THE SUBSTANTIVE LAW APPLIED BY MUSLIM COURTS IN ETHIOPIA

Possible Justifications for the Continued Application of the Sharia

By Zaki Mustafa

Introduction—The Position Before the Civil Code:

It may be helpful to begin by stating that Sharia courts have for a long time had a *de facto* existence in Ethiopia[1] and were performing very much the same functions that they are performing today, long before any legislation was passed to regulate and organize their constitution and functions. It may also be helpful to remember that Sharia courts, wherever they exist in the world today, are viewed as special courts designed to serve a special function, namely the determination of certain questions falling within the area of Muslim personal law. As far as Ethiopia is concerned the organization and jurisdiction of Sharia courts are governed by the Kadis and Naibas Councils Proclamation 1944,[2] article 2 of which provides:

"There shall be established Kadis and Naibas Councils in such places as we may determine with jurisdiction to decide:-

a. any question regarding marriage, including divorce and maintenance, guardianship of minors and family relationship, provided that the marriage to which the question related was concluded in accordance with Mohammedan law or the parties are all Mohammedans;
b. any question regarding wakf gift, succession or wills provided the endower or donor is a Mohammedan, or the desceaed was a Mohammedan at the time of his death;
c. any question regarding the payment of the costs incurred in any suit regarding the aforementioned matters.

These provisions made the jurisdiction of Ethiopian Muslim courts similar to that of Sharia courts in the Sudan, Nigeria, Niger, Senegal and other African countries where special courts exist to handle the personal law matters of the Muslim part of the population. The drafting of these provisions appears to raise some rather interesting questions. To begin with sub article (a) appears to bring the following marriage situations within the jurisdiction of the Muslim Courts:

1. The situation where both parties are Muslims and the marriage was concluded in accordance with Muslim law.
2. The situation where the husband is a Muslim and the marriage was concluded under Muslim law.

1. J. S. Trimingham, *Islam in Ethiopia*, pp. 137, 151, 227, 230, 232 Frank Cass and Co. London, 1965.
2. Proclamation No. 62 of 1944.

3. The situation where both parties were not Muslims at the time when they first married, but later adopted Islam as their religion.
4. The situation where both parties are Muslims but the marriage was not concluded in accordance with Muslim law.
5. The situation where neither of the parties is a Muslim but the marriage was concluded in accordance with Muslim law.

Although situations 1-3 could reasonably be assumed to have been contemplated by the draftsman of this article, it is difficult to imagine that he intended the article to apply to situations 4 and 5, but in view of the use of the conjunction or in the last part of the proviso to sub-article (a) one has no option but to say that they are included. It is difficult to see how non-Muslims can contract marriages under Muslim law or how Muslims can contract a valid marriage outside the rules of Muslim law.

Another point arising out of the drafting is to be found in sub-article (b) where we find reference to *wakf* gift, which is a misdescription of the institution referred to. In Islamic law reference is made to *wakf* which is defined as "a thing which while retaining its substance yields a usufruct and of which the owner has surrendered his power of disposal with the stipulation that the yield is used for permitted good purposes.[3]" This is the Islamic law equivalent of the English law institution of trust and just as it is unusual to talk about a trust gift in English law, it is unusual to refer to *Wakf* gift in Islamic law. A question may arise as to whether the Legislator meant *Wakf* pure and simple or a special variation of that institution known as *Wakf* gift. The courts have so far treated the words as referring to *Wakf*. One cannot help wondering, however, whether the introduction of the word gift in the description of *Wakf* is in any way responsible for the omission of gift as a subject of litigation from the jurisdiction of Muslim Courts. *Hiba* (gift) is considered one of the personal law questions falling within Jurisdiction of Sharia courts in all those Muslim states where Sharia Courts have a separate existence, because of its close relationship with and its effect on succession. Could it be then that the Legislator meant to include both *Wakf* and gift but the omission of a comma which should have separated the two words created the problem just discussed? This is quite possibly what happened.

Subject to these brief remarks on the drafting of article 2, we can then say that Islamic courts in Ethiopia have been empowered to exercise jurisdiction in relation to all the matters mentioned in that article and that they have in fact been doing so.

