Islam and Christian–Muslim Relations

ISSN: 0959-6410 (Print) 1469-9311 (Online) Journal homepage: https://www.tandfonline.com/loi/cicm20

Negotiating Muslim–Christian Relations in Kenya through *Waqf*s, 1900–2010

S. Athuman Chembea

To cite this article: S. Athuman Chembea (2017) Negotiating Muslim–Christian Relations in Kenya through *Waqf*s, 1900–2010, Islam and Christian–Muslim Relations, 28:4, 431-451, DOI: 10.1080/09596410.2017.1357958

To link to this article: https://doi.org/10.1080/09596410.2017.1357958

Published online: 27 Jul 2017.

Submit your article to this journal

Article views: 193

View Crossmark data

Full Terms & Conditions of access and use can be found at
https://www.tandfonline.com/action/journalInformation?journalCode=cicm20

ISLAM AND CHRISTIAN–MUSLIM RELATIONS, 2017
VOL. 28, NO. 4, 431–451
https://doi.org/10.1080/09596410.2017.1357958

Negotiating Muslim–Christian Relations in Kenya through *Waqfs*, 1900–2010

S. Athuman Chembea

Bayreuth International Graduate School of African Studies (BIGSAS), University of Bayreuth, Bayreuth, Germany

ABSTRACT

Waqfs provided socio-economic security for the progeny of endowers and for other social welfare causes. Being thus guaranteed socio-economic well-being, these beneficiaries were antithetical to ruling elites in Muslim dynasties and Christian colonial powers, which led to the establishment of policies and institutions to control *waqfs* and check their growing influence. This development was not only counter to normative precepts but also set minority Muslims in predominantly Christian societies at odds with non-Muslim states. To what extent did civil policies and judgements influence *waqfs*? How did Muslims negotiate the secular state constructs vis-à-vis waqf practices? How did secular state control of *waqfs* influence the dynamics of Christian–Muslim relations? This discussion, based on ethnographic research in Kenyan coastal areas, employs two theoretical frameworks – Asad's 'Islam as a discursive tradition' and Scott's concept of 'symbolic (ideological) resistance'. The article draws mainly on the perspective of the Muslim minority in Kenya and argues that state control of *waqfs* in Kenya did not only interfere with normative practices but also partly laid the ground for the present-day economic and political marginalization and exclusion of Muslims, leading to suspicion and ambiguous relations with their Christian compatriots.

ARTICLE HISTORY
Received 22 September 2016
Accepted 18 July 2017

KEYWORDS
Waqfs; resource control; resistance; inter-faith relations

Introduction

The contact and subsequent relation between the predominantly Christian community and the Muslim minority in Kenya is a historical phenomenon dating back to the arrival of the Portuguese in the sixteenth century (see Mraja 2007; Mwakimako 2007a). Islam preceded Christianity in Kenya's coastal regions, having been present from as early as the eighth century. However, after the encounter between the two religions in the sixteenth century, which was formalized by the establishment of British colonial rule in the nineteenth century, the relationship between the two could aptly be described as one of constant negotiation, particularly as regards religion, economics and politics. Boundaries in the various areas of negotiation were fluid, so that relations between the two protagonists became ambiguous, with remarkable results. This scenario could vividly be described through the microcosm of the institution of the *waqf*.

CONTACT S. Athuman Chembea kamondeh@yahoo.com, chembea.suleiman@uni-bayreuth.de
© 2017 University of Birmingham

The religious endowment or *waqf* (Arabic; pl. *awqāf*) is an Islamic socio-economic bequest that lies somewhere between *mīrāth* (inheritance) and *ṣadaqa* (alms giving). A *wāqif* (endower) permanently dedicates a particular property to a religious cause. It is held in trust by a *nāẓir* (or *mutawallī*; custodian) and its disposal is forbidden, as any benefit (*manfaʿa*) it yields is channelled to predetermined purposes (see van Leeuwen 1999, 11–12; also Baer 1969; Hoexter 2002). *Waqf*s were established to provide for the security of the progeny of the endower (*waqf dhurrī* or *waqf ahlī*; family *waqf*), or the socio-cultural welfare of the community (*waqf khayrī*; charitable *waqf*), or both causes in agreed proportions (*waqf mushtarak*; mixed *waqf*). By definition, however, all *waqf*s are charitable since they are meant to provide for a public cause as a residual benefit in accordance with the principle of *taʾabbud* (also *muʾabbad*; perpetuity). In compensation for the loss of proprietary rights, endowers are believed to gain *thawāb* (merit) and *qurba* (closeness [to God]), making a *waqf* an invaluable means of attaining *taqwā* (piety) from God (see Baer 1969; Hoexter 1995; El Daly 2010).

The Sharia also allows an endower to impose special conditions (*shurūṭ al-wāqif*) in relation to beneficiaries, distribution of benefits, custody and investment patterns, including but not limited to the period for the lease (*ana*), or rent (*ḥikr)* or exchange (*isitibdāl*) of the property. In their various forms, therefore, *waqf*s are believed to have complemented sitting governments in the provision of a wide range of social welfare benefits including healthcare, education, housing, religious institutions and infrastructure (see Qureshi 1990; Hoexter 1998; Lev 2005). By seemingly 'independent' administration, *waqf*s became a vehicle through which the socio-economically secure beneficiaries and descendants, and the *ʿulamāʾ* (Muslim clerical class) became major actors and evolved into independent groups that could fearlessly challenge the political status quo (see Burr and Collins 2006; Sanjuan 2007). This partly explains efforts by nation states to take on active involvement in the management of *waqf*s through policies and specific departments staffed by personnel appointed by the political elites.

Three scenarios have been advanced to account for the rapid change from normative precepts on *waqf* management to direct state involvement. First was the need to protect *istiṣlāḥ* (public interest). This was premised on the view of the inseparability of *dīn* (religion) from *dawla* (the state) in a cross section of Muslim communities, which allowed members to dovetail with ease within the two spheres to ensure that corrupt *mutawallī*s would not inhibit the fulfilment of the designated objectives of *waqf*s. The establishment of the Ministry of Imperial Religious Endowments in the Ottoman Empire during the eighteenth century correctly fits this scenario. Apart from *mutawalī*s being placed under the strict supervision of the state, they were also obliged to submit periodic reports and accept a quarterly audit of their accounts. Those found culpable were punished and their private property auctioned to recover embezzled *waqf* funds (see Barnes 1986; Hoexter 1997; Sheriff 2001).

Second, it was realized that some designated objectives of the *waqf*s overlapped with state obligations in the provision of social welfare in the community, especially in sectors such as education, housing and healthcare, among others. In view of this, it was claimed that state involvement could play a significant part in streamlining the running of these essential sectors in society. Consequently, political elites, as was evident in Persia, Egypt and the Ottoman Empire, removed from the direct control of *mutawallī*s those *waqf*s that had considerable income and socio-cultural appeal, and brought them

under imperial supervision. The ruling elites, in addition to dedicating *waqf*s in order to demonstrate their charitable credentials and thus bring a degree of religious legitimacy to their political hegemony, also supported religious rites such as the *ḥajj* (pilgrimage) and *zāwiya*s (Sufi orders). Furthermore, *mutawallī*s, mostly drawn from among the *ʿulamāʾ*, were appointed to manage such *waqf*s on the basis of their jurisprudential affiliations. This guaranteed that the ruling elites controlled not only the *ʿulamāʾ* but also the wider community of Muslims, who looked to the clerics for spiritual guidance (see Makdisi 1981; Sheriff 2001; Sanjuan 2007).

Third, with a secure economic base, the *ʿulamāʾ* and the various groups of beneficiaries were perceived to be evolving into popular and strong constituencies that threatened the political hegemony. To stem their rising power, Muslim political establishments, such as the Ottoman Empire, usurped the control of the institution as the economic mainstay by which these groups influenced the decision-making processes. The same strategy was also followed by non-Muslim invading colonial powers, including the French in Algeria (1831), the British in Zanzibar (1905), and the Italians in their colony of Libya (1911–1941) (see Kozlowski 1998).

