

## CHAPTER 4

### DEVOTIONAL ACTS

#### Meaning of Classification of legal acts (Ahkamu-Sharia)

These are legal categories under which actions have been divided on basis of Islamic sharia (laws in Islam) so as to guide Muslims to the right path.

#### Classification of legal acts in Islam

The following are classifications of legal acts in Islam:

##### 1. Fardh and Wajib

**Fardh** refers to the compulsory acts which a Muslim, who is sane and has attained puberty, must observe. Performing these acts earns a Muslim reward while neglecting them leads to Allah's punishment. It is divided into faradh ain and faradh kifaya.

- a) **Fardh-Ain** is an act that is compulsory for every individual Muslim. When a person performs these acts, they earn individual rewards from Allah. Failure to perform them will lead to a Muslim to get a sin. For example, fasting during the month of Ramadhan, performing the five-daily prayer.
- b) **Fardh-Kifaya** means collective duty or collective responsibility. These acts are obligatory upon the entire Muslim community. If it is performed by a few members of the community, then the obligation is lifted for the rest of the Muslims. In case none performs it, then the entire Ummah falls into error and is liable for punishment. For example, performing swalatul Janaza.

**Wajib** These are necessary and deserving, acts of ibada, which must be observed. One is rewarded for performing a Wajib act while Allah (SWT) punishes whoever neglects it. A Muslim who denies the performance of Wajib acts shall be declared a kafir (unbeliever). Wajib acts form part of the steps of acts of Ibada and by leaving these steps, the ibada is deemed deficient by. For example, during prayer, it is necessary to perform a prostration of forgetfulness a wajib act is omitted forgetfully or to repeat the prayer if omitted intentionally. In the case that one neither prostrates for forgetfulness nor repeats the swalat, one is still counted as having offered the swalat though with deficiency (this is sinful).

## 2. Sunnah

Sunna acts refer to the optional and recommended deeds upon the Muslims. These acts comprise the prophet (p.b.u.h) deeds, his teachings or his exemplary life. Allah (SWT) rewards those individuals who observe sunna acts but does not punish one for not observing them. For example, sharing food and saluting people, performing Itqaf in the last ten days of Ramadhan, performing sunna prayers like tahiyyatul Masjid.

## 3. Sahih

This is the performance of acts of ibada in their correct way by following the procedure laid down in the Shariah. Observation of legal acts in the correct manner renders them valid and acceptable. For example, making the correct intention before performing swalat, saum, hajj or any other ibada and observing the prerequisites of prayers.

## 4. Batil

Batil means to invalidate or cancel. In the Sharia, they refer to those actions that have been nullified or invalidated due to the performer failing to observe them correctly. For example, observing fast without intention, or praying without wudhu or missing out certain rules and conditions when performing Hajj.

## 5. Halal and Haram (Permitted and non-permitted acts in Islam)

**Halal** refers to any lawful and permissible rule, practice or mode of behaviour by the Sharia. One is rewarded for observing these acts and whoever neglects them, earns sins. For example, marriages, trading, eating meat of animals that have been slaughtered according to the teachings of Islam.

**Haram** refers to any unlawful and prohibited rule, practice or mode of behavior by sharia. Avoiding these acts earns a Muslim praise and rewards while one is punished both in this world and in the hereafter for performing them. Haram is divided into two categories as shown in the table below:

Haram by itself	Haram caused by others
<p>These are acts which are forbidden by themselves right from the start, for example:</p> <ul style="list-style-type: none"><li>• Adultery (zinaa)</li><li>• Selling dead bodies</li><li>• Marrying mahram (forbidden degrees)</li><li>• Gambling</li><li>• Intoxicants</li><li>• Theft and robbery</li><li>• Corruption</li><li>• Ribaa (usury)</li></ul>	<p>Are acts which initially were wajib, sunnah etc but something caused them to become haram, example</p> <ul style="list-style-type: none"><li>• Praying to show off</li><li>• Performing hajj with a stolen dress</li><li>• Trading while deceiving the other party</li><li>• Continuous fasting without a break</li><li>• Marrying for the sake of paving way for one who has been divorced thrice</li><li>• Collecting money for a good course but through lottery, dance or evils acts.</li></ul>

## 6. Makruh

Makruh are the disapproved, unpleasant, disliked and distasted deeds by the Islamic law. These acts are disliked because they may be harmful to us or may lead to haram actions. Even though performing such acts does not lead to any sins, a Muslim who avoids them will be rewarded. For example, blowing one's

nose before others, growing very long fingernails, spitting in public, sleeping till after sunrise among others.

