

Legal Pluralism Vs Human Rights Issues: Sharia Courts and Human Rights Concerns in the Light of the Federal Constitution of Ethiopia

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Introduction

The Federal Democratic Republic of Ethiopia Constitution (FDRE constitution) has taken a bold step in recognizing and promoting ethno-linguistic and religious diversity in the country. To this effect, it has specifically granted mandate to customary and religious system in settlement of disputes on matters affecting personal status of individuals. The legal pluralism recognized by the constitution gives rise to plurality of sources of normative ordering that could potentially conflict with state laws, and especially with the supremacy clause of the constitution and human rights provisions enshrined under the constitution. This is the case with matters falling within the competence of sharia courts that are to be resolved by the application of Islamic law, which has a different conception and approach towards the rights of women in general and gender equality in divorce, inheritance, sharing of estate upon divorce, etc. The decisions rendered by sharia courts using Islamic rules could conflict with rules human rights norms in general and rules on gender equality, protection of against discrimination on any ground, etc that are enunciated under the Constitution. This paper examines mechanisms, if any, adopted by the FDRE Constitution to manage the potential clash between state laws on the one hand and religious laws and decisions on the other as related to the jurisdiction of sharia courts. Whether or not final judgments pronounced by sharia courts are supposed to be compatible with the constitutional standards (such as the supremacy clause and human rights provisions) are examined. Before doing so, some important issues that serve as a framework to put things in context that are related to sharia courts such as their brief history in the country, their jurisdiction, structure, administration, and place in the legal system will be discussed. In addition, few cases decided by sharia courts that shed light on practice of exercising their jurisdiction and relationships with courts of law and an organ in charge with the task of interpreting the Constitution are reviewed. The discussions on issues raised in the paper are based on the analysis of the relevant provisions of the FDRE constitution and laws related to the jurisdiction of sharia courts, such as the Sharia Courts Establishment Proclamation, the Civil Code, the Federal Courts Establishment Proclamation, etc, and review of few cases decided on by sharia courts along with consultation of relevant literature. Sharia courts are set up both the Federal and each nine units of the Ethiopian federation and the focus here is on the Federal sharia courts and not the Regional ones.

1. Background

Islam arrived early in Ethiopia soon after the advent of the message of Prophet Mohammed. Ethiopia is the first country that accepted Islam after Arabia and this happened following the taking refuge in Ethiopia of some of the followers of the Prophet

that suffered persecution at the hands of the then powerful tribe of Mecca, Qureysh, to which the Prophet belonged to. The then Ethiopian king offered kind treatment and eventually converted, after considering the message they were persecuted for, as believed by Muslims, to Islam. As a result of the well-treatment of the followers who sought refuge and protection in the county, the Prophet ordered Muslims in general and his followers to respect and protect Ethiopians and not to offend/attack Ethiopian except in self-defence and this instruction is now well-known by Muslims throughout the world.

An influx of immigrants and traders from South Arabia during the course of the following centuries increased the number of Muslims in coastal areas around Ethiopia¹, in the present day Somalia and Eritrea, and helped Islam to penetrate these areas and Islamic law to take root. The firm presence of Islam in the area created discontent between the dominant Christian kingdom, which considered Islam a threat to their areas of influence and led to violent conflict at times, the significant of which is the campaign spear-headed by Muslim leader commonly called *Ahmed Gragn*. He uprooted the Christian Regime of *King Libne Dengel* and established his own rule in the central part of the country for about 16 years and Ethiopia nearly became to a Muslim state². One notable attempt by Christians to forcefully convert Muslims against their will was made by Emperor Yohannes in the 19th Century but his determination to Convert Muslims did not materialize as he was killed in a battle elsewhere in the country. After the present day shape of Ethiopia was established by *Emperor Menelik II* in 19th Century, after a successful series of campaigns of expansion of territory, there was no significant clash between Muslims and Christians, and the two enjoyed peaceful coexistence. It appears that mainly the peaceful coexistence and culture of tolerance between the two, along with the *de facto* existence of Sharia courts in the country for long time and the number of Muslims in the country³ propelled the official recognition of the courts in the early 1940s. The inception of the federal form of government in 1990s paved the way for explicit recognition of sharia courts to deal with some personal matters and gave a constitutional status to the courts and allowed them to operate in a different a unique legal framework, which also gives rise to some questions regarding their jurisdiction and operation, and their relationships with law-applying bodies such as courts and the *House of Federation*, which is vested with the task of authoritative interpretation of the constitution.

2. Sharia Courts in Ethiopia: A Brief Historical Account

Shariat courts have been in *de facto* existence since the country embraced Islam and the growing influence of the religion in the coastal areas surrounding the country⁴. However; they acquired official state recognition only in 1940s when in 1942, the *Proclamation for the Establishment of Khadis Courts* was issued. The Proclamation defined the jurisdiction of sharia courts, which are essentially the same with the present jurisdiction of the courts,

¹. http://en.wikipedia.org/wiki/Islam_in_Ethiopia, accessed on 21 August 2010

². John Miles, *Customary and Islamic Law and Its Development in Africa*, Legalbrief Africa, African Deveopment Bank, 2004, at 136; See also Jan Abbinik, "Ethiopian Islam and the Challenge of Diversity" *ISIM Newsletter*, Volume 4, 1999, at 24

³. Muslims account for 33.9 % of the population according to the official *Housing and Population Census* released in 2007

⁴. I. S. Trimingham, *Islam in Ethiopia*, 1965, at 15

and provides that the Government would appoint judges serving in the court. This proclamation was repealed in 1994 by the *Khadis and Naiba Councils Proclamation*, (Proclamation No. 62/1944), which provided a three set of courts.

