

Intersection between Shari'a and Reproductive and/or Sexual Health and Human Rights

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Shari'a has become an important feature of the legal system of the Muslim world with its attendant implications for reproductive health and human rights. Like other religious doctrines, Islam has been used to legitimize conflicting positions on gender and reproductive choice. In some cases, women were being denied rights by those who claimed to be acting in the name of 'Islamic' laws, some of which are incompatible with internationally recognized human rights. This article identifies selected sexual and reproductive health issues at the intersection of reproductive rights and Shari'a e.g. adultery (zina), inheritance, child marriages, polygny, and violence against women and considers how their shared concerns may prompt actions leading to the elimination of religious and cultural barriers imposed by Shari'a which impede the implementation of international legal frameworks and consensus documents on reproductive rights. Nigeria is selected as a case study on the nature of implementation of Shari'a law and reproductive rights. The article calls for more progressive interpretations of Islamic law to be codified in legislative reforms and/or seek to interpret Islamic law in harmony with international human rights standards and calls for the implementation of Shari'a that would promote respect for human rights.

I believe that if Islam is interpreted and applied correctly, we can have totally egalitarian laws for women and strike punishments such as stoning and cutting hands from out of law books.¹

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1 S Ebadi of Iran, 'Arab Women Urged to Advocate for Rights Post-Revolution.' interview with the Nobel Peace Prize Laureate. WUNRN_ListServe@LISTS.WUNRN.COM. 5 November 2011.

INTRODUCTION

Shari'a is the moral code and religious law of Islam. Shari'a is derived from the *Quran* and Quranic legislation interpreted through the centuries. It is contained in the *Quran* and *Hadiths* (traditions) which are considered evidence of *Sunna* (practice of the Prophet), or the practices and customary law of Arabian society prior to Islam.² For Muslims, Shari'a is the Divine Law; by virtue of its acceptance, a person becomes a Muslim, although he or she may not be able to realize all of its teachings or follow all of its commands. *Shari'a* refers to the entire system encompassing the framework for the dispensation of Islamic law regulating the public and private lives of Moslems. It comprises Islamic laws and the institutions for implementing Islamic law according to the practice of Islam derived from the primary sources – the *Qur'an*, *Sunnah*, *Ijma* (consensus of opinions) and *qiyas* (analogy).³ In Muslim nations, Shari'a which stands for law of Islam is the principal source of law for the national legislation defining rights, duties, and responsibilities of men and women.

Shari'a law lays the groundwork for translating Muslim faith into behavioral standards and expectations for men and women. Unfortunately, as Hajjar states, 'in many contexts Shari'a provides a potent justification for states to deny or limit women's rights.'⁴ For example, Shar'ia legislation in northern Nigeria discriminates against women in two ways. In a trial, a woman's testimony is given only half the weight of a man's testimony and the standards of evidence required in cases of *zina*—adultery and fornication—also favour men.⁵ For instance, according to Shari'a penal codes in northern Nigeria, pregnancy serves as sufficient evidence to convict a woman of adultery, in that if a woman is pregnant but unmarried, she is deemed to have committed *zina*, including in cases of rape. On the other hand, four eyewitnesses are required to convict a man of the same crime; that is, a man will not be convicted of committing *zina* unless four other men witness the act. This latter proof is 'usually impossible to obtain, and has not been obtained in any of the cases which have arisen so far.'⁶

2 K Nundy, *The Global status of legislative reform related to the Convention on the Rights of the Child*. Legislative Reform Initiative – Paper Series. (2008). United Nations Children's Fund, New York.

3 Nundy (n 2 above). 29.

4 L Hajjar, 'Religion, State Power, and Domestic Violence in Muslim Societies: A Framework for Comparative Analysis. *Law and Social Inquiry*.' 29, no. 1, <http://www3.interscience.wiley.com/journal/118784923/abstract> (accessed 27 April 2012).

5 Human Rights Watch. 'Political Shari'a? Human Rights and Islamic Law in Northern Nigeria' (2004). <http://www.hrw.org/en/reports/2004/09/21/political-sharia> (accessed 27 April 2012).

6 Ibid.

IMPORTANCE OF RELIGION TO SEXUAL/REPRODUCTIVE HEALTH AND RIGHTS

It is nearly impossible to consider sexual and reproductive health and rights without simultaneously considering the role of religion.⁷ As the participants in the Conversation of Women and Religious Leaders held in *Chiang Mai*, Thailand in 2004 observed:

Religions have...collaborated with dehumanizing values of cultural, economic and political powers. Thus they have contributed to the suffering of women:

- They have been silent when patriarchal systems have legitimated the violence, abuse and exploitation of women by men.
- This silence has been deafening in the face of such atrocities as rape, incest, female genital mutilation, sex selective abortion, and discrimination against sexual minorities.
- They have not recognized the conscience and moral agency of women, especially in relation to their sexuality and reproductive decisions. But religions can and must do better. They must reclaim their core values of justice, dignity, and compassion and apply these values to women.⁸

Through their influence on individuals, cultures, and policies, religions play a critical role in shaping people's and governments' attitude toward reproduction and sexuality. Whatever one may think about religion personally, its importance is undeniable: 33 percent of the world's population are Christian, 20 percent are Muslim, and 13 percent are Hindu and millions of others are adherents of other religions. Thus, the world's religions can be an important ally in the efforts to advance sexual and reproductive health and rights or, conversely, a key obstacle.⁹

SPECIFIC RIGHTS OF WOMEN RECOGNIZED UNDER SHARI'A

The Quran in recognizing the rights to women states:

And they (women) have rights similar to those (of men) over them in kindness.¹⁰
O Mankind! Be conscious of your Sustainer, who has created you out of one living entity (*nafs*), and out of it (*minha*) created its mate (*zawjaha*), and out of the two

7 United Nations Population Fund (UNFPA), *Diverse Religions, Shared Values: A Review of UNFPA's Partnership with Religions* (unpublished, 2003). UNFPA, New York.

8 See <http://www.agnt.org/charter/chiang-mai-summary.html> (accessed 29 May 2012).

9 Religion and Sexual and Reproductive Health and Rights: 'An Inventory of Organizations, Scholars, and Foundations.' Report prepared by The Center for Health and Social Policy for The John D. and Catherine T. MacArthur Foundation and The Ford Foundation. January 2005.

10 *Quran* 2.228.

spread abroad a multitude of men and women. And remain conscious of God, in whose name you demand your rights from one another, and of the ties of kinship. Verily, God is ever watchful of you! ¹¹

1 Right to Equality in Status, Worth and Value

Islam considers a woman to be equal to a man as a human being and as his partner in this life. The centrality of women's rights to the right to equality has been expounded by the Indian Supreme Court in *Valsamma Paul v. Cochin University*,¹² where the Supreme Court held that:

Human rights are derived from the dignity and worth inherent in the human person. Human rights and fundamental freedoms have been reiterated in the Universal Declaration of Human Rights. Democracy, development and respect for human rights and fundamental freedoms are inter-dependent and have mutual reinforcement. The full development of personality and fundamental freedoms and equal participation by women in political, social and economic and cultural life are concomitants for national development, social and family stability and growth – cultural, social and economical. All forms of discrimination on grounds of gender is violative of fundamental freedoms and human rights.

The rights to non-discrimination and substantive equality are fundamental components of human rights law that are entrenched in a wide range of human rights treaties,¹³ human rights instruments,¹⁴ national laws, and jurisprudence.¹⁵

11 *Quran* 4:1

12 AIR (1996) SC 1011.

13 See, eg, International Covenant on Civil and Political Rights, Dec. 16, 1966 (entered into force Mar. 23, 1976), 999 UNTS 171 (ICCPR), arts 2, 3, 26; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966 (entered into force Jan. 3, 1976), 993 UNTS 3 (ICESCR), art 2; Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979 (entered into force Sept. 3, 1981), 1249 UNTS 13 (CEDAW); International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Dec. 21, 1965 (entered into force Jan. 4, 1969), 660 UNTS 195; Convention on the Rights of Persons with Disabilities, Dec. 13, 2006 (entered into force May 3, 2008), GA Res 61/106, UN Doc A/61/611 (2006) (CRPD), art. 5.