The Introduction of the Civil Code and Its Possible Effect On the Substantive Law Applied by the Muslim Courts: When the Civil Code was promulgated in 1960, one of the questions which arose was whether it had in any way affected the rules of Islamic law which the Muslim Courts were applying. To answer that question one would have to look at article 3347(1) of the Civil Code. That article provides:

> "Unless otherwise expressly provided, all rules whether written or customary previously in force concerning matters provided for in this Code shall be replaced by this Code and are hereby repealed."

3. See Shorter Encyclopaedia of Islam p. 624, Luzac, London, 1953

When we examine the Code we find that Book II[4] carries very detailed provisions governing matters of marriage, divorce, maintenance, guardianship, family relationships, testate and intestate succession, gifts etc. It appears to follow logically from this that Sharia rules are among the rules affected by this article. Book II covers all the matters falling within the jurisdiction of Sharia Courts except Wakf. [5] The Civil Code is intended to be universally applicable to all residents of the Empire in relation to all the matters that its provisions set out to regulate. No exception is made in favour of any group or class. Book II carries no saving clause in favour of Sharia rules. It thus seems an inescapable inference that the Civil Code intended to abrogate those Sharia rules which were in force before its promulgation, in so far as they were not expressly saved, in relation, to all matters covered by its provisions. If this inference is accepted, it would follow that Muslim Courts, whose only function is to apply those Sharia rules to certain family relations pertaining to Ethiopian Muslims, would have no substantive law to apply and should have seized to exist as soon as the Civil Code came into force.

We find however that Muslim courts do exist. The legal propriety of their continued existence has not so far been seriously challenged. We also find that the substantive law which they apply is the Sharia, and their right to apply that law has not so far been seriously questioned. The problem of whether the continued application of Sharia rules is compatible with the Civil Code, has, until now, been an academic problem occupying the minds of scholars alone. The institutions immediately concerned are not even aware that a problem exists. It may be fair to start by admitting that there is no easy academic answer to the 'academic' problem created by article 3347(1) of the Civil Code. There are however a number of possible explanations which we shall now examine:

Article 40 of the Revised Constitution 1955: A Question of Supremacy of Constitutional Provisions

Article 40 of the Revised Constitution provides:

> "There shall be no interference with the exercise, in accordance with the law, of the rites of any religion or creed by residents of the Empire, provided that such rites be not utilized for political purposes or be not prejudicial to public order and morality".

Muslim law considers marriage as well as some of the questions relating to it as religious rites.[6] The same is true of succession and some forms of gift. Can it not therefore be argued that since the Constitution guarantees the free exercise of religious rites, then any interference with those rites is null and void? The obvious weakness in this argument is that article 40 of the Revised Constitution guarantees the free exercise of religious rites, "in accordance with the law", and since there is no doubt that the Civil Code is a law, one would conclude that there is no inconsistency. But that is not the end of the matter. The Amharic version of article 40 does not include the phrase "in accordance with the law", and thus appears to be absolute in its purport. The Amharic version is the official version and would

4. Article 550-1125.
5. It could be argued that even *Wakf* is covered by the provisions relating to gifts because the Legislator appears to have treated it as a form of gift in Proclamation No. 62 of 1944.
6. Muslims are implored to marry, to treat their wives well ect. by various verses in the Kuran and a number of traditions of the Prophet. One of the traditions goes as far as saying that marriage is essential to complete the religion of a true Muslim.

in the case of any conflict between it and the English version, be considered the more authoritative version.[7] One could therefore argue that since article 3347(1) of the Civil Code appears to be inconsistent with article 40 of the Constitution, in as much as it attempts to interfere with marriage and succession in the case of Muslims, it shall be amended or abrogated to the extent which would remove the inconsistency between it and article 40 of the Constitution. But one must hasten to admit that although this line of argument appears to afford some explanation to the problem, it by no means offers a satisfactory answer to the academic question raised. One can almost bet that it would not carry a lot of weight with the courts if the problem is litigated.

The Civil Code Provisions Relating to Religious Marriages: A Possible Escape:

There is no doubt that marriage and the consequences flowing from it constitute by far the most important question in Muslim personal law. The Civil Code deals with the question of marriage in great detail. The Code refers to two classes of marriage: Civil marriage (arts. 597-604) and other marriages: (arts. 605 and 606). The category of other marriages includes religious marriage and marriage according to custom. Article 605 (1) provides:

> "The conditions on which a religious marriage may be celebrated and the formalities of such celebration shall be as prescribed by the religion of the parties concerned."