The enactment of the 1960 Civil Code, which calls for uniform application of rules regarding all civil matters, put the legal status of the courts in limbo. Article 3347 provides that “*Unless otherwise expressly provided, all rules whether written or customary previously in force concerning matters provided for in this code shall be replaced by this code and hereby repealed*”. Some people contend that the provision repealed the law establishing them and the jurisdiction of the courts⁵. The repeal of the courts by Article 3347 is an implied one as the Civil Code contains no rule relating to Muslims in general and the courts in particular. In other words, since the Civil Code repealed all other civil laws and customary rules and the law was supposed to be uniform throughout the country, and that there is no exception made to any group, the argument is that the courts are no longer recognized and their jurisdiction to apply Islamic law is annulled⁶.

A contrary argument is that since such courts were in existence and applying Islamic law to some extent, the Civil Code, which makes no reference to the courts, was not intended to revoke their jurisdiction in relation to cases within their remit by virtue of existing law⁷. It was in consideration, apparently, of the repeal effect of Article 3347 of the Civil Code regarding sharia courts that then *Minister of Justice* instructed, by issuing circular, the courts to continue to exercise their jurisdiction defined under the law that set them up⁸. Although not clearly stated, the action of the *Minister of Justice* seems to be based on the assumption that the sharia courts establishment law was affected by the entry into force of the Civil Code.

The promulgation of the Civil Code put the legal status of sharia courts in ambiguity and uncertainty, which appears to be a deliberate action since Ethiopia at that time was struggling to come to grips with, following the entry into force of the Civil Code, the question of distinct law for Muslims⁹. One can, therefore, see the dilemma following the Civil Code- on the one hand the desire for uniform law (legal universalism), and the need to take into account important religious law for the Muslim community on the other. Ultimately, the action of the *Minster of Justice* tilted towards the interest of Muslims and entitled the sharia courts to continue their operation amid their status that was put into question.

The adoption of the Federal Constitution of Ethiopia brought about a specific legal recognition to the sharia courts and put their legal framework in a unique position in the sense that it is the first constitution in the country that specifically recognized religious

⁵.Zaki Mustapha, “The Substantive Law to be Applied by Muslim Courts in Ethiopia”, *Journal of Ethiopian Laws*, Volume 9, No. 1, at 140; see also James C. N. Paul and Christopher Clapham, *Ethiopian Constitutional Development: A Source Book Volume II*, 1971, at 849, citing Robert A. Sedler, “The Development of Legal Systems: The Ethiopian Experience”, *Iowa Law Review*, Volume 53, 1967

⁶.Ibid

⁷.Ibid

⁸.Ibid

⁹.Paul and Clapham, *op. cit.*, at 849

and customary systems of dispute settlement and tried to provide their general areas of competence and a general condition attached to their operation.

3. Why Sharia Courts in a Christian-dominated Country?

Although Ethiopia is the first country that embraced Islam after Arabia, the country is long considered an Island of Christianity. The Coptic Church had a status of state religion up to the early 1974, that it had a significant leverage on would become the king of the country in the sense that the Emperor of the kingdom should have the blessing and backing of the Church to have a legitimacy to rule the country, that it was entitled to a third of the revenue generated by the government, that the political and legal traditions were dictated by its precepts, etc. Although there has been a degree of respect and tolerance between Muslims and Christians in the country, Ethiopian Muslims were called 'Muslims living in the country' and were not treated as a true citizen of the country. The rules considered themselves to be the lord protectors of the Coptic church and relegated Muslims to a second-class citizen¹⁰. Muslims in the country, especially in the Northern part, were disenfranchised owing to the fact that they were excluded from the customary land-holding system¹¹. They also were not almost represented in higher political echelons and significant military, police security apparatus, and civil service institutions posts, especially in a period before 1970s¹². One wonders why the Sharia courts received state recognition in 1940s in those prevailing conditions. One reason for the extension of state recognition to sharia courts may be ascribed to the largely peaceful co-existence and culture of tolerance between Muslims and Christians, which entitled Muslims to practice their religion freely¹³. The second reason may be attributed to a major criticism leveled against Ethiopian government, during Emperor Haileselassie, by Muslims states such as Iraq, Egypt, Pakistan, etc accusing the government that Muslims in the country were treated a 'second-class' citizen for a mere reason of their religion¹⁴. The *de jure* recognition of the courts may be an act of appeasing foreign criticism and showing that Muslims had the right to be governed by their own religious law. Another factor that explains the recognition of sharia courts in the country is that historically, family relations, which have been the focus of jurisdiction of the courts before and since their recognition in 1940s and even at the present day, have been based on each communities religions and customary norms¹⁵. Muslims are predominantly concentrated in the peripheries of the country where the penetration of state laws are minimal(because of lack of infrastructure, scarcity of resources and man-power and lack of effective state apparatus, etc), and they traditionally rely on long existing sharia courts to settle private and family matters, and this state of affairs may have forced the government to recognize them as they constitute the main forum for dispensing justice for Muslims in certain matters. This may be why the Emperor heeded the request of Muslims to set up a

