonial administration adopted strategies to transform *wakf* institutions in the Busa'idi Sultanate. The British noted the significance of *wakf* institutions in Muslim societies and therefore adopted gradual policies in transforming these institutions so as to avoid resistance from Muslim religious leadership. Large tracts of land and properties in the Busa'idi Sultanate were dedicated to *wakf* under either private or communal ownership. After declaration of British protection in Zanzibar, the British perceived the system of land ownership practiced in the Busa'idi Sultanate to be an impediment in the process of developing the British Empire. Hence, the British colonial

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<sup>130</sup> KNA/PC/Coast/2/17/1, The Wakf Commissioner's Ordinance: Legislation, letter from the Provincial Commissioner, Mombasa, to the Colonial Secretary, Nairobi, dated 6 May 1932.

officials embarked on a process of reforming management of *wakf* properties by regulating how land could be consolidated and utilized.

In the process of transforming *wakf* institutions, the British established *wakf* commissions to ensure control over properties in the Busa'idi Sultanate. By adopting the policy of indirect rule policy, the British appointed prominent persons who were co-operative with the colonial government to serve as *wakf* commissioners. Appointed commissioners who opposed colonial directives were threatened to be expelled from the *wakf* commissions. The British enacted ordinances in order to regulate operation of the *wakf* commissions. Several amendments were done to *wakf* statutes in order to ensure dominance of British officials in the *wakf* commissions particularly in key areas such as the Secretary of the Commission.



In the process of transforming *wakf* institutions in Zanzibar, the British encountered resistance from Muslim religious leaders. This was apparent in cases where British staff in the Zanzibar *Wakf* Commission wanted to use the income of certain *wakf* properties for other purposes not included in the *wakf* deeds such as benefiting other dormant *wakf* properties. British *wakf* commissioners advocated for using the spirit of Islamic law and urged their fellow Muslim *wakf* commissioners to interpret the strict rules pertaining to *wakf* deeds in order to reconstruct the static nature of *wakf* properties. However, Muslim *wakf* commissioners declined and confined their opinions to the wishes of the dedicators.

In the process of transforming *wakf* institutions, the British employed notions of English law such as confining the meaning of charitable purposes according to the English

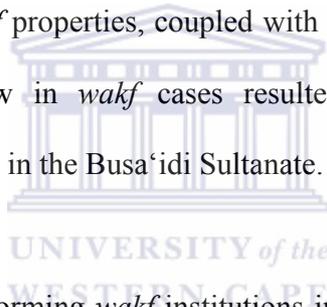
Charitable Uses Act of 1601. Confining the use of charitable purposes to English norms paved way for British judges to reject *wakfs* created for religious purposes sanctioned by Islamic law. The English concept of individual ownership of land was introduced by British judges contrary to communal or family ownership of properties prevalent in the Busa'idi Sultanate. British judges interpreted *wakf* cases according to notions of English law. For instance, the English rule against perpetual endowments was applied in *wakf cases* in the Busa'idi Sultanate. *Wakf* properties which offended the rule were invalidated by British judges despite the fact that such endowments were good in Islamic law.

Imposing English norms on *wakf* cases caused hardship which generated protest from Muslim circles the Busa'idi Sultanate. Due to such discontent, the British colonial authorities responded by enacting ordinances to validate *wakf* properties which were invalidated by British judges. During the Great Wars, the British government needed funds to cater for war expenses. Hence, the colonial government embarked on a policy of raising funds from the British Empire. For instance in Zanzibar, the British invested *wakf* funds in war loans and funds of the *Wakf* Commission were used to make donations to the British Red Cross Society.

British colonial officials in the Kenya coastal strip proposed to amend the Public Trustee Ordinance so as to allow unclaimed estates of deceased Muslims to escheat to the British Crown. Due to opposition from Muslim religious leadership, the British abstained from implementing the proposal. British policy of transforming land tenure in the Busa'idi Sultanate was to achieve agricultural prosperity for the benefit of British interests. For instance, Edward Clarke (British Consul in Zanzibar) proposed a decree to reform the system of land tenure in Zanzibar. Clarke's proposal seemed to be 'too drastic' and out of

fear of anticipated resistance from owners of *wakf* properties, the British colonial authorities abandoned the proposal.

The process of transforming *wakf* institutions was marked with contradictions in colonial courts. Due to lack of consistent policy in handling *wakf* cases, British judges gave conflicting decisions on the application of Islamic law in *wakf* matters. On the one hand, some judges excluded the application of Islamic law rules in *wakf* cases and instead applied Indian statutes based on English law. On the other hand, other British judges decided that Islamic law was applicable in governing land matters. Lack of a clear policy in handling land issues which included *wakf* properties, coupled with conflicting opinions of courts on the application of Islamic law in *wakf* cases resulted in impeding the process of transforming *wakf* institutions in in the Busa'idi Sultanate.



British colonial policy of transforming *wakf* institutions in the region was caught between the zeal to reform the institution to achieve British interests on the one hand, and on the other hand, to uphold non-interference policy in religious institutions in order to gain support of the colonized people. In striking a balance between the two extremes, the British colonial authorities implemented the reform process in areas which did not attract discontent of the colonized people. In cases where the transformation process caused hardship, the British responded by enacting statutes to ameliorate the situation. In areas which generated resistance, the British retreated from the reform process.

## **Chapter 6: Breaking the servitude bonds: The British policies on the abolition of slavery in the Busa'idi Sultanate**

### **6.1 Introduction**

Chapter 6 is a continuation of part III as a case study that reflects the transformation process adopted by the British colonial administration on the abolition of slavery in Busa'idi Sultanate. This chapter will first highlight the historical background of the institution of slavery along the East African coast. Driven by economic as well as political motives, European and oriental powers competed in controlling trade along the East African coast. Between the 17<sup>th</sup> and 19<sup>th</sup> centuries, slave trade occupied a significant place in the economy of the East Africa coast until its abolition in the early 20<sup>th</sup> century. The chapter will proceed to explore slavery in the Islamic context and demonstrate the mechanisms adopted by the British to encourage the emancipation of slaves. The focus of this chapter will be on the strategies adopted by the British colonial authorities towards the abolition of slavery in the Busa'idi Sultanate. In the process of transforming the institution of slavery, the British implemented a gradual policy in order to avert abrupt abolition that could have led to the collapse of the plantation economy founded on slave labour. The British faced resistance from the Sultans and their subjects on the abolition of the status of concubinage. This chapter will show how the British colonial officials, particularly in Zanzibar, managed to contain the institution of concubinage in order to avoid causing disruption to family ties attached to the institution. In the process of emancipating slaves, differences emerged between judges and *kadhis* due to conflicts between Islamic legal rules and statutes enacted by the British colonial administration in the Busa'idi Sultanate.

This chapter will explore conflicts in the courts between British judges and *kadhis* and demonstrate the root causes of these conflicts.

## 6.2 Brief historical background of the slave trade

According to the definition of Stanley Engerman, slavery refers to a condition in which a person is owned by another who controls their life and work as his slave.<sup>1</sup> The Atlantic slave trade began in the 15<sup>th</sup> century due to the need for slaves on the sugar plantations controlled by European powers that included Portugal, the Netherlands, France, and Britain. The demand of slaves on European markets led to the expansion of the slave trade in Africa. Around 1440, the Portuguese captured slaves and took them to Portugal and the Islands of Madeira and Canaries to work on sugar plantations.<sup>2</sup>

In the mid 17<sup>th</sup> century, the demand for slaves grew enormously in the Caribbean Islands due to the need for slaves on sugar plantations owned by the British. In order to ensure continuous availability of slaves, the British established the Royal African Company in West Africa with the objective of maintaining an English monopoly that would challenge

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<sup>1</sup> Engerman, S, Drescher, S, and Paquette, R (eds.) (2001) *Slavery* Oxford: Oxford University Press 2.

<sup>2</sup> Manning, P (1990) *Slavery and African Life* Cambridge: Cambridge University Press, 30. During the 1430s, Prince Henry of Portugal argued that navigation of the African coast was part of a holy war and sought the support of the Catholic church both for his missionary enterprise and to ward off other European powers. In 1452, a Papal Bull was issued by Pope Nicholas V that gave King Alfonso of Portugal “power to conquer and enslave pagans”. William H, Worger, N. L, and Alpers, E. A (eds.) (2001) *Africa and the West: A Documentary History from the Slave Trade to Independence* Phoenix, Arizona: Oryx Press 13.

other European competitors. According to the terms of the Company's Charter that was issued in 1672, the Company had "the right not only to an exclusive monopoly of West African trade, but also to raise armies, declare wars, and enslave 'Negroes'."<sup>3</sup> By the later part of the 18<sup>th</sup> century, Britain became the leading nation in the slave trade. Ironically, Britain was also the leading nation to support the efforts of William Wilberforce (d.1833) who established the anti-slavery movement in the late 18<sup>th</sup> century.<sup>4</sup> Occidental slave trade declined following the Haitian revolution of 1770, and after 1850 the slave trade in most of the Western nations was virtually over.<sup>5</sup>

The slave trade along the East African coast expanded in the late 18<sup>th</sup> century when the French needed slaves for their sugar plantations in their colonies, which included Reunion and Mauritius. During the same period Brazilian and Indian Ocean ports joined the slave trade market and their demand for slaves continued in the 19<sup>th</sup> century.<sup>6</sup> Demand for slaves along the East African coast was accelerated by the establishment of a plantation economy based on slave labour in Zanzibar when Sultan Seyyid Sa'id (r.1804–1856) transferred his capital from Muscat to Zanzibar in 1832. The other factor that contributed to the rise of the slave trade along the East African coast was the expansion of trade between Zanzibar,

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<sup>3</sup> Alpers, 2001, 21.

<sup>4</sup> Cohen, A. (1959) *British Policy in Changing Africa* Evanston: Northwestern University Press 7. Sir Andrew Cohen was the British Governor of Uganda and Head of the Africa Division, the Colonial Office.

<sup>5</sup> Manning, 1990, 21.

<sup>6</sup> Morton, R. F (1976) "Slaves, Fugitives and Freedmen on the Kenya Coast, 1873-1907" (Unpublished PhD Dissertation, Syracuse University) 4.

Oman and India. Based on commercial ties between city ports in the Indian Ocean, slaves from the East African coast were transported to India, south Arabia and the Persian Gulf.<sup>7</sup>

### 6.3 Slavery in the Islamic context

Slavery existed in Pre-Islamic Arabia and occupied an integral part of the social life of Arab pagans. The Quran acknowledges the existence of slavery since the time of Prophet Yusuf (Joseph) when he was captured and sold by travellers.<sup>8</sup> By the time of the Prophet Muhammad, slavery was widely practiced in the Meccan society. Islam prohibited all forms of enslavement and recognised only one mode of enslaving prisoners of war with certain restrictions.<sup>9</sup> Enslavement of captives of war was permissible on a reciprocal basis in cases where enemies of Islam enslaved Muslim prisoners of war according to the prevailing custom of the time.<sup>10</sup> Since the dawn of Islam, all nations used to enslave

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<sup>7</sup> Manning, 1990, 138.

<sup>8</sup> Chapter 12 verse 19 states “And they concealed him [Yusuf] as merchandise ... And sold him for a reduced price - a few *dirhams*”.

<sup>9</sup> These restrictions include: (1) the war must be fought in defence of Allah’s religion, (2) the enemy should be the ones who have started the war by fighting the Muslims or by hindering Muslims from spreading their religion; (3) the enemy should not have agreed to surrender; and (4) the enemy should not have entered into a treaty. In these cases, the Imam has the discretion to either free the prisoners of war without any ransom or to free them in exchange for Muslim prisoners of war taken by the enemy. Mazrui, M.K. (1993) *Histroria ya Utumwa katika Uislamu na Dini Nyengine* Nairobi: Islamic Foundation 3.

<sup>10</sup> Under Islamic legal rules, enslavement of female captives of war was permitted on a reciprocal basis where the enemies of Islam took Muslim women as prisoners of war. The relationship between a female captive of war and her master was regulated, and was not left to a chaotic and immoral sexual relationship, as is usually

prisoners of war, and therefore it was logical for Muslims to be allowed to enslave their enemies as prisoners of war.<sup>11</sup> Prisoners of war in a Muslim state were dealt with according to the dictates of the circumstances. The State could either ask for compensation from the enemy, exchange prisoners of war with those held by the enemy, or enslave them reciprocally according to the measures adopted by the enemy.<sup>12</sup>

Enslavement of prisoners of war is sanctioned by the Quran which states “then secure their bonds and either (confer) favour afterwards or ransom (them) until the war lays down its burdens”.<sup>13</sup> When a war is waged against a Muslim state, persons who are not under the protection of a Muslim state could be captured as prisoners of war. Authority to enslave captives of war in Islam is derived from the Islamic notion of dividing geographical boundaries of the Muslim state into two: *dar al-Islam* and the *dar al-harb*. Based on this territorial categorisation, people’s security in a Muslim state could be achieved either by

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the case with female captives of war in history. Qutb, S (1982) *Fi Dhilal al-Quran* (10 ed.) Beirut: *Dar al-Shuruq* (vol.6) 3701. The Quran prohibited prostitution of female slaves. Chapter 24 verse 33 provides: “And do not compel your slave girls to prostitution, if they desire chastity, to seek (thereby) the temporary interests of worldly life. And if someone should compel them, then indeed, Allah is (to them), after their compulsion, Forgiving and Merciful”.

<sup>11</sup> Mazrui, 1993, 3.

<sup>12</sup> Qutb, 1982, vol.1, 230. Seyyid Qutb noted that Islam accepted slavery to counter war customs that prevailed at the time, and that it was not possible for Islam to confine itself to the principle of “either (confer) favour afterwards or ransom (them)” in a time that the enemy enslaved Muslim prisoners of war. In the event that all nations agree not to enslave prisoners of war, then Islam will apply the principle of “either (confer) favour afterwards or ransom (them)” Qutb, 1982, vol.6, 3285.

<sup>13</sup> Chapter 47 verse 4.

submission to the Muslim faith or acceptance of the protection offered by the Muslim state. Persons who refused to adhere to either of the two options were regarded as being outside the secured boundary of the Muslim state, and therefore could be fought and captured as prisoners of war.<sup>14</sup>

Islam opted for the reduction of the sources of slavery gradually to the stage of complete abolition without causing social chaos that could not be controlled.<sup>15</sup> Muslim scholars have set down detailed rules that governed the master-slave relationship.<sup>16</sup> An interesting aspect of classical writings of Muslim scholars on slavery is that they have dealt in detail with chapters related to emancipation of slaves without mentioning modes of enslavement. For instance, out of 71 chapters of *Minhaj al-Talibin*, Imam al-Nawawi has dedicated only 4 chapters to ways of manumission of slaves, without any reference to modes of enslavement.<sup>17</sup> This tendency seemed to have been influenced by the approaches of the Quran and Hadith that have implicitly encouraged slave owners to treat their slaves well and emancipate them without mentioning modes of enslavement.<sup>18</sup>

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<sup>14</sup> Sanneh, L.O “Slavery, Islam and the Jakhanke People of West Africa” 1976 46 (1) *Africa* 80.

<sup>15</sup> Seyyid Qutb, *Fi Dhilal al-Quran* Beirut: *Dar al-Shuruq*, 1982, 10<sup>th</sup> ed., vol.1, 230.

<sup>16</sup> For instance, see the chapter on slaves in *Minhaj al-Talibin* by Imam al-Nawawi.

<sup>17</sup> Chapter 68: simple manumission; chapter 69: testamentary manumission; chapter 70: emancipation by contract; and chapter 71: freedom on account of maternity. Another chapter related to slavery is chapter 44 on the period of waiting (*‘idda*) of a slave. See Howard, 1914.

<sup>18</sup> There are several verses of the Quran which encourage emancipation of slaves, such as, chapter 9 verse 60, and chapter 2 verse 177.

Quranic concepts regarding slavery did not specifically contain legal formulations but rather broad propositions of an ethical nature.<sup>19</sup> Quranic injunctions encouraged manumission of slaves as an act of piety and provided several procedures to facilitate it.<sup>20</sup> In other cases, manumission of slaves was regarded as a form of expiation (*kaffara*) for offences committed by persons.<sup>21</sup> There are several references to slavery in the Quran and Hadith that have urged the kind treatment of slaves.<sup>22</sup> Based on the appeal of Islamic injunctions to manumit slaves, a number of Muslims owning slaves either liberated their

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<sup>19</sup> Sikainga A. A. "Shari'a Courts and the Manumission of Female Slaves in the Sudan, 1898-1939", (1995) 28 (1) *The International Journal of African Historical Studies* 6.

<sup>20</sup> For instance, chapter 9 verse 60 states categories of areas in which *zakat* could be spent. Among them is freeing captives (or slaves). Chapter 2 verse 177 "Righteousness is not that you turn your faces toward the east or the west, but true righteousness is in ...freeing slaves."

<sup>21</sup> Freeing of a slave is regarded as *kaffara* (expiation) when a person commits offences, such as, (i) non-intentional homicide as quoted in the Quran chapter 4 verse 92, which provides: "And whoever kills a believer by mistake- then the freeing of a believing slave and a compensation payment presented to his (deceased's) family"); (ii) going against a vow as provided in chapter 5 verse 89, which states "Allah will not impose blame upon you for what is meaningless in your oaths, but He will impose blame upon you for (breaking) what you intended of oaths. So its expiation is the feeding of ten needy people from average of that which you feed your (own) families or clothing them or the freeing of a slave"; and (iii) having intentional intercourse during the month of Ramadhan.

