

The Function and Challenges of Sharia Court in Applications of Islamic Law:

The Ethiopian context

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Introduction

The discourse on sharia courts, fraught as it is with a plethora of complexities is one of the most challenging, yet compelling domain of disquisition and articulation within contemporary socio legal debate and research agenda. Critiques have engaged in recent years to interpret sharia courts as something parallel to formal courts engaged in posing challenges to the formal judicial edifice. A study of the existence of sharia courts or for that matter sharia justice is particularly fruitful and warranted for a deeper understanding of the interplay of power, social control and freedom. Privatization of adjudication is a global reality today, the notion that all laws must necessarily emanate from the state have been questioned by proponents of legal pluralism.

The functioning of sharia courts rather than revealing a conventional turn to mechanisms of alternative dispute resolution as problem solving move emerging from an over-loaded docket springs from much deep-seated fundamental socio-religious and communitarian concerns. In fact the system unfolds itself through both social and spiritual lenses. The sharia courts as socio-religious institutions provide a voluntary, empowering way of resolving familial disputes of members of Muslim community in an informal way.

1. Application of the Islamic Law in General

1.1. Application of Islamic law in contemporary world

Most Muslims are comfortable practicing their faith in the contemporary world. Relatively few feel there is an inherent conflict between being religiously devout and living in a modern society, and the prevailing view in most countries surveyed is that there is no inherent conflict between religion and science¹.

¹ The World's Muslims: Religion, Politics and Society, APRIL 30, 2013

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While there is indeed a clear need for comprehensive reform in the Muslim world, it is not clear that secularization is the path to realizing it. Although in the West religion has been largely separated from law, in the Muslim world Islamic law, or sharia, is not confined to purely religious matters. Sharia is applied to a wide variety of ‘secular’ legal issues, ranging from inheritance, marriage, and divorce to contracts and criminal punishments. An increasing number of Muslim-majority countries are inserting ‘sharia supremacy’ clauses into their constitutions, making any legislation which contradicts the provisions of Islamic law unconstitutional.²

Implementation of Islamic law is seen as especially troubling, standing in the way of any liberalization and the embrace of human rights. Indeed, with the so-called ‘Islamic’ regimes of Saudi Arabia and Iran justifying authoritarianism and a wide array of repugnant practices in the name of sharia, it is little wonder that some believe the West is engaged in an irreconcilable “clash of civilizations” with the Islamic world. Across the six major Muslims regions reject the notion that there is an inherent tension between modern society and leading a religiously devout life.³ In fact, Western policymakers, ‘Islamic’ regimes, and indeed large numbers of individual Muslims have all grossly misinterpreted Islamic law. Sharia is not a rigid and immutable ‘law of God’ based on unchanging texts written in the middle Ages. Understood and applied correctly, sharia is an imminently flexible, dynamic jurisprudence that is fully compatible with the modern human rights framework. A modern and liberal body of sharia law which promotes respect for human rights is not only possible; it is necessary. With-out a firm sharia-based justification for liberal positions on economic and social issues, the changes being promoted by Muslim reformers and Western policymakers alike will fail to be accepted as legitimate by the individual citizens of the Muslim world.

Perversely, the vast majority of Muslims—who indeed reject violence and extremism—are increasingly marginalized and caught between the narratives promoted by radicals within their own faith community and conservatives from outside their communities.

The roots of these dual misinterpretations of sharia come from a specific set of historical circumstances that have cast a long shadow on the Muslim world and its interaction with the West. The truth is that sharia, if implemented correctly, can protect human rights.

² Reclaiming Tradition: Islamic Law in a Modern World

³ *ibid*, Reference shows that, Central Asia (median of 71%) and Southern and Eastern Europe (58%) – as well as in regions where most Muslims are highly observant –Southeast Asia (64%) and the Middle East and North Africa (60%). Muslims in sub Saharan Africa are more divided on the compatibility of religion and modern life (median of 50%). Muslims in South Asia, meanwhile, are less likely to say modern life and religious-devotion are compatible (median of 39%). (For more details, see page 128. *Of The World’s Muslims: Religion, Politics and Society* APRIL 30, 2013).

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But understanding the proper application of sharia requires, in the first instance, a brief introduction to the origins and sources of Islamic law.⁴

1.2. Application of Islamic law in international perspectives

Islam is one of the Universal religions of the world. As a religion, Islam is governed by an assortment of divine laws known as shariah of which its sources are mainly attributed to the divine revelations in the Holy Qur'an and traditions of the Prophet (P.B.U.H). This package is what forms the basis of the spiritual, economic, political and social guidance of Muslims. Thus, all the laws of Islam have to be annexed to and borne of the Holy texts. Contrary to this, such laws would be regarded as un-Islamic.

On the other hand, as regards the modern states, the mother of all laws is the constitution in domestic law of certain states that which is source are international convention and other laws. It, therefore, follows that any law of the land must be in conformity with the Constitution; otherwise, such a law would be declared unconstitutional or ultra vires the constitution and would be of no legal effect.

In other words, no state has a right to enact any laws or rather provide for the application of the same, unless such laws have been expressly or impliedly guaranteed by the constitution.

1.2.1. Human Right Implementation by the Sharia court

Under the Sharia, like in most legal systems, human rights means that the citizen's freedom of worship, expression, movement, association and other forms of self-development, are not restricted or disturbed unnecessarily, except in accordance with the due process of law. It ensures that even when the citizen falls foul of the law, he or she is treated with some respect and restraint.⁵ When we also speak of human rights under Sharia we really mean that these rights have been granted by ALLAH, the Almighty God, and no one has the right or power to abrogate, suspend or withdraw them. They are part and parcel of the Islamic Faith.

A greater implementation of international human rights norms may be achieved through supporting an extended and more open role for sharia courts in Muslim states. With respect to this, it is important to note those sharia are constitutionally endowed with a progressive mandate to its jurisprudence. There are no rules of precedent jurisprudence,

⁴ PRACTITIONER'S GUIDE Islamic Law July 2013 written by: Hamid Khan, J.D. Senior Program Officer. United States Institute of Peace.

