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# Between the Lines of Hegemony and Subordination: The Mombasa Kadhi's Court in Contemporary Kenya

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**Between the lines of Hegemony and Subordination:  
the Mombasa Kadhi's Court in Contemporary Kenya**

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SIT Kenya: Swahili and Islam Cultural Identity

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## I. Introduction

In the middle of a scalding hot October afternoon, I found myself waiting at the Mombasa Kadhi's Court for the fifth time. Frustrated with my prior failure to meet the Kadhi and gain his permission to research at the court, I waited alongside a cross section of the Muslim community of Mombasa all attempting to meet with the Kadhi. Despite frustrations with the red tape surrounding the Kadhi's court, acting as a barrier between me and all of the information I believed to be pertinent to my research, I realized that my research had already begun.

A number of aggravated people around me began to strike up conversations, half due to frustrations with the Kadhi, and half due to the group curiosity surrounding the "mzungu" wearing a *hijab*. The court opened a standard fifteen minutes late, and the Kadhi's staff informed me to try again in the morning. Apparently, the Kadhi had not returned to court for the afternoon. Disappointed at leaving the court yet again, unsuccessfully, my attention was drawn to a man making his way to the court. He was old and bedraggled, pushing himself upright from a makeshift wheelchair/ tricycle contraption, while simultaneously trying to prop himself on a single crutch. He struggled on to his only leg and began to make his way slowly to the large steps that ascended to the Kadhi's court, only to be told that the Kadhi was not there and he should try again tomorrow. I wondered how many strenuous journeys this man would make up the stairs before his matter was solved with the Kadhi, or he gave up.

When I reflect on an image that most clearly epitomizes my research on the Mombasa Kadhi's Court, I continuously return to this man on his single leg and tattered clothes making the pilgrimage to court day after day. He represents my research on the Kadhi's court, because he symbolizes the challenge and promise of the Kadhi's court within contemporary Kenyan society. In particular, it reflects the Kadhi's court as a site of struggle and contestation, where Kenyan

Muslims attempt to maintain a court that upholds *Sharia* law while simultaneously participating as equal citizens in a pluralistic secular society that is often at odds with such attempts at upholding tradition.

## I. Background

Kenyan Kadhis' Courts have a long standing relationship with Kenyan secular law, dating back to the arrival of the Imperial British East African Company in 1887 (Jeppie, 273). The company received a concession of 10 miles along the East African coastline from the Sultanate of Zanzibar where it was given full jurisdiction to enact new laws and create Courts of Justice (Jeppie, 274). Between 1897 and 1899 agreements were made between the Sultan and the Company that formally gave the Company rights to administration in parts of the Sultan's land, as long as it was governed under Islamic Law (Jeppie, 274). This meant that Non-Muslim white British men were given the authority to enforce and decide legal matters from criminal matters but also Islamic family law. Acting as de-facto Kadhis, many of the Company officers had trouble enforcing some matters of Muslim law, as they felt their rulings should not just enforce legal standards, but also be an icon of Western Civilization's superiority and consistent with Judeo-Christian morality. (Jeppie, 275). This issue is commonly referred to in colonialism as the repugnancy clause. In this case, the officers found it repugnant that a Muslim woman could be legally forced to return to a husband she had left, or Muslim beliefs on guardianship and custody of children challenged their Anglican ideals on what was in the best interest of a child (Jeppie, 275). The British government bought out the Imperial British East African Company in 1897, and took the helm of the Sultanate's land concessions (Jeppie, 277). This period marks the shift from independent and hegemonic Kadhi's courts in East Africa to their union with a system based around non-Muslim law. This transition marked the beginning of a new legal pluralism as British common law derived East African secular law was welded with systems of customary and religious law.

The existing climate of legal pluralism in Kenya can be greatly attributed to the British Colonial policy of indirect rule. Under Indirect rule, the British emphasized a need to establish Native Courts where British powers were in theory limited to oversight and supervision. In practice, the policy of indirect rule gradually altered the legal power structure away from Religious and Customary law courts (Jeppie, 280). Under this system the British established several court systems, including the High Court and district courts in the secular side, and native courts that included the Kadhi's Court and the Court of Local Chiefs (Jeppie, 282). The architect of British East African indirect rule, Arthur Hardinge established jurisdiction of Kadhis' Courts in every district along the coast, confining Islamic law to only matters of personal status (Jeppie, 282). The matters of personal status, or Islamic family law, consist of matters of marriage, divorce, and inheritance. Second, Hardinge created the position of a Chief Kadhi to be responsible for overseeing all Kadhi's Courts within British jurisdiction, and handling matters of appeals, and then secular positions as administrative magistrates that could claim jurisdiction in Muslim personal law (Jeppie, 280). These changes have lasted within the Kadhis' Courts through the reign of colonialism and into post independent Kenya, with the same standards of jurisdiction being renewed and applied through the Constitution of Kenya, and now the New Constitution of Kenya. After the Magistrates Act in 1967, the Secular Courts and Kadhis' Courts were fully integrated, and while keeping the position of the Chief Kadhi, the process of appeals was sent through the High Court (Jeppie, 287).

Currently there has been a large amount of controversy surrounding the Kadhi's Court, due to the induction of the New Constitution. Many people around Kenya feel that it was not right to give the Kadhi's Court legal jurisdiction in the constitution, but rather all Kenyan's should use the same legal system and body of laws. However, with a Muslim population of over

4 million within Kenya, a large debate erupted. In the end the New Constitution was passed with a special section setting aside jurisdiction for the Kadhi's Courts, so that Muslims can adhere to *Sharia* principles, and use the Kadhis' courts to make personal claims that are submerged in family law. The Kadhi's Court is officially given jurisdiction as seen fit by the Kenyan Parliament, and any matters decided in the Kadhis' Courts can be appealed in the Kenyan High Court, so that secular legal systems always rank supreme, at least in technical language (New Constitution). This was a political move to help ease over tensions between those in favor of the Kadhi's Courts, and those against the Kadhi's Courts.

## II. Statement of the Problem

1. The Kenyan Kadhi's Court is overcrowded and underfunded, severely limiting its ability to effectively provide an alternate arena for dispute resolution.
2. The role of religious law in a secular country is still being contested and disputed in Kenyan legal arenas, most recently exemplified in the struggles over ratification of the new Kenyan Constitution.
3. The Kadhi's Court faces jurisdictional boundaries in that the limits of the Kadhi's jurisdiction are continuously shifted by the Kenyan parliament and constitutional drafts, while still wielding transnational power that affects many people throughout the globe.

### III. Objectives

1. To gain an accurate understanding of the process and system of the Kenyan Kadhi's court, as well as the *Shafi* fiqh used in the Court.
2. To understand the relationship between the Kadhi's Court and the new legal landscape in Kenya.
3. To understand both sides of the debate on whether or not to keep the Kadhi's Court in the new Kenyan Constitution, and provide pros and cons for the decision to give the Kadhi's Court jurisdiction over Muslim family law.
4. To understand legal pluralism in the Kenyan context, and the practicalities and impracticalities of the simultaneous practice of Customary, Secular, and Religious Law in Kenyan Legal systems.
5. To make suggestions for solutions to the aforementioned problems of the Kadhi's Court, and for further research into the Kadhi's Court.

#### IV. Methodology

My primary research was conducted throughout the month of November, 2010, with some prior academic literature based preparation, and prior observations and visits to the Mombasa Kadhi's Court, and civil trials in the Mombasa High Court. The bulk of my research falls into three categories: legal, archival, and ethnographic research. The main topics I researched consisted of understanding the inner workings and process of Kenyan Kadhis' Courts, understanding how the Court fits into the larger Kenyan legal arena, the full jurisdiction of the Court, the gendered dynamics of Court rulings, and the arguments surrounding the New Constitution Kadhi's Court controversy. Along the way I was also able to add new topics to my research, such as the transnational nature of the Court, the impacts of being a multilingual legal process, and the realistic struggles surrounding costs, funding, and bureaucratic difficulties, including differing understandings and standards of professional norms.

