The Intersection Of Sharia And Constitutional Law: Investigating The Implications Of Sharia-Based Legal Provisions In The Gambia And Ethiopia.

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ABSTRACT

This thesis examines the relationship between Sharia family law and constitutional law in The Gambia and Ethiopia, two African countries with legal systems incorporating religious and customary principles. The Gambia, a predominantly Muslim country in West Africa, and Ethiopia, with more than 30% of its population following Islam, apply standard, religious, and customary laws to reflect the diversity of their people, cultures, and traditions. Both countries have legal systems that have evolved through a complex process of colonial legacies, religious influences, and political transformations. The Gambia, a former British colony, has a common law system that coexists with Islamic law practised by the Muslim majority, while Ethiopia, with a long history of statehood and legal traditions, has a federal system that allows for the application of Sharia law alongside civil law within specific communities. The Gambia's 1997 Constitution acknowledges the applicability of Sharia in personal status matters for Muslims, such as marriage, divorce, and inheritance, while Ethiopia's 1995 Constitution recognises the country's ethnic and religious diversity by allowing for the application of religious and customary laws in personal and family matters.

This study will explore legal pluralism, the coexistence of different legal systems within a single state. This concept is crucial in understanding the relationship between Sharia and constitutional law. The literature on the intersection of Sharia and constitutional law examines the harmonisation and conflicts between these systems, exploring how states manage legal diversity and the effects on legal coherence and state authority.

The research conducted in The Gambia and Ethiopia sheds light on the complex challenges associated with implementing Sharia law in personal status issues. However, there is still a lack

of understanding about how conflicts between Sharia and constitutional law are resolved. While there is extensive literature on the Ethiopian federal system for Sharia, which impacts governance and ethnic diversity, this study will focus on The Gambia, where limited existing literature is available. This study examines the practical application of Ethiopia's system and identifies potential areas that The Gambia could adopt.

This thesis examines legal provisions causing tensions and explores how the Constitution and Courts can resolve them. It also compares legal developments and assesses the effectiveness of conflict resolution mechanisms over time. The thesis will examine the insights gained from Ethiopia's efforts to integrate Sharia-based legal systems and provide recommendations for other comparative studies based on these findings.

Keywords: The Gambia, Ethiopia, Constitution, Sharia, gender equality, Islamic Law, Legal Pluralism, Secular, women's rights, Family law, interpretation, patriarchy, Quran, Court,

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INTRODUCTION

Constitutions worldwide are crucial in establishing a nation's fundamental principles, including its government's framework and citizens' primary rights. John Hart [1]reiterate the purpose of a constitution as establishing the framework and main functions of a government while deriving its authority from the people who govern it. These principles are considered the bedrock of a country's legal system and cannot be easily altered by regular legislative acts. Constitutions are often viewed as the highest laws in the land, and this is clearly stated by section 4[2] of the Constitution of The Gambia and Article 9 (1)[3] of the Federal Democratic Republic of Ethiopia (FDRE) Constitution of Ethiopia. African Constitutions are often characterised by their adaptation of Western legal traditions to African contexts, their struggle for democracy, and their attempt to create inclusive, participatory governance structures that respect African states' diverse cultures and societies[4]. African Constitutions incorporate multiple legal systems to promote inclusivity and embrace cultural diversity by recognising them as sources of law within the country's legal framework. By doing so, they consider cultural, religious, and colonial laws[5].

When a state Constitution recognises legal pluralism, it permits multiple legal systems to function concurrently. This has various implications. On the one hand, it can be viewed as a

[1] Ely, John Hart. Democracy and Distrust: A theory of Judicial Review. Havard University Press, 1980
[2] Section 4 of the 1997 constitution of the Gambia states that the Constitution is the Supreme Law of the Gambia.

[3] Article 9(1) FDRE states that the Constitution of Ethiopia is the supreme law of the land.
[4] Ghai, Yash. Constitutionalism and the Challenges of Democracy in Africa. Cambridge University Press, 2011
[5] Bah, A. A. (2008). "Legal Pluralism in The Gambia: A Study of the Interaction between Customary Law and the Modern Legal System." In Journal of African Law, 52(1), 99-123

sign of respect for cultural and religious diversity, acknowledging the state diversity of its population and on the other hand, it introduces a level of complexity into the judicial system that can result in clashes and contradictions, especially when the various legal frameworks have disparate fundamental principles and values, which is the reality in the context of the Gambia.

A Constitution that accommodates citizens' differences and needs by incorporating multiple legal systems into a constitutional framework, particularly Islamic Law, also called Sharia, presents unique challenges due to the distinct nature of religious legal systems compared to secular state laws. Islamic law is based on Islamic principles and serves as a comprehensive guide for individual and communal life for Muslims. Personal status laws, which address areas such as marriage, divorce, child custody, property rights, and inheritance, are a crucial component of Sharia law, often incorporated in pluralist legal systems, including Sharia. These laws can significantly impact women's empowerment and self-determination as they influence their rights within the family. Women's rights and certain roles under Sharia are predetermined, such as inheritance rights, and are unequal to men's. This is based on the belief that men are typically seen as the primary providers for women and the family, reflecting a broader system in which men have financial responsibilities towards women[6]. In multiple social settings, personal status regulations frequently limit women's rights and sustain patriarchal power. For instance, women are mandated to secure their guardian's approval for marriage, a provision not applied to men. Moreover, men have the sole authority to initiate divorce, while women do not share the same privilege. Another illustration is in the Gambia, where women's rights related to acquiring property[7], selecting a marital home[8], separation, divorce, and annulment of

[6] Joseph Schacht, *An Introduction to Islamic Law* (Oxford University Press 1983).pp 70-72
[7] Section 41 Women's Act 2010
[8] Ibid Section 42

marriage[9], and Widow's rights[10] are subject to personal law i.e women's rights are subject to Islamic law norms. Notwithstanding these disparities, concerted endeavours and initiatives are underway within Islamic communities to advance gender equality, manifested in pursuing legal reforms to bolster women's rights. Illustratively, Tunisia and Morocco have enacted progressive family laws designed to augment women's rights in matters pertaining to marriage and divorce. [11]

Sharia is a comprehensive legal and ethical Muslim guideline in Islamic scripture and traditions. It encompasses various life aspects, from personal spirituality to civil and criminal laws[12]. Islamic jurists have elaborated this body of rules and principles over the first centuries of Islam, based on the primary sources of Islam, the Quran and Sunnah (the words and actions of the Prophet Muhammad), which hold the highest authority for Muslims [13]. Furthermore, Ijma (consensus) and Qiyas (analogical reasoning) supplement these primary sources by guiding on issues not directly addressed in the foundational texts. These sources of Sharia are widely accepted among Muslims, although there may be some variations in interpretation[14].

The four sources mentioned are widely regarded as not only a lifestyle but also as a legal system that governs Muslims. In many countries around the world, including Sudan, Libya, Pakistan, Iran, Sudan, Mauritania, and Yemen, Islamic law is used in criminal, civil, and family legal

[9] Ibid section 43
[10] Ibid section 44
[11] Charrad, Mounira M. States and Women's Rights: The Making of Postcolonial Tunisia, Algeria, and Morocco. University of California Press, 2001
[12] Hallaq, Wael B. An Introduction to Islamic Law. Cambridge University Press, 2009. Pp 125-126
[13] Hallaq, Wael B, *The Origins and Evolution of Islamic Law* (Cambridge University Press 2005) 123-126.
[14] Mashood A Baderin, *Islamic Law: A Very Short Introduction* (First edition, Oxford University Press 2021).pp 28-29

systems. Islamic family law applies formally as part of state law in all Muslim-majority countries except Turkey[15].

In The Gambia, where Muslims constitute over 90% of the population, Sharia has been included as one of the sources of law under section 7(f) of the Constitution, although limited to matters of marriage, divorce and inheritance, reflecting the religious beliefs of the dominant Muslim community and its leaders. Ethiopia, with a Muslim population of more than 30%, applies aspects of Sharia law through Articles 34(4) and 78(5) of its Constitution, which caters to creating Religious Customary Courts to adjudicate personal and family laws. Accordingly, this thesis will focus on aspects of applying Sharia law to matters of personal or family law. The basis for applying Sharia is the incorporation of Sharia provisions into both Constitutions.

Justification Of The Study

Islamic law and constitutional law have long been the subject of scholarly inquiry, focusing on their relationship in family law, legal pluralism, and secularism[16] (based on the argument for separating religion and the state). Despite this, there has been little comparative study of The Gambia's model in comparison with other countries. My research aims to address this gap by examining the similarities and differences in the application of Islamic law in family matters, such as marriage, inheritance, and divorce, in the Gambian and Ethiopian constitutional frameworks.

[15] Baderin 2021: 45
[16] Hirschl, Ran. Constitutional Theocracy. Harvard University Press, 2010.pp 314

Methodology

This thesis will be qualitative research adopting a combined approach using doctrinal analysis and case study methodology. By doing so, the study aims to provide a comprehensive understanding of the implementation of Sharia law within the constitutional frameworks of The Gambia and Ethiopia.

The Gambia and Ethiopia were chosen as case studies for this research due to the pluralist similarities in legal frameworks, where multiple legal systems coexist within a national legal framework. Both countries present a blend of customary, Sharia, and secular laws, providing an ideal context for examining the interactions and conflicts between legal traditions. The varying degrees of Sharia law application based on the constitutional provisions and other laws offer an opportunity to assess the harmonisation of religious laws with constitutional principles in different societal contexts, given that the Gambia is a Muslim-majority country and Ethiopia only has over 30% Muslim population.

Furthermore, the comparison provides the opportunity for practical challenges and successes in incorporating Sharia law into the constitutional framework through analyses of how the judicial systems of the two countries have approached the interpretation of legal provisions. The selection of the two countries allows for a comprehensive comparative analysis, drawing broader conclusions about integrating religious laws in diverse legal environments.

The research approach will help analyse the relevant legal frameworks of the two countries through examination of the relevant laws and legal theory on pluralism and the inclusion of Sharia as a source of law. The research will involve document analysis of primary data sources, including relevant sections of both countries' constitutions, related statutes and judicial

decisions from both The Gambia and Ethiopia, and secondary sources from scholarly articles, books, and research reports for additional context and analysis. This will illustrate the theoretical underpinnings and established principles governing the implementation of Sharia law in both countries.

A case study analysis of relevant case law and judicial decisions from Gambian and Ethiopian courts will be explored to assess how these legal frameworks affect guaranteed constitutional rights to equality. This part will focus on cases concerning family law matters, particularly those related to marriage, inheritance, and divorce. By analysing how Sharia principles are interpreted and applied by the courts in these cases, the research intends to potentially identify and highlight inconsistencies between the theoretical framework and implementation of pluralist Shartia-incorporated systems, as well as identify areas where the Sharia court exceeds its jurisdiction, particularly in The Gambia, and how that affects equality and women's rights within the legal framework.