⁵ Human rights and the administration of justice under the Sharia in Nigeria: Understanding the issues and challenges

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stare decision; sharia judges cannot even follow their own precedent jurisprudent. Their actions are to be dictated by adopting the most pleasing solution to God and to the truth.

Moreover, despite the fact that each Muslim country's jurisprudence normally feels obliged to follow the general path of one particular school of fiqh, sharia judges in their application of the law retain a broad ambit of choice in this area. Indeed, Islamic jurisprudence encompasses different methodologies which would reflect its flexibility in this respect. Firstly, different interpretation often occurs within a school and the judge may choose his favoured interpretation among them. Secondly, the judge can apply the sharia principle 'tasbayyur al-ayyam yaqdati tagbayyur al-ahkam'(change in time calls for a change in rules). Finally , the judge is empowered to use the principle of ijtiḥad which allows a judge to make a legal decision by the independent interpretation of legal source ,(Quran and sunna).accordingly, the use of ijtiḥad by sharia judges has demonstrated itself to be an effective tool towards a harmonization of Islam and international human right.⁶

The concept of human rights continues to guarantee his/her humanity and limits the excesses to which ordinary individuals serving as representatives of the State might be tempted. This last point is of particular importance, especially in relation to the citizen who comes in contact with the criminal justice system in the disadvantaged position of an offender. It is in such contexts that the citizen is most vulnerable to the disregard of his/her human rights by the operators of the criminal justice system. Human rights in the administration of criminal justice, therefore refers to what institutional arrangements exist for protecting the rights of the citizens in his most vulnerable circumstances, that is, as a suspect or offender or accused person. This is irrespective of whether he is aware of such rights or not. However, the citizen's awareness of his/her rights is an extremely important element in ensuring the observance of such rights⁷.

Finally, the compatibility of Sharia Law (herein after called Islamic Law) with the certain modern international human rights law has consistently been debated among academics and further forms a wide topic of discussion among Islamic States.

A conflict between pre-modern and modern understanding of Islamic law forms the crucial point of these debates. Pre-modern Muslim jurists are of the opinion that "the totality of the Islamic legal system is the word of God: any analysis or attempts to review the Sharia would be tantamount to heresy."

However, modern Islamic thinkers and jurists argue that the primary sources of Sharia which are the Quran (also called the Book of Allah) and Hadith or the Prophet

⁶ Sharia, Muslim States and International Human Rights Treaty Obligations: By Nisrine Abiad

⁷ Human rights and the administration of justice under the Sharia in Nigeria: Understanding the issues and challenges

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Muhammad's sayings are interpreted by the early Muslim jurists in the second and third centuries in accordance with their personal understandings and comprehension of the word of God. Islamic principles are thus "neither rigid nor stagnant and can in fact be applied in evolving situations. Laws are as well subject to constant review and change.

The pre-modern views of Islamic law (hereinafter called pre-modernism) thus lead the proponents of the notion into the premise where they find most of the international human rights norms incompatible with Islamic law. While, for modern Islamic jurists, scholars, and thinkers the universality of human rights "are not alien from a Quranic point of view and that, in fact, almost all the rights can be supported by the Quran and the practice of the Prophet."

In case of Ethiopia, The regular court in general, and sharia court in particular, the role of the judiciary in the implementation of the provisions of international human rights agreements in Ethiopia stands on firm ground as far as legitimate mandate is concerned. This reality indicates that the practical implementation of this function faces a number of challenges. Some of the major ones are raised in the following paragraphs.⁸

Status of International Human Rights Instruments As noted in the introductory sections, the status of international human rights instruments under the Ethiopian legal system is far from clear. This has impacted on the actual judicial practice by limiting the tendency of courts to refer directly to the provisions of international human rights instruments ratified by Ethiopia in the adjudication of cases.⁹

Limited Domestic Legislation on the Substance and Scope of Rights In an ideal scenario, international human rights instruments are translated into domestic legislation that addresses the substantive scope of the right, procedures for its enforcement and remedies for violation. In such a scenario, courts will have little trouble enforcing the provisions of international human rights instruments. In the Ethiopian context, significant efforts have been made to harmonize domestic legislation with international human rights standards through a process of legislative review (Tsegaye Regassa,¹⁰ September 2009, pp. 309-310).

1.2.2. Women's Rights in application of Islamic law

Women throughout the Islamic world do not enjoy the same legal rights and privileges as men. Women remain disproportionately disadvantaged compared to men in access to education, health and resources generally, and face discrimination, intimidation,

⁸ Ghetnet Metiku - The powers of courts in Ethiopia in the interpretation and application of international human rights provisions

⁹ Amina Bashir case,

¹⁰) Making Legal Sense of Human Rights, September 2009, pp. 309-310 [Tsegaye provides a very coherent presentation of the critical importance of domestic legislation for the enforcement of human rights treaties

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harassment, torture and physical abuse by State organs, non-State organs and their own family.¹¹ Application of the traditional tools of sharia, from either a modern or a traditional perspective, leads conclusively to the requirement of equality between men and women. The reality is that much of the lamentable treatment of women in Islamic countries today has its origins not in Islam itself, but rather in medieval jurisprudence that warped Islamic law in order to justify a return to the old norms of pre-Islamic Arab culture (**Azizah al-Hibri**, feminist Islamic scholars,).