## 7. Mubah

Mubah refers to those actions that are neither commanded nor prohibited by the Shariah. However, performing these acts does not earn a Muslim reward and failure to perform then does not earn any sins. For example, wearing a new garment, furnishing house among others.

### Meaning of the term law

**Laws** are rules that are established by the authority in a given area in order to safeguard the rights of others. For example, in Kenya it is a law that a citizen should be eighteen years so as to be given an identity card.

### Categories of laws

Generally, the laws are divided into two broader categories as discussed below:

- a) **Secular laws:** These are set of rules that are declared and imposed by the government or by certain community upon its people in order to safeguard their rights. For example:
- Laws established by constitution.
  - Statutory laws like the Traffic Act, Drug and poisons Act.
  - By-laws made by different organizations.
  - Customary laws of a particular group of people
- b) **Religious laws:** These are the universal laws set by Allah through His revealed books and prophets to safeguard the rights of all creatures at all times.

### Types of secular laws

There are four types of secular laws as explained below:

- a) **Civil laws:** Rules aiming at resolving disputes among individuals in the society. In Kenya, for example, the Parliament makes and amends laws for the citizens. Such laws are enshrined in the Kenyan constitution. Laws are usually enforced by those in authority. They cover among others, aspects

of marriage, property ownership, rights and privileges, divorce, contracts and agreements.

- b) **Criminal Law:** Rules of conduct that safeguard the health, safety and moral conduct of people. Punishment is awarded to those people who cause harm to others, destroy property or the environment or generally break the law.
- c) **Common laws:** A system of law which is based on judges' decisions, on custom and usage rather than on written laws.
- d) **Statute laws:** The body of law consisting of written laws adopted by a legislative body. Statute law is often contrasted with case law which originates from decisions of the appellate courts and with constitutional laws.

### Islamic Criminal Law

Islamic criminal laws deal with all forms of human interaction, relationship and give penal punishment for offences that are against the limits set by Allah (SWT) as describe in His divine scriptures revealed to the respective Prophets.

### Forms of Islamic criminal law

The following are the examples/ forms of Islamic criminal law:

- i. Treason.
- ii. Sedition
- iii. Support unbelievers to destroy the believers.
- iv. Reveal the secrets of Islamic military force.

### Classification of Crimes and Punishments

Islam has classified crimes into three categories namely Hudud, Qisas and Taazir.

Hudud (Fixed punishments)

The term *Hudud* literally means a limit, restriction or boundary. In the Islamic Shariah, it is used to refer to the boundaries of acceptable behaviour and the punishments prescribed by Allah (SWT) in the Qur'an for serious crimes. These

crimes have fixed punishments that cannot be changed. One should not award lesser or more punishment than what is prescribed in Quran and Hadith.

### **Rules for the application of huddud**

The following are the rules to be observed before implementing any hadd to a person:

- a) The individual to be punished must be a Muslim
- b) He or she must be a person of sound mind. Any hadd is lifted from an insane person.
- c) The person to be punished must have attained age of puberty. A minor cannot be punished.
- d) The proof of the offence must be justified beyond reasonable doubt.
- e) There must be witnesses who are reliable, just and fulfill the required number for the particular offence.

### **Crimes punished under Hudud**

Under the Islamic criminal law, the following six major offenses are punished under hudud:

- a) **Zinaa (Adultery and fornication):** It is a sexual offence which involves having sexual relations among unmarried people. Allah (SWT) Has outlined the punishment for adultery as stoning the individuals to death and for fornicator as to be flogged each of them with a hundred lashes.

b) Al-Sariqa (Theft): Theft is when a person takes something that does not belong to him or her without the owner's consent. The punishment for theft is chopping off the thief's hand.

c) Qadhf (False accusation): Slander involves accusing someone falsely of an offence he or she has not committed. Punishment for slander is to flog the offender eighty lashes in public mercilessly and rejecting his or her testimony thereafter.

d) Al-Hirabah (robbery with violence): This refers to robbing or stealing from a person with the intention of killing or causing injury to the victim. It may either take place on the highway (commonly known as highway robbery), on the streets or in a person's house hold. The penalty varies according to whether the robber has killed or injured the victim or simply robbed or threatens to rob him or her. The prescribed penalties are as follow:

- Death: If the robber has killed but did not manage to get away with the stolen property
- Crucifixion: If the robber has killed and also taken the stolen property
- Cutting off the hand and foot on opposite sides: If the robber has taken the property but has not killed the victim
- Exile: If the robber frightens the victim but does not kill or get away with the stolen property.

e) Al-Riddah (Apostasy): It is denouncing Islam for another faith. If a person becomes an apostate, he or she is given a period of three days of reflection during which he can repent and return to Islam and thus obtain impunity. If he is not ready to revert to Islam, then his punishment is death (killed) and the actions of a person who departs from Islam and dies as a non-believer have no bearing in the hereafter. Such a person shall receive severe punishment on the day of judgement.

f) Drinking alcohol: All intoxicants are prohibited in Islam. The punishment of taking alcohol is to give eighty stripes for a free man and forty stripes for slave.

## How the application of Hudud laws can reduce the rate of crime in the society

The following are the ways in which the application of Hudud laws can reduce the rate of crime in the society:

- Punishments given for the sexual offences. For example, stoning for adultery and one hundred lashes for fornication will act as a deterrent for these immoral acts.
- Chopping off the hand of a thief will serve as a lesson to the potential thieves and hence reduce the particular vice. This will also act as a shame to the offender before the public thus minimizing a repeat of the same.
- Punishing the murderers by killing them will serve as a lesson that no human being has a right to take the life of the other.
- Since the murderer has to be killed, it will remain as a living lesson to the society not to commit the crime.
- The punishment for slander of giving eighty lashes, which is carried out in public creates awareness to all those who witness it of the severity of the crime and thus no one would wish to be subjected to the same.
- The punishment awarded for the highway robbery death, crucifixion and exile will instil not only fear but respect for the peoples' properties.
- The humiliation that the person who has consumed alcohol undergoes during punishment. He or she is given eighty stripes and in public. This will act as deterrent for such act.
- The fact that hudud laws cannot be manipulated by the state or individuals make people to refrain completely from such crimes.

## Qisas (Law of equity/retaliation)

The word Qisas comes from the Arabic verb *Al-Qass*, which means to follow in the footsteps of someone. This law ensures that an offender is awarded a punishment equivalent to the crime he or she has committed without fear or favour.

## Crimes punished under Qisas



Qisas is awarded in the following cases:

- a) *For intentional homicide:* In cases of intentional murder, then the killer should be killed. The free for the free, the slave for the slave, the woman for the woman. But if any remission is made by the brother of the slain, then Muslims should grant any reasonable demand, and compensate him with handsome gratitude.
- b) *For unintentional homicide:* If a believer kills a believer mistakenly then should pay diya (blood money) and free a believing slave.
- c) *Retaliation in injured physical body parts:* This involves equal for equal retaliating upon someone who has willfully inflicted physical injuries on another person, that is eye for eye, nose for nose, ear for ear, and tooth for tooth.

### Conditions under which Life May be Taken as a Punishment

The following are the situations/ conditions under which someone's life may be taken as punishment:

- a) If a Qisas (law of equity) is applied for a murderer who kills someone intentionally.
- b) When the punishment of death to the traitor/ those who try to overthrow an elected Islamic government/ punishment for those who are guilty of treason is applied.
- c) When in a war of defence (Jihad) against the enemies of Islam.
- d) If a married man or woman is given a hadd as punishment for adultery.
- e) If giving it as a punishment to those who commit highway robbery.
- f) When giving it as a punishment to Apostasy (rejecting Islamic-religious beliefs).

### Taazir (discretionary punishment)

The word **Azara** literally means to help, prevent or honour. **Taazir**, in the Islamic Shariah refers to the punishment awarded as a corrective measure in order to help and prevent the criminal from repeating or committing more crimes.

Punishments awarded under taazir law are neither fixed nor mentioned in the Qur'an and Hadith.

### **Conditions for the application of Taazir and Qisas punishments**

The following are the conditions for the application of Taazir and Qisas punishment:

- The persons must be sane and able to differentiate what is good and bad. No Taazir or Qisas is liable on an insane (lunatic) or minor because both are not punishable by the Shariah.
- There must be a learned person to solve the case and administer the punishment, for example Qadhi.
- The individual to be punished must be a Muslim and from any other religious groups.
- There must be just and reliable witnesses to present real evidence for Qisas or circumstantial evidence for Taazir punishment.
- The punishment to be awarded should be in line with the Islamic teachings. For example, one who kills unintentionally should pay dia (blood money), If one cut one another the offender also should be cut.
- Qisas should be applied to intentionally done crime against human crime. The offender should not have committed the crime under coercion, duress or compulsion.

