

WORKING DOCUMENT FOR THE CONSTITUTION OF KENYA
REVIEW COMMISSION ON THE KADHI'S COURTS, CHIEF KADHI
AND KADHIS

By

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The Commission's Mandate

The Constitution of Kenya Review Act provides that the objects and purposes of the constitutional review is to secure provisions therein, inter alia respecting ethnic and regional diversity including the right of communities to organize and participate in cultural activities and the expression of their identities and establishing a democratic government that respects human rights - (Section 3(e) & (b)). Further, under Section 5(b) of the Act, the organs of the review shall ensure that the review process accommodates the diversity of the Kenyan people including socio-economic status, race, ethnicity, gender, religious faith, age, occupation, learning, persons with disability and the disadvantaged. The Commission is also mandated to seek views on and make recommendation to the judiciary and the legal systems of Kenya.

Chapter 5 of the Constitution of Kenya guarantees the protection of the fundamental rights and freedoms of every person. Section 78 guarantees the freedom of thought, religion and conscience and Section 82 prohibits discrimination of any person on account of inter alia his or her religious beliefs.

The Current Status of the Kadhi's Courts, Chief Kadhi and Kadhis

The Kadhi's Court, Chief Kadhi and Kadhis are Constitutional offices established under Section 66 of the Constitution of Kenya. A Kadhi is strictly speaking a judicial officer, judge or magistrate presiding over an Islamic Court, called the Kadhi's Court, where Islamic law or Sharia is applied and subject to the jurisdiction of the Court all the parties who appear before the Court are those that profess the Muslim/ Islamic faith. A Kadhi is not necessarily a spiritual leader or imam.

Section 66 of the Constitution provides for the office of the Chief Kadhi and such number of other Kadhi's, not being less than three as may be prescribed by the Law. Sub-Section 3 of Section 66 provides for the establishment of subordinate Courts held by Kadhi's as parliament may prescribe. The jurisdiction of the Chief Kadhi and the other Kadhi's is to hold a Kadhi's Court having jurisdiction within the former Kenyan protectorate and 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.

The Chief Kadhi and Kadhis are appointed by the Judicial Service Commission (Section 69(3) (d).

The qualification for appointment to the office of a Kadhi (including a Chief Kadhi) under Section 66, sub-section 2 of the constitution is that one must profess the Muslim religion and possess such knowledge of the Muslim law applicable to any sect or sects of Muslims as is satisfactory to the judicial service commission.

The Wakf Commissioners Act, Chapter 109 of the Laws of Kenya, defines a Muslim to mean an Arab, a member of the twelve tribes, a Baluchi, a Somali, a Comoro islander, a Malagasy or a native of Africa of the Muslim faith.

The Law of Succession Act, Chapter 160 of the Laws of Kenya, also defines a Muslim as any person who professes the religion of Islam and accepts the unity of God and Mohammed as his Prophet. In the same Section, Muslim law is defined as the law applicable to a person who is a Muslim.

Pursuant to the provisions of Section 66 of the constitution of Kenya and for the better carrying out of the functions of the Kadhis, parliament passed the following acts:

1. The Kadhi's Courts Act, Chapter 11 of the Laws of Kenya;
2. The Mohammedan Marriage and Divorce Registration Act, Chapter 155 of the Laws of Kenya;
3. The Mohammedan Marriage, Divorce and Succession Act, Chapter 156 of the Laws of Kenya.
4. Amendments to the Law of Succession Act, Chapter 160 of the Laws of Kenya.

The following are the salient features of each of the aforesaid acts:

(a) Kadhi's Courts Act

- ∪ Section 4(3) states that it is subordinate to the High Court. This section conforms to the provisions of the constitution which give the High Court original unlimited jurisdiction over all civil and criminal matters in Kenya and section 65 which gives it power to supervise any civil or criminal proceedings before any subordinate court.
- ∪ Section 5 restates the jurisdiction of the Court as already provided for in Section 66 of the Constitution.
- ∪ Section 6 states that the law and rules of evidence to be applied in the Court are those applicable under Muslim law. However, Section 6(iii) provides that in the absence of the applicable Muslim law and rules of evidence, then the law and rules of evidence applicable in the High Court shall be used, i.e. the Evidence Act, Chapter 80 of the laws of Kenya. This is in spite of the fact that Section 2 of the same Evidence Act states that it shall apply to all judicial proceedings in or before any Court other than a Kadhis Court!
- ∪ Section 8 provides that the Chief Justice may make rules of Court for the procedure and practice to be followed by the Court but where no such rules are made, then the procedure and practice to be followed shall be those of the subordinate Courts i.e. the Civil Procedure Act, Chapter 21 of the Laws of Kenya. It is to be noted that to date the Chief Justice has not made the rules of Court for the Procedure and Practice to be followed by the Kadhi's Court. They therefore use the Civil Procedure rules even though they are not trained for it.

