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# How to Manage a Marital Dispute: Legal Pluralism from the Ground Up in Zanzibar

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*This paper considers legal pluralism on the Swahili Coast by looking at marital dispute resolution among Muslims in Zanzibar, Tanzania. The state of Zanzibar, a semi-autonomous island polity of Tanzania, has its own semi-independent legal system, which includes Islamic courts for family disputes for Muslims. Through investigating legal pluralism from the point of view of lay people and their day-to-day legal practice, the paper argues for studying legal pluralism from the ground up, thus building on calls from Caplan and Dupret for socio-legal scholars studying legal pluralism to ask “what is the law” through the eyes of everyday people. In particular, I aim to show how different legal actors—primarily lay people—recognize and apprehend this pluralism and compare their often very different arguments about the ramifications and consequences of such pluralism. The paper draws on ethnographic data, interviews, and documents from rural Zanzibari Islamic courts and the surrounding community.*

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## INTRODUCTION

Many years ago, when I conducted my first fieldwork in Zanzibar's Islamic courts, I was struck by the details of a court case brought to the rural *kadhi* (Islamic judge) with whom I was working. A woman named Leila<sup>1</sup> brought a claim that seemed to center on lack of maintenance from her husband, Abeid. As the case unfolded, however, it became clear that the crux of the dispute was Abeid's alleged failure to uphold the terms of a contract of sorts that had been prepared by Leila's elders in an attempt to resolve the couple's dispute; this agreement was referred to as the *karatasi ya wazee* (elders' paper). Eventually, the kadhi decided that it was Leila herself who had not fulfilled the terms of the contract, and he issued a ruling that reflected this, much to her dismay.

In Zanzibar, Islamic courts are presided over by kadhis, and have jurisdiction over family law matters for all Muslims. However, other figures with different kinds of authority, such as elders, also play critical roles in marital disputes. The focus of this paper is the pluralism inherent in the processing of Zanzibari marital disputes, particularly as it is understood by everyday actors. In a recent lecture, the anthropologist Sally Engle Merry argued that legal pluralism is not "a theory of law or an explanation of how it functions, but a description of what law is like."<sup>2</sup> The aim of this paper is thus to describe what legal pluralism "looks like" in Zanzibar from the point of view of people like Leila who use the law—whatever that may be—in their daily lives.

In so doing, I seek to build on the work of scholars who examine legal pluralism in Muslim contexts, particularly those who attend to the role of Islamic law vis-à-vis other types of legal ideas, normative systems, and legal institutions. Recently, Ido Shahar has argued for the potential of legal pluralism to contribute to studies of Islamic law.<sup>3</sup> He identifies the primary ways in which recent scholarship has done this. One way has been through a consideration of the interaction between state law, Islamic law, and local norms or customs, such as in John Bowen's work in Indonesia.<sup>4</sup> Another is the study of forum shopping between *madhhabs* (Islamic legal schools of thought), and still another is the consideration of the relationship between Islamic law and other legal orders in the West.<sup>5</sup> In his own work, Shahar examines the "usefulness of the idea of legal pluralism" as it relates to two different types of pluralism in Jerusalem. One is the interrelationship of Israeli shari'a courts, Jordanian shari'a courts, and secular courts and how Muslims forum shop to choose between them. The other type of pluralism refers to the relationship between qadis

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1. All names have been changed to protect privacy.

2. Sally Engle Merry, *McGill Convocation Address: Legal Pluralism in Practice*, 59 MCGILL L.J. 1, 2 (2013).

3. See Ido Shahar, *Legal Pluralism and the Study of Shari'a Courts*, 15 ISLAMIC L. & SOC'Y 112 (2008).

4. See *id.* at 114.

5. *Id.*

trained in different madhhabs.<sup>6</sup> In general, Shahar argues for an approach to studying pluralism that considers both the litigants themselves and how institutions interact with one another. In particular, Shahar encourages anthropologists and socio-legal scholars to pay more attention to forum shopping in situations of legal pluralism. Thus, he builds on the seminal work of Keebet von Benda-Beckmann, who considered both how Indonesian disputants forum shopped between venues and how forums also “shop” for disputes in arguments over jurisdiction and procedure.<sup>7</sup>

I agree that legal pluralism can be a useful framework for thinking about Islamic law in Zanzibar, and I seek to show this utility both within and beyond the confines of state-recognized institutions and vis-à-vis other types of legal authority that have no basis in Islam. My goal, however, is not to prioritize institutions, but rather to highlight the way in which everyday actors describe a plural legal landscape. I aim to show how Zanzibaris conceive of what is legal, and differentiate between types of authority figures who are perceived to have a role in dispute resolution. In this way, I adopt aspects of Baudouin Dupret’s praxiological approach. “The task of social scientists is,” he writes, “to describe the situations, the mechanisms, the processes through which people orient to something legal which they identify as pluralistic.”<sup>8</sup> Thus, “any study of law should basically look at what people do and say when practicing what they call law.”<sup>9</sup> Therefore, instead of deciding for Zanzibaris what law is, I start from the ground up in an effort to understand what ordinary Zanzibaris consider law and “legally-relevant norms” (using John Bowen’s term) in the handling of marital disputes.<sup>10</sup> In essence, then, I explore legal pluralism through the legal consciousness of regular people in rural Zanzibar. Merry has described legal consciousness as simply “[t]he way people understand and use law,” which includes their “commonsense understanding of the world.”<sup>11</sup> In exploring pluralism through legal consciousness, I make a particular effort to identify points of tension and conflict; specifically, I describe local perceptions of changes in dispute processing in recent decades.

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6. *Id.* at 115. Though it is not something I will develop in this paper, Shahar proposes a rethinking of Griffiths’ “strong” and “weak” legal pluralism, and suggests that “strong” legal pluralism should be understood as a context in which litigants can forum-shop between options (even if they are all recognized and supported by the state), whereas “weak” pluralism is when certain groups are assigned to certain venues, thus limiting the ability to shop. See John Griffiths, *What is Legal Pluralism?*, 18 J. LEGAL PLURALISM & UNOFFICIAL L. 1, 5 (1986).

7. See Keebet von Benda-Beckmann, *Forum Shopping and Shopping Forums: Dispute Processing in a Minangkabau Village in West Sumatra*, 19 J. LEGAL PLURALISM & UNOFFICIAL L. 117 (1981).

8. Baudouin Dupret, *Legal Pluralism, Plurality of Laws, and Legal Practices: Theories, Critiques, and Praxiological Re-Specification*, 1 EUR. J. LEGAL STUD. 296, 296 (2007).

9. *Id.* at 305.

10. John R. Bowen, *Law and Social Norms in the Comparative Study of Islam*, 100 AM. ANTHROPOLOGIST 1034 (1998).

11. SALLY ENGLE MERRY, *GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS* 5 (1990).

I am not the first scholar to take up the question of legal pluralism on the Swahili Coast. In Swahili, the term *sheria*, derived from the Arabic shari'a, is used to refer all types of law, not just Islamic law. In her research on Mafia Island, about 100 miles from Zanzibar, anthropologist Pat Caplan considered dispute resolution and the legal relevance of the Swahili concept of *mila*, which is often translated into English as "custom."<sup>12</sup> Caplan has argued that men and women strategically use both religious law (known as *sheria za dini*) and *mila* in handling disputes, and she argues for a fluid conception of legal pluralism: "People thus use *mila* and *sheria* [law] selectively in different contexts, generally calling upon whichever is most useful to them in their disputes and negotiations with others."<sup>13</sup> However, where Caplan looked primarily at how disputants used ideas and norms associated with either *mila* or *sheria* in managing their disputes, I seek to explore how disputants view and approach different forms of authority, and to show that both lay people and authority figures themselves understand law in Zanzibar as inherently plural.