### **Offences that are punished by Taazir**

The following are offences that are punishable by taazir in Islam:

- Mismanagement of the public funds
- Spying on other people affairs
- Taking of riba (usury)
- Perjury by telling an untruth
- Abuse of authority by leaders
- Breaching of confidence
- Indulging into fraudulent deals

### **Punishments/ Measures/ Methods under taazir**

The following are punishment used under Taazir:

- a) **Al-Waadh:** Giving a kind admonition and advice to remind the offender about the evil of the crime.
- b) **Al-Tahdeed:** By threatening the criminal to fear the punishment.
- c) **Al-Tawbikh:** By giving harsh reprimand through wording to show disappointment.
- d) **Al-Gharamah:** Imposing fines on the offender.
- e) **Al-Musadarah:** Seizure of property of the offender.
- f) **At-Tashreeh:** Public exposure to disclose the offender and the crime.
- g) **Al-Habs:** Imprisonment of the offender to rehabilitate him or her from the crime.
- h) **Al-Jald:** flogging and lashing strokes.

### **Relevance of Islamic Criminal Law**

The following are the relevance/ Importance of the application of Islamic criminal law:

- 1) The law of taazir (retaliation) promotes fairness and justice in the society.
- 2) Kind admonition may give a criminal a chance to reflect on his conduct thus mending his ways.
- 3) It gives the criminal room for reform and he or she is spiritually amended.
- 4) It helps in maintain peace and harmony in the society by minimizing criminal acts.
- 5) It is a way of deterring other people from committing similar or other related crimes.
- 6) It shields Muslims from effects that may arise as a result of sins or crimes. For example, transmission of sexually transmitted diseases through crimes likes zinaa.
- 7) One is highly rewarded by Allah by following, accepting and implementing the shariah of Allah.

- 8) Since the prescription is from Allah (SWT), the believers are satisfied psychologically with the nature of the punishment given as fair.
- 9) It helps in reducing the rate of crime in the society because they are meant to instill fear in potential criminals.

### Differences between Sharia and secular laws

The following table shows the differences between Islamic Shariah and secular laws:

Islamic law	Secular laws
Their authority and source is Allah (SWT).	Secular laws are formulated by human beings.
Sharia laws take care of both spiritual and materials needs of humankind regardless of time.	They are insufficient, not all inclusive and cannot stand the test of time
Allah's laws are universal for all Muslims and are uniformly applied in all places.	They are suitable for a particular nation or country depending on the needs of the citizens.
They are implemented for the sake of pleasing Allah (SWT) and one earns rewards for observing the Sharia.	Secular laws are implemented with the purpose of meeting only the material and worldly needs of its people and the state.
Allah (SWT) Has promised to protect the main source of Islamic law. That is the Qur'an. [Q 11:9]	They have limited or no protection at all, may be corrupted easily depending on the individual or group preferences.
They are comprehensive and relevant and do not need reforms and can stand the test of time.	They are temporary in nature and depend on the needs and requirements of its members and are often subjected to reforms, amendments or promulgations.
They are applicable only to those professing Islamic faith.	Secular laws are meant for all citizens living in that given state, country or nation. Both Muslims and non-Muslims alike.
The main evidence for an offence is confession, an oath, or the oral testimony of a witness or item stolen.	Secular laws rely on lawyers, plaintiffs and defendants represent themselves.
Trials are conducted solely by the Qadhi, and there is no jury system.	Trials are conducted by the courts at different levels. For example, the law courts, courts of appeal and supreme court.

The accused are not routinely required to swear before testifying, instead oaths are a sincere method used as a final part of the evidence process.	The defendant must swear before the court that he is telling the truth simply to guarantee the truth of the subsequent testimony.
They are perfect, and free from shortcomings.	They may contain defects, errors, ambiguity and many other forms of shortcomings.

### The concept of sin and crime in Islam

A **sin** is an action or omission that goes against the commands and limits of Allah (SWT). It is a willful breach of the laws and norms laid down by Islam.

A **Crime** refers to any legal prohibition imposed by Allah (SWT) whose infringement entails punishment prescribed by Him. Everything prohibited by Allah (SWT) and his Prophet (p.b.u.h) is a crime and every crime is a sinful act.