14 See, eg, Human Rights Committee (HRC), General Comment No. 28: Equality of Rights between Men and Women, UN Doc CCPR/C/21/Rev.1/Add.10 (2000); HRC, General Comment No. 18: Non-discrimination, UN Doc HRI/GEN/1/Rev.1 at 26 (1994); Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 16: The Equal Rights of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights, UN Doc E/C.12/2005/4 (2005); CESCR, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights, UN Doc E/C.12/GC/20 (2009); Committee on the Elimination of Discrimination against Women (CEDAW Committee), General Recommendation No. 25: Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures, UN Doc A/59/38 (2004).

15 See, eg, *D.H. v The Czech Republic*, Appl. No. 57325/00 (2007); *Nachova v Bulgaria*, Appl. Nos. 43577/98 & 43579/98 (2005); *Morales de Sierra v Guatemala*, Case 11.625, Inter-Am. C.H.R., Report No. 4/01, OEA/Ser.L/V/II.111, doc. 20 rev (2001); *Schuler-Zraggen v Switzerland*, Ser. A No. 263 (1993).

The principle of equality is further elaborated in article 26 of the International Covenant on Civil and Political Rights (1966) which guarantees that all people are equal before the law, and are entitled to the equal protection of the law without discrimination of any kind, including on the grounds of sex. Substantive equality is concerned not only with formal rights, but also with the effects of laws, policies and practices, and with ensuring that these do not maintain, but rather alleviate, the inherent disadvantages faced by particular groups of people.¹⁶ The full effect of this provision is impaired whenever any person is denied the full and equal enjoyment of any right. Consequently, States should ensure to men and women equally the enjoyment of all rights provided for in the Covenant.¹⁷

An important aspect of achieving substantive equality is eradicating systemic discrimination against underrepresented and marginalised groups of people.¹⁸ The right to equality in status, worth and value is also protected in national laws such as the Constitution of Nigeria which provides as follows:

A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person:-

- (a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religion or political opinions are not made subject.¹⁹ No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.²⁰

According to Islam, men and women serve to complement each other. They are equal members of the society, but have certain duties and responsibilities. These duties and responsibilities account for some of the differences between the roles of men and women in the society, but these differences do not make one gender superior and the other inferior.²¹ Some people have misinterpreted the verse of

16 For an analysis of substantive equality see, for example, Committee on Economic, Social and Cultural Rights, General Comment No. 16 (2005) The equal right of men and women to the enjoyment of all economic, social and cultural rights, E/C.12/2005/4, 11 August 2005.

15 See, for example, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights, UN Doc E/C.12/GC/20 (2009) [12].

17 General Comments adopted by the Human Rights Committee under article 40, paragraph 4, of the International Covenant on Civil and Political Rights. General Comment no. 28 (68) * Equality of rights between men and women. 23 March 2000.

18 See, for example, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights, UN Doc E/C.12/GC/20 (2009) [12]. See Marriage Equality – A Basic Human Right Submission to the Inquiry into the Marriage Equality Amendment Bill 2009 August 2009. Human Rights Law Resource Centre Ltd. Australia. 7.

19 Constitution of Federal Republic of Nigeria, 1999. Section 42(1).

20 Ibid. s. 42(2).

21 Islam and Women. <http://www.islamzine.com/women/3>. (accessed 12 January 2012).

Surah al-Nisa which says “Men are the managers of the affairs of women because Allah has made some to excel the other.”²²

This is not to say that men should exercise control over all women. Rather, it means the husband has the responsibility of maintenance, taking care of his wife and children by providing for them.²³ While the Quran made it clear that men and women are equal before the Almighty Allah (God), Muslims in the 21st century are still being burdened by conservative interpretations made according to the patriarchal biased interpretations of the Quran. The fundamentals of the Shari’a are rooted in wisdom and promotion of the welfare of human beings in this life and the hereafter. Shari’a embraces justice, kindness, the common good and wisdom. Any rule that departs from justice to injustice, from kindness to harshness, from the common good to harm, or from rationality to absurdity cannot be part of Shari’a, even if it is arrived at through individual interpretation.²⁴

2 Right to Inheritance

In Islam, women are entitled to the right of inheritance.²⁵ The Quran grants a woman a share in the inheritance of the family and warns against depriving her of that inheritance.²⁶ In general, Islam allows females half the inheritance share available to males who have the same degree of relation to the deceased.²⁷ This difference derives from men’s obligations to financially support their families. Inheritance rights are crucial for Muslim women because distribution and control of property and assets significantly affect their ability to enjoy stable and fulfilling lives and to exercise other rights.

The Quran proclaims the right of every Muslim woman to buy and sell property, to contract and to earn and to hold and manage her own property and money.²⁸ This right implies that the capacity of women to own property, to enter into a contract or to exercise other civil rights may not be restricted on the basis of marital status or any other discriminatory ground. It also implies that women may not be treated as objects to be given, together with the property of the deceased husband, to his family.²⁹ States must provide information on laws or practices that prevent women from being treated or from functioning as full legal persons and the measures take

22 *Quran* 4:34.

23 Islam and Women. (n 20 above).

24 Ibn Qayyim al-Jawziyyah, *‘I’lam al-Muwaqqi’* (1955) in Vol. 3, 1st edition, Cairo: Sa’ada, 1.

25 *Quran* 4:7.

26 *Quran* 4: 7-11 and 19.

27 As above.

28 See the Constitution of the Federal Republic of Nigeria, 1999, Sec 43 which provides that every citizen of Nigeria shall have the right to acquire and own immovable property anywhere in Nigeria..

29 General Comments adopted by the Human Rights Committee under article 40, paragraph 4, of the International Covenant on Civil and Political Rights. General Comment no. 28 (68) * Equality of rights between men and women. 23 March 2000.

to eradicate laws or practices that allow such treatment.³⁰

3 Right to Maintenance

The Quran in recognising the importance of complimentary sexual roles, grants women the right to maintenance in exchange for her contribution to the physical and emotional wellbeing of the family and for the care she provides in the rearing of the children. The wife is guaranteed the right to reasonable maintenance irrespective of her economic standing.³¹

When the marriage is dissolved, Islamic law requires the wife to wait for a period of three months before she remarries. The purpose of the waiting period is to ensure that she does not remarry before it is established beyond reasonable doubt that she is not pregnant with the previous husband's child.³²

4 Right to Custody of Children

Dissolution of marriage raises the question of the right to the custody of the minor children of the marriage. The rule under Islamic law is that the right belongs to the wife subject to certain conditions. e.g. that she is mentally and physically capable of taking care of the child and that she is not of bad character. Despite the recognition of the above specific rights of women under Shari'a, poverty, illiteracy, lack of access to legal aid, lack of observance of procedural guarantees under Shari'a by judges, lack of training of Shari'a court judges in comparative human rights and administration of justice have been identified as obstacles to the effective realization of women's rights and access to justice under Shari'a.³³

SELECTED ISSUES IN THE INTERSECTION BETWEEN SHARI'A AND REPRODUCTIVE AND/OR SEXUAL HEALTH AND HUMAN RIGHTS

Women's rights have long been considered a crucial issue. The belief that women are key to development, and the demand that their rights be foremost in matters of reproductive health, were the main messages of the 1994 International Conference on Population and Development.³⁴ Most inequalities and contradictions in the Islamic jurisprudence regarding women's rights exist in family matters and related traditions and practices such as marriage, dissolution of marriage, custody and guardianship rights, inheritance to property etc. In most Muslim nations, women face gender based discrimination in the family code which is deeply embodied on

30 As above.

31 Quran 4.34.

32 MT Ladan. 'Women's Rights, Access to and Administration of Justice Under the Shari'a in Nigeria' in JN Ezeilo et al (eds) *Shari'a Implementation in Nigeria: Issues and Challenges on Women's Rights and Access to Justice*. (2003) WACOL, Enugu. 34.

