LUND UNIVERSITY
Faculty of Social Sciences

Graduate School

Master of Science in Development Studies

Major: **Sociology of Law**

Course: **SIMV07**

Term: **Spring 2016**

Supervisor: **Ida Nafstad**

The Kadhis' Courts in Kenya

Towards Enhancing Access to Justice for Muslim Women

Author: **Kevin Odimbe Wanyonyi**

Abstract

The legal framework in Kenya today is akin to a 'right-angled triangle' with the African Traditional Society as the hypotenuse, the Islamic law as the adjacent side and the English law as the opposite side. These 'Pythagorean' triples have informed both the Kenyan Family law history and practice. Kadhis' Courts applying Islamic law of personal status have been in East Africa for over 200 years now and were entrenched in Kenya's Independence constitution in 1963. This thesis examines the role of Kadhis' Courts towards enhancing access to justice for Muslim women since the enactment of the new constitution in 2010. Muslim women are both marginalized and a minority group. The study equally adds new knowledge on the Kenyan Islamic law jurisprudence.

In order to investigate the role of these courts, I have employed legal pluralism and access to justice as theories. Relativism was my ontological stance and social constructivism as the epistemological standpoint. Empirical material was obtained through interviews with the Kadhis and Magistrates. Some of the main findings of the study are: independent judiciary; enhanced accessibility of the courts; prompt decisions; inexpensive legal costs; mediation as opposed to adversarial process; public confidence in the Kadhis' Courts. Other findings include lack of developed Islamic jurisprudence in Kenya, limited jurisdiction by the constitution and the uncodified Islamic law. The findings of this study analyzed through access to justice indicators and 'Rule of Law' approach, suggest that Kadhis' Courts have enhanced access to justice for Muslim women. This research, also points towards similar findings like Susan Hirsch's ethnographical study at Malindi Kadhis' Courts. However, the main limitation of this study is failure to interrogate the experience of Muslim women with these Courts. Hence, the findings only reflect the perceptions of Kadhis and Magistrates interviewed. Consequently, this study evinces how legal pluralism through the Kadhis' Courts plays a role that is of importance to access to justice for Muslim women.

Key words: Kadhis' Courts, Kadhis, Legal Pluralism, Access to justice, Muslim women.

Table of Contents

Abstract……..1

List of Abbreviations.....…5

Acknowledgements.....5

Dedication.....7

1. Introduction.....8

1.1 Research Problem.....9

1.2 Research Aim and Main Question 10

1.3 Defining Marginalized and Minority community.....10

1.4 General Overview 12

2.0 Historical Roots of the Kadhis' Courts in Kenya 13

2.1 The Odyssey of the Kadhis' Courts in Kenya.....15

2. 1.1 Kadhis' Courts – Towards Constitutional Recognition.....16

2.1.2 Kadhis Courts - The Bone of Contention in the Constitutional Review Debates? 16

2.2 Islamic Law in Kenya: Origin, Sources and Practice 19

2.2.1 Origin.....19

2.2.2 Sources, Practice and Jurisdiction.....20

2.2.3 Fiqh.....20

2.2.4 Shar'ia.....21

2.2.5 Ijma.....22

2.2.6 Other Sources 22

2.2.7 Discussions on the Sources 23

2.2.8 Prominent Schools of Thought of Islam in Kenya 24

2.3 Legal Pluralism – A product of the Triple Heritage 24

2.4 'Pronouncing and Persevering' 25

2.5 Summary 28

3.0 Theoretical Framework.....28

3.1 Legal Pluralism defined 29

3.1.1 Definitional deadlock! 31

3.1.2 Legal Pluralism and Colonization: Before, During and After.....31
3.2. Theorizing Access to Justice.....33
3.2.1 Defining Access to Justice.....35
3.2.2 The Rule of Law approach.....36
3.2.3 Socio-Legal approach to Access to Justice.....38
3.3 Indicators of Access to Justice.....39
3.4 Legal Pluralism and Development: Kenyan Scenario.....40
3.5 Summary.....41
4.0 Research Methodology.....42
4.1 World View and the Researcher's Position.....42
4.2 Design and Location of the Study, Sample Selection and Description.....43
4.3 Interviews.....45
4.4 Literature Review.....47
4.5 Reliability and Validity.....48
4.6 Limitations.....49
4.7 Ethical Considerations.....50
5.0 Fieldwork Analysis: Kadhis' Courts' roles in Access to Justice for Muslim Women in Kenya in Personal Law Disputes?.....50
5.1 Analyses through Access to Justice Indicators.....52
5.1.1 Independent Judiciary.....52
5.1.2 Accessibility of the Courts.....54
5.1.3 Inexpensive Legal Cost.....57
5.1.4 Prompt Decisions.....58
5.1.5 Mediation as Opposed to Adversarial Process.....59
5.1.6 Public Confidence in the Kadhis' Courts.....61
5.1.7 Public Interest in the cases Before the Courts.....62
5.2 Analysis through the Rule of Law approach.....63
5.2.1 Legal Recognition.....64
5.2.2 Limited Jurisdiction by the Constitution.....66
5.2.3 A Woman cannot be a Kadhi.....68
5.2.4 Law as a Command from God.....69

5.2.5 Islamic Jurisprudence in Kenya....70
5.2.6 Uncodified Islamic Law in Kenya....73
5.3 Summary of the Findings....74
6.0 Conclusion....76
Appendix 1: Map of Kenya....78
Bibliography....79

List of Abbreviations

ADR – Alternative Disputes Resolution

CKRC – Constitution of Kenya Review Commission

CUC – Court Users Committee

MCC – Muslim Consultative Council

SDG – Sustainable Development Goals

SUPKEM – Supreme Council of Kenya Muslims

TJS – Traditional Justice System

UNDP – United Nations Development Programme

Acknowledgements

To begin with, my profound appreciation goes to God Almighty for His faithfulness, for His guidance and for His divine provision and protection. Special gratitude goes to my supervisor Dr. Ida Nafstad for her patience and for providing immeasurable assistance reading the various drafts and giving very useful comments. This thesis is a product of her diligent guidance. I also wish to express my sincere gratitude to Prof. Reza Banakar not only for introducing me to the department but also for giving me an opportunity to intern at the department. This thesis is the end product of the internship and my fieldwork funded by the department. I would also like to thank the head of the Department of Sociology of Law and Assoc. Prof. Matthias Baier for accommodating me at the department for almost one year now. It was really an honor to interact and learn from some of Sweden's leading socio-legal scholars.

I am equally very grateful to Assoc. Prof. Måns Svensson and Martin Joormann for reading and commenting on this thesis as well as pointing out corrections to be made for quality outcome. My sincere gratitude also goes to other members of the department for their encouragement throughout the thesis writing process. That kept me going.

I am also indebted to the Swedish Government through the Swedish Institute for providing me with the Swedish Institute Study Scholarship to pursue a Master of Science degree in Development Studies, Sociology of Law major, of which this dissertation is part. I also do appreciate foresight of Lund University for running the programme, and especially the Graduate School staff for their constant support.

Then there are the research participants for this study, the Kadhis and Magistrates. Without them, this work would not have materialized. To you I say *shukrani*. And to my aunt Caroline Khasoa Wanyonyi who arranged some of the interviews with the Magistrates, *asande senge*.

I save my last expression of gratitude to my family and friends for your support, comfort and prayers. To Cor Deyl for lending me his recorder for my fieldwork and dutifully updating me on the Champions League. *Erokamano maduong'* Okoko K'afwata, my student and disciple who constantly reminds me of the bigger picture. Special mention to my love Claudia Deijl who has basically been my manager throughout the thesis writing. And for transcribing the audios and proofreading thesis proper. Without your support, I do not know how I would have managed. Thank you heartedly.

Dedication

To the People of the Republic of Kenya and to the Kenyan Muslim women who inspired this thesis.

…and to my late mom Tinah who dared me to dream.

1.0 Introduction

Family law in Kenya has been characterized by perspectives envisioned by legal pluralists where customary law, religious law and state law co-exist. The interaction between Arabs and East Africans at the Coast led to the growth of Islam in the region. This led to the development of Islamic Courts to settle disputes between and among Muslims. During colonization, the Muslim Courts (hereinafter referred to as Kadhis' Courts) were already key players in dispute resolution which led to the incorporation of the Kadhis' Courts in the Kenya's Independence Constitution in 1963.[1] This gave legitimacy to the Kadhis' Courts and led to the dual legal system in Kenya. The new constitution that was promulgated in 2010 not only retained the Kadhis' Courts, but also gave them jurisdiction all over the country.

Legal pluralism on the other hand has been one of the most salient and influential academic trends in law and society scholarship for over five decades now. It primarily articulates detachment from legal centralism revolving around state law and criticism of the exclusiveness of state law. Scholarship in legal pluralism entails decentralization of court-centered judicial studies, exploration of non-state legal orders, unveiling of informal socio-legal practices, and an understanding of law as a multi-centered field that deals with the convergence of norms, localities, states, global sites, and practices. Legal pluralism has underscored the ways in which various identities and traditions have decentralized state law and offered non-state legal orders.[2]

The nexus between development and access to justice has been a subject of research in the recent years. In fact, the inclusion of these perspectives to the United Nations Sustainable Development Goals (SDGs) as the sixteenth goal, eloquently demonstrates so as follows:

---

[1]. Cussac, A., 2008. Muslims and Politics in Kenya: The Issue of the Kadhis' Courts in the Constitution Review Process. *Journal of Muslim Minority Affairs*, 28 (2), 289-302. At pp. 291. Hereinafter referred to as Cussac.

[2]. Barzilai, G., 2008. Beyond Relativism: Where is Political Power in Legal Pluralism? *Theoretical Inquiries in Law*, 9 (2), 395-96.

'*Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.*'[3]

It is against this backdrop on promotion of the 'Rule of Law' and access to justice for all that I intend to explore plurality of legal orderings in Kenyan Family Law, with emphasis on the Kadhis' Courts.

While criminal law practice is dominated by the state law through conventional courts[4], family law legislation and practice have mainly been informed by the various cultural practices, religious laws and the prevailing socio-economic conditions in Kenya. This 'reality' has been taken into consideration based on the changes in the family lives in Kenya. This research will be examining access to justice for Muslims, especially Muslim women in Kenya, who resort to Kadhi's Courts when disputes arise, since the adoption of the new constitution in 2010.

1.1 Research Problem

In a civilized society, when a dispute arises between or among citizens, there are many ways of resolving them, including through the formal courts. This may also apply to people who are married or in similar relationships recognized by law. However, more often than not, the formal courts are not accessible to the poor and marginalized people, as legal representation is usually expensive.[5] The wheels of justice are equally slow, either due to the procedural quagmire or backlog of cases, or both. This not only denies the poor, the marginalized or a minority group access to justice, but may also hinders their overall development in society. This is because when people have a right to access to justice; it becomes easier for them to access other rights as well. My thesis will focus on the access to justice of Muslims, particularly Muslim women who are a marginalized group in Kenya, and who resort to the Kadhis' Courts in the case of disputes.

---

[3]. Goal 16 .:. Sustainable Development Knowledge Platform. 2016. *Goal 16 .:. Sustainable Development Knowledge Platform*. [ONLINE] Available at: https://sustainabledevelopment.un.org/sdg16. [Accessed 31 March 2016].

[4]. Constitution of Kenya Cap 165(3)(a).

[5]. Mbote, P.K., and M. Akech. 2011. *Kenya Justice Sector and the Rule of Law*. Johannesburg: Open Society Initiative for Eastern Africa. At pp. 156

In order to carry out this study, I adopted a qualitative research approach using the judges of the Kadhis' Courts (hereinafter referred to as a Kadhi or Kadhis in plural), and the Magistrates of conventional courts as the participants of the study. The data was primarily collected through interviews. I have elaborated further on this in the methodological chapter.

1.2 Research Aim and Main Question

In light of the changes brought forth by the new constitution of Kenya, 2010, effectively expanding the jurisdiction of the Kadhis' Courts to all parts of Kenya, this research aims at gaining rich descriptions and new knowledge in the field of Sociology of Law and development within legal pluralism, particularly the issues surrounding Muslim women in Kenya as regards access to justice. This research also aims to contribute to the discussions and discourses on the role of law as a ladder for freedom and development by empowering the marginalized groups. Therefore, it may further help in the emancipation of Kenyan Muslim women by highlighting these issues, hence increasing the possibilities for Kenyan law-makers to enact family law legislations that reflect the prevailing cultural, religious and socio-economic conditions in Kenya. On the basis of the background above, the main research question is:

What is the role of the Kadhis' Courts towards access to justice for Muslim women in Kenya in personal law disputes?

1.3 Defining Marginalized and Minority community

Marginalized group has been defined as "a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the following grounds: race, sex, pregnancy, marital status, health status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language or birth."[6]

[6]. Ibid

The United Nations Minorities Declaration refers to minorities as based on national or ethnic, cultural, religious and linguistic identity, and provides that States should protect their existence.[7]

The Constitution of Kenya defines the marginalized community as:

(a) a community that, because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole;

(b) a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole;

(c) an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; or

(d) pastoral persons and communities, whether they are—

(i) nomadic; or

(ii) a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole;[8]

According to Francesco Capotorti - Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, a minority is: "a group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members - being nationals of the State - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language."[9]

Marginalized group therefore denotes a group of people who are subject to, or likely to be discriminated on the grounds of religion, culture, ethnicity, disability, race or all of the above. Minorities are numerical minorities whose identities, cultures, religion or ethnicity are threatened or may be threatened by extinction

---

[7]. A/RES/47/135. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. 2016. *A/RES/47/135. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.* [ONLINE] Available at: http://www.un.org/documents/ga/res/47/a47r135.htm. [Accessed 13 April 2016].

[8]. The Constitution of Kenya, 2010. *Interpretation Clauses*, Cap 260. Hereinafter referred to as The Constitution of Kenya.

[9]. Study on the Rights of Persons belonging to Ethnic, Religious and Linguistics Minorities (New York: United Nations, 1979) E/CN4/Sub2/384/Rev 1/Un Sales No E91XIV2 at 96.

due to assimilation from the majority population they live in their midst. Muslims in Kenya are subject to discrimination on grounds of religion, culture, dress, belief and even race. Many, of Arabic heritage, are often perceived and treated by the population large as foreign. Muslims are equally ethnic, cultural and religious minority, comprising only between 15% and 30% of the population in Kenya.[10] Therefore, they would fall in the category of both the marginalized as well as a minority group.

1.4 General Overview

This thesis is divided into six parts. The first part is the introductory chapter outlining the research problem, research aim and the research question. The second chapter is an extensive literature review of the Kadhis' Courts in Kenya, tracing their origin before, during and after the British colonial period. I also discuss Islamic law in Kenya, touching on its origin, sources practice, jurisprudence and the various schools of thoughts of Islamic law. I review literature on the working of the Kadhi's Court in Malindi. Chapter three focuses on the theoretical framework employed in this thesis, from legal pluralism to access to justice, the Socio-legal and the 'Rule of Law' approaches to access to justice to legal pluralism and development. Chapter four introduces the research methodology, outlining the epistemological and ontological standpoint of the researcher, the interview method, the validity, strengths and weaknesses of the methodology employed and the ethical considerations. Chapter five outlines the fieldwork analyses of the empirical data, combining it with the previous research and theory to discuss further the findings. My material and research may be supported, contradicted or add new findings to previous scholarship. I use the Council of Europe's indicators for access to justice, based on my data, to evaluate whether the Kadhis' Courts enhance access to justice for Muslim women in personal law disputes. The thesis ends with a conclusion of the analysis and recommendations for further research.

[10]. Cussac: 290

2.0 Historical Roots of the Kadhis' Courts in Kenya

Kadhis' Courts applying Islamic Law of personal status have been in existence at the East African Coast for almost two centuries, and were embedded in Kenya's Constitutional design at independence in 1963.

In 1832, Sayyid Said bin Sultan, the Sultan of Muscat, moved his Capital from Oman to the island of Zanzibar, ultimately making it an independent Arab State, stretching from the Coast of East Africa, to Wanga and Kipini. What is today the Kenya's Coast was thus ruled by the Sultan, who used to exercise both the executive and the judicial powers in his territories. "However, from the reign of the Busaidi, the Sultanate was administered under a system of courts based on the Islamic tradition and handled by judges called *liwali, mudir* and *kadhi*."[11] These administrators were appointed and remunerated by the Sultan. The Sultan would directly appoint the *Kadhis* (the judges), even in the most remote areas, and in a few cases, on the advice of Muslim scholars, local "*wazee*" (elders) or the local *liwali* (local administrators). In Zanzibar there were several Kadhis from both the Sunni and the Ibadhi School of thought.[12] However, in certain places like Lamu and Mombasa, there were only two Kadhis who were appointed from local prominent families - the Maawi in Lamu and the Mazrui in Mombasa.[13] There were Kadhis also working in the main coastal towns such as Bagamoyo, Malindi and Kilwa.

During the same period (late nineteenth century), the British interest in the stability of the East African Coast was increasing expeditiously, as they wanted to protect the Indian Ocean trade routes. The British were in crucial need of support from the Sultan of Zanzibar to protect their interests in the region. In return, they would offer the Sultan protection against Germany's threat who were colonizing the then Tanganyika - Tanzania's mainland. Charles Euan Smith - the British Consul in Zanzibar from 1889 to 1891 - took advantage of the situation to persuade Sultan Ali b. Sa'id (r. 1890-1893) to declare a British Protectorate over

[11]. Cussac: 291.
[12]. Cussac: 290.
[13]. Pouwels, L.R, 1987. *HORN AND CRESCENT: Cultural change and traditional Islam on the East African coast, 800-1900*. Cambridge: Cambridge University Press.

Zanzibar, marking the last stage in the progressive shrinking of the Sultan's dominion over his subjects.[14] British colonial administrators established Consular courts in Zanzibar to cater for the British subjects whereas the Kadhis were retained to cater for the subjects of the Sultan of Zanzibar who were primarily Muslims, resulting in dual legal system.