This dialectical approach enables the interpretation and evaluation of abstract legal principles in the discourse of pluralist constitutional frameworks, particularly involving Sharia as a source of law. Still, it is conducted through empirical legal experiences derived from case law outcomes to see how past judicial decisions have affected the law. By applying deductive reasoning, the study applies principles from legal rules to draw logical conclusions about the implementation of Sharia law and its impact on the broader international? standards of equality and women's rights in the Gambia. This will be supported by analogical comparisons between the two countries to find differences and parallels. Practical recommendations for legal reforms will be outlined to harmonise Sharia law with constitutional and international human rights standards, promoting gender equality and justice.

The thesis will adhere to ethical standards by accurately citing and referencing all data sources to uphold academic integrity. Potential biases in data collection and analysis will be mitigated by using multiple data sources and perspectives to maintain a balanced and objective approach.

Thesis Structure

My thesis comprises an introduction and four chapters. The introduction contains the introduction, research objective, justification and methodology. The first chapter offers a historical overview of both countries' legal and constitutional development, emphasising legal pluralism and secularism within the Gambian context. The second chapter examines the legal provisions governing Sharia law in the Gambia and Ethiopia, looking at how Sharia Courts are established and operate and analysing the national legislation and practical implementation. The third chapter is the main focus of the thesis. It explores the tensions created by state legal pluralism arrangements, i.e., applying Sharia, liberal constitutional values, and international human rights standards. The final chapter presents the findings and recommendations, discussing the strengths and weaknesses of the approaches within the two legal systems and advocating for legal reforms to harmonise Sharia law with constitutional and international human rights standards and promote gender equality and justice.

CHAPTER 1: BRIEF HISTORICAL DIVERSITY

BACKGROUND OF THE GAMBIA

The Gambia, a West African country, was formally colonised by the British from 1888 to 1965[17]. She gained independence from Britain on February 18, 1965 [18], and became a republic on April 24, 1970 [19]. Although it is the smallest country in mainland Africa, covering an area of approximately 11,295 square miles of land[20], it has a diverse population of around 2.8 million people[21]. The British and French colonial authorities drew the country's borders during the colonial era without considering the ethnic, historical and cultural ties of the people living in the West African region. As a result, the arbitrary borders imposed by these nations often split ethnic groups across different countries. For instance, the inhabitants of The Gambia found themselves separated from the people of Senegal by a border despite sharing common ethnic, historical, and cultural backgrounds.[22]

Before and after independence, Gambians recognized and practised legal pluralism, where British, religious, and customary laws coexist[23]. Despite having a less than 10% Christian population, The Gambia is notable for its harmonious relationship between Christians and Muslims, with instances of intermarriage reflecting this peaceful coexistence. This pluralistic

[17] Ousman Jammeh, *The Constitutional Law of the Gambia: 1965-2010* (AuthorHouse 2011). P1
[18] ibid
[19] Jammeh (n 17).p1
[20] ibid
[21] (Worldometer) (Nations Geo | Population).
[22] Herbst, Jeffrey. "The Creation and Maintenance of National Boundaries in Africa." *International Organization*, vol. 43, no. 4, 1989, Cambridge University Press. pp. 673-692.

[23] Gambia's long journey to republicanism a study in the development of ... Darboe, Abubakarr N. M. Ousainu, ProQuest Dissertations and Theses; 1979; ProQuest Dissertations & Theses Global. pp 78 - 110

legal framework allows for the accommodation of diverse legal and cultural practices within the country.

During colonial rule, some of the pre-colonial laws and customs of Gambia were preserved and integrated into the colonial laws in force in the colony[24]. The system of adjudicating community disputes through the chiefs was preserved and codified in the District Tribunals Act 1933. The common law courts Courts were instructed to uphold any so called 'native' law or custom which is not against natural justice, equity, and good conscience or incompatible with any existing law[25]. This dualism has led to conflicts between the two systems of justice, which will be discussed in chapter three. Muslim law was seen or included to form part of customary law[26]. This is reiterated by Justice Adeyinka Morgan in the Therese Saidi Vs Saika Saidy[27] that " in West Africa, which includes the Gambia, Muslim law forms part of customary law".

Brief Historical Diversity Background of Ethiopia

The Federal Democratic Republic of Ethiopia (Ethiopia) is located in the Horn of Africa region of East Africa. Its population is estimated to be around 129.47 million people.[28] It is the second most populous country in Africa, with its land size spanning approximately 1.1 million square meters [29]. Ethiopia is landlocked with diverse geography, including highlands, plateaus, and the Great Rift Valley.

[24] Ibid
[25] ibid
[26] Ibid
[27] Ibid (Theresa Saidi Vs Saika Saidy civil Appeal No. 4/73 reported in (1974) 18 J.A.L.190 at 197)
[28] (World Population Review) (Nations Geo | Population).
[29] International Data & Economic Analysis(IDEA) powered by USAID

Ethiopia, like many, if not all, African countries, is known for its remarkable ethnic diversity. Over 80 different ethnic groups are identified within its borders[30]. The largest ethnic groups include the Oromo, Amhara, Tigray, Somali, Sidama, Gurage, and Afar. Each ethnic group has its distinct language, culture,e and law. Most analyses of the integration of Customary laws with the constitution have colonial influences, but Ethiopia is a unique African country which was briefly occupied by the Italians from 1935 to 1941[31] but it was never fully colonised. This presents a unique and interesting perspective on the historical interaction between religion, customs, and laws and how factors influenced their evolution[32].

Ethiopia's legal system is one of the oldest codified in the world, with a history that intertwines religious, customary, and formal state law. The historical roots of legal pluralism in Ethiopia can be traced back to ancient times, when traditional customary laws and religious laws, particularly those of the Ethiopian Orthodox Church, played a central role in the adjudicating of disputes[33].

During the Aksumite Empire (circa 100 AD to 940 AD), religious laws based on Christianity, adopted as the state religion in the 4th century, significantly influenced the legal system. The Fetha Nagast, a legal code combining ecclesiastical law and Roman law elements, was

[30] *A Theory of African Constitutionalism* (1st edn, Oxford University PressOxford 2021) <https://academic.oup.com/book/39895> accessed 6 June 2024. pp202

[31] Katrin Seidel, 'Constitutional Recognition of Islamic Family Law and Shariʿa Courts in Ethiopia: Governmental Strategies to Co-Regulate the Plural Family Law Arena' in Norbert Oberauer, Yvonne Prief and Ulrike Qubaja (eds), *Legal Pluralism in Muslim Contexts* (BRILL 2019) <https://brill.com/view/book/edcoll/9789004398269/BP000013.xml> accessed 22 May 2024. Pp142

[32] The HISTORY Channel) (Wikipedia).

[33] Abir, Mordechai. *Ethiopia: The Era of the Princes: The Challenge of Islam and the Re-unification of the Christian Empire, 1769-1855*. Longman, 1968.

introduced in the 13th century and became a cornerstone of Ethiopian law. This code underscored the influence of religious principles in governance and legal matters.[34]

The incorporation of Sharia law into the Ethiopian legal system is primarily due to the significant Muslim population, particularly in regions like Harar and parts of Oromia. During the reign of Emperor Haile Selassie in the early 20th century, there were efforts to modernise and centralize the legal system by the promulgation of the 1931 Constitution[35], establishment of regular courts, codification of laws which included the Penal Code, Civil Code and the Commercial Code[36]. Still, customary and religious laws continued to be recognized, particularly in areas deeply entrenched in the social fabric. Sharia courts have been a part of the country since its adoption of Islam, and the state first official recognition of Sharia Courts in the 1940s[37] through the Proclamation [38]for the Establishment of Naiba and Kadis Coucils[39]. They gained constitutional status under the 1995 FDRE Constitution under a federal form of government, and their jurisdiction remains the same as that of the present-day courts[40]. The government appoints the judges serving in these courts as stipulated by Article 16 of Proclamation 188/1999. The 1995 Constitution of the Federal Democratic Republic of Ethiopia

[34] Crummey, Donald. *Land and Society in the Christian Kingdom of Ethiopia: From the Thirteenth to the Twentieth Century*. James Currey Publishers, 2000, pp. 237-239.

[35] Bahru Zewde, A History of Modern Ethiopia, 1855–1991 (James Currey 2001)

[36] John Spencer, Ethiopia at Bay: A Personal Account of the Haile Selassie Years (Red Sea Press 1984)

[37] in Susanne Epple and Getachew Assefa (eds), Kultur und soziale Praxis (1st edMohammed Abdo, '7. Federal Sharia Courts in Addis Ababa: Their Administration and the Application of Law in the Light of Recent Developments' in Susanne Epple and Getachew Assefa (eds), *Kultur und soziale Praxis* (1st edn, transcript Verlag 2020) <https://www.transcript-open.de/doi/10.14361/9783839450215-008> accessed 22 May 2024.Mohammed Abdo, 'Islam in Ethiopia'. pp 140

[38] Kadis Court Proclamation No.2/1942 and 62/1944

[39] Abdo, 'Islam in Ethiopia' (n 37). Legal Pluralism Vs Human Rights Issues: Sharia Courts and Human Rights Concerns in the Light of the Federal Constitution of Ethiopia. Pp1-15

[40]ibid

(FDRE) formally acknowledged the application of religious and customary laws in personal and family matters shrouding the Sharia legal system in Constitutional authority[41].

Legal And Constitutional Development Of The Gambia And Ethiopia

The concept of legal pluralism/ state-recognised legal pluralism

Legal pluralism has been widely discussed by scholars, who have provided various definitions. Some notable writers who have significantly impacted this subject include John Griffiths[42], Leopold Pospisil[43] and Micheal Garfield Smith[44]. Pospisil argues that no society has a single consistent legal system, but instead, every society has multiple legal levels that arise from subgroups like family, lineage, community, and political confederacy, each with its own distinct laws[45]. He further suggests that a society has a multiplicity of legal systems ordered hierarchically based on their inclusiveness[46].

Legal pluralism is a concept that suggests that multiple legal systems can coexist within a single society or jurisdiction. This means that individuals may be governed by different legal orders or norms, which can come from various sources, institutions, and traditions. In certain societies, different legal systems may operate concurrently, each with its own rules, principles, and methods for settling disputes. These legal systems may originate from various sources, such as

[41] Article 34 (5) of the FDRE Constitution
[42] John Griffiths, 'What Is Legal Pluralism?' (1986) 18 The Journal of Legal Pluralism and Unofficial Law 1.-55
[43] Leopold J. Pospisil's book "Anthropology of Law: A Comparative Theory" (1971) is a seminal work in legal anthropology that presents a comparative analysis of legal systems across cultures, 98-125
[44] Micheal Garfield Smith, The Sociological Framework of Law," published in the book *"Law and Warfare: Studies in the Anthropology of Conflict"* edited by Paul Bohannan in 1967,
[45] Griffiths (n 42).
[46] ibid

state, customary, religious, indigenous, and international laws, and each source may govern different aspects of people's lives and relationships. The Gambia and Ethiopia are examples of countries where legal pluralism is present, as both states continue to apply customary and Islamic law simultaneously.