Under the Kadhi's Courts Act, Parliament has established twelve Courts. The Kadhi's Courts Act passed in 1967 initially established 6 Kadhi's Courts, subordinate to the High Court, four having jurisdiction within the area of the former protectorate, one in Nyanza, Western and parts of Rift Valley Province and the last one having Jurisdiction over the former Northern Frontier Districts of Garissa, Wajir and Mandera (Ghai & McAuslan).

An appeal from the Kadhi's Court can be lodged with the Chief Kadhi's Court or to the High Court. The High Court will sit in appeal with the Chief Kadhi or other Kadhi's as assessors. The opinion of the Kadhis as assessors is however not binding

on the judge in deciding the appeal, especially if he disagrees with their opinion. An appeal also lies to the Court of Appeal from the High Court and in that final Court, the Chief Kadhi or any other Kadhi does not sit even as assessors.

(a) The Mohammedan Marriage and Divorce Registration Act

This is a procedural Act which provides for the registration of marriage and divorce by Muslims, the appointment of registrars and their assistants and the keeping of the register of marriage and divorce.

(b) The Mohammedan Marriage, Divorce and Succession Act

This Act deals with the law relating to divorce, matrimonial causes and interstate succession. Section 2 defines matrimonial cause or suit to mean any suit relating to the validity of an Islamic marriage or any suit claiming any species of relief whether by divorce or otherwise. Section 3(1) states that Islamic law will apply in all divorce cases involving Muslims. Section 3(2) provides that the High Court and every judge shall have power to hear and determine all matrimonial cases or suits arising out of Muslim marriages at the instance of either party if resident in Kenya. In exercising this power, the High Court or the judge is to give reliefs upon the principles of Mohammedan law applicable to that marriage. Section 4 provides that the onus of proving an Islamic Law principle before the High Court is on the Party alleging it.

(c) The Amendments to the Law of Succession Act

- ∪ This Act provides for the universal application of one Law of Succession to the estates of deceased persons in Kenya.
- ∪ Amendment to Section 2 of the Act vide Legal Notice No. 21/90 exempted the application of the Act to the estates of deceased Muslims and provided for the devolution of such estates in accordance with Islamic law.
- ∪ However Section 3(4) provides that the provisions of Part VII, relating to the grant of letters of administration shall apply to Muslims too.
- ∪ Section 48(2) declared that, *“for the avoidance of doubt it is hereby declared that the Kadhi's Courts shall continue to have and exercise jurisdiction in relation to the estate of a deceased Muslim for the determination of questions*

relating to inheritance in accordance with Muslim law and of any question arising under this Act in relation to such estates.”

- o Section 50(2) stated that an appeal shall lie to the High Court from any order of the Kadhis Court in respect of the estate of a deceased Muslim and with prior leave thereof, in respect of any point of Muslim law, to the Court of Appeal. Section 50A states that the Chief justice, may in consultation with the Chief Kadhi, make rules of Court for the better carrying into effect and for regulating the exercise of the jurisdiction conferred on the Kadhi's Court by the Act. However, to date no such rules have been made thereby disabling the Kadhi's Courts in exercising the powers granted under the Act.

Why the Kadhi's Courts were given Special Status and Entrenched in the Constitution

In order to understand the reason why the Kadhis Courts were given special status and entrenched in the constitution, one must go back to the history of the ten-mile coastal strip of Kenya and how it lost its protectorate status to become part of Kenya at the time of independence. (Kenya Coastal strip - Report by the Commissioner).

