Introduction

Islamic law and its importance in defining Muslim identity are vigorously debated in various parts of the world today. These debates are underpinned by questions such as whether Islamic law constitutes a threat to non-Muslim populations and is a backlash to modernity and civilisation. They are further driven by fear and misconceptions of its role, both entrenched in the colonial period, in which the Western coloniser imposed reforms on the Islamic legal system in order to eradicate its allegedly draconian, partial, and uncivilised aspects. Since the late nineteenth century, Islamic law has undergone major reforms to make it compatible with a Western-conceptualised, modern judiciary. Against the backdrop of this colonial judiciary, this study uses Islamic courts to map gendered social, legal, and economic agency in Zanzibar Town, a cosmopolitan city on the East African coast during the British colonial period from 1890 to 1963.

In the nineteenth century, Zanzibar Island was a hub in the Indian Ocean trade system and an entrepot for slaves.[1] Its lush environment and reputation as a trading center attracted the Omani Bū Saʿīdī sultans, who established their hegemony over the East African coast by drawing on trade networks linking this region with the wider Indian Ocean world for more than two millennia. A common religion, Islam, and its legal framework buttressed these socioeconomic networks.

[1] Zanzibar and its sister island, Pemba, were both subject to Omani and later British rule. This study is exclusively concerned with the island of Zanzibar.

From the 1830s onwards, the Bū Saʿīdī sultans established in Zanzibar a plantation economy based on the exploitation of slave labour. Using the abolition of slavery as a justification to integrate the island into their empire, the British made Zanzibar a protectorate in 1890. By then, the British perception of Zanzibar as an Arab and a Muslim settler colony was firmly in place. This perception would increase rifts along ethnic identities, between Arabs and non-Arabs, while at the same time fostering the aspiration of the latter towards Arabness. Islamic courts, locally known as *kadhi*'s courts, reveal negotiations for improving and defending socioeconomic status among a wide range of actors, Arabs and non-Arabs, spouses and kin, as well as former slaves and slave owners, in an increasingly ethnicised society.

Islamic Law and the *Kadhi*'s Courts

The *kadhi*'s courts in Zanzibar are the only judicial institution that has operated continuously from the precolonial period to the present day. The law applied in these courts has been Islamic law, or shariʿa. For reasons of convenience we can translate the term "shariʿa" as Islamic law, but shariʿa actually supposes a holistic sociolegal concept in which only a few legally enforceable rules are clearly laid down. In this way, shariʿa is better understood as a total discourse informed by religious, legal, moral, economic, and political discourses, all of which shape it reciprocally. Although the notion of a total discourse is helpful, shariʿa has never ruled all aspects of life of any individual Muslim at a given time. Its purpose is to perpetuate and improve the social order by mediating conflicts rather than punishing individuals, a characteristic of the modern nation-state.[2] Shariʿa is characterised by its adaptability and openness to local and contextual interpretation and has become permeated by customary law in all Muslim societies. The fact that morality and the law are strongly intertwined in Islam accounts for the social embeddedness of shariʿa and its workings.

The term "Islamic law" is actually problematic due to its Western, orientalist roots. Until today, many Western scholars and the general

[2] Wael B. Hallaq, *Shariʿa: Theory, Practice, Transformations* (Cambridge: Cambridge University Press, 2009), 365–66.

public have approached Islamic law as the law of the Other, as a legal system deemed incompatible with modern notions of justice, human rights, and impartiality. Historians of Islamic law, however, have created a considerable body of scholarship that contests these notions of the orientalised Islamic law by understanding shariʿa in its diverse social and historical contexts.[3] This study draws on the malleable discursive traditions of shariʿa at the beginning of British rule and demonstrates how judicial reforms diminished them over the first half of the twentieth century.