According to Griffiths, there are two types of legal pluralism: strong and weak. Griffiths notes that during colonial times, the application of customary and religious laws was authorised by respective Western laws, which made legal pluralism in colonial societies weak legal pluralism[47]. He believes that weak legal pluralism is not the true version of legal pluralism, as it is permeated by legal centralism since the state authorises the application of non-state laws. Griffiths considers strong legal pluralism the true version of legal pluralism, as the law is neither systematic nor uniform but self-regulated in the semi-autonomous social field. He argues that legal pluralism is an empirical situation in every society where multiple legal orders apply in the same social field without the state's authorisation. By doing so, Griffiths liberates law from solely associating with the state berates law from being solely associated with the state. The aforementioned argument underscores the significance of recognizing that this thesis is centered on weak or state-sanctioned legal pluralism.

There are different means through which the state can recognise the normative ordering of communities. One way is to respect and acknowledge individuals' religious beliefs or allow Indigenous people to follow their customary practices; another approach is for the state to recognise the special status of customary systems, but only if they comply with constitutional standards, as seen in South Africa. Alternatively, state law could take measures to suppress

[47] Ibid

normative ordering that contradicts established constitutional standards. Now let me understand which order The Gambia and Ethiopia are following.

In applying Griffith's theory, both comparators in this study exhibit weak, also known as state-recognised legal pluralism, as both constitutions allow for religious law in family matters to apply with some autonomy. During the colonial period, the British introduced common law principles in The Gambia and customary Islamic law. This led to creating a hybrid legal system that recognises the diversity of legal traditions in the country. While, during colonial times, these customary and religious laws were allowed to operate as long as they were not repungnant to British laws, the present 1997 Gambia constitution allows religious laws to operate without applying the repungnancy test on their conformity to the Constitution or other state legislation. Similarly, the 1995 Ethiopian constitution recognises legal pluralism and does not explicitly address conflicts between state laws and other normative orders[48]. It contains a supremacy clause invalidating any law or decision that goes against it.[49] However, it also recognises and gives status to customary and religious ways of settling personal disputes when parties consent to such institutions.[50] This recognition allows the final decision of such institutions, but only in matters affecting personal status. The Ethiopian Sharia Court Establishment Proclamation reinforces this by stating that cases submitted to Sharia courts cannot be taken to regular courts and vice versa[51]. Non-state legal systems can be integrated into state legal systems through

[48] *A Theory of African Constitutionalism* (n 30).290-299

[49] Article 9 (1) (2) of the Constitution of Ethiopia, allows the Constitution to serve as the ultimate legal authority in the country and any legislation, customary practice, or decision made by a state organ or public official that contradicts the Constitution is null and void. Every citizen, state organ, political organisation, and their officials are responsible for upholding the Constitution and adhering to its provisions.

[50] This Constitution does not restrict the resolution of disputes related to personal and family matters in accordance with religious or customary laws, provided that both parties agree see Article 34 (5) of the Ethiopian Constitution.

[51] Article 5 (4) of the Proclamation of 7th December 1999

decentralisation, incorporation, or recognition of cultural diversity[52]. These processes can either advance or obstruct human rights.

The Relationship Between The State And Religion In Gambia And Ethiopia/ Legal Pluralism And Secularism

The Gambia and Ethiopia can be characterized as secular states due to their constitutional frameworks that separate state and religion while embracing legal pluralism[5354]. It is crucial to acknowledge that the absence of the word "secular" in a constitution does not automatically render a country non-secular. The Gambia is distinct from the number of more traditional Islamic States in that it does not officially recognise any religion in its Constitution or other laws, and it prohibits the National Assembly from enacting any legislation to establish a state religion[55].

Ethiopia, in contrast, has a diverse religious background and a wide range of religious traditions. Christianity and Islam are the two main religions in this nation, with Orthodox Christianity being the most prevalent Christian denomination and Islam having a significant followership, especially in regions such as Harar and the Somali Regional State. Article 11 of The Ethiopian constitution, titled “Separation of State and Religion”, classifies the country as a secular state and prohibits adopting any religion as a state religion. At the same time, it

[52] *A Theory of African Constitutionalism* (n 30).290-299

[53] Section 100(2) of the constitution of The Gambia dictates that the National Assembly is precluded from enacting any legislation to designate a particular religion as the state religion. This provision is considered an entrenched clause, thereby subject to modification solely through a referendum.

[54] Article 11 of the Ethiopian Constitution mandates the separation of the state from religion. It expressly prohibits the establishment of a state religion and precludes state interference in religious matters. Similarly, it prohibits religious institutions from interfering in state affairs.

[55] Section 100 (2) of the Constitution of the Gambia

acknowledges the right of religious communities to practice their faith without any interference from the government.

In a secular state, no religion is favoured or discriminated against, and religious institutions operate independently of the government. The state creates formal laws with primary authority, but multiple legal systems may exist within its jurisdiction, including religious, customary, and indigenous traditions. However, their authority is always secondary to state law. In The Gambia, the Islamic religious laws are not created by the State but derived from the Quran or Sunnah of the Holy Prophet Muhammed (SAW). Secularism, which advocates the separation of state and religion, faces challenges from theocratic governments and religious movements. Critics argue that secularism is associated with flawed modernisation and an incorrect perception of rationality[56]. They claim that secularism is a narrow-minded doctrine that denies its dependence on emotions and cannot accommodate community-specific rights[57].

Religion and state relationships in The Gambia and Ethiopia are shaped by historical, cultural, political, legal, and constitutional factors. In The Gambia, the majority religion is Islam, with over 90% of the population identifying as Muslims[58]. This religious affiliation has a long historical background, dating back to the 11th century when Islam was brought to the country via trade and commerce with North African merchants. The practice of Islam in The Gambia is characterised by Sufi influences and adheres to the Sunni tradition[59]. The Constitution

[56] Rajeev Bhargava, 'Political Secularism' in John S Dryzek, Bonnie Honig and Anne Phillips (eds), *The Oxford Handbook of Political Theory* (1st edn, Oxford University Press 2009) <https://academic.oup.com/edited-volume/34325/chapter/291338471> accessed 21 May 2024.1-17

[57] ibid

[58] Pew Research Center, 2021)

[59] Hudson, H. A. (1978). *The Influence of Islam on a West African Republic: The Gambia*. African Studies Review, 21(1), 1-17

guarantees religious freedom and prohibits the state from interfering with an individual's religious beliefs. Despite Islam being the most widely followed religion, Christianity also has a significant following, and religious diversity is widely respected. Ethiopia presents a diverse religious milieu where Christianity and Islam predominate as the two primary faiths. Approximately 43.5% of the populace espouses the Ethiopian Orthodox Christian faith, whilst more than 30% adhere to Islam. Islamic jurisdiction with its own judicial mechanisms has existed in Ethiopia for centuries, predating official recognition by Emperor Haile Selassie 1 in 1942. Despite a history of power struggles between Muslim and Christian political actors, practices of coexistence and cooperation developed over time. The legal status of Ethiopian Muslims changed significantly during the brief Italian occupation (1935-1941), with Shari'a courts officially recognized through the Kadis Proclamation of 1942 and the Naiba and Kadis Council Proclamation of 1944[60].

Gary Jeffrey Jacobsohn's model of secularism, as described in his book The Wheel of Law, shows that no singular aspirational model of secularism is uniform or applicable to all countries. Secularisation is the process of separating the polity from religion. A secular constitution signifies a "polity where there exists a genuine commitment to religious freedom manifest in the legal and political safeguards put in place to reinforce that commitment."

In his paper Political Secularism, Rajeev Bhargava [61]identified that Secular states can be divided into two types: amoral secular states, often imperial and autocratic, and value-based states, which prioritise principles such as peace, liberty, and equality. He also mentioned that the disconnection between religion and the state can take different forms, including one-sided

[60] Seidel (n 31).p 142
[61] Bhargava (n 56). p6

exclusion, mutual exclusion, and the erection of a "wall of separation.[62]" Liberal-democratic secular states protect religious liberty and the equality of citizenship while allowing individuals to criticise or reject their birth religion. However, critics like Greenawalt [63] criticise secularism for its perceived lack of neutrality towards religion. He argues that secularism can sometimes favour certain religious or non-religious beliefs over others, leading to discrimination or marginalisation of certain religious groups. Secularism denounces both secular and religious regimes that violate these principles, and the notion that religious majorities are no worse than secular majorities is ambiguous and misses point[64].

In contextualising secularism, Bhargava[65] said that secularism can be contextual when the "**State intervenes or refrains from interfering, depending on which of the two better promotes religious liberty and equality of citizenship.**" Therefore, I can comfortably say that The Gambia is a secular state as it incorporates elements of the mainstream majority religion of the polity for identarian purposes. It presents them as part of the polity's constitutional secularism rather than inseparably linked to the country's main religion.

The Gambian government bestows special privileges on the majority religion, Islam, including state-funded pilgrimages and mosque construction,[66] particularly in public spaces, which suggests a close relationship with the Islamic faith. The Gambian Constitution recognises Sharia Law[67], which pertains to Marriage, Divorce, and Inheritance for those who adhere to it.

[62] ibid.10
[63] Greenawalt, K. (1998). *Religion and the Constitution: Establishment and Fairness.* Princeton, NJ: Princeton University Press.
[64] Nussbaum, M. C. (2012). *The New Religious Intolerance: Overcoming the Politics of Fear in an Anxious Age.* Cambridge, MA: Harvard University Press.
[65] Bhargava (n 56).
[66] The Gambia TRRC Report Compendium Part A, p60,
[67] Section 7 of the 1997 Constitution of the Gambia

Additionally, the Constitution establishes Cadi Courts[68] to resolve Islamic issues among Muslims in the country. The State pays the Cadi's and also their Courts are financed by the State. Although the Gambian government claims to be religiously neutral, it can be argued that the country's power centre is closely connected to the Islamic religion.

Ethiopia's legal system combines customary and religious laws, particularly concerning personal and family issues, much like The Gambia. The Muslim community in Ethiopia is governed by Islamic law (Sharia) in family matters, while different ethnic groups adhere to their customary laws. For centuries, Christianity has played a pivotal role in Ethiopia's history and culture. The Ethiopian Orthodox Tewahedo Church is one of the most ancient Christian denominations in the world and has significantly shaped Ethiopia's cultural identity and customs. For the majority of its history, Ethiopia has been governed by monarchs who held complete control over the government. According to the nation's unwritten constitution, the monarch functioned as the sovereign, with power primarily determined by the intricate relationship between the monarch, the Ethiopian Orthodox Church, and the nobility[69].

The relationship between constitutionally recognised Islamic law and the claim to be a secular state is a contentious issue in Ethiopia. The FDRE Constitution guarantees religious freedom and reflects a secular state, separating state and religion. Historically, a strong bond existed between the Ethiopian Orthodox Tewahedo Church and the state under monarchic rule. The PDRE Constitution of 1987 ended this interdependency, and secularism became the preferred stance of the state. The constitutional recognition of Sharia courts in Ethiopia aligns with the

[68] Section 137 and 137 (A)
[69] *A Theory of African Constitutionalism* (n 30). P 238

idea of a 'principled distance' between politics and religion[70]. However, state funding of Sharia courts remains a contested feature, as it implies involvement in religious affairs. The federal Proclamation 188/1999 regulates the administrative cooperation between Sharia courts and governmental institutions, with state courts supporting Sharia courts in staff recruitment and providing basic facilities[71].

