

7. Federal Sharia Courts in Addis Ababa

Their administration and the application of law in the light of recent developments

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Introduction

Sharia-based law in Ethiopia gained greater political and legal prominence with the political liberalization that followed the regime change in 1991. However, almost two decades after they were formally constituted, Sharia courts have received limited academic attention and only a small number of research works focus on their jurisprudence and day-to-day operation. This chapter examines the nature of Sharia case law, litigants and the procedures for settling cases. Besides providing an analysis of the statistics of Sharia courts and a description of court proceedings, most importantly, it will look at two recent developments affecting the Muslim community: growing human rights and women's rights consciousness; and increasing Muslim demands for self-autonomy over religious matters, and their influence, if any, on Sharia court rulings. The research shows that, despite the fact that Sharia law prescribes a patriarchal tendency in marital ties and sanctions a sex-based differential treatment of divorce and post-divorce matters, young, educated and economically independent women form the overwhelming majority in suits brought before Sharia courts in Addis Ababa. It also shows that Sharia courts tend to apply civil procedure rules rather leniently but that their proceedings appear consistent. *Shafie* Islamic jurisprudence, which is said to be relatively less conservative over family and divorce matters than other schools of thought, guides their judgments. However, attempts by the Sharia courts to expand their jurisdiction to matters beyond those delineated by legislation has been kept in check by the state's judicial and quasi-judicial organs.

Islamic law in Ethiopia

Ethiopia's current legal system reflects the legacies of foreign laws (civil law and common law traditions), Christianity, authoritarian political heritages and the

Muslims' struggle for recognition. Long relegated to the status of second-class citizens, Muslims have struggled to gain recognition in public spheres but over time they have managed to win small concessions from successive regimes, including the first official recognition of Sharia courts in the 1940s.

A federal republic since the 1990s, Ethiopia is a multi-ethnic nation with a sizeable Muslim population and a constitution that established a parliamentary system and that guarantees fundamental rights and freedoms, including freedom of religion and the equality of all religious groups. While the current constitution emphasizes secularism, it includes customary and religious laws in the constitutional order. The recognition given to religious and customary dispute settlement mechanisms seems deliberately designed to accommodate religious autonomy and to promote diversity. This recognition does not, however, repudiate the secular nature of the nation and its constitutional dispensation.

While Sharia-based law gained *de jure* recognition in the early 1940s, it has experienced greater momentum since the regime change of the early 1990s and the adoption of multiculturalism and political liberalization. A distinct law setting up a separate Islamic judicial sector, based on constitutional provisions, was enacted in 1999 (Proclamation No. 188/1999) at the federal level and successively in all regions except Gambella.¹ The law implies that Islam is seen as an important source of legal, social and cultural values. Having been put in legal limbo by the 1960 Civil Code, which essentially repealed the 1944 proclamation on Sharia courts, Muslim personal and family law and the Islamic courts have been elevated by this new legal development, which symbolically gives Islamic law its due place in Ethiopian law.² The symbolism of official Islamic courts being implicitly anchored in the constitution and applying an Islamic law has proved appealing to the Muslim community.³

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- 1 Article 34(5) of the Federal Constitution of Ethiopia (FDRE 1995): 'This Constitution shall not preclude the adjudication of disputes relating to personal and family laws in accordance with religious or customary laws, with the consent of the parties to the dispute. Particulars shall be determined by law.' Article 78(5): 'Pursuant to sub-Article 5 of Article 34 the House of Peoples' Representatives and State Councils can establish or give official recognition to religious and customary courts. Religious and customary courts that had state recognition and functioned prior to the adoption of the Constitution shall be organized on the basis of recognition accorded to them by this Constitution.'
 - 2 Article 3347 of the 1960 Civil Code reads: '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.' This provision is said to have repealed the 1944 proclamation setting up Sharia courts (see also Mustapha 1973:140, James and Clapham 1971:849).
 - 3 In November 1994, before the current constitution was adopted, the Muslim community in Addis Ababa took to the streets demanding, among other things, the inclusion of Sharia law as one of the bases of the new constitution (Østebø 2007:3). The reference made in the FDRE constitution to religious dispute resolution and the subsequent promulgation of legislation

Non-state normative sources (customary and/or religious) are still influential in Ethiopia in settling disputes. They form a strong alternative to state institutions and may even be the first resort for justice for many people in rural areas. This chapter focuses on the Federal Sharia Courts in Addis Ababa and their function as dispensers of justice.⁴ Studying the practices of the Federal Sharia Courts in applying Sharia law in Addis Ababa is significant for demographic, political, economic, and legal reasons. The Federal Sharia Courts in Addis Ababa were the first Sharia courts to be set up following the regime change in 1991. They serve the largest Muslim community in an urban setting in Ethiopia: Muslims account for more than 16 per cent of the total population of Addis Ababa. Many wealthy, prominent Muslim community figures and religious scholars, as well as relatively better-educated members of the Muslim community, live in the city. As Addis Ababa is the economic and political powerhouse of Ethiopia, studying the functioning of the Federal Sharia Courts casts light on their standing with the Muslim community in Ethiopia in general as well as on their relationship with the state. Moreover, studying their practices, uncovers the functioning of 'law in practice/action' rather than 'law in text', revealing the courts' inner workings and understanding of the jurisdiction granted to them.

Accordingly, this chapter examines the nature of cases, litigants and procedures for settling cases. The research is not merely an analysis of statistics on Sharia courts or a description of the courts' proceedings. It also looks at recent developments affecting the Muslim community, such as the push for an independent body to administrate religious affairs – manifested, among other events, in recent tensions relating to the *majlis* election – and the growing consciousness of human and women's rights and their influence, if any, on the proceedings and final rulings of the courts.⁵

establishing Sharia courts to some extent addressed Muslim concerns in that regard. In the past, Sharia courts were set up by secondary legislation and Muslims used to call for their establishment on the basis of primary legislation.