The Omani reforms of the judiciary occurred in the context of creating a modern state, which exercised tighter control over its subjects.[4] From the 1820s onwards, the Bū Saʿīdī sultans embarked on the institutionalisation of the judiciary, setting up regular court sessions in

[3] Ibid., 1–2, 10. See, for example, Ghislaine Lydon, *On Trans-Saharan Trails: Islamic Law, Trade Networks, and Cross-Cultural Exchange in Nineteenth-Century Western Africa* (Cambridge: Cambridge University Press, 2009); Shamil Jeppie, Ebrahim Moosa, and Richard Roberts, eds., *Muslim Family Law in Sub-Saharan Africa: Colonial Legacies and Post-Colonial Challenges* (Amsterdam: Amsterdam University Press, 2010); Allan Christelow, "The Transformation of the Muslim Court System in Colonial Algeria: Reflections on the Concept of Autonomy," in *Islamic Law: Social and Historical Contexts*, ed. Aziz al-Azmeh (London: Routledge, 1988), 215–30; Colin Imber, *Ebu's-su'ud: The Islamic Legal Tradition* (Edinburgh: Edinburgh University Press, 1997); Haim Gerber, *State, Society, and Law in Islam: Ottoman Law in Comparative Perspective* (Albany: State University of New York Press, 1994); Brinkley Messick, *The Calligraphic State: Textual Domination and History in a Muslim Society* (Berkeley: University of California Press, 1993); Michael G. Peletz, *Islamic Modern: Religious Courts and Cultural Politics in Malaysia* (Princeton: Princeton University Press, 2002); Ron Shaham, *Family and the Courts in Modern Egypt: A Study Based on Decisions by the Sharīʿa Courts, 1900–1955* (Leiden: Brill, 1997); Iris Agmon, *Family and Court: Legal Culture and Modernity in Late Ottoman Palestine* (Syracuse: Syracuse University Press, 2006); Judith E. Tucker, *In the House of the Law: Gender and Islamic Law in Ottoman Syria and Palestine* (Berkeley: University of California Press, 1998); Margaret L. Meriwether, *The Kin Who Count: Family and Society in Ottoman Aleppo, 1770–1840* (Austin: University of Texas Press, 1999); Leslie Peirce, *Morality Tales: Law and Gender in the Ottoman Court of Aintab* (Berkeley: University of California Press, 2003).

[4] On the absorption of precolonial legal systems by the colonial state, see Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (Cambridge: Cambridge University Press, 2002); M. B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Oxford: Oxford University Press, 1975); W. J. Mommsen and J. A. De Moor, eds., *European Expansion and Law: The Encounter of European and Indigenous Law in 19th and 20th Century Africa and Asia* (Oxford: Oxford University Press, 1991).

town and rural areas, headed by *kadhi*s, or Muslim judges, and *liwali*s, or local governors. While aiming to make the law more accessible to the population, they started curtailing previously flexible and culturally adapted discursive practices, which spanned the global Muslim community. The Bū Saʿīdī sultans were Ibāḍīs, while the majority of Muslims on the East African coast was Sunni in the nineteenth century. Among the four Sunni schools of law, or legal traditions, the East African coast has followed the Shafiʿi school since the fourteenth century. It was common practice for Muslims, *kadhi*s and litigants, to choose among different legal doctrines. Due to lack of evidence, we can only surmise that this was also practised on the Swahili coast. Archaeological evidence of the coexistence of various Muslim identities, Sunni, Shiʿi, and Ibāḍī from the eighth to the thirteenth centuries, speaks to the historical fluidity of religious practices. Yet after 1845, *kadhi*s had to follow their own school in issuing judgements, meaning that only Shafiʿi and Ibāḍī rules applied. Moreover, the sultans served as appeal institutions. As elsewhere in the Muslim world, the interference of the state was the major cause of the demise of shariʿa in its protean form, epitomised by legal scholars' independence from the political authority.[5] Codification was a key reform tool in the majority of Islamic states, yet not in Zanzibar, where Islamic law has remained essentially uncodified until today.

> Zanzibar was an oriental state, with a well-developed Government, but the local Mahomedan courts were ill-adapted to the adjustment of disputes between nationals of Western powers, and furthermore the establishment of courts in which offences against the slave laws could be dealt with was essential.[6]

Due to the British perception of Zanzibar as an Arab state, Islamic law remained the fundamental law of the protectorate throughout the colonial period. Nevertheless, the British surreptitiously interfered in its application in areas in which they found it incompatible with their

[5] Hallaq, *Shariʿa*, 15–16, Chapter 13; David S. Powers, "Orientalism, Colonialism, and Legal History: The Attack on Muslim Family Endowments in Algeria and India," *Comparative Studies in Society and History* 31, no. 3 (1989): 535.