### I. METHODOLOGY

The data that I draw on in this paper were collected during almost two years of ethnographic field research in Zanzibar conducted between 1999 and 2008; I spent eighteen months in Zanzibar in 1999 and 2000, and went back for shorter visits of a few weeks in 2002, 2005, and 2008. I conducted research in two rural Islamic courts, and in the community surrounding the court in the rural northernmost region of Unguja, the largest island in the Zanzibari archipelago.

This paper draws primarily on research I conducted out of the court, through interviews, informal conversations, and participant-observation in daily life. Over the years, I have conducted over one hundred interviews with women and men of various ages, and innumerable informal conversations. The norms of social propriety in Zanzibar mean that, as a woman, it has always been easier for me to talk to other women about matters concerning marriage and divorce. However, I have been able to conduct some interviews with men on the subject, particularly with those who were significantly older than me.

I also draw on court-based research; in particular, I discuss interviews with *kadhis*, and I examine one court case from the year 2000. In court, my research consisted of daily participant observation of proceedings; semi-structured interviews with litigants, clerks, and *kadhis*; collecting and copying court documents as they were produced; and, perhaps most importantly, extended informal conversations with courts clerks and *kadhis*. Participant observation during actual hearings consisted of combining observation and note-taking on the proceedings with occasional questions and comments back and forth between me, the *kadhi*, and the clerks. Swahili is the language of Zanzibar, and all court proceedings are

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12. See Pat Caplan, *'Law' and 'Custom': Marital Disputes on Northern Mafia Island, Tanzania*, in UNDERSTANDING DISPUTES: THE POLITICS OF ARGUMENT 203 (Pat Caplan ed., 1995).

13. *Id.* at 220.

conducted in Swahili and all court documents are written in Swahili; all translations in this essay are my own.

## II. RESEARCH SITE

Zanzibar is a semi-autonomous island polity of Tanzania with its own president, parliament, and semi-independent legal system. Unlike on the Tanzanian mainland, where there are no Islamic courts, Islamic courts were incorporated into Zanzibar's state legal system in the 1984 constitution, and they have jurisdiction over all family law matters for Zanzibar's Muslims, who make up the vast majority of the population. Today, there are ten Islamic family courts of first instance, and two levels of appeal. Kadhis are appointed by the state and collect a government salary. However, as we will see, the kadhi courts of first instance are understood as the final step in the progression of handling marital disputes.

I have conducted most of my research in a rural area about one hour north of Zanzibar Town, in the northwestern region of Unguja. Although this part of Unguja is very rural, and there are no real towns or cities, it is quite densely populated. Indeed, as one travels north on the main road on a *gari ya abiria* (passenger truck), it seems that one village runs right into the next, and people on foot, on bicycles, and on Vespas (and occasionally on donkeys) travel up and down the road constantly. Some villages are situated right on the main road, and others can only be reached down long red dirt paths or roads that wind into the lush countryside. Unlike the drier eastern coast of Unguja, the area is very green and fertile, and most of the plants and trees are cultivated crops.

The northernmost region of Unguja, Kaskazini A, is home to over 100,000 people and is divided into numerous *shehia*, small political districts with 2,500 to 6,000 people, presided over by government-appointed community leaders called *shehas*. I lived and worked in a shehia I call Mnazi Mrefu, which had about 3,000 residents and was comprised of about ten villages, one of which was Kinanasi. Most people in this part of Unguja subsist through farming, fishing, and participating in the small-scale or informal economy. Men may tend shops or repair bicycles, and women sell produce, fried or baked goods, or dried fish. There are several schools in the area, and some people are also teachers or work in the government's regional administrative offices. Although tourism has been a major part of Zanzibar's economy in recent years, this is not a touristy area, and I did not know anyone in the region who earned a living through the tourist economy.<sup>14</sup>

All adults in Zanzibar are expected to marry and most do. Most first marriages are arranged by elders, and there is a strong norm of young people adhering to their

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14. Although it is not important to the argument of this paper, nearly all people living in the area identify ethnically as Watumbatu; the name is derived from the island of Tumbatu, which is just to the west of Mnazi Mrefu across a narrow channel, and has a population of about 10,000 to 15,000 people. The Watumbatu are often regarded as one of the original ethnic groups of Unguja.

elders' wishes, at least in first marriages.<sup>15</sup> As I have noted elsewhere, divorce is very common in Zanzibar,<sup>16</sup> as it is in other regions of the Swahili Coast.<sup>17</sup> There is little stigma attached to divorce, and remarriage is also very common. Indeed, I encountered several men and women who had been married three or four times. Most divorces take place out of court, primarily through male unilateral repudiation, known as *talaka* (from the Arabic term *talaq*). Unlike in many other Muslim-majority countries, Zanzibari Muslim men maintain the unattenuated right to *talaka*, which is usually done through a spoken or written statement of divorce. Zanzibari women may ask their husbands to divorce them or may file for divorce in court, and divorce suits are second only to claims for maintenance among women, who open the majority of cases in Zanzibar's Islamic courts.<sup>18</sup>

### III. LEGAL PLURALISM FROM THE GROUND UP: HOW TO MANAGE A MARITAL DISPUTE IN ZANZIBAR

In most of my other writings about law in Zanzibar, I have taken what might be referred to as a court-centered approach: I have started with descriptions of the court, how marital disputes are handled there, and the processes of reasoning that the *kadhi*, with the help of his clerks, engages in when arbitrating disputes. I have always drawn on my research out of the court, but usually to bolster my arguments about what is happening in the court.<sup>19</sup> In this essay, however, I am starting from the other direction: I describe the legal landscape in Zanzibar from the point of view of everyday people.

I have observed that most people in rural Zanzibar describe the process of managing a marital dispute in the same way, which is very clearly focused on engaging different kinds of authority figures in a three-step sequential procedure. Descriptions of this process were consistent across different segments of the population: men and women of various ages, *shehas*, and even the *kadhi* described it in essentially the same way. Indeed, such explanations are a fine illustration of the plural nature of legal authority figures as conceived of in the legal consciousness of most Zanzibaris. This is somewhat similar to what Keebet von Benda-Beckmann

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15. See Erin Stiles, *The Right to Marry: Daughters and Elders in the Islamic Courts of Zanzibar*, 21 *ISLAMIC L. & SOC'Y* 252, 253–60 (2014).

16. ERIN E. STILES, *AN ISLAMIC COURT IN CONTEXT: AN ETHNOGRAPHIC STUDY OF JUDICIAL REASONING* 78 (2009).

17. See SUSAN F. HIRSCH, *PRONOUNCING AND PERSEVERING: GENDER AND THE DISCOURSES OF DISPUTING IN AN AFRICAN ISLAMIC COURT* 37 (1998); JOHN MIDDLETON, *THE WORLD OF THE SWAHILI: AN AFRICAN MERCANTILE CIVILIZATION* 124 (1992); Caplan, *supra* note 12; Susi Krehbiel Keefe, *Being a Good Muslim Man: Modern Aspirations and Polygynous Intentions in a Swahili Muslim Village*, in *GENDERED LIVES IN THE WESTERN INDIAN OCEAN: ISLAM, MARRIAGE, AND SEXUALITY ON THE SWAHILI COAST* 321 (Erin E. Stiles & Katrina Daly Thompson eds., 2015).