- 4 Sharia courts at the federal level are located in Addis Ababa and Dire Dawa city. Apart from housing the Federal Sharia Courts, Addis Ababa is also the seat of the Supreme Sharia Courts of Oromia National Regional State, since the city serves as the capital of the region as well.
- 5 Tensions have been simmering between Muslims and the government since December 2011. These tensions flared up following the closure of *awoliya* and a campaign launched by the Ethiopian Supreme Islamic Affairs Council (commonly known as *majlis*) to instil *Al-Ahbash* beliefs and undertaken with the alleged direct and/or indirect support of the government authorities. This resulted in a call for a free and fair election to an independent *majlis*. There are generally two opposing narratives on the problem. A considerable number of Muslims believe that they are contesting their constitutional rights, enabled by secularism and exercising their right to administer their own religious affairs. However, the government contends that extremism has been taking root in the country, forcing it to take legitimate measures to tackle it, and that it has not interfered in the freedom of religion in general and in the in-

Qualitative in nature, this study employed key informant interviews with the personnel of the Federal Sharia Courts (judges and Registrar) in Addis Ababa; interviews with randomly selected women who appeared before the courts on the dates set for interviews; literature review; review of the archive of Sharia courts; and analysis of relevant laws. Personal observation was also used to reflect on some of the issues that demanded explanation. To conduct meaningful interviews, a semi-structured list of key questions was prepared beforehand.

Historical perspective on Sharia courts in Ethiopia

Sharia as a normative system, along with customary norms and foreign laws, has impacted the Muslim community and influenced the development of state laws in Ethiopia. The unique legal position of Sharia courts is rooted in the Muslim community's on-going quest for self-governance in the personal matters intrinsically governed by Islamic law. To understand the existing jurisdiction of the Sharia courts and their relationship with state laws, it is important to understand their history.

The relationship between state laws and Sharia courts presents a challenge for states with a sizeable Muslim community. The political recognition of Sharia courts, the scope of their power and their relationship with state laws are intertwined with government attitudes and policy towards the Muslim community, which have often hinged on regime changes. The scope of Sharia-based law in Ethiopia has not, however, oscillated with regime changes as it has, for example, in Nigeria and Indonesia, where the power of Sharia courts has changed with shifting popular and government attitudes over the years ('Kola-Makinde 2007:186–190; Ostien and Dekker 2010:571–577; see also Huis 2015:8,45). That is to say, in Ethiopia the political discourse on the Sharia courts has followed a consistent trajectory in the sense that the subject-matter of Sharia courts' jurisdiction has remained the

ternal affairs of the religious community in particular. In some instances, the tensions led to violent protests that claimed lives and destroyed property. The prominent Muslim community figures, who spearheaded attempts to defuse the tensions were rounded up, charged and finally convicted of attempting to commit terrorist acts and forming an illegal committee to incite conflicts. They were eventually pardoned. The tension that flared up and the unprecedented perseverance of Muslim forces to have an independent *majlis* seems to have caught government officials by surprise and revealed the extent of the government's desire to keep religious institutions under its watch. On the other hand, there is a growing consciousness of human rights in general and women's rights in particular, ascribed to civic education and campaigns by government and NGOs. Although discriminatory attitudes and practices are still widespread in many rural parts, in urban areas women are becoming better educated and are thought to be in a better position to assert their rights and to demand equality in many spheres.

same and has not been significantly affected by regime changes in the years since their formal inception in 1942 (Mohammed 2011:86, 2012:273).

The Sharia courts gained official recognition and unprecedented support during Italy's brief occupation of Ethiopia (1936–1941) and flourished throughout the country during that period. They constituted part of a grand colonial scheme designed to attract the support of the marginalized Muslim community and thereby to enervate the Christian-dominated government (Markakis 1990:74, Trimmingham 1965:77, Mohammed 1999:8).

Fearing a reversal of policy after the end of the occupation, the Muslim community pleaded with Emperor Haile Selassie to officially sanction the operation of the Sharia courts as before. The Emperor heeded their plea and introduced a law, enacted in 1942, which provided the basis for the creation and procedures of the first official Islamic courts.⁶ These courts administered Sharia law in personal status cases and in litigation regarding pious foundations (*awqaf*). Their independent functioning was however compromised by the state's hand in appointing their judges (*qadis*). *Qadis* serving in Islamic courts during the imperial period were appointed according to their allegiance to the government.⁷

Haile Selassie's fall from power in 1974 marked the demise of the privileged political position enjoyed by the Orthodox Church and Christian elites under his government and ushered in a new era for the Muslim community. The subsequent Derg regime made a pivotal move in relation to religious matters and in the political recognition of the Muslim community, rescinding the Orthodox Church's status as official state religion, declaring that all religions are equal and adding three Muslim holidays to the list of official holidays to be honoured. Also, an institution administering Muslim affairs (popularly known as *majlis*) – the first of its kind in the nation's history – was created in 1976, although it remained tightly supervised by the state authorities. Sharia courts were permitted to operate as before. Cognizant of the Ethiopian Muslims' long marginalization and in the wake of an unprecedented Muslim protest demanding recognition that occurred on 20 April 1974, the Derg sought legitimacy through reaching out to the Muslim community.⁸ There was however no significant legal or institutional mechanism designed to advance Islamic normative principles introduced by the Derg. In other words, the Derg undertook no new legislative measures regarding Islamic personal law

6 The Proclamation to Establish Kadis' Courts, Proclamation No. 12/1942, *Negarit Gazeta*, No. 2/1942.

7 Miran 2005:211.

8 On 20 April 1974, Muslims in Addis Ababa took to the streets calling for changes to the status of Muslims and publicly demanding that the Imperial regime implement a series of actions, one of which was the establishment of Sharia courts by proclamation, as their legal status had been placed in limbo by the 1960 Civil Code (see Ahmedin 2015:272–273).

or Islamic courts because the regime retained its predecessor's policy as far as the status of Sharia courts was concerned.

The Derg's downfall in 1991 marked the revival of religious activism in Ethiopia. A combination of national and foreign factors, one of which is political liberalization, has enabled the resurgence of religion. In 1991, the country embarked on a new path, shifting away from earlier restrictive laws and policies and introducing a new legal and political discourse that underscored a democratic system and fundamental rights in general and religious equality and freedoms in particular. The rapid expansion of religious institutions (for example, mosques and seminaries) and the increasingly visible character of Muslims – manifested in dress codes and increasing representation in public sectors – are often offered as proof of religious resurgence following the regime change. Over the last two decades, Muslims in Ethiopia have thus attained, among other things, a symbolic language of identity and normative distinction that is implicit in, among other things, their assertiveness over religious self-administration and issues relating to the Sharia courts.⁹ With regard to the Sharia courts, personal status law became a bone of contention and Muslim figures passionately debated the draft law that preceded the adoption in 1999 of the Sharia courts' establishment legislation.¹⁰ So far, a law relating to personal and family matters is the only domain of legislation where Islamic legal norms are recognized for application by Sharia courts.