The way the British colonial government dealt with *waqf*s in Kenya, particularly at the coast from 1888 to 1963, could appropriately be characterized by the third paradigm. Until the establishment of the East Africa British Protectorate (*mwambao*) in 1895, there was neither a legal body in charge of *waqf*s nor separate courts to hear and adjudicate in disputes arising from them. The region, a narrow coastal strip stretching only ten miles inland from the coast, from Kipini in the north to Vanga in the south, was part of the Zanzibar Sultanate but administered according to Sharia, unlike the upcountry Kenya colony (see Hailey 1979; Eliot 1996; Ndzovu 2014). Under Sharia, litigation regarding *waqf*s fell within the jurisdiction of the *kadhi* (Arabic: *qāḍī*; judge) while administrative aspects of the endowments resided with the *mutawallī*s.[1] After the establishment of the *mwambao*, however, the British colonial government established a body corporate – the Waqf Commissioners of Kenya (WCK) in 1899 and formulated a civil statute, the Waqf Commissioners' Ordinance, in 1900, which managed *waqf*s as part of the governing authorities' wider control of resources in the Protectorate.

Virtually all the civil policies and judicial framework on *waqf*s that were established by the colonial administration were inherited by subsequent postcolonial regimes. Up to the present, the statute regulating *waqf*-related matters is restricted to the coast province (Section 1, the WCK Act (1951); Legal Notice no. 604 of 1963). Administratively, the coast province is composed of the four *mwambao* regions of Kwale (south), Mombasa (central), Kilifi/Malindi and Lamu (north), plus the two hinterland regions of Tana River (north-west) and Taita Taveta (west). However, because the Muslim population is concentrated in the *mwambao* regions, *waqf*s in the hinterland regions have been systemically overlooked by the state authorities.

Although relations between Muslims and Christians in the Kenya coast date back to the early periods of Portuguese rule, as mentioned above, this article seeks to highlight the dynamics of negotiations between the predominantly Christian secular state and Muslims in the administration and development of the institution of *waqf*s in the light of civil policies established since the period of the British Protectorate. It will argue that direct involvement and interference by the British colonial government in the normative precepts in the practice of *waqf* administration in the region partly contributed to the

Muslim minority's perceptions of their exclusion and marginalization by the postcolonial state, and hence to the volatilility of Christian–Muslim relations in the country.

Limiting the jurisdiction of *kadhi* courts and the establishment of policies to administer *waqf*s in the protectorate

Mann and Roberts (1991, 3; quoted in Mwakimako 2011, 332) observe that 'law formed an area in which Africans and Europeans engaged one another – a battleground as it were on which they contested access to resources and labor, relationship of power and authority, and interpretations of morality and culture'. This observation correctly describes the East African Protectorate milieu, first under the British colonial authorities and later under postcolonial regimes, where various legislative and judicial undertakings shaped relations between the Muslim minority and the Christian majority as understood in the control of *waqf*s by the state.[2] As previously explained, *waqf*s were managed before the establishment of the Protectorate by *mutawallī*s appointed by the dedicators to benefit a wide range of social welfare causes. This suggests the extent to which *waqf*s became the economic mainstay of a large constituency of Muslims composed of the interlocutors of knowledge and authority – the *ʿulamāʾ*and the *kadhi*s on whom the *waqf* law relied for interpretation – the endowers, their descendants and the *mutawallī*s. The various groups of beneficiaries of *waqf*s, though not strictly identified as such, were a socio-economically secure Muslim 'civil society'. Such groups often advocated for social and political positions independent of and in opposition to the ruling class (Burr and Collins 2006, 35). Not oblivious to this threat to the colonial project as earlier experienced in Egypt and India, the British authorities established ordinances that addressed various aspects of the economy in the Protectorate, some of which impacted on *waqf*s, bringing them under state control.

This was evident in the East African Order in Council (1897), which re-organized the judiciary into two categories of 'Native Courts'. In one group were the High Court, the Chief 'Native Court', Provincial Courts, District Courts and Assistant Collectors' Courts. These were presided over by a British judicial officer and regulated by the Indian Civil Procedure Code (CPC) and the Indian Penal and Criminal Procedure Codes (PCPC). The second category consisted of the Sharia courts and Court of local chiefs (African local courts), presided over by a 'native authority' and regulated by the CPC and PCPC as well as the 'native laws' or customs that existed in the respective jurisdictions (see Anderson 2008; Hashim 2010). This categorization ensured close supervision of the 'native courts' by the British colonial government and, most importantly, vetted legal decisions arrived at by the former as they lacked appellate powers, which remained the preserve of the latter. The High Court was not bound by Sharia and could 'take whatever steps it may deem right or desirable for satisfying itself' as to the Sharia applicable to the litigation (Anderson 2008, 83). True to the application of the Sharia as understood by the British colonial officers, a number of what would have passed for valid *waqf*s were invalidated, as discussed below, to the detriment of designated socio-religious causes and beneficiaries.

The Mohammedan Marriage Divorce and Succession Ordinance of 1897 was another piece of legislation that further restricted the jurisdiction of the Sharia courts. This statute, for instance, limited the jurisdiction of the *kadhi* courts to matters of Muslim personal status law, which was narrowly defined to include marriage, divorce and inheritance

between Muslim litigants in which the value of the matter in dispute did not exceed 1000 Kenya shillings (Article 55, British native Courts Regulation (1897) as quoted in Hashim [2005, 30]; see further Carmichael [1997], Anderson [2008], Ndzovu [2014]). In its wider context, however, as observed by Powers (1990, 19–20), inheritance 'refers to the combination of laws, customs, land tenure rights and settlement restrictions that regulate the division of land at a succession'. This suggests that *hiba* (gifts) and *waṣiyya* (bequests), which could all be actualized through *waqf*s, are significant elements of the inheritance system in Islam, which rightly falls within the jurisdiction of the *kadhi*.

Consequently, under such statutes, *waqf*-related matters were taken out of the jurisdiction of the Sharia courts for three reasons: (a) the narrow and compartmentalized interpretation of Islamic personal status law, restricted by English (British) perceptions to mean marriage, divorce and inheritance; (b) the fact that the majority of revenue-generating *waqf*s involved properties worth more than the stipulated amount that Muslim courts could legally handle and (c) the categorization of *waqf* matters under real estate contracts, whose procedures not only required English legal training and expertise but also were mainly in the English language, which made them inaccessible to the *kadhi*s. Thus, as observed by Bang (2001, 75), '*waqf* administration was among the tasks previously handled by the '*ulama* which now became increasingly governmentalized'. Accordingly, with a constricted *kadhi* court, one arm of the Muslim authority was placed under constant surveillance, laying the foundations for a second set of civil policies as explained below.

Economic space control: appointment and influence of the *waqf* agency by the colonial state

Limiting the jurisdiction of the Sharia courts to a narrowly interpreted Muslim personal status law created a vacuum in the administration of *waqf*s, as *mutawallī*s and endowers were left without the supervision required by normative precepts. This justified the establishment of the WCK to control the institution's vast resources. As administration of *waqf*s became centralized, commissioners were appointed by the state from among collaborating Muslims along socio-ethnic and regional affiliation lines as well as on the basis of 'proven loyalty to the colonial state', to borrow Mwakimako's phrase (2011, 118), with a view to protecting colonial state interests rather than equitable representation of major stake holders. Ordinarily, commissioners were to serve for five years but many were retained for longer periods as a favour and bringing them prestige. As a result, the commissioners lost their independence and the right to exercise their discretion and judgement in accordance with Sharia and ancient customs pertaining to *waqf*s (see Carmichael 1997).

In essence, establishment of the WCK was, in itself, a noble idea that could have streamlined the institution and improved its efficiency. However, given the political environment in which the state agency was conceived and operationalized, it became the vehicle for the spearheading of the popular modernizing capitalist ideals advocated by the colonial authorities (see Fair 2001). Moreover, it was also used as a tool to restrict the socio-economic and symbolic influence of the ʿ*ulamā*ʾ and the diverse groups of beneficiaries and *mutawallī*s that could be brought to bear against the colonial political hegemony. This was evident in the imposition of the compulsory registration of *waqf*s, non-compliance with which was punished with fines and jail terms (Section 10, 4, Government Printers,

Kenya. Waqf Commissioners Ordinance [1900] (presently Act, 1951)). The colonial government also seized the management of private *waqf*s, allegedly for lack of proper administration, as in the case of the Wakilifi *masjid* in *mji wa kale* (old town), Mombasa, in 1957.[3]

The colonial state further influenced the decision-making process of the *waqf* agency into utilizing revenues in ways other than for the designated causes. This was manifested in the directive that the agency should use *waqf* funds to improve sanitation and public health as well as in the allocation of undeveloped *waqf* lands to residents for farming in Malindi (Carmichael 1997, 301). There is no dispute that the Sharia allows *qabala* (share cropping) as a way of improving the productivity of agricultural *waqf* land. However, in the cited cases, the colonial government was not proposing *qabala* but was opening up *waqf* land to possible private ownership. Moreover, the land was not 'unproductive', which is a prerequisite for *qabala*, but rather 'undeveloped', which made the directive a misplaced demonstration of colonial authority. Since then, *waqf* lands have been encroached upon by squatters as a result of the lack of protection of private property by the state, thus disenfranchising the Muslim beneficiaries.[4]