<sup>22</sup> For instance, chapter 4 verse 36 provides: "Worship Allah and associate nothing with Him, and to parents do good and those whom your right hands possess." It is reported that Prophet Muhammad (Peace be upon Him) said: "He who kills a slave, we shall kill him; who mutilates his nose, we shall cut his nose; and who castrates a slave we shall castrate him in return." Hadith narrated by both Imam al-Bukhari and Muslim. In another tradition, the Prophet said: "You are all sons of Adam and Adam was created from dust." Hadith narrated by Imam Muslim and Abu Daud.

slaves during their lifetime or wrote wills to free their slaves after the owner's death. Freeing a slave was considered as a meritorious act in the sight of Almighty God and a step towards achieving a place in Paradise. There are plenty of deeds in the Zanzibar archives that provide for the emancipation of slaves. The following is a translation of a deed for freeing a slave in Zanzibar:

“In the name of the Most Merciful God. Zuhra binti Khamis bin Kombo declares that she has emancipated her slave Juma bin Kheri and set him free for the sake of God, seeking His pleasure, with a hope that the Beneficent God will save her from the Hellfire; and that neither she nor anyone else amongst her heirs after her will have any right over him except the right of “wila” (matrimonial guardianship). She has also given him a piece of her shamba which is situated at Maungani in Zanzibar Island. Dated Friday 12<sup>th</sup> *Jamadal Al-āakhir* 1303 [18<sup>th</sup> March 1886].”<sup>23</sup>

Classical Islamic law texts provide detailed rules on various modes in which a slave can be freed. Ways in which a slave could be emancipated include: (1) upon the death of a master, two witnesses can declare before a *kadhi* that they heard the deceased pronouncing the freeing of the slave; (2) where a concubine of a master bears him a child, she becomes *ipso facto* a free woman on his death; and (3) payment of *kaffara*, as in the case of manslaughter and oath breaking. There are also other means by which a slave could obtain freedom through mutual agreement with the master, including: (a) voluntary emancipation in the form of a grant of immediate and unconditional freedom; (b) *mukataba*, which is a written agreement to free the slave on certain conditions, such as, the payment in instalments of a ransom; and (c) *tadbir*, which is a promise of freedom contingent on the master's death.<sup>24</sup>

<sup>23</sup> ZA/HC8/110. Name of the emancipator indicates that Zanzibaris of non-Arab origin also owned slaves.

<sup>24</sup> Letter from Arthur Hardinge to the Earl of Kimberley Zanzibar 26 February 1895, “Correspondence Relating to Zanzibar” *Africa* 1886 (1) 13.

In the case of *mukataba*, the slave owners were urged to make contractual arrangements with their slaves who desire to free themselves, with a view to paving the way for their freedom. The Quran states “And those who seek a contract (for eventual emancipation) from among whom your right hands possess, then make a contract with them if you know there is within them goodness and give them from the wealth of Allah which He has given you”.<sup>25</sup> As a means to facilitate their freedom, slaves are given the freedom to work and whatever they get from their work belongs to them. Slaves were also given the right to work for others beside their masters in order to earn wages so as to pay for their freedom. In addition to these sources of income, slaves were entitled to be financially assisted by the *bayt al-mal* through *zakat* funds in order to achieve their freedom.<sup>26</sup>

In order to encourage the freeing of slaves, the rules of Islamic law did not require a freed slave to prove his/her freedom in cases where heirs of the master deny the claim. The burden of proof lay on the heirs to prove that the master did not free his/her slave.<sup>27</sup> Islamic legal rules in this case have been relaxed for the benefit of the slave who claimed his/her freedom as opposed to the general rule that a person who claimed a right is required to prove his/her case.<sup>28</sup>

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<sup>25</sup> Quran chapter 24 verse 33.

<sup>26</sup> Quran chapter 9 verse 60.

<sup>27</sup> Mazrui, 1993, 6.

<sup>28</sup> Howard, 1914, 548.

Slavery along the East African coast, and other regions, has always been associated with the ideological label of 'Muslim or Islamic' slavery.<sup>29</sup> Abdul Sheriff remarked on the significance of distinguishing between “what Islam preaches about slavery in its classical texts and what Muslims in different lands, periods and circumstances have practiced, because there has not always been congruence between the two”.<sup>30</sup> Seyyid Qutb regarded the practice of slavery in Muslim societies to be a deviation from Islamic teachings and that enslavement of people that took place during the Muslim dynasties should not be related to Islam.<sup>31</sup> Hence, the existence and spread of slavery in the Muslim world were determined by economic and social realities, rather than by religious norms.<sup>32</sup>

#### 6.4 Categorisation and recruitment of slaves in the Busa'idi Sultanate

Slaves were attached to the ruling elite and served as sources of political and military support. For instance, the Sultans of Zanzibar employed slaves as bodyguards and navy

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<sup>29</sup> A number of authors have subscribed to the concept of 'Islamic' or 'Muslim' slavery. See Miller, Joseph C. "Muslim Slavery and Slaving: A Bibliography" in Savage, Elizabeth (ed.) (1992) 13 *Slavery and Abolition, A Journal of Comparative Studies* 249.

<sup>30</sup> Sheriff, A "Suria: Concubine or Secondary Slave Wife? – the case of Zanzibar in the nineteenth Century" (Unpublished paper). Sheriff objects to the use of the term 'Islamic or Arab slavery' taking into consideration the colonial and missionary pedigree of slavery. Sheriff argued that intellectual discourse on slavery should not use ideological labels and instead preferred to use a geographical one. He avoided naming the Atlantic slave trade as a 'Christian or European Slave Trade,' despite the fact that most of the slave traders were Christians and Europeans. Sheriff, A "The Twilight of Slavery in the Persian Gulf: what Islam preaches, what some Muslims practiced" (Unpublished paper) 1.

<sup>31</sup> Qutb, 1982, vol.1 583.

<sup>32</sup> Sikainga, 1998, 7.

staff.<sup>33</sup> In the eyes of slave owners, the enslaved people were perceived to be outsiders belonging to a religion other than Islam. This perception served as a foundation that justified enslavement of such persons as outsiders to the realm of Islam.<sup>34</sup> The slaveowners relied on religious traditions that justified enslaving people during war from outside Islam (*dar al-harb*). For the slaveholders “taking a slave from that world saved him from death and made him a Muslim”.<sup>35</sup>

Muslim slave owners relied on the religious foundation of Islam to legitimise the social order in which slaves operated.<sup>36</sup> The slave owners felt obliged to provide Islamic religious teachings to their slaves with the hope of converting them to Islam. For the slaveholders, the proselytising process served two purposes: one was to justify the enslavement on religious grounds, and the other was to convert their slaves to their dominant ideology. By doing so, the slaveholders, who included the elite and learned classes, filled the roles of Gramsci’s hegemonic intellectuals.<sup>37</sup> Due to their exposure to Islamic rituals and performances, slaves subscribed to various religious brotherhoods and participated in mystical Islamic rituals (*dhikri*).<sup>38</sup> By adopting Islamic rituals, slaves sought to improve their status in the household of the master and in society at large.

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<sup>33</sup> Cooper, F. “Islam and Cultural Hegemony: The Ideology of Slave Owners on the East African Coast”, in Lovejoy, P. E (ed.) (1981) *The Ideology of Slavery in Africa* London: Sage Publication 280.

<sup>34</sup> Lovejoy, 1981, 17.

<sup>35</sup> Cooper, 1981, 283.

<sup>36</sup> Lovejoy, 1981, 17.

<sup>37</sup> Cooper, 1981, 283.

<sup>38</sup> Fair, 2001, 267.

Slaves were categorised into various groups that determined the status and superiority of one group over the others. Home born slaves were referred to as *mzaliwa* and were normally attached to their master's house, while those who served their masters in the household were known as *hadimu*. Domestic slaves were the most kindly treated of all and formed part of the master's household. Slaves attached to the master's house were exposed to Islamic religious teachings conducted in the local mosques during evening hours.

Slaves who did petty jobs were known as *mtumwa* and the ones who were assigned to work in the plantations were called *mtwana*.<sup>39</sup> Slaves who worked on the plantations were given a piece of land that was sufficient to build a house and provide them with food. They cultivated their master's plantations and in return they were allowed to cultivate on Thursdays and Fridays in order to provide sufficient food for themselves and their families. The number of slaves working in plantations was determined by the size of plantations. Large slave owners owned an average of one hundred and fifty slaves who worked in their plantations. For instance, Sulayman b. 'Abdallah Al Ma'uli owned two hundred and sixty one slaves who worked on over one thousand acres of land in Malindi.<sup>40</sup> Another category of slaves were artisans who worked for pay outside their master's household. A percentage of their earnings, which did not exceed one-half, was paid to their master and in return, the slaves were provided with accommodation, food and clothing.<sup>41</sup>

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<sup>39</sup> El-Zein, 1974, 28.

<sup>40</sup> Hamidin, 2000, 12.

<sup>41</sup> El-Zein, 1974, 45.

Recruitment of slaves in the interior of East Africa was a shared task between slave traders and middle men who were chiefs from various tribes. Tribal chiefs were provided with arms by slave traders and used to raid their neighbours whenever a need for slaves aroused. For instance, Chiefs of the Yao tribe in Tanganyika supplied slaves to Arab traders in Zanzibar.<sup>42</sup> Other chiefs also took advantage of the African traditional practices such as punishment for witchcraft to enslave their tribesmen.<sup>43</sup> Enslavement between members of a tribe took various forms. Tribesmen were enslaved as prisoners of war. In some cases, a person was enslaved when his tribe failed to pay for blood money for killing a person from another tribe. Another form of enslavement was in cases where a man committed adultery with a wife of another person and his tribe failed to pay for compensation.<sup>44</sup> Slaves were also used as a medium of exchange in cases where a person settled his debt.<sup>45</sup>

Famine contributed towards the process of self-enslavement. Several parts of East Africa were struck by famine that forced tribes to offer their weak members into slavery. During the reign of Sultan Bargash b. Sa'id (r. 1870-1888) a famine occurred in Mrima interior of Tanganyika whereby persons from the *Zaramu* tribe were sold to Arab slave traders.<sup>46</sup> In 1884, the *Mijikenda* tribe along coastal Kenya were struck by *Mwachisenge* famine that

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<sup>42</sup> Levtzion, N "Slavery and Islamization in Africa: A comparative Study" in Willis, J.R (ed.) (1985) *Slaves and Slavery in Muslim Africa*, (Vol 1: Islam and the Ideology of Enslavement) London: Frank Cass 189.

<sup>43</sup> Alpers, E.A (1967) *East African Slave Trade* Dar es Salaam: The Historical Association of Tanzania 18

<sup>44</sup> *Ibid*, 98.

<sup>45</sup> El-Zein, 1974, 28.

<sup>46</sup> Lodhi, A (1973) "The Institution of Slavery in Zanzibar and Pemba" (Research Report No.16 Uppsala: The Scandinavian Institute of African Studies) 5.

caused great hardship and forced them to sell their children and women to slavery.<sup>47</sup> The *Masai* tribe in the hinterland of Kenya were struck by famine in 1894 and become too weak to defend their people. As a consequence of the famine, the *Kikuyu* tribe captured the *Masai* women and children and sold them to slave traders.<sup>48</sup> Some of the coastal tribes such as the *Mijikenda* and *Orma* acquired female slaves in order to increase descendants of their clans and improve their social standing.<sup>49</sup>

### 6.5 The British pressures on the Busa‘idi Sultans to abolish slavery

Slavery existed along the East African coast before the establishment of the British Protectorate in Zanzibar. The British colonial administration initially recognized the institution of slavery based on the fact that slavery was sanctioned by Islam and practiced in the Busa‘idi Sultanate. Sir John Kirk (British Consul General in Zanzibar 1870-86) ruled out that no slave could be the legal property of a Pagan, since slave-owning was recognized only by Islamic Law.<sup>50</sup> Commissioner J.T. Last acknowledged the significance of religious recognition of slavery in the minds of slave owners by stating:

“the Arab is what he is by the law and religion which guides him, and he has no reason to think that he is wrong in holding slaves and profiting by their services. It is scarcely just that he should be

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<sup>47</sup> Morton, 1976, 18.

<sup>48</sup> KNA/PC/Coast/1/44 Letter from Mr. Hardinge to the Marquess of Salisbury dated 13<sup>th</sup> July 1896.

<sup>49</sup> Morton, 1976, 84.

<sup>50</sup> Fisher, H. J and Fisher A. G (1970) *Slavery and Muslim Society in Africa: The Institution in Saharan and Sudanic Africa and the Trans-Saharan Trade* London: C. Hurst and Company 17.

summarily deprived of them and their services and thereby be reduced to poverty because others think differently.”<sup>51</sup>

Since the early nineteenth century, Britain adopted a gradual policy by persuading Sultan Seyyid Sa‘id (r.1804-1856) to sign treaties against slave trade in exchange for British protection. In 1822, the British government negotiated with Seyyid Sa‘id (by then Sultan of Muscat) and signed the Moresby Treaty in order to prevent export of slaves from the Sultan's possessions in East Africa to Britain’s possessions in India. The Treaty permitted the British Navy to search Sultan’s vessels for slaves outside a coastal zone extending northward between Portuguese East Africa and British possessions in India.<sup>52</sup>

Seyyid Sa‘id directed his Governor in Zanzibar to prohibit Christian states from buying slaves in the Sultan’s dominions along the East African coast.<sup>53</sup> The Sultan’s subjects were exempted from the provisions of the Treaty and were allowed to buy slaves along the East African coast. The Treaty also provided for the establishment of a British Consul in Zanzibar in order to observe and report on implementation of the Treaty’s provisions.<sup>54</sup> In

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<sup>51</sup> El-Zein, 1974, 53.

<sup>52</sup> Wilson, H. H “Some Principal Aspects of British Efforts to Crush the African Slave Trade” (1950) 44 (3) *The American Journal of International Law* 505. Sir Fairfax Moresby (1786-1977) was commissioned in 1821 with orders to suppress the slave trade, and concluded a treaty with the Imam of Muscat in 1822 restricting the scope of local slave trading and conferring on English warships the right of searching and seizing local vessels.

<sup>53</sup> Morton, 1976, 9.

<sup>54</sup> Nwulia, M.D.E “The Role of Missionaries in the Emancipation of Slaves in Zanzibar” (1975) 60 (2) *The Journal of Negro History* 270.

1841, Captain Hamerton (British Consul in Zanzibar 1841-1857) proposed to Seyyid Sa'id to abolish slave trade by sea but the Sultan warned Hamerton the adverse effects of abolishing slave trade on British interests in the region. In order to protect her economic interests, Britain was forced to retreat from forcing the Sultan to abolish slave trade. Britain also feared that much pressure on the Sultan could force him to seek alliance with Napoleon who had already advanced threats against Britain.<sup>55</sup> The political and economic relationship between Britain and Seyyid Sa'id existed for long time and the British government could not afford to dispense with the support of Seyyid Sa'id to the British Crown.

Although the British government was keen to abolish slavery, colonial officials on the ground had to consider economic interests of the British Empire. In mid-nineteenth century Zanzibar, a British administrator R. Newman Hunt noted:

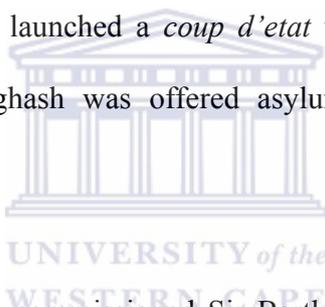
“Since the conclusion of the Treaties with the Imam for the suppression of the slave trade His Highness has assiduously endeavoured to improve the social and moral condition of his people by promoting commerce and agriculture – he has successfully introduced into the Island of Zanzibar the cultivation of the clove tree and sugar cane, and although by the treaties he has stipulated for the continuance of slave owning within his own dominions, he has scrupulously prohibited the Foreign Slave Trade. Your Lordship is also aware that a Treaty of Commerce and Navigation has recently been concluded between this country and Muscat, the provisions of which with respect to our trade exceed in liberality anything we have obtained from other foreign states.”<sup>56</sup>

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<sup>55</sup> Nwulia, 1975, 41.

<sup>56</sup> ZA/CA4/1/1, letter from R. Newman Hunt, to The Earl of Aberdeen, H.M. Principal Secretary of State for Foreign Affairs, dated 11 July 1845.

Another gradual policy adopted by the British government to limit slave trade was done by signing of the Hamerton Treaty in 1845 which prohibited slave trade between Oman and Zanzibar. The Treaty banned the export of slaves from Sultan's dominions along the East African coast to the Persian Gulf. Seyyid Sa'id complained to the British against the harsh provisions of the Treaty by stating "you have put on me a heavier load than I can bear".<sup>57</sup> The success of the Hamerton Treaty was hampered by the French intervention after the death of Seyyid Sa'id in 1856. The French pressurized Majid b. Sa'id (r.1856-1870) to abrogate the Hamerton Treaty so as to permit slaves to be shipped to French plantations in Reunion Islands. French's efforts to persuade Majid failed, and instead they backed his brother Barghash b. Sa'id who launched a *coup d'etat* to seize the throne of Zanzibar. When the attempt failed, Barghash was offered asylum by the French Consulate in Zanzibar.<sup>58</sup>



In 1872 the British government commissioned Sir Bartle Frere on a special anti-slavery mission to Zanzibar and Muscat. Sultan Barghash b. Sa'id (r.1870-1888) first resisted Frere's proposal but due to pressure from British abolitionists and threats from the British government, Barghash signed the Frere Treaty on 5<sup>th</sup> June 1873 which abolished entirely the export of slaves from the African mainland and provided protection to all liberated slaves. The Treaty declared the closure of all public markets for sale of imported slaves including the slave market in Zanzibar where a Christian cathedral was built.<sup>59</sup> Barghash

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<sup>57</sup> Mungeam, 1966, 27.

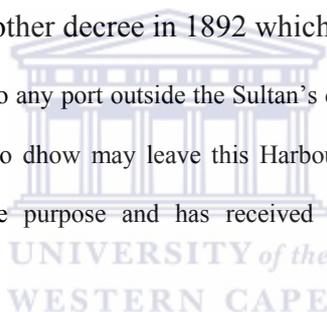
<sup>58</sup> Green, 1985, 35.

<sup>59</sup> Wilson, 1950, 520.

was succeeded by his brother Khalifa b. Sa'id (r.1888-1890) who issued a decree that declared all slaves brought into Zanzibar and Pemba after 1889 to be free.

