KADUNA STATE GOVERNMENT
COMMITTEE ON THE HARMONISATION OF DRAFTS
OF THE SHARIA PENAL CODE AND
SHARIA CRIMINAL PROCEDURE CODE LAWS

Reports by the two subcommittees of the committee[1]

Contents:

[1] Ed. note: these reports are both undated. The committee whose reports they are held its first meeting on 24th November 2001, see p. 2, and the Kaduna State Sharia Penal and Criminal Procedure Codes on which they report were both signed into law on 21st June 2002, so presumably the reports were completed some time in the first half of 2002.

I.

Report of Subcommittee Chaired by Hon. Grand Kadi Dr. Maccido Ibrahim

KADUNA STATE GOVERNMENT COMMITTEE TO HARMONISE DRAFTS ON SHARIA CRIMINAL PROCEDURE AND SHARIA PENAL CODE LAWS

[Introduction]

In its efforts to meet the demand of its people, the Kaduna State Government decided to establish Sharia and Customary Courts in the State.

The Government, in view of the above retained the services of the Centre for Islamic Legal Studies, Ahmadu Bello University, Zaria to produce drafts on Sharia Penal Code and Sharia Criminal Procedure Code Laws.

On completion of the assignment, His Excellency, Alhaji Ahmed Moh'd Makarfi, the Executive Governor of Kaduna State set up a committee to harmonise the drafts of the two laws, with a view of drafting a final bill to be forwarded to the Kaduna State House of Assembly for its consideration and passage into law.

Pursuant to this decision, the Government established a seven-man committee. Thus:

1.	Hon. Justice Bashir Sambo, Grand Kadi of the Fed. Capital Abuja (Rtd)	Chairman
2.	Hon. Justice Mu'azu Aliyu, Grand Kadi Kaduna State (Rtd)	Member
3.	Hon. Dr. Maccido Ibrahim Grand Kadi Kaduna State	Member
4.	Hon. Attorney General Kaduna State	Member
5.	Barrister Alh. Yahya Mahmud a Kaduna based Legal Practitioner	Member
6.	Barrister Shehu Ibrahim Ahmed – Chief Registrar Sharia Court of Appeal, Kaduna	Member
7.	Barrister Ibrahim Lawal Ibrahim, Legal Draftsman Ministry of Justice Kaduna	Secretary

The committee held its first meeting on the 24th of Nov. 2001 at 11.30 a.m. The committee established two sub-committees, one under the chairmanship of the Hon. Grand Kadi Kaduna State Dr. Maccido Ibrahim, and two to be reviewed by Barrister Yahya Mahmud.

[Terms of reference of the subcommittees]

Sub-committee number one of the Hon. Grand Kadi has the following guidelines:

1. *Ta'azir*: does that mean lashes only or include imprisonments in Islam?
2. Creating roles for traditional rulers in *mu'amalat* and matters regarding witchcraft, juju etc.
3. Can compensation be awarded in place of *qisas*? and

4. To generally look into the conformity of the two laws with the Islamic law taking into consideration the volatile and multi-religious nature of the state.

The Yahya Mahmud sub-committee will take care of constitutional limitations and the problems which might arise on appeal to Court of Appeal and the Supreme Court of Nigeria.

[Observations on specific sections of the draft Sharia Penal Code]

The sub-committee of the Hon-Grand Kadi reviewed the Sharia Penal Code Law and make the following observations:

1. P. 1 S. 3(1) Sharia Penal Code Law. The section does not accept deletion or substitution because it is a matter of law i.e. a provision under S. 20(1)(b) of Sharia Courts Law, 2001 as amended by Sharia Court (Amendment) Law, 2001.
2. P. 15 S. 57(b). The word *qisas* includes punishments inflicted upon offenders by way of equitable retaliation for causing death or injury to a person. Not necessarily that the killer will be killed with the same instrument or weapon.
3. [no text opposite 3 in original]
4. P. 27 S. 93(1)(h). The word retaliation can be changed to a more civilized one such as the word equality as defined by Professor Abdurraman I. Doi in his book, *The Basis of Sharia* p. 331. While (i) to (p) in the same section can be under (h) as regard commission of crimes, their nature, circumstances and economic position of the state and the judge's discretion. This is because punishments vary according to variation of circumstances e.g. during disaster, war or famine.
5. P. 10 S. 26. The word voluntarily is not clear, can be substituted with the word intentionally subject of the committee's understanding of the context.
6. P. 11 S. 37. Not all crimes and their punishments can be substituted to the payment of compensation to person injured. This committee can discuss and make a decision in some offences.
7. P. 13 S. 47. The definition of *taklif* is in agreement with the Constitutional provision of the Federal Republic of Nigeria 1999.
8. P. 14 S. 50. The definition of *qatl'al-gheelah* needs more elaboration or amendment, because *qatl al-gheelah* can be done without taking property – e.g. a husband who intentionally killed his wife with a gun or knife is *gheelah*; or master kills his slave in the same manner. In this case the general principle of *annafs binnafs* should be applied.
9. P. 14 S. 57. *Ta'azir* can be applied by the State or judge.
10. P. 14 S. 57(A). Offences or punishments as provided under the sections simply means:

    S. 125 - *Zina*
    132 - Incest
    138 - *Qadhf* defined

139 - Punishment of *qadhf*
143 - Theft defined
144 - Punishment for theft
148 - Punishment for drinking alcoholic drink
150 - Punishment for drunkenness in a public or private place
151 - *Hirabah* defined
152 - Punishment for *hirabah*.

11. P. 15 S. 57(b). The word retaliation can be changed to a more civilized one such as "the law of equality" or "reciprocity".

12. P. 23 S. 83. Provides that right of *diyah* or damages shall not be prejudiced in appropriate cases such as:

S. 66 - Presumption of knowledge of an intoxicated person
67 - Act done by person justified by law
68 - Act of court of justice
69 - Act done pursuant to the judgement or order of court
70 - Accident in doing a lawful act
71 - Act done without criminal intent to prevent other injury or to benefit person injured.
72 - Act of child
73 - Act of person of unsound mind or person asleep
74 - Involuntary intoxication
75 - Act not intended to cause death done or grievous hurt done by consent
76 - Act done not intended to cause death done by consent for a person's benefit.
77 - Correction of child, pupil, servant or wife
78 - Communication made in good faith
79 - Act to which a person is compelled by threats
80 - Nonvoluntary act
81 - Act of necessity
82 - Act causing slight harm.

13. P. 23 S. 84 up to 92. Right of private defence is in agreement with Maliki school of law and there is no alternative.

14. P. 27 S. 93(i)(k). Reprimand can be " " [sic] instead of *tawbikh*. S. 939(i)(p). Warning is not the same as *tahdid*, the world *tahdid* can be changed to *inzar* to give the court meaning or warning.

15. P. 28 S. 95(b). The number of lashes or the amount of fine is supposed to be open in accordance with the *ijtihad al-qadi*. Subject to the opinion of the committee.

16. P. 28 S. 96(i). In Maliki school of law every Sharia Court has unlimited jurisdiction without tempering the aggrieved party's right to appeal against the decision of the lower court.

17. P. 28 S. 97. The solution in Maliki school of law is *taflis* i.e. to auction the offender's movable or immovable properties or to give him time to pay instalmentally, but certainly not imprisonment. If the offender has nothing to auction Islamic treasury can pay for him.

18. P. 29 S. 98. In Maliki school of law there is no imprisonment or canning in default of payment of fine. This is because as earlier on stated either the offender to pay the fine or his property to be sold in order to pay the fine or the Islamic treasury is to pay it on his behalf so the table under the section is not known and not applicable under Maliki law. The table can be brushed [sic] or substituted with *ta'azir* subject to committee's opinion.

19. P. 30 S. 100. The section is not clear because Islam generally and Maliki school of law in particular kicked against double jeopardy. Committee has to form opinion on this.

20. P. 30 S. 101. An example of misdemeanour must be provided in order to see whether or not a particular misdemeanour is an offence in Islam. Again *tahdid* does not denote warning refer to S. 27(k).

21. P. 31 S. 102. The section is not quite relevant with Maliki school of law because all Sharia Courts are bound to apply Maliki law only and no any other law or act apart from fundamental issues of the Constitution or any other cardinal principles of justice affecting human right.