The idea of a strict separating religion from the state, which is prevalent in Western liberal societies like France (principle of laïcité), has been subject to criticism as it is believed that religion plays a crucial role in shaping the modern state, its laws, and legal ideologies[72]. Religion influences how individuals and communities view the universe and guide them in their practices, driven by faith in transcendent forces. Furthermore, it reflects the meaning of existence in all aspects of human life. Therefore, it is essential to recognise the interdependence between law and religion, as law without religion loses its sanctity and inspiration, while religion without law loses its social and historical character[73]

In Ethiopia, Muslims have historically utilised de facto sharia courts, and the Constitution recognises their de jure existence in the light of this reality and their status as a significant minority group. The Constitution's acceptance of legal pluralism necessitates a compromise on the principle of secularism.

[70] Seidel (n 31).147
[71] ibid.
[72] Harold J Berman, *The Interaction of Law and Religion* (Abingdon Press 1974).pp 77- 86
[73] ibid.

This model of secularism, as articulated by Bhargava[74] and Jacobsohn[75], acknowledges that the separation of law and religion does not have to be absolute. Instead, it should be flexible enough to accommodate the religious and cultural realities of the society. The Gambian and Ethiopian experience shows that a secular state can still respect and incorporate religious norms in specific contexts, ensuring that religious liberty is preserved without compromising the principles of equality and justice.

[74] Bhargava (n 56).

[75] Gary J Jacobsohn, *The Wheel of Law: India's Secularism in Comparative Constitutional Context* (2. print., and 1. paperback print, Princeton University Press 2005).

CHAPTER 2: LEGAL PROVISIONS

In this chapter, I wish to discuss the legal provisions that affect this thesis. I may only be able to discuss some legislation sparingly. Still, I will provide some simple comprehension of the legislations that intersect with the Constitutions of the Gambia and Ethiopia. We will look at the following legislation: The 1997 Constitution of The Gambia, the Constitution of the Federal Republic of Ethiopia, The Women's Act 2010 of The Gambia, The Children's Act 2005, the Muslim Marriage and Divorce Act 1941, the Sharia Law Recognition Act 1905, and the Proclamation for the Establishment of the Khadis Court 1942, (Proclamation No. 62/1944), Proclamation No. 188/1999 A Proclamation to consolidate Federal Courts of Sharia.

The Gambia

The legal system in The Gambia is characterised by plurality, as stated in Section 7 of the Constitution. This provision highlights that the laws of The Gambia encompass, in addition to the Constitution, a wide range of sources, including (a) Acts of the National Assembly and subsidiary legislation made under them; (b) Orders, rules, regulations, or other subsidiary legislation made by a person or authority under a power conferred by the Constitution or any other law; (c) Existing laws, such as decrees passed by the Armed Forces Provisional Ruling Council; (d) Common law and principles of equity; (e) Customary law, applicable to members of the relevant communities; and (f) Sharia law, which governs matters of marriage, divorce, and inheritance among members of the relevant communities. This provision thus reflects the diverse sources of law in The Gambia. Section 7(f) of the constitution restricts the application of Sharia jurisdiction to matters related to marriage, inheritance, and divorce. At the same time,

customary law covers a broader range of issues, encompassing the land tenure system, local or traditional leadership, and dispute resolution at the community level. The Cadi Court[76] is responsible for hearing cases related to Sharia law, while the District Tribunals, headed by Chiefs, handle cases related to customary law[77]. The effective functioning of these courts has significantly contributed to promoting peace and cohesion within communities, and in some instances, customary laws may be influenced by Sharia principles.[78]

Matters within the purview of Sharia courts are resolved by applying Islamic law, which provides a unique perspective on women's rights and gender equality in areas such as divorce, inheritance, and the distribution of property upon divorce. These family laws, governed by Sharia, have a wide-ranging impact on laws from various sources, including the Constitution, the Women's Act, the Children's Act, and certain court rules and procedures. The judges and district chiefs in Sharia courts are not legal practitioners and may only sometimes be familiar with constitutional provisions and human rights norms. This could lead to unfair treatment of parties involved and decisions that conflict with the Constitution and other legislation.

The Constitution of The Gambia guarantees the rights of all individuals, including men, women, and children, against any form of discrimination in various ways. The preamble to the Constitution enshrines the fundamental rights and freedoms guaranteed for all time, ensuring that human rights and fundamental freedoms are respected and observed for everyone, irrespective of their ethnic background, gender, language, or religion. The Constitution further reinforces these rights, with Section 28 guaranteeing equality between men and women before

[76] Section 137(1) and (2) of the 1997 Constitution of the Gambia
[77] Section 120 (b) and Section 137 A (6) of the 1997 Constitution of the Gambia
[78] 'Gambia Report _layout_FINAL_DIGITAL_2907.Pdf' <https://africa.unwomen.org/sites/default/files/Field%20Office%20Africa/Attachments/Publications/2020/Gambia%20report%20_layout_FINAL_DIGITAL_2907.pdf> accessed 22 May 2024.p12-54

the law. Section 27 allows all men and women of full age and capacity to enter into a marriage based on their own free will and consent. Additionally, Section 33, specifically Section 33(2), addresses the issue of discrimination. This provision stipulates that no law should make any discriminatory provisions, either directly or indirectly. Section 33(4) defines discrimination as treating individuals differently based on race, gender, religion, or other factors. However, Section 33(5)(c) undermines the prohibition of discrimination in the Women's Act and makes provisions null and void. The Constitution is the supreme law, and inconsistent laws are void. The exceptions listed in Section 33(5)(c) apply to personal laws such as marriage, adoption, divorce, burial, and property inheritance, distinct from state laws. As a result, the discriminatory provisions of sharia and customary law still apply, even if women seek legal action. This contradicts the non-discrimination and equality provisions.[79]

Section 28(1) of the Constitution guarantees women's right to full and equal dignity with men. The Women's Act guarantees women's right to property and inheritance subject to personal law, specifically Sharia for Muslims. Although gender equality is not guaranteed in Sharia law when it comes to inheritance, the distribution of inheritance is prescribed in Suratul Nisa of the Holy Quran[80]. It states that a son is entitled to twice as much as a daughter[81]; this is so because the religious dictates of Islam place men as the primary financial providers for their families[82]. Consequently, if a man dies and leaves only daughters, they are only entitled to inherit 2/3 of the estate[83]. However, if a man dies and leaves even one son, that son is entitled to inherit the

[79] ibid.
[80] Sura An - Nisa, Chapter 4 of the Holy Quran 'Surah An-Nisa - 1-176' (*Quran.com*) <https://quran.com/an-nisa> accessed 6 June 2024.17/06/2024 13:30:006/17/2024 1:30:00 PM
[81] ibid. Specifically (Quran 4:11)
[82] Quran 4:34
[83] Ibid

entire estate[84]. These simple provisions demonstrate that in Sharia, there cannot be equal treatment of men and women.

The Gambia ratified the CEDAW[85] and Mopoto[86] Protocols, which were subsequently domesticated by enacting the Women's Act of 2010 and its amendment in 2021 to make provision for equitable distribution of matrimonial property. At first glance, this law appears impressive, aiming to eliminate discrimination against women and providing them equality as envisaged by the Constitution. The Acts grants women a wide range of political and socio-economic rights. However, a closer examination would clearly show that the said rights are subject to personal law[87], specifically Sharia law, whose application, particularly with respect to women mothers, is marred by inequality issues. The Women's Act encompasses 77 articles, with 41 articles specifically safeguarding women's rights. These rights include equity, property rights, equal access and protection under the law, consent-based marriage, inheritance, widow's rights, and the right to seek separation, divorce, or annulment of marriage. Nonetheless, Section 7 of the law restricts these rights by subjugating Muslim personal law to Sharia. Consequently, many women's rights are contingent upon personal law, granting recognition only if they align with Islamic law. This indicates an opportunity to explore ways to ensure that these rights remain consistent with legal and moral standards while respecting religious principles.

The Children Act 2005 has jurisdiction over all legal matters relating to children. In the Gambia, a person is considered a child as long as they have not reached the age of 18.[88] The

[84] 'Surah An-Nisa - 1-176' (n 80). (Quran 4:11)
[85] In 1993 The Gambia ratified CEDAW without reservations and thus committed to implementing the rights and freedoms of women contained therein.
[86] Gambia signed the Maputo Protocol in September 2003 and ratified it in May 2005.
[87] Examples are Sections 29(1), 42,43,44, 45 etc
[88] Children Act 2005, Section 2 (interpretation)

Act grants children the right to inherit their parents' property[89], the right to refuse to marry before the age of 18[90], and the right to be named, among other things. However, the rights above are subject to personal law, which means that children born out of wedlock are not entitled to inherit their fathers' property or take their name even if the father acknowledges paternity. It is important to note that the age of marriage in Islam is determined by puberty rather than chronological age. Additionally, some provisions of the Children Act do not align with Sharia principles or Islamic law. A notable example of such is the provision guaranteeing children the right to parental property; Islamic law excludes children born out of wedlock from the provision of this right.

Ethiopia

Ethiopia, similar to the Gambia, is characterised by a pluralistic society. Since 1994, the country has been governed by a federal constitution that recognises customary and religious laws to regulate personal status[91]. The Kadi's Court in Ethiopia was officially acknowledged in 1940, and the Proclamation for the Establishment of Khadis Court was issued in 1942, granting the Court jurisdiction to handle personal matters involving Muslims.[92] The most recent Proclamation, No. 188/1999, reflects this ongoing recognition. The preamble of the FDRE Constitution emphasises the importance of respecting individual and collective fundamental freedoms and rights to live together in equality and without any form of sexual,

[89] ibid, s 23(d)
[90] ibid, s 24
[91] Article 34(5) FDRE Constitution
[92] Seidel (n 31).143

religious, or cultural discrimination[93]. Article 34(5) of the Constitution acknowledges the possibility of resolving disputes related to personal and family laws through religious or customary laws with the consent of the parties involved. Furthermore, Section 78(5) of the Constitution specifically recognises religious laws in personal and family matters, reinforcing the legal pluralism within the country. Article 34 ensures that men and women, regardless of race, nation, nationality, or religion, have the right to marry and form a family and have equal rights upon entering into, during, and upon divorce. The family, recognised as the natural and fundamental unit of society, is entitled to protection by society and the State, as articulated in Article 34(4). By provisions specified by law, recognition can be given to marriages concluded under systems of religious or customary laws. Additionally, Article 35 guarantees women's rights, ensuring they have equal rights with men to enjoy all constitutional rights and protections, including equal rights in marriage.

Article 4(1) of Proclamation No. 188/1999 stipulates that Federal Courts of Sharia have ordinary jurisdiction over any question regarding marriage, divorce, maintenance, guardianship of minors and family relationships and any question regarding Wakf, gift/Hiba/, succession of wills, provided that the endower or donor is a Muslim or the deceased was a Muslim at the time of his death.

The careful implementation of Sharia law in Ethiopia is shown in the detailed Proclamation. The Proclamation grants the Court jurisdiction with the mutual consent of the parties and explains how jurisdiction is initiated and regulated. This key feature will be discussed in chapter three. These legislations from the Gambia and Ethiopia clearly show how plural the

[93] Article 25 of the FDRE Constitution

legal system is. So far, we have seen how tensions may arise from the Constitution guaranteeing equality and the same Constitution subjecting persons to other legislations that do not guarantee equality. What is the solution to this? I believe we will get the response by the end of the study.