The British colonial administration in Zanzibar continued to persuade the Sultans of Zanzibar to issue proclamations in order to put an end to slave trade. Sultan Ali b. Sa'id (r. 1890-1893) was influenced by Sir Charles Euan-Smith (British Consul in Zanzibar 1889-91) to enact a decree in 1891 which prohibited future sale of slaves or their transmission within the Sultan's dominions except by direct inheritance. British naval forces kept strict surveillance on dhows sailing along the East African coast. Under the instigation of British authorities, Sultan Ali issued another decree in 1892 which stated:

“no dhow is allowed to sail to any port outside the Sultan's dominions from any place in this Island except Zanzibar Harbour. No dhow may leave this Harbour until she has been examined by the authorities appointed for the purpose and has received the necessary papers authorising her departure.”<sup>60</sup>



Further stringent measures were laid in monitoring sea trade where most of slave trafficking was undertaken. Sea vessels were required to be numbered and provision was made for inspection of all native passengers and sailors.<sup>61</sup> When British administration introduced measures to curb slave trade, Arab slave owners travelled with their slaves to Arabia. Hardinge noted:

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<sup>60</sup> ZA/AC1/2, H.H. the Sultan Decree issued 7 September 1892.

<sup>61</sup> ZA/AC1/2, letter from John Kirk, the First Plenipotentiary for Zanzibar at the Brussels Conference, to Marquis of Salisbury, dated 13 January 1891.

“this year since the south-west monsoon winds began to break; the number of Arabs proceeding with slaves to Muscat has been large and in many cases makes us refuse permission to slaves to accompany their masters to Arabia, even when the slaves professed themselves desirous and anxious to do so.”<sup>62</sup>

## 6.6 The British policies on the abolition of slavery in the Busa‘idi Sultanate

British initiative to abolish slave trade along the East African coast was prompted by various factors. On the one hand, English politicians and philanthropists in Britain pressed the British government for the immediate emancipation of slaves in the Busa‘idi Sultanate. On the other hand, the British government was concerned that the effects of immediate abolition of slavery in the Islands would create a labour crisis that in turn would cause economic disaster as well as political instability in the region. British colonial policy on slavery had to strike a balance between pressures of philanthropists in England and her Imperial interests.

According to British colonial officials, English abolitionists perceived slavery narrowly within their own cultural settings. Mr. Brodrick, the Minister of War on Zanzibar Slavery, argued that the word slavery was according to the average Englishman a synonym for the chain and the lash and therefore gave a very wrong idea of the existing state of slavery in East Africa. He noted that “It is not to the master's interest to ill-treat his bondsmen; as a matter of fact he does not do so. The system is dying a natural death. The emancipation of

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<sup>62</sup> KNA/CA/1/13, letter from Sir A.Hardinge, Zanzibar, to Marquesss of Salisbury, dated 23 April 1898.

slaves in large batches has not proved a success in the past”.<sup>63</sup> Brodrick’s understanding of slavery was shared with another British official in Sudan. C.A. Willis (Director of intelligence in Sudan) noted: “It is difficult for the Englishmen not to associate the word [slave] with chained gangs and a long whip. But the Arab conception of the status of an ‘*Abd*’ is by no means as cruel or inhumane as European exploitation made the slave trade.”<sup>64</sup>

The British government felt that it was morally bound to support the anti-slavery movement and exploited the anti-slavery initiative as a moral justification for invasion and annexation of East African territories.<sup>65</sup> British colonial authorities took the advantage of abolishing slavery in the Busa’idi Sultanate, British colonial officials were interested to secure Imperial economic interests. In addition to securing economic their interests, British colonial officials were interested in the exploitation and control of trade in the interior. British economic competitors including Arabs managed to penetrate to the interior parts of East Africa and traded in various items. A British officer noted:

“where these Zanzibar Arabs go, filibustering oppression of the natives and slavery is carried on a great extent. Starting either from Mombasa or Pangani, these caravans take about 18 months to get to the Ivory districts. Whereas by ascending the Tana, I calculate that we could do the journey in six months at the most, establish friendly relations with the people and secure for the Englishmen the

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<sup>63</sup> The Gazette for Zanzibar and East Africa, Vol. IX No.458 7th November 1900, 3.

<sup>64</sup> Quoted in Sikainga, 1995, 9.

<sup>65</sup> Zwanenberg, R.M.A. “Anti-Slavery, the Ideology of 19<sup>th</sup> Century imperialism in East Africa” in Ogot, B.A. (ed.) (1975) *Economic and Social History in East Africa, Hadith 5*, Nairobi: East African Literature Bureau 108. Similarly in Sudan, the British colonial administration regarded the abolition of slavery as a justification for British occupation.

sole exclusive trade in rubber, ivory, Ostrich feathers, orchilla weed, to be found in that vast region.”<sup>66</sup>

British colonial policy on abolishing slavery in the Busa'idi Sultanate was marred by contradictions. On the one hand, colonial policy was geared towards supporting the anti-slavery movement that advocated for total abolition of slavery under the banner of 'civilizing' the colonized people. On the other hand, the British colonial officials on the ground adopted a sympathetic policy by supporting slave owners in urging that slaves were not yet 'matured enough' to be freed on the ground they were incapable of utilizing their freedom properly. British colonial officials persuaded the colonial establishment that before freeing slaves, it was important first to determine their 'fitness' for work. Commissioner J.T. Last, in charge of slavery emancipation in Zanzibar, remarked:

“when we think carefully of the indolent character, love of ease, and the unfitness for real work [of the slaves], it is necessary to study the position seriously before giving them their freedom in a body, with liberty to scatter themselves and roam over the island and do what they think fit. Judging from their general habits and customary laziness, one may easily conclude that they would rather steal than work.”<sup>67</sup>

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<sup>66</sup> ZNA/AC1/2, letter from Colonel Pollock, to the Foreign Office, dated 26 January 1891. In the letter Pollock gave details of his proposed trading expedition on the Tana and Juba River (Equatorial Africa Traders Co.). By the first quarter of the 19<sup>th</sup> century New England merchants were already trading in Zanzibar. They brought guns and gunpowder to exchange for ivory and copal. Nwulia, M. D.E (1975) *Britain and Slavery in East Africa*, Washington: Three Continents Press 96.

<sup>67</sup> El-Zein, 1974, 53.

Edward Clarke (British Consul in Zanzibar 1908-1913) supported the 'laziness' theory when he employed seventy freed slaves in his *shamba*. He entered into an agreement with the freed slaves to cultivate and pay them daily wages. Clarke noted that after their first harvest, many slaves could not support themselves. Clarke asserted 'laziness' of the slaves by stating: "but of the seventy [freed slaves], thirty have fulfilled the agreement; forty who were lazy and drunkards left me, of these some are now roaming about the Island, other working as the fit and hinge takes them as labourers in the town."<sup>68</sup>

The British adopted a uniform policy of gradual emancipation of slaves in their colonies. For instance in Sudan, slavery persisted for at least three decades after British conquest. British colonial officials in Sudan termed slaves as "servants" and considered them as a form of domestic servitude that could be abolished over time a period of time. Lord Kitchener (British Governor in Sudan) embraced the idea of "domestic servants" and argued that "slavery is not recognized in the Sudan, but as long as service is willingly rendered by servants to masters it is unnecessary to interfere in the conditions existing between them".<sup>69</sup> Kitchner further argued that slavery was deeply rooted in the customs of Sudanese people and that it has been for so long "part of the religious creed and customs of this country, and which is impossible to remove at once without doing great violence to the feelings and injuring of the prosperity of the inhabitants".<sup>70</sup>

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<sup>68</sup> ZA/AC2/1, letter from British Consul, Zanzibar, Edward Clarke to Secretary of State, Edward Grey dated 8<sup>th</sup> may 1912.

<sup>69</sup> Quoted in Sikainga, 1995, 10.

<sup>70</sup> Quoted in Vezzadini, E. "Abolitionist policies in the Sudan: the making of narratives of power, race and abolition" (Unpublished paper) 11.

British colonial policy for gradual emancipation of slavery in Sudan was two fold. First was the British concern to not disrupt labour supplied by slaves which was essential to the agricultural economy of the country. The other reason was that British colonial officials in Sudan were not prepared to face political costs of slave emancipation. After the suppression of the Mahdist uprisings in Sudan, British colonial authorities noted that Gordon's abrupt efforts to abolish slavery were to a large extent responsible for the rise of the Mahdist rebellion.<sup>71</sup>

Similarly in the Busa'idi Sultanate, the British adopted the gradual policy in transforming the institution of slavery. Sir Arthur Hardinge (British Consul in Zanzibar 1894-1896) advocated for gradual abolition of slavery in Zanzibar and demonstrated sympathy to the Arab slave owners and regarded them as key figures in the administration of the British Protectorate.<sup>72</sup> Hardinge argued:

“that the only way of carrying out emancipation, without the most serious injury to Zanzibar, is, whilst impressing gently but firmly upon the Arabs that it is inevitable, to induce them, if possible, to cooperate with us by the offer of such terms as will tempt them to acquiesce in it, rather to listen to the counsels of despair.”<sup>73</sup>

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<sup>71</sup> The British colonial administration was occupied with the suppression of the Mahdist uprising in Sudan. British officials were convinced that the anti-slavery measures taken in 1860s and 1870s were major factors in the acceleration of the Mahdist uprising in 1881. Sikainga, 1995, 8.

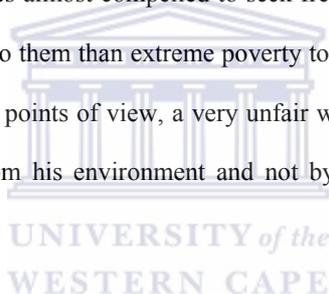
<sup>72</sup> Mungeam, 1966, 25.

<sup>73</sup> Letter from Hardinge to Kimberley, dated 26 February 1895, F.O. 107/35 No.37 quoted in Green, 1985, 252.

Hardinge further argued: “to me personally, it appears that the whole system of slavery is so deeply rooted in the life of every class of this people that only the lapse of time can eradicate the ideas and habits which have grown up with it for generations past.”<sup>74</sup>

Hardinge sentiments were shared by Commissioner J.T. Last who was in charge of supervising on the working of the 1897 Decree for the Abolition of the Legal Status of Slavery in Zanzibar. Commissioner Last noted that it was unfair to treat slave owners by abolishing slavery abruptly and proposed for the Decree to be allowed to work slowly. Last noted that:

“It is necessary that the edicts of the Decree should be allowed to work slowly. If the Decree is strongly pressed and the slaves almost compelled to seek freedom, that it must bring to the Arabs a state of penury, much worse to them than extreme poverty to the ordinary poor man. This would be a very drastic and from some points of view, a very unfair way of treating them, for the position of the Arab must be judged from his environment and not by the strong philanthropic ideas of the West.”<sup>75</sup>



British colonial officials who sympathized with slave owners in Zanzibar advanced the argument that slaves preferred to remain in the servitude status rather than seeking their freedom. Slaves who chose to remain with their masters argued that they were content with their working conditions which were far better off than the freed wage earners. For instance, Commissioner Farler (His Highness Slavery Commissioner in Pemba) pointed out a case where a slave refused to be freed. Farler noted:

“a slave named Fataki told me that he was the slave of the Arab overseer at Banani: 'Those Europeans there ordered me to come and be freed. But I don't want to be freed. Hamid b. Abdullah

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<sup>74</sup> Green, 1985, 252.

<sup>75</sup> El-Zein, 1974, 53.

is like my father to me, and I don't want to lose my home; will you make these Europeans leave me alone?.”<sup>76</sup>

Mr. Brodrick (Minister for War on Zanzibar Slavery) noted that many of the slaves in Zanzibar hardly recognised that they were in a state of slavery and felt they belonged to the master's family and many of them were very unwilling to ask for the freedom.<sup>77</sup>

Another argument advanced by British colonial officials to delay total abolition of slavery was that mass emancipation of slaves would lead freed slaves to become vagrants, criminals, and prostitutes. In order to control workless freed slaves flooding into the towns, restrictions were laid before slaves could gain their liberty. Freed slaves were required to prove that they had a regular domicile and means of subsistence. In order to ensure that freed slaves could earn their living, the British colonial administration in Zanzibar enacted the Vagrancy Decree of 1905. Section 2 of the Decree stated:

“any person being a subject of the Sultan of Zanzibar who neglects or refuses to maintain himself or herself or his or her family, or is found asking for alms, or is without visible means of subsistence, and who in any of the above cases, is physically capable of work, shall be deemed a vagrant.”<sup>78</sup>

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<sup>76</sup> KNA/CA/1/13, correspondence Respecting the Abolition of the Legal Status of Slavery on Zanzibar and Pemba, Report by Commissioner Farler (His Highness Slavery Commissioner in Pemba) on the Working of the Decree for the Abolition of the Status of Slavery in Pemba, dated 31<sup>st</sup> January 1898, 59.

<sup>77</sup> The Gazette for Zanzibar and East Africa, Vol. IX No.458, 7 November 1900, 3.

<sup>78</sup> Vagrancy Decree of 1905, Revised Edition of Zanzibar Laws, 1922 volume I, chapter 4

The Decree empowered police officers to arrest vagrants without warrant and put them into custody for a period not exceeding three months.<sup>79</sup>

British colonial policy on the immediate emancipation of slaves in the Busa‘idi Sultanate was mainly informed by the need to protect British interests in the region. The main concern of the British authorities was that compulsory emancipation of slaves would result in social chaos that in turn would affect economy of the Busa‘idi Sultanate.<sup>80</sup> British colonial officials anticipated that immediate abolition of slavery could lead slaves to abandon agricultural plantations which could in turn entail an economic disaster in the Sultanate. Consequences of such a disaster would have converted the slave owners into a discontented community and all local industries would have been brought to a standstill.<sup>81</sup>

British colonial authorities had experiences in dealing with slavery in various colonized Muslim regions. Lord Lugard was among the pioneer architects of gradual abolition of

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<sup>79</sup> In Sudan, the British colonial administration enacted the Vagabonds Ordinance in 1905 which prosecuted any person found without any honest means of livelihood. Vezzadini, “Abolitionist policies in the Sudan” 13.

<sup>80</sup> The same argument was pursued by British colonial officials in Sudan. Rudolf Slatin (Inspector-General of the Sudan 1900-1914) discouraged the emancipation of slaves in Sudan and argued that “Liberation [of slaves] would have resulted in the abandonment of most of the cultivation along the river-banks, the loss of many of the flocks and herds of the nomad Arabs and consequent deaths of thousands of innocent individuals who, through no fault of their own, had been brought up under a social system that was repugnant to Western ideas”. Sikainga, 1995, 9.

<sup>81</sup> Cave, B.S. “The End of Slavery in Zanzibar and British Africa” (1909) 9 (33) *Journal of the Royal African Society* 32.

slavery in Northern Nigeria. Lugard advocated for the gradual emancipation of slaves by stating:

“ it was necessary to lay down careful instructions, with the object on the one hand of gradually eradicating slavery, and on the other hand of avoiding such hasty and ill-considered action as would dislocate the whole social framework in Moslem States, and result in pauperising and destroying the ruling classes, which it was the object of government to preserve and strengthen.”<sup>82</sup>

Lugard anticipated that abrupt abolition of slavery in Northern Nigeria could have resulted into a state of anarchy which in turn would have resulted in the dislocation of the Muslim states. He noted:

“ the great cities would have been filled with vagrants, criminals, and prostitutes; indeed the large majority of the criminal class consisted of runaway slaves. To abolish prematurely the almost universal form of labour contract before a better system had been developed to take its place, would not only have been an act of administrative folly, but would have been an injustice to the masters.”<sup>83</sup>

In the Busa‘idi Sultanate, Euan-Smith (British Consul in Zanzibar 1889-91) proposed for the adoption of a gradual policy of abolition of the legal status of slavery and compensation be given to slave owners. Euan-Smith argued:

“it becomes our duty to ensure that the inevitable social change, the disappearance of the status of slavery, should be carried through with as little as possible in the existing relations between master

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<sup>82</sup> Lugard, 1913-14, 221.

<sup>83</sup> British policy to abolish slavery in Nigeria drew a distinction between the Northern Muslim Provinces which recognised slavery and the Southern Christian Provinces in which slavery was abolished since 1874. Laws against slavery in Northern Nigeria were first lenient and were progressively stringent until they culminated in the Ordinance of 1916 that abolished slavery. Lugard, 1913-14, 217.

and slave. The measures likely to have the best effect would I think be the immediate abolition of the status of slavery and the distribution amongst the slave owners of a sum of money by way of compensation for the loss of the capital which they have invested in slaves.”<sup>84</sup>

British colonial officials in Zanzibar feared that immediate abolition of slavery would send planters into debt and eventually bankrupt the government. Commissioner Last noted that the slave owners were brought to a state of bankruptcy and were deeply indebted to the Indian mortgagors. Last’s proposal for gradual emancipation of slaves in Zanzibar was to give slave owners an opportunity to re-establish themselves on a basis of co-operation with their slave workers on a just and equitable manner and to give to the slaves an opportunity to learn the value of their own labour and get trained in self-respect and independence.<sup>85</sup> Mr. O’Sullivan, (Vice British Consul in Pemba) suggested measures had to be put in place to control liberated slaves. He proposed that freed slaves should be prohibited for five years from quitting the island and be confined by law to the plantations and compelled to pay a hut-tax to their late owners which could serve as a sort of compensation.<sup>86</sup>

Rennel Rodd (British Consul in Zanzibar 1892-1894) argued that emancipating slaves by force could break the master-slave relationship that was bounded by strong ties. He argued that when slaves were liberated by their master’s free will, the strong tie that existed between them did not break and that the slaves almost invariably remained members of

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<sup>84</sup> ZNA/AC1/1, letter from Euan-Smith, Zanzibar 2 April 1891.

<sup>85</sup> Lugard, 1913-14, 54.