### Facts about the concept of sin and crime

The following are the Islamic beliefs about the concept of Sin and crime:

- The concept of sin and crime started with Adam and Hawa during their arrival at garden of Aden, as stated by Hammuda Abdalah in Islam in focus.
- This made human race to be guilty and live with stigma and confusion, which shows human being have intellectual capacity to recognize their own sins.
- The idea of original sin or hereditary criminality has no origin in Islam teachings. Sin is a product of Human Society in a social set up.
- Sin is associated with disobedience and transgression.
- Mankind potential capacity of a sin which is latent to him/her is not greater than his/her piety and goodness.
- Sin is not inborn is acquired. It is avoided able and not inevitable.

### Differences between sin and crime

The following table shows the differences between Sin and Crime:

<b>Sin</b>	<b>Crime</b>
Sin is breaking the laws of Allah.	Breaking the law of the land/ country/ state/ community.
Sin in the eyes of Allah can be forgiven	The state authority may not pardon the criminal.

Sin is punished directly by Allah or His vicegerent.	Crime is punished according to law of the state.
The punishment on a sin is uniform.	Punishment varies from one nation to another.
Sin is judge by Allah.	Crimes are judged by courts of law.
Parts of the body testify against sins.	Parts of the body do not testify against crimes
Sin cannot be hidden from Allah	Crimes can be concealed from the state
Sinners will definitely be punished in the here after	Criminals are punished in this world.
Sins are universal to all mankind	Crimes varies from one nation to another.

### **Relationship between sin and crime**

The following are the ways through which sins and crimes relate to each other:

- Not all sins are crimes and thus vary in their punishments depending on Allah (SWT's) pleasure.
- Both sins and crimes affect the physical, moral and social order of mankind and therefore must be avoided for the good of humankind.
- Repetition of sins leads to crimes thus damaging righteousness and promoting evil.
- Prohibitions of sins and crimes foster the observation of the goals of Islamic laws.

### **Effects of sins and crimes**

The following are the effects of performing sins and crimes to the society:

1. Earning defamatory titles in the society. A person who commits sins will be referred to names denoting his or her evil actions. For example, Abu Lahab- the father of flames, was called so because he used to humiliate the Prophet and the Muslims.
2. A sinner is easily deceived by sheitan to deviate further into sinful acts.
3. Allah punishes the people who are involved in sinful acts.
4. Allah removes his favours and blessings from the land where sins and crimes are committed.
5. Prevailing of sins may lead to calamities in the world.

6. A sinner is continuously haunted and tormented by the fear of being discovered.
7. Sins and crimes weaken the faith (iman) of a person making them disinterested in righteous deeds and neglecting acts of worship.
8. Sinners find it difficult to recite the shahada during the time of death.
9. A sinner is disliked by other members of the society because of the evil acts he or she engages in.
10. Sinners do not benefit from the duas made for the believers and righteous people by the Angels.

### **Solution for crimes in the society**

The following are ways to campaign against crimes in the society

- a) Parents to be good role models in terms of behaviors so as the children to emulate them.
- b) Encouraging guiding and counselling-both home and school level
- c) Encouraging people to work hard to avoid laziness and idleness which are the main cause of crimes
- d) Establishment of rehabilitation centres where people's characters are reshaped and rebuilt afresh.
- e) Teaching religious values in public places such as mosques, madrasas, schools and barazas.
- f) Use of the right procedures to solve conflicts such as dialogue, mediation and diplomacy
- g) Government to provide security to all citizens and ensure implementation of the prescribed punishments to the law offenders.
- h) Implementation of Islamic laws of Hudud, Qisas and Taazir as stated in the shariah.

### **The concept of Major and minor sins in Islam**

In Islam, sins are divided as either major or minor.

**Major sins:** These are extremely serious and are mentioned in the Qur'an and Hadith as being worthy of punishment both in this world and in the hereafter. Specific warnings and prescribed punishments have been mentioned in the Sharia for these sins.

### Examples of major sins

The following are the manifestations of major sins:

- a) Shirk: Associating anything with Allah in His lordship, worship and qualities.
- b) Magic
- c) killing of one whom God has declared inviolate without a just cause
- d) Consuming the property of an orphan
- e) Consuming of usury (riba/interest)
- f) Turning back when the army advances
- g) Slandering chaste women who are believers, but unwary.