33 Ibid, 36 – 38.

34 AWID Resource Net Announcements: 'Tunisia - Women's Rights in the New Democracy.' 9 November 2011.

the ideas of the inferiority or the superiority of either sexes or on stereotyped roles for men and women.³⁵

Throughout the world, culture is employed to justify discrimination and violence against women. Culture is used to impose control over women's bodies, sexuality, emotions, decisions and actions, preventing them from expressing their own free will and enjoying their fundamental freedoms and human rights. Culture is not homogenous or static; it evolves and changes over time. This can be both positive and negative.

Women can and often do benefit from progressive government policies and societal values such as equality and the commitment to prevent violence and uphold human rights. Even when these frameworks are in place, women can still suffer from abusive and degrading practices such as virginity testing, female genital mutilation, forced marriage, honour killing, polygny, harmful menstruation rituals and much more.³⁶ Often these 'traditions', are upheld through claims of religious authority or cultural authenticity, raising tensions between cultural relativism and women's rights. Patriarchal interpretation of the Shari'a laws along with traditional practices and customs has created an unequal situation where men get priority and superiority in the family relations which consequently put women in a situation of inferiority.

1. Polygny

Polygny is the practice of having more than one wife at the same time. Polygny is permitted in jurisdictions that adopt Shari'a law as governing family relationships. Pursuant to traditional interpretation of Shari'a, men marry up to four wives simultaneously and can terminate each at will without justification or consent of wives consent or presence.³⁷ The practice of polygny is arguably profoundly patriarchal in reinforcing and promoting gender inequality. A key argument raised by opponents of polygny relates to its potential ability to undermine women's reproductive autonomy.³⁸ It is commonly reported that the patriarchal nature of polygny leads not only to women insubordination but also to their sexual, emotional

35 FA Begum. 'Interpretation of the Islamic Jurisprudence in the spirit of the International Human Rights Norms and the Convention on the Elimination of All Forms of Discrimination Against Women.' Rabat Round Table Discussion on Women Leading Change in the Muslim World. Ministry of the Interior, Morocco and Wellesley Centers for Women, 16-17 May 2011. Rabat, Morocco.

36 Call For Submissions/Writers: 'Culture And Human Rights: How Can We Challenge 'Cultural' Excuses For Gender-Based Violence?'. Gender Across Borders.' [http://www.awid.org/Library/Call-for-Submissions-Writers- Culture-and-Human-Rights-How-can-we-Challenge-Cultural-Excuses-for-Gender-Based-Violence](http://www.awid.org/Library/Call-for-Submissions-Writers-Culture-and-Human-Rights-How-can-we-Challenge-Cultural-Excuses-for-Gender-Based-Violence), (accessed 19 September 2011).

37 MH Ziba. 'The Construction of Gender in Islamic Legal thoughts and Strategies for Reform.' (2003) *Hawwa*. 7.

38 'How Have Policy Approaches to Polygamy Responded to Women's papers.' ssrn.com/sol3/.. /SSRN_ ID1360230_code372694.pdf

and physical abuse in the hands of their husbands.³⁹ Conversely, legislation criminalizing and prohibiting polygny has been attacked as unconstitutional in a number of countries on the grounds that it violates constitutional guarantee of the right to freedom of religion.

The permission to marry more than one wife (up to the maximum of four) is restricted by the condition in the Quran which states: “marry women of your choice, two, or three, or four; but if you fear that you shall not be able to deal justly with your wives, then marry only one....”⁴⁰ This implies that polygny is possible only in exceptional circumstances. Under present economic realities, it is difficult for one person to treat multiple wives equally and justly. Polygny is highly controversial and not socially accepted in most parts of modern societies. Those who support polygny often refer to the *Sunnah* where Prophet Mohammed practised polygamous marriages for political and humanitarian reasons after death of his first wife, *Khadijah*.

Polygamous marriage contravenes a woman’s right to equality with men, and can have such serious emotional and financial consequences for her and her dependants that such marriages ought to be discouraged and prohibited. The United Nations Committee on the Elimination of Discrimination against Women (CEDAW) has noted with concern that polygny violates the constitutional rights of women, and breaches the provisions of article 5 (a) of the Convention.⁴¹

Remarkably, polygny was prohibited under the 1956 Tunisia law based on the understanding of *Quran* 4:129 (‘You are never able to be fair and just as between women, even if it is your ardent desire ...’) that no husband can treat multiple wives equally. Under this law, it is a criminal offence, rendering a man who contracts a polygamous marriage liable to a year of imprisonment or a fine of 240,000 Tunisian *Dinars* or both and a woman who knowingly enters a polygamous marriage liable to the same. In Pakistan, the practice of polygny has also been controlled by the Muslim family laws) Ordinance (1961)⁴² under which prior permission is to be obtained for marrying a second wife, after which following specific procedure of applying to the Chairman of the Union council who will form an Arbitration council to determine the genuineness of the request and with the consent of the existing wife or wives may permit or deny permission to marry.

39 A Al-Krenawi and JF Graham, ‘The story of Bedouin Arab Women in a Polygamous Marriage.’ (1999) *American Women Studies International Forum* 22 (5). 501.

40 *Quran* 4:3.

41 CEDAW General recommendations. 21. (General Comments). Equality in marriage and family relations. (Thirteenth session). Equality in marriage and family relations. 2 April 1994.

42 Sec 6.

Some States parties, whose Constitutions guarantee equal rights, permit polygamous marriage in accordance with personal or customary law.⁴³ An example of such Constitution is the Constitution of Nigeria which provides that every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance.⁴⁴

A woman's right to choose a spouse and enter freely into marriage is central to her life and to her dignity and equality as a human being. An examination of States parties' reports discloses that many countries in their legal systems provide for the rights and responsibilities of married partners by relying on the application of common law principles, religious or customary law, rather than by complying with the principles contained in the Convention. These variations in law and practice relating to marriage have wide-ranging consequences for women, invariably restricting their rights to equal status and responsibility within marriage. Such limitations often result in the husband being accorded the status of head of household and primary decision-maker and therefore contravene the provisions of the Convention.⁴⁵

2 Divorce

In Islam, a woman can initiate a divorce. According to Shari'a Law, a woman can file a case in the courts for a divorce in a process called *Khal'a*, meaning 'release from'. To prevent irrational decisions and for the sake of the family's stability, Islam enjoins that both parties observe a waiting period (of roughly three months) before the divorce is finalized.⁴⁶ Shari'a law states that divorce has to be confirmed on three separate occasions and not, as is commonly believed, simply three times at once. The first two instances the woman and the man are still in legal marriage. The third occasion of pronouncing divorce in the presence of the woman, the man is no longer legally the husband and therefore has to leave the house. The purpose of this procedure of divorce in Islam is to encourage reconciliation where possible. Even after divorce, the woman should wait three monthly cycles during which her husband remains responsible for her and her children's welfare and maintenance. He is not permitted to drive her out of the house.⁴⁷ This process may leave the woman destitute should her family not take her back or the ex-husband fail to support her and possibly his children. After the third pronouncement, they are not allowed to get back together as husband and wife, unless first, the wife is divorced in another lawful and fully consummated marriage. This rule was made to discourage men from easily using the verbal declaration of divorce by knowing that after the third time, there would be no way to return to the wife and

43 CEDAW General recommendations, n 42 supra, 21.

44 Sec 38(1).

45 CEDAW General recommendations n. 42 supra 21.

46 'Women in Islam.' http://en.wikipedia.org/wiki/Women_in_Islam. (accessed 10 October 2011).