Another instance of colonial interference in normative *waqf* precepts involved the invocation of the Preservation of Objects of Archeological and Paleontological Interest Ordinance, Cap 314. Using this Ordinance, a closed cemetery of the Mazrui and a ruined *jāmiʿa masjid* of the Wakilindini in Mombasa were declared national monuments and were beautified as public gardens. Arguably, this was in line with 'the policy of the city of London and most English cities for the last twenty years to convert closed cemeteries and ruined Churches into public gardens with flowers that is open to the public (sic)'.[5] By appropriating English (and possibly Judaeo-Christian?) culture in these two scenarios, the colonial government clearly demonstrated insensitivity to the religious feelings and established practices of the local Muslim community, despite protests supported by their religious and political leaders.[6]

In the courts, the Sharia was applied as understood by the colonial government, consequently invalidating what would have been valid *waqf*s. This was evident in the High Court ruling of 1952, where the *waqf dhurrī* of Fatuma binti Mohamed bin Salim was invalidated because it allegedly made the residual charitable cause too remote by specifying a large network of beneficiaries. The ruling was based on the doctrine of precedence in Common Law, citing the invalidation of similar *waqf*s in India (1894) and Zanzibar (1946). As understood in the Sharia, however, the *waqf*s were valid on their own merit as charities (see Schacht 1982; Kozlowski 1998; Anderson 2008).

Colonial policies on land and immovable properties that impacted on *waqf* practices

The state agency was principally regulated by the Waqf Commissioners Ordinance and a host of other statutes, which at best centralized *waqf* administration, rather than by the Sharia, under which *waqf*s subsist. These statutes accorded the colonial government the power to define the 'official economic policy', in which capitalism through house rents, land taxes and paid labour were favoured over *waqf*s, which came to be regarded as mere acts of generosity (see Fair 2001; Oberauer 2008). One area where the British colonial

administration paved the way for strained Muslim–Christian relations in the country, and the *mwambao* in particular, regarded land control and ownership.

Whereas the colonial government perceived land exclusively as a factor in production, defined in a certificate of ownership upon survey and demarcation for use in a capitalist economy, local Muslims looked upon land from a communal point of view, as with public *waqf*s and other customary land rights. Consequently, from 1908, through the Land Titles Ordinance, the ownership of huge tracts of land in *mwambao* changed from community land or 'native reserves' to Crown Lands, despite widespread protests and claims of historical tenure by the local people.[7] The Ordinance further empowered the Governor 'to grant lease or otherwise alienate in Her Majesty's behalf any Crown lands for any purpose and on any terms and conditions as he may think fit' (Anderson 2008, 91). This came to be referred to as the law on 'Compulsory Acquisition', supposedly for public causes.

The net effect of this Ordinance was two-fold: first, it dealt a blow to claims of ownership by the locals in the *mwambao*, the majority of whom were incidentally Muslims, on the basis of lack of titles that they were able to present to the Land Registration Court to prove their ownership. Second, it abrogated Muslims' ownership of their customary lands, some of which were *waqf*s, and reduced them to squatters interfering with the community's socio-economic well-being (see Berg-Schlosser 1984; Pouwels 1987; Syagga 2010). The compulsory acquisition without compensation of *waqf* land for the construction of a railway line in Changamwe, Mombasa, for instance, remained for a long time in the hearts of Muslim beneficiaries who perceived the trains to be moving over their ancestors' dead bodies for free (see Carmichael 1997).

Islamic law requires compensation for compulsorily acquired *waqf*s to enable the establishment of alternatives. Clearly, the lack of compensation was a blow not only to the welfare of the beneficiaries but also to the spiritual aspirations of the endowers. On the other hand, compensation was paid for several other *waqf*s acquired by the colonial state in similar circumstances from 1950 to 1960. They include the *waqf* land of *shaykh* Mbaruk bin Rashid bin Salim el-Kehlany in Mombasa, endowed for the benefit of his two *masjid*s, Mbaruk (also Baluchi) in Mombasa, and Gazi, and those whose usufruct was designated for *masjid*s Mandhry and Mwana Iki bint Suleiman, also in Mombasa. However, although a ruling for compensation was made, no alternative *waqf*s were established by the state agency as was required under Sharia.[8] One may only speculate as to whether the compensation remains in the accounts of the state agency, immune to fluctuation since the 1950s.

Paradoxically, the WCK Ordinance did not specify a time limit by which such compensation payments were to be re-invested with a view to maintaining the benefit of the proceeds. Consequently, various groups of beneficiaries and social welfare causes were denied support owing to the dismantling of the *waqf*s, not to mention the spiritual rewards due to the endowers. On the other hand, the lack of titles of ownership to land implied that no new land-based *waqf*s could be established. Without doubt, this was a drawback to the various Muslim sectors that relied on *waqf*s. Furthermore, *mutawallī*s could not develop some *waqf*s for lack of titles of ownership as demanded by the Crown Lands Ordinance. This is true of some *waqf* lands and wells in the Malindi area, where the WCK failed to develop them for lack of title deeds from 1911 to 1912 (see Carmichael 1997).

This change in the perception of land ownership seriously influenced the *waqf* institution and, in effect, Muslim socio-cultural development. Of paramount importance too

was the fact that some statutes established during the colonial period also prohibited the establishment of new *waqf*s, thus ultimately incapacitating the colonized community. The African Property Preservation Ordinance (1916) provides that:

> No building, standing coconut palm, standing fruit tree, or other standing tree situated in an area to which this Ordinance has been applied shall be sold, leased, hypothecated, mortgaged or pledged by any means whatsoever to any person who is not a member of an African tribe inhabiting such area and residing therein. (quoted in Anderson 2008, 9)

Prohibiting the pledge 'by any means whatsoever' to non-Africans in the spirit of the statute, subtly outlawed the consecration of new *waqf*s as it did not take cognizance of the fact that Islamic charity is not limited by race, ethnicity or even locality. Various *waqf*s were endowed by non-African Muslims, particularly Asian immigrants, whose causes, whether primary or residual, lay outside the country, as the Sharia allows.[9] Incidentally, not all Asians were recognized as Muslims by the Ordinance and could not, therefore, establish *waqf*s in the strict sense of the statute.[10]

Asian Muslims are part of the immigrant community that settled in the Protectorate from the Persian Gulf and the Indian sub-continent from as early as the seventh century as traders, guards and religio-political refugees (see Lodhi 2013; Ndzovu 2014; Nicolini 2014). By not recognizing them as Muslims and prohibiting them from endowing *waqf*s, the statute set them apart from their Arab and African brethren and prevented them from a religious undertaking whose benefit essentially transcends racial, regional and ethnic boundaries. This undoubtedly discouraged them from endowing new *waqf*s because of the limitations placed upon them.

With *waqf*s strictly under the control of the British colonial government, the largest impact was arguably felt in the sector of Muslim education. Ordinarily, Muslim educational institutions – *madrasa*s and *duksi*s (elementary qur'anic schools) were attached to mosques and the *ʿulamāʾ* who supervised those institutions were expected to be full-time servants of the community, imparting knowledge and being supported through *waqf*s. Orphanages where the imparting of Islamic knowledge was undertaken were also among major beneficiaries of *waqf*s.[11] Colonial state control of *waqf*s adversely affected this sector by causing the loss of its major source of income, as resources were utilized even in non-designated causes, as explained above, throwing these arrangements into disarray.

As a substitute for the Islamic education system, Christian missionaries, under the auspices of the colonial government, introduced formal education that many Muslims viewed with suspicion. Their apathy was premised on the fact that missionaries were using education as a disguise for evangelization, since baptism was a prerequisite for admission to the mission schools (see Loimeire 2007; Mwakimako 2007a). With limited, ill-equipped, racially-based, state sponsored formal schools that emerged much later, many Muslim children missed out on formal education.[12] The inadequate provision of formal education for Muslims undoubtedly laid the foundations for the economic backwardness and political exclusion of the community during the independence period as they could not compete favourably with their Christian counterparts for jobs and civil service appointments, among others. This created the minority-marginalization narrative and disenfranchisement among Muslims in contemporary Kenya (see McIntosh 2009; Ndzovu 2014).