Legal: I conducted legal research in not only the Mombasa Kadhi's Court, but also the Mombasa High Court. In both venues I was able to observe hearings and trials, as well as conduct interviews with the Chief Magistrate of the Mombasa High Court, and the Kadhi of the Mombasa Kadhi's Court. By not limiting research to the Kadhi's Court, I was able to get an effective comparative perspective and deepen my understanding of the distinctions of Kadhis' Courts from the secular legal system. By witnessing the process of various disputes and conflict resolution within the Kadhi's Open Court, I was able to assess and analyze the hegemonic power structure of the Kadhi's Court, while it maintains a technically subordinate position in the Kenyan legal system.

I further conducted legal research with academic writings on Kenyan Kadhis' Courts and Muslim Law. My primary sources include, but are not limited to, Kassim and Vianello (eds.), *Servants of the Sharia*; Hirsch, *Pronouncing and Persevering*; Tucker, *In the House of the Law*; Rashid *Muslim Law*; Wadud, *Qur'an and Woman*. My understanding was that the Kadhi's Court practiced the *Shafi* fiqh; I have come to understand the process as a much more generalized application of *Sharia*. I used the various aforementioned texts as well as observations and interviews to assess this application of Islamic Law. I also performed an in depth analysis of the New Constitution, and the preceding Wako Draft to analyze the constitutional jurisdiction of the Courts, as well as the controversy surrounding the inclusion of a religious court system in a secular legal system.

Archival: My archival research consisted of analyzing Kadhis' Court records, documents, and cases. In the court records I was able to see the forms of reasoning used in the Court's handling of disputes, as well as the thought processes that lead to the Kadhi's final judgments. In addition, the documents also provided me with a sense of the general kinds of disputes that appear before the Kadhi, as well as the basic *Sharia* based logic that unbiasedly is applied to the majority of cases. Further archival research consisted of internet accessed newspaper archives documenting arguments surrounding the jurisdiction and legality of the Kadhis' Court from such sources as the Daily Nation and the Standard. One notable archive was the Daily Nation's article "Kenyan AG to appeal kadhi courts ruling," from May 26<sup>th</sup>, 2010 in which a three judge bench declared the inclusion of the Kadhis' Court in the New Constitution as unconstitutional. By accessing these archives through the internet I was also able to gather Daily Nation reader comments, and notably this article alone received 29,000 "likes" in favor of the three judges'

ruling. This mode of archival research was able to highlight the heightened level of controversy surrounding the Kadhis' Courts in Kenyan society.

Ethnographic: My ethnographic research consisted of participant observation, structured and unstructured interviews, ethnographies pertaining to the Courts, as well as the occasional eavesdropping insight. I performed participant observation in not only the Kadhi's Open Court and Mombasa High Court proceedings, but also in the process of gaining entry into the Court, and watching and being one of countless throngs of people volleying in line for their turn to enter the Court Clerk's office for various forms of assistance that are mandatory before ever reaching a chance at a hearing. This research helped further my comprehension and awareness of both the procedures of the court and the aspirations and frustrations of the applicants who utilize the Kadhi's Court. The informal sector of my research has proved invaluable in order to narrowly focus my research on important issues within Muslim family law that people are being frustrated with here and now. During the course of document research, I have had the chance to discuss issues pertaining to the court with various officers and staff of the court. As the staff consists of only six people, I am handling their opinions and interviews differently from the rest of my interview sample, to protect their work and community interests in a more strenuous manner than other interviews. I will mostly refer to impressions that I got while in the court, rather than citing an individual's concerns from within the Kadhi's Court staff. In opposition, in structured interviews I gained permission to cite, but most interviewees will remain under aliases.

Lastly, I want to address frustrations and limitations faced in the process of research, ranging from access to the Kadhi, gender limitations, language limitations, archival research barriers, and the standard struggles of bureaucracy. I found my first week of research excruciatingly difficult, as the Kadhi was not at the court any of the 6 times I tried to find him

during court hours. Until the Kadhi met with me and granted permission for me to research, I was not allowed access to any court information. During this phase of research I coined the term “*buibui* brigade” to describe the expert staff of women in the Kadhi’s Court who gracefully assisted the Kadhi, and handled his reputation to the countless frustrated people vying for their day in court, myself included. On one of my more frustrating days trying to access the Kadhi, a member of the “*buibui* brigade” told me to try again the next morning at 8:30 am. I pushed to try and schedule an appointment, or leave my name and phone number, so that if all else failed at least the Kadhi would know that someone was trying desperately to reach him, I was then told this was not necessary. I asked if she knew the Kadhi would be there the next day for sure, and the response was “the Kadhi is only human, we can’t expect more from him than that.”

Once I had been granted access by the Kadhi, I faced another issue, understanding the open court. I found it very difficult to hear in the open court, whether English or Kiswahili were being used, which greatly affected my ability to understand court proceedings. Further, I struggled to understand many of the women’s testimonies as not only did they use Kiswahili, they also spoke drastically more quietly than men in court proceedings. Further, in trying to read through old court cases, I discovered the Mombasa Kadhi has the world’s worst handwriting, and that many of his judgments were indecipherable not only to myself, but his staff as well. All of these limited my ability to fully delve into the ways in which the Kadhi makes decisions, and therefore limited my knowledge of the full extent of the application of Islamic law in Mombasa Kadhi’s courts.

Lastly, I faced some issues in research, because of the gender dynamics of access, however with these limitations also came some benefits. I found that my status as a woman in Kadhi’s court research was personally challenging, but also transformed my interactions. To show respect

to the Kadhi and those surrounding the court I choose to dress differently than normal. My daily wardrobe consisted of ankle length skirts, long sleeved button down shirts, and a *hijab*. By covering I was able gain more access to interviews and resources, because many people very clearly appreciated that I covered. My status as a covered woman also encouraged other women to talk to me, often times seeking me out in conversation as they waited next to me for the court to open. However, I noticed that women are far more shy around the Kadhi's court, and hard to approach when wearing the more severely covering *buibuis*. At the same time, my status as a woman also dictated that I sit among other women in open court, which happened to be the furthest benches from the Kadhi, therefore limiting my ability to hear and understand. Also, I found it difficult to speak with men because of my status as an outsider.

## V. Literature Review

### A. The Proposed Constitution of Kenya, 6<sup>th</sup> May, 2010 (Approved Aug 4<sup>th</sup> 2010)

As a starting point in my research on the Kenyan Kadhis Courts, I examined *The Proposed Constitution of Kenya* that was approved by public referendum August 4<sup>th</sup> 2010, and subsequently ratified by the Kenyan Parliament. Articles 159 through 173 govern judicial authority, organization, and funding. Article 159(2) states that “in exercising judicial authority, the courts and tribunals shall be guided by the following principles- (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms shall be promoted, subject to clause (3).” Clause (3) goes on to state “traditional dispute resolution mechanisms shall not be used in a way that- (a) contravenes the Bill of Rights; (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or (c) is inconsistent with this Constitution or any written law.” Under section 162, System of Courts, the establishment of subordinate courts is under Article 169 or by Parliament in accordance with Article 169. Subordinate Courts are defined by the constitution as the Magistrates courts, the Kadhis’ courts, the Courts Martial, and “any other court or local tribunal as may be established by an Act of Parliament, other than the courts established as required by Article 162(2). Further in Article 169(2) the constitution sets aside the authority of Parliament to enact legislation that sets the jurisdiction, functions, and power of the subordinate courts. Lastly, Article 170 explicitly defines the role of Kadhi’s courts in Kenya.

170. (1) There shall be a Chief Kadhi and such number, being not fewer than three, of other Kadhis as may be prescribed under an Act of Parliament. (2) A person shall not be qualified to be appointed to hold or act in the office of Kadhi unless the person- (a) professes the Muslim religion; and (b) possesses such knowledge of the Muslim law applicable to any sects of Muslims as qualifies the person, in the opinion of the Judicial Service Commission. To hold a Kadhi’s court. (3) Parliament shall establish Kadhis’ courts, each of which shall have the jurisdiction and powers conferred on it by legislation,

subject to clause (5). (4) The Chief Kadhi and the other Kadhis, or the Chief Kadhi and such of the other Kadhis (not being fewer than three in number) as may be prescribed under an Act of Parliament, shall each be empowered to hold a Kadhi's court having jurisdiction within Kenya. (5) The jurisdiction of a Kadhis' court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceeding in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts.