While the FDRE constitution emphasizes the secular character of the state as well as the equality of adherents of different religions before the law, it makes no reference to Islam or Sharia courts. However, Articles 34(5) and 78(5) of the Constitution set conditions for state-recognized and state-funded religious courts¹¹ that suggest that the provisions were designed specifically for Muslim courts. The

9 Aside from personal status law, another contentious issue between the Muslim community and state authorities is related to the administration of the Muslim community's internal affairs: that is, the establishment and running of the *majlis* and its powers. On efforts to free the *majlis* from alleged government control, see Jemal 2012:72–100. To counter the growing clout of Muslims, the government adopted a policy on management of religious issues fight against counter what it designated 'growing fundamentalism and extremism' taking root in the nation (see Ministry of Federal and Pastoralist Development Affairs 2015).

10 A committee set up by the *majlis* to study the status of Sharia courts and to come up with suggestions to strengthen them was chaired by a Muslim scholar. Other Muslim scholars took an active part in the debate to shape the draft law establishing Sharia courts. A conference on strengthening and consolidating Sharia courts was organized by the House of Peoples' Representatives and the Ethiopian Supreme Islamic Affairs Council (*majlis*) and took place from 12–14 September 1999. Five papers were presented for discussion by scholars, all of them were prominent Muslim figures. Also, most participants were knowledgeable Muslims, including *qadis*, lawyers, academics, elders, and well-known personalities (see Ethiopian Supreme Islamic Affairs Council 1999:35; see also Jemal 2012:39, note 13).

11 See note 1 on Articles 34(5) and 78(5) of the Federal Constitution of Ethiopia.

provisions offer legitimacy to courts that were in operation well before the current constitution and that had been recognised by the state in the past. The Sharia courts fulfilled these criteria and were thus reorganized and officially instituted by virtue of Articles 34(5) and 78 of the Constitution. By contrast, the Christian courts had been abolished in the 1960s and were therefore not in operation before the FDRE constitution. Thus, it seems that the government may not set up state-funded Christian courts within the meaning of the two provisions.

Contending principles relevant to the status of Sharia courts

The recognition accorded to Sharia courts involves the balancing of tricky legal and political issues, such as secularism, the equality of religious groups, civic citizenship, the accommodation of diversity and the relationship between state and religious courts. An understanding of the basic contending principles relating to the functioning of Sharia courts and their status in Ethiopia's legal system is important in casting light on the institutional structure of the courts and their standing as justice providers. This section does not, however, purport to offer an exhaustive list of these principles, but focuses rather on the crucial ones.

Sharia as a normative system incorporates rules that contradict state laws, especially around the notions of equality and non-discrimination on the basis of gender and religion. The recognition given to Sharia courts involves conflicts, real and perceived, with the government's mandate to ensure fundamental rights. The government's decision to grant the Sharia courts a specific mandate may be viewed as a political overture, and it is not subject to judicial review. This means that the government has come to terms with the fact that Sharia laws contradict certain state laws so that it can accommodate religious diversity and address the Muslim community's continuing quest to govern the personal matters that are intrinsically tied to their religious values. Weighted against this position is the perception of state endorsement or sanctioning of a particular religion at the expense of the equality of other religious groups.

Although one might marshal many legal justifications against the recognition of the Sharia courts, the very existence of such courts does not negate secularism nor amount to the adoption of a state religion within the meaning of Article 11 of the FDRE Constitution.¹² Article 11 does not in and of itself preclude a degree of accommodation of religious norms for dispute settlement, as long as individuals are guaranteed the freedom to choose a forum. Generally, as the courts function on

12 Article 11 of the Federal Constitution of Ethiopia reads: 'Separation of State and Religion: 1. The Ethiopian State is a secular state. 2. There shall be no state religion. 3. The State shall not interfere in religious affairs; neither shall religion interfere in the affairs of the State.'

a voluntary basis and are not intended to replace the ordinary courts of the country, their establishment does not affect the secular nature of the state.

The Sharia courts are composed of a three-tiered structure at both federal and regional levels, and administer Islamic law on matters falling within their jurisdiction. They function separately and independently of Ethiopia's ordinary courts, but function as 'state' courts in that they are subject to statutory law, accountable to the state judiciary and subject to review by the Supreme courts at both federal and state levels. While they are independent entities and apparently operate in parallel with the state courts of law, they lack inherent self-governing powers and rely, in terms of human and financial resources, on the ordinary courts of the land.¹³ Unlike ordinary courts, the Sharia courts report to the Federal Supreme Court on their performance and utilization of budget and not to the parliament.

Regarding jurisdictional issues, Sharia courts have a defined mandate, which is specifically stated under Article 4 of the enabling legislation. This provides that the courts have common jurisdiction on any question regarding marriage, divorce, maintenance, guardianship of minors and family relations, provided that the marriage to which the question relates was concluded in accordance with Islamic law or the parties involved consent to be adjudicated in accordance with Islamic law. The Sharia courts can adjudicate over questions regarding *wakf*,¹⁴ *hiba* and gift succession of wills provided the endower or donor is a Muslim or the deceased was a Muslim at the time of his death. If they exceed their jurisdiction, their decisions may be subject to review by state courts once they have passed through the Sharia court system and a final decision has been made by the Supreme Sharia Court.¹⁵

13 For the appointment of Sharia judges and hiring of other staff as well as funding, Sharia courts depend on the Federal Supreme Court. See Article 20 of Proclamation setting up Federal Sharia Courts, No. 188/1999.

14 *Wakf* is equivalent in meaning to mortmain property. It is an inalienable charitable endowment under Islamic law, involving, for instance, the donation of a property or a plot of land or other assets for Muslim religious or charitable purposes with no intention of reclaiming the asset.

15 Article 80(3) of the Federal constitution of Ethiopia: 'Federal Supreme Court has a power of cassation over any final court decision containing a basic error of law.' Accordingly, the final decision of the Sharia courts might be subject to review if they exceed their jurisdiction. Final decisions rendered by Sharia courts may be reviewed by the Federal Supreme Court only on procedural grounds, such as when they exceed their jurisdiction or when they decide cases without securing the consent of the defendants at the outset (see Mohammed 2011:19, note 8).