¹⁰.Bahru Zewde, *A Modern History of Ethiopia: 1885-1974*, 2nd eds., Addis Ababa University Press, 2001, at 7

¹¹.Ibid

¹².Jan Abbinik, *supra* note 2, *op. cit.*, at 24

¹³.Ibid; see also Paul and Clapham, *supra* note 5, *op. cit.*, at 849

¹⁴.John Miles, *supra* note 2, *op. cit.*, at 137

¹⁵.Ibid; see also Paul and Clapham, *supra* note 5, *op. cit.*, 849. Christians had such courts that deal with family issues and their jurisdiction was abolished in 1940s

government-backed sharia courts in 1940s and this along with the criticism of some states and the de facto existence of the courts for a long time in dealing with family and private matters have lead to their official recognition of the state.

The fact that the Government comes to grips with the reality that family matters that are governed by religious laws and institutions are virtually important to Muslim community and decided to continue to recognize sharia courts can be gleaned from the action taken by the *Minister of Justice* following the adoption of the Civil Code of 1060, which call for uniform application of civil laws in the country. Personal and family affairs codes are intrinsically tied with the preservation of one's culture and identity and if Muslims were forced to be governed by the uniform law, as envisaged by the Civil Code that abolishes all religious and customary laws, it would result in a staging of resistance by Muslims and could bring about upheavals in the country¹⁶. That is why the Ministry of Justice issued circular so that sharia courts could continue to function despite the legal status that was put in limbo by a provision of the Civil Code, Article 3347.

4. Jurisdiction of Sharia Courts

The jurisdiction of sharia courts since they were set up by state official law in 1940s is and remains the same-they are granted mandate in two types of cases, which are provide under Article 4 of the Sharia Courts Proclamation, Proclamation No. 188/1999¹⁷. It is in fact in the areas of family law that the influence of religious as well as customary rules are most visible and the jurisdiction conferred upon sharia courts is made in recognition of this fact¹⁸. As is plain from the provision on jurisdiction of sharia courts, personal and family matters are the only areas in civil cases to which Islamic law applies and thus sharia courts are denied the power to deal with many civil, criminal, commercial, etc matters. This is the case with sharia courts in many countries save for full blown theocracies, such as Saudi Arabia, that confine the jurisdiction of the courts to matters affecting personal status of Muslims¹⁹.

The FDRE Constitution does not determine the specific jurisdiction granted to sharia courts, it rather recognizes the possibility of settlement of personal disputes by customary and religious systems. It does not define the personal matters amenable to the jurisdiction of such systems either. However, the Constitution provides the general areas of competence (i.e., that means personal matters) and condition attached (i.e., consent of parties) to the exercise of jurisdiction by sharia courts. The specific types of cases falling within the competence of sharia courts are defined under the sharia courts establishment

¹⁶ . Paul ad Clapham, *supra* note 5, *op. cit.*, at 849

¹⁷.Article 4 of the Sharia Courts Establishment Proclamation provides that the courts have jurisdiction any question regarding marriage, divorce, maintenance, guardianship of minors and family relations; provided that the marriage to which the question relates was concluded, or the parties have consented to be adjudicated in accordance with Islamic law; any question regarding *Wakf*, gift succession of wills, provided the endower or donor is a Muslim or the deceased was a Muslim at the time of his death

¹⁸.The old and new family codes recognize the validity of marriage concluded as per religious rules and ceremonies.

¹⁹.Zaki Mustapha, *supra* note 5, *op. cit.*, at 138

proclamation that was promulgated pursuant to Articles 34(5) and 78(5) of the constitution.

Apart from determining jurisdiction of sharia courts, the proclamation as well as the Constitution provides a condition attached to the exercise of jurisdiction by sharia courts-the precondition of consent of parties. Sharia courts do not, therefore, have a compulsory jurisdiction over parties on matters falling within their reach unless both parties demonstrate their express and unequivocal consent to the exercise of jurisdiction by the courts²⁰. There is no clear guideline as to when and how the consent of the parties must be expressed²¹. However, one can draw the rules from the Civil Procedure Code as the sharia courts proclamation provides that the rules of procedure governing the proceedings before the sharia courts are those of the Civil Code²². Normally, a party who files a case as a plaintiff is said to have shown his consent to the court as institution of a case to the court indicates that the party is willing to get his case settled by the court. The problem with the consent of a party against whom a claim is made-how and when to establish a clear and express consent of the defendant and concerning the consent of the defendant, the Proclamation provides that there shall be attached, a long with the notice to be served on the defendant, a form in which the defendant declares that he/she expressly consents to the hearing of a case by sharia courts. It is possible that the defendant may not fill in the declaration but appear during the opening of hearing of the suit and raise his/her objection orally against the exercise of jurisdiction by a sharia court. Some of the issues in connection with securing consent of parties will be reviewed in the section entitled “Main Issues in relation to Jurisdiction and Performance of Sharia Courts”.

