

DIVORCE UNDER ISLAMIC LAW

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BY

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DIVORCE UNDER ISLAMIC LAW.

INTRODUCTION:

The growth of Islam in Arabia and its spread to neighbouring countries was followed by different interpretation¹. As the controversy assumed a significant proportion, there emerged four great Muslim Scholars who wrote at length on the controversial issues and whose works did much narrow down the difference, such that, in almost all matters they became a universal opinions and applications². Two schools of thought emerged the 'Sunni' and 'Shia'. The Sunni sect is subdivided into four sects, known as the 'Hanafi', 'Hambalil', 'Shafi' and 'Malaki'³. Among them the 'Hanafi' are in the majority.⁴ The Sunnis account for 95% of the World Muslim population.⁵

As far as Islamic laws and procedure on divorce are concern there are no significant difference of opinion among the four schools of thought.⁶ In Kenya all Sunni muslims have a common islamic divorce procedure, despite the fact that they are followers of Hanafi and Shafi schools⁷, (which are the two predominate sects in Kenya).

At this point it is necessary to comment on the Kenyan muslims population and their attitude towards divorce. The Kenyan muslims can be divided into two distinct sects, the sunnis and shia,⁸ Whereas the sunnis have no sub-sects. The Kenya shia community is divided into sub-sects called the Ithna-Ashri, Bohoras, Ismaili, Druses and Zayids.⁹ Their respective attitude towards divorce is given below.

The 'Ismailis' do not follow Islamic law of Marriage and Divorce. They have their own divorce law which is very much like the English Divorce Law.¹⁰ Contracting a Marriage is very easy and simple and equally easy is divorce. The Ismailis are said to have the highest rate of divorce among Kenyan muslims.¹¹ A party not satisfied with the judgement in divorce case, has the right to appeal.¹² All such divorce cases are conducted by their own communal tribunals appointed by their religious leader, the H.H. Aga Khan.¹³ The 'Bohoras' unlike Ismailis, observe Islamic way of life, despite their secular education.¹⁴ They follow Islamic divorce law in general. They are not influenced by any school of thought or by the Shia divorce laws.¹⁵ It is believed that the rate of divorce among them is very low.¹⁶

The 'Druses' are found in Lebanon and a very small number live at the Kenyan coast.¹⁷

They follow the Islamic law of divorce generally, just like the Bohoras. Divorce among them is rare.¹⁸

It is worthy of note that in Lebanon the rate of divorce among the Druses is very high.¹⁹

The 'Zayids' although they are shias, observe more or less sunni islamic divorce laws.²⁰ They are found at the Kenya's coastal towns. Although among them the rate of divorce is low, that of polygamy is high.²¹

The Zayids are considered to have the highest rate of polygamy marriage, among all the muslims in Kenya.²²

The 'Ithna-Ashri' are numerically the largest and account for 80% of the total world shia populations.²³ Most of them are found in Iran and they constitute nearly 65% of the total population in Iran.²⁴ Their marriage and divorce laws are different from all the other muslims and to understand their concept of divorce, their marriage customs must be understood too.

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The marriage custom practiced by the Ithna-Ashri is called 'Muta'.²⁵ 'Muta' means a temporary marriage of any period man wishes. Normally the duration ranges between one year and four years. The woman is paid a small sum for entering into the temporary marriage.²⁶ The wife of such a marriage does not enjoy the rights of a wife under Islamic law.²⁷

The marriage is considered as only a temporary cohabitation on commercial terms.²⁸ The existence of such a marriage does not call for a defined divorce procedure. Although it has declined among the formally educated people, it is lawful in Iran. There is a small Ithna-Ashrian community in Kenya, mostly in Mombasa, but it does not practice Muta Marriage.²⁹ The rate of divorce among them is comparatively low. The 'sunni' muslims constitute 95% of the muslim population in Kenya.³⁰ Sunni muslims follow Islamic law of divorce as presented in the Holy Quran.³¹ Tajdin - G. Kassam says that sunni divorces evolve around specific grounds and marriages are dissolved if such grounds are proved. A notable feature among sunni muslims is the steadfast adherence to Quranic injunctions. In Kenya there are cases of divorce among the sunni, but the rate is considerably low, in relations to the large sunni population.³²

Divorce is intended to put an end to suffering of the spouses when the marriage breaks down. Divorce therefore to the Muslim is a protective remedy and not a punishment.³³

Islam as a religion seeks to meet all the needs of the individual,³⁴ such as those under divorce. The Islamic concept of divorce is based wholly on specific verses of the holy Koran which deal with divorces.³⁵

The Quren has a Chapter on women. This indicates the role of women in the Muslim society. The rules of marriage, divorce, re-marriage, almony and compensations in case of divorce.³⁶

The situation in Arabia before the advent of Islam, was that there existed many clans which had their own customary divorce procedure.³⁷ Most of these divorce laws were to deprive married women any rights.³⁸ The clannish divorces was easy to get and it was only husbands who could marry and divorce wives according to their whims. Islam completely swept aside all the customary divorce laws and introduced Islamic divorce procedures, which created and guaranteed rights of married womens and compensation for them in case of divorce.³⁹

The muslim divorce was a complete system (codified) in that it had well defined procedure of evidence, complaints, examination of complaint and awaiting of compensation to the agrieved party. This was a unique feature, as the other three religions christianity, Hinduism and Buddhism did not have any such defined procedure for divorce.⁴⁰ In fact, none of these religions allowed divorce.⁴¹

Another unique element of the Islamic divorce procedure is the system of re-marriage and reconcilliation available to the spouses after the pronouncement of talak (divorce).

This issue is discussed in Chapter two of this paper.

This paper will first establish the historical and legal bases of the applications of islamic law generally. In the subsequent Chapter, divorce under islamic law generally and in Kenya shall be discussed. In the conclusion the writer gives her opinion and tries to suggest reforms, if any are needed or desired in relation to the law of divorce in Kenya's muslim society.

CHAPTER ONE:

HISTORICAL AND THE LEGAL BASES OF THE APPLICATION OF ISLAMIC LAW.

INTRODUCTION.

A discussion of law relating to divorce amongst the muslims in Kenya, is incomplete without a brief discussion of the historical and legal bases of the application of Islamic Law.

In Part I of this Chapter, the emigration of Muslims, the impact of Islamic influence on the indigenious people and the reason for the tolerance of Islam by the British Colonial power, are discussed while part II deals with the legal basis of application of Islamic Law, within two periods, the pre-independence period (1895 - 1963) and the post-independence period (1963 - 1979).

PART I.

A. THE EMIGRATION OF MUSLIMS AND THEIR INFLUENCE

In about A.D. 622 the Arabian people were moulded and unified into a world power, under the stimulus of the Islamic revelation.¹ During the same period, specific porsecutions wars and unrest occured in Western Asia. This was due to struggle among several factions of the Moslem World to gain class recognition. As a result many moslems emigrated and sought peace and new lands away from the scenes of strife.²

According to F.B. Pearce, as the people from Western Asia had been trading along the East African Coast for a long time, it was easy to understand their interest in settling along the Coast.³

There were three main period of Islamic Cultural History in East Africa, according to Trimingham.⁴ The first period was around mid 12th Century, the early settlement of Muslims in Coastal places which were under the rule of the Zengi⁵, of whom some of those living in settlement adopted Islam. The earliest emigration of Muslims according to U.H. Ingrams were arabs in origin, from Oman to Zanzibar. Caliph Abdul Malaki the ruler of Oman was defeated and driven out of his country by the Governor El-Hagyay of El-Irak. Caliph Abdul Malaki emigrated to the land of Zengi,, taking with him, his family and members of his tribes.

Trimingham called the second period, as the Shirazian, which was around mid 16th Century. It is associated with formation of a number of petty settlements dynasties all along the Coast. Developing into a definite Islamic Coastal Culture. These Shirazians emigrated from Persian Gulf and Central Arabia were mainly Shia Moslems, from the Indian Muslim Community.⁷ The Indian Moslems were more important from the economic rather than the religious point of view. They contributed towards the building up of Persian principalities and communities along the East African Coast.⁸

The spread of Islamic faith was a matter of centuries rather than the result of two or three Sporadic cases of emigration of any particular people at any particular period.⁹ For it was not until the third period of Muslim emigration to East Africa, which succeeded the decline of the Portuguese Power, that Islam was associated with political as well as religious influence.¹⁰ This was possible due to the Slave Trade. The Arab Muslims were among the most active participants in Slave Trade, during its era. To gain better access to Slave Trade, they settled along the Coastal Towns, making Zanzibar their headquarters.¹¹ They lived a muslim way of life which was based wholly on the Islamic religion and law.¹²

It was during this period of mid 19th Century that the State of Zanzibar was eventually formed. Transferring the decayed sharazi Culture into an over-whelming predominance of Hadrami Shafi Islamic Influence, along the Coast.¹³ After the Sultan had established some form of authority over Zanzibar the other Coastal towns were regarded as tributary¹⁴ by the Sultan. He expected these tributaries to pay tribute of half of the poll tax claimed on natives African. Each village that was given it's own Chief (Sheha) above whom is the Liwali as district head.¹⁵ The main concern of these headmen was to collect taxes while the Kadhi were introduced, when the need to settle dispute arising from personal status between Native Muslim and Arab Muslim arose.¹⁶

As Prof. J.N.D. Anderson states, 'It is clear, of course, that before any British protectorate existed in East Africa, Muslims Courts were enforcing Islamic law over much of the Coastal region chiefly under the authority of the Sultan of Zanzibar who was recognized as ruler or Suzerian of most of these localities'.¹⁷

According to W.H. Ingrams 'It has been recorded by early travellers to East African Coast' that tribal Marriage among the Converted natives contrary to Islamic law were not common. Where they do occur, were not regarded as legitimate unless formally acknowledged. Therefore the Native Muslims went to the Kadhi Courts in cases of personal status. While in cases concerning real property, action is part and other action in crime, the natives did avail themselves of customary law and restored to elders' discussions

It was evident by 1800 that the natives were influenced by Islamic faith. As recorded by Masondi.¹⁹

"The Arabs colonized these Islands, along the East Coast of Africa, with them, they brought the Holy Koran and Islamic faith there was evidence of converted natives Muslims who were extremely honest and chaste to the Islamic religion, even though they did not understand it fully....".

Accounting for the influence of Islam in present Kenya, North Eastern Province, Trimingham claims that it was due to South

South Somalia acting as a zone of contact between Bantu Nyika, Galla, Somalia and the Arabs and other emigrants from Asia, their main objectives being trade. The spread to the Bantu speaking members of the Islamic civilization resulted in a gradual substitution of Muslims in place of Native rules in the settlement and the defusion of an Islamic civilization.²⁰

The acceptance of Islam, by the indigenous natives, in both the Coastal town and North-Eastern Province, was due to the native of the Islamic religion itself. For the Muslim Natives, Islam supplements rather than replaces tribalism, especially where tribal authority is normally Moslem. Nor does it introduce new standard in ordinary morals.²¹ It is interesting to note that Norman Keyes in his book 'Kenya' states that, the European officers in the colony considered the Muslims moral as "degrading as the natives" in certain aspects of life. Like the permitting of polygamy.²²

Islamic faith was readily accepted by the natives, because the single idea it attempts to convey to its followers, is the Unity of God. This unity made no attempts to control man's activities²³ while according to Trimingham, 'the acceptance of Islam by the indigenous natives was more of a socio-cultural factor than religious. For example the pride Muslims showed in their religious culture had the effect of self-respect and feeling of superiority.

This created a great impression on the natives.²⁴

However, it could be argued that the Arabs having colonized the East Coast Islands,²⁵ had political power over the indigenous Natives. This also contributed to the acceptance of Islam by the indigenous native.

It is thus clear that before the introduction of the British Colonial rule, most of natives along the Coastal towns and the present North-Eastern Province of Kenya, had accepted Islam as their faith. They were accordingly governed, if not wholly then partially by Islamic laws. However, it should be noted that, although the native Muslim had accepted Islam, the extent of his belief is open to question. As pointed out by Masandi ²⁶ "..... there was evidence of converted natives Muslims who were extremely honest and Chaste to the Islamic religion.... although they could not understand it fully". And as Arthur Phillips ²⁸ noted, the Mohammadism was only skin deep, to most of the Natives, who had accepted Islam. This was the position in which the British Colonial power found the Coastal towns in, when it declared Kenya a British Colony in 1845.

B. THE BRITISH ATTITUDE TOWARDS THE ISLAMIC WAY OF LIFE

Britain allowed laws reflecting the Islamic way of life, to continue to apply.²⁷ The Moslem were considered in their nature to be more advanced than other indigenous people.

In Kenya, the individual ownership of land which was said and is evident according to the British to exist amongst the civilized people, was assumed to be in the existence at the Kenya Coast. Whereas in the interior where the africans - non-moslem lived, it was held that the indigenous peoples rights were merely those of cultivations.²⁸ This distinction is futile. The British failed to realize that ownership of land in whatever form, does not, symbolize the civilization of a particular race, but the type of life one leads. As G.K. Kamau pointed out that "the african takes the view that all human beings are of equal worth and that their past and present organisation both regards holding of property and political and social organizations, embody this equal worth of everybody, that they believe the good life as they see it can only be realised, if life is communal, Property must be held communally either by the entire Community or the family.....". According to Sorrenson it was evident that (Kikuyu) had individual system of land ownership.³⁰ This fact in contrast with British view that all the indigenous system of ownership is basically cultivation or communal. The British therefore failed to understand, or if they did preferred to ignore, the African philosophy and values of life.

Norman Keyes³¹ has noted that "Islam is a religion that is sincere and makes ideal citizens. This religion is the best and most suitable for the African.... the administrators viewed with distaste. The ambition of many Christian converts, to gain the knowledge that is power, to prefer,

For the Africans a religion that keeps them in isolation of social ideas and ideals. The brotherhood of all Moslems in a less distributing maxim, than the brotherhood of men." The main idea of the colonial power, there was to interfere with the natives' customs and religion. Apart from keeping the natives passive, it was considered as unfair to burden the natives' mind with complex laws and procedure of the English legal system. Therefore, it was best for natives to retain their cultural and religious values.³² Norman Keyes arguments cannot be taken seriously because all religions whether Christianity, Islam, Hinduism or Customary faith, tend to be sincere and make ideal citizens.

The Sultan's sovereignty, over the Coastal towns was recognised by the British Power to a greater extent than other communities' sovereignty. The position of Muslims along the Coast was safeguarded by agreements made between the Sultan and the British. This meant that the British accepted the application of Islamic law to the Muslims along the Coast. For instance, the concession granted by Sultan to the imperial British East African Association on 24th May, 1887, regarding the administration of Sultans territories on the mainland from Vanga to Kipini stated "The judges shall be appointed by the Association or their representatives, subject to the Sultan's approval, but all Kadhis shall nominated by the Highness Sultan of Zanzibar"³³ The appointment of Kadhis by the Sultans ensured the application of Islamic law. An identical clause was included in the 1895 Agreement when Kenya was declared

a Protectorate. There was an express agreement signed between the Sultan of Zanzibar and Britain which provided all cases and suits between native muslims will continue to be decided according to the Mohammadan Laws.³⁴.