The ultimate objective of the British was to transform the parallel court system into a unified judicial system, complete with the British judicial officers. However, the practical reality in Zanzibar called for the existence of parallel court systems due to the presence of both the Sultan's subjects and citizens of other colonial power.[15] Another reason was because the two systems had different approaches to dispute resolution as explained in the quote: "This however could not suffice due to the different approaches of the English legal system and the Kadhis Courts; the administration of justice in the Kadhis' Courts was judged by the degree of satisfaction of the litigants as opposed to the notion of justice upheld in the English legal system."[16] While the British courts adopted adversarial approach, where the judge was to act as a referee in a duel between the litigants; the Kadhis Courts followed an inquisitorial system where the Kadhi acted as a mediator attempting to reconcile the parties to a dispute.[17]

Consequently, the British embarked on a process of transforming the Kadhis' Courts into a colonial institution. They did so by incorporating the religious Courts into its colonial apparatus to legitimize their colonial authority. By this, they incorporated Muslim scholars who were influential and were often appointed as Kadhis. The transformed Court would incorporate various *madhhabs* (Islamic Schools of thought) such as *shafi'i*, *ibadhi* and *shia* (all three are schools of Islamic law among the Sunni Muslims since majority of Muslims in East Africa are Sunnis). The schools of thought in Islamic law are elaborated further in this

[14]. Hashin, A., 2012. Shaping of the Sharia courts: British policies on transforming the Kadhi courts in colonial Zanzibar. *Social Dynamics*, 38(3), 381-397. At pp. 381-382. Hereinafter referred to as Hashin.
[15]. Hashin: 385
[16]. Hashin: 385
[17]. Barakbah, S. A, (1994). Judges and the Judicial Function. *Islamic International University of Malaysia Law Journal*, 4(12), 49-72. At pp. 51.

chapter. The Anglo-Mohammedan law applied various *madhhabs* and a few English legal principles. Eventually, when Kenya became a British Colony in 1920, the jurisdiction of the Kadhis' Courts expanded beyond the ten miles strip to Kenya in the following towns: Mombasa, Malindi, Lamu, to preside over disputes between or among Muslims. In a further step to control the Kadhis Courts, the British established **the Muslim Academy** in Nairobi, Kenya in 1952, for a five-year programme for training the Kadhis on Islamic Subjects, Arabic language, English and elementary mathematics.[18] The jurisdiction of the Kadhis Courts was confined to Muslim personal law of personal status by the Judicature Act of 1907 and 1931.

Figure 1: Map of the Ten Miles Coastal Strip.

Source: MapQuest.com

2.1 The Odyssey of the Kadhis' Courts in Kenya

Ever since their establishment during the reign of the Sultanate of Zanzibar, the Kadhis' Courts have undergone tremendous transformations. In this section, I shall revisit this journey from when Kenya attained her independence.

[18]. Hashin: 387

2. 1.1 Kadhis' Courts – Towards Constitutional Recognition

In the preparation for Kenya's independence, the Protectorate along the ten-mile coastal strip was merged with the Colony to form the present-day Kenya. Kenya attained her independence in 1963. The Independence constitution established the Kadhis' Courts alongside the conventional judicial system, effectively giving the Kadhis' Courts constitutional recognition. The Kadhis' Courts were established under Article 66 (1) to (5), which provided for the establishment of these courts. The Independent Constitution read:

Article 66 (1)

> *There shall be a Chief Kadhi and such number, not being less than three, of other Kadhis as may be prescribed by or under an Act of Parliament.*

Article 66 (5)

> *The jurisdiction of a Kadhi's court shall extend to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion.*

Initially there were three Kadhis' Courts, but the number increased subsequently as parliament established more courts to other parts of the country with the passage of *The Qadis' Courts Act, 1967*, thereby establishing fourteen Kadhis' Courts, two in each of the then seven provinces of Kenya.[19]

2.1.2 Kadhis Courts - The Bone of Contention in the Constitutional Review Debates?

While the Kadhis' Courts enjoy the recognition of the legal framework in Kenya, it did not come on a silver platter. It was among the most contested issues during the constitutional review process that lasted over two decades. This section will therefore elucidate on this journey prior to the promulgation of the new constitution of Kenya in August, 2010.

---

[19]. Chesworth, J, (2010). Kadhi's Courts in Kenya: Reactions and Responses. *In Islam, African Publics and Religious Values*. University of Cape Town, 20 March 2010. Cape Town, South Africa: National Research Foundation. 3-17. At pp. 5-6. Hereinafter referred to as Chesworth.

After a decade of Kenya being a *de facto* single party state, in 1982 parliament inserted the now infamous Section 2(a) in the constitution that effectively rendered the country a single party state *de jure*. There was a great deal of protest from the political divide, the civil society and churches. Some politicians, church leaders and the civil society led the campaign for multiparty democracy. The then President of Kenya, Daniel Moi eventually gave in to the pressure from both within and the international community, and acquiesced a constitutional amendment that repealed Section 2(a), thereby reintroducing multiparty democracy in Kenya. However, the amendment did not meet the expectations and aspirations of the Kenyan populace, as the general elections were marred with allegations of rigging and other malpractices. People were equally opposed to the imperial presidency that was stipulated in the constitution, making the president all powerful and above the law. This led to the clamor for new constitution dispensation being led by the civil society, human rights associations and the religious leaders under the banner of Ufungamano Initiative.[20]

While both the Christians and Muslims were united in the talks on reform of the constitution, they increasingly became divided on the issue of the Kadhis' Courts in the future constitution. On the 1st of June, 2001, a 29-member commission called, the Constitution of Kenya Review Commission (CKRC) was formed, to collect and collate views throughout Kenya, provide recommendations and publish its report.[21] Of the twenty-nine members of the CKRC, seven were Muslims, one having been appointed specifically to represent Muslims. The Supreme Council of Kenya Muslims (SUPKEM), one of the founders of the Ufungamano Initiative and another group called the Muslim Consultative Council (MCC) also part of Ufungamano, represented the Kenyan Muslims in the constitutional review process.[22] At the Bomas conference which had 629 delegates, the two groups SUPKEM and MCC sent 70 delegates, giving Muslims proper representation in the process, and giving their views on the Kadhis Courts,

[20]. Ufungamano Initiative is a group of religious leaders comprising Muslims, Christians and the civil society
[21]. Cussac: 290.
[22]. Cussac: 294.

the qualifications of a Kadhi, their appointments, matters they should handle, and on appeals.[23] The Bomas conference[24] finalized its sittings and a draft constitution was published after the process. The Bomas draft[25] gave the Kadhis' Courts higher status including the creation of a High Court for Kadhis. This brought disagreements between Muslims and some Christians as illustrated in the following quote: "In August 2005, at a meeting organized between several Members of Parliament and President Kibaki, a bishop called for a divine intervention from the threat of *sharia* posed by proposals to recognize the Kadhis' Courts in the Constitution."[26] The Muslim representatives in the meeting left in protest and demanded a public apology. The new constitution was eventually defeated in a referendum.

After about two decades of constitutional dispensation in Kenya, beginning in the early 1990s, Kenyans voted for a new constitution that was promulgated on the 27th of August, 2010. The position of the Kadhis' Courts was even strengthened in the new document, and parliament later on passed laws establishing a Kadhis' Courts in each of the forty-seven counties in Kenya. The Kadhis courts are lower courts alongside the Magistrates Courts, headed by the Chief Kadhi. The constitution stipulates the qualification to be a Kadhi as follows:

(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."[27]

Appeals from the Kadhis' Courts go to the High Courts, with the Chief Kadhi or any other two Kadhis sitting alongside the High Court judges to advise the court on the questions of Islamic Law.

---

[23]. Cussac: 295.
[24]. The constitutional review conference was held at the cultural heritage center in Nairobi Kenya - the Bomas of Kenya – that is where the conference got its name from.
[25]. Also deriving its name from the conference venue.
[26]. Cussac: 297.
[27]. Constitution of Kenya, Cap 170(2).

2.2 Islamic Law in Kenya: Origin, Sources and Practice

In this section, I will discuss the sources, tracing the origin of Islamic law in Kenya and the Islamic jurisprudence as practiced in Kenya.

2.2.1 Origin

The 1873 treaty between the Sultanate of Zanzibar - Sayyid Barghash - and the British, completely abolishing the slave trade, greatly weakened the grip of the Sultan. He was constantly under threat from both the breakaways of some of his loyal territories like Kilwa and Lamu, as well as an imminent attack from the Germans, the Turks (Ottoman Empire) and other colonial powers.[28] However, instability in this region was unfavourable to the British interests insofar as the Indian Ocean Trade was concerned. A window of opportunity opened when the British came to seek support of the Sultanate in bringing stability in the region. The Sultanate requested for British protection of his empire in return, hence resulting in the Sultanate declaring Zanzibar a British Protectorate in 1889.[29]

Before Zanzibar became a Protectorate, the Sultanate did not interfere with the internal affairs of the subject towns, including disputes resolutions. It was common practice for the local *wazees* (elders) to settle disputes arising in their *mitaa* (villages/community). Such affairs were based on the recognized traditions and legal claims as the law was locally conceived and practiced. While Kadhis were appointed to most of these subject towns, they would only hear cases brought to them by litigants on their own free will and by mutual consent. The new event however, elevated the status of Barghash from the position of *primus inter pares* to that of a sovereign, with enhanced political power. He decided to expand his grip to exercise greater control over the judicial systems in the Coastal towns.[30] He further passed a decree expanding the jurisdiction of the Kadhis' Courts to the subject towns as well and appointed more Kadhis to further the

[28]. Pouwels, R. L. (1987). *Horn and Crescent, Cultural Change and Traditional Islam on the East African Coast, 800–1900,* Cambridge: Cambridge University Press, p. 133. Hereinafter referred to as Pouwels.
[29]. Ibid
[30]. Pouwels: 134

agenda. This would later prove vital as it not only led to the spread of Islamic law along the Coastal strip, but also of Islam in general.

2.2.2 Sources, Practice and Jurisdiction

The term Islamic law is generally used to refer to the entire body of law and jurisprudence associated with Islamic religion,[31] including the primary sources of law (Shar'ia), the secondary sources as well as the methodology used in the interpretation of the law (fiqh).[32] The Arabic phrase for Islamic law is *qanun ul Islamia* which did not exist in the original vocabulary but is thought to have been coined in reaction to the Western influence.[33]

2.2.3 Fiqh

Fiqh literally translates to knowledge or comprehension, hence in the Islamic law context; it means the knowledge and comprehension of the laws that guide Muslims in their day to day life, as stipulated by the Quran and the Sunnah. While Sharia is the divine law, fiqh is the interpretation and application of Sharia.[34] While Sharia sets the general rules, fiqh sets out the details of the rules which must not be inconsistent with the general principles provided by Sharia.[35] Fiqh divides human actions into the following categories: obligatory (Fard); recommended (Mostahab); permissible (Mohab); reprehensible (Makrouh) and prohibited (Moharam).[36] Fiqh has fundamentally been used to fill in the lacunae, in an area that was not envisaged during the life of the prophet, consequently was not touched upon by the Quran or the Sunna.

---

[31] . Faruqi, I. and al Faruqi, L., (1986). *The Cultural Atlas of Islam*. 1st ed. New York: Macmillan Publishers. Hereinafter referred to as Faruqi and Faruqi.
[32]. Abdal-Haqq, I, (1996). Islamic Law: An overview of its origins and elements. *Islamic Law and Culture*, 1(1), 1-60. Pp. 31. Hereinafter referred to as Abdal-Haqq.
[33]. Abdal-Haqq: 32
[34]. Taman, S, (2014). An Introduction to Islamic Law. *European Journal of Law Reform*, 16(2), 221-246. At pp. 226. Hereinafter referred to as Taman.
[35]. Taman: 226.
[36]. Pouwels: 227

2.2.4 Shar'ia

There are two scriptural or divine sources of Islamic law, namely: the Quran and the Sunnah (the traditions of the prophet of Islam, Mohammad). The Sunnah of Mohammad includes both his sayings (hadith) as well as what he did or refrained from doing.[37] *Shar'ia* or more properly *al-Shar'ia*, literally means the path/clear way to be followed.[38] In original usage, *Shar'ia* meant the pathway to the water place or simply, the way to life since water is life.[39] Coulson's remark that: "Law is the command of God; and the acknowledged function of Muslim jurisprudence, from the beginning, was simply the discovery of the terms of that command"[40], aptly captures the very essence of *Shar'ia.* Muslim scholars developed a technique for reading and interpreting the Quranic verses (*tafsir*), an important element in the development of Islamic jurisprudence (*fiqh*).[41]

The Sunnah is the second source of *Shar'ia*, being the traditions of the prophet. Since the Prophet Muhammed was considered as the most pious of all believers, his life and ways became a model for all other Muslims, which passed from a generation to the other by word of mouth. Muslim scholars collected them and published them into works that we now know as the *hadith*. The authority to establish laws based on the Prophet's sayings, practices and teachings emanate directly from the Qur'an, as illustrated in the ayats (verses in the Qu'ran) below:

> "He who obeys the Messenger, obeys Allah, but if any turn away, We have not sent thee to what over them.
>
> Ye have indeed in the Messenger of Allah an excellent example for him who hopes in Allah and the Final Day, and who remembers Allah much.

---

[37]. Haddad, Y & Lummis, T (1987). *Islamic Values in the United States: A Comparative Study*. 1st ed. New York: Oxford University Press. At pp. 18-20, 98. Hereinafter referred to as Haddad & Lummis.

[38]. Pouwels: 33.

[39]. Ibid.

[40] . Coulson, N. J, (1964). *A History of Islamic Law*. 1st ed. Edinburgh: Edinburgh University Press. Pp 75. Hereinafter referred to as Coulson.

[41]. Tucker, J, E., (2008). *Women, Family and Gender in Islamic Law*. 1st ed. Cambridge: Cambridge University Press. At pp. 12. Hereinafter referred to as Tucker.

> It is not fitting for a believer, man or woman, when a matter has been decided by Allah and His Messenger, to have any option about their decision. If any disobeys Allah and His Prophet, he is indeed on a clearly wrong path."[42]

The above ayats give the Sunnah legitimate claim as primary sources of the Shar'ia.

2.2.5 Ijma

Ijma or consensus of the scholars is generally considered as the third most important source of law in Islam after the Quran and the Sunna, and first of the human sources. In application of law, Ijma is third in hierarchical order, hence when a dispute arises; Ijma cannot be referred to if the matter has already been addressed either by the Quran or the Sunnah.[43] Ijma derives its authority from the hadith of the prophet that says that the Ummah (community) of the prophet cannot agree in error. Ijma only came into practice after the death of the prophet for during his life, he was the supreme law giver. Ijma has two forms, express and implicit. The former is when the jurists expressly support a particular interpretation, the latter being either by lack of dissent or affirmative support in silence. The silence in that case should be deliberate, and approved by other scholars.[44] Ijma, specifically the express Ijma, agreed upon by jurists of a particular time and age remains in force (is binding) until there is no longer consensus supporting the rule in our present time.[45]

2.2.6 Other Sources

The above three form the main sources of Islamic law. However, there are other human sources that may be referred to in certain cases. *Qiyas* is the reasoning by analogy. The qiyas allowed the Islamic scholars to address situations not explicitly addressed by the earlier sources.[46] Qiyas does not contain substantive rules; rather, it is a process of reasoning by which a scholar finds a rule for a case

---

[42] . The Noble Qur'an - القرآن الكريم. 2016. *The Noble Qur'an* - . [ONLINE] Available at: http://www.quran.com. [Accessed 14 March 2016].
[43]. Taman: 221.
[44]. Taman: 223-224.
[45]. Ibid.
[46]. Tucker: 13.

by applying a rule from another case. *Urf* is the custom or normative custom of a people. Urf has also been defined as "recurring practices which are acceptable to people of sound nature."[47] Another source commonly applied in the Islamic jurisprudence is the *fatwa* or *fatawa* in plural. When the Ijtihad or a Mufti (a Muslim scholar) is approached to give a legal opinion on a particular matter, and uses his reasoning to render an opinion in consonance with the rules and spirit of Islamic law. Such opinion is known as *fatwa*.[48]

2.2.7 Discussions on the Sources

Whereas the Quran is the most important source of Islamic law, only about ten percent of its content addresses issues of law[49] and that too, regarding religious duties rather than relationship between or among believers or Muslim faithful. That leaves an entire body of law to be developed by Muslim jurists or scholars. Hence this contradicts the very notion of law as a command of God to man, that is the foundation of Islamic law. The Sunnah being the second most important source is based on the oral traditions of the Prophet. The very nature of these traditions having being transferred to the present generation does not render them authoritative. There are chances that these traditions were diluted in the process and the compiled Sunna is not representative of the true reflection of the very sayings and traditions of the prophet.

Similarly, the Quran itself is not completely immune to contradictions as illustrated in, "...and the angels hymns and praises of God and pray that he will forgive those on earth,"[50] conflict with, "... and the angels around the Throne hymn the praises of God and pray that He will forgive those who believe."[51] So is Sunna which is equally susceptible to contradictions. With such contradictions in the divine sources of law, developing the Islamic jurisprudence (fiqh) may have been based on assumptions in some cases. However, my objective is not to

---

[47]. Kamali, M. H, (2003). *Principles of Islamic Jurisprudence*. 3rd ed. Cambridge: Islamic Text Society. At pp. 369. Hereinafter referred to as Kamali.
[48]. Taman: 242.
[49]. Tucker: 12
[50] . Burton, J, (1990). *THE SOURCES OF ISLAMIC LAW Islamic theories of abrogation*. 1st ed. Edinburgh: Edinburgh University Press. Pp 1. Hereinafter referred to as Burton.
[51] . Ibid

identify problems and contradictions surrounding the sources, but rather to encourage robust and open discussions on the subject of the 'divine and scriptural' sources of Islamic law.

2.2.8 Prominent Schools of Thought of Islam in Kenya

There are four major schools of thoughts in Islam (*madhahab*), meaning to follow, namely: the Hanafi School (started in Iraq); the Maliki (started in Hejaz), the Shafi'i (started in Egypt) and the Hanbali (started in Baghdad).[52] Hanafi School recognizes cognate relationship when it comes to inheritance matters, i.e. all blood relations including the daughters' children; whereas in the Maliki School, agnate relationship is paramount.[53] The Hanbali School had rejected the juristic reasoning of the jurists by analogy – Ijma – while the Shafi'is principle thesis is the paramount of the traditions of the Prophet.[54] The school of thought predominant in Kenya is the Shafi'i School. However, according to the Kadhis I interviewed, they are flexible when making judgements, and can apply any of the schools depending on the circumstances of the case before them.