18. See STILES, *supra* note 16, at 26–27.

19. See Erin E. Stiles, *Unsuitable Husbands: Allegations of Impotence in Zanzibari Divorce Suits*, in *GENDERED LIVES IN THE WESTERN INDIAN OCEAN: ISLAM, MARRIAGE, AND SEXUALITY ON THE SWAHILI COAST* 245, 250 (Erin E. Stiles & Katrina Daly Thompson eds., 2015); Stiles, *supra* note 15.

has described in her work in forum-shopping in Minangkabau, Indonesia, where she observed that in the customary system, a “hierarchical principle gives a chain of authority vested in offices.”<sup>20</sup> And although state court judges in Minangkabau may try to persuade disputants to seek a settlement at the village level,<sup>21</sup> Zanzibar’s kadhi courts—state courts—will almost always send a potential litigant back to her elders and sheha in the name of proper procedure and the “chain of authority.” Unlike in Minangkabau, Zanzibari disputants cannot proceed directly to the kadhi courts and bypass the local structures of authority. Although there was little disagreement in Zanzibar on the procedural steps to handling a marital dispute, I identified significant points of tension in a couple of areas: lay people and legal authorities had different opinions about whether certain steps in the process were valuable or beneficial, and some elders regretted that recent changes in dispute processing had compromised elders’ authority over adult children.

The agreed-upon first step in managing a dispute is taking the problem to the elders, known in Swahili as *wazee*. The elders consulted are normally parents or grandparents, though uncles, aunts, or elder siblings may also be included. If the elders fail to resolve the matter, the disputants approach their sheha. If the sheha cannot resolve the disagreement, then the disputants take the matter to the kadhi. Nearly all interviewees who described the process explained the same three steps, as in the words of a woman called Bi Dawa<sup>22</sup>: “Everyone goes [to the elders]—even the *watu wazima* [adults]. If the elders are defeated, then they go the sheha. But the sheha isn’t someone of the law. No, the sheha just gives out a paper sending you to the kadhi.” In this comment, Bi Dawa seems skeptical of a sheha’s ability to solve disputes. However, as we will see, some shehas do try to mediate marital conflicts.

Although these figures are associated with different fora for resolving disputes (the family, the state/community, and the court), Zanzibaris do not engage in forum-shopping in the way that Shahar describes for Muslims in Jerusalem.<sup>23</sup> Zanzibari authorities are not regarded as alternatives to one another, but rather, as different levels of dispute processing. However, they are certainly viewed as having different kinds of expertise. In earlier work, I have shown how elders and shehas are incorporated into court procedure and practice.<sup>24</sup> In this essay, I hope to move in a new direction by examining how we might regard this variety of legal figures as a manifestation of pluralism as it is understood, experienced, and utilized by Zanzibaris who might (or might not) seek out these authority figures in handling

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20. Von Benda-Beckmann, *supra* note 7, at 137.

21. *Id.* at 142.

22. *Bi* is short for *Bibi*, an honorific for women that might be translated as Ms. All proper names have been changed to protect privacy.

23. See IDO SHAHAR, LEGAL PLURALISM IN THE HOLY CITY: COMPETING COURTS, FORUM SHOPPING, AND INSTITUTIONAL DYNAMICS IN JERUSALEM (2015); Ido Shahar, *Forum Shopping Between Civil and Shari’a Courts: Maintenance Suits in Contemporary Jerusalem*, in RELIGION IN DISPUTES: Pervasiveness of Religious Normativity in Disputing Processes 147 (F. von Benda-Beckmann et al. eds., 2013).

24. See STILES, *supra* note 16, at 131–57.



marital disputes. Following Dupret's call to take a praxiological approach to understanding not only Islamic legal practice but also legal pluralism, I hope to illuminate how lay people understand the roles of these figures as "legal options" and how the authorities themselves view their roles vis-à-vis each other.

*A. Step One: The Wazee, Elder Authority in Disputes*

The first step, then, is approaching the elders to resolve a dispute. Interviews indicate an overwhelming consensus on the importance of elders in all matters regarding marriage and divorce.<sup>25</sup> For example, two women interviewees, neighbors and relatives who were both in middle age, responded to my general question about how to handle marital disputes by explaining that first a woman would go to her elders, who would then call her husband so they could all talk together. They explained that, once summoned, everyone would "calm down," the elders would solve the problem, and then everyone would go home. However, they emphasized that this was only a first step by explaining that if the problems persisted, a woman would "go to the *juu* [top]" meaning that she would go to a higher level, such as the sheha or kadhi.<sup>26</sup>

In Zanzibar, although elders are rarely described as having expertise in *sheria za dini* (Islamic law, the body of law that is deemed most relevant to managing marital disputes), they are regarded by lay people, shehas, and kadhis as the mandatory first step in the legal process, and thus they must be considered in any discussion of legal pluralism in Zanzibar. In an interview, one sheha emphasized the importance of seeing the elders first: "If they come without the wazee," he told me, "I have the power to call the wazee." When people occasionally came straight to him with their problems, he would tell them to go home and come the next day with the wazee so they that could all talk together.

Although the kadhi with whom I worked most closely, Shaykh Hamid, described respect for the authority of the elders as a specifically religious requirement,<sup>27</sup> other respondents would associate the elders' role in dispute resolution and managing matters of their children as *mila*, or custom. One sheha, for example, told me although some people are shy about going to their elders with problems, and so would try to see him first, he emphasized to me that "*Iko taratibu*—there is a process. It is our *mila* to go to the elders when the children get a problem with the marriage."

The power of elders over their children—including their adult children—is based on customary norms and local legal practice, and my interviews indicate that until the recent past, corporal punishment was an important way for elders to exercise this power. However, this is changing, and beating is no longer considered

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25. See Stiles, *supra* note 15.

26. Unfortunately, I was never able to observe elders specifically attempting to moderate a marital dispute. Therefore, I draw on how respondents described elders' efforts rather than data from participant observation.

27. See STILES, *supra* note 16, at 131.

appropriate by most people. For some elders, this indicates a decline in elder authority. Thus, it is evident that although the various authorities who may weigh in on a dispute are perceived locally as sequential steps in the process rather than competing alternatives for resolution, tensions may still arise. This seems to be particularly true concerning the perceived decline of certain types of authority due to the rise of others. The clearest example of this is a professed weakening of elder authority in the legal consciousness of many Zanzibaris; this decline is most often attributed to a rise in religious knowledge.

In an engaging conversation with Mzee Bweni<sup>28</sup> (a man in his late sixties) and Mzee Nur (around age fifty), the two men strongly emphasized the role of the wazee in solving marital disputes, noting that this was particularly the case in the past. I knew these two men well, as they were friends and neighbors with whom I visited daily. When I asked about disputes, Mzee Nur explained that, “In the past, many matters [marital disputes] were just finished by the elders!” Mzee Bweni concurred, saying that the disputants were just beaten with a *bakora* (a cane). I asked if even adults would be beaten, and they emphatically affirmed:

Yes! Everyone! You and your husband would be beaten. If you made a mistake with your husband, the elders would come and also the elders of the husband. They come and they ask you about your mistakes. If they feel that you all do not have *adabu*, [good manners, good behavior] then five canings for the both of you!

In jest, I asked if even the elderly Mzee Bweni and his wife, Bi Halima, would be beaten. They said yes, and laughed heartily at the thought of dignified and reserved Bi Halima being beaten by her parents. Bi Halima herself overheard us, and amusedly assured me from the back of the house that yes, indeed, it was all true.

I asked a hypothetical question: if Mzee Bweni’s adult daughter came with her husband to seek their help, and her husband had made a mistake in the marriage but she had not, would he beat both of them? Mzee Bweni said that yes, they would both be beaten, but Mzee Nur disagreed, saying it depended on the circumstances. Mzee Bweni argued that beating both of them would serve as an important lesson. However, they then explained to me that they would not do this today, as times had changed, and that beating was only for *nchi za majuba* (countries of fools) where people are ignorant because they do not study Islam. They both laughed, and Mzee Nur gave me a Swahili lesson by telling me that if I heard that someone was *mjuha*, ignorant or foolish, then I would know that they do not understand the matters of the sharia, the law.