Another condition attached to the exercise of jurisdiction by sharia courts is that the jurisdiction can only be invoked where the marriage is governed by Islamic Law, which normally means that the parties are Muslims and have concluded marriage according to Islamic Law, or where the parties consent to get their cases handled by sharia courts, which means that non-Muslims can also appear before sharia courts so long as they consent to get their case settled by the sharia courts. Thus, both Muslims and non-Muslims can approach sharia courts to have their case resolved by them.

5. Structure and Administration of Shariat Courts and Procedural Issues

The Sharia court is of a three-tiered structure: the Supreme Court of Sharia, the High Court of Sharia and the First Instance Court of Sharia each with its own necessary number of Kadis, judges and has registrar and other personnel to run the activities of the court. The sharia courts are held accountable to the *Judicial Administration Council*, an organ in charge of, among others, recruiting and dealing with disciplinary matters of judges. The courts are established, staffed and funded by the government. They do not form part of the regular court of the land, are distinct from regular court structure and not subordinate to the regular court unlike the case in Kenya where they are subordinate to the High Court. This is clear from the provision in the Sharia proclamation, which

²⁰.See Article 34(5) of the Federal constitution and Article 4(2) of the Sharia Courts Proclamation

²¹.John Miles, *supra* note 2, *op. cit.*, at 142

²² .Article 6(2) of the Shari Court proclamation

provides that once a case is submitted to sharia court after meeting all procedural requirements, it may not be transferred to regular courts and vice versa²³. It is in the anticipation of the inevitable clash between the substantive law applied by and decisions of sharia court on the one hand and form state law rules that such provision is inserted in the sharia proclamation in order to delineate a clear line between them.

In considering matters falling within their competence, sharia courts supposed to apply substantive Islamic law. However, they are obliged to follow the rules relating to civil proceedings used by ordinary civil courts in undertaking their activities in hearing and disposing cases appearing before them--i.e., substantive sharia law is to be enforced by Civil Procedure Code governing the proceedings before ordinary civil courts. For instance, hearing proceedings, production and administration of evidence, execution of judgments, etc of sharia courts are regulated by the rules of the *Civil Procedure Code*. There is anomaly in the application of rules of civil Procedure of ordinary courts to sharia courts as the former may conflict with the rules of the latter, which will be touched on in the next section.

6. Main Issues in relation to Jurisdiction and Performance of Shariat Courts

Here, attempt is made to discuss major issues that the jurisdiction of sharia courts spark and their performance at the Federal level. The performance of sharia courts is examined on the basis of some few cases decided by them, which were reviewed by the *Federal Supreme Court* and the *House of Federation*, the final arbiter of constitutional disputes in Ethiopia. The cases highlight the relationship between sharia courts and ordinary court system and authoritative interpreter of the constitution, mechanism used by the constitution to deal with the clash between state law and the different normative ordering made possible by recognition of legal pluralism, and issues related to securing the express consent of both parties.

6.1. Issues related to Securing Express Consent of both Parties

Sharia Courts can see cases only when parties expressly indicate their consent to the exercise of jurisdiction by sharia courts. Cases decided show that if it is established that no express consent was secured by sharia courts before it decided on a case, the final decision rendered by the courts can be reviewed by the Federal Supreme Court and the House of federation. One famous case in this regard is known as the *Kedija Beshir case*²⁴. Kedija got a house following the passing away of her husband. Close relatives of her husband lodged a case to the First Instance Sharia courts with a view to claiming a share from the estate. She raised an unequivocal objection to the jurisdiction of the court. In spite of her clear objection, the court considered the case and finally decided on the claim filed by the relatives of her husband and forced her to surrender the house she acquired. She appealed against the decision to the High and Supreme Sharia Courts, both of which confirmed the decision of the First Instance Sharia Court. She submitted her application for cassation division of the Federal Supreme Court, pursuant to Articles 80(3) and

²³.See Article 5(4) of the Sharia Courts Proclamation

²⁴.Federal Supreme Court Cassation Division File No. 12400/1999

Article 10 of the Federal Courts establishment Proclamation (Proclamation No. 25/1996) which lists down cases fit for the review by cassation, which also decided against her by saying that there was no fundamental error of law in the decisions made by all the Sharia Courts that could lead to the review of the case. The *Ethiopian Women Lawyers Association* acted on behalf of Kedija and brought the case to the *House of Federation*, the final arbiter of constitutional case, by alleging that the consideration of the case by all the Sharia courts involved in deciding on her case amounts to the violation of the constitution as they considered the case while she expressly objected to the exercise of jurisdiction by sharia courts. The *House of Federation* decided that the decision was unconstitutional by saying that is only regular courts that have compulsory jurisdiction and that the jurisdiction of sharia courts is based on consent of jurisdiction and made reference to Article 34(4) of the Constitution. It also rejected the reasoning of Sharia that the requirement of consent under thP Sharia Courts proclamation does not apply to the case as the case was filed before the Proclamation was enacted and appeared in the official law reporter in the country, the *Negarit Gazzeta*²⁵.