**Minor sins:** These are unpleasant or displeasing acts to Allah (SWT) and to fellow human beings but no specific punishment or severe warning have been issued. Performing these acts is punishable before Allah (SWT). They should not be taken lightly simply because they are termed as minor, because they lead one to commit major sins when done repeatedly, hence must be avoided under all circumstances.

### Examples of Minor sins

The following are examples of minor sins:

- a) Wearing of gold or silk by men
- b) Laughing at other people's mistake
- c) Masturbation
- d) Passing in front of people while they are praying
- e) Friendship with immoral people
- f) Flattering
- g) Selling or buying commodities at lower prices to ruin other people's business.



## Administration of Justice

The term **justice** comes from the Latin word *Jus* which literally means *Right*. Technically, it is the conformity to what is morally right by treating others fairly. It is agreed in both the Islamic and secular laws that justice is about fairness in distributing rights, duties and favours towards Allah, oneself, other human beings and other creatures.

In the contemporary world, this institution of administering justice is referred to us 'the judiciary.' However, in Islam, the office of the Qadhi deals with all affairs related to justice and matters relating to the Sharia. All the rulings are based on the teachings of the Quran and Hadith.

## Things to be considered by people who are entrusted with administration of justice in Islam

The people who are entrusted with administration of Justice in Islam must put in mind the following considerations:

1. Allah (SWT) is the most superior authority whose legislation cannot be invalidated by any other source or authority. Any decisions made should therefore not contradict his decree.
2. Administering justice is a divine duty whose objective is to please Allah (SWT). This duty earns rewards.
3. Justice is a trust from Allah (SWT) and must not be denied to those who deserve it.
4. It is a social responsibility that must drive every Muslim towards fair play.
5. It should guarantee the freedom and protect the rights of individuals.
6. It must be administered by the one who is conversant with Islamic Jurisprudence and has necessary qualities like honesty, integrity and sincerity among others.
7. Whoever is trusted with the duty of judgement should be objective. He should not be overtaken by pride or personal interest.

## Significance/ importance of administration of justice

The provision of administration of justice has its significance, some of which are as follow:

- a) Every community or Society requires peace and justice for it to prosper and half development. Without peace and justice there will be Anarchy
- b) It is the command of Allah that we should administer Justice so as to enforce good and right and suppress evil and wrong in the community or Society.
- c) It is a Sunnah of the Holy Prophet Muhammad as he himself had been fairly solving disputes himself. He also appointed Qadhi's (judges) to deputize him in other places under Muslim rule.
- d) It is the Human Nature to commit errors and wrong which normally affect the rights of others. We therefore require administration of justice to settle such disputes without which may breach the peace.
- e) It is only through provision of administration of justice that the society or community will be safe. This will discourage people from checking laws into their hands.

### **The Kadhi (Qadhy)**

The term **Qadhi** comes from an Arabic word *Qadha*, which means carrying out a decision. Technically, it involves making a decision or judgement in accordance with the rules of the Sharia. A **Kadhi** is a Muslim judge who has the duty to make decisions as well as administer justice among Muslims.

In Kenya today the Kadhis court is enshrined in the constitution with a total of thirty-five Kadhis. They include one chief Kadhi and his deputy, three principal Kadhis, ten Kadhi 1 and twenty kadhi 2. The kadhis represent either counties or regions that may constitute more than one county.

The table below shows the compositions of Kadhis in Kenya:

<b>Title</b>	<b>Total number</b>	<b>Equivalent of the Judiciary</b>
Chief Kadhi	1	Chief Magistrate
Deputy chief Kadhi	1	Deputy chief magistrate
Principal Kadhi	3	Principal Magistrate

Qadhi 1	10	Senior resident Magistrate
Qadhi 2	20	Resident magistrate

### Qualities of a Kadhi

Even though the Qur'an does not explicitly mention the qualities of a Kadhi, Muslim scholars have agreed on specific elements to be considered in the appointment of Kadhis. These qualities include the following:

1. A Kadhi must be a practicing Muslim with sound *aqeeda* (belief).
2. He should be conversant with Islamic Laws and how to apply them from their sources namely Qur'an, Hadith, ijma and Qiyas.
3. He should be conversant with Arabic language so as to understand the sources of sharia accordingly.
4. He should have Taqwa (fear for Allah) and dignity so as to follow the commands of Allah.
5. He should be a mature person of sound mind.
6. He must be a free citizen of the state (that is not a slave). This will make him execute the judgement without compromise.
7. He should not be suffering from any physical impairment that may hinder his judgement or ability to interpret the evidence. For example, Muslims with hearing or visual impairment.
8. He should be pious, honesty and should not have been convicted of any criminal offence.
9. He should be morally upright and have a high standard of integrity. He should not ask for or accept bribes, meet any parties in private or practice nepotism.