The New Constitution highlights the inherited colonial legacy in regards to the jurisdiction and organization of the Kadhis' courts. It is interesting how the 2010 draft of the constitution still retains the legacy of the repugnancy clause. The vagueness of the concept of "repugnancy" was used, within the colonial context, to uphold a particularly Christian view of morality when governing non-Christian populations. The current constitution, in retaining this language of repugnancy, similarly shows the particularistic impulses within purportedly universal and unbiased secular law. In the Kenyan case, the new constitution's repugnancy clause can thus be read as holding onto the colonial legacy of a Christianity derived secular legal system and it's fear of giving Islamic based religious law full jurisdiction in its respective field. Other illustrations of this enduring colonial legacy in the New Constitution can be seen through the limited jurisdiction of the Kadhis' courts, as well as the secular legal system's ultimate hierarchy over all subordinate courts. The basic establishment of the Kadhi's court by Arthur Hardinge has had a long lasting durable legacy.

#### B. Kenya Gazette Supplement, 2005

##### The Proposed New Constitution of Kenya (Wako Draft)

The Wako Draft was a proposed constitution that was defeated in it's 2006 public referendum. One of the critiques was that the draft did not legitimately limit the power of the presidency. Among other critiques, the draft was argued by some to be pro abortion, and frustrations surrounded the treatment of religious and customary law courts. In Article 178(3) the

draft states that the law, courts, and tribunals would be guided by various principles, including “reconciliation, mediation and arbitration between parties, and the use of traditional courts, where appropriate, shall be promoted.”

Article 195 specifically addressed religious courts, unlike the current Constitution which specifically addresses Kadhis’ courts.

- 195.(1) There are established Christian courts, Kadhi’s courts and Hindu courts.
- (2) Parliament may, by legislation, establish other religious courts.
- (3) Christian courts, Kadhi’s courts, Hindu courts, and other religious courts shall respectively-
  - (a) consist of Chief presiding officers, Chief Kadhi and such number of other presiding officers or Kadhis, all of whom profess the respective religious faith; and
  - (b) be organized and administered, as may be prescribed by the respective Act of Parliament
- (4) Christian courts, Kadhi’s courts, Hindu courts and other religious courts shall have jurisdiction to determine questions of their religious laws relating to personal status, marriage, divorce and matters consequential to divorce, inheritance and succession in proceedings in which all the parties profess the respective faith, as may be prescribed by an Act of Parliament.

The above section of the Wako Draft was a political attempt at pacifying any dissent of the Kadhis’ courts. It is invalid because Kenya does not have any established Christian or Hindu court systems. Also, within Christian and Hindu belief systems, the notion of Religious law is a mistranslation, and they are amendable to a separation of Church and State, as evident by a Biblical injunction “Give to Caesar what is Caesar’s and give to God what is God’s.”

### C. In the House of the Law

By: Judith Tucker

To further my basic understanding of Islamic Law, and the role played by *fatwas* in an Islamic community I used Judith Tucker's *In the House of the Law*. The *fatwas* Tucker presents show a clear depiction of the importance of gender in Ottoman Syria and Palestine, while also presenting the basics of Islamic gender roles as "a man was to provide; a woman was to consume. A man was to decide; a woman was to obey" (Tucker 66). One distinctly gendered area is that of childrearing. In *fatwas* regarding parenthood, children need more paternal care in the later stages of childhood, and maternal in the earliest stages. Under *Sharia* law there are four stages of childhood before one reaches full adulthood, a child in the womb is considered to be in the first stage of childhood. While mothers are not punishable for unintentional miscarriage, the loss of an unborn child can be considered murder on the mother's part if her actions resulted in the loss of the fetus. Throughout the early stages of childhood until *bulugh*, or puberty, mothers play a large role as caregivers. As children begin to gain the skills needed to fully care for themselves the roll of the father increases, until *bulugh* when the parental importance shifts dominantly to the father. I witnessed this theory in practice in the Mombasa Kadhi's Court in many case files of custody between two divorced parents, often mother's received custody until the child reached puberty, and fathers received custody for post puberty aged children.

Other important elements of *In the House of the Law* were in understanding the role of legal thinkers, *muftis*, and *fatwas* in Islamic Law. The task of an Islamic legal thinker is to not only distinguish the male from the female, but also to elaborate on distinctly gendered rights, many of which privilege men, but some of which work to temper male dominance (Tucker 66). This resource proved invaluable in understanding many judgments issued by the Mombasa Kadhi, and

the basic principles that governed them. Tucker highlights *fatwas* that revolve around gender and law, which was crucial in my understanding of the Kadhis courts, because Islamic family law is always gendered.

#### D. Pronouncing and Persevering: Gender and the Discourses of Disputing in an African Islamic Court

By: Susan Hirsch

Pronouncing and Persevering was the literary starting point in my research, and is integral as a way to understand dispute in the Kadhis' courts as gendered legal discourse. Hirsch sheds light on the gendered tailoring of narratives in the public space of a court testimony, as a result of both Swahili and Islamic cultural norms.

Hirsch outlines the processes of economic decline and political marginalization among the Swahili, and the use of Swahili women as a way to police the status of Swahili families, and keep a hierarchical class structure within the Swahili. She analyzes representation among the Swahili through tools like the "*buibui*" and how the varied forms of veiling can shed light on a woman's family's status and values, while acknowledging the contemporary shifts in veiling. For example the Swahili use of the *hijab* style of veiling can both mark women's entrance into formal economic production, but despite leaving the face uncovered like other *buibui* styles, it is often considered a higher class veiling, as it keeps the woman modestly covered, while acknowledging the family to which she belongs by leaving the face visible.

One of the main ideas presented by Hirsch, and critical to my research is the argument of dispute as a performance. Hirsch argues that in the context of the Kadhis' courts men and women not only tailor their narratives along gendered lines, but also enact a performance that edits to make the narrative the least disturbing to the family reputation. The process of dispute has

already gone through various stages by the time it has metastasized to the point of court interference. The image of the Swahili family is the pronouncing husband and the persevering wife, in relationships where couples are offered the advice when they wed, argue, and separate “to marry in a good way, and divorce in a good way.” In order to be granted a divorce they must present a narrative of suffering that also portrays themselves as persevering and positive assets to their families.

Hirsch describes the recommended process of dispute resolution in which Conflict Resolution is held by men and their larger access to Islamic Law: First a man should talk with his wife, if no agreement results, he should refuse to have sex with her until she consents to work toward a resolution. If, after a short, specified period of time, this approach fails to lead to reconciliation, then the husband is permitted to use mild physical force. In local practice, beating one’s wife is condemned and the Koranic reference is interpreted as meaning “symbolic beating.” If this produces no result, the husband can take a formal oath of sexual continence lasting up to four months. If after the period of sexual abstinence the couple still has failed to reconcile, they should approach a third party for assistance. These procedures are understood as measures taken before one invokes legal discourse. Finally, if all efforts fail men are permitted to wield Islamic law and pronounce divorce.

The overall point of Hirsch’s work is to emphasize how Muslim women use legal processes to transform Religious and cultural norms, that underpin their subordinate position within Swahili society. Although social conventions project women as persevering wives, who should suffer in silence, as opposed to their pronouncing husbands, some women none the less are able to circumvent these stereotypical roles to temper male power. My only critique of Hirsch’s work

is that it dwells too much on the historical background of the work, rather than analyzing the court processes.

E. *Servants of the Sharia: The Civil Register of the Qadis' Court of Brava 1893-1900*

By: Alessandra Vianello and Mohamed M. Kassim

*Servants of the Sharia* provided an excellent and in depth historical analysis of the history of Kadhis' courts in East Africa, especially pertaining to the interaction between the Courts and colonial governments. Unlike Kenya, in the Case of Brava, the colonial authority was the Italian government, and the Kadhis' court register documents the period of transition from *Sharia* law based society to their subordination under the Italian government.

The register documents the handling of all legal matters, not just family law, including debt and inheritance. It chronicled the idea of the deed, or property title as it gained efficacy in the region in the region to a point where local Muslims preferred to take the deed as proof of ownership to colonial courts instead of going through the often cumbersome rules of evidence in order to determine title within *Sharia*. Many of the cases involved indebtedness and inheritance, as issues regarding capital were well detailed and given high value. These case files included explicitly outlined payment schedules and exact amounts of debt, despite being unable to claim interest due to the principle of *lariba* under *Sharia*.