The Judiciary: State Law Courts and The Sharia Court

The judiciary is an independent third arm of government established by the national constitutions. They are set up in a hierarchy comprising the Supreme Court, the Court of Appeal, the High Court, Magistrates' courts and Cadi (Sharia) courts for family matters concerning Muslims in both the Gambia and Ethiopia. The judiciary upholds the Constitution, interprets laws, and ensures justice. Family courts, influenced by Sharia, handle matters such as marriage, divorce, inheritance, and child custody among Muslims, highlighting the role of Islamic sharia within the legal system. The Gambian and Ethiopian Constitutions guarantee religious freedom, allowing individuals to practice, preach, and teach their religion. Both states separate state and religion by ensuring no state religion is imposed.

The Gambia

Section 120 of the Gambian Constitution established the country's courts and judiciary. This section outlines the various courts that make up the judicial system, including the Supreme Court, Court of Appeal, High Court, and Special Criminal Court, as well as the Magistrates Courts, Cadi Court, District Tribunals, and other lower courts established by an Act of the National Assembly. Subsection (2) states that the judicial power of The Gambia is vested in these courts and exercised according to the jurisdictions conferred upon them by law. Subsection (3) further emphasises the independence of the judiciary, stating that the courts,

judges, and other holders of judicial office are subject only to the Constitution and the law and are not subject to the control or direction of any other person or authority, except as provided in the relevant chapter.

Section 137 of the Constitution established the Cadi Courts, courts of first instance. The court comprises a panel consisting of the Cadi and two other Sharia scholars qualified to be Cadi or Ulama. The court's jurisdiction is limited to marriage, divorce, and inheritance where the parties are Muslims. Appeals from the Cadi court can be made to the Cadi Appeals Panel as laid down in section 137(5). Section 137A establishes the Cadi Appeals Panel, which is responsible for hearing appeals from the Cadi court. This Panel consists of a Chairperson and at least four members. The Chairperson and members are appointed by the Cadi Appeal Selection Committee, which comprises the Chief Justice, Attorney General, and a member of the Supreme Islamic Council. The qualifications for serving as the Chairperson and panel members are outlined in section 137A(5). Furthermore, the Committee has the authority to establish rules of practice and procedure for the Panel, as specified in section 137A(7).

Ethiopia

Ethiopia is a federal state comprised of nine provinces, each with its own State Supreme Court and First Instance Court. The Federal Supreme Court and Federal High Court hold the highest judicial authority over federal matters. In addition, Article 78 (5) grants the House of Peoples' Representatives and State Councils the power to establish or recognise religious and customary courts. The judicial authority of the State Supreme Courts extends to state matters and has jurisdiction equivalent to that of the Federal High Court.

The Federal Courts of Sharia Consolidation Proclamation No. 188/1999 was enacted in accordance with Articles 34 (4) and 78(5) of the Ethiopian legal system. This Proclamation granted the Federal Courts of Sharia jurisdiction over specific matters: marriage, divorce, maintenance, guardianship of minors and family relationships, provided that the marriage in question was contracted under Islamic law or the parties have consented to be ruled by Islamic law; Wakf, gift/Hiba/, or succession of wills[94], provided that the donor or endower is a Muslim or the deceased was a Muslim at the time of their death; and the jurisdiction for any question regarding payments of costs incurred in any suit relating to the aforementioned matters. It is crucial to note that in Ethiopia, the consent of Muslim parties is required to initiate the Sharia Court jurisdiction, whereas, in The Gambia, a person merely needs to be a Muslim for the Sharia Court to have automatic authority.

Article 4(2) of the 188/1999 Proclamation states that the consent of both parties is necessary for the Sharia courts to have the power to make legal decisions. Sharia courts can only assume jurisdiction when both parties have agreed to be adjudicated under Islamic law. Apart from express consent, consent has also been provided in other ways. Article 5(2) of Proclamation No. 188/1999 states that if a party fails to appear before the Sharia court, it will amount to consent to the court's jurisdiction, provided that the defaulting party has been properly served with a summons. Therefore, the court will hear the case ex parte. Article 5(3) of the same proclamation also provides that if the parties have not consented to the case being adjudicated by the Sharia court, the case will be transferred to the regular federal court with jurisdiction.

[94] Article 4 of the Proclamation No. 188/1999 Federal Courts of Sharia Consolidation Proclamation

Once the plaintiff has chosen a forum and the defendant has consented to the jurisdiction of that forum, neither party can transfer the case to a regular court under any circumstances.

Article 6 of the Sharia proclamation states that the Federal Courts of Sharia shall adjudicate cases under their jurisdiction by Islamic Law. In Ethiopia, the Sharia Court applies civil procedure laws. However, certain rules of procedure are deferred, especially in evidence-giving. For instance, in some cases, the number of witnesses in Islamic law differs for men and women. According to the Quran 2:282, a man's witness testimony or evidence holds enough weight, while a single woman's evidence is considered unsatisfactory. In Gambia, the Cadi have their own Cadi rules, which apply to their courts.

In Ethiopia, there are three levels of Sharia Courts [95] established: the Federal First Instance Courts of Sharia, the Federal High Court of Sharia, and the Federal Supreme Courts of Sharia. Each level has its own team of Cadis, judges, registrars, and other staff to manage the court's activities. The Federal First Instance Court of Sharia has the authority to hear cases involving amounts not exceeding 200,000 Birr, which is approximately USD 3,500. The Federal High Court, on the other hand, has the authority to hear cases exceeding 200,000 Birr and can also review decisions made by the First Instance Court[96]. It can also handle applications for a venue change from a Federal First Instance Court of Sharia to another court or to itself.[97] The Federal Supreme Court of Sharia has two jurisdiction: decisions of the Federal High Court of Sharia rendered in its first instance jurisdiction and decisions of the Federal High Court of Sharia rendered in its appellate jurisdiction[98].

[95] Article 3 of Proclamation No. 188/1999, Federal Courts of Sharia Consolidation Proclamation
[96] Ibid Article 9
[97] Ibid
[98] Ibid article 8

The highest and final judicial power in Ethiopia is held by the Federal Supreme Court, which has the power of cassation over any final court decision that contains a fundamental error of law. Article 80 outlines this power and states that the specifics of its implementation shall be determined by law. Some writers, such as Muhammed Abdo, have argued that this power does not extend to the decisions of Sharia Courts but is limited to the regular state courts[99]. However, I disagree with this interpretation, as the Federal Supreme Court and the House of Federation reviewed the case of Kedija Beshir Kedija, a Sharia Court case. I believe that Article 80(3)(a) can address any intersection between Sharia and constitutional cases, which I will discuss in the next chapter.

[99] Abdo, '7. Federal Sharia Courts in Addis Ababa' (n 37).p 8

CHAPTER 3: Tensions and Conflicts Between Sharia And Constitutional Law

The intersection between Sharia and Constitutional law in the Gambia and Ethiopia are more visible in women's rights. In addition to both countries ratifying international conventions for women such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (MAPUTO Protocol), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), both the Constitutions of The Gambia and Ethiopia contain provisions that recognise and guarantee women's rights.

The issue of women's rights is a crucial aspect of the debate between universalism and cultural relativism regarding human rights. The universalist perspective argues that culture itself poses a significant obstacle to the realisation of women's rights,[100] as many cultural systems are based on patriarchal structures[101]. Therefore, according to this viewpoint, human rights should have greater importance than cultural traditions in safeguarding and promoting women's rights and interests.

In Africa, women's rights are considered both universal and culturally specific. Women are entitled to equal rights as men and unique rights based on their experiences. However, culture

[100] *A Theory of African Constitutionalism* (n 30). 260.
[101] *ibid.* 260.

and religion can impact the exercise of these rights, leading to a balance between universality and cultural relativism. Constitutions provide a space where women can claim and advance their rights, but ongoing challenges exist. It's important to note that women's rights are not solely a Western export or indigenous product but rather a result of legal syncretism[102]. This process aims to integrate diverse rights concepts into a cohesive constitutional framework.

The Ethiopian Federal Constitution, in line with the International Bill of Human Rights and CEDAW, recognises women's rights.[103] It guarantees ethnic self-determination while enshrining gender equality and non-discrimination. Women's rights are formulated as democratic rights, focusing on their participation in the state's economic and social development as equal citizens. The Constitution recognises the equal importance of civil, political, economic, social, and developmental rights while protecting women from discrimination in their private lives. It also grants women the right to affirmative action, demonstrating the incorporation of the liberal concept of women's rights.

The emergence of Islam brought a significant transformation in societal perspectives in the societies it was practiced, shifting the focus from tribal affiliations to individualism. This new way of thinking ensured that everyone, regardless of their gender, race, age, or wealth, was treated equally. Women, in particular, the freedom of women as free human being with equal rights was recognized, which helped improve their social circumstances[104]. By abolishing harmful practices such as female infanticide, Islam reinforced women's freedom and elevated their status. The principles of equality, freedom, independence, and women's rights are

[102] ibid.
[103] Article 35 of the FDRE Constitution
[104] 'Essay - Historical Background' <https://www.mwlusa.org/topics/history/herstory.html> accessed 21 May 2024.

fundamental to Islam and are divinely ordained. The ultimate goal of divine law, or Shari'a, is to establish justice, eliminate injustice, and protect human rights, including those of minority groups such as Christians, Jews, orphans, and slaves. The emancipation of women in the Islamic tradition not only improved their status in Arabia but also secured their rights and elevated their status globally.[105].

Wael B. Hallaq[106] states that Sharia is rooted in divine sources, but its interpretation and application depend on human jurisprudence. While some Muslims consider it entirely divine, Islamic Law is susceptible to change. It is inferred from divine sources through human endeavour, known as ijtihad[107]. Islamic law blends morals and ethics into its legal system, unlike other legal systems that endeavour to strictly separate them. Islamic law's classification as "law" depends on how the term is defined. Islamic law represents only one aspect of a comprehensive guide to conduct. The ultimate goal of Islamic law is to secure divine favour in this world and the hereafter[108]. Muslims acknowledge Islamic law as a legitimate legal system that fulfills all the criteria of law, as referenced in H.L.A. Hart's "The Concept of Law."

Understanding the distinction between Shariah and fiqh (Islamic jurisprudence) is crucial when studying Islamic law. Shariah refers to the unchangeable divine sources, including the Qur'an and Sunnah. Fiqh, on the other hand, is the human interpretation and understanding of the law, which can change based on circumstances and time. Ijtihad is the process of deriving Islamic law from Shariah, involving various jurisprudential methods and principles under Islamic legal

[105] ibid.
[106] Wael B Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge University Press 2005). Baderin (n 14).
[107] ibid.
[108] ibid.

theory. These jurisprudential rulings are considered law but are not immutable, unlike the Qur'an and the Sunnah[109].