This article appears to sanction the application of Muslim personal law to the very important question of marriage. It can therefore be argued that since the marriage was concluded according to Muslim law, then that law would govern the marriage and all its consequences. If this is so then that part of Muslim personal law which applies to marriage has been incorporated into the Civil Code by virtue of article 605(1) and the continued application of the relevant legal rules as well as the continued existence of Muslim courts, as the organs for the application of those rules, is therefore legally justified.

This argument, plausible as it may be, does not stand close scrutiny. There are at least two good arguments against it. Firstly article 605(2) says:

> "The provisions of this Code relating to the conditions common to all forms of marriage shall be complied with in all cases."

When these conditions are examined one discovers that there are some of them that are not consistent with the Sharia e.g. the provisions relating to bigamy and the period of widowhood, *ida* (arts. 585 and 596 respectively). These provisions which are common to all forms of marriage clearly show that it was not the intention of the Legislator to permit the application of religious or customary rules in their totality.

Secondly the article appears to be aimed at recognising and giving effect to marriages *celebrated* in accordance with one's religion, i.e. recognising the union concluded in accordance with religious rites as lawful. It was probably not the intention to make marriage and all questions stemming from it subject to some special

7. See article 125 of the Revised Constitution.

law applied by a set of special tribunals. For if that were so, then there should be special sets of rules for the various Christian sects and for the Jews and may be even special courts to apply those rules. The elaborate provisions of the Civil Code would be confined to situations where the parties elect to conclude their marriage and have it governed by those provisions. One can hardly imagine that this could have been the intention.

The Intention of the Legislator:-

One of the main questions to be asked in order to ascertain the meaning and true purport of any enactment is; what intention did the Legislator have? Various theories have been evolved as to how legislative intent can be ascertained. This is not the appropriate place to discuss those theories. It suffices to say here that in our attempt to ascertain the intention of the Legislator we would look both at the wording of the article concerned, as well as the discussions and all other relevant circumtances which preceeded and followed the Promulgation of the Civil Code.

Article 3347(1) is very clearly worded and whether we read it independently or in conjunction with other articles it leaves us in no doubt that it was intended to have unviersal application. If we take it that the Legislature had intended to use the words actually employed in that article and had given perfect expression to its intention, we would have no option but to conclude that the Legislature intended to abrogate the Sharia rules that were in application before the coming into effect of the Civil Code. There are, on the other hand, a number of other relevant factors which make such an interpretation appear unreal: To begin with there is a substantial amount of evidence that the Codification Commission intended to allow most, if not all, of the rules of Muslim personal law to continue unaffected by the Code. To give effect to this Professor R. David prepared at the request of the commission a set of draft provisions which would have enabeld Sharia rules relating to marriage, succession etc. to apply, with certain exceptions.[8] The draft provisions prepared by Professor David were not incorporated in the final draft and no reason could be found for their omission. However that reason is not difficult to guess. Both Professor David and the Commission were fully aware that the problem of making the Civil Code provisions relating to personal status applicable to Muslims, involved the taking of policy decisions by the Government, rather than by a technical commission of legal experts. The Government might have thought it, undesireable to create the impression that it was in any way interferring with the rules of the draft provisions was intended to leave the rules of Sharia intact and unamended Sharia applied by Muslem courts. This means that the omission of rather than abrogate them completely. This view finds support in an incident which occured during the discussion of the Civil Code in Parliament. While Parliament was debating the chapters of the Code dealing with personal status, one of the members asked whether those chapters were intended to replace Sharia rules in the case of Muslims. The speaker sent the question in writing to the Minister of Justice. The written answer of the Minister stated that the promulgation of the Civil Code was not intended to affect the Muslim courts or the rules they were applying.