The case shows that if a sharia court proceeds to see and decide on a case without securing the express consent of the parties, the decision can be reviewed on procedural ground of failure to comply with consent requirement by both the *Federal Supreme Court* and the *House of Federation*. However, if one reads the provision of the sharia Proclamation, a case filed to sharia courts may not be reviewed by ordinary courts and vice versa and this rule seems to bar the possibility of review of decision of sharia courts by ordinary Federal Courts in general and the Federal Supreme Court in particular. The Federal Supreme Court reviewed the case through its cassation division on the basis of Article 80(3)(a) of the Federal Constitution and Article 10 of the Federal Courts Proclamation. The relevance of Article 80(3) of the constitution to justify jurisdiction of the Federal Supreme Court to review final decisions of sharia courts on the basis of failure to secure the express consent of parties through cassation is doubtful. Article 80(3)(a) says “*The Federal Supreme Court has a power of cassation over any final court decision containing a basic error of law. Particulars shall be determined by law*”. Does the phrase “any final court decision” under Article 80(3) include decisions of sharia courts? The scope of Article 80(3) appears to be limited to final decisions of regular courts, be it federal and regional courts and does not seem to extend to shariat courts as the preceding sub-articles talk only of the regular courts. This is bolstered by Article 10 of the *Federal Courts Proclamation, Proclamation No. 25/96* that specifies the types of final decision of regular courts that qualify for review by cassation and the cassation powers of the Supreme Court under this Article makes explicit reference only to regular courts and does not cover final decisions delivered by shariat courts²⁶.

²⁵.The proclamation had not entered into force when the case was filed but entered into force when Khadija appeared for the first hearing of the suit. The sharia court said the proclamation would not apply to an already filed case but the HF said this is immaterial as what is important is securing the consent of parties as the constitution provides the requirement of express consent under Article 34 (5) and this can be done at the first hearing of the suit, irrespective of whether or not the Proclamation entered into force, which has been done by Khadija, and thus rejected the argument of sharia court.

²⁶.The final decision subject to cassation review by the Supreme Court cassation division include final decisions of the Federal High Court rendered in its appellate jurisdiction, final decisions of the regular

The review made by *Hose of Federation* is justified on the basis of the constitutional provisions mandating the House to make a final authoritative decision on all constitutional disputes and on the provisions in proclamations relating to power of the House. But as will be seen in the next section, the review made by the House is confined to procedural question and not in relation to substantive final decisions of sharia courts

In another case(*Abdurahman Ali et al Vs Hajji Kassim Mohammed and Zenit Ali*), Kassim Mohammed and Zenit Ali concluded marriage before a judge in the presence of two witness of their choice. Close relative of Zenit, her two brothers and an uncle, filed an objection to the marriage before the First Instance Sharia Court alleging that there was no consent of her parents and relatives to the marriage and argued that parents and relatives must, as per Islamic law, show their willingness to the marriage concluded by their girl and that they were never consulted as to whether or not they consent to the conclusion of the marriage. The couple knew that the parents and close relatives of Zenit would not consent to their marriage and ignored them and made their own arrangement to appear before a judge for conclusion of marriage, and that explains why they did not invite relatives and parents to attend the process before a judge. They did not express their consent to the Court but the Court decided to annul their marriage. The couples appealed to both the High and Supreme Sharia Courts, which upheld the decision of the lower court. It is clear that the decision of all the three levels of the sharia courts in this case is contrary to the clear provision of the sharia courts establishment proclamation and the relevant provision of the federal constitution on consent for sharia courts to see a case.

Another problem in relation to consent is that the shariat courts are lenient towards securing the express consent of parties. They do not usually ask parties in express terms as to whether or not the parties consent to their jurisdiction at the date of the first appearance of the parties before them. They seem to operate with the presumption that the parties have consented to their jurisdiction. The undisclosed reason for this is perhaps the judges have adopted a stance that once the parties are Muslims, it means that they have agreed to be governed by it and thus they will be committed to it by their prior consent. The problem is exacerbated by the behavior of the parties-parties do not usually express their explicit rejection of the jurisdiction of sharia courts for fear that they may face negative perception and reaction from fellow Muslim community and/or that they feel that such express objection is tantamount to offending one's own religion and deviating from religious beliefs or because they are put under social pressure not to demonstrate their clear objection to the assumption of jurisdiction by sharia courts.

6.2. Problems related to Procedures Governing Sharia Courts Proceedings

The proceedings before sharia courts are governed by the rules of civil proceedings used by ordinary civil courts and this creates anomaly between two different laws. The application of civil procedure of ordinary courts to proceedings before shariat courts may

division of the Supreme Court, and final decisions of the Regional Supreme courts rendered as a regular division or in its appellate jurisdiction. This makes it plain that it is only final decisions of regular courts that qualify for reviewed by cassation and not that of sharia court.

compromise the effective operation of the courts. The sharia/Islamic law in general has a simplified procedures in areas of production and administration of evidence, requirement on number of witness and their examination, hearing of parties, etc. The application of civil procedure compromise this simplicity, and could even be in conflict with the substantive Islamic law²⁷. It appears that is the lack of a ready-made Islamic rule of procedure that forced the law-maker to prescribe *Civil Procedure* for the proceedings of sharia courts. If a codified rule of procedures of sharia courts is managed to be put in place, the courts may use their own procedure and this requires the amendment of the existing sharia courts proclamation in future.