Muslim Courts were in existence along the East Coast of Africa before the coming of the British colonialists in the latter part of the 19th century. The Kenya coastal strip was then part of the territories controlled by the Sultan of Zanzibar. The Chief Kadhi's Court had jurisdiction throughout the Coastal Region and Kadhi's Court's had jurisdiction within a district only. These Courts were Muslim religious Courts and applied Islamic Law identical to that observed in the Courts of the Sultan of Zanzibar in all cases affecting the personal status of Muslims (Ghai & McAuslan). By an agreement made in 1887, the Sultan of Zanzibar granted concessions, subject to an agreed consideration, regarding his territories to the British East Africa Association (BEA) and later to the Imperial British East Africa Company. In 1895, an agreement was signed between Great Britain and the Sultan of Zanzibar which made the Kenya coastal strip a protectorate. The administration of the mainland and islands was entrusted to the Imperial Officers by the British Government. Moreover, the agreement was not to affect the Sultan's Sovereignty in the territories. The British also agreed to respect the existing Islamic judicial system. When the British took over the administration of the coastal strip, they found an already existing administrative and judicial system in place. Within the administration, there was a special cadre of Arab administrative officers headed by the liwalis for the coast and assisted by mudirs. These officers also held subordinate Courts with jurisdiction in

both civil and criminal cases. The Kadhis were magistrates specializing in questions of Islamic law in relation to inheritance, marriage, divorce and other personal matters. When the colonial administrators took over the protectorate, they to a large extent, retained the institutions of the Kadhis Courts and their jurisdiction, with certain limitations as to the scope of the application of Islamic law. e.g. removal of the exclusive jurisdiction of the Kadhi and the giving of parallel jurisdiction to the High Court under the Mohammedan Marriage, Divorce and Succession Ordinance of 1920.

The British Government administered the Protectorate and the Kenya Colony as a two-in-one unit for administrative convenience. Before Kenya became independent and at the beginning of the Lancaster House constitutional talks, the British Government and the Sultan appointed a commissioner, James R. Robertson in September 1961 *“to report to the Sultan of Zanzibar and Her Majesty’s Government jointly on the changes which are considered to be advisable in the 1895 Agreement relating to the coastal strip of Kenya as a result of the course of constitutional development of East Africa.”* He visited the Kenya Colony, the coastal strip and Zanzibar to collect the views of all the stakeholders. Views were divided as to whether the coastal strip should be treated as a single entity with Kenya Colony, or whether it should be handed back to the Sultan of Zanzibar or it be treated as an independent entity and declared Independent.

In a report submitted to the British Government and the Sultan of Zanzibar entitled *“The Kenya Coastal Strip – Report by the Commissioner”* Mr. Robertson recommended that the coastal strip be incorporated into Kenya before self-government and independence subject to certain safeguards being given to the coastal people which should be entrenched in the constitution. At page 29 of the report, the commissioner states as follows regarding Kadhi's Courts:

“The Muslim religion is, however, not only a faith, it is a way of life and one of the most cherished rights of a Muslim is the exercise of the Sharia law in all his personal affairs. Cases arise concerning marriage, divorce, alimony, trusts and inheritance which have their own method of settlement in the Sharia law. At present the Muslims of the Coast have a number of judges (Kadhi's) who adjudicate in such matters according to Muslim law. I would strongly recommend that this system be continued. At present the Kadhis who are really Arab or Muslim magistrates, are quite separate and distinct from the judiciary. I consider that this is anomalous and that they should be integrated within the judicial system proper under the Chief Justice’s administration. I recommend that a Chief Kadhi should be appointed together with perhaps three Kadhis, one for Mombasa and its surroundings, one for

Malindi and Lamu, and one for Vanga and the south. Such officers should be Muslims, although not necessarily Arabs, and they should have an adequate degree of competence in Sharia law. I consider also that on their being fully integrated in the Judicial Department, they should be liable for posting to any area where Muslims reside and where cases are submitted for consideration under Sharia law. I consider that the criterion that the Kadhis should be Muslims will counter the suggestion on the part of the Africans that the provision is discriminatory, while the same time providing the Arabs and Swahili's and Muslim Indians with a reasonable safeguard in a matter in which I consider they have a right."

Robertson further recommended that the British Government abrogate the 1895 Agreement with the Sultan of Zanzibar and that another Agreement be made between the Government of Kenya and the Sultan of Zanzibar whereby the Sultan of Zanzibar will surrender his Sovereignty claims over the Coastal strip in consideration of the Kenya Government undertaking to respect and safeguarding inter alia the maintenance of the Sharia Law for Muslims and the retention of the Kadhi's Courts. On the 5th October 1963, the said Agreement was actually executed in the form of an exchange of letters between the Prime Ministers of Kenya and Zanzibar Messrs Jomo Kenyatta and M. Shante respectively. The independence constitution, under the Chapter dealing with the judiciary, then provided for the establishment of the Kadhi's Courts and their powers.