Vianello and Kassim paid particular interest on the gender dynamics of the court, in the ways in which disputes were gendered within the community. Women were able to stake a claim within this patriarchal system for issues like the dissolving of their marriages in the absence of adequate *nafaqa*. In order to receive favorable decisions women were increasingly

able to take up issues in Secular colonial courts, which provided an albeit limited form of forum shopping legal arenas.

While Servants of the *Sharia* provided excellent historical analysis of the history of Kadhis' courts on the East African coast, despite failing to connect to the contemporary existence of Religious law in the area, It also gives a tireless record of the various cases registered in the Kadhi's Court in Brava, but would have been far more interesting with fewer cases and an more in depth analysis of them.

## VII. Analysis and Results

### A. Jurisdiction

According to Black's Law Dictionary, jurisdiction is the practical authority granted to formally constituted legal body to make pronouncements on legal matters, and by amplification administer justice within a defined area of responsibility. Under the new constitution, Kadhi's courts are given jurisdiction in matters of personal law, as long as the participating parties meet specific requirements. Personal law, also referred to as family law, is defined within the Kenyan legal system as matters pertaining to personal status, marriage, divorce, or inheritance. Jurisdiction over divorce also includes matters of dowry, alimony, and child custody. Requirements to fall under the Kadhi's court jurisdiction are primarily that both parties identify themselves as Muslims, that the parties are of sound mind, and the issue has to be located in the Republic of Kenya, and more specifically in the specific jurisdictional area of the individual Kadhi's court for which the issue is addressed. Given that the Kadhis' courts are enshrined in the New Constitution, they are an official piece of the Kenyan judiciary, technically linked with the Kenyan High Court, and therefore able to summon and issue warrants for non-compliance with Kadhi judgments. It is important to stress that the Kadhi's court has concurrent jurisdiction with other subordinate courts that deal with matters of civil law, so that in many ways the Kadhi's court is a form of shopping for the best legal forum for your issue of personal law. According to one staff member within the court, many applicants to the court fail to realize that the Kadhi's court falls within the Kenyan judiciary, and is not in itself a fully separate and autonomous legal system. In one conversation she expressed feelings that Muslims entered the court as if they owned it, and that they did not understand that it was an integral part of the Kenyan judiciary in

which they could opt to have their family matters treated in an Islamic way, while still adhering to the Kenyan penal code.

Examples of the Kadhi's jurisdiction can be found in a variety of cases I reviewed. The records for Civil Case A was the first time I ran across a Kadhi's court Penal notice, which highlighted the authority granted under the Kadhi's jurisdiction. The Penal Notice states that "any party served with this order and who disobeys the same shall be guilty of contempt of court and liable to imprisonment for a term not exceeding 6 months or a fine or both fine and imprisonment." This case not only displayed the power the Kadhi can exert on people in the court, but also highlighted the kinds of issues that can be addressed within the court. In this case, the plaintiff received custody and guardianship of his child without being divorced from his wife. The plaintiff did not want a divorce, but was concerned that his wife, a Tanzanian citizen, would take his child across the border, and out of the country. This particular case was perplexing, because in the Kadhi's order no reference was made to Islamic law that may have been used in creating the judgment. Additionally, the mother had her parental rights revoked not only while married to the father, but also without being present in the court. It is interesting that custody and guardianship can be given to a sole parent, while legally the parents are a joint legal entity. In this way, I sense that the Kadhi's court understanding of family law is in many ways fluid and lacks concrete definitional binding. This is distinct from civil law, which treats parents of a child as a legal unit until the marriage is dissolved, therefore the products of that unit cannot be legally divided without divorce.

In Civil Case E, I found a case that also exemplifies the Kadhi's court jurisdiction, as it dealt with polygamy, which cannot legally exist as a union under Kenyan civil law, and is not recognized in the Kenyan Marriage Act. However, under the Kadhi's Court's jurisdiction, and as

found in Civil Case E of my research, issues of polygamous marriage and divorce can be addressed in the Kadhi's Courts as legal unions. In Civil Case E the Kadhi granted a woman maintenance (alimony) payments, after she was divorced by a man to whom she was his second wife. In a civil case within the jurisdiction of a magistrate's court, a woman who was a second wife would not be eligible for alimony payments, as she would not have legally been married to the man, and therefore the man would have no legal responsibilities towards her.

Another important jurisdictional element to understand is that a Kadhi's judgment can be appealed, through a process of filing an appeal in the Kenyan High Court. However, what many using the court fail to realize, is that once your case has been processed under the Kadhi's Court jurisdiction, it will still be decided through Islamic law in the High Court Appeal. As judges and magistrates of the High Court lack Islamic law knowledge, they bring in a new Kadhi to advise on all Kadhi's court appeals, so that the case will receive a second judgment that is not a civil judgment, but remains under Islamic law. However, the same process in reverse is different. In a situation where the appellant is not satisfied with the secular court system's judgment, they can decide, based on their status as a Muslim, to re-file the case under the Kadhi's court and get a new judgment with a different system of law. My understanding of this process of appeals is from an interview with a staff member of the High Court, who works in the Mombasa Kadhi's Court office.

## B. Kenya's New Constitution

With the recent adoption of the new Kenyan Constitution, it is important to discuss the making of this constitution, and the controversy involved in debates over the constitutionality of the Kadhis' courts. The Kadhis' courts were sanctioned by the new Constitution, but not without

vociferous debate as well as various attempts at compromise. The size of this debate alone was massive, with one news article published on the Daily Nation's website receiving 29,000 votes against the Kadhis' courts in an online poll (Judges ruled on Kadhi's court). These large numbers attest to the sensitivity of this issue and the massive impact of this debate on Kenyan life.

The main argument against the authority of the Kadhis' courts as set forth in the constitution is that it creates an unfair division among Kenyans, due to the sanctioned use of separate courts. The basic idea is that all Kenyans should follow the same laws, and take up their problems in the same courts. This argument merely seeks to set up an idea of legal equality and homogeneity throughout the country. Opponents of the Kadhis' courts insist that these institutions unfairly privilege one particular community and exasperate the larger divide among Kenyans, who are notorious for their ethnic struggles. This argument is also being applied to other constitutional questions, such as the manner in which census data is collected, with many fearing the results of having people identified by ethnicity, *kabila*, or religion.

The secondary argument against the Kadhis' courts was that it was the first step towards the imposition of *Sharia* law on a national level, and that government funds were being used to favor one religion over others. This argument felt that ignoring the separation of church and state by giving jurisdiction and funds to the Kadhis' courts would further Islamic agendas at the cost of the non Islamic majority of the nation. However, this argument fails to understand that the Kenyan Kadhis' courts have a long history that is intertwined with British colonial participation, and have been in the constitution since 1963. Other opponents of the Kadhis' courts argue that these courts are in violation of other constitutional principles, such as the freedom of religion, and equal protection under law. This argument believes the courts violate freedom of religion because favoring one religion automatically violates another religion; and that certain people

because of the nature of their beliefs will get special privilege to the institution. The main downfall of these other two arguments is that one community's religious freedom is not inherently a violation of another community's religious freedom, dismissing the notion of Kenya as a singular community and acknowledging the presence of 42 different *kabilas*, and countless belief systems. The notion that Kadhi's courts violate the equal protection under the law ignores that the constitution does provide special protections for groups other than Muslims, including women, children, and people with disabilities. Muslims can also be argued as deserving protection under the law, as Kenyan Muslims can claim minority status.