6.3. Lack of Consistency in Decisions

Sharia courts apply substantive sharia laws in limited cases as defined under Article 4 of the Sharia Courts Proclamation. Although the law they apply is not explicitly stated, one can easily derive this from the very article that defines their jurisdiction. Articles 4 and 6 of the Sharia Courts proclamation say they see the cases in accordance with Islamic law. There is, however, absence of guiding rules for settlement of disputes lodged to sharia courts on different matters within their reach and thus judgments to be pronounced depends ultimately on school of thought a judge succumbs to. In Sunni Islam, there are four schools of thought and three of them are found in Ethiopia, the predominant of which is claimed to be the Shaffie school²⁸. On different issues save the basic pillar of the faith and some limited issues regarding primary sources of Islamic law(the Quran and Sunna), there are different opinions among Islamic jurists. The judges may be from different school of thought and this may make decisions on same matters not consistent, especially on matters in relation to the secondary sources of Islamic Law(the scholastic consensus and analogy), which depend much on the opinion of judges. Accompanied by the absence of a codified and uniform Islamic substantive law to be applied by the sharia courts on matters falling within their mandate, the likelihood of decisions not to be consistent regarding essentially same matters is high. The absence of such rules means that there are no guiding rules for settlement of disputes lodged to sharia courts on different matters within their reach.

6.4. Secularism

The Federal constitution of Ethiopia professes a secular democracy that makes solemn commitment to fundamental rights. Secularism is one of the basic principles of the constitution and as such state and religion are separate and each is obliged not to interfere in the business of the other²⁹. However, sharia courts, although not part of the regular court structure, are set up, staffed and funded by the government. As raised elsewhere, one could challenge the legitimacy of these courts on the basis of secularism and rule of

²⁷.Ibrahim Idris, “Status of Federal Sharia Courts under the 1994 FDRE Constitution”, in Center for Contemporary Islam, *Islamic Law in Africa Project*, University of Cape town, Proceedings of Symposium, 2002

²⁸.Zaki Mustapha, *supra* note 5, op. cit., at 143

²⁹.See Article 11 of the FDRE Constitution

law as the government establishes and provides budget to them and makes different law for a certain categories of people based on their religion.

Invoking secularism to challenge the very establishment of sharia courts is, at its face value, a legitimate concern. However, the concern for secularism is watered-down by freedom of choice (i.e., parties may opt to get their matter settled by sharia courts by their own volition) and is also a necessary compromise made for the sake protecting a minority religion. To ensure and guarantee the respect of secularism, the federal constitution of Ethiopia made sure that a provision was put in it that safeguarded parties to disputes a choice of forum-that is to say not to be compelled to be subjected to the jurisdiction of the courts³⁰. Muslims have been living with Christians in a culture of tolerance and they have been resorting to the de facto existing sharia courts for a long time and the constitution gave them de jure recognition in consideration of this reality and the fact that they are a significant minority. Apart from this, the embracing of legal pluralism by the Constitution makes it necessary to compromise the notion of secularism.

7. Legal Pluralism, Shariat Courts and Human Rights Issues

Legal pluralism is capable of different connotations, depending on contexts in which it is employed. In one sense, it refers primarily to the incorporation or recognition of customary norms or institutions within state law or to the independent co-existence of indigenous norms and institutions alongside state law, whether or not officially recognized³¹. Legal pluralism makes it inevitable that there are multiplicity of legal orders that are diverse, uncoordinated, co-existing or overlapping bodies of law³². As such, it gives rise to diverse source of normative ordering, some of which include, official legal system, customary, religious, functional, community, and capitalist systems³³. The advantages of the existence of non-state laws made possible as a result of recognition of legal pluralism include the followings: they are said to be ‘closer’ geographically and culturally, more accessible and flexible, well-suited to address deep conflicts, relatively inexpensive, the overall burden of engaging with them is considerably less than in the case of state’s legal system, etc³⁴. Some of the demerits of legal pluralism are that they are not sensitive to human rights of individuals, non-conformity or even difference, which leads to those on the structural margins of the community experiencing discrimination, they give rise to competing claims of authority, impose conflicting demands of norms, etc³⁵. The diverse source of normative ordering made possible as a result of legal pluralism are poised to clash with each other and state laws, particularly when their underlining norms and processes are inconsistent, and such clashes are the

³⁰.Majamba, “Possibility and Rationale of establishing Khadi Courts in Tanzania Mainland”, Paper Presented at the Research and Education for Democracy in Tanzania Workshop, University of Dar Es Salaam, 2007, at 18

³¹.Brian Tamanaha, “Understanding Legal Pluralism: Past to Present, Local to Global”, *Sydney Law Review*, Volume 30, 2007, at 390

³².Ibid, 375

³³.Ibid, 397; see also International Council on Human Rights Policy, “An Approach Paper: *Research Project on Plural Legal Orders and Human Rights*, 2008, at 4