We continued the conversation, and I asked what a woman would do if she wanted a divorce, since she was not able to repudiate her husband. Mzee Bweni explained:

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28. Mzee is a title of respect for an older man. Titles of respect are nearly always used when addressing or discussing people.

She would go to her mother to explain the problems, and then the wazee would call each other. But the disputing wife and husband are not called yet. First it's just the wazee and they ask each other [about the situation]— [why] the children came with their problems. “What’s going on?” you would be asked. Then we say, “Tomorrow we’ll talk together with the children.” And they come and they explain.

I asked if all the elders listen together, and he said,

Yes. And they say who caused the problems. Then they will decide—”Ah, I see that the husband caused the problems.” Then, they’ll notify and warn [the children]. They tell the husband, “This matter, don’t do it.” And things like that . . . [or] “You two have already had children. And it’s necessary that you raise your children together well.”

It took a few tries to get Mzee Bweni to tell me what would happen if the elders failed to solve the problems, as he seemed quite convinced that they could always handle the matter. However, eventually he disclosed that, “If it’s still a problem and the wazee [don’t solve it], then you send them to the sheha. But the sheha will just send you straight to the kadhi. He’ll write you a paper and you go.”

A few months later, I was visiting with Mzee Bweni and I told him about my upcoming trip to the neighboring small island of Tumbatu, where the kadhi with whom I worked lived. He asked why I was going, and I told him that because so few cases came to the court from Tumbatu, I wanted to interview the shehas there about marital dispute resolution. Mzee Bweni had a ready answer for this, and confidently told me that the people of Tumbatu do not go to the court because their wazee solve their problems. He explained that if a Tumbatu husband and wife take their problems to the wazee, then they solve it with the bakora, the cane. “Really?” I asked, “You mean like they did here in the past?” He said, “Yes, just like that!” Remembering Mzee Nur’s comments about increased knowledge of Islam leading to the decline of such beatings, I made a comment implying that they must be unlearned, to which Mzee Bweni responded, “No, they just follow the ways of the past.”

Although the term *mila* did not often come up in discussions of marital dispute resolution, as noted earlier, the practice of beating children was one area where it did, and is an excellent indicator of a change in legal consciousness among some Zanzibaris. Mzee Nur and Mzee Bweni presumed that Zanzibaris were moving closer to Islamic law in dispute resolution and away from *mila* because of more widespread Islamic education. People thus had more access to religious teachings and, as a result, followed religious law more carefully. Mzee Bweni told me that parents no longer beat their children to solve problems because now they were more educated in religion and knew that this was not *sheria za kiislamu* (Islamic law). Beating children was *sheria*, he said, but not of *dini* (religion), but rather, *sheria za mila*, which might be translated as “customary law.”<sup>29</sup> Thus, in their view, legal

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29. See STILES, *supra* note 16, at 132–33.

consciousness was shifting from a more customary means of handling marital problems to one associated with Islamic law and Islamic legal norms.

Several other respondents, particularly those of more advanced age, also focused on beating as a common way to resolve marital disputes in the past. An elderly woman called Bi Patima told me that a long time ago, before the 1964 revolution, “The shehas were called, and they came to solve the problem. If you refused your husband, you were beaten with a stick.” I asked, “The shehas would beat you?” Bi Patima replied, “Yes! They beat you! Your elders beat you! Yes, it meant you were quarrelling. If you were squabbling, you were beaten with stick and told ‘Why are you making us look bad in front of [other] people?’” I expressed confusion, and Bi Patima clarified:

Elders, shehas, both of them! The sheha was given permission by your father to beat you. And each person [was beaten] with a stick right away. If there were four people, then there were four sticks . . . . Yes, you went for reconciliation, and then you were beaten . . . . You were told, “Go home, go and live with your husband.

I asked if things today were the same, and she said, “You still go to the sheha but first the elders try to fix the problem. If they fail, if the sheha fails, then the sheha gives you a paper to go to see *Bwana Kadhi*.”<sup>30</sup>

It is clear that many Zanzibaris think that the elders’ authority in disputes has declined to some extent—particularly in terms of their ability to wield physical punishment as a means of modifying their adult children’s behavior. Some, like Mzee Nur and Mzee Bweni, explained this as a shift in legal consciousness to a more appropriately Islamic means of resolving disputes. However, despite this perceived change in authority, elders still have a significant role in handling marital disputes. As an illustration, let us now return to the court case introduced at the opening of the paper, in which Leila, her elders, and the kadhi regarded the *karatasi ya wazee*, the elders’ contract, as the heart of the case. Elsewhere, I have discussed this case as an example of the importance of intention in the kadhi’s reasoning about disputes.<sup>31</sup> Here, I attempt to draw something different out of it: a closer consideration of the role of the elders and the legally relevant contract that they prepared.

*1. Mkokotoni Case 46-99: Leila’s Contract as an Indicator of Elder Authority in Zanzibar’s Plural Legal Environment*

Leila opened a case in the kadhi’s court in the village of Mkokotoni at the end of January 1999. I was working in the court at the time and observed the case throughout the proceedings. Leila was thirty-two years old, and the third wife of a prosperous boat builder called Abeid. Leila, careful and composed in the courtroom, was very different from her mercurial husband, who went from fury to

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30. Bwana is a title of respect for a man, similar to Mister.

31. See STILES, *supra* note 16, at 118–24.

humor in the blink of an eye. The kadhi of Mkokotoni at the time was a genial and soft-spoken man known as Shaykh Hamid; I have written extensively about him elsewhere.<sup>32</sup>

Leila originally brought the case against her husband to claim for maintenance for herself and their child, which she said Abeid had not paid for the past two years. She and I talked about the case, and she said that she was the third of four wives, and that Abeid had never supported her adequately. She had lived with her cowives for several years, but tired of that and so went to live with an older sister who worked as a doctor in Zanzibar Town. Although polygyny is not unknown in Zanzibar, it is not very common, and it is highly unusual that wives would live together; particularly in this case, because Abeid appeared to be quite well off. Leila told me that she had married him thirteen years ago, and that he already had two wives when he asked her parents for permission to marry her. He had told them he would divorce one of his wives, but had not done so. Eventually, Abeid said he had a house ready for Leila, but she was angry about the lack of maintenance, and did not want to return to him. When I asked her about the process of getting to court, she told me that she had gone to her elders with the problem, and that eventually her maternal grandfather told her she needed to open a case in the kadhi's court.

In her written claim, prepared with the clerks, she demanded Abeid pay 730,000 Tanzanian shillings in back maintenance, which was nearly 1,000 US dollars at the time. If he failed to pay the maintenance, the claim document said, then he must give his wife a divorce. When Abeid was summoned, he denied that he had failed to support her, and claimed that she had "broken sheria" by refusing to live with him. His counterclaim refuted several aspects of her claim, and asserted that she was to blame for the marital discord by leaving him. He demanded that she return to him.

As noted, at the heart of the case was a contract that had been prepared by Leila's elders in an attempt to resolve the matter. It was referenced in her written claim as an "effort made by the elders": "[V]arious efforts made by the elders together with the plaintiff were used in order to get the defendant to support his wife and children and also to build them a house to live in, but he has not done this." In the first hearing with Shaykh Hamid, much of his discussion with Leila focused on the elders. Several times, she asserted that her elders had already "solved the problems," but that Abeid had failed to uphold his side of the bargain and that now she was "tired." Although Leila was clearly frustrated, she remained calm throughout the proceedings. The same could not be said of Abeid, who was exceedingly angry and yelled repeatedly that Leila's elders had broken the law. He demanded that they be summoned.