Federal Sharia Courts in Addis Ababa

Physical setting and overview of caseload

In 2015 the Federal Sharia Courts in Addis Ababa moved into their current building. Before that, they were housed in cramped and dilapidated buildings that created an environment un conducive to the work of the judges and other court personnel and was unpleasant for anyone who visited. The condition of these buildings was a cause for concern among Muslims, some of whom accused the government of deliberately housing the Sharia courts in a rundown building in order to tarnish the image of the courts and thereby diminish the Muslims' appetite for making use of them (Ahmedin 2015:230–231, note 12).

Today, the courts occupy a four-storey building, much larger than the previous rundown buildings. The new building is spacious and conducive for the successful conducting of proceedings. It has more amenities than the previous buildings and has waiting areas for clients, a separate room for each judge, a wide room for the Registrar, a room for old files and documents, and separate one for active ones. It is physically pleasant and the *qadis*, Registrar and clients have all openly expressed their happiness with the current building and its facilities, comparing it favourably with past conditions. All three levels of the Federal Sharia Courts are housed in the same building. The Federal First Instance Sharia Court has two benches, the High Court has one bench and the Supreme Court has three benches. There are ten *qadis* in Addis Ababa, including the chief *qadi*. The total annual budget for the July 2017–July 2018 fiscal year is about 13 million Birr.

For the last couple of years, the Sharia courts in Addis Ababa have handled more or less a similar volume of cases (Mohammed 2012:283): on average, a minimum of 7000 cases and a maximum of 8000 cases have been filed every year. Most cases relate to matrimonial issues, including *nikah* (the engagement that happens before the marriage ceremony) and permission to marry, marriage registration, divorce, custody of children and inheritance. Divorce makes up the lion's share of Sharia courts' caseload, while the number of cases relating to *wakf* is limited.

Practice in the application of subject-matter jurisdiction and substantive law

The jurisdiction of the Federal Sharia Courts is confined to personal and family matters. On matters involving marriage, divorce and the maintenance and guardianships of minors, Sharia courts are competent to hear suits when a marriage was concluded in accordance with Sharia law or when all the parties involved consent to having their suit adjudicated in accordance with Islamic law.¹⁶ This rule

16 See Article 4(1) of Proclamation No. 188/99.

is highly significant as it not only limits the Sharia courts' scope of competence but also defines the nature of the parties over which they can preside. While it does not expressly demand that all parties be Muslim, it emphasizes the form of conclusion of marriage or consent of the parties at the time of the suit, rather than their religious background per se. The authority of the Sharia courts may thus be extended to non-Muslims, if they voluntarily subject themselves to Islamic law. This is in direct contrast to the 1942 proclamation setting up same courts, which stipulated that either all the parties should be Muslims or the marriage to which the question related had to have been concluded according to Islamic law.¹⁷

However, in practice, Federal Sharia Courts in Addis Ababa operate with the assumption that parties to family suits are Muslims or that the marriage was concluded as per Islamic form. The *qadis* take for granted that the parties are Muslims and feel they are not obliged to inquire into the reasons why some defendants refuse to have their cases heard by Sharia courts. Yet, the *qadis* are of the opinion that defendants' objections to their jurisdiction have little to do with religious background.

In other personal matters, Sharia law makes the religious background of a party a pre-condition, along with consent, for a hearing in the Sharia courts. As mentioned, in *wakf* (inalienable charitable endowment), *hiba* (gift), and succession of wills cases, the endower or donor has to be, or have been at the time of death, a Muslim for Sharia courts to hear the suit. According to a *qadi* from the First Instance Sharia Court in Addis Ababa, the question of who is/was a Muslim has not so far arisen in the Sharia courts.¹⁸ Unless challenged and the contrary is proved, the court assumes that the endower or donor is/was a Muslim.

After securing the express consent of both of parties, Federal Sharia Courts apply normative Islamic law to decide the matter in hand. While there are primary and secondary sources of Islamic law, there is no express rule on the particular school of thought¹⁹ that should be used for administering Sharia law in

17 See Article 2 of Proclamation to Establish Khadis' Courts, Proclamation No. 12/1942, Negarit Gazeta No. 2/1942.

18 Interview with Sheik Ali Mohammed, qadi of Federal First Instance Sharia Court in Addis Ababa, 25 November 2017, Addis Ababa.

19 The four schools of thought are: Shafie, Maliki, Hanbali, and Hanafi. The school chosen matters when it comes to personal and marriage matters. Of the four schools, the Hanbali school of jurisprudence is often considered the most restrictive when it comes to personal status issues. The Hanbali doctrine 'advocates a particularly patriarchal family structure. Among other things, it provides women with less justification for leaving a marriage. Accordingly, a wife can obtain a judicial divorce only on very limited grounds, namely the husband's incapacity to consummate the marriage, his apostasy, or in cases of a 'fraudulent marriage contracted prior to puberty'. The Shafie doctrine is said to be less conservative in comparison with other doctrines on personal and family matters (see Moussa 2005:11–13).

Ethiopia, unlike in Sudan²⁰, for instance. Nor is there a compilation of Islamic law that should be used as the main legal source for judgments. The absence of specific doctrine allows, in principle, parties to make use of the diverging opinions of the available schools of thought for litigation purposes. The heterogeneous nature of the Islamic community in Ethiopia in general and Addis Ababa in particular may be the rationale behind this non-specification of a particular school of thought. Consequently, Muslims make use of different schools of thought, often depending on their geographical location. In the northern part of Ethiopia (Wollo and Tigray areas), the Hanafi School is prevalent; in areas bordering Sudan and Eritrea, Malki is the dominant school; while Shafie is found across Ethiopia and is the influential doctrine in many well-known Islamic seminaries in the country (Abdella 2017:159). The *qadis* of the Federal Sharia Court in Addis Ababa tend to subscribe to the Shafie school of thought but occasionally resort to another doctrine if a particular issue justifies it, for instance, if another doctrine prescribes a lesser punishment than Shafie doctrine.²¹

The lack of a formally adopted Islamic doctrine to guide proceedings, in principle, paves the way for a reliance on the judges' discretion and puts the consistency of judgments at risk, which impacts upon predictability of judgments and legal certainty. However, if discretion-based interpretations are consistently applied over particular matters, they develop into case law and this mitigates the potential for unpredictability and uncertainty in judgments. Fortunately, the existing practice, which is tilted in favour of one doctrine, seems to have moderated the use of discretion and favours a degree of uniformity in judgments.