Accordingly, in some Muslim country, women are not prohibited from appearing in public without a veil or without a male relative an escort nor do women have the right to drive or to leave the country without permission from a male relative. In additions to this women's are denied the right to vote or to meaningfully participate in politics¹² (**the case of today's Saudi Arabia**).¹³ In stark contrast to the unconscionable way that women are treated in many Muslim countries, the Qur'an insists on equality between the sexes. Unlike the Bible, the Qur'an does not blame humanity's expulsion from the Garden of Eden on Eve alone, rather, according to the Qur'an, men and women were created from the same nafs (soul) "and God made from that nafs its mate so that the mate may find tranquillity with it." The hadith are likewise clear that the Prophet Muhammad "mended his own clothes, cut meat, and performed other household chores . . . his private life was characterized by cooperation and consultation, all to the amazement of some of the men who knew about it."¹⁴

Generally, in some, but not all, countries Muslim women are more supportive of women's rights than are Muslim men. Accordingly, as different survey indicates that Muslim women voice greater support than Muslim men for a woman's right to decide whether to wear a veil in public. In none of the countries surveyed are Muslim women substantially less likely than Muslim men to support a woman's right to choose to wear a veil or the

¹¹ Women's Rights Under Sharia In Northern Nigeria: A Case Study of Safiya by ,Dr. Mohammed Tewfik Ladan Senior Law Lecturer and Head, Dept. of Public Law Faculty of Law, A.B.U., Zaria.

¹² A Critical Study in how the Saudi Arabia Arbitration Code Could be Improved and on overcoming the Issues of Enforcing Foreign Awards in the Country As a Signatory State To the New york Convention, by Abdulrahman Mamdoh Saleem, May 2012

¹³ However, for these restrictions, **Saud Arabia** justifies these laws by claiming that they are requirements of sharia, this could not be further from the truth. Concerning these issues, **Azizah al-Hibri**, one of many contemporary feminist Islamic scholars, argued that Early Muslim women were actively involved in every aspect of the life of the nascent Muslim society. They included businesswomen, poets, jurists, religious leaders and even warriors." One cannot help but marvel at the fact that the Prophet's first wife, Khadijah, was a highly successful businesswoman and Similarly, the Prophet's second wife, Aisha (whom he married after the death of Khadijah), would become a major figure in Islamic history and a "distinguished political and religious leader" of the growing Islamic community, even leading a group of Muslims into battle during a succession dispute.

¹⁴ Implementation of Islamic law in minority Muslim country (secular state)

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right to equal inheritance for daughters and sons.¹⁵ From survey this we understand that the right women's in application of Islamic law one of the area that needs to be focus on it for protection. In addition, Women's right are one of the hot issues in sharia court relation divorce, inherence, and other personal status issues. That is why we raises women's right may be one of the challenged area of law with women's right in international arena concerning women's human right in implementations of Islamic law . Regarding this, As Masmoudi points out in **Amina Lawal case**¹⁶, the challenge facing modern Muslim societies is how to reap Ply the principles of shari'ah in social, economic, and political contexts that are markedly different from those that existed during its original development.

1.2.3. Freedom of Religion under Islamic law

The right to freedom of religion is one of the oldest human rights that have been recognized internationally. The right has further been addressed in 'the major religious traditions and a number of international conventions, resolutions and declarations proclaim the right to freedom of religion. The issue is the Islamic prohibition against leaving one's faith, which constitutes the crime of apostasy and is punishable under classical sharia law with heavy penalties, allegedly even in some circumstances the death penalty. It is commonly assumed that criminalisation of apostasy violates the freedom of religion for Muslims. Nevertheless, the issue of changing a religion or belief is a controversial issue among pre-modern and modern Islamic thinkers. In accordance with pre-modern Islamic law, if a Muslim converts to another religion, denies the existence of God or the attributes of God, rejects a particular messenger of God or refuses to accept any of the fundamentals of religions or which is termed as apostate, is subject to capital

¹⁵ Overall, the survey finds that Muslims who want sharia to be the law of the land in their country often, though not uniformly, are less likely to support equal rights for women and more likely to favor traditional gender roles. Muslims who favor an official role for sharia also tend to be less supportive of granting specific rights to women. For instance, in six countries, those who want Islamic law as the official law are less likely to say women should have the right to divorce, including in Russia (-34 percentage points), Morocco (-19) and Albania (-19). However, the opposite is true in Bangladesh (+13) and Jordan (+12). See on **Pew research center, APRIL 30, 2013: The World's Muslims: Religion, Politics and Society.**

¹⁶ **The Case of Amina Lawal:** In Nigeria, the debate about shari'ah implementation reached a peak in 2002, when a shari'ah court sentenced a young woman, Amina Lawal, to death after she was convicted of adultery. The case generated great interest, and the court's decision met with international protest and condemnation. Many Westerners saw death as an excessive punishment for an act that falls within the realm of private choice in most countries. Many Muslims also opposed the shari'ah court's ruling, and reputable Muslim scholars and jurists found many flaws in its judgment. The court did not, for instance, give sufficient attention to ensuring due process: among other issues, it accepted a forced confession the police took from the accused and it released the man, who denied having sexual relations with the woman, without any punishment.

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punishment.¹⁷ Despite the fact that pre-modern Islamic law further claims conversion of the apostate back to Islam by coercion, By referring to authentic interpretation of the verses of Holy Quran and genuine hermeneutical approach to Hadith, the modern Islamic jurists challenges the conversion by force and further assert that according to Islam ‘there is no compulsion in religion, and that is entirely up to the individual to choose which religion they should follow(Prof. Kamran Hashemi,¹⁸ a modern Islamic thinker).

Different Islamic States adopt different approaches in arriving at a conclusion with regard to apostasy. In certain Islamic States, for instance, in Saudi Arabia, Sudan, and Yemen, apostasy is subject to death. While in certain Islamic States, for example, Morocco, voluntary conversion is not a crime under civil or criminal codes. Turkey and Tunisia also proclaim freedom of religion in their constitutions. In accordance with pre-modern Islamic law the acts of blasphemy and apostasy is subject to death. However, according to the international law and modern Islamic law everyone has the right to freedom of religion. Basically, most of the Islamic countries entered into reservation that are deemed ‘a rejection to central provisions of CEDAW, such as Article 16, which requires elimination of discrimination against women in all matters relating to marriage and family relations.’ Nevertheless, the modern Islamic thinkers and scholars challenge these propositions. They argue that the patriarchal interpretations of the Islamic sources by male scholars, jurists, writers, and interpreters have constructed a vast gap between human rights and woman; even it has portrayed Islam as an anti-woman religion.¹⁹ The pre-modern interpretation of Islamic law coupled with culture imperialism rooted the incompatibility of international human rights norms with Islamic principles a modern Islamic thinker, asserts ²⁰(Abdullah Ahmad An-Naim, Some Muslim countries have taken a variety of stances...some ratifying without reservations of any kind and some making reservations that have nothing to do with Islam... [In other words] there is far too much in the way of variations in Muslim countries’ approaches to ratifying human rights treaties and far too much disarray in their substantive reservations for it to be realistic to say that these are inspired by an Islamic model.