<sup>86</sup> “The Present Position of the Zanzibar Slave Question”, *The Gazette for Zanzibar and East Africa*, vol. 5 No.248 dated 28<sup>th</sup> October 1896.

their masters' household. On the contrary, where slave were liberated by force, the tie was absolutely broken and the slaves had no relationship with their former master.<sup>87</sup>

British colonial officials on the ground were careful to impose drastic anti-slavery measures so as to avoid provoking an armed uprising. The reluctance of the British colonial administration to implement stringent measures against abolition of slavery in the Busa'idi Sultanate was to avoid any anticipated revolutionary reaction from slaves that could result into serious political and economic turmoil. Edward Clarke (British Consul in Zanzibar 1908-1913) experienced an incident where slaves wanted to revolt against their masters. Clarke noted:

“it is possible that if slaves were emancipated without first taking strong measures for the protection of life, that in Pemba many of them would rise against their former masters, and also murders would take place in isolated parts of Zanzibar. In the reign of Seyyid Ali, the Hamali porters came to me and asked for guns and powder, stating that if I would give them arms that they would murder every Arab in Zanzibar. When Johanna (Comoro) slaves were emancipated they arose against their masters.”<sup>88</sup>

The other concern of British colonial authorities on the immediate abolition of slavery was that slave owners would take their slaves into the German territory in Tanganyika that would empower the Germans.<sup>89</sup> British gradual policy on abolition of slavery can be compared with German's approach towards elimination of slavery in German East African

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<sup>87</sup> “Correspondence Relating to Slavery in Zanzibar”, (1895) 6 *Africa* 17

<sup>88</sup> ZA/AC2/1, letter from the British Consul, Zanzibar, Edward Clarke, to the Secretary of State, Edward Grey, dated 8 May 1912.

<sup>89</sup> Green, 1985, 253.

territories. Germans argued that immediate emancipation of slaves would have caused disastrous effect on political and economic conditions and therefore introduced gradual legislation which facilitated for the slaves to purchase their freedom. German colonial authorities issued a proclamation that all children born after 3<sup>rd</sup> December 1905 to be free. According to German officials, declaring free all persons born after the specified date gave the opportunity for masters and their slaves to be accustomed to the new order of things without any economic upheaval.<sup>90</sup>

As a result of pressures from British philanthropists, the British government signed the General Act of the Anti-Slavery Conference of Brussels of 1890 on the African slave trade. The intention was to end slave trade in Zanzibar but due to political considerations, British colonial government had to retreat from imposing stringent measures against slavery in the Sultanate.<sup>91</sup> Mamdani noted that “the Victorian notions of right and wrong played a role in matters such as slavery, polygamy and bride price; but they were subordinate to political

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<sup>90</sup> KNA/PC/Coast/1/1/193, German book, Memorandum Respecting Domestic Slavery in German East Africa with some special reference to Mafia, by Norman King, African Native Commissioner for German East Africa, dated 7 April 1915.

<sup>91</sup> The General Act of the Anti-Slavery Conference of Brussels of 1890 did not attempt to abolish domestic slavery but its provisions were directed towards the suppression of slave raiding and slave trading. The General Act of Brussels contains a special chapter (IV) dealing with Signatory powers whose institutions permit the existence of domestic slavery. Great Britain, Germany, Persia, Turkey and Zanzibar were all signatory powers and all of them ruled at the time over lands where domestic slavery existed. KNA/PC/Coast/1/1/193, German book, Memorandum respecting domestic slavery in German East Africa with special reference to Mafia.

considerations and they were always negotiable”.<sup>92</sup> The Brussels Act provided freedom to slaves who ran away from their masters. Article 28 of the Brussels Act stated that “every fugitive slave arriving on board of a vessel of war belonging to a power signatory to the Act was entitled to freedom”. Euan-Smith (British Consul in Zanzibar 1890-91) objected to this Article on the ground that it provided a loophole for slaves to escape their masters by taking refuge on board a ship of war. Euan-Smith noted that slave owners suffered large losses from the desertion of their slaves.

Euan-Smith influenced Sultan Ali b. Sa‘id (r. 1890-1893) to issue an anti-slavery decree. On 1<sup>st</sup> August 1890 Sultan Ali enacted a decree which provided that all children born after 1890 to be free. The decree stated:

“ whereas His late Highness Sayyid Khalifa b. Sa‘id agreed on 13<sup>th</sup> September 1889 with Her Majesty’s Agent and Consul General at Zanzibar that all persons born in his dominions after 1<sup>st</sup> January 1890 should be free. It is hereby declared by Her Majesty’s Commissioner and Consul General for the East Africa Protectorate, under authority from her Majesty’s Government, that the Sa‘id agreement is valid and operative in the aforementioned mainland dominions of His Highness the Sultan of Zanzibar, and that no person born subsequent to 1<sup>st</sup> January 1890 can be legally claimed as a slave within them.”<sup>93</sup>

The Decree further declared that slaves of masters who died without legal heirs were to be free and gave right to slaves to purchase their freedom. Slave owners raised a strong protest against the right given to slaves to purchase their freedom. In order to calm the

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<sup>92</sup> Mamdani, 1996, 117.

<sup>93</sup> ZA/AC2/1, Notification of the Anti-Slavery Decree issued on 1 August 1890.

protest, the British enacted a provision to the effect that slave owners were not obliged to accept money from slaves willing to buy their freedom.

### **6.7 British approach towards total abolition of slavery and the abolition of the legal status of slavery 1897-1907**

Based on the success of Euan-Smith anti-slavery policies in Zanzibar on influencing Sultan Ali b. Sa'id (r. 1890-1893) to issue an the Anti-Slavery Decree of 1890, Euan-Smith proposed to Colonel E.C. Ross (British Political Resident in the Persian Gulf) to persuade the Sultan of Muscat to issue proclamations against slave trade similar to those enacted in Zanzibar. However, due to difference of political conditions between Zanzibar and Muscat, Ross declined to adopt Zanzibar's anti-slavery policies. Ross reported:

“ the political situation in Oman and Zanzibar are widely different. The Zanzibar Sultan had always a control over his subjects, and they now from a ‘Protected State’; whereas the authority of the Sultan of Muscat beyond his capital and sea-coast depends on the good-will of the tribes and exists on sufferance. It is a delicate matter to propose to an independent sovereign in this situation to issue a decree which his subjects will generally condemn, and which in the existing circumstances he would be unable to enforce beyond Muscat and Mutrah.”<sup>94</sup>

Despite Ross's warning not to force the Sultan of Muscat to enact anti-slavery decrees, the Consul General in Muscat, Colonel Mockler approached the Sultan and proposed to issue a decree against slavery. The Sultan appealed to the British government to be exempted from issuing anti-slavery proclamations and noted:

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<sup>94</sup> ZNA/AC1/2, letter from Colonel E.C. Ross, the Political Resident in the Persian Gulf, to the Secretary to the Government of India, dated 1 December 1890.

“after compliments, We have considered the proclamation (dated Zanzibar, 1<sup>st</sup> August 1890), and find the conditions laid down therein are fitting for the country in which the proclamation was issued. The issue of this proclamation in the territories of Oman would be to stir up and excite the people to violence and resistance everywhere, and certainly harm would result from it, which is not what the great Government would wish.”<sup>95</sup>

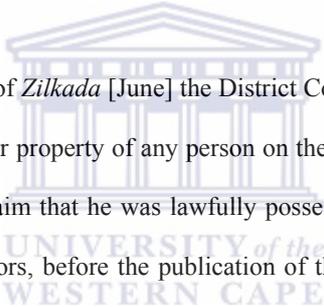
British colonial officials in Zanzibar pressurised Sultan Hemed b. Thuwayn (r.1893-1896) to abolish the legal status of slavery. Despite the willingness of the Sultan to comply with British pressures, his main concern was the interests of slave owners. The Sultan suggested that if the British government was keen on freeing slaves in the Sultanate then definite proposals ought to be made in order to allow compensation to slave owners. Based on Sultan’s proposal, the British colonial administration embarked on a project of maintaining a record of slaves before emancipating them. R.W. Hamilton suggested that the registration of slaves should be done gradually and argued that: “the abolition of slavery can only be effective with fairness to both the master and to the government by an accurate register of existing slaves being first carefully, quietly and slowly prepared. When this is done, an abolition ordinance providing for compensation could be put in force with minimum of trouble and friction to either side.”<sup>96</sup>

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<sup>95</sup> ZNA/AC1/2, translation of the letter from His Highness Seyyid Feysal b. Turki, Sultan of Muscat, to Colonel E. Mockler, Her Britannic Majesty’s Political Agent and Consul General at Muscat, dated 12 December 1890 /27<sup>th</sup> *Rabi al-Thani* 1308.

<sup>96</sup> ZA/AC/AC2/1, letter from the British Consul, Zanzibar, Edward Clarke to the Secretary of State, Edward Grey, dated 8 May 1912.

British colonial policy on the abolition of slavery was caught in a conflict between two oppressing factors: on the one hand, British philanthropists and politicians in England strongly criticized the government for her reluctance to abolish slavery. On the other hand, British colonial authorities on the ground felt that the difficulty of immediate abolition of slavery would cause suffering to the slaves and their masters. In order to reconcile between the two conflicting factors, the British government advised Sultan Hamud b. Muhammad (r.1896-1902) to issue a decree to abolish the legal status of slavery and let the freeing of slaves work out gradually as it did in India without causing great economic changes. In 1897, Sultan Hamud enacted a decree to abolish the legal status of slavery. Article 3 of the Decree stated:



“ from and after this first day of *Zilkada* [June] the District Court shall decline to enforce any alleged rights over the body, service or property of any person on the ground that such person is a slave, but whenever any person shall claim that he was lawfully possessed of such rights, in accordance with the Decrees of Our predecessors, before the publication of the present Decree, and has now by the application of the said Decree been deprived them, and suffered loss by such deviation, then the Court shall report to our First Minister that it deems the claim entitled, in consideration of the loss of such rights and damage resulting therefrom, to such pecuniary compensation as may be a just and reasonable equivalent for their award to him such sum.”<sup>97</sup>

The purpose of abolition of the legal status of slavery was mainly intended to pave way for the voluntary freeing of slaves. Slaves were given the opportunity to claim freedom. The Decree did not end the institution of slavery but instead abolished legal enforcement of rights based on slavery. Although the Decree abolished the legal status of slavery, it

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<sup>97</sup> Decree dated 1<sup>st</sup> *Dhul Qa'ada* 1314 [3<sup>rd</sup> April 1897]. The Gazette for Zanzibar and East Africa, Vol.6 No.271, 5.

secured the rights of slave owners who possessed slaves. The Decree provided that if an owner proved before a Court of Law that he had lawfully possessed of any rights over a slave and had suffered loss due to the Decree, then the Court could decide on reasonable amount of compensation.

Application of the Decree was restricted to the Islands of Zanzibar and Pemba. By the enactment of the Decree, the position of slaves in Zanzibar and Pemba was no longer recognized as legal and slaves were given the option to claim for their freedom. However, although slaves were entitled to claim for their freedom, the Decree stipulated that the slaves were not *ipso facto* free until an application was made in a Court of Law. Status slavery was based on voluntary agreement between slaves and their masters notwithstanding the fact that the law refused to take cognisance of the status of slavery. Provisions of the Decree provided for 'permissive' as opposed to 'compulsory' freeing of slaves.<sup>98</sup>

British policy on compensating slave owners was based on the fact that slaves were acquired under religious sanction and therefore slave owners could not be deprived of their property without compensation.<sup>99</sup> In compensating slave owners, the British administration aimed at gaining the confidence of the Arab slave owners. Hardinge noted that:

“by providing compensation for the vested rights, it has proved to the Arabs that the Government, while strong enough to trample on those rights, was desirous of dealing with them in a spirit of

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<sup>98</sup> Nwulia, 1975, 283.

<sup>99</sup> Lugard, F.D “Slavery in All Its forms” (1933) 6 (1) *Africa: Journal of the International African Institute* 11.

equity, and thus inspired them with a sense of confidence in our justice, and removed, at least mitigated, feelings of bitterness or resentment on the part of the subject race.”<sup>100</sup>

In order to ensure a progressive mode of emancipating slaves in the Busa‘idi Sultanate, the British colonial administration embarked on a process of registering all slaves in the Protectorate.<sup>101</sup> After the creation of a Register of slaves, an Ordinance was enacted on the abolition of the legal status of slavery in 1897.<sup>102</sup> Compensation to slave owners was based on the Register which contained all claims for compensation of slaves who claimed freedom. Slavery compensation courts were established for freeing slaves. The Register was compiled with great care and contained full particulars of the slave such as how the slave was acquired and other personal details such as sex, age, and tribe. Masters were required to submit to the Slavery Compensation Courts a list of their slaves bearing a certain date and no name was allowed to be added after the expiry of that date. The procedure was intended to check on masters who intentionally gave a false list of names or included in the list a slave who they knew had no claim. Such slave masters were deprived by the Ordinance from receiving any compensation from the government in respect of any of their claims. The 1897 Decree provided that any master who could prove that he had suffered loss in the service of his slave or otherwise in consequence of the abolition of legal status of slavery should apply to the District officer for compensation. Claims for

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<sup>100</sup> KNA/CA/1/13, letter from Sir Arthur Hardinge, Zanzibar, to Marquesss of Salisbury, dated 18 April 1898.

<sup>101</sup> British anti-slavery policies were unified all over her colonial territories. For instance in Sudan the British issued a circular in 1907 that provided for the compulsory registration of slaves and declared that all slaves born after the coming of the Condominium to be free. Vezzadini, “Abolitionist”, 13.

<sup>102</sup> KNA/AP/1/29, memorandum on measures suggested to give effect to the abolition of the legal status of slavery by R.W. Hamilton, dated 22 February 1907.

compensation were restricted within the Sultan's dominions and no claims were allowed in respect of slaves living outside the Busa'idi Sultanate.<sup>103</sup>

Slaves in Zanzibar took the advantage of applying for their freedom from offices that were specifically established to cater for freeing slaves. In the case of *Tuffa and Rehema v. Rashid b. Salim*<sup>104</sup> two girls (appellants) had been for several years in the household of the respondent who had cohabited with them. After some time the appellants ran away and applied for their freedom from the Slave Commissioner on the ground of cruelty. The Commissioner offered the appellants badges of freedom on 23<sup>rd</sup> July 1907. The respondent complained that the appellants were his *surias*. The Court considered whether a master in making a girl a *suria* was bound to go through certain formalities as required by Islamic law. The Court established that rules of Islamic law provided that before taking a girl as a *suria*, the master must put her in *khalwa* for a period of one month.<sup>105</sup> Two Kadhis gave expert evidence in the case by stating that the other way of proving that a slave girl was a *suria* was for her master to formally declare before two witnesses that he had made her a *suria*. Judges Lindsey Smith and T.S. Tomlinson ruled in favour of the appellants and held that there was no evidence that the slave girls were secluded or that their master declared before two witnesses that he had made them *surias*.

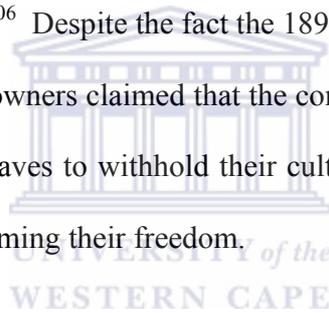
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<sup>103</sup> KNA/AP/1/29, instructions for the guidance of slavery compensation courts.

<sup>104</sup> In the Court by Special Delegation of H.H. the Sultan under the Slave Decree of 1 *Dhul Qa'ada* 1314 [3<sup>rd</sup> April 1897] The Official Gazette of Zanzibar Government, Vol. 17 No.887, 27<sup>th</sup> January 1909, 3 (unreported).

<sup>105</sup> According to rules of Islamic jurisprudence, the master can not lawfully cohabit with his *suria* until she completes her *'idda* period of a single regular menstruation period or a single month. Howard, 1914, 375.

Proper procedures were laid for carrying out the provisions of the Decree for the Abolition of the Status of Slavery Decree of 1897. Slaves who claimed freedom appeared at the Compensation Court. If the owner lived in the neighbourhood he was sent for at once and the case is settled. Otherwise, if the owner was further away, a date was fixed to hear the claim and both claimant and owner were ordered to appear on that date. On the appearance date, the owner had to prove his rights over the claimant by two responsible witnesses after which compensation was given to the owner. The claimant was then given a token of freedom in a form of a brass badge bearing a number corresponding with the number of the case as recorded in the Register. Establishment of the Compensation courts gave slaves the option to ask for their freedom.<sup>106</sup> Despite the fact the 1897 Decree provided for reasonable pecuniary compensation, slave owners claimed that the compensation was too small. Other slave owners threatened their slaves with withhold their cultivation rights and not to employ them for waged labour after claiming their freedom.



The British colonial administration further pressurised Sultan Ali b. Hamud (r.1902-1911) to enact the Abolition of Slavery Ordinance 1907. The Ordinance paved way for the emancipation of many slaves which in turn led to the decrease of labour in the plantations. Before the enactment of the Abolition of Slavery Ordinance 1907, slaves depended on their masters who provided land for cultivation and settlement. However, after the abolition of

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<sup>106</sup> KNA/AG/437, letter from J.T. Last, Collector of Zanzibar, to Peter Grain, the Acting First Minister, Zanzibar, dated 5 March 1908.

slavery, many slaves were forced out of their master's land while others preferred to stay on their ex-owner's land as squatters.<sup>107</sup>

Effects of abolition of slavery were felt in the 1940s when plantations of slave owners were destroyed rendering the owners getting poorer and losing their agricultural lands as a result of foreclosures of mortgages.<sup>108</sup> The destruction of the economic foundations of Arab land owners due to the abolition of slavery in the Kenya coastal strip led British colonial officials to sympathize with the Arab slave owners. A memorandum written by the Secretariat of the Coast Administration noted:

“ the Arab population in the coast has never been able to recover from the economic shock of the abolition of slavery and its condition at present is causing anxiety not only to leading Arabs but to the Government. It is indeed necessary that an effort should be made now to give them help without which it is unlikely to be possible to extricate them from their present depressed condition; this is more important in that there is a real danger that they may develop into a hostile and irresponsible proletariat of which mischievous agitators may make unfortunate use. In any case the Arabs come from the same stock as ourselves and there is a traditional and long established friendship between them and us in the whole of the Indian Ocean area. And it is right and proper that we should help our friends.”<sup>109</sup>

Based on the mutual friendship between the two ruling races, British and Arabs, the British colonial administration laid measures to control mortgage and foreclosure on plantations in

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<sup>107</sup> Hamidin, 2000, 159.

<sup>108</sup> KNA/MAA/7/256, Coast Province, notes for the Under Secretary of State, prepared by Governor of Kenya, dated 5 September 1946.