PART II

A. COLONIAL PERIOD:

The Agreement reached between the Sultan and the British Crown in 1895, about the Sheria was implemented by the Native Courts Regulation 1897. It established two classes of native courts. Namely, those presided over by a European officer and those presided over by a native authority. The former was to be guided as far as practical by the Indian civil procedure code and Indian penal Code.² While the later in both civil and criminal cases, within the Mohammedan Coast region, or is deciding with Mohammedans, the Court were to have regard to the general principles of the law of Islam.³ The 1897 Order-in-Council, further provided that the Kadhis courts⁴ should "take cognisance of all matters effecting the personal status of Mohammedans (such as marriage, divorce and succession)⁵, and should follow there in subject to the provisions of these regulations, the law and procedure ... which has hitherto been observed by them in accordance with the laws of the Sultanate of Zanzibar."⁶

Although the regulation ensured the application of Islamic law by the Kadhi Courts in Kenya, it interfered with the rights for such application of Islamic law. Sharia Law was applied through the Native Courts Regulation 1897, which was promulgated under 1897 E.A. order-in-council. This order-in-council empowered the Commissioner to make rules and orders for the alteration or modification of the operation of any Native Law or custom⁷ is so far as that might be necessary. The regulation further adopted a very wide definition of the term 'Native'. The word 'Native' included not only any Native of African not of European or American Origin', but also any person not of European or American origin, who were within the dominions of the Sultan of Zanzibar, would be subject to this Highness Jurisdiction. Even though such person should not have been born in Africa. The 1897 order-in-council classified a Moslem as a Native, thus empowering the Commissioner to modify Islamic Law.

It is submitted that this would interfere with the Muslim freedom of worship. Secondly, the Islamic Legal system is distinguishable from the Natives legal system, in that it is codified in the Koran⁹. When passing the order-in-council, the British did not consider the Islamic philosophy of life fully.

The 1897 regulations were repealed by the 1907 Courts Ordinance Schedule III.¹⁰ The ordinance established Courts subordinate to the High Court which included the Liwalis, Mudirs and Kadhi Courts. It gave the Kadhi, Liwalis and Mudirs Courts, power to hear and determine cases arising out of Islamic Laws. However, it did not provide expressly for the High Court or Court of Appeal to have jurisdiction to hear and determine cases arising out of Islamic Matrimonial Suits.

The colonial supreme court refused to adjudicate in matters arising from Moslems Matrimonial cases or suits. It held that it had no legal authority to do so. This was held in the case of Gulam Mohammed v Gulam Fatima¹¹ which was decided in 1916. The issue before the Court was whether an Indian marriage under Mohammedan Law in East Africa, which was potentially polygamous, was valid. Morris Cater C.J. had this to say

"by virtue of Section 33 of the East African Marriage ordinance 1902.. the marriage is not to be deemed invalid, yet the court should not so far depart from the spirit of the ordinance as to decree restitution of conjugal right in marriage which is or has been polygamous."

This case was carried a step further by another action between the same parties in 1917. Justice Hamilton before whom the case was, persisted in the negative attitude, towards hearing and determining Matrimonial Cases or Suits arising from Islamic Law.

He stated that:

"The defendants' position in the same as though he had when temporarily resident in England, gone through a form of Mohammedan Marriage with a co-religouist. Whereby the Courts in England would not regard such a marriage as a legal marriage, under English Law, the Courts here permitted it to stand has not invalid Mohammedan Marriage but the Court has no jurisdiction to determine the Case."

He further held that:

"It is an essential exercise of jurisdiction in England (followed in Kenya) to determine the domicile of the married parties, before rendering the marriage valid or not. And as the husband in this case was not a domicile in East Africa, the Court had no jurisdiction to hear such cases."

These arguments and reasons advanced by the High Court were unsound. It was stated expressly in the 1902 East African order-in-council¹³ Article 150) that "there shall be a High Court of East Africa with full jurisdiction, in civil and criminal matters, over all persons and over all matters in East Africa."

This article gave the High Court full jurisdiction and legal authority, to hear and determine Moslems Matrimonial Suits. Further more, the Supreme Court having accepted the fact that a valid Mohammedan Marriage does exist in the case of Gulam Fatima v Gulam Mohammed¹⁴ should have adjudicated Matrimonial matters which arose.

In 1918, in the case of Fatima Binti Athman v Ali Baka¹⁵ Hamilton J. stands firmly to ^{his} previous view¹⁶ as to the jurisdiction to adjudicate an matrimonial cases or suits arising from Mohammedan Marriage. He stated that the 1902 ordinance clearly contemplated a monogamous marriage only. A muslim marriage was not a marriage in accordance with the ordinance. He reasoned that neither did the 1902 Marriage Ordinance make special law which directed or required the Court to administer to Mohammedan Law in matters of marriage and divorce. By virtue of Section 33 of the East African Marriage Ordinance Courts, had therefore to refuse to decree restriction of conjugal rights in a marriage, which was or had been polygamous. Further more, according to him, it was not the intention of the government to allow courts to apply Mohammedan Laws.

This statement of the law is difficult to support. Penalties are provided under the Mohammedan Registration of Marriage and Divorce,¹⁷ for non-registration of Mohammedan Marriages and divorce. The ordinance did not invalidate the Marriage on failure to register nor did the divorce become void. There was sufficient evidence of the government intention to allow the High Courts to have jurisdiction to adjudicate in Matrimonial Suits from Mohammedan Law.

It is therefore evident that the supreme court, not only refused to adjudicate on matters arising out of Mohammedan Marriages on grounds that it had no legal authority, but

also treated a Moslem Marriage not a good Marriage. Mainly because a Moslem Marriage was potentially polygamous.

This problem existed until 1920 when the principal ordinance concerning Islamic Marriages and Divorce and Succession was promulgated.¹⁹ This ordinance was passed to solve four problems. First it was to amend the laws relating to divorce. Second it was to make it clear that the colonial courts of English legal system, too had from Mohamedan Marriages. Thirdly it was to indicate the classes of people governed by Islamic Law and lastly to indicate the relationship between Islamic Marriage Law and African and European Marriage Laws.¹⁹

The ordinance did not state the rules themselves, but made it clear that Islamic Marriage, Divorce and Succession laws were to apply to all muslims in Kenya. Section 3(3) of the Mohammedan Marriage Divorce and Succession Ordinance 1920 stated expressly : -

"In all such matrimonial causes or suits.... the supreme court shall exercise its jurisdiction and act and give relief upon the principles of Mohammedan Law applicable to the same respectively and **not otherwise.**"

It is worthy of note that, although the contents of the Islamic Laws on Marriage, Divorce and Succession were not substantially interfered with by the legislative, they were subjected to 'civilization' which meant westernization by the colonial Courts.

This fact is illustrated by the attitude of the colonial judges, who treated a Mohammedan Marriage as no ordinary or good marriage in various cases.

The case of Gulam Mohammed v Hadayati bibi²⁰ which was decided in 1922 sought to establish three facts.

First, the Courts now had jurisdiction to decide and hear causes arising out of Mohammedan Matrimonial Suits by virtue of 1920 ordinance. Secondly, the issue of domicile is not relevant when deciding or hearing a Matrimonial Suit under Mohammedan Law. And lastly, a suit to recover dowry is not a Matrimonial Case or Suit as defined by Mohammedan Marriage or divorce 1920

Contrary to the case of Gulam Fatima v Gulam Mohammed²¹ in Gulam v Hadayati bibi the court of Appeal, presided over by Sir W.M. Cater held that: -

"The court had jurisdiction to decide the suit without going into the question of domicile."

In Gulam Mohammed v Gulam Fatima, it had been held by the Supreme Court, that one of the parties, not being domiciled in East Africa, the Court did not have jurisdiction to hear the Suit. As regards the third issue, the Supreme Court of Kenya held that a suit to recover dowry was not a Matrimonial Suit as defined by the Mohammedans Marriage ordinance 1920 because the word 'relief' under Matrimonial suits, meant relief in aid of or is dissolution.

of the marriage bind and did not include such matters as a claim for dowry.

The view held by the Supreme Court of Kenya was not in accordance with Islami Law. Divorce under Islamic Law is the most detested item in a society, as stated in the Holy Koran²³ It is therefore, the final remedy restored to after conciliatory measures have failed to bring about a peaceful reconciliation between the spouses. Hence in aid of relief does not mean the dissolution of Marriage under the English Legal System.

Sir W.M. Cater authoritatively stated in this case²⁴

"I am quite satisfied that the Court would have had jurisdiction to entertain a suit for the payment of dowry which the plaintiff was claiming by virtue of a contract, as is the case in this suit. Dowry is admittedly one of the essentials in a Contract of Marriage under Mohammedan Law. But after the marriage has been completed the enforcement by the wife of such a contract as the one on which the action in this case, was brought cannot in my view be regarded as a claim or relief in respect of the Marriage."

The payment of dowry is not an action under Contract, as stated by Sir W.M. Cater.

It is a matrimonial relief. D.F. Mulla²⁵ states that under Islamic Law, the refund of dowry by the wife to the husband is a necessity when she demands a divorce. Once she pays the dowry back, the husband is under an obligation to divorce her. Mulla further states : -

"the object of dowry is to serve as a check upon the capricious exercise by the husband of his power to dissolve the Marriage at will."

Therefore according to D.F. Mulla's dowry plays an important role in regulating divorce under Islamic Law. Consequently, as divorce is a matrimonial cause, dowry is a matrimonial relief.

Fyzee A.A.A.²⁶ has cited two cases in India where dowry has been taken to a Matrimonial relief and not a contract. In Abdul Kadir v Salima²⁷ Mr. Justice Mohmood defines dowry as follows: -

"Dowry under Mohammedan Law is a sum of money or other property promised by the husband to be paid or delivered to the wife, in consideration of the marriage and even where no dowry is expressly fixed or mentioned at the marriage ceremony, the law confers the rights of dowry upon the wife. The result is that dowry is purely in the nature of a marriage settlement, therefore a Matrimonial Suit."

Dowry therefore plays an important part in a Muslim marriage and any attempt to divorce it from the matrimonial suit relief is wrong. The judges should have realised that the form of relief under English Law normally judicial separation, is not identical to the relief recognized under Islamic Law. The two system of marriages are different.

The colonial courts, not contented with their civilizing mission of laws, went further creating one law for all people.²⁸ They did this in certain fields through the device of interpretation of Statutory Law in cases that are customary, Muslim or Hindu. The colonial Courts replace Islamic Law of custody with the English Law of Kenya. This is illustrated in the case of Mana binti Mazee v Mohammed Hassan²⁹ which was decided in 1932. The issue in this case was the custody of a child whose parents were Mohammedans. What law was applicable, to the guardianship of the child? There were two rulings at two different periods, of the same case. It is necessary therefore to consider both rulings, so as to account for the courts' attitude towards the application of Islamic Law.

At the first ruling in 1932, it was held by Lucie-Smith J. that according to the evidence of the registrar of Mohammedan Marriage and the works of Sheikh Abdul Kadir of Aden, the custody of the child under Islamic law is in the hands of the maternal grandmother of the child, up to a certain age, in the absence or disability of the child's mother.

This was a sound decision on custody under Islamic Law. But then, the same court in 1941 refused to apply Islamic Family Law on custody, when the same parties appeared before it. The second application was made by the defendant for reasons that as held by this Court the guardianship of the petitioner expired when the Child attended the age of seven and thereafter the the guardianship belonged and belongs to the defendant according to the principles of Mohammedan Law.

The Court of Appeal held on the second application that the question of guardianship of minor children of Mohammedans are to be determined by the courts of the Colony according to the English Common Law Principles³⁰ and not as previously held in accordance with Mohammedan Law. Whereby over-rulling the law on custody under Mohammedan Laws.

The colonial courts believed the English type of Marriage and considered the Muslim ways of life a state ahead of the african philosophy of life in the process of civilization. In Ali Gunyuna v Ali Mohammed³¹ the issue was whether the estate of a native Mohammedan could divorce in accordance with the Digo Customary Law. Sir Charles Griffins C.J. answered the question in the negative, he said

"Succession to a native Christian estate follows the law of his tribe which such christian belongs. But it is because the Indian Act does not apply to natives, that the only law that can be applied is the Law and Custom of the deceased Native Tribe. But where natives are Mohammedans, the Mohammedan Law applies to them".

The decision was commonly accepted as holding that Mohammedan Law must invariably prevail in any conflict with natives estate law and custom regarding the disposition of the estate of the deceased african, who had at one time professed Islam in however, shallow or ignorant fashion. The judges held this so, notwithstanding the fact that the intention of the imperial government, in allowing the african natives law and custom to operate, was that different Marriages and Succession Laws should apply to different communities with different philosophies of life.

This attitude of the Colonial Courts towards Native inferiority and Muslim Superiority in civilization, need not blind us. They never accepted Islamic philosophy as of life. They still considered and contemplated under the 1920 East African Marriage Ordinance, a situation where a Muslim became civilized and conducted marriages, into English or Statutory type of Marriage.³² A similar situation was contemplated under the Mohammedan Marriage Divorce and Succession Ordinance 1920.³³

However, there was a half-hearted recognition of potentially polygamous marriage by the Colonial Courts. After the Second World War, recognition of polygamous marriage was inevitable, even in England itself. The change of attitude by the judiciary corresponded with the colonial policy. Although they still believed that their philosophy of life, economical and legal systems were the best, they realized colonialism was not here to stay. The civilizing mission though good was to be sparingly used. R.U. Mwanji³⁵ illustrates this judiciary change of attitude. The Privy Council, then the highest Court of Appeal for Eastern Africa and other Commonwealth Countries was prepared in this case to recognise as valid for all purpose a potentially polygamous Marriage.

B. POST - INDEPENDENCE PERIOD.

This part of the discussion concentrates on constitutional and legal basis for the application of Islamic Law, and the dominant attitudes adopted towards its application from Independence to the present day.

According to G.K. Kamau¹ the ex-British Colonies and Protectorates were very much unlike the European Nation State. The European nations states, had long period of nationhood, a homogenous community with one culture or one way of life.

While the ex-colony has two or more distinct communities with distinct philosophies of life, which are given effect by different marriage law. In Eastern and Central African countries of Kenya, Tanzania and Zambia, the Nation states has four distinct communities each of which has its own system of Marriage Laws. The four communities are africans who have a common philosophy of life and belong to different ethnic groups called tribes, are treated as a single community although their marriage laws differ in some respect. The Moslems and Hindus who emigrated from the Middle East and Indian Sub-Continent brought the Moslem Hindu Marriage Laws with them. And the European who were mainly English had the English way of life and therefore had English type of Marriage Laws. Due to this historical background and the nature of the present society, there was a need to retain the few systems of family law existing in Kenya.²

On the 12th December, 1963 Kenya attained her political independence. The colonial legal system, which existed was retained to the present day. The first statutory basis of the application of Islamic Family Law in Kenya after independence was the constitution³ which is the Supreme Law of Kenya.⁴ The Constitution has rooted in, the ideas of human equality and dignity, which are embodied in Section 70, 78 and 82.

Section 78 protects the freedom of worship and conscience. Section 82 inter alia, protects different personnel laws, and Section 70 protects the fundamental rights of all citizens. Hence the African who regulates his affairs in accordance with customary law, Moslem who profess the Islamic faith, Hindus who profess Hindu faith and the Europeans who are mainly from Britain, are equally protected by the Kenyan Constitution.⁵ Accordingly, the Muslims in Kenya are allowed to lead their kind of life within the guaranteed human equality and dignity.