[6] J. H. Vaughan, *The Dual Jurisdiction in Zanzibar* (Zanzibar: Government Printer, 1935), 9.

standards of justice and morality. Because of the alleged partiality of *kadhi*s, one of the main concerns of the British was to bring subjects of Western nations as well as economically important groups under their jurisdiction. To achieve this aim, they set up ethnically and economically based legal categories of natives and non-natives, reduced the *kadhi*'s sphere of jurisdiction to family or personal status law, bureaucratised the judiciary, and appointed British magistrates and judges to administer Islamic law in the sultan's courts. Prior to 1909, free Muslims who were not subjects of Christian nations could file civil and criminal suits in the *kadhi*'s courts. After 1908, criminal jurisdiction was no longer exercised by the *kadhi*s but by British magistrates. Yet *kadhi*'s courts continuously administered Islamic law in civil matters in the realm of marriage, divorce, and inheritance up to a certain value under dispute to African and Arab Muslim subjects under the sultan's jurisdiction, whereas Indian Muslims were under British jurisdiction.

*Kadhi*s were part of both the classical and modernised structure of the Islamic judiciary. They embodied the long-established Islamic legal tradition of the Swahili coast and constituted an elitist group whose erudition was passed on intergenerationally. Their social embeddedness and role as servants of the law as well as of the community faced new challenges during British rule, which integrated them into the colonial legal apparatus and subjected them to reforms, leading to their alienation from the Islamic legal framework and the people whom they served. *Kadhi*s' attempts to keep individuals in their social positions caused tensions with litigants striving for socioeconomic mobility. Although *kadhi*s enabled individual social mobility, they were more concerned about maintaining the social stability of the community as a whole.[7] Their agency occurred in interplay with the social fabric, political economy, and colonial policies. As the modern colonial state increased bureaucratisation and instigated a shift from community networks towards reliance on the state, *kadhi*s transitioned from orality, which had characterised the legal system for centuries, to scripture.

[7] Cf. Mona Siddiqui, "Law and the Desire for Social Control: An Insight into the Hanafi Concept of *Kafā'a* with Reference to the Fatawa ʿAlamgiri (1664–1672)," in *Feminism and Islam: Legal and Literary Perspectives*, ed. Mai Yamani (Reading, UK: Ithaca Press, 1996), 65, where she uses the concept of equality in marriage as an example for jurists' aim to maintain the social order.