<sup>109</sup> KNA/MAA/7/256, Memorandum-Coast Administration by The Secretariat, Colony and Protectorate of Kenya, dated 26 March 1947.

order to save bankrupt Arabs from being dragged into further indebtedness by Indian creditors.<sup>110</sup>

Before embarking on emancipation of slaves in the plantations, British colonial authorities adopted a policy of transforming the institution of slavery from forced labour to paid labour. The policy was tailored in order to establish a smooth transition from servitude status to complete freedom in a gradual manner without any serious economic disturbance or injury to existing vested interests.<sup>111</sup> The 'paid labour' policy was implemented in order to give an opportunity to the slave owners to replace 'forced labour' offered by their slaves and give the slaves a chance to value their labour. The policy also gave the British colonial administration an opportunity to plan and organize labour supply in order to assist plantations.<sup>112</sup> British administrators advocated for change of attitude of the slave owners to appreciate the advantages of paid labour and the slaves to understand the value of their labour.

British efforts towards the abolition of slavery were directed towards inculcating the notion of paid labour in the minds of the slave owners as well the slaves. As the British colonial officials contemplated the abolition of slavery in Zanzibar, they also wished to bind slaves to the plantations owned by their former masters.

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<sup>110</sup> Stockreiter, 2007, 278.

<sup>111</sup> ZA/AC2/1, letter from A. Hardinge to the Vice Consul, Chaki Chaki, dated 31 March 1897.

<sup>112</sup> Cave, 1909, 32.

The 'paid labour' policy bureaucratized the master-slave relationship in that it created new working arrangement which determined hours and amount of work to be done by the slaves on the plantations. The British colonial administration adopted a policy of transforming slaves into squatters so as to ensure continuity of labour supply to plantations and avoid the collapse of the plantations. A number of slaves in the Kenya coastal strip petitioned the British government to provide land for settlement and cultivation. The following is an example of a petition made by freed slaves along the Kenya coastal strip:

“ since the government have given us our freedom, we ceased to do any more work for our owners and our masters have expelled us from their shambas [farms], and in most cases sold our dwellings and dispossessed us of any property which we had owned, so we have to come to you [the government] to explain our pitiful condition, and at the same time crave for land to settle upon and cultivate the same for our own and our children's support.”<sup>113</sup>

The British government responded by creating a native reserve of around two thousand acres for the ex-slaves in Tezo at the Kenya coast.<sup>114</sup> Creation of the native reserve meant to cater for slave population who were turned to squatters.

## 6.8 The British policy on the emancipation of surias

British colonial administration in Zanzibar was caught between the sentiments of the Sultans to maintain the institution of concubinage on one the hand and on the other hand pressures from missionaries to end enslavement of concubines. British administrators

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<sup>113</sup> KNA (Mombasa ) CY/3/20, letter from the Chairman of the Arbitration Board to the Secretary of Administration, dated 13<sup>th</sup> February 1911. Quoted in Hamidin, 2000, 159.

<sup>114</sup> Hamidin, 2000, 159.

anticipated that abolition of concubinage would break up families and disrupt the social organization of the Sultanate and therefore leaned towards maintaining the institution.

Although the British colonial officials managed to persuade Sultan Hamud b. Muhammad (r.1896-1902) to abolish the legal status of slavery, their efforts to abolish enslavement of concubines did not succeed. Concubinage was perceived to be a privilege of the ruling elite and the nobility. Due to the entrenchment of concubinage in the social structure of the Sultanate, slave owners with concubines resisted any interference with the status of concubines. The only ground that was allowed to end concubine relationship was cruelty.

Article 5 of the Slavery Decree of 1897 provided:

“concubines shall be regarded as inmates of the Harem in the same sense as wives and shall remain in their present relations unless they should demand their dissolution on the ground of cruelty, in which case the District Court shall grant it if the alleged cruelty has been proved to its satisfaction. A concubine not having borne children may be redeemed with the sanction of Court.”<sup>115</sup>

Despite the fact that Sultan Hamud heeded to the British advise to enact the Slavery Decree of 1897, he urged the British colonial administration to exempt concubines from the application of the Decree. Sultan Hamud pleaded to Lloyd Mathews (First Minister of Zanzibar 1891-1901) by stating:

“ tell Hardinge I feel deeply for my subjects as regards the status of their concubines, and after freedom being forced to allow to quit their homes and become prostitutes, that concubines are practically wives,

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<sup>115</sup> Slave Decree of 1<sup>st</sup> *Dhul Qa‘ida* 1314 [3<sup>rd</sup> April 1897] , The Official Gazette of Zanzibar Government, Vol. 17 No.887, 27 January 1909, 3.

and mothers of their master's children, sharing equal rights with children of Arab mothers; that in allowing concubines to leave their masters Arab homes will be broken up.”<sup>116</sup>

The British colonial administration faced difficulties in dealing with the institution of concubinage in the Busa'idi Sultanate. This was partly due to the misconception of British abolitionists and missionaries by perceiving concubinage in Islam similar to the Western context. Difference in the connotation and meaning of the institution of concubinage between English and Islamic law was manifested in the misconception of proper understanding of concubinage in Islam. The *Concise Oxford Dictionary* defines a concubine as a 'woman cohabiting with a man not legally married'.<sup>117</sup> The definition excludes the concubine and her children from any legal relationship with the master. Contrary to this definition, a *suria* enjoys legal recognition in Islam. The legal recognition is strengthened when the *suria* bears a child from the cohabitation with her master. Arthur Hardinge (British Consul in Zanzibar 1894-1896), who had been exposed to Muslim societies even before coming to Zanzibar, understood the significance of concubinage in Islam. Hardinge noted:

“it is only fair to point out that analogies drawn from entirely different social system of Christendom or phrases about "womanly sanctity and chastity" are here entirely misleading and out of place. It ought, however, I think, to be made clear to those who criticize the law of Islam on this subject

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<sup>116</sup> KNA/CA/1/13, Correspondence Respecting the Abolition of the Legal Status of Slavery on Zanzibar and Pemba, letter from LLlyod Mathews, Zanzibar, to A. Hardinge dated 14 November 1896.

<sup>117</sup> *Concise Oxford Dictionary*, Oxford: Clarendon Press 7<sup>th</sup> ed. 1982, p.195. A more liberal definition is given to the institution of concubinage as 'the state of a woman in an ongoing, usually matrimonially-oriented relationship with a man that cannot be married to her, often because of a difference in social status'.

<http://en.wikipedia.org/wiki/Concubinage>. Accessed on 26 July 2009

without personal experience of its working that a slave woman, in Zanzibar at least, can not be made a concubine against her will.”<sup>118</sup>

Concubines occupied a special status in the house of their masters and were treated like freeborn wives of the master. By having relationship with her master, the *suria* was removed from the category of slavery and achieved a higher status than her fellow female slaves. Farler, a British administrator in Zanzibar, described the significance of a concubine in the Sultanate by stating that:

“a concubine has a very important legal status, second only to that of a wife. She has a house and servants assigned to her, she is handsomely clothed and receives many presents of jewellery, and her children take rank immediately after the children of the legal wife. If the father dies intestate they take their share of the property with the other children.”<sup>119</sup>

Although a *suria* was not required to fulfil essentials of marriage similar to those of a freeborn female, the *suria* was still treated for all purposes as a wife. According to Islamic legal rules, when a master intended to take his slave girl as a *suria*, he was required to declare before two witnesses that he had made her a *suria* and he has to put her in *khalwa* for a period of one month for the purposes of determining on whether she was pregnant or not.<sup>120</sup> After having taken his slave girl as a *suria*, the master could not sell his *suria* but had the option to dissolve his relationship with the *suria* and let another person marry

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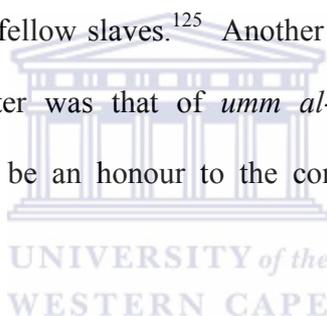
<sup>118</sup> <http://en.wikipedia.org/wiki/Concubinage>. Accessed on 26 July 2009

<sup>119</sup> KNA/CA/1/13, Correspondence Respecting the Abolition of the Legal Status of Slavery on Zanzibar and Pemba, Letter from Lloyd Mathews, Zanzibar, to A. Hardinge dated 14 November 1896.

<sup>120</sup> The Official Gazette of Zanzibar Government, Vol. 17 No.887, 27<sup>th</sup> January 1909, 3.

her.<sup>121</sup> In the event the *Suria* was married by another person, her master can not resume possession unless she was divorced by her husband.

When a *suria* bore a child to her master, she became free upon her master's death whether the child she gave birth to is living or dead.<sup>122</sup> The child conceived from her master is free the moment of its birth and inherits from the father.<sup>123</sup> Children of *suria* by their masters were legal equals of their half-brothers and sisters who were born by freeborn wives.<sup>124</sup> By virtue of having a child from her master, the *suria* is known as *Mamebwana* (mother of the master's son) or *Mamebibie* (mother of the master's daughter) and she achieves a higher social status in the eyes of her fellow slaves.<sup>125</sup> Another title that was given to the *Suria* after giving birth to her master was that of *umm al-walad*. The master-concubine relationship was considered to be an honour to the concubine and a step towards her freedom.



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<sup>121</sup> El-Zein, 1974, 31.

<sup>122</sup> Howard, 1914, 558.

<sup>123</sup> Under Islamic legal principles, child of a master born by a *suria* is affiliated to his/her father and enjoys all equal rights similar to the ones born by a free born wife. This is in contrast to legal systems such as the American system, in which white slave owners refused to acknowledge the paternity of their children who remained slaves like their mothers. Sheriff, A “*Suria*: Concubine or Secondary Slave Wife? The case of Zanzibar in the 19<sup>th</sup> Century.” (Unpublished paper) 1.

<sup>124</sup> Cooper, F. (1977) *Plantation Slavery on the East Coast of Africa* New Haven and London: Yale University Press 198. The Bible regards children of a concubine to be legal inferiors of those of a wife in that it provides “the son of the bond-woman shall not be heir with the son of the free-woman”. On the contrary, Islam puts children of the concubine on the same level as those of the wife.

<sup>125</sup> Stockreiter, 2007, 263.

The institution of concubinage was not only practiced by affluent slave owners but was entrenched in the social lives of the Sultans as well as their subjects.<sup>126</sup> Sultan Seyyid Sa'id left behind thirty six children on his death and almost all of them were born by his *surias*. Seyyid Sa'id was succeeded in the throne of Oman and Zanzibar by his sons through concubine mothers. Sultans of Ethiopian concubine mothers were Thuwayn b. Sa'id (ruled in Oman 1856-56), Turki b. Sa'id (ruled in Oman from 1870-88), Barghash b. Sa'id (ruled in Zanzibar 1870-88), Khalifa b. Sa'id (ruled in Zanzibar 1888-90), and Ali b. Sa'id (ruled in Zanzibar 1890-93). Sultan Majid b. Sa'id (ruled in Zanzibar 1856-70) was born to a Circassian concubine mother.<sup>127</sup> Other Sultans of Zanzibar who were born by concubine mothers were Hemed b. Thuwain (ruled in Zanzibar 1893-1896) who was a son of a Georgian mother and Khalid b. Barghash who tried to seize the throne in Zanzibar was born by a Circassian mother.<sup>128</sup> Kadhis also married concubines. For instance, *kadhi* Burhan b. Abd al-Aziz al-Amawi had a number of concubines and the wife of *kadhi* Tahir b. Abubakr al-Amawi was the child of a concubine.<sup>129</sup>

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<sup>126</sup> Purchase of female slaves was also practiced in Zanzibar by some Western residents. Rigby noted that in 1859 French residents openly purchased female slaves. For instance, the French Consul was charged for having purchased an Ethiopian slave girl for a considerable sum. Sheriff, A "A *Suria*: Concubine or Secondary Slave Wife? the case of Zanzibar in the 19<sup>th</sup> Century." (Unpublished paper) 2.

<sup>127</sup> Sheriff, *Suria*, 5.

<sup>128</sup> KNA/CA/1/13, Correspondence Respecting the Abolition of the Legal Status of Slavery on Zanzibar and Pemba, Letter from Sir Arthur Hardinge, Zanzibar, to Marquess of Salisbury, dated 23 April 1898. Among the daughters of Sultan Seyyid Sai'd was Sayyida Salme (Emily Ruete), (1844-1924) born by a Circassian concubine. When her father died in 1856 she inherited a plantation with a residence and 5,429 pounds.

<sup>129</sup> Stockreiter, 2007, 263.

### 6.9 Christian Missionaries and the abolition of slavery in the Busa‘idi Sultanate

British colonial administration resisted pressures from missionaries who advocated for the total abolition of slavery in the Busa‘idi Sultanate. Initial efforts of the missionaries were to spread the Christian faith along the East African coast. However, with the emergence of anti-slavery campaigns made by English philanthropist, mission centres realized that freeing of slaves owned by Muslim slave masters contributed much to the success of their evangelizing mission. Missionaries felt that the abolition of slavery was not enough and embarked on the spread of the Christian way of life. Hence a number of missionary societies were founded at the beginning of the nineteenth centuries which resulted to the conversion of many runaway slaves to Christianity.<sup>130</sup>

It is interesting to note that the end of slavery in the Busa‘idi Sultanate came together with the beginning of establishment missionary centres. The Frere Treaty signed between Sir Bartle Free and Sultan Barghash b. Sa‘id on 5 June 1873 that abolished the export of slaves from the Busa‘idi Sultanate also provided for the establishment of a cathedral church at exactly the same place of the last slave market in Zanzibar.<sup>131</sup>

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<sup>130</sup>Cohen noted that among the reasons for the British colonial administration to stay in Uganda was the determination of the missionaries to be able to continue their work of spreading Christianity and civilization, and the support which they were able to secure in Britain from very large numbers of ordinary religious people. Cohen, 1959, 12.

<sup>131</sup> Wilson, 1950, 520.

Missionaries assisted slaves who ran away from their masters by providing shelter in mission centres. Driven by ideals of Christianity, the missionaries felt that they were morally bound to accommodate fugitive slaves. Reverend Bins from Frere Mission station in Mombasa noted: “Our hands have been forced and our sympathies have always been with slaves. It is better that the slave should go to the missions than elsewhere; he is thereby helped to be a better man and a more useful member of society.”<sup>132</sup>

Missionary societies established slave centres in the Busa‘idi Sultanate with the assistance from the British navy who delivered captured slaves to the mission centres.<sup>133</sup> A mission centre was established at Bagamoyo in Tanganyika by French missionaries to cater for slaves who were freed by British naval troops. The centre was established with the support of the British government and provided vocational training to the freed slaves who were then sent to the interior of Tanganyika to establish “villages and from small nucleus of Christianity and civilization”.<sup>134</sup> The Christian Missionary Society (C.M.S) was among the active missionary societies that provided a hiding place for runaway slaves along the Kenya coastal strip.<sup>135</sup> In 1840s John Ludwig Krapf (1810-1881) and Johannes Rebmann (1820-1876) were sent by the C.M.S to Kenya. Krapf moved to Rabai on the coastal hills of

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<sup>132</sup> Letter from the Reverend H.B. to Arthur Hardinge, Frere town, Mombasa, 7 December 1898, quoted in “Correspondence Relating to Slavery in Zanzibar” *Africa* 6, 1895, 18.

<sup>133</sup> Githige, R.M. “The issue of Slavery: Relations between the C.M.S and the State on the East African Coast Prior to 1895” (1986) 16 (3) *Journal of Religion in Africa* 209.

<sup>134</sup> ZA/AC1/2, letter from C. Euan-Smith, Zanzibar to Marquis of Salisbury dated 5 March 1891.

<sup>135</sup> For details on history and activities of C.M.S see Holway, J.D “C.M.S. Contact with Islam in East Africa before 1914”, (1971) 4 (3) *Journal of Religion in Africa* 200.

Kenya and established a mission centre.<sup>136</sup> In 1864, the first so called 'Bombay Africans' returned and settled at Rebmann's station in Ribe near Rabai.<sup>137</sup> In 1875 another mission centre was established by the C.M.S across Mombasa Island to accommodate freed slaves. The centre was named Frere Town after Sir Bartle Frere.<sup>138</sup>

Liberated slaves from Ribe were transferred to the mainland opposite Mombasa.<sup>139</sup> With the establishment of the Frere Town just across Mombasa Island, slaves were persuaded to run away from their masters. In 1880, the C.M.S supported a slave rising against their

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<sup>136</sup> [http://en.wikipedia.org/wiki/Johann\\_Ludwig\\_Krapf](http://en.wikipedia.org/wiki/Johann_Ludwig_Krapf). Accessed on 23 July 2009.

<sup>137</sup> Arab dhows carrying slaves from East Africa were intercepted by British naval ships in the Persian Gulf and the liberated slaves were delivered to the C.M.S stations in Bombay. In 1855, the C.M.S established a mission centre at Nasik in India for slaves who were landed at Bombay; and in 1864 the first of several Indian-trained Africans were sent to Rebmann's mission centre in Ribe. Oliver, R (1969) *The Missionary Factor in East Africa*, London: Longmans 16.

<sup>138</sup> There were three kinds of freed slaves at Frere Town and Rabai. The first group was the East Africans "Bombay Africans" who had spent much of their preceding lives as freed slaves in and around Bombay, which had been brought by the British naval patrol after their liberation aboard dhows in the Indian Ocean. In 1873 the C.M.S Western India Mission, which cared for young freed slaves, sent many of them to Mombasa as adult volunteers to help in the establishment of Frere Town. The second group was those slaves captured after 1874 by British patrol in East African waters and liberated by the British Consul in Zanzibar who sent them to C.M.S for care and resettlement and it was for them that Frere Town had been founded in 1875. The third group was found only in Rabai, were slaves who had run away from *Miji Kenda* and coastal Muslim owners. Morton, 1976, 283.