Islamic law is primarily grounded in the primary sources - Quran and Sunnah, the words and actions of the Prophet Muhammad, which hold the highest authority[110]. Additionally, Ijma (consensus) and Qiyas (analogical reasoning) supplement these primary sources by guiding on issues not directly covered in the foundational texts. These sources of Sharia are widely accepted among Muslims despite variations in interpretation[111].

According to Imam Shafi[112], Obedience to God, the Messenger, and those in authority means adhering to the Qur'an and the Sunnah. On the other hand, obeying jurists and leaders implies adherence to their rulings, which must be based on the Quran and the Sunnah through Ijma or Qiyas. Although there are four Sunni schools of thought, namely Maliki, Hanbali, Shafi'i, and Hanafi, and one Shia school, they all concur that the Quran and Sunnah are the primary sources, and that Ijma and Qiyas represent the methods of Islamic law rather than being considered as 'sources' in the true sense. The Qur'an describes itself as a book of guidance (huda) for every aspect of human life, including law, with its verses covering diverse matters, including legal issues. Its legal verses regulate social and secular matters such as trade, inheritance, crimes, etc[113].

The Gambia and Ethiopia follow different schools of Islamic jurisprudence. The Gambia predominantly adheres to the Maliki school, which emphasizes the practices of the people of

[109] Joseph Schacht, *An Introduction to Islamic Law* (Oxford University Press 1982) 56-59.
[110] Schacht (n 6).
[111] Baderin (n 14).
[112] ibid.
[113] ibid.

Medina. In contrast, Ethiopia primarily follows the Shafi'i school, known for its systematic approach and emphasis on Hadith, with some influence from the Hanafi school. The application of these schools is evident in personal status laws, religious courts, and community practices, reflecting the historical, cultural, and social contexts of each country.

From the above understanding of Sharia as divine and the sources of Islamic law, we can now focus on the Islamic law adopted by The Gambia and Ethiopia. As stated, both The Gambia and Ethiopia apply Islamic laws to personal family matters.

Conflicts /Tensions between Sharia and Constitution provisions and other Legal Provisions

Surah An-Nisa,[114] (chapter 4 of the Quran), deals with Islamic personal law, emphasizing the importance of familial relationships and the rights of women, children, and orphans. The surah discusses inheritance, safeguarding women's reputation, and abolishing oppressive practices such as inheriting widows without consent, treating them poorly in marriages, or usurping their wealth. It also specifies every type of relationship that falls under the category of incestuous marriages. Allah establishes the right of women to have dowries and to marry in a dignified and publicly accepted manner. The protection of dowries falls within the broader financial rights, and usurpation of wealth is prohibited. This surah also explains how women can protect

[114] 'Surah An-Nisa - 1-176' (n 80).

themselves by taking action against husbands who fail to fulfil their responsibilities, promising to support those who choose to divorce to avoid further harm[115].

These verses show a similar objectives tob the conventional law, in protecting women and children. However, examining landmark cases in both jurisdictions is warranted to explore potential conflicts or tension.

Conflicts in Marriage, Inheritance and Divorce in The Gambia and Ethiopia

1. Section 27 (1) of the Gambian Constitution states that men and women of full age and capacity have the right to marry and establish a family. Furthermore, marriage should only be based on the free and full consent of the intended parties. Similarly, Article 34 of the Ethiopian Constitution asserts that marriage should be entered only with the intending spouses' free and full consent.

The Quran reiterates this idea in Surah An-Nisa[116], which emphasises the importance of avoiding coercion or compulsion in marriage and mutual consent and respect within marital relationships.

In the case of Abdurahman Ali et al. versus Hajji Kassim Mohammed and Zenit Ali in Ethiopia,[117] the marriage between Kassim Mohammed and Zenit Ali was annulled by the First

[115] 'Surah Al-Nisa': An Introduction and Thematic Explanation' (*Imam Ghazali Institute*, 28 June 2021) <https://www.imamghazali.org/blog/surah-al-nisa-introduction> accessed 21 May 2024. (*The Endless Banquet: A Thematic Explanation of the Qur'an (Volume I) by Shaykh Hamzah Abdul Malik.)*

[116] Quran 4:19

[117] Abdo, '7. Federal Sharia Courts in Addis Ababa' (n 37).9.

Instance Sharia Court. Zenit's close relatives, including her two brothers and an uncle, objected to the marriage because Zenit's parents and other relatives were not consulted before the marriage, which Islamic law requires. The couple had married before a judge, with two witnesses of their choice present. The couple appealed to the High and Supreme Sharia Courts, but their appeals were rejected, and the lower court's decision was upheld.

Section 27(1) of the Gambian constitution and Article 34(1) of the Ethiopian constitution state that a person must have "full age and capacity to marry" to be eligible for marriage. According to the Civil Code, the age of maturity in Ethiopia is typically set at 18 years old[118]. The Children's Act of 2005 in The Gambia defines a child as any person under 18. The Children's Act (Amendment) 2016 states that a person under 18 cannot marry in The Gambia, irrespective of personal law.

However, in Sharia law, a girl is eligible for marriage once she has reached puberty.[119] Thus the Constitutional mandate that Sharia law governs marriage for Muslims in the Gambia, and the Cadi Court has jurisdiction to apply Sharia in matters of marriage, divorce, and inheritance for Muslim parties are clearly at odds. This conflict between the Constitution and Islamic personal law regarding the age of marriage has not been challenged in The Gambian Courts[120].

[118] Ethiopia also enacted The Revised Family Code (2000): The current legal age of marriage in Ethiopia, for boys and girls is 18 (Family Code, 2000, Art. 7)
[119] Sahih al-Bukhari, Hadith 5134.
[120] Reference: Tahirih Justice Center. Forced Marriage Overseas: The Gambia.

Both Article 35 of the Ethiopian Constitution and Section 28 of the Gambian Constitution guarantee equal equal marriage and property ownership rights. However Sura An-Nisa provides exact guidance on the distribution of inheritance with males to receive twice the share of female heirs. Parents inherit a sixth of the estate if there are children, and if there are no children, the mother receives one-third or a sixth. If a man's wife has no children, he inherits half of her possessions, while a woman's husband inherits one-fourth or an eighth. This unequal treatment is a direct result of Allah's ordinance, which contradicts the guarantee of equal treatment in Section 28 of the Gambian Constitution.

2. The Quran provides guidance on divorce, including the waiting period (Iddah) for women and the conditions under which divorce may be initiated (Surah At-Talaq, 1-7) and the potential for reconciliation between divorced spouses (Surah Al-Baqarah, verse 229). Verse 228 of Surah Al-Baqarah addresses the issue of maintenance (Nafaqah) for divorced women during the waiting period (Iddah) and emphasizes the husband's responsibility to provide for his ex-wife's financial needs during this period. In Gambia, Islamic jurisprudence has yet to evolve to current realities, leaving divorce as a significant obstacle for women in The Gambia's Cadi system. This results in women leaving their marital homes empty-handed after years of marriage and building a family, whether they initiate the divorce or not. This might be attributed to the unequal distribution of labour within the patriarchal framework, where men are responsible for providing for the family and everything belongs to them. In Islam, men are accountable for the children's upkeep even when the marriage is annulled, but recent global advancements where both men and women work and contribute to their families as

partners have not been reflected in the Cadi courts, and women's contributions to building the home are not recognized.

3. In Ethiopia, Article 36 of the Constitution guarantees equal rights to children born in and out of wedlock. However, the Gambian Constitution does not address this issue explicitly azlthough section 33 of he Constitution protects every human being from discrimination. The Quran does not provide clear guidance on the inheritance rights of illegitimate childre and Islamic jurisprudence (figh) and legal principles derived from the sources guide this matter. According to Islamic jurisprudence, illegitimate children do not inherit from their biological father's estate, regardless of whether their paternity has been acknowledged. The case of Ebrima D.M. Jagne v. Mass Jagne, Yassin Jagne and the Attorney General Civil Appeal No **GCA 005/2015** support this argument**.**

The judicial precedent promoting gender equality in The Gambia has been inconsistent, as illustrated by **Ebrima D.M. Jagne v. Mass Jagne, Yassin Jagne, and the Attorney General Civil Appeal No. GCA 005/2015** (unreported). This case highlights the challenges of reconciling common law and Sharia, particularly regarding the rights of children born outside wedlock and using deeds of gift for property distribution. The Cadi court's panel focused on the appellant's birth legitimacy, as Sharia laws do not recognize a child born out of wedlock as an heir, contradicting common law, which allows inheritance regardless of legitimacy. As a result, the Cadi panel excluded the appellant from inheriting his father's estate, declaring him "illegitimate." This case underscores the conflicting legal positions and raises concerns about privacy rights due to the public disclosure of private family matters.

The case highlighted the potential utility of a deed of gift to circumvent rigid Sharia inheritance rules, allowing both male and female children to inherit equally. However, the Cadi court exceeded its jurisdiction by invalidating the appellant's property assignment through a deed of gift without allowing him to defend his claim. This underscores the need for a more harmonized approach that respects religious traditions and legal principles while protecting individual rights under the Constitution. The Court of Appeal overturned the Cadi court's decision, emphasizing that the Cadi court had exceeded its jurisdiction by adjudicating the validity of the deed of gift, highlighting the importance of effective oversight mechanisms for appeal.

Similar conlficts arose in the cases of Isatou Secka V Susan Badgie[121] in The Gambia and Kedija Bashir[122] in Ethiopia, both cases being brought before the highest adjudicators in the respective countries.

Case Study of The Gambian Case of Isatou Secka V Susan Badgie GSCLR Supreme Court Of The Gambia (Civil Appeal No: 15/2012) 13" November 2014

The case of **Isatou Secka v. Susan Badjie**is a civil appeal in The Gambia. The issue was whether a Muslim marriage is invalid if a Muslim male has a subsisting civil marriage. The court held that the Civil Marriage Act 1938 only applies to marriages celebrated under its provisions and does not invalidate other marriages celebrated under different laws. The right of a Muslim male to marry more than one wife under Sharia law is unalterable. The court also

[121] 'ISATOU SECKA v SUSAN BADGIE.GAMBIA (CIVIL APPEAL NO: 15/2012)'.
[122] Girmachew Alemu, 'Kedija Bashir et al. vs Aysha Ahmed et Al.'

considered various statutes, including the Constitution, the Muslim Marriage and Divorce Act, and the Sharia Law Recognition Act.

The case details reveal that on 4 April 1995, Susan Badgie (the respondent) and Ebrima Badjie (deceased) entered a civil marriage under the Civil Marriage Act 1938, which only permits monogamous unions. During their marriage, Ebrima contracted another union with Isatou (the appellant) in a mosque, per the Muslim Marriage and Divorce Act 1941. It is worth noting that Ebrima was a Muslim at the time of both marriages. The legal proceedings were initiated at the High Court of The Gambia. However, the trial judge rendered a verdict without providing any logical reasoning or drawing from relevant precedents[123], stating that the marriage between Isatou Secka and Ebrima Badjie was not void but rather voidable at the applicant's discretion.

The Court of Appeal, upon review, determined that Ebrima Badjie's purported marriage to Isatou Badjie (Appellant) was invalid due to his existing marriage with Susan Badgie. The court reasoned that Ebrima Badjie lacked the necessary capacity to enter a second marriage under the provisions of the Civil Marriage Act of 1938. The Court of Appeal's ruling upheld the legal principle of monogamous marriage as established by the Civil Marriages Act.