2.3 Legal Pluralism – A product of the Triple Heritage

Kenya has been greatly influenced by the triple heritage: the African Traditional Society; Islam – when Sayyid Said, the Sultan of Muscat, moved his capital from Oman to Zanzibar, an Island along the East African Coast; and the British through colonization. This triple heritage brought forth pluralism both in religion and legal systems. In Kenya today, there exists legal pluralism where the Kadhis' Courts co-exist alongside the conventional State Law Courts as formal courts, albeit at the lower courts level. However, the existence of the Kadhis' Courts should not be seen as a parallel legal system or a challenge to the state legal system as it is both entrenched in the constitution and has the full backing of the state. The Kadhis' Courts are established in all the forty-seven counties in Kenya, with their judicial officers recruited and remunerated at par with their conventional courts

[52]. Taman: 243
[53]. Coulson: 88.
[54]. Coulson: 90

counterparts, by the State. The Kadhis' Courts have jurisdiction over matters on marriage, divorce, maintenance and matters on personal status, among or between Muslims who consent to its jurisdiction. Hence the Kadhis' Courts provide the possibilities for Muslim disputants to approach either court in case of a dispute, in an attempt to resolve it.

2.4 'Pronouncing and Persevering'

Susan Hirsch in her comprehensive book, *Pronouncing and Persevering,*[55] has documented accounts of one hundred and twenty-nine cases in the Kadhis' Courts in Malindi, Coastal Kenya.[56] Hirsch explores how Swahili women in Malindi pursue marital disputes in the Kadhis' Courts. The book covers a number of important subjects, particular the gender discourses in the courtroom. Hirsch further highlights how women, disadvantaged by their position in the Swahili community, use legal system to transform their lives. Hirsch has eloquently outlined the economic decline and political marginalization of the Swahili people.[57] Hirsch's perspective, through her experience from an ethnographic study, challenges the Western feminist scholarship that portrays Muslim women as "the silenced others of Western women,"[58] and delegated as subordinate to their male counterparts in marital relationships. This confronts the views of the Western feminists who believe "that progress of women in non-western cultures can only be achieved by giving up their native culture."[59] Hirsch's study was before the promulgation of the new Constitution of 2010. However, for the purposes of this thesis, I shall only review the outcomes of the cases where women or men approached the Kadhis' Courts in dispute, between a woman and a man, from Hirsch's work. This part of Hirsch's work is relevant to, and has been used in the analysis of this thesis.

---

[55]. Hirsch, S. (1998) *Pronouncing and Perservering. Gender and the Discourses of Disputing in an African Islamic Court.* Chicago: The University of Chicago Press. Hereinafter referred to as Hirsch.
[56]. Hirsch: 13
[57]. Hirsch: 11
[58]. Hirsch: 2
[59]. Ali, S. (2000). *Gender and Human Rights in Islam: Historical Roots of a Modern Debate.* New Haven & London: Yale University Press.

Of the 129 cases Hirsch analyzed over a period of twenty months between 1985 and 1986, 108 were brought by women and seventeen by men.[60] Hirsch is however silent on who brought the remaining four cases as they were not pertaining to gender issues, hence not subject of her study.[61] The 129 cases are the cases filed at Malindi Kadhis' Courts during the twenty month period. The cases involved a number of issues including: failure to provide economic support of one kind or another; claims for physical or mental abuse; child custody; claims by divorced women where their ex-husbands failed to provide for maintenance, bride-wealth and so on.[62]

From Hirsch's observation, women hardly lose cases in the Kadhis' Courts. The two cases lost by women were regarding maintenance. One claim was denied because the woman was disobedient to her husband. The other claim for maintenance and bride-wealth by a divorced woman whose ex-husband had made efforts to pay but became ill, the Kadhi urged the woman to be patient until the man recovered.[63] It is important to note that half of the cases brought by women and won were heard *ex parte.* The other half of the cases heard (46 cases), resulted in awards of maintenance or dissolution of marriage. Women were mostly awarded the amount they had requested in cases of maintenance. However, the enforcement of the awards is a different thing as most of the monetary awards in *ex parte* cases are seldom paid. Where a woman complains that the ex-husband has not honored the maintenance agreement, the court usually becomes the collector, but the courts capacity to collect the maintenance is limited and the court therefore relies on repeatedly summoning the defaulter and shaming them in an open court.[64] Hirsch laments that the maintenance awards are usually meagre and is unlikely to improve the conditions of these women, unless remarrying is contemplated as a rise in social and economic status. [65]

[60]. Hirsch: 126
[61]. Hirsch: 126
[62]. Hirsch: 126
[63]. Hirsch: 127
[64]. Hirsch: 127
[65]. Hirsch: 128

Another observation by Hirsch is that many cases are resolved through mediation or outside of court agreement between the parties, and even in court; the Kadhi encourages the disputants to arrive at an agreement before the judgement.[66] Whichever the route of the mediation, women's claims are mostly granted. However, it is not always positive as Hirsch posits further in the following excerpts from her book.

> "…Men are particularly discouraged from bringing claims of adultery against women. Women who bring problems not easily subsumed under the standard claims recognized in Islamic law are steered toward mediation or perseverance."[67]

Below is an excerpt from a Kadhis' Court consultation as translated by Hirsch.

> "WOMAN: what if he's just tired of me?
>
> KADHI: It's his right, but he has to maintain you.
>
> WOMAN: What if I say I'm just tired of him?
>
> KADHI: Don't say that. Your duty is to work at it.
>
> WOMAN: What if love is gone?
>
> KADHI: You still have children."[68]

From the above excerpts, despite the positive outcomes of the cases to women, there may still be a barrier to access to justice in cases not envisioned in Islamic law. Overall, even when men fail to honor court agreements, the rate of high success in cases filed by women are themselves authority and can change their positions within troubled circumstances.[69]

Hirsch also posits that women get favorable outcomes from these courts because of a number of reasons including: they bring good claims to court; they bring concrete evidence collected through perseverance in a troubled marriage over a period of time, and that the Kadhis try to neutralize the power that men assert through pronouncements based on Islamic law.[70] Hirsch summarizes that: "In short, women win cases in part because Kadhis are in conflict with other men for authority."

---

[66]. Hirsch: 128
[67]. Hirsch: 128, para 3.
[68]. Hirsch: 112
[69]. Hirsch: 129
[70]. Hirsch: 129

However, Hirsch's study has some limitations key among them is that the study was only conducted in one city in Coastal Kenya. We cannot assume to expect other similar types of claims and success rates in other parts of Kenya as there may be cultural conditions and other factors at play as well. The high success rates in cases brought by women may not necessarily echo empowerment of women. What if these women know (through own or others experience) which cases have a good chance to succeed?

2.5 Summary

This chapter has attempted a literature review on the history of the Kadhi's Courts from the reign of the Sultan of Zanzibar, the transformations of the courts during the British Protectorate and the eventual inclusion of the Kadhis' Courts at Kenya's independence. I have also discussed the Islamic law in Kenya, from the origin, sources of Islamic law, to the schools of thought in Islamic law and the Islamic jurisprudence practiced in Kenya. Lastly, I have reviewed literature on previous research in the Kadhis' Courts in Coastal Kenya. The review will help in the analysis as my work did not include ethnographic study of Kadhis' Courts. The next chapter is on theory used is this study.

3.0 Theoretical Framework

The concept of legal pluralism has been the subject of many studies in post-colonial societies in Africa, Asia and South Africa. Plurality of legal orderings within a social sphere has been examined and researched as a counter claim to the supremacy of legal centralism.[71] Early legal pluralists, such as Barry Hooker and Jacques Vanderlinden, focused in legal pluralism prevalent in colonial and post-colonial settings.[72]

In this chapter, I shall discuss the concept of legal pluralism, beginning with the various definitions put forth by some prominent proponents of legal pluralism. I also discuss the definitional problem as a point of disagreement among legal

[71]. Griffiths: 3

[72]. Sartori, P and Shahar, I, (2012). Legal Pluralism in Muslim-Majority Colonies: Mapping the Terrain . *Journal of the Economic and Social History of the Orient*, 55(4-5), 637-663. At pp. 638.

pluralists, and coin my definition for the purpose of this study. I have also shed light on the concept of legal pluralism in the Kenyan perspective today. I also discuss the concept of access to justice through the Socio-Legal and 'Rule of Law' lenses, elucidating various indicators of access to justice. Legal pluralism is relevant to my study since Kadhis' Court as an institution, is as a result of plurality in Kenya to adjudicate on cases from Muslim minorities. The concept of access to justice is relevant to enable us see whether these institutions really enhance justice, according to the Kadhis. To find out whether that is the case, the indicators of access to justice are used in the analysis. Lastly, in chapter 3, I discuss the nexus between legal pluralism, access to justice and development.

3.1 Legal Pluralism defined

Law as a genre is itself diverse. Legal pluralism is within the purview of legal theory. To begin with, I discuss some definitions of legal pluralism by eminent legal pluralists to give a background into the subject. One such definition is by Griffiths, in his seminal work, '*What is Legal Pluralism*?' In his article, Griffiths explicitly identified legal pluralism as a counter mechanism to challenge the ideology of legal centralism. He defines legal pluralism as:

> "one in which law and legal institutions are not all subsumable within one 'system' but have their sources in the self-regulatory activities which may support, complement, ignore or frustrate one another, so that the 'law' which is actually effective on the 'groundnorm' of society is the result of enormously complex and usually in practice unpredictable patterns of competition, interaction, negotiation, isolationism and the like."[73]

Griffiths also demarcates legal pluralism into weak and strong form, weak or juristic form being the co-existence of several legal orders within a social group that do not belong to the same system.[74] Another concept of plural legal systems is Moore's notion of the semi-autonomous social field. Moore defines the semi-autonomous social field as one:

[73]. Griffiths, J, (1986). What is legal pluralism? *The Journal of Legal Pluralism and Unofficial Law*, 18(24), 1-55. At pp. 39. Hereinafter referred to as Griffiths.
[74]. Griffiths: 8

> 'that has rule-making capacities, and the means to induce or coerce compliance; but it is simultaneously set in a larger social matrix which can, and does, affect and invade it, sometimes at the invitation of persons inside it, sometimes at its own instance.'[75]

This therefore implies that a the semi-autonomous field though being self-regulatory, not only generates its own laws and customs, but is equally affected by the laws and customs of its surroundings.[76] This would be true of the Kadhis' Courts that beside Islamic laws equally refer to State laws when resolving disputes.

Griffiths defines legal pluralism as co-existence of two or more legal systems within the same social field.[77] Griffiths specifies further that a "situation of legal pluralism (...) is one in which law and legal institutions are not all subsumable within one 'system' but have their sources in the self-regulatory activities"[78] of different social fields. Merry in her article, *Legal Pluralism* further classifies legal pluralism into classical and new legal pluralism. According to Merry, classical legal pluralism is that which was as a result of colonization, a product of colonial and postcolonial societies.[79] Moreover, she defines new legal pluralism as the legal pluralism concept applied to non-colonized advanced societies, especially Europe and the United States.[80] Therefore going by Merry's definitions, the present legal pluralism in Kenya is an example of the classical legal pluralism. Merry's classification however fails to address the plurality of legal orderings that existed in the colonized countries before the advent of colonization. To assume that there was no plurality of legal orderings before the coming of the imperialists would be simplistic. In Kenya for example, even within the Sultanate of Zanzibar, the Sultan did not interfere with the internal affairs of the subjects' towns; rather, the towns had their own self-rule systems complete with judicial administration.

---

[75]. Moore, S, F., (1978). *Law as a Process: An Anthropological Approach*. 1st ed. Oxford: Oxford University Press. At pp. 56. Hereinafter referred to as Moore.
[76]. Ibid.
[77]. Griffiths: 1
[78]. Griffiths: 39
[79]. Merry, S. E, (1988). Legal Pluralism. *Law & Society Review*, 22(5), 869-896. At pp. 871. Hereinafter referred to as Merry.

The Kadhis Courts were only an alternative where both the litigants - on their own volition - opted to take their matter to the Kadhis.

Griffiths furthermore elucidates on a different dimension to legal pluralism. "Juridical" legal pluralism is where it is allowed by the provisions of law which spells out the rules and procedures for specific groups, or recognized by state law.[81] On the other hand, "empirical" legal pluralism is that where in the case of a dispute, an individual is presented with several legal norms to choose from in the event of a legal dispute.[82] The Kadhis Courts in Kenya would be described as juridical, as they have full state sanction, going by Griffiths' classification. They also provide 'empirical' legal pluralism since Muslims are provided with more than one option to resolve their issues when dispute arises.

3.1.1 Definitional deadlock!

Legal pluralists are often criticized for lack of clear definition of legal pluralism, as illustrated by the definitions above. Jurists have rejected the definitions and have even referred to legal pluralists as a 'strange sect.'[83] Criticism has also been meted on the obscurity of the concepts of law and social norms.[84] Due to the definitional deadlock in legal pluralism, in this thesis, legal pluralism shall be defined as, *co-existence of more than one legal orderings within a social field (i.e state), with either state-sanctioned or non-state justice systems that adjudicate over disputes arising from that social field.*

3.1.2 Legal Pluralism and Colonization: Before, During and After

The legal systems in post-colonial societies in Africa have been characterized by pluralism where customary law, religious law and state law co-exist.[85] This is due

---

[80]. Merry: 871.
[81]. Griffiths: 50
[82]. Griffiths: 50.
[83]. Twinning, W (2010). "Normative and Legal Pluralism: A Global perspective." *Duke Journal of Comparative & International Law*,Vol. 20:473, pp.473-517.
[84]. Tamanaha, B (2000). 'A Non-essentialist View of Legal Pluralism.' *Journal of Law and Society*. 27(2), 296-321. At pp. 297
[85]. Kamau, W., (2009). 'Law, Pluralism and the Family Law in Kenya: Beyond Bifurcation of Formal law and Custom. 'International Journal of Law, Policy and the Family. Vol 23:2. Pp. 133-144. At pp. 135.Hereinafter referred to as Kamau.

to the interaction between the Imperialists' Laws and the traditional and religious ordering from the African societies.[86] When Kenya became a British Protectorate in 1920, the British established their Consular courts which applied the English law to dispense justice to the British subjects. Similarly, they allowed the traditional courts as well as Kadhis' Courts to operate alongside their courts.

However, only the Kadhis' Courts had prominence, apart from the colonial courts, thereby establishing a dual legal system in Kenya. The British had incorporated indigenous laws onto their laws as long as they were not, "repugnant to natural justice, equity and good conscience" or "inconsistent with the written law."[87] The statement above affirms that the advent of the colonial state was not the beginning of law in Kenya, but rather an addition of some new and complicated laws to an already existing legal framework.[88] Besides the Kadhis' Courts that administer justice based on the Islamic laws mainly from the Quran, there also exist other traditional justice systems which are culturally specific. These systems existed before the advent of colonization and experienced significant changes during colonization. At independence, in many African countries, including Kenya, most disputes were resolved using unofficial justice systems.[89] "Some of the reasons for the persistence of Traditional Justice Systems (TJS) in Africa despite the introduction of Western-based state law systems include the incomplete reach of the state's legal structures, due to the weak nature of most African states".[90] Customary Law in Kenya involving personal law, including the law regarding the burial of a deceased has been thoroughly researched. Authors such as Eugene Cotran,[91] and P.E Nowrojee[92] among others

---

[86]. Kamau: 135.
[87]. Merry: 869
[88]. Woodman, G. R, (1996). Legal Pluralism and the Search for Justice. *Journal of African Law*, 40(2), 152-167. At pp. 157.
[89]. Kimathi, LW, (2005). Codesria 11th General Assembly. *In THEME: REINVENTING THE AFRICAN STATE AND REDIFINING ITS ROLE IN DEVELOPMENT*. Maputo, Mozambique, 6th-10th December, 2005. Maputo, Mozambique: Codesria. 1-20. At pp. 4.
[90] . FIDA-Kenya. (2010). *Traditional Justice Systems in Kenya: A Study of Communities in Coast Province, Kenya*. [ONLINE] Available at: http://www.fidakenya.org/sites/default/files/Traditional-Justicefinal.pdf. [Accessed 14 March 16]. Hereinafter referred to as FIDA-Kenya.
[91]. Cotran, E (1968) Integration of the Courts and Customary Law in Kenya. *East African Law Journal* 4, 14-20.

have extensively written on the subject, including a book on the famous Kenya's case, *SM Otieno Case*.[93] In Kenya today, TJS vary from community to community, with hierarchy ranging from the village levels to district levels. The membership of these systems mostly comprises men, though in a few cases, both women and men constitute the membership, with men comprising the majority.[94] Their jurisdictions range from marital disputes, petty thefts, juvenile misconduct, parental misconduct and boundary disputes.

In Ogambla village, Mamboleo, in the outcasts of Kisumu City, in Western Kenya region where I grew up, normally the TJS *barazas* (council of elders' open court) would follow simple procedure where the complainant would file a complaint with the authorities, usually by word of mouth. Then the accused would be summoned by word of mouth, and in some cases in writing. A date would then be set for hearing, where charges would be read to the accused, and given a chance to reply either by admitting or deny them. Simple rules of evidence applied mostly by way of witnesses, and where applicable, physical evidence. The barazas are usually held in public and remedies or punishment comprise apologies, fines, physical punishment, and social sanctions and in extreme cases where one is found guilty of witchcraft, even banishment from the community. The chief who presides over the barazas, being assisted by the village elders, is appointed by the state. The elders are appointed by the community.

3.2. Theorizing Access to Justice

The concept of access to justice has endured important metamorphosis, in consonant with the changes in civil procedural research.[95] In the late eighteenth and the nineteenth centuries, liberal, materialistic (bourgeois) states in the civil

---

[92]. Nowrojee, P.E (1973) Can the District Judge Administer the Whole of the Customary Law. *East Africa Law Journal*. 9, 59-76.

[93]. SM Otieno was a prominent Kenyan lawyer who upon his death, dispute arose between his wife and his clan as to where his remains should be buried. The trial lasted four months and many articles including a book have since been written about the case.

[94]. FIDA-Kenya.