<sup>139</sup> Sundkler, B. and Steed, C. (2000) *A History of the Church in Africa* Cambridge: Cambridge University Press 553.

masters in Mombasa and accommodated fugitive slaves in the Mission's centre.<sup>140</sup> The C.M.S also provided land to runaway slaves to cultivate free of charge with the only obligation imposed upon them being attendance at church. Missionaries' efforts to assist fugitive slaves angered slave owners who protested to the British colonial administration. Hardinge captured the anger of slave owners in his letter addressed to Marquess of Salisbury:

“your Lordship can easily imagine the bitterness aroused in the Arab and Swahili population by this combined attack on their religion and their material interests. I sent Mr. D. J. Wilson to Rabai to point out to the missionaries in a friendly way that this particular method of proselytism, besides being a violation of the local law, was unfair and injurious to the Province as a whole.”<sup>141</sup>

Cases of runaway slaves raised problems on the one hand between the missionaries and Muslim ex-slave owners and on the other hand between abolitionists and the British colonial administration in the Busa'idi Sultanate. According to the Order-in-Council of 1897, British administration in the British Protectorate in Kenya was bound to administer Islamic law and not interfere with the institution of slavery within the Sultan dominions. Muslims who owned slaves in the Busa'idi Sultanate expected the British colonial administration not to interfere with the institution of slavery. However, in 1897 the British colonial authorities enacted the Abolition of Slavery Decree that declared the abolition of legal status of slavery in the Sultan's dominions that included the British Protectorate in Kenya. British administrative officers were caught between the provisions of the two legislations when the case of ran away slaves arose. In 1898, Saleh b. Hussain, an Arab

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<sup>140</sup> Morton, 1976, 130.

<sup>141</sup> KNA/CA/1/13, Correspondence Respecting the Abolition of the Legal Status of Slavery on Zanzibar and Pemba Letter from A. Hardinge, Zanzibar, to the Marquess of Salisbury, dated 5 July 1897.

slave owner claimed that his three lawful slaves, Kazibeni, Komba, Mama Kombo, escaped from him and sought refuge at Ribe mission centre under the care of the United Free Methodists. Saleh appeared before Edward Lloyd the Acting Judge of the District Court of Mombasa and applied for his three slaves to be returned to him. Lloyd held: “ the slaves have no plea to claim their freedom, and as Ribe is within the Sultan’s dominions, I am of the opinion that they have always been in slavery, and as they all declare that they were the lawful property of the claimant, Court orders them to return to their master.”<sup>142</sup>

Missionaries and abolitionists were disturbed by Lloyd’s judgment and appealed to the British government for redress. As a result of pressures from abolitionists in England, the Foreign Office instructed Hardinge that British officers were barred from returning runaway slaves to their ex-owners. Although British judicial officers, such as Lloyd, were eager to abide with the law, they were however, “forced to keep to the spirit of the times rather than the strict letter of the law”.<sup>143</sup>

### **6.10 Conflicts between British judicial officers and *kadhis* on the emancipation of slaves**

Before anti-slavery movements came to the East African coast towards the end of the nineteenth century, the process of emancipating slaves by voluntary means was already in

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<sup>142</sup> Judgement of Edward Llyod, the Assistant District Officer and the Acting Judge of the District Court of Mombasa, dated 6 June 1898. Quoted in “Correspondence Relating to Slavery in Zanzibar” *Africa* 6, 1895, 13.

<sup>143</sup> Mungeam, 1966, 60.

place.<sup>144</sup> Islamic teachings considered emancipation of slaves to be a meritorious deed and urged slave owners to liberate slaves in return for rewards in the life hereafter. Most of the emancipated slaves were domestic slaves who were voluntarily freed by their owners. It is interesting to note that most of the emancipations were done through a Will after the death of slave owners and that there was no *en mass* emancipation of plantation slaves until measures were laid by British colonial administration in early twentieth century.

Among the challenges that faced British colonial authorities in emancipating slaves in the Busa'idi Sultanate was people's perception on the mode of liberating slaves. Slaves freed by British colonial government were referred to as "slaves of the government" or "slaves of the Consul" and distinguished from those freed by their masters.<sup>145</sup> Slaves freed by the British colonial administration did not consider themselves honoured but preferred instead to be freed by their masters. Under Islamic legal rules, the authority to free slaves lays only with their master. Imam Nawawi noted that "the manumission of a slave is legal only on the part of a master who has the free disposition of his property".<sup>146</sup>

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<sup>144</sup> Voluntary emancipation of slaves by their masters was widely practiced particularly before the death of slave owners. For instance, Emily Ruete (formerly known as Salma bt. Sultan Seyyid Sa'id) mentioned that her sister Shawana bt. Sultan Seyyid Sa'id set free her slaves and bequeathed to them all their jewels and dedicated one whole estate for their maintenance. Ruete, E. (1989) *Memoirs of an Arabian Princess from Zanzibar* New York: Markus Wiener, 251.

<sup>145</sup> Cooper, 1977, 242.

<sup>146</sup> Howard, 1914, 537.

Conflicts arose between British judges and *kadhīs* on matters related to slaves freed by the British government without consent of slave owners. In a case of *Ahmed b. Abdulla b. Hafidh v. The Administrator of Native*, Juma Kiroboto was a British government freed slave who died in 1922.<sup>147</sup> A dispute arose as to who was entitled to inherit the deceased estate. Two grandchildren of the deceased Juma Kiroboto claimed to be the heirs and Ahmed b. Abdulla b. Hafidh, the ex-owner of the deceased Juma Kiroboto, claimed the estate alleging that the grandchildren were not entitled to inherit from their deceased grandfather on the ground that according to Islamic law they still retained status of slavery. The *kadhi* decided that the grandchildren of the deceased were not entitled to inherit as they had not been freed by their masters and there being no other heir, the ex-owner was entitled to inherit the estate. Against this decision the Administrator appealed to the Supreme Court which made a declaration that the grandsons were the heirs of the deceased. The appellant being unsatisfied appealed to the Court of Appeal. The Court of Appeal upheld the decision of the Supreme Court and held that the grandchildren were entitled to inherit their deceased grandfather on the ground that the 1907 Decree abolished the legal status of slavery. The chief *kadhi* rejected Supreme Court's decision and regarded that it interfered with Islamic law. He argued that the 1907 Decree as an attempt to contravene the Sharia that constituted part of unalterable system of religious law.<sup>148</sup>

Another area that caused conflict between British colonial administration and Kadhis was in cases where slave girls freed by the British colonial government desired to get married.

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<sup>147</sup> KNA/AP/1/893, Civil Appeal No.8 of 1926, His majesty's Court of Appeal for Eastern Africa sitting at Zanzibar. (unreported).

<sup>148</sup> KNA/AG/1/9, inheritance of ex-slaves by the government instead of ex-master in default of natural heirs.

According to Islamic law, the consent of the master of the ex-slave was indispensable to the marriage of the ex-slave. According to Islamic rules related to manumission of slaves, a master of an ex-slave has a right of *wala* over his slave.<sup>149</sup> Under Islamic legal rules, the master-slave relationship was not severed by the emancipation of the slave but it extended even after the slave has been freed through the right of patronage. A number of ex-slaves retained close ties with their former masters. Based on the right of patronage, a master was responsible to arrange or approve a marriage for his ex-slave and be his or her heir in the absence of relatives of the slaves.<sup>150</sup> Kadhis supported the patron-client relationship by applying Islamic legal principles which gave former masters shares of inheritance from the estate of their ex-slaves.<sup>151</sup>

British administrative officers and Kadhis as well, were caught in a conflict between dictates of Islamic law and British regulations.<sup>152</sup> This conflict was stated by the Acting Provincial Commissioner of Mombasa who noted:

“if the consent of an owner of a girl is necessary before she can be married according to the sheria, we can not alter that law, but we are sufficiently powerful to enforce English law and ignore

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<sup>149</sup> Howard, 1914, 548.

<sup>150</sup> In Islamic law, the right of patronage conferred onto the ex-master over his ex-slave was a stronger relationship than clientage under common law in that in the former it could not be broken even if the ex-master so desired, whereas a patron could terminate a relationship with a client. Cooper, 1977, 248.

<sup>151</sup> Stockreiter, 2007, 281.

<sup>152</sup> Conflict between *kadhis* and British officials on emancipation of slaves was also prevalent in other British territories. For instance in Sudan, *kadhis* ruled in favour of slave owners. In cases where a female slave was liberated by a District official, the slave owner would take his case to a *kadhi* who often ruled in his favour. Sikainga, 1995, 16.

Mohamedan law. We can also by English law declare the issue of the marriage to be legitimate but that does not alter Mohammedans law. From an administrative point of view there is no way out of this tangle until we get a definite policy. We are under a treaty with the sultan to uphold Mohamdean law: are we to do it?"<sup>153</sup>

*Kadhis* were of the opinion that consent of a master to free his slave should be obtained before the slave could be legally married under Islamic law. Although the Abolition of Slavery Ordinance of 1907 abolished the status of slavery but it was necessary, under Islamic law, that the slave obtained consent of his former master.<sup>154</sup> The British colonial authorities noted that *Kadhis* did not abide by provisions of the Abolition of Slavery Decree of 1907 and instead considered consent of the ex-owner of a slave girl to be an essential requirement in marriage. The Registrar of slaves noted: "in the coastal strip there are thousands of ex-slaves who are craving for permission evenly from their late masters. These permissions can only be obtained at a price entirely beyond the slave's position. *Kadhis*, unfortunately support the masters in their present attitude."<sup>155</sup>

In the case of *Re: Hamisi b. Mohamed, kadhi* Sulayman b. 'Ali Mazru'i was instructed by a British judicial officer to marry an ex-slave without the consent of his ex-master. *kadhi* Suleyman declined to proceed with marrying Hamisi and noted:

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<sup>153</sup> KNA/PC/Coast/1/3/18, Marriage of the freed slaves, Letter signed by F.W. Isaac, the Acting Provincial Commissioner, Mombasa, 21 February 1912.

<sup>154</sup> KNA/AP/1/687, Sheria opinion on various points by *kadhis*, letter from R.W. Hamilton to the Town Magistrate, Mombasa, dated 18 January 1911.

<sup>155</sup> KNA/PC/Coast/1/3/80, letter from the Registrar of slaves to the Chief Secretary, Nairobi, dated 5 March 1912.

“ after compliments received your note Re: Hamisi b. Mohamed, you have informed me to marry [Hamisi b. Mohamed] because the Government has wiped away the name of the slave, certainly it is necessary to obey the Government orders, nevertheless the Government has only removed or wiped away the name of the slave, and according to Mohammedan law, the slave is never blotted out, except by freedom by the master’s wish. And when a slave wants to get married, the master must give consent, Otherwise there is no marriage. It is an adultery, and I can not marry them to the person to open the way for committing adultery, and If the Government has ordered this against the Mohammedan law I cannot obey it, because I am only kept to judge according to Mohamedan law, and I am very sorry that you should order a thing, and not be carried out, please excuse me.”<sup>156</sup>

The above decision reflects *kadhis*’ adherence to Islamic rules pertaining to manumission of slaves which extend master-slave relationship through patronage. Based on *kadhi* Suleyman’s refusal to implement provisions of the 1907 Decree, the British Acting Chief Secretary in Kenya issued a circular to direct *kadhis* in the British Protectorate in Kenya to marry ex-slave girls without the consent of the ex-owner. The circular provided:

“ any Government Kathi may assent to and give in marriage to an ex-slave (who has been freed under the Abolition of the Legal Status of Slavery Ordinance and for whom his master has been paid compensation) a woman desiring to get married at her own request as in such a case the kathi is in the position of her *wali* [guardian]. It is not incumbent on the Kathi prior to performing such a marriage to require the ex-slave to obtain consent from any one to such a marriage, as such ex-slave is under no disability and is competent to marry.”<sup>157</sup>

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<sup>156</sup> KNA/AP/1/687, Sheria opinion, Letter from *kadhi* of Mombasa, Seleman b. Ali al-Mazrui. (unreported)

<sup>157</sup> KNA/PC/Coast/1/1/223, Secretariat circular, Circular from the Acting Chief Secretary dated 29<sup>th</sup> August 1913.

Conflict between *kadhis* and British officers also occurred in cases of local customs such as the payment of lien by ex-slaves to their former masters. *Kadhis* in the British Protectorate in Kenya enforced payments in form of lien that was paid by ex-slaves, whether male or female, to their ex-owners before marriage. Failure to make such payment prevented the ex-slaves to marry. In the event that ex-owners died, right of payment was inherited by relatives of the ex-owners.<sup>158</sup> British administrative officers objected to the payment of lien by ex-slaves on the ground that it was contrary to the Abolition of Slavery Decree of 1907. The Provincial Commissioner of Mombasa instructed the *liwali* for the coast to invalidate all claims related to ex-slaves rights by stating:

“ I beg that you will issue instructions to all Arab Courts in an equivocal term, informing them that all rights over ex-slaves and their families have been extinguished by law, and that any Arab Magistrate enforcing a master’s claim to control in any way the property or actions of a former slave or his family will be liable to dismissal.”<sup>159</sup>

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### 6.11 Conclusion

In the process of transforming the institution of slavery in the Busa‘idi Sultanate, the British were caught between pressures of philanthropists and missionaries to completely abolish slavery on the one hand, and on the other hand, resistance from the Sultans and their subjects to end slavery. In striking a balance between the two extremes, the British colonial administration implemented a gradual policy of abolishing slavery in the Sultanate.

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<sup>158</sup> KNA/AP/1/893, Marriage of slaves freed under the Abolition of Legal Status of Slavery Ordinance, Letter from the District Commissioner, Lamu, to the Provincial Commissioner, Mombasa, dated 26 March 1928.

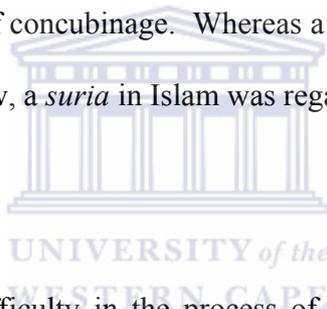
<sup>159</sup> KNA/AP/1/893, Marriage of slaves freed under the Abolition of Legal Status of Slavery Ordinance, letter from the Provincial Commissioner, Mombasa, to the *liwali* for the coast, dated 5 April 1928.

Among the architects of the gradual policy to abolish slavery in Zanzibar was Sir Arthur Hardinge based on his approach of “pressing gently but firmly” on the Sultans and slave owners to abolish slavery in the Busa‘idi Sultanate. In the process of implementing the gradual policy, British colonial officials in some cases retreated from enacting statutes which generated resistance from the slave owners. Slavery was widely practiced along the East African coast before the coming of the British. The institution of slavery was well entrenched in the social lives of the Sultans and their subjects. In addition, slaves served as the backbone of the Busa‘idi Sultanate which was based on plantation economy. Due to these factors, and in order to avert economic as well social disasters, the British abstained from abrupt abolition of slavery. Since early nineteenth century, the British government enacted anti-slavery statutes in order to confine slave trade within the Busa‘idi Sultanate. After the establishment of the British Protectorate in Zanzibar, the British pressurized the Sultans to abolish the legal status of slavery which paved way for freeing of slaves. In the process of emancipating slaves, the British laid mechanisms which encouraged slaves to seek their freedom and compensation was made to slave owners. In transforming the institution of slavery, the British introduced the notion of paid labour which served as a transition process in emancipating slaves from forced to waged labour.

Success of British gradual policy to abolish slavery in the Busa‘idi Sultanate was achieved in early twentieth century when slavery was completely abolished. Efforts of British colonial officials were complimented by support of missionaries who established centers in the Busa‘idi Sultanate to accommodate fugitive slaves. The British colonial administration was caught between missionaries’ efforts to assist fugitive slaves on the one hand, and on the other hand, protests of slave owners against missionaries’ role in encouraging slaves to

run away from their masters. Conflicts arose in courts due to cases of fugitive slaves. Such conflicts called for the intervention of the Foreign Office which ruled in favour of anti-slavery campaigners.

Among the areas which generated resistance from the slave owners was the institution of concubinage. The British colonial administration was caught between pressures of abolitionists and missionaries to abolish concubinage on the one hand, and on the other hand, by sentiments of the Sultans and slave owners to maintain the institution. The main contention was the misconception of the proper understanding of concubinage in Islam by abolitionists on the institution of concubinage. Whereas a concubine was not considered to be legally married in English law, a *suria* in Islam was regarded to be a secondary wife who enjoyed legal recognition.



Another area which caused difficulty in the process of abolition of slavery was *kadhis* perception of slaves freed by statutes enacted by the British colonial administration in the Busa'idi Sultanate. Based on Islamic rules of *wala*, *kadhis* regarded ex-slaves to be under the patronage of their ex-masters irrespective of the fact such slaves were deemed to be free persons according to the Abolition of Slavery Decree of 1907. The right of patronage continued to apply to the ex-slaves in cases of inheritance and marriage. Based on the right of patronage, *kadhis* insisted that before marriage of a freed slave girl, by virtue of the Decree of 1907, consent of her ex-master must be obtained in order to validate the marriage.

## **Chapter 7: Conclusion: Transforming from within: British policies of accommodation and gradual changes**

### **7.1 Introduction**

The process of transforming the administration of Islamic law and its institutions in the Busa'idi Sultanate was part of a larger colonial project of extending imperial dominance over the African continent in the late 19<sup>th</sup> century. The British believed their moral and material cultures to be part of their civilisation, which was good for the colonised peoples particularly on the African continent.<sup>1</sup> According to Mamdani, British perception of 'civilization' meant rule of law, and colonial legal officials were supposed to be the torch bearers of implementing colonial civilization in their conquered territories.<sup>2</sup> Britain's colonial enthusiasm to dominate cultures of the colonised peoples qualifies Antonio Gramsci's hegemonic theory in which the supremacy of a group manifests itself as a 'dominant' order and imposes sets of laws on the lives of 'subordinate' peoples.<sup>3</sup>

The British sought to establish their colonial empire in the Busa'idi Sultanate through the process of transforming the administration of Islamic law and its institutions. British colonial policies were formulated to avoid confrontation with the local religious leadership, particularly in areas which did not threaten colonial rule. As noted earlier, British colonial authorities intervened in areas such as Islamic criminal law, which were related to public

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<sup>1</sup> Mann, 1991, 11.

<sup>2</sup> Mamdani, 1996, 119.

<sup>3</sup> Carmichael, 1997, 298.

order. In matters which were beyond the purview of public law and order, British colonial administrators adopted a policy of non-interference which was apparent in accommodating religious institutions, such as, the *kadhis* courts and the *wakf* system.