*Waqf*s and Muslim–Christian relations in postcolonial Kenya

Among Muslim administrative positions incorporated in the British in direct rule policy were those of *liwali* and *mudīr*, most of whom were Mazrui Arabs stationed in various parts of the Protectorate.[13] This shows how the British colonial government failed to correct the socio-ethnic hierarchy in the Muslim community entrenched by the Bu Sa'idi Sultanate, which accorded preferential treatment to Arab Muslims. Rather, the colonial government capitalized on the socio-ethnic divisions in the Muslim community by recognizing Mazrui Arabs as leaders of the coastal communities, a development that not only cemented the animosity between Muslim groups but also aligned well with the British divide-and-rule policy. As part of Arab–British mutual working relations, the colonial government further established private land rights for a cross section of the Mazrui Arab Muslim family through the Mazrui Land Trust Act (1914).[14] The land trust, commonly known as the Takaungu land at Kilifi district, comprised 2,716 acres consecrated as *waqf dhurrī* of the Mazrui Shak'si followers of Salim bin Khamis. A lands board of trustees was also constituted to administer the *waqf* for more than seven decades according to the Mazrui Lands Trust Act (1914) and the Sharia.[15]

Besides the failure of the postcolonial government to protect the *waqf* land from encroachment and squatting, it also invalidated the Act that established the *waqf* through the Mazrui Lands Trust (Repealed) Act in 1989. This took place without compensation to the beneficiaries for the loss of their private property, contrary to both the Sharia and the Land Acquisition Act (1983). Like the Sharia, the Land Acquisition Act requires that prompt compensation be made to owners for the loss of their land, which could then be used to establish a substitute endowment.[16] The revocation of the *waqf* without compensation therefore brought back bitter memories of colonial times, when Muslims lost much of their ancestral lands to the 'Crown land' initiatives.

The lack of compensation implied that no alternative *waqf* was established, thereby frustrating the endower's spiritual expectations and removing the beneficiaries' socio-economic benefit. This scenario reverberated across the majority of *waqf* lands that were converted to Crown lands in the 1970s to 1990s and used to reward political loyalty or to settle non-locals, particularly up-country Christians, generally referred to in the region as *wabara* (up-country people) at the expense of *wapwani* (indigenous coastal folks). These experiences were occasionally re-enacted in public forums to epitomize perceived historical injustices in relation to economic exploitation and political marginalization of the Muslim community by subsequent predominantly Christian regimes (see al-Mazrui 2004, 7). Consequently, they remain recurrent emotive and sensitive issues that occasionally flare up into bloody conflicts between the predominantly Christian *wabara* and the Muslim *wapwani* over control and ownership of resources (see McIntosh 2009; Ndzovu 2014).

In another incident where relations between Christians and Muslims were further strained, the provincial administration and Christian political elites colluded with a Christian organization to usurp a *waqf*. In what is referred to as *istibdāl*, *hikr* and *ana*, mentioned earlier in this article, the Sharia allows the sale, exchange, lease or rent of *waqf* properties with a view to either improving revenue or even acquiring better alternatives (see Qureshi 1990). In this case, around 1962, the National Council of Churches of Kenya (NCCK) acquired leasehold rights to the *waqf* of Salim bin Mbaruk bin

Dahman, comprising 9.74 acres of beach plot at Kanamai, Kilifi district. The lease was contingent on the payment of a monthly rent on top of a *salf* (advance payment, premium) and was conditional on no church being established on the *waqf* land.[17] However, immediately upon acquisition of the *waqf* land, the NCCK violated the leasehold agreement by refusing to pay rent, felled coconut trees without the consent of the WCK, and constructed a church and Christian retreat centre.

Efforts by the aggrieved WCK to seek redress from several state offices proved futile. It turned out that the NCCK had violated the agreement under the auspices of the provincial administration, which is, incidentally, representated on the WCK board, and a host of political elites who were members of the NCCK panel.[18] Throughout the time when the NCCK was refusing to pay rent, the spiritual aspirations of the endower and recipient causes of various Muslim groups remained unfulfilled. These included the annual performance of *ḥajj* by proxy and the maintenance of a local orphanage and qur'anic school, and so the bad blood between Christians and Muslims was intensified. The NCCK later changed the dynamics of the argument, claiming that it had acquired the leasehold of the *waqf* without rent requirements, and even petitioned the President (*Mzee* Jomo Kenyatta) on the launch of the Christian centre in 1971 to prevail upon the WCK to terminate its entitlements with regard to the *waqf* land. Consequently, the WCK reluctantly agreed to accept a three-bedroom Swahili house offered by the NCCK in place of the beach plot 'with a view of not embarrassing the president [and] to remove the relationship existing between the WCK as landlords and NCCK as lessees' (al-Mazrui 2004, 11–13).[19]

Although some of the incidents narrated above appear to have been 'settled', the mere fact that they are occasionally resurrected indicates that Muslims were not satisfied with the way their compatriots negotiated the deals and the subsequent outcome. The last incident in particular elicits strong emotions among a broad cross-section of Muslims, for it can appropriately be seen as a religio-political duel. Informing this view is the pre-independence unsuccessful attempt by the two predominantly Muslim regions (Coast and North-eastern provinces) to secede from up-country Christian Kenya, which was prompted by their historical (dis-)engagement with the British colonial government that had left them economically and socio-culturally neglected and marginalized.

On the eve of independence, Muslims were suspicious that a unitary postcolonial system would condemn them to further exclusion and alienation by the socio-economically endowed Christian majority, and hence the desire of the Coast and North-eastern provinces to join Zanzibar and Somalia, respectively (see McIntosh 2009; Ndzovu 2014). In relation to the loss of the Kanamai *waqf*, some Muslims perceived the involvement of Christian political elites and the ultimate intervention by the President, whose presence during the inauguration of the Christian centre was not merely coincidental, as political coercion meant to intimidate them into recognizing the prevailing Christian officialdom after the fall of the Sultanate (read Muslim rule).

On the religious front, Muslims further view their loss of the *waqf* as an attempt by Christians to lodge a claim for adherents in the perceived Muslim heartland in the country. Christians in the *mwambao* were a marginalized group as Muslims commanded almost all sectors, given their engagement with the Bu Sa'idi Sultanate before the establishment of the Protectorate. By appropriating political power in the postcolonial period, the NCCK was determined to test and question the dominance of Islam in the region by

establishing a Christian centre on Muslim *waqf* land with a view to fighting for a share of adherents in the so-called competition 'for the soul of Africa'. As argued elsewhere in this article, the competition 'for the soul of Africa' in Kenya's religious landscape started with the coming of the Portuguese and was compounded by the establishment of British colonial rule. The British colonial government provided a conducive environment for Christian missions and evangelization, which resulted in the establishment of centres such as Waa and Rabai.[20]

Despite support by the colonial government, however, proselytization by Christian missionaries on the coast did not gain much ground, prompting their relocation to upcountry Kenya, where they were well received. Incidentally, these colonial-era religious negotiations seemed to echo the spirited opposition by a section of the 'Kenya Churches', an adhoc group of Christians, mainly Pentecostals supported by some Anglicans and Methodists, to the expansion of the legal jurisdiction of the *kadhi* courts during the 2005–2010 constitutional debate (see below). In retrospect, democracy, as Ndzovu (2014) suggests, requires that the majority protect the minority rather than bullying and oppressing them, yet the above incidents illustrate the exact opposite, pointing to ambivalent relations between the two religio-political communities in the country.

Constitutional negotiations to free *waqf*s from state control in postcolonial Kenya

The constitutional negotiations to free *waqf*s from state control in postcolonial Kenya were undertaken under the auspices of reforming the *kadhi* courts during the change of the constitution in 2000s. Like the *kadhi* court, the WCK Act was retained in the independence constitution courtesy of a tripartite agreement, based on the Robertson Commission of 1961, between the Sultan of Zanzibar, the Prime Minister of Kenya and the British Secretary of State. The charter provided that Islam would be the official religion in the Protectorate and that 'all cases and law suits between natives will continue to be decided according to Shari'a' (Robertson 1961, 32–33; Carmichael 1997, 292). In addition, a cross-section of Muslims felt that use of the Sharia as provided by the charter entailed 'freedom of worship and the preservation of religious buildings and institutions like *waqf*s' (al-Mazrui 2004, 3).