47 A Fareena. 'Beyond the Veil.' Newsweek 26 November 2006.

thus encourage men's tolerance and patience.⁴⁸ Usually, assuming her husband demands a divorce, the divorced wife keeps her *mahr* (dowry), both the original gift and any supplementary property specified in the marriage contract. She is also given child support until the age of weaning, at which point the child's custody will be settled by the couple or by the courts.

In practice in most of the Muslim world today divorce can be quite involved as there may be separate secular procedures to follow as well. While men can divorce their wives easily, women face many legal and financial obstacles. In some instances, a Shari'a court may pronounce a marriage dissolved as a punitive measure against a woman who they have deemed to be *haram*, or sinful.

In Northern Nigeria, a man married under Islamic law may divorce his wife unilaterally by repeating the phrase '*Talaq*' (I divorce you three times). Such action is not available to women. However, Islamic law does provide that a woman may divorce her husband with his consent if she returns the dowry to him. In considering the grounds for divorce, Shari'a courts may take into account, inter alia, any failure to pay maintenance, a prolonged absence, or the infliction of harm.⁴⁹

In a 2005 case in India, a Muslim woman named *Imrana* turned to a Shari'a court to complain of being raped by her father-in-law, *Ali Mohammed*. Her marriage was dissolved by the court on these grounds. Although India is a secular country, Muslim communities in rural India generally make use of the Shari'a judicial system rather than the secular one. The Sharia verdict was upheld by the Indian Muslim seminary *Darul ul Uloom Madrasa*, which issued a *fetwah* in support of it. The All India Muslim Personal Law Board, consisting of 41 Muslim scholars, also upheld the verdict.

The grounds for divorce and annulment should be the same for men and women, as well as decisions with regard to property distribution, alimony and the custody of children. Determination of the need to maintain contact between children and the non-custodial parent should be based on equal considerations. Women should also have equal inheritance rights to those of men when the dissolution of marriage is caused by the death of one of the spouses.⁵⁰

48 As above.

49 Asylum Aid. 'Refugee Women and Domestic Violence: Country Studies.' (2003). A Report by Refugee Women's Resource Project.' <http://www.unhcr.org/refworld/country,,ASYLU MAID,,SRB,,478e3e6d0,0.html>,_(accessed 28 May 2012).

50 General Comments adopted by the Human Rights Committee under article 40, paragraph 4, of the International Covenant on Civil and Political Rights. General Comment no. 28 (68). Equality of rights between men and women. 23 March 2000.

3 Child marriage

Child marriage is defined as marriage out below the age of 18 years, before the girl is physically, physiologically and psychologically ready to shoulder the responsibilities of marriage and childbearing.⁵¹ Pregnancy related deaths are the leading cause of mortality in 15-19 year old girls, and girls aged 15 years or under are five times more likely to die than those over 20.⁵² Child brides are often more likely to experience domestic violence and less likely to take action against this abuse. Girls who marry early are also more likely to believe that a man is justified in beating his wife.⁵³ Since child marriage harms the girl child's health, particularly her sexual and reproductive health, which often results in maternal mortality and morbidity due to early pregnancies, States are obliged under the CRC 'to take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.'⁵⁴

Where Shari'a law stipulate age of puberty as the minimum age of marriage is in most cases lower than 18 years. Most child marriages are forced marriages, where the consent of the child is not considered before the consummation of the union. The sexual and reproductive health of married girls is significantly poorer than that of their unmarried counterparts. Girls and women who marry early and with little or no schooling often have limited awareness of their rights and lack the knowledge and confidence to negotiate safer sex, including condom use. Young married girls are more likely to contract HIV than their unmarried counterparts as a result of their heightened sexual exposure, often with an older spouse who by virtue of age is more at risk of being HIV positive.⁵⁵

An examination of States parties' reports discloses that there are countries which, on the basis of custom, religious beliefs or the ethnic origins of particular groups of people, permit forced marriages or remarriages. Subject to reasonable restrictions based for example on woman's youth or consanguinity with her partner, a woman's right to choose when, if, and whom she will marry must be protected and enforced at law.

Child marriage is a continuation of gender discrimination as it places women in an inferior position disempowered to participate equally in their marriage, sexual and reproductive choices.⁵⁶ Child marriage is a harmful traditional practice that predisposes girls to forced sexual relations and early childbearing with an older spouse, adversely affecting girls' health and general

51 See The Inter-African Committee on Traditional Practices Affecting the Health of Women and Children. Newsletter, December 2003.

52 IPPF and UNICEF - '*Ending Child Marriage - A Guide for Global Policy Action.*' 2006. 1.

53 Ibid.

54 Convention on the Rights of the Child (CRC), art 24.

55 Plan UK *Breaking Vows: Early and Forced Marriage and Girls' education.* (2011), Plan UK. 26.

56 'Child Marriage and the aw.'[http://www.unicef.org/policyanalysis/files/Child_Marriage_and_the_Law\(1\).pdf](http://www.unicef.org/policyanalysis/files/Child_Marriage_and_the_Law(1).pdf) (accessed 10 October 2011).

development.⁵⁷ Giving birth at too young an age puts girls and adolescents at high risk of maternal death and morbidity.⁵⁸ Early pregnancy, when it does not cause death, takes a negative toll on young women's bodies. The risk of maternal death worldwide is twice as high for adolescents than for women in their twenties.⁵⁹

In concluding observations to some State Party reports, the CRC Committee has been concerned that the health of adolescents, particularly girls, is neglected, given for instance, a very high percentage of early marriages, which can have a negative impact on their health.⁶⁰ For example, the CRC Committee directed Nigeria to review the compatibility of customary laws with that of the values of the CRC especially in regard to child marriage.⁶¹ The CRC Committee also urged Kuwait to undertake all measures, including legal measures, to prevent and combat the harmful traditional practice of child marriage which directly affected the health and well-being of the girl child.⁶² To continue to comply with and implement its obligations under the CRC, CEDAW and other human rights standards, countries should not hide under the guise of Sharia law to promote discriminatory legislation, such as the reduction of the minimum age of marriage for girls.

The devastating impact of child marriage continues to be ignored under Shari'a law despite the existence of numerous international and regional human rights laws and conventions against the practice. It is clear that international human rights instruments relating to child marriage remain, at best, rhetoric or general declarations of principles, without effective national policies and mechanisms to implement and enforce them. The persistent neglect of the plight of child brides under Shari'a law is a direct reflection of the failure of our collective responsibility to protect the human rights of vulnerable young people. The silenced voices of the many millions of young women and girls forced into marriage before their eighteenth birthday signify complacency and discrimination and utter neglect of

57 UNDP Yemen Country Profile, 2002.

58 WHO, The World Health Report 2005: Make Every Mother And Child Count 4 (2005), available at http://www.who.int/whr/2005/whr2005_en.pdf; UNFPA, State of the World Population 2004: The Cairo Consensus at Ten: Population, Reproductive Health and the Global Effort To End Poverty 76 (2004), available at www.unfpa.org/swp/2004/pdf/en_swp04.pdf [hereinafter UNFPA, State of the World Population 2004]; CEDAW Committee, Concluding Observations: Nepal (2004), supra note 1, paras. 212, 213; Committee on the Rights of the Child, General Comment No. 4: Adolescent Health, para. 20, U.N. Doc CRC/GC/2003/4 (2003). ("early...pregnancy is a significant factor in health problems related to sexual and reproductive health").

59 UNFPA, State of the World Population, WHO, The World Health Report 2005: Make Every Mother and Child Count 4 (2005), available at http://www.who.int/whr/2005/whr2005_en.pdf. 26.