22. P. 31 S. 103. Closure of premises used in conducting business in contravention of Sharia like beer parlour, casino houses etc. Such places can be closed forever or to change the business to something permissible in Islam.

23. P. 31 S. 104. The section is in agreement with Maliki school of law and there were a case law to that effect whereby Sayyidi Ali (RA) ordered for a whole caravan to be killed because one of them killed a fellow traveller and all of them refused to show him to the authority.

24. P. 32 S. 110. Since there is no express provision made by this Code which is supposed to follow Maliki school of law, then there is the need to borrow from other schools of law such as Shafi'i or Hanbali or Hanafi.

25. P. 32 SS 108 to 119. Though the matters need further discussions by the committee, because of the *muhadanah* (mixed laws) they contain. This mixture of Sharia and man-made law makes the sections irrelevant also run counter to the provisions of S. 4 of Sharia Court Law as amended by Sharia Courts (Amendment) Law 2001.

26. P. 35 S. 120. Contains (*muhadanah*) – mixed laws, Sharia and man-made law please refer to P. 32 above.

27. P. 36 S. 121. The applicability of this depends upon the alkali's discretion after due consideration of manners, mood and intention.

28. P. 36 S. 122(1) & (2). Falls under *qisas* while p. 37 S. 123 they are called in Arabic *bugatuz zalimin* or *mufsidun* they are to be punished according to their different offences.

29. P. 37 S. 124. The provisions of this S. are borrowed from another Islamic school of thought, so the section is subject to be discussed by the committee.

30. P. 37 S. 126(b). Needs an intensive research to get an alternative even if by going outside the country, though it can remain as it is till we find an alternative. The explanation under the section is acceptable to the Maliki school of law.

31. P. 38 S. 127(1)(v). Needs more elaboration or be abolished, though it is subject to the opinion of the committee. This is because age does not matter in cases of rape.

32. P. 38 S. 128(c). The sections can be applied to both housewives and concubines after investigations on culture.

33. P. 39 SS 129 & 130. The punishment for sodomy is specifically provided by Sunnah of the Prophet (SAW)

    [space left in original evidently for insertion of text in Arabic]

    and there is no difference between a man and woman. The only exception is where the husband commits the offence of sodomy with his wife the punishment in this case is caning.

34. P. 39 S. 132(a). The punishments can differ according to the form and gravity of the crime for instance incest with mother and daughter or grand daughter can attract severe punishment exceeding one year. But in case with a sister one year is enough as provided by the ode, depending upon the alkali's *ijtihad*. Refer to S. 126(b) for a similar provision in case of alternative if need be.

35. P. 41 S. 137. The provision of this section does not cover kissing in public of man and a woman who are husband and wife. It can not also be applied on people whose culture allows them to do so in public like Arabs and English, they do it to even their relations whether male for female most particularly on the cheek.

36. P. 41 S. 138. Second paragraph of this section needs more elaboration and if possible with an example.

37. P. 41 S. 138. No alternative.

38. P. 41 S. 140(a). The provision of this section is acceptable even in murder cases punishable with death the punishment can be changed to payment of *diyah* as prescribed in Maliki law.

39. P. 41 S. 140(b). Where husband withdrew his allegation against the wife the matter becomes ordinary *qadhf* so in this case the husband can be caned 80 lashes and the marriage continues, thus before *li'an*, according to some jurist even after *li'an*.

40. P. 42 SS. 141 & 142. Need more elaboration in respect of the position of the Holy Prophet (SAW) by stating that if one applied what are contained in the two sections

on the Holy Prophet Muhammad (SAW) with bad intention he should be killed and there is no alternative. See the Book of *Alshifa* written by Al-Qadi (Iyadh).

41. P. 44 SS. 143 & 144. There will be no amputation in case of theft where there is necessity, hunger, war faming or disaster; the punishment can be commuted to imprisonment.

42. P. 47 S. 150. The section is just a style of English Penal Code. Islam the punishment is canning or imprisonment let it be so or both but no more. Subject to further discussion by the committee.

43. P. 48 S. 152(a). Which authority provides the type of punishment SS (b) would not be applied unless the robber used dangerous weapons. SS (c) is supposed to be under murder and not *hirabah*.