Views Received/Concerns Raised

The following is a summary of the views given and concerns raised by people, organizations, institutions and experts on the Kadhi's Courts, the Chief Kadhi and Kadhis:-

- ∪ That Muslims must be consulted in the appointment of the Chief Kadhi and other Kadhis. They should either elect them or be members of the appointing authority i.e. the Judicial Service Commission. That Muslim organizations such as **SUPKEM** should be consulted.
- ∪ There should be some minimum academic qualifications for the Chief Kadhi and the Kadhis e.g. a degree in general and Islamic Law from a recognized university.
- ∪ That Kadhi's Court be empowered to effectively deal with their work in terms of the setting up of a scheme of service, improvement of their terms of service

and conditions of employment e.g. salaries, staff, communication facilities, etc.

- υ That the Chief Kadhi be given the same status as a High Court Judge and the Kadhis as a Chief Magistrate.
- υ That the number of Kadhi's Courts be increased and they must be at every Province and District.
- υ That the Kadhi's Court should have a separate Appeal Court and no appeal should lie to the High Court.
- υ That Muslim Judges who are experts in Islamic Law be appointed to the High Court to hear appeals from the Kadhi's Courts.
- υ That Kadhis Courts be empowered to determine both the substantive and Procedural Law on inheritance and succession for Muslims.
- υ That Kadhis Courts be expressly empowered to deal with not only divorce in Islamic marriages but also on issues arising out of such divorces e.g. maintenance and custody of children, guardianship, adoption, division of matrimonial properties after divorce and other matters incidental thereto and connected therewith.
- υ That since the Wakf Commissioners, appointed under the wakf commissioners Act have failed to administer the wakf properties under their charge, to the satisfaction of the dependants and beneficiaries, are not representative, transparent and accountable, they should be abolished and instead their functions be given to the Kadhis Courts in the respective districts where the Commission operated. The application and operation of the Wakf Commissioners Act be extended to cover the whole country and not just the Coast Province as currently stipulated
- υ That each Kadhi must have a female assistant to handle delicate cases involving women.
- υ The powers of the Kadhi's Courts be increased to include handling civil and commercial cases involving Muslims.

- ∪ That although the Kadhi's Courts have a constitutional mandate to apply Islamic Law in their Courts, the practice has been that the mandate has not been effectively administered due to the lack of an institutional legal framework by legislation and other administrative measures.
- ∪ That Kadhis' work should be restricted to judicial work and Muslims to elect their own Islamic/spiritual leader (mufti) who will be their official spokesman and an advisor to the government on issues affecting Muslims in Kenya.
- ∪ That Kadhis' and the Chief Kadhi should not be involved in matters related to Idd celebrations and other non-judicial work.
- ∪ That Kadhi's Courts should be re-named Islamic Sharia Courts and references to Mohammedan Law should be changed to Islamic Law or Sharia.
- ∪ Islamic law should be taught at the public universities and Muslim personal law should be codified into legislation.
- ∪ Muslims of the Shia Sect should also be appointed as Kadhis to cater for the interest of the Shia Muslims.
- ∪ Supremacy of Muslim personal law over all other laws for the Muslims in matters of personal law be affirmed.

Analysis of the Current Status of the Kadhis Courts, the Chief Kadhi and Kadhis

- ∪ The office of the Chief Kadhi and other Kadhis, though created under S.66 of the Constitution, do not have any security of tenure. They are appointed by the Judicial Service Commission - some on contract. There is no Scheme of service in place for the Kadhis. They are appointed as Kadhi and they retire as Kadhis.