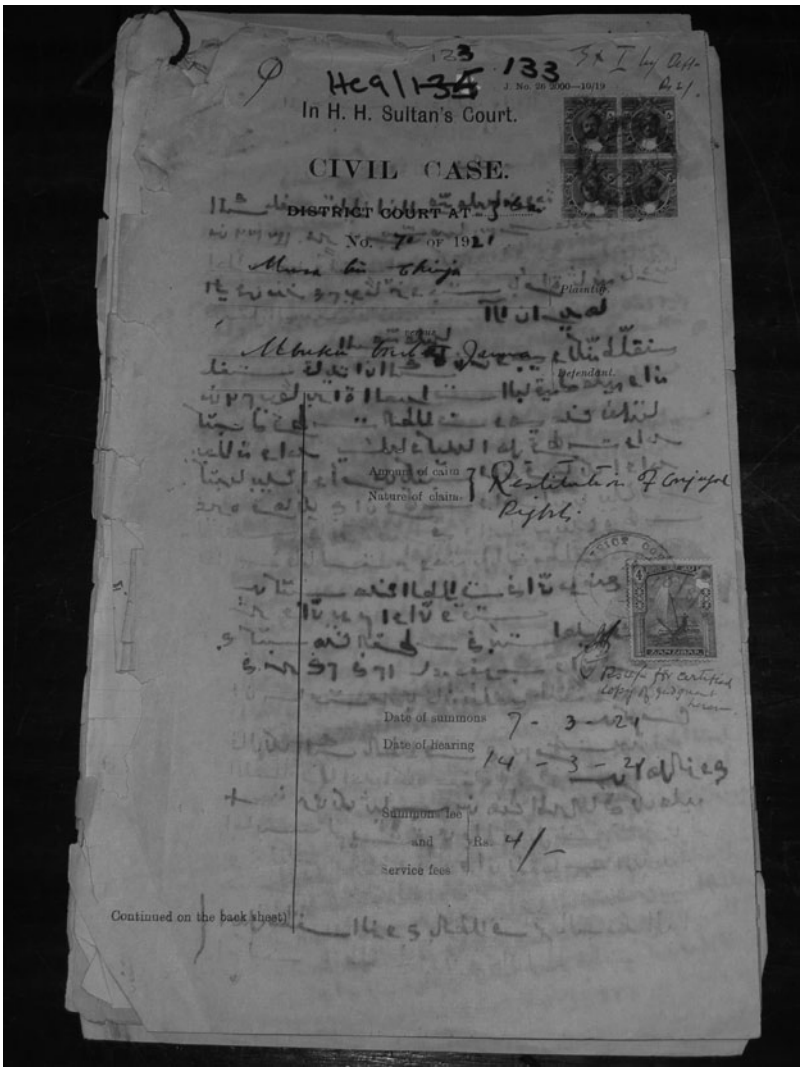

FIGURE 0.1. Cover page of a case file, 1921. The handwriting of the *kadhi*, Sh. Ṭāhir, is bleeding through the verso. Courtesy of ZNA.

It is certainly no coincidence that *kadhi*'s court records became available from 1900, as a decree providing for the keeping of court records was issued in 1899.[8] The presumably earliest preserved records

[8] Decree from Ḥamūd b. Muḥammad, 26 Shaʿbān 1316/9 January 1899, BA14/25, Zanzibar National Archives (hereafter ZNA).

of cases heard by *kadhi*s were contained in a bound, large notebook, dating from February 1900 to June 1903.[9] These neatly written summaries of cases were extremely short if not fragmentary; they did not always record who the plaintiff was and who the defendant was or what the nature of the claim concerned. The value of these entries lies in giving us a sense of who sued whom and of the wide range of issues that was raised before *kadhi*s. Litigants across all social strata sued, for instance, for shares of inheritance and debts, husbands demanded the return of disobedient wives, while some wives sought the dissolution of their marriage because of the husband's impotence or refusal to have sexual intercourse.[10] These usually very short summaries also convey the flexibility of court sessions heard by *kadhi*s at the time, as some defendants used the opportunity to bring counterclaims that the *kadhi* willingly considered.[11]

The *kadhi* first heard the plaintiff and then the defendant, followed by their witnesses in the same order. The burden of proof was on the plaintiff. Islamic law gives preference to proof in the form of oral testimony yet also considers oaths, confessions, and circumstantial evidence. If the plaintiff failed to support his or her claim, the defendant took an oath affirming his or her innocence. Cases in which defendants refused to take this oath were decided in favour of the plaintiff.[12] The office of *wakīl*, or lawyer in the *kadhi*'s courts, was a colonial

[9] HC28/29, ZNA.

[10] Entry #469, no. 635, 28 Dhū l-Ḥijja 1318/18 April 1901; Entry #490, no number, 11 Muḥarram 1318 [1319]/30 April 1901, HC28/29; HC10/3552, ZNA. Also in a restitution of conjugal rights case, the wife accused the husband of impotence (Entry #330, no. 362, 3 Ramaḍān 1318/25 December 1900, HC28/29, ZNA).

[11] During the hearing, the roles of plaintiff and defendant may change. No entry #, no number, 26 Muḥarram 1317 [1318]/26 May 1900; Entry #217, no. 174, 17 Jumādā I 1318/12 September 1900; Entry #404, no. 497, 30 Shawwāl 1318/20 February 1901; Entry #535, no. 780, 27 Ṣafar [1319]/15 June 1901; Entry #584, no number, 13 Rabīʿ I [1319]/29 July 1901; Entry #764, no. 225, 23 Shawwāl [1319]/2 February 1902; Below entry #867, no number, 7 Muḥarram [1320]/16 April 1902; No entry #, no. 5020, 29 Ṣafar [1320]/6 June 1902, HC28/29, ZNA.

[12] Oaths are assigned to whom the *kadhi* believes to be the one most likely to know the truth. Socially confirmed truth outweighs truth affirmed by an individual, and truth inferred from evidence is ignored correspondingly. This implies that people who lack witnesses, such as strangers, tend to fail to prove their claim. See Allan Christelow, "Theft, Homicide, and Oath in Early Twentieth-Century Kano," in *Law in Colonial Africa*, ed. Kristin Mann and Richard Roberts (Portsmouth, NH: Heinemann, 1991), 208. Yet legal doctrines are also protective of strangers. See Chapter 5 below.