60 Concluding Observations of the Committee on the Rights of the Child: India, 23/02/2000, CRC/C/15/Add.115 para 32.

61 Concluding Observations of CRC: Nigeria, CRC/C/Add.54 para. 26, 1995.

62 Concluding Observations of CRC: Kuwait, 19th Session, CRC/C/151/Add.96. para. 28; 1998.

the duty to protect, respect and fulfill the rights of young girls.

Child marriage violates a panoply of interconnected rights, including, the right to equality on grounds of sex and age, the right to marry and found a family, the right to life, the right to the highest attainable standard of health, the right to education and development and the right to be free from slavery that are guaranteed in the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriages and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.⁶³

In Nigeria, the Child Right's Act provides for the protection of the rights of a child by prohibiting child marriage as follows:

No person under the age of 18 years is capable of contracting a valid marriage, and accordingly a marriage so contracted is null and void and of no effect whatsoever.⁶⁴

A person-

- (a) who marries a child; or
- (b) to whom a child is betrothed; or
- (c) who promotes the marriage of a child; or
- (d) who betroths a child, commits an offence and is liable on conviction to a fine of N500,000; or imprisonment for a term of five years or to both such fine and imprisonment.⁶⁵

Locating child marriage as a human rights violation also helps to raise it as a grave public concern rather than a private matter between families. The human rights agenda helps to view child marriage through the lenses of both civil and political rights and economic, social and cultural rights covenants. Most of all, the human rights perspective helps to frame child marriage as a crime against women and the girl child. Child marriage disproportionately affects girls because of their sex and despite facially neutral laws, women and girls are often de facto unequal before the law. That is why apart from specific child marriage laws, laws relating to prohibitions against discrimination on the ground of sex and age must be strengthened in an effort to strike out the root causes of child marriage.⁶⁶ Legal and political activism is one way to press for enforceable laws that protect young women and girls from early marriage.

63 United Nations Children's Fund (UNICEF), *Child marriage and the law*. Legislative Reform Initiative Paper series. (2008) (UNICEF), New York, 2008. 1.

64 Child's Rights Act of Nigeria, 2003. Sec 21.

65 Ibid., Sec 22.

66 UNICEF, n 63 supra.

Strict enforcement of the law is needed to actually prevent the practice of child marriage from occurring. Ending child marriage is indeed a mandatory task if we are to make progress in global efforts to attain the Millennium Development Goals. This will require unambiguous political commitment, visionary leadership, and support for grassroots advocacy to address many of the cultural practices and behaviours that place young women and girls at increased multiple health risks, including HIV.

SHARIA'S POSITION ON SELECTED REPRODUCTIVE RIGHTS

Reproductive rights embrace certain human rights that are already recognized in national laws, international human rights instruments⁶⁷ and other relevant United Nations consensus documents. This right rests on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. They also include the right of all to make decisions concerning reproduction free of discrimination, coercion and violence.⁶⁸

1. Right to freedom from torture, degrading and inhuman treatment

Islam exists to protect and free women from a life of torture.⁶⁹ The Quran gives both females and males the same rights. The core of all female problems is the struggle for women's rights, which, at present is unequal. On a social level, the position of women is generally not considered to be useful, while characteristics such as power and strength tend to be equated with males.⁷⁰

2. Right to freedom of movement

Generally, Shari'a law restricts women's social mobility and rights, the more closely Shari'a is followed. In Iran, for example, the law oppresses women women's testimony counts half that of men, and far more women than men

67 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. res. 36/55, 36, U.N. Doc. A/36/684 (1981).

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW 1979), arts 1, 2 and 16; International Covenant on Civil and Political Rights (1966), art 18(1); Convention on the Rights of the Child (1989), art 1, 16 and 24 (3); UN Declaration on the Elimination of Violence against Women (1993); African Charter on the Rights and Welfare of the Child (1990), art 21; Protocol to the African Charter on Human and Peoples' Rights, (2003); art 5; Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, (1981), arts 2 and 3.

68 International Conference on Population and Development, Cairo (1994). Programme of Action, para. 7. 3.

69 See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (1984), art 1.

70 L Dewanti Women's Reproductive Rights in the Islamic Jurisprudence.' www.ppinda.wordpress.com. (accessed 15 August 2011).

are stoned to death for adultery.⁷¹ The human rights of women are violated by the *fatwa* which restricts the movement of women by prohibiting them from driving automobiles. Saudi Arabia is the only puritanical kingdom that practices strict separation of the sexes, including banning women from driving.

Saudi women are legally subject to male chaperones for almost any public activity. This is an obvious and enormous barrier to the personal development of girls and women; going against their autonomy, freedom of expression and exercise of their sexuality. Under Shari'a law, women have no choice about their looking and are imprisoned behind veils under the justification that otherwise men cannot trust that they will control their sexual impulses.⁷²

3 Right to marry

Islam recognizes value of sex and advocates marriage. Islam does not believe in celibacy. The Prophet of Islam has said, 'marriage is my *sunnah* (recommended action of the Prophet) and whoever does not follow my *Sunnah* is not my true follower.' Allah has commanded the Muslims to marry:

And marry those among you who are single....⁷³

It is not permissible for Muslim women to marry non-Muslim men."⁷⁴

Islam has allowed man to marry more than one woman but has put serious restrictions on this. It requires agreement of the new wife, his ability to maintain more than one wife, equality among the wives, etc. Islam has allowed this to man to curb illicit sex.

Under Shari'a law in northern Nigeria, the father of a woman retains the right (*ijbar*) to arrange the marriage of his daughter, regardless of her age and without her consent.⁷⁵ This practice was overruled in the Court of Appeal's decision in the celebrated case of *Karimatu Yakubu v Paiko*⁷⁶ where the Court allowed the appeal in favour of a teenage girl on the grounds that her right to consent in marriage and to marry her suitor was of paramount consideration even under the Shari'a family law, notwithstanding her father's right to exercise the power of *Ijbar* (compulsion). This is a commendable decision as it has clearly indicated that the need for the consent of a girl or woman in her marriage is sacrosanct.

71 J Arlandson. 'Top ten reasons why Shari'a is bad for all societies.' <http://www.themuslimwoman.com/herrights/womensrights.htm>. (accessed 23 August 2011).

72 Report submitted by the Maldives Women Coalition on The Maldives Islands. 9th Session of the Universal Periodic Review – November 2010.

73 *Quran* 24:33.

74 *Quran* 2:221 and 60:10.

75 Centre for Reproductive Law and Policy. Shadow Report on Nigeria. (1998). New York.

76 Unreported Appeal No. CA/K/805/85.

OPPOSITION TO REPRODUCTIVE RIGHTS

A frequently aired view of opponents of Shari'a is the view that the Shari'a is biased against women, that it violates their rights and is unjust to them. An ostensibly dramatic vindication of this view came when some Shari'a courts accepted the evidence of pregnancy as proof of the offence of *zina* (adultery). The argument then came to be promoted that this evidentiary rule was deliberately formulated to convict women since only women could be convicted for *zina* on the basis of pregnancy, while in reality, no woman gets pregnant without the complicity of a man.⁷⁷

Women do not enjoy equal status with men before the law. In particular, the implementation of the Shari'a Penal Code in some Muslim states has been highlighted by human rights organizations as discriminating on grounds of gender.⁷⁸ The following Muslim States imposed reservations on core articles such as articles 2, 16 and 28 of CEDAW on the basis of Shari'a laws: Algeria, Bangladesh, Brunei, Egypt, Iraq, Jordan, Kuwait, Libya, Malaysia, Maldives, Mauritania, Morocco, Niger, Oman, Pakistan, Saudi Arabia, Syria, Tunisia and UAE on the grounds that cannot implement some or all of the CEDAW provisions if those provisions are inconsistent or conflicts with 'Islam' or 'Shari'a. In many cases, States parties identify specific issues such as polygny, inheritance, age of marriage, etc. for which they argue that laws or practices cannot be changed because of it is inconsistent or conflicts with 'Islam' or 'Shari'a. Saudi Arabia, stated that no law would stand if it were found to be inconsistent with the Islam and/or the *Quran*.⁷⁹ Saudi Arabia noted that the 'Holy *Quran* and Immaculate *Sunna* ... contain unequivocal rulings in favour of non-discrimination between men and women, desiring that women enjoy the same rights and duties.⁸⁰ State Parties have been urged to expedite the steps necessary for the withdrawal of its reservations and in that regard draws its attention to the Committee's statement on reservations in its report on its nineteenth session and, in particular, its view that Articles 2 and 16 are central to the object and purpose of the Convention and that, in accordance with article 28, paragraph 2, they should be withdrawn.⁸¹

It is often argued that Muslim family law systems cannot be amended to allow equality between men and women because these are divine laws and therefore unchangeable, or that practices cannot be changed because they are part of the Islamic tradition.⁸² Removing these reservations is a critical step to putting in

77 JN Ezeilo et al. *Shari'a Implementation in Nigeria: Issues and Challenges on Women's rights and Access to Justice*. (2003). WACOL, Enugu. 6.