However, the independence constitution adopted the *kadhi* courts with the narrowly defined Muslim personal status law, contrary to the expectations of Muslims (see Mwakimako 2007b, 2010; Chesworth 2011; Osiro 2014). Section 66 (3) of the independence constitution on the *kadhi* courts provides that:

> A *kadhi's* court shall have and exercise the following jurisdiction, namely the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion; but nothing in this section shall limit the jurisdiction of the High court or of any subordinate court in any proceeding which comes before it.[21]

Entrenching the narrowly defined Islamic personal status law in the independence constitution implied carrying over the ambiguous relation between *waqf*s and *kadhi* courts, as *waqf*s were to be managed in accordance with the WCK Act. Since then, various amendments have been made to the independence constitution at various times until a new constitution was promulgated in August 2010. However, the *kadhi* court statute and the WCK

Act were virtually untouched. In the course of the review process, Muslims' desire to expand and enhance the jurisdiction of the *kadhi* courts included broadening the scope of personal status law and inheritance as understood in the Sharia to include *waqf*s, *waṣiyya* and *hiba*. This was captured in Article 2000(1) of the Bomas draft constitution (2004):

> The jurisdiction of a *kadhi*'s court extends to (a) the determination of Muslim law relating to status, marriage, divorce, including matters arising after divorce, and inheritance, and succession in proceedings in which all parties profess Islam; (b) the determination of civil and commercial disputes between parties who are Muslims, in the manner of a small claims courts as by law established, but without prejudice to the rights of parties to go to other courts or tribunals with similar jurisdiction; (c) the settlement of disputes over or arising out of the administration of *waqf* properties.

As contained in the proposals, enhancement of the *kadhi* courts did not preclude the right of Muslims to seek legal redress from civil courts, or in litigations pitting Muslims against non-Muslims. Thus, the choice of the *kadhi* courts for the purpose of arbitration remained the private choice of individual Muslims. However, a section of Christians, mainly Pentecostals with the support of Anglicans and Methodists, under the banner of 'the Kenya Churches', misconstrued the Muslims' proposals as having a religious aim of favouring their religious community and as a disguise for an intention to impose the Sharia on the Christian majority (see Mwakimako 2007b; Tayob and Wandera 2011; Wario 2014). This was premised on the fact that Kenya's constitutional debate and the Muslims' proposals to expand the *kadhi* courts coincided with advocacy for Sharia in some other parts of Africa, culminating in the declaration of the same in several West African nations, particularly some federal states in Nigeria and Mali (see Frederiks 2010; Chesworth and Kogelmann 2014).

The allegations by 'the Kenya Churches' not only polarized Kenyans along religious lines, but also temporarily stalled the constitutional review process. To unlock the impasse, Muslims gave in to the opposition by Christian groups and dropped their demands to expand the jurisdiction of the *kadhi* courts, consequently losing the negotiation to bring *waqf*-related matters under the jurisdiction of the Sharia courts and management institutions of the *mutawallī*. The net effect of this loss was that the socio-economic heritage of Muslims remains under the supervision of the secular statute and the predominantly Christian state, despite their persistent contestation.

Muslims' response to state interference in *waqf*s since the colonial period

The foregoing argument demonstrates that active involvement in *waqf*s by the secular state since the colonial period has interfered with the institution, causing disenfranchisement among Muslims. More importantly, in controlling *waqf*s, the colonial government imposed a shift in economic focus that encouraged capital investment. For instance, the policy regarding land was to use it as a factor in production rather than allowing it to be inhabited by groups of dependants and other social welfare causes as a charitable asset. What the colonial government was possibly not aware of was the perception of life as one totality in some Muslim communities, the present being no exception.

Muslims have a profound belief in Islam not merely as a religion but also as a complete way of life. Attempts to undermine any single aspect therefore have ripple effects in the

entire system of Muslim life. In the case of *waqf*s, state control clearly interfered with several aspects of Muslim life: from spiritual to economic, social to symbolic, legal to legislative. At some point, this went as far as questioning the institution of *waqf*s altogether by invalidating what would have been valid *waqf*s under Sharia, as discussed above.[22] By controlling *waqf*s, the British colonial government rendered the positions of *mutawallī*s, ʿ*ulamā*ʾ and *kadhi*s redundant and effectively contributed to their loss of social, economic, symbolic and religious influence in society, in sharp contrast to the subsequent rising influence of the colonial government.

Moreover, historical evidence suggests that the economy of the predominantly Muslim *mwambao* region was mainly driven by slave labour. The economy was destroyed by the Portuguese when they occupied the coast but became vibrant again after their expulsion in the seventeenth century. In the early twentieth century, the British colonial government permanently abolished the slave trade, disrupting the economy of the region (see Sheriff 1991; McIntosh 2009; Mwinyihaji 2014). As McIntosh (2009, 28, 55–58) observes, the abolition of slavery was not followed by any contingent plans for former slaves, such as repatriation (the majority having been sourced from present-day Tanzania) or resettlement, rather than seeking to control African labour and enforce the rights of landowners. Furthermore, centuries of slave labour had produced a distinct Muslim Arabo-African culture called Swahili as a result of settlement and intermarriage between masters and slaves.

The lack of contingency planning following the abolition of slavery therefore rendered a large indigenous population of manumitted slaves and the Swahili jobless, economically insecure, without permanent residence and condemned to permanent squatting. Given the imperial authority of the colonial government, however, Muslims could not openly question the policies that brought them into subordination. Rather, they resorted to ideological (also symbolic) resistance – 'the ordinary means of class struggle [and] techniques of first-resort [such as non-compliance with official demands, foot dragging, sabotage and withdrawal] in the common historical circumstances in which open defiance was impossible and entailed mortal danger' (Scott 1987, 419, 2004, 34).

In the case of *waqf*s, ideological resistance involved non-compliance with the compulsory registration rule, as is evident in the decline in the number of *waqf*s in the central registry. Only seven *waqf*s (6.7%) were registered from 1940 to 1960, two decades before the end of colonial rule, compared with 74 *waqf*s (71.2%) registered from 1910 to 1930 upon the establishment of the state agency – a 54.8% decline.[23] Non-compliance with compulsory registration, as depicted in the figures, was not a coordinated response from the Muslim community, neither was it openly declared in the conventional sense of a resistance movement. It became an inconspicuous but effective means through which the community expressed its dissatisfaction with state interference in *waqf*s and partly enabled ownership and control of resources to revert to Muslims.

The lack of political will on the part of postcolonial regimes to address the various policies that put the Muslim community into extended subordination, including the historical injustices in land control and ownership, political marginalization and economic exploitation, further exacerbated the animosities between the two socio-religious groups.[24] This is evident in the occasional bloody confrontations between the Muslim *wapwani* and Christian *wabara* over control of resources. Consequently, only 13 *waqf*s (12.5%) were registered from 1970 to 2000. Furthermore, Muslims 'exited' from state-controlled *waqf*s to

non-labelled *waqf*s and other uncontrolled charitable initiatives including private trusts, *zakāt*, *ṣadaqa* and community-based associations (including NGOs).

This was particularly true from the 1990s, following expansion of the democratic space in Kenya. The Mazrui land *waqf* that was revoked through government legislation but later restored by the court (see above) correctly fits this scenario. Upon restoration of the *waqf* land in 2012, the beneficiaries established a Mazrui community land trust 'for the sake of preservation into perpetuity of the assets and properties comprised in the 2,716 acres of land in Takaungu'.[25] As contained in the spirit of the trust deed, the Mazrui trust is a non-labelled *waqf*, since it provides for administration of the property 'according to Islamic Shari'a law [and the] *waqf* land cannot be sold, but the benefit accruing thereof may be enjoyed, leased, transmitted and/or passed on to the next generation'.[26] However, by being designated as a 'trust', it technically became independent from the rigours of the WCK and, by extension, the political manoeuvering and direct control of the government.

The 'Trust of the Mosque of Msalani', established in 2011 by a self-appointed executive committee in defiance of the WCK, provides another illustration of Muslims' symbolic resistance to state control of *waqf*s. As legal administrators of the *masjid* upon inquiry and takeover, allegedly owing to lack of an established *mutawallī*, the WCK appointed a caretaker who was opposed by the executive committee, which defiantly established the 'Trust of the Mosque of Msalani' instead.[27] Were it not for the land title deed that the WCK used to petition the Registrar of Titles and the Land Registry not to recognize the mosque committee, this would have taken the *waqf* out of the mandate of the WCK. This is not to forget the innumerable orphanages, *masjid*s, integrated schools and *madrasa*s, as well as health centres run by local committees and registered under various bodies. The majority, if not all, of these non-labelled *waqf*s have capitalized on the principles of *waqf* to harness resources for the socio-cultural welfare of the Muslim community outside the purview of the WCK.