A further protection was given to Islamic Family Law. Its application was guaranteed in Part II of the Constitution⁶. Another Statutory is the Kadhi Magistrate Courts Act 1967, which was enacted to establish the special Muslim Courts Validity. It provided that no part of the former protectorate was to be outside the jurisdiction of such Courts of a Kadhi.⁷ The jurisdiction of the Kadhi Courts was extended to the determination of questions of Muslim Law, relating to personal status, marriage, divorce and succession, in proceedings in which all the parties profess the Muslim religion.⁸ It further provided that only a Muslim professing knowledge of Islam would be eligible for appointment by the judiciary service commission as a Kadhi.

It is important to note that Islamic family law was not subjected to the repugnancy clause under the Judicative Act 1967 Section 3(2) which demands that customary law must not be repugnant to justice, and morality. There are 3 reasons that may be given for such treatment of Islamic law. Firstly, the Islamic legal system as noted before is codified in the Koran, and it is a legal system of its own. Secondly, the Muslims had their own Courts, known as the Kadhi Courts, which applied Mohammadan Laws. Lastly, the Arabs before independence were claiming autonomy for the Coastal strip. They wanted nothing to do with an independence Kenya and wanted to secede. This was in fear that the Coastal minorities way of life and land titles were to be affected. An agreement was reached between the Sultan and the British government that safeguard would be entrenched in Kenya Constitution to meet the legitimate and very real anxieties of the Coastal minorities.⁹ Whereby Islamic law was not to be interfered with. However, it is evident that the real reasons were political rather than the structure of the Islamic legal system.

The courts continued with the anglicization of the Islamic Law on Marriage, Divorce and Succession.¹⁰ It was held in the case of I v I¹¹ that the Married Woman's Property Act 1882 of England is a statute of general application.

It applied to all married women in Kenya, irrespective of the kind of marriage contracted.

Trevelayer J. proceeds on the assumption that

"the circumstances of Kenya and its inhabitants do not require, that married women should not be able to hold property ...in fact the majority of the country's inhabitants are subjected to customary law, is irrelevant, as Customary Law is subject to any written law."

The married women's property Act 1882 permitted the spouses to hold separately the property they owned, before marriage and recognized their rights to acquire and hold property separately during the existence of the marriage. This Act was meant and reflects the English idea of good life.¹² It was not meant to create a situation where the Muslims women is not subjected to Islamic Law on matters concerning property, but rather to English law. G.K. Kamau¹³ gives certain illustration that shows clearly, that certain laws intended to enable the Europeans to lead an english way of life in Kenya, and not directed to the native Africans or Muslims. First he points out that in all English speaking African countries there were European courts manned and run by Europeans, which were intended to be used by them mainly.¹⁴ Secondly, in criminal trials, in Kenya, which was intended to be a "white man's country", the Europeans had a jury trial. While the Africans had not.¹⁵

Lastly, the Courts in applying marriage and property laws, were to exercise their jurisdiction in accordance with laws applied in Matrimonial proceedings in England.

In Ayob v Ayob¹⁶ the court of Appeal held that a monogamous English type of marriage contracted under the marriage act is such a superior institution, that it is not capable of being converted into another type of marriage. The judges considered the English type of marriage as the highest type of civilization, on the grounds it is monogamous.¹⁷ This attitude of the English court judges is purely discriminating and racialist in nature. Kenya's legislative¹⁸ and Commonwealth Courts¹⁹ decision show that marriages can be converted into different forms and kinds, with the change of either domicile or faith, which goes with the change in life style. For example in the case Rattansay v Rattansay,²⁰ it was held in 1960

"... admission by the respondent of the Islamic faith being genuine, made her subject to all respect to the religious laws of that community and the marriage between them shall be dissolved by talak, under that law, although contracted first under Marriage Ordinance is a civil ceremony."

In A-G of Ceylon Vs Reid²¹ the Privy Council stated

"Every person who is devided in Ceylon which consists of many races, religion and faith has a right to change his religion and personal law and thus to contract a valid polygamous marriage....."

The court in R. V Kadhi²² laid down the principle that there is no obligation on a wife to remain with her husband at common law and that the Kadhi Court had no jurisdiction enabling it to direct that, a wife should return to her husband. The order according to the Court, was unconstitutional in depriving the applicant of her Liberty, freedom of movement and holding her in servitude. Under the principles of Mohammedan Law, however, a wife who refuses 'without lawful course' to cohabitare with her husband, can be ordered to return to the Matrimonial home.²³ And the Kadhi was executing his duties in accordance with Islamic principles. The law clearly states that where the wife 'without lawful purpose' refuses to cohabitare with her husband, the court has the right to order her return to the Matrimonial home. Had there been a lawful purpose, for the wife not to cohabitating with her husband, the Kadhi would naturally not have ordered the wife back to her husband. For it would be contrary to Islamic law and therefore not applicable.

Hence the High Court decision watered down Section 78 of the constitution, which protects all types of religion and faith. The court should have considered the wife's right of Islamic Law, instead of the Common Law.

In regard to guardianship, the High Court still firmly follows its previous decision²⁴ discussed earlier on. This is illustrated by Yasmin v Mohammedan²⁵ decided in 1973. The High Court held it was

"endeavour with jurisdiction to safeguard the interests and welfare of the Infants.... all infants in Kenya of whatever community, tribe or sect falls within the ambit of the Guardianship Infants Act. And the Court is is charged with the sacred duty of ensuring that their interests are protected.

It is necessary to point out that although the Law, after independence recognized polygamous Marriage, both under customary as well as Islamic Law, they appear to have been treated as inferior to the monogamous marriage.²⁶ For as late as 1963, it was held by the Court of Appeal for East Africa, that communication between spouses of polygamous marriages were not privileged²⁷ in the case of Abdulrehaman bin Mohamed and Another V R²⁸

Marital harmony is protected by rules of evidence which make it possible for spouses to avoid embarrassment, that would arise from being compelled to participate in the prosecution in courts, of the other party by strangers to the marriage.²⁹

A spouse is generally not a competent witness for the prosecution, where the other spouse is charged with a crime.³⁰ Therefore she or he cannot be compelled to disclose any communication made to him or her during the marriage by the other spouses. Where a spouse is a competent witness for the prosecution in a Criminal Case, he or she will testify only if the one accused so demands.³²

The decision in Abdulrehman's Case was based on the earlier view in Rv Amekyo³³ that polygamous marriage had all the elements of non-existence of mutual trust and confidence, which existed only in a civilized marriage. As a result the wife of such a polygamous marriage was not within the preview of the general rule that the husband or wife of the person charged is not a competent witness for the prosecution.

Kassem in his critique on the commission report on "Marriage and Divorce in Kenya", argued that a polygamous marriage does fall victim in the definition of Marriage in the case of Hyde v Hyde which was

created in the 1902 marriage ordinance. According to the definition, marriage is a voluntarily union of one man and one woman intended to last for their joint lives. A polygamous union is a union between one man and one woman. A polygamist enters into two or more separate marriage contract and not one marriage contract, with two or more women. Hence there is no reason why a polygamous marriage cannot be considered as a valid institution which can benefit from evidence rule of competency and competability between the spouses.

Kenya has a marriage Bill which is based on the recommendation of the Commission Reports on Marriage and Divorce in Kenya. The commission on marriage and Divorce was appointed by the Kenya Government

"to consider the existing laws relating marriage, divorce matters relating thereto; to make recommendation for a new law providing a comprehensive and as far as practicable, confirm law of marriage and divorce applicable to all people in Kenya, which will replace the existing law in the subject comprising Customary Law, Islamic Law, Hindu Law and the relevant Acts of Parliament and to prepare a draft of the new law. To pay particular attention to the Status of women in relation to marriage and divorce in a free democratic society."35

The main aim of the commission was to find a practical way of unifying all types of marriage and divorce laws existing in Kenya.

G.K. Kamau's view towards such unification of the marriage laws, is that the Bill is unconstitutional and against social realities.³⁶ As for F.M. Kassam in his critique on the Commission's report on Marriage and Divorce law in Kenya, believes, that the only reform to take place is in the form of preserving the existing Customary religious laws, in so far as they are genuinely observed and enforced. While at the same time harmonising the laws so that all forms of marriage enjoy social and loyal part of status. He gives the example of Section 3(1) of the Tanzania Evidence Act 1967 which defines husband and wife in a way so as to include a husband and wife of a polygamous marriage. In the past privileged communication was confined to spouses of a monogamous marriage. Kassam further points out that unification can be successful where different systems of law which are the subject of unification. Under the marriage and divorce laws in East Africa, there are some basic differences which may cause great difficulty in the unification process. He says there is a broad division between monogamous and polygamous marriages. Extra-judicial divorce appears to be a common practice under customary and Islamic laws as opposed to judicial divorce under the monogamous system, while under customary and Islamic law, puberty is considered the marriagable age. Because of these basic difference, any form, of unification

may disturb the status quo, may cause unnecessary hardship and lead to an unusual wide gulf between the law in the books and the actual behaviour of the people.³⁷

The commission of the law of succession was appointed by the late President of Kenya

" to consider the existing law of succession to property on death, the making and proving of wills and administration of estates, to make recommendations for a new law providing a comprehensive and so far as may be practicable, uniform code applicable to all persons in Kenya which will replace the existing law on the subject....."38

The general policy consideration underlying the enactment of the law of succession Act 1972 as seen by the Commission, are found in paragraphs 9 and 17 of the Commission's Report. First, the new law should meet Kenya's conditions where the African way of life is changing rapidly.³⁹ This presupposes that the traditional way of life has changed and all the Kenyan people have adopted western or English mode of life which view is incorrect.⁴⁰

Secondly, Kenya is a country of many races, religions and communities with different philosophies and consequently as little harm as possible should be done. If this consideration of the Commission's Report on the law of succession is strictly adhered to

it would inevitably come into direct conflict with the subsequent one namely that

"the new law should encourage national unity and building Kenya as one Nation."⁴¹

It was also thought that the changes should be understood by, and accepted to, the people" But one wonders whether the changes introduced by the new law are understood by the people at all.

The best policy consideration of the commission's Report was that the new law should be in conformity with the principles embodied by the Kenya Constitution.⁴²

It is important to observe that the commission misinterpreted Section 78 and 82(4) of the Kenya Constitution. The two provisions read together guarantee an individual the freedom to worship and the freedom to live according to his philosophy of life. Consequently a change of one's religion includes a change of one's personal-law and to say that there is no link between one's faith and one's personal law is to go against the spirit of the constitution.⁴³

It can be argued further that in so far as the Kenya constitution remains in operation, as it is, the law of Succession Act is unconstitutional to the extent that it contravenes the provisions of the Constitution.⁴⁴

Of course, the assumption made by the commission was that independence has brought with it economic, sociological and political intergration amongst the peoples of Kenya so much so that it would be justifiable to have a uniform code of Succession Law without offending the different religions beliefs or interfere with the different philosophies of life. This is absurd.

CHAPTER TWO.

(PART ONE)

THE LAW OF DIVORCE IN THE MUSLIM WORLD.

INTRODUCTION:

In part one of this Chapter, the law of divorce and its reforms in the Muslim World are discussed.

In part two, Islamic Law of Divorce and its reforms in Kenya are discussed.

Part One.

Hamilton Gibbs says

"the Sheria¹ does not only represent the master science in the Muslim World, but the most effective agent is moulding the social order and community life of Muslim people and is holding the social fabric of Islamic Compact and secure through all fluctation of political fortune."²

Anderson believes that

"..... although every part of the Sheria is regarded as based on devine revelation, there can be no doubt, that it is in the field of family law(especially in such matters on Marriage, divorce and inheritance) that the Quran itself is not explicit, that the sacred Law has been most meticulously followed and that Muslims, have regarded that law as paratakng most closely of the very wrap and woof of their religion."³

The Chief source of these Islamic family laws are derived from the Quran, the holy book of the Muslims and Sunnah, the teachings and practices of the prophet Mohammed.

The supplementary sources are Al-Istislah, the unprecedented judgement motivated by public interest and the custom and usage of a particular society and deed known as Ali-Lif.⁴

The Muslim Marriage, we have seen, is regarded as a Civil Contract. It is dissoluble, under given circumstances. Divorce is a natural concept associated with Marriage and Contract. Islam lays down a number of injunction for the reconciliation of the parties, if such circumstances arise, as to jeopardise the chances of a balanced happy marriage. However, where the spouses are inevitably incompatible, divorce can be initiated.⁵

Prophet Mohammed showed his dislike of divorce.

He is reported to have said

"with Allah the most detestable of all things permitted is divorce".⁶

Ameer Ali one of the distinguished Muslim judges (Kadhi), restrained the power to divorce possessed by the husband. He gave to the woman the rights of obtaining a separation on reasonable grounds. Towards the end of his life, he went so far as practically forbidding the exercise of divorce by men without the intervention of arbitrators or the elders or judges.

He considered 'Talak' as an instrument that prevented conjugal happiness and interfered with the proper bringing up of children.⁷

Dr. Abdulreheman Aswabunani⁸ defined divorce as

"the termination of Matrimonial life by competent husband or wife at a particular time before witnesses with the intension to divorce or meaning of divorce, it should be voluntarily so, under no compulsion."

According to this definition a husband must fulfil three conditions before he initiates divorce proceedings under Islamic Law. First, the words pronouncing divorce must indicate an intention to dissolve the marriage as illustrated in Rashid Ahmed V Anise Khatum.⁹ It was held, the words

"I have divorced my wife forever"

was a clear indication of an intention to dissolve the marriage. Secondly, if the husband had pronounced Talak (divorce) under compulsion or influence of intoxication, the divorce is not valid. However, the application of the law varies with Islamic School of Thought or Sect, a Muslims belongs to. Under the Hanafi Law, as distinguished from the Shafi or Ithna-Asheri¹⁰ a divorce pronounced under compulsion or under the influence of intoxication is valid and effective.¹¹ It had been suggested by Kadhi Ameer Ali¹² and AbdulRaham A.F.M.¹³ of the institute of

Muslim Law in Calcutta, that in cases of divorce under compulsion or influence of intoxication, the court should on grounds of equality apply the Shafi and not the Hanafi Law, where the parties happen to be Hanafis, as the rule is absurd and unjust.¹⁴ This call has been followed by most of the Muslim States. As remarked by William R. :

"It is true in the majority of the Muslim countries the widler extravagance of the Hanafi Law of divorce have now been remedied and a divorce formula pronounced by a Muslim under the influence of Compulsion, drink, or uncontrollable passion is no longer regarded as valid or binding."¹⁵

Although India and Pakistan has, had no legislation of this effect, the courts however, adopt the Shafi Law, when such cases appear before them.¹⁶

Thirdly, the parties must have the capacity to divorce. Parties must be of sound mind. Talak cannot be pronounced if the wife is in her menstration period, or after sexual intercourse.¹⁷ The presences of witnesses is an essential element in concluding a valid Talak.

Therefore, it is wrong to state, that the greatest defect of the Islamic system of divorce is the absolute power given to the husband to divorce his wife without restrictions, at anytime he wanted. The Koran forbids the man to seek pretexts for divorcing his wife, if she has been faithful and obedient. The husband is also restricted in exercising his right to divorce on the slightest disgust.¹⁸ The husband is given the option to initiate the act of divorce, but his will is fettered by restrictions, as mentioned above.

The next issue is to examine the grounds and forms of divorce under Muslim Law. Fyzee A.A.A. Classifies the dissolution of Marriage under Islamic Law into three categories : -

- i by the death of Spouses
- ii by the act of the parties
- iii dissolution by judicial process.¹⁹

The writer however, feels that the dissolution of a Muslim Marriage can be classified into the following Sectors : -

- i Dissolution through operation of law, which covers; by death, ila, apostasy and marriages falling within prohibiting degree.
- ii Act of the parties.
- iii Judicial Process.