The Minister's reply could be considered as a clear manifestation of "governmental intention". But one may legitimately ask whether the Minister of Justice is

8. The exceptions related to bigamy, age of majority and administration of succession.

the competent authority to interpret the Civil Code, and whether his statement has any legal standing *vis-a-vis* a law passed by Parliament and approved by the Sovereign? In answer to this we could say that the Minister was not really interpreting the Code, he was merely defining to Parliament the scope of application of a particular part of the Civil Code as the Government understood and intended it. Parliament, therefore, passed the Civil Code on the understanding that it did affect the Sharia rules of personal law applicable to Muslims. We may thus have in this incident an example of a situation where the Legislature had not given correct expression of its intention.

In addition to this there is evidence that Muslim Courts as well the law they apply exist by the wish and on the order of the Sovereign. Immediately after the promulgation of the Code it was rumoured that Muslim Courts would be abolished and the application of Sharia rules would cease. This led a number of Muslim dignitaries and elders to seek audiance with the Emperor and to sound their apprehensions. His Imperial Majesty assured them that nobody shall interfere with the work of the Sharia courts. In consequence of this meeting and perhaps also as a result of the question raised in Parliament, the Minister of Justice sent out a circular addressed to the President of the Court of Shariat informing him that all Muslim courts should continue to function in accordance with the provisions of the 1944 Proclamation. This circular was not gazzetted. Since then the Ministry of Justice and the Muslim courts have been working and dealing with each other on that understanding. Although the circular, taken in isolation may raise a jurisprudential question similar to that already raised about the authority of the Minister of Justice to interpret or limit legislation passed by Parliament, it seems to have much more behind it than the authority of the Minister of Justice. It has the authority of the Sovereign. The Sovereign had in the present case sufficiently manifested His will when He assured Muslim elders that nobody would interfer with the work of the Sharia Courts.

We can thus say that Muslim courts and the Sharia rules which they apply have more than a *de facto* existence and that if a question as to the legality of the continued application of the rules of Muslim personal law to Muslims, is ever challenged, there would be at least two good answers to it namely:

1. The true intention of the Legislature was that Sharia rules should not be affected by article 3347(1) and
2. The wish of the Sovereign is that the Sharia should continue unaffected.

But would it not have been much tidier if a short article was included at the beginning of Book II stating that the provisions of that part of the Civil Code shall not apply to matters affecting the personal status of Muslims and falling within the jurisdiction of Muslim Courts as defined in Proclamation No. 62 of 1944.

The School of Jurisprudence Followed By The Courts

Generally speaking the indigenous Muslim population of Ethiopia follow one or the other of three of the current *Sunni* Schools of Jurisprudence, namely the Hanafi, the Shafi'i and the Maliki Schools. There are no known adherents to the Hanbali School among the indigenous population. There are however a few *Zaidis* and *Ibadis* (both of which are *Shi'a* sects) among the immigrants from Southern Arabia. It is said that the followers of the Shafi'i school are a majority among Ethiopian Muslims

but it is difficult to ascertain this. There has been a time when Hanafis constituted a majority on the court of Sharait. At present most of the Kadis are Shafi'i's with some Hanafis and a few Malikis in Eritrea.

In a situation such as this, when the Muslim population does not adhere to one School, the question naturally arises as to the School which should be followed by the courts. Had all the Muslim population or a substantial majority of them been followers of one school, the logical thing to do would have been for the courts to follow that School. In cases where the Muslim population of a state follows more than one school, one usually finds that there are three possible alternatives for determining the school to be followed by the courts:

1. The state may deem it fit to prescribe the school to be adhered to. This would be a legislative act which the courts would have to obey. This course of action had been taken in Egypt, the Sudan and some other countries. Ethiopia has not followed this particular course. Although this method of determining the school whose principles and teachings are to be applied by the courts, has the obvious merit of making the law definite and certain both to courts and the litigants, it is of doubtful validity as far the principles of the Sharia are concerned as we shall shortly see.
2. The courts may choose to follow the school to which the parties belong. This alternative has two obvious merits. In the first place it would afford the parties the chance to be judged by their own personal law in matters affecting their personal status which may be highly desireable. In the second place, it would help to avoid the difficulties and anamolies which would arise when parties who had concluded their contract of marriage in accordance with their own school of jurisprudence, find that questions relating to maintenance, family relationship, divorce and the like, are to be determined in accordance with the rules of some other school. This alternative will also ensure that the law which is applied on appeal, if there is any, is the same as that applied at first instance. However, this alternative has its own difficulties. It does not solve the problem of what is to happen when the parties belong to different schools. One is also not sure whether it is practical or desireable to put the Kadi in a position in which he would have to apply all the schools to which litigants appearing before his court may belong. Muslim Courts in Ethiopia do not follow this alternative.
3. The court may follow the principles of the school to which the Kadi belongs. This is what the Muslim courts in Ethiopia do. Although this alternative appears to raise a number of problems to which we shall refer below, it is the one alternative that is consonant with the teachings of the Sharia.