The elders were called in for the next session. Leila brought her older sister and three of their male elders, including a grandfather and an uncle, Mwalimu Simai, a local religious expert who was often sought out for his expertise (he was often

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32. See STILES, *supra* note 16.

referred to as a *kadhi wa mtaa*, or local kadhi).<sup>33</sup> Elsewhere, I have described the efforts Shaykh Hamid took to incorporate elders into the legal proceedings,<sup>34</sup> and in this case Shaykh Hamid specifically told the group that he did not want to overstep their authority, which was the reason he called them in.

Leila's grandfather explained that he had talked with Abeid at length in an attempt to resolve their marital difficulties. He had asked Abeid to divorce Leila, which Abeid did not want to do. The grandfather said that Abeid was told that, as a resolution, he would be given *masharti*, a set of terms that he needed to uphold, which included paying 50,000 shillings to Leila. This was a reference to the elders' paper, *karatasi ya wazee*. Shaykh Hamid talked with the elders briefly about the details and timeline of the marital dispute, and then he asked Leila's sister for her opinion. She had been sitting quietly but attentively, a pen poised on a writing pad to take notes. She agreed that they needed to solve the problems of the couple, and pointed out that they had already done so through the *karatasi ya wazee*, which specified that the couple would be divorced if Abeid was unable to fulfill the terms set out in the *karatasi*. One of the elders then pulled the actual contract out of his pocket. He handed it to the kadhi, who read it and asked Abeid if he had agreed to the terms. He had. A discussion ensued about whether he fulfilled it. Tensions were high, especially when Abeid accused Leila's sister of stealing her away from him. Eventually, the kadhi asked if there was a *muda* (a time period) attached to the contract. The sister replied that Abeid had had two weeks to fulfill the terms; if he failed, then Leila would be considered divorced. Additional discussion revealed that Abeid had come to Leila's village within the appointed time with the money, but she had been absent, and so the money had not changed hands. When Leila returned to the village, Abeid had already gone. Because she had not seen him, Leila had assumed she was divorced.

Witnesses were eventually called, and it was established to the kadhi's satisfaction that Abeid had attempted to fulfill the terms of the contract, but that Leila had been absent when he arrived; thus, *she* had failed to fulfill the terms. The kadhi's written decision stated that Abeid had failed to maintain his wife properly, and that he must pay her back maintenance, though not for the extended period that Leila originally requested. Leila was required to return to her husband. She was not pleased.

In Leila's case, the litigants, the elders, and the kadhi regarded the elders' paper as a binding document, based on the authority of elders over matters regarding even their adult children. The elders' paper seems a good example of what Sally Engle

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33. In addition to the three-step process of resolving disputes, Zanzibaris may also call on other figures to assist them with their marital troubles. In particular, these are people who are well known for their expertise in religious learning, such as religious teachers. Sometimes, these experts are known as local kadhīs, *kadhi wa mtaa*, particularly if they are able to record marriages and divorces. *See id.* Mwalimu Simai, the elder of Leila who was introduced above, was the most notable *kadhi wa mtaa* in shehia, in which I did most of my work, and many people thought him to be a much better religious and legal scholar than Shaykh Hamid.

34. *See* STILES, *supra* note 16, at 131–57.

Merry means by legal indicators. Merry has suggested that we consider certain indicators as evidence of legal pluralism, and argues that people often draw parallels between informal and formal legal processes and adopt the formal meanings and trappings associated with legal institutions in informal contexts.<sup>35</sup> Thus, she notes that the boundaries between the formal and informal are “fuzzy, underscoring the pluralism of law in practice.”<sup>36</sup> In one example, Merry describes the personnel of an informal women’s court in India, which does not have any formal legal authority, adopting the trappings of state formal legal institutions. We can consider Leila’s contract an indicator of this “fuzzy boundary” between formal and informal legal processes. There is no family legal code in Zanzibar, and certain kinds of Islamic divorces are regarded as valid even when they happen outside the confines of the state institution of the kadhi’s court. And although elders do not have an “official” role in dispute processing that is supported by the state, as we have seen, lay people and legal professionals agree that they are a mandatory part of dispute resolution. Maurits Berger has written similarly about “formal” and “informal” sharia as a manifestation of pluralism in Syria: “[T]he shari’a does not only move at the level of (formal) state legislation but also at the level of (informal) application on a voluntary basis.”<sup>37</sup> The presence of Mwalimu Simai, a noted religious scholar whose word on legal matters bore significant weight in Shaykh Hamid’s court, was also significant. We might then regard this as the informal operation of sharia za dini—the contract was prepared outside the confines of the state court but was no less legitimate. Importantly, it was also regarded as binding by the state court and was then framed as a central issue in the dispute between Leila and Abeid throughout the case.<sup>38</sup>

### B. Step Two: The Sheha, Local Experience, and Local Knowledge

If the elders fail to resolve a marital dispute, the next step is taking matters to the sheha, who is a very different sort of authority figure. Shehas have long had a role in dispute processing in Zanzibar as noted by historians,<sup>39</sup> and they were most recently established as part of the governing structure of Zanzibar by Act No. 11 of 1992. The Act replaced the political districts called “branches” that were established in Zanzibar after the 1964 revolution with shehias and designated shehas as the chief executives of the shehias.<sup>40</sup> The Act states that shehas are responsible for

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35. See Merry, *supra* note 2, at 2–4.

36. *Id.* at 4.

37. Maurits S. Berger, *The Shari’a and Legal Pluralism: The Example of Syria*, in LEGAL PLURALISM IN THE ARAB WORLD 113, 123 (Baudouin Dupret et al. eds., 1999).

38. It should be noted that not all kadhies in Zanzibar were as willing to incorporate elders into their courtrooms. Indeed, one other kadhi, Shaykh Vuai, was quite critical of Shaykh Hamid and thought he was under the thumb of elders.

39. See generally W.H. INGRAMS, ZANZIBAR, ITS HISTORY AND ITS PEOPLE (1931); Elke Stockreiter, *Tying and Untying the Knot: Kadhis Courts and the Negotiation of Social Status in Zanzibar Town, 1900–1963* (2008) (published Ph.D. dissertation, University of London).

40. See STILES, *supra* note 16, at 133–34.

“[the] settlement of all social and family disputes arising in that area in accordance with the customary laws of that area.”<sup>41</sup> Shehas thus derive their authority from the state, and because they are usually members of Zanzibar’s ruling party, they are at times met with criticism or skepticism by supporters of the opposition party.<sup>42</sup> However, they are uniformly regarded as a mandatory part of the dispute resolution process, and litigants are required to see their sheha before opening a case in the kadhi’s court. As will be evident in the following discussion, a sheha plays many roles. The sheha is the second step in the dispute resolution process, but works as a mediator rather than an arbiter, and sometimes does not do more than refer parties to the kadhi. At times, as will be shown below, the sheha will also either uphold or counter the authority of elders. The shehas are also often called into court to discuss disputes between people in their shehias, as the kadhi and court staff expect the sheha to have a good knowledge of local goings-on.

In interviews, while people had very different views on the shehas themselves, particularly as individuals, there was consistency in terms of how people evaluated their knowledge and abilities to solve disputes. Generally, they were not regarded as experts in religion, religious law, or state law, but rather as community leaders whose familiarity with community norms, values, and standards could be helpful in moderating disputes.