Cognizant of the interpretation problems that might arise from the Islamic law not being administered according to one particular school, a rule in the establishment proclamation gives the Chief *qadi* of the Federal Supreme Court of Sharia the power to form a temporary division, composed of at least five *qadis*, to look into cases involving fundamental differences between divisions of the Federal Supreme Court of Sharia with regard to interpretation of Islamic law. This measure helps to mitigate the use of discretion by the *qadis* and rein in divergent interpretations, thereby helping to maintain a uniform case law.

The personal and family matters that fall within the Sharia courts' ambit are open to interpretation and have implications for the scope of the courts' authority. Through adjudication, the Sharia courts provide interpretations of such open

20 The law governing the Sudanese Islamic courts, stipulates that the decisions of the courts should be in accordance with the authoritative doctrines of the Hanafiya Jurists unless directed otherwise by the grand *qadi* through a judicial circular or memorandum. In which case, the decisions should be in accordance with the doctrines of the Hanafiya or other Mohammedan Jurists as are set forth in the circular or memorandum (see Akolawi 1973:155).

21 Interview with Sheikh Ali Ahmed, Judge of Federal Sharia First Instance Court, 27 November 2017, Addis Ababa.

rules and when those interpretations are applied consistently in the court system, they become case law. In the following, an attempt is made to see how Federal Sharia Courts deal in practice with matters falling within their jurisdiction. Doing so sheds light on how Sharia courts go about defining the scope of their competence in adjudicating Islamic personal matters.

Article 4 of the Sharia courts' establishment legislation provides the list of matters Federal Sharia Courts are competent to deal with.²² However, the provision is not clear on whether the list is exhaustive or merely indicative of major matrimonial and personal matters envisaged as subject to the jurisdiction of Sharia courts. The issue is: Do Sharia courts have full jurisdiction over all matrimonial and personal matters, for instance, over matrimonial and inheritance property, which are not explicitly specified under their subject-matter jurisdiction? To be more specific, do they have a mandate to hear cases involving the consensual division of marital property, and are they authorized to deal with the division of inheritances aside from determining who the inheritors are?

In practice, Federal Sharia Courts, while acknowledging the limits to their power, tend to assume jurisdiction over matrimonial property and division of inheritances if parties raise such issues in a particular suit. As long as the parties consent, the courts seem to believe they can legitimately take on these matters, even though they are not specifically outlined under their subject-matter jurisdiction as defined by the enabling legislation. However, some of their decisions in such cases have been challenged by parties who have lodged petitions before the cassation division of the Federal Supreme Court, alleging that the Sharia courts committed fundamental errors of law in expanding their jurisdiction. The Federal Supreme Court then rendered the decisions of Sharia Courts made while expanding their subject-matter jurisdiction to cover, for instance, ownership of property and division of inheritance, invalid on the grounds that they exceeded their jurisdiction.²³ The decisions of the Supreme Court set a precedent and are binding on any court. They demarcate the extent of Sharia courts' subject-matter jurisdiction and confine the provisions of the establishment law, purportedly creating room for widening the scope of the Sharia courts' competence in practice.

In general, based on the aforementioned case law of the Federal Supreme Court, Sharia courts are not entitled to expand the meaning of family and personal matters beyond that specified under Article 4 of the establishment legislation.

22 See Article 4 of the establishment proclamation mentioned earlier.

23 A case between Shamsi Yenus and Nuriya Mami over possession of a plot of land was heard first by the Federal Sharia Court in Dire Dawa city. It finally reached the Federal Supreme Court after the Federal Sharia Supreme Court had given a final ruling. The Federal Supreme Court held that Sharia courts could not expand their jurisdiction and hear cases not specifically indicated in their enabling legislation and they could not hear cases over possession of a plot of land. See Federal Supreme Court, Cassation File No. 36677, 2009.

The case law indicates that Article 4 is couched in exhaustive terms to preclude the expansion of subject-matter jurisdiction under the guise of interpretation and/or consent of parties, implying a strict limit to the scope of the Sharia courts' jurisdiction. This is in line with the intent of the Constitution's framers, who envisaged Sharia justice with competence limited to the matters specifically laid down in their legislation.²⁴

Another interesting issue is whether regional states establishing Sharia courts can expand their reach to cover matters not specifically listed in the proclamation establishing Federal Sharia Courts. For instance, the legislation instituting Oromia regional state's Sharia courts envisaged competence to hear suits on matrimonial property.²⁵ To avoid expanding the discussion on this matter is important because, in addition to being a potential area of conflict between federal and state laws, it involves issues around the competence of the regions over personal matters in the federal setting.²⁶

24 The minutes of constitutional assembly on Articles 34(5) indicate that Sharia courts would assume a strict mandate confined to those specified by law (Minutes of Constitutional Assembly 1994:10–26).

25 Article 5 of the Oromia Sharia Courts Establishment Proclamation, No. 53/2002, Magalata Oromiyya, 9th year, No. 2, 2002.

26 The question is: is a region justified in enlarging the jurisdiction of Sharia courts under the guise of competence to legislate on civil matters? If a region's attempt to widen Sharia courts' competence is found to be in conflict with the federal constitution and federal legislation, what is its legal effect? According to the division of power stipulated by the Federal Constitution of Ethiopia (Article 52(1)) residual powers belong to the units of the Federation. States as a result are competent to legislate on matters not included in the legislative list of matters that are exclusively reserved or concurrently granted to both federal government and the states. The matters falling under Sharia courts' power are obviously personal matters, and states are competent to legislate on personal matters as they are not expressly reserved for the federal government. However, it is unclear whether states can enlarge the Sharia courts' competence beyond the specific personal and family matters covered by the Federal Sharia Courts' enabling law. In Nigeria it was held that Sharia courts had restricted jurisdiction, confined to matters specified by the federal constitution (Ostien and Dekker 2010:581–582, note 3). Admittedly, while the Nigerian constitution gave the Sharia courts a specific mandate, the Ethiopian federal constitution failed to do so (see Article 262 of the Constitution of the Federal Republic of Nigeria of 1999). However, case law from the highest judicial body has cast light on the meaning of personal and family matters not only under the enabling law but also under the provisions of the federal constitution sanctioning the very establishment of Sharia courts. The FDRE constitution may not outline the scope of matters falling under the jurisdiction of the Sharia courts, but its framework seems to have intended Sharia courts to have limited competence to deal with the matters specifically falling within their power, as defined by legislators both at federal and state level (see the Minutes of Constitutional Assembly by the House of Peoples Representatives' 1994). States in Ethiopia, while competent to legislate on personal matters, may not therefore go beyond the personal matters defined