A. DISSOLUTION OF A MUSLIM MARRIAGE THROUGH THE OPERATION OF LAW.

"By operation of law" means on the happening of an event like death or an conclusion of an illegal contract whereby the subject matter in issue ceases to exist.²⁰

According to Tyabji Faiz, the death of the husband or the wife operates in law, as a dissolution of the marriage. The effect of this dissolution, is that after the wife dies, the husband may remarry immediately. As for the widow, she has to wait for four months and ten days after the death of her husband, before she can remarry. This period is known as 'Idda'. If on the expiration of idda period the widow is pregnant, then she waits until she delivers the child, before remarrying.²² The reasons for idda is to establish whether the widow is pregnant so as to determine the legitimacy and inheritance rights of the child.²³

As regards apostate, a muslim husband who renounces Islam is an apostate and as such his marriage with his Muslim wife is dissolved. ipso facto²⁴ The Muslim women, according to the older law, as laid down by the classical jurists of Islam. A postary on the part of the wife operated as an immediate and absolute dissolution of Marriage.²⁷

However, the present law in most of the Muslim countries specially in India, is that the mere renunciation of Islam does not dissolve the marriage. Even after the wife has offered her husband to accept Islam, on his refusal her marriage is not dissolved. This was so held by the Indian High Court in Robaba Kharim v Khadadad Bamaaji²⁶. Blogder J. who preside in the High Court held that a Zorastain wife

"could not do away with her marriage by a mere proffession of Islam, or refusal of Islam by her husband, upon she offering him so."

This rule does not apply to a woman converted to Islam from other faith, who re-embraces her former faith. This was the decision in Mst Resham Bibi v Baksha.^{28 (a)} Where Ameer Ali Kadhi in Indian High Court held that, if a wife becomes a Jew or a Christian this rule should not be applied in its strictness, due to the changing social conditions. However, the law remains, if the wife re-embaces her old faith the marriage between her Muslim husband and herself is dissolved.

Fyzee pointed out that in a modern state where all religions are equal in the eye of the law, the rule of apostacy under Islamic law cannot stand, it must be subjected to modification.^{28(b)}

He criticised J. Jahas v Abinash Chandra²⁸ where it was held that a married christian domiciled in India, after his conversion to Islam, is governed by Mohammedan Law and is entitled during the subsistence of his marriage with his former christian wife, to contract a valid marriage, with another woman, according to Mohammedan rites. Fyzee disagreed with this discussion on the grounds that the Court appeared to have over looked the important principle, that a previous marriage in accordance with one scheme of personal law, cannot be destroyed by the mere adoption of another faith, by one of the spouses.²⁹

Ameer Ali provides a solution to a situation where conflict of interests arises due to the existence of various religious sects. He says the enforcement of Muslim law, as a whole in regard to apostates, in a country inherited by Moslems and other religious sects, is contrary to the principles of justice.⁽³⁰⁾

Therefore the position of the married parties one of whom abandons Islam must be determined on principles of law, other than those relating to apostacy. Such, would be, to apply the general rule that a non-muslim cannot contract a valid marriage with a Muslim. It is an illegal union. Consequently, when a Moslem husband abandons Islam, his connection with his wife becomes an illegal or at any rate an invalid connection.

The women accordingly on the expiration of her idda period can marry someone else. This then would make it easier and better for the woman to acquire her divorce.

Under ila (vow of continence) the husband swears not to have intercourse with the wife and abstains for four months or more. The husband may revoke the oath by resumption of marital life. After the expiration of the four months period, under Hanafi law, the marriage is dissolved without legal proceeding but aliter in Shafi law, legal proceedings are necessary. However, this form of divorce is absolute in India and many parts of the Muslim World, according to Fyzee -

"....apparently there is no case law on the subject."³¹

A bar to marriage void or disoluable through the operation of law, is on the grounds of blood relationship.³²

Therefore, a marriage prohibited by reason of consanguinity and affinity³⁴ is void. Similarly, a marriage forbidden by reason of fosteryes³⁵ is void and absolute.³⁶

B. ACTS OF THE PARTIES:

Under this heading, dissolution of marriage, is subdivided into three categories.

1. By the Husband : He can initiate divorce through

(a) 'Talak' which means the repudation of the marriage on pronouncement of the word Talak.

- (b) 'Zihar' which means injurious assimilation by the husband against the wife.
- (c) 'ila' which means vow of continence. This category has been discussed above, under the heading divorce through the operation of law.³⁷

II Dissolution by the Wife: It is known as Talaq-i-Tafwid (the power to divorce by the husband is delegated to the wife).³⁸

III By Common Consent: Whereby divorce may be initiated by both parties; there is a mutual feeling to divorce each other; known as 'Mubara'. Or divorce may be initiated by the wife, on payment of compensation to the husband.³⁹

Dissolution of marriage by the husband are of two kinds. The revocable divorce, or most approved form known as 'Talaq-i-Sunna' and the irrevocable divorce or approved form known as 'Talakul Baida'. The Talaq-i-Sunna or revocable divorce, is further subdivided into two classes by Mulla and Fyzee. The 'Ahsan form' and 'Hasan Form'. Under the Ahsan form, there is one single pronouncement of Talak in a period of tuhr (purity) i.e. when the woman is free from her menstrual cause, followed by abstinence from sexual intercourse during idda.⁴⁰

Mulla and Fyzeelives this mode or procedure was the most approved by the prophet or proper and orthodox form of divorce.⁴¹

One of the unique feature of divorce under Islamic law is that the pronouncement made in the Ahsan form is revocable during iddat period. This period is three months from the date of the declaration of Talak, or if the woman is pregnant until delivery. The husband may revoke the divorce at any time during the iddat.⁴² Such revocation may be by express words or by conduct. An example of revocation by conduct is resumption of conjugal intercourse. However, after the expiration of idda the divorce becomes irrevocable.⁴³

The Ahsan form consists of successive pronouncements during three consecutive period of purity (tuhr). Each of these pronouncements should have been made at a time when no intercourse has taken place, in that particular period of purity. During any of the three periods of purity the husband can re-marry the wife. The third pronouncement operated in law as a final and irrevocable dissolution of the marital tie. The marriage is dissolved and re-marriage becomes impossible.⁴⁴

This is so because the prophet, according to Kadhi Nazar, Ameer Ali and Fyzee by the rule of irrevocability of the third pronouncement, indicated clearly that such barbarous pre-Islamic practice, of divorcing ones wife and taking her back several times, in order to ill-treat her, could not continue. Hence if the husband really wishes to take the wife back, he should do so after two reconcilations, the third would operate as a final bar. These rules of divorce follow the code in the Koran injunction.

"then when they have reached their term, take them back in kindness or part from them in kindness."⁴⁶

This revocable type of divorce is applicable to all Sects of the Muslim Community.⁴⁷

As to the irrevocable divorce, Talaqui-bida, is practice by the Sunnis and Malaki sects. Under this form of divorce, one either takes a triple declaration in a single tuhr (purity period) in one sentence,

"I divorce thee",

or in three sentences,

"I divorce thee, I divorce thee, I divorce thee,"

or a single irrevocable declaration made either during the period of tuhr or otherwise.⁴⁸ The later form of talak may be given in writing. Such a bill of divorcement comes into operation immediately and severs the marital tie.

According to Tyabji⁴⁹ although this form of divorce is lawful, it is sinful under Islamic law. He points out that the deplorable development of the Hanafi law, the sinful or abominable forms have become the most common for

"men have always moulded the law of marriage so as to be most agreeable to themselves."^{50(a)} However, in the majority of the Muslim Countries, the wilder extravagances of Hanafi law of divorce, the repudiation of a marriage in one single pronouncement has been remedied, through Statutory Law.^{50(b)} The legislation now provide that a triple divorce pronounced on one and the same occasion, should be treated as only a single and therefore revocable, repudiation.⁵¹ Provisions to such effect according to Anderson "Law in the Muslim World" can be found in Egypt⁵² Sudan,⁵³ Jordan,⁵⁴ Syria,⁵⁵ Morocco⁵⁶ and Iraq.⁵⁷ In India, Tunisia, Singapore, Palastan, South Yemen and Iran, although no comparable legislation exist, the courts give effect to such cases.⁵⁸ The removal of the irrevocable form of divorce, is to reduce the rate of divorce. By restricting the husbands in exercising irrationally his power to divorce. Secondly, as pointed out earlier, to protect women from the conditions of pre-Islamic System, of re-marrying a wife just to ill-treat her.

The legal effect of an irrevocable divorce, is marital intercourse becomes unlawful between the couple. They may re-marry, unless there has been more than two pronouncement. Where there has been a triple pronouncement, re-marriage can only take place under certain stringent conditions. It is therefore, necessary to consider the procedure for reconciliation and re-marriage under Islamic law, which is unique in itself. When there have been one or two declaration under the revocable divorce (talaqui-Sunna) a reconciliation can take place during idda period, without a regular re-marriage. The reconciliation may be by a formal revocation of talak (divorce) or by resumption of Marital life. Where there have been one or two declaration under Talaq Sunna (revocable) and the period of idda has expired, a mere reconciliation is not enough. A regular re-marriage is necessary and possible. Lastly, where there has been three declaration amounting to an irrevocable talaq, the re-marriage of the couple is only possible after the wife has observed idda, and is lawfully married to another husband.⁵⁹ Such intervening marriage must be actually consummated. Then the second husband must pronounce divorce (talak), whereby the wife will have again to observe idda, after her divorce. Only after the expiration of the second idda, can a lawful marriage take place between the couple.⁶⁰

Such procedure must be strictly adopted otherwise the second marriage between the couple will be illegal.⁶¹ In case no second marriage takes place between the couple, then the union is void and the offspring of such union are illegitimate. Such was the case in Rashid Ahmad v Amsa Khatum.⁶² The husband had pronounced a triple talak on his wife. Four days later he executed a deed of divorce which stated that the three divorce were given under the irrevocable form of divorce. There was no remarriage between the parties, nor was there any proof of an intermediate marriage. The couple afterwards lived together and had five children. It was held that ...

"the words of divorce were clear and effectual, there was an irrevocable divorce. Under these circumstances, the acknowledgement of legitimacy was of no avail, and the five children born after the triple divorce were illegitimate. The bar to remarriage had not been removed".

The other form of divorce available to the husband is 'Zihar'. In Zihar, Mullar and Fyzee states that the husband swears that to him the wife is like "the back of his Mother."

If he intends to revoke this declaration, the husband has to pay money by way of expiation, or just for a certain period. After the oath has been taken, the wife has the right to go to court and obtain divorce or restitution of conjugal rights on expiation.⁶⁵

This is an archaic form of oath and dates from the pre-Islamic Arabia.⁶⁴ Zihar says Tyabyi⁶⁵

"has hardly any significance so far as the law courts in India are concerned."

While Anderson says that

"it is noteworthy that in Indian sub-continent and other Muslim States, the ancient procedure of Zihar and ıla are distinctive form of dissolution of marriage and may be dissolved as virtually extinct today."⁶⁶

Divorce by the Wife (Talaqu-i-Tafwid).

Talaqu-i-Tafwid means the power to divorce is delegated to the wife by the husband. The husband in Mohammedan Law has the power to delegate his own right of pronouncing divorce to some third party or to his wife. A stipulation that under certain specified conditions, the wife can pronounce divorce upon herself has been held valid provided the option is not absolute and unconditional.⁶⁷

This principle is based on the respective rights and duties⁶⁸ of the spouses is regarded by most of the Schools of Islamic law, to have been prescribed by the divine lawgiver,⁶⁹ and not susceptible to any variation, at the will of the parties to which expression may validly be given in stipulation or conditions inserted in the Contract of Marriage.⁷⁰ According to the majority of the Muslim jurists, the only stipulations inserted in a Marriage Contract which are valid and enforceable are those which serve merely to reinforce on particularized

one or another of the established right or duties of Marriage.⁷¹ Such as to the character and nature of dowry. any conditions designed to safeguard or improve a wife's position, such as a stipulation that her husband will not marry a co-wife, will not forbid her to practice her trade or profession or will not submit her to personal chastisement, were regarded as invalid⁷² and unenforceable by all sects of Muslim Communities except the Hanbals.⁷³

The Hanbals regarded as valid any stipulation in a Marriage Contract by which a husband undertakes not to do something which the Sheria normally permits but does not require as part of the essence of marriage.⁷⁴

Recent legislative reforms in the Muslim World have followed this Hanabal principle (which differs in one form from one state to the other) in order to improve the position of married women. In the Ottoman Empire, Article 38 of the Ottoman Law of Family rights 1917 restricts the practice of polygamy, by allowing a stipulation to be made by the wife in a Marriage Contract. It read as follows : -

"If a woman stipulates in her marriage contract that her husband shall not marry another wife till she is divorced, the Contract is valid and the stipulation recognised. The wife would be entitled to claim a judicial divorce should the husband fail to keep the stipulation."

This legislation runs directly contrary to the accepted doctrine of the Hanafis, Māliki's and Shafi's, who all hold the view, the divine lawgiver had prescribed the legal effects of a Contract of Marriage, which are not subject to variation

at the whim of the parties. Because a Muslim is permitted to have as many as four wives at one and at the same time, a stipulation to the contrary would be void.⁷⁵ J. Oak did not consider this so when deciding the case of Braddrudin v Asiha Begum,⁷⁶ where he noted,

"although a Muslim is permitted to have four wives, having more than one wife is not religious."

And in the case of Shahulameedu v Sabaida Beani⁷⁷ in India, he held that,

"the Quran itself had enjoined monogamy upon Muslims and departure there from as an exception permissible only in special circumstances".

The author agrees wholly with Oak J. decision.

The Hanbal principle of validation of a stipulation inserted by the woman, in the Marriage Contract, against the husband, was accordingly enacted Syria under the law 1953 Article 14, Morocco, Moroccan Code 1958, Article 38, Article 6 of the Iraq Law 1959 in Iraq and the Jordan law 1951 Article 21 of Jordan. Much the same position has also been reached in India and Pakistan but through judicial decisions rather than legislative enactment provided the stipulation are regarded by the Courts as reasonable and not contrary to policy of law.⁷⁸

And it had been held in the cases of Maharam Ali v Ayesa Khatum and Badaramissa v Mafiattalla⁶⁶ that an agreement between a husband and wife by which he authorized the wife to divorce herself from him in the event of him marrying a second wife, without her consent is valid and not contrary to the policy of law, provided the wife establishes clearly that the events entitling her to exercise her option have occurred and she has actually exercised her option.

Fyzee observed that the delegated divorce is perhaps the most patent weapon in the hands of a Muslim wife, to obtain her freedom without the intervention of any Court.⁷⁹ It is now beginning to be fairly common in India.⁸⁰ While Anderson points out that the insertion of a stipulation in the Marriage Contracts is today the rule rather than the exception in upper class families in Jordan. In most countries (Islamic) it is becoming increasingly common in all classes.⁸¹

Divorce by Common Consent:

Fyzee points out that the dissolution of Marriage by common consent of the Spouses is a peculiar feature of Islamic Law. Prior to Islam the wife had practically, no right to ask for divorce. It was the koranic legislation that provided for this form of relief.

As a general rule in 'Khula' the wife makes some compensation to the husband or gives portion of her dowry in consideration of which the husband is to give her, her divorce. However, most of the Islamic States, have legislated, that it is not necessary for a wife to pay compensation or consideration in return for her release.