British colonial authorities were careful not to implement policies which interfered with the religious rites of the colonised peoples. In the process of transforming Islamic law institutions, the British adopted gradual policies in order to avoid resistance from the colonised peoples. This concluding chapter will highlight how British colonial authorities adopted policies of accommodation and gradual change in transforming the administration of Islamic law and its institutions in the Busa'idi Sultanate. The chapter will also draw conclusions from the previous chapters by highlighting the salient features of the transformation process. The focus of this chapter will be on two major policies adopted by British colonial authorities in the transformation process, namely: the policy of accommodation and the policy of gradual changes.

## **7.2 Transformation through the policy of accommodation**

The establishment of British colonial legal order in the Busa'idi Sultanate was made through aggressive attempts by the British to impose their legal system. Through the adoption of the indirect rule policy, the British retained the existing legal institutions, and limited legal change, as a way of maintaining social order. The imposition of the colonial legal system upon the colonised peoples resulted in resistance. In order to counter this resistance, the British colonial officials adopted the policy of accommodating local

institutions.<sup>4</sup> In the process of transforming Islamic law institutions in the Busa‘idi Sultanate, the British colonial administration adopted the indirect rule policy in order to accommodate Muslim administrative as well as judicial institutions within the colonial framework. Implementation of the indirect rule policy by British colonial officials was a doubled-edged sword in that, on the one hand, the British incorporated the local institutions in the colonial establishment, and on the other hand, gradually exercised power by adapting themselves to the existing traditional structures.<sup>5</sup>

British adoption of the indirect rule policy sought to strengthen the authority of the colonial state. For strategic purposes, the British tolerated the existence of Muslim legal institutions in the early colonial period when British control was weak. However, after gaining control over the Busa‘idi Sultanate, the British embarked on a process of transforming Muslim legal institutions and gradually abolished them. The authority of *liwalis* and *mudirs* was gradually diminished and before the independence of Zanzibar and Kenya, *liwali* and *mudir* courts were abolished. The institution of Muslim *wakils* was not spared from the transformation process initiated by British colonial authorities. After the establishment of the British Protectorate in Zanzibar, Muslim *wakils* were accommodated in the colonial legal system. The appointment and functioning of Muslim *wakils* were bureaucratized and regulated by colonial statutes. Through the policy of accommodation, the role of Muslim *wakils* was gradually curtailed until shortly before the independence of Kenya when the institution of Muslim *wakils* was abolished.

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<sup>4</sup> Benton, L (2002) *Law and Colonial cultures: Legal Regimes in the World History 1400-1900*, Cambridge: Cambridge University Press, 2.

<sup>5</sup> Mann, 1991, 6.

In the process of transforming *kadhi* courts in the Busa'idi Sultanate, the British colonial administration accommodated *kadhīs* within the colonial judicial system in order to ensure control over them. The British perceived *kadhi* courts as symbols of Islam and that *kadhīs* possessed religious authority that could be utilised by the colonial state to legitimise its authority by incorporating *kadhi* courts into the colonial apparatus.<sup>6</sup> In the process of transforming the functioning of *kadhi* courts, the British adopted two conflicting policies of inclusion and exclusion. On the one hand, the British colonial administration recognised the authority of *kadhīs* in order to portray paternalistic approach towards religious leadership which served as a basis for legitimising British colonial rule. On the other hand, the British adopted a policy of exclusion by curtailing the powers of *kadhīs* which resulted in restricting the jurisdiction of *kadhīs* to MPL.

The process of transforming *kadhi* courts focused on reforming the training and recruitment of *kadhīs*. Training of *kadhīs* in the Busa'idi Sultanate was based on the traditional mode of learning in mosques. The main objective of reforming the training of *kadhīs* was to provide them with legal training based on English procedural laws in order to cope with judicial reforms introduced by the colonial order, and to respond to the needs of the new British legal system. As part of the transformation process, the British introduced a system of assessing *kadhīs* before their appointment. British colonial officials categorised *kadhīs* as civil servants and subjected them to a scheme of service similar to that of other colonial

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<sup>6</sup> Carmichael, 1997, 293.

officers. Hence, the role of *kadhis* under the new colonial rule shifted from being religious figures to becoming a corps of civil servants.<sup>7</sup>

Among the strategies adopted by the British colonial authorities in transforming *kadhi* courts was the introduction of hierarchies of appeal systems in order to ensure effective supervision of *kadhi* courts. Judgments of *kadhis* were subjected to the repugnancy test which nullified decisions deemed to be repugnant to justice and morality, or inconsistent with any British statute. Functioning of *kadhi* courts was bureaucratized in that *kadhis* were required to keep written records of court proceedings and judgments. Among the objectives of transforming *kadhi* courts was to reform the procedural aspects of Islamic law so as to have them conform to English procedural laws.

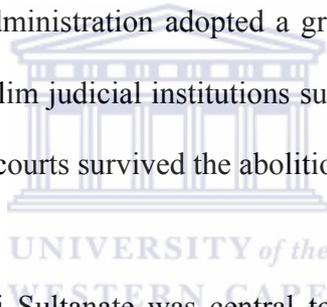
Part of the transformation process of *kadhi* courts was to restrict the powers of *kadhis* in civil matters and exclude criminal jurisdiction from the *kadhi* courts. British colonial officials adopted a gradual policy of curtailing the powers of *kadhis*. From the establishment of the British Protectorate in Zanzibar, the British colonial policy of transforming *kadhi* courts focused on curtailing the powers of *kadhis* in criminal matters. The policy succeeded in the early 20<sup>th</sup> century, when *kadhis* did not have criminal jurisdiction and by 1916 all criminal cases in the Busa'idi Sultanate were determined according to the Indian Penal Code.

The ultimate objective of transforming *kadhi* courts was to integrate them into a unified court system in order to avoid the parallel system of courts which existed in the Busa'idi

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<sup>7</sup> Bang, 2001, 59.

Sultanate. Throughout their colonial rule in the Busa'idi Sultanate, British colonial administrators were faced with the challenge to integrate the two systems of courts under one unified system. Britain's concerted efforts to establish a unified court system that intended to integrate Islamic and English laws into a uniform system did not succeed due to differences in the concepts of justice between the two systems.<sup>8</sup> Sir Mitchell, Governor of Kenya, highlighted this challenge by stating: "There cannot be two systems of jurisprudence or conceptions of justice existing simultaneously within the same sovereignty."<sup>9</sup> Through the policy of accommodation, the British colonial administration succeeded in incorporating *kadhi* courts into the colonial judicial system. In the Kenya coastal strip, British colonial administration adopted a gradual policy of abolishing *kadhi* courts. Compared to other Muslim judicial institutions such as the *liwali* and *mudir* courts in the Busa'idi Sultanate, *kadhi* courts survived the abolition process.



Control of land in the Busa'idi Sultanate was central to British colonial policy. British colonial officials considered the local land tenure based on religious notions, such as the *wakf* system, to be an obstacle to the economic welfare of the Busa'idi Sultanate. Large tracts of land in the Busa'idi Sultanate were tied to either private or communal ownership. Hence, the British colonial administration embarked on a gradual process of transforming the management of *wakf* properties. Among the strategies adopted by the British to transform *wakf* institutions was the establishment of *wakf* commissions. Through the policy of accommodation, the British colonial authorities in the Busa'idi Sultanate appointed

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<sup>8</sup> Naniya, 2002, 14.

<sup>9</sup> Mitchell, 1951, 59.

persons from prominent families onto the *wakf* commissions. Appointed commissioners from notable families co-operated with the colonial government to serve imperial interests. The British colonial administration adopted a policy of centralisation which gave authority to *wakf* commissioners to manage and supervise all *wakf* properties. British officers were appointed onto the *wakf* commissions in order to ensure control over *wakf* properties.

In the process of transforming *wakf* institutions in the Busa'idi Sultanate, the British colonial administration employed conflicting policies of inclusion and exclusion. On the one hand, Muslim dignitaries, including *kadhis*, were appointed as *wakf* commissioners under the control of the colonial government. British officers were appointed as secretaries of *wakf* commissioners and number of colonial officials was gradually increased on the *wakf* commission. On the other hand, the powers of Muslim *wakf* commissioners were gradually curtailed and the application of Islamic legal rules on *wakf* properties was replaced by Indian statutes based on English law. The British colonial administration enacted statutes which imposed English legal concepts on the administration of *wakf* properties. British colonial policies were not only confined to regulating *wakf* properties but included defining property rights according to English law concepts.<sup>10</sup>

In dealing with *wakf* institutions, British colonial judges determined the extent to which English legal concepts applied to *wakf* properties. For instance, the charitable purpose of *wakf* was interpreted according to the English Charitable Uses Act of 1601. English notions such as the concept of individual ownership of land, were introduced and replaced the concept of communal ownership of land. The British notion of land ownership was

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<sup>10</sup> Benton, 2002, 22.

based on individual private ownership as opposed to the *wakf* system that allowed family ownership of land indefinitely. British colonial officials regarded family ownership of land over generations as offending the English rule against perpetuities.

British colonial efforts to transform *wakf* institutions was marked by contradictions which seemed to be a hallmark of British colonial policy in reforming the administration of Islamic law and its institutions in the Busa'idi Sultanate. Conflicting colonial policies resulted in a scenario whereby British colonial officials implemented the transformation process by accommodating *wakf* institutions in the colonial framework, on the one hand, and, on the other hand, refrained from reforming areas which generated resistance.

### 7.3 Transformation through gradual changes

Umar noted that the adoption of gradual but firm strategies was a central characteristic of British colonial policy in their territories.<sup>11</sup> The transformation process undertaken by British colonial officials in reforming the administration of Islamic law and its institutions in the Busa'idi Sultanate was implemented gradually over time. As noted earlier, British colonial authorities accommodated *kadhi* courts with the objective of transforming them and incorporating Muslim judicial institutions within the colonial structures. The transformation process succeeded partly in the abolition of the Muslim *wakils* and the incorporation of *kadhi* courts into the colonial judicial system. As part of the transformation process, British colonial officials directed their efforts towards reforming the judicial system through gradual changes over a period of time. The process of

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<sup>11</sup> Umar, 2006, 6.

transformation was implemented through three phases of reform, namely: institutional, procedural, and exclusion of civil and criminal jurisdictions from *kadhi* courts.

The policy of institutional transformation aimed at conferring powers on British colonial officials to control Muslim judicial institutions. Through gradual changes, the British colonial administration first embarked on a process of re-organising courts in the Busa‘idi Sultanate in order to implement reforms. The East African Order in Council of 1897 initiated the process of re-organisation of the court system in the Busa‘idi Sultanate which resulted in the incorporation of *kadhi* courts into the colonial judicial system which gave British judges powers to supervise and control *kadhi* courts.

The British colonial administration then embarked on a policy of procedural transformation that aimed at reforming procedural laws and rules of evidence applied in *kadhi* courts. British colonial officials found that *kadhis* applied Islamic procedural laws and rules of evidence which in some cases conflicted with English law rules. In order to achieve uniformity of procedural laws, British colonial officials introduced English procedural law and evidence in *kadhi* courts with a view to substituting that for Islamic procedural laws and rules of evidence. The British took advantage of their experience in India and transplanted Indian procedural as well as substantive laws to the Busa‘idi Sultanate. The introduction of English procedural law and rules of evidence in *kadhi* courts led to a conflict between English and Islamic laws that resulted in *kadhis* rejection of applying English procedural laws and rules of evidence. Despite the fact that the British colonial administration enacted procedural laws and rules of evidence based on English common law in order to achieve uniformity in all colonial courts, *kadhis* did not conform and instead

applied Islamic procedural laws and rules of evidence. Non-adherence of *kadhis* to English procedural laws and rules of evidence was due to significant differences between the two systems of law.

Among the challenges which faced British colonial officials in the administration of Islamic law in the Busa‘idi Sultanate was the lack of a codified law that could guide British legal officers. British colonial officials perceived the rules of Islamic law to be “uncertain, unsystematic and arbitrary”.<sup>12</sup> In order to remedy these shortcomings, the British colonial administration adopted a policy of codifying Islamic law. As noted above, the process of codifying Islamic law in the Busa‘idi Sultanate succeeded partly in codifying procedural laws related to MPL.

As part of the transformation process, the British embarked on a policy of translating classical Islamic legal texts in order to ascertain the corpus of Islamic law applicable in the colonial courts. The British motives for translating classical Islamic legal texts were twofold: first, to avoid *kadhis*’ arbitrariness in giving their judgements, and, secondly, to empower British judges to consult classical Islamic legal texts without recourse to *kadhis*.<sup>13</sup>

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<sup>12</sup> Zaman, 2002, 22.

<sup>13</sup> Anderson, 1993, 174. Among the translated classic Islamic legal texts is the *Minhaj et Talibin: A Manual of Muhammadan Law According to the School of Shafii* London: W. Thacker & Company translated into English from the French Edition of L. W. C. Van Berg. Translation of Islamic legal text into the Kiswahili language was done in the post-colonial period. For instance, the translation of *Mirathi* by Ali b. Hemed al-Buhri (d.1957) written in Kiswahili into English by P.E. Mitchell, Nairobi, Government Printer, 1923 and reprinted in 1949. Another text written by Ali b. Hemed al-Buhri in Kiswahili *Nikahi* was translated to English by J.W.T. Allen, Dar es Salaam, Government Printer, 1959.

In Fair's view, British efforts to abolish slavery in the Busa'idi Sultanate was considered to be the principle transformation which took place in the Sultanate at the turn of the 20<sup>th</sup> century.<sup>14</sup> The British colonial administration adopted the policy of transforming the institution of slavery through gradual changes which included a "process of coercing and compromise between the British and the Sultans".<sup>15</sup> The British adoption of gradual policies in the abolition of slavery in the Busa'idi Sultanate was to ensure the gradual extinction of slavery rather than the sudden suppression of servitude. British colonial authorities embarked on a gradual policy in the abolition of slavery in order to avert a collapse of the plantation economy which could have resulted in the destruction of the Busa'idi Sultanate. British efforts to abolish slavery were caught between the calls of British philanthropists and missionaries to abruptly abolish slavery in the Busa'idi Sultanate, and resistance from the Sultans and their subjects against ending slavery. In striking a balance between the two extremes, British colonial officials on the ground adopted a gradual policy and avoided imposing drastic anti-slavery measures in order to avoid political as well as social upheavals.

British colonial policy on the abolition of slavery in the Busa'idi Sultanate was marred by contradictions. On the one hand, the policy indirectly supported centres established by missionaries which accommodated fugitive slaves. On the other hand, British colonial officials on the ground advocated a gradual approach to abolishing slavery so as to allow a

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<sup>14</sup> Fair, 2001, 265.

<sup>15</sup> Purpura, 1997, 133.

smooth transition from the status of slavery to freedom without creating drastic changes. British colonial officials who sympathised with abolishing slavery embarked on a process of transforming the institution of slavery from one of forced labour to one of paid wage labour. The gradual process aimed at establishing a smooth transition from servitude status to complete freedom without causing serious economic or political chaos.

Abolition of the institution of *suria* posed a challenge to the British colonial administration in the Busa'idi Sultanate. Recognition of concubinage in Islam deterred British efforts to emancipate *surias*. The institution of *suria* was well entrenched in the social lives of the Sultans and their subjects, making it difficult for the British to abolish it. The British were caught between the pressures of philanthropists and missionaries to end the enslavement of *surias*, on the one hand, and, on the other hand, resistance from the Sultans and their subjects to retain the institution of *suria*. Since the establishment of the British Protectorate in Zanzibar, Britain enacted statutes in order to gradually abolish slavery. The process culminated in the abolition of slavery in the Busa'idi Sultanate by virtue of the Anti-Slavery Decree of 1907. However, due to resistance from the Sultans and their subjects, British colonial authorities exempted the institution of *suria* from the Anti-Slavery Decree of 1907. *Surias* continued to exist in the Busa'idi Sultanate and were left to die out gradually until the independence of Zanzibar in 1963.

#### **7.4 Conclusion**

The Administration of justice in the Busa'idi Sultanate was central to British colonial rule, and Muslim judicial institutions formed essential elements in establishing and maintaining colonial domination. British colonial rule in the Busa'idi Sultanate was the medium

through which institutional as well as procedural transformations of Islamic law and its institutions were undertaken from the establishment of the British Protectorate in 1890. As part of the imperial project across the conquered territories, British colonial authorities embarked on a process of transforming the administration of Islamic law and institutions in the Busa'idi Sultanate. British colonial efforts to reform Muslim judicial and administrative institutions resulted in processes of change and conflict. The response of the Sultans and their subjects to these transformational processes generated resistance with, in turn, various responses. British confrontation with Muslim legal institutions in the Sultanate was marked by continuous conflict. Muslim legal institutions which included *kadhi* courts and Muslim *wakils*, which were classified by British colonial authorities as “traditional”, were transformed in order to cope with colonial desires.

British colonial officials implemented the transformation process by adopting the indirect rule policy which accommodated Muslim legal institutions and gradually transformed them. Through the policy of inclusion and exclusion, British colonial authorities incorporated Muslim judicial institutions, such as, *liwali*, *mudir*, and *kadhi* courts and Muslim *wakils*. The transformation process culminated in the abolition of *liwali* and *mudir* courts before the independence of Kenya and Zanzibar in 1963. Muslim *wakils* continued to exist in Kenya and Zanzibar and were abolished shortly after the independence of the two countries.

British colonial officials perceived *kadhi* courts as active agents of the transformation process. The focus of the reform was on transforming the functioning of *kadhis* and their courts. To this extent, British colonial administration managed to bureaucratise the appointment and recruitment of *kadhis*. Training of *kadhis* posed a major challenge to the

colonial authorities. British colonial officials in Zanzibar established a seminary college in order to streamline the training of *kadhīs* so that they could cope with colonial judicial reforms. However, the reform project in training *kadhīs* could not succeed due to the fact that most of the potential candidates for *kadhīship* were inclined to traditional centres of Islamic learning.