Federal Sharia Courts' case statistics and gender issues

Gender relations are undergoing changes in Ethiopia in urban settings, particularly in big cities like Addis Ababa. Women now tend to be educated and have jobs both in the public and private sectors, although their representation in the public space is not yet on a par with men. Education paves the way for an increasing awareness of the civic matters, especially regarding gender roles in society, espoused by government and human rights activists in general and women's rights activists in particular. Given that the law applied by the Sharia courts embodies patriarchal ideology and recognizes a sex-based preferential treatment regarding divorce and post-divorce issues, it is important to see what influence, if any, the assumed growing empowerment and awareness of Muslim women has had on case law in the Sharia courts.

A judicial divorce obtained through either the civil or Sharia courts is the only one recognized by Ethiopian law. The Sharia courts have thus been dealing with the issue of women's divorce and post-divorce rights, which are laden with gender sensitivity and involve normative differences and tensions between statutory rights and obligations on the one hand and religious norms and values on the other. The application by Sharia courts of religious norms in divorce and post-divorce proceedings thus attracts the attention of interest groups, researchers and activists. It is interesting to examine the practice of Addis Ababa-based Federal Sharia Courts in divorce and post-divorce claims in terms of gender, and question who resorts to these courts, given that women in Ethiopia tend to be economically dependent on their husbands.

Most of the suits filed to federal Sharia courts in Addis Ababa are related to marriage issues, including confirmation of consent for marriage, marriage registration, and divorce. Although the exact figure is difficult to come by, divorce accounts for up to 90 per cent of marriage suits.²⁷ Looking at their caseload, one could be justified in calling the courts 'divorce courts'. In the last years there has been a dramatic change that seems to have baffled the Sharia courts and currently around 85–90 per cent of divorce petitions are filed by women.²⁸ Most of the grounds for divorce include irreconcilable differences, abuse and violence, the husband's absence, and husbands marrying second wives without their first wives' consent. Most of the petitioners for divorce are young, employed, educated women. They tend to be economically independent and do not seem to encounter economic

by federal legislation and judicial bodies. Sharia court jurisdiction ought to be strictly construed as it forms an exceptional recognition of religious norms for dispute settlement.

27 Interview with Sheik Ali Mohamed and Registrar, 25 November 2017, Addis Ababa, Ethiopia.

28 *Ibid.*

hardship in sustaining their post-divorce lives. Such women are thought to be better informed and in a better position to assert their rights before the state courts, which could provide them better post-divorce terms, but they refrain from doing so.

According to female informants, seeking justice before the Sharia courts has more to do with religious conviction. They believe that the ruling of a civil court would not religiously end their marital ties. They also express that, from a religious point of view, it is not appropriate to submit claims for divorce to regular courts. As their entry into marriage in the first place was made according to a religious ethos, their exit from it, they believe, should be through the same route. Based on personal observation, the religious renaissance among Muslims seen in Ethiopia over the last two decades might underpin their decisions.

Sharia courts tend to mediate between the parties with the aim of reconciling them, in line with Islam's general decrual of divorce. According to the *qadis* and the Registrar of the Federal Sharia Courts in Addis Ababa, it is usually the women who insist on getting divorced, while the men often agree to reconcile or withdraw their cases after having filed an application for divorce. While the rationale is subject to speculation, better economic independence might explain women's insistence on divorce and their refusal to reconcile.

Should reconciliation fail, the courts issue a divorce verdict, the effect of which depends on the petitioner. If a women petitions for the divorce, it takes effect as soon as the presiding judge pronounces his verdict. If the husband is the petitioner, he has to come to the court in person to pronounce the *talak* (unilateral divorce or release of his wife from marriage) before the judge in order for the divorce to come into effect. After the divorce decree has been issued, women often make post-divorce claims for things such as spousal and child support and child custody. The courts make their decision based on Islamic law and husbands tend to comply with their rulings. Accordingly, the courts do not – in principle – award any spousal award if it was the woman who petitioned for the divorce. According to *qadis*, parties sometimes refrain from pursuing post-divorce claims, probably to avoid further confrontation and/or in the belief that ex-husbands will provide spousal and child support through their own volition. Parties also tend to make informal/private arrangements for post-divorce claims to avoid washing their dirty linen in public. Sharia court decisions settle such issues should informal arrangements fail to work out.

The *qadis* and the Registrar of the Federal Sharia Courts in Addis Ababa suggest that divorce has been shifting from the man's domain to become a women's practice. Indeed, several of the women I interviewed at the Federal First Instance Sharia Courts in Addis Ababa said they believed they had the right to divorce. They

stated that they were neither afraid of the stigma attached to divorce nor were they be worried about their post-divorce life.²⁹

Application of procedural laws

Generally, the Federal Sharia Courts in Addis Ababa, as a state institution, render justice based on laws. While they apply substantive Islamic law to settle cases, they are bound by state procedural rules that govern their proceedings.³⁰ By determining the procedures regulating the Sharia courts proceedings, the state seems to disengage religious law from its religious source and confine the scope of the laws to be applied by the courts. This seemingly strange combination of two distinct laws appears to be a mechanism designed to assert state control over religious law, probably with the intention of ensuring due process and fairness.

The *qadis* of the Federal First Instance Sharia Court in Addis Ababa state that they have no objection to using civil procedure rules for their proceedings, believing that it is somehow in line with Sharia rules on procedures. They apply a civil procedure with some necessary changes while acknowledging that they largely follow Sharia procedure, which they in turn believe is predominantly in line with the rules of civil procedure. The main procedural steps include confirmation of the presence of both parties, securing the consent of the defendants, reading the statement of claims followed by the statements for the defence, hearing the witnesses, securing the production of evidence if deemed necessary, and finally delivering judgment.