78 Asylum Aid, n 49 supra.

79 Saudi Arabia State party report, U.N. Doc. CEDAW/C/SAU/2 (2007), 10.

80 CEDAW and Muslim Family Laws: In Search of Common Ground. (2011) Musawah, Malaysia.

81 See Concluding Observations of the CEDAW Committee to Egypt. 02/02/2001, paras. 326 and 327.

82 Begum n 35 supra.

place a legal framework that supports women's rights.⁸³

Women human rights activists and Islamic feminists regard the issue of discrimination against women as patriarchal interpretations of Islam based on unequal family relations that aim to subordinate women. They argue that justice is inherent to the philosophy of law in Islam, thus laws or legal amendments introduced in the name of Shari'a and Islam should reflect the values of equality, justice, love, compassion and mutual respect among all human beings. These are values and principles on which some Muslims agree and which Muslim jurists hold to be among the indisputable objectives of the Shari'a and are also consistent with universal human rights principles and values.⁸⁴

Remarkably, Tunisia has become the first country in the Middle East/North Africa region to lift all specific reservations to CEDAW. The Tunisian Council of Ministers adopted a Decree on 16 August 2011 to lift the reservations which limited women's equality within their families thus proclaiming its commitment to advance women's rights. Although Tunisia has one of the most progressive personal status codes in the region, the code still contains discriminatory provisions. Women are denied an equal share of an inheritance, for example. Brothers, and sometimes other male family members, such as cousins, are legally entitled to a greater share.⁸⁵

IMPLEMENTATION OF THE SHARI'A LAW ON REPRODUCTIVE AND HUMAN RIGHTS - NIGERIA AS A CASE STUDY

The Nigerian legal system is based on English Common Law and the Constitution guarantees freedom of religion. Within the federal structure of Nigeria, states have constitutional mandate to enact laws on many local issues, including criminal law. Consequently, Zamfara State government signed the Shari'a law in 2000, thereby expanding the jurisdiction of Zamfara State Shari'a Courts to include deciding criminal cases according to Islamic law.⁸⁶ Twelve other states quickly followed suit, including Kano, Katsina, Niger, Bauchi, Borno, Kaduna, Gombe, Sokoto, Jigawa, Adamawa, Yobe, and Kebbi.

Under the Shari'a penal code that applies to Muslims in the thirteen northern states, offences such as alcohol consumption, homosexuality, infidelity and theft carry harsh sentences, including amputation, lashing, stoning to death

83 Progress of Women and Pursuit of Justice.(2011). UN Entity for Gender Equity and the Empowerment of Women. New York. 119.

84 Begum n 35 supra.

85 Human Rights via TrustLaw, <http://www.hrw.org/news/2011/09/06/tunisia-government-lifts-restrictions-women-s-rights-treaty> (accessed 17 April 2012).

86 See PO Jamila et al. *Comparative Perspectives on Shari'a in Nigeria*, (2005). Spectrum Books, Ibadan and VO. Nmehielle, 'Shari'a Law in the Northern States of Nigeria: To Implement or Not to Implement, the Constitutionality is the Question,' (2004), *Human Rights Quarterly*, volume 24. 730-759.

and long prison terms.⁸⁷ Shari'a law introduced at the state level in 2000 threatens women's human rights and undermines all people's access to full information on reproductive and sexual health and rights.

With the recent "*Sharianization*" of parts of the country, new offences have been created, mostly surrounding sexuality, which has had a negative effect on women's rights.⁸⁸ Imam argues that while Sharia (Muslim laws) are neither uniform nor God given, the opposition between conservative and liberal jurisprudence has prevented progressive scholars and activists from establishing Muslim laws that ensure and protect the rights of women.⁸⁹ Also still unresolved and ambiguous is that of the contradictions and gaps between the new Sharia Penal Codes and the Criminal Procedure Codes that determine procedures and evidence: What counts as evidence? What are the procedures? How are offenses actually defined? Further, whether the Sharia acts themselves or the nature of the punishments are subject to international human rights law has been debated. Nigeria is in fact a state party to several international human rights covenants. However, although such agreements may give rise to obligations under international law, unless they have been specifically incorporated into domestic law, they give no basis for claims in national courts. The interplay between domestic Nigerian multiple and parallel legal systems of secular, Muslim and customary laws is also problematic as they give differential rights on different issues, and jurisdiction can be contentious. Whose version of Sharia is to be upheld is another area that requires further definition.⁹⁰ In theory, these laws apply to Muslims only, but it remains an open question whether Muslims have the right to choose to be governed by general Nigerian law, without having to renounce their religious identity.⁹¹

Concerns have also been raised regarding certain provisions of the Shari'a legal system operating in some Northern States of Nigeria which ostensibly tend to adversely infringe on the rights of women and children.⁹² Shari'a penal codes apply harsh punishments for 'sexual crimes'. The punishment for a woman committing adultery is either death by stoning, for married women, or lashing, for

87 'Sub Saharan Africa, Nigeria.' Travel advice by country. United Kingdom, Foreign and Commonwealth Office. <http://www.fco.gov.uk/en/travelling-and-living-overseas/travel-advice-by-country/sub-saharan-africa/nigeria?ta=lawsCustoms&pg=3>. (accessed 20 March 2009).

88 AM Imam. 'Nigeria: Women's reproductive and sexual rights.' (2006). <http://www.pambazuka.org/en/issue/245> (Accessed 27 April 2012).

89 Ibid.

90 Ibid.

91 Ibid.

92 AU Iwobi. 'Tiptoeing through a Constitutional Minefield: The Great Shari'a Controversy in Nigeria.' (2004). *Journal of African Law*, School of Oriental and African Studies Vol. 48, No. 2. 143.

unmarried women.⁹³ Adultery is defined as the intercourse between a man and a woman whose intercourse is inherently forbidden '*haram*'.