- u The Judicial Service Commission appoints all the Kadhis who are to work under the Chief Kadhi yet its membership does not include the Chief Kadhi or even a Muslim representative. Furthermore, the Commission is to appoint a Chief Kadhi or a Kadhi if, in its opinion, he is well learned in Islamic Law. How is the Commission to know whether one is a scholar in Islamic law if it has no Chief Kadhi or other Muslim representative to advise it so?
- u Muslim personal law on marriage, divorce, inheritance and succession is not codified into legislation in Kenya. It is left to the Kadhi's in their different courts to interpret the law as they understand it. There are no reports of the Kadhi's Court's decisions - hence this has hampered the growth of Islamic Law jurisprudence in Kenya.
- u Appeals from the Kadhi's Courts go to the High Court and although the High Court is to apply Islamic Law in the appeal, there may be some practical difficulties where the Judge hearing the appeal is not a Muslim and does not understand Islamic Law. While sitting in appeal, the High Court is to be assisted by a Kadhi as an assessor but his advice is not binding on the Judge. This too is not desirable considering that the Kadhi is supposed to be the expert in Islamic Law. If the matter goes to the Court of Appeal, Kadhis don't sit even as assessors to the Court. If and when such cases go to the High Court or Court of Appeal and a verdict is rendered, questions have arisen as to the acceptability and legality of such decisions under Islamic law since the decisions are made by non-Muslim judges. For example in the case of divorce in Islamic marriages, a divorce certificate issued pursuant to the decision of a non-Muslim judge is not valid under Islamic law.
- u Although the Kadhi's Court's Act states that Islamic Law and rules of evidence shall be applied in the Court this does not happen in practice as the said Islamic Law and rules of evidence have not been made by the Chief Justice. Instead the Kadhis use the Law and rules of evidence as provided for under the Evidence Act. Yet Section 2 of the Evidence Act clearly states that it shall apply to all other Courts except the Kadhi's Courts. There appears to be a conflict between section 6(iii) of the Kadhi's Courts Act which permits the application of the law of evidence under the Evidence Act, and section 2 of the same Evidence Act which excludes the Kadhi's courts from its application. However, a look at the commencement date of the two Acts shows that the Evidence Act came into force much earlier in 1963 while the Kadhi's Courts Act was enacted in 1967. It then follows that section 6(iii) of

the latter Act contradicts section 2 of the former. Moreover, section 2 of the Evidence Act seems to obey and conform to the spirit of section 66 of the constitution that establishes the Kadhi's courts while section 6(iii) appears to contradict the same section and ought to be declared null and void under section 3 of the constitution for being inconsistent with section 66 of the constitution.

Again, the Kadhi's Courts Act states that the Chief Justice shall make rules of Practice and Procedure for the Court but to date this has not been done. Instead, the Kadhis use the Procedure under the Civil Procedure Act. This is provided for under section 8(2) of the Kadhi's Courts Act. This provision, just like section 6(iii) discussed hereinabove, appears to violate the spirit of section 66 of the constitution and in practice the two sections have acquired the character of claw back or derogatory clauses to the extent that they have been used in lieu of the Islamic law and rules of evidence and the practice and procedure of the court as ideally envisaged under sections 6(1) and 8(1) of the Kadhi's Courts Act.

Since the Kadhis are not trained lawyers who understand the Evidence Act and the Civil Procedure Act, it is not desirable for them to use the Procedures under this Act to administer their Courts. There is now an urgent need for the Chief Justice to provide for the correct Islamic Law Procedures, Practice and evidence for the Kadhi's Courts for them to effectively and competently fulfill their mandate. In view of the failure by the Chief Justice to make and provide for these rules for the Kadhis Courts it may be worthwhile to follow the examples of other countries which give the Kadhi's Courts or the Chief Kadhi the power to make the rules for the Courts.

- o In the area of inheritance and succession, the Kadhi's Courts have the constitutional and legislative mandate to administer Islamic Law on inheritance and succession but in practice this does not happen. Under the Law of Succession Act, a Muslim must first apply to the Secular Courts (High Court or Magistrate's Court) for the grant of Letters of Administration before the Kadhi can advise on the division of the estate. There is therefore an inconsistency to the extent that the Kadhi is in charge of the substantive Law but the Secular Courts determine the Procedural Law. Although the amendment to the Act in 1990 vide legal Notice No. 21/90 vests in the Kadhi the power to exercise jurisdiction over the estate of deceased Muslims, this power cannot be exercised because the Chief Justice has not, in consultation with the Chief Kadhi under Section 50A, provided for the rules to be applied.

It is necessary therefore to have the Kadhi deal with both the substantive and procedural aspects of the Law on succession and inheritance. Moreover, it may be more useful to have a separate Islamic Law of Succession Act to deal with all these issues.