[95]. Garth, Bryant G. and Cappelletti, Mauro, "Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective" (1978). *Articles by Maurer Faculty*. Paper 1142. http://www.repository.law.indiana.edu/facpub/1142. Hereinafter referred to as Garth & Cappelletti.

procedure litigation mirrored the essentially individualistic philosophy of the predominant rights during that period.[96] The right of access to justice, though a natural (fundamental) right, was not under the state protection – hence the aggrieved party had to ensure their enforcements through the courts.[97] The only duty of the state was to ensure that the right was not infringed by others.[98] This passivity on the part of the state essentially reduced justice to a commodity, which meant that justice, like any other commodity in the *laissez-faire* state, could only be purchased by those who could afford its cost.[99] The complex structure of latter days relationships have necessitated a change from the individualistic character of access to justice envisioned by the free market economy, to recognizing social rights which call upon the recognition of the state, communities, associations and individuals.[100] It should therefore not be startling to observe that the right of access to justice has gained currency as recent "welfare state" reforms in Europe have increasingly sought to arm individuals with new substantive rights in their capacities as citizens, consumers and employees among others.[101]

Access to justice has been closely linked to poverty reduction because the poor and the marginalized are often deprived of choices, opportunities, access to basic resources and a voice in decision-making.[102] Lack of access to justice limits the effectiveness of poverty reduction and democratic governance programs by limiting participation, transparency and accountability. In this thesis, my focus is on one of the formal avenues for resolving disputes in Kenya - the Kadhis' Courts. Kadhis' Courts have jurisdiction to resolve disputes on personal law

---

[96]. Garth & Cappelletti: 183
[97]. Cappelletti, *General Report,* in FUNDAMENTAL, GUARANTEES OF THE PARTIES IN CIVIL LITIGATION 659, 726-40 (Milan/Dobbs Ferry, N.Y.: Giuffr6/Oceana; M. Cappelletti & D. Tallon eds. 1973).
[98]. Garth and Cappelletti: 3
[99]. Garth and Cappelletti: 3 (Empasis in original)
[100]. Garth and Cappelletti: 184
[101]. European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6 213 U.N.T.S. 221 (1953); Corte Cost. Decision of Dec. 22, 1961, no. 70, [1961] Giur. Ital. III 1282.
[102].UNDP. 2004. *Access to Justice Practice Note*. [ONLINE] Available at: http://www.undp.org/content/undp/en/home/librarypage/democratic-governance/access_to_justiceandruleoflaw/access-to-justice-practice-note.html. [Accessed 13 April 2016].

between or among Muslim faithful's, who voluntarily submit themselves to its jurisdiction.[103] Muslims in Kenya are not only a minority, comprising between 15 and 30 percent of the Kenyan population, going by 2009 census,[104] but are also a marginalized group. Avocats Sans Frontières notes that access to justice – an essential component of the rule of law – remains a major challenge for the most marginalized people in society due to poverty and lack of awareness.[105] Research shows that "non-discriminatory access to justice is an essential pillar for developing and combating poverty, in that it leads to the effective implementation of other human rights."[106] Therefore it is necessary to ensure that the institutions tasked with resolving disputes among the populace are able to attract the parties who need them the most.

3.2.1 Defining Access to Justice

In order to understand the concept of access to justice, it is prudent that we define it. The word justice comes from the Latin word *jus*, meaning right or law. Banakar posits that law and justice have surfaced closely associated as normative elements of social organization.[107] Cappalletti and Garth refer to access to justice as: 'a system by which people may vindicate their rights and/or resolve their disputes under the general auspices of the state.'[108] The United Nations Development Programme (UNDP) on the other hand defines access to justice as, "the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards."[109] This definition broadens the idea of justice beyond the formal courts to include other mechanisms

---

[103]. The Cosntitution of Kenya, Cap 170
[104]. Cussac: 291.
[105]. Accompanying note to the conference organised by Avocats Sans Frontières HOW ACCESS TO JUSTICE CAN REDUCE POVERTY, at pp.1. Hereinafter referred to as ATJ.
[106]. ATJ: 2; Buscaglia, Edgardo (1996), *"Introduction to Law and Economics of Development,"* Law and Economics of Development, New Jersey: JAI Press. At pp. 56.
[107]. Banakar, R. (2015) *Normativity in Legal Sociology. Methodological Reflections on Law and Regulation in Late Modernity.* Cham: Springer International Publishing. At pp.61. Hereinafter referred to as Banakar.
[108] . Cappalletti, M., and Garth, B. (1978). *Access to Justice – A World Survey*. Sijthoff and Noordhoff at page 6.
[109]. UNDP. 2005. *Programming for Justice: Access for All*. Bangkok: United Nations Development Programme.

for dispute resolution. Weber moreover classifies 'Khadi justice' as an example of irrational decision-making founded on "ethical', emotional, political or practical criteria."[110] In sum, a Kadhi has been described as: "strict constructionist where general rule existed, but had varying degrees of discretion in dealing with particularities where the law was silent."[111] In this thesis, however, access to justice is defined as the process of accessing the courts and having one's disputes heard before competent judicial or quasi-judicial systems. It is immaterial as to whether the people who access these systems finally get 'fair and just' outcomes.

In order to understand access to justice better, I shall revisit various approaches to access to justice. This will help theorize the concept.

3.2.2 The Rule of Law approach

The importance of access to justice cannot be underestimated. It is the end product of the rule of law and without it, the rule of law remains nothing but an empty ideal and concept.[112] While the constitution of Kenya does not define what the rule of law is, the World Justice Project defines the rule of law as a system where the following principles are observed:

1. "The government and its officials and agents as well as individuals and private entities are accountable under the law.
2. The laws are clear, publicized, stable, and just; are applied evenly; and protect fundamental rights, including the security of persons and property and certain core human rights.
3. The process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient.

[110]. Sterling and Moore: 73
[111]. Sterling and Moore: 74
[112]. Caplen, A., and Mcllroy, D. (2001). "*Speaking Up" – Defending and Delivering Access to Justice* Today. Accessed online..At. . 2016. . [ONLINE] Available at: http://www.theosthinktank.co.uk/files/files/Speaking%20up%20final.pdf. [Accessed 25 April 2016].

4. Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve."[113]

Belton on the other hand posits that the application of law is the rule of law.[114] While law may sometimes be unjust, inasmuch as its purpose is to serve justice, it remains in force.[115] Dicey in his masterpiece, *Introduction to the Study of Law of the Constitution*[116], posits that the rule of law exists where every man or woman, irrespective of their rank or position, is equal before law and that there is an established procedure followed to punish all those who breach the law.[117]

Going by these definitions, we gather that where the rule of law is observed, no one is above the law; there is equality before law and equal protection of laws; the legislation process is participatory, free and fair; justice is not delayed and there is the independence of judiciary. Loorbach and Cohen argue that the rule of law can only be effected by, "having a well-organized, properly educated, independent, and sufficiently empowered and staffed judiciary; by having the availability of competent and independent lawyers; and by having the means of recognition and enforcement so that individuals can reap the fruits of this system."[118] However, the rule of law should not be confused with or be fused with justice. Rule of law further attests that it is the laws governing the people that should be just, as people are more inclined to be influenced by their own personal interests.[119] In sum, the rule of law denotes to existence of just laws, equal laws applicable to equals in a system where nobody is above the law. However, generalization on what is the rule of law can be problematic since different places and contexts have different

---

[113]. What is the Rule of Law? | The World Justice Project. 2016. *What is the Rule of Law? | The World Justice Project*. [ONLINE] Available at: http://worldjusticeproject.org/what-rule-law. [Accessed 20 April 2016].
[114]. Belton K. Rachel. 2005. Competing definitions of Rule of Law-Rule of law series No 55 January 2005.Washington: Carnegie Endowment for International Peace.
[115]. Banakar: 221
[116]. Dicey, A. V., (1915). *Introduction to the Study of the Law of the Constitution*. 8th ed. London: Macmillan.
[117]. Dicey, A. V., (1915). *Introduction to the Study of the Law of the Constitution*. 8th ed. London: Macmillan. At pp. 110
[118]. Loorbach, J and Cohen, J. M. (2013). Poverty and the Law. In: Maynard, D. P. and Gold, N. *Piverty, Justice and the Rule of Law*. London: International Bar Association. 15-17.
[119]. Zdravko, Planinc .1991. Plato's Political Philosophy: Prudence in the Republic and the Laws. London: Gerald Duck Worth & Co Ltd.

realities. Krygier posits that instead of asking 'what' the rule of law is; we should be asking 'why' the rule of law: "what might one want the rule of law *for?* Not *what,* what is it made up of?"[120] Krygier further argues that '*why*' is the most important question since what may be a sensible answer to what is the rule of law in one place, may not be entirely sensible elsewhere.[121] In this thesis, I examine the rule of law according to the Islamic law. It is important to note that Islamic rule of law, in its context generally, though lacking certain components of the 'Western' concept of the rule of law, should also be appreciated and understood for what it is. I shall now examine the socio-legal aspects to access to justice.

3.2.3 Socio-Legal approach to Access to Justice

It is argued in socio-legal studies that law is not only made by man to serve man, but is also a part of the society. It is therefore inherent that the laws change according to the prevailing circumstances of our time. Sociology of Law as a discipline is concerned with, among others, the theoretical and practical approaches to law.[122] There is likely to be a clash between "lawyers' law" and "practical law" as according to Weber as quoted by Sterling and Moore, the operational aspects of law concerns itself with problem-solving.[123] It investigates the empirical studies of law or more properly, 'law in action' as opposed to 'law in books'.[124] In order to understand the function of law better, investigating the background of the legislation is a good place to begin from. Sociology of Law is a branch of knowledge concerned with certain legal issues such as: why certain laws are embraced and some repealed; how norms and laws can contribute to sustainable society; the origin and applications of law and their effects and

---

[120]. Krygier, M, (2011). Four Puzzles about the Rule of Law: Why, what, where? And who cares? *American Society for Political and Legal Philosophy*, 50, 64-104. At pg. 69. (Emphasis in original) Hereinafter referred to as Krygier.

[121]. Krygier: 69

[122]. Nelken, D. (1984). Law in Action or Living Law? Back to the Beginning of Sociology of Law. *Legal Studies*, Vol.4(2). 157-174. At pg. 157. Hereinafter referred to as Nelken.

[123]. Sterling, S. J, and Moore, W. E (1987) Weber's Analysis of Legal Rationalization: A Critique and Constructive Modification. *Sociological Forum*. Vol. 2(1), 67-89. At pp. 72. Hereinafter referred to as Sterling and Moore.

[124]. Nelken: 159

functions.[125] Socio-legal studies critically interrogate what mainstream legal scholarship refers to as the 'principal values' of the legal system, such as 'law's autonomy, objectivity and commitment to the rule of law'.[126] Socio-legal approach enables us to view access to justice through the lens of the right-bearer, the needs, legal needs, for the poor.[127] The 'unmet' legal needs arise when certain groups of people are unable to benefit from the existing legal solutions.[128] The essence of a sound legal system is not only to have the system in place but to avail it to each and every citizen aggrieved based on established laws. It would be both simplistic and dangerous to take it for granted that because there is availability of a service to meet a particular need, the right-bearers will necessary see their relevance and utilize them.[129] That is where Sociology of Law comes in to interrogate why the right bearer does not recognize or utilize the available service to meet his/her apparent legal need.

3.3 Indicators of Access to Justice

According to the Council of Europe, some of the indicators of access to justice include:

- Caseload development
- Litigation threshold level
- Legal expenses
- Interests in disputed cases
- Success in court
- Duration of the process
- Experienced procedural justice
- Court proceeding in different kinds of cases
- Uniform laws applicable to all people

---

[125]. Education | Sociology of Law Department. 2016. *Education | Sociology of Law Department*. [ONLINE] Available at: http://www.soclaw.lu.se/en/education. [Accessed 20 April 2016].
[126]. Banakar: 221
[127]. Morris, Pauline. (1973). Social Needs and Legal Action / (by) Pauline Morris, Richard White, and Philip L. London: Robertson, (Law in society series). At page 50. Hereinafter referred to as Morris.
[128]. Morris: 50
[129]. Morris: 52

- Accessibility of the courts (physical structure and the officials)[130]

Using these indicators among others, I shall examine whether or not the existence of Kadhis' Courts throughout the country post-2010, providing the Kenyan Muslims with more than one option to approach in case of disputes, can or has facilitated easy access to justice to Muslims, especially Muslim women.

3.4 Legal Pluralism and Development: Kenyan Scenario

Conflicts and disputes must be managed effectively and expeditiously for development to take place as development is not feasible in a conflict situation.[131] Borrowing from Amartya Sen's definition of development that: "development must be understood as a process for expanding real freedoms enjoyed by individuals,"[132] possibilities of the right to access to justice therefore may translate to development. Enhanced access to justice may also contribute to the respect of the Rule of Law, which is indispensable for development.[133] Research shows that access to justice is an important pillar for developing and combating poverty, since it leads to the effective implementation of other human rights.[134] Conflicts and disputes resolutions mechanisms in Kenya comprise among others: court adjudication including the state courts and the Kadhis' Courts; alternative dispute resolution mechanisms (ADR) e.g. negotiation, mediation, conciliation, expert opinion, mini-trial, ombudsman procedures, arbitration, and traditional dispute resolution mechanisms.[135] The official justice systems for dispute resolution have not always been effective as they have been inaccessible by the poor due to legal technicalities, complex procedures, high costs and delays,

---

[130]. Council of Europe. 2012. *Indicators of Access to Justice*. [ONLINE] Available at: http://www.coe.int/t/dghl/cooperation/cepej/events/OnEnParle/A2J_2_Ervasti.pdf. [Accessed 24 May 2016].

[131]. Muigui, K. & Kariuki, F. (2014) ADR, Access to Justice and Development in Kenya. *In Strathmore Annual Law Conference*. Strathmore University, Nairobi, Kenya., 3rd and 4th July. Nairobi, Kenya: Strathmore University. 1-25, at pp 2.

[132]. Sen, A, 2001. *Development as Freedom*. 1st ed. Oxford: Oxford University Press. At pp. 2. Herinafter referred to as Sen.

[133]. Sen: 2

[134]. ATJ: 2

[135]. Ibid: 2

limiting access to justice for the poor.[136] Contracting lawyers and availing the formal courts can be very costly in them, but also entail opportunity costs, which for the poor usually mean time away from income-generating activities. The other determinant is the lack of necessary skills to understand and use the formal legal system. Promoting the importance of the right to access to justice promotes the rule of law, implying strengthening access to justice for all; especially the vulnerable ones have a direct impact elevating their social and economic conditions.[137] The problems with the formal legal system have however necessitated a shift towards alternative justice systems and the Kadhis' Courts - which are a part of the formal courts - for dispute resolution. Hence, I shall investigate whether or not access to the Kadhis' Courts by the Muslim women, from the perspectives of the Kadhis, may imply access to justice, or even development.

3.5 Summary

This chapter covered the concept of legal pluralism in details, particularly examining the main debates in the topic and the points of agreements and disagreements among legal pluralists. I also ventured on plurality of legal orderings in Kenya. This is because Kadhis' Courts are a reflection of legal pluralism, where Islamic law is applied to adjudicate disputes among Muslims. Therefore, I covered the concept of access to justice, working from the definition, to approaches to access to justice, in particular those relevant to understanding and analyzing the empirical material collected for this thesis. I have also attempted to theorize the concept of access to justice. Lastly, the indicators of access to justice have been remunerated, for purposes of analyzing the empirical material, and the nexus between legal pluralism and development drawn.

The next chapter covers the research methodology employed in this thesis.

---

[136]. Whitford W.C. (2000). "The Rule of Law: New Reflections on an Old Doctrine," *East African Journal of Peace and Human Rights Vol. 6(2),* pp. 159-161.

[137]. Buscaglia, Edgardo (1996), "Introduction to Law and Economics of Development," *Law and Economics of Development*, New Jersey: JAI Press. At pp. 56.

4.0 Research Methodology

This is qualitative research design, based on empirical material obtained primarily through semi-structured interview methods. I have interviewed five Kadhis and three Magistrates. I have also attempted a review of literature on the Kadhis' Courts to provide a background of the Courts in Kenya and their transformation, and a review of ethnographical research on the Kadhis' Courts.

4.1 World View and the Researcher's Position

This research was conducted from the ontological position of relativism, and social constructivism as the epistemological position. The world is understood as relational and relative. Each person has their own perception of what reality is, based on their social arena, circumstances and beliefs. Therefore, there is no true reality, but a reality for each person, which is being created in the social relations. The philosophical standpoint will be concerned with questions such as '*what is real*?[138]', and '*how is one to know*?[139]' What is 'reality' and 'knowledge' is initially justified by their social relativity.[140] Berger and Luckmann contend that, "sociology of knowledge is concerned with the analysis of social constructivism of reality."[141] Knowledge would be considered a social construct to the extent it is aligned with reality.[142] It is important to note that, social realities are continually being accomplished by social actors and are in constant state of revision.[143] Barnes and Bloor further affirm that in the relativist view of social construction, every view is as good as the other.[144] It is clear from the above that different social constructionists differ as to what is social construct. Thus I do not intend to

---

[138]. Berger, P. L., & Luckmann, T. (1966). *The Social Construction of Reality*. 1st ed. London: Penguin Group. At pp. 13. Here in after referred to as Berger & Luckmann.
[139]. Berger & Luckmann: 13
[140]. Berger & Luckmann: 15
[141] Berger & Luckmann: 15
[142]. Social constructionism Facts, information, pictures | Encyclopedia.com articles about Social constructionism. 2016. *Social constructionism Facts, information, pictures | Encyclopedia.com articles about Social constructionism*. [ONLINE] Available at: http://www.encyclopedia.com/topic/Social_constructionism.aspx. [Accessed 04 May 2016].
[143]. Bryman, A, (2012). *Social Research Methods*. 4th ed. Oxford: Oxford University Press. At pp. 169. Hereinafter referred to as Bryman.
[144]. Barnes, B., and Bloor, D. (1982). Relativism, Rationalism, and the Sociology of Knowledge. In *Rationality and Relativism*, eds. Martin Hollis and Stephen Lukes, 21-47. Cambridge, MA: MIT Press.

find a ‘true’ reality to reveal, but instead the result of the research is the result of the social interactions between the participants and I, the methods and theories that are applied.

My position as a researcher, which becomes part of forming the research, its analysis and results, is that I am a young Kenyan male; hence I am familiar with the local culture, language and locality. I am educated abroad in a European university. This may have influenced the willingness of the judges to be interviewed, due to curiosity or even try to portray a nice picture. My background is in law, so I understood most terminologies used by my interviewees. My interviewees also easily identified with me. The potential threats to the study are that I am non-Muslim, therefore, may have been regarded as an intruder or ‘spy’, which would have affected the responses from my interviewees. Also being a man, it would not have been easy to interact with Muslim women as part of the study.

This research is therefore focused on applying methods that allow the researcher to get in-depth knowledge and interaction with the participants/community being studied. Furthermore, the theory that was applied was compatible with the methodology research design of the study because existence of Kadhis’ Courts in the formal legal system is a ‘reality’ of legal pluralism. Also, the theories will help to analyze the material to determine whether these courts enhance access to justice.