Fornication is usually punished by lashing in places that enforce Shari'a.⁹⁴ Women are more likely to be sentenced to stoning than men because they are more often found guilty of adultery under *zina* laws in Nigeria. Because of the negative social stigma associated with women's sexuality along with the gender discrimination in Shari'a, women are highly susceptible to being found guilty of *zina*.⁹⁵

Punishment by stoning provided under Shari'a law is a cruel, degrading and inhuman punishment, which fails to provide deterrence to criminal behaviour and represents an unacceptable denial of human dignity and integrity. Any miscarriage of justice which may occur in the course of criminal trial cannot be reversed. Furthermore, the death penalty provides no added value in terms of deterrence. Instead, the abolition of the death penalty contributes to the enhancement of human dignity and the progressive development of human rights.⁹⁶

Harsh punishments for adultery were not the only method by which Nigerian authorities attempted to control women's sexuality, freedom of movement, and independence. Conservative interpretations of Muslim laws resulted in tightened restrictions on women's dress, transportation, and presence in the public sphere.⁹⁷ The reintroduction of Shari'a has hurt women disproportionately as women make up most of the adultery related cases and bore the brunt of the stoning punishments.⁹⁸ Women encounter serious challenges while trying to access justice, especially when relating to issues concerning sexuality, personal status and family law.⁹⁹ As a result, the new Shari'a Penal Codes deprive women of protection from

93 BBC News, 23 January 2002, 'Nigeria's 'adulteress' set free', available at <http://news.bbc.co.uk/1/hi/world/africa/1778614.stm>. See also arts 487 - 489 of the Lebanese Shari'a code which continues to discriminate against women in other matters, such as, for example, imposing different penalties for adultery on women and men. Under the Lebanese Shari'a code, a married woman who has an extramarital affair can be imprisoned from three months to two years, whereas the punishment for the same crime for a man is one month to one year. A married man can only be tried for adultery if he engages in extramarital sex in the conjugal home, or if he has a "stable" extramarital relationship. Other countries in the region e.g. Bahrain, Jordan, Kuwait, Saudi Arabia, Syria, the United Arab Emirates, and Yemen have similar laws criminalizing adultery.

94 R Terman and M Fijabi. 'Stoning is Not Our Culture: A Comparative Analysis of Human Rights and Religious Discourses in Iran and Nigeria.' The Global Campaign to stop killing and stoning. Women reclaiming and redefining culture program women living under Muslim laws. March 2010. 29.

95 S Sadr, 'The revival of the abandoned law of stoning.' <http://www.stopstoning.net/spip.php?article11>. (accessed 10 January 2012).

96 Preamble to the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. Adopted and proclaimed by General Assembly resolution 44/128 of 15 December 1989.

97 Terman and Fijabi. N.94 supra.

98 Ibid.

99 Ibid.

rape and sexual assaults while leaving them at risk of being charged with *zina*.¹⁰⁰ Sexual intercourse is a product of mutual agreement and private sexual relations between consenting adults, yet it is been criminalized under Shari'a law. Laws which impose more severe penalties on women than on men for adultery or other offences violate the requirement of equal treatment.¹⁰¹

SHARI'A AND FUNDAMENTAL HUMAN RIGHTS IN NIGERIA

The Constitution of the Federal Republic of Nigeria (1999) guarantees:

Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance.¹⁰²

The issue of torture is covered by several instruments applicable in Nigeria including the Constitution of the Federal Republic of Nigeria) which provides in s.34(1) that "Every individual is entitled to respect for the dignity of his person, and accordingly (a) no person shall be subject to torture or to inhuman or degrading treatment..." Section 42 provides for non-discrimination on the basis of gender, religion, ethnicity, age or circumstances of birth against any citizens including children. Shari'a may be seen as discriminatory under the Constitution on the ground that although it applies only to Muslims, its punishments are more severe than those of the Penal Code which applies to non-Muslims in the Northern states.

Shari'a penal codes discriminate against women in that Shari'a demands a higher burden of proof for women: a woman's testimony is not considered equal to a man's. To bring a claim of rape, a woman needs the evidence of four male witnesses instead of the normal two to verify her claim. It has been observed that the tendency of this rule is to make it impossible ever to convict.¹⁰³ Laws that fail to provide an effective response to rape diminish women's rights to bodily integrity and decision-making, as well as their control over sexuality. The following cases are illustrative:

100 A Imam, 'Women, Muslim laws, and human rights in Nigeria.' <http://www.wilsoncenter.org> .(accessed 21 April 2012.)

101 General Comments adopted by the Human Rights Committee under article 40, paragraph 4, of the International Covenant on Civil and Political Rights. General Comment no. 28 (68) * Equality of rights between men and women. 23 March 2000.

102 See Sec 38(1).

103 FH Ruxton. *Maliki law* (1916). Lucas and Co. London. 299.

*The State v Amina Lawal*¹⁰⁴

One the most widely publicised cases of stoning in Nigeria is that of *Amina Lawal*, a 30 year old Muslim divorcee from Bakori in Katsina state. After leaving her second husband, *Amina* began a relationship with *Yahaya Mohammad*, who agreed to marry her. On January 15, 2002, *Amina* was charged with adultery (*zina*) along with her partner. *Yahaya* was set free after swearing on the Holy Quran that he did not have sexual relations with *Amina Lawal*. However, she was convicted of adultery by a single judge, *Alhaji Nasiru B. Dayi* in the lower court in Bakori found her guilty and sentenced her to death by stoning. The grounds for conviction were admission, pregnancy, and the existence of *Wosilat*, *Amina's* daughter born outside of marriage. An appeal was lodged at the Upper Shari'a Court, Funtua, on March 28, 2002 before four judges.

The Court of Appeal found several shortcomings that warranted *Amina's* acquittal. First, they held that the arraignment of the defendant before the Shari'a Court of Bakori was incurably defective. The court held that any person accused of *zina* can only be arraigned before a court on the basis of four witnesses required by the Quran; furthermore, any person alleging *zina* against another must prove it by evidence, else he or she would receive the mandatory one hundred lashes for false accusation. On the issue of retraction of confession, the court held that any person accused could retract his or her confession any point before the execution of judgment.¹⁰⁵

These events generated a heated controversy in Nigeria about the nature and desirability of Shari'a law, rights in Muslim laws, international human rights and their relationship(s) to each other. Her case attracted international attention and protest campaigns. The judgment reinforced the hope and expectation, held by many activists and specialists for Islamic law alike that a careful application of Shari'a law by well trained jurist and judges could eventually lead to end of *huudud* (capital) punishments that are incompatible with internationally accepted human rights standards.¹⁰⁶

*State v Safiya Husaini*¹⁰⁷

Safiya Husaini, a 35-year old divorcee was found guilty of *zina* and sentenced to death by stoning after residents in her village of *Tungan Tudu* noticed that she was pregnant and reported her to the authorities. While *Husaini* was sentenced to death, the Shari'a Judge acquitted 60 year-old *Abubakar*, who impregnated her, although

104 Unreported Appeal No. AS/1/2002. Upper Shari'a Court, Funtua, Katsina State.

105 Terman and Fijabi, n.94 supra 31.

106 Ezeilo et al. N.77 supra XXV.

107 Unreported Judgment of the Sokoto State Court of Appeal, Funtua dated 3 September 2002. See *Sudan Government v Kaltoum Ajbana* reported in Sudan Law Journal and Reports. (1985) 102.

the Quoran explicitly states that both parties ought to be punished.¹⁰⁸ *Abubakar* admitted to police that he had sex relations with *Husaini*, but the judge dismissed any charges against him since only three policemen heard his confession, and Shari'a law requires four witnesses. After a successful appeal and pressures from the international community, *Husaini's* sentence was not carried out.

These cases have been integral to the opening up of issues relevant to ensuring and developing women's reproductive and sexual rights, and to understanding them in ways that recognizes and respects both local cultures and contexts, as well as international rights agreements.¹⁰⁹

While Nigeria's Criminal Code (applicable in the southern states of Nigeria) does not punish its citizens for adultery or fornication; the same sexual activity carries a sentence of death by stoning, if married, and 100 lashes, if unmarried, under Shari'a (applicable in northern states of Nigeria). This provision has perhaps been the most debated law of Shari'a. In the Penal Code for Zamfara state of Nigeria, for instance, the punishment for *zina* is specified as follows:

Whoever being a man or a woman fully responsible, has sexual intercourse through the genital of a person over whom he has no sexual rights and in circumstances in which no doubt exists as to illegality of the act, is guilty of the offence of *Zina*.