Ahdur Raha noted that the Egyptian Code of Hanafi Law based on classical authorities lays down in Article 275 "A Khularepudiation (an validity take place before or after consummation of the marriage and without payment of compensation, by the wife." On the contrary, in India, the Muslim wife will have to pay at times compensation of greater amount than the dowry she received, if she wanted to repudiate her marriage through Khala.

The essential condition under Mubaran divorce is that both parties are happy to divorce each other, there is mutual consent.⁸² The legal effect of divorce by Khula and Mubaran is they operate as a single and irrevocable divorce. Therefore Marital life cannot be resumed by mere reconciliation, a formal remarriage is necessary.⁸³

C. JUDICIAL PROCESS:

Dissolution of Marriage under Islamic Law through judicial process or decree, is known as 'Lian' (divorce by Mutual Impreciation).⁸⁴ Lian is mentioned in the Koran⁸⁵ and is supported by the traditions of the prophet.⁸⁶ The procedure of lian may be described as follows. A husband accuses his wife of adultery but is unable to prove the allegation. The wife in such cases is entitled to file a suit for dissolution of marriage. At the hearing of the suit the husband has two alternatives: He may either formally **retract** the charge before the commencement⁸⁷ of the hearing whereby, the wife loses her right to divorce. Or the husband may not retract, where by he is called upon by the court to take oaths of allegation. This is followed by the oath of innocency made by the wife. After these mutual imprecations, the judge pronounces that the marriage is dissolved.⁸⁸

The High Court of Bombay held Mohammed Ali Mohammed v Haziabai,⁸⁹ that three conditions are necessary for a valid retraction by the husband. First, the husband must admit that he has made a charge of adultery against the wife. Secondly, he must admit that the charge was false and thirdly, he must make the retraction before the end of the trial.

Lian remedy available to the Moslem women is a unique remedy as opposed to the English Law of Divorce. Under the Statutory Law, adultery in itself is a ground for divorce, whereby, the act of adultery has to be proved to have taken place.⁹⁰ While under Islamic Law, an allegation against adultery is sufficient grounds for divorce. Aneer Ali cites the Koran by saying the power of the Kasi or Judge to pronounce a divorce is founded by the express words of the Prophet.

"If a woman be prejudiced by a marriage, let it be broken off."

According to Mulla, a muslim wife cannot divorce herself from her husband, except in the cases of Khula and Mubara. She may also sue for divorce on the ground of her husbands impatency or depend on 'lian'. Otherwise the wife is not entitled to claim divorce on any other grounds, not even if the husband fails to perform the obligations arising on Marriage.⁹²

However, today, in most of the Muslim States, this is not the position. In India under the Dissolution of Muslim Marriage Act 1939⁹³ in Egypt, Sudan, Jordan Syria, Tunisia, Morocco, Iraq and Singapore,⁹⁴ the Muslim wife may broadly speaking have four reasons to claim a judicial decree for divorce.⁹⁵

First ground is for certain 'defect' of body or mind which either prevent the husband from consummating the Marriage or which make married life dangerous. Failure to maintain the wife is another ground for judicial divorce available to the Muslim wife today. The exact period, which amounts to failure to maintain, varies within the Muslim countries, In India, the period is two years, while in Ottoman Empire is three years, and in Kenya, with reference to Mombasa, the Kadhi Courts have judged reasonable period in accordance with the circumstance and facts of the particular case.

Thirdly, any act which constitute intollerable treatment or cruelty against the wife by the husband is sufficient ground for her to sue for judicial divorce. Hence again, what constitute intollerable treatment or cruelty, varies within the Muslim Countries. Lastly the Muslim wife can claim for a judicial divorce, if she has been deprived of her husbands company for a considerable period of time. what 'considerable period' of time constitute is left to the Courts to decide and in some states the statutes so provides.⁹⁶

Morocco and Tunisia have gone further by introducing sweeping reforms on the context, that ^{the}wife may insist under Article 31(3) and Article (16) on a judicial divorce for any reason, or none at all provided she is prepared to pay her husband such compensation as the court may decree. And in Pakistan, a wife may in most cases, obtain a divorce for incompatibility of temperament or break down of marriage,⁹⁷ (which was never heard of as a ground for divorce under Islamic Law).

Further steps have been taken, by a few Muslim countries to discourage Muslim husband from divorcing their wives, even when this is their considered desire. Such steps is the awarding to the Muslim wife compensation for wrongful divorce. This is contrary to the basic law, that a husband has unfettered power to divorce his wife, for no reason at all. He is therefore, stopped from divorcing his wife, on the grounds that if it appears to Kadhi, the divorce was wrongful, the husband will be under a duty to compensate the wife, for injury and damages⁹⁸

In Syria Article 17 of the Law of Personal Status 1953 provides that

"If a man divorces his wife and it becomes plain to the Kadhi that the husband was treating her wrongfully by divorcing her, without reasonable cause, and in the case the wife suffers damages and poverty ... the Kadhi having regard to the husband's financial standard and also to the degree to which he had wronged her, of compensation and not exceeding the amount of a year's maintenance for one in her position, in addition to the maintenance due to her during idda, period.....".

Morocco, Singapore, Tunisia and Iraq have included a similar Statute, whereby the wife is entitled to financial compensation for wrongful divorce.⁹⁹ Although the financial compensation for a divorced wife according to Anderson, is a significance step in the right direction, the financial compensation is far from adequate.¹⁰⁰

According to him it is only among the Ismailias Khojas of East Africa, that a more realistic sum would in all probability be awarded.

It is interesting to note the Muslim husbands infettered right to divorce his wife, for no reason, has been reduced to a right equally available to the wife. Legislation in the Muslim World has been designed to ensure that no divorce is effective unless or until the intervention of the courts has been involved. As provided in the legislation of Tunisia,¹⁰¹ Iraq,¹⁰² Singapore¹⁰³ and Pakistan¹⁰⁴ that before making an order or decree of divorce the Sheriah Court may appoint in accordance with the Muslim Law two arbitrators, who shall endeavour to effect a reconciliation

between the parties. The most radical reforms which have hitherto been enacted in this matter are those of the Iranian Family Protection Act, South Yemen and Somalia Family Law, which insists not only on the woman to acquire a certificate of impossibility of reconciliation but also the husband before the dissolution of the marriage.¹⁰⁵ And in Algeria, Legislation is provided that

a" divorce could be effected only by judicial decree" within specified grounds on the demand of either of the spouses, or on their joint demand.¹⁰⁶

In conclusion Schacht says although the Muslim family law was based on a religious character, in the field of practice due to the changing social elements (such as women rights over person and property) protected by the Constitution shall prevail over the religious law so as to uprise the position of women.¹⁰⁷

CHAPTER TWO (PART TWO)

DIVORCE UNDER ISLAMIC LAW IN KENYA:

As noted in the introduction, there are various Muslim sects existing in Kenya. All but the Ismailis follow the Islamic Law on divorce as stated in the Koran.¹ The first part of this Chapter examines the extent to which Islamic divorce law is properly followed by the courts and the extent to which, if at all meets the needs of the Kenya Moslems.

The prevailing form of divorce in Kenya especially along the coast is the irrevocable divorce 'Talaqui-bida'² This form of divorce is practiced by the Sunni (Hanafi) Sect,⁽³⁾ which is the major Muslim sect in Kenya.⁴ This type of divorce does not permit the parties to reconcile, hence the divorce becomes absolute on pronouncement of Talak by the husband. In order to restrict the Muslim husband from exercising his power to divorce (at times irrationally),⁵ the Talaqui-bida' should be done away with. J.S. Reads recommended the adoption of Talaqui-Sunna, the revocable divorce.⁶ That is when a husband may pronounce triple talak at 30 days interval, making an allowance for reconciliation between the parties.

Recent research by the author has judicated that before 1975 the majority of divorces have been initiated by men. In such cases the Kadhi have nearly always granted divorce. Since it is believed, and wrongly so, that it is only men who hold the right to pronounce Talak.⁷ Divorce may not be pronounced by the husband :

1. When the wife is in her menstruation period
2. After having sexual inter-course with her
3. When he is drunk,
4. If he is not of sound mind and
5. Unless there are present at least two witnesses.⁸

In a largely male dominated Society the Kadhi may grant divorce, even though the husband had not complied with the stated conditions.

However, there was a marked change as to the procedure followed in relation to granting of divorce, in a few cases that were decided in the Kadhi Courts after the year 1975. The procedure was, on application of divorce the Kadhi, orders a two week reconciliation period between the parties.⁹ In the event that reconciliation does not occur, and both parties still insist on divorce the Kadhi then appoints an arbitration Committee, with the aim to reconcile the parties.¹⁰ On failure to reconcile the parties, divorce is granted.¹¹

The main grounds for divorce application at the Kadhi Courts are cruelty, non-maintenance and desertation.^{11(b)}

In Hadija bin Zuberi vs Mohammed Rajab,^{11(c)} the defendant, the husband of the plaintiff chased the plaintiff from the matrimonial home. The husband did not maintain his wife for a period of five years. The plaintiff was claiming for maintenance. If the husband fails to do so, she prayed the court to grant her divorce. The Kadhi Court held the husband was under an obligation to maintain the wife and ordered that he maintain her.

In Halima Mzee v Ali Hamisi¹² the defendant, the husband deserted the wife for six months. During this period, the defendant refused to maintain the wife. The Court held, having not heard evidence, that due to lack of maintenance and desertion the marriage was dissolved as prayed by the wife.

Similarly, in Amina Hussien v Bakari Omari¹³ the defendant had deserted the wife and children for two years, without leaving means for them to live on.

The wife claimed for divorce on grounds of non-maintenance and desertion, divorce was granted.

It is important to note here that there is no fixed period (as the above case indicate) in which non-maintenance claim may arise. According to research the Kadhi Courts consider the period in which non-maintenance claim may arise, to depend on the circumstances and facts of the case.

In Fatima Ali v Omar Salim Said,¹⁴ the petitioner prayed for the dissolution of her marriage on grounds of ill-treatment and cruelty. The court again granted divorce without proper evidence.

In all the above cases, divorce was granted without any proper evidence or explanation or discussion of the law relating to each case. For instance, divorce granted on grounds of cruelty as held in Fatima Ali Omar Salim Said¹⁵ did not even cover a definition or the degree for which cruelty would be sufficient ground for divorce. As to what acts amounts to cruelty was not explained. This inadequency proves rather serious, since out of every ten applications of divorce, upto seven are a result of cruelty non-maintenance or desertion.¹⁶

This defect was also pointed out by the High Court in Sayyed Omar bin Ahmed Saggof v Asha Binti Said.¹⁷

The High Court held in a civil case, evidence must be given to prove or disapprove a case. It is not enough for mere statements to be made. The courts cannot grant a dissolution of a Marriage, on the grounds of failure to provide maintenance, unless the liability of the husband to provide maintenance is proved.

Apostasy is among the grounds for divorce in the Kadhi Courts. In Fatima Ali v Omar Salim Said,¹⁸ the husband claimed the wife did not follow the Islamic religion rules. She did not fast during holy month of Ramadhani. The defendant^{dis-}claimed the allegation and explained that she still believed in the Muslim faith. The Kadhi Court held, renouncement of the Islamic Faith calls for the dissolution of marriage.

The divorce was not granted according to Sheria. Even if the wife had professed a change in religion. (the Muslim faith) the marriage could not be dissolved.¹⁹ The law is clearly stated in Robaba Khan v Khodad Baswayi²⁰ by Blogelen J. ,

"a wife could not be done away with by a mere preffession of Islam or refusal of Islam".

He referred to the works of Mulla²¹ and Fyzee²². Therefore, the fact that the wife did not fast, did not mean that she had no faith in the Muslim religion.

However, in Biasha binti Mohammed v Said William Nyello²⁵ the Kadhi held and rightly so, that due to the husband's mode of life (he lead a different way of life from that of the Muslim - he even went to church) he showed a non-profession of the Muslim faith, even if he had been converted. The marriage was declared invalid.

The law is that a husband who renounces Islam is an aspostate and as such his marriage with the Muslim wife is dissolved ipso facto²⁶.

Another case where the Kadhi Courts have made a mistake as to the law regarding divorce is Zahra binti Mohammed Awadh v Nasser bin Salim bin Nasib.²⁷ The wife petitioned for divorce on grounds that the husband was suffering from a contagious disease T.B., that he failed to have sexual intercourse with the petitioner and lastly he did not maintain her and the children.

The Kadhi Court refused to grant divorce on the ground that the husband was suffering from a contagious disease. The court ordered the husband to maintain the petitioner and her children within three days. This decision was wrong because the law is that due to certain defects of the body or mind which either prevent the husband consummating it or which make married life dangerous, the wife is entitled to judicial separation.²⁸

On appeal²⁹ the High Court referred to Alum 5th Volume by Al-Iman-Shaffi interpretation of the law³⁰ relating to the issue in question, and stated :

"the wife has the choice to annul a marriage when she finds that her husband is suffering from an infectious disease like T.B."

The reason being that the disease may infect the wife and her children. The doctor had given evidence that T.B. was a contagious and dangerous disease. The marriage was then dissolved.

The Kadhi appear not to be keeping up with the latest reforms taking place in the Muslim World. As Kenya is developing rapidly, with it the social conditions are changing. The woman plays a greater role, than just

being a mother and wife in the home. The muslim woman is also influenced by this social change. If the Kadhis do not adjust to the changing social conditions, an increase in divorce among the Muslim spouses will be inevitable. As indicated by the Chart below : -

THE DIVORCE RATE: IN MOMBASA MUSLIM COMMUNITY

Year	No Divorce	No. of Marriages	Ratio Divorce, Marriage %	Remarks
1936	-	233	-	
1937	-	253	-	Complete data could not be acquired.
1938	-	259	-	
1939	-	251	-	
1940	-	322	-	
1941	574	574	-	
1942	-	300	-	
1943	-	-	-	
1944	-	-	-	
1945	-	-	-	These divorces were on grounds of cruelty and desertion and Khula
1946	-	-	-	
1947	-	-	-	
1948	-	-	-	
1949	5	-	-	
1950	6	-	-	Compleat data could not be acquired .
1951	4	-	-	
1952	7	-	-	
1953	8	-	-	
1954	8	-	-	
1955	5	-	-	
1956	6	-	-	
1957	7	264	2.7	
1958	4	239	1.7	1.4% Average Ratio is period 1964-1969
1959	4	300	1.3	
1960	4	376	1.1	
1961	3	418	0.7	
1962	6	510	1.2	
1963	5	723	0.7	
1964	10	460	2.2	3.2.% Average Ratio in period 1964-1964
1965	6	459	1.3	

Year	No. of Divorce	No. of Marriage	Ratio $\frac{\text{Divorce}}{\text{Marriage}}$ %	REMARKS
1966	20	316	6.3	
1967	12	616	1.9	
1968	20	552	3.6	
1969	14	380	3.7	
1970	17	450	3.8	8.4% Average Ratio
1971	24	342	7.0	is period 1970-19
1972	28	280	10.0	
1973	47	279	10.8	
1974	26	511	5.1	
1975	36	280	12.9	
1976	10	235	4.3	12.06% average
1977	23	240	9.6	ration in period
1978	54	298	18.1	1975-1979
1979	74	481	15.1	
1980	-	55	-	upto Feb. 11th onl

This data is in reference to the Coast Province (Mombasa) only. It was acquired through research at the Kadhis and Chief Kadhis Court in Mombasa. This data does not include marriages and divorces not registered in the Registrar Book. The Chart indicates a rise in the rate of divorce from 1.4. % average ratio of divorce to Marriage in the period 1957 - 1963 to 12.06% in the period 1975-1979.