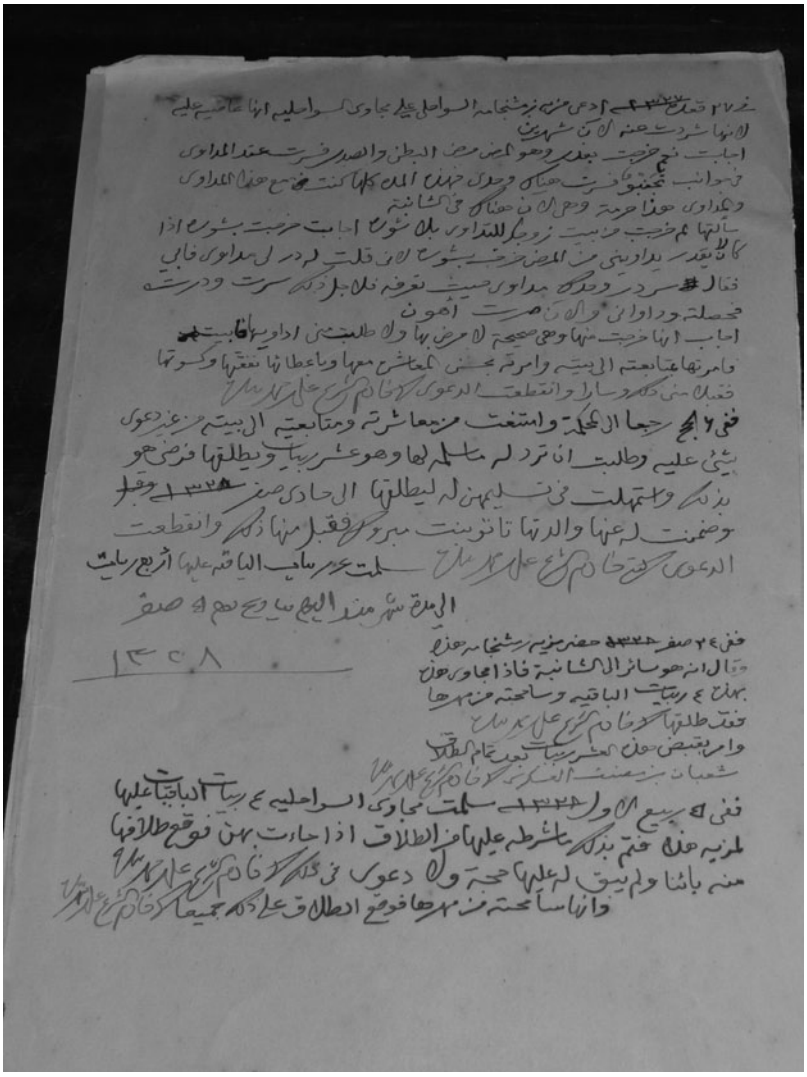

FIGURE 0.2. Last page of the minutes of a case, 1909. *Kadhi* Sh. ʿAlī b. Muḥammad signed *khādim al-sharīʿa*, "servant of the law." Courtesy of ZNA.

innovation dating back to the 1880s. The *wakīl* of either party could ask the litigants and their witnesses questions. Considering these statements and, if provided by the parties, written documents, the *kadhi* arrived at his judgement that he wrote down and read to the parties. In some cases, *kadhi*s referred to legal texts of their school of law to

justify their reasoning. If a case was heard over a long period, several *kadhi*s may have presided over sessions at different dates.[13] When a case went on appeal, its records had to be translated for the judge and it is in these instances that Arabic and English transcripts are available.

Until 1964, the *kadhi*'s court records were exclusively written in Arabic by the *kadhi*s themselves, except for the case summaries from 1900 to 1903, which were recorded by a scribe or clerk and often failed to attribute the case to a certain *kadhi*.[14] The *kadhi*'s way of record keeping changed from short summaries in 1900 to 1903 to more formal and standardised records following colonial demands (see Figures 0.1 and 0.2). The length of the cases varied considerably, from half a page to more than sixty pages, with an average of a couple of pages. The length of the records was determined by the nature of the case and the number of witnesses summoned.