44. P. 48 S. 153. Is not Maliki law it also contains double jeopardy there is again a difference between preparation and attempt. Preparation can attract canning and not imprisonment.

45. P. 49 SS. 155-159. The sections provide more than one punishment using the word "shall" which indicates imperative application while Islam prohibits double jeopardy. So the ward "can" may be used instead of shall in order to give room for an alternative.

46. P. 62 S. 199(c) (a) (b) [sic]. Needs elaboration. The punishment of *gheelah* contained in the proviso to the section can be remitted to payment of *diyah* if the heirs opted to it.

47. P. 65 S. 206. The provision of the Code in respect of payment of *ghurrah* for causing miscarriage is in line with Maliki school of law. But instead of providing an imperative additional caning of ten lashes the section should have allowed the judge to exercise his discretion.

48. P. 65 SS. 207-304. Should remain as they are. This is because to get their details in Maliki school of law is not easily possible according to our understanding, but subject to the committee's opinion.

49. P. 98 SS. 305-340. Are also same as above, likewise SS. 341-353.

50. P. 119 SS. 354-399. We also advise that they should remain as they are, while SS. 400-402 can be applied under *ijtihad al-qadi*; but S. 403(A)(1)(2) are absolutely in compliance with Islamic schools of jurisprudence.

51. P. 138 SS. 404-409. Dealing with ordeal, witchcraft and juju. According to the provisions of the Holy Qur'an and the Maliki law people who engage in such practices are the ones who associate [other things] with Allah (SWA) because they invoke the help of *jins* by calling their names and making sacrifices for them most especially with goats. Legally speaking any Muslim engages in such a practice will be asked to repent within (3) days if repented and desist from the practice he will be set free, if refuses repentance then he will be regarded as the one who commits *ridda* and his punishment is to be killed by hanging. The code and other books of theology provide death punishment for such practices.

SUMMARY

(a) Term of reference number one, which says does *ta'azir* mean only lashes or does it include imprisonment in Islam. Grand Kadi AbuAlhasan Aliyu Ibn Muhammad Ibn Habib Al-Mawardi in his book *Al-Ahkam al Sultaniyyah* Chapter 19 pp. 219-259 says that imprisonment can be included in some aspects.

(b) Term of reference number two which deals with roles to be played by the traditional rulers in *mu'amalat* and matters related to witchcraft, juju and the like. In this respect business people of different calls such as *sarkin* or *galadiman pawa*, *sarkin ma'auna* or *sarki in dillalai* can be mobilised through traditional rulers to act as *hisbah* to deal with those who adulterate foods or drinks or those who tamper with scales or mudus with the view to earn wrongful gain and cause wrongful loss to buyers. This does not mean that they will try and punish offenders, but they only caution and deter offenders or take them to court in cases beyond their control for justice to take its course.

(b)i Traditional rulers can also be used to reconcile between a father and his daughter in case of forced marriage if the reconciliation fails they take matter to court.

(b)ii They can be used as arbiters between neighbours who are ready for out of court settlement once and for all in cases of mischief or nuisance.

(b)iii They can assist courts and give evidence by specifying the boundaries of farm lands in court or when judge goes for locus in quo visit. In this respect traditional rulers can be invited by one of the parties or court can summon them to assist or give evidence.

(b)iv In case of witchcraft all the punishments are there in the Penal Code.

(c) Term of reference number three deals with payment of compensation instead of *qisas*. This is done when the *waliyul-dam*, legal claimants of the blood of the victim, asked for same in place of *qisas* and is allowed even in intentional killing.

(d) Term of reference number four which deals with the conformity or otherwise of the two Sharia Codes with the Islamic law considering the volatile and multi-religious nature of Kaduna State. The matter is simple, because Islamic Sharia allows intra-borrowing from one or more particular school of though to another when the need for so doing arises. Sharia law in general and the two Sharia Codes of Kaduna State in particular are in conformity with the 1999 Constitution by virtue of SS. 4 (4), 6(4) (5), 33 & 34, 38, 275-277 and S. 10.

CONCLUSION

We observe that this Sharia Penal Code has adequately treated *hudud* & *qisas* contained in the Holy Qur'an and there is no alternative from a clear provision of the Holy Qur'an which does not accept any other than its apparent meaning.