When either of the parties for the suit is not satisfied with the Kadhi's judgement, an appeal lies to the High Court of Kenya by virtue of the 1920 ordinance which was subsequently amended in 1923 and 1926. It was so held in Gulam Mohammed v Hadajati bibi⁵⁵ that the Supreme Court had jurisdiction to hear and determine Moslem Matrimonial Suits.

However, the Court of Appeal in 1968 still considered a Moslem Marriage to be much inferior to that of an English Monogamous one, in Ayoob v Ayoob.³⁶

The parties to the suit were both Mohammedans, married under the marriage Act of Kenya. On the same day they went through a ceremony of marriage according to Mohammedans Law. The husband later purported to divorce the respondent by 'Talak' and by petition to the High Court, sought a declaration that his marriage was lawfully dissolved. The petition was dismissed. On appeal the Court held that a monogamous English Marriage contracted under the Marriage Act is such a superior institution, that it is not capable of being converted into another type of marriage.

This attitude of the High Court judges is discriminatory and racialist in nature. Kenyan legislation³⁷ and Commonwealth Courts³⁸ decisions show that marriages can be converted into different forms and kinds, with the change of either domicile or faith, which goes with the change of life style.

We now look at the way the non-moslem courts have applied Islamic law on divorce.

In Bimoto binti Ali v Chur Khan³⁹ the petitioner was a Beluchi Mohammedan living in Mombasa while the respondent was an Indian Mohammedan. The petitioner took an oath in the presence of the Court, swearing that she had received no maintenance for three years, and that she was entitled to maintenance from the respondent. A sumon was served on the respondent who never appeared. The Chief Kadhi, who was never called to assist the Court intimated that two witnesses are required to prove that, when the respondent left, the petitioner, left her without any provisions and had not provided her since. The witnesses were called accordingly. Judgement was entered for the petitioner. The marriage was dissolved.

The above decision was arrived at in accordance with the Sheria, which was developed further in Sayed Omar bin Ahmed Saggaf v Asha binti Said⁴⁰.

The petitioner in the lower court petitioned for dissolution of marriage under Mohammedan laws on the ground that her husband the defendant had failed to maintain her for nearly two years. In addition, to ordering a dissolution of the marriage, the Kadhi held the defendant able to provide maintenance. No Evidence was taken from any witnesses, each party merely made several unsown statements.

On appeal it was held, in a civil case, evidence must be given to prove or disapprove a case. It is not enough for mere statements to be made. It is the negation of justice, having made an order nisi against a party, for the court to make such an order absolute without giving that party an opportunity of showing cause why the order should not be made absolute. It would appear from the case of Bumoto Ali v Pr Chur Khan that two witnesses for a divorce petition are necessary. The Kadhi never ordered for such witnesses to be called to dispute or agree with the allegations, alleged by the petitioner.

This is a common practice among the Kadhi Courts, where judgement is delivered without even attempting to state the principles of law that were applicable.⁴¹

In Salina Binti Buraka v Thabit Bin Salim⁴² the petitioner a resident of Lamu having been deserted by her husband, the respondent, went to live with her father, who brought her to Mombasa. There she petitioned at the Kadhi Courts for divorce on grounds of desertion and non-maintenance.

The Kadhi as usual, not well versed in the law, refused to grant the divorce on the preliminary point that the petitioner had travelled to Mombasa without the consent of her husband and had therefore forfeited her right for being disobedient.

The petitioner appealed to the High Court and the case was sent back to the Kadhi Court to be decided in accordance with the Sheria. Hamilton J. stated the law as follows : -

"according to Sheikh-ul-Islam under the circumstances of the case the husband being in Arabia (deserted her) and the woman living with her parents, coming to Mombasa with them does not amount to disobedience".

The Kadhi's judgement was reversed, she was granted divorce, on the grounds she had been entitled to maintenance and the husband had deserted her.

The Divorce known as 'Khula' was the main issue in Lali bin Ahmed v Asha binti Sheikh Ahmed.⁴³ The essential parts of a Khula divorce are that there must be mutual consent of the parties and the payment by the wife of a sum agreed on. Usually the sum to be paid by the wife, is either equivalent to the dowry she received or half of it.

The defendant pleaded in this case, that she had been divorced through the Khula system. It was clear from the evidence that an agreement for a Khula divorce had been arrived at. The plaintiff alleged that he refused to complete his part of the agreed sum. There was also a defective entry in the register of Mohammedan Divorces.

The Kadhi who was not an interested party swore to the divorce having taken place and he consequently, issued the certificate. The High Court held, as the lower court judging of fact was not wrong, a Khula divorce had been agreed on. The court also pointed out that a defective entry in the register of Mohammedan Divorces, does not invalidate a divorce which in itself is valid. The Khula divorce was therefore valid.

Divorce is stated to be the most detestable item in a Society in the holy Quran.⁴⁵ To prevent unreasonable and unwarranted divorce a third party is excluded from initiating a divorce.⁴⁶

In Mirza Amir Beg v Saadat Begum and Mohammed Bashir⁴⁷ The first defendant was married to the sister of the plaintiff. The plaintiff sued to have the marriage set aside, because, he, as the guardian of

sister did consent to the marriage. The marriage had been consummated.

Thacker 3 had this to say :

"According to Cap. 171 laws of Kenya Mohammedan Marriage Divorce and Succession Act Section 2 and Section 3(1) the words 'the parties thereto' refers to parties to the marriage who shall be entitled to any relief by way of divorce. The parties to the marriage refer to the husband and wife and so no third party such as an agent or guardian."

On these ground, the Supreme Court had no jurisdiction to decide such cases. Petition was dismissed. This is the correct law, in that it prevents the unnecessary breaking up of marriage due to a person not even a party to the marriage.

A similar decision was arrived at in Abdulla Tairas v Hussein bin Kassam.⁴⁸ The Supreme Court held that under Section 3(1) of the Mohammedan Marriage Divorce and Succession Act, it had jurisdiction to hear and determine Mohammedan Matrimonial Suits, only where the parties belong to the marriage, which means the husband and wife.

Sir Barclay Alihill in Athman bin Mohammed v Ali bin Salim⁴⁹ further emphasises the point by saying .

"The Supreme Court does not have jurisdiction to entertain such suits, where person not party to the marriage intitute a divorce."

It is important to note that the registration of Mohammedan Divorce does not in anyway effect the validity of the divorce. It was so held in Abdulla bin Mohammed v Mshane bin Kombo⁵⁰ Pickering stated :

"A divorce registered is a record of a final divorce."

Under the Mohammedan Marriage Divorce Registration Act Section 25. Failure to register a divorce does not invalidate the divorce but provides for a penalty of a fine amounting to Shs.3,000/= or six months imprisonment.

EFFECTS OF DIVORCE:

After the dissolution of marriage ie effective, matrimonial intercourse between the parties become unlawful.⁵¹

A divorced couple cannot always remarry⁵² where the marriage was consummated the wife has to wait till the expiration of her idda in order to be able to remarry. The husband on the other hand, if he has four wives must wait until the completion of the divorced wife's idda⁵³ where the marriage was not consummated, the parties can marry immediately. On the question of dowry, if the marriage was consummated, the whole dowry is payable immediately to the wife. If not half of the dowry is due.⁵⁴

As regard maintenance, the husband has to provide maintenance for the wife during idda as well as maintenance for the children born out of wedlock.⁵⁵ If the wife is pregnant the husband has to maintain her until she delivers.⁵⁶

So long as the divorce is revocable one spouse, can inherit from the other, but when the divorce becomes irrevocable, the rights of inheritance terminate inter se.⁵⁷

Custody of children is one of the most touching issues among the muslim spouses. The Mother has the right of custody of a male infant child up to the age of seven,⁵⁸ of her female child till puberty.⁵⁹

On expiration of the age limit the father then becomes the legal guardian of the children.⁶⁰ The Father is under obligation to maintain the child when in the custody of the mother.⁶¹

In Kenya the Islamic law on custody appears to have been replaced by the Guardianship Infants Act.

This was so held in two leading cases, Nana binti Mazee v Mohammed Hassan and Yasmin v Mohammed⁶²

However, in 1977 in Mohrunmissa d/o late Mohamed Shafi v Mohamed Parvez s/o Mohamed Mawaz⁶⁹ the Court of Appeal presided by Maden J.A. held that it was to be the Islamic Law on custody that is to apply to parties who are moslems. The law relating to Islamic custody is stated by Mulla and Ameer Ali as

"It is the accepted doctrine that the mother's right of a male child ends with the completion of his seventh year".

And Maden J.S. accordingly held that,

"the mother is entitled in preference to the father to the custody of her infant male child under seven years of age... This right belongs to her mother and nothing can take it away from her except her own misconduct."

CONCLUSION:

Reforms of the Islamic divorce law, has to come within the society.

The Islamic law of divorce and the prescribed procedure as such do not require reforms. It is the following aspects which need reforms.

Firstly, the need for comprehension of the law by the people. Secondly, comprehension of the law by the law administrators. (Kadhis).

Since Islam allows divorce and polygamy, the Islamic law of divorce has been grossly misunderstood by 'man' who view it subjectively. In practice Islamic polygamy has many restriction imposed on it, such that it is almost impossible for the husband to get married to more than one wife. The practice in Kenya, is that when a wife objects to her husband marrying a second wife, the husband resorts to divorce to satisfy his personal whims. If there is a dispute between the husband and wife, the former normally opts for divorce without understanding the Islamic requirements. Most Kadhis appear not to be aware of the requirements of Islamic divorce law.

Today upon the application of divorce the Kadhi courts act like rubber stamps. Divorces are not denied. The attitudes of the Kadhis Courts need reform in that not all applications should be accepted. Each application should be viewed on its merits. Any application not based on strong grounds should be rejected.

Further, when a divorce petition is received in the Kadhi's Court, hearing should be preceded by reference of the matter to a conciliation committee consisting of some men and women who can attempt to facilitate reconciliation. The hearing of the divorce petition should be postponed until the report of the reconciliation committee is received. Where reconciliation fails, a period of at least three months should elapse before the petition is heard. This procedure may save some marriages.

The social structure of the muslim society is such that a vast majority of muslims rely on or look to priests for interpretations of any Islamic Law. Further more, there is the tendency among Muslims to acquire knowledge of only those Islamic matters or worship, pilgrimage to Mecca, fasting, prayers and Islamic prohibition on pork, alcoholic beverages and meat of certain animals.

This is a weakness on the part of the muslims' Society, Every muslim ought to know those Islamic Laws which effect their families and life.

Laws on such matters as marriage, divorce, inheritance and education of both women and children are part of and parcel of the muslim society, embodied in Koran.

Two things are needed. First muslim masses should be made aware of laws of marriage, divorce and other personal matters. Second, Kadhis as administrators of Islamic Laws, should be thoroughly conversant with the family laws, including divorce. The Kadhis should state and discuss the divorce law before they apply it. The Kadhi of Mombasa, agreed that the defect lies with the administration of rather than with the law itself.

It is not only the duty of Kadhi and Maaslims to educate the muslims masses, but that of the graduate or law students. Very few muslim students, (and also others) if any at all on completion of their law course, do ever pursue Islamic studies. There is a need for such graduates to help educate the muslim masses, on matters partering their lives. If the foregoing is introduced imperfect knowledge of divorce law, resulting in misinterpretations would diminish and there would emerge a better understanding and application of Islamic Laws.

The other possible solution is the publication of Literature, based on the Islamic law. Many publication every year of literature literature on Islam takes place. These often are on past Islamic history glorifications of Islam, muslims heroes who sacrifices their lives for the course of Islam, rivalry and war that took place between Islam and other religions.

This practice needs a change. There should be literature annually on Islamic family laws such as marriages, divorce, inheritance, education and role of women in Islam.

In Chapter four of the Holy Quran, the English translation by Mohammed Marmaduke Pickthall 1930, declares that divorce should only be as a last resort, because Allah would not be pleased if divorces became a family crisis. This Quranic verse is meant to enjoin muslims to continue marriage by mutual sacrifices rather than resorting to divorce.

Such would revolutionise thinking on divorce and would infuse the spirit of continuing cohabitation.

In Chapter one of this paper it was noted that the commission's report on marriage, divorce and succession, thought the Africans Hindus and Muslims way of life is approaching that of the European or English. Any changes therefore embodying western or English values were quite in order. This presupposes that the Kenyan people are socially, politically and economically intergrated. This is not the state of affairs. Such assumption are wrong so far as they ignore social realities and contraverns Chapter five of the constitution which embodies the concepts of human equality and dignity, which allows one to follow his personal laws.

Lastly, it would be advantageous to all concerned, if the substantial and proceedural principles of law relating to Islamic matrimonial matters, were enacted in detail. The present statute is too general and leaves all the interpretation of laws to the Kadhis' Courts. On enactment the principles will be available to the public for better understanding of the law.

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P. 57-68 Oxford Clarendon Press 1979.
And - "The Unlettered Prophet and the
rise of Islamic Scholarship" article
printed in "AL - Momin"
Centenary issue in Commemoration of the
15th Century Hijra" by Muhammed Bakari,
University of Nairobi Lecturer. p. 71
and Said Ramadhan: Islamic Law: Its Scope
and Equity. P.R. Macmillan Ltd. London.
Geneva (1961) P. 27 "The Shariah is the
Quranic and prophetic texts" P 31-41.
2. Schardt J. "Introduction to Islamic Law".
Supra P. 57-68.
3. (1976) Reader Digest - Almanac And Year Book
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I.N.C. Plansantville, New York No.10570.
P. 701 and Schardt J.: Supra P. 57-63 - Mulla:
"Principles of Mohammedan Law" 11th Edition
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P.V. - Viii. A.A. Fyzee: "Outlines of
Mohammedan Law": (1964) Oxford University Press
3rd Edition. Chapter VP. 31 and Chapter VIP.37.
4. A.A.A. Fyzee: Supra P. 31 - 37
Anderson J. D. 'Islamic law in Africa' 1970 Cass and
Co. Limited P. 3 - 10.
5. On interview with T.G. Kassam subscribed for the
'Al-Momin' Centenary Issue in Commemoration of
15th Century Hijra.
Jamia Mosque, Railing Landhies and Islamic Primary
School Association. Annual Reports on Islamic
Matters. May 19th 1980.
6. Schardt J. Supra PP 57-68
T.G. Kassam. Supra.
7. On Research carried out by the author in Mombasa
town - upon interview with the Kadhi of Mombasa
Mr. Nazor. And interview with T.G. Kassam :
Supra.
8. Mulla: Supra P. iii - viii.
Fyzee: Supra Chapter V P. 31 and Chapter VIP. 37.
Anderson J.N.D. 'Law reform in the Muslim World'
P. 3-10 : University of London. The Athlene Press 1970

9. 'Islam - The Religion of my Ancestors':
H.H. The Prince Aga Khan and Simon and Schuster I.N.C. (1954) Ismailia Association Pakistan Karachi. 2 -
Fyzee: Supra Chap. V & VI PP 31 - 37.
Mulla: Supra P. iii - viii.
10. T.G. Kassam : Supra.
T.G. Kassam : Supra.
12. 1920 Ordinance
Consitution. Sec. 66
13. "Islam - the religion of my Ancestore":
H.H. Aga Khan : Supra: P.18 - 19
14. Interview with the Mombasa Kadhi Mr. Nazor.
T.G. Kassam: Interviewed.
15. T.G. Kassam: subscriber for the "Al-Momin".
Supra.
16. J.N.D. Anderson: Islamic Law in Africa:
Supra P. 1 - 10
T.G. Kassam: Supra.
17. On Interview with the Mombasa Kadhi.
18. T.G. Kassam: Supra.
19. Supra.
20. Supra.
21. Supra.
22. Supra.
23. (1978) Reader Digest - Almanac and Year Book
Published by the Reade Digest Association.
INC Pleasantville, New York 10570 U.S.A. P. 702.
24. Supra.
25. 'Muta - Temprary Marriage': Mr. Muhammed
Musleh Ud-Din cited by Said Abdalla Seif -
al-Hatimy - "Women in Islam - A Comparative
Study." Islamic publication Limited.
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Mulla: Supra P. 210
Fyzee: Supra P. 101.