When transmitting oral proceedings into written records, *kadhi*s functioned as filters in translating and writing down the words of the litigants and witnesses, uttered in Swahili. The *kadhi*'s verbatim record of testimonies indicates the use of jargon and stereotypical formula. Yet longwinded phrasing and the transmission of seemingly irrelevant, unexpected statements attest to the originality and value of this source because of the diversity, intimacy, and, at times, immorality and illegality of its information.[15] The narratives that do not relate to the case balance the bias towards disharmony inherent in the source, which reminds us that people reveal their understanding of social values and norms often only in the context of narrating disputes.[16]

[13] In a case heard during 1959 and 1961, three *kadhi*s presided over different sessions (HC10/3695, ZNA).

[14] HC28/29, ZNA.

[15] Cf. Gerber, *State, Society, and Law*, 31; Mahmoud Yazbak, "Minor Marriages and *khiyār al-bulūgh* in Ottoman Palestine: A Note on Women's Strategies in a Patriarchal Society," *Islamic Law and Society* 9, no. 3 (2002): 388.

[16] Simon Roberts, ed., *Law and the Family in Africa* (The Hague: Mouton Publishers, 1977), 13. Cf. Kristin Mann, *Slavery and the Birth of an African City: Lagos, 1760–1900* (Bloomington: Indiana University Press, 2007), Chapter 8. A caveat about the sources' focus on conflict is expressed by Ron Shaham, *Family and the Courts*, 20; Kristin Mann, "The Rise of Taiwo Olowo: Law, Accumulation, and Mobility in Early Colonial Lagos," in *Law in Colonial Africa*, ed. Kristin Mann and Richard Roberts (Portsmouth, NH: Heinemann, 1991), 90–91. Since first exploring Islamic court records in the 1970s, historians have attended to their methodological problems, advantages, and liabilities. See particularly Dror Ze'evi, "The Use of

Unlike contemporary Western legal systems, *kadhi*'s courts did not require specialised legal knowledge, a professional mediator, or wealth. They were easily accessible institutions and operated in open space prior to British colonial rule. Given these characteristics, combined with legal doctrines that support the weak and vulnerable, it should be less surprising that marginalised socioeconomic groups were prominent litigants who mostly obtained judgements in their favour.[17] Both genders had equal access to the courts and women were full legal personalities who regarded the notarial work of the courts as essential to the flow of their daily social and economic transactions.[18] The disadvantage they faced towards men in executing these transactions was purdah, or female seclusion, practised by almost all females among higher social strata from the Bū Saʿīdī reign onwards.

After the abolition of slavery in 1897, *kadhi*'s courts were open to all African and Arab Muslim subjects of the sultan. I demonstrate that these courts became fora where freed slaves and their descendants could negotiate socioeconomic participation and, following Jonathon Glassman, could "struggle for citizenship."[19] As the *kadhi*s' task was to preserve social order, they continued to impose restrictive social criteria that equalled varying levels of moral integrity.[20] Although

Ottoman Shariʿa Court Records as a Source for Middle Eastern Social History: A Reappraisal," *Islamic Law and Society* 5, no. 1 (1998): 35–56; Wael Hallaq, "The *qāḍī's diwan* (*sijill*) before the Ottomans," *Bulletin of the School of Oriental and African Studies* 61, no. 3 (1998): 415–36; Beshara Doumani, *Rediscovering Palestine: Merchants and Peasants in Jabal Nablus, 1700–1900* (Berkeley: University of California Press, 1995); Iris Agmon, "Women, Class, and Gender: Muslim Jaffa and Haifa at the Turn of the Twentieth Century," *International Journal of Middle East Studies* 30, no. 4 (1998): 477–500; Leslie Peirce, "'She Is Trouble . . . and I Will Divorce Her': Orality, Honor, and Representation in the Ottoman Court of ʿAintab," in *Women in the Medieval Islamic World: Power, Patronage, and Piety*, ed. Gavin R. G. Hambly (New York: St. Martin's Press, 1999), 269–300; Judith E. Tucker, *Women in Nineteenth-Century Egypt* (Cambridge: Cambridge University Press, 1985).

17 Cf. Hallaq, *Shariʿa*, 171–73, 187; Judith E. Tucker, *Women, Family, and Gender in Islamic Law* (Cambridge: Cambridge University Press, 2008).

18 Hallaq, *Shariʿa*, 187; Tucker, *Women, Family, and Gender*, 32–33.

19 Jonathon Glassman, *Feasts and Riot: Revelry, Rebellion, and Popular Consciousness on the Swahili Coast, 1856–1888* (Portsmouth, NH: Heinemann, 1995), 23–25.

20 Cf. Hallaq, *Shariʿa*, 167.