The Orthodox Sharia View on the School to be Followed By the Kadi:

There is a famous Sharia maxim which says "*Al Kadi yakdi ala madhabihi*". (A judge shall only decree in accordance with his own School).

The Sharia requires that only those who are well versed and throughly knowledgeable in the Sharia can be appointed as Kadis. Some of the leading *imams*, require that the Kadi should be an original interpreter of the basic Shara sources, able to understand, and to extract rules from them for himself without the need to follow the opinion of anybody else. But some of the Orthodox *imams*, including

Abu Hanifa and Malik say that it is possible to appoint an imitator, who follows the interpretations and deductions of others as a Kadi. This is what is happening all over the Muslim world today because the category of those who can interpret the original sources and form their own opinions has almost compltely dried up.

From the time when only an original interpreter (mujtahid) could be appointed as a Kadi, a theory was developed that the Kadi must always rule according to what he believes to be the correct Sharia rule. He was not allowed to apply the views of another original interpreter because if he genuinly believed them to be the correct Sharia stand on a particular question then they would have been his own views.[9] This theory was applied with greater force to the Kadi who is a mere imitator adhering to a particular school. The philosophy on which this is based is fairly simple; an imitator who has the choice of selecting between several schools would select and follow the school which he considers to be nearer to the correct understanding and explanation of the Sharia than others. To him it should, therefore, represent what is right. Other schools are, at best, not as right as that school. Therefore if he rules on any issue according to the principles and teachings of a school other than his own he would be applying principles about the correctness of which he has some doubt. His judgment would therefore be null and void. What is more the Kadi is expected to follow the "official" or predominant view within his school. He is not allowed to ignore that and follow a weak or minority view.[10] In short the imitator should always follow his *Imam*. The Sharia makes it unlawful for the government to call upon the Kadi to apply principles of law derived from a school other than his own or to follow the weaker view within his own school.[11] If the appointment of a Kadi was made on the condition that he applies the doctrines of a school other than his own, the appointment is considered valid but the condition is void and does not bind the Kadi.[12]

It thus appears that the practice prevailing in Ethiopia is more in keeping with the Orthodox Sharia view than what prevails in Egypt, the Sudan and a number of other Muslim countries. However, the adherence of the Muslim courts in Ethiopia to this theory appears to raise a number of questions to which we must now attempt to find the answers. One may thus ask whether it is fair to apply to the litigants the doctrines of a school other than their own, with the possible result that a transaction concluded in accordance with the principles of one school, would, when litigated be judged by the principles of another school. This question was discussed in some detail with the members of the Addis Ababa Court of Shariat. The answers to it can be summarized as follows:

1. The differences among the Sunni schools of Jurisprudence do not relate to the basic principles of the Sharia and are mainly confined to details which do not seriously affect the individual litigant if his school was not followed. Had there been a question of applying a rule of Sunni jurisprudence to a Shi'i adherent or *vice-versa*, there would have been some hardship and injustice.

9. This is not to say that an interpreter cannot change his view on any matter if he becomes later convinced that another interpreter's view on the same question appears near to the truth than his own.