Several people, particularly women, saw advantages to taking disputes to the sheha. One elderly woman, Bi Kijakazi, explained that she went to the sheha with a complaint about her first husband, who refused to provide her with clothing. Husbands in Zanzibar are expected to provide for all of their wives’ material needs, and the lack of appropriate maintenance is a frequent grievance of wives.<sup>43</sup> Bi Kijakazi said she bought clothes for herself with her own money, but her husband set them on fire. She went to the sheha to explain what happened, and in an example of Sally Engle Merry’s point that one indication of legal pluralism is the utilization of legalistic language,<sup>44</sup> Bi Kijakazi used the verb *kushtaki*, which means to accuse. She told me that she went to the sheha to “accuse” her husband, and told him that, “My husband . . . doesn’t give me anything and I eat at my sister-in-law’s house.”<sup>45</sup>

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41. The Local Government (District and Urban Authority) (Amendment) Act 1992, Act No. 11, s 27C(1)(a) (Zanzibar).

42. See STILES, *supra* note 16, at 134; Erin Dean, “The Backbone of the Village”: Gender, Development, and Traditional Authority in Rural Zanzibar, 31 J. CONTEMP. AFR. STUD. 18 (2013).

43. See STILES, *supra* note 16, at 139.

44. See Merry, *supra* note 2.

45. This is a severe criticism. Husbands in Zanzibar are expected to provide all food and clothing for the members of their household. While women normally cook the food that their husbands buy, this is not understood as a legal requirement, whereas providing the food is. By saying that she has to eat with her sister-in-law, she asserts just how poorly her husband is fulfilling his marital responsibilities. There is an enormous social obligation on women to cook every day and to also share food. An anecdote from my first research period in Zanzibar illustrates this. One afternoon, the woman with whom I lived, Mwanahawa, was late getting home from visiting friends. Mwanahawa was a wonderful cook and did nearly all of our household cooking. As she began to race to prepare a meal, I tried to stop her by telling her that our elderly neighbor, Bi Halima, had sent over a bowl of food, which was more than enough for the two of us for our evening meal. She looked aghast at the suggestion that



She explained that when the sheha called her husband in, the sheha asked him why he set the clothes on fire and told him that he had to pay for them. Furthermore, the sheha told her husband that if he caused any more problems, he would face more serious consequences.

Another woman, Bi Paje, explained it was always better to take the problems to the sheha, rather than “being a person who would not complain.” She likened the situation to being hungry: if you are hungry, she told me, you need to complain so you get food. When I mentioned that some other women said they felt ashamed to take their problems outside of the home, she responded:

*Hakuna haya*—there is no need to be ashamed. The sheha is concerned with matters of the village—you should tell him if things are good or bad or whatever. You should tell him if you aren’t getting support. You’ll ask him, “Who is supposed to support me?” [It’s] better if you go to the sheha and tell him your problems.

As might be expected, the wife of one sheha, Bi Tatu, expressed significant benefits to seeing the sheha, particularly compared to the past, when elders may not have been supportive of women in difficult situations. Bi Tatu was very intelligent and seemed to know a great deal about matters of religion. When I mentioned this, she told me that most women know such things, but they are just too shy to express it. “I know a lot of things,” she said, and continued:

And now I know that if you beat me, I’ll run to the sheha! If you’re beaten you go to the sheha . . . [and then] if you return [to him] then you have your witness, because you’ve already gone to the sheha. But in the past there wasn’t anything like this. You could be beaten until you’d die! The elders would come and tell you to go back home, [you’d] go back home whether or not you wanted to. You would be returned [to your husband]—it was necessary. [It didn’t matter] if you did or did not want it.

Respondents also occasionally described disadvantages to going to the sheha. It is important to note that these were different from the political criticisms of shehas that I have discussed elsewhere,<sup>46</sup> in that they were focused on how seeing the sheha could negatively affect the disputants. For example, a woman called Bi Kombo gave an interesting strategic explanation of why she did not visit the sheha. The mother of seven children, Bi Kombo had been divorced by her husband, but told me that she had not wanted to see the sheha because she did not want to appear to love her husband too much:

I thought, “That’s it. I’m divorced [and] it is better that I just stay put.” Because if I had gone to the sheha to complain it would have seemed like I adored him and wanted him back! So . . . if I went back he’d think he

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she stop cooking, and asked me: “But then what will we send to her? She’ll think we didn’t cook today!” Since Bi Halima cooked an enormous meal to feed up to a dozen people every day, I knew that she did not need our food to feed her family. Rather, for my housemate, preparing food was the social signifier that we were running an efficient household, and thus preparing food every day was of critical importance.

46. See STILES, *supra* note 16, at 133–40.

could do whatever he wanted at home [because I loved him so much]. Otherwise, he would come back himself to get me—not like I went to the sheha to get him . . . Now he, when he comes, it will be by himself—I didn’t call him, he came by himself [of his own volition], if I had gone to the sheha he would have told me—you want him so much, and he would make me do what he [my husband] wanted right then. So I returned, and just stayed with my parents and I thought, “That’s it!”

When I asked her if she had thought she would ever see him again, she said, “Not at all!” However, she told me that eventually he came back, and they raised their children together happily.

In interviews, shehas themselves were usually careful to differentiate their work from that of other authority figures, like kadhis.<sup>47</sup> None of the eleven shehas I interviewed asserted any special knowledge of religion or religious law, and many explained that their main task as a sheha was to maintain good community relations. For example, one sheha described his work to me like this:

First, you maintain the *usalama* [security] of the citizens . . . Second, [your job is] to clarify the problems of the community—conflicts and strife. And, to keep the property of the citizens secure—like crops, cows, everything. You’re supposed to make certain that they are living peacefully—[that] they come in peace, and return in peace, and to [ensure that] there are no problems in the house.

When I asked if he studied religious law, he replied,

We studied the laws of marriage, but the keeper of those laws is the kadhi; so we know that if these types of problems come they aren’t ours, and that they go to the kadhi. . . . If someone comes and you listen to him, you tell him, “This work isn’t mine; it is the work of the kadhi.” And then you send them to the kadhi.

Other shehas were also very unlikely to describe their work as specifically legal. Rather, they would stress that their knowledge of local norms and local matters helped them resolve disputes. For example, the sheha above explained that in handling disputes, he would talk with disputants, and use *uzoefu wa mtaa*—local experience—to try to help.

In response to a similar question, another sheha told me, “I don’t know the law, but [concerning] the laws of wife and husband, if [they] are disputing, then I can solve their problems.” Linguistically, this illustrates the flexibility and breadth of the term *sheria* in Zanzibari Swahili: by saying that he can solve problems concerning “the laws of wife and husband,” he is referring to standards of marital behavior, not specifics of Islamic marriage law.<sup>48</sup> When I followed up by asking if he knew the *sheria* of divorce, he replied, “I don’t. To divorce, I send them there,” gesturing to the kadhi’s court down the road.

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47. See *id.* at 135–36.

48. See Stiles, *supra* note 15 (describing how the term “*sheria za ndoa*” can be used as a euphemism for the sexual relationship between wife and husband).

Yet another sheha asserted a bit more knowledge about the law than the others, but still said he would ultimately refer matters to the kadhi if he could not handle a marital dispute. He told me that he used his own intelligence and common sense, but that he also knew something about the *sheria za ndoa*—the laws of marriage. He explained that he was able to tell a disputing couple the laws relevant to their marital troubles, and was accordingly able to correct them if they did not know the sheria. However, he said, if they could not agree on a solution, then he would send them to the kadhi. Therefore, he would use his knowledge to help the parties come to an agreement rather than issue a decision or solution himself.