The Respondent, discontented, appealed to the Supreme Court. The Court reversed the ruling of the lower courts. It opined that the Muslim male's entitlement to practice polygamy in The Gambia is sanctioned and upheld by various statutes, including the Muslim Marriage and Divorce Act of 1941 and the Constitution of The Gambia. The Civil Marriage Act of 1938

[123] 'Gambia Report _layout_FINAL_DIGITAL_2907.Pdf' (n 78).

applies solely to unions conducted according to its provisions and does not impact the validity or invalidity of other marriages, such as Muslim marriages. The right of the Muslim male to wed multiple spouses[124] is unwavering and remains exercisable, even if a person elects not to exercise the right. The Court states;

> *"The right of the Muslim male to marry more than one wife under Sharia Law is unalterable. The Muslim male may decide not to exercise the right, but the right remains exercisable. Under a person's Islamic personal law, one can decide to marry and remain married to one wife whether or not the marriage contract is a Muslim marriage or one contracted under the Civil Marriage Act, but that by itself does not mean that such a person had 'opted' out of his law. His decision is irreversible while he remains married to that one wife."*

The consequence of this ruling is that even if a Muslim man consensually enters into a monogamous marriage that is recognised under the Civil Marriage Act, the courts are still required to respect his right to have multiple wives as permitted by Sharia. This ruling effectively encourages a Muslim man to disregard the legal implications and consequences of a monogamous union under the Act despite having the option to choose a civil marriage that is legally limited to one partner. The Supreme Court's decision establishes that as long as the parties involved are Muslims, Islamic Law will be applied without exception.

[124] Surah An-Nisa (4:3)

This judgement was delivered in 2014. However, third-party claims are still pending due to the ruling. The Respondent, the first wife, relying on her rights from a Civil Marriage, took over her husband's estate and began selling some of the landed property. The Supreme Court adjudged that the Plaintiff's marriage was valid since the deceased was a Muslim, and as long as one is a Muslim, Sharia law applies. This also implies that the estate ought to be divided according to Sharia, and the Respondent, being a non-Muslim, cannot inherit from the deceased[125] Consequently, the estate is passed on to the Plaintiff and her children. This case put the Respondent in a significantly unfavourable position after more than 15 years of marriage, causing her to lose all the assets and properties she and her deceased husband had jointly acquired. In reverse, the protective intent of the Constitution to protect women's rights is infringed by the same constitution.

From this instance, it is apparent that as long as the individuals involved are Muslim and the issue relates to Islamic personal law, the Supreme Court of the Gambia, which is responsible for interpreting the Constitution, will allow the utilisation of Sharia, regardless of the outcome. However, the situation is different in Ethiopia, where the House of the Federation has been established and can interpret the Constitution[126]. Ethiopia also has article 9 (1), which states that the Constitution holds supreme authority and any law, customary practice, or decision of an organ of state or public official that contradicts the Constitution shall be null and void. To further illustrate the intersection of Sharia and Constitutional law in Ethiopia, let's consider the case of **Kedija Bashir et al. vs Aysha Ahmed et al.[127]**

[125] Sahih al-Bukhari, Book 80, Hadith 7566; Sahih Muslim, Book 25, Hadith 4163.
[126] Articles 61 and 62 FDRE Constitution
[127] Federal Supreme Court Cassation Division File No. 12400/1999

Case Study of the Ethiopian case of Kedija Bashir et al. VAysha Ahmed et al. Federal Supreme Court Cassation Division File No. 12400/1999

This case began in the Naiba First Instance Court of Sharia in Addis Ababa in 1992 (Ethiopian calendar dates). The plaintiffs claimed inheritance rights to their late grandfather Ato Aman Shene's house, held by the defendants, who were also grandchildren of Ato Aman Shene. The plaintiffs sought a court order based on Sharia law for the defendants to hand over their share of the property. The defendants objected, citing their right under Article 34(5) of the FDRE Constitution to refuse the court's jurisdiction and claimed the issue had been previously settled under the Ethiopian Civil Code. The Naiba Court overruled the objection due to the defendants' failure to appear in court and ruled in favor of the plaintiffs.

The defendants appealed to the Federal High Court of Sharia, arguing jurisdictional error. The respondents contended that one party's consent sufficed for jurisdiction. The Federal High Court of Sharia upheld the Naiba Court's judgment, noting the case predated the Federal Courts of Sharia Consolidation Proclamation No. 188/1999. The defendants then appealed to the Federal Supreme Court of Sharia, which rejected the appeal as inadmissible. On March 1, 1995, the defendants appealed to the Federal Supreme Court Cassation Division, arguing the Sharia courts ignored their jurisdictional objection. On July 25, 1995, the Cassation Division rejected the appeal, finding no fundamental error of law by the Sharia courts.

On February 2, 1996, the Ethiopian Women Lawyers Association (EWLA) petitioned the Constitutional Inquiry Council (CCI) on behalf of W/o Kedija Bashir, a member of EWLA and

one of the initial defendants in the present case. EWLA argued that the decisions of the Federal Supreme Court Cassation Division and the Courts of Sharia have violated Article 34(5) of the FDRE Constitution. The CCI found that the decision of the Naiba Court violated Article 34(5) of the FDRE Constitution and recommended the nullification of the decision based on Article 9(1) of the FDRE Constitution. The House of Federation approved the recommendation of the CCI.

In the Kedija Bashir et al. case the Federal Supreme Court Cassation Division, an authority in this legal process, rejected the appellants' petition, stating that the Federal Courts of Sharia committed no fundamental error of law. However, the Federal Supreme Court has the power of cassation over any final court decision containing a basic error of law[128]. The Federal Courts Proclamation 9 does not provide a power of cassation review of decisions of Courts of Sharia by the Federal Supreme Court. The Proclamation provides that Federal Courts of Sharia are given exclusive jurisdiction over a case brought before them. Once a case is brought before a Court of Sharia and the parties consent, such a case cannot be transferred to a regular court[129]. Thus, except for the general and controversial phrase 'over any final court decision' under the FDRE Constitution, there is no clear legal basis for the Federal Supreme Court to exercise cassation power over decisions of the Courts of Sharia[130].

In this case, the Ethiopian Constitution has implemented safeguards for applying Sharia. Seidel asserts that the FDRE Constitution provides mechanisms to handle conflicts within the

[128] Article 80(3) (a) of the FDRE Constitution
[129] 'Federal Sharia Proclamation_188_1999_Ethiopia.Pdf'.Article 5 (4)
[130] Alemu (n 122).

interdependent spheres of state, groups, and group members[131]. The law did not give Sharia courts blanket jurisdiction but ensured Islamic law was interpreted concerning individuals' and people's fundamental freedoms and rights to live together based on equality and without discrimination as stated in the preamble. Scholars[132] contend that the Constitution's mechanisms are debatable, arguing that the Cassation bench's role is limited to reviewing civil procedural law or fundamental legal principles, not Sharia laws. A comparative analysis will consider how Ethiopia and The Gambia address the relationship between Sharia and constitutional provisions, to draw insights on balancing religious law with conventional freedoms and rights.

Comparative Analysis

The Gambia has two-tier Sharia courts system - the Cadi's Court and the Cadi's Appeal Panel[133]. The Cadi's Appeal Panel hears appeals from the Cadi Court and District Tribunals involving Sharia law. The Supreme Court of the Gambia, the ultimate court, can interpret or enforce the Constitution and hear appeals from the Court of Appeal[134]. However, per Section 128, the Supreme Court cannot hear appeals from Sharia Courts. Thus, the Cadi's Appeal Panel is the final Sharia court in the Gambia, with no further appeal options[135]. The Gambia's constitutional design prevents interference with Sharia Courts, as decisions of the Cadi's Appeal Panel are not subject to review. Conventional courts, however, have a three to four-tier system with the possibility of a review by seven Supreme Court justices.

[131] Seidel (n 31).151-164
[132] Katrin Seidel and Muhammad Abdo
[133]Section 137 and 137 A 1997 Constitution of the Gambia
[134] Section 137 A (6) 1997 Constitution of the Gambia

[135] Section 128 (1) (a) (b) 1997 Constitution of the Gambia

In Ethiopia, a three-tier Sharia Court structure exists[136], and additional Constitutional measures are in place to review decisions that go against the Constitution's spirit. Among these measures is Article 9(1), which emphasises constitutional supremacy, stating that any customary practice or decision that contradicts it is null and void. Article 80(3a) also grants the Federal Supreme Court the power of cassation over any final court decision with a fundamental error in law. It gives the House of Federation, representing the Nations, Nationalities, and People of Ethiopia, to interpret the Constitution[137]. The Constitution further established the Council of Constitutional Inquiry (CCI), which can investigate constitutional disputes and provide Constitutional interpretation when required[138]. The Council will examine the matter and present it to the House of Federation for a final decision.

The Constitution allows for reviewing the intersection of Sharia Court decisions by other state organs by requiring the parties' consent as a condition precedent to initiate the jurisdiction of the Sharia Court. The Sharia Courts must apply the Civil Procedure Code[139] and not their own rules. Suppose a litigant is dissatisfied with a decision of the Sharia Courts based on consent, jurisdiction, and court procedure; they can seek intervention from the Federal Supreme Court of Cassation and the House of Federal through the Council of Constitutional Inquiry. This method serves as a way to enforce checks on the Sharia Court, serving as a means to prevent and resolve tensions. Katrin Seidel[140] portrays it as the cassation bench of the Supreme Court primarily examining how procedural matters are conducted based on fundamental laws. They refrain from delving into Sharia laws because they lack detailed knowledge. Consequently,

[136] 'Federal Sharia Proclamation_188_1999_Ethiopia.Pdf' (n 129). Article 3
[137] Article 62 (1) FDRE Constitution
[138] Article 84 (1) FDRE Constitution
[139] Federal Sharia Proclamation_188_1999_Ethiopia.Pdf' (n 134).article 6 (2)
[140] Seidel (n 31).at page 160 - 161

the cassation bench's scope is restricted to reviewing the application of civil procedural law or determining whether fundamental legal principles have been breached.

Muhammed Abdo[141] posited that The Constitution permits the acknowledgement and validation of customary and religious laws in matters about personal status while possessing a supremacy clause that abolishes any law or custom that contradicts the Constitution. He sees this arrangement as problematic since evaluating such decisions and proclaiming them unconstitutional hinders the Sharia courts from having absolute authority over personal and family matters, which are of great significance to Muslims and their identity. Furthermore, Abdo contended that when parties willingly accept the jurisdiction of the Sharia Court, the result should be exempt from constitutional standards, as this contradicts the principle of legal pluralism that the Constitution establishes. This author hold a different perspective from Abdo. If Sharia Courts are bestowed with unrestricted authority, devoid of the application of the supremacy clause and the oversight of the Hof & CCI to scrutinize their adjudications, there is a potential for the Sharia Courts to be exploited. Consequently, Muslim individuals may encounter obstacles in exercising their constitutionally guaranteed rights and freedoms. Granting complete authority to Sharia Courts over personal and family matters has the potential for misuse and discriminatory practices. This concern is exemplified in The Gambia, where the jurisdiction, judgments, and procedures of the Cadi are unquestioned. The court's rulings, which do not find their basis in the Quran or Sunnah but in analogical reasoning, exhibit inconsistency due to variations in individual Cadis' perspectives, logical reasoning, and inclination to different Islamic schools of thought. The Gambia must address the conflict of

[141] Abdo, '7. Federal Sharia Courts in Addis Ababa' (n 37).

laws contradicting the universal application of rules under the Constitution. Consenting to the Court's jurisdiction, akin to Ethiopia, serves as a robust control mechanism that empowers women to mitigate unfair treatment imposed by Sharia Courts, thereby allowing them to determine how to resolve their disputes.