Prior to the promulgation of the new constitution, an earlier attempt at compromise and accommodating the Kadhi's courts within the judicial framework is visible in the Constitution "Wako Draft" of 2005, which failed to be ratified. Article 195 of the draft established religious courts, as approved means of alternative dispute resolution, sanctioning Christian, Islamic, and Hindu courts. This article was an ineffective tool in easing the Kadhis' court debate, because while it tried to acknowledge other predominant Kenyan religions, it failed to change anything. This is because Christian and Hindu courts do not exist in Kenya, and therefore it does not make sense to acknowledge Christian or Hindu law based courts, in the end the courts would have been a constitutional myth. Historically speaking, Christians and Hindus lack legal traditions that are separate from the state; therefore people who fall under these categories were able to take up all matters of personal law within secular court systems without directly affronting their religious beliefs. The other change is the Wako draft's separation of traditional and religious courts, which is lumped together under "alternative forms of dispute" in the new constitution. While there is a large difference in customary and religious law in their application in Kenya, the move to include them in the same category within the new Constitution acts as broadening category for those who

do not fall under the Kadhis' courts' jurisdiction, to act as a buffer between Kadhis' courts supporters and protestors.

In 2008, the Kenyan parliament passed the Constitutional Review Act, which protected the constitutional reforms process from judicial review, unless on a referendum platform. This means that the formation of the constitution could only be changed by a national vote, in which all registered voters would have a voice. This move by parliament was to prevent last minute politically motivated tweaks to the constitution that would completely alter the balance of power set forth by the draft immediately preceding the referendum.

In May 2010, during the build up to the new Constitution, a three judge bench of the High Court ruled, in a controversial decision, that the inclusion of the Kadhis' courts in the judicial system violated the equal protection of religion clause of the Constitution, and thus was unconstitutional. The judges ruled that government financing of the Kadhis' courts amounted to "segregation, and is sectarian, discriminatory, and unjust as against the applicants." However, this decision was not upheld, because shortly after this ruling, the new Constitution was voted in by referendum. The High Court judges' decision was in regards to the old constitution, and would have been valid had the new Constitution not passed by referendum. This move by the three High Court judges was thus purely political, and a move to publically align themselves with the bishops and clergy of Christian denominations throughout Kenya opposing the Kadhis' courts inclusion in the New Constitution. One striking feature of the opposition of the Kadhis' courts has been the widespread use of mass media, including the internet, to galvanize opposition in new and lesser explored arenas. Through the course of my research, I found people participating in Kadhis' courts debates on the Daily Nation's website, as well as the Standard, and even an anti-Kenyan Kadhis' courts Facebook group. While the Facebook group only had approximately

850 members, one Daily Nation online poll had 29,000 votes against the Kadhis' courts in the new Constitution. The main message of the internet participation has been fear mongering propaganda, encouraging a wide spread belief that Kadhis' courts are a secret plot towards the Muslim domination of the world.

Despite wide spread fear and arguments against the Kadhis' courts, the August 4<sup>th</sup> 2010 referendum ensured that Kenyan Kadhis' courts would continue to be enshrined in the judiciary and provide an avenue for Kenyan Muslims to seek redress on issues of personal/family law from within an Islamic jurisprudential framework.

### C. Kadhi's Court Power Structure

According to Kenya's 2010 census, Kenya is home to 38.6 million people, and 4.3 million Muslims. To serve the family law issues of these 4.3 million Muslim citizens, Kenya has 17 Kadhis. That is 253,000 people to every one Kadhi. In comparison the other 34.3 million Kenyans average one judge per 10,000 people (UNODC Kenyan Judiciary Report). These 17 Kadhis' are organized under the guidelines set forth in the new Constitution which required the Kadhis' courts to have 1 Chief Kadhi, with at least 3 other Kadhis. All Kadhis must be Muslim, with knowledge of Muslim law in the opinion of the Judicial Service Commission (Constitution of Kenya, Articles 169-170). The result is a severely understaffed Kadhis' courts system that is unintentionally hegemonic in its power structure, despite its status as a subordinate court within the Kenyan Judiciary. Each of the 17 Kadhis has his own court, divided into districts throughout Kenya. Depending on your location, and the location of your issue, there is a certain Kadhi with whom your case must be heard by.

The Muslim populations of Mombasa, Kilifi, Mariakany, Voi, and Taveta are all in the Mombasa Kadhi's Court district. Mombasa is the 2<sup>nd</sup> biggest city in Kenya, with 60-70% of its population being Muslim (Daily Nation, Kenya Census Results). All of these people rely solely on the Mombasa Kadhi, Sheikh Twalib Bwana Mohamed, who has been the Mombasa Kadhi for 15 years. Due to the organization of the Kadhis' courts, Kadhi Twalib is solely responsible for the decisions regarding a large population and the court fails to have a strong system in place to temper the power wielded by the Kadhi.

The weaknesses in a system with this hegemonic structure can be most clearly seen in the appellate system of the court. If a decision made by the Kadhi is appealed, despite being filed in the High Court, it is re-decided by another of the 17 Kadhis under the assistance of a High Court judge, based off of the case file assembled by the 1<sup>st</sup> Kadhi, and using Islamic not secular law. When the appeal is filed, the deciding Kadhi is notified, and his case file and decision is requested. Given the small number of Kadhis, it is fair to assume a degree of uniformity in their decision-making styles, and the appeals process seems biased in favor of the deciding Kadhi. This fails to temper any one Kadhi's power, because the fraternity of Kenyan Kadhis will support one another, and internalize any issues, leading to an impenetrable hegemonic power structure.

I argue that the appeals process in the Kadhi's court is unable to temper the Kadhi's power. There is no check on the Kadhi's power, because even if his decisions are publically regarded as mediocre or inadequate, the system is not designed for an arena of dissent communication. Common sense tells us that it would be intimidating to file an appeal for many patrons of the Kadhis courts, because of how the Kadhi's power is publically portrayed. It is even more intimidating for those patrons who fully comprehend the process of appeals, because if there is

only one Kadhi who you affront by appealing his decision, what happens when you need to address another issue within the court? For example, if someone appealed a decision regarding their divorce proceedings, but later needed the Kadhi's court for a matter of inheritance; will that person automatically receive an unbiased judgment from the Kadhi?

Problematic appeals processes are not limited to Kadhis' courts in Kenya. This is a deeply rooted problem that plagues the entire Kenyan judiciary. For example, I observed a rape trial appeal in the Kenyan High Court at Mombasa. In this case, a man had been found guilty of molesting and violating a minor, and received 20 years in prison based on the testimony of two primary witnesses. The High Court judge during judicial review did not call the witnesses to stand in order to testify, but simply accepted their testimonies without ever laying eyes on the witnesses. Neither did the judge offer solid legal reasoning for upholding the prior decision, and returned the man to his 20 year prison sentence without ever once acknowledging his presence in the court room, or allowing him to speak on his behalf. This hegemonic power of the judge, and clear judicial fraternal alliance is both a legacy of colonial common law tradition, but more importantly a practical result of an overcrowded and underfunded judiciary. The case in question was completed in less than five minutes and followed by a considerably longer case on rental dispute. Further, the court was trying such a large number of cases, the criminally accused defendants were being seated among the audience, with only two guards, and no visual identification differentiating accused from members of the public. Thus the problems of the Kadhis' courts power structure can be seen as symptomatic of the broader problems within the Kenyan judiciary.

#### D. Professionalism and Bureaucracy

There is a misconception among a number of proponents of the Kadhis' courts that these sites of alternate dispute resolution offer a less bureaucratic forum for conflict resolution and are thus preferred to secular courts. In my research, I interviewed a long time Kenya resident, and graduate degree holding Muslim woman who informed me of how wonderful and infinitely preferable Kadhis' courts were to secular courts. She held the opinion that the Kadhis' court systems were very informal and easy to access, with an open door policy to any issues of conflict, not only formally filed complaints, but also as a form of counseling for those experiencing issues related to personal law. I refute this opinion based on my experience and research of the Mombasa Kadhi's court. I reported to the Kadhis' courts on seven occasions before gaining access to the Kadhi, each time being given another time to return in hopes that the Kadhi might actually show up to his court. I asked to leave my name and number, I asked to make an appointment, and I repeatedly asked if the Kadhis' staff if he really would be there the next morning at the time I was given to return. I finally saw the Kadhi on my 8<sup>th</sup> visit, and was able to speak with him for five minutes before his open court adjourned. I was lucky with my one week of attempts, I interviewed a man from London who had been trying to have his case heard by the Kadhi for over 2 weeks. Therefore, I argue that the Kadhi's court is not the informal, easily accessed, and bureaucracy free setting that my Lamu interviewee mistakenly understands it to be.

