

- The determination of civil and commercial disputes between parties who are Muslims, in the manner of a small claims court as by law established, but without prejudice to the rights of parties to go to other courts or tribunals with similar jurisdiction;
- The settlement of disputes over or arising out of the administration of wakf properties. A Wakf is a trust created under Muslim law for purposes considered pious, religious or charitable. Currently a commission appointed under the Wakf Commissioners Act administers Wakf properties.

The debate surrounding these provisions stem from various arguments the following are but a few:

- The draft Constitution gives precedence to Islam above other religions by referring to Islam and the Kadhi Courts.
- Kenya is a secular state hence no religion should be referred to in the draft Constitution.
- The Kadhi Courts can easily be legislated against by Parliament if they are not entrenched in the draft Constitution.
- The Kadhi Courts have been entrenched in the current Constitution since independence and they have caused no harm.

Between the 8th and 11th of April 2003 the Kenyan Section of the International Commission of Jurists held a Constitutional Symposium which brought together technical experts from civil society, legal practitioners, the Ministry of Justice and Constitutional Affairs and other stakeholders to substantially discuss the draft constitution, more specifically Chapter Nine which refers to the Legal and Judicial system, and other contentious issues arising. Due to the huge debate surrounding the Kadhi Courts an entire day was dedicated to discussing this. It was stressed that constitution making was a negotiative process and that consensus would not always be reached. Below are the views of the majority of participants.

The Kadhi Courts

The following recommendations were made: -

- The Kadhi Courts should be retained in the draft constitution as per the current constitution section 66³. Hence sections 199 to 204 of the draft constitution should be replaced by section 66 of the current constitution.
- Section 66(4) should be amended to read "...within the country or within such part of the country as may be prescribed. Provided that no part of the country shall be outside the jurisdiction of some Kadhi Court."
- The Kadhi Courts should be further provided for by parliament through the relevant statute. The constitution should establish the Kadhi courts leaving their operationalisation to an Act of Parliament.⁴

We urge the delegates of the National Constitutional Conference to adopt the above recommendations as a compromise for the benefit of the nation.

¹ Ahmed Issack Hassan, Commissioner, CKRC "Working document for the constitution of Kenya review commission on the kadhi's courts, chief kadhi and kadhis"

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³ Note amendment to section 66 (4) of the current Constitution.

⁴ A reservation was noted. There were those of the view that all matters of religion should be deleted from the constitution, as Kenya was a secular state.



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The Draft Constitution: Chapter 9

The Kadhi Courts

The Draft Constitution:

Chapter Nine

The Kenyan Section of the International Commission of Jurists (ICJ [K]) is a non-governmental member based organisation dedicated to the promotion and protection of democracy, rule of law and human rights. ICJ (K) has been continuously involved in the Constitution making process by submitting a memorandum to the Constitution of Kenya Review Commission, facilitating the Advisory Panel of Eminent Judicial Experts Project and providing fora for the public and experts to discuss the legal issues pertaining to the draft Constitution.

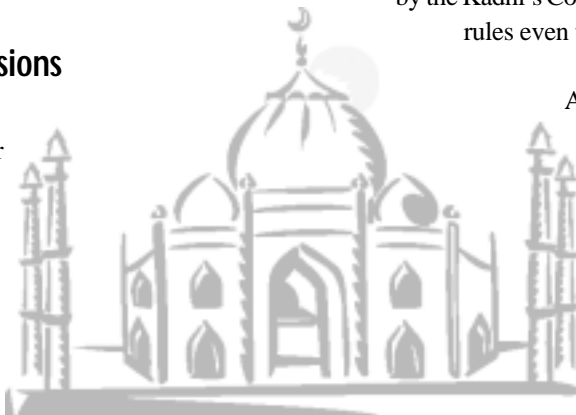
ICJ (K) has noted the wide debate on the Kadhi Courts and hereby endeavours to provide the delegates of the National Constitutional Conference with a consensus.

History of the Establishment of Kadhi Courts

Muslim religious Courts were in existence along the East Coast of Africa long before the coming of British Colonialists to the country. An agreement was executed by the Prime Ministers of Kenya and Zanzibar Messrs Jomo Kenyatta and M. Shamte respectively on 5th October 1963 and the independence constitution then provided for the establishment of the Kadhi's Courts and their powers.¹

Current Constitutional provisions regarding the Kadhis Court

The current constitution provides for the establishment of Kadhis courts under section 66. This section provides for the appointment of a chief Kadhi and such other number of Kadhis (not being less than three) as may be prescribed by an Act of Parliament. Each



Kadhi is empowered to hold a Kadhi court within Kenya as is further prescribed under the Kadhis Courts Act (Cap 11).

The jurisdiction of the Kadhis court under the constitution extends to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all parties profess Islam.

As regards the qualifications for appointment as Kadhi, the constitution provides only that the appointee must profess the Muslim religion and possess such knowledge of Muslim law as qualifies him, in the opinion of the Judicial Service Commission, to hold a Kadhi's court.

In pursuance to these constitutional provisions, the Kadhi's Courts Act (Cap 11) provides for the establishment of 12 Kadhis courts in addition to the Chief Kadhi and establishes the jurisdiction of these courts in various areas around Kenya. It further provides that the Chief Justice may make rules for the procedure and practice to be followed in the court. In the absence of these rules the court is mandated to apply the procedure and practice prescribed for subordinate courts under the Civil Procedure Act.

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.²

An appeal from the Kadhi's Court can be lodged with the Chief Kadhi's Court or to the High Court. The High Court sits 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 but here the Chief Kadhi or any other Kadhi do not sit as assessors.

It should be noted that the law does not vest Kadhis Courts with exclusive jurisdiction over matters concerned with Muslim personal law. The High court and subordinate courts may hear and determine matters on Muslim personal law and need not apply Muslim law in the process.

The Draft constitution and its provisions regarding the Kadhis Court

With regard to the Kadhis courts the draft constitution provides as follows:

1. Section 199 of the draft establishes the offices of Chief Kadhi, senior Kadhi and Kadhi and provides that there shall be a number, being not less than thirty, of other Kadhis as may be prescribed by an Act of Parliament.

The lowest court in the hierarchy of this system is a district Kadhis Court presided over by a Kadhi and having jurisdiction within a district or districts as may be prescribed by an Act of Parliament. Appeals from this court lie with the provincial Kadhis court presided over by a senior Kadhi. From this court, appeals lie with a Kadhis court of appeal presided over by the chief Kadhi assisted by two senior Kadhis.

The highest court in this hierarchy is the Supreme court (established under section 187 of the draft) where an appeal from the Kadhis' Court of Appeal lies, but only on a point of Islamic Law or on an issue affecting the interpretation of the Constitution or any other constitutional issue.

2. With regard to jurisdiction, the Kadhis court is mandated to determine questions regarding:
 - The personal status, marriage, divorce, including matters arising after divorce, and inheritance and succession in proceedings in which all the parties profess Islam;