- ∪ References to Islamic Law as Mohammedan Law in the constitution and in the legislations is wrong in form and in substance. This is a Colonial nametag which has been carried over. There is no Mohammedan Law in Islam. Mohamed (p.b.u.h) was/is a Prophet of Islam and the Islamic Law cannot be named after him. Just as the Islamic religion cannot be called Mohammedan religion, Islamic Law cannot be called Mohammedan law and Muslims cannot be called Mohammedans.
- ∪ The Chief Kadhi and other Kadhis have often assumed non-judicial roles such as leading prayers in mosques, giving sermons therein and for the Chief Kadhi, he has been holding himself out as the spiritual leader of the Muslims and their spokesperson when he has not been elected or appointed as such. It is common knowledge that a lot of controversy arises among the Muslims during the month of Ramadhan when the Chief Kadhi purports to issue edicts directing when the moon was sighted and when the Idd will be. It would have been more practical for this role to be left to an elected Islamic leader of the Muslims or a mufti who should be an advisor to the government on Islamic affairs.
- ∪ The Kadhi's Courts have become, for the Muslims, a symbol of their Islamic faith and culture but more importantly for the Muslim women, the Courts have become an important site for resisting the oppression experienced in marriage and in their domestic circumstances in a traditionally patriarchal and male dominated society. Through these Courts, Muslim women have succeeded in fighting for the protection and enforcement of their rights as guaranteed under Islamic law and to challenge negative cultural practices and customs of Muslim communities that tend to undermine these rights (Susan F. Hirsh).

Islamic Law does not permit women to hold the office of a Kadhi but this does not prevent them from being appointed as assistants to the Kadhi to help in those instances where women litigants in the Court find it difficult to explain to the male Kadhi the delicate and intimate details of some of their domestic problems.

- υ Muslims are mainly of two sects in Kenya - the Sunni and Shia. Majority of the Muslims in Kenya are Sunni Muslims but there is a significant population of Shia Muslims too and consideration ought to be given to the appointment of Kadhis of the Shia Sect to cater the interest of the Shia Muslims.

- υ Under Section 66 of the constitution as read with the provisions of the legislations passed pursuant to that Section, Islamic Law is clearly recognized as a source of the Laws of Kenya in as far as matters pertaining to marriage, divorce and inheritance for the Muslims is concerned. The Kadhi's Court's and the High Court must apply the Muslim Personal Law in dealing with Muslim personal matters. However, Section 3 of the Judicature Act, Chapter 8, Laws of Kenya which lists the sources of the Laws of Kenya and provides for the Jurisdiction of the various Courts in Kenya, does not include Muslim personal law as one of the sources of the Laws of Kenya subject to limitation as to the scope of application. The result has been that Institutions of higher learning in Kenya that teach law to students do not include Islamic Law in their curriculum or courses. Consequently, when lawyers get admitted to the bar in Kenya as advocates with the right of audience before all Courts, they find it difficult to effectively represent clients in the Kadhi's Court's especially if they are not Muslims and have not studied Islamic Law. It is therefore necessary to recognize Islamic Law as one of the sources of the law in Kenya and for the same to be taught at universities and in the Kenya School of Law.

Comparative Experiences

Several countries in Africa, Asia and the Middle East provide for the establishment of the Kadhis Courts in their constitutions. Save for those countries that have established Islamic states which apply Islamic Law throughout the country, other states tend to limit the jurisdiction of these Courts to matters affecting the personal status of the Muslims. In some cases, the jurisdiction is exclusive to the Kadhis Courts while in others the Courts are established as subordinate Courts to the Secular High Courts. The Kadhis Courts are also called Qadhis Courts (Uganda), Cadi Court (Gambia), Sharia Court (Nigeria), Shariat Court (Pakistan) and Religious Court (Jordan). The following is a brief analysis of the position of the Kadhis Courts or their equivalent in some countries:-

Nigeria

The Nigerian constitution provides for the establishment of the Kadi and Sharia Courts in the states and in the Federation. The Sharia Court of Appeal is to compose of the Grand Kadi and such number of Kadis as may be prescribed by Law. The jurisdiction of the Sharia Courts is listed under Sections 262 and 277 as being to decide on:-

- (a) any question of Islamic personal law regarding a marriage concluded under that law, including the issue of validity or dissolution;
- (b) any question of Islamic personal law regarding a wakf, gift, will or succession where endower, donor, testator or deceased person is a Muslim;
- (c) any question of Islamic personal law regarding an infant, prodigal or person of unsound mind who is Muslim or the maintenance or guardianship of a Muslim who is physically or mentally infirm;
- (d) Any other matter where the Court of first instance decided the matter according to Islamic Personal Law.