³⁴.International Council on Human Rights Policy, *op. cit.*, at 5

³⁵.Ibid, see also Tamanaha, *op. cit.*, 375

most dynamic aspect of legal pluralism³⁶. There are different schemes adopted by states to deal with such discords through, for instance, provisions like conflict rules, choice of law rules, etc³⁷. Some of the specific provisions to manage the conflicts among different normative ordering include the following:

- A. One common arrangement is for official state legal system to assume a position of neutrality with respect to the various communities and religions, allowing a degree of autonomy to each³⁸. The exemption of normative ordering from compliance with state law could fall here, such as the clause in Zambian and Zimbabwean constitutions, which exempt customary norms from compliance with the constitutional standard³⁹.
- B. Another mechanism is for state law to absorb competing systems and a common mechanism in this respect is to explicitly recognize customary, religious, economic, or community norms, or to explicitly recognize and lend some support(financial or coercive) to existing customary, religious, community or economic norms⁴⁰. There are different means to achieve this purpose. The state may, for instance, choose, like India, Pakistan or Niger, to recognize or even create institutions outside the formal state legal system to mediate and resolve disputes⁴¹. In other words, the state legal system recognizes the validity of private arbitration decisions, or even encourage parties to have recourse to such arbitration⁴². The other mechanism here is that the state may allow the application of different normative ordering but limits its scope. For instance, the official state law, such as in Israel, Malaysia, Indonesia, etc, may permit for the application of different laws, especially those affecting personal status(such as marriage, adoption, divorce, etc) to different people depending on their religious identity, or, for example allowing indigenous people to be subject to their own customary, such as in USA, Canada, etc⁴³.
- C. The other means is for state official system to recognize the special status of customary system but only in so far as they are not contrary to constitutional standards, such as in South Africa⁴⁴.
- D. Another option available is for state law to make aggressive effort to suppress the different normative ordering that are in conflict with state law-declaring them to be illegal and trying to eliminate them⁴⁵.

Now, let us see how the Ethiopian federal constitution tries to deal with legal pluralism and the relationships between different normative ordering and the concern for human rights issues. Before directly delving into the discussion, it is good to have a brief glance at the general constitutional framework related to the issues subject to discussion here.

³⁶.Tamanaha, *op. cit.*, at 400

³⁷.Ibid, at 400, and 403-407

³⁸.Ibid

³⁹.International Council on Human Rights Policy, *supra* note 33, *op. cit.*, at 6

⁴⁰ Tamanaha, *supra* note 31, *op. cit.*, at 404

⁴¹.International Council on Human Rights Policy, *supra* note 33, *op. cit.*, at 6

⁴².Tamanaha, *supra* note 31, *op. cit.*, at 404

⁴³.International Council on Human Rights Policy, *supra* note 33, *op. cit.*, at 6

⁴⁴.Ibid

⁴⁵.Tamanaha, *supra* note 31, *op. cit.*, at 404

Cultural diversity is a trait that has a deep root in Ethiopia as manifested by the existence of different ethnic, linguistic and religious groups (There are about 82 ethnic groups speaking about 80 different languages). The main three religions (Christianity, Islam, and Judaism (although the followers of Judaism has been dwindling following the emigration Ethiopian Jews to Israel) along with various traditional beliefs are embraced and practiced in the country. Ethno-linguistic and religious diversity resulted in the presence of various customary norms and religious laws. In a stark contrast to the past constitutions, the incumbent federal constitution of 1995 took a bold step and accorded, in explicit terms, recognition to customary and religious laws in settling disputes related to personal matters, giving rise to legal pluralism, regardless of the pros and cons that may be raised against such system. On the other side of the spectrum, the constitution gave due emphasis to human rights, with almost 1/3 of the 106 provisions of the constitution devoted to human rights. Apart from this, the constitution provides that human rights instruments ratified by the country are integral part of the law of the country, that it is the supreme law of the land and as such laws, decisions and customary practices, etc that are against it shall be of no effect, and that its provisions on human rights shall be interpreted in conformity with international human rights instruments adopted by the country⁴⁶. One of the challenges of legal pluralism is the uniform application of human rights in the country, which is envisaged under the constitution. It is clear that there is a tension between legal pluralism (which is in favor of particularity in application) on the one hand and the human rights instruments adopted by the country and enshrined under the constitution on the other (which are universal in nature and require uniform application). Different normative ordering recognized under the Constitution could constrain the uniform application of human rights enshrined under the constitution as their underpinning norms and processes are obviously bound to differ in many instances. One typical example that can be cited here is the constitutional guarantee of gender equality on the one hand and the treatment of women in the customary and religious laws and systems.

For our purpose here, on matters falling within the competence of sharia courts, the courts apply substantive sharia law, which has a different perception and approach to issues of gender equality. There are different ways of treating women in Islamic law that are to be applied by the courts in such areas like divorce, partition of property, inheritance, etc. How can one reconcile the different treatment of women with issues such as the gender equality and non-discrimination under the Constitution? Which mechanism is used by the Ethiopian constitution when the decisions rendered by sharia courts are alleged to be against the provisions of the Constitution or its human rights norms? Should decisions of the sharia courts be in compliance with the Constitutional standard? In other words, does the supremacy clause under Article 9 of the FDRE constitution apply to decisions of sharia courts that are alleged to contravene the

⁴⁶ .Article 9(1) of the FDRE Constitution provides “The Constitution is the supreme law of the land. Any law, customary practice or a decision of an organ of state or a public official which contravenes this Constitution shall be of no effect”. Article 13(2) says “The fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and International instruments adopted by Ethiopia.