While attending to my research in the Mombasa Kadhi's Court, I took a quick count of the amount of people at the Kadhi's Court each time I arrived. Whether it was first thing in the morning, when the court opened at 8:30 am, or whether it was the opening of the court after lunch at 2:00 pm, I continually counted a minimum of 35 people volleying to be heard by the Kadhi's Court staff, or waiting to their turn to testify in the Kadhi's Open Court. The only

occasions I found less than 35 people waiting in the court were the afternoons around 3:00 pm on the days that the Kadhi had opted not to return to the court after his afternoon meal. When I enquired whether or not the Kadhi informed his office staff whether or not he would be at the court, I received a very tailored response, that pretty much told me that no they were not generally aware of where he was or why he had not returned, but that he is a very good Kadhi all the same. The “*buibui* brigade”, after all, were experts on managing the public image of a lackadaisical Kadhi, and masters of pleasant yet efficient crowd control.

Further bureaucratic issues lie in the record making and storing processes. The court has a strange mix of formal record keeping with informal storage. The courts records are basically handwritten short hand notes written by the Kadhi, and only legible to the Kadhi, and typewriter style subpoenas and orders. These notes are then placed into file folders that look ten years old when they are only a year old. Then files are stored in an almost organized manner, numerical by case number and case type, but also randomly stacked under the front counter, in an organization system only a few clerks seem to magically know. The records room I had access to was a huge jumble of cases from 2008 to the present, the rest are locked up in an archive room a distance away from the current Kadhi’s Court locations. To add to the chaos of the frequently illegible records, the laid back hegemonic power of the court gave me access to some of the most personal information. I sifted through countless files with medical examiner reports after a husband had beaten his wife, I had my hands on passport numbers, immigration information, bank statement copies, and even emails from the process of courtship between a man, his wife, and his soon to be second wife. While I had research permits and permission from the Kadhi, part of me felt that I was violating the privacy of many patrons of the Kadhi’s Court.

### E. Court Costs and Funding

Many opponents of the Kenyan Kadhis' courts argue that it is wrong for the courts to be funded through the Kenyan government, and that they take funds and resources away from the Kenyan High Court. The argument is founded around questions regarding the use of Kenyan tax payer money to fund a religious institution that is not used by everyone, but privileges those who identify as Muslim.

I argue that the Kadhis' courts do the reverse; they actually privilege all Kenyan religious sects, because they eliminate 4.3 million people (Kenyan Muslims) from the already overstretched secular court system. The Kadhis' courts do not act as a financial burden because it has low overhead to be financed, and Muslim citizens of Kenya are certainly paying more in taxes than the minor costs of a Kadhis' court system with only 17 Kadhis for the entire country. Additionally, the court does not necessarily act as a privileged experience that those who are not practicing Muslims are robbed of, rather it is often a stressful experience that Muslims put themselves through in order to get legal decisions that keep their personal faith and values in mind.

Those Muslims who use the court are also paying through Court fees, and the various costs of affidavits, copies, evidence processing, subpoenas, and other court services. Then many opt for legal representation, and then pay additional costs to attorneys, and lastly they lose valuable time in which they could be generating income. During the course of my research in the Mombasa Kadhi's Court I quickly realized that many people were not only leaving work to take up issues at the court, but traveling domestically and internationally. The costs of travel, missing

work, lodging, and basic court and representation fees meant that using the Kadhi to solve problems in the realm of family law quickly becomes a complicated and expensive process.

#### F. Trans-National Nature of the Court

One morning, during my first week of research, I noticed a man who seemed to be different from the other men attending the Kadhi's Court. He was clean shaven, well dressed in attire that can only be described as business casual. After we failed to meet with the Kadhi in the morning, and were both told to return when the court reopened after lunch, this increasingly irritated man, "Haldoon," decided to strike up a conversation with me. Haldoon's story was the first of many that would reveal the trans-national nature of the Mombasa Kadhi's Court. Haldoon gave up his Kenyan citizenship to become a citizen of the United Kingdom, and currently lives in London. After the death of his Mother, Haldoon had to travel to Kenya to settle her succession in the Mombasa Kadhi's Court. Haldoon said that his Mom had millions in property that as her only son, was his inheritance, but due to his absence had come under attack by another person trying to take over his full inheritance. In the process of filing the case with the Kadhi's Court he had packed up his family and pulled his children out of school for what was supposed to be a two week visit to Mombasa. Haldoon was a constant feature in the Kadhi's Court everyday for two weeks. At the point that I met Haldoon, he was being fined by his childrens' school for their extended absence, and had lost money on their return plane tickets because they were forced to miss their return flights. He had already paid lawyer and court fees, but every time the Kadhi assigned a time for him to come to open court, the Kadhi failed to be around or get to the case.

Haldoon's frustration prompted a long discussion in which he told me about his view of the relationship between money and power in Kenya. He criticized the courts, claiming that poor

people seeking the Kadhi will not receive help for weeks, but still have to try everyday, diminishing their already meager incomes. He told me that he preferred his life in the United Kingdom, where the man with one leg trying to make his way up the stairs would be the first priority of the court, as a person with disabilities. Haldoon asked that I write a paper that would turn the stone to reveal the problems and corruption with the entire Kenyan Judiciary, but particularly the Kadhis' courts. I think that Haldoon's unique position as both a local, but a citizen of another country enabled him to speak out against what he saw as corruption in the Kadhis' courts, that many people using that courts do not have. So in this sense, some of the trans-national cases are not only highlighting the extended authority of the Kadhis throughout the globe, but also creating an arena for the Kadhi's to be openly criticized. After all, once Haldoon's decision was reached he returned to London, and went on with his life with very little chance of needing to return to the Kadhi for more legal issues.

My argument that first began to crystallize through my interview with Haldoon, is that the Kadhis courts are not just Kenyan, but rather a legal system that finds itself extending its power across the world, not just to neighboring communities but even the family law decisions of some people in the western world who profess the Muslim faith and have issues where one person involved has ties to Kenya. Evidence supporting my argument came in the case of another interview with a Somali man, and two case files that involved citizens from other countries, one from Germany, and the other from Tanzania.

The aforementioned Case A was a custody dispute, in which a man was seeking for sole guardianship of his child, without filing for or receiving divorce. The man based his argument on the premise that his wife was an immigrant, and Tanzanian national. His concern was that his wife would take his son and flee across the border to her family in Tanzania. While this case was

emotionally trying for me, as I felt unsure about the validity of the man's claims, it is not an uncommon occurrence for "kidnappings" that breach country borders. This case highlights the trans-national nature of families, and the Kadhi's Court recognizing that nature, and switching it's jurisprudence in order to accommodate the way in which national boundaries create separate legal jurisdictions.

Case A resulted in the man being granted custody of his child, without the wife ever being present in the Court. There was paperwork filed saying that the woman was notified of the case, and that in her absence the case would be decided without her. However, how can the court be certain that she was notified of the proceedings, when there is no signature or concrete evidence? I mainly questioned these proceedings, because I have difficulty understanding what parent would not even show up for court, when their parental authority is being threatened. I do wonder if perhaps the court clerk was bribed not to serve the paperwork. Another oddity in the case that I found startling, was the while the woman had no contact with the court, and was living apart from her husband, the husband had filed paperwork regarding his wife, to prove that the issue fell under the jurisdiction of the court. This paperwork included the wife's Kenyan identification card, her birth certificate, Kenyan immigration paperwork including her dependents pass, her passport, and the wedding certificate. It is not surprising to see this threat of a trans-national family being separated by dancing around the jurisdictional boundaries put in place by geographical borders. In Susan Hirsch's case study of the Malindi Kadhi's Court, *Pronouncing and Persevering*, she lived in a family that had experienced the father taking two beloved grandchildren into Tanzania for over a decade.