4.2 Design and Location of the Study, Sample Selection and Description

My fieldwork was conducted at the Coast – Mombasa and Malindi - and in Western Kenya – Kisumu and Kakamega respectively. Mombasa was chosen since it is Kenya’s second-largest city and the major city at the Coast where Islam is prevalent, and administrative capital of Mombasa County. Kisumu is its equivalent in Western Kenya, the third-largest city in Kenya along the shores of Lake Victoria, and the administrative capital of Kisumu County. The two are comparable in terms of size, population and diversity of communities living in it. However, unlike Mombasa, Islam is not prevalent in Kisumu. Malindi on the

other hand is a small town about 150KM North of Mombasa. Kakamega is a town in Western Kenya, about 50KM North of Kisumu. The two are comparable in terms of population size which mostly comprises local communities. The two towns are equally semi-urban as compared to the other two which are urbanized cities. While Malindi is predominantly Muslim populated, Kakamega mostly comprise non-Muslims. The two sets of cities were interesting in this study to see whether there are differences in the application of Islamic Law between Muslim predominant cities and the non-Muslim predominant cities. However, while doing my analysis, there were not significant differences; hence I have not included this criterion in the analysis.

My primary research was conducted between the 10th of January 2016 and 5th of February, 2016, with some prior academic literature based preparation. My research falls into two categories: literature review and interviews. The main topics I researched consisted of the perception of Kadhis and Magistrates of access to justice and operational aspects of the working of the Kadhis' Courts.

Figure 2: Photo of the Kadhis' Courts Building in Mombasa, taken in Jan. 2016.

Source: Photo taken by the author during fieldwork

4.3 Interviews

Interviews are among the widely used method to collect knowledge through the exchange between an interviewer and an interviewee.[145] Based on my research question, the use of semi-structured qualitative interviews was deemed the most appropriate. Semi-structured interviews are very flexible[146], which made them more appealing to me in my research. Another reason for the choice of method was the freedom that semi-structured interviews bring forth, allowing one to 'ramble', vary the order of questions, or even allow the interviewer to 'adjust the emphases' in research based on the significant issues that emerge in the course of the interview.[147] These advantages outlined allowed me to seek clarification and elaboration on the responses from the interviewees and ask follow up questions on the significant issues raised. I also preferred the semi-structured interviews which as per Bryman, they would make the fieldwork experience more natural, and more of a conversation between the interviewees and I[148], and hence I could get the best from the interviewees due to reduced tension. This data collection allows the interviewer to ask the interviewees a series of predetermined but open-ended questions;[149] hence it allowed me to gather more data from my interviewees. These interviews allow the interviewer to put emphasis on the interviewees, especially on how they 'frame and understand issues'[150], hence I asked questions ranging from their perception of the application of Shar'ia law in Kenya, the practical aspects of the working of the Kadhis' Courts in Kenya among others. Through these, I got their perception of the above issues that were not only relevant to answering my research question, but also gave me a background of my research work on the Kadhis' Courts in Kenya. Hence, the interviews helped to collect advance knowledge combined with personal and internal experience.

[145]. Bryman: 169
[146]. Bryman: 469
[147]. Bryman: 470
[148]. Bryman: 471
[149]. Bryman: 471
[150]. Bryman: 471

I also had to select my participants carefully based on the research question and geographical area I was interested in researching for comparative analyses, if any, to make the most of the opportunity. I interviewed two Kadhis in Mombasa, including the Chief Kadhi and one in Malindi. I also interviewed one Kadhi each in Kisumu and Kakamega. I also interviewed one Magistrate each in Kisumu, Kakamega and Mombasa. Kadhis are the judges who preside over cases in the Kadhis' Courts; Magistrates are their conventional courts counterparts at the lower courts cadre. One peculiar aspect of my fieldwork that I had not anticipated was that I was able to observe the interactions between the Kadhis and the litigants, besides conducting interviews with the Kadhis and Magistrates in these stations. In one case, in the middle of the interview, a litigant who was not satisfied with the outcome of the case came to the Kadhi to complain about it. I was even more puzzled by the approach the Kadhi took. The litigant was advised to go and discuss on how to divide the property with the other parties to the case. Once they reached an agreement, they should come back before the Kadhi who will simply endorse it. Although not relating directly to my research question, this experience gave me further valuable insight on the working of the Kadhis' Courts that I could not have got by mere interviews alone. By not limiting research to the Kadhis, I was able to get an effective comparative perspective and deepen my understanding of the distinctions of Kadhis' Courts from the mainstream judiciary. My understanding was that the Kenya's Kadhis' Court practiced the *Shafi* fiqh or jurisprudence: the generalized application of *Shar'ia*. I used the aforementioned observations and interviews to assess this application of Islamic Law and its jurisdiction. 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 Kadhis' Court. I shall use some of the quotes from the interviewees (who shall remain anonymous) to elucidate more on the impression I got on the sources of Islamic Law, its jurisprudence, its jurisdiction and procedure.

I preferred interviews method since through them; I was able to consider the motivation and attitude of the respondents about the study. It also provided

considerably conducive interaction with respondents where I was in a position to retrieve more information from them beyond the interview questions. The semi-structured interviews were also preferred since they fitted well in my methodological approach to this research, since I relied mostly on their perceptions rather than 'facts'. In addition, through interviews, frank and open responses could be obtained. I tried as much as possible, to be clear in my questions, to be sensitive to the topics, to be simple in my language and not to ask leading questions. Most of the interviews were recorded, and transcribed while I took notes in the rest where the interviewees objected to recording the sessions.

4.4 Literature Review

The Kadhis' Courts in Kenya have been in existence for about two centuries now. In order to understand their working, jurisdiction and their constitutional recognition, it was prudent that I give the background of the Kadhis' Courts. For that matter, I have done a review of literature on the subject, giving an overview right from the days of the Sultan. The literature search has been conducted through the following online source: www.scholar.google.se. Whenever the search options permitted, I applied a Boolean search methodology that would include all of the predetermined search terms for example, by searching for (Kadhis' Courts OR access to justice OR development OR Women OR Legal Pluralism) AND (Pre-independent Kenya OR Sultan of Zanzibar OR Post-Independent Kenya). I went through the abstracts of the articles yielded in the search results with relevant headings and selected relevant articles or books. The review touches on the Court's existence during the time of the Sultan of Zanzibar, the transformation brought about by the British, through to the constitutional recognition of the Kadhis' Courts at independence. I have also included the odyssey of the Kadhis' Courts from Independence of Kenya up to when Kenya adopted its new constitution in 2010. The last part of the literature review is on the research on the Kadhis' Courts in Kenya.

4.5 Reliability and Validity

On external reliability, or the degree to which this study can be replicated in future, Bryman argues that it is impossible to 'freeze' a social setting and circumstances of the initial study.[151] I can also not guarantee that the findings of this study would not hold to other parts of Kenya due to cultural differences and other factors. However, if other researchers want to replicate this research, then they would need to 'adopt a social role'[152] similar to the one I adopted. On internal validity, which entails matching the observations in the field with the theory,[153] I have endeavored to relate my fieldwork observations to the theory applied in this research.

Based on the empirical data that I obtained for this research, the external validity of this research is mainly convergent. This is problematic since, as Bryman observes, there is 'tendency to apply case studies and small samples.'[154] I have also tried to discuss whether legal pluralism enhances access to justice and development. However, the ontological grounding of the research is relativism, and the research simply reflects my observations of reality. On trustworthiness, while there can be multiple accounts of social reality,[155] I carried out the research within the stipulated canons of good practice. The context of the research, though unique, I have provided detailed descriptions for easy transferability. All the records pertaining to this research have been properly documented, right from the selection of the research participants, fieldwork notes, interview transcripts and the available analysis decisions, as prescribed by Bryman.[156] I have also acted in good faith as prescribed by Bryman[157], not allowing my personal values or beliefs, or even theoretical groundings to influence the conduct of the research and the findings thereof. While this is an action research, as posited Bryman,[158] I have endeavored to be fair and I believe that the research would be educative to

[151]. Bryman: 390
[152]. Bryman: 390
[153]. Bryman: 390
[154]. Bryman: 390
[155]. Bryman: 390
[156]. Bryman: 392
[157]. Bryman: 392-93
[158]. Bryman: 393

both the participants and other members of the social settings researched. Despite all these efforts, measuring the validity of this qualitative research would still be problematic.

4.6 Limitations

Lastly, I want to address the limitations and frustrations I faced in the process of research, ranging from the ambit of the research, which though focusses on the access to justice, does not cover the Muslims who do not bring their cases to the Kadhis' Courts. Another limitation is the over-reliance of the Kadhis for information rather than archival research through the examination of the court records/cases and observation of proceedings in the open court. Apart from the standard struggles of bureaucracy, I had to make more than two trips to the Courts in order to get an appointment to interview the Kadhis. I found my first week of research excruciatingly difficult, as the Court clerks would attend to the litigants first before giving me hearing. Kadhis would still attend to other matters in between interviews which made the whole process tedious. I had to repeat certain questions. This actually proved to be interesting for the fieldwork as I also witnessed how Kadhis resolve disputes before them. Another drawback is that some of the respondents objected to being recorded during the interviews.

To get an appointment with the Magistrates of the formal courts was even a more tedious process. They were always busy and unwilling to schedule a time for interviews. In the end, I was able to get interview schedules with three Magistrates, including a Deputy Registrar of Kakamega High Court.

Another limitation was that the focus group discussion I organized with the women who had had cases in the Kadhis' Courts, failed. This was due to the sensitive nature of the discussions that evoked emotions, thereby stalling the discussion. The eight Muslim women for the focus group, aged between 22 and 28 years, were all divorced. My cousin, who was to be in charge of the focus group, is herself a divorced Muslim woman in her mid-twenties. According to her, the women were very uncomfortable to talk about their experience since they were still hurting from divorce and other consequences of their cases in these

courts. The focus group collapsed as the women could not be coerced to participate in an event they were not willing to. Therefore, I was not able to gather the experience of the Muslim women with the Kadhis' Courts and their idea of justice. I have tried to remedy this limitation by using Hirsch's study results. Similarly, I could not ask a direct question on access to justice to the Kadhis since that could only be measured by other variables. Lastly, the research perspective of access to justice is only on those who approached the Courts.

4.7 Ethical Considerations

With respect to the understanding that Islamic Law is derived from the divine scriptures of the Islamic religion, I endeavored to be sensitive to their religious sentiments. Also based on the sensitive nature of the offices of my interviewees, while quoting them, confidentiality of the participants will be maintained. To that regard, in the analysis, I research participants become Kadhi A, B, C, D, E and Magistrate E with the letters being constant for each of the Kadhis and Magistrates. I also briefed the participants on the purpose of the research and obtained their informed consent before the interviews. I also explained to the respondents their rights including that participation in the study was voluntary; the information from them would be handled with the integrity it deserves and only to the purported study and the right to discontinue in the study, or the right to withdraw at any time during the study.

5.0 Fieldwork Analysis: Kadhis' Courts' roles in Access to Justice for Muslim Women in Kenya in Personal Law Disputes?

Access to justice, being among the fundamental human rights, is an essential right towards achieving the rule of law. However, more often than not, the poor and the marginalized are mostly excluded from the justice systems especially in developing countries.[159] Despite the right having been entrenched in most

[159]. UNDP. 2016. *Access to Justice and Rule of Law | UNDP*. [ONLINE] Available at: http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus_areas/focus_justice_law.html. [Accessed 12 May 2016].

countries' Bills of Rights, access to justice still remains a commodity that can only be *bought* by the rich.[160] In Kenya, the State having recognized the need for the Muslim minority's right to access justice through a system that respects their culture and religion, has established the Kadhis' Courts in all the forty-seven counties in the country. In order to observe, through the views of the Kadhis, whether or not the existence of the Kadhis' Courts in all parts of Kenya since the new constitution was promulgated in August 2010, have a significance for access to justice to Muslims and especially the Muslim women, I conducted interviews with the Kadhis as their profession exposes them to the different experienced 'realities' on the ground on this subject matter. The interviews give us the 'reality' and 'knowledge' of the working of the Kadhis' Courts, according to the Kadhis. The knowledge we get from these interviews is limited to those areas or stations the Kadhis come from, and may not be representative of the whole country. The Kadhis' Courts are however founded on religious ground, thereby applying standards that may not be similar to the Western notion of justice, equality before law and equal protection from laws. It is also important to note that this research only focused on the parts of access to justice which entails access to the courts and the litigation process, as opposed to whether the laws applicable are just or the judgements delivered are fair, just and enforced. While investigating whether the outcome of the court proceedings was fair and just would be an interesting study, it is beyond the scope of this research. In that, I have also used previous research in the analysis, it is of key interest in this thesis to explore if this study affirms, contradicts or add new knowledge to, in particular, Hirsch's case study findings. Previous research also complemented and assisted my study as I did not have access to archives and court records from these courts besides not the limitation of engaging women who had experience with these courts.

In this chapter, I will first analyze the empirical material through the Council of Europe access to justice indicators, followed by analysis through the Rule of

[160]. UNDP. 2003. *Poverty Reduction and Human Rights*. [ONLINE] Available at: http://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/poverty-reduction-and-human-rights-practice-note/HRPN_%28poverty%29En.pdf. [Accessed 12 May 2016].

Law approach. Lastly, I shall discuss the findings of my analysis, highlighting the interplay between theory and methodology, in the research.

5.1 Analyses through Access to Justice Indicators

In order to examine whether legal pluralism, or more properly, whether the existence of the Kadhis' Courts have contributed to access to justice among Muslim women in Kenya, I have identified key parameters of access to justice, as stipulated by the Council of Europe.[161] I also discuss in the analysis, the contexts, blending it with my methodology, previous research and theories used in this study.

5.1.1 Independent Judiciary

According to the Council of Europe, independent judiciary has been listed as among the parameters for access to justice.[162] According to the United Nations Human Rights Office of the High Commissioner, an independent judiciary entails among others, "the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."[163] According to Duhaime's Law Dictionary, independent judiciary is where, "judges are not subject to pressure and influence, and are free to make impartial decisions based solely on fact and law."[164] One Kadhi had this to say regarding their independence.

---

[161]. 2016. [ONLINE] Available at: http://www.coe.int/t/dghl/cooperation/cepej/events/OnEnParle/A2J_2_Ervasti.pdf. [Accessed 13 April 2016].

[162]. 2016. [ONLINE] Available at: http://www.coe.int/t/dghl/cooperation/cepej/events/OnEnParle/A2J_2_Ervasti.pdf. [Accessed 13 April 2016].

[163]. Basic Principles on the Independence of the Judiciary. 2016. *Basic Principles on the Independence of the Judiciary*. [ONLINE] Available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx. [Accessed 21 April 2016].

[164]. Judicial Independence Definition. 2016. *Judicial Independence Definition*. [ONLINE] Available at: http://www.duhaime.org/LegalDictionary/J/JudicialIndependence.aspx. [Accessed 21 April 2016].

> "These are now the distributions. Each Kadhi or each Magistrate is independent for making his own decisions without inference, without review of the senior one. They don't have that authority. That authority always lies with the higher court."
>
> Kadhi A

According to this Kadhi, he makes decisions as per the principle of independent judiciary where a judge makes his/her own independent decision based on the facts and law. This is however, only Kadhi A's reality, and cannot be regarded as the prevailing condition in all the Kadhis' Courts. Hirsch on the other hand posits that "the Chief Kadhi monitors the decisions and practices of the Kadhis who serve under him."[165] This contradicts the statement by Kadhi A above, who feels that he is independent. This may also be because Hirsch's study was conducted before the new constitution came into effect. That is why it is difficult to make generalizations; all we can affirm is that these are constructed truths of these research participants, based on their circumstances or even how they decide to present them to me. However, the Kadhis too are human and are not immune to err and the Kadhi may have made above statement based on his feelings or particular circumstance that day. It would not be surprising if on another day, the Kadhis gave a different response. It could also be that the practice in this Kadhi's court is different from the court Hirsch observed. Where, due to the Kadhi's own personal preference or for any other reasons, there is miscarriage of justice, the aggrieved party appeals to the High Court. But the High Court, unlike the Kadhis Courts, entails cumbersome procedure, and is also expensive. This may be a hindrance to access to justice to many, owing to the fact that most of the litigants, especially women are mostly poor.[166] Independence can also be viewed through other lenses like the Kadhi is independent from other courts. Another aspect of Islamic law in Kenya is that it is not codified. This may imply that the Kadhi is free to decide the school of thought to use in the judgements (more on the uncodified Islamic law has been discussed later in the chapter). The principle of an independent judiciary falls under the legal approach to access to

[165]. Hirsch: 123
[166]. Kadhi A observed so. I have elaborated later in analysis.

justice, which is the rule of law. However, this does not necessarily mean that there is independent judiciary in the Kadhis' Courts system.

5.1.2 Accessibility of the Courts

Accessibility to the Courts, both physical structure and the Court officials, has also been listed as among the indicators of access to justice. Physical accessibility entails that the courts are located within a geographical location that can be utilized by the litigants or right-bearers. However, having the Court buildings nearer to the users is not enough if the potential litigants do not make use of them. For example, it is not unusual to see that Muslim women are restricted from accessing certain public places by their culture or religion as Hirsch observed that: "On entering the courtyard, Muslim women pull their veils closer and move quickly, treating the Magistrates Courts and offices as public space in which they may be exposed inappropriately."[167] Hence, the legal system should take such factors into consideration to encourage the rights-bearers access the courts. Until recently (2010), there were only eight Kadhis in Kenya, who were supposed to serve 4.3 million Muslims[168], translating to a ratio of one Kadhi for every 615,000 people. However, the new constitution has brought significant changes that may improve the geographical accessibility of these courts according to one Kadhi as demonstrated below.

> "Before the year 2010, we only had seven Kadhis is Kenya, with three stationed in Mombasa. However, the new constitution provided for establishing the Kadhis' Courts in every corner of Kenya and parliament enacted a law for that. We now have Kadhis' Courts in all counties in Kenya, with some Muslim majority counties like Mombasa and Kilifi having more than one Kadhi. Now this means that the courts are accessible to Muslims wherever they live in Kenya. Most women file cases are paupers, if the court was 200km away; will she be able to reach that Court? It is a bit difficult. Now that has improved."
>
> Kadhi B

[167]. Hirsch: 114

[168]. Mraja, M. (2010). *Kadhi's Courts in Kenya: Current Debates on the Harmonized Draft Constitution of Kenya*. In Islam, African Publics and Religious Values. University of Cape Town, 20 March 2010. Cape Town, South Africa: National Research Foundation. 32-38.