*C. Step Three: The Kadhi, Expertise in Religious Law*

The final step in the three-step process of dispute resolution is a visit to the state-appointed kadhi. The rural kadhi's court in the village of Mkokotoni, where I did most of my court-based research, has jurisdiction over a region of over 100,000 people, and sees about forty to fifty cases opened in court per year. In earlier work, I have written extensively about kadhis and their reasoning processes,<sup>49</sup> and so in this essay I would like to elaborate on lay perceptions of going to the kadhi. The kadhi courts are incorporated as part of legal system in Zanzibar's constitution of 1984, and they are established in the Kadhi's Courts Act of 1985, which was slightly amended in 2003 by the Written Laws (Miscellaneous Amendments) Act.<sup>50</sup>

As with local perceptions of the changing role of elders, there also are indications of changing legal consciousness regarding the kadhi courts. I noted a general impression in interviews that people—especially women—were more likely to take their disputes to the kadhi than they had been in the past, although there were certainly mixed views on whether this was a good thing. It should be noted, however, that this perception of increased court use does not match court records from the recent past: the Mkokotoni court register does not show an increase in the number of cases opened each year from 1979–2005, the years for which I have records. It is possible, however, that respondents are referring to an earlier period.

In my interviews, women tended to have more positive views of the kadhis, which might reflect the greater frequency with which women take disputes to court and their successes there.<sup>51</sup> Furthermore, women tend to be more optimistic about the perceived increase in disputes taken by women to the kadhi.<sup>52</sup> Mwalimu Simai, introduced earlier in this essay, echoed this positive view of the kadhi's court as potentially beneficial to women. In an interview, he told me that when women came to him seeking advice on divorce, he would send them to the state-appointed kadhi, since only he could give them a divorce. He would tell them, "It is better you go to the court. You'll be better served there at the court."

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49. See generally STILES, *supra* note 16.

50. The Written Laws (Miscellaneous Amendments) Act 2003, Act No. 4 (Zanzibar).

51. See STILES, *supra* note 16.

52. See *id.* at 137.

Others had negative views of going to the kadhi, but reasons for this varied. One reason cited by some men was a perceived bias in favor of women. On more than one occasion, Mzee Bweni described the kadhis to me as *chongoo*—one-eyed. By this, he meant that they only saw one side of disputes, which he argued was the women’s side.<sup>53</sup> Interestingly, another kadhi with whom I worked, Shaykh Vuai, told me that he had a hard time not automatically siding with women because he was so sympathetic with their plight. Others cited the inconvenience of going to court. Bi Dawa, introduced earlier, told me that going to court could take up too much time, and it was preferable for the elders to solve any marital problems.

It’s not good [to go to court]. If you go to the court, today you’ll be called, tomorrow you’ll be called, and you won’t do your work. It’s better if you can solve the problems at home . . . then you’ll have finished with your problems [more quickly] than at the court.

Some people, though not many, regarded the kadhis as corrupt. In a conversation with Mzee Nur and his elderly friend, Mzee Faras, they emphasized that, in the past, shehas would work with the parents of a married couple if there were any problems, but that it was great shame to go to the kadhis. When I asked why, saying that the kadhis are people of religion and law, Mzee Faras answered “Yes! [a kadhi is a] person of religion, a person of law, and person of breaking the law!” By this, he meant that the kadhis would take bribes. “If we go to the court,” he said, “and you’re the guilty party but you if pay the kadhi, then he’ll say I’m the one [that is guilty] and you’ll win the case!”<sup>54</sup> I then asked that if there was the same shame associated with going to the kadhi in present, and Mzee Faras replied resignedly by saying, “If you need the law, who else will you go to?”

One woman in her early thirties, Bi Asha, described another potential drawback of going to the kadhi. I had asked if, in her opinion, the shehas knew how solve marital problems. She enthusiastically stated that she thought they knew very well how to solve the problems, and that their training prepared them for different kinds of problems and what to do about them. She told me that a sheha would explain the procedure: “If someone did this, then he can say, ‘Bwana [sir] you have to do this,’ or ‘Bibi [ma’am] you must do this.’” However, she said that if the problems increased or if he couldn’t find a solution, then the sheha must “send them to the court to the *mwanasheria* [lawyer/person of the law].”<sup>55</sup> We talked a bit about her perceptions of the kadhi’s court, and Asha thought that it was not a good idea to go to the kadhi because problems could arise. When I asked her to explain, she answered: “If you go to the court maybe the *mwanasheria* [legal professional] will make the husband do things you don’t want. For example, if you still want him

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53. *See id.*

54. While I very occasionally heard accusations of kadhis taking bribes, I saw no obvious indication of it in the courts in which I worked.

55. *Mwanasheria* is the Swahili term for lawyer, but I think she is using it here in a general sense to talk about the kadhi as a legal expert; lawyers are not used in kadhi courts, and this was one of the only times I heard the term even used in this rural area.

he might make him divorce you. So maybe the court will make you get a divorce.” Essentially, Asha was concerned that if a couple went to the court just to solve a marital problem they might end up with a divorce they did not want.

Similarly, a Qur’an teacher in Kinanasi, Mwalimu Ali, explained to me that he often assisted people with their marital problems, and he thought it was preferable to going to the kadhi, because at the court there was a possibility that the disputing couple would become *maadui*—enemies—because they would have “accused each other.” As a teacher, he explained, he was able solve things and maintain harmony. Going to the kadhi was certainly “sheria,” he said, by which he meant it was legally appropriate, but it was better if couples could solve matters at home. Elsewhere, I have written of a similar view expressed by some women who are well aware of their legal right to take marital matters to the kadhi but prefer to let God handle their problems. For example, Mwanahawa, a woman who had been divorced twice and received no support for the young son of her second marriage, told me that as a devout person, it was better that she let God handle the matter rather than take it to court.<sup>56</sup>

### 1. *A Point of Tension: Kadhis’ Views on State-Sanctioned Pluralism and the Necessity of Compromise*

In some ways, the position of a state-appointed kadhi in Zanzibar is one of necessary compromise because, according to state law, the kadhi courts have jurisdiction only over family law matters for Muslims; this is an example of the “weak” form of legal pluralism described by John Griffiths.<sup>57</sup> Kadhis themselves sometimes reflected on this necessary pluralism. Shaykh Hamid most definitely regarded his position as one of compromise, and told me on more than one occasion that others rejected the appointment of kadhi because of this. In discussing adultery, he told me that “most of the laws concerning beating have been left behind,” and that because of this, many kadhis refused the job of state kadhi: “They don’t want it. They refuse to be kadhi because they can’t use all of the ways that are found in the book.” He then told me about the man who was offered the job of kadhi before he was. He was given the job, but he said he would take it only if he was given permission to use the law *kwa kamilifu*—in its entirety. “But,” he said, “They [the kadhis] couldn’t. We are given by the government a mix of laws to use: Government [laws] and Islamic [laws]. He said he didn’t want it, and he told them to give it to one of his students.” At this, he chuckled.

Shaykh Hamid himself, however, was untroubled by this necessary compromise, and he had readily accepted the work of the kadhi. In his view, the “laws of the past,” by which he meant classical Islamic law, were sometimes not suitable. He told me, “*kukamilifu wanafanya hafifu*,” a phrase that suggests that to attempt to make something perfect (in this case, attempting to use Islamic law in its

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56. See Stiles, *supra* note 15.