Sharia courts in practice seem to comply with the procedure of securing consent before hearing cases, as it is prescribed by the Constitution and the enabling legislation. Accordingly, they normally ask for confirmation of the defendant's consent at the opening of proceedings. However, after consent is secured, the procedure in use does not seem to strictly follow the rules prescribed by the civil procedure. Proceedings are somewhat less formal than in regular courts of law. However, the procedure in use in Sharia courts seems to be consistent and applied consistently. A breach of, or non-compliance with, civil procedure does not necessarily affect the outcome of the proceedings, and a decision may be rendered invalid only if the procedural irregularity committed is a substantial one.³¹

The full-fledged application of civil procedure by Addis Ababa's Federal Sharia Courts is hampered by at least two factors. One is the belief that Islamic procedure laws ought to govern the application of Islamic personal law administered by the courts. The other has to do with a lack of basic knowledge among the *qadis* of state

29 Four anonymous women were interviewed at the court compound, 26 November 2017, Addis Ababa, Ethiopia.

30 Article 6(2) of the enabling legislation (Proclamation No. 188/99).

31 On procedural irregularity and its effect, see Articles 201–211 of the Civil Procedure Code. See also Mohammed 2010:164–165.

law in general and procedural law in particular. This problem stems from a lack of training on basic state laws. In fact, the enabling legislation does not make knowledge of basic state procedural laws a pre-condition of appointment as a judge.

Pursuant to the establishment legislation, Sharia courts are supposed to ensure openness of proceedings.³² However, most of the cases falling within the jurisdiction of the Sharia courts relate to private matters that often dictate a closed hearing.³³ Despite this, the Sharia courts hold open hearings whenever the parties do not object.

Evidence

Sharia law itself incorporates rules on evidence, the most important of which is the testimony of witnesses. However, there are normative differences between religious and state laws regarding witnesses, and the number of witnesses used by Islamic law in some cases is different for men and women.³⁴

The proclamation establishing the Sharia courts is silent on the rules of evidence to be used by the courts. While they ask for witnesses and the production of written or other forms of evidence deemed necessary for particular cases, it seems that evidence production is regulated by the normative rules of Sharia law. The *qadis* seem to assume that, as matters within their jurisdiction are governed by religious norms, the relevant Sharia rules of evidence ought equally to apply to evidence issues.

Legal counsel

According to the *qadis* interviewed, in an overwhelming number of cases parties are not represented by lawyers. Most applicants to the Sharia courts handle cases by themselves or are assisted by family members and/or friends. Parties hire legal representatives in some instances, such as when appealing a decision made by the lower Sharia courts. There is no clear rule that governs legal counsel before Sharia courts. The establishment legislation is silent on this matter as well. However, the general rules governing legal counsel before civil courts might apply, with necessary changes having been made, to Sharia courts.

32 Article 15 of the Establishment Proclamation, Proclamation No. 188/99.

33 The Federal Courts Establishment Proclamation allows closed hearing for private matters. See Article 26 of Federal Courts Establishment Proclamation 25/1988.

34 For instance in financial transaction the Qur'an (2:282) says the following: '... and call in to witness from among your men two witnesses; but if there are not two men, then one man and two women from among those whom you choose to be witnesses, so that if one of the two errs, the second of the two may remind the other...'

As matters heard by Sharia courts are governed by Islamic laws per se, legal counsel is limited to procedural issues. Often, as one *qadi* from the First Instance Sharia Court told me, lawyers (mostly non-Muslims) who offer legal counsel encourage the defendants to rule out the Sharia court, and succeed in turning parties away from Sharia justice.³⁵

The need for legal representation is apparently scuttled partly because Sharia court proceedings are not as formal, confrontational and complex as civil court proceedings. Another factor that may curtail the use of legal representation is a lack of lawyers with a sound knowledge of Islamic law, or their lack of interest in appearing before Sharia courts. Finally, the lack of representation might be simply because Sharia law does not encourage its use, especially in civil cases.

Administrative issues related to Federal Sharia Courts in Addis Ababa

As a state institution, Sharia courts are funded and staffed by the government. Recently, there has been an improvement in the management of the budget by Sharia courts. In the past, they had to apply to the Federal Supreme Court for operational costs on the basis of need, which often caused a delay in the procurement process. Nowadays, the Federal Supreme Sharia Court has its own account and managed the entire budget for the Sharia courts. This has significantly reduced the delays to payments to the courts. However, the Sharia courts continue to report to the Federal Supreme Court on the utilization of the budget.

Nevertheless, the remuneration for judges serving in the Sharia courts is lower than for those working in the regular courts, and Sharia judges do not receive any housing or transport allowance. There are no assistant judges and no training is available to the judges before they take the bench, unlike in the state courts. While the Sharia court *qadis* and Registrar are appreciative of the gradual improvements to their physical working environment and financial management, they still feel the courts are treated as inferior/second-class. To bolster this contention, they also point to a rule on contempt of court that is aimed at ensuring respect for the courts. Although in practice contempt of the court is uncommon. *Qadis* complain that the fine or punishment for it is lower in the Sharia courts than in the regular courts, and complain it suggests they are seen as less deserving of respect.³⁶

The Addis Ababa-based Federal Sharia Courts do not seem to proactively seek to improve their image with the public. The reason for this, as a *qadi* at the First In-

35 Interview with Sheikh Ali Mohammed, 25 November 2017, Addis Ababa.

36 According to the establishment proclamation, any person who, in whatsoever manner, shows improper conduct in the course of any proceedings or who, without good cause, fails to comply with an order of the court shall be punishable with imprisonment of up to one month or to a fine of up to Birr 1.000 (One thousand Birr).

stance Sharia Court told me, may have to do with a general problem of leadership. The leadership of the Sharia Supreme Court is said to be unwilling and incapable of improving the courts' image.³⁷ While the leadership have arranged some seminars for *qadis* on particular issues, it has not taken the initiative to reach out to prominent Muslim community figures and scholars to conduct debates on issues affecting the courts' operation. The Sharia courts do not publish their cases in electronic or print form to generate debate or to ensure transparency. Nor is there a research unit that undertakes studies on the functioning of the courts in order to make suggestions for improvement. The Sharia courts remain, as a result, obscure.