¹⁷ Abdullah Saeed, ‘Pre-modern Islamic Legal Restrictions on Freedom of Religion, with Particular Reference to Apostasy and its Punishment,’ in: Anver M Emon, Mark S El lis & Benjamin Glahn (Eds.) *Islamic Law and International Human Rights Law*, (Oxford University Press, 2012) 226

¹⁸ Prof. Kamran Hashemi , asserts that “for early Muslims conversion was considered not merely a matter of faith, but equal to treason, submission to foreign domination, treason against a very basic and all-encompassing group identity and loyalty and an act of war against the Muslims.”

¹⁹ Abdullah Ahmed An Naim, ‘Human Rights in the Muslim World,’ in: Henry J. Steiner, Philip Alston,

²⁰ Abdullah Ahmad An-Naim, said that “I believe that a modern version of Islamic law can and should be developed. Such a modern Sharia could be, in my view, entirely consistent with current standards of human Rights.”

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1.3. Sharia and National Law in Muslim Countries

Conflicts between national law based on classical sharia and human rights are, in the first place, considered legal conflicts. A legal provision violates a legal principle or rule of a higher nature. Some Muslim states have tried to avoid such legal conflicts by expressing their reservations when ratifying international human rights treaties. Such reservations have been contested by European states since they were considered to be contrary to the core of the human rights in question. Working towards feasible solutions of the legal conflicts usually requires new interpretations of sharia by the state's legal institutions resulting in legal changes. Obviously, this is a long-term process involving political negotiations and social change as well. In contrast, we also see actual conflict, when states who act in violation of human rights justify this by referring to laws based on sharia such as the actual imprisonment of rape victims, prosecution of minorities, the execution of cruel sanctions, physical threats to converts and to blasphemers. Such violations are often reported by the international press and by NGOs who may call for action.²¹

1.4. Implementation Islamic law by judiciary in Muslim countries²²

Judges must resolve disputes through the implementation of applicable law within the framework of national legal systems and in a manner which assuages the public sense of justice. In most developing countries, characterised by their heterogeneity and normative pluralism, this is a huge challenge. Muslim countries are no exception, and the position and role of sharia adds to the complexity of their tasks. State courts have largely ousted the traditional qadi in the Muslim world. Some of these state courts, however, are formally called 'Islamic' or 'religious' courts. It has been noted in several instances that such religious courts are deemed to be more accessible and less corrupt than the general state courts in such countries. Higher courts have played an important role in the progressive application of law. For example, they have helped to reduce and surmount conflicts between sharia and national law in the area of criminal law.

As mentioned earlier, stoning and amputation are not or rarely executed in most countries which have had punishments enshrined in legislation, thanks to decisions by higher judges. Furthermore, supreme courts in countries such as Malaysia, Pakistan, and Egypt, have decided that large portions of the legal system, such as the constitutional framework itself or large codifications such as the civil code legislation or family law, shall not be scrapped due to alleged conflict with sharia.

²¹ Sharia and National Law in Muslim Countries Tensions and Opportunities for Dutch and EU Foreign Policy.BY, Jan Michiel Otto

²² Sharia and National Law in Muslim Countries

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However, one still finds many conservative judges, especially in the lower courts. Sometimes, as in the infamous case of Amina Lawal (Nigeria), they gain the attention of the international press with their harsh, conservative rulings, only to see their decisions overturned by higher courts, or just not enforced by the executive.

1.5. The concept of the Secularism and application of Islamic law in non-Muslim country

Sharia, or Islamic law, influences the legal code in most Muslim countries. A movement to allow sharia to govern personal status law, a set of regulations that pertain to marriage, divorce, inheritance, and custody, is even expanding into the West. "There are so many varying interpretations of what sharia actually means that in some places, it can be incorporated into political systems relatively easily," said CFR's Steven A. Cook. Sharia's influence on both personal status law and criminal law is highly controversial. Some interpretations are used to justify cruel punishments such as amputation and stoning, as well as unequal treatment of women in inheritance, dress, and independence. The debate is growing as to whether sharia can coexist with secularism, democracy, or even modernity, an idea that is being tested by several countries in the Middle East in the wake of popular uprisings and civil wars.²³ Whether democracy and Islam can coexist is a topic of heated debate. Some conservative Muslims argue democracy is a purely Western concept imposed on Muslim countries. Others feel Islam necessitates a democratic system and that democracy has a basis in the Quran since "mutual consultation" among the people is commended (42:38 Quran). Rather than rejecting democracy, many Muslims see sharia as a means "to be liberated from government corruption and believe it can exist within a democratic and inclusive framework".²⁴

Many majority Muslim countries have a dual system in which the government is secular but Muslims can choose to bring familial and financial disputes to sharia courts. The exact jurisdiction of these courts varies from country to country, but usually includes marriage, divorce, inheritance, and guardianship. Examples can be seen in Nigeria²⁵, Ethiopia and Kenya, which have sharia courts that rule on family law for Muslims. A variation exists in

²³ Islam: Governing Under Sharia (Aka Shariah, Shari'a) Authors: Toni Johnson, and Mohammed Aly Sergie

²⁴ The issue of **sharia law versus secular law** gained new scrutiny in 2011 in the wake of uprisings in several Arab countries, such as Libya, Tunisia, and Egypt, which ousted long-time autocrats and helped Islamist political parties gain prominence. At the same time, Muslims in only five countries, including Pakistan and Afghanistan, preferred a strong leader to a democratic form of governance.