The qualification for appointment to the office of Grand Kadi or Kadi of the Sharia Court of Appeal is set out by Sections 261 and 266. Under these Sections, a person shall not qualify to hold the office of Kadi or Grand Kadi unless:-

- (a) He is a legal practitioner in Nigeria and has been so qualified for a period of not less than ten years and has obtained a recognized qualification in Islamic Law from an Institution acceptable to the National Judicial Council; or
- (b) He has attended and has obtained a recognized qualification in Islamic Law from an Institution approved by the National Judicial Council and has held the qualification for a period of not less than ten years; and
 - (i) he either has considerable experience in the practice of Islamic Law, or
 - (ii) He is a distinguished scholar of Islamic Law.

Sections 264 and 279 give the Grand Kadi, who is the equivalent to the Chief Kadhi in Kenya, the Power to make rules for regulating the Practice and Procedure of the Sharia Court.

Gambia

The Gambian Constitution under Section 137 establishes the Cadi Court to be constituted by the Cadi and two other Scholars qualified to be a Cadi or Ulama. Appeals from this Court goes to a review Court composed of the Cadi and four ulamas (Islamic Scholars).

The Cadi Court has Jurisdiction to apply Islamic Sharia in matters of marriage, divorce and inheritance where the Parties before the Court are Muslims.

The qualification for appointment to the position of Cadi requires a person of high moral standing and professional qualification in Sharia Law.

Uganda

The Ugandan Constitution establishes the Qadhis Courts under Section 129 as one of the subordinate Courts of judicature exercising judicial power in Uganda to deal with matters of marriage, divorce, inheritance of property and guardianship. The details of the Court's structure and the exercise of the jurisdiction thereof is left to Parliament to determine.

Jordan

Section 104 of the Constitution of Jordan establishes the Sharia Courts as one of the religious Courts under that Section.

The jurisdiction of the Sharia Courts are over Muslim Personal Law (marriage, divorce, inheritance and succession) and cases concerning blood money (diyeh) where the parties are Muslims or consent to the jurisdiction of the Court.

Pakistan

Section 203c of the Constitution of Pakistan sets up the Federal Shariat Court which shall consist of 8 Muslim Judges including the Chief Justice appointed by the President. Out of these 8 Judges, 3 of them must be ulemas (scholars) who are well

versed in Islamic Law while the other 4 will be persons qualified to be appointed as Judges.

The Federal Shariat Court has the power and jurisdiction to ensure that all laws enacted in Pakistan and all decisions of the Courts in Pakistan conforms to the Principles of Islamic Law and in particular that they do not contradict the Provisions of the Holy Quran and the Sunnah (teachings and practice) of the Prophet Mohammed (p.b.u.h). If any of these Laws and decisions contradicts the Provisions of the Holy Quran and the Sunnah of the Prophet, then the same are declared null and void to the extent of the inconsistency. This in effect confirms the supremacy of Islamic Sharia over all other Laws in Pakistan.

The Sharia Court is empowered, under Section 203J of the Constitution, to make rules of Court to enable it exercise its powers and jurisdiction.

Tentative Recommendations

- 1. The Kadhi's Court's be retained in the manner and form as proposed hereunder.***
- 2. The Number of Kadhi's Courts be increased to not less than 30 to be located at the districts where Muslims predominantly reside. These Courts will be called the District Kadhi's Court to be held by a Kadhi. Appeals from this Court shall be heard by the Provincial Kadhi's Court and will be presided over by a Senior Kadhi. The last Court in this hierarchy shall be the Kadhi's Court of Appeal and the Chief Kadhi assisted by 2 Senior Kadhi's will preside over this Court which shall be the final Court of Appeal for the Kadhi's Court's. The Kadhis Court of Appeal shall, in addition to its usual sitting, also sit at regular intervals throughout each calendar year in each of the regions of the country to hear appeals in those regions. An appeal from the Kadhi's Court of Appeal shall lie to the Supreme Court only on a point of Islamic Law or an issue affecting the interpretation of this constitution as it relates to the Kadhi's Court's provided always that the Court shall apply Islamic Law in determining the appeal.***
- 3. The jurisdiction of the Kadhi's Courts shall be increased to deal with not only Muslim personal law but also to Civil and Commercial matters where both Parties before the Court profess the Muslim faith. This enhanced jurisdiction of the Kadhi's Courts will be subject and***

without prejudice to the right of any Muslim to go to any Court other than the Kadhi's Court to deal with such Civil or Commercial matter as the person so desires.