We also observe that SS. 206-219 of the Sharia Penal Code where "shall" which denotes imperative is frequently used the word "can" can serve the purpose in order to give room for an alternative and to allow the judge to use his discretionary powers taking into consideration the mercy nature of Sharia which prohibits double jeopardy, that is why one will find that only few cases such as *zina* and *qatl* murder carry three different punishments at a time.

In *zina* the offender can be sentenced to 100 lashes, one year imprisonment and in addition, the offender can be adjudged to pay damages. In respect of the volatile and multi-religious nature of Kaduna State, the solution to the problem is that every judge among the three tier legal system shall limit himself to what the law provides for him as jurisdiction in personal, territorial and subject matter jurisdictions with out exceeding limit.

Co-operation and understanding of traditional rulers and application of justice equity and good conscience will help matters.

We also realise that the draftsmen of the Sharia Penal Code Law depended on a well-known books. One is *Punishment in Islamic Law* written by Muhammad S. El-Awa from Chapter 4 SS. 96-116 they depend on the book 100% word by word in both Arabic and English. Two, is *Basis of Sharia (Islamic Law)* written by Prof. Abdurrahman Doi concerning criminal offences most especially part III PP. 316-391. Three *Islamic Law in Nigeria: Application and Teaching* edited by S. Khalid Rashid. Four, *Al-Ahkam al-Sultaniyyah* written by Grand Kadi, Abu-Akhasan Aliyu, Ibn Muhammad, Ibn Habib Al-Mawardi. Five, *Al-mahakim al-shar'iyyah.* Six, the Penal Code Law of Kaduna State.

We also want to seise this opportunity to advise the Government to provide the standard and uniform mudu and scale for measuring and weighing essential commodities, such as cash crops, meat and the like.

The Code under review is acceptable and appropriate most especially in a State like Kaduna which has multi-religious and divergent ethnic groups.

The provision of the Code apart from *hudud* and *qisas* which mainly based on Maliki school of law are based on what is known in Sharia as *maswalih al-amah*, public interest, which is also an important source of Sharia along with *qiyas,* analogical deductions, as they are always good instruments used to take care of new cases arising as a result of technological advancement and civilisation sophistication. These are our observations after reading the Code page by page.

Signed by:

……..
Dr. Maccido Ibrahim
Grand Kadi
Kaduna State
[Chairman Sub-Committee]

Signed by

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Barrister Shehu Ibrahim Ahmad
Chief Registrar Sharia Court of Appeal
Kaduna
Member/Secretary Sub-Committee

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II.

Report of Subcommittee Chaired by Barrister Yahya Mahmud

KADUNA STATE GOVERNMENT COMMITTEE FOR THE HARMONISATION OF KADUNA STATE DRAFT SHARIA PENAL CODE LAW 2001 AND KADUNA STATE SHARIA CRIMINAL PROCEDURE CODE LAW, 2001

INTRODUCTION

The Kaduna State Government must be congratulated for preparing draft Sharia Penal Code Law, 2001 and Sharia Criminal Procedure Code Law 2001 for the criminal administration of justice to the Muslim citizens in Kaduna State as a fulfilment of their fundamental right. The fundamental rights of the Muslims begin with Divine rights, which can only be accomplished with the provisions of Sharia to govern their lives. It must be remembered that just before Nigeria became independent in 1960 the former Northern Nigeria Government was under duress blackmailed into passing Penal Code Law and Criminal Procedure Code Law for the administration of criminal justice in Northern Nigeria for both Muslims and non-Muslims. Though these Penal Code Law and Criminal Procedure Code Law contained some aspects of Sharia punishments for Muslims only, they were not found to be satisfactory to the Muslim as both the Northern Nigerian Government and the Panel of Jurists which it appointed to reorganise the laws of criminal justice did betray a very important recommendation of the panel which says:

> (b) Since the majority of the people living within the Region were Muslims, it was desirable to ensure that the new criminal system or Penal Code to be adopted did not in any way conflict with the provisions and injunctions of the Holy Qur'an and Sunnah (Sharia).

It will be of interest to know the several comments, observations and recommendations made on the draft bill by the Junaidu Committee.