²⁵ Shari'ah Implementation in a Democratic Nigeria: Historical Background and the Quest for Developmental Legality, **Dr. Juwayriya Badamasiuy:-** The return of democracy in Nigeria's political landscape in 1999 after decades of either brutal military dictatorship or truncated democracy brought several opportunities to citizens. Democracy to Northern Nigeria Muslims meant an avenue to return to the full application of Shari'ah Islamic law through the purview of operational 1999 constitution.

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Tanzania, where civil courts apply sharia or secular law according to the religious backgrounds of the defendants.²⁶ Several countries, including Lebanon and Indonesia, have mixed jurisdiction courts based on residual colonial legal systems and supplemented with sharia. Western countries are also exploring the idea of allowing Muslims to apply Islamic law in familial and financial disputes. In late 2008, the United Kingdom officially allowed tribunals governing marriage, divorce, and inheritance to make legally binding decisions if both parties agreed.²⁷ Sharia has become a topic of political concern in the United States in recent years.²⁸ The state of Oklahoma passed a ballot measure in November 2010 to ban the use of sharia law in court cases, which supporters said was "a necessary pre-emptive strike" against Islamic law.

Secularism is one of the basic principles of the **FDRE Constitution** and, in effect, the state and religion are separate²⁹ - with each not allowed to interfere in the affairs of the other. However, sharia courts are set up, staffed and funded by the government although they are not part of the regular court structure. One could challenge the propriety of sharia courts on grounds of secularism, and may object the role of the government in establishing sharia courts and its act of providing them with budget.³⁰ Besides the FDRE Constitution embodies a provision that guarantees parties to have choice of forum without, however, being subjected to the compulsory jurisdiction of the sharia courts.³¹ In Muslim countries where Islam is the official religion, sharia is declared to be a source, or the source, of the law. Examples include Saudi Arabia, Kuwait, Bahrain, Yemen, and the United Arab Emirates, where the governments derive their legitimacy from Islam. In Pakistan, Iran, and Iraq, among others, it is also forbidden to enact legislation that is antithetical to Islam. The crafting of new constitutions following the ouster of long-time rulers in Libya, Egypt³², and Tunisia has led to a discussion about the role of Islamic law in a democracy. Saudi Arabia employs one of the strictest interpretations of sharia. Women are under the guardianship of male relatives at all times, and must be completely

²⁶ Muslim Personal Law in Kenya and Tanzania: Tradition and Innovation, ABDULKADIR HASHIM

²⁷ SECULARISM, THE RULE OF LAW, AND 'SHARI'A COURTS': AN ETHNOGRAPHIC EXAMINATION OF A CONSTITUTIONAL CONTROVERSY. BY JEFFREY A. REDDING*

²⁸ Several opponents of the construction of new mosques around the United States, including one near Ground Zero in lower Manhattan, have cited fear of the spread of sharia as a reason for their opposition. And about a third of Americans in an August 2010 Newsweek poll suspected U.S. President Barack Obama sympathizes with Islamist goals (PDF) to impose sharia. (as reported by Lauren Vriens)

²⁹ Art.11 of the FDRE constitution

³⁰ Legal pluralism, sharia courts ,and constitutional issues in Ethiopia, Mohammed Abdo

³¹ As Mohammed Abdo, write on his articles, **Secularism** is compromised in the interest of religious diversity permitting parties to choose the forum of adjudication in personal matters. To this end, the FDRE Constitution embodies a provision that guarantees parties to have choice of forum without, however, being subjected to the compulsory jurisdiction of the sharia courts.

³² Efforts to force an Islamist agenda in Egypt by the Muslim Brotherhood led to the 2013 ouster of Mohamed Morsi, the country's first democratically elected president, and the return of a more secular military government.

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covered in public. Elsewhere, governments are much more lenient, as in the United Arab Emirates, where alcohol is tolerated. Non-Muslims are not expected to obey sharia, and in most countries they are under the jurisdiction of special committees and adjunct courts under the control of the government.

Muslim countries where the government is declared to be secular in the constitution include Azerbaijan, Tajikistan, Chad, Somalia, and Senegal. Islamist parties run for office occasionally in these countries and sharia often influences local customs. Popular Islamist groups are often viewed as a threat by existing governments.³³ As in Azerbaijan in the 1990s, secularism is sometimes upheld by severe government crackdowns on Islamist groups and political parties. Similar clashes have occurred in Turkey. Under the suspicion that the majority party, the Islamist Justice and Development Party, was trying to establish sharia, Turkey's chief prosecutor petitioned the constitutional court in March 2008 to bar the party from politics altogether. Secular Muslim countries are a minority, however, and the popularity of Islamist political parties are narrowing the gap between religion and state.³⁴

2. Sharia court in Action

Since the **imperial period** the functions of the qadi have not changed much in as much as he still remains responsible for performing the „qadha“ or „qaza“ that is, settling disputes according to sharia principles and balancing rights and duties that Muslims owe to „Allah“. Well versed in „Islamic fiqh“, the qazi as judge discern and extract the legal rules from the sacred Islamic sources and suggests remedy to those approaching him with their grievances. As judge the qazi chiefly follows the Quranic injunctions and precepts together with previous interpretation of the Holy Law by eminent jurists.

The qazi as mediator brings together the contesting parties. He has no ritual sanction nor any temporal powers but only a serious determination to mediate between man and man, and man and God. The ability of sharia courts to adjudicate upon disputes within a normative framework together with its flexibility to assimilate customary values along with Islamic principles has allowed for their wide acceptance in the Muslim society. Addressing private family disputes and social breaches without concerning with serious criminal cases, sharia courts strike balance among different familial actors. These courts adjudicate upon disputes within a normative framework together with its flexibility to assimilate customary values along with Islamic principles. The system addresses the issue

³³ Islam and the Politics of Secularism: The Caliphate and Middle Eastern, By Nurullah Ardi

³⁴ Report on secularism vs. sharia, by Lauren Vriens

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of power-relationship between the victim and offender within the broader context of communitarian values.