The Kadhi above opines that the new changes in the constitution establishing Kadhis' Courts in all corners of the country, has improved accessibility of the courts to the potential users. According to him, this is a progressive change since most court users are mostly poor, and may otherwise not access the courts. While distance which was a hindrance has now been reduced, some counties are very big especially those in Northern Kenya, hence, some court users living far away from the location of the court may still have this problem. So this reality is relative to the location of the court. Another Kadhi expressed similar sentiments as the above.

> "In the constitution, when you look at some parts, we were told that Kadhis were not going to exceed even three, when you look at chapter 170 of the constitution. But recently we see things changing. We have…in every county, we are having Kadhis Courts. Before that Kadhis were only entitled to be listed and to be rotated in coastal region. But now things are changing. Now we have Kadhis everywhere. Because Muslims are also everywhere in the country."
>
> Kadhi C

According to Kadhi C, the existence of the Kadhis' Courts has improved accessibility of the courts to the potential court users. Distance which would have been a hindrance especially to the poor has been reduced. Though as argued earlier, this may still be a major challenge in larger counties in the country. It is equally important to note that Kadhis' Courts are located in the same space, and in some cases, same building as the Magistrates Courts. This may be a hindrance to accessing Kadhis' Courts by Muslim women, as noted by Susan Hirsch. The recognition of these Courts and their existence to all counties of the country has been brought about by legal pluralism. The Kenyan state recognized the peculiar nature of the Muslim minority and their personal law which is very different from those of other communities in Kenya, and initiated the process of establishing the Kadhis' Courts. But the physical Court buildings being nearer to the people is not enough. The government has gone a step further to address this as interpreted by the following Kadhi:

> "We have for example… courts have changed a lot. We have what is called courts users committee (CUC). Here when women come, we just tell them not to be scared, not to feel that they are not wanted. They will be protected by the law. Here I always advise them, that

> when you are being assaulted by your husband, before coming here, just go to the police station. Go and report before coming here. So we have courts users committee. We give them the services… tell them how they are being protected by the law."
>
> Kadhi C

This Kadhi thinks that the court buildings being nearer are not enough. According to him, the introduction of the Court Users Committee (CUC), has improved the accessibilities of these courts especially by women. The CUC is a platform that both encourage Muslim women to avail the courts, as well as educate them on their rights. Another Kadhi also had similar opinion.

> "Every court in Kenya has the CUC. It protects especially the interests of women and those who are vulnerable, even women or children."
>
> Kadhi D

According to this Kadhi, the existence of CUC is a progressive change. However, this may not be entirely a progressive change. Hirsch in her book recounts on how during a consultation between a Kadhi and a complainant who was a woman, the Kadhi counsels her to persevere and remain in marriage for the children's sake even though all love is lost.[169] Going by Hirsch's account, the CUC may actually obstruct access to justice. The existence of the CUC is as a result of the establishments of the Kadhis' Courts in Kenya, indicating the value of legal pluralism. Again, we see how legal pluralism (that resulted in the establishment of Kadhis' Courts), has enhanced access to justice according to these Kadhis. The establishment of the CUC also demonstrates the socio-legal approach to access to justice, where the government may have realized that Muslim women were reluctant to approach the courts, have provided a platform and encourage them to make use of them. The government, having understood the position of Muslim women, based on their culture, had to bridge that gap which according to the Kadhis, was a hindrance to Muslim women accessing these courts. This however, depends on fact and circumstances of particular case, since as discussed above, CUC may also be a hindrance to accessing justice, where the Kadhis discourage women from bringing certain cases to the Court.

[169]. Hirsch: 128

5.1.3 Inexpensive Legal Cost

One of the major barriers to access to justice generally is the expensive legal fees or costs associated with the legal process. This has reduced justice to a commodity that can only be bought by the rich[170], especially in developing countries where the majority of people are often poor or even in developed countries. Attorneys usually charge very high fees, not to mention the costs for filing a case. Even though the Kadhis' Courts are a part of the State judiciary, the legal costs are not very high. Apart from the court fees which has been described as minimal, there are no other mandatory charges as expressed below.

> "Of course there is a court fee before anyone can file a case. The fee is minimal and where a person cannot afford, there is always a way out. For example a clerk or a Kadhi can refer you to the legal aid committee. We don't just turn down anyone who comes to us to seek justice."
>
> Kadhi E

From the illustration above, the Kadhi opines that as opposed to the conventional courts, the Kadhis' Courts are more *humane* regarding how they handle the poor court users. While there are court fees that need to be paid, if a litigant cannot raise it, the court does not ignore them. Instead there is a 'legal aid committee' that assesses the litigants on a case to case basis. While this does not necessarily mean that all deserving cases are exempted from paying court fees, at least the poor litigants are referred to a committee that can hear them. The Advocates Act[171] does not have provisions for legal aid by an advocate; hence, a poor litigant seeking justice from the conventional courts only has hopes in the 'Kituo Cha Sheria'.[172] The court recognizes the social and economic conditions of majority of its users; that the poor court users are heard in a legal aid committee may give some social support to them. This may demonstrate a socio-legal approach to the concept of access to justice, which considers the notion that not

---

[170]. Garth and Cappelletti: 3

[171]. CAP. 16. 2016. *CAP. 16*. [ONLINE] Available at: http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2016. [Accessed 06 May 2016].

[172]. An NGO involved in legal Aid and Legal Empowerment in Kenya. Kituo Cha Sheria – We care for justice. 2016. *Kituo Cha Sheria – We care for justice*. [ONLINE] Available at: http://kituochasheria.or.ke/. [Accessed 06 May 2016].

all litigants may be able to access the courts. There is also another element, litigants usually do not need the attorneys to represent them, if they cannot afford as stated by the Kadhi below.

> "There are those who can afford to hire advocates to represent them… especially in cases involving property… but you can just represent yourself also…"
>
> Kadhi A

According to this Kadhi, it is clear that it is not a requirement that a litigant be represented by an attorney litigant in the Kadhis' Courts, a requirement in the State Courts. This may contribute to people who would otherwise not have access to the courts, to approach the courts in case of disputes. Hirsch's accounts of litigants representing themselves a Kadhis' Courtroom,[173] tend to corroborate with these accounts of this Kadhi. This may also lead to a miscarriage of justice where a poor litigant presents her/himself and his/her opponent is represented by an advocate. The minimal court fee charged by these courts may however be a positive point, as claimed by the Kadhi above, and may help promote access to justice since the burden of court fees will be reduced for many litigants.

5.1.4 Prompt Decisions

Among the major hindrance to access to justice in conventional courts is the delay of the process due to sophisticated court procedure. Civil cases especially can last for several years, which is in accordance to the long-standing legal doctrine of justice delayed is justice denied. However, unlike the conventional courts, the Kadhis' Courts are not courts of records. Similarly, the Kadhis' Courts use simple procedure when hearing cases and judgements are summarily according to this Kadhi.

> "Here we follow simple procedure and we are very friendly to them. We communicate with simple English for the parties to a case to understand… The process is fast, in two to three days the matter can be concluded."
>
> Kadhi A

According to Kadhi A, Kadhi Courts employ simple procedure. Moreover, Kadhis are friendly and communicate with simple English, if need be, for the litigants to

[173]. Hirsh: 195, 198-199.

understand the proceedings. Cases may be concluded within two or three days. On the same note, Magistrate F had this to say:

> "To an extent, I may say no, we cannot. The reason being I am yet to come across any judicial decision rendered by these people. You see, Kadhis are very practical courts. A couple comes fighting. You know, they are intermediaries. Once they that they say that we have agreed, we have set our differences aside, the Kadhi, I presume, will close the file and say that job well done on my part and go home. But for us, when you come to the mainstream, now the ordinary courts, you'll find that even to hear the case there is a fixed procedure. You know having to notify someone of a hearing that I am actually filing papers for divorce, there is a fixed procedure. I don't know however in Islamic law they have a procedure. Just like someone writing a letter to another and hey lets's meet at the judge. And they appear and they talk, they know each other and they go back home. No formality, no nothing. As you had mentioned, common law it is more or less paperless. Paperless know that they use these."
>
> Magistrate F

From the above statement, this Magistrate believes that there are no formalities in the Kadhis' Courts which make them render decisions faster. While these views from a Kadhi and a Magistrate demonstrate that Kadhis' Courts render decisions promptly, they remain their own perspectives and we can never know for sure if this would be the scenario in all cases and in these courts throughout the country. However, delivering decisions promptly is one of the indicators of access to justice according to Council of Europe. These courts being a product of plurality of religion and legal orderings in Kenya, demonstrate how legal pluralism may be enhancing access to justice.

5.1.5 Mediation as Opposed to Adversarial Process

One thing struck me most while carrying out the fieldwork. In the middle of the interview with one of the Kadhis, an aggrieved party to a suit that had been concluded, knocked at the door and was allowed in. With him was the signed agreement, which he protested to be unfair to him. To my surprise, the Kadhi explained that he did not author the agreement; the brothers involved had agreed among themselves on how to divide the property and brought the written agreement to the Kadhi's office to affirm. And as if that was not enough, the

Kadhi advised him to return and sort it out with his brothers and bring back a new agreement agreeable to all of them for the Kadhi to sign. I found this function of the Kadhis' Courts, going by this Kadhi's approach remarkable. Through this Kadhi's approach it seems that these courts are not only interested in the process of the litigation, they are equally interested in the satisfaction of the litigants. This account is in agreement with Hirsch's observation in her book when she recounts: "Even in court, Kadhis encourage disputants to reach a solution before judgement."[174] Hirsch further posits that in mediations, disputants can ask Kadhis questions in order to clear up mishearing or misunderstandings.[175] This is a rare element that may not be in existence in the conventional legal system. It seems as if in the eyes of the Kadhis' Courts, the Kadhi is not a referee in a duel between litigants, where one emerges a winner. Instead, the Kadhi mediates between the disputing parties to ensure satisfaction of both of them. This is also in consonance with the Kadhis' Courts during the colonial period where as I stated earlier, the British courts adopted adversarial approach, where the judge was to act as a referee in a duel between the litigants; Kadhis Courts followed an inquisitorial system where the Kadhi acted as a mediator attempting to reconcile the parties to a dispute.[176] However, based on my ontological standpoint, these may only reflect the experienced 'reality' of these research participants or previous research based on those particular circumstances. I believe that if this be the case - where the Kadhi is mostly interested in the satisfaction of the litigants, while acting as a mediator – reflects the very essence of law to serve man. From this context according to the material and previous research, it seems that Kadhis' Courts – inserted into the Kenyan legal system due to realization of plurality of religion and legal orderings – are contributing towards access to justice since the institution is interested in mediation.

[174]. Hirsch: 128
[175]. Hirsch: 189
[176]. Barakbah, S. A, (1994). Judges and the Judicial Function. *Islamic International University of Malaysia Law Journal* , 4(12), 49-72. At pp. 51.

5.1.6 Public Confidence in the Kadhis' Courts

Another indicator for a system where there is access to justice is the public confidence in the courts. Public confidence is reflected by the people resorting to the courts to resolve their disputes. Public apathy on the other hand reflects lack of interest and lack of confidence with the courts. The Kadhis' Courts however, have been popular, especially with the women, according to the Kadhis quoted below:

> "About eighty percent of the clients are women. Women are the court movers. I believe that they are the majority because they have faith with the court system."
>
> Kadhi A

According to Kadhi A, about eighty percent of the court users are women. According to this Kadhi, women have faith in these Courts. Another Kadhi with a concurring opinion had this to say:

> "In general, all those who come to the court are heard, and fair decisions given. About seventy percent of the complainants are women. They also have a right to appeal. They (women) are mostly satisfied. Women are entitled to so many rights in the Quran; they come to Court when they are aggrieved."
>
> Kadhi C

According to Kadhi C, women have many entitlements from the Quran and they always turn to Court for reinforcements of these rights, whenever they are aggrieved. And in most cases, according to him, they are mostly satisfied. While this Kadhi thinks that the women are satisfied, does not necessarily mean that the women are satisfied. The women may have a different opinion on this and therefore it is not representative of the women's thoughts or experience. Another Kadhi had similar thoughts as quoted below.

> "No special measures are in place for women. But since most of the clients are women, it means that they have confidence in the Courts. Men call Kadhis as *Kadhis for women*. Drawback – many women are illiterate, poor. Slow speed of justice was a hindrance, but not anymore."
>
> Kadhi D (Emphasis in original)

From the above quote, we can infer that according to Kadhi D, the people, especially Muslim women, have confidence in the courts. Previous research

findings by Hirsch corroborate with the accounts of these Kadhis. From Hirsch's observation, women hardly lose cases in the Kadhis' Courts.[177] According to the observations by these Kadhis and previous research, women have confidence in these Courts, which contradicts the perception people may have on Islam which is seen as oppressive to women. It is even more interesting to see that men refer to Kadhis as, "*Kadhis for women*." This may also suggest bias of the Kadhis in favor of women, partly because they are in conflict with other Muslim men for authority, as Hirsch suggests.[178] This may lead to men's lack of confidence in the courts. I believe that in order to have harmony, the courts must strive to be impartial when rendering judgements before them. The satisfaction of the women, according to these Kadhis and Hirsch's observations, reflects how Kadhis' Courts, created to cater for Muslim minority in Kenya as a result of religious pluralism, may enhance access to justice for Muslim women. The Council of Europe has enumerated public confidence as one of the indicators of access to justice.[179]

5.1.7 Public Interest in the cases Before the Courts

The Kadhis' Courts in Kenya have traditionally operated outside the purview of the public. That is part of the reason its inclusion into the new constitution of Kenya was a contentious issue between Muslims and Christians in Kenya. However, sometime November 2015, a judgement from Mombasa Kadhis' Courts attracted a lot of public interest and media coverage. In the said case, the court had ordered a woman who had separated from her husband of twelve years to marry another man, to return back to her first marriage. The couple was also forbidden from sleeping together for some time until it is established whether or not the woman had conceived from her second marriage which the court had dissolved.[180] The Kadhi, while annulling her second marriage, accused the woman

---

[177]. Hirsch: 127

[178]. Hirsch: 126 says that: "…women win cases in part because Kadhis are in conflict with other men for authority."

[179]. . [ONLINE] Available at: http://www.coe.int/t/dghl/cooperation/cepej/events/OnEnParle/A2J_2_Ervasti.pdf. [Accessed 13 April 2016].

[180]. Standard Digital News - Kenya: Mombasa court orders couple be reunited but forbids sex . 2016. *Standard Digital News - Kenya : Mombasa court orders couple be reunited but forbids sex* .

(Rehema Dzuya) of entering into a void marriage with Rashid Karisa.[181] The woman had falsely presented herself to a Muslim official, claiming to be a virgin. The Kadhi, in his ruling ascertained that although "two human beings cannot be forced to live together", it is not fair for a man to be forced to divorce a woman he still loves.[182] The case elicited interesting debates among Kenyans both who profess Islam and non-Muslim. This judgement is partly in consonance with Hirsch's observations in a Kadhi Courtroom observation where the Kadhi counsels a woman not to divorce her husband even though the woman in question no longer loves her husband.[183] While these illustrations may also depict how Islam treats women as their husbands' 'property', these cases are not representative of the whole country. This particular case shows that cases in Kadhis' Courts can attract public interest. But this cannot be attributed to all other cases in the Kadhis' Courts as many cases go unnoticed by the media. This may also indicate access to justice as public interest in the cases before the courts has equally been listed as among the indicators of access to justice by the Council of Europe. I shall now explore the Rule of Law approach to access to justice.

5.2 Analysis through the Rule of Law approach

In this section, I will analyze my empirical data through the Rule of Law approach being one of the approaches to access to justice. Dicey posits that the rule of law exists where every man or woman, irrespective of their rank or position, is equal before law and that there is an established procedure followed to punish all those who breach the law.[184] By 'Rule of Law' I mean the provisions of the constitution that give life to the Kadhis' Courts.

[ONLINE] Available at: http://www.standardmedia.co.ke/article/2000182764/mombasa-court-orders-couple-be-reunited-but-forbids-sex. [Accessed 25 April 2016].

[181]. Standard Digital News - Kenya : Mombasa court orders couple be reunited but forbids sex . 2016. *Standard Digital News - Kenya : Mombasa court orders couple be reunited but forbids sex* . [ONLINE] Available at: http://www.standardmedia.co.ke/article/2000182764/mombasa-court-orders-couple-be-reunited-but-forbids-sex. [Accessed 25 April 2016].

[182]. Ibid

[183]. Hirsch: 128

[184]. Dicey, A. V., (1915). *Introduction to the Study of the Law of the Constitution*. 8th ed. London: Macmillan. At pp. 110

5.2.1 Legal Recognition

The Kadhis Courts were entrenched in the constitution of Kenya at independence and have been in existence since. However, they were regarded as inferior by their conventional courts counterparts. The Kadhis were not properly remunerated, and were under scrutiny from the State. However, with the promulgation of the new constitution in the year 2010, the status of the courts has been promoted to the same level as their conventional counterparts, the Magistrates Courts, as affirmed by this Kadhi.