I further found evidence of the transnational nature of families and the Kadhis' courts in Case E, a divorce case between a man and his second wife, a German national. Having access to this

case file was fascinating, and I found myself hungrily reading each page of the huge file. The plaintiff of the case was a German national woman, who after receiving a scratched out divorce notice from a Malindi imam wishing her the best of luck in her future endeavors. She filed for a divorce certificate, past maintenance, *edda* maintenance, and house rent, totaling 16.5 million Kenyan shillings in payments from the husband. Through a thick stack of emails between the plaintiff, the defendant (her ex husband), and the defendant's first wife, I was able to trace the courtship and decisions leading to the marriage. The Plaintiff and Defendant courted via email between Kenya and Germany, after meeting in Kenya, although the Plaintiff returned to Germany. When the Defendant proposed to the Plaintiff, and the Defendant's first wife extended her blessings to the second bride, the Plaintiff migrated from Germany to Kenya. One of the past maintenance claims the Plaintiff thus made were for the costs of immigration. While the Kadhi did not award the Plaintiff 16.5 million Kenyan Shillings in past maintenance, he did reward 2 million for immigration costs, and 463,000 for *Edda* and past maintenance. This case highlights and underlines the transnational impact of families, and therefore the importance and value of family law jurisdiction in the various forms of courts that hold this jurisdiction.

Lastly, I conducted a second interview that revealed further the transnational nature of the Kadhis' courts. While waiting in the court, I asked a man for the time in Kiswahili, he informed me in English that he couldn't speak Kiswahili, but his wife, who was sitting beside me, could speak Kiswahili. Upon further questioning I discovered that the man couldn't speak Kiswahili, because he was not from Coast Province. Rather the man was from London, but originally near the Kenya Somali border, with his first language being Somali. The man had traveled from London, where he drove one of the famous double decked buses, to marry a Swahili woman. This man displayed how the Kadhis' court is homogenous in religion, features a transnational

and trans-cultural authority that impacts the lives of people from different countries, as well as different ethnic groups and cultures.

### G. Languages

One facet of the Mombasa Kadhi's Court that was simultaneously impressive and a critique was the multilingual nature of the court. Through my observation of cases within the Open Court, I found the court to be a place that used a plethora of languages. In many ways language was a gendered tool, while women speaking with the Kadhi spoke almost inaudible Kiswahili, and men tended to speak clear and vocal English with the Kadhi. On the several cases I observed, I only heard a man testify in Kiswahili once, and never heard a woman testify in English. This gendered dynamic of the court suggests other cultural norms, in which men are more active in the public and business sphere, meaning that they are most likely not as confined to one dominant language as their female counterparts. I found the comfort of the Kadhi, his clerks, and the attorneys switching between Kiswahili and English to be quite impressive. The Kadhi also handwrote the court proceedings, in which he would specify what language the proceedings were in, but simultaneously listen and translate all Kiswahili into English within the case file. However I criticize this use of multiple languages for several reasons.

The first reason I criticize the movements from one language to another within court proceedings is on the basis of fairness and an elimination of bias. Those who testify can be cross examined, but when the person testifies in English, and the other party is only comfortable in Kiswahili, how will they understand the proceedings they just witnessed? If for example a woman who is only comfortable in Kiswahili is filing for divorce, but her husband testifies in English, how will she recognize the potential errors, lies, or slander in his testimony? How will

that woman be able to defend herself if she is not fully aware of what has been said about her?

By keeping these gendered and divided standards of language within the court, I felt that the court would never be able to be unbiased, or even close to demonstrating a lack of bias.

The second reason the multi lingual nature of the court is problematic, lies in the courts inability to serve Kenyan Muslims who are not efficient in English or Kiswahili. In an interview with one of the Kadhis' Court staff, I questioned about such groups as the Gujarati, and their use of the Kadhis' courts. The staff member told me that the Gujarati are Muslim, but they refrain from using the Kadhis' courts as often as the Swahili. The staff member expressed feelings of frustration towards working with the Gujarati, because the Gujarati who do use the court are usually only women seeking divorce, and that because of the nature of the Gujarati's confinement of women, there was usually a language barrier. She said that these women were confined and typically only learned to be efficient in Hindi, so explaining court processes and hearing their cases was exceedingly difficult, as no one within the court spoke Hindi. I think that in this case the staff member pitied Gujarati women in many ways, but felt that the court was at a loss to adequately serve their needs, despite their falling under the Kadhis' jurisdiction.

Lastly, through my interview and observation of the Somali speaking man, and his Somali speaking family, I discovered that those who use the court cannot rely on the ease of everyone communicating in the same language. That ultimately there is a large assortment of languages in which people using the court are proficient at, and that they did not always fall under the same languages court staff and authorities are able to use. This prevents fair and balanced judgments, as well as equality in access to the court systems, so that many people are alienated from the court system, and face oppression even in a legal system that is supposed to be a tool for tempering forms of gendered, ethnic, and religious oppression faced by patrons of the court.

## H. Gender

The Kadhis' Court is a gendered space for legal dispute in which women are commoditized, while simultaneously creating a space for women to make claims for justice. Both my secondary literature research surrounding *Sharia* law, and first hand research on the traditional implementations of *Sharia* within Kadhis' courts draw attention to the view of women and men as inherently separate, and therefore treated differently. According to Islamic legal scholar, Judith Tucker, "the idea that such net differentiation ran the risk of fostering hostilities, of producing social rifts if not outright conflicts along gender lines, lurked between the lines of legal discourse. The task of a legal thinker, thus was not only to distinguish the male from the female, but also to elaborate on distinctly gendered rights, many of which privilege men, but some of which worked to temper male dominance" (Tucker 66). Tucker's argument in regards to the role of legal thinkers is applicable to my research, as I found that many *fatwas* and Kadhi judgments can seem liberal in the area of women's rights, but in actuality they are applied as a tool for protecting a system of patriarchy and inequality. Evidence can be seen through divorce cases, in which women seek and receive divorce, because men who desire divorce do not need the Kadhi or permission from a man to receive a divorce. Further evidence of this was seen in Case H, in which the appearance on the surface is one that favored a woman, after the Kadhi granted her custody of her children. However when you dive deeper into the case file, it is apparent that the decision was made not because of the woman's testimony of violence and abuse at the hands of her husband, but rather because she had a son of 18 years who as a man testified and corroborated his mother's story.

My research also evidenced the commoditization of women. Case I was the custody case over a ten year old daughter. The defendant was a woman who was divorced while she was

pregnant, and forced to move to Saudi Arabia for temporary work when the child was young. For the duration of the woman's work contract, approximately two years, the child lived with the maternal grandmother. Throughout the child's life, the father was absent, although occasionally taking the child to the hospital when sick, and paying school fees when harassed by the grandmother. At the time of the case, the daughter was 9 years old. Despite the defendant, her mother, and the daughter's testimonies that clearly emphasized the child's home was with her mother, the father was granted full custody once the child reached puberty, around approximately 12 years of age. Additionally, evidence and testimonies corroborated that the mother was more financially capable of caring for the child, with a larger home and no additional children, while the father's home was only two bedrooms with his wife and their three children.

In this case the daughter is being commoditized because her best interests are being configured through a larger patriarchal system. In this system of local interpretations of *Sharia*, the mother is confined to the domestic space within the child's life, so that in order to create a stable future the child needs the father to navigate the public arena. So neither daughter nor mother are able to define their lives independently or outside of the patriarchal structure in which they exist. A woman's value thus lies in her relationship to men, with no independent agency outside of the relationship and role to men. The Kadhis' courts thus perpetuate this system of gender division and differentiation. The Kadhi's judgment of this case is as follows:

“The general rule is that in the event of disagreement between parties on custody the best interests of the child takes priority. Priority is generally given to the mother for custody of a child till he/she reaches maturity/adolescence unless the mother remarries.

It is reputed that a lady complained to the holy prophet (pbuh) that his divorcee (husband) wanted to take away their child, the prophet ruled in her favor to get custody as long as she is not remarried. Abubakar (12.7) the second (calipha ruled) otherwise in the care of Um Asim vs Umar bin calipha in the matter of the custody of Asin bin Umar bin Khatib.

The law gives priority on custody to the mother till she remarries. It also gives the child a right to choose between his/her parents when she/he reaches adolescence. Before adolescence the girl child is best suited to live with her mother as she needs to be taught a lot about growing up cleanliness, menstruation, etc. and the best suited is the mother. A balance has to be struck between the two principles... custody of child granted to defendant for 2 years until the child reaches puberty (menstruation). Thereafter custody shall revert to the plaintiff as father as a matter of right (*ex desito justitiae*). During the period plaintiff is entitle to visit and pay child maintenance... Right to appeal within 30 days.”