The qazi attached to the institution performs a number of functions. He is not only a judge competent to pass judgement but also an experienced community member who helps the parties in distress vent their emotions, fix priorities, cognize disputants on specific questions of Islamic laws and principles and explain codes of good behaviour and, mustahaab“ or virtuous actions.

2.1. Bases and jurisdiction of sharia court and Application of Islamic Law

The establishment of the sharia court in Ethiopia was a result of the constitutional guarantee which provides that the settlement of personal disputes by customary and religious systems. The existence of sharia courts does not stand in contradiction to the spirit of the Constitution. Since the constitution does not directly determine the specific jurisdiction granted to sharia courts, and does not define the personal matters amenable to the jurisdiction of such systems, rather stipulating the general competence of the religious court (Mohammed Abdo)³⁵, left the contents such matters should be illustrated or determined under the establishment legislation of the sharia courts. Besides the exercise of jurisdiction of the sharia court shall be based on the consent of the parties to be adjudicating their cases before Khadis.³⁶

The institution is competent to deal with any question of Islamic personal law regarding marriage concluded in accordance with Islamic law. Accordingly, the specific matters falling under the jurisdiction of the sharia courts as provided by Federal Courts of Sharia Consolidation Proclamation includes Any question regarding marriage, divorce, maintenance, guardianship of minors and family relationships; provided that the marriage to which the question relates was concluded, or the parties have consented to be adjudicated in accordance with Islamic law. Besides the court also have a jurisdiction over any question regarding Wakf, gift/Hiba/, succession of wills; provided that the endower or donor is a Muslim or the deceased was a Muslim at the time of his death.³⁷ Accordingly, in implementation of Islamic law of personal and family matter Qadis had discretion in deciding cases. Principles of istihsan and istihbab (preference) guided the qadi in the direction of what was expected and preferable depending on the sociocultural and economic context of the people he served. Every qadi belonged to and specialised in one particular madhhab (school of law), but the theological collections and

³⁵ Legal pluralism, sharia court, and constitutional issues in Ethiopia, Mohammed Abdo.

³⁶ Articles 34(5) and 78(5) of the FDRE Constitution

³⁷ Art. 4 of Federal Courts of Sharia Consolidation Proclamation No.188/1999

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interpretations of all four madhahib were available to him as reference in deciding cases. More frequently, a qadi's decisions were informed by, and made according to, local 'urf (custom). Unlike modern nation states, the premodern State did not establish legal codes determining social relations; rather it passed qanun, edicts or executive orders, pertinent to collecting taxes, the amount of the diyya (blood-price) and various types of security measures. With these guides and juristic fiqh as a framework, the qadi reached his decisions. Unlike courts today, qadis had neither the right to force a woman to stay with a husband she wanted to divorce, nor did they question her reasons for asking for divorce. The qadi's role was that of a mediator regarding financial rights and support given the circumstances of the divorce.³⁸

2.2. Application of Islamic law of personal status and family matter by sharia court

It is commonly asserted that personal status laws applied in Muslim countries today are based on the Islamic Shari'ah and as such should be considered God's laws as provided through the Qur'an and the Sunnah of the Prophet despite it is the construct of the modern state. Thus, any effort to change personal status laws is an attack on the very basic principles of Islam. While the rules can be found in the interpretation of medieval fiqh, the actual laws by which Muslims live today are a combination (talfiq) of fiqh rules, traditions ('urf), and nineteenth century philosophy toward gender relations. These laws and the approach to gender embedded within them reflect prevailing Victorian values and European laws, traditions, education and legal systems of the nineteenth century, characterised by the spread of European hegemony. The personal status laws developed in the modernisation period established a construction of the family with the father as the recognised official head of the family whose powers are legally defined and protected by the powers of the state.

What is said to be Shari'ah in law and practice today has very little to do with what was practised in Shari'ah courts before the reform of the law. The system was flexible and provided an avenue for the public to achieve justice and litigate disputes rather than to enforce a particular philosophy of social laws and norms formulated by the State.

³⁸ The Genesis of Family Law: How Shari'ah, Custom and Colonial Laws Influenced the Development of Personal Status Codes, Amira El-Azhary Sonbol

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Litigation in court seemed to be a daily activity for men and women, and there were no separate courts for the sexes.³⁹

2.2.1. Marriage

In **Islam**, marriage is a legal contract between two people. Both the groom and the bride are to consent to the marriage of their own free wills. A formal, binding contract is considered integral to a religiously valid Islamic marriage, and outlines the rights and responsibilities of the groom and bride. There must be two Muslim witnesses of the marriage contract.

In Ethiopia, the Revised Family codes of Ethiopia that govern the conclusion of marriage. Accordingly, family law states that marriage can be conducted in three forms, civil marriage, customary marriage and religious marriage. So, the spouse can conclude their marriage according to their choice. This means that the Muslim spouses can choose to conclude their marriage according to Islamic law. However, Tanzania law recognizes a marriage contracted Islamically, Muslims are not obliged to contract their marriages according to Islam. They have a choice between contracting Islamically or in civil form. This clearly indicates an interference with Islamic law, as it is not applied independent of the state law.

In regarding the issue of the minimum age of marriage the revised Family law of Ethiopia is in dispute with Islamic law. The revised family provides that, the minimum age for marriage is 18 years for the man and 15 years for the woman. On the contrary, according to Islam, any Muslim man or woman (subject to certain conditions) may contract marriage provided he or she has attained puberty. There is no minimum age; the point of focus is puberty. In spite of all these, some aspects of Islamic law find room in the laws as regards marriage. For instance, if a woman contracts marriage in the Islamic form and is widowed or divorced; then she goes ahead and contracts another marriage during the grace period of iddat, the marriage is void. This is in conformity with Islamic law. Therefore, the sharia court may challenge by the minimum age requirement for majority provided by state law, that is considered as crime if coerced to conclude marriage by their family even though valid in Islamic law.