Appointment procedure for *qadis* vs. Sharia courts' application of Islamic law

The qualifications for Sharia courts' *qadis* and the procedures for their appointment are set forth in the enabling legislation. Any Ethiopian may qualify for appointment as *qadi* if he has been trained in Islamic law in an Islamic educational institution or has acquired adequate experience and knowledge in Islamic law.³⁸ Other appointment criteria include personal qualities, consent, and age.³⁹ The same criteria are used for all levels of the Sharia courts, and thus any eligible candidate may be appointed at any level of the courts.⁴⁰

Except for a training in Islamic law, the establishment law does not expressly require *qadis* to have any educational qualifications or credentials. It does not specify prerequisites to determine an applicant's knowledge or experience of Islamic law. The rationale for not insisting on any academic credentials or formal education/training might be in consideration of the reality in Ethiopia, where there exists only one Islamic higher academic institution offering formal training or education in Islamic law. Consequently, many would-be Islamic scholars travel abroad in search of formal religious education. The Awoliya College in Addis Ababa, which used to offer Islamic education, was accused by the government of being a breeding ground of 'Wahhabism' or 'fundamentalism' (Jemal 2012:34–35, note 13).⁴¹ It was sealed off by the *majlis*, with the alleged backing of the government, who dismissed

37 Anonymous *qadi* interview and personnel of the Federal Sharia Courts, 27 November 2017, Addis Ababa.

38 See Article 16(1) of Proclamation No. 188/99.

39 Diligence and good conduct, consent and a minimum age of 25 are required to become a *qadi* (see Article 16(2–4) of Proclamation 188/1999).

40 In other countries, for instance Malaysia, criteria for appointment might be different depending on the level of Sharia court, (see Zin 2012:119–120).

41 See also the Ministry of Federal and Pastoralist Development Affairs 2015: 211–215.

its teaching staff and banned its curriculum.⁴² The closing of the college was one of several reasons for the recent confrontation (2011–2013), pitting government and large segments of the Muslim community. The college was reformed, with new teaching staff and a new curriculum that suits the *majlis*' interests and is aimed at producing students who will counter the so-called 'Wahhabi' doctrine.⁴³

In practice, most of the *qadis* currently serving in Sharia courts received Islamic 'training' or 'education' in traditional ways, attending traditional religious seminaries (*madrassas*) common in rural parts of Ethiopia. Except for three *qadis* in Addis Ababa, who secured formal credentials from foreign Islamic educational institutions, all of the sitting *qadis* do not have formal religious education.

The appointment procedure for *qadis* involves three bodies: the *majlis*, the Federal Supreme Court, and the Federal Judicial Administration Commission. The appointment of *qadis* is made by the Federal Judicial Commission, which follows the advice of the *majlis* and the recommendations of the Federal Supreme Court. In fact, the process is controlled by the *majlis*, which is in charge of recruiting the would-be *qadis* and submits the list to the Federal Supreme Court. Unlike state courts, the appointment of *qadis* does not involve the final approval of the House of Peoples' Representatives: the approval by the Judicial Administration Commission is sufficient.⁴⁴

Historically, the appointment of *qadis* was manipulated by the state. The same seems to hold true today. People who have resisted the involvement of state authorities in Islamic affairs and in Sharia court business have faced reprisals, being either dismissed or systematically excluded from Muslim institutions in general. Sheik Khiyar Mohammed, a former President of the *majlis*, for example, was dismissed after publically detailing the direct interference of the government in Muslim affairs and manipulation of the *majlis* to advance government interests.⁴⁵

As a result, candidates with a religious orientation other than the one approved by the *majlis* would not be allowed to assume any position in the *majlis* and impliedly in Sharia courts as well. This is particularly the case when candidates have credentials from 'Wahhabi' religious schools, including Awoliya College. The constraints of formal education and the *majlis*' control of the appointment process for *qadis* are said to have weakened the Sharia courts' capacity to fully apply Islamic law to cases (Abdella 2017:135–136, note 27). Consequently, some Muslim scholars and figures have challenged the dominance of *majlis* and called for the rescinding of its power in that regard (Jemal 2012:35, note 13).

42 Ministry of Federal and Pastoralist Development Affairs 2015: 214.

43 *Ibid.*

44 Article 17 of the enabling law.

45 For information on his interview see the weekly newspaper *Addis Admas* from 23 June 2018 and *Chion Magazine*, 9 June 2018.

The *qadis* serving in Federal Sharia Courts in Addis Ababa seem to be circum-spect of the Hanbali school of thought, which is said to be more conservative on many issues, including family and personal Islamic law. The existing orientation of Sharia courts inclined to Shafie jurisprudence which might have to do partly with the *majlis*' preference for Shafie-inclined traditional Islamic teaching prevalent at many Muslim seminaries in Ethiopia or the requirements for appointment of *qadis* tend to downplay formal religious education and favours traditional Shafie-inclined nominees.

Concluding remarks

Although secularism is a fundamental constitutional principle in Ethiopia, the Sharia courts are recognized as the independent Islamic judicial body dealing with family and personal matters, and as forming an integral part of national law. Their establishment does not deviate from a secular constitutional order that is considered to be the most appropriate political and legal mechanism for multicultural and multi-confessional society.

The paper has shown that while the mandate of the Sharia courts is couched in general terms, their attempt to expand its scope as defined by law has been kept in check by the decisions of ordinary judicial and quasi-judicial bodies, which have held that Islamic law can only be applied to personal matters in the limited areas specifically designated to them.

Based on the case law of Sharia courts, divorce has today become a women's practice as opposed to being part of men's long-held sphere of influence over marital ties. Better economic conditions, religious conviction, and/or changing societal attitudes to divorce propel women to forgo the relatively better protection that may be afforded by state courts.

Influenced by substantive Islamic law and a lack of basic knowledge of state laws, Sharia courts apply civil procedure rules rather leniently. Nevertheless, their proceedings are largely consistent. Yet, a lack of visibility is the hallmark of Sharia courts, and this has, to a certain extent – prevented them from becoming subject of academic discourse. To rectify this lack of transparency, it is important to revisit the existing requirements for appointment to the courts, so that candidates with formal education could become judges. Issues arising from the *majlis*' control over the appointment process for *qadis* may be addressed if and when free and fair elections deliver an independent *majlis*.

The state courts also need to engage Sharia courts through platforms relevant to their functioning and to enhance their knowledge of basic state laws.

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