It is also important to note that the decision was appealed in the High Court, and the typed court records that were sent to the High Court are the reason why I was able to fully read the Kadhi’s judgment and not merely the order. Unfortunately the appellate notice does not show which party filed the appeal, and there is no information in the Kadhi’s Court regarding the outcome of the appeal.

My research of Case G also demonstrated the gendered inequality of the court when the plaintiff filed for divorce against her husband. Included in the plaintiff’s heartbreaking testimony of prolonged physical, mental, and verbal abuse from the defendant and his mother, there were also copies of Kenyan police reports, including a medical examiners report of the extent of physical abuse apparent on the Plaintiff after one incident. The medical examiners report stated that the Plaintiff had suffered heavy blows with a blunt object, and that she had a history of abuse. There was marked bruising and tenderness across her body. Despite the obvious misconduct of the husband, he was granted custody of their children, and ordered to pay the Plaintiff 16,000 shillings in maintenance. After failing to pay the maintenance the Kadhi issued a warrant for his arrest, but did not revoke custody of the children. The idea that someone can be evidenced as abusive and violent, yet is still considered the best option for child custody is astonishing, and clear evidence of a complicated and gendered legal process within the Kadhis’ courts.

On a more positive note, I am not completely critical of the Kadhis' courts gender policies and behaviors. The Kadhis' courts application of *Sharia* law legitimizes polygamy in the legal arena, where polygamy under Secular law remains illegal. In this way women who are in polygamous unions lack protection through Secular law, and the Kadhis' courts are the only court system that provides some protection for these women. In Case E I witnessed a more positive side to polygamy within the Kadhis' courts. The case surrounded the divorce of a second wife, in which she was able to get some maintenance (although meager in size) from her ex husband. Included in the evidence were emails between the second wife (before the marriage), the husband, and his first wife. One email in particular highlighted a lesser seen side of polygamous unions in which the first wife wrote to the soon to be second wife "I am a Muslim woman and my husband has the right to marry 4 women if he can. Maybe if it was don't you that he found he could have found some stupid woman. I do not like but I like you so do not feel worried or ashamed, come to me happily..." I felt that this quote taken from the evidence was a very insightful remark on the existence of polygamy in Muslim Kenyan families, that shows not only the more positive side of the relationship, but also that women find themselves as having voices that are easy to pretend do not exist.

#### I. Legal Pluralism and Conclusion

The inclusion of the Kadhis courts as well as provisions for customary legal systems has created a legally pluralist society throughout Kenya. Anthropologist Sally Engle Merry defines legal pluralism as a situation in which two or more laws or legal systems coexist within a given social field. Kenyan legal pluralism is not limited to the existence of Religious law and Secular law, but is accompanied by various forms of Customary law practiced differently within the multitudes of Kenyan ethnic groups. With respect to the Kadhis' courts the legally pluralistic

nature of society allows Muslims to participate in a matter of forum shopping separate systems of law in issues of Family/Personal law; which has a number of disadvantages as well as advantages.

Kenyan legal pluralism contains some serious disadvantages. One disadvantage is the impossibility of defining where the boundaries of law are if everything can be appealed in a different legal arena. Part of the function of law is social regulation, which isn't totally possible when there are coexisting different legal systems. Further, fetishizing forum shopping helps to cover the faults within the different legal systems. More legal systems in this case are not necessarily better. One arena where this is most apparent is the gendered definitions of rights. Men and women's rights are often defined differently in order to rid of preserve systems of oppression. However, rights are further divided when legal pluralism causes various different definitions of gendered rights, so that you see a situation in which not only are men and women different, but divisions erupt between different women or different men.

Specifically with respect to the Kadhis' courts, there is a question of whose interpretations of *Sharia* and Islam are being applied within the space of the courtroom. As numerous scholars have highlighted, what is called *Sharia*, or Islamic law, is a historic product of debates between Muslims across space and time. Within *Sharia* there is room for disagreement and critique, but its application in the courtroom can pave over these disagreements with a sweeping and particularistic interpretations. Often times these interpretations, as has been displayed in my case discussions serve to perpetuate a patriarchal and elite dominated system.

As my research has shown, forum shopping has its limits, and the Kadhis' courts are beset by a variety of problems. These problems include the aforementioned critiques in gender, language,

bureaucratic, transnational, cost, power structure, constitutional, and jurisdictional spheres.

Those who use the forum of the Kadhis' courts are working within a specific set of limitations.

Forum shopping is also a current point of contention among many contemporary Kenyan

Christians, who find the Kadhis' courts to be exclusionary, and a way of navigating around the Christian Marriage Act's statutes.

At the same time, I found Kenya's system of legal pluralism to be an advantage in the independence that is created by the opportunity to forum shop for the best-case scenario in legal decisions. Kenyan Muslims often have the choice between three forums, Secular, Customary, or Religious law, which helps them choose the legal principles to live by. A number of interviewees highlighted the advantage of having multiple legal forums to address their problems, like the Gujarati's existence between Secular courts and Kadhis' courts, depending on the issue within Family/Personal law. The second advantage is the greater freedom to participate as a Kenyan and a Muslim within contemporary society. This is established by not being fully isolated into one legal forum, nor being forced to accept the hegemony of a Judeo-Christian inspired legal system.

### VIII. Recommendations for Avenues for Further Research

For those interested in topics surrounding legal pluralism, Religious law, and Family/ Personal law, I compiled a list of areas I would have liked to have extended my own research to.

One of the fascinating aspects of the Kadhis' courts, is their dependence and connection to the Kenyan High Court. It would be interesting to track this relationship through the Kadhis' courts appeals process, which is filed in the High Court, and decided by a High Court judge, in accordance with the advice and opinion of a second Kadhi. I feel that tracking the process of appeals would be integral to fully understanding Kenyan legal pluralism, as well as a fascinating insight on the application of Religious law in a Secular court. It would also be interesting to do a survey of different Kenyan Kadhis' courts, and how the Kadhi's court of the Lamu archipelago differs from the Mombasa Kadhi's Court, as they each respectively have one Kadhi, but are vastly different in the amount of cases they hear.

Second, I recommend research on the history of Kadhis' courts throughout East Africa, and a comparative look at the Tanzanian approach to Kadhis' courts. Post-colonial Tanzania forbade the use and establishment of Kadhis' courts in their constitution, and the development of their Secular legal system has had to universally apply the same body of family laws throughout the country. This is a vastly different approach than Kenya, and it would be interesting to compare how this approach was implemented, and what the various results of the approach is. Also it would be interesting to understand Tanzanian family law versus Kenyan in terms of dowry, divorce, and polygamous unions, in terms of what falls under Tanzanian legal jurisdiction.

Case Appendix:

Civil Case “A” 93/2010

“AMF” v. “TL”

Dispute involving custody and guardianship of the child

Civil Case “B” (open court case)

“FSM” v. “RSM”

Dispute involving attempt to travel outside Kenya

Civil Case “C” (open court case)

“SAD” v. “RSM”

Plaintiff seeking custody and guardianship of child

Civil Case “D” 267/2008

“LSM” v. “DSM”

Succession and inheritance claim involving property filed after the Respondent’s death in 2008.

Civil Case “E” 136/2009

“GW” v. “SC”

Alimony and maintenance payments involving a polygamous household, case with transnational dimensions as the appellant was a German national moving the Kadhi’s court for divorce and maintenance payments.

Civil Case “F” (open court case)

“SM” v. “SW”

Case involving divorce and custody claims

Civil Case “G” 369/2009

“NK” v. “KA”

Appellant seeking divorce and custody of the child, divorce awarded to appellant, while custody awarded to respondent in spite of overwhelming evidence of domestic abuse and assault corroborated by police and medical reports.

Civil Case “H” 135/2009

“SF” v. “SM”

Dispute involving divorce and custody of children, one minor and one deemed of majority age by the court.

Civil Case “I” 271/2009

“OSF” v. “YSM”

Dispute involving custody of child with court attempting to balance best interests of the child with the claims of the appellant and the respondent. Case appealed to the High Court Ref: HCCIA 116/2010. Details of appeal process and summary judgment included in case file.

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