26. Supra.
27. Supra.
28. Supra.
29. An Interview with the Mombasa Kadhi, Mr. Nazor and T.G. Kassam.
30. Interview with T.G. Kassam.
31. Said Abdallah Seif -al-Hatimy: "Women in Muslim" A Comparative Study: Islamic publication Ltd. Lahore Pakistan. P. 31 - 49
"The Holy Quran": English Translation by Mohammed Marmaduke Pickthall - printed for Jamat Dawah by Begun Aisha Baway Wakef - Karachi 1930 - Ashraf publication.
Chapter IV - dealing with women - =.49-64.
32. Interview with T.G. Kassam.
34. Said Abdallah Seif-al-Hatimy: Supra. P. 32.
33. Interview with T.G. Kassam.
35. 'Holy Quran' - English translation: Supra Chapter IV.
36. Supra.
37. Abdul Hammed Siddiqui - 'Mohammed the Benefactor of Humanity' (1978) Islamic Publications Ltd. Lahore Pakistan Cap. 1.
38. Supra:
39. 'Holy Quran': English translation - Supra. Chapter IV.
40. T.G. Kassam: Supra - and class lecturers.
41. Supra:

FOOTNOTES.

CHAPTER ONE:

1. F.B. Pearce: "Zanzibar the Island Metropolis of
of Eastern Africa"
(Franle Cass & Co. Ltd. 1967) p. 37

2. F.B. Pearce: Supra P. 38

3. F.B. Pearce: Supra p. 38

"For Centuries Arabia and Persia have regarded East Africa as a land of promise, a land of flowing rivers, abundant crops, the Source of Gold, Ivory and Slaves. A place where the poorest might live in comfort. Each Monsoon trip made to East Coast by the Arabians and Persians vessel was always successful".

4. Trimmingham: 'Islam in East Africa' 1964 Clevendon Press Oxford. Chapter I. But this does not mean there wasn't an earlier Muslim settlement along the East Coast. As recorded by Zoe Mash "East Africa Through Contemporary Records" Cap. I 1961 Cambridge University Press, Islamic Settlement along the Coast extends as far back 1000 A.D.

5. Trimmingham: Supra Chapter I
"The Persian Gult term for Bantu or Black People was Zenj or Zanzi".

6. W.H. Ingrams: "Zanzibar its History and Its People" Frank Cass & Co. Ltd. 1967 P. 74 cited Captain Stignad in "The Lord of Zenji" under the Article "History of Pate" published by Journal of the African Society 1931.

"The beginning of these Coast Towns, he who first made them was a ruler called Abdul Malik. The date was 77th year of the Hegira. He heard of the Century and his Soul longed to found a new Kingdom, so he brought Syrians and they built the cities of Pate, Mulindi, Zanzibar, Mombasa, Lamu and Kwale, in each town he had a Liwali."

7. J.S. Spencer Trimmingha: Islam in East Africa
Claverdon Press Oxford 1964.
8. J.S. Spencer Trimmingha: Supra and W.H. Pearce:
Zanzibar of Metropolis - Supra P. 37 - 38

"The Indian Moslems did not care to inter-marry with the Africans. Their main aim was to build up trade. They were economical minded people. But still their presence help protrait the Islamic way of life. Gradually, having an impact on the indiginous natives.
9. F.B. Pearce : Supra P. 39
10. Trimmingha : Supra P.
11. T.F. Buston : "The African Slave Trade and Its Remedies." 1967 edited by J. Hansen P. 59-72. Topic - "Mohammedan Slave Trade" And Robert L. Bungler Jr. "Islamization Among the Upper Pokomo" 1973 published by East African Studies XI - Maxwell School of Citizenship and Public Affairs. W. Hichans: "Khabar-al-Kumu" Bantu Studies (1938) pp 1 - 34.
12. C.M. Stigand: The land of Zinj. Frank Cass & Co. Ltd. 1966 - See general on the topics 'Mombasa Arabs and Islam' and "The Swahili" - p. 103 - 131.
13. A.H.J. Prins "The Swahili Speaking People" London International African Institute 1967 cited by Robert L. Singer Jr. Supra
W.H. Ingrams: Supra p.p. 243 - 244
14. Tributary means the Coastal towns were considered as part of the Sultans daunas(areas). Hence they did pay allegiance to the Sultan of Zanzibar.
15. Triningham : Supra P.
16. J.N.D. Anderson: Islamic Law in Africa Frank Cass and Co. Ltd. 1970 : P.82
see General W.Hichans: Supra - The Influence of Islam on Upper Pokomo.
17. Supra : p. 82
/Ingram
18. W.H. /Supra P. 285 - 236 and J.N.D. Anderson "Law Reform in the Muslim World" P. 31 1976 : University of London Athlane Press.

19. Masoudi was one of the early Moslem travellers and writer on the spread of Islam in East Africa cited by W.H. Ingrams "Zanzibar Its History and Its People" 1967: Frank Cass & Company Limited.
20. Trimingham : Supra.
21. See generally Gray 'History of Zanzibar From the Middle Ages to 1856': London Oxford University Press 1962.
22. Norman Keyes cited by W.H. Ingrams Supra. pp35-51.
23. W.H. Ingrams : Supra.
24. F.B. Pearce : Supra - p. 240
Trimingham : Supra Chapter One.
25. Masoudi's Quotation : Supra.
- 26a) Supra.
- 26b) 38
27. G.K. Kamau : "Laws of Marriage and Property In English Speaking Africa"
Lecture delivered at Seminar on Women and development at Lesotho April 17-30 1977.
Cited J.N. Anderson 'Islamic Law in Africa'
Supra: Allots"Essay in African Law":
Butterworth 1960. p. 217 and Report of the Commission on the laws of Marriage and Divorce in Kenya. Government Printers (1968) Chap. 3
28. G.K. Kamau : Supra cited Lord Lugard "The Dual Mandate in British Tropical Africa"

Frank cass & Co. Ltd. 1970 Chapter 4.
M.P.K. Sorrenson'Origins of European Settlement in Kenya : O.U.P. 1967. Chapter 3.
29. G.K. Kamau : 'Laws on Marriage - Supra.
30. M.P.K. sorrenson: "Lond Reform In Kikuyu Country"
Published on behalf of East African Institute of Social Research. Makerere University College.
Oxford University Press, London 1967.
31. Norman Keyes : 'Kenya" Leonard and Virginia Woolf London W. C. 1924. Chapter 10 and 12.

32. International Review of Missions
"Islam in Africa" 1902 cited by E. Hertset
'Map of Africa By Treaties': 1960 Frank ..
Cass & Co, Ltd. P. 42.

33. J.N. Anderson : Supra.

34. Supra.

PART TWO:

1. J.N.D. Anderson: Supra Cited 1897 Native
order in Council Article 2.

3. Article 4 - Supra.

4. Anderson - Supra.
'One Variety of the Native Courts under a Native
Authority was the Kadhi Court.'

5. Article 55 Native Court Order-in-Council 1897
cited by Anderson Supra.

6. Article 58 - Supra.

7. Supra

8. Article 1 (a) of Native Courts Regulations cited
by Anderson p. 83 : Supra.

9. Family Law in Asia and Africa: School of Oriental
and African Studies on Modern Asia and Africa:
No. 6 J.N.D. Anderson p. 225 - 234 and Absullala
Maududi "Islam Law and Constitution" translated
and edited by Kharshid Ahmad - Islam Publication
Limited 1960 pp 45.

10. Anderson Supra p. 83

11. 6 E.A.L.R. 119

12 Gulam Fatima v Gulam Mohammed 7k.L.R. 30 (1916).

13 1896 - 1902 East African Protectorate, Order-in-
Council Kings (Queens) regulations, ordinance and
other official order-in-council in East African
Protectorate on 1st January 1903 pp 5.

14. 6 E.A.L.R. 119 (1917)

15. 7. E.A.L.R. 117.

16. Gulam Fatima v. Gulam Mohammed 6. E.A.L.R. 30
17. No.13 1906.
18. J.N.D. Anderson : Supra p. 86
19. Gibson K.K. 'Trends in Marriage and Succession Laws in Kenya 1886 - 1977' Annual Session Report by the historical Association of Kenya 1977.
20. 9. E.A.L.R. 76
21. Supra.
22. Supra.
23. Holy Koran : English Translation by Mohammed Marmaduke - Pickthall: Printed by Ashraf Publication Karachi 5 1978 : Chapter on Divorce LXVI p. 373 "Revealed at al Madinah"
24. Gulam v. Hayadati Bibi 9 E.A.L.R. 76
25. D.F. Mulla : "Principles of Mohammedans Laws" 7th Edition 1922 revised and edited by Mr. B.K. Desai : P. 176.
26. Fyzee A.A.A. "Outlines of Mohammedan Laws" 3rd Edition Oxford University Press 1964 P.126-128
27. (1886) 8 ALL E.R. 149 P. 157
28. G.K. Kamau : 'Trends in Marriage and Succession Law in Kenya 1886 - 1977': Supra
29. 20 K.L.R. 51
30. Anderson Supra: pp 106 - 107
31. 11 K.L.R. 38
32. Section 5.
33. Section 3 (6)
34. Y.P. Ghai and MacAuslan 'Public Law and Political Change in Kenya': O.U.P. see generally.
35. (1956) 23 E.A.L.A. 609.

POST INDEPENDENCE: PART TWO

1. G.K. Kamau: Lecturer, Faculty of Law, Department of Private Law, University of Nairobi.
"Cohabitation Outside Marriage in Some English Speaking African Countries" Presented to third World Conference on Family Living in a Changing Society. Uppsala June 5th - 9th (1979).
2. Supra.
3. Kenyan Independence Constitution No.5 1969.
4. Section 3. Kenya Independence Constitution 1969
5. G.K. Kamau "Laws of Marriage and Property in English Speaking Africa" - Supra.
6. Chapter 4 of Kenya Constitution 1964.
7. The Kadhi Magistrate Courts Act Cap 11 1967
8. Supra : Section 5.
9. Y.P. Ghai: "Independence And Safeguard in Kenya." E.A.L.J.S. (1967) p. 181 - 185
10. G.K. Kamau : Supra
11. (1971) E.A. 278
12. G.K. Kamau : Supra
13. Supra.
14. G.K. Kamau: Cited Y.P. Ghai : Public and Political Change In Kenya. OUP 1970: Chapter 4.
Allot's Essays in African Law Butterworth 1960 Sawyer
"Internal Conflict of Laws in East Africa and Social Change."
15. G.K. Kamau cited ' The jury System in Colonial Africa. (1958) J.A.L. 160
16. (1968) E.A. 77.
17. G.K. Kamau : Supra.
18. Cap. 150 Laws of Kenya Section 11 + 35 .
Cap. 151 Laws of Kenya Section 9.

19. Rattansey v Tattansey (1960) E.A. 81 (T)
A-G of Ceylon v Reid (1968) ALL.E.R. 812
Chani v Chani (1960) 1 All. E.R. 687.
Mangeny v. M'dongo (1967) J.A.L. 137
20. (1960) E.A. 81 (T)
21. (1968) 1 ALL. E.R. 812.
22. (1973 E.A. 153.
23. Mullar: Principles of Mohammedan Laws - Supra
Fyzee : Outlines of Mohammedan Laws - Supra
pp 109 - 110
24. Nana binti Mazee v Mohammed Hassan -
20 K.L. 51 R.
25. (1973) E.A. 370
26. Kassam : Critique on the Commissioners Report
on Marriage and Divorce in Kenya: Makerere
University College.(1977)
27. Cap. 43 Section 119 (1) Uganda Laws According to
to Kassam in his Critique on the Commissioner on
Marriage and Divorce in Kenya 1977 permits
Where a Husband or wife of the person charged to
give evidence against the other spouse. They
are competent and compellable witnesses for
the prosecution, if the Spouses are Married other
than Monogomous Marriage.
28. (1963) E.A. 188.
29. G.K. Kamau : Supra
30. Kenya Evidence Act: Cap. 80 Laws of Kenya
Section 127 and 130
31. Supra.
32. Supra.
33. 1917 7 E.A.L.R. 14
34. (1886) L.R. (TP & D) 130

36. G.K. Kamau : The Marriage Bill is Unconstitutional and Against Social realities: And G.K. Kamau Marriage Laws and Property in Kenya. Supra and cited Weekly Review September 1976: Marriage Bill Good Intension.
35. The Commission was appointed by the President of the Republic of Kenya Under Section 3 of the Constitution of Inquiry Act. Cap. 102. See Kenya Gazette, Vol. LXVIX. No. 18
Gazette Notice No. 1261, 1967.
37. Kassam : Supra p. 210
- 26b. Authur Phillips: Report on Native Tribunals Government Printer Nairobi. (1945).
38. Commission Report on the law of Succession Government Printers Nairobi 1968. Chapter 3. para. 72 - 74
- 39 Report: Para. II Also See comments.
40. G.K. Kamau : Christianity and Family Law in Kenya. 5 E.A.L.J. p. 75 - 75
41. Para. 13 of the Report.
42. See Report Para. 17.
The Commission's interpretation of Sec. 66(5), 78 and 82 (4) is wrong in so far as it is based on the assumption that there is no essential link between one's faith and one's personal law. Therefore, par. 23 of the Report ignores the different philosophies of life which the constitution permits. The Commision Sought to champion the course of paternalism; tje very thing the Constitution forbids.

FOOTNOTES : CHAPTER TWO: PART ONE.