10. *Al Bada'i* Vol. VII p. 5, *Ibn'Abdin* Vol. II p. 368

11. *Ibn'Abdin* Vol. II p .75

12. *Hashiyat Ibn'Abdin Ala el Dur* Vol. IV p. 369 and All Mughni Vol. IX p. 106

2. In those cases where the difference between the school to which the litigant belongs and that of the Kadi, is material, the Kadi usually determines the matter in accordance with the rules of the school of the litigant. Thus if a question as to the validity of a marriage concluded in accordance with the rules of a school which does not require the consent of the *Wali* (guardian) or which does not make the presence of witnesses essential for the validity of the marriage, arises before a Kadi belonging to a school that has a different rule on these matters, the Kadi would determine the question according to the rules of the school of the litigant. This indicates that in practice no injustice results from adherence to this rule.
3. There has for sometime now been a growing tendency to recruit Kadis from among the inhabitants of the locality where they would be stationed. This, to a certain extent, ensures that the Kadi in any particular areas would be professing the same *Madhab as the prospective litigants.*

Another question which comes to mind relates to the problem which is likely to arise if the Kadi who decided the case at first instance belonged to a school different from that of the Kadi or Kadis of the appellate court to which the case was referred. This is not a remote possiblility and the matter may acquire an additional complicating dimension if the appellate court consisted of several Kadis who did not all adhere to the same school. According to the strict Sharia view each Kadi is supposed to adhere to the doctrines of his school in determining the matter before him. The Chief Kadi, in answer to this question, said that the appellate court would determine the cases referred to it in accordance with the principles of the school which was followed by the Kadi who first decided the case. The appellate court confines itself to ascertaining that the court of original jurisdiction had correctly interpreted and applied the rules of the relevant school. This appears to be logical and fair to both the litigant and the Kadi in the court of first instance. It would however constitute a contravention of the orthodox Sharia view explained above.

Developing Sharia Rules

The attitude of the Ethiopian Government has to a large extent been one of non-interference in the religious practices of Muslims. The two Proclamations[13] which were promulgated in 1942 and 1944, to organise Muslim courts, made no mention of the substantive law which those courts were to apply. This has resulted in a situation where both the determination of the substantive law to be applied and its development and modification were left to the *Kadis* and the local *'ulama.'* In other parts of the world where Muslim courts exist to administer Sharia rules we find that the law establishing those courts in addition to defining the *madhab* to be followed, prescribes the way in which rules of that *madhab* may be departed from in favour of rules taken from another *madhab* or based on the views of some leading jurisconsults. We thus find that in Egypt the Sharia Courts Law provided that the Sharia courts shall apply the prevailing view within the Hanafi school except where a legislative provision authorising the application of a different view exists. The same method was followed in Iraq, Tunis and many other jurisdictions. In the Sudan and Northern Nigeria, on the other hand we find that the

13. Proclamation No. 12 of 1942 and Proclamation No. 62 of 1944.

relevant legislation vsests in the Grand Kadi[14] the power to authorise departure from the rules of the prescribed *madhab* by circulars sissued by him.[15] In almost all parts of the Muslim World where a method for departing from the rules of the prescribed *madhab* exists, full advantage was taken of that method to modify or depart from some of the rules that had proved to be unduly restrictive or unsuitable for the changed social and economic conditions of the countries concerned. Thus Egypt modified the rules governing the minimum age at which a person, male or female, can marry, the rules governing prescription, Pre-emption, legacies to heirs, the period of gestation etc. In the Sudan more than fifty circulars were issued authorising departure from the prevailing view within the Hanafi school on a number of questions including the right of a girl to marry without the consent of her father or guardian, the right of a husband to compel his wife to live in the matrimonial home, the right to custody of the children, the period of gestation etc. In Tunis severe restrictions were imposed upon the right of a Muslim male to practise bigamy or to effect unilateral divorce. In all these cases the desired change was effected by resorting to a minority view within the prescribed *madhab*, the prevailing view within another *madhab* or some view, completely outside the recognised *madhabs*, advocated by a leading *'alim'* or drawing directly on the Kuran and the Sunna as ultimate sources. But there has recently been a tendency to go outside these limits and to subject Sharia rules to changes dictated by the necessity of the social and economic conditions. A good example of this is found in the legislation passed by Tunis and Iraq, a few years ago, decreeing that the children of a praepositus shall inherit equally irrespective of their sex. This change in the Sharia rule which gives the male twice the share of the female was not based on any recognised view within or outside the accepted schools of Muslim jurisprudence.