Whoever commits the offense of *Zina* shall be punished:

- (a) With caning of one hundred lashes if unmarried, and shall be liable to imprisonment for a term of one year; or
- (b) If married, with stoning to death (*rajm*).¹¹⁰

Criminalization of *zina* is controversial, at least in part because of the consent issue. If two adults agree to participate in a private sex act, what harm can justify state intervention to criminalize that conduct? Protagonists of the libertarian approach to sexual regulation have argued that if the parties to the sex act consent, the act should not be a crime. As a matter of human rights, consensual sexual relationships between adults should never be criminalized, including relationships outside marriage and those between same-sex partners.¹¹¹

108 'Nigerian appeals Sharia sentence,' *BBC News*. 19, October 2001, 1.

109 AM Imam, (2006). 'Women's reproductive and sexual rights and the offence of Zina in Muslim laws in Nigeria.' Issue 245. <http://pambazuka.org/en/category/features/32609>. (accessed 12 December 2011).

110 Zamfara State Shari'a Penal Code, (2000), Sec 10 which is *in pari materia* with Kaduna Shari'a Penal Code (2002), art 122. The provisions of this Code are strictly made in conformity with the injunctions of the Qur'an. See also Islamic Penal Code of Iran (1991), arts 74 and 83.

111 See 'Lebanon law reform targets honor crimes.' <http://www.hrw.org/news>. (accessed 11 September 2011).

International human rights law support the decriminalization of consensual adult sexual relationships to protect the rights to physical autonomy, health, and privacy. Furthermore, international law is not in support of laws which discriminate based on gender, in this case providing more severe punishments for women for the same alleged offence. In turn, infringement of these human rights impacts indirectly on the right to health. Such laws are generally inherently discriminatory and, as such, breach the requirements of a right-to-health approach, which requires equality in access for all people. The health-related impact of discrimination based on sexual conduct and orientation is far-reaching, and prevents affected individuals from gaining access to other economic, social and cultural rights.¹¹²

These infringements ultimately undermine the inherent dignity of persons upon which the international human rights framework is based. Denying the dignity of individuals through the criminalization of certain conducts substantially diminishes their self-worth and, in doing so, prevents the realization of the right to health.¹¹³

DEATH PENALTY AS A PUNISHMENT UNDER SHARI'A PENAL LAWS IN NORTHERN NIGERIA

The Shari'a being a 'Believer's law rests on faith or conviction and it represents the standard of judgment for all human actions, with its own ethical norms of virtue and vice, good and evil. The purpose of Shari'a is to guide human conduct and provide general principles of life.¹¹⁴ Reactions to *Sharianization* were many. Christian and non-Muslims feared the imposition of Muslim religious laws on them. Human rights and other NGOs activists were concerned about the religious rights of non-Muslims and the violation of constitutional provisions of secularity. Both Muslim and non-Muslim women's rights activists were concerned that Shari'a would be used as a rationale to discriminate against women and restrict their rights.

The majority of countries where executions are taking place are ruled by Shari'a law. Death penalty is a 'violation of the most fundamental human right, the right to life.' Since this sanction had not succeeded anywhere in deterring criminality or preventing it, Muslim states applying Sharia law are enjoined to work progressively towards abolishing capital punishment in compliance with

112 A Grover. Report of the Special *Rapporteur* on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health presented to the United Nations General Assembly Distr A/HRC/14/20. Human Rights Council Fourteenth session. Agenda item 3. Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. 27 April 2010.

113 Ibid..

114 MT Ladan. "Contending perspectives on Death penalty in Nigeria: With special reference to the Shari'a Penal laws in Northern Nigeria" in JN Ezeilo (ed.) *Human Rights protection in Administration of Shari'a Justice system*. (2005) WACOL, Enugu. 37 – 38.

the United Nations General Assembly's resolution¹¹⁵ on the universal moratorium on death penalty. The alternative punishments such as imprisonment, repentance to the relatives of the victim and reform acceptable to the community should be considered.

STONING AND HUMAN RIGHTS

Stoning is a cruel form of torture that is used to punish men and women for adultery and other 'improper' sexual relations under shari'a law applicable in Northern Nigeria. The use of stoning as a method of execution in adultery cases is a fatal assault on human dignity as adultery does not constitute a serious crime by international standards. Stoning violates the fundamental right to freedom from torture and/or cruel, inhuman, or degrading treatment. The new Shari'a Penal Codes allow Shari'a courts to impose the death penalty on adultery. By such practice, Nigeria is currently in breach of some international legal standards, including those relating to the avoidance of discrimination against women, the elimination of torture and key fair trial provisions,¹¹⁶ including the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishments (CAT), International Covenant on Civil and Political Rights (ICCPR) and African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.¹¹⁷ By ratifying the Convention Against Torture in June 2001, the Federal Republic of Nigeria agreed not to apply such punishments.

Demystifying *Sharianization* in Nigeria also involves critiques of the current class- and gender-bias in content and implementation. There have been fewer convictions of men than of women for adultery or fornication. Moreover, men convicted of violent sexual offences like rape and sexual assault have received less severe punishments (usually fines, imprisonment, or acceptance of pleas of illness and insanity), despite the stronger punishments available in the Shari'a Penal Codes that are routinely meted out for consensual sex outside marriage. Women have clearly been discriminated against. In some instances, judges have ignored or dismissed women's allegations of rape and coercion in *zina* cases.¹¹⁸

115 As of 22 December 2010. Morocco, Lebanon and Algeria are Arab nations who have voted in favour of the United Nations moratorium resolution.

116 European Coalition to Abolish the Death Penalty Team, 'Imminent execution to Ahmadu Ibrahim and Fatima Usman, Nigeria.' <http://www.petitiononline.com/usman/petition.html>. (accessed 10 January 2012).

117 Cap C10, Laws of Federation of Nigeria (2004).

118 AM Imam. 'Women's reproductive and sexual rights and the offence of *Zina* in Muslim laws in Nigeria.' <http://pambazuka.org/en/category/features/32609>. (accessed 1 September 2011).

CONCLUSION

Shari'a laws pose a serious challenge to the achievement of female human rights around the Muslim world. Women face unique obstacles and challenges to accessing and fulfilling their sexual and reproductive health rights as a result of some discriminatory practices under Shari'a law which compromise their health and wellbeing, discriminate against them and undermines their access to accurate information on sexuality and reproductive rights. Radical reforms are needed to bring together interpretation of Shari'a law and civil Law to ensure they are not conflicting but are both supporting the reproductive and/or sexual health and human rights of women and girls. Over the years, progress has been made towards integrating women's rights into laws and adopting equality laws. Yet, a lot remains to be done for many women to fully enjoy human rights. Even where gender-responsive legislation is in place, biases and harmful traditional and religious practices continue to hinder change.

Muslim scholars, women human rights activists and NGOs should continue to strive to achieve gender equality through a more dynamic interpretation of the Holy Quran which permits consideration of the opinions of individual jurists from different schools of thoughts. This could open a door for a new egalitarian vision of women's rights in conformity with the requirements of the CEDAW at the same time respecting the Islamic heritage.¹¹⁹ Strong commitment and political will are required to end gender discrimination and allow for women's full participation at all levels of society and the realization of reproductive rights. The push for gender equality, gravitation towards progressive values, rejection of conservative interpretations of Islam and establishment of a hybrid legal system which will be a fusion of secular and Islamic law is one of the hallmarks of the in modern Muslim societies.

Any part of Shari'a law that negatively affects women's economic and family lives, their health, safety and their ability to participate in political dialogues and public life should be reformed. The need to explore how the positive powers of religion could be engaged to advance the well-being of women through laws that guarantee women equal rights to men in divorce, marriage and inheritance is counseled This could provide a powerful force for advancing women's human rights.

It is imperative to create a conducive atmosphere where women understand and enjoy their sexuality, own their bodies and make reproductive decisions freely and responsibly by rejecting the imposition of oppressive norms and values in the name of religion; eliminating religious and cultural barriers imposed by Shari'a which impede the implementation of international legal frameworks and consensus documents on reproductive rights.