> "The Kadhis' Court basically in Kenya is a subordinate court, or is a lower court. In our constitution, what we have is the Supreme Court, the Court of Appeals and the High Courts as superior courts. Now the rest is termed as the lower courts. Or maybe the subordinate court in other words. Nowadays the 'subordinate court' is a bit of taboo, people don't use. (…)
>
> The reason why they are termed as subordinate, because they are subordinate to the higher courts; to the authority of the higher courts; to the supervision of the higher courts. One of the roles of the High Court is to supervise the lower courts. So the lower courts, we have the Kadhis' Courts, the magistrates court, court martial, tribunals." (…)
>
> "The Muslim Law in Kenya is State law, so Sharia laws are part of the State laws. Kadhis sit with the judges on appeal from a Kadhis Court, and Kadhis are judges of equal cadre to the Magistrates."
>
> Kadhi A

According to this Kadhi, the Kadhis' Courts are now at par with their conventional counterparts – the Magistrates Courts – as lower courts of the Kenyan judiciary. Another Kadhi had similar position quoted below:

> "We are together as a branch family. We are judicial officials and magistrates are also judicial officers. So we are just the same. Because we also have our cadres, from chief Kadhi, you go to senior principal Kadhi to principal, like that. I am Kadhi 2. Just recently employed. Kadhi 2 from that you got to Kadhi 1. But recently, we have been told, they want to change. So that we resemble the magistrate cadres. So you begin from resident Kadhi to senior, like that to principal chief Kadhi. Which is good. Other than Kadhi 2, Kadhi 1. Kadhi 2 you go to resident like that. Now they want to harmonize it."
>
> Kadhi B

According to this Kadhi, Kadhis feel recognized just like the magistrates as judicial officers. He suggests that the process is on to harmonize the cadres of the

Kadhis to be similar to those of Magistrates. Another Kadhi with concurrent views had this to say:

> "Before the new constitution, we were having differences, but nowadays things are just the same, because a Kadhi is being recognized as a judicial officer. But before the current constitution, things were very different to an extent that Kadhis' Courts were even lacking spaces in courts. But now Kadhis are being recognized as judicial officers. We can demand to be given our rights in the court, and privileges like vehicles. Before that Kadhi was just seen as a religious leader. But nowadays, we have been recognized as judicial officers."
>
> Kadhi D

According to this Kadhi, before the new constitution, the Kadhis were treated differently from officers of the conventional courts. However, according to him, with the passing of the new constitution that has changed. The problems they faced ranging from lack of office and court space, to remuneration has now been sorted. This is equally supported by Hirsch's previous research where she narrates that the Kadhis' Court offices only occupied less than half of one side of the square.[185] While the Kadhi was initially seen as a religious leader, this Kadhi thinks that this has changed and the Kadhis are now viewed as judicial officers. Another Kadhi who shared the sentiments above posited as follows:

> "Before the new constitution, the Kadhis' Courts were inferior to the conventional Courts. We have now been at per with the Magistrates for the past five to six years."
>
> Kadhi E

This Kadhi thinks that before the new constitution, Kadhis' Courts were viewed as inferior to the conventional Courts but the situation changed with the coming in force of the new constitution. Another Kadhi with related thoughts affirmed as below:

> "There is a better understanding now. Kadhis feel they are important now since they derive their authority from the Constitution. Initially, they were regarded as quasi-judicial officers. Islamic law jurisprudence is being developed through judgements. Judgements are not recorded, laws not compiled and disseminated. Kadhis' Courts are not Courts of Record."
>
> Kadhi C

From the above illustrations, there is a high degree of agreement on this among Kadhis. All interviewed Kadhis experienced improvements after the coming into

[185]. Hirsch: 113

effect of the new constitution, considerably boosting the morale of the Kadhis. They now feel that they are at par with their Magistrates counterparts. This seems to have boosted the confidence of the Kadhis, which may enable them to discharge their duties effectively. The Kadhis being remunerated with perks consonant to the Magistrates may mean that they are not susceptible to corruption. However, this cannot be said to be representative of the picture for the whole country since they only represent the sentiments of the Kadhis interviewed. All the same if that were the case, then we can argue that the constitutional recognition of the Kadhis' Courts has affected access to justice positively because the Kadhis have acknowledged improvements in their jobs. The perspectives reflected above may epitomize the 'Rule of Law' approach to the concept of access to justice where equals are expected to be treated as equals. According to these accounts, no preferential treatments are accorded to either side of judiciary; hence Kadhis' Courts are treated as equal to the Magistrates Courts.

5.2.2 Limited Jurisdiction by the Constitution

While the constitution has largely been progressive when it comes to enumerating provisions of the Kadhis' Courts, with it comes certain limitations to access to justice through these courts. Article 170(5) of the Constitution of Kenya reads as follows:

> (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 proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhis' courts."[186]

From the above, two contentious issues have arisen, at least in my interaction with the Kadhis. The first issue regards the definition of what is 'personal status', whether it means divorce, maintenance or inheritance, or whether the three are part of the 'personal status.' One Kadhi had this to say:

---

[186]. Kenya Law Reports. 2010. *The Constitution of Kenya*. [ONLINE] Available at: http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010#KE/CON/Const2010/chap_10. [Accessed 25 April 2016].

> Art. 170(5) I contest the provision where both parties submit to the Kadhis Courts. In my opinion, the defendant should not have a choice.
>
> Kadhi D

From this Kadhi's perspective, the defendant should not have an option as regards submission to the Kadhis' Courts. Another Kadhi with similar sentiments had this to say:

> "Section five of Article 170 of the constitution undermines the justice system. Because you cannot claim that I will go to a court, subject that my colleague accepts. You know that? We are going to the court when we agree. These are family matters, normally the defendants run away from the justice. The courts cannot compel you to appear before it after the matter is not resolved. It is just enough to say that I am not submitting and then the case dies there. That one is a retrogressive aspect in my view. For one, it affects the faith people have in the court. Secondly, it affects the parties themselves, financially and also by time consumption. It is costly, probably you know, and then after all you are told no, no, you have to wait for another court. Maybe this matter is a matter that involves a number of things. This woman wants for example maintenance for herself. Or she wants a dowry for herself. She files a suit for her dowry. Or for a succession matter. And then this man says no, I don't have faith in this court. And they have no reason, they haven't a satisfactory reason. His objective is to frustrate this woman or the man or whoever. We find it a bit retrogressive and it defeats the objective or essence of accessibility to justice. Now there are various ways. Maybe the only court available there is only Kadhis Court? We have many of them in this part of the country. At a certain juncture, now a man could say look woman, you want us to provide a service for the boy. No me I don't submit to the Kadhis court. The conventional court is 200km away. This is a poor woman. Perhaps most of time those who file cases are paupers. Now will she able to reach that court? It is a bit difficult. Now this area we find a retrogressive development. […] "It is retrogressive because, under ordinary circumstances, if any party is not happy with how a court of law is handling the case, they are always at the liberty to challenge the court. That is what we have already. Every client is there to say that we don't have faith in this judge – not as a court – because of A, B, C, D. Then the court will consider that, to either put up him- or her in the court or withdraw the case. Or you can go to the higher court and say that look, I don't have faith in this court because of A, B, C, D. The court will evaluate that and then decide accordingly. But you must give reasons, valid reasons. Otherwise that one is a joke and an attack to the reputation of the court, which we must protect."
>
> Kadhi A

According to this Kadhi, the 'submitting' clause can be a hindrance to access to justice. Another issue is that of jurisdiction. Family law generally entails matters of divorce, maintenance, succession, children's custody, and burial rights among others. This Kadhi thinks that the constitution has taken away certain jurisdictions of the Kadhis' Courts. According to another Kadhi, other barriers to access to justice through the Kadhis' Courts have been brought by the new changes to the Matrimonial Property Act[187], a concept that is not in Shar'ia law. The Kadhis' had these to say:

> "Matrimonial property is a challenge, on whether a divorcee woman is entitled to it. Borrowed from West and adopted as laws of Kenya. It is not included in the Islamic law. But we have alimony, compensation in succession – a widow is entitled to a portion of the entire property (one-eighth)."
>
> Kadhi C

According to Kadhi C, changes brought about by the national legislation may be barrier to access to justice through the Kadhis' Courts. Pertinent among them is the issue of the matrimonial property that is not covered by Shar'ia laws.

5.2.3 A Woman cannot be a Kadhi

This takes us to the next issue that may be a barrier to access to justice in the Kadhis' Courts – a woman cannot be a Kadhi. With exception of one Kadhi, the rest observed that a woman cannot be a Kadhi.

> Yes, a woman can be anything except from being a prophet. According to the Quran, all prophets were men. Elsewhere there are women Kadhis like in Egypt, Sudan, and Malaysia."
>
> Kadhi D

Only Kadhi D believes that a woman can be anything, including being a Kadhi. The only exception is that a woman cannot be a prophet. A justice system that embraces gender equality among its officers may easily inspire public confidence. Other Kadhis answered the question in the dissenting. Here are a few excerpts:

---

[187]. Kenya Law Reports. 2013. *Act Title: MATRIMONIAL PROPERTY* . [ONLINE] Available at: http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2049%20of%202013. [Accessed 25 April 2016].

> "No, a woman cannot be a Kadhi. Preponderant opinion – they *cannot*. Only Ahmed Hambali reports so. A woman cannot give consent to marriage, hence cannot annul a marriage. But can officiate on matters on inheritance."
>
> Kadhi C

Kadhi C believes that women cannot be appointed as Kadhis since they cannot give consent to marriage, nor can they annul it. Three other Kadhis also had similar opinion. According to these Kadhis, in Kenya, a woman cannot be a Kadhi. One Kadhi explained that in Kenya, Kadhis perform both legal and religious duties, some of which a woman cannot preside over. Therefore, a woman cannot be a Kadhi in Kenya. While the judgements have largely been favorably to women, it would be reasonable if women were appointed as Kadhis. However, it is important to note that Kadhis' Courts are a creation of religion which certain sets of beliefs, among them, that women cannot consent to, or annul a marriage. Therefore, when investigating whether there is access to justice, we should have their 'reality' in mind. Applying a uniform standard prevailing in Western democracies to an Islamic Court, operating in a different context in different circumstances may itself be an 'injustice'. The existence of these Islamic Courts in Kenya as formal courts alongside conventional courts portrays legal pluralism in action in Kenya. The intention of this thesis was not to investigate whether Islamic laws are fair, or whether the concept of equality and equal protection from law exists within the Shar'ia legal framework. Rather, the goal was to examine whether the Kadhis' Court system can provide an avenue for Muslim women to access justice.5.2.4 Law as a Command from God

While the Quran does not define justice and access to justice, several ayats demonstrate that justice is the foundation of the Quranic faith. The following ayats sum it up as follows:

> "You who believe! Be upholders of justice, bearing witness for Allah alone, even against yourselves or your parents and relatives. Whether they are rich or poor, Allah is well able to look after them. Do not follow your own desires and deviate from the truth. If you twist or turn away, Allah is aware of what you do. (Surat an-Nisa', 135)
>
> Among those We have created there is a community who guide by the Truth and act justly according to it**.** (Surat al-A'raf, 181)
>
> … if you do judge, judge between them justly. Allah loves the just**.** (Surat al-Maida, 42)

> You who believe**!** show integrity for the sake of Allah, bearing witness with justice. Do not let hatred for a people incite you into not being just. Be just. That is closer to taqwa**.** Fear [and respect] Allah. Allah is aware of what you do. (Surat al-Maida, 8)
> Every nation has a Messenger and when their Messenger comes everything is decided between them justly**.** They are not wronged. (Surah Yunus, 47)"[188]

Another Kadhi had this to say regarding Sha'ria.

> "First of all, Sharia law does not change. Sharia is law promulgated by God; probably you know that kind of law. This is a law which is permanent. But there are of course in each and every legal system evolvements."
>
> Kadhi A

From this Kadhi's observation, Shar'ia is law promulgated by God and is permanent. The religious book, the Quran has also been quoted to grant women many rights by one Kadhi as below:

> "…Women are entitled to so many rights in the Quran; they come to Court when they are aggrieved."
>
> Kadhi C

This is a reflection of the theological approach to justice. Law as command from God is equally reflected from in Coulson's remark that: "Law is the command of God; and the acknowledged function of Muslim jurisprudence, from the beginning, was simply the discovery of the terms of that command"[189], aptly captures the very essence of *Shar'ia.* It is therefore important to understand that Islamic law derives its authority from Islamic faith; hence the concept of access to justice through this law may differ from the Western approach due to different social context. Justice through these courts is what Weber refers to as 'Khadi justice'.

5.2.5 Islamic Jurisprudence in Kenya

Another interesting observation from my research was that all the Kadhis I interviewed had at least their first legal training abroad. Unlike during the reign of the Sultan where Kadhis along the Kenyan Coast were appointed from the famous

[188]. Verses in the Qur'an about justice. 2016. *Verses in the Qur'an about justice*. [ONLINE] Available at: http://www.harunyahya.com/en/Articles/17228/verses-in-the-quran-about. [Accessed 20 April 2016].

[189] . Coulson, N. J, 1964. *A History of Islamic Law*. 1st ed. Edinburgh: Edinburgh University Press. Pp 75. Hereinafter referred to as Coulson.

families like the Mazrui and the Maawi[190], Kadhis' Courts are now a part of the formal courts in Kenya, with the Kadhis appointed on a competitive basis, based on their qualifications. We cannot talk about the Islamic Law in Kenya without touching on the Islamic jurisprudence. Firstly, fiqh, as already described earlier in this thesis, literally translates to knowledge or comprehension, hence in the Islamic law context; it means the knowledge and comprehension of the laws that guide Muslims in their day to day life, as stipulated by the Quran and the Sunna. While Sharia is the divine law, fiqh is the interpretation and application of Sharia.[191] The point of departure in discussing fiqh in Kenya is to ask whether the Islamic jurisprudence or fiqh prevalent in Kenya is a local creation or borrowed from abroad. With all the Kadhis who were my research participants having received their Islamic Law education abroad, the implication would be that the jurisprudence practiced has its foundation from abroad. Of course certain factors that may come into play like urf[192], when determining cases in the Kadhis' Courts, may have to be the local practices. According to these Kadhis, there is no institution for training Muslims on Islamic Law in Kenya. Going by their assertion, it seems that the fiqh in Kenya is borrowed from where respective Kadhi studied, as they studied in different countries including Egypt, Pakistan, Saudi Arabia and Kuwait. From these accounts, we can derive existence of pluralism even within the Islamic Law in Kenya itself. One Kadhi even had a comparative study of Islamic Law. This is what he said:

> "My educational background has been a comparative Islamic Law. …After that I proceeded to an Islamic university in Pakistan, Islamabad, named International Islamic University, which offers a comparative legal education. (…) The sources of Islamic law, as a point of reference for Kadhis that is what the law, both the constitution and the Kadhis Courts Act, provides for, that the law that should be applied is the Islamic law. The Kadhis as specialists in Islamic law use both primary and secondary sources of Islamic law. The primary sources …We are not very much subjected to only one school of thought. We are

[190]. Pouwels, L.R, 1987. *HORN AND CRESCENT: Cultural change and traditional Islam on the East African coast, 800-1900*. 1st ed. Cambridge: Cambridge University Press. At pp. 17.
[191]. Taman, S, (2014). An Introduction to Islamic Law. *European Journal of Law Reform* , 16(2), 221-246. At pp. 226. Hereinafter referred to as Taman.
[192]. Already defined in literature review. The prevailing local culture that is also referred to as a source of Islamic Law.

> liberal in our reasoning. We are accommodative of each view depending on the circumstances of the case before us. Any view that suits the circumstances and could reach, in our view, achieve justice. That is what we implore."
>
> Kadhi A

This Kadhi trained in comparative Islamic law, when making judgements, uses the school of thought that he thinks will serve justice. Another Kadhi had this to say regarding which school of thought he refers to when making judgement:

> When we practice in the Kadhis' Courts, we normally almost use four schools of thought. We have Shaffi. We have Malik. We have also Hanba. We have also had Hannifi. But in East Africa we normally use Shaffi other than the other one. It is more popular. But in Kadhis' Court we are even allowed to take their teaching, if it is related to what we are going to do, let's say if it is on judgement. We can just take any of the four if it relates with the Prophet's teaching. Sometimes they differ in understandings. Shaffi, Malik, Hanba, Hannifi.
>
> Kadhi B

This Kadhi equally applies the teachings from any of the four schools of thoughts in Islam when making judgements. Another Kadhi had this to say:

> East Africa belongs to Imam Shaffi School of Thought (Madhab – Madhehebu). Other schools of thought also included when making judgements: Hanafi, Hambali, Maliki. (Sunnis) I also refer to Shi'a schools of thoughts sometimes when making judgements.
>
> Kadhi C

From these illustrations, according to these Kadhis, they employ various schools of thoughts while making judgements. It seems that there is pluralism even within the Kadhis' Courts. Another peculiar feature at least according to these Kadhis is that they decide to apply the teachings from a school of thought that would best serve justice. If this be the case, it is a contribution to access to justice since the Kadhi would not be bound to use specific school of thought. Rather, he would make use of the one which according to him would serve justice the most. However, these accounts are only true and a reality of these Kadhis interviewed and may not necessarily reflect the picture in the country at large.

While the above discussion on the Islamic jurisprudence may be a positive development, it may also hamper the development of Kenyan Islamic jurisprudence in Kenya. One thing that may arise is lack of consistency in judgements delivered by the Kadhis as deplored by this Kadhi:

> "We have had Kadhis' Courts along the Kenyan Coast for more than 200 years; we still do not have our own Kenyan Islamic jurisprudence. We rely on what we get from abroad since now all Kadhis are appointed on merit. Each Kadhi applies the school of thought he believes can help serve justice. So different courts render even conflicting judgements. But that can be resolved if the government establishes Islamic university where Islamic jurists can help develop our jurisprudence as is the case in Sudan and Egypt."
>
> Kadhi D

According to this Kadhi, development of Islamic education in Kenya, including an Islamic University, would enable the jurists to develop Kenyan Islamic jurisprudence. The lack of demarcation between religious and legal duties where a Kadhi performs both the functions may also be due to lack of established jurisprudence or proper Islamic education. This trend where every Kadhi can render a judgement that differs from the rest due to different schools of thought in Islam being applied in the judgment may be a negative development to access to justice. Council of Europe has listed 'uniform law applicable to all people' as one of the indicators of access to justice. However, it still reflects on the general theme of legal pluralism in Kenya where even within the Kadhis' Courts exists pluralism.

5.2.6 Uncodified Islamic Law in Kenya

Islamic Law in Kenya is not codified. Instead it is upon the Kadhis to find out where the law is, when a matter is before them for determination. One Kadhi had this to say regarding this.

> "Even Zambia has something like that. There are quite a number of countries that I know in the world which apply the same system. Some of these countries have codified law. For us, it is blanket. What we have is a blanket one. We are told Kadhis are mandated to apply Sharia law in this area. It is up to you to find out where the law is. There is no good education. There is no specific law to be found. It is a bit difficult area. The Kadhis have to look around. Even the judges, on the matters that go for an appeal, even the matters that originate at the high court. That is possible to open that."
>
> Kadhi A

According to this Kadhi, Islamic law in Kenya is not only uncodified, it is also upon the Kadhi to look for where the law is. This Kadhi further bemoans that there is lack of good education. This problem may affect the application of

Islamic law even in the appeals as the judges of the conventional courts are equally not learned in Shar'ia. Non-codification of Islamic law may also be a factor for non-application of uniform Islamic laws in Kenya. Lack of codification of law may lead to miscarriage of justice in cases where the Kadhi presiding over a case is not aware of an existing legal principle over the matter before him. The non-application of uniform law also goes against 'uniform law applicable to all people' discussed above, which one of the indicators of access to justice according to Council of Europe and a long-standing legal principle. On the other hand, the uncodified Islamic law in Kenya could be a blessing in disguise as Kadhis' Courts mostly resort to mediation when resolving disputes. In mediation, the parties reach a conclusion agreeable to both of them, hence it may imply win-win situation.