2. What the Kaduna State Government has done in drafting Sharia Penal Code Law and Sharia Criminal Procedure Code Law is simply to expand the criminal Sharia jurisdiction of Sharia Courts and making the Sharia Penal Code Law and Sharia Criminal Procedure Code Law applicable to Muslims only. The harmonisation committee has therefore studied the two Sharia Codes and made clarification of the provisions in order to make it to have no conflict with Holy Qur'an and Sunnah and also in conformity with the Sharia provisions in the Constitution and authoritative laws. One must pray and hope that those Muslims who by ignorance or selfishness tried to hinder the proper development of Sharia legal system in this country will not repeat themselves again. The way and manner the Kaduna State Government has reformed the legal system in the State, the High Court, the Sharia Court of Appeal, the Magistrates, the Sharia Courts and Customary Courts for the administration of justice to all its citizens is really commendable. No Kaduna State citizen can now complain of being taken and made to go to a court, which is not of his/her choice. The two Sharia Penal Code Law and Sharia

Criminal Procedure Code Law have met the demand of the Muslim citizens of Kaduna State the they are applicable to the Muslims only.

1999 CONSTITUTION

3. The harmonisation committee has also studied the two laws in line with the 1999 Constitution and it has come to firmly believe that the laws conform with the provisions of the 1999 Constitution. This is because the Kaduna State Government has prepared the two laws in line with the powers given to it by the 1999 Constitution. The sections of 1999 Constitution which give the Kaduna State Government the powers are section 1, 4(6), 4(7), 6(4), 6(5)k, 36(12) 277(1), 278 and 279.

Section 1(1) "This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria."

Section 1(3) "If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail and that other law shall to the extend of the inconsistency be void."

Section 38(1) "Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance."

According to section 1(1), section 38(1) of the 1999 Constitution as quoted above is binding on Kaduna State Government. It is by this provision that the Kaduna State Government prepared the two Sharia Code laws for her Muslim citizens in fulfilment of their fundamental right of religion. The two Sharia Code laws are not inconsistent with any provision of the 1999 Constitution. The other provisions of the Constitution which give the Kaduna State Government prepare these two Sharia Penal Code are:

Section 4(6) "The legislative powers of State of the Federation shall be vested in the House of Assembly of the State."

Section 4 (7). "The House of Assembly of a State shall have power to make laws for the peace, order and good government of the State or any part thereof with respect to the following matters, that is to say:

(a) any matter not included in the Exclusive Legislative List set of in Part I of the Second Schedule to this Constitution;
(b) any matter included in the Concurrent Legislative list set out in the first column of Part II of the Second Schedule to this Constitution to the extent prescribed in the second column opposite thereto; and
(c) any matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution."

Section 6(4) "Nothing in the forgoing provisions of this section shall be construed as precluding:

(a) the National Assembly or any House of Assembly from establishing courts other than those to which this section relates with subordinate jurisdiction to that of a High Court;

(b) the National Assembly or any House of Assembly which does not require it from abolishing any court which it has power to establish or which it has brought into being."

Section 6(5)k "such other courts as may be authorised by law to exercise jurisdiction at first instance or on appeal on matters with respect to which a House of Assembly may make laws."

Section 36(12) "Subject as otherwise provided by this Constitution, a person shall not be convicted or a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law; and in this subsection, a written law refers to an Act of the National Assembly or a law of a State, any subsidiary legislation or instrument under the provisions of a law."

Section 277(1) "The Sharia Court of Appeal of a State shall, IN ADDITION TO SUCH OTHER JURISDICTION AS MAY BE CONFERRED UPON IT BY THE LAW OF THE STATE, exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal law which the court is COMPETENT to decide in accordance with the provisions of subsection (2) of this section." It is clear indeed to anybody unless his vision is clouded with ignorance or selfishness he cannot say that the law of the State can only confer additional in Islamic personal law. It is beyond doubt that the law of the State has power to confer to the Sharia Court of Appeal additional jurisdiction in both Islamic civil and criminal matters. If the lower courts of Sharia i.e. Sharia Courts are given jurisdiction to deal with Islamic civil or criminal matters, the Sharia Court of Appeal would have jurisdiction to entertain appeals in both Islamic civil and criminal matters coming from such lower courts. THAT THE EXPRESSION "IN ADDITION TO SUCH OTHER JURISDICTION AS MAY BE CONFERRED UPON IT BY THE LAW OF THE STATE" IN SECTION 277 OF THE CONSTITUTION WOULD EMPOWER A STATE LAW TO CONFER JURISDICTION ON THE SHARIA ON THE SHARIA COURT OF APPEAL IN ALL CASES GOVERNED BY ISLAMIC LAW IS CONFIRMED BY REFERENCE TO "JURISDICTION CONFERRED UPON IT BY THIS CONSTITUTION OR ANY LAW" IN SECTIONS 278 AND 279 OF THE CONSTITUTION.