### Functions of a Kadhi in Kenya

The following are some of the functions of the Kadhi:

1. He makes decisions on cases and solves any conflicts or disputes among Muslims. For example, cases on divorce, inheritance, child custody among others.

2. He makes pronouncements of the rulings that have been made at the Kadhi courts.
3. He supervises the other staff members under his jurisdiction.
4. He represents Muslims during public functions like the National Holidays. Therefore, he is given power to announce the commencement of Ramadhan and the Eid-festivals.
5. He is the intermediary between the state and the Muslims. Therefore, he is consulted by the government on Islamic legal issues.
6. He provides general guidance and counseling to the Muslims.
7. The chief Kadhi represents Muslims of Kenya at international Islamic fares.
8. He leads the rest of the Muslims during Islamic functions and ceremonies. For example, Nikah and Idd prayers.
9. They take part in the appointment of guardians for minors or the mentally challenged.
10. They give guidance on the execution of wills of the deceased. He acts as the administrator or trustee of property especially if other relatives of the deceased are qualified.
11. He determines cases involving crimes [hudud], taazir and administers appropriate punishment.
12. He acts as a guardian for women who have no walii (guardians) in marriage. Under certain jurisdiction, the kadhi is empowered to issue marriage and divorce certificates.
13. He presides over waqf properties and oversees their administration.

### Code of Conduct for Kadhis

In the administration of legal decisions, a Muslim judge should:

- i) Dispense justice at the time when he is in good state of mind. Therefore, he should not be angry, hungry, tired, sad or sick.
- ii) Listen to both parties before passing a judgement. This should happen everywhere in the same manner aiming at understanding the finer details of the matter at hand.

- iii) Show a positive and objective attitude. There should be no evidence or suspicion that he is favouring one party or group over the other.
- iv) He should not be overcome by temptations to bribe nor accept any favours.
- v) He must dress decently so as to uphold his dignity and status.
- vi) He should neither judge cases, nor stand as a witness against his close relatives, friends and enemies as this may raise suspicion.
- vii) He must be able to gather full evidence and sufficiently use it in judgement.
- viii) He must be able to give fair judgement without fear or favour. Nobody should be favoured by the judicial system.

### **Roles of Kadhi's court in administration of justice in Kenya**

The following are the roles of Kadhi's court in administration of justice in Kenya:

- They should ensure that they execute fairly the cases presented to him. Justice is achieved when the laws applying to case before hand are followed strictly according to the stipulated laws of Islam.
- They should ensure that they apply laws equally to all people without considering one person to be better than the other.
- The Kadhi has to be partial in the case by not liking and disliking the evidence given.
- The Kadhi should ensure that reliable evidence is provided before judgement of the case is made.
- The Kadhi should avoid making judgement between two people when he is hungry, thirst or suffering from any nervousness.
- He should judge using the direct commands of shariah as revealed in the sources of sharia. The use of innovation (bidaa') in judging cases in Islam is prohibited.
- He should be one when he finds an act of oppression being committed in the society, he addresses it with the aim to correct.
- His role is to ensure that he bring reconciliation between two contenting person/ parties.
- He has the role of advising the authority of the unjust treatment being carried out by another person or a leader, give evidence of the fact as seen by him and then help in preserving the mora; health of the society.

### **Factors that would hinder application of Islamic law in Kenya**

The following are the problems/ challenges facing the Qadhi's court in Kenya:

1. Majority of Kenyans are non-Muslims and view Sharia as a threat to them.
2. Lack of enough learned personnel in Islamic Law to implement and execute it.

3. Some Muslims tend to compromise on matters related to Shariah might not support it in order to confirm to its establishment.
4. Kadhis courts in the country are too few to deal with issues of the Muslims.
5. Shariah would have to be included in the constitution and this would be opposed by the rest of the Kenyans.
6. Some Muslims prefer secular law as it can be manipulated as opposed to the Islamic Sharia which does not favour anybody.
7. The powers of the Office of the Chief Kadhi are limited to deal with personal and family related matters and do not extend to criminal and civil issues.

## Evidence

Giving evidence is an important aspect of administering justice. Any truth that is sought must be proved beyond doubt. Every citizen is deemed to be innocent before the law until he or she is proved guilty. There must be sufficient evidence for any accusation.