5.3 Summary of the Findings

From the analysis above, we can infer that the new Constitution of Kenya, 2010 has greatly improved the position of the Kadhis' Courts. This has enhanced access to justice through courts especially to Muslim women. The 'enhancement' has been demonstrated through accessibility to the courts, inexpensive legal costs, confidence in the courts, albeit from women, mediation as a resort for settling disputes and decisions made promptly and public interest in the cases and rulings by Kadhis. The theory of access to justice is aptly captured through these indicators. Some indicators such as inexpensive legal costs, resolving conflicts through mediation, the Court Users Committee (CUC), public confidence in the courts and simple court procedures may not be applicable to the State Courts. Majority of Kadhis' Courts movers are women who seldom lose cases before these courts. It may also be that women mostly bring cases they think will have greater chances of success, hence success rates in courts may not give the exact picture. Here we see how the existence of the Kadhis' Courts in catering for the Muslim minority as recognized by Kenyan State Law demonstrates the advantage of embracing legal pluralism.

Other findings from this study include: women cannot be Kadhis; Islamic law in Kenya is uncodified and lack of Islamic jurisprudence in Kenya. While there are women Kadhis in other countries including neighboring Sudan and Egypt, which is not the case in Kenya. However, the distinction between these countries and Kenya is based on the functions of the Kadhis. While in these countries, Kadhis exclusively perform legal duties, in Kenya, Kadhis perform both legal and religious roles. In Islam, women cannot perform certain religious functions, hence their exclusion from being a Kadhi in Kenya. Despite this barrier, women still seem to have confidence in these courts and mostly win cases before them, enforcement of these judgements being a different thing altogether. Another observation from the analysis that Kenyan Islamic law is not codified. That different schools of thought are used by different Kadhis while making decisions, hence no uniformity in the application of law. This goes against one of the indicators of access to justice that says, 'uniform law applicable to all people.' On the other hand, it may also be a positive element or may have less effect since we have also observed that Kadhis encourage litigants to resolve their disputes through mediation. The very possibility of Kadhis using different schools of thought while making judgements is itself an example of pluralism even within the Islamic legal system in Kenya. Again these reflect the ontological and epistemological standpoints of this study where as to which school of Islamic law will best serve justice in a particular case, entirely depends on the Kadhi's perspective.

From the above discussions, we can argue that legal pluralism through Kadhis' Courts has enhanced access to justice especially to Muslim women who are the majority of court users. This enhancement has been attributed to the factors enumerated above. The greatest contribution of legal pluralism towards accessing justice, in my estimation as an observer in the field, is the accessibility of the Kadhis' Courts. Prompt decision making of these courts as well as women mostly getting favorable decisions are equally an improvement to access to justice. Prompt decisions may equally imply that the time that the women would otherwise be spending visiting the courts may now be utilized in economic

activities. Research in access to justice suggests that existence of the right of access to justice equally contribute to accessing other human rights. When this happens, an individual's capacity is enhanced. Going by Sen's definition of development that, "development must be understood as a process for expanding real freedoms enjoyed by individuals,"[193] this enhancement of an individual's capacity is itself development. Hence, access to justice can be seen both as a means to an end and an end. Therefore, from this thesis, we can derive that legal pluralism, access to justice and development is the three sides of the 'golden triangle'.

6.0 Conclusion

In conclusion, from this study entitled: "Kadhis' Courts in Kenya: Towards Enhancing Access to Justice and Beyond", we have observed that Kadhis' Courts plays a role that is of importance to access to justice especially to Muslim women. Kadhis' Courts are formal courts recognized by the State to cater for the Muslim minorities. Therefore, Kadhis' Courts were created due to religious pluralism in Kenya. Their existence in the Kenyan legal system is an example of legal pluralism. Besides the accessibility of the courts, we have equally observed that the Kadhis portray themselves as friendly and approachable. Disputes are resolved faster due to less complicated court procedures in the Kadhis, and the costs are usually inexpensive. These may suggest that Kadhis' Courts have contributed to access to justice to the Muslim population in Kenya, where the formal courts may not be accessed either due to geographical disadvantage or culture. However, these courts equally have some drawbacks key among them: lack of developed Islamic jurisprudence in Kenya, probably due to non-existence Islamic law education in Kenya; uncodified Islamic law and that the Kadhis double as both legal and religious officers. Uncodified Islamic law is both an advantage and a disadvantage as it suggests that Kadhis have freedom of choosing the school of thought of Islamic law that would best serve justice based on facts and circumstances of the case, while it denies development of Islamic law

[193]. Sen: 2

jurisprudence. Kadhis do not have enforcement authority for their decisions, even if the decisions were favorable to women. Since both the parties to a case should voluntarily submit to these courts, it hints that a case would collapse should the opponent refuse to submit to these courts authority. That would be a blow to access to justice. Despite these drawbacks, this research as well as previous research point to the observations that these courts which are an illustration of legal pluralism have enhanced access to justice particularly to Muslim women. Access to justice might subsequently lead to enjoyments of other fundamental rights, hence leading to development. Access to justice has been demonstrated both as a 'means to and end and an end itself.' But these observations are only based on the perspectives of the Kadhis and Magistrates. Further research to focus on the experiences of Muslim women with these courts would suffice as it would either affirm or compliment these findings. Another area that would be interesting is an empirical study to determine whether there is a correlation between these women's accessing the courts and their development.

Appendix 1: Map of Kenya

Source: Maps of the World online.

From this map, the four cities I conducted my research from, Mombasa, Malindi, Kisumu and Kakamega can be seen.

NB: The author was born in Kakamega.

Bibliography

2016. [ONLINE] Available at: http://www.coe.int/t/dghl/cooperation/cepej/events/OnEnParle/A2J_2_Ervasti.pdf. [Accessed 13 April 2016].

A/RES/47/135. *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*. 2016. A/RES/47/135. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. [ONLINE] Available at: http://www.un.org/documents/ga/res/47/a47r135.htm. [Accessed 13 April 2016].

Abdal-Haqq, I, (1996). Islamic Law: An Overview of its Origins and Elements. Islamic Law and Culture, 1(1), 1-60.

Accompanying note to the conference organized by Avocats Sans Frontières HOW ACCESS TO JUSTICE CAN REDUCE POVERTY.

Ali, S. (2000). *Gender and Human Rights in Islam: Historical Roots of a Modern Debate.* New Haven & London: Yale University Press.

Ayres, l (2008), '*Semi-Structured Interview'*, in LM Given (ed.), The Sage Encyclopedia of Qualitative Research Methods, Sage Publications, Inc., Thousand Oaks, Ca, pp. 811-3, viewed 28 march 2016, DOI: http://dx.doi.org.ludwig.lub.lu.se/10.4135/9781412963909.n420

Banakar, R. (2015) *Normativity in Legal Sociology. Methodological Reflections on Law and Regulation in Late Modernity.* Cham: Springer International Publishing.

Barakbah, S. A, (1994). "Judges and the Judicial Function. Islamic*" International University of Malaysia Law Journal*, 4(12), 49-72.

Barnes, B. and Bloor, D. (1982). Relativism, Rationalism, and the Sociology of Knowledge. In *Rationality and Relativism*, eds. Martin Hollis and Stephen Lukes, 21-47. Cambridge, MA: MIT Press.

Barzilai, Gad, 2008. *Beyond Relativism: Where is Political Power in Legal Pluralism?* Theoretical Inquiries in Law, 9 (2), 395-96.

Basic Principles on the Independence of the Judiciary. 2016. Basic Principles on the Independence of the Judiciary. [ONLINE] Available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx. [Accessed 21 April 2016].

Basic Principles on the Independence of the Judiciary. 2016. *Basic Principles on the Independence of the Judiciary*. [ONLINE] Available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx. [Accessed 21 April 2016].

Belton K. Rachel. (2005). *Competing definitions of Rule of Law-Rule of law* series No 55 January 2005.Washington: Carnegie Endowment for International Peace.

Berger, P. L., & Luckmann, T. (1966). *The Social Construction of Reality*. 1st ed. London: Penguin Group.

Bryman, A, (2012). *Social Research Methods*. 4th ed. Oxford: Oxford University Press.

Burton, J, (1990). *THE SOURCES OF ISLAMIC LAW Islamic theories of abrogation*. 1st ed. Edinburgh: Edinburgh University Press.

Burton, j, (1990). The Sources of Islamic Law. Islamic Theories of Abrogation. Edinburgh: Edinburgh University Press.

Buscaglia, E. (1996), "Introduction to Law and Economics of Development," Law and Economics of Development, New Jersey: JAI Press.

Caplen, A., and Mcllroy, D. (2001). *"Speaking Up" – Defending and Delivering Access to Justice* Today. Accessed online..At. . 2016. [ONLINE] Available at: http://www.theosthinktank.co.uk/files/files/Speaking%20up%20final.pdf. [Accessed 25 April 2016].

Cappalletti, M., and Garth, B. (1978). *Access to Justice – A World Survey*. Sijthoff and Noordhoff.

Cappelletti, General Report, in FUNDAMENTAL, GUARANTEES OF THE PARTIES IN CIVIL LITIGATION 659, 726-40 (Milan/Dobbs Ferry, N.Y.: Giuffr6/Oceana; M. Cappelletti & D. Tallon eds. 1973).

Chesworth, J, (2010). *Kadhi's Courts in Kenya: Reactions and Responses.* In Islam, African Publics and Religious Values. University of Cape Town, 20 March 2010. Cape Town, South Africa: National Research Foundation. 3-17.

Cotran, E (1968) "*Integration of the Courts and Customary Law in Kenya*." East African Law Journal 4, 14-20.

Coulson, N. J, (1964). *A History of Islamic Law*. Edinburgh: Edinburgh University Press.

Cussac, A, (2008).*"Muslims and Politics in Kenya: The Issue of the Kadhis' Courts in the Constitution Review Process"*. Journal of Muslim Minority Affairs, 28 (2), 289-302.

Education | Sociology of Law Department. 2016. Education | Sociology of Law Department. [ONLINE] Available at: http://www.soclaw.lu.se/en/education. [Accessed 20 April 2016].

European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 6 213 U.N.T.S. 221 (1953); Corte Cost. Decision of Dec. 22, 1961, no. 70, [1961] Giur. Ital. III 1282.

Faruqi, I.and al Faruqi, I. L., (1986). The Cultural Atlas of Islam. New York: Macmillan Publishers.

FIDA-Kenya. (2010). *Traditional Justice Systems in Kenya: A Study of Communities in Coast Province, Kenya.* [ONLINE] Available at: http://www.fidakenya.org/sites/default/files/Traditional-Justicefinal.pdf. [Accessed 14 March 16].

Garth, Bryant G. and Cappelletti, Mauro, "Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective" (1978). Articles by Maurer Faculty. Paper 1142.

Goal 16 . Sustainable Development Knowledge Platform. 2016. Goal 16 .:. Sustainable Development Knowledge Platform. [ONLINE] Available at: https://sustainabledevelopment.un.org/sdg16. [Accessed 31 March 2016].

Griffiths, J, (1986).*"What is legal pluralism?"* The Journal of Legal Pluralism and Unofficial Law, 18(24), 1-55

Haddad, Y & Lummis, T (1987). Islamic Values in the United States: A Comparative Study. 1st ed. New York: Oxford University Press.

Hashin, A., (2012). "*Shaping of the Sharia Courts: British Policies on Transforming the Kadhi Courts in colonial Zanzibar*." Social Dynamics, 38(3), 381-397.

Hirsch, S. (1998) *Pronouncing and Perservering. Gender and the Discourses of Disputing in an African Islamic Court.* Chicago: The University of Chicago Press.

Hirsh, S. (1998). Pronouncing and Persevering, Gender and the Discourses of Disputing in an African Islamic Court. The University of Chicago Press, Chicago.

Judicial Independence Definition. 2016. *Judicial Independence Definition* . [ONLINE] Available at:

http://www.duhaime.org/LegalDictionary/J/JudicialIndependence.aspx. [Accessed 21 April 2016].

Kamali, M. H, (2003). Principles of Islamic Jurisprudence. 3rd ed. Cambridge: Islamic Text Society.

Kamau, W (2009). '*Law, Pluralism and the Family in Kenya: Beyond Bifurcation of Formal law and Custom.'* International Journal of Law, Policy and the Family. Vol 23:2. Pp. 133-144. At pp. 135.Hereinafter referred to as Kamau.

Kenya Law Reports. 2010. The Constitution of Kenya. [ONLINE] Available at: http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010#KE/CON/Const2010/chap_10. [Accessed 25 April 2016].

Kenya Law Reports. 2010. *The Constitution of Kenya*. [ONLINE] Available at: http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010#KE/CON/Const2010/chap_10. [Accessed 25 April 2016].

Kenya Law Reports. 2013. Act Title: MATRIMONIAL PROPERTY . [ONLINE] Available at: http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2049%20of%202013.

Kenya Law Reports. 2013. *Act Title: MATRIMONIAL PROPERTY*. [ONLINE] Available at: http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2049%20of%202013. [Accessed 25 April 2016].

Kimathi, L. W, (2005). Codesria 11th General Assembly. In *THEME: REINVENTING THE AFRICAN STATE AND REDIFINING ITS ROLE IN DEVELOPMENT*. Maputo, Mozambique, 6th-10th December, 2005. Maputo, Mozambique: Codesria. 1-20.

Krygier, M, 2011. Four Puzzles about the Rule of Law: Why, what, where? And who cares? *American Society for Political and Legal Philosophy*, 50, 64-104.

Loorbach, J and Cohen, J. M. (2013). Poverty and the Law. In: Maynard, D. P. and Gold, N. *Piverty, Justice and the Rule of Law*. London: International Bar Association. 15-17.

Mbote, P.K., and M. Akech. 2011. Kenya_Justice Sector and the Rule of Law. Johannesburg: Open Society Initiative for Eastern Africa

Merry, S. E, (1988). Legal Pluralism. Law & Society Review, 22(5), 869-896

Moore, S, F., (1978). *Law as a Process: An anthropological Approach*. Oxford: oxford university press.

Morris, P. (1973). Social Needs and Legal action / (by) Pauline Morris, Richard White, and Philip L. London: Robertson, (Law in society series).

Muigui K & Kariuki F (2014). ADR, Access to Justice and Development in Kenya. In Strathmore Annual Law Conference. Strathmore University, Nairobi, Kenya., 3rd and 4th July. Nairobi, Kenya: Strathmore University. 1-25.

Nelken, D. (1984). Law in Action or Living Law? Back to the Beginning of Sociology of Law. *Legal Studies*, Vol.4(2). 157-174

Nowrojee, P.E (1973) '*Can the District Judge Administer the Whole of the Customary Law'*. East Africa Law Journal. 9, 59-76.

Pouwels, R. L. (1987). *Horn and Crescent, Cultural Change and Traditional Islam on the East African Coast, 800–1900*, Cambridge: Cambridge University Press.

Sartori, P. and Shahar, I, (2012) *Legal Pluralism in Muslim-Majority Colonies: Mapping the Terrain*. Journal of the Economic and Social History of the Orient, 55(4-5), 637-663.

Sen, A., (2001). Development as Freedom. 1st ed. Oxford: Oxford University Press.

Social Constructionism Facts, Information, Pictures | Encyclopedia.com articles about Social constructionism. 2016. *Social constructionism Facts, information, pictures | Encyclopedia.com articles about Social constructionism*. [ONLINE] Available at: http://www.encyclopedia.com/topic/Social_constructionism.aspx. [Accessed 04 May 2016].

Standard Digital News - Kenya: Mombasa court orders couple be reunited but forbids sex. 2016. Standard Digital News - Kenya: Mombasa court orders couple be reunited but forbids sex. [ONLINE] Available at: http://www.standardmedia.co.ke/article/2000182764/mombasa-court-orders-couple-be-reunited-but-forbids-sex. [Accessed 25 April 2016].

Sterling, S. J, and Moore, W. E (1987) Weber's Analysis of Legal Rationalization: A Critique and Constructive Modification. *Sociological Forum*. Vol. 2(1), 67-89.

Study on the Rights of Persons belonging to Ethnic, Religious and Linguistics Minorities (New York: United Nations, 1979) E/CN4/Sub2/384/Rev 1/Un Sales No E91XIV2 at 96.

Taman, S, (2014). 'An Introduction to Islamic Law. *European Journal of Law Reform*', 16(2), 221-246. At

Tamanaha, B (2000). 'A Non-essentialist View of Legal Pluralism.' *Journal of Law and Society*. 27(2), 296-321.

The Constitution of Kenya, 2010. Interpretation Clauses, Cap 260. The Cosntitution of Kenya, Cap 170

The Noble Qur'an - القرآن الكريم. 2016. The Noble Qur'an - القرآن الكريم. [ONLINE] Available at: http://www.quran.com. [Accessed 14 March 2016].

The School of Cooperative Individualism: Where the idea of Liberty Thrives. 1951. Justice in the Bible by Robert Clancy. [ONLINE] Available at: http://www.cooperative-individualism.org/clancy-robert_justice-in-the-bible-1951.htm. [Accessed 20 April 2016].

Tucker, J, E., (2008). Women, Family and Gender in Islamic Law. 1st ed. Cambridge: Cambridge University Press.

Twinning, W. (2010). "*Normative and Legal Pluralism: A Global perspective.*" Duke Journal of Comparative & International Law, Vol. 20:473, pp.473-517.

UNDP. 2004. *Access to Justice Practice Note*. [ONLINE] Available at: http://www.undp.org/content/undp/en/home/librarypage/democratic-governance/access_to_justiceandruleoflaw/access-to-justice-practice-note.html. [Accessed 13 April 2016].

UNDP. 2005. *Programming for Justice: Access for All*. Bangkok: United Nations Development Programme.

Verses in the Qur'an about justice. 2016. Verses in the Qur'an about justice. [ONLINE] Available at: http://www.harunyahya.com/en/Articles/17228/verses-in-the-quran-about. [Accessed 20 April 2016].

What is the Rule of Law? | *The World Justice Project.* 2016. What is the Rule of Law? | The World Justice Project. [ONLINE] Available at: http://worldjusticeproject.org/what-rule-law. [Accessed 20 April 2016].

Whitford, W.C. (2000). *"The Rule of Law: New Reflections on an Old Doctrine,"* East African Journal of Peace and Human Rights Vol. 6(2), pp. 159-161.

Woodman, G. R, (1996). *'Legal Pluralism and the Search for Justice*'. Journal of African Law, 40(2), 152-167. At pp. 157.

Zdravko, P. (1991). *Plato's Political Philosophy: Prudence in the Republic and the Laws*. London: Gerald Duck Worth & Co Ltd.