1. Fazlur Rahman: 'Islamic Methodology in History' Central Institute of Islamic Research, Karachi. 1965 p. No. 2 pp 135 + p. 70 States that the Sheria is the religious commandments of Allah.
- Said Rahadan : "Islamic Law: Its Scope and Equity" P.R. Macmillan Ltd. London: Genever (1961) p. 27 'the Shariah is the Quranic and Prophetic Texts".
p. 31 - 41 - cap. 3 "The Sharia is the Contents of the Quran and the Teaching of Prophet Mohammed." As professor Gibbs Says - "Sheria technically means, "authority to any legal Source inside the Quran and the Sunnah, anything outside the quran and Sunnah is known as Hadith" -(Traditions accepted over generation).
2. Mohammedanism OUP 2nd Edition London (1953) cited by Said Ramadan Supra.
3. Anderson: "Law Reform in the Muslim World". University of London - The Athlone Press (1976) p.17.
4. Said Ramadan "Islamic Law: Its Scope and Equity." 1961 P.R. Ltd. London: Geneva Cap. I / Macmillan
5. Interview with the Kadhi of Mombasa.
6. Supra.
7. Mohammed Ali Manual: p. 284 No. 1 cited by Fyzee: "Outlines of Mohammedan Law" 3rd edition. Oxford University Press (1964) pp 139.
8. Lecturer at University of Damascus in his Article 'Islamic Divorce' cited by Mulla in "Mohammadan Personal Code" (Arabic Version) edited by the Damascus Press (1967)
9. (1932) 59 I.A. 21.
10. Fyzee: Supra pp 31 - 37
The Muslim School of Thought (which governs the Sects) are classified into four sectors. The Keya School of Iman Abu Hanafi known as the Hanafi School Se or Sect. The Medina School of Malik Ibn Anas known as the Malik School: The Iman Shafi known as the Shafi school and the Iman Ahmed Ibn Hanibal known as the Hanibal school. Although all these four schools believe in the contents of the koran, they differ as to its interpretation

A simple example of such difference is the Hanifa believe divorce pronounced under compulsion or influence of intoxication is valid while the Shafi do not consider it valid.

11. . Fyzee : Supra cited Ameer Ali Kadhi Nurman Cap. 4
12. Tagore Law Lecturers (1884) Vol. I 4th Edition Calcutta 1912 and Vol. II 5th edition 1929. Calcutta.
13. Institute of Muslama Law Calcutta 1907 cited by Fyzee Supra Cap. 4
14. Fyzee: Supra Cap. 4.
Mulla : "The Principle of Mohammedan Law". 7th Ed. E.G. Pearson at the times Press Bombay 1922 p. 186.
15. Williams cited by Anderson: "Law Reform in the Muslim World" Supra P. 123. Such Muslim Countries are Egypt, Syria, Jordan and Singapore.
18. Mulla : Supra Cap. I p.I
17. Kadhi of Mombasa whom interviewed stated so; He also cited 'Mohammedan Personal Codes' - Mulla (In Arabic Version) Supra.
- 18 Holy Koran: English translation by Mohamed Marmaduke Pickthall - (1930) Cap. IV p. 49-64 Ashraf publication
- A. Fyzee: "Outlines of Mohammedan Law:" Supra p. 152.
19. Fyzee cited 'the Muslim wife's Rights of Dissolving her marriage' (1936) 38 Bombay law Report. J. I pp 113.
20. Underhill: 'Trusts and Trustees' 6th edition. Butterworth & Company. Law Publishers London 1904 p. 8-10 Wedderburn, K.W.: "Sutton and Shannon on Contract" pp. 451 - 460 London Butterworth & Co. Publishers Ltd. (1956)
21. Fyzee: Supra pp 132.
22. Wilson R.K. "Anglo-Mohammedan Law:" 6th Edition London (1930) cited by Fyzee p. 142 : Supra.

24. Tayabali: p. 195, Wilson P. 78 (A) Ameer Ali pp. 390 all cited by Mulla : Supra pp 321.
25. Fyzee p. 171 and Amin Bey v. Samen (1910) 33 All 90
26. 1946 38 Bon L.R. 864.
27. (1937) 19 Lahore 277.
- 28a. (1939) 2 Cal 12 cited by Mulla Supra
- 28b. Fyzee: Outlines of Mohammedan Law: Supra p.127
29. Fyzee : Supra 173 -(1939) 2 Cal 12.
30. Fyzee: Supra 176.
31. Fyzee: Supra p. 152.
Mulla: Supra p. 152.
32. Fyzee : Supra pp 100
Mulla : Supra pp 206
33. Under Islamic Law Consanguinity Includes
A man prohibited from marrying his mother or grandmother, his daughter or grandfather, his sister whether full, consanguine or interne, his niece or great niece, his aunt or great aunt paternal or maternal.
34. Affinity: Includes a man prohibited from marrying ascendants or decendant of his wife and the wife of any ascendent or descendent. By way of exception, a man may marry the decedant of a wife with whom the marriage has not been consummated.
35. Fosterage: Forbids a man from marrying any person with whom the relationship of forsterage is established e.g. his foster-mother, her daughter, of his foster sister.
36. Mulla + Fyzee : Supra.
37. Mulla + Fyzee: Anderson Supra Cap. 4 Cap. 16
Anderson 'Islamic Law in Asia and Africa'
38. Supra
39. Supra
40. Supra

41. Sheikh Fazhur Raham v Met Aisha (1929)
and Patana 690 Cited by Fyzee Supra p. 144
42. Supra
43. Supra
44. Supra
45. Kadhi of Mombasa, Fyzee: Supra pp.146
cited by Ameer Ah p. 146
46. Koran IXZ-Z
- 47a Supra
- 47b Fyzee: Supra pp 147
- 48 Supra
49. Supra
- 50a Magne: 'Hindu Law' cited by Fyzee : Supra
- b. William : cited by Anderson: Law on the O Moslem World
p. 123. Such countries as : - Egypt, Jordan, Syria
and Singapore.
51. Anderson : "Law Reform in the Muslim World"
Supra p. 123.
52. Article 2 - 4 of the Law of 1929
53. Article 2 - 4 of judicial circular No. 41 of 1963.
54. Article 70 Law of Family Rights 1951
55. Article 90 90 Law of Personal Status 1953.
56. Article 50 - 52 : Code of 1958.
57. Article 36 - 37 of the Law of 1959.
58. Anderson: Supra p. 123.
59. Fyzee: Mulla and Ameer Ali : Supra
60. Supra.
61. Supra
62. (1931) 59 I A 21
63. Supra

64. Fyzee: Supra p. 154.
65. Supra
66. Anderson : "Law Reform on the Muslim World" 136 + 129
67. Fyzee, Mulla Anderson: "Family Law in Asia + Africa"
- Supra
68. Anderson: 'Reform in the Muslim World' p. 114
The marital relationship broadly speaking envisaged in the traditional law may be summed up in terms of a wife's duty to obey her husband in every lawful demand he may make, provided only that he has given her, her prompt dowry and in consideration for his duty to provide her with suitable maintenance and support.
69. Koranic Texture.
70. Anderson Supra pp 115.
71. Anderson : Supra pp 116
72. Supra : p. 115
73. Supra: pp 115
74. Supra : pp 49
75. Supra : pp 115
76. (1957) All L.J. 300
77. (1970) K.L.T.H. cited by Anderson : Supra p. 81
78. Anderson : Supra
Mullar pp 188 + p 233
79. Fyzee : Supra pp 151
80. Fyzee : Supra cited 'The Muslim Wife's Rights of Dissolving her Marriage' (1936) 38
Bon Law Rep. J.L. 113 p.p. 120 - 1
81. Anderson : Supra p.p. 116
82. Fyzee + Mulla : Supra.
83. Supra
84. Fyzee: p. 164
85. Koran XXIV 6 - 9

86. Mohammed Ali Manual 290 No. 11 cited by Fyzee
87. Fyzee: Not after the Close of Trial p. 160-2
88. Anderson: The ancient oaths are pictureque and may be of interest both to Students and to lawyers According to the Fatama Alangiri, the judges begins with the husband who swears four times as follows: -
- "I attest by God, that I was a speaker of Truth when I cast her the charge of adultery" and the time he says -
- "The curse of God be upon him (i.e. refers to Himself) If he was a liar, when he cast at her the charge of adultery. Then follows the wife and she swears four time,
- "I attest, by God, that he is a liar in the charge of adultery that he has cast upon me"
- and says on the fifth occassion....
- "The wrath of God be upon me if he be a true speaker in charge of adultery which he has cast upon me."
89. (1955) Bom 464.
90. Sec 14(d) Matrimonial Causes Act Cap. 152 Laws of Kenya.
91. 'Holy Koran' : English translation : Supra Cap. 4
92. Mulla : Supra p. 189
93. cited by Fyzee + Mulla Supra Cap on Dissolution of Marriage.
94. Anderson : 'Law Reform in the Muslim World'. p.p 121 - 122
95. Supra: pp 121 - 122 - In Egypt the Fact remains entirely on the Social Status of the parties. while in India the Dissolution of Muslim Marriage Act 1936 provides a list of circumstances were an act is said to be intollerable and cruel.
96. See Footnotes p. 122 Anderson: Law Reform in the Muslim World!
97. This was so held under case law not legislation Case to illustrate-Khushid bibi v Mohammad Amin. p. 1 1968 Lahore 413 cited by Anderson Law Reform

Reform in the Muslim World" pp 123. See also
Anderson Article 'Reforms on the Law of Divorce'
Vol. 21. (1970) p.p. 46

98. Anderson : Supra p. 124.
99. Anderson: p. 124 - 125 See Footnote 101
100. Anderson : Supra p. 124.
101. Law 1956 Article 30.
102. Code 1959 Article 39
103. Law 1958 Article 50
104. Muslim Family Law Article 7 and 8
105. Anderson : "Law Reform in the Muslim World" :
Supra gives example of women Muslim Social case
Workers who had been regularly used to try and
reconcil the parties and that their efforts have
been successful, stated in Ali Nawaz v Mohammed
Yusuf P. L.D. 1963 S.C. 59
106. J. Schacht 'An Introduction to Islamic Law'
O.U.P. London (1964) p. 50
107. Cap. 4 P. 18: 'An Introduction to Islamic Law'
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Footnotes :- Chapter Two (Part II)

1. 5 E.A.L.J. P134 by James S. Reads
2. 4 E.A.L.J. P 1 by J.M.N. Kakooza
2. Research at the Kadhi Courts Mombasa
3. Fyzee - "Outlines of Mohammedan Law". third edition Oxford University Press 1964 P 147
4. Tajdin Kassam - Interviewed
5. For example when he is drunk.
6. 5 E.A.L.R. 136 Marriage and Divorce a new look for the law in Kenya.
- 6b Mulla; Principles of Mohammedan Law P302-304
7. J.B.Ojwang: Polygamy as a legal and social institution in Kenya 10 E.A.L.J. P68-82
8. Bimoto binti Ali v Chur Khan 12 K.L.R.104 and Sayyed Omar bin Ahmed Saggaf v Asha binti Said 20(1) K.L.R. - See Thacker J. judgment
9. This study is based largely on Research carried on by the author in the Mombasa town.
10. Supra.
11. Supra.
- 11b This is with particular reference to the coast province in the town of Mombasa.
- 11c Civil Case No. 103 1979
- 12 Civil Case No. 132 1978
- 13 Civil Case No. 136 1979
- 14 Civil Case No. 121 1979
- 15 Supra
- 16 Data collected from the Kadhi Courts registrar
- 17 20(1) K.L.R.
- 18 Supra.
- 19 Fyzee: Supra P169-176
- 20 Bom L.R. 864 Vol 48 (1946)
- 21 Mulla: "Principles of Mohammedan Law"sixth edition Published by N.M.Tripathi Private Ltd. Bombay 1968 p 297-298
- 22 Fyzee : P 169-176
- 25 Civil Case No. 76 1978
- 26 5E.A.L.J.136 J.S.READS:- "Marriage and Divorce a new look for law in Kenya"and Mulla, Fyzee: Supra P 297-298 and P 169-176
- 27 Civil Case No. 58 1975
- 28 Supra; Alum fifth edition by Al-Iman Shaffi P19 cited by the High Court in the judgment .
- 29 Civil Case No. 16 1975
- 30 Supra; P 19
- 31 6 E.A.L.R 119
- 32 6 E.A.L.R 30
- 33 7 E.A.L.R 117
- 34 See chapter one (part 1) of this paper.

- 35 (1960) E.A. 81 (T)
36 (1968) E.A. 72
37 Cap 150 Laws Of Kenya section 11 and 35 Cap 151 Laws
of Kenya section 9
38 Rattansay v Rattansay (1960) E.A. 81 (T)
A-G of Ceylon v Reid (1968) 1 All.E.R. 812
Cheni v Cheni (1962) 3 All.E.R. 873
Ali v Ali (1960) 1 All.E.R. 687
Mangeny v N'dongo (1967) J.A.L.137
39 12 K.L.R 104
40 20(1) K.L.R
41 Pointed out in this paper above
42 2 E.A.L.R. 131
43 5 E.A.L.R. 165
44 See Said Abdullah Seif- al- Hatimy: Islamic publication
Ltd Lahore Pakistan 1979 "Women In Islam" Cap 3
45 'Holy Koran' English translation by Mohammed Marmaduke
Pichthall Chapter 4 1930 Ashraf publication Karachi
46 Kadhi of Mombasa
47 22(1) K.L.R 12
48 20 E.A.C.A. 105
49 (1915) 6 E.A.L.R. 91
50 8 E.A.C.A. 61
51 Mulla : Supra P 311
Fyzee : Supra P 177
52 Fyzee: Supra P 177 and Mulla Supra P 311
53 Supra;
54 Supra;
55 Fyzee: Supra P178 and Mulla: Supra P 309
56 Supra;
57 Supra;
58 Fyzee: p 189
59 Supra; P189
60 Supra P 190
61 Supra P 190
62 20 K.L.R. 51 and (1973) E.A.370
63 Civil Case NO. 127 of 1977 - Civil Appeal No. 11 1979
unpublished case

ABBREVIATIONS:

ALL. E. R	:- All England Reports.
E.A.C.A	:- East African Court Of Appeal
E.A.J.	:- East African Journal
E.A.L.J	:- East African Law Journal
E.A.L.R (E.A)	:- East African Law Report
E.A.L.R	:- Kenya Law Report (East Africa Protectorate)
K.L.R.	:- Kenya Law Report
I.A.	:- Indian Appeals
Bom.L.R	:- Bombay Law Report
ALL	:- Allahabad
K.L.T	:- Karachi Law Times.
PLD	:- Pakistan Law Division
O.U.P.	:- Oxford University Press
B.H.C	:- Bombay High Court Reports
CAP	:- Chapter
EDIT	:- Edition

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John Jihna Vs Abinosh Chandra
Rashid Ahmad Vs Anisa Khatum
Mohammedali Mohammed Vs Hazrabai
Hadiya bin Zuberi Vs Mohammed Rajab
Halima Mzee Vs Ali Hamisi
Amina Hussien Vs Bakari Omar
Fatima Ali Vs Omar Salim Said
Sayyed Omar bin Ahmed Saggaf Vs Asha binti Said
Biasha binti Mohammed Vs said William Ngello
Awadhi Vs Nasser bin Salin bin Nasib
Bimoto binti Ali Vs Chur Khan
Saliha binti Baraka Vs Thabit bin Salim
Lali bin Ahmed Vs Asha binti Sheikh Ahmed
Mirza Amir Beg Vs Saadat Begum Mohammed Bashir
Abdalla Tariaa Vs Hussien bin Kassam
Athman bin Mohammed Vs Ali Bin Salim
Abdalla bin Mohammed Vs Mahama bin Kombo
Mehrunmisa d/o Late Mohammed Safi Vs Mohammed Purez s/o Mohammed. M

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R Vs Mwauji
R Vs Amekyo
I Vs I
Cheni Vs Cheni
Rattansay Vs Rattansay
A-G of Ceylon Vs Reid
Abdulkadir Salima Vs Mohammed Hassan
Ali Vs Ali
Mangeny Vs N'dongo
Abdulrehman bin Mohammed & Another Vs R
Hyde Vs Hyde
Robaba Khanim Vs Khodadad Bamaji
Mst Resham bibi Vs Khada Baksha
Bradruddin Vs Asha Begum
Shahulameeda Vs Subaida Becui
Mahuran Ali Vs Majittalla

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