57. See Griffiths, *supra* note 6, at 5.

entirety) means that it would be done poorly, and that is was better to use contemporary laws. Because I have written about his views on this compromise elsewhere,<sup>58</sup> I will review only two illustrative examples here. In our discussion of a case involving an out-of-wedlock pregnancy, he told me that Zanzibari laws concerning adultery were “very light,” and that classical Islamic law was “a bit too heavy” for Africa.<sup>59</sup> In another example concerning inebriation, he said that:

[It] is like the laws concerning drunkenness. If a person gets drunk, there is a law you must use according to religion, [b]ut you cannot follow it because, if you do, you will be going behind the back of *kanuni* [government, or state law]. And if a kadhi wants to do that [neglect state law], then he can't do [his] job.<sup>60</sup>

As I have noted elsewhere, another kadhi viewed the situation rather differently.<sup>61</sup> Shaykh Vuai was familiar with the limited jurisdiction of the kadhi courts and with procedural laws that supersede Islamic rules, but he was committed to applying Islamic law in full. This was perhaps most evident in Zanzibari laws on witnessing, as written in the 1985 Kadhi's Act, which mandate that all witness testimony be treated equally, regardless of gender, ethnicity, or religion.<sup>62</sup> Shaykh Vuai was aware of this law, but claimed to follow only Islamic law in his court. In an initial conversation on the topic, he explained a clever strategy that allowed him to follow both Islamic witnessing rules and those of the state: he considered witness testimony in his reasoning process, but based any decisions on other evidence.<sup>63</sup> Two years later, he said simply that he knew the state laws but chose not to follow them because he only followed *sheria za dini* (religious law) in his court.<sup>64</sup> In his view, then, the duty of a kadhi is to apply Islamic law in full—even in the face of contradicting state law or local practice.

#### IV. DISCUSSION: LEGAL PLURALISM FROM THE GROUND UP IN ZANZIBAR

What can be concluded about the landscape of the law in Zanzibar, from the view of everyday actors? What might be useful for studying the phenomenon of pluralism elsewhere? To conclude, I would like to offer a few general observations about the legal consciousness of legal pluralism in Zanzibar.

First, I would like to propose that the flexibility in the way in which Zanzibaris use the Swahili term “*sheria*” might be considered a reflection of the pluralism in the legal landscape. As we have seen, the Swahili word *sheria*, although derived from the Arabic word *shari'a*, is a more general term for law and does not necessarily mean religious or Islamic law. Indeed, in Zanzibari Swahili, specifying a kind of law

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58. See STILES, *supra* note 16.

59. *Id.*

60. *Id.* at 192.

61. *Id.* at 16.

62. The Kadhis' Courts Act 1985, Act No. 3, s 7(i) (Zanzibar).

63. See STILES, *supra* note 16, at 155–56.

64. See *id.*

requires the use of an adjective. Thus, *sheria za dini* means religious law, and *sheria za kiislam* indicates Islamic law. In practice, however, *sheria za dini* nearly always means Islamic law. *Sheria za kanuni* or *sheria za serikali* refers to state law. Although the term *mila* is often used on its own, people in this part of Unguja made occasional reference to *sheria za mila*.<sup>65</sup> As we have seen, the term *sheria* can also be used to describe the rights and duties expected in marriage—it does not necessarily specify formal law, as we saw with the sheha who essentially told me he did not know *sheria* (as in classical Islamic law) but he knew *sheria* (as in the rights and duties of wives and husbands in marriage). I have recently examined how the phrase *sheria za ndoa*, “the laws of marriage,” may be used as a euphemism for the healthy sexual relationship that is considered a legal requirement of the ideal Islamic marriage in Zanzibar.<sup>66</sup>

Secondly, it is clear that many people perceive a change in Zanzibari legal consciousness and a corresponding change in the way that disputes are handled. Although all the authority figures—elders, shehas, kadhis—are noted as being important both in the past and present, many people, and especially older adults, argued that the authority of elders was declining. The most common explanation for this was that as people gained more Islamic education, there has been a move toward religion and away from customary practices, like beating. This is a point of tension in the legal landscape of Zanzibar, and is clearly linked to the declining acceptability of beating as a way of managing disputes. There are also mixed opinions about what some regard as an increasing use of the kadhi courts. Some are critical, and argue that family disputes should not be aired in public by taking them to the kadhi’s court. Others view the perceived increase in court usage in a positive light and as particularly beneficial to women. An interesting parallel might be drawn with Caplan’s research on marriage and weddings on Mafia Island, Tanzania. Caplan has argued that from 1990s until the present, people in Mafia have fairly starkly moved away from celebratory events during weddings that are regarded as merely *mila*, and thus un-Islamic. Caplan attributes this to several developments, including an embrace by many of a more “global” or universalist orientation in Islam, and a

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65. While what qualifies as *sheria za dini* and *kanuni* are fairly clear, the idea of *mila* is not as easy to explain. Scholars have defined *mila* both as “customary law” and as simply custom, or social norms as a whole. In my experience in Zanzibar, the latter seems more accurate because it is broader, although lay people and professionals use the term in both ways. *Mila* refers to a wide range of practices and norms; in Zanzibar, it is only occasionally used in opposition to *dini* and *kanuni*. Unlike elsewhere in Africa, customary law was never formalized or codified in colonial Zanzibar. Scholars have argued that the colonial codification of custom actually resulted in the “creation” of customary laws. See generally MARTIN CHANOCK, LAW, CUSTOM, AND SOCIAL ORDER: THE COLONIAL EXPERIENCE IN MALAWI AND ZAMBIA (1985). This was not, however, the case in Zanzibar, where few provisions have been made in either the colonial or independence periods for customary law. Anderson, for one, argues that the reason for this was because *mila*, which he translates as customary law, was already wholly infused with Shafi’i Islamic legal ideas, and thus was not in contradiction to Islamic law and needed no separate recognition. J.N.D. ANDERSON, ISLAMIC LAW IN AFRICA 67–68 (1955).

66. See Stiles, *supra* note 19, at 246–49.

desire to emulate what Muslims do elsewhere, particularly in the Arabian peninsula, rather than continue with practices viewed as more “African.”<sup>67</sup>

It is also important to note that elders, shehas, and kadhis are associated with different bodies of legally relevant knowledge and are therefore understood to draw their authority from quite different sources. Today, although shehas are very clearly associated with the power of the state in that they are usually appointed from within the ruling party, their knowledge is assumed to come from their familiarity with the community and norms of marriage and interpersonal relationships. The kadhis are, of course, the “keepers” of Islamic law, as one respondent put, but are also associated with state law in that they are appointed by the state and their decisions are recognized as binding and thus final in a way that the reconciliation efforts of elders and shehas are not. The elders are quite a different sort of authority than both the kadhis and shehas, but are regarded as the essential first step in the process of dispute resolution. While Shaykh Hamid described this as a religious requirement, and some shehas described the elders’ authority as an aspect of *mila*, most respondents did not specifically link elders’ authority with religion or *mila*, but rather simply as how things should be.

Finally, it seems significant that various kinds of authority figures—some with traditional authority (elders and shehas), some with religious expertise (kadhis), some “official” in that they are appointed and paid by the state (kadhis and shehas), and some not (elders)—are all commonly regarded as mandatory steps in the process of resolving disputes. In Shahar’s discussion of the usefulness of legal pluralism for understanding shari’a courts, he observes astutely that “shari’a courts often constitute only one element . . . in much broader decentralized, socio-legal fields, and Islamic law is frequently practiced in parallel to other, non-shari’a bodies of law.”<sup>68</sup> This is certainly what we see in Zanzibar, and considering this, what seems interesting about the Zanzibari case is not that these very different kinds of authorities—elders, shehas, kadhis—are “shopped” or consulted as alternatives to one another, but rather that they are regarded as tiered and compulsory steps in the widely agreed upon process of managing marital disputes.

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67. See Pat Caplan, *Two Weddings in Northern Mafia*, in *GENDERED LIVES IN THE WESTERN INDIAN OCEAN* 85, 98–100 (Erin E. Stiles & Katrina Daly Thompson eds., 2015).

68. Shahar, *supra* note 3, at 116.