2.2.2. Divorce

³⁹ The Genesis of Family Law: How Shari'ah, Custom and Colonial Laws Influenced the Development of Personal Status Codes, Amira El-Azhary Sonbol

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Divorce (or dissolution of marriage) is the termination of a marriage or marital union, the cancelling and/or reorganizing of the legal duties and responsibilities of marriage, thus dissolving the bonds of matrimony between married couples. The procedures and effect of dissolution of marriages are different in application of religious law or state law.

Accordingly, in many Islamic worlds, men have possessed a unilateral and unconditional right to divorce. In these same countries, women are often not only not afforded that right but, if they are allowed the right of divorce at all, must resort to the courts to divorce their spouses, where they confront innumerable social, legal, and bureaucratic obstacles. Similarly, women are often at a massive disadvantage compared to men in such matters as financial support, child custody, child visitation and child guardianship, and subsequent remarriage.⁴⁰

The **family law of Ethiopia** also provides that two kinds of divorce by mutual consent of the parties and petition to the court of law by one of the spouses. The court after giving six month grace period would end their spousal relationship. In many Muslim nations, the courts are set up to accommodate Sharia law through a process called “tafriq.” Depending on the country, the court may act in addition to a traditional Sharia divorce or in lieu of it. A couple can register with the court, notifying it that they would like to terminate their marriage. They’re then required to meet with a counsel or over the course of a three-month period called “iddat.” The counsel or will attempt to reconcile the couple before allowing them to move forward with divorce proceedings. If counselling fails, the couple’s divorce moves on to a judge, who will decide whether to permit them to end their marriage.⁴¹ In application or ruling of Islamic law over divorce cases before sharia courts or khadi’s in both Muslim country and secular state, the sharia court may be challenged due to the existence of the difference in decision making bet the Islamic school thought which will discuss it in detail in the next chapter.

Accordingly, **in Ethiopia** since there is no codified Islamic family law this kinds problem was also found sharia courts with that the khadis to simplify the issues most of the time used to prefer the madh-hab that he/she follows to decides on cases. In Kenya, Most of the cases presented to the Kadhi's Courts are dealt with according to Islamic Family Law rules based on the **Shafii madhhab**⁴². So, there is no possibility that the sharia court may face these kinds of problem.

⁴⁰ “Best Practices” Progressive Family Laws in Muslim Countries August 2005

⁴¹ Application of sharia law in US

⁴² Muslim Personal Law in Kenya and Tanzania: Tradition and Innovation, ABDULKADIR HASHIM

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2.2.3. Child custody

Muslim countries often restrict the rights of mothers to raise or even to have the right to visit their own children in the event of a divorce. Instead, these countries cite a “natural right” of fathers to have guardianship over their children; custody defaults to the father after a child reaches a particular (often very young) age⁴³. According to Ibn Qayyam There are two types of guardianships. In one, father prevails over the mother and that is in matters of money and marriage. In the other one the mother prevails over the father and that is in matters of nourishing and upbringing.⁴⁴ Under Islamic law even if the mother has the physical custody of her children, father continues to be the guardian of the child as he is supposed to support the child financially. However it should be noted that under the prevailing social setup where the father is not the sole financial contributor and the mother shares financial responsibility and in most cases is the main contributor to the financial needs of the family then the privilege of ‘guardianship of person and property’ should vest in her as well. When come to the **case of Ethiopia**, the Majority of Muslims are followers of Shafi’, wards are to remain with their mother till the age of five in the absence of any ‘serious reason’. Civil Code provides that child custody and maintenance arrangements are to be made only with consideration for the interests of the ward. However, under revised family codes provide that until the child able decide as to with whom he will be live it is advisable as to stay with his/her mother.

When we see in other Muslim country, **In Kuwait**, although Maliki School is the official madhab divorced mother has a right to son’s custody till puberty and daughters till marriage.

In Jordan, Hanafi madhab is the dominant school in Jordanian law. Jordanian Law of Personal Status (JLPS) refers to classical Hanafi rules in the absence of specific reference in the text but the law also provides that divorced mother can retain child custody till puberty, subject to classical conditions.

Similarly, in Kenya has a very diverse Muslim population due to Arab and south Asian settlements, Dominant madhab is the Shafi’i school of fiqh with sizable Hanafi communities. Islamic law is applied by Qadhis’ courts where all the parties profess the religion Islam in suits relating to personal status. In Kenya at the age of 7 for boys and 14 for girls, custody reverts to the father.

⁴³ Best Practices” Progressive Family Laws in Muslim Countries August 2005

⁴⁴ Ibn Qayyam (1292-1350CE / 691 AH- 751 AH) was a Sunni Islamic jurist and commentator of Quran. His scholarship was focused on Hadith and fiqh.

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2.2.4. Division of Matrimonial assets and Maintenance

Concerning the division of the assets, according to family law there are common and private property of spouses. So, the court upon granting a decree of divorce or separation may order division between the parties of any assets acquired by them by their joint efforts having regard, inter alia, to the extent of the contributions made by each party and subject to considerations, shall incline towards equality of division.

This is contrary to Islamic law which recognises separate property for the spouses, there is no common asset. Furthermore, family law states that the housework done by the wife constitutes sufficient contribution to the matrimonial property. Accordingly, the sharia court was challenged by the women's right to get their contribution to the property exist before the conclusion of marriage, otherwise it may be considered that the denial of right to get up to their contribution to the particular. This why we prefer to this as one of the challenges of the sharia court would have face.

2.2.5. Inheritance

When there is no uniform law of succession in secular country deemed to be that Muslims are to be governed by the Islamic law of inheritance. The particular importance of the Islamic laws of inheritance is obvious from the verses immediately following those verses giving specific details on inheritance shares, "These are limits (set by) Allah (or ordainments as regards laws of inheritance), and whosoever obeys Allah and His Messenger will be admitted to Gardens under which rivers flow (in Paradise), to abide therein, and that will be the great success.