The Muslim Education and Welfare Association (MEWA) of Mombasa and Tawfiq Hospital in Malindi would suffice as further illustrations of charitable institutions that have benefitted from the ideals of *waqf*. MEWA was founded in 1985 as a local initiative in response to the falling standards of formal education for Muslims in the town. The community pooled resources to provide bursaries, educational materials and partial scholarships for advancing students. In 1993, the project was registered as an NGO. It currently runs one of the most prestigious hospitals in the region, offering healthcare at subsidized rates. It also offers educational services in a range of library facilities, career training and Ramadan *ifṭār* portions to poor Muslims.[28]

Tawfiq Hospital in Malindi, a brainchild of two local groups, Tawfiq Muslim Youths and Muslim Education and Development Association (MEDA) of Malindi, was similarly established in 1985 to provide subsidized healthcare in an area long neglected by the government. The hospital currently operates with support from the local community, volunteers and a plethora of well wishers, both local and international, including the Islamic Development Bank (IDB), World Assembly of Muslim Youths (WAMY), the International Islamic Relief Organization (IIRO), and the Islamic Foundation (Saudi Arabia). The hospital also runs a Ramadan *ifṭār* programme, *zakāt al-fiṭrī*, and organizes funerals for the poor, care for the elderly and orphans, and *daʿwa* (Islamic proselytization) through a well established *masjid* within the hospital. Support from international bodies

for these non-labelled *waqf*s comes in the name of Islamic charity and also caters for orphanages, Muslim (integrated) schools, mosques and *madrasa*s.[29]

Clearly, Muslims disagreed with state interference in the institution of *waqf* and their withdrawal to uncontrolled alternatives corroborates this. The proliferation of charitable trusts among Muslims in Kenya and their preference for uncontrolled and decentralized charitable initiatives, such as *ṣadaqa* and community associations that operate within *waqf* principles are forms of symbolic resistance to state interference with *waqf*s. These should be understood from the perspective of the subordinate Muslim community as valuable but inconspicuous means to express dissatisfaction with secular state policies on *waqf*s that seek to reverse control of economic, symbolic and social privileges.

In the same vein, the proliferation of non-labelled *waqf*s could be viewed through the lenses of *waqf* as an Islamic 'discursive tradition', 'a tradition of Muslim discourse that addresses itself to conceptions of the Islamic past and future, with reference to a particular Islamic practice in the present' (Asad 2009, 20). This concept seeks to explain Muslim institutions as lived and negotiated across the global *umma* (community of believers), not as a fossilized set of rules unrelated to the beliefs and practices of the faithful and incompatible with contemporary realities, but as a progressive discourse that relates to the past and the future through a present. The development of the institution of *waqf* since its inception in the seventh century has assumed different faces at various times in response to local customs and needs, causing it to be lived and mediated in varied ways across the Muslim world.

After suffering setbacks and near collapse between the eighteenth and nineteenth centuries, several Muslim communities have, in the last decades of the twentieth century, established new policies and institutions to reinvigorate *waqf*s (see Kahf 2003; Siraj and Hilary 2006; Dafterdar and Cizakca 2013). Transnational organizations inspired by the rise of civil society in Islam, including the subsidiaries of the IDB – the World Waqf Foundation [WWF] and the Awqaf Properties Investment Fund [APIF] – IIRO, Islamic Relief (UK) and WAMY, are at the forefront in re-inventing *waqf*s within corporate frameworks and re-interpreting theological principles that arguably used to hold back the growth of the institution. This explains their involvement in international Muslim socio-cultural welfare in the name of Islamic charity. These organizations encourage Muslims to make voluntary contributions towards specific initiatives in the form of *waqf* shares and certificates, which are pooled together and channelled to particular areas of need in the global Muslim *umma*. All these could readily find parallel in the non-labelled *waqf*s among Muslims in the Kenya coast area. The resultant effect is the according of a measure of independence and control over resources to the Muslim minority in a multi-religious landscape heavily skewed in favour of Christianity.

Conclusion

There is no doubt that historical engagement between Muslims and Christians, particularly after the introduction of British colonial rule in the Protectorate, has had consequences in contemporary trends and relations between the two groups. British colonial policies were meant to control resources with a view to instilling capitalist economic ideals and checking the socio-religious influence of the *ʿulamāʾ* and various groups of

economically secure *waqf* beneficiaries for the sake of ensuring political hegemony. These were informed by the earlier experiences of the British in Egypt and India.

What could, however, be seen as more disturbing is the apparent failure and lack of political will on the part of successive predominantly Christian postcolonial regimes to undo the colonial framework that subordinated the Muslim community for the sake of peaceful co-existence in the country. As a society, Kenya needs to reflect on the historical trajectory with a view to discarding the fashionable 'let us accept and move forward' attitude. It is the inability to learn from shared historical encounters that makes Kenyans vulnerable to policies such as the banning of Muslim charitable organizations (1980s) and the Suppression of Terrorism Bill (2013), which only served to perpetuate the perceived political profiling, marginalization and economic exploitation of Muslims by predominantly Christian regimes. Until this systemic subordination and marginalization of the Muslim minority population is addressed, Kenya's moral authority to engage in inter-faith discourse for cooperation and co-existence will continue to be shrouded in suspicion and mistrust.

Notes

1. Available *waqf* deeds give registration dates from the 1900s, but this does not indicate the date when they were established as no registration was required before the founding of the WCK. See the *waqf* deed of Gulamhussein Adamji, fols 38–39; Alibhai Adamji Dhar, fols 78–88; Mwanajumbe bint Ali bin Khamis, fols 32, 34–35; Mohammed bin Omar el Auf, fol 48–49 (WCK archive, Mombasa). For further discussion on matters of *waqf* before the establishment of the WCK in the region, see Bang (2001), Anderson (2008).
2. Figures from the Kenya National Bureau of Statistics (KNBS) derived from the 2009 National Population and Housing Census put Muslims at 11.2% of the 38 million Kenyans. Several sources, however, contest the KNBS figures and estimate the Muslim population variously at between 8% and 25%. See KNBS, Population and Housing Census, Nairobi, 2009, file:///C:/Users/USER/Downloads/Volume%202Population%20and%20Household%20Distribution%20by%20Socio-Economic%20Characteristics%20(1).pdf; accessed April 2016. See also Ndzovu (2014).
3. Sections 12 (1a & b) of the WCK Ordinance empower the state agency to take over administration of *waqf*s whenever it 'appears to the Commissioners that there is no properly constituted trustee or […] is acting in an improper or unauthorized manner'. See also *Mombasa Times*, Thursday, November 3, 1957, and Saturday, November 5, 1957; correspondence between WCK's Advocate and Naaman bin Ali, June, 1957; minute 50/94 of November, 1994; letter of Ali's appointment by the WCK as caretaker of the *masjid*, October, 1994 (all available at the WCK archive, Mombasa).
4. The *waqf* of Mazrui at Takaungu, Kilifi, was one such endowment that was invaded by squatters as a consequence of lack of state protection of private property. The majority of the Takaungu local people follow Christianity and African religion (Afrel). Personal interview with Rashid Muhammad Salim al-Mazrui, Takaungu, October 2015.
5. Letter from J.S. Kirkman, the officer in-charge, Royal Gedi National Park Malindi, to the DC, Mombasa, January 1955; minute 2 of the meeting held in the DC's office, Mombasa, February, 1955 (WCK archive, Mombasa).
6. Letter of protest by *shaykh* Mbarak Hinawy, the *liwali* of the coast, to the town clerk, Mombasa, cc. the PC, DC, Secretaries of Education, Labor & Lands, Forestry Development, Game & Fisheries, Nairobi, January, 1955 (WCK archive, Mombasa).
7. The Land Titles Ordinance as quoted in Anderson (2008, 91) defines Crown land as

    […] all public lands in the colony which are for the time being subject to the control of Her Majesty by virtue of any treaty, convention, or agreement, or by virtue of Her

> Majesty's protectorate, and all lands which shall have been acquired by Her Majesty for the public service or otherwise howsoever, and includes all lands occupied by the African tribes of the colony and all lands reserved for the use of members of any African tribe, save only the lands declared to be native lands by the Native Lands Trust Ordinance.

See Anderson (2008, 106–107), Syagga (2010).