Furthermore, states are bound by international commitments and obligations to uphold the rights of their Muslim citizens. As such, they must honour these commitments by affording Muslims the option of utilising a forum that guarantees and protects their rights. Failure to subject Sharia Court decisions to scrutiny under the supremacy clause could result in the religious justice system neglecting its duty to safeguard the constitutional rights of Muslims.

CHAPTER 4 RECOMMENDATIONS AND CONCLUSIONS

The Constitutional design of adopting multiple legal systems in The Gambia and Ethiopia is a powerful demonstration of embracing diversity. Legal pluralism not only respects and recognises the unique characteristics of a society but also enhances access to justice for marginalised and underserved communities. By providing alternative dispute resolution mechanisms, such as religious courts, legal pluralism ensures accessibility, affordability, and cultural relevance for specific groups. Embracing diverse legal traditions promotes social cohesion and mutual understanding among different communities, fostering a sense of belonging and solidarity within society. It is crucial for peaceful coexistence and conflict resolution in societies with deep-seated cultural or religious divisions. It enables communities to govern according to their norms and values, thus mitigating tensions and preventing social unrest. As said by Berihun A. Gebeye,[142] "This type of constitutional designs and practices offer better options to women than what the universalists or cultural relativists prescribe". Gambian women have yet to benefit from the constitutional opportunities provided fully. Consequently, the following recommendations are proposed, with the aim of enabling the complete realisation of constitutional assurances to marginalized groups and fostering a more robust experience of legal pluralism.

[142] *A Theory of African Constitutionalism* (n 30).

Recommendations

Within The Gambia, the coalescence of Sharia and Constitutional law brings to light the dilemma of section 33(5)(c), which permits discrimination in adoption, marriage, divorce, burial, property inheritance, and other personal law matters. This clause introduces a contradiction within the Constitution. Eliminating this provision will establish uniformity and conformity with the more progressive aspects of the Constitution. Furthermore, it will facilitate the achievement of legal parity between genders, particularly in personal law affairs. It will also eliminate all forms of discrimination. To guarantee that women are granted equal opportunities, the implementation of sharia and customary law must adhere to the explicit provisions of Chapter 4 of the Constitution, which safeguards women from discrimination. The interpretation and application of customary and sharia laws must explicitly align with the principles of non-discrimination outlined in Sections 33(2) and (4) of the Constitution.

In The Gambia, there are a variety of laws related to family matters, including the Constitution of 1997, the Muslim Marriage and Divorce Act of 1941, the Christian Marriage Act of 1862, the Married Women's Property Act of 1885, the Matrimonial Causes Act of 1986, the Civil Marriage Act of 1938, the Women Act of 2010, and the Children Act of 2005. The Gambia must move towards establishing a coherent family law system that applies to all and reflects the current family structure while safeguarding women's rights across all legal systems. This will promote consistency, streamline legislation, and alleviate the conflict between Sharia and the Constitution.

The Gambian Sharia Courts must ensure they interpret and decide cases while considering the Constitutional guarantee of rights and freedoms and refrain from applying patriarchal reasoning. To achieve this, they can draw inspiration from Article 9 (1) of the Ethiopian Constitution, which emphasises constitutional supremacy and declares any customary or religious practice or decision that contradicts it as null and void. Furthermore, it is imperative to institute an additional level of appeal within the Sharia court system, supplementing the existing Court of First Instance and the Cadi Appeal Panel. This supplementary tier would afford litigants the opportunity for further recourse, thus signifying a comparable level of gravity within the sharia court system as observed in conventional courts. This necessitates endowing the Supreme Court with the jurisdiction to scrutinize rulings pronounced by the Cadi's Court, which can be effectuated by appointing additional judges well-versed in Sharia law to conduct comprehensive reviews.

The Gambia can also take inspiration from Article 34 (5) of the Ethiopian Constitution, which mandates that parties' consent is necessary to initiate the jurisdiction of the Cadi's court. This ensures that Muslims have the freedom to choose which court will hear matters concerning marriage, inheritance, and divorce rather than being compelled to attend the Cadi's court. Furthermore, to promote juris generative judgments, the formal courts appointing Judges should consider selecting individuals knowledgeable in Islamic Law.

It is recommended that the Gambia establish adequate mechanisms to ensure proper oversight of the Cadi Courts. The Cadi Courts not only deliver varying judgments on similar cases based on different Islamic schools of thought that the Cadis are trained in, but they also handle cases outside their prescribed jurisdiction of marriage, divorce, and inheritance. For example, Cadis

are adjudicating cases involving deeds of gifts, as seen in the case of **Ebrima Jagne,** and making decisions on child custody cases, which fall under the jurisdiction of the Children's Court according to Section 39 of the Children's Act. In the same vein, there should be uniformity or agreement on the Islamic school of thought to adhere to when it comes to family matters put for adjudication before the courts to avoid inconsistent outcomes by the cadis on similar subject matters.

The Judicial arm, responsible for interpreting and enforcing Islamic and Constitutional Law, should receive education on gender equality standards and principles. Ordinary law courts must ensure that statutory provisions do not discriminate against women and girls or hinder their socioeconomic progress. The Supreme Court decision in Isatou Secka v. Susan Badgie supra had a discriminatory outcome. The Women's Act also needs to be more consistently enforced in ordinary law courts, as seen in the case of Dawda Jawara v. Matty Faye Dawda Jawara v. Matty Faye SC CA 023/2016 (unreported), where the Supreme Court ruled that the property in question was not jointly owned despite contributions made by the respondent, Matty Faye. The decision should have considered the principle of joint and common endeavour and the economic value of contributions over time. This highlights the need for a capacity-building program on gender equality standards for both judges and the Cadi.

Ethiopia has demonstrated a more constructive approach to converging Sharia law and the Constitution. Therefore, two recommendations are proposed for Ethiopia. focusing on the

application of Civil Procedure by the Sharia Court and the need for precise definitions of "any final court decision[143]" and "state organ"[144].

Article 6 (2) of Proclamation No. 188/1999 obligates courts to implement civil procedure laws in their proceedings. However, this challenges Sharia Courts, as they utilise substantive Islamic law and state procedural regulations. The lack of comprehension among the Cadis of state law, particularly procedural law, impedes their application of the civil procedure. Nevertheless, they must adhere to the rules of civil proceedings followed by ordinary civil courts when hearing and disposing of cases, which may lead to conflicts. It can be said that the main procedural steps include confirming the parties' presence, obtaining the defendants' consent, reading the statement of claims followed by the statements for the defence, hearing the witnesses, securing the production of evidence if necessary, and ultimately, delivering judgment. In cases involving witnesses, there are differences between religious and state laws, such as the number of witnesses in Islamic law, where one male witness is considered equal to two female witnesses[145]. Moreover, a statement from a Muslim is given more weight than a statement from a non-Muslim[146]. In this particular context, it is recommended that Ethiopia considers adopting the approach utilized by the Gambia, which involves implementing distinct Cadi Rules for the Cadi Courts or integrating the Sharia rules of procedure into civil court regulations. Furthermore, providing comprehensive training for both Cadi and Judges is essential to ensure effective implementation.

[143] Article 80 (3) of the FDRE Constitution
[144] Article 9 of the FDRE Constitution
[145] Surah Al-Baqarah (2:282), which discusses the requirements for witnesses in financial transactions
[146] Ibid

Muhamed Abdo argued that Article 80 (3) (a) gives the Federal Supreme Court the power of cassation over any final court decision containing a basic error of law;

"*appears to be limited to the final decision of regular courts, federal and regional courts. It does not seem to extend to Shariat courts, as the preceding sub-article talks only about the regular courts. This is bolstered by Article 10 of the Federal Courts Proclamation, Proclamation No. 25/96, which specifies the types of final decisions 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 sharia courts"*

The Ethiopian Constitution should explicitly mention "any final decision," including decisions of the Sharia Courts. This, along with Article 9(1) subjecting decisions of the Sharia Court to the Constitutional supremacy clause, provides an excellent solution to the intersection of Sharia and Constitutional Law. It will also give a clear legal basis for the review power of the Federal Supreme Court Cassation Division over decisions of the Sharia Courts.

The precise delineation of the term "state organ" is imperative, particularly in light of ongoing discourse in Ethiopia concerning the classification of Cadi's Courts. I posit that Cadi's Courts should be deemed state organs given their formal recognition, establishment, and financial backing[147] by the state, coupled with their role in adjudicating disputes among the state's citizens. Nonetheless, for an exhaustive elucidation of the concept of a state organ, it is

[147] 'Federal Sharia Proclamation_188_1999_Ethiopia.Pdf' (n 129).

indispensable that the FDRE Constitution explicitly defines and incorporates Cadi's Courts within this category.

Conclusion

Islamic family law, although considered progressive, was designed to suit the societal norms of the 6th century. As we progress into the modern era, it is imperative that Islamic family law aligns with the fundamental principles of equality between men and women as enshrined in the constitution. Islamic teachings underscore the notion of equality among all individuals, emphasizing that every person is equal in the eyes of God, irrespective of race, ethnicity, or social standing[148], yet the Sharia provisions are sometimes in tension with conventional equality rights. Ultimately, it is essential to afford Muslims the autonomy to determine the resolution of their familial affairs, but ways must be devised to ensure protection of the rights of marginalised groups like women, within the legal framework that is patriarchal.

The Gambia and Ethiopia are both confronted with the challenge of addressing the absence of specific mechanisms within their respective constitutions to regulate rulings of Sharia courts that deviate from constitutional standards. Although the Ethiopian state exercises authority over the private sphere and acknowledges local and religious legal systems, the constitutional recognition of Islamic law has created ongoing negotiation opportunities to reorganize power dynamics. Nonetheless, the existing mechanisms established by the Constitution of Ethiopia, such as the Cassation Division, the CCI of the House of Federation, and the application of Article 9(1), have been deemed insufficient in instances of conflict. Therefore, tangible

[148] Surah Al-Hujurat (49:13): "O mankind, indeed We have created you from male and female and made you peoples and tribes that you may know one another. Indeed, the most noble of you in the sight of Allah is the most righteous of you. Indeed, Allah is Knowing and Acquainted."

solutions are imperative to navigate the intersection of Sharia and constitutional law. The deficiency of conflict resolution provisions between Sharia and state law pertaining to constitutional guarantees and universal human rights necessitates attention through legal channels. It is critical that the constitutional recognition of religious laws be accompanied by a robust legal and institutional framework that facilitates and oversees their interplay.

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