- 4. The Chief Kadhi shall have the same status, privileges and immunities as a High Court Judge, the Senior Kadhi as a Chief Magistrate and the Kadhi as a Resident Magistrate.*
- 5. Muslim Lawyers who are experts in Islamic Law be appointed as Judges of the High Court to hear appeals from the Kadhi's Court of Appeal.*
- 6. Muslims in Kenya must be consulted in the nomination and appointment of the Chief Kadhi and the Kadhi's either through their participation in the process through an election or by their duly appointed representatives.*
- 7(a) The qualification for appointment to the position of Chief Kadhi shall be as follows:-*
 - (i) Must be a Muslim; aged 35 years and above but below 65 years.*
 - (ii) Is an Advocate of the High Court of Kenya or is qualified to be appointed as such and has been a legal practitioner for a period of not less than 10 years; and*
 - (iii) Has obtained at least a degree in Islamic Law from a recognized University; or*
 - (iv) Has not less than 10 years' experience in the practice of Islamic Law, has held the office of a Kadhi's Court for a similar period and has at least a degree in Islamic law from a recognized university.*
- (b) The qualification for appointment as a Kadhi and a Senior Kadhi shall be as in (a) above with the exception that the years of experience shall be 5 years under each of the categories of qualifications.*

8. *The composition of the Judicial Service Commission shall be expanded to include the Chief Kadhi and one other person nominated by National Muslim Organizations who must be a Muslim woman.*
9. *The Chief Kadhi (and not the Chief Justice) shall be mandated to make the Islamic rules of Court, of practice, procedure and evidence to be applied in the Kadhi's Courts in consultation with the Chief Justice, the Law Society of Kenya.*
10. *The Kadhi's Courts shall, in addition to their exclusive jurisdiction to deal with the substantive Muslim personal law on inheritance and succession, also have the power to determine the procedure to be applied in the administration of the estates Of deceased Muslims.*
11. *The Kadhis Courts be expressly mandated to deal with not only divorce in Islamic marriages but also with the consequential matters that arise out of such divorce and other matters incidental thereto or connected therewith e.g. custody and Maintenance of children, guardianship, adoption of children and division of matrimonial properties.*
12. *The jurisdiction of the Kadhis court be expanded also to include the administration of Wakf properties as are currently administered by the Commission appointed under the Wakf Commissioners Act. Appropriate amendments be made to the said Act to firstly expand its application and operation throughout Kenya and secondly to vest in the relevant Kadhis courts all the powers and functions as are now exercised by the Wakf Commission.*
13. *The work of the Chief Kadhi and the other Kadhis shall be strictly judicial work in accordance with the Provisions of the constitution or any other written Law defining their Jurisdiction.*
14. *That Islamic Law on marriage, divorce, inheritance and succession shall be codified so that appropriate legislation is enacted dealing with the substantive law of Islam on marriage, divorce and inheritance. The goal*

will be to achieve an Act or Acts of Parliament dealing with the Islamic Law of marriage, divorce and succession.

15. There should be a female assistant to the Kadhi's Court to assist in dealing with the more delicate and intimate issues affecting women litigants in the Court. Such female assistants to have basic knowledge of Islamic Law where possible. Their role would basically be equivalent to administrative officers in the courts and not as judicial officers. They would not deputize for or act in the place of the Kadhis.

16. In the appointment of the Kadhis, consideration shall be given to the appointment of Muslims of the Shia Sect to cater for the needs of the Shia Muslims in Kenya.

17. References to Mohammedan Law in the constitution and in all other written Laws should be changed to Islamic Law.

18. Islamic Law studies should be included in the Curriculum or course studies for Law graduates in Kenya.

19. An office of an Islamic mufti or spiritual leader be established in Kenya with functions and duties defined by law. The mufti must be elected by all Kenyan Muslims. The qualification for appointment or election as a mufti be equivalent to those of the chief Kadhi or a demonstrated competence as a distinguished scholar in Islamic Law.

END