8. Minute 2068 of April 1957 (WCK archive, Mombasa); personal interviews with Muhammad Shalli, Mombasa, October–December, 2014.
9. *Waqf*s of Gulamhussein Adamji, fols. 38/9; Hajji Ismael Adam, fols 5152; Hajji Ebrahim Adam, fols. 67 (WCK archive, Mombasa).
10. Section 2 of the *Waqf* Commissioners Act (1951) defines a Muslim as '[…] an Arab, a member of the Twelve Tribes, a Baluchi, a Somali, a Comoro Islander, a Malagasy or a native of Africa, of the Muslim faith'.
11. Among *waqf*s designated for Muslim educational causes include those of Salim Mbaruk bin Dahman, (Takaungu, unmarked); Latifa bint Saleh bin Awadh, fols 100101; Rehema bint Ali, fol. 254; Ali bin Salim, fols 9495; Amria bint Ali bin Khamis, fol. 36; Seif bin Salim bin Khalfan el-Bu Sai'di, fols 2021 (WCK archive, Mombasa).
12. Among the few colonial government-sponsored racially based schools were the Arab girls' school (currently Serani Secondary, Mombasa); the Arab boys' school (currently Khamis Secondary, Mombasa); the Indian school (currently Aldina Visram, Mombasa) and the African school (currently Ronald Ngala, Mombasa). Personal interviews with *mu*ʿ*allim* Yussuf Bakari Mwamzandi, Msambweni, November–December, 2014.
13. There were six Muslim administrative units of the *liwali* in the Kenya coast, that is, Gazi (south coast), Mombasa (central); Takaungu, Mambrui, Malindi and Lamu (north coast); and four *mudīr*s in Vanga (south coast), Mtwapa, Witu and Faza (north-coast). See Partridge and Gillard (1995).
14. On political relations between British colonial government and Mazrui Arabs in the Protectorate, see Mwakimako (2010), Ndzovu (2014).
15. Section 3 of the Mazrui Lands Trust Act (1914) indicates that the lands board of trustees of the *waqf* was composed of the PC, Coast Province, and not more than six other members. See KNA/PC/Coast/1/11/41; judgment on Civil Suit no. 185 of 1991 in the High Court of Kenya in the matter of Mazrui Lands Trust (Repeal) Act and in the matter of the Constitution of Kenya between the Mazruis and the Attorney General.
16. Section 5, Land Acquisition Act (1983). See also sections 75(1) and 40(3), pre-independence constitution 1963 (revised 2010).
17. Transfer of lease from Goolshan Ladies Wear Ltd. to NCCK, July 1962; correspondence between the WCK and NCCK's Advocate, August–November 1962 (available at the WCK archive, Mombasa).
18. The NCCK was then under the chairmanship of the Rev. Thomas Kalume, who was also a Member of Parliament for Malindi North constituency from 1969. See correspondences between the PC, Coast Province, the Chief *Kadhi*, and the WCK, May 1967; correspondence between the Registrar General, the WCK and the NCCK, May–October 1971; letter by WCK to the PC, coast Province, October 1972 (available at the WCK archive, Mombasa).
19. See also minutes of the WCK meeting held in the PC's office at Mombasa, December 1973; correspondence between the NCCK and the PC, Coast Province, September 1972; the PC and the WCK, October 1973; the NCCK and the WCK, January–July 1974; minute 143 of special meeting of WCK and NCCK, July 1974; correspondence between the NCCK and the WCK, July–August 1974; minute 26/76(1) of WCK meeting, July 1976 (available at the WCK archive, Mombasa).
20. For early negotiations between Muslims and Christian missionaries for the religious space on Kenya's coast, see Mwakimako (2007a), McIntosh (2009).
21. See also section 5, *Kadhi's* Court Act, 1967.

22. *Waqf*s were also invalidated during the postcolonial period as a consequence of legal clashes between the Sharia and Common Law. They include the *waqf*s of Rukiyabhai, Civil Suit no. 60 of 2006 in the High Court; Said bin Rashid al-Mandhry, Civil Suit no. 55 of 2011 in the High Court; and Athman bin Kombo bin Hassan, Civil Appeal no. 17 of 2014 in the High Court.
23. Statistics drawn from 104 sampled *waqf* deeds during research (2014–2017) at the WCK archive, Mombasa.
24. Figures from the National Housing and Population Census (2009) indicate that predominantly Muslim regions in the Coast and North-eastern provinces are well below national averages in general development and social welfare provision by the government. See file:///C:/Users/USER/Downloads/Volume%202Population%20and%20Household%20Distribution%20by%20Socio-Economic%20Characteristics%20(1).pdf (accessed April 2016).
25. Clause 3 of the trust deed of the Mazrui Community Land Trust (WCK archive, Mombasa).
26. Clause 2(a) of the trust deed of the Mazrui Community Land Trust (WCK archive, Mombasa).
27. The ‘executive committee’, led by Salim Awadh, wanted to be recognized as trustees instead of Khamis Omar Khamis (Shaibo), who had usurped the role of imam since the demise of the initial *mutawallī*. See copy of inquiry, March 1976; Shaibo’s correspondence with the WCK, March 2000; WCK’s letter of appointment to Shaibo, July 2000; Awadh’s correspondence with the WCK, May–July 2001; the WCK’s correspondence with the Registrar of Titles, January 2003 (WCK archive, Mombasa).
28. Personal interviews with Muhammad Shalli, Mombasa, November 2015; Zubeir Hussein Noor, Mombasa, November 2015. See also https://www.betterplace.org/en/organisations/10087-mewa-muslim-education-and-welfare-association (accessed July 6, 2017).
29. Personal interviews with Ahmed Aboud Hadi, Malindi, November 2015; Hamdoun, WCK agent, Malindi, November 2015.

Disclosure statement

No potential conflict of interest was reported by the author.

Funding

This article is part of an ongoing research jointly funded by the German Academic Exchange Services (DAAD) and the National Commission for Science, Technology, and Innovation (NACOSTI), Kenya under the Kenya-German Postgraduate Training Programme [50085235].

ORCID

S. Athuman Chembea http://orcid.org/0000-0001-6549-6199

References

al-Mazrui, H. 2004. *Memorandum to the Commission of Inquiry into Illegal/Irregular Allocation of Public Land*. Mombasa: Kenya.

Anderson, J. 2008. *Islamic Law in Africa*. New York: Routledge.

Asad, T. 2009. “The Idea of an Anthropology of Islam.” *Qui Parle* 17 (2): 1–30.

Baer, G. 1969. *Studies in the Social History of Modern Egypt*. Chicago, IL: University of Chicago Press.

Bang, A. 2001. “Intellectuals and Civil Servants: Early 20th Century Zanzibar ‘Ulama and the Colonial State.” In *Islam in East Africa: New Sources*, edited by S. Amoretti, 59–98. Rome: Herder Editrice E Libreria.

Barnes, J. 1986. *An Introduction to Religious Foundations in the Ottoman Empire*. Leiden: Brill.

Berg-Schlosser, D. 1984. *Tradition and Change in Kenya: A Comparative Analysis of Seven Major Ethnic Groups*. München: Ferdinand Schöningh.

Burr, R., and M. Collins. 2006. *Alms for Jihad: Charity and Terrorism in the Islamic World*. Cambridge: Cambridge University Press.

Carmichael, T. 1997. "British Practice towards Islam in the East Africa Protectorate: Muslim Officials, Waqf Administration and Secular Education in Mombasa and Environs, 1895–1920." *Journal of Muslim Minority Affairs* 17 (2): 293–309.

Chesworth, J. 2011. "Kadhis Courts in Kenya: Reactions and Responses." In *Constitutional Review in Kenya and Kadhis Courts*, edited by A. Tayob and J. Wandera, 3–17. Cape Town: Center for Contemporary Islam.

Chesworth, J., and F. Kogelmann, eds. 2014. *Shari'a in Africa Today: Reactions and Responses*. Leiden: Brill.

Dafterdar, M. H., and M. Cizakca. 2013. *The Role of Awqaf in the 21st Century: An Update on the Development of Islamic Foundations*. [Opusculum 69] Berlin: Maecenata Institut.

El Daly, M. 2010. "*Challenges and Potentials of Channelling Local Philanthropy towards Development and Social Justice and the Role of Waqf (Islamic and Arab-Civic Endowments) in Building Community Foundations*." (*PhD diss.*). Humbolt-Üniversität zu Berlin.

Eliot, C. 1996. *The East Africa Protectorate*. London: Frank Cass.