As part of the transformation process, the British embarked on a strategy of codifying Islamic law. British colonial authorities utilised their colonial experience in India by transplanting statutes to the Busa‘idi Sultanate. Due to differences of *madhhab* affiliation between India and the East African coast, only a few statutes related to MPL and *wakf* were transplanted from India. British colonial efforts to transform Islamic procedural laws and rules of evidence applicable in the Sultanate could not be fully implemented due to the difference between English and Islamic laws, on the one hand, and the resistance and reluctance of *kadhīs* to adhere to the English laws of procedure and rules of evidence, on the other hand.

Imposing the English legal system on the existing Muslim judicial institutions resulted in the emergence of a parallel courts system. In order to avoid this anomaly, the British embarked on a policy of integrating *kadhi* courts within the colonial judicial system. *Kadhi* courts’ mode of operation differed from British courts. More significant was the fact that *kadhīs* perceived themselves as religious figures and therefore inclined to their religion more than the colonial masters. The policy of integrating *kadhi* courts within the colonial legal framework succeeded partly by incorporating the courts within the colonial judicial system rather than integrating them. As part of the reform process, the British colonial

administration in the Busa'idi Sultanate embarked on a policy of excluding civil and criminal jurisdiction from *kadhi* courts. The policy was implemented gradually and two decades after the establishment of the British Protectorate, *kadhis* criminal jurisdiction was curtailed and their civil powers were confined to MPL.

British colonial policies on transforming *wakf* institutions in the Busa'idi Sultanate were caught in a contradiction. On the one hand, the British embarked on transforming the land system in order to achieve economic development. On the other hand, the colonial enterprise was keen to uphold a paternalistic approach of accommodating religious institutions. British efforts to transform *wakf* institutions in the Busa'idi Sultanate succeeded partly by establishing *wakf* commissions which were controlled by the British colonial officials. The ultimate aim was to change the management of *wakf* properties so as to conform to the English land tenure system. However, due to resistance from Muslim *wakf* commissioners, the British had to retreat from transforming the administration of *wakf* properties. Among the challenges which faced the British colonial administration in the Busa'idi Sultanate was the abolition of slavery. Similar to other fields of reform, British policies on abolition of slavery were marred by contradictions. On the one hand, the British government was under pressure from philanthropists and missionaries to end slavery; on the other hand, British colonial officials on the ground wanted to portray their patronage of slave owners by delaying the abolition exercise. In order to avoid this contradiction, British colonial authorities adopted a gradual approach by devising mechanisms which paved the way for the gradual abolition of slavery. British efforts to abolish slavery since the establishment of the Busa'idi Sultanate in 1832, resulted in the final abolition of slavery in 1907. The institution of *suria* posed a major challenge to the

British in the process of abolishing slavery in the Busa'idi Sultanate. British efforts to abolish the institution of *suria* did not succeed due to religious recognition of *surias*, and entrenchment of the institution in the social lives of the Sultans and their subjects. Due to these factors, British colonial officials exempted the institution of *suria* from the abolition process and permitted it to continue until it died out gradually after the independence of Zanzibar.

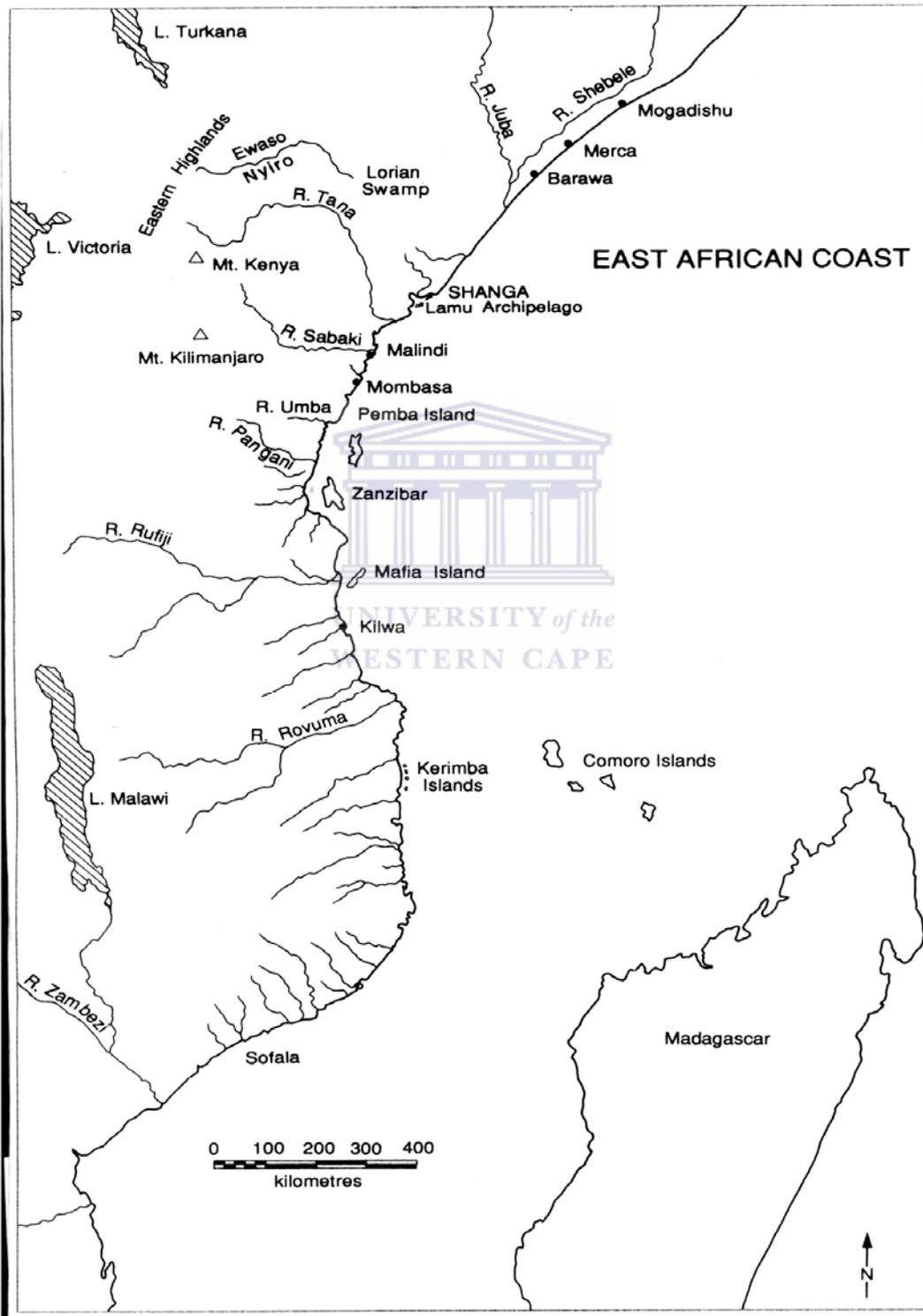
The period between the establishment of the British Protectorate in 1890 in the Busa'idi Sultanate and independence of Zanzibar in 1963 can be characterised as a transformative phase that engaged the British colonial state in various processes of change. Within a span of seven decades of colonial rule in the Busa'idi Sultanate, the British colonial administration managed to transform the administration of Islamic law and its institutions. Key areas of the transformation process included the formalisation of the administration of Islamic law in which procedural laws related to MPL and *wakf* regulations were codified. *Kadhi* courts and *wakf* commissions were institutionalised and incorporated in the colonial apparatus. The functioning of *kadhi* courts was bureaucratised in that the recruitment and appointment of *kadhis* were subjected to the colonial scheme of service. *Kadhis* were required to keep written records of their judgements and follow strict rules of operation according to colonial terms. British colonial officers were appointed to supervise *kadhi* courts and *wakf* commissions in order to ensure effective control over them. In the process of transformation, British colonial authorities adopted gradual policies in diminishing the role of Muslim institutions, such as *liwali* and *mudir* courts, which resulted in their abolition before the independence of Zanzibar and Kenya in 1963. The institution of

Muslim *wakils* followed suit and was abolished shortly after independence of the two countries.

The focus of the transformation process was on the curtailment of *kadhis* powers. By 1916, criminal jurisdiction was removed from *kadhis* and their civil jurisdiction was gradually confined to MPL. More significant among the transformations undertaken by the British was the abolition of slavery in the Busa'idi Sultanate. Through their policies of compromise and coercion, British colonial officials managed to gradually abolish slavery without causing political or social upheavals. The reform process was marked with transformative contradictions. In the process of transforming the administration of Islamic law and its institutions in the Busa'idi Sultanate, the British colonial administration encountered resistance from the Sultans and their subjects. In cases of resistance, British colonial authorities retreated from their reform agenda in order to avoid confrontation with their colonised peoples. British colonial officials adopted non-interference policies with regard to religious matters which did not threaten their colonial rule. In doing so, the British portrayed themselves as patrons and protectors of Islam which in turn served as a basis of their colonial rule. Despite the paternalistic attitude of Britain towards the Busa'idi Sultanate and the ancient cordial relationship between the British Crown and the Sultans, the British 'protecting power' could not save its 'friendly' Sultanate from being toppled by the 1964 revolution.

APPENDICES

APPENDIX I  
Map of East African Coast



Source: Mark Horton (1996) "Shanga: The Archaeology of a Muslim Trading Community on the coast of East Africa" *Memoirs of the British Institute in Eastern Africa*: (No.14.) London: The British Institute in Eastern Africa p.2.

**APPENDIX 2****AGREEMENT BETWEEN GREAT BRITAIN AND ZANZIBAR RESPECTING  
THE POSSESSIONS OF THE SULTAN OF ZANZIBAR ON THE MAINLAND  
AND ADJACENT ISLANDS EXCLUSIVE OF ZANZIBAR AND PEMBA.****SIGNED AT ZANZIBAR, 14<sup>TH</sup> DECEMBER 1895.**

Zanzibar possessions on the mainland and islands exclusive of Zanzibar and Pemba to be administered by British Government.

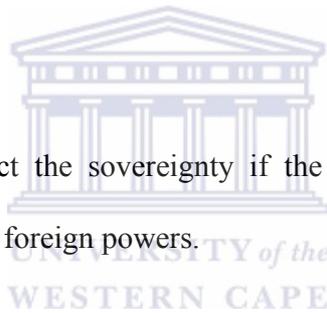
His Highness Seyyid Hamed b. Thuwain, Sultan of Zanzibar, agrees for himself, his heirs and successors that as regards his predecessors on the mainland and adjacent islands, exclusive of Zanzibar and Pemba, the administration shall be entrusted to officers appointed direct by Her Britannic majesty's Government, to whom alone they shall be responsible.

These officers shall have full powers to executive and judicial administration, the levy of taxes, duties, and tolls, and the regulation of trade and commerce. They shall have control over public lands, forts, and buildings, over all roads railways, waterways, telegraphs, and other means of communication, and shall regulate questions affecting lands and minerals. All custom duties, taxes, and dues shall be accounted for to, and shall be expended by, Her Britannic Majesty's Government.

All assets purchased by the Sultan's Government from imperial Britain East Africa Company at the time of the surrender of its Concessions shall be the property of Her Britannic Majesty's Government, who shall also retain as their own property all public works of any description which may be constructed by the officers administering under this Agreement.

Her Britannic Majesty's Government shall pay to the Sultan's Government annually the sum of £11,000 as well as of £6,000 representing interest at 3 per cent. on the sum of £200,000 disbursed by the latter for the surrender of the Company's Concessions, and for the purchase of its assets.

This Agreement shall not affect the sovereignty of the Sultan in the above-mentioned territories or the Treaty rights of foreign powers.



Her Britannic Majesty's Government shall have the power of terminating this Agreement on giving six months' previous notice to the Sultan of Zanzibar of their intention to do so.

(Signature of Sultan in Arabic)

ARTHUR HARDINGE

Her Britannic Majesty's Agent and

Consul-General.

Zanzibar, 14<sup>th</sup> December 1895.

Source: *Report of the Kenya Coastal Strip Conference, 1962*. Presented to the Parliament by the Secretary of the State for the Colonies by command of Her Majesty, April 1962, London: Her Majesty's Stationery Office, 1962, p.5.



**APPENDIX 3****AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM,  
HIS HIGHNESS THE SULTAN OF ZANZIBAR, THE GOVERNMENT OF KENYA  
AND THE GOVERNMENT OF ZANZIBAR**

AN AGREEMENT made this 8<sup>th</sup> day of October 1963 between the Right Honourable Duncan Sandys, M.P., one of the Her Majesty's Principal Secretaries of State, on behalf of Her Majesty Queen Elizabeth II, His Highness Seyyid Jamshid bin Abdulla bin Khalifa Sultan of Zanzibar, Jomo Kenyatta Prime Minister of Kenya on behalf of the Government of Kenya and Mohammed

Shamte Prime Minister of Zanzibar on behalf of the Government of Zanzibar:



Whereas by an Agreement made on behalf of Her Majesty Queen Victoria on 14<sup>th</sup> June 1890 with

His Highness Sultan Seyyid Hamed bin Thuwain it was agreed that His Highness's possessions on the mainland of Africa and the adjacent islands, exclusive of Zanzibar and Pemba, should be administered by officers appointed direct by Her Majesty's Government and those territories are at present being administered accordingly as part of Kenya under the name of the Kenya Protectorate:

And whereas by Exchange of Letters concluded in London on 5<sup>th</sup> October 1963 between the Prime Minister of Zanzibar and the Prime Minister of the Government of Kenya entered into certain undertakings concerning the protection, after Kenya has attained independence,

of the interests of His Highness's present subjects in the Kenya Protectorate and their descendants:

NOW THEREFORE it is hereby agreed and declared that on the date when Kenya becomes independent –

(1) the territories comprised in the Kenya Protectorate shall cease to form part of his Highness's dominions and thereupon form part of Kenya;

(2) the Agreement of 14<sup>th</sup> June 1890 in so far as it applies to those territories and the Agreement of 14<sup>th</sup> December 1895 shall cease to have effect.

Signed:

DUNCAN SANDYS.

SEYYID JAMSHID BIN ABDULLA.

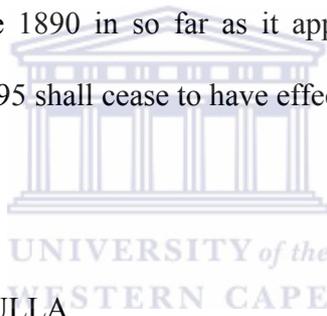
JOMO KENYATTA.

M. SHAMTE.

Marlborough House,

London.

8<sup>th</sup> October 1963.



**APPENDIX 4****LETTER FROM THE PRIME MINISTER OF KENYA TO THE PRIME MINISTER OF ZANZIBAR**

London

5<sup>th</sup> October 1963

My Dear Prime Minister,

I have the honour to refer to discussions held between our respective Governments on the subject

of the future of the Kenya Protectorate (the Coastal Strip) and to place on record the following undertakings by the Government of Kenya in relation thereto-

(1) The free exercise of any creed or religious will at all times to be safeguarded and, in particular, His highness's present subjects who are of the Muslim faith and their descendants will at all times be ensured of complete freedom of worship and the preservation of their own religious buildings and institutions.

(2) The jurisdiction of the Chief Kadhi and all other Kadhis will at all time preserved and will extend to the determination of questions of Muslim law relating personal status (for example marriage, divorce and inheritance) in proceedings in which all parties profess the Muslim religion.

(3) Administrative officers in predominantly Muslim areas should, so far as is reasonably Practicable, themselves be Muslims.

(4) In view of the importance of teaching of Arabic to the maintenance of Muslim Religion, Muslim children will, so far as is reasonably practicable, be taught Arabic and, for this purpose, the present grant-in-aid to Muslims primary schools now established in the Coast region will be maintained.

(5) The freehold titles to land in the Coast Region that are already registered will at all times be recognized, steps will be taken to ensure the continuation of the procedure for the registration of new freehold titles and the rights of the freeholders will at all times be preserved save in so far as it may be necessary to acquire freehold land for public purposes, in which event full and prompt compensation will be paid.

I have the honour to propose that this letter and your reply in confirmation thereof shall constitute an agreement between our two Governments.

Yours sincerely,

JOMO KENYATTA.

**APPENDIX 5****LETTER FROM THE PRIME MINISTER OF ZANZIBAR TO THE PRIME MINISTER OF KENYA**

London

5<sup>th</sup> October 1963

My Dear Prime Minister,

I have the honour to refer to your letter of today's date on the subject of the future of the Kenya



Protectorate (the Coastal Strip) in which you placed on record the following undertakings by the Government of Kenya in relation thereto-

(1) The free exercise of any creed or religious will at all times to be safeguarded and, in particular, His highness's present subjects who are of the Muslim faith and their descendants will at all times be ensured of complete freedom of worship and the preservation of their own religious buildings and institutions.

(2) The jurisdiction of the Chief Kadhi and all other Kadhis will at all time preserved and will extend to the determination of questions of Muslim law relating personal status (for example marriage, divorce and inheritance) in proceedings in which all parties profess the Muslim religion.

(3) Administrative officers in predominantly Muslim areas should, so far as is reasonably Practicable, themselves be Muslims.

(4) In view of the importance of teaching of Arabic to the maintenance of Muslim Religion, Muslim children will, so far as is reasonably practicable, be taught Arabic and, for this purpose, the present grant-in-aid to Muslims primary schools now established in the Coast region will be maintained.

(5) The freehold titles to land in the Coast Region that are already registered will at all times be recognized, steps will be taken to ensure the continuation of the procedure for the registration of new freehold titles and the rights of the freeholders will at all times be preserved save in so far as it may be necessary to acquire freehold land for public purposes, in which event full and prompt compensation will be paid.

I have the honour to confirm the contents of your letter and to accept your proposal that your letter and this reply shall constitute an agreement between our two Governments.

Yours sincerely,

M. SHAMTE.

Source: *Kenya Coastal Strip: Agreement between the Government of the United Kingdom, His Highness the Sultan of Zanzibar, the Government of Kenya and the Government of Zanzibar*. Presented to the Parliament by the Secretary of the State for the Colonies by command of Her Majesty, October 1963, London: Her Majesty's Stationery Office, 1963.

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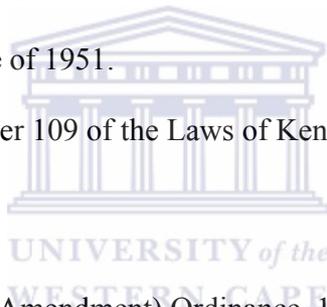
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