Constitutional standard set by Article 9? Do the human rights provisions that are accorded due emphasis under the constitution override judgments of sharia courts that are found to be against the human rights norms enshrined under the constitution? Can the House of Federation as an authoritative interpreter of the Constitution review final substantive decisions of sharia courts and declare them to be unconstitutional?

The constitution has not used an explicit rule unlike in some countries to deal with the potential conflicts between state laws and the various normative ordering given recognition under it. On the one hand the Constitution contains a supremacy clause that provides that any law, decision and customary practices that go contrary to the spirit of the constitution shall be of no effect and this in a way means that decisions of, for instance, shariat courts that are alleged to be in transgression of the constitutional provisions are of no effect. On the other hand the constitution has an express provision that provides constitutional recognition and status to settlement of disputes related to personal matters by customary and religious ways when parties refer a matter to such institution though their own consent (See Article 34/35 and Article 78 of the constitution). This impliedly means that the constitution acknowledges the difference in the norms and processes between state law on the one hand and customary and religious laws on the other but tolerates their final decision in matters affecting personal status of individuals when they voluntarily submit their cases to such institutions. This argument is reinforced by the arrangement under the sharia court establishment proclamation. The Proclamation on sharia courts enacted by virtue of the recognition stated under the constitution provides that once a case is submitted to sharia courts after meeting all procedural requirements, there is no way to take the matter to the regular courts of courts and vice versa as indicated under Article 5(4) of the Sharia Courts proclamation. It appears that the supremacy clause under Article 9(1) of the constitution does not apply to decisions of sharia courts even if the substantive decisions made by sharia courts are discriminatory in nature or in conflict with human right issues under the constitution and such decision are treated as exceptions to Article 9(1)⁴⁷. Even if the constitution fails to explicitly state so, unlike the case in Zambia and Zimbabwe, it appears that the constitution exempts personal matters settled by religious and customary institutions from compliance with the standard under Article 9(1). This is because reviewing such decisions and declaring them unconstitutional means that the sharia courts have no role in having full control over personal and family matters that are virtually important to Muslims and the manifestation of their identity. It also implies imposing of uniform laws on Muslims regarding even matters intrinsically associated with them, which means ignoring a special function of sharia courts, which is to serve the interest of Muslims in some areas. Furthermore, it also goes against the very essence of legal pluralism advocated by the Constitution, which entitles religious and customary norms to deal with cases of parties on matters affecting their personal status. Thus final decisions made by sharia courts on matters within their remit may be treated an exception to constitutional standard set under Article 9(1). This arrangement raises question about Ethiopia's commitment under various human rights

⁴⁷.The House of Federation may review the decision off sharia courts on procedural grounds such as failure to comply with express consent or that the courts exceed mandate granted to them but it is not entitled to deal with substantive matters falling within the jurisdiction of the courts so long as the parties consent to the case being seen by the courts and the matter is within the scope of the courts.

instruments ratified by the country that contain provisions prohibiting discrimination against women. This is because personal status laws, which fall in Ethiopia within the jurisdiction of sharia courts, are often considered the area of law in which discrimination on the ground of gender is solidly entrenched⁴⁸. The constitutional provisions that give recognition to customary and religious institution to settle personal disputes subject to consent of parties may not be in conformity with the provisions of these instruments regarding equality and the equal application of human rights to all human beings regardless of their religion, status, etc and the protection against discrimination on any ground. This in turn triggers issues related to the status of international human rights under the Federal constitution, which is not the subject of this paper. What appears to be impliedly evident from the constitution is that particularity of application of some human rights issues are given preference over universal application of laws and this is done for the sake of religious and customary rules governing personal status when parties choose such rules for settlement of their disputes.

Concluding Remarks

The jurisdiction granted to sharia courts raises questions and concerns about human rights provisions enshrined under the Federal Constitution-gender equality, protection against discrimination, etc. However, the Constitution has not provided a specific mechanism as to how to decisions of sharia courts that are in conflict with constitutional standards can be dealt with. In other words, the Constitution fails to clearly state whether or not its supremacy clause and provisions on human rights sway over conflicting final decisions of sharia courts. It appears that the Constitution has made final decisions delivered by sharia courts an exception to its supremacy clause and human rights norms, i.e., concerning some matters affecting personal status that can be settled by customary and religious courts, the constitution appears to adopt a stance of tolerance and thus they are not supposed to be compatible with the constitutional standard although they may be conflict with such standard. This is made in favor of the pluralism encouraged by the constitution itself. This brings into picture question about Ethiopia's commitment under the various human rights treaties it has ratified that guarantee equality and protection against discrimination based on any ground gender. However, one could at the end say that to the extent of personal matters, the notion of 'cultural relativism' prevails over universality of human rights so far as decisions of sharia courts are concerned.

⁴⁸ .Jasmine Mousa, *The Reform of Sharia-derived Divorce Legislation in Egypt: International Standards and the culture Debate*, 2005, at 1