When we consider the position of the Ethiopian Muslim Courts in relation to what obtains in those parts of the world just referred to, we cannot help wondering whether the rules of Muslim law which those courts apply are going to remain indefinitely static since no procedure for changing them has been prescribed. It may be fair to start by stating that the freedom of choice between legal rules which the Muslim courts in Ethiopia seem to enjoy appears to be much greater than that enjoyed by Muslim courts in jurisdictions where there is active legislative intervention. Interviews with the Chief Kadi and a number of Kadis revealed that the law which the Muslim courts in Ethiopia apply is what one may call jurist's law. Each Kadi has a number of leading annotations and commentaries relating to the *madhab* which he follows. These works are several centuries old and their authority is accepted without question. Whenever a problem comes before the Kadi he refers to these expositions of his *madhab* and determines the problem in accordance with the preveailing view within the *madhab*. No attention is paid to any other view and the question of whether the prevailing view is consonant with the needs and dictates of the changed conditions of life is ruled out as irrelevant since the rules of the Sharia "are good for all times and all peoples". The Kadis recognise the authority of the local *'ulama'* (jurists) and their right to challenge the decision of Muslim

14. This is the title given to the person who heads the Sharia division of the Judiciary. He enjoys the same status as the Chief Justice in the Civil division. The equivalent post in Ethiopia is that of the Chief Kadi.

15. See section 53 of the Mohammedan Law Courts Organization and Procledure Regulations 1916.

courts on the ground that those decision constitute a departure from the relevant *madhab* or that they are a misinterpretations of the prevailing view within that *madhab*. The Kadis readily concede that, in theory they are free to choose the rules that appear to be more liberal and more suitable to modern conditions from any Sharia source and without the need to restrict themselves to any *madhab*. They also concede that they could take advantage of the changes that had been effected in the Sharia in countries with conditions similar to those of Ethiopia. At the same time they sound a fear that any purported departure from the prevailing view within the relevant *madhab* would be met with opposition from the *'ulama'*, and will not be accepted by the generality of the Muslim population. Some of them also feel that explicit authorisation or direction is needed before they can engage in what they consider to be a process of *talfig* (patching). For this reason the rules of Islamic law which Ethiopian Muslim courts apply have remained unchanged and represent to a large extent the views of the authors of the leading expositions of the relevant *madhab* as to what the prevailing view within that *madhab* is. We can see from this that no advantage was taken by the Kadis of the apparently unlimited freedom which they enjoyed as a result of the non-intervention of the state, to develop the Sharia rules which they applied. We should not however forget that Sharia Kadis and the *ulama* as a whole are conservative people who resent and dread change for fear that every change produces a new situation that may constitute a contravention of Allah's commandments and invite His anger. This is not peculiar to Ethiopia. It is the position in many countries where special Sharia courts exist. In many cases the failure of the Kadis to use the means at their disposal to develop and adapt Sharia rules, had led to the use of the more cumbersome legislative procedures to effect sudden and fairly drastic changes. As far as Ethiopia is concerned, one feels that the solution would lie in clothing the Chief Kadi[16] with the same authority which the Grand Kadi has in the Sudan. The reason why I think this would produce some result is that the Kadis of the Ethiopian Muslim courts have interpreted the absence of any provision authorising or sanctioning changes in Sharia rules, as meaning a prohibition of such changes. A legislative provision along the lines suggested would act both as a command and a licence. And although I was assured time and time again that no injustice or hardship had resulted from the lack of adaptation of some Sharia rules, one feels certain that the problem would have to be faced within the not too distant future and therefore a procedure for tackling it must be prescribed. Since there are a number of reasons which make the revision of the Naibas and Kadis Councils Proclamation highly desireable. I would suggest that the revised version should include a provision along the following lines:

> "Decisions of Muslim Courts shall be in accordance with the authoritative doctrines of the school to which the Kadi, trying the case at first instance, belongs, except in relation to matters in which the Chief Kadi otherwise directs by judicial circular or memorandum in which case the decision shall be in accordance with the directions set forth in such judicial circular or memorandum."

This would give official recognition to the existing practice by which the madhab to be followed is determined and would at the same time give an imaginative and courageous Chief Kadi ample chance to develop and adapt Sharia rules by drawing on the experience of Muslim communities elsewhere.

16. One difficulty here would lie in the fact that no mention is made of the post of Chief Kadi in Proclamation No. 62 of 1944 and therefore in law the post does not exist even though there is in fact a Chief Kadi who is appointed as such.