Section 278 "For the purpose of exercising any jurisdiction conferred upon it by this Constitution or any law."

SECTION 279 "Subject to provisions of any law made by the House of Assembly of the State."

SECTION 10 "The Government of the Federation or of a State shall not adopt any religion as State Religion". This section 10 is a controversial provision of the 1999 Constitution, which contradicts other important provisions of the 1999 Constitution. This section 10 is wrongly given the meaning of secularism for the country and it can not certainly stand the way of Kaduna State Government in its resolve to give the Muslim

citizens their fundamental right through the provisions of Sharia Penal Code Law and Sharia Criminal Procedure Code Law. As a matter of fact the Nigeria Inter-Religious Council, in its effort to build a solid mutual understanding between Muslims and Christians of this country organised a two day seminar on Sharia, June 21 – 22nd 2000, co-chaired by His Eminence the Sultan of Sokoto, Alhaji Muhammadu Maccido and the President of Christian Association of Nigeria, His Eminence Dr. Sunday Mbang and issued the following communiqué at the end of the seminar:

(1) Whereas the Council accepts the fact that Muslims have the right to practice Sharia in accordance with the demands of Islamic religion and within the provisions of the Constitution of the Federal Republic of Nigeria, NIREC appreciates the fears expressed by non-Muslims on the application of Sharia, especially in the areas of apostasy, capital punishment and any other areas of discrimination. The Council therefore recommends that the implementation of Sharia in any part of Nigeria should not violate the freedom and legitimate interests of non-Muslims as guaranteed by the Nigerian Constitution.

(2) Whereas the practice of Sharia remains the right of every Muslim faithful, it should not be extended to non-Muslim. The Council notes the fact that a non-Muslim is not even qualified to practice Sharia.

Besides these two points of the communiqué quoted above, there are seven more points of the communiqué which is relevant in efforts to bring understanding between Muslims and non-Muslim but the two quoted points above are most relevant as far as the question of Sharia is concerned. It is therefore crystally clear that the two Kaduna State Government Sharia Penal Code Law and Sharia Criminal Procedure Code Law are in conformity with the 1999 Constitution.

COURT OF APPEAL

4. It has been opined that since the 1999 Constitution has fundamentally given the Sharia Court of Appeal jurisdiction in civil proceedings of Islamic personal law, it is therefore the Court of Appeal that is likely to tackle appeals from the decisions of the Sharia Court of Appeal on Islamic personal law only. This opinion is wrong since the Constitution has given the State law the power to confer additional jurisdiction in all cases governed by Islamic law. What is important to understand is that the competence of the Sharia Court of Appeal to decide can not be limited to questions of Islamic personal law only when the State law has conferred to it jurisdiction in other laws, criminal or otherwise. The Court of Appeal is therefore competent always to decide on whatever the Sharia Court of Appeal is competent to decide. It is in order to prepare justices of the Court of Appeal that such justices are required to be learned in Islamic law and not in Islamic personal law. A reference to Section 288 of the 1999 Constitution testifies to that. Section 288 says:

(1) In exercising his powers under the forgoing provisions of this chapter in respect of appointments to the offices of Justices of the Supreme Court and Justices of the Court of Appeal, the President shall have regard to the need to ensure that there are among the holders of such offices persons learned in Islamic personal law and persons learned in Customary law.

(2) For the purposes of sub-section (1) of this section (a) a person shall be deemed to be learned in Islamic personal law if he is a legal practitioner in Nigeria and has been so qualified for a period of not less than fifteen years in the case of a justice of the Supreme Court or not less than twelve years in the case of the Court of Appeal and has in either case obtained a recognised qualification in ISLAMIC LAW from an institution acceptable to the National Judicial Council.