## Rules of evidence

Amr bin Shuaib (RA) reported that the Messenger of Allah (p.b.u.h) said: *“Proof is upon the plaintiff and oath is upon the defendant.”* (Tirmidhi). The following rules should be considered while giving evidence:

1. There must be reliable witnesses. There should be two reliable male witnesses, except for evidence of adultery that must be proved by four witnesses. In the case of female witnesses, then they should be two female and one male.
2. The witnesses must be fair and just while giving their evidence, even if it is against one's personal interest or that of their confidants.
3. The witnesses should be mature and of good reputation.
4. The witnesses should be transparent and not conceal evidence when asked to testify.
5. One should swear by the name of Allah (SWT) that he will speak the truth in giving evidence.
6. The evidence should be conclusive, convincing and free from suspicion.

7. The witnesses should have knowledge of the subject on which evidence is required.
8. The background of the witnesses must be established so as to ascertain their trustworthiness.

### Meaning of Tawba (Repentance)

**Tawba** means returning to Allah, ask for His forgiveness, repent for the sins committed or actions omitted and begging for safety from the evil of what one fears in future.

### Hadith of Tawba (Repentance)

The prophet Muhammed (p.b.u.h) said: *"The one who asks to be forgiven from sins is like the one who has not sinned."* The following are lessons/ teachings from the above Hadith:

- a) We must seek for forgiveness since Allah is most forgiving.
- b) Allah forgives although He can punish.
- c) Those who ask for forgiveness are blessed.
- d) Those who are forgiven are in higher rank than the sinners.
- e) Believers should not despair and Allah is pleased with them.
- f) Believers are encouraged to repent and ask for forgiveness.
- g) Allah forgives all sins except shirk.

### Conditions for Tawba

The following are the conditions to be fulfilled for a valid tawba:

- a) He or she must stop doing the sinful act and renounce it immediately.
- b) He or she should hasten to repent. Any Tawba at the time of death shall not be accepted.
- c) One must make a firm commitment not to return to the sinful act again. The sins should not be repeated again. One should have the intention and determination of never repeating the sin.



- d) If it involves the rights of others, for example stealing, then the stolen property must be returned to the owner or compensation done. He or she should also ask for forgiveness from those he or she has wronged.
- e) If it involves the rights of Allah (SWT), then one should make up if possible, for the duties he or she has missed in the past like paying zakat
- f) In the process of asking repentance one must have a strong believe that Allah (SWT) is ever ready to accept our repentance.
- g) Giving up the sin for the sake of Allah and not for any other reason i.e. one should not stop doing wrong for fear of punishment from other people or being afraid of what people will say.
- h) Feeling sorry and regretting for the sin committed, one should show remorse for the sin committed. One should not be happy /pleased when remembering past sins or wish to go back to it.
- i) Keep away from places of sin, if being there will make one fall into sin again.
- j) Keeping away from people who induced the committing of the sin if associating with them will lead to repetition of the sin.

### Significance of the Concept of Tawba

The following are merits/ significance of Muslims to seek tawba:

1. Through Tawba, a believer gets a chance to be forgiven by Allah (SWT).
2. Repentance cleans the heart of a believer from the stains of sins.
3. Allah changes the minor sins of those who repent to good deeds.
4. It instils in a believer innermost peace and removes guilt of the sins previously committed.
5. To gain the love, mercy and kindness of Allah (SWT) since He loves those who repent over their sins.
6. To prevent one from repeating the sin committed. This is among the conditions of acceptable Tawba.
7. To regulate the relationship between a Muslim and with His Maker.
8. To draw humankind closer to paradise.

9. To enhance good relationship between mankind as it promotes the virtue of forgiveness amongst people.
10. To develop one's Taqwa as one must regret for the sins committed during the search for Tawba.

### **How can the concept of Tawba guide a Muslim to the righteous path of Allah?**

The following are ways through which the concept of tawba guides a Muslim to the righteous path of Allah:

- Through keeping distance between the person and polytheism (shirk).
- By making the believer to remember his Almighty Allah.
- Through facilitating the Muslim to ask for forgiveness from Allah all the times.
- By making the Muslim to be more observant and vigilant in his or her doing.
- Through making the person to do good deeds and avoid evils to ensure a clean record.
- By nurturing the spirit of forgiveness, compassion and humanity among Muslims in relationship to others.