Almost worldwide, widows comprise a significant proportion of all women, ranging from 7 percent to 16 percent of all adult women. These numbers are higher following an extended conflict; thus, forward-looking Islamic countries have found it important to safeguard the rights of widows.

The main issues at stake are maintenance and residence of a widow during the customary waiting period—the amount of time allotted to determine whether there is an additional pregnancy, thus affecting inheritance, the right to remarry, and custody and guardianship of children (Professor Almaric Rumsey, 1825-1899).⁴⁵

⁴⁵ Best Practices” Progressive Family Laws in Muslim Countries August 2005, The divine justness and equitability of the Islamic laws of inheritance have been correctly appreciated by many non-Muslim scholars such as Professor Almaric Rumsey (1825-1899) of King's College, London, the author of many works on the subject of the Muslim law of inheritance and a barrister-at-law, who stated that the Muslim law of inheritance, "comprises beyond question the most refined and elaborate system of rules for the devolution of property that is known to the civilised world.

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In some Muslim country sharia courts would have face challenges in application of Islamic law of the inheritance, especially in relation will of the deceased, that raises the question of the whether non-Muslim can inherit a Muslim is one of the important question. Generally, the purpose of inheritance under Islamic law is to ensure that maintenance and inheritance rights for widows and Guarantee custody rights for mothers. Further alteration is found in the issue of inheritance of a non-Muslim from a Muslim. According to Islam, a non- Muslim cannot inherit from a Muslim, except a Christian or Jewish wife. Consequently, non-Muslims are allowed to inherit from Muslims provided they are part of the lineage.

CONCLUSION

Ethiopia is a multi-religious country in which every citizen should be reasonably by the constitution allowed to practice his faith. Although Sharia is claimed to be essential to Islam and Muslims have a right to it, yet the operation of Sharia law must stop where the right of a non-Muslim begins. And since every revelation is received according to the manner of the receiver, the revelation and reception of Sharia should be re-examined in the light of the free nature of man.

Accordingly, It is evident from the above theoretical discussion and analysis that the application of Islamic law conflicting with the western based law due to the perception towards to Islamic by the orientalist. Despite this problem exist widely in secular states, in many Muslim and non-Muslim country they recognizes Sharia court to entertain the personal status and family matter.

In Most Muslim country the understanding they have in application of sharia law in personal status and family matters are the common problem in litigation process with national law. This might be arises from the influence western law that which imposed on them by using different policy measures in order to liberalizes their law especially in relation to the human right. Besides the perception towards to Islamic law in place of international standards are far from the fact of the teaching of the prophet (saw) even in the Muslim dominate country. Generally, conflicts between laws based on classical sharia and human rights occur mostly in four areas as it could be observed from our discussion. Gender discrimination, discrimination of non-Muslims, cruel-corporal punishments, Freedom of religion, and freedom of expression about religion. Concerning, the gender issues Classical sharia makes major distinctions between the legal positions of men and women, which are generally more advantageous for men than for women. For example, men have more powers to make key decisions about marriage, divorce and family life than women, men inherit more than women, evidence given in court by men is given

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higher value than evidence provided by women. In classical sharia, homosexual behaviour is prohibited, raising this as the ground of problem rather than know the fact of sharia law provides for women's to exercise their right and sharing her contribution without discrimination. It seems that Challenges of Sharia and critics approached to it are not necessary decisive; it depends on interpretation and rules adapted as Sharia. Iranian experience shows that it is possible to adapt an appropriate interpretation of Sharia which at the same time is conform to the conditions of modern life and respect principles and goals of Sharia.

Finally as observed from our analysis, the problem mostly raised in the sharia courts of the Eastern Hararghe zones are not far that of in contemporary Muslim world due the understanding of the sharia by the judiciary rather the preferable way that must be bold, imaginative, and purposive in their interpretation of human rights and other Islamic law. Besides the problem of application of sharia law might be created by the law of the country especially the sharia court establishment proclamation regard the recruitment of qadi, there is no any examining procedure whether the person have deep understanding Islamic law, rather it requires that the mere religion knowledge of the person.

In addition, concerning women's right, in east Hararghe the society are highly traditionalist, so they consider and follow sharia as attached to their cultures. So, lack of awareness and perception towards to sharia law, women are refused to bring their case before sharia court fearing that the qadis himself similar to that of the traditional elders who does not provide more property share as ordinary law so requires.

RECOMMENDATIONS:

After conducting our term paper we strongly recommend the following issue

1. The sharia court qadis should get into agreement on the marriageable age of the spouses, because we heard that the marriageable age of the spouses sometimes interpreted inline of revised family code of Ethiopia where as some qadis use the quranic version as to render decision on the same issue. A qadis before the current qadi used bulugh (menstrual cycle) as to render decision on such issue whereas the current one use the family code age which is 18. This should correct.
2. The succession of property should interpreted inline of the women's right that is discussed under different quranic and Hadith verses accordingly.
3. There should be continuous capacity building trainings for qadis as to avoid mis-interpretations and different interpretations of the same verses of Quran and hadith.

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4. The problem of qadis knowledge of interpreting the shari'ah law is directly related with the way they recruit the qadis should base on their knowledge of Quran and hadith.
5. There must be, a codified and independent procedural laws concerning the issues under the jurisdiction of Islamic shari'ah courts in general so, as to make distinct the shari'ah laws issue from regular courts procedure which is not flexible and some of its articles are against the shari'ah law.
6. Availability of the qadis in their working time and days should control in some mechanisms.
7. There must be strong bond tie between hierarchies of shari'ah courts from first instance or woreda level to supreme shari'ah court in regional states because we received such information from the qadis that their tie with the supreme shari'ah is not that much.
8. Finally, it recommended that the age of the qadis should consider before assigning them for such post.

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