5. If sections 237, 240 and 244 of the 1999 Constitution are examined well, they will confirm that the Court of Appeal has jurisdiction to entertain any decisions which the Sharia Court of Appeal is competent to decide.

Section 237

(1) "There shall be a Court of Appeal."

(2) "The Court of Appeal shall consist of a President; and such number of justices of which three shall be learned in Islamic personal law."

Section 240

"Subject to the provisions of this Constitution, the Court of Appeal shall …… [sic] as may be prescribed by an Act of the National Assembly."

Section 244

(1) An appeal shall lie from decisions of a Sharia Court of Appeal to the Court of Appeal as of right in any civil proceedings before the Sharia Court of Appeal with respect to any question of Islamic personal law, which the Sharia Court of Appeal is competent to decide.

If section 288 which makes it clear that a justice of the Court of Appeal must be learned in Islamic law is considered with sections 237, 240 and 244, it will be clear that the Court of Appeal has jurisdiction to hear appeals from Sharia Court of Appeal on all cases governed by Islamic law. The proviso which is in the opening of section 240 has made it clear that section 244 must always go together with the section as the proviso has shown that anything added to the Sharia Court of Appeal by the law of the State will make the Sharia Court of Appeal competent to decide on it. By this proviso in Section 240, the Court of Appeal is made duty bound to hear appeals from all cases governed by Islamic law upon which the Sharia Court of Appeals is competent to decide as Section 277(1) of the 1999 Constitution has clearly vindicated.

AUTHORITIES

5. [sic] It is necessary to consider authorities, which may appear to be in conflict with the provisions of the Sharia Penal Code Law and Sharia Criminal Procedure Code Law prepared by the Kaduna State Government. But if such authorities are considered they will be found to come about out of ignorance or selfishness. In any case, as far as Islamic law is concerned, the law of precedence of the common law has no validity in Islamic law. Such authorities should not discourage the Kaduna State Government in preparing

its Sharia criminal laws, which are fundamentally made in fulfilment of the fundamental rights of the Muslim citizens of Kaduna State. If cases decided by the Sharia Court of Appeal go to the Court of Appeal they will not be decided only on decided cases but on the Constitution and other aspects of law. If the court becomes convinced that section 277(1) strengthened by section 278 and 279 has given the law of the State power to confer additional jurisdiction on the Sharia Court of Appeal in all cases governed by Islamic law, it can then hear and decide on all such cases coming to it from the Sharia Court of Appeal. Whatever the case may be, the Kaduna State Government has the constitutional right to provide the Muslim citizens of Kaduna with their fundamental rights of freedom of religion as enshrined in section 38(1) of the Constitution. No freedom of religion can be provided without the laws of such a religion and in the case of Sharia both civil and criminal. It is earnestly hoped that those Muslims who in the past used to stand in the way of the development of the Sharia legal system will stop doing so in the interest of justice and fair-play.

EDUCATION

6. The administration of justice within the Sharia legal system requires that both the judge and plaintiff/defendant should have the knowledge of Sharia. It is especially so with the judge It is necessary therefore for the Kaduna State Government to give more attention to the religious education of all of its citizens. In any case, no person should be allowed to be a judge unless he has the requisite qualification, good learning and fear of Almighty Allah.

7. Finally with further studies of the provisions of the two Kaduna State Sharia Penal Code Law and Sharia Criminal Procedure Code Law concluded the bills should be made ready for presentation to the Kaduna State House of Assembly. An interim has already been made available. What remains may be a trip overseas to seek verification of certain provisions of the two Sharia Penal Code Law and Sharia Criminal Procedure Code Law. Lastly, the Kaduna State Government ably led by His Excellency, Alhaji Ahmed Mohammed Makarfi, the Executive Governor of Kaduna State must again be congratulated for preparing the Kaduna State Sharia Penal Code Law and Sharia Criminal Procedure Code Law in fulfilment of the fundamental rights of the Muslim citizens of Kaduna State. May the Almighty Allah bring peace, mutual understanding, respect and prosperity to Kaduna in particular and throughout the Federal Republic of Nigeria in general, amen!

[Yahya Mahmud]
Chairman Secretary