Fair, L. 2001. *Pastimes and Politics: Culture, Community and Identity in Post-Abolition Urban Zanzibar, 1890–1945*. Athens: Ohio University Press.

Frederiks, M. 2010. "Let Us Understand Our Differences: Current Trends in Christian–Muslim Relations in Sub-Saharan Africa." *Transformation: An International Journal of Holistic Mission Studies* 27 (4): 261–274.

Hailey, L. 1979. *Native Administration in the British African Territories*. London: His Majesty's Stationery Office.

Hashim, A. 2005. "Servants of Sharia: Qadis and the Politics of Accommodation in East Africa." *Sudanic Africa* 16: 27–51.

Hashim, A. 2010. "Coping with Conflicts: Colonial Policy towards Muslim Personal Law in Kenya and Post-Colonial Court Practice." In *Muslim Family Law in Sub-Saharan Africa: Colonial Legacies and Post-Colonial Challenges*, edited by S. Jeppie, E. Moosa and R. Roberts, 221–245. Amsterdam: Amsterdam University Press.

Hoexter, M. 1995. "Huquq Allah and Huquq al-ibad as Reflected in the Waqf Institution." *Jerusalem Studies in Arabic and Islam* 19: 133–156.

Hoexter, M. 1997. "Adaptation to Changing Circumstances: Perpetual Leases and Exchange Transactions in Waqf Property in Ottoman Algiers." *Islamic Law and Society* 4 (3): 319–333.

Hoexter, M. 1998. *Endowments, Rulers and Community: Waqf al-Haramayn in Ottoman Algiers*. Leiden: Brill.

Hoexter, M. 2002. "The Waqf and the Public Sphere." In *The Public Sphere in Muslim Societies*, edited by M. Hoexter, S. Eisenstadt and N. Levton, 119–138. New York: State University of New York Press.

Kahf, M. 2003. "The Role of Waqf in Improving the Ummah Welfare." Paper presented at the International Conference on Waqf as a Legal Private Body. Medan, The Islamic University of North Sumatra.

Kenya National Bureau of Statistics (KNBS). 2009. *National Housing and Populations Census (2009)*, vol. 2. Accessed April 2016. file:///C:/Users/USER/Downloads/Volume%202-Population%20and%20Household%20Distribution%20by%20Socio-Economic%20Characteristics%20(1).pdf.

Kozlowski, G. 1998. "Religious Authority, Reform, and Philanthropy in the Contemporary Muslim World." In *Philanthropy in the World's Traditions*, edited by W. Ilchman, S. Katz and E. Queen, 279–308. Indianapolis: Indiana State University Press.

Lev, Y. 2005. *Charity, Endowments, and Charitable Institutions in Medieval Islam*. Miami: University Press of Florida.

Lodhi, A. 2013. "The Baluchi of East Africa: Dynamics of Assimilation and Integration." *The Journal of the Middle East and Africa* 4 (2): 127–134.

Loimeire, R. 2007. "Perceptions of Marginalization: Muslims in Contemporary Tanzania." In *Islam and Muslim Politics in Africa*, edited by B. Soares and R. Otayek, 137–156. New York: Palgrave Macmillan.

Makdisi, G. 1981. *The Rise of Colleges: Institutions of Learning in Islam and the West*. Edinburgh: Edinburgh University Press.
Mann, K., and R. Roberts. 1991. *Law in Colonial Africa*. Portsmouth: Heinemann.
McIntosh, J. 2009. *The Edge of Islam: Power, Personhood, and Ethno-Religious Boundaries on the Kenya Coast*. London: Duke University Press.
Mraja, M. 2007. *Islamic Impacts on Marriage and Divorce among the Digo of Southern Kenya*. Würzburg: Ergon Verlag.
Mwakimako, H. 2007a. "Christian–Muslim Relations in Kenya: A Catalogue of Events and Meanings." *Islam and Christian–Muslim Relations* 18 (2): 287–307.
Mwakimako, H. 2007b. *Mosques in Kenya: Muslim Opinions on Religion, Politics and Development*. Berlin: Klaus Schwarz Verlag.
Mwakimako, H. 2010. "Conflicts and Tensions in the Appointment of Chief Kadhi in Colonial Kenya 1898-1900s." In *Muslim Family Law in Sub-Saharan Africa*, edited by S. Jeppie, E. Moosa and R. Roberts, 109–134. Amsterdam: Amsterdam University Press.
Mwakimako, H. 2011. "The Historical Development of Muslim Courts: The Kadhi, Mudir and Liwali Courts and the Civil Procedure Code and Criminal Procedure Ordinance, c. 1963." *Journal of Eastern African Studies* 5 (2): 329–343.
Mwinyihaji, E. 2014. "Necessity Removes Restrictions: Swahili Muslim Women's Perspectives on Their Participation in the Public Sphere." In *Shari'a in Africa Today: Reactions and Responses*, edited by J. Chesworth and F. Kogelmann, 177–194. Leiden: Brill.
Ndzovu, H. 2014. *Muslims in Kenyan Politics: Political Involvement, Marginalization, and Minority Status*. Evanston, IL: Northwestern University Press.
Nicolini, B. 2014. "Notes on Asian Presence Along the Swahili Coast During the Nineteenth Century." *Quaderni Asiatici* 107: 61–86.
Oberauer, N. 2008. "'Fantastic Charities': The Transformation of Waqf Practice in Colonial Zanzibar." *Islamic Law and Society* 15 (3): 315–370.
Osiro, R. 2014. "Women's Views on the Role of Kadhi's Courts: A Case Study of Kendu Bay, Kenya." In *Shari'a in Africa Today: Reactions and Responses*, edited by J. Chesworth and F. Kogelmann, 195–212. Leiden: Brill.
Partridge, M., and D. Gillard, eds. 1995. *British Documents on Foreign Affairs: Reports and Papers from the Foreign Office Confidential Print. British Africa, 1887–1905*. Vol. 17. New York: University Publications of America.
Pouwels, R. 1987. *Horn and Crescent: Cultural Change and Traditional Islam on the East African Coast, 800–1900*. Cambridge: Cambridge University Press.
Powers, D. 1990. "The Islamic Inheritance System: A Socio-Historical Approach." In *Islamic Family Law*, edited by C. Mallat and J. Connors, 11–29. London: Graham & Trotman.
Qureshi, M. 1990. *Waqfs in India: A Study of Legislative and Administrative Control*. New Delhi: Gian.
Robertson, James W. 1961. *The Kenya Coastal Strip: Report of the Commissioner*. London: HMSO.
Sanjuan, A. 2007. *Till God Inherits the Earth: Islamic Pious Endowments in al-Andalus, 9th–15th Centuries*. Leiden: Brill.
Schacht, J. 1982. *An Introduction to Islamic Law*. Oxford: Clarendon Press.
Scott, J. 1987. "Resistance without Protest and without Organization: Peasant Opposition to the Islamic Zakat and the Christian Tithe." *Comparative Studies in Society and History* 29 (3): 417–452.
Scott, J. 2004. "Everyday Forms of Resistance." *Copenhagen Journal of Asian Studies* 4: 33–62. Accessed July 6, 2017. https://rauli.cbs.dk/index.php/cjas/article/view/1765/1785.
Sheriff, A. 1991. "The Peasantry under Imperialism, 1873–1963." In *Zanzibar under Colonial Rule*, edited by A. Sheriff and E. Ferguson, 109–140. London: James Currey.
Sheriff, A. 2001. "The Records of the 'Wakf Commission' as a Source of Social and Religious History of Zanzibar." In *Islam in East Africa: New Sources*, edited by S. Amoretti, 27–45. Rome: Herder Editrice Libreria.
Siraj, S., and L. Hilary. 2006. *Land, Law and Islam: Property and Human Rights in the Muslim World*. London: Zed Books.

Syagga, P. 2010. “Public Land, Historical Land Injustices and the New Constitution.” *Society for International Development* 9 (6), Nairobi: Constitution Working Paper Series.

Tayob, A., and J. Wandera, eds. 2011. *Constitutional Review in Kenya and Kadhis Courts*. Cape Town: Center for Contemporary Islam.

Van Leeuwen, R. 1999. *Waqfs and Urban Structures: The Case of Ottoman Damascus*. Leiden: Brill.

Wario, H. 2014. “Debates on Kadhi’s Courts and Christian Muslim Relations in Isiolo Town: Thematic Issues and Emergent Trends.” In *Shari’a in Africa Today: Reactions and Responses*, edited by J. Chesworth and F. Kogelmann